

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Skanska US Building, Inc.) ASBCA No. 56339
)
Under Contract No. DACA21-02-C-0055)

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK
ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The parties have filed cross-motions for partial summary judgment regarding the referenced appeal.¹ The dispute concerns contract requirements regarding construction of walls for a forensic laboratory facility. The appeal is one of six relating to the contract

¹ The motion papers include: Respondent’s Motion for Partial Summary Judgment (gov’t mot.) incorporating a Compilation of Facts in support of the motion referenced herein as government proposed findings (GPF); Appellant’s Motion for Partial Summary Judgment (app. mot.) with a supporting legal memorandum and proposed factual findings (APF); a Joint Stipulation of Facts (stip.); Appellant’s Response in Opposition to Respondent’s Motion for Partial Summary Judgment (app. resp. to mot.) and Appellant’s Response to Respondent’s Compilation of Facts (app. resp. to GPF(s)); Respondent’s Response to Appellant’s Motion for Partial Summary Judgment (gov’t resp.); and, Respondent’s Reply to Appellant’s Response in Opposition to Respondent’s Motion for Partial Summary Judgment (gov’t reply).

involving claims totaling \$18 million. Because genuine issues of material fact are present we deny both motions.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF MOTIONS

1. On 3 June 2002, the United States Army Corps of Engineers (COE or government) issued a solicitation for construction of the U.S. Army Criminal Investigation (Forensic) Laboratory at Fort Gillem, Georgia. This project was the first forensic laboratory constructed by the COE for the Department of Defense. The plans and specifications were prepared by the COE's architect, Helmuth, Obata & Kassabaum (HOK), and its consulting mechanical and structural engineers, R.G. Vanderwell Engineering, Inc. and Michael M. Simpson & Associates, Inc. (Stips. 3, 4, 6)

2. On 18 September 2002, Skanska US Building, Inc. (Skanska or appellant) submitted its revised proposal for the project. Skanska's proposal included Option 1, Operations and Maintenance of the Criminal Investigation Laboratory for five years. Pre-award, there were five offerors in the competitive range. Skanska's price was \$1,302,000 higher than the lowest priced offeror. Nevertheless, the contracting officer (CO) determined that Skanska's proposal offered the best value to the government. (Stips. 14, 19)

3. On 28 September 2002, the COE awarded the referenced contract for the laboratory to Skanska in the amount of \$27,812,000. The contract included the following clauses: DFARS 252.236-7001, CONTRACT DRAWINGS, MAPS, AND SPECIFICATIONS (AUG 2000); FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997). (Stips. 22, 65; R4, tab 7 at 1214, 1243)

4. Work under the contract required, *inter alia*, the construction of an 88,000 sq. ft. forensic laboratory to include laboratory spaces, administrative offices, an indoor firing range, evidence storage areas, break areas, locker and shower facilities, and mission support areas such as a hazardous waste holding facility and a training conference room for use by the U.S. Army Criminal Investigation Command (USACIC). The contract contained an operation and maintenance requirement after completion of the facility. (R4, tabs 6, 7; stip. 65)

5. Specification § 09260, located in Division 9, Finishes, of the contract specifications, relates to the provision of Gypsum Board Assemblies (GBA) (R4, tab 7 at 2230-43; stip. 65).

6. Specification § 09260, Part 2, Products, states that GBA consist of framing

material including metal studs, gypsum wallboard (GWB), trim and accessories, joint tape and compound, together with miscellaneous materials including sound attenuation blankets, screws and acoustical sealants (R4, tab 7 at 2236-38; stip. 65).

7. Specification § 09260, ¶ 2.2.3, Modified Deflection Track Detail, provides in relevant part, “[m]anufacturer’s standard top runner detailed to prevent cracking of gypsum board applied to interior partitions resulting from deflection of the structure above” (R4, tab 7 at 2236, stip. 65).

8. Specification § 09260, ¶ 2.2.4, Deflection and Firestop Track, provides in relevant part:

Top runner designed to allow partitions heads to expand and contract with movement of structure above while maintaining continuity of the assembly. Comply with requirements of ASTM C 645 except configuration, of thickness indicated for studs and width to accommodate depth of studs indicated with flanges offset at midpoint to accommodate gypsum board thickness.

(R4, tab 7 at 2236; stip. 65)

9. Specification § 09260, ¶ 3.3.4, Partition Heights, provides in relevant part:

Where not indicated otherwise, extend partitions from floor to the underside of solid structure above. Where indicated, extend partitions to the underside of suspended ceiling or to just above suspended ceiling, as indicated in the Partition Schedule.

(R4, tab 7 at 2239; stip. 65)

10. Specification § 09260, ¶ 3.3.6, Modified Deflection Track Detail, provides in relevant part:

At full-height interior partitions only and at non-fire rated partitions, construct deflection track detail allowing for 13 mm joint head in accordance with manufacturer’s standard recommendations, by cutting vertical studs 13 mm short and not screw mounting to top rack. Gypsum Board is screwed to verticals at maximum 75 mm from top rack.

(R4, tab 7 at 2240; stip. 65)

11. Specifications § 09260, ¶ 3.4.2, Partition Perimeters, states in relevant part, “[c]arefully seal around penetrations such as electrical boxes, plumbing, cabinets, ducts, and other openings” (R4, tab 7 at 2240).

12. Appendix A, Vol. 3, ¶ 3.2 I, Finishes, provides in relevant part, “[t]ypical interior partitions are constructed of light gauge metal framing supported by floor runner and deflection track attached to the structure above” (R4, tab 7 at 3841; stip. 65).

13. The WALL TYPES LEGENDS on drawings A-900-02 identify and describe 13 interior wall types as follows:

- I-1 150 MM STEEL STUD TO STRUCTURE
INTERIOR BRICK VENEER TO 3.2 M
50 MM AIR SPACE, BATT SOUND INSULATION
- I-2 200 MM CMU UP TO 1 M
150 MM STEEL STUD TO STRUCTURE
14 MM GYP. BOTH SIDES
(BATT SOUND INSULATION)
- I-3 200 MM SMU TO STRUCTURE
- I-4 150 MM STEEL STUD TO STRUCTURE
15 MM BYP. BOTH SIDES
SOUND BATT INSULATION
- I-5 90 MM STEEL STUD TO 3.2 M
15 MM BYP. BOTH SIDES
BRACING AS REQUIRED
- I-6 150 MM STEEL STUD TO STRUCTURE
15 MM SYP. BOTH SIDES
SOUND BATT INSULATION
- I-7 210 MM CONCRETE WALL TO STRUCTURE
INTERIOR VAULT
- I-8 200 MM CMU WALL TO STRUCTURE
INTERIOR VAULT

- I-9 200 MM CONCRETE WALL
- I-10 200 MM CMU TO STRUCTURE
INTERIOR BRICK VENEER TO 3.2 M
5 MM GYPSUM BOARD LAB SIDE ON FURRING
CHANNELS
- I-11 150 MM STEEL STUD TO STRUCTURE
1 LAYER 15 MM GYPSUM BOARD EACH SD UL
DESIGN # U465
- I-12 150 MM STEEL STUD TO 3 M
1 LAYER 15 MM GYPSUM BOARD EACH SIDE
1 HR RATED UL DESIGN # U465
- I-13 200 MM FIRE RATED CMU TO STRUCTURE
15 MM GYPSUM BOARD 1 SIDE ONLY ON
FURRING

(R4, tab 8, Contract Drawings A-900-02; stip. 66)

14. WALL TYPES LEGENDS on drawings A-900-02 also identify and describe eight exterior wall types as follows:

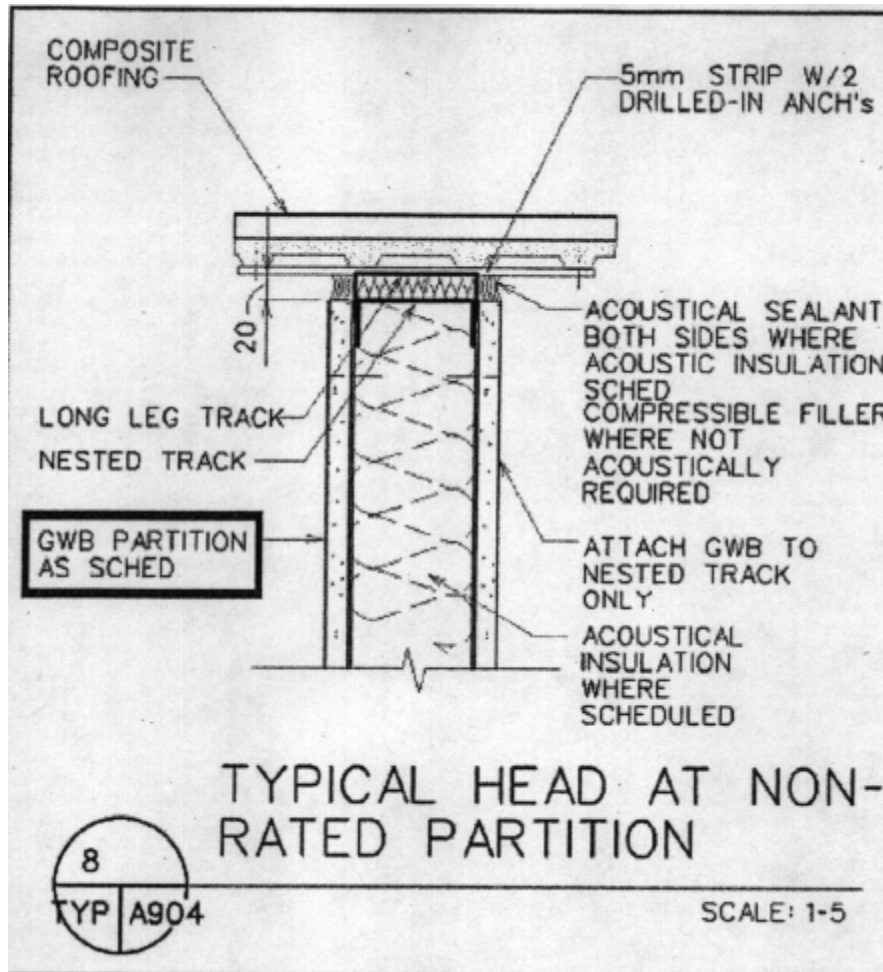
- E-1 ALUMINUM CURTAIN WALL
FLOOR TO STRUCTURE WITH 3 GLASS TYPES
- E-2 200 MM STEEL STUD TO STRUCTURE
EXTERIOR BRICK VENEER
50 MM AIRSPACE, 15 MM EXTERIOR
GYPSUM SHEATHING. FILL CAVITY WITH 5-26
INSULATION
- E-3 150 MM STUD TO STRUCTURE
EXTERIOR BRICK VENEER, 15 MM EXTERIOR
GYPSUM SHEATHING
FILL CAVITY WITH R-26 INSULATION
15 MM INTERIOR GYPSUM BOARD
- E-4 ALUMINUM CURTAIN WALL

FLOOR TO 3 M. WITH 200 MM STEEL STUDS
ABOVE TO PARAPET
15 MM EXTERIOR BRICK VENEER
R-26 BATT INSULATION

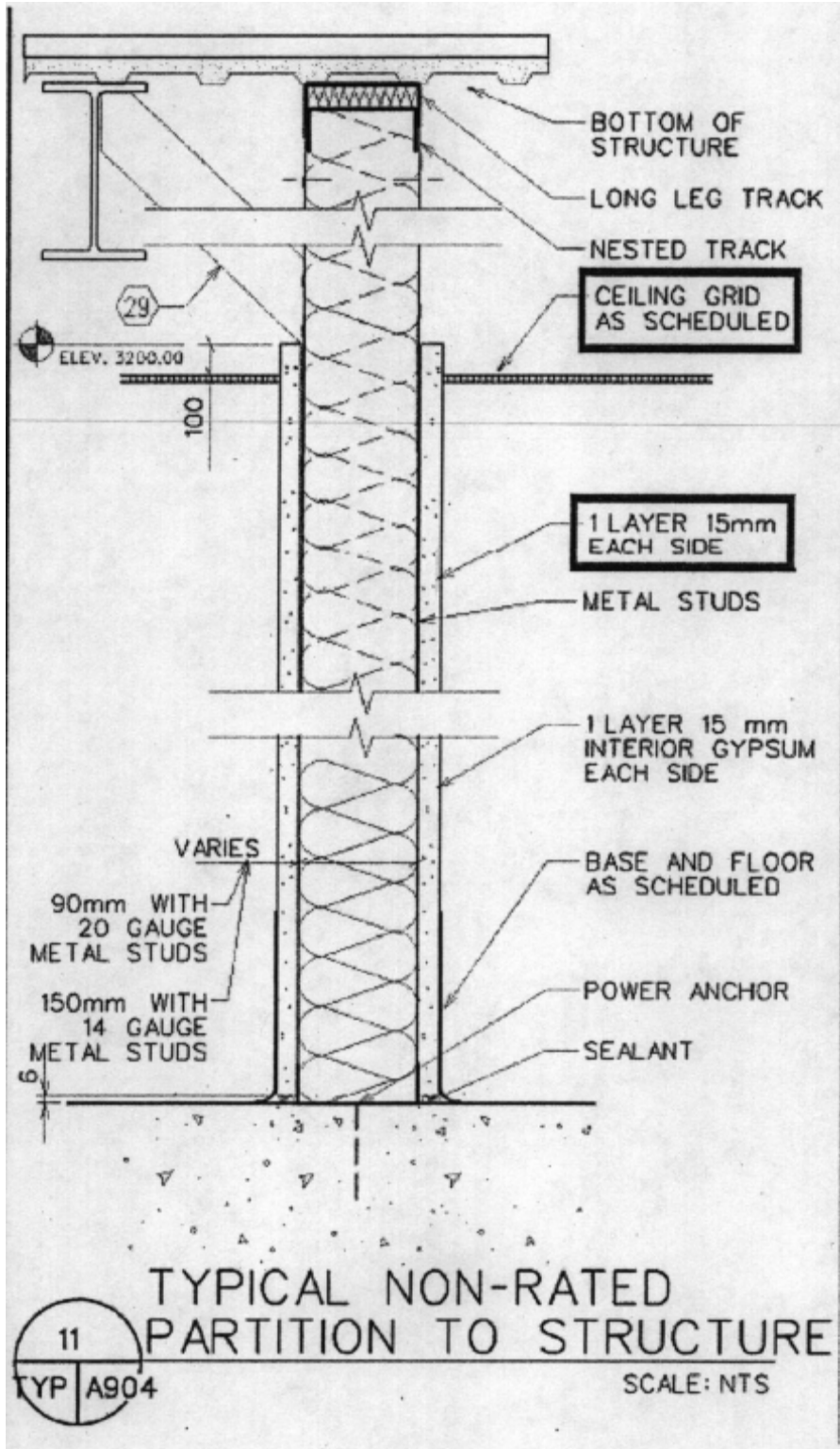
- E-5 200 MM CMU STRUCTURE
50 MM RIGID INSULATION, AIR SPACE, BRICK
VENEER EXTERIOR
- E-6 200 MM FIRE RATED CMU TO STRUCTURE /
SHEARWALL
50 MM RIGID INSULATION, AIR SPACE, BRICK
VENEER EXTERIOR
15 MM INTERIOR GYPSUM BOARD ON
FURRING CHANNELS
- E-7 200 MM CONCRETE WALL TO STRUCTURE
EXTERIOR BRICK VENEER
50 MM RIGID INSULATION / AIR SPACE
- E-8 200 MM CMU WALL UP TO 1M HEIGHT WITH
200 MM
STEEL STUDS ABOVE TO STRUCTURE
BRICK VENEER, EXTERIOR GYPSUM
SHEATHING,
R-26 BATT INSULATION

(R4, tab 8, Contract Drawings A-900-02; stip. 66)

15. Contract Drawing A-904, Interior Wall Details, provides 15 details relating to construction of partitions. Detail 8, Contract Drawing A-904, Typical Head at Non-Rated Partition, depicts the upper portion of a partition up to and including its connection with the underside of the roof deck. The depiction includes, from the top down, the composite roofing and the roof deck along the horizontal plane. A 5mm strip with 2 drilled in anchors, acoustical sealant or compressible filler on both sides, a long leg track, a nested track, and GWB extending down the partition on both sides with acoustical insulation in between the GWB are shown along the depiction's vertical plane. Detail 8, A-904 includes a note which provides in relevant part, "attach GWB to nested track only." (R4, tab 8, Contract Drawing A-904; stip. 66) Detail 8 is as follows:



16. Detail 11, Contract Drawing A-904, Typical Non-Rated Partition to Structure, depicts a partition in its entire length from floor to attachment to the underside of the roof deck. The detail depicts metal studs from floor to the underside of the roof deck, a lay-in acoustic ceiling grid (as scheduled) intersecting the partition just below elevation 3200.00 (approximately $\frac{3}{4}$ the way up the depiction) and GWB on both sides of the partition extending to elevation 3200.00, a point just above where the ceiling grid is depicted. Additionally, the detail depicts material inside the partition, *i.e.*, the width of the metal stud, which is not called out in the detail but which, on detail 8, is described as “acoustical insulation where scheduled.” (R4, tab 8, Contract Drawing A-904; stip 66) Detail 11 was as follows:



17. On 12 November 2002, notice to proceed on the contract was issued (stip. 23).

18. In December 2002, Skanska's estimator, Dane Wooley, prepared drywall take-offs to determine if Skanska would self-perform the drywall work (stips. 24, 25). The parties have differing interpretations of the meaning and implications of these take-offs. The parties also dispute whether appellant relied, in its proposal, on the interpretation of the contract drawings and specifications advanced by it in these appeals (e.g., gov't resp. at 19-28; app. resp. to GPFs ¶¶ 94, 99, 113-16). The evidence in the current record is inconclusive on the issue of reliance.

19. On 28 July 2003, Skanska entered into a contract with Accou-Wall Interiors (AWI) for construction of cold formed steel framing, exterior gypsum sheathing, gypsum board assemblies, acoustical ceilings and building insulation associated with the project. On 27 October 2003, AWI began interior wall construction. (R4, tab 13; stips. 28, 29)

20. During an 8 December 2003 site visit, the COE's mechanical engineer identified walls of various types in the project, which he maintained should run to the underside of the structure and be sealed to achieve pressurization of the space. In response to a request from HOK for marked-up floor plans identifying the HVAC zones so that HOK could verify if the drywall needed to go to the underside of the structure, he marked these walls in heavy lines for identification on 11" x 14" size sheets of drawings A-901 and A-902. The ME wrote on the side of those sheets, "FULL HEIGHT WALLS REQ'D FOR PRESSURIZ." (Stip. 30)

21. The mechanical engineer was responsible for and prepared the mechanical design reflected in the mechanical drawings and specifications, but was not involved in the design of the walls (stip. 31).

22. The drawings marked by the mechanical engineer were attached to Request for Modification #13 ("RM013"), which was transmitted to Skanska on 7 January 2004. The scope of work described in RM013 is:

Provide full height sound walls around all spaces to be pressurized as indicated on the attached drawings transmitted by the AE (HOK) on 18 December 2003. All walls must extend to the roof structure above and be sealed as to resist the passage of air as required by the mechanical system specified in the contract documents. Include all fire rated walls, sound walls, and other walls that require full height construction.

(Stip. 32)

23. On 2 February 2004, Skanska and its mechanical contractor, Tebarco, exchanged a series of emails regarding the north, south and east partition walls of electrical room 127. In those emails, Skanska advised its subcontractor that “[t]he walls go to the deck to make the room.....fire rated.” The emails also indicated that in a meeting the previous Tuesday, “Skanska clearly stated that the walls of this room were to be fire rated and would be built to the deck.” Finally, Skanska noted:

Additionally, this is not a change as these walls have always been fire rated wall to deck. The walls of the electrical rooms are noted as being fire rated on the 900 series drawings. Per the contract documents the most stringent requirement is to be used, therefore the notation of a UL Design overrides the notation of the walls to 3 meters.
[Emphasis in original]

(Stip. 56)

24. On 13 February 2004, the COE issued a revised RM013. The scope of work described in revised RM013 states, “[r]evises Type I-5 Wall Height.” Revised RM013 identifies certain Type I-5 walls in nineteen areas of the building that needed to be changed by extending the steel studs, insulation and gypsum board full height to the underside of the roof deck with penetrations sealed. Revised RM013 also added gypsum board ceilings above the lay-in acoustical ceiling in several vestibules separating corridors from laboratory spaces. (Stip. 36)

25. On 27 April 2004, in response to Skanska’s Request for Equitable Adjustment for all walls that Skanska claimed had been changed by RM013 and the COE’s directives to construct walls with gypsum board full height, the COE issued supplementary sketches depicting where it believed full height gypsum board and/or insulation was required by the contract and where changes to Type I-5 walls and vestibules had been made. The COE directed Skanska to proceed with the work described in the attached sketches, and pursue a claim if Skanska disagreed with the COE’s direction. (Stip. 37)

26. Skanska’s claim asserts that the COE, by correspondence dated 27 April 2004, changed contract requirements by directing that I-12 partitions including GWB be extended to structure (stip. 50). I-12 Partitions are described in the Partition Legend (Contract Drawings A-900-02) as requiring 150mm steel stud to 3M, 1 layer 15mm Gypsum Board Each Side, 1 HR Rated UL design # U465. The Reference Detail

corresponding to this wall type is noted as “Type I-11/A-903.” (R4, tab 8, Contract Drawings A-900-02 at 4207-09; stip. 51)

27. Type I-11 Detail, Contract Drawing A-903, depicts the partition from a plan view (top down) and shows 150mm steel stud, 15mm Gypsum Board on each side of the metal stud, with R-19 Batt Insulation in the interior of the partition. The detail also notes this wall type as being 1 HR Rated, UL * 0465. (R4, tab 8, Contract Drawing A-903; stip. 52)

28. The deposition testimony of appellant’s project manager indicates that he considered that both I-11 and I-12 type walls were required by the contract to be built “to structure” because of fire rating requirements (app. resp. to GPF 132).

29. Contract Drawing A-904, Detail 12, Typical 1 Hour-Rated Partition to Structure, depicts a metal stud and GWB with sound batt insulation running the entire length of the partition from the floor to the underside of the roof deck (R4, tab 8, Contract Drawing A-904).

30. The COE interpreted the contract documents to require that I-12 partitions be constructed to the full height of the structure because those partitions were fire-rated as indicated on A-902 and A-903. The COE concluded that the description in the Partition Legend requiring 150 mm steel stud to 3m was in error. (Stip. 55)

31. The north, east, and south partitions in electrical room 127 are noted on Contract Drawings A-901 and A-902 as being I-12 walls (R4, tab 8, Contract Drawings A-902-902; stip. 57).

32. The parties agree that Modification P00011 made changes to the construction requirements of certain Type I-5 walls and vestibules, and was issued unilaterally because the parties disagreed about the cost and time impact caused by that change. Modification P00011 added \$52,926.00 to the contract price. No additional time was granted by the COE in Modification P00011. (Stip. 38) The parties dispute whether the requirement to add gypsum board and/or insulation full height to the underside of the roof deck on certain non-Type I-5 walls constituted a change to the contract’s requirements (stip. 39).

33. The parties cite many of their contemporaneous communications in support of their respective positions advocated in this case. However, they dispute the proper meaning to be accorded these communications, allege “confusion” and conflicts with later interpretations advanced by the opposing party, and ultimately question the materiality and persuasiveness of these communications with respect to the interpretation issues to be resolved. Deposition testimony of key project personnel for Skanska also

reflects confusion and possible inconsistencies regarding appellant's interpretation of the contract. (*E.g.*, SOF ¶¶ 20-32 above and 37-38 below; app. resp. to GPFs 18-25, 28, 30, 33, 36, 93-102, 104-11, 132; gov't mot. at 25-28)

34. On 31 January 2006, Skanska submitted a certified claim under the referenced contract in the amount of \$10,258,985, on behalf of itself and subcontractors for the recovery of additional direct costs, delay damages, additional pending or rejected proposed change orders, Skanska's costs of contract administration, retainage and other withheld funds, together with "other damages" and markups (R4, tab 3; stip. 58).

35. On 29 September 2006, Skanska submitted a supplement to its original claim increasing the total amount claimed to \$17,940,584 accompanied by an updated certification (R4, tab 4; stip. 59).

36. On 30 March 2007, the CO rendered a decision on Skanska's claim finding partial merit to the claim, but denying the remainder (R4, tab 2; stip. 60). Prior to the CO's final decision, the COE retained HOK and its consulting engineers to review and evaluate Skanska's claim. These services were provided under the design and construction services agreement between COE and HOK for the project, and payment by the COE for these services was made from funds remaining under that agreement. (Stip. 61) On or about 2 April 2007, the CO's decision was delivered to Skanska (R4, tab 1; stip. 62). On or about 27 June 2007, Skanska filed a notice of appeal with the Board and the appeal was docketed as ASBCA No. 56075 (R4, tab 1; stip. 63). On or about 31 July 2007, Skanska filed a complaint with the Board (stip. 64). In a pre-hearing order of 10 March 2008, the Board assigned separate docket numbers to the constituent issues and claims involved in ASBCA No. 56075. The instant dispute and motions relate to "Interior Wall Frame and Design Issues" and correspond to Count VI of the complaint which, together with related Count V, was docketed as ASBCA No. 56339.

37. In its complaint, Skanska identifies certain interior partition walls (Type I-1, I-2, I-4, I-5, I-6, I-11, and I-12) that it interpreted to "terminate just above the ceiling." The complaint alleges that the COE's directives to extend virtually all gypsum board partitions delayed the project and significantly increased the cost of the work. (Compl. ¶¶ 46-57; stip. 45)

38. In its Response to Respondent's First Request for Admissions, Skanska asserts that its complaint seeks reversal of the CO's Final Decision on Skanska's claim for additional compensation and additional contract time resulting from directed changes to interior and exterior walls identified as Wall Types I-1, I-2, I-3, I-4, I-5, I-6, I-7, I-8, I-9, I-11, I-12 and the E-type walls, as more specifically described in Skanska's certified claim and the other factual allegations of its complaint (stip. 47).

39. The COE interprets the contract documents for this project to require GBA to extend to the underside of the structure for the majority of interior and exterior wall types, citing Specification 09260 and Contract Drawings A-900-904 (stip. 48). Skanska interprets the contract documents to require full height installation of gypsum board on non-rated walls only in locations where no ceiling was scheduled. Where ceilings are scheduled, Skanska interprets the contract documents to require only that the gypsum board be installed to a height just above the ceiling. (Stip. 49)

40. The parties agree that there is no evidence of record that Skanska constructed the interior and exterior walls in a manner inconsistent with the COE's interpretation of the contract documents (stip. 40). Skanska achieved substantial completion of the work on 26 August 2005 (stip. 41).

41. There are express and implied references to industry or trade customs standards and practices with respect to construction of forensic laboratories generally, and the proper interpretation to be accorded to various drawings in particular, in the parties' filings in support of their respective motions (*e.g.*, gov't. mot. at 15-25, 40, 43-44). These references raise genuine issues of fact concerning the alleged customs, standards and/or practices that we are unable to resolve on the current record.

42. The parties dispute whether provisions of the operations and maintenance (O&M) portions of the contract in Volume 7 and Appendix A are relevant to the interpretation of the construction requirements for the facility (*e.g.*, gov't. mot. at 40; app. resp. to mot. at 38-39; app. resp. to GPFs 56-61). The record is unclear as to how appellant interpreted the O&M sections of the solicitation during the proposal preparation period.

43. The parties disagree as to whether ceilings that appellant intended to install are functionally equivalent to full height walls, in particular with respect to alleged fire rating, air flow and cross contamination requirements. In addition, the parties dispute the significance and implication of the mechanical drawings, deflection track, and ceiling-related details on the proper interpretation of the contract. (*E.g.*, app. resp. to GPFs 33, 36, 51-52, 78, 85-89, 125)

44. In summary, the parties allude to dozens of specification and drawing provisions and details in support of their respective positions in their motion papers and briefs. For the most part, the parties dispute the proper interpretation to be accorded these provisions and details as well as the overall conclusion to be drawn from them on the ultimate issue for resolution. In addition, their interpretations might not have been consistent over time. Either expressly or implicitly, these disputes also include allegations regarding industry customs and standards that the Board should consider in determining the intended meaning of the numerous contract provisions involved.

DECISION

The primary issue in this case is whether the contract required most walls of the forensics laboratory to be built “to structure” with GWB, as argued by the government, or to terminate slightly above the ceiling of non-fire-rated walls as maintained by appellant (stip. ¶¶ 42-49). The parties have made an exemplary effort to develop and argue the issue for summary judgment in several hundred pages of briefs based on 46 volumes of Rule 4 documents, stipulations of fact, numerous affidavits and excerpts from 25 depositions. Nevertheless, we consider that the case is not subject to disposition by summary judgment.

Summary judgment standards are well-settled. As stated in *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987), “Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” If genuine issues of material fact are present, it is improper to grant summary judgment even where both parties have filed cross motions requesting it. *Id.* at 1391.

Questions of contract interpretation can be resolved by summary judgment if the provisions in dispute are unambiguous. *E.g.*, *Robert A. Muniz v. United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992); *P.J. Maffei Bldg Wrecking Corp.*, 732 F.2d 913, 916 (Fed. Cir. 1984). However, where the provisions involved are complex, numerous, disputed by experts, subject to allegedly conflicting contemporaneous interpretations by a party, and/or involve trade customs and standards, we have declined to grant summary judgment. *E.g.*, *Ashbritt, Inc.*, ASBCA Nos. 56145, 56250, 09-2 BCA ¶ 34,300 at 169,435 (“When the meaning of a contract and the parties’ intentions are both relevant and in dispute, there are mixed questions of fact and law that pose triable issues precluding summary judgment”); *Hanley Industries, Inc.*, ASBCA No. 54315, 05-2 BCA ¶ 33,032 at 163,711 (parties’ intent regarding ambiguous language in release was a genuine issue of material fact precluding summary disposition); *PK Contractors, Inc.*, ASBCA No. 53576, 04-2 BCA ¶ 32,661 at 161,662 (Board could not determine whether contract was ambiguous or its intended meaning without further development of the record); *Computer Sciences Corp.*, ASBCA Nos. 56168, 56169, 09-2 BCA ¶ 34,221 at 169,152 (absence of factual predicate to understand context of communications regarding interpretation issue resulted in denial of summary judgment); *L-3 Services, Inc., Unidyne Division*, ASBCA Nos. 56304, 56335, 09-2 BCA ¶ 34,156 at 168,849 (Board declined to “decide the reasonableness of the parties’ contract interpretations or whether the relevant contract terms are clear or ambiguous (latent or patent)” where a “better developed record, including evidence of the parties’ contemporaneous interpretations” was needed); *Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,514

(summary judgment inappropriate where “the meaning of the contract is both relevant and in dispute” and extrinsic evidence was needed to determine parties’ intent).

This dispute involves dozens of cumulatively complex drawing notes and details and specification provisions whose meaning, relevance and materiality the parties vigorously contest. Any clarity that arguably exists when any particular provision is viewed singly and in isolation is lost on this record in the welter of other provisions that complicate their interpretation.

This confusion is evident by the parties’ actions and communications contemporaneously during performance and throughout the prosecution of this appeal. The contemporaneous, and perhaps conflicting, interpretations of the pertinent contract provisions by representatives of the parties and appellant’s subcontractors at critical periods both prior to and following award are contested and unclear on the present record. In addition, the parties dispute the inferences that can be drawn from critical contemporaneous documents and conversations addressing the numerous relevant drawings and specifications. For example, the parties dispute the meaning and significance of communications from the government’s mechanical engineer in December 2003 as well as RMO13 and revised RMO13, transmitted by the government to appellant on 7 January and 13 February 2004, respectively. The parties’ contemporaneous interpretations may provide insight on issues of the reasonableness of their present interpretation; whether critical provisions were ambiguous; and, the nature of any ambiguity, *i.e.*, whether it was patent or latent. *Cf. TRW, Inc.*, ASBCA No. 27602, 83-2 BCA ¶ 16,726 at 83,182. The disputed communications are not sufficiently clear, without further explanation, to draw firm conclusions.

If the disputed provisions are latently ambiguous, there are also genuine factual issues regarding whether appellant relied on its current interpretation in preparing its proposal. *Cf. Murson Constructors, Inc.*, ASBCA No. 34538, 88-2 BCA ¶ 20,549 at 103,885 (Board denied summary judgment motion when there were disputed issues relating to whether patent ambiguities were present and to reliance). For example, the parties have stipulated that Skanska’s estimator prepared post award take-offs to determine if Skanska would perform the work. However, the interpretation of pertinent contract provisions by appellant or relevant subcontractors at the time of proposal preparation remains uncertain and the subject of factual disputes. Moreover, the government contends that the post award drywall (GWB) estimate prepared by Skanska is consistent with the government’s interpretation of contract GWB requirements. Appellant disagrees with that contention and we cannot determine with certainty what interpretation is reflected in the take-offs prepared by the estimator without further explanation.

There are also differences among some drawing details and legends that may be unique as to one, or a subset, of the over 20 exterior and interior wall types that were to be constructed. The parties' contemporaneous discussions and correspondence do not consistently treat wall types the same. These differences may warrant different conclusions regarding appellant's entitlement to recover for that particular wall type or subset. Following docketing of the appeals, there appears to be continuing confusion regarding the wall types covered by the claim. There are discrepancies among the wall types identified in the claim, complaint and the wall types later identified in Skansa's Response to Respondent's First Request for Admissions. We are disinclined at this point to resolve and address the presence and or impact of these potential conflicts and dissimilarities in the requirements for the various different types of walls on this record.

Additionally, the materiality of certain provisions cited by one party is disputed by the opposing party. Among other things, appellant questions the relevancy of requirements relating to the post-construction, maintenance and operation of the facility while the government considers them to be pertinent to interpreting the contract as a whole. Appellant also alleges that various meeting minutes and communications authored by members of the design team evidence the intent of the contract with respect to the walls and should be considered by the Board in determining the meaning of the contract. The government challenges the alleged significance and conclusions of the design team's pre-solicitation discussions and deliberations related to the issue.

There are implications in the government's arguments that appellant's interpretation was unreasonable in part because it should have known of the alleged requirement to install GWB "to structure" given the specialized purpose of the building as a crime lab. The government does not concede that the contract requirements can be achieved through installation of sealed ceilings as alleged by appellant. In essence, these issues concern technical acceptability, trade practice and custom for the construction of such buildings. The issues are inherently factual in nature and require the parties to present further relevant evidence.

Given the complexity and number of drawings, specification provisions and communications cited by the parties in support of their respective interpretations, as well as the other aforementioned factors, we consider that a hearing is necessary during which the critical provisions and the context of the disputed communications can be fully explained and clarified. The meaning and interrelationships of the specification provisions and drawings alleged to affect the reasonableness of the parties' respective interpretation are more prudently developed and determined on a more complete record. *Cf. Hamilton Acquisition Corp. t/a Stallings Group*, ASBCA No. 55901, 56321, 09-2 BCA ¶ 34,299 at 169,430 (denial of summary judgment where "respective roles, actions and authority" of key factual witnesses unclear).

For the reasons detailed above, the parties' cross-motions are denied.

Dated: 10 March 2010

ROBERT T. PEACOCK
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. 56339, Appeal of Skanska US Building, Inc., rendered in conformance with the Board's Charter.

Dated:

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