

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Ryan Company) ASBCA No. 53385
)
Under Contract No. N68711-92-C-4710)

APPEARANCE FOR THE APPELLANT: Christopher F. Wilson, Esq.
Christopher Wilson & Associates
Torrance, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
John McMunn, Esq.
Senior Trial Attorney
Naval Facilities Engineering Command
Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE TUNKS

Appellant seeks an equitable adjustment of \$136,865 for drilling a fourth well in connection with the construction of a sewage treatment, transmission and disposal system. Only entitlement is at issue.

FINDINGS OF FACT

1. On 28 February 1997, the Government issued Invitation for Bids (IFB) No. N68711-92-B-4710 for a firm fixed-price contract to construct a sewage treatment, transmission and disposal system at the Marine Corps Base, Camp Pendleton, California. The work included the construction of three effluent injection wells. (R4, tab 1)

2. Among other clauses, the IFB included the following relevant provisions:

FAR 52.236-21 SPECIFICATIONS AND DRAWINGS (APR 1984)

(a) . . . In case of difference between drawings and specifications, the specifications shall govern

....

FAR 52.246-12 INSPECTION OF CONSTRUCTION (JUL 1986)

....

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed . . . conforms to contract requirements.

....

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change . . . the specification without the Contracting Officer's written authorization.

....

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

FAC 5252.201-9300 CONTRACTING OFFICER AUTHORITY (JUN 1994)

In no event shall any understanding or agreement between the contractor and any Government employee other than the Contracting Officer . . . be effective or binding upon the Government.

(R4, tab 1)

3. The specifications included the following relevant provisions:

SECTION 01400

QUALITY CONTROL

....

1.4 QC PROGRAM REQUIREMENTS

Establish and maintain a QC program . . . to provide materials, equipment, workmanship, fabrication, construction and operations which comply with . . . this Contract.

....

1.13.1 Contractor Quality Control Report Certification

Each Contractor Quality Control Report shall contain the following statement: “On behalf of the Contractor, I certify that this report is complete and correct and equipment and material used and work performed during this reporting period is in compliance with the contract drawings and specifications to the best of my knowledge, except as noted in this report”.

....

1.14.2 Contractor Quality Control Report

Reports are required for each day that work is performed . . . and shall . . . [i]nclude a “remarks” section . . . [noting] construction deficiencies encountered

....

SECTION 02670

WATER WELLS - INJECTION

....

1.3 GENERAL REQUIREMENTS

. . . Contractor shall make himself fully familiar with the . . . “Hydrogeologic Evaluation of Proposed Injection Field” by Leighton & Associates dated March 18, 1994.

....

1.4.3 SD-18, Records

....

b. Boring Log

During the drilling . . . [a] log shall be prepared by . . . a California Registered Geologist [T]he log shall include depths, elevations, and descriptions of all formations . . . ; identification of each stratum . . . ; depths at which ground water is encountered and artesian flow rates. Electric . . . and gamma logs shall be prepared at the completion of drilling . . . This information shall be used for determining the well screen location.

....

2.2 WELL SCREENS

. . . “Blanks” in the well screen may be utilized in nonproductive zones and shall be considered “casing.”

....

3.1.1 General Requirements

. . . The well shall be a filter pack well developed in the target aquifer. . . . The hole shall penetrate the water bearing stratum at least 300 feet.

(R4, tab 1)

4. Drawing C-57 included a typical well detail. The detail required blank casing from 0 to 281 feet below ground surface (bgs) and a Portland cement/bentonite grout seal from 0 to 260 feet bgs. A bentonite grout seal was to be placed from 260 to 280 feet bgs. The confining layer was estimated to end at 280 feet bgs. Below the confining layer, the detail required a 321 foot filter pack and 300 feet of well screen. (R4, tab 1)

5. Appellant provided six excerpts from other contracts in support of its contention that a typical detail within the well drilling industry means that the detail is preliminary and subject to change in the field at the discretion of the geologist. Only one of the excerpts contained a “typical” detail. None of the excerpts were from contracts for the construction of injection wells and none were from Federal contracts (app. supp. R4, tab 9).

6. The contract did not specify well depth. Well depth depended on where the confining layer ended and the number of blanks that had to be put in the screens. For example, the detail on drawing C-57 required that there be 300 feet of well screen below the confining layer and estimated that the confining layer would end at 280 feet bgs. Thus, if the confining layer ended at 550 feet bgs (rather than 280 feet bgs as estimated on

drawing C-57), the well had to be at least 850 feet deep in order to put 300 feet of well screen in the well. Well depth also depended on the number of blanks in the screen pursuant to paragraph 2.2 of the well specification. For example, if the confining layer ended at 300 feet bgs and there were non-productive zones between 300 and 400 bgs and 500 and 600 bgs, the well had to be at least 800 feet deep and would have 300 feet of well screen and 200 feet of blanks. (Tr. 78, 173, 185-86)

7. At the request of the Government's architect-engineer, MacDonald-Stephens Engineering, Inc. (MSE), Leighton & Associates, Inc. (Leighton) investigated the feasibility of constructing the proposed injection well field. The Leighton report, which was referenced at paragraph 1.3 of the well specification, was prepared by Mr. Douglas F. Roff, an expert in the field of hydrogeology. (R4, tab 2)

8. Mr. Roff used computer modeling to determine the impact of injection on ground water levels. For purposes of the model, he assumed that the target aquifer was 250 feet thick (R4, tab 2 at 22; tr. 174-75). The target aquifer is the most permeable area, *e.g.*, the sandy area below the confining layer (tr. 173). The water bearing stratum encompassed the target aquifer and any less permeable areas below the target aquifer (tr. 180). Mr. Roff assumed a conservative thickness for the target aquifer "to make sure that the [well] could survive if there really only turned out to be 250 feet [of aquifer] there" (tr. 194-95).

9. At Mr. Roff's direction, five test holes were excavated, including a 980 foot injection well. The geologic log for the 980 foot well indicated that there was sand with clay from 280 to 302 feet bgs, a hard clay layer from 302 to 325 feet bgs, soft clay with fine sand from 325 to 345 feet bgs, coarse gravel from 345 to 365 feet bgs, medium to coarse sand and gravel from 365 to 385 feet bgs, medium to fine sands from 385 to 410 feet bgs, medium to very fine sands and silt from 410 to 515 bgs, medium to fine sands from 515 to 610 bgs, hard clay from 610 to 635 bgs, medium to fine sands from 635 to 678 feet bgs, hard clay from 678 to 680 feet bgs, and medium to fine sands, silty sands and clay from 680 to 1,025 feet (R4, tab 2, geologic log). The electric logs, which measure electrical resistivity, showed "nearly continuous sand from roughly 235 to 310 feet bgs, 330 to 925 feet bgs and 945 to 995 feet bgs." The spontaneous potential logs measure the voltages at the contacts between different soil types. They indicated "sandy materials from roughly 400 to 925 feet bgs and 945 to at least 1000 feet bgs." The gamma logs, which measure radiation, indicated "a sandy unit from roughly 330 to 875 feet bgs and 945 to 990 feet bgs." The flow meter measures vertical water flow. This data indicated that "nearly all of the water is coming from the interval at the top of the screen to roughly 530 feet bgs." (R4, tab 2 at 5-6) Based on the data collected during the study, Mr. Roff concluded that there were 290 feet of permeable material between 280 and 600 feet bgs and 590 feet of permeable material between 280 and 1,020 feet bgs (supp. R4, tab 13; tr. 197-98).

10. In the Conclusions and Recommendations section of the report, Mr. Roff found that the project was feasible and recommended that the wells "extend a minimum of 300

feet below the bottom of the confining layer” (R4, tab 2 at 24). Mr. Roff’s recommendation contemplated an injection well with 300 feet of screen. He testified that, all things being equal, a well with 300 feet of well screen was a better product than one with 250 feet of well screen and would be less costly to maintain. (Tr. 201-02, 212)

11. Since he could not predict where the confining layer would end or how many non-productive zones he might find in each hole, Mr. Roff recommended that well screen location be determined by a registered geologist who would log each hole as it was drilled. Based on the contemporaneous logs, the geologist would determine where the confining layer ended and where there were non-productive zones and tell the contractor where to place the screen so that it would be adjacent to permeable material. (Tr. 169-70, 172-73, 184-85, 252-53) This recommendation was incorporated into the contract at paragraph 1.4.3(b) of the well specification (R4, tab 1).

12. With respect to the meaning of a typical detail within the well drilling industry, Mr. Roff testified that “[t]hings that say estimated . . . have to be determined in the field [but things] that have specific dimensions on them have to be built as shown” (tr. 182-83). Thus, if a typical detail specifically says 300 feet of well screen, the contractor must “[p]ut in precisely 300 feet of well screen” (tr. 199).

13. The Ryan Company (Ryan or appellant) based its bid on three lump sum written quotations it received from subcontractors. It did not independently estimate the cost to drill the wells. (Tr. 505-06, 517) There is no evidence that Ryan sought clarification of the specification or drawing C-57 prior to award and Ryan did not offer its bid documents into evidence.

14. The Government awarded Contract No. N68711-92-C-4710 in the amount of \$6,898,000 to Ryan on 14 August 1997 (R4, tab 1).

15. On 19 November 1997, Ryan awarded a well drilling subcontract to Beylik Drilling, Inc. (Beylik) (supp. R4, tab 2). Beylik did not submit a bid to Ryan, but it did submit a bid to another general contractor. In preparing its bid, Beylik interpreted the contract to require 300 feet of well screen (tr. 263).

16. On 30 January 1998, Ryan awarded a subcontract to Applied Consultants Environmental Geology and Engineering (Applied Consultants) for geological services (supp. R4, tab 1; tr. 403). Applied Consultants assigned Mr. Christopher J. Maxin, a registered California geologist, to the project (tr. 355).

17. On 30 January 1998, Mr. Maxin and Mr. G.J. Billings, Beylik’s division manager, applied for a well drilling permit from the State of California. The application stated that the well screens would be 300 feet long. (R4, tab 3; tr. 220-21, 379-81)

18. At the request of Ryan, Mr. Maxin prepared a “preliminary design” for the wells on 12 February 1998 (tr. 354, 438). The design did not comply with drawing C-57. Mr. Maxin’s design called for blank casing with a slurry seal from 0 to 150 feet bgs, a bentonite seal from 150 to 200 feet bgs and a filter pack from 200 feet to 850 feet with 250 feet of well screen between 280 and 530 feet bgs. Neither Ryan nor Mr. Maxin provided a copy of the design to the Government (tr. 94, 384).

19. On 6 March 1998, the Government’s project engineer, Mr. Michael I. White, conducted a preconstruction meeting. Mr. White did not have contracting officer authority (tr. 131, 497, 509). During the meeting, Mr. Maxin asked Mr. White how deep the wells should be and indicated that his preliminary design called for 850 foot deep wells. Mr. White told Mr. Maxin to follow the plans and specifications. (Tr. 90-94) We conclude that Mr. White did not prohibit Mr. Maxin from drilling to 850 feet. In addition, Mr. John M. Kennedy, Beylik’s drill superintendent, twice asked Mr. White to tell him how much screen to order (tr. 90, 523-24). At the hearing, Mr. Kennedy conceded that there was no question in his mind that drawing C-57 required 300 feet of well screen (tr. 554). Mr. White told Mr. Kennedy that Applied Consultants was the geologist and that he should follow its direction (tr. 523-24, 552). We conclude that Mr. White did not agree to allow Beylik to use 250 feet of well screen.

20. After the meeting, Mr. Maxin shortened his design to 600 feet (tr. 364).

21. On or about 6 March 1998, Mr. Kennedy ordered 250 feet of screen for the first hole (R4, tab 4; tr. 552-53).

22. Beylik began drilling on 6 March 1998 (R4, tab 4).

23. As each hole was drilled, Mr. Maxin prepared boring logs showing the types of soils found, the presence of water and/or other conditions bearing on the location of permeable material. After each hole was drilled, Beylik ran gamma and electric tests. (Tr. 251, 366, 417-28)

24. Mr. Maxin directed Beylik to put 250 feet of well screen between 280 and 530 bgs in each hole (tr. 391-94, 404). Mr. Maxin justified this decision on the basis that the Leighton report assumed the target aquifer was 250 feet thick for purposes of computer modeling and stated that the flow meter data showed that nearly all the water was coming in at 530 feet bgs (R4, tab 2 at 6, 22). Neither Ryan nor Applied Consultants sought the approval of the contracting officer prior to making this change (tr. 404-05).

25. Only a few of Ryan’s contractor quality control reports are in the record. The report for 17 March 1998, which was certified by Mr. Maxin, stated that Beylik had 250 feet of well screen on hand. No construction deficiencies were noted. (app. supp. R4, tab

13 at 7; tr. 396) Ryan's report for 18 August 1998, however, noted the following deficiency:

While reviewing the boring logs of the injection well it was noted that 400 feet of sand pack and 250 feet of screen were installed. The QC specialist (Chris Maxin) recommended this construction rather than the 320 feet of sand pack and 300 feet of well screen shown on the drawing.

(Supp. R4, tab G-14)

26. A memorandum prepared by Mr. Lance C. Petteway, the contracting officer, on 4 October 2001 indicated that, except for the contractor quality control report dated 18 August 1998, the quality control manager certified the work without noting any construction deficiencies with respect to the well screen (app. supp. R4, tab 8 at 11). Appellant did not rebut the information in the memorandum.

27. The third well was completed by 20 August 1998 (app. supp. R4, tab 8 at 11).

28. The Government received the boring logs prepared by Mr. Maxin in late August and mid-September 1998. The logs indicated that Beylik had placed 250 feet of well screen between 280 and 530 feet bgs in each well. (Supp. R4, tab G-19)

29. Mr. Bernard J. Luther, president and CEO of Applied Consultants and Mr. Maxin's employer at the time, is an expert in the interpretation of boring logs (supp. R4, tab 3; tr. 353-55, 357, 407, 438). He testified that the boring logs showed permeable material below 530 bgs in all three holes and agreed that there was "no geologic reason" for not screening the full 300 feet (supp. R4, tab 19; tr. 449-57, 467). Mr. Roff concurred with Mr. Luther's analysis (tr. 207-10). Mr. Luther also testified that neither the gamma logs nor the electric logs were used to determine well screen location (tr. 446).

30. At the hearing, Mr. Maxin conceded that the boring logs showed permeable material below 530 feet bgs in all three wells (tr. 389-94, 472-75). He also conceded that screening the full 300 feet would have resulted in a better well:

Q [I]f you had put down the well screen another 50 feet in those wells . . . you would have achieved even better penetration, would you not . . . ?

A Yes.

(Tr. 390)

31. On 28 September 1998, the Government requested a remedial plan (R4, tab 5).

32. On 4 February 1999, Mr. Petteway, the contracting officer, met with representatives of Ryan and Beylik to discuss the well problems. Most of the meeting was spent on the seal defects. (Tr. 23, 440) In at least two of the wells, Beylik had installed only 190 feet of well seals rather than the 280 feet required by drawing C-57 (tr. 239-40). With respect to the screens, the parties discussed three options: drilling three new wells, slant drilling and adding screen to the wells and drilling a fourth well. Drilling a fourth well was the least costly option. (Tr. 513-14) Mr. Petteway credibly testified that he agreed to consider a credit for the omitted well screen if the seals passed the seven-day leak test (app. supp. R4, tab 1; tr. 24-25, 34). Mr. Maxin, Ryan's geologist, testified that Mr. Petteway agreed to consider a credit for the screens if the seals did not leak (tr. 377). Mr. Beylik, president of Beylik, testified that Mr. Petteway agreed to accept a credit if the seals passed the seven-day test (tr. 244). Mr. Kennedy, Beylik's drill superintendent, did not recall any discussion regarding a credit for the well screen (tr. 521, 542). Mr. Luther, president of Applied Consultants, testified that there was a "gentlemen's agreement" that the Government would accept a credit if the wells passed the seven-day test (tr. 413). On this evidence, we cannot find that Mr. Petteway agreed to accept a credit for the omitted well screen if the wells passed the seven-day leak test.

33. On 24 February 1999, Mr. Craig A. Bradley, Ryan's assistant project manager, sent Mr. White a test procedure for the seals. Mr. Bradley did not testify. The letter included one line relating to the screens, which stated that "[n]o further testing would be required [if the seals passed the seven-day test] and a credit in the amount of \$3,750 would be accepted for the 150 LF of screen not installed." (App. supp. R4, tab 1)

34. On 25 February 1999, Mr. White replied that "[c]redits due for screen not installed will be addressed by modification, separately from this issue" (R4, tab 22). Mr. Petteway testified that he had "no problem" with the letter (tr. 29).

35. On 8 March 1999, MSE advised that the Government was due a credit for the well screen, stating that the "shortened length of installed well screen will cause an increase in the frequency of well cleaning and maintenance" (R4, tab 23).

36. On 30 March 1999, Mr. Bradley advised Mr. Petteway that the seals had passed the seven-day leak test and requested the following:

We would also like to finalize the issue regarding the screen. You have indicated that the \$3,750 credit would be addressed by a modification.

As soon as the acceptance is received and the amount of the credit is agreed to in writing, we will invoice for the remaining well work and finalize Beylik's subcontract.

(R4, tab 24)

37. Although the seals did not leak, the pressure and flow rates recorded during the test conflicted with earlier data submitted to the Government. The Government declined to accept the wells until this discrepancy was resolved. (R4, tab 30; tr. 136-37)

38. The Government agreed to a second set of seal tests that were performed between 12 and 19 May 1999. Water from the treatment plant was injected into the wells to see if they could accept the flow. The wells failed the test. (R4, tabs 32, 33, 36)

39. The Government later learned that Beylik had installed a different grade pipe than that called for by the contract, causing the system to form air bubbles. To remedy this problem, Beylik installed air release valves at its own expense. (Tr. 138) The Government thereafter accepted the seals.

40. On 14 June 1999, the Government directed Ryan to install a fourth well "to compensate the Government for not installing the one-hundred fifty feet of well screen required by the contract" (R4, tab 36).

41. On 30 June 1999, Mr. Petteway and Mr. Salvatore Marinosci, Ryan's vice-president, negotiated Amendment No. A00014 (R4, tab 1). Mr. Marinosci signed the modification on 7 July 1999 (R4, tabs 1, 39). The modification required Ryan to provide a fourth well with 250 feet of well screen to compensate the Government for the omitted well screen. The Government agreed to pay Ryan \$16,552 for the piping and other incidental costs and extended the contract by 99 days. (R4, tab 1)

42. By letter dated 8 July 1999, Ryan "reserve[d] its right to file a claim on its own behalf, or to sponsor a claim by its Subcontractor, Beylik, Inc., for all costs associated with construction of the additional well . . ." (app. supp. R4, tab 5).

43. Mr. Petteway executed Modification A00014 on 14 July 1999 (R4, tab 1).

44. On 8 February 2001, Ryan requested a contracting officer's decision on Beylik's claim for \$136,865.

45. The contracting officer did not issue a final decision and appellant appealed the deemed denial of the claim to this Board on 15 May 2001. The appeal was docketed as ASBCA No. 53385.

DECISION

Appellant seeks an equitable adjustment of \$136,865 for drilling a fourth well to compensate the Government for its failure to install the full amount of well screen in three effluent injection wells. Although appellant admits that the typical well detail on drawing C-57 required 300 feet of well screen, it argues that the detail was inapplicable because: (1) a typical detail within the well drilling industry means that the design is preliminary and subject to change in the field by the geologist; (2) there is a conflict between paragraph 3.1.1 of the well specification and drawing C-57 and that, under the order of precedence clause, we must give precedence to paragraph 3.1.1; (3) the contracting officer accepted the change because the contractor quality control reports submitted to the Government inspector indicated that appellant's subcontractor was only putting in 250 feet of well screen; (4) appellant complied with paragraph 3.1.1 by screening the target aquifer; (5) the Government's project engineer agreed to the change during a 6 March 1998 preconstruction meeting; (6) the contracting officer agreed to accept a credit for the omitted well screen at the 4 February 1999 meeting; (7) the correspondence between the parties that followed the 4 February 1999 meeting indicates that the Government agreed to accept a credit; and (8) the contracting officer's directive to drill a fourth well was commercially senseless. The Government argues that appellant is not entitled to an equitable adjustment because drawing C-57 clearly required 300 feet of well screen in each well.

Appellant first argues that a typical detail within the well drilling industry is preliminary and may be changed in the field by the geologist. In order to prove a trade practice, appellant must show that it reasonably relied on its interpretation during bidding. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999). Ryan did not prepare an independent estimate of the cost to drill the wells and did not submit its bid documents. Thus, appellant has not established reliance. Assuming *arguendo*, that appellant had proven reliance, only one of the six excerpts it submitted contained a detail labeled "typical." None of the contracts were for effluent injection wells and none were from Federal contracts. Mr. Roff, the Government's expert, testified that within the industry a typical detail means that "[t]hings that say estimated . . . have to be determined in the field [but things] that have specific dimensions on them have to be built as shown" (finding 12). Appellant's trade practice argument also fails for lack of proof.

Second, appellant argues that there is a conflict between paragraph 3.1.1 of specification section 02670 and drawing C-57 that must be resolved under the order of precedence clause. Appellant reads paragraph 3.1.1 to mean that the target aquifer was 250 feet thick. Neither paragraph 3.1.1 nor any other provision of the contract specifies the thickness of the target aquifer. Appellant arrives at its interpretation by incorporating the assumption Mr. Roff used for modeling the impact of injection on ground water levels—namely that the target aquifer was 250 thick—into paragraph 3.1.1. Appellant's reading of paragraph 3.1.1 is untenable. The Leighton report was not part of the contract. While it was

referenced in the contract, it was not incorporated into the contract and cannot be read into paragraph 3.1.1. Thus, there is no conflict between paragraph 3.1.1 and drawing C-57. In addition, appellant's reliance on the flow meter data is misplaced. The boring logs and other geophysical logs indicated that overall there were 290 feet of permeable material above 600 feet and 590 feet of permeable material above 1,020 feet.

Third, appellant argues that the contracting officer accepted the change because the contractor quality control reports indicated that appellant's subcontractor was installing 250 feet of well screen. This argument is ill-founded. FAR 52.246-12(b) INSPECTION OF CONSTRUCTION (JUL 1986) made Ryan responsible for providing an inspection system to ensure that the work complied with the plans and specifications. Specification section 01400 set up an elaborate quality control system to monitor the contractor's performance. Among other things, the specifications required the quality control manager to note construction deficiencies on the contractor quality control reports and to certify that the work performed each day complied with the plans and specifications. Putting a reference or two to 250 feet of well screen in the body of a report and certifying that the work complied with the plans and specifications does not satisfy this requirement. The Government is entitled to enforce strict compliance with its plans and specifications. As we stated in *Robert McMullan & Son, Inc.* ASBCA No. 11408, 68-1 BCA ¶ 6940 at 32,093:

We do not agree that the lack of protest and/or comment by Government inspectors or by other representatives of the Government can under normal circumstances be construed as an interpretation of the meaning of a contract. The Government has not obligated itself to supervise the work or to make a step by step inspection to avoid the installation of improper or unacceptable work. On the contrary, the contract places upon the contractor the burden of compliance with the contract specifications.

Fourth, appellant argues that it screened the target aquifer as required by paragraph 3.1.1. This argument is based on two assumptions: (1) that the target aquifer was 250 feet thick; and (2) that the contract only required appellant to screen the target aquifer. Neither of these assumptions is correct. As indicated above, the Leighton report was not part of the contract and neither paragraph 3.1.1 nor any other provision of the contract indicated that the target aquifer was 250 thick. Thus, there was no contractual basis for screening only 250 feet. Reading paragraph 3.1.1 and drawing C-57 together, it is clear that appellant was required to screen 300 feet of the well regardless of the thickness of the target aquifer. Although paragraph 3.1.1 required that the wells be "developed in the target aquifer," it also required that the holes "penetrate the water bearing stratum at least 300 feet." The water bearing stratum included the target aquifer and the less permeable layers below it. Drawing C-57 required 300 feet of screen in each well. After reviewing the boring logs for this job,

Mr. Luther, president and CEO of Applied Consultants and an expert in the interpretation of boring logs, concluded that “there was no geologic reason for not screening the full 300 feet.” We conclude that appellant’s non-compliance is not excused on the basis that it screened the target aquifer.

Fifth, appellant argues that Mr. White, the Navy’s project engineer, agreed that appellant could use 250 feet of well screen during the 6 March 1998 preconstruction meeting. We have found as fact that Mr. White did not agree that appellant could use 250 feet of well screen. However, even if he did, FAC 5252.201-9300 CONTRACTING OFFICER AUTHORITY (JUN 1994) stated that “[i]n no event shall any understanding or agreement between the contractor and any Government employee other than the Contracting Officer [be] effective or binding upon the Government” (finding 2). Thus, any agreement entered into by Mr. White would not have been binding on the Government.

Sixth, appellant argues that Mr. Petteway agreed to accept a credit at the 4 February 1999 meeting. We have found as fact that Mr. Petteway agreed, at most, to consider a credit for the well screen.

Seventh, the correspondence between the parties after the 4 February 1999 meeting does not prove that Mr. Petteway agreed to a credit. With the exception of one line, appellant’s letter of 24 February 1999 related to the seal test. The line relating to the screens stated that “[n]o further testing would be required [if the seals passed the seven-day test] and a credit . . . of \$3,750 would be accepted” (Finding 33) Mr. White’s reply of 25 February 1999 contained one line relating to the screens: “[c]redits due for screen not installed will be addressed by modification, separately from this issue” (finding 34). These exchanges do not establish that Mr. Petteway agreed to a credit. Even if Mr. White’s reply could be so construed, he did not have contract authority. Moreover, appellant’s letter of 30 March 1999 makes it crystal clear that Mr. Petteway had not agreed to a credit. The letter stated that “[a]s soon as the acceptance is received and the amount of the credit is agreed to in writing, we will invoice for the remaining well work” (Finding 36) Appellant also argues that Mr. Petteway agreed to a credit by testifying at the hearing that he had “no problem” with Mr. White’s letter (finding 34). In view of the evidence that Mr. Petteway did not agree to a credit, this argument is without merit.

Eighth, appellant argues that the Navy’s directive to drill a fourth well was “completely irrational and commercially unreasonable” and suggests that the Navy is trying to “under-compensate” Beylik (app. br. at 8). These assertions are not well taken. Mr. Petteway could have directed appellant to drill three new wells or to add more well screen to the existing wells by slant drilling. Either of these remedies would have been more expensive than drilling a fourth well. Under the circumstances, Mr. Petteway’s directive to construct a fourth well properly mitigated the Government’s damages.

All other arguments not specifically addressed herein have been considered and found to be without merit.

CONCLUSION

The appeal is denied.

Dated: 6 November 2002

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

CAROL N. PARK-CONROY
Administrative Judge
Acting 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. 53385, Appeal of The Ryan Company, rendered in conformance with the Board's Charter.

Dated:

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