

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Strand Hunt Construction, Inc. ) ASBCA No. 55904  
 )  
Under Contract No. DACA85-03-C-0007 )

APPEARANCE FOR THE APPELLANT: James F. Nagle, Esq.  
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Seattle, WA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
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U.S. Army Engineer District,  
Alaska

OPINION BY ADMINISTRATIVE JUDGE PAUL  
PURSUANT TO BOARD RULE 11

This is a timely appeal of a contracting officer's (CO) decision denying appellant Strand Hunt Construction, Inc.'s (SHCI) claim in an amount of \$2,447,453. The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 is applicable; and the parties have opted to submit the appeal on the record pursuant to Board Rule 11. We deny the appeal.

FINDINGS OF FACT<sup>1</sup>

1. On 30 April 2003, the United States Army Corps of Engineers (Corps) entered into fixed-price Contract No. DACA85-03-C-0007 with SHCI for the design and construction of emission reduction baghouse facilities to support the coal-fired power plant (CHPP) at Eielson Air Force Base (AFB) in Fairbanks, Alaska. The face amount of the contract was \$21,719,361. (R4, tab 1 at 1, 6, tab 40 at 133-34)

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<sup>1</sup> In a decision promulgated on 23 January 2009, 09-1 BCA ¶ 34,059, the Board denied the parties' cross-motions for summary judgment. Familiarity with that decision is presumed.

2. The contract contained several standard FAR provisions, including FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.243-4, CHANGES (AUG 1987); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); and FAR 52.236-13, ACCIDENT PREVENTION (NOV 1991) (R4, tabs 30-34).

3. The contract also contained a "GENERAL REQUIREMENTS" division. Subsection 1.3, "INTENT" of section 01010, "DESIGN REQUIREMENTS" stated, in part:

The government seeks a fully operational emissions reduction system designed to reduce particulate emission via filtration for each of six Eielson CHPP so as to comply with all applicable air quality discharge regulations. These systems shall be complete, useable, free of defects, and compatible with the existing CHPP systems. These systems shall be designed so as to be capable of being maintained and operating during all seasons (including winter at -51 degrees F and summer at 90 degrees F). In addition to providing emission reduction systems, the ash collection, conveying, storage, and ash truck loading systems shall be designed to have redundant capacity, to be constructed of high quality materials and equipment, and shall be easily maintained.

(R4, tab 40 at 5) Key elements of the equipment to be installed were the induced draft fans which were treated in section 11215 of the specifications. Subsection 1.5.c., "Indoor Design Criteria," provided:

- 1) Noise in control room, offices, etc. (dBA maximum):  
OSHA
- 2) Temperature (Filtration Buildings):
  - (1) Minimum: 50 degrees F
  - (2) Maximum: 20 degrees F above ambient

In addition subsection 1.5.d. stated:

- d. *Current* CHPP Building Indoor Temperatures:
  - 1) Minimum: 50 degrees F
  - 2) Maximum: 90 degrees F

(R4, tab 42 at 6) (emphasis added) These temperatures were also stated in subsections 1.4.c. and d. "DESIGN CRITERIA," of section 11500 of the specifications which was

entitled, "BAGHOUSE COLLECTOR SYSTEM" (R4, tab 43 at 6-7). Finally, the temperatures were also provided in subsections c. and d. of subsection 1.5, "DESIGN CRITERIA," which were contained in section 11700, "ASH CONVEYING SYSTEM," of the specifications (R4, tab 44 at 8).

4. Various other specifications described the temperature ranges which SHCI could expect to encounter in the CHPP. For example, subsection 2.4.3 of section 07900 specified the characteristics of the preformed sealants to be applied by SHCI in the baghouses as follows:

Preformed sealant shall be polybutylene or isoprene-butylene based pressure sensitive weather resistant tape or bead sealant capable of sealing out moisture, air and dust when installed as recommended by the manufacturer. At temperatures from minus 30 to plus 160 degrees F, the sealant shall be non-bleeding and shall have no loss of adhesion.

(Supp. R4, tab 79) With respect to the instruments and controls for the baghouse systems, subsection 2.4.1.1 of section 13405 stated the general requirements for the Programmable Logic Controllers (PLCs) in these terms:

PLCs shall be micro-processor based, capable of receiving discrete and analog inputs and, through programming, shall be able to control discrete and analog output functions, perform data handling operations and communicate with external devices. PLCs shall meet the requirements of Class A computing devices, and shall be labeled as set forth in 47 CFR 15 and shall be able to withstand conducted susceptibility test as outlined in NEMA ICS 1, NEMA ICS 2, NEMA ICS 3, or IEEE C37.90.1. PLCs shall function properly at temperatures between 32 and 122 degrees F at 5 to 95 percent relative humidity non-condensing and shall tolerate storage temperatures between minus 40 and plus 140 degrees F at 5 to 95 percent relative humidity non-condensing.

(Supp. R4, tab 80 at 21) Further, with respect to the digital control system for the heat, ventilation and air-conditioning (HVAC) system, the following temperatures were stated in section 15951 of the specifications:

### 1.2.8.1 Space Temperature

Space temperature with a range of minus 30 to 130 degrees F plus or minus 1 degree F.

### 1.2.8.2 Duct Temperature

Duct temperature with a range 40 to 140 degrees F plus or minus 2 degrees F.

### 1.2.8.3 Outside Air Temperature

Outside air (OA) temperature with a range of minus to 30 plus 130 degrees F plus or minus 2 degrees F; with a subrange of 30 to 100 degrees F plus or minus 1 degree F.

(Supp. R4, tab 81 at 7-8) Finally, regarding measurements for the HVAC instrumentation, subsection 2.7.1 of section 15951 stated:

Transmitters shall be calibrated to provide the following measurements, over the indicated ranges, for an output of 4 to 20 mAdc:

- a. Space temperature, from 30 to 130 degrees F.
- b. Duct temperature, from 40 to 140 degrees F.
- c. Heating hot-water temperature, from 100 to 250 degrees F.
- d. Outside-air temperature, from minus 30 to 130 degrees F.

(Supp. R4, tab 81 at 22)

5. The "PROPOSAL SUBMISSION REQUIREMENTS," section 00100 of the Request for Proposals (RFP), included item 11 which was entitled "PRE-PROPOSAL CONFERENCE SITE/VISIT." It provided that a site visit would be held at the power plant on 17 October 2002. Item 11 stated further:

Prospective offerors are advised to visit the work site to ascertain the degree of difficulty expected in avoiding

existing features, and other factors affecting the work. Any difficulties arising during performance of work that would have been evident at such a prior inspection will not be considered to be a result of differing site conditions.

(R4, tab 29 at 3) This language was bolstered by the contractual clause governing site investigations, FAR 52.236-3, which provided, in pertinent part:

The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost... Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(R4, tab 33 at 1-2)

6. The site visit proceeded as scheduled. It was conducted by Mr. William Havard who was the "operation and maintenance supervisor/superintendent" of the CHPP (supp. R4, tab 75 at 6). Also in attendance was Mr. Sonny Lindner of SHCI, as well as several representatives of Wieland Lindgren Engineers, a firm which assisted SHCI in the design phase of the contract (R4, tab 69 at 19; supp. R4, tab 25 at 3). Mr. Havard described his responsibilities with respect to the contract at issue as follows:

I was originally one of the people that helped with the design concept before it was written for a project for the Air Force. Once the project blossomed from there and was awarded, I was on the selection committee with the Corps of Engineers with a group of other people. From that point on after the company was selected, I was the--pretty much the main person coordinating everything for any work in the central heat and power plant. All projects in that plant went through me, coordination, everything.

(Supp. R4, tab 75 at 7-8)

7. During this sworn deposition, Mr. Havard generally described the site visit in these terms:

Yeah. Pretty much if a contractor hadn't been in there before, show him the basic layout. I give him my basic speech, spiel, whatever you want to call it, that they wouldn't affect anything in that plant. Show them the boilers, the turbine side. If you look where my office was at the time, you would come out onto the turbine floor, see the five turbines, go over and see the boilers, go up in the elevator. As you walk down, showing each level of the boilers, the fan decks, where they had to tie in and remove the fans.

Talked about how in the wintertime that we had to close everything up because at 50, 60 below, you can't have doors open. You suck it in so--basic physics. Heat rises. Fan deck normally can run 120, 140 degrees. In the summertime even hotter if you have got ambient temperature. You know, give them a layout there.

One of the things I always harped on with the contractors is to let them know that --have their employees drink plenty of liquids because you get dehydrated. I saw too many times where contractors had passed out because of the heat in there. So they had to drink plenty of liquid. There were the circumstances.

But then, again, you have to look at, I was on the selection committee, and one of the things, the criteria is having experience in a power plant. Now, if you experience in a power plant, everything I'm telling you or them, they should be very well aware of it, you know, that power plants are hot, dirty places, especially coal fired plants.

(Supp. R4, tab 75 at 16-17) Mr. Havard also testified at greater length regarding his discussion with potential offerors about the hot working conditions they would encounter at the CHPP. He stated:

Normally I tell them through the walk-through. I've told it in briefings. We had water fountains on levels there. Most of my people know that. Temperature came up at different times, I know, because of work that they would do like, on the fan deck, if they were doing anything by the boilers, because that's where it's especially hot.

The only heaters in that power plant were by doors. That plant was heated by the temperature from the equipment. I mean, it was all over there. Some equipment, if you look at the higher level, you had to keep in mind the temperature. And the fan deck is one area I know that I told them about because we had to use high temperature grease on our bearings for those--the fan motors. So it's just one of the areas where it was always hot.

(*Id.* at 17-18)

8. Although SHCI concedes in its opening brief that there “does not appear to be any dispute that the temperature on the upper levels where work was being done routinely exceeded 120° F.,” Mr. Lindner, its representative at the site visit, stated in an unsworn statement that he “did not carry a thermometer with me and do not recall it being excessively hot inside the CHPP during my brief walk through.” Mr. Lindner also stated that he was not “very near” Mr. Havard during the site visit and did not hear him assert that the plant was “hot.”<sup>2</sup> (App. br. at 3; R4, tab 593) Mr. Lindner’s statements in his unsworn statement are contradicted by a host of assertions made by other employees of SHCI in their sworn depositions. For example, Mr. Mark Carton, SHCI’s project superintendent on the CHPP, stated that the temperatures on the upper floors of the facility during his first visit were hot. He also testified: “I was sweating my guts out” (supp. R4, tab 70 at 15). Mr. Carton’s sworn testimony was corroborated by that of Mr. Philip T. Dearing, SHCI’s project manager, who testified in pertinent part, as follows:

But my recollection was it always seemed to be hot up there because you’d think that in the winter that it would be cooler, but it wasn’t because it was so cold outside that they kept all the doors shut and stuff. And so it was boiling hot in the winter, and that’s also when they’re producing a tremendous amount of heat from the boilers because everyone’s cold and so they’re trying to keep the buildings warm. So the boilers are much more in demand, which is creating heat.

But in the summer, it was still boiling hot. They’d have the doors open right at the very top of the baghouse, and I just

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<sup>2</sup> There is no record evidence as to what the three Wieland representatives either felt or heard during the site visit.

remember that it was still boiling hot up there because it was summer and so it was warmer outside anyway.

(Supp. R4, tab 71 at 43) The sworn testimony of Messrs. Carton and Dearing was corroborated further by that of Mr. Tim Jauhola, another SHCI superintendent on the project. In his sworn deposition, Mr. Jauhola testified with respect to the upper levels of the facility “[i]t’s like 120 degrees up there. It’s hot, hot, hot.” (Supp. R4, tab 74 at 87) Hence, the sworn testimony of three SHCI managers directly contradicts the unsworn statement of Mr. Lindner and confirms Mr. Havard’s sworn assertions.

9. The CO gave SHCI notice to proceed on 14 May 2003, and SHCI acknowledged the notice on 18 May 2003 (R4, tabs 27, 28). In August 2003, an issue arose as to the temperatures at the CHPP. Misquoting subsection 1.5.d. of the design criteria set forth in section 11215 of the specifications, Mr. James Michael of Wieland Lindgren Engineers forwarded the following letter to SHCI:

As per our recent discussion please find this letter my explanation for the need to upgrade the Induced Draft Fan Drive Motor.

The RFP Specifications, Section 11215-Induced Draft Fans, Section 1.5, paragraph d, “Design Criteria” state that the CHPP indoor temperatures are; minimum 50°F, maximum 90°F. During the 65% review meeting comments were made by the plant operations manager, Bill Havard, that the elevated floor that the Induced Draft Fans were situated on, exceed the temperature given in the Design Criteria. Mr. Havard stated that temperatures in the range of 135°- 140°F have been recorded. This ambient temperature exceeds the ambient design rating of the standard motor. The motor specified to the ID Fan vendor was upgraded to operate in this higher ambient condition. I believe that the vendor can provide you with the upcharge for this motor. I believe that this higher operating temperature motor will be installed with larger size conductors than would be used for the typical drive motor. This can be confirmed by your electrical sub-contractor, and he can advise you best on the additional charge for the larger conductors.



If you have any questions or comments, please contact me.

(R4, tab 25 at 3)<sup>3</sup> On 4 September 2003, SHCI forwarded "Request for Information No. 011" to the Corps in which it stated, in part:

See the attached letter from our designer. We believe the upgrading of the temperature r[e]quirements to be a change to the contract.

Please confirm asap as we are proceeding with fan construction based upon the verbal direction given previously[.]

(*Id.* at 1-2) The Corps responded to SHCI's letter on 24 September 2003, stating, in pertinent part:

We shall address increasing the operating temperature rating of all six (6) ID Fan drive motors in a forthcoming Request for Proposal.

(R4, tab 24) On 15 January 2004, after reviewing the specifications, the Corps provided a further response to SHCI's letter in part, as follows:

Reference your serial letter H-0037 dated September 4, 2003, and our serial letter C-0029 dated September 24, 2003.

It is our position that the substitution of WEG motors for the originally proposed TECO-Westinghouse motors for the ID fans is not a contract change but a variation and we shall accept it as such. Therefore, we shall not issue an RFP or otherwise pursue a contract modification.

Under the expected loads, both motors will operate at the maximum interior ambient temperature of 140°F, making the WEG motor an acceptable variation.

(R4, tab 22)

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<sup>3</sup> The subsection cited by Mr. Michael referred to "current" temperatures at the plant (finding 3).

10. SHCI installed the substituted engines and did not dispute the Corps' finding that the substitution constituted merely a variation—and not a change—to the contract (2<sup>nd</sup> supp. R4, tab 83).

11. No further issues arose regarding indoor temperatures at the CHPP until 14 June 2005 when SHCI forwarded a letter to the Corps in which it stated, in part: “We also wish to take this opportunity to notify you that we are reserving our rights to claim time and costs related [to] the excessive temperature Strand Hunt and our Subcontractors experienced while working in the plant” (R4, tab 9 at 2).

12. On 29 June 2006, SHCI forwarded a request for equitable adjustment (REA) to the Corps. It wrote:

We are submitting this request for equitable adjustment that was as a result of working in the excessive heat and its related inefficiencies in the amount of \$2,447,453.

This change has been identified early in the project. The Government has stated this temperature difference from 90°F. to 120° would be handled by change order to the contract (see Tab A.12).

The inefficiencies and the related costs and delays due to working in temperatures in excess of 90° is a changed condition to our contract. Please review the attached ‘Excess Heat Summary of Information’ book dated June 29, 2006 along with Volumes I through XIII with detail source information.

Upon your initial review, and within 30 days, we would like to receive a date when a response by the Government is anticipated.

(R4, tab 7) The statement that the government would handle the “temperature difference” issue “by change order to the contract (see Tab A.12)” referred to evaluations conducted by the Corps in 2003 relating to the fan motor issue. The initial recommendation that this matter was to be “handled by change order to the contact” was marked “Non-concurred” with Mr. Havard commenting that the “[a]verage temperature for fan deck area is 120 degrees, not 90 degrees” (ex. A-12 at 1). On this basis, no change order was issued in 2003; SHCI did not contemporaneously dispute this conclusion (findings 9, 10).

13. On 30 June 2006, SHCI wrote another letter to the CO. It stated:

As per our telephone conversation today, due to the Government's inability to commit to a schedule for review and negotiation of this REA, we hereby request a Contracting Officer's decision for our claim for the working in excess heat in the amount of \$2,477,453.

We have just recently sent you two (2) complete copies and one (1) set to Mr. Norm Sams.

We have also enclosed a Certification of this Claim.

Please advise us immediately should you require any other documents to consider this valid claim.

(R4, tab 6 at 1)

14. On 19 April 2007, the Corps' CO, Ms. Crystal D. Labreque, issued a final decision in which she denied SHCI's claim in its entirety (R4, tab 1 at 31). As a basis for her decision, the CO relied heavily upon various specifications which described temperatures in the CHPP as high as 140° F (*id.* at 7-8). In addition, the CO noted that, at the pre-proposal conference, Mr. Havard "alerted all participants that it was very hot inside the building and contractors should plan to take precaution for personnel working in the heat" (*id.* at 13). Accordingly, the CO concluded that SHCI had encountered neither a changed condition nor a differing site condition as a result of the admittedly high temperature in the CHPP (*id.* at 28). This appeal followed (R4, tab 2 at 4).

#### DECISION

In contending that the high temperatures at the CHPP constituted either a constructive change or a type I differing site condition, SHCI focuses on isolated subsections of the specifications which referred to "current" indoor temperatures at the CHPP varying from 50° F to 90° F at the time when the RFP was prepared (app. br. at 3). But it fails to give any weight whatsoever to several subsections of the specifications which described indoor temperatures as high as 140° F. All of the specifications which we have cited were integral elements of the baghouse system (findings 3-4). Accordingly, interpreting the contract as a whole, the specifications clearly stated a high temperature range in the CHPP of 90° to 140° F. Based upon the testimony of SHCI's

own project superintendents and managers, these are precisely the conditions which appellant encountered throughout the life of the contract (finding 8).

In an attempt to thwart this conclusion, appellant's counsel now argues that the specifications alluding to temperatures as high as 140° F referred to "other buildings and equipment that generate[d] its own heat" (app. br. at 9). Initially, we note that this is the first instance in which this argument has surfaced in the course of this protracted litigation. SHCI did not raise these contentions in its request for equitable adjustment, its claim, its notice of appeal, its complaint, or in its motion for summary judgment. This is significant. It is axiomatic that we give credence to disputed interpretation of contractual provisions only if they were held by a party at the time of award. There is no evidence to support such a conclusion in this instance.

Just as importantly, counsel's assertions are not supported by persuasive record evidence. For example, with respect to the preformed sealants described in subsection 2.4.3 of section 07900 of the specifications (finding 4), counsel's arguments are not supported by any evidentiary references whatsoever (app. br. at 9). Similarly, regarding the instruments and controls-baghouse system, described at subsection 2.4.1.1 of section 13405 of the specifications (finding 4) appellant's counsel attempts to bolster his statements with a generic, unsworn statement from a representative of one of SHCI's subcontractors (R4, tab 599). There is no indication that SHCI held this interpretation at the time of contractual award six years earlier. Finally, appellant's counsel cites no persuasive evidence to support its allegations regarding various subsections of 15951, "DIRECT DIGITAL CONTROL FOR HVAC" (finding 4; app. br. at 10). In sum, SHCI has failed to meet its burden of demonstrating that various provisions in specifications stating temperatures as high as 140° F are irrelevant to the appeal. The temperatures encountered by SHCI in the CHPP were within the range stated in the specifications. Therefore, appellant encountered neither a constructive change nor a type I differing site condition in performing its work under the contract.<sup>4</sup>

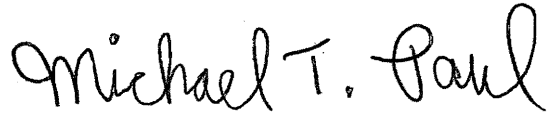
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<sup>4</sup> Based upon the Board's decision, the Corps' notice arguments relating to a differing site condition need not be addressed.

CONCLUSION

The appeal is denied.

Dated: 21 June 2012

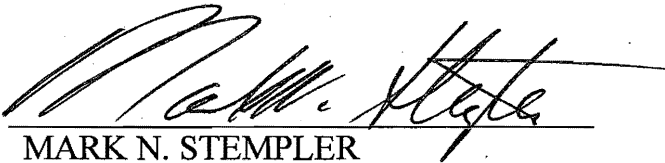


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MICHAEL T. PAUL  
Administrative Judge  
Armed Services Board  
of Contract Appeals


I concur

I concur



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



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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. 55904, Appeal of Strand Hunt Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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