ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Elam Woods Construction Company, Inc.	)	ASBCA No. 52448
	)	
Under Contract No. NAFFR3-98-C-0012	)	

APPEARANCE FOR THE APPELLANT: James E. Keough, Esq.
Pacific Grove, CA

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Sue Ying Leong, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Seattle

OPINION BY ADMINISTRATIVE JUDGE TODD
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This appeal arises from a final decision denying a claim for a price adjustment for extra work providing synthetic turf for areas where it was not required. The Government has moved for summary judgment. Appellant opposed the motion on the grounds that it was premature before discovery and on the merits. The Government agreed to respond to appellant's discovery requests, and appellant has conducted its requested discovery and been given the opportunity to file an additional response to the motion. Appellant filed further responses, including documents to supplement the record, and the Government has filed its replies.

STATEMENT OF FACTS

On 26 February 1998, the Army Corps of Engineers, Seattle District, awarded Contract No. NAFFR3-98-C-0012 to appellant Elam Woods Construction Company, Inc. for the design and construction of improvements to two outdoor athletic facilities located at the Presidio of Monterey, California (R4, vol. I, tab A). The contract work included the construction of "a new multi-purpose football/soccer field with synthetic turf, goal posts, portable soccer goals and a six-lane synthetic running track" at the Price Fitness Center (R4, vol. I, tab A at C-1-1).

The Request for Proposals No. NAFFR3-98-R-0004 (the RFP)[1] alerted offerors that the "accepted proposal will be incorporated into the contract" (R4, vol. I, tab A at L-6). The RFP also specifically provided:

> The criteria specified in this RFP are binding contract criteria and in cases of any conflict, subsequent to award, between RFP criteria and Contractor's proposal, design, and submittals, the RFP criteria shall govern unless there is a written agreement between the Contracting Officer and the Contractor waiving the specific requirement or accepting a specific condition pertaining to the offer.

(*Id.*) The RFP further required that the offeror demonstrate that the requirements and criteria of the RFP would be met or exceeded (*id.*).

The RFP informed offerors how to request "an explanation or interpretation of the solicitation, drawings, specifications, etc." (R4, vol. I, tab A at L-1). The RFP cautioned:

> Offerors should carefully examine the specifications and fully inform themselves as to all conditions and matters which can in any way affect the work or the cost thereof. Should an offeror find discrepancies in, or omission from, the specifications, or other documents, or should be in doubt as to their meaning, at once notify the contract specialist . . . .

(R4, vol. I, tab A at L-4)

The Government estimated in the RFP that the probable cost of the project was between $2,700,000 and $3,600,000 (R4, vol. I, tab A at C-1-3).

The RFP encouraged design freedom which met or exceeded RFP requirements, but discouraged deviations from specific requirements. Specifically, the RFP stated:

> Design Freedom: Requirements stated in this RFP are minimums. Innovative, creative, or cost-saving designs and proposals which meet or exceed these requirements are encouraged. Deviations from the overall space and adjacency requirements are discouraged unless the change results in a significant improvement to the facility. Deviations from RFP requirements must be clearly explained and justified in the Offeror's proposal, and the Offeror's proposal must reflect the cost of the proposed deviation. Informative drawing and notes are encouraged to depict the deviation.

(R4, vol. I, tab A at C-1-3)

The RFP described the construction of the multi-purpose playing field. Section C-3 in the Design Requirements portion of the Specifications/Work Statement included a provision for the "Synthetic Multi-purpose Field" that stated the construction would include the preparation of subgrade and specified the required depth of different layers of materials. Initially, the placement was "4 inch [crushed] aggregate base [CAB], 2 inches of asphalt concrete pavement [ACP], . . . 1 ½ inches of rubberized elastic layer [EL], knitted synthetic turf [ST]" (AR4, tab 3 at C-3-2). The RFP did not include dimensions for the field in this provision other than to state, "[f]ootball and soccer fields shall be constructed to the dimensional requirements prescribed and approved by the TAC [The Athletic Congress of the USA]" (R4, vol. I, tab A at C-3-2, C-2-9).

Section C-4 in the Outline Specifications included Section 02505, Granular Paving, which provided for the "Synthetic Multi-purpose Field," that the CAB was required to cover the "entire field area (entire area internal to running track surface)" (R4, vol. I, tab A at C-4-2). Section 02540, Synthetic Surfacing, provided:

> Synthetic Turf (ST): Contractor shall <u>install</u> synthetic turf over <u>entire EL internal to running track surface</u> for the Price Fitness site. ST shall be of sufficient length to permit full cross field installation. . . . ST shall be bonded to the EL utilizing full coverage adhesive as recommended by the ST manufacturer and <u>anchored</u> to a trench grate <u>along the interior perimeter of the running track</u>.

(*Id*. at C-4-3, emphasis added.) In Section 02725, Precast Trench Drain and Synthetic Turf Anchoring System, the specification required "Model: SportsEdge – manufactured by ABT, Inc. . . . " (*id*. at C-4-6). RFP Attachment J-1b, Drainage System, included the commercial literature for the SportsEdge drainage and anchoring system. It shows that, when used between a synthetic running track and a synthetic turf field, the system is located between the track surface and the synthetic turf. (*Id*. at J-1b-2)

Amendment No. R0001, dated 5 January 1998, to the RFP, along with other changes not relevant here, revised the Design Requirements for the synthetic multi-purpose field. The composition of the layers of materials was changed. The amendment replaced the bottom two layers (CAB and ACP) with a "6-inch non-permeable base, [and a] 6-inch free-draining stone base with underdrain system for the entire synthetic turf field." The phrase, "the entire synthetic turf field," was added to the language used in the original RFP concerning the placement of the various layers of materials. (AR4, tab 3 at C-3-2) The amendment read, in pertinent part, as follows:

> Construction for the multi-purpose synthetic fields shall include the preparation of the subgrade, placement of ~~4 inch aggregate base course, 2 inches of asphalt concrete pavement~~

> 6-inch non-permeable base, 6-inch free-draining stone base with underdrain system for the entire synthetic turf field, 1 ½ inches of rubberized elastic layer, knitted synthetic turf . . . .

(*Id.*)

The RFP required that the project be designed and constructed in accordance with applicable codes and standards of various technical and regulatory agencies, which were referred to by their acronyms and abbreviations. Among those listed were TAC, which was defined as "The Athletic Congress of the USA," and NCAA, which was defined as the "National Collegiate Athletic Association." (*Id*. at C-2-1, C-2-7, C-2-9) The RFP specifically provided that, "[w]here no other standard or specification is provided, the standards of these organizations apply to this contract unless otherwise specified" (*id*. at C-2-3).[2]

At a pre-proposal conference and site visit, the Government told offerors that the budget was $3,600,000 and could not be exceeded (AR4, tab 2 at 2). On 23 January 1998, appellant submitted a price proposal in the amount of $3,600,000. Appellant's proposal included a price of $1,950,000 for construction at the Price Fitness Center Site, which the Government had estimated at $2,584,015. (R4, vol. I, tab B; app. resp., exs. 24, 25).

Appellant's proposal certified that "all items submitted in our proposal comply with RFP requirements and that all final design documents will comply with RFP requirements" (R4, vol. I, tab B at 7). Appellant further stated in its transmittal letter its understanding that in case of any conflict between the RFP and its proposal, the RFP would govern. Appellant included three drawings, dated "JAN 98," in its proposal that show the running track and define the dimensions of the multi-purpose field for the Price Fitness Center. Sheet L-1, entitled LANDSCAPE PLAN, and Sheet S-1, entitled PLOT PLAN, mark the entire area internal to the oval running track using the legend, "SYNTHETIC TURF WITH INLAID STRIPING FOR FOOTBALL AND SOCCER WITH LOGO AND TEXT." Both Sheets L-1 and S-1 outline an area marked "MULTI-PURPOSE FOOTBALL/SOCCER FIELD" which conforms to the entire area internal to the running track surface. Sheet S-1 also shows the "TRENCH DRAIN/TURF ANCHORING SYSTEM ALL AROUND FIELD" as the line of demarcation between the inside edge of the running track and the outer perimeter of the field. Drawing U-1, entitled UTILITY PLAN, shows in the same manner the entire area internal to the running track covered with synthetic turf and the location for the trench drain/turf anchoring system. (R4, vol. I, tab B; AR4, tabs 7, 8)

Appellant's proposed price included the cost of 78,500 square feet of synthetic turf based on a quote for "the standard area of E-Layer and Turf on this type of installation" which was received by appellant from its competing suppliers (affid. of Lee Woods, R4, vol. II, tab N). Appellant's president instructed its architect to prepare drawings to

demonstrate compliance with the RFP (affid. of Cliff Elam, R4, vol. II, tab K). Appellant's architect prepared the drawings accordingly. He had no specific intent to place synthetic turf in the entire field area. (Affid. of Russel Strobel, R4, vol. II, tab L)

Following evaluation of appellant's proposal, negotiations were conducted. Appellant submitted its best and final offer (BAFO), dated 17 February 1998 at no change in price. Appellant included a revised drawing Sheet S-1 with no change to the outline, marking, and legend for the synthetic turf. (R4, vol. I, tab C)

The contract as awarded incorporated the RFP, the amendments thereto, and appellant's proposal, including its BAFO in their entirety (R4, vol. I, tab A at A-(1a)).

The RFP and contract incorporated contract clauses which are relevant to this appeal. Although the contract was a non-appropriated fund (NAF) procurement, not subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, the Disputes clause allowed the appellant to appeal an adverse final decision of the contracting officer to this Board (R4, vol. I, tab A at I-14, ¶ I-25). The Submission of Construction Drawings, Specifications, and Design Analysis after Award clause required that the contractor make two design submittals, including one at the 50 percent design stage, and specified that drawings in the design submittals include, *inter alia*, sections indicating "design, materials, etc., for the facilities" (R4, vol. I, tab A at H-14, ¶ H-16). The Specifications and Drawings for Construction (April 1987) clause mandated that the contractor promptly notify the contracting officer of any discrepancy in the figures, drawings, or specifications. Making any changes without a determination by the contracting officer was specifically stated to be at the contractor's risk and expense. (R4, vol. I, tab A at I-34, ¶ I-61)

Appellant made its first drawing submittal at the 50 percent design stage. Appellant's drawing sheet C-1, entitled SITE PLAN, included the legend "MULTI-PURPOSE FOOTBALL/SOCCER FIELD" and showed synthetic turf covering the length of the football and soccer fields to their end lines and the width of the area internal to the running track surface, including the area outside the sidelines of the football and soccer fields. The legend appearing in the areas bounded by the far ends of the football and soccer fields and the curved sections of the running track showed that these areas would not be covered with synthetic turf. These areas at each end of the field are known as the "D-areas." The legend there read, "2 [INCHES] ASPHALTIC CONCRETE ON NATIVE SOILS COMPACTED TO 95%." The drawing showed the trench drain around the entire field immediately inside the running track surface. Only one vcrsion of this drawing, which is dated 11 June 1998, appears in the record. (R4, vol. II, tab T)

On 4 May 1998, at the 50 percent design review meeting, the Government objected to appellant's proposed provision of synthetic turf for the football and soccer field area, but not for the D-areas. The Government advised appellant that the RFP clearly called for synthetic turf over the entire area internal to the running track surface, and appellant's

proposal provided that both the field area and the D-areas would be treated the same. (R4, vol. III, tab E-1)

In a letter, dated 5 May 1998, appellant asserted that the only other offeror (as well as "three experts in the industry") had interpreted the RFP requirement as not requiring synthetic turf in the D-areas (R4, vol. III, tab E-1 at 2). In its response, dated 8 May 1998, the Government confirmed that appellant's competitor had not included synthetic turf in the D-areas, but asserted that it was "irrelevant" since "[b]oth firms proposed entirely different solutions which were independently evaluated in comparison to the RFP" (R4, vol. II, tab C).

On 16 June 1998, the contracting officer directed appellant to perform in accordance with the drawings submitted with its initial proposal and BAFO (R4, vol. III, tab E-4).

Appellant installed synthetic turf over the entire area internal to the running track surface in response to the Government's directive, dated 16 June 1998 (R4, vol. III, tab C).

On 5 March 1999, appellant submitted a certified claim for $377,588.05 to the contracting officer for extra cost on the basis that the RFP for a design-build project was misleading and appellant had not intended to furnish the quantity of synthetic turf that the Government required after contract award (R4, vol. II). On 18 August 1999, the contracting officer's final decision denied the claim in its entirety (R4, vol. III, tab B).

Appellant filed this timely appeal.

DECISION

Summary judgment is properly granted when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Kent Line Limited*, ASBCA No. 45326, 94-2 BCA ¶ 26,722. A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Factual inferences are to be drawn in favor of the party opposing summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Alvarez & Associates Construction Co., Inc.*, ASBCA No. 49341, 96-2 BCA ¶ 28,476. In deciding a motion for summary judgment, we are not to resolve factual disputes, but ascertain whether material disputes of fact are present. *DynCorp*, ASBCA No. 49714, 97-2 BCA ¶ 29,233.

The burden on the movant is not to produce evidence showing the absence of a genuine issue of material fact, but to point out that there is an absence of evidence to

support the nonmoving party's case. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987). Once the moving party has met its burden, the nonmovant must proffer countering evidence sufficient to create a genuine factual dispute. Conclusory statements, denials, or arguments do not raise a genuine issue of fact. *Applied Companies v. United States*, 144 F.3d 1470, 1475 (Fed. Cir. 1998); *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1190 (Fed. Cir. 1993). A genuine issue of material fact arises when the nonmovant presents sufficient evidence upon which a reasonable fact finder, drawing the requisite inferences and applying the applicable evidentiary standard of proof, could decide the issue in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, *supra*, at 254-55; *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993).

The Government maintains that it is entitled to summary judgment on the uncontroverted facts as a matter of contract interpretation. At the time of contract award, according to the Government, the RFP and appellant's proposal, which the Government accepted and which was incorporated into the contract, required synthetic turf over the entire area of the multi-purpose field internal to the oval running track surface. The Government argues that Amendment No. R0001 to the RFP, which changed the composition of the layers of the multi-purpose field, did not change the perimeter of the layers of the field. Thus, the Government submits that appellant was required by the contract to install synthetic turf in the D-areas beyond the ends of the rectangular football and soccer fields and internal to the running track surface and is not entitled to a price adjustment for what appellant alleges was extra work.

Appellant opposes the motion on the grounds that its understanding of the RFP was reasonable and the Government's interpretation is outside the zone of reasonableness (app. resp. at 23). Appellant interprets the amendment to the RFP as changing the perimeter of the area required to be covered with synthetic turf. Appellant argues that if the Government intended that the new substances to be substituted in layers of the field have an area of coverage equal to the layers of material that were eliminated, it was obliged to communicate its intention with statements in the specification provisions in the amendment (app. resp. at 18). Appellant argues that there is contradictory evidence of the parties' interpretations of the contract before the dispute arose which renders summary judgment inappropriate (app. resp. at 36). Appellant also argues that an offer of additional work by a contractor in design documents does not impose a contract requirement to furnish the work and that a preliminary design submitted with a proposal for a design-build contract cannot become a final requirement (app. resp. at 27).

Appellant raised the issue of "economic overreaching" by the Government in accepting its proposal in its claim to the contracting officer and in its complaint. After discovery, appellant maintains that the Government had constructive notice of "a probable misunderstanding" from cost and pricing information before award of the contract that gave rise to a duty to verify appellant's bid (app. 3d resp. at 12). Since the Government did not

question appellant's proposal or discuss any erroneous contract interpretation with appellant, appellant claims it is entitled to compensation for the additional work it was directed to provide.

The question presented is whether the contract required the amount of synthetic turf that appellant installed, or whether appellant performed extra work for which it could be entitled to an equitable adjustment in price. Pure contract interpretation is a question of law that may be resolved by summary judgment. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984).

We are to interpret the contract as a whole. An interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it meaningless. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Metric Constructors, Inc.*, ASBCA No. 49343, 97-2 BCA ¶ 29,076. Contract interpretation begins with the plain meaning of the words used. *BMY-Combat Systems, A Division of Harsco Corp.*, ASBCA No. 39495, 98-1 BCA ¶ 29,575. The phrase "entire area internal to running track surface" in Section 02505 and the requirement to "install synthetic turf over entire EL internal to running track" in Section 02540 of the specifications can be reasonably interpreted according to the ordinary meaning of the words used. The whole area inside the six-lane running track was to be covered with the layer of synthetic turf. The D-areas are part of the whole oval inside the running track. The "synthetic multi-purpose field" was not the same in area as the football and soccer fields. The synthetic multi-purpose field was defined by reference to the surrounding oval track. The football and soccer fields were rectangular and defined in dimensions by reference to publications of listed organizations, *e.g.*, the NCAA. They were plainly different. We interpret the contract to require that synthetic turf be installed in the D-areas.

Appellant acknowledges this is a correct interpretation of the RFP as initially issued, but rejects it as a reasonable interpretation of the contract requirements after Amendment No. R0001 to the RFP was issued. Appellant relies on the contracting officer's final decision to support its argument. In denying appellant's claim, the contracting officer concluded that Section 02540 of the specifications defined the requirement for synthetic turf. Synthetic turf was required to cover the elastic layer. The specifications initially required the crushed aggregate base to cover the entire multi-purpose field, the elastic layer was to cover the asphalt concrete paving, and the asphalt concrete paving was to cover the crushed aggregate base. Appellant argues that Amendment No. R0001 "revoked [the requirement] by implication and by necessity even though the boilerplate[3] language was left as an artifact in the contract." (App. resp. at 3) Appellant argues that the amendment deleted the crushed aggregate base and "reduce[d] its area of coverage to zero" (app. resp. at 15). The amendment did not use the words "entire field area (entire area internal to running track surface)" that appear in Section 02505 of the specifications. Thus, appellant maintains that the amended RFP did not require that the synthetic turf cover the entire multi-purpose area, but rather that the synthetic turf was to be installed only on the football

and soccer field area, excluding the D-areas. Appellant thus disputes the Government's position that the perimeter of the layers of the multi-purpose field was not changed by the amendment.[4] The amendment provided that the layers were "for the entire synthetic turf field." We construe it to have made no change in the coverage of the synthetic turf. Appellant's strained interpretation of Amendment No. R0001 and its effect is unreasonable.

Appellant also states that the original wording of the RFP was "somewhat ambiguous and contradictory" (app. resp. at 7). According to appellant, the RFP incorporated dimensions for the football and soccer fields, and the area of coverage of the layers of the synthetic multi-purpose field was inconsistent with them. Appellant's alleged interpretation of the area to be covered with synthetic turf arises from a reading of the wording of the specifications in the RFP and shows that, if held, appellant was actually aware of an ambiguity. Appellant did not make any inquiry before bidding, but promised in express terms to perform to a contrary interpretation of the specifications. Assuming *arguendo* that the specifications were ambiguous, they were patently ambiguous. As such, appellant had a duty to inquire and, having failed to do so, it bore the risk of its failure. *HKH Capitol Hotel Corp.*, ASBCA No. 47575, 98-1 BCA ¶ 29,548 at 146,472, citing *Interwest Construction v. Brown*, 29 F.3d 611 (Fed. Cir. 1994) (if the language of a contract contains a patent ambiguity, a duty is imposed to seek clarification or bear the risk of a misinterpretation).

Appellant also takes the position that its proposal complied with the RFP, but did not obligate it with respect to the design for synthetic turf because the RFP did not include a specification for the quantity of synthetic turf to be provided. According to appellant, it was providing a conceptual design in its proposal that it could change after contract award. Appellant submits that, where a design-build specification does not make a feature mandatory, the contractor is entitled to design within the scope of the RFP and the RFP specifications control over what was contained in its proposal in the event of a conflict. (App. resp. at 25-26) Appellant further states that the contractor has freedom to act within the requirements of the RFP and the final design need not be the same as any preliminary design. As authority for this view of design-build contracts, appellant cites *Design and Production, Inc. v. United States*, 18 Cl. Ct. 168 (1989). The facts in that case distinguish it from the present appeal. The Court found where a solicitation unambiguously did not require the construction of theater walls and the contractor's proposal did not offer to include that work in its plans, the contracting officer's direction to construct theater walls constituted a compensable change. The case does not govern interpretation of an RFP that required work which the contractor offered to provide. Appellant was not free to design a multi-purpose synthetic field with less synthetic turf when the RFP specified that a larger area was required to be covered with synthetic turf.

Appellant alleges that it did not plan to furnish synthetic turf for the D-areas, and it did not include the cost of these additional areas in its bid price. Appellant's intention to install synthetic turf in accordance with alleged industry standards and exclude the D-areas

was held only by appellant and was not shared with the Government in appellant's proposal, notations on its drawings, or other communications. The drawings submitted with appellant's proposal show synthetic turf over the entire field area internal to the running track. Appellant certified that all items in its proposal complied with RFP requirements. The terms of appellant's proposal were clearly expressed, and were unconditionally accepted by the Government. Appellant thereby became obligated to provide synthetic turf for the entire area internal to the running track, regardless of an unexpressed, subjective intention. The subjective, unexpressed intent of one of the parties is irrelevant to contract interpretation. *See Andersen Consulting v. United States*, 959 F.2d 929, 934 (Fed. Cir. 1992); *City of Oxnard v. United States*, 851 F.2d 344 (Fed. Cir. 1988). There is no basis to infer that appellant communicated its claimed intention to the Government. Assuming appellant held the interpretation that it claims at the time of contracting, the outcome of the case would not be affected.

Accordingly, we find appellant's arguments about the Government's intention at the time of contracting to be immaterial. According to appellant, the Government may not have intended, contemporaneously with the RFP and before the dispute arose, to have the entire field area internal to the running track surface covered with synthetic turf (*see, e.g.*, app. resp. at 23, 35). Appellant conjectures that the Government may have considered a competing proposal met the RFP requirements, but it omitted synthetic turf from the D-areas (app. resp. at 31-32). Appellant alleges that a Government representative did not criticize its omission of synthetic turf in the D-areas of the field at the 50 percent design review (app. resp. at 23). These arguments do not raise a genuine issue of material fact. Adopting the interpretation advanced by appellant would be contrary to the clear and unambiguous terms of the RFP.

Appellant has argued that the Government's acceptance of appellant's proposal with synthetic turf at the offered price amounted to "economic overreaching" which was unconscionable (app. resp. at 37). Appellant submits that the Government had constructive notice from appellant's proposed pricing of an erroneous contract interpretation. If the Government has knowledge, or constructive knowledge, that a contractor's bid is based on a mistake, and the Government accepts the bid and awards the contract despite knowledge of this mistake and without inquiry, relief may be appropriate to prevent the Government from overreaching. If the contractor's error did not result from a clear cut clerical or arithmetical error, or a misreading of the specifications, the contractor is not entitled to a remedy. *Giesler v. United States*, 232 F.3d 864, 869 (Fed. Cir. 2000); *see C.H.T., Inc.*, ASBCA No. 50773, 99-1 BCA ¶ 30,221 (overreaching of a contractor by a contracting officer when the latter has actual or imputed knowledge that the bid is based on or embodies a disastrous mistake and accepts the bid may lead to a determination of unconscionability). Appellant has made no showing of a legally cognizable mistake made at the time it submitted its proposal. There was no misreading of the specifications but a clear error in business judgment for which there is no relief. *Liebherr Crane Corporation v.*

United States, 810 F.2d 1153, 1157 (Fed. Cir. 1987). Appellant has presented insufficient evidence to give rise to a genuine issue of material fact.

We have considered all of appellant's lengthy submissions and supplements to the Rule 4 documents and find appellant's arguments do not warrant further discussion.

For the foregoing reasons, the Government's motion for summary judgment is granted. The appeal is denied.

Dated: 15 February 2001

LISA ANDERSON TODD
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

NOTES

[1] The RFP was captioned "Design-Build Outdoor Athletic Facilities Presidio of Monterey Monterey, California" (R4, vol. I, tab A at C-TC-i).

[2] The RFP required that football and soccer fields conform to TAC published dimensions as stated above, but that organization does not prescribe dimensions. The reference should have been to the NCAA. *See, e.g.*, app. resp. at 14, and exs. 6-8.

[3] Appellant refers to the specification provisions in Section C-4, Outline Specifications, as "boilerplate" (app. resp. at 7). We understand the term

"boilerplate" to mean standard language in a legal document that is identical in documents of a like nature. This section included the provision that required crushed aggregate base over the entire multi-purpose field (R4, vol. I, tab A at C-4-2 § 02505, Granular Paving). It also included Section 02510, Asphaltic Concrete Paving, and Section 02540, Synthetic Surfacing. Since the amendment did not change these provisions, appellant argues that Section 02505 remained "as an artifact" (app. resp. at 14, n. 35).

[4] Appellant has characterized the Government's arguments in its summary judgment motion as a "post-hoc rationalization of government counsel" that cannot substitute for a decision by the contracting officer (app. resp. at 17). Appellant is misinformed about the nature of appeals before the Boards of Contract Appeals. The CDA mandates that the findings by the contracting officer in a final decision are not binding in any subsequent proceedings which are *de novo*. *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (*en banc*); *Kelso Painting Company*, ASBCA No. 47639, 99-2 BCA ¶ 30,405.

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. 52448, Appeal of Elam Woods Construction Company, Inc. rendered in conformance with the Board's Charter.

Dated:

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