

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: January 24, 2005

GSBCA 16470

HOOK CONSTRUCTION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Kenneth R. Hook, Vice President of Hook Construction, Inc., Solon, IA, appearing for Appellant.

Mark R. Warnick, Office of Regional Counsel, General Services Administration, Kansas City, MO, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **PARKER**, and **DeGRAFF**.

DeGRAFF, Board Judge.

This appeal is from a contracting officer's decision denying the contractor's request for an equitable adjustment to the contract price. The contractor claims the agency improperly required the contractor to supply a product manufactured by a specific company, and would not allow the contractor to supply a less expensive alternative product. We deny the appeal because the contractor has not established the product it proposed to supply fulfilled the requirements of the contract.

Findings of Fact

In late 1993, Hook Construction, Inc. and the General Services Administration (GSA) entered into a contract for renovation work at the United States Courthouse in Cedar Rapids, Iowa. Section 12300 of the specifications contained the requirements for manufactured casework, which consisted of base and wall cabinets. Exhibit 1.¹

Paragraph 1.6 of section 12300 required Hook to provide shop drawings showing casework locations, large scale plans, elevations, cross sections, rough-in and anchor placement dimensions and tolerances, clearances required, and relationship to adjoining surfaces. Exhibit 1 at 12300-1. Shop drawings were supposed to show in detail the proposed fabrication, assembly, and installation of the casework. Shop drawings included drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by Hook to explain in detail the work required by the contract. Hook was required to review all shop drawings for accuracy, completeness, and compliance with contract requirements before sending them to GSA. Exhibit 1 (GSA Form 3506 at 15). Paragraph 1.6 of section 12300 also required Hook to provide product data, including component dimensions, configurations, construction details, joint details and attachments, utility and service requirements and locations, and shape and type of materials used. Exhibit 1 at 12300-1.

Paragraph 1.8 of section 12300 required the manufacturer and installer of the casework to be a company which specialized in manufacturing casework and had a minimum of five years experience in such work. Paragraph 1.13 required the casework to come with a ten-year warranty against defects in material and workmanship, a five-year warranty on all parts on on-site labor, and a thirty-year warranty against delamination. Exhibit 1 at 12300-2.

Paragraph 2.1 of section 12300 said the basis of the specification was casework manufactured by Goelst USA, and allowed Hook to supply an approved equal. Exhibit 1 at 12300-2, -3. The contract's Material and Workmanship clause said references to a product by name "shall be regarded as establishing a standard of quality and shall not be construed as limiting competition," and allowed Hook to use any casework that, in the judgment of the contracting officer, was equal to the Goelst casework. If Hook wanted to supply something other than Goelst casework, the contract required it to provide the contracting officer "full information" regarding the alternative product. Exhibit 1 (GSA Form 3506 at 16).

Paragraphs 2.2, 2.3, and 2.4 of section 12300 contained two and one-half single-spaced pages of detailed requirements for the casework, hardware, and accessories. Paragraph 2.5 set out the fabrication requirements. Exhibit 1.

On October 15, 2003, Hook provided GSA with shop drawings showing the manufactured casework and the woodwork required by the contract were to be supplied by RCS Millwork. On November 3, 2003, GSA returned the drawings to Hook, unapproved and containing several handwritten notes, and told Hook to resubmit the drawings. One of the notes on a manufactured casework drawing said, "Goelst or equal." Exhibit 6.

¹All cited exhibits are found in the appeal file.

In late October, Hook submitted shop drawings showing the casework was to be manufactured by Goelst. The second week in November 2003, GSA approved the drawings, with notations. Exhibit 7. It is unclear when GSA returned these drawings to Hook.

In mid-November, Hook contacted the contracting officer's representative (COR) regarding the casework. Hook provided the COR with a telefax from RCS Millwork which said, in its entirety, "After reviewing the specifications, we feel that RCS Millwork can meet all the requirements. We are a certified [Architectural Woodwork Institute (AWI)] shop, capable of producing casework to meet any specification." Hook said it understood the COR would prefer the Goelst casework, which would cost more than the RCS Millwork product. Hook suggested the COR contact RCS Millwork directly to verify it could comply with the specifications. Exhibit 9. The contract did not mention AWI certification in section 12300, which addressed manufactured casework. AWI certification was mentioned in section 6402, which addressed woodwork. Exhibit 1 at 6402.

On December 5, the COR wrote to Hook regarding the casework. He said the first shop drawing submittal was rejected because the subcontractor had not demonstrated an understanding of the contract documents and GSA was concerned about whether a millwork company could meet the standards set out in section 12300 of the contract. The COR then listed sixteen manufactured casework characteristics he expected to see addressed in Hook's submissions. The COR said he had assembled the list of contract requirements in order to help Hook evaluate whether its subcontractor could meet the specifications. Exhibit 12. Our review of Hook's shop drawings and section 12300 of the contract confirm most of the COR's observations. Hook's shop drawings do not say whether RCS Millwork had the five years of experience required by the contract or whether the casework would come with the required warranty. In addition, the shop drawings do not address all of the finish and function requirements set out in the specifications and mentioned in the COR's letter.

In a telefax to the COR dated December 9, Hook said RCS Millwork had reviewed the COR's December 5 letter and "said just mark what you want on his shop drawings if anything is not 100% clearly understood or call him at [telephone number]." Hook said it did "not have time to send [the drawings] through again for corrections." Exhibit 13.

On December 17, GSA returned several items to Hook, including RCS Millwork shop drawings. The drawings for woodwork were marked, "approved as noted." Those for the manufactured casework were marked "rejected . . . until Goelst or equal is proved." These latter drawings did not contain any markings. Exhibit 14.

In a December 19 telefax from Hook to the COR regarding the rejected RCS Millwork shop drawings, Hook asked whether the drawings were sufficient to allow RCS Millwork to build samples for GSA's approval. Also, Hook said, if GSA wanted another set of shop drawings submitted, it would have to be specific about what was not satisfactory. Hook said it needed a prompt response, due to the construction schedule. Exhibit 15.

On December 23, the COR wrote to Hook. In his letter, the COR said it was Hook's responsibility to demonstrate through the shop drawing process that the requirements set out in the contract documents would be met. GSA was not convinced Hook's shop drawings demonstrated the standard established by the Goelst cabinets would be met by the product

Hook was proposing. The COR referred Hook to his December 5 letter for a list of characteristics GSA was looking for in the casework. Exhibit 17.

In a December 23 telefax, Hook told the COR, "Due to verbal phone calls in regards to Dec. 19, 03 fax. It is clear that 'or equal' is not going to be accepted." Hook said it would place an order for Goelst casework. Exhibit 18.

On December 24, Hook sent another telefax to the COR. Hook said RCS Millwork had looked up Goelst specifications and said they could build casework equal to the Goelst product. Hook said because GSA had not marked up the rejected RCS Millwork drawings, it did not know why the drawings had been rejected. Hook also said GSA should have allowed RCS Millwork to build a sample of the casework it intended to manufacture. Exhibit 20.

The COR sent a letter to Hook on December 30, in order to clarify the agency's position. He said the shop drawing submittal was rejected because the section 12300 requirements were never met and because the Government was not inclined to approve any product based upon a statement that the product would meet the specifications, without any other information being provided. Exhibit 22.

Hook submitted a claim for \$1468 to the contracting officer on April 22, 2004. Hook said it had not obtained a price quotation from Goelst for the casework before it submitted its bid to GSA, and the \$1468 was the additional cost Hook incurred when it supplied Goelst casework instead of the RCS Millwork casework. Exhibit 30. On July 9, 2004, the contracting officer denied Hook's April 22 request for an equitable adjustment. The contracting officer told Hook, "Simply making statements that your subcontractor can make an 'or equal' does not meet the requirements of the specifications." Exhibit 26.

Hook filed its notice of appeal on July 20, 2004, and the parties agreed to submit the appeal for a decision based upon the written record pursuant to Board Rule 111, (48 CFR 6101.11 (2003)).

Discussion

Hook contends GSA should have allowed Hook to supply casework manufactured by RCS Millwork. Hook says RCS Millwork's casework would have been equal to the Goelst casework because RCS Millwork found Goelst's specifications on the internet and intended to use them to manufacture the casework. Hook suggests GSA was unwilling to allow a substitute for Goelst casework, regardless of whether the substitute was equal to casework manufactured by Goelst. Because GSA did not allow Hook to supply the RCS Millwork casework, Hook asserts it is due an equitable adjustment to the contract price.

GSA says it did not allow Hook to supply casework manufactured by RCS Millwork because Hook did not provide enough information to the contracting officer to establish whether RCS Millwork's manufactured casework was the same standard of quality as the Goelst manufactured casework. Thus, GSA concludes there is no basis for making an equitable adjustment to the contract price.

When the Material and Workmanship clause is part of a contract which specifies a brand name product, the brand name establishes a standard of quality. If the agency determines the product must fulfill certain essential requirements, it must state the requirements in the specifications. Unless the contract specifically provides otherwise, the contractor is permitted to supply an alternative to the brand name product if the alternative meets all of the essential requirements set forth in the specifications, functions the same as the brand name product, and provides the same standard of quality. The alternative product does not have to be identical to the specified brand name product. The contracting officer is required to consider a proposed alternative product, and if the contracting officer refuses to do so, or if the agency wrongfully rejects an acceptable alternative product, the result is a change to the terms of the contract. Jack Stone Co. v. United States, 344 F.2d 370 (Ct. Cl. 1965); American Commercial Contractors, Inc., GSBCA 11713, 94-3 BCA ¶ 26,973; North Landing Line Construction Co., GSBCA 5079, 80-2 BCA ¶ 14,482; Blount Brothers Corp., ASBCA 31202, 88-3 BCA ¶ 20,878, motion for clarification denied, 89-2 BCA ¶ 21,729.

In order to prevail upon a claim based on the Material and Workmanship clause, the contractor bears the burden of either proving it supplied the contracting agency with sufficient information to establish its proposed alternative product met the specified essential requirements and functions the same in all essential respects as the brand name product, or of proving its failure to supply such information was excusable. If the contractor cannot make such a showing, the agency is not liable for rejecting the proposed product. American Commercial Contractors; Davho Co., GSBCA 4414, 79-1 BCA ¶ 13,564 (1978), reconsideration granted, 80-1 BCA ¶ 14,317, aff'd, Davho Co. v. United States, 29 CCF ¶ 81,747 (Ct. Cl. Tr. Div. Aug. 6, 1981); Shah Construction Co., ASBCA 50044, 00-1 BCA ¶ 30,667 (1999); Trataros Construction Co., ASBCA 42845, 94-1 BCA ¶ 26,592 (1993); Blount Brothers Corp.; Central Mechanical Inc., ASBCA 29360, 84-3 BCA ¶ 17,674.

Although Hook suggests GSA was unwilling to allow a substitute for the Goelst casework, assertions and unsupported allegations do not constitute evidence, and our record contains no evidence to support Hook's suggestion. The record shows GSA evaluated all of Hook's shop drawings and on December 5, 2003, provided Hook with a list of characteristics not addressed in the drawings. GSA's actions, including providing Hook with a roadmap of the path to approval of the RCS Millwork product, are inconsistent with an intention to accept only Goelst casework.

Hook argues RCS Millwork's casework would have been equal to the Goelst casework and should have been approved by GSA as an alternative product. Hook believes GSA should have accepted Hook's assurances about RCS Millwork's capabilities, spoken with RCS Millwork directly to verify RCS Millwork's capabilities, or revised the shop drawings itself. GSA was not required, however, to accept Hook's general assurances regarding RCS Millwork's capabilities and was not obligated either to contact RCS Millwork or to revise Hook's shop drawings. The contract required Hook to supply shop drawings for the casework and full information regarding the RCS Millwork product, and the essential purpose of such submittals is to show the Government the proposed product conforms to contract requirements. Sovereign Construction Co., GSBCA 913, 1964 BCA ¶ 4468; Ellis-Don Construction, ASBCA 51210, 99-1 BCA ¶ 30,346; E.H. Marhoefer, Jr., Co., DOTBCA 70-17, 71-1 BCA ¶ 8791.

As the COR's December 5, 2003 letter to Hook explained, the shop drawings Hook supplied to GSA did not show the RCS Millwork product would meet the requirements set out in the specifications or meet the standard of quality established by the Goelst casework. Because Hook's shop drawings did not show the manufactured casework Hook proposed to supply would meet the contract requirements and because Hook did not supply GSA with any other information to make such a showing, GSA was not required to approve the use of the proposed casework and Hook is not entitled to an equitable adjustment to the contract price.

Decision

The appeal is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ROBERT W. PARKER
Board Judge