ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| The Ryan Company | ) | ASBCA No. 53385 |
| | ) | |
| Under Contract No. N68711-92-C-4710 | ) | |

APPEARANCE FOR THE APPELLANT: Christopher F. Wilson, Esq.
Christopher Wilson & Associates
Torrance, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
John McMunn, Esq.
Senior Trial Attorney
Naval Facilities Engineering Command
Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Appellant moves for summary judgment, alleging that it is entitled to an equitable adjustment of $136,865 for drilling an additional well.

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). In ruling on a motion for summary judgment, our role is not to weigh the evidence, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). A material fact is one that may affect the outcome of the case. *Anderson*, 477 U.S. at 248. All significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Diebold*, 369 U.S. at 655.

The basic facts are undisputed. The Government awarded appellant a contract to construct a sewage treatment, transmission and disposal system at Camp Pendleton, California. Among other things, the contract required appellant to construct three wells. The "typical" well detail on Drawing C-57 indicated that appellant was to install 300 feet of well screen in each well. The specifications were silent as to the length of the well screen. The specifications delegated certain design responsibilities, in particular the "filter pack

and well screen," to a hydrogeologist to be hired by appellant. Appellant hired Applied Consultants, Inc. to be its hydrogeologist. On Applied Consultants' instruction, appellant installed 250 feet of well screen instead of the 300 feet shown on Drawing C-57. When the Government discovered the omission, it directed appellant to install a fourth well. Appellant installed the fourth well and invoiced the Government for the cost of the work. The Government refused to pay the invoice. Appellant subsequently submitted a claim to the contracting officer for $136,865.14. The contracting officer failed to issue a final decision and appellant timely appealed the deemed denial of its claim to this Board.

Appellant moves for summary judgment, alleging that there are no issues of disputed fact regarding the following issues: (1) a "typical" detail, such as the detail on Drawing C-57, is understood to be only for bidding and permitting purposes within the well drilling industry; (2) the contract delegated responsibility for determining the "sizes" and "location" of various aspects of the well design to the hydrogeologist (Applied Consultants), including the length of the well screen; (3) the contract was latently ambiguous as to the length of the well screen; (4) the contract did not require 300 feet of well screen in each well; (5) Applied Consultants was the "Navy's expert;" and (6) appellant's approved "work plan" impliedly disclosed that it would only install 250 feet of well screen in each well. The Government opposes the motion.

We cannot grant summary judgment on appellant's first four arguments because they involve disputed issues of material fact that are so intertwined as to require a full hearing on the merits. Appellant first argues that the term "typical" has a different meaning within the well drilling industry. Trade usage is a factual issue that must be proven at the hearing by a preponderance of the evidence. *Metric Constructors v. NASA*, 169 F.3d 747, 753 (Fed. Cir. 1999); *M.A. Mortenson Co. v. United States*, 29 Fed. Cl. 82, 97 (1993). The Government denies appellant's second argument, that the contract delegated the length of the well screen to Applied Consultants to design. The Government asserts that the "typical" detail on Drawing C-57 required appellant to install 300 feet of well screen in each of the wells. Appellant's third argument, that the contract was latently ambiguous, depends, in large part, upon how the parties interpreted the term "typical" when they entered into the contract. In this regard, we note that appellant must show that it relied on its asserted interpretation at the time it prepared its bid. *See Fruin-Colnon Corp. v. United* States, 912 F.2d 1426, 1429 (Fed. Cir. 1990). With respect to appellant's fourth argument, that the well screen was to be 250 long because the acquifer was 250 feet thick the Government denies that the acquifer either was, or was assumed to be, 250 feet thick. Accordingly, appellant's motion for summary judgment on these issues is denied.

Appellant's fifth argument, that Applied Consultants was the "Navy's expert," is without merit. The Government did not hire Applied Consultants either directly or indirectly. Applied Consultants was hired by appellant. The design work delegated by the contract to Applied Consultants was part of the work appellant agreed to perform when it entered into the contract and for which it expected payment. Moreover, it is well

established that subcontractors under a Government prime contract have no privity of contract with the Government. *See United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983). Appellant's motion for summary judgment on this issue is denied.

Appellant's last argument that appellant's approved "work plan" impliedly showed 250 feet of well screen is incorrect on this record. The plan, which is dated 21 November 1997, is exhibit 4 to appellant's supplemental reply of 7 February 2002. The plan does not appear to indicate the length of the well screen appellant intended to use. Appellant's motion for summary judgment on this issue is denied.

Accordingly, appellant's motion for summary judgment is denied.

Dated: 6 March 2002

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

I concur

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

I concur

CAROL N. PARK-CONROY
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. 53385, Appeal of The Ryan Company, rendered in conformance with the Board's Charter.

Dated:

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