UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: January 26, 2015

CBCA 3724

LEEWARD CONSTRUCTION CORPORATION,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Donald R. Adams, Project Manager of Leeward Construction Corporation, Fort Worth, TX, appearing for Appellant.

Lindsay C. Roop and Dennis M. McGuire, Office of Regional Counsel, Department of Veterans Affairs, Columbus, OH, counsel for Respondent.

Before Board Judges **POLLACK**, **McCANN**, and **ZISCHKAU**.

McCANN, Board Judge.

Appellant, Leeward Construction Corporation (Leeward), seeks recovery for additional contract work performed at the Department of Veterans Affairs (VA) Medical Center (VAMC) in Dayton, Ohio. Both entitlement and quantum are in issue. The parties have submitted the case for decision on the written record pursuant to Board Rule 19.

Facts

1. On April 6, 2012, the VA posted an invitation for bids (IFB) for construction work for the relocation of the oncology department at the VAMC in Dayton, Ohio. The specifications included a description of the work as follows:

Contractor shall completely prepare site for building operations, including demolition and removal of existing items, and furnish labor and materials and perform work for project 552-11-109, entitled Dayton VAMC-Relocate Oncology as required by drawings and specifications.

2. The specifications contain a section on asbestos abatement entitled:

Section 02 82 13.19
ASBESTOS FLOOR TILE AND MASTIC ABATEMENT
(PROVIDED BY VAMC)
TABLE OF CONTENTS

This asbestos abatement specification states:

1.1 SUMMARY OF THE WORK

1.1.1 CONTRACT DOCUMENTS AND RELATED REQUIREMENTS

Drawings, general provisions of the contract . . . shall apply to the work of this section. . . . In the event the Asbestos Abatement Contractor (Contractor) discovers a conflict in the contract documents and/or requirements or codes, the conflict must be brought to the immediate attention of the Contracting Officer for resolution. Whenever there is a conflict or overlap in the requirements, the most stringent shall apply. Any actions taken by the Contractor without obtaining guidance from the Contracting Officer shall become the sole risk and responsibility of the Contractor. All costs incurred due to such action are also the responsibility of the Contractor.

. . . .

1.1.5 ABATEMENT CONTRACTOR USE OF PREMISES

A. The Contractor and Contractor's personnel shall cooperate fully with the VA representative/consultant to facilitate efficient use of buildings and areas within buildings. The Contractor shall perform the work in accordance with the VA specifications, phasing plan and in compliance with any/all applicable Federal, State and Local regulations and requirements.

. . . .

1.5.2 CONTRACTOR RESPONSIBILITY

> The contractor shall assume full responsibility and liability for compliance with all applicable Federal, State and Local regulations related to any and all aspects of the abatement project. The Contractor is responsible for providing and maintaining training, accreditations, medical exams, medical records, personal protective equipment as required . . . . The Contractor shall incur all costs of the Contractor Provided Industrial Hygienist (CPIH), including all sampling/analytical costs to assure compliance with OSHA/EPA/state requirements.

3. The solicitation incorporated a complete set of drawings which includes Drawing 310-A2, entitled PARTIAL FIRST FLOOR DEMOLITION PLAN (BLDG. 310 - VACATED ONCOLOGY). The general demolition notes on the drawing state: "Contractor shall coordinate demolition with owner; salvage and turn over to COTR [contracting officer's technical representative] doors, toilet accessories, curtain tracks, light fixtures and other items designated by owner." The drawing includes a demolition legend that states, *inter alia*: "[R]emove existing flooring and adhesive down to existing concrete slab." Part of the drawing is unshaded and set off with a dotted line, and part of it is shaded. At the bottom of the legend there is a small, unshaded, dotted-line rectangle. Next to it is a note that states: "Asbestos floor tile and asbestos abatement occurs at this area designated for abatement." Another shaded rectangle of the same size is located under the dotted line rectangle. Next to it is a note indicating: "Denotes area outside scope of work."

4. On April 26, 2012, the VA held a site visit for all potential bidders. The VA received questions at the site visit, and on May 7, 2012, the VA posted the following questions and answers as an amendment to the solicitation:

Question:	All abatement is by the owner, correct?
Answer:	Per the contract documents.
Question:	All floors on 1st floor are to be abated by owner. All floors on 4th floor are to be removed by contractor as normal construction debris.
Answer:	Per contract documents, if any additional hazardous materials are present on the project refer to Section 02 82 13.19. Normally construction debris are to be in covered carts, using the service elevators to the loading docks as discussed at the walk thru.

5. Leeward was the low bidder and was awarded contract VA250-12-C-0054 on June 11, 2012, in the amount of $1,384,777.

6. After award and during discussions about mobilization, Leeward informed the VA that it did not believe the contract required it to perform the asbestos abatement contained in the asbestos abatement section of the contract. On July 28, 2012, Leeward issued a request for information (RFI) to the VA about its responsibilities for asbestos abatement. Leeward stated in the RFI:

> Specification Section No. 02 82 13.19 Asbestos Floor Tile and Mastic Abatement is included within the bound set of specifications. However, the table of contents (ref: page 00 01 10 - 1 of the Project Manual) add the note "(Provided by VAMC)". A request for clarification was submitted during the pre-proposal stage of the project but the VA response (see Mod. P00003 Questions and Answers no 16) was "Per contract documents."
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> In a conversation with the COTR, he advised that Asbestos Abatement is the responsibility of the Contractor. Since that directive is in direct opposition to the "(Provided by VAMC)" NOTE IN THE WRITTEN DOCUMENTATION, Leeward requests the CO [contracting officer] to interpret the documents and provide the appropriate directive to resolve this contradiction.
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> Leeward presumes the written documentation will take precedence over the COTR's advisement.
>
> Potential Impact to Cost and Time of Completion: Possible; depends on resolution.

7. On January 29, 2013, Leeward submitted a request for a change order for the asbestos abatement work. In that change order request, Leeward provided an estimate of $13,691 (not including the services of a contractor-provided industrial hygienist) to perform the work.

8. On January 31, 2013, Leeward contracted with Ohio Technical Services to perform the asbestos abatement work in the amount of $11,315 (not including the cost of an industrial hygienist). After various adjustments, the final price of the subcontract came to $13,286.25. The asbestos abatement work was performed from August 5 through August 7, 2013.

9. The CO denied Leeward's request for an equitable adjustment to the contract on February 28, 2013.

10. On September 30, 2013, Leeward submitted a formal claim under the Contract Disputes Act, 41 U.S.C. 7101-7109 (2012) (CDA), for asbestos abatement in the amount of $58,073. The CO issued his final decision denying the claim on January 28, 2014. Subsequently, Leeward revised the amount of its claim downward to $45,147.75.

11. The breakdown of Leeward's claim is as follows:

Base Subcontract - Ohio Technical Services	$13,286.25
Superintendent Time, June - August 2013	$12,153.00
Project Manager Time, June - August 2013	$ 4,441.00
Claim Documentation and Defending	$ 7,182.00
Overhead, Fee, Performance and Payment Bond	$ 8,085.47
Total	$45,147.75

12. The record contains an invoice from Leeward's subcontractor, Ohio Technical Services, dated September 3, 2013, in the amount of $13,286.25. The VA does not dispute that this is the amount that was paid for the subcontract work, and agrees that the amount is reasonable.

13. Leeward claims that its superintendent spent 277 hours on this project from the week ending June 7, 2013, to the week ending August 10, 2013, doing work that was caused by the addition of the abatement work. As support, Leeward has submitted unsigned daily logs with the typed name of the superintendent shown, indicating that he was the person who completed the log. The daily logs indicate that the superintendent was on site, but do not show how long he was on site or on what projects he was working. The logs do not show that he was performing work caused by the addition of the abatement work.

14. Leeward claims that the project manager spent 69.25 hours from the week ending June 7, 2013, to the week ending August 10, 2013, doing work that was caused by the addition of the abatement work. It contends that this time was spent: 1) finding an asbestos subcontractor; 2) negotiating and writing the subcontract; 3) receiving, reviewing, modifying, and submitting, submitals to the VA; 4) finding and hiring an industrial hygienist; and 5) scheduling the asbestos work. It further contends that this work was in addition to the work a project manager would ordinarily do to accommodate such additional work. There is no documentary or testimonial evidence in the record that supports the claim that the project

manager spent this time on these tasks, or that the project manager spent any time on these tasks over and above what he ordinarily would have spent on such additional work.

15. With regard to the documentation and defense of its claim, Leeward estimates that the project manager spent an additional 112 hours. Leeward points to nothing in the record to support this. This alleged effort was expended for the preparation and defense of Leeward's Contract Disputes Act claim.

16. Leeward contends that both project overhead in the amount of ten percent and a fee or profit of ten percent are reasonable and customary. Finally, it contends that it is obligated to pay for payment and performance bonding for the full contract price, and that recovery for this is both reasonable and customary.

Discussion

Entitlement

The focus of the dispute in this case is the meaning of the phrase "(PROVIDED BY VAMC)" in the title to the asbestos abatement section. In the absence of this phrase, the contract would certainly require the contractor to perform the asbestos abatement work, as the specification is replete with references to the contractor performing the work. With this phrase included, however, the specification becomes far less clear about which party is to perform this work.

Leeward argues that, because of the phrase, the contract unambiguously places responsibility for the asbestos abatement on the VA. It further contends that the VA confirmed this interpretation at the bidders site visit when the VA twice responded, "Per contract documents," to questions about which party was to perform the abatement work, and then amended the solicitation to include the questions and answers.

Regardless of this phrase and despite the VA's responses to questions at the bidders conference, the VA maintains that the contract, read as a whole, unambiguously requires Leeward to perform the abatement work. The VA contends that the phrase simply means that the VA "provided the specification." It further argues that, at best, the specification and drawings are ambiguous, and since Leeward did not make the specific inquiry, Leeward must absorb the costs of performance.

The VA cites to various sections of the specification that it contends support its position that the contractor was to perform the work. There is no need to discuss those sections, as it is quite clear that there are many references in the contract to performance of

the work by the contractor. Certainly, in the absence of the phrase "(PROVIDED BY VAMC)," the contract would require performance by the contractor. The phrase, however, was included in the contract, and the question is how to interpret the contract with the phrase included, and in light of the agency's response to the bidders' questions.

The VA posits that the phrase was intentionally included in the contract to indicate to bidders that the agency "provided the specification." This interpretation is not reasonable. Such an interpretation begs the following questions: "Provided to whom and for what purpose?" "Why would the VA put such a phrase in the abatement section and no other sections?" "What importance would it be to bidders to know that the VA was providing the specification?" In addition, such an interpretation renders the phrase "(PROVIDED BY VAMC)" superfluous to the abatement work.

A contract is to be construed in a manner that gives meaning to all of its provisions, if possible. *First Nationwide Bank v. United States*, 431 F.3d 1342, 1347 (Fed. Cir. 2005) (citing *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965) ("[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous."). The phrase is obviously inconsistent with the rest of the specification that calls for the contractor to perform the abatement. The contract cannot be interpreted unambiguously, giving meaning to all sections, with this phrase included. The contract is patently ambiguous and the contractor did have an obligation to inquire. *Gulf Shores, LLC v. Department of Homeland Security*, CBCA 802, 09-1 BCA ¶ 34,024, at 168,306 (2008). Unfortunately for the VA and contrary to its assertion, bidders did inquire. In its response and solicitation amendment, the VA chose not to resolve this obvious ambiguity.[1]

Seemingly, the VA contends that the actual winner of the contract, as opposed to any bidder, must do the inquiring,. If that were true, there would be no purpose in disseminating the questions and answers to all bidders and to incorporating the questions and answers into the solicitation. Mandating that only the winning bidder's inquiry is relevant makes little sense. That would necessitate that all bidders ask the same question at the bidders conference to protect themselves, as no one would know at that point who the winning bidder would be. The law does not demand that the specific winner of the contract make inquiry.

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[1] The only way that meaning can be given to all parts of the contract is to interpret the statement "the Asbestos Abatement Contractor (Contractor)," in section 1.1.1 of the specification to mean a contractor other than Leeward that will be "provided by the VAMC." Such an interpretation would lead to the same ultimate result. The VA would be responsible for covering the cost of asbestos abatement.

It only requires that inquiry be made and the response promulgated. That was done in this case.

Obviously, bidders did find the contract language ambiguous enough to request that the VA confirm that it was responsible for performing the asbestos abatement. Instead of clarifying the situation, the VA on two occasions simply stated "Per the specifications." The VA had the opportunity and the responsibility to clarify an ambiguous specification and it chose not to do so. Under these circumstances, the only rational conclusion that a reasonable bidder could draw would be that the VA would perform the work. To conclude otherwise would put bidders at risk of losing the award to a bidder who did so conclude.

Leeward is entitled to recovery for its costs plus overhead and a reasonable profit for the work at issue.

Quantum

Leeward is entitled to recover some of the amounts claimed. Leeward may recover the entire subcontract price of $13,286.25, as it is clear that this was a cost reasonably incurred to accomplish the work.

The alleged time expended by the superintendent and the project manager is not recoverable. Their time is compensated for in the recovery of additional overhead.[2] In any event, the record does not support that the hours claimed for these two employees was actually expended, or was expended on asbestos abatement work, or was expended in addition to work that what would ordinarily be performed.

The claimed $7182 for claim documentation and defense also fails. The claimed costs of preparing and prosecuting a CDA claim are not recoverable under the circumstances presented here. "[I]f a contractor's underlying purpose for incurring a cost is to promote the prosecution of a CDA claim against the Government, then such cost is unallowable under FAR 31.205-33 [48 CFR 31.205-33(2011)]." *Tip Top Construction, Inc. v. Donahoe*, 695 F.3d 1276, 1284 (Fed. Cir. 2012) (quoting *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995)). To the extent that any of this claim relates to the project manager negotiating an equitable adjustment instead of his promoting the prosecution of a CDA claim, it is still not recoverable, as there is no support in the record that any additional work was performed.

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[2] Leeward tells us that its "Project Managers . . . do not log hours by task to each project." We see no evidence that the superintendent's hours were logged by task to each project.

Leeward is entitled to an additional ten percent for overhead and also ten percent for profit. Department of Veterans Affairs Acquisition Regulation (VAAR) 852.236-88(b)(10) (48 CFR 852.236-88 (b)(10)). Leeward is entitled to recovery for any increase in bonding costs. Such recovery shall be made at "final settlement under the contract and will not be included in the individual change." VAAR 852.236-88(b)(11).

Decision

The appeal is **GRANTED IN PART** to the extent indicated.

R. ANTHONY McCANN
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

JONATHAN D. ZISCHKAU
Board Judge