



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 25, 2024

CBCA 7399

EDGEWATER CONSTRUCTION SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

David A. Hearne of David A. Hearne, P.C., Yorktown, VA, counsel for Appellant.

Laetitia C. Coleman, Office of General Counsel, Department of Veterans Affairs, Arlington, TX; and Neil S. Deol, Office of General Counsel, Department of Veterans Affairs, Decatur, GA, counsel for Respondent.

Before Board Judges **KULLBERG**, **ZISCHKAU**, and **KANG**.

KANG, Board Judge.

Appellant, Edgewater Construction Services, LLC (Edgewater), appeals a final decision by a contracting officer of respondent, Department of Veterans Affairs (VA), concerning appellant's contract to build two additions to the VA Medical Center in Martinsburg, West Virginia. Appellant seeks costs for what it contends was respondent's change to the contract requirement to install a pneumatic tube system. Respondent has filed a motion for summary judgment, arguing that the contract terms were not changed and that appellant is not entitled to costs; appellant opposes the motion. We grant respondent's motion and thereby deny the appeal.

Background

VA awarded contract no. 36C24518C0215 to Edgewater on September 26, 2018, to build two additions to the VA Medical Center. Appeal File, Exhibit 17.¹ The additions are the domiciliary (DOM) clinic addition, designated as building 502F, and the community living center (CLC) addition, designated as building 501D. Exhibit 1 at VA000015. The contract incorporated various documents, including two volumes of specifications and seven sets of drawings. Exhibit 17 at VA002010.

Relevant to this appeal, volume 1 of the contract specifications required installation of a pneumatic tube system for the DOM and CLC additions. Exhibit 1 at VA000221-22. A pneumatic tube system “consist[s] of a tube network with carriers that travel by air pressure and vacuum between [physical] stations.” Joint Stipulation to Definitions. A carrier² is a cylindrical container into which a user can place objects to be sent through the pneumatic tube system. *See* Respondent’s Motion for Summary Judgment (Respondent’s Motion), Declaration of John E. Fenton, Contracting Officer’s Representative (Sept. 14, 2023) ¶¶ 8-9; Exhibit 63, Deposition of Richard Marano, Edgewater Vice-President (June 6, 2023) at VA005349. A physical station is “[t]he place where a person manually sends and/or receive[s] a carrier.” Joint Stipulation to Definitions; *see also* Respondent’s Motion at 4 n.1. “A pneumatic system might have two [physical] stations, or it may have diverging paths that lead to several [physical] stations.” Joint Stipulation to Definitions. A transfer station, or transfer unit, is “enclosed equipment that is comprised of a network of tubes entering and leaving internally that is controlled via switches/programming to allow an automatic exchange of carriers between the network of tubes, to transfer carriers between the [physical] stations.” *Id.* A transfer station is “generally located above the ceiling or in utility/mechanical closets.” *Id.*

The existing VA Medical Center has a pneumatic tube system manufactured by Swisslog. Respondent’s Motion at 2. The contract specifications for the system to be installed in the CLC and DOM additions were primarily in the architectural drawings, including the following note regarding the first-floor drawings for the additions:

REUSE EXISTING PNUEMATIC [sic] TUBE TRANSFER STATION
LOCATION TO EXTEND SERVICE TO [CLC], ROOM 501D-120, AND
[DOM], ROOM 502F-106. CONTRACTOR TO FACILITATE WORK OF
VA APPROVED VENDOR.
BASIS OF DESIGN FOR PRICING IS SWISSLOG.

¹ All exhibits are found in the appeal file, unless otherwise noted.

² Throughout the record, this object is also called a tube, cartridge, or cylinder.

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Exhibit 5 at VA001751-52. The architectural drawings and contract specifications for the system to be installed refer to existing transfer station #061, which (along with physical station #601) is located in room C-114 (pharmacy) of the existing VA Medical Center. *Id.*; see also Fenton Declaration ¶¶ 17-18.

On March 17, 2020, Edgewater submitted a proposal for VA's approval to install a pneumatic tube system manufactured by Aerocom to meet the contract requirements. Exhibit 34 at VA002312. On October 16, 2020, VA rejected Edgewater's proposal. *Id.* at VA002310. On October 28, 2020, VA directed Edgewater to install a system manufactured by Swisslog. Exhibit 35 at VA002322.

On November 15, 2021, Edgewater submitted a request for equitable adjustment (REA) to the contracting officer seeking \$75,467.50 for the additional cost to install a Swisslog system instead of its proposed Aerocom system. Exhibit 45 at VA003182. On January 26, 2022, the contracting officer denied the request. Exhibit 50. On February 28, 2022, Edgewater submitted a claim and request for a contracting officer's final decision, seeking to recover its additional cost for installing the Swisslog system. Exhibit 54; Complaint ¶ 5. The contracting officer denied the claim on March 28, 2022, stating that the proposed Aerocom system did not meet the contract requirements because it could not connect to the existing Swisslog system. Exhibit 55.

Edgewater timely filed an appeal of the contracting officer's final decision with this Board. On September 15, 2023, respondent filed a request for summary judgment.

Discussion

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party demonstrates it is entitled to judgment as a matter of law. *Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, et al., 19-1 BCA ¶ 37,439, at 181,950. Genuine issues of material fact exist where a rational finder of fact could resolve an issue in favor of either party and the resolution of that issue would impact the outcome of the case under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). We must view all inferences in a light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 599 (1986). Interpretation of contract language is primarily a matter of law, and disagreements concerning the legal interpretation of contract documents do not create factual disputes that preclude summary judgment. *South Texas Health System v. Department of Veterans Affairs*, CBCA 6808, 23-1 BCA ¶ 38,420, at 186,707; *Partnership for Response & Recovery, LLP*

v. Department of Homeland Security, CBCA 3566, et al., 14-1 BCA ¶ 35,805, at 175,114; see *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1205-06 (Fed. Cir. 2004).

To resolve an issue of contract interpretation, we look first to the plain language of the contract. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). When interpreting a contract, the document must be considered as a whole and interpreted so as to harmonize and 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 that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

Appellant primarily argues that the contract did not require a brand-name Swisslog pneumatic tube system and that respondent improperly rejected its proposal to use an Aerocom brand system. For these reasons, appellant contends that it is entitled to recover the difference between the lower-cost Aerocom system and the higher-cost Swisslog system it was directed by VA to install. Respondent argues that the contract required the new system for the DOM and CLC additions to connect to the Swisslog system in the existing parts of the VA Medical Center and that the Aerocom system could not connect to the existing Swisslog system. Respondent contends that it appropriately rejected appellant's proposed system and that appellant is not entitled to any additional costs because the installation of the Swisslog system merely complied with the contract requirements.

Respondent's motion for summary judgment and appellant's opposition address three primary issues: (1) whether the contract required the new pneumatic tube system to physically connect to the existing Swisslog system; (2) whether the agency's direction to use the Swisslog system was improper because it created a de facto sole source requirement that did not comply with the requirements of applicable procurement laws and regulations; and (3) whether respondent's direction to appellant to use a Swisslog system was a constructive change to the contract that entitled appellant to additional costs.³ We resolve the first question in the affirmative and the second and third questions in the negative. The resolution of these questions establishes that there is no genuine issue as to a material fact and that respondent is entitled to summary judgment as a matter of law.

³ The parties each raise other collateral arguments. Although we do not address every argument, we have reviewed them all and find that none provides a basis for a different conclusion in this decision.

1. The Contract Required the New Pneumatic Tube System to Connect to the Existing Swisslog System

The parties contest whether the contract required the pneumatic tube systems installed in the DOM and CLC additions needed to connect to the existing Swisslog system. The key language in the architectural drawings incorporated into the contract stated that the contractor was required to “REUSE EXISTING [PNEUMATIC] TUBE TRANSFER STATION LOCATION TO EXTEND SERVICE” to the CLC and DOM additions. Exhibit 5 at VA001751-52.

The parties agree that, although the specifications stated “BASIS OF DESIGN FOR PRICING IS SWISSLOG,” the contract did not require the use of a name-brand Swisslog system. Complaint ¶ 3; Answer ¶ 3. Neither Edgewater’s bid, nor the resultant contract, identified the brand of pneumatic tube that must be provided during performance. *See* Exhibits 16, 17. The parties further agree that Swisslog is the only pneumatic tube system that could integrate, or physically connect, with the existing Swisslog system. Exhibit 55; Appellant’s Opposition to Respondent’s Motion for Summary Judgment (Appellant’s Opposition), Declaration of James Collins, Edgewater President ¶ 18.

The parties stipulate that pneumatic tube service is “a tube network with carriers that travel by air pressure and vacuum between [physical] stations.” Joint Stipulation to Definitions. The word “extend,” as defined in the Merriam-Webster online dictionary, means to “cause to reach (as in distance or scope),” “to cause to be longer,” or “ADVANCE, FURTHER.” <https://www.merriam-webster.com/dictionary/extend> (last visited Jan. 25, 2024). Similarly, Black’s Law Dictionary provides the following definition of the word “extend”: “Term lends itself to great variety of meanings, which must in each case be gathered by context. It may mean to expand, enlarge, prolong, lengthen, widen, carry or draw out further than the original limit; *e.g.*, to extend the time for filing an answer, to extend a lease, term of office, charter, railroad track, etc. To stretch out or to draw out.” Black’s Law Dictionary 583 (6th ed. 1990) (citation omitted).

Respondent argues that the term “extend service” refers to extending the pneumatic tube service provided by the existing Swisslog system from the existing VA Medical Center to the new additions. *See* Respondent’s Motion at 2, 8. Under this interpretation, a carrier placed into a physical station in the existing VA Medical Center must be able to travel through the pneumatic tubes to a physical station in the new additions. Respondent contends that to achieve this result, the new system installed by the contractor must connect to the existing Swisslog pneumatic tube system. We agree.

Appellant’s claim and its opposition to respondent’s motion for summary judgment primarily rely on the fact that the contract does not expressly state that the new system must

physically connect to the existing Swisslog system. Testimony by Edgewater’s president shows that appellant understood that the contract requires transmission of carriers from the existing VA Medical Center to the CLC and DOM additions: “[W]e were told to reuse the existing pneumatic tube transfer system at the location which is shown up at the top of the drawing to *extend the service from our new extension into this room [C-114] and then it is to extend into the rest of the hospital.*” Exhibit 64, Deposition of James Collins (June 6, 2023) at VA005381-82 (emphasis added); *see also id.* at VA005397-98, VA005400, VA005402, VA005404-05. Edgewater’s vice president provided similar testimony during a deposition. *See* Exhibit 63, Marano Deposition at VA00538-19, VA005347-49. These statements show that appellant shared respondent’s understanding that the contract specifications require pneumatic tube service that permits the transmission of a carrier through the pneumatic tube system from one physical station to another.

Appellant explains that its proposal to install an Aerocom system assumed that pneumatic tube service would be “extended” by placing a new Aerocom physical station in room C-114, where the existing transfer station is located. Appellant’s Opposition at II. Facts ¶ 19; Collins Declaration ¶ 23. Because the Swisslog and Aerocom systems cannot physically connect, however, appellant’s approach requires an additional manual process to allow a carrier to travel from a physical station in the existing VA Medical Center to a physical station in the CLC or DOM addition.

Under appellant’s approach, a user sending a carrier from the existing VA Medical center to the CLC or DOM addition would initiate the process by using a physical station from the Swisslog system to send the carrier to room C-114. A person would need to be present in room C-114, remove the carrier from the Swisslog physical station, take the carrier to the newly-installed Aerocom physical station, place the carrier into the new Aerocom physical station, and then direct the carrier to the final destination at a new Aerocom physical station in the new additions.⁴ Collins Declaration ¶ 23. As the president of Edgewater testified in a deposition:

Since it wasn’t, you know, detail defined in the documents, then we – the best idea we had was to, okay, put a [physical] station there and then *somebody nearby or someone would have to take the cylinder out of our existing – let’s say receiving station, and put it into the [new physical] station in the same location to extend further in the hospital.*

⁴ The process would be reversed for sending a carrier from a physical station in one of the new additions to a physical station in the existing building. All references herein to appellant’s described manual transfer process therefore refer to sending carriers in either direction.

Exhibit 64, Collins Deposition at VA005404-05 (emphasis added).

On this record, we find that both parties interpreted the contract specifications to require pneumatic tube service be extended in a manner that allows transfer of carriers through the pneumatic tubes between physical stations in the existing VA Medical Center and either the CLC or DOM additions. Given this shared understanding, we find appellant's interpretation of the specification unreasonable because it does not provide for a physical connection between the existing and new systems and requires manual transfer of the carriers between the systems in room C-114.

Appellant's interpretation conflicts with or fails to give meaning to all parts of the specifications in the architectural drawings. Appellant's interpretation assumes that a person will be present in room C-114 to manually transfer the cylinder from the old to the new system each time a cylinder is sent from the existing VA Medical Center to the new additions.⁵ Appellant's assumption regarding manual transfer effectively ignores the term "extend" in the specification because it would create two unconnected pneumatic tube systems that do not provide pneumatic tube service from the existing VA Medical Center to the two new additions. This is inconsistent with the parties' stipulated definitions and statements.⁶

⁵ Respondent states that "VA does not have employees, at any location, recovering tubes from one destination and immediately putting the tubes into another [physical] station for another destination. This would defeat the purpose of the tubes." Fenton Declaration ¶ 11. Additionally, respondent explains that a carrier "may contain information protected in accordance with the Health Insurance Portability and Accountability Act (HIPAA); it is important that the information is transferred directly from sender to recipient without an intermediary." *Id.* ¶ 14.

⁶ The parties also dispute whether the architectural drawings – separate from the specifications set forth in the notes to the drawings, discussed above – show a connection between the existing Swisslog system and the system to be installed. Respondent says the architectural drawings "depicted the new [physical] station connecting to the existing transfer station" and points to the drawings that generally show lines representing pneumatic tubes running through boxes representing transfer station #061. Respondent's Statement of Undisputed Material Facts ¶ 5; *see* Exhibit 5 at VA001751-52. Appellant argues that the architectural drawings do not show the location of the pneumatic tube routing, and lack details needed to show a connection or lack thereof between the existing and new systems. *See* Appellant's Opposition at II. Facts ¶ 6; Appellant's Statement of Genuine Issues ¶ 5.b; Collins Declaration ¶¶ 10, 14-15; Exhibit 64, Collins Deposition at VA005409-10. We find that the architectural drawings do not clearly support either party's interpretation of the contract requirements and thus do not affect our conclusion that the specifications require a

In sum, the contract requires the pneumatic tube system for the DOM and CLC addition to connect to the existing Swisslog system. Appellant's proposed system did not meet the contract requirements.⁷

2. VA's Direction to Use a Swisslog Brand-Name System Does Not Create a De Facto Sole Source Requirement that Affects This Claim

Appellant contends that respondent's direction to use a Swisslog brand-name pneumatic tube system created an improper de facto sole source requirement that the agency failed to properly justify when issuing the solicitation. Appellant's Opposition at I. Background, II. Facts ¶ 18. In effect, appellant argues that respondent's interpretation – even if reasonable – should be rejected because it establishes Swisslog as the only acceptable option for the new system.

Appellant does not explain why, even if we were to find the specifications reflect a sole source requirement that violates procurement statutes and regulations, such a finding would provide a basis to disregard the plain language of those specifications. To the extent appellant believes that the specifications for the system creates an improper de facto sole source requirement for a Swisslog system, this is a matter that pertains to the terms of the solicitation that could have been addressed in a bid protest. As this Board has explained, “[a]ppeals and protests are distinct,” and where a contract's terms are clear, the fact that a solicitation created an improper sole source requirement does not give rise to a claim. *CMEC/ARC Electric JV, LLC v. Department of Veterans Affairs*, CBCA 2806, 14-1 BCA ¶ 35,477, at 173,950 (2013).

3. VA's Direction to Use a Swisslog Pneumatic Tube System Does Not Give Rise to a Claim Based on Increased Costs

In addition to the issues above, appellant somewhat indirectly argues that a claim arose from respondent's direction to use a Swisslog pneumatic tube system because Edgewater was deprived of the opportunity to use a less costly system. While an agency's improper rejection of a request for substitution under Federal Acquisition Regulation clause 52.236-5, Material and Workmanship (APR 1984) may constitute a constructive change that

connection between the existing and new systems.

⁷ Appellant also contends that parts of the existing Swisslog pneumatic tube system equipment were non-functional at the time a pre-bid inspection was conducted. Appellant's Statement of Genuine Issues ¶ 3. Even assuming this to be true, appellant does not point to any contract language excusing the contractor from any requirement if part of the existing system was not functioning.

entitles the contractor to an equitable adjustment, *see Delfour, Inc.*, VABCA 3803, 94-2 BCA ¶ 26,789, at 133,228-29 (citing *Jack Stone Co. v. United States*, 344 F.2d 370 (Ct. Cl. 1965)), we find that respondent reasonably rejected appellant's proposed Aerocom system. Apart from the rejected Aerocom system, appellant has not identified any compliant alternative it could have used. For these reasons, there can be no claim for costs arising from the difference between the non-compliant Aerocom system and the compliant Swisslog system.⁸

Decision

For the foregoing reasons, we grant respondent's motion for summary judgment and thereby **DENY** the appeal.

Jonathan L. Kang

JONATHAN L. KANG
Board Judge

We concur:

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Board Judge

⁸ Respondent also contends that appellant cannot demonstrate any harm from the agency's direction to use a Swisslog brand-name pneumatic tube system because Edgewater based its bid on a price quote for a Swisslog system. Appellant acknowledges that it based its bid price on using a Swisslog system, rather than an Aerocom system. Collins Declaration ¶ 11. Because the contract did not require use of a brand-name system, and appellant's bid did not identify the brand of the system it intended to provide, appellant was free to perform using any system that satisfied the contract requirements and to enjoy the benefit of providing a lower-priced, compliant system.