ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Dragados USA, Inc.	)	ASBCA No. 57664
	)	
Under Contract No. W912EP-08-C-0011	)	

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OPINION BY ADMINISTRATIVE JUDGE CLARKE ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal involves a contract for construction of a dam in Puerto Rico. The parties dispute the interpretation of one paragraph setting out quantities of concrete aggregate to be used in construction of the dam. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. We grant the government's motion and deny the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 14 March 2008, the U.S. Army Corps of Engineers (COE), Jacksonville District, awarded Dragados USA, Inc. (Dragados) Contract No. W912EP-08-C-0011 for the construction of the Portugues Dam and Bucana Rivers Project, Ponce, Puerto Rico (R4, tab 4 at 345). The project is described in part as follows:

> The work will include construction of a 220-foot high Roller Compacted Concrete (RCC) thick arch dam with a crest length of 1,230 feet and an estimated 367,000 cubic yards of RCC.

(R4, tab 4 at 639)

2. The project consisted of five construction phases generally described as follows:

> --Phase 1 – Mobilization, clearing, quarry overburden excavation, power-line relocation.
>
> --Phase 2 – Foundation excavation, aggregate production, dental concrete.
>
> --Phase 3 – Aggregate production, 50% dam RCC placement.
>
> --Phase 4 – Final dam RCC placement, spillway, intake structure.
>
> --Phase 5 – Remaining items, valve house, access road, mechanical, electrical.

(R4, tab 4 at 644-47)

3. The specification included Section 03700, "CONCRETE," that is generally described as follows:

> The work covered by this section consists of the maufacturing [sic], placing, compacting and curing of all concrete other than the roller compacted concrete for use at the Portugues Dam Project. This includes all reinforced concrete, foundation treatment concrete and dental concrete. The gradings of the nominal 2-inch NMSA RCC and conventional concrete coarse aggregate are similar. The Contractor may choose to produce "shared use" coarse aggregate stockpiles for efficiency.

(R4, tab 4 at 1288) The specification also included Section 03701, "ROLLER-COMPACTED CONCRETE" (R4, tab 4 at 1326). Section 03700, subparagraph 1.2, "GOVERNMENT TESTING AND STUDIES," incorporated the provisions of Section 03701:

> 1.2.1.1 Aggregates
>
> The requirements of Section 03701 ROLLER-COMPACTED CONCRETE paragraph "Aggregate Information" shall be applicable to the conventional concrete.

(R4, tab 4 at 1290) The same is true for 1.2.1.2 Cementitious Materials, Admixtures, and Curing Materials; 1.2.1.3 Materials for Mixture-Proportioning Studies; 1.2.2.1 General

(under "Construction Testing by the Government"); 1.2.2.2 Aggregate Testing; 1.2.2.3 Cementitious Materials; and 1.2.2.4 Admixtures (R4, tab 4 at 1290-91).

4. Specification Section 03701, "ROLLER-COMPACTED CONCRETE," is generally described as follows:

> a. The work covered by this section consists of the manufacturing, transporting, placing, compacting and curing of roller compacted concrete (RCC) for use at the Portugues Dam Project. Roller compacted concrete is a combination of find and coarse aggregate, pozzolan, cement and admixture that are blended with water to a damp consistency that permits hauling and spreading with earth moving equipment and compaction with vibratory rollers.

(R4, tab 4 at 1329)

5. Section 03701, subparagraph 1.2.1.1, "Aggregate Information," reads in part:

> Coarse and fine aggregates for this project will be produced by the Contractor from a government furnished quarry located approximately 1-mile upstream of the proposed dam site. Testing has been performed previous to the award of this contract. Results of this testing indicate that the quarry is capable of producing materials of the quality and quantity required for this project, provided suitable processing is performed.

(R4, tab 4 at 1332)

6. Section 03701, subparagraph 2.2, "MIXTURE PROPORTIONING," includes the following two subparagraphs:

> 2.2.1 Composition
>
> All concrete mixtures will be proportioned by the Contracting Officer. RCC shall be composed of cementitious materials, water, fine and coarse aggregates, and water-reducing/retarding admixture. The cementitious material shall be Portland cement in combination with pozzolan. Air-entraining admixture will not be used in the RCC.

2.2.2 Proportions

RCC mixtures and all other conventional concrete mixtures including bedding mortar and grout for GERCC will be proportioned by the Contracting Officer. There will be one primary RCC mixture used for the mass of the dam structure. This primary mixture will contain approximately 210 to 250 pounds water, 180 to 215 pounds of Portland cement and 90 to 125 pounds pozzolan per cubic yard. Based on the design mix, 280,000 tons of fine aggregate and 420,000 tons of coarse aggregate will be required. These values do not include a waste factor. These values are provided as information. The actual amounts will be determined during the mixture proportioning studies performed at the project laboratory. The bedding mortar is a high-slump broomable mixture containing approximately 600 to 700 pounds of Portland cement and 200 to 250 pounds pozzolan per cubic yard. The mortar shall include the fine aggregate specified in Section 03700 CONCRETE and will have a slump, when placed, of 9 to 11 inches. Grout for the GERCC is a flowable mixture (designed for 10 to 20 seconds flow when tested in accordance with ASTM C 939), consisting of a cement and water mix proportioned at an approximate water to cement ratio of 0.5 by weight.

(R4, tab 4 at 1342)

7. On 2 November 2009 the COE provided Dragados the approved mix designs for conventional concrete (app. supp. R4, tab 109). On 12 February 2010 the COE provided Dragados the approved mix design for RCC (app. supp. R4, tab 111).

8. On 23 April 2010 Dragados sent a letter notifying the COE that it believed the approved mix designs resulted in a change to the contract:

Aggregate production. Quantity of aggregates

This work requires Dragados to produce the aggregates for the RCC mixtures and conventional concrete mixtures. This work is paid under Mobilization and Preparatory Work (Phase 2 Line Item 2001, Phase 3 Line Item 3001 and Phase 4 Line item 4001) Section 01270.

The applicable contract provision is paragraph, 2.2.2 "Proportions" of Section 03701 of the "Roller-Compacted

> Concrete" specification. This provision requires 280,000 tons of fine aggregate and 420,000 tons of coarse aggregate. The actual amounts will be determined during the mixture proportioning studies performed at the project laboratory.
>
> Based on the studies performed by the project laboratory, USACE has provided us with the final mix designs that require 293,000 tons of fine aggregate and 473,000 tons of coarse aggregate. Dragados considers this to be a change to the contract requirements, which under the Changes clause FAR 52.243-4, entitles Dragados to an equitable adjustment in the contract price and possibly the schedule. Dragados will monitor its costs and schedule and will submit a request for an equitable adjustment upon completion of this work item.

(R4, tab 6R)

9. On 17 September 2010, Dragados submitted a Request for Equitable Adjustment (REA) for the additional costs incurred as a result of the change in quantities of aggregates resulting from the approved mix designs (R4, tab 6N). Citing Section 03701, "ROLLER-COMPACTED CONCRETE," Dragados explained the change as follows:

> This is the only section in the Contract where the quantity of aggregates to be produced is discussed. In SECTION 03700 CONCRETE reference is made to SECTION 03701 ROLLER COMPACTED CONCRETE. Although paragraph 2.2.2 of SECTION 03701 indicates that the estimates were provided as information, having no other way of estimating the requirement, Dragados USA had to rely on these estimates when preparing the proposal for the contract. Therefore, using the information supplied by the Government, we estimated a total of 700,000 tons of aggregate (280,000 tons of fine aggregate and 420,000 tons of course aggregate) would be needed for the overall project.

(R4, tab 6N at 5502-03) Dragados went on to state that based on its estimate, the approved mix design resulted in an additional 72,817 short tons of aggregate and requested $1,925,693 (*id.* at 5503).

10. On 30 November 2010 the COE resident engineer advised Dragados that he found no merit in Dragados' REA (R4, tab 6K at 5456). Attached to the letter was a technical evaluation performed by the COE that expressed an interpretation of Section 03701, paragraph 2.2.2, Proportions. After quoting paragraph 2.2.2 it reads:

> If the above paragraph is read carefully, there is only one way it can be reasonably interpreted. The first sentence indicates that all mixes, including the conventional concrete (subject of section 03700) will be provided by the government. Then it discusses the approximate per cubic yard component weights of other that [sic] coarse and fine aggregates, and finally the total estimated weights of coarse and fine aggregates for the mass of the dam structure. Although there is mention of conventional concrete, bedding mortar and grout, no attempt is made to provide approximate quantity of aggregates for these. Therefore, the contractor should have used other information in the solicitation (RFP), such as the drawings, technical reports, etc, to determine not only main dam RCC aggregate production requirements, but requirements for the entire project. As such, contractor's estimates should have included Main Dam RCC, Valve House RCC, Test Section RCC, RCC Trial Mix Process, and RCC for Miscellaneous uses. Also, estimates of aggregate for all conventional concrete in permanent structures and miscellaneous applications should have been developed by Dragados USA in preparing their bid.

(R4, tab 6K at 5459) The technical review continues to explain how the volume of RCC may be determined from the contract specifications and drawings (*id.* at 5459-60). The review included a section that argued aggregate production for the conventional (non-RCC) concrete could be determined from "take offs" from the contract drawings (*id.* at 5461).

11. On 14 December 2010 Dragados submitted a certified claim in the amount of $2,969,504 to the contracting officer (CO) (R4, tab 3 at 25-29). Included in the submission was a detailed response to the COE's technical analysis of the REA (*id.* at 97-105). Dragados summarized its position as follows:

> 1. An estimate of 700,000 tons of aggregate was provided in the contract as an indication of the overall amount of aggregates needed in the project.
> 2. With the limited information available, Dragados USA performed its own quantities take off. Lacking clear, detailed information about the RCC mix design to be used and any information at all about the conventional concrete mix design to be used, the resulting quantity of aggregates based on typical concrete mix designs for both RCC and

conventional concrete is very close to the 700,000 tons indicated in the contract.

3. Based on the previous two points, Dragados USA used the amount of 700,000 tons of aggregates for its offer and reached an agreement with its subcontractor Construcciones José Carro for the same amount.
4. Dragados USA is entitled to recover all additional costs for producing aggregates in excess of the 700,000 tons baseline. Final quantities will be determined once all concrete in the project has been placed. Current estimate had been updated from the 72,817 tons, previously presented, to 90,058 tons and will continue to be updated as concrete placement proceeds.

(*Id.* at 105)

12. On 1 April 2011, the CO issued a final decision denying Dragados' claim (R4, tab 1 at 1-9). On 23 June 2011, Dragados filed its timely appeal of the final decision. On 24 June 2011, the appeal was docketed as ASBCA No. 57664.

DECISION

This opinion deals with cross-motions for summary judgment based on a single question of contract interpretation. Summary judgment may be appropriate in contract interpretation cases if there are no ambiguities requiring weighing of extrinsic evidence:

> The standards for summary judgment are established. It is a salutary method to resolve an appeal when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Sweats Fashions, Inc. v. Pannill Knitting Co.,* 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). Any significant doubt over factual issues, and all reasonable inferences, must be resolved and drawn in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987). Legal questions of contract interpretation are amenable to summary resolution, unless there is an ambiguity that requires the weighing of extrinsic evidence. However, extrinsic evidence will not be received unless there is such an ambiguity. *Coast Federal Bank, FSB v. United States,* 323 F.3d 1035, 1040 (Fed. Cir. 2003) (*en banc*); *Beta Systems, Inc. v. United States,* 838 F.2d 1179, 1181, 1183 (Fed. Cir. 1988); *Gosselin World Wide Moving NV,* ASBCA No. 55367, 09-2 BCA ¶ 34,242 at 169,234.

Dixie Construction Co., ASBCA No. 56880, 10-1 BCA ¶ 34,422 at 169,918. As explained below, we need not consider extrinsic evidence to arrive at the proper interpretation of the disputed language.

Contention of the Parties

Dragados summarizes its argument in the introduction to its motion:

> The Contract specifications provided a clear and specific representation of the quantity of aggregate that would be required for the Project. Specification Section 03701 ¶2.2.2. stated that, "Based upon the design mix, 280,000 tons of fine aggregate and 420,000 tons of coarse aggregate will be required." (Rule 4 Tab 4, p. 1342) Both Dragados and its subcontractor understood that the 700,000 ton aggregate requirement (280,000 tons of fine aggregate + 420,000 tons of coarse aggregate) applied to both the RCC and the conventional concrete. [Footnote omitted]

(App. mot. at 1) Dragados argues:

> The only reasonable interpretation of Section 03700 [sic],[1] ¶ 2.2.2 is that "280,000 tons of fine aggregate and 420,000 tons of coarse aggregate will be required" for the RCC and the conventional concrete on the Project. This is the only interpretation that is consistent with the language of Section 0370[1], ¶ 2.2.2, as well as the contemporaneous circumstances at contract formation. Furthermore, it is the only interpretation that gives meaning to all of the provisions of Section 0370[1], ¶ 2.2.2.

(App. mot. at 22)[2] Dragados admits that the second and third sentences relate to RCC alone, "[t]he second and third sentences clearly are limited to the RCC mix" (app. mot. at 23). Dragados arrives at its interpretation by linking the first sentence of Section 03701, ¶ 2.2.2, "***RCC mixtures and all other conventional concrete mixtures including bedding mortar and grout for GERCC will be proportioned by the Contracting Officer***" and the fourth

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[1] This should be "03701."

[2] In its claim, Dragados disclosed that it did "quantities take off" and, utilizing "typical concrete mix designs," calculated the total quantity of conventional and RCC concrete arriving at close to 700,000 tons of aggregates (SOF ¶ 11). This raises the question of whether Dragados relied upon the interpretation it asserts in this dispute.

through seventh sentences, "***Based on the design mix, 280,000 tons of fine aggregate and 420,000 tons of coarse aggregate will be required. These values do not include a waste factor. These values are provided as information. The actual amounts will be determined during the mixture proportioning studies performed at the project laboratory***." (App. mot. at 22-23) Dragados discusses each sentence focusing on whether certain words are "plural," for example:

> Finally, the seventh sentence makes it absolutely clear that ¶ 2.2.2 applies to the aggregates for both RCC and conventional concrete. That sentence reads as follows: "The ***actual amounts*** will be determined during the ***mixture proportioning studies*** performed at the project laboratory." (Emphasis added) The term "actual amounts" only can refer to the tons of fine and coarse aggregate that will be required for both RCC and conventional concrete on the Project. This is because the sentence refers to "mixture proportioning studies." The use of the plural implies that there is a mixture proportioning study for the RCC and one (or more) mixture proportioning study for the conventional concrete.

(App. mot. at 23)

The government argues as follow:

> The disputed paragraph begins by stating that "RCC mixtures and all other conventional concrete mixtures including bedding mortar and grout for GERCC will be proportioned by the Contracting Officer." While this sentence in essence states that the Contracting Officer will proportion all concrete mixtures, it specifically separates RCC mixtures and conventional concrete mixtures rather than merely using the word 'all.' This again should have alerted the Appellant that the paragraph was not lumping all types of concrete together in its discussion. The next two sentences Appellant admits apply only to RCC concrete: "There will be one primary RCC mixture used for the mass of the dam structure. This primary mixture will contain approximately 210 to 250 pounds of water, 180 to 215 pounds of Portland cement and 90 to 125 pounds pozzolan per cubic yard." At this point in the reading of the paragraph it is clear, as admitted by the Appellant, that it [sic] discussing a single primary RCC mixture. The paragraph then goes on to read "[b]ased on <u>the</u> design mix, 280,000 tons of fine aggregate and 420,000 tons of coarse aggregate will be required." (Emphasis added). It

> is this sentence that Appellant alleges applies to all concrete aggregates and not just RCC aggregates. However, this interpretation is not reasonable when you read the paragraph and the entire Contract as a whole.

(Gov't opp'n at 20-21) The government places importance on the fact that words are "singular":

> Fifth, the work "mix" is singular. As the conventional concrete would have a different design mix than the RCC, it is clear that the singular word "mix" could not apply to both RCC and conventional concrete aggregates.

(Gov't opp'n at 21) There is also the analysis presented in the government technical evaluation of the REA (SOF ¶ 10).

Interpretation Analysis

The basic rules of contract interpretation were well stated in *Teg-Paradigm Environmental, Inc. v. United States,* 465 F.3d 1329, 1338 (Fed. Cir. 2006):

> When interpreting a contract " 'the language of [the] contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.' " *Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.,* 169 F.3d 747, 752 (Fed. Cir. 1999) (quoting *Hol-Gar Mfg. Corp. v. United States,* 169 Ct. Cl. 384, 351 F.2d 972, 975 (Ct. Cl. 1965)). When deriving this meaning, we begin with the contract's language. *Coast Fed. Bank, FSB v. United States,* 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc). When the contract's language is unambiguous it must be given its "plain and ordinary" meaning and the court may not look to extrinsic evidence to interpret its provisions. *Id.* at 1040; *McAbee Constr.,* 97 F.3d at 1435.

See also LAI Services, Inc. v. Gates, 573 F.3d 1306, 1314 (Fed. Cir. 2009). We apply these principles to Section 03701, ¶ 2.2.2 Proportions.

The parties agree that this case involves the interpretation of one paragraph—Section 03701, ¶ 2.2.2 Proportions. The first four sentences of the paragraph are relevant to our inquiry. The first sentence simply restates what was said in ¶ 2.2.1, that all concrete mixtures "will be proportioned by the Contracting Officer" (SOF ¶ 6). Both parties agree that the second and third sentences deal only with RCC, "[t]here will be one primary RCC mixture used for the mass of the dam structure. This primary mixture will

contain approximately 210 to 250 pounds water, 180 to 215 pounds of Portland cement and 90 to 125 pounds pozzolan per cubic yard" (*id.*). We conclude that "210 to 250 pounds of water, 180 to 215 pounds of Portland cement and 90 to 125 pounds pozzolan per cubic yard" is an estimated range of design mix. The fourth sentence reads, "[b]ased on the design mix, 280,000 tons of fine aggregate and 420,000 tons of coarse aggregate will be required" (*id.*). We conclude that this is the result of some sort of calculation "[b]ased on the design mix." The words "[b]ased on the design mix" in the fourth sentence can only refer to the second and third sentences because they contain the only design mix information in the paragraph. The first sentence does not contain anything that could reasonably be interpreted to be referred to by the words "[b]ased on the design mix." There is no design mix information in the first sentence that would allow for the calculation of number of tons of fine and coarse aggregate identified in the fourth sentence. Since everyone agrees that the second and third sentences relate to RCC, the fourth sentence must also relate to RCC. Dragados' reliance on "plural" words and the government's reliance on "singular" words miss the obvious interpretation of these sentences. There is only one reasonable interpretation of Section 03701, ¶ 2.2.2 Proportions – the 700,000 tons of fine and coarse aggregate is for the RCC. This interpretation causes no conflict with the rest of ¶ 2.2.2 or any other language in the contract. We agree with the government's technical evaluation that there is much more information in the drawings that Dragados could have used to estimate the amount of aggregate for the non-RCC concrete and Dragados appears to have done just that with its use of "take offs" that it says verified the validity of the 700,000 tons of aggregate (SOF ¶¶ 10-11).

CONCLUSION

For the reasons stated above, we grant the government's motion and deny Dragados' motion. The appeal is denied.

Dated: 29 August 2013

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

(Signatures continued)

I concur

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

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting 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. 57664, Appeal of Dragados USA, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals