[¶ 18,884] **Sauer Mechanical, Inc.**

NASA BCA No. 884-9. March 6, 1986. Contract No. NAS10-10805.

Interpretation of Contracts—Duty to Seek Clarification—Conflict Between Drawings and Specifications.—A contractor was not entitled to an equitable adjustment for furnishing assemblies for use in fueling the space shuttle, because even though the drawings listed the assemblies as government-furnished equipment, a list of government-furnished equipment did not contain the assemblies. This discrepancy raised a patent ambiguity that should have been clarified by the contractor prior to bidding. Whether the contractor actually knew of the discrepancy was not relevant. The discrepancy was patent, which raised the contractor's duty to inquire.

For the appellant: Smith & Fleming, Atlanta, Georgia, by Kent P. Smith and George D. Wenick. For the government: Richard H. Mundy and Donald H. Schiller, Office of Chief Counsel, John F. Kennedy Space Center, Kennedy Space Center, Florida.

Opinion by Administrative Judge Bayus with Administrative Judges Anderson and Dicus concurring.

[Text of Opinion]

Appellant's contract called for construction modifications to a launch pad at Kennedy Space Center. A drawing in the invitation for bids and resultant contract documents indicated two assemblies used in fueling the space shuttle would be Government-furnished. Appellant asserts that the documents show clearly that the assemblies would be Government-furnished, and that the cost thereof, $71,653.54, is the Government's responsibility. The Government argues that the relevant documents contained a patent ambiguity and that Appellant should have requested clarification from the Government before contract award. Entitlement only was litigated at the hearing.

Findings of Fact

1. The National Aeronautics and Space Administration (Respondent) issued Invitation For Bids 10-0125-3 (IFB) on May 18, 1983, for construction modifications to Launch Pad 39B at the John F. Kennedy Space Center, Florida. Among other things, the IFB provided that any explanation desired, or any suggested changes therein by a bidder regarding the interpretation of the IFB must be requested in writing and received at least 10 days prior to the scheduled bid opening (A.F. tab 26).

2. Sauer Mechanical, Inc. (Appellant) was the successful offeror on the IFB and entered into Contract NAS10-10805 on August 15, 1983, with Respondent. The contract was a fixed-price type in the amount of $10,891,000.

3. The contract work was to conform to NASA's Technical Specification 79K24051, Revision B, dated April 27, 1983, consisting of 503 pages, and drawing package, Drawing 79K024048, Revision A, dated May 28, 1983, consisting of approximately 1400 sheets (Tr. 43; Ex. A-1).

4. The IFB and Contract Schedule provided in part:

SECTION I

ARTICLE I

DESCRIPTION OF WORK

The contractor shall furnish all management, labor, transportation, facilities, materials and equipment (except any property including utilities as may be specified hereunder to be Government-Furnished) and perform all work for the project named as defined in the "Contract Drawings, Maps and Specifications (Jan. 1965)" in accordance with the terms and conditions of this contract. . . .

* * *

ARTICLE 7

ORDER OF PRECEDENCE (JULY 1968)

In the event of an inconsistency between provisions of the Invitation for Bids, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule, (b) Bidding Instructions, Terms and Conditions of the Invitation for Bids, (c) General Provisions, (d) other provisions of the contract, whether incorporated by reference or otherwise, and (e) the Specifications.

* * *

SECTION X

ARTICLE I

GOVERNMENT PROPERTY (FIXED-PRICE) (OCTOBER 1977)

(a) Government-Furnished Property. The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described as Government-furnished property in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished property suitable for use (except for such property furnished "as is") will be delivered to the Contractor at the times stated in the Schedule or if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. . . .

5. The Government Property clause in Section X, Article 1 contained two lists of items to be furnished to the contractor by the Government. They were titled "List of Government Furnished Equipment/Property, GFE-84690-001, and GFE-84690-002," respectively. Each list provided, among other things, the estimated cost and the respective availability dates for most of the listed items (Ex. A-1). The lists totaled approximately 100 pages and contained over 3,000 different item part numbers which were to be Government-furnished to the contractor (A.F. tab 26).

6. The Contract specifications provided in part:

MECHANICAL SPECIFICATIONS

SECTION 15001

Paragraph 1.3.7 Government Furnished Equipment

All equipment shown on the Drawings as Government Furnished Equipment ("GFE") will be furnished by the Contracting Officer.

7. Appellant's solicitation to its potential steel erection subcontractors included all the applicable drawings and specifications contained in the IFB. Drawings M-251 through M-255 of the drawing package related to the two hypergol umbilical carriers for the flex hoses. The hoses transport various liquids and gases, principally hypergol, from the launch pad structure to the spacecraft (Ex. A-1).

8. Sheet M-251 of the mechanical drawings is labeled, "RSS 112' Level, Hypergol Umbilical Carrier Installation." Sheet M-251 has three distinct section drawings on it, one of which, Section A, contains the words, "Hypergol Umbilical Assy (GFE)." A note under one of the other section drawings on M-251 stated: "For Fab Details See SH M-252, M-253, M-254 and M-254A." (A.F. tab 2; Exs. A-2, A-3).

9. The contract drawings had been prepared for Respondent by the joint venture organization comprised of Planning Research Corp. and the architect engineering firm of Briel, Rhame, Poynter & Hauser (PRC/BRPH) (Tr. 166). PRC/BRPH's preliminary contract drawings included several GFE symbols for the carriers. Prior to issuance of the IFB, PRC/BRPH determined that the symbols should not have been

placed on the drawings (Ex. A-1). PRC/BRPH erroneously failed to remove the GFE legend from drawing M-251 (Tr. 168).

10. Ivey's Steel Erectors, Inc. (Ivey's) was one of the potential subcontractors solicited by Appellant to perform the steel erection work. Ivey's quote to Appellant was prepared by its project manager, Mr. Richard Walls, who had 24 years experience on NASA contracts (Tr. 57-58, 60).

11. Mr. Neil Wickersty was one of Appellant's vice-presidents, and branch manager for the region including Kennedy Space Center. He had ten years experience with space shuttle related construction and headed Appellant's bid preparation team for the subject Contract (Tr. 32-33).

12. Prior to preparing the solicitation for the steel erection subcontract, Mr. Wickersty had not determined whether the carriers were to be Government-furnished. He intended to place responsibility on the steel erection subcontractor for determining what was required by the drawings (Tr. 34-36).

13. In preparing Ivey's quotation, Mr. Walls believed initially that Ivey's would have to furnish the carriers because the solicitation noted "M-251 to 255—complete—Hyp. Umb. Carrier", and to him "complete" meant furnish and install whatever was listed on the sheets (Tr. 60, 61, 70, 76, 103). But after noting the GFE symbol on Section A of drawing 251, Mr. Walls thought that the carriers would be GFE (Tr. 75).

14. Before submitting Ivey's quote, Mr. Walls called Mr. Wickersty to discuss the hypergol umbilical carrier assembly requirement. After Mr. Walls brought the GFE symbol to Mr. Wickersty's attention, the latter agreed that the assembly was GFE, but he told Mr. Walls that the determination as to whether the carriers were to be Government-furnished was Mr. Walls' responsibility (Tr. 38, 46-47).

15. Mr. Walls reached the conclusion that the carriers were to be furnished by the Government solely upon the GFE symbol appearing in Section A on Sheet M-251 (Tr. 98). Mr. Wickersty and Mr. Walls agreed that any subcontract with Ivey's would include the symbol GFE for the hypergol umbilical carrier installation (Tr. 55-56).

16. Mr. Wickersty included Ivey's quote in Appellant's bid to NASA. Neither Ivey's quote nor Appellant's bid included the cost of furnishing the carriers. After Appellant was awarded the Contract, Appellant awarded the steel erection subcontract to Ivey's. (Tr. 38). The carriers were the only property specifically identified as GFE in the subcontract (Tr. 49; Ex. A-1).

17. The Government-furnished property lists failed to include 34 electrical part numbers, consisting of 38 items, which the Government intended to furnish to the contractor. The average dollar value of these items was less than $1,000, and the estimated cost of no one item exceeded $2,500 (Tr. 183-84; A.F. tab 26).

18. We find that the hypergol umbilical carriers were the only non-electrical type item omitted from the lists (Tr. 183-84). Mr. Walls reviewed the GFE lists before submitting Ivey's quote to Appellant and he knew that the carriers were not on the GFE lists. All the other Government-furnished items that Ivey's would have to install were included in the lists (Tr. 77-79).

19. Appellant did not request clarification, or inquire of NASA prior to submitting its bid whether the carriers were to be GFE or contractor-furnished equipment (Tr. 47-48).

20. Because the Contract GFE lists did not list the carriers, Appellant after contract award, estimated their delivery date so Appellant could prepare its contract performance schedule for submission to NASA. The estimated delivery date was based on the median delivery date for other hypergol equipment listed as GFE and for which availability dates were given (Tr. 134-37).

21. Appellant's contract administrator, Mr. Timothy Haverland, had extensive experience estimating contracts for NASA jobs and he testified the Contract had more GFE than he had previously seen on other contracts (Tr. 142).

22. Mr. Walls knows of no GFE item other than the carriers, where details sufficient to fabricate the items were shown on the installation and fabrication drawings (Tr. 82, 97). The detailed drawings on sheets M-252 through M-255 would be helpful, but not necessary for installation, if the carriers were GFE (Tr. 85).

23. Mr. Leland Marsh was the Contracting Officer's Technical Representative for Respondent on the Contract. He thinks that Appellant should have sought clarification whether the carriers were to be GFE because the four fabrication drawings referenced on M-251 would be unnecessary if the carriers were GFE (Tr. 170, 209).

24. On October 24, 1983, Appellant requested NASA to supply the delivery date for the carriers (A.F. tab 1). The Contracting Officer replied that they were to be contrac-

tor-furnished (A.F. tab 3). Appellant procured and furnished the items and now seeks $71,653.54 as the total price of the alleged Government change to the contract.

Decision

Appellant alleges that the invitation for bids (IFB) and resultant contract stated clearly on one drawing that the hypergol umbilical carrier assemblies were to be furnished to the contractor by the Government, with no contrary indications. Thus Appellant concludes that it had no legal duty to seek clarification from Respondent prior to contract award regarding whether the assemblies would be Government-furnished.

Respondent's position is that there was a patent ambiguity in the IFB with respect to which party was responsible for supplying the assemblies, and Appellant was obliged consequently to clarify the discrepancy with the Government before contract award. Respondent argues further that Appellant's interpretation of the bid documents was unreasonable, and moreover, that Appellant had actual knowledge of the discrepancy prior to submitting its bid.

The evidence is that the Government contractor who prepared the original IFB included the statement "Hypergol Umbilical Assy (GFE)" on one of the three section drawings of installation drawing sheet M-251. The legend was not timely removed after it was decided that the assemblies would be contractor-furnished.

While Appellant's steel erection subcontractor, Ivey's Steel Erectors, Inc., was preparing its quote to Appellant, Mr. Walls, Ivey's project manager, noticed the GFE symbol on M-251. Before submitting Ivey's quote to Appellant he spoke with Mr. Wickersty, Appellant's vice president responsible for preparing Appellant's bid. Mr. Walls called Mr. Wickersty's attention to the GFE symbol on M-251, and they agreed that the assemblies were GFE.

The IFB stated that equipment shown as GFE in the contract schedule or in the specifications would be Government-furnished. The specifications provided that equipment shown on the contract drawings as GFE would be furnished by the Government. Two clearly labeled lists, which parenthetically, proved to be quite accurate and complete, notwithstanding the relatively extensive number of items on the lists, identified the items to be furnished by the Government as well as each item's respective availability date and estimated cost.

It is unclear from the record if Mr. Walls had reviewed the Government-furnished property lists in the IFB before his conversation with Mr. Wickersty. Mr. Walls did review the lists sometime prior to submission of Ivey's quote, and he knew that the assemblies did not appear on either list.

The pivotal issue in this appeal is whether, objectively viewed, the discrepancy in the IFB between the GFE lists and the drawing reference to GFE was such that Appellant was under a duty to seek clarification prior to bidding. In making a judgment on the issue "[w]e must seek to put ourselves in the position of appellant at the time he bid on the contract, i.e., we must seek the meaning that would be attached to the language by a reasonably intelligent bidder in the position of appellant. ..." *Roberson Construction Co.*, ASBCA No. 6248, 61-1 BCA ¶ 2857 at 14, 915.

Appellant's practice was to place responsibility with each subcontractor for the determination whether property required for its respective subcontract would be furnished by the Government under Appellant's prime contact. However, it is Appellant's obligation to make certain that the cost of every item specified to be done was included in its bid. *Gall Landau Young Construction Company, Inc.*, ASBCA No. 21549, 77-1 BCA ¶ 12,515 at 60,690. Thus, the delineation of responsibility between Appellant and its subcontractor or between various subcontractors is not of concern in resolving this dispute. *Basic Construction Company, ASBCA No. 21411, 21536, 21724, 78-1 BCA ¶ 12,882* at 62,695-96.

The record does not reveal if Mr. Wall told Mr. Wickersty that the assemblies were not on either list of Government-furnished property during their discussion about whether Ivey's was to provide the assemblies. Nevertheless, because of its contractual privity with the Government it was Appellant's obligation to determine if the assemblies were to be furnished by the Government.

The Government-furnished property lists included in the Contract schedule were obviously a primary source, if not the primary source, in the IFB that Appellant should have consulted to ascertain what property the Government would furnish to the successful contractor. Had Appellant performed a routine, timely review of the IFB, it would have known of the glaring contradiction between drawing M-251 and the property lists. A Government contractor who does not read the terms of the IFB prior to submitting his

bid does so at his peril. *Robert L. Guyler Co. v. United States*, [25 CCF ¶ 83,090] 219 Ct. Cl. 403, 414, 593 F. 2d 406, 412-13 (1979), *Dale Ingram, Inc. v. United States*, [18 CCF ¶ 82,123] 201 Ct. Cl. 56, 70, 475 F.2d 1177, 1184 (1973). Moreover, "[w]e need not go on to establish if plaintiff actually knew of the obvious conflict, since it is not the actual knowledge of the contractor, but the obviousness of the discrepancy which imposes the duty of inquiry." *Chris Berg, Inc. v. United States*, [17 CCF ¶ 81,143] 197 Ct. Cl. 503, 515, 455 F. 2d 1037, 1045 (1972); *J. A. Jones Construction Co. v. United States*, [12 CCF ¶ 81,823] 184 Ct. Cl. 1, 13, 395 F. 2d 783, 790 (1968).

Appellant argues the contra proferentem doctrine of contract interpretation. To prevail, Appellant must establish that the alleged deficiency was latent. However, in addition to the conflict in the contract language addressed above, Appellant's pre-bid discussion with Ivey's about whether the assemblies were GFE was precipitated by that subcontractor's concern over the specific requirement at issue. While Appellant still may not, as it maintains, have been aware of the conflict before submitting its bid, the circumstances were such that it should have been, and we find as a result that Appellant should have made further inquiry. *Beacon Construction Co. v. United States*, [9 CCF ¶ 72,018] 161 Ct.Cl. 1, 7, 314 F. 2d 501, 504 (1963). A bidder "presented with an obvious omission, inconsistency, or discrepancy of significance ... must consult the Government's representatives if he intends to bridge the crevasse in his own favor." *Id.*

We have carefully considered the other arguments and precedents advanced by Appellant to support its claim. In view of the instant holding, those arguments are irrelevant and there is no need to discuss them.

Accordingly, the appeal is denied.