

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Senate Builders & Construction Managers, Inc.) ASBCA No. 56236
)
Under Contract No. W912KC-05-C-0003)

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OPINION BY ADMINISTRATIVE JUDGE DICKINSON
ON THE PARTIES' CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

This appeal arises from a Multiple Award Task Order Contract for construction services under which Senate Builders & Construction Managers, Inc. ("Senate" or appellant) was issued a task order by the United States Army on behalf of the Pennsylvania Air National Guard ("government" or "PAANG") to repair aircraft pavements at the Middletown Air National Guard facility adjacent to the Harrisburg International Airport. In its appeal Senate seeks compensation for alleged additional work as well as the remission of liquidated damages assessed by the government. The government has moved for partial summary judgment on the issues of alleged additional spall repairs and trench drain angle bar materials. Senate has opposed the government's motion and cross-moved for partial summary judgment on both issues.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. Multiple Award Task Order Contract (MATOC) No. W912KC-05-D-0003 was issued 22 June 2005 (R4, tab 1). On 5 May 2006 Task Order 0009 (TO 0009) was issued to Senate to repair and maintain approximately 47,454 square yards of concrete aircraft parking ramp for the lump sum price of \$528,080. The work was to be complete 120 days after the notice to proceed was acknowledged as received by Senate. The task order provided that any additional work identified during construction would be managed as a change to the contract. (R4, tab 84 at 1, 3, 5, tab 84.1)

2. The MATOC incorporated the following clauses pertinent to this appeal: FAR 52.233-1, DISPUTES—ALTERNATE I (JUL 2002); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); FAR 52.243-4, CHANGES (AUG 1987); FAR 52.243-5, CHANGES AND CHANGED CONDITIONS (APR 1984) (R4, tab 1 at 9, 10).

3. Specification § 03720, “REPAIR OF EXISTING CONCRETE SLAB,” provided:

The work specified in this section consists of repairs to portions of the existing concrete. Types of repair to be made include but are not limited to:

1. Repair of surface spall and delamination areas on existing concrete.
2. Repair of cracks on existing concrete.
3. Repair of control joints between existing slab pours.
4. Repair of concrete at vertical transitions.

(R4, tab 84 at 19, ¶ 1.01) With respect to spall and delamination areas, ¶ 3.03 of specification § 03720 provided:

- A. General: This work consists of repairing the leveling the [sic] concrete by placing a cementitious mortar on top.
- B. Repair Procedure:
 1. Make a 51 [2”] deep saw cut a minimum of 152 [6”] beyond all sides of the...repair area. Saw cuts shall be perpendicular and parallel to existing expansion joints. Remove spalled, scaled, loose and deteriorated concrete to sound concrete. Thoroughly blast and vacuum the newly exposed area prior to forming. Remove all resulting debris from the site.

(R4, tab 84 at 22, bracketed references to 2” and 6” in original)

4. The contract also included specifications § 05500, “METAL FABRICATIONS,” and § 05600, “ALUMINUM FABRICATIONS” (app. supp. R4, tab 1¹). Specification

¹ These specifications were submitted by appellant by cover letter dated 13 August 2008 as supplements to the “Appeal file.” We therefore designate them as tab 1 of appellant’s supplemental Rule 4 file.

§ 05500 states in subsection 1.01 that it includes “[m]etal fabrications related to the proposed trench drain bar rack and outfall plate.” The specification also contains the following reference to metal bars:

2.01 MATERIALS

- A. Miscellaneous Metal: Steel used for miscellaneous metal applications shall conform to ASTM A36.
 - 1. Steel shapes, Plates and Bars: ASTM A36.
 - 2. Stainless Steel Shapes and Bars: ASTM A276, AISC Type 304 and 316.

(App. supp. R4, tab 1, § 05500 at 05500-2) Specification § 05600 states in subsection 1.01 that it includes “[p]rovision of aluminum fabrications and appurtenant components related to the trench drain outfall plate.” The specification also contains the following references:

2.01 MATERIALS

- A. Aluminum Fabrications:
 - 1. Aluminum Structural Shapes: Aluminum alloy 6061-T6 conforming to ASTM B308, rolled or extruded. Shapes and thicknesses as indicated on Contract Drawings.
 - 2. Aluminum Rod and Bars: Aluminum alloy 6061-T6 conforming to ASTM B221. Dimensions as indicated on Contract Drawings.
 - 3. Aluminum Sheet and Plate: Aluminum alloy 6061-T6 conforming to ASTM B209. Thickness as indicated on Contract Drawings.

(App. supp. R4, tab 1, § 05600 at 05600-2)

5. Drawings C1-C3 provided the general locations of the different types of repairs, including spall and delamination areas, to be made on the pavements (R4, tab 84 at end of tab). Drawing C4 included several tables listing the approximate repair areas in square feet of spalls and delaminations by slab number shown on drawings C1-C3. For example, in the APRON CONCRETE REPAIR TABLE at slab A1 there is a repair area of 2.25 feet by 2 feet. The drawings did not indicate the depth of any identified repair. (R4, tab 84 at end of tab) The repair areas were designated as Zones 1, 2, 3 and 4 (R4, tab 84 at 28).

6. The General Notes on drawing C4 provided the following with respect to spall and delamination areas:

2. REFER TO DETAIL FOR REPAIR OF SPALLED AND DELAMINATED AREAS. DEPTH OF REPAIR ESTIMATED TO BE 51[2"] MINIMUM, EXCEPT WHERE 152[6"] IS NOTED.

....

4. SPALL/DELAMINATION AREAS LISTED IN THE TABLES BELOW DO NOT INCLUDE AREA BEYOND THE DAMAGE TO MAKE THE REPAIR. SEE TYPICAL SPALL AND DELAMINATION DETAIL, THIS DRAWING.

(R4, tab 84, bracketed references in original) Drawing C4 also provided the following "TYPICAL SPALL AND DELAMINATION REPAIR DETAIL." The detail stated:

1. SAWCUT AROUND PERIMETER OF REPAIR AREA AS SHOWN. KEEP CUTS PARALLEL WITH EXPANSION JOINTS.
2. REMOVE DAMAGED AND REMAINING CONCRETE TO MINIMUM DEPTH OF 51 [2"] BETWEEN CUTS.

(*Id.*) The detail showed a 51 [2"] deep sawcut around the perimeter of repair areas. General Note 10 on drawing C1 provided that Senate was to repair pavements adjacent to the trench drain and drawing C4 included a "TYPICAL SPALL AND DELAMINATION REPAIR ALONG TRENCH DRAIN." That detail also included a note 2 referring to "MINIMUM DEPTH OF 51 [2"]." (*Id.*)

7. The parties agree that contract drawing C4 provides that Senate was to "PROVIDE NEW ANGLE BARS ALONG EACH SIDE OF TRENCH DRAIN TOP" (R4, tab 84, drawing C4, "EXIST TRENCH DRAIN RECONSTRUCTION AT FUEL AREA"). They also agree that the contract does not specify the material used in the existing angle bars nor the material to be used in fabricating the new replacement angle bars (gov't mot. at 4; app. mot. at 15-16).

8. TO 0009 referenced FAR 52.211-12, LIQUIDATED DAMAGES—CONSTRUCTION (SEP 2000) (*see* R4, tab 1 at 11, 35) and specified that liquidated damages would be assessed at the rate of \$1500.00 for each day after the contractual completion date plus a one-time legal charge of \$400.00 (R4, tabs 84, 84.1).

9. In support of its opposition to the government’s motion for partial summary judgment and its own cross-motion for partial summary judgment, Senate provided the 12 August 2008 sworn affidavits of Senate’s president, Eugene McNally, and its vice president, Edward Bennett.

a. Mr. McNally prepared Senate’s bid and stated that he did so after reviewing the specifications and drawings as well as bids from subcontractors for work including the concrete repair work. In particular, Mr. McNally stated that his bid factored in his interpretation that the word “surface” in the requirement to “repair...surface spall and delamination areas” and the requirement to place cementitious mortar “on top” of a repair (*see* SOF ¶ 3) did not indicate “a significant depth of repair.” Mr. McNally further stated that he interpreted the requirement for sawcutting around the perimeter of a repair to a depth of two inches and the requirement to remove damaged and remaining concrete to a minimum depth of two inches to be consistent with his interpretation that “the term ‘remaining concrete’ [meant] sound concrete and that sound concrete by the typical detail was within two inches of the surface.” Mr. McNally stated he then “could readily multiply the square footage of repair areas by the two inch depth to determine a scope of work on which to base Senate’s price for repair of the surface spalls and delaminations.” (McNally aff. ¶¶ 4-5). Upon receipt of a bid from Structural Restoration Services, who became Senate’s concrete repair subcontractor, Mr. McNally believed his interpretation of a two inch repair depth to be confirmed (McNally aff. ¶¶ 6-7). Structural Restoration Services’ bid specifically stated:

The depth of the typical spall and delamination repair and the typical spall and delamination repair detail along trench drain is bid at 2”. Additional depth repairs over 2” will be invoiced in accordance with approved unit costs.

(McNally aff., attach. 1) Even though Senate’s concrete repair subcontractor’s bid recognized the possibility of repairs deeper than two inches and provided for additional payment for such work, Mr. McNally did not take the same approach in Senate’s bid.

I relied upon the government’s representations in the specifications and drawings regarding the scope of work being surface repair and the specified 2 inch depths and did not include a contingency for any greater, unknown depth of

repair because using such a contingency would have been highly speculative on my part.

(McNally aff. ¶ 8)

b. Mr. Bennett stated that he attended the pre-bid site visit held on 11 April 2006 and observed the existing trench drain grate and angle bars which appeared to him to be steel. Mr. Bennett reviewed the specifications and drawings and, after determining that the trench drain angle bars were “not part of the trench drain outfall plate” which was indicated on drawing C4 to be aluminum, he observed that all other metal designations on drawing C4 were either stainless steel or galvanized steel. He concluded that Senate’s bid should include replacement of the existing angle bars with cast steel angle bars. (Bennett aff. ¶¶ 3-8; McNally aff. ¶ 12)

10. The Pre-Construction Conference was held 15 May 2006. The Notice to Proceed is dated 15 May 2006 but was not acknowledged or signed by Senate’s representative until 22 June 2006 (R4, tab 85), making 20 October 2006 the contract completion date (R4, tab 86.1). Senate mobilized to the jobsite on or about Monday, 31 July 2006 (R4, tabs 93, 96, 97).

11. On 31 July 2006 Senate forwarded to the government its subcontractor’s RFI #1 request for clarification.

THE REPAIR AREA IDENTIFIED ON DRAWING NO. C4 INDICATES THAT NEW ANGLE BARS ARE TO BE INSTALLED. SPECIFICATION SECTION 05500 2.01 IDENTIFIES THAT STEEL USED FOR MISCELLANEOUS METAL APPLICATIONS SHALL CONFORM TO ASTM A36. BASED UPON OUR FIELD INSPECTION YESTERDAY, THE ANGLE BARS APPEAR TO BE STAINLESS STEEL. ARE WE TO INSTALL STAINLESS STEEL ANGLE BARS? PLEASE CLARIFY.

(R4, tabs 91, 98) The government responded to RFI #1 on 4 August 2006 advising that the existing trench angle bars were aluminum and that Senate should replace them with angle bars of the same material (R4, tab 98). On 10 August 2006 in RFI #3 Senate advised that the manufacturer of the existing angle bars no longer produced aluminum bars but did produce cast iron angle bars which Senate requested be approved by the government for use on this project (R4, tab 102). The government approved the request on 16 August 2006 (R4, tabs 104, 105). Senate ordered the cast iron angle bars in

September 2006 (R4, tab 171), received them on the jobsite on 10 October 2006 and installed them 24 November 2006 (R4, tab 259 at 3).

12. The minutes of the 15 August 2006 Construction Coordination Meeting reported that the contracting officer representative (COR) requested that Senate identify specific crack and spall areas not included in the contract and provide an RFI with proposed contract changes to repair the additional areas (R4, tabs 104, 119).

13. On 5 September 2006 Senate submitted to the COR a list of additional work in Zone 2 that Senate proposed to perform at additional cost to the government (R4, tab 132). An RFP for performance of the Zone 2 additional work was drafted (R4, tab 137). On 8 September 2006 Senate was requested to submit a cost proposal for the additional work in Zone 2 (R4, tab 138).

14. On 7 September 2006 Senate submitted to the COR a list of additional work in Zone 1 that Senate proposed to perform at additional cost to the government (R4, tab 136).

15. On 13 September 2006 Senate submitted a cost proposal including a request for more time for additional spall repair work in Zone 2 and the parties negotiated for several days (R4, tabs 144, 149, 150, 151, 153-56).

16. RFI #4 was initiated by Senate on 16 August 2006 to address the subject of spall repairs at grid S/R 22/23 in Zone 2 where the damage area was larger than shown on drawing C3 (R4, tab 106). The RFI stated that “[d]ue to the existing multiple cracks, Senate is concerned about the new product and method of repair. The type of repair seems to be incorrect.” The government responded to RFI #4 on 28 August 2006 authorizing the repair of the larger area as a change to the contract with new drawings associated only with this particular repair. On new drawing SK-1 it was noted that “EXISTING CONCRETE REPAIR (DEPTH OF REPAIR UNKNOWN).” Drawing SK-2 contained the following notes:

1. SAWCUT 2” DEEP AND REMOVE CONCRETE 2” DEEP AND REPAIR PER STANDARD DETAIL. IF CONCRETE REPAIR BETWEEN EXISTING JOINTS IS DEEPER THAN 2”, REMOVE EXISTING CONCRETE UNTIL SOLID CONCRETE IS ENCOUNTERED OR TO A MAXIMUM DEPTH OF 8” IS REACHED.

2. IF DEPTH IS LESS THAN 8" REPAIR BASED ON SPALL REPAIR DETAIL WITH SEVERAL LIFTS AS RECOMMENDED BY SIKA.
3. IF EXISTING CONCRETE REPAIR IS MORE THAN 8" IN DEPTH, FULL DEPTH CONCRETE REPAIR IS REQUIRED. CONTACT THE ENGINEER FOR ADDITIONAL DETAILS.

(R4, tabs 118, 148) The parties referred to this particular additional work as the "deep spall repair" or "deep repair." The "deep repair" was distinguished from the type and method of repair in the contract as awarded by the imposition of a maximum spall repair depth and the possibility of a full-depth concrete repair. On 19 September 2006 the government requested the status of a proposal for the Zone 2 "deep repair" work (R4, tab 158). The proposal for the "deep repair" work was submitted by Senate on 20 September 2006 in which it asked for an extension of two (2) days to the performance period (R4, tab 163). The "deep repair" proposal was accepted by the government the same day (R4, tab 164). Senate also submitted its proposal for additional Zone 1 work on the same day and asked for an extension of eight (8) days to the performance period (R4, tab 165). The government accepted Senate's amended proposal for Zone 1 additional work on 22 September 2006 (R4, tabs 166-68).

17. Modification No. 1 to the contract was signed by the contracting officer on 26 September 2006 and included, *inter alia*, the Zone 1 additional work, Zone 2 additional work and the Zone 2 "deep repair." The contract completion date was extended by 18 days to 7 November 2006 and the contract price was increased \$25,020. (R4, tab 170)

18. On 28 September 2006, at the beginning of work in Zone 3, Senate and its subcontractor advised the COR that they considered the demolition of concrete to a depth greater than two (2) inches for spall repairs to be extra work. On 3 October 2006 the COR responded that demolition of concrete to a depth greater than two (2) inches for spall repairs was not extra work and was required by the contract as awarded. (R4, tab 173)

19. On 10 October 2006 the government forwarded an RFP to Senate for Zone 3 additional work (R4, tab 174). The minutes of the Construction Coordination Meeting which also took place on this date indicated that a field change would be written limiting spall repairs along the trench drain to a four inch depth (R4, tab 175). The field change was the result of Senate's request for "direction for repairs [in] areas where spalls are specified and cannot be completed due to deterioration of existing trench drain wall where voids are evident between the frame and surrounding areas" (R4, tab 176). The

following week on 18 October 2006 the COR forwarded to Senate by e-mail a document titled "FIELD CHANGE," in which the change was described as:

Limit spall repair depth along 30" wide trench drain to approximately 4". Remove loose concrete adjacent to trench grate support angles in a manner that limits the disturbance of surrounding concrete. Limit spall repair length along 30" wide trench drain to approximately 6" beyond contractual areas of repair.

(R4, tab 185) The field change document was signed by the COR but Senate refused to sign it because the form also indicated the work was to be done at no additional cost to the government (R4, tab 253). There is no evidence in the record before us on the motions of a contract modification addressing this change to the contract requirements for spall repairs in the area of the trench wall but there is no dispute that Senate performed the work as changed.

20. On 12 October 2006 Senate submitted its proposal for the Zone 3 apron additional spall repair work (R4, tab 178). The government did not accept the proposal and directed Senate to perform only the repairs in the Zone 3 apron which were specified in the contract as awarded (R4, tabs 181-84).

21. On 26 October 2006 the government requested a proposal from Senate for Zone 4 deletions and additional work (R4, tab 191). Senate submitted its proposal on 30 October 2006 which included a request for an extension of the contract performance period by 6 days (R4, tabs 193, 196-97).

22. Senate submitted a revised proposal for the Zone 4 additional work by 8 November 2006 in which it forwarded the following notification by its subcontractor of an issue about spall repair depth (R4, tab 207):

Please note that the RFP does not specify depth for the additional spall repairs. If the additional spall repair locations identified in this RFP require the repair depth to exceed two (2) inches, a separate Change Order will be submitted for approval prior to proceeding with the additional depth repairs.

(*Id.* at 1)

23. On 21 November 2006 the contracting officer sent Modification No. 3 for Zone 4 additional work to Senate for signature. The modification included the amount proposed by Senate and the requested six (6) additional days of performance; it also made

13 November 2006 the new contract completion date. (R4, tab 218) On the same day Senate submitted a proposal for more additional work in Zone 4 and a further extension of the contract performance period by two (2) days (R4, tabs 219-20).

24. It is undisputed that the government took beneficial occupancy of the project area on 1 December 2006 and that final contract completion occurred on 15 December 2006 (R4, tabs 257-62).

25. Modification No. 4, effective 3 January 2007, included the additional amount and two days performance time proposed by Senate for Zone 4 on 21 November 2006 and also assessed liquidated damages in the amount of \$30,400.00 for the 15 days between the revised contractual completion date of 15 November and 1 December 2006, the date of beneficial occupancy by the government (R4, tab 230). Modification No. 5, effective 25 January 2007, was issued to correct the calculation of the liquidated damages amount to \$22,900.00 (R4, tab 232).

26. In February 2007 Senate submitted a series of change order requests designated 0001A through 0001F and a weather delay request to the contracting officer requesting that the government compensate it for additional costs alleged to have been incurred and/or to extend the contractual completion date due to a variety of delays alleged to have been suffered by Senate (R4, tabs 234-40).

27. On 6 and 13 April 2007 the contracting officer denied Senate's letter requests (R4, tabs 243-49). None of the denial letters were identified as contracting officer final decisions nor did they contain statutory appeal language.

28. On 28 July 2007 Senate submitted additional facts to the contracting officer in support of six claims and requested contracting officer final decisions:

- (1) Five days extension due to adverse weather (R4, tab 250);
- (2) Change Order Request 0001A—costs in the amount of \$1,588.55 associated with the additional work of conducting surveys to identify additional spall repair work in Zones 1 and 2 (R4, tab 251);
- (3) Change Order Request 0001B—ten days extension and costs in the amount of \$4,195.79 associated with defective specifications or differing site conditions pertaining to the trench drain angle bar material, specifically the government's direction to supply aluminum bars (R4, tab 252);
- (4) Change Order Request 0001C—eight days extension and costs in the amount of \$12,158.26 associated with removal and replacement of concrete to a depth of more than two inches due to defective specifications or differing site conditions pertaining to the Zone 3 trench drain spall repairs (R4, tab 253);

- (5) Change Order Request 0001D—seven days extension and costs in the amount of \$31,343.61 associated with removal and replacement of concrete to a depth of more than two inches due to defective specifications or differing site conditions pertaining to spall repairs in Zone 4 (R4, tab 254); and
- (6) Change Order Request 0001E—four days extension and costs in the amount of \$6,620.17 associated with removal and replacement of concrete to a depth of more than two inches due to defective specifications or differing site conditions pertaining to spall repairs in the Zone 3 apron (R4, tab 255).

29. By letter dated 1 November 2007 Senate appealed from the deemed denial of its six claims totaling \$55,906.38 when it had received neither the requested contracting officer final decisions nor any indication from the government as to when such decisions would be issued. Senate's notice of appeal also stated that its requests for time extension in its claims, if granted, would result in the remission of liquidated damages in the amount of \$22,900.00. The appeal was docketed as ASBCA No. 56236. On 12-20 December 2007 the contracting officer issued final decisions denying Senate's six claims. (R4, tabs 257-62)

DECISION

In this appeal Senate seeks time extensions to the contractual completion date (and resultant remission of liquidated damages) as well as monetary compensation for costs allegedly incurred as a result of extra-contractual work performed. The government has moved for partial summary judgment in its favor on the contract interpretation issue of alleged extra work and delays due to defective contract specifications or differing site conditions as they relate to the removal of spalled concrete deeper than two inches (SOF ¶ 31, ¶¶ 4-6 (Change Order Requests 0001C, 0001D, 0001E)). The government also seeks partial summary judgment in its favor on the issues of alleged delays and increased costs related to the trench drain angle bar materials, arguing that the lack of a specified material in the contract was a patent ambiguity that required Senate to seek clarification prior to bidding, which it did not do and which precludes judgment in Senate's favor as a matter of law (*id.* ¶ 3 (Change Order Request 0001B)).

Senate opposes the government's motion. On the subject of spall repairs Senate argues that its contract interpretation, as well as the alleged contemporaneous interpretation of the government, as to the depth of spall repairs is correct as a matter of law and it has filed its own cross-motion for partial summary judgment on the issue of spall repairs made to a depth greater than two inches. Alternatively, it argues that it may recover on the basis of a Type I differing site condition. On the subject of the trench drain angle bars, Senate argues that the government is not entitled to judgment in its favor because there was no ambiguity and because there are material facts in dispute. In the alternative Senate argues that, even if there was an ambiguity, it was latent not patent.

Senate also cross-moves for partial summary judgment in its favor as a matter of law on this issue (app. mot. at 19).

We evaluate each party's motion for summary judgment under the well-settled standard that:

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.... The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In the course of our evaluation, the Board's role is not to resolve factual disputes, but to determine whether material facts are disputed and whether there are any genuine issues for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A material fact is one which may make a difference in the outcome of the case. *Id.* at 248. If there are genuine issues of material fact, summary judgment is inappropriate even where both parties have filed cross-motions requesting it. *Mingus*, 812 F.2d at 1391; *Skanska US Building, Inc.*, ASBCA No. 56339, 10-1 BCA ¶ 34,392; *Facilities Engineering & Maintenance Corp.*, ASBCA No. 39405, 91-3 BCA ¶ 24,239 at 121,212.

A. Spall Repairs

The issue in this appeal, as it relates to spall repairs, is whether the contract price included spall repairs deeper than two inches. Senate seeks compensation for alleged extra spall repair work in three of its claims: 0001E (Zone 3 apron); 0001D (Zone 4); and, 0001C (Zone 3 trench wall). Both parties seek summary judgment on these three claims and each opposes the other's motion.

1. Claim 0001E (Zone 3 Apron) and Claim 0001D (Zone 4)

Senate claims that, for spall repairs which were identified in the contract, as awarded, a two inch deep repair was included in the contract price and any repair which was deeper than two inches was extra, compensable work. In the Zone 3 apron area Senate identified additional spall repair areas not in the contract, as awarded, but the parties could not come to agreement on the terms of performing this additional work and the government directed Senate to perform only the spall repairs identified in the contract as awarded (SOF ¶¶ 19-20). In Zone 4 Senate received the compensation it requested, in both time and money, for work in addition to what was required by the

contract as awarded (SOF ¶¶ 23, 25). On these two claims, then, the only issue before us is whether the contract, as awarded, required Senate to perform spall repairs to a depth greater than two inches if necessary to reach sound concrete.

The contract drawings and specifications required a two-inch deep sawcut at the perimeter of spall repair areas (SOF ¶¶ 3, 6). They also required that, within the repair area inside the sawcut perimeter, Senate and its subcontractor were to “[r]emove spalled, scaled, loose and deteriorated concrete to sound concrete” (SOF ¶ 3). The only limitation in the contract drawings and specifications, as awarded, with regard to the depth of the repair was that all repairs would be at a *minimum* depth of two inches (except where noted otherwise in the contract) and, while there was *no maximum* depth indicated anywhere in the contract, it is clear that the contract contemplated that the depth of repairs would be determined by the depth at which sound concrete was encountered (SOF ¶¶ 3, 5, 6). As contract performance progressed, the only instances in which a maximum depth of repair was specified were the two instances in which the presence of sound concrete in the area to be repaired was called into question: the “deep repair” with a maximum depth of eight inches (SOF ¶ 16)²; and, the field change involving spall repairs adjacent to the trench wall with a maximum depth of four inches (SOF ¶ 19).

Prior to bid and contract award, Senate’s concrete repair subcontractor recognized the possibility of repairs deeper than two inches after reviewing the contract drawings and specifications and included in its bid to Senate the subcontract term that repairs deeper than two inches would be subject to additional payment by Senate to the subcontractor. Senate’s president acknowledged that the subcontractor’s bid included contingency pricing for repairs deeper than two inches, yet he chose to bid one price for all repairs and did not include contingency pricing for depths greater than two inches in his own bid to the government. (SOF ¶ 9a)

We find that the contract drawings and specifications read as a whole have only one reasonable interpretation and that is that all spall repairs could be expected to be two inches or greater in depth, depending upon the point at which sound concrete was reached. We find Senate’s argument in its filings on these motions that the words “surface” and “on top” corroborate Mr. McNally’s interpretation that no repairs deeper than two inches would be encountered (SOF ¶ 9a) to be unpersuasive. The occurrence of such words in the contract did nothing to indicate a maximum depth of two inches

² It is on the basis of this exception to the depth requirements of the contract, as awarded, that we reject Senate’s argument that the government’s imposition of an eight-inch maximum depth for this particular repair was a “contemporaneous interpretation” by the government consistent with Senate’s interpretation of a maximum depth of two inches for all repairs.

any more than they indicated any other depth, either lesser or greater than two inches. For the same reason, appellant may not recover on the basis of a Type I differing site condition in these areas. We grant the government's partial motion for summary judgment as to these claims. We deny Senate's partial motion for summary judgment as to these claims.

2. Claim 0001C (Zone 3 Trench Wall)

In this claim Senate seeks compensation for spall repairs performed at the Zone 3 trench wall which exceeded two inches in depth. As we held above, the contract, as awarded, did not specify a maximum depth for spall repairs and therefore required the depth of spall repairs to be at whatever depth was necessary to reach sound concrete. In the case of the Zone 3 trench wall spall repairs, however, the contractually-required depth of the spall repairs was altered when the parties agreed that the spalled conditions encountered were significantly more deteriorated than expected. As a result, the government gave verbal approval as well as a written "field change" authorizing Senate to perform spall repairs no deeper than four inches along the trench wall. However, Senate refused to sign the field change document and no contract modification was ever executed by either party which would manifest an agreement as to the repairs in the trench wall area. There is no dispute that Senate performed the spall repairs in this area but there is nothing in the record before us on the motions to indicate the details of that work and how it was accomplished. (SOF ¶ 19)

It is undisputed that, as it relates to the Zone 3 trench wall spall repairs, the inherent assumption of the contract that sound concrete would be reached at some point (SOF ¶¶ 3, 5, 6) was recognized by both parties to be in question because spall repairs could not be completed "due to deterioration of [the] existing trench drain wall where voids are evident between the frame and surrounding areas" (SOF ¶ 19). We understand the words "deterioration" and "voids" to describe unsound concrete. The field change document did not indicate whether the entirety of the concrete along the trench drain wall was unsound or whether there were areas of both sound and unsound concrete. There remain questions of material fact as to whether sound or unsound concrete was present at the directed four-inch depth of repair, whether the method of repair specified in the contract was appropriate for unsound concrete, whether a different method of repair was directed or performed in the trench drain wall area, and whether the work performed by Senate in this area actually caused the increased costs it has claimed. There are, therefore, genuine issues for trial and neither party is entitled to summary judgment in its favor as a matter of law on the issue of the Zone 3 trench wall spall repairs. *PK Contractors, Inc.*, ASBCA No. 53576, 04-2 BCA ¶ 32,661. We deny the government's motion for partial summary judgment as to this claim. We deny Senate's motion for partial summary judgment as to this claim.

B. Claim 0001B (Trench Drain Angle Bars)

Senate seeks compensation in time and additional costs it claims to have incurred as a result of defective specifications which caused it to provide trench drain angle bars of a different material than the cast steel angle bars it claims to have included in its bid (SOF ¶¶ 9b, 11). The parties agree that the contract was silent as to both the material of the existing angle bars and the material of the new replacement angle bars. The government argues that the total lack of this information constituted a patent ambiguity requiring Senate to inquire before bidding. Because Senate did not inquire, the government argues, it is precluded from raising the issue now and the government is entitled to judgment as a matter of law.

Senate argues that, even though the contract drawings and specifications did not identify the material of either the existing or new trench drain angle bars (SOF ¶ 7), the contract did identify all other metal components in the contract as being either aluminum or steel (SOF ¶¶ 4, 9b). Further, Senate argues, the drawings and specifications provide that only the trench drain outfall plate and its components were aluminum and that all other metal fabrications were to be stainless steel or galvanized steel (*id.*). On this basis, Senate concluded that the specifications and drawings required steel angle bars and were not ambiguous.

We find Senate's argument unpersuasive. The total absence in the entire contract of any reference to the material of the existing trench drain angle bars or the material of which new ones were to be fabricated was obvious and constituted a patent ambiguity. It was therefore incumbent upon Senate to inquire about the completely missing information, regardless of its perception that its interpretation was reasonable. *Interstate General Government Contractors, Inc. v. Stone*, 980 F.2d 1433, 1435 (Fed. Cir. 1992); *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985).

We recognize that Senate in fact received and installed the trench drain angle bars late in the contract performance (SOF ¶ 11). However, its failure to inquire prior to submitting its bid puts responsibility for all associated costs squarely on its own shoulders. By not inquiring prior to bid submission and contract award, Senate not only denied itself and its subcontractor of the information that the existing angle bars were aluminum, it also denied itself and the government the opportunity to determine prior to bid that aluminum angle bars were no longer available and to act accordingly. We grant the government's partial motion for summary judgment as to claim 0001B. We deny Senate's partial motion for summary judgment as to this claim.

CONCLUSION

Claim 0001B (Trench Drain Angle Bars)	Government's motion is granted. Senate's motion is denied.
Claim 0001C (Zone 3 Trench Wall)	Government's motion is denied. Senate's motion is denied.
Claim 0001D (Zone 4 Apron)	Government's motion is granted. Senate's motion is denied.
Claim 0001E (Zone 3 Apron)	Government's motion is granted. Senate's motion is denied.

The effect of the rulings above is to leave Senate's Claims 0001A, 0001C and Senate's claim for delays due to adverse weather remaining to be resolved in the appeal docketed as ASBCA No. 56236. It follows that there are genuine issues of material fact as to delays experienced by Senate in the performance of the contract as they relate to the three remaining claims leaving the question of remission of liquidated damages yet to be resolved.

Dated: 19 July 2010

DIANA S. DICKINSON
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 No. 56236, Appeal of Senate Builders & Construction Managers, Inc., rendered in conformance with the Board's Charter.

Dated:

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