



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
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MAY 20, 2020**

MOTION TO DISMISS DENIED: May 7, 2020

CBCA 6534

HJD CAPITAL ELECTRIC, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Johnathan M. Bailey and Hector M. Benavides of Bailey & Bailey, P.C., San Antonio, TX, counsel for Appellant.

Brett A. Pisciotta, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **SULLIVAN**, and **CHADWICK**

BEARDSLEY, Board Judge.

Appellant, HJD Capital Electric, Inc. (HJD), agreed to construct a project at a land port of entry for the General Services Administration (GSA). GSA moved to dismiss this appeal for failure to state a claim under Board Rule 8(e) (48 CFR 6101.8(e) (2019)). For the reasons stated below, the Board denies the motion.

Background

GSA awarded HJD task order GS-P-07-17-HH-0002 under indefinite delivery/indefinite quantity (IDIQ) contract GS-07P-15-HH-D-0044 to construct a new seizure vault expansion and administrative wing at the Pharr Land Port of Entry in Pharr, Texas. In its complaint, HJD alleges that GSA imposed different and higher security clearance standards than required by the task order and IDIQ contract. HJD says its “bid only accounted for the time and expense of a locally generated badging requirement by the CBP [Customs and Border Protection] and not the extensive National GSA Requirement; [sic] which is equivalent to the Department of Defense’s Top Secret Clearance.” GSA’s security clearance process required that all HJD employees go through “a full credentialing process,” which HJD alleges took “four months or more.” HJD alleges further that the GSA badging process was a moving target that changed on a daily basis and that the badging requirements were “unclear, burdensome, confusing and not required by the Contract and Task Order,” adding “additional time and costs for [HJD] to comply.”

According to the complaint, HJD sought clarification of the security clearance requirement. GSA responded that the task order required the GSA badging and background investigation in order to comply with HSPD-12 [Homeland Security Presidential Directive 12] because the contractor was working in a “federally controlled facility.” HJD asserts that the construction area was “fenced off with a single entrance controlled by [HJD],” and “the occupying agency for this project was CBP.” GSA asks the Board to take judicial notice of the alleged fact that GSA owns the building where the construction took place.

HJD alleges that “HSPD-12 requires for all government agencies to provide security regulations for their respective agencies; therefore, security clearances from the Customs and Border Patrol [sic] Agency would sufficiently satisfy all HSPD-12 requirements and comply with specification 1.1 A.” HJD further states in its complaint that “HSPD-12 itself does not actually spell out any specific security requirements” and “does not require that contractor employees go through an excessive and time consuming security clearance.”

The task order scope of work stated:

All contractor personnel performing working on premises at GSA owned and operated buildings are required to pass a security background check conducted by the Department of Homeland Security/Federal Protective Service. Each contractor employee shall submit their full name, driver’s license or Identification card No., Social Security Number and date of birth. No contractor employee will be allowed on building premises until employee has

been determined to be suitable for entrance by the Department of Homeland Security/Federal Protective Service. **Please do not send personal information to GSA personnel.** GSA personnel are not authorized or cleared to accept personal information.

Exhibit 10 at 8. The task order also incorporated by full text amendments 1 through 3 of the procurement request. Amendment 1 included a question/answer section, which stated in relevant part:

3. What daily security measures will employees have to undergo before beginning work?

Employees will be required to obtain clearances by both GSA and CBP for the duration of the project. They will be required to have the clearance ID in their possession and present it upon request by GSA or CBP personnel monitoring the project. There will not be specific daily security measures as the work site is self-contained.”

Id. at 23. Task order section 01593—Security Regulations, Part 1, General, 1.1 General Security Requirements, required that:

- A. All work shall be in accordance with HSPD-12.
.....
- C. Construction Clearances: “[A]ll Contractor employees . . . shall comply with security regulations as imposed by the occupying agency.

Id. at 96. Task order section 01593—Security Regulations, Part 1, General, 1.2 General Security Regulations, required:

- B. Agency Security Regulations: All persons employed within the boundaries of the property or restricted access areas therein, and all persons permitted to enter such property and areas shall comply with the security regulations that have been established for this Contract.
 - 1. The Contractor agrees on behalf of himself and all subcontractors that the following security regulations will be

observed by Contractor and subcontractor personnel on the property. The Contractor shall make it a specific provision of his subcontracts that these regulations be accepted.

....

- f. At a time designated by the Contracting Officer or when an individual reports to the site for work the first time, a period of 2 hours will be required for security processing, including review of identification forms and fabrication of a permanent badge. Personnel will then be permitted to go to work without further processing of identification forms by the Government, but 15 minutes should be allowed each day for signing in with security to obtain access to the site.

Id. at 96-97.

Paragraph III.0. Administrative Matters, subparagraph (6) of the IDIQ contract also set forth a security clearance requirement, stating:

- (c) In addition, all such personnel who will be on site 6 months or longer must apply for and receive clearance in accordance with Homeland Security Presidential Directive 12 (HSPD-12). See Section IV, Contract Clause, GSAR 552.204-9.

Exhibit 1 at 18. GSAR 552.204-9 “Personal Identity Verification Requirements” states:

- a) The contractor shall comply with GSA personal identity verification requirements, identified at <http://www.gsa.gov/hspd12>, if contractor employees require access to GSA controlled facilities or information systems to perform contract requirements.

HJD claims that GSA’s imposition of a higher level of badging requirements than required by the contract constituted a constructive change delaying the project and for which HJD incurred \$336,111.64.

Discussion

The Board looks to Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance in deciding a motion to dismiss for failure to state a claim. Rule 8(e). Under this standard, HJD’s claim must be “plausible on its face” when drawing “all reasonable inferences in favor of the [appellant].” *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); see also *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility” *Iqbal*, 556 U.S. at 678. The contract can plausibly be read, at least for purposes of assessing the viability of HJD’s complaint, to require a different level of GSA security clearance—or even none at all—for this project.

“To demonstrate a constructive change,” HJD “must show (1) that it performed work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government.” *Bell/Heery*, 739 F.3d at 1335 (citing *Redland Co. v. United States*, 97 Fed. Cl. 736, 755–56 (2011)). “Contract interpretation begins with the language of the written agreement, from which we try to discern the parties’ intent at contract formation.” *CSI Aviation, Inc. v. General Services Administration*, CBCA 6543 (Apr. 9, 2020) (internal quotation marks and citations omitted).

GSA argues that, as a matter of law, there could not be a constructive change here because “GSA security clearances were required from the beginning.” GSA bases its motion on the pre-bid answer, incorporated in the task order, stating that “[e]mployees will be required to obtain clearances by both GSA and CBP.” This sentence does not define the security clearance process, however. Other terms of the task order add details such as that at the initial visit “a period of 2 hours will be required for security processing.” Even assuming that, as GSA contends, the contract required HJD employees to obtain GSA security clearances, a heightened clearance process could constitute a constructive change.

HJD’s reading of the contract as not requiring a GSA security clearance is also plausible. The incorporated solicitation amendment did not “plainly state[] that clearances from both GSA and CBP [would be] required for the duration of the Project,” as GSA argues. Another possible interpretation of the language is that HJD employees could undergo a single process to obtain a single clearance acceptable to both agencies.

A third interpretation of the phrase “clearances by GSA,” when read together with the requirement that “[a]ll work shall be in accordance with HSPD-12,” could require a GSA security clearance in order to comply with HSPD-12. It is unclear, however, what HSPD-12 specifically required. HJD asserts in its complaint that a GSA security clearance was not required for the “work [to] be in accordance with HSPD-12” because a CBP security

clearance satisfied HSPD-12. HJD also asserts that HSPD-12 security clearances were required only if HJD's employees had to access a facility controlled by GSA, and that this facility was not controlled by GSA. Moreover, HJD asserts that because the facility was a repair and alteration project and the work areas were fully separated from occupied areas with isolated access, the project was not a GSA-controlled facility (if it ever was) until substantial completion of the construction, and HJD personnel did not, therefore, have to comply with the HSPD-12 program before beginning work. Even if we were to accept GSA's position that compliance with HSPD-12 was required by the contract, it is plausible that such compliance did not require GSA security clearances, or at least not at the level on which GSA insisted.

The contract language does not unambiguously support GSA's position. The case, therefore, turns on disagreements about extrinsic evidence which "cannot be properly resolved on a motion to dismiss." *Fraunhofer-Gesellschaft zur Förderung der Angewandten Forschung E.V. v. Sirius XM Radio Inc.*, 940 F.3d 1372, 1382 (Fed. Cir. 2019).

Decision

We **DENY** GSA's motion to dismiss.

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

We concur:

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

Kyle Chadwick

KYLE CHADWICK
Board Judge