

**UNITED EXCEL CORPORATION**

**CONTRACT NO. V101DC0183**

**VABCA-6937**

**VA MEDICAL CENTER  
KANSAS CITY, MISSOURI**

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**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY  
ON  
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Respondent, Department of Veterans Affairs (VA or Government) has moved for a judgment as a matter of law on Appellant, United Excel Corporation's (UEC) appeal from the Contracting Officer's (CO) denial of its claim for an equitable adjustment of \$112,818.00 for providing stainless steel diffusers in a new surgical suite and post anesthesia care unit constructed under Contract No. V101DC0183 (Contract) at the Department of Veterans Affairs Medical Center, Kansas City, Missouri (VAMC KC). UEC brings this appeal on behalf of the real parties in interest, Stadium Sheet Metal (Stadium) and Stadium's supplier, Triangle Sales, Inc. (Triangle) who were lower tier subcontractors to UEC's mechanical subcontractor Kansas City Mechanical, Inc. (KCM).

We have before us the Government's MOTION FOR SUMMARY JUDGMENT, UNITED EXCEL CORPORATION'S SUGGESTIONS IN OPPOSITION TO THE DEPARTMENT

OF VETERANS AFFAIRS MOTION FOR SUMMARY JUDGMENT and RESPONDENT'S REPLY TO APPELLANT'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT which will be cited respectively as: (MOTION, p. \_\_\_), (RESPONSE, p. \_\_\_), and (REPLY, p. \_\_\_). The MOTION includes three attachments, (Attachment 1: Declaration of Dennis Sagness, Attachment 2: Declaration of Eric R. Carey, Attachment 3: text of RFP 004-AE, Project No. 589-401 provisions) which will be cited as (MOTION, Att. \_\_\_). The RESPONSE includes one Attachment, (Affidavit of John H. Stone), which will be cited as: (RESPONSE, Att. 1). Included with the Att. 1 are two letters from Triangle to Stadium and three reduced reflected ceiling plan drawings for the project operating rooms. The REPLY includes one attachment, (Declaration of Dennis Sagness) which will be cited as: (REPLY, Att. 1). In addition to the above, the record before us includes the pleadings (cited as COMPLAINT, para. \_\_\_ and ANSWER, para. \_\_\_ ) and the Appeal File consisting of 44 numbered exhibits (cited as R4, tab \_\_\_).

Both entitlement and quantum are before the Board.

## FINDINGS OF MATERIAL FACT FOR THE PURPOSE OF RULING ON THE MOTIONS

### **General**

The VA issued Request For Proposals (RFP) No. 004-AE on July 25, 2000 soliciting proposals for a design-build contract to construct “New Surgical Suite and Post Anesthesia Care Unit at VAMC KC. The VA awarded UEC the fixed-price Contract in the amount of \$11,718,000 on September 29, 2000. UEC received the Notice to Proceed with the work on November 1, 2000, establishing the original Contract completion date as April 25, 2002. (R4, tabs 1-2)

RFP Part I-General, Paragraph 1.2 A., ACQUISITION METHOD, of the RFP defines design-build as “the procurement by the Government, under one contract, with one firm or joint venture (JV) for both design and construction services for a specific project.” UEC’s architectural partner for the Contract was the firm of Hoefler Wysocki Architects, LLP (HWA).

(MOTION, Att. 1; R4, tabs 1, 9)

The VA’s architect engineering consultant who developed the RFP plans and specifications and who also participated in review of the UEC/HWA submissions on behalf of the VA was J. Christopher Gale & Co. (JCG).

(R4, tabs 32-35)

Paragraph 1.2.C in Part II of the RFP, DESIGN-BUILD TEAM, states:

The RFP documents are intended to define existing conditions, certain required items, and design parameters to be included in the project. It is the DB Team’s responsibility to complete the documents and construction in a manner consistent with the intent of the RFP documents within the required time period (contract length).

(MOTION, Att. 1)

Paragraph 1.1.A.1 in Part IV, POST Award Requirements, of the RFP states:

The Design-Build A/E (DB A/E) shall prepare and submit complete construction documents for review and approval by the VA in accordance with standard professional practice, the Veterans Affairs RFP (VA RFP), and prevailing codes. A list of drawings and specifications shall be included with each design submittal for VA reviews. The review will incorporate client comments on functional relationships and technical peer review comments (by others). The DB A/E shall submit construction documents for review at (30%) and (95%) completion stage. If documents are not complete for the required stage a post review may be required the cost of which will be borne by the DB team. See the section IV.4 (Construction Period Submittals) for distribution of approved 100% construction documents. 95% documents with comments incorporated will constitute 100% final construction documents. [sic]

(MOTION, Att. 1)

Paragraph 1.1.C.1.a. and b. of Part IV of the RFP required in part:

- a. The DB team shall prepare and submit complete construction specifications in accordance with standard professional practice and the VA RFP.
- b. The construction specifications shall be in compliance with the VA RFP.

In July and November 2001, UEC, on behalf of KCM/Stadium submitted two change order proposals totaling \$119,005 for the additional costs of installing stainless steel diffusers in six operating rooms. The VA disagreed that UEC's installation of the stainless steel diffusers was a change to the Contract entitling UEC to an equitable adjustment. (R4, tabs 21-24)

UEC, on May 3, 2002, submitted a certified claim for an equitable adjustment in the amount of \$112,818 resulting from installing stainless steel instead of aluminum diffusers and for installing higher priced, longer diffusers allegedly required by the VA.

(R4, tab 26)

By final decision, dated June 18, 2002, and received by UEC on June 25, 2002, the Contracting Officer denied the claim. This appeal followed.

(R4, tabs 25-29)

**Stainless Steel vs. Aluminum**

The RFP Specification applicable to the instant case is section 15840.2.16, Air Outlets and Inlets, which states, in relevant part:

A. Materials:

1. **Steel or aluminum** except that all units installed in **operating rooms** shall be **aluminum or stainless steel**. Provide manufacturer's standard gasket.
2. Exposed Fastenings: The same materials as the respective inlet or outlet. Fasteners for aluminum may be stainless steel.
3. Contractor shall review all ceiling drawings and details and provide all ceiling mounted devices with appropriate dimensions and trim for the specific locations.

\* \* \* \* \*

C. Air Supply Outlets:

\* \* \* \* \*

2. Linear Grills and Diffusers: Extruded **aluminum**, manufacturer's standard finish, positive holding concealed fasteners.

\* \* \* \* \*

3. Air Distribution panels for operating rooms: Clean room type, low-aspirating, vertical pattern unit composed of plenum (shell), baffle or valve mechanism and removable perforated face plate. Exposed components shall have a manufacturer's standard **aluminum** finish.

a. Shell: **Aluminum** with extruded margin. Provide plaster frame for units in plaster ceilings.

b. Inlet: Round neck, with opposed blade damper or valve mechanism, to evenly distribute air over entire diffuser.

c. Perforated Plate: **Aluminum**, removable for cleaning, with safety retention chain. Provide for damper adjustment without removing air supply providing downward airflow over the operating table and fixed nonadjustable multiple slot plate.

4. Operating Room Air Distribution Devices:

a. Devices shall consist of a non-aspirating perforated panel center air supply providing downward airflow over the operating table and fixed nonadjustable multiple slot perimeter panels surrounding the operating table area to provide an air curtain which shall be projected outward from the operating table area at not less than a five degree angle nor more than a 15 degree angle. Velocity of air distribution at operating

table height shall not exceed 12/m/min (40 feet per minute) for the center supply or 15/m/min (50 feet per minute) for the air curtain. Perforated pressure plates shall be provided over the perimeter and center air distribution faces to equalize pressure and airflow throughout the system.

b. All components of the system **shall** be fabricated of 1.0 mm (20 gauge) 18-8 **stainless steel**, No. 4 finish. All distribution components and pressure plates shall be attached to the face panels at both the perimeter and center. The face panels shall be retained with 1/4 turn fasteners. Plenums shall be supplied by the manufacturer and shall be sized to permit them to be easily wiped out by hand with germicidal solution for sterilization purposes and all horizontal corners of the plenums shall have a minimum radius of 20 mm (3/4 inch). Connecting elbows shall be radialized and be sized to permit manual sterilization of the plenums.

(R4, tab 5, emphasis added)

In a February 2001 meeting reviewing the UEC/HWA 90% design submission, a formal comment was made by VA representatives that the RFP required stainless steel operating room HVAC components. UEC/HWA responded that the 90% drawings showed aluminum components and that it would revise the drawings. (R4, tab 32)

In various UEC Shop Drawing submittals for OR HVAC components between May and October 2001, the VA approved the UEC submittals subject to the provision of stainless steel components. (R4, tab 44)

Included in the material supporting the claim and request for final decision is an undated letter from Triangle to Stadium, noting that, prior to submitting its bid, it was aware of the conflicting provisions in the specifications regarding the material requirements for registers/diffusers in the operating

rooms required to be stainless steel or aluminum. Triangle priced aluminum registers/diffusers in its bid in order to provide the “best value.”

R4, tab 25; RESPONSE, Att. 1))

### **Diffuser Size and Quantity**

Drawings SDA-1, SDA-2 and SDA-5, issued as part of an August 11, 2000 Amendment to the RFP, depict the reflected ceiling plans for the operating rooms to be constructed under the Contract. SDA-1 applies to Operating Rooms Nos. 1, 2, 3 and 5. SDA-2 and 3 apply to Operating Rooms Nos. 4 and 6 respectively. These drawings indicate that linear slot air distribution components around the perimeter of the operating tables and center air distribution panels centered on the operating tables were required as follows:

- a. SDA-1, Operating Room #2 Reflected Ceiling Plan.  
1 each - 24 in. x 96 in. supply air register, the length of which goes from east to west.  
4 each - 15 in. x 57 in. perimeter panels going north to south.  
4 each - 15 in. x 75 in. perimeter panels going east to west.
  
- b. SDA-2, Operating Room #4 Reflected Ceiling Plan.  
1 each - 24 in. x 96 in. supply air register, the length of which goes from north to south.  
4 each - 15 in. x 57 in. perimeter panels going east to west.  
4 each - 15 in. x 71 in. perimeter panels going north to south.

- c. SDA-3, Operating Room #6 Reflected Ceiling Plan.
  - 1 each - 24 in. x 48 in. supply air register, the length of which goes from north to south
  - 2 each - 15 in. x 60 in. perimeter panels going from east to west.
  - 4 each - 15 in. x 43 ½ in. perimeter panels going from north to south.

These three drawings identify the center and perimeter HVAC air distribution devices as “supply air registers.” With regard to the perimeter installation at issue here, these components will be referred to as “diffusers.”

(R4, tab 3; MOTION, Att. 1)

The UEC/HWA 100% construction drawing for HVAC ductwork for the operating rooms depicts a reflected ceiling plan showing continuous, perimeter diffusers around the operating tables. (R4, tab 8)

The center and perimeter diffusers are part of a ventilation system that delivers clean, filtered downward air at specified volume and pressure around an operating table to create an air curtain around the operating table area. This insures a sterile operating environment by preventing any airborne contaminants from outside the area covered by the air curtain provided by the diffusers.

(R4, tabs 5, 9, 30)

The VA approved a May 2001 shop drawing indicating the use of 4' x 12" stainless steel diffusers around the perimeter of the operating tables. However, subsequent KCM/Stadium submittals proposing the use of 4' diffusers in October 2001 were disapproved based on the UEC/HWA 100% design operating room reflected ceiling plan calling for the use of longer, continuous diffusers. A February 2002 submittal proposing the use of longer, continuous perimeter diffusers around the operating tables was approved. These 12, 10, and 6' diffusers had to be custom fabricated by the manufacturer at a premium of \$10,938 because they were not stock sizes. (R4, tab 44; Response, Att. 1)

In October 2001, Stadium initiated a series of six Requests for Information (RFI) pointing out discrepancies between the architectural and mechanical Contract drawings and the dimensions reflected in the HWA prepared grill schedule which was part of the UEC/HWA 100% design pertaining to the inlet and supply grill layouts in the operating rooms. In each instance, HWA responded to the RFI as follows:

The ceiling diffuser design layout is intended to provide a linear air curtain to provide a clean air zone around the operating table area. Continuous linear air diffusers are to be furnished with inlet plenums to match indicated airflow quantities. The continuous diffuser length shall match the architectural reflected ceiling plans.

The VA Senior Resident Engineer concurred with the HWA RFI response in each instance. HWA's response to the RFIs acknowledged that the grill schedule it had prepared as part of the 100% design submission was incorrect with regard to operating room perimeter diffusers. (R4, tabs 7, 9-20; MOTION, Att. 1)

## DISCUSSION

We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party carries the burden of showing that there is no genuine issue of material fact; all doubts over whether a genuine factual dispute exists will be resolved in favor of the non-movant. *Sabbia Corporation*, VABCA No. 5858, 99-2 BCA ¶ 30,463; *Saturn Construction Company*, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff d. sub nom, Saturn Construction Company v. VA Medical Center, Allen Park, Mich.*, 991 F.2d 810 (Fed. Cir. 1993) (Table); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Our role in deciding a motion for summary judgment is to determine whether a genuine triable issue of material fact exists. The existence of a genuine, triable issue of material fact cannot be established by a non-movant simply challenging a fact or by an unsupported conclusion. The non-movant must show, by pointing to some part of the record or additional evidence, that material facts differ significantly from the way the movant has presented them and upon which a reasonable fact finder, drawing inferences in favor of the non-movant, could decide in favor of the non-movant. *Centex Bateson Construction Co.*, VABCA No. 5166 *et. al.*, 97-2 BCA ¶ 29126; *Fire Security Systems, Inc.*, VABCA No. 3086, 90-3 BCA ¶ 23,235; *Hengel Associates*, VABCA No. 3921, 94-3 BCA ¶ 27,080; *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539 (Fed. Cir. 1993); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

### **Stainless Steel vs. Aluminum**

The VA concedes that the Contract specifications contained conflicting provisions regarding material requirements for registers, grilles and diffusers in the operating room HVAC installation because they could be read as permitting the use of either aluminum or stainless steel. The VA alleges, however, that this discrepancy was “patent” and that, since UEC failed to inquire about what material was required, it can not take advantage of its unilateral interpretation that aluminum grilles, registers and diffusers were permitted. UEC maintains that the admitted ambiguity in the specifications was not “patent” citing the numerous specification sections allowing the use of aluminum diffusers.

It is well settled that where, as in this case, two reasonable interpretations of a specification are possible, the specification is ambiguous. Under the *contra proferentum* rule, an ambiguous specification is construed against the drafter (the VA) unless the ambiguity is so “obvious” or “glaring” that it is a “patent

ambiguity.” *Roy Kay, Inc.*, VABCA No. 5113, 97-2 BCA ¶ 29,271; *Grumman Data Systems Corp. v. Dalton*, 88 F.3d 990 (Fed. Cir. 1996).

Because it is undisputed that Stadium/Triangle was aware of the specification discrepancies with regard to material requirements for the diffusers prior to submitting its proposal to UEC/HWA and the VA, it is unnecessary to determine whether the aluminum/stainless steel discrepancy was “patent.” Where a contractor/bidder has actual knowledge of an ambiguity be it “patent” or “latent,” it has an obligation to inquire about the ambiguity. Since UEC failed to inquire about the aluminum/stainless steel discrepancy, it can not now prevail on an equitable adjustment claim resulting from its unilateral resolution of the ambiguity. *South-West Marine, Inc.*, ASBCA No. 53,561, 02-1 BCA ¶ 31,834; *Canam Construction, Inc.*, VABCA No. 2069, 85-1 BCA ¶ 17,793; *James A. Mann, Inc. v. United Sates*, 535 F.2d 51 (Ct. Cl. 1976).

UEC argues further that, because this was a design-build contract and the RFP drawings and specifications established only “design parameters,” it was entitled to choose aluminum diffusers as the most economic way to achieve the design intent. We see nothing in the language of the Contract supporting this argument. The Contract is clear that, in executing the final Construction documents, UEC was constrained to follow the requirements of the RFP specifications and drawings and this constraint required UEC/HWA to design a diffuser configuration, using stainless steel diffusers, which would meet the sterile air curtain requirements. We also see nothing in the case law, and UEC has provided none, for the proposition that the well settled law relating to the contract interpretation is suspended or abrogated in a design-build contract. To the contrary, the case law indicates that a design build contract shifts risk to a contractor that a final design will be more costly than the bid price to build and that the traditional rules of fixed-price contract interpretation still obtain. UEC

was not relieved of its obligation to inquire about the aluminum stainless steel diffuser discrepancy because the Contract was design-build. *Donahue Electric, Inc.*, VABCA No. 6618, 03-1 BCA ¶ 32,129; *Elam Woods Construction Company, Inc.*, ASBCA No. 31,305, 01-1 BCA ¶ 31,305; *Dillingham Construction, N.A., Inc. v. United States*, 33 Fed. Cl. 495 (1995).

UEC also urges us to create a new convention of contract interpretation applicable to design-build contracts because use of the traditional “patent ambiguity” rules of interpretation “unduly punish” contractors where a contractor is forced to bid on plans and specifications that, by definition, are incomplete. UEC asks us to look to tort law and allocate fault in this case through use of comparative negligence principles.

This Board has apportioned damages in the past based on a factual assessment that both the VA and a contractor’s actions caused an increase of costs. *Jem Development Corp.*, VABCA No. 3272, 91-2 BCA ¶ 24,010; *Ultra Const. Co.*, VABCA No. 1873, 85-2 BCA ¶ 18,007. However, as we discussed above, there is nothing in the terms of the Contract or the law that would permit us to ignore the Contract language and establish a new rule of allocating the risk that a patent ambiguity exists in the specifications of a design-build RFP. Moreover, even were we so disposed, we would not do it in this case since it is clear that UEC had actual knowledge of the aluminum/stainless steel discrepancy in the RFP specifications prior to submitting its price proposal.

### **Diffuser Size and Quantity**

For reasons unknown to us, the parties can not agree on the configuration of the diffusers actually installed over the six operating tables in VAMC KC. The VA seems to think that the 46 shorter perimeter diffusers configuration reflected in drawings SDA-1, 2 and 3 were what UEC installed. UEC, on the other hand, by the declaration of Mr. Stone, Triangle's President, represents that the longer, custom manufactured, continuous diffusers were installed. However, this apparent dispute on what was actually installed is not material to our ruling on the VA's MOTION. The responsibility for executing the final design to achieve a ventilation system over the operating tables meeting the Contract requirement to form a sterile air curtain rested with UEC/HWA. The UEC/HWA 100% design clearly provide for use of the longer, continuous diffusers and the UEC submittals of the perimeter diffusers show that, at some point after the VA had approved use of the shorter diffusers as reflected in drawings SDA-1, 2, and 3, UEC/HWA determined to install continuous diffusers to meet the design requirements.

UEC avers that this change to the longer diffusers was directed by the VA and that the shorter, stock diffusers would have accomplished the air curtain requirements. This averment rests solely on Mr. Stone's representation in his Affidavit included with the RESPONSE that Triangle had to provide the longer, custom diffusers "[d]ue to the VA's position." UEC points to nothing in the record that explains, supports or corroborates this assertion. Such a general, conclusory statement, unaccompanied by citation to any relevant supporting facts, does not a dispute as to a material fact make. *Fire Security Systems, Inc.*, VABCA No. 3086, 90-3 BCA ¶ 23,235; *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d. 831 (Fed. Cir. 1984) , *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986).

It is undisputed that UEC/HWA's obligation under the Contract was to complete the final design, including the operating room perimeter diffuser configuration. It is undisputed that the UEC/HWA final design provided for the longer, continuous perimeter diffusers. We thus conclude that the use of the continuous diffusers as part of the sterile air curtain system over the operating tables resulted from UEC/HWA's design choice. There is no credible evidence that the final design or installation of the perimeter diffusers was anything more than what the VA represents it is, UEC/HWA's discharge of its obligation under the Contract. Whether UEC/HWA's installation was more costly than Stadium/Triangle's original proposal and which party bears the responsibility for any increase is a matter to be resolved between UEC and its subcontractors.

*Donahue Electric, Inc.*, VABCA No. 6618, 03-1 BCA ¶ 32,129.

**DECISION**

For the foregoing reasons, the Respondent, Department of Veterans Affairs' MOTION FOR SUMMARY JUDGMENT is **GRANTED**.

Accordingly, the Appeal of United Excel Corporation under Contract No. V101DC0183, VABCA-6937 is **DENIED**.

DATE: **December 11, 2003**

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RICHARD W. KREMPASKY  
Administrative Judge  
Panel Chairman

We Concur:

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MORRIS PULLARA, JR.  
Administrative Judge

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PATRICIA J. SHERIDAN  
Administrative Judge