Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: February 21, 2001

GSBCA 15101

TRATAROS CONSTRUCTION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Robert J. Sciaroni of Bell, Boyd & Lloyd, Washington, DC, counsel for Appellant.

Jeremy Becker-Welts, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

DeGRAFF, Board Judge.

Trataros Construction, Inc. and the General Services Administration (GSA) entered into a contract that required Trataros to perform construction work. In this appeal, Trataros claims that during the course of the contract GSA changed its requirements for corridor grilles and that this change resulted in increased costs. Trataros elected to use the Board's small claims procedure in order to resolve this case, see Rule 202 (48 CFR 6102.2 (1999)), and a hearing was held. Because the contract drawings contained an obvious mistake about which Trataros asked no questions before bidding, and because Trataros has not established that it relied upon the mistake when it prepared its bid, we deny the appeal.

Findings of Fact

On September 26, 1996, the parties entered into contract GS-02P-DTC-0033(N) for renovations and alterations to the United States Post Office and Courthouse Building in Old San Juan, Puerto Rico. Drawing 4-14 depicted work to be performed in corridors 305, 312, 323, and 331 on the third floor, including work related to metal grilles in the corridors. Drawing 4-14 showed a total of twenty-two grilles, including six grilles in corridor 312. For some of the grilles in each of the corridors, the drawing contained a notation referring the

reader to detail 15 of drawing 5-43.[1] Detail 15 is labeled "Plan Detail - Door Infill at 312 Corridor." Detail 15, which shows no grilles, shows masonry being used to fill an opening in corridor 312. Detail 14 of drawing 5-43 is labeled "Infill Detail at Exist[ing] Corridor Transfer Grill." Detail 14 shows a grille and shows that a metal plate would be installed to fill the opening behind the grille. Details 14 and 15 are side-by-side on drawing 5-43. Exhibit 1; Transcript at 259-60, 264.

There is no evidence to show how, or if, Trataros read drawings 4-14 and 5-43 before it submitted its bid for the contract. Transcript at 258. Trataros sent the drawings to its steel fabricator, MoMetal, which calculated the number of metal plates that would be needed behind the grilles. Transcript at 242, 263. We do not have any testimony or documentation from MoMetal to establish what conclusions it drew from the drawings, and we do not know how many metal plates MoMetal planned to provide. A Trataros witness believed that MoMetal thought that the openings behind the grilles on the third floor would be filled with masonry, and so did not plan to provide metal plates behind those grilles. This Trataros witness, however, was not present when Trataros submitted its bid and had no first-hand knowledge of MoMetal's reading of the drawings. Transcript at 257-58, 263.

On April 11, 1997, Trataros sent Request for Information 91 (RFI 91) to GSA's construction manager, O'Brien Kreitzberg. Trataros explained that drawing 4-14 showed a grille and referred to detail 15 of drawing 5-43, which did not show a grille. Trataros asked which drawing was correct. Exhibit 6. Trataros sent this RFI because its superintendent believed, when he looked at the drawings, that drawing 4-14 referred to the wrong detail. Transcript at 249, 256-57. A few days later, O'Brien Kreitzberg sent Trataros a response from GSA's project architect, which said that drawing 4-14 should have referred to detail 14, and not detail 15, on drawing 5-43. Exhibit 6. Trataros sent this response to MoMetal, which then told Trataros that thirty-four additional metal plates would be needed. Transcript at 242.

On May 18, 1999, Trataros asked GSA to increase the contract price by $26,254 to cover the cost of providing and installing additional metal plates behind grilles. Exhibit 6. On May 20, O'Brien Kreitzberg responded that the reference to detail 15 on drawing 5-43 was an obvious error, and that the correct reference should have been to detail 14. O'Brien Kreitzberg noted that details 14 and 15 were side-by-side on drawing 5-43, and that detail 14 was labeled as a grille, while detail 15 was labeled as showing a door and not a grille. O'Brien Kreitzberg said that it was inconceivable that a qualified contractor would not be able to tell the difference between a grille and a door. Exhibit 7. On May 27, Trataros submitted a claim for $26,254 to the contracting officer. Exhibit 8. The contracting officer denied the claim, because she determined that it was obvious that drawing 4-14 should have referred to detail 14, and not detail 15, on drawing 5-43. Exhibit 9. At the hearing, a Trataros witness agreed that the reference to detail 15 appeared to be a fairly obvious mistake. Transcript at 269-70.

Discussion

[1] Actually, the note referred to "15/43." Exhibit 1. The parties understand this to be a reference to detail 15 on drawing 5-43. Complaint ¶ 8, Answer ¶ 8.

In its complaint, Trataros says that the direction to provide the metal plates as shown on detail 14 was a change to the terms of the contract. Complaint ¶ 14. In its post-hearing brief, Trataros says that the reference to detail 15 was a latent ambiguity. Appellant's Post-Hearing Brief at 2. GSA says that there was no change because the reference to detail 15 was an obvious error that Trataros should have asked about before it submitted its bid. Respondent's Post-Hearing Brief at 1-2.

The reference to detail 15 was an error and the error was an obvious one. Drawing 4-14 showed grilles on four corridors on the third floor. For some of the grilles in each corridor, the drawing referred the reader to detail 15 on drawing 5-43. Detail 15, however, was labeled as showing the use of masonry to fill a door opening in one corridor on the third floor and did not depict any grilles. Even a casual reader should have realized that something was wrong when drawing 4-14 showed grilles in four of the third floor corridors and yet cross-referenced to detail 15, which applied only to one of the third floor corridors, did not show a grille, and was labeled as depicting a door. In addition, a reasonably careful look at drawing 5-43 would have revealed that adjacent to detail 15 was detail 14, which was labeled as applying to grilles, which depicted a grille, and which showed the use of a metal plate to fill the opening behind the grille. O'Brien Kreitzberg thought that the reference to detail 15 was an obvious error, as did the GSA contracting officer. Trataros's superintendent believed that the drawings referred to the wrong detail, which is why he submitted RFI 91. At the hearing, a Trataros witness agreed that the reference to detail 15 was a fairly obvious mistake. We have no persuasive evidence to show how MoMetal read the reference to detail 15. Based upon a review of the drawings and the testimony, we conclude that the reference to detail 15 was an obvious error in the drawings.

Because the reference to detail 15 was an obvious error and Trataros did not ask GSA about that error before bidding, it is not entitled to recover for any additional costs that it incurred as a result of the error. An obvious error in a contract constitutes a patent ambiguity. A reasonably prudent contractor who is preparing to submit a bid in response to a solicitation should recognize a patent ambiguity immediately as creating a serious problem and must ask the Government for a clarification before bidding in order to permit the Government to issue any needed amendments to the solicitation, so that the ambiguity is not included in the contract. If a bidder does not ask the Government to clarify any of a solicitation's provisions before submitting its bid, the bidder will bear the risk of its interpretation of any patently ambiguous provisions, regardless of the reasonableness of the bidder's interpretation. Community Heating and Plumbing v. United States, 987 F.2d 1575 (Fed. Cir. 1993); Fortec Constructors v. United States, 760 F.2d 1288 (Fed. Cir. 1985); Newsom v. United States, 676 F.2d 647 (Ct. Cl. 1982); S.O.G. of Arkansas v. United States, 546 F.2d 367 (Ct. Cl. 1976). Trataros bears the burden of any added costs that it incurred due to the erroneous reference to detail 15 because that error was obvious and Trataros did not ask GSA to clarify the reference until more than six months after contract award, when its superintendent read the drawings, concluded that they referred to the wrong detail, and submitted RFI 91.

Even if the reference to detail 15 had been a latent, as opposed to a patent, ambiguity, Trataros would not be entitled to recover. If an ambiguity is not patent, the Government will bear the burden of compensating a contractor for the cost of its interpretation of the contract's provisions, so long as the interpretation is reasonable and so long as the contractor

can establish that it actually and reasonably relied upon its interpretation at the time it submitted its bid. The contractor has the burden of establishing its reliance by a preponderance of the evidence. Fruin-Colnon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990). The best evidence of reliance is a bid work sheet or other document generated at the time the bid was prepared. Courts and boards have decided that statements made in support of a contractor's case, years after a dispute arises, are not particularly persuasive evidence. Fry Communications v. United States, 22 Cl. Ct. 497 (1991); Maintenance Engineers v. United States, 21 Cl. Ct. 553 (1990); American Transport Line, ASBCA 44510, 93-3 BCA ¶ 26,156; Malloy Construction, ASBCA 25055, 82-2 BCA ¶ 16,104. Assuming for the moment that the interpretation of detail 15 that Trataros now advances is reasonable, there is no evidence to establish how Trataros or MoMetal read detail 15 before Trataros submitted its bid for the contract, or to establish that they relied upon the reference when the bid was prepared. We do not have a bid work sheet or any other document created before the dispute arose to show that either Trataros or MoMetal read detail 15 as applying to the grilles. Thus, even if the reference to detail 15 constitutes a latent ambiguity, Trataros is not entitled to recover because it has not established by a preponderance of the evidence that either it or MoMetal relied upon its present interpretation of detail 15 at the time the bid was prepared.

Finally, Trataros has not established the amount by which the contract price should be adjusted, even if GSA were liable to make an adjustment. We do not know how many metal plates MoMetal originally intended to provide, so we cannot be sure how it determined that it was required to provide any "extra" plates. If, as Trataros believes, MoMetal provided thirty-four extra metal plates, this cannot be attributed to the ambiguity contained in the drawings. Drawing 4-14 showed a total of only twenty-two grilles on the third floor, and only six of those were in corridor 312, which is the corridor to which detail 15 applied. At most, if MoMetal relied upon detail 15 as applying to the grilles, it should have planned to supply plates behind all but six grilles. But, we do not know whether MoMetal relied upon detail 15 when it determined how many metal plates were required or, if it did, how it later determined that thirty-four "extra" plates were needed. In short, even if GSA were liable to Trataros, our record contains no explanation of how a mistaken reference that affected six grilles led to the need for thirty-four additional metal plates.

Decision

The appeal is **DENIED**.

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MARTHA H. DeGRAFF
Board Judge