

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HANKS CONTRACTING,)
INC.)
) Docket No. MSBCA 1212
Under DGS Contract No.)
N-000-796-011)

August 20, 1985

Contract Interpretation - The contract, including the construction drawings, when read as a whole clearly required electrical work to be performed in both wings of a building. Shaded areas on the electrical drawings designated that work was to be performed in both wings, although the drawings necessarily provided only one detail describing the work.

Patent Ambiguity - Duty to Inquire - Under the contractor's interpretation of the electrical drawings, a patent ambiguity is present and, therefore, it had a duty to seek a clarification prior to bid opening. Failure to do so rendered the contractor responsible for the adverse impact of its erroneous interpretation.

Mistake in Bid - Discovered After Award - A procurement officer may not grant a change in the contract price based on a mistake in bid discovered after award under the provisions of COMAR 21.05.02.12 D. The Md. Court of Appeals has overruled the Board's decisions in J. Roland Dashiell & Sons, Inc., MSBCA 1078 and John W. Brawner Contracting Company, Inc., MSBCA 1085.

APPEARANCES FOR APPELLANT:

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OPINION BY MR. LEVY

This is an appeal from a Department of General Services (DGS) procurement officer's final decision denying Appellant's request for an equitable adjustment to its contract for additional electrical work. DGS maintains that this work was required to be performed under the terms of the contract drawings and specifications.

Findings of Fact

1. DGS and Appellant entered into contract No. N-000-796-011 on February 4, 1982 providing for the renovation of showers and toilet rooms in the Baldwin and O'Connell Residence Halls at Morgan State University. Notice to proceed was issued on April 13, 1982.

2. By letter dated December 8, 1982, Appellant advised DGS that its electrical subcontractor, Hague Electric, Inc. (Hague) was refusing to do work in the east wing of O'Connell Hall since it had included only the west wing in its price proposal. Appellant was required to perform the electrical work in the east wing using another subcontractor. On April 5, 1984 Appellant filed a claim with DGS for its costs associated with the performance of this work contending that defective or ambiguous drawings caused Hague to exclude the east wing work from its quote. The cost of the work performed by Appellant was charged against Hague's subcontract.

3. The contract drawings consist of the Architectural A-0 through A-5, Mechanical M-1 through M-5 and the Electrical E-1 through E-5. All three phases of the work are presented in the same general form. There is a separate floor plan for each floor of the two buildings with shaded areas indicating where the work is to be performed. Larger sized details of the shaded areas are also shown on the drawings depicting both the existing and the proposed plan.

On drawings E-4 and E-5 a shaded area is shown in both the east and west wings on all three floors of O'Connell Hall. Since the work in both wings was identical, only one large size detail of the shaded area was used to describe the work required on these two drawings. On drawings E-1, E-2, and E-3 the work to be performed in the shaded areas at the two ends of each floor in Baldwin Hall was significantly different, therefore, two large size details were used. In its protest Appellant argued that electrical drawings E-4 and E-5 were vague and inconsistent with the other contract drawings.

4. The DGS procurement officer issued his decision denying Appellant's claim on July 16, 1984 maintaining that the drawings were not ambiguous and that in any event it was Appellant's responsibility as the general contractor to obtain prebid clarification of any perceived ambiguity or deficiency. From this decision, Appellant took a timely appeal to this Board.¹

5. At the hearing of the appeal, Appellant argued as an alternative to its defective specification theory that assuming *arguendo* that the drawings were not defective or ambiguous, Hague made a mistake in its interpretation

¹By Memorandum Opinion and Order dated December 11, 1984, the Board denied DGS' motion to dismiss the appeal on timeliness grounds.

of the drawings which was not discovered until after award. It would be unconscionable, therefore, not to grant the request for an equitable adjustment pursuant to COMAR 21.05.02.12 D. The parties entered into the following stipulation with respect to the mistake theory.

Appellant, Hanks Contracting, Inc. ("Hanks"), and Respondent, State of Maryland, Department of General Services ("DGS"), hereby stipulate to the truth of the following facts.

1. That Hanks received bids for electrical work associated with the work under the subject contract in the amount of \$13,570 (Hague Electric); \$15,757 (Anderson Electric); \$16,129 (B & L Electric); \$20,500 (Barclay's Electrical Contractors); and \$21,191 (Eagle Electric Service).

2. That Hanks incorporated the amount of the bid by Hague Electrical into its bid to DGS and added to this amount a percentage covering overhead and profit.

3. That, prior to December, 1982, Hanks and DGS were unaware of the existence of a mistake by Hanks' electrical subcontractor, Hague Electrical Corporation ("Hague Electrical") and had no reason to believe that such mistake had been made.

4. That Hanks did not learn of the alleged mistake by Hague Electrical until December, 1982. At that time, Hague Electrical contended that the work was not within the scope of its contract with Hanks, such contract incorporating by reference the plans and specifications of the subject contract.

5. That the alleged error in the plans and specifications and Hague Electrical's omission of such work in its bid was then brought to the attention of DGS. First at a meeting attended by Hanks and its counsel, and then in a second meeting with Hague Electrical and its counsel.

6. That Hague Electrical refused to complete the work which it alleges was not included in the plans and specifications of the work to be performed.

7. That, in order to complete the work under the contract in a timely manner, Hanks incurred actual costs in the amount of \$5,528.95.²

8. That "but for" the alleged mistake by Hague Electrical, the amount of Hanks' bid would have been in excess of the amount stipulated to in paragraph 7.

9. Before construction on the subject Project, the floorplan of the toilet and shower rooms in the east and west wings of O'Connell Hall were substantially the same.

10. The work performed by Hanks in the west wing of O'Connell Hall was substantially the same as the work performed in the east wing.

11. Appellant requested relief from DGS prior to the issuance of a procurement officer's decision on the theory of mistake in bid discovered after award. The procurement officer concluded that, under the circumstances of this case, monetary relief was not available as a matter of law based on the theory of mistake. Therefore, the procurement officer did not consider whether a failure to correct the alleged mistake would be unconscionable pursuant to COMAR 25.[sic]05.02.12D.

²In addition to the cost of the work in the amount of \$5,528.95, Appellant seeks overhead and profit on this sum in the amount of 17% and predecision interest from the date of the procurement officer's final decision.

Decision

Appellant, on behalf of its subcontractor Hague, argues initially that the electrical drawings were defective or ambiguous and that its interpretation that work was required for only one wing of O'Connell Hall was reasonable. The electrical drawings (E-4 and E-5), as well as all other drawings relating to O'Connell Hall (A-4, A-5, M-4 and M-5), show a floor plan with areas shaded on both the east and west wings of all three floors of the building. It is not disputed that shading indicates areas within the existing structure requiring new work. (Tr. 28-29). Appellant's interpretation is based entirely upon the fact that drawings E-4 and E-5 each contain only one detail describing the work to be performed in the two shaded areas.

We find that the electrical drawings were neither ambiguous nor defective and that Hague apparently made a mistake in its interpretation of the drawings. In order to have found Appellant's interpretation to be reasonable, the shaded areas on drawings E-4 and E-5 would have to be disregarded or rendered meaningless. However, to do so would be contrary to the basic rule of contract interpretation which requires that all parts of the contract be read together and interpreted as a whole; and that no one provision be rendered meaningless when a meaning consistent with the contract as a whole is possible. See: Laurel Race Course, Inc. v. Regal Construction Co., Inc., 247 Md. 142, 333 A.2d 319 (1975); Cam Construction Co., Inc., MSBCA 1088 (October 10, 1983) at p. 10.

It is obvious that Appellant's interpretation is unreasonable since there is no indication on the drawings in which wing the work was to be performed. There is no reasonable explanation of why Hague chose to do the work in the west wing rather than the east. Of equal importance to the Board's determination is the testimony of Mr. Herman Hague, Hague's president, an experienced electrical contractor. He stated that the custom and usage in the trade is that shaded areas on drawings mean that work is to be performed in such areas and that he failed to notice the shaded areas on the upper part of the drawings. Had Mr. Hague noticed these areas he would have submitted a quote to Appellant that included the work in both wings. (Tr. 11-35). Because Appellant's interpretation is unreasonable, it cannot base its claim for relief upon such interpretation of the contract. Jamsar, Inc. v. United States, 194 Ct.Cl. 819, 827-828 (1971), 442 F.2d 930.

Even if we were to assume, arguendo, that Appellant's interpretation of the use of one large detail means that work is to be done in only one wing is reasonable, Appellant is faced with patent ambiguities in the drawings: Which of the two wings requires the new work? What meaning attaches to the shaded area in the other wing? Neither Appellant nor Hague consulted anyone at DGS either prior to bid opening or award concerning this obvious conflict created by their interpretation. Hague just resolved this conflict by bidding on one wing and concluding the other wing was not within the scope of electrical work under the contract.

This Board has stated on several occasions that a bidder has an affirmative obligation to seek prebid clarification of such patent ambiguities. See: American Building Contractors, Inc., MSBCA 1125 (June 24, 1985) at pp. 9-10; Dominion Contractors, Inc., MSBCA 1041 (February 9, 1984) at pp. 13-15, 31-33. The rule is one of common sense.

"The doctrine of patent ambiguity is an exception to the general rule of contra proferentem which requires that a contract be construed against the party who wrote it. If a patent ambiguity is found in the contract, the contractor has a duty to inquire of the contracting [procurement] officer the true meaning of the contract before submitting a bid. This prevents contractors from taking advantage of the Government; it protects other bidders by insuring that all bidders bid on the same specifications; and it materially aids the administration of Government contracts by requiring that ambiguities be raised before the contract is bid on, thus avoiding costly litigation after the fact."

George E. Newsom v. United States, 230 Ct.Cl. 302, 303, 676 F.2d 647 (1982).

Appellant's asserted interpretation of the contract creates a patent ambiguity which was evident on the face of the bidding documents. Appellant is bound by Hague's failure to make any inquiry regarding the obvious ambiguity created by such interpretation of the drawings. Therefore, Appellant is not entitled to recover on the theory of a defective or ambiguous specification.

As an alternative theory for recovery, Appellant argues a mistake in bid was discovered after award and it would be unconscionable not to grant reformation of the price term of the contract. It cites as authority this Board's decisions in J. Roland Dashiell & Sons, Inc., MSBCA 1078 (July 25, 1983) and John W. Brawner Contracting Company, Inc., MSBCA 1085 (July 25, 1983) to the effect that the procurement officer may grant fiscal relief from mistakes discovered after award where not to do so would be unconscionable under the provisions of COMAR 21.05.02.12 D.³

In Maryland Port Administration v. John W. Brawner Contracting Agency, Inc., ___ Md. ___, ___ A.2d ___ (May 13, 1985), the Court of Appeals of Maryland held that under COMAR 21.05.02.12 D changes in price for mistakes are not permitted after award of a contract and overruled the decisions of this Board in Dashiell and Brawner, *supra*. Accordingly, Appellant is not entitled as a matter of law to any relief under the theory of mistake in bid discovered after award. The procurement officer did not err in refusing to consider this ground of Appellant's protest.

For the foregoing reasons, therefore, the appeal is denied.

³COMAR 21.05.02.12 D provides:

Mistakes may not be corrected after award of the contract except when the procurement officer and the head of a procurement agency makes a determination that it would be unconscionable not to allow the mistake to be corrected. Changes in price are not permitted. Corrections shall be submitted to and approved by the State Law Department. (Underscoring added).

The doctrine of joint liability is an application of the general
rule of joint liability which requires that a contract be
made by two or more persons. It is a general principle
that in the absence of an agreement to the contrary,
the liability of the parties to a contract is joint and
several. This means that each party is liable for the
entire performance of the contract, and the creditor
may sue any one of the parties for the whole amount
due. The liability of the parties is joint and several
unless the contract provides otherwise.

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