

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED: September 29, 2005

GSBCA 16688, 16689

PANGEA, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Tim Gelnett, Contracts Manager of Pangea, Inc., St. Louis, MO, appearing for Appellant.

Mark R. Warnick, Office of Regional Counsel, General Services Administration, Kansas City, MO, counsel for Respondent.

GOODMAN, Board Judge.

Appellant, Pangea, Inc., appeals two contracting officer final decisions with regard to unilateral deductive modifications to two contracts with respondent, General Services Administration (GSA). Appellant has elected the small claims procedure, and the parties have elected to have the appeals decided on the written record without a hearing, Rule 202¹, Rule 111. The appeals have been consolidated as they involve common operative facts and questions of law. Rule 124.

¹ 48 CFR 6102.2 (2004). A decision pursuant to this rule is final and conclusive, shall not be set aside except in case of fraud, and has no value as precedent.

Factual Background

Both contracts were sole source procurements for roof replacement at federal buildings in St. Louis, Missouri. Appellant submitted proposals, negotiations were conducted, and fixed-price contracts were awarded. In its proposals, appellant included, as components of the proposed contract prices, estimates of bond premiums for itself and its subcontractors and overhead and profit on these premiums. According to appellant, when proposals were submitted, the exact costs of the bond premiums were not known, but the estimates were calculated from a bond costing table calculated at a specific percentage of the estimated cost. Respondent's Supplemental Appeal File, Exhibit 4, Letter from Appellant to the Contracting Officer (Jan. 17, 2003).

During discussions, GSA raised various questions concerning the calculation of appellant's contract prices, including the magnitude of the amounts included in the initial proposals for bond premiums and the allowability of profit and overhead on bond premiums. GSA requested revised proposals. According to GSA, the revised proposals still contained overhead and profit calculated upon the bond premiums. GSA states that ultimately the parties did not reach agreement as to the various individual cost elements of the proposal but the total contract prices that were negotiated and agreed were considered fair and reasonable by GSA. Appeal Files², Contracting Officer's Memorandum of Positions at 1.

The contracts contained the following clauses which read in relevant part:

FAR 52.232-5 Payments Under Fixed Price Construction Contracts (May 1997):

(a) *Payment of Price.* The Government shall pay the Contractor the contract price as provided in this contract.

(b) *Progress Payments.* The Government shall make progress payments monthly as the work proceeds, . . . on estimates of work accomplished. . . .

. . . .

(g) *Reimbursement for Bond Premiums.* In making these progress payments, the Government shall, upon request, reimburse the Contractor for the amount of premiums paid for performance and payment bonds (including coinsurance

² Appeal Files for both appeals contain identical exhibit numbers and substantially similar documentation in the exhibits.

and reinsurance agreements, when applicable) after the Contractor has furnished evidence of full payment to the surety.

....

FAR 52.215-10 Price Reduction for Defective Cost or Pricing Data (Oct 1997)

(a) If any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because

(1) The Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data;

(2) A subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data; or

(3) Any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction. . . .

....

(c)(1) If the Contracting Officer determines under paragraph (a) of this clause that a price or cost reduction should be made, the Contractor agrees not to raise the following matters as a defense: . . .

(iii) The contract was based on an agreement about the total cost of the contract and there was no agreement about the cost of each item procured under the contract.

Appeal Files, Exhibit 6.

Appellant executed Certificates of Current Cost and Pricing Data before contract award, stating that the "cost or pricing data . . . submitted . . . are accurate, complete, and current as of May 23, 2002," the day when price negotiations were concluded and price agreement was reached. Appeal Files, Exhibit 1. The contracts were awarded for fixed

prices on June 20, 2002 for \$1,554,166 and on July 19, 2002 for \$1,150,052. Appeal Files, Contracting Officer's Memorandum of Positions at 1.

Prior to the first payment under the contracts, appellant submitted receipts for bond payments which were less than the amounts in the proposals for both contracts. On October 28, 2004, GSA issued unilateral modifications to reduce the contract amounts by \$23,758 and \$9016. GSA asserts that the amounts of the unilateral modifications were the alleged differences between the estimated amounts for bond premiums submitted in the revised proposals and the actual costs of the bonds. Appeal Files, Exhibit 2. On April 18, 2005, appellant submitted letters disagreeing with the unilateral modifications and requesting a contracting officer's final decision. Appeal Files, Exhibit 4. On June 16, 2005, the contracting officer issued final decisions affirming the unilateral modifications. Appeal Files, Exhibit 5. Appellant appealed both decisions by notices of appeal dated June 30, 2005.

Discussion

The Government has the burden of proving entitlement to a deductive change order by demonstrating that the contractor has not fulfilled the cost or pricing data submission requirements. *See, e.g., Aydin Monitor Systems*, NASA BCA 381-1, 83-1 BCA ¶ 16,500. The Government has not met its burden in this case.

GSA asserts that provision (g) of the Payments clause obligates it to pay appellant only for the actual premiums it paid to the surety. Appellant disagrees, stating that it is entitled to the total fixed price of both contracts. In the absence of a bidding schedule for a fixed-price contract that contains specific language requiring bidders to include actual bond costs in their bids,³ the Payments clause included in appellant's fixed-price contracts does not limit the contractor's right to receive the entire contract price, even if its actual bond premiums incurred after contract award are less than those estimated during the bidding process. *Bean Stuyvesant LLC*, ASBCA 52889, 01-1 BCA ¶ 31,224 (interpreting substantially similar language to be procedural in nature, giving the contractor the option of receiving reimbursements for performance and payment bond premiums as part of progress payments and not restricting the contractor's right to recover the lump sum bid as bond costs); *see also Moulder Bros.*, ASBCA 31769, 86-3 BCA ¶ 19,297; *Reese Industries*,

³ *See, e.g., D&J Construction, Inc.*, ENGBCA 5291, 88-2 BCA ¶ 20,678; *Lane Construction Corp.*, ENGBCA 5880, 93-1 BCA ¶ 25,448 (Government included language in the bidding schedule restricting bond costs to reimbursement for actual bond premiums paid).

ASBCA 25862, et al., 83-1 BCA ¶ 16,245; *Spickard Enterprises, Inc.*, ENGBCA 4509, 81-1 BCA ¶ 14,878.

There is no evidence in the record that appellant was required to include actual bond premiums in its proposal. Rather, the parties entered into negotiations and the dollar amounts of the bond premiums included in appellant's initial and revised proposals were estimates of bond premiums to be incurred by appellant and its subcontractors if the contracts were awarded, calculated at a percentage of the proposed contract prices. The parties did not reach an agreement as to the various individual cost elements of the proposal; their agreement was only as to the total contract prices.

GSA asserts further that, because appellant executed certificates of cost and pricing data, it is entitled by operation of the Price Reduction for Defective Cost and Pricing Data clause to reduce the contract prices by the difference between the actual bond premiums and the estimated amounts included in the proposals. Furthermore, it argues that appellant violates the clause by asserting as a defense what it is prohibited to assert in paragraph (c)(1)(iii) of the clause, i.e., that the contract was based on an agreement about the total cost of the contract.

These arguments fail because estimated costs submitted in proposals are not cost and pricing data and therefore cannot be defective cost or pricing data. Even though such estimates are less than actual costs incurred after award, the Price Reduction for Defective Cost and Pricing Data clause does not entitle respondent to reduce the contract price under these circumstances. *See, e.g., Plessey Industries, Inc.*, ASBCA 16720, 74-1 BCA ¶ 10,603 (contractor's judgments as to estimated future costs are not verifiable facts and are therefore not cost or pricing data); *see also GKS, Inc.*, ASBCA 47692, 01-1 BCA ¶ 30,914 (citing *Litton Systems, Inc.*, ASBCA 36509, 92-2 BCA ¶ 24,842).

Decision

The appeals are **GRANTED**.

ALLAN H. GOODMAN
Board Judge