

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
M.A. Mortenson Company) ASBCA Nos. 53123, 53124, 53125,
) 53126
Under Contract No. DACA85-94-C-0031)

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OPINION BY ADMINISTRATIVE JUDGE ROME

This is our second Rule 11 opinion deciding entitlement on appeals by M.A. Mortenson Company (Mortenson) from 22 final decisions of the contracting officer (CO) denying its constructive change claims under its contract with the U.S. Army Corps of Engineers (Corps) for construction of the Composite Medical Facility, Phase II, at Elmendorf Air Force Base, Alaska (CMF project). Familiarity with *M.A. Mortenson Company*, ASBCA Nos. 53105 *et al.*, ASBCA LEXIS 86 (17 Aug. 2004) (*Mortenson I*), in which we decided 5 of the 22 appeals is presumed. We incorporate herein such of our fact findings in *Mortenson I* concerning the contract's provisions and drawings and other matters as are relevant. Appellant supports its appeals with affidavits of Darryl Kloepfer, operations manager and vice president of its drywall subcontractor, Pacific Partitions/Specialty Interiors, J.V. (PPSI) (*see Mortenson I*, finding 15).

ASBCA No. 53123
(Added Work at Coiling Door 1A113B)

This appeal involves appellant's \$3,633 claim for costs to rework walls near coiling door 1A113B in the Satellite Pharmacy Room 1A113, add gypsum wallboard

(GWB), relocate electrical conduits, and extend a soffit to allow installation of the door's motor/operator.

FINDINGS OF FACT

1. The contract's specifications and drawings review requirements and its coordination drawing, shop drawing, and other coordination requirements are set forth in our general fact findings in *Mortenson I* (findings 3-9) and in various findings in *Mortenson I* with respect to individual appeals.

2. The contract's Federal Acquisition Regulation (FAR) 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984), clause states, concerning shop drawings:

(d) Shop drawings means drawings, submitted to the Government by the Contractor, subcontractor, or any lower tier subcontractor pursuant to a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements, and (2) the installation (i.e., fit, and attachment details) of materials or equipment. It includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the contractor to explain in detail specific portions of the work required by the contract.

. . . .

(e) . . . the Contractor shall coordinate all such [shop] drawings, and review them for accuracy, completeness, and compliance with contract requirements and shall indicate its approval thereon as evidence of such coordination and review. . . . The [CO] will indicate an approval or disapproval of the shop drawings and if not approved as submitted shall indicate the Government's reasons therefor. Any work done before such approval shall be at the Contractor's risk. Approval by the [CO] shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) below.

(f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in

writing, separate from the drawings, at the time of submission. . . .

(Bd. ex. 1, vol. 1 at I-83)

3. Paragraph 1.3 of Technical Specification section (hereafter “TS”) 01305, SUBMITTAL PROCEDURES, states:

The approval of submittals by the [CO] shall not be construed as a complete check, but will indicate only that the general method of construction, materials, detailing and other information are satisfactory. Approval will not relieve the Contractor of the responsibility for any error which may exist, as the Contractor under the CQC requirements of this contract is responsible for the dimensions and design of adequate connections, details and satisfactory construction of all work.

(*Mortenson I*, finding 6)

4. TS 08000, Door and Frame Schedule, calls for a fire-rated steel coiling counter door for door 1A113B, citing Details 41 and 46 of Drawing No. A8.503, DOOR DETAILS (Bd. ex. 1, vol. 4, § 08000 at 2, 3, 16). Scaled Detail 41, OVERHEAD SHUTTER HEAD, depicts a rolling counter fire door and overhead shutter (coiling door) head, with a coiling door housing boxed in with a soffit. It refers to the Reflected Ceiling Plan for ceiling height. (R4, tab 25)

5. TS 08331, METAL COILING COUNTER DOORS, states:

1.2 GENERAL REQUIREMENTS

Coiling counter doors shall be electrically operated and of the sizes indicated. . . .

1.3 SUBMITTALS

Government approval is required for submittals with a “GA” designation; submittals having an “FIO” designation are for information only. The following shall be submitted in accordance with Section 01305 SUBMITTAL PROCEDURES:

1.3.1 SD-01 Data

Coiling Counter Door Unit; FIO.

Submittal shall include manufacturer's catalog data.

1.3.2 SD-04 Drawings

Coiling Counter Door Unit; FIO.

A schedule showing the location of each counter door shall be included with the drawings. . . .

. . . .

2.1.3 Barrel

The curtain shall be coiled around a steel tube of sufficient thickness and diameter to prevent deflection

. . . .

2.2.1 Electric Power Operation

Electrical power operators shall be industrial type. Acceptable evidence shall be furnished to demonstrate that the unit will operate the door through 50,000 cycles, minimum. The operator shall be so designed that the motor may be removed without disturbing the limit-switch timing. The power operator shall be provided with a slipping clutch coupling to prevent stalling of the motor. . . .

2.2.2 Motor

Motor shall be mounted inside curtain coiling shaft. Motor operator shall be equipped with rapid set push button limit switch, solenoid activated disc brake, asynchronous capacitor start and run thermally protected motor, planetary gear reduction and manual crank override for operation in the event of power failure.

(Bd. ex. 1, vol. 2, § 08331 at 1-4) The parties appear to agree that TS 08331 calls for an enclosed “tube motor.”

6. On 11 October 1995, Mortenson submitted a shop drawing and equipment data transmittal for coiling counter door units, requesting, among other things, approval of an operator/motor variance from paragraphs 2.2.1 and 2.2.2 of TS 08331, above (R4, tab 28 at first and second pages). The request included a 13 September 1995 letter from manufacturer Wayne-Dalton Corporation (Wayne-Dalton) to Mortenson’s subcontractor Anchorage Door and Dock Service (Anchorage Door) stating that the proposed coiling doors would conform with the specifications’ intent and that:

A gear head operator will be used on the shutters because of the following: Enclosed “tube motors” are not recommended for “high cycle” (50,000 specified paragraph 2.2.1). They also are not equipped with a slipping clutch, or solenoid brake, or Nema 7 or 9 enclosure. The gear head operator can have these features, but will not be enclosed in the curtain coiling shaft.

(R4, tab 28 at fourth page)

7. The Corps’ Elmendorf Resident Office (ERO) sought more information, including whether the variance covered all electrically operated doors, and sought drawings to show the apparatus’ size and where it would be mounted. On 17 November 1995, it returned the submittal without approval. (*Id.*, at first and seventh pages)

8. On 8 December 1995, Mortenson resubmitted its variance request, noting that it applied to all electrically operated doors, which would use a gear head operator in lieu of tube motors, as depicted in enclosed product data, with the unit size shown in the data and shop drawings, and the location shown in the shop drawings. Mortenson enclosed a Wayne-Dalton drawing dated 14 September 1995 covering the doors, including 1A113B. The drawing showed a door guide section with surface-mounted guide tracks; a coiling-side elevation view with a door hood; and a vertical section door view, with a gear reduction motor operator extending 16 inches from the back of the coiling door housing. (R4, tab 29)

9. The ERO’s 10 January 1996 Transmittal Comments stated:

Contractor comments appear valid. However we would like to see a sample of the proposed change. Coordination will need to be done to see if the proposed change will fit in the space above the ceiling.

(*Id.*, at third page) On 11 January 1996, the ERO returned the resubmittal without approval (*id.*, at first page).

10. On 19 April 1996, in another data resubmittal, Mortenson stated that a door sample was available for review and enclosed control station data (R4, tab 30 at first page). The ERO's 14 May 1996 Transmittal Comments stated: "Gear head operator is approved for contractor convenience, provided coordination is done by contractor" (*id.*, at third page). On 15 May 1996, it returned the resubmittal as approved (*id.*, at first page).

11. On 9 August 1996, Mortenson resubmitted coiling counter door drawings. One of them was a Wayne-Dalton drawing covering door 1A113B which showed coil-side elevation and vertical section views, but not the extended gear reduction motor operator. The drawing also differed from the prior one in depicting concealed rather than surface-mounted door guides. (R4, tab 31 at first and fourth pages) ERO Transmittal Comments dated 5 September 1996 stated:

Ref all drawings, all vertical sections. Please indicate/coordinate where typical ceiling height should be. It is important to coordinate that it not be any higher or lower than what is necessary to avoid conflict with operating mechanisms of door.

(*Id.*, at third page) ERO Transmittal Comments dated 17 September 1996 stated:

. . . Details of guide sections are unclear, it is reviewers understanding that the side tracks shall be surface mounted, not hidden by gyp. Please clarify. Please show ceiling heights on inside and outside of rooms. . . .

(*Id.*, at second page) On 17 September 1996, the ERO returned the drawings resubmittal as disapproved (*id.*, at first page). Neither Mortenson nor the ERO commented upon the door 1A113B drawing's omission of the extended gear reduction motor, which the CO, in her final decision, below, attributed to oversight or to an omission from the shop drawing (R4, tab 1 at 8). The submittal/approval process thereafter is not clear, although we infer eventual approval because work had begun on door 1A113B by at least April 1997 (*see* finding 12).

12. The contractor determined, after framing, GWB and electrical rough-in work had been accomplished in connection with door 1A113B, that the walls adjacent to coiling door 1A113B would have to be modified to install the shutter. Mortenson consulted with the ERO's Quality Assurance Representative (QAR) Regan Sarwas. (*See* R4, tab 3 at 1, tabs 4, 5, 8; Kloepfer aff., ¶ 6) On 28 April 1997, Mortenson issued RFI No. 2785, stating:

Per discussion with Regan Sarwas, please confirm the modification to the adjacent walls @ 1A113B for the installation of the coiling shutter. The modification will be identical to that of coiling door 1C111A with the exception of the adjacent wall @ F line which is a smoke wall. At this smoke wall, a cavity will be constructed similar to what is done at a fire extinguisher cabinet in a smoke wall. The back piece of drywall may be less than 5/8" if required and will be attached directly to the back side of the other sheet of drywall. Note that this work will not extend below the ceiling line at either wall.

(R4, tab 4) On 5 May 1997 the ERO responded: "Confirmed – wall rework is to maintain the smoke wall integrity" (*id.*). RFI No. 2785A, dated 14 May 1997, stated: "Per discussion with Regan Sarwas, please confirm that the soffit @ coiling door 1A113B will be extended approximately 10" to allow for installation of the coiling door motor above the ceiling line" (R4, tab 5). The RFI included a sketch of the extension. On 16 May 1997 the ERO responded: "Confirmed, at no additional costs to the Government" (*id.*).

13. On 14 May 1998, Mortenson requested a \$3,628 equitable adjustment, the largest portion of which was based upon a \$1,262.29 change order request from Mortenson's electrical subcontractor, ALCAN Electrical & Engineering, Inc. (ALCAN), on the ground that the response to RFI No. 2785A had required relocation of several conduits feeding various systems after the work had been completed for rough-in and signed off (R4, tab 8 at sixth page; *see also* third and seventh pages). PPSI had sought \$649 for remobilization costs, among others, including added soffit framing and GWB (*id.*, at third, eleventh and twelfth pages). Anchorage Door claimed \$543, including for management time for "confirming why the door won't fit in the opening" (*id.*, at fourteenth page; *see also* third page). On 4 June 1998, the ERO denied Mortenson's request, stating "the soffit extension required to enclose the coiling door and motor is a coordination issue" (R4, tab 9).

14. On 26 May 2000, Mortenson submitted a \$3,633 claim incorporating its equitable adjustment request and contending that "[i]ncomplete design details failed to properly depict the need for additional GWB behind the coiling door 1A113B" and that Mortenson and its subcontractors had corrected what was clearly a design deficiency (R4, tab 3 at 1, 2).

15. On 25 August 2000, the CO denied Mortenson's claim, on the grounds, among others, that Mortenson had deviated from the contract design by creating a pocket to allow above-ceiling installation of the coiling door hood, which had impinged upon adjacent walls and compromised the integrity of the specified smoke barrier; the

additional GWB was to maintain the integrity of the smoke barrier wall above the ceiling; and Mortenson had proposed the RFI No. 2785 adjustments for its convenience, because it had failed to coordinate the construction work. She further found that the ERO had approved the variance from the specified coiling door operator on condition that Mortenson coordinate to assure that the motor operator would fit above the ceiling, and that the 2785A soffit addition was due to its failure to do so. (*Id.*, at 13)

16. There is no sworn statement or other evidence in the record from ALCAN, whose costs are the principal part of Mortenson's claim, and no sworn statement or other evidence from Anchorage Door concerning the results of its review as to why door 1A113B would not fit in the opening.

17. Mr. Kloepfer states that PPSI was required to remobilize to the previously completed area to install additional GWB behind door 1A113B and to add a soffit extension to maintain a rated enclosure around the coiling door unit (Kloepfer aff., ¶ 6). He alleges that, "[u]pon reviewing the design details, it is apparent that the design drawings failed to depict the need for additional gypsum board behind coiling door 1A113B" (*id.*, ¶ 5). He contends that the GWB and electrical rough-in rework at the door were caused solely by design deficiencies and not by any failure to coordinate (*id.*, ¶ 11). Mr. Kloepfer does not address particular drawings, appellant's coiling door variance, or any efforts by appellant or its subcontractors to review and coordinate the work at door 1A113B, in view of the variance or otherwise.

18. Appellant has not elucidated its claim that the government's design was defective. We cannot determine on the record before us whether there were design deficiencies.

DISCUSSION

Appellant contends that the government's plans did not properly convey that additional GWB was needed behind coiling door 1A113B; the government thereby breached its implied warranty of its plans; and it directed additional work to remedy its design deficiencies. The government alleges that appellant's variance from contract requirements, and its failure to coordinate the work to adjust to the variance, caused the rework at issue. Appellant bears the burden to prove by a preponderance of the evidence that it complied with the contract, but that a defect in the contract drawings, which it could not have recognized with reasonable effort, was responsible for its claimed extra costs. Unsupported allegations do not constitute proof or evidence. *See Mortenson I*, and cases cited.

Appellant has not submitted evidence to counter the government's assertion that appellant's variance and its failure to coordinate, rather than any design problems attributable to the government, caused appellant's problems with coiling door 1A113B.

Appellant had sought approval of a variance that substituted an extended gear reduction motor operator for the specified enclosed tube motor (findings 5, 6, 8). The ERO had responded that coordination was necessary to see if the proposed change would fit in the space above the ceiling. It ultimately approved the gear head operator for the contractor's convenience, provided it coordinated the work. (Findings 9, 10)

Because the gear reduction motor operator was not enclosed, but extended 16 inches from the back of the coiling door housing (finding 8), it likely required spatial and other adjustments. Whether or not by oversight, appellant's resubmission of the coiling counter door shop drawings omitted the extended gear reduction motor (finding 11). In any event, as provided in the contract's Specifications and Drawings for Construction clause and in TS 01305, the ERO's approval of the variance submittal did not shift responsibility for the variance, or any errors, to it. The contractor remained responsible for proper dimensioning and accurate construction. (*See* findings 2, 3)

There is no evidence in the record from ALCAN, whose costs form the major portion of appellant's claim, and none from Anchorage Door concerning the results of its review as to why door 1A113B would not fit in the opening (finding 16). Mr. Kloepfer of PPSI states that the alleged design omission is obvious from a review of the contract drawings (finding 17). Although likely not his intent, without further explanation, this suggests that appellant and its subcontractors should have discovered the claimed problem during the drawings review and work coordination efforts required by the contract, prior to work at the door (*see* finding 1 and referenced findings). Mr. Kloepfer has not addressed particular specifications, drawings, appellant's coiling door variance, or any efforts by appellant or its subcontractors to review and coordinate the work at door 1A113B, in view of the variance or otherwise (finding 17).

Dispositively, regardless of drawings review, work coordination, and variance issues, appellant has not elucidated its claim that the government's design was defective, and we cannot determine whether there were design deficiencies (finding 18). Thus, appellant has failed to meet its burden to prove the alleged design defects.

DECISION

ASBCA No. 53123 is denied.

ASBCA No. 53124
(Added GWB Return at Column G/4)

This appeal involves appellant's \$9,105 claim for costs to construct a GWB return for columns at grid lines G/4, allegedly necessitated by defects in the contract drawings.

FINDINGS OF FACT

19. In addition to the above provisions concerning shop drawings (finding 2), the contract's Specifications and Drawings for Construction clause provides:

(a) . . . In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the [CO], who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The [CO] shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(See *Mortenson I*, finding 3)

20. The contract's FAR 52.246-12, INSPECTION OF CONSTRUCTION (JUL 1986), clause states:

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. . . . All work . . . is subject to Government inspection and test . . . before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not - -

. . . .

(3) Constitute or imply acceptance; . . .

. . . .

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price.

(Bd. ex. 1, vol. 1 at E-1 to E-2)

21. The contract's Special Contract Requirements clause SCR-5, Department of Defense FAR Supplement (DFARS) 252.236-7001, CONTRACT DRAWINGS, MAPS, AND SPECIFICATIONS (DEC 1991) clause (Contract Drawings clause) calls for the contractor to check all drawings upon receipt; compare them and verify figures before laying out the work; and promptly notify the CO of any discrepancies. The clause assigns responsibility to the contractor for any errors that might have been avoided through compliance with the review and notification requirements. It provides that omissions or misdescriptions of work details in the drawings that are manifestly necessary to carry out the drawings' intent, or customarily performed, do not relieve the contractor from performing them. (See *Mortenson I*, finding 4)

22. TS 03450, PRECAST ARCHITECTURAL CONCRETE, paragraph 1.3.1, Standards and Loads, states, concerning precast units:

The dimensions shown on the drawings are for design intent and bidding purposes only; the Contractor is responsible for detailing and fabricating the units, including determining the dimensions and locations of all openings.

(Bd. ex. 1, vol. 1, § 03450 at 3)

23. Architectural Drawing No. A4.101, BUILDING ELEVATIONS, which is scaled, depicts two north elevation views of the CMF facility, with precast panels at four separate levels: Level 1, IBS Level 1, Level 2, and IBS Level 2. The panels between grid lines G and H are at issue. They are depicted with the edges nearest to grid line G aligned, one on top of the other, with no discontinuities or apparent differences in panel length. Detail 1 depicts the panels terminating short of grid line G. Detail 2 depicts similar alignment, with the panels terminating short of, but closer to, grid line G. Panel dimensions are not supplied. (R4, tab 17)

24. Structural Drawing No. S8.01, BUILDING PRECAST PANEL ELEVATIONS, which is scaled, depicts the precast panels similarly to above Drawing No. A4.101, with the panels aligned one on top of the other near, but terminating short of, grid line G. Panel dimensions are not supplied. General Precast Panel Note 1 repeats the language of TS 03450, ¶ 1.3.1 (finding 22). General Precast Panel Note 9 states: "See architectural plans and elevations for locations and dimensions of precast panels and openings." Dimensioning Note 3 states: "For physical dimensions of all precast concrete panels refer to the architectural drawings." (R4, tab 16; Kloepfer aff., ¶ 10)

25. Drawing No. A2.203, FIRST LEVEL AREA '1A3' FLOOR PLAN, which is scaled, depicts a plan view of the entry vestibule at grid lines G and 4, showing the precast panels in dispute stopping approximately three feet (scaled) from grid line G, with a gap between the precast panel and a Gypsum Fiber Reinforced Gypsum (GFRG)

column enclosure (R4, tab 19; *see also* tab 1 at 4). The drawing also refers to scaled Drawing No. A8.809, MALL SECTIONS, at Section Looking North @ Gridline 4, which depicts an interior elevation view of grid line 4. Two of the precast panels on that drawing terminate on a vertical line at grid line G between level 1 and IBS level 1, and between level 2 and IBS level 2. Two others terminate along a vertical offset from grid line G at IBS level 1 and IBS level 2. Panel dimensions are not given. (R4, tab 27)

26. Drawing No. A2.213, FIRST LEVEL AREA '1D1' FLOOR PLAN, which is scaled, depicts the area in dispute at grid lines G/4. The precast panels are dimensioned and shown terminating about three feet (scaled) from grid line G, with a gap between the precast panel and the GFRG column enclosure at grid line G. (R4, tab 18) We infer that the dimensions on this drawing, and on the architectural drawings below (finding 27), are accurate; neither party has indicated otherwise.

27. Drawings No. A2.262, FIRST LEVEL IBS AREA '1ID1' FLOOR PLAN; A2.313, SECOND LEVEL AREA '2D1' FLOOR PLAN; and A2.362, SECOND LEVEL IBS AREA '2ID1' FLOOR PLAN, which are scaled, each depict the precast panels terminating at the GFRG column enclosure, without a gap, about one foot six inches (scaled) from grid line G. Dimensions are shown for the precast panels along grid line 4. (R4, tabs 20-22)

28. Drawings No. A8.201, LEVEL ONE COLUMN DETAILS, and A8.301, SECOND LEVEL COLUMN DETAILS, each depict the GFRG column enclosure at grid lines G/4, with no dimensions shown. The first drawing shows a gap between the enclosure and the precast panel and the second shows the panel abutting against the enclosure. (R4, tabs 24, 25)

29. Drawings No. A8.817, MALL FLOOR PATTERN FIRST LEVEL – NORTH, and A8.819, MALL FLOOR PATTERN SECOND LEVEL – NORTH, are scaled and depict the precast panel on grid line 4, with no dimensions shown. The first drawing shows the panel terminating with a gap to the GRFG column enclosure at grid line G and the second shows it abutted against the enclosure. (R4, tabs 28, 29)

30. Based upon the above, we find that Drawings No. S8.01 and A4.101 indicate that there is no difference in precast panel length at the area in question at the four CMF facility levels, whereas the other applicable drawings show that the panels above the first level are longer than those at the first level.

31. PPSI deemed the precast elevations on Drawing No. S8.01 (finding 24) to control. They were the basis for the contractor's precast panel submittals, which the ERO approved; for panel fabrication; and for installation, which the ERO inspected. There is no evidence concerning whether the ERO inspector(s) noted any installation errors.

32. Mr. Kloepfer states that “[u]pon reviewing the contract documents and actual field conditions, PPSI determined that a gap existed between the precast concrete panels and the GFRG column cover at column lines G and 4,” which it believed required closure for thermal and fire-rating purposes (Kloepfer aff., ¶¶ 5, 6). We infer that the review occurred upon installation of the panels in the area at issue (*see* finding 33). There is no evidence that PPSI or Mortenson reviewed any contract drawing other than Drawing No. S8.01 prior to fabrication and installation of the precast panels in question.

33. Mortenson issued RFI No. 2989, dated 15 October 1997, stating:

Reference sheet A2.213, The exterior furred wall on 4 line at grid G is shown terminating at the end of the precast concrete panel. No termination or Architectural finishes are shown. Please confirm that a GWB insulated N/S return needs to be added for thermal, and architectural appearances.

Reference Sheet A3.213 and A2.262, Sheet A3.213 (lvl. 1 RCP) shows the north ceiling edge aligning with the precast concrete panel above. Actual field conditions are different from that shown. The precast is terminated in alignment with that which is on lvl. #1 and both thermal and architectural finishes are needed to properly close this area off. This condition occurs at lvl. 1IBS, 2 and 2IBS (reference sheets A2.313, A2.362, A3.313). Please confirm thermal insulation should be added to the ends of the precast, where it terminates short of the columns, also confirm metal framing, GWB, tape and paint are to be added to accommodate the absence of the precast concrete panel. Also please provide a detailed sketch for this added work.

(R4, tab 4)

34. The ERO’s response, dated 31 October 1997, stated in part:

2. A2.262 (1IBS), A2.313 (2nd), A2.362 (2IBS) and A3.313 (2nd RCP) show the precast extending to the column while A2.203 (1st) and A3.213 (1st RCP) do not. The precast panels above the first floor were not installed per the contract. It is noted that you have already accommodated the missing precast panels in the framing east of column G4 at the 1st IBS and 2nd levels. You may extend the GWB return (detail 10/A6.202 SIM) above the 1st floor to the 2nd floor ceiling. Closure to the GFRG column cover is also required above the 1st floor to replace the missing

precast panels. This closure must be 2 hr. rated construction to maintain continuity of the fire barriers. . . .

(Id.)

35. On 14 May 1998, Mortenson requested a \$9,194 equitable adjustment based upon requests by PPSI and Wasche Commercial Finishes, Inc., in the amounts of \$5311 and \$1609, respectively, for remobilization and other costs to frame, sheetrock, tape and paint a two-hour fire-rated closure at column G/4 from IBS Level 1 through IBS Level 2 (R4, tab 6). Mortenson stated that the “contract documents do not clearly identify what the details at this location represent” (*id.*, at 2). The Administrative Contracting Officer (ACO) denied the request on 5 June 1998 on the ground that the precast panels above the first floor at column intersection G/4 had not been installed per contract requirements and that the RFI response had provided an acceptable method of correcting the contractor’s installation error without replacing the panels (R4, tab 8). On 26 May 2000, Mortenson submitted a \$9,105 claim, incorporating its equitable adjustment request (R4, tab 3). It disputed that the precast panels had been installed incorrectly and asserted that the ERO had confirmed drawing inconsistencies in its RFI response but had failed to recognize that Drawing No. S8.01 “[c]learly shows the precast aligning with itself from the First Level to the 2IBS Level, terminating well short of column line G” and that the “GWB closure was necessitated by errors and omissions in the documents” (*id.*, at 2).

36. The CO’s 8 September 2000 final decision acknowledged “discrepancies between the drawings showing the north elevation views of the precast panels and the floor plans showing the precast panels” (R4, tab 1 at 1-2) and elaborated:

A review of the contract drawings, to include not only the structural drawing but also the architectural drawings for the precast panels in dispute, leads one to conclude that there is a misdescription of the terminating edge of the precast panels above the first level IBS as depicted on structural drawing [No. S8.01] and architectural drawing [No. A4.101]. No dimensions were shown on the two referenced drawings that depict the elevation views of the precast panels for the north wall of the [CMF].

(Id., at 10-11) The government also so concedes in briefing (gov’t br. at 53). However, the CO denied Mortenson’s claim on the grounds that it had not satisfied the contract’s drawings review and quality control coordination requirements; had incorrectly relied only upon Drawing No. S8.01; and had not heeded that drawing’s notes or the other contract drawings to determine the precast panel dimensions. She asserted:

The architectural floor plans clearly depict that the precast panels above level 1 IBS were to abut against the GFRG column enclosure without the gap that is shown on the plan view for the level 1 at the Entry Vestibule. Therefore, it is intuitively obvious that the precast panels above the first level IBS had to be longer than the precast panel for the first level.

(*Id.*, at 11) The CO contended that, had the contractor fabricated the precast panels as shown on the architectural floor plans, there would have been no need for the allegedly missing design detail. She stated that, in lieu of requiring removal and replacement of the defective precast panels, the government had accepted the added GWB return closure at column G/4 to mitigate the problem, as a “benevolent concession.” (R4, tab 1 at 12-13)

DISCUSSION

Appellant seeks to recover remobilization and other costs to frame, sheetrock, tape and paint a two-hour fire-rated closure at column G/4 from IBS Level 1 through IBS Level 2. It asserts that the precast panels were installed correctly, in conformity with its approved submittals to the ERO and the contract drawings, but that the drawings did not provide a GWB closure detail with requisite thermal and fire rating features. The government acknowledges a misdescription of the terminating edge of the precast panels above the first CMF facility level in Drawings No. A4.101 and S8.01, but asserts that appellant did not consider all applicable drawings and did not properly fabricate the precast panels as shown on the architectural floor plans and that, had it done so, there would have been no need for the GWB closure detail for which it claims extra costs.

As established, a contract is to be read as a whole. There is no evidence that appellant relied upon any drawing other than structural Drawing No. S8.01, which covers building precast panel elevations, and which appellant deemed to control precast panel fabrication and installation (findings 31, 32). That drawing, and architectural Drawing No. A4.101, pertaining to building elevations, do not show panel dimensions but depict the panels in question aligned one on top of the other, with no apparent difference in the length at the CMF facility levels (*see* findings 23, 24).

General Precast Panel Note 9 and Dimensioning Note 3 on Drawing No. S8.01 direct the contractor to “architectural plans and elevations for locations and dimensions of precast panels and openings” and to the architectural drawings “[f]or physical dimensions of all precast concrete panels” (finding 24). We have inferred that the dimensions shown on several of the architectural drawings are accurate because neither party has indicated otherwise (*see* finding 26). Regardless, General Precast Panel Note 1 to Drawing No. S8.01, like TS 03450, states that dimensions shown on drawings are for design intent and bidding purposes only and that the contractor is responsible for detailing and

fabricating the precast units, including determining the dimensions and locations of all openings (findings 22, 24).

Moreover, whereas Drawings No. S8.01 and A4.101 indicate that there is no difference in precast panel length at the area in question at the four CMF facility levels, the other applicable drawings show that the panels above the first level are longer than those at the first level (finding 30). The contract's Specifications and Drawings for Construction clause and its Contract Drawings clause require the contractor to bring such discrepancies in the contract drawings to the CO's attention before it begins work. Otherwise, it proceeds at its own risk. (Findings 19, 21)

Further, the Specifications and Drawings for Construction clause provides that government approval of shop drawings does not relieve the contractor from responsibility for errors in them (finding 2). Additionally, whether or not an ERO inspector noted any installation errors, which the record does not address (*see* finding 31), pursuant to the contract's Inspection of Construction clause, inspections are for the government's sole benefit; they do not constitute or imply acceptance; and the contractor is to correct work that does not conform to contract requirements without charge (*see* finding 20).

Appellant has not established that it complied with its contractual drawings review and coordination duties but that, nonetheless, a defect in the contract drawings, which it could not have recognized with reasonable effort, was responsible for its claimed costs. *See Mortenson I.*

DECISION

ASBCA No. 53124 is denied.

ASBCA No. 53125

(Revisions to Walls and Soffits at Room 2F118 (Recovery))

This appeal involves appellant's \$1,681 claim for costs to revise work pertaining to walls and soffits at Room 2F118 due to a design conflict.

FINDINGS OF FACT

37. Drawing No. A2.318, SECOND LEVEL AREA '2E2' FLOOR PLAN, depicts the west wall of Corridor 2E140 at 10'-4" from grid line J, with 8'-0" clearance between the east and west corridor walls (R4, tab 14; Kloepfer aff., ¶ 6). Drawing No. A2.321, SECOND LEVEL AREA '2F1' FLOOR PLAN, depicts the 8'-0" opening at door 2F108D, located at the north end of Room 2F118, at 10'-5" from grid line J. The opening was to align with Corridor 2E140. The drawing also appears to locate the 8'-0"

opening at door 2F108A, which is at the south end of room 2F118, at a total of 10'-5" from grid line J. In any case, appellant contends, and the government has not disputed, that the contract specified a 10'-5" dimension to locate that door opening (R4, tab 15; Kloepfer aff., ¶¶ 6, 8; *see also* R4, tab 3 at 1 and finding 39) Drawing No. A3.321, SECOND LEVEL AREA '2F1' REFLECTED CEILING PLAN, reflects that the two door openings were to align with a light cove and common soffit running the length of room 2F118 (R4, tabs 5, 16; Kloepfer aff., ¶ 8; *see also* R4, tab 3 at 2). The government acknowledges that "[a] review of the contract drawings in dispute reveal[s] a discrepancy in the layout of the corridor walls from grid line J" (gov't br. at 58).

38. After PPSI had laid out corridor 2E140 as shown on Drawing No. A2.318, at 10'-4" from grid line J, it discovered the conflict with Drawing No. A2.321, which positioned the door 2F108D opening at 10'-5" from grid line J (R4, tab 4). Mortenson submitted RFI No. 1135, dated 20 September 1995, stating:

Contract drawing No. A2.321 shows an 8'-0" clear opening for door 2F108D located 10'-5" from grid line J. Please note that corridor 2E140 is laid out as dimensioned on A2.318, which puts the 8'-0" corridor 10'-4" from line J.

The above referenced dimensions create a conflict at the east door jamb of door 2F108D. Where the west wall of room 2E145 (Staff Bath) meets the jamb of 2F108D the track is 1" farther west than the A4 wall south of the jamb and there is not enough clearance for the gyp. board to be installed between the outside of the H2/X wall and the door frame.

(*Id.*) Mortenson suggested that the A4 walls on the south side of door 2F108D be relocated. It noted layout was underway and requested a prompt response. The ERO's response, dated 11 October 1995, was that the A4 walls in question were to be located "such that the west side of the clear opening begins 10'-4" east of grid line J." (*Id.*)

39. Mr. Kloepfer states that:

As PPSI progressed in laying out the walls and soffits in the area, the 10'-4" dimension, previously identified by the ERO via RFI 1135 for use to locate the opening for Door 2F108D at the north end of Room 2F118, conflicted with the 10'-5" dimension identified by the contract drawings and specification for use to locate the opening to Door 2F108A at the south end of Room 2F118. The two door openings were to align with a common soffit running the length of the room, thus warranting an adjustment to one end of the room.

(Kloepfer aff., ¶ 8) He adds that PPSI did not know of the design conflict until it began work in the field (*id.*, ¶ 11).

40. Eleven days after its receipt of the ERO's response to RFI No. 1135, Mortenson issued RFI No. 1135A, dated 23 October 1995, stating:

RFI 1135 noted that a dimensional conflict between sheets A2.321 and A2.318 resulted in GWB conflicts at the east door jamb of door 2F108D. The RFI response was to relocate the walls in question 1" farther west.

Upon further review it has been discovered that this response will result in additional conflicts. Reflected ceiling plan A3.321 shows a light cove and soffit running the length of room 2F118, this light cove is to align with the partitions at door 2F108D and 2F108A at the north and south ends of the room. Also note that the nurses station casework is to align with the wall on the west side of door 2F108A.

Please advise if the wall will be relocated as responded to in RFI 1135 and if so provide direction as to additional resulting conflicts.

(R4, tab 5)

41. The ERO's response, dated 14 November 1995, stated that:

By RFI-1135 the dimension at Door 2F108D wing wall was revised to 10'-4". Note that there are no A4 walls associated with the millwork as shown on 3/A8.911. At door 2F108A the 8'-0" clear refers to the millwork. The west face of the millwork is to align with the west face of the wall. This will result in an 8'-1 1/2" clear on the corridor side of door 2F108A. On the RCP the three areas at the nurse station [that] are mistakenly depicted as walls become part of the soffit. The light coves align with the door wing walls, for the east light cove the wing wall at door 2F108D and for the west light cove the wall at door 2F108B. At the opposite end the light coves abut the perpendicular walls across the door opening. At the nurse station maintain 2'-8" wide soffits as shown with the dimension being reduced as the soffit passes the door alcove at 2F108A.

(*Id.*) The response meant that the 10'-4" dimension was to be used throughout Room 2F118 and the soffit width at door 2F108A was to be adjusted (Kloepfer aff., ¶ 9; *see also* R4, tab 3 at 2).

42. PPSI remobilized to remove and replace previously installed wall and ceiling track to comply with the ERO's response to RFI No. 1135A (Kloepfer aff., ¶ 15). On 23 January 1996, Mortenson submitted a \$1,580 equitable adjustment request on behalf of itself and PPSI for costs of revising completed layouts and of removing and replacing the framing track, which had required relocation due to the response (R4, tab 8). The ACO denied the request on 25 March 1996 on the ground that the Contract Drawings clause required that the contractor compare all drawings and verify figures before laying out the work and that it notify the CO of any discrepancies, and that it was responsible for errors resulting from its failure to do so (R4, tab 9; *see also* finding 21).

43. On 26 May 2000, Mortenson submitted a \$1,681 claim for revising walls and soffits at Room 2F118, incorporating its equitable adjustment request. The CO denied the claim on 14 September 2000, on the basis that the contract drawings contained a patent defect, caught by the contractor before it laid out its work, and that it was remiss in proceeding with the claimed work (R4, tab 1 at 5, tab 3).

DISCUSSION

Appellant alleges that the Room 2F118 conflict at issue was not obvious, as evidenced by the government's failure to discover it despite alleged months of design review prior to the invitation for bids, and that appellant and its subcontractors did not have actual or constructive knowledge of it until they began field work. The government acknowledges a design discrepancy in the layout of the corridor walls from grid line J, but it alleges that the defect is patent; appellant failed to comply with its quality control preparatory duties under TS 01440, ¶ 3.6.1, and with the requirements of the Specifications and Drawings for Construction and Contract Drawings clauses that it review drawings before beginning work and promptly notify the CO of discrepancies (*see* findings 19, 21; *Mortenson I*, finding 7); and that, had it done so, the discrepancy could have been timely resolved and the claimed rework avoided. The government further asserts that the ERO's response to RFI No. 1135A was a minor clarification of work manifestly necessary to carry out the contract's requirements, not a directed change.

Prior to appellant's issuance of RFI No. 1135 concerning Room 2F118, PPSI had already laid out corridor 2E140 as shown on Drawing No. A2.318 at 10'-4" from grid line J. It then discovered the conflict with Drawing No. A2.321, which positioned the door 2F108D opening at 10'-5" from grid line J. In RFI No. 1135, appellant alerted the ERO to the conflict, noting that the corridor had been laid out using the 10'-4" dimension. Appellant suggested that the A4 walls on the south side of the door be

relocated and the ERO complied, allowing relocation to comport with PPSI's 10'-4" layout. (See finding 38)

It was not until after appellant's receipt of the ERO's response to RFI No. 1135, and after it had continued to lay out Room 2F118, that PPSI noticed that, not only had there been a conflict with the 10'-4" corridor layout and the 10'-5" dimension designated for the north door in the room, but that there was a similar conflict with the 10'-5" dimension specified with respect to the aligned south door. Appellant then issued RFI No. 1135A. (Findings 39, 40) The ERO responded to the effect that the 10'-4" dimension was to be used throughout the room (see finding 41). It appears that, prior to receipt of the ERO's response to RFI No. 1135A, and despite the ERO's response to RFI No. 1135 concerning application of the 10'-4" dimension, PPSI had already laid out the south door area using the 10'-5" dimension. We infer that this is so because, after receipt of the response to RFI No. 1135A, PPSI remobilized to remove and replace previously installed wall and ceiling track, and appellant's equitable adjustment request and claim were for rework costs. (See findings 42, 43)

There is no evidence in the appeals before us concerning the extent of design review performed before the invitation for bids issued (see *Mortenson I*, finding 1). Thus, we cannot evaluate that aspect of appellant's argument. Regardless, there was a discrepancy between the noted 10'-4" and 10'-5" dimensions concerning room 2F118 that appellant failed to discover before beginning work. Even after it became aware of a conflict during its layout of Room 2F118 with respect to the room's north door, its drawings review remained incomplete, because it failed timely to notice the conflict at the south door.

Again, appellant has not shown that it complied with its contractual drawings review and coordination duties but that a defect in the contract drawings, which it could not have recognized with reasonable effort, was responsible for its claimed costs.

DECISION

ASBCA No. 53125 is denied.

ASBCA No. 53126 (Added GWB Scope in Exhaust/Intake Plenums)

This appeal involves appellant's \$17,006 claim for closure framing and GWB at the exterior wall/plenum interfacing at the pods A through E intake and exhaust plenums. The government alleges that the contract required rigid insulation with integral vapor retarder and a four-inch metal stud wall with GWB within the interior of the plenums and that the plenum panels be terminated at the precast concrete walls, with no gap. The

government contends that, as an accommodation to appellant, it deleted the requirement for the insulation and wall within the plenums. The closure requirement remained. However, because of the deletion, there was no specific contract detail to cover the type of closure now needed. The government provided an example of such a closure in its response to RFI No. 2188 below (finding 56). The dispute centers on the closure work. The government alleges that the net result of its deletion of work within the plenums was that appellant performed less work than originally required by the contract and incurred fewer costs. Appellant contends that the contract never specified the “deleted” work and that the government’s closure requirement constituted extra work for which it is entitled to an equitable adjustment.

FINDINGS OF FACT

44. Mechanical Drawings No. M5.04, M5.10, M5.16, M5.22 and M5.28 (the mechanical pod drawings) (R4, tabs 24-28), depict roof level mechanical plans for pods A through E and show the plenums in dispute to the right of vertical grid line B, at horizontal grid lines 13 (intake louver) and 15 (exhaust louver), with notes directing the contractor to see the architectural drawings for the intake and exhaust louvers. Behind the intake louvers on the inside of the pods is a rectangular area of the floor sloping to drain enclosed by a plenum panel, with a cite to Keyed Note 4, which states:

Construct OSA [outside air] plenum behind OSA louver utilizing walls, floor, and 2” insulated sheet metal plenum panels as indicated. Terminate plenum panels on concrete curb in accordance with detail 1/M6.11. Approximate plenum dimensions are: 12 ft. wide by 3 ft. deep by 17 ft. high.

(*Id.*) Another plenum panel cites to Keyed Note 2, which begins “Construct relief plenum behind relief louver,” and thereafter is the same as Keyed Note 4 (*id.*). The referenced Detail 1, Plenum Curb Detail, on Drawing No. M6.11, MECHANICAL DETAILS, depicts a two-inch insulated plenum wall, among other things (R4, tab 29).

45. Drawings No. A2.401 through A2.405 (the architectural pod drawings) show roof level floor plans for pods A through E (R4, tabs 16-20). The government contends, and appellant has not disputed, that Drawing No. A2.401, for pod A, is typical of the other architectural pod drawings (R4, tab 16). At the top and bottom of the drawing, at horizontal grid lines 13 and 15, the precast concrete panels are depicted in plan view with another wall on the interior face of the panels, parallel to them. For construction of this wall, the drawing refers to Detail 1, Exterior Wall Const. @ Occupied Zone, of Drawing No. A6.202, GENERAL DETAILS (ex. G-5), and describes it as “similar.” Although Detail 1 is placed to the left of grid line B, which is outside the plenum area, at grid line 15 the precast concrete panel and interior wall are shown as continuous several feet to the

right of grid line B, into the plenum area, until they abut against a concrete column that is integral with the panel. Nearby there is a reference to Detail 5, Section Thru Roof Pods, East & West, on Drawing No. A6.303, MISC. ROOF DETAILS (ex. G-6). A wall parallel to and about 14 feet to the right of grid line B cites to Detail 7, Drip Shelf Detail, on Drawing No. A6.302, ROOF DETAILS (ex. G-7).

46. Detail 1 shows a cross section of a precast concrete panel with rigid insulation and an integral vapor retarder on the interior face of the panel, and a four-inch metal stud wall with GWB separated by a one-inch air space between it and rigid insulation attached to the precast panel (ex. G-5). Detail 1 is not depicted on any architectural pod drawing other than typical Drawing No. A2.401.

47. Detail 5 appears on all of the architectural pod drawings. It shows a standing seam metal roof and concrete precast panel. It does not show framing, insulation, or GWB. (Ex. G-6; Kloepfer aff., ¶ 9) However, Detail 5 cross references Drawing No. A5.07, BUILDING SECTION THROUGH POD 'F' (ex. G-4.1), which depicts a cut at the roof line of pod F, not part of this dispute, and which the government contends looks similar to what one would expect for the location shown on the architectural pod drawings. The government alleges that actual plenum wall construction is depicted in Detail 7, not Detail 5.

48. On a wall to the right of, and parallel to grid line B, typical Drawing No. A2.401 and two other architectural pod drawings cite to Detail 7, which depicts the construction of an eight-inch metal stud wall with standing seam metal roofing over plywood, with an air filtration barrier, batt insulation, and GWB on the interior side of the wall (R4, tabs 16, 18, 20; ex. G-7).

49. Drawing No. A6.303, which includes Detail 5, also contains Detail 6, East & West Pod Details, consisting of a "JAMB" detail and a "HEAD" detail, each of which depicts eight-inch studs, plywood, and GWB with insulation (ex. G-6). Appellant contends that Detail 6 conflicts with Detail 5 and does not apply, but it concedes that Detail 6 appears to pertain to the plenum space:

The HEAD details [of Detail 6] are a section view. However, there is no section in Pods A through E that has a concrete roof and wall that can be represented as this detail indicates. The JAMB detail is a plan view. However, this detail completely contradicts details 5/A6.303. Although Detail 6/A6.303 appears to be from a section showing a portion of the plenum space, Detail 5/A6.303 is referenced in all five Pod plan views and more accurately depicts and compliments (sic) the other referenced details within the plenum space. In this detail, no framed wall is shown inside the plenums.

(Kloepfer aff., ¶ 14)

50. Drawing No. A6.303 also contains Detail 9, Circular Louver, which does not show framing, insulation or GWB at the exterior wall/plenum interfacing (ex. G-6; Kloepfer aff., ¶ 7).

51. Drawing No. A2.602, ROOF PLAN – CENTER (R4, tab 21), at the roof drawing at pods D and E, refers to Detail 4, Roof Detail @ Pod, on Drawing No. A6.301, ROOF DETAILS, with respect to the lower right hand corner of the Pod E roof area (R4, tab 23; *see* R4, tab 3 at 2). Appellant contends that there is no framing, insulation or GWB at the depicted location. However, Detail 4 refers to Detail 1, Typical Parapet Detail, on Drawing No. A6.301 for additional notes. Detail 1 notes: “Fill W/Batt Insulation” with apparent application to an area on Detail 4. (R4, tab 23) Detail 4 does not depict interior furred walls (Kloepfer aff., ¶ 13).

52. Structural Drawing No. S2.53, ROOF LEVEL AREA ‘C’ FRAMING PLAN, depicts a rectangular concrete floor at grid lines B/13 to B.4/13 and B/15 to B.4/15, of the same approximate size and location of the plenums described in the mechanical pod drawings; shows the concrete curb for the plenum panels depicted and noted on those drawings; and cites to Keynotes 5.31 and 5.32, which call, respectively, for a concrete curb at the plenum wall and coordination of the location and “extents” with the mechanical contractor, and slope of the concrete slab to drain the area and coordination of the location with the mechanical contractor (ex. G-8).

53. Mortenson submitted RFI No. 2046, dated 28 June 1996, concerning the architectural pod drawings and Details 5 and 9, stating:

- a. It appears that the inside of the Roof Area Plenums (North & South) do not receive a furred GWB Wall.

Please confirm.

- b. Is a furred wall above the Plenums required?

Please clarify.

- c. Is GWB required at the 8” Exterior Framed Wall inside these Plenums? None is shown.

Please confirm no GWB is required.

(R4, tab 4)

54. The ERO responded on 2 August 1996 that:

- 1) The typical Pod exterior wall (detail 1/A6.202, Sheet A2.401) is required per the documents, but the insulation/vapor barrier and gypsum board on metal studs can be deleted within the Pod Intake and Exhaust Plenums.
- 2) Yes. Wall construction is required except behind the plenum.
- 3) Plan and Section details 6/A6.303 do indicate gypsum board and will be required.

(*Id.*) In additional notes, the ERO called for work per attached sketches ASD-214, which cites the mechanical pod drawings and depicts plenum plan views, and ASD-215, which shows precast panels and does not depict interior furred walls (*id.*; Kloepfer aff., ¶ 13).

55. By RFI No. 2188, dated 18 August 1996, Mortenson asked the ERO to clarify its response to RFI No. 2046:

Your response indicates the deletion of framing and Gypboard in the Plenums (response #1, #2, to RFI #2046 and attached sketch ASD214). If this is your intent please be aware that the Plenum walls will not be in contact with the precast panel creating an 8” gap (see M5.04). As we feel that this gap will be unacceptable, please advise on the method of closure at this intersection (Gypboard & framing or Plenum filler panel) as work is ongoing in this area. Note that filler panels will result in additional cost as well as time delays.

(R4, tab 5)

56. The ERO responded on 9 September 1996 that it had deleted framing and drywall only “WITHIN the plenums;” a gap between the plenums and exterior construction was unacceptable; and a positive connection of the plenum to the louver/wall was required. It attached sketch ASD-221 as an example of an acceptable joint that terminated the exterior vapor barrier and insulation, insulated the space between the exterior insulation and plenum, and sealed the interior of the joint. (*Id.*)

57. By letter to Mortenson of 11 September 1996, PPSI claimed additional costs and/or time. It disagreed that GWB, metal stud framing, and insulation had been “deleted,” stating that Details 4, 5 and 9 had not shown the work as required. PPSI apparently had continued to work before the ERO responded to the plenum inquiries

because PPSI stated that return trips to at least some of the pods were necessary. (R4, tab 3 at ex. L)

58. On 3 March 1997 PPSI wrote to Mortenson that:

Originally, we did not figure any work within the plenum, as the large scale details do not show this work as being required. The large scale details/sections supersede smaller scale drawings as set forth in SCR 5 Paragraph C [*]. This was confirmed on RFI #2046. RFI # 2188 provided a detail for connecting the plenums to the precast. This change caused the delay of the completion of our work. The design resequenced the application of our framing and drywall from “prior to the plenum installation until after the plenums were installed.”

(R4, tab 7)

59. Mr. Kloepfer states that, based upon Details 4, 5 and 9, PPSI had assumed, prior to submitting its bid to Mortenson, that no framing, insulation or GWB was required at the exterior wall/plenum interfacing and that no furred walls were required above the plenum space. He alleges that Details 4 and 9, and sketch ASD-215, do not depict interior furred walls. (Kloepfer aff., ¶¶ 6-13) Mr. Kloepfer does not state whether he was involved in preparing or reviewing PPSI’s bid prior to submission to Mortenson and appellant has not supplied evidence to substantiate the claimed assumption.

60. On 25 March 1997 Mortenson submitted RFI No. 2188A, asking for confirmation that an attached sketch showing a method for “pod plenum closure to precast” was correct. The ERO responded that the sketch was acceptable in general but that it did not show how the gap between the rigid insulation and the plenum panel was insulated or how the vapor barrier for the gap was sealed. (R4, tab 8)

61. By RFI No. 2188B, dated 10 April 1997, Mortenson resubmitted the sketch, stating that it had been reviewed with Corps personnel “to correct a document deficiency” (R4, tab 10). The ERO denied any contract document deficiency:

* The reference is to paragraph (c) of the Contract Drawings clause, which states: “Large scale drawings shall, in general, govern small scale drawings. Figures marked on drawings shall, in general, be followed in preference to scale measurements.” (Bd. ex. 1, vol. 1, at SCR-2) PPSI did not identify the drawings to which it referred.

The requirement from the M5.00 series Pod Roof Plans is to construct OAS/Relief Plenums behind the OSA/Relief louvers which are installed in the precast walls. The plenum is made up of the building components as well as the insulated panels. It does not appear that the insulated panel will tie to the GWB wall and the GWB has not been returned to the precast, both conditions result in an incomplete plenum. We have agreed that you can close this resulting gap in the general manner as depicted on [the contractor's RFI-2188A sketch] however additional refinement is required

(*Id.*) The ERO eventually accepted PPSI's method of plenum construction (R4, tab 11).

62. On 2 May 1997, the ERO issued unilateral Modification No. P00318, which formalized the alleged deletion of the insulation/vapor barrier and GWB on metal studs within the pod intake and exhaust plenums per the ERO's response to RFI No. 2046, and increased the contract amount by \$18,085, mainly to cover the work in the additional notes to the response. It also incorporated sketches ASD-214 and ASD-215 as partial revisions of the contract drawings. (R4, tab 30)

63. On 22 June 2000, Mortenson submitted a \$17,006 claim for remobilization and other costs to provide closure framing and GWB at the exterior wall/plenum interfacing in the pods A through E intake and exhaust plenums, including \$9,995 for PPSI, \$3,704 for Klondike Painting & Decorating, and markup. The contractor claimed that each of the five pods required return work. (R4, tab 3)

64. On 22 September 2000, the CO denied the claim on the ground that Keyed Notes 2 and 4 on the mechanical pod drawings had required eight-inch framed walls to provide plenum closure to the precast wall in pods A through E, the work Mortenson was now claiming as extra. She alleged that the contractor had recognized during performance that the plenums would not function properly without that work and that it originally had failed to read the contract as a whole. The CO also asserted that deletion of the contract requirement for insulation, vapor barrier and GWB on metal studs from within the intake and exhaust plenums had benefited the contractor in cost and time savings, for which the government reserved the right to file a claim. (R4, tab 1)

DISCUSSION

Appellant contends that: the ERO's responses to RFIs No. 2046 and 2188, with their requirement that appellant provide closure framing and GWB at the exterior wall/plenum interfacing, called for extra work not depicted on the contract drawings (*see* findings 54-58); PPSI had assumed, pre-bid, based upon Details 4, 5 and 9, that framing, insulation and GWB were not required at the exterior wall/plenum interfacing and furred

walls were not required above the plenum spaces, and Details 4 and 9, and sketches ASD-214 and ASD-215, do not depict furred walls (*see* finding 59; app. br. at 22, proposed finding e.); and the government has misconstrued “inapplicable and conflicting details” (app. br. at 25).

The government asserts that: appellant did not coordinate the mechanical, architectural and structural drawings; the contract originally had required the work deleted in the ERO’s response to RFI No. 2046; the deletion was an accommodation to appellant; because the contract had not contemplated deletion of the interior wall next to the precast concrete panel within the plenum, there had been no detail, as now depicted in ASD-221, covering the gap closure at issue (*see* finding 56); and, had appellant complied with the original contract requirement, the GWB closure between the plenum and the precast walls, which was only incidental to the deletion, would not have been necessary.

The record does not reveal whether the alleged deletion accommodated appellant, as the government claims. However, we conclude that the contract, read as a whole, should have alerted appellant that insulation, GWB and an interior wall within the intake and exhaust plenums, and closure/termination of the plenums at the precast concrete walls, were required. Keyed Notes 2 and 4 on the mechanical pod drawings require the construction of plenums behind intake and exhaust louvers using “walls, floor and 2” insulated sheet metal plenum panels” that terminate on the concrete curbs. The referenced Detail 1 on Drawing No. M6.11 depicts a two-inch insulated plenum wall. (Finding 44) Structural Drawing No. S2.53 calls for a concrete curb at the plenum wall and for coordination with the mechanical work (finding 52).

Architectural pod Drawing No. A2.401 depicts precast concrete panels with a wall on their interior face. For construction of the wall, the drawing refers, at the left of grid line B, which is outside the plenum area, to Detail 1, Exterior Wall Const. @ Occupied Zone, of Drawing No. A6.202 and describes it as “similar.” Detail 1 shows a cross section of a precast concrete panel with rigid insulation and an integral vapor retarder on the panel’s interior face, and a four-inch metal stud wall with GWB separated by a one-inch air space between it and rigid insulation attached to the precast panel. Although Detail 1 is shown only on Drawing No. A2.401, that drawing is typical of the other architectural pod drawings. (*See* findings 45, 46). Appellant contends that the placement of Detail 1 outside the plenum area, and the fact that the plenum area cannot be characterized as an “occupied zone,” preclude the application of Detail 1 to plenum construction. However, the precast concrete panel and interior wall to which Detail 1 refers continue several feet to the right of grid line B, into the plenum area (finding 45). Also, it is unreasonable to conclude that a plenum would have to be considered an “occupied zone,” or at such a zone, in order for the “similar” detail to apply.

To the right of grid line B, all of the architectural pod drawings refer to Detail 5 on Drawing No. A6.303, which shows a standing seam metal roof and concrete precast

panel, and does not show framing, insulation, or GWB. Appellant contends that this means that there was to be no framing, insulation, or GWB within the plenum space. However, Detail 5 cross references Drawing No. A5.07, which depicts a cut at the roof line of pod F, and which the government contends looks similar to what one would expect for the location shown on the architectural pod drawings. The government alleges that actual plenum wall construction is shown in Detail 7. (Finding 47) At a wall to the right of grid line B, the architectural pod drawings cite to Detail 7, which depicts the construction of an eight-inch metal stud wall with standing seam metal roofing over plywood, with an air filtration barrier, batt insulation, and GWB on the interior side of the wall (finding 48).

Detail 9, Circular Louver, on Drawing No. A6.303, does not show framing, insulation or GWB at the exterior wall/plenum interfacing (finding 50). However, Detail 6, on the same drawing, depicts eight-inch studs, plywood, and GWB with insulation. Appellant alleges that Detail 6 contradicts Detail 5, but it acknowledges that Detail 6 appears to pertain to the plenum space. (Finding 49) Detail 4 on Drawing No. A6.301 does not depict interior furred walls, but it appears to call for insulation (*see* finding 51).

Although Mr. Kloepfer contends that PPSI had assumed prior to submitting its bid to Mortenson that that no framing, insulation or GWB was required at the exterior wall/plenum interfacing and that no furred walls were required above the plenum space, it is not clear whether he participated in the bidding preparation or review process and his statement has not been substantiated with other evidence (*see* finding 59). Regardless, appellant should have been alerted by the potential conflicts or inconsistencies in the details and drawings to inquire of the ERO, as required by the contract's Specifications and Drawings for Construction and Contract Drawings clauses (findings 19, 21).

In fact, appellant's submittal of RFI No. 2046 about the intended construction of the plenums reflects some uncertainty about the drawings interpretation it now advances (*see* finding 53). Moreover, when the ERO responded that the contractor could delete certain framing and GWB within the plenums, appellant replied that this would result in an unacceptable gap (findings 54, 55). This suggests that it had expected that the framing and GWB might be required, or that it had recognized that, if there were no such framing and GWB, there would have to be closure and connection to the precast panels. Further, PPSI indicated that "smaller scale drawings" might have required the disputed work, but that they were superseded by "large scale details/sections," again reflecting that it was aware that there was at least a question about the required work (*see* finding 58).

In any event, appellant has not met its burden to prove that the government changed the contract in a manner that resulted in extra costs entitling appellant to an equitable contract price increase.

DECISION

ASBCA No. 53126 is denied.

SUMMARY

ASBCA Nos. 53123, 53124, 53125 and 53126 are denied.

Dated: 2 November 2004

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53123, 53124, 53125, 53126, Appeals of M.A. Mortenson Company, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals