

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Dick Pacific/GHEMM, JV) ASBCA Nos. 54743, 55255
)
Under Contract No. DACA85-02-C-0004)

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OPINION BY ADMINISTRATIVE JUDGE SCOTT

Dick Pacific/GHEMM, JV (DP/G) has appealed from the contracting officer's (CO's) final decisions denying its claims under the Contract Disputes Act, 41 U.S.C. §§ 601-613, under its contract with the United States Army Corps of Engineers (the Corps) to construct a replacement hospital at Fort Wainwright, Fairbanks, Alaska, known as the Bassett Hospital Replacement Project. DP/G filed the claims on behalf of its fire protection subcontractor, Big Sky Fire Protection, Inc. (Big Sky), for costs of installing sprinkler systems in mechanical rooftop penthouses (ASBCA No. 54743) and providing freeze protection in one of them (ASBCA No. 55255). The Board held a hearing in the consolidated appeals in June 2008 in Fairbanks, appellant's requested location, which covered entitlement only. Briefing was complete in May 2009. For the reasons stated below, we deny the appeals.

PRELIMINARY MATTER-GOVERNMENT MOTION TO STRIKE

The Corps moves to strike appellant's reply brief as untimely. The Board required that reply briefs be served and filed by 4 May 2009, with the post-marked date of mailing to be the date of service and filing. By fax dated 4 May 2009 appellant's counsel stated that she had attempted to mail appellant's reply brief that evening but had then learned that the post office no longer had evening hours. She offered to file a motion addressing the issue, but the Board did not require one. On 8 May 2009 the Board received the reply

brief, with a 5 May 2009 post-marked mailing date. We find no prejudice to the Corps due to the one-day delay and we deny its motion to strike.

Alternatively, the Corps moves to strike the following from appellant's reply brief and asks the Board to disregard as improper arguments based upon them: three drawings (Figure Nos. 1, 4, and 6); two photographs (Figure Nos. 2 and 3); citation to and quotation from a website, <http://rjagroup.com> (APFF No. 19 n.9, app. br. and reply br. at 5); Appendix B, an excerpt from a Corps May 2005 Information Sheet concerning its Alaska District, part of which describes the Bassett Hospital Replacement Project and is derived from the District's website; and Appendix D, correspondence between the parties. The Corps notes that appellant did not move to re-open the record and asserts that, in any case, once it is closed, new evidence should be accepted only for compelling reasons, which appellant has not offered.

Appellant responds that Figure No. 1 (app. reply br. at 2 of 33, app. proposed finding of fact (APFF) No. 2) is a stylized drawing by its counsel of 11 penthouses at issue. It contends that it is not offered as evidence but as "counsel's distillation of information that is depicted in a number of admitted exhibits" (app. opp'n at 4 of 9). Figure Nos. 4 (app. reply br. at 22 of 33, APFF No. 83) and 6 (*id.* at 24 of 33) are excerpts from fire protection (FP) drawing No. FP3.104, annotated with counsel's markings, as part of her "advocacy and argument" (app. opp'n at 5 of 9). Appellant describes Figure Nos. 2 (app. reply br. at 3 of 33, APFF No. 9) and 3 (*id.* at 29 of 33) as photographs taken during a site visit that was "part of the hearing process," said to remind the judge of what she observed, rather than to serve as independent photographic evidence (app. opp'n at 8 of 9). Appellant includes an expanded excerpt from the first website in question (app. opp'n at 6 of 9) and responds that Rolf Jensen & Associates, Inc. (RJA) (involved with the project's fire protection design) proclaimed itself as having a certain reputation and the "fact that the Board may take judicial notice of a party's proclamation on the internet does not mean that the Board must then find the proclamation to be true" (app. opp'n at 6-7 of 9). Appellant notes that Appendix B is from the Corps' website and that Appendix D concerns transcript corrections.

Appellant did not give any reason why it could not have sought to include the disputed material (other than appendix D) in the record before the end of the hearing. Once the record is closed, unless a compelling reason is established and the circumstances are fair to both parties, the Board will not re-open it to accept new evidence. *See* Board Rules 13(b), 28(a); *T&M Distributors, Inc.*, ASBCA No. 51279, 01-2 BCA ¶ 31,442 at 155,276. References in a brief to evidentiary matters outside the record are improper. Even if the proffered material lacks evidentiary value, it constitutes improper argument and will be disregarded. *See USD Technologies, Inc.*, ASBCA No. 31305, 87-2 BCA ¶ 19,680 at 99,616-17, *aff'd on other grounds*, 845 F.2d 1033 (Fed. Cir. 1988). This includes proposed evidentiary or other material prepared by counsel.

See United Technologies Corp., ASBCA No. 25501, 86-3 BCA ¶ 19,171. Moreover, the Board stated that the site visit requested by the parties, which was not transcribed, would not be part of the record (*e.g.*, tr. 1/93-94).

Accordingly, we grant the Corps' motion to strike Figure Nos. 1, 4, and 6 and the photographs at Figure Nos. 2 and 3. The Board also strikes APFF Nos. 7, 8, and 9, which concern the site visit (app. br. at 3-4 of 28; app. reply br. at 3 of 33). Additionally, with respect to the website materials, RJA is not a party to these appeals. Regardless, we are not persuaded to take judicial notice of the extract. The same is true of the Appendix B website excerpt. *See T&M Distributors, Inc.*, 01-2 BCA ¶ 31,442 at 155,276. We grant the Corps' motion to strike appellant's citations to and excerpts from the websites and do not consider any proposed facts or arguments based upon them.

Appendix D is a different matter. By order of 16 January 2009, the Board directed that, if a party alleged that there were material errors in the hearing transcript, it was to submit proposed corrections to the other party by 13 February 2009 and they were to attempt to reach a stipulation, to be included with their post-hearing briefs. The Corps did not propose changes. Appellant proposed many. Appendix D contains correspondence reflecting that it transmitted transcript pages to the Corps with proposed corrections and that, with a few exceptions, including some based upon untimeliness, the Corps accepted them, although it did not find citations to material errors. However, except for one copy of a marked transcript page (tr. 1/71), Appendix D does not identify the agreed changes. By order of 7 May 2009, the Board directed the parties to submit transcript pages marked with the agreed changes. On 15 May 2009 the Board received appellant's marked pages and the Corps' response that it had not sought corrections because there were no materials errors. The Corps noted that it had objected to some changes and it enclosed correspondence previously included in Appendix D.

The Board denies the Corps' motion to strike Appendix D, and augments the appendix with the marked transcript pages received from appellant on 15 May 2009 and with the Corps' 15 May 2009 submission.

Expert Evidence Issue

The Corps also moves to strike appellant's citation in its reply brief to its proposed hearing exhibit A-37, a 5 July 2005 letter to Big Sky from David R. Hughes, Jr., an engineer who participated in Big Sky's fire protection design work. The letter was Mr. Hughes' response to Big Sky's post-claim request for his professional opinion concerning the penthouse sprinklering dispute (ex. A-35). The Corps had objected to exhibit A-37 to the extent that it was offered as an expert opinion (tr. 1/155-57). The Board had sustained the objection (tr. 1/157, 2/181). Appellant responds that Mr. Hughes' letter is already in the Rule 4 file as part of excerpts from his deposition that

the Board had admitted over appellant's objection (R4, tab 83 at 809 (Hughes dep., ex. 19); Board's 5 June 2008 order). The parties had not previously pointed out to the Board that the letter was in the Rule 4 file, and the Corps did not seek to withdraw it.

Accordingly, we deny the Corps' motion to strike exhibit A-37. However, the parties did not proffer any hearing witnesses as experts and we do not accept the exhibit as an expert opinion or a lay opinion under Rule 701 of the Federal Rules of Evidence. In this connection, appellant appears to raise an issue for the panel that the presiding judge resolved against it. Before the hearing, appellant's counsel alleged that, after she had filed a list of expert topics when the hearing was first set (23 November 2006), the Corps attorney then assigned had informed her that he did not want to incur the costs of experts and expert reports in order to rebut appellant's expert evidence. Appellant's counsel stated that she had agreed to keep the costs down, but had noted that she did not want to be "sand-bagged later by an objection that the Board should exclude witnesses' testimony as improper undesignated expert witness evidence" (app. opp'n at 8 of 9). The details of the alleged agreement, which is not of record, are unclear.

Regardless, the Board's 4 March 2008 and 16 April 2008 pre-hearing orders stressed that proposed experts were to be identified, expert reports were required, and they were to be submitted no later than 9 May 2008. The Board reiterated during a 13 May 2008 teleconference that it would not receive any proffered expert testimony without an expert report and it sustained the Corps' objection to any testimony by appellant's witnesses that purported to be expert testimony or that did not comport with Rule 701's restrictions on lay opinion testimony (*see* 5 June 2008 order).

Appellant's 14 May 2008 witness list included Messrs. Hughes, Robert Tate and Olie Olson, said to be "fire protection specialists" involved in the project who would testify about their interpretation of the government's plans and "about how fire protection contractors in general" would have interpreted them (*see* 5 June 2008 order at 3). The Corps objected to the extent that they would be offering expert testimony, because they did not submit expert reports, and to any speculation concerning other opinions. In sustaining the objection the Board noted that the witnesses could testify as to their own contract interpretations, project experiences and perceptions. (5 June 2008 order)

The panel affirms the presiding judge's rulings.

FINDINGS OF FACT

Solicitation

1. In September 2001, the government posted an announcement in the Commerce Business Daily (CBD), which described the project in part as follows:

The project scope entails the construction of a 32-bed, multi-story replacement **hospital** to support the military, dependent, and retiree population of Fort Wainwright, Fort Greely, Eielson AFB, and remote military sites north of the Alaska Range.... *It incorporates the Integrated Building System (IBS) concept, with two of the three occupied floors having Distribution Zone space for utilities.* [Emphasis added]

(Ex. A-41, Summary at 1 of 2)

2. The Corps issued a solicitation for proposals dated 10 October 2001, which was amended several times. The amended due date was 11 December 2001. (Ex. A-41, *e.g.*, at 1-2, 26 of 3670) The solicitation refers to “IBS” as “Interstitial Building System” and “Interstitial Space” (ex. A-41 at 19, 1798, 1811 of 3670).

3. The Architect and Engineering (A&E) firm HKS, Inc./Wingler & Sharp (HKS/WS) designed the project. RJA was its consultant or subcontractor for fire protection design work. (Tr. 1/78, 89-90, 107-08, 162) Mike Crowley was RJA’s fire protection engineer and designer on the project. Corey C. Weldon of RJA was also involved. (Tr. 1/109, 231)

Contract Award and General Provisions

4. On 19 February 2002 the Corps awarded the subject negotiated contract, which incorporated the solicitation’s clauses and drawings, to DP/G in the amount of \$178,289,000, based upon its 4 February 2002 proposal (ex. A-41 at 1-2 of 3670).¹

¹ The Rule 4 file, as revised to include legible contract drawings, contains FP drawings, Nos. FP1.000 through FP3.105, and FP3.107, reduced in size, at tab 50. Appellant’s Rule 4 file supplement, filed when it was appearing *pro se*, contains a full-sized set of those drawings at tab 1. There is no FP3.106 (*see* ex. A-41 at 218 of 3670). Our citations to the drawings refer to the full-sized drawings, in addition to any Rule 4 file reference.

5. The contract includes the Federal Acquisition Regulation (FAR) 52.215-8, ORDER OF PRECEDENCE-UNIFORM CONTRACT FORMAT (OCT 1997) clause, which provides:

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the specifications).
- (b) Representations and other instructions.
- (c) Contract clauses.
- (d) Other documents, exhibits, and attachments.
- (e) The specifications.

(R4, tab 33)

6. The contract includes the FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997) clause, which provides in part:

(a) ... 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 case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the [CO], who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The [CO] shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(R4, tab 36)

7. The contract includes FAR 52.243-4, CHANGES (AUG 1987) (R4, tab 37).

8. At Special Contract Requirements (SCR) clause SCR-5, the contract includes the Defense Federal Acquisition Regulation Supplement (DFARS) 252.236-001, CONTRACT DRAWINGS AND SPECIFICATIONS (AUG 2000) clause, which provides in part:

(d) Omissions from the drawings or specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work. The Contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.

(e) The work shall conform to the specifications and the contract drawings identified on the following index of drawings[.]

(R4, tab 38 at 189-90)

Contract Specifications

9. Contract specification section 01040, "COORDINATION," provides at subsection 1.4, "COORDINATION DRAWINGS," among other things, that the contractor is responsible for coordinating the work of all trades, subcontractors and material suppliers (ex. A-41 at 411-12 of 3670).

10. Contract technical specification (TS) 13930, "WET PIPE SPRINKLER SYSTEM, FIRE PROTECTION," section 1.1, "REFERENCES," states that listed publications are part of the specification to the extent referenced. National Fire Protection Association (NFPA) publication NFPA 13 (1996; Errata 13-96-1), Installation of Sprinkler Systems, is among the listed publications. (R4, tab 41 at 214-16)

11. TS 13930, section 1.2, "GENERAL REQUIREMENTS," provides in part:

Wet pipe sprinkler system shall be provided in all areas of the building. The sprinkler system shall provide fire sprinkler protection for the entire area. Except as modified herein, the system shall be designed and installed in accordance with NFPA 13. [Emphasis added]

(R4, tab 41 at 216)

12. TS 13930, section 1.5, “SUBMITTAL PREPARER’S QUALIFICATIONS,” states:

The sprinkler system submittals, including as-built drawings, shall be prepared by an individual who is a registered professional engineer in the field of fire protection engineering.

(R4, tab 41 at 219) TS 13930, section 1.6, “INSTALLER QUALIFICATIONS,” states: “The installer shall be experienced and regularly engaged in the installation of the type and complexity of system included in this project” (R4, tab 41 at 219).

13. TS 13930, section 1.7, “REGULATORY REQUIREMENTS,” states in part:

Compliance with referenced NFPA standards is mandatory.... In the event of a conflict between specific provisions of this specification and applicable NFPA standards, this specification shall govern. All requirements that exceed the minimum requirements of NFPA 13 shall be incorporated into the design. Reference to “authority having jurisdiction” shall be interpreted to mean the [CO].

(R4, tab 41 at 220)

14. TS 13930, section 3.1, “INSTALLATION REQUIREMENTS,” states in part that the installation shall be in accordance with NFPA 13 (R4, tab 41 at 225).

15. The specifications distinguish between IBS areas and penthouses. *See, e.g.*, DIVISION 08 – DOORS & WINDOWS, specification section 08700, “BUILDERS’ HARDWARE” (ex. A-41 at 359, 1641-42, 1650 of 3670 (referring separately to “STAIR TO IBS VESTIBULE,” “IBS VESTIBULE TO IBS,” “PENTHOUSE TO STAIRS,” and “PENTHOUSE TO EXTERIOR”)); DIVISION 09 – FINISHES, section 09916, “ROOM FINISH SCHEDULE” (*id.*, 359, 1868 of 3670) (listing “IBS” areas and “PENTHOUSE” areas separately); and DIVISION 10 – SPECIALTIES, section 10441, “INTERIOR SIGN SCHEDULE” (*id.*, 359, 1951-52, 1958-59, 1975, 1981-82, 1984-85 (listing “FIRST LEVEL IBS,” “SECOND LEVEL IBS,” and “PENTHOUSE” areas separately).

16. The parties have not directed the Board to any definition of “Distribution Zone” in the contract. The only specification we located that refers to “Distribution Zone” is in Specifications DIVISION 15 – MECHANICAL, section 15080, “THERMAL INSULATION FOR MECHANICAL SYSTEMS,” subsection 3.4, “DUCT INSULATION INSTALLATION,” at the following subsections:

- 3.4.2 Insulation and Vapor Retarder for Cold Air Duct
 - 3.4.2.1 Installation on Concealed Duct Including Ducts Within the Distribution Zone
 - 3.4.2.2 Installation on Exposed Duct Work Including Ducts in Mechanical Rooms, Central Energy Plant [CEP], Penthouses and Similar Service Areas
- 3.4.3 Insulation for Warm Air Duct Including Ducts Within the Distribution Zone
 - 3.4.3.1 Installation on Concealed Duct
 - 3.4.3.2 Installation on Exposed Duct Including Ducts in Mechanical Rooms, [CEP], Penthouses and Similar Service Areas

(Ex. A-41 at 2515) Read as a whole, the subsection listing appears to distinguish Distribution Zones, containing concealed duct, and penthouses, containing exposed duct.

17. The parties have not directed the Board to any penthouse specifications. The only one we located that describes penthouses is at Mechanical Division 15, section 15895, "AIR SUPPLY, DISTRIBUTION, VENTILATION, AND EXHAUST SYSTEM," Part 2, "PRODUCTS," section 2.16, "DUCTWORK ACCESSORIES," subsection 2.16.10, Penthouses, which describes the mechanical portion of the penthouse (ex. A-41 at 2788, 2810).

Contract Drawings

18. SCR-5(e)'s index of drawings includes the following, *inter alia*: Index of Volumes-Volume 1, which lists architectural drawings, A6, identifying them as roof plans, roof details, penthouse plans, and elevations; Index of Volumes-Volume 6, which includes the FP drawings; Index of Drawings-Volume 1, which identifies penthouse plans and penthouse elevations drawings under Roof Plans in the Architectural section; and Index of Drawings-Volume 6, covering FP drawings. (R4, tab 38 at 190, tab 52 at 566-67; ex. A-41 at 171, 212, 217 of 3670; tr. 2/149)

19. SCR-5(e)'s index of drawings identifies separate drawings for Distribution Zones and penthouses. *See, e.g.*, "Plumbing Distribution Zone Plan Level 1," Areas 101-110, and "Plumbing Penthouse Plans," "Penthouses 1 & 2," "Penthouses 3 & 4," "Penthouses 5 & 6," "Penthouses 7 & 8," and "Penthouse 11 & Service Bay 2W52." (Ex. A-41 at 292, 297 of 3670)

20. Drawing No. FP1.000, LIFE SAFETY PLAN – LEGEND, states in Note 1:

THE BUILDING WILL BE PROVIDED WITH AN AUTOMATIC SPRINKLER SYSTEM INSTALLED THROUGHOUT. IN ACCORDANCE WITH NFPA13 AND NFPA101. [sic] THE DISTRIBUTION ZONES AND CRAWL SPACE DO NOT REQUIRE FIRE SPRINKLER PROTECTION. [Emphasis added]

21. Drawing No. FP1.203, LIFE SAFETY PLAN, LEVEL 2 – AREA 203, shows penthouse No. 6 in plan view. It shows one floor, then an IBS, then the roof. (R4, tab 50 at 499; ex. G-8 at 499, ex. G-9 (gov't hand-drawing showing section view); tr. 1/226-27, 2/142, 145; *see also* tr. 1/124, 126-27) Drawing No. FP1.301, LIFE SAFETY PLAN, LEVEL 3 – AREA 301, shows part of penthouse No. 1 in plan view, the stairwell leading to it, and the roof level. The remainder of the penthouse depiction continues onto Drawing No. FP1.302, LIFE SAFETY PLAN, LEVEL 3 – AREA 302, which shows penthouses Nos. 1, 2, and 3 and a round penthouse known as PW6 or 2W52. Drawing No. FP2.203, LIFE SAFETY PLAN, IBS LEVEL 2 – AREA 203, shows penthouse No. 6. (R4, tab 50 at 500-01, 510; ex. G-8 at 500-01, 510; tr. 1/227-28, 2/147-48, *see also* tr. 1/127)

22. Penthouses are also shown on the structural, plumbing, mechanical, electrical, and architectural drawings (ex. G-3 at 617-28, 630-40, 646-50, ex. G-4 at 607-16, ex. G-5 at 583-606, ex. G-6 at 568-82, ex. G-7 at 518-35, 537-42, 548-49, 560, 562-63; tr. 1/124, 172, 2/137-42).

23. Drawing No. FP3.100, SPRAYED FIREPROOFING SCHEDULE, depicts two schematic wall sections. Wall Section No. 01 shows typical floors and roof without IBS and IBS decks. From the bottom of the drawing to the top it shows five zones, topped by a "ROOF LEVEL." The zones are described as "UNOCCUPIED ZONE (CRAWL SPACE)," "OCCUPIED ZONE," "DISTRIBUTION ZONE," "OCCUPIED ZONE," and "DISTRIBUTION ZONE." The Wall Section No. 02 shows typical floors and roof with IBS and IBS decks. It includes the same five zones, topped by a roof level, with the addition of a "CONNECTION ZONE" with "TYPICAL IBS" between each Occupied Zone and Distribution Zone. Drawing No. FP3.107, FIREPROOFING DETAILS, shows three schematic walls sections showing typical floors and roof with IBS. Wall Section No. 1, "AMBULANCE GARAGE," shows only one Distribution Zone below the roof level and one each of the other zones and IBS. Wall Sections No. 2, "DOCK," and No. 3, "TYPICAL SERVICE BAY," show two Distribution Zones, the other zones, typical IBS, and roof level, as in Drawing No. FP3.100, Wall Section No. 2. The Distribution Zones are depicted separately and there is no indication that rooftop penthouses are part of the Distribution Zones. (R4, tab 50 at 511, 517)

24. A “riser” is the vertical pipe carrying water from the crawl space or lower floor areas up through the building (tr. 1/66). A “cap” is a plumbing fire protection symbol which typically indicates that pipe does not continue further (tr. 1/149). Drawing No. FP3.104, SPRINKLER RISER, is a schematic that outlines some of the criteria required to be incorporated into the sprinkler design for the hospital building. It does not give specific details as to location and scale. It does not show branch lines or sprinkler heads. (Tr. /104-5) The drawing depicts certain risers in or through the crawl space, first floor, first IBS, second floor, second IBS, third floor, and fourth floor. The risers are capped at various levels. One of the risers, referred to on part of the drawing as a “COMBINATION RISER,” extends from the crawl space through the fourth floor, at Stair No. 6, before it is capped. That riser is shown with four control valve assemblies (CVAs), including one above the fourth floor line. A portion of the drawing covering “SBE 2,” “SBE3,” and “SBE 4” shows risers capped below the first IBS and CVAs below that level. (R4, tab 50 at 515)

25. The Corps has not directed us to, and we have not located, any sprinklering details on any of the above drawings that refer specifically to the penthouses at issue.

NFPA

26. NFPA 13, section 1-4.1, “NFPA Definitions,” defines “Authority Having Jurisdiction” as: “The organization, office, or individual responsible for approving equipment, an installation, or a procedure” (R4, tab 42 at 237).

27. NFPA 13, section 1-6, “Level of Protection,” provides at subsection 1-6.1:

A building, where protected by an automatic sprinkler system installation, shall be provided with sprinklers in all areas.

Exception: Where specific sections of this standard permit the omission of sprinklers. [Emphasis added to first sentence]

(R4, tab 42 at 241)

28. NFPA 13, sections 3-1 and 3-2, describe the system requirements for wet and dry pipe systems, respectively, and section 3-3 describes the system requirements for preaction and deluge systems (R4, tab 42 at 250-52). NFPA 13, section 3-5, describes the system requirements for antifreeze systems (R4, tab 42 at 254).

29. NFPA 13, section 4-1*, “Basic Requirements,” states in part at subsection 4-1.1*:

The requirements for spacing, location, and position of sprinklers are based on the following principles:

(a) *Sprinklers installed throughout the premises,*

....

Exception No. 1: For locations permitting omission of sprinklers, see 4-13.1, 4-13.2, and 4-13.8. [Paragraph (a) emphasis added]

(R4, tab 42 at 259) The referenced exceptions to areas requiring sprinklers pertain to certain concealed spaces (§ 4-13.1), certain vertical shafts (§ 4-13.2) and portions of certain dwelling units (§ 4-13.8) (*id.* at 280-81). Appellant cites to an NFPA Automatic Sprinkler Systems Handbook that addresses the section 4-13.1 concealed spaces exception and provides in part:

The exceptions indicate conditions where sprinklers are not required in spaces that would normally require sprinklers. Sometimes the building is modified to meet one of these exceptions to avoid installing sprinklers in the space.

(R4, tab 44 at 399; app. br. at 16-17 of 28; app. reply br. at 18-19 of 33, APFF No. 70).

30. Erik Hursh, a licensed professional mechanical engineer, was a project engineer for the Corps’ Construction Office on the Bassett Hospital project for a five-year period starting in May 2002. He was the primary mechanical staff engineer in the Office Engineering section. Alaska does not have a separate license for fire protection engineers. Mr. Hursh’s mechanical engineer’s license enables him to practice in the field of fire protection and his experience includes sprinkler system design. (Tr. 1/213-14, 2/101, 123, 173) Mr. Hursh testified that none of the exceptions referenced in NFPA 13, section 4-1.1 apply to the penthouses in dispute (tr. 2/151-56). Mr. Hughes also testified in his deposition and at hearing that none of those exceptions apply to the penthouses (R4, tab 75 at 763; tr. 1/173). In his view, the penthouses were like other areas for which NFPA 13 does not require sprinklering and with respect to which the engineer of record must make a sprinklering decision (R4, tab 75 at 763, *see also* R4, tab 75 at 758-762). Appellant has not directed us to any evidence that any NFPA 13, section 4-13.1 exception, or any NFPA sprinklering exception, applies to the

penthouses or that the Corps modified the hospital building to avoid installing sprinklers in the penthouses.

31. Appendix A to NFPA 13, to which the asterisks in sections 4-1 and 4-1.1 refer (*see* R4, tab 42 at 237), states:

A-4-1.1 This standard contemplates full sprinkler protection for all areas. Other NFPA standards that mandate sprinkler installation might not require sprinklers in certain areas. The requirements of this standard should be used insofar as they are applicable. The authority having jurisdiction should be consulted in each case. [Emphasis added]

(R4, tab 42 at 329-30)

32. The Corps asserts (gov't reply br. at 8), and we find, that the fact that a riser is capped does not mean that sprinklers stop at the floor where the riser stops. If that were the case, stairwells would not have been provided with sprinkler protection, which would have violated NFPA 13. NFPA 13, section 4-13.3, "Stairways," provides in part at section 4-13.3.2:

In noncombustible stair shafts with noncombustible stairs, sprinklers shall be installed at the top of the shaft and under the first landing above the bottom of the shaft.

(R4, tab 42 at 281) In general on the project, stairwells lead to penthouses. Penthouse No. 1, for example, is accessible by roof and by stair. Not all of the penthouses are accessible by stairs. Where there are stairs, the top of the stairs ends at the same level as the penthouse, with a sprinkler at the top of that stairwell. That the stairwells required sprinklering has not been questioned. (Tr. 2/157-58) Moreover, the risers were not extended and remained capped below the penthouse level when the penthouses were ultimately sprinklered (*see, e.g.,* finding 70).

33. NFPA 101, Life Safety Code, Chapter 12, "NEW HEALTH CARE OCCUPANCIES" (R4, tab 48 at 419), provides in part at section 12-3 "PROTECTION" (R4, tab 48 at 423), subsection 12-3.5, "Extinguishment Requirements":

12-3.5.1 Buildings containing health care facilities shall be protected throughout by an approved, supervised automatic sprinkler system installed in accordance with Section 7-7. [Emphasis added]*

(R4, tab 48 at 425)

34. NFPA 101, Chapter 7, “BUILDING SERVICE AND FIRE PROTECTION EQUIPMENT” (R4, tab 46 at 406), section 7-7, “AUTOMATIC SPRINKLERS AND OTHER EXTINGUISHING EQUIPMENT,” provides in part at subsection 7-7.1.1: “Each automatic sprinkler system required by another section of this *Code* shall be installed in accordance with NFPA 13, *Standard for the Installation of Sprinkler Systems*” (R4, tab 46 at 409).

Big Sky’s Bid to DP/G

35. At some point, DP/G received four fire protection bids, listed on an undated DP/G chart entitled “Orig. Bid: FIRE PROTECTION”: Fire Protection C, \$4,617,510; Grinnell Fire Protection, \$3,050,000; Western States Fire Protection, \$2,827,413; and Big Sky, \$1,970,300. (Supp. R4, tab 90)

36. Robert Tate had owned and operated Big Sky, which provides fire sprinkler systems, for about 25 years prior to his retirement. He is not a fire protection engineer but has some knowledge about all aspects of the business and had prepared about 150 to 200 project estimates annually. Big Sky performed about 50 or 60 projects annually that required design drawings. Once it obtained a project, its in-house engineers would perform it if they had the necessary skills; otherwise, the company would employ outside engineering firms. Mr. Tate prepared Big Sky’s estimate for the fire sprinklering work on the Bassett Hospital project. (Tr. 1/187-90, 203)

37. Although DP/G’s undated bid chart lists Big Sky’s bid at \$1,970,300, at some point Mr. Tate had submitted a \$1,907,000 bid, dated 6 December 2001, to DP/G, said to cover TS 13920, Fire Pump; 13930, Wet Pipe Sprinkler; and 13935, Dry Pipe Sprinkler. The bid contained exclusions, including fire stopping of penetrations. Big Sky proposed to perform that work for an additional \$52,000. At some point prior to 6 November 2002, Big Sky changed its bid to \$1,959,000, to cover fire stopping. The 6 December 2001 bid and the amendment to \$1,959,000 indicate that four pages were sent, including a cover sheet. The bid copies of record include only one page each. (Ex. A-7 at 832, ex. G-1 at first and last pages; tr. 1/190, 198-99) Other than DP/G’s chart, there is no evidence of any bid by Big Sky in the amount of \$1,970,300. We infer that it could have been a transposition of its 6 December 2001 bid of \$1,907,000 (*see also* finding 43).

38. Mr. Tate did not submit any pre-bid questions to the Corps or DP/G about the project. In estimating Big Sky’s bid, he performed a preliminary review of the full set of bid documents to ensure that he had everything but he paid specific attention to the fire protection sprinklering specifications and drawings. He read portions that he thought might affect his work and costs. He did not include the penthouses in his estimate because, to him, the sprinkler drawings had no indications that they were to be protected.

All of the other areas where Big Sky was to provide protection were shown, with pipes and control valves designating the particular system required. He followed riser diagrams up to see how many valves, which were expensive connections, were required. When piping stopped and was capped off, it indicated to him that no further sprinkler work was required. Pipes below the penthouses were capped. (Tr. 1/193-94, 207, 209)

39. Rick Leone was a mechanical and electrical coordinator for DP/G on the project. Among other things, he helped with subcontract review and submittals and quality control coordination. The fire protection system fell under a mechanical subcontract. (R4, tab 89 at 860-61) Mr. Leone was in Guam at the time of the hearing and of his 26 November 2007 deposition by the Corps, which is part of the record. He testified telephonically both times. At the deposition, Mr. Leone testified that he was “[v]aguely” familiar with the issue of whether the contract required that penthouses be sprinklered (R4, tab 89 at 872).

40. Mr. Leone participated in the preparation of DP/G’s project proposal to the Corps (tr. 1/100). At the time, DP/G did not, to his knowledge, make any inquiries regarding penthouse sprinkler protection (R4, tab 89 at 921). When asked at the hearing, “Did [DP/G] incorporate Big Sky’s quote into [DP/G’s] proposal to the [Corps]?” he testified “Yes” (tr. 1/100). There is no further evidence on this point.

Big Sky’s Subcontract with DP/G

41. On 18 March 2002 Mr. Tate accepted DP/G’s 14 March 2002 letter of intent which noted that it had been awarded the contract and that it planned to award a subcontract shortly. DP/G asked Big Sky to submit a schedule of values. (Ex. A-2)

42. After Big Sky had submitted its bid to DP/G, Mr. Tate asked Mr. Hughes, a registered fire protection engineer, then vice president of Sprinkler Technology Design, Inc. (Sprinkler Technology), to prepare a cost estimate for Mr. Tate’s evaluation of Big Sky’s bid for its bonding company. Mr. Hughes had founded Big Sky in 1979. In 1987 he had founded another firm. He is a member of the National Fire Protection and National Fire Sprinkler Associations and has considerable fire protection engineering and hospital design experience, principally in Montana. He had worked with Mr. Tate and Big Sky for a long time. Mr. Hughes was not consulted by Big Sky prior to its bid and was not involved with DP/G’s proposal to the Corps. He did not do any design work on the project until after Big Sky had submitted its bid to DP/G. (Ex. A-6; tr. 1/129-30, 143-44, 146, 148, 169) Mr. Hughes’ cost estimate did not include sprinklering the penthouses. He did not believe it was required. (Tr. 1/145-46)

43. By letter of 3 May 2002, Sprinkler Technology submitted a preliminary schedule of values to Mr. Leone. Big Sky’s subcontract bid was reflected as \$1,907,000.

The cost breakdown did not include sprinklering the penthouses. (Ex. A-3; tr. 1/145-46) In Mr. Tate's view, that was not in his contract (tr. 1/203).

44. By letter of 28 May 2002 to DP/G, Mr. Tate stated Big Sky had received DP/G's subcontract and he proposed changes (ex. G-1 at 2-3). Thereafter, Big Sky signed a subcontract, which is not of record (tr. 1/201).

ASBCA No. 54743

Big Sky, Sprinkler Technology, and Fire Protection Design

45. Mr. Tate found that the contract included fire protection drawings and detailed pages showing the areas to be sprinklered along with all of the basic components. Detailed pipe grouting, sprinkler head locations, and items that need to be finalized for installation were not included. (Tr. 1/211)

46. Sprinkler Technology's work involved fire protection design for crawl space, mechanical areas and stand pipes. No portion of the design to be submitted by the contractor under the contract had yet been done when Sprinkler Technology began working on the project. (Tr. 1/129-30)

47. In preparing shop drawings Sprinkler Technology coordinated all aspects of the project, including structural, architectural, mechanical and electrical. It made a composite drawing to determine what space was available to install the fire sprinkler piping. Mr. Hughes acknowledged that the architectural, mechanical and plumbing drawings show the penthouses. His view that the penthouses did not require sprinklering was based upon the alleged absence of penthouses in the sprinkler drawings and drawing indications that spaces like penthouses did not require sprinklering. (Tr. 1/170-72)

48. An updated schedule of values, apparently prepared by Sprinkler Technology on about 6 November 2002, shows sprinklers in various areas, including service bays, but not in the penthouses (*see ex. A-7*).

49. By telefax dated 16 February 2003 to DP/G, Big Sky submitted Mr. Olson as an additional fire protection engineer to assist in the fire protection design. Mr. Olson, who did not testify at the hearing (*see tr. 1/160*), was a registered fire protection engineer who had worked with Big Sky from 1987 to 1998, when he became president of Fire Protection Design. Among other things, he was a member of the Society of Fire Protection Engineers. (Ex. A-9)

50. Sprinkler Technology did CEP, crawl space, and stand pipe work but "did not continue with the higher levels of sprinkler design" (tr. 1/158). Some of its employees

left, leaving insufficient staff to complete the work for Big Sky. Sprinkler Technology had then arranged with Mr. Tate to have Mr. Olson do some of the work on the higher levels. Mr. Olson raised the issue of sprinklering the penthouses after Sprinkler Technology had completed its work. (Tr. 1/158-59)

51. Big Sky's final sprinkler design was done in part by Mr. Hughes and his firm, Mr. Olson and his firm, and Mike Lewison of Big Sky and his assistants (tr. 1/210).

52. By fax dated 9 March 2003, Mr. Olson stated that Big Sky might want to forward certain information, including "[c]ontract documents do not indicate the penthouse areas to be protected with a fire sprinkler system" (ex. A-10).

53. In a 15 April 2003 fax to Mr. Leone, Mr. Lewison submitted a "Mechanical Penthouse RFI [Request for Information]," stating:

During completion of the fire sprinkler system design, several mechanical penthouses were noticed which are not indicated to be sprinklered on the bid document drawings, or required by specification.

The penthouses are above the first floor service bays. [Big Sky] interprets the owner intentionally deleted sprinklers in these areas, as they are essentially non-combustible mechanical fan rooms.

Should the owner request sprinklers in the areas, [Big Sky] will provide a cost proposal for consideration.

(R4, tab 30)

54. On 26 April 2003 Mr. Leone forwarded to government, DP/G and Big Sky personnel his minutes of a 24 April 2003 Electrical/Fire Alarm meeting (R4, tab 28 at 168 *et seq.*). Under "Penthouse Sprinklers," Mr. Leone's minutes reflect a 15 April 2003 discussion as follows:

4/15/03: Rick L noted penthouses are not shown on the fire protection drawings and questioned if the area will require sprinkler protection. Ken W. confirmed the locations do require protection and were not excluded from the system similar to the crawlspace and IBS spaces that were noted as not requiring sprinkler protection.

(R4, tab 28 at 174) We infer that “Ken W.” referred to Ken Wheatley, of Gogtting & Associates, which performed mechanical and electrical design work for the project (*see* exs. A-47, -48 at 966).

55. By e-mail of 15 April 2003, Mr. Leone submitted DP/G’s “Subcontractor RFI Response” to Mr. Hughes, stating:

Please reference FP1.000 note # 1, this states “The building will be protected with an automatic sprinkler system installed throughout, in accordance with NFPA 13 and NFPA 101. The distribution zones and crawl space do not require fire sprinkler protection.” We do not see this area as being excluded from the contract documents or from your proposal. Unless you can provide specific information from the contract documents DPG/JV expects the penthouse’s [sic] to be provided with automatic sprinkler protection per note 1 on FP1.000

(R4, tab 29)

56. At his deposition, Mr. Leone had thought that the government had initiated the penthouse sprinkling issue (R4, tab 89 at 872-73). Appellant asks the Board to find that: “Before the Corps raised the issue, DP/G (the prime contractor) believed that the penthouses did not need sprinkling” (app. br. at 12 of 28, APFF No. 49). Appellant cites to Mr. Leone’s deposition testimony that, prior to the government’s bringing the issue up, neither he nor DP/G believed that the penthouses required sprinklers (R4, tab 89 at 873). However, later in the deposition, Mr. Leone testified that, as of his 15 April 2003 e-mail to Mr. Hughes, Mr. Leone was of the opinion expressed in his e-mail that the penthouses required sprinkling, and he did not agree with Mr. Lewison’s position in his 15 April 2003 e-mail to Mr. Leone that they did not (R4, tab 89 at 896). We conclude that the record does not establish that DP/G had any particular view about penthouse sprinkling at the time it submitted its project proposal to the Corps.

57. By letter of 30 April 2003 to DP/G, Big Sky provided what it described as a clarification of its penthouse sprinkler position, which stated in part:

Bid document drawing FP 3.104 indicates riser locations and zone [CVAs]. The contract documents do not indicate the risers or piping penetrating the first floor roof/ceiling. They are shown to be capped at the first floor level. SBE2, SBE3, and SBE 4[.]

(R4, tab 27 at 164)

58. By letter dated 7 May 2003 to the attention of Ken L. Larson, P.E., then the Corps' Administrative Contracting Officer (ACO), Ronald Young, DP/G's Project Executive, forwarded Big Sky's 30 April 2003 letter, referred to as RFI No. 771 (R4, tab 27 at 162-64; *see* R4, tab 26 at 155).

59. By letter to the A&E of 16 June 2003 concerning RFI No. 771, Mr. Weldon of RJA stated that TS 13930, Part 1.2, required that all areas of the building be provided with sprinkler protection; the mechanical penthouses were to be sprinklered; they were to comply with the density requirements for Ordinary Hazard Group 1 Occupancies; zone valves were to be provided for each penthouse; and pipe routing and supply locations were shown in attached sketches (exs. A-87, -88 at 1143-48). On 23 June 2003 the A&E forwarded RJA's response to ACO Larsen (ex. A-86).

60. By e-mail dated 11 July 2003, Mr. Hursh notified Mr. Leone that the A&E had advised that sprinklers were required for mechanical penthouses. He added that, although sprinkler coverage was clearly required, the government would also need CVAs for the penthouses and it appeared that this would be a contract addition since they were not a code requirement and the riser diagram did not show them. (Ex. A-89)

61. By letter to DP/G of 16 July 2003, ACO Larson stated that, although Drawing No. FP3.104 did not show CVAs feeding directly to the penthouses, per TS 13930-1.2 and Drawing No. FP1.000, Note 1, the penthouses must be sprinklered. He conveyed RJA's design density and CVA instructions and attached its sketches. (R4, tab 26)

62. In Mr. Hughes' view, RJA's annotated drawings were the drawings missing from the contract that would have indicated that sprinklers were required in the penthouses (tr. 1/165).

63. Mr. Hughes stated that RJA's response to RFI No. 771 called for the addition of a separate zone to protect the penthouses, which would not be part of a zone from a lower level, and that RJA's response was the sort of design he would have provided. He further noted, however, that this was not the design that was ultimately installed. The additional CVAs were not installed and extensions were made from the lower level up into each penthouse. (Tr. 1/166-67; *see also* finding 68)

64. By letter to the ACO of 26 July 2003, DP/G noted its intent to submit a request for equitable adjustment (REA) under the Changes clause with respect to RFI No. 771 (R4, tab 25).

65. On 28 August 2003 ACO Larson gave DP/G additional penthouse CVA locations and pipe routings and a revised riser diagram. He stated that the Corps was in

the process of issuing “a formal case” (a system for tracking a contract change or alleged change) for the addition of the penthouse CVAs, but he reiterated that “penthouse sprinkler coverage itself is part of your contract.” (R4, tab 23 at 138)

66. By letter to DP/G dated 3 October 2003, the ACO stated that the Corps had revised its prior opinion and had determined that, because separate CVAs were not an NFPA requirement, they were not essential for each penthouse and no such change would be requested. He again noted that the requirement for penthouse sprinkler coverage remained. (R4, tab 21)

67. The parties continued to disagree about penthouse sprinkler coverage (R4, tabs 19, 20). On 30 December 2003, DP/G forwarded to the ACO a 15 December 2003 letter from Big Sky which, *inter alia*, asserted that “[t]he penthouses are clearly similar in occupancy to intermediate spaces and are distribution zones,” which were excepted from sprinkler coverage (R4, tab 18 at 130)

68. On 31 March 2004 the ACO notified DP/G that it would not receive an equitable adjustment. He confirmed that penthouse sprinkler coverage was to use existing CVAs on levels directly below the penthouses. (R4, tab 15)

69. By certified claim dated 30 April 2004, DP/G sought a \$204,524 contract modification for fire protection sprinklers at the penthouses and a CO’s final decision (R4, tab 14 at 106). Although appellant states that 11 penthouses are at issue, and excludes the circular penthouse No. 2W52 (*see opp’n to motion to strike and app. br. at 3 of 28, APFF No. 2 n.1*), the claim covered alleged costs at 12 penthouses: Nos. 1, 2, 3, 4, 2W52, 5, 6, 7, 8, 9, 10 and 11 (R4, tab 14 at 108, 110, 115). Big Sky’s claimed costs, plus overhead and profit, totaled \$163,681.82, which included costs for sprinklers, other items and labor, for all of the penthouses, plus some items designated “Pipe” for penthouse Nos. 5, 6, 7, 8 and 11 (R4, tab 14 at 110-22). DP/G added costs such as for administration, supervision, quality control, safety, submittals, certain labor, overhead, profit and bond, to arrive at the total claim of \$204,524.

70. Appellant has not rebutted the Corps’ proposed findings that: as built, the risers were constructed as depicted at schematic drawing No. FP3.104 and are located in the stairwells at the floor levels; the risers were large enough to service the penthouses without extension; and the risers remain capped at the lower levels below the penthouses and were not extended to provide coverage to the penthouses (tr. 1/68-69, 149; gov’t br. at 12, gov’t proposed findings Nos. 44, 45). There is some additional piping in place for the penthouses (tr. 1/150; *see finding 69*).

71. On 30 August 2004 CO Claudette M. McDonald issued a final decision denying DP/G’s penthouse sprinklering claim (R4, tab 13).

72. On 22 September 2004 DP/G timely appealed to the Board, *pro se*, from the CO's denial of its claim. On 27 September 2004 the Board docketed DP/G's appeal as ASBCA No. 54743. On 30 August 2005 appellant's counsel entered her appearance.

Further Testimony on Whether Penthouses are Distribution Zones or
Are Otherwise Excepted from Sprinklering Requirements

73. Mr. Tate acknowledged that the contract did not specifically except penthouses by name from sprinklering requirements but, in his view, penthouses are distribution zones or very similar to the excepted areas. He believed penthouses distribute air, and have concrete floors that will stop fire. In support of his view that penthouses do not require sprinkler protection, he also referred generally to the “[e]xcept as modified herein” qualification in TS 13930 concerning NFPA 13 (*see* finding 11). (Tr. 1/204-07)

74. According to Mr. Hughes, fire protection plans normally would include a separate set of documentation for each level to be covered, which did not occur in this case. In making his point, he referred to two IBS levels and to the penthouses as separate physical areas. (Tr. 1/137)

75. Mr. Hughes did not consider the crawl space on the project, which had high ceilings, a poured concrete floor and an access door that people could walk through, to be a typical crawl space, which would be unfinished, with dirt floors and accessed by a hatch in his view. He would not sprinkle such a non-combustible crawl space. He would expect the sort of crawl space that existed on the project to be sprinklered. (Tr. 1/139) He would also expect the project's IBS zones to be sprinklered because an IBS zone has a permanent floor (tr. 1/140). Based upon the contract's exception that crawl spaces and distribution zones did not require fire sprinkler protection, he extrapolated that penthouses—which, in his view, were similar spaces that had floors and duct work, and were unoccupied and similarly accessible—did not require sprinklers either. He added that there was nothing on the fire protection plans, including the riser diagram, that indicated that pipe could be extended to the penthouses. (Tr. 1/142) As with the term “IBS,” Mr. Hughes occasionally used the term “interstitial space” interchangeably with “distribution zone” (*see* tr. 1/140-41, 173).

76. Mr. Hughes acknowledged that, on other projects of this kind, “I would say almost always you would expect to see sprinklers in the mechanical penthouses as well as other areas” (tr. 1/138).

77. Mr. Hursh was familiar with crawl spaces and distribution zones. He did not consider penthouses to be either of the two for the following reasons, among others: penthouses are named differently; they have a different function than crawl spaces and

distribution zones, and are constructed differently; penthouses interface differently with the service bays below and are used to exhaust air out of the building whereas the crawlspace and the IBS act to distribute air to the building and other utilities; service bays, which are sprinklered, are functionally connected to penthouses; and the owner can store materials in penthouses (because they are to be sprinklered, in his view), but cannot use a crawlspace or distribution zone for storage. Here and elsewhere, Mr. Hursh referred to the distribution zones on occasion as “IBS.” (Tr. 1/220-21, 2/130-32) He did not agree with the statement in Big Sky’s 15 April 2003 fax to DP/G that the penthouses were essentially non-combustible mechanical fan rooms (*see* finding 53). In his view, there was a combustible load in the penthouses and, when storage is added, there is a “high probability of combustible load” (tr. 2/157). Also, there were stairwells on the FP drawings that had no ending point, leaving, in Mr. Hursh’s view, a question concerning the space above the stairwells that a reasonable contractor would pursue (tr. 1/225).

ASBCA No. 55255

78. TS 13935 covers “DRY PIPE SPRINKLER SYSTEM, FIRE PROTECTION” (ex. A-41 at 2424 of 3670). Section 1.1, “REFERENCES,” incorporates the 1996 version of NFPA 13 cited above, to the extent referenced (*id.* at 2426). Section 1.2, “GENERAL REQUIREMENTS,” states in part:

Dry pipe sprinkler system shall be provided in the ambulance parking garage and the enclosed loading dock. Except as modified herein, the system shall meet the requirements of NFPA 13.

(*Id.* at 2427)

79. The dry pipe system is an automatic sprinkler system (tr. 2/175).

80. NFPA 13, section 4-14, “Piping Installation” (R4, tab 42 at 284) at subsection 4-14.4.1, “Protection of Piping against Freezing,” provides in part:

4-14.4.1.1 Where portions of systems are subject to freezing and temperatures cannot reliably be maintained at or above 40°F (4°C), sprinklers shall be installed as a dry pipe or preaction system.

Exception: Small unheated areas are permitted to be protected by antifreeze systems or by other systems specifically listed for this purpose. (See 3-5.2.)

(R4, tab 42 at 287) NFPA 13, section 3-5 describes requirements for antifreeze systems (*see* finding 28).

81. On 2 October 2003, Paul Park, a field mechanical engineer in the Corps' Office Engineering section, e-mailed Paul Winkler, a member of DP/G's quality control team (tr. 1/224), that he was listing wet sprinkler pipes in the cold areas of the service bays as a deficiency item. He stated that TS 13930 1.2 called for the entire building to be sprinklered in accordance with NFPA 13, which required protection of piping against freezing and for small unheated areas to be protected by antifreeze systems or other systems specifically listed for the purpose. Mr. Park stated that unheated areas needed to be identified for the sprinkler system designer so the installation could be in accordance with NFPA 13. Mr. Winkler responded affirmatively. (R4, tab 22)

82. By e-mail of 16 February 2005 to Mr. Lewison and others concerning "Penthouse #10 Sprinkler Issue," Mr. Winkler stated that there was a problem with the sprinkler piping in penthouse No. 10 that Big Sky needed to address:

Issue: The sprinkler piping is routed through the radiator heat rejection rooms as can be seen on the attached drawings. This area does not contain any terminal heating units and is open to outside air at all times. The 3 rooms to the west provide ventilation for the CEP. There is no provisions [sic] for terminal heaters in these rooms either.

(R4, tab 11)

83. Mr. Lewison responded by e-mail on 16 February 2005 that he had reviewed the drawings regarding penthouse No. 10 and the areas were non-combustible construction, return air plenums, not intended for use for storage or anything other than air plenums or air cooling for the radiators. He stated that Big Sky would delete sprinkler coverage in "these non-heated areas" and provide a credit in its penthouse sprinkler claim. (R4, tab 10 at 66)

84. On 22 March 2005 DP/G submitted RFI No. 1949 to the Corps which appended Big Sky's 16 February 2005 e-mail and reflected a cost decrease due to Big Sky's intended deletion of sprinklers in penthouse No. 10 (R4, tab 10 at 62, 65, 66).

85. By letter of 30 March 2005, ACO Rolf Ness, who was Chief of the Office Engineering Branch for most of the contract period and the Acting Resident Engineer for the latter part, responded to RFI No. 1949, stating that the CEP penthouse areas were shown on mechanical drawings and others and that they were to be sprinklered. He stated that NFPA 13 and the contract did not allow deletion of sprinklers there. He also

noted that there were heated and unheated spaces in the area and that freeze protection was to be provided as required. (R4, tab 9; tr. 2/27)

86. By e-mail to DP/G dated 31 March 2005, Big Sky stated that NFPA 13 does not require sprinklers in noncombustible concealed spaces that are not intended for storage and that freeze protecting the area would require the addition of a dry pipe valve assembly (R4, tab 8 at 59).

87. By letter to ACO Ness dated 31 March 2005, citing Big Sky's e-mail of the same date, DP/G stated that it would submit an REA (R4, tab 8 at 58, *see also* R4, tab 7 (related RFI No. 1961)).

88. By letter to DP/G of 12 April 2005, ACO Ness denied that it was entitled to an equitable adjustment. Concerning freeze protection, he stated that the Corps would accept any system selected by the contractor, as sprinkler system designer, that NFPA 13 allowed (citing § 4-14.4.1, finding 80). He stated that dry pipe, preaction, and antifreeze systems were acceptable but noted that the Corps believed the antifreeze system was the most practical. If DP/G chose an antifreeze system, it was to locate valves in the warm penthouse No. 10 fan room. (R4, tab 6)

89. In response to the ACO, on 27 April 2005 Big Sky wrote to DP/G that:

The contract bid documents indicate where wet and dry systems will be provided.

Specification section 13930 Wet Pipe Sprinkler System, paragraph 1.2, states "Wet pipe sprinkler system shall be provided in all areas of the building."

Specification section 13935 Dry Pipe Sprinkler System, paragraph 1.2, states "Dry pipe sprinkler system shall be provided in the ambulance parking garage, and the enclosed loading dock."

These are the only specification sections that relate to locations of fire sprinkler systems, and do not indicate additional locations for dry or other "freeze-proof" systems.

(R4, tab 5 at 44) Big Sky listed additional costs of \$11,101.78 for installing an antifreeze system for the area of penthouse No. 10 in question. The costs included pipe, test valves and other items. (*Id.* at 44-45)

90. On 28 April 2005 DP/G submitted a certified claim to the CO for \$18,858, which included \$11,364 for Big Sky's alleged costs of installing the antifreeze system, plus DP/G's alleged labor, material, overhead, profit and bond costs (R4, tab 4 at 21, 41). On 5 August 2005 CO McDonald denied the claim (R4, tab 3). The record does not establish when DP/G received her decision. Appellant's counsel represented in DP/G's notice of appeal, submitted first by fax dated 7 November 2005, 94 days after the decision, that it was received on 10 August 2005. It is not clear whether she was referring to DP/G's receipt, but the Corps has not challenged that DP/G received the decision on that date, and we accept that it did, which renders its appeal timely.

91. On 8 November 2005 the Board docketed the appeal as ASBCA No. 55255. On 28 February 2006, pursuant to the parties' agreement, it consolidated ASBCA Nos. 54743 and 55255 for disposition.

DISCUSSION

The Parties' Contentions

Appellant raises the same arguments in its sprinklering and freeze protection appeals. It contends that the contract, read as a whole, is not ambiguous concerning sprinklering or freeze protection in the penthouses and does not require it. It asserts that Big Sky's contract interpretation was reasonable and is imputed to DP/G. It alleges that, if the Board were to find that the contract is ambiguous concerning sprinklering or freeze protection in the penthouses, any ambiguity is latent and should be resolved in appellant's favor. Appellant adds that the doctrine of mutual mistake provides a separate basis for granting its appeals, but it does not elaborate and, in view of our disposition of the appeals, we do not reach that argument.

The Corps contends that the fire protection drawings clearly depict the penthouses; they are shown on several other drawings; and, even if the penthouses were missing from the fire protection drawings, the contract read as a whole requires appellant to provide sprinkler protection for the penthouses and therefore to provide freeze protection in areas subject to freezing. The Corps asserts that penthouse No. 10 contained an unheated space that required freeze protection in accordance with NFPA 13. It contends that, if there were any contract ambiguity, it was patent and appellant cannot recover because it failed to inquire about it prior to submitting its proposal. The Corps alleges, alternatively, that even if any ambiguity were latent, appellant did not prove that it relied upon Big Sky's interpretation at the time appellant submitted its proposal to the government, and there was a wide discrepancy in the amounts of the fire protection bids appellant received from potential subcontractors.

The Contract, Read as a Whole, Requires Sprinklering the Penthouses

It is elemental that a contract is to be interpreted as a whole, so as to harmonize and give reasonable meaning to all of its parts. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). When we examine each relevant part of the contract, including its general provisions, specifications and drawings, we conclude that the Corps' interpretation is the only reasonable one – the contract required that the contractor provide sprinkler protection for the penthouses.

Under the contract's Specifications and Drawings for Construction clause, anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, is deemed to be shown or mentioned in both, and in case of any difference between the drawings and the specifications, the specifications govern (finding 6). The specifications and drawings are to be read together; they complement and supplement each other. Even if the drawings omit work called for by the specifications, or engender confusion about it, the specifications take precedence and require that the work be done. *Speegle Construction, Inc.*, ASBCA No. 23281, 79-1 BCA ¶ 13,824 at 67,808 (interpreting predecessor to clause).

Further, under the Contract Drawings and Specifications clause, omissions from the drawings or specifications of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed, does not relieve the contractor from performing the omitted work. It is to perform them as if fully and correctly set forth and described in the drawings and specifications. (Finding 8) Concerning "customarily performed," Mr. Hughes acknowledged that, on projects of the kind at issue, "almost always you would expect to see sprinklers in the mechanical penthouses as well as other areas" (finding 76). Appellant cites to the Order of Precedence clause, which provides in part that, if there is an inconsistency in the contract, then the contract clauses and any other documents, exhibits and attachments take precedence over the specifications (finding 5). Here, there is no inconsistency. The specifications and drawings, read together as required, call for sprinklering the penthouses.

Regarding the specifications, TS 13930, section 1.1, incorporates NFPA 13 to the extent referenced (finding 10). TS 13930, section 1.2, requires a wet pipe sprinkler system in "all areas of the building," to provide fire sprinkler protection for the "entire area," and, except as modified in the contract, the contractor its to design and install the system per NFPA 13 (finding 11).

Further, the fire protection drawings require sprinklering the penthouses, although they are incomplete in that regard. While the penthouses are depicted in other contract

drawings (*see* findings 18, 19, 22), only five of them are shown on the fire protection drawings (finding 21), and there are not any sprinklering details shown on any of the drawings that refer specifically to the penthouses (*see* finding 25). However, the fire protection drawings do not exclude penthouse sprinklering and Note 1 to Drawing No. FP1.000 states that the building will be provided with an automatic sprinkler system “INSTALLED THROUGHOUT” in accordance with NFPA 13 and NFPA 101 (finding 20). That Drawing No. FP3.104 does not show risers or piping penetrating the first floor roof or CVAs feeding directly to the penthouses (finding 24), does not mean that sprinkling stops where the risers stop. In fact, when the penthouses were ultimately sprinklered, the risers were not extended. They remained capped below the penthouse levels and appellant used existing CVAs on the levels directly below the penthouses. (Findings 32, 63, 68, 70)

Note 1 excludes only distribution zones and crawl space from fire sprinkler protection. According to Mr. Hughes, those areas, as designed for the hospital, normally would require that protection (finding 75). In any case, distribution zones and crawl space are the only modifications to the required full scope protection set forth in TS 13930, section 1.2. Appellant’s witnesses alleged that the penthouses are distribution zones or similar thereto, or similar to crawl space. They focused upon the alleged distribution zone similarity (*see* findings 67, 73, 75), as do we, because the record does not support equating the project’s crawl space to its penthouses. Although the contract does not define “distribution zone” (finding 16), both parties’ witnesses used the terms “IBS,” “interstitial space,” and “distribution zone” interchangeably (*see* findings 75, 77) and we interpret the contract and their testimony in that light.

The Corps disagrees that penthouses are distribution zones, or similar thereto, and asserts, among other things, that penthouses are named differently; have a different function; are constructed differently; interface differently with the service bays below; and exhaust air out of the building, whereas the distribution zone distributes air to the building and other utilities. The Corps also notes that service bays, which are sprinklered, are functionally connected to penthouses. (Finding 77)

The CBD announcement noted that the project incorporates the IBS concept, with two of the three occupied floors having distribution zones for utilities (finding 1). This reflects that distribution zones are two areas distinct from the rooftop penthouses. The contract itself treats penthouses and IBS or distribution zones separately (*see* findings 15 (specifications distinguish between IBS areas and penthouses), 16 (specifications distinguish distribution zones and penthouses), 19 (separate drawings for distribution zones and penthouses), and 23 (separate depiction of distribution zones)). Mr. Hughes also referred to IBS and penthouses as separate physical areas (finding 74).

We are persuaded by the weight of the evidence that penthouses are not distribution zones or similar thereto within the meaning of the fire sprinklering exception contained in Note 1 to Drawing No. FP1.000.

Moreover, the contract's incorporated NFPA provisions require sprinklering the penthouses. NFPA 13, section 1-6, requires that a building, where protected by an automatic sprinkler system, "shall be provided with sprinklers in all areas" (finding 27). The only exceptions are those permitted by specific sections of that NFPA standard (*id.*). NFPA 13, section 4-1.1, states that sprinkler location requirements are based upon the principle, among others, of "[s]prinklers installed throughout the premises," with referenced exceptions (finding 29). Messrs. Hursh and Hughes agree that none of the specific exceptions apply to the penthouses and appellant has not directed us to any evidence that any NFPA 13, section 4-13.1 exception, or any NFPA sprinklering exception, applies to them (finding 30). Appendix A to NFPA 13, to which section 4-1.1 refers, states that "[t]his standard contemplates full sprinkler protection for all areas." Although other NFPA standards might not require sprinklers in certain areas, the "authority having jurisdiction" is to be consulted in each case (finding 31). NFPA 101 states that "[b]uildings containing health care facilities shall be protected throughout" by an automatic sprinkler system (finding 33) and it refers to NFPA 13 for installation requirements (finding 34).

Appellant states that bidders have practical constraints and suggests that its subcontractor, Big Sky, could not be expected to review the entire contract to find the government's alleged mistake in failing to depict penthouse sprinklering in the fire protection drawings (*see app. br. at 25-26 of 28, APFF Nos. 110-14*). However, even if it were customary in the construction industry for potential subcontractors to review only portions of the contract pertaining to their specialties, the prime contractor is charged with knowledge of what all of the specifications and drawings require. *Carmone Corp.*, ASBCA No. 43023, 93-3 BCA ¶ 26,185 at 130,344; *Gall Landau Young Construction Co.*, ASBCA No. 21549, 77-1 BCA ¶ 12,515 at 60,689-90.

In sum, the contract, reasonably read as a whole, requires sprinklering the penthouses.

If the Contract were Ambiguous, any Ambiguity would be Patent and Appellant Failed to Inquire About it Prior to Submitting its Proposal

Appellant urges that its contract interpretation concerning penthouse sprinklering, which it derives from its subcontractor, Big Sky (*see finding 56*), is reasonable; the Corps asserts that its interpretation is reasonable. If a government contract provision is susceptible of more than one different, reasonable, interpretation, it is ambiguous. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999); *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). While we have found the Corps' interpretation to be the only reasonable one, even if we were to assume that there

is another reasonable interpretation, appellant cannot recover because any ambiguity would be patent and it failed timely to inquire about it.

A contract provision is patently ambiguous if the ambiguity would be apparent to a reasonable person in the claimant's position. If the ambiguity is patent, the contractor has a duty to inquire of the government about the meaning of the contract before it submits its bid or proposal. The issue of whether a contractor's particular interpretation is reasonable is reached only if the ambiguity is not patent. *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997); *Newsom v. United States*, 676 F.2d 647, 649 (Ct. Cl. 1982).

The fact that the government impliedly warrants the correctness and adequacy for the job of its design specifications and drawings, *United States v. Spearin*, 248 U.S. 132, 136-37 (1918), does not relieve a contractor of its duty "to investigate or inquire about a patent ambiguity, inconsistency, or mistake when the contractor recognized or should have recognized an error in the specifications or drawings." *White v. Edsall Construction Co.*, 296 F.3d 1081, 1085 (Fed. Cir. 2002). Absent such an inquiry, a patent ambiguity is resolved against the contractor. *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1355 (Fed. Cir. 2002).

As established, the contract specifications, at TS 13930, drawing No. FP1.000, at Note 1, and NFPA 13, its Appendix A, and NFPA 101 call for full sprinkler coverage at the hospital, with stated exceptions. TS 13930 states that compliance with NFPA standards referenced in the contract is mandatory, but in the event of a conflict between the specification and applicable NFPA standards, the specification governs, and all requirements that exceed the minimum requirements of NFPA 13 are to be incorporated into the design. (Finding 13) The fire protection drawings do not show sprinklering details in the penthouses, but it is apparent that the hospital includes penthouses, and penthouses in similar projects are typically sprinklered. The only exceptions to the full coverage specified in Note 1 are crawl spaces and distribution zones. Penthouses are not crawl spaces and the contract treats distribution zones and penthouses separately. Thus, any ambiguity concerning whether Note 1's sprinklering exception for distribution zones was intended to include penthouses is an obvious one.

Further, the sprinklering exceptions enumerated in NFPA 13 do not apply to the penthouses. Appendix A notes that NFPA 13's requirements are to be used insofar as they are applicable and "[t]he authority having jurisdiction should be consulted in each case" (finding 31). TS 13930 defines the "authority having jurisdiction" as the CO (finding 13). Again, even if appellant and/or Big Sky deemed that NFPA 13 and 101 did not require penthouse sprinklering, any ambiguity is an obvious one in view of TS 13930's requirements.

Neither appellant nor Big Sky inquired of the CO or the government about sprinklering the penthouses prior to submitting their proposal and bid, respectively (findings 38, 40). Appellant did not raise the issue until Mr. Olson initiated an RFI commencing in March 2003 (*see* findings 52-55). Therefore, even if the contract were ambiguous concerning penthouse sprinklering, appellant's claim must fail because any ambiguity would be patent and appellant failed timely to inquire about it. Accordingly, we do not address its latent ambiguity contention.

We deny ASBCA No. 54743.

ASBCA No. 55255

Appellant bears the burden to prove its claims by a preponderance of the evidence. *M.A. Mortenson Co.*, ASBCA Nos. 53105 *et al.*, 04-2 BCA ¶ 32,713 at 161,845. There is little evidence or specific argument from appellant concerning its claim that the contract did not require freeze protection in the disputed area in Penthouse No. 10.

NFPA 13, subsection 4-14.4.1, incorporated into the contract, provides that, where portions of systems are subject to freezing and temperatures cannot reliably be maintained at or above 40°F (4°C), sprinklers are to be installed as a dry pipe or preaction system, with the exception that small unheated areas can be protected by antifreeze systems and other systems (finding 80). The ACO advised appellant that the Corps would accept any NFPA-allowed system selected by the contractor, but that the Corps believed that the antifreeze system was the most practical (finding 88). Appellant has not proved by a preponderance of the evidence that the contract did not require the antifreeze system installed in penthouse No. 10 (*see* findings 78, 81-83, 85, 89, 90).

We deny ASBCA No. 55255.

DECISIONS

We deny the appeals, ASBCA Nos. 54743 and 55255.

Dated: 18 June 2009

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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. 54743, 55255, Appeals of Dick Pacific/GHEMM, JV, rendered in conformance with the Board's Charter.

Dated:

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