

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Medlin Construction Group, Ltd.) ASBCA No. 54772
)
Under Contract No. DACA63-02-C-0015)

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OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Appellant timely appealed a contracting officer's final decision denying its claim in the amount of \$56,140.38. Appellant's claim was based on asserted extra work performed as a result of the alleged government directive to use precast concrete retainers under the grade beams. The government moved for summary judgment on the basis that the undisputed facts show that the government is entitled to summary judgment as a matter of law. Appellant opposes the government's motion and cross-moved for summary judgment asserting that when cross-motions are filed, counsel are deemed to represent that all relevant facts are before the Board and a hearing is unnecessary. According to the parties, the essential facts are undisputed. The provisions of the specifications and drawing are undisputed, and that it is only the legal effect of those provisions that is at issue. Appellant has elected the accelerated procedure of Board Rule 12.3.

STATEMENT OF FACTS FOR PURPOSE OF THE MOTIONS

The government awarded appellant the subject contract on 29 July 2002 for the construction of the vehicle maintenance facility at Ft. Hood, Texas, for the firm, fixed-price amount of \$14,267,011.06 (compl., answer, R4, tab 3). The contract contained the

standard clauses for construction contracts, including, FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997):

- (a) The Contractor shall keep on the work site a copy of the drawings and specification and shall at all times give the Contracting Officer access thereto. *Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In the case of difference between drawings and specifications, the specifications shall govern. . . .*
- (b) Wherever in the specifications or upon the drawings the words “directed”, “required”, “ordered”, “designated”, “prescribed”, or words of like import are used, it shall be understood that the “direction”, “requirement”, “order”, “designation”, or “prescription”, of the Contracting Officer is intended
- (c) Where “as shown,” “as indicated”, “as detailed”, or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word “provided” as used herein shall be understood to mean “provide complete in place,” that is “furnished and installed.” [Emphasis added]

The contract specifications, Section 03100A, Structural Concrete Formwork, provided in Part 2, the products prescribed for the concrete framework. (R4, tab 4) Subpart 2.1.8 provided that: “Fiber voids shall not be allowed to form the soffits of gradebeams [sic].” This subpart then continues to define when and how fiber voids are to be used, and the material to be used for fiber voids. Subpart 2.2 provided:

2.2 FIBER VOID RETAINERS

2.2.1 Polystyrene Rigid Insulation

Polystyrene rigid insulation shall conform to ASTM C 578, Type V, VI, or VII, square edged. Size shall be

38 mm thick by 400 mm in height by 1 meter in length, unless otherwise indicated.

2.2.2 Precast Concrete

Precast concrete units shall have a compressive strength of not less than 17 Mpa, reinforced with 150 mm by W1.4 WWF wire mesh, and 300 mm (height) by 1 m (length) by 40 mm (thickness) in size unless indicated.

Part 3 of this specification, EXECUTION, provided in pertinent part in subpart 3.1. INSTALLATION:

3.1.3 Fiber Void Retainers

Fiber void retainers shall be installed, continuously, on both sides of fiber voids placed under grade beams in order to retain the cavity after the fiber voids biodegrade.

The parties agree, and there is no dispute that the drawing detail for the TYPICAL GRADE BEAM VOID, depicted 41 x 304 x 914 mm precast concrete retainers in Contract Drawing Sequence No. A-S101 (R4, tab 5). The detail further stated that the bottom of all grade beams shall be formed with plywood of sufficient thickness to support wet concrete during placement. There is no dispute between the parties concerning this requirement set forth in the detail, and indeed, it is undisputed that appellant formed the underside or soffit of the beams with plywood. Contract Drawing Sequence No. A-S101 stated in Note No. 11 of the FOUNDATION NOTES: "ALL GRADE BEAMS SUPPORTED BY DRILLED PIERS SHALL HAVE VOIDS UNDER THEM (SEE "TYP. GRADE BEAM VOID" DETAIL THIS SHEET)." There is no dispute concerning this requirement or its interpretation.

The drawing detail for the TYPICAL GRADE BEAM VOID, further depicted a permanent void space at the bottom of the grade beam with a note at the bottom of the void space stating "51 x 152 PRECAST CONC. SPACERS @ 914mm O.C. AT JOINTS OF SIDE RETAINERS." (R4, tab 5) This drawing detail further depicted the retainers on both sides of the grade beam void, with a note pointing to them, which stated: "41 x 304 x 914mm PRECAST CONC. CONT. RETAINERS."

By letter dated 27 January 2003, appellant informed the Central Texas Office of the Army Corps of Engineers that the government had informed appellant during informal discussions that the government believed that the contract documents required utilization of precast concrete continuous retainers at all grade beams, and that appellant took exception to this position and/or interpretation of the contract documents. By letter dated 31 January 2003, appellant forwarded to the government the information which the government requested, including Sketch AA-02 which illustrated the construction of the space beneath grade beams with the utilization of the specified polystyrene rigid insulation, and the specific product data for the materials to be installed. (R4, tab 6)

The Administrative Contracting Officer (ACO) responded to appellant's letter of 31 January 2003 by letter dated 17 March 2003. (R4, tab 7) While the ACO recognized that Part 2 of the Specifications, Section 03100A, Products, listed two types of fiber void retainers, and that the drawing detail for the TYPICAL GRADE BEAM VOID in Contract Drawing, Sequence No. A-S101, specified the use of precast concrete, according to the ACO, there was no conflict between the specifications and the drawings. This conclusion was based on the rationale that the specifications listed two acceptable products, and the drawings only authorized the use of one of the acceptable products. Therefore, the ACO stated that appellant's proposal to use polystyrene rigid insulation in lieu of the "required pre-cast concrete retainers at the grade beams is not acceptable."

Appellant filed a claim in the amount of \$58,904.12 for the extra costs of furnishing precast concrete retainers as fiber void retainers, and requested a final decision within 60 days (R4, tab 8). On 9 August 2004, appellant revised its claim to \$56,140.38 (R4, tab 9). The only difference between the original claim and the revised claim was the correction of a mathematical error in the computation regarding appellant's general liability insurance.

According to a statement executed by appellant's Project Director who was involved in preparing appellant's bid for this contract, and certified under penalty of perjury in accordance with 28 U.S.C. § 1746, he had examined the specifications in Section 03100A, subpart 2.2 and understood this paragraph to authorize the contractor to use either polystyrene rigid insulation or precast concrete fiber void retainers. Appellant, therefore, chose to use the polystyrene rigid insulation under the grade beams. He also reviewed the Foundation Note No. 11 and the "Typical Grade Beam Void Detail" on Contract Drawing Sequence No. A-S101, and interpreted this to indicate the size of the void, to use plywood to form the bottoms of the beams and not carton forms. He also noted that this drawing detail provided for concrete retainers with dimensions slightly different than called for in the specifications. He further stated that: "[s]ince I was not going to use concrete retainers the change did not matter to me." Moreover, "[t]he detail did not tell me I could not use rigid insulation retainers and even if I had, I knew that specifications control over drawings." He also stated that "[t]here was no need for the

drawing detail to show both rigid insulation and concrete retainers because the same void dimensions and placement of retainers would be made regardless of which type of fiber void retainer was chosen by us.” Appellant, therefore, included the cost for the polystyrene rigid insulation in the cost estimate for the line item “Foundation Fill Retainers,” under the heading “Grade Beams (3/A-W101 TYPICAL).” There is nothing in the record to indicate whether or not the facts set forth in this statement are undisputed, and we make no factual conclusions from their mere recitation in the Project Director’s statement.

DECISION

The issue, according to the government, is whether the contract required the use of precast concrete retainers and precast concrete spacers at the grade beam voids. Appellant frames the issue slightly differently. According to appellant, the issue is whether the contract, as a whole, permitted appellant to use polystyrene rigid insulation fiber void retainers at the grade beam voids. Both agree that summary judgment is appropriate when no material facts are genuinely in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Moreover, both assert that there are no material facts in genuine dispute, at least according to their respective theories of the case. The parties generally agree that the only issue of entitlement is the proper interpretation of Contract Drawing Sequence No. A-S101, drawing detail for the TYPICAL GRADE BEAM VOID, as it relates to subpart 2.2 of Specifications, Section 03100A.

The issues here are whether there is a conflict between the specification and drawing detail, and if so, can that conflict be resolved by the normal rules of contract interpretation and the application of the SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION clause. The government argues that there is no conflict between subpart 2.2 of Specifications, Section 03100A, and the drawing detail, because, although the specifications provide for two types of void retainers and allow some latitude or option to the contractor, the contract drawings narrow the latitude or options by providing additional details regarding the grade beam void retainers. Appellant, on the other hand, argues that the contract must be interpreted in its entirety, giving meaning to all its terms so that none of the terms are left meaningless, and that in doing so, under the SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION clause, the specifications must prevail. Appellant further argues that its interpretation is reasonable since it gives meaning to all the parts of the contract and was accepted in a previous and similar contract where appellant used polystyrene rigid insulation fiber void retainers without objection by the government.

While it is true that there is a difference between the language in subpart 2.2 of the specification and the contract drawing detail regarding the typical grade beam void, we are not persuaded that there is a conflict between the two. It is undisputed that subpart

2.2 of the relevant contract specification provided for two types of fiber void retainers. It is also undisputed that the drawing detail for the TYPICAL GRADE BEAM VOID depicted the void retainers for the grade beams and contained a note pointing to the retainers in the drawing detail that specified “41 x 304 x 914mm PRECAST CONC. CONT. RETAINERS.”

As the parties both recognize, the law is well established that the contract must be read as a whole, and that an interpretation which gives reasonable meaning to all parts of the instrument is preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless and superfluous. *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384, 351 F.2d 972 (1965). Moreover, a contract is ambiguous only when it is susceptible to two or more different and reasonable constructions, each of which is consistent with the contract language. *George Bennett v. United States*, 178 Ct. Cl. 61, 371 F.2d 859 (1967) Although neither party asserts that the contract specifications and drawings are ambiguous, appellant argues that its interpretation is reasonable, and that it gives meaning to all of the parts of the contract because it gives the “like effect” language of the SPECIFICATIONS AND DRAWINGS clause meaning, thereby authorizing the use of polystyrene rigid insulation specified in the specifications to be read into the drawing detail for the grade beam void. However, as we noted in our statement of facts, appellant’s Project Director noted, when he was preparing the bid, that the drawing detail did not provide for the use of polystyrene rigid insulation and that the dimensions for the precast concrete were slightly different than the dimensions specified in the specification. Nevertheless, appellant chose to use the polystyrene rigid insulation since it was authorized by the specifications and discounted the dimensional difference for the precast concrete since this change did not matter to him, and the specifications controlled over the drawings anyway.

We have held, a specification provision that allows latitude or options is not in conflict with contract drawings that narrow the latitude or options. *Caddell Construction Co.*, ASBCA No. 32641, 87-1 BCA ¶ 19,359, at 97,915. Thus, the more specific requirements of the drawings do not contradict or override the specifications, but complement the specifications by providing particularization and supplying additional detail. *See also, A. R. Mack Construction Co.*, ASBCA No. 49526, 97-1 BCA ¶ 28,742, at 143,464; *cf. Hobbs Construction & Development, Inc.*, ASBCA No. 29910, 91-1 BCA ¶ 23,518, at 117,933. In *Hobbs Construction & Development, Inc.*, the specifications required the contractor to provide a storehouse “complete and ready for use,” but did not specify that the storehouse was required to contain smoke and heat vents. The contract drawing roof details for the storehouse contained a detail showing an insulated metal smoke vent curb resting on top of the concrete roof slab, with the vent shown to be covered by an “insulated metal smoke vent cover.” We held that the SPECIFICATIONS AND DRAWINGS clause of the contract containing the language quoted above in paragraph (a) of the instant SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION clause, “reiterated

the well-settled principle that a contract, when read as a whole, includes both the specifications and drawings,” citing *Hol-Gar Manufacturing Co v. United States, supra*, and citing the principle set forth in *Caddell Construction Co., supra*.

In *Merritt-Chapman & Scott Corp. v. United States*, 355 F.2d 622 (Ct. Cl. 1966), there was an apparent difference between the specifications and the drawings. As the Court said, if the specifications were standing alone, without regard to the drawings, there would be no question that the filter and drainage materials were to be installed only around the underdrain, which was several feet above the bottom of the tank. The drawings, on the other hand, showed arrows depicting the location of the filter and drainage materials under the bottom of the tank. The contract contained a “Conflicts – Omissions – Misdescription – Misinformation” clause which contained the language quoted above in paragraph (a) of the SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION clause in the instant contract. In light of the language of the clause, the Court held that it could not be said that the language of the specification can stand alone in determining the scope of work to be performed. The Court held that variance between the specifications and drawings was an “omission,” not a “difference” as those words were used in the clause. Therefore, the governing preference for the specifications set forth in the precedence language of the clause in the event of difference between drawings and specifications, did not apply.

In *Franchi Construction Co. v. United States*, 609 F.2d 984 (Ct. Cl. 1979), the specifications required the installation of a specified type of flooring, and in one part, directed that the “installation of tile shall be deferred until all other work that might cause damage to the flooring has been completed.” The specifications further provided that the tile shall be laid out in a specified pattern starting from axes that would produce tile against opposite walls of equal width and not less than half the tile width. A note on one of the contract drawings provided for the laying of tile “wall-to-wall”. The Court held that there were two familiar and related principles of contract interpretation: that is, that potentially conflicting provisions should, if the language permitted, be assigned meanings that will place them in harmony rather than discord, and that the particular matter prevails over the one that is general in terms. The Court further held that in order to constitute a “difference” as contemplated by the order of precedence language of the clause, “specifications and drawings must be in the same degree of affirmative conflict.” *Franchi Construction Co. v. United States*, 609 F.2d at 989. Here the Court held that there was no conflict among either the drawings, as a whole, or between the drawings and the constituent provisions of the specification sufficient to impose on the contractor the duty of inquiry to seek clarification.

Appellant argues that our decisions in *Caddell Construction Co.*, and *A. R. Mack Construction Co.*, are distinguishable from the instant case. According to appellant, the significant distinctions in *Caddell* are the fact that the *Caddell* project was directly linked

to a nearby project, the specific reference in the specifications incorporating the drawings, and the fact that there was a manufacturer's generic specification that merely referred to the drawings and advised the contractor to select the appropriate pipe configuration. Moreover, appellant further contends that there is no technical reason why rigid polystyrene insulation fiber void retainers cannot be used. In the case of *A. R. Mack Construction Co.*, appellant contends that the distinction arises out of the contention that there was no conflict between the specifications and drawings because the specifications provided for two types of unit heaters, and the drawings included both types of heaters without indicating that either type was required for any specific location. Appellant, therefore, argues that unlike *A. R. Mack Construction Co.*, the drawing in the instant case does not specifically provide for the use of both products allowed in the specifications. Notwithstanding these alleged distinctions, appellant contends that the Board in *A. R. Mack Construction Co.*, relied on *Caddell Construction Co.* for the proposition that a specification which allows latitude or options is not in conflict with drawings which narrow the latitude or options is logically incorrect and unnecessary to reach the result the Board did in that case. Appellant faults the Board in *Caddell Construction Co.* for claiming that the Board had so held "numerous times," but did not cite a single prior decision that so held. Appellant further asserts that the Board has not so held on "numerous occasions" or any occasion other than *A. R. Mack Construction Co.* and *Caddell Construction Co.*

While we may agree that there are superficial factual distinctions in these cases, as asserted by appellant, the principle is well established and applicable to the instant appeal. Notwithstanding these superficial distinctions, both *A. R. Mack Construction Co.* and *Caddell Construction Co.* involved specifications that stated broader and more general requirements than those depicted and identified in the drawing details. Both cases held that there was no conflict between the specifications and drawings because the drawings simply supplied the contractor with additional detail regarding the heating unit air deflectors required in *A. R. Mack Construction Co.* and the pipe configuration required in *Caddell Construction Co.* See also, *A. D. Roe Co.*, ASBCA No. 23425, 79-1 BCA ¶ 13,757, cited by the Board in *A. R. Mack Construction Co.* In *A. D. Roe Co.*, the Painting Schedule of the contract required that the specified paint, either enamel or latex, was to be applied to concrete masonry units unless otherwise specified. The contract drawings identified certain walls of the concrete masonry units that were to receive a liquid glaze coating. The contractor contended that the Painting Schedule did not require any liquid glaze coating. We held that there was no conflict between the general specification and the drawings because the paint was to be applied "unless otherwise specified," and the drawing, which "formed part of the specifications, specified otherwise." "These two contractual documents must be read as a harmonious whole in order to give meaning to all their parts," citing *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384, 351 F.2d 972 (1965), *supra*. "Read reasonably, their parts complement each other rather than conflict." *A. D. Roe Co.*, 79-1 BCA at 67,409.

However, notwithstanding appellant's asserted distinctions in *A. R. Mack Construction Co.* and *Caddell Construction Co.*, there appears to be no cogent reason that these distinctions should make any difference and require us to reject the body of precedent recognizing the principle stated in *Caddell Construction Co.* We, therefore, hold that subpart 2.2 of contract specifications, Section 03100A, provided latitude or options to the contractor with respect to the fiber void retainers, and that the more specific statement of the requirements as set out in drawing detail for the TYPICAL GRADE BEAM VOID, together with the notes adjacent to the drawing detail, narrowed the latitude. Accordingly, we hold that drawing details, together with the accompanying notes, did not conflict with, or override, subpart 2.2 of the specifications, Section 03100A. Rather, they complimented the specifications by providing particularization and supplying additional detail. We are not persuaded that appellant's argument that it used polystyrene rigid insulation for fiber void retainers on another unrelated project at Fort Sam Houston, Texas binds the government to appellant's alleged interpretation of the specifications and drawings in the instant contract, or that it demonstrates the reasonableness of appellant's interpretation, particularly since appellant merely argues that the contract specifications provision and drawing detail in the instant contract are "essentially identical" with the specifications and drawing detail in the Fort Sam Houston contract. In light of our holding that there is no conflict between the drawing detail and subpart 2.2 of the specifications and, therefore, no ambiguity, were we to accept appellant's argument in this regard, the result would, nevertheless, be the same.

To the extent appellant argues that there is no functional or practical reason why polystyrene rigid insulation fiber void retainers could not be used on this project, there is an insufficient factual basis in the record upon which we could make such a finding. Moreover, the result here would be the same, namely, the contract required appellant to use precast concrete void retainers for the grade beams in accordance with the drawing details.

Accordingly, we grant the government's motion for summary judgment, deny appellant's cross motion for summary judgment, and deny the appeal.

Dated: 11 April 2005

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signature continue)

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54772, Appeal of Medlin Construction Group, Ltd., rendered in conformance with the Board's Charter.

Dated:

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