

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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WPC, Inc. ) ASBCA No. 53964  
)  
Under Contract No. N44255-00-C-2573 )

APPEARANCE FOR THE APPELLANT: Mr. Daniel G. McKinney  
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
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Senior Trial Attorney  
Engineering Field Activity West  
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Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY  
PURSUANT TO BOARD RULE 11

This appeal involves matters of contract interpretation. It has been submitted on the record pursuant to Board Rule 11. We deny the appeal.

FINDINGS OF FACT

The negotiated design-build contract at issue in this appeal was awarded pursuant to FAR SUBPART 36.3 - TWO-PHASE DESIGN-BUILD SELECTION PROCEDURES for the construction of an aquatic combat training facility at the Naval Station, Everett, WA (R4, tab 8a).

The declaration of Melvin R. Rivera, a professional engineer and the government employee responsible for management of the award, design and construction of the facility, establishes that the Request for Proposals (RFP) for Phase I was issued on 5 January 2001, and requested interested offerors to provide technical proposals for the purpose of selecting a maximum of five of the most highly qualified offerors to proceed to Phase II (ex. G-1, Rivera decl. at ¶¶ 1, 3, 7). The RFP included specification section F1040, SPECIAL FACILITIES, which stated in paragraph 1.6, STRUCTURE:

Provide a formed, cast-in-place concrete pool tank.  
Pneumatically placed concrete (shotcrete) construction shall

not be allowed. Provide foundation in accordance with Section A1000, "Foundations". [sic]

(R4, tab 7 at 8)

Appellant WPC, Inc. (WPC) submitted its Phase I proposal on 9 February 2001, which the government initially found to be unacceptable (R4, tab 1). Following discussions with WPC, the government issued Amendment No. 0004 to the RFP on 5 March 2001 (R4, tab 8e). WPC revised its Phase I proposal on 13 March 2001 and was one of the offerors selected to proceed to Phase II (ex. G-1, Rivera decl. at ¶¶ 15 to 20). Phase II of the selection procedures was initiated on 29 March 2001, when Amendment No. 0005 was issued (R4, tab 8f; ex. G-1, Rivera decl. at ¶ 21).

In its Pre-Proposal Inquiry (PPI) No. 12 dated 19 April 2001, WPC advised the government that it took "exception to the prohibition of pneumatically placed concrete for the pool tank" in paragraph 1.6 of section F1040 of the specifications. It asserted that: "The pools that were not built with shotcrete performed worse than the ones that were. The structural reinforcing details for air placed shotcrete are identical to cast - in - place concrete. Crack control is just as efficacious in air placed concrete as any other method." It asked whether the government would "allow the use of air placed structural concrete, installed by certified nozzlemen, for the construction of the pool tank." After evaluation, the government responded: "The solicitation for this item will not be changed at this time." (Ex. G-2)

Thereafter, another offeror, McCarthy Building Companies, Inc. (McCarthy), in its PPI No. 9, asked: "If our structural concrete pool tank is in accordance with the requirements of section A1000 Foundations, can a 6" Shotcrete applied topping be installed inside" a structural concrete pool tank to create the pool. The government responded: "Providing a formed, cast-in-place concrete pool tank per the specifications, and applying a shotcrete topping to create the pool itself, would appear to meet the specification requirements." (R4, tab 3) The McCarthy inquiry led Mr. Rivera to think that paragraph 1.6 of section F1040, as written, prohibited "any shotcrete construction at all." He "decided to amend the solicitation to remove the absolute prohibition on shotcrete construction because the requirement for a formed, cast-in-place pool tank was still explicitly stated and was still controlling on the basic pool tank." (Ex. G-1, Rivera decl. at ¶ 25)

Amendment No. 0010 was issued on 2 May 2001. Along with a number of other specification amendments, it modified section F1040 of the Phase I RFP specifications as follows:

1. Paragraph 1.6, **delete** this paragraph in its entirety and **replace** with the following:

“Provide a formed, cast-in-place concrete pool tank. Provide in accordance with the requirements of Section A1000 “Foundations”. [sic]

(R4, tab 8k at 3) WPC was not provided with copies of the McCarthy PPI No. 9 and the government’s response (app. resp. at 2-3).

Appellant submitted its Phase II Technical Proposal on 10 May 2001. Its bid for the basic work, Contract Line Item (CLIN 0001), was \$4,828,001.00. In the “Foundation & Swimming Pool Design & Construction Concept” narrative, the proposal stated:

. . . The concrete pool tank will be cast integrally with the pile caps and grade beams so that the entire system acts as one structural unit. . . . We have intentionally sought to minimize the number of piles and increase the depth and width of cast-in-place concrete grade beams as well as increase slab thickness for efficient use of resources and to minimize the impact of pile driving on the adjacent facility.

. . . .

. . . Our attention to detail in placing the pool tank is unparalleled because we have found through our research that mistakes and inattentiveness during the casting of the pool tank is one of the primary causes of customer complaints and dissatisfaction.

(R4, tab 4 at 4, 36-37, 39) The proposal did not make any mention of using shotcrete. Based upon the narrative, the government believed that WPC met the requirement to provide a formed, cast-in-place concrete pool tank (ex. G-1, Rivera decl. at ¶ 31).

By a letter dated 24 May 2001, the government provided appellant with a list of questions addressing the weaknesses and/or deficiencies noted in its technical proposal and advised that its price for CLIN 0001 exceeded the funding profile of \$4,700,000.00. Phase II discussions were held on 29 May 2001. None of the government’s questions related to the pool tank construction method. The Phase II Technical Proposal Revisions WPC submitted on 6 June 2001 in response to these questions made no mention of any plan to use shotcrete and made no changes to the construction methods originally described in its “Foundation & Swimming Pool Design & Construction Concept” narrative. WPC reduced its proposed price for CLIN 0001 by \$269,000.00, to \$4,559,001.00. (R4, tabs 5 to 6; ex. G-1, Rivera decl. at ¶ 29; app. resp. at 18)

On 28 June 2001, WPC was awarded Contract No. N44255-00-C-2573 in the total amount of \$4,655,001.00, based upon its Phase I and Phase II proposals, as revised on 6 June 2001 (R4, tab 8a; ex. G-1, Rivera decl. at ¶ 32).

WPC's 60% Design Submittal is dated 31 August 2001 (R4, tabs 10a to 10c). As to paragraph 3.17 SHOTCRETE on Sheet S0.2 of the drawings, Mr. Rivera made the following review comment, No. 80: "Where are we using shotcrete? If not used, delete." WPC's response was: "Shotcrete may be used in the pool tank area. The method is under review and discussion." (R4, tabs 10b, 11 at 12; ex. G-1, Rivera decl. at ¶¶ 33, 34)

The shotcrete issue was discussed at the 60% design review meeting held on 3 October 2001. The government took the position that "shotcrete [was] not allowed by the RFP because it lacks the durability of cast-in-place concrete" and was precluded by paragraph 1.6 of section F1040 for construction of the pool tank. Appellant, by Messrs. Wade Perrow and Scott Clark, pointed out that the intent of the specifications was not as clear as the government believed and advised that its team had "not [yet] determined whether or not shotcrete will even be used on the project, but [that it was their] view that it is allowed by the RFP." (R4, tab 12 at 5; ex. G-1, Rivera decl. at ¶ 35)

A subsequent letter dated 16 October 2001, written by Mr. Perrow, reiterated appellant's position and represented that, after Amendment No. 0010 was issued, WPC "modified [its] proposal and the cost associated with constructing the pool tank to reflect the change in the structural requirements of 1.6, Structure." The letter went on to assert: "WPC intended to utilize shotcrete and we have now changed the design to represent cast-in-place methods, which will not utilize pneumatically placed concrete." It attached copies of the definitions of "cast-in-place" from ACI (AMERICAN CONCRETE INSTITUTE) 116R, MANUAL OF CONCRETE PRACTICE, and the CONSTRUCTION DICTIONARY. (R4, tab 13) The ACI MANUAL defines "cast-in-place" as "[m]ortar or concrete which is deposited in the place where it is required to harden as part of the structure, as opposed to precast concrete" (R4, tab 13a). The CONSTRUCTION DICTIONARY has the same definition (R4, tab 13b). The ACI MANUAL further defines "shotcrete" as "mortar or concrete pneumatically projected at high velocity onto a surface; also known as air-blown mortar, pneumatically applied mortar or concrete, sprayed mortar, and gunned concrete" (ex. G-1, Rivera decl. at ¶ 41.a.). Additionally, the ACI MANUAL defines "form" as "[a] temporary structure or mold for the support of concrete while it is setting and gaining sufficient strength to be self-supporting" (app. br. at 4).

The contracting officer responded on 22 October 2001, stating that:

. . . Cast-in-place concrete and shotcrete are not synonymous. In the definition of the term "cast-in-place", the method of deposition is inherent. The definition of the term "cast," from WPC's same construction dictionary is, "to form in a mold by

pouring or pressing”. This is contrary to the method of deposition proposed by WPC-shotcrete, defined as, “mortar or concrete conveyed through a hose and projected at high velocity onto a surface”. [sic]

He explained that the prohibition against using shotcrete was redundant, given the requirement to use the cast-in-place method, and was eliminated to allow a specific technical solution proposed by McCarthy that still complied with the requirement for a cast-in-place concrete pool tank. He further advised that the cast-in-place concrete pool tank was to be constructed in accordance with Section A1000 of the specifications, paragraph 2.2 of which requires compliance with ACI 301, SPECIFICATIONS FOR STRUCTURAL CONCRETE, and ACI 318/318M, BUILDING CODE REQUIREMENTS FOR STRUCTURAL CONCRETE, both of which are consistent with the cast method, and not ACI 506, GUIDE TO SHOTCRETE. (R4, tabs 8m, 14)

According to WPC:

ACI 301 Chapter 8 - PLACING, paragraph 8.2.2.4 states:  
*‘Pumping or pneumatic conveying equipment shall be of suitable kind with adequate pumping capacity. Pneumatic placement shall be controlled so that segregation is not apparent in the discharged concrete. The loss of slump in pumping or pneumatic conveying equipment shall not exceed 2 in. Concrete shall not be conveyed through pipe made of aluminum or aluminum alloy.’*

(App. br. at 5) WPC did not provide a copy of the ACI 301 document from which this statement is taken, and there is no paragraph 8.2.2.4 in the ACI 301 SPECIFICATIONS FOR STRUCTURAL CONCRETE with which paragraph 2.2 of section A1000 of the contract specifications requires compliance. The ACI 301 SPECIFICATIONS FOR STRUCTURAL CONCRETE do not discuss pneumatic placement of concrete in SECTION 5 - HANDLING, PLACING AND CONSTRUCTING. (R4, tab 14a)

Additionally, WPC relies upon a quote taken from the “COMMENTARY” discussion of ACI 318/318R, Section 5.9 - CONVEYING, which states: “*The provisions of 5.9 apply to all placement methods, including . . . pneumatic systems, . . .*” (app. resp. at 4, 12). The quote is taken from a single-page excerpt identified at the top of the page as ACI 318/318R and MANUAL OF CONCRETE PRACTICE which is not a contract requirement (R4, tab 14b).

In a letter to the contracting officer dated 26 October 2001, WPC reiterated its view and asserted that use of shotcrete should be allowed, that utilizing a hose and projecting concrete at high pressure would be “pressing” it against a form, and that using shotcrete did comply with selected provisions of ACI 301 and 318, via references from ACI 506. It again

asserted that it had incorporated shotcrete into its proposal due to budgetary challenges and the removal of the prohibition of the shotcrete method. (R4, tab 16) The contracting officer was not persuaded. By a letter dated 26 November 2001, he informed WPC that use of shotcrete for the pool tank was not an acceptable construction method and directed WPC to proceed with a cast-in-place design (ex. C-1). According to Mr. Rivera, shotcrete and cast-in-place concrete are two different methods of placement and construction (ex. G-1, Rivera decl. at ¶¶ 39.b., 46). His view is supported by the technical articles and documentation identified and discussed in his declaration which have been properly presented to the Board for consideration (*id.* at ¶ 39.c.).

On 14 January 2002, WPC submitted a “Request for Adjustment or Interpretation of Contact Terms” regarding the pool tank construction method which the contracting officer rejected on 22 February 2002 because WPC had not quantified any monetary adjustment for its request (R4, tabs 18, 19). WPC’s final design was submitted on 22 March 2002 (R4, tabs 24 to 24b). On 22 May 2002, it submitted “CLAIM AMENDMENT No. 1,” which quantified its claim for estimated direct costs and a 27 day time extension to be \$176,446.00 (R4, tabs 25 to 25e). The claim was certified on 6 June 2002 (R4, tab 27).

WPC’s amended claim asserts that its revised 6 June 2001 proposal was based upon using pneumatically placed concrete (shotcrete) for the pool structure, which was a cost-saving approach allowed when the government removed the prohibition against using shotcrete when it issued Amendment No. 0010 and was, “in large part,” the basis for its price reduction. It seeks the difference between the estimated costs of using cast-in-place concrete and shotcrete, based upon the Means Estimating Guide, and a time extension of 27 calendar days. (R4, tab 25a)

A final decision denying the claim in its entirety was issued by the contracting officer on 8 July 2002. He found that WPC’s interpretation of the contract following Amendment No. 0010 was unreasonable, that the government understood from the references to “cast” and “casting” in WPC’s proposal that it met the requirement for the cast-in-place method of construction, and that there was no evidence to support WPC’s contention that its revised proposal was based upon using shotcrete. He further found that it was unreasonable to interpret the cast-in-place and shotcrete application methods to be synonymous. (R4, tab 28) This timely appeal followed and the parties elected to proceed under Board Rule 11. The complaint filed by WPC with the Board indicates that the amount claimed is now \$204,753.00, apparently due to an increase in the number of delay days claimed, from 27 to 68 (compl. attachs. B, D).

WPC’s response to the government’s brief mentions ongoing discussions with Pacific Pools about a gunite (shotcrete) option price it apparently received before Amendment No. 0010 was issued (app. resp. at 26); however, the appeal record does not contain any documentation of WPC’s proposal pricing or any affidavits from WPC personnel responsible for interpreting the contract specifications, compiling WPC’s

proposal costs, and making the final reduction of \$269,000.00 to its proposed CLIN 0001 price. There is also no evidence that the author of WPC's complaint and the briefs filed in this appeal pursuant to Board Rule 11 participated in the preparation of WPC's cost and technical proposals.

### DISCUSSION

According to WPC, the dispute in this appeal is the result of the government's failure to explain the basis for issuing Amendment No. 0010. After it was issued, paragraph 1.6 of section F1040 of the contract stated:

Provide a formed, cast-in-place concrete pool tank.  
Provide in accordance with requirements of Section A1000,  
"Foundations". [sic]

WPC asserts that it reasonably interpreted paragraph 1.6 to allow the use of pneumatically placed shotcrete to construct the concrete pool tank. WPC's interpretation of paragraph 1.6 begins with the ACI MANUAL definitions of "form" and "cast-in-place" concrete. It explains that its use of shotcrete would have included formwork and that pneumatically placed concrete would have been "deposited in the place it was required to harden as part of the structure." (App. br. at 4) It then relies upon the commentary to section 5.9 of ACI 318/318R, relating to conveying concrete, which includes the pneumatic method of concrete placement (app. resp. at 15). Its interpretation of the second sentence of paragraph 1.6 is that paragraph 2.2 of section A1000 requires that concrete design and construction be in accordance with ACI 301 and that the reference to "pneumatic conveying" in paragraph 8.2.2.4 of ACI 301 further supports its view that use of shotcrete should have been allowed. In short, it is ACI's position that shotcrete is a method of placement, and that the method of placement "does not eliminate it from the casting of concrete in place." (App. br. at 7; app. resp. at 15)

The government asserts Amendment No. 0010 did not change the clear and unambiguous requirement in paragraph 1.6 for a "formed, cast-in-place concrete pool tank" and that WPC's interpretation is unreasonable because it renders the requirement meaningless or superfluous. The government is of the view that cast-in-place concrete and pneumatically placed concrete (shotcrete) are not synonymous and that, to the extent the deletion of the prohibition against using shotcrete created an ambiguity as to whether it was permissible, the ambiguity was patent. The government further asserts that the record shows no evidence that WPC relied upon the interpretation of paragraph 1.6 it now advances.

The issues we must address in this appeal are those of contract interpretation. The first is whether the deletion of the prohibition against the use of "[p]neumatically placed concrete (shotcrete)" rendered paragraph 1.6 of section F1040 ambiguous. A contract

provision is ambiguous if it is susceptible to two different, yet reasonable, interpretations, each of which is consistent with the contract language and the other provisions of the contract. *See Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997). In this regard, WPC does not dispute that the government has a logical position and we understand WPC's position to reflect its recognition that the government's interpretation of the specifications is reasonable. However, WPC argues that, absent knowledge of why the government issued Amendment No. 0010, its position is equally, if not more logical, *i.e.* reasonable. (App. resp. at 5) We do not agree for a number of reasons.

First, WPC's interpretation of paragraph 1.6 of section F1040 assumes that the government unilaterally re-evaluated WPC's PPI No. 12 request to use shotcrete for construction of the pool tank. There is no factual basis for the assumption. As originally written, paragraph 1.6 excluded use of shotcrete and the government advised WPC in its response to PPI No. 12 that the specification would "not be changed at this time." The government had no further communications with WPC about PPI No. 12. In issuing Amendment No. 0010, the government made no representations whatsoever about any of the various changes to the specifications it effected. Moreover, four other offerors had been selected to proceed to Phase II. WPC reasonably should have expected that these offerors had made technical inquiries, just as it had. In any event, Amendment No. 0010 only deleted the words "[p]neumatically placed concrete (shotcrete) shall not be allowed" from paragraph 1.6. It made no change to the requirements for a "formed, cast-in-place concrete pool tank," provided in accordance with section A1000.

Second, WPC's interpretation of the requirements for a "formed, cast-in-place concrete pool tank," provided in accordance with section A1000 relies upon a strained reading of the various ACI definitions, standards, guidelines and commentary, some of which are of questionable application. In this regard, irrespective of whether forms are used with shotcrete, WPC's attempts to expand the ACI MANUAL's general definition of "cast" and "cast-in-place" to include concrete that is deposited by high velocity pneumatic projection, is to no avail. Rather, as was recognized by WPC itself in its PPI No. 12, pneumatically placed concrete (shotcrete) and cast-in-place concrete are two different methods of concrete placement and construction.

Paragraph 2.2 of section A1000 of the contract requires that the pool tank be constructed in compliance with ACI 301, SPECIFICATIONS FOR STRUCTURAL CONCRETE and ACI 318/318M, BUILDING CODE REQUIREMENTS FOR STRUCTURAL CONCRETE. WPC contends that paragraph 8.2.2.4 of ACI 301 includes "pneumatic placement;" however, the ACI 301 SPECIFICATIONS FOR STRUCTURAL CONCRETE in the record do not have such a paragraph. Nor do the ACI 301 SPECIFICATIONS FOR STRUCTURAL CONCRETE in the record discuss pneumatic placement of concrete in SECTION 5 - HANDLING, PLACING AND CONSTRUCTING. Further, while the record contains conflicting evidence as to the



official title of ACI 318/318R, there is no confusion about whether it is a contract requirement. The contract incorporates ACI 318/318M, not ACI 318/318R.

For these reasons, we are satisfied that WPC's assumption that shotcrete was a permissible method of construction was unreasonable. To the extent Amendment No. 0010 could possibly have created an ambiguity as to the requirements of paragraph 1.6, the ambiguity was so glaring and patent that WPC had a duty to inquire about whether shotcrete could now be used to construct the "cast-in-place concrete pool tank." *See Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997).

Nevertheless, even if the ambiguity was latent, WPC still could not prevail because it did not establish that it relied upon its current interpretation at the time it prepared and submitted its Phase II Technical Proposal, as revised on 6 June 2001. *E.g., Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990). Indeed, the record evidence seemingly supports the opposite conclusion. WPC's Phase II Technical Proposal was submitted to the contracting officer on 10 May 2001, after Amendment No. 0010 was issued. It uses the words "cast," "cast-in-place," and "casting" in the narrative describing the "Foundation & Swimming Pool Design & Construction Concept," but makes no reference to shotcrete and the government understood from the narrative that WPC met the specification requirements for a cast-in-place concrete pool tank. And, since none of the government's questions related to the concrete pool tank, WPC's 6 June 2001 proposal revisions likewise did not address it.

Absent any documentation of WPC's pricing and the lack of any affidavits from WPC personnel responsible for interpreting the specifications, preparing the Phase II proposal, and making the final revisions to it, including the reduction of \$269,000.00 to its proposed price, we are left with only the representations made by WPC after contract award in conjunction with the 60% design review and in its subsequent correspondence with the government, which culminated in a claim. Moreover, the lack of reliance at the time it submitted its proposal upon the interpretation it now advances seems apparent in WPC's responses to the government's inquiries during the 60% design review which reflect that use of the shotcrete method for the pool tank was still "under review and discussion" and that it "had not yet determined whether shotcrete will even be used on the project." Under these circumstances, the subsequent correspondence and claim in which WPC expresses its disagreement with the government's interpretation of the specifications, and asserts that it incorporated shotcrete into its proposal due to budgetary considerations and, "in large part," due to the change in the requirements, are insufficient to establish the requisite reliance.

#### CONCLUSION

The appeal is denied.

Dated: 28 November 2003

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CAROL N. PARK-CONROY  
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 No. 53964, Appeal of WPC, Inc., rendered in conformance with the Board's Charter.

Dated:

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