ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Steele & Sons, Inc.	)	ASBCA No. 49077
	)	
Under Contract No. DAEA08-93-C-0053	)	

APPEARANCE FOR THE APPELLANT: Mr. A.C. Fox
Vice President

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
CPT Jody M. Hehr, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE KIENLEN

This appeal involves five claims arising out of a gas pipeline construction contract which was completed ahead of schedule. Claim 1 involves the size of regulators and meters; claim 2 concerns the number of pipeline markers; claim 3 involves delay in access to building 710; claim 4 pertains to multiple re-submissions and corrections to the as-built preliminary drawings; and, claim 5 is a differing site condition involving concrete under asphalt roadways. Only entitlement is in issue. The appeal is sustained in part with respect to the first four claims. It is denied with respect to the fifth claim.

OVERVIEW OF SOLICITATION AND AWARD

FINDINGS OF FACT

On 12 July 1993 the U.S. Army's 7th Signal Command at Fort Ritchie, Maryland issued a solicitation for the installation of an underground gas piping loop in the family housing areas. Two bids were received: Steele & Sons, Inc. at $129,756, and Callas Contractors at $314,400. (R4, tab 2) The appellant's bid was within the Government's estimate range of $123,024 minimum and $166,445 maximum (R4, tab 39; tr. 1/21-23). The award was made to Steele & Sons, Inc. on 20 September 1993 (R4, tab 1). Upon receipt of the notice to proceed, the contract required the work to be completed within 120 days, which was 17 February 1994 (R4, tab 9). The completion date was extended to 30 July 1994, due to inclement weather, at no cost to either party (R4, tab 15).

The gas piping loop was a medium pressure distribution system for seven family housing areas. The gas loop eliminated the undesirable qualities generated in dead end

distribution systems. (Tr. 3/106) The contract included the removal of an underground propane tank serving the commanding general's quarters (building 710), and new meters and pressure regulators connecting the piping to buildings 360, 400, 402, and 500 (R4, tab 1). Building 360 is a dining facility, and buildings 400, 402, and 500 are enlisted housing barracks (tr. 1/49-50, 164-65, 2/60-61, 3/17-24; R4, tabs 52J, 52O, 52U, 52Y, 52CC, 52FF). The contract required the new piping to be laid so as "to not interfere with the underground fuel oil tanks serving buildings 360, 400, 402 and 500 which are to remain in service" (R4, tab 1, section 01010 ¶ 1.1.4).

A medium pressure distribution system operates at a maximum pressure of 50 pounds per square inch. At Fort Ritchie the system operated at 15 pounds per square inch. High pressure systems can run to a thousand pounds of pressure per square inch, while low pressure systems have less than one pound of pressure per square inch. At Fort Ritchie the system was served by four 33,000 gallon LP fuel tanks. The regulators maintain 15 pounds of pressure from the storage tanks throughout the system until the fuel reaches a particular building, where a service line regulator drops the pressure to 11 inches of water column, which is less than one pound of pressure. (Wiles, tr. 3/8-11)

The contract included the following standard clauses: SUSPENSION OF WORK (APR 1984) FAR 52.212-0012, CHANGES (AUG 1987) FAR 52.243-0004, and DIFFERING SITE CONDITIONS (APR 1984) FAR 52.236-2.

CLAIM NO. 1 – Meters and Regulators

FINDINGS OF FACT

The gas meters and regulators for buildings 360, 400, 402, and 500 had to accurately measure and handle the gas pressures for the flow rates indicated for each building (R4, tab 1, 022685 ¶ 2.3.2, 2.4). The flow rates were not stated in the contract or otherwise provided. Flow rates are a function of the gas consumption rates of the various gas appliances or devices used in a particular building (tr. 3/119). Although the appellant did not know the specific flow rates, the appellant was prepared to provide meters and regulators sized for the gas devices used in those buildings.

The heating system in each of these buildings was fueled by oil; and, the drawings made it clear that the existing "fuel oil tank[s] [were] to remain." (R4, tab 52II, sheets 5 & 6 of 7) The specifications also made it clear that the "underground fuel oil tanks serving Buildings 360, 400, 402, and 500 [were] to remain in service" (R4, tab 1, section 01010, para. 1.1.4).

In preparing its bid, the appellant relied upon the contract documents and its vendor's quote of $2,856.00 for the regulators and meters (AR4, tab A5 at 3; tr. 3/121;

R4, tab 47). These meters and regulators were designed and used for residential or light commercial use (tr. 3/26-27; R4, tabs 49A, 49B). The Government's cost estimate for meters and regulators was $856 less than the appellant's estimate (R4, tab 39). We find that the meters and regulators of the type bid by the contractor were appropriate for the existing gas devices in buildings 360, 400, 402, and 500 (R4, tabs 49A and 49B).

The appellant's initial submittal package on 13 October 1993 did not indicate the specific size of the meters and regulators (tr. 3/100, 103; R4, tab 49B). By letter of 19 October 1993 the appellant requested "additional information, not provided in the specifications . . . to properly size" the meters and regulators for buildings 360, 400, 402, and 500 (R4, tab 7; tr. 3/13-14, 16). On 26 October 1993, the Contracting Officer's Representative approved the initial submittal package (tr. 2/73; R4, tab 49B).

On 3 December 1993, the Government provided flow rates to the appellant for each of the four buildings. Those flow rates required larger capacity meters and regulators at costs higher than those bid by the appellant. (R4, tabs 13-14; AR4, tab A5) The Government's flow rate was based on the demand of future gas devices, once the dual heating systems to be installed in those buildings were converted from oil to gas. It was part of the Government's master plan to install dual fuel burners in those four buildings, and its "future down the road dream was to have natural gas piped to Fort Ritchie to tie in with this gas line." (Tr. 3/19, 3/87)

Except for building 402,[1] none of the conversions to dual fuel burners had begun at the time this contract was awarded. As we found above, the specifications and the drawings specifically indicated that the oil fuel tanks were to remain. There was nothing to put the appellant on notice that the Government had long range plans to convert the heating systems from oil to gas. Thus, there was nothing in the contract or otherwise to suggest that the Government wanted meters and regulators sized for gas fired boilers which were not in operation or not even installed in those buildings. The Government's long range plan to convert to gas was not disclosed to the appellant prior to contract award (tr. 3/107).

DECISION – Meters and Regulators

The appellant contends that it had no way of knowing that the Government wanted meters and regulators sized for a future gas conversion plan. The Government argues that the absence of the flow rates was a patent ambiguity that shifted to the appellant the responsibility for the failure to specify the flow rates for its future gas conversion plan.

Although the contract did not contain the flow rates for the gas appliances used in the four buildings, there was no ambiguity about the fact that the appellant was

responsible for providing meters and regulators that were properly sized for the gas appliances in use in those buildings. However, instead of requiring meters and regulators sized for gas appliances used in those buildings, the Government required meters and regulators sized for gas appliances that were to be installed and used in the future. This was not an ambiguity, it was a change in the contract requirements. The appellant is entitled to an equitable adjustment under the Changes clause for the additional expense of providing greater capacity meters and regulators.

CLAIM NO. 2 – Additional Pipeline Markers

FINDINGS OF FACT

The contract required pipeline markers "on both sides of every roadway crossing" (R4, tab 52J, Drawing Note 2, Sheet 7). The purpose of the marker is to warn anyone digging in the area of the presence of the gas pipeline. Digging in the area is most likely to occur during maintenance of utilities, which are normally located along the road side. (Tr. 1/171-72, 2/191, 3/43, 85, 122) The contract did not define "roadway crossing," nor did it require markers at any other location.

The appellant installed pipeline markers at the seven locations where the new gas pipeline crossed roadways. This did not include any markers at driveways or parking lots. (Tr. 1/85-86) During the final inspection on 17 May 1994, the Government said it wanted 12 additional pipeline markers at various parking lots and driveways (R4, tabs 22, 23). By letter of 18 May 1994 the appellant took exception to the punch list requirement for pipeline markers at driveways and parking lots. The appellant stated:

> According to Note 2 pertaining to the detail entitled "Propane Gas System Pipeline Marker" shown on Sheet 7 of 7 of the Contract drawings, "The markers shall be located on both sides of every **roadway** crossing." While each contract is independent, the requirements for subject Contract are identical to our two previous contracts in regard to providing such signs, and that interpretation was acceptable to the Government on those previous contracts. We have always interpreted that note [the marker requirement] to mean that the signs are required strictly at road crossings; not at driveways, parking lots and other miscellaneous paved surfaces. Consequently, we prepared our bid on the basis of providing signs at the seven roads to be crossed (two signs per crossing) along the new gas line routes.

(R4, tab 24) On 23 May 1994 the contracting officer directed the appellant to install 12 extra pipeline markers at driveways and parking lots as noted on the punch list, plus one additional marker at the driveway for building 710, the commanding general's quarters (R4, tab 25). The contracting officer's letter rejected the appellant's interpretation:

> [Your letter] provided this office with your interpretation of Note 2 of sheet 7 of 7 for the subject contract. Note 2 states that "The markers shall be located on both sides of every roadway crossing." This office contends that a roadway, as defined in Webster's, is the strip of land over which a road passes and a road is an open way for vehicles, persons and animals.

There was no evidence that there were utilities buried along side of the driveways and the parking lots where the government directed installation of additional pipeline markers.

Although the Government argued that in two prior contracts the appellant installed signs at driveways and parking lots in accord with the Government's interpretation of "roadways," its evidence was not convincing (tr. 1/210-12, 2/84-89). The appellant testified that it placed signs only at road crossings, and offered credible evidence that the markers purchased for those contracts were only enough for the road crossings, with no extra markers for driveways or parking lots (tr. 3/123-30; AR4, tab 31). There is insufficient evidence to establish that there was a course of dealing under the prior contracts with respect to the placement of pipeline markers at driveways and parking lots.

Both parties rely on the Federal Pipeline Safety Regulations as the industry standard on the placement of pipeline markers (R4, tab 50D; 49 C.F.R. (1993); app. brief at 6; Gov. brief at 72). Those regulations, promulgated pursuant to the Natural Gas Pipeline Safety Act of 1968, as amended (49 U.S.C. § § 16.101 *et seq.*), embody basic standards governing the placement of gas pipeline markers by the owners of pipelines. The regulations expressly require markers only at public roads and railroads, leaving it to the pipeline operator to identify any other necessary locations. Section 192.707(a) reads as follows:

> **§ 192.707 Line markers for mains and transmission lines.**
>
> (a) Buried pipelines. Except as provided in paragraph (b) of this section [not applicable here], a line marker must be placed and maintained as close as practical over each buried main and transmission line:
>
> (1) At each crossing of a public road and railroad; and

(2) Wherever necessary to identify the location of the transmission line or main to reduce the possibility of damage or interference.

DECISION – *Pipeline Markers*

The Government relies for its interpretation on Webster's II New Riverside University Dictionary, which defines the term roadway as "[a] road, esp[ecially] the part over which vehicles travel;" and, defines the term road as "[a]n open, gen[eral] public way for the passage of persons, vehicles, and animals." Both parties argue that their interpretation is consistent with trade practice and Federal regulations for the placement of pipeline markers at public road crossings.

According to the dictionary definition cited by the Government, a "roadway" is synonymous with "road," or, more particularly, to that part of a road over which vehicles travel. Which ever meaning is intended, the essence of its meaning is that it is a "way" that is open to the general public for the passage of vehicles. Driveways and parking lots have different meanings. In its common understanding, while driveways are for the passage of vehicles from the public way, the driveway is for private use and not intended for open, public passage of vehicles; and, while parking lots may be open for public use, they are not intended for the passage of vehicles. (WEBSTER'S NEW INTERNATIONAL DICTIONARY (3rd Edition, 1971)) We must give language "its ordinary and commonly accepted meaning unless it is shown that the parties intended otherwise." *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 976 (Ct. Cl. 1965).

The contract does not provide for any special placement for markers; and, we have found no credible evidence that "roadway" in the contract was intended to include "driveways" and "parking lots." We conclude that the appellant's interpretation is the only reasonable one. The appeal with respect to this claim is sustained.

CLAIM NO. 3 – Delayed Work at Building 710

FINDINGS OF FACT

The Government's contract administrator testified that the appellant was required to give notice before working at individual housing units, especially at building 710 because it was the commanding general's quarters (tr. 1/179-80). The contract, however, did not require such notice (R4, tab 1). Nevertheless, the Government inspector told the appellant that it had to give notice, and receive permission, before working at the general's quarters (tr. 1/68, 72).

According to the appellant's 4 April 1994 revised construction progress schedule, the appellant planned to excavate and remove the underground storage tank at building 710 on or about 17 July (tr. 1/100-01; R4, tabs 15, 50A). The appellant accelerated its performance.

On 3 May 1994 the appellant's superintendent, Charles Summers, advised the Government that it was ready to install the service line to building 710 and sought permission to work there. At that time the appellant was told it would have to wait until it was given clearance. (R4, tab 48; tr. 1/106-07)

On 4 May, the appellant sent two of its laborers home and spent the day installing the interior piping in buildings 402 and 500 (tr. 1/90-91, 107-08; R4, tab 48, 51B). Although it rained on 4 May, Mr. Summers testified that the rain would not have prevented work outside. The prior days work was done on 5 May. We find that the weather prevented work related to the service line to building 710 on 4 May 1994, because there was work which was available to be done on that day (tr. 1/107-13). On 6 May the appellant worked inside on building 402. The appellant did not work on the weekend of 7 and 8 May 1994 (Tr. 1/89-90, 2/145-46; R4, tab 48).

The appellant made several inquiries of the Government as to when it would be allowed to work at building 710. The appellant had idle rental equipment waiting for clearance to work at building 710. (AR4, tab 31, report 44; tr. 1/88) The appellant kept a rented trencher on hand because of the uncertainty of access to building 710 and because of the economy of a weekly vs. daily fee structure, taking into account the pickup and delivery costs (AR4, tab C2; tr. 1/89, 148, 121).

Mr. Shaffer, the Government's alternate COR, believed that the appellant had plenty of work to do and did not need to work at building 710 to keep busy. He did not advise the appellant until Monday, 9 May, when he gave the appellant a memo advising the appellant that it could work at building 710 on 12 and 13 May 1994. (AR4, tab 31, report 44; tr. 1/68-79, 88-89; R4, tab 48, Shaffer's memo of 9 May)[2]

On 9 May the appellant's crew spent a 9 hour day installing meters, dressing up the area behind building 400, and getting ready to lay the asphalt the next day; on 10 May 1994 the crew spent a 9 hour day laying asphalt; and on 11 May the crew spent a 10 hour day performing grass restoration work, installing the remainder of the meters and interior piping, and installing the bollards[3] at building 360. (Tr. 1/94-95; R4, tabs 48, 51 B) The appellant's assertion that crews were worked inefficiently solely to keep them on the payrolls is not convincing since they worked several 9 to 10 hour days.

On 12 May the appellant's crew spent a 9 hour day laying the remaining 1 inch service line to the commanding general's quarters, using the trencher it had rented (R4, tabs 48, 51B, 51D). On 13 May the appellant's crew spent a 9 hour day removing the underground storage tank and repairing the driveway at the commanding general's quarters, pouring the concrete pads for the meters, and painting the outside piping (R4, tabs 48, 51B, 51C). There is no evidence that this change in the work schedule at building 710 delayed the overall completion of contract performance.

On 13 May 1994 the appellant returned the trencher to Rentals Unlimited, Inc. (R4, tab 51D). But for the Government-caused delay in access to building 710, the appellant would have finished trenching operations and returned the trencher on 6 May, rather than 13 May. The appellant paid $2,440.26 to rent the trencher from 27 April 1994 to 13 May 1994. The weekly rental charge was $1,000. (R4, tab 51D, invoice is date stamped RECEIVED May 19, 1994)

DECISION – *Delayed Work*

The appellant claims $6,391.53 for additional material costs, extended overhead, and resources which were underutilized, but kept available during the delay in performing the work at building 710.

We found that the appellant did not establish that it was unable to reallocate its labor resources effectively, and thus did not establish that the delay in access to building 710 delayed the overall completion of the contract work. However, the appellant would have completed trenching operations and returned the rented trencher on 6 May, but for the delay in access to building 710. Because of the delay, we found that trenching operations and return of the rented trencher were not completed until 13 May. As a result we found that the appellant incurred an additional one week rental cost.

The Government acknowledged in its brief that this contract did not require prior notice of access to contract sites (Gov. br. at 78). There was, however, an implied duty of cooperation which obliged the Government to make the site available upon reasonable notice. Given the situation, the appellant's one day notice was reasonable. It was the Government's choice to deny access to building 710 from 4 May to 12 May.

The Government relies on *Ben C. Gerwick, Inc. v. United States*, 285 F.2d 432 (Ct. Cl. 1961) for the proposition that unless the contract expressly covenants to make the site available at a particular time, the contractor must establish that the Government was at fault. In *Gerwick* the delay was caused by the dredging contractor's failure to make the site available. That case is not applicable. In *Gerwick* the legal theory was based on a breach of contract, not on an equitable adjustment. Even more important, "*Gerwick* was decided before the use of the suspension of work clause had become widespread in

Government procurement." *Fruehauf Corp. v. United States*, 587 F.2d 486, 493 (Ct. Cl. 1978) The instant contract contains a suspension of work clause.

Further, in this case it was the Government that unilaterally choose not to make the site available. The appellant must cooperate with the Government in its scheduling, but need not bear the extra costs made necessary by the Government's decisions. The appeal of this claim is sustained to the extent the appellant incurred additional costs for the extended rental of the trencher.

CLAIM NO. 4. – Delayed As-Built Drawing Approval

FINDINGS OF FACT

The as-built drawing approval process begins with the appellant submitting preliminary as-built drawings of the pipeline installation. After the Government approves the preliminary as-built drawings, it returns them to the contractor with CAD disks so that the contractor can prepare the final as-built drawings. (Tr. 2/102-25, 122-23)

Mr. Samuels, the Government's primary draftsman, had a personal standard requiring the as-built drawings to be accurate within 4" of the actual as-built conditions (tr. 2/214, 234). Mr. Wiles, the Chief of Operations and Maintenance at Ft. Ritchie, wanted no variance (tr. 3/45-46). The contract was silent on this issue. During contract performance the appellant took as-built measurements (red lines) as work progressed (tr., 1/129-30, 2/24).

On 18 May 1994 Mr. Summers presented Mr. Miller, the COR, with a copy of the appellant's marked-up as-built drawings for review. Mr. Miller reviewed them and had Mr. Shaffer spot check them with Mr. Summers for accuracy. Mr. Shaffer found them to be complete. The Government made a copy of the drawings for its retention and the appellant left with its copy of the marked-up as-built drawings. (Tr. 2/24-28)

On 7 and 8 June Ms. Heck, the Government's contract administrator, in telephone calls with Mr. Fox, the appellant's vice-president, discussed changes that the Government wanted in the as-built drawings. Ms. Heck insisted that the appellant still had to formally submit two copies of preliminary as-built drawings. (R4, tab 52G, 52H; tr. 1/77) On 9 June 1994 Mr. Stimmel, the contracting officer, wrote to the appellant stating that the preliminary as-built drawings had not been submitted (AR4, tab D5). On 9 June 1994 the appellant submitted two copies of as-built marked prints (preliminary as-built drawings) (Revision A) (R4, tab 52J).

After receipt of the 9 June submittal, Mr. Miller told Mr. Shaffer and Mr. Samuels to verify the location of the pipeline and to make a complete record for the government's

use (tr. 2/104-105, 282). Between 20 June and 1 July 1994 Mr. Shaffer and Mr. Samuels spent approximately 6 man days locating, measuring, and sketching the pipeline. They used still visible road and trench cuts to locate the pipeline. They measured from the center of these cuts to fixed objects. (Tr. 1/81, 231, 2/104-05, 187-89, 196-97, 235-36, 246) They made and retained notes of their field survey (R4, tabs 52K, 52L; tr. 2/272-84).

Mr. Samuels explained that he and Mr. Shaffer made their measurements by looking at the cuts in the road and still visible signs where the trenches had been dug, and then measured to what they thought was the center line of the trench. He acknowledged that if the pipe was not laid exactly in the center of the trench, then his measurement would have been off. (Tr. 2/235-36) Clearly, if Mr. Samuels' perception of the outer edges of the trench were not accurate, then his measurement of the center line would also be inaccurate, as well as his measurement of the location of the pipeline. Nevertheless, these field notes became the Government's sole source for reviewing the dimensions on all subsequent revisions of the preliminary as-built drawings (tr. 2/242-45).

After evaluating Revision A against Samuels' field notes, by letter of 13 July 1994 the contracting officer returned Revision A to the appellant with a four page sample of Mr. Samuels' sketches "for a complete rework." The contracting officer advised the appellant that "all drawings are incorrect in their measurements," and noted that "one major area of discrepancy is the drawing scale." Appellant was told to provide corrected as-built drawings no latter than 12 August 1994. (R4, tab 29)

On 1 August the appellant dispatched Thomas and Beverly Hendershot to Fort Ritchie to remeasure the entire pipeline (tr. 2/216, 3/148; R4, tab 52N). At that time, Mr. Samuels showed the Hendershots the 4 page sample of his sketches and advised them that he had found numerous discrepancies between his sketches and Revision A (tr. 2/217-18). The Hendershots changed some of the dimensions showing the pipeline locations reflected on Revision A (tr. 3/151-56). Mr. Shaffer agrees that Mr. Hendershot made field measurements in the same way that he, Mr. Shaffer, made them (tr. 2/176).

On 17 August 1994 the appellant submitted two copies of its revised as-built mark-ups (Revision B) to the contracting officer (R4, tab 52O). After evaluating Revision B against Samuels' field notes, by letter of 30 August 1994 the contracting officer returned Revision B to the appellant. The contracting officer said that the appellant had corrected only the errors shown on the 4 page sample of Mr. Samuels' sketches, and that Revision B was still 65 percent inaccurate. The contracting officer's letter states in part:

> The preliminary as-built drawings are being returned, once again, for a complete rework due to discrepancies. The Government provided a sampling of the errors in reference b;

> however, these items were the only areas which were corrected. The Government is not required to provide the contractor with detailed listings of the discrepancies.
>
> As stated in [the letter of 13 July 1994], the Directorate of Public Works personnel inspected the entire installation and all the drawings were incorrect; this is still an accurate statement. We are curious why the discrepancies were not corrected. The contract requires as-builts drawings be up-dated on a daily basis; however, it appears that the drawings were up-dated upon the project completion thereby creating the discrepancies.
>
> The Government has determined that the provided as-built drawings are 65% inaccurate which is totally unacceptable to the Government.

(R4, tab 31) On 6 October 1994 Mr. Fox met with Ms. Heck, Mr. Miller, Mr. Samuels, and Mr. Wiles, to discuss the remaining "punch list" items for this contract as well as two other contracts. During this meeting Mr. Fox said he would re-survey the pipeline and re-submit the as-built drawings. (R4, tabs 52R, 52V; tr. 2/224-25)

On 7 October 1994 Mr. Fox re-measured the entire pipeline, using an electronic pipe locator. The Government agrees, and we find, that this is the most accurate way to locate a buried gas pipeline (tr. 3/82-83; R4, tab 48). It took Mr. Fox 11 hours acting alone to take the measurements (tr. 3/157-58). Mr. Fox used Revision B to mark up his measurements. Based on the electronic measurements, on 11 October 1994 the appellant submitted Revision C of the preliminary as-built drawings (R4, tab 52U; tr. 3/171). This revision made a few changes of less than 12 inches in the length of reference dimensions, three changes between 14 and 18 inches, and several changes in reference points (tr. 3/159-67; R4, tab 52 U and Gov. ex B; e.g.: building 503 at tr. 3/162; and the parking lot off West Reckord [Record] at tr. 3/163-65).

After evaluating Revision C against Samuels' field notes, by letter of 16 December 1994, the contracting officer said that the Directorate of Public Works (DPW) was returning Revision C under separate cover, because there were still dimensional errors which were not acceptable to the Government (R4, tab 32). On 26 January 1995 Mr. Fox spoke by telephone to Ms. Heck, Mr. Miller, and Mr. Samuels regarding the appellant's previous submittals. During this conversation Mr. Samuels detailed a list of all of the dimensional errors the Government expected to be corrected on the preliminary as-built drawings. (Tr. 1/42-43, 198-200, 2/39, 229-31; R4, tabs 52X and 52Z, detailing approximately 2 dozen changes on 3 of 7 sheets) Ms. Heck prepared a "very" detailed

memorandum of that telephone conference call (tr. 1/198-99). Based on those instructions, on 31 January 1995 the appellant submitted two copies of revised as-built mark-ups to the contracting officer (Revision D) (R4, tab 52Y).

On or about 21 February 1995, after the revision was evaluated against Samuel's field notes, Revision D was returned to the appellant because there were still discrepancies between the revision and Samuels' field notes. This time, however, Mr. Samuels wrote the corrections required for acceptance on the drawings themselves. (Tr. 2/231-33; R4, tab 52BB) We find that Revision D was returned because the Government wanted additional changes and edits not discussed in the 26 January teleconference (tr. 2/255-79).

On 3 March 1995 the appellant resubmitted the preliminary as-built drawings (Revision E), corrected per the Government's instruction. They were approved by the Government on 14 March 1995. (R4, tab 52CC)

By 1 July 1994 the Government could have provided the appellant with all of the reference points and dimensions it was going to insist be on the preliminary as-built drawings, but decided not to do so because that would be doing the appellant's work (tr. 2/281-82, 242-45; R4, tabs 52K, 52L). Although Revision C was prepared using the most accurate pipe locating equipment, we need not and do not make any finding as to which revision, if any, accurately reflects the as-built conditions.

DECISION – *As-Built Drawings*

The appellant claims that it's preliminary as-built drawings were subjected to multiple inspections with different standards, and were repeatedly returned for revision without any notice of the specific details of the expected modifications. The appellant seeks $5,720 for the additional expense of the multiple revisions and submissions of the preliminary as-built drawings.

The Government maintains that it is entitled to strict compliance with the contract requirements and that it is entitled to conduct multiple inspections. The Government relies upon *Servidone Constr. Co. v. United States*, 19 Cl. Ct. 346 (1990). The U.S. Court of Federal Claims upheld multiple tests where the tests did not hinder, delay, or increase the cost of the contractor's performance. The facts in the instant case are different. The Government's actions increased the cost of, and the time required for, the contractor's performance.

The Government conducted only one complete inspection of the drawings with the actual as-built conditions on the ground. That was done between 20 June and 1 July 1994 after receipt of Revision A. Subsequently, the Government compared each revision with

the Government's 1 July data, knowing it would require the as-built drawings to reflect the Government data. When the appellant conducted its resurvey of the installed pipe and prepared Revision B, the Government had, but withheld, the data which it wanted the appellant to show on the as-built drawings.

It was unreasonable for the Government to withhold the information which it knew it was going to insist be shown on the as-built drawings. It was unreasonable to require the contractor to incur unnecessary costs in trying to discover the data known only by the Government. Once the Government knew which data it wanted shown on the as-built drawings, it had an obligation to provide this data to the contractor. *See*, *P.B. Lynn Company*, ASBCA No. 28819, 84-2 BCA ¶ 17,334 at 86,376; *Kahaluu Construction Co., Inc.*, ASBCA No. 31187, 89-1 BCA ¶ 21,308, *aff'd on recon.*, 89-1 BCA ¶ 21,525 (contracting officer's failure to provide instructions was a failure to cooperate that materially breached the contract). *See also*, *WPC Enterprises, Inc. v. United States*, 323 F.2d 874 (Ct. Cl. 1963); *Hardies-Tynes, MFG Co.*, ASBCA No. 20582, 76-2 BCA ¶ 11,972 at 57,379 (the Government has a clear obligation to respond promptly to a request for clarification). This claim is sustained to the extent the appellant incurred unnecessary costs in surveying the pipeline and preparing the as-built drawings as a result of the Government withholding of the July 1st data.

CLAIM NO. 5 – Concrete Subpaving Under Roadways

FINDINGS OF FACT

During the last two weeks of April 1994 the appellant discovered concrete subpaving under the asphalt roads where the pipeline crossed West Banfill Ave. (tr. 1/95-98, 2/5-6), Greenhow St. (AR4, tab E1), and Grombacher St., near building 360 (AR4, tab F1). The Government's representative, Mr. Shaffer, observed the concrete subpaving under the asphalt at those locations (tr. 1/77-79, 95-98, 2/5-68; R4, tab 48).

The appellant did not stop work and formally notify the contracting officer that the concrete under the asphalt was a differing site condition. Mr. Shaffer was aware of the concrete and agreed that it had to be removed so that the work could be completed and the traffic flow restored. (Tr. 1/78-79; R4, tab 1, section 01010, para 1.2.10) There is no evidence that the Government was prejudiced in any way by the decision not to stop work and seek specific instructions from the contracting officer.

The contract contained nearly identical subsurface warnings in clause H.26 and in section 01030 of the specification:

> [H.26] (a) The indications of physical conditions on the drawings and in the specifications are the result of site

> investigations by and review of as-built drawings. No subsurface exploration had been undertaken to determine true underground piping locations, soil conditions, depths to rock, or depth to groundwater.
>
> [Section 01030] 2.2 Exploration: The physical conditions indicated on the drawings are the result of site visits and review of as-built drawings. No subsurface exploration has been undertaken to determine true underground piping locations, soil conditions, depth to rock, or depth to groundwater.

Neither the specifications nor the drawings identified the material components of either the surface or the subsurface of any of the roads located at Fort Ritchie. The General Transportation Map of Fort Ritchie shows that Grombacher Street is asphalt over concrete, and West Banfill Avenue and Greenhow Street are only asphalt. (Ex. A) This map was not made available to the appellant (tr. 2/133, 66). However, it was general knowledge among "old timers" at Fort Ritchie that some of the asphalt roads were laid over concrete (tr. 1/202, 2/62). The appellant did not offer any evidence as to what a reasonable contractor would expect to find under the asphalt roads at Fort Ritchie.

DECISION – *Concrete Subpaving*

The appellant contends that because there was no indication of the subsurface concrete in the contract plans or specifications, and because there was no reasonable means of discovering the condition prior to bidding, it is entitled to an equitable adjustment under the DIFFERING SITE CONDITIONS clause in the contract (FAR 52.236-2 (APR 1984)). The Government contends that the subsurface concrete does not constitute either a type I or II differing site condition

Because the contract made no representations at all with respect to the subsurface conditions, the subsurface concrete is not a type I condition. *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987); *P.J. Maffei Bldg. Wrecking v. United States*, 732 F.2d 913 (Fed. Cir. 1984) As was said in *Pacific Alaska Contractors, Inc. v. United States*, 436 F.2d 461, 469 (Ct. Cl. 1971), "there must be reasonably plain or positive indications in the bid information or contract documents that such subsurface conditions would be otherwise than actually found in contract performance . . . ."

A type II condition is an unknown subsurface condition which differs materially from that which is ordinarily encountered and generally recognized as inhering in the work. (FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984)) It is generally recognized that in order to recover on a type II differing site condition the contractor must

establish four elements: (1) the recognized and usual physical conditions at the site of the work; (2) the physical conditions actually encountered; (3) that they differed materially from the known and usual conditions, and (4) that they caused an increase in the cost of performance. *Charles T. Parker Construction Co. v. United States*, 433 F.2d 771, 778 (Ct. Cl. 1970); *Robert McMullan and Son, Inc.*, ASBCA No. 22168, 78-2 BCA ¶ 13,228 at 64,700; see discussion by Medsger in "Category II Differing Site Conditions in Construction Contracts," WL: 1988 Army Lawyer 10.

The appellant has established that there was concrete under the asphalt in three locations. However, the record does not establish that the existence of the concrete "differed materially from the known and usual conditions." While asphalt was laid on top of concrete on some of the roads at Fort Ritchie, there is no evidence from which we could find that it would have been unusual for concrete to have been found under an asphalt road at Fort Ritchie, or anywhere else for that matter. The appellant's differing site condition claim is denied because of the absence of proof of the known and usual conditions.

CONCLUSION

To the extent set forth above the appeal is sustained with respect to the meters and regulators claim, the pipeline markers claim, the delay at building 710 to the extent of the added rental cost of the trencher, and the as-built drawings to the extent of the unnecessary work after Revision A. The appeal is otherwise denied. The appeal is remanded to the parties for resolution of quantum. Should the parties fail to reach agreement on the quantum of these claims within 60 days, either party may return to this Board for a decision.

Dated: 13 March 2000

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

DAVID W. JAMES, JR.
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] The dual fuel burner in building 402 was installed earlier than planned because the old burner failed. An emergency procurement was awarded to replace the old burner.

[2] Mr. Shaffer testified that he was told on 4 May 1994 that building 710 was not available until 12 and 13 May, and that he "had to pass the information on right away." (Tr. 2/143) We did not find this testimony credible evidence that he advised the appellant prior to 9 May 1994 that access would be granted on 12 and 13 May.

[3] A *bollard* was used here to mean any of a series of short posts set at intervals to delimit an area, as a traffic island, or to exclude vehicular traffic.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49077, Appeal of Steele & Sons, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals