

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
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BYA International, LLC ) ASBCA Nos. 58031, 58341  
 )  
Under Contract No. W5J9JE-10-C-0010 )

APPEARANCE FOR THE APPELLANT: Stephen E. Smith, Esq.  
Goldberg Simpson, LLC  
Prospect, KY

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
James D. Stephens, Esq.  
Tania Wang, Esq.  
Engineer Trial Attorneys  
U.S. Army Engineer District, Middle East  
Winchester, VA

OPINION BY ADMINISTRATIVE JUDGE PEACOCK ON APPELLANT'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT AND THE GOVERNMENT'S  
CROSS-MOTION FOR SUMMARY JUDGMENT

These timely appeals concern a contract for design and construction of a military installation for the Afghanistan National Army. ASBCA No. 58031 concerns appellant's appeal of the termination of the referenced contract for default. ASBCA No. 58341 involves appellant's claim for an equitable adjustment of \$3,176,167.18 and a time extension of 105 days allegedly associated with construction of the installation's exterior walls. Appellant has moved for partial summary judgment on the exterior wall issue in ASBCA No. 58031 and the government has filed a cross-motion for summary judgment in both appeals because the exterior wall issue comprises the subject matter of ASBCA No. 58341 and also involves issues relating to the propriety of the default termination. We grant the government's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

The Gardez Contract

1. The captioned contract (sometimes referenced herein as the Gardez contract) was awarded by the U.S. Army Corps of Engineers (Army or government) to BYA International, LLC (BYA) for the firm fixed-price of \$33,669,974.75 on 21 January 2010 for design and construction of an Afghan National Army (ANA) military installation in

Gardez, Afghanistan. As revised, the contract completion date was 9 January 2012. The contract included the following clauses: FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.243-4, CHANGES (JUN 2007); and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984). (R4, tab 15 at 58)

2. In Section 00555, "DESIGN CONCEPT DOCUMENTS," the contract states in pertinent part (R4, tab 15 at 50-51):

## PART 1 GENERAL

### 1.1 GENERAL

This section identifies documents issued with this RFP which establish the concept or basis for the project design. These requirements are minimum standards and may be exceeded by the Offeror. Deviations from these concepts and standards may be approved if considered by the Government to be in its best interests.

The extent of development of these requirements in no way relieves the successful Offeror from the responsibility of completing the design, construction documentation, and construction of the facility in conformance with applicable criteria and codes.

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### 1.4 SPECIFICATIONS

Specifications included herein shall be utilized as design criteria and minimum standards for the corresponding construction work. The successful Offeror shall develop complete construction specifications using the criteria included in these specifications.

The Government will provide Division 1 specifications sections as required, to the successful Offeror; and these sections shall be included in the final construction specifications without change. The Design Build Contractor shall furnish these specifications on electronic media for the production of construction specifications when requested. These specifications shall be submitted together with other required contractor prepared project construction documents

during the Second Design Submittal of the Design Phase, Part II.

3. Section 01015, "TECHNICAL REQUIREMENTS-DESIGN/BUILD" states in pertinent part (R4, tab 15 at 148, 183, 187, 222-23):

1.0 GENERAL

1.1 COMPLIANCE

The Contractor's design and construction must comply with technical requirements contained herein. The Contractor shall provide design and construction using the best blend of cost, construction efficiency, system durability, ease of maintenance and environmental compatibility.

1.2 MINIMUM & ALTERNATE REQUIREMENTS

These design and product requirements are minimum requirements. The Contractor is encouraged to propose alternate design or products (equipment and material) that are more commonly used in the region; will be equally or more cost effective or allow for more timely completion, but furnish the same system safety, durability, ease of maintenance and environmental compatibility. The Contractor will be required to submit information as requested by the Contracting Officer to make a comparison of the proposed alternate. All variations of approved designs must be approved by the Contracting Officer.

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3.0 ARCHITECTURAL REQUIREMENTS

3.1 GENERAL

All material approved shall become standardized material to be used throughout the facilities under contract. Different sub-contractors shall not use different material or standards under the contract. Intent of the project is to use locally procured materials (unless specified otherwise) and labor to the maximum extent possible while satisfying seismic building code. Conflicts between criteria shall be brought to

the attention of the Contracting Officer for resolution. In such instances, the Contractor shall furnish all available information with justification to the Contracting Officer. All building exterior walls shall be constructed with reinforced CMU, insulated concrete sandwich panels, reinforced concrete or approved equivalent. (Emphasis added)

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#### 3.8.1.2 Pre-Engineered Metal Building Systems

Metal building systems shall comply with the requirements of the MBMA Low Rise Building Systems Manual-2002. Facilities designated as long-span, shall have no interior columns.

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### 4.0 STRUCTURAL

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#### 4.2 DESIGN

Design shall be performed and design documents signed by a registered professional architect and/or engineer. Calculations shall be in SI (metric) units of measurements. All components of the building shall be designed and constructed to support safely all loads without exceeding the allowable stress for the materials of construction in the structural members and connections. All building exterior walls shall be constructed with reinforced CMU, shotcrete 3-D panels, or reinforced concrete unless otherwise stated in sections 1010 or 1015. (Emphasis added)

4. Section 01335, "SUBMITTAL PROCEDURES FOR DESIGN-BUILD PROJECTS" states in pertinent part at ¶ 1.2.1, "DESIGN SUBMITTALS" (R4, tab 15 at 325, 327-28):

The Contractor shall clearly label and date all Design Submittals to reflect the current design stage and date of submission to the Government to avoid confusion between current and previous submittals. The Design-Build

Contractor shall not begin construction work until the Government has reviewed the Design-Build Contractor's concept, intermediate and final designs and has cleared them for construction. Clearance for construction shall not be construed as meaning Government approval. Unless otherwise indicated, the risk for the design is the sole responsibility of the Design-Build Contractor.

As a minimum, design submittals shall be submitted at the following intervals:

Concept (Preliminary) design – 35%

General design – 65%

Final design review – 99%

Cleared for Construction review – 100%

5. Section 01335 also set forth the following additional requirements regarding submittals (R4, tab 15 at 338, 362-63):

### 1.3.2 Responsibility for Errors or Omissions

It is the sole responsibility of the Contractor to ensure that submittals do or do not comply with the contract documents. Government review, clearance for construction, or approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract.

#### 1.3.2.1 Government Review

[A]pproval will not relieve the Contractor of the responsibility for any error which may exist, as it is the sole responsibility of the Contractor to certify that each Submittal has been reviewed in detail and is in strict conformance with all the contract documents and design criteria referenced therein.

### 1.3.3 Substitutions

After design submittals have been reviewed and cleared for construction by the Contracting Officer, no resubmittal for the purpose of substituting materials or equipment will be considered unless justified as indicated in the paragraph entitled VARIATIONS.

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### 3.6.4 Variations

If Design or construction submittals show variations from the contract parameters and/or requirements, the Contractor shall justify such variations in writing, at the time of submission. Additionally, the Contractor shall also annotate block "h" entitled "variation" of ENG FORM 4025. After design submittals have been reviewed and cleared for construction by the Contracting Officer, no resubmittal for the purpose of substituting materials, equipment, systems, and patented processes will be considered unless accompanied by the following:

- a. Reason or purpose for proposed variation, substitution, or revision.
- b. How does quality of variation compare with quality of the specified item? This shall be in the form of a technical evaluation tabulating differences between the item(s) originally specified and what is proposed.
- c. Provide a cost comparison. This shall include an acquisition and life cycle cost comparison.
- d. For proprietary materials, products, systems, and patented processes a certification signed by an official authorized to certify in behalf of the manufacturing company that the proposed substitution meets or exceeds what was originally specified.
- e. For all other actions, a certification signed by a licensed professional engineer or architect certifying that the proposed

variation or revision meets or exceeds what was originally specified.

f. Advantage to the Government, if variation is approved, i.e. Operation and Maintenance considerations, better product, etc.

g. Ramifications and impact, if not approved.

If the Government review detects any items not in compliance with contract requirements or items requiring further clarification, the Contractor will be so advised. Lack of notification by the Contracting Officer of any non-complying item does not relieve the Contractor of any contractual obligation.

6. Appellant sought to use Pre-Engineered Metal Building Systems (PEB or PEB Systems) for exterior walls in accordance with ¶ 3.8.1.2 rather than concrete-based exterior walls which the parties for ease of reference jointly refer to simply as CMU walls. BYA's 35% design submittal indicated its intent to use the PEB walls. The PEB walls do not contain any concrete. (R4, tabs 47-48, 50-51, 97, 103)

7. Proposals for the Gardez contract were due on 15 May 2009 (R4, tab 13 at 1). There is no evidence that offerors were afforded the opportunity to submit revised proposals.

#### The Gamberi Contract

8. On 9 June 2009 (prior to award of the Gardez contract), the government awarded BYA a contract for the design and construction of an ANA military installation at Camp Gamberi, Jalalabad, Afghanistan (the Gamberi contract). The parties have pointed to no relevant differences between the requirements for exterior wall construction in the Gamberi and Gardez contracts and the process for obtaining substitutions or variations in both contracts. (R4, tabs 5, 15)

9. On 19 October 2009, BYA submitted its 35% (concept) design for the Gamberi contract to the Army. Appellant contends that portions of that submittal indicated use of PEB for exterior walls. The submittal contained no notice that appellant was seeking a variation substituting the PEB walls for the CMU exterior walls or other evidence satisfying the requirements of the "Variations" clause, in particular evidence establishing and certifying the "equivalency" of the PEB walls. (See app. mot., exs. 3, 4 )

10. By late November 2009, the Army had completed its review of the 35% design submittal for the Gamberi contract and it was “approved” by digital signature subject to numerous comments on 30 November 2009 (app. mot., exs. 3, 4; R4, tab 6). We are unable to determine from the submittal that appellant unambiguously intended to use PEB systems for the exterior walls. There was no express mention, acknowledgement or specific “approval” by the government of PEB use on exterior walls. The Gamberi design review comments document extensive inadequacies in the submittal and that the government considered that BYA’s submission lacked critical and sufficient details. For example, the government’s comments included the following:

[Comment] 2846570, Architectural Plans...General comment:  
Design analysis is required to document your design  
principle: building type, general build material selection,  
insulation and weather proofing, fire and life safety....

....

[Comment] 2846571, Architectural Plans...General comment:  
for 65% submittal make sure to provide sufficient detail on:  
interior partition types and composition, exterior wall and  
roofing detail, sufficient building section with dimensions,  
bathroom elevation, and attic space ventilation.

....

[Comment] 2851787, Civil, Plans and Specs...Contractor  
shall construct all features of Contract work (architectural,  
structural, civil, mechanical, plumbing and electrical) in  
complete accordance with Contract plans and specifications  
furnished by AED.... The documents sent to AED for review  
as the 35% submittal are totally inadequate and incomplete.  
There is no design analysis. The civil site plans are too small  
to determine and review any of the grading, roadway layout,  
water or sewer installation, stormwater design or anything  
else. The site plans need to be increased in size so they are  
readable and contain pertinent information for construction  
and review. Currently, they provide none of this information  
in a reviewable format. Other firms presenting designs for  
this same facility have partitioned all of their site work into  
6 or 8 sheets per discipline so that the work is reviewable.  
Please do the same. One sheet is ridiculous if any review is  
anticipated.



....

[Comment] 2855400, Structural Plans...35% SUBMITTAL:  
The 35% submittal did not provide any primary members for the walls and or roof. For most of the buildings, the contractor only submitted one structural drawing. The structural information was lacking for the 35% submittal.

(R4, tab 6, at 4, 13-14, 33; app. mot., attach. 4)

11. In an affidavit accompanying BYA's motion, appellant's president stated that appellant, based on the Gamberi 35% design "approval" (as well as specification ¶ 3.8.1.2), "prepared its bid with the understanding that PEBs would be allowed" in performing the referenced Gardez contract (app. mot., ex. 1, ¶ 13).

12. By letter of 16 May 2010, the government specifically rejected PEB exterior walls in its review of appellant's 65% design submittal for the Gamberi contract. The government also generally rejected the entire 65% design in the same letter for noncompliance with appellant's overall Design Quality Control responsibilities. (R4, tab 9) In a subsequent letter dated 18 August 2010, the government detailed "serious concerns" with BYA's performance citing, *inter alia*, "111 open/unresolved comments from previous submittals as well as 292 new comments on the 65% design resubmittal" (R4, tab 10).

### The Dispute and Appeals

13. On 18 September 2010, the government informed BYA that appellant's inclusion of PEB exterior walls in its 35% design submittal for the Gardez contract was noncompliant with the contract's CMU exterior wall requirements. Appellant initially "Concurred" in this government review comment rejecting the PEB walls. (R4, tab 46 at 66-67)

14. Following its initial concurrence with the rejection, appellant filed various Request for Information Reports (RFIs) requesting the use of the PEB metal panels. The government rejected use of PEB systems for exterior walls because they were not "equivalent" (R4, tabs 47, 48, 50-51).

15. In other contemporaneous documents, appellant agreed that PEB exterior walls were not "equivalent" or "approved" as such but sought to use them as a "substitute" (R4, tab 15 at 94, tab 47).

16. By letter dated 20 February 2012, the government terminated the Gardez contract for default (R4, tab 3).

17. Appellant timely appealed the termination of the Gardez contract and the Board docketed the appeal as ASBCA No. 58031 (R4, tab 1). For the first time in its complaint, dated 13 April 2012, BYA asserted that the government “approved” PEB exterior walls in connection with its review of appellant’s 35% Gamberi design submittal and appellant “relied” on that “approval” precluding the government from contesting that the PEB walls were an “approved equivalent” for use on the Gardez contract (compl. at 8-9).

18. On 24 April 2012, BYA filed a certified claim for additional costs and delays resulting from the government’s rejection of PEB exterior walls. By letter dated 27 September 2012, appellant appealed from the contacting officer’s deemed denial of that decision, which appeal was docketed as ASBCA No. 58341. (R4, tab 2)

### DECISION

Summary judgment may properly be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). We agree with the parties that there are no genuine issues of material fact that would preclude summary judgment on the CMU wall issue. We also consider that the government is entitled to judgment as a matter of law.

This dispute requires us to interpret the captioned contract. As stated in *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004):

Contract interpretation begins with the language of the written agreement. When interpreting the contract, the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its part. An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous. [Citations omitted]

Here, the contract required CMU exterior walls. That requirement was clearly and unambiguously established in both ¶¶ 3.1 and 4.2 of § 01015 of the contract’s technical requirements. Although PEB systems were recognized in ¶ 3.8.1.2 for possible use for some areas of the contract, that provision was silent regarding their use as exterior walls. Construing the contract reasonably as a whole, CMU was required for exterior walls and PEB systems were permitted for non-exterior wall use. Appellant’s interpretation renders the CMU exterior wall requirement meaningless and void.

Appellant's principal contention is that PEB systems were an "approved equivalent" as authorized and contemplated by ¶ 3.1. According to appellant, the Gamberi contract "approval" constituted a "prior course of conduct," and contemporaneous interpretation of the permissibility of using PEB systems. Therefore, BYA argues that its "reliance" on such "approval" and its use of PEB exterior walls was justified in performance of the Gardez contract in dispute.

These contentions are meritless. Use of PEB systems was not justified as an "equivalent," the government did not "approve" their use as a substitute for CMU under either contract and appellant could not have "relied" on any alleged "approval." A reasonable factfinder could not find otherwise.

Although the contract does not expressly define "approved equivalent," it detailed the process for establishing equivalency and obtaining government approval of a proposed substitution or variation from the CMU requirement. Among other prerequisites for a variation of this nature, BYA, *inter alia*, had to expressly and adequately notify the government that it was seeking to substitute PEB metal walls, as well as provide evidence substantiating and certifying their "equivalency." Appellant did neither.

Moreover, given the extensive government comments on the Gamberi 35% design upon which Army approval was conditioned, it was unreasonable for appellant to conclude that the PEB walls were in fact "approved." The detailed design comments by government reviewers, if anything, expressed extensive dissatisfaction with the detail, adequacy and completeness of appellant's 35% "concept" design, including the limited wall and structural information contained in appellant's submittal. Even final 100% "Cleared for Construction" review does not constitute "approval" of variations or substitutions absent compliance with contractual procedures, much less the initial 35% "Concept" review.

In addition, appellant's offer on the Gardez contract predated the alleged subsequent "approval" during the design review process under the Gamberi contract. Therefore, it was temporally impossible for appellant to "rely" on the subsequent Gamberi "approval" in the preparation of its Gardez proposal. Given the chronology of events, the statement in the affidavit of appellant's president that BYA relied on the "approval" of its 35% Gamberi concept design absent any corroborating evidence is inherently implausible. Regardless of whether there may have been Gardez proposal revisions (that are not of record) following the November 2009 Gamberi "approval" that might substantiate "reliance," appellant failed to justify the variation as emphasized above.

Contemporaneously as late as October 2010, appellant also in fact expressly recognized and "concurred" with the CMU exterior wall requirement when it sought

permission to substitute PEB systems in October 2010. The prior “approval,” “course of conduct” and “reliance” arguments first were mentioned in appellant’s complaint on appeal. The logical time to have raised these contentions would have been when the issue first surfaced in connection with the Gardez 35% review process.

For all of the above reasons, we need not address whether a “prior course of conduct” could reasonably have been established with respect to the CMU exterior walls. In addition, because the CMU requirement was in our view clear and unambiguous we do not reach the government’s contentions regarding whether appellant had a duty to inquire when allegedly confronted with a patent ambiguity between the CMU and PEB systems requirements for the exterior walls created by appellant’s interpretation.

In conclusion, we sustain the government’s motion and deny ASBCA No. 58341. In addition, to the extent that the CMU issue is involved in ASBCA No. 58031 the government’s motion is sustained in accordance with this decision.

Dated: 23 September 2013



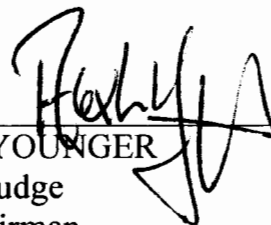
ROBERT T. PEACOCK  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



ALEXANDER YOUNGER  
Administrative Judge  
Acting 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. 58031, 58341, Appeals of BYA International LLC, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals