

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
M.A. Mortenson Company) ASBCA No. 53346
)
Under Contract No. DACA85-94-C-0031)

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OPINION BY ADMINISTRATIVE JUDGE TING

M.A. Mortenson Company (Mortenson) timely appealed a contracting officer's (CO) decision denying its claim for \$782,790 for being directed to employ a mechanical engineer and an electrical engineer as a part of the Contractor Quality Control (CQC) staff it had to provide over the course of contract performance. Mortenson had initially proposed in its CQC plan to use its subcontractors' mechanical and electrical CQCs to fill these CQC staff positions. That plan was rejected. Both entitlement and quantum were heard. Because we conclude there is no entitlement, we need not reach the quantum issues presented.

FINDINGS OF FACT

1. In September 1994, the U.S. Army Corps of Engineers (the government or the Corps) entered into Contract No. DACA85-94-C-0031 with Mortenson for the construction of a 110-bed, multi-story Composite Medical Facility for the Air Force and the Department of Veterans Affairs (R4, tab 1). The original contract amount for base items was \$120,579,000. The contract included as Clause I.80, FAR 52.243-0004, CHANGES (AUG 1987).

2. Technical Specification (TS) 01440 pertains to “CONTRACTOR QUALITY CONTROL.” As explained in ¶ 3.6 of TS 01440, “Contractor Quality Control is the means by which the Contractor ensures that the construction, to include that of subcontractors and suppliers, complies with the requirements of the contract” (R4, tab 19 at 6).

3. Paragraph 3.1 of TS 01440 requires Mortenson to establish and maintain an effective quality control system:

The Contractor is responsible for quality control and shall establish and maintain an effective quality control system in compliance with the Contract Clause entitled “Inspection of Construction.” The quality control system shall consist of plans, procedures, and organization necessary to produce an end product which complies with the contract requirements

Paragraph 3.2.1 of TS 01440 requires that:

The Contractor shall furnish for review by the Government, not later than 30 days after receipt of notice to proceed, the Contractor Quality Control (CQC) Plan The plan shall identify personnel . . . to be used

Paragraph 3.2.3 of TS 01440 provides that:

Acceptance of the Contractor’s plan is required prior to the start of construction The Government reserves the right to require the Contractor to make changes in its CQC plan and operations including removal of personnel, as necessary, to obtain the quality specified.

(R4, tab 19 at 1-3)

4. Paragraph 3.4 of TS 01440 pertains to “QUALITY CONTROL ORGANIZATION.” It requires at ¶ 3.4.2, “CQC Organizational Staffing,” that Mortenson “provide a CQC staff which shall be at the site of work at all times during progress, with complete authority to take any action necessary to ensure compliance with the contract.” (R4, tab 19 at 4) The CQC staff specified included a “CQC System Manager” (¶ 3.4.1), and “Supplemental Personnel,” consisting of a mechanical engineer, an electrical engineer, a structural engineer (¶ 3.4.2.3a, b, and c) and others (R4, tab 19 at 4-5)

5. With respect to the “CQC System Manager,” Paragraph 3.4.1 of the specification requires:

The Contractor shall identify an individual within its organization at the site of the work who shall be responsible for overall management of CQC and have the authority to act in all CQC matters for the Contractor. This CQC System Manager shall be on the site at all times during construction and *shall be employed by the Contractor*

(Emphasis added) (R4, tab 19 at 3)

6. With respect to “Supplemental Personnel,” the specification provides generally that:

A staff shall be maintained under the direction of the CQC system manager to perform all QC activities These personnel may perform other duties, but must be fully qualified by experience and technical training to perform their assigned QC responsibilities and must be allowed sufficient time to carry out these responsibilities

(See ¶ 3.4.2.3, R4, tab 19 at 4)

7. Paragraph 3.4.2.3 set forth the more specific requirements of the mechanical engineer:

a. Mechanical engineer – at least one registered mechanical engineer shall physically be on site full time from the date that mechanical submittals are available for review, or from the date of commencement of any work activities related to mechanical installations, whichever is earlier, until those work activities have been completed. The mechanical engineer shall have specific responsibility for submittal review, verification of installations, checkout, testing, verification that hospital support systems are adjusted and regulated properly, and inspection of mechanical systems

(R4, tab 19 at 4)

8. Paragraph 3.4.2.3 set forth the more specific requirements of the electrical engineer:

b. Electrical engineer – at least one registered electrical engineer shall physically be on site full time from the date that electrical submittals are ready for review, or from the date of commencement of any work activities related to electrical installations, whichever is earlier, until those work activities have been completed. The electrical engineer shall have specific responsibility for submittal review, verification of installations, checkout, testing, verification that hospital support systems are adjusted and regulated properly, and inspection of electrical installations

(R4, tab 19 at 5)

9. In bidding the Elmendorf project, Mortenson’s bid team, in conjunction with its subcontractors, decided that the subcontractors rather than Mortenson would employ the mechanical and electrical engineers (CQCs) (tr. 1/18, 32). Under this plan, Mortenson would retain an overview/review function, but “the main responsibility for conforms [sic] to the [contract] documents falls back on the subcontractor” (tr. 1/33).

10. Mortenson chose W.A. Botting Company/The Poole & Kent Company, a Joint Venture (B/P&K) as its mechanical subcontractor, and Alcan Electrical & Engineering, Co., Inc. (Alcan) as its electrical subcontractor (R4, tab 3B). Mortenson’s contract with Alcan included a clause that provided:

Provide & Comply with all contractor quality control procedures described in Section 01440 and the project QC plan. Provide personnel to meet the qualification requirements, and perform the functions described in 01440 and the project QC plan

(R4, tab 3B; tr. 1/20) Mortenson’s contract with B/P&K contained the same provision but with an additional sentence: “Prepare QC procedures description for mechanical work, for inclusion in the overall QC plan to be submitted to the Owner” (R4, tab 3B).

11. A preparatory meeting between government and Mortenson representatives was held on 27 October 1994. At this meeting, Mortenson introduced a member of its mechanical subcontractor’s staff as its (Mortenson’s) mechanical quality control staff member. (R4, tab 4)

12. By letter dated 28 October 1994 (ERO 11), C. Alex Morrison, Jr., Administrative Contracting Officer (ACO Morrison) for the Corps advised Mortenson that:

The contract identifies several specialists that are required to be members of your Quality Control Staff. The specialists can have other duties but as members of your staff are required to be employees of Mortenson.

The letter stated that “[t]he use of subcontractor employees as your quality control staff is not acceptable.” (R4, tab 4) In taking this position, ACO Morrison was concerned about “the degree of control of Mortenson over the quality control personnel” and the “[p]otential conflict of interest with the subcontractors” (tr. 1/204). Mortenson’s reply, dated 3 November 1994, stated: “We see absolutely no basis in the contract documents for a prohibition of subcontractor employees on the CQC staff” (R4, tab 5).

13. In his 14 November 1994 letter (ERO 024), ACO Morrison advised that Mortenson’s draft quality control plan failed to comply with TS 01440. He reiterated his belief that “use of subcontractor employees to fill the positions of selected specialists on your [Mortenson’s] Quality Control staff is unacceptable.” ACO Morrison took the position that the contract required Mortenson’s quality control staff to be comprised of Mortenson employees. He told Mortenson that if it disagreed with his position, it could seek recourse under the contract. In the meantime, he expected Mortenson to proceed with assembling a quality control staff in accordance with his direction. (R4, tab 6) Mortenson acknowledged that this letter did not change the requirement of TS 01440 other than to require the prime contractor to hire the mechanical and electrical CQCs as its employees (tr. 1/85).

14. Mortenson submitted its “Contractor Quality Control Plan” on 30 November 1994. The government disapproved this plan on 6 December 1994. Among the reasons for disapproval was Mortenson’s proposal to use mechanical and electrical quality control specialists not employed by Mortenson. (R4, tab 7)

15. Thereafter, Mortenson notified the government by letter dated 23 December 1994 that it considered the government’s direction to be a change order. Mortenson said that the government had changed the specification “by adding a prohibition against subcontractor personnel filling any of the positions specified for the Quality Control organization.” Mortenson took the position that the contract did not specify what work might or might not be subcontracted. The letter stated that the costs to be forwarded would include duplication of effort and its ability to plan and staff the project. (R4, tab 8)

16. B/P&K had chosen Susan K. Metcalf (Metcalf) to be its mechanical CQC. When Mortenson was required to hire its own supplemental mechanical engineer, it chose Metcalf. Alcan had chosen Theodore G. Creedon (Creedon) to be its electrical CQC. When Mortenson was required to hire its own supplemental electrical engineer, it chose Creedon. (Tr. 1/85-86) The government subsequently approved Metcalf and Creedon as Mortenson's supplemental mechanical and electrical engineers to serve under its CQC System Manager (tr. 1/90).

17. Hiring away Metcalf from B/P&K and Creedon from Alcan was Mortenson's decision, not the government's (tr. 1/86-87). Hiring Metcalf and Creedon created a vacuum in its subcontractors' CQC staff that the subcontractors in turn had to fill (tr. 1/91). Mortenson could have chosen its mechanical and electrical engineers from elsewhere. In that case, no vacuum would have resulted in its subcontractors' staff. Based on the evidence in the record, we find that no one in the government directed Mortenson to hire Metcalf away from B/P&K, or to hire Creedon away from Alcan. Nor did anyone in the government direct B/P&K to turn Metcalf over to Mortenson, or direct Alcan to turn Creedon over to Mortenson. (Tr. 1/232-33)

18. Under Mortenson's original plan, the subcontractors' mechanical and electrical CQCs would have the main responsibilities for the detailed technical review of submittals (tr. 1/28-30). These submittals would then "flow to" Mortenson's CQC System Manager for his review. After his review, the submittals would be forwarded to the government for its review (tr. 1/35-36). On the Elmendorf project, Robert Simpson (Simpson) was Mortenson's CQC System Manager (tr. 1/30). Mortenson's project manager acknowledged that Simpson performed a "coordination" function (tr. 1/30), and his responsibility was "beyond the specific nature of the specification . . . more global in nature" (tr. 1/96).

19. According to Mortenson, as a result of ACO Morrison's direction, it went from "two levels of review to a third level of review." The subcontractors' CQCs still conducted their initial review. "Then the submittal gets submitted to Mortenson, it goes to Mortenson's Mechanical or Electrical CQC, and then it goes to Mortenson's CQC manager for yet the third review" before forwarding to the government. (Tr. 1/37)

20. After Metcalf went to work for Mortenson, B/P&K's initial solution was "to try to fill Susan's shoes with in-house personnel to the greatest extent possible." B/P&K's project executive assigned himself more responsibility. By December 1995, he realized that B/P&K "didn't have people that really had the skills that were necessary to handle the issues we had on this project." B/P&K then made a management decision to "bring in people from our home office . . . and brought a bunch of additional detail and personnel up at that time." At that point, B/P&K's project executive assumed all the day-to-day duties as project manager and assigned the submittal responsibilities to Adam

Snavley (Snavley) out of B/P&K's Baltimore office. (Tr. 1/133-34) According to B/P&K's project executive, it had to bring in additional qualified people because "Mortenson was putting a lot of pressure on us to make sure that we were following the quality control provisions, that [we] were just not cutting it with clerical people" (tr. 1/135). B/P&K's project executive explained why it submitted its claim: after Metcalf went to work for Mortenson, B/P&K "gave Mortenson back 200,000 dollars," but it still "had to bring people into my office to carry out the duties that Susan was doing" (tr. 1/128). We find between Mortenson and B/P&K, Mortenson would not and could not deal directly with B/P&K's subcontractors and suppliers without B/P&K's review and participation.

21. Unlike B/P&K, Alcan had no subcontractors; it was to perform all of its own work under its contract with Mortenson. While B/P&K "had a lot of submittal review to do, [Alcan] had less submittal review." (Tr. 1/159)

22. According to Alcan's project manager, Creedon was "an expensive person," "with a great deal of expertise . . . knowledgeable across the full spectrum of everything that needed to be done" (tr. 1/162). Had he remained at Alcan, Creedon's responsibility as electrical CQC would have included reviewing submittals, inspecting work-in-place, observing testing, and completing the punch-list items. Creedon testified that, to complete these assignments, he needed "an entire staff to support me." (Tr. 2/36-37) He testified that, as Alcan's electrical CQC, his first responsibility was to make sure that Alcan "didn't lose money" (tr. 2/7).

23. As Mortenson's electrical CQC, the scope of Creedon's responsibility was broader than the responsibility he would have had as Alcan's electrical CQC. He testified that, as Mortenson's electrical CQC, his responsibilities included installation in the MRI room on the HVAC Patrol System, which was not in Alcan's scope of work and which was "central to the proper functioning of the entire building . . ." (Tr. 2/54)

24. After Creedon went to work as Mortenson's electrical CQC, submittals went directly from him to the Corps because Mortenson's CQC System Manager "didn't have the technical expertise to review them" (tr. 2/41). The evidence shows that Simpson in fact "depended 100 percent" on his mechanical and electrical engineers because he did not have the necessary qualifications to approve mechanical and electrical submittals. (Tr. 2/23-24)

25. In explaining the "two-tier process of CQC review" which formed the basis of Alcan's and Mortenson's claim, Alcan's project manager testified that before the ACO's direction, the expertise for electrical matters, "the final answer for the contractor [Mortenson] would have resided on our [Alcan] staff." He testified that, after the direction, there was "that debate going back and forth now" between Alcan and

Mortenson, “instead of just a final provision of information.” (Tr. 1/179-80) According to Alcan, before ACO Morrison’s direction, the Alcan CQC would have been a part of the quality control team, and there was no requirement for Mortenson to have an electrical CQC, only the CQC System Manager (tr. 1/181).

26. Alcan’s project manager testified that after Creedon went to work for Mortenson, he “spent time reviewing all aspects of the electrical design. And found a lot of errors that became changes to the contract.” He testified that “[w]hen we [Alcan] do our installation, we install based on those engineered drawings.” (Tr. 1/178) We find this was precisely why Mortenson should have its own electrical CQC.

27. Mortenson’s 26 December 1995 letter (Serial Letter No. 894) asked the ACO to issue a change order increasing the contract amount by \$937,278. The letter contended “The directive contained in ERO 024 that the mechanical and electrical engineers for the CQC staff be employees of the Contractor changed the contract requirements.” As the attachment to the letter shows, without markups, the amount claimed was \$795,172. This amount was the difference between \$1,232,146 and \$436,974. The \$1,232,146 amount was made up of (1) \$768,670 representing the costs Mortenson said it incurred in employing a mechanical CQC and an electrical CQC directly; (2) \$170,066 representing additional costs B/P&K estimated for additional staff when its mechanical CQC assigned to the project was transferred to Mortenson’s payroll; (3) \$293,410 representing additional costs Alcan estimated for additional staff when its electrical CQC assigned to the project was transferred to Mortenson’s payroll. According to B/P&K and Alcan, their CQCs were originally assigned to perform more than CQC work. Their departure required the companies to hire additional help for the other duties originally assigned to the CQCs. The \$436,974 credit Mortenson gave back included (1) the original cost Mortenson estimated for a mechanical CQC as subcontractor employee (\$251,974) and (2) the original cost Mortenson estimated for an electrical CQC as subcontractor employee (\$185,000). (R4, tab 9)

28. ACO Morrison’s 27 February 1996 response (ERO 654) to Serial Letter No. 894 stated:

. . . Upon further review, I agree that the contract did not specifically require the mechanical and electrical quality control personnel to be directly employed by the prime contract; consequently I agree that my previous directive was a change to the contract requirements.

Having said this, ACO Morrison stated that Mortenson had not shown that any additional compensation was actually due. He took the position that “the contractually-required quality control duties of the two individuals did not change.” He also pointed out that his

directive to make the mechanical and electrical quality control personnel direct employees of the prime contractor “did not in any way change the contractually–specified duties of those individuals or add any additional quality control requirements.” Moreover, he argued that the subcontractors should bear the costs of unrelated collateral duties assigned to the mechanical and electrical CQCs. (R4, tab 10) At the hearing, William J. Walters (Walters), an office engineer at the Elmendorf Resident Office who filled in for ACO Morrison during his absence, acknowledged that, at some point, he too considered ACO Morrison’s directive to be a change (tr. 1/205, 218-19).

29. Mortenson’s 28 March 1996 letter (Serial No. 1254) revised its claim to \$1,147,274 (\$977,640 plus markup). As before, this claimed amount was made up of three elements: (1) Mortenson’s costs to employ the mechanical and electrical CQCs as directed by ERO 024 (\$803,849); (2) credit from B/P&K and Alcan when they deleted the CQC components from their contract with Mortenson (\$388,040); and (3) additional staffing costs of B/P&K and Alcan (\$561,831). Mortenson explained that B/P&K and Alcan had been “deprived of the opportunity to provide a single employee as planned to perform engineering duties as well as the contractually required CQC duties,” and to offset the staffing inefficiency created by the government, the subcontractors were forced to add staff. (R4, tab 11)

30. Mortenson’s revised claim did not persuade the ACO. He advised Mortenson by letter dated 9 September 1996 (ERO 1059) that absent “factual and auditable” information, he would issue a unilateral modification “at the Government estimate” (R4, tab 13).

31. Mortenson’s 22 October 1996 letter requested the CO’s intervention to resolve the issue. In its subsequent letter dated 19 November 1996 to the CO, Mortenson stated that “[w]e can only assume your lack of substantive response to be your agreement with this change.” The letter went on to say:

Effective immediately we will incorporate into our monthly pay application the appropriate percentage complete for this work activity. We will assume the approved costs to be the value submitted in Mortenson Serial Letter No. 1254 (\$1,147,124.00).

(R4, tab 15) By letter dated 18 December 1996 (ERO 1350), ACO Morrison advised Mortenson that the CO had directed an audit of its proposal (R4, tab 16).

32. The Defense Contract Audit Agency (DCAA) issued its report on the proposal Mortenson submitted on behalf of Alcan on 18 April 1997 (R4, tab 20). A similar report on the proposal Mortenson submitted on behalf of B/P&K was issued on 21 May 1997 (R4, tab 21). In addition, an audit on Mortenson’s equitable adjustment proposal was

issued on 30 May 1997 (R4, tab 22). DCAA questioned the entire amount proposed as direct employee costs because “it has been Mortenson’s established practice to charge the costs of the Electrical and Mechanical Quality Control employees as a part of the Field Office Overhead since as early as February 1995” (R4, tab 22 at 4; tr. 2/63).

33. On 17 September 1997, ACO Morrison issued Modification No. P00383 unilaterally. The modification revised the first sentence of TS 01440, ¶ 3.4.2.3a to read “Mechanical engineer – at least one registered mechanical engineer, *employed directly by the Contractor*, shall physically be on site full time” The first sentence of TS 01440, ¶ 3.4.2.3b was revised to read “Electrical engineer – at least one registered electrical engineer, *employed directly by the Contractor*, shall physically be on site full time”¹ (Emphasis added). The modification authorized no change to the contract amount. (R4, tab 23)

34. By Serial Letter No. 4222 dated 17 March 2000, Mortenson submitted a certified claim to the Corps (R4, tab 3). Pricing its claim as a direct cost to the project, Mortenson sought \$782,790 (*id.* at 9). This amount included a credit of \$31,553 back to the government for on-site overhead charges previously charged to the government through contract modifications (*id.* at tab T, worksheet A.4). Mortenson’s claim asserted that “[e]ven if Mortenson were to price its claim as an indirect cost, the Government would still be liable for \$712,212 for the change to the specifications requiring Mortenson to employ more quality control personnel”² (*id.* at 10).

35. By decision issued on 29 January 2001, the CO denied Mortenson’s claim. The decision explained that although Modification No. P00383 required the mechanical and electrical quality control personnel to be directly hired by the prime contractor, the modification did not change the contractually specified duties of those individuals or add any quality control requirements. The CO found that ACO Morrison’s directive was within the scope of the contract to establish a proper Contractor Quality Control organization specified by the contract. (R4, tab 1 at 8-9) Mortenson timely appealed the decision by letter dated 9 April 2001.

DECISION

¹ Revised pages 4 and 5 were forwarded by government counsel letter dated 19 April 2005 in response to the Board’s request of 14 April 2005.

² At the hearing, Mortenson modified its direct cost claim to \$761,802, and its indirect cost claim to \$720,221 (ex. 100).

For its case on entitlement, Mortenson advances two arguments: first, it contends that “the Board need not determine whether there was a change to the contract [because] [t]his fact has been admitted by the Government before and at the hearing” (app. br. at 19); second, Mortenson contends that the Board should follow *Gaston & Associates, Inc. v. United States*, 27 Fed. Cl. 243 (1992), because “[t]he facts in the present case are nearly identical to the facts in *Gaston*” (app. br. at 16).³ Appellant also attached new exhibits to its brief. We grant the government’s motion to strike those exhibits.

The admissions Mortenson relied upon consist of ACO Morrison’s 27 February 1996 letter in which he stated “I agree that my previous directive was a change to the contract requirements,” and of Walters who acknowledged, that, at some point, he too considered ACO Morrison’s directive to be a change. (Finding 28) Whether there has been a change to the contract requirements is a question of law. What ACO Morrison and Walters admitted is inconsequential. *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562, 1564 (Fed. Cir. 1987); *Foster Const. C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 880 (Ct. Cl. 1970); *Bay Decking Co.*, ASBCA No. 33868, 89-2 BCA ¶ 21,834 at 109,846 (“we find no value in ‘admissions’ regarding how the Board should interpret the contract”).

Appellant also points to unilateral Modification No. P00383. An interim decision such as this does not bind the government on appeal. *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 856 (Fed. Cir. 2004).

The *Gaston* case involved a contract to construct three separate buildings at Fort Wainwright, Alaska. The IFB permitted the Corps to award each building to a different bidder or to award all three buildings to a single bidder. After winning the contract for all three buildings, Gaston designated its project superintendent as its CQC System Manager, and planned to have one CQC inspector monitor all three buildings. The Corps rejected Gaston’s quality control plan contending that the project superintendent could not act as the CQC System Manager, and that a full-time CQC inspector would be required for each building.

On the first (CQC System Manager) claim in *Gaston*, the specification required that “the Contractor shall directly superintend the work or assign and have on the work [site] a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.” Another provision of the specification required the contractor to “identify an individual, within his organization at the site of the work, who shall be responsible for overall management of CQC and have the authority to act in all CQC matters for the contractor.” 27 Fed. Cl. at 246. In bidding the contract, Gaston had

³ Court of Federal Claims decisions are not binding precedent for the Board.

interpreted the above provisions to mean that the individual selected as the CQC System Manager could perform other duties on the project as well. After the Corps rejected its quality control plan, Gaston hired another individual to act solely as the CQC System Manager. The court found that, depending on the complexity of the project, the Corps' guide specifications let it choose whether the CQC System Manager should or should not be assigned other duties. Noting that the Corps did not so specify in the contract, the court concluded the specification to have been latently ambiguous and subject to construction against the Corps as its drafter.

On the second (CQC staff) claim, the pertinent contract provision stated: "This staff shall consist of, at the minimum, one full time person who will be at the job site at all times construction is in progress, and whose sole responsibility shall be quality control compliance with the contract plans and specifications, for each building." 27 Fed. Cl. at 248. In bidding the contract, Gaston had interpreted this contract provision to mean that a minimum of one CQC staff person in addition to the CQC System Manager was required to ensure quality control over the entire project. After the Corps rejected its plan, Gaston hired two other CQC inspectors. The question before the court was whether the term "job site" meant the entire Battalion Headquarters project, as plaintiff contended, or whether each of the three buildings composing the project was its own separate job site. The court rejected the government's argument that its interpretation was the only reasonable one, and alternatively, that the contract provision was patently ambiguous. It found the contract provision latently ambiguous, and it construed it against the Corps as its drafter. 27 Fed. Cl. 248-49.

Gaston turned on its specific facts and contract provisions. Its holdings have no application to the case before us. When construing a contract, we are to read the contract as a whole and give meaning to each of its provisions. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). "[A]n interpretation which gives a reasonable meaning to all [of a contract's] parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991), quoting *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978). Also, a contract should be interpreted to effectuate its purpose. See *Northrop Grumman Corp. v. Goldin*, 136 F.3d 1479, 1483 (Fed. Cir. 1998).

Mortenson's interpretation focuses narrowly and exclusively on ¶ 3.4.2.3a and ¶ 3.4.2.3b (findings 7, 8) which, unlike ¶ 3.4.2 (finding 5), were silent on whether the mechanical and electrical engineers had to be employed by the contractor. Mortenson argues that since ¶ 3.4.2.3a and ¶ 3.4.2.3b did not prohibit it from using its subcontractors' mechanical and electrical CQCs, the government changed the contract when it insisted that the mechanical and electrical engineers had to be employed by Mortenson.

Mortenson's interpretation fails to take into account other relevant provisions of TS 01440. Under ¶ 3.6, Mortenson was charged with the responsibility of ensuring that the construction of its subcontractors and suppliers complied with the requirements of the contract (finding 2). This required Mortenson to act as the government's advocate. We do not believe that Mortenson could have fulfilled this responsibility if B/P&K and Alcan were left to determine for themselves what would or would not comply with the contract requirements.

Mortenson has argued that the CQC System Manager was a Mortenson employee, and he could have ensured contract compliance (tr. 1/94). We are not persuaded. The specification did not contemplate that the CQC System Manager would be involved in the detailed technical review of subcontractor submittals. Paragraph 3.4.1 of the specification states that the CQC System Manager is responsible for "overall management of CQC" although he has "the authority to act in all CQC matters for the Contractor" (finding 5). Moreover, if the specification had contemplated that the CQC System Manager would do all the CQC work for Mortenson on this multimillion dollar project, it would not have specified a mechanical and an electrical engineer with defined duties as "Supplemental Personnel" (finding 6). In this connection, the evidence shows that, in actuality, Mortenson did not intend for its CQC System Manager to ensure its subcontractors' submittals were contract compliant. The evidence shows that Simpson, Mortenson's CQC System Manager, in fact "depended 100 percent" on his mechanical and electrical engineers because he did not have the necessary qualifications to approve mechanical and electrical submittals (finding 24).

In addition, ¶ 3.4.2 of the specification required Mortenson to "provide a CQC staff . . . with complete authority to take any action necessary to ensure compliance with the contract" (finding 4). Under Mortenson's rejected quality control plan, Metcalf and Creedon were the subcontractors' employees; they reported to B/P&K and Alcan. Thus, Mortenson would not have been in a position to vest in them complete authority to take "any action necessary" should such action need to be taken against the interest of B/P&K and Alcan. Creedon's testimony at the hearing underscored this potential but real conflict. He testified that, had he remained as Alcan's electrical CQC, his first responsibility would be to make sure that Alcan "didn't lose money" (finding 22). By the same token, we do not believe that Alcan would tolerate employing Creedon only to have him work for someone else's best interest. We conclude that the CQC plan Mortenson initially proposed would not be an "effective quality control system" required by ¶ 3.1 of the specification (finding 3).

Indeed to allow the subcontractors to police themselves when the contract placed that responsibility on Mortenson would frustrate the very purpose for requiring

Mortenson to establish and maintain an effective quality control system – “a weird and whimsical result.”

Because Mortenson’s proposed CQC plan did not meet the specification requirements stated above, we hold that it was within ACO Morrison’s right, under ¶ 3.2.3 of the specification (finding 3), to require Mortenson to change its non-conforming CQC plan.

Because requiring supplemental mechanical and electrical CQCs to be under Mortenson’s direct control was what the specification, when read as a whole, contemplated in effectuating a quality control plan that would be effective, we hold that the government did not change the contract in directing Mortenson to employ its own mechanical and electrical engineers.

As far as B/P&K’s and Alcan’s pass-through claims are concerned, we have found that no one in the government directed Mortenson to hire Metcalf away from B/P&K, or to hire Creedon away from Alcan. Nor did anyone in the government direct B/P&K to turn Metcalf over to Mortenson, or direct Alcan to turn Creedon over to Mortenson. (Finding 17). This is a matter for Mortenson and its subcontractors to resolve. *See Sierra Blanca, Inc.*, ASBCA Nos. 32161 *et al.*, 90-2 BCA ¶ 22,846 at 114,732-33 (appellant contractually responsible for review and approval of submittals; its problem with its subcontractor on when work was to proceed was for appellant and its subcontractor to resolve).

CONCLUSION

For the foregoing reasons, this appeal is denied.

Dated: 27 June 2005

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER

EUNICE W. THOMAS

Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53346, Appeal of M.A. Mortenson Company, rendered in conformance with the Board's Charter.

Dated:

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