

Board of Contract Appeals

*General Services Administration
Washington, D.C. 20405*

DENIED: February 21, 2001

GSBCA 15058

TRATAROS CONSTRUCTION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Robert J. Sciaroni of Bell, Boyd & Lloyd, Washington, DC, counsel for Appellant.

Jeremy Becker-Welts, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL** and **DeGRAFF**.

DeGRAFF, Board Judge.

Trataros Construction, Inc. and the General Services Administration (GSA) entered into a contract that required Trataros to perform construction work. In this appeal, Trataros claims that GSA should increase the contract price to compensate Trataros for repairing stucco surfaces in the loggias. Trataros elected to use the Board's accelerated procedure in order to resolve this case and a hearing was held. See Rule 203 (48 CFR 6102.3 (1999)). Because the contracting officer directed Trataros to perform a limited amount of repair work and did not direct Trataros to perform the work for which it seeks compensation, the appeal is denied.

Findings of Fact

On September 26, 1996, the parties entered into contract GS-02P-DTC-0033(N) for renovations and alterations to the United States Post Office and Courthouse Building in Old San Juan, Puerto Rico. The building was constructed in two phases, referred to as the 1914 building and the 1940 building. Exhibit 1. The outside of the 1914 building consists in large part of open archways looking into loggias. Exhibit 1 (Drawings 4-1 through 4-4). The contract required Trataros to perform the following work in the loggias:

Clean all concrete/stucco surfaces using pressure water wash and biocide to remove loose and flaking paint and organic growth. Prepare surface and repaint.

Exhibit 1 (Drawings 4-8 through 4-11). The contract did not require Trataros to repair areas where the stucco in the loggias was not properly bonded to the concrete substrate. Exhibits 1, 29.

On December 31, 1997, Trataros told GSA's construction manager, O'Brien Kreitzberg, that in many areas the stucco was not properly bonded to the concrete substrate. Trataros said that it could determine the condition of the stucco by tapping it and listening for a hollow sound. Trataros proposed making a survey of the loggias and asked GSA how it wanted to proceed. Exhibit 6. Within the next few weeks, Trataros and O'Brien Kreitzberg made a survey of the areas at issue. Exhibit 8.

In early March 1998, GSA, GSA's project architect, Trataros, and O'Brien Kreitzberg inspected the loggias and decided that Trataros would be responsible for damage it had caused to the loggia walls and that the remaining work needed due to the de-bonded stucco would be considered "additional." Exhibit 14. In late April 1998, Trataros's project superintendent and Juan Garcia, a representative of O'Brien Kreitzberg, inspected the first and second floor loggias. After some disagreement and discussion, Trataros and O'Brien Kreitzberg agreed upon the areas that needed to be repaired and the extent of the repairs, and they noted those areas on the contract drawings and marked them on the building with spray paint. They also agreed upon which repairs were needed due to damage caused by Trataros. Exhibits 17, 41 at 91-100, 112; Transcript at 373-74, 417-21. At a May 5 project meeting, at Trataros's request, GSA confirmed that "areas that sound hollow are not to be addressed" if the surface appeared acceptable. Exhibits 18, 20.

Mr. Garcia prepared a list of the areas that needed to be repaired, annotated to the contract drawings. The list identified dozens of areas to be repaired and stated the dimensions of each area, for a total of 834 square feet of repairs. Some of these areas were those that had been damaged by Trataros. The remaining areas of work constituted 662 square feet. Exhibits 16, 17, 31, 41 at 94-95, 112; Transcript at 324, 371-78. Trataros reviewed Mr. Garcia's list of the areas that needed to be repaired and agreed that it was complete except for ceiling repairs.¹ Exhibit 21. According to Trataros's project superintendent, even though he agreed with the list of areas and square feet of repairs that would be needed in the loggias, he believed that there were still more square feet that would need to be repaired. Exhibit 41 at 102-03. Mr. Garcia believed that Trataros might encounter areas that would need to be repaired in addition to the agreed upon areas. He recalled telling Trataros's project superintendent that if Trataros encountered such areas, it would have to tell O'Brien Kreitzberg, and O'Brien Kreitzberg would have to tell GSA and get some direction. Transcript at 378-79, 382-85.

On July 8, 1998, the GSA contracting officer directed Trataros to proceed to repair the loggias at the locations agreed upon by Trataros and O'Brien Kreitzberg, at a price to be

¹ Ceiling repairs are not part of the claim at issue here. Transcript at 291.

determined later. Exhibit 27. On July 20, 1998, GSA sent Trataros Request for Proposal 34 (RFP 34), which asked Trataros to submit a cost proposal so that GSA could change the contract to include repairs to loggia areas described in Mr. Garcia's list. GSA asked Trataros to provide its unit price broken down into a price per square foot that could be used to price any additional repair areas, if such additional areas were identified. Exhibit 29.

On July 31, 1998, Trataros sent GSA a response to RFP 34. Trataros said that it would repair the 662 square feet of "agreed wall area" for \$14,893. Exhibit 31. At some point, in accordance with its July 8 direction to repair the agreed upon loggia areas at a price to be determined later, GSA paid Trataros \$15,000. Exhibit 35.

As the work in the loggias progressed, Trataros realized that it was repairing more than the agreed upon 662 square feet. According to Trataros's project superintendent and its project manager, the number of square feet increased due to conditions that Trataros encountered after it began its work. For example, when Trataros removed an agreed upon area of de-bonded stucco, it sometimes found that it also had to remove an adjacent area in order to blend the new work with the old work and provide a quality job. Also, Trataros had to remove stucco so that it could attach corner bead at the edges of openings in the loggias. Exhibit 41 at 116-17; Transcript at 295-96.

Although Trataros's project superintendent knew that work was being performed outside the agreed upon 662 square feet, he did not completely realize the extent of the increased quantity of work that was being performed. Exhibit 41 at 110-11. Mr. Garcia was present when Trataros was performing its work, but Trataros's project superintendent did not remember discussing with him the extent of the repairs that Trataros was performing. Exhibit 41 at 117. Mr. Garcia noticed that Trataros was making repairs beyond the spray painted lines encompassing the agreed upon repair areas, but he did not notice and was never told by Trataros that it was performing an extraordinary amount of work outside those lines. Transcript at 379-80. Mr. Garcia's supervisor noticed that Trataros was working outside the agreed upon lines and asked Trataros's project superintendent about this. Mr. Garcia's supervisor was left with the impression that Trataros did not intend to submit a claim for the work beyond the agreed upon areas. Transcript at 395-97. GSA employees were there when Trataros was performing its work, but Trataros's project manager did not recall discussing with them that Trataros was exceeding the scope of the agreed upon areas to be repaired. Transcript at 306.

On August 26, 1998, after Trataros completed its loggia repair work, Trataros informed GSA that a total of 3136 square feet of surface area had been repaired, of which GSA was responsible for 2482 square feet. Trataros asked for \$55,838 to repair the 2482 square feet. Exhibit 33; Transcript at 411. On February 12, 1999, Trataros submitted a revised proposal, which asked for \$62,217. Exhibit 37. O'Brien Kreitzberg responded that it appeared that Trataros was trying to recover for the cost of repairs necessitated by damage it had caused. In addition, O'Brien Kreitzberg said that Trataros had revised the scope of the work for Trataros's convenience and without any approval from GSA, and O'Brien Kreitzberg denied Trataros's revised proposal. Exhibit 38.

On March 2, 1999, Trataros submitted a claim to the contracting officer for an equitable adjustment to the contract price of \$47,217, which was the \$62,217 it asked for in

its February 12 proposal, less the \$15,000 that GSA had already paid for repairing the loggias. Exhibit 39. The contracting officer denied Trataros's claim on May 11, 1999. She concluded that GSA had not directed or requested Trataros to repair more than the agreed upon number of square feet of surface area in the loggias, and that any additional areas that Trataros repaired were either for its own convenience or to repair damage that it had caused. Exhibit 40.

The contract provided that the contracting officer alone had the power to bind GSA, unless she authorized someone else to act for her. Exhibit 1 at 0148. The contract also provided that Government inspections were for the sole benefit of the Government, and that a Government inspector was not authorized to change the contract without the written authorization of the contracting officer. Exhibit 1 at 0161. The contract allowed the contracting officer to make changes to the contract work. If such a change increased Trataros's costs, GSA was required to make an equitable adjustment to the contract price to compensate for the added costs. Exhibit 1 at 0178-79.

Discussion

Trataros is entitled to be paid for the repair work that the contracting officer directed it to perform. The contracting officer's direction, given to Trataros on July 8, 1998, was to repair the loggias at a price to be determined later in the locations agreed upon by Trataros and O'Brien Kreitzberg. The agreement regarding locations was that Trataros would repair 834 square feet of stucco, and that GSA would pay for 662 of those square feet. In response to RFP 34, Trataros said that it would repair the 662 square feet for \$14,893, and GSA paid Trataros \$15,000 for the agreed upon loggia repair work.

Trataros is not entitled to be paid for the work that it performed in addition to the limited amount of work that the contracting officer directed it to perform. Although O'Brien Kreitzberg and GSA employees saw that Trataros was performing repair work outside the agreed upon areas, their observations do not entitle Trataros to recover. The contract expressly stated that only the contracting officer or someone authorized to act on her behalf could change the terms of the contract, and there is no evidence that Trataros's work beyond the agreed upon areas was called for by the contracting officer or by someone authorized to act for her. In some circumstances, a contracting officer can ratify someone else's unauthorized direction to perform additional work. Here, however, there is no evidence that anyone from GSA or O'Brien Kreitzberg ever told Trataros to perform work outside the agreed upon areas, or that the contracting officer knew that Trataros had gone beyond the agreed upon repair areas until after Trataros completed the work. Trataros has not pointed to any contract provision or legal theory that would entitle it to payment for work in addition to that which the contracting officer directed it to perform on July 8, 1998.

Decision

The appeal is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

I concur:

EDWIN B. NEILL
Board Judge