ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Kato Corporation	)	ASBCA No. 51513
	)	
Under Contract No. F45603-96-C-0004	)	

APPEARANCE FOR THE APPELLANT: John Lukjanowicz, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
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Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from the contracting officer's denial of a claim for $6,352.22, allegedly expended to excavate, stockpile and replace contaminated subsurface soil encountered during performance of a contract which included removal of an underground storage tank. The parties initially outlined their positions in cross-motions for summary judgment filed with the Board. Subsequently, in a telephone conference held with the Board on 24 March 2000, the parties rescinded their motions for summary judgment, and jointly requested that the Board issue a decision on the merits under Board Rule 11 based on arguments and evidence already in the record. Entitlement and quantum are before the Board. We deny the appeal.

FINDINGS OF FACT

1. The Air Force awarded Contract No. F45603-96-C-0004 to appellant, Kato Corporation (Kato), in November 1995 at a fixed price of $502,801. The contract required appellant to make various improvements to the heating and ventilation system serving McChord AFB, Building 1305, and to excavate, remove and dispose of an adjacent 2,000-gallon underground storage tank containing fuel oil. (R4, tab 1)

2. As solicited and awarded, the contract incorporated six separate appendices, including a specification that addressed in detail the various elements of work required (R4, tab 1, § J). Section I-122 of the contract incorporated by reference FAR 52.214-29 ORDER OF PRECEDENCE – SEALED BIDDING (JAN 1986), which provided that:

> [a]ny inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the Specifications); (b) the representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

(R4, tab 1, § I)

3. The contract also incorporated by reference FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984) ("the Differing Site Conditions clause"); FAR 52.233-1, DISPUTES (MAR 1994); and FAR 52.243-4, CHANGES (AUG 1987). (R4, tab 1, § I) The parties have not identified, and we cannot find, soil borings or other indicia of subsurface conditions.

4. The specific requirements relating to removal of the underground fuel oil tank were set forth in detail at contract specification section 02071, UNDERGROUND STORAGE TANK REMOVAL. Paragraph 1.2, MEASUREMENT AND PAYMENT, provided:

> Payment for all other work shall be under the base bid for the tank removal and shall constitute full payment for all work defined in the contract documents including testing of the contents, excavation and disposal of the tank, and testing of the underlying soil.

(R4, tab 2)

5. Paragraph 1.3, SUBMITTALS, called for submission of a work plan which was to include "[i]dentification of waste, tank and contaminated soil transporters . . . disposal facilities and means of disposal or remediation . . ." and "[d]econtamination procedures" (R4, tab 2).

6. An overview of the tank removal project was provided at specification section 02071, paragraph 1.6, PROJECT/SITE CONDITIONS, which stated in pertinent part as follows:

> The work consists of removal, decontamination and disposal of one, 2000-gallon underground storage tank and associated piping and ancillary equipment. The tank is constructed of steel and is at the approximate location shown on the drawings. The 2000-gallon tank was used for storing fuel oil and has not been taken out of service. Residue remaining in the tank is considered a hazardous waste. *Subsurface conditions are not known*. The Contractor is responsible for verifying the actual conditions prior to submitting a bid.

(R4, tab 2, § 02071 (emphasis added))

7. Specification section 02071 addressed soil contamination. Subparagraph 3.4.4.2, Tank Excavation, provided that excavation of soil from around the tank "shall be performed in a manner that will limit the amount of potentially contaminated soil that could be mixed with previously uncontaminated soil" and that "[c]ontaminated soil shall be segregated in separate stockpiles." Subparagraph 3.4.4.4, Stockpiles, also discussed the disposition of excavated soil as follows:

> Uncontaminated excavated soil shall be stockpiled and used for backfill in the tank excavation prior to using borrow material. Excavated material which is visibly stained and which has an obvious petroleum odor or as required by the State of Washington or implementing agency shall be considered contaminated and shall be stockpiled for sampling in accordance with Paragraph Stockpiled Material Sampling. Uncontaminated soil shall be stockpiled separately from the contaminated soil, a safe distance away from, but adjacent to, the excavation. Contaminated soil shall be placed on a[n] impermeable geomembrane a minimum of 30 mils thick, and covered with a l0 mil sheet of geomembrane. The geomembrane shall be placed such that the stockpiled soil does not come into contact with surface water run-off. The l0 mil geomembrane cover shall prevent rain or surface water from coming into contact with the contaminated soil, as well as limit the escape of the volatile constituents in the stockpile.

Paragraph 3.6 required "[t]he tank area and any other areas associated with the excavation shall be backfilled with select clean fill materials." (R4, tab 2)

8. Further, subparagraph 3.4.5.2, Contaminated Soil, provided that:

> After the tank has been removed from the ground, the adjacent and underlying soil shall be examined for any evidence of leakage. The soil shall be visually inspected for staining and also screened for the presence of volatile and semi-volatile hydrocarbon contamination using a real time vapor monitoring instrument. Contaminated soil shall be stockpiled onsite per Paragraph Stockpiles. The State of Washington inspector shall determine the extent of the contaminated soil to be removed from each site but shall not exceed 20 cubic yards per site. Any evidence that contamination exceeds that indicated in the contract shall be reported to the Contracting Officer or authorized representative on the same day it is discovered. After the known contaminated soil is removed, the excavation shall be sampled and analyzed per Paragraph SOIL EXAMINATION, TESTING, AND ANALYSIS.

The SOIL EXAMINATION, TESTING, AND ANALYSIS paragraph referred to in subparagraph 3.4.5.2 is found at 3.5 and consists solely of the following subparagraph 3.5.1:

> I[t] is not anticipated that contaminated soil will be encountered. If found, contact the Contracting Officer or authorized representative for further direction.

(R4, tab 2, § 02071)

9. Mr. John W. Engebretsen served as appellant's general manager and was responsible for preparing the bid that resulted in award of the McChord AFB contract to appellant. Because appellant was not experienced or certified in tank removal, Mr. Engebretsen solicited a bid from Omega Services, Inc. (Omega) to subcontract the tank removal work. Based on a package of documents provided by appellant, which included a copy of specification section 02071, Omega submitted a fixed price bid of $9,455 for the tank removal work, based on the express assumption that "no soil or ground water contamination exists." According to Mr. Engebretsen, both he and Omega's representative interpreted specification section 02071, paragraph 3.5 to exclude any work needed to address latent soil contamination. While specification section 02071 contained several provisions expressly addressing soil contamination, Mr. Engebretsen believed that those provisions existed only to provide proper soil handling procedures in the event that the scope of work was expanded to address latent areas of contamination discovered after award. (Aff. of John W. Engebretsen)

10. Prior to preparation of appellant's bid for the contract, appellant's employee Neil Rammell visited the jobsite to conduct a site inspection on appellant's behalf. Mr. Rammell submitted an affidavit testifying that, during his site visit:

> we walked right over the area where the tank and excavation work was going to be performed. As we walked over that area, I did not smell any sort of petroleum-related product. There was also no discoloration of the ground. . . .

Mr. Rammell further testified that, on several occasions after submission of appellant's bid, he ate lunch at a picnic table near the unexcavated tank and did not "smell or otherwise notice the presence of contaminated soil." (R4, tab 5; aff. of Neal A. Rammell)

11. Excavation operations incident to removal of the tank began on 11 March 1996. Dana Smith, appellant's project manager, was present at that time and witnessed those operations. According to Mr. Smith, no contamination of the soil was apparent "either by sight or by smell" even after the excavation had proceeded to a depth of about three feet below grade. After the excavation was complete and the tank was removed, however, Mr. Smith noticed soil discoloration on the floor of the empty tank bed and detected a petroleum odor. Tests confirmed that the soil underlying the tank was contaminated with petroleum residue. (R4, tab 17 at 3; aff. of Dana G. Smith)

12. By letter dated 14 March 1996, appellant informed the Government that contaminated soil had been discovered in the empty tank bed, and provided test results regarding the specific levels of contamination detected (R4, tab 17). A dispute evolved as to whether appellant was required to perform any excavation or stockpiling of contaminated soil from the tank bed within the original contract price (R4, tabs 18, 19). According to appellant, a requirement to excavate contaminated soil constituted a change to the contract because contract specification section 02071, paragraph 3.5.1 had recited that "[it] is not anticipated that contaminated soil will be encountered" (R4, tab 19). The Government disagreed, citing specification section 02071, subparagraphs 3.4.5.2 and 3.4.4.4, which provided express and detailed procedures for removal of contaminated soil (R4, tab 18). On 31 July 1996, the Government directed appellant to excavate and stockpile 20 cubic yards of contaminated soil, and to import a like amount of replacement clean fill dirt (R4, tabs 20, 21). This work was completed by Omega at a total price of $4,792.22 (aff. of John W. Engebretsen, ¶¶ 11,12 and ex. G).

13. Kato submitted a claim for $7,594.07 in reasonable detail for costs arising from excavation, stockpiling and replacement of contaminated soil on 7 January 1998 (R4, tab 25). On 17 March 1998, the Government issued a final decision granting $1,241.85 of appellant's claim,[*] which represented loaded costs incurred for extended fence rental,

[*] The Government has not disputed appellant's entitlement to this amount.

extended supervision costs and proposal costs. The Government denied entitlement to the remaining $6,352.22 on grounds that the contract's statement of work required appellant to bear the cost of removing up to 20 cubic yards of contaminated soil found on the floor of the empty tank bed. (R4, tab 26) Appellant has timely appealed the Government's final decision to this Board, seeking to recover the $6,352.22 in soil excavation costs denied by the Government, as well as interest and attorneys' fees.

PRELIMINARY MATTERS

In a "Motion for More Definite Statement" filed with the Board, Government counsel argued that appellant had failed to properly quantify its claim for relief. We deny the motion. Appellant's claim dated 7 January 1998 is quantified in reasonable detail. Moreover, appellant has expressly confirmed subsequent to the Government's motion that the dollar amount at issue in this appeal is $6,352.22 (app. brief dated 27 August 1999, at 2).

The Government also filed a motion to strike appellant's claim for attorneys' fees. We would normally grant such a motion, as the claim is premature. However, the motion is rendered moot by our holding here.

DECISION

Appellant argues that the soil contamination underlying the tank constituted a Category I subsurface condition compensable under the contract's Differing Site Conditions clause. Appellant also argues, albeit in defending against respondent's summary judgment motion, that its claim should be sustained under the contract's Changes clause. The Government opposes appellant's assertions.

I. Differing Site Conditions Claim

Appellant has first alleged that the soil contamination constituted a Category I differing site condition compensable under the Differing Site Conditions clause (finding 3). Under that clause, appellant may receive an equitable adjustment for performing contract work if the cost of that work is increased by "subsurface or latent physical conditions at the site which differ materially from those indicated in" the contract. In order to prove entitlement on a Category I differing site condition claim, appellant has the burden of proving that: (1) the contract documents positively indicated the site conditions that form the basis of the claim; (2) the contractor reasonably interpreted the contract documents and relied upon the indicated site conditions; (3) the conditions actually encountered at the site differed materially from those indicated in the contract; (4) the site conditions encountered existed at the time the contract was executed and were unforeseeable based on all the information available at the time of bidding; and (5) the contractor's injury was caused solely by the materially differing site conditions. *See Skip Kirchdorfer, Inc.*, ASBCA No. 40516, 00-1 BCA ¶ 30,625 at 151,181-82.

In applying this test, we must first determine whether appellant's contract as awarded contained a positive indication that the subsurface soil surrounding the tank was free of contamination. A positive indication of favorable site conditions may be established in a number of ways. *See, e.g.*, *Met-Pro Corp*., ASBCA No. 49694, 98-2 BCA ¶ 29,776 (absence of subsurface soil contamination positively indicated by lab reports reproduced in IFB that indicated low levels of contamination in surrounding soil); *Boro Developers, Inc.*, ASBCA No. 48748, 98-1 BCA ¶ 29,346, *reconsideration denied*, 98-1 BCA ¶ 29,503 (soil borings that showed no evidence of subsurface rock gave a positive indication that there was no subsurface rock on jobsite); *Praught Construction Corp*., ASBCA No. 39670, 93-2 BCA ¶ 25,896, *reconsideration denied*, 93-3 BCA ¶ 26,084 (statement that there would be no "weak or wet material to a depth greater than indicated" was a positive indication that contractor would not encounter subsurface water). On the other hand, it is well established that the Government's mere silence is insufficient to establish the absence of unfavorable site conditions. *M. Raina Associates, Inc.*, ASBCA Nos. 50486, 50488, 99-1 BCA ¶ 30,180 at 149,321. Similarly, "hopes, expectations, guesses, or suggestions . . ." as to latent conditions do not constitute positive indications for purposes of establishing a Category I differing site condition. *See Pacific Alaska Contractors v. United States*, 436 F.2d 461, 470 (Ct. Cl. 1971).

Here, we believe that any representations the Government may have made as to the condition of subsurface soil fell short of positively indicating an absence of soil contamination. The contract did not include soil borings or other data that could be relied on as representing subsurface conditions (finding 3). The strongest contractual statement appellant can adduce to support its position is specification section 02701, paragraph 3.5.1, which stated that "[it] is not anticipated that contaminated soil will be encountered." But for this statement, the contract would be devoid of any representation as to the absence of subsurface contamination and, presumably, this dispute would not have arisen. However, this statement, read in context, cannot be characterized as a positive indication that no subsurface contamination would be encountered. Indeed, the next sentence goes on to provide that appellant should consult with the Government in the event contamination was discovered (finding 8). Moreover, any suggestion that the Government warranted there was no subsurface contamination is dispelled when contract specification section 02071 is examined as a whole. Specification section 02071 paragraph 1.6, entitled PROJECT/SITE CONDITIONS, expressly stated that "[s]ubsurface conditions are not known." (Finding 6) Further, subparagraphs 3.4.4.2 (Tank Excavation), 3.4.4.4 (Stockpiles), and 3.4.5.2 (Contaminated Soil), each contained detailed procedures to be followed in the event contamination was encountered in the soil located adjacent to or under the tank (findings 7, 8). Under these circumstances, we are not persuaded by appellant's argument that the contract as solicited and awarded contained positive indications that subsurface soil contamination would not be encountered. Appellant has failed to carry its burden of establishing the existence of a Category I differing site condition.

II. Changes Claim

Appellant also argues that its costs to remove, stockpile and replace contaminated soil are recoverable because the contract's original scope of work did not encompass excavation and/or stockpiling of contaminated soil. As a fallback position, appellant contends that contract provisions addressing excavation and stockpiling of contaminated soil contained latent ambiguities that must be construed against the Government. Appellant's proposed interpretation of the contract relies heavily on two excerpts from contract specification section 02071: first, paragraph 1.2, which provided that "[p]ayment for all other work shall be under the base bid for the tank removal and shall constitute full payment for all work defined in the contract documents including testing of the contents, excavation and disposal of the tank, and testing of the underlying soil"; and second, paragraph 3.5.1, which provided in part that "[it] is not anticipated that contaminated soil will be encountered."

Our primary objective in interpreting contracts is to ascertain the intention of the parties. *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987). In determining the intention of the parties, we interpret the contract as would a reasonably intelligent person acquainted with the contemporaneous circumstances. *Metric Constructors, Inc., v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999). Further, we are to give reasonable meaning to all parts of the contract so as not to render portions of the contract meaningless. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Order of precedence clauses appearing in the contract should be given full effect. *See Kerr Contracting Corp*., ASBCA No. 44783, 93-2 BCA ¶ 25,674. If application of these rules demonstrates that a contract is ambiguous (*i.e*., capable of two reasonable interpretations), we proceed to determine whether the ambiguity was latent or patent. If the latter, the contractor has a duty to seek further clarification of patent ambiguity from the Government. *See C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1544-45 (Fed. Cir. 1993).

In considering appellant's proposed interpretation, we first note that the contract's order of precedence clause does not assist us because the relevant provisions are all contained in the contract specification. Thus, any existing conflict is internal to the specification itself. In reading the specification as a whole, however, we are unable to hold that the contract excluded work related to contaminated soil, or contained fatal ambiguities. As we have already discussed above, the Government's statement that it did not "anticipate" contaminated soil at the jobsite does not, when read in context, qualify as a positive representation that appellant would not encounter contaminated soil. Indeed, specification section 02071 as a whole is capable of only one reasonable interpretation: that the Government did not know what subsurface conditions attained at the site (paragraphs 1.6 and 3.5), and thus notified contractors of the potential for latent soil contamination (subparagraphs 3.4.4.2, 3.4.4.4, and 3.4.5.2).

Moreover, having warned contractors that subsurface contamination might exist, the Government went one step further by affirmatively requiring contractors to perform limited and defined work in the event that contamination was discovered. The specification at 3.4.4.2 specifically required that contaminated soil discovered during excavation around the tank perimeter "shall be segregated in separate stockpiles." Subparagraph 3.4.4.4 prescribed detailed procedures for stockpiling contaminated soil and securing it so that the contamination did not spread. Moreover, the specification unequivocally required the contractor to perform the very work that is at issue in this appeal: *i.e*., to inspect and test the empty tank bed for soil contamination, to excavate up to 20 cubic yards of soil from the tank bed in the event that contamination was found, to stockpile that contaminated soil, and to backfill "the tank area and any other areas associated with the excavation . . . with select clean fill materials" (findings 7, 8).

Appellant argues that although the specification required certain measures to be undertaken in the event subsurface contamination was identified, the parties never intended to include work relating to contaminated soil in the contract price. According to appellant, the contract price was only intended to cover soil testing, excavation and disposal of the tank, and testing of the soil underneath the tank, items specifically enumerated in specification paragraph l.2, MEASUREMENT AND PAYMENT. Appellant supports its position by citing to the rule of construction *ejusdem generis* (app. resp. at 24). That rule can operate to confine the meaning of subsequent general words or phrases which are preceded by a specific list to items of the same class or character as those in the antecedent list. *Sanpete Water Conservancy District v. Carbon Water Conservancy District*, 226 F.3d 1170, 1180 (10th Cir. 2000). Assuming, *arguendo*, handling contaminated soil is work of a different character than the listed items, the general phrase, "all work defined in the contract documents," *precedes* the specific list (finding 4) and is linked to the list by the word "including." We think the rule is inapplicable. *Cf. Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 280 (3rd Cir. 1995). Moreover, *ejusdem generis* "is subject to the contrary agreement of the parties . . . [and] will not preclude the inclusion of things not of the same class or kind when it appears the parties so intended." 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS, § 32.10, 451-53 (4th ed. 1999). We believe the only reasonable interpretation is that the parties intended the base bid to include measures arising from soil contamination. Various contract provisions support that interpretation (findings 5, 7, 8).

Appellant further suggests that the contract should be construed so as to ignore what it characterizes as "exculpatory clauses" that improperly shift the risk of unfavorable subsurface conditions onto the contractor. Indeed, appellant goes so far as to suggest that, under the contract's order of precedence clause, the terms of the Differing Site Conditions clause "trump" those specification provisions that notified bidders that latent soil contamination might exist. We disagree. It is true that we have refused to give effect to contract disclaimers where they are improperly used to negate the effect of affirmative representations as to conditions affecting performance. *See, e.g., Saturn Construction*

Co., Inc., ASBCA No. 28319, 85-1 BCA ¶ 17,728 at 88,508. In this case, however, the Government has not, as appellant contends, attempted to "override" the operation of the Differing Site Conditions clause. Instead, the Differing Site Conditions clause, by its own terms, is inapplicable with respect to Category I because the Government refrained from making any affirmative representations as to actual site conditions. Appellant has not argued, and the record does not support, a Category II claim.

Further, this is not a case where the Government has forced bidders to sign a "blank check" undertaking sweeping obligations to perform in the face of all possible subsurface conditions. The contract, reasonably interpreted, did not rule out soil contamination, and contained specification provisions which placed defined and limited obligations on the contractor in the event contamination was encountered. The contract did not require appellant to fully remediate whatever contamination might exist on the jobsite; instead, the contract limited appellant's obligations to removing, securing and replacing 20 cubic yards of contaminated dirt. This work was not only easily susceptible to quantification for bidding purposes, but was also fairly minimal in nature ($6,352.22 in a $502,801.00 contract), amounting to less than l.5 percent of the total contract price. The appeal is denied.

Dated: 30 November 2001

CARROLL C. DICUS, JR.
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
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51513, Appeal of Kato Corporation, rendered in conformance with the Board's Charter.

Dated:

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