

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

DENIED: March 21, 2002

GSBCA 15628

WITHERINGTON CONSTRUCTION CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Andrew J. Kilpatrick, Jr., of Gore, Kilpatrick, Purdie, Metz & Adcock, Ridgeland, MS, counsel for Appellant.

M. Leah Wright, Office of Regional Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

WILLIAMS, Board Judge.

Appellant, Witherington Construction Corporation (Witherington), challenges a contracting officer's final decision denying an equitable adjustment in the amount of \$28,754 for the provision of light fixtures on a renovation Witherington performed. Appellant elected to have this claim processed under the small claims procedure. Rule 202. As such, this decision has been issued on an expedited basis, is final and conclusive, and has no value as precedent.

Because we conclude that the contract, read as a whole, required Witherington to supply the light fixtures, we deny the claim.

Findings of Fact

On October 16, 2000, Witherington submitted a bid under solicitation number GS-04P-00-CXM-0049 to provide all materials, equipment, and labor for renovations/alternations of the area occupied by the United States Marshal's Service on the 10th Floor of the Clifford B. Davis Federal Building in Memphis, Tennessee. Appeal File,

Exhibit 2 at 6. Witherington was selected as the lowest responsive, responsible bidder, and on November 6, 2000, was awarded contract number GS-04P-97EWC-0023 and issued order number P-04-01-EW-0001 in the amount of \$2,019,971. Id. The notice to proceed was issued to Witherington effective December 4, 2000.

On December 8, 2000, Witherington entered into a subcontract with Dennis Electric, Inc. (Dennis) for the electrical portion of the project.

Contract Section 01421, Reference Standards and Definitions, paragraphs F, G, and H provide the definitions for the words "furnish," "install," and "provide" as used in the contract. Appeal File, Exhibit 6 at 38. Furnish is defined as "to supply and deliver to the Project site ready for unloading, unpacking, assembly, installation, and similar operations." Id. Install is defined as describing "operations at the Project site, including the actual unloading, temporary storage, unpacking, assembling, erecting, placing, anchoring, applying, working to dimension, furnishing, curing, protecting, cleaning, and similar operations." Id. Provide means to "furnish and install, complete and ready for the intended use." Id.

Contract Section 01010-3, Summary of Work, paragraph 1.6, Products Ordered in Advance, provides:

- A. General: The Government has negotiated purchase orders with suppliers of material and equipment to be incorporated into the work. The Government has assigned these purchase orders to the Contractor. Costs for receiving, handling, storage, and installation are included in the Contract Sum.
 - 1. The Contractor's responsibilities are the same as if the Contractor negotiated the purchase orders. If necessary, the Contractor shall renegotiate purchase and execute final purchase-order agreements.

Appeal File, Exhibit 9.

Contract Section 01010-3, Summary of Work, paragraph 1.7, Government Furnished Products, states:

- A. The Government will furnish products as indicated on the drawings. The work includes providing support systems to receive the Government's equipment and mechanical and electrical connections.
 - 1. The Government will arrange for and deliver necessary shop drawings, product data and samples to the Contractor.
 - 2. The Government will arrange and pay for delivery of Government furnished items according to the Contractor's Construction Schedule.
 - 3. Following delivery, the Government will inspect items delivered for damage.

4. If Government-furnished items are damaged, defective, or missing, the Government will arrange for replacement.
5. The Government will arrange for manufacturer's field services and for the delivery of manufacturer's warranties to the appropriate Contractor.
6. The Contractor shall designate delivery dates of Government furnished items in the Contractor's Construction schedule.
7. The Contractor shall review shop drawings, product data, and samples and return them to the Contracting Officer's Representative (C.O.R.) noting discrepancies or problems [anticipated] in use of the product.
8. The Contractor is responsible for receiving, unloading, and handling Government-furnished items at the site.
9. The Contractor is responsible for protecting Government-furnished items from damage from exposure to the elements. The Contractor shall repair or replace items damaged as a result of his operations.

Appeal File, Exhibit 6 at 9-10. The drawings in the record do not indicate that the Government will provide light fixtures. Id., Exhibit 7.

Contract Section 16515, Lighting, provides, in pertinent part:

CONFIRM QUANTITIES OF LIGHT FIXTURES

The Electrical Contractor shall be responsible for providing the General Contractor/Construction Manager with a complete and correct list stating the quantity of each light fixture type required for the project. The Electrical Contractor shall review and approve the manufacturer's shop drawings for proper trim, finish, accessories, mounting hardware, etc. for each light fixture type. The Electrical Contractor shall communicate with the distributor/manufacturer to assure the timely delivery of the light fixtures, anchor bolts, rough-in housings, accessories, etc. to the project.

RECEIVE LIGHT FIXTURES

The Electrical Contractor shall be responsible for receiving the light fixtures on the project site or elsewhere as directed by the General Contractor/Construction Manager or Owner. The Electrical Contractor shall coordinate the delivery arrangements with the transportation company and shall perform all administrative work as necessary to receive the light fixtures for the Owner.

UNLOAD AND STACK LIGHT FIXTURES

The Electrical Contractor shall be responsible for unloading, handling and stacking the light fixtures in accordance with the instructions marked on each carton at the time of delivery and as may be required by the General Contractor/Construction Manager throughout the project. Any damage to the light fixtures incurred due to improper unloading, handling and/or stacking shall be the responsibility of the Electrical Contractor.

INSPECT LIGHT FIXTURES

The Electrical Contractor shall be responsible for individually inspecting each light fixture for damage. If any damage is found the light fixture shall be inspected by the transportation company in the presence of the Electrical Contractor in accordance with the requirements of the transportation company. The Electrical Contractor shall note any occurrences of freight damage on the shipping receipt or as otherwise required to allow for the filing of a valid and proper freight claim. The Electrical Contractor shall not install any scratched, dented or otherwise damaged light fixtures on the project. Should such damaged light fixtures be installed by the equipment costs incurred in removing the damaged light fixtures and receiving, unloading, inspecting, sorting, protecting, transporting, unpacking, and installing the replacement light fixtures provided by the distributor/manufacturer. [sic]

NOTIFY DISTRIBUTOR/MANUFACTURER AND TRANSPORTATION COMPANY OF FREIGHT DAMAGE

The Electrical Contractor shall be responsible for notifying the distributor/manufacturer and transportation company of any freight damage to the light fixtures and for initiating the claim process with the transportation company. It is the responsibility of the Electrical Contractor to make the necessary notations on the shipping receipt to allow for the filing of a valid and proper claim with the transportation company. Should the Electrical Contractor fail to notify the distributor/manufacturer and transportation company of damage to the light fixtures in a thorough and timely manner to the extent that a valid and proper claim cannot be filed, the Electrical Contractor shall be responsible for any resulting cost incurred by the Owner.

RETURN DAMAGED LIGHT FIXTURES

The Electrical Contractor shall be responsible for the return of any damaged light fixtures as may be required at the direction of the distributor/manufacture[r] and/or the General Contractor/Construction Manager. Transportation costs for the return of damaged light fixtures is not the responsibility of the Electrical Contractor.

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TRANSPORT LIGHT FIXTURES TO WORK AREA

The Electrical Contractor shall be responsible for transporting the light fixtures as needed from the storage areas to the appropriate work area.

UNPACK LIGHT FIXTURES

The Electrical Contractor shall be responsible for the unpacking of the light fixtures and the removal of all such debris from the project. Unless there is

evidence of possible freight damage all light fixtures shall remain in the original cartons until time of installation.

PROVIDE WARRANTY

The Electrical Contractor shall be responsible for providing the labor and such incidental materials as may be necessary to replace defective parts and/or light fixtures for a period of one (1) year from date of acceptance by the Owner. The distributor/manufacturer will provide all replacement parts and/or light fixtures to the Electrical Contractor as required. Any costs incurred for labor, materials, light fixtures, etc. that are required in order to correct damage caused by incorrect, defective or unworkmanlike installation of the light fixtures shall be the responsibility of the Electrical Contractor.

Appeal File, Exhibit 6 at 645-47.

In other sections of the Division 16000 specifications, there are numbered subsections for "General," "Products," and "Execution" that give specific criteria for what is to be furnished by the contractor. Appeal File, Exhibit 6 at 614-20. Additionally, other sections request submittal data on the items to be furnished. Id. Nowhere in Section 16515 does it state who is to "provide" the light fixtures. Id.

Contract Drawing EL.0 provides the lighting fixture schedule. General Note A states that "[t]he term 'provide' shall mean Contractor shall furnish and install items and connect as required to obtain a complete working system." Appeal File, Exhibit 7 (emphasis added). The lighting fixture schedule lists the eight types of fixtures to be provided, including the manufacturer and catalog number for each type. Note 1 of the lighting fixture schedule on Drawing EL.0 provides: "All fluorescent troffers above are listed as grid troffers, provide flanged troffers for installation in gypsum board ceiling. See architectural reflected ceiling plan and finish schedule for ceiling type in order to provide the proper fixture." Id. (emphasis added). Notes B, J, O, P, Q, T, and X require that items be "provided." Id. Note B provides that a continuous ground must be provided through conduit system. Id. Note J states: "From each communication type outlet. Provide a (Min.) 3/4-inch conduit" Id. Note O states: "Provide fire stop to all conduits crossing fire rated walls and floors." Id. Note P states: "Provide cast outlet boxes and covers for light switches or devices in open areas where box cannot be flush mounted in wall." Id. Note Q states: "For each receptacle supplied from a ground fault circuit interrupter breaker in panelboard, provide a cover plate with the following permanently etched or engraved marking: 'G.F.C.I. protected.'" Id. Note T states: "Provide new updated, typed panel ledgers for all existing panels altered during project with all changes/additions indicated." Id. Note X states: "A code size insulated ground conductor shall be provided in all feeder and branch circuit conduits." Id.

On December 20, 2000, Witherington forwarded to the General Services Administration (GSA) a list of the light fixtures required by the project. Witherington indicated that per Section 16515, the light fixtures were to be furnished by the owner. Appeal File, Exhibit 5 at 27-28.

On December 20, 2000, GSA responded stating that Section 16515 of the contract did not indicate that the owner would furnish any materials. Appeal File, Exhibit 5 at 22.

On December 21, 2000, the electrical subcontractor sent an e-mail message to Witherington asserting that the specifications required the Government to provide light fixtures and requesting that Witherington expedite the information due to the urgent nature of ordering the light fixtures. Appeal File, Exhibit 5 at 20-21. Witherington forwarded the electrical subcontractor's e-mail to GSA requesting resolution of the matter and suggesting that, in the meantime, a directive from the contracting officer could allow the project to move forward.

On December 29, 2000, Witherington forwarded the lighting submittal to GSA. Appeal File, Exhibit 4. On January 8, 2001, GSA approved the lighting submittal. Id. at 1.

On March 28, 2001, appellant requested a change order in the amount of \$28,754 to provide light fixtures for the project. Appeal File, Exhibit 5 at 4.

On April 25, 2001, the contracting officer issued a final decision denying appellant's claim in its entirety. Appeal File, Exhibit 3.

Discussion

The question of whether the contractor or the Government is to provide the light fixtures is a matter of contract interpretation. In interpreting a contract, "[w]e begin with the plain language." Hunt Construction v. United States, No. 01-5061, slip op. at 4 (Fed. Cir. Mar. 1, 2002); Massie v. United States, 166 F.3d 1184, 1189 (Fed. Cir. 1999) (citing McAbee Construction, Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996)). "We give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning." Massie, 166 F.3d at 1189 (quoting Harris v. Department of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1998)). Further, "we must interpret the contract as a whole and in a manner that gives meaning to all its provisions and makes sense." Hunt, slip op. at 4; Massie, 166 F.3d at 1189; New Valley Corp. v. United States, 119 F.3d 1576, 1580 (Fed. Cir. 1997); McAbee, 97 F.3d at 1435 (Fed. Cir. 1997).

When read as a whole, this contract can only reasonably be interpreted to require the contractor to furnish the fixtures. First, the contractor's bid was for provision of all materials, equipment, and labor for the renovation, and light fixtures are materials. Second, Note 1 and General Note A of the drawing containing the lighting fixture schedule, read together, indicate the contractor is to provide the light fixtures. Note 1 to the schedule, which directly follows the list of light fixtures, including the manufacturer and catalog number for each, directs the contractor to the ceiling plan and finish schedule "in order to provide the proper fixture."¹ General Note A on this drawing states that the term "provide" means that the

¹ Appellant apparently believes that Note 1 was not specifically directed to the contractor, but it would make no sense for the drawing to provide this guidance to the Government.

contractor shall furnish and install items and connect as required to obtain a complete working system. Third, the Government Furnished Products clause states that the Government will furnish products as indicated on the drawings, but there is no indication on the drawings that the Government will furnish the light fixtures. See Northwest Marine, Inc., ASBCA 43502, 94-1 BCA ¶ 26,521, motion for reconsideration denied, 94-2 BCA ¶ 26,798 (necessary materials not expressly listed as Government furnished are to be supplied by contractor).

Appellant contends that because five notes on the lighting fixture schedule drawing spell out that the contractor is to "provide" other items -- a continuous ground, a certain conduit, a fire stop, cast outlet boxes, cover plates, panel ledgers, and a specified ground conductor -- the drawing similarly would have indicated appellant was to provide the fixtures, if that were the case. We read Note 1 and General Note A as indicating that the contractor was to provide the fixtures. Although not as clear as the notes appellant cites, Note 1, combined with General Note A and the contractual provisions outlined above, requires the contractor to provide the fixtures.

Certain requirements with respect to the fixtures were delineated in great detail, i.e., how the contractor was to list quantities of each type of fixture, do the administrative work, receive fixtures, unload and stack fixtures, inspect fixtures, notify manufacturers of freight damage, return damaged fixtures, and protect and transport the fixtures. Although appellant argues that this litany of requirements would be unnecessary if the contractor were providing the light fixtures, we see nothing inconsistent with these detailed directives and the provision of the fixtures by the contractor.

Appellant cites the "Products Ordered in Advance" section of the contract as being "controlling" here, without further elaboration. Appellant's Memorandum and Brief at 4. This provision does not, however, help appellant -- it simply notes that the Government had negotiated purchase orders for unspecified material and equipment to be incorporated into the work and had assigned such purchase orders to the contractor. Had light fixtures been the subject of such purchase orders, there would have been an assignment of such purchase orders to appellant, and there is no suggestion in the record that such an assignment occurred.

The contract cannot reasonably be read to impose the requirement to provide fixtures on the Government. Because we conclude that this contract may not reasonably be interpreted in the manner advanced by appellant, we do not deem it ambiguous. See, e.g., Massie, 166 F.3d at 1189; Hill Materials Co. v. Rice, 982 F.2d 514, 516 (Fed. Cir. 1992); Pacificorp Capital, Inc. v. United States, 25 Cl. Ct. 707 (1992), aff'd, 988 F.2d 130 (Fed. Cir. 1993) (citations omitted) (a contract may be found ambiguous if the provisions under scrutiny may reasonably be interpreted in two ways). Although imperfectly drafted, the contract is not ambiguous. Appellant is responsible for providing the light fixtures.

Decision

The appeal is **DENIED**.

MARY ELLEN COSTER WILLIAMS
Board Judge