

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Meltech Corporation, Inc.) ASBCA Nos. 61706, 61768
)
Under Contract No. W912DR-14-D-0021)

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OPINION BY ADMINISTRATIVE JUDGE CATES-HARMAN
ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

These appeals are consolidated with thirteen (13) other appeals.¹ Several motions and cross-motions for summary judgment are outstanding.² This decision will deal exclusively with the motion for summary judgment and cross-motions for summary judgment in ASBCA Nos. 61706 and 61768. The dispute in these appeals involves work on the exterior stairs and sidewalks. The Board has jurisdiction to hear these

¹ ASBCA Nos. 61706 and 61768 are consolidated with ASBCA Nos. 61694, 61762, 61763, 61764, 61765, 61766, 61767, 61768, 61869, 61870, 61871, 61872, 62091, 62987. The lead appeal is ASBCA No. 61694.

² Appellant also filed motions for summary judgment in ASBCA Nos. 61694, 61762, 61763, 61764, and 61767. The government has filed cross-motions for summary judgment in ASBCA Nos. 61694, 61762, 61763, 61764, and 61767.

appeals pursuant to the Contract Disputes Act (CDA) of 1978, 41 U.S.C. § 7105. For the reasons stated below, we find summary judgment is appropriate for the resolution of ASBCA Nos. 61706 and 61768, and deny the appeals.

STATEMENT OF FACTS (SOF) FOR PURPOSES
OF THE MOTIONS

The Contract

1. On June 10, 2014, U.S. Army Corps of Engineers (USACE) issued a Request for Proposals (RFP) for a Multiple Award Task Order contract (MATOC) that included both Design-Build and Design-Bid-Build construction projects within the Baltimore District Area of Responsibility. This was Phase 1 of a two-phase construction procurement. (R4, tab 2 at 2, 5)

2. USACE selected a pool of eight (8) successful offerors from Phase 1. Only those qualified offerors were permitted to submit proposals in Phase 2. (R4, tab 2 at 5; tab 24 at 2)

3. On August 14, 2014, USACE issued RFP Amendment No. 0003, which requested proposals from offerors for two seed projects, including Seed Project No. 2, which included the renovation of Building 8609 Training Barracks Upgrade Program (TBUP). The amendment included notification of a site visit for Building 8609³. The site visit for Building 8609 took place on August 21, 2014. (R4, tab 24 at 2-6, 21-22; gov't opp'n and cross-mot. in ASBCA No. 61767, G-2 at 2)

4. Meltech submitted its proposal for the renovation of Building 8609 on or about September 15, 2014. (R4, tab 25; gov't opp'n and cross-mot. at 8)

5. On September 29, 2014, USACE awarded MATOC No. W912DR-14-D-0021, to Meltech. This contract provided for both Design-Build and Design-Bid-Build construction projects within the Baltimore District Area of Responsibility. (R4, tab 28 at 1-2)

6. On September 30, 2014, USACE awarded Firm-Fixed-Price (FFP) Task Order No. 0002 to Meltech for all costs in connection with the renovation, design and construction of Building 8609, located at Ft. Meade, MD. (R4, tab 29 at 1-2)

Appeal No. 61706

7. On May 24, 2016, appellant submitted RFI No. 0093 advising USACE that

³ Amendment No. 3 included an inaccurate reference to Building 8506. Paragraph 52.236-27(d) should have identified the site visit at Building 8609. (App. supp. R4, tab 357)

they were advised by the Base Fire Department that the steps leading to the north and east side of the building were not code compliant and required adjustment, and provided further⁴:

Meltech has proposed to replace the concrete sidewalk in front of the two stairs on the North side of the building. A drawing is attached for you to review. This will take care of the first riser height issue.

The steps on the North side of the building need to be sloped towards the front of the step in which they now slope backwards. Meltech believes that we can apply a bonding material to the steps which will allow us to repair the stairs versus remove and replace them.

The Fire Department has also established that we need to install nosings on all treads, on all stairs.

Meltech requests that USACE provide Meltech a RFP to allow us to price the work indicated above. This will impact cost but not time.

(R4, tab 125)

8. On July 8, 2016, USACE responded and advised appellant that the work described in its RFI was within appellant's scope of work, stating in pertinent part:

Meltech is responsible for providing a code-compliant renovation of Building 8609. (See Section 01 10 00 Para 2.1 "General").

The steps are part of the building, and it is the contractor's obligation to make them code-compliant. The design drawings indicate removal of two sets of steps on the south side of the building and the addition of one exterior concrete set of steps on the hammerhead portion of the building, as well as accessible ramp. In the same way that those steps are part of the project, the steps in question on the north and east sides of the building should also be considered within the contractor's scope.

(R4, tab 125)

⁴ All communications addressed in this decision are reproduced verbatim.

9. On September 14, 2016, appellant submitted RFI No. 0095 with the subject Riser height at North Stairs advising USACE that:

At both north stairs, the sidewalks are too low where they abut the stairs creating an out-of-code riser height for the first step.

This condition is outside of the 5' outside of building contract limits. Please indicate whether this should be corrected, and if so, if an RFP will be issued.

(R4, tab 141)

10. USACE provided its response to RFI No. 0095 with the subject Riser height at North Stairs on September 20, 2016, and stated:

After reviewing the IFC drawing plans C-101 & C-103 both shows your company addressing this issue by saw cutting and removing the concrete slab & sidewalk and replacing the affected area with new concrete sidewalk. It is understood by both parties: Government and Meltech, that the repairs needed for both north stairs sidewalks is responsibility of the contractor and this is not considered a change to the contract.

(R4, tab 141)

11. On November 7, 2016, Meltech submitted RFI No. 0107 with the subject Irregular Riser Height at north stairs advising USACE that:

The first riser on the existing south stairs is a different height . . . than the rest of the risers. It is 7-3/4" high and all the others are 6-1/4" high. Please inform us of this is desired to be corrected. The correction will involve demolishing and replacing a section of sidewalk adjacent to the over-high riser. Photos are attached.

(R4, tab 151)

12. USACE provided its response to RFI No. 0107 on February 13, 2017, and stated:

The Government agreed that existing differing height condition between the 1st riser and the rest of the risers at the two entrances to the building at the north side, heading to the Hammer Head at the south side, and the dent observed on the top of the concrete slab before heading down to the basement is not in compliance with the following NFPA 101: Life Safety Code 2012 edition:

7.2.2.3.6.1 Variation in excess of 3/16 in. (4.8 mm) in the sizes of adjacent tread depths or in the height of adjacent risers shall be prohibited, unless otherwise permitted in

7.2.2.3.6.2 The variation between the sizes of the largest and smallest riser or between the largest and smallest tread depths shall not exceed 3/8 in. (9.5 mm) in any flight

7.2.2.3.6.3 Where the bottom or top riser adjoins a sloping public way, walk, or driveway having an established finished ground level and serves as a landing, the bottom or top riser shall be permitted to have a variation in height of not more than 1 in. in every 12 in. (25 mm in every 305 mm) of stairway width

However, the RFP Section 0110 00 Para 3.9.1 (c) Site Design requires the Design Builder to “Provide all site improvements necessary to support the renovation of the building facilities” including the walkways.

Correction of the sidewalks is required by the contract and is not considered additional work.

(R4, tab 151)

13. Meltech completed certain additional work including the stair remediation, which included the removal and replacement of sections of the sidewalk to ensure the proper elevation of the stairs on both the north and south side. (App. mot. at 6; gov’t opp’n and cross-mot. at 12)

14. On June 12, 2017, Meltech submitted PCO No. 22 to the contracting officer describing a changed condition at Building 8609, increasing its costs and delaying performance. Specifically, appellant claims repair to the exterior stairs and the construction of new exterior walkways for Building 8609, arguing that the contract did not contain any reference identifying work to the exterior stairs or walkways, specifically:

Remove and replace the concrete sidewalk at the main south entry to raise it to proper height to make the bottom step consistent with the other existing steps. . . .

Flash patch the concrete sidewalk to feather it out to make the bottom step consistent with the other existing steps at the west stair on the north side. . . .

Form and pour new concrete topping slab on top of the existing sidewalk to raise the height of the concrete to make the bottom step consistent with the other steps at the east stair on the north side.

The Request for Equitable Adjustment (REA) sought costs in the amount of \$7116 and no time extension. (R4, tab 194)

15. On September 8, 2017, after hearing no response from the contracting officer, Meltech requested a contracting officer's final decision on its REA submitted on June 12, 2017. (R4, tab 208)

16. On July 6, 2018, the contracting officer issued a final decision denying appellant's REA in the amount of \$7,116. (R4, tab 242)

17. On July 17, 2018, Meltech filed its Notice of Appeal of the Contracting Officer's Final Decision (COFD) dated July 6, 2018. Appellant provided in its Notice of Appeal that "[o]n June 12, 2017, Meltech requested a change order in the amount of \$7,116 for modifications on the Project. On September 8, 2012, Meltech submitted a Request for COFD regarding the change order described above..." Meltech attached the COFD dated July 6, 2018, as Exhibit 1 to its Notice of Appeal.

18. On July 17, 2018, this appeal was assigned ASBCA No. 61706, and was consolidated with ASBCA No. 61694.

19. On August 29, 2018, Meltech filed its complaint in ASBCA No. 61706, alleging these same facts as set forth above in findings 11-17.

ASBCA No. 61768

20. On November 30, 2017, the government requested appellant to replace the sidewalk for Stair No. 2 which is showing cracks caused by “your company when Meltech Inc. was installing the underground utilities for the temporary office trailers and when heavy equipment was crossing that same sidewalk during the installation of the brick veneer facade, the metal roof panels, and the underground storm water piping for the roof downspouts.” During the pre-final punch list for the site which occurred on October 23, 2017, the government notified Meltech of the damage to the concrete sidewalk for Stair No. 2. Two photographs were attached to the November 30 request showing the condition of the sidewalk on or about January 14, 2015, before construction began, and on November 1, 2017, when construction was near completion. The first photograph taken before the start of construction revealed that the concrete sidewalk for Stair No. 2 was generally in good repair and free from cracks. The November 1, 2017 photograph showed significant cracking on the concrete sidewalk for Stair No. 2. (R4, tab 221 at 1)

21. On January 9, 2018, Meltech submitted RFP-0039 “Replace Extra Sidewalk to Stair 2,” to the contracting officer. Meltech described its claim as follows:

Meltech was requested in December to replace additional sections of the sidewalk that USACE allege was damaged by Meltech construction operations. Meltech is proceeding under protest with this work and will complete it as soon as there is a break in the weather. The additional cost to perform this work will be Five Thousand Four Hundred Forty-One Dollars (\$5,441). (emphasis removed)

(R4, tab 225 at 1). Attached to the submission was PCO No. 39 titled “Replace Sidewalk Not damaged by Meltech” dated January 9, 2018, with a cost breakdown totaling \$5,441, and a “Meltech Project Change Order” issued to its subcontractor, Premier Concrete. Premier’s Change Order No. 3 was executed on December 27, 2017, in the amount of \$3,600. (R4, tab 225 at 2-3)

22. On June 11, 2018, Meltech requested a contracting officer’s final decision on various claims including PCO No. 39 dated January 9, 2018 – Sidewalk Replacement. Meltech states that it “never received a response . . . and requests[] a final decision.” The contracting officer never issued a final decision on PCO No. 39. (R4, tab 240; gov’t answer dtd October 29, 2018, para. 62)

23. On August 23, 2018, Meltech filed a Notice of Appeal based upon a deemed denial of its REA submitted on January 9, 2018 “in the amount of \$5,441 for the costs of correction of an unforeseen site condition.” Appellant attached two exhibits to its

Notice of Appeal; Exhibit 1 “RFP-0039 Replace Extra Sidewalk to Stair 2,” dated January 9, 2018, and includes at page 2 a price breakdown with a subject: PCO No. 39 Replace Sidewalk Not Damaged by Meltech. Exhibit 2 includes the June 11, 2018 request for a contracting officer’s final decision on PCO Nos. 37-39.

24. On August 27, 2018, this appeal was assigned ASBCA docket No. 61768, and was consolidated with ASBCA No. 61694.

25. On October 1, 2018, appellant filed its consolidated complaint and provided a further explanation of the claim:

(Para. 58) In June 2017, Meltech replaced large sections of the sidewalk and reworked the approach to the exterior stairs at the Project as required by the fire marshal.

(Para. 59) This requirement was not foreseen by nor reflected in the Project plans and design.

(Para. 60) In order to comply with this unstated requirement, Meltech incurred an additional cost of \$5,441.

(Para. 61) On January 9, 2018, Meltech requested an equitable adjustment reflecting this additional cost.

(Para. 62) On June 11, 2018, Meltech requested a final decision on this from USACE.

(Para. 63) To date, USACE has not issued a decision and therefore the claim is deemed denied.

WHEREFORE, Meltech respectfully requests the Board grant its request and award it the sum of \$5,441 to account for the unforeseen modification to the design of the Project.

26. On October 29, 2018, the government filed its answer to the complaint (COUNT VII – APPEAL No. 61768) and provided in its response to appellant’s allegations:

(Para. 57) ANSWER: Admitted that Appellant replaced sections of the sidewalk and reworked the approach to the exterior stairs, but this was required by the

DB TOC. R4, tab 14, p.2. Section 01 10 00 Paragraph 3.9.1: “Site Design” Paragraph (c) “Walkways,” required Appellant to “Connect the building to a public walkway system and to parking with pedestrian walkways. . . .”, and comply with the National Fire Protection Association (NFPA) Life Safety Code. R4, Tab 4.

(Para. 58) ANSWER: Denied that replacing sidewalk and reworking approach to exterior stairs was an unforeseen requirement. See answer 57, above. Appellant was responsible for design in this DB TOC. R4, Tab 14, p. 2

(Para. 59) ANSWER: Denied that there was any unstated requirement. (See Answers 57-58, above.) Appellant was responsible for all costs incurred in performing this FFP DB TOC. R4, Tab 14, p. 2)

(Para. 60) ANSWER: Admitted that on the date indicated, Appellant requested an equitable adjustment in the amount of \$5,441. R4, Tab 142.

(Para. 61) ANSWER: Admitted that on the date indicated, Appellant made a demand for ADR, or in the Alternative, for a COFD regarding its PCO 37 – Add 4 Emergency Light; PCO 38 – Added Heat Trace Work; and PCO 39 – Sidewalk Replacement. R4, Tab 137.

(Para. 62) ANSWER: Admitted only that USACE has not issued a COFD

27. The government provided a declaration from Mr. Gary Hudson, a Civil Engineering Technician/Office Engineer, to support its opposition. Mr. Hudson has over 12 years of experience with the Federal Government during which he was assigned for 7 years to the Bay Area Office on Fort Meade. Mr. Hudson is not a contracting officer and had no authority to bind the government. He stated that he did not tell Meltech the work associated with the exterior stairs and sidewalk were changed conditions, nor that an RFP would be issued nor that they were owed any additional monies for this work. Mr. Hudson also states that he “did not tell Meltech that a modification had been issued to other contractors on this issue.” According to Mr. Hudson, “[t]he other Projects were similar buildings, but not identical. They were built in different years and seemingly by different contractors, and As-Constructed Drawings were not available for reference.” Given the lack of empirical data, he

believed that “TBUP Contractors would necessarily have to make surveys, measurements and analysis for design requirements to achieve compliance with codes, standards and regulations as required.” (Gov’t opp’n and cross-mot. dtd July 8, 20, ex. G1 ¶¶ 2, 3.a, 3.b, 3.c)

Specification

28. Specification Section 1.12.1.1 Site Layout Plan, provides:

The Contractor shall provide a site layout plan showing the proposed layout of the building, roads, parking and other paved areas, retaining walls, etc. The plan shall be provided to scale. While a grading plan is not required at this stage, the submittal should as a minimum demonstrate the intended drainage patterns and the requirements for major cut and fill or retaining structures. The intent of this submission will be to sufficiently demonstrate that the required functions of the site can be met within the site constraints given with a layout that is acceptable to the government. The submittal will include an explanation of objectives and factors influencing siting decisions and a general overview of major site features, such as building orientation, drainage patterns, parking provisions, traffic circulation and delivery access, provisions for the handicapped, security requirements, etc.

(R4, tab 3 at 99)

29. Specification Section 01 10 00, 2.0 SCOPE provides at 2.1 GENERAL:

The successful Offeror is to provide a renovated company barracks facility for an existing three story barracks structure, Building 8609, under the Training Barracks Upgrade Program at Fort Meade, Maryland. The scope of work includes complete renovation of the building structure to the requirements as defined herein to the extent practicable within the area limitations of the existing building envelopes and available funding. The intent of the renovation is to maximize the residential occupancy of the Building structure while providing the minimal required company command and control, supply, and administrative functions necessary to sustain the population and operate the Building facility. The area of

the renovated structure is not to exceed that of the original building.

(R4, tab 3 at 7)

30. Specification Section 01 10 00 at 2.2 BUILDING 8609 provides:

Building 8609 is a 38,490 SF three story, permanent barracks with a hammerhead shaped one story portion housing the main entry and administrative/community functions. The building was constructed circa 1955. The building was last renovated in 1975 when individual rooms and air conditioning were added. In 1982, the windows were replaced but do not meet current Anti-Terrorism Force Protection (AT/FP) requirements. Only limited maintenance and repair work has occurred since. The mechanical, plumbing and electrical systems are to be replaced. The roofs are to be replaced with a sloped, gabled roof assembly. Exterior walls are to be retrofitted or replaced with a complete brick veneer façade and masonry veneer base. New windows are to be installed throughout. The building envelope must prohibit water infiltration and mold must be remediated. The renovated building must meet AT/FP guidelines and concur with current Advanced Individual Training (AIT) Complex standards.

(R4, tab 3 at 7)

31. Specification Section 01 10 00, 2.3 SITE provides:

Except where Anti-Terrorism Force Protection (AT/FP) requirements are to be met and to make new utility connections, the contractor is to limit site work to within 5'0" of the structure. Anticipated work includes removal of landscaping that violates the AT/FP requirement, excavation to provide structural support for new brick with masonry base facades and grading to ensure positive drainage away from the facilities as well as ensuring the extent of the new brick-like façade is below grade, and to extend utility piping the point of connection. Verify all

plans site measures to comply with AT/FP requirements with Fort Meade DPW and the Baltimore District COE.

(R4, tab 3 at 7)

32. Specification Section 01 10 00, 3.0 FUNCTIONAL AND AREA REQUIREMENTS, 3.1 GENERAL provides in part:

The scope of the work area includes the building itself and five feet of area beyond the building. Refer to Section 2.0, Scope, for further explanation of the limits of construction.

(R4, tab 3 at 9)

33. Specification Section 01 10 00, 3.5 ACCESSIBILITY, provides in part:

Portions of the spaces in this Barracks 8609 facility are to meet handicapped accessible requirements outlined in the Architectural Barriers Act (ABA) Accessible Standards for Department of Defense (DoD) Facilities. These portions include the following spaces:

4. Exterior path of travel to and from accessible parking space(s)

* * *

11. Corridors and egress/exit paths leading to and from these above spaces

(R4, tab 3 at 11)

34. Specification Section 01 10 00, 3.6 FUNCTIONAL AND OPERATIONAL REQUIREMENTS, provides in part:

The features of the residential wing are to be designed to adequately accommodate the needs of either male or female trainees and provide secure ingress and egress to and from these buildings in accordance with Department of the Army and TRADOC policies.

(R4, tab 3 at 11)

35. Specification Section 01 10 00, 3.9 TECHNICAL REQUIREMENTS provides:

3.9.1 SITE DESIGN

Provide all site improvements necessary to support the renovation of the building facilities. The site is located in the southwest quadrant of the Fort Meade and is directly east of the southern end of 6th Armored Cavalry Road. The following site design requirements are applicable to the design of the proposed facility:

- (a) Design Standards and Codes: See Section 4 APPLICABLE CRITERIA
- (b) Site Planning Objective: Provide positive drainage away from facilities and incorporate Anti-Terrorism/Force Protection standards.
- (c) Walkways: Connect the building to a public walkway system and to parking with pedestrian walkways. Primary building entrances will be at least 8 feet wide. The minimum width of a walkway will be 5 feet. Exterior walkways shall be of Portland cement concrete construction, 4-inch minimum thickness over 4-inches of gravel bedding. Sidewalks will be designed in accordance with UFC 3-230-18FA.

(R4, tab 3 at 23)

36. Specification Section 01 10 00, 3.3.9.3 LIFE SAFETY AND FIRE PROTECTION provides in part:

- (a) Comply with NFPA 101 for building related egress and safety to life. Occupancy definitions in NFPA 101 shall be used to determine means of egress requirements. The existing building has dead end corridors which must comply with NAPA 101.

(R4, tab 3 at 25-26)

37. Specification Section 01 10 00, 4.0 APPLICABLE CRITERIA, 4.1 INDUSTRY CRITERIA, provides:

The publications referenced represent the most significant starting criteria for the RFP. In turn, these publications reference other codes, standards or manuals that may be of assistance to the designers and where applicable should be assumed to be all inclusive in the development of the design. . . . National Fire Protection Association (NFPA) 101 Life Safety Code

(R4, tab 3 at 30, 34)

38. Specification Section 01 10 00, 5.2.3 PAVEMENT states: “No new pavement will be added for this project, unless existing pavement is disturbed by activities necessary under this scope of work. In such an event, disturbed existing pavement will be restored to its’ original condition.” (R4, tab 3 at 39)

39. Specification section 01 05 00, paragraph 1.8 PROTECTION OF GOVERNMENT PROPERTY AND PERSONNEL (DEC 1975), provides:

1.8.1 Protection of Equipment. All existing Government owned equipment within the work area shall be protected by the Contractor from damage caused by construction operations. As a minimum, the Contractor shall cover all furniture, equipment and carpets in the work area with dust barriers and protect such items from any damage due to dust, vibration, water, heat or other conditions resulting from construction activities. Existing work damaged by construction operations shall be promptly repaired by the Contractor at his own expense.

(R4, tab 3 at 84)

40. Specification section 01 45 04, paragraph 3.2.2 Landscape, provides:

Trees, shrubs, vines, grasses, land forms and other landscape features indicated and defined on the drawings to be preserved shall be clearly identified by marking, fencing, or wrapping with boards, or any other approved techniques. The Contractor shall restore landscape

features damaged or destroyed during construction operations outside the limits of the approved work area.

(R4, tab 3 at 208)

41. Specification section 01 50 00, paragraph 1.10, RESTORATION OF STORAGE AREA provides:

Upon completion of the project and after removal of trailers, materials, and equipment from within the fenced area, the fence shall be removed and will become the property of the Contractor. Areas used by the Contractor for the storage of equipment or material, or other use, shall be restored to the original or better condition. Gravel used to traverse grassed areas shall be removed and the area restored to its original condition, including top soil and seeding as necessary.

(R4, tab 3 at 198)

42. Specification Section 01 45 04, paragraph 3.8.2 Pre-Final Inspection provides:

The Government will perform the pre-final inspection to verify that the facility is complete and ready to be occupied. A Government Pre-Final Punch List may be developed as a result of this inspection. The Contractor's CQC System Manager shall ensure that all items on this list have been corrected before notifying the Government, so that a Final inspection with the customer can be scheduled. Any items noted on the Pre-Final inspection shall be corrected in a timely manner. These inspections and any deficiency corrections required by this paragraph shall be accomplished within the time slated for completion of the entire work or any particular increment of the work if the project is divided into increments by separate completion dates.

(R4, tab 3 at 186-87)

43. Specification section 01 45 04, paragraph 3.10 NOTIFICATION OF NONCOMPLIANCE, provides:

The Contracting Officer will notify the Contractor of any detected noncompliance with the foregoing requirements. The Contractor shall take immediate corrective action after receipt of such notice. Such notice, when delivered to the Contractor at the work site, shall be deemed sufficient for the purpose of notification. If the Contractor fails or refuses to comply promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. No part of the time lost due to such stop orders shall be made the subject of claim for extension of time or for excess costs or damages by the Contractor.

(R4, tab 3 at 188)

44. Specification Section 01 45 04, paragraph 3.15 POST CONSTRUCTION CLEANUP, provides:

The Contractor shall clean up all areas used for construction in accordance with Contract Clause: "Cleaning Up." The Contractor shall, unless otherwise instructed in writing by the Contracting Officer, obliterate all signs of temporary construction facilities such as haul roads, work area, structures, foundations of temporary structures, stockpiles of excess or waste materials, and other vestiges of construction prior to final acceptance of the work. The disturbed area shall be graded, filled and the entire area seeded unless otherwise indicated.

(R4, tab 3 at 213)

45. Section 00700 – Contract Clauses incorporates by reference 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991), which states:

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or

property that occur as a result of the Contractor's fault or negligence. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(R4, tab 2 at 41; 48 C.F.R. § 52.236-7)

46. Section 00700 – Contract Clauses incorporates by reference 52.236-9 PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984), which states:

(a) The Contractor shall protect from damage all existing improvements and utilities (1) at or near the work site, and (2) on adjacent property of a third party, the locations of which are made known to or should be known by the Contractor. The Contractor shall repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

(R4, tab 2 at 42; 48 C.F.R. § 52.236-9)

Design

47. Amendment No. 6 to the RFP provided at Item 60:

Question: The scope of work requires the 50 year old building to be completely analyzed to meet current design codes. It is highly unlikely a 50 year old building will meet current building and design codes. How do we determine design solutions and related construction costs to bring an existing building up to current building code requirements since this would occur after project award?

Answer: It was assumed that the contractor/designer would do a code analysis as part of the conceptual design effort for the proposal to at least determine what upgrades need to be accomplished by this renovation.

After award this design will continue to detail how to meet the necessary codes, or what variances from the code can be accomplished.

(App. supp. R4, tab 293 at 12832)

48. Meltech's March 11, 2015 Demolition Plan (95%) provided for the removal of "DNE 16 remove concrete stairs, railings, landings, and associated components in their entirety up to existing wall." In an update dated March 19, 2015, the Final 95% Demolition and Hazmat Submission required Meltech to "[r]emove two (2) existing exterior concrete stairs and footing on south side of dormitory as indicated. Remove sidewalks, curbs, gutters, and street light bases as indicated." (R4, tab 34 at 3-4; tab 36 at 23)

49. DESIGN COMPLETE (100%) SUBMITTAL EXCLUDING EXTERIOR ENVELOPE DECEMBER 4, 2015, and provides for work to be performed at two stairway entrances on the north side of the building to include "sawcut and remove ex. concrete (slab and sidewalk) and replace with new sidewalk (See Sheet C-103)." On both the north and south side of the building certain designated areas required work to include "existing asphalt to be stripped and designated as a 'no parking' area," and Meltech was to demolish concrete pads in designated locations and then add some concrete pads in others. (R4, tab 59, G-Anno-Text)

50. Drawing C-103 included the layout for the replacement of the new sidewalk. (R4, tab 60)

51. Meltech's Design (100%) Submittal dated December 4, 2015, provided at "Issued for Construction" ("IFC") drawing C-101 provides notification in the general notes at 8 that "ALL EXISTING SITE FEATURES DAMAGED/DEMOLISHED DURING CONSTRUCTION OF PROPOSED FEATURES INCLUDING BUT NOT LIMITED TO: ROADWAY PAVEMENTS, CONCRETE CURBS, FENCES, GATES, SIDEWALKS AND STREET LIGHTS SHALL BE REPLACED IN KIND AND GRADE. (R4, tab 59)

52. Drawing C-103 provides the following notification at General Note 9: "EXISTING PAVEMENT SHALL NOT BE DAMAGED FOR INSTALLATION OF STABILIZED CONSTRUCTION ENTRANCE OR THROUGHOUT CONSTRUCTION ACTIVITIES." (R4, tab 60)

Meltech's Proposal

53. Meltech's proposal at section 1.7.8 Site/Civil provides in part that "except where ATFP requirements are to be met and where new utility connections occur, the

site work will be limited to within 5'-0" of the structure . . . Connect the building to a public walkway system and to parking with pedestrian walkways." (R4, tab 25 at 8-9)

54. When addressing life safety in its proposal, Meltech provided:

1.15.5.7 Life Safety

The complete life safety and building code analysis for the project will be developed and modified as the design evolves. The design shall comply with NFPA 101, International Building Code, UFC 1-200-01 and UFC 3-600-01.

An allowable height and area calculation will be performed to determine the appropriate type of construction. As a result, the corresponding fire resistance rating for the structural elements will be provided.

The building occupant load, number of exits, exit capacity, travel distance, common path of travel and dead-end corridors will be provided in accordance with NFPA 101 and the IBC. The building is designed using a mixed-use non-separate approach, the most restrictive requirements from the various occupancy types will apply to the whole building. Based on this approach the most restrictive occupancy is terms of means of egress will be applied throughout. With this approach the appropriate fire resistance rated walls for the occupancies and room separation will be provided.

The building was provided with portable fire extinguishers and protected throughout by an automatic fire sprinkler system. The building will be provided with a combined fire alarm system. See the *Fire Protection Systems* and *Fire Alarm & Detection Systems* above for additional information.

(R4, tab 25 at 25)

55. Meltech's proposal provides a clear understanding that points of entry/exit are part of the structure. Meltech's proposal at Section **1.3 Assumptions and Techniques**, provides "[i]t is assumed that there are only minor civil site features such as sidewalks, dumpster pad, equipment pad and positive drainage around the new building façade." And provided further at **1.7.1 Architecture**, that it would provide "[d]edicated exterior entrances that can be secured and do not obstruct entry/exit into other areas of basement will be provided as well as a continuous corridor that provides two paths of egress from the two Arms Vaults spaces." Under **1.7.3 Interior Design**, Meltech states: "The separation will be a nonpermanent partition containing a door with an

alarm and equipped with panic hardware to allow access between separated areas to comply with egress requirements for life safety during emergency conditions. (R4, tab 25 at 5-7)

DECISION

The Underlying Claims in 61706 and 61768

We begin by defining the claim(s) that are before us. The government asserts that Meltech has plead an identical cause of action in ASBCA No. 61706, as it did in ASBCA No. 61768. The government argues that a comparison of the two causes of action are based upon the same facts. (Gov't mot. at 13-14) While we agree that appellant has presented us with two claims that appear to be identical, our examination reveals they are not.

Both claims began with the identification by the fire marshal of code violations. (SOF ¶¶ 7, 25). ASBCA No. 61706 starts by describing RFI-0093 as the first notification of the code violations received from the Base Fire Department concerning the “steps leading to the north and east side of the building.” In response, Meltech stated that it planned to replace the concrete sidewalk in front of the two stairs on the north side of the building and would provide a drawing of the intended repair. Meltech advised that “this will take care of the first riser height issue.” Additionally, a repair of the steps on the North side of the building required that they be sloped since the step “now slopes backwards.” Meltech was also required by the Base Fire Department to install nosing on all treads on all stairs. (SOF ¶ 7) RFI No. 0095 identified the issue of the “riser height at north stairs” pointing out that the sidewalks are too low where they abut the stairs creating an out-of-code riser height for the first step, claiming that this condition is outside of the 5’ building contract limits. (SOF ¶ 9) Meltech identifies this issue again in RFI No.107 as “irregular riser height at north stairs.” (SOF ¶11) In the REA, Meltech describes the changed condition as “repair to the exterior stairs and the construction of new exterior walkways for Building 8609 . . . [r]emove and replace the concrete sidewalk at the main south entry to raise it to proper height . . . [f]lash patch the concrete sidewalk to feather it out . . . at the west stair on the north side . . . pour new concrete topping slab on the top of the existing sidewalk to raise the height . . . at the east stair on the north side.” (SOF ¶ 14)

Little detail is provided by appellant on its claim that comprises ASBCA No. 61768. In the notice of appeal, appellant points to its January 9, 2018 REA seeking an adjustment of the contract price in the amount of \$5,441 and referenced its June 11, 2018 request for final decision with attached exhibits 1-2. (SOF ¶ 23) While this correspondence references the corrections made to the stairs and sidewalk as required by the fire marshal pursuant to change order proposal PCO No. 22, the complaint also mentioned that the work associated with this claim was for the additional work

requested in December 2017 “to replace additional sections of the sidewalk that USACE allege was damaged by Meltech construction operations.” (SOF ¶¶ 21-22, 25) Exhibit 2 to the Notice of Appeal which is a request for a contracting officer’s final decision, references “PCO No. 39 – Additional sidewalk replacement - \$5,441”, however, PCO No. 39 is not attached as a reference. The documentation relates back to November 30, 2017, when the contracting officer advised Meltech of an issue with regard to cracks in the sidewalk to stairway No. 2 which he claimed to be caused by Meltech when installing the underground utility work and the use of heavy equipment across the sidewalk during the installation of the brick veneer facade. The contracting officer attached two photographs, one taken on January 14, 2015, and the other taken on or about November 1, 2017. A comparison of those photographs reveal significant cracking along the sidewalk to stair No. 2 having occurred during the period between January 14, 2015, and November 1, 2017. (SOF ¶ 20) Appellant seeks \$5,441 as an equitable adjustment under ASBCA No. 61768. (SOF ¶¶ 23-25)

Appellant filed its summary judgment motion in ASBCA No. 61768, and defines this claim as consisting of “repairs to the exterior stairs and the construction of new exterior walkways for Building 8609.” (App. mot. at 1) Throughout its motion appellant describes the facts that support the claim set forth in ASBCA No. 61706, including its references to RFIs 0093, 0095, 0107, PCO No. 22, and the July 6, 2018 COFD. (App. mot. at 5-6) Predictably, the government concluded ASBCA Nos. 61706 and 61768 set forth the same claim and suggested that both appeals be addressed together. The government focused its opposition and cross-motion for summary judgment on both appeals. (Gov’t opp’n and cross-mot. at 13) In its reply to the governments opposition and cross-motion, appellant focused entirely on the claim that underlies ASBCA No. 61706. (App. opp’n dtd August 7, 2020) In preparation for the oral arguments on the motion for summary judgment and the cross-motion for summary judgment, the parties agreed to present arguments on ASBCA Nos. 61706 and 61768 together. Unfortunately, during oral argument the parties only addressed the underlying facts in ASBCA No. 61706, never unraveling the mistake made in the pleadings and motions. With that background, we will proceed with our consideration of appellant’s motion for summary judgment and the government’s cross-motion for summary judgment of ASBCA Nos. 61706 and 61768.

Parties Contentions

Appellant argues that “[t]here is no disagreement that new construction was required to meet certain code requirements, but the RFP contains no provision requiring the Design-Builder, prior to bid, to verify that the existing construction was code compliant or, after award, correct pre-existing non-compliant work at no cost to the Government.” (App. mot. at 2) (emphasis omitted) The government responds that all bidders were aware of the condition of the building and the work required. The RFP put all bidders on notice that they would be required to bring a 1950s-era building

into compliance with present-day code. (Gov't opp'n and mot. at 4). More specifically, that the "contract required that the project comply with applicable codes, including the NFPA 101 for building-related egress and safety." (Gov't opp'n and mot. at 2) In addition, the site visit of building 8609 revealed the then current conditions of the stairs. (Gov't opp'n and mot. at 8)

Appellant relies on Amendment No. 6 and opines that the response in Amendment No. 6 supports its argument that they need not consider code compliance prior to the submission of the bid, citing the very language in item 60, that the government relies upon to further illustrate that bidders should consider code compliance prior to submitting its bid. (App. mot. at 2-3, gov't opp'n and mot. at 21; SOF ¶ 47)

Appellant also relies on its understanding as noted in the Meltech Project Review Meeting minutes – Agenda at 19.12.10 that "Gary Hudson indicated that this was a change order on other projects and that a RFP would probably be coming out for Meltech to price up." (App. mot. at 5; app. supp. R4, tab 302 at 22). The government challenges appellant's contention and submits a declaration from Mr. Hudson directly contradicting appellant's statements. They state further that even if the statements were made by Mr. Hudson, he was not a contracting officer and had no authority to change the requirements of the contract. (Gov't opp'n and mot., ex. G-1 at 1-2) We agree with the government here. Mr. Hudson was an engineering technician/office technician, not a contracting officer. (SOF ¶ 27). Meltech's contention that Mr. Hudson had the authority to change the contract lacks evidentiary support. Meltech produced no evidence in its motion, opposition, or during oral argument that could be understood to imply that Mr. Hudson had the authority to obligate the government to pay Meltech for work they were performing. Even if the events had occurred exactly as Meltech described, and those events could be considered constructive changes, Mr. Hudson had no authority to modify the contract. *Winter v. Cath-Dr/Balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007), (where a party contracts with the government, apparent authority of the government's agent to modify the contract is not sufficient; an agent must have actual authority to bind the government); *ECC, Int'l*, ASBCA 55781, 13-1 BCA ¶ 35,207 at 172,738; *States Roofing Corp.*, ASBCA Nos. 55500, 55503, 09-1 BCA ¶ 34,036 at 168,348 (appeal dismissed 333 F. App'x 526 (2009)).

Relying on the contract provisions that "limit the site work to within 5'0" of the structure," Meltech argues further that the RFP failed to put bidders on notice to include contingencies to bring the existing building up to the standards of current codes and contend that if the "design has to change because there are undisclosed conditions in or around the existing building, the changes clause is applicable to pay for the added work." (App. reply and opp'n at 2-3, 7) The government responds that the specifications included several requirements that put Meltech on notice of the work associated with the stairs and sidewalks, and that demonstrate that work associated

with stairs and sidewalks were not outside the contract. Meltech should not have been surprised by the work they performed to meet the requirements set forth in section 1.15.5.7, specifically requiring compliance with NFPA 101. (Gov't opp'n and mot. at 16) The contract also addressed entrances and accessibility, and required Meltech to "provide secure ingress and egress to and from these buildings." (Gov't opp'n and mot. at 19) The RFP "described a design-build contract, where the contractor was required to both design the necessary renovations, including code compliance, and to construct it." (Gov't opp'n and mot. at 20)

Standard of Review for Motion for Summary Judgment

The applicable provisions are well settled. Summary judgment is appropriate only if there is no genuine issue as to any 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); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Colonna's Shipyard, Inc.*, ASBCA No. 59987 *et al.*, 16-1 BCA ¶ 36,518 at 177,902. When the parties have both filed motions for summary judgment, as is the case here, we must evaluate each motion on its own merits. *Spindler Constr. Corp.*, ASBCA No. 55007, 06-2 BCA ¶ 33,376 at 165,462. We are not required to grant judgment as a matter of law for one side or the other. Judgment in favor of either side is only proper if there exists no material facts in dispute. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). In the course of evaluation of a motion for summary judgment, "our task is not to evaluate or weigh competing evidence but only to determine whether a genuine disputed issue of material fact exists that is suitable for resolution at trial." *Ellis Environmental Group, LC.*, ASBCA No. 56227, 08-2 BCA ¶ 33,911 at 167,796; *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849 at 157,393 (quoting *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)); *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. A material fact is one that may affect the outcome of the decision. *Liberty Lobby*, 477 U.S. at 248-49; *Colonna's Shipyard*, 16-1 BCA ¶ 36,518 at 177,902.

It is the moving party's burden to establish 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*, 812 F.2d at 1390-91; *Colonna's Shipyard*, 16-1 BCA ¶ 36,518 at 177,902. Once the moving party has met its burden of establishing the absence of disputed material facts, then the non-moving party must set forth specific facts, not conclusory statements or bare assertions, to defeat the motion. *Mingus Constructors*, 812 F.2d at 1390-91; *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984); *Colonna's Shipyard*, 16-1 BCA ¶ 36,518 at 177,902. Where a party opposes summary judgment they must provide a clear challenge with support to demonstrate material facts in dispute. If

there is a failure to contradict the evidence, the Board may accept the moving party's undisputed version of the facts. *Sinil Co.*, ASBCA No. 55819, 55820, 09-2 BCA ¶ 34,213 at 169,132.

Decision on ASBCA No. 61706⁵

With the corrections made above, we proceed with our evaluation of ASBCA No. 61706, and settle the question whether Meltech's work on stairs and sidewalks, to bring the stairs into compliance with code requirements, specifically NFPA 101, was work performed outside the contract requirements.

The parties do not differ in their request; each seeks summary judgment, relying on identical provisions of the contract terms to support its understanding that the other party is responsible for the cost associated with ensuring that the stairs are code compliant. (App. mot. dtd. June 4, 2020 at 1-3; gov't opp'n and mot. dtd. July 7, 2020 at 15-18; app. reply dtd. August 7, 2020 at 1) This dispute involves a question of contract interpretation. Contract interpretation is a matter of law. See, e.g., *ThinkQ, Inc.*, ASBCA No. 57732, 13 BCA ¶ 35,221 at 172,825. The rules of contract interpretation require that we first look to the plain language of the contract. *Langkamp v. United States*, 943 F.3d 1346, 1349 (Fed. Cir. 2019); *Banknote Corp. of America, Inc. v. United States*, 365 F.3d 1345, 1353 (Fed. Cir. 2004); *Hercules, Inc. v. United States*, 292 F.3d 1378, 1380 (Fed. Cir. 2002). We "appl[y] the principle of contract interpretation that possibly conflicting contract provisions should be read harmoniously." *Hometown Fin., Inc. v. United States*, 409 F.3d 1360, 1369 (Fed. Cir. 2005) (citing *Guar. Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 999 (11th Cir. 1991)).

[P]rovisions of a contract must be so construed as to effectuate its spirit and purpose . . . an interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.

Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (quoting *Ariz. v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978)).

Here, the contract required appellant to renovate a three story barracks – Building 8609 – with a scope of work that required a complete renovation of the

⁵ As described above, in the Motion for Summary Judgment on ASBCA No. 61768, appellant argued the underlying facts that form the basis of its claim in ASBCA No. 61706. As a result, we treat appellant's Motion for Summary Judgment on ASBCA No. 61768, as a Motion of Summary Judgment on ASBCA No. 61706.

building structure. Following the explicit requirements as set forth in the specification, and to the extent practicable, Meltech was to perform the work within the limitations of the existing building envelope and not to exceed that of the original building. (SOF ¶¶ 28-31) Meltech argues first that the solicitation did not require it to determine pre-bid what work was required to meet code, and the work they performed to bring the stairs into compliance with code was work outside the renovated structure.

What defines the structure can be found in the materials provided to offerors prior to bid, with ample references in the specification that indicate that the renovation of the building structure included the stairs used for ingress and egress. Practically speaking, access to and from the building structure necessitated code compliant stairs. (SOF ¶¶ 33-37) The first indication of work to be performed on the stairs is located at Appendix G, the drawings. The drawings provide a schematic of the existing building and included each set of stairs on the exterior of the building. (SOF ¶¶ 50, 52) Work was to be performed on the exterior stairs, including the removal of two staircases and the addition of one at the main entrance. (SOF ¶¶ 48-50) We recognize that unless required by AT/FP requirements, the contractor was to limit site work to within 5'-0" of the structure. The contract specifically provides at Section 3.0 that the scope of the work area includes the building itself and five feet of area beyond the building. (SOF ¶¶ 29, 31-32) But, those restrictions do not apply to the work for which appellant seeks a change to the contract.

In this design-build, fixed-price contract, the contractor was tasked with designing the structure "to provide secure ingress and egress to and from these buildings." (SOF ¶ 34) The contractor was also required to make designated areas of the structure handicap accessible, and include the exterior path to and from accessible parking space(s), and egress/exit paths leading to and from these spaces. (SOF ¶ 33) In order to provide secure ingress and egress to the building, the contractor was required to meet current code requirements, including life safety and fire protection, NFPA 101 for building egress and safety to life. (SOF ¶¶ 36-37) This work was to be performed as required by the contract, and necessitated consideration of these provisions by the contractor prior to bid.

Appellant complains they did not have enough time during the site visit to identify code deficiencies. (App. mot. dtd June 4, 2020 at 2; app. reply dtd. August 7, 2020 at 1-3) However, bidders were made aware of the condition of the building structure. (SOF ¶ 29-30) The government forewarned bidders that this was a building built in the 1950s, last upgraded in 1975, and had limited maintenance and repair work done over the years. (SOF ¶ 30) When asked during the solicitation phase whether "[t]he scope of work requires the 50 year old building to be completely analyzed to meet current design codes," the government responded "it was assumed that the contractor/designer would do a code analysis as part of the conceptual design effort for the proposal to at least determine what upgrades need to be accomplished by this

renovation. After award this design will continue to detail how to meet the necessary codes, or what variances from the code can be accomplished.” (SOF ¶ 47) Pre-bid questions and answers used by bidders in estimating and submitting bids are highly relevant to the post award interpretation of contract provisions. *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 995-97 (Fed. Cir. 2014).

Meltech claims it did not consider NFPA 101 compliance because of the government’s response in Amendment No. 6, arguing that the answer to Item No. 60 directs the bidder to the belief that all considerations of code compliance would be dealt with after award and in the design phase. The government’s response to Item No. 60 cannot be interpreted in the manner suggested. The language, “[i]t was assumed that the contractor/designer would do a code compliant analysis as part of the conceptual design effort for the proposal,” can mean nothing other than an identification of the contractor’s responsibility to consider code compliance issues in the submission of its bid, to include the requirements of NFPA 101. At minimum, the response from the government in Amendment No. 6 imposes a duty upon Meltech to inquire further. *See Interstate Gen. Gov’t Contractors, Inc. v. United States*, 980 F.2d 1433, 1435 (Fed. Cir. 1992); *Southwest Marine, Inc.*, ASBCA No. 53561, 02-1 BCA ¶ 31,834 at 157,280; *Newsom v. United States*, 676 F.2d 647, 650 (Ct. Cl. 1982). We conclude that in this instance, the government’s response so clearly addressed the need to consider code compliance in its bid, that the response imposed a duty upon the contractor to inquire if it needed further clarification of its responsibilities prior to bid. In addition, in the response to a similar inquiry addressing determinations of pre-bid design requirements, the government again reinforced the contractor’s responsibilities pre-bid when it responded to Item 61 that “it was assumed that the contractor/designers would do a preliminary analysis as part of the conceptual design effort for the proposal to at least determine what upgrades need to be accomplished by this renovation.” (App. supp. R4, tab 293 at 36) Meltech’s interpretation of Item 60 is not supported by the government’s response and is unreasonable. *E.g. ECC Int’l LLC*, ASBCA Nos. 61176, 62029, 21-1 BCA ¶ 37,824 at 183,694-695 (appellant’s reliance on the government’s response in a Solicitation question to bolster its interpretation was not supported by the answer and found to be unreasonable).

Moreover, Meltech’s proposal demonstrates that they possessed a clear understanding of the work to be performed, and conducted a thorough analysis relating to the egress and ingress. (SOF ¶55) The proposal specifically addressed “Life Safety” and provided that the design shall, among other things, comply with NFPA and the “number of exits, exit capacity, travel distance, common path of travel . . . will be provided in accordance with NFPA 101 . . .” (SOF ¶ 54) While Meltech assumed there would be only minor civil site features, they included things such as sidewalks, including a link between the building and the public walkway system and to parking with pedestrian walkways. (SOF ¶¶ 53-55) Meltech’s proposal offers a complete understanding of the points of entry/exit in the structure. We will not allow Meltech to

retrospectively distance itself from a document that demonstrates a complete understanding of the responsibilities of the contract, including compliance with NFPA 101. The work performed by Meltech to make the stairs compliant with NFPA 101 was foreseeable.

The parties do not dispute that the stairs required repair to meet the requirements set forth in NFPA 101. (SOF ¶¶ 36, 55) However, the solution implemented to meet the requirements of NFPA 101 was entirely up to Meltech and its DOR. The design solution included the replacement of the “concrete sidewalk in front of the two stairs on the North side of the building [to] take care of the first riser height issue.” (SOF ¶¶ 7, 9, 11) Meltech provided what it believed to be the best alternative to ensure that the stairs were code-compliant, a necessary requirement of the contract. The government did not take issue with the solution proposed by Meltech, and the government admits that Meltech brought the stairs into compliance with NFPA 101. (SOF ¶¶ 8, 10, 12)

Nevertheless, appellant seems to suggest one of two things, either that the stairs are not part of the renovation because they are not part of the structure, or that because the work required to bring the stairs into compliance causes it to perform work beyond the 5’0” perimeter of the structure. In either case, appellant suggests that the government is responsible for paying Meltech to bring the stairs into compliance through its chosen design solution. Both positions are unreasonable. To say the stairs are not part of the structure, would necessitate that we have a structure without a means of egress or ingress. The structure that makes up Building 8609 must include stairs, and we find the stairs to unambiguously be part of the structure. With regard to the latter position, which we believe is the one appellant may be advancing, that because their design choice to correct the code deficiency on part of the structure may have taken them outside the five-foot area, they are not responsible for that cost.⁶ The design risk of complying with the requirements of the specification are borne by the contractor in a firm fixed-price, design-build contract. *John C. Grimberg Co.*, ASBCA No. 58791 *et al.*, 18-1 BCA ¶ 37,191 at 181,052, *rev’d on other grounds*, *United States Army Corps. Of Eng’rs v. United States*, 817 Fed.Appx. 960 (2020). Code-compliant stairs were a requirement of this firm fixed-price, design-build contract, and the cost to meet that requirement cannot be shifted to the government. *Lakeshore Eng’g Servs., Inc. v. United States*, 748 F.3d 1341, 1347 (Fed. Cir. 2014) (“The essence of a firm fixed-price contract is that the contractor, not the government, assumes the risk of unexpected

⁶ Even if we were to agree with that argument, Meltech has failed to present any evidence that the work performed to bring the stairs into compliance with the contract was beyond the five-foot distance around the structure. If there is a failure to contradict the evidence, the Board may accept the government’s undisputed version of the facts. *See Sinil*, 09-2 BCA at 169,131.

costs.”); *Edinburgh Int’l*, ASBCA No. 58864, 16-1 BCA ¶ 36,227 at 176,744 (“the risk of increased performance costs in a firm-fixed-price contract, absent a clause stating otherwise, are on the contractor,”) (quoting *Chevron U.S.A., Inc.*, ASBCA No. 32323, 90-1 BCA ¶ 22,602 at 113,426); *see also United States v. Spearin*, 248 U.S. 132, 136 (1918) (“where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.”)

The plain language of this contract supports only one reading. “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.” *TEG-Paradigm Envtl., Inc. v. United States.*, 465 F.3d 1329, 1338 (Fed. Cir. 2006). As far as we can ascertain from the record before us, the specifications involved here were both clear and reasonable. If there was an issue with the stairs that required repair in order to meet the requirements of NFPA 101, that repair was within the scope of work required by the contract. We hold that it was Meltech’s responsibility to perform this work under the terms of the contract.

Decision on ASBCA No. 61768

The parties have provided little to work with in their quest for summary judgment on ASBCA No 61768. On November 30, 2017, the government requested appellant to “replace the existing concrete sidewalk for Stair No. 2 which is showing too many cracks caused by . . . actions in the field during construction.” (SOF ¶ 20) Other than this letter with the attached photographs, and PCO No. 39, we know that the work was being performed by Meltech under protest. (SOF ¶ 21) There is nothing in the record to indicate when the work was performed and when it was accepted by the government. Nonetheless, there exists nothing in the filings that challenge the fact that the work was completed by Meltech, and was accepted by the government. Our examination of the photograph taken before construction reveals that the concrete sidewalk for Stair No. 2 was in generally good condition and free from cracks. The photograph taken toward the end of construction on or about November 1, 2017, contained significant cracking throughout the sidewalk leading to the No. 2 stairs. (SOF ¶ 20) There has also been no challenge to the authentication of the photographs.

Appellant filed a motion for summary judgment on ASBCA No. 61768 but mistakenly identified the wrong appeal number. (App. mot. dtd June 4, 2020) Appellant asserts that the claim addresses code compliance of the stairs. As set forth in appellant’s motion the “(1) south stair remediation, which included removal of sections of the sidewalk, and rebuild to raise the elevation of the sidewalk and thereby reduce the existing height of the first step that was too high per code; and (2) north sidewalk, which required similar work and replacement of the step.” (App. mot. dtd June 4, 2020 at 2)

Appellant submits that on June 12, 2017, PCO No. 22 was submitted requesting compensation for replacing the sidewalk to the main south entry. (App. mot. dtd June 4, 2020 at 6) Appellant explains further that the work performed was the subject of a COFD issued on July 6, 2018. (App. mot. dtd June 4, 2020 at 6). Nowhere in its reply does appellant address the facts related to its appeal assigned as ASBCA No. 61768, i.e., PCO No. 39) and for which no contracting officer's decision was ever issued. Instead, ASBCA No. 61768 was an appeal based upon a deemed denial. (SOF ¶¶ 25-26) Because these are the facts that support appellant's claim in ASBCA No. 61706, not the claim in ASBCA No. 61768, we then treated appellant's Motion for Summary Judgment on ASBCA No. 61768, as a Motion of Summary Judgment on ASBCA No. 61706. We therefore conclude that the only motion before us on ASBCA No. 61768 is from the government.

The government's opposition raised the issue of the similarity of the two appeals and asserts that Meltech pled virtually an identical cause of action in ASBCA No. 61706. As such, the government addressed Appeal Nos. 61706 and 61768 together in both its opposition and Cross-Motion for Summary Judgment. (Gov't opp'n dtd. July 7, 2020 at 13) The government maintains that the scope of our review is limited to the sufficiency of the allegations set forth in the complaint and states that "[w]hile Meltech may have intended the appeals to address separate issues, they do not, and under federal law, factual allegations made by litigants in their pleadings are binding on them." (Gov't opp'n at 13) (citing *Kimber Baldwin Designs, LLC v. Silv Comm.s, Inc.*, 225 F.Supp.3d 670 (S.D. Ohio 2016).

To the contrary, the scope of our review is not limited to considering the sufficiency of allegations set forth in the complaint, but includes much more. The primary document setting forth the claim is not the complaint, *per se*, but the contractor's claim submitted to the contracting officer. *Lockheed Martin Integrated Sys, Inc.*, ASBCA Nos. 59508, 59509, 17-1 BCA ¶ 36,597 at 178,281. The Board's rules require only notice pleading. *The Boeing Co.*, ASBCA No. 54853, 12-1 BCA ¶ 35,054 at 172,197-98. In this regard, Board Rule 6(a) provides . . . This pleading shall fulfill the generally recognized requirements of a complaint, *although no particular form is required*. . . consequently, when weighing an appeal before us we will look to the complaint, its exhibits, and also to the claim submitted to the contracting officer. *Matcon Diamond, Inc.*, ASBCA No. 59637, 15-1 BCA ¶ 36,144 at 176,407. Our review of the complaint, notice of appeal, and underlying claim, reveal that Appeal Nos. 61706 and 61768 are not identical, nor do they rely upon the same set of facts. While the submissions related to ASBCA Nos. 61706 and 61768 both address sidewalk replacement, the similarity ends there, and they provide separate and distinct claims.

It was during the pre-final inspection on October 23, 2017, that the government provided notice of the damaged condition that occurred on the concrete sidewalk leading to Stair No. 2. (SOF ¶ 20) As required by specification section 01 10 00,

5.2.3, no new pavement was required unless pavement is “disturbed by activities necessary under this scope of work” pavement that is disturbed will be restored to its original condition. (SOF ¶ 38) When the contractor is notified of a noncompliance, they “shall take immediate corrective action.” (SOF ¶ 43) Repair was not made after the October 23rd notification, and the contracting officer followed up on November 30, 2017 to again address the damage to government property and the need to repair at the contractor’s expense. (SOF ¶ 20) The contracting officer reminded Meltech of the responsibility under the contract to repair government property damaged by construction operations, and that the CQC Manager is responsible to ensure that all items on the Pre-Final Punch List are corrected. (SOF ¶ 42) It was the responsibility of the contractor to protect government property within the work area and all “existing work damaged by construction operations shall be promptly repaired by the Contractor at his own expense.” (SOF ¶¶ 40-43, 45-46)

Based upon the evidence, if the damage to the concrete sidewalk for Stair No. 2 was caused by construction operations, Meltech is responsible for the property damage. The contract charged the contractor with the protection and repair of any damage to structures, equipment, vegetation, improvements and utilities. (SOF ¶¶ 39- 41, 44) Under the Permits and Responsibilities clause, the contractor is responsible for all damage to property that occurred as a result of its fault or negligence. (SOF ¶ 45) The drawings also provided warnings related to site features that were damaged during construction, to include sidewalks, and should damage occur, Meltech was responsible to replace “in kind and grade.” (SOF ¶¶ 50-52)

The government has put forth sufficient evidence in the record to meet its burden on the motion for summary judgment, and the burden now shifts to Meltech. Since the cross-motion seeks summary judgment on ASBCA No. 61768, Meltech must set forth specific facts showing that there is a genuine issue for trial on the underlying claim in ASBCA No. 61768. *Liberty Lobby*, 477 U.S. 242, 248 (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). Instead, appellant advances no challenge. Even after the government raised the similarity of the claims, appellant failed in both its reply and opposition, to address the corrected facts of the underlying claim. Appellant chose not to present facts that demonstrate its entitlement to the claim that makes up ASBCA No. 61768. Likewise, there was no evidence raised during oral argument challenging the facts before us. Appellant simply ignores the facts that form the basis for its claim under ASBCA No. 61768.

The standards set forth in FED. R. CIV. P. 56 guide us in resolving the motion for summary judgment here. *J. W. Creech, Inc.*, ASBCA Nos. 45317, 45454, 94-1 BCA ¶ 26,459 at 131,661; *Allied Repair Serv., Inc.*, ASBCA No. 26619, 82-1 BCA ¶ 15,785 at 78,162-63. There has been no credible challenge to the contracting officer’s determination that the damage to the sidewalk was caused by anything other than construction operations. Likewise, there has been no showing to

support a finding that the government caused the damage, or that it occurred at the behest of a third party. The evidence indicates that the construction area was turned over in good condition, and any damage that occurred as a result of construction operations was to be repaired at Meltech's sole cost and expense. (SOF ¶ 39) The contract is filled with references informing Meltech of the care required to protect government property, real and personal, and if repair or replacement is necessary it will be at the contractor's expense. (SOF ¶¶ 39-41, 44, 46) We find that the Government's punch list items came well within its rights under the clause. (SOF ¶¶ 42-43) The specifications involved here were both clear and reasonable, and the government did no more than insist upon compliance with the requirement to repair the damaged property at its own cost.

Silence will simply not suffice -- this lack of evidence in support of the allegations is sufficient basis upon which to deny the appeal. Appellant has not proven that it is entitled to be compensated by the government for the work performed in repairing the existing concrete cracked sidewalk leading to Stair No. 2. While the evidence produced by the non-moving party is to be believed and all justifiable inferences drawn in its favor, Meltech failed to raise any facts that could make a difference in the outcome of the case. If there is a failure to contradict the evidence, the Board may accept the government's undisputed version of the facts. *See Sinil*, 09-2 BCA at 169,131. The absence of any evidence challenging the facts in this appeal leads us to conclude that there are no material facts in dispute, making ASBCA No. 61768 ripe for summary disposition.

For a proper challenge, appellant would need to provide facts inconsistent with the conclusion reached by the contracting officer. Without such facts, we are unable to conclude that the government improperly assigned responsibility for the damage to the sidewalk to Meltech. The un rebutted evidence indicates that Meltech had possession of the site, and was responsible under the Permits and Responsibilities Clause, among other provisions in the contract, to care for and to repair any damage at its cost. (SOF ¶ 45)

Having failed to meet its burden, summary judgment may be granted. *Alutiq Commercial Enters., LLC*, ASBCA No. 61503, 20-1 BCA ¶ 37,506. On this record, appellant has not proved that it is entitled to be compensated by the government for the work performed in repairing the existing concrete cracked sidewalk for Stair No. 2. Accordingly, this appeal is denied.

Conclusion

We have considered the parties' other arguments, but find those arguments are unnecessary to address. The appeals are denied.

Dated: December 17, 2021



STEPHANIE CATES-HARMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals



OWEN WILSON
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 Nos. 61706, 61768, Appeals of Meltech Corporation, Inc., rendered in conformance with the Board's Charter.

Dated: December 17, 2021



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