



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL SUMMARY RELIEF
AS TO CBCA 1088 GRANTED; CBCA 1566 DENIED: September 23, 2009

CBCA 1088, 1566

HAMBONE CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Joshua J. Divine of Reese, Smalley, Wiseman & Schweitzer, LLP, Redding, CA,
counsel for Appellant.

Marnie G. Ganotis, Office of the General Counsel, Department of Agriculture, San
Francisco, CA, counsel for Respondent.

Before Board Judges **HYATT**, **POLLACK**, and **STEEL**.

POLLACK, Board Judge.

This appeal arises out of contract no. AG-9A28-C-06-0023, Goods Creek Bridge Construction, between Hambone Construction, Inc. (Hambone or appellant) and the Department of Agriculture, Forest Service (FS or Government), under which Hambone was to construct a bridge and perform other associated work. A primary subject of dispute involved the furnishing and placement of diaphragms, as part of the bridge construction. For various reasons, Hambone has asserted that it was reasonable for it to bid the contract

without pricing diaphragms and that it should be compensated for the diaphragms it had to provide on the project. The FS disagrees and has filed this motion for partial summary relief seeking dismissal of those portions of the appeals that relate to the diaphragms. The Government contends in its motion that the contract drawings included with its solicitation for offers made clear that the construction of the bridge required diaphragms, and thus the contract was unambiguous as to a diaphragm requirement. Additionally, the Government maintains that appellant was not entitled to rely on representations, as to the diaphragm requirement, attributed by appellant to a FS official prior to bid.

Hambone's initial appeal in this case was docketed as CBCA 1088. The appeal was from a final decision of the contracting officer, which decision addressed a claim from Hambone for the cost of providing diaphragms and addressed a separate claim for additional landscape costs. As part of the processing of the appeal, appellant filed a complaint and therein raised factual and legal contentions relating to the diaphragms that, according to the FS, had not been previously placed before the contracting officer. The contentions related to claims as to government direction and representations, both pre-and post-bid. On November 18, 2008, the FS filed a motion to dismiss what it characterized as the "new" allegations being submitted by appellant, asserting that the new allegations were outside the scope of the initial claim. After discussion with the Board, and without prejudice to whether the contested allegations were new claims or not, appellant agreed to provide a separate claim to the contracting officer, where appellant would address the matters raised in the complaint. The FS agreed to promptly respond to that claim with a final decision. The parties and Board further agreed that upon appeal by appellant, the matter would be assigned a new docket number and that case would be consolidated with the existing appeal for processing. That newly docketed appeal would address solely the matter of the diaphragms. On April 22, 2009, after receiving a decision from the contracting officer as to the "new" claim, appellant filed a second appeal as to the diaphragms. It was docketed as CBCA 1566.

Background

The contract documents, provided with the solicitation, do not contain a separate specification sheet addressing diaphragm construction. The first page of the contract drawings (under General Notes at the center of the sheet), however, incorporates by reference the Standard Specification for Highway Bridges and Standard Specification for Construction of Roads and Bridges on Federal Highway Projects (also known in the industry as the FP-03). Appeal File, Exhibit 3 at 98; Respondent's Memorandum in Support of Respondent's Motion for Partial Summary Relief, Exhibit 5, ¶¶ 21-22. According to the FS, such publication provides industry standard specifications for the components of a bridge. Respondent's Memorandum in Support of Respondent's Motion for Partial Summary Relief, Exhibit 5, ¶ 22.

Two contract depictions, each on sheet R-1576-03, address the incorporation of diaphragms into the design of the bridge. The drawing section titled Superstructure Plan, Appeal File, Exhibit 3 at 100, contains a depiction which shows three diaphragm lines across the girders, with two diaphragms noted per line ($3 \times 2 = 6$ diaphragms). This depiction is shown in three locations on the referenced drawing section. Diaphragms are also depicted on the drawing section titled Superstructure Elevations, *id.*, which shows a concrete diaphragm at span quarter points (middle left of sheet). Both drawing sections referenced by the FS are scale drawings and lack detail as to the diaphragms. Appeal File, Exhibit 3 at 100; Respondent's Memorandum in Support of Respondent's Motion for Partial Summary Relief, Exhibit 5, ¶¶ 8, 10.

The Government's design engineer, Mr. Christopher Shields, attests in his affidavit that the lack of detail is not significant in terms of defining the contract requirement for diaphragms. He explains that a contractor could use a scale ruler to make a computation to come up with the necessary amount of material needed for construction. Mr. Shields also states that the reason the FS did not detail the diaphragms beyond the two drawings was that the final configuration of the diaphragms needed to conform to the precast girders. Those girders were to be designed and fabricated by Hambone's girder supplier, Morse Bros. (Morse). Mr. Shields notes that the shop drawings developed by Morse provided the final details for the diaphragm geometry, reinforcing steel and embedded inserts in the girders to anchor the rebar. Respondent's Memorandum in Support of Respondent's Motion for Partial Summary Relief, Exhibit 5, ¶¶ 7-12, 22-25. 39-40.

Appellant acknowledges that the drawings with the solicitation included depictions of diaphragms. Appellant's Statement of Uncontested Facts, ¶ 36. Appellant did not include diaphragms in its bid pricing because, in its opinion, the diaphragms depicted on the drawings lacked sufficient detail as to construction. Appellant further inquired of Morse, prior to bid, whether diaphragms noted on the drawings would be precast or not. Morse told appellant that it did not know the answer to that question, pointing out that the design had not yet been approved by the FS. *Id.* ¶¶ 37-38. Still prior to submitting its bid, Hambone contacted the FS and spoke to Mr. Gary Hemsted, another FS engineer, about its concerns over how to bid. Appellant states it was told by Mr. Hemsted to bid what was on the plans, and was additionally told by him that it would be compensated for any diaphragms required. Relying on those representations, appellant did not include diaphragms in its pricing. Appellant's Statement of Uncontested Facts, ¶¶ 36, 40-43.

The only FS official with contracting officer authority on this contract was Ms. Lela Steweicki, the then-contracting officer. There is no evidence establishing that any contracting authority was vested in Mr. Hemsted at the time of bid, nor any record of him occupying an administrative contracting role. The contracting officer did not provide

Hambone with any clarification or direction concerning the diaphragms. Respondent's Memorandum in Support of Respondent's Motion for Partial Summary Relief, Exhibit 1, ¶¶ 6-10; Exhibit 6.

Although the parties address in part the details surrounding the submission and approval of the design, the subject was not fully developed in the submissions on the motion. Appellant, in a declaration attached to its response to the FS motion, in fact indicates that at least one submission from Morse was not fully approved. Declaration of Jerry Cash (Aug. 30, 2009) ¶¶ 11-13. More to the point, according to appellant, without the details which Morse included in the shop drawings which Morse provided after award (ultimately approved by the FS), appellant considered it impossible for it or its subcontractors to include any bid price as to diaphragms. Appellant's Statement of Uncontested Facts ¶ 40. At the time of bid, appellant was uncertain whether the diaphragms would be precast or poured in place; and uncertain as well as to the size of the diaphragms, the size of rebar, threading, and other construction details. *Id.* ¶¶ 37-39.

Finally, appellant points out that for two other FS projects, Pine Creek Bridge and West Branch Indian Creek Bridge, the FS provided detailed drawings of diaphragms, as contrasted to the bare bones depiction on the Cross Creek drawings. Cash Declaration ¶¶ 13, 14. The FS has pointed out differences in those projects from the bridge being constructed in this case. Respondent's Memorandum in Support of Respondent's Motion for Partial Summary Relief, Exhibit 5, ¶¶ 13-20.

Discussion

In a decision involving a motion for summary relief, the law requires that we draw all reasonable factual inferences in favor of the non-moving party. It is not our role to weigh competing evidence. As long as a party has provided some evidence which could sustain its factual contentions and those facts are material to the ultimate resolution of the appeal, we proceed as if those facts were established. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). We have applied the above in deciding the motion before us.

There is no question that the contract drawings on this project identified diaphragms in several locations. Although the drawing depictions of the diaphragms clearly lacked detail, that does not change the fact that diaphragms were identified as an element of the contract. The record further shows that appellant evidently recognized that diaphragms were noted on the drawings and in fact sought clarification as to them. Taking all inferences in favor of appellant, we accept for purposes of this motion that the drawings lacked detail and that the appellant had reason to be uncertain as to whether the diaphragms would be precast

or poured in place. The drawings also provide insufficient information to determine definitively the size of the diaphragms, size of rebar, threading, and other construction details. Making all inferences in favor of appellant, we conclude that the design concerns addressed by appellant were items that could not be determined with any precision at the time of bid and had to wait for design finalization, after award. We also accept that on some other FS bridge projects requiring diaphragms, the FS provided significantly more information than on this project. Additionally, we find that to some extent, appellant, in order to bid a price, would have had to “fill in the blanks” as to aspects of the design, such as size, configuration and other similar elements. Coming up with a price may well have been difficult, and accordingly, imprecise. There may well have been areas of speculation in arriving at the dollars to be attributed to the diaphragms. Even accepting Hambone’s statements as true, however, we cannot find that the lack of detail in the drawings justifies appellant’s decision not to include pricing for the diaphragms, thus effectively deleting the requirement from the contract. The diaphragms depicted in the drawings must be given meaning and can not simply be read out of the contract absent a contractually valid direction to disregard them. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985).

When dealing with the Government and relying upon an official’s advice, one must go to the right individual. Where advice is provided by one who does not have contracting authority, his actions cannot legally bind the Government. When seeking pre-bid guidance and commitment from the Government, one must make sure that the person relied on had the authority to make the commitment. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Europa Bakery, Inc.*, PSBCA 4994, et al., 06-2 BCA ¶ 33,400; *Rich Macauley*, AGBCA 2000-155-3, 01-1 BCA ¶ 31,350, at 154,811. That simply did not happen here. Thus, accepting as a fact that Hambone was told by Mr. Hemsted that it would be compensated separately for diaphragms, there still can be no relief. There is no evidence that prior to Hambone submitting its bid, the contracting officer on this project had approved or was aware of the claimed directions from Mr. Hemsted. There is further no evidence that Mr. Hemsted had contracting authority of any nature. As to Hambone’s legal argument that Mr. Hemsted can be found to have implied authority, we find that unpersuasive and contrary to well-established case law. *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007). Mr. Hemsted was not a contract administrator at the time of bidding, but rather was a FS engineer. He was simply not cloaked with any contracting authority, either apparent or implied. Accordingly, any guidance that may have been provided does not excuse appellant from bidding and providing diaphragms as part of its contract obligation.

We do not address, in this ruling, any further issues or disputes which might remain as to the scope of the contract requirement for diaphragms or as to the effect of the Government post-award actions. To the extent there may be issues, such as to the difference

between diaphragms provided and those required by the contract, such issues would need to be addressed in a separate claim and decision. Finally, the matters surrounding the landscape issues remain before the Board as part of CBCA 1088.

Decision

We **GRANT** respondent's **MOTION FOR PARTIAL SUMMARY RELIEF** in part as to CBCA 1088, finding that appellant was required to provide diaphragms as part of its bid. We **DENY** CBCA 1566 in its entirety.

HOWARD A. POLLACK
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

CANDIDA S. STEEL
Board Judge