

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Alliance General Contractors, LLC) ASBCA No. 54979
)
Under Contract No. DACA45-02-C-0015)

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In this sponsored appeal regarding a contract to upgrade an existing road, Alliance General Contractors, LLC (Alliance) seeks recovery on behalf of its subcontractor, Kirkland Construction L.L.P., for extra work. The parties chiefly dispute whether the drawings were defective and whether Alliance was required to perform extracontractual work in consequence. Only entitlement is before us. We deny the appeal.

FINDINGS OF FACT

A. The Contract

1. By date of 28 June 2002, respondent Army Corps of Engineers (the Corps) awarded Contract No. DACA45-02-C-0015 to Alliance to upgrade the existing Route 3 north-south and east-west access roads at Pueblo Chemical Depot, Pueblo, CO for the firm fixed price of \$2,790,000 (Bd. corr. ltr. dtd. 16 July 2008 at 2-3). This appeal deals only with the north-south road. It was approximately 19,366 feet long, or slightly less than four miles, and it intersected the east-west road, which was approximately two miles long (tr. 37, 53).

2. The contract contained various standard clauses, including: FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997); FAR 52.243-4 CHANGES (AUG 1987); FAR 52.244-2 SUBCONTRACTS (AUG 1998); FAR 52.246-21 WARRANTY OF CONSTRUCTION

(MAR 1994); and DFARS 252.201-7000 CONTRACTING OFFICER'S REPRESENTATIVE (DEC1991), which provided, in paragraph (b), that the contracting officer's representative was "not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract." (Ex. 2 at 00700-1, 00700-70, 00700-76, 0700-78, 00700-80, 00700-86)

3. The contract also contained specifications. Among those relevant here were specification Section 02300A, EARTHWORK 12/97, which contained paragraph 1.1, REFERENCES, that incorporated by reference various publications of the American Society for Testing and Materials (ASTM), including ASTM D 1557 (1991; R 1998) LABORATORY COMPACTION CHARACTERISTICS OF SOIL USING MODIFIED EFFORT (56,000 FT-LBF/CU. FT. (2,700 KN-M/CU. M.)). (Ex. 3 at 1)

4. The contract also contained drawings. Six drawings are central to the parties' contentions here. They are: drawings C-02, C-49, C-50, C-51, C-52, and C-55, all entitled GRADING AND DRAINAGE PLAN ROAD LAYOUT PLAN (R4, tab 28; exs. 42-45, 48). The record reflects (tr. 132-33, 191), and we find, that none of these drawings had precedence over any other and all were meant to be used in conjunction with each other, and with survey information.

5. Drawing C-02 provided an overall summary of the different types of construction contemplated. The drawing set forth the various segments of both the north-south and east-west roads, demarking each segment by station number and specifying the construction method to be employed for each. With respect to the north-south road, for some segments, such as station 36+29 to station 141+23, the drawing specified that "RAP [reclaimed or recycled asphalt pavement] CONSTRUCTION" (*see* finding 8(a)) was to be employed. For other segments, such as station 0+00 to station 0+10, the drawing specified that "FULL DEPTH CONSTRUCTION" (*see* finding 8(b)) was to be employed, while others such as station 0+10 to station 2+00, were areas where transitions from RAP to full depth construction were called out. The drawing also contained a note stating, "THE PAVEMENT CONSTRUCTION INFORMATION PROVIDES AN OVERALL SUMMARY OF THE PAVEMENT TYPES, SEQUENCE, LOCATION AND LINEAR FEET OF EACH PAVEMENT CONSTRUCTION TYPE REQUIRED..." (R4, tab 28). With respect to the transition segments depicted on the drawing, such as station 0+10 to station 2+00, we find that a contractor would have to consult drawings C-49 through C-52 (*see* finding 6) to know what elevations to build the finished road (tr. 195-98).

6. The elevations for the north-south road were shown in drawings C-49 through C-52, each of which was titled GRADING AND DRAINAGE PLAN ROAD LAYOUT PLAN (exs. 42-45). Each of these four sheets presented a profile view of the road, divided into stations, showing points of vertical inflection and elevations at each of those points, as well as the required slope of the final finished road (tr. 191). Each profile view contained two sets of lines: a broken line denoting the elevation of the existing grade, and a solid

line to indicate the elevation of the finished grade. The two lines should run parallel to each other for the road to be raised eleven inches uniformly (tr. 127). We find, however, that the distance between the finished grade line and the existing grade line was not consistently higher or lower, but instead varied at different stations (exs. 42-45). We further find that:

(a) drawing C-49 shows the two grades with “minimal” differences between them, *viz.*, “getting close together” between stations 12+00 and 13+00, “close together” at stations 30+50 to 31+00, at virtually identical elevations between stations 34+00 and 34+50, and “closer together” at station 47+00 (ex. 42; tr. 127-29);

(b) drawing C-50 shows that the two grades “get close” between stations 73+50 and 76+00 and the distance is “minimal” between stations 87+00 to 89+00 (ex. 43; tr.129-30);

(c) drawing C-51 appears to show very little difference from stations 109+00 to 113+00, but shows the existing grade was to be higher than the finished grade between stations 153+00 and 154+50 (ex. 44; tr. 131);

(d) drawing C-52 shows the two grades “closer together” between stations 156+00 and stations 165+00 (ex. 45; tr. 132).

7. The record reflects (tr. 103, 124-25, 128, 193, 198), and we find, that neither drawing C-55 (*see* finding 8), nor any other drawing aside from drawings C-49 through C-52, provided the elevations for the existing road or the finished road.

8. Drawing C-55 depicted the materials that were to be employed to construct typical sections of the road: hot-mix asphalt, graded-crushed aggregate, subbase material to be made from reclaimed asphalt pavement, and subgrade. Drawing C-55 contained two separate drawings, as follows:

(a) The first drawing, TYPICAL SECTION ACCESS ROAD RECLAIMED ASPHALT PAVEMENT (RAP) CONSTRUCTION, set forth the various layers of components in a typical portion of the road. Significantly, the drawing called for an “8-IN GRADED CRUSHED AGGREGATE (GCA) BASE COURSE” and a “3-IN HOT MIX ASPHALT” covering on top of that. Note 1 defined the kind of RAP that was contemplated:-

EXISTING ASPHALT PAVEMENT SHALL BE SALVAGED AS RECLAIMED ASPHALT PAVEMENT (RAP). THIS WORK WILL CONSIST OF PULVERIZING IN PLACE AND REDUCING IN SIZE THE EXISTING ASPHALT PAVEMENT TO A MAXIMUM ALLOWABLE PARTICLE SIZE OF 2-INCHES, BLENDING WITH THE

EXISTING BASE COURSE TO AN OVERALL MINIMUM DEPTH OF 8-INCHES, AND COMPACTING TO NOT LESS THAN 100 PERCENT OF LABORATORY MAXIMUM DENSITY IN ACCORDANCE WITH ASTM D 1557 [*see* finding 3].

Note 2 addressed the shoulders of a typical section. It provided that “SHOULDERS TO BE CONSTRUCTED OF 14-IN. THICK GRADED-CRUSHED AGGREGATE (GCA) BASE COURSE AND COMPACTED TO NOT LESS THAN 100% ASTM D 1557 MAXIMUM DENSITY.” Note 3 provided that “EXISTING SUBGRADE OF THE WIDENED ROADWAY AND SHOULDER SHALL BE COMPACTED TO A DEPTH OF 8-IN. TO NOT LESS THAN 95% ASTM D 1557 [*see* finding 3] MAXIMUM DENSITY.”

(b) The second drawing, TYPICAL SECTION ACCESS ROAD FULL DEPTH CONSTRUCTION, depicted components and contained two notes. By contrast to the first drawing, this second drawing called for a “14-IN GRADED CRUSHED AGGREGATE (GCA) BASE COURSE” and a “3-IN HOT MIX ASPHALT” covering on top of that. Significantly, the second drawing did not depict or otherwise refer to, eight inches of graded crushed aggregate topped by three inches of hot mix asphalt. Note 1 to the second drawing addressed the shoulders, providing that “SHOULDERS TO BE CONSTRUCTED OF 14-IN. THICK GRADED-CRUSHED AGGREGATE (GCA) BASE COURSE AND COMPACTED TO NOT LESS THAN 100% ASTM D 1557 MAXIMUM DENSITY.” Note 2 provided that the “EXISTING SUBGRADE OF THE WIDENED ROADWAY AND SHOULDER SHALL BE COMPACTED TO A DEPTH OF 8-IN TO NOT LESS THAN 95% ASTM D 1557 MAXIMUM DENSITY.” (Ex. 48)

9. Drawing C-55 also depicted, in each of the two sections, two drainage ditches running parallel to the road on either side (ex. 48; tr. 148). We find that these ditches were intended to prevent water from penetrating the road prism from the side (tr. 210).

10. With respect to drawing C-55, we find that:

(a) it was intended to convey the thickness of the various layers of the pavement section, and the material to be used in each of those sections, for application along the length of the road (tr. 191-93);

(b) Peter Sturdivant, the government’s project engineer who is also a registered professional engineer, credibly testified that it is not common practice for typical section drawing sheets to deal with elevations (tr. 193);

(c) Kirkland’s owner testified that drawing C-55 “does not list elevations” (tr.128);

(d) while Kirkland's owner characterized drawing C-55 as "a picture" of the road (tr. 89), the first section of the drawing, TYPICAL SECTION ACCESS ROAD RECLAIMED ASPHALT PAVEMENT (RAP) CONSTRUCTION (*see* finding 8(a)), did not apply to the entire length of the road, inasmuch as approximately 2,400 of the 19,366 linear feet of the roadway were not to be constructed of RAP (tr. 91-94);

(e) Kirkland's owner testified that the second section, TYPICAL SECTION ACCESS ROAD FULL DEPTH CONSTRUCTION (*see* finding 8(b)), does not show the road being raised by eleven inches (tr. 95);

(f) the drawing does not depict the seven asphalt loading pads, or parking lots, adjacent to the roadway, or their elevations (tr. 103; *see also* tr. 107), although Alliance refers to those parking lots as reference points for its contentions regarding elevation; and

(g) there is no evidence that the drawing was to be given precedence over any other drawing.

B. *Contract Performance and Modifications*

11. By date of 10 July 2002, Alliance entered into a subcontract with Kirkland to perform a portion of the work on the roadways and accompanying shoulders (Bd. corr. ltr. dtd. 14 July 2008). Kirkland thereafter performed over 75 percent of the work specified in the prime contract (tr. 36).

12. By letter dated 6 November 2002, Kirkland notified Alliance that it had encountered "unforeseen and differing site conditions," consisting of unstable wet dirt below the existing base material (R4, tab 16 at 1; Joint Proposed Stipulation of Facts (J.S.), ¶ 5). We find that the subgrade consisted of expansive soil that, when wet, became plastic and expansive, losing its ability to stay together (tr. 200, 209, 212). As a result of the poor subgrade, Kirkland was unable to meet the 100 percent ASTM D 1557 compacted density requirements set forth in drawing C-55 (*see* finding 8) (J.S., ¶ 4).

13. In response to Kirkland's 6 November 2002 letter, the parties entered into bilateral Modification No. R00002 under the Differing Site Conditions clause (*see* finding 2) effective 9 January 2003. The modification revised drawing C-55 (*see* finding 8) to add a note 4 stating that Alliance was to "provide a test section as described below. Test section length shall not exceed 500 feet. Location and length as directed by the [Corps'] on-site government representative." (R4, tab 12 at 2) The area to be chosen for the test section was to be in a portion determined to be a "worst-case area." (*Id.*; J.S., ¶ 6)

14. It is undisputed that, after the required testing, soil borings, scarifying, drying, compacting and replacement of the RAP on the subgrade, Alliance could not achieve the required 100 percent density requirement (J.S., ¶ 7) because of subgrade failure (tr. 177).

Following the excavation of test trenches, the Corps determined that all improper subgrade material was found no deeper than 24 inches below the subgrade surface (J.S., ¶ 9). This material was a “plastic, yellowish clay that was...very wet and highly plastic” (tr. 179).

15. Following a further site investigation in January 2003, the Corps completed a new RAP design to resolve the problems that Alliance had experienced with the north-south subgrade (J.S., ¶ 10). As a result, by date of 6 February 2003, the parties entered into bilateral Modification No. R00004 under the Differing Site Conditions clause to increase the contract price by an amount not-to-exceed \$300,000, with no change in completion date. The modification again revised drawing C-55 to add a new note with the following new scope of work:

In order to facilitate placement of the compacted base course material within the north/south portion of the road, the existing subgrade surface is to be compacted to 95% of maximum density as determined from ASTM D-1557 [*see* finding 3]. The Contractor shall be directed to do the following:

1. Remove the existing RAP material and stockpile it offsite in an area directed by the Contracting Officer.
2. Remove up to 24” of existing subgrade soil and stockpile it for processing.
3. Uniformly mix the stockpile material and moisture condition to facilitate compaction prior to reuse as backfill material.
4. Prior to placing the stockpiled materials, the subgrade soils should be scarified to a depth of 6”, adjusted to a moisture content to facilitate compaction and compacted to 95% (ASTM D 1557) of the maximum modified Proctor density.
5. Backfill over excavated material using 8” loose lifts of suitable, moisture conditioned, stockpile materials. Each lift shall be compacted to density of 95% (ASTM D 1557).
6. In lieu of using the 8” of RAP material previously removed, replace it with CDOT Class 5 material. . . .

If compaction in step 4 is not achievable, and the subgrade deforms significantly under heavy wheel loads, or is generally unstable, remove another 6” of subgrade material, stockpile and process it for reuse. Repeat step 4 until subgrade compaction is achieved using 6” removal increments. The Contracting Officers [sic] Representative shall be notified of any excavation and removal of material required in excess of

the quantities described in 1 through 6 above (24 inches below the base of the existing GCA/RAP layer.) The Contracting Officers [sic] Representative shall be notified if additional structural fill is required (in excess of the reused material and the imported 8-inches of [Colorado Department of Transportation] CDOT Class 5 material.) If such additional work is deemed necessary, the additional scope will be issued in a supplement to Modification R00004.

Modification No. R00004 itself did not contain a release. (R4, tab 13 at 2; J.S., ¶ 11) Kirkland began the RAP removal required by the modification on 13 February 2003 (J.S., ¶ 13).

16. We find that the principal changes to the contract requirements wrought by Modification No. R00004 were to: (a) eliminate the RAP material; (b) replace the RAP material with CDOT Class 5 material; and (c) remove up to 24 inches of existing subgrade and condition it (tr. 183).

17. At a meeting on 6 March 2003, Alliance and Kirkland advised the Corps that they could not construct the project utilizing drawing C-55 because: (1) the existing subgrade material had become highly rutted when Kirkland had hauled base course material over it to the east-west road between November 2002 and January 2003; and (2) drawing C-55 did not contain elevations and profiles necessary to survey the project (R4, tab 3 at 2-3; J.S., ¶ 15). Kirkland advised the Corps that it needed additional money to survey the north-south road subgrade (J.S., ¶ 15).

18. Effective 31 March 2003, the parties entered into bilateral Modification No. R10004 under the Changes clause (*see* finding 2) extending the completion date by 180 days and increasing the contract amount by \$725,400. While thus granting Alliance additional time and money, the modification reiterated the drawing revisions contained in Modification No. R00004 (*see* finding 15), which it supplemented, and “directed [Alliance] to proceed” with that modification. (R4, tab 14 at 2-4)

19. As a result of the 6 March 2003 meeting (*see* finding 17), effective 24 April 2003, the parties entered into bilateral Modification No. R20004 under the Changes clause (*see* finding 2) extending the completion date by 15 days and increasing the contract amount by \$341,821. The modification supplemented both Modification No. R00004 (*see* finding 15), and Modification No. R100004 (*see* finding 18), and expressly made no drawing changes. It included payment for surveying the north-south road to establish the grade, and the parties have stipulated that this was to be done “pursuant to Drawing Sheets C-49, C-50, C-51 and C-52.” (R4, tab 15 at 1, 3; J.S., ¶ 16)

20. Modification No. R20004 also contained a partial release. It provided:

It is understood and agreed that this adjustment to the contract price and time for performance set forth herein is inclusive of all costs and delay(s) incurred by the contractor as a consequence of this modification. Such costs include but are not limited to, those for labor, materials, equipment delay, labor inefficiency, extended field overhead, and/or extended and/or unabsorbed home office overhead. Notwithstanding the foregoing, costs incurred by the contractor as the result of the cumulative effects of the issuance of modifications are not included herein.

21. By date of 24 April 2003, the parties entered into bilateral Modification No. 10002 under the Differing Site Conditions clause (*see* finding 2), revising drawing C-55 again to add a new note 5 to provide for the excavation of test trenches approximately every 300 feet along the north-south road and increasing the contract price by an additional \$11,851 to pay for this work (R4, tab 12 at 5).

22. Kirkland subsequently hired Abel Engineering Professionals (Abel Engineering) to survey the north-south road subgrade, including surveying and staking the road's red top subgrade elevations and establishing a string line for Kirkland's subgrade trimmer (J.S., ¶ 17).

23. The record contains testimonial evidence that, in May 2003, following execution of Modification No. R20004 (*see* finding 19), Kirkland concluded that it had excavated extra subgrade (tr. 78-79, 103-07, 168-69). Alliance thereafter furnished "written notice of differing site conditions" by letter to the Corps dated 29 May 2003. Alliance's project manager asserted that elevations shown on the drawings for "the existing parking lots at various locations throughout the north/south road" did not match existing conditions. Alliance referred to and enclosed a 27 May 2003 letter to it from Kirkland asserting that "[t]he elevations on the plans do not represent what is on site" because the parking lots along the road "are either at the same elevation or higher than the roadway," whereas the plans "show the roadway to be approximately one foot higher than the parking lot[s]." (R4, tab 18 at 1-2)

24. Kirkland reiterated this latter position by letter to Alliance dated 18 June 2003, asserting that drawing C-55 shows "that the road is to be raised 11 inches higher than the existing roadway. The 11 inches consists of 11" of Graded Crushed Aggregate (GCA) Base Course and 3" of Hot Mix Asphalt (HMA)." Kirkland asserted that, "[n]ow that the road is built to finish elevation, it is obvious that the roadway is approximately 11 inches lower than the typical sections indicate." Kirkland further reasoned that, while the road "was designed to be 11 inches higher than the parking lot[s]," they were in fact "at the same elevation or higher than the roadway." Kirkland stated that, "[b]ecause of the incorrect plans we had to haul, excavate and stockpile 28,000 cubic yards of excavation

that was not in our bid,” for which Kirkland requested a modification of \$153,137.15 (R4, tab 19). We find no persuasive evidence connecting this claimed overexcavation to adherence to the drawings. Kirkland’s owner testified that Kirkland:

...had great big piles of dirt left over, that through all of our calculations and observing and looking at plans, it’s pretty hard to get dirt left over when the road is – when it’s pretty hard to raise a road and generate more dirt...But from the plans, we went – when we bid it, we calculated it all and we did it again of late. And you’re not supposed to have dirt left over from the project.

We know we took it all off the north-south road that was supposed to be raised, not lowered. It’s pretty hard to raise a road and generate excess. Kind of impossible.

(Tr. 87) Kirkland’s owner further testified that, while the finished road was eleven inches too low by the loading, or parking, areas, he did not do any measurements and picked the eleven inch figure “[j]ust because it was simple” (tr. 107, 145-46).

25. On or about 15 May 2003, while construction was in progress, a rainstorm caused damage to the subgrade of the unfinished road bed (tr. 150-51). As a result, effective 8 August 2003, the parties entered into bilateral Modification No. R00006 under the Changes clause (*see* finding 2). The modification amended multiple drawings “to provide additional drainage ditches and repair weather damaged sub grade” on one side of the north-south access road (G. ex. 67 at 2; J.S., ¶ 26). These ditches were distinct from those depicted on drawing C-55 (*see* finding 9). The modification provided that completion time remained unchanged, but increased the contract price by \$139,953 (*id.* at 3). The parties have stipulated that this amount was to compensate “for the repair of the finished sub grade damaged from the runoff of the loading [or parking] areas” (J.S., 26). The modification also contained a release. We find that the modification: (a) did not revise, otherwise alter or relate to the elevations in drawings C-49 through C-52; and (b) was executed to provide a system to keep the road dry during construction (tr. 211).

26. By letter to Alliance dated 8 December 2003, Duncan Juergenson, the contracting officer’s authorized representative, advised that he found “no justification” for the present claim for additional compensation (R4, tab 22 at 1-2). While the briefs contain much speculation regarding Mr. Juergenson’s alleged role and possible testimony, we find no credible evidence that he instructed Alliance to ignore drawings C-49 through C-52 or that he otherwise transgressed the limits in paragraph (b) of the Contracting Officer’s Representative clause (*see* finding 2).

C. Claim and Appeal

27. By letter to the Corps dated 18 February 2004, Alliance sought reconsideration of Kirkland's request for equitable adjustment in the amount of \$153,137.15, stating that "if we cannot settle this issue, consider this as our notification of claim" (R4, tab 3 at 1). Alliance's vice president added a certification that we find did not fully comply with that prescribed in 41 U.S.C. § 605(c) (1) (*id.*).

28. By decision dated 8 February 2005, the contracting officer denied Alliance's claim (G. ex. 1) and Alliance brought this timely appeal. Thereafter, by letter to the Corps' counsel and the Board dated 2 June 2005, Alliance's vice president tendered a certification complying with that in 41 U.S.C. § 605(c)(1) (Bd. corr. ltr. dtd. 2 June 2005).

29. The record establishes that Kirkland did not engage any firm to survey the elevations of the existing road before contract performance (tr. 133-34), and contains no other evidence of the elevations beyond the drawings.

DECISION

A. Contentions of the Parties

In seeking recovery on behalf of Kirkland for defective specifications, Alliance organizes its case around the proposition that “[t]he typical cross section for RAP construction depicted in [drawing] C-55 [see finding 8(a)] showed the new roadway would be completed at an elevation 11-in. higher than the old roadway.” (Appellant’s Opening Brief (app. br.) at 16; *see also* app. br. at 3, 4, 7, 9, 11, 17, 18; Appellant’s Post-Trial Reply Brief (app. reply br.) at 5, 8, 10, 19, 21, 22, 25, 26) Echoing the position that it took in June 2003 correspondence (*see* finding 24), Alliance derives this eleven inches figure from the first of the two typical sections in that drawing (*see* finding 8(a)), which shows that, before execution of Modification No. R00004 (*see* finding 15), the contractor was to pulverize the existing asphalt into RAP and then the drawing “required an additional 8-in. of graded crushed aggregate (GCA) and on top of that 3-in. of new asphalt pavement.” (App. br. at 3) Alliance maintains that Modification No. R00004 did not change this eight-inch-plus-three-inch elevation increase. It explains that, although the modification required that it remove, dry and replace subgrade material, it still had “to follow the original plan by placing 8-in. of GCA and 3-in. of hot asphalt pavement.” (App. br. at 6) Alliance tells us that, while the original road was “at the same elevation as the adjacent parking areas” at the start of the project, and was to be raised by eleven inches, the finished road turned out to be lower than the parking areas at the end of construction. (*Id.*) From its review of drawing C-55, Kirkland “was able to conclude that it had removed 28,000 cubic yards of sub-grade” for which it had not been paid. (App. br. at 7) Alliance also challenges the government’s affirmative defense that Modification No. R20004 (*see* finding 23) constituted an accord and satisfaction, asserting that the modification did not result from a meeting of the minds. (App. reply br. at 23-24)

For its part, the Corps urges that Alliance has not established the elements of a defective specifications claim. The Corps insists that Alliance advances an inherently unreasonable contract interpretation by reading drawing C-55 to require that “a vast majority (19,000 of the 19,366 feet) of the finished North-South road was to be raised 11” as compared to the existing road.” (Government’s Post-Trial Brief (gov’t br.) at 11) The Corps stresses that the only reasonable contract interpretation is to read drawing C-55 in conjunction with drawings C-49 through C-52 (*see* finding 6) because, it says, such a reading gives meaning to every portion of those drawings. (Gov’t br. at 14-15) The Corps also disavows any basis for a Type I Differing Site Condition theory of recovery, asserting that there is no evidence that the elevations encountered during performance differed materially from those depicted on the drawings. (Gov’t br. at 19-21) The Corps also insists that the parties achieved an accord and satisfaction through Modification No. R20004 because Alliance signed the document with no assurances regarding compensation for extra costs. (Gov’t br. at 39-41)

B. *Defective Specifications*

The requisite elements of a defective specifications claim are familiar. “When the government provides a contractor with defective specifications, the government is deemed to have breached the implied warranty that satisfactory contract performance will result from adherence to the specifications, and the contractor is entitled to recover all of the costs proximately flowing from the breach.” *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1289 (Fed. Cir. 2000). Of course, the contractor advancing such a claim bears the “essential burden of establishing the fundamental facts of liability, causation and resultant injury.” *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965). The fact that drawings, rather than specifications, are chiefly in dispute here is of no moment, given the equation of “plans and specifications” in *United States v. Spearin*, 248 U.S. 132, 136 (1918). Moreover, we note that the contract here contained the standard SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION clause (*see* finding 2) giving “like effect” to anything shown on the drawings but not mentioned in the specifications.

Considering these principles, together with the interpretative canon quoted below, we conclude that a reasonable reading of this contract must treat drawing C-55 and the other five disputed drawings (*see* finding 4) as complementary. There is no evidence that drawing C-55 is to be given precedence over another drawing (finding 10(g)). Accordingly, we read drawing C-55 to portray the components to be employed to construct the road, such as graded crushed aggregate and hot mix asphalt, and the thicknesses of those components at the various required elevations of the finished road, whatever those specified elevations might be at any point along the road. We read drawing C-02 to specify which of the two types of construction is required on the various segments of the road, whether they be the RAP construction depicted in the first part, or the full depth construction specified in the second part, of drawing C-55. We read drawings C-49 through C-52 as the drawings that a reasonable contractor must consult to determine the height of the finished road because they are the contractual repository of information regarding elevations. Reading all six of the disputed drawings in this manner, we conclude that they are not defective, but are instead harmonious and complementary.

In reading the contract as we do, we necessarily reject Alliance’s central proposition that “[t]he typical cross section for RAP construction depicted in [drawing] C55 showed the new roadway would be completed at an elevation 11-in. higher than the old roadway” (app. br. at 16). The proposition is not supportable. The proposition cannot be reconciled with drawing C-55 itself, which, as Kirkland’s owner conceded, does not show elevations (finding 10(c)), and does not speak of elevations in the notes (findings 8(a), 8(b)). During performance, Alliance and Kirkland told the Corps as much (finding 17). The testimonial evidence confirms what is evident from the drawing itself, *viz.*, that it was intended to show the components to be used, and their respective

thicknesses, in the several layers of two types of pavement sections of the road (finding 10(a)). The record reflects that drawings of typical sections do not commonly show elevations (finding 10(b)). Apart from these considerations, the drawing does not apply to 2,400 feet of the road (finding 10(d)), the elevations for which presumably would be left to guesswork. The second part of drawing C-55 applies to those parts of the road in which full depth construction is to be employed, and calls for fourteen inches of graded crushed aggregate, plus three inches of hot-mix asphalt (finding 8(b)), which cannot be reconciled with Alliance's eight-inch-plus-three-inch elevation increase theory.

Alliance's interpretation also renders superfluous drawings C-49 through C-52, which, the record shows, *are* the contractual sources for the road's elevations (finding 7). Inspection of these drawings themselves reveals that they have station-by-station elevations for both the existing road and the finished road (finding 6). They are the only drawings that provide these elevations and we cannot disregard them because "[w]e must eschew an interpretation that renders part of a contract 'useless, inexplicable, inoperative [or] void.'" *Charitable Bingo Associates, Inc., d/b/a/ Mr. Bingo, Inc.*, ASBCA Nos. 53249, 53470, 05-2 BCA ¶ 33,088 at 164,015 quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Alliance's interpretation, which purports to divine the requisite elevation information from drawing C-55, does in fact render drawings C-49 through C-52 "useless, inexplicable [and] inoperative." *Id.*

Drawings C-49 through C-52 in themselves also undercut Alliance's recurring proposition that "the new roadway would be completed at an elevation 11-in. higher than the old roadway" (app. br. at 16). To the contrary, our findings reflect that there is no uniformity in the elevations of the existing and finished grades; the differences vary at different stations (finding 6). Moreover, it bears repeating that the eight-inch-plus-three-inch figure that Alliance dwells upon derives from drawing C-55 (*see* finding 24), which was intended to convey the thicknesses of the various layers of material below the finish elevations (finding 10(a)), not to supplant the elevations shown on drawings C-49 through C-52. The parties agreed to use those drawings in both the basic contract (findings 1, 6), and again agreed to follow them ten months later when they executed Modification No. R20004 (finding 19). As we have said, drawings C-49 through C-52 are the contractual repository for information regarding elevations (finding 7; *see also* finding 29). They cannot be rendered superfluous.

Finally, while Alliance has thus failed to establish "the fundamental facts of liability," *Wunderlich*, 351 F.2d at 958, it has also failed to meet its burden regarding causation. Assuming, *arguendo*, that the drawings were defective, there is no documentary evidence to establish a causal link between the drawings and the overexcavation said to result, and the testimonial evidence proffered to show that following the drawings led directly to excess "great big piles of dirt" is vague, puzzling, and entirely unpersuasive (finding 24).

C. Differing Site Condition

While we understand this to be a defective specifications case, in the pleadings, Alliance alleged, and the Corps denied, that “the plans, profiles, typical section and depicted existing ground elevations misrepresented the actual site conditions and the work that was actually required to perform the project work” (compl. and answer ¶¶ 1). During performance, Kirkland asserted that it had encountered “unforeseen and differing site conditions,” which related to soft and wet subgrade, and Alliance furnished “written notice of differing site conditions” to the Corps relating to a disparity in elevations between the road and the parking lots (findings 12, 23). Nonetheless, Alliance now tells us that “[t]he Government’s argument that Appellant was claiming a differing site condition is without any basis whatsoever.” (App. reply br. at 13) Whatever its current position may be, Alliance was paid in three bilateral modifications under the Differing Site Conditions clause (findings 13, 15, 21; *see also* finding 2) and the record reflects no showing of other such conditions for which the contract price was not increased.

D. Release

While the Corps styles its affirmative defense as accord and satisfaction, it plainly is not pointing to substituted performance, but to whether Alliance released its claim by execution of Modification No. R20004 (*see* finding 20). Nevertheless, we need not reach this release defense because we have decided the case on the merits adversely to Alliance’s claim.

CONCLUSION

The appeal is denied.

Dated: 3 December 2008

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 54979, Appeal of Alliance General Contractors, LLC, rendered in conformance with the Board's Charter.

Dated:

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