

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
)  
M.A. Mortenson Company ) ASBCA Nos. 53183, 53380, 53391,  
) 53392  
Under Contract No. DACA85-94-C-0031 )

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OPINION BY ADMINISTRATIVE JUDGE ROME

This is our fourth Rule 11 opinion deciding entitlement on appeals by M.A. Mortenson Company (Mortenson) from final decisions of the contracting officer (CO) denying its constructive change claims under its contract with the U.S. Army Corps of Engineers for construction of the Composite Medical Facility, Phase II, at Elmendorf Air Force Base, Alaska (CMF project). The Corps' Elmendorf Resident Office (ERO) administered the contract. Familiarity with *M.A. Mortenson Company*, ASBCA Nos. 53105 *et al.*, 04-2 BCA ¶ 32,713 (*Mortenson I*), *M.A. Mortenson Company*, ASBCA Nos. 53123 *et al.*, 04-2 BCA ¶ 32,787 (*Mortenson II*), and with *M.A. Mortenson Company*, ASBCA Nos. 53146 *et al.*, 05-1 BCA ¶ 32,846 (*Mortenson III*), is presumed. We incorporate herein such of our fact findings in those decisions concerning the contract's provisions and other matters as are relevant.

ASBCA No. 53183  
Added Shaftliner to Tube Steel at Elevators 1-4)

This appeal involves appellant's \$21,237 claim for providing shaftliner at elevator guide rail support systems for elevators 1 through 4 to maintain their fire rating.

## FINDINGS OF FACT

1. The contract contained various fire protection requirements, including for partition type T/X, at issue, which called for metal stud with shaft wall liner and two layers of 5/8" gypsum board; metal stud with gypsum fiber reinforced concrete (GFRC) wall panel; and a 2-hour fire rating (*see* R4, tab 31).

2. The contract's structural drawings directed the contractor to coordinate the location of elevator guide rail support columns with the elevator manufacturer (*e.g.*, R4, tabs 35-42 at key note 5.17).

3. The government admits that there was a conflict between the contract's architectural and structural drawings concerning the location of elevator guide rail support columns and that Mortenson brought it to the ERO's attention (R4, tab 1 at 12-13; gov't br. at 95). The conflict had become apparent to the contractor during construction of the elevator shafts. On 24 March 1995 Mortenson submitted Request for Information (RFI) No. 382, initiated by its elevator subcontractor, Alaska Pacific Elevator (APE), noting that Dover Elevator, the manufacturer, had requested modification of the elevator guide rail support location in accordance with attached sketches. (R4, tab 4; Kloepper aff., ¶ 5) The ERO responded on 4 April 1995 that it did not concur, because the back side of the guide rail supports could not be relocated as apparently depicted in the sketches, without penetrating the shaft wall and causing fire protection problems (R4, tab 4).

4. An APE letter and a meeting culminated in the ERO's reconsideration of RFI No. 382, retitled RFI No. 382A (R4, tab 5). On 5 May 1995 the ERO asked its Architect and Engineer firm (the A&E) to evaluate all elevators for architectural and structural conflicts and to provide design solutions (R4, tab 46).

5. On 13 June 1995 the ERO issued a revised response to RFI No. 382A, stating that it had agreed to relocate the guide rail supports to outside the shaft, as shown on a revised Detail Schedule and 13 attached sketches prepared by the A&E, including SSD- 65 through SSD-70 and ASD-17 through ASD-22 (R4, tab 5). On 16 June 1995 Mortenson sought a change order (R4, tab 6). On 6 October 1995 the ERO issued Modification No. P00040, Part I (Mod. 40), apparently unilaterally, to provide additional guide rail supports to elevators 1 through 4 and others; and to "[m]odify the elevator shaft wall systems to ensure proper fire protection" (R4, tab 44 at 2). The modification incorporated the A&E's sketches and revised Detail Schedule. It reserved adjustments in contract price and/or time.

6. Sketches SSD-65 and SSD-66, pertaining to elevators 1 through 4, depict the general location of elevator guide rail support columns in relation to the elevator pit clear hoistway. A note concerning the columns states "coordinate location with elevator

manufacturer.” Sketch SSD-69 also depicts the general location of the support columns. Sketch ASD-17 shows a detail for wall partition type T/X and depicts the line of the elevator guide rail support columns clear of the elevator hoistway, behind the face of the shaft wall, enclosed by a GFRC wall panel. Detail 18B on sketch ASD-18, which pertains to elevators 1 through 4, depicts an elevator guide rail support steel column penetrating the shaft wall, set back from the face of the hoistway. It shows the guide rail support column framed and enclosed with two layers of GWB, for fire protection. (R4, tab 5; *see also* R4, tab 3 at 7-8; ex. G-22)

7. On 12 January 1996 the ERO issued unilateral Modification No. P00063, Part II, which increased the contract amount by \$160,210 for the elevator changes in Mod. 40. It did not extend the contract completion date. (R4, tab 45)

8. Mortenson located the elevator guide rail support columns based upon APE’s submittals. It is not clear whether they were the sketches submitted with RFI No. 382A, which the ERO had challenged on the ground, among others, that they would cause fire protection problems; earlier submittals; or submittals produced after Mod. 40. Per the submittals, the columns were moved from their previous position within the shaft wall to a position penetrating the wall’s hoistway side. However, the new location raised questions concerning the columns’ fire rating. (*See* R4, tab 3 at 2; tab 10; Kloepfer *aff.*, ¶¶ 7, 10; *see also* *app. br.* at 18, ¶ c.) Mortenson issued RFI No. 2577, dated 14 January 1997, stating that, due to the designed location of the elevator rail supports at elevators 1 through 4, the shaftwall could not be installed as shown on sketch ASD-17, and that maintaining the fire rating was not possible with the as-built conditions (R4, tab 7).

9. On 5 February 1997, the ERO responded that the location of the elevator rail supports was not as designed; they were not to be flush with the hoistway opening as installed, but were to be behind, and not to interrupt, the shaftwall construction. It approved the contractor’s proposal to maintain the fire rating by applying two layers of shaftliner to the inside face of the wall covering the support columns. (R4, tab 7)

10. On 12 February 1997 Mortenson sought a change order (R4, tab 8). On 17 March 1997, Mortenson’s drywall subcontractor, Pacific Partitions/Specialty Interiors, J.V. (PPSI), claimed \$16,581 and a 16-day time extension, citing RFI No. 2577 and the alleged elevator rail support and wall conflict (R4, tab 10). On 16 February 1998, Mortenson sought a \$21,204 equitable adjustment, covering its and PPSI’s claimed costs. It alleged that the RFI No. 382A response had described changes necessary for the relocation of the guide rail supports out of the elevator pits but that it and subsequent sketches did not remove the contract requirement that the contractor coordinate the guide rail supports with the elevator manufacturer. Mortenson contended that the submittal for elevators 1 through 4 defined the manufacturer’s expected locations for the supports; the contractor had positioned them in accordance with the RFI response and at locations coordinated with the elevator manufacturer’s information; and that it was this effort to

comply with all aspects of the contract that had led to a conflict between the support tubes and the shaftwalls. (R4, tab 11)

11. On 11 March 1998, the ERO denied Mortenson's equitable adjustment request, alleging that it had not installed the guide rail support steel columns, or provided proper fire protection, in accordance with Mod. 40; steel support members had been installed in different locations in some elevator shafts than depicted in the modification; and Mortenson's relocation of those members had caused the conflict with the shaft wall system installation (R4, tab 12).

12. On 27 July 2000 Mortenson submitted a \$21,237 claim, alleging that, in coordinating the new design information provided in Mod. 40 with information received from the elevator supplier, Mortenson and PPSI were required to perform the extra work of adding a shaftliner to protect the elevator support columns (R4, tab 3). On 17 November 2000, the CO denied the claim, asserting that the contractor had been fully compensated for the design changes and that the government was due a credit for work installed that did not comply with the contract (R4, tab 1). There is no evidence that the government ever made a quantified demand for payment.

### DISCUSSION

To prevail on its appeal, appellant must prove the fundamental facts of government liability. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*). When, as here, it alleges that the government's specifications and/or drawings are defective, it must prove that it complied with the contract but that the alleged defect, which it could not have recognized with reasonable effort, was responsible for its claimed extra costs. *Mortenson I, supra*, 04-2 BCA at 161,846. Appellant has not rebutted the government's contention that it installed the elevator guide rail support steel columns at issue differently than depicted in the sketches incorporated into Mod. 40 (*see* findings 5, 11). Rather, appellant alleges that it installed the columns based upon its elevator subcontractor's submittals, which apparently incorporated details from the manufacturer, and that it thereby complied with the contract's and modification's directions that it coordinate the location of guide rail supports with the elevator manufacturer (*see* findings 2, 6, 8, 10, 12).

It is not clear whether the submittals to which appellant refers were the sketches submitted with RFI No. 382A, which the ERO had challenged, including on the ground that they would cause fire protection problems; earlier submittals; or submittals produced after Mod. 40 (*see* findings 3, 8). It is clear that the contract had fire protection requirements (finding 1), and that one of Mod. 40's stated purposes was to "[m]odify the elevator shaft walls systems to ensure proper fire protection" (finding 5). Regardless of whatever coordination Mortenson, PPSI, or APE engaged in with the elevator manufacturer, it was inadequate, because the contractor's choice of installation location

for the elevator guide rail steel support columns did not satisfy the contract's fire protection requirements (*see* finding 8).

In sum, appellant has failed to establish that it complied with the contract, which defeats its claim.

### DECISION

ASBCA No. 53183 is denied.

#### ASBCA No. 53380

#### (Added Gypsum Wallboard (GWB) Soffits in Lower Level Distribution Zone (DZ))

This appeal involves appellant's \$2,907 claim for construction of two GWB soffits in the lower level DZ to conceal mechanical expansion loops and preserve the walls' fire rating.

### FINDINGS OF FACT

13. Technical Specification section (TS) 07270, FIRESTOPPING, provides in part as follows:

#### 1.1 REFERENCES

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

The list does not include the National Fire Protection Association (NFPA) 101 (1991 Life Safety Code) or the United States Gypsum Company's Gypsum Construction Handbook, each of which the government cites for industry practice concerning fire barriers, including that openings in fire rated walls be constructed with material that maintains the fire resistance rating; gypsum board soffits be used to conceal overhead piping; and overhead soffits with fire rated GWB be used to maintain the integrity of fire rated walls. If these materials are referenced elsewhere in relevant contract provisions, the government has not directed us to them. However, while claiming entitlement to costs to construct soffits not depicted in the contract, appellant does not appear to dispute the alleged industry practice, stating that "[i]t is industry standard to **design** . . . and construct overhead soffits with fire rated [GWB] to maintain the integrity of fire rated walls" (Kloepfer aff., ¶ 11).

14. TS 07270 further provides:

### 1.3 GENERAL REQUIREMENTS:

Firestopping shall consist of furnishing and installing a material or a combination of materials to form an effective barrier against the spread of flame, smoke and gases, or maintain the integrity of fire resistance rated walls, partitions, floors and ceiling-floor assemblies.

....

#### 1.4.1 Design Requirements

Fire-rated construction: Maintain barrier and structural floor fire resistance ratings including resistance to cold smoke at all penetrations, connections with other surfaces or types of construction, at separations required to permit building movement and sound or vibration absorption, and at other construction gaps.

....

### 1.5 DEFINITIONS

....

#### 1.5.2 Barriers

Time rated fire walls . . . .

....

#### 1.5.5 Construction Gaps

Gaps between adjacent sections of walls, exterior walls and structural floors, at wall tops between top of wall and ceiling . . . .

(Bd. ex. 1, vol. 2, § 07270 at 1-2)

15. The contract imposes numerous drawing review and coordination requirements upon the contractor, including providing coordination drawings (*see, e.g., Mortenson I*, general findings 3-9, and findings in individual appeals). Among those, TS 15011, MECHANICAL GENERAL REQUIREMENTS, paragraph 1.5.1, Coordination, calls for the contractor to coordinate the mechanical work with all trades;

to review the contract documents to verify the location of building components and items to be installed; and to coordinate with installers in other divisions to define space and clearance requirements with respect to all equipment (*see Mortenson I*, finding 16).

16. Drawing No. A2.166, LOWER LEVEL DZ AREA ‘L1G2’ FLOOR PLAN, depicts fire ratings for various fire/smoke walls and refers to Drawing No. A2.113 for the dimensioned location of partitions and partition types (R4, tab 11). The latter drawing, LOWER LEVEL AREA ‘LG2’ FLOOR PLAN, states at Partition Note 2:

ALL FIRE RATED, SMOKE RATED AND WALLS FOR ROOMS WITH NO CEILINGS (EXPOSED STRUCTURE) SHALL EXTEND TO STRUCTURE WITH GYPSUM BOARD BOTH SIDES AS REQUIRED FOR RATING OR CONDITION. COORDINATE STUDS WITH MECHANICAL AND ELECTRICAL SYSTEM RUNS.

(R4, tab 12)

17. Drawing No. M0.53, ENLARGED UTILITIES ROUTING PLAN LOWER LEVEL DZ, depicts the mechanical utility routing of the lower level DZ (R4, tab 13).

18. During construction, PPSI discovered a gap between mechanical piping and GWB, apparently caused by mechanical expansion loops, that compromised the integrity of a fire resistant wall in the lower DZ. According to Mr. Kloepfer, the gap was not evident from PPSI’s review of the pertinent plans and specifications or addressed by them, although he has not specified the materials PPSI reviewed or the time of its review (whether before or after layout), or any coordination efforts in which it engaged. (R4, tab 4; Kloepfer aff., ¶¶ 7, 10) PPSI determined that, to maintain the wall’s fire rating, “two additional soffits not originally identified in the contract would need to be provided and installed” (Kloepfer aff., ¶ 6).

19. In RFI No. 2733, dated 25 March 1997, Mortenson stated that, at the lower level DZ, a section of the 1-hour fire rated wall could not be constructed while maintaining the fire rating due to mechanical expansion loops, and that it was installing above-ceiling soffits to maintain the rating, as discussed with the ERO, which accepted its solution (R4, tab 4).

20. On 20 May 1997 Mortenson requested a \$2,917 equitable adjustment for providing the soffits, consisting mainly of PPSI’s claimed costs of \$2,065, which included, among others, “Stop Work / Discover Problem,” remobilization and demobilization of framers (*id.*, at PPSI’s Estimate Sheet). On 6 June 1997 the Administrative Contracting Officer (ACO) denied the request on the basis that it was Mortenson’s responsibility to lay out and coordinate its mechanical work to avoid

conflicts (R4, tab 7). On 7 December 2000 Mortenson submitted a \$2,907 claim (R4, tab 3). The CO denied it on 22 February 2001 on the ground that TS 07270 requires that gaps in fire rated walls be constructed with a combination of materials to maintain the integrity of the fire resistance rating, and that, as set forth in NFPA 101 and the Gypsum Construction Handbook, it was industry standard to construct overhead soffits, with fire rated GWB, to maintain the integrity of fire rated walls (R4, tab 1 at 6).

21. Mortenson has not provided any specific evidence pertaining to its document review, document review by its mechanical subcontractor, or any efforts by it or its subcontractors to coordinate the layout of the GWB and the mechanical work at the affected area of the lower level DZ to avoid conflicts and gaps such as that at issue.

### DISCUSSION

Appellant contends that a defect in the contract drawings resulted in a conflict between a 1-hour fire rated wall and mechanical piping in the lower DZ area and a gap that compromised the wall's integrity and made construction of two additional overhead soffits necessary (*see* findings 18, 19). The government alleges that the contract requires appellant to coordinate its work to avoid conflicts that affect the integrity of fire rated walls; it is industry standard to construct overhead soffits, with fire rated GWB, to maintain that integrity; and appellant did no more than the contract and industry standard required. Appellant does not appear to dispute that industry standard; rather, it alleges that the government should bear the costs of compliance, due to the government's allegedly defective design. (*See* finding 13)

The contract contains fire protection requirements, including at construction gaps (findings 14, 16). The drawings give the dimensioned location of partitions and the partition types, depict the mechanical utility routing of the lower level, and call for the contractor to coordinate its GWB, mechanical, and electrical runs (findings 16, 17). The contract imposes numerous drawing review and coordination requirements upon the contractor. TS 15011, for example, calls for the contractor to coordinate the mechanical work with all trades; to review the contract documents to verify the location of building components and items to be installed; and to coordinate with installers in other divisions to define space and clearance requirements with respect to all equipment. (Finding 15)

Appellant has not provided any specific evidence pertaining to its document review or review by PPSI or its mechanical subcontractor, or any efforts by it or its subcontractors to coordinate the layout of the GWB and the mechanical work at the affected area of the lower level DZ to avoid conflicts and gaps. PPSI did not discover the problem until after it had begun work and after mechanical work had already been installed. (*See* findings 18, 21)

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

### DECISION

ASBCA No. 53380 is denied.

### ASBCA No. 53391 (Above-Ceiling Conflicts in Room 2A188)

This appeal involves appellant's \$730 claim for resolving space conflicts between light fixtures and above-ceiling mechanical piping in Room 2A188 and for framing and painting the gypsum ceiling.

### FINDINGS OF FACT

22. We incorporate our findings concerning the contract's coordination requirements addressed above and in ASBCA No. 53105, which, like the instant appeal, involves conflicts between light fixtures and above-ceiling items (*see Mortenson I* and above findings 7-9, 16-21). In particular, TS 13060, INTEGRATED BUILDING SYSTEM REQUIREMENTS, paragraph 1.3.2, Connection Zones, requires the contractor to coordinate the work of all trades to resolve potential interferences prior to installation of the work of any trade (*see Mortenson I*, finding 8); TS 15011 contains mechanical work coordination requirements (*see* finding 15, above); TS 16011, ELECTRICAL GENERAL REQUIREMENTS, paragraph 1.5.1, Coordination, requires the same sort of coordination with respect to electrical work (*see Mortenson I*, finding 17); and TS 16415, ELECTRICAL WORK, INTERIOR, paragraph 1.2.2, Coordination, requires that lighting fixtures be located to avoid interference with mechanical or structural features, or otherwise be located to suit conditions fixed by design and shown (*see Mortenson I*, finding 19).

23. Mechanical drawing No. M1.302, SECOND LEVEL AREA '2A2' FLOOR PLAN – HVAC, depicts an SV (steam vent) line running north and south through Room 2A188 (R4, tab 12). Electrical drawing No. E2.302, SECOND LEVEL AREA '2A2' LIGHTING PLAN, depicts Room 2A188 with the two light fixtures at issue nearest its eastern wall (R4, tab 13).

24. After PPSI had mobilized to Room 2A188, it discovered a spatial conflict between the SV line and the two light fixtures. An ERO employee orally authorized it to move the light fixtures four inches to the west to resolve the conflict. Mr. Kloefer alleges that no amount of coordination could have identified what he describes as a

design error prior to PPSI's mobilization, but he has not specified any contract materials PPSI reviewed, or the time of any review (whether before or after layout), or any coordination efforts in which it engaged. (R4, tab 4; Kloepfer aff., ¶¶ 6, 9)

25. Mortenson also has not specified any contract materials it or its subcontractors reviewed, or the time of any review, or any coordination efforts in which it engaged concerning Room 2A188.

26. Mortenson submitted RFI No. 2719, dated 18 March 1997, to verify that it could move the two lights so that the SV line would clear them. It stated that a reply was required by 25 March 1997. The ERO's response, dated 21 March 1997, was stamped as received by Mortenson on 24 March, one day before the requested deadline. The ERO stated that the contractor could install the two light fixtures as requested if there were no additional costs to the government. It noted that, as of 20 March, neither the ceiling framing nor the light fixtures were in place. (R4, tab 4)

27. On 24 July 1997 Mortenson requested a \$933 equitable adjustment for relocating the two light fixtures, including PPSI's claimed costs of \$456, \$150 for subcontractor Wasche Commercial Finishes, Inc. (Wasche), and Mortenson's costs. Mortenson noted that the claimed costs included labor to remobilize to frame and paint the ceiling (R4, tab 6). On 8 August 1997 the ACO denied the request on the ground that TS 13060 requires the contractor to coordinate the work of all trades to resolve potential interferences prior to installation of the work of any trade. He asserted that, since neither the ceiling nor the light fixtures were in place when the request to move the fixtures was initiated and accepted, Mortenson had ample time to coordinate. (R4, tab 7)

28. On 7 December 2000 Mortenson submitted a \$730 claim, no longer including costs for Wasche (R4, tab 3). Mortenson alleges that PPSI was forced to demobilize its ceiling grid crew and remove its laser equipment until the ERO responded to its RFI six days after it issued, and that this disruption caused added costs (*id.*; Kloepfer aff., ¶ 8). The CO denied the claim on 19 March 2001, concluding, *inter alia*, that there was a minor interference between the light fixtures and the SV line in Room 2A188 that was not tantamount to a design deficiency; the contract required the contractor to coordinate the work of its trades to avoid electrical and mechanical system interferences; no redesign or contract change was required; and the government's response to the RFI was received by the contractor one day prior to its requested deadline, so the government had not caused any delay (R4, tab 3 at 5-6).

## DISCUSSION

Appellant alleges that a design conflict between light fixtures and mechanical piping in Room 2A188 caused it and PPSI to incur increased costs, particularly relating

to remobilization. The government defends against the appeal essentially on the grounds enunciated by the CO in her final decision (*see* finding 28).

Once more, appellant has not provided specific evidence pertaining to any document review, or any efforts by it or its subcontractors to coordinate the layout of the light fixtures and above-ceiling mechanical piping in Room 2A188 to avoid conflicts (findings 24, 25). Moreover, neither the ceiling framing nor the light fixtures were in place when Mortenson submitted its RFI to verify that it could move the lights at issue, and the ERO responded within appellant's requested timeframe (finding 26).

Appellant failed to establish that it complied with the contract's coordination requirements and has not proved any facts that would render the government liable for its alleged extra costs.

### DECISION

ASBCA No. 53391 is denied.

### ASBCA No. 53392 (Redesign of Patient Room Lighting)

This appeal involves appellant's \$3,203 claim for costs to resolve conflicts in the layout of components in patient bedrooms.

### FINDINGS OF FACT

29. The contract's FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) clause provides in part that: in case of difference between the contract drawings and specifications, the specifications govern; in case of discrepancy in the drawings or specifications, the matter shall be promptly submitted to the CO, who shall promptly make a determination in writing; any adjustment by the contractor without such a determination shall be at its own risk and expense; and the CO shall furnish from time to time such detailed drawings and other information as considered necessary. (*See Mortenson I*, finding 3)

30. TS 01030, SPECIAL ITEMS, paragraph 28, ROOM MOCK-UPS, requires the contractor to construct a complete mock-up room for a typical double-bed patient room with toilet. Prior to installation of the mechanical, electrical, and other work, the mock-up is to include all finishes and to be approved by the CO to insure proper location of all items. (*See Mortenson III*, finding 22; Bd. ex. 1, vol. 1, § 01030 at 14)

31. TS 11702, MEDICAL EQUIPMENT, MISCELLANEOUS, paragraph 2.1.1.2(a), gives specification data for patient console items A1110, and A1110A-E and

states that the console unit “shall be available in panel widths of 19-3/8 inches, 28-3/8 inches and 37-3/8 inches” (Bd. ex. 1, vol. 2, § 11702 at 6). However, this conflicts with the contract drawings, which depict the A1110 series vertical patient consoles as “2'-0”” (24 inches) wide (*see* Drawing No. A7.05, PATIENT CONSOLE ELEVATIONS AND SECTIONS, Details 9-15 (R4, tab 15)).

32. In addition to the portion of TS 16415, ELECTRICAL WORK, INTERIOR, paragraph 1.2.2, Coordination, referred to above (finding 22), the specification states:

The drawings indicate the extent and the general location and arrangement of equipment, conduit, and wiring. The Contractor shall become familiar with all details of the work and verify all dimensions in the field so that the outlets and equipment shall be properly located and readily accessible . . . .

(*See Mortenson I*, finding 19)

33. The following has not been disputed: The contract’s architectural drawings depict interior elevations of 1-bed, 2-bed and 4-bed patient rooms. The headwall, against which the beds are to be positioned, accommodates, for each patient, a patient light (type HA); a bedside television; bed wall bumpers, and a vertical patient console (A1110, A1110A, A1111B, or A1111C, depending upon room type). The interior elevations for each type of patient room depict where the components should be located, relative to each other or to a wall edge or column. The bedside television brackets are located via an offset from the wall edge, typically 2'-0" but sometimes 18" or 16". The distance between the television bracket and the patient light for a particular bed location is not defined and varies among room types. (*See* Drawing No. A7.264, FIRST LEVEL AREA '1H1' INTERIOR ELEVATIONS, Detail 1; Drawing No. A7.265, FIRST LEVEL AREA '1H2' INTERIOR ELEVATIONS, Detail 7; Drawing No. A7.266, FIRST LEVEL AREA '1H2' INTERIOR ELEVATIONS, Details 2, 4, 5; Drawing No. A7.363, SECOND LEVEL AREA '2H1' & '2H2' INTERIOR ELEVATIONS, Details 1, 8; Drawing No. A7.365, SECOND LEVEL AREA '2J3' INTERIOR ELEVATIONS, Detail 7; Drawing No. A7.366, SECOND LEVEL AREA '2J3' INTERIOR ELEVATIONS, Details 2, 4, 5; Drawing No. A7.367, SECOND LEVEL AREA '2J4' INTERIOR ELEVATIONS, Detail 7; and Drawing No. A7.368, SECOND LEVEL AREA '2J4' INTERIOR ELEVATIONS, Detail 1 (R4, tabs 16-23, respectively))

34. Drawing No. E8.101, LIGHT FIXTURE SCHEDULE, describes type HA lights as 3' linear (36 inches long), fluorescent, 3-lamp wall fixtures (R4, tab 25).

35. By shop drawing transmittal (SDT) No. 696, dated 15 September 1995, Mortenson resubmitted shop drawings and materials covering type HA patient lights.

The data indicated that the lights had a nominal length of 3 feet but an actual length of 39-1/2 inches. (R4, tab 29)

36. By SDT No. 965, dated 29 November 1995, Mortenson submitted drawings for the A1110 patient console series, showing a 28-inch console width. The ERO disapproved the submittal for reasons other than console width. (R4, tab 30)

37. In a letter to Mortenson dated 19 December 1995, designated ERO 535, which the ACO described as a contract clarification to be performed at no additional cost to the government, he stated that bedside televisions were to be at least one foot six inches from the edge of patient lights – about five feet six inches from a referenced centerline. He described the one foot six inches as the critical dimension, to avoid conflict between the television and the light, and referred to patient room elevations in the architectural drawings. (R4, tab 8) Appellant views this as a contract revision that provided new information regarding the amount of space between lights and televisions in patient rooms (Kloepfer aff., ¶ 7).

38. ERO 535 did not address details to install all in-wall components of the patients' rooms. Mortenson and its subcontractors met with ERO inspectors on site and obtained measurements and layout information, then the contractor issued RFI No. 1673, dated 8 February 1996, to confirm alleged directions received. (Kloepfer aff., ¶ 8) The RFI included copies of details on Drawings Nos. A7.264 (Detail 1), A7.265, A7.266, A7.363, and A7.365 through A7.368, with mark-ups on most, showing revised locations for the patient televisions and lights in 13 bedrooms. The drawings were not marked to correct the console width from the 24 inches they had originally depicted to the 28 inches Mortenson had submitted, and the patient lights were not marked as changed from their original 36-inch width to the actual submitted width of 39-1/2 inches. On 12 February 1996 the ERO concurred with the RFI. (R4, tab 26; *see also* R4, tab 1 at 7)

39. Mortenson and its subcontractors initiated construction upon the ERO's concurrence with RFI No. 1673 (Kloepfer aff., ¶ 9).

40. Three months later, an additional alleged conflict (unspecified) was identified. A second onsite meeting occurred. On or about 8 May 1996, Mortenson submitted RFI No. 1673A to confirm the outcome. It involved rework to the metal backing in the 2-bed patient rooms, which had already been installed in accordance with RFI No. 1673. (Kloepfer aff., ¶¶ 10-12) Per RFI No. 1673A, Detail 1 on Drawing No. A7.264, as previously revised, which covered the 2-bedroom units on the CMF facility's first floor, "doesn't work dimensionally" (R4, tab 27). The RFI attached a field layout which depicted the patient consoles as 28-1/2 inches wide and the patient lights as 39-1/2 inches. On 15 May 1996 the ERO concurred. (*Id.*)

41. A third onsite meeting was held to resolve alleged conflicts (unspecified) in the 2-patient rooms. Mortenson issued RFI No. 1673B, dated 23 May 1996, to confirm alleged verbal directions. (Kloepfer aff., ¶ 13) It enclosed a “field re-layout” and asked the ERO to verify dimensions on two pages of the enclosure, which, among other things, included the 28-1/2 inch and 39-1/2 inch dimensions for the consoles and lights. The ERO concurred on 23 May. (R4, tab 28)

42. ERO 535 and RFI Nos. 1673, 1673A and 1673B culminated in re-work of patient room in-wall component installations (*see* Kloepfer aff., ¶ 14).

43. By SDT No. 2594, dated 1 October 1996, Mortenson submitted supplemental shop drawings depicting patient consoles A1110 A-C to be 28-1/2 inches wide. The ERO approved the submittal on 15 October 1996. (R4, tab 32)

44. On 16 October 1996 Mortenson sought a \$2,694 change order for alleged extra costs incurred by it, PPSI, and ALCAN Electrical & Engineering, Inc., Mortenson’s electrical subcontractor. It alleged that ERO 535, RFI No. 1673, and field meetings had redesigned dimensions for 13 patient bedrooms, including locations for headwall consoles, lighting, framing, and backing for miscellaneous accessories; with the ERO’s knowledge, rough-in had proceeded as directed in those rooms; and three months later a new design was required to correct dimensional inaccuracies, resulting in the rework of lighting layout and related backing. (R4, tab 6)

45. By letter dated 7 November 1996, designated ERO 1252, the ACO denied Mortenson’s change order request, alleging that the RFIs were part of the contractor’s required mock-up and coordination process and that revisions to the ERO’s response to RFI No. 1673, and rework, had been required because Mortenson had given incomplete information and had performed work covered by mock-up room requirements prior to mock-up room approval, which had not yet occurred. He asserted that he had cautioned Mortenson repeatedly about working prior to completing mock-up rooms. (R4, tab 5)

46. On 28 January 1997 Mortenson forwarded to the ERO a 19 November 1996 letter from PPSI stating that the RFI No. 1673 series was not part of the mock-up process and was due to ERO 535’s direction to relocate equipment from its original scheduled location, and to design conflicts (unspecified) in the contract documents (R4, tab 4).

47. On 7 December 2000 Mortenson submitted a \$3,203 claim for extra costs of revisions to in-wall electrical rough-in and wall backing plates allegedly due to the ERO’s instructions. Mortenson claimed that the contract was flawed in the placement of components within patient room walls; the ERO had provided “[s]pecific details” to resolve design conflicts; the RFIs had confirmed the ERO’s directions; and the ERO was aware of Mortenson’s intent to proceed based upon them. (R4, tab 3 at 2-3)

48. By final decision dated 16 March 2001, the CO denied Mortenson's claim (R4, tab 1). In addition to reiterating the ACO's contentions concerning the required mock-up room process, the CO acknowledged the conflict between the drawings and the specifications concerning the width of the patient consoles and stated that Mortenson had properly given precedence to the specifications by submitting consoles that were 28-1/2 inches wide. She noted that Mortenson's submittals had shown the patient lights to be 39-1/2 inches long. She contended that, when Mortenson subsequently submitted RFI No. 1673, the consoles were shown at 24 inches wide and the lights at 36 inches long, despite the different information in its submittals, and its failure to coordinate its layouts and work with its submittals had caused the problems that resulted in RFI Nos. 1673A and B. She claimed that ERO 535 was a contract clarification, issued consistently with the Specifications and Drawings for Construction clause, "because the distance between the television brackets and the patient lights was not dimensioned in the contract drawings and any potential conflict between the two items needed to be avoided" (R4, tab 1 at 10).

49. Appellant has not responded to the CO's contention that its failure to coordinate its layouts and work with the dimensions for patient consoles and lights shown on its submittals caused the problems that resulted in RFI Nos. 1673A and B. Although it has referred generally to installation locations changed due to ERO 535 and with respect to the RFI No. 1673 series, it has not specified the design conflicts of which it complains, with citation to the particular specifications and/or drawings involved. The specifications and drawings were admittedly in conflict concerning the width of the patient consoles, but appellant submitted a width consistent with the specifications, and with the contract's instruction that the specifications prevail in the case of such a conflict (*see* findings 29, 31, 48). Without further guidance from appellant, apart from the stated conflict, which was resolved, there is insufficient evidence for us to find that any specifications or drawings concerning the 2-bed patient rooms were defective.

50. Although appellant denies that the mock-up process bears upon its claimed contract changes, it has not denied that it proceeded with the work at issue in 13 patient rooms prior to ERO approval of the mock-up room required by the contract. Accordingly, we so find.

## DISCUSSION

Appellant contends that: the contract plans were defective because they depicted conflicting positions of components within patient rooms; to remedy the design error, it met with the ERO and received specific direction on how to build the rooms, which the ERO confirmed in approved RFIs; and when it attempted to perform the work as directed, more design conflicts emerged, resulting in additional work that constituted a constructive contract change. The government reiterates the CO's reasons for denying appellant's claim, including that, when appellant submitted RFI No. 1673 to verify layout

dimensions in patient bedrooms, it showed the patient consoles to be 24 inches wide and the lights to be 36 inches long, rather than the 28-1/2 inches and 39-1/2 inches, respectively, shown in its submittals, and that it was this mistake that required the revised layout dimensions (*see* findings 38, 48). The government characterizes ERO 535 as a contract clarification, noting that the Specifications and Drawings for Construction clause contemplates that the government is to furnish from time to time such detailed drawings and other information as considered necessary (*see* finding 29). Finally, the government contends that appellant performed rough-in work in the 13 patient rooms at issue prior to the government's approval of a patient mock-up room, and that it did so at its own risk.

Appellant has not responded to the CO's contention that its failure to coordinate its layouts and work with the dimensions for patient consoles and lights shown on its submittals caused the problems that resulted in RFI Nos. 1673A and B. Further, we have found that, other than a conflict that was resolved in accordance with the contract, appellant has not established that any specifications or drawings concerning the 2-bed patient rooms were defective. (Finding 49) Finally, appellant has not denied that it proceeded with the work at issue prior to the ERO's approval of the patient mock-up room required by the contract (finding 50).

Thus, appellant has failed to establish that it complied with the contract, and that any relevant drawings or specifications were defective.

#### DECISION

ASBCA No. 53392 is denied.

#### SUMMARY

ASBCA Nos. 53183, 53380, 53391, and 53392 are denied.

Dated: 18 March 2005

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CHERYL SCOTT ROME  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53183, 53380, 53391, 53392, Appeals of M.A. Mortenson Company, rendered in conformance with the Board's Charter.

Dated:

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