



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: May 27, 2008

CBCA 581

HERRE BROS., INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Jason A. Copley and Robert G. Ruggieri of Cohen, Seglias, Pallas, Greenhall & Furman, PC, Philadelphia, PA, counsel for Appellant.

Kenneth B. MacKenzie and Phillipa L. Anderson, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **SHERIDAN**, and **WALTERS**.

SHERIDAN, Board Judge.

This appeal arises out of a dispute between the appellant, Herre Bros., Inc. (Herre Bros.), and the respondent, the Department of Veterans Affairs (VA), under contract V595C-644 to "REPLACE AIR HANDLING UNITS, B[UILDING] 1" at the VA Medical Center (VAMC) in Lebanon, Pennsylvania, "in accordance with the terms and conditions of IFB [invitation for bids] 595-28-04." Herre Bros. seeks an award of \$70,177.45 for asbestos and lead abatement work it performed that was outside the contract scope of work.

We deny the appeal, because the asbestos abatement and lead paint removal Herre Bros. performed was clearly required by the terms of the contract.

Statement of Facts

On July 8, 2004, the VA issued IFB 595-28-04, soliciting bids to demolish and remove the existing air handling units in building 1 at the VAMC, and provide the labor and materials to replace those units. Appeal File, Exhibit 2. Appeal File, Exhibit 2. The IFB also included, among other things, specification section 01569, Asbestos Abatement, and section 02090, Lead Paint Removal. Appeal File, Exhibit 2.¹

Specification section 01569.1.1.2 sets forth a description of the extent of the work and the estimated quantities of asbestos containing materials (ACM) that were to be abated. These quantities included:

1315 SF [square feet] of black outer flashing material on fiberglass-insulated duct work associated with AC [air conditioning unit] 7-1 and AC 8-1. Also include black flashing and putty seam sealant on aluminum-casing around fiberglass-insulated piping. All of material shall be handled as non-friable asbestos material. The equipment lies on the roof.

.....

8 LF [of ACM piping] and 4 mudded fittings in the Ground Floor Clinical Laboratory Mechanical room (room contains AC 13-1).

62 LF, 12 mudded fittings, and 1 vibration isolation collar in the Ground Floor Morgue Mechanical room (room contains AC 10-1).

60 LF, 25 mudded fittings in the Attic Mechanical Room (room contains AC 5-1).

Appeal File, Exhibit 2.

¹ Specification section 01010, General Requirements, contained, among other items, the phasing requirements of the project and specifically noted that, in phases V through IX, removal of lead paint was required. Appeal File, Exhibit 2.

Specification section 02090.1.1 addressed the removal of lead paint on structural supports and columns in building 1. The structural supports and columns were identified as including:

- a. 2nd floor exterior mechanical area (AC 7-1, 8-1) - white and grey unit platform steel structural support beams.
- b. 5th floor mechanical area (AC 6-1) - grey structural support columns.
- c. Attic mechanical area (AC 4-1) - grey structural support columns.

Appeal File, Exhibit 2.

The IFB also included drawing 1-HAZ1, which contained six drawing notes addressing asbestos abatement and lead paint removal stating:

1. Abate lead paint on grey structural support columns.
2. Abate 30 linear feet of asbestos piping and 10 asbestos mudded fittings.
3. Abate 8 linear feet of asbestos piping and 4 asbestos mudded fittings.
4. Abate 62 linear feet of asbestos, 12 asbestos mudded fittings and 1 vibration collar.
5. Abate black outer flashing material on fiberglass-insulated duct work, black flashing putty, and seam sealant aluminum-casing around fiberglass insulated piping. Material is non-friable.
6. Abate lead paint on white and grey platform steel structure support beams.

Appeal File, Exhibit 3. The drawing showed the areas in the building where each of the notes pertaining to an abatement was to be performed. *Id.*

The VA held a pre-bid conference for prospective bidders at the VAMC on August 12, 2004. Appeal File, Exhibit 5; Transcript at 9. The pre-bid conference included a meeting and a walk-through of the areas containing the air handling units in building 1. Transcript at 26-27. The VA's contracting officer, Mr. Benjamin Grogg, attended the pre-bid conference, as did Mr. Steve Hammer, the contracting officer's technical representative (COTR), and Mr. Grant Ruhl from the VAMC. Appeal File, Exhibit 5. In addition to Herre

Bros., two other prospective bidders attended the pre-bid conference, Preferred Sheet Metal and McClure Mechanical Services. *Id.*; Transcript at 26. A representative from Burdette, Koehler, Murphy & Associates, Inc. (BKM), the architectural/engineering (A/E) firm retained by the VA to design the project, also attended. Appeal File, Exhibit 5.

Mr. Craig Seig attended the pre-bid conference on behalf Herre Bros. Appeal File, Exhibit 5; Transcript at 26. Mr. Seig is an estimator who has been involved in preparing construction estimates for approximately twenty years and has significant experience as an estimator in mechanical contracting. Transcript at 23-24. Prior to being employed by Herre Bros., Mr. Seig worked for McClure as an estimator. *Id.* at 23. Mr. Seig testified that, during the pre-bid conference, the contracting officer informed the prospective bidders that the asbestos abatement and lead paint removal work outlined in the IFB would be performed by the VA. *Id.* at 27. Whereupon, Mr. Seig, who was at the time taking notes, asked Mr. Grogg: “‘The contractor, we’re not to do abatement?’ and it was stated, ‘Yes, you don’t do that.’” *Id.* at 27. Mr. Seig testified further that Mr. Grogg told prospective bidders that either the VAMC would take care of the work or the contracting officer would execute a supplemental agreement with the contractor to do the abatement. *Id.* at 27, 37. Mr. Seig says that Mr. Grogg stated the VA would address asbestos abatement on a situation-by-situation basis, depending on what the VAMC wanted to do after it was notified of the additional work. *Id.* at 65. An undated, handwritten document, prepared by Mr. Seig and titled “Lebanon VA Hospital Pre-Bid,” contains a notation “ABATEMENT - By VA, Contractors Don’t.” Appeal File, Exhibit 15; Transcript at 28-29. Mr. Seig stated he returned from the pre-bid conference and immediately began working on Herre Bros.’ bid proposal for the project. Transcript at 25. He testified that he relied on Mr. Grogg’s statement that the VA would be responsible for all abatement work when he prepared Herre Bros.’ bid for the project. *Id.* at 25-26.

Mr. Grogg denies that he told prospective bidders at the pre-construction conference that the VA would be performing the asbestos abatement and lead paint removal set forth in the specifications. When asked if he recalled making any statement regarding asbestos abatement or lead paint removal, Mr. Grogg acknowledged that he did make a statement about asbestos abatement:

I make the statement, [the] same statement at all of our pre-bid conferences, and that is, if the contractors run into any asbestos or lead paint abatement that is not listed in the contract, the drawings or specifications, that they should stop work immediately and notify the Government, and then we would do one of two things, either we would take care of it from there or we would do a supplemental agreement for the contractor to take care of the work. It’s a

situation by situation basis, depending on what we want to do after we're notified of the additional work.

Transcript at 65. Mr. Grogg testified that he never stated that the VA would be responsible for the asbestos abatement and lead paint removal work that was called for in the contract specifications and drawings. *Id.*

Mr. Hammer testified that he did not recall Mr. Grogg telling prospective bidders that the asbestos abatement and lead paint removal work set forth in the IFB would be performed by the VA. Transcript at 73-74. Mr. Hammer confirmed that Mr. Grogg made the statement during the pre-bid conference that he usually makes on all projects "that if [contractors bidding on the project] encounter any additional asbestos that was not included in the original contract, they are to stop their work and inform me immediately and then I will, in turn, inform [the contracting officer] that we have additional work that needs to be done." *Id.*

Mr. Seig's estimate formed the basis of Herre Bros.' bid. Transcript at 31. Herre Bros. did not include money in its bid to perform the asbestos abatement or lead paint removal called for by the specifications and drawings. *Id.* at 32; Appeal File, Exhibit 15. Mr. Seig also testified that, based on his experience, owners typically take full responsibility for the performance of asbestos and lead abatement work on a project even though the language in the specifications indicates that the abatement work is included in the contractor's scope of work. Transcript at 31, 38, 57-58. Mr. Seig additionally testified that he had never encountered a situation where Herre Bros., rather than the owner, was responsible for performing hazardous material abatement. *Id.* at 30.

Prior to award, the VA amended the solicitation three times, with none of the amendments specifically addressing the asbestos abatement or lead paint removal work described in the solicitation. Appeal File, Exhibits 4, 6, 7. Herre Bros. did not seek clarification on why an amendment had not been issued to delete the asbestos and lead paint abatement work set forth in the specifications and drawing contained in the IFB. Transcript at 33.

On September 3, 2004, the Appellant submitted its bid of \$1,900,900, including in its bid package sections 01569 and 02090. Appeal File, Exhibits 2, 8. Five bids were received, with Herre Bros. the low bidder and McClure the second low bidder at \$1,935,000. *Id.*, Exhibit 8. On September 10, 2004, Herre Bros. was awarded contract V595C-644 in the amount of \$1,900,900. *Id.*, Exhibit 9.

Approximately sixty days after the award of the contract, Herre Bros. mobilized and began contract performance. Transcript at 44. The contract completion date was October 9,

2005. Appeal File, Exhibit 10. Six supplemental agreements were entered into by the VA and Herre Bros. that added work and extended the contract completion date to June 8, 2006. *Id.*, Exhibits 10-13.

A pre-construction conference which Messrs. Grogg and Hammer attended, was conducted on October 1, 2004. Appeal File, Exhibit 16. Mr. Bradford Hamm, the Herre Bros. project manager assigned to oversee the project, recalls that, during the meeting, he told Messrs. Grogg and Hammer that Herre Bros. was not responsible for the abatement work. Transcript at 41, 59, 61-63; Appeal File, Exhibits 14-15. He testified that Mr. Hammer told him the work was Herre Bros.' responsibility. Transcript at 45-47; Appeal File, Exhibit 14.

Mr. Hammer does not recall having a discussion at the pre-construction conference about asbestos abatement or lead paint removal. Transcript at 74. He remembers that the first time he heard that Herre Bros. had not included money in its bid for the asbestos abatement and lead paint removal work was in a meeting between Mr. Hamm and Herre Bros.' subcontractors, "sometime in June or July of 2005." *Id.* The record contains a Herre Bros. sign-in sheet for a job site meeting held on July 20, 2005, which Messrs. Hammer and Hamm attended, along with several of Herre Bros.' subcontractors. Appeal File, Exhibit 19. Mr. Grogg did not attend this meeting. *Id.* Mr. Hammer testified that at the end of that meeting:

[Mr.] Hamm brought up to me that he didn't think Herre Bros. was responsible for the asbestos and lead paint abatement and I then told him he needed to go see [Mr. Seig] if that is what you believe, because it's in the contract and it's in the drawing requirements.

Transcript at 74-75. Mr. Hammer denied hearing about the abatement issues prior to that meeting. *Id.*

Mr. Grogg testified under oath that the asbestos abatement and lead paint removal issues were not discussed at the October 1, 2004, pre-construction meeting and had they been raised during the meeting, he would have asked that the issues be addressed in writing. Transcript at 67, 70. According to Mr. Grogg, Herre Bros. did not raise the asbestos abatement and lead paint removal issues with him until the letter of April 20, 2006, discussed below. Transcript at 70; Appeal File, Exhibit 14. Herre Bros.' notes of a job site meeting held on November 3, 2004, make no mention of the asbestos abatement or lead paint removal issues. Appeal File, Exhibit 19. On March 16, 2005, Herre Bros. submitted a project schedule, showing that Herre Bros. planned to perform the asbestos abatement work from March 28 through July 1, 2005. *Id.*, Exhibit 20.

On April 20, 2006, over twenty months from the pre-bid conference of August 12, 2004, and eighteen months after the pre-construction conference of October 1, 2004, Mr. Hamm wrote a letter to “confirm” with Mr. Grogg certain events. In that letter Mr. Hamm contended:

During the pre-bid meeting . . . you stated that the asbestos and lead abatement would be performed by the VA, and not by the contractor. As a result, we did not include the cost of this work in our original bid. This will confirm that we discussed this issue with you and Steve Hammer on 10/1/04 at the pre-construction conference.

Nevertheless, Steve Hammer directed Herre Bros. to proceed with the work as he asserted it was in our contract. This letter will also confirm that we are proceeding with performance [of] this work in accordance with the directive of Mr. Hammer. Please be advised that Herre Bros. reserves its right to make a claim for all additional costs associated with performing the abatement and is proceeding under protest.

Appeal File, Exhibit 14. Mr. Grogg did not respond to this letter. Transcript at 69-70.

Herre Bros., via its subcontractors, performed the asbestos abatement and lead paint removal work set forth in the contract. Transcript at 77. The work was performed between April and June 2006. *Id.* at 77-78. Herre Bros. and the VA stipulate that the VA was made aware of the asbestos abatement and lead paint removal issues prior to the work being performed by Herre Bros. *Id.* at 76-77.

On July 28, 2006, Herre Bros. wrote Mr. Grogg, asking for his assistance and forwarding documentation to support its position that it had not included asbestos abatement and lead paint removal costs in its bid and had incurred unanticipated costs associated with this work. Appeal File, Exhibit 15. Referencing its July 28 submission, Herre Bros. submitted a claim on August 31, 2006, seeking \$70,177.45 for performing the asbestos abatement and lead paint removal work set forth in the contract. *Id.*, Exhibit 16. Herre Bros. has not presented evidence or asserted that it performed any asbestos abatement or lead paint removal work beyond the work that was set forth in the terms of the contract.

The contracting officer issued his final decision on October 31, 2006, denying Herre Bros.’ claim. Appeal File, Exhibit 17. Mr. Grogg maintained that Herre Bros. did not tell him that it had not included asbestos abatement and lead paint removal in its bid until after

it had completed the work. *Id.* After extensively reciting the verbiage contained in the specifications and drawings on asbestos abatement and lead paint removal, Mr. Grogg wrote:

At the pre-bid meeting the Government never stated that the lead paint removal and asbestos abatement would be removed from the solicitation. If that were the case, an amendment would have been completed to remove the work from the solicitation. The Government never issued an amendment to remove the lead paint removal and asbestos abatement. As detailed above, the asbestos abatement and lead paint removal was listed in both the specifications and the drawings. Since the work was clearly shown in the drawings and specifications the contractor was responsible for removing the lead paint and abating the asbestos as part of the original contract.

Id.

The final decision was timely appealed to the VA Board of Contract Appeals, where it was docketed as VABCA 7626. When the VA Board was consolidated into the Civilian Board of Contract Appeals (CBCA) on January 6, 2007, Herre Bros.' appeal was redocketed as CBCA 581.

Positions of the Parties

The appellant argues that, during the pre-bid conference, the VA “unequivocally undertook the contract obligation to perform all of the lead and asbestos abatement in accordance with the project specifications,” and that it relied on the VA’s “undertaking of the obligation” in formulating its bid. It posits that the VA breached its duty of good faith and fair dealing under the contract by refusing to perform the abatement work, directing Herre Bros. to perform the work instead, and then refusing to pay Herre Bros. for the work. The appellant concludes that based on the VA’s breach, the respondent is “estopped” from refusing to pay Herre Bros.’ claim. Alternatively, the appellant argues that, even if the Board finds that the contracting officer did not state that the VA was going to perform the abatement work, Herre Bros. is entitled to an equitable adjustment for the lead paint removal and asbestos abatement work “that was not contemplated nor bargained for by either party.”

The respondent argues that Herre Bros. was contractually obligated to perform the asbestos abatement and lead paint removal work and is not entitled to additional compensation for performing that work. The respondent posits that even if Herre Bros. did not include money in its bid for the work, the contract specifications and drawings clearly required the work. It avers that the contracting officer never stated that the VA would perform the abatement work, and that since the contracting officer issued amendments to the

solicitation prior to award, none of which referenced the abatement work, Herre Bros. was required to do something that it never did -- seek clarification of its understanding prior to award.

Discussion

The record in this case presents several questions concerning the requisite asbestos abatement and lead paint removal. Although much of the testimony received was conflicting, the language in the contract is perfectly clear. The appellant acknowledges that “the instant dispute is not over the interpretation of ambiguous contract language. There is no dispute that the specifications include the abatement work.” Appellant’s Rebuttal Brief at 3. Pursuant to the terms of the contract, and as set forth in the specifications and drawings, the appellant was required to perform asbestos abatement and lead paint removal in certain areas of the building. Notwithstanding the contract terms, the appellant argues that the contracting officer orally changed the contract requirements when he stated during the pre-bid conference that the VA would be responsible for performing the hazardous material abatement work.

Application of the parol evidence rule prevents the appellant’s recovery in this case. Where the language of a contract is unambiguous, it must be given its plain and ordinary meaning. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996); *George Hyman Construction Co. v. United States*, 832 F.2d 574, 579 (Fed. Cir. 1987). Also, the parol evidence rule precludes a court or tribunal from using extrinsic evidence to vary a contract’s terms where the contract language is clear and unambiguous, even though there is testimony at odds with the clear language of the contract. *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1327 (Fed. Cir. 2003); *Coast Federal Bank, FSB v. United States*, 323 F.3d 1035 (Fed. Cir. 2003); *HRE, Inc. v. United States*, 142 F.3d 1274 (Fed. Cir. 1998); *Sylvania Electric Products, Inc. v. United States*, 458 F.2d 994, 1005 (Ct. Cl. 1972). As discussed below, even if the appellant could overcome the parol evidence rule, it would not prevail for several other reasons.

The appellant has failed to meet its burden to prove that the contracting officer made an oral statement negating the terms of the contract. The appellant’s estimator testified that at the pre-bid conference the contracting officer made a statement that the VA would be responsible for the hazardous material abatement work; both the contracting officer and COTR testified that such a statement was never made. Although the appellant produced the estimator’s notation from the pre-bid conference, and argued that the notation supports its contention that the contracting officer made the statement, the notation is cryptic and susceptible to a variety of interpretations. We do not find the estimator’s recollection of this event to be persuasive. Moreover, the appellant failed to call any witnesses to corroborate

its estimator's testimony even though two other potential bidders were present at the pre-bid conference.

The appellant asserts that there exists a trade practice where owners "typically take full responsibility" for asbestos and lead paint abatement work "even though language in the project specifications indicates that the abatement work is included in the contractor's scope of work." Even if we found the testimony on this issue to be persuasive, a trade practice cannot negate the clear and unambiguous requirements of the contract. *See Jowett, Inc. v. United States*, 234 F.3d 1365 (Fed. Cir. 2000). The *Jowett* decision is directly applicable to the present case, and precludes the appellant from using a trade practice to negate clear contract requirements that require asbestos abatement and lead paint removal in the specific listed areas set forth in the specifications and drawings.

As pointed out by the respondent, the appellant has not sought reformation of this contract based on a mistake in bid. Reformation has been the relief sought in cases where the Government knew or should have known of a mistake in bid, or where there was no meeting of the minds in making the contract. The parol evidence rule does not preclude a showing of mistake in bid. Restatement (Second) of Contracts § 157 & cmt. a (1979) (cited in *Parcel 49C Limited Partnership v. General Services Administration*, GSBCA 16377, 05-2 BCA ¶ 33,013, at 163,606, *aff'd, sub nom. Parcel 49C L.P. v. Doan*, 186 F. App'x 1002 (Fed. Cir. 2006)). Even if the appellant had argued that it made a unilateral mistake in bid, the meager spread between the appellant's bid and the next low bidder's would be insufficient to alert the VA to the possibility of a bid error and thereby create a duty to request bid verification.

The Board concludes that based on the facts as proven and the law, the appellant was responsible for performing the asbestos abatement and lead paint removal clearly articulated in the contract.

Decision

Accordingly, this appeal is hereby **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

RICHARD C. WALTERS
Board Judge