

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
M. A. Mortenson Company) ASBCA No. 50383
)
Under Contract No. DACA85-94-C-0031)

APPEARANCE FOR THE APPELLANT: William R. Joyce, Esq.
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APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
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OPINION BY ADMINISTRATIVE JUDGE ELMORE

M. A. Mortenson Company (Mortenson or appellant) was awarded a contract to construct a new multi-story composite medical facility for the Air Force and the Department of Veteran Affairs. The contracting officer (CO) has denied Mortenson's certified equitable adjustment claim for \$190,301 allegedly incurred for providing continuous counterweight guide rails supports for electric elevators 5 through 11. Only entitlement will be decided (tr. 1/10).

FINDINGS OF FACT

1. On 16 September 1994, Mortenson was awarded firm fixed-price construction Contract No. DACA85-94-C-0031 (C-0031 or contract) to construct a multi-story medical facility at Elmendorf Air Force Base, Alaska, at a contract price of \$120,579,000. The contract included the construction of five hydraulic and seven electrical elevators.¹ Electric elevators require the use of counterweights to counterbalance the weight of the elevator cab. The notice to proceed was issued in October 1994. Actual construction did not begin until sometime in January 1995. (R4, tab 1; tr. 1/13, 117, 2/67; ex. G-14)

2. The contract included or incorporated by reference the following Federal Acquisition Regulation (FAR) clauses: 52.214-29, ORDER OF PRECEDENCE - SEALED BIDDING (JAN 1986); 52.233-1, DISPUTES (DEC 1991); 52.236-21, SPECIFICATIONS AND

DRAWINGS FOR CONSTRUCTION (APR 1984); 52.243-4, CHANGES (AUG 1987) and Department of Defense Federal Acquisition Regulation Supplement (DFARS) clause: 252.236-7001, CONTRACT DRAWINGS, MAPS AND SPECIFICATIONS (DEC 1991).² (Exs. G-13, 14; R4, tabs 14, 15, 18, 19)

3. FAR clauses 52.214-29, ORDER OF PRECEDENCE - SEALED BIDDING (JAN 1986); 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984); and DFARS clause 252.236-7001, CONTRACT DRAWINGS, MAPS AND SPECIFICATIONS (DEC 1991) stated in pertinent part (*id*):

[52.214-29] Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

[52.236-21] Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of a discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing.

[252.236-7001] (b) The Contractor shall –

- (1) Check all drawings furnished immediately upon receipt;
- (2) Compare all drawings and verify the figures before laying out the work;
- (3) Promptly notify the Contracting Officer of any discrepancies; and
- (4) Be responsible for any errors which might have been avoided by complying with this paragraph (b).

....

(d) Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the contractor from performing such omitted or misdescribed details of the work, but shall be performed as if fully and correctly set forth and described in the drawings and specifications.

4. Specifications at Section 14210, ELEVATORS, ELECTRIC provided, in pertinent part (R4, tab 20):

1.1 REFERENCES

The publications listed below form a part of this specification to the extent referenced. . . .

....

AMERICAN SOCIETY OF MECHANICAL ENGINEERS (ASME)

ASME A17.1 (1993) Safety Code for Elevators and Escalators

....

1.3 DESIGN REQUIREMENTS

. . . Design and fabrication shall be in accordance with ASME A17.1. . . .

....

2.23 COUNTERWEIGHT

Counterweight for each car shall equal the weight of the car plus approximately 40 percent of the specified load. . . .

....

2.24.1 Elevator Car and Counterweight Guides

Guides shall be roller type with not less than 10 inch diameter rollers for the car and 3-inch diameter rollers for the counterweight. . . .

2.24.2 Car and Counterweight Guide Rails

Guide rails shall be planed steel tee sections with structural channel rail backing as required Guide rails shall be of the length to extend from the bottom of the pit to the underside of the roof over the hoistway.

. . . .

2.26 ELEVATOR SUPPORTS

Structural steel machine beams, inserts, brackets, bolts and fastening devices shall be provided for the proper installation of all elevator equipment. . . .

. . . .

PART 3 EXECUTION

3.1 INSTALLATION

Elevators and equipment shall be installed in accordance with ASME A17.1 and the manufacturer's recommendation.

Guide rails shall be set plumb and parallel and attached to guide rail brackets secured to the building framing as indicated and at intervals to meet seismic design criteria.

5. Some tube steel supports can act as support for both the car and the counterweight guide rails, others can act as support for just the counterweight or just the car guide rails (tr. 1/137-38). Structural channel rail backing, as referred to in subsection 2.24.2, described a C-shaped type of support placed against the back of the guide rail. Tube steel served a similar purpose. Nothing in the elevator specifications described the number of pieces or sizes of support steel that should be installed for the elevator or counterweight guide rails. (Tr. 1/133, 169-70, 2/51-52, 61)

6. ASME A17.1, Part II, applicable to machinery and equipment for electric elevators, Section 200, CAR AND COUNTERWEIGHT GUIDE RAILS, GUIDE-RAIL SUPPORTS AND FASTENINGS stated in pertinent part (R4, tab 21; tr. 1/159):

Rule 200.1 Guide Rails Required

Elevator cars and counterweights shall be provided with guide rails.

Rule 200.2 Material

Guide rails, guide-rail brackets, rail clips, fishplates, and their fastenings shall be either:

(a) of steel or other metals conforming to the requirements of Section 200

. . . .

200.9a Design and Strength of Brackets and Supports. The building construction forming the supports for the guide rails, and the guide-rail brackets, shall be designed to:

(1) safely withstand the application of the car or counterweight safety when stopping the car and its rated load or the counterweight;

7. The Government's architectural (A) and structural (S) drawings were produced by Anderson DeBartolo Pan, Inc. (ADP). ADP produced drawings for both the elevators and the support steel on the project. Drawing A0.02, General Notes, at Floor Plan Note 10 stated: "ELEVATORS ON FLOOR PLANS SHOW CLEAR HOISTWAY DIMENSIONS AND ELEVATOR NUMBER. REFER TO ELEVATOR DRAWINGS A9.301 THRU [sic] A9.402 FOR DETAILED ELEVATOR PLANS AND ELEVATOR SECTIONS." There are no notes or other references on the architectural or structural drawings addressing the elevator counterweight guiderails individually, instead, references were to "car and cwt [counterweight] guide rail support." (R4, tabs 22 through 28, 35; AR4, tabs K, L; exs. A-2, -3)

8. Drawing A9.300, entitled Elevator Electrical, Mechanical, Rail Forces & General Notes, has the following declaration at the bottom center of the drawing: "COORDINATION WORK ITEMS TO BE PERFORMED BY OTHER TRADES NOT IN ELEVATOR CONTRACT . . ." and "WORK BY OTHER TRADES." ABBREVIATIONS AND

GENERAL NOTES, ¶ 4, stated: “Provide adequate structural support for attachment of elevator car and/or counterweight guide rails @ each floor, pit and overhead.” (R4, tab 23) Drawing A9.300 excluded support steel from the scope of the elevator segment of the contract (tr. 1/79-86).

9. Drawing A9.302 provided hoistway and machine room plans for electric elevators five, six, and seven. Detail one depicted the hoistway and machine room plan for elevator five. The elevator car was depicted by a square. There were two small rectangles, a typical symbol for a tube section in structural steel, one at the center east side, and one at the center west side of the elevator. The two small rectangles were connected by a centerline. The small rectangle on the east side was referenced by an arrow from a note which stated: “[c]ontinuous structural support for car and cwt [counterweight] guide rail support. Refer to structural drawings.” The small rectangle on the west side was immediately below a much larger unlabeled rectangle depicting the counterweight which ran parallel to the upper west side of the elevator. Detail two on drawing A9.302 depicts the pit plan for elevator five. This drawing had an additional small unlabeled rectangle at the upper left hand corner of the elevator car, just above the counterweight. The Government Quality Assurance Representative (QAR), Mr. Regan Sarwas, admitted that detail one contained a mistake because it failed to depict the third piece of steel for counterweight support. (R4, tab 24; tr. 1/205)

10. Drawing A9.302, detail four, depicted elevator cars six and seven by two adjacent squares. Four pieces of tube steel, one piece at the center north and one at the center south of each elevator car are depicted by small rectangles. All four small rectangles were connected by a vertical line running through the middle of the elevator cars. The topmost small rectangle was referenced by an arrow to a note which stated: “[c]ontinuous structural support for car and cwt [counterweight] guide rail support. Refer to structural drawings.” The two small rectangles between the cars were adjacent to each other. To the right of each of these small rectangles were two much larger unlabeled rectangles which represented the counterweights. Between the outside edges, on the east side of the counterweights, was a fifth small unlabeled rectangle indicating a counterweight guide rail. Detail five, the pit plan for elevators six and seven also showed the same five small rectangles as in detail four. Detail six showed the overhead plan for elevators six and seven. Two tube steel supports are shown, one on the north side of elevator seven and one on the south side, but no tube steel is shown on the east side of the counterweight as was required. No support steel for elevator six is shown because the elevator stopped before the topmost floor. (R4, tab 24, tr. 1/135-38, 206)

11. Drawing A9.303 depicted hoistway and machine room plans for elevators eight through eleven. Detail one depicted elevators eight and nine by two adjacent squares. Three pieces of tube steel, one north of elevator eight, one between elevators eight and nine and one south of elevator nine are depicted by small rectangles. All three

small rectangles were connected by a vertical line running through the middle of the elevator cars. The small rectangle above elevator eight was referenced by an arrow to a note which states “[c]ontinuous structural support for car and ctw [counterweight] guide rail support. Refer to structural drawings.” There were two unlabeled large rectangles depicting counterweights, one on the west side of elevator eight and one on the west side of elevator nine. Two small rectangles depicted guide rail supports at each end of the counterweight for elevator eight. There were no guide rail supports depicted on either end of the counterweight for elevator nine. Detail two is the pit plan for elevators eight and nine. This detail showed, in addition to the five small rectangles shown in detail one, two additional small rectangles at either end of the counterweight for elevator car nine. The QAR testified that detail one had a mistake because it did not depict the required tube steel for the counterweight located west of elevator nine. Ms. Michele Kaprisin, the Government Office Engineer, when referring to drawing A9.303, detail one, conceded that “it does not show or depict . . . the counterweight steel clearly.” (R4, tab 25; tr. 1/140, 207)

12. Drawing A9.303, detail four, depicted elevators ten and eleven by two adjacent squares. Four pieces of support steel for the elevator cars, one on the north, and one on the south of each elevator, is shown by small rectangles. All four small rectangles were connected by a vertical line running through the middle of the elevator cars. The top rectangle is referenced by an arrow to a note which reads: “[c]ontinuous structural support for car and ctw [counterweight] guide rail support. Refer to structural drawings.” Two unlabeled counterweights are depicted between the cars and one guide rail support is depicted between the outer edge of the counterweights. Detail five, depicted the pit plan for elevators ten and eleven and showed the same five pieces of tube steel as in detail four. Detail three and six, depicting the overhead plan for elevators eight and nine, and ten and eleven respectively, did not depict guide rail supports. (R4, tab 25; tr. 208-09)

13. Drawings A9.401, detail three, and A9.402, details one through three, included hoistway sections for elevators five through eleven. Each of these sections included an unlabeled dashed line which showed the location of the elevator car guide rails. Each detail contained a note, referenced to the dashed line, which read: “[c]ontinuous structural support for car and cwt [counterweight] guide rail support. Refer to structural drawings.” In addition, there were two unlabeled vertical rectangles. The Government QAR, when asked to identify them, conceded it is unclear whether they depicted the counterweight frame or the guide rail support tube. (R4, tabs 26, 27; tr. 1/209-11)³

14. Drawing S0.02, GENERAL NOTES, provided at GENERAL, notes 1, 3 (R4, tab 28; tr. 1/55-61):

1. COORDINATE DIMENSIONS, OPENINGS, EMBEDDED ITEMS, AND CONDITIONS WITH ARCHITECTURAL, MECHANICAL AND ELECTRICAL DRAWINGS AND TRADES PRIOR TO CONSTRUCTION. NOT ALL ITEMS ARE INDICATED ON STRUCTURAL DRAWINGS. NOTIFY CONTRACTING OFFICER OF DISCREPANCIES.

.....

3. ALL DETAILS ARE TYPICAL, INCORPORATE INTO PROJECT AT APPROPRIATE LOCATIONS WHETHER SPECIFICALLY INDICATED OR NOT.

15. The structural drawings, using two small rectangles at the same location as in the corresponding architectural drawings, depicted two tubular steel support columns for each elevator. Each drawing included Keynote 5.17 which stated: “TS [tube steel] 12x6x5/8 elevator guide rail support columns. See 3/S5.04. Coordinate location with elevator manufacturer.” Drawing S5.04 was a sheet of structural connections and welding details. Detail 3 provided elevator guide rail support details. The structural drawings did not identify separate structural supports for the counterweight guide rails. (R4, tabs 29-35; tr. 1/38, 55, 89-90, 2/11, 12, 17; exs. A-3, G-2)

16. Mr. Mark Ruffino, the construction engineer and lead estimator responsible for estimating the project for appellant, reviewed the architectural and structural drawings and concluded that the contract called for one set of support steel per elevator to provide support for both the car and the counterweights. Mortenson did not inquire whether the elevator car guide rail and counterweight guide rail could use the same tube steel support. (Tr. 1/23-25, 36-43, 48, 94-95)

17. Mortenson’s request for bids from potential subcontractors consisted of a letter which identified Mortenson as bidding the project as the “general contractor” and inviting the submittal of subcontractor bids. Potential subcontract bidders were advised that Mortenson would not provide contract documents; that bidders should submit “bids per the plans and specifications”; and bidders should address questions regarding the requirements of the contract documents to the Government’s contact person named in the documents. Mortenson received hundreds of subcontractor bids most, if not all, on the same day that Mortenson’s bid was due to the Government. Mr. Ruffino conceded that all bids were not identical inasmuch as it was impossible to list all items on the project, that some bidders included and some excluded items while others submitted only a dollar figure without explaining what was included. (Tr. 1/25-30, 43-46, 65-66, 69; ex. A-4)

18. Mortenson received two bids for the elevator portion of the contract neither of which included or mentioned support steel for guide rails nor did either potential subcontractor submit questions regarding guide rail supports for either the counterweight or the elevator car (tr. 1/32-33; ex. A-1). The location and dimension of each elevator hoistway were indicated on the contract documents and appellant was to design the elevator system in accordance with ASME A17.1 (R4, tab 20). Suffice it to say that neither elevator bidder nor the elevator designer provided an affidavit or testified at the hearing. Accordingly, the Board places little evidentiary weight on the fact that the bids did not include or mention the support steel for the guide rails.

19. Eighteen subcontractor bids were received for the structural steel portion of the project. Some of those bids specifically included the elevator guide rail supports, some of them specifically excluded the elevator guide rail supports, and some did not mention elevator support steel at all. None of the structural steel bids called for separate counterweight guide rail supports. (Tr. 1/53-54; ex. G-1) There is no evidence that any potential subcontractor submitted questions regarding the counterweight guide rail supports (tr. 1/49; ex. A-1). Mr. Ruffino prepared a spread sheet with several columns of bid items for a particular subdivision of the work so that he could compare bids and ensure that all items were covered. Mr. Ruffino could not testify whether some structural steel bidders specifically included or excluded counterweight or elevator supports since his spread sheets did not include a column for this item. (Tr. 1/45-46, 61-69; ex. A-4) Mortenson subcontracted with Waiward Steel Fabricators Ltd. (Waiward) for the support steel portion of the contract. Waiward's bid provided for two pieces of steel per electric elevator (tr. 1/58, 61-69, 84-85; ex. G-1). Waiward neither submitted an affidavit nor testified at the hearing. Accordingly, the Board places little evidentiary weight on the fact that its bid did not call for separate counterweight guide rail supports or submit questions regarding their need (finding 18 *supra*).

20. Mr. Bernard Landeis, a licensed civil engineer hired in November 1994, after contract award, as Mortenson's structural contract quality control (CQC) and project engineer was responsible for reviewing architectural and structural plans for the elevators and ensuring that the specification documents for concrete and structural steel were complied with (tr. 1/74, 112). Mr. Landeis had extensive previous experience estimating for structural steel and with hydraulic elevators, which do not have counterweights, but no experience with electric elevators. He concluded after reviewing the elevator drawings that the architectural and structural drawings called for two pieces of structural steel per elevator, that the design of the support steel for the guide rails would be detailed on the structural drawings, and that the structural drawings provided the needed information to install the support steel. When he reviewed the architectural drawing A9.302, Mr. Landeis was unable to recognize the counterweight or counterweight guide rail support symbol. (Tr. 1/73-85, 108-12; R4, tab 24)

21. Prior to submittal of the elevator shop drawings, Mr. Eric Pankey, vice president of Alaska Elevator, Mortenson's elevator subcontractor, notified Mortenson that the structural steel drawings did not show counterweight steel and that two pieces of steel were inadequate to support both the elevator car and the counterweight guide rails. In response, Mr. Landeis on or about 17 January 1995 prepared and submitted Request for Information (RFI) 160, which for the first, time notified the Government of discrepancies in the contract documents, stating (R4, tab 6; tr. 1/85-86, 122, 2/74):

We are requesting that you promptly review the following matter and advise us how we are to proceed.

Please reference Drawing 1/A9.402 and 1/A9.302 which reference structural details for counterweight rail. Structural drawings show car rails but do not show counterweight rail. Please provide detail for counterweight rail support.

22. On 22 March 1995, two months after RFI 160 was submitted, the Government's Administrative Contracting Officer (ACO), Mr. Arthur Davies, responded as follows:

Please refer to the attached sketches SSD-38 through SSD-44. The elevator counterweight guide rail support column shall be a TS8X4X3/8 to be used at elevator Nos. 5, 6, 7, 8, 9, 10, and 11.

At elevator No. 5, from the lower level to the first level, the counterweight guide rail can be supported off of the solid grouted CMU wall. The TS8X4X3/8 rail support column shall start at the first level (see SSD-38). Because of the placement of steel beams above, a TS8X4X3/8 column shall be inserted between steel beams at each level and shall be connected to the beams at top and bottom per SSD-42 and SSD-43. Coordinate the location of the support column with the elevator shop drawings.

At elevator Nos. 8 and 9 (see SSD-41) the TS8X4X3/8 rail support column shall start at the lower level and extend up at floor to floor intervals (lower level to level 1: level 1 to level 2: etc.). Connection at the lower level shall be per A SSD-44 and at levels above per A SSD-42 and A SSD-43. Coordinate the location of the support column with the elevator shop drawings.

At elevator Nos. 6 and 7, and Nos. 10 and 11 (see SSD-39 and SSD-40) there are two TS8X4X3/8 continuous rail support columns, one each side of the elevator separator beam, placed in a similar manner as the elevator guide-rail support columns and connected at the lower lever per A SSD-44, and at the levels above per 3C, 3D, and 3E S5.04. Coordinate the location of the support column with the elevator shop drawings.

At the end of the response, the ACO added in handwriting: "REQUEST PROPOSAL FOR ADDED STEEL." (R4, tab 6; tr. 1/89-92, 2/65-67; ex A-5)

23. The sketches, SSD-38 through SSD-44, prepared by ADP, provided design details for the counterweight steel that differed from the architectural and structural drawings that were included with the contract (R4, tab 6; tr. 1/89, 2/34, 55, 107-09). For example, where drawing A9.302, detail four, depicted one piece of separate counterweight steel for elevators six and seven, SSD-39 depicted two pieces of counterweight steel. Where drawing A9.303, detail one, depicted two pieces of separate counterweight steel, SSD-41 depicted four pieces of counterweight steel. Where drawing A9.303, detail four, depicted one piece of steel for counterweights, SSD-40 depicted two pieces for counterweights. In addition, the designated size of the counterweight guide rail support, TS8x4x3/8, was smaller than that of the elevator car supports. A representative from ADP was not called to testify on the differences between the sketches and the contract drawings.

24. Elevator shop drawings submitted by Mortenson's elevator subcontractor, Alaska Pacific Elevator, in April 1995, had been produced in January 1995 by Dover Elevator Systems, Inc. (Dover), the elevator designer and manufacturer subcontracted to Alaska Pacific Elevator. They called for two pieces of TS12x6x5/8 steel as depicted on the structural drawings in addition to separate TS12x6x5/8 counterweight guide rail supports similar to those depicted on the architectural, but not the structural, drawings. The shop drawings specifically noted that the structural steel was outside the scope of Dover's contract. (Tr. 1/79-82, 217-27; exs. G-7 through -11)

25. On 27 March 1995, Mortenson informed the Government that it was requesting additional direct cost and time because the direction contained in the Government's response to RFI 160, requiring additional counterweight steel members be installed for the electric elevators, constituted a contract change (R4, tab 7, CIN 05-0015).

26. On 24 May 1995, the ACO, Mr. Davies, acknowledged that “some” additional costs were associated with the added structural steel and Mortenson was requested to provide a cost proposal. Mr. Davies was not called as a witness to testify and the Government did not provide an explanation for the ACO’s handwritten comment or his acknowledgment that extra costs were incurred. (SR4, tab A; tr. 1/97-98; finding 23, *supra*)

27. By letters dated 5 June and 12 July 1995 Mortenson submitted a cost proposal and a revised cost proposal in the amounts of \$239,994 and \$242,226, respectively, for the additional steel to accommodate the counterweights (R4, tabs 8, 9).

28. On 5 September 1995, the present ACO, Mr. C. Alex Morrison, Jr., in his ERO 370 (Elmendorf Resident Office) letter, referencing specification section 14210, paragraphs 2.24.2 and 2.26 and ASME 17.1 Rules 200.1 and 200.9, informed Mortenson that the fabrication and installation of structural support for the electric elevators’ counterweight guide rails were contractually required and directed it to proceed with the electric elevator work in accordance with the accepted shop drawings and clarifications issued (R4, tab 10).

29. On 7 September 1995, Mortenson, responding to the Government’s 5 September 1995 letter, disagreed with the Government’s conclusion the support for the electric elevator counterweight guide rails was a contractual requirement contending (R4, tab 11):

This issue was raised originally in January of 1995 by RFI 160. The response to RFI 160 included seven additional sketches and a note reading “Request proposal for added steel.” The requested proposal was completed and submitted on June 5, 1995 and revised on July 12, 1995.

Now, nearly two months later, your letter appears to indicate that you have somehow concluded that the responsibility to provide additional structural steel to support the elevator counterweight guide rails is a contractual requirement. We disagree.

We offer the following comments on your ERO 370:

1. The ASME code referenced provides design requirements for the elevator and the elevator components. It probably does provide load and strength requirements for the supporting structure for rails. It certainly does not, by

reference, make providing these supports a contractual responsibility.

2. Paragraph 2.24.2 defines the requirements for the construction of guide rails, not the structural support for same.

3. Paragraph 2.26 does not refer in any way to structural supports for guide rails.

4. We agree that Drawing A9.302 and A9.402 indicate that there will be structural support provided. These drawings also say specifically to “refer to structural drawings” for the required supports. The structural drawings show nothing.

5. Detail 3/S5.04 does show anchorages for guide rail supports. These details apply where guide rail supports are shown on the structural drawings. The rail supports in question are not shown on the structural drawings.

30. On 14 September 1995 by letter ERO 382 the ACO informed appellant that the Government’s response to RFI 160 did not result in a change to the contract; that the information and sketches provided in the response to RFI 160 presented one method of meeting the contract requirements; that appellant could utilize an alternate counterweight guide system provided it met all of the requirements in the contract; and appellant was directed to proceed with the design, fabrication and installation of the electric elevators as required by the plans and specifications (R4, tab 12; tr. 1/100).

31. Waiward fabricated and installed the elevator car guide rail supports and International Steel Erectors installed the counterweight guide rail support columns. Mortenson’s claim for \$190,301, transmitted to the Government by letter dated 13 February 1996, included \$4,607.20 for general construction work and engineering time to coordinate and design locations of the counterweight guide rails. The claim states in pertinent part (R4, tab 5; tr. 1/105-06):

By issuing ERO 382 in combination with the response to RFI 160, the Administrative Contracting Officer directed that the Contractor perform extra work to provide structural steel support for electric elevator counterweight guide rails. We believe this directive to be a change in the contract requirements and request an equitable adjustment to our contract in the amount of \$190,301.00.

....

The response to RFI 160 was received on March 22, 1995. This response provided direction on how the continuous counterweight guide rail supports were to be installed, what materials were to be used for the continuous supports and included seven sketches (SSD38 through SSD44) revising the structural drawings to incorporate the continuous structural supports for the counterweight guide rails. The response to RFI 160 also included the note "Request proposal for added steel." We believe the response clearly demonstrates the document deficiencies we have defined above.

32. On 28 March 1996 Mortenson certified its claim pursuant to the Contract Disputes Act, 41 U.S.C. § 605(c)(6) (R4, tab 3).

33. On 28 October 1996 the CO issued a final decision denying appellant's claim stating in pertinent part (R4, tab 1 at 11-14):

Contract Drawings A9.302, A9.303, A9.401 and A9.402 depicted continuous elevator and counterweight guide rail supports for Elevators #5, #6-7, #8-9, and #10-11. Depicted were tubular steel columns and horizontal support at the floor level and intermediate levels between floors. The architectural drawings did not denote the size of the continuous structural steel columns and horizontal supports for the elevator car and counterweight guide rails. Notes adjacent to the elevator car and counterweight guide rail support column referenced the structural drawings. Note 5.17 on the structural drawings designated TS 12x6x5/8 support columns for the elevator car guide rails, but omitted any reference to counterweight guide rail support columns.

The contractor requested in RFI No. 160, that the Government provide details for the counterweight guide rail support columns. The Government provided sketches, details and member sizes for the counterweight guide rail support column. The sketches depicted TS 8x4x3/8 support columns.

....

The contractor does not dispute that Drawings A9.302 and A9.402 indicate structural support was required; however, the contractor contended that it was not a contract requirement because of their omission from the structural drawings.

....

The requirement to provide counterweight guide rail supports was clearly established by the architectural drawings even though the referenced structural drawings failed to detail them. The Government offered no explanation as to the omission of the sizing and detailing of the elevator car guide supports, including the base plates and other points of attachment from the structural drawings. However, it is obvious that the failure to detail the counterweight guide rail supports was an omission from the structural drawings that is covered by Special Contract Requirements SCR-5 [DFARS 252.236-7001] which requires the contractor to perform the work, regardless of the omission, as if the drawings had depicted the support columns for the counterweight guide rails.

The architectural drawings clearly establish that it was a contract requirement for the contractor to provide continuous structural support for the elevator car and counterweight guide rail supports. The structural drawings detailed elevator guide rail support details, but did not detail or reference the counterweight guide rail supports. . . .

....

Therefore, I conclude that in accordance with the architectural drawings, the Technical Specifications, and ASME A17.1, that the contractor was clearly required to provide adequate structural support for the attachment of the elevator counterweight guide rails to the building frame, including elevator counterweight guide rail supports, brackets, and where necessary reinforcement of the building that formed support for the guide rails. I conclude further that it is irrelevant to the Government whether the counterweight rails

are provided by the contractor, subcontractor, or the elevator manufacturer, as it is an inherent contract requirement.

34. On 20 November 1996 the appellant timely appealed the CO's final decision to this Board (R4, tab 2).

DECISION

This appeal presents a question of contract interpretation. Electric elevators require cars and counterweights. The specifications required that design and fabrication of the elevators be in accordance with ASME A17.1, Safety Code for Elevators and Escalators (1993). They also stated that the car and counterweight guide rails were to have "structural channel rail backing as required." (§ 14210, ¶¶ 1.3, 2.24.2) The architectural drawings showed tube steel supports, which can serve the same purpose as structural channel rail backing, adjacent to the cars with a note "[c]ontinuous structural support for car and cwt [counterweight] guide rail support. Refer to structural drawings." The architectural drawings also showed separate tube steel supports adjacent to some of the counterweights. (*See, e.g.*, drawing A9.302) The structural drawings showed two tube steel supports for each elevator. Appellant claims that it reasonably understood from the structural drawings that only two pieces of tube steel were to be provided for each elevator as continuous support for both the car and the counterweight guide rails. The Government argues that the contract required appellant to provide support steel for the counterweight guard rails. (App. br. at 1, Gov't br. at 8)

It is a settled legal principle that a contract or its terms are considered ambiguous only when susceptible to two different reasonable interpretations, each of which is consistent with the contract language. *T.F. Powers Construction Co.*, ASBCA Nos. 38031 *et al.*, 90-1 BCA ¶ 22,483 at 112,844, *aff'd, sub nom. T.F. Powers Construction Co. v. United States*, 918 F.2d 187 (Fed. Cir. 1990) (table); *Sun Shipbuilding and Dry Dock Co. v. United States*, 393 F.2d 807 (Ct. Cl. 1968). The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem* which requires that a contract be construed against the party who drafted it. A reasonable interpretation is one that reads the contract as a whole and does not render any provision superfluous or meaningless. *M. A. Mortenson Company*, ASBCA No. 37647, 89-2 BCA ¶ 21,873, citing, *Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1057 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 814 (1983).

Appellant knew or should have known that electric elevators require counterweights to counterbalance the weight of the elevator car (findings 1, 6). The appellant argues that although architectural drawings A9.302 and A9.402 indicate that there would be structural supports provided, these drawings refer to the structural drawings which fail to address counterweight guide rail steel supports and, accordingly,

appellant concluded that only one set of structural steel supports for guide rails was required for both the elevator car and the counterweight (finding 29). We find the appellant's contention unreasonable.

Appellant ignores the requirements of the specifications. Furthermore, the counterweights depicted on the architectural drawings could only be supported by the support steel for the car guide rails on the end of the counterweight facing the car. Accepting appellant's contention that at the time it prepared its bid it determined the counterweights could be supported by the tube steel of the elevator car, that would only account for the support for one end of the counterweight leaving the other end of the counterweight without support. Appellant looking at the architectural drawing was faced with a glaring inconsistency between the known need for counterweights and the failure of the structural steel drawings to address the counterweight support steel necessary for the unsupported end of the counterweight.

Also important to our decision is the fact that Dover, the supplier to appellant's elevator subcontractor, when preparing its shop drawings in January 1995 made an accommodation for separate counterweight guide rail supports similar to those depicted on the architectural drawings (finding 24). While it is not impossible that the elevator bidders were unaware of the need for the guide rail support necessary for the unsupported end of the counterweight, neither elevator bidder nor the elevator designer, Dover, was called on to give testimony at the hearing. We have consistently held that it is permissible to draw an adverse inference from a party's failure to call a witness, in this case the elevator subcontractor or the elevator designer, who would be expected to give favorable testimony in a material area. *J. C. Equipment Corporation*, ASBCA No. 42879, 97-2 BCA ¶ 29,197 at 145,285.

We conclude, therefore, that the Government's interpretation, that support steel was required as necessary for the counterweight guide rails, is the only reasonable interpretation of the contract.

The appeal is denied.

Dated: 18 May 2000

ALLAN F. ELMORE
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
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

- ¹ Only the 7 electric elevators identified in the contract as elevator numbers 5 through 11 are in dispute (R4, tab 3).
- ² The contract erroneously gives the title of this clause as CONTRACT DRAWINGS, SPECIFICATIONS AND EXHIBITS.
- ³ On Detail 3, the arrow from the note correctly points to a dashed vertical line which runs from the bottom of the pit through the top terminal floor. On Details 1 and 2 the arrow erroneously points to a horizontal line which intersects the nearby vertical dashed line to which the arrow should point. (R4, tab 18; tr. 1/210-11)

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. 50383, Appeal of M. A. Mortenson Company, rendered in conformance with the Board's Charter.

Dated:

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