

DRP CONSTRUCTION COMPANY)	AGBCA No. 98-149-1
(Lower Walker River Bridge Repair),)	
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Appellant)	
)	
Representing the Appellant:)	
)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

February 10, 1999

OPINION BY ADMINISTRATIVE JUDGE JOSEPH A. VERGILIO

DRP Construction Company (contractor or Appellant), of Encinitas, California, filed this appeal with the Board on February 10, 1998. The dispute involves the fixed-price contract, No. 43-91W8-7-7060, for the Lower Walker River Bridge Repair project in Klamath National Forest, California. The U. S. Department of Agriculture, Forest Service (FS or Government), offered the contract to DRP, which DRP accepted on September 11, 1997. The contractor interpreted the contract as permitting it to utilize an escrow agreement to provide payment protection required by the contract. The Contracting Officer (CO) rejected a proposed escrow agreement. The contractor supplied a payment bond. It sought reimbursement for its cost of the bond, \$2,977, contending that it would not have incurred a cost but for the improper rejection of its escrow agreement. The CO denied the claim.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The parties have submitted the case on the record, without a hearing, pursuant to Board Rule 11. The Government filed and served a brief; the contractor did not.

The contract specifies that the contractor “shall submit one of the following payment protections: payment bond, or an irrevocable letter of credit (ILC).” Contrary to the contractor’s assertions, other

language in the contract does not make this provision ambiguous. The CO did not alter the contract by rejecting the escrow agreement proposed to satisfy the requirement, an escrow agreement being neither a payment bond nor an ILC. The contractor is not entitled to additional payment for complying with the contract requirement. The Board denies the appeal.

FINDINGS OF FACT

1. The Request for Quotations (RFQ) and the contract, No. 43-91W8-7-7060, underlying this dispute, contain a clause from the Federal Acquisition Regulation (FAR), Alternative Payment Protections (FAR 52.228-13) (JUN 1996), which states, in relevant part:

(a) The Contractor shall submit one of the following payment protections: payment bond, or an irrevocable letter of credit (ILC).

....

(e) Except for escrow agreements and payment bonds, which provide their own protection procedures, the Contracting Officer is authorized to access funds under the payment protection when it has been alleged in writing by a supplier of labor or material that a nonpayment has occurred, and to withhold such funds pending resolution by administrative or judicial proceedings or mutual agreement of the parties.

(f) When a tripartite escrow agreement is used, the Contractor shall utilize only suppliers of labor and material who signed the escrow agreement.

(Appeal File (AF) at 100 (¶ I.16)). In the RFQ, the Government stated the estimated price range for the project as from \$25,000 to \$100,000 (AF at 29).

2. On September 11, 1997, DRP accepted the contract to perform the bridge repair for \$99,234.20 (AF at 27). This amount included a line item price for mobilization, which was to include bonding costs (AF at 27 (line item 1), 38 (¶ 1505-1.02)). On September 17, 1997, the contractor submitted to the Government a proposed escrow agreement to provide payment protections (AF at 13-14). Because the CO rejected the escrow agreement, the contractor provided a payment bond, which the Government accepted (AF at 15-19).

3. After completion of performance, by letter dated October 17, 1997, to the CO, the contractor requested reimbursement of \$2,977, DRP's cost of the payment bond. The letter specified:

Prior to starting the project you did admit to me that you thought the contract document pertaining to the Alternative Payment Protection clause, regarding the use of an escrow agreement, was ambiguous and misleading. I feel that in light of the preceding, given the urgency of this project and that DRP did not delay the project until this issue was resolved, it is reasonable to request reimbursement.

(AF at 21.)

4. By letter dated October 22, 1997, to the contractor, the CO denied the request for reimbursement. The CO referred to the contract and the two options thereunder for payment protections: a payment bond or an ILC. The CO also referenced the progress payment provisions of the contract, which state that the first progress payment will include the total premium paid to obtain bonds (AF at 38 (¶ 1505-1.02.B.1)). (AF at 22.)

5. The contractor sought a decision from the successor CO, by letter dated December 20, 1997, regarding the Government's rejection of the request for reimbursement of costs to obtain the payment bond (AF at 26). The CO issued a decision denying the claim, on January 22, 1998 (AF at 1-3). On February 10, 1998, the contractor timely filed an appeal with the Board.

DISCUSSION

The contract specifies that the contractor must submit one of the identified payment protections. An escrow agreement is not specified as an acceptable protection. (Finding of Fact (FF) 1.) Regarding the clause, subparagraphs (e) and (f), separately or together, do not alter the interpretation of subparagraph (a). Subparagraph (a) specifies what the contractor shall submit; subparagraphs (e) and (f) describe obligations of the CO and contractor, respectively, when a particular type of agreement is utilized. The latter subparagraphs do not expand the options prescribed in subparagraph (a). Despite the contractor's assertions, regarding its interpretation and that alleged of a CO, the clause is not ambiguous.¹

Further, if one looks beyond the plain language of the contract, the contractor's interpretation proves to be unreasonable. The FAR, 48 C.F.R. § 28.102-3(b) (1996), made the Alternative Payment Protections clause mandatory for this fixed-price construction contract, which the Government estimated in the RFQ to be in the price range of \$25,000 to \$100,000, and which was awarded for \$99,234.20 on September 11, 1997 (FF 1-2). That provision specifies:

Insert the clause at 52.228-13, Alternative Payment Protections, in solicitations and contracts for construction, when the estimated or actual value exceeds \$25,000 but does not exceed \$100,000. Complete the clause by specifying the payment protection or protections selected (see 28.102-1(b)(1)), the penal amount required, and the deadline for submission.

The referenced clause 28.102-1(b)(1) dictates that the CO "shall select two or more of the following payment protections, giving particular consideration to inclusion of an irrevocable letter of credit as

¹ While the contractor maintains that the contract provision is ambiguous, it does not explain how the alleged ambiguity is other than patent. The alleged inconsistency arises from the language of the provision. A contractor does not recover for a patent ambiguity; the contractor bears the "duty" to inquire and, without such inquiry, the contractor risks interpreting the contract contrary to the Government's intended interpretation.

one of the selected alternatives.” The stated payment protections are a payment bond, an ILC, a tripartite escrow agreement, certificates of deposit, and a deposit of identified types of security. The regulations were issued pursuant to statute, the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4104(b)(2), 108 Stat. 3243, 3342 (1994) (48 C.F.R. § 28-102-1(b)(1)). As noted in Finding of Fact 1, the CO selected two of the identified payment protections; the CO did not identify the escrow agreement as an acceptable protection. The contractor did not object to the terms and conditions of the RFQ, which served as a basis for selection and award.

DECISION

The Board denies the appeal.

JOSEPH A. VERGILIO

Administrative Judge

Concurring:

EDWARD HOURY

Administrative Judge

ANNE W. WESTBROOK

Administrative Judge

Issued at Washington, D.C.

February 10, 1999