In the United States Court of Federal Claims

No. 96-571C

(Filed: October 13, 1999)

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AMERICAN RENOVATION &

CONSTRUCTION COMPANY, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

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Motion for Reconsideration; Absence of New Factual or Legal Matters.

William L. Bruckner, San Diego, California, for plaintiff.

Andrea I. Kelly, Department of Justice, Washington, D.C., for defendant.

ORDER

The American Renovation & Construction Company, Inc., (ARC) has filed a motion to reconsider the Court's opinion and order, issued September 22, 1999, granting the government's Motion for Summary Judgment. **ARC's motion is hereby DENIED**.

The decision to grant a motion for reconsideration is left to the sound discretion of the court. Yuba Natural Resources, Inc. v. United States, 904 F.2d 1577, 1583 (Fed.Cir.1990). To prevail on a motion for reconsideration, the movant must point to a manifest, i.e., clearly apparent or obvious, error of law or a mistake of fact. Principal Mutual Life Ins. Co. v. United States, 29 Fed.Cl. 157, 164 (1993). A court, therefore, will not grant a motion for reconsideration if the movant "merely reasserts ... arguments previously made ... all of which were carefully considered by the [trial c]ourt." Id. (quoting Frito-Lay of Puerto Rico v. Canas, 92 F.R.D. 384, 390 (D.P.R.1981)).

ARC has merely reasserted the arguments previously made before this Court. Indeed, it appears most of its motion consists of previously submitted text literally cut and pasted for use here. Each of these arguments was addressed in the Court's earlier decision. The Court will nonetheless briefly address the issues raised in the motion and reiterate its position.

1. When the contract was bid ARC did not know the proprietary nature of the specification.
2.

ARC was aware of the proprietary nature of the roof specifications before the contract was awarded, yet failed to file a formal protest. ARC pointed to no evidence which raises a contrary inference. Indeed, the matters it cites reaffirm its knowledge of the "...requirements mandating the use of the Ziplast products

only for the referenced solicitation."

1. ARC conditioned its bid for the use of the Polyglass product.
2.

After the submittal was rejected and asserting that the specifications were proprietary, ARC nonetheless registered its intent to comply with the contract it had just been awarded:

Finally, as per the guidelines set forth in your letter of September 28, 1994 (of which I received a FAX copy today), *AMERICAN RENOVATION & CONSTRUCTION COMPANY* will abide by the specification as written. ARC letter of October 3, 1994.

1. ARC did challenge the Navy's specifications.
2.

If ARC wished to challenge the Navy's specifications as proprietary, it should have made a formal protest. It did not.

1. There is evidence that the fire rating was waived by the Navy when it awarded the contract or at least the Navy knew the product ARC bid on was not Class A fire rated over the entire slope of the building.
2.

ARC argued previously that the Class A fire requirement was added by the original designer, and that the Navy did not require the designer to specify a Class A system. Regardless of how the requirement came to be, it was a part of the solicitation and the contract. The government is entitled to insist on safety standards for which it has explicitly contracted. The Navy was not arbitrary and capricious in its refusal to change the requirement.

ARC also argued that the pre-contract Polyglass submittal indicated the limited fire rating it intended to supply. We repeat: When ARC accepted the contract it accepted the specifications, including the fire rating specification.

1. SBS and APP are equivalent products

The contract called for an "aluminum foil faced modified bitumen styrene butadiene (SBS) cap sheet." ARC failed to present a genuine dispute that APP is the functional equivalent of the contractually required SBS. The transcript testimony ARC points to in its motion does not raise any inference to the contrary. It merely suggests that both products are widely used, and both products can be torch applied. It does not state that they are functional equivalents. Other parts of these same transcripts cited by the Court clearly state that SBS is in a number of ways a superior product to APP.

1. ARC's VECP submittal is not a claim but a fact that supports ARC's position that the product was equal.
2.

We simply do not have jurisdiction over this aspect of ARC's claim, in whatever form ARC wishes to couch it. This assertion was not even raised until ARC responded to the government's motion for

summary judgment. While ARC complains that this is form over substance, the Supreme Court has made clear that the Court of Federal Claims has jurisdiction "only of those [claims] which by the terms of some act of Congress are committed to it." Hercules, Inc. v. United States, 116 S.Ct. 981, 985 (citing Thurston v. United States, 232 U.S. 469, 476 (1914)). The claim ARC submitted did not refer to VECPs, nor did it allude to them in a manner which would have alerted the contracting officer that they were involved in the claim. The Court expresses no opinion on ARC's right to make a claim to the contracting officer based on the VECP rejection.

1. The Navy clearly breached its obligation of good faith and fair dealing.
2.

ARC repeats the Court's finding that the specifications were in fact proprietary. This much is correct. The Navy was wrong to employ a proprietary specification. But given ARC's prior knowledge, there was no breach of good faith and fair dealing.

1. Eichleay damages are composed solely of unabsorbed home office overhead and have nothing to do with field office overhead and the additional direct costs to utilize the MBTech product
2.

ARC did not establish even a prima facie case of injury. It was not on standby as required to recover Eichleay damages. Its other damage claims were either abandoned, unproved, or not presented in its initial claim.

Conclusion

ARC has presented no evidence or reasonable inferences from the evidence which raise a genuine factual dispute. As such, summary judgment in favor of the government was appropriate. ARC's motion for reconsideration has failed to point to a manifest error of law, or a mistake of fact, or a material factual dispute.

IT IS SO ORDERED.

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LAWRENCE M. BASKIR

Judge