UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: June 28, 2013

CBCA 2409

JAMES A. CUMMINGS, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Jason D. McLarry of Troutman Sanders, LLP, Atlanta, GA, counsel for Appellant.

Ricarto Brazela, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **VERGILIO**, and **STEEL**.

SOMERS, Board Judge.

James A. Cummings, Inc. (appellant or Cummings) alleges that the Department of Veterans Affairs (respondent or VA) owes it $213,254 for requiring steel carrier piping for the below grade fuel piping system at a medical center. The parties have elected to waive a hearing and submit the case on the written record pursuant to Board Rule 19. The record considered by the Board in issuing this decision consists of the pleadings, the appeal file exhibits, the parties' submissions, including declarations, affidavits, and excerpts from deposition transcripts. For the reasons discussed below, we grant the appeal.

Findings of Fact

On January 27, 2010, Cummings and the VA entered into a firm fixed-price contract which required the contractor to furnish and install three separate fuel systems (gas, engine-generated, and vehicular fueling) at a VA medical center in Orlando, Florida. Based upon its interpretation of the contract requirements, Cummings intended to supply a glass fiber reinforced plastic (FRP) carrier and containment pipe system for the underground fuel system.[1] Relying upon a different interpretation, the VA planned for the contractor to install steel carrier pipe housed within FRP containment pipe.

The contract specifications at issue here are found in Section 23 10 00, entitled "Facility Fuel Systems." This section sets forth the contract requirement for the project's diesel fuel oil and burner fuel oil tanks, piping, and accessories located outside, underground or above ground. The section is broken down into the following parts: General, Products, and Execution.

Part I, General, described the work and provided for quality assurance. Relevant to this appeal is subsection 1.3, Quality Assurance, which provides that, among other things, the contracting officer's approval will be based on the contractor's certification that "the entire installation shall conform to requirements of local and state pollution control authorities." Another subsection, 1.4, Submittals, required the contractor to ensure that the fuel piping is compliant with standards established by ASTM (ASTM International, known until 2001 as the American Society for Testing and Materials) and UL (Underwriters Laboratories Inc.).

Part 2, the Products section, provides, in pertinent part:

2.5 PIPING, VALVES, FITTINGS

B. Steel Pipe and Fittings

[1] Cummings explains that "'[c]arrier' pipe refers to small bore piping that carries fuel or other materials from underground storage tanks to termination points, typically housing generators or other components that rely on combustion engines. 'Containment' pipe refers to larger diameter piping that encloses carrier piping to protect it and ensure fuel is not released into the environment in the event the carrier pipe is breached or otherwise compromised."

1. Piping: Steel, seamless or electric resistance welded (ERW), ASTM A53 Grade B or ASTM A106 Grade B, Schedule 40. Aboveground piping shall be painted . . . .

2.6 SECONDARY CONTAINMENT FOR UNDERGROUND FUEL PIPING SYSTEMS . . .

B. Glass Fiber Reinforced Plastic (FRP) Conduit:

1. Conform to UL 971 and ASTM D2996 using a filament winding process and epoxy or vinyl ester resins.

2. Design pipe, fittings and joining system for carrier pipe fuel service, 66 °C (150 °F), 1030 kPa [kilopascals] (150 psi [pound force per square inch] pressure, 68 kPa (20 inches Hg [hectogram]) vacuum.

The Execution Section, Part 3, contains these relevant parts:

3.3 INSTALLATION AND TESTING, UNDERGROUND PIPING SYSTEMS

A. Leak Detection system: Arrange fuel carrier piping, enclosed in secondary containment piping, to accommodate lead detection systems . . .

B. Steel Fuel Carrier Piping: All joints butt or socket welding. Threaded piping is not permitted. Piping ends shall be accurately cut, true and beveled for welding.

C. Glass Fiber Reinforced Plastic (FRP) Fuel Carrier Piping and Secondary Containment Piping: Install in accordance with printed instructions of pipe manufacturer. Installation personnel trained in accordance with Article, QUALITY ASSURANCE. Plastic piping not permitted in same secondary containment system with steam or condensate piping.

D. Secondary Containment Piping:

> 1. Provide sand bedding and backfill material for steel piping and pea gravel for FRP piping. . . .

Cummings reviewed the project specifications. In addition, it examined the state and local regulations and determined that Florida statutes require storage tank system equipment be approved before installation and use. In particular, Florida Administrative Code section 62.761-850(2)(a) provides that "storage tank system equipment used in the State of Florida must have the approval of the [Florida Department of Environmental Protection (FDEP)] before installation or use."

The Florida Administrative Code, chapter 62-761.500(8)(b), permits the use of either fiberglass reinforced plastic piping or other non-metallic piping, or coated steel piping. FDEP publishes an approved equipment list, which sets forth approved underground fuel carrier and containment piping. From this list, Cummings selected its fuel carrier and containment system to be used on the project. The system, identified as the Ameron International Dualoy® 3000/LCX product, a glass fiber reinforced plastic fuel carrier piping system, in addition to being approved by Florida authorities, met the UL 971 standard required by the contract specifications.

Cummings relied on sections 2.6(B) and 3.3(C) of the Facility Fuel System specification to prepare its proposal based on an FRP carrier and containment pipe system. Section 2.6(B) references carrier pipe and states that it must comply with UL 971. Section 3.3(C) provides installation and testing requirements for "Glass Fiber Reinforced Plastic (FRP) Fuel Carrier Piping and Secondary Containment Piping."

At some date after contract award, Cummings presented the VA with its plan to use the FRP carrier and containment system in submittal no. 231000-01. On June 9, 2010, the VA reviewed the submittal and determined that Cummings must review and resubmit its submittal. The VA advised that the "Manufacturer's literature and data include a fiberglass piping system; note that 23 10 00.2.5 requires steel piping for liquid fuels, 23 10 00.2.6. requires FRP products for containment purposes – intention of the submitted product is not clear." This response provided Cummings with its first indication that something was awry.

On July 12, 2010, Cummings responded through request for information (RFI) 0052, stating that "installation of a fuel system utilizing a steel pipe for liquid fuels, as indicated in our submittal response, conflicts with both the requirement of the specification and local codes." Cummings asserted further that:

> 1. There are no factory fabricated containment systems utilizing steel piping currently approved by the Florida Department of Environmental

Protection. As a result the system you describe in your submittal response appears to conflict with the specification section 23 10 00.1.3.3F requiring the installation to conform to the requirements of local and state pollution control authorities.

2. The project requires the installation of over 500 linear feet of 4" carrier piping. If this piping is steel, then an 8" secondary containment system will be needed. There are currently no 8" UL listed FRP containment systems. Additionally, the large annular space between the carrier and containment piping could promote the build up of condensation and ultimately corrosion of the steel carrier.

3. Specification section 23 10 00.1.4.C - Fuel Piping: indicates that the piping must be compliance [sic] with both ASTM and UL. We currently can find no UL standard covering steel pipe within an [sic] FRP carrier for fuel oil service.

4. Specification section 23 10 00.1.6.G - Underwriters Laboratories UL provides reference to UL 971-95 "Non-Metallic Underground Piping for Flammable Liquids." There is no standard provided for metallic underground piping.

Cummings also stated that "specifications can be interpreted to require steel piping above grade and non-metallic carrier and conduit below grade." Cummings requested that the VA reconsider its planned use of the FRP system.

Responding to Cummings' request, on July 27, 2010, the VA wrote:

1. We will accept the specified steel piping with FRP containment piping.

2. We have confirmed with manufacturers that 4" steel pipe will fit in the 6" FRP containment sleeve.

3. UL listing pertains to FRP containment system only.

4. UL listing pertains to FRP containment system only. [sic]

5. Spec[ification] section 2.6 is headed Secondary Containment for Underground Fuel Piping Systems. ***Para 2.6 B.2 should read "containment pipe" and not "carrier pipe."*** (emphasis added).

> 6. ***Spec section 3.3C does state FRP carrier and containment piping which is in error but certainly does not override the specific products section calling for steel pipe***. (emphasis added).

Cummings asked the VA to reevaluate the submittal and to approve its proposed product. By letter dated August 25, 2010, Cummings stated:

> As previously related, Specification 23 10 00 1,4 B.2 (Products) provides design information for both fittings and joining of a Glass Fiber Reinforced carrier pipe. This response to RFI No. 52 indicates that the specification *should* read "containment pipe" and not "carrier pipe." This statement appears incorrect, because containment piping is generally rated for between 3 and 5 psi, whereas the pressure requirement within this specification is 150 psi. Additionally, Specification 23 10 00 3.3 C (Execution) relates to the installation and testing of FRP carrier and containment pipe.
>
> The specifications states [sic] that the "entire installation shall conform to requirements of local and state pollution control authorities." There are no factory fabricated containment systems utilizing steel carrier pipe that are currently approved by the Florida Department of Environmental Protection (FDEP). The use of steel carrier pipe with a FRP containment system would require waiver for not utilizing the state approved or UL-listed system. . . . We have investigated the carrier pipe systems with the GFRP jacket that has been recommended, and preliminary pricing indicates that the cost of the system could be in excess of $300,000.

The VA requested that its architect/engineer (AE) review Cummings' contentions that the specifications permitted the use of FRP systems. By letter dated September 2, 2010, the AE disagreed with Cummings' position, stating:

> It seems that their main position is that the specified system is not currently on the approved FDEP list; however . . . in researching this issue, we reviewed Florida Statute, Chapter 62-761 Underground Storage Tank Systems and have found no exclusion to using steel carrier pipe – the rationale being that, if steel or other materials are used, they must be contained as required in this Chapter. We also spoke to a piping system fabricator who discussed this issue with a representative of the FDEP who indicated that the steel pipe with an FRP jacket meets the State intent.

After receiving these comments, on September 7, 2010, the VA rejected Cummings' request and directed Cummings to supply and install steel for underground fuel piping, with FRP for the secondary containment system. Cummings advised the VA by letter dated September 21, 2010, that it would proceed under protest with the installation of a steel fuel piping system using FRP secondary containment. In a letter sent to the VA on September 29, 2010, Cummings explained that it believed the specifications to be ambiguous.

The VA's resident engineer confirmed in his deposition that the specifications contained errors. He testified that the specifications for the project were developed by using master specifications or templates modified to suit particular VA projects. The VA's architect/engineer is responsible to delete provisions included in the master specifications that do not conform with the VA's intent.

As to the issues of the errors contained in the language of the specifications, the resident engineer testified about paragraph 2.6, entitled "Secondary Containment for Underground Fuel Piping Systems," located in the "Products" section. He said that subparagraph 2.6(B)(2) should have read "containment pipe," not "carrier pipe." Further, in the "Execution" section, paragraph 3.3, entitled "Installation and Testing, Underground Piping Systems," subsection (C) should also have read "containment pipe." When asked whether the resident engineer would agree that the installation specification for FRP carrier pipe was at least ambiguous, he testified, "It's not the best."

On December 30, 2010, Cummings submitted a certified claim to the VA, seeking $244,079. Cummings supported its claim by including a letter from its subcontractor, Fueling Components, dated December 27, 2010. The letter stated, "We have provided a change request in the amount of $228,448 for the above mentioned costs increase [sic] for Tricon Piping System [the steel system] with the appropriate decrease in the Ameron Piping System [the FRP system]." The subcontractor submitted an invoice, showing the net cost of the change in systems was $205,439. Adding overhead, profit, and bond, the total was $228,448. A more detailed voucher illustrated the change in cost from a fiberglass carrier pipe with fiberglass containment to a steel pipe with fiberglass containment. Cummings also submitted various quotes from other subcontractors for a steel pipe system. The contracting officer denied the claim.

Cummings submitted a notice of appeal, docketed on May 3, 2011. In its appeal, Cummings decreased its claim from $228,448 to $196,877, noting that its subcontractor and sub-subcontractor had provided revised pricing for the system. Cummings later amended its complaint, increasing its claim to $213,254, based upon additional labor costs. Cummings submitted vouchers supporting the final claimed amount.

Discussion

The parties focus upon whether the contract has a patent ambiguity. As noted above, the resident engineer testified that subsection 3.3(C) did include an erroneous reference to "FRP Fuel Carrier" piping. This type of piping is also addressed in paragraph 3.3(D), "Secondary Containment Piping," which provides for its installation requirements. When combined with the errors conceded above, the VA asks us to find a patent ambiguity, arguing that "the solitary deed Appellant needed to make to resolve any potential confusion concerning the use of a Steel Carrier Pipe versus an [sic] FRP carrier pipe was to inquire. A simple request for information prior to bid would have resolved any possible questions regarding the Underground Piping."

Cummings disagrees, arguing that the VA had failed to show that the specification was patently ambiguous, citing *Ted-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (for ambiguity to exist there must be more than one reasonable interpretation of contract language); *Gaston & Associates, Inc. v. United States*, 27 Fed. Cl. 243 (1992) (discrepancy identified by other bidders who sought clarification); *Mountain Home Contractors v. United States*, 425 F.2d 1260 (Ct. Cl. 1970) (no inquiry when claim associated with disputed specification was "less than one half of one percent of the total contract price"). Cummings asserts that no glaring ambiguity could be found at bid time so as to place a reasonable contractor on notice and to prompt the contractor to rectify the inconsistency by inquiring. Cummings maintains that the ambiguous nature only became apparent after discussions with the VA after contract award, when the VA informed Cummings that the specifications contained errors. Any ambiguity thus could only be considered to be a latent ambiguity.

The parties miss the point. The real question presented here is one of contract interpretation. Specifically, does the contract mandate the use of steel piping or not? After reviewing the contract specifications, we conclude that it does not. The terms of the contract are not ambiguous.

The products section refers to the use of both steel and FRP piping, and the execution section permits either for carrier piping. Nothing in the execution section mandates the use of steel for the underground system. Clearly, the contract allowed the contractor to use either variety for carrier piping.

The contract also requires the contractor to certify that the installation would conform to any requirements established by state and local pollution control authorities. For underground fuel piping, Florida requires that storage tank system equipment used in Florida must be approved by the FDEP before installation or use. Cummings complied with

Florida's requirements, selecting its proposed FRP carrier and containment piping system from the approved list published by the state.

Because the contract permitted Cummings to chose FRP carrier piping in pricing its proposal, the VA's rejection of Cummings' proposal and its mandate to use steel piping represented a change to the contract. Cummings is entitled to an equitable adjustment based upon this change.

Cummings seeks $213,254, plus applicable interest. The record contains the certified claim and vouchers supporting the quantum sought. The VA presented no evidence disputing Cummings' calculation of damages. In an affidavit submitted by the VA from its resident engineer, the witness addresses Cummings' quantum damages by stating only that "the VA has not reviewed the quantum of Cummings' claim and cannot confirm the accuracy." The Board concludes that the record amply supports the request for $213,254.

Decision

The appeal is **GRANTED**. Cummings is entitled to recover $213,254, plus interest as permitted by statute, 41 U.S.C. § 7109 (Supp. IV 2011), calculated from December 30, 2010.

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JERI KAYLENE SOMERS
Board Judge

We concur:

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JOSEPH A. VERGILIO
Board Judge

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CANDIDA S. STEEL
Board Judge