

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

GRANTED IN PART: May 27, 2004

GSBCA 16175

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.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, NVT Technologies, Inc. (NVT), appeals the final decision of a General Services Administration contracting officer denying NVT's claim for additional costs for disposal of used lighting materials and repair of an underground conduit.¹ Appellant elected to submit the appeal for a decision on the written record pursuant to Board Rule 111.

¹ Appellant's complaint contained two additional counts that were resolved by the parties before the record of the appeal was closed for a decision.

Findings of Fact

1. NVT was awarded contract number GS-04P-98-LCC-0010 (the contract) by respondent to provide building mechanical maintenance and elevator maintenance at the Charles E. Bennett Federal Building and United States Post Office/Courthouse, Jacksonville, Florida. Appeal File, Exhibit 1 at 5.

2. The contract's scope of work read in relevant part:

The Contractor shall provide all management, supervision, labor, materials, supplies, repair parts, tools and equipment, and shall plan schedule and coordinate and ensure the effective economical operation, maintenance, and repair of the facility as specified in this contract. . . .

The Contractor shall not be required to make replacements or repairs made necessary by reason of negligence or misuse of the equipment by persons other than the Contractor, his representatives, or employees, or by reason of any other cause beyond the control of the Contractor, except ordinary wear and tear.

Appeal File, Exhibit 1 at 19.

3. The contract read in relevant part:

The equipment and systems to be operated, maintained and repaired include all mechanical, electrical and plumbing systems installed at the site, including but not limited to: . . .

Electrical equipment, lighting and switchgear, . . .

Lighting systems components including Fluorescent Lamps, Ballasts and incandescent and special lamps. . . .

Contractor shall replace existing fluorescent tubes and compact fluorescent lights with like wattage and design when necessary relamping is accomplished.

Appeal File, Exhibit 1 at 164-67.

Debris from work inside buildings shall be removed from the facility daily except as approved by the COR. Premises shall be left neat and clean after each work shift so that Government business may proceed the next regular work day without interruption.

Id. at 90.

The contractor shall provide metal storage cabinet(s) and metal container(s) for waste and flammable materials associated with the performance of the contract.

Id. at 171.

4. The contract contained a list identifying hazardous items by Federal Supply Class. Contained in this list was an identification of various electrical parts deemed to be hazardous, some of which contained Polychlorinated Biphenyls (PCB). Appeal File, Exhibit 1 at 376-77.

Disposal of Used Lighting Materials

5. After NVT had replaced various lighting materials, the Government ordered NVT, by letter dated September 25, 2002, to dispose of all the used lighting materials in accordance with Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency (EPA) requirements. Appeal File, Exhibit 4.

6. The lighting materials removed consisted of 12,090 fluorescent bulbs, 2948 lighting ballasts containing PCB, and 36 lighting ballasts not containing PCB. Appeal File, Exhibit 1 at 500.

7. By letter dated October 11, 2002, NVT advised respondent:

NVT is responsible to clean up and remove their debris and /or excess material from the work area after completion of the work. However the waste removal from your building is not part of the scope of work under the referenced contract. As part of our responsibilities, we have complied with EPA as well as OSHA requirements and have stored the discarded light bulbs/ballasts in question in their original packages for proper disposal by your waste management contractor. If the Government would like NVT to perform this task and haul away their wastes, please advise us to provide you with a cost proposal.

Appeal File, Exhibit 5.

8. By letter dated October 24, 2002, respondent's contracting officer stated:

I am in receipt of your letter dated October 11, 2002 in reference to the disposal of light bulbs. I interpret . . . [the contract] to reflect that you are responsible for the disposal. This would be handled in the same manner as NVT's disposal of the chiller oil. Furthermore, this was discussed at the pre-start up meeting prior to the start of this contract. According to the terms and conditions of the contract, please dispose of these in a timely manner.

Appeal File, Exhibit 6.

9. By letter dated November 13, 2002, NVT stated:

We are in receipt of your letter dated October 24, 2002 regarding the disposal of the discarded light bulbs and ballasts. . . . Disposal of this waste or any other waste is not part of the services under the referenced contract and if it

has been done at no cost to the Government in the past, it shall not justify a no-cost work order for the disposal of waste lamps/ballast at the referenced facilities. As per your directive . . . we have scheduled a pickup with "Environmental Remediation Services," a waste management company, to remove and dispose all the Fluorescent lamps and ballasts.

Appeal File, Exhibit 7.

10. Attached to NVT's letter dated November 13, 2002, was a cost proposal for the disposal of the lighting material for \$7154.53 (\$5800 for Environmental Remediation Services and the remainder for NVT's general and administrative costs (G&A) and profit). Appeal File, Exhibit 7 at 2.

11. NVT sent respondent's contracting officer an electronic mail message dated December 12, 2002, that read in relevant part:

NVT has removed over 10,000 discarded fluorescent lamp bulbs and 500 ballasts . . . on November 15, 2002. However, last week, we were advised by Environmental Remediation Services . . . that the 500 ballasts in question contains [sic] PCB based material, and require special handling in their disposal. According to ERS, the PCB ballasts are considered as a type of hazardous waste that must be incinerated, consequently, [they] will cost more to dispose. In order for ERS to dispose [of] these ballasts, they are requesting additional \$3,095.00 to their original quote of \$5800.00, [increasing] NVT's previously submitted cost proposal from \$7154.53 to 10,972.34.

Appeal File, Exhibit 9.

12. On February 3, 2003, NVT submitted a claim to respondent in the amount of \$10,999.43 resulting from the disposal of lighting material. This amount included \$8916.96 invoiced by Environmental Remediation Services plus \$2082.47 as NVT's mark up for G&A and profit. The Environmental Remediation Services invoice itemized the following:

Loading and transportation			\$ 1,500.00
Disposal fluorescent bulbs	12,090	.40	4,836.00
Waste Disposal, PCB Ballast	2948 lbs	.87	2,564.76
Non PCB Ballast	36	.45	16.20
Total			\$8,916.96

Appeal File, Exhibit 1 at 549.

Repairs to Underground Conduit and Circuits

13. On April 19, 2002, a failure occurred in the underground electric conduit and wiring that provided power to the parking lot lighting circuits. NVT was directed to perform repairs. NVT advised respondent that it believed these repairs were outside the scope of the contract. Appeal File, Exhibit 1 at 573. Respondent directed appellant to proceed with the repairs. Id. at 495.

14. The electrical conduit and wiring requiring repair were buried under layers of asphalt and limestone base. Appeal File, Exhibit 1 at 495. Accessing the conduit and wiring for repair required extensive cutting and trenching of asphalt. Id. at 567.

15. NVT's contemporaneous documentation asserts that the damage to the underground conduit and wiring was caused by the collapse of a sidewalk floor which was the result of faulty design, and not ordinary wear and tear. Appeal File, Exhibit 1 at 540. The underground conduit and wiring were not accessible for inspection for the existing deficiencies inspection report. Id.

16. Respondent's contracting officer states:

"Ordinary wear and tear" is not limited to just those items or building components where the contractor performs preventive maintenance. The damage to the underground circuit is ordinary wear and tear.

Respondent's Record Submission, Declaration of William J. Murray, Jr., at 2.

17. On February 3, 2003, appellant submitted a claim to the contracting officer for \$8657.85 for the cost of the repair of the underground circuits. Appeal File, Exhibit 1 at 520-21. This amount consisted of the value of three work orders -- repair of the underground conduit, change out the electrical panel, and work performed in checking the transfer and breaker switches. The claim did not include appellant's overhead or profit. Appellant's Record Submission, Declaration of V. Thanh Nguyen at 1-2.

18. By final decision dated April 2, 2003, the contracting officer denied appellant's claims for disposal of the used lighting material and repairs to the underground conduit and wiring. Appellant appealed the contracting officer's decision to this Board. Appeal File, Exhibit 2.

Discussion

Disposal of Lighting Materials

Appellant asserts that the specifications do not impose any requirement on NVT to dispose of used lighting materials. Respondent counters that the contractor was required to clean up "debris" at the worksite, and extrapolates from this an obligation to dispose of the used lighting tubes at issue.

The contract clearly and unambiguously supports respondent's interpretation of the contract. It reads:

Debris from work inside buildings shall be removed from the facility daily except as approved by the COR. Premises shall be left neat and clean after each work shift so that Government business may proceed the next regular work day without interruption.

(Emphasis added).

The used lighting materials that are replaced are clearly "debris" resulting from the work performed, and the contract directs the contractor to remove this material from the facility. Accordingly, NVT was obligated to dispose of the lighting material within the scope of its contract as directed by the respondent.

The contract contained lists of possible hazardous materials, which included electrical items containing PCB. While light ballasts were not specifically mentioned, some of the light ballasts which were removed by NVT did contain PCB. This material was identified as requiring extra handling only after NVT's subcontractor removed the material from the building, not while NVT was performing its work. The extra fee to dispose of these light ballasts appears to be \$1238.16, plus NVT markups, based upon the differential in unit price to dispose of the ballasts containing PCB and those not containing PCB. NVT argues that disposal of this material unreasonably converts its maintenance contract to a "remediation contract." Under the circumstances, we do not find that this additional charge for disposal of a portion of the lighting materials after removal from the premises was an increase in the scope of NVT's contract.

The Repairs to Underground Conduit and Circuits

On April 19, 2002, a failure occurred in the underground conduit and wiring that provided power to the parking lot lighting circuits. The electrical conduit that failed was buried under layers of asphalt and limestone base. Accessing these cables required extensive cutting and trenching of asphalt. Respondent directed NVT to perform repairs with no apparent determination as to the cause of the failure. NVT responded that these repairs were outside the scope of the contract, asserting that the cause of the failure of the underground conduit and wiring was beyond its control.

According to the contract, NVT is not required to make replacements or repairs made necessary by reason of negligence or misuse of the equipment by persons other than the contractor, his representatives, or employees, or by reason of any other cause beyond the control of the contractor, except ordinary wear and tear. There is no allegation that the failure of the underground conduit and circuits were the result of negligence or misuse. Rather, the issue is whether the failure was the result of a cause beyond NVT's control or ordinary wear and tear.

NVT's documentation contemporaneous with the repair states that it ascertained that the collapse of the sidewalk floor above the conduit was the result of faulty design, which, therefore, was not ordinary wear and tear and not its responsibility to repair. There is no indication that respondent made any attempt to ascertain the cause of the failure. Respondent's contracting officer has submitted an affidavit in this appeal in which he asserts that "[o]rdinary wear and tear is not limited to just those items or building components where the contractor performs preventive maintenance. The damage to the underground circuit is ordinary wear and tear." No explanation is given by respondent as to why it has concluded the cause of the failure was "ordinary wear and tear." Appellant's contemporaneous documented assessment is more credible than respondent's unsupported after-the-fact assertion. See, e.g., Griffin Services, Inc., GSBCA 11171, 92-1 BCA ¶ 24,556 (1991). Accordingly, we find that the cause of the failure was beyond NVT's control and was not

ordinary wear and tear. NVT is entitled to compensation for its repair of the underground conduit and circuits.

Appellant has submitted sufficient documentation to support its request for \$8657. We find this amount reasonable for the repairs performed, and appellant is entitled to payment.

Decision

The appeal is **GRANTED IN PART** as stated herein.

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge