

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Bender GmbH) ASBCA No. 52266
)
Under Contract No. DAJA22-96-C-0035)

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APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
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OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

This timely appeal involves a contract awarded to appellant, Bender GmbH, to clean and close a United States Army sewage treatment plant in Babenhausen, Germany. Bender appeals from a contracting officer decision refusing payment of Bender's final invoice for DM 48,678.86, and directing Bender to repay DM 120,798.10, a claimed overpayment. We deny the appeal.

FINDINGS OF FACT

1. On 30 November 1995 Bender was awarded lump-sum fixed-price Contract No. DAJA22-95-C-0154 to clean and close the sewage treatment plant in Babenhausen, Germany, so the property could be returned to the German Government (R4, tab 1 at B-1, tab 42; tr. 56-57). The contract was in the original amount of DM 187,246.57, increased to DM 486,788.57 by Modification Nos. P00004 through P00007.

2. Bender, whose managing director is Dieter Bender, is located in Grünstadt, Germany (R4, tab 1). Dieter Bender had been a contractor in Germany for thirty years and during that time had contracts with the United States government (tr. 146-47), and had before performed the type of work required by the contract (tr. 117). Dieter Bender submitted Bender's bid for the contract and the contract modifications, negotiated with the subcontractors for the contract, and discussed the contract with Bender's agent who signed the contract and its modifications on behalf of Bender (tr. 84-85).

3. Under Supplies or Services and Prices/Costs, the contract stated in part:

B.2 LINE ITEMS

(a) The Contract Line Item is specified in the schedule below.

(b) The unit price (U/P) column is deleted, and the total lump sum price shall be expressed in Deutsche Mark (DM) in the total amount column (AMOUNT).

(c) The abbreviation "JB" means "Job".

<u>ITEM</u>	<u>DESCRIPTION</u>	<u>QUANTITY</u>	<u>U/I</u>	<u>UNIT PRICE</u>	<u>AMOUNT</u>
0001	Cleaning out and shut down of Sewage Plant, . . . performed in accordance with the attached work specifications. . . . Firm Fixed Price Delivery Date: Oct 30 95	1.00	JB	_____ - ____	<u>187 246.57</u>

(R4, tab 1 at B-1)

4. Under Scope of Work the specifications for the "Clean Out Shut Down" of the sewage plant provided in part:

5. In no event may the sewer sludge be hauled off and the water accumulating from cleansing [sic] work be drained into the sewer system without prior treatment, rather, disposal must be effected pursuant to the disposal regulations issued by the district and/or community and the Federal Law Sewer Sludge Decree dated 15 Apr 92.

The COR will be furnished with a certification on the proper disposal.

(R4, tab 1, project No. DA-04003-2J at 3)

5. Also under Scope of Work the specifications for the "Clean Out Shut Down," Title 1, Clean-Up Work, consist of Items 1.1 through 1.4. Under Item 1.1, the quantity listed was "390 m³." Item 1.1 stated:

Pump out water and sewer sludge from the buildings of the sewer treatment plant, such as sand retention basin, pre-treatment and after-treatment basin, and sewer digestion tower into tank trucks.

Sewer sludge will become contractor's property and will be disposed of as prescribed. Certification on proper disposal will be submitted to COR.

(*Id.*, at 7)

6. The contract contained FAR 52.243-4, CHANGES (AUG 1987), and FAR 52.246-12, INSPECTION OF CONSTRUCTION (JUL 1986), the latter of which stated in part:

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. . . .

. . . .

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. . . .

. . . .

(i) . . . Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.

(R4, tab 1 at E-1, E-2)

7. Clause E.2, Inspection and Acceptance (Construction), states:

(a) Completed work will be inspected in accordance with the clause(s) at 52.246-12, by the COR.

(b) Final acceptance will be performed by the COR by verification of the work performed and certification of contractor's invoices.

(R4, tab 1 at E-2)

8. Clause H.4, Measurements and Quantities, states:

Unless stated otherwise, all quantities and measurements listed in the specifications, drawings, plans if provided, are estimates only. The offerors shall familiarize themselves with the job site and determine extent, nature, and scope of work as appropriate.

(R4, tab 1 at H-3)

9. Clause H.19, Warranty of Construction (Federal Republic of Germany), states in part:

(a) In addition to any other representations in this contract, the Contractor represents, . . . that the work performed under this contract conforms to the contract requirements

(b) This warranty shall continue for the period(s) specified in Section 13, VOB, Part B, commencing from the date of final acceptance of the work under this contract. . . .

. . . .

(f) If the Contractor fails to remedy any failure, defect or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

. . . .

(j) This warranty shall not limit the Government's rights under the Inspection and Acceptance clause of this contract with respect to latent defects, gross mistakes, or fraud.

(R4, tab 1 at H-11, H-12)

10. On 22 December 1995 the government issued Modification No. P00001 to change the contract number to DAJA22-96-C-0035 to reflect the correct fiscal year and make other similar administrative changes (R4, tab 2).

11. The contract provided that work was to begin 10 days after award and be completed in 40 calendar days (R4, tab 1 at 6). However on 7 February 1996 the government issued a notice to proceed in which the government stated work would begin within 10 days and be completed by 18 March 1996 (R4, tab 3).

12. Prior to the start of performance of the contract, Bender submitted an analyzed sample of the water to the City of Babenhausen which ordered the water was not to be discharged into the public sewer system (tr. 104).

13. On 8 March 1996 Bender wrote the government and stated in part:

The actual performance status of above project was on
7th March 96: **50%** (acc. your Inspector Mr. Michel).

Due to the unforeseen long winter-period one tank is still
frozen and we can't pump the water out. Therefore we ask you
kindly for a **time extension of 7 cal. days.**

(R4, tab 5)

14. In March 1996 rainwater had collected on top of the sludge in the digestion towers. Dieter Bender understood the basic contract required Bender to "haul everything away" (tr. 116). Nevertheless, between 11 and 13 March, Bender pumped this water into a pre-treatment basin and out into a field. The contracting officer representative (COR) discovered the water had been pumped into the field and not disposed of at the treatment facility as contemplated by the government. The DM 4,000 reduction in price in Modification No. P00004 was as a result of this situation. (R4, tabs 13, 33, ¶ 4, tab 42; *see* finding 23)

15. Between 11 March 1996 and 14 March 1997 Bender submitted, and the government paid, six invoices under the contract. Each invoice shows the amount of the contract with the increases by the modifications, and the percentage of that work completed to date. Each invoice was stamped "Measurements Are Correct." On each invoice an authorized COR certified "that services mentioned have been received and work performed is satisfactory and in conformance to the condition of this contract." Each public voucher authorizing payment was signed by the Finance and Accounting Officer and stated: "AMOUNT VERIFIED CORRECT FOR DM"; "PURSUANT TO THE AUTHORITY VESTED IN ME, I CERTIFY THAT THIS VOUCHER IS CORRECT AND PROPER FOR PAYMENT." (R4, tab 29)

16. Bender's first invoice dated 11 March 1996 shows 50% completion on 8 March 1996 and the second invoice dated 15 March 1996 shows 90% completion on 15 March 1996, both based on the initial contract price of DM 187,246.57 (R4, tab 29).

17. On 14 March 1996 Bender wrote the government that, weather permitting, all contract work, except for Position 1.1, would be completed that day, and that a modification was necessary because the dimensions of the buildings were larger than anticipated and thus the amount to be removed and disposed of was larger than contracted for. Appellant asserted that the quantity was 721.78 m³ rather than 390 m³. (R4, tab 6) The record does not contain a government response to this request for a modification.

18. On 20 and 26 March 1996 the parties executed bilateral Modification No. P00002, effective 16 March 1996, which extended the period of performance from 18 March to 7 April 1996 due to freezing weather (R4, tab 7).

19. On 27 March 1996 Bender delivered water and sludge samples to the Institut Kuhlmann for testing. On 10 April 1996 Bender wrote the government that the sludge in the digestion towers was contaminated with heavy metals resulting in greater disposal costs. Due to indications of heavy metal of zinc contamination in a sludge sample, the government issued Modification No. P00003, effective 8 April 1996, which extended the period of performance to 30 June 1996. (R4, tabs 8, 9, 10, 33, ¶¶ 2, 5)

20. On 26 April 1996 Bender submitted the proposal which requested an additional payment for the contaminated material as follows:

Additional payment for Pos. 1.1 water and sewer sludge disposal.

Due to unforeseeable contamination and therefore a different method of disposal, other than proposed, the costs associated with proper disposal are high.

We are herewith forwarding you a modification for additional costs for the above stated contract item.

N.1. Drying of item 1.1 and its orderly disposal by means of Truckstockfilter cleaning, at 35% dried material.	240 m ³	147.60	35,424.00
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N.2. Dried material to be loaded on a truck and cart away.	84 m ³	48.60	4,082.40
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N.3. Disposal of contaminated material 84 m ³ = 84 tons			
@ DM 628.00 per ton (deposit costs)			
<u>DM 62.80</u> G&A			
DM 690.80	84 tons	690.80	<u>58,027.20</u>
	Offered price		DM 97,533.60

(R4, tab 11)

21. Bender's equation in N.3. of volume in cubic meters to weight in tons on a one-to-one basis, is consistent with the usual trade practice, although the greater the density of the sludge, the greater the weight (R4, tab 32; tr. 44). Despite Bender's equations in N.3, Dieter Bender testified one ton of dried (or compressed) sludge does not equal one cubic meter (tr. 151).

22. On 17 September 1996 Bender modified its proposal in a letter which stated in part:

In consequence of the meeting which was held last Friday, and yesterday's conversation we wish to clarify the facts as follows:

On 30 Nov 95 we received on a lumpsum basis above mentioned contract.

Under Position 1.1. of specifications we were requested to pump out the water and sewage sludge into **tank trucks** and to dispose same properly.

The water from the sewage treatment plant was examined by the Institut Kuhlmann. The analyses proved that the water is within normal range, and therefore we decided that tank trucks are not necessary for disposal. Mr. Nehrig [the government's] (Sewage Plant Operator) had no objection with the kind of our disposal. In our basic offer we had included tank truck cost of DM 4,000, - (10 trucks per day - capacity of truck = 20 m x 2 days DM 200,- = **DM 4,000**]).

If the further analyses would not have discovered contamination of soil, we would have disposed the actual quantity of 731m³ (water & sludge together), - actual quantity measured on 14 March 96 with Mr. Michels (US-Army Inspector) - without additional charge. But however the analyses resulted in heavy metal contamination of the sludge and therefore we asked for a modification to cover the additional cost for disposal of the contamination sludge. Till today we have not received this modification which would cover the cost for differing site conditions. . . .

Pos. 1.1 of the specification was based in our basic offer on a mixed calculation with a unit price of DM 148.10 (Water & sewage sludge). Disposal of the **not-contaminated soil** was calculated with DM 120 per m3.

In consequence thereof we can offer you the following:

Original Contract Price		DM 187.246,57
Decrease in Pos. 1.1 (for not using the tank truck)	-	DM 4.000,-
Disposal of the contaminated soil:		
120 m3 x DM 739,40 =		DM 88.728,-
./. cost for not-contaminated soil, 120 m3 x DM 120,- =	-	DM 14.400,-
(included in basic offer)		
Total		DM 70.328,-

Therefore we ask you kindly to increase the contract by DM 70.328,-, so that we can complete the contract as soon as possible.

(R4, tab 12)

23. Modification No. P00004 dated 24 September 1996 added Items 1.5 through 1.7 to the Scope of Work, "Clean Out Shut Down," Title 1, Clean-Up Work, and adopted the price changes in Bender's 26 April and 17 September 1996 proposals. Specifically, Modification No. P00004 increased the price to DM 739.40 for each cubic meter of contaminated sewer sludge, and reduced the price by: (1) the amounts allotted to disposing of non-contaminated soil within the original contract; and (2) DM 4,000 for not using the tank trucks. Disposal of 140 cubic meters of water was to be made at no cost to the government. Modification No. P00004 states in part:

Item#	Quantity m3 Old/New	Unit price DM	Decrease DM	Increase DM
1.1	390/ 0	(LS 148.10)	18,400,00*	
1.5	0/70	NA		0.00
1.6	0/70	NA		0.00
1.7	0/120	739.40		88,728.00

Total difference, Increase . . . DM 70,328.00

*= DM 4.000, - for not using the tank truck
DM14.400,- for not contaminated soil, 120 m3 x DM 120,-

b. STATEMENT OF WORK FOR THE ADDED ITEMS 1.5 -
17 above:

1.5 Pump out rain water from the after-treatment basin.

1.6 Pump all contaminated rain water in pre-treatment basin stemming from sewer digestion towers into tank vehicles and dispose of [in] the proper method. Certificate of proper disposal including the cost is to be handed to the COR. The cost for disposal is to be born by the contractor because he drained the sewer digestion tower into the pre-treatment basin instead of disposing it the proper way.

1.7 Contaminated sewer sludge is to dispose of properly. The certificate is to be presented to the COR.

c. Based on the above, the total contract amount is increased
from DM 187,246.57
by DM 70,328.00
to DM 257,574.57

d. Final price determination of subject modification and basic contract will be subject to the [German Price Control Office] GPCO audit.

e. The completion date for the above contract and modification thereto is 15 November 1996.

(R4, tab 13)

24. The sum of the prices proposed in N.2 and N.3 of Bender's 26 April 1996 proposal for loading, carting away, and disposing of dried contaminated material total DM 739.40 per ton, which is the same number as the unit price used in Modification Nos. P00004 through P00007.

25. Dieter Bender read Modification No. P00004 prior to execution and agreed to its terms (tr. 114-17).

26. Dieter Bender recalled the parties discussed the price audit “oftentimes,” although not in connection with any specific modification (tr. 129-30). There is no evidence Dieter Bender inquired which type audit was required by the modifications to the contract (tr. 147-48).

27. On 30 September 1996 Hock GmbH submitted its offer to Bender for “mobile sludge draining” for the contract, and stated Hock’s offer was “based on a quantity of approx. 120 cbm diluted wet sludge to be drained per start-up” (ex. G-3). On 11 October 1996 Bender subcontracted with Hock for the removal and disposal of the contaminated sludge in the digestion towers at a price of DM 260.00 per ton (tr. 89). That letter agreement stated in part: “Calculation of quantity upon verification. The estimated quantity is approx. 200 tons.” (Ex. G-4) Hock’s manager for the commercial and business area, Frank G. Höefling, prepared Hock’s offer for the contract and the modifications (tr. 163, 173-74). Hock began work in mid to late October 1996 (exs. G-4, G-6).

28. Hock first added water to the sludge in the digestion towers to make it easier to pump (tr. 89, 98-99). Frank Höefling estimated that 300 cubic meters of water were pumped into the digestion towers (tr. 178). The water and sludge were mixed and then pumped from the towers into compression chambers where the water was squeezed out (tr. 163). Hock’s machinery had measurement devices that registered 849 cubic meters of water and sludge were processed, approximately 35% - 40% of which was solid material (tr. 166, 170-71, 178). The sludge left after compression was put into ten cubic meter containers. When three containers were partially filled, the sludge was transported to a disposal site. (Tr. 165-66, 179-80)

29. At the disposal site each loaded vehicle was weighed, unloaded, and weighed again. The difference between the weights was the weight of the compressed sludge and sand disposed of. The disposal site gave Hock a weight slip for each of the ten loads of sludge. The ten weight slips reflect that Hock disposed of a total of 229.12 tons of sludge. The first two of the three dates on each weight slip are 6 November 1996; the third dates range from 12 December 1996 to 16 January 1997. Each weight slip is accompanied by an additional sheet, each of which bears the same third date and the same number of tons disposed of that are shown on the accompanying weight slip. The weight slips also show that ten vehicles conveyed the sludge in thirty partially filled containers which totaled 300 cubic meters in volume. The containers were not filled to the top to avoid spillage, thus the weight slips showed the volume in cubic meters of the containers was greater than the weight in tons of the sludge. (R4, tabs 26, 32; ex. G-14; tr. 43-45, 123, 166-67, 180-81)

30. On 6 November 1996 the government’s sewer plant manager, Manfred Nehrig, noticed that in the process of compressing sludge, Hock allowed the water that was pressed

out of the sludge to flow into the City of Babenhausen’s sewer system (tr. 22-31). The government reported the incident to the City of Babenhausen due to concern that the water was contaminated and had not been treated (tr. 29). The City of Babenhausen ordered Hock to stop work and the City said that the water being dumped into the sewer was contaminated. Because a permit for the discharge did not exist, local authorities filed a request for prosecution of illegal discharge of filtration water. The report stated: “Whether and to what extent pollution was caused cannot be stated at the present time.” (R4, tab 46; tr. 146, 182-83)

31. “At the beginning” Dieter Bender knew how Hock was going to perform the sludge removal, and that “they always discharge the water after the compression of the sludge into the sewer system” (tr. 90, 130-34). Frank Höefling testified no untreated water under the contract was put in the canalization (sewage system) by Hock (tr. 165).

32. On 8 November 1996 Bender wrote Hock and stated in part: “This order refers to the unforeseen increase in quantity”, which Bender confirmed would still be at the price of DM 260 per ton (ex. G-6).

33. In November 1996 Bender requested that the amount of contaminated sludge covered by the contract be increased at the agreed upon price of DM 739.40 (R4, tabs 14 to 16). The government agreed to increase the amount from 120 cubic meters to 430 cubic meters, but issued the necessary paper work in two modifications due to funding requirements (tr. 66).

34. Bender’s third invoice dated 13 November shows 75% completion on 8 November 1996 based on the contract price of DM 257,574.57 which reflects the increase in price for 120 cubic meters after Modification No. P00004 (R4, tab 29).

35. Modification No. P00005, executed 21 November 1996 and effective 15 November 1996, used the same unit price and states:

a. The purpose of this modification is to increase the quantity for item 1.7 as specified below for project # DA-04004-2J:

ITEM #	Quantity m3 Old/New	Quantity Increase	Unit Price	Total Increase
1.7	120/270	150 m3	DM 739.40	DM 110,910.00

b. Based on the above, the total contract amount is increased
from DM 257,574.57
by DM 110,910.00
to DM 368,484.57

c. Final price determination of subject modification and basic contract will be subject to the GPCO audit.

(R4, tab 17)

36. Modification No. P00006, executed 15 November 1996 and also effective 15 November 1996, states:

Differing site conditions

a. The purpose of this modification is to increase the quantity for item 1.7 as specified below for project # DA-04004-2J:

ITEM	Quantity m3 Old/New	Quantity Increase	Unit Price	Total Increase
1.7	270/430	160 m3	DM 739.40	DM 118,304.00

b. The additional quantity will be funded and definitized based on the price proposal and disposal certificates provided by the contractor.

c. The completion date for the above contract is hereby extended to the 15 December 1996.

d. Final price determination of subject contract and modification will be subject to the GPCO audit.

(R4, tab 18)

37. On 18 November 1996 Hock invoiced Bender for DM 65,550 which was 75% of the anticipated total contract amount of DM 76,000, including disposal of “approx. 200 t, for DM 260 per ton” (ex G-9).

38. Bender’s fourth invoice dated 18 November 1996 shows 75% completion on 18 November 1996 based on the contract price of DM 368,484.57 which reflects the increase to 270 cubic meters after Modification No. P00005 (R4, tab 28).

39. On 9 December 1996 Bender wrote Hock confirming that based on the water analysis Hock could continue to pump the water into the canalization, and stated in part:

Contrary to your promise, your firm did not perform any work on the site on Friday 6 December 1996 and failed to resume work.

For this reason, we will definitely claim delay if the work that was started on Saturday is not finished without interruption.

Work must be finished at the latest by 13 December 1996.

(ex. G-11)

40. On 9 December 1996 Hock wrote Bender, referred to the above letter and stated in part:

If the [approval of the city of Babenhausen] is transmitted quickly we will complete our work within the set period by 13 December 1996.

(ex. G-12)

41. Bender's fifth invoice dated 19 December 1996 shows 80% completion on 19 December 1996 based on the contract price of DM 486,788.57 which reflects the increase to 430 cubic meters after Modification No. P00006 (R4, tab 29).

42. Modification No. P00007, executed 8 January 1997 and effective 7 January 1997, funded the increase in quantity relating to Item 1.7 as outlined in Modification No. P00006 and stated in part:

c. The funding is based on the contractor's proposal faxed on 17 Sep 96. The contractor will be paid when disposal certificates are provided by the contractor and work is completed.

d. In order to obtain all necessary permissions for transportation and disposal of the contaminated water a time extension is granted to complete the project until 7 February 1997.

e. Additional cost will be borne by the contractor if the quantities to be hauled off will increase due to rain, sleet or snow until project completion.

....

h. The final price determination of subject contract and modification will be subject to the GPCO audit.

(R4, tab 21)

43. “[A]round the end of December” Dieter Bender submitted another sample of the water to the City of Babenhausen (tr. 104). On 6 January 1997 Hock received *post facto* approval and was granted a permit from the City to dump the water removed in performing the contract into the City’s sewer system (nearby canal) (R4, tabs 53, 55; tr. 107, 182-83). Dieter Bender testified that the City decided that the water could be discharged into the public sewer system in small quantities (tr. 104).

44. On 17 January 1997 Hock invoiced Bender an additional DM 36,360.88 for the period 30 October through 13 November 1996 and billed for the lump sum amounts for draining, emptying sludge in the digestion tanks, and disposing of the balance of the 229.12 tons of sludge at the unit price of DM 260. (Exs. G-9, -13, -14, -16; tr. 174-75)

45. On 19 February 1997 representatives of Bender and the government signed a Completion and Acceptance Certificate. The Certificate stated that the contract was completed 14 February 1997, inspected 19 February 1997, and would be accepted on 3 March 1997. A list of deficiencies and comments not pertinent to this appeal was attached to the Certificate and were corrected by 3 March 1997. The Certificate also stated that the warranty period would start on 3 March 1997 and end on 2 March 1999. (R4, tab 23)

46. Bender’s sixth invoice dated 4 March 1997 shows 100% completion on 3 March 1997 based on the contract price of DM 486,788.57 which reflects the increase to 430 cubic meters after Modification Nos. P00006 and P00007. Ninety percent of the sixth invoice in the amount of DM 69,277.01 was paid 14 March 1997, and the balance remaining in the contract after this payment was DM 27,732.57. (R4, tab 29)

47. On 11 March 1997 Hock submitted its final invoice to Bender for DM 575.00 for supplies and labor for final cleaning of the sewage treatment plant (ex G-16; tr 174-75).

48. Bender submitted its seventh and final invoice on 22 April 1997 for DM 48,678.86 which was intended to bill for the balance due under the contract. However, the billing did not take into account a government payment of DM 20,946.29, so the invoice should have been for DM 27,732.57. (R4, tabs 24, 29)

49. At the end of April 1997 the contracting officer (CO) returned the seventh invoice to Bender stating that a final payment would not be made because: (1) the price

audit had not been done; and (2) Bender had not provided disposal certificates per Modification No. P00007 and Item 1.1 - Sludge Disposal (R4, tab 25).

50. On 29 April 1997 Bender submitted weight slips for sludge disposal and its cover letter stated in part:

Attached please find the requested weight slips, as well as the corresponding documentation for the proof of disposal.

The quantity disposed of according to the corresponding documentation is 300 cubic meters.

As you know the sludge to be disposed of had been compressed, therefore the quantity of sludge to be disposed was reduced accordingly.

The enclosed weight slips totaled 229.12 tons of disposed material. (R4, tab 26; tr. 69, 80-81)

51. To perform the price audit, the GPCO requested information from Bender relating to its charge of DM 739.40 per ton for the transportation and disposal of sludge. Bender refused to supply the information, arguing initially that the contract was a construction contract which did not require an audit, and subsequently that an audit was not relevant because the contract was fixed price. This dispute extended through 1997. (R4, tabs 19, 59; app. supp. R4, tabs 3 to 11, 13 to 16; tr. 125-26, 148-50) On 5 January 1998 the government withdrew its request for a price audit because Bender would not provide the necessary documentation (R4, tab 20). The GPCO informed Bender of the government's withdrawal on 14 January 1998 (R4, tab 60).

52. On 27 March 1998 Bender wrote the government that if the government no longer wanted a price audit, the "contractually agreed payment is due." Bender went on to say that on 15 April 1998, it would turn the matter over to its attorney. (R4, tab 57)

53. A law firm representing Bender wrote the government on 17 September 1998 requesting payment of DM 48,678.86 under the contract (R4, tab 61). On 24 September 1998 the government refused and demanded Bender return amounts due to savings from improperly disposing of water by use of tank trucks (R4, tab 62). On 2 November 1998 the government wrote to Bender saying that if it did not receive a response to the 24 September 1998 letter by 16 November 1998, the CO would issue a final decision (R4, tab 63). Bender's attorney responded on 8 December 1998 reiterating Bender's demand for payment of its last invoice plus interest if payment was further delayed (R4, tab 64).

54. On 5 January 1999 the CO issued a decision, and in accordance with the letter that had been sent on 24 September 1998, the government stated that Bender had discharged 267.40 cubic meters of water into one nearby canal despite the fact that the contract required it to be disposed of at a treatment facility, resulting in a savings to Bender of DM 39,601.94 that it nevertheless charged to the government. The CO said that the unpaid amount remaining on the contract was DM 27,732.57 which meant that Bender owed the government DM 11,869.37. (R4, tab 30) Bender filed an appeal of this decision which was docketed as ASBCA No. 52126 (pleadings ¶ 51).

55. On 13 March 1999 the CO issued two documents. In one, the 5 January 1999 decision was withdrawn with the statement that a revised decision would be issued shortly (R4, tab 31). In the other, the CO referred to Bender's 29 April 1997 letter (finding 40) which stated that Bender had disposed of 300 cubic meters of sludge. The CO noted that the disposal tickets accompanying that letter only totaled 229.12 cubic meters, and requested that Bender supply disposal tickets for the remaining 70.88 cubic meters. (R4, tab 27)

56. On 20 April 1999 Bender wrote the CO, stating that the enclosed disposal tickets were "for the total amount of 300 cubic meters . . . not only those for the 70.88 cubic meters." The tickets were, however, copies of those that Bender had submitted on 29 April 1997 and, as before, totaled only 229.12 tons. (R4, tab 28; tr. 69)

57. Bender paid Hock, the subcontractor who performed the sludge removal for Bender, DM 59,571.20 for disposal of 229.12 tons of compressed sludge at DM 260 per ton (ex. G-14; tr. 70-73). Bender received no charge from Hock for pumping water into the sewage system (tr. 130). Bender's total payment to Hock was DM 101,856.88 (tr. 174; exs. G-9, -13, -14).

58. On 26 May 1999 the CO issued a revised final decision denying Bender's 22 April 1997 invoice in the amount of DM 48,678.86 and asserting a government claim in the amount of DM 120,798.10. The latter claim was calculated as follows: Bender billed for 430 cubic meters, the full quantity of sludge estimated in Modification No. P00006, at DM 739.40 per cubic meter. Bender had provided disposal tickets for 229.12 cubic meters, a difference of 200.88 cubic meters, or an alleged overcharge of DM 148,530.67. That figure was reduced by the open balance on the contract of DM 27,732.57 and the CO thus demanded repayment of DM 120,798.10. (R4, tab 33)

59. On 30 June 1999 Bender withdrew its appeal of the 5 January 1999 CO decision, ASBCA No. 52126, subject to reinstatement to pursue settlement. On 19 July 1999 Bender filed this appeal of the 26 May 1999 decision which we deem to be a continuation of the former appeal.

DECISION

This dispute concerns Bender's demand for payment of the full contract price, which after the seven modifications was DM 486,788.57, for this completed contract to clean and close the United States Army sewage treatment plant in the City of Babenhausen, Germany. The government contends the contract was changed from lump sum to one based on unit pricing, by Modification Nos. P00004 through P00007 which variously required both a price audit by the GPCO (which the government later waived) and presentation of certificates to show the amount of sludge disposed of. Bender contends the contract remained lump sum despite the modifications, thus the fact the certificates showed only 229.12 tons rather than 430 tons (or cubic meters) of sludge, was irrelevant, or alternatively, to be expected since the sludge was dried and compacted. Bender's final invoice intended to bill for the remaining balance due under the contract, but should have been reduced by DM 20,946.29 for earlier government payments, so Bender's final demand was properly for DM 27,732.57.

We begin an interpretation inquiry by ascertaining "whether the written understanding is clearly stated and was clearly understood by the parties"; if there is an ambiguity, our task is to implement the intent of the parties at the time the agreement was made. *King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997). If a term is susceptible to more than one reasonable interpretation, then the term is ambiguous. *Massie v. United States*, 166 F.3d 1184, 1189 (Fed. Cir. 1999). If a contract itself is ambiguous, parol evidence may be considered. *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988).

Perhaps due to the problems inherent in working with translations between two languages, certain changes made by Modification Nos. P00004 through P00007 are in some respects hard to follow. However, it is clear that after the modifications, for sludge removal, Bender would be paid the fixed unit price of DM 739.40 (initially subject to a price audit) upon submission of disposal certificates for 430 cubic meters or tons (findings 23, 33, 35, 36, 42). At no time did the parties delete the Measurements and Quantities clause stating the quantities were estimates. We have no indication that the term "certificates" meant anything other than the weight slips from the disposal site where the sludge was taken. These weight slips showed the weight in tons of the sludge and the total volume in cubic meters of the partially filled containers which were used to transport the sludge (finding 29). The Government waived its right to an audit and thus accepted Bender's proposed unit price (finding 51). Thus the question before us is whether the proposed price of DM 739.40 was for each ton of dried, compressed sludge shown on the weight slips, or for each cubic meter of water/sludge mixture taken from the tanks, or perhaps, alternatively, the volume of the partially filled containers shown in cubic meters on the weight slips.

In support of its position that DM 739.40 was the price per cubic meter for the water/sludge taken from the tanks, Bender states the parties “contemplated and agreed” to the disposal method of filtering out the water (which comprised approximately 65% of the water/sludge mixture), and compressing the sludge before disposing of it (app. reply br. at 13). Consequently, Bender continues, the weight slips would show only about 35% of the cubic meters of water/sludge removed. Our reading of Bender’s proposals and Modification Nos. P00004 through P00007 which referred to and incorporated these proposals, does not confirm this position.

All the modifications use DM 739.40 as the unit price, an amount which is the total of the payments Bender requested in N.2 and N.3 of its 26 April 1996 proposal to load, cart away and dispose of the dried contaminated material (findings 20, 21, 23, 35, 36, 42). Both Modification Nos. P00004 and P00007 adopted or referred to Bender’s 17 September 1996 proposal which clarified its 26 April 1996 proposal (findings 23, 42). Bender’s 26 April 1996 proposal set out the dried sludge as either per cubic meter or ton, the two measurements being shown as equal. The industry uses the two measurements interchangeably, although the weight of the sludge varies depending on the amount of solid material. (Finding 20, 21)

Hock, the subcontractor who performed the sludge removal for Bender, invoiced Bender DM 260 per ton for disposing of 229.12 tons of sludge (finding 57). The weight slips showed 300 cubic meters total volume of the partially filled containers which transported the 229.12 tons of sludge disposed of. The only evidence of cubic meters disposed of, is the volume of these partially filled containers shown on the weight slips. (Finding 29) Bender received no charge from Hock for pumping water into the sewage system (finding 57). “At the beginning” Dieter Bender knew that Hock would add water and then compress the sludge and the water would be pumped into the nearby canal of the sewer system which was Hock’s standard way of performing this work (finding 31). Dieter Bender reviewed Bender’s bid and negotiated with the subcontractors for the contract (finding 2).

This record reflects that the parties’ agreement was that Bender would receive DM 739.40 for each ton of dried (or compressed) sludge properly disposed of as reflected on each weight slip. The Government is entitled to return of all amounts paid in excess of DM 739.40 for each of 229.12 tons for which Bender provided weight slips, a reduction of DM 148,530.67 (200.88 tons times DM 739.40) in the contract price. *See B.F.I. Waste Systems*, ASBCA No. 30076, 86-2 BCA ¶ 18,842 (Government entitled to recoup payments made in excess of services shown on delivery tickets despite argument that contract was lump sum.)

Bender argues that payments made are now final and in so doing, cites *Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996). In *Decker* the Court stated at 1582:

Both as a matter of contract and as a principle of law, once the Government accepts the work required under the contract, that acceptance is binding on the parties. . . .

As a matter of general principle, finality in contract relations is important not only in light of the parties' expectations, but as a matter of economic efficiency. Uncertainty has real costs, and it is in the interest of both the contractor and the Government to be able to rely on decisions fairly made.

Final Completion and Acceptance Certificate of the contract work was signed on 19 February 1997 (finding 45). Between 11 March 1996 and 14 March 1997 Bender submitted and the government paid, six invoices. Each invoice sets out the percentage of work accomplished of the contract amount as increased by modifications to that date, and each invoice is stamped "Measurements Are Correct." On each invoice an authorized COR certified "that services mentioned have been received and work performed is satisfactory and in conformance to the condition of this contract." Each of the vouchers was signed by the Finance and Accounting Officer and stated: "AMOUNT VERIFIED CORRECT FOR DM"; "PURSUANT TO THE AUTHORITY VESTED IN ME, I CERTIFY THAT THIS VOUCHER IS CORRECT AND PROPER FOR PAYMENT." (Finding 15)

After the final Completion and Acceptance Certificate and payment on the first six invoices was made to Bender and the government waived the price audit by the GPCO, these payments were final under the contract's Inspection of Construction clause with stated exceptions. That clause states: "Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee." (Finding 6)

In *Chilstead Building Company, Inc.*, ASBCA No. 49548, 00-2 BCA ¶ 31,097, we held under the identical Inspection of Construction clause as in this appeal, that a contractor's gross mistakes which amounted to fraud outweighed any error of the government's personnel, and, upon discovery of defects in a contractor's product, the government was entitled to reopen the contract and to avail itself of all provisions of the original contract, notwithstanding the prior acceptance and final payment. A contractor's concealment of facts it had a duty to disclose which induced the government to accept and pay for end items, is a gross mistake amounting to fraud. *Catalytic Engineering and Mfg. Corp.*, ASBCA No. 15257, 72-1 BCA ¶ 9342 at 43,369-70, *recon. den.*, 72-2 BCA ¶ 9518. Revocation of acceptance must be done within a reasonable time after the latent defect, gross mistake, or fraud is discovered, or could have been discovered with ordinary diligence. *Chilstead, supra* at 153,574.

This Board further stated in *Chilstead, supra* at 153,575:

To revoke final acceptance based on fraud, the Government has the burden of proving-

(1) that its acceptance was induced by its reliance on (2) a misrepresentation of fact, actual or implied, or the concealment of a material fact, (3) made with knowledge of its falsity or in reckless or [r] wanton disregard of the facts, (4) with intent to mislead the Government into relying on the misrepresentation, (5) as a consequence of which the Government has suffered injury.

See *Dale Ingram, Inc.*, ASBCA No. 12152, 74-1 BCA ¶ 10,436 at 49,331. To revoke final acceptance based on "gross mistakes amounting to fraud," the elements of proof are the same as for fraud, except that there is no requirement to prove intent to deceive (or mislead) the Government. See *Bar Ray Products, Inc. v. United States*, 340 F.2d 343, 351, n.14, 167 Ct. Cl. 839, 851, n.14 (1964).

With regard to the first and second elements of the government's burden, the government's payments were pursuant to Bender's invoices showing a percentage of completion of the contract amount as modified and Bender's stamp "Measurements are Correct." Although Bender disposed of 229.12 tons of sludge, it invoiced through invoice six for 100% of the work, or disposal of 430 tons (or cubic meters) of sludge (finding 46). Prior to making the final payment, the government demanded the weight slips and the audit, which it ultimately waived (findings 49, 51).

With regard to the third element, Bender's second invoice dated 15 March 1996 is for 90% completion on that date based on the original contract price of DM 187,246.57 (finding 16). Thus essentially all that remained in the contract work was disposal of the sludge and cleaning the tanks (DM 18,400, or approximately 10%, deleted from the initial contract by Modification No. P00004 for the disposal of non-contaminated sludge and not using the tank truck) (findings 23, 47). Hock's 30 September 1996 offer to Bender for Hock's work under the contract was "based on a quantity of approx. 120 cbm diluted wet sludge to be drained per start-up" (finding 27). The first two dates on each of the ten weight slips are 6 November 1996 and the third dates range from 12 December through 16 January 1997. Each weight slip is accompanied by an additional sheet which bears the third date and the number of tons disposed of that are shown on the accompanying weight slip. (Finding 29) On 8 November Bender wrote Hock concerning the "unforeseen increase in quantity" (finding 32), and on 15 and 21 November 1996 Bender and the government at Bender's request increased the contract to 430 cubic meters of sludge at the price of DM 739.40 per

cubic meters or ton of dried, contaminated sludge (findings 35, 36). On 18 November 1996 Hock invoiced Bender for DM 65,550 for 75% of the work that included disposing of approximately 200 tons of sludge, and estimated the total amount of the charges would be DM 76,000 (finding 37). Cleaning of the tanks remained (finding 47). However if the only work remaining for Hock had been disposal of sludge at the price of DM 260 per ton, there could be no more than 40 tons remaining. Bender was aware of Hock's progress in mid December 1996, and submitted another water sample to the City of Babenhausen at the end of December (findings 38, 40, 43).

On 19 December 1996 Bender submitted its fifth invoice for payment of 80% of the contract price of DM 486,788.57 (finding 41). The 20% remaining results in DM 97,357.71 or approximately 131.67 cubic meters or tons, which results in 298.33 cubic meters or tons billed for by the 5th invoice. On 6 January 1997 Hock received *post facto* approval and was granted a permit from the City to dump the water removed in performing the contract into the City's sewer system (nearby canal) (finding 43). On 17 January 1997 Hock invoiced Bender DM 36,360.88 for the period 30 October through 13 November 1996 and billed for the lump sum amounts for draining, emptying sludge in the digestion tanks, and disposing of the balance of the 229.12 tons of sludge at the unit price of DM 260 (finding 44). On 4 March 1997 Bender submitted its sixth invoice for 100% of the contract price (finding 46). On 11 March 1997 Hock submitted its final invoice for DM 575.00 for the supplies and labor for cleaning the tanks (finding 47). Bender knew, or had wanton disregard of the facts, that the percentage completion which were stated in no less than its fifth and sixth invoices were in substantial error.

The Government was injured by its payments to Bender, and thus satisfies the fifth element. We conclude that the exception for gross mistakes amounting to fraud is applicable. *Decker* did not involve the exceptions to final acceptance and is thus distinguishable.

Since the government waived the right to an audit we need not address whether Bender was required to inquire which of two audits were applicable to the contract. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426 (Fed. Cir. 1990).

In light of our conclusions in this decision, we do not find it necessary to address the parties' other arguments.

Accordingly, the appeal is denied. The Government is entitled to recoup all amounts paid in excess of DM 739.40 for each of 229.12 tons for which Bender provided weight slips, a reduction of DM 148,520.67 in the contract price.

Dated: 20 November 2003

JEAN SCHEPERS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 52266, Appeal of Bender GmbH, rendered in conformance with the Board's Charter.

Dated:

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