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Appeal of :
: Case No. 84-BCA-5
CAMARGO ASSOCIATES, LIMITED :
: Contract No. 99-3-4230-14-057-01 :
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Peyon E. Hutchens
Roy W. McGuire
For the Appellants

Frank P. Buckley, Esq.
For the Respondent, U.S.
Department of Labor

DECISION AND ORDER

Statement of the Case

This timely appeal concerns a firm-fixed price contract entered into May 27, 1983 between the Respondent Department of Labor and Camargo Associates, Limited, the contractor/appellant herein, to provide architectural and engineering services in connection with the electrical renovation work at the Cincinnati Job Corps. Center. A hearing was held on March 26, 1984 in Cincinnati, Ohio. The record has been held open until May 1, 1985 for posthearing submissions, the latest of which was a respondent's brief received April 8, 1985. The case is ready for decision.

Background

1. On May 27, 1983, the Department of Labor (hereinafter "Respondent") and Camargo Associates, Limited (hereinafter "Appellant") entered into Contract No. 99-3-4230-14-057-01 (A-1, #2/R-1, T-E)¹. By the terms of the contract the Appellant was to provide architectural and engineering services in connection with electrical renovation "- work at the Cincinnati Job Corps Center at a fixed price of \$17,000. The period of performance under the contract extended from June 17, 1983 through the completion of construction estimated to be on or about April 20, 1984 (AF Tab E, Schedule, Clause II).

¹ The following abbreviations will be used throughout:

- TR = Transcript
- A-1 = Appellant's File (EX.: A-1, #2=Appellant's file, attachment #2)
- R-1 = Respondent's File (EX.: R-1, T-B=Respondent's file, tab-B)

2. On July 18, 1983, the Appellant wrote to the Contracting Officer requesting additional compensation of \$5,886.69 because field conditions were different from those anticipated, thereby resulting in increased work to accomplish the tasks required under the programmatic phase of the project (A-1, #6/R-1, T-D). The Appellant stated that 217 hours of additional work were required to define existing conditions of the electrical system in order to produce accurate construction cost estimates. To justify charging the additional hours, Appellant stated that certain features of the lighting fixtures had to be identified and building floor plans had to be developed.

3. On August 10, 1983, the Contracting Officer (hereinafter "CO") denied the Appellant's claim because the contract had a firm fixed price. This price, according to the CO, was agreed to after the Appellant reviewed the scope of work and walked through the site. It was not, according to the CO, subject to adjustment based on the cost experience of the Appellant (41 C.F.R. §1-3.404-2(a)). The CO also stated that the Appellant did not seek and was not given written authorization by him before charging the additional costs as required by Clause 3(b) of the General Provisions of the contract (A-1, #1/R-1, T-C).

4. On October 13, 1983 the Appellant timely appealed the denial of its claim to the Board of Contract Appeals. The matter, as indicated, was heard March 26, 1984 in Cincinnati, Ohio.

Findings of Fact

5. On April 1, 1983, Appellant received a proposal request on a competitive "short-listed" basis from the Respondent to submit a bid on the proposed electrical renovation of the Cincinnati Job Corps Center, Building #1 in Cincinnati, Ohio (TR-43, 78).

6. Appellants participated in an on-site inspection walk-through on April 1, 1983 (TR-88; A-1, #4/R-1, T-G).

7. Appellants submitted their first of two bid proposals on April 11, 1983, based on review of the stated Scope of Work, estimating 102,000 gross square footage (hereinafter "GSF") and the project design indicating \$173,000.00 construction limit as set by Respondent (TR-45-59; A-1, #4/R-1, T-G).

8. Appellants there after submitted their first proposal bid, totaling \$25,220.00 to be completed in two design phases and construction culminating in 12 months (A-1,-4).

9. On April 25, 1983, Appellants submitted a revised fee proposal, reducing their bid to \$17,000 based on confirmation by EMC (Environmental Management Consultant), that Building No. 1 has "59,000 GSF and not 102,000 GSF" (A-1, #3/R-1, T-G; TR=45-59).

10. This second bid was submitted with the understanding that "2. Full size Building No. 1 floor plan blueprints (diaz) will be provided by EMC to CAL (Appellants) for drawing backups" (A-1, #3/R-1, T-G; TR-45, -60, -96).

11. The second proposal of April 25, 1983 was accepted by Respondent and Contract #99-3-4230-14-057-01 was executed on May 27, 1983, an Architect-Engineer Fixed-Price Contract, Standard Form 252 (A-1, #2/R-1, T-E; TR-45).

12. The Contract anticipated a programmatic phase of five weeks for 30% completion approval, a direct design phase for approvals at 60% and 95% completion and final approval upon finalization of the project (TR-50, 68).

13. In a June 6, 1983 conference with Respondent's representative, EMC, Appellants advised that the drawings received on that date from EMC were questionable as to the scale. EMC later confirmed they were incorrectly based on a 1 inch scale which, when field verified, should have been 1/8 inch scale (TR-49, 50; A-1, #8; R-1, T-B, pg. 14).

14. On July 21, 1983 and as of the initial and timely 30% review, Appellants informed the CO, Edward A. Tomchick, of differing site conditions from those anticipated which had formed the basis of the negotiated fee (TR-48; A-1, #6; R-1, T-D).

15. According to additional expenditure of hours and services rendered to "accurately define existing conditions and thereby produce accurate construction cost estimates", Appellants incurred the following expenses to produce from scratch full-sized accurate floor plan blue prints for the 4-story building to be built:

Project Engineer effort	16.5 hrs.	@ \$16.25 per hr.
Draft Persons effort	<u>200.5 hrs.</u>	@ \$10.10 per hr.
Total overhead factor	\$5,269.70	sub total
Approved profit factor	<u>10%</u>	
(Subtotal)	5,796.67	
Additional Drawings	<u>90.00</u>	(TR-55)
Total Amt. Claimed	5,886.67 plus interest	(TR-56, 65)

16. As indicated, the CO considered Appellant's request and denied it because of the nature of the firm-fixed contract held by the parties, placing the risk of additional "cost experience" on the Appellant, and because no preapproval for additional costs had. been sought by Appellant. Further noting the pre-bid walk-through site inspection and the additional incorporation of the proposal into the contract he stated that "[O]nce officially executed, your proposal is held to be inviolable absent any changes to the Scope of Work" (A-1, #1/R-1, T-C).

17. There is no provision in the contract at issue referring to the incorporation of the two proposals dated April 11 and 25, 1983, the second referred to in the CO's decision dated October 11, 1983 (TR-79).

18. On October 13, 1983, Appellants timely appealed the CO's denial, specifically noting that the EMC had been notified of the wrong scale of the drawings provided Appellants on the very day they received them and were "... instructed by the Government to develop floor plans through

a scale conversion factor (1" = 1/8") and field verify during site investigation" (A-1, cover letter/appeal; R-1, T-B; TR-76, 95).

19. Thereafter, Appellant entered the direct design and construction phases of the contract, with review at the 60% and 95% levels completed on time. The electrical renovation was completed in September, 1983 and received final approval as scheduled (TR-50 through -53).

20. Appellant continued to perform contract administration service throughout the continuing construction phase, implementing design and advisory capacities under separate contract signed on March 25, 1984 (TR-53, -54).

Appellant's Position

21. The Appellant argues that their accepted proposal of April 25, 1983 was conditioned on the provision of full-size blue prints (Diaz) for Building No. 1 for drafting backups, thereby eliminating formulation of a building layout and field verification and to unify bidding for Contractors under the construction phase of the renovation (A-1, cover letter/R-1, T-B). They further note the Respondent's provision of a 1982 Facility Survey sketch, photographically reduced, provided in place of the agreed upon floor plan blueprints (Diaz) which misrepresented the GSF at 82,200 rather than 59,000 GSF. On the same day they were provided with these faulty drawings, Appellant notified EMC's A.N. Fierro of the mistake and received a directive to use 1/8 inch scale instead of the 1 inch scale indicated as that had been field-verified on the first floor, and further to develop and field-verify floor plans for all floors (TR-14; A-1, #8/R-1, T-B). Therefore, Appellant requests an equitable adjustment of \$5,886.67.

Respondent's Position

22. Respondent initially objects on the basis of the Parole Evidence Rule to the consideration of: all prior negotiations, including the testimony of appellants' Peyton E. Hutchens, Project Manager and licensed professional engineer; the two proposals, dated April 11 and 25, 1983 and Conference memos of record. Respondent cites several decisions, all of which exclude prior evidence as to intent of the parties and state of mind prior to the contract: Blue Cross Asso., 79-2-BCA ¶13,953 (1979); Daiken Construction Co. Inc., 75- BCA ¶11,437 (1975); (TR-36). Secondly, all claims against the government relating to the contract must be made in writing under Section 6(a) of the Contract Disputes Act, 41 U.S.C. §605 (a). Here, Respondent maintains that no misrepresentation or allegations concerning the Respondent's agreement to provide the blue prints were in writing in Appellant's claim. Because these items allegedly were not considered by the CO, Respondent claims that this Board lacks jurisdiction to consider argument thereon.

Finally, Respondent argues that this written contract is a firm-fixed price document, prohibiting any adjustment by reason of the "cost experience" of the contractor in performance, who bears the maximum risk and profit incentive for effective cost control and contract performance (Respondent Brief-pgs. 7, 8). Furthermore, even though Clause 3 (b) of the General Provisions of this contract provides for CO approval of additional costs or fees, prior written authorization is required (Respondents Brief pg. 9). Without such approval, which Appellant confirmed they had not received, any such additional cost is non-compensable (TR-90).

Appellant's Response

23. Appellant's response points to its July 18, 1983 letter to the CO detailing the blue print requirement and prior representations that had been made by the Respondent to supply them (A-1, #6/R-1, T-D). Additionally, the Conference with EMC and follow-up call on June 6, 1983 directing the formulation and field verification of such floor plans by Mr. Fierre was noted as understood approval of these expenses, basic to all future contractually agreed upon work (Appellant's Brief - pg. 2).

Finally, Appellant stresses the CO's incorporation by reference of the April 25, 1983 proposal in his October, 1983 order. Title 41 of the Federal Procurement Regulations ¶1-3.811 requires a record of "significant considerations controlling the establishment of an initial revised final price", Appellant argues, so that, Respondent has the burden of providing the record with such prior proposal negotiations.

Conclusions of Law

24. Initially, we must address the Respondent's parole evidence objections. Where allegations of misrepresentation or mistake of material facts in the inducement to a contract exist, as is alleged here, parole evidence may be considered in determining the issues raised by those allegations. Reimann v. Saturday Evening Post Co., 464 F. Supp 214, 219 (1979); United States Ex. Rel Roman v. Schlesinger, 404 F. Supp. 77, 85 (1975). Here, the representations as to the GSF of the building and blue prints were at issue. Therefore, consideration of prior negotiations and submissions between the parties will be allowed.

25. Also unwarranted is the Respondent's objection based on Appellant's failure to appeal the specifics of the claim before this Board. The CO in fact considered all aspects of Appellant's claim before this Board in his Decision of October 11, 1983 (A-1, #1/R-1, T-C). The CO directly refers to the April 25, 1983 proposal as follows:

In your proposal of April 25, 1983 and signed by yourself on May 2, 1983, \$5,200.00 was proposed to cover all work through the site investigation and programmatic phase of this project. Additionally, your firm proposed to accomplish reproduction of the bid sets for \$500.00, which would cover 35 sets, with the number of drawing sheets estimated at eight. Subsequent to this, your proposal, which was made after studying the Scope of Work for this project and walking through the site, was incorporated into a contract which was duly signed by yourself prior to execution by the Department of Labor. Once officially executed, your proposal is held to be inviolable absent any changes to the Scope of Work. (Emphasis added).

The Appellant's letter of July 18, 1983 to the CO did in fact allege that full size floor plan blue prints were to be supplied by the Respondent and that the existing conditions were defined only through extensive additional efforts (Item 2, pg. 2 of A-1, #6/R-1, T-D). Therefore, the Board may take jurisdiction as to the issues raised herein.

26. Respondent argues that Appellant bears the burden for all costs experienced in excess of the firm-fixed price of the contract, citing: Radiation Systems, Inc., 75-2 BCA ¶11,585 (1975) and Cobe Laboratories, Inc., 75-2 BCA ¶11,551. These cases both present costs which could or should have been anticipated by the contractor before signing such an agreement.

27. However, here the GSF of the renovation building is a pre-condition to the performance of the contractual duty agreed upon. As in Assurance Company, 83-2 BCA ¶16,908 (October 17, 1983), equitable adjustment was necessitated where a contractor had relied on inaccurate government contract drawings forming the basis of the negotiated price thereon.

28. As in Assurance Co., Appellants herein inspected pre-bid but had to rely on governmental GSF and plans available, conditioning the contractual agreement later on the presentation of working full-scale blue prints in their April 25, 1983 proposal. See also Peabody N.E., Inc. 85-1 BCA §17,867 (January 15, 1985).

29. The Appellants could not reasonably be expected to verify conditions in the bidding documents by taking measurements during a pre-bid site inspection to reveal latent discrepancies that could not be confirmed except by a survey. Chance Construction Co., Inc., 82-2 BCA §16,084 (September 29, 1982).

30. The full-sized blue prints for Building No. 1 were a condition of the proposal accepted and incorporated into the contractual agreement between the parties. Due to failure of the Respondent to provide them, Appellants, on request from the EMC, generated them at a cost of \$5,886.67 so that renovation could proceed under this contract. Therefore, equitable adjustment must be provided.

ORDER

The appeal is granted and the equitable adjustment in the amount of \$5,886.67 plus interest is awarded.

GLENN ROBERT LAWRENCE
Administrative Law Judge
Member, U.S. Department of Labor
Board of Contract Appeals

E. EARL THOMAS
Vice Chairman, U.S. Department of
Labor, Board of Contract Appeals

I concur:

SAMUEL B. GRONER
Administrative Law Judge
Member, U.S. Department of Labor
Board of Contract Appeals

Dated: MAY 31 1985
Washington, D.C.
GRL:ll:crg