

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
)  
Kilgallon Construction Company, Inc. ) ASBCA Nos. 52582, 52583  
)  
Under Contract No. DACA05-96-C-0026 )

APPEARANCE FOR THE APPELLANT: Edward R. Stepan, Esq.  
Wolkin & Timpane, LLP  
San Francisco, CA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
Kerry S. Curtis, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District, Sacramento

OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals are taken from the deemed denial of two claims submitted to the contracting officer by appellant, Kilgallon Construction Company, Inc. (Kilgallon). The parties have stipulated that the issue before us in ASBCA No. 52582 is “[w]as Contractor’s interpretation of the plans and specifications regarding placement of ‘select’ and ‘satisfactory’ fill material ‘reasonable,’ thus entitling Contractor to recover for a constructive change when it was required to perform per the Government’s interpretation;” and, in ASBCA No. 52583, the issue before us is “[w]as the material that the Contractor called cement-treated base (CTB) at the worksite a Type I or Type II differing site condition.” (Stipulation at 4.a, 4.b)<sup>1</sup> The appeals have been submitted on the record

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<sup>1</sup> We recognize that alternative bases for decision might exist and that a complete analysis of these two disputes might require us to resolve facts which would carry us beyond the issues as stipulated. For example, an appeal may be denied even where an appellant’s interpretation of a specification provision is reasonable if its reliance at time of bidding is not proved. However, since the parties have stipulated to the issues to be decided and not offered arguments beyond those issues, we have confined ourselves to the parties’ stipulated positions and proceeded to resolve the appeals in the manner which the parties have requested. We have done so on the understanding that inherent in their stipulation and the arguments raised thereunder is each of the parties’ satisfaction that their opponent could establish any factual predicates such as the prime contractor’s reliance at time of bidding, or that alternative bases for recovery such as superior knowledge could not be successfully established.

pursuant to Board Rule 11. Only entitlement is before us. We deny ASBCA No. 52582 and sustain ASBCA No. 52583.

### FINDINGS OF FACT - GENERAL

1. Contract No. DACA05-96-C-0026 was awarded to Kilgallon on 29 March 1996 for the firm fixed-price of \$9,411,846. The contract called for construction of a 243,000 sq. ft. General Purpose Warehouse at the DDRW Sharpe Site, California. (R4, tab 6)

2. As solicited and awarded, the contract included FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984). That clause requires the contractor to acknowledge that it has made a site investigation and “satisfied itself as to the general and local conditions which can affect the work or its cost . . . .” This includes “the character, quality, and quantity of surface and subsurface materials . . . insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications . . . .” (R4, tab 7 at 00700-vi, -67) A pre-bid site inspection was made by at least two employees of Kilgallon’s excavation subcontractor, DSS Company (DSS) (app. supp. R4, tabs A-27, -28).

3. The contract also included the following relevant clauses: FAR 52.214-29, ORDER OF PRECEDENCE—SEALED BIDDING (JAN 1986); FAR 52.233-1, DISPUTES (OCT 1995); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) ALTERNATE I (APR 1984), under which a conflict between specifications and drawings is resolved in favor of the specifications; and FAR 52.243-4, CHANGES (AUG 1987) (R4, tab 7 at 00700-ii, -vi).

4. Notice to Proceed was issued on 11 April 1996 (R4, tab 11).

### FINDINGS OF FACT - ASBCA No. 52582

5. The Scope of Work for Section 02221, Excavation, Filling, and Backfilling for Buildings, ¶ 1.1, states: “[t]his section covers the excavation, filling, and backfilling for structures and includes all earthwork necessary to construct the building and dock areas.” That section contained several provisions that deal with fill material, as follows:

1.3.1 Satisfactory Material: Local excavated native and existing fill materials which classify as satisfactory material may be used for fill and backfill except where other materials, such as select material, are to be used as specified or shown on the contract drawings. Satisfactory material includes minus 2-inch material that classifies according to ASTM D

2487 as GW, GP, GC, GM, SW, SP, SC, SM, ML, CL and combinations of these such as SP-SM. Classification of soil is not a function of moisture content. In addition, satisfactory material shall be free of debris and have not more than 2% organic matter by volume. Satisfactory material required beyond that produced from project excavations shall be “Select Material” as defined below.

1.3.2 Unsatisfactory Materials: Unsatisfactory materials include materials classified according to ASTM D 2487 as CH, MH, OL, OH, and Pt. and debris. Classification of materials as unsatisfactory is not dependent on moisture content. Uncompacted fill or backfill from previous construction are considered unsatisfactory until completed.

1.3.3 Unstable Material: Unstable material is material that cannot be properly compacted or will not support construction equipment or fill material due to excess moisture. Potentially unstable materials are soils with natural moisture contents near or above the plastic limit as determined by ASTM D 4318 or 3 or more percent greater than the optimum moisture content as determined by ASTM D 1557. Potentially unstable material shall not be called unstable until the Contractor has dewatered the site or excavation and attempted to moisture condition the soil as required.

....

## PART 2 - PRODUCTS

2.1 **BORROW MATERIAL**: Borrow material shall be selected to meet requirements and conditions of the particular fill for which it is to be used. The Contractor shall provide the necessary clearing, grubbing, disposal of debris, and satisfactory drainage at all times of borrow pits.

2.1.1 Selection: Borrow materials shall be obtained from borrow sources outside the limits of Government controlled land. Borrow materials shall be subject to the approval of the Contracting Officer. The source of borrow material shall be the Contractor’s responsibility.

2.1.2 Select Material: Select material shall be used to backfill the overexcavation for footings and to construct the building pad. Satisfactory material may be used in the lowest 2-feet of the building pad. Select material shall be free of organics and debris and shall conform to the following gradation and Atterberg limits:

<u>Sieve Size</u>	<u>Percent by Weight Passing</u>
2-inch	100
No. 4	50-90
No. 200	5-35

Liquid Limit less than 35.  
 Plasticity index less than 12.

....

3.3 EXCAVATION: . . . If unsatisfactory or unstable material is encountered below specified excavation grade lines, the determination of the extent of unsatisfactory or unstable material shall be made by the Contracting Officer's Representative. All unsatisfactory material and surplus satisfactory material shall be disposed off base. In the event that it is necessary to remove unsatisfactory or unstable material to a depth greater than specified, the Contracting Officer shall be notified and an adjustment in the contract will be considered. Unsatisfactory and unstable material excavated below the excavation grade shown shall be excavated and replaced with select material. Excavations carried below the depths indicated, without specific direction from the Contracting Officer, shall except as otherwise specified, be refilled to the proper grade with select material as directed. All additional work of this nature shall be at the Contractor's expense. . . .

....

3.12 FILLING AND BACKFILLING: Satisfactory material shall be used in bringing fills and backfills to the lines and grades indicated below the structure and, except for bridging material, for replacing unstable materials.

(R4, tab 10 at 02221-1 through -7, -9)

6. Drawing C7.0 contains interior and exterior footing details. Both include the following as note 4, which is designated by the number “4” in a circle: “SATISFACTORY MATERIAL COMPACTED TO 95% MINIMUM.” The drawing detail shows all fill material under the footing and, within the body of the fill, the number “4” in a circle. It also shows a 6-inch aggregate base above the fill material. In another part of the drawing there are two cross sections which show elevations in relation to footings, pavement, existing grade, grade after over-excavation, and the concrete pad. Of 23 footings shown, 3 are below existing grade, by depths of approximately 6, 12, and 18 inches. The cross sections (CS) show elevations within the footprint of the concrete pad approximately as follows:

	<u>CS “A”</u>	<u>CS “B”</u>
Existing grade	18' 4" to 19' 10"	17' 4" to 19' 4"
Grade after over excavation	16' 4" to 17' 10"	15' 4" to 17' 4"
Finish floor (top of concrete pad)	23'	23'

(R4, tab 9)

7. DSS has submitted the affidavit of Mr. James Eavenson regarding, *inter alia*, bid preparation. In preparing its bid, DSS studied paragraphs 1.3.1, 2.1.2, 3.3, and 3.12, of Section 02221, and drawing C7.0. DSS also recognized that the requirements of paragraph 2.1.2 were “more stringent” (app. supp. R4, tab A-27, ¶ 12). It concluded that select materials would be required because there was insufficient satisfactory material onsite. However, DSS further concluded that fills would be placed using satisfactory materials at the bottom of the excavation, with select materials above the satisfactory and below the base rock for the concrete slab of the warehouse. If unstable or unsatisfactory material was encountered, it was to be excavated and select was to be used for filling any overexcavation. DSS did not, however, bid planning to place select at all of the 100 or so footings:

. . . [A]s bid by DSS, the earthwork operation was expected to be generally Satisfactory at lower elevations (except if overexcavation of unstable were required at footings) and, at higher elevations, after onsite Satisfactory had run out, Select material would be used as building pad fill. Broadly, this plan permitted DSS to estimate costs avoiding double handling for most material, which is normal practice, and which lowered the DSS earthwork bid. It also permitted DSS to dig deeper footings with an excavator, setting native material beside the hole, and after reaching line and grade, generally pushing the dug native material back in, working the material, watering and

compacting, and having it accepted, all, generally, without trucking material or moving it for a long distance.

(App. supp. R4, tab A-27, ¶ 11)

8. Early in contract performance after a pre-construction meeting with respondent a dispute developed over whether satisfactory fill could be used under footings (app. supp. R4, tab A-27, ¶ 18). On 2 July 1996 DSS sent a letter to Kilgallon which states, in pertinent part:

We are requesting clarification on the following items regarding the rough grading at the subject project.

1. The footing details on sheet C7.0 indicate satisfactory material is to be used to backfill the footing overexcavation, building site overexcavation and to construct the building pad. Foundation Detail 1 on sheet S5.1, and Details 1, 6 & 7 on sheet S5.6 indicate satisfactory material to construct the required fill. Specification Section 02221 Excavation, Filling, and Backfilling for Buildings, Part 3 - Excavation, Paragraph 3.12 Filling and Backfilling states that “Satisfactory material shall be used in bringing fills and backfills to the lines and grades indicated below the structure . . .” .

Specification Section 02221 Excavation, Filling, and Backfilling for Buildings, Part 2 - Products, Paragraph 2.1.2 Select Material states that “Select material shall be used to backfill the overexcavation for footings and to construct the building pad. Satisfactory material may be used in the lowest 2-feet of the building pad.”

We have assumed that the Excavation section of the specifications, backed up by the plans, supercedes the lone conflicting specification section under Products. If this is not the case please clarify the use of select material and define the “lowest 2-feet of the building pad” using elevations if applicable.

(R4, tab 1 at unnumbered 6)

9. Kilgallon sent Request for Information (RFI) No. 7 to respondent on 3 July 1996:

Our interpretation of “building pad” per Section 02221, paragraph 2.1.2 is that area above the line labeled “existing grade” shown on C-7.0 [sic]. We are proceeding with grading based upon this interpretation. If you see otherwise, please notify us at once.

(R4, tab 1 at unnumbered 8)

10. By letter of 11 July 1996, received by Kilgallon on 15 July 1996, respondent replied as follows:

For RFI #7: Specification Section 02221, Paragraph 2.1.2, indicates that select material be used for constructing the building pad. Satisfactory material may be used to backfill the 2' overexcavated area. Satisfactory material may also be used to an elevation above the overexcavation equal to the bottom of the 2' select material layer. These elevations are as follows:

Satisfactory Material: Up to elevation 19'-10" (19.8').

Select Material: From 19'-10" (19.8') to 21'-10" (21.8').

Aggregate Base: From 21'-10" (21.8') to 22'-4" (22.33').

Concrete Slab: From 22'-4" (22.33') to 23'-0" (23.0').

This information is provided as a clarification only. If you consider any of this information to be a change, please contact me immediately for direction before proceeding with the work.

(R4, tab 1 at unnumbered 9)

11. By letter of 17 July 1996, Kilgallon thereafter informed DSS as follows:

As I indicated to you at the jobsite meeting yesterday I asked the Government to review your assertion that satisfactory material may be used below the footings as shown on C-7. Their initial indication is that although there is a conflict within the contract documents the most stringent of the two requirements prevails. We have submitted a written request to have them review their position and let us know in writing.

Until you hear otherwise, in writing, you are to proceed with the fills as required by section 02221, 2.1.2, that is using select materials to backfill overexcavation.

(App. supp. R4, tab A-26)

12. DSS was required to perform in accordance with respondent's interpretation thereby increasing its costs (app. supp. R4, tabs A-27, -30; May 2003 stipulation, ¶ 4.a).

13. Kilgallon filed a properly certified claim in the amount of \$193,811 with respondent on 23 April 1999 (R4, tab 1). When a contracting officer's decision was not issued, Kilgallon deemed the contracting officer's inaction a denial of the claim and filed a Notice of Appeal dated 14 January 2000 (complaint and answer, ¶ 8).

14. The parties have stipulated the issue to be resolved as follows: "[w]as Contractor's interpretation of the plans and specifications regarding placement of 'select' and 'satisfactory' fill material 'reasonable,' thus entitling Contractor to recover for a constructive change when it was required to perform per the Government's interpretation?" (May 2003 stipulation, ¶ 4.a)

#### DECISION - ASBCA No. 52582

The stipulated issue before us is whether Kilgallon's interpretation of the contract provisions regarding placement of select and satisfactory fill was reasonable.<sup>2</sup> The interpretation advanced by DSS is that select material would only be used after satisfactory material onsite had been depleted, and it did not plan to place select at all of the footings (finding 7). For a variety of reasons, including the precedence of the specifications over the drawings, respondent argues that this interpretation is unreasonable. In any event, it is Kilgallon's position that respondent constructively changed the contract by requiring it to perform in accordance with respondent's interpretation.

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<sup>2</sup> Even where there are inconsistencies within the specifications allowing for more than one reasonable interpretation, an appellant must still show that its interpretation is reasonable. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 n.6 (Fed. Cir. 1993). Thus, while ¶ 2.1.2 may be susceptible of more than one interpretation, appellant must show that its version is reasonable. Although the parties have not placed the issue before us, we do not believe that respondent's interpretation (finding 10) is unreasonable and, in any event, Kilgallon's instructions to DSS appear to have been at odds with respondent's answer to RFI # 7 (*cf.* findings 10, 11).



We agree that under the order of precedence in the Specifications and Drawings for Construction clause (finding 3), the specifications govern. *Hensel Phelps Construction Co. v. United States*, 886 F.2d 1296 (Fed. Cir. 1989). The issue which the parties have defined for us is whether appellant's interpretation was reasonable (finding 14). Under the precedence established in the contract, that issue must be decided based solely on the specifications even though we may believe there is a conflict with the drawings. *Id.*

Appellant argues that the specifications and drawings permit "the use of onsite Satisfactory for fills to the extent that native material lasted." App. br. at 6. In appellant's view, the exception to this occurred if unsatisfactory or unstable material was encountered. *Id.* Appellant's interpretation ignores the unambiguous requirement for select material to backfill the overexcavation for footings, bridging material, and in construction of the building pad (finding 5). Those requirements are not qualified in any way by considerations of the availability of native soil and cannot be reconciled with an interpretation that is. Appellant's interpretation also would require it to use select where it is not required, *i.e.*, wherever unstable or unsatisfactory material is encountered. We hold that appellant's interpretation is unreasonable. ASBCA No. 52582 is denied.

#### FINDINGS OF FACT - ASBCA No. 52583

15. Drawings C2.2, C2.3 and C2.4 contain 12 boring logs. Nine of the logs state at the top elevation either "FROM 0 TO 0.5-FOOT HARD CRUST" or "HARD CRUST: 0 TO 0.5 FOOT." (R4, tab 9) Thus, bidders were told to expect the first six inches of excavation to be "hard crust." According to appellant's expert, Mr. Ronald Heinzen, a licensed geotechnical engineer, the term is not precise, but it refers to natural soil that is dense or baked dry at the surface. Mr. Heinzen states, and we find, that a reasonable bidder could expect to use the "hard crust" material in making fills by using ordinary construction equipment such as that in use at the site. He further states that a site investigation "would not reveal the nature or existence of the material called [cement treated base]." (App. supp. R4, tab A-31, ¶¶ 3, 6)

16. DSS prepared its bid expecting to find packed soil which would be hard to dig, but which could be broken up by heavy equipment and used as fill. The bid did not contemplate encountering a material which appellant calls "cement treated base" (CTB), or anything as hard as CTB. Such material was encountered (app. supp. R4, tab A-27, ¶ 24). Appellant has submitted a 7" x 3.5" (approximately) piece of the material as an exhibit. The Board observes that the material is rock-like, and very hard (app. supp. R4, tab A-33). Mr. Heinzen states that the material is not hard crust and includes a cementitious agent such as fly ash, cement, or lime. Mr. Heinzen also states, and we find, its composition includes metal shavings and its compressive strength is 2 to 3 times that of concrete and 100 times the strength of native soil found in the area. (App. supp. R4, tab A-31, ¶ 4)

17. The result of encountering CTB was that the cost of breaking up the material, which required hauling it off-site and using a rock crusher, was more expensive than DSS had estimated in preparing its bid. Additional cost was incurred in spite of respondent allowing DSS to use the crushed material for making select fill after off-site crushing. (App. supp. R4, tabs A-27, A-29)

18. Respondent has submitted the affidavit of Mr. Douglas Betz, Construction Representative. Mr. Betz maintains that the material called CTB by appellant was observable at and prior to time of bidding. (Resp. supp. R4, tab 5)

19. Respondent has also submitted the affidavit of Mr. Alfred Gonzales who was responsible for quality assurance. Mr. Gonzales states that the events depicted in the 17 July 1996 Quality Assurance Report (QAR) report are accurate and that he took the photos dated 17 July 1996 appended to that report. (Resp. supp. R4, tab 6) The first four photos show material which appears visually similar to app. supp. R4, tab A-33, that is, chunks of material some of which are several inches thick and 6 to 12 inches at the widest point. The photos show substantial quantities of the chunks of material. However, other photos include asphalt and are not reliable regarding the appearance of the top layer of the ground. (Resp. supp. R4, tab 1) According to Mr. Ben Silver, the erstwhile DSS superintendent, the CTB was just under the asphalt (app. supp. R4, tab A-30, ¶ 7).

20. The QAR report for 17 July 1996 noted that appellant had stated it may file a claim because the hard-crusting surface material encountered was difficult to crush, and that appellant was informed that if it could not process the hard-crusting surface material to comply with the requirement for fill of less than the 2-inch sieve size in paragraph 2.1.2, appellant would have to dispose of the material off of Government property (resp. supp. R4, tab 1).

21. DSS filed a Request for an Equitable Adjustment (REA) of \$119,487.77 with Kilgallon by letter of 20 December 1996. DSS asserted that the hardness of the CTB material was such that it had to be hauled off-site and crushed with a rock crusher, and that this constituted a differing site condition. On 24 April 1997, DSS's letter was forwarded to respondent by Kilgallon. The REA was certified, the amount revised to \$101,595.00, and a contracting officer's decision was requested in Kilgallon's letter of 23 April 1999. On 14 January 2000, an appeal notice was filed when no contracting officer's decision was received. (R4, tab 2)

22. The parties have stipulated the issue to be decided as follows: “[w]as the material that the Contractor called cement-treated base (CTB) at the worksite a Type I or Type II differing site condition?” (May 2003 stipulation, ¶ 4.b.).

DECISION - ASBCA No. 52583

Appellant argues that the CTB was a differing site condition. Respondent argues that appellant did not encounter a differing site condition and that the conditions were discoverable by a reasonable site inspection as required by the Site Investigation and Conditions Affecting the Work clause (finding 2). We hold that the CTB was a differing site condition.

The Differing Site Conditions clause provides, in relevant part:

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

Appellant's differing site condition argument is directed to the hardness of the material and the difficulty encountered in crushing it into pieces of less than two inches. According to appellant, it expected to crush the material on-site without use of special equipment. Instead, it had to transport the material off-site and use a rock crusher. Appellant argues this was a Type I differing site condition.

Type I differing site conditions consist of "subsurface or latent physical conditions at the site which differ materially from those indicated in th[e] contract." C.F.R. § 52.236-2(a)(1) (1994). To establish entitlement to an equitable adjustment due to a Type 1 differing site condition, a contractor must prove, by preponderant evidence, that: the conditions indicated in the contract differ materially from those actually encountered during performance; the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding; the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and the contractor was damaged as a result of the material variation between expected and encountered conditions. *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998).

*Control, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. 2002).

It is undisputed that the bid documents characterized the soil. Appellant's expert states, and respondent does not rebut, that the characterization, "hard crust," is not a precise term, but that it would be understood by a reasonable bidder to describe material which could be readily broken up with construction equipment such as that used at the site (finding 15). As it could not be crushed with that equipment, appellant meets the first of the *Control* criteria.

Regarding the second, foreseeability, photographs of the site show clumps of what appears to be hard material similar to the sample submitted by appellant, and respondent's construction representative maintains that the CTB was observable at time of bidding (finding 19). On the other hand, appellant's superintendent states the CTB was encountered below asphalt, which would have made observation during a site visit highly unlikely, and appellant's expert believes a site investigation "would not reveal the nature or existence of the material called CTB" (findings 15, 19). On balance, we conclude it is more probable than not that the extreme hardness of the CTB would have been unforeseeable by a reasonable bidder based on all available information, including a site inspection. Our conclusion is heavily influenced by the opinion of appellant's expert as to the extreme hardness of the material and whether this would have revealed itself to a reasonable bidder during a site investigation. Appellant therefore meets the second *Control* criterion.

The third criterion, reliance, is established through DSS' affidavit addressing bid preparation (finding 16; note 1). The fourth, damage, is similarly and believably established through the affidavits (findings 16, 17 ). Accordingly, we sustain the appeal.

#### SUMMARY

We deny ASBCA No. 52582 and sustain ASBCA No. 52583.

Dated: 30 September 2003

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CARROLL C. DICUS, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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 Nos. 52582 and 52583, Appeals of Kilgallon Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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