

MAINTENANCE ENGINEERS, INC.**CONTRACT NO. V531P-2284****VABCA-5350 & 5457****VA MEDICAL CENTER
BOISE, COLORADO**

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Merilee D. Rosenberg, Esq., Trial Attorney; *Philip S. Kauffman, 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 ROBINSON

These appeals are from final decisions by the Contracting Officer (CO), denying the claims of Maintenance Engineers, Inc. (MEI or Appellant). In VABCA-5350, the Appellant seeks recovery of funds withheld by the Department of Veterans Affairs (VA or Government) for what the VA has asserted to be unsatisfactory trash and snow/ice removal, and to cover certain costs incurred by VA in removing large snow and ice accumulations, all of which took place during December 1996. In VABCA-5457, the Appellant demands an equitable adjustment to compensate it for its own snow removal efforts during the same December 1996 period of asserted "unusually severe" winter weather conditions.

With respect to both appeals, the VA defends its withholdings, denying Appellant's assertion that the weather was "unusually severe" for that time of year in Idaho. It asserts that the snow removal services rendered by Appellant, as well as the services performed by VA personnel and a local contractor hired for the removal tasks, were necessary and were Appellant's responsibility under the terms of the grounds maintenance contract between the parties.

Both parties elected to submit their cases pursuant to Board Rules 11 and 13. Issues of entitlement and quantum are to be decided. The record for decision consists of the parties' pleadings, the (consolidated) Rule 4 file as supplemented (R4, tabs 1-49, App. R4 Supp., tabs 500-506), and sworn affidavits, both affirmative and rebuttal, by witnesses for the Appellant and the VA. Some of the affidavits are accompanied by additional documentation, which will be identified, for example, as "Herman Aff., Exh. 1;" "Pope Aff., Exh. 2;" etc. Counsel for both parties filed extensive briefs.

Ruling on Appellant's Evidentiary Objection

The Appellant objects to inclusion of the several photographs attached to the affidavit of the CO, Pamela Pope. The objection is based on the asserted lack of any accompanying identification or dating of the photographs. Neither does the CO specifically identify the individual who took each of the photos. Rule 901(a) of the Federal Rules of Evidence provides that "authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims." Board Rule 20(A), although dealing with hearings, speaks to the submission of "such relevant evidence as would be admissible under the Federal Rules of Evidence." It then states that even evidence inadmissible under the Federal Rules may be admitted in the discretion of the presiding administrative judge. *See, e.g., Pinner Construction Co., Inc., et al.*, VABCA No. 1712, *et al.*, 87-2 BCA ¶ 19,886; *Lafaye Associates, Inc.*, VABCA No. 2151, 89-1 BCA ¶ 21,270 at 107,260.

The Pope affidavit, at page 6, paragraph 23, states that "On December 23, 1996, Monday, Steve Rhodehamel, Chief of Operations, Facilities Management, at VA Boise, noted that none of the parking lots or roads on the north side of the station had been cleared over the weekend. Photographs were taken. (See Attachment 1)." In examining the fifteen attached photographs (hereinafter referred to as Exhibits 1(a) through 1(o)), we observe that *all* have the dates and times of day that they were taken, as well as a brief description of each location. For example, Exhibit 1(a) is labeled: "Friday 12/20/96 @ 9:35 a.m. Parking Lot #8 Eye Clinic (Bldg. 6) Outpatient Visitor Parking - Northwest View." On Exhibit 1(d), the CO's Technical Representative (COTR) Dana Rowley is shown and identified in the photograph, together with CO Pope. COTR Rowley is also shown and identified in Exhibit 1(g). None of the information directly accompanying the fifteen photographs indicates by whom they were taken.

As to the identity of the photographer(s), the pictures were taken by, or under the direction of, Steve Rhodehamel. (R4, tab 28, p. 2) In response to Appellant's Interrogatory No. 7, the VA (by CO Pope) stated that between 8:40 a.m., December 20, 1996, and 9:30 AM, December 24, 1996, photographs were taken by VAMC Media Photographer John Mangam and by M&R Supervisor Steve Rhodehamel. (App. R4 Supp, tab 506) A comparison of the fifteen photos with Mr. Rhodehamel's five page report (to CO Pope) concerning the events of December 20 through 24, 1996, reveals that the photos' locations generally correspond to the several areas of concern discussed in his report. (Rhodehamel Aff, Exh. 1)

In exercising the considerable discretion allowed by Rule 20(A), the Board is satisfied that the photographs are sufficiently identified and authenticated and that they do accurately portray the conditions indicated in the accompanying dated descriptions. Accordingly, they remain a part of the evidentiary record in these appeals. Appellant's objection is overruled.

FINDINGS OF FACT

On September 30, 1996, the VA awarded Contract No. V531P-2284 to MEI. The Contract was for a firm fixed price of \$158,620, and called for MEI to perform complete year-round grounds maintenance, including the provision of all necessary equipment, supervision, labor and materials to perform trash/debris and snow/ice removal services, at the VA Medical Center in Boise, Idaho (VAMC or station). The Contract provides a base year of October 1, 1996 through September 30, 1997, with four option years. In March of 1997, the VA terminated the Contract for the convenience of the Government. That action has not been challenged and has no relevance to the issues involved in the captioned appeals. (R4, tab 49)

The Contract contains a Section C, which defines the scope of maintenance services to be performed by the Contractor. Particularly relevant to the disputes underlying these appeals is the following:

Section C - Performance Work Statement

C-2 Roadway And Sidewalk Maintenance

C.2.1 The Contractor shall maintain all traffic surfaces (i.e., parking areas, sidewalks and steps) as described below.

C.2.2 The Contractor shall advise the COTR prior to starting traffic surface maintenance and check with the COTR before leaving the medical facility.

C.2.3 Snow and Ice:

(1) The Contractor shall remove snow and ice by plowing, blowing, shoveling or other suitable means not harmful to the traffic surfaces, in order to produce and maintain safe passage of pedestrians and vehicles. Snow shall not be piled on or near trees, shrubbery, ground cover or flower beds. **The estimated months to anticipate snow coverage under this contract are November through March.**

(2) During normal duty hours of 6:00 AM to 6:00 PM, the Contractor shall initiate action within one (1) hour from notification by the COTR to treat traffic surfaces. During other than normal duty hours, 6:00 PM to 6:00 AM, including weekends and holidays, the Contractor shall take action within two (2) hours from the time he is notified by the COTR or designee, to treat traffic surfaces. The Contractor may begin his operations sooner if he determines that such work is necessary to maintain traffic surfaces in a safe condition. The Contractor's actions shall be continuous and in accordance with the following snow priority removal plan until treatment of traffic surfaces is no longer necessary. All snow priorities shall be accomplished at a minimum of one time, before 7:00 AM.

[NOTE: The underlined portion of the above paragraph was deleted by Amendment One to the Solicitation. No other language was substituted in its place]

Snow Removal Plan

Snow priority have (sic) been divided into five priorities.

- a. **Priority one** to include all sidewalks and crosswalks, to include around the entire hospital area, including sidewalks and stairs leading up the hill and around all buildings on hill.
- b. **Priority two** will include all patients parking areas.
- c. **Priority three** will include all employee parking lots and road on hill, beyond buildings and in front of buildings.
- d. **Priority four** will include all stop signs and bus stops.
- e. **Priority five** all roadways.

(4) Contractor shall place signs warning [sic] hazardous conditions until traffic conditions are safe for passage, sign shall be removed when hazardous conditions have been corrected. Signs shall be placed at all entrances/exits to the Medical center grounds as well as all areas designated by the COTR. The signs shall be in accordance with OSHA standards.

(5) The Contractor shall apply sand and calcium chloride (DE-ICER) to streets, sidewalks, ramps, parking lots, steps and dock areas to remove/prevent hazardous conditions and provide safe passage for pedestrian and vehicular traffic. The Contractor shall submit Material Safety Data Sheets (MSDS) on proposed de-icer to the COTR for approval prior to its use.

* * * * *

(R4, tab 49)

Under the terms of the Contract, and as had been furnished with the solicitation package to all bidders, the VA prepared a methodology for determining contract compliance and for calculating payment deductions in cases of non-compliance. Following are relevant portions of this document.

Performance Requirements Summary (PRS)/Quality Assurance Surveillance Plan

1. This technical exhibit contains the information used by the Government in calculating some, but not necessarily all, deductions from the contract price. It contains entries for both those tasks that can be reperformed and those which by their nature cannot be reperformed. Use of the deduction procedures for tasks included on the PRS in no way abridges any of the rights of the Government established by the Inspection of Services clause, Default clause, or any other clause, (nor) does it relieve the Contractor from any requirements stated elsewhere

in this contract.

2. For services listed on the PRS, the amount to be deducted from monies due the Contractor will be the sum of the deductions for each unacceptably performed subtask. The CO reserves the right to make these deductions from any payment due the Contractor, to exercise any other option stated or implied elsewhere in this contract, or both. . . .

3. Notwithstanding the contract clause entitled Inspection of Services, or any interpretation thereof, the Government may, in addition to exercising the rights discussed above, including the right to make permanent deductions, require the Contractor to reperform defective services to an acceptable level

4. Computation of Deductions: Monthly payment to the Contractor will be reduced for unsatisfactory performance using the following methods. Each month, contract performance will be compared to contract standards and acceptable quality levels using the Quality Assurance Surveillance Plan. If performance of any required service is unsatisfactory, an amount of money up to the percentage stated in Column 4 of the Performance Requirements Summary will be deducted from the monthly invoice.

5. Inspection Criteria: Work will be inspected to Acceptable Quality Level (AQL) criteria identified on the Performance Requirements Summary (PRS) (PRS3-6) unless otherwise specified by the CO. Contract Discrepancy Reports (CDR) (PRS -7) may be issued when monthly summarized inspection results (show) the AQL identified on the PRS is exceeded. Deductions from payment shall be made when the observed defect rate, calculated from the monthly summary of inspection results exceeds the AQL identified in the PRS. The Observed Defective Rate (ODR) will be calculated on a monthly basis from each of the components identified in the PRS. Deductions will be made when the AQL criteria (are) exceeded - i.e., the ODR is greater than the allowable AQL. Payment deductions will be recommended to the CO when work has not been performed or work was performed in an unsatisfactory manner after a specified time limit and after contractor notification for reperformance, if such notification is given. . . .

* * * * *

(R4, tab 49)

The compliance criteria vary according to the nature of the tasks to be performed. For

example, while column 4 of the PRS for weed control in lawns and planting beds has maximum allowable deviations of 5% and 10% respectively, the maximum allowable deviation (AQL) for such items as lawn fertilization and *snow removal/ice treatment* is 0% (*i.e.*, 100% compliance)

Column 6 of the PRS is titled "The Proportion or (sic) Required Service to Total Monthly Price." For the Contract Line Item (CLIN) for Snow Removal, priced at \$1,270 per month over the entire five year potential contract period, the proportion is listed as 20%.

Column 3 of the PRS describes the *Standard* for Snow Removal in the following manner: "All priorities to be completely treated for snow and ice by 0700 & continuous removal during 0600 to 1800 - No valid CDR acceptable." This particular specification language was *not* amended prior to bidding.

In addition to the foregoing provisions, Paragraph 7 of the PRS also contains information outlining the responsibilities of the CO and her COTR. While the CO has the overall inspection and record keeping and quality assurance responsibility, the COTR has the authority to inspect and to issue CDRs whenever warranted. These CDRs are listed in column 5 of the PRS as the sole "Method of Surveillance" of the Contractor's compliance with the snow removal and ice treatment requirements of the Contract.

The Contract also contains the requisite Federal Acquisition Regulation (FAR) provisions applicable to contracts for the provisions of supplies and services. Of particular relevance is Contract Clause E.1, FAR 52-246-4, Inspection of Services -Fixed Price (FEB 1992). The clause gives the Government the right to inspect the services called for by the contract and to order a contractor to reperform if practicable. When defects in services cannot be corrected by reperformance, the Government may both require contractor action to ensure future contract compliance and "reduce the contract price to reflect the reduced value of the services performed." Where a contractor "fails to promptly perform the services again or to take the necessary action" to ensure future contract compliant performance, the Government has a choice. It may "by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service," or it may terminate the contract for default.

The Contract does *not* contain the standard FAR clause that is titled Default (Fixed-Price Supply And Service) (APR 1984). That default termination clause, in subparagraph (b), permits the Government to charge the defaulted contractor for any *excess costs of reprocurig* similar supplies or services. However, subparagraph (c) states, *inter alia*: ". . . the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include . . . (9) unusually severe weather." This clause is mandated, by 49 CFR, Chapter 1, Part 49.504, for inclusion in any federal contract for services, similar to the one at issue in these appeals. There is no other provision in the Contract, either expressly stated, incorporated by reference, or required by law or regulation, that affords the Contractor any relief from timely performance on account of "unusually severe weather."

Section H of the Contract is titled "Special Contract Requirements." It calls for the Contractor to furnish past and present performance information for similar types of contracts; to provide a local contract manager and any alternate(s) (together with a list of telephone numbers where such individuals could be contacted "7 days per week at any hour of the day or night to provide services under this contract"); safety requirements; quality control; and, quality assurance. These two latter provisions (H-4 & H-5) reference and implement the Inspection of Services clause of the Contract.

Paragraph H-4 requires that the Contractor develop a Quality Control Plan which includes a system for inspections and a method of keeping records of such self inspections.

Paragraph H-5 relates to the Government's inspection responsibilities. It states, in relevant part:

Quality Assurance

According to the Inspection of Services clause (FAR 52.246-4), the government will evaluate the Contractor's performance under this contract. For those tasks required, the Contracting Officer's Technical Representative (COTR) or valuator will follow the methods of surveillance specified in the contract. Government personnel will record all surveillance observations. When an observation indicates defective performance, the COTR will require the contract manager or representatives at the site to initial the observation. The initialing of the observation does not necessarily indicate concurrence with the observation, only acknowledgment that he/she has been made aware of the defective performance. Any action taken by the Contracting Officer as a result of the surveillance will be in accordance with the terms of this contract.

* * * * *

MEI's bid had been one of five received by the VA. Because MEI's low bid of \$158,620 was considerably less than the next bid of \$206,248, the CO forwarded a copy of the bid abstract and requested that MEI verify its bid. Both by letter and in a telephone conversation with the CO, MEI's treasurer, Stuart Herman, stated that he had reviewed the bid and it contained no errors. At the CO's request, and in accordance with Section H of the Contract, he faxed a list of his firm's prior and ongoing grounds maintenance contracts for her review. The CO observed (in an internal memo) that all of MEI's experience had been in Southern climactic areas. She could find no prior experience in snow removal. Despite this misgiving, the CO determined to award the Contract to MEI, the low bidder. These events transpired on September 26-27, 1996. (R4, tabs 3-6)

On September 30, 1996, the same date as she awarded the Contract, the CO sent a separate letter to MEI's president, expressing her concern over whether the firm could provide the requisite snow removal "for the low dollar amount on your bid." She

requested a list of the equipment which MEI planned on "having available for the snow requirements of this contract." (R4, tab 9)

MEI identified Hector Alcazar as its on-site Project Manager. It also furnished its Quality Control Program. The first item (of 15) covered was:

1. Snow And Ice:

Streets, side walks, ramps, parking lots, steps and dock areas shall be inspected for snow and ice build-up

Inspections are made daily and more frequently in inclement weather.

Upon snow and ice build-up, operation shall begin immediately to remove build-up.

(R4, tabs 10, 11)

On October 1, 1996, the parties participated in a pre-performance meeting. The VA was represented by the CO, Pamela Pope; the COTR, Dana Rowley; and, Engineering Service Chief, Dennis Johnson. MEI was represented by its President, Bradley L. Herman; Secretary, Barbara Herman; Treasurer, Stuart Herman; and, Project Manager, Hector Alcazar. Among the topics generally discussed were the size of the MEI crew, which was to consist of the foreman (Mr. Alcazar) and two former employees of the prior grounds maintenance contractor. The CO related that a particular problem on the prior contract involved snow/ice removal. The conversation then continued as reported by the CO:

Mr. Herman asked how much snow do we get?

COTR stated off and on, we sometimes will get heavy snow, sometimes not. They asked, how many inches? Again, this varies. We cannot predict.

I stated that we get more complaints over slipping from the ice than the snow. I talked of the previous years problems, we had complaints of stairs not being salted, sidewalks, patient parking areas. I recalled one instance where handicapped parking had snow piled up right up in front, the person could not get to the sidewalk. I had to get the contractor to shovel out. Hand shoveling is required. We used a lot of de-icer. Again, how much snow, Mr. Herman stated they get walls, we do not get that much, but again we need response for 1" of snow or ice just as much as a wall of snow. *We expect 24 hour service and availability.*

They will use a tractor [w/] blade and a sander.

(Emphasis added) None of the MEI representatives present are reported as objecting to being available for the entire 24 hour period of each day. (R4, tab 12; Pope Aff.)

In a letter of October 10, 1996, MEI advised the CO that "We intend to use a snow plow on the front end of our Kabota 4030 tractor, a tractor-mounted sander and a small, gas powered snow blower." (R4, tab 13)

On October 17, 1996, the CO received from the Contractor, and then furnished to the VAMC Police, the names and telephone numbers of Project Manager Alcazar and his Alternates #1 and #2, Deborah Ihm and Darla Davis. (R4, tab 14)

During the early morning hours of December 3, 1996, it snowed at the VAMC. Although there was an icy build-up on the parking lots and sidewalks, MEI had but one 80 pound bag of de-icing material. Mr. Alcazar and his helper then had to wait for over two hours while more de-icer was delivered. CO Pope states that, although MEI was notified of the snow and ice at 4:30 a.m. on Friday, December 3, and started removal at 5:00 a.m., it did not finish until after 11:00 a.m. This was in part because of the inadequate amount of de-icer available. This prevented MEI from strictly complying with that Contract provision requiring that such removal activity be *continuous*. As late as 10:30 a.m., the CO observed numerous icy spots still evident around the station. (R4, tabs 15, 17, Pope Aff., Rowley Aff.)

The COTR and the CO prepared a Contract Discrepancy Report (CDR) for December 3, in which the Contractor's performance was criticized and its excuses rejected. The CDR did not list payment reduction as a required action. Instead, it noted the need for further discussion with MEI. (R4, tab 16)

In a letter of December 9, 1996, Mr. Alcazar told the CO of steps that he had taken to assure that MEI could perform its snow and ice removal duties. Among these steps were the following:

1. Four men on call 24 hours per day from Labor Ready.
2. Twenty cubic yards of sand on hand, with unlimited quantities available upon request from International Stone.
3. Thirty boxes (100# ea.) of calcium chloride (de-icer) on hand, with unlimited quantities available upon request from the West Coast Company.
4. Three types of equipment available for spreading sand and/or de-icer: backpack style for stairs and inner courts; two wheel broadcast spreader for long sidewalks; tractor-pulled centrifugal spreader for longest sidewalks, roads and parking lots.

In the fifth numbered paragraph, the Contractor's Project Manager had this to say "[concerning] Emergency/Technical Back-up: Should the amount of snow overwhelm me and I can't have the roads serviced on time, I will have Curtis Clean Sweep Company

(208) 343-7600 (Joe), assist me with snow plowing and sanding roads and parking lots." Mr. Alcazar concluded his letter by assuring that all of his equipment and accessories were "in top condition." (R4, tab 18)

On December 16, 1996, the CO issued a CDR addressed to Mr. Alcazar's attention. She rejected the Contractor's de-icing efforts, under Contract Line Item (CLIN) 1a, of that same morning, as well as its trash and debris removal (CLIN 5a) over the previous two weeks. On December 18, 1996, the CO issued another CDR, this time for excess accumulations of cigarette butts (CLIN 5a) in several areas around the hospital grounds. In both CDRs, the CO indicated that payment reductions were required. CO Pope had, on December 18, 1966, personally observed, at several locations, trash containers that had not been emptied for two weeks, as well as cigarette butts and debris of several days' vintage. (R4, tabs 19, 20; Pope Aff.)

In his memo to the CO dated December 17, 1996, Mr. Alcazar challenged the December 16th CDR. He asserted that the de-icing was begun by his forces at 9:50 a.m., only twenty minutes after receiving notification from the VA. He further asserted that de-icing was completed within one and one-half hours. The VA has not credibly rebutted this assertion. Mr. Alcazar also stated that MEI usually completed inspections and policing of the grounds by 9:00 a.m. If the VA did not inspect immediately, there was no way to determine whether accumulations of trash or cigarette butts were left over from previous days or if they were from patients and employees who had used the facilities since the morning clean-ups. (R4, tab 21)

During the early morning hours of Friday, December 20, 1996, it began to snow in the Boise area. The National Weather Service officially reported that 9.8 inches fell in Boise during the twenty-four hour period of December 20-21, 1996. That snow storm was reported by the local newspapers as having produced the second or third largest twenty-four hour snow accumulation since 1939. By 7:00 a.m., there were approximately three inches of snow on the ground. It snowed continuously through the day, with about seven inches on the ground by 5:00 p.m. By midnight Friday, between nine and at ten inches had fallen. Another inch or more fell the following day. This heavy snowfall continued over a 24 hour period, with accumulations reaching 9.8 inches. (R4, tab 30; App. R4 Supp., tab 502; Alcazar Aff.) Following is a chronology of the events that took place during and after this snowstorm.

At 5:45 a.m., Friday, December 20, the COTR notified Mr. Alcazar to begin the de-icing and snow removal in accordance with the Contract's schedule of priorities. Mr. Alcazar arrived on station at approximately 6:15 a.m., followed by two more individuals at approximately 6:45 a.m. All three began snow removal upon their arrival. At 8:10 a.m., the VAMC Police Chief Nagy phoned M&R Supervisor Rhodehamel to report a lack of snow removal activity. When Mr. Rhodehamel toured the station between 8:10 and 8:50 a.m., he saw that none of the Priority A areas (sidewalks, handicap parking, entrances) had been cleared. He was told, by two individuals working for MEI, that the battery was dead on their tractor and that they were left with only a two-wheel drive truck with a snow plow to move the snow. Because of the lack of traction (even with chains installed), this truck was incapable of effectively utilizing the snowplow to push the snow. This situation was not remedied until well after the December 20-22 weekend. In the meantime, at 7:20 a.m., Mr. Alcazar told procurement official Linda Liquin, that

the Contractor would not be able to clear the Priority areas under the terms of the Contract, citing what he considered to be an unusually severe snowstorm then in progress. At 8:00 a.m., Larry Head, the VAMC's Chief of Acquisition and Material Management, was advised by the Hospital Director's office that staff and patients were having difficulties in getting to the buildings. He toured the area, observing that no snow removal had been accomplished. He then located Mr. Alcazar. He told him that, because of the unsafe conditions, the VA would have to call in another contractor to assist MEI. He added that MEI would be billed for this service. Mr. Alcazar did not object to this course of action, stating that while his company was equipped to deal with a "normal snowfall," this storm was beyond reasonable expectation. (Rhodehamel Aff., Exh. 1; Rowley Aff.; Liquin Aff.; Alcazar Aff.; Head Aff., Exh. 1)

Ms. Liquin attempted to contact MEI's designated backup firm, Curtis Clean Sweep (Curtis), but without success. CO Pope contacted another local firm, Metcalf, at about 9:00 a.m. Metcalf arrived on site at about 9:45 a.m., with twelve employees, two 4-wheel drive trucks with snowplows, and two all terrain vehicles with plows. In addition to Metcalf's forces and equipment, the VA was also able to activate twenty-one of its own employees. They operated the VA's tractor for some snow removal and also removed snow and ice by hand with available brooms and shovels, together with six shovels and ten boxes of de-icer, which the VA purchased for this purpose. (Rodehamel Aff., Exh. 1; Pope Aff.)

On December 20th, Mr. Alcazar was able to secure four temporary workers (temps) from the firm of Labor Ready, and later, a fifth, to assist with Friday's snow removal. He states that he was unable to get any more temps that day. He used the (ineffective) snow plow attached to the front of the half-ton pickup, plus several hand operated snow blowers. He also states that he telephoned Curtis Clean Sweep (Curtis) for assistance in snow plowing, but that the firm was unavailable. Appellant's Vice President, Bradley Herman, states that his firm was unable to obtain additional help on Friday because Metcalf had preempted the services of Curtis to help at the VAMC, and that Metcalf also used up the available supply of labor temps for its VAMC work. Mr. Herman is incorrect in these assertions. While Curtis did have subcontracts with MEI for *street cleaning* during leaf removal and *sanding* for snow/ice removal, there was never any contract between these firms for snow removal. Curtis was called by Metcalf and assisted in sanding at the VAMC, but was not ever asked by MEI to provide sanding services at VAMC. When MEI finally reached Curtis on Friday afternoon, the owner told them that all of his firm's snow removal equipment had been contracted out. Curtis did remove snow that Friday under subcontract to Metcalf, but *not* at the VAMC. Furthermore, had Curtis not worked for Metcalf, it would have been contractually obligated to jobs other than MEI's at the station. Labor Ready, according to its Customer Service Representative, had a large pool of available labor temps every day in December 1996. The firm has no record of having refused any request by MEI for additional labor on December 20th. The Lead Staffing Specialist at another such firm, Volt, states that her firm could have provided additional labor temps for work at the VAMC at any time during December 1996, had she been contacted. The Account Manager for West Coast Paper, the local supplier of de-icer, states that MEI had no written delivery agreement with his firm, and that Mr. Alcazar did not order any of the material until the time of the first snowfall. (Alcazar Aff.; Herman Aff.; Zubizaretta Aff.; Burrus Aff.; Weissenfluh

Aff.; Elton Aff.)

The VA's own crew, together with Metcalf's personnel and equipment, started by clearing the Priority A and Priority B areas. As a part of that effort, four VA employees spent an hour hand shoveling the sidewalks leading to five buildings, as well as the main entrance sidewalk. At 2:20 p.m., M&R Supervisor Rhodehamel inspected the grounds and observed that MEI had not removed snow from any of the remaining Priority A areas. Sidewalks leading to six buildings remained blocked by snow. The same condition applied to all of the receiving/loading docks and the roads leading to them. Mr. Rhodehamel took polaroid photographs of several of these apparently untouched areas. Before leaving the VAMC at 4:15 p.m., Mr. Rhodehamel checked with CO Pope. She advised him that MEI had assured her of nighttime coverage by Curtis. In a telephone conversation earlier that day, at 1:30 p.m., CO Pope had been present when Mr. Herman told the CO's supervisor, Larry Head, that if the VA released Metcalf from its clearing work at the VAMC, Appellant would be able to secure the services of another contractor. This proved not to be the case, because at 11:45 p.m., there was no sign of activity by Appellant at the station. According to the invoices from Labor Ready, its temps worked for Appellant until no later than 6:00 p.m., and did not return that night. (Rhodehamel Aff.; Head Aff.; Pope Aff., Exh's. 1, 2)

On Friday night, when Mr. Rhodehamel telephoned MEI, he could not reach Mr. Alcazar, and left a message on his answering machine. Several attempts were made to reach Alcazar, to no avail. When it became obvious to him that there was no "backup" contractor to assist MEI, Mr. Rhodehamel called four VA employees in to assist him in removing what by then (1:00 a.m., Saturday, December 21st) was a three and one half to four inch snow accumulation over all the areas which previously had been cleared. In areas that had not been previously cleared, the estimated snow accumulation was at least ten inches. One VA employee operated the VA's tractor with the attached front-end loader. He removed snow from the Emergency Room and Handicapped parking lots. In the meantime, Mr. Rhodehamel and a three man crew worked until 4:30 a.m. clearing several sidewalks leading from two parking lots to several buildings and the ER loading area, as well as sidewalks and landings around four other hospital buildings. (Rhodehamel Aff., Exh. 1)

Around 4:30 a.m. on Saturday, December 21st, Mr. Alcazar and a crew of seven workers arrived on station and Mr. Rhodehamel left at about 5:00 a.m. Notwithstanding that only a few inches of snow fell on Saturday *morning*, MEI still failed, by 6:00 p.m., to clear all remaining accumulations of snow from the Friday-Saturday storm. (Rhodehamel Aff., Exh 1; Pope Aff., Exh. 1)

Shortly after 8:00 p.m. Saturday, Mr. Rhodehamel was notified, by a station official, that MEI had been contacted to de-ice several sidewalks and roadways but had not reported in. Mr. Rhodehamel telephoned Mr. Alcazar and was told that he had spent twelve hours on station. He was reluctant to return. Mr. Rhodehamel obtained Alcazar's permission to use one hundred pounds of MEI's ice melt. He then used his personal vehicle to spread that material over the most hazardous sidewalks and parking areas. When he ran out of the ice melt, Rhodehamel found enough sand to treat the graded road leading from the main entrance to the guard shack. He left the station at about 10:30 p.m.

(Rhodehamel Aff., Exh. 1)

MEI had not arrived on station by 6:00 a.m. on Sunday, December 22, after station personnel earlier had unsuccessfully attempted to contact Mr. Alcazar to apply de-icer to the hazardous areas. Mr. Rhodehamel called a VA employee who worked from about 6:30 a.m. to 8:30 a.m. de-icing several parking areas and stairs. As late as 9:00 a.m. on Sunday, there were still several priority areas where removal of the Friday-Saturday snow accumulations had not been completed. Mr. Alcazar assured Mr. Rhodehamel that MEI would finish snow removal from those areas on that day. Nevertheless, when Rhodehamel reported to work on the following Monday morning, there were still significant snow accumulations on the roads and parking lots at the north side of the station. He contacted Alcazar, who had been able to secure the services of seven temps from Labor Ready that day. Both Rhodehamel and Alcazar subsequently discussed the situation over the phone with MEI's owner, who promised Mr. Rhodehamel that MEI would have heavy equipment on station by 6:00 p.m. that evening. This equipment arrived at 5:40 p.m. and MEI cleared most accumulations before the next day. (R4, tab 28, Rhodehamel Aff.; Pope, Aff., Exh. 1; Alcazar Aff.)

MEI invoiced the VA for December 1996 snow and ice removal, at the monthly price for that particular CLIN (\$1,270). Because the VA had issued eight CDRs during December, the CO multiplied 20% of the CLIN price (\$254) by eight. Since the total exceeded the monthly price of CLIN #0001, the VA withheld the entire amount of \$1,270 from the Contract payment due MEI for that month. Utilizing the same approach to MEI's invoice for December trash and debris removal, the VA multiplied 10% of the CLIN #0005 price (\$1,055 x .10) by the number of CDRs issued for that task in December (6), thereby paying the Contractor only 40% of the CLIN (\$422) for December trash and debris removal. (R4, tabs 44, 46)

In a letter to MEI dated February 17, 1997, and again in her final decision letter of May 21, 1997, CO Pope stated that the VA's claim was for additional costs incurred by assisting the Contractor in dealing with the snow and ice conditions which occurred beginning on Friday, December 20, 1996. These costs were stated as follows:

a. VA Employees , which totaled twenty-four, with their hours varying during different shift changes for the period 12/20/96 to 12/22/96).	\$1,408.24
b. Equipment and Material Cost , to purchase six each 24" snow shovels and ten 100 lb. containers of de-icer.	\$ 556.84
c. Interim Contractor , for snow removal from 1030 to 1830 December 20, 1996.	\$3,896.25
Total VA Costs	\$5,861.33

(R4, tabs 44, 46)

In response to Appellant's discovery request, the VA indicated that the documentation for each of the cost categories of its claim was contained in the Contract files, and was available for inspection. Prior to briefing, Appellant did not challenge the accuracy of these costs and the referenced supporting documentation. Neither party has entered that documentation into the record. (App. R4 Supp., tab 506)

MEI filed its claim for the withheld amounts. In her final decision letter, the CO retained the entire December invoiced amount of \$6,860, stating that the \$1,270 plus the \$633 for deficient performance, when added to the \$5,861 which the VA spent in assisting MEI's snow removal efforts amounted to \$7,764. Because this exceeded the total December invoice of \$6,860, the CO stated that the VA was retaining that amount and that MEI owed the VA the difference [of \$904], to be withheld from the next invoice. The appeal was docketed as VABCA-5350. (R4, tabs 44-46)

For its part, MEI filed an affirmative claim with the VA. It contended that because the CO directed it to work in "unusually severe weather," its own additional costs associated with snow and ice removal during and after the December 20-21, 1996 snowstorm were a change to the Contract terms. The CO denied the claim in its entirety. A timely appeal was filed and docketed as VABCA-5457. The Contractor seeks an equitable adjustment as follows:

Labor Ready workers	\$1,684.45
Temporary workers added to [MEI's] Payroll. Total of 97 hours December 22 through December 28, 1996.	\$ 679.00
Labor burden on payroll	\$ 169.75
Purchase of additional snow thrower	\$1,942.50
Rental of backhoe with attached loader Used to load snow for snow removal December 23-26, 1996.	\$ 424.50
Purchase of additional tire chains and replacement chains.	\$ 227.12
Purchase of sand and de-icer on emergency basis during snow storm and cleanup period.	<u>\$1,568.77</u>
	Subtotal \$6,696.09
	Overhead - 21.8% <u>\$1,459.75</u>
	Subtotal \$8,155.84
	Profit - 6% <u>\$ 489.35</u>
	Total \$8,645.19

(Herman Aff., pp. 5-6; Exh's. 1-6)

DISCUSSION

A. What was the Extent of Appellant's Snow/Ice Removal Responsibility?

The Appellant argues that Amendment #1 to the Solicitation eliminated any responsibility on its part for snow/ice removal between the weekday hours of 6:00 p.m. and 6:00 a.m. and over weekends and holidays.

Several interpretation issues must be resolved. If the amendment created no ambiguity or conflict, then we must interpret the Contract as amended, and according to its plain meaning. *Interwest Construction v. Brown*, 29 F.3d 611 (Fed. Cir. 1994). If the amendment *did* create an ambiguity or conflict, then it will be construed in Appellant's favor (as the non-drafting party) so long as it is latent and Appellant's interpretation is reasonable. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993). Appellant's interpretation will not be considered reasonable if it fails to reconcile all parts of the Contract, thereby leaving any portion(s) of the Contract inoperative or meaningless. *Holgar Manufacturing Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965); *Interwest Construction v. Brown*. In addition, the Appellant must demonstrate that its bid was based on the interpretation *now* being asserted. *Fruin-Colnon Construction Corporation v. United States*, 912 F.2d 1426 (Fed. Cir. 1990); *J.W. Bateson Company, Inc.*, VABCA No. 3460, 93-2 BCA ¶ 25,819.

The Appellant would have us find that over half of the snow and ice removal requirements from a proposed yearly station maintenance contract were entirely eliminated by deletion of the language in question. However, Appellant does not address the final sentence of subparagraph C.2.3(2) of the Performance Work Statement: "All snow priorities shall be accomplished, at a minimum of one time, before 7:00 a.m." That sentence remained unchanged by Amendment #1. The amended Contract *continued to require* the Contractor to "initiate action within one (1) hour from notification by the COTR to treat traffic surfaces" during normal duty hours of 6:00 a.m. to 6:00 p.m. It is senseless to require a contractor to accomplish "all snow priorities" at least once by 7:00 a.m. - unless there is some responsibility to treat these traffic surfaces during off-duty hours. Thus, that final sentence of the subparagraph logically could *only* pertain to snow and ice removal *actually begun or continued* during off-duty hours. When one reads the entire paragraph as amended, the sole reasonable interpretation is that the Contractor must initiate action within one hour of notification, and remove snow and ice on a continuous basis between 6:00 a.m. and 6:00 p.m., until all priority areas are cleared satisfactorily. If removal has not been completed by 6:00 p.m., or if it begins to ice and/or snow during evening hours, the Contractor is required, "at a minimum of one time," to *completely remove* ice and/or snow from all priority areas prior to 7:00 a.m. It appears that the intent of the amendment was to omit the requirement that the COTR provide after-hours *notification* to treat traffic surfaces and leave the decision of when to start evening work to the Contractor, so long as all removal was accomplished by 7:00 a.m. If the entire amended clause is examined, it cannot reasonably be interpreted to entirely eliminate the Contractor's duty to remove snow and ice during these off-duty hours.

The foregoing interpretation is buttressed by the language of the Snow Removal

Standard in Column 3 of the Performance Requirements Summary of the Contract. This Standard calls for "completely treating" all designated surfaces by not later than 7:00 a.m. At the same time, it requires "continuous removal" of ice and snow between the hours of 6:00 a.m. and 6:00 p.m.

While there may be other interpretations of the foregoing language, they must reconcile the omissions of the amendment with the continuing requirement of the final sentence of subparagraph C.2.3(2). The Appellant's interpretation fails to do this and thus renders a portion of the Contract meaningless. *See, e.g., Roy Kay, Inc.*, VABCA No. 5113, 97-2 BCA ¶ 29,271 at 145,621. Likewise, Appellant's position that all weekend ice and snow removal was eliminated by the amendment does not withstand rational analysis. Once the language requiring two hours notice "during other than normal duty hours, 6:00 p.m. to 6:00 a.m., including weekends and holidays," was omitted, the Contract became *silent* with respect to whether "normal duty hours [of] 6:00 a.m. to 6:00 p.m." included weekends and holidays. This question could only be reconciled by a pre-bid inquiry to the VA. The Appellant made no such inquiry. Furthermore, we doubt that the interpretation now advanced by the Appellant is the same as its interpretation when it bid the project. During the pre-performance meeting convened after Contract award, the CO made it clear to the four MEI representatives then present, that the VA expected "24 hour availability" for snow and ice removal. Had Appellant then interpreted the Contract the way that it now does, logic dictates that there would have been an immediate reaction to the CO's statement. The record does not indicate that there was any such reaction.

Even were we to accept Appellant's interpretation of the amended Contract, it creates a patent ambiguity regarding the responsibility for ice and snow removal during off-duty hours and on weekends and holidays. The Appellant's failure to make any pre-bid inquiry regarding the intent of that amendment forecloses any relief based on its current interpretation.

B. Were the VA's Deductions Contractually Justified?

Paragraph 4 of the Performance Requirements Summary (PRS) is titled "Computation of Deductions." It specifies the methodology for reducing monthly payment to the contractor on account of unsatisfactory performance. It reads as follows:

Each month, contractor performance will be compared to contract standards and acceptable quality levels using the Quality Assurance Surveillance Plan. If performance of any required service is unsatisfactory an amount of money up to the percentage stated in Column 4 of the Performance Requirements Summary will be deducted from the monthly invoice.

(Emphasis added)

Further on, at paragraph 7 (third subparagraph), titled "Quality Assurance Surveillance Plan," it is made clear that where the Contractor has "ignored a service item for an entire month the Government *can deduct the specified percentage* from the contractor's monthly billing." (Emphasis added) Again, this is stated as a one-time deduction of *the*

specified percentage for that particular item (CLIN). In no way does the language authorize the VA to deduct *multiples* of that percentage from the invoiced CLIN amount during the same month.

The Appellant points out that the percentages listed under *Column 4* of the PRS Chart are to be used in computing the monthly deductions. It is quickly obvious, even to a casual reader, that this was a typographical error. Column 4 lists the maximum percentages of deviation from performance requirements that are allowed before the performance will be considered unsatisfactory. At least one half of the individual required services listed on the Chart allow no deviations - expressed as 0%. None allow more than a 10% deviation. On the other hand, Column 6 of the Chart is titled "The Proportion [of] required Service to Total Monthly Price." These percentages run from 10% all the way to 100% (for such tasks as diking fire breaks in May and once-a-year fertilization of 500 trees). A comparison of the two columns makes it clear that Column 6 - not Column 4 - contains the appropriate percentages to be used in the monthly deductions. The Appellant's interpretation, seizing on an obvious typographical error, would render Column 6 meaningless.

The VA's interpretation of the PRS is equally unreasonable. It has taken the position that for each instance of noncompliance during a month - no matter how many times - it is entitled to deduct another 20% from the monthly invoiced price (per the CLIN) for snow and ice removal. In its deductions, it has acted on that interpretation. This resulted in multiple deductions from the December monthly invoiced amount based on the CLIN for Snow and Ice Removal, *i.e.*, \$1,270 x .20 (\$254) x (number of unsatisfactory service incidents). It has done likewise with regard to the CLIN for Trash and Debris Removal (Daily Litter): \$1,055 x .10 (\$105.50) x (number of unsatisfactory service incidents). The VA's interpretation is at odds with the plain language of the clause, which states that the VA will deduct "an amount of money up to the percentage stated in Column 4 of the PRS." This language speaks of "an amount up to the percentage." As this language is expressed in the singular, the *obvious* meaning is that the VA need not deduct the full percentage for only one incident, but has the right to go as high as the listed percentage in Column 6, where the incidences of noncompliance are serious and are repeated in the same month. Even were there another arguably reasonable interpretation of this language, it would not avail the VA. As the drafter of the language, any such subtle ambiguity must be construed against the Government. *WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 876 (Ct. Cl. 1963); *Fanning, Phillips & Molnar*, VABCA No. 3856, 96-1 BCA ¶ 28,214, *motion for reconsideration granted*, 96-2 BCA ¶ 28,427.

There is another problem with the VA's application of this clause. Even if its interpretation could be read to allow for multiple deductions from the invoiced monthly amount for the same task, such a potentially disproportionate action amounts to an unenforceable *penalty* against the Contractor. Because there were more than five CDRs issued for MEI's snow/ice removal efforts during December of 1996, the VA deducted the entire amount of the CLIN (\$1,270) from the December payment. As a result, the Contractor received no compensation for any snow or ice removal work that it did satisfactorily perform in December. In addition, the VA billed Appellant for the ice and snow removal costs that it incurred over the December 20th weekend. In effect, the VA has not only held back payments based on the several Contract Discrepancy Reports, but seeks also to recover its actual damages for periods within the same (12/20-21) period.

In the appeal of *Charles O. Estes, d.b.a. Phoenix Reforestation Co.*, IBCA No. 1198-7-78, 84-1 BCA ¶ 17,073, the Interior Board of Contract Appeals ruled that a "no pay" provision in a tree planting contract was punitively applied against a contractor, denying any payment at all, even though 84% of the trees had, in fact, been planted. So too, in the *instant* disputes, the VA made similar multiple deductions for both the snow/ice removal and trash removal CLINs. As a result the total monthly subtraction from the invoiced amounts actually exceeded the monthly unit price for snow/ice removal and amounted to 60% of the trash removal. These deductions discounted any benefits received by the VA on the days that the services *were* adequately performed. The net result is that this effectively became an "all-or-none" inspection, which deprived the Contractor of credit for partial performance of work that had been accomplished to the Government's satisfaction during the preceding month. *Clarkies, Inc.*, ASBCA No. 27784, 81-2 BCA ¶ 15,313. As the Armed Services Board of Contract Appeals has stated, in administering this type of clause, the Government's deduction methodology must be "properly proportionate to the defective work for that particular task." *Capital Services, Inc.*, ASBCA No. 40511, 91-1 BCA ¶ 23,310 at 116,908.

Of course, where such a percentage deduction provision, as applied, serves only to reduce a payment in some proportion to the actual work done, it will be deemed valid and enforceable. *Capital Services, Inc.; Aerial Services Corporation*, ASBCA No. 36392, 91-1 BCA ¶ 23,582. Likewise, if the Government receives little or no value for services only partially performed, withholding the entire payment may be warranted. *See, Double E Reforestation, Inc.*, AGBCA No. 85-109-1, 86-2 BCA ¶ 18,764; *The Work Force Reforestation, Inc.*, AGBCA No. 90-130-3, 90-1 BCA ¶ 23,007 at 115,530 (Houry, J., concurring). Again, any withholding must conform to the language of the particular contract involved.

Furthermore, the VA has an adequate remedy for non-performance or unsatisfactory performance under the Contract's Inspection of Services clause. This provision allows the Government to give notice, wait a reasonable period, and perform the service with its own or other forces. It can then charge the costs of this mitigative effort (actual damages) to the Contractor. The VA followed this course of action on December 20-21 after determining that Appellant was incapable of dealing with the weather conditions. In particularly egregious instances of repeated noncompliance, the Government may terminate the Contractor's right to continue performing part, or all, of the service contract. There is thus no need for the Government to impose an oppressive penalty in addition to the remedies that are already available.

C. Did "Unusually Severe Weather" Excuse Performance?

In analyzing the responsibilities of the parties for their respective costs incurred during the snowstorm that began on Friday, December 20, 1996, resorting to the language of the Contract is the logical starting point. A thorough examination of both the Solicitation and the resultant Contract reveals that there is no limit placed on the *quantities* of snow and ice which the Contractor must remove from the various VAMC areas designated as Priorities 1 through 5. Furthermore, the VA made no pre-bid representations concerning the quantities of ice and snow to be expected in the Boise, Idaho area during the winter season. With nothing further, it would appear that the Appellant contracted to remove

any quantities of snow and ice which would be encountered during the winter months at Boise VAMC, subject to certain conditions set forth in the amended solicitation.

The Appellant asserts that the quantities and rates of snowfall over the December 20-22, 1996 weekend period amounted to "unusually severe weather," for which the standard default clause gives relief in the form of a time extension. The Appellant further charges that by requiring it to perform snow and ice removal during such conditions, the VA constructively changed the terms of the Contract. The Contract does not contain the FAR-mandated default termination clause. It is not even incorporated by reference. However, the clause is required by a valid published procurement regulation - 48 C.F.R. § 49.504 - whenever (as here) the fixed price-service contract exceeds the small purchase authority of the agency. The clause not only states the grounds upon which the Government may hold a contractor in default, but also enumerates the defenses available against default. In addition, it provides the contractor's sole remedy for an improper default termination - conversion to a convenience termination - effectively limiting the Government's liability for what would usually be more severe Common Law breach damages. This mandated clause therefore expresses "a significant and deeply ingrained strand of public procurement policy," and must be read into the Contract as a matter of law. *G.L Christian and Associates v. United States*, 312 F.2d 418, *rehearing denied*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963); *General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775, 779-80 (Fed. Cir. 1993); *H & H Machinists Company*, ASBCA No. 38440, 91-1 BCA ¶ 23,373. *See also*, *University of California, San Francisco*, VABCA No. 4661, 97-1 BCA ¶ 28,642

The Appellant has cited several board decisions in which time extensions were granted on account of unusually severe weather: *Barrett Company, Inc.*, ENGBCA No. 3877, 78-1 BCA ¶ 13,075; *J.R. Pope*, DOTBCA No. 78-55, 80-2 BCA ¶ 14,562. However, these decisions involved construction contracts containing differently worded provisions relating to defaults and time extensions, having no relevance to these appeals.

These appeals involve the Default (Fixed-Price Supply And Service) (APR 1984) Clause required by FAR 52.249-8. It provides, *inter alia*:

(a)(1) The government may, subject to paragraph (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the contractor fails to - -

* * * * *

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

* * * * *

(2) The Government's right to terminate this contract under subdivision (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt

of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs of those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or the public enemy, and (9) *unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor.*

[Emphasis added]

The above-quoted Default clause specifies that the failure to perform must be "beyond the control" of the Contractor. Here, the Appellant could have better controlled the situation of unexpected snow by utilizing appropriate equipment and employing adequate numbers of workers. The VA did *not* default this Appellant. It simply sought to have the Contractor perform the services required. The very essence of this particular Service Contract is to deal with whatever winter weather conditions might be encountered at the Boise VAMC. In all respects, this is a Performance Contract, with no limitations specifically given on the level of effort required of the Contractor. The very first sentence of Contract Subparagraph C.2.3 clearly states the performance criteria: "The Contractor shall remove snow and ice by plowing, blowing, shoveling, or other suitable means not harmful to the traffic surfaces, *in order to produce and maintain safe passage of pedestrians and vehicles.*" (Emphasis added)

In our view, the justification for failure to perform ice and snow removal services in a timely manner does not depend on whether the climactic conditions were "unusually severe" in terms of what would normally be expected. While the facts indicate that the 9.8 inch snowfall on December 20-21, 1996 was probably "unusually severe" when compared with historic data, the *relevant* inquiry is to what extent these weather conditions rendered the timely provision of such services contractually impracticable, if not impossible. Consideration of these issues will guide our inquiry.

In her January 7, 1997 Show Cause Notice, CO Pope defended the VA's position that MEI's performance during the December 20-23, 1996 period was deficient. The Board agrees with her statement in the first paragraph on page two of the Notice that "it was not [the VA's] position that the full range of services should have been provided without delay during periods of record-setting snowfall." We also agree with her position that MEI's persistent lack of suitable and operational equipment, enough de-icing materials, and an adequate workforce failed "to demonstrate a reasonable good faith effort to perform the most critical categories of snow and ice removal/treatment," particularly

during the worst snowfalls of December 20-21.

The record convincingly establishes that, during the first twenty-four hour period of snowfall, the VA officials afforded Appellant every opportunity to initially remove ice or snow accumulations before utilizing its own personnel or bringing in an outside contractor to assist in the work. At all times, Appellant was on notice, either actual or constructive, of the need to remove snow and to treat designated surfaces with de-icing materials. There is no dispute that Appellant's Project Manager Alcazar stated early on Friday morning that, because of the storm's severity, his firm would not alone be able to perform its snow and ice removal responsibilities. After hearing that, the VA officials acted responsibly in assembling their own employees and in contacting another local contractor to assist Appellant in clearing the station premises to assure safe passage for both pedestrians and vehicles.

The Appellant's snow removal equipment, as it existed on December 20th, was inadequate for removing any sizeable accumulations on the station roads and parking areas. MEI had failed to secure adequate contractual *commitments* for back-up snow removal services from local contractors, even though it had previously assured the VA that such commitments were forthcoming. Even when able to secure additional manpower from local sources, MEI did not hire enough workers to reasonably keep pace with climactic conditions. None of these omissions were the fault of the VA. It is a fundamental tenant of fixed-price contracting that a contractor is solely responsible for providing an adequate number of workers with the proper equipment to do the work required. *Holtzen Construction Company*, AGBCA No. 413, 75-2 BCA ¶ 11,378; *Skyline Maintenance Company, Inc.*, GSBCA No. 4609, 76-2 BCA ¶ 12,193; *Johnson-Egli Tunnel & Shaft Co.*, ENGBCA No. 3827, 78-1 BCA ¶ 13,008; *Patty Precision Products Co.*, ASBCA No. 24458, 83-1 BCA ¶ 16,261.

Even though Mr. Alcazar had assured the VA that MEI could summon Curtis Clean Sweep for backup snow removal, this was not the case. The owner of that firm stated under oath that he had no such contractual commitment to MEI, and that his workers were not available when he was contacted by Appellant on the afternoon of December 20, 1996. The VA's mitigative contracting efforts during the weekend period thus were *not* the proximate cause of that firm's unavailability to assist Appellant. The owner's affidavit states, without rebuttal, that other commitments would have been honored before responding to MEI's request for help at VAMC. The Customer Service representative at Labor Ready stated that she had over forty workers available on any day in December of 1996. Had MEI desired, it could have hired more th