UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 28, 2015

CBCA 4594(3048)-REM

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.

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

Before Board Judges **DANIELS** (Chairman), **HYATT,** and **SHERIDAN**.[1]

**SHERIDAN**, Board Judge.

In November 2013, the Board denied the claim of Reliable Contracting Group, LLC (Reliable), seeking additional costs for the Department of Veterans Affairs' (VA's) alleged rejection of back-up emergency generators provided for a project at the VA medical center in Miami, Florida. The Board concluded that the generators, which had been in storage for four years, could not be factory-tested and did not meet the requirement of being "new." We

[1] Judge Borwick, an original member of the panel assigned to this appeal, retired after the issuance of the Board's initial decision. Judge Hyatt was selected at random to replace him as a panel member.

also found that at the time the units were delivered, and the VA questioned whether the generators were in compliance with the applicable contractual requirements, neither Reliable nor its electrical subcontractor, Fisk Electric Company (Fisk), characterized the generators as "new" or asserted that the units met the specification in response to the VA's specific request for confirmation that this was the case. *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 3048, 14-1 BCA ¶ 35,475 (2013). Reliable appealed that decision.

The United States Court of Appeals for the Federal Circuit, in *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, 779 F.3d 1329, 1334 (Fed. Cir. 2015), held that Reliable was required to install "new" generators and stated that this term meant that the generators were to be in "fresh condition," "not be used," 'and "free of significant damage, i.e., damage that was not cosmetic." The Court characterized Reliable's argument that "the generators were 'new' because they were not used," as incomplete, noting that appellant had failed to provide an industry definition of "new." *Id*. at 1332. The Court noted that, because "new" was not defined by the contract and "there is no single plain meaning of the word 'new' [the term] is ambiguous." *Id*. at 1334. The Court also found that "[t]he record evidence before us is conflicting with respect to the extent of the damage, and there was no express finding by the Board on this issue." *Id*. The Court vacated the Board's decision and remanded the appeal to the Board with instructions "to determine whether the damage to the generators during the four-year period between the original manufacture and the date of delivery to the VA site was significant enough to render the generators not 'new.'" *Id*. at 1335. The Court did not address the fact that, at the time the units were delivered, neither Reliable nor Fisk informed the VA of their view that the generators were "new," much less produced contemporaneous evidence that they were "new" within the meaning of the specification. Nor did the Court comment on the fact that the record contained no evidence that the four-year-old internal components and parts would not need to be replaced or refurbished.

The parties in this appeal elected to submit the case for decision on the written record pursuant to Rule 19 of the Board's Rules of Procedure. 48 CFR 6101.19 (2013). The record consisted of documents provided by the parties under Rule 4, namely, the appeal files and affidavits of various witnesses. Neither party provided additional evidence following the remand of this matter to the Board for further findings.[2] Thus, our ability to address the

[2] The VA initially expressed an interest in submitting another brief and appellant objected. The Board denied the VA's request when, during a telephone conference, the VA was unable to articulate the benefit of further briefing.

Court's concerns is restricted to the evidence adduced by the parties when they submitted the case for decision.

## Findings of Fact

Under its contract with the VA, Reliable was required to furnish and install, among other things, three "new" back-up emergency generators at the Miami VA medical center. Specifically, contract section 01001, GENERAL CONDITIONS, provides in pertinent part at paragraph 1.47(a): "All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended." Reliable subcontracted with Fisk to furnish and install the back-up generators. Fisk acquired units manufactured by Cummins/Onan (Cummins) to meet this requirement.

After two of the generators were delivered to the VA medical center and were viewed by the VA senior resident engineer (SRE), the SRE sent a request for information (RFI) to Reliable on June 27, 2004, stating:

> Upon receipt of two of the three 1825 kw generators, I am concerned that they 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 can not pay you for these as planned in this month's payment without that certification.

(Emphasis added.)[3] The VA SRE's question about whether Reliable was willing to certify the generators as "new" was forwarded from Reliable to Fisk, and from Fisk to DTE Energy Technologies, Inc. (DTE Energy), the company that supplied the Cummins generators to Fisk.

Another VA resident engineer, Tomas DeCastro-Quiroz, also visually inspected the two generators. He found them to be in "poor condition" and stated: "In my experience, 'new' generators that have been placed in storage would not have been in as poor of condition as the Cummins generators that were delivered to the project site. Furthermore, the cut hoses on the units were a clear indication of previous use of the generators."

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[3] Although the appeal file does not contain a copy of the specification requiring such certification, Reliable has not contended that certification was not required and in fact provided a suitable certification for the Caterpillar, Inc. (Caterpillar) generators that were ultimately installed on the project.

David Conkin, Reliable's vice president and senior project manager, wrote to Fisk on June 28, 2004:

> 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 owner has made clear that these units will be rejected if they are not in 100% compliance with the contract documents in every respect. [Emphasis in original.]
>
> *[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 [the generators] 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.

(Emphasis added.)

In turn, Fisk's project manager, Calvin Samuels, wrote to DTE Energy that same day:

> *My foreman noted that the units were in "BAD CONDITION"* and proceeded to install the units. . . .
>
> *The general contractor [Reliable] and the VA have indicated to Fisk Electric, that the two units appear to be used and have given directive (see attached)* [Mr. Conkin's communication above] *for Fisk Electric 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. At this time the only documentation we have received is from DSA Encore (not signed) stating that these are new generators. [W]e need a little more documentation than this!*

> . . . .
>
> Please be advised that there are escalating associated costs being accumulated with the generator issues [ ] which will be passed on to DTE Energy.
>
> We trust that DTE [Energy] will comply and provide all requested information, reports and certification by [June 29, 2004] and *that is satisfactory to the owner or Fisk Electric [or we] will have no choose [sic] but to remove the generators from the site at DTE [Energy's] expense.*

(Emphasis added.)

Around this time, Fisk was informed by DTE Energy that the Cummins generators had been purchased from DSA Encore. Neither Reliable nor Fisk has explained whether DSA Encore was a generator supplier or why it was involved in providing the generators. DSA Encore stated that it purchased the Cummins generators from "another company who took delivery of the units, but never installed or started the units."[4] DSA Encore represented to DTE Energy that the generators were "new, unused units." However, there was no showing that this information was ever forwarded to the VA.

On June 29, 2004, the VA SRE wrote to Reliable, questioning whether Reliable was attempting to deceive the Government by offering used generators, informing Reliable that the VA would not accept used generators, and requesting a full explanation of the matter. He also cautioned that the generator issue could potentially impact the construction schedule. Reliable responded the same day, stating that

> representatives of Fisk have assured us that they were as surprised as anyone at the condition of the equipment delivered to the site. We have been working closely with Fisk personnel to investigate the matter and per our conversation have directed them [Fisk] to remove the nonconforming generators from the project site.

Reliable wrote to Fisk again on June 29 stating that it found the condition of the generators to be "unacceptable."

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[4] While the purchaser remained unnamed, DSA Encore stated to Fisk that the entity was comparable to an owner or end user "who took delivery of the units," in much the same manner that the VA would take delivery of the units under the contract. Respondent refers to this entity as "an ultimate purchaser."

> Suffice it to say, we are taking this matter [the generators] very seriously. *As we discussed with you, the equipment on site is clearly unacceptable by anyone's standards*. . . .
>
> It is in your interest to have conforming equipment delivered to the project as soon as possible. We cannot overstate the urgency of this matter and the critical nature of this equipment to the schedule and overall success of this project. We have been directed by the owner to provide a "plan to salvage the timely completion of this contract" and will require your input to accomplish this task. We will work with you in any way that we can to minimize the schedule impact so as to avoid having to seek recovery of resulting costs from your company. To this end, we will be scheduling an on site meeting with all interested parties including Fisk's Bonding Company, to ensure a realistic plan of action has been implemented.

(Emphasis added.)

On June 29, 2004, Fisk contacted Reliable, advising that it had obtained information from a Cummins representative. According to Fisk, the representative stated during the inspection that he had "received information that [the two generators] are new generators from Cummins."[5] The Cummins representative found that the east generator showed seven start hours, three engine hours, and nine control hours. The west generator showed twelve start hours, two engine hours, and four control hours. The generators had been manufactured in June and July of 2000. Fisk wrote to Reliable, the same day, reporting the readings taken by the Cummins representative and informing Reliable that it was waiting for "a plan of action" so that DTE Energy could remedy the condition of the generators in place. Fisk told Reliable it was meanwhile "searching the market place for other units in the event this issue cannot be resolved with DTE Energy."

DTE Energy sent an email message to Fisk on June 29, 2004, attaching two DTE Energy letters. The first letter represented: "The [three] Cummins generators [1825kW] open set generators you purchased from us in February 2003 *are new and unused units*. The units were first purchased by another company but they were never installed or used by them. Our vendor purchased the units and stored them in the Galasso Rigger yard in New York." (Emphasis added.) The second attached letter represented:

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[5] The record does not reflect from whom the inspector received this information.

> [P]lease be advised that the [three Cummins generators] that were purchased from [DSA] Encore . . . by DTE Energy in July 2003, *were new, unused units*.
>
> These 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 [in storage] 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.

(Emphasis added.)

Fisk wrote to Reliable on June 30, 2004, communicating the following information:

> As to the events of yesterday, DTE Energy sent to the project Mr. Bob Coulson (a [Cummins] representative) and a service technician who accessed the generator control panels via a laptop computer as witnessed by your Mr. Barry Wahler. The control panel readings indicated both generators had only factory start-up and test run times. Secondly, Fisk Electric was in communication with DTE Energy's upper management. *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.* DTE Energy will give us their written proposed action plan today and we will pass it on to Reliable as soon as we receive it for your review, acceptance or rejection.
>
> Finally, we are searching the market place for other units in the event this issue cannot be resolved with DTE Energy. We will keep you apprised of the events as they unfold today. Please be assured we will do whatever is necessary within the terms of the subcontract as to not delay the project and to work this problem out.

(Emphasis added.)

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, the local

Cummins-authorized service representative capable of testing and servicing the generators. The third generator, which was never delivered to the project site, was also shipped from its location in Virginia to OK Generators.

By July 8, DTE Energy noted that OK Generators had "checked and run" the generators and had developed a "plan of compliance" for the generators. DTE Energy's letter setting forth the plan opened by stating, "we have verified that the [generators] for the VA hospital project are unused and warrantable." The letter continued:

> Our proposal for *evaluation* and pre-commissioning [the generators] is as follows:
>
> 1. Test and *Evaluation*
>    a. Conduct visual inspection of generators.
>    b. Connect fuel lines.
>    c. Connect battery voltage.
>    d. Test Power Command control alarms and shutdowns.
>    e. Test system on 200kW resistive load bank.
>    f. Determine any required adjustments.
> 2. *Complete Adjustments as Necessary*
> 3. Complete Pre-commissioning Activities
>    a. Change oil and filters.
>    b. Evaluate coolant top off or replace as necessary.
>    c. Clean exterior surfaces, remove rust, and paint.
>    d. Clean mufflers, remove rust, and paint (high temp black).
>
> This work will be conducted at OK Generators. . . .
>
> *We are confident that you will find these units to be in new and fully warranted condition in accordance with our June 3, 2003 proposal*.

(Emphasis added.)

The "plan of compliance" was sent to Fisk and then forwarded to Reliable. Reliable provided the plan to the VA SRE via an email message stating, "We have been asked by Fisk to forward their proposed plan (attached) regarding the [Cummins] generators to the VA for consideration. Please respond at your earliest convenience."

On July 15, 2004, the VA SRE wrote back to Reliable referencing the proposed plan:

> 1. "All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended unless otherwise specifically provided in this contract." (01001, 1.47 (a)). *Previously owned equipment is not new and as noted in DTE Energy's letter, DSA Encore had previously owned the generators being offered. Previous ownership makes them used.*
>
> 2. The new generators are to be factory tested and the government selects the option of witnessing this test. (16208, 1.3, E).
>
> 3. Only new generators with all of the submittal data called for in 16208, 1.4 *reviewed and approved by the prime contractor* and engineer of record will be considered.

(Emphasis added.)

As of July 15, 2004, neither Reliable nor Fisk had represented the generators as "new" to the VA or recommended to the VA that it should accept the generators as "new." The only entity suggesting that the generators were "new" was DTE Energy.

Reliable forwarded the SRE's response to Fisk as an attachment to a July 15 email message and instructed Fisk to "[p]lease provide generators as directed in this attachment, in full compliance with the contract documents, so as not to impact the overall project's schedule. Please provide us with Fisk's written plan of action as soon as it is determined." On July 16, 2004, Fisk passed the correspondence along to DTE Energy with the instructions: "Fisk Electric Company is directing DTE Energy to proceed with supplying submittals and generators as per our purchase order . . . specifications and contract documents. In the interest of scheduling we are requesting a response by end of business day [July 19, 2004] with actual lead times of the contract compliant generators."

It appears from the record that Reliable and Fisk abandoned all efforts to offer the generators as contract-compliant after July 16 and decided to submit generators manufactured by Caterpillar.

Around July 19, individuals in Fisk management discussed responding in writing, "taking exception" to the VA SRE's position that "previous ownership makes [the Cummins generators] used." However, the record does not indicate a letter or email message was ever written. There is no evidence that, at that time the Cummins generators were in issue, Fisk relayed to Reliable any disagreement it had with the VA SRE's position.

Reliable subsequently submitted and installed Caterpillar generators, provided through a joint venture agreement between Caterpillar dealers Pantropic Power, Inc. (Pantropic) and High Plains Power Systems, Inc. (High Plains). Both Pantropic and High Plains submitted letters stating that the generators are "new and have never been placed in service." On April 19, 2005, the VA SRE accepted these verifications as proof 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[6] on behalf of Fisk "for the additional costs incurred due to the VA issued directive to replace the [Cummins] 1825 kW emergency generators." When the VA contracting officer failed to issue a timely final decision, Reliable on October 10, 2012, appealed the deemed denial of the claim to this Board, where it was docketed as CBCA 3048. On November 20, 2012, the contracting officer issued a decision denying the claim. The decision recounted some of the facts relevant to the claim, pointed out that the VA SRE had asked Reliable to certify that the generators were "new," and noted that Reliable failed to provide such a certification, but had instead maintained only that the generators were "unused" and "warrantable." The contracting officer concluded that the terms "unused" and "warrantable" did not establish that the units were "new." He determined that the generators were "previously owned" and "reconditioned," as defined by Federal Acquisition Regulation (FAR) 52.211-5(a), 48 CFR 52.211-5 (2004), in that they had to be "restored to the original normal operating condition." Additionally, the contracting officer disagreed that the Cummins generators were "of the most suitable grade for the purpose intended under the contract," particularly because both Reliable and Fisk had acknowledged that the generators as delivered to the project site were "unacceptable by anyone's standards." The contracting officer also maintained that the Cummins generators were "previously owned" by DSA Encore and "required reconditioning in order to meet the contract requirements."

The Affidavit of David A. Conkin

As part of its submission on the record, appellant provided the affidavit of its vice president, David A. Conkin. The affidavit was executed on July 11, 2013, approximately nine years after the events pertinent to the dispute occurred. At the time the generators were delivered to the site, Mr. Conkin was Reliable's senior project manager for the subject VA contract. In pertinent part, Mr. Conkin relates:

> [The VA SRE] verbally told me to remove the gen[erator] sets stating they would never be acceptable to the VA and to have the units removed from the Project site. I relayed this information to Fisk. Our president, Steve

[6] The claim was subsequently adjusted to $1,138,662.95.

> Thornberry, sent a follow-up letter to Fisk on June 29, 2004 explaining that the units had to be removed and other equipment had to be delivered. . . . That same day, I sent the SRE a letter stating that we were working with Fisk to investigate the matter and the condition of the Cummins Generators. I also confirmed to the SRE that I had relayed [a] written directive to remove the Cummins Generators from the Project site.

Mr. Conkin did not, in his affidavit, offer an opinion as to whether he or anyone in Reliable believed the Cummins generators were "new."

The Affidavit of James S. Muhl

Also as part of its submission on the record, appellant provided the affidavit of James S. Muhl, Fisk's executive vice president and chief operating officer, executed on July 8, 2013. In his affidavit, Mr. Muhl represents himself as knowledgeable about customs in the electrical and construction industries regarding the purchase and use of electrical equipment, including generators; affirms that he was extensively involved in the generator problem at the VA project; and states that he had a significant role in drafting the claim.

Mr. Muhl's affidavit contains some facts, his opinions, and his conclusions. Most, if not all, of the conclusions he reached regarding the generators appear for the first time in the affidavit. The affidavit does not establish that his views were shared with either Reliable or the VA during the period in which the Cummins generators were the subject of concern. Mr. Muhl's affidavit conclusions about the condition of the Cummins generators are largely based on an evaluation of seven photographs taken of the exterior of generators in which he observed rust, worn or scraped paint, disconnected hosing, dust, dirt, and grime. Nowhere in the affidavit does Mr. Muhl suggest that he personally observed the units when they were delivered to the VA site in Miami. In pertinent part, Mr. Muhl attests:

> 26. It is my opinion that these five categories of apparent cosmetic issues – rust, scraped paint, burn marks, disconnected hosing and dust – were all incurred during storage of the units, during the removal of the units, or during the shipment of the units to the Project. Rust would obviously accrue over time and is easily remedied. The burn marks, worn or scraped paint, and damaged hosing all appear to have been sustained during the removal of the units from their enclosures. All of this damage is exterior and appears to have been caused by a rushed removal process. Finally, the dust is likely due to being shipped by truck, and is fairly common.
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> . . . .

29. All of these minor items are easily resolved. In the industry, we commonly call the work to resolve these minor types of issues as a "buff and puff." A "buff and puff' is not uncommon, particularly where units are kept in storage.

. . . .

38. For background, large generators such as the Cummins Generators typically come with a new equipment warranty from the manufacturer. The generators are not "used" until the generators are commissioned. At this point, the manufacturer pushes out the new equipment warranty and the unit is put into "service." Importantly, I have never heard of a generator that was first put into service, i.e. used, and then later received a new equipment warranty from the manufacturer. Thus, between run times and the warranty history, you can determine whether or not a particular generator has been "used." If the unit has not be [sic] "used," then the unit is "new."

. . . .

41. Based on the above, I can testify that Cummins Generator F000116718 was "new" when the unit was delivered to the Project in June 2004 because the unit was not commissioned, or put into service, until February 9, 2006, months after [the VA SRE] rejected it. Cummins Generator FE000107713 was certainly "new" when the unit was delivered to the Project in June 2004 because it has never been put into service. Finally, although Cummins Generator F000116717 was sent directly to OK Generators for its "buff and puff," the unit was also "new" because the unit was not put into service until later on March 9, 2005.

. . . .

47. In my opinion, the run times on these units are consistent with testing and start-up activities, and show that the units had not been put into service. These run times confirm Mr. Coulson's information, from Cummins, that the two delivered generators were "new" and had not been put into service, and are consistent with my subsequent investigations into the manufacturing and service history of these units.

48. These run times also confirm the subsequent investigations by myself and Mr. Birdsong of OK Generators into the manufacturing history of these units.

49. On June 29, 2004, Fisk confirmed it was awaiting verification from DTE Energy as per the terms of the RFI. (Appeal File, Tab 32). Before DTE Energy could reply with its verification, the SRE issued a follow-up letter to Reliable, rejecting the Cummins Generators for being "used" and describing the units as "not only used but also abused." (Appeal File, Tab 8, p. 1).

50. The VA directed that the Cummins Generators be removed from the Project site in a meeting between [the VA SRE] and Dave Conkin of Reliable. Mr. Conkin then relayed this directive to Fisk to remove the Cummins Generators. While Fisk did not agree with the VA, it made arrangements for the removal of the installed Cummins Generators, which were removed on July 1, 2004 to OK Generators. (Appeal File, Tab 16, pp. 35-39).

. . . .

53. I disagree with [the VA SRE]'s statement that "previous ownership makes them used." I have been in this business for 36 years and I have been a part of the procurement of hundreds of generators. I believe [the VA SRE] has incorrectly stated industry customs with regards to the purchase of "new" generators.

54. [The VA SRE's] statement suggests you can only purchase directly from a manufacturer. In fact, manufacturers do not sell direct. Generators are purchased through a dealership network or through third parties. If time and money permits, generators may be custom built. For tighter budgets and time frames, one works through third parties to find generators that satisfy a project's specifications. This can include unused generators in storage that are owned by someone other than the original equipment manufacturer. This "previous ownership" would not make them "used." In the electrical and construction industry, they become "used" only when they have been put into service, i.e. operated.

55. In the industry, the only issue in determining whether the generators are "used" is whether they have been put into service. When a unit is put "into service," the manufacturer then pushes out its warranty and the unit begins its operations. Only after this occurs would a generator be considered "used" in the industry.

The Affidavit of Robert Birdsong

Finally, appellant produced the June 27, 2013, affidavit of Robert Birdsong, the president of OK Generators, the local Cummins authorized service representative which was capable of testing and servicing the generators. Mr. Birdsong attests that "OK Generators serviced three Cummins generators in July 2004." He prepared a chart showing (1) the Cummins generator serial number, (2) the date it was first commissioned and put into service, (3) the date the manufacturer's one-year warranty commenced and (4) whether there had been any warranty work requested on the units. Mr. Birdsong attested that the three generators were manufactured in June 2003. Generator F000116717 was commissioned in March 2005 and the warranty commenced that same month. Generator F0000116718 was commissioned in February 2006 and the warranty commenced that same month. For generator E000107713, the date of commissioning and commencement of the warranty was unknown. Mr. Birdsong did not address whether he believed the Cummins generators to be "new."

## Discussion

The Federal Circuit's decision held that Reliable was required to install "new" generators, which meant not only that the generators "must not be used," but also that they were "free of significant damage, i.e., damage that was not cosmetic." *Reliable*, 779 F.3d at 1334. The Court remanded this appeal "for the Board to determine whether the damage to the generators during the four-year period between the original manufacture and the *date of delivery to the VA site* was significant enough to render the generators not 'new.'" *Id*. at 1335. (emphasis added.)

As previously noted, the parties elected to submit this appeal for decision on the written record without a hearing. The record was not developed with much specificity as to the condition of the generators when they arrived at the project. Contemporaneous documentary evidence reveals that when the Cummins generators arrived at the project site, they were characterized as clearly "unacceptable" by all the parties to this litigation, including Reliable, Fisk, and the VA. Furthermore, Reliable and Fisk considered the poor condition of the generators when they arrived on the project to be just as serious and critical as the VA did, and urgently contacted the supplier to express their concerns. At that time, neither Reliable nor Fisk represented to the VA that the generators were "new." Neither Reliable nor Fisk contended that the generators were "new" throughout the entire period the Cummins generators were being discussed with the VA.[7] Also, importantly, Reliable did not

[7] Notwithstanding the Court's instructions, we are unable to reliably assess the extent of the damage to the generators when they were delivered to the project site because

indicate to the VA that it was willing to certify the Cummins generators were "new," when it was clear that this is what the VA SRE sought from Reliable. All evidence points to the conclusion that when the Cummins generators arrived on the project, Reliable and Fisk did not consider them to be "new." The documentary evidence does not reveal, and appellant's affiants do not address, when, or if, Reliable decided that the generators were, in fact, "new." Reliable characterizes the VA's statements that the generators did not appear to be "new" as a "rejection" of the equipment, and posits that the burden is upon the Government to prove the contractors' non-compliance. We do not agree. Reliable is correct that when the Government rejects work as being not in compliance with its specifications, the burden is upon the Government to demonstrate that the work was non-compliant. *See Southwest Welding & Manufacturing Co. v. United States*, 413 F.2d 1167 (Ct. Cl. 1969); *Jimenez, Inc.*, VABCA 6423, et al., 02-2 BCA ¶ 32,019. However, Reliable's decision to remove the generators does not transform the contracting officer's expressed concerns into a rejection. Where all the parties initially found the generators to be "unacceptable," at a minimum it was incumbent on Reliable to affirmatively assert that the generators were "new" and met the specifications as of "the date of delivery to the VA site." We conclude that Reliable failed to proffer convincing evidence that the Cummins generators met the contract specifications.

While the Court only asked us to look at the condition of the generators as of "the date of delivery to the VA site," we also examined whether the originally "unacceptable" Cummins generators should have been considered to be acceptable as more information became available about them. When confronted with what all the parties involved agreed were "unacceptable" generators, the VA asked Reliable whether it was willing to certify the generators as "new." Both Reliable and Fisk looked down the chain of suppliers for a solution. At no time during the period the Cummins generators were being discussed with the suppliers, or before the removal of the units, did Reliable or Fisk attempt to convince the VA SRE that the generators were "new," or provide the requested certification.

The only contemporaneous information the VA received regarding the Cummins generators' condition was DTE Energy's July 8, 2004, plan for consideration, also referred to as the "compliance plan," which Reliable forwarded via email message to the VA.[8] The

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Reliable and Fisk abandoned the generators prior to determining their actual condition. It appears that most of the conclusions appellant reached with regard to the Cummins generators were reached long after Reliable and Fisk elected, most likely for project scheduling reasons, not to pursue acceptance of the Cummins generators by the VA.

[8] As previously noted, DTE's plan was provided in response to a demand from Fisk that DTE provide it "with their plan of action for *removing the generators from the project* and for providing the generators in compliance to the purchase order." (Emphasis

plan represented that the Cummins generators were "unused and warrantable," called for additional testing, evaluation, and adjustments as necessary, and contained DTE Energy's representation that "[w]e are confident that you will find these units to be in new and fully warranted condition in accordance with our June 3, 2003 proposal." It is unclear whether the proposal was based on the applicable contract specifications requiring the generators to be "new." In forwarding the email message to the VA, Reliable stated, "we have been asked by Fisk to forward their proposed plan (attached) regarding the [Cummins] generators to the VA for consideration. Please respond at your earliest convenience." Reliable made no effort to endorse the plan, or state that it considered the generators to be "new," as required by the specifications, or to certify the generators as "new" as requested by the VA. Reliable merely passed the plan on to the VA.

The VA's SRE responded to the plan by citing what he considered to be the applicable specification provisions, opining that "previously owned equipment is not new," and ending by stating that "only new generators . . . reviewed and approved by the prime contractor and engineer of record will be considered."[9] The record does not support the conclusion proffered by Reliable that the VA had categorically rejected the Cummins generators, but simply that the VA made clear that "only new generators with all of the submittal data . . . reviewed and approved by the prime contractor and engineer of record will be considered." Again, the VA was seeking Reliable's involvement in certifying that the Cummins generators were "new." The record does not reflect whether DTE Energy's plan was ever executed and

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added.) The plan was not fully responsive to that demand and instead offered corrective measures to be taken on Cummins generators.

[9] The documentary record does not support a finding that the VA SRE refused to accept the Cummins generators under any condition. Other than Mr. Conkin's statement in his affidavit, the record contains no evidence that the VA SRE told Reliable that the generators "would never be acceptable to the VA." As early as June 29, 2004, Reliable's president directed Fisk to remove the Cummins generators, and there is no indication that Reliable ever reconsidered this direction. Had such a significant statement actually been made, we would expect Mr. Conkin to have made some notation of it in contemporaneous records. We find Mr. Conkin's recollection in this regard to be self-serving and lacking credibility. During the period that the Cummins generators were on site, the VA SRE consistently asked Reliable to certify that the Cummins generators were "new." Reliable refused to verify that the generators were "new" and throughout this litigation has never verified the generators were "new." Reliable is a sophisticated contractor, and it filed a multitude of requests for equitable adjustments and claims under this contract. We expect that a contractor as savvy as Reliable would have developed a contemporaneous record if it disagreed with the VA SRE's assessment that generators were not "new."

what, if any, repairs, reconditioning, refurbishing, or necessary adjustments were actually done to the Cummins generators. Reliable did not offer evidence that the Cummins generators were ultimately accepted by a subsequent owner as "new."

Appellant relies on Mr. Muhl's affidavit as proof that the VA had an obligation to accept the Cummins generators as "new." Considering the evidence of record as a whole, however, we do not find Mr. Muhl's opinions and conclusions to be compelling or particularly helpful in resolving the dilemma posed by the condition of the equipment as delivered and whether Reliable has met its burden to demonstrate entitlement to the equitable adjustment it seeks.

Mr. Muhl's affidavit was drafted nine years after the events giving rise to this dispute occurred. In this affidavit, Mr. Muhl suggests that he would have been willing to state that the Cummins generators were "new" when the units were delivered to the project site in June 2004. The affidavit does not explain, however, why such a statement was not made at the time, particularly since the VA had explicitly requested confirmation that the equipment was new as required by the terms of its contract with Reliable. This conclusion controverts all the contemporaneous evidence in the record.

Furthermore, Mr. Muhl does not claim to have have any firsthand knowledge of the equipment's condition based on personal observation of the units as delivered to the VA site. Rather, he bases his present conclusions solely on documents, produced by the sub-tier suppliers, that do not appear to have been shared with the VA, and on seven photographs that he reviewed prior to preparing his affidavit. The record does not reflect that Mr. Muhl or anyone from Fisk had any direct involvement in discussions with the VA about the Cummins generators while they were being discussed. Reliable does not address whether Mr. Muhl, or any other individuals from Reliable or Fisk, contemporaneously held the opinions Mr. Muhl now appears to hold. The opinions expressed by Mr. Muhl in his affidavit do not appear to have been communicated to the VA or Reliable at the time the generators' conformance with contract requirements was questioned by the VA. There is no evidence in the record that anyone from Reliable or Fisk had ever characterized the generators as "new" in dealings with the VA until well after performance of the generator work was completed. Mr. Muhl was noticeably silent at the time the generator issue arose even though his affidavit indicates he was aware of the problem presented by the Cummins generators. Had Mr. Muhl actually been convinced the Cummins generators met the contract requirements, we would expect that to have been communicated to the VA prior to removal of the equipment and not mentioned solely in an affidavit drafted years later for purposes of this litigation.

We also note that Mr. Muhl's experience is in the "electrical contracting and construction business," including, among other things, purchasing and installing electrical

generators. The affidavit does not establish that he has any particular knowledge as to terms used by the generator manufacturing industry or can reliably opine on what is considered a "new" generator within that industry. A variety of other terms used in the generator industry to describe various generator conditions, e.g., "new," "unused," "used," "refurbished," "factory-reconditioned," "reconditioned," and "remanufactured," were used but left undefined during this litigation. Mr. Muhl's affidavit wholly fails to address these other conditions and only addresses a generator in terms of being "new" or "used." Mr. Muhl's simplistic statement that "the only issue in determining whether the generators are 'used' is whether they have been put into service," in our view, evidences a lack of understanding of the nuances of the generator industry. We are not convinced that generators which have had multiple owners (including another end user owner), and require at a minimum a "buff and puff," "additional testing," "evaluation," and "adjustments as necessary," would still be considered "new" within the generator industry, or marketed as such. For these reasons, the Board finds Mr. Muhl's conclusions and opinions to be self-serving and not based on demonstrated familiarity with the industry standards.

As previously noted, Mr. Conkin similarly did not offer an opinion in his affidavit on whether he or anyone in Reliable believed the Cummins generators were "new" at the time the controversy arose. Of the affidavits Reliable submitted, we would expect Mr. Birdsong to have addressed that issue because he is the president of a company that is a Cummins-authorized service representative and would be expected to possess such knowledge. Nonetheless, while he would presumably be familiar with what is considered "new" within the generator industry, his affidavit notably did not discuss the subject of whether the Cummins generators were "new" as that term is used in the industry. We draw a negative inference from his failure to address whether he considered the Cummins generators to be "new" as required by the contract.

The VA has consistently maintained, at the time the units were delivered and throughout the contract disputes process and this litigation, that only "new" generators were permitted under the contract. It was incumbent on Reliable to provide the VA with sufficient and timely information that what were originally considered by all parties concerned to be "unacceptable" generators, were actually "new." Reliable failed to make any effort to do so and indeed did not at the time voice any disagreement with the engineer's assessment that the generators did not appear to meet the contract specifications.

Moreover, even in internal correspondence between Fisk and Reliable, there is no evidence that, while the Cummins generators were being discussed, either contractor actually

considered the Cummins generators to be "new."[10] During the same time period Reliable states it was discussing the Cummins generators with the VA, it was pressuring Fisk to locate generators that would meet the VA specifications. Fisk was also urging its suppliers to find acceptable generators. Due to the potential for schedule delays, sometime during the period when the Cummins generators were being discussed, it appears that Reliable and Fisk made a business decision to abandon the Cummins generators and purchase other generators rather than risk further potential delays on the project. While appellant does not address the schedule delays that Reliable and Fisk were facing, the evidentiary record shows that Reliable and Fisk were both inclined to believe the VA's position was justified and, in any event, were not willing to make the effort to persuade the VA to accept the Cummins units. Rather than risk a longer project delay, Reliable and Fisk quickly made a decision to change to the Caterpillar generators that they could certify as "new."[11] Indeed, they never even expressly stated any disagreement with the VA's position so as to put the agency on notice that they considered the units to have been improperly rejected, entitling them to compensation for increased costs.

In its decision, the Federal Circuit considered several definitions of "new." One of the definitions of "new" in the Oxford Dictionary of English (2d ed. 2005) that was not addressed by the Court is: "not previously used or owned: *a second-hand bus costs a fraction of a new one*." (Emphasis in original). The Cummins generators were previously owned and therefore not "new"; the VA SRE's original opinion was not inconsistent with this definition. Just as we found Mr. Muhl's representations to the effect that generators are generally provided by suppliers and are therefore always pre-owned to be overly simplistic, however, the VA SRE's opinion that previously-owned generators are not "new" is similarly lacking in nuance.

The dilemma in this case is that there is insufficient reliable evidence in the record to determine what the generator industry would consider to be the condition of these four-year-old generators, that were purchased from another end user but presumably never actually put into service: e.g., new, unused, used, refurbished, factory-reconditioned, reconditioned, or remanufactured. Moreover, since there is no evidence with respect to the extent of refurbishing or repair that was required, we cannot definitively determine whether the

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[10] Reliable's correspondence provides no indication that it considered the Cummins generators to be "new," much less attempted to convince the VA that they were "new."

[11] While Reliable never offered to certify the Cummins generators as "new," Reliable provided, and the VA accepted, a certification that the Caterpillar generators were "new."

damage to the generators during the four-year period between the original manufacture and the date of delivery to the VA site was significant enough to render the generators not "new."

We are mindful that when an ambiguity in contract language is presented for resolution, a primary objective of the tribunal is to seek to discern and effectuate the mutual understanding of the parties. As the Court observed in its opinion,

> Generally, evidence of contemporaneous beliefs about the contract is particularly probative of the meaning of a contract. *See Blinderman Constr. Co. v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982) ("It is a familiar principle of contract law that the parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation."); *Max Drill, Inc. v. United States*, 427 F.2d 1233, 1240 (Ct. Cl. 1970) (en banc) (per curiam) (expressly adopting Commissioner Stone's view that "[t]he interpretation of a contract by the parties to it before the contract becomes the subject of controversy is deemed by the courts to be of great, if not controlling weight").

*Reliable*, 779 F.3d at 1332; *accord A-Son's Construction, Inc. v. Department of Housing and Urban Development*, CBCA 3491, 3636, slip op. at 31 (Sept. 3, 2005) ("[I]n an executory contract . . . where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the [tribunal] as the true one." (quoting *City of Chicago v. Sheldon*, 76 U.S. (9 Wall.) 50, 54 (1869)). Further, "[t]he closer in time to contract formation, and the more distant the prospect of litigation, the more reliable the parties' practical interpretation should be." *Dalles Irrigation District v. United States*, 82 Fed. Cl. 346, 356 (2008)).

Based on their contemporaneous behavior during the period in which the Cummins generators were being considered, neither Reliable nor Fisk asserted to the VA that it was willing to stand behind the Cummins generators as "new" – much less certify them as "new."[12] To the contrary, Reliable's and Fisk's position of record at the time was consonant with the VA's opinion that the Cummins generators delivered to the site were not new. The lack of disagreement over the condition of the equipment at the time leads us to the conclusion that both Reliable and the VA, the two parties to the contract, mutually agreed that the units were not new within the meaning of the contract's specifications. Reliable and

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[12] The documentary evidence and the affidavits are conspicuously silent as to whether or when Reliable (or Fisk) notified the VA that they considered the VA's demand for "new" generators (or the VA's purported rejection of the Cummins generators) to be based on incorrect assumptions or constitute a change to the contract.

Fisk did not then manifest a belief that the equipment was compliant with the specifications or that it was "new." Instead, they continued to treat the Cummins generators as "unacceptable," and stopped offering them to the VA about nineteen days after the generators were delivered to the site. We found no evidence that Reliable or Fisk changed its views about the Cummins generators being "unacceptable," or that either of them proffered the generators as "new" to the VA, during the relevant time frame. Neither Reliable nor Fisk asserted that an industry standard existed that would qualify the generators as "new" units. It was only long after Reliable and Fisk had replaced the Cummins generators that they decided to revisit the issue of whether the generators were "new." We find Reliable's and Fisk's behavior, at the time the Cummins generators were being considered, to reflect both of their contemporaneous interpretations of what constituted "new" generators. Neither contractor put much effort into asserting that the Cummins generators were "new" before switching to the Caterpillar generators.

When we view the evidence of record as a whole, the VA acted reasonably in referring Reliable to the applicable contract requirements and requesting assurances that the specifications had been met. It was incumbent on Reliable to satisfy the VA that the units were "new" and contract compliant. Reliable did not undertake to do so. Given these circumstances, it is not fair to conclude that the VA actually rejected the units – rather, at the time, Reliable and Fisk were either unwilling or unable to represent the generators as "new." Moreover, using the definitions of "new" established by the Federal Circuit for this case, we cannot on this record find that the Cummins generators were "not . . . used," in "fresh condition," and "free of significant damage, i.e., damage that was not cosmetic," when they were delivered to the project site or in the time following their delivery.[13]

Furthermore, even if we could determine that the equipment was "new" under the Federal Circuit's definition, neither party held this interpretation at the time the controversy arose. Reliable and Fisk, for reasons of their own, never contemporaneously asserted that the Cummins generators met the contract specification of being "new." There is no evidence indicating that they disputed the VA's position that the Cummins generators were not "new." They effectively abandoned the proposed use of the Cummins generators without making much, if any, effort to have them accepted by the VA. Reliable's and Fisk's conduct does not support the conclusion that they believed the equipment to be contract compliant at the time the Cummins generators were being considered. The contract schedule and Reliable's and Fisk's contemporaneous assumptions of what constituted a "new" generator are what

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[13] In its initial brief, Reliable indicated that another end user had ultimately purchased and installed the Cummins generators, but did not provide persuasive evidence as to the condition of the generators at that time or the terms under which they were purchased by the final end user.

drove their actions. These actions preclude the Board finding that the Cummins generators were "new."

Decision

For the foregoing reasons, the Board **DENIES** the appeal.

PATRICIA J. SHERIDAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge