

14-1 BCA P 35477, CBCA 2806, 2013 WL 6709787 (Civilian B.C.A.)

CBCA
Civilian Board of Contract Appeals

CMEC/ARC ELECTRIC JV, LLC, APPELLANT,
v.
DEPARTMENT OF VETERANS AFFAIRS, RE-
SPONDENT.

DENIED: December 18, 2013

Erik H. Thorleifson and Michael S. Bissell of Campbell & Bissell, PLLC, Spokane, WA, counsel for Appellant.

David G. Fagan, Office of Regional Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **DRUMMOND**. **VERGILIO**, Board Judge.

On April 4, 2012, the Board received a notice of appeal from CMEC/ARC Electric JV, LLC (contractor) concerning its contract with the Department of Veterans Affairs (VA or agency). The contractor installed generators and provided ancillary work at an agency facility. The contract required that controls for the new system work with the existing system with one database. The contractor disputes the determination by the contracting officer that the agency would not pay the contractor additional money to comply with the contract requirement.

The agency has moved for summary relief. The material facts are not disputed. The contractor is not entitled to additional payment; the agency required no more than compliance with the requirements of the contract. Accordingly, the Board grants the motion for summary relief submitted by the agency and denies the contractor's claim.

Findings of Fact

1. Under contract VA260-RA-0817, the contractor was to replace and upgrade generators, and do ancillary work, at the Spokane VA Medical Center. Contract at 1, 5, 6; Uncontested Facts 1. This dispute involves but a portion of the overall work.

2. The solicitation and contract contained specifications regarding the direct digital control system for the heating, ventilation, and air conditioning (HVAC) system. Regarding the existing system and the new system, a requirement stated:

New system including interface to existing systems and equipment shall operate and function as one complete system including one database of control point objects and global control logic capabilities. Facility operators shall have complete operations and control capability over all systems, new and existing including[:] monitoring, trending, graphing, scheduling, alarm management, global point sharing, global strategy deployment, graphical operations interface and custom reporting as specified.

Contract at 23 09 23 7T-1 (¶¶ 1.1.A, D), -4 (¶ 1.3.Q); Uncontested Facts 3.

3. Only after award did the contractor identify its intended system—a solution that would utilize a database separate from the existing, installed database. The agency rejected the system as non-compliant with the contract requirements. The contractor viewed the agency's interpretation of the contract as flawed, because in its view the requirement for a single database amounted to a sole-source requirement for the controls. Uncontested Facts 3, 4, 5.

4. The contractor submitted a request for an equitable adjustment, seeking \$129,699, said to be its additional costs of providing a system that met the agency's interpretation of the contract. The contractor based its request upon its belief that the agency interpreted the contract to create a sole-

source requirement. The contractor alleged that only a single source was capable of satisfying the requirement for one database. The contractor maintained that it was entitled to relief because of a defective specification, a constructive change, and/or because of the agency's failure to disclose its superior knowledge. Uncontested Facts 7; Request for Equitable Adjustment (Feb. 25, 2011). In the request for an equitable adjustment, the contractor contended that it reasonably believed that the existing controls system was an "open" system, such that the end user could competitively bid controls, and states that it "was not originally aware that [its proposed] controls would have to run off a separate database from existing [manufacturer-]installed database [.]". Request for Equitable Adjustment at 3.

5. The contracting officer denied the request and notified the contractor of its appeal rights. The contractor filed this appeal at the same time it submitted a certified claim to the contracting officer reiterating what was in its request for an equitable adjustment (a submission that lacked certification). The contracting officer denied the claim. Uncontested Facts 8-11. The contractor here appeals from that denial.

Discussion

The contractor contends that the agency improperly created a sole source procurement, as the contractor seeks relief based upon theories of defective specifications, a constructive change, and the agency's withholding of superior knowledge. The agency moves for summary relief, asserting that the undisputed terms of the contract required the contractor to provide a system that encompassed only one database, not the two proposed by the contractor in its solution. The contractor opposes the motion, as it states that there are material facts in dispute.

The contractor states that there is a genuine issue of fact as to whether the specification required a "single" database as asserted by the agency. Contractor's Statement of Genuine Issues and Uncon-

tested Facts at 2 (¶ 7). This statement does not create a genuine issue of fact. The language of the contract is not disputed. Interpretation of the contract is a legal matter. The contract is not ambiguous. The contract calls for a system with a single database. The solution proposed by the contractor did not satisfy that requirement. The agency acted within the terms and conditions of the contract in insisting that the contractor provide a system satisfying the requirement.

The contractor makes allegations regarding the sole-source nature of the single database language as interpreted by the agency, and seeks to demonstrate reliance upon its assumption that this was to be an open system procurement. These matters are not material to this post-award dispute. The contract required the contractor to provide a system that operates and functions with one database. The agency properly rejected the contractor's proposed solution that failed to comply with the contract requirement.

Theories of relief raised by the contractor (defective specification, constructive change, and failure by the agency to disclose its superior knowledge) attempt to shift liability to the agency. For the purpose of resolving this motion, one can assume that the single database requirement in fact amounted to a sole-source requirement. The contractor did not dispute that term and condition. The contract required the contractor to provide a solution compliant with the contract requirements. The agency can enforce the requirement; its actions are not implicated in the administration and dispute stages of the procurement. The contractor did not object to the terms and conditions of the procurement. Post-award, its assertions regarding the sole-source nature of the requirements come too late. Appeals and protests are distinct.

Decision

The Board grants the agency's motion for summary relief and **DENIES** the appeal.

JOSEPH A. VERGILIO

Board Judge

We concur:

CATHERINE B. HYATT

Board Judge

JEROME M. DRUMMOND

Board Judge

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