Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED: June 16, 2003

GSBCA 16047

NVT TECHNOLOGIES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jeffrey A. Lovitky, Washington, DC, counsel for Appellant.

John C. Ringhausen, Office of Regional Counsel, General Services Administration, Atlanta, GA, counsel for Respondent.

NEILL, Board Judge.

This appeal involves a claim by NVT Technologies, Inc. (NVT) for $13,447.42. The amount is said to represent the cost of extra work NVT alleges it was directed to perform under its contract to provide the General Services Administration (GSA) with mechanical maintenance services and other related services for a federal courthouse.

NVT has elected to proceed in this case using the small claims procedure under Board Rule 202. This decision is issued, therefore, by a single judge and is final and conclusive and shall not be set aside in the absence of fraud. The decision shall have no value as precedent. Board Rule 202(b). The parties have agreed to submit their cases on the record pursuant to Board Rule 111.

Findings of Fact

1. On March 25, 1998, NVT was awarded contract no. GS-04P-97-LVV-0007 (the contract). The award was made under the Small Business Administration's 8(a) subcontracting program. 15 U.S.C. § 637(a) (1994). Under the contract, NVT was to provide GSA mechanical maintenance and other services for the United States Courthouse

II in Tampa, Florida. In addition to the base year, the contract provided for three option years. Appeal File, Exhibit 1 at 66-67 (unnumbered)[1]. The letter advising NVT of the award also provided a notice to proceed beginning October 1, 1998. This date was later changed by formal amendment to April 20, 1998. Id. at 60 (unnumbered). All three renewal options were exercised by the Government. The contract terminated at the close of April 19, 2002. Id. at 9, 32, 39, 53 (all unnumbered).

2. NVT's contract provided that the contractor was responsible for performing preventive maintenance (PM) on all building equipment and systems. The equipment and systems to be operated, maintained, and repaired were said to include "all mechanical, electrical, and plumbing systems installed at the site." Some specific equipment and systems were identified in the contract, but this listing was expressly said to be not all-inclusive. Among the equipment and systems mentioned were: air-conditioning equipment and systems, air-handling/distribution equipment and systems, heating equipment and systems, and HVAC (heating/ventilation/air-conditioning) system controls and monitoring equipment. Appeal File, Exhibit 1 at 80 (unnumbered) (revised page 153 of the solicitation).

3. The contract also imposed on NVT the duty of developing and implementing a PM program. The program was to include periodic inspection, testing, cleaning, lubrication, adjustment, filter cleaning, replacement of necessary parts, and repairs to keep equipment and systems in optimum operating condition. The contract also noted that various equipment warranties were in effect and imposed on the contractor the responsibility of obtaining information regarding all warranty expiration dates. Appeal File, Exhibit 1 at 80-81 (unnumbered) (revised pages 153, 157 of the solicitation). GSA's Region 4 PM Guides were incorporated by reference into the contract. Id. at 215.

4. Under the PM provisions of the contract, the contractor was said to be responsible for the repair/replacement costs, including labor, equipment, and supplies for all equipment and systems, up to the limits stated in exhibit 3 of section J of the contract. Equipment for which scheduled maintenance was to be performed less frequently than annually was, nonetheless, to be scheduled to receive PM during the first twelve months of the contract and then to be repeated at the prescribed intervals thereafter. Appeal File, Exhibit 1 at 82 (unnumbered) (revised page 158 of the solicitation).

4. The limits set out in exhibit 3 of section J were as follows:

1. Scope of Work.

[1] The consecutive Bates-numbering of the pages of Exhibit 1 does not begin with the first page of this exhibit. Rather, there are eighty-seven pages relating to contract and solicitation amendments which precede the numbered pages. When citing to any page within this first series of pages, we will designate the page as "unnumbered" but, as is usual in such cases, give to the page its actual number within the series.

> a. The Contractor shall be responsible for accomplishing all architectural and structural, or mechanical maintenance, repairs/replacements, where the cost of labor, equipment and materials is expected to be $10,000 or less. This dollar threshold applies to each individual repair job or replacement that may be required.
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> b. Any architectural and structural, or mechanical maintenance, repairs/replacements, estimated to cost over $10,000 but less than $25,000 may be accomplished by the Contractor. The contractor is responsible for the first $10,000 of any architectural and structural, or mechanical maintenance, repairs/replacement cost toward accomplishing these repairs.
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> c. The Contractor may be directed, solely at the discretion of the contracting officer or his designated representative, to perform Architectural/Structural or Maintenance Repairs under this contract where expected cost will be between $10,000 and $25,000 for labor, material and parts.
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> d. The Contractor shall not be required to perform any architectural/structural, or mechanical maintenance, repairs or replacements, where the cost is expected to exceed $25,000, and shall not be responsible for the first $10,000 toward accomplishing these repairs.

Appeal File, Exhibit 1 at 84 (unnumbered) (revised page 167 of the solicitation).

5. Exhibit 3 of section J also had a section which dealt specifically with maintenance repairs. "Maintenance repairs" were defined as "unscheduled work required to prevent a breakdown of a piece of equipment or a system or to put it back in service after a breakdown or failure." With regard to maintenance repairs in excess of the thresholds set out in the Scope of Work clause, the contract provided:

> Repairs in excess of threshold shall be immediately reported to the COR [contracting officer's representative]. Work shall not be performed until the Contractor and the COR have reached an agreement on the price to accomplish the project. This requirement may be waived by the COR in the case of an emergency.

Appeal File, Exhibit 1 at 169.

6. The contract required that within five calendar days of notice of award, the COR and the contractor's project manager or their designees were to make a complete and systematic initial inspection of all mechanical, electrical, and utility systems and equipment; fire alarm systems; and structural features covered by the contract. The purpose of this inspection was to develop an existing deficiency report. The report, however, was not to include any items that would be replaced, repaired, or adjusted during the performance of normal PM. The contractor was not obliged to correct the listed deficiencies. Rather, it was required only to submit a cost proposal for any corrective work. The Government would then have the option of accepting this proposal in whole or in part. Any work not awarded

to the contractor could then be given either to government employees or other contractors. Appeal File, Exhibit 1 at 160.

7. The contract contained Alternate I of the Federal Acquisition Regulation (FAR) Changes clause for fixed priced contracts. Appeal File, Exhibit 1 at 99; see 48 CFR 52.243-1 (1987) (FAR 52.243-1).

8. The initial deficiency list (IDL) was not prepared promptly upon notice of award, as the contract required. Rather, it was prepared shortly before the start of the second year of the contract in April 1999, when the initial construction and manufacturer's warranties were said to be close to expiration. Appeal File, Exhibit 2 at 1 (unnumbered). Among the numerous HVAC deficiencies noted on the IDL, one reads: "The Test & Balance has not been accepted." Id. at 27. A note regarding this item states that it is reported as a warranty issue and that the construction general contractor will be responsible for resolution of the problem. Id.

9. The various problems with the courthouse's HVAC system appear to have continued throughout the second year of the contract and into the third. Eventually, GSA hired an independent contractor, Gate Engineering Corporation (Gate), to survey and balance the system. Appeal File, Exhibits 4-5, 7. During the course of this work, Gate determined that some sensors in the HVAC system were defective. The principal problem appears to have been that the sensors were not properly calibrated. Id., Exhibit 5.

10. The discovery of the defective sensors in the HVAC system gave rise to the question of whether NVT, in the course of its PM program, should itself have discovered this problem. In a letter dated May 3, 2001, NVT's Director of Operations wrote the GSA contracting officer regarding this issue. He explained that, although the sensors are contained in equipment which NVT is obliged to service under its contract, actual calibration of the sensors should be considered outside the scope of the contract. NVT based this conclusion on the fact that no mention of these sensors is made in GSA's PM Guides with which the contract requires the contractor to be familiar. Neither do the tool lists in the PM Guides include many of the diagnostic and calibration tools necessary to ensure that these components of the equipment are functioning properly. Although NVT considered calibration of the HVAC sensors outside the scope of its contract, it did offer in its letter of May 3 to provide a cost proposal for this work. Appeal File, Exhibit 4.

11. NVT's position regarding repair of the HVAC sensors and its offer to perform this work as extra work under the contract was apparently rejected by GSA. By letter dated June 15, 2001, the COR advised NVT that, in view of the high quantity of sensors already found by Gate to be out of calibration in its on-going survey and balancing of the HVAC system, NVT was expected to calibrate the remaining sensors without further delay. The letter went on to explain that it was the responsibility of NVT to calibrate the HVAC sensors as part of the PM program called for under the contract. Any costs charged by Gate for this work would, therefore, be for NVT's account and would be deducted from future contract payments. The COR directed NVT to provide a schedule for this work. Appeal File, Exhibit 5.

12. By letter dated July 9, 2001, NVT replied to the COR's letter of June 15. The arguments made in NVT's previous letter of May 3 were repeated. In addition, NVT observed that calibration of sensors is normally a matter examined during building commissioning and that factory calibration should be valid if the sensors are properly located. Calibration problems then being found by Gate, could, therefore, be readily attributable to the fact that the factory calibration of the sensors was defective or that the sensors had not been properly located in the HVAC system. In any event, NVT objected strenuously to the COR's position that NVT should be held responsible for the deficiencies then being found to exist in many of the HVAC sensors. NVT's previous offer, however, to provide a proposal for remedial work was repeated. Appeal File, Exhibit 6.

13. We find nothing in the record indicating that GSA responded to NVT's letter of July 9. Nevertheless, as Gate continued its survey of the courthouse's HVAC system, various defective sensors were identified. In December 2001 and again in January 2002, NVT purchased various HVAC sensors to replace those found to be defective. This included thirty-six sensors, model number HE-67N3-0N00P, for a total of $6804; four sensors, model number H-904, for a total of $488; and nine sensors, model number CD-W00-00-0, for a total of $2916. Appeal File, Exhibit 7 at 3-6 (unnumbered).

14. Appellant has submitted for the record product literature on the three sensor models purchased by NVT. Model HE-67N3-0N00P is described as "not field repairable." Model CD-W00-00-0 is said to require no maintenance or field calibration, and model H-904 is said to be self-calibrating. Appellant's Position Paper, Exhibits 1-3.

15. Sometime subsequent to the purchase of the forty-nine sensors, NVT submitted to GSA a cost proposal covering their purchase. The proposal listed a material cost of $11,020.04 and a labor cost of $38.02. With the usual mark-ups, the total proposal amounted to $13,447.42. Appeal File, Exhibit 7 at 2-7 (unnumbered). GSA declined to approve the proposal. Eventually, by letter dated March 7, 2002, NVT submitted to the contracting officer a claim for these costs. The claim letter references several phone conversations previously held with the contracting officer regarding the claim and asks that the contracting officer now either direct that the claim be paid or issue a final decision denying the claim. Id., Exhibits 7 at 1 (unnumbered), 8 at 1 (unnumbered). NVT's request went unheeded. By letter dated January 7, 2003, counsel for NVT, appealing from a deemed denial of the claim, filed his client's complaint in this case.

16. Although the contracting officer failed to issue a final decision on NVT's claim as requested, GSA's position regarding the claim was set out plainly in a letter sent to NVT by a newly-appointed COR following NVT's request for a final decision. In what appears to have been a last ditch effort to convince GSA to pay the claim for $13,447.42, NVT's president, by letter dated March 11, 2002, transmitted to the COR an invoice for this amount and a copy of the original cost proposal. In this letter, the company's president presented a new argument in support of the enclosed invoice and proposal. He wrote that the building manager at the courthouse, once apprised of the problem with the HVAC sensors, had concluded that an emergency situation existed and, consequently, directed NVT to replace the sensors. Appeal File, Exhibit 8.

17. By letter dated March 18, 2002, the COR replied to this latest letter from NVT. She rejected NVT's invoice and denied the existence of any emergency situation. She further denied that anyone had directed NVT to replace the devices. She noted that, under the contract, maintenance repairs were not to be made until the contractor and the COR had agreed on the price of the work. She wrote: "We did not reach agreement on pricing, did not ask your company to perform the work, and did not order the work." Appeal File, Exhibit 9.

Discussion

GSA's position in this dispute is that NVT was obliged under the contract to service the HVAC sensors found to be defective and that before NVT purchased replacements for the sensors, it was required under the contract to reach agreement first with the COR on price. Since no such agreement was reached, GSA believes that NVT is not entitled to any compensation for the cost of replacing the sensors.

NVT, on the other hand, insists that it was not obliged under the contract to calibrate the defective sensors. Nevertheless, when directed to do so, it took the only practical course of action, which was to purchase properly calibrated sensors to replace those found to be defective. It now seeks to be compensated for this extra work.

Of the two respective positions, we find appellant's far more persuasive. NVT looks to GSA's PM Guides for an indication of whether the HVAC sensors at issue here would normally be included in a typical PM program. As noted earlier, the Guides are incorporated by reference into the contract. Finding 3. Presumably, this was done so that they could fulfill their avowed purpose of serving as guides to the parties. NVT contends that there is no reference in the text of the PM Guides to the HVAC sensors at issue here or, in the Guides' tool lists, to the many tools necessary to service these sensors. Finding 10. GSA has not challenged this assertion. This silence of the Guides certainly lends credence to the contractor's contention that regular PM of these sensors was not within the intended compass of the original contract. NVT's position is further strengthened by the fact that the product literature submitted by appellant regarding the three types of sensors in question confirms that they are typically not repaired or calibrated in the field. See Finding 14.

The manner in which GSA ultimately chose to survey and balance the HVAC system also persuades us that NVT was not obliged to provide PM to the HVAC sensors under the original contract. From the evidence provided, we conclude that the work Gate was retained to perform and any assistance rendered by NVT to Gate's efforts was for purposes of correcting preexisting deficiencies for which NVT was obviously not responsible under its contract.

The IDL finally prepared towards the close of the first year of the contract demonstrates that, even at that late juncture, there were still numerous deficiencies in the HVAC system. Finding 8. This is somewhat surprising and appears to confirm appellant's contention that no thorough survey of the HVAC system was undertaken at the time the

courthouse was commissioned. See Finding 12. The obvious purpose of the deficiency report called for under the contract was to relieve NVT of any responsibility for preexisting deficiencies in the various building systems covered by the contract. Correction of these deficiencies was plainly outside the scope of NVT's contract. See Finding 6; see also Schindler Elevator Corp., GSBCA 8853, 89-3 BCA ¶ 22,225.

The record does not contain a full description of the scope of Gate's contract. We are told, however, that one of Gate's tasks was to survey and balance the system. We know for a fact that one of the deficiencies noted in the IDL was that the test and balance of the HVAC system had not been accepted. See Finding 8-9. Given this and the other numerous HVAC deficiencies noted on the IDL as still existing at the close of the first year of the contract, we find it reasonable to assume that Gate was hired by GSA to correct these deficiencies and to identify and repair any other deficiencies in the system which would have been detected earlier had a thorough survey of the system been undertaken before award of a contract to NVT. Accordingly, any assistance which NVT rendered to Gate as part of this effort -- such as purchasing sensors to replace those found to be defective -- was clearly new work which NVT was not originally required to perform under the contract and for which it is, therefore, entitled to compensation under the contract's Changes clause.

One final issue remains. Was NVT actually directed to perform this new work? It is well established that when a government official who customarily instructs a contractor, orders that contractor to perform work not required under the contract and the Government acquiesces in and accepts the benefits of such order, the Government has constructively changed the contract and the contractor is entitled to the benefits of the Changes clause of the contract. Wieman v. United States, 678 F.2d 207, 214 (Ct. Cl. 1982); Hensel Phelps Construction Co. v. General Services Administration, GSBCA 14744, et al., 01-1 BCA ¶ 31,249, at 154,278. In such situations, the usual requirements of the Changes clause that the order be in writing or that the contractor's notice of claim be presented within thirty days of that order do not apply. Eggers & Higgins v. United States, 403 F.2d 225, 236 (Ct. Cl. 1968).

Counsel for NVT contends that the COR's letter of June 15, 2001, did, in effect, constitute such a directive. In that letter, GSA insisted that it was NVT's responsibility under the contract to provide PM for all HVAC sensors and demanded that a schedule for this work be provided. The COR further directed NVT to calibrate all remaining sensors without further delay and warned that, if this work was done instead by Gate, it would be for NVT's account. Finding 11.

Certainly the COR fits the description of one who customarily instructs the contractor to perform work. It is likewise clear that the Government has accepted the benefits of the COR's demand that the sensors be calibrated. But, did the COR's order to NVT to calibrate all sensors justify NVT's actual purchase of sensors to replace those found to be defective? We are persuaded that in this case purchase of the sensors was a reasonable response to the COR's order. NVT has convinced us that on-site calibration of the particular HVAC sensors involved here was not practicable and that the only reliable method for complying with the COR's demand that all remaining sensors be calibrated was to purchase properly calibrated sensors which could be used to replace any found to be defective.

In its response to appellant's position paper, respondent suggests that calibration would have been much less expensive than replacement. Respondent's Position Paper at 4-5. Even if we were convinced that field calibration was feasible, we can find nothing in the record to support the Government's contention that calibration in the field would have been less costly than replacement of the defective sensors. On the contrary, an e-mail message in the file refers to limited calibration done by Gate "only for the 2nd and 16th floor," which amounted to $16,000 -- an amount in excess of NVT's total claim here. Appeal File, Exhibit 3. In the absence of contrary evidence, this suggests to us that appellant's purchase of replacement sensors to remedy the problem posed by the defective sensors was not only the most practical but perhaps the least costly as well.

Finally, we find no merit in GSA's argument that NVT's purchases should not have been made before the contractor and the COR reached agreement on the price of the work. The contract provision GSA relies on is one which deals with maintenance repairs NVT was required to make under the contract. The requirement for prior agreement on price applies only to repairs called for under the contract and then only where it is anticipated that the cost of such repairs will exceed the threshold stated in exhibit 3 of section J of the contract. Finding 5. We do not read this provision as applicable to a constructive change such as we have found to exist here.[2]

In short, we find that NVT is entitled to reimbursement for this extra work pursuant to the contract's Changes clause.

Decision

Appellant's appeal is **GRANTED**. GSA shall pay NVT the sum of $13,447.42. Interest is due on this amount from the date on which the contracting officer received the claim, until the principal amount is paid. 41 U.S.C. § 611 (2000).

EDWIN B. NEILL
Board Judge

[2] GSA's reliance upon this contract provision may well have been prompted, at least in part, by the argument NVT raised in its letter of March 11, that the pricing requirement did not apply because of the existence of an alleged emergency. See Finding 16. We reject this particular argument of appellant as well as GSA's reason for rejecting it. For the reason already stated, we consider both parties to be mistaken in their assumption that the maintenance repair provisions in exhibit 3 of section J are applicable to the facts of this case.