

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Keller Mechanical Services, Inc.) ASBCA No. 56318
)
Under Contract No. FA4600-06-P-0120)

APPEARANCE FOR THE APPELLANT: Mr. Kevin E. Keller
President

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
MAJ Christy J. Kisner, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES

Keller Mechanical Services, Inc. (Keller), timely appealed from the contracting officer's (CO) 18 January 2008 final decision that offered \$5,052.01 to settle appellant's 16 March 2007 claim for \$19,676.15 for alleged extra work under the captioned contract. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. The government made an oral legal argument at the conclusion of the one-half day hearing in Kansas City, MO (tr. 130-32). Appellant submitted a brief on 4 February 2009. The government submitted a reply brief dated 10 March 2009 and appellant replied thereto on 12 March 2009. The Board is to decide entitlement only (tr. 9-10).

FINDINGS OF FACT

1. On 19 June 2006 the 55th Contracting Squadron, Offutt Air Force Base, issued Solicitation No. FA4600-06-T-0035 (the solicitation) for commercial items, *viz.*: "Purchase and install Independent Supplemental Humidification System for CRACs [Computer Room Air Conditioner Nos.] 39 and 40. In accordance with Statement of Work (SOW)." The SOW provided in pertinent part:

Install Independent Humidifiers on Two CRAC Units

(f) Scope: The work covered by this [SOW] includes the furnishing of all labor, materials, and equipment for the

purchase and installation [of] independent humidifiers on Computer Room Air Conditioners (CRAC's [sic]), # 39 and 40, serving the AFWA [Air Force Weather Agency] computer room L-30. The humidifiers will provide a source of steam/humidity independent of the main steam plant.

(g) Furnish and install two dry-steam self-contained humidification systems, one to each CRAC unit. Each unit must be capable of providing 30 lbs/hr of additional humidification [sic] to the L-30 computer room.

(h) Install all mechanical and electrical connections as required for proper operation.

(i) Install steam dispersion tubes in each of the existing 22-ton Liebert [air conditioning] unit ductwork assemblies.

(j) Install 2 modulating room humidistats to monitor and control humidity in the room.

....

(l) The work under this contract will be performed in Building 301...just outside Room L-30, Offutt AFB, NE. Work is to be completed within 30 days after notice to proceed is issued.... POC [Point of Contact]: Ms. Kathleen Morgan.... Alternate POC. Mr. Richard A. Riederer....

The solicitation incorporated by reference the FAR 52.212-1 INSTRUCTIONS TO OFFERORS—COMMERCIAL ITEMS (JAN 2006) clause, which provided in pertinent part:

(b) *Submission of offers.* Submit signed and dated offers to the office specified in this solicitation at or before the exact time specified in the solicitation. Offers may be submitted on the SF [Standard Form] 1449.... At a minimum, offers must show--

....

(4) A technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation. This may include product literature, or other documents, if necessary;

The solicitation specified that offers were due by 30 June 2006. (Supp. R4, tab 14 at 1, 3, 25)

2. On 28 June 2006 Keller submitted an offer for \$25,247.00 on the solicitation (supp. R4, tab 15 at 1, 3). On 7 July 2006 Keller sent the government Nortec product literature, dated 27 June 2006, describing two units of Nortec Model NHMC-030/440-480/3 “Self-Contained Microcomputer Controlled Electrode Steam Humidifier (Isothermal Technology),” and an air proving switch, condensate hose, humidistat and wall-mounted controller for each of the two humidifiers. Nortec’s literature described the humidifier and “Switch Air Proving (duct airflow safety interlock)”:

Using the patented ‘auto-adaptive’ control, the system will automatically adjust to incoming water conditions.

....

[O]n/off, duct mounted, pressure differential switch,...good for positive, negative or differential pressure applications, stops humidifier if duct air pressure is not sensed. Turns humidifier off if air handler fails.

....

C. Air Proving On/Off Switch--Wired to make when sensing air flow, break when no air flow. As a safety to prevent duct saturation when no air flows.

(R4, tab 2 at 7-10, 15, 18)

3. On 26 July 2006 CO MSgt Charles D. Jones signed Contract No. FA4600-06-P-0120 (the contract) which cited the solicitation, designated Keller as contractor and stated the \$25,247.00 price. The contract incorporated by reference the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (SEP 2005) clause, whose ¶ (a) provided:

Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies...at no increase in

contract price. The Government must exercise its postacceptance rights (1) within a reasonable time after the defect has been discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

and whose ¶ (i) provided:

Payment.-- (1) Items accepted. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract....

(R4, tab 1 at 1, 4)

4. The contract's local requirements clause B, "CHANGES TO THE CONTRACT..." provided that the CO "is the only person authorized to approve changes or modify any of the requirements under this contract and, notwithstanding any provisions contained elsewhere in this contract, the said authority remains solely with the CO" (R4, tab 1 at 10).

5. During the period 14-21 September 2006, Mr. Kevin Keller, president of Keller, installed two Nortec humidifiers at the L-30 computer room (tr. 5, 19, 25, 62; supp. R4, tab 30, photo 6). On or before 17 September 2006 Mr. Keller brought two modulating humidistats to install with the humidifiers. According to Mr. Keller, Ms. Morgan, designated in the SOW as a POC, and AFWA's Bill Kohler, neither of whom was a CO, told him that they didn't want two humidistats, so Mr. Keller installed one humidistat. (Tr. 20-21, 57-59)

6. At that time Mr. Keller attempted unsuccessfully to get one of the modulating humidistats to work with the two humidifiers, calling for help to Nortec, the manufacturer. Mr. Keller suggested to Mr. Kohler and Ms. Morgan to change the humidistat from modulating to "an on/off control," to which one of them replied, "Fine....That's what I wanted." Mr. Keller told them that he didn't have an on/off control humidistat, so he would obtain it and return later to install it. (Tr. 21-22, 26, 59)

7. Keller's 17 September 2006 e-mail to Ms. Morgan stated (supp. R4, tab 16):

I have finished the install [sic] of the humidifiers with the exception of the humidifier control wiring next to CRAC #40. I left the fuses out so the unit could not be turned on. The other unit can be operated by turning the disconnect on and then turn the switch on the unit control panel to on. The

schematics were not clear on how the connection needs to be since the humidistat operates by modulation. I thought it best if I waited till Monday 9-18-06 and call the factory and get the straight scoop from them on how it should be connected. I didn't want to chance damaging the circuit board, humidistat or both. So I will be back at Offutt Monday 9-18-06.

The record does not show whether Mr. Keller returned to Offutt on 18 September 2006.

8. On 21 September 2006, Mr. Keller told Mr. Riederer, the alternate POC, that Keller had tried to install an air proving switch, but the duct had insufficient pressure and too much vibration to allow him to adjust the air proving switch to work properly. Mr. Riederer said, "Well, okay," and to Mr. Keller's question, "Have I completed everything that's been asked?" answered "Yes...everything looks good." (Tr. 27-28)

9. On a form headed "Keller Mechanical Services, Inc. Service Report/Invoice," handwritten entries appear: "9-21-06, Nortec #39 NHMC 030... #40....Completed install and final inspection of humidifiers." On the form is a block stating: "I have authority to order the work outlined above which has been satisfactorily completed. I agree that Seller retains title to equipment/materials furnished until final payment is made as agreed..." below which is the signature of Richard A. Riederer. The form also had a "WORK COMPLETED" block checked "YES." (App. supp. R4, tab 3 at 3) When Mr. Riederer signed the foregoing form, Mr. Keller assumed "that the project was complete without regard to the air proving switches. That would have to be discussed, some other means of...connection" (tr. 28-29).

10. Without the air proving switch, the humidifiers ran independently from the CRACs and would continue to run when the CRAC was not running, thus leaving the facility vulnerable to duct saturation and excessive condensation under the sub-floor of

the computer room (tr. 112-13; R4, tab 4 at 2). We find that proper operation of the humidifiers that Keller offered required an air proving switch or another means to shut off the humidifiers when the CRACs were not operating to avoid duct saturation.

11. Keller's Invoice No. 3011331, to Offutt AFB, CO Jeffrey Ausenbaugh (tr. 26) and Mr. Riederer, of 21 September 2006, stated: "Upon completion and approval of project was recalled because of condensate not working. Found pump working properly with no problem.... All work is complete!" and the amount \$488.00 for overtime, travel and mileage (supp. R4, tab 18 at 1).

12. Keller's Invoice No. 3011313, to DFAS, Limestone, ME and Offutt AFB, dated 22 September 2006, requested payment of \$25,247.00 for the contract performance (app. supp. R4, tab 12 at 1).

13. Ms. Morgan's 16 October 2006 e-mail to Keller stated (app. supp. R4, tab 6):

Kevin,

When you were last here you were talking about the need to modify the control switches to the humidifiers so they would automatically shut off if the CRAC's [sic] shut down. You were going to send me an email explaining the situation and the possible options. Additionally, the condensate pump to CRAC 39...will not shut off by itself but continues to run unless tapped on the top. We really need to get these two items cleared up.

The good news is that during a recent steam outage the 2 humidifiers maintained the humidity in the room at about 41% for a period of a few hours. However, we're reluctant to use them to help control the humidity on a full-time basis because of the lack of a shut-off.

14. On or about 3 November 2006 Keller received notice that the government had rejected Keller's Invoice No. 3011313 because of "Work not complete" (app. supp. R4, tab 5 at 1). Keller's 3 November 2006 e-mail to CO Ausenbaugh asked: "What and why in detail you say the job was not completed, ultimately rejecting invoice submitted on 9/26/06.... How are you proposing the work to be corrected and completed for approval." (App. supp. R4, tab 13 at 2)

15. CO Ausenbaugh's 6 November 2006 letter to Keller replied:

Paragraph 1 of the [SOW] states that the humidifiers must be on the [CRACs].... Page 19 of your specifications titled Installation, paragraph C states "Air Proving On/Off Switch-wired to make when sensing air flow, break when no air flow. As a safety to prevent duct saturation when no air flows.

and instructed Keller to contact Mr. Riederer to set a time to make the needed repairs (app. supp. R4, tab 5 at 2). Keller's 6 November 2006 e-mail to Mr. Riederer stated that Keller would hook up the humidifiers as instructed "UNDER PROTEST" (app. supp. R4, tab 13 at 4). Keller's 9 November 2006 e-mail to Mr. Riederer stated that Keller was charging a \$2,214 monthly "rental fee" for the humidifier equipment starting 21 September 2006 (app. supp. R4, tab 8).

16. CO Ausenbaugh's 21 November 2006 e-mail to Keller stated that the humidifier that fed CRAC #40 had sprung a leak and Keller should repair the leak when he connected the humidifiers to the CRACs (supp. R4, tab 21 at 22).

17. On 27 November 2006 Keller returned to the site, installed relays on both humidifiers and tied those relays into terminals T5 and G2 of the control circuit of the Liebert CRAC units (app. supp. R4, tab 16 at 3). Hard wiring a relay to a circuit board performed the function of an on/off air proving switch (tr. 122-23). Mr. Keller said that to connect the humidifiers to the CRAC units would not provide "independent" humidifiers (tr. 29). The Board finds that interpretation unreasonable because SOW ¶ (f) did not state that the humidifiers were to operate independent of the CRAC units, but plainly required that the humidifiers operate "independent of the main steam plant."

18. Keller submitted two invoices dated 27 November 2006 to Offutt AFB, CO Ausenbaugh and Mr. Riederer. Invoice No. 3011332 billed \$4,388.83, including 8 labor hours each for Mr. Keller and a helper, travel, mileage, two relays, two relay bases, electrical miscellaneous and commission. Invoice No. 3011333 billed \$4,194.05, including 8 labor hours each for Mr. Keller and a helper, travel, mileage and commission and stated: "Service call saying humidifier leaking.... Humidifier leakage do [sic] to no maintenance by customer" (supp. R4, tab 18 at 2-3). Keller's service report described the 27 November 2006 work as installing relays (app. supp. R4, tab 16 at 3).

19. Keller's 28 November 2006 e-mail to CO Ausenbaugh stated (supp. R4, tab 21 at 26):

Under protest I connected the humidifier circuits to the Liebert [CRACs] on Monday 11-27-06. Your leak...is

caused by “NO MAINTENANCE”. Maintaining the equipment is not in my contract it is YOUR RESPONSIBILITY.... Thus, you will be charged for a service call. I have completed the new project. You must pay the original invoice [for] \$25,247.00.

The government does not dispute that Keller fixed the leaking humidifier on 27 November 2006 but asserts that the government made a daily visual check for error messages and changed tanks as required, monthly until a water softener was installed, and after that every three months, and that Offutt personnel believe that subsequent problems were the result of defective installation, not maintenance (supp. R4, tab 31 at 18).

20. Respondent paid Keller’s \$25,247 Invoice No. 3011313 on 18 December 2006 (app. supp. R4, tab 12 at 1). Thereafter the parties corresponded on Keller’s other invoices for additional work.

21. Keller’s 16 March 2007 letter to CO Ausenbaugh submitted a claim for \$19,676.15, including \$6,494.40 for rental, \$11,110.87 for interest, \$9,070.88 for service calls (sum of \$488 for Invoice No. 3011331 and \$4,388.83 and \$4,194.05 for Nos. 3011332 and 3011333) and \$3,000 for collection fees (R4, tab 2 at 5).

22. CO Jones’s 14 May 2007 e-mail offered Keller \$5,052.01 to settle the foregoing claim, subject to a bilateral modification (R4, tab 4). Keller’s 14 August 2007 e-mail to CO Jones sent Keller’s acceptance of the \$5,052.01 offer (R4, tab 8 at 2-3). On 20 August 2007 CO Jones sent Keller proposed Modification No. 01 for a \$5,052.01 price increase, with a release of claims (R4, tab 9). On 28 August 2007 Keller declined to sign the release of claims (R4, tab 10 at 1-2).

23. On 19 November 2007 Keller requested the CO’s final decision on its pending claim. CO Jones’ 18 January 2008 decision on Keller’s 16 March 2007 claim stated that the contract SOW required humidifiers “installed...for synchronization,” that Keller’s offer of an air proving on/off switch was “required to make the units operate in concert,” by not installing such switches the humidifiers were “running independently from the [CRAC] units, thus leaving the facility vulnerable to duct saturation and excessive condensation,” and that on 27 November 2006 Keller finally synchronized the humidifiers with the CRACs. The CO renewed his \$5,052.01 offer to settle Keller’s claims, and properly advised Keller of its appeal rights. (R4, tab 2)

24. On 14 February 2008 the Board received Keller’s timely notice of appeal, dated 8 February 2008, from the CO’s foregoing decision, which was docketed as ASBCA No. 56318. The notice of appeal sought additional monies in the amount of \$198,380.75. Keller’s 20 March 2008 letter to the Board provided a 10-element

breakdown of the \$198,380.75. The first three elements were in Keller's 16 March 2007 claim to the CO. The other seven elements are additional damages, identified as priority level designation, design fee, intellectual property fee, safety and code research, administrative fees, personal damages (10 years) and business damages (10 years). The Board designated Keller's notice of appeal and its 20 March 2008 letter as its complaint on 21 April 2008.*

25. Mr. Craig Hickle, Offutt AFB mechanical engineer, testified that Ms. Morgan sent him a copy of the proposed SOW and that "synchronization" meant to him "as far as an air handling device and humidifier goes, the two will always work in concert" and the SOW requirement for "proper operation" can be that "humidification only happening when air movement is happening...depending on the situation" (tr. 106-10). Mr. Keller testified that the government's interpretation was inconsistent with the "independent" operation that SOW ¶ (f) required of the humidifiers (tr. 29). We have rejected that interpretation as unreasonable (finding 17). We find that the SOW, ¶ (h), required that the humidifiers operate only when the CRACs are operating.

DECISION

This appeal presents two issues for decision: whether the services Keller furnished to respondent on 21 September 2006 and 27 November 2006 were within the scope of the contract. The government's offer to settle in the CO's final decision is not proof of liability. Once an appeal is taken, the Board decides the appeal without deference to the CO's findings in his final decision. *See Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994).

Although on 21 September 2006 Mr. Riederer signed Keller's Service Report whose "WORK COMPLETED" block was checked "yes," the parties knew that the air proving switch Keller had installed was not connected so as to operate properly (findings 9-10). Thus, the contract work in fact was not complete. Keller's Invoice No. 3011331 of 21 September 2006 stated that Keller was "recalled because of condensate not working. Found pump working properly with no problem" (finding 11). Keller has not proven that it did any "extra" work on 21 September 2006. Mr. Keller returned to Offutt AFB on that date to work on the air proving switch and possibly the humidistat. Thus, Keller's 21 September 2006 services were within the scope of the contract.

With respect to Keller's services on 27 November 2006 Keller argues that the term "synchronization" does not appear in the SOW, respondent's view that synchronization was required, based on the SOW ¶ (h) provision, "Install all mechanical and electrical connections as required for proper operation," is invalid because the SOW did not define

* We have no jurisdiction over appellant's \$198,380.75 claim to the extent it was not submitted to the CO in appellant's 16 March 2007 claim.

“proper operation,” which term would apply as well to “independent operation of the units” and respondent conceded that the SOW was unclear about a synchronization requirement since it offered to settle Keller’s claim for \$5,052.01 (app. br. at 1). Respondent argues that “synchronization” was within the scope of the contract as explained by Mr. Hickle, and the last sentence of SOW ¶ (f) qualified what “independent” meant (tr. 129-30).

In our view the issue is whether the SOW’s terms with respect to “proper operation” were ambiguous and the *contra proferentem* rule applies in Keller’s favor. *Contra proferentem* requires proof, among other requirements, that where a contractor seeks recovery based on his interpretation of an ambiguous contract, he must show that he relied on this interpretation in submitting his bid. See *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). Despite Keller’s current interpretation in litigation, its 2006 offer, as supplemented by the Nortec product literature, shows that Keller interpreted the SOW to require an on/off air proving switch, whose stated purpose was to assure that the humidifiers operated when they sensed air flow, and to cease operating when no air flowed (finding 2), consistent with the government’s interpretation of the SOW. Furthermore, the plain meaning of the SOW ¶ (f) term “independent” did not mean that humidifiers were required to be independent of the CRACs, but rather were to be independent of the main steam plant as sources of humidity (finding 17). Therefore, respondent had the right on 27 November 2006 to require Keller to repair the non-conforming humidifier equipment pursuant to the contract’s FAR 52.212-4(a) clause (finding 3). Accordingly, Keller has not shown that its Invoice No. 3011332 for installing two relays and bases on 27 November 2006, was outside the scope of the contract.

Respondent does not dispute that on 27 November 2006 Keller repaired the leaking humidifier, the subject of its Invoice No. 3011333 (finding 18). Respondent asserts that the government made a daily visual check for error messages and changed tanks as required, monthly until a water softener was installed, and after that every three months (finding 19). Those government contentions about daily and periodic maintenance do not specifically address the humidifier’s leakage and are too vague and conclusory to substantiate that the cause of the leakage was the humidifier’s non conformity to the requirements of the contract and SOW. Accordingly, such leak repair was outside the scope of the contract.

We sustain the appeal with respect to the humidifier repair work, subject of Keller’s Invoice No. 3011333, and deny the balance of the appeal. We remand the appeal to the parties to resolve the amount of recovery for repairing the leaking humidifier.

Dated: 18 March 2009

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56318, Appeal of Keller Mechanical Services, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals