

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: February 21, 2001

GSBCA 15059

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, during the course of the contract, GSA changed its requirement for the type of paint to be applied to exterior concrete surfaces and that this change resulted in increased costs. Trataros elected to use the Board's accelerated procedure in order to resolve this case, see Rule 203 (48 CFR 6102.3 (1999)), and a hearing was held. Because the contract's terms were latently ambiguous and Trataros has not established that it relied upon its present interpretation of the ambiguity when it prepared its bid, we deny the appeal.

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. Exhibit 1. Section 09900 of the contract's statement of work contained the specifications related to painting. Exhibit 1 at 1179. Paragraph 1.3 of section 09900 required Trataros to submit product data for each paint material that it planned to use

and to submit samples of each material and color. Exhibit 1 at 1181. Paragraph 1.4 required Trataros to prepare field samples by applying its paint materials on exterior walls so that GSA could determine whether the samples were acceptable. Exhibit 1 at 1182.

Paragraph 2.4 of section 09900 contained the specifications for primers and read, in part:

B. Available Products: Subject to compliance with requirements, prime coat materials that may be incorporated in the Work include, but are not limited to, the following:

.....

3. Exterior Concrete and Masonry Primers: For concrete and masonry to receive elastomeric finish coating:

[List of manufacturers and their products omitted]

4. Exterior Stucco Primers: For new and existing stucco to receive elastomeric finish coating:

[List of manufacturers and their products omitted]

Exhibit 1 at 1185-86. Several times, section 09900 said that the primer and the finish coat had to be compatible. Exhibit 1 at 1184, 1185, 1188, 1190, 1192.

Paragraph 3.7.B of section 09900 contained the exterior paint schedule for concrete, stucco, and masonry, and read as follows:

B. Concrete, Stucco, and Masonry, as indicated:

1. Semigloss, Acrylic-Enamel Finish, for trim: 2 finish coats over a primer . . .

2. Acrylic Elastomeric Exterior Coating, for stucco surfaces: Two finish coats over primer . . .

3. Lusterless (Flat) Acrylic Latex Finish, where indicated: Two finish coats over primer . . .

Exhibit 1 at 1195. The contract drawings did not indicate where any particular type of finish would be applied to an exterior surface. Exhibit 40 at 74; Transcript at 668. The drawings referred to the exterior surface of the building as "concrete/stucco." Exhibit 1 (Drawings 4-1 through 4-4, Masonry Restoration Keynote 6).

In June 1997, Trataros subcontracted with Rio Piedras Painters to perform the interior and exterior painting and masonry restoration and cleaning work required by the contract. The subcontract did not say what kind of paint Rio Piedras would apply to any of the

building's surfaces. Exhibit 39. The product data submitted by Rio Piedras in September and in November 1997, stated that the primer it intended to apply on exterior concrete and masonry to receive an elastomeric finish was Glidden Glid Seal Waterproofing Clear Sealer No. 19528, and that a different primer would be applied on stucco that would receive an elastomeric finish. Rio Piedras provided data regarding the finish that it would use for exterior trim, the elastomeric finish that it would use for stucco, and the latex finish that it would use where indicated. Exhibits 7, 8.

On May 7, 1998, GSA's construction manager, O'Brien Kreitzberg, sent Notice of Non-Conformance No. 111 to Trataros. Trataros had begun painting the exterior of the building, but had not submitted samples of each paint material and color, as required by paragraph 1.3 of section 09900 of the contract. In addition, Trataros had not prepared any field samples, as required by paragraph 1.4 of that section. O'Brien Kreitzberg notified Trataros that it was proceeding to paint at its own risk. Exhibit 9.

Throughout the summer and fall of 1998, Rio Piedras continued to paint the exterior of the building. Transcript at 660-62. The primer that Rio Piedras applied was Glid Seal Waterproofing Clear Sealer No. 19528. Although its submittals said it would use this primer for exterior concrete and masonry to receive an elastomeric finish, Rio Piedras was using latex paint for the first finish coat. Exhibit 16.

A number of project meetings were held in the summer and fall of 1998, during which the exterior paint was discussed. Exhibits 10-14. At the July 22 meeting, GSA "expressed concern as to whether the proper paint had been used for the first coat and if a primer had been applied (latex rather than elastomeric paint)." Exhibit 10. Subsequently, Trataros hired a historic preservation consultant to render an opinion as to the composition of the exterior surface of the building. Exhibit 18; Transcript at 677-78. Throughout the summer and fall, Trataros worked to supply the paint samples required by section 09900 of the contract. Exhibits 11-14. Rio Piedras finished applying the first finish coat of latex paint in the summer of 1998, and started applying the second finish coat of latex paint sometime in the fall of 1998. Transcript at 660-62. On October 13, GSA's project architect stated in a letter addressed to O'Brien Kreitzberg that Trataros should supply paint samples of elastomeric paint for the exterior of the building. Exhibit 33. Trataros did so, and those samples were approved in October and November 1998. Exhibits 34-37.

On November 9, Trataros provided GSA with a copy of the historic preservation consultant's report, which concluded that the surface of the building should be considered concrete, unless testing proved otherwise. Trataros told GSA that the building's exterior surface was concrete, not stucco, and that the specifications required the application of a latex paint. Exhibit 18. O'Brien Kreitzberg agreed that the building was concrete, but did not agree that the specifications required a latex paint. According to O'Brien Kreitzberg, the contract required the use of elastomeric paint. Exhibit 22.

On December 7, 1998, Trataros notified GSA that the requirement to apply an elastomeric finish constituted a change to the contract, and requested that GSA increase the contract price by \$39,327. This figure took into account the difference in price between latex and elastomeric paints, but did not take into account any difference in the labor required to apply the two types of paints. Exhibit 23. O'Brien Kreitzberg responded that the building

was expected to be stucco, which would have been painted with elastomeric paint. O'Brien Kreitzberg did not believe that Trataros was due any increase in contract price due to the fact that the building was concrete. Exhibits 24, 29. In January 1999, Rio Piedras informed Trataros that it considered the requirement for elastomeric paint to be a change to the terms of its contract, and that it would apply two coats of elastomeric paint to all of the exterior walls for approximately \$104,000. Exhibit 30.

On April 28, 1999, Trataros submitted a claim to the contracting officer for \$65,443 for painting the exterior of the building with elastomeric paint.¹ Exhibit 30. Trataros's project superintendent, who was not present when Trataros prepared its bid for the contract, explained how he concluded that the contract called for latex paint on the exterior of the building. He reasoned that paragraph 3.7.B of section 09900 specified the types of paint to be used for exterior concrete, stucco, and masonry. Subparagraphs 3.7.B.1 and 3.7.B.2 specified the types of paint to be applied to trim and to stucco, but did not mention concrete. This left only subparagraph 3.7.B.3, which called for the use of latex paint, "where indicated." Although the drawings did not indicate where latex paint would be applied to exterior surfaces, Trataros's job superintendent viewed subparagraph 3.7.B.3 as being the only subparagraph that could apply to exterior concrete. If that subparagraph did not apply to exterior concrete, then he did not see how Trataros would have known how to paint the building's exterior concrete. Exhibit 40 at 69-74, 80. A Trataros witness testified that latex paint was compatible with a concrete surface and is the type of paint which is predominantly used for all exterior concrete. Transcript at 668-69.

The contracting officer denied the claim on June 11, 1999. In deciding that the contract required Trataros to use elastomeric paint for the finish coats on the exterior of the building, the contracting officer reasoned that the contract drawings referred to the building's exterior surfaces as concrete/stucco, and the specifications required the use of elastomeric paint on stucco surfaces. Although the specifications stated that latex paint would be used where indicated, the drawings never indicated where any latex paint would be applied. The primer that Rio Piedras applied was described in its product data submittal as a primer that would be used on concrete that would receive an elastomeric finish coat. Rio Piedras never submitted product data for a primer that would "correspond to" a latex finish coat. Exhibit 31.

In the fall of 1999, Rio Piedras finished painting the building with the second finish coat of latex paint. It seems that Trataros either directed or permitted Rio Piedras to complete painting the building with a second latex finish coat in order to meet a December 1999 project completion date. Transcript at 652.

In early 2000, Trataros hired a subcontractor other than Rio Piedras to paint the exterior surfaces of the building with elastomeric paint. Transcript at 653. The subcontractor

¹ At the hearing, Trataros increased the amount of its claim. Its April 28, 1999 claim included credits of \$1604 for paint, \$9400 for labor, plus the associated overhead and profit for the cost of applying the second coat of latex paint. Exhibit 30; Transcript at 681-82. Trataros no longer believes that these credits are appropriate because after the claim was prepared, Rio Piedras finished applying the second coat of latex paint. Transcript at 649.

applied two coats of elastomeric paint to the building in the spring of 2000. Transcript at 657. Our record does not contain a copy of the subcontract and we do not know what Trataros paid the subcontractor for its work.

Trataros's bid included \$150,000 for interior and exterior painting, but we do not know what Trataros included in this amount. There is no testimony or documentation to explain how Trataros constructed its bid. Exhibit 38; Transcript at 685-87. A progress payment activity breakdown prepared by Trataros shows that the total value of "Ext Restore - Paint Bldg Exterior" was \$100,000. Exhibit 6; Transcript at 685-91.

Discussion

If GSA made a change to the contract work that increased Trataros's costs, the contract requires GSA to make an equitable adjustment to the contract price to compensate for the added costs. Exhibit 1 at 0178-79. In its complaint, Trataros says that the direction to apply elastomeric finish coats to the building's exterior concrete surfaces was a change to the terms of the contract. Complaint ¶ 8. GSA says that there was no change because the contract, read as a whole, required an elastomeric finish. Respondent's Post-Hearing Brief at 2-4.

The contract can reasonably be read to say that an elastomeric finish, not a latex finish, was required on exterior concrete. The contract contained a specification for a primer to be applied to exterior concrete that would receive an elastomeric finish coat and required finish coats to be compatible with primers. The contract did not contain a specification for a primer to be applied to exterior concrete that would receive a latex finish coat. If the contract meant to allow a latex finish coat, it is reasonable to assume that it would have specified a primer to be applied under a latex finish coat. Because the contract only specified a primer to be applied under an elastomeric finish coat, a reader could reasonably conclude that an elastomeric finish coat was required. This interpretation of the contract is bolstered by the contract drawings, which did not show where a latex finish coat would be applied to the exterior of the building.

The contract can also reasonably be read to say that a latex finish, not an elastomeric finish, was required on exterior concrete. The heading of paragraph 3.7.B of section 09900 said that the paragraph listed the required finish for both exterior stucco and exterior concrete. The paragraph specified that stucco would receive elastomeric paint and said that latex paint would be used where indicated. The contract drawings indicated that the exterior of the building was concrete/stucco and reading this together with paragraph 3.7.B leads to the conclusion that the stucco portion of the building was to receive elastomeric paint and the concrete portion of the building was to receive latex paint. If paragraph 3.7.B did not mean that latex paint would be used on concrete, then its reference to latex paint was superfluous and it failed to address the finish to be used on concrete even though it purported to do so. Although the contract did not contain a specification for a primer to be applied to exterior concrete that would receive a latex finish coat, this gap is bridged by the contract's requirement that the primer be compatible with the finish coat. Also, latex is commonly applied to exterior concrete surfaces and so it is reasonable to read the contract to say that latex was required on such surfaces.

The contract's requirements regarding the finish required for exterior concrete are ambiguous because they are liable to more than one reasonable interpretation. The ambiguity, however, was not so glaring and obvious as to require Trataros to inquire about the contract's provisions before it submitted its bid. Instead, the ambiguity was a subtle one and a reasonable contractor would have had no clear warning that anything was amiss when it read the specifications and reviewed the drawings.

Because the ambiguity was not patently obvious, GSA will bear the burden of compensating Trataros for the cost of its interpretation of the contract's provisions, if Trataros can establish that its interpretation was reasonable and that it actually and reasonably relied upon its interpretation at the time it submitted its bid. Trataros has the burden of establishing its reliance by a preponderance of the evidence. Fruin-Colnon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990). The best evidence of reliance is a bid work sheet or other document generated at the time the bid was prepared. Courts and boards have decided that statements made in support of a contractor's case, years after a dispute arises, are not particularly persuasive evidence. Fry Communications v. United States, 22 Cl. Ct. 497 (1991); Maintenance Engineers v. United States, 21 Cl. Ct. 553 (1990); American Transport Line, ASBCA 44510, 93-3 BCA ¶ 26,156; Malloy Construction, ASBCA 25055, 82-2 BCA ¶ 16,104.

There is no evidence to establish when Trataros first read the specifications to say that a latex finish was required on exterior concrete, much less to establish that Trataros relied upon that interpretation when it submitted its bid to GSA. We have no testimony to show how Trataros read the paint specifications when it constructed its bid. The only relevant documentary evidence consists of a document that reflects Trataros's bid, which showed \$150,000 for interior and exterior painting, and its progress payment activity breakdown, which showed \$100,000 for exterior painting. According to Trataros's claim, the cost of applying an elastomeric finish is much closer to \$100,000 than is the cost of applying a latex finish, so the available documentary evidence contradicts the notion that Trataros based its bid upon the reading of the contract that it advances today. It is well settled that when a contract contains a latent ambiguity, the contractor has the burden of proving that it relied upon its own reasonable interpretation of the ambiguous contract term when it submitted its bid. In the absence of such proof, as is the case here, the contractor cannot recover.

Decision

The claim is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

I concur:

EDWIN B. NEILL
Board Judge