

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
EJB Facilities Services) ASBCA No. 57434
)
Under Contract No. N44255-05-D-5103)

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Naval Facilities Engineering Command
Litigation Office
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

EJB Facilities Services (EJB) seeks an equitable adjustment of \$635,832.60 in connection with a base operating support contract (BOSC), alleging that the Naval Facilities Engineering Command (government) imposed a more stringent performance standard for elevators than that required by the contract. The parties have filed cross-motions for summary judgment.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 1 August 2005, the government awarded BOSC Contract No. N44255-05-D-5103 to EJB in the amount of \$405,270,351.64. The work was to be performed at various installations under the cognizance of the Naval Facilities Engineering Command Northwest in the Western Puget Sound area of Washington State. (R4, tab 1 at 1, 20 of 45) The contract was a combination firm, fixed-price/indefinite delivery, indefinite quantity (FFP/IDIQ) contract. The contract included a phase-in period (2 August 2005 through 30 September 2005), a base period (1 October 2005 - 30 September 2006), four option years (FYs 2007 through 2010), and three "Award Option" years (FYs 2011 through 2013) (R4, tab 1 at 20 of 45).

2. The contract incorporated FAR 52.233-1, DISPUTES (JUL 2002) – ALTERNATE I (DEC 1991) and FAR 52.243-1, CHANGES—FIXED-PRICE (AUG 1987) – ALTERNATE II (APR 1984) by reference (R4, tab 1 at 28 of 45).

3. The Performance Work Statement (PWS) is divided into 21 “annexes.” The copy of the PWS in the record is updated in relevant respect to include revisions as of Modification No. P00014 dated 4 August 2006, and that is the version of the PWS which we quote below. (Mot. at 4 n.5 and ex. 2)

4. Spec. Items 2.1.2 and 2.1.3 of annex 1502000, “Facility Investment” contain the following definitions:

2.1.2 Maintenance

Maintenance work is inspection, testing, cleaning, lubrication, adjustment, calibration, and minor part and component replacement (such as filters, batteries, belts, hoses, fluids, oil and grease) as required to verify proper system operation; minimize malfunction, breakdown, and deterioration of systems and equipment; and maximize useful life....

2.1.3 Service Call

A service call is work identified at a point in time that is necessary to return a facility, structure, or piece of equipment to its intended use. Service calls are brief in scope, do not generally require detailed job planning, and have a maximum financial liability for the contractor of either \$5000 or \$2000 for the direct cost of labor and materials. Repairing a non-functioning HVAC unit, replacing lamps in light fixtures, and unclogging drains are examples of service calls....

(R4, tab 2 at 108 of 262)

5. Spec. Item 3.1, Service Calls, provides, in part, as follows:

[Performance Objective]

The Contractor shall perform service call work to ensure facilities and equipment are restored to a safe, operable condition and function properly.

[Related Information]

....

Emergency work requires immediate action to correct or prevent loss or damage to Government property and assets, restore disrupted essential services, affecting production or life safety, maintain security, or eliminate life-threatening hazards to personnel or property..... The Contractor shall respond to emergency calls within one (1) hour with the appropriate service personnel and equipment.... The Contractor shall continue work until the emergency has been mitigated.... Remaining work from a mitigated emergency that does not affect production, life safety, or cause continued damage to Government property or assets shall have 30 days to be completed.

Urgent work requires action to respond to failures of services that do not immediately endanger facility occupants or Government property, but would soon inconvenience and/or affect the mission or the security, health, or well being of occupants. The Contractor shall complete service calls classified as urgent within 15 calendar days....

Routine work is work that is not designated as Emergency or Urgent. The Contractor shall complete service calls classified as routine within 60 calendar days....

....

[Performance Standard]

Service call work is responded to and completed within designated timeframes.

(R4, tab 2 at 110-11 of 262)

6. Spec. Item 3.3, Maintenance, provides, in part, as follows:

[Related Information]

....

Facilities and equipment shall be maintained in accordance with Spec. Items 3.3.1 through 3.3.25....

[Performance Standard]

....

All maintenance is implemented on schedule.

T1 critical equipment is operational 100% of the time.^[1] All other equipment is operational 98% of the time.

(R4, tab 2 at 113 of 262)

7. Spec. Item 3.3.11 pertains to vertical transportation equipment and is the only Spec. Item that directly relates to VTE. Spec. Item 3.3.11 provides in part, as follows:

[Performance Objective]

The Contractor shall maintain Vertical Transportation Equipment (VTE).

....

[Performance Standard]

VTE is operational at all times except when maintenance is being performed.

(R4, tab 2 at 122 of 262)

8. VTE includes elevators. Attachment J-1502000-10d to the PWS lists 160 VTE units, including 131 elevators distributed among 72 buildings (R4, tab 3 at 110-15 of 142; compl. and answer ¶ 21).

9. Mr. Robert F. Parker, P.E., EJB's General Manager, described the service call provisions as follows:

¹ No Vertical Transportation Equipment (VTE) was classified as T1 critical (R4, tab 17).

3. Under the Contract, EJB is paid a fixed-price for certain basic services, and other services are priced on an IDIQ basis....

4. There are six types of service calls included in the fixed-price work: Routine, Urgent and Emergency calls costing EJB up to \$2,000 each, and Routine, Urgent, and Emergency calls costing EJB up to \$5,000 each. The Contract specifies the maximum number of each type that is included in the fixed-price work....

5. Under the Contract, repairs whose need is identified during routine maintenance and which will cost less than \$250 are included in the fixed-price and they are not considered service calls and do not count against the service call quotas.

6. Under the Contract, each command purchases a specific quantity of each type of service call, i.e., Routine, Urgent or Emergency, which can be used for elevators as well as other equipment or systems. When any command's quantities are expended they cannot order more of that type unless they purchase additional quantities through E-Mall. When E-Mall is sold out of that type, the command cannot order more of that type.

(App. reply to gov't response, 2nd Parker decl. at 2-3)

10. EJB initially used a subcontractor to perform the elevator work. However, it took the work in-house in March of 2009. Mr. Sergeson, the Administrative Contracting Officer (ACO) stated in his declaration that after EJB began performing the work there were "a greater number of elevators being down, longer down times and a consistently negative maintenance trend" (gov't resp. to app. cross-mot., ex. 7, ¶ 5). Mr. Brian Van Woudenberg, the government's Senior Performance Assessment Representative (SPAR), stated in a declaration that he "almost immediately [noticed] an uptick in issues with VTE services, specifically in service call response" when EJB began performing the work (mot., ex. 4, ¶ 9).

11. On 1 May 2009, Ms. Patricia L. Kelly, the Contracting Officer's Representative² (COR), directed EJB as follows:

I am directing you to classify elevator service calls as emergencies in accordance with Annex 15020000, Spec. Item 3.1. The Government is concerned about elevator down time that can cost the Government in production, efficiencies and reputation. The Government stressed the importance of having the elevators operational at all times under the maintenance requirements. The Government considers this standard is equally important for repairs.

(R4, tab 13)

12. On 11 May 2009, Mr. Parker replied as follows:

...Your letter references the "Maintenance" standard [in] Spec. Item. 3.3.11, "VTE is operational at all times except when maintenance is being performed" and you are applying that standard to "Service Calls" under Spec. Item 3.1. It is clear to EJB that there is a distinction between "Maintenance", which is defined in...Spec. Item 2.1.2 and a "Service Call" [which is] defined in Spec. Item 2.1.3 and 3.1. [A] service call is defined as the response to facilities in "need of repair," to return a facility structure or piece of equipment to its intended use" and to "restore facilities and equipment to an operable condition." When an elevator breaks unexpectedly the response is no longer a maintenance issue but rather a repair requirement for which service call procedures are required to be followed....

(R4, tab 14)

² EJB questioned Ms. Kelly's authority to issue the directive because her letter of appointment did not authorize her to incur additional costs or constructively modify the contract (R4, tab 16).

13. On 28 September 2009, Mr. Sergeson, the ACO, responded as follows:

EJB is hereby directed to immediately proceed with the performance of VTE in accordance with...specification items 3.3 and 3.3.11.

(R4, tab 15)

14. On 5 November 2009, Mr. Parker wrote Ms. Fitzgerald, the Procuring Contracting Officer (PCO), in part, as follows:

[O]ur maintenance requirements were contained in Annex 1502000, Spec. Items 2.1.2, 3.3 and 3.3.11. While performing regular scheduled maintenance, if a repair requirement is identified then it will be accomplished utilizing the criteria described...for Service Calls...

Our repair responsibilities were contained in Annex 1502000, Spec. Item 2.1.3, "Service Calls". As there is no separate category of Service Calls specific to VTE, the same standards for response and completion apply for Service Calls generated for VTE repair work as those of other related facilities.... [Thus if] the nature of the work meets a specific criteria, i.e., "Emergency, Urgent or Routine" that is the criteria we use in identifying the type of Service Call generated....

(R4, tab 16)

15. On 16 December 2009, Ms. Fitzgerald replied as follows:

We both agree that the VTE maintenance requirements are included in...paragraphs 2.1.2, 3.3 and 3.3.11. We also agree that in the event repairs are required, the repairs will be treated as service calls in accordance with paragraphs 2.1.3 and 3.1....

....

...Paragraph 3.3, Maintenance, requires T1 critical equipment to be operational 100% of the time. All other equipment is to be operational 98% of the time. Since none of the elevators are designated as T1, the performance standard is

98%.... However, the specific performance standard for VTE in paragraph 3.3.11 states that VTE is to be operational at all times except when maintenance is being performed.

....
...[I]t is virtually impossible to achieve the “operational at all time” performance standard if the work is performed as a Routine service call and you have sixty days to complete the repairs. The same logic applies to repairs completed as Urgent service calls with a task completion time of fifteen days.... With a clear performance standard requiring full time operability, I believe that the Government has specifically designated [VTE] as meeting the [requirement for emergency service calls in paragraph 3.1].

(R4, tab 17)

16. On 11 January 2010, Mr. Sergeson directed EJB to proceed with VTE work using the performance standard required by the contract (that VTE “remain operational at all times except when maintenance is being performed”) and to prepare a preventative maintenance plan to achieve that standard. He attached a copy of a Contract Discrepancy Report (CDR) that cited EJB for failing “to insure VTE meets inspection requirements 100% of the time.” (R4, tab 27)

17. On 15 January 2010, EJB requested that the government rescind its letters of 16 December 2009 and 11 January 2010 (R4, tab 29).

18. On 21 March 2010, Ms. Fitzgerald replied, in part, as follows:

[T]he performance standard for elevators is they shall be operational at all times except when maintenance is being performed, and the only way that objective can be achieved is if repairs are treated as emergency service calls. Further, this is not a change to the contract; the[se] standards...were present in the solicitation and subsequent award of the contract.

....
This letter serves as notice that all elevator repairs completed via service call will be classified as an emergency.

(R4, tab 31)

19. On 21 June 2010, the government requested EJB to submit a proposal to increase the quantity of emergency and urgent service calls. On 29 July 2010, the parties entered into bilateral Modification No. A00048 increasing the quantity of emergency service calls to 2,300 and the quantity of urgent service calls to 6,500 for FY 2010. The modification contained accord and satisfaction language. No claims were excepted from this language. (R4, tab 32)

20. On 29 June 2010, EJB submitted a certified claim to the PCO requesting a final decision. EJB asserted that, by directing it to respond to all elevator service calls as emergencies, the government had constructively changed the contract, entitling it to an equitable adjustment of \$99,113.45.³ In addition, EJB requested that the contract price be increased by \$161,753.51 per year for the remainder of the contract to compensate for the additional costs of performing in accordance with the Navy's interpretation. (R4, tab 34)

21. On 27 August 2010, the CO denied the claim, stating that the government did not change the criteria for maintenance of VTE, that the maintenance and service call portions of the contract were not "stand-alone" requirements, and that it did not impose a higher performance standard for VTE than that set forth in the contract. The CO also asserted that the requirement for VTE to be operable at all times except when maintenance is being performed means that VTE must be considered as "essential services" under Spec. Item 3.1 and therefore subject to emergency service call performance standards. (R4, tab 35)

22. EJB timely appealed the denial of its claim to this Board where it was docketed as ASBCA No. 57434 on 19 November 2010.

23. On 2 May 2011, the government filed a motion for summary judgment, alleging that (1) reading the contract, as a whole, all "non-operational" elevator service calls were to be classified as emergencies; (2) the contract is clear but if the Board finds the language ambiguous, it is patently ambiguous, or, if latently ambiguous, EJB did not rely on its interpretation at time of bid; (3) EJB cannot prove any economic injury; and (4) EJB's claim for FY 2010 is barred by the doctrine of accord and satisfaction. The government attached the declaration of Mr. Van Woudenberg, the SPAR, to its motion. His declaration states, in part, as follows:

19. Based on the Contract's VTE provisions, EJB was required to keep VTE up and running at all times. If an

³ EJB also asserts that the government's actions constitute "overzealous" inspection, but that it is not basing its cross-motion for summary judgment on that ground (cross-mot. at 2 n.4).

elevator went out of service, then EJB should have responded immediately and worked to get it back in service as quickly as possible. The contract clearly states that the VTE operational standard is “operational at all times except when performing maintenance.” The only way EJB could meet this standard is if it classified service calls for non-operable VTE as emergencies triggering EJB’s repair crew to start work immediately to restore VTE service. The Navy did not change the level of service required; it simply instructed EJB to use the Service Call classification system correctly to meet required performance standards.

(Mot., ex. 4, ¶ 19)

24. On 21 June 2010, EJB filed a cross-motion for summary judgment and opposition to the government’s motion for summary judgment. EJB argues that the contract does not require all elevator service calls to be treated as emergencies and that the government has admitted it directed EJB to classify all elevator repairs completed via service call as emergencies. Thus, EJB concludes that the government imposed a more stringent performance standard for elevators than that required by the contract. EJB also denies that the elevator provisions are patently or latently ambiguous. Finally, EJB disputes that bilateral Modification No. A00048 constitutes an accord and satisfaction with respect to FY 2010, stating that there is no evidence that the parties intended that modification to resolve this claim and that, in any event, the claim is not barred because the CO considered the merits of EJB’s claim without asserting an accord and satisfaction. In addition, EJB submitted the declaration of Mr. Parker, which stated, in part, as follows:

15. I understand that the Navy has claimed in this appeal that “the Government has never asserted all VTE-related Service Calls are required to be treated as ‘emergency’ service calls,” and that the Navy only gave EJB direction to classify all Service Calls “for non-operable elevators” as emergencies. These claims by the Navy are not true. Rather, the Navy directed that all Service Calls related to VTE be classified as emergencies.

(Emphasis in original)

25. On 18 July 2011, the government submitted its response to EJB’s cross-motion for summary judgment and its opposition to the government’s motion for summary judgment. The government asserts that it only directed EJB to classify

“inoperable” elevator service calls as emergencies, that the contract required EJB to classify all non-operable elevator service calls as emergencies, that elevator service is an essential service under the contract, that there has been no prior course of dealing wherein the parties agreed that not all elevator service calls are emergencies because that has never been the government’s position, and that EJB has not demonstrated any damages. In support of these contentions, the government submitted the declarations of Ms. Kelly, the COR, Ms. Fitzgerald, the PCO, Mr. Sergeson, the ACO, and a second declaration from Mr. Van Woudenberg, the SPAR. In her declaration, Ms. Kelly stated that her direction “only related to elevator service calls for non-operable elevators and [that she] never knew EJB to think differently” and that “[a]t no time, have I ever directed EJB to classify all elevator service calls as Emergency service calls” (*id.*, ex. 5, ¶¶ 4-5). Ms. Fitzgerald’s declaration states that “[a]t no time have I ever directed EJB to classify all elevator service calls as Emergency service calls” (*id.*, ex. 6, ¶ 5). Mr. Sergeson’s declaration stated that, “[t]o my knowledge, EJB does not, and did not, classify all VTE service calls as ‘Emergency’” (*id.*, ex. 7, ¶ 3). In his second declaration, Mr. Van Woudenberg denied that the government directed EJB to respond to all elevator service calls as emergencies “no matter the nature of the problem or repair” (response, ex. 9, ¶ 1).

26. On 22 August 2011, EJB filed a reply to the government’s response, with a second declaration from Mr. Parker. On 1 September 2011, the government filed a sur-reply challenging EJB’s assertion that it was handling all elevator repair calls as emergencies.

DECISION

The fact that both parties have moved for summary judgment does not mean that we must grant judgment as a matter of law for one side or the other. Summary judgment is not proper if disputes remain as to material facts. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).

These motions involve a dispute over the performance standard for elevators. EJB argues that the government constructively changed the contract by directing it to classify all elevator service calls as emergencies. The government argues that it only directed EJB to classify non-operational elevator service calls as emergencies. Spec. Item 3.1, on which EJB relies, relates to service calls and sets forth the performance standards for emergency, urgent, and routine service calls. Spec. Item 3.3.11, on which the government relies, applies to maintenance of vertical transportation equipment (VTE), which includes the elevators. Spec. Item 3.3.11 required that VTE be operational at all times except when maintenance is being performed. Since the contract did not include a separate category of service call for VTE, EJB used the criteria in Spec. Item. 3.1 to

determine whether an elevator service call should be classified as emergency, urgent or routine. (SOF ¶¶ 5-7)

The contract was awarded to EJB on 1 August 2005. Until March 2009, EJB used a subcontractor to perform the elevator work. Once EJB took the work in-house, the government noticed a decrease in the timeliness of EJB's service call response. On 1 May 2009, Ms. Kelly, the COR, directed EJB to classify elevator service calls as emergencies in accordance with Spec. Item 3.1 (SOF ¶ 11). On 28 September 2009, Mr. Sergeson, the ACO, directed EJB "to immediately proceed with the performance of VTE in accordance with [Spec. Item] 3.3.11" (SOF ¶ 13). On 16 December 2009, Ms. Fitzgerald, the PCO, explained the government's position as follows:

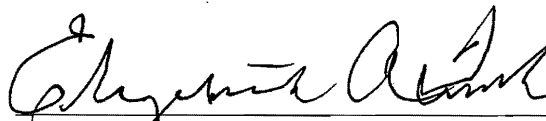
...[I]t is virtually impossible to achieve the "operational at all time" performance standard if the work is performed as a Routine service call and you have sixty days to complete the repairs. The same logic applies to repairs completed as Urgent service calls with a task completion time of fifteen days.... With a clear performance standard requiring full time operability, I believe that the Government has specifically designated [VTE] as meeting the [requirement for emergency service calls in paragraph 3.1].

(SOF ¶ 15) On 11 January 2010, Mr. Sergeson again directed that VTE must "remain operational at all times except when maintenance is being performed" (SOF ¶ 16). On 21 March 2010, Ms. Fitzgerald directed EJB to treat "all elevator repairs completed via service call...as an emergency" (SOF ¶ 18).

In its motion for summary judgment, the government argues for the first time that it only directed EJB to classify "non-operational" elevator service calls as emergencies. In support of its position, the government submitted the declarations of various government officials. In her declaration, Ms. Kelly states that "[a]t no time have I ever directed EJB to classify all elevator service calls as Emergency service calls." Ms. Fitzgerald's declaration states that her direction "only related to elevator service calls for non-operable elevators" and EJB understood that. Mr. Sergeson states that to his knowledge, EJB does not and did not, classify all VTE service calls as emergency. In his second declaration, Mr. Van Woudenberg, the SPAR, denies that the government directed EJB to respond to all elevator service calls as emergencies "no matter the nature of the problem or repair" (SOF ¶ 25). The parties disagree as to whether the government directed EJB to classify all elevator service calls as emergencies. They also disagree as to whether by directing EJB to classify all elevator service calls as emergencies, the government imposed a higher performance standard for elevators than that in the contract. These issues go to the very heart of the dispute and must be resolved at a

hearing on the merits. Accordingly, the motions are denied on the basis of disputed issues of material fact.

Dated: 7 March 2012




ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



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. 57434, Appeal of EJB Facilities Services, rendered in conformance with the Board's Charter.

Dated:

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