

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of P.G. CONSTRUCTION)
COMPANY)
) Docket No.
Under SHA Contract) MSBCA 1642
No. P-895-501-329)

September 17, 1992

Contract Interpretation - Latent Ambiguity - A latent ambiguity exists where two or more reasonable interpretations of the contract language are possible.

APPEARANCES FOR APPELLANT: Michael P. Sawicki, Esq.
Smith, Somerville & Case
Baltimore, MD 21202

APPEARANCES FOR RESPONDENT: Dana A. Reed
Assistant Attorney General
Contract Litigation Unit
Baltimore, MD 21202

OPINION BY MR. MALONE

Appellant timely appeals¹ a final decision of the State Highway Administration's Procurement Officer denying its claim for equitable adjustment based upon a latent ambiguity. SHA further argues by Motion that part of the claim was not properly put before the Procurement Officer and should be dismissed on jurisdictional grounds.

Findings of Fact²

1. On October 4, 1989 Appellant and SHA contracted for construction for a project known as "Southern Regional Lab and District Offices" under Contract No. P-895-501-329. (Project)
2. The contract required Appellant to furnish and install laboratory metal casework and fixtures. The fixtures and

¹The Procurement Officer's failure to render a final decision within 180 days became appealable to this Board under COMAR 21.10.04.04 (E).

²The appeal is accelerated under COMAR 21.10.06.12 requiring only summary findings of facts and conclusions.

casework would be serviced by pipe for water, gas and vacuum from the source through the building walls and attaching to the fixtures.

3. The drawings pertaining to this work were organized in part to show architectural requirements and mechanical requirements. The relevant specifications appeared under the headings; Section 15010 Basic Mechanical Requirements, Section 12345 Laboratory Metal Casework and Fixtures and Section 11610 Laboratory Fume Hoods.

4. The architectural drawings clearly showed the work included pipe from the source, through the walls (pipe chases) to the service pipe³ to the fixture itself.

5. Appellant received the bid documents in early June and requested subcontractors to provide bids to it for work concerning the Project. The Appellant did not provide copies of the plans or specifications to the subcontractors. Appellant relied on subcontractors to obtain whatever parts of the bid documents they deemed necessary to properly understand the scope of work when providing it with quotes. No subcontractors testified at the hearing and the record does not reveal what the subcontractors considered in making their bids to Appellant.

6. On bid day Appellant received from Mid-Atlantic Laboratory Furniture, Inc. (Mid-Atlantic) a quote for work specified in Section 11610 and 12345 - Laboratory Metal Casework and Fixtures without exceptions taken to the specifications.

Appellant then received from Heath Corporation (Heath) a quote for work which referred to drawings M-1 through M-23 dated August 31, 1988 and specifications, dated August 31, 1989, Division 15 - Mechanical Exclusive of Section 15300 - - Fire Protection. Heath further clarified its quote to Appellant by

³ Service pipe is the pipe which connects the pipe in the wall (pipe chase) to the fixture itself and constitutes the work in dispute between the parties.

excluding "Connections from stub-outs to equipment⁴ by others" and connecting of the following: (a) Casework (b) Sinks (Type A thru K) designated as P-8 on the Mechanical Drawings (c) Fume Hood Service Fixtures (d) Counter Service Fixtures. Heath did, however, provide Appellant with an option to "Provide final connections from pipe chases to casework service fixtures (Materials by Others)" for \$3,000.00.⁵

7. The contract documents taken and read together clearly require service piping as part of the work. The bids of Heath and Mid-Atlantic, however, focused on their interests as subcontractors. Heath's quote treats the service piping as an exclusion to the work. Appellant should have known this when making its bid on this contract.

8. Appellant was awarded the contract and proceeded unaware of the implications of Heath's exclusion of service piping as it related to Mid-Atlantic's quote.

9. Appellant discovered the conflict during the submission of shop drawings. It was then clear to Appellant that neither Heath nor Mid-Atlantic would provide service piping since Section 15010 Basic Mechanical Requirements does not specifically refer to Section 12345 as a related Section for mechanical work. However, the contract drawings instruct bidders to look at all of the drawings and general provisions as they relate to the work.

10. Mechanical drawing M-2 further states "Piping chase schedule indicates service piping".

Mechanical drawing M-4 has a piping chase schedule which clearly provides detail for service piping connections to the sinks, water, gas, vacuum and fume hoods, and also indicates

⁴ Stub-outs to equipment is the same pipe work as from pipe chase to fixtures which is the subject of this appeal.

⁵ Appellant did not elect to take this option.

which pipes are only to be a stub.⁶ This connection schedule also refers bidders to the architectural drawings A-41 and A-43 for other information.

11. The drawings and specifications read together are not in conflict and are unambiguous. Appellant in receiving last minute quotes from subcontractors did not find the exclusion in its subcontractors, quotes and submitted its bid in error. Service piping is shown on the mechanical drawings and refers to the architectural drawings. A bidder also knows how and where each connection is to be made. Appellant did not bid on one drawing but rather on all of the contract documents. The contract documents when read together are not susceptible of two reasonable interpretations.

12. Appellant filed a claim, May 30, 1991, captioned "Request for Change Order", asserting that the specifications were ambiguous since the architect failed to specify that the material under Section 12345 was to be installed under Division 15. Appellant attached invoices from Heath relating to the service piping. Appellant also attached to this claim five other invoices which related to a separate claim for extra work not provided for in the contract documents which Appellant was directed to perform as extra work.⁷

In this claim submission Appellant claimed \$14,285.00 in costs plus 15% for its mark-up and 5% mark-up for subcontractors for a total claim of \$17,142.00. At the hearing the parties stipulated that \$2,699.40 was the amount related to the separate claim of extra work found in the five attached invoices.⁸

⁶ Stub - refers to pipe which is in place but is capped at the base of the chase for future use.

⁷ The State did not contest the extra work claim on any basis other than jurisdiction.

⁸ These invoices were invoice Nos. 08853 Trichlor Drain, 09704 Insulated Pipe Chase, 09705 Back Flow Vent, 09700 Back Flow and 08854 Test Trichlor Drain.

13. SHA contends that Appellant's claim narrative makes no reference to the extra work claim and asserts that by merely attaching invoices for extra work to a claim explained in narrative as relating to an ambiguity in service piping the Appellant did not comply with the requirements for a claim under Md. State Finance and Procurement Article § 15-219. Appellant, however, notes that the work to which the five invoices pertained was not required by the contract documents but was extra work directed by SHA. Therefore, Appellant argues that the submission of the invoices was all that was necessary to perfect its claim since SHA had directed the work.

The record reflects that not only did SHA direct this extra work but also had meetings and follow-up correspondence with Appellant concerning payment for it. Since the extra work was not required by the contract and was directed by SHA, SHA had notice which was perfected upon presentation of the invoices. There is no Procurement Officer's decision and this appeal was taken upon a constructive final decision under the 180 day rule. SF § 15-219. While Appellant created some confusion by attaching the extra work invoices without further explanation, the extra work claim was before the Procurement Officer.

Decision

Motion to Dismiss

While conceding that Appellant's claim for extra work in the stipulated amount of \$2,699.40 represents extra work directed by it, SHA moves to dismiss on jurisdictional grounds; i.e., that the claim represented by the five invoices was not properly brought before the Procurement Officer pursuant to the notice requirements of SF § 15-219. The claim for extra work under invoices; 08853, 09704, 09705, 09700, 08854 in the amount of \$2,699.40 was before the Procurement Officer. The Procurement Officer did not act. Contract claims have an inherent vagueness when appealed to this Board under the 180 day rule.

since no analysis of the contractors claim has been brought to a final form. SHA directed this extra work. The work performed as described in the invoices was not a requirement of the contract. SHA and Appellant had meetings and correspondence regarding the extra work. The invoices reflecting the cost of this work were submitted to the agency Procurement Officer. The fact that these invoices were attached to a separate claim is not fatal under the facts of this appeal. Since the final action of the agency was constructive, the Board takes a liberal view of what level of detail a claim must contain to satisfy the notice requirements of SF § 15-219.

We therefore deny SHA's motion and sustain Appellant's claim for extra work in the amount of \$2,699.40. The Board declines to award pre-decision interest on this extra work claim.

Merits - Latent Ambiguity - Service Piping

A latent ambiguity exists where two or more reasonable interpretations of the contract language are possible. See Substation Testing Co., MSBCA 1464, 3 MICPEL 225 (1989). Appellant argues that the mechanical drawings do not sufficiently require the reader to refer to other contract drawings and the specifications which when read in isolation can result in two reasonable interpretations thus presenting a latent ambiguity concerning the actual work required. The Board disagrees.

The mechanical drawings do refer the reader to other sections of the contract documents which make clear the service piping was included in the work. The parties all agree that if the contract drawings and specifications are read together it is clear that the service piping is included.

Appellant's argument that the test of latent ambiguity can be made by solely focusing on an isolated part of the drawings is not well founded. The drawings clearly warn the reader to read all of the documents. The subcontractors in this case in preparing their bids to Appellant had their own interpretation

of certain work and bid accordingly. However, the errors of a subcontractor or their exclusions of work can not be used as the basis of an equitable adjustment under the facts of this appeal.

The law is well settled before the Federal Boards of Contract Appeals that the contract drawings and specifications must be read together to determine ambiguity. It is the general contractors obligation to insure that its bid covers all required work. The erroneous or exclusionary interpretation of its subcontractors is not the responsibility of the government. See Hobbs Construction & Development, Inc., ASBCA No. 29910, 91-1 BCA § 23,518. the Appellant's assertion of latent ambiguity places an undue burden on the State. The drafters of the contract documents necessarily assume the bidders have read all of the documents. The general contractor is responsible for determining that all aspects of the work are included in the bid of its subcontractors. See Dawson Construction Company, Inc., PSBCA No. 2925, 92-2BCA § 24,903.

The record in this appeal reflects that the subcontractors provided their respective bids to the Appellant at the last possible moment. The Appellant had very little time to review the subcontractors bids for accuracy prior to the time for bid submission. However, the problems caused by the last minute submissions is not the fault of the State. The Appellant relied upon the bids of its subcontractors. The Appellant can not now re-negotiate the contract. Since the contract documents are clear and definite as to Appellant's obligation to install the service piping they must govern the rights and liabilities of the parties. See Centex Construction Company, Inc., MSBCA 1419, 3 MICPEL 243 (1990), Aff'd. Case No. 9011704/CL112710 Cir. Ct. for Balto. City (Nov. 7, 1990). Accordingly, Appellant's claim for equitable adjustment based upon latent ambiguity is denied.

Dated: 9/17/92
Neal E. Malone
Neal E. Malone
Board Member

I concur:

Robert B. Harrison III
Robert B. Harrison III
Chairman

Sheldon H. Press
Sheldon H. Press
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1642, appeal of P.G. Construction Company, Inc. under SHA Contract No. P-895-501-329.

Dated: September 17, 1992

Mary G. Priscilla
Mary G. Priscilla
Recorder