

MASTERCLEAN, INC.**CONTRACT NO. V659C-553****VABCA-3818****VA MEDICAL CENTER
SALISBURY, NORTH CAROLINA**

William S. Swain, Esq., Pate & Swain, Attorneys at Law, Russellville, Arkansas, for the Appellant.

Paul A. Embroski, Esq., Trial Attorney, and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE PULLARA

This appeal was taken from a final decision of the Contracting Officer for the Department of Veterans Affairs ("VA" or "Government") denying a claim for additional compensation brought by Masterclean, Inc. ("Appellant" or "Contractor"), on behalf of its demolition subcontractor, Owen's Multi-Service, in connection with a contract for the initial phase of renovating a building at the VA Medical Center (VAMC), Salisbury, North Carolina. The Contractor seeks additional compensation of \$133,330.16 for increased costs resulting from the VA's refusal to allow Owen's Multi-Service to use certain equipment, referred to as "skid steer loaders" or "Bobcats," to perform demolition work inside the building.

The record includes the Rule 4 Appeal File (R4, tabs 1-12), Appellant's Rule 4 File Supplement (R4 Supp., tabs 13-16), Appellant's Exhibits (Exh. A-1 to A-32), Government's Exhibits (Exh. G-1 to G-56), and the four-volume transcript of the hearing held in Salisbury, North Carolina (Tr. 1-1054).

FINDINGS OF FACT

On December 2, 1991, the VAMC, Salisbury, North Carolina, issued Solicitation No. 9136-AE seeking sealed bids for asbestos abatement and partial demolition of a building. The solicitation specified that bids were to be opened on January 23, 1992. The solicitation cover sheet, Block 9, titled "FOR INFORMATION CALL," provided the name and telephone number of Jack Gill, the project architect for this job, who was employed by the VA's Architect/Engineer (A/E), Middleton, McMillan, Architects, of Charlotte, North Carolina. (R4, tab 1; Tr. 796)

The work in this contract was to be the first phase for the conversion of Building 21, a half-century old, three story concrete frame structure, into a Nursing Home Care Unit (NHCU). At the conclusion of the asbestos abatement and partial demolition of Building 21, a separate contract would be awarded to renovate the remaining structural "shell" into a new NHCU. At the time this contract was being performed, the follow-on nursing home renovation was being designed. (Tr. 830)

Paragraph 6 on page 2 of the Solicitation entitled "EXPLANATION TO PROSPECTIVE BIDDERS (FAR 52.214-6) (APR 1984)" stated that:

[a]ny prospective bidders desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids. *Oral explanations or instructions given before the award of a contract will not be binding.* Any information given a prospective bidder concerning a solicitation will be furnished promptly

to all other prospective bidders as an amendment to the solicitation, if that information is necessary in submitting bids or if the lack of it would be prejudicial to other prospective bidders. (Emphasis added.)

(Exh. G-1)

Paragraph (b) of Specification Section 01001-1.36 entitled "SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (FAR 52.236-3) (APR 1984)" stated that:

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, *unless that understanding or representation is expressly stated in this contract.* (Emphasis added.)

(Exh. G-1)

Paragraph (a)(2) of Specification Section 01001-1.43 entitled "ACCIDENT PREVENTION (FAR 52.236-13) (APR 1984)" incorporated the OSHA standards issued by the Secretary of Labor at 29 CFR Part 1926 and 29 CFR Part 1910, by reference. (Exh. G-1) 29 CFR 1926.856(a), "Removal of walls, floors, and material with equipment," stated that "*[m]echanical equipment shall not be used on floors or working surfaces unless such floors or surfaces are of sufficient strength to support the imposed load.*" (Emphasis added) (Exh. G-21)

Paragraph 2.1(A) of Specification Section 02050 required the Contractor to "*[p]rovide interior and exterior shoring, bracing, or support to prevent movement, settlement, or collapse of structures to be demolished and adjacent facilities to remain.*" (Emphasis added.) (Exh. G-1) Paragraph 2.2(C) of Specification Section 02050 required the Contractor to "*[l]ocate demolition equipment throughout structure and promptly remove debris to avoid imposing excessive loads on supporting walls, floors or framing.*" (Emphasis added) (Exh. G-1)

On January 7, 1992, the VA conducted a pre-bid conference and site visit at the VA Medical Center. (Exh. G-2) A participant at the site visit, Mr. J. S. Fulps, Vice President of Abatement Systems, a bidder on the project, testified that some twenty to thirty people were in a group that toured Building 21. (Tr. 764-65, 768) Mr. Fulps testified that one member of the group was reported to have asked: "can we use Bobcats to tear these walls out," while commenting that "it would be an easier process." Mr. Fulps agreed that "most of [the walls] were concrete masonry units with ceramic tile . . . covering them, and it would have been a whole lot easier to have taken a Bobcat and knocked them down [versus] taking sledge hammers, or jack hammers, and knocking them down. . . . there were several people that were interested in that." Mr. Fulps also stated that a VA representative said, "you're not going to use our elevators to get them up there, because they're old and they won't handle the weight." (Tr. 778-79) Mr. Fulps asked VA representatives whether the interior walls were load bearing and the following dialogue occurred:

[VA representatives said] "[Y]ou will have to verify that before . . . you bring any machinery up here." I [Fulps] said well, how about just tearing down the walls, if we tear them down, is the building going to fall down on our people, and

the answer was "we're not sure about that, but . . . you should check into that if you get the job." . . . We bid it . . . to provide a certain amount of shoring. Not a lot, but a certain amount, at least to hold up the floor pan, and the floor sub-straight from floor to floor as we took the walls down if they were, in fact, load bearing.

(Tr. 780-81)

Amendment No. 1 to the solicitation was issued on January 16, 1992, to address numerous questions raised by prospective bidders at the pre-bid conference, including questions about the use of skid steer loaders. The amendment changed the bid opening date from January 23 to January 30, 1992, and included the following:

1. Questions may be asked of the architect, engineer or owner by letter or telephone, but FINAL ANSWERS ARE BY AMENDMENT ONLY. (Emphasis in original.) ***Bidders shall not rely on verbal answers.*** (Emphasis added)

* * * * *

4. A detailed site visit should be made by all bidders. The building may be toured Tuesday and Thursday afternoons between 1:00 pm and 4:00 pm throughout the bid period. Check in the Engineer's office in Building 4.

* * * * *

11. The use of a skid steer loader ("Bobcat") will not be prohibited; ***however, contractor shall assume responsibility of verifying safe load conditions and finding the means for lifting the loader to the floors.*** (Emphasis added)

(R4, tab 1)

At this time, Joe and Jo Ann Owen were the owners and officers of a corporation called Owen's Multi-Service, hereinafter referred to as "Owen's." The company was in the business of doing demolition work. (Tr. 201, 452) Mr. Owen first learned about this project on or about January 13, 1992, a week after the pre-bid conference and a week or so prior to the issuance of solicitation Amendment No. 1, during a meeting with Keith Bradford, then Masterclean's Division Manager, in Camp Lejune, North Carolina. (Tr. 460) Later that same day, Mr. Owen called Mr. Bradford and asked if he would be permitted to use Bobcats to perform the demolition work. Mr. Bradford called him back and told Mr. Owen that he understood that an amendment was "being issued allowing the use of skid steers." (Tr. 574; R4, tab 8; Exh. G-36)

On January 15, 1992, Mr. Owen contacted the office of Mr. Gill by telephone, at the number listed in the solicitation, requesting a copy of the bid specifications for this job. (Tr. 460, 795; Exh. A-1) During that telephone call, Mr. Owen was informed that the bid

date had been extended. (Tr. 461) On January 20, 1992, Mr. Owen scheduled a walk-through of Building 21. Mr. Owen testified that he discussed with Mr. Gill whether Bobcats could be used on the job, but the details of that conversation were not described and, at that time, Mr. Owen had not yet received either the plans and specifications or the solicitation amendment addressing the use of Bobcats. (Tr. 462)

On January 21, 1992, Mr. Owen called Mr. Bradford of Masterclean again to inquire about the use of a Bobcat for demolition. Mr. Bradford checked with the VA and then notified Mr. Owen that the VA had issued an amendment specifying that Bobcats were acceptable. (Exh. G-36)

Mr. Owen conducted a site investigation at the Medical Center on January 21, 1992. He received a copy of the contract plans and specifications by mail at his office in Russellville, Arkansas, on January 22, 1992, and a copy of Amendment No. 1 on January 24, 1992. (Tr. 463, 468) On or about January 23, 1992, Mr. Owen had begun calling tractor companies to locate a skid steer with the dimensions that would allow the skid steer to go through the doorways and into the elevator in Building 21. (Tr. 462)

During this period of time, Mr. Owen talked to a friend who was a contractor with 30 years experience, and who advised Mr. Owen that he should not consider bidding on the job unless he could make use of skid steers. (Tr. 466) This contractor, Louie Howard, informed Mr. Owen that he had done a job in North Little Rock, under a contract with the City of Little Rock, on a multi-story building that was previously owned or leased by the VA. The job that Mr. Howard performed was a gut-out job and had been performed about 15 years previously. Mr. Howard informed Mr. Owen that he had used skid steers on the job. (Tr. 467) However, Mr. Owen had not seen the building to which Mr. Howard referred. (Tr. 568)

Mr. Owen made four telephone calls to Mr. Gill's office on January 27, 1992, concerning use of the elevator in Building 21 to raise the skid steers from floor to floor. Mr. Owen learned that the weight capacity of the elevator was 5,000 pounds. (Tr. 466; Exh. A-1)

Sometime between January 27-28, 1992, through his telephone calls to tractor companies, Mr. Owen located a skid steer that weighed approximately 3,000 pounds or less. (Tr. 465) He also learned that the bid date was being extended again, from January 30 to February 13, 1992. (Tr. 465; Exh. G-5)

On January 28, 1992, Mr. Owen, finding the term "load conditions" to be "a little unclear," telephoned Mr. Gill and talked for approximately 10 minutes concerning the language in Item 11 of Amendment No. 1. (Tr. 466) By Mr. Owen's account, he asked, "what loads are being addressed in this amendment?" and Mr. Gill responded, "equipment loads." According to Mr. Owen, he and Mr. Gill discussed specifications on the equipment being considered by Mr. Owen for demolition at the site. It was discussed that the dimensions and weight (approximately 3,000 pounds, more or less) of each piece of equipment would permit using the elevator (5,000 pound capacity) to lift them to the upper floors of the building, as long as the elevator was not overloaded (e.g., both skid steers carried at the same time) and the walls were not damaged. The VA intended to service and continue using the elevator. Thus, the means for lifting the skid steers to the upper floors was determined, as Mr. Owen understood it.

Next, Mr. Owen says, they discussed "the loads that are being addressed," and Mr. Gill asked about attachments to be used on the Bobcats. Mr. Owen said he intended to use a hydraulic hammer on the small skid steer and a scoop on the larger one for hauling debris out of one of the stair wells. Mr. Gill was concerned, due to safety considerations, about attachments that had been modified and might exceed the equipment capacity. He insisted on the use of unmodified factory attachments. Mr. Owen testified that he understood that to mean that if he followed those instructions, he had "satisfied the conditions" of the amendment. (Tr. 472-74)

A short time later, however, it occurred to Mr. Owen that he "had not addressed this issue in writing" so he called Mr. Gill and asked if he wanted Mr. Owen to "address this in writing." Mr. Owen says he was told, "No . . . you've satisfied the conditions in the Amendment," and that the "Amendment was issued for the equipment, I don't have any problems with it, but call the VA and make sure they are satisfied that you don't need to put it in writing, because I'm not going to say." Mr. Owen also said that Mr. Gill told him, "if it doesn't change the scope of the contract it doesn't need to be in writing [but] don't take my word for this, call the VA and ask them."

Mr. Owen then called the Contracting Officer's office, told an unidentified person about his conversation with Mr. Gill, and asked whether he needed to address this in writing. The answer was basically, "If [Mr. Gill's] satisfied, so are we." That apparently ended the matter as far as Mr. Owen was concerned. (Tr. 474-76)

Mr. Gill, an architect with some 20 years experience, testified that he had no specific recollection of any conversation with Mr. Owen; however, he did not deny that the conversation occurred. Mr. Gill explained that there were a lot of bidders, more than expected, and a lot of questions, some of which pertained to the use of skid steers. He said that it was common to receive numerous calls just before bid opening. Mr. Gill testified that the types of questions he could handle informally over the phone were those pertaining to the number of amendments issued, the bid opening date, or where to find things in the plans and specifications, but that "there's nothing we will answer except by amendment, in writing, if it in any way changes what's on the drawings, or specs." He had participated in the preparation of Amendment No. 1. (Tr. 795-806, 813)

Mr. Owen prepared a quote to perform the demolition work in Building 21 in the amount of \$179,953, based on using skid steers. Mr. Owen submitted this quote to Masterclean. This was his first quote on a Government project. (Tr. 542, 551)

A second amendment to the solicitation, Amendment No. 2, dated January 29, 1992, extended the bid opening date to February 13, 1992. (Exh. G-5)

On February 10, 1992, Masterclean and Owen's entered into a Demolition Services Subcontract for Building 21 in the amount of \$179,953 which, by its terms, would become binding "in the event of contract award." (Exh. G-9)

Bid opening was held on February 13, 1992, at the VA Medical Center in Salisbury, North Carolina. At bid opening, 28 bids, ranging in price from \$614,663 to \$1,480,000, were received and opened. Masterclean was the low bidder with its bid price of \$614,663. Abatement Systems Inc., of Broken Arrow, Oklahoma, was the second low bidder with its bid price of \$648,484, and Atlantic Environmental, Inc., of Virginia Beach, Virginia, was the third low bidder with its bid price of \$659,160. (Exhs. G-6, G-7, G-8)

On March 11, 1992, the VA Contracting Officer (CO), Jollette Daywalt Cole, awarded Contract No. V659C-553 to Masterclean. Accordingly, Masterclean and Owen's

Demolition Services Subcontract became binding. (Exhs. G-5, G-11, G-12; Tr. 452)

On March 25, 1992, the Contracting Officer issued the Notice to Proceed. Mr. Owen ordered two skid steers for the project on March 26, 1992. (Tr. 480; Exh. A-4) The Notice to Proceed was received by Masterclean on March 31, 1992, and the contract completion date was established as September 26, 1992. (Exh. G-13)

A pre-construction conference was held on or about March 31, 1992. One of the items covered was that Mr. Owen was to furnish to the VA, through Masterclean, an equipment list. Although Appellant contends that such a list was furnished to the VA within the first week of starting the project, the record does not show that such list was ever received by the VA. (Tr. 236-37, 478-79, 354-56) Ms. Cole and Mr. Gill testified that they never received a submittal from Masterclean proposing to use the skid steers in Building 21. (Tr. 806, 866) Mr. Owen testified that he delivered an equipment list and the skid steer brochures to Masterclean's offices but that he did not know if they were ever delivered to the VA. (Tr. 479, 579-80) Vency Hanson testified that he was not sure if Masterclean's corporate offices ever submitted a skid steer submittal or an equipment list to the VA for approval, but admitted that he never received an approved skid steer submittal back from the VA before permitting Mr. Owen to use the equipment. (Tr. 354, 404, 406, 409)

Both Masterclean and Owen's mobilized and began performance on April 7, 1992. (Tr. 453) On April 8, 1992, an inspection of Building 21 was performed by the VA Contracting Officer (CO), Jolette Cole, the CO's Technical Representative (COTR), Randy Peterson, and Contractor representatives during which pre-existing damages to the building were visually identified and listed, prior to commencement of construction, so that the Contractor would not be charged later for the damage. (Tr. 994; Exh. G-38) There is no indication in the record, however, that this had any bearing on the subsequently-raised skid steer loader question.

On April 14, 1992, Masterclean submitted its first proposed Progress Schedule to the Contracting Officer for approval. The schedule indicated that Masterclean and Owen's planned to work continuously through completion twenty-one weeks later on August 31, 1992. (Exh. G-15)

A skid steer loader, Case Model No. 1818, was delivered to the project site on Thursday, April 16, 1992. It was put into use that day and was used every day until the following Tuesday, April 21, 1992. (Tr. 181, 239, 316, 360, 481) This skid steer had a base operating weight of 2,728 pounds, a rated bucket load capacity of 650 pounds, and a wheelbase of 30 x 35 inches. (R4 Supp., tab 14; Exh. G-41) A second skid steer, Case Model No. 1825, arrived on Monday, April 20, 1992, and was placed in the lobby of the building. (Tr. 488-89) This second skid steer was larger and had a base operating weight of 3,158 pounds, a rated operating bucket load of 800 pounds, and a wheelbase of 33.5 x 44 inches. (Exhs. G-39, G-41; R4 Supp., tab 14) According to the Appellant, the VA COTRs observed the Model No. 1818 skid steer in operation from April 16 to April 21 without objection. (Exh. G-38; Tr. 181, 184, 186, 239-43, 245, 316-20, 322-23, 360-62, 481, 483-84, 486-88)

At trial, Mr. Owen took the position that he never intended to operate the two skid steers together on the same floor at the same time. Rather, he testified, he intended to first

demolish a stairwell on the north side of the building, and then use the 1818 skid steer to perform demolition work on the upper floors and push debris down the open stairwell where it would be gathered up by the larger 1825 skid steer and loaded onto dump trucks parked next to the dock. (Tr. 630-33)

However, during his May 16, 1994, deposition, almost one year earlier, when asked the same question, Mr. Owen stated that he planned to use the two skid steers in tandem. He planned to use the 1818 skid steer to demolish the doorways, pull out ceiling tiles, clean the floors and keep debris from piling up and becoming an unsafe condition. After the doorways were opened up wide enough for the 1825 skid steer to fit through, it would be used to demolish the walls while the 1818 skid steer proceeded to the next