ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
M.A. Mortenson Company	)	ASBCA No. 50151
	)	
Under Contract No. DACA85-94-C-0031	)	

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OPINION BY ADMINISTRATIVE JUDGE TUNKS
PURSUANT TO RULE 11

This is an appeal from a contracting officer's final decision denying a claim for an equitable adjustment of $1,064,391 for over-excavation of material. Only entitlement is at issue. The appeal was submitted on the record pursuant to Board Rule 11.

FINDINGS OF FACT

1. On 16 September 1994, the Government awarded the subject contract in the amount of $120,579,000 to appellant to build a medical center (Phase II) at Elmendorf Air Force Base, Anchorage, Alaska (R4, tab 1).

2. Among other clauses, the contract included FAR 52.243-0004 CHANGES (AUG 1987) and FAR 52.233-0001 DISPUTES (DEC 1991) (R4, tabs 11, 12).

3. Section 02201 of the earthwork specification (specification) included the following relevant provisions:

1.3 DEFINITIONS

1.3.2 Classified Fill and Backfill

Classified fill and backfill shall be approved, well-graded nonfrost susceptible materials consisting of sand, gravel, broken stone, or similar material . . . containing not more than 60 percent by weight passing the No. 4 sieve. All material shall be free of frozen lumps. Material shall not exceed a size equaling 2/3 of the specified maximum lift thickness.

. . . .

1.6 SUBSURFACE INVESTIGATIONS

Explorations consisting of drill holes and/or test pits have been made . . . . [T]he Government does not guarantee that [other] materials . . . will not be encountered, or that the proportions of the various materials will not vary from those indicated [on the Drawings] . . . . The drill holes shown on the Drawings reflect the soil conditions at those locations as they existed prior to Phase One Construction activities . . . .

. . . .

3.2 EXCAVATION

3.2.1 General

The excavation shall conform to the dimensions, elevations and lines indicated on the drawings for each building and structure except as specified below . . . . The extent of excavation for the removal of undesirable materials . . . has been determined from the results of the explorations and has been shown on the drawings as the excavation line. Any excavation beyond the authorized dimensions, elevations and line shall be backfilled with compacted classified material without cost to the Government . . . . Undercutting will not be permitted.

Excavated material conforming to the contract specification requirements for materials to be used for embankments, fills, backfilling or grading . . . shall be considered as suitable . . . . Where excavated surfaces are of suitable material for placing slabs and footings, such surfaces shall be uniformly compacted to a depth of 2 feet . . . to at least 95 percent compaction . . . .

. . . .

3.3 FILL AND BACKFILL

3.3.1 Subgrade

No fill or backfill shall be placed until the top 6 inches of subgrade has been compacted to 95 percent . . . .

3.3.2 Classified Fill and Backfill

Where classified fill or backfill is . . . required . . . it shall be placed in layers not exceeding 8 inches in thickness, uniformly compacted to at least 95 percent compaction . . . .

. . . .

3.8 MINIMUM COMPACTION

Tests . . . specified in paragraph QUALITY CONTROL shall be performed on each layer of compacted material . . . . The Contractor shall remove and replace nonconforming materials and shall recompact and retest failed and replaced areas until the specified degree of compaction is obtained . . . .

3.9 QUALITY CONTROL

The Contractor shall . . . ensure compliance with . . . the items listed below:

> 3.9.1 Limits of Excavation
>
> Limits of excavation are controlled according to line and grade.
>
> . . . .
>
> 3.9.5 Density Tests
>
> [D]ensity tests are required beneath structures with on-grade concrete floor slabs and when uniform compaction requirements are specified for beneath footings and slabs.
>
> The number of tests shall apply to each layer of material placed.

(R4, tab 15) Paragraphs 3.9.5.1, 3.9.5.2 and 3.9.5.3 provided the required number of tests (*id*.).

4. Drawing C3.11 contained site sections and details for the building excavation. The drawing showed the elevation of the existing ground (a dashed line), the concrete slab (double solid lines), the footings (diagram) and the "limit of excavation" line (a solid line). The drawing included three sets of notes which are also relevant. The first set consisted of notes with arrows pointing to the "limit of excavation" line, which stated as follows:

> LIMIT OF EXCAVATION
> COMPACT TOP 6" OF
> EXISTING MATERIAL TO 95%
> TYP

The second set consisted of notes with arrows pointing to the area between the slab and footings and the "limit of excavation" line, which stated "2' MIN TYP" or 24" or "24" MIN." The third set of notes, which also pointed to the area between the slab and footings and the "limit of excavation" line, stated as follows:

> CLASSIFIED MATERIAL
> @ 95% COMPACTION

(R4, tab 19)

5. Appellant argues that we should consider certain notes on drawing C3.16 in interpreting the excavation requirements for the building foundations. Drawing C3.16 relates to the parking lot, sidewalk and driveway pavement foundations. In the absence of

any evidence showing that the notes relating to the pavement foundations applied to the building foundations, drawing C3.16 is irrelevant.

6. Drawing S0.02 contained the following pertinent general notes:

> FOUNDATIONS AND EARTHWORK
>
> . . . .
>
> 2. FOOTING BEARING ON 2' - 0" OF RECOMPACTED SOIL PER NOTE NO. 4 BELOW AND CIVIL DRAWINGS. THE EXCAVATIONS SHALL EXTEND A MINIMUM OF TWO FOOT BELOW EXISTING GRADES.
>
> 3. CONCRETE SLABS ON GRADE: ON 2' -0" OF RECOMPACTED SOIL PER NOTE NO. 4 BELOW.
>
> 4. COMPACTION REQUIREMENTS (MIL-STD-621A)
> BELOW FOOTINGS - 95%
> BELOW SLABS AND PAVEMENT - 95%
> UNPAVED AREAS - 90%
> MAXIMUM LIFT - 8" LOOSE DEPTH
>
> 5. SUBGRADE: SCARIFY AND RECOMPACT TOP 6" OF SOIL BENEATH FILL, PER NOTE NO. 4 ABOVE.

(R4, tab 23)

7. The drawings did not identify the areas to be excavated with "hash marks" or diagonal lines (R4, tabs 16, 17, 18, 19, 20, 21, 22, 23, 24).

8. Note 3 on drawing C1.1 indicated that the Government performed a foundation investigation in August 1992. Although the foundation report was not incorporated into the contract or made available to bidders prior to award, appellant does not dispute that the data from the Government's explorations were included on Drawings C8.1 through C8.10 (the soil logs) (app. br. at finding 18; ASR4, tabs 8, 10). The Government also conducted some seismic studies prior to award. These studies were likewise not made part of the contract or provided to bidders prior to award (R4, tabs 11, 12, 13).

9. The Government issued the notice to proceed on 6 October 1994 (R4, tab 1).

10. By letter dated 16 February 1995, the contracting officer issued the following guidance regarding the extent of the excavation required by the contract:

> The limits of excavation are stated on drawing S0.02 . . . and are depicted in cross section in . . . drawing C3.11. As a minimum, you are to perform excavation to the "Limit of Excavation" line . . . on the contract drawing cross sections (C3.11) regardless of the suitability of the material . . . .

(R4, tab 3)

11. On 23 February 1995, appellant advised the contracting officer that it regarded the contracting officer's guidance as a change order, explaining as follows:

> Paragraph 3.2.1 states . . . that excavation is to be carried to the depth shown on the drawing "…for the removal of undesirable materials…" In the succeeding paragraph, this specification also states, "where excavated surfaces are of suitable material for placing slabs and footings such surfaces shall be uniformly compacted to at least 95% compaction. . ." Drawing C3.11 shows clearly that the material above the excavation limit line and below footings and slabs is to be classified material at 95% compaction. Nowhere can we find a requirement that all material within 2'of the bottom of slabs and footing shall be removed and recompacted. If that was the intent, then the . . . specification could have simply stated: Excavate all areas to 2' below bottom of footing or slab. Backfill to footing or slab subgrade with classified material compacted to 95%.

(R4, tab 4)

12. On 16 December 1995, appellant submitted a certified claim for $1,064,391 for the work (R4, tab 9).

13. The contracting officer denied the claim on 11 July 1996, stating as follows:

> [T]he contract drawings and specifications clearly required the contractor to excavate a minimum of two foot [sic] below the slabs and foundation footings, scarify the subgrade and recompact the top six inches, then backfill with classified fill from the excavated material . . . and recompact to 95 percent compaction in eight inch lifts to the lines and grades depicted on the contract drawings. I . . . find no merit [for] the contractor's contention that this contract only required that two

> foot [sic] of material below slabs and foundations footings be compacted in place without excavating.

(R4, tab 1)

14. Appellant appealed the denial of its claim to this Board on 29 August 1996 (R4, tab 2).

15. In support of its appeal, appellant presented the affidavit of Mr. Craig Southorn, a "project executive" for this contract. The affidavit states that Mr. Southorn, Mr. Jeff Gort and Mr. Mark Weyant prepared the earthwork portion of appellant's bid. According to Mr. Southorn, they interpreted the solicitation to mean that no excavation was required in areas where they expected to find classified material beneath the footings and slabs. (Southorn decl. ¶ 5) As a result, appellant "did not include in its bid . . . the effort necessary to excavate to a depth of two feet beneath footings and slabs for the are[a] south of grid line 12," which included "approximately 60% of the footings and 56% of the slab area." (Southorn decl. at ¶ 6) No supporting documentation was provided. We are not persuaded without more support that this is the interpretation appellant relied on when it prepared its bid, particularly because the affidavit is inconsistent with appellant's answer to the Government's interrogatory No. 6. Interrogatory No. 6 requested the identity of "each person who prepared the . . . bid estimate or provided supervisory or managerial responsibilities for preparing, reviewing or approving the . . . bid for the excavation and compaction portion" of the work. In reply, appellant named Mr. Mark Ruffino, Chief Estimator, Mr. Jeff Gort, Cost Estimator and Mr. Ralph McCoy, Vice President. Neither Mr. Southorn nor Mr. Weyant was named.

16. Appellant also presented the affidavit of Dr. James W. Mahar, Ph.D., an engineering geologist. Dr. Mahar was asked to offer opinions as to whether appellant's "planned method of excavation would have satisfied the government's design requirements." In summary form, his opinions were as follows:

> a) The [Government's] directive to overexcavate . . . provided . . . no enhanced foundation performance or improved safety from seismic activity . . . than would have been provided [by] Mortenson's approach . . . .
>
> b) The result of Mortenson's approach would have been that all unsuitable material within the two-foot zone . . . would have been discovered and remedied.
>
> c) Nothing in the [foundation report or] Seismic Reports . . . supports the . . . assertion [advanced by the Government in discovery] that poorly graded gravel lenses within the two foot

> depth beneath slabs and footings had to be removed due to "the probability of differential compaction . . . during a large earthquake "[or] . . . that "the presence of poorly graded gravel lenses . . . was the controlling factor for the [foundation] design recommendations . . . ."
>
> d) If the poorly graded gravel . . . was a seismic risk or a design concern, these risks or concerns would have been identified in the [contract] documents.
>
> e) If poorly graded gravel lenses . . . were . . . a seismic risk, the Government's directive to overexcavate the additional two feet provided no enhanced protection from such risk.

(Mahar decl. ¶ 3)

17. Dr. Mahar also stated that the absence of hash marks or diagonal lines above the "limit of excavation" line indicated that the area did not have to be excavated (Mahar decl. at ¶ 13).

18. In his affidavit, Dr. Mahar used the term "recompact" as follows: the Government's directive "to overexcavate, backfill, and recompact the two feet of soil below all footings and slabs provided no enhanced foundation performance or improved stability . . . " (Mahar decl. at ¶ 27).

DECISION

The sole issue in this appeal is whether the contract, read as a whole, required appellant to excavate two feet below the slabs on grade and footings. Since this is a request for an equitable adjustment, appellant bears the burden of proof. *Environmental Safety Consultants, Inc.*, ASBCA No. 47498, 00-1 BCA ¶ 30,826 and cases cited therein.

Appellant argues that the contract only required removal of unsuitable material, *e.g.*, material that did not meet the contract definition of "classified material," within the two-foot zone beneath the slabs and footings. As a result, appellant asserts that the contracting officer's directive to remove all material to the "limit of excavation" line regardless of the suitability of the material was a compensable change to the contract. Alternatively, appellant invokes the rule of *contra proferentum*, arguing that its interpretation was reasonable. The Government argues that the contract, read as a whole, required appellant to excavate a minimum of two feet below the slabs and footings and that, in any event, appellant's interpretation was unreasonable.

In interpreting a contract, we are guided by the following principle:

> [A] court must give reasonable meaning to all parts of the contract and not render portions of the contract meaningless. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983). Otherwise stated, . . . the contract should be construed in its entirety "so as to harmonize and give meaning to all its provisions." *Thanet Corp. v. United States* 219 Ct. Cl. 75, 82, 591 F.2d 629, 633 (1979) . . . .

M.A. Mortenson Co. v. United States, 29 Fed. Cl. 82, 96 (1993).

Appellant asserts that paragraph 3.2.1, taken as a whole, required removal of only unsuitable material. Among other things, appellant advances the following arguments in support of its interpretation. First, the second sentence of paragraph 3.2.1 indicated that the extent of excavation for unsuitable material was the excavation line, meaning that suitable material did not have to be excavated. Second, the latter portion of paragraph 3.2.1 stated that suitable material need not be excavated so long as the compaction requirements were met. Third, the general notes on drawing S0.02 were ambiguous. Fourth, the drawings did not distinguish the material to be removed with hash marks or diagonal lines. Fifth, appellant's planned method of construction would have satisfied all the concerns of the Government's foundation report, seismic reports and other design documents.

Reading the contract as a whole, we are persuaded that appellant was required to remove all existing material to the "limit of excavation" line, regardless of the character of the material to be excavated. Paragraph 3.2.1 required the excavation to "conform to the dimensions, elevations and lines indicated on the drawings . . . except as specified below." Drawing C3.11 indicated that the "limit of excavation" line was a minimum of two-feet beneath the slabs and footings. Drawing C3.11 contained notes with arrows pointing to the zone beneath the slabs and footings, which stated that the material within the zone was to be classified material, compacted to 95 percent. Paragraphs 3.3.2 and general note 4 on drawing S0.02 indicated that classified fill was to be placed in lifts of not more than 8 inches, with each lift compacted to 95 percent. Paragraph 3.8 made appellant responsible for "recompact[ing] and retest[ing] failed and replaced areas until the specified degree of compaction [is] obtained" before placing the next layer and paragraphs 3.9.5 *et seq*., established the number of compaction tests that were to be performed on "each layer."

Appellant's remaining arguments are likewise unpersuasive. We do not agree that the second sentence of paragraph 3.2.1 renders the contract ambiguous. Read in context with the rest of paragraph 3.2.1, that sentence indicated that the "limit of excavation" line delineated the extent of excavation for suitable and unsuitable materials. The notes on drawings C3.11 and S0.02 relating to scarification and compaction of the top 6 inches of

material below the "limit of excavation" line are clear, particularly when read in conjunction with the requirement to remove all materials to the "limit of excavation" line. We also disagree that the term "recompacted" as used in general notes 2, 3 and 5 on drawing S0.02 was ambiguous. Appellant's expert used the term at paragraph 27 of his affidavit in exactly the same manner. In view of the numerous provisions requiring that classified fill be placed in 8 inch lifts, the absence of hash marks or diagonal lines to identify the area to be excavated is irrelevant.

In the alternative, appellant argues that we should apply the rule of *contra proferentum.* In order to invoke the rule of *contra proferentum,* the contractor's interpretation must be within a "zone of reasonableness." *Metric Constructors, Inc. v. NASA* , 169 F.3d 747, 751 (Fed. Cir. 1999). Appellant's interpretation does not meet this test because it renders numerous contract provisions meaningless, including portions of paragraphs 1.3.2, 3.8 and 3.9.5 *et seq*. and drawings C3.11 and S0.02. Appellant also failed to prove that it relied on its present interpretation in preparing its bid, another prerequisite to application of the rule. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1429-30 (Fed. Cir. 1990); *International Fidelity Insurance Co.,* ASBCA No. 44256, 98-1 BCA ¶ 29,564 at 146,552. Appellant also requests us to consider extrinsic evidence--the foundation report, the seismic reports and design data—in assessing the reasonableness of its interpretation, asserting that its planned method of constructing the foundation would have satisfied all the Government's design concerns. Extrinsic evidence may not be used to vary the meaning of an otherwise clear contract. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). Moreover, the Government is entitled to strict compliance with its specifications, regardless of whether appellant's alleged method of performance would have satisfied the Government's design objectives. *See Maxwell Dynamometer Co. v. United States*, 181 Ct. Cl. 607, 628, 386 F.2d 855, 868 (1967).

We have considered all the other arguments advanced by appellant and have found them to be without merit.

The appeal is denied.

Dated: 23 May 2001

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50151, Appeal of M.A. Mortenson Company, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals