

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Whiting-Turner Contracting Company) ASBCA No. 56319
)
Under Contract No. NAFBA1-02-C-0041)

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MAJ Peter Dungan, JA
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OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This is an appeal under a contract with a nonappropriated fund instrumentality to construct an expansion to a hotel owned by the instrumentality. The government has moved for partial summary judgment, contending that each of 21 bilateral modifications executed by the parties constituted an accord and satisfaction for all claims for the work described in each particular modification. In opposing the motion, the general contractor insists that the government's reading of the modifications is not supported either by their express wording or by the circumstances surrounding their negotiation. The parties also dispute the general contractor's entitlement to interest. We grant the motion in part and deny it in part.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. By date of 8 July 2002, the Army Morale, Welfare and Recreation Fund (Fund), a nonappropriated fund instrumentality, awarded appellant Whiting-Turner Contracting Company (Whiting-Turner) Contract No. NAFBA1-02-C-0041 (the contract) to furnish new construction and renovation of an expansion of the Shades of Green Hotel at the Walt Disney World Resort in Lake Buena Vista, FL (R4, tab 10 at 2535, 2551-52).

2. The contract contained various standard clauses common to contracts awarded by nonappropriated fund instrumentalities, including: clause I-4 CHANGES-CONSTRUCTION (FEB 1997); I-21 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (FEB 1997); I-25 DISPUTES (FEB 1997); I-39 INTEREST (FEB 1997), which applied to “amounts that become payable by the Contractor” to the Fund; and I-40 DIFFERING SITE CONDITIONS (FEB 1997) (R4, tab 10 at 2604, 2622, 2635, 2643, 2644). The Disputes clause provided in paragraph (b) that “[t]he contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613)” (R4, tab 10 at 2635).

3. During performance, the parties agreed to various changes, and sought to memorialize their understandings in bilateral contract modifications, 21 of which are set forth in the findings below. Unless otherwise indicated, all modifications were issued pursuant to the Changes clause.

4. By date of 9 October 2002, the parties entered into bilateral modification P00001 under which Whiting-Turner was to “make adjustments in the field by site contractor to reduce the elevation height differences resulting from the incorrect placement” of a manhole. The parties agreed that, as a result of the adjustment, “the contract price remains the same...and the time for performance remains unchanged.” The parties also agreed that “[a]cceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.” The modification contains no reservation of rights. (Government’s Motion for Partial Summary Judgment (gov’t mot.), ex. G-1)

5. By date of 17 October 2002, the parties entered into bilateral modification P00003, under which the contract was modified to include five referenced additive and three referenced deductive changes, resulting in a net decrease of the total contract price by \$96,518.60, which the parties agreed constituted a “complete equitable adjustment.” The parties further agreed that the performance period “remains unchanged.” The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov’t mot., ex. G-2)

6. Effective 12 December 2002, the parties entered into bilateral modification P00006 to include the work described in five referenced change notifications, agreeing that, as a “complete equitable adjustment,” they would increase the contract amount by \$7,752, and leave the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov’t mot., ex. G-3 at 1-3)

7. Effective 9 January 2003, the parties entered into bilateral modification P00008 to make an administrative change by correcting a typographical error that failed to reflect a \$70,000 increase in the contract price. The parties also agreed to the same accord and

satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov't mot., ex. G-4)

8. Effective 7 February 2003, the parties entered into bilateral modification P00010, agreeing to include the work described in five referenced change notifications, and, as a "complete equitable adjustment," increasing the contract amount by \$8,171 and leaving the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov't mot., ex. G-5 at 1-3)

9. Effective 24 February 2003, the parties entered into bilateral modification P00011, agreeing to include the work described in two referenced change notifications, and, as a "complete equitable adjustment," increasing the contract amount by \$11,325 and leaving the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. The parties did not cite a contract clause as authority for the modification. (Gov't mot., ex. G-6 at 1-3)

10. Effective 25 March 2003, the parties entered into bilateral modification P00013 pursuant to the Differing Site Conditions clause to include the work described in seven referenced change notifications, increasing the contract amount by \$18,979 as a "complete equitable adjustment" and leaving the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (R4, tab 17 at 002695-97)

11. Effective 19 March 2003, the parties entered into bilateral modification P00014 pursuant to the Differing Site Conditions clause "to definitize [a] previous [undefinitized] modification...for work associated with remediation of mold in the chase walls between the bathrooms in the Garden Gallery and employee cafeteria areas" described in two referenced change notifications. The parties agreed, as a "complete equitable adjustment," to increase the contract price by \$21,554 and to leave the completion date unchanged. The parties further agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov't mot., ex. G-7 at 1-2)

12. Effective 25 April 2003, the parties entered into bilateral modification P00019 to include the work described in two referenced change notifications, agreeing, as a "complete equitable adjustment," to increase the contract amount by \$3,239 and to leave the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov't mot., ex. G-8 at 1-2)

13. Effective 7 June 2003, the parties entered into bilateral modification P00021 to include the work described in 11 referenced change notifications, chiefly pertaining to structural steel in Areas 4, 4A and 6, agreeing to increase the contract amount by \$53,333 as a “complete equitable adjustment,” and leaving the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (R4, tab 19 at 002841-43)

14. Effective 8 July 2003, the parties entered into bilateral modification P00025 pursuant to the Differing Site Conditions clause “to definitize [a] previous [undefinitized] modification...for additional work associated with the Rockwork as requested by the owner.” The parties agreed to increase the contract amount by \$142,532 as a “complete equitable adjustment” and to leave the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov’t mot., ex. G-9 at 1-2)

15. Effective 18 July 2003, the parties entered into modification P00027 to include the work described in 31 referenced change notifications, agreeing to increase the contract amount by \$84,934 as a “complete equitable adjustment” and leaving the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov’t mot., ex. G-10 at 1-5)

16. Effective 22 July 2003, the parties entered into bilateral modification P00029 to include the work described in two referenced change notifications, agreeing to increase the contract amount by \$10,390 as a “complete equitable adjustment” and leaving the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov’t mot., ex. G-11 at 1-2)

17. Effective 23 July 2003, the parties entered into bilateral modification P00030 “to increase the contract amount [by \$277,930] and to extend the contract completion date” by 65 calendar days. The parties also agreed that the modification constituted “partial recovery from impacts incurred as a result of structural steel delays [resulting from change notification 133]...and address[ed] the schedule and dollar impact for...Whiting-Turner...only.” They further agreed that “any cost impacts to sub-contractors,” as well as “future schedule and cost impacts to the contract” would be “addressed separately.” The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights other than those stated. (R4, tab 20 at 003043-44) The record also contains a contemporaneous correspondence reflecting that: one subcontractor quotation pertained to steel fabrication in one part of Area 4A, but not “the other parts of Area 4;” Whiting-Turner presented a proposal to the contracting officer for “partial recovery from impacts incurred as a result of structural steel delays” attributable to change notification 045; a deposition in which

the contracting officer testified that the modification was “compensating for [then] known impacts” only. (Whiting-Turner’s Verified Response to the Government’s Motion for Partial Summary Judgment and Memorandum of Law in Support Thereof (app. opp’n) exs. D, E at 1, ex. L at 202-03) The record further includes an affidavit from Louis Rossi, a vice president of Whiting-Turner who signed the modification, attesting that it was intended as a “single issue modification” to address structural steel delays and that Whiting-Turner reserved its rights to additional compensation as stated (app. opp’n, ex. G, ¶¶ 2, 10).

18. Effective 29 July 2003, the parties entered into bilateral modification P00031 to include the work described in 13 referenced change notifications, agreeing to increase the contract amount by \$74,514 as a “complete equitable adjustment” and leaving unchanged the completion date as extended by modification P00030. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov’t mot., ex. G-12 at 1-3)

19. Effective 7 August 2003, the parties entered into bilateral modification P00033 to include the work described in eight referenced change notifications, agreeing to increase the contract amount by \$29,711.88 and to leave the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov’t mot., ex. G-13 at 1-2)

20. Effective 2 September 2003, the parties entered into bilateral modification P00034 to include the work described in 28 referenced change notifications, increasing the contract amount by \$50,525.72 as a “complete equitable adjustment” and leaving the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov’t mot., ex. G-14 at 1-5)

21. Effective 11 September 2003, the parties entered into bilateral modification P00037 pursuant to the Differing Site Conditions clause to definitize a previous modification, which had been issued in a not-to-exceed amount, for work associated with Force Wall Openings at the North Elevation to Garage 2A and 3A. The parties agreed to issue modification P00037 in the deductive amount of \$8,152 as a “complete equitable adjustment” and to leave the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov’t mot., ex. G-15 at 1-2)

22. Effective 12 September 2003, the parties entered into bilateral modification P00038 to include the work described in three referenced change notifications, increasing the contract amount by \$8,382 as a “complete equitable adjustment” and leaving the completion date unchanged. The parties also agreed to the same accord and satisfaction

terms as those included in modification P00001, with no reservation of rights. (Gov't mot., ex. G-16 at 1-2)

23. Effective 12 September 2003, the parties entered into bilateral modification P00039 to include the work described in a referenced change notification that constituted "a partial settlement" of a proposal relating to claims by various subcontractors." The parties agreed that "negotiations are ongoing for the remainder of this proposal." With respect to the portions of the proposal included in the modification, the parties agreed to increase the contract amount by \$67,303 as a "complete equitable adjustment" and to leave the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov't mot., ex. G-17 at 1-3)

24. Effective 22 September 2003, the parties entered into bilateral modification P00041 to include the work described in seven referenced additive and deductive change notifications and one referenced request for information, yielding a net increase in the contract amount by \$1,910 and leaving the completion date unchanged. The parties also agreed to the same accord and satisfaction terms as those included in modification P00001, with no reservation of rights. (Gov't mot., ex. G-18 at 1-2)

25. We find no evidence in the present record that any of the foregoing modifications were the product of duress.

26. With respect to all the disputed modifications, there is no evidence in the motion papers that either party failed to render the substituted performance addressed in those modifications.

27. In multiple subsequent modifications, apparently starting with modification P00046, by contrast to the terms that they employed in the modifications in dispute here, the parties began using different terms indicating the scope of their agreement. Thus, they provided:

This contract modification does not release the NAFI, nor does it include, settle, or resolve Contractor's and the Contractor's Subcontractors and vendors direct and/or indirect additional costs and time stemming from this change for labor impact/delays, disruptions, active interference, acceleration, and/or other impacts. Nothing herein shall release the Contractor's or Subcontractor's claims for such additional cost or time, and the Contractor reserves the right to pursue all such claims.

Likewise, this modification does not release the Contractor, nor does it include, settle, or resolve any NAFI claim, or cause of action of any nature whatsoever against the Contractor. This modification creates no new rights for either party and preserves all rights of both parties established by contract NAFBA1-02-C-0041.

(R4, tab 21 at 003134; *see also* R4, tabs 25 at 003398, 26 at 003410, 27 at 003422, 28 at 003463, 29 at 003475, 31 at 004096, 32 at 004107, 33 at 004144, 34 at 004217, 35 at 004223, 36 at 004233) Modifications P00048 and P00051 contained provisions substantially similar to that quoted above (R4, tab 22 at 003265, tab 23 at 003315, tab 24 at 003384).

28. Whiting-Turner submitted a request for equitable adjustment, which the contracting officer denied. By date of 21 September 2007, Whiting-Turner submitted a claim for \$2,725,415, asserting its own alleged costs (including an unquantified amount for interest), as well as those of three subcontractors. Whiting-Turner properly certified its own claim, as well as the claim of one of its subcontractors; two other independent claims, on behalf of other subcontractors, each for less than \$50,000, were uncertified. (App. supp. R4, tabs 2 at 1, 3 at 1, 4 at 1, 5 at 1) By decision dated 26 November 2007, the contracting officer denied these claims. (ASBCA 56319, compl., ex. 8) By date of 2 November 2007, Whiting-Turner submitted a properly certified claim for \$1,638,513, asserting amounts for another subcontractor, together with a markup. (App. supp. R4, tab 6 at 1) By date of 21 December 2007, the contracting officer denied this amended claim. (*Id.*, ex. 9 at 1) We docketed Whiting-Turner's timely appeal of both these contracting officer's decisions as ASBCA No. 56319.

29. In 2008, Whiting-Turner submitted two properly certified claims, for \$664,428 and \$3,272,256 respectively, incorporating the claims of two additional subcontractors, as well as markups. (App. supp. R4, tabs 7 at 2, 8 at 1) By date of 28 May 2008, the contracting officer denied these claims. (ASBCA 56452, compl., ex. 12) Whiting-Turner then brought the appeal that we docketed as ASBCA No. 56452. Whiting-Turner's complaint also included the claims alleged in the complaint in ASBCA No. 56319, as well as the 2008 claims.

DECISION

A. Contentions of the Parties

The Fund advances three arguments in support of its overall position that the disputed modifications constitute accords and satisfactions regarding all the covered work. First, the Fund contends that, with the exception of modifications P00030 and P00039, all of the modifications "contain the full accord and satisfaction language" and

meet the requisite elements to extinguish any further claims. Second, with respect to modification P00030, the Fund insists that extraneous evidence establishes the requisite meeting of the minds for an accord and satisfaction. Third, with respect to modification P00039, the Fund maintains that the modification by its terms resolved claims regarding “the work as herein revised,” which was that set forth in the referenced change notification and performed by the subcontractors listed in the modification itself. As a separate argument, the Fund urges that Whiting-Turner has no statutory or other entitlement to interest for the interval between claim submission and payment. (Gov’t mot. at 12-15)

In opposing the motion, Whiting-Turner stresses the intent of the parties. Whiting-Turner contends that, in 20 of the modifications, the parties did not “discuss or negotiate delay, impact or acceleration costs as the referenced [change notifications] did not request such relief.” Whiting-Turner also asserts that “[t]he purpose and intent of the accord and satisfaction clause” in 16 of these 20 modifications “was to resolve...the direct costs...stemming from” the referenced change notifications, not other costs (app. opp’n at 4-9, 22-24). For four additional modifications--modifications P00001, P00008, P00033 and P00039--Whiting-Turner makes no explicit assertion regarding direct costs (app. opp’n at 4-5, 22-24). Finally, with respect to one modification--modification P00030--Whiting-Turner makes an elaborate argument supported by an affidavit and other documents, the substance of which is that the parties achieved only a partial settlement, leaving many matters unresolved (app. opp’n at 9-21).

With regard to interest, Whiting-Turner contends that, reading the Prompt Payment and Disputes clauses together, “there may be an ambiguity” regarding interest, which ambiguity should be resolved against the Fund as the drafting party (app. opp’n at 35-36).

In evaluating the parties’ arguments, we follow the familiar canon that summary judgment is appropriate where there is no genuine issue regarding any material fact and the movant is entitled to judgment as a matter of law. *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); FED. R. CIV. P. 56(c). On such a motion, “[o]ur task is not to resolve factual disputes, but to ascertain whether material disputes of fact--triable issues--are present.” *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969.

We approach this task in light of the familiar principles of the defense of accord and satisfaction. “To prove accord and satisfaction, the government must show ‘(1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration.’” *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009) quoting *O’Connor v. United States*, 308 F.3d 1233, 1240 (Fed. Cir. 2002). “To reach an accord and satisfaction there must be mutual agreement between the parties with

the intention clearly stated and known to the contractor.” *Coastal Government Services, Inc.*, ASBCA No. 50283, 99-1 BCA ¶ 30,348 at 150,088.

B. *Disputed Modifications*

1. *Modifications P00001, P00003, P00006, P00008, P00010, P00011, P00013, P00014, P00019, P00025, P00027, P00029, P00031, P00033, P00034, P00037, P00038 and P00041*

We conclude that the record does not present triable issues regarding eighteen of the disputed modifications. Those falling into this category are modifications P00001, P00003, P00006, P00008, P00010, P00011, P00013, P00014, P00019, P00025, P00027, P00029, P00031, P00033, P00034, P00037, P00038, and P00041.

Each of these modifications was bilateral. In each, Whiting-Turner agreed that the terms of the accord and satisfaction embraced “any and all costs,” including those for the categories specified. *See Bell BCI*, 570 F.3d at 1341-42 (holding that terms in modification releasing government from “any and all liability” were unambiguous, barring further recovery for changed work). Significantly, no modification contains any reservation of rights.

We give effect to the terms of these modifications. Inasmuch as we regard the terms as unambiguous, we need not examine extrinsic evidence. *Bell BCI*, 570 F.3d at 1341. Instead, we focus on the terms as the best evidence of the parties’ intentions, not the attorney argument proffered by Whiting-Turner regarding “the purpose and intent” of the instruments (app. opp’n at 4-9, 22-24). In each modification in this group—except modifications P00001, P00008, P00033 and P00041—the parties agreed that the price and, if applicable, time, constituted a “complete equitable adjustment.” In each of these modifications, they purported to resolve “any and all costs, impact effect, and...delays and disruptions” related to the work described. Given the breadth of these terms, we look for “evidence that would lead us to conclude that the parties had any unarticulated intention to reserve any rights.” *Leonhard Weiss GmbH & Co. and Huebsch Industrieanlagen Spezialbau GmbH, Joint Venture*, ASBCA No. 37574, 93-1 BCA ¶ 25,443 at 126,707 (holding that accord and satisfaction providing compensation for “all delays” precluded further payment for unreserved claims).

For this group of modifications, the present record does not afford any basis to conclude that other claims were reserved. By contrast to the practice followed by the parties in modification P00046 and later, in executing the modifications in this group, the parties did not include any express reservation of rights, or any other terms that could be read to limit the reach of the disposition of “any and all costs.” *See United States v. William Cramp & Sons Ship & Engine Building Co.*, 206 U.S. 118, 128 (1907) (noting that “[i]f parties intend to leave some things open and unsettled, their intent to do so

should be made manifest”). Moreover, we have not been directed to any clarifying documents executed with the modifications, comparable to the letters incorporated by reference in *Robinson Quality Constructors*, ASBCA No. 55784, 09-1 BCA ¶ 34,048 at 168,391 (findings 15, 18), *recon. denied*, 09-2 BCA ¶ 34,171. There is also no evidence that the Fund failed on its part to render the substituted performance–payment of the agreed sums and granting any additional time–to which it agreed in these modifications.

2. *Modifications P00021, P00030, and P00039*

We deny the motion regarding modifications P00021, P00030 and P00039.

As indicated, the great part of Whiting-Turner’s brief relates to modification P00030, concerning which the contractor attaches multiple documents, as well as an affidavit, to demonstrate that the parties agreed to a partial settlement only. By its terms, the modification has a reservation of rights. The parties made clear that they intended the settlement to be no more than a “partial recovery” applicable solely to Whiting-Turner, and they expressly reserved both “cost impacts to sub-contractors” and “future schedule and cost impacts to the contract” to be “addressed separately.” The affidavit and other materials proffered only confirm what the terms say. Hence, resolving all inferences in favor of Whiting-Turner, as the party against which the motion is directed, *e.g.*, *BearingPoint, Inc.*, ASBCA No. 55354, 08-2 BCA ¶ 33,890 at 167,732-33, we conclude that the record presents triable issues regarding modification P00030.

We also conclude that modifications P00021 and P00039 present triable issues. Modification P00021 relates in part to structural steel work in Areas 4 and 4A, which are among the subjects of the partial settlement in modification P00030. While the modification contains the same accord and satisfaction terms as those found in the 18 modifications addressed above, we believe that the better practice is to deny the motion as to this modification because of the nexus to work in these two areas. Modification P00039 by its terms constitutes “a partial settlement” of a change notification. Again resolving all triable issues in favor of the party against which the motion is directed, we deny summary judgment regarding modifications P00021 and P00039.

C. *Interest*

In its complaint, Whiting-Turner seeks “interest on claimed amounts...from the date of submission of claim until paid” (compl. ¶ 227). In its amended complaint, Whiting-Turner employs a slightly different formulation, seeking “interest on the amounts claimed herein...from the date of submission for payment until such date as that obligation is fully satisfied” (amended compl. ¶ 247). Regardless of the formulation, we conclude that Whiting-Turner’s claim for interest presents no triable issue.

“An allowance of interest on a claim against the United States, absent constitutional requirements, requires an *explicit* waiver of sovereign immunity by Congress. Such express consent to the payment of interest must be found in either a specific statutory or an express contractual provision.” *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 826 (1983) (italics in original); *LA Limited, LA Hizmet Isletmeleri*, ASBCA No. 53447, 04-1 BCA ¶ 32,478 at 160,635, 160,637 n.6 (holding that Disputes clause in nonappropriated fund instrumentality contract did not provide for interest recovery). Given the Disputes clause in this contract, the entitlement of 41 U.S.C. § 611 is unavailable, and we have not found—nor been directed to—any other statutory or contractual waiver of sovereign immunity. Even if we agreed with Whiting-Turner’s argument that “there may be an ambiguity” lurking between the Prompt Payment clause, which provides for an interest penalty for late payment of undisputed invoices, and the Disputes clause, such an ambiguity would not equate to the requisite explicit waiver to authorize an interest award.

CONCLUSION

The government’s motion for summary judgment is granted in part and denied in part to the extent indicated.

Dated: 6 May 2010

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56319, Appeal of Whiting-Turner Contracting Company, rendered in conformance with the Board's Charter.

Dated:

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