



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 27, 2013

CBCA 3048

RELIABLE CONTRACTING GROUP, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Reginald A. Williamson and William E. Dorris of Kilpatrick Townsend & Stockton LLP, Atlanta, GA; and Gregory C. Thomas, General Counsel of Fisk Electric Company, Houston, TX, counsel for Appellant.

Ogochukwu Ekwuabu, Charlma Quarles, and Phillipa L. Anderson, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **SHERIDAN**.

SHERIDAN, Board Judge.

This is a claim brought by Reliable Contracting Group, LLC (Reliable), the prime contractor, on behalf of itself and its first tier subcontractor, Fisk Electric Company (Fisk), and Fisk's electrical supplier, DTE Energy Technologies, Inc. (DTE Energy). Reliable was contracted to design and construct a new utility plant and electrical distribution system at the Department of Veterans Affairs (VA) Medical Center (VAMC) in Miami, Florida. Reliable seeks an equitable adjustment in the amount of \$1,138,662.95 for what it characterizes as a VA-directed change to remove and replace certain back-up generators at the VAMC. The parties have elected to submit the case on the record without a hearing pursuant to Board Rule 19. 48 CFR 6101.19 (2012).

Findings of Fact

This case arose out of a contract issued by the VA for the design and construction of a new utility plant and electrical distribution system at the VAMC in Miami, Florida. One of the primary purposes of the project was to upgrade and consolidate the electrical equipment at the VAMC. On February 10, 2003, the VA awarded contract V101BC0197 to Echo Construction Company (Echo), for a total contract amount of \$ 20,345,000. By way of a March 31, 2003, novation agreement, Echo, Reliable, and the VA agreed to transfer all rights, titles, and interest in the contract to Reliable.

The contract required the furnishing and installation of two emergency generation systems, one to handle essential loads and another to handle back-up equipment and normal loads. This appeal involves the emergency generators for the back-up system. For the back-up generation system, three back-up emergency generators rated at no less than 1825 kilowatt (kW) prime were required under the contract. Reliable subcontracted with Fisk to provide the back-up generators, and Fisk utilized DTE Energy to supply the generators. DTE Energy offered Fisk three model DQKC, 1825 kW emergency generators manufactured by Cummins Power Generation for installation on the project: serial numbers F000116718, F000116717, and E000107713.

One of the Cummins generators was delivered to the project and set in place on June 26, 2004, and another on June 27.¹ The generators were inspected by the VA upon delivery, where it was noticed by the VA's senior resident engineer (SRE), Leonard Romano, that the generators showed "a lot of wear and tear including field burns to enlarge mounting holes." On June 27 SRE Romano forwarded a request for information (RFI) to Reliable, stating:

I am concerned that [the two generators that were delivered] are not "new" as required by General Conditions 01001, 1.47(a). They show a lot of wear and tear including field burns to enlarge mounting holes. Are they new and will you certify them as such? I cannot pay you for these as planned in this month's payment without that certification.

Contract section 01001, GENERAL CONDITIONS, provides in pertinent part at paragraph 1.47(a): "All equipment, material, and articles incorporated into the work covered

¹ These two generators were shipped from New York; the third generator was in Virginia. It appears that the generator in Virginia was never shipped to the VA project.

by this contract shall be new and of the most suitable grade for the purpose intended.” Contract section 16208, ENGINE GENERATORS, provides:

1.3 QUALITY ASSURANCE

....

E. Factory Test: The Government shall have the option of witnessing the following tests at the factory. . . .

1. Load Test
2. Quick Start Test

Fisk wrote DTE Energy on June 28, 2004, about the “serious concerns” that Reliable and the VA had about the two Cummins generators that were delivered to the project site. Fisk noted:

My foreman noted that the units were in “BAD CONDITION” and proceeded to install them.

....

[Reliable] and the VA have indicated to Fisk Electric, that the two units appear to be used and have given directive (see attached) for Fisk to remove them from the site until proven otherwise. Our purchase order indicates new generators are to be installed, please provide written documentation to that effect.

Reliable’s June 28, 2004, directive to Fisk stated:

As you are aware [the VA] has very serious doubts and concerns as to whether the equipment furnished is in compliance with the contract. As is apparent from the photographs previously sent you the units were manufactured four years ago and from markings and wear on the units themselves, there are concerns that the units have been previously installed and used. The [VA] had made it clear that **these units will be rejected** if they are not in 100% compliance with the contract documents **in every respect**.

[T]his is a very serious matter which reflects poorly on Fisk and has adverse implication for Reliable’s relationship with [the VA] and has monumental impact to the schedule of this project. We simply cannot allow this equipment

to remain on site without immediate and conclusive proof that they are in 100% compliance with the contract documents and hereby are notifying Fisk to remove the generators at once from the project site.

To compound the problem, the steel erector is fully mobilized (with a crane) and prepared to begin erection this week. We have no alternative but to hold Fisk responsible for any delays and/or damages arising out of this matter, including but not limited to the interruption to the progress of the work and all costs associated with the immediate removal of the non-compliant equipment.

DTE Energy had purchased the Cummins generators from DSA Encore, which wrote to DTE Energy on June 28, explaining that:

These [Cummins] generators had been sold to another company who took delivery of the units, but never installed or started the units. They sat in place, uninstalled/unused, until DSA Encore picked up the units and delivered them to Galasso Riggers where they remained until now.

Upon delivering the generators to Galasso Riggers, DSA Encore hired Cummins Power to perform preventative maintenance and start the units, prior to preparing them for storage.

The generators have only a few test hours on them, and come with a full 1-year warranty.

While there is evidence in the record that this letter was emailed to Fisk, it is unclear from the record that Reliable or the VA received this email or the information contained in the letter.

On June 29, 2004, SRE Romano again wrote to Reliable, informing it that the Government would not accept used equipment and asking for an explanation about the generators:

To avoid any confusion or additional delay on your part . . . be advised that the Government will not accept used equipment. . . . Only two of the three [generators] ever showed up and they are not only used but also abused. It is inconceivable to me that you would have ever considered pulling off such a deception on the Government. I strongly advise for the sake of your company's reputation that you immediately provide a full explanation of the

above complete with your time to salvage the timely completion of this contract.

Reliable again wrote to Fisk on June 29, 2004, advising that Reliable was taking the matter very seriously and “as we discussed with you, the equipment on site is clearly unacceptable by anyone’s standards.” Reliable urged Fisk to have conforming equipment delivered to the project as soon as possible due to the “critical nature of [the generators] to the schedule and overall success of the project,” and asked that Fisk “immediately coordinate with our field staff the removal of the unacceptable equipment from the site at the earliest possible opportunity.”

Reliable also wrote to SRE Romano on June 29, saying it was in contact with Fisk, which had assured that “they were as surprised as anyone at the condition of the equipment delivered to the site.” Reliable informed the VA that it had “directed [Fisk] to remove the nonconforming generators from the project site.” The June 29 correspondence between Reliable and Fisk, as well as Reliable and the VA, stresses the importance of the contract’s schedule, the impact the unacceptable generators were having on the schedule, and the importance attached to resolving the generator issue.

Fisk wrote to Reliable on June 29, 2004, saying that Fisk had requested the run hour status of the two generators delivered to the project and had a representative from Cummins physically view the generators and witness the history of them from the control panel. According to the estimation of the Cummins representative, the units were in “good condition and [the representative] acknowledges that he had received information that they are new generators from Cummins.” The two generators’ control panels showed, respectively, start hours (7 and 12), engine hours (3 and 2), control hours (9 and 4) and kilowatt hours (2071 and 2251). Fisk concluded to Reliable that “[t]he readings indicate that the generators appear to only have been in test and start up condition. At this time we are waiting for the documentation from the manufacturers indicating a complete history and a definitive plan of action from DTE to remedy the condition of the generators in place.” Fisk wrote Reliable on June 30, 2004, that a Cummins representative had accessed the generator control panels via a laptop computer and “the control panel readings indicated both generators had only factory startup and test run times.” Fisk concluded: “In that the generators appear to have been inadequately stored, we have directed DTE Energy to provide us with their plan of action for removing the generators from the project and for providing the generators in compliance to the purchase order.” Fisk told Reliable it was “searching the market place for other units in the event this issue cannot be resolved with DTE Energy.”

Around July 1, 2004, Reliable told Fisk to have the Cummins generators removed from the VA project. They were removed that day and shipped to OK Generators, which had factory certified technicians capable of testing and servicing the Cummins generators.

OK Generators tested the Cummins generators at its facility. While it was invited to do so, the VA did not observe the testing. DTE Energy provided Fisk with a proposal around July 8, 2004, to address the generator issue. The proposal was set forth in a letter from DTE Energy to Fisk stating it had verified that the two Cummins generators in issue “are unused and warrantable”:

These units are fully backed by the standard DTE Energy Technologies warranty and the underlying Cummins . . . 1 year warranty for new engines. Prior to our purchase of these units, they were purchased by DSA Encore and placed in enclosures but never run. In accordance with your request, a representative from the local Cummins authorized service group went to the job site, powered the units, and took readings of the run hours on two of the three units; they were 2 hours and 3 hours. The third unit has been powered and shows 3 hours of run time. These run times represent factory test time and pre-startup activities and are typical of new units.

DTE Energy went on to propose that the Cummins generators be tested and evaluated, adjusted as necessary, and “pre-conditioned”; and that the generators be returned to the site on July 19, 2004.² Fisk forwarded the DTE Energy proposal to Reliable on July 9, which emailed it to SRE Romano on that same date.³

SRE Romano responded to Reliable on July 15, 2004, by quoting the contract’s General Conditions provision 01001, 1.47(a) and stating: “[p]reviously owned equipment is not new and as noted in DTE’s letter, DSA Encore had previously owned the generators being offered. Previous ownership makes them used.” The SRE went on to state that “only new generators with all the submittal data called for in 16208, 1.4[,] reviewed and approved by the Prime Contractor and [VA] Engineer of Record[,] will be considered,” and “[t]he new

² The pre-conditioning activities for the generators included: evaluation; cleaning, removing rust, and painting the exterior surfaces; changing the oil and filters; replacing the coolant; and cleaning, removing rust, and painting the mufflers.

³ In forwarding the proposal, Reliable noted that SRE Romano was on leave from the project and would not return until July 15, 2004.

generators are to be factory tested and the government selects the option of witnessing this test.”

On July 16, 2004, Fisk directed DTE Energy “to proceed with supplying submittals and generators as per our purchase order, specifications and contract documents.” According to Reliable, DTE Energy wrote Fisk on July 21, 2004, to address the SRE’s concerns about the generators, but SRE Romano attests that he has no recollection of receiving a copy of that letter prior to receiving Reliable’s claim. The record shows that, internally, Fisk’s purchasing agent objected to SRE Romano’s conclusion that “previous ownership of [the Cummins generators] makes them used,” and urged Fisk management to take exception to the SRE’s conclusion. However, the record does not contain documentary evidence that Fisk contacted Reliable or that Reliable contacted the VA to take exception to the SRE’s conclusion.

At Reliable’s urging, Fisk started to look at supplying the VA project with three Caterpillar 3516, 2000 kW generators for the emergency generation system. Fisk used Pantropic Power, Inc. and High Plains Power Systems, Inc. to supply the Caterpillar generators. Reliable’s submittal on the Caterpillar generators was approved on October 13, 2004. On April 19, 2005, Reliable provided to SRE Romano certifications from Pantropic and High Plains that the Caterpillar generators were “new.”

On April 3, 2007, Reliable submitted to the VA a certified claim in the amount of \$1,100,623 on behalf of Fisk “for the additional costs incurred due to the VA issued directive to replace the [Cummins] 1825 kW emergency generators.”⁴ When the VA contracting officer failed to issue a timely final decision, Reliable appealed the deemed denial of the claim to this Board, where it was docketed as CBCA 3048. On November 20, 2012, the contracting officer (CO), Ed Nicholson, issued a contracting officer’s final decision denying the claim. CO Nicholson recounted some of the facts leading up to the issue and noted that the VA SRE had asked Reliable to certify the generators were “new” and it failed to do so, instead verifying that the generators were “unused” and “warrantable.” CO Nicholson wrote that “unused” and “warrantable” do not indicate that the units are “new”; he concluded that the generators were “previously owned” and “reconditioned,” as defined by Federal Acquisition Regulation (FAR) 52.211-5(a), in that they had to be “restored to the original normal operating condition.”⁵ Additionally, the contracting disagreed that the Cummins

⁴ The claim was subsequently adjusted to \$1,138,662.95.

⁵ The clause found at FAR 52.211–5 MATERIAL REQUIREMENTS, for use in solicitations and contracts for supplies that are not commercial items, provides, among other things, definitions for the terms “new” and “reconditioned.” “*New* means composed of previously unused components, whether manufactured from virgin material, recovered

generators were “of the most suitable grade for the purpose intended under the contract,” particularly as “Fisk was as surprised as anyone at the condition of the equipment delivered to the site,” and had originally concluded that “the equipment on site is clearly unacceptable by anyone’s standards.” CO Nicholson concluded the Cummins generators were “previously owned” by DSA Encore and “required reconditioning in order to meet the contract requirements.”

Discussion

The dispute before us involves a question of contract interpretation and whether the Cummins generators that Reliable offered to the VA were new and otherwise met the terms of the contract. To resolve this issue of interpretation, we look first to the plain language of the contract. *See Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). The intention of the parties is gleaned from the contract’s clauses interpreted as a whole, giving meaning to all provisions wherever possible. An interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible. *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). We need not go beyond the four corners of this contract to decide the merits of the dispute before us. *Id.* at 976.

General Conditions provision 01001, 1.47(a) of the contract required Reliable to provide that equipment was “new and of the most suitable grade for the purpose intended.” The contract provision specifically addressing the generators, section 16208, 1.3.E, also required that the testing of the generators occur at the factory with the VA having the option of witnessing the tests. Reading the contract as a whole, to be considered new, each of the generators had to be capable of being tested at the factory. We believe that Reliable understood this, and that is why, when the generator issue arose, it did not overly involve itself in attempting to convince the VA that the generators were “new.” Clearly, the Cummins generators, which had been in storage for four years, could not be factory-tested and did not meet the requirement of being “new.” Further, it appears that at the time when the Cummins generators issue arose and was being addressed by the VA, neither Reliable nor Fisk characterized the Cummins generators as “new.” Conversely, when the Caterpillar

material in the form of raw material, or materials and by products generated from, and reused within, an original manufacturing process; provided that the supplies meet contract requirements, including but not limited to, performance, reliability, and life expectancy.” 48 CFR 52.211-5(a). “*Reconditioned* means restored to the original normal operating condition by readjustments and material replacement.” *Id.* This clause was not included in the contract before us.

generators were offered, Reliable and Fisk readily verified that the generators were “new,” and appropriate certifications were forwarded to the VA. The VA accepted the Caterpillar generators and the certifications that they were “new,” and we decline appellant’s invitation to look behind those certifications to analyze whether the Caterpillar generators had defects similar to the Cummins generators.

Decision

For the reasons set forth above, the Board **DENIES** the appeal.

PATRICIA J. SHERIDAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ANTHONY S. BORWICK
Board Judge