UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 13, 2009

CBCA 719

F.A. WILHELM CONSTRUCTION COMPANY,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Paul J. Carroll and William J. Hancock of Harrison & Moberly, LLP, Indianapolis, IN, counsel for Appellant.

Peter S. Kraemer, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **McCANN**, and **DRUMMOND**.

DRUMMOND, Board Judge.

This appeal arises out of contract V101BC-0207 (the contract) for the modernization and construction of an expansion to the Richard L. Roudebush VA Medical Center (Roudebush Medical Center), in Indianapolis, Indiana, which was awarded to F.A. Wilhelm Construction Co. (Wilhelm) by the Department of Veterans Affairs (VA). Wilhelm seeks $202,129 for supplying the equipment required for a complete and operable monitoring network and public address system, commonly referred to as a nurse call system (System). The VA denies that it owes the amount claimed, contending that it was Wilhelm's contractual responsibility to supply the equipment. The parties have filed cross-motions for summary

relief based upon the existing record.[1] In addition, Wilhelm has moved to strike a portion of Respondent's Statement of Uncontested Facts primarily on the grounds of hearsay and relevancy. Wilhelm's motion challenges the first sentence of paragraph 12 of Respondent's Statement of Uncontested Facts, which states that Wilhelm, at a meeting held on March 24, 2006, "inquired about the provision of the Nurse Call System and whether or not it was to be Contractor or Government supplied." Wilhelm asserts that this statement "is not supported by any documents or any affidavits or other declarations proffered by the VA as required by . . . Rule 8(g)(2) . . . [and cannot be] considered by the Board . . . ." The VA has not filed a reply to Wilhelm's motion to strike.

For the reasons stated below, we deny Wilhelm's motion for summary relief, grant the VA's motion for summary relief, and deny the appeal. We find it unnecessary to address Wilhelm's motion to strike; as this decision did not consider as evidence the assertion in the first sentence of paragraph 12 of Respondent's Statement of Uncontested Facts, the motion is now moot.

Background[2]

On June 30, 2005, the VA awarded to Wilhelm a contract for construction work described as the "7th and 8th Floor Ward Modernization Addition-Phase I" at the Roudebush Medical Center. Appeal File, Exhibit 1. The contract was awarded in the fixed-price amount of $19,979,000 and called for, *inter alia*, "the furnishing, installing, and testing of a complete and operating [nurse call] system, and associated equipment." *Id*. at 16761-1, §§ 1.1(A), 3.

Under the terms of the contract, the successful contractor and its original equipment manufacturer [OEM] were responsible for the "design, installation, certification, operation, and physical support for the System." Appeal File, Exhibit 1 at 16761-4, § 1.3. The contract required the successful contractor to provide "written proof of contractual relationship or technical certification by the OEM and . . . pass through the OEM's certification and equipment warranty to VA." *Id*.

The contract described the System as:

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[1] The record consists of the pleadings; Appeal File, Exhibits 1-12; Supplemental Appeal File, Exhibits 1-20; Respondent's Statement of Uncontested Facts 1-16; Appellant's Statement of Additional Facts 1-3; Respondent's Motion for Summary Relief (Respondent's Motion); and Appellant's Motion for Summary Relief and Opposition to Respondent's Motion (Appellant's Motion).

[2] The Board considers these facts to be undisputed.

> microprocessor based and includ[ing], but not limited to, a combination of group control, specialized interface network hubs, power supply with backup battery units; nurse control master station; bedside patient, staff, duty, code one, and emergency stations; dome lights; combiners, traps, and filters; audio distribution amplifier; conduit and necessary passive devices such as, cable, wire, and connectors, cord sets, push buttons, pillow speakers, fire alarm smoke detector interface module, auxiliary input plate for ancillary signal from IV umps [sic], and specialized bed connection outlets and connector cables.

Appeal File, Exhibit 1 at 16761-1, § 1.1(A).

The contract singled out for special attention the equipment requirements for the System. Appeal File, Exhibit 1 at 16761-1 to -46. Specification 16761, entitled "Audio Visual Nurse Call and Code One Systems and Equipment," states in section 2.1 that "[w]hen the contractor furnishes an item of equipment for which there is a specification contained herein, that item of equipment shall meet or exceed the specification for that equipment." *Id*. § 2.1(A)(2). Section 2.2 identified twenty-five pieces of nurse call equipment required for a complete and operable System. *Id*. § 2.2. The equipment was identified as: equipment cabinet, ground control module, floor power supply, power supply backup, data interface module, nurse control master station, universal interface module, staff station, duty station, single patient station, dual patient station, corridor dome lights, intersectional dome lights, auxiliary alarm input station, special bed wall connectors, bath emergency station, code one with staff assist, digital pillow speaker, single lighting interface, dual lighting interface, low voltage lighting controller, single television isolation module, dual television isolation module, J-bus interface module, and push button cordset. *Id*. The contract required the successful contractor to ship the specified equipment to the project in the OEM's original, unopened container, clearly labeled with the OEM's name, equipment model, and serial identification number for inspection by the project engineer prior to being assembled and installed. *Id*. §§ 2.1(F)(1), 2.2.

Specification 01010 addressed the general requirements for the entire project and included section 1.24(A), which provides that "[t]he Government shall deliver to the Contractor, the government-furnished property shown on the schedule drawings." Supplemental Appeal File, Exhibit 1.

The contract included various drawings. Drawing 1-E43, an electrical drawing, includes various notes, including notes for the System. Supplemental Appeal File, Exhibit 6. Note 1 for the System states that "[a]ll nurse call system components shall be Owner furnished, and Contractor installed." *Id*. The term "components" is not defined on drawing 1-E43 or in specification 16761. The record contains no evidence that Wilhelm raised any questions concerning the notation of drawing 1-E43 prior to submitting its bid.

The contract also included Federal Acquisition Regulation (FAR) clause 52.243-4, Changes (Aug. 1987), and FAR clause 52.236-21, Specifications and Drawings for Construction (Feb. 1997). The latter clause states:

> anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern.

Supplemental Appeal File, Exhibit 1.

During contract performance, a dispute arose between the VA and Wilhelm as to whether Wilhelm was required to furnish the nurse call equipment for the System. Appeal File, Exhibit 4. On March 28, 2006, the contracting officer (CO) wrote to Wilhelm stating that although drawing 1-E43 states the components of the System are to be owner furnished and contractor installed, specification 16761 states that "the Contractor shall furnish, install, and test a complete and operating Audio-Visual and Code One (Blue) Nurse Call system." *Id.* The CO observed that in accordance with specification 01001, section 1.44(a), "where there is a difference between drawings and specifications, the specifications shall govern." The CO ended the letter by directing Wilhelm to install the System in accordance with the aforementioned specifications. *Id.*

On April 10, in response to the CO's March 28 letter, Wilhelm wrote:

> We are in receipt of the . . . letter directing . . . [Wilhelm] to furnish and install all materials required for the . . . [System] regardless of the specific notations on the drawings that the system is provided by the Owner's vendor. Be advised that we did not include furnishing these materials as the drawings very specifically note the materials to be provided by the Owner for Contractor Installation.

Appeal File, Exhibit 5. Wilhelm advised the CO that it did not "agree with the interpretation . . . that there is a conflict between the specification and drawings deferring to the . . . general conditions" in specification 01001, section 1.44(a). *Id.*

On June 23, 2006, Wilhelm wrote to the CO requesting a change order in the amount of $202,129 for supplying the equipment for the System. Appeal File, Exhibit 7. This amount represented Wilhelm's cost, together with mark-ups, for the twenty-five pieces of nurse call equipment required by specification 16761 for a complete and operational System. On February 6, 2007, the CO issued a final decision denying Wilhelm's certified claim in its entirety. *Id.*, Exhibit 12. The CO noted that specification 16761 "specifies the furnishing, installing, and testing of a complete and operating . . . [System]." The CO also noted that sections 1.4,[3] 2.1(A)(2), and 2.1(G)(3)[4] "clearly indicate that the Nurse Call system components are to be provided by the Contractor." In denying Wilhelm's request for an equitable adjustment, the CO concluded that since "the specifications differ from the drawings in this respect, the specifications must govern in accordance with Federal Acquisition Regulation 52.236-21." *Id.* By letter dated April 26, 2007, Wilhelm timely appealed the CO's decision.

Discussion

Cross-Motions for Summary Relief

This appeal before us involves a matter of contract interpretation. The parties have cross-moved for summary relief. Wilhelm asserts that it was not contractually required to supply the equipment components for the System and is therefore entitled to the requested relief. The VA asserts that it is entitled to summary relief since, as a matter of law, based on the other terms of the contract, Wilhelm's claim must fail.

The Board is guided by the well-established rules applicable to summary relief motions. Summary relief is appropriate when there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In ruling on cross-motions for summary relief, we must evaluate each party's motion on its own merits, taking care to draw all reasonable inferences against the party whose motion is under

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[3] Section 1.4 states that contractor's submittal shall include a list of equipment to be furnished.

[4] Section 2.1(G)(3) states that the equipment for the System "must conform with each UL [Underwriters Laboratories] standard in effect for the equipment."

consideration. *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1338-39 (Fed. Cir. 2001); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). Any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Under Rule 56(e) of the Federal Rules of Civil Procedure, to which this Board looks for guidance, more than mere allegations are necessary to defeat a properly supported motion for summary relief. *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554, at 166,175 (citing *Fireman's Insurance Co. of Newark, N.J. v. DuFresne*, 676 F.2d 965 (3d Cir. 1982); *Tilden Financial Corp. v. Palo Tire Services, Inc.*, 596 F.2d 604 (3d Cir. 1979); *General Dynamics Corp.*, DOT CAB 1232, 83-1 BCA ¶ 16,386, at 81,459). The parties are in agreement that there are no genuine issues of material fact for trial. Their differences are confined to the law and its application to the contract in this appeal. Therefore summary relief is appropriate in this case.

Contract Interpretation

Wilhelm alleges that the specifications and drawings, taken individually or as a whole, do not contain any requirement for Wilhelm to furnish the components for the System. According to Wilhelm, the contract required the VA to provide the components for the System, while Wilhelm was only required to install and incorporate those components, along with various conduits and cables supplied by its subcontractor, into a final operable System. Wilhelm further argues that the Order of Precedence clause is not relevant, as the contract terms are clear.

The VA's motion for summary relief restates the reasons the CO gave for denying Wilhelm's claim. The VA maintains that Wilhelm's claim fails because the contract required Wilhelm to supply and install a complete and operating System which included all specified equipment or components. The VA asserts that the Order of Precedence clause as well as other clauses in the contract take precedence over the notation on drawing 1-E43 upon which Wilhelm relies. The VA also asserts that to the extent the contract terms were ambiguous, Wilhelm's claim should be denied because the ambiguity is patent and created a duty to inquire, which Wilhelm failed to do.

Contract interpretation begins with the language of the written agreement. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). When interpreting the contract, the Board is bound to consider the document as a whole and interpret it in such a way as to give reasonable meaning to all of its parts. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996). An interpretation will generally be rejected if it leaves portions of the contract language meaningless, useless, ineffective, or superfluous. *Gould,*

Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Connor Brothers Construction Co.*, VABCA 2519, et al., 95-1 BCA ¶ 27,409 (1994). In addition, a matter covered by the Order of Precedence clause will generally be resolved in a manner prescribed by the clause. *Hensel Phelps Construction Co. v. United States*, 886 F.2d 1296, 1299 (Fed. Cir. 1989). Here the clause establishes that contract specifications control; the drawings do not where they are inconsistent with the specifications.

Wilhelm, while relying on the general contract provisions relating to the pre-testing of the mechanical and electrical systems in section 1.22(c) of specification 01010, argues that a System for purposes of this contract is a "functioning multi-element end product or complex," while "components" are simply "the constituent parts to be installed and connected together to comprise that system." Appellant's Motion at 7. Based upon this difference, Wilhelm contends that it is reasonable to read specification 16761 consistent with note 1 for the System on drawing 1-E43 and conclude the VA is responsible for supplying the components to be installed and made operational by Wilhelm. *Id*. at 8.

We disagree. As hard as it tries to fit the specifications and drawing into a bed of contract uniformity, Wilhelm has provided no probative evidence that a reasonable contractor could conclude that "components" were not an integral part of a complete and operable System. The argument that there is no conflict between specification 16761, which sets forth the materials, standards, and manner to construct the System, and note 1 on drawing 1-E43 is disingenuous at best. Note 1 on drawing 1-E43 states that the owner shall provide the components for the System. Wilhelm has offered no probative evidence to support its argument that specification 16761 can be read as saying the VA will provide all equipment for the System, while the contractor was only required to install and incorporate components supplied by the VA, along with various conduits and cables. Specification 16761 includes no such requirement, and to the extent the language in note 1 conflicts with specification 16761, specification 16761 governs. Hensel Phelps, 886 F.2d at 1299. Wilhelm has also failed to explain how the components identified in specification 16761 are not integral parts of the complete and ready to use System to be supplied by Wilhelm. Specification 16761 clearly states that the successful contractor shall furnish, install, and test a complete and operable System and that the System shall include, at a minimum, the listed equipment. Further, Wilhelm has not explained how its interpretation is consistent with the requirement that the successful contractor contract with an OEM to deliver the equipment to the project and receive authorization by the OEM to pass through the OEM's certification and equipment warranty to the VA. Wilhelm's naked characterization that the contract, read as a whole, supports its interpretation is not evidence that its interpretation is reasonable. Mere allegations made by a contractor, unsupported by evidence of probative value, are insufficient for it to prevail. *Etex Co.*, VABCA 3415, et al., 93-03 BCA ¶ 26,116, at 129,814.

Drawing all inferences in favor of the VA, the contract, plainly read, does not support Wilhelm's interpretation. We find that the undisputed record discloses nothing more than a unilateral error of judgement by Wilhelm in accepting the contract with the VA. Wilhelm's motion is denied.

The VA's motion argues, *inter alia*, that the language in specification 16761 is clear and required Wilhelm to furnish a complete and operable System which included, at a minimum, the equipment in dispute. The VA urges that where a conflict, as here, is between a specification and a drawing, the Order of Precedence clause provides a means of resolving the matter. The VA argues further that if the contract's terms were ambiguous, the ambiguity was patent and Wilhelm is not entitled to recovery, because Wilhelm did not bring the ambiguity to the VA's attention before submitting its bid. A determination of what constitutes a patent ambiguity is made on a case-by-case basis given the facts in each contractual situation. *Interstate General Government Contractors, Inc. v. Stone*, 980 F.2d 1433 (Fed. Cir. 1992); *H.B. Zachry Co. v. United States*, 28 Fed. Cl. 77 (1993), *aff'd*, 17 F.3d 1443 (Fed. Cir. 1994) (table). An ambiguity is patent if it is "obvious, gross, (or) glaring." *H&M Moving, Inc. v. United States*, 499 F.2d 660, 671 (Ct. Cl. 1974); *see also Newsom v. United States*, 676 F.2d 647, 649 (Ct. Cl. 1982). The "existence of a patent ambiguity in itself raises the duty of inquiry regardless of the reasonableness of the contractor's interpretation." *J.F. O'Healy Construction Corp.*, VABCA 2784, et al., 91-1 BCA ¶ 23,320, at 116,995 (1990) (citing *Newsom*).

Wilhelm says that when it prepared its bid it determined that the VA was responsible for supplying the components for the System based on note 1 on drawing 1-E43 and the general language in specification 01010, notwithstanding the requirement in specification 16761 that the contractor furnish a complete and operable System. Wilhelm alleges that the VA's interpretation is not reasonable because it ignores the clear language in note 1 on drawing 1-E-43. We disagree because specification 16761 plainly required Wilhelm to furnish a complete and operable System.

To the extent that the contract is ambiguous because the language in note 1 on drawing 1-E43 and in section 1.24(A) of specification 01010 conflict with the provisions in specification 16761, the ambiguity is patent, and Wilhelm had an obligation to bring it to the VA's attention before submitting its bid. *S.O.G. of Arkansas v. United States*, 546 F.2d 367 (Ct. Cl. 1976). The law establishes this obligation in order to ensure that the Government will have the opportunity to clarify its requirements and thereby provide a level playing field to all competitors for the contract, and to avoid litigation after the contract is awarded. A contractor proceeds at its own risk if it relies upon its own interpretation of contract terms that it believes to be ambiguous instead of asking the Government for a clarification. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993). Here

Wilhelm neither inquired about the obvious conflict, nor utilized the Order of Precedence clause to resolve the inconsistency. The contractor bears the risk of misinterpretation by failing to seek clarification prior to award of the contract. *Triax Pacific, Inc. v. West*, 130 F.3d 1469 (Fed. Cir. 1997); *Nielsen-Dillingham Builders, J.V. v. United States*, 43 Fed. Cl. 5 (1999).

We hold that, on the record before us, there are no disputed material facts. The undisputed material facts do not support Wilhelm's entitlement to an equitable adjustment. The VA is entitled to judgment in its favor as a matter of law because specification 16761 plainly required Wilhelm to furnish a complete and operable System, and because, if there is an ambiguity created by note 1 on drawing 1-E43 and specification 01010 as to who was responsible for furnishing the equipment for the System, the ambiguity was patent. Wilhelm had an obligation to call this to the VA's attention before submitting its bid.

Decision

Respondent's motion for summary relief is granted; appellant's motion for summary relief is denied. This appeal is **DENIED**.

JEROME M. DRUMMOND
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

R. ANTHONY McCANN
Board Judge