UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 28, 2012

CBCA 490, 491, 492, 716, 1555, 1763

FLUOR INTERCONTINENTAL, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Edward J. Parrott, Joseph S. Guarino, Matthew E. Vinciguerra, and Steven L. Lunsford of Watt, Tieder, Hoffar & Fitzgerald, L.L.P., McLean, VA, counsel for Appellant.

John C. Sawyer and Thomas D. Dinackus, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA; and Alexandra N. Wilson and Sarah G. Lounsberry of IE Discovery, Inc., Arlington, VA, counsel for Respondent.

Before Board Judges **SOMERS**, **BORWICK**, and **McCANN**.

SOMERS, Board Judge.

Appellant, Fluor Intercontinental, Inc. (Fluor), contracted with respondent, the Department of State (DOS), to design and construct an embassy complex. According to appellant, it incurred significant problems during construction as a result of various broken promises and misrepresentations by the Government. The agency denied appellant's claims for additional costs. Appellant filed these appeals.[1]

[1] Each docket number is identified below:

CBCA 492 (referred to by the parties as the "Pile Encasement" claim): Fluor

In order to prevail, appellant must establish that the contract documents, reasonably read, made promises to it about the conditions to be expected. It must also establish that it relied upon these promises when it prepared its offer and entered into the contract. Because the evidence does not prove either of these points, we deny the appeals.

Findings of Fact Relating to All Appeals

Request for Proposals

On June 20, 2003, DOS issued a request for proposals (RFP), seeking offers for the design and construction of a United States embassy complex to be located in Astana, the new capital of Kazakhstan.[2] DOS identified the contract which would ensue as a firm fixed price "design/build" contract, which meant that DOS wanted a contractor who could both design the project and build the structures identified, to include a new chancery office building (NOB), several other buildings, and a perimeter wall.

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seeks $10,574,751 for damages and delay related to the alleged changes and breach of warranty related to the new chancery office building (NOB) foundation pile design;

CBCA 491 ("Infrastructure"): Fluor seeks $4,218,426 for damages related to alleged changes and breach of warranty related to the project infrastructure;

CBCA 490 ("Perimeter Wall"): Fluor seeks $1,817,770 for alleged changes to the perimeter wall design;

CBCA 716 ("Liquidated Damages"): Fluor seeks $2,773,694 in unpaid contract balance withheld by DOS for liquidated damages;

CBCA 1763 ("Acceleration"): Fluor seeks $4,197,345 for acceleration damages allegedly required to overcome project delays; and

CBCA 1555 ("Overtime"): Fluor seeks $488,216 in unpaid contract balance withheld by DOS for overtime costs.

[2] The Republic of Kazakhstan received its independence from the former Soviet Union on December 16, 1991. Up until 1997, the city of Almaty had been the capital of Kazakhstan. In 1997, Kazakhstan relocated its capital to Astana, the city closest to the geographical center of the country.

Page one of the RFP stated:

> The Government requires performance of the work described in these documents:
>
> . . .
>
> Drawings are included for the sole purpose of illustrating the design intent of the owner [larger type size and emphasis in original]
>
> The entire contract documents including Section C and Section J, List of Attachments as follows:
>
> J.1 Administrative Documents
> J.2 OBO Standard Design Documents
> J.3 Project-Specific Design Documents

Section B summarized the requirements as follows:

> The contractor shall complete all work to design and construct the [embassy complex], including furnishing all professional services, labor, material, equipment and services, unless otherwise specified herein, required under this contract for the following firm fixed price and within the time specified herein.

Section C explained that DOS had developed an integrated set of design drawings and specifications for DOS facilities, referred to as the "Standard Embassy Design," to be adapted to the site when the contractor produced the construction documents for Astana.

Contract Provisions

The RFP was incorporated into the contract. Other provisions of the contract which are important to resolution of these appeals are described below.

Contractor Required to Hire Experts

The statement of work (SOW) required the contractor to provide design expertise in architecture, civil engineering, structural engineering, mechanical/plumbing engineering, and electrical engineering, as well as other designated areas. In particular, the SOW required the

contractor to engage the services of a geotechnical consultant. Section C.2.8 of the contract stated:

> The Contractor's geotechnical engineer shall review all available geotechnical information provided in the Contract package and become familiar with the soil and site conditions at the project site by visiting the site. During the site visit and in subsequent phases of the project, the Contractor shall examine and/or verify the information provided and obtain any additional information to complete the design and construction of the project. **The Contractor remains solely responsible and liable for design sufficiency and should not depend on reports provided by the [Government] as part of the contract documents**.

(emphasis added). Section C.4.4 explained that the contractor would be responsible for adapting the Standard Embassy Design (SED) "according to the unique conditions of the site and other local and regional factors," based upon analyses performed by the contractor.

Limited Infrastructure Existed at the Site

Other sections of the SOW provided "project specific information." Section C.7.2.3 noted that no public roadways currently existed:

> The local government is responsible for constructing adjacent roadways. Per the Real Estate agreement for the property, the local government will design, construct, and pay for all road extensions to the property. The design-build Contractor shall coordinate with the local authorities for the road design and construction.

Section C.7.2.5 informed the contractor that local utilities would be unavailable and required the contractor to plan on contingencies. The section stated:

> The local utility company will provide a medium voltage service, at some point. As this part of Astana is being developed, there are some unknowns about the timing of the utility connection. The Contractor therefore shall plan on the design and construction of a facility that has its own prime power generating plant . . . and rely solely on standby generators for construction power. The Contractor shall design and construct the electrical utility interface to allow the connection to utility power, as it becomes available.

Section H, identified as "Special Contract Requirements," contained the following clauses concerning temporary facilities and services:

> H.15.14 Temporary Utilities.
>
> H.15.4.1. Responsibility. Unless otherwise specified, the Contractor shall obtain all water, light, power and other utilities necessary for the completion of the work, including all final tests.
>
> H.15.4.2. Connections. The Contractor is responsible for determining with local authorities what is required in connection with outside services and utilities.

In addition, paragraph H.26 of this section provided that each offeror is responsible for "ascertaining the availability of all materials and equipment necessary to produce the work required by the proposed Contract Documents, of sufficient skilled labor to perform the work, and of the availability of transportation to the site."

Perimeter Wall Design and Coordination

Section C, Appendix A1, of the contract discussed the sitework requirements. In addition to requiring the contractor to coordinate with local authorities for the work required outside the United States Government property, this section provided information concerning the design of the perimeter wall. Section CA1.1.3.2 stated that the contractor

> . . . shall design the location of the perimeter wall so that along a public right-of-way, the outside face of the wall shall be in line with the property line. Along adjacent private property, the outside face of the wall foundation shall be in line with the property line to avoid encroachment.

Site Investigation

Section E.6, located in the Inspection and Acceptance section of the contract, referred to the site data provided by the Government. It specified the following:

> E.6.1 Information Concerning Host Country. Offerors shall not rely on any information provided by the Government concerning the host country, such as the climatology data at the site, local laws and customs, currency restrictions, taxes, or the availability of local labor, materials, and transportation, etc. It is the responsibility of the Offeror to determine whether any additional site

> investigation is required, and to make such investigations at the Offeror's expense.
>
> E.6.2 Information Obtained by Offeror. Before submitting a proposal, each Offeror shall, at its own expense, make or obtain any additional examinations, investigations, explorations, tests and studies, and obtain any additional information which the Offeror requires.

Design Review Process

The contract describes an accredited web-based Extranet that has been developed to facilitate communications between the Government and the contractor. This system is called ProjNet (shorthand for Project ExtraNET). ProjNet uses virtual private network (VPN) tunnels to transmit data. The Government and the contractor used this system to provide comments to each other about aspects of the design.

If the contractor had a question, the contractor's project manager would create a document referred to as an RFI (a request for information), which would be submitted electronically to the contracting officer's representative. The document and the government's responses would be relayed through ProjNet.

The contract detailed the design review process as follows: First, once the contractor submitted its design, government representatives with technical expertise would review it and place comments in the ProjNet system. The government project executive and design managers would review and edit these comments in order to eliminate comments that either lacked technical merit or placed a new requirement on the contractor. After the Government completed the technical coordination, the design review would be opened to the contractor for technical feedback. Once the contractor had a chance to review these comments, it would place its response on the system. The original government reviewer would close out issues that had been resolved. Comments that remained designated as "open" reflected design issues as to which the Government and the contractor differed substantially in their interpretation of a technical design requirement or its implementation. The parties would meet to resolve all remaining technical issues.

This same section called for a design review at several stages of the project. The first design review would occur at the 35 percent design development phase. The second, called the construction document phase, would occur at the 90 percent phase. The third occurred at the 100 percent stage, after which the contractor would submit final construction documents.

Standard Clauses

The contract contained standard construction contract clauses, including Changes, Differing Site Conditions, Site Investigation and Conditions Affecting the Work, and Schedules for Construction Contracts, among others. Of particular relevance to this appeal are the following.

> I.47 52.236-4 Physical Data (Apr 1984) Data and information furnished or referred to below is for the Contractor's information. The Government shall not be responsible for any interpretation or conclusion drawn from the data or information by the Contractor.
>
> (a) The indications of physical conditions on the drawings and in the specifications are the result of site investigations by **N/A - Design/Build Contractor shall gather the required data during the site visit and design phase**.
>
> (b) Weather conditions **Design/Build Contractor shall gather the required data during the site visit and design phase**.
>
> (c) Transportation facilities **Design/Build Contractor shall gather the required data during the site visit and design phase**.
>
> (d) **Design/Build Contractor shall gather the required data during the site visit and design phase**.

(Emphasis in original.)

In addition, the contract provided that the contractor must notify the Government of any potential issues that could cause delay. Section F.13.4 stated:

> Notice of delay. In the event the Contractor receives a notice of any change in the work, or if any other conditions arise which are likely to cause or are actually causing delays which the Contractor believes may result in completion of the project after the Contract Time, the Contractor shall notify the COR [contracting officer's representative] of the effect, if any, of such change or other conditions upon the approved schedule, and shall state in what respects, if any, the relevant schedule or the Contract Time should be revised. Such notice shall be given promptly, and not more than 20 calendar days following the first occurrence of event giving rise to the delay or prospective delay.

> Revisions of the approved Progress Schedule shall only be made with the approval of the COR.

The contract also provided that the contractor must take steps to overcome contract delays, when necessary:

> Maintenance of progress. If, in the opinion of the COR, the Contractor falls behind an approved schedule, the Contractor shall take steps necessary to improve its progress or overcome any delays and ensure completion of the work within the Contract Time, without additional cost to the Government. In this circumstance, the COR may require the Contractor, without additional cost to the Government, to increase any or all of the number of shifts, overtime operations, days of work, and the amount of construction plant [sic], and to submit for approval any supplementary schedule or schedules in such form as the COR deems necessary to demonstrate how the approved rate of progress will be regained.

The contract contemplated the possibility of excusable delay, stating, in section F.13.6:

> Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the any [sic] failure to adhere to the performance schedule resulting from alleged excusable delay. If the Contracting Officer determines that any failure to perform results from one or more of the causes for an excusable delay, the relevant schedules shall be revised, subject to the rights of the Government under the termination clause of this contract, and, if and to the extent considered appropriate in the judgment of the Contracting Officer, an equitable adjustment shall be made in the Contract Time.

The contract explained that for a delay to be excusable:

> In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor, and the failure to perform furthermore (1) must be one that the Contractor could not have reasonably anticipated and taken adequate measures to protect against, (2) cannot be overcome by reasonable efforts to reschedule the work, and (3) directly and materially affects the date of final completion of the project.

Should an excusable delay occur, section F.9.1 stated that the contractor would be allowed time, not money, for delays, and referenced Federal Acquisition Regulation

(FAR) 52.249-10. The contract permitted the contracting officer to assess liquidated damages should the contractor fail to substantially complete the contract as planned. The contract permitted DOS to assess liquidated damages of $18,011 per day until substantial completion.

Project Specific Documents Incorporated in the Contract

1. The Site Utilization Plan

The site utilization plan (SUP) generally described the plans for development around the proposed "diplomatic town" within Astana.[3] Relying upon a geotechnical report prepared by a local contractor, the SUP noted that: (1) partial flooding control at the perimeter of the site would include the provision of additional fill to elevate structures constructed in the lower portion of the site, (2) drainage systems would potentially be required beyond the building envelope, (3) potential erosion protection system would be needed on the west portion of the site, (4) deeper than normal foundation systems might be necessary, (5) partial replacement of the on-site soils due to frost susceptibility might be necessary and, depending on the specific soil materials, the water table and structure being built should take into account a frost design depth as much as 3.5 meters, (6) pavements thicker than normal would be required, (7) no basements could be constructed, (8) for more than two story construction, significantly higher foundation costs could be experienced, (9) septic field construction was restricted or will be of higher than normal costs and (10) the soils had a high sulfate content and the contractor should consider using special sulfate resistant concrete.

2. The Engineering Feasibility Study

An Engineering Feasibility Study (EFS or the survey), dated January 3, 2003, using a question and answer format, was created with the purpose of aiding DOS in "evaluating economic and market conditions prevailing in the territory for which the survey is

[3] The SUP described the land to be used for the embassy site as open fields, abandoned agricultural or grazing land, and areas containing soviet era housing or abandoned factories. It noted that virtually no amenities, such as shops, services, or restaurants, existed in the vicinity of the embassy site. The streets were nothing more than dirt roads, frequented only periodically by a few vehicles. Utilities to the sites of the planned government offices had not been developed at the time of the issuance of the SUP, which stated that while the city had confirmed that utilities would be developed in the near future, no exact time frame been provided.

conducted." The first page of the EFS noted that the future development of the area, including road, sewer elevation, and all utilities remained in a state of flux and that "there is an 'informal' commitment of the host government to expedite the local governing processes necessary to complete the project with minimal delays." The staff specifically stated that "abnormal costs will occur because of the high water table level combined with severe winter frost. This will require special foundation and drainage."

The EFS provided information and data gained from various local administration representatives and contractors. Topics ranged from permit requirements to material availability. In a section of the EFS identified as "site and geotechnical data," the study noted that the foundations for most buildings in Astana are based on piles. The study stated that "reinforced concrete is the most common material for piles. Special cement is required due to the sulfate content." It also noted that "piling is a commonly used technique in Astana and many contractors, either local or international, are able to provide precast or in situ concrete piles of any size." The survey stated that, for field tests or measurements commonly used for piling, no information was available. It did note, however, that iron and steel products were generally imported from Russia.

The EFS did not provide any specific details or recommendations concerning how to build the project. Instead, the solicitation required each offeror to use a geotechnical engineer to assist with the preparation of its proposal.

Questions and Answers

DOS sought bids for the construction of three different embassy sites, Astana, Kazakhstan; Bamako, Albania; and Kingston, Jamaica, at the same period of time. DOS took questions from bidders related to these three projects, and incorporated the questions and its answers into all three of the solicitations.[4] Some questions and answers applied generally to the solicitations, and some focused only on one of the three projects.[5] The bidders focused

[4] The questions and answers from these sessions were incorporated by reference into the solicitation for the Astana project by amendments issued on July 25, 2003, August 7, 2003, and August 21, 2003.

[5] Fluor appears confused by the fact that the questions and answers did not apply to all three projects. These can be seen from Fluor's statement of facts, in which Fluor refers to a bidder's question regarding project duration. Fluor quotes DOS's response, which states in part that "OBO [DOS's Office of Building Operations] design reviews will be more limited in scope than previous contracts" and relies upon this response for a significant part of its argument that the DOS design reviews were inappropriately not limited and impacted

extensively on the performance period, the potential need for additional shifts, and the need for additional government employees to monitor the construction. For example, the following question and response appears in the second set of questions and responses:

> Question 32: In view of the shortened performance period required for the 3 SED projects to date will the Government provide additional CST's and CAG's to cover second shift operations by the Contractor?
>
> Response: OBO is currently working on a response for this question. The response is being coordinated with the OBO Director which will take some time. If it is approved, the revised terms and conditions will have to be incorporated into the RFP. Unfortunately, I see no way to get a response before the proposals are due. Please ensure your proposal is submitted in accordance with the current terms of the RFP not later than the date set for receipt. If we receive a positive response, we will discuss this matter during negotiations and provide an Amendment as part of the call for Final Proposal Revisions.
>
> On including Liquidated Damages in a proposal submission. Offerors should make their best effort not to include such a cost. however, it [sic] the performance period is found to be unachievable, you will have to include a condition for award that explains the circumstances and states and [sic] amount that must be included in the contract price should you be selected for award. Please also offer that the additional sum is waived should the Government decide to increase the time for performance for a set number of days. I see no way to put this cost figure in the UNIFORMAT as the bottom line price must flow into the schedule submission, and one's proposal must not exceed the performance time in order to be a responsive and an acceptable offer.
>
> Question 33: In view of the shortened performance periods required for the 3 SED projects to date will the Government waive the overtime charges payable to the Contractor for CST's and CAG's required to cover second shift operations by the Contractor?

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its ability to do the work. However, this question clearly related to the Kingston project, as can be confirmed by looking at the detailed subpart questions and answers that follow. Most of the questions and answers contained in the first set of questions and answers specifically apply solely to the Kingston project, and not to Astana.

> Response: See Response to Q32 above. At this time the charges are not waived. Please include the necessary costs in your proposal.
>
> Question 34: Please confirm that the 60 hour work week restrictions will be removed due to the compressed schedule on all three SED's to date.
>
> Response: See Response to q 32 and 33 above.

In the fourth set of questions and answers, a bidder requested that DOS reconsider the contract duration, as shown in the following exchange:

> Question 6: We wish to reiterate our scheduling concerns with respect to the 28-month contract duration and request that OBO reconsiders the duration. We have many of the same concerns as stated on the Jamaica and Albania projects. Please advise if the Kazakhstan schedule duration can be increased and if so, to what duration. (Note, some concerns are: permits, weather, design reviews are lengthy, etc).
>
> Response: The schedule can not be increased.
>
> Question 7: At this time, we anticipate considerable overtime work will be required. Please advise: How many OBO-CST's will be required to oversee Contractor's OT work; What the cost to Contractor will be per hour for OBO-CST labor. We need sufficient detail so as to properly price our proposal accordingly.
>
> Response: Cannot determine without knowing how much overtime the Contractor is estimating.

DOS remained firm in its determination that each of the contracts must be performed within the time period set forth in the RFP.

Contract Award

On September 29, 2003, DOS awarded the contract to Fluor for the design and construction of the Astana embassy project, with a contract price of $63,057,022. The parties held a meeting to discuss the schedule and requirements of the project on October 2, 2003, and continued their discussions during a pre-design conference on October 17, 2003. On

November 5, 2003, DOS issued the first of two notices to proceed mandated by the contract, establishing the contract completion date as March 6, 2006.[6]

During the period November 9 through November 20, 2003, Fluor and DOS representatives met in Almaty and Astana. Officials from the government of the city of Astana, and from the Kazakhstan national government, participated in the site visit, made presentations, and answered questions.

As noted earlier, the contract required Fluor to submit four separate design submissions for approval, referred to as the 35 percent design, the 90 percent design, the 100 percent design, and the final construction documents. Fluor submitted its 35 percent design submission on January 30, 2004. DOS approved the 35 percent submittal on February 29, 2004. Fluor submitted its 90 percent design submission on July 9, 2004.

Findings and Conclusions Relating to Individual Appeals

Infrastructure Claim (CBCA 491)

Background

Fluor began mobilizing to the construction site in February 2004. At the time that Fluor arrived on site, no permanent electrical power existed there. The only source of permanent electrical power was about one kilometer from the site. Fluor learned about the availability of this electrical power during the November 2003 site visit. The substation equipment located one kilometer from the site, as of November 2003, was described as "old" and was "scheduled to be replaced."

Fluor decided not to obtain electricity from this local source. Instead, Fluor decided to use diesel-powered electrical generators to provide electrical power at the site. The site did not receive permanent power until April 2006.

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[6] Section F.17 of the contract called for the Government to issue two notices to proceed for the project. The first one, identified as a limited notice to proceed, required the contractor to start preliminary activities for administrative requirement submissions, mobilization, and any other work identified by the contracting officer (i.e., to begin design and mobilization). The second notice to proceed was to be issued after certification of the design development submittal and completion of other requirements identified in Section J.3.3 (i.e., to begin construction).

In addition to lacking electricity, the construction site did not have a public source of water. In February 2004, there was a public water pipeline about two kilometers from the site. Fluor retained a subcontractor to install a piping system to connect the site to the public water system. Public water did not come to the site until January 2006.

As noted in various places in the solicitation, the construction site had a high water table. The water needed to be removed for construction. Fluor apparently planned to dewater the site by directing water into a storm sewer system, but, when it arrived in February 2004, it discovered that no storm sewer system existed there. Fluor used pumper trucks to remove stormwater and groundwater from the site. It also addressed the water issue by raising the level of the site by approximately one to two meters. As part of this effort, Fluor contends that it (1) cleared and grubbed a larger area than it had anticipated, (2) removed a layer of muddy soil that could not be built upon, (3) purchased, placed, and compacted soil to raise the level of the site, and (4) purchased and placed topsoil on the site. Storm sewers were not operational at the site until late April or early May 2006.

Also in February 2004, Fluor found that no improved or paved public roads connected the construction site to the public road network. The closest improved or paved public road existed approximately one kilometer from the main entrance to the site. Fluor constructed a temporary road approximately one kilometer long by improving one of the existing unimproved dirt tracks to connect the site to the public roads. Fluor maintained this road throughout the project. Construction of public roads accessing the site was not completed until mid-2006.

By letter dated April 1, 2005, Fluor notified DOS "of the adverse impacts to the project and potential change to the contract resulting from the late delivery and availability of utilities and roads to the NEC Astana job site by the City of Astana." Fluor states that "the City initially indicated that roads would not be available to the site until spring 2006," and "at this point, the City needs to deliver utilities to the site based upon the information and agreements that have been made to date." While acknowledging that the city of Astana was responsible for completion of the roads and utilities, Fluor told DOS that it would be seeking a "cost and schedule change."

Discussion

Fluor claims that DOS made certain promises about the conditions at the project site and that Fluor relied upon these promises to its detriment. Specifically, Fluor contends that DOS told it that all necessary utilities and infrastructure (electrical power, storm sewers, and roads connecting the construction site to the local road network) would be available at the construction site in time to support construction activities. Fluor points to the DOS-provided

EFS and SUP, which Fluor claims promised that utilities and other infrastructure would be available at the beginning of the project.[7] As a result, Fluor seeks $4,218,426 for damages related to alleged changes and breach of warranty related to the project infrastructure.

DOS responds that no implied warranty was created because the express language of the contract carries no clear and direct affirmative promise from which a warranty or guarantee can be inferred. Addressing Fluor's argument that the EFS contained promises, DOS asserts the EFS merely predicted what the local authorities might do in the future, but made no express promises. In addition, DOS maintains, Fluor knew that the infrastructure had not been completed based upon its own observations in July 2003, when Fluor attended the pre-proposal conference in Astana. DOS states that Fluor understood that it would be responsible for establishing temporary construction utilities on-site. Fluor never notified DOS that the lack of utilities or other infrastructure had any adverse impact on contract performance until Fluor stated so in the April 1, 2005, letter.

"[A] warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself." *Oman-Fischbach International (JV) v. Pirie*, 276 F.3d 1380, 1383-1384 (Fed. Cir. 2002) (quoting *Dale Construction Co. v. United States*, 168 Ct. Cl. 692, 699 (1964)). To prevail on its claim, Fluor must show that DOS provided a warranty either explicitly or implicitly in its contract by showing that: "(1) the Government assured [appellant] of the existence of a fact, (2) the Government intended that [appellant] be relieved of the duty to ascertain the existence of that fact for itself, and (3) the Government's assurance of that fact proved untrue." *Id*. at 1384 (quoting *Kolar, Inc. v. United States*, 650 F.2d 256, 258 (Ct. Cl. 1981).

Contrary to assuring Fluor that utilities and other infrastructure would be available at the construction site, the contract states otherwise. The contract expressly states that no public roads or utilities are currently present on the site and informs the contractor that it must "coordinate with local authorities for the road design and construction" and should

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[7] The "specific representations" provide only minimal information about the conditions at the site. Statements highlighted by Fluor make no promises, but are instead fairly generic statements such as the statement referring to utilities, which states that "as stated during the meetings with [the local government representatives], all utilities will be in place in the middle of year 2003." Fluor ignores other statements that refer to the need to coordinate with the local government, who bears responsibility for installing the utilities, and the fact that these utilities were not installed when Fluor examined the site in July 2003.

"plan on the design and construction of a facility that has its own prime power generating plant with N+1 redundancy, and rely solely on standby generators for construction power." In another section of the contract, Fluor is told that it "shall obtain all water, light, power, and other utilities necessary for the completion of the work" and that it "is responsible for determining with local authorities what is required in connection with outside services and utilities."

Additionally, the contract incorporated several clauses that place the burden of determining the availability of roads, utilities, and infrastructure on the contractor, including standard clause "Site Investigation and Conditions Affecting The Work (Apr. 1984)," as set forth at FAR 52.236-3. *See* 48 CFR 52.236-3 (2002). That clause provides in pertinent part:

> (a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads . . . .
>
> (b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding is expressly stated in this contract.

Paragraph (a) places the burden of determining the availability of water, electric power, and roads on the contractor. Paragraph (b) disclaims representations made by officers or agents before the execution of the contract. This includes representations made during the pre-bid site visit. *See, e.g., Oman-Fischbach*, 276 F.3d at 1385.

Fluor contends that the EFS represented that infrastructure would be delivered to the site to support construction. The EFS, at best, stated only that local government authorities have committed to provide utilities, including power, water, sanitary/storm sewers, and telecommunications, to the site area by June 2003. Nothing in these statements can be construed to be a promise from DOS that these events would occur. "[A]bsent fault or negligence or an unqualified warranty on the part of its representatives, the Government is not liable for damages resulting from the action of third parties." *Oman-Fischbach*, 276 F.3d at 1385 (quoting *Dale Construction*, 168 Ct. Cl. at 698). As *Oman-Fischbach* affirms:

> Unless the parties in unmistakable terms agreed to shift the risk of increased costs due to acts by the Portuguese military, no liability on the part of the Navy attaches from such acts. *See Lenry, Inc. v. United States*, 156 Ct. Cl. 46, 297 F.2d 550, 553 (1962); *see also Fort Sill Assoc. v. United States*, 183 Ct. Cl. 301, 309 (1968) (the government is not liable for failing to make a work site available to a contractor at a specified time due to delays experienced by another independent contractor).

276 F.3d at 1385. Indeed, even if Fluor had relied upon those statements initially in preparing to bid on the contract, Fluor should have observed the absence of any infrastructure during the pre-proposal site visit in Astana, which occurred in July 2003, one month after local authorities allegedly promised to complete the infrastructure. *See, e.g., C.H. Hyperbarics, Inc.*, ASBCA 49375 et al., 04-1 BCA ¶ 32,568, at 161,147 ("It is the responsibility of the contractor to investigate and select sources of supply prior to bidding and to obtain assurances that the materials needed to perform the contract in accordance with the contract terms will be available."). Fluor had plenty of time to adjust its bid to take into account the actual state of the construction site. To do otherwise was to ignore the obvious.

Neither the EFS, nor the SUP, nor the contract contains statements that can be construed as a warranty by DOS, either expressly or implicitly, that infrastructure would be provided at any particular time. To adopt Fluor's approach of selectively quoting sections of documents out of context requires one to ignore the seminal rule of contract interpretation: an interpretation that gives meaning to all relevant provisions, and reads them to be consistent with one another, is greatly preferred to one that ignores certain provisions or creates conflicts between provisions. *See, e.g., Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, 07-2 BCA ¶ 33,678, at 166,748. We decline to follow Fluor's lead in this respect. Accordingly, this claim is denied.

Pile and Encasement Claim (CBCA 492)

Background

As noted above, the solicitation required each offeror to use a geotechnical engineer to assist in the preparation of its proposal. Fluor elected not to do so, instead relying upon the geotechnical information provided by the Government in its EFS and SUP. Fluor did not retain a geotechnical engineer until after contract award.

Fluor hired Wilber Smith Associates (WSA), and WSA produced a geotechnical report dated January 21, 2004. This report told Fluor about the general subsurface conditions and local construction practices. Addressing foundations, WSA noted:

> Based on our discussions with Karaganda GIIZ [a local geotechnical drilling and laboratory testing subcontractor], we understand that the vast majority of multi-story buildings in Astana are supported on driven reinforced concrete piles that are not prestressed. These square piles are typically 30x30 cm and can be manufactured in Astana with lengths of 3 to 12 m. Approximately 15 local contractors are reportedly capable of driving these concrete piles.

The report noted that Fluor based its design using ultimate pile capacities of 80 to 120 metric tons, whereas local practice was based on ultimate pile capacities of 60-70 tons. Apparently, during the design development stage, Fluor did not investigate to determine whether local pile driving contractors would be able to drive the larger capacity piles called for in its design, or whether local manufacturers would be able to fabricate those piles. WSA noted:

> Obtaining such capacities will require hard driving for the piles to penetrate sufficiently to bear on/in the weathered rock, and these piles are not routinely used in Astana with such a large design capacity. We believe that very close monitoring of pile driving will be required to ensure that piles are not damaged and achieve the design load. As they are not accustomed to driving these piles to achieve relatively high capacities, local contractors may not have equipment on hand that will be required to appropriately drive these piles. The load testing program will be of great importance to demonstrate that the contractor can successfully achieve these loads with his equipment.

Finally, WSA recommended that Fluor consider using a lower allowable pile capacity for the one- and two-story structures, since the column loads there would be smaller than those of the NOB. The lower capacity piles would allow for a shorter pile, which, presumably, a local contractor would be able to handle with the equipment on hand.

Fluor planned to use precast concrete piles, reinforced with rebar, for the NOB foundation. However, the yield strength of the locally-available rebar did not meet contract requirements. Using ProjNet, on December 19, 2003, Fluor asked:

> Locally produced concrete steel reinforcement in Kazakhstan has a maximum yield strength of 355 Mpa (50 ksi).[8] Per SED documents, steel reinforcement mus[t] conform to ASTM 615 with a yield strength of 420 Mpa (60 ksi). Fluor

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[8] The MPa, or megapascal, is a unit of measurement for pressure exerted on an object. Ksi (kilo pound-force per square inch) is another unit of measurement for pressure.

> can purchase 420 Mpa steel reinforcement in the Kazakhstan market, however this steel is imported from Russia. Is it acceptable to use the imported steel from Russia?
>
> Mike Ross, an alternate contracting officer's representative (ACOR),[9] responded:
>
> There are two aspects to this response, security and technical. Security – Per paragraph 1.3.C, in Section 01105 of Division 1, the use of Russian material is not permitted in the CAA.[10] You may request an exception to this prohibition from the [DOS], but you would have to present adequate justification to warrant the exception. Russian material may be used outside of the CAA. Technical – If the Russian rebar does not comply with ASTM or other standards required by the contract, an [sic] substitution must be approved, IAW [in accordance with] Division 1, Section 01633, Part 2.3. Please note the conditions under which a substitution may be granted.

The exchange of communications continued: Flour:

> We are evaluating alternate steel for piles. All other steel will meet the ASTM requirements. Steel used in the CAA will not be sourced from Russia.[11]

Mr. Ross:

> Please be careful. If there is a connection between the piles and the pile caps and the continuity extends to the CAA via a column or a wall, then the steel in the pile would be considered an extension of the CAA.

Fluor:

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[9] Mike Ross held a limited delegation of authority from the contracting officer. He did not have authority to modify the contract or issue changes under the Changes clause.

[10] The CAA is a designated area within a building where classified information may be handled, stored, discussed, or processed.

[11] The contract prohibited Fluor from using Russian rebar only in the CAA. Fluor could have used Russian rebar in the other parts of the NOB and the other buildings called for in the contract.

> Fluor will not purchase any steel used to support the NOB from a restricted source per Section 01105 of Division 1.

This exchange occurred in December, before Fluor had submitted its 35 percent design to DOS.

The ProjNet exchange did not cause Fluor to change its plan to use precast concrete piles. In February 2004, Fluor issued a solicitation, seeking a subcontractor who could manufacture and drive the piles. Fluor specified that the pile manufacturer use "portland cement, ASTM C150, Type V," a concrete mix that was not readily available in Astana.[12] It is unclear from the record whether Fluor received any responses to its solicitation. Fluor had two meetings with one pile manufacturer, Stroy Constructii, on February 20, 2004, and on March 9, 2004. Fluor contends that only one pile manufacturer in Astana. However, that company declined to bid on the contract.[13]

Fluor explored several alternatives, including casting its own piles, importing reinforced steel that was manufactured in Uzbekistan to be used for the rebar, or shipping precast piles from a non-local manufacturer. Ultimately, sometime in the middle of March, Fluor decided to switch from using precast concrete piles to steel H piles. Fluor relayed this decision to Mr. Ross:

> Subject: Pile Change Notice
>
> Dear Mike,
>
> As you are aware we have been proceeding with procurement of the concrete piles as previously approved by OBO [DOS]. During this process we have determined that the local manufacturers of piles are not willing to provide reinforcing steel that complies with the contract requirements of no Russian materials (as Russian steel is what they carry in stock). Due to the critical schedule impacts of piles we have explored two options:

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[12] The contract issued by the Government contained a specification that detailed cast-in-place concrete. The specification did not identify a specific type of concrete; it merely noted that the type would be "site specific – as required."

[13] Stroy could only manufacture the piles. Fluor would have still needed to find someone to drive the piles into the ground.

1. Ship reinforcing steel that meets the contract requirements to the local manufacturers then have the piles prefabricated
2. Change the design to Steel "H" piles and have them shipped to the site.

We are now planning to implement option 2. The H Piles will minimize any schedule impact as option 1 will require a lag time to allow for shipping to the pile manufacturer. The H piles will be of materials in conformance with the contract.

Unfortunately this will require us to resubmit our pile design package to OBO for approval. We plan on submitting the new design documents on April 4, 2004. Please be advised that this is in the best interest of the project and we would appreciate your cooperation in reviewing our revised design.

Fluor's decision to change to steel H piles resulted in a flurry of comments on ProjNet and e-mail messages between the Government and Fluor. In one comment, DOS noted that the change would increase Fluor's cost of performing the contract, stating "Contractor needs to realize that these additional costs for the extra pile lengths are going to be absorbed by the contractor." In e-mail messages between the parties, the pile change was referenced as a substitution, not a change. Fluor did not challenge these statements or otherwise convey to DOS that it considered the switch from precast concrete piles to steel H piles as a compensable change under the contract.

Fluor submitted its new steel H pile design, identified as "pile materials substitution" to DOS on April 6, 2004. Fluor ordered the NOB's steel H piles for pile testing on April 28, 2004, and the production piles on May 12, 2004. The testing piles arrived on June 25, 2004, but Fluor had yet to hire a pile-driving subcontractor. Fluor hired the pile-driving subcontractor on July 1, 2004.

Meanwhile, as a result of the change in materials to be used for the piles, Fluor had to submit evidence to show that the materials would have a minimum service life of one hundred years. Accordingly, Fluor submitted two sets of calculations intended to demonstrate the durability of the steel, one on May 31, 2004, and a second, prepared by its corrosion engineer, on June 7, 2004.

After Fluor submitted these calculations, on June 16, 2004, Fluor decided to raise the site by adding 1.5 meters of loose soil to the existing jobsite to eliminate the swamp-like conditions caused by the high water table. But, when Fluor submitted its 90 percent design

on July 9, 2004, the design failed to indicate the raised site.[14] Fluor submitted revised design information regarding the elevation change to the site on August 30, 2004.

On September 16, 2004, DOS asked Fluor to explain how its previous corrosion calculations remained valid in light of the elevated site. After much discussion between the parties about the issue, Fluor formally responded by letter dated November 4, 2004, and explained that, because Fluor had always intended to encase the steel piles, which would be placed in the "disturbed" soil/fill, the original corrosion study was still valid.

While the parties were still trying to resolve the corrosion issue, Fluor began driving test piles using test pile driving criteria from its expert. After experiencing problems, which led to test pile failures on September 28 and 30, Fluor decided to adopt a new test plan which required, among other things, a change in pile driving equipment.

In order to avoid further delay, Fluor decided to proceed with NOB production pile driving on October 20, 2004, before it had completed pile testing and before it had developed the criteria for production pile driving. Fluor started the second round of pile testing on November 4, 2004. It submitted its pile testing plan to DOS on November 9, 2004. Fluor did not receive the final pile driving criteria until December 2, 2004. Fluor completed NOB pile driving on December 10, 2004.

Fluor began excavation work for encasing the steel H piles at the NOB on December 6, 2004, and began pouring encasement concrete on December 22, 2004. Meanwhile, the parties continued discussions about whether the H piles contained sufficient steel to last one hundred years based upon the soil conditions.

On December 22, 2004, Fluor notified the contracting officer of project schedule delays and additional costs "resulting from OBO direction that the design and construction procedures for the installation of the steel H piles are not approved."[15]

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[14] Internal correspondence reflects that Fluor knew that raising the site would impact the 90 percent submission, but elected to submit in accordance with the contract requirements, because, as noted by Jay Toadvine, Operations, Fluor, "not meeting the published dates opens us to a short term 'concurrent delay' situation when we have the client on notice regarding the permit issues in Astana . . . figure out a plan, but we do not want to delay the client reviewing the entire finished building and systems for site level changes."

[15] In this letter, Fluor confirmed that it decided to change from concrete piles to steel H piles (1) to address issues with the local fabricator's use of Russian rebar; (2) because

In January 2005, Fluor's engineer performed an analysis which concluded that the steel H piles possessed sufficient sacrificial steel to last one hundred years. On January 12, 2005, Fluor submitted a new set of structural design calculations which took into account the fill that had been added to the site. Based on these newer calculations, DOS approved Fluor's approach on January 19, 2005, and agreed that encasement of the piles would not be necessary based upon the new information provided.

Discussion

Under design specifications, the Government provides precise details of the materials and manner in which the work is to be performed, and the contractor is not permitted to deviate from those specifications. Under performance specifications, the Government sets forth an objective or standard to be achieved, and the contractor is to use its own ingenuity to select the means to achieve that objective or standard of performance while assuming responsibility for meeting the contract requirements. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,775, at 171,130; *Acquest Government Holdings U.S. Geological, LLC v. General Services Administration*, CBCA 439, 07-1 BCA ¶ 33,576, at 166,338 (citing *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1362 (Ct. Cl. 1969)). Whether a specification is a design or performance specification depends upon the obligations imposed by the specification, not upon the label given to it. *Walsh/Davis*, 11-2 BCA at 171,130 (citing *Blake Construction Co. v. United States*, 987 F.2d 743, 746 (Fed. Cir. 1993)). In the case of performance specifications, the risk of poor design choice or problems falls upon the contractor.

Using this framework, we now examine Fluor's allegations as relates to the design and construction of the NOB foundations. Fluor contends that the Government warranted precast concrete piles would be available from a local source; that the Government constructively changed the contract by incorrectly interpreting the contract to preclude the use of Russian materials in the NOB foundations, and that the Government misinterpreted the contract requirements and ordered Fluor to encase steel H piles with concrete. These issues, all occurring as the result of the Government's actions or statements, allegedly delayed

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local manufacturers were not using a concrete mix that OBO would approve; (3) because local manufacturers were not using Type V cement; (4) because local manufacturers refused to change their manufacturing to accommodate the project and even if Fluor provided the materials.

performance. As a result, Fluor seeks $10,574,751 for damages and delay related to the alleged changes and breach of warranty related to the NOB foundation pile design.

DOS responds, stating that Fluor chose the design for the NOB foundations and then changed the design for its own reasons. To the extent that Fluor is asserting that DOS's statement or actions caused it to change its planned method of performance, Fluor failed to give the contracting officer notice of the changes as required by the contract's Changes clause. Finally, DOS contends that it did not warrant that locally-available precast concrete piles would be sufficient to meet the contract's performance requirements. As to Fluor's allegations of delay, DOS denies that it took any action, or failed to take action, that resulted in delaying the project.

This contract placed all of the responsibility for design and construction (and, as a consequence, all of the risk) on Fluor. While the Government provided Fluor with standard design documents and basic technical specifications developed for use for all embassy construction, the contract made plain that Fluor would be responsible for adapting the design to the specific location in producing the project construction documents. Bidders were expressly told in many different sections of the RFP not to rely on the drawings, as illustrated by the following: "drawings are for the sole purpose of illustrating the design intent of the owner"; "the Contractor remains solely responsible and liable for design sufficiency and should not depend on the reports provided by the [Government] as part of the contract documents"; and noting that the contractor would be responsible for adapting the design "according to the unique conditions of the site and other local and regional factors."

The Government did not provide partially complete design drawings to Fluor to use to develop a final design for construction of the project. Instead, the RFP required the contractor to provide for all design work, and set forth a design review process in which the Government would review the contractor's design development submittals at the 35 percent and 90 percent phases. The ultimate responsibility for design and construction methods, and the risk that those methods might need to be changed during the course of performance, remained with Fluor. *See, e.g., United Excel Corp*., VABCA 6937, 04-1 BCA ¶ 32,485 (2003).

Because Fluor was required to design the project completely, this case is distinguishable from *M.A. Mortenson Co.*, ASBCA 39978, 93-3 BCA ¶ 26,189. In *Mortenson*, the board determined that the risk had not shifted to the contractor because the Government had made certain warranties. Specifically, the Government prepared and furnished as part of the RFP "concept submittal" drawings, stipulated to be 35 percent complete, for the construction of a medical clinic. The drawings indicated specific sizes and quantities for structural concrete and reinforcing steel. The contract expressly stated that the

bidders could rely upon the requirements used in the drawings for guidance in pricing their bids. After contract award, the design-build contractor determined that the materials needed had been substantially underestimated in the RFP.

The board rejected the Government's argument that the design-build contractor was responsible for the additional expense, stating:

> At its most basic, the Government's interpretation is that appellant assumed the risk of any cost growth in connection with the structural concrete and reinforcing steel when it agreed to a fixed price for the construction phase. As the Government recognizes, this interpretation effectively reads the Changes clause out of the contract.

The board ruled that, by creating such a specific plan and asking the contractors to rely upon it for their estimates, the Government had warranted the specifications and was responsible for paying for the additional materials. Contrary to the Government's suggestion that it would have been prudent for the contractor to have a structural engineer conduct some sort of review, the board found that the solicitation could not reasonably be construed to require the bidder to conduct pre-proposal engineering.

Nothing about the EFS can be construed as a warranty that precast concrete piles would be available from a local source. The EFS provided only general information about the standard construction practices in Astana. While the EFS noted that reinforced concrete is the most common material for piles, it did not make any recommendations concerning how to build the project. Presumably, this is why the solicitation required bidders to use their own geotechnical engineers for advice in this area. Nor did the EFS confirm that the locally available precast concrete piles would be available for use by the successful bidder or that, if piles were available, they would meet contract performance requirements. Fluor needed to make that determination after it created the detailed drawings and specifications required to perform the contract. Likewise, Fluor had the responsibility to "investigate and select sources of supply prior to bidding and obtain assurances that the materials needed to perform the contract in accordance with the contract terms will be available." *C.H. Hyperbarics, Inc.*, 04-1 BCA at 161,147. Fluor failed to do this.

On the issue of the Russian rebar, Fluor has failed to present convincing evidence to show that it decided to change its design to steel H piles because it could not use Russian steel for the rebar. In fact, the evidence mandates the conclusion that Fluor made this change because it discovered that local manufacturers could not construct the piles as designed, it

delayed in looking for pile manufacturing and pile driving subcontractors, and it concluded that only one pile manufacturer could supply the piles.[16]

Fluor designed the NOB foundation with precast concrete piles having a rated ultimate capacity of 80-120 metric tons, which called for large piles. However, as noted previously, on January 21, 2004, post-contract award, Fluor's geotechnical engineer provided a report which confirmed that, while precast concrete piles were locally available, the local manufacturers traditionally created piles that were smaller than those called for in Fluor's design.[17] In order to execute its design as planned, Fluor would have had to subcontract with a pile-driving contractor which had the equipment and ability to drive piles that were larger than the norm for the region. None of the evidence presented establishes that Fluor had found a subcontractor capable of driving these larger piles.

Among Fluor's allegations is that the Government improperly refused to approve its steel H pile design and wrongfully directed Fluor to encase the upper three meters of steel with sulfate-resistant concrete. Fluor contends that these government actions increased its costs and caused schedule delay. In order to prove compensable delay, Fluor must prove the extent of the delay, the causal link between the Government's alleged wrongful acts and the delay in the contractor's performance, and the alleged harm to the contractor for the delay. *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1316-17 (Fed. Cir. 2000) (citing *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000).

Here, the delay to the project resulted from Fluor's failure to prove to the Government that its corrosion calculations still applied once Fluor decided to raise the elevation of the site. It was reasonable for the Government to require Fluor to demonstrate that the previous calculations adequately addressed the changed conditions. Until Fluor submitted the

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[16] It is unclear to what extent Fluor explored alternatives. It is possible, however, that if Fluor had started looking for a pile manufacturer earlier than February 2004, it could have explored other options for importing rebar for use in the piles. Indeed, the record shows that non-Russian rebar was available from Uzbekistan, but Stroy was reluctant to use it because "[i]mporting materials from Uzbekistan is difficult because of political conflict." Meanwhile, during this process, Fluor had contacted a project manager with J.A. Jones Corporation to discuss his success in buying steel manufactured in Uzbekistan for use in an Embassy project currently being built in Uzbekistan.

[17] Notably, Fluor submitted its 35 percent design to DOS on January 30, only nine days after receiving the report from its geotechnical engineer. Fluor's 35 percent design called for the use of precast concrete piles.

calculations that had been prepared by, and signed by, its engineer of record, the Government could not be sure that the contract requirements had been met. Fluor had the burden of demonstrating its compliance with contract requirements. The Government acted reasonably under the circumstances.

Accordingly, we deny Fluor's pile and encasement claims. In this design/build contract, the risk of developing a design, and the consequences of miscalculating the resources available for constructing to the design, fell solely upon the contractor. Fluor assumed the risk that its plan for construction would work. The fact that Fluor had to change its plan based upon conditions at the project site is Fluor's own problem.

Perimeter Wall Claim (CBCA 490)

Background

The contract required Fluor to design and construct a perimeter wall strong enough to withstand a ramming attack by a vehicle. The buildings within the compound were located a distance from the perimeter wall in order to ensure that they would be protected should an explosive device be detonated outside of the wall. The contract included a drawing depicting one possible design for the perimeter wall and its foundation. Fluor proposed to use a different design for the wall using precast concrete piles for the foundation.

On January 30, 2004, Fluor submitted its 35 percent design to the Government. Fluor's drawings did not depict the location of the property boundary. Fluor's plan placed the foundation for the wall above the frost line. WSA recommended that Fluor use a shallow continuous footing of one meter below grade for the foundation, although it acknowledged that local practice called for placing spread footing at least two meters below.

In June 2004, Steve Manchester, Fluor's project manager, and Jack Whitney, DOS's project director and COR, met with local authorities to discuss the design. The local authorities told them that local law prohibited any part of the perimeter wall foundation from encroaching on the adjacent properties. Mr. Manchester confirmed that the foundation would not protrude across the compound's boundary.

Fluor began excavating on October 12, 2004, before it had received approval for major portions of its design. On October 18, 2004, DOS received Fluor's shop drawings. At that time, the Government discovered that Fluor had designed the perimeter wall with the foundation encroaching upon the adjacent property. Fluor changed its design and moved the wall eighteen inches back so that no part of the foundation would encroach upon adjacent properties.

Fluor's design called for shallow footing, which was consistent with the recommendations of its geotechnical engineer. However, when the Government questioned whether the use of shallow footing would comply with the International Building Code (IBC), as required by the contract, Fluor consulted with several experts. The experts confirmed that the IBC requirements applied to any structure more than six feet tall. Because the wall would be more than six feet tall,[18] it would be considered a structure under the IBC. The IBC required that footings for structures must be below the frost line. In order to comply with this requirement, Fluor needed to modify its design to construct the wall with a deep foundation.

By letter dated May 17, 2005, Fluor notified the Government that it would change its design and would use a deep foundation.[19] In its certified claim, Fluor alleged that the Government "constantly found reasons to reject any design which included a shallow foundation," concluding that the Government's "shifting demands left Fluor with no alternative but to construct a deep foundation perimeter wall." Fluor alleges that these alleged changes increased its cost to perform the work because it had to rework finished wall foundation work, as well as wrongfully delaying the construction project. Fluor seeks $1,817,770 for alleged changes and delay related to the perimeter wall.

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[18] The contract required that the wall be 2.75 meters, which equals approximately nine feet.

[19] In another issue related to the perimeter wall, the contract required the wall to be a certain height. Since the roads had not yet been graded on the property adjacent to the NEC, DOS contacted the local authorities to obtain information about the roads so that Fluor could plan accordingly. When the local authorities failed to provide any information in a timely fashion, Mr. Whitney suggested that Fluor design the wall to be higher than the minimum just in case the roads were ultimately higher than anticipated. In its certified claim, Fluor alleged for the first time that the Government had failed to coordinate with local authorities on a timely basis.

Discussion

Fluor contends that the contract both specified the location of the perimeter wall, and required it to follow its geotechnical engineer's recommendations regarding the perimeter wall depth. Fluor asserts that DOS wrongfully rejected the perimeter wall design despite the fact that the perimeter wall met those requirements. In addition, says Fluor, DOS waited until too late in the process to complain about the design. Therefore, when Fluor changed the design to meet DOS's objections, it incurred additional costs and delay.

Fluor's arguments are similar to those made in relation to its pile and encasement claim. It seeks to distance itself from the responsibilities that it took on as the design/build contractor. The contract did not prescribe the design of the perimeter wall's foundations. Instead, the contract required Fluor to design the wall and its foundations. The contract did place certain conditions on Fluor with regards to its design. Fluor had to comply with the 2003 IBC, for example. This code required Fluor to take frost protection into account when it designed the wall's foundation. In this circumstance, to do so, Fluor had to extend the foundation below the frost line. The contract also required Fluor to comply with local law, which prohibited encroachment into areas outside of the project site. The fact that DOS did not discover the flaw in Fluor's approach until later in the project does not change Fluor's obligations. Even if DOS's action had some impact upon Fluor's choices, causing it additional costs or delay, Fluor failed to give DOS adequate and timely notice that a problem existed and that Fluor believed that the contract required DOS to solve it.

Fluor originally planned, as illustrated in its proposal, to use piles as the foundation for its perimeter wall. Fluor changed its design from piles to a shallow spread-footing foundation based upon the recommendation of its geotechnical consultant. Fluor made the decision to change its design. The risks, and the consequences, of Fluor's design choices fall solely upon Fluor. Fluor remained responsible for complying with the contract's requirements. *See*, *e.g.*, *Granite Construction Co. v. United States*, 962 F.2d 998, 1003 (Fed. Cir. 1992). We conclude that Fluor is not entitled to recovery of any costs incurred in this effort.

Acceleration Claim (CBCA 1763)

On April 26, 2004, Mr. Ross wrote to Fluor regarding its schedule and "to answer . . . questions regarding substantial completion." Mr. Ross noted that Fluor's schedule listed work items that showed completion dates that fell beyond the contract completion date of March 5, 2006. He told Fluor:

> Since your contract completion date is 05 March 2006, all work must be completed prior to that date. On the following day the Government will take

> possession of the compound and begin preparations for occupancy. Therefore, substantial completion must occur sometime before the contract completion date.

Mr. Ross reminded Fluor that under the contract, "in accordance with Reference C, liquidated damages 'will be assessed from the completion date indicated in the contract or extensions thereof to the date that substantial completion is actually achieved by the Contractor. . .'"

On October 13, 2004, Mr. Whitney (DOS) and Mr. Toadvine (Fluor) discussed the fact that the project was behind schedule. Fluor asserts that Mr. Whitney told Mr. Toadvine that Fluor would not receive any schedule extensions and that DOS was considering assessing liquidated and consequential damages. DOS contends that while it is true that the parties discussed the fact that the project was behind schedule, they did not discuss acceleration and Mr. Whitney did not say that DOS would refuse to grant Fluor a schedule extension if warranted.

By letter dated December 22, 2004, Fluor informed the contracting officer that it was experiencing delay "resulting from OBO direction that the design and construction procedures for the installation of the steel H-piles are not approved." The letter did not mention that Fluor planned to accelerate performance in order to compensate for the delay.

On March 1, 2005, Charles Williams, director of DOS's Bureau of Overseas Building Operations, wrote to Fluor to complain about Fluor's performance on the U.S. Embassies in Astana, Kazakhstan, and Kingston, Jamaica. He stated that "Fluor must be committed to achieving the project objectives including the project completion dates . . . . We expect Fluor to deliver these projects on time . . . . I am deeply troubled that time is passing by without positive steps being made by Fluor to bring these projects in line with the construction schedule." Fluor did not respond to this letter. Nonetheless, Fluor now contends that it construed this letter as direction to accelerate.

By letter dated April 1, 2005, Fluor advised the contracting officer of the possibility that it might seek, at a minimum, a 25-week time extension and $10 million in additional costs. Fluor intended to submit a request for a change order by May 13, 2005. In the meantime, Fluor advised that "unless the Government immediately considers and timely grants a time extension, Fluor may find itself in a position where it has no alternative other than to accelerate the work at great cost." Fluor followed up this letter with another to the contracting officer on April 22, 2005, in which Fluor informed DOS that, as a result of DOS comments at the October 13, 2004, meeting, Fluor had taken action to accelerate contract performance and had incurred additional costs as a result.

The contract required Fluor to prepare a project schedule, which it had to submit to the Government, and to update the schedule to reflect the status of the work and the impact of any changes. The contract stated that the "project schedule shall be the critical tool for effective project management, analysis, control, and overall performance." Section 01314, Paragraph 3.7 (D) provided that, in the event that the contractor believed that the schedule might be impacted by project delays, or that it might need an extension of the contract time for performance, the contractor had to present a time impact analysis within fifteen calendar days after delay occurred, demonstrating

> the estimated time impact based on the events of delay, the date the change was given to the Contractor, the status of construction at that point in time, and the event time computation of all activities effected [sic] by the change or delay.

The contract provided that "[i]n cases where the Contractor does not submit a time impact analysis for a specific change order or delay within the specified time, the Contractor shall be deemed to have irrevocably waived any rights to any additional time and compensation." The contract also required DOS to notify the contractor, in writing, if it believes that the contractor's execution of the work fell behind the project schedule. Upon notice, the contractor was required to "take any and all steps necessary within the agreed work period parameters to improve progress. These attempts at recovery shall incur no additional cost to the [Government]."

Fluor did not submit a time impact analysis to the contracting officer when it notified the Government that it needed extra time to perform the contract. Ultimately, however, Fluor did submit a certified claim for constructive acceleration on July 13, 2009. In its claim before us, Fluor seeks $4,197,345 for acceleration damages.

Discussion

Fluor asserts that DOS had formal and actual notice of the project delays. Fluor claims that, despite this knowledge, DOS failed to grant contract extensions when requested, causing it to accelerate the schedule to compensate for the delays. In its reply brief, Fluor clarifies its claim of constructive acceleration, stating that DOS's "threat of liquidated damages, and instruction to Fluor to meet the original project schedule constitute a constructive change to the contract."

DOS contends that Fluor is responsible for its delays, none of the delays are excusable, and, accordingly, Fluor is not entitled to any additional costs resulting from its efforts to compensate for the delays. In addition, DOS contends that Fluor failed to submit a request for a schedule extension supported by a time impact analysis, as required by the contract.

Finally, DOS states that the Government never ordered Fluor to accelerate performance, and that Fluor has not established entitlement to damages on a constructive acceleration theory.

In order to prevail upon a constructive acceleration theory, the contractor must establish:

> (1) that the contractor encountered a delay that is excusable under the contract; (2) that the contractor made a timely and sufficient request for an extension of the contract schedule; (3) that the government denied the contractor's request for an extension or failed to act on it within a reasonable time; (4) that the government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as a constructive change to the contract; and (5) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.

Fraser Construction Co. v. United States, 384 F.3d 1354, 1361 (Fed. Cir. 2004).

In this case, we have determined that Fluor is responsible for any delays that occurred on the project, and that there are no excusable delays. However, even if Fluor had been able to establish excusable delay, Fluor failed to comply with contract requirements to submit a request for a schedule extension supported by a time impact analysis.

Fluor argues that DOS knew about the schedule slippage and that it did provide a request for a schedule extension, which is sufficient to support its claim.[20] DOS clearly knew that the schedule was slipping – it told Fluor that in so many words. Nonetheless, Fluor has failed to show that the contracting officer directed Fluor to accelerate performance. The verbal statements by Mr. Whitney (not a contracting officer) in October 2004, that reflected agreement that Fluor was running behind schedule, and the more pointed letter from

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[20] Fluor cites *Hensel Phelps Construction Co. v. General Services Administration*, GSBCA 14744, et al., 01-1 BCA ¶ 31,249, to support this proposition. *Hensel* involved a construction contract in which the contractor sought compensation for costs incurred as a result of "pervasive" changes to the contract. In a lengthy opinion, the board found that the Government had expressly authorized acceleration, but that the contractor's claim as a result of the acceleration arose from labor inefficiencies and did not form the basis for an acceleration claim in the strictest sense of the word. *Hensel* is distinguishable from the facts in this case.

Mr. Williams (again, not a contracting officer) in March 2005, that he was disappointed with Fluor's performance are not directions to accelerate. Even if they could be construed as such, Fluor did not notify the contracting officer that it believed that it had received a constructive order to accelerate.

Fluor's acceleration claim is denied.

Liquidated Damages (CBCA 716)

Background

The contract completion date was March 6, 2006. Fluor achieved substantial completion on September 18, 2006, and finally completed the contract on December 6, 2006. DOS assessed liquidated damages at a rate of $18,011 per day, the rate agreed upon by the parties, from March 7, 2006 through September 17, 2006 (until substantial completion). DOS assessed liquidated damages at $1,389 per day from September 18, 2006, through November 30, 2006. The total liquidated damages assessed is $3,614,931.

Discussion

Fluor does not challenge DOS's right to liquidated damages; it simply contends that it is entitled to recover liquidated damages for the 154 days for which it contends entitlement to compensable delay damages. Fluor acknowledges being responsible for forty-two days of delay.

In light of the fact that we have rejected Fluor's contention that it is entitled to compensable or concurrent delay, DOS's assessment of liquidated damages for the days of contract performance that occurred after the contract should have been completed is proper. Fluor's claim for recovery of $2,773,694 is denied.

Overtime (CBCA 1555)

Background

The contract provided that the work hours at the job site would be limited to six ten-hour days per week. The contract also provided that the contractor could request to work additional hours, but that it would be required to compensate DOS for the cost of DOS personnel who would have to be present while the contractor was working the additional hours. The contract provided that hourly rates would apply.

Starting in June 2004, Fluor requested to work additional hours. At that time, Fluor did not claim that Government actions forced it to work these additional hours. In June 2006, Fluor first asserted that DOS should absorb the costs resulting from these additional hours.

DOS granted Fluor's request to work additional hours. DOS personnel worked overtime, and DOS regularly informed Fluor of the overtime charges accruing. DOS ultimately charged Fluor $621,336 for government overtime.

Discussion

Fluor does not dispute the Government's right to assess charges for overtime. It seeks $488,216 in unpaid contract balance withheld by DOS for overtime charges. Fluor acknowledges that some of the charges withheld were based upon delays for which it was responsible. It simply contends that but for the government-caused delays, the overtime inspection costs would not have been necessary.

The overtime claim must suffer the same fate as the acceleration and liquidated damages claims. Because Fluor is not entitled to compensable or concurrent delay, the overtime costs that occurred as a result of Fluor's request to work additional hours were properly withheld. We deny Fluor's claim for payment of the unpaid contract balance withheld for overtime costs.

Misrepresentation, Superior Knowledge, and Miscellaneous Claims

We have considered appellant's other arguments and do not find them persuasive. Fluor's misrepresentation claim is simply a rehash of its warranty claim. Fluor's contention that DOS failed to disclose its knowledge that utilities and infrastructure would not be available at the project site in time to support construction activities cannot stand in light of our determination that DOS never represented that infrastructure would be available to support construction. Nor has Fluor established any facts to prove its contention that DOS violated its obligation to act in good faith and deal fairly with Fluor.

Finally, we do not address or opine upon the evidence presented by either party or its experts concerning the critical path, because the information provided is simply not relevant in light of our findings that Fluor is not entitled to compensable or concurrent delay.

Decision

The appeals are **DENIED**.

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JERI KAYLENE SOMERS
Board Judge

We concur:

_____
ANTHONY S. BORWICK
Board Judge

_____
R. ANTHONY McCANN
Board Judge