

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of-- )  
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Hartman Walsh Painting Company ) ASBCA No. 57832  
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Under Contract No. W912BV-09-D-1010 )

APPEARANCE FOR THE APPELLANT: Jennifer L. Mach, Esq.  
Greensfelder, Hemker & Gale, P.C.  
St. Louis, MO

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr. Esq.  
Engineer Chief Trial Attorney  
Keith S. Francis, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District, Tulsa

OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the contracting officer's (CO) decision which denied the \$27,628.92 claim of Hartman Walsh Painting Company (Hartman) for alleged extra work performed to redirect traffic around the road across the Fall River Dam. Hartman elected the accelerated procedure pursuant to 41 U.S.C. § 7106(a) and Board Rule 12.3. The parties have agreed to submit the appeal on the written record under Board Rule 11. The record includes four volumes of the Rule 4 file in ASBCA No. 57742, a fifth volume, appellant's exhibits and the parties' briefs. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109. We decide entitlement only.

SUMMARY FINDINGS OF FACT

1. On 23 March 2009 the Army Corps of Engineers (ACOE), Tulsa District, issued Request for Proposal (RFP) No. W912BV-09-R-1010 for a Multiple Award Task Order Contract (MATOC) for preparation, rehabilitation and painting of large industrial structures in the ACOE's Southwestern Division. The RFP included a March 2009 Initial Task Order to sandblast and paint the eight tainter gates of the Fall River Dam, Kansas. (R4, tab 2 at 1-2, 5, 7, 408, 418)

2. The RFP included: (a) § 01 00 00, SCOPE OF WORK, ¶ 1.4, SITE VISIT, which provided: "An authorized contractor representative in conjunction with the USACE [CO] and/or technical representative(s) shall conduct a site visit at the proposed construction site. The purpose of the site visit will be to meet with project

representative(s) and obtain a more detailed understanding of this Scope of Work” and (b) § 01 04 00, COORDINATION, FIELD ENGINEERING, AND MEETINGS, ¶ 1.4, ROAD CLOSURE, which provided:

The Contractor shall obtain written permission/approval from the state’s Department of Transportation or county...and from the [CO] 21 days prior to any partial or complete closure of a road across a dam. The Contractor may upon approval and with proper traffic control close one lane of the road for extended periods of time. Complete closure of the road will be limited to a maximum of 4 hours at a time and only with good justification.

(R4, tab 2 at 55, 418)

3. On 31 March 2009, the ACOE’s Robert Goranson, who “put together the specifications,” conducted an Organized Site Visit (R4, tab 2 at 232-34; ex. A-1 at 19). Also present at the site visit, *inter alia*, were Kenneth Reznicek, an ACOE engineering technical representative, and Matt Huebener, Hartman’s project manager (R4, tab 2 at 235, tab 60 at 3; ex. A-1 at 6-7, 9-10, ex. A-3, ¶ 3).

4. Based on Mr. Reznicek’s deposition testimony, we find that: (a) a contractor asked at the site visit whether the roadway could be closed, both full closure and partial or temporary closure were discussed, no answer was given at the visit and it was understood that an official reply to the question would be issued by the CO; (b) Mr. Goranson stated that there was a seven-day requirement to notify the public, county representatives, road department and emergency medical services there would be a road closure and alternate routes would be necessary and (c) the term “bridge closure” is “interchangeable” or “one in the same with road closure”; “bridge closure” differs from “lane closure” because with lane closure there is limited access across the bridge, and with “full road closure or bridge closure...alternate routes are necessary” (ex. A-1 at 11-13, 16, 21).

5. The site visit Meeting Minutes, attached to solicitation Amendment No. 0001, dated 10 April 2009, stated, *inter alia*: “Should a bridge closure be necessary, 7 days public notice and adequate signage will be required. A traffic control plan shall be required. Coordinate the bridge closure through the [CO]” and “[a]ny changes to the RFP will be issued by amendment.” (R4, tab 2 at 230-32, 234)

6. According to Mr. Huebener’s 23 February 2012 affidavit:

3. On March 31, 2009, I attended the Organized Site Visit (the “Organized Site Visit”) for Solicitation W912BV-R-1010,

commonly referred to as the Fall River Dam Rehabilitation Project (the "Project").

4. During the initial meeting of the Organized Site Visit, the issue of lane and road closure was discussed. A representative for the Army Corps of Engineers (the "Corps") stated that blockages would be required on both ends of the bridge for a one lane closure or, alternatively, a seven day notice would be required for total lane closure.

6. During the Organized Site Visit, a representative for the Corps again stated that total lane closure would be allowed and they would notify the local farmers that utilize the road to haul grain trucks and inform them to take another route around the dam.

7. As a result of the representations made by the Corps at the Organized Site Visit, I believed that a closure of all lanes over the bridge was allowed during the Project.

7. The representations made by the Corps at the Organized Site Visit that all lanes over the bridge could be closed during the project were relied upon in [Hartman's] bid on the Project.

(Ex. A-3; paragraph numbers as in original)

7. On 21 September 2009 the ACOE awarded Task Order No. 0001 (TO 1) under the MATOC to Hartman in the amount of \$2,782,747 (R4, tab 2 at 509-10, tab 5 at 1).

8. On 27 January 2010 Hartman submitted to the ACOE a Traffic Control Plan, transmittal No. 010000-2, requesting a "complete road closure of County Road 20 across the Fall River Dam...for a period of twelve (12) months beginning in March 2010," with a proposed public notice of complete road closure and alternate traffic routes (R4, tab 63 at 1, 3-5).

9. On 10 February 2010 the ACOE disapproved transmittal No. 010000-2, stating "Two lane closure for duration of contract will not be allowed" (R4, tab 64 at 1).

10. On 5 March 2010 the ACOE received Hartman's submittal No. 01 00 00 2.3 (R4, tab 59 at 3). The ACOE approved that Traffic Control Plan submittal on 9 March 2010 (R4, tab 66 at 1).

11. On 9 May 2011 Hartman submitted to the ACOE a \$27,628.92 request for equitable adjustment (REA) for additional traffic control costs, alleging:

The bidders were verbally advised...by the USACE Representative conducting the pre-bid walk, that the road over the dam could be closed for the duration of the project. Hartman Walsh reasonably relied upon this information when preparing the proposal for which this contract is based.

After contract award we were advised by your office that one lane would need to stay open and the contract was completed according to those instructions.

(R4, tab 60 at 1-2). On 13 May 2011 the Corps denied Hartman's 9 May 2011 REA (R4, tab 61).

12. On 28 July 2011 Hartman submitted a claim requesting a CO's decision (R4, tab 62). On 28 October 2011 the CO denied Hartman's claim (R4, tab 59). On 4 November 2011 Hartman timely appealed that CO's decision to the ASBCA.

#### DECISION

Hartman argues that at the 31 March 2009 site visit, "a representative for the Corps explicitly stated...that the entire road over the Dam could be closed for an extended period of time" (app. br. at 2). Specifically, Mr. Goranson represented to Hartman and other participants that bridge closure was possible, and in particular, that should a bridge closure be necessary, seven days public notice and adequate signage would be required for bridge closure; Mr. Reznicek (in his deposition) stated that "bridge closure" is interchangeable with "road closure" and "signifies complete closure of the road over the bridge, without any access thereto"; and Hartman relied on Mr. Goranson's misrepresentation in preparing its TO 1 proposal to its detriment (app. br. at 8). Hartman asserts that the statements of Mr. Goranson, though not a CO, nonetheless bind the government, citing *Max Drill, Inc. v. United States*, 427 F.2d 1233, 1243 (Ct. Cl. 1970) (when an official of the contracting agency is not the CO, but has been sent by the CO for the express purpose of giving guidance in connection with the contract, the contractor is justified in relying on his representations).

The government argues that the ACOE's 31 March 2009 site visit minutes do not state that the ACOE told Hartman that complete road closure for the duration of the contract period would be allowed, those minutes were consistent with the RFP and TO 1 specifications and the ACOE did not change those specifications before or after TO 1 was awarded (gov't br. at 4-5).

In order for a contractor to prevail on a claim of misrepresentation, the contractor must show that the government made an erroneous representation of material fact that the contractor honestly and reasonably relied on to the contractor's detriment. *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 729 (Fed. Cir. 1997); *DG<sup>21</sup>, LLC*, ASBCA No. 56386, 12-1 BCA ¶ 34,898 at 171,605.

TO 1 specification § 01 04 00, ¶ 1.4 provided:

The Contractor shall obtain written permission/approval from the state's Department of Transportation or county...and from the [CO] 21 days prior to any partial or complete closure of a road across a dam. The Contractor may upon approval and with proper traffic control close one lane of the road for extended periods of time. Complete closure of the road will be limited to a maximum of 4 hours at a time and only with good justification.

(Finding 2) Thus, ¶ 1.4 expressly provided for both one-lane road closure for extended periods of time as well as complete road closure for 4 hours maximum with good justification, in either event with the written permission of the CO 21 days prior to the closure. But it plainly did not provide for complete closure of the road for extended periods of time. The term "road closure" is interchangeable with the term "bridge closure" (findings 4-6). "Bridge closure" is full "road closure" requiring alternate traffic routes, while "lane closure" limits access across the bridge (finding 4).

Insofar as Mr. Goranson stated on 31 March 2009 that road closure required a 7-day notice, rather than the 21-day notice prescribed by ¶ 1.4, that change was formalized in RFP Amendment No. 0001 (finding 5). However, there is no evidence that Mr. Goranson or any other identified ACOE official stated to offerors on 31 March 2009 that the ACOE would authorize "road closure" or "bridge closure" for "extended periods of time." When a contractor asked whether the roadway could be closed, the ACOE gave no answer and said an official reply would be issued by the CO. (Finding 4(a)) The CO's 10 April 2009 official reply, in RFP Amendment 0001, did not represent that road closure or bridge closure would be authorized for extended periods of time (finding 5).

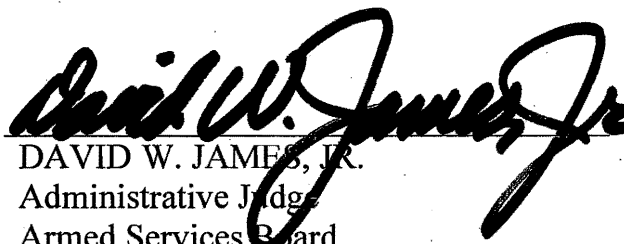
According to Mr. Huebener's 23 February 2012 affidavit, the Corp made two statements concerning total road closure. First, at the initial 31 March 2009 meeting the Corps representative stated that "blockages would be required on both ends of the bridge for a one lane closure or...a seven day notice would be required for total lane closure." The "Corps again stated that total lane closure would be allowed." (Finding 6, ¶¶ 4, 6) Aside from the reduction of the notice time from 21 to 7 days, analyzed above, Mr. Huebener's recollection of the Corps' 31 March 2009 statements at the site visit is harmonious with the provisions of the MATOC Scope of Work, ¶ 1.4 ROAD CLOSURE

(finding 2). Mr. Huebener's belief that the Corps would allow closure of all lanes over the bridge (finding 6, ¶¶ 7), is not inconsistent with MATOC ¶ 1.4, which permitted such a closure, limited to a maximum of 4 hours at a time and with good justification. Notably, Mr. Huebener did *not* attribute to the Corps any statement that it would authorize total lane closure "*for extended periods of time,*" inconsistent with the MATOC ¶ 1.4.

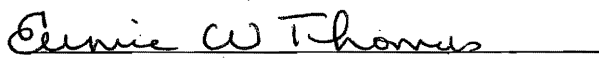
For the foregoing reasons, we hold that Hartman has not carried its burden to prove the first element of misrepresentation, that the government made an erroneous representation of material fact.

Accordingly, we deny the appeal.

Dated: 24 April 2012

  
DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

  
EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 57832, Appeal of Hartman Walsh Painting Company rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals