

**DONAHUE ELECTRIC, INC.**

**CONTRACT NO. V593-C5548-99**

**VABCA-6618**

**VA MEDICAL CENTER  
LAS VEGAS, NEVADA**

*Gerald J. Brentnall, Jr., Esq.*, Loomis, California, for the Appellant.

*Anna C. Maddan, Esq.*, Trial Attorney; *Charlma J. Quarles, 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 is a timely appeal taken by Donahue Electric, Inc., (Appellant or Donahue) from the Department of Veterans Affairs (VA) contracting officer's deemed denial of its claim for an equitable adjustment for the costs of dealing with and remedying the problems that resulted when the boiler Donahue says was prescribed by the specifications on Contract No. V593-C5548-99 could not properly operate the VA furnished sterilizer. The Government denies liability on the ground that the Contract was a design-build contract, thus making the Contractor entirely responsible for properly sizing the boiler. A hearing was held, and the evidentiary record before the Board includes the Pleadings; Rule 4 file, tabs 1 through 47, (cited as "R4, tab\_"); Appellant's Rule 4 Supplement, tabs 500 through 531 (cited as "R4 Supp., tab\_"); Appellant's Trial Exhibits A-1 through A-9, (cited as "Exh. A-"); Government Trial Exhibits G-1 through G-2 (cited as "Exh. G-"); the two-volume hearing transcript (tr. 1-547) (cited as "Tr.

[vol. #]:\_.”; and the seriatim MAIN, RESPONSE, and REPLY BRIEFS (cited as MAIN, RSPNSE, or RPLY at \_\_\_\_);

## **FINDING OF FACTS**

### **Background**

The VA’s Ambulatory Care Center (ACC) was located within a built-to-lease space in Las Vegas, Nevada. VA intended the Center to open with the rest of the building, however, because the Center area was not built to code, it was not allowed to open. After two years, and following numerous complaints and an investigation, the VA determined to “fix” the deficiencies and open the ambulatory surgery center as soon as possible. (Tr. 324)

In order to accomplish the “fix”, Contracting Officer Don Nevis contacted Donahue and Mr. William Allen of Harris Consulting Engineers (HCE), an A/E firm. Donahue had performed over a hundred contracts in the VA building in the 2 preceding years and had an extensive knowledge of the building. (Tr. 180) Mr. Mike Donahue, Appellant’s President, testified that VA proposed HCE, and specifically Mr. Allen, to work as the VA’s engineer to develop the scope of work and a partial design that, in turn, would be given to the design/build team, consisting of HCE (Mr. Allen) and Donahue, who would put it together as a project capable of obtaining a Las Vegas City building and occupancy permit. (Tr. 77)

The VA did not provide Mr. Allen funding limitations or any indication of how much it expected to pay for this project. (Tr. 378) Apparently, HCE was to develop the VA’s cost estimate based on his design. Mr. Allen testified he never knew how much money was available for the project and that his design would have cost around \$1 million. (Tr. 419, 518-19) To keep Donahue from knowing Mr. Allen’s design cost, another member of HCE worked with Donahue. Mr.

Allen was prohibited from discussing pricing with Donahue. If Donahue needed assistance, it was directed to talk only to one of the Harris brothers. (Tr. 76, 326)

The VA arranged a June 4, 1999 “express plan check” with the City of Las Vegas. At that meeting, the VA was to present permit ready documents that the City plan checkers would go over, discuss, and then issue a permit. VA, HCE, and Donahue all attended the meeting. No permit was given, and one of the requirements of the City was for the VA to provide product information sheets for *all* the equipment listed in the contract. (Exh. A-5) The VA furnished Steris sterilizer, which ultimately became the source of conflict, was never put on the list of equipment.

Mr. Donahue admits that he never looked at the Steris specifications prior to submitting the bid. (Tr. 220) When asked how he could bid this project without knowing the specific requirements for the sterilizer, Mr. Donahue stated that the Contract specified the sterilizer location, the size boiler that would operate it and the pipe routes and other information necessary for installation. (Tr. 82)

A potential subcontractor to Donahue, Southwest Air Conditioning, Inc., bid almost \$2 million for the heating, ventilation and air conditioning (HVAC), plumbing and medical gas portion of the proposed project. The bid was based on “Furnish and install complete HVAC system in accordance with plans and specifications by HCE Consulting Engineers (Mr. William Allen)” and “Furnish and install all equipment as listed on equipment schedules and plans M-1 thru M-12, dated 5-7-99...” (Exh. A-6)

Appellant’s “bid” for the project in July 1999, was nearly three times the VA’s (Allen) estimate. VA did not negotiate with Appellant, nor did it meet with Mr. Allen and Donahue to ascertain what caused the differences between the bid

price and the Allen estimate. VA's only response was to instruct Donahue to "sharpen its pencil." (Tr. 326) Mr. Donahue, believing that it was "imperative" for the design-build team to meet to determine why there was such a large difference between the "bid" and the VA cost range, arranged a meeting between his subcontractors, an equipment supplier, and HCE. However, Mr. Allen refused to share his design cost information. Donahue's bid for the material costs alone exceeded the high end of the VA cost range by \$100,000. Donahue advised Mr. Goodman that, without the HCE cost estimates, he could not determine the reasons for the discrepancy between the "bid" and the VA's cost estimate. (Exh. A-3)

Mr. Allen, thinking that he was eventually going to design the entire project, developed extensive, detailed drawings and equipment schedules suitable for construction. (Tr. 483) At one point, Donahue advised the VA that it was becoming a "plan and specification" project rather than a "design-build" project. (Tr. 351) Mr. Allen testified that he had installed 40 to 50 Steris sterilizers in various hospitals and universities and he "fine tuned" the boiler and pipe design in order to make a 7HP boiler work. (Tr. 402) He had worked with the Steris 3400 before and knew the Parker 10HP boiler would work. He stated that he originally planned a 15HP boiler with a 518 burst capacity but he believed he could save the VA the money by "designing down" to the 7HP by adding design elements such as putting the boiler in a building and using pre-heated water. (Tr. 415-419, 425) The cost of "fine tuning" would seem to far exceed the \$1000 or so savings in the cost of the boiler. In addition, the 7HP boiler installation would only work if the entire project were awarded. Mr. Allen never indicated to anyone that he had specified the 7HP boiler based on this "fine tuning." (Tr. 474)

On July 13, 1999, the CO asked Donahue why it had not provided a list of the equipment it intended to purchase. Appellant advised that it intended to use the equipment specified by HCE. (Exh. A-3) When Donahue's next price submission still exceeded the VA's budget, VA management decided to pursue a "competitive" procurement. (Tr. 327) In addition, when the non-competitive situation failed, HCE wanted Donahue to pay \$21,000 for the specifications and drawings. Donahue refused because it had no contract with HCE. The VA paid the \$21,000 to HCE in exchange for the "completed" drawings, which were ultimately provided to bidders on the "competitive" procurement. (Tr. 378)

### **Request For Proposals**

To accomplish this now "competitive" design/build solicitation, the VA selected two more contractors to participate in the bidding and created a base bid with 3 alternates. The Solicitation was issued August 4, 1999, and bids were submitted September 2, 1999. (R4, tab 6) The VA never determined a precise cost estimate for the project, but published a clearly understated cost range of \$500,000 to \$1,000,000. (R4, tab 6)

The VA claims that each bidder was to ignore the HCE drawings provided with the solicitation and bid on developing its own design. At hearing Mr. David Goodman, Contracting Officer (CO), recalled that at the pre-proposal conference on August 4, 1999, Mr. Ralph Tillman, the VA Chief of the Construction Contract Section, "instructed the offerors to utilize the drawings for informational purposes only, and that they were to develop their own design for the steam generation system for the sterilizer installation." (Tr. 328) That recollection is not supported by Mr. Goodman's contemporaneous Memorandum of that meeting which makes no mention of such specific

instructions being given to the attendees about the drawings. The Memorandum does state the bidders were told that an amendment would be issued seeking “alternate (independent) Bids” on three items, which would be awarded only if proposals for the entire project came in substantially higher than the VA’s estimate. In that event, VA reserved the right to award independent contracts for one or more of the alternate bid items. (R4, tab 2, 6) The work called for in the alternates was also part of the base bid and would only be awarded as alternates if the main project was not awarded.

On August 4, 1999, VA issued a “Request for Proposal [RFP] to Design-Build” the Las Vegas ACC. (R4, tab 6) The RFP required the re-design and correction of various deficiencies at the ACC, specifically in the Ambulatory Surgery Section (Surgery), the Supply, Processing and Distribution Section (SPD), the Medical Gas System, the Police and Security Service Operations Room, and the Isolation Room, all in accordance with applicable National Fire Protection Agency Standards, National Electric Code, American Institute Architect (AIA) Guidelines, Uniform Building Code (UBC), VA Standards, and City of Las Vegas Codes.

Items of work included the re-design and correction of the HVAC system, installation of a VA-furnished sterilizer and Contractor-furnished steam generator system, repair and re-certification of the Medical Gas System, installation of a patient shower, installation of an Ethylene Oxide Monitor Alarm, correction of ventilation deficiencies in the Isolation Room, and one (1) hour fire barrier protection.

The RFP, Section A, Project Objectives, stated as follows:

A1. **Definition.** Design-Build (DB) as defined by the Department of Veterans Affairs (VA) is the procurement by the Government, under one (1) contract, with one (1) firm (which may be a joint venture) for both design and construction services for a specific project.

A2. **Scope of Work.** Offeror shall provide all management, supervision, labor permits, materials, tools and equipment, and Design-Build (DB) services necessary for completion of the VA Southern Nevada Healthcare (VASNHS) Ambulatory Care Center (ACC) Ambulatory Surgery/Supply Processing and Distribution (SPD) Section/Isolation Room Re-Design Project.

A3. **Cost Range.** The anticipated cost range for this project is between \$500,000 and \$1,000,000.

A4. **Schedule Objectives.** The anticipated completion of this project is 120 days after written notice to proceed.

The RFP, Section B, covered the Selection Procedures. Paragraph B6, Role for VA's Consultant A/E, listed HCE as the A/E team who produced the RFP documents. It was also stated that the Government had determined that HCE was "not available to be named as members of the Offeror's design team" and that "VA shall retain HCE for the remainder of the project's development for review and monitoring purposes."

Section C, Offer Requirements, Paragraph C2, Cost Proposal Requirements, subparagraph (b) required offerors to submit separate prices for A/E services, construction work and other activities. In addition, by amendment to the solicitation, VA requested independent alternate bids for the following items:

- (1) Sterilizer Installation in SPD.
- (2) Medical Gas System Repair and Third Party Certification IAW MGM, Inc. Medical Gas Report.
- (3) Installation of New 450 KW Emergency Generator.

Paragraph C3, Technical Proposal Requirements, subparagraph (a)(1) stated:

The intent of this project is to allow for Joint Commission on the Accreditation of Healthcare Organization (JCAHO) certification of the Surgical Suite. Drawings are included for informational purposes only and should in no manner be used, or considered, as *as-built drawings*.

(R4, tab6)[Emphasis in original.]

Subparagraph (a)(2) through (6), General Scope of Work, referenced some thirty-four Architectural, Mechanical HVAC, Mechanical Plumbing and Electrical Drawings. Subparagraph (a)(5)(g) stated:

Install a new Government furnished Steris Washer/Sterilizer in the SPD area. Extend the exhaust hood, and remove the existing washer. Install new steam boiler (196 LB/hr of 50-psig steam from RO water).

Drawing M-3, Mechanical Schedules, had the following stamped in red thereon:

These Drawings Are For Informational Purposes Only. These Drawings Should In No Way Be Considered As *As-Built* Drawings.

(R4, tab 6)[Emphasis in original.]

That drawing included schedules for nineteen exhaust fans, thirty-one single duct air terminal units, three humidifiers, a fan coil, a ventilation fan, a packaged exhaust system, and a steam boiler. The Steam Boiler Schedule listed a Parker B-3 Kompact water tube type gas fired boiler with steam capacity of 242 lb/hr. That boiler is a 7 HP boiler.

In order to speed up the bidding process, the VA deleted the requirement for technical proposals because it did not want to give the bidders time to prepare drawings. (Tr. 514)

Mr. Goodman's pre-proposal meeting Memorandum states that he gave each offeror five sets of the "RFP and Plans (50% Drawings)." Paragraph 8 of his memo states the "Offerors were informed by Mr. Allen, Harris Consulting Engineers, that the re-design project is generally designed around VA Standards." Mr. Donahue testified that the VA said that any changes to the plans and specifications required something in writing. Mr. Donahue said he believed

he was given the concepts and equipment that the VA wanted him to use and the general scheme on how to install it. (Tr. 89)

In a design/build solicitation owners normally provide, at a minimum, the project's functional and aesthetic requirements but leave the development of the construction documents and details of construction technology to the design/build team. RFP documents usually show sufficient detail to convey the design concept, applicable criteria, standards, specifications and guarantee requirements. Often the RFP A/E provides any additional design criteria necessary for project development including supporting calculations, equipment guide list, construction standards, design manuals, signage design, etc. so that the design/build team can provide construction drawings and specifications.

On September 2, 1999, Donahue Electric ("Donahue") offered to perform the work required in the RFP at the prices specified below:

120 Day Construction Period	
A&E Consultants	\$ 70,000
One Hour Fire Rated Ceiling	\$ 62,787
Medical Gas	\$ 203,249
HVAC/Electrical/Misc.	\$1,297,560

Supervision/Fees	\$ 113,521
Total	\$1,747,117

180 Day Construction Period	
A&E Consultants	\$ 70,000
One Hour Fire Rated Ceiling	\$ 62,787
Medical Gas	\$ 203,249
HVAC/Electrical/Misc.	\$1,297,864
Supervision/Fees	\$ 141,521
Total	\$1,757,421

Alternates:

(1) Sterilizer Installation in SPD	\$ 43,750
(2) Medical Gas System Repair & Cert.	\$ 80,740
(3) Install of New 450KW Emerg. Gen.	\$ 114,920

The Contractor's Project Narrative submitted with its proposal included the following:

The new gas fired steam boiler for the Steris Washer/Sterilizer and the Steam Wand in the Cart Wash Room (Re: C3(5) g. and f.) shall be housed in the unit package enclosure. The size of this steam boiler shall be as specified (196 LB/hr at 50-psig). There exists the possibility of cost savings if the new Steris electrical steam generator already owned by the VA is used instead of the new gas fired steam boiler. Any installation cost savings realized would have to be measured against slightly higher energy costs for the electrical steam generator versus the gas fired boiler.

On September 14, 1999, the VA Contracting Officer awarded Contract No. V593C-5548 (Contract) to Donahue in the aggregate amount of \$124,490 for Alternate Bid Item #1, Sterilizer and Boiler (\$43,750) and Alternate Bid Item #2, Medical Gas (\$80,740). (R4, tab 6) The Contract incorporated the Donahue Project Narrative as part of its terms.

The boiler schedule was identical to the one submitted to the city of Las Vegas for the June 4 meeting. (Tr. 99) Referring to the Parker 7HP boiler, Mr. Allen testified as follows:

Q. This was the boiler you were specifying for the non-competitive phase; right?

A. Right.

Q. And that was the same boiler that you specified for the competitive phase; right?

A. Well, we left it on the plans on the competitive, yes.

Q. And you left it on the plans when it went to competitive because you intended people to use that boiler; right?

A. Not that—

Q. Or an equal, as long as it met the salient characteristics that were shown on the schedule?

A. Right.

The VA now says the “information only” note on the drawings and schedule effectively prevents bidders from using or relying on the drawings in any way. VA does not adequately explain how anyone could formulate a bid without using the provided drawings unless a bidder completely designed the project prior to bid.

Donahue believed the “information only” note applied to the existing locations and spaces of the rooms, and it could not rely on the drawings that a closet shown on the drawing would really be a closet, etc. However, to the extent Mr. Allen’s designs were for new work, the “as-built” language would not apply to them. For example, the steam-piping diagram was not an as-built but a new design. (Tr. 104) No similar, “information only” note applied to the specifications.

Representatives from Syska & Hennessy, Appellant’s eventual design consultant, were in attendance at the pre-proposal conference. (R4, tab 3) On

August 11, 1999, Syska wrote to Donahue declining to participate in the design portion of the project for the following reasons:

- a.) This is not a proposal for design-build services. The RFP as written, specifically Section 3 which defined the scope of work, is written around the design prepared by Harris Engineers. There is no design to be done as the major concepts to comply with the RFP are already established.
- b.) It is our opinion that this is a pricing exercise. The established budget of \$1,000,000 is not sufficient to accomplish the scope of work as defined by the RFP.
- c.) With the constraints of the RFP, Syska & Hennessy cannot add value to this project.

(R4, tab 56)

Nevertheless, on September 8, Syska sent Donahue a letter agreement to provide mechanical and electrical construction documents for 5% of the total construction cost of the project. (R4, tab 57) Although a subpoena was issued, no one from Syska & Hennessy testified at the hearing.

Mr. Donahue states he never intended to use Syska for the sterilizer portion of the project. In lieu of an A/E, Appellant planned to perform the electrical portion of the sterilizer installation and Desert Plumbing and Heating Co., Inc. (Desert Plumbing), would do the mechanical portion. (Tr. 181) Later, Mr. Donahue testified that the design itself was not complicated but not so simple that Donahue could do it. (Tr. 296) He also stated that had the specifications required a 25HP boiler, he would not have needed an A/E. (Tr. 314) Mr. Donahue realized that he could have proposed any 196-lb/hr boiler, but chose the one "specified" because of convenience and speed. (Tr. 88)

Mr. Allen testified:

And yes, I believe personally, as a registered professional engineer, that had they built the mechanical building, put the steam boiler, connected to

the water heater, ran it, done it exactly as I had intended, that that sterilizer would have worked perfectly. However, as soon as the project was changed around, the mechanical building was deleted, the boiler went outside, everything that I had done was out the window.

(Tr. 478)

All of the proposals for the “competitive procurement” were substantially higher than the Government’s estimate. The solicitation was not the normal circumstance where an alternate bid is used in a solicitation to add or delete items from a procurement. In this case, the solicitation clearly stated that the alternate bids would only be effective if there was no award of the base bid. The VA decided to award only two of the three bid alternates, thus reducing a potential \$1-2 million dollar project to a contract for \$124,490. (R4, tab 4) Mr. Goodman asked Donahue to verify its bid and expressed particular concern about Alternate 2, Medical Gas System Repair, because it was “significantly lower than the other two offerors.” The VA’s estimate for this work was \$124,490 to \$269,301, the low estimate matching Donahue’s combined price for the two alternates. (R4, tab 5) Donahue verified its bid. (R4, tab 4) Mr. Allen testified that, when he read Donahue’s narrative, he knew that Donahue was going to have problems because his “fine tuning” had been eliminated. (Tr. 420) However, there is no indication that Mr. Allen advised anyone of the existence of this “fine tuning” or the problems associated with the award of only a small portion of the project.

The Notice to Proceed issued to Donahue set a completion date of December 3, 1999. (R4, tab 8) However, neither party mentioned that date again. Donahue believed that the completion date was December 10, 1999; the CO later computed the original completion date as January 26, 2000. We find the

completion date cited in the Notice to Proceed controls; the initial Contract completion date was December 3, 1999.

On September 27, 1999, Donahue informed Mr. Goodman that it anticipated shutting down the SPD on October 18 but needed to meet with Steris to insure compatibility of equipment. (R4, tab 9) The next day Syska & Hennessy advised Donahue that the 7HP boiler would not meet the instantaneous burst requirements set forth in the Steris installation specifications. Those specifications state:

1.1 Steam Supply @50-00 PSIG (3.52-5.62 KO/CH3)  
dynamic, 196 LBS. (89KO) per hour consumption and  
526 LBS. per hour (238.6 KO) periodic (instantaneous,  
demand 44 LBS 120 KO) required per cycle.

(Exh. A-1)

Syska & Hennessy also stated it had reviewed the alternate electric steam boiler owned by the VA, noting that the sterilizer would require 180kW and that it would use significant amounts of electric power. (R4 Supp., tab 509) There is no indication why or when Syska & Hennessy first knew of this “problem” but their involvement at this point contradicts Donahue’s testimony that he had no intention of using them.

The record is not clear when the electric boiler alternate began to be seriously discussed. On October 8, Donahue advised Contracting Officer’s Technical Representative Ruben Romero (COTR or COTR Romero) that the 7HP boiler was undersized and provided a letter from Steris saying the 150kW electrical steam generator was “adequate.” Mr. Donahue urged using the 150kW steam generator and stated that he needed written authorization if he was to install the specified 7HP boiler because he could not guarantee that it would work. (R4 Supp., tab 510)

Initially, Steris took the position that the 150kW steam generator was “adequate” if only 446 lb/hr were required. On October 15, 1999, Mr. Allen advised COTR Romero that he thought Syska & Hennessy was over designing for the VA’s intended use and was creating an inefficient system. He stated, “[n]owhere in the literature did I find the 526 lb/hr figure.” He advised COTR Romero to hold the boiler decision because “[w]hen the system is clearly defined the type and size of boiler will be obvious.” (R4 Supp., tab 512) A cursory glance discloses the 526 lb/hr requirement is clearly stated in paragraph 1.1 of the Steris installation specification. (Exh. A-7)

On October 22, Mr. Donahue and CO Goodman had a conversation and agreed to the use of the VA owned 150kW electric steam generator in lieu of the steam boiler. However, Mr. Donahue did not disclose the Syska & Hennessy finding that 180kW would be required. (R4, tab 10; R4 Supp., tab 513)

On October 25, 1999, the CO advised Donahue that use of the electric generator required a value-engineering proposal (VEP). In the absence of a VEP “you are required to proceed with the Gas Steam Generator design at no additional cost to the Government and no additional time will be provided for completion. You had 50% design when you submitted your proposal and award was for a Firm Fixed-Price.” (R4, tab 10)

Donahue submitted a VEP prepared by Syska & Hennessy on October 28, 1999. The cost was \$41,750, a \$2,000 savings from the bid price of \$43,750. No mention was made of the need for 180kW generator in the VEP. (R4, tab 11) HCE reviewed the proposal and raised questions because it was conceptual. However, Harris opined that properly engineered the VEP would work. (Rule 4, tab 12) On November 3, John Biley of Steris wrote to Syska & Hennessy and stated “the 150kW steam generator sold by Steris has a rating of 528 lbs. per hour

under optimum conditions (water supplied at 212 deg F water, voltage is at specified level and piping insulated). Therefore, if the installation meets these standards, operation will be satisfactory with the Reliance 3400.” (R4 Supp., tab 515)

On November 9, Mr. Romero, the Acting Facility Manager and COTR, recommended accepting the VEP. (R4, tab 13) Mr. Goodman prepared a modification dated November 9 reflecting the cost and agreed upon a due date of November 19 for a bar-graph schedule and November 12 for final design. (R4, tab 15)

A meeting was held on November 12 where Donahue informed the VA that Steris had incorrectly advised that the 150kW steam generator would work. However, it is clear that Syska & Hennessy and Donahue had actual knowledge the 150kW would not meet the 526 lb/hr burst requirement on September 28. In addition to the September 27 letter, there is a Syska Hennessy FAX dated October 14, 1999 that states:

A 180kW electric generator would be required to meet the instantaneous steam demand of 526 lb/hrs/hr. According to local Steris representatives, an unused Steris 150kW steam generator capable of generating 445 lbs/hr of steam which was procured last year by the VA could be utilized. Although a letter from David Saldivar, Steris District Sales Manager, indicates the 150kW steam generator is adequate, we recommend additional documentation be obtained directly from Steris engineers confirming this.

(R4, tab 511)

At the November 12 meeting, all the parties discussed the issue that the 150kW was “marginal” and VA said it preferred the 180kW unit. (R4, tab 16) By letter dated November 29, Donahue requested a time extension from its

completion date of December 10, 1999 to January 21, 2000. Donahue also requested \$3,000 for the cost of converting the 150kW unit to 180kW. Mr. Allen advised Mr. Goodman that it was his impression that Steris did not have a “good handle on what their machine actually does.” (R4, tab 17)

In response, the VA issued a December 7, 1999 letter, stating that it had orally directed Donahue to implement the VEP at the November 12 meeting, and it was perplexed that the new design had not been received. Mr. Goodman asserted that regulations precluded a request for additional funds. Apparently no consideration was given to treating the situation as a change rather than a VEP. Instead, Mr. Goodman, based on information from Mr. Allen, who at that point was taking the position that the specifications were not as important as designing to how the VA actually intended to use the sterilizer, determined that Syska & Hennessy, had caused a 6-week inexcusable delay by designing a system to meet maximum equipment specifications rather than the VA proposed application. Mr. Goodman recognized that Steris, the manufacturer of the VA furnished sterilizer and VA owned electric steam generator, had misled Donahue but says Donahue’s designers should have figured that out within 2 or 3 days. What Mr. Goodman did not know was that Donahue was aware of that on September 28. Mr. Goodman granted a 2-day time extension to January 28, 2000 and then ordered Donahue to submit plan/ drawings for either the original design or VEP design for the electric generator by December 13. (R4, tab 18)

Syska & Hennessy knew from at least September 27, 1999, that 180kW was required to meet boiler requirements specifications and so advised Donahue on September 28. Donahue did not disclose this information to the VA and proposed using the 150kW steam generator. Mr. Donahue still did not disclose the need for the 180kW steam generator and subsequently sought a VEP using

the 150kW steam generator. Mr. Donahue did not contact Steris about the cost of upgrading from 150 to 180kW until November 15. (R4 tab 16)

### **The Decision To Use Larger Gas Boiler**

Donahue decided not to convert the 150kW electric generator to 180kW. (Tr. 122) Donahue submitted the 25HP boiler for use with the sterilizer on December 13, 1999. The VA responded to the submittal on December 15, noting 23 deficiencies. (R4, tab 21)

Mr. Robert McCook of McCook Boiler and Pump Company, testified that the 7HP boiler was quoted at \$11,990 but never ordered and the 25HP was quoted at \$16,150 and sold at \$15,000. (Tr. 442) Donahue authorized Desert Plumbing to order the 25HP boiler on December 13. Donahue submitted new drawings on December 21, 1999. (R4, tab 22) The VA approved Donahue's boiler submission on January 3, 2000. (R4, tab 28)

On January 19, 2000, Desert Plumbing submitted its bid to Donahue for supplying and installing the sterilizer and 25HP boiler based on Syska Hennessy drawings dated December 13, 1999:

- \$18,262 for installation of the boiler
- \$16,302 cost of the boiler
- \$6,119 install 1" pipe
- \$2,000 to increase pipe to 1 1/2"

There is no indication in the record that the 25HP boiler installation amounts were different from the installation amounts for the 7HP boiler.

CO Goodman determined that the original completion date was January 26, 1999. He gave a time extension of 18 days for medical gas permit delays and 11 days for the sterilizer permit delays. Since there was one contract covering both alternates, he used the 18 days to extend the completion date to February

15, 2000. (Rule 4, tab 31) Mr. Goodman testified that Donahue did not request any money for the time extension. (Tr. 341) On February 23, Mr. Goodman granted a “provisional” 23-day extension effective February 24 to March 15, 2000 for change order work only. Mr. Goodman specifically did not grant a time extension “for the remaining six (6) days (February 18, 2000, through February 23, 2000) of the original contract term.” Paragraph 6 of his letter states that all the work originally contracted for “is scheduled for completion by COB today Wednesday, February 23, 2000. These projects are still due by COB today and are not included in this time extension, CO #3.” (R4, tab 35)

Mr. Donahue wrote to COTR Romero on February 24, 2000, stating Steris had installed the sterilizer and all deficiencies were corrected by February 23, 2000. Mr. Goodman and COTR Romero signed the Final Acceptance on February 25, 2000. (Rule 4, tab 36) Thus, it took approximately 30 days from submission of the Desert Plumbing bid to completion and acceptance of the boiler/sterilizer installation. Appellant’s ill advised pursuit/dalliance with the electric steam generator consumed over 60 days.

### **Contractor Claim**

On September 5, 2000, Appellant filed a claim for \$130,133.42 asserting that the specification required a 7HP boiler that would not properly operate the Steris sterilizer and thus “Our correction constituted a constructive change for which we are entitled to compensation under the changes clause of the contract.” (R4, tab 37)

In support of its claim Donahue submitted an estimate from Desert Plumbing as follows:

- |                         |             |
|-------------------------|-------------|
| 1. Install Steam Boiler | \$18,262.00 |
|-------------------------|-------------|

2. Provide the Boiler	16,302.00
3. Install New 1" M.P. Gas Line	<u>6119.00</u>
Total all work	\$40,683.00
28% Markup	11,391.24
cost for 7HP	<u>(30,000.00)</u>
Total increase	\$22,074.24

These numbers are the bid numbers submitted by Desert Plumbing on January 19, 2000, that Donahue says represents a reasonable amount for the work Desert performed. (Tr. 150; R4, tab 516) Mr. Donahue requested Desert Plumbing to submit its "breakouts for the upgrade from the 7HP Boiler installation to the 25HP Boiler installation so we can establish the basis for a claim." (R4 Supp., tab 530) We see no evidence in the record that Desert Plumbing ever responded to this request. Further, there was no participation by Desert Plumbing at the hearing.

In his May 12, 2000 letter to Desert Plumbing, Mr. Donahue states:

Your original quote for Alternate No. 1, per the VA RFP documents, including Harris Consulting Engineers plans and specifications Project No. 99042.30 dated 7/30/99, included the furnishing and installation of (1) 7HP Parker Boiler with all accessories, all required gas and water supplies and connections, all required sewer connections, all required insulation, supports and heat tracing to provide a complete and operational Boiler system.

(R4 Supp., tab 530)

We can only conclude that all of the items listed in the original bid were also included in the proposal for the 25HP boiler. A cost of \$2,000 was quoted if 1 ½ inch pipe was used. The only other variable in Desert Plumbing's quotation for doing the 7HP and the 25HP boiler is the cost of the boiler. Increases to the

insulation and supports etc. are included in the change order requests discussed below.

Donahue seeks another \$15,884 for change orders performed by Desert Plumbing and listed in a one page Desert Plumbing letter dated April 13, 2000.

There were 5 change orders:

1. RO Water Additions	\$5,246.00
2. Insulation Additions	\$4,174.00
3. After Cooler/Blowdown Additions	\$2,138.00
4. Heat Trace Additions	\$2,019.00
5. Additional Boiler Piping/Supports	<u>2,307.00</u>
Total Cost	\$15,884.00

(Exh. A-2)

Desert Plumbing did not testify or provide any explanation or support for why these changes were necessary. Its letter says the work was performed at the field direction of Donahue. There is no indication that these work items were ever presented to the CO until Donahue filed its claim. Mr. Robert Kimble, Appellant's field representative and superintendent, who should have been directly involved, was unclear in his explanation of the changes. He very briefly explained what they were but did not explain either why the changes were needed or at whose direction Donahue issued the field directions. No data supporting the costs of the alleged changes was submitted. The VA does not refute that these "changes" took place, only that the Appellant failed to substantiate the costs. As discussed below, we find a negative inference from the lack of participation by Desert Plumbing.

The RO (Reverse Osmosis) water problem arose when it was discovered that the entire suite in the SBD area, including the toilets, was supplied with RO water. The VA wanted city water, and the change was made. No other facts, including cost data, regarding this change were presented by Appellant.

The upsize of piping resulted in additional insulation. Plus, Mr. Kimble “believed” there was additional work required by the COTR in the form of removable valve caps. He said the caps were a standard item that contractors install. Mr. Donahue stated he had no reason not to believe the amount was reasonable but offered no details on how much additional insulation was needed, its unit cost or any other details. (Tr. 31)

For the blow down, Mr. Kimble said they had to make some changes because of the size of the boiler. When asked about the amount, he stated he probably would not contest the amount. (Tr. 32) Change 4 involved wrapping the feed water tank to keep it from freezing. Change 5 involved larger supports necessitated by the larger piping. Donahue added \$4,447.52, a markup of 28% to its subcontractor’s cost.

The engineering costs of \$17,209.11 claimed by Donahue are attributed to design work performed by Syska & Hennessy because of the change in boiler size. Mr. Donahue states Syska & Hennessy only worked on the upgrade of the boiler, but Appellant’s evidence clearly indicates otherwise. (Tr. 155) It is clear that Syska & Hennessy also worked on the VEP for the electric steam generator. (R4 Supp., tab 509) The only evidence to support Syska & Hennessy’s claim is an invoice it sent to Donahue on March 27, 2000 that states:

Per your request, our office has spent \$17, 209.11 on this project so far. Attached please find a copy of the actual printout from our accounting department.  
Do we need to utilize a specific date and revision number for the “as-built” plans? Please let me know.

(R4 Supp., tab 522)

There is no credible evidence supporting Donahue’s contention that the entire \$17, 209.11 was spent solely on problems associated with the upgraded

boiler. To the contrary, the evidence shows Syska & Hennessy was working on other issues. As will be discussed below, we find a negative inference from the absence of Syska & Hennessy at trial.

Donahue claims \$16,253.55 for increased costs of labor during the delay. Using a Contract completion date of December 10, 1999, Donahue attributes the entire period from December 10, 1999 to February 23, 2000 as delay resulting from the change in boiler size. Donahue claims 285 hours of labor were expended in that period at \$57.03 per hour. This is a fully loaded amount and includes Donahue's profit and overhead markup of 28%.

Supervision costs claimed by Donahue consist of 1080 hours for Mr. Kimble less the 224 hours included for him in the bid at \$57.03 hour. To this was added a Donahue 28% markup making a total of \$48,817.68.

Donahue claims \$3,200 for vehicle costs of Mr. Kimble's personal car and for a tool allowance; Donahue characterizes these costs as a direct cost of the contract.

## **DISCUSSION**

Donahue argues that the boiler portion of the contract was a prescriptive specification preventing it from varying from the Parker boiler specified in the Steam Boiler Schedule. The specification was not prescriptive. Donahue was not *required* to use the Parker boiler specified in the Steam Boiler Schedule, however, it was certainly justified in using this boiler or an equivalent. Donahue was aware that Mr. Allen had pre-qualified the Parker boiler for the initial procurement. Since it was pre-qualified for the initial sole source procurement, Donahue reasonably concluded it was pre-qualified for either the "competitive" procurement or the alternate.

VA argues that Donahue had no right to rely on the VA's 50% drawings. VA says Appellant had total design responsibility and should have ignored the HCE drawings, obtained the Steris sterilizer specifications, hired an A/E, developed its own design and purchased whatever was necessary for the installation of the VA furnished sterilizer.

The VA provided the three bidders with (50%) design drawings; the successful bidder was expected to use those drawings to complete the design and construct the project. At a minimum, the drawings were provided as guidance/concepts for the design-build bidders. The "Note" that the drawings are "information only" is not consistent with that approach. VA's position would require that bidders design the project prior to bid.

The Specifications state "Install new steam boiler (196 LB/hr of 50 psig steam from RO water)." The Specifications do not require a 7HP boiler. Thus the VA specified that Appellant was to provide a boiler meeting or exceeding the 196LB/hr requirement. The boiler designated on the Steam Boiler Schedule met that requirement.

A properly written and administered design-build contract transfers the risk of design insufficiency from the VA to the design-builder. The owner is shielded when the design results in cost overruns or does not work. *M.A. Mortenson*, ASBCA No. 39978, 93-3 BCA ¶ 26,189. There are two stages in design/build contracting. First, the design/build team must determine from the conceptual drawings in the RFP, if any, and, more importantly, from the specifications, if any, what it will cost to design and build the project. Specifications included in a design/build contract, however, to the extent specific requirements, quantities and sizes are set forth in those specifications, place the risk of design deficiencies on the owner. Thus, the VA reassumed the risk and

warranted the accuracy of the specifications with regard to the 196 LB/hr boiler output.

The VA could simply have stated, “install the Steris 3400 GFP sterilizer and a boiler to operate it.” Such a specification would have made Donahue responsible for choosing a boiler that would properly operate the sterilizer. When, as here, the VA specifies a 196 LB/hr boiler, absent actual knowledge to the contrary a bidder may rely on that information. It was the VA’s A/E who “fine-tuned” the specifications in order to make a 7HP boiler work. It was the A/E who knew from past experience the Steris 3400 “needed” a 15HP boiler producing a 518 lb steam burst. Mr. Allen also obviously knew, although he denied it at one point, that such a burst requirement was required here. It was the A/E who knew that the 7HP boiler would not work if only the bid alternate was awarded. Yet, the specification the VA issued did not mention any of these conditions, making the specifications incomplete and defective. We find that Donahue reasonably relied on the 196 lb/hr boiler specification for its alternate bid.

The VA argues that the 25HP boiler was larger than necessary. We disagree. We find the 25HP boiler was a reasonable solution for meeting the sterilizer requirements. Appellant is entitled to the difference in cost between the 7HP and 25HP boilers, \$3,010, plus the appropriate percentages for overhead and profit set forth at ¶1.88, CHANGES-SUPPLEMENT (FOR CHANGES COSTING \$500,000 OR LESS) (VAAR 852.236-88 (b), (JUN 1987), that provides 10% each for overhead (\$301) and profit (\$331.10) for the party performing the work (Desert Plumbing) and 10% fee for the prime (\$364.21) for a total of \$4,006.31.

Turning to the other aspects of Appellant’s claim, we first consider the delay portion of the claim. Within a week of the Notice to Proceed, Donahue

knew that the 7HP boiler would not work and that its proposed electric alternative would require a 180kW steam generator. Even if someone from Steris said the 150kW might be “adequate,” Syska & Hennessy had specifically advised Appellant that 150kW would not meet the Specifications. Yet Donahue proposed making such a change without disclosing that fact to the VA. The time (September 28 to December 13) and costs associated with the proposed change to the electric steam generator and Appellant’s subsequent decision to abandon its VEP must be borne by Donahue. Thus, Donahue’s failure to timely complete the work was due to its own unreasonable actions. Moreover, a contractor has the burden of showing that the Government extended contract performance time by delaying work on the critical path. *JRR Construction Co., Inc.*, DOT BCA No. 1838, 88-3 BCA ¶ 20,905 In order to establish that the Government is the sole proximate cause of the delay, the contractor must show the absence of concurrent grounds for delay which would have equally delayed the time of completion of the contract. *Coffey Construction Company, Inc.*, VABCA Nos. 3361, 3432, & 3473, 93-2 BCA ¶ 25,788

Even if we were to find there was delay by the VA regarding the boiler, Appellant’s actions surrounding the proposal for the 150kW boiler would have made any delay concurrent and therefore non-compensable. Where there are concurrent (government and contractor) causes of delay, the contractor must prove that the Government's cause was the sole and proximate cause of the delay, and the resulting damages. *Essex Electro Engineers, Inc. v. Danzig*, 224 F. 3d 1283 (C.A. Fed., 2000); *Blinderman Constr. Co. v. United States*, 695 F.2d 552 (Fed. Cir. 1982)

Next we consider Appellant’s claim for reimbursement of A/E fees billed by Syska & Hennesey. We agree with Appellant’s argument that it was not

required to hire an A/E. However, Appellant knew that, while Mr. Allen's drawings were extensive, they were not complete and certainly had limited use in the alternate bid situation. The evidence contradicts Mr. Donahue's testimony that Appellant did not intend to use an A/E for the alternate bid. On September 28, 1999, only one day after Appellant claims to have received the sterilizer specifications, and before any disclosed problem with the size of the boiler, Syska & Hennessy had reviewed the boiler and sterilizer requirements, discovered the size problem and investigated the possible use of the electric steam generator.

Donahue maintains that all of Syska & Hennessy's efforts were directed to resolving the boiler size problem. The record does not support that assertion. No one from Syska & Hennessy supports that claim. The possible use of the electric steam generator was not related to sizing the gas boiler problem; and the record indicates Syska & Hennessy spent considerable time on that issue.

Syska & Hennessy presented no evidence or testimony demonstrating or allocating their efforts. Although some of its effort related to the gas boiler size change, it is impossible to tell how much. Appellant has failed to carry its burden to show the A/E costs that are attributable to the boiler size problem. In addition, Appellant has not convinced us that the change in boiler and pipe size increased the complexity or difficulty of the work.

Next we consider the Desert Plumbing claims for increased costs due to the change in boiler size. Supported by a hand-written entry on a purported bid sheet, Donahue claims that in the base bid, Desert Plumbing offered to design and install the 7HP boiler/sterilizer for \$30,000. There is no indication of what specific items of work were included in Desert Plumbing's original bid. The \$30,000 appears to be all-inclusive. There is no distinction made between installation of the base bid and for the design and installation of the

boiler/sterilizer for the alternate bid. We simply do not know from the evidence in the record whether the installation figures would be increased or decreased. There is nothing in the record that allows us to determine whether the installation costs varied from the 7HP to the 25HP boiler. To the contrary, some of the change orders appear to be items that were included under the term installation for the base bid. We received no credible evidence from Desert Plumbing to support any aspect of its costs. In fact, although asked to do so by Donahue, Desert Plumbing never provided a "breakout" to support the claim.

With regard to the alleged changes resulting from the upgrade from a 7HP to a 25HP boiler, the changes may have been compensable to some extent. Appellant's cursory treatment of both the nature and the costs of the changes, however, prevents us from awarding a judgment for the changes. The record does not support Appellant's broad argument, unsubstantiated by any evidence, that all the changes were direct and foreseeable consequences of the change in boiler size or were not included in the overall installation cost.

On virtually all of the Desert Plumbing claims asserted by Appellant, the "proof" consists of conclusory, one-page "estimates." Data contained in these documents was not susceptible to substantiation or verification through either other documents or testimony. The only evidence in support of these estimates consisted of testimony by a field supervisor and Mr. Donahue with no demonstrated personal involvement in the daily operations of the subcontractors or in the collection and analysis of the information presented in the estimate. Mr. Kimble, when queried about the estimates, testified without further elaboration that they were "reasonable" or he would have no reason to question the amount.

We draw negative inferences from the absence of details and evidence from both Syska & Hennessy and Desert Plumbing. As we said in *Appeal of Bay*

*Construction Co.*, VABCA Nos. 5594, 5625, 5626, 5628, 5831, 02-1 BCA ¶ 31,795, 157,041:

Essentially, Bay failed to produce any witnesses who actually knew or understood what was happening at the time Phase I work was being performed. In these circumstances, we drew the negative inference that, if so questioned, those witnesses would not have provided testimony helpful to the Appellant and would not have substantiated these claims. *Centex Bateson Construction Co.*, VABCA Nos. 4613, 5162-5165, 99-1 BCA ¶ 30,153 at 149,258; *Centrex Bateson Construction Co. v. West*, 250 F. 3d 761 (Fed. Cir. 2000); *Dawson Construction Company, Inc.*, VABCA Nos. 3306, *et al.*, 93-3 BCA ¶ 26,177, *affd. sub nom Dawson Construction Company v. Brown*, 34 F3d 1080 (Fed. Cir. 1994) (Table), *Blount, Inc.*, VABCA No. 3236, 93-1 BCA ¶ 25,474.

Without considering whether or not the alleged costs are precluded by the VA's Supplemental Changes Clause, Appellant has not shown that any of the labor, supervision, vehicle, and tool allowance costs it incurred after December 13, 1999 were solely attributable to the VA. The 33 days it actually took to perform the boiler/sterilizer installation work and have it accepted would have been well within the original contract period had Appellant acted upon information it knew on September 28, 1999.

The assertion of a claim, or mere contention, is not sufficient basis on which to determine that appellant is entitled to relief. Unsupported opinion type statements are afforded little weight when such statements are little more than self-serving conclusions. *L.B. Sanford, Inc.*, ASBCA No. 32645, 93-1 BCA ¶ 25,228 at 125,660; *Newell Clothing Co.*, ASBCA No. 28306, 86-3 BCA ¶ 19,093, *aff'd*, 818 F.2d 876 (Fed. Cir. 1987)

Cost estimates can support a judgment if accounting records are unavailable due to no fault of the contractor. *International Equipment Services, Inc.*, ASBCA Nos. 21,104 and 23,170, 83-2 BCA ¶ 16,675. There the Board noted that:

Even if use of estimates is permissible, the contractor bears the burden of proof. This burden can be satisfied by demonstrating the bases and accuracy of those estimates. The burden is not satisfied by resort to unsupported allegations. [Citations omitted]  
(*International* at 82,924)

We do not condone the VA's behavior in this procurement. Although neither party raised the issue, it is clear that the VA seriously underestimated the cost of the base bid and never obtained sufficient funds to support the project. Even a cursory review of the FAR leads to the conclusion that this purported design/build acquisition was irregular in nearly every aspect. VA failed to recognize its responsibility for the specifications and placed all blame on the Appellant under a misapplication of the principles of design-build contracts. Under the circumstances presented here, we hold for Appellant that the change in boiler size was a compensable change for which Appellant is entitled to the difference in cost between the 7HP and 25HP boiler. With regard to Donahue's other claims, even where the possibility of recovery exists, Donahue failed to provide other than cursory support for the amount it claims. A jury verdict approach can not be utilized when the party seeking relief, as is the case here, has failed to provide credible support for its alleged costs. *Dore & Associates Contracting, Inc.*, AGBCA No. 92-236-1, 95-1 BCA ¶ 27,517; *W. L. Holbrook* AGBCA No. 2000-174-1, (2002 WL 31647883 Nov.14, 2002); *International Equipment*, supra. Thus, there is simply not enough evidence in this Record

providing a reasonable basis for us to formulate a jury verdict. *Fanning, Phillips & Molnar*, VABCA No. 3856R, 96-2 BCA ¶ 28,427, citing *Dawco Construction v. United States*, 930 F.2d 872,880 (Fed. Cir. 1991).

## DECISION

For the forgoing reasons, the Appeal of Donahue Electric, Inc., under Contract No. V593-C5548-99, VABCA No. 6618 is **Sustained** in part and **Denied** in part. Donahue Electric is entitled to a judgment of \$4,006.31 plus interest pursuant to the Contract Disputes Act; all other aspects of the appeal are **Denied**.

Date: **December 27, 2002**

---

William E. Thomas, Jr.  
Administrative Judge  
Panel Chairman

We Concur:

---

Richard W. Krempasky  
Administrative Judge

---

Morris Pullara, Jr.  
Administrative Judge