

ROY KAY, INC.

CONTRACT NO. V526C-491

VABCA-5113

**VA MEDICAL CENTER
BRONX, NEW YORK**

David Kay, Vice President, Roy Kay, Inc., Freehold, New Jersey for the Appellant.

Patrick J. LaMoure, Trial Attorney; *Charlma O. Jones, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C. for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE THOMAS

This appeal is from the contracting officer's final decision denying the Appellant's request for an equitable adjustment for removing the main HVAC trunk duct on the ninth floor of the Department of Veterans Affairs Medical Center in Bronx, New York. (VAMC Bronx)

During demolition of the ninth floor, the Appellant notified the Contracting Officer that the main trunk duct should have been included in the demolition because the duct occupies the same space as the new duct that Appellant was to install.

The Appellant contends that the applicable drawing does not show removal of the main trunk lines on the 9th floor and the drawing Notes clearly limit the duct removal to branch duct work.

The Government argues that: 1) the Appellant failed to read the contract as a whole; 2) Appellant's interpretation is unreasonable; and, 3) the purpose of the contract would be thwarted if the removal was not performed. In the alternative, the VA avers that Appellant's interpretation creates a patent ambiguity about which Appellant failed to make the required inquiry.

On August 30, 1996, the Contracting Officer issued a final decision which was timely appealed to this Board on October 16, 1996. A hearing was held in New York City on February 26, 1997. The Record consists of the Complaint, Answer, Rule 4 File Exhibits 1-6 (R4), Respondent's Rule 4 File Supplement

No. 1, Exhibits G-1 to G-6 (R4S1); Respondent's Rule 4 Supplement No. 2, Exhibits G-1 to G-11, (R4S2), and hearing transcript pages 1-145 and briefs from both parties.

FINDINGS OF FACT

Contract No. V526C-491, (Contract) was awarded to Roy Kay, Inc. (Appellant or Contractor) on October 3, 1995, for a price of \$2,044,000 to Renovate Ambulatory Care, at the VAMC Bronx. (R4S1, tab G-1) The specifications and drawings for this project were developed by Beatty, Harvey and Associates, an Architect-Engineer firm (A/E), whose Mr. Todd Harvey testified at the hearing on behalf of the VA. While the specifications and drawings were titled Renovate Ambulatory Care, the project included renovation of the 2nd floor for ambulatory care service space and the renovation of the

9th floor for office space.

There are six Contract drawings pertinent to this appeal. The first two, Drawing D-1, "Demolition Plan, Second Floor, Area 'C'" and Drawing D-2 "Demolition Plan, 9th Floor, Area 'C'" contain 13 identical "Demolition Notes". Note 5 states:

Existing ceiling construction shall be removed or demolished to corresponding extent of floor plan, including but not limited to acoustical tile ceiling assembly, gypsum board soffits and ceilings, light fixtures, diffusers, ductwork, sprinklers, etc., unless noted otherwise. See also electrical plumbing and HVAC.

Neither of these drawings indicate the particular existing ducts to be removed. (Tr. 14)

The third drawing, Drawing M-1, "HVAC Plan Second Floor, Area 'C'," contains the following notes:

GENERAL DESIGN NOTES:

1. All existing air diffusers, grilles, and registers to be removed.
2. All existing mixing boxes and ductwork to be removed, unless otherwise noted.
3. New diffusers, grilles, registers, mixing boxes and ductwork to be installed.
4. Verify all existing conditions.

Drawing M-1 also contains a list of symbols, applicable to the entire project, that include a dotted line denoting "existing ductwork to remain" and a solid line denoting "proposed ductwork." There is no symbol for what ductwork is to be removed nor is there any indication on the drawing as to existing duct work except for that which is to remain.

Drawing M-2, "HVAC plan, Interstitial Space Second Floor, Area 'C'" has eight general notes:

NOTES:

1. All existing air diffusers, grilles and registers to be removed.
2. All existing mixing boxes and branch duct connections to be removed, unless otherwise noted.
3. New diffusers, grilles, registers, mixing boxes and branch ductwork to be installed.
4. Install manual balancing damper in supply air branch duct to each ceiling diffuser.
5. Install manual balancing damper in return air branch duct to each return air grille.
6. Install manual balancing damper in exhaust air branch duct to each exhaust air grille.

7. Relocate existing interstitial spacer lighting fixtures as necessary to accommodate new duct layout.
8. Verify all existing conditions.

The work required on the second floor by notes 7 and 8 is not a requirement for the 9th floor.

The fifth pertinent drawing, "Drawing M-3, HVAC Plan, Ninth Floor, Area 'C'," states in its notes:

GENERAL DESIGN NOTES:

1. All existing air diffusers, grilles and registers to be removed.
2. All existing mixing boxes and branch duct connections to be removed, unless otherwise noted.
3. New diffusers, grilles, registers, mixing boxes and branch ductwork to be installed.

Finally, Drawing M-4, "HVAC Plan, Interstitial Space, Ninth Floor, Area 'C'" has notes identical to the first six notes on M-2.

The drawings designate the 2nd floor main trunk lines to remain; the 9th floor main trunk lines are shown to be new. On the two drawings applicable to the second floor, one drawing (M-1) notes that all ductwork is to be removed "unless otherwise noted," and the other drawing (M-2) requires the removal all branch duct connections "unless otherwise noted." On the 9th floor, both applicable drawings speak only to removal of branch duct connections "unless otherwise noted." The 9th floor drawings clearly indicate installation of new main trunk lines; however nothing on the 9th floor drawings indicates what happens to the main trunk.

When asked why the general design note for the 9th floor differed from the 2nd floor, Mr. Harvey testified "I don't know why." (Tr. 121) It clearly was not what the A/E or the VA intended. The intent of the designer and owner was the same for both floors; to have the Contractor remove all duct work not indicated to remain. (Tr. 57)

Mr. Roy Kay, Appellant's President, testified that he had a team of estimators, for example, general construction, mechanical and electrical. Mr. Kay would oversee their progress and as bid day approached, he would review the job. (Tr. 29) He stated that the first step in the bidding process would be to look at the demolition drawings. (Tr. 30) Step two would be to look at what duct had to be installed, and for that you refer to the "M" series of drawings. (Tr. 31)

Mr. Kay's estimators explained the job to him as they went through the drawings with him sheet by sheet. (Tr. 31) During cross examination Mr. Kay explained how the estimating process worked:

Q --- is it reasonable to say you would give them the M drawings, the duct work installation drawings? I'm referring to the duct work specifications as to what materials to use. Is that how that works?

A There would be, say, three estimators. The demolition required for GC goes to the GC. That required to the mechanical man would go to the mechanical man. That required to the electrical would go to the electrical man.

Q When you say that, you mean the drawings?

A The drawings. In other words, the chief estimator would assign the drawings to the different men which would be myself. I would assign them to different people.

(Tr. 33-34)

On this bid the demolition of the existing duct work and the installation of the new duct work was estimated by the same person:

Q. Okay. And what's the time frame that let's talk about the demolition bid and the bid for installation of the duct work. Let's focus on that. The group or groups that were first of all, was it two separate groups? One had the

A No. Demolition is mechanical. The mechanical guy does his installation or his demolition. The GC does his stuff. The electrical does his stuff. They do the demolition they don't have other people. No.

Q Who did the demolition?

A Who did the demolition of what?

Q Of the duct work.

A The mechanical guy.

Q Okay. And who did the bid work up for the installation?

A The mechanical guy.

Q Okay. So the same guy?

A Right.

(Tr. 93)

The Project Engineer and Contracting Officer's Technical Representative, Richard Cox (COTR) boiled his interpretation down to the following:

Q Okay. When you were first notified of this issue concerning removal of the trunk duct lines, you made a determination that they indeed needed to be removed and that that was part and parcel of the contract. In other words, it was not an extra type of work. How did you know that? How did you know to say that?

A Well, I just looked at all the notes combining the job, drawings D-1, D-2, and also looking at the drawing, whatever I see that says existing to remain, that will remain. Everything else will have to go.

(Tr. 85)

Mr. Roy Kay, President of Appellant, pointed out the very competitive nature of these jobs:

Recently we've been bidding against 20 to 30 people, maybe 25 people. If I put an extra light fixture in the job, I may lose it. If it's something not there, I'm not going to put it in. I don't care who does that work. It doesn't matter. If it's spec'd, then they get it. If it's not spec'd, they don't get it. Otherwise I don't get the job."

(Tr. 33)

In keeping with that policy Mr. Roy Kay testified that he did not include the removal of the main trunk lines for the 9th floor because "it wasn't shown on the drawings." (Tr. 28) Mr. David Kay testified that:

A We didn't even consider it. It's not our job. We're the contractor. You know, it says do it and we do it.

Q You just thought it was going to be removed by someone else.

A Someone else or whatever. We just didn't even consider it. Didn't think about it.

(Tr. 134)

Mr. Harvey testified about the duct work involved in this project:

"There are two types of duct work. There was existing duct work that was currently in place that our intention was to have it renamed and to be reused and there was new duct work that needed to be added to that to supplement the existing duct work."

(Tr. 117)

While removing branch duct work on the ninth floor, the Appellant's project supervisor, Mr. Ronald Mangano, went to the office of COTR Cox, a few days prior to June 13, 1996, and advised him that there was a problem. (Tr. 12, 61) Both Mr. Cox and Mr. Mangano testified they then visited the 9th floor where Mr. Mangano told Mr. Cox that the drawings did not show the removal of the main trunk lines. (Tr. 12, 61) Mr. Cox told him that he had to remove it as part of his Contract and they "agreed to disagree." Appellant had already removed some small areas of the trunk line when this conversation

took place. (Tr. 61) Based on this conversation, Appellant continued to remove the trunk line and 50-60% had been removed by the time Appellant's June 13, 1996, letter advised the Contracting Officer that they were proceeding with the demolition and requested a change order. (R4, tab 1)

In a June 21, 1996, letter Appellant advised Contracting Officer Frank Serra that Drawing M-4 calls for removal of only the branch duct on the 9th floor and that the main ducts were not addressed. The main line removal was considered out of the scope of its Contract, resulting in an change order proposal of \$21,965.37. (R4, tab 2)

The Contracting Officer relied on the A/E to resolve the issue and

Mr. Harvey responded incorrectly that the notes for the second floor also applied to the 9th floor. Mr. Harvey later testified that his initial position was wrong.

(Tr. 120) The parties ultimately stipulated that the general design notes on Drawing M-1 apply only to the second floor. (Tr. 143) The VA witnesses agreed with Appellant's position that the drawing notes for the 9th floor only require the removal of the branch ducts. (Tr. 54; 124)

It was impossible to install the new main trunk duct without removal of the existing duct. Prior to its bid, Appellant visited the site and was aware, because of the drawings and the site visit, that there was an existing main duct that had to be removed in order to install the new main duct required by the contract. (Tr. 23, 31; R4S1, tab G-1)

DISCUSSION

This appeal demands we answer a fairly simple question of contract interpretation: Was the Appellant required to remove the main trunk lines on the 9th floor? To answer that question we first must determine if the Contract terms are ambiguous. ***George E. Newsom v. United States***, 676 F.2d 647, 650 (Ct. Cl. 1982); ***Monarch Painting Corporation v. United States***, 16 Cl. Ct. 280 (1989) A contract is ambiguous if it is "unclear and capable of being interpreted in at least two reasonable ways." ***Chris Berg, Inc. v. United States***, 455 F.2d 1037, 1044 (Ct. Cl. 1972); ***Appeal of Stanger Industries Incorporated***, VABCA No. 2679, 90-1, BCA ¶22,300. Under the rule of *contra proferentem*, the drafter of a contract that is ambiguous may have the ambiguous provision construed against it. ***Sun Shipbuilding and Dry Dock Company v. United States***, 393 F.2d 807 (Ct. Cl. 1968).

If the contract is ambiguous, then we next must determine if the ambiguity is patent. ***Newsom***, at 650. If the ambiguity is patent, whether the Contractor's interpretation is reasonable or not, the *contra proferentem* rule will not apply because Appellant has a duty to inquire regarding the ambiguity. If the ambiguity is not patent, we must determine if the Contractor's interpretation is reasonable. *Id.*

The Government's initial argument is that a reading of Contract drawing M-4 in its entirety clearly requires the Contractor to remove all of the ductwork in the ceiling of the 9th floor. The Government argues that the Contract must be read as a whole, in harmony,

and without ignoring any of the provisions, including the drawing notes. The Government avers that the only reasonable interpretation of the Contract is that the main trunk on the 9th floor must be removed and the Contractor's interpretation that someone else would remove it is unreasonable.

The Government never explains how Notes 2 and 3 on Drawing M-4 fit into their "read as a whole" interpretation. The use of "branch duct connections" in Note 2 is not an isolated mistake; that phrase agrees with General Design

Note 3 which states: "New diffusers, grilles, registers, mixing boxes and branch ductwork to be installed." The difference in the general design notes for the 2nd and 9th floors is not simply the inadvertent inclusion of a word or some innocent mistake, but rather, since it appears consistently in both the "remove" language and the "new installed" language, it must have been the product of some rational thought. The Government simply ignores those notes and does not discuss how they supplement or can be read in harmony with the rest of the Contract. We are not persuaded that a note that specifically limits the duct to be removed can be said to supplement an interpretation that all duct must be removed. The Government limits its argument to M-4 and fails to discuss the 2nd and 9th floor language differences. There was no testimony as to what the note might mean nor why the "verify existing conditions" note is omitted for the 9th floor. To compound matters, the A/E could not explain why the drawing contained the "branch connection" language. Notwithstanding the foregoing, a question remains whether a reasonable and prudent contractor would question the omission.

We are not persuaded by the Government's primary contention that the Contract is not ambiguous. Both the A/E and the COTR testified that the general design note on M-4 limited duct removal on the 9th floor to branch duct connections. However, they conclude that the main duct must be removed because the drawing itself shows a new main duct to be installed in an area where the existing main duct is located.

The Government witnesses do not contest Appellant's contention that the Drawing M-4 Note itself limits the 9th floor duct removal to "branch duct connections." The Government argues, however, that duct removal could not be limited to branch connections because existing main duct lines had to be removed in order to install the new duct lines. The failure of the drawings to address the handling of the existing main duct creates an ambiguity.

Was the ambiguity patent? In making that determination, we must put ourselves in the place of a "reasonable and prudent" contractor. *Weeks Dredging & Contracting, Inc. v. United States*, 13 Cl. Ct. 193, 219 (1987); *aff'd*, 861 F.2d 728 (Fed. Cir. 1988); *P.J. Maffei Building Wrecking Corporation v. United States*, 732 F.2d 913, 917 (Fed. Cir. 1984). When a contractor receives an Invitation for Bid from the Government it is the contractor's role to figure out what work is involved and to bring any obvious problem, errors or omissions to the Government's attention. When in doubt, a contractor cannot simply guess or choose a course of action but must bring the situation to the contracting officer for resolution. *General Elevator Company, Inc.* VABCA Nos. 3666, 3768 93-2 BCA ¶25,685. This is true even if the contractor thinks its interpretation is reasonable.

MWK International, Ltd., Inc. v. United States, 2 Cl. Ct. 206 (1983)

It is well established that it is the bidder's responsibility to bring patent ambiguities in the specifications and drawings to the contracting officer's attention. A "patent ambiguity is one that is 'obvious, gross, [or] glaring.'" ***Grumman Data Systems Corp. v. Dalton***, 88 F.3d 990, 997 (Fed. Cir. 1996);

H & M Moving, Inc. v. United States, 499 F.2d 660, 671 (1974). A patent ambiguity "does not exist where the ambiguity is 'neither glaring nor substantial nor patently obvious.'" ***Community Heating & Plumbing Co., Inc. v. Kelso***, 987 F.2d 1575, 1579 (Fed. Cir. 1993) When a contract contains a patent ambiguity, the contractor is under a duty to seek clarification, and if no clarification is sought, the contractor cannot later argue that its interpretation is correct. ***Grumman Data Systems*** at 998. See also ***Lockheed Martin IR Imaging Systems, Inc. v. West***, 1997 WL 88998, at 3 (Fed. Cir. Mar. 4, 1997); ***Fortec Constructors v. United States***, 760 F. 2d 1288, 1291 (Fed. Cir. 1985) The same rule applies to ambiguities in contract drawings. ***Community Heating*** at 1580.

The fact that the problem may arise from the ineptitude of the Government or its A/E does not entitle the Contractor to "bridge the crevasse" in its favor. As the court said in ***Beacon Construction Co. v. United States***, 324 F.2d 501, 504 (Ct. Cl. 1963):

We do not mean to rule that ... the contractor must at his peril remove any possible ambiguity prior to bidding; what we do hold is that when he is presented with an obvious omission, inconsistency, or discrepancy of significance, he must consult the Government's representatives if he intends to bridge the crevasse in his own favor.

Appellant knew it was renovating the two floors. When the Contractor looked at the 2nd floor it knew the note on Drawing M-1 said remove all duct work and that the note on Drawing M-2 said remove branch duct connections. The Contractor knew that the note to remove all ductwork was "modified" by the drawing showing a dotted line indicating existing duct work to remain. When it looked at the 9th floor, the Contractor could see both drawing notes referring to branch duct connections. These notes are identical to the note on Drawing M-2. In the exact main duct area as the second floor, Contractor sees a solid line instead of a dotted line. The solid line means new duct work will be installed. Contractor knew it was installing both branch duct work and main trunk lines on the 9th floor but was only removing the branch duct work. So what was the situation with the existing main trunk lines? Were they already out? Was someone else going to take them out? Would the new duct be installed without removing the old duct? Installing the new lines without removing the old was not possible. Nevertheless, Appellant says it did not consider it, did not think about it. It was not shown as work for it to do so Appellant decided that it did not have to remove it because somebody else must be demolishing and removing the existing main trunk duct.

If differing constructions of the Contract's plain meaning are plausible, we must inquire whether such discrepancies would be apparent to a reasonably prudent contractor. ***John G. Grimberg Co.***, 7 Cl. Ct. at 456. Reasonableness is the standard. Contractors must inquire only as to major discrepancies, obvious omissions, or manifest conflicts in

contract provisions. *WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 877 (1963). As the Court of Claims stated in *Wickham Contracting Co., Inc. v. United States*, 546 F.2d 395, 398 (Ct. Cl. 1976); "It is not the contractor's actual knowledge, but the obviousness of the inconsistency that imposes the duty to inquire." "This proposition is for application in situations where a bidder knew, as well as in situations where a bidder should have known, of the discrepancy. . . ." *Wickham*, at 398. A contractor's failure to comprehend an obvious ambiguity in no way excuses its affirmative duty of inquiry. *Carothers Construction Co., v. United States*, 20 Cl. Ct. 556, 560 (1990); *J.A. Jones Construction Co. v. United States*, 184 Ct. Cl. 1, 395 F.2d 783 (1968).

Significant policy considerations impose the duty of inquiry on a contractor when the discrepancy is sufficiently obvious. In particular, it encourages clarification of ambiguities or correction of errors before the contract award and thereby avoids the need for expensive and complex litigation during contract administration. *Monarch Painting Corp. v. United States*, 16 Cl. Ct. 280, 287 (1989); *Beacon Construction Co. v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963).

It is difficult to see how anything short of an inquiry about the removal of the existing main duct, so as to ascertain the actual Contract requirements, could be considered reasonable conduct.

Was the Contractor under a duty to inquire about who would be removing the main trunk that occupied the space where its new duct was to be installed? As the court noted in *George E. Newsom v. United States*, 676 F.2d 647, 650 (Ct. Cl. 1982); "This is not a simple yes-no proposition but involves placing the contractual language at a point along a spectrum. Is it so glaring as to raise a duty to inquire?" In our view, the removal of the existing main duct on the 9th floor is an obvious discrepancy in the provisions and one that leaps from the pages of the Contract to constitute "an obvious omission, inconsistency, or discrepancy of significance." *Beacon Construction Company v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963). We conclude that Appellant had a duty to inquire about the ambiguity and cannot, in this Appeal, assert reliance on its reasonable interpretation of the contract documents.

Finally, we have considered Appellant's argument that the Contracting Officer, Mr. Serra, would have issued the requested change order if the A/E had provided Mr. Serra with the correct information about the applicability of the 2nd floor notes to the 9th floor. Speculating on what the Contracting Officer may or may not have done is not relevant to the disposition of this Appeal.

DECISION

The appeal of Roy Kay, Inc., pursuant to Contract No. V526C-491, is denied.

DATE: **September 30, 1997**

WILLIAM E. THOMAS, JR.
Administrative Judge
Panel Chairman

We Concur:

JAMES K. ROBINSON
Administrative Judge

RICHARD W. KREMPASKY
Administrative Judge