BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	)	
	)	
HERITAGE CLEANING COMPANY OF AMERICA	)	Docket No. MSBCA 1937
	)	
Under DHMH Housekeeping Service Contract July 1, 1989 through July 31, 1994, Clifton T. Perkins Hospital Center	)	

December 18, 1996

Equitable Adjustment - Reliance on Specifications - A contractor may be entitled to an equitable adjustment for increased costs resulting from reasonable reliance on a defective specification as set forth in the bid specifications.

APPEARANCE FOR APPELLANT	David M. Silbiger, Esq. Silbiger & Silbiger Baltimore, MD
APPEARANCE FOR RESPONDENT	Sharon Krevor-Weisbaum Assistant Attorney General Baltimore, MD

MEMORANDUM OPINION

Appellant timely appeals the denial of its claim for an equitable adjustment arising out of a janitorial contract with Respondent.

Findings of Fact

1. In early 1989, the Department of Health and Mental Hygiene (DHMH) solicited bids to provide janitorial services for the Clifton T. Perkins Hospital Center, 8450 Dorsey Run Road, Jessup, Maryland.
2. The contract was to be for a three-year period beginning on or about July 1, 1989 and ending on or about June 30, 1992, with options for two one-year renewal periods.
3. The specifications described the areas to be cleaned, the approximate square footage of each area, the specific work to be done in specified areas, the times when work could be

performed, and other requirements associated with such work.

4. Appellant's President attended a pre-bid conference and walked the areas to be serviced prior to submitting the bid.
5. At bid opening on March 13, 1989 four bids were received. Appellant was the lowest bidder.
6. Based upon the bid specifications, the State entered into a three-year contract with Appellant beginning June 1, 1989, for a total cost of $311,418.12 for the three-year period.
7. The Contract included a provision to allow for an adjustment if the minimum wage was increased by State of Federal legislation, and such an adjustment was made effective April 1, 1990 at a cost of $43,096.35 for the duration of the Contract.
8. As provided for in the Contract, the Contract was extended for two additional one-year periods, and payment was made consistent with the existing Contract provisions concerning payment.
9. Appellant performed the work required under the Contract and during the Contract period there were no deductions from the payments to the contractor.
10. In March of 1994, DHMH again solicited bids for janitorial services for the Hospital Center. This solicitation was essentially identical to the solicitation in 1989 and was intended to cover the same area. However, in June 1994, the solicitation was amended to reflect that the total approximate square footage to be cleaned (serviced) was 90,269.5 square feet, or approximately 18.5% greater than the 73,585 total approximate square footage to be serviced as set forth in the 1989 bid documents.
11. The Contract provides, in bold print, that **"It is the responsibility of the bidder to verify the accuracy of the square feet of the areas listed."**
12. Appellant serviced this facility under an emergency contract for five months prior to submitting its bid in response to the 1989 invitation for bids.
13. Appellant performed and was paid under the Contract for the initial three-year period and for each of the two one-year renewals without acknowledging costs were greater than expected and without protesting payments made for the work performed.
14. Appellant did not provide any documentary evidence that it incurred additional cost because of the underestimate of the square footage in the 1989 invitation for bids. Appellant's President testified that such records were destroyed in a fire and he was not able to reconstruct necessary records from other sources.
15. In June 1993, Appellant and the State agreed that the square footage of the carpeting requiring shampooing was understated, and the Appellant was entitled to an additional one-time payment of $3,426.00 for work performed between July 1, 1992 and May 31, 1993 and such amount was paid by the State.
16. As noted above, the 1989 solicitation listed the total approximate square footage of the areas to be cleaned as being 73,585 square feet. The March 1994 solicitation (as amended in June) reflected the square footage of these areas to be 90,269.5 square feet. This represents an increase of 16,684.5 square feet to be serviced, or an increase of approximately 18.5%. As a result of reading the 1994 solicitation, Appellant's President learned that the square footage of the area Appellant was responsible to service was approximately 18.5% greater than the approximate square footage shown in the bid specifications in the March 1989 solicitation that were incorporated into the Contract.
17. Appellant claims an amount of $142,436.75 (as amended at the hearing) due solely to having to clean (service) an additional 16,684.5 square feet above what was identified in the 1989

bid documents. As noted above, Appellant is unable to quantify any actual cost incurred in servicing a larger area than as set forth in the 1989 bid specifications. Appellant's claimed amount equals its unit bid price per square foot per day as set forth in the financial proposal forms (i.e., bid forms) included with the 1989 bid documents, times the additional square footage actually involved in the various areas in the Hospital Center to be serviced, and further adjusted to reflect the impact of the additional square footage on the increase in minimum wage and a contract modification occurring during the course of performance of the Contract.

18. According to the testimony of a former employee at the Hospital Center with certain responsibilities for the Contract certain Hospital Center employees knew at the time of the 1989 solicitation that the square footage numbers set forth in the 1989 bid documents were not accurate and did nothing about it.

19. Appellant's President testified that Appellant based its bid on the cost per square foot to service the various areas identified in the financial proposal form included with the 1989 bid documents. Appellant's President also testified that it was standard industry practice for bids on this type of cleaning contract to be submitted based on cost per square foot.

20. The State and Appellant stipulate that the actual square footage in the areas to be serviced was 16,684.5 square feet greater (73,585 vs. 90,269.5) than as set forth in the 1989 bid documents.

Decision

The State does not disagree that the 1989 bid documents included the incorrect square footage, and it does not deny that the bid documents require that bid costs be expressed in "cost per square foot". However, the State argues that the appeal should be denied for three reasons. First, the low bid was selected based upon the lowest total contract cost for servicing the entire facility and not the square foot cost for any given area. Second, Appellant serviced this facility for five months prior to bidding the 1989 Contract and thereafter had ample opportunity to further verify the square footage in question during performance of the original three-year term of the Contract and the two extensions. However, Appellant did not raise a question about additional work being involved over this entire five and one half-year period. Third, Appellant did not show that it incurred any additional cost beyond the Contract bid price entitling it to an equitable adjustment.

The basis of Appellant's claim is that for a period of five years, Appellant serviced an area of 90,269 square feet and was only paid based on a bid for servicing 73,585 square feet. Under the terms of the Contract, Appellant is requesting to be paid for the additional area serviced on a square foot unit cost basis as set forth in his bid. The 1989 solicitation specifically requested a square foot cost per day for each area to be serviced, and Appellant's President testified that this served as the basis upon which he calculated his bid. The Appellant's President further indicated that it is standard practice in the janitorial business to quote prices on a square foot basis. However, Appellant offered no evidence to show that as a result of the incorrect data in the bid its costs were in fact increased. Appellant's President attributed Appellant's inability to present such evidence to loss of necessary records in a fire.

Nevertheless, the Appellant contends that it is entitled to an equitable adjustment for cleaning

the larger area because the State failed to advise it of the larger square footage actually involved. Appellant's contention in this regard is based upon the testimony of a former employee at the Hospital Center, with certain responsibilities for the Contract, to the effect that she informed her superiors in 1987 that the square foot numbers were incorrect, and the State chose not to disclose this information to prospective bidders in 1989. This former employee also testified that she was instructed by her supervisors not to disclose this information and therefore, did not advise Appellant of the discrepancy. Appellant argues that knowingly withholding this information from the Appellant was a fraudulent act entitling it to be paid the amount of its claim. We make no finding as to whether such failure to disclose was accidental or deliberate. The record reflects that the specifications did not accurately represent the square footage to be cleaned. Whether such failure was inadvertent or deliberate legally does not matter. A contractor may be entitled to an equitable adjustment for increased costs resulting from reasonable reliance on a defective specification as set forth in the bid specifications. W.M. Schlosser Co., Inc., MSBCA 1373 & 1385, 3 MSBCA ¶269(1990) at pp. 22-24. The question for the Board thus is whether the Appellant had a reasonable belief that he could rely on the square footage set forth for the various areas in the 1989 bid documents upon which he based his bid.

We will accept Appellant's President's testimony that he based his bid solely on the amount of square footage to be cleaned. The issue then is whether Appellant's reliance "solely" on the square footage of the areas to be serviced as set forth in the 1989 bid documents was appropriate. We find such reliance was not reasonable. The record reflects that many cleaning contractors qualitatively base their bids on the unique requirements of the areas to be cleaned and not only on the size of the area. The bid documents specifically cautioned the Appellant in bold print that **"It is the responsibility of the bidder to verify the accuracy of the square feet of the areas listed."** The square footage of the total area to be cleaned was stated to be "approximate."

The Board does not condone deliberately or negligently including incorrect information in a bid document and thereafter deliberately failing to disclose such fact to bidders or contractors. However, assuming (without so finding) that that is what occurred herein, we decline to find that Appellant was reasonably entitled to rely on the accuracy of the square footage approximations set forth in the bid documents,[1] particularly where Appellant had participated in a pre-bid walk-through of the areas to be cleaned, and had previously performed similar services at the hospital for five months pursuant to a non-bid emergency contract, and was thus uniquely in a position to assess personally the resources required to clean the facility and the accuracy of the square footage set forth in the bid documents.

More fundamentally, however, and assuming that a bidder could reasonably consider the 1989 bid documents herein to make representations concerning the exact square footage of the areas to be cleaned and could rely on the accuracy of such representations of the square footage of the areas to be cleaned, such reliance must be shown to have caused damage. Section 13-218(a)(4), Division II, State Finance and Procurement Article (1988), as it existed at the time of bid herein,

[1] We point out that this is a services (janitorial) contract as defined in COMAR 21.01.02.01(79), not a construction contract, and therefore there was (and is) no requirement for a differing site condition clause. See §13-218(b), Division II, State Finance and Procurement Article (1988).

required a clause in each procurement contract covering variations that occur between estimated and actual quantities of work. The Contract herein does not contain such a clause. Even if it did, such mandatory clause has been construed by the Board in the context of construction contract disputes to require the contractor to show that it has incurred increased costs due solely to the variation.[2]

In this appeal Appellant has not shown that it incurred any additional costs to clean the additional area whether the square footage for the various areas as set forth in the 1989 bid documents are viewed as an estimate or as the actual (albeit incorrect) square footage size of the area. Appellant's President testified that Appellant based its bid quantitatively solely on the square footage set forth for the area to be cleaned rather than qualitatively considering what the cleaning of the area involved. Notwithstanding Appellant's claim that the additional square footage cost it money, Appellant performed under the Contract for its original three-year term plus two one-year extensions, and serviced the facility for five months preceding the award of the Contract without ever complaining that it was being required to clean more than it bid on or expected, or that its bid was not adequate to cover the costs it was experiencing in cleaning the areas. Accordingly, the appeal is denied. Wherefore, it is ORDERED this 18th day of December, 1996 that the appeal is denied.

Dated: December 18, 1996

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

Randolph B. Rosencrantz
Board Member

[2]In the mandatory construction contract estimated quantity clause (COMAR 21.07.02.03) a variation of 25% is necessary before adjustment is permitted. Here the variation is only 18.5%. In the absence of any variations clause in the instant Contract, we do not attempt to predict what the percentage variation for triggering such absent clause should be.

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1937, appeal of Heritage Cleaning Company of America, under DHMH Housekeeping Service Contract July 1, 1989 through July 31, 1994, Clifton T. Perkins Hospital Center.

Dated: December 19, 1996

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Mary F. Priscilla
Recorder