ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Larry D. Barnes, Inc. d/b/a/ Tri-Ad Constructors	)	ASBCA No. 51473
	)	
Under Contract No. N62742-95-C-1315	)	

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In this appeal under a contract to install a new sprinkler and fire alarm and detection system in a secure facility, appellant claims increased costs allegedly resulting both from a constructive change in the contract's security requirements and from ceiling obstructions constituting a type II differing site condition. Both entitlement and quantum are before us. We dismiss the appeal in part and deny it in part.

FINDINGS OF FACT

1. By date of 18 April 1996, respondent awarded appellant the subject contract to install a new preaction sprinkler system and fire alarm and detection system for the basement and second floors of Building 80 at Camp Smith, HI for the firm fixed price of $116,874. (R4, tab 1 at 6, § 01010 at 1) The contract completion date, as awarded, was 14 November 1996. (R4, tab 1 at 6) There are no disputes regarding the electrical work associated with the fire alarm and detection work; the appeal relates solely to the sprinkler system. (Appellant's Closing Brief at 1; tr. 1/95, 3/125)

2. Appellant is a family-owned construction business (tr. 1/28, 2/221). Larry Barnes is appellant's president, with 51 percent ownership (tr. 1/26, 2/204). His father, E.C. "Bud" Barnes, is vice president, with 49 percent ownership (tr. 1/26, 2/204). Rick E.

Barnes, one of Larry Barnes' brothers, was the superintendent for the contract work (tr. 1/21).

3. Before bidding, appellant had had no previous experience with Building 80, which is a high-security facility housing the command and control center for the commander-in-chief, Pacific Fleet (tr. 3/10). The building has four stories and a basement. It is a windowless concrete structure, with concrete floors and multiple concrete walls. It was constructed in the 1960s, and its sole use has been as a command and control center; it has never been a hospital (tr. 1/174, 3/9-10). Each floor in the building covers approximately 7,000 square feet (tr. 3/49; *see also* R4, tab 13 at 2). We find that Building 80 contained large numbers of computers, and that preaction sprinkler systems, which are pressurized air systems that delay the application of water to a fire to avoid unnecessary damage to electronic equipment, are commonly installed in computer centers (tr. 1/37-38, 170-71, 2/104-05, 3/28, 99).

4. The contract contained various standard clauses, including: FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); and FAR 52.243-4, CHANGES (AUG 1987). (*Id*. § 00711 at 1)

5. The contract also contained specifications. They included section 01010, SUMMARY OF WORK. Paragraph 1.7, EXTRAORDINARY SECURITY REQUIREMENTS, imposed restrictions on the contractor's movements within Building 80. (R4, tab 1, § 01010 at 1, 4, 5) Paragraph 1.10, PRECONSTRUCTION CONFERENCE, contained subparagraph 1.10.1, Field Investigation, which provided:

> Prior to the start of any site work, shop drawing, and material submittal preparation and submission, meet with the Contracting Officer's representative at the job site: (1) to take actual field measurements to ensure proposed materials/equipment will fit in the allocated spaces; (2) record locations and capacities of existing utilities; and (3) identify hazardous conditions and materials.

(*Id*., at 6) Section 01300, SUBMITTALS, provided in paragraph 1.3.5, CONTRACTOR'S RESPONSIBILITIES, that appellant was to "[d]etermine and verify field measurements, materials, field construction criteria; review each submittal; and check and coordinate each submittal with requirements of the work and Contract documents." (*Id*., § 01300 at 3)

6. The specifications also included section 15340, FIRE EXTINGUISHING SPRINKLER SYSTEMS (PREACTION), which incorporated by reference National Fire Protection Association (NFPA) standard 13, Installation of Sprinkler Systems (1994). Section 15340

further provided in paragraph 1.2, SYSTEM DESCRIPTION, that appellant was to "[d]esign and provide new and modify existing automatic preaction fire extinguishing sprinkler systems for complete fire protection coverage throughout the basement and second floor of Building 80." In paragraph 1.3, SPRINKLER SYSTEM DESIGN, section 15340 also required appellant to "[d]esign automatic preaction fire extinguishing sprinkler systems in accordance with the required and advisory provisions of NFPA 13." It further provided that appellant was to "[d]esign and provide each system to give full consideration to blind spaces, piping, electrical equipment, ducts, and other construction and equipment in accordance with detailed working drawings to be submitted for approval." Paragraph 1.4, SUBMITTALS, required appellant to:

> [s]ubmit the following in accordance with Section 01300, "Submittals." [*See* finding 5] [Respondent's] Fire Protection Engineer delegates the authority to the Quality Control (QC) Representative's U.S. Registered Fire Protection Engineer for review and approval of submittals required by this section. Submit to [respondent's] Fire Protection Engineer one set of all approved submittals and drawings immediately after approval but no more later than 15 working days prior to final inspection.

7. Paragraph 2.2 of section 15340, PIPE SLEEVES, required appellant to install such sleeves "where piping passes entirely through walls, floors, and roofs." Subparagraph a of paragraph 2.2 also provided for "Sleeves in Masonry and Concrete Walls," permitting the contractor to employ "[c]ore drilling of masonry and concrete" instead of pipe sleeves under certain circumstances. (*Id*., § 15340 at 6)

8. The contract also included drawings (R4, tab 2). They contained symbols and abbreviations denoting: (a) the locations of existing diffusers, where cold air exited from air conditioning ducts above the suspended, or drop, ceilings (tr. 1/179); (b) the locations of existing light fixtures, which were fed by conduits above the suspended ceilings (tr. 1/180-81); and (c) concealed conduit in the suspended ceiling or walls which fed outlets in the walls and floors (tr. 1/181). The plans also showed the water main at the building stairway accompanied by notes directing the contractor to "PROVIDE PREACTION SPRINKLER PROTECTION FOR ENTIRE BASEMENT" and for "ENTIRE SECOND FLOOR," respectively (R4, tab 2 at sheets 3, 4 of 13; tr. 1/119-20).

9. It is undisputed that the contract provisions, taken as a whole, constitute a performance specification (tr. 2/300, 3/53, 103-04, 127, 129-30; *see also* 1/119-20, 214).

10. On 7 February 1996, respondent conducted a site inspection for interested bidders. Appellant did not attend because Rick Barnes was at home due to an unspecified "personal family related problem" (tr. 1/48-49, 226-27; R4, tab 3 at 1).

11. By date of 13 February 1996, appellant submitted its bid for $116,874, which was under the Government estimate of $170,000 (R4, tab 4 at 1). Appellant assumed six months for performance, including four months for the installation work and a month each for mobilization and demobilization (tr. 1/41). Appellant "[a]bsolutely" anticipated that it would install the sprinkler piping in a continuous, uninterrupted sequence (tr. 2/240).

12. By letter to appellant dated 16 February 1996, respondent requested bid confirmation. In its letter, respondent asked appellant to "pay particular attention" to specified factors in reviewing its bid. Among them was paragraph c, which provided that, "[s]ince Building 80 has existing HVAC ductwork, it may be difficult to locate the sprinkler piping." (R4, tab 4 at 1) Rick Barnes acknowledged that, by the reference in paragraph c, respondent put him on notice before his site inspection to check out the ductwork, which could "make it very tough" to install the sprinkler piping; Bud Barnes testified that it did not cause appellant to reconsider its bid inasmuch as appellant anticipated "some obstructions" above the ceilings consisting of "ducts that might pose a problem here and there" (tr. 1/167, 2/235-36).

13. On 21 February 1996, after bid and before award, respondent provided a special site visit for Rick Barnes alone, pursuant to his request (R4, tabs 3, 5 at 2; tr. 1/68-69, 161, 168). When he arrived, it was obvious to him that Building 80 was a highly secured site (tr. 2/16-17). While he had performed "minor" sprinkler work before, this contract was the first sprinkler work that he had attempted on an existing building, and he later characterized it as "really a technical fire alarm installation" (tr. 1/38, 207-08). His site visit lasted approximately two hours and he visited all four floors and the basement (tr. 1/71-72, 168). Respondent furnished him with a ladder, which he used to look in the area between the suspended ceilings and the underside of the floor above (tr. 1/168).

14. In the basement of Building 80, there are stairwells, a mechanical room, an electrical room and an emergency generator room, none of which had any drop ceilings that could conceal obstructions (tr. 3/19). Elsewhere in the basement, Rick Barnes was not permitted to enter a room denominated as the SKIF room, which contained classified equipment; appellant's costs associated with this room were later the subject of modification A00003 (tr. 1/72-74, 142, 153, 2/8; *see* finding 27). Aside from the SKIF room, Rick Barnes testified that there were a "few rooms," otherwise unidentified, that he was not permitted to enter because of security considerations (tr.1/72-73). In the remainder of the basement, he saw numerous computers, but concluded that, apart from distribution panels in the ceilings, the wiring for the computers was connected through the floors (tr. 1/170-71).

15. The second floor of Building 80 contains a hallway in the middle and rooms off to the side (tr. 1/74). Rick Barnes testified that he was given access to about 50 percent of the second floor because of security considerations and because the offices were then in

use (tr. 1/75, 170, 3/70). He testified that "when I found I couldn't gain access to certain rooms, it kind of brought a big concern to me" (tr. 1/83). There is no evidence that respondent's representatives made any representations to appellant regarding above-ceiling conditions in the rooms to which he had access (tr. 1/83).

16. In the second floor areas which Rick Barnes did inspect, he attempted to push up tiles in the drop ceiling and view the space above at "30 to 40" locations, but was able to do so "[l]ess than 50 percent" of the time (tr. 1/78, 169). Where he was unable to push up the tiles, it "told me there was something laying right on top of the tile" (tr. 1/169-70). Where he was able to push up the tiles, he "saw the air handling units, . . . the electrical conduits. . . [and] a few spots that were cluttered" (tr. 1/82). He interpreted this as evidence of "a slight deal of difficulty, not anything of great volume like I encountered" (*id*.). He also concluded that the interior walls that he observed were non-load bearing partition walls, which did not extend above the suspended ceilings (tr. 1/172, 2/44). At the end of his site visit, "[a]fter popping up what few ceiling tiles I could, I felt I could do it [for the bid price], but still in the back of my mind, I could not gain access to some of the rooms so I wasn't completely sure" (tr. 1/85, 2/231; *see also* 2/290-91).

17. No witness who testified at trial was present at the site visit conducted on 7 February 1996, and we find no evidence that that site visit was more or less informative than the special pre-award site visit provided to appellant (*see* tr. 1/48-49, 2/92, 2/281, 3/95, 3/133; *see also* findings 10, 13-16).

18. By letter to respondent dated 4 March 1996, appellant confirmed its bid (R4, tab 7; tr. 1/186).

19. We find that, before award, respondent made the as-built drawings for Building 80 available to appellant and other bidders, as is its practice, but that no one requested those drawings (tr. 3/125). We further find that, after award, they were made available to appellant, but that appellant did not request them (tr. 1/128-29, 2/202-03).

20. In late April, after award, Rick Barnes and appellant's fire control engineer made a second site visit (tr. 1/188-90, 2/13). This site visit lasted about three hours (tr. 1/266, 2/14). Respondent made a ladder available to Rick Barnes and Thomas McClintock, appellant's fire protection engineer, together with the computer-assisted (CAD) drawings for the project with the accompanying computer disks (tr. 1/184-85, 2/13). They pushed up "approximately 20" ceiling tiles and took measurements inside the ceiling (tr. 1/267, 2/15). As a result, they developed a "pretty good idea" regarding how the HVAC duct system, and the ceiling lighting system, were laid out (tr. 2/15-16).

21. On 1 May 1996, the parties held a preconstruction conference. (R4, tab 47) Among other topics, "[s]ecurity and pass requirements were discussed" (*id*. at 2).

22. By date of 28 May 1996, appellant submitted its fire sprinkler shop drawings. We find that, in accordance with paragraph 1.4 of section 15340 (*see* finding 6), respondent did not approve these shop drawings (R4, tab 51; tr. 3/19-23, 76-82). They were prepared by appellant's fire protection engineer and approved by appellant's registered quality control fire protection engineer (R4, tab 51; tr. 1/184-85, 3/20-22, 72-74). Note 1 of the fitter notes on each drawing read: "INSTALL DROPS IN AREAS AS INDICATED, SOME FIELD ADJUSTMENTS IN PIPING LOCATIONS MAY BE REQUIRED DUE TO EXISTING CONDITIONS AND PIPING CONFLICTS." (R4, tab 51; tr. 1/193) In addition, Rick Barnes and appellant's quality control fire protection engineer certified, *inter alia*, that the system "can be installed in the allocated spaces" (*id*.).

23. After mobilizing, appellant began work on the jobsite on 26 June 1996 (tr. 1/87, 193). Appellant started with electrical work in the basement (tr. 1/89). Thereafter, on 22 July 1996, appellant started sprinkler work, core-drilling holes in the basement (tr. 1/90, 194). Rick Barnes testified, and we find, that, "[a]fter reviewing my records . . . , most of the time there were three working on the job," although the average was four (tr. 2/19-20). In addition to Rick Barnes, who served as superintendent, appellant's crew typically consisted of Troy Hinote, a skilled plumber with no prior experience installing a sprinkler system such as this, together with a laborer and possibly an electrician (tr. 2/20, 183-84).

24. In performing the sprinkler installation work, appellant encountered above-ceiling conditions that it memorialized in "obstruction logs" submitted with its claim (*see* finding 28). We find that, of the obstruction logs that were part of the claim package: (a) 43 percent cite HVAC ducts as obstructions; (b) 10 percent cite electrical cable trays and junction boxes as obstructions; and (c) the remainder cite miscellaneous problems, and are divided among those that cite (i) structural components of the building, (ii) the SKIF room, the four inch water main and escort problems, which were covered by modifications (*see* finding 27), and (iii) painting wall fittings, which were covered by the contract (tr. 3/122-24, 148-55; *see also* tr. 1/176-77).

25. The record contains abundant testimony regarding these obstructions. While Rick Barnes anticipated installing the sprinkler system in "[p]retty much straight lines," (tr. 1/122), he testified that "the amount of obstacles above these ceilings were so intense that we couldn't make it 10 feet without having to turn around something and then once we diverted around something, it would change . . . [the] height of our sprinkler pendents" (tr. 1/125). He had expected "a few obstructions but not 90 percent of your pipe would have to be rerouted" (tr. 1/255). He testified that the majority of the obstructions were HVAC ducts, but that appellant also encountered numerous cable trays and electrical conduits (tr. 1/176-77). In addition, he testified that concrete walls extending above the suspended ceiling to the underside of the floor above were "totally unexpected" and a "surprise" (tr. 1/139, 2/37). For his part, Mr. Hinote characterized the above-ceiling area as a "spider web of conduits" and testified that high walls going above the suspended ceiling to the underside of the floor above were a major problem (tr. 2/119, 131-32). On both direct and

cross examination, Mr. Hinote estimated that appellant had adequate space for installation only ten percent of the time and was obstructed ninety percent of the time (tr. 2/127-28, 170).

26. We find that appellant completed work on the sprinkler system on 24 or 25 October 1996 (tr. 1/194-95; R4, tab 31, reports nos. 83, 84). We further find that appellant, having begun work on the system on 22 July 1996 (*see* finding 23), completed the system in three months, which was within the contract completion date and within the four month period that appellant allowed for installation in its estimate (tr. 1/41, 194-98, 2/36, 178-79; *see* findings 1, 11).

27. Following performance, the parties entered into several modifications, including: bilateral modification No. A00003, which increased the contract price for additional costs associated with (a) the SKIF room in the basement and (b) relocation of a four inch water main; bilateral modification No. A00004 effective 25 March 1997, which increased the contract price for "delay costs due to several unscheduled delays caused by the unavailability of prearranged [security] escorts" (R4, tab 1 at 3-6).

28. By letter to the administrative contracting officer dated 11 January 1997, appellant submitted its certified claim for "all added costs . . . that as of now have not been reimbursed," in the amount of $90,505.91. Asserting that "[o]ur claim has three parts," appellant characterized them as: "1. 'Install and Survey Obstructions (Basement Only)' . . . 2. 'Obstructions, 2nd Floor' . . ." and the third part, which was for sprinkler pendant reordering because of differing site conditions above the ceilings. (R4, tab 19 at 1) The first two parts of the claim were derived from cost proposals submitted to the contracting officer by dates of 13 September 1996 (basement) and 15 November 1996 (second floor), respectively (R4, tabs 9, 16; tr. 1/146, 149) The cost proposals in turn were based upon 215 obstruction logs that had been prepared by Rick Barnes and that were incorporated by reference. We find that certain of these obstruction logs, including the nine logs relied upon by appellant in support of its argument supporting jurisdiction over its constructive change claim, relate to delays from miscellaneous causes, to the SKIF room, or to security escort delays; that they have either been resolved by modifications Nos. A00003 and A00004 (*see* finding 27) or are otherwise not part of the present claim; and that these matters differ from the issue of changes to the contract's security requirements (tr. 1/142-43, 152-54, 177, 197, 201-04, 2/7-11, 261). In particular, we find that:

- while obstruction log 1 relates to "overhead and profit for 1 day of contract delay," Rick Barnes testified both that log 1 "is not included" in the present claim and that appellant has no claim for delay (tr. 1/143-44, 197);
- log 1-A also relates to "overhead & profit for 1 day of contract delay";

- log 3 relates to a "delay for whole crew waiting for secured gate . . . to be opened (key was lost);"
- logs 11, 179, 183, 187 relate to security escort delays, with log 183 reciting such a delay for the SKIF room;
- log 151 relates to "Contract delay Room # 207, 209 (could not enter due to being occupied);"
- log 186 relates to wire installation "to new control panel from existing control panel on 1st floor" and has no evident relevance to any jurisdictional argument; and
- none of the foregoing logs recites a problem that, on its face, relates to a change in the contract's security requirements.

(R4, tab 9, logs 1, 1A, 3, 11; tab 16, logs 151, 179, 183, 186, 187)

29. By letter to the contracting officer dated 31 January 1997, appellant "set-aside" its claim to pursue negotiations that proved unsuccessful and appellant then reinstated its claim by letter to the contracting officer dated 24 May 1997. (R4, tabs 21, 29; tr. 2/262-63, 265) By final decision dated 19 March 1998, the contracting officer denied the claim. (R4, tab 32) We find no evidence that appellant, in its claim, or the contracting officer, in his decision, addressed any changes in the contract's security requirements or the cost impacts of room-by-room written security requests.

30. The record contains evidence that the conditions encountered by appellant were not unusual. There is evidence that, when remodeling older buildings, obstructions above suspended ceilings are to be expected (tr. 2/292, 3/18, 3/50-51; *see also* tr. 1/254-55, 2/135). In addition, Joseph Condlin, respondent's chief fire protection engineer, with long industry and Government experience in the field of fire protection systems (tr. 3/6-9), testified that, from the contract and site visit, it was evident that Building 80 was a highly secured facility, which "tells you you're going to have trouble . . . getting this thing done quickly" (tr. 3/36). He further testified:

> You would also know that there are a lot of computers in there, and it looks like an old building. So you could assume that there are a lot of things above the drop ceiling. So . . . on top of that when someone [at trial] said they pushed it up, and it looked like a spider web [*see* finding 25], that verified our common practice that in a computer-type installation there are obstructions and they're expected.
>
> So the government contract allowed six months, because there's access problems and there's problems above the

> ceiling, but it's nothing – it's not the worst I've ever seen. It's not the best I've ever seen. It's about average.

(*Id*.; *see also* tr. 3/57-58) We find this testimony of Mr. Condlin credible.

DECISION

Appellant advances two arguments. First, appellant contends that respondent constructively changed the contract's security requirements, which are chiefly found in paragraph 1.7 of section 01010. (*See* finding 5) According to appellant, it was required to submit room-by-room written security requests that effectively limited its sprinkler installation to two work areas at a time. Appellant urges that this change "resulted in repeated suspension and delay," increasing performance costs. (Appellant's Closing Brief at 14) Second, appellant focuses upon "major" above-ceiling obstructions, which it characterizes as those that are "so significant as to be beyond the scope of the contract." (*Id*. at 17) Appellant argues that these major obstructions were so severe that, "when combined with the Navy constructive security changes," they constituted a type II differing site condition. (*Id*. at 17) Appellant asserts no claim for delay (tr. 1/197). By contrast to appellant's position, respondent stresses that appellant completed the contract on time notwithstanding the obstructions, and asserts the negative of each of the two arguments advanced by appellant. (Respondent's Brief at 21-27) We address the two issues in turn.

A. Constructive Change

As we view the record, the dispositive consideration regarding that part of the claim in which appellant alleges a constructive change does not relate to the merits, but to jurisdiction. The applicable principles are familiar. "Under the Contract Disputes Act [, 41 U.S.C. § 601 *et seq*.,] all claims by a contractor . . . must be . . . submitted to the contracting officer for a decision before we can take jurisdiction over an appeal." *Phoenix Petroleum Co.*, ASBCA No. 42763 *et al*., 94-1 BCA ¶ 26,461 at 131,668; *see also Paragon Energy Corp. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981) (contracting officer's decision is the "linchpin" of our jurisdiction); *EDL Construction, Inc.*, ASBCA No. 34623, 88-1 BCA ¶ 20,313 at 102,707 (no jurisdiction because of failure to submit claim to contracting officer for decision).

In their post-trial briefs, neither party raised the issue of whether we have jurisdiction to decide appellant's claim insofar as it seeks recovery for changes to the contract's security requirements. Accordingly, by order dated 29 May 2001, the Board raised the issue *sua sponte* and allowed the parties additional time to brief the issue pursuant to our Rule 5(a).

In response, appellant points to the obstruction logs that were incorporated by reference in the claim. Appellant asserts that nine of these logs – enumerated as logs 1, 1A, 3, 11, 151, 179, 183, 186 and 187 – "reveal that Appellant clearly submitted the security or escort issue as part of its Contract Disputes Act Claim." (Appellant's Post-Hearing Brief Re: Board Jurisdiction at 3) In its filing, respondent denies that the issue of changes to the contract's security requirements was raised in the claim submitted to the contracting officer.

We cannot accept appellant's argument. We have examined the nine cited obstruction logs. We have found that four of the logs - 1, 1A, 3, and 151 - speak of miscellaneous delay (finding 28). Four other logs - 11, 179, 183 and 187 - cite escort delays, with log 183 also pertaining to the SKIF room (*id*.). The ninth cited log - 186 - has no evident relevance (*id*.). As we have also found, it is not apparent that any of these nine logs relate to a change in the contract's security requirements (*id*.). We understand the hallmark of the alleged change to be the requirement of room-to-room written security requests which limited sprinkler installation to two work areas at a time and we cannot relate these logs to that. (Appellant's Closing Brief at 14) *See, e.g., Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987) (claim must give contracting officer "adequate notice of the basis . . . of the claim"); *Atherton Construction, Inc.*, ASBCA No. 49150, 00-1 BCA ¶ 30,633 at 151,239 (same). While the alleged change is said to have "resulted in repeated suspension and delay" (Appellant's Closing Brief at 14), and four of the logs speak of miscellaneous delay (finding 28), Rick Barnes, the author of the logs (*id*.), has testified that appellant asserts no claim for delay (*id*.).

Accordingly, this portion of the claim must be dismissed without prejudice to the submission of a claim to the contracting officer.

B. Differing Site Condition

In asserting a type II differing site condition claim, appellant is "confronted with a relatively heavy burden of proof." *Charles T. Parker Construction Co. v. United States*, 433 F.2d 771, 778 (Ct. Cl. 1970). Appellant must satisfy "a stiffer test" than for a type I differing site condition, "demonstrat[ing] that [it] has encountered something materially different from the 'known' and the 'usual'." *Id.; see also Randa/Madison Joint Venture III*, ASBCA No. 49452, 99-2 BCA ¶ 30,553 at 150,878, *aff'd,* 239 F.3d 1264 (Fed. Cir. 2001) (contractor "must establish that the [alleged type II] condition was both unknown and unusual").

An unknown condition within the meaning of the DIFFERING SITE CONDITIONS clause "'must be one that could not be reasonably anticipated by the contractor from his study of the contract documents, his inspection of the site, and his general experience[,] if any, as a contractor in the area.'" *Randa/Madison*, *supra*, 239 F.3d at 1276, quoting *Perini Corp. v. United States*, 381 F.2d 403, 410 (Ct. Cl. 1967). At the same time, "[a]n unusual

condition within the meaning of the clause is one which might not reasonably be anticipated based on the contract work and the location at which the work was to be performed." *Ivey's Construction, Inc.*, ASBCA No. 47855, 95-1 BCA ¶ 27,584 at 137,463.

Measured against these standards, the obstructions that appellant encountered were not unknown. Considering the first *Randa/Madison* factor, a "study of the contract documents" would have yielded no detailed design because the contract constituted a performance specification (finding 9), prescribing "an objective . . . to be achieved." *J. L. Simmons Company, Inc. v. United States*, 412 F.2d 1360, 1362 (Ct. Cl. 1969). Nonetheless, appellant could reasonably have anticipated many of the types of obstacles complained of from paragraph 1.3 of section 15340 of the specifications, which underscored the presence of "blind spaces, piping, electrical equipment, ducts, and other construction and equipment" above the ceilings (finding 6; *see also* findings 24, 25). Paragraph 2.2 of the same section indicated that Building 80 contained the "Masonry and Concrete Walls" that Rick Barnes testified were "totally unexpected" and a "surprise" (findings 7, 25). Appellant also could reasonably have anticipated ductwork and conduits from a study of the contract drawings. They depict diffusers where cold air exited from ducts above the ceilings (finding 8). They also depict both the locations of the conduits that fed the existing light fixtures and the conduits that fed wall and floor outlets (*id.*).

Considering the second *Randa/Madison* factor, the contract contained the standard SITE INVESTIGATION clause (finding 4). It is familiar that a type II claim "may be made only after a reasonable site investigation, especially where the contract, as here, directs that one be made." *Vann v. United States*, 420 F.2d 968, 982 (Ct. Cl. 1970). By contrast to a type I differing site condition, there are "higher site investigation requirements attendant to possible recovery for a Category 2 differing site condition." *Pitt-Des Moines, Inc.*, ASBCA Nos. 42838 *et al.*, 96-1 BCA ¶ 27,941 at 139,575. Nonetheless, a bidder is not held to knowledge of "conditions hidden . . . and thus unavailable to any reasonable pre-award inspection." *Farnsworth & Chambers Co., Inc. v. United States*, 346 F.2d 577, 581 (Ct. Cl. 1965). Ultimately, whether the site investigation was reasonable "is dependent upon the facts and circumstances of the particular case." *S.T.G. Construction Co., Inc. v. United States*, 157 Ct. Cl. 409, 415 (1962).

Appellant's own witnesses cast doubt on the reasonableness of its site inspection. If we accept the testimony of both Rick Barnes and Mr. Hinote that performance revealed that ninety percent of the above-ceiling space was obstructed and only ten percent unobstructed (*see* finding 25), then we cannot reconcile those figures with appellant's testimony that what Rick Barnes saw did not reveal what was later encountered. Rick Barnes testified that, on his site visit, he looked at approximately 50 percent of the rooms on the second floor, attempted to push up the tiles in 30 to 40 locations and viewed the ceiling space in something less than 50 percent of them (*see* finding 16). Other considerations also call into question the adequacy of the site investigation. Thus, one of appellant's key bidding assumptions was that it could install the sprinkler piping in a continuous, uninterrupted

sequence (finding 11). Yet, before the site inspection, respondent alerted appellant that "[s]ince Building 80 has existing HVAC ductwork, it may be difficult to locate the sprinkler piping" (finding 12). At his site inspection, where Rick Barnes was unable to push up a tile, it "told me there was something laying right on top of the tile", and where he saw air handling units, conduits and some cluttered spots he dismissed their potential difficulty (finding 16). Taking all these factors together, we are unpersuaded by the site investigation testimony.

Considering the third *Randa/Madison* factor, appellant's "general experience . . . as a contractor in the area" was sparse. That is, appellant itself had had no previous experience with Building 80 (finding 3). Rick Barnes, appellant's superintendent, had no previous experience performing fire alarm sprinkler work on an existing building, much less with a "technical fire alarm installation" such as this (finding 13). Troy Hinote, appellant's plumber, while undoubtedly versatile, had never installed a sprinkler system such as this (finding 23).

The conditions that appellant encountered also were not unusual within the meaning of the DIFFERING SITE CONDITIONS clause. Applying the *Ivey's Construction* standard and considering the contract work, the record contains evidence that obstructions are to be expected above suspended ceilings when remodeling older buildings (finding 30). Considering "the location at which the work was to be performed," we ascribe little weight to the testimony of Rick Barnes and Mr. Hinote regarding the above-ceiling conditions at Building 80 in view of their inexperience with comparable sprinkler systems (*see* findings 13, 23). Instead, we give greater weight to the credible testimony from respondent's chief fire protection engineer that the conditions in the building were "about average" (finding 30), which is also consistent with appellant's timely completion (*see* finding 26).

In thus concluding that the conditions that appellant encountered were neither unknown not unusual, we are not dissuaded by *Gaffny Plumbing & Heating Corp.*, VABCA No. 1820, 86-2 BCA ¶ 18,987, upon which appellant relies. Appellant stresses that *Gaffny* is "very similar" because appellant's "inability to view these above ceiling spaces was not the result of its own conduct, but rather the Navy's lack of diligence in obtaining clearance and providing access" during appellant's two site investigations. (Appellant's Closing Brief at 19) We do not regard *Gaffny* to be apposite chiefly because there is no evidence that respondent made any representations regarding the areas that were unavailable to appellant on its site inspection (finding 15). *See Gaffny, supra*, 86-2 BCA at 95,885.

There remains the third part of appellant's claim, which is for pendant reordering (*see* finding 28). Inasmuch as this portion of the claim is tied to the alleged differing site condition (*id.*), we also cannot conclude that appellant is entitled to prevail with respect to it.

CONCLUSION

Insofar as the appeal seeks recovery for changes in the contract's security requirements, it is dismissed without prejudice to the submission of a claim to the contracting officer. Insofar as the appeal seeks recovery for a differing site condition, it is denied.

Dated: 12 July 2001

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

PAUL WILLIAMS
Administrative Judge
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. 51473, Appeal of Larry D. Barnes, Inc. d/b/a Tri-Ad Constructors, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals