Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED: December 14, 2001

GSBCA 15648

J. KOKOLAKIS CONTRACTING, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joseph J. Kokolakis, President of J. Kokolakis Contracting, Inc., Rocky Point, NY, appearing for Appellant.

Joshua Roth, Office of Regional Counsel, General Services Administration, New York, NY, counsel for Respondent.

HYATT, Board Judge.

This appeal is from a contracting officer's decision denying a claim for an equitable adjustment under a contract for the renovation and alteration of the Internal Revenue Service Customer Center in Holtsville, New York. The subject appeal involves a dispute over the proper interpretation of contract requirements for the cleaning of metal ductwork in the building. The total amount claimed is $44,644. Appellant, J. Kokolakis Contracting, Inc. (Kokolakis), has elected to proceed under the Board's expedited procedure for small claims. Rule 202 (48 CFR 6102.2 (2000)). This rule permits issuance of a decision in summary form. Decisions issued under the small claims procedure are final and shall not be set aside except in cases of fraud affecting the Board's proceedings. 41 U.S.C § 608 (Supp. V 1999); Palmer v. Barram, 184 F.3d 1373 (Fed. Cir. 1999). This decision has no value as precedent.

Findings of Fact

On June 15, 1999, the General Services Administration (GSA) awarded contract number GS-02P-98-DTC-0056 to appellant, J. Kokolakis Contracting, Inc., in the amount

of $15,712,000. Appeal File, Exhibit 4. By letter dated December 13, 1999, appellant was given notice to proceed effective January 11, 2000. Id., Exhibit 5.

The IRS complex in Holtsville consists of five buildings, all of which are slated for renovation to some extent. This appeal involves work to be done in two of the buildings. The campus is sizable -- approximately 500,000 square feet or roughly the size of ten football fields. Transcript at 76. The overall contract work includes removing ceilings; installing new light fixtures, ductwork, and floor finishes; updating electrical work; renovating bathrooms; and the like. Substantial renovation of the heating, ventilation, and air conditioning (HVAC) systems is included in the contract. The renovations are phased, with most of the work being performed in space which is not occupied at the time that the contractor is performing work. Appeal File, Exhibit 1; Transcript at 13.

One of the contract requirements is for metal duct cleaning. The contract specification for duct cleaning, section 15995, provides that the contractor will clean all supply return and exhaust ductwork associated with the enumerated air conditioning systems. Subpart 1.04 of this specification defines the term "air conveyance system" as follows:

> The air conveyance system is any interior surface of a building's air distribution system for conditioned spaces and/or occupied zones. . . . This includes the entire air moving system from the points that the air enters the system to the points where the air is discharged from the system.

The specification lists 18 air conveyance systems that are to be cleaned as systems in subpart 3.03. These are not all of the systems in the five buildings, however. Subpart 1.07A defines the scope of work "under this contract" as including "all labor, materials and appliances necessary for the complete cleaning of all equipment plenums, louvers, coils, diffusers, registers, and duct work associated with the [enumerated] systems." The specification further provides that to the extent possible, the air conveyance systems should be hand brushed, vacuumed and hand washed. Subpart 1.01 of the specification advises that drawings and general provisions of the contract apply to this section. Appeal File, Exhibit 1 at 887-93.

At the hearing, appellant presented the testimony of its vice president, Nicholas Leo, who is responsible for the preparation of all the estimates used in bidding contract work. Mr. Leo has completed substantial credits toward a college degree in architecture and has many years of experience in the construction industry. Mr. Leo prepared the company's estimate for this contract. He started this process by reviewing the plans and specifications to determine what type and how much work is required. Then he obtained the drawings. Transcript at 10-16. To estimate the cost of the duct cleaning he started with the pertinent specification -- Section 15995 of the contract. He looked at the definitions and the scope of the work. He then went to the drawings and began the process of trying to quantify the cleaning work -- i.e., how many feet of ductwork, and how many grills, and the like. Transcript at 16-19.

The drawings indicate the individual size of ductwork throughout. In order to determine the quantity of ducting that required cleaning in building 1, Mr. Leo reviewed drawing 9-M-103, which depicts the mechanical plan, or HVAC layout, for building 1. He

located the referenced air conveyance system and traced the system on the drawing. Once he traced the system he was able to quantify the lineal footage of duct to be cleaned. He also needed to calculate the surface area of the interior of the duct because this impacts the cost to clean. The drawings also contained size and placement details for other items required to be cleaned under the specification, such as registers, reheat coils, and grills. Transcript at 24-26.

Drawing 9-M-103 includes a bolded dotted line dividing up the building's floor plan. The drawing describes the areas within the line as "existing to be renovated" and describes the portions of the building outside the line as "existing area not in contract (NIC)." Appellant understood that line to be the boundary line for its contract and refers to the line as "the contract limit line." The acronym NIC was included in other drawings as well, and Kokolakis understood it to mean that no work was to be performed in those areas. The NIC areas are shaded in other drawings, and there are similar notations to the effect that there would be no work in those areas. The phasing plan, also included in the drawings, states that work will be performed in unoccupied, not occupied, areas. Transcript at 25-34.

Based on drawing 9-M-103, Mr. Leo concluded that the ductwork to be cleaned under the contract was only the ducting depicted within the area to be renovated. He based this conclusion on the level of detail provided on the drawing in the area that was to be renovated versus the absence of any detail that would enable him to estimate the extent of ductwork to be cleaned outside the area to be renovated. In addition, to clean ductwork in the occupied areas, the contractor would have to enter those areas and cut the ceiling and ductwork. Transcript at 25-36. Although the occupied NIC area of the building might be accessible to walk through, no contract work, other than the disputed duct cleaning, is scheduled to be performed there. Transcript at 82. Mr. Leo thus testified that numerous factors led him to believe that the Government did not intend that the contractor clean ductwork outside that area -- in particular, the lack of detail enabling a contractor to estimate the extent of ductwork in the NIC area; the phasing plan, under which the NIC area would remain occupied throughout the course of the contract; the lack of a coil reheat schedule; and the overall floor plan of the building. Transcript at 36-37.

The other area in which this issue arises is in the drawings for building 5, for which Mr. Leo consulted drawings 9-M-504 and -503. For this building the schedule called out two air conveyance systems to be cleaned -- 502 and 503. Not all of the air conveyance systems in building 5 were required to be cleaned. The work was scheduled selectively. Although ordinarily the system includes both the air supply and return, for air conveyance unit 503, only the supply was required to be cleaned. Transcript at 39-41. Mr. Leo followed the same process for estimating the quantity of ductwork to be cleaned in building 5. He located the air handling systems identified as included in the work and traced the ductwork as depicted in the drawing. Building 5 does not have any area identified as NIC, so he included all the ductwork shown on the drawings for the two systems identified for cleaning in the contract, assuming that the drawings were complete. After contract work was started, the contractor determined that there was significantly more ductwork to be cleaned than was shown on the drawings. Although Kokolakis participated in the pre-bid walk-through, the ductwork is concealed in high ceilings. The area in question is a cafeteria, which is active twenty-four hours a day. Locating the ductwork would require using ladders and lifts and removing a

portion of the ceiling, and even then it might not be readily determinable how much ducting was involved. Transcript at 41-48.

After commencing work on the renovation contract, Kokolakis began working in the areas above the ceilings, to take measurements and replace parts of systems, and realized that there was a lot more ductwork than was shown on the drawings. Transcript at 74-75. On July 11, 2000, Kokolakis submitted a request for information concerning the scope of duct cleaning work under the contract. The request references specification section 15995 and the contract drawings. Kokolakis requested that GSA advise whether it wished to have duct cleaning operations performed in areas which were designated NIC (not in contract) on the three referenced drawings. Kokolakis also expressed the view that its contractual obligation did not extend to ducts passing through those areas. In response, GSA's architect, Atkinson Koven Feinberg Engineers, Inc., directed that:

> The Air Conveyance System cleaning schedule defines the requirements of systems required to be cleaned under this project, including those systems located partially or entirely in NIC areas.

Appeal File, Exhibit 6. Thereafter, Kokolakis, on July 27, 2000, wrote to the construction quality manager and took exception to this response from the architect, emphasizing that the pertinent portions of the building are clearly delineated as "Not in Contract." Kokolakis intended to subcontract the work, and included with its letter is a copy of a bid submitted by a duct cleaning subcontractor, which shows that the subcontractor construed the language on the drawings as limiting the extent of the ductwork cleaning.

On May 9, 2001, Kokolakis wrote to the contracting officer setting forth a formal claim for the cost of performing work it deemed to be outside the scope of the contract. Specifically, with respect to the work in building 1, Kokolakis took issue with the architect's requirement that it clean existing metal duct systems in areas designated in the contract drawings as "EXISTING AREA NOT IN CONTRACT." In support of its interpretation of the specifications, Kokolakis pointed out that with respect to building 1, the contract limit line is clearly indicated in contract drawing 9-M-101. Kokolakis also contended that air conveyance systems scheduled for renovation and cleaning under specification 15995 are to be cleaned to the extent that they fall within the contract limit lines and that all existing ductwork falling inside the contract limit lines is shown and sized on the contract drawings, while ductwork extending into the NIC part of the building is only partially shown and is not sized. In addition, in building 1 the ductwork outside the contract limit line is concealed above finished ceilings in the mailroom and warehouse areas. With respect to building 5, the scope of work referenced by the contract documents is clearly limited to penthouse 5 and does not extend to the space below. Existing duct runs, and the related air distribution network, are not shown on the HVAC contract drawings, as there is no plan for building 5 which extends beyond the penthouse. Absent a first floor plan for this area, Kokolakis maintained, related work is excluded from the contract. Appeal File, Exhibits 7, 8.

By letter dated July 20, 2001, the contracting officer denied appellant's claim. The contracting officer addressed appellant's contentions concerning the portions of the drawings that are shown as NIC. Specifically, GSA maintained that the drawings pertain to demolition

and installation of ductwork and are not pertinent to the scope of work for metal duct cleaning. GSA's position was that the definition of air conveyance systems to be cleaned made clear that all ducting associated with these systems was in the contract regardless of notations on the mechanical drawings. In addition, GSA pointed out that the solicitation cautioned prospective contractors to inspect the premises prior to bidding on the contract. Appeal File, Exhibit 9.

At the hearing, the Government proffered the opinion of its expert, GSA's project manager for this contract, Dr. Adel Eskander, concerning the proper interpretation of this language. GSA's expert has a PhD in civil engineering and considerable experience in managing and supervising construction projects for GSA. Transcript at 97-100.

GSA pointed out that the areas labeled "not in contract," or NIC, were intended to denote areas that would remain fully occupied at all times and not be under the control of the contractor, as opposed to other areas scheduled for renovation that would, under the phasing plan, be vacated on a temporary basis and be fully accessible to the contractor. Further, GSA noted, there is some work in some of the plans that would take place in occupied areas, such as rewiring lighting fixtures and reinstalling control valves. The term NIC simply designated areas in the buildings that would not require full contractor access for such major efforts as asbestos removal and HVAC system demolition and replacement. Transcript at 100-07. Moreover, Dr. Eskander suggested that duct cleaning contractors would generally expect to clean the whole system within a building and would not necessarily rely on drawings to determine the scope of that effort. Transcript at 116-17.

Kokolakis did not disagree that its contract includes minor work in some of the occupied areas that were not going to be vacated under the phasing plan, but pointed out that that work was clearly depicted on the pertinent drawings. The extent of the ducting intended to be cleaned was not shown in the same fashion. GSA's response to that was that the plans showing the ductwork were for demolition purposes -- according to GSA, none of the plans were intended to depict duct cleaning. Kokolakis responded that the drawings for building one, at least, showed existing ductwork to be cleaned as well as ductwork slated to be demolished and replaced. Transcript at 112-14.

At the hearing, both parties confirmed that the work in dispute has not yet been performed. Thus, while Kokolakis had a quote from a prospective subcontractor to perform the work for some $44,000, the actual cost to perform the duct cleaning work is as yet unknown.

Discussion

The principal issue to be decided here is a question of contract interpretation concerning the extent of ductwork cleaning required under the contract. Appellant contends that the contract documents, read as a whole, reasonably give rise to its interpretation that ductwork in areas delineated as "not in contract" in the drawings, or otherwise not shown in the contract at all, was not included in the scope of work. GSA maintains that the definition set forth in specification 15995 is plain and unambiguous and requires that all the ductwork be cleaned if associated with an air conveyance system designated in subpart 13.03 of

specification 15995, regardless of the notations in the drawings which, in GSA's view, are not relevant to this issue.

This Board has previously observed:

> As a general rule, a contract must be given that interpretation which would be understood by a reasonable contractor. Corbetta Construction Co. v. United States, 198 Ct. Cl. 712, 451 F.2d 1330 (1972), citing Norcoast Constructors, Inc. v. United States, 196 Ct. Cl. 1, 448 F.2d 1400 (1971). However, it is also a well-settled principle of contract interpretation that the Government, as drafter of the contract, 'has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions -- as well as the main risk of a failure to carry that responsibility.' WPC Enterprises, Inc. v. United States, 163 Ct. Cl. 1, 323 F.2d 874, 877 (1963). Although the meaning of a contract provision need not be expressly stated to be understood, a contractor is not required to be clairvoyant in order to determine the intention of the Government in using a particular provision. Corbetta, supra.

Wagner Moving & Storage, GSBCA 5053, 80-1 BCA ¶ 14,284, at 70,337.

The United States Court of Appeals for the Federal Circuit has more recently summarized the general principles of contract construction as follows:

> In interpreting a contract, we begin wth the plain language. We give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning. In addition, we must interpret the contract in a manner that gives meaning to all of its provisions and makes sense. If terms are susceptible to more than one reasonable interpretation, then they are ambiguous. An ambiguity may be patent or latent. A patent ambiguity is one that is so glaring as to raise a duty to inquire. A latent ambiguity, on the other hand, is not glaring, substantial, or patently obvious. Where such a latent ambiguity exists, the court will construe the ambiguous term against the drafter of the contract when the nondrafter's interpretation is reasonable.

Massie v. United States, 166 F.3d 1184, 1189 (Fed. Cir. 1999) (citations and quotations omitted); accord, Griffin Services, Inc. v. General Services Administration, GSBCA 14507, 00-2 BCA ¶ 30,998, at 152,939.

Kokolakis, in preparing its bid, reviewed the specifications and drawings for the entire project. These materials were voluminous and the company had only about one month to

prepare a bid for submission. The cleaning specification refers prospective contractors to the drawings. Mr. Leo followed his customary procedures in preparing an estimate that included the cost of metal duct cleaning. His review of the specification and relevant drawings led him to the conclusion that the ductwork to be cleaned in building 1 was limited to the area described as being in the contract and did not extend to the occupied NIC area. In particular he noted that substantial detail was offered with respect to the sizing of ductwork and locations of such items as grills and registers which would require cleaning so as to enable him to estimate the scope of the job in the area shown as being in the contract. Similar detail was lacking in the NIC part of the drawing, leading him to believe that the work was limited to the area expressly described as being in the contract. For building 5, although there is no line delimiting the portions of the building that were in the contract as opposed to not in the contract, not all of the systems in that building were scheduled for renovation or cleaning, and he assumed that the ductwork depicted on the drawings was complete. It was only after contract work commenced that Kokolakis discovered the work had not been shown in full. Although the Government suggests the contractor could have asked to inspect the ductwork to determine its extent, this was not practicable since the ducting is covered by ceilings which would have had to be removed for inspection and the drawings did not cause the contractor to suspect they might be incomplete.

The Government argues that the specification provides for the complete cleaning of covered air conveyance systems -- thus, the contractor must clean all ductwork associated with a system listed in the specification. This, in GSA's view, is clearly stated and should, under the contract's order of precedence clause, be controlling to the extent there is a conflict or discrepancy in the drawings. If indeed the language might be regarded as ambiguous, the Government then argues that the conflict was sufficiently glaring to impose a duty on Kokolakis to inquire. Moreover, the Government could have provided as-built drawings for the building to permit a more accurate calculation of the extent of ductwork to be cleaned if Kokolakis had asked for them.

Kokolakis responds that it viewed this specification, subpart 1.07, as providing that the contractor must clean all of the ductwork "under the contract." Since at least one of the drawings contained a large area designated NIC, and the "in contract" part of the drawing provided ample detail for estimating the extent of the duct work, Kokolakis concluded that no further ducting in building 1 was intended to be cleaned. It drew a similar conclusion in building 5 because of the level of detail provided for the ducting depicted on the drawings. Kokolakis had no practical way to determine that additional ductwork existed but was not shown on the drawings, and appellant was not prompted to ask, given its understanding of the contract terms and the drawings.

In these circumstances, we have two comparable and reasonable ways to interpret the contract documents, a situation which has been addressed by the Court of Claims:

> Both [parties'] interpretations lie within the zone of reasonableness; neither appears to rest on an obvious error in drafting, a gross discrepancy, or an inadvertent but glaring gap; the arguments, rather, are quite closely in balance. It is precisely to this type of contract that this court has applied the rule that if some substantive provision of a government drawn

> agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of bidding or performance, that is the interpretation which will be adopted -- unless the parties' intention is otherwise affirmatively revealed. This rule is fair both to the drafters and to those who are required to accept or reject the contract as proffered, without haggling. Although the potential contractor may have some duty to inquire about a major patent discrepancy, or obvious omission, or a drastic conflict in provisions, he is not normally required (absent a clear warning in the contract) to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation. The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions -- as well as the main risk of a failure to carry that responsibility.

WPC Enterprises Inc. v. United States, 323 F.2d 874,876-77 (Ct. Cl. 1963) (citations omitted); accord Blount Brothers Construction Co. v. United States, 346 F.2d 962, 972 (Ct. Cl. 1965). Here, as in WPC Enterprises, the ambiguity was subtle – not the type of glaring, or patent, discrepancy or omission that would obligate the contractor to seek a resolution of the issue prior to submitting its bid. Since this was a latent ambiguity, Kokolakis need not prove that its interpretation is the only, or even the more, reasonable construction of the plans, specifications and drawings. It need only show that its interpretation was within the zone of reasonableness. We find that appellant has met this burden. The appeal is granted as to the issue of contract interpretation presented.

Finally, we note that although the appellant valued the cost of the work to be $44,644, the amount of a quote provided to it by a prospective subcontractor, quantum cannot be awarded because the work has not yet been performed and the actual cost of performance is unknown. Indeed, the parties suggested at hearing that the work might not be required and might be deleted from the contract, in which case no monetary award would be necessary. Accordingly, our decision with respect to the issue of contract interpretation disposes of this appeal.

Decision

The appeal is **GRANTED**.

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CATHERINE B. HYATT
Board Judge