



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 16, 2009

CBCA 1291

BEHAVIORAL SYSTEMS SOUTHWEST, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Christopher S. Lindholm, President of Behavioral Systems Southwest, Inc., San Clemente, CA, appearing for Appellant.

William Robinson and Dionis Gauvin, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **McCANN**, and **SHERIDAN**.

McCANN, Board Judge.

Appellant claims entitlement to an equitable adjustment in the contract price because it was required to perform contract work which it was unaware of at the time of contracting. We deny the claim.

Facts

On August 8, 2005, the Federal Bureau of Prisons (BOP) awarded contract DJB200785 to appellant, Behavioral Systems Southwest, Inc. (BSS). Appeal File, Exhibit 12. The statement of work (SOW) set forth the performance requirements and is entitled

Comprehensive Sanctions Center with MINT Program.¹ *Id.*, Exhibit 2. The work involves community-based residential and nonresidential correctional services obtained through contractual agreements with state, county, and city governments and private corrections contractors. BSS was to provide services which include employment and residence development and other self-improvement opportunities to assist federal offenders in becoming law-abiding citizens. *Id.*

The contract required BSS to provide a facility that complied with the Architectural Barriers Act of 1968 (ABA). Accordingly, on December 9, 2004, BSS certified that each of its facilities:

complies with the most current local, state, and federal laws and regulations (or whichever is most stringent) concerning facility safety, zoning, occupancy, Architectural Barriers Act (or a reasonable accommodation has been made off-site), and air exchange as outlined in the Statement of Work and the Solicitation for the above reference[d] RFP [Request for Proposals].

Appeal File, Exhibit 4 at 5-6.

On February 23, 2005, BOP wrote to BSS indicating that “[a]n ABA survey must be conducted by an independent third party certified in ABA regulations for the detailed assessment of the facility.” Appeal File, Exhibit 5 at 2. The original survey that BSS provided to BOP had been conducted by Arizona Bridge to Independent Living (ABIL) and was dated two years earlier, April 23, 2003. *Id.*, Exhibit 6 at 36-45. By letter of April 4, 2005, the BOP indicated that this survey would not suffice and that a new survey would have to be conducted. *Id.*, Exhibit 7. BSS ordered a new survey to be done by ABIL. By letter dated May 3, 2005, ABIL informed BSS of the results of its survey, which was actually a follow-up to its 2003 survey. *Id.*, Exhibit 10. Nothing in either survey requires new stairways to be built to bring the facilities into compliance with the ABA regulations or any other regulations.

Prior to award, BSS also hired Abilities Unlimited, Inc. (AU) to conduct a survey of the facilities to assess the degree of compliance with the Uniform Federal Accessibility Standards as referenced in the ABA. Appeal File, Exhibit 28 at 61-119. In its July 2005

¹ MINT stands for mothers with infants nurturing together.

report, AU indicated “N/A” in the sections marked “Stairs.” *Id.* at 69, 73. No explanation has been offered by BSS as to why AU marked these sections “N/A.”²

Subsequent to award, the BOP conducted a full monitoring in accordance with the SOW. Appeal File, Exhibit 3 at 109. A “full monitoring” is a “comprehensive inspection and review of all aspects of the contractor’s operation and facility.” *Id.* A full monitoring report contains all serious deficiencies detected and “outlines appropriate corrective action.” The contractor is to respond within thirty days with a plan of action for correction. *Id.*

In this case, the full monitoring report dated November 2, 2005, indicated that the following minor repairs require corrective action: “1. Both sets of stairs at the main facility have serious rust issues and [are] in need of replacement.” Appeal File, Exhibit 17 at 6. Following the report, the BOP wrote a separate letter to BSS, dated February 8, 2006. In its letter, the BOP indicated that:

The purpose of this letter is to convey deficiencies identified during the Full Monitoring of November 2005.

Based on our review of the Architectural Barriers Act, the following deficiencies were noted and require corrective action.

....

2. Stairs - The stairs vertical clearance needs to comply with ABA 307 protruding objects and ABA 505.5 handrail clearance.

....

Please provide a response within thirty (30) days as to the status of each of these deficiencies and a time frame for completion.

Id., Exhibit 20.

² On page 3 of its brief, BSS states: “The AU report indicates that there were no vertical clearance problems and does not mention any stair issues.” BSS has not pointed out where the report makes such indications, and we have not found them. Accordingly, we give this statement no weight.

Mr. Christopher Lindholm, President of BSS, responded by letter dated March 14, 2006:

This letter is written in response to your correspondence, dated February 8, 2006, concerning compliance with the Architectural Barriers Act (ABA). Our plans of action to specifically address the deficiencies listed in your correspondence are as follows:

....

2. Behavioral Systems Southwest (BSS) has obtained bids from Carat Steel to install five new stairways at both the Phoenix and Roosevelt locations. Copies of these bids are attached. BSS plans to have the new stairways installed by July 31, 2006. The new stairways will comply with required vertical and handrail clearances.

Appeal File, Exhibit 21.

BSS replaced the stairs in November 2006. Over a year later, on February 26, 2008, BSS submitted a formal claim for additional compensation in the amount of \$68,562.55. In this claim BSS states:

At no time prior to the issuance of said full monitoring report, which was issued 5 months after contract performance began, was BSS aware of the requirement to replace all stairs at both places of performance. As a result, the cost to replace the stairs was not factored into my best and final offer.

Appeal File, Exhibit 24 at 1. The BOP denied the claim on April 28, 2008. *Id.*, Exhibit 27.

Discussion

BSS claims entitlement to \$68,562.55 for replacing the five staircases. BSS alleges that it was directed to replace these staircases because the BOP indicated in its February 8, 2005, letter that the staircases needed to comply with ABA standards 307, protruding objects, and 505.5, handrail clearance. A review of the evidence reveals that the BOP did not direct BSS to replace the staircases; rather, BOP simply directed BSS to comply with the contract, which in turn required compliance with ABA standards. As evidenced by its

March 14, 2006, letter, BSS elected to comply with the contract and the standards by replacing the staircases.³

BSS does not dispute that the stairs must be brought into compliance with the contract and the ABA standards referenced therein. Nevertheless, BSS claims that it is entitled to reimbursement because it was unaware of the need to bring the stairs into compliance prior to award. The fact that it was unaware of the contract requirements, however, is no reason to be excused from the effect of those requirements.

BSS claims that all three of its pre-award reports either indicate that the stairs were in compliance, or fail to indicate that the stairs were not in compliance. Thus, it contends that it was unaware of the need to factor into its bid the cost of replacing the stairs. Upon review of these reports, it is clear that compliance of the stairs was not addressed. Regardless, BSS is bound to fulfill the contract requirements.

Decision

The appeal is **DENIED**.

R. ANTHONY McCANN
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

PATRICIA J. SHERIDAN
Board Judge

³ It does not appear from the record that BSS discussed with BOP alternative means of complying with the contract.