ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
HSG Technischer Service GmbH	)	ASBCA Nos. 55595, 55596, 55597
	)	
Under Contract No. DACA90-01-D-0006	)	

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

These timely appeals involve claims by appellant that soils, flooring and hazardous materials encountered by appellant during renovation of military family housing in Stuttgart, Germany constituted differing site conditions. The work was performed pursuant to a task order issued under the referenced contract. Both entitlement and quantum are to be decided. We sustain ASBCA Nos. 55595 and 55596. We deny ASBCA No. 55597.

FINDINGS OF FACT

The Contract and General Background

1. On 29 September 2003, the U.S. Army Corps of Engineers, European District (government or Corps) issued Task Order No. 0004 (TO or contract) to HSG Technischer Service GmbH (HSG or appellant) for "integrated design and construction" work involving renovation of ten family housing apartment buildings and associated site improvements at Kefurt and Craig Villages at Patch Barracks, Stuttgart, Germany. The TO was issued under the above-captioned multiple award Multiple Task Order Contract (MATOC) previously entered into between the Corps and HSG in 2001. Standard construction contract provisions applicable to the work included FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); FAR 52.243-4, CHANGES (AUG 1987);

FAR 52.236-3, SITE INVESTIGATIONS AND CONDITIONS AFFECTING THE WORK (APR 1984); FAR 52.233-1, DISPUTES (DEC 1998). As originally awarded the firm-fixed contract price of the TO was 21,169,484 Euros. (R4, tabs 4, 7[1]; tr. 1/63-64)

2. Prior to award of the TO, the Corps issued a Request for Proposals (RFP) on 22 August 2003, soliciting offers for the work (identified as Project Number 54540) from appellant as well as other MATOC contractors (ex. A-6). Award was made to HSG which submitted the lowest price, technically acceptable proposal (R4, tab 7 at 15).

3. The apartment buildings to be renovated were originally constructed in 1950-1951. Prior to this contract, the apartment buildings had not undergone substantial or relevant renovation. (R4, tab 7 at 27-29)

4. The Corps issued, and appellant received, the Notice to Proceed on indeterminate dates in November 2003 (R4, tab 5). Pursuant to subsequent modifications, the completion date was extended to 5 September 2005 (R4, tab 6).

5. HSG is a wholly-owned subsidiary of Bilfinger-Berger (BB). Prior to submitting its proposal HSG obtained a quote from DDS Bau GmbH (DDS) for performance of all work in the amount of 18,139,720 Euros. HSG entered into a subcontract with DDS and accepted the DDS quote. With certain markups and adjustments, HSG incorporated the DDS quote into its proposal. DDS later renovated six of the ten buildings. HSG eventually subcontracted the renovation of the remaining four buildings to BB. (Exs. A-34, -56; tr. 1/72-73, 92-97, 2/211-12, 4/100, 103-05)

6. The three claims involved in these appeals were received by the contracting officer on 28 November 2005. Each claim sought recovery of an amount exceeding the $100,000 certification threshold. Appellant originally submitted uncertified claims on 16 August 2005. The 28 November 2005 claims were defectively certified. Appellant corrected the certification deficiencies for all claims on 12 June 2006. (R4, 55595, 55596, 55597, tab 2) The claims were denied by three separate final decisions, each dated 2 June 2006 (R4, 55595, 55596, 55597, tab 2). The subsequent, referenced timely appeals were consolidated for hearing, briefing and decision.

[1] A separate Rule 4 file has been prepared for each referenced appeal. Unless otherwise indicated, Rule 4 citations to the contract and in the "Contract and General Background" section of the Findings reference the file in ASBCA No. 55595. Citations in subsequent sections of the Findings are to the file prepared for the pertinent appeal unless otherwise indicated.

ASBCA No. 55595—THE SOIL CLAIM

FURTHER FINDINGS OF FACT

7. The TO required HSG to demolish and reconstruct, among other things, various paved surfaces including parking lots, driveways, streets. Following award and prior to performance of the associated construction, appellant was required to perform a subsurface soil investigation of areas to be paved. The RFP and contract did not indicate the type, compactability or load bearing capacity of the underlying soils. (Exs. A-5, -72; R4, tab 7; tr. 1/108, 110, 2/214, 228-29, 236)

8. HSG's proposal, and the incorporated DDS quote, assumed that soil exchange/improvement would not be required to achieve soil load bearing and compaction requirements and included no allowance for such a contingency. HSG and DDS had performed numerous government construction projects in Germany and have considerable experience in the Stuttgart area. HSG assumed that if the native soil could not be compacted, that information would be provided in the solicitation. In DDS's experience, the load bearing capacity of native soils on other projects it had performed in the Stuttgart area had been sufficient without special soil exchange/improvement measures. (Tr. 1/110-11, 117, 119-20, 2/226-27, 234-36)

9. Contract § 5.2.2.1 D.B (e) states, "[t]he designed paving section shall also take into consideration the existing soil types, depth of frost penetration and drainability" (R4, tab 7 at 39).

10. Contract § 6 "Performance Specifications" contained the following pertinent provisions (R4, tab 7 at 47-48, 58):

> 6.1.1 CRITERIA
>
> A. Technical Criteria and Applicable Publications
>
> Design and Construction Criteria, Regulations, and Publications listed below in addition to project meeting minutes are applicable all or in part to pertinent project features covering the work scope requirements for this family housing community renewal project. Generally the design shall be based on but not limited to the latest version of the following German DIN Publications, Regulations, Pamphlets, Code of Practice, etc. and where specifically specified, US Criteria shall govern. In the absence of criteria the local and German National Standards shall be applicable to the design and construction of this project. [Emphasis supplied]

….

DIN 18300 Earthwork

….

6.1.4 STREETS, DRIVEWAYS, SERVICE VEHICLE ACCESS, AND PEDESTRIAN WALKS

….

4. The paver system shall be constructed of layered pavement elements; compacted subgrade, placement of subbase of non-frost susceptible material overlain with base course of gravel or crushed natural rock mix 26 cm thick topped with a 4 cm thick sand bedding layer under keyed concrete paving blocks 10 cm thick…[t]he in-situ subgrade or select fill subgrade shall be in dimensions required per design calculations and shall be compacted prior to the placement of the base course. The design of the paving sections shall consider the existing soil quality and parameters along with the seasonal frost penetration. [Emphasis added]

11. The Deutsche Industrie Norm standards or DIN referenced in ¶ 6.1.1 above are prepared by the German Committee for Construction Contract Procedures. DIN 18300 contains the General Technical Specifications for "Earthworks." (Ex. A-2 at 1-2) It provides in pertinent part (*id.* at 8, 10, 13, 16-17):

2. Materials and components; soil and rock

The specifications of clause 2 of DIN 18299 are to be supplemented as follows:

2.1 General

….

2.1.2 Soil and rock material are not normally to be supplied by the contractor.

….

3 Execution of Work

….

3.7.7 If the prescribed degree of compaction is not reached, special measures are to be agreed upon such as soil improvement or soil exchange. The work involved counts as a special task (see subclause 4.2.1) [Emphasis added]

….

4 Associated tasks and special tasks

….

4.2 Special tasks

In addition to those specified in subclause 4.2 of DIN 18299, the following also count as special tasks.

4.2.1 Measures as specified in subclauses 3.1.3 to 3.1.5, 3.1.7, 3.3.1, 3.5.3, 3.5.5, 3.7.2, to 3.7.4, 3.7.7, 3.8.2 to 3.8.4, and 3.10.3. [Emphasis added]

12. DIN 18300 references DIN 18299, *inter alia*, as "indispensable for the application" of DIN 18300 and both of these DIN cross reference each other (ex. A-2 at 2, ex. A-3 at 1). DIN 18299 defines "associated" and "special" tasks as follows (ex. A-3 at 4):

0.4.1 Associated tasks

Associated tasks (described in subclause 4.1 of all standards of the VOB series of standards) shall only be referred to explicitly in the specification of works if, by way of exception, they are to be remunerated separately. Such explicit reference is called for when the costs of the associated tasks can significantly influence pricing; in such cases, they shall be itemized separately.

….

0.4.2 Special tasks

> If the performance of special tasks (described in subclause 4.2 of all standards of the VOB series of standards) is required, this shall be indicated in the specification of works and, where necessary, the work concerned shall be itemized separately.

13. Payment for performance of "special tasks" is standard and customary in Germany. To the extent contractors perform "special tasks" that are not specified in the contract, they are entitled to additional compensation in the German construction industry absent express contract coverage of the work involved. (Tr. 1/129-32)

14. Appellant performed a soils investigation prior to commencement of the paving work as required by the contract. The soil tests disclosed that the in situ soil could not be compacted to achieve the specified load bearing capacity. (Tr. 1/103-08, 2/167-68, 171-77, 3/147-51; exs. A-15, -18)

15. On 25 November 2004, HSG informed the government of the results of its soils investigation and recommended three methods for improving or replacing/exchanging the native soils. The letter indicated that appellant considered the soils encountered to be a differing site condition and that it would seek an equitable adjustment based on the method implemented. (R4, tab 8)

16. Following consultation and agreement with the Corps, appellant implemented one of the soil improvement/exchange measures mentioned in its 25 November 2004 letter (tr. 2/192-93; R4, tab 11; ex. A-13).

17. The parties agree that appellant incurred costs totaling 157.368,70 Euros, including undisputed DDS costs and HSG markups, to implement the agreed soil improvement/exchange method (exs. A-8, -13, -57; tr. 1/134, 137, 141; gov't br. at 10**)**.

18. Appellant's soils expert, Mr. Matthew Gotz testified that there was great variety in the engineering-related characteristics of the native soil in the Stuttgart area and a "50/50 chance" that the soils encountered by a contractor would require special measures involving soil exchange or improvement. In his opinion, it is not uncommon for the in-situ soils to be materially different 300 meters away from the site of construction. Because of the unpredictability of soil conditions, it is essential to perform a pre-construction soils investigation, according to Mr. Gotz. (Tr. 2/133-34, 179, 182, 192; ex. A-61)

19. The government's experts Mr. Mott and Mr. Norman considered that the native soils encountered were not unusual and should have been reasonably anticipated

by appellant. Mr. Mott stated that the specific characteristics of the soils in the area were not predictable and that pre-construction testing was required to determine load bearing capacity and compactability. (Exs. G-1, -4; tr. 3/252-53)

20. After completion of the TO, DDS constructed a dining facility approximately 500 meters from the project site and a four story building 10 to 15 kilometers from the project site. The load bearing capacity of the soil for each of those projects was sufficient without soil improvement/exchange measures. (Tr. 2/231-35)

DECISION

The government contends in ASBCA No. 55595 that the soil conditions encountered were neither a Type I nor a Type II differing site condition. The Corps maintains that, because ¶ 6.1.4.4 (finding 10) requires compaction of either the "in-situ subgrade" or a "select fill subgrade," the contract sufficiently indicated the possibility select fill might be required and, therefore, no Type I condition was present. Moreover, the government emphasizes that appellant's own expert conceded that there was a 50/50 chance of encountering uncompactable native soil. Therefore, the uncompactable soil encountered was not an unknown or "unusual" Type II condition.

Appellant contends that several references to soil compaction in the specifications indicated that the *in situ* soil would be compactable without soil exchange or improvement. It therefore argues that the soils actually encountered constituted a Type I differing site condition. It further alleges that the need to use select fill (or other special soil measures) to stabilize uncompactable soil was unusual in its other Corps projects in neighboring areas. It emphasizes that there is no allegation that soil conditions were known or should have been discovered before proposal submission. Soil investigations were to be conducted following award and no subsurface data or other information was provided which reasonably could have placed appellant on notice of the actual conditions. Consequently, appellant reasons that the subsurface soil conditions actually encountered also constituted a Type II differing site condition. Alternatively, HSG contends that it is entitled to compensation under the DIN because the soil exchange/improvement work performed was compensable as a "special task."

We consider on the unusual facts of this case that the conditions encountered constituted a Type I differing site condition. Our conclusion is premised on the fact that the soil exchange/improvement work involved in this appeal is expressly defined in the DIN as a "special task." The DIN were incorporated into the contract. There is no dispute that the remedial work required here qualified as a "special task" within the meaning of the pertinent DIN provision. Nor is there any dispute that contractors in Germany are customarily entitled to additional compensation for the performance of "special tasks" unless they are "indicated" in the contract. Here there was no such indication. The coverage of the Differing Site Conditions clause extends to implied as

well as express contractual representations. *Stock & Grove, Inc. v. United States*, 493 F.2d 629, 645-46 (Ct. Cl. 1974) (contract impliedly represented that quarry would produce adequate rock); *J. E. Robertson Co. v. United States*, 437 F.2d 1360, 1363 (Ct. Cl. 1971) (contract impliedly indicated that concrete slab would be substantially thinner than actually encountered). The failure to include an express specification requirement for soil exchange/improvement, reasonably implied that performance of that "special task" would not be necessary. *Cf. Caesar Construction, Inc.*, ASBCA No. 41059, 91-1 BCA ¶ 23,639 at 118,417, *aff'd on recon.*, 91-2 BCA ¶ 23,953 (where contract drawings failed to label pipe as a French drain as required by industry custom, Board found that contract impliedly indicated that solid pipe would be encountered and that contractor was entitled to relief for Type I condition when it encountered French drain).

In this case, the DIN provide the best evidence of what was within the scope of appellant's contractual undertaking absent explicit specification coverage elsewhere in the contract modifying that definition and reasonably indicating that the work would be necessary. Definitions of "special tasks" in the DIN provide independent, objective assessments concerning what is generally considered within the scope of performance. Appellant relied on the DIN in preparing its proposal.

The government observes that where the contract otherwise requires the work, appellant would not be entitled to additional compensation even if the work qualifies as a "special task." In this regard, the government argues that the contract provisions adequately address and provide notice of the potential need for soil exchange or improvement. It contends that ¶ 6.1.4.4 expressly recognizes that soil exchange/improvement may be required where the native soil is unstable. Therefore, HSG is not entitled to compensation under the DIN "special task" provisions according to the government.

The generic provision relied on by the government merely states the obvious. If the native soil is unstable and not compactable as required, suitable soil exchange or improvement measures must be taken. Clearly, either compactable or uncompactable soil would be encountered. The all inclusive options do not address the likelihood of performing remedial measures or preclude an equitable adjustment if such measures are in fact required, much less reasonably "indicate" the presence of adverse soil conditions. We consider that the cited provision is not sufficiently specific to require appellant to include the costs of soil improvement or exchange in its proposal. When read together with the DIN and harmonizing the two provisions in conjunction with the Differing Site Conditions clause, the contract promises compensation if uncompactable soil is encountered and "special task" measures are needed. The government interpretation fails to reasonably construe the contract as a whole and renders the implied and customary promise in the DIN meaningless. *E.g., Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). We consider that appellant's interpretation reasonably was based on standard industry practice in Germany that it would receive additional

compensation for performance of "special tasks." There is no dispute that contractors are customarily paid in accordance with this standard practice absent clear and specific contract provisions to the contrary.

A well established purpose of the Differing Site Conditions clause is to eliminate inclusion of contingencies to cover the possibility of encountering conditions more adverse than the indicated and usual. *Foster Construction C.A. and Williams Brothers Co. v. United States*, 435 F.2d 873, 887 (Ct. Cl. 1970). Here the contractor was promised compensation for performance of the "special task." Had the *in situ* soils been compactable, the government would have benefitted by the lower fixed price of the contract. In exchange for the reduced fixed price premised on the assumption that performance of the "special task" will not be necessary, the government must compensate appellant if it does prove to be required.

The quantum of relief due appellant is not in dispute. The Corps has stipulated that appellant is entitled to the claimed 157.368,70 Euros. The appeal is sustained in that amount, plus interest from 28 November 2005 in accordance with the Contract Disputes Act.

ASBCA No. 55596—THE FLOOR CLAIM

FURTHER FINDINGS OF FACT

21. Contract § 3.3 "Architectural" stated in pertinent part (R4, tab 7 at 23):

- Existing Wood Floors – Remove all wood floors and subflooring. Place screeding material as necessary to raise floor level. Provide even surface and additional sound insulation.

- Subflooring – Removal subfloors include parquet floor glue and bituminous layer as separating or water-proofing layer – both to be treated as hazardous wastes and abated accordingly. After removing the subfloor, floor shall be leveled as stated above.

22. Contract § 6.2.2 "Demolition" requirements reiterated the requirement to "Remove all parquet wood flooring and sub flooring (including floor screed)" (R4, tab 7 at 5, 63-64).

23. Contract § 3.4 "Structural" required appellant to perform a post award structural investigation, *inter alia*, of the existing floors before preparing its floor design. As part of the required investigation, HSG was to take six to eight core samples of the

existing floors, "report the floor layering composition," and "[i]dentify every material and its thickness." (R4, tab 7 at 26, 239-40)

24. Appellant anticipated, based on the above representations and its own experience, that it would encounter a discrete screed subfloor layer that could be easily removed by chipping it off the underlying concrete structural slab with hammers. Screed is a soft, fine-grained, lightweight concrete insulating and leveling material found between the parquet (or tile) flooring or carpet and the load bearing, hard and coarse-grained concrete slab. (Tr. 1/146, 152-54, 156, 3/281) HSG also anticipated that the screed would not be bonded to the concrete but would have been poured as a second layer on top of a cured concrete slab, *i.e.*, a "wet" layer of screed on a "dry" layer of concrete. Wet screed on cured dry concrete is sometimes referred to as "floating" or non-bonded screed. If wet screed is applied on wet, uncured concrete it is sometimes referred to as "bonded" screed. As part of the process of chipping out the screed subfloor, appellant also intended to abate and remove the hazardous waste glue affixing the flooring to the subfloor. (Tr. 1/154, 160, 162, 167, 3/47)

25. Following award, HSG conducted its structural investigation *inter alia*, of the floors. That investigation revealed that there was no discrete and distinct screed or subfloor layer between the concrete and the parquet floors of the units. (Exs. A-27, -28, -29; tr. 1/156)

26. The government's expert stated that a contractor performing work on the buildings should anticipate encountering "bonded" screed 30% to 50% of the time in a layer 20-30 millimeters thick, and "floating" (or non-bonded screed) 50% to 70% of the time (tr. 3/118-20).

27. By letter of 12 February 2004, appellant enclosed the results of its structural investigation of the floors. Because of the absence of a subfloor to be removed, there was insufficient space to install the new replacement subfloor (including sound insulation) as originally contemplated. HSG described the situation and proposed three possible solutions for the build up of the subfloor, as follows (ex. A-27):

> The floor build-up as specified contradicts the as-build situation as proofen by the structural investigations. The screed as such has been cast in a wet in wet technique consequently the concrete slab and the screed appears to be homogenous unit which could not be split. The screed as specified can not be removed hence it follows that the floor build up as specified totals to the thickness of 75 mm whereas only 25 mm are available. Following alternatives are possible.

> 1 - to install the specified floor build up (sound insulation and cemente screed) would raise the level of the apartment floor appr. 45 mm above the level in the stair case (45-50 mm step). In addition the [weight] to the slab would be [increased] with 120kg/m² which requires additional investigations in view to the static calculations. Installation of asphalt screed would reduce the weight rise and the encrease of thickness yet almost neglectable
>
> 2 - should the apartment floor level still correspond to the staircase floor level the existing screed/slab have to be grind down by the thickness of the screed and the sound barrier (appr 60 mm). Both described alternatives result to additional costs and doubtful achievements.
>
> 3 - The least solution would be to apply leveling compound to the existing slab. In [this] case the floor levels in the apartments and staircases would be the same. The disadvantage would however; no sound barrier could be installed. [Sic]

28. We have studied the photographs of the core samples taken from the various units and reviewed the associated testimony of the witnesses and conclude that the subfloor under the parquet floors was concrete with little if any screed. To the very limited extent, if any, that screed was present, it was bonded to the concrete as one homogenous unit. The concrete structural slabs had been poured at one time and were troweled or smoothed out without an intermediate screed subfloor layer. Although the above letter (finding 27) implies that some bonded screed was found, appellant's witnesses who were actually present during the taking of the core borings and performance of the work stated that there was no screed layer, either bonded or floating. We found their testimony persuasive and confirmed by our own review of the core boring photos and associated testimony of other witnesses. (Ex. A-27, -38, -55; tr. 1/156, 164, 178-86, 2/90, 92-93, 98-107, 111-13, 209-10, 3/36-41, 136-40, 3/154-59, 165, 174, 178-80)

29. The absence of an intermediate screed (bonded or non-bonded) subfloor is unusual for family housing constructed in Germany in the 1950s and differed from what HSG anticipated in preparing its proposal (tr. 1/155-56, 158-61, 164-65, 170, 2/90, 92-93, 96-99, 3/44, 165, 178-80, 4/17-18; ex. A-60).

30. On 25 October 2004, the government advised appellant that it did not consider the subflooring encountered to be unusual or a differing site condition. To the extent that installation of the soundproofing and removal of a screed layer was no longer necessary,

the Corps requested that HSG prepare a proposal for recognizing the associated savings and providing for a credit to the government. (R4, tab 12)

31. Because of the absence of a screed subfloor, appellant could not chip out the hazardous glue and screed as planned. Instead it used a machine to scrape or grind off the glue and vacuum it up in disposable hazardous material sacks in the same operation. (Tr. 1/167) However, HSG determined that it could not grind the subfloor down very far because it would jeopardize its load bearing capacity. Because there was insufficient room to apply the planned thick screed layer, HSG and the government eventually agreed to place other comparatively thin, lighter materials that had the added advantage of minimizing any raising of the subfloor level. (Tr. 1/172-73; exs. A-33, -34)

32. To compute its claimed equitable adjustment totaling 303,071.44 Euros, appellant detailed actual cost of renovation for each of the ten buildings and deducted the as planned or estimated cost for each building (ex. A-34). In summary, the amount sought for each building was as follows (*id.* at 1):

Total Building No. 2500	Sub BB	29.597,03€
Total Building No. 2501	Sub BB	33.931,79€
Total Building No. 2511	Sub BB	31.901,95€
Total Building No. 2512	Sub BB	30.225,25€
Total Building No. 2502	Sub DDS	27.852,45€
Total Building No. 2503	Sub DDS	29.421,07€
Total Building No. 2504	Sub DDS	30.231,61€
Total Building No. 2509	Sub DDS	30.476,50€
Total Building No. 2514	Sub DDS	29.948,58€
Total Building No. 2515	Sub DDS	29.465,21€
Proposal Total net:		303.071,44€

33. Backup documentation for each building detailed the revised actual materials/operations, actual costs incurred, and deducted the "Cost Savings" to be credited to the Corps. Appellant subcontracted with BB to renovate the floors of four buildings and DDS to perform the work on the other six buildings. (Ex. A-34) To illustrate the methodology used to compute the claim for the DDS buildings, we have selected a representative building (Building 2503) to itemize the additive/deductive operations, materials and methodology used in the computation below (*id.* at 5):

Building 2503 Actual Costs				
Lin.	Description of Actual work Items	Quantity	Unit Cost	Total Cost
1	Removal of PAH-Contaminated parquet[2]	1166,000 m²	11,58€	13.502,28€
2	Demolition of Ceramic Tile Floor incl. Mortarbed	305,000 m²	10,68€	3.257,40€
3	Demolition Soft Floor (Attic Area)	375,000 m²	7,44€	2.790,00€
4	Lean Concrete in tiled areas thickn. ~8cm	74,200 m²	11,44€	848,85 €
5	Hot Bitumen Screed	1846,000 m²	25,56 €	47.183,76 €
6	Perlite Compensation Levelling <30mm	1846,000 m²	6,96 €	12.848,16 €
7	Perlite Compensation Levelling >10mm	0,000 m²	1,62 €	0,00 €
8	Wood Fiber Board thckn. 8 mm	1449,860 m²	5,10 €	7.394,29 €
9	Felt Paper Layer	1846,000 m²	1,32 €	2.436,72 €
10	Mineral Fiberboard 12/10mm	1818,390 m²	8,22 €	14.947,17 €
11	Mineral Fiberboard 72/25mm	0,000 m²	10,08 €	0,00€
12				
13				
14				
15				
			Total:	105.208,63 €

Building 2503 Cost Savings				
Lin.	Description of actual work Items	Quantity	Unit Cost	Total Cost
1	Demolition of Screed Incl. Contaminated Adhesive	1166,000 m²	16,92 €	19.728,72 €
2	Sound Reducing Fireboard 12/10	1846,000 m²	7,38 €	13.623,48 €
3	Demolition Screed with Soft Floor	375,000 m²	15,72 €	5.895,00 €
4	Demolition Screed with Ceramic Tiling	305,000 m²	17,76 €	5.416,80 €
5	PE-Foil over Insulation Layer	1846,000 m²	1,98 €	3.655,08 €
6	Cement Screed ~45mm	1846,000 m²	14,88 €	27.468,48 €
			Total:	75.787,56 €
Difference: Actual Cost Less Achieved Cost Savings				29.421,07 €
EQUITABLE ADJUSTMENT				29.421,07 €

34. To explain appellant's methodology for each building renovated by BB, we have selected the representative computation for Building 2501 below (*id.* at 9):

[2] The title of this work category was revised at the hearing by appellant to better reflect the nature of the operation for both the DDS and BB buildings (tr. 1/186-88).

Building 2501 Actual Costs				
Lin.	Description of Actual work Items	Quantity	Unit Cost	Total Cost
1	Removal of PAH-Contaminated parquet	1894,030 m²	18,13 €	34.338,76 €
2	Hot Bitumen Screed	1820,995 m²	19,88 €	36.201,38 €
3	Perlite Compensation Levelling <10mm	1820,995 m²	2,33 €	4.242,92 €
4	Perlite Compensation Levelling >10mm	952,862 m²	2,05 €	1.953,37 €
5	Low Density Fiber Board	1828,800 m²	3,42 €	6.254,50 €
6	Felt Paper Layer	1820,995 m²	0,75 €	1.365,75 €
7	Fesco Expanded Perlite Board 20 mm	25,082 m²	6,71 €	168,30 €
8	Fesco Expanded Perlite Board 30 mm	21,661 m²	8,00 €	173,29 €
9	Fesco Expanded Perlite Board 40 mm	39,037 m²	11,43 €	446,19
10	Fesco Expanded Perlite Board 60 mm	9,950 m²	16,33 €	162,48 €
11	Sound Proof Layer 12/10 Incl. Fillerstrip to Wall	937,316 m²	5,33 €	4.995,89 €
12				
13				
14				
15				
			Total:	90.302,83 €

Building 2501 Cost Savings				
Lin.	Description of actual work Items	Quantity	Unit Cost	Total Cost
1	Demolition of Screed incl. Contaminated Adhesive	1894,030 m²	9,13 €	17.292,49 €
2	Cement Screed Incl. PE-Foil Underlay	1820,995 m²	13,53 €	24.638,06 €
3	PE-Foil Underlay betw. Concrete Slab and Screed	1820,995 m²	0,25 €	455,25 €
4	Sound Reducing Layer 12/10 Type TK	1820,995 m²	7,68 €	13.985,24 €
5				
6				
			Total:	56.371,04 €
Difference: Actual Cost Less Achieved Cost Savings				33.931,79 €
EQUITABLE ADJUSTMENT				33.931,79 €

35. In its proposal, HSG incorporated DDS's estimated cost of renovating the floors of each building. That cost (including HSG indirect markups and profit) was 75.787,56 Euros. Appellant deducted that originally proposed estimated cost from the actual cost to renovate DDS' six buildings as a credit to the Corps for the deletion of the originally contemplated work. The actual cost (including indirect markups and profit) of performing the work for the six buildings DDS renovated ranged from 103,640.01 to 106.264,06 Euros. (Ex. A-34 at 2-7) Its actual cost in Euros, less the credit to the Corps for the costs saved, resulted in the following claim per DDS building:

Building 2502	27.852,45€
Building 2503	29.421,07€
Building 2504	30.231,61€
Building 2509	30.476,50€
Building 2514	29.948,58€
Building 2515	29.465,21€
DDS Bldgs. Total	177.395,42€

36. Appellant estimated that the credit to the Corps for the originally contemplated work should be 56.371,04 Euros per building renovated by BB, including all markups. Its actual cost for the work (including markups) ranged from 85.968,07 to 90.302,83 Euros per building. HSG claims the difference between the BB actual and estimated costs. (Ex. A-34 at 8-11)

37. The estimated DDS rates per square meter incorporated into the proposal for demolition of the anticipated screed and PAH-contaminated adhesive varied depending on whether parquet, tiles or carpet was installed above the adhesive as follows: 16,92 Euros for parquet, 17,76 Euros for tile and 15,72 Euros for carpeted areas. Using the scraping/vacuuming method to remove the PAH-adhesive and grind the subfloor after encountering the alleged differing site condition DDS's PAH removal costs were reduced to 11,58 Euros, 10,68 Euros and 7,44 Euros for the parquet, tile and carpeted areas, respectively. However, actual costs were increased by the installation of the following, in lieu of the planned thick screed layer, in quantities that varied as appropriate for building up the subfloor of each building: hot bitumen screed, perlite compensation leveling, wood and mineral fiber board, a felt paper layer and "lean concrete" (in tiled areas). (Ex. A-34 at 2-7)

38. BB used only one rate per square meter for demolition of the anticipated screed regardless of whether parquet, tile or carpet was installed above the subfloor. That rate set forth in the BB post-award estimate of what the work would have cost (or the cost savings to the Corps) was 9,13 Euros. There is no persuasive evidence explaining the very substantial difference between the BB and DDS estimated rates for the originally-anticipated demolition work. The BB per square meter rate for the grinding/vacuuming and removal of the PAH-contaminated parquet adhesive was 18,13 Euros. The discrepancy between the DD and BB rates is not adequately explained. The significant cost differential between the actual costs incurred by DDS and BB is primarily attributable to BB's substantially lower per square meter costs for the materials, in particular the "hot bitumen screed" (19,88 Euros for BB vs. 25,56 Euros for DDS). (Ex. A-34 at 2-11) BB attributed the reduced cost of materials to discounts and superior arrangements with its suppliers (tr. 4/71-72).

39. The units renovated by BB and DDS, as originally constructed, were different in varying degree and the amount of floor build-up and renovation work in each building was not necessarily comparable. The two subcontractors also used somewhat different methods of building up the subfloors. There is no evidence that the actual cost of the materials, labor rates, or methodology used by either DDS or BB for the subfloors were unreasonable. The Corps and appellant monitored the quantities and costs associated with the actual work performed on several test apartments. The government knew appellant's approach to the revised work and the materials installed. Contemporaneously, the Corps did not challenge the reasonableness of appellant's methodology or costs incurred. (Tr. 1/191-94, 206-07, 4/71)

40. For reasons stated in our decision, we consider that the DDS estimate of the cost of the work per building that was incorporated into the HSG proposal (75.787,56 Euros) is the best evidence of the probable cost of the floor renovation work had the subfloor condition been as anticipated. Deducting that amount from the actual

cost incurred by BB in the renovation of its four buildings, the increased cost per building was as follows (ex. A-34 at 1, 8-11):

Building 2500	10.180,51 (85.968,07 – 75.787,56)
Building 2501	14.515,27 (90.302,83 – 75.787,56)
Building 2511	12.485,43 (88.272,99 – 75.787,56)
Building 2512	10.808,73 (86,596.29 – 75.787,56)

Total Increased Cost BB Bldgs. 47.989,94 Euros

DECISION

The government argues in ASBCA No. 55596 that screed in the subfloor was encountered and this condition was neither contrary to contractual indications nor unusual. Therefore, the government maintains that appellant has failed to prove that it encountered a differing site condition.

Appellant maintains that no screed was encountered in the subfloor. To the extent that there was any subfloor buildup above the hard concrete slab, appellant contends that the materials were bonded to the concrete and not removable. The actual conditions meet the criteria for either a Type I or Type II differing site condition according to HSG.

The contract indicated that HSG was to "remove...sub flooring (including floor screed)" preparatory to replacing it with a new floor buildup. However, we have found that appellant encountered no screed layer and effectively no subflooring. It encountered one homogenous concrete structural slab. Clearly this condition differed from anything reasonably contemplated by either party. The condition was unknown and unusual constituting a Type II differing site condition. It also differed from contractual indications that reasonably indicated, *inter alia,* that screed would be encountered and require demolition with consequent room to rebuild the floor with new screed and sound insulation. Accordingly, the lack of a screed layer was also a Type I condition.

The formula for determining the quantum of the adjustment is the actual reasonable cost of the work less the reasonably estimated cost that the contractor would have incurred if the differing site condition had not been encountered plus profit. *Haskell Corp.,* ASBCA No. 54171 *et al.*, 06-2 BCA ¶ 33,422 at 165,693. In addition, HSG was required to mitigate its damages to the extent reasonably possible. *See Home Savings of America, FSB v. United States*, 399 F.3d 1341, 1353 (Fed. Cir. 2005).

The government argues that the "reasonable actual cost" to demolish the floors was what it asserts was DDS' actual cost per building of 19.549,68 Euros. Because that actual cost was less than DDS' estimate for allegedly the same work of 31.040,52 Euros, the Corps claims a credit for the difference ("demolition savings") of 11.500,84 Euros per

building. (Finding 33, actual costs, lines 1-3, cost savings, lines 1, 3, 4) The government then contends that the "reasonable actual cost to reconstruct" the floors was BB's alleged actual cost per building ranging from 51.629,31 to 55.964,07 for its four buildings (*see, e.g.*, finding 34, actual costs less 34.338,76). Because BB's cost exceeded DDs' estimated cost of 44.747 Euros per building (finding 33, cost savings, lines 2, 5, 6) the Corps concedes that appellant would be entitled to the increased cost differential per building. Since the credit to the Corps for the "demolition savings" exceeds the increased actual cost per building, the government concludes that there was no overall cost increase and appellant was not damaged.

The actual cost incurred to perform the work is not seriously in dispute. Both the Corps and appellant agreed on sample apartments, necessary types and quantities of materials and the per-unit cost of placement involved.

The parties dispute what the appropriate estimated cost should be for the originally-planned work. Appellant in effect calculated two separate estimates, one prepared by DDS and incorporated into the proposal and one prepared by BB after award for four of the buildings. DDS's pre-award estimate was substantially higher than BB's post-award estimate. Appellant argues that the DDS estimate should be deducted from its actual costs and credited to the Corps for the six buildings renovated by DDS. However, with respect to the four buildings renovated by BB, appellant asserts that BB's separately-estimated cost for the original work should be subtracted from its actual cost of renovating the floors following discovery of the differing site condition.

The government notes that BB's actual cost for reconstruction (for its four buildings) was only approximately 10,000 Euros higher than DDS's estimated cost (incorporated into the HSG proposal). Therefore, to the extent that appellant incurred extra costs, the increase was limited to that amount according to the Corps.

We consider that the original estimate relied on in appellant's proposal best reflects on this record what the work would have cost but for the differing site condition. That estimate was prepared when there was no incentive to reduce the cost savings to the government. In particular, the substantial disparity between the DDS and BB per square meter cost for removal of the anticipated screed has not been persuasively explained by appellant. To that extent, we agree with the government's approach to the pricing of the adjustment.

However, the actual cost incurred by both DDS and BB to perform the work on their respective buildings has been established. The government contends that we should limit the adjustment solely to the difference between BB's (lower) actual costs and the (higher) DDS estimate. The government argues that BB's actual costs establish the reasonable cost of overcoming the differing site condition.

Although the government is entitled to cost savings achieved by BB performance on four buildings, the government is not entitled to deprive appellant of a portion of the actual costs incurred by DDS. In this case, there is no persuasive and particularized proof that any specific cost incurred by DDS was unreasonable, that DDS was inefficient, or that its specific technical approach for renovation of any particular apartment was improper. There also were differences among the buildings and units making comparisons of the renovation costs problematic. Appellant, in its attempts to timely complete the work, simply hired an additional subcontractor to perform part of the work. To the extent that the additional subcontractor was able to perform its portion of the work less expensively, its cost did not establish a ceiling on recovery per building. The bulk of the savings achieved by BB were through volume discounts and more favorable terms for materials. There is no evidence that similar savings were available to DDS. Nor is there evidence that it was possible for BB to timely perform the floor renovation work on all ten buildings. HSG notes that no time extension or delay damages have been claimed. Nor does the record reflect what subcontractual arrangements existed between DDS and HSG and what additional costs might have been incurred by HSG if it had terminated the floor renovation work on DDS's six buildings. There is also no evidence when HSG knew the extent to which BB's total actual floor renovation costs incurred would be lower than those incurred by DDS. In short, we do not question HSG's business judgments in minimizing the added cost to the government and using both subcontractors to expeditiously complete the work.

Adding together the increased cost of the buildings renovated by DDS and BB, appellant is entitled to recover 225.385,36 Euros (findings 35, 40), plus interest in accordance with the Contract Disputes Act commencing 28 November 2005. ASBCA No. 55596 is sustained to that extent.

ASBCA No. 55597—THE PAH DISPOSAL CLAIM
FURTHER FINDINGS OF FACT

41. The contract required the demolition of certain existing paved surfaces. Prior to commencement of demolition, and as part of its contractually-required hazardous materials investigation, appellant was to test the pertinent roads and drives for "TAR Containing Materials" and Polycyclic Aromatic Hydrocarbons (PAH). (R4,55595, tab 7 at 7, 34, 40, 60, 95-96, 175-76, 183-85)

42. Contract § 3.7 "Environmental" stated in part (*id.* at 28):

> 1. Perform and provide (see submittal register) a comprehensive hazardous materials investigation (samples, testing, analysis, etc.) as described in the attached scope of work. (See Attachments for investigation requirements.)

> 2. Remove all asbestos containing materials in buildings, and provide test results and certification by licensed professional/s that renovated buildings are asbestos free.
>
> 3. Remove all lead-based paint in buildings above acceptable levels (0.06%) where the surface will be exposed after completion of work, and provide test results and certification by licensed professional/s that renovated buildings are lead-based paint free.
>
> 4. Remove PAH (Polycyclic Aromatic Hydrocarbons) adhesive where wood flooring is removed in accordance with AFH guidelines, and provide test results and certification by a licensed professional/s that renovated buildings are PAH free
>
> 5. This project will require the removal of existing in place flexible (bituminous) pavement. Prior to the removal of the flexible pavement the pavement shall be tested for presence of PAH and if present the pavement must be removed and disposed of in an environmentally prescribed manner for such pavements.

43. Contract § 6.1.1A listed and incorporated by reference numerous design and construction criteria, regulations and publications (*id.* at 47-50, finding 10). Following this listing, the above subsection stated (R4, tab 7 at 50):

> A Civil Specification attachment to this solicitation document is being provided as a guide and for illustrative purposes that generally covers and addresses the site work, utility infrastructure, planting, landscaping, community use elements and requirements. The Sample Civil Specification attachment shall be used as a guide by the IDC-RFP offeror to cover site-civil engineering features and utility infrastructure requirements. Site features that are a part of the design but not covered in the sample specification shall require the preparation of the specific feature specification by [appellant] for the various design submittals for review and approval.

44. Contract § 6.1.1B stated in part (*id.* at 50-51):

> B. SPECIFIC CRITERIA
>
> In addition to the technical criteria and applicable publication cited above in the preparation of the design and construction document for the project features and requirements the following specific criteria are to be used as guidance in site and utility renovations and replacement. The offeror shall also utilize and incorporate the pertinent and applicable criteria and standards in the Installation Management Agency, Europe "Army Family Housing Standard Design Guide" (latest most recent edition) a copy of which will be provided or made available in electronic format to the offeror. As a guide and an aid to [appellant] this solicitation contains as an attachment a sample Civil Specification that generally covers the site and utility enhancement features generally required for Whole Neighborhood Renewal type projects. This sample specification may not be totally inclusive for all site features required for any specific project and will require augmentation by the IDC respondent. As stated the sample specification is being provided for illustrative and guidance purpose[s] only.

45. Contract § 6.5 "Environmental Protection" stated in part (*id.* at 95-96):

> **6.5.1 REMEDIATION PLAN**
>
> After completion of the hazardous Materials Investigation, the successful offeror shall develop a plan (approved by the COR) for remediation of any hazardous materials found in the buildings. All demolition and separation of debris must be performed in accordance with German laws and regulations. Disposal costs shall be included in the contract. After demolition and disposal IAW environmental and safety requirements a copy of the disposal certificate must be submitted to the COR for record. [Emphasis supplied]
>
> **6.5.2 ASBESTOS**
>
> Remove and dispose of all asbestos in the building in accordance with TRGS519 and all applicable US laws. This

may include windowsills, gaskets or fire doors. Asbestos survey results for these buildings will be provided. Asbestos abatement work shall be performed only by a licensed contractor who is trained, experienced, and regularly engaged in the abatement of asbestos-containing materials. Obtain all required permits and agreements for the transport and disposal of asbestos containing materials to an approved dump site.

6.5.3 POLYCYCLIC AROMATICE HYDROCARBONS (PAH)

The contractor is required to follow all applicable host nation environmental safety requirements (e.g. "Instruction Manual for the Removal of PAH Containing Adhesives for Wood Floors" prepared by the Berufsgenossenschaften der Bauwirtschaft, i.e. Professional Associations of Building Industry), included in section 6 of the Installation Management Agency, Europe AFH Standard Design Guide.

6.5.4 LEAD-BASED PAINT

Remove and dispose of all items in the building with paint that has a lead content [of] 5000 mg/kg or greater – unless the lead is found on walls or ceilings which are to be entirely covered by gypsum board wall construction….

6.5.5 TAR CONTAINING MATERIALS

Remove and dispose of all flexible-bituminous pavements within the project area that have been tested and positively identified as having PAH (Polycyclic Aromatic Hydrocarbons) constituents in the mix design. Samples shall be taken prior to demolition efforts in a manner prescribed by the governing environmental authority. The . . . Contractor shall dispose of the tar containing asphalt material at either an appropriate landfill site licensed to accept such materials or in accordance with the guidelines of BMBAU Regulations.

46. Contract § 7 enclosed the following "Attachments" (*id.* at 97):

7. ATTACHMENTS

7.1 Reference Drawings & Model Plans

7.2 Submittal Register.

7.3 Special Requirements.

7.4 Section 1100 Requirements.

7.5 Installation Management Agency, Europe AFH Design Guides Volumes 1, 3, & 4.

7.6 Civil Specifications (For Guidance and Illustrative Purposes)

7.7 Structural Investigation SOW

7.8 Hazardous Materials Investigation SOW

7.9 Hydrant Flow Data

7.10 Bid Schedule

7.11 1991 Hazardous Materials Survey

47. Attachment 7.3 "Special Requirements" contained the following clause (*id.* at 135):

SR-22 DESIGN-BUILD CONTRACT – ORDER OF PRECEDENCE

(a) The contract includes the standard contract clauses and schedules current at the time of contract award. It entails (1) the solicitation in its entirety, including all drawings, cuts, and illustrations, and any amendments, and (2) the successful offeror's accepted proposal. The contract constitutes and defines the entire agreement between the Contractor and the Government. No documentation shall be omitted which in any way bears upon the terms of that agreement.

(b) In the event of conflict or inconsistency between any of the provisions of this contract, precedence shall be given in the following order:

(1) Betterments: Any portions of the accepted proposal that both conform to and exceed the provisions of the solicitation.

(2) The provisions of the solicitation:

a. Scope of Work and Performance Specifications
b. Volumes 1, 3 & 4 AFH Design Guide
c. Special Requirements
d. 1100 Requirements
e. Reference Drawings & Model Plans

(3) All other provisions of the accepted proposal.

(4) Any design products including, but not limited to, plans, specifications, engineering studies and analyses, shop drawings, equipment installation drawings, etc.

48. Attachment 7.4 to the contract set forth the "1100 Requirements" (*id.* at 97, 147). Section 01525 "Safety Requirements of Attachment 7.4" at subpart 1.3.3 provided (*id.* at 161-62):

1.3.3 Unforeseen Hazardous Material

If material that may be dangerous to human health upon disturbance during construction operations is encountered, stop that portion of work and notify the Contracting Officer immediately. Intent is to identify materials such as PCB, lead paint, and friable and nonfriable asbestos. Within 14 calendar days the Government will determine if the material is hazardous. If the material is not hazardous or poses no danger, the Government will direct the Contractor to proceed without change. If the material is hazardous and handling of the material is necessary to accomplish the work, the Government will issue a modification pursuant to "FAR 52.243-4, Changes" and "FAR 52.236-2, Differing Site Conditions."

49. Attachment 7.6, "Civil Specifications (For Guidance and Illustrative Purposes)" contained the following provision concerning "Site Clearance and Demolition" (*id.* at 175-76):

> Demolition Material
>
> Unless otherwise specifically stated in the item text, demolition material shall become the property of the Contractor. . . . Even when not specifically stated in the item text, the hauling off site and the disposal of demolition material deemed to be the property of the Contractor is included in the scope of work of all specification items. This applies also to other specification sections. The dumps for uncontaminated demolition material shall be official disposal sites determined by the Contractor. The Contractor shall be responsible for meeting the requirements of the disposal site authorities regarding the material there delivered and for paying dumping fees. He shall also provide the COR with documentation verifying the material has been properly disposed of.
>
> Disposal of Contaminated demolition material shall be handled under section 08.02, Hazardous Toxic Waste Remediation/Removal.

50. Section 08.02.0070 of the "Hazardous Toxic Waste Remediation/Removal portion of Attachment 7.6" stated (*id.* at 185):

> ***08.02.0070 Dispose of contaminated asphalt**
>
> Dispose of tar-containing asphalt material. The Contractor may choose to dispose of the material either at an appropriate landfill site, in accordance with the guidelines of BMBAU, or to deliver the material to an asphalt mixing firm having the relevant Land's approval for handling and treatment of tar-containing material.
>
> Charges for disposal of tar-containing material at landfill site shall be reimbursed separately upon presentation of an appropriate invoice. Invoiced charges shall include costs for any tests on the material that the landfill authority may require before accepting the material. [Emphasis added]

> Prior to disposal, material may be temporarily stored on site in impermeable containers or on paving with a sheet cover. Provision of appropriate containers or sheeting for usage for a duration during the construction is covered in separate items.
>
> A certificate verifying that disposal was performed satisfactorily with respect to applicable regulations and ordinances shall be presented to the COR.

51. Section 1.1 of the contract introduced the "integrated design and construction" process stating as follows *(id.* at 15):

> **1.1 PREPARATION AND REVIEW OF TECHNICAL MATERIAL**
>
> This document describes an Integrated Design and Construction method. A selected offeror will assume professional responsibility and liability for the combined design and construction of the subject buildings, civil, and common area work (whole neighborhood renovation). The offeror should attend the pre-proposal site visit scheduled by the Corps of Engineers to gain a full understanding of the requirements of the project, review the existing site conditions, and review the AFH Standard Design Guide volumes 1, 3, & 4 prior to submitting a proposal for the work. The AFH Design Guide outlines the requirements for renovation of Army Family Housing by Installation Management Agency, Europe. The Design Guide and performance specifications contained in this document described the minimum standard that must be met for the renovation work. The successful offeror must achieve the same standard of quality, but is encouraged to pursue innovative alternative methods and materials that will provide cost and/or time savings. Design Guide volume 4 does not include civil-site and supporting infrastructure development work, therefore a generic civil specification supplement has been included for illustrative purposes to be used as a guide in developing project/site specific technical specification. (See Attachments.) **Note: if any of the following requirements conflict with guidance or criteria in the AFH Design Guide, this document shall govern.** [Bold in original]

52. For each of the buildings to be renovated, Attachment 7.11 listed the results of an asbestos survey conducted by the government in 1991 that identified areas that were "assumed" to contain asbestos and areas where no asbestos was detected. The survey did not disclose that asbestos would be encountered in the air ducts (*id.* at 257-79). No comparable investigation was conducted with respect to the paved surfaces to be demolished.

53. It is not possible to determine the presence of PAH or the level of any contamination without testing (tr. 1/21, 25-26, 209, 213; exs. A-60, -62).

54. DDS and HSG did not include an allowance for disposal fees payable to remediation facilities or landfills receiving delivery of demolished PAH-contaminated pavement (tr. 1/76-78, 2/213). Appellant considered that the PAH condition encountered was an "Unforeseen Hazardous Material" within the meaning of § 1.3.3 of Attachment 7.4. It also maintained that the landfill costs would be reimbursed separately if any PAH-contaminated pavement was encountered pursuant to § 08.02.0070 of the Civil Specifications. It also did not expect to find PAH because of references in the contract to "flexible bituminous" pavement, which does not contain the hazardous material. (Tr. 1/25-26, 76-78) In addition, during the pre-proposal site visit the government emphasized that the contractor was to include disposal costs for the PAH contaminated flooring (*see* ASBCA No. 55596 above) without specifically mentioning PAH in the paved road surfaces. Appellant construed this differentiation in emphasis as an indication that the disposal of PAH contaminated roads would be separately reimbursed. (Tr. 1/78-79) Finally, no cost allowance was included because in the experience of HSG and DDS on prior government renovation contracts, the government had consistently made separate payment for PAH disposal (tr. 1/ 214-16).

55. The contracting officer agreed that disposal fees were generally paid separately as a matter of practice in design-bid-build contracting but not under the terms of the design-build contract in dispute (tr. 4/59).

56. According to appellant's expert, the presence of PAH should be anticipated approximately 50% of the time in roads constructed during the 1950's (tr. 1/20-21).

57. Following award, appellant performed the requisite testing of the roadways to be demolished for PAH. Two of the four test samples revealed the presence of hazardous PAH levels requiring treatment and disposal of the contaminated road materials as hazardous waste in an authorized disposal facility or landfill. (Tr. 1/21-23, 30-32)

58. In February 2005, appellant requested reimbursement of costs associated with disposal of the PAH-contaminated asphalt, as well as for removal and disposal of asbestos-contaminated air ducts in areas of the buildings. On 22 March 2005, the government denied that appellant was entitled to recover for the asphalt and requested

additional information regarding the asbestos. (R4, tabs 7, 8) The government denied the asphalt claim but eventually reimbursed appellant for the cost of removing and disposing of the asbestos in August 2005 (ex. A-45).

59. By letter dated 28 November 2005, appellant indicated that disposal of the contaminated asphalt was complete and claimed that it was entitled to be reimbursed 117.802,06 Euros representing the amount incurred in performing the work (ex. A-41). The claim was eventually certified and denied by the contracting officer from which decision appellant timely appealed (finding 6).

DECISION

Appellant contends in ASBCA No. 55597 that the contract, reasonably read as a whole and in its entirety, provides for the payment of dumping fees incurred to dispose of PAH-contaminated paved surfaces. It cites, in particular, the Unforeseen Hazardous Materials clause in attachment 7.4 (finding 48) and § 08.02.0070 of the Civil Specifications provided as an attachment "For Guidance and Illustrative Purposes." Appellant argues that under the doctrine of *contra proferentum,* any ambiguity with other portions of the contract should be resolved against the government.

The Corps cites § 6.5.1 regarding the disposal of hazardous materials which states "Disposal costs shall be included in the contract," and the express listing of PAH-contaminated paved surfaces in § 6.5.5 in the itemization of hazardous materials that might be encountered. The government contends that appellant's construction of the contract's attachments is either unreasonable in light of the plain meaning of § 6.5.1 or created a patent ambiguity that appellant was under a duty to clarify.

Appellant's interpretation of the Civil Specifications was facially inconsistent with the plain meaning of the direction to include the disposal costs (including dumping fees) in § 6.5 of the contract and should have been immediately apparent to appellant. *Cf. Triax Pacific, Inc. v. West,* 130 F.3d 1469 (Fed. Cir. 1997); *Newsom v. United States,* 676 F.2d 647 (Ct. Cl. 1982). It is well established that, regardless of the reasonableness of an interpretation of an alleged ambiguity, *contra proferentum* is inapplicable where the contractor fails to seek clarification of patent ambiguities that it knew or should have known were present prior to submitting a bid or proposal. *E.g., S.O.G. of Arkansas v. United States,* 546 F.2d 367 (Ct. Cl. 1976). Here, the ambiguity created by appellant's interpretation was obvious and conspicuous. *Cf. P.R. Burke Corp. v. United States,* 277 F.3d 1346 (Fed. Cir. 2002). The contractor concedes that it actually identified and focused on the conflicting language in preparing its proposal. *Cf. James A. Mann, Inc. v. United States,* 535 F.2d 51 (Ct. Cl. 1976). By failing to inquire and seek clarification, it forfeited the opportunity to obtain relief. *Cf. Comtrol, Inc. v. United States,* 284 F.3d 1357, 1365 (Fed. Cir. 2002).

HSG proceeded to resolve the obvious ambiguity unilaterally in a circuitous excursion through the attachments to the contract. The Civil Specifications were attached as a general, illustrative guide or sample for the more particularized specifications that were to be tailored by appellant after award to the precise needs of this project. Any post award specifications drafted by appellant were to comply with the plain meaning of the existing mandatory requirements set forth in the contract, not perpetuate the conflict or eliminate those requirements entirely. The Civil Specifications attachment was not identified as part of the contract for purposes of the Design Build Contract—Order of Precedence clause. The complete omission of any reference to the attachment was further reason to question its interpretation without inquiry. It was improper for HSG to accord equivalent weight to the generalized attachment in the face of the patently contrary language specific to this contract.

Appellant's interpretation also conflicted with its post award actions and recognition that disposal costs were not separately reimbursable when incurred to remediate other hazardous materials. We have included the entirety of contract § 6.5 Environmental Protection in our findings (finding 45) to insure that nothing is lost in paraphrasing its scope. The introductory § 6.5.1 states that "Disposal costs shall be included in the contract." Appellant acknowledges that disposal costs associated with the other listed hazardous materials were to be included in its proposed fixed price. Those other materials included lead-based paint (§ 6.5.4), PAH in the flooring (§ 6.5.3) and asbestos identified in the asbestos survey (§ 6.5.2). During performance, it made no claim that costs associated with the disposal of the other listed materials were separately reimbursable. There is no persuasive reason to interpret the remaining "Tar Containing Materials" paragraph (§ 6.5.5) differently.

Appellant's contention that it is entitled to relief under the "Unforeseen Hazardous Materials" (or Differing Site Conditions) clause is also without merit. The possibility of finding PAH or tar containing materials was indicated in the contract and their presence was not unusual. Indeed, appellant's own expert opined that there was a 50% chance of encountering PAH in the paved surfaces to be demolished. Appellant's test revealed PAH in 50% of its test samples. There is no persuasive evidence that the classification of the PAH encountered was more hazardous, or the quantity more extensive, than appellant reasonably should have anticipated.

ASBCA No. 55597 is denied.

Dated: 16 June 2009

ROBERT T. PEACOCK

Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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 Nos. 55595, 55596, 55597, Appeals of HSG Technischer Service GmbH, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals