

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Macro-Z-Technology ) ASBCA No. 56711  
 )  
Under Contract No. N44255-04-D-9122 )

APPEARANCES FOR THE APPELLANT: James F. Nagle, Esq.  
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APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.  
Navy Chief Trial Attorney  
Anthony K. Hicks, Esq.  
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Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY  
ON THE GOVERNMENT'S MOTION AND APPELLANT'S CROSS-MOTION  
FOR PARTIAL SUMMARY JUDGMENT

At issue are the parties' cross-motions for partial summary judgment relating to the Order of Precedence clause of the contract. The Navy's motion for partial summary judgment asserts that ten of the claim items sought by appellant Macro-Z-Technology (MZT) in this appeal are subject to the clause. MZT's cross-motion asserts that the clause is void.

By a letter dated 26 June 2012, MZT's counsel advised the Board that MZT is no longer pursuing a number of its claim items. These claims, including five that are addressed in the Navy's motion, were dismissed with prejudice. Accordingly, the Navy's motion as to the five claim items we dismissed is moot. For the reasons stated, with respect to the five claim items remaining at issue, the Navy's motion is denied. MZT's cross-motion is also denied.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

On 15 July 2004, the Engineering Field Activity, Northwest Division, of the Naval Facilities Engineering Command (NAVFAC) issued a Request for Proposals (RFP), Solicitation No. N44255-04-R-9115, for a competitive "LARGE 8(a) MULTIPLE AWARD CONSTRUCTION CONTRACT (MACC)." The design-build seed project was identified as "MCON [Military Construction] P-041 FIRE STATION ADDITION

AND RENOVATION” and involved buildings 2526 and 121 at the Naval Air Station, Whidbey Island, Oak Harbor, Washington. (R4, tab 2 at 14)

MZT submitted its proposal for the MACC on 19 August 2004. With respect to the Fire Station seed project, the technical proposal narrative stated:

After reviewing the proposed scope of work and inspecting the jobsite, our recommendation is to demolish the existing building and construct a new facility. The cost of doing this would be no more than renovating and adding on to [sic] the existing building.

(R4, tab 6 at 1065) Drawings for the new facility prepared by Mr. Gregory Benton of Belay Architects were included as part of MZT’s proposal (gov’t mot. ¶ 6 and tabs A, B, C).

It is undisputed that the following five design features were included in MZT’s proposal for the Fire Station seed project:

- (a) attic space above the second floor for mechanical and storage area with access stairs (gov’t mot., tab A at 75, 77, tab C at 27, 50-52);
- (b) roof overhang at the equipment bays (gov’t mot., tab A at 77, tab C at 48-49);
- (c) windows for the dormitory rooms on the second floor (gov’t mot., tab A at 75, 76, tab C at 41);
- (d) first floor window overhang shading device eyebrows and an entry canopy (gov’t mot., tab A at 76, tab C at 44-45); and
- (e) apparatus direct access to Ranger Street through a new gate (gov’t mot., tab A at 70, 73, tab C at 27-28).

(Gov’t mot. at 2-4; app. resp. at 2-4)

With respect to (e) above, the drawings also show a relocated gate and relocated offset fence (gov’t mot., tab A at 73). The proposal narrative states:

#### **Site Constraints**

...The apparatus have direct access to Ranger Street through a new gate and the parking has been relocated to the north

opposite the existing parking access off of Ranger Street. The 24 displaced stalls have been replaced with 28 new stalls. This will require repositioning a portion of the standoff fence and the relocation of the existing gate. Access to the building will be through this relocated gate.

(Gov't mot., tab A at 70)

An Indefinite Delivery, Indefinite Quantity (IDIQ) MACC, No. N44255-04-D-9122, was awarded to MZT by NAVFAC on 29 September 2004 (R4, tab 10 at 1192-94). Task Order (TO) No. 0001 in the amount of \$3,999,872 for the Fire Station seed project was issued to MZT that same day (R4, tab 28 at 4778-4801). Box 17 of the contract stated that "the offeror agrees to perform the work required below in strict accordance with the terms of this solicitation." It described TO No. 0001 as "all work complete an [sic] in accordance with dwgs. & specs." (R4, tab 10 at 1193)

Specification section 01331N dated "09/03" of the RFP was replaced with section 01331N dated "09/06" by contract Modification No. P00002 on 25 September 2006 (R4, tab 12 at 1249-51). Both versions of section 01331N are entitled "DESIGN SUBMITTAL PROCEDURES" and include the following Order of Precedence clause in Part 3, "EXECUTION:"

#### 3.4.2 Order of Precedence

In the event of a conflict or inconsistency between any of the requirements of the various portions of the contract, precedence shall be given in the following order:

- a. Any portions of the accepted proposal or accepted final design that exceed the requirements of the solicitation.
- b. As between the accepted final design and the accepted proposal:
  1. Any portion of the accepted proposal that exceeds the accepted final design.
  2. Any portion of the approved final design that exceeds the accepted proposal.
- c. The requirements of the solicitation and or the Task Order RFP.

d. Those portions of the accepted proposal or accepted final design that meet but do not exceed the solicitation requirement.

In no case shall acceptance of the Contractor's proposal or final design be construed as a waiver of the requirements in the Basic Contract or the Task Order RFP requirements, unless specifically noted in writing by the Contracting Officer.

(R4, tab 1 at 212, tab 12 at 1272-73)

#### *MZT's Claim*

On 10 March 2008, MZT submitted to the contracting officer a Request for Equitable Adjustment (REA) seeking \$4,823,797 in direct and indirect costs associated with 85 separate items (R4, tab 28 at 4735). The REA was certified as a Contract Disputes Act (CDA) claim on 2 September 2008 (R4, tab 29 at 4974-75). Ten of the claim items were addressed in the Navy's motion for partial summary judgment: B.1.2 (attic space); B.1.4 (mezzanine storage area); B.1.6 (roof overhang at equipment bays, the correct claim item number for which is B.1.5 and is the number we use hereafter); B.1.8 (deck); B.1.10 (first floor concrete masonry units (CMU)); B.1.11 (dormitory windows); B.1.15 (main entry vestibule); B.1.16 (first floor window overhang eyebrows and entry canopy); B.1.39 (new gate); and B.1.45 (standing seam metal roof) (gov't mot. at 5).

By a letter dated 26 June 2012, MZT withdrew a number of its claim items, including five that were addressed in the Navy's motion: B.1.4, B.1.8, B.1.10, B.1.15 and B.1.45. These claim items were dismissed with prejudice on 30 November 2012, leaving only the remaining five claim items for our consideration.

Claim item B.1.2 seeks a schedule impact of 29 days and \$647,497 for the attic area increase of 3,265 square feet (sf). The claim states that the "RFP in the section for [b]uilding 2526 did not indicate that a useable attic space be provided in the final overall square footage for the building.... The RFP calls for a 21,948 sf. building not to exceed. The inclusion of the attic space was required by the Navy increasing the total building area to 25,213 sf. The attic was provided and no change order was issued." The claim further states: "Basis of Entitlement: Betterment to project, Constructive directive." The narrative explains:

The Navy's desire to use the attic space that was created as a result of the sound study constitutes betterment to the project. The framing in of the space, inclusion of framed doorways

and drywall, addition of fire sprinklers and the additional materials and creating access to the space created a larger useable space than what was specified in the RFP. If the necessity for a buffer between the roof and the 2<sup>nd</sup> floor [had] not been required as a means to reduce the noise impact from the aircraft using the base, then the space which is now the attic would not have been required and a flat roof would have been employed. The HVAC system that now occupies a large portion of this space could have been placed on the exterior of the building on the roof as well as the communication room which could have been placed in the electrical space on the first floor.

(R4, tab 27 at 2591-92) The Navy's motion does not explain why or when building 2526 was increased to 25,213 square feet or why or when the sound study was performed and the significance of the study to claim item B.1.2.

Claim item B.1.5 seeks a schedule impact of 75 days and \$11,799 for the "Overhang at equipment bays." The claim states that "[t]he RFP does not require or address that this item be a part of the exterior of the building. Value engineering solution was to remove from [sic] the overhang from the design. Navy requested to retain for aesthetic reasons and no compensation was provided." The claim further states: "Basis of Entitlement: Constructive directive." The narrative states:

MZT, in cost saving efforts to deliver a viable product, initially proposed to delete the overhangs above the bay doors on the structural side of the station.... The Navy's desire to have an aesthetically pleasing building and not one that looks like a warehouse added extra costs in materials and time to purchase and install and constitutes betterment to the project. MZT's position is that an aesthetic building would still have been achieved had these overhangs been omitted. The RFP does not provide direction for including these overhangs that were provided at the direction of the Navy and no change order was ever issued.

(R4, tab 27 at 2895)

Claim item B.1.11 for dormitory windows seeks a schedule impact of 100 days and \$102,322. The claim states that "[t]he RFP for [b]uilding 2526 does not address the need or desire to have windows located in the dormitory rooms. Windows were added at the Navy's direction and no modification was issued." The claim further states: "Basis of Entitlement: Changes to RFP, Project Betterment." The narrative explains:

Due to the sound study, it was determined that the originals [sic] design for the windows would not meet the minimum STC [sound transmission class] ratings that were desired by the Navy. This initial double framed window required being changed to a single framed system. This change required the windows to be reframed so that the new windows would fit properly. The windows also needed to provide blast resistance.... Windows were not referenced in the RFP for the sleeping rooms and these windows were provided at the direction of the Navy and no change order was ever issued.

(R4, tab 27 at 2969-70) As with claim item B.1.2, the Navy's motion does not explain why or when the sound study was performed or the significance of the study to claim item B.1.11. However, it appears from the record that the issues relating to the STC ratings and the blast resistance did not surface until September 2005, after contract award (*id.* at 2986-96).

Claim item B.1.16 for the first floor window overhang shading device eyebrows and entry canopy seeks a schedule impact of 75 days and \$15,206. The claim states that "[t]he RFP for building 2526 does not address the need for these to be above the windows or the entry. The Navy requires these items to remain for aesthetic reasons. No modification was issued for the change." The claim further states: "Basis of Entitlement: Change to RFP, Project Betterment, Constructive directive." The claim narrative explains:

Value engineering determined that the presence of these items was above and beyond the scope of the RFP. To reduce the cost of building the project, it was determined that these items should be removed. When presented to the Navy as possible cost reductions, these items were rejected due to the desire to preserve the aesthetic appearance of the building separating it from looking like a "warehouse". The RFP does not provide direction for including these window overhangs and entry canopy that were provided at the direction of the Navy and no change order was ever issued.

(R4, tab 27 at 3173)

Claim item B.1.39 for added fence and a new gate seeks a schedule impact of 45 days and \$43,829. The claim states that "[t]he RFP section for [b]uilding 2526 does not address the need for a fence or gate to enclose the perimeter of the fire station." The

claim further states: "Basis of Entitlement: Changes to RFP, Constructive Directive."  
The claim narrative states:

On May 13, 2005, the Contracting Officer for the Navy states that "the existing gate is not practical for the new facility. The government recommends that you include a 16' entrance/exit gate for the new fire station building as a part of the design." At this time, there was no reference to additional fencing or gates to be included in the design. This addition constitutes a change to a deficient RFP. MZT was directed to install this fence and gate and no modification was ever issued.

(R4, tab 27 at 4602)

#### *Non-Contractual Specifications*

MZT has referenced the Department of Defense (DoD) "STANDARD PRACTICE FOR UNIFIED FACILITIES CRITERIA AND UNIFIED FACILITIES GUIDE SPECIFICATIONS," identified as MIL-STD-3007B and dated 1 April 2002. The "FOREWARD" to MIL-STD-3007B states:

This standard establishes procedures for the development and maintenance of Unified Facilities Criteria (UFC) and Unified Facilities Guide Specifications (UFGS). Use these procedures for the planning, design, construction, operation, and maintenance, sustainment, restoration and modernization of facilities for the Army, Navy, Air Force, Defense Agencies and DOD Field Activities.

(App. reply, ex. A at ii)

Section 01331, "DESIGN SUBMITTAL PROCEDURES," of the UFGS dated August 2004 contains an Order of Precedence clause in paragraph 3.4.2. There are some slight differences between that clause and the Order of Precedence clause in section 01331N of the RFP and contract quoted above which use the word "accepted" instead of the word "approved" in subparagraphs a., b., b.1, and d., and include "and or the Task Order RFP" in subparagraph c. Additionally, the UFGS version of the clause does not contain the last paragraph relating to waiver of contract requirements. (Gov't resp. to app. cross-mot., ex. A at 23) The record does not contain any factual information regarding the preparation and approval processes associated with MIL-STD-3007B, the UFGS, or the Order of Precedence clause in particular or whether they were published in the Federal Register. Nor is there any evidence relating to the extent of the UFGS

clause's distribution and use. And, despite the similarities, there is no evidence that it was used as a guideline for the Order of Precedence clause in the RFP and contract at issue here.

MZT has also referenced the NAVFAC Acquisition Supplement (NFAS). At the Board's request it provided a copy of the 2006 edition of the NFAS, but was not able to provide a copy of the 2004 edition in effect at the time of contract solicitation and award. The NFAS "provides general guidance to field contracting officers in the execution of their delegated authority" and "implements or supplements" the Federal Acquisition Regulation (FAR), the Defense FAR Supplement (DFARS) and the Navy Marine Corps Acquisition Regulations Supplement (NMCARS). It is not a "stand-alone document, but must be read together with the FAR, DFARS, and NMCARS." NFAS, § 1.101(a)-(b) (2006 ed.).

The 2006 edition of the NFAS includes an Order of Precedence clause for design-build contracts identified as specification provision 5252.236-9312. This clause also provides that any portion of the proposal or the final design that exceeds the contract or that exceeds the other has precedence; however, the structure and wording is otherwise not as similar to the RFP/contractual clause as is the UFGS clause. There is no record evidence explaining whether there are any differences between the 2004 and 2006 editions of the NFAS with respect to provision 5252.236-9312. There is also no factual information regarding the preparation and approval processes associated with the clause 252.236-9312 contained in the 2004 edition of the NFAS, the extent of its distribution and use, whether it was published in the Federal Register or whether it was used as a guideline for the Order of Precedence clause in the RFP and contract at issue here.

### DISCUSSION

The Navy's motion with respect to the remaining five claim items still at issue is based upon the design features identified above which MZT included in its proposal for new construction for the Fire Station seed project. The Navy asserts that, "[t]o the extent MZT's proposal exceeded the requirements of the 9115 solicitation," the order of precedence clause requires MZT to comply with the representations it made in its proposal at no additional cost (gov't mot. at 6).

MZT's response and cross-motion for partial summary judgment do not address any of the claim items that are the subject of the Navy's motion. Rather, they assert that the Order of Precedence clause is "void and inoperative" because NAVFAC implemented the clause without first publishing it in the Federal Register for public comment in violation of section 22 of the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. § 418b (app. resp. at 11). The OFPP Act provides in relevant part:

(a) [N]o procurement policy, regulation, procedure, or form (including amendments or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulation, procedure or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 60 days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register pursuant to subsection (b) of the section.

Notwithstanding the preceding sentence, such a policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but in no event may that effective date be less than 30 days after the publication date.

The standards for summary disposition are familiar. Summary judgment is appropriate where no material facts are in dispute and the moving party has met its burden of establishing it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The motion must set forth sufficient material facts on all relevant issues raised in the motion to demonstrate the standards for summary judgment have been satisfied. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The record as a whole must be such that a “rational trier of fact” could not find in favor of the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Where both parties have filed motions for summary judgment, we are to evaluate each party’s motion on its own merits. *Mingus*, 812 F.2d at 1390-91.

#### *MZT’s Motion*

We address MZT’s motion first because it asserts that the Order of Precedence clause is subject to 41 U.S.C. § 418b and is void. We are satisfied that MZT has not met its burden of establishing the clause is void as a matter of law.

In order to rule in MZT’s favor, we would have to determine that the Order of Precedence clause is a “procurement policy, regulation, procedure or form” having a significant effect beyond NAVFAC or a significant cost or administrative impact on contractors or offerors that was not published in the Federal Register for public comment. The relevant record here consists only of the RFP/contractual specification clause, the UFGS clause and the 2006 edition of the NFAS 5252.236-9312 clause. The RFP/contractual clause is most like the UFGS clause, although all three of the clauses are

substantively similar. Apart from the clauses themselves, we are offered only unsupported assumptions and/or argument of counsel regarding the applicability of 41 U.S.C. § 418b. Thus, even if we were to assume that the Order of Precedence clause can be categorized as a “procurement policy, regulation, procedure or form,” we would have no record evidence from which to evaluate whether the clause has a significant impact beyond NAVFAC’s internal operating procedures or whether it has a significant cost or administrative impact upon contractors. There is also no evidence relating to the preparation and approval of any of the clauses or whether they were published in the Federal Register. In this regard, we note that MZT’s brief states only that “it appears” from MZT’s research that NAVFAC’s clause was never published for public comment in the Federal Register (app. resp. at 11).

Further, the precedent cited by MZT is inapplicable. Unlike the circumstances here, *La Gloria Oil and Gas Co. v. United States*, 56 Fed. Cl. 211 (2003), *Navajo Refining Co., L.P. v. United States*, 58 Fed. Cl. 200 (2003), and *Tesoro Hawaii Corp. v. United States*, 58 Fed. Cl. 65 (2003), all involved deviations to economic price adjustment clauses. Moreover, *Tesoro* was reversed on appeal in *Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005), in a decision finding the clause at issue was authorized under the FAR, and judgment in favor of the government was eventually issued in *La Gloria*. See *La Gloria Oil and Gas v. United States*, 72 Fed. Cl. 544 (2006), *aff’d in part, rev’d in part on other grounds, ConocoPhillips v. United States*, 501 F.3d 1374 (Fed. Cir. 2007).

Nor are we persuaded that we should follow *Munitions Carriers Conference, Inc. v. United States*, 932 F. Supp. 334 (D.C. 1996), *rev’d on other grounds*, 147 F.3d 1027 (D.C. Cir. 1998), also cited by MZT. That case did not arise in the context of the FAR. Rather, it involved a challenge under the Administrative Procedure Act (APA) provisions for a notice and comment period for substantive rules to a Notice promulgated by the Military Traffic Management Command (MTMC) regarding the rates freight carriers would be paid for foreign military sales (FMS) shipments. The court found the Notice exempt from the requirements of the APA and then addressed 41 U.S.C. § 418b(a), which had been brought to the court’s attention during oral argument and subsequently briefed by the parties. The court concluded that the Notice was a procurement regulation and had a significant effect beyond the internal operating procedures of MTMC and that requiring carriers to solicit FMS business with other traffic at a combined rate had a significant cost and administrative impact on the way carriers bid for work. *Munitions Carriers*, 932 F. Supp. at 340. For the reasons previously stated, the record in this appeal does not support a similar finding with respect to the Order of Precedence clause.

#### *The Navy’s Motion*

Turning to the Navy’s motion, we consider the record regarding claim items B.1.2, B.1.11, and B.1.39 to be wanting. With respect to B.1.2, the additional attic space, the

record lacks evidence relating to what appear to be facts that are material to the claim, in particular the reason for the increase in the square footage of the building and the impact of the sound study. With respect to B.1.11, the dormitory windows, the claim does state that windows were not specified for the second floor dormitory, but the present record suggests that due to the sound study, the Navy later insisted upon windows with specific STC ratings and blast resistance which were different from the windows MZT proposed. We are unable to determine whether there are other RFP specifications relating to STC ratings and blast resistance that the Navy rightly relied upon or whether the Navy demanded more from MZT than it was entitled to receive. Finally, with respect to B.1.39, we cannot discern how the new gate proposed by MZT, which allowed direct access to Ranger Street, may relate to the fencing or gate the Navy recommended in May 2005 and which the claim indicates was needed to enclose the perimeter to the fire station. Nor can we determine whether MZT's proposal references to relocating the existing gate and repositioning a portion of the standoff fence have any relationship to the additional gate and fencing that is the subject of the claim.

In contrast, it appears from the record that claim items B.1.5 and B.1.16 are based upon design features proposed by MZT that may have exceeded the requirements of the RFP. The claims themselves state that the RFP did not require equipment bay overhangs, first floor window overhang shading device eyebrows, or an entry canopy. The narratives further explain that MZT proposed deleting these design features to save costs, but that the Navy insisted upon keeping them for aesthetic reasons.

To grant the Navy's motion as to claim items B.1.5 and B.1.16, however, would seemingly imply that we agree that the Order of Precedence clause is valid and that the Navy was acting within its contractual rights because these accepted design features exceeded the solicitation requirement. The posture of the record here is not such that it would be appropriate to leave such an implication. The validity of the Order of Precedence clause is the subject of MZT's cross-motion for summary judgment. The Navy opposed the motion, but did not seek judgment as a matter of law that the clause is valid. In light of the unusual circumstances surrounding the cross-motions, we believe the parties should be afforded the opportunity to further develop the record evidence relating to the validity of the Order of Precedence clause and all five of the claim items at issue. *See, e.g., Distributed Solutions, Inc.*, ASBCA No. 57266, 12-1 BCA ¶ 34,917 at 171,690-91 and cases cited.

CONCLUSION

The Navy's motion for partial summary judgment on claim items B.1.4, B.1.8, B.1.10, B.1.15, and B.1.45 is denied as moot, and otherwise denied as to claim items B.1.2, B.1.5, B.1.11, B.1.16, and B.1.39. MZT's cross-motion for partial summary judgment is also denied.

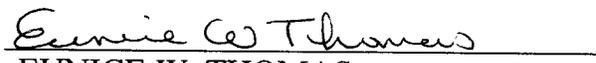
Dated: 29 January 2013

  
CAROL N. PARK-CONROY  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

  
MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
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. 56711, Appeal of Macro-Z-Technology, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals