



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL SUMMARY RELIEF DENIED: February 8, 2016

CBCA 3927, 4099

P.J. DICK INCORPORATED

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

K. Bradley Mellor and Ross A. Giorgianni of Blumling & Gusky, LLP, Pittsburgh, PA; and William E. Dorris of Kilpatrick Stockton LLP, Atlanta, GA, counsel for Appellant.

Benjamin M. Diliberto, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **GOODMAN**, and **ZISCHKAU**.

GOODMAN, Board Judge.

P.J. Dick (P.J. Dick or appellant) has filed appeals on behalf of itself and its subcontractors, W.G. Tomko, Incorporated (Tomko) and Climatech, Inc. (Climatech), from a decision of a Department of Veterans Affairs (respondent) contracting officer denying a claim to recover increased costs. Respondent has filed a motion for partial summary relief with regard to the first count of appellant's complaint, which alleged defective specifications. As discussed below, although the contract is clear and unambiguous, that does not preclude a decision that defective specifications existed. We deny respondent's motion for summary relief, as issues of material fact remain in dispute. These issues of material fact pertain to the actions of appellant and its subcontractors during the bidding stage and performance of the

contract. Additionally, on the current record, issues of material fact remain as to whether the contract requirements were satisfied.

Background

On July 16, 2008, respondent issued solicitation notice no. VA-101-08-RP-0082 (the solicitation) for a new mental health inpatient unit and behavioral health outpatient clinic at the VA Medical Center in Pittsburgh, Pennsylvania (the project).

The solicitation included specification section 15840 pertaining to ductwork and accessories. This specification contained numerous references to the SMACNA (Sheet Metal and Air Conditioning Contractors' National Association)¹ standards, including the following:

1.3 QUALITY ASSURANCE: . . . C. Duct System Construction and Installation: *Referenced SMACNA Standards are the minimum acceptable quality.*

3.2, DUCT LEAKAGE TESTS AND REPAIR . . . C. Test procedure, apparatus and report shall conform to SMACNA Leakage Test manual. *The maximum leakage rate allowed is 1 percent of the design air flow rate.* [Emphasis added.]

While the contract specifications contained the one-percent maximum leakage rate stated above, the SMACNA standards do not specify a maximum leakage rate.

Climatech, appellant's second-tier subcontractor, prepared the portion of appellant's bid for the ductwork. Climatech's owner states in an affidavit submitted in this case that "[i]n reliance upon the Project design specifications for SMACNA, Climatech bid the Project." He also acknowledges in his affidavit that "[t]he Contract specifications also state that 'the maximum leakage rate allowed is 1 percent of the design air flow rate.'" The affidavit contains no affirmative statement that the one-percent maximum leakage rate was considered during the bid preparation process.

¹ Respondent has referred the Board to the online version of the SMACNA standards, <https://law.resource.org/pub/us/cfr/ibr/005/smacna.duct.1995.pdf>.

Neither appellant nor its subcontractors requested clarification of specification section 15840, the ductwork portion of the work scope, or the inclusion of the one-percent maximum leakage rate before submitting appellant's bid.

On November 7, 2008, respondent awarded contract no. VA101CFM-C0014 (the contract) to appellant for the work referenced in the solicitation.

On September 17, 2009, almost a year after contract award, appellant's first-tier subcontractor, Tomko, received request for information (RFI) 026 from Climatech, in which Climatech stated that it was fabricating ductwork "to SMACNA HVAC [heating, ventilation, and air conditioning] Duct Construction standards and sealed to Class A in accordance with the SMACNA Air Duct Leakage Test Manual. The specification . . . calls for a maximum leakage rate of 1% that far exceeds the leakage factors to which the duct is being constructed. . . . We are providing notification of a conflict in the specification." The RFI attached figure 4-1 from the SMACNA Air Duct Leakage Test Manual, which Climatech alleged demonstrated "that the specified maximum leakage rate does not even register on SMACNA's chart and is not represented by any Leakage Class."

On September 21, 2009, appellant forwarded RFI 026 to respondent, renumbered as RFI 0328, and attached a technical paper written by SMACNA with a letter from the National Environmental Balancing Bureau which stated that testing should be done to SMACNA standards and not to a designated percentage rate. RFI 026 contained the request that "testing should be done according to the SMACNA Air Duct Leakage Test Manual which includes the applicable leakage classes per Table 4-1 in the manual."

On September 21, 2009, the same day that appellant forwarded the RFI to respondent, appellant sent an e-mail message to representatives of Tomko and Climatech, stating:

Although we have presented [the RFI to respondent] we must again caution [you] that, as addressed during our meeting of September 17th, this may not produce the desired result. It is our experience that the specifications are complimentary [sic] and that an Owner has a right to demand a higher quality [than is] identified in a particular section of the project documents. Many times a particular section will establish the minimum acceptable requirement that is considered acceptable. If, as constructed per this standard, other project performance requirements can be met then a contractor may not have to enhance its installation to satisfy a particular performance requirement. If the contractor cannot satisfy a particular performance requirement utilizing this minimum acceptable requirement then they may have to enhance the installation to satisfy this particular performance requirement.

For example, the VA may respond that the pressure class and sealing requirements represent a minimum acceptable construction requirement for the ductwork. If the sheetmetal contractor can satisfy a 1% leakage with this construction then additional work to satisfy this performance requirement would not be required. If however additional work is required over and above this minimum standard then the work, as well as cost, lies solely with that particular contractor.

PJD [P.J. Dick] will keep WGT [W.G. Tomko] posted on the reaction from the VA and its designers but, during this timeframe, would urge that the 1% leakage requirement continue to be met.

On September 30, 2009, respondent provided appellant a response to RFI 0328, reiterating the contract requirement that the maximum leakage rate allowed was one percent of the design air flow rate and that this requirement could be met while constructing the duct to SMACNA standards.

Appellant and its subcontractors proceeded to perform the contract work as directed by respondent. Respondent asserts that the ductwork ultimately constructed met the contract requirements, i.e., both the SMACNA standards and the maximum leakage rate of less than one percent of the design air flow rate.

On September 19, 2012, appellant submitted request for change order (RCO) 0271, alleging defective specifications, dictation of means and methods, and additional scope of work. Respondent rejected RCO 0271 on October 26, 2012.

On September 17, 2013, appellant submitted a revised version of RCO 0271, requesting \$673,612 in additional costs and a contracting officer's final decision. Attached as an exhibit to this RCO was a document dated February 15, 2012 (change order request) from Climatech that discusses the alleged defective specifications, dictation of means and methods, and additional scope of work. In the portion of that document entitled "Defective Specifications," Climatech enumerates the various references to SMACNA standards and the SMACNA Air Duct Leakage Test Manual in the specifications, and also quotes from a SMACNA technical paper on duct leakage. The revised RCO states:

Based on all of the above referenced Specifications and SMACNA Standards, as well as the Subcontract Language, Climatech developed its Work Plan, Bid and Price for the Project to be in accordance with SMACNA Standards.

Specifications Section 15840- 3.2.C – contains information that is inconsistent with the requirements of SMACNA and the work scope described throughout the Project Specifications. This section contains the following language:

“The maximum Leakage Rate allowed is 1 Percent of the Design Air Flow Rate.”

This defined leakage rate was both inconsistent with the SMACNA Standards as well as the VA’s own Master Specifications Section 3.2.C. which stated that the maximum leakage rate allowed is 4% of the design.

The revised RCO describes how Climatech, after award of the contract, “requested clarification of the inconsistencies contained in Specification Section 15840-3.2.C and the other project specifications that required the ductwork to be fabricated and installed in accordance with SMACNA standards.” The revised RCO contained allegations, based upon technical sources, that 1) it is not appropriate to evaluate leakage as a percentage of air flow in separate sections of the same duct system; 2) testing to a stated percentage is completely wrong; and 3) specifying duct leakage is completely meaningless.

On June 24, 2014, appellant appealed this matter to the Board as a deemed denial of its claim, because respondent had not issued a contracting officer’s decision in response to the RCO. That appeal was docketed as CBCA 3927. On August 8, 2014, respondent’s contracting officer issued an appealable decision, rejecting the claim in its entirety. On September 3, 2014, appellant appealed from that final decision, and that appeal was docketed as CBCA 4099 and consolidated with CBCA 3927.

Appellant designated as its complaint its notice of appeal filed in CBCA 4099, and its claim submittal and exhibits included in the appeal file in CBCA 3927. As stated above, the document attached to the RCO dated February 12, 2012, contains the narrative entitled “Defective Specifications” that allegedly is the count that is the subject of this motion.

Appellant’s claim states in its introduction:

After being forced to meet both a *design* specification (SMACNA) and a *performance* specification (1% leakage rate) Climatech submitted its procedures and materials necessary to meet the aforesaid specifications. [Emphasis added.]

Respondent alleges that appellant ultimately provided ductwork that met the SMACNA Standards and had a maximum leakage rate of less than one-percent of the design

air flow rate. Respondent's engineer on the project states in an affidavit submitted in support of respondent's motion:

Contract specification section 15840-3.2-C required a maximum duct leakage rate of 1%. The contract specifications also required that all the ductwork be sealed in accordance with the SMACNA Seal Class A. SMACNA Seal Class A requires sealing of all transverse joints, longitudinal seams and duct wall penetrations. . . .

Federal agencies are required by the Energy Policy Act of 2005 and 410 CFR § 433 to design and build new Federal buildings that are energy efficient. To meet this requirement, the Project was designed to achieve the LEED [Leadership in Energy & Environmental Design] Silver rating, which it did achieve. A lower ductwork leakage factor results in more utilities savings and extends the life of the HVAC equipment. In addition, a lower leakage rate makes occupied spaces more comfortable, as heated or cooled air does not leak out of ductwork before it reaches the space and there will be less noise from leaking ducts. The VA selected the 1% duct leakage to insure energy efficiency was achieved. In deciding on this percentage, the VA noted that duct sealant manufacturers currently market products that they indicate provide zero leakage . . .

The contractor hired WAE Balancing, a testing and balance company, to perform and record the ductwork testing. WAE calculated the 1% allowable leakage in cubic feet per minute (cfm) using the design airflow data shown on the contract documents. The ductwork system was divided into sections by the contractor and tested in those sections. WAE recorded the test summary information on Air Duct Leakage Test Summary forms. During an actual field test, a Resident Engineer would witness the pressure test conducted in the field, compare it to the calculated 1% allowable leakage and sign off on the test summary form. . . . To the best of my knowledge, only two of the 189 test sections (tested between April 2009 and December 2009) failed the first time they were tested. Those test sections both passed the 1% duct leakage requirement on the second test. . . All ductwork was sealed to meet the required SMACNA Seal Class A.

In support of its response to respondent's motion, appellant has submitted an affidavit from the owner of Climatech, who disputes respondent's assertions that the ductwork met both the SMACNA standards and the leakage rate requirement. The affidavit reads in relevant part:

The SMACNA specifications and the 1% leakage rate allowance are inconsistent. Specifically, SMACNA specifications do not contain, outline, or include the requirements to reach a 1% leakage rate and a contractor cannot obtain a 1% leakage rate by following the SMACNA design specifications.

....

It is impossible to construct the HVAC ductwork in compliance and accordance with the detailed specifications set forth by SMACNA and have a resulting leakage rate of only 1%.

....

SMACNA specifications and materials specifically incorporated by Respondent into the design specifications for the contract documents states [sic] that “no leakage tests are required by the SMACNA duct construction standards or by this Leakage Test Manual.”

....

The design specifications contained in the manual are defective where . . . [the specification] requires a neoprene gasket to be used to fulfill the transverse joint sealant requirement for a Seal Class A specified by Section 2.2. of the specifications.

The affidavit of Climatech’s owner contained additional allegations of inability to meet SMACNA standards and attain a maximum one-percent leakage rate.

Appellant has also submitted a report from an individual tendered as an expert to support its opposition to respondent’s motion. That report contains a list of “key specifications” that include:

Duct Construction and Installation: Referenced SMACNA Standards are the minimum acceptable quality.

Duct Seal Class: Seal all ductwork to Seal Class A in accordance with SMACNA HVAC Air Duct Leakage Test Manual.

Test Procedure, apparatus and report shall conform to SMACNA Air Duct Leakage Test Manual. The maximum leakage rate allowed is 1% of the design airflow rate.

Appellant's tendered expert cites the SMACNA HVAC Air Duct Leakage Manual, which states that "[a]ssignment of leakage classes involves careful consideration of system size, duct location, sealing and construction class. Arbitrary assignment of an allowable % of leakage in disregard of these factors can indicate unobtainable results." Appellant's tendered expert offers an opinion that "the difficulty in meeting this [one-percent leakage] requirement would not be known by the contractor at the bidding stage." His conclusion with regard to the issue of leakage is: "It is my professional engineering opinion, to within a reasonable degree of engineering certainty, that the VA specifications for 1% leakage were not within industry standards."

Discussion

Standard for Summary Relief

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. Respondent's motion for summary relief involves the issue of interpretation of contract language. As this Board stated in *Butte Timberlands, LLC v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730, at 166,993 (2007):

Pure contract interpretation is a question of law that may be resolved by summary judgment. . . . However, the question of interpretation of language, the conduct, and the intent of the parties, i.e., the question of what is the meaning that should be given by a court or board to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law. If there is a genuine dispute of material fact, summary judgment is inappropriate.

The Dispute

This dispute relates to the specifications for the fabrication, testing, and maximum leakage rate of the ductwork in the contract at issue. The claim and complaint are based on three counts: defective specifications, interference with the means and methods of

performance, and scope of work.² The first count, which is the subject of respondent's motion for summary relief, involves appellant's assertion that those specifications are defective because the construction and installation of ductwork required compliance with SMACNA [Sheet Metal and Air Conditioning National Association] Standards and also required a maximum allowable leakage rate of one percent of design air flow rate, and both could not be achieved at the same time.³

Respondent's Position

In its motion for summary relief, respondent alleges that the specifications are not defective, in that a plain reading of the specifications indicated to the bidder that compliance with the SMACNA standards was a minimum accepted quality requirement as to the construction and installation of the ductwork that did not conflict with the achievement of a maximum allowable leakage rate of one percent of design air flow. Respondent asserts that the SMACNA standards were design specifications, and the maximum allowable leakage rate was a performance specification. Respondent maintains that even though the one-percent leakage rate requirement may have required work in excess of the minimum SMACNA standards, since the SMACNA standards were specified as minimum requirement, and the one-percent leakage rate was clearly specified, there was not a conflict in the specifications, nor were the specifications defective.

Respondent acknowledges that the SMACNA standards do not specify a particular leakage rate. However, respondent cites specific SMACNA Standards that it believes allow

² While respondent's motion mentions two counts, the February 15, 2012, change order request incorporated into appellant's complaint contains three counts, with count two containing two issues. Respondent's motion for summary relief states that the motion relates only to the first count, defective specifications. However, allegations of defective specifications are contained in the other two counts, and appellant's responses reference the allegations of all the counts.

³ The second count alleges respondent directed the means and methods of performance, by changing the SMACNA requirement for sealing ductwork and the use of certain gasket types. The third count alleges increased scope of work, as pre-testing of the ductwork was required in contravention of SMACNA standards that did not require pre-testing.

designers to specify a maximum leakage percentage, based on the requirements of a specific system, as long as the leakage requirements are not unreasonably low,⁴ and concludes:

Since the SMACNA Standards contemplate the possibility of owner or designer-specified enhanced requirements, the contract specifications requiring compliance with referenced SMACNA Standards as the minimum acceptable quality cannot be in conflict with the requirement for a specified enhanced leakage percentage. . . . Appellant was ultimately able to meet both the minimum acceptable quality and the maximum leakage rate percentage requirement.

Respondent's Reply Brief at 5-6.

To support its motion for summary relief, respondent has submitted an affidavit from its project engineer that explains why the one-percent maximum leakage rate was chosen, and avers that appellant sealed the ductwork to SMACNA Seal Class A requirements and achieved the maximum leakage rate requirement.

Appellant's Position

While respondent attempted to confine its motion to the count for defective specifications, appellant's responses go beyond that count and address all counts of its complaint. Appellant offers various legal theories as to the increased costs allegedly incurred—defective specifications, inconsistent specifications, impossibility of complying with both SMACNA standards and the one-percent maximum leakage requirement, ambiguities, materially changed requirements after being directed to comply with the one

⁴ Respondent references the following sections in the SMACNA standards (page references are to those in the pdf file referenced in note 1 of this decision): The SMACNA standards further provide that “[w]here other construction details are needed to meet the special needs of a particular system design, the designer should comply with appropriate construction standards” (p. 23); a designer is to “apply construction standards appropriate for the requirements and scope of each project” (p. 24). In discussing leakage, the SMACNA standards indicate that “[a]dequate airtightness can normally be ensured by a) selecting a static pressure, construction class suitable for the operating condition, and b) sealing the ductwork properly” (p. 30). In discussing general requirements for all ducts, the standards note that “[c]onstruction methods that economically achieve the predicted and desired performance must be determined” (p. 222), and “[a] designer should not impose unreasonably low limits of leakage” (p. 221).

percent leakage requirement and not the SMACNA requirements, and the refusal of respondent to allow appellant to choose materials necessary such that the one-percent maximum leakage requirement cannot be deemed a performance requirement.

Appellant maintains that there is a conflict between the specification for the application of SMACNA standards as the minimum acceptable quality for construction and installation of the ductwork and the one-percent maximum leakage requirement. Appellant characterizes this conflict as follows:

Respondent repeatedly refers to the SMACNA Standards as the “minimum standards” required under the contract. By emphasizing the terminology “minimum standards”, however, Respondent cannot escape the fact that the SMACNA Standards conflict with the simultaneous contractual requirement that the HVAC system be constructed with a 1% leakage rate. “Minimum standards” implies that the construction of the HVAC system would have permitted Appellant to comply with the standards required by SMACNA and also meet the 1% leakage requirement. As set forth in the Affidavit of [Climatech’s owner], and the expert report . . . , however, compliance with both SMACNA and the 1% leakage requirement was impossible.

Appellant’s Sur-Reply at 2.

Appellant also challenges respondent’s argument that the one-percent maximum leakage requirement was a performance specification,⁵ asserting that once the Government dictated the materials and methods Climatech was required to utilize to achieve the specified maximum leakage rate, the specifications were converted to design, rather than performance, specifications. Appellant’s Response at 11-12. Appellant supports this position by factual allegations contained in Climatech’s owner’s affidavit, in which he alleges that once the means and methods of accomplishing the one-percent maximum leakage rate were dictated by respondent in contravention of the SMACNA standards, appellant incurred additional costs.

Decision on Summary Relief

Respondent has addressed its motion for partial summary relief to the first count of the complaint—defective specifications—and seeks a ruling that as a matter of law the

⁵ We note that appellant’s claim referred to the maximum leakage rate requirement as a performance specification and not a design specification.

specifications were not defective. As noted previously, while respondent confines its motion to the first count of the complaint, appellant's allegations of defective specification are also contained in the second and third count, with regard to respondent's direction as to means and methods and scope of work. On the current record, there are issues of material fact that arise in both the bidding stage and during performance that preclude a finding that the specifications were not defective.

Appellant alleges a conflict or inconsistency in the specifications because the SMACNA standards for constructability of the ductwork do not require leak testing, but the contract also requires a maximum leakage rate. We find that the plain meaning of the specifications clearly informs the bidder that it must meet both the SMACNA Standards and the maximum leakage requirement. The specifications are clear that the SMACNA standards are the minimum acceptable quality with regard to duct system construction and installation. While the SMACNA standards do not specify a maximum leakage rate, the specifications also clearly state a maximum leakage rate—one percent of the design air flow rate. Climatech's claim, the affidavit of its owner, and its expert report demonstrate that appellant was aware of both requirements before bid. There is no allegation that the maximum leakage rate requirement was obscurely stated, or otherwise not obvious to a bidder.

Accordingly, we find that, on its face, the contract is clear and unambiguous in that the SMACNA standards must be complied with for constructability, and the ducts must have a maximum leakage rate of one percent.⁶ This gives rise to two issues of material fact in the bidding stage that remain unresolved.

The first issue of material fact is why the bidder did not seek clarification of the alleged inconsistency prior to bid, as the alleged inconsistency appears to be patent, or obvious, which would have raised a duty of the bidder to inquire before bid submission.⁷ See *SOS International, Ltd. v. Department of Justice*, CBCA 3678, 14-1 BCA ¶ 35,751; *A&B Limited Partnership v. General Services Administration*, GSBCA 15208, 01-2 BCA ¶ 31,444. A patent or obvious conflict or inconsistency in specifications which exists in the

⁶ Appellant, P. J. Dick, communicated this same interpretation to its subcontractors when it submitted the RFI to respondent on their behalf.

⁷ Appellant's tendered expert opines that the "difficulty" in meeting the leakage requirement would not be known by the contractor at the bidding stage, but this is not stated in the claim or in Climatech's owner's affidavit. This is a different issue from the alleged conflict of the SMACNA Standards, lacking a maximum leakage requirement, and the inclusion of a specified maximum leakage requirement, as this allegation ignores the clear language of the two requirements apparent at bid.

solicitation phase of a procurement gives rise to a bidder's legal duty to clarify before it chooses to rely upon its own interpretation. Failure to fulfill that legal duty results in the bidder bearing the burden of the alleged conflict or inconsistency. *W.B.&A., Inc.*, ASBCA 32524, 89-2 BCA ¶ 21,736.

The second issue of material fact in the bidding stage is why the bidder did not consider the clearly specified maximum leakage rate during bid preparation. Despite both requirements being apparent in the bidding stage, it appears from the current record that Climatech prepared its bid for the ductwork in reliance on the SMACNA standards, without taking into consideration the clearly specified maximum leakage rate. The alleged inconsistency raised in Climatech's RFI, almost a year after contract award—that the SMACNA standards did not contain a maximum leakage requirement and this was inconsistent with the “specified maximum leakage rate”—appears to be apparent before bid. These two issues of material fact that arise during the bidding stage remain to be resolved on the merits.

Other issues of material fact remain with regard to the performance of the contract work. While we find the statement of the contract requirements clear and unambiguous, the resolution of issues of material fact arising during performance (with regard to the second and third counts of the complaint) will determine compensation, if any, to appellant.

Appellant alleges, through the affidavits of Climatech's owner and its tendered expert, that the one-percent maximum leakage requirement was met, but only after respondent directed that the work be completed in a manner that was *not* in compliance with SMACNA, thereby converting the leakage requirement from a performance specification to a design specification, which resulted in excess costs. To demonstrate that the specifications were not defective, respondent alleges, through the affidavit of its project engineer, that the work *was* completed in compliance with the specifications, both as to the minimum requirement of compliance with SMACNA Standards for construction and fabrication and the one-percent maximum leakage requirements, and any costs incurred are not compensable.

Thus, the record has yet to be developed as to whether the contract requirements could be satisfied, as there are conflicting allegations as to whether the completed work complied with the SMACNA standards. While we conclude that the plain language of the contract requires that the ductwork comply with the SMACNA standards and have a maximum leakage of one percent of airflow, we cannot resolve the issue of material fact as to whether the completed work met both of these requirements. If it is found that the work as completed by appellant and accepted by respondent did not comply with the SMACNA standards, as alleged by appellant, this could be a factor in determining if these are defective specifications.

Decision

Respondent's motion for partial summary relief is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

JONATHAN D. ZISCHKAU
Board Judge