

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Walsh Group Ventures) ASBCA No. 61222
Under Contract No. W912DW-15-C-0002)

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OPINION BY ADMINISTRATIVE JUDGE PROUTY

The parties have submitted cross-motions for partial summary judgment¹ centered on the prosaic question of whether the requirements of the above-captioned contract (the contract) would have been satisfied by appellant, Walsh Group Ventures' (Walsh's) use of telescoping piles for an air traffic control tower's foundation. Under the standards that apply to a motion for summary judgment, the government's contract interpretation, that Walsh's telescoping piles

¹ Walsh's motion is styled as a motion for summary judgment, though it only addresses the subject of the foundation piles raised in the government's motion and is, in fact, only a motion for partial summary judgment as Walsh notes within the motion's text (app. mot. at 1). We refer to Walsh's combined opposition to the government's motion for partial summary judgment and cross-motion for summary judgment as "app. mot." The government's combined opposition to Walsh's motion and reply in support of its motion is "gov't reply" and its response to Walsh's proposed findings of fact is "gov't resp. to Walsh facts ¶__".

do not satisfy the contract because it required piles of uniform diameter, is contradicted by terms in the specifications that appear to contemplate variation in the diameter of the piles – in particular when subsurface obstacles are encountered. It is further contradicted by evidence supporting a finding that the contract drawings actually were consistent with telescoping piles. Walsh’s own mirror-image cross-motion runs into similar problems. Accordingly, we deny both cross-motions for partial summary judgment.

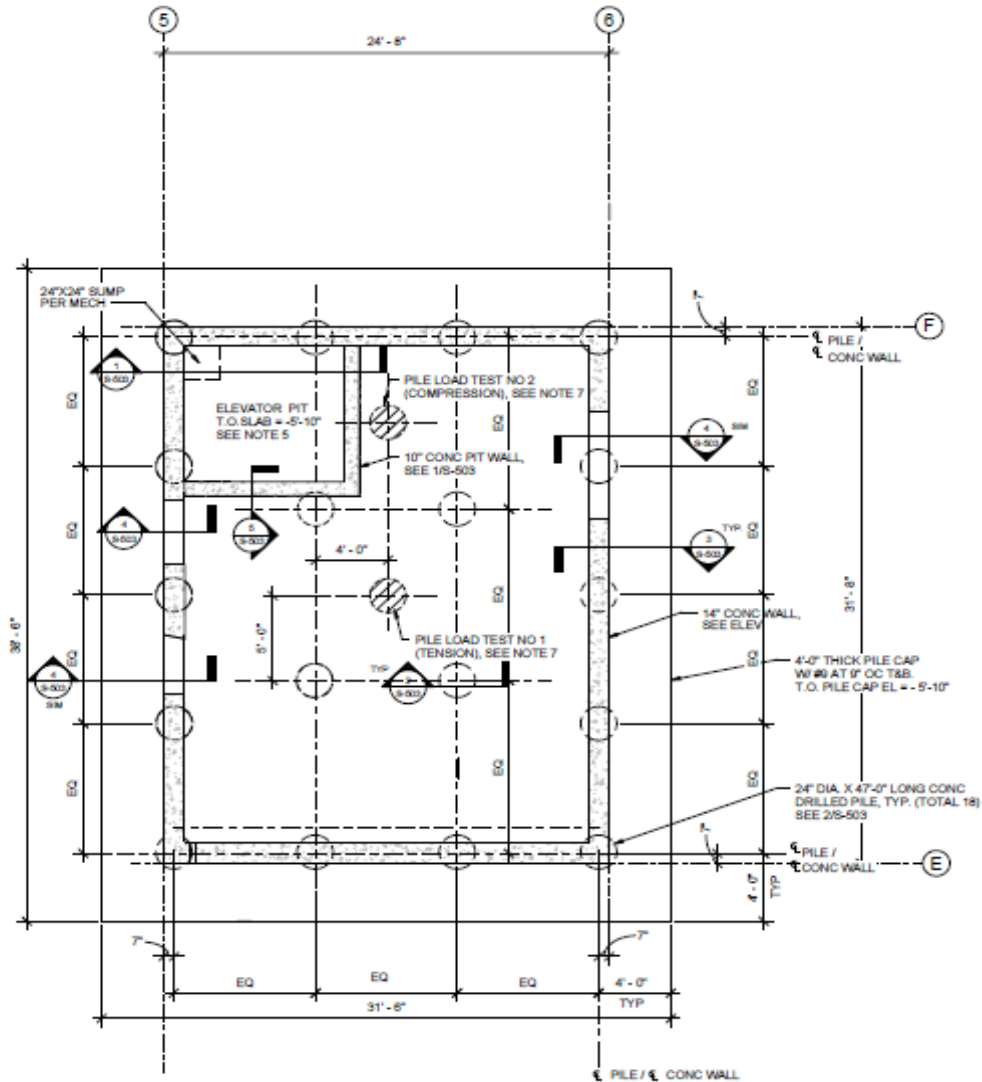
STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTIONS

On April 9, 2015, the United States Army Corps of Engineers Seattle District (the Corps, or the government) executed the contract with Walsh. The contract, in the amount of \$11,319,000, was to build an Air Traffic Control Tower (ATCT) and Base Building at Joint Base Lewis-McChord (JBLM) in Washington State. (*See* R4, tab 2 at 1-2)

I. Contract Plans and Specifications for the Tower Foundation

A. The Contract Drawings: Apparent Uniformity in Pile Diameter

The issue in this appeal involves the foundation for the ATCT. The contract includes plans depicting foundation piles to be constructed in a rectangular footprint approximately 24 X 32 feet in plan, as shown in the figure immediately below:



1 ATCT - TOWER FOUNDATION PLAN
1/8" = 1'-0"

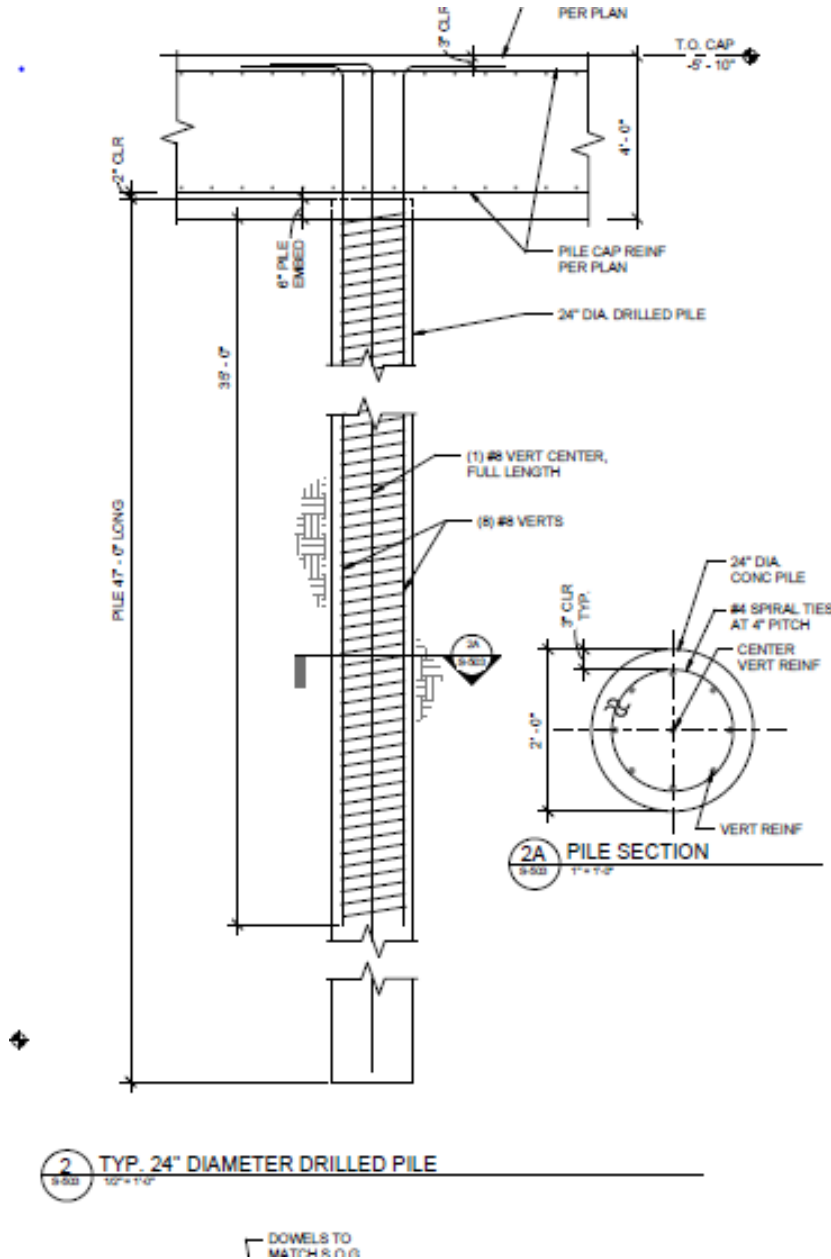
FOUNDATION NOTES:

1. SEE S-001 AND S-002 FOR GENERAL NOTES AND DESIGN CRITERIA.
2. TOP OF PILE CAP ELEVATION = [-5'-10"]
3. SLAB ON GRADE SHALL BE 5" THICK W/ #4 AT 16" OC EW, TYP, UNO.
4. SEE S-101 FOR WALL FOOTING SCHEDULE
5. ELEVATOR PIT DEPTH SHALL BE VERIFIED W/ ELEVATOR MANUFACTURER BY CONTRACTOR PRIOR TO CONSTRUCTION.
6. COORDINATE LOCATIONS OF EQUIPMENT PADS WITH MECHANICAL, ELECTRICAL AND PLUMBING DRAWINGS.
7. TEST PILES REFER TO GEOTECHNICAL SPECIFICATION. TOP OF TEST PILES SHALL BE 6" BELOW BOTTOM OF PILE CAP (EL = -6'-4").

(R4, tab 2 at page 2685)

As can be seen, an arrow pointing to one of the piles on the lower right hand side of this drawing includes the language: 24" DIA. X 47'0" LONG CONC. DRILLED PILE, TYP. (TOTAL 18) SEE 2/S-503. (*Id.*)

Sheet 503 of the specifications (referenced in the language above) may be found on page 2704 of the contract in the Rule 4 file. Drawing 2 on that sheet, labelled, "TYP. 24" DIAMETER DRILLED PILE" is depicted immediately below, along with Drawing 2A:



(R4, tab 2 at 2704)

The reader will observe that the pile is depicted as having a uniform diameter of 24 inches in drawing 2, and that in drawing 2A, which is a cross-section, there is no indication of more than one diameter for the pile, although, as will be discussed below, that might not be so dispositive as it appears.

B. The Specifications Appear to Have Some Wiggle Room

The contract's written specifications discuss the foundation piles² in Division 31 -- Earthwork, Section 31 63 29 Drilled Concrete Piers and Shafts³ (*See* R4, tab 2 at 2382-83). In relevant part (and we direct the reader to the "Tolerances" provision), this section provides:

1.3.4 Construction Criteria

Provide and install monolithically cast-in-place concrete drilled shaft foundation to the sizes indicated.

Tolerances:

...

- b. Bottom Diameter: Minus-zero, plus-6 inches, measured in any direction from shaft.

...

Drilled shaft excavations and completed shafts not constructed within the required tolerances are unacceptable. The Contractor shall be responsible for correcting all unacceptable shaft excavations and completed shafts to the above tolerances and to the satisfaction of the Contracting Officer's Representative (COR). Materials and work necessary, including engineering analysis and redesign, to complete corrections for out-of-tolerance drilled shaft excavations shall be furnished without either cost to the Government or an extension of the completion date of the project.

Notably, although the tolerance for the "bottom diameter" of the piles is up to an additional 6 inches, as far as we can tell (and the parties have not suggested otherwise) the specifications do not set forth a tolerance for a top diameter or define what is the bottom (or the top) for the piles.

² As seen here, the terms "piles," "piers," and "shafts" are used interchangeably.

³ Unless otherwise stated, all references to contract sections in this opinion are found within Section 31 63 29.

“Excavation” of the holes for the concrete piles is discussed in Section 3.3 of the contract. It begins by stating that “[e]xcavation of shaft foundations [is] to be accomplished by standard excavation methods.” It further provides that excavated walls were to be protected by “temporary watertight steel casings of sufficient length to prevent water intrusion, cave-ins” and other similar concerns. (R4, tab 2 at 2385) The section also provides that the temporary casings will be extracted before completion of the project (*id.* at 2386).

Temporary casings, in turn, merit their own section in the contract, Section 3.6. In part, that section provides:

All subsurface casing shall be considered temporary unless specifically shown as permanent casing in the contract documents. The Contractor shall be required to remove temporary casing before or immediately after completion of concreting the drilled shaft. Casing should never be pulled after the concrete begins to set due to probable entrapment of drilling fluid in the shaft concrete and probable separation of the concrete within the shaft.

If the Contractor elects to remove a casing and substitute a longer **or larger-diameter** casing through caving soils, the excavation shall be either stabilized with slurry or backfilled before the new casing is installed. Other methods, as approved by the Engineer, may be used to control the stability of the excavation and protect the integrity of the foundation materials.

(R4, tab 2 at 2387) (emphasis added) The reference to the use of “larger diameter casing through caving soils” will become important later in this decision and there is one other reference to a larger diameter casing in the contract.

Section 3.4 of the contract, OBSTRUCTIONS, provides for actions to be taken in the event that the contractor encounters obstructions, which are defined as:

impenetrable objects that a) cannot be removed or excavated using conventional augers fitted with soil or rock teeth, underreaming tools, and/or drilling buckets, and b) cause a significant decrease in the rate of excavation advancement, relative to the rate of advancement for the rest of the shaft excavation within the particular strata that the obstruction is located in, if removed using the

techniques and equipment used successfully to excavate the shaft.

(R4, tab 2 at 2386) This contract provision also requires the immediate notification of the COR “when obstructions are encountered.” It further provides that the COR is the “sole judge” of the significance of reduced shaft advancement rates and the classification of any obstruction. Of most importance here, in its list of “special procedures” and tools that can be used to overcome obstructions, the contract includes (among other things) “temporary casing, and increasing the hole diameter.” (R4, tab 2 at 2386)

A final matter of importance from the specifications is that the beginning of the section, under Section 1.1, includes a list of publications, which “form a part of this specification to the extent referenced” (R4, tab 2 at 2378). Amongst the publications listed is one from the United States Federal Highway Administration: FHWA-IF-99-025 (2000) Drilled Shafts: Construction Procedures and Design Methods (with Errata Sheet) (R4, tab 2 at 2379). This particular publication is referenced later in the “General” subsection (No. 1.3.1) of the Quality Assurance section (No. 1.3), which provides in part:

Install Drilled Shaft Foundations in accordance with applicable requirements as described by ACI 336.1 “Reinforced Specifications for the Construction of Drilled Piers”, ADSC “Standards and Specifications for the Foundation Drilling Industry”, FHWA IF-99-025 “Drilled Shafts: Construction Procedures and Design Methods” and FHWA IP-84-11 “Handbook on Design and Construction of Drilled Shafts under Lateral Load.”

(R4, tab 2 at 2380) Excerpts of Publication FHWA IF-99-025, which Walsh attached as Exhibit A to its reply brief,⁴ describe the fact that “some contractors sometimes prefer to make deep excavations using more than one piece of casing with the ‘telescoping casing’ process.” (App. reply, ex. A at 101)

The contract incorporates by reference Federal Acquisition Regulation (FAR) 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB

⁴ The version attached by Walsh was dated 1999 and made no mention of errata sheets, though, as noted above, the contract referenced the 2000 version of the publication, with errata sheets. For the purposes of this motion, as will be seen, we can ignore this discrepancy. If this matter should advance to a hearing, this inconsistency will need to be resolved if Walsh wishes us to rely upon the 1999 version of the publication.

1997) (*see* R4, tab 2 at 79), which provides that, in a conflict between the drawings and the specifications, the specifications shall govern. *See* FAR 52.236-21(a).

II. Walsh Seeks to use a “Telescoping” Casing Process: The Corps Says, “No”

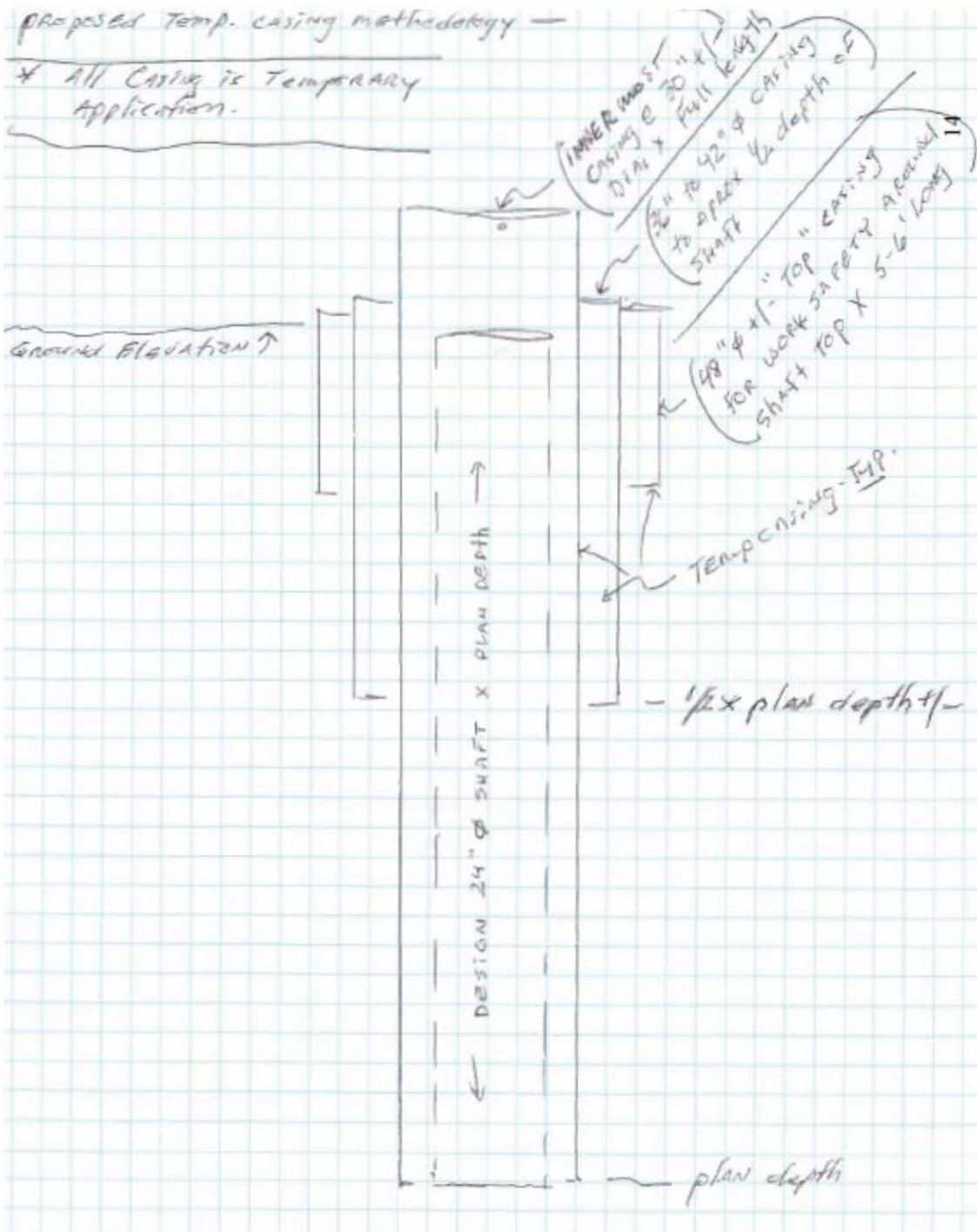
A. Walsh’s First Transmittal

On June 17, 2015, Walsh submitted Transmittal 31 63 29-1 (the first transmittal) as required by the contract, indicating how it intended to build the ATCT foundation (*see* R4, tab 6 at 1-85). The submittal provided that the diameter of the shafts would depend upon the subsurface conditions that were encountered – if the soils were more stable than expected, they would be “smaller over-sized temp. casing,” but if they encountered “over-sized cobbles and looser conditions” they would utilize “larger dia. temp casing to accommodate the extraction of the over-sized materials” (R4, tab 6 at 4).

In its section on “Means and Methods,” Walsh explained that it would:

[i]ninstall and advance over-sized, temp. casing utilizing the “Telescoped” casing method The casing lengths and diameters will be determined once the test shaft is installed but we anticipate installing possible [sic] a short casing at the top of each shaft to secure the loose upper soils and make the work area safe – this would be maybe a 48” dia. x 5-6 ft. in depth. Once the top of that shaft is safe to work around, we anticipate installing 2 ea. telescoping casings. Possibly one at 42” dia. and one at 36” or 30” dia.

(R4, tab 6 at 5) This transmittal also included the following drawing done by hand, demonstrating the telescoping method schematically:



(R4, tab 6 at 14)

B. The Corps Rejects the Walsh Transmittal

On July 23, 2015, the Corps responded to the first transmittal. In this response, it stated, “[t]he designed shaft diameters are 24 inches. Any change in dimension

would require re-design. Additionally, calculated strength from skin friction developed with in-situ materials would be lost if over-excavation occurs. Contractor's recommendation to site adjust shaft diameter is rejected." (R4, tab 9 at 1) The Corps also asked a number of questions about the proposed larger diameter piles and the "skin friction" that it thought might be less (R4, tab 9 at 2-3).

C. Walsh Tries to Persuade the Corps; it Continues to Say, "No"

On July 31, 2015, Walsh responded to this critique (and others not material to the present dispute). That response explained that the numbers for the sizes of the telescoping piles were not fixed, but would be determined by the circumstances encountered, and that larger diameter piles would have more, not less, skin friction since they would have a larger corresponding area in contact with the soil. (R4, tab 11 at 5, 7)

The Corps was not persuaded. On August 13, 2015, the Corps responded to Walsh's July 31 re-submission and rejected anything but a 24-inch diameter pile. The August 13 correspondence rejecting Walsh's submission also indicated that Walsh needed to find another means of removing cobbles and obstructions than increasing the pile diameter. (R4, tab 13 at 1)

We need not go through the remainder of the correspondence in detail for our purposes here: in short, the Corps considered everything but uniform diameter 24-inch shafts to be a variation in the contract's design, though it would consider it if Walsh went through the variation process contained within the contract (*see* R4, tabs 15, 25, 31). Though Walsh disagreed, it attempted to satisfy the Corps, obtaining two different opinions from engineering consultants stating their view that its proposed "change" would provide as good or better foundation for the ATCT and that the uniform 24-inch diameter piers were impracticable, given the soil conditions (R4, tabs 26, 29-30).

III. "Compromise" and Completion of the Foundation

Ultimately, Walsh abandoned its efforts to persuade the Corps to permit the telescoping shafts, and, on November 20, 2015, submitted a Transmittal including a proposed shaft with a 30 inch uniform diameter (R4, tab 37). This, the Corps permitted (R4, tab 41). Walsh successfully drilled the 30 inch cylindrical piles between December 21, 2015 and January 15, 2016 (R4, tab 50 at 2) and they were accepted by the government on February 5, 2016 (R4, tab 51).

IV. The Claim

On October 26, 2016, after unsuccessfully seeking an equitable adjustment for the schedule and cost impacts related to the drilled pier design (R4 tabs 55-56), Walsh submitted a certified claim to the contracting officer in the amount of \$1,573,216 and seeking a time extension of 134 days (R4, tab 67). The contracting officer denied the claim in full in a decision dated April 21, 2017 (R4, tab 72). Walsh timely appealed this decision to the Board.

V. Expert Testimony for the Present Motion

In addition to the contract documents and correspondence, Walsh has included with its motion the unrefuted⁵ testimony of several of its expert witness. For our purposes, it is sufficient to focus on one of them: Dr. Dan Brown, PhD, P.E. Dr. Brown was also one of the authors of the second report from an engineering consultant that Walsh had submitted to the Corps in its efforts to persuade it to allow the telescopic method for pile emplacement (*see* R4, tab 29 at 13, tab 30 at 6). His background in matters of foundation piles is impressive: he has extensive expertise in foundation shafts (*see* Brown dep. at 6-7)⁶ and he was one of the principal authors of publication FHWA-NHI-10-016, “Drilled Shafts: Construction Procedures and LRFD Design Methods” (*see* app. mot., ex. 2 at 3), which is set forth in the contract as a reference (*see* R4, tab 2, at 2379), though not cited within those provisions dealing with pile diameter.

Dr. Brown testified to two salient facts for this motion: first, that telescopic piers which have a larger diameter at the top than at the bottom are the norm in 90 percent of pier construction (Brown dep. at 55); second, that the drawings in the contract are consistent with the use of telescopic piers, even if they do not depict multiple diameters (*see* Brown dep. at 31-32 (expressing doubt that “24 inches” depicted in the drawings is meant to be exactly 24 inches) 79-81). Though the government disputes Walsh’s proposed finding of fact regarding the meaning of the drawings, it only does so with respect to one of the witnesses who came to this conclusion because, it argues, she did not say what Walsh contends that she said; it does not do so with respect to Dr. Brown’s testimony (gov’t resp. to Walsh facts, ¶ 42).

⁵ Presumably, because it is of the opinion that the contract is unambiguous, thus there is no need for extrinsic evidence of its meaning, the Corps has offered no evidence beyond the documents submitted in its Rule 4 file.

⁶ Dr. Brown’s deposition may be found at Exhibit 1 to Walsh’s combined opposition to the government’s motion for partial summary judgment and cross motion for summary judgment. We refer to it as “Brown dep. ___” here.

One last note from Dr. Brown’s testimony, not cited by Walsh: when he was asked at the end of his deposition what tolerance should be permitted when it is not set forth in the specifications, he agreed with government counsel that it could be anything “within reason.” (Brown dep. at 107)

DECISION

As alluded to above, we deny summary judgment to both parties under the standards applicable to such motions. As will be more fully discussed below, the contract specifications, combined with Dr. Brown’s testimony, place into serious doubt the government’s assertion that only a uniform 24-inch diameter pier could fulfill the contract’s requirements. On the other hand, the specifications do place *some* limits on the design of the piers and we cannot say, at this juncture, whether Walsh’s telescoping proposal fell within those limits.

I. The Standards for Summary Judgment

The standards for summary judgment are well established and need little elaboration here. Summary judgment should be granted if it has been shown that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A non-movant seeking to defeat summary judgment by suggesting conflicting facts “must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). Nevertheless, “[t]he moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.” *Mingus Constructors v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

We also note that while matters of contract interpretation are often well-suited for summary judgment, *see Varilease Tech. Grp., Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002) (citing *Textron Def. Sys. v. Widnall*, 143 F.3d 1465, 1468 (Fed. Cir. 1998)), that is much less the case when the contract contains ambiguity which must be resolved through extrinsic evidence. *See L.C. Gaskins Constr. Co.*, ASBCA No. 58550, 15-1 BCA ¶ 36,059 at 176,087.⁷

⁷ We do not read *Gaskins* to mean that there may *never* be summary judgment when there is ambiguity in a contract interpretation – theoretically, the right undisputed material facts may allow it in certain circumstances; rather, as a practical matter, it is unlikely.

II. The Government’s Motion for Summary Judgment is Denied Because, Notwithstanding the Drawings, it is Reasonable to Interpret the Contract as Permitting Variance in Pile Diameter

A. The Law Governing Contract Interpretation

Like the standards for summary judgment, the law governing contract interpretation is well worn. Under basic principles of the law, a contract is interpreted “in terms of the parties’ intent, as revealed by language and circumstance.” *United States v. Winstar Corp.*, 518 U.S. 839, 911 (1996). Generally, this process begins and ends with the language of the contract. *TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006). And in reviewing this language, the Board should read the contract “as a whole and [interpret it] to harmonize and give reasonable meaning to all its parts,” if possible, leaving no words “useless, inexplicable, inoperative, insignificant, void, meaningless or superfluous.” *Precision Dynamics, Inc.*, ASBCA No. 50519, 05-2 BCA ¶ 33,071 at 163,922 (citations omitted); *see also Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002) (“contract must be construed to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract”); *Hunkin Conkey Constr. Co. v. United States*, 461 F.2d 1270 (Ct. Cl. 1972) (rejecting contract interpretation that would render a clause in the contract meaningless).

If a contract provision is “susceptible to more than one reasonable interpretation, it is ambiguous.” *TEG-Paradigm*, 465 F.3d at 1338 (citing *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986)). And ambiguity allows us to consider extrinsic evidence in order to determine the parties’ intent at the time entered into the contract. *TEG-Paradigm*, 465 F.3d at 1338.

Finally, even if a contract is not ambiguous on its face, extrinsic evidence in the form of trade practice and custom may be considered when they give contract terms different meanings than may be read by the non-specialist public. *TEG-Paradigm*, 465 F.3d at 1338 (citing *Hunt Constr. Grp., Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002)).

B. The Contract Specifications (Which are Controlling) Permit Departure from the Uniform 24 Inch Diameter Depicted in the Drawings

The government’s position throughout this dispute has been that the contract drawings depict foundation piles of a uniform 24 inch diameter (*see, e.g.*, gov’t mot. at 17-19). A cursory look at the contract drawings which we have reproduced above supports this conclusion: the lines appear ruler-straight and consistent; there is no schematic indication of the telescopic drilling scheme; and the cross section of the “typical” pier indicates that it is 24 inches in diameter. Moreover, nothing in the

specifications makes mention of the telescopic drilling method. So far, so good for the government.

But the specifications, which by terms of the contract overrule the drawings in the event of conflict, pose a problem for the government, as noted by Walsh. First, the six inch positive tolerance on the “bottom” of the pile – a number that is 25 percent of the nominal diameter of the pile – is substantial. Next, the fact that this tolerance figure is only for the “bottom” of the pile and not for the top raises a host of questions. One does not need Dr. Brown’s qualifications to recognize that the laws of physics and geometry dictate that a temporary casing⁸ at the bottom of a hole drilled in the Earth cannot be of a larger diameter than the top of the hole, which it would have to go through to reach its ultimate position. It could be of a smaller diameter than the top, yes, but not a larger diameter. This leads us to a conclusion that, as a practical matter, the tolerance for the casing size at the top of the hole must be at least as large as the tolerance at the bottom of the hole. The fact that the tolerance at the top of the hole is undefined leads just as easily to the conclusion that the tolerance was to be greater than the tolerance at the bottom as it leads to the conclusion that it is to be the same.⁹ Indeed, if the tolerance were to be the same for the top and bottom of the hole, why does the contract provision regarding tolerances specify that it is for the bottom of the pile, rather than just the pile?

Further complicating the matter is the contract’s discussion of measures to deal with obstructions. It explicitly references the use of “temporary casings and increasing the hole diameter.” Thus, in the event of obstructions, the contract expressly contemplated a larger diameter hole, though it also contemplated the involvement of the COR as when such obstructions were encountered.

Finally, we have Dr. Brown’s unrefuted testimony that the drawings in the contract, seemingly depicting uniform diameter piles, are actually typical of projects where a telescoping excavation is permitted. This tends towards trade usage, though he did not quite say so in his testimony which, admittedly, was in response to a question by government counsel in his deposition. The Federal Highway Administration publications referenced in the contract, contemplating telescoping piles, lend credence to Dr. Brown’s testimony, though they are not dispositive to the interpretation of this contract because they neither specify that all drilled concrete piers must be telescoped nor define how to interpret the drawings. Moreover, the

⁸ As noted in the facts section above, the contract provided that the walls of the shafts would be lined with temporary waterproof steel casings prior to the concrete pour.

⁹ Indeed, specifying the tolerance at the top of the hole would be a more effective delimiter of diameter variation than specifying it at the bottom because the bottom diameter would necessarily be less than or equal to the top.

contract does not state that every construction scheme referenced in the publications is necessarily applicable to the project here.

The government attempts to reconcile the reference to a larger diameter hole in the obstruction provision of the contract by essentially arguing that the default for the contract should be uniform 24-inch diameter piles, as referenced in the drawings, and that allowance for the larger diameter only comes *after* an obstruction is met, in which case it may be an appropriate remedy with COR concurrence (gov't reply at 3-4). The relatively significant tolerance for a larger diameter hole would, in this reading, be consistent with the possibility of encountering obstructions.

To the government's construction, we say, "maybe." It does have the virtue of reconciling the drawings to the specifications, and though the specifications are superior in authority to the drawings, the preferred contract interpretation – leaving no portion superfluous – would be one in which the drawings and specifications were in harmony. Nevertheless, applying the standards of summary judgment and keeping Dr. Brown's (sort of) trade usage testimony in mind, we find that a construction of the contract allowing a variable diameter also appears to be within the zone of reasonableness. This is a classic ambiguity which precludes us from granting summary judgment in favor of the government.

III. The Amount of Variance in Pile Diameter Permitted by the Contract and When it May be Changed are Issues That Preclude Summary Judgment for Walsh

One question following our finding of ambiguity above is whether the principle of *contra proferentem*, which resolves contract ambiguity against the drafter of the document, *see, e.g., Gardiner, Kamya & Assocs., P.C. v. Jackson*, 467 F.3d 1348, 1352 (Fed. Cir. 2006), should lead to summary judgment in Walsh's favor. We are tempted to do so, but do not for several reasons. First, *contra proferentem* is a rule of last resort, only applied when all other approaches to contract interpretation have failed, *see id.*, and we have not reached that point just yet since extrinsic evidence has not yet been fully flushed out. Next, our finding that Walsh's contract interpretation was within the zone of reasonableness was arrived at through the application of summary judgment standards and consideration of Dr. Brown's deposition testimony. That testimony, with all inferences drawn in Walsh's favor (as was appropriate for consideration of the government's motion for summary judgment), supports a finding that the drawings are consistent with trade usage that allows a telescopic pile foundation. When we consider the same testimony for purposes of Walsh's motion, thus drawing all reasonable inferences against Walsh, we are less persuaded.

A final matter precluding judgment in Walsh’s favor at this point is the question of whether its proposed telescopic plan was “within reason” (as Dr. Brown admitted would be necessary). Generally, there must be some upper limit to the tolerances of the pile diameters, even if the tolerance could potentially be larger at the top than at the bottom.¹⁰ The government argues that the plan submitted by Walsh was 200 percent larger than the 24-inch diameter pile depicted in the plans, making it inherently unreasonable (*see* gov’t reply at 9). In the circumstances presented here, we conclude that whether the particular proposal submitted by Walsh contained tolerances for the upper portion of the piles that were “within reason” is a question of fact that will need to be determined based upon trial testimony.

CONCLUSION

The cross-motions for partial summary judgment are denied.

Dated: May 14, 2020



J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur



JOHN J. THRASHER
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur



CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

¹⁰ Though we are inclined to hold that the specifications permit a larger tolerance at the top than the bottom, we need not draw that conclusion to reach our results here.

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. 61222, Appeal of Walsh Group Ventures, rendered in conformance with the Board's Charter.

Dated: May 15, 2020



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals