UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY RELIEF EACH GRANTED IN PART:
October 27, 2016

CBCA 4539, 4545

GRUNLEY CONSTRUCTION CO., INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Lawrence M. Prosen and Daniel P. Broderick of Kilpatrick Townsend & Stockton LLP, Washington, DC, counsel for Appellant.

Jay N. Bernstein, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **DRUMMOND**, and **RUSSELL**.

DANIELS, Board Judge.

Grunley Construction Co., Inc. (Grunley) and the General Services Administration (GSA) have both filed motions for partial summary relief in appeals which concern claims made by Grunley under a construction contract between the parties. In ruling on the motions, we narrow the issues, but not to the extent preferred by either of the parties.

Background

On September 28, 2005, GSA awarded to Grunley a contract to provide all necessary labor, materials, and equipment to modernize the Mary E. Switzer Building in Washington, D.C. The scope of work included the removal of hazardous material, including asbestos abatement, from the building. Grunley subcontracted this work to Goel Services, Inc. (Goel).

Wage rate claim

The contract required Grunley and its subcontractors to pay their employees wages at rates prescribed pursuant to the Davis-Bacon Act (which is now codified at 40 U.S.C. §§ 3141-3148 (2012), but was at the time of contract award at 40 U.S.C. §§ 276a to 276a-7 (2000)). The Davis-Bacon wage determination included in the contract required that unskilled laborers be paid at least $11.83 per hour, with fringe benefits of at least $2.23 per hour, and that hazardous material handlers be paid at least $11.93 per hour, with fringe benefits of at least $5.85 per hour.

On July 6, 2006, GSA's project manager wrote to Grunley, expressing concern that Goel was not paying its employees wages at the rates prescribed by the wage determination. Specifically, he said:

> All of Goel's workers are categorized in their certified payroll as unskilled labor and paid accordingly. Majority of Goel's personnel is performing the work of a Hazardous Material Handler . . . . None of Goel's hourly employees are receiving fringes above an unskilled laborer and only a [sic] three or four out of the roughly one hundred plus Goel hourly employees are receiving above an unskilled labor rate.

Goel protested to Grunley that it "is in compliance with Davis Bacon Act and has properly paid [its] workers." According to Goel, paying the hazardous material handler rates would have been appropriate only for removal of asbestos from mechanical systems that would be placed back into service, and that paying unskilled laborer rates was appropriate for all other asbestos removal activities. Grunley forwarded Goel's letter to GSA's project manager on July 13, 2006. On August 8, the project manager, unconvinced, responded that if the "discrepancies" were not "corrected" by August 31, "the Government may be forced to proceed with notifying the Department of Labor [DOL] of this matter." Grunley replied by attaching a statement by Goel reiterating its position.

By letter dated December 4, 2006, DOL informed the GSA contracting officer that the agency project manager's position was correct. On January 9, 2007, the contracting

officer told Grunley of DOL's determination and "advised that back wages are to be paid per the appropriate categories spelled out in [the] determination for Hazardous Material Handlers and Skilled Laborers as they relate to asbestos abatement."

Grunley forwarded the contracting officer's letter to Goel, which refused to pay the back wages. At Grunley's request, GSA withheld contract funds earned by Goel for the amount that represented the estimated amount that Goel had underpaid its workers, given the DOL determination.

The contract incorporated by reference a clause denominated as FAR (Federal Acquisition Regulation) 52.233-1, Disputes (JUL 2002). Subsection (i) of this clause provides, "The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer." 48 CFR 52.233-1 (2004). Similarly, Grunley's subcontract with Goel provides, in paragraph 18, "Subcontractor specifically agrees that any dispute with the Owner or the contractor shall not interfere with Subcontractor's progress of its work in any manner, and that Subcontractor shall proceed with its work as ordered, subject to claim."

In January 2007, Grunley issued a cure letter to Goel, asserting that Goel had "reduced its onsite forces to the point where the work is no longer being prosecuted expeditiously" and directing Goel "to immediately provide sufficient manpower to cure your performance deficiencies." Grunley stated that "[i]f after three days you have not cured these issues Grunley intends to supplement your work forces and to back charge your subcontract accordingly. In addition, if you do not comply, you leave Grunley no alternative but to consider default termination." Grunley then engaged Basic Industries (Basic) to supplement Goel's forces.

On March 19, 2007, Grunley again expressed displeasure with Goel's approach, ordering it to show cause why its subcontract should not be terminated for default "based on . . . material breaches." Grunley wrote:

> As you are aware, the Government directed you some time ago to make correct payments at the required Davis-Bacon rates for past and current Goel employees working in abatement and demolition activities on the project, but you have consistently refused to take corrective action . . . . This ongoing exposure is unacceptable. . . . [E]ven if your position is correct, Goel is still required to proceed as directed to proceed as directed by the Contracting Officer. . . . Your failure to do so . . . is a material breach of your subcontract obligations.

> [A]nother material breach . . . is Goel's failure to maintain sufficient manpower to maintain progress on the job.

Goel continued to maintain that it had at all times paid its workers the appropriate wages and benefits. In particular, it maintained in February 2007, the wages and benefits were paid pursuant to agreements it and its subcontractors had with relevant unions.

GSA transmitted Goel's explanation to DOL, and on July 12, 2007, DOL responded that "[i]n consideration of clarifying information received, we must change our initial determination." DOL approved Goel's request that the proper classification and wage and benefit rates for the company's workers were those for unskilled laborers. GSA transmitted DOL's July 2007 determination to Grunley by letter dated September 12, 2007.

By letter to Grunley dated April 30, 2010, Goel sought an equitable adjustment for "the additional labor costs associated with the GSA's improper wage decision and the costs incurred to prepare the [request for equitable adjustment]" in the amount of $391,711. According to Goel, Basic devoted 20,487.75 labor hours on the project, and the difference in cost per hour between Basic and Goel (including equipment, materials, and markup on materials) was $12.81. Multiplying these numbers by each other, Goel calculated "value of direct cost of Labor DOL Impact" to be $262,448.08. The remainder of the amount sought consisted of 16.6% overhead and 10% profit on this figure; general liability of 1.34% on the sum of direct cost of labor, overhead, and profit; and estimated costs of $25,000 for proposal preparation and $30,000 for legal fees. Grunley transmitted this request to GSA on May 17, 2010.

By letter dated November 18, 2011, Goel asked Grunley to seek a contracting officer's final decision on its request for equitable adjustment, the amount of which it reduced to $320,964. (The copy of this letter in our record states that the difference in costs per hour between Basic and Goel was $12.81, as in the April 30, 2010, correspondence, but does not include the exhibits which show the calculation of the total amount.) Grunley forwarded this letter to GSA by letter dated December 21, 2011, asking for a contracting officer's final decision. Grunley certified the claim on March 13, 2012.

A contracting officer's decision has not been issued on this claim. Grunley appealed from the deemed denial of the claim, and the Board docketed the appeal as CBCA 4539.

Additional asbestos claim

According to a declaration of Goel's owner, in preparing its bid for this project, Goel relied on the drawings and specifications provided by GSA in its solicitation. A solicitation amendment contained this question from a prospective offeror and the agency's answer:

> Amendment #3 . . . deletes the given quantities for each type of ACM [asbestos containing material]. Please provide assume[d] quantities for each type of ACM that is to be removed in the building or provide clear direction on how this abatement work is to be priced for our bid.
>
> Hazmat [hazardous material] drawings and specifications are provided only to show locations of hazardous materials and types of hazardous materials. Demolition drawings for each discipline and other drawings referenced from the demolition drawings show all material to be removed from the project including hazardous materials indicated in the hazmat drawings and specifications.

The drawings include a "G400" series of drawings, each one labeled in part "Hazardous Materials." A "General Note" on drawing G400 states that the contractor "shall use these drawings in conjunction with the remainder of the set in order to determine the extent of hazardous materials that must be abated. Refer to architectural, mechanical, electrical and plumbing series for specific information on which items are to be removed." The G400 drawings for each floor of the building contain a note instructing the contractor to "refer to MEP [mechanical, electrical, and plumbing] demolition drawings for coordination of ductwork and piping demolition" and to "refer to MEP drawings for sizes and[1] extent of duct work and piping to be removed and coordinate quantities of ACM and non-ACM demolition."

Drawing G400 includes this note: "Pre-alteration assessment survey has been conducted for asbestos-containing materials (ACMS) . . . . Areas found to contain these materials have been indicated on the contract documents." The other drawings in the G400 series include the note: "The existing identified asbestos-containing material (ACM) and sample collection locations are indicated on these drawings." The G400 series drawings all contain legends showing where ACM was and was not located on piping risers. The MEP drawings show all of the horizontal piping, state that all of the horizontal piping is to be

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[1] The note on the drawings for the first floor does not contain the words "sizes and."

removed, and include notations identifying the size of the piping as less than six inches in diameter. An ACM table included as an appendix to the specifications for asbestos abatement procedures (section 02085) states that pipe insulation with a diameter of less than six inches is located "[t]hroughout the building."

The contract incorporated by reference the Differing Site Conditions clause which is set out at FAR 52.236-2 (APR 1984). This clause provides, in pertinent part:

> (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of . . . subsurface or latent physical conditions at the site which differ materially from those indicated in this contract . . . .
>
> (b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause, and the contract modified in writing accordingly.
>
> (c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required.

48 CFR 52.236-2.

On April 28, 2006, Goel sent to Grunley a request for information (RFI). The RFI stated, "It appears that the chases demolition of the terracotta next to the windows and the bathrooms has significant delaminating ACM materials from the pipes and fittings in these chases. In several areas, chases have been opened and extensive unforeseen asbestos contamination [exists]." Grunley sent this message, denominated RFI 175, to GSA two days later.

The response, on May 5, was:

> ACM to be removed per addendum #1 dated 5/9/05 and as noted on dwg. [drawing] G-4-00 which states,
>
> In addition to the locations noted in 02085-Appendix C, Contractor shall assume that pipe and duct insulation debris suspected to be ACM exists in

> chases, plenums, above ceilings and within induction unit's[2] enclosures throughout the building. This debris shall be assumed to exist wherever ACM is indicated in the building.

The contracting officer then wrote to Grunley on May 8, "The discovery of asbestos containing debris in the pipe chases is not an unforeseen condition as noted in the RFI 175 response . . . . You are hereby directed to proceed with this work."

On January 4, 2007, Goel sent the following RFI to Grunley:

> Only one riser between any of the windows with ACM is identified on the G400 (Hazmat) drawings with no ACM on any of the horizontal runs. The second chase had documented asbestos within it as well as a horizontal run of ACM leading to the induction unit. In continuation of previous RFI's regarding chase contamination, the debris from the horizontal piping is a changed condition along with ACM at the wall, on the walls near the horizontal sections and mixed with the masonry products that were placed in the chases as well as the entire second chase.

In an electronic mail message which GSA says is dated January 5, 2007 (but whose date is not apparent from the exhibit to GSA's motion), Grunley's project manager told Goel, "Grunley wishes to point out that Goel has never previously brought to Grunley's attention that Goel thought there were 'extra' risers. Regarding the second item, the residual ACM debris is a result of Goel's failure to perform the complete abatement of contract work while the area was in containment." Grunley's project manager testified at his deposition that the issue raised by Goel on January 4 was not raised earlier and that Goel had completed "a substantial amount of the work" by that date.

Nevertheless, Grunley evidently passed on this RFI (now denominated RFI 408) to GSA, for the agency responded on January 14, "It appears that the contract drawings show fewer than 50% of the pipe riser locations within the exterior walls. . . . This is not a RFI;

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[2] The parties use the terms "induction" and "non-induction" in their motions, but provide us no evidence as to their meaning. Grunley tells us, "The parties refer to the ACM found above the ceilings and bathrooms wall chases as the 'non-induction unit ACM.'" GSA refers to "non-mechanical areas of the project, such as the bathrooms (also referred to as the non-induction unit claim)." Are these attorney-offered definitions consistent with each other? We cannot tell. Definition of these terms will have to await further development of the record.

it is a change order notification. Please submit change order through proper channels. Please note that this work is complete."

By letter dated March 6, 2007, Goel sent to Grunley a request for $900,488.47 "for additional work . . . due to changed conditions and increased quantities of ACM on ACM [sic] not identified in the contract drawings of specification within risers and other locations." Goel explained:

> On the G400 drawings and the Mech demolition drawings, only one pipe in one riser per induction unit is depicted with no ACM on the horizontal piping identified. In actuality, multiple pipes existed on each side of the induction unit (total of 3) and horizontal piping with embedded ACM existed in the terracotta wall next to the induction unit where is was [sic] utilized like a fire-stop. Additionally, ACM was over-installed (not debris) on the brick walls and as previously notified by Goel Services, poor construction practices of the terracotta contractor dumped their spoils into the chase destroying the ACM on the unidentified horizontal runs. This created significant redo and redesign of the abatement procedures including sealing the chases, opening terra cotta that was not shown or identified to be removed.

Grunley forwarded this letter to GSA by letter dated March 8, 2007, along with a cost proposal seeking $1,074,307, the sum of Goel's alleged costs and Grunley markups.

Additional correspondence between Goel and Grunley ensued. By letter dated January 14, 2008, Grunley told Goel that it had "reviewed your claim and find[] it fundamentally flawed, supporting data to be inaccurate and supporting data to be incomplete." Among other criticisms, Grunley stated:

> Please explain why the combination of the "NOTE TO CONTRACTOR" on all the hazmat drawings that refers you to MEP demolition drawings for coordination of piping demolition, and corresponding note D on the plumbing demolition drawings, entitles you to any additional ACM removal costs[.]
>
> . . . .
>
> Goel failed to promptly, and before the conditions were disturbed, give written notice to the Contracting Officer of subsurface or latent physical conditions which differed materially from those indicated in the contract. [This is a] fundamental Government procedure[] that Goel should have performed.

Nevertheless, Grunley sent to GSA by letter dated September 12, 2008, a revised version of Goel's request, in the amount of $2,104,068 ($1,753,130 in Goel costs plus Grunley markups). Goel costs included $1,335,252.84 for "Induction Unit System Mechanical risers/runouts extra work," $367,148.75 for "Plumbing and non-induction unit mechanical systems extra work," and $60,728.25 for "Proposal Preparation Time as requested in December 2007 meeting by GSA." Grunley said that this request covered "increased quantities of asbestos containing materials, asbestos contaminated materials removal, and demolition work relative to pipe risers and branches for HVAC [heating, ventilation, and air conditioning] pipe serving induction units, and plumbing pipe systems in phase 1." By letter dated May 17, 2010, Grunley told GSA that Goel had requested a contracting officer's final decision on this matter and that Grunley also wanted such a decision. Grunley certified the claim on that date.

A contracting officer's decision has not been issued on this claim. Grunley appealed from the deemed denial of the claim, and the Board docketed the appeal as CBCA 4545.

GSA's project manager testified at his deposition that "[m]y opinion . . . [is] that there is some area of entitlement in their claim. . . . There were some areas that were identified as impacted work . . . that could not be identified on the drawings."

Markups

The contract includes a clause labeled "GSAM [General Services Administration Acquisition Manual] 552.243-71 – Equitable Adjustments (Apr 1984)." This clause provides, in pertinent part, that for work involving contemplated changes covered by a request for an equitable adjustment,

> The allowable overhead shall be determined in accordance with the contract cost principles and procedures in Part 31 of the Federal Acquisition Regulation (48 CFR Part 31) in effect on the date of this contract. The percentages for profit and commission shall be negotiated and may vary according to the nature, extent and complexity of the work involved, but in no case shall exceed the following unless the contractor demonstrates entitlement to a higher percentage:

	Overhead	Profit	Commission
To Contractor on work performed by other than his own forces	---	----	10%
. . . .			
To Contractor and/or the subcontractors for that portion of the work performed with their respective forces	To be Negotiated	10%	---

The contract also includes a clause entitled "Forward Pricing for Changes" which states:

> The following rates and prices will be utilized for changes in accordance with changes clause (FAR 52.243-4) and equitable adjustment clause (GSAM 552.243-71)
>
> OVERHEAD PRICES
>
> Overhead (Home Office) 7%.

Discussion

Each party has moved for partial summary relief in these cases. Resolving a dispute on such a motion is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, to defeat a motion for summary relief, the nonmoving party must come forward with specific facts showing the existence of a genuine issue for trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999).

In CBCA 4539, Grunley claims that it is entitled to an equitable adjustment in the amount of $320,964 to compensate the contractor for additional amounts it was forced to pay in subcontractor wages and benefits as a consequence of a wage determination that the Department of Labor made pursuant to a GSA request, but later rescinded. Grunley maintains that it paid for work at higher rates at GSA's direction, and that the duration of pay at those higher rates was lengthened by GSA's delays in transmitting correspondence as to the matter. GSA contends that the claim should be denied because "the backcharges assessed against Goel by Grunley, and which form the basis for the costs that Goel seeks to recover, were the result of Goel's unjustified failure to perform, which Grunley acknowledges to have constituted a breach of Goel's subcontract."

In CBCA 4545, Grunley claims that it is entitled to an equitable adjustment in the amount of $2,104,068 to compensate for removing quantities of asbestos containing materials which were additional to those shown in the contract drawings, and therefore constituted a differing site condition. Grunley maintains that it relied on GSA-provided drawings in preparing its offer and that its discovery, upon opening chases, of more ACM than was shown on the drawings caused it to perform extra work at extra cost. Grunley says that it notified GSA of the differing site conditions on April 30, 2006, in what came to be known as RFI 175, and that GSA never investigated the extent of the additional ACM and has never disputed the existence of ACM that was not shown on the drawings. GSA contends that this claim should be denied because the contractor did not inform it of the alleged differing site conditions until January 2007, by which time a substantial amount of the asbestos had been removed. Thus, says the agency, it "was prejudiced by Goel's failure to provide timely notice to GSA." Further, "based upon the unambiguous contract terms, the ACM encountered by Goel was not a differing site condition." Additionally, says GSA, if there is entitlement to any of the sum claimed, the markups sought by Grunley must be reduced because they exceed those permitted by the contract.

Wage rate claim (CBCA 4539)

"[W]here the Government requires a contractor to pay higher wages than he was obligated to do under his contract, the United States is liable for the additional costs." *Black, Raber-Kief & Associates v. United States*, 357 F.2d 355, 361 (Ct. Cl. 1966); *see also A. J. Paretta Contracting Co. v. United States*, 109 Ct. Cl. 324, 351 (1947); *J. R. Cianchette*, ASBCA 4508, 60-2 BCA ¶ 2814. That is what happened here: GSA directed Grunley to pay workers involved in asbestos abatement the wages and benefits for hazardous material handlers, rather than the appropriate, lower wages and benefits for unskilled laborers. To the extent that Grunley's motion seeks a ruling that the contractor is entitled to be paid the difference between wages and benefits it and/or its subcontractors paid workers for necessary

asbestos abatement work and wages and benefits which would have been paid at the lower rates, the motion is granted.

GSA's own motion, as well as its opposition to Grunley's motion, is misfocused in two significant ways. First, the agency is incorrect in asserting that the claim is from subcontractor Goel, not prime contractor Grunley. Although the claim was crafted by Goel, it was submitted by Grunley. While the documented costs were those incurred by Goel, the claim itself is for "the additional labor costs associated with the GSA's improper wage decision," compensation for which is due to Grunley no matter whether those costs were incurred in the first instance by a subcontractor or not.

Second, the agency seems to believe that the costs sought were incurred only because Goel refused to comply with directions from the contracting officer, passed through by Grunley. It is certainly clear that Grunley was displeased with Goel's recalcitrance and even threatened to terminate Goel's subcontract for default. It is possible that Goel's performance caused Grunley to devote more time to asbestos abatement (in part through use of Basic's efforts) than would have been necessary if Goel had been more efficient. Grunley has the burden of proving that it and its subcontractors prosecuted the work in an appropriate manner, taking a reasonable amount of time. This consideration goes to the amount of recovery, however, not entitlement.

GSA is on firmer ground in questioning not only Grunley's assertion of the time the asbestos abatement reasonably took, but also the difference of $12.81 per hour claimed as the differential between costs incurred due to the contracting officer's direction to pay the higher wages and benefits and the costs which should have been incurred at the lower wage and benefit rates. It is not apparent why the difference should be so great, given that the difference in wage and benefit rates was only $3.72 per hour. Grunley has the burden of substantiating the claimed, much larger difference. Additionally, to the extent that Grunley seeks recovery of the costs of proposal preparation and legal fees – which were merely estimated in the original request for equitable adjustment and may have been dropped from the claim – it has the burden of demonstrating both entitlement and amount as to those costs.

Both parties have spent considerable effort in discussing whether GSA is responsible for the length of time during which Grunley and its subcontractors had to pay employees the inappropriate, higher wages and benefits. A ruling on this issue is unnecessary. The key fact is that the excessive costs were incurred over whatever period they were incurred, and we find that GSA is responsible for the difference in costs, for reasonable prosecution of the asbestos abatement work, over that period. What that difference is remains to be decided.

Additional asbestos claim (CBCA 4545)

Grunley's claim as to abatement of additional asbestos is presented as a type I differing site conditions claim. The Court of Appeals for the Federal Circuit has explained:

> Type I differing site conditions consist of "subsurface or latent physical conditions at the site which differ materially from those indicated in th[e] contract." FAR § 52.236-2(a)(1) (1994). To establish entitlement to an equitable adjustment due to a Type I differing site condition, a contractor must prove, by preponderant evidence, that: the conditions indicated in the contract differ materially from those actually encountered during performance; the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding; the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and the contractor was damaged as a result of the material variation between expected and encountered conditions.

Comtrol, Inc. v. United States, 294 F.3d 1357, 1362 (Fed. Cir. 2002) (citing *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998)). The Differing Site Conditions clause –

> exists precisely in order to take at least some of the gamble on subsurface conditions out of bidding: instead of requiring high prices that must insure against the risks inherent in unavoidably limited pre-bid knowledge, the provision allows the parties to deal with actual subsurface conditions once, when work begins, more accurate information about them can reasonably be uncovered.

Metcalf Construction Co. v. United States, 742 F.3d 984, 996 (Fed. Cir. 2014) (citing *Foster Construction C.A. & Williams Brothers Co. v. United States*, 435 F.2d 873, 887 (Ct. Cl. 1970) (quotations omitted)).

Additionally, as required by the clause, which was included in the contract, the contractor must "promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer" of the differing conditions. A claim of this variety is not allowed, the clause states, "unless the Contractor has given the written notice required." "The purpose of the notice requirement is to provide the government with the opportunity to investigate and exercise some control over the cost and effort associated with resolving the problem." *Bay West, Inc.*, ASBCA 54166, 07-1 BCA ¶ 33,569, at 166,300. "When a contractor fails to furnish information to the Government that will allow the Government an opportunity to

relax the contract requirements before proceeding to incur extra costs, the contractor's claim will fail." *David Boland, Inc.*, ASBCA 48715, et al., 97-2 BCA ¶ 29,166, at 145,025.

The parties disagree as to two key elements of the claim – first, what was indicated on the contract drawings, and second, whether Grunley gave GSA sufficient notice of what the contractor considers differing site conditions.

With regard to the drawings, Grunley maintains that it and subcontractor Goel properly relied on the G400 series of drawings – the hazardous materials, or hazmat drawings – as showing all the asbestos to be abated. The MEP drawings, says Grunley, were for the purpose of showing "the locations and extent of the mechanical systems that required removal." According to the contractor, "If Grunley encountered ACM in areas other than the locations depicted on the Abatement Drawings [by which it means the hazmat drawings], then it encountered a differing site condition." GSA, on the other hand, contends that reading the contract as a whole, it is clear that the MEP drawings, as well as the hazmat drawings, show asbestos to be abated.

GSA's approach is correct. As the Board has written, with citation to numerous Supreme Court and Court of Appeals for the Federal Circuit decisions:

> In interpreting the language of a contract, reasonable meaning must be given all parts of the agreement so as not to render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract. In other words, an interpretation that gives a reasonable meaning to all parts will be preferred to one which leaves a portion of the contract useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.
>
> Contract language should be given the plain meaning that would be derived by a reasonably intelligent person acquainted with the contemporaneous circumstances. The contract must be construed to effectuate its spirit and purpose, giving reasonable meaning to all of its parts.

Electronic Data Systems, LLC v. General Services Administration, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009) (citations and quotations omitted).

It is true, as Grunley says, that in a solicitation amendment, GSA told prospective offerors that "[h]azmat drawings and specifications are provided . . . to show locations of hazardous materials," and that other drawings "show all material to be removed from the project including hazardous materials indicated in the hazmat drawings and specifications."

The hazmat drawings, however, show risers, not horizontal piping, and they tell the contractor to refer to MEP drawings with regard to asbestos removal. The MEP drawings show the horizontal piping, and piping of the diameter of those pipes is said (in an appendix to the specifications) to be located "[t]hroughout the building." Ignoring all this information would "leave[] a portion of the contract useless, inexplicable, inoperative, void, insignificant, meaningless, [and] superfluous," so it may not be done. The MEP drawings, as well as the hazmat drawings, show asbestos to be removed. (This conclusion should come as no surprise to Grunley, since the contractor expressed the same thought to Goel in January 2008.) To the extent that the cross-motions address this matter, GSA's motion is granted and Grunley's is denied.

We now turn to the second key element addressed by the parties in their cross-motions, whether Grunley gave GSA sufficient notice of what the contractor considers differing site conditions. Grunley issued two RFIs which the parties consider critical to this matter. In April 2006, it forwarded to GSA RFI 175 from Goel, which stated:

> It appears that the chases demolition of the terracotta next to the windows and the bathrooms has significant delaminating ACM materials from the pipes and fittings in these chases. In several areas, chases have been opened and extensive unforeseen asbestos contamination [exists].

In January 2007, the contractor forwarded RFI 408, in which Goel maintained:

> Only one riser between any of the windows with ACM is identified on the G400 (Hazmat) drawings with no ACM on any of the horizontal runs. The second chase had documented asbestos within it as well as a horizontal run of ACM leading to the induction unit. In continuation of previous RFI's regarding chase contamination, the debris from the horizontal piping is a changed condition along with ACM at the wall, on the walls near the horizontal sections and mixed with the masonry products that were placed in the chases as well as the entire second chase.

According to Grunley, RFI 175 gave GSA plenty of notice that asbestos additional to that shown in the contract drawings and specifications had to be removed. Even if RFI 175 did not provide sufficient notification, Grunley continues, GSA was not prejudiced by the lack of advice, for it never investigated the extent of additional asbestos or the extra work Goel and Basic performed to remove it. According to GSA, RFI 175 addressed only ACM debris that was mixed with terra cotta building materials, and RFI 408 was the contractor's first notice of additional asbestos at other locations. By the time Grunley sent RFI 408, GSA maintains, because a substantial amount of the asbestos abatement work had been performed,

the agency was thoroughly prejudiced because it had no opportunity to examine the pre-existing conditions or to monitor the work Grunley's subcontractors undertook.

GSA suggests that if RFI 175 had concerned additional asbestos throughout the building, there would have been no need for Grunley to issue RFI 408. Although this might be true, the scope of asbestos referenced in RFI 175 is not clear. Indeed, statements made by each party, and contained in the record referenced by the parties in their motions, provide support for the opposing party's position. Grunley told Goel, in response to RFI 408, that "Goel [had] never previously brought to Grunley's attention that Goel thought there were 'extra' risers" and that "the residual ACM debris is a result of Goel's failure to perform the complete abatement of contract work while the area was in containment." Grunley later complained to its subcontractor that "Goel failed to promptly, and before the conditions were disturbed, give written notice to the Contracting Officer of subsurface or latent physical conditions which differed materially from those indicated in the contract." GSA, on the other hand, responded to RFI 408 by saying that "[i]t appears that the contract drawings show fewer than 50% of the pipe riser locations within the exterior walls" and that performance of work additional to that shown in the contract was a matter to be discussed through a change order. The agency's project manager testified that in his opinion, "there is some area of entitlement in their claim. . . . There were some areas that were identified as impacted work . . . that could not be identified on the drawings."

At this stage of the proceedings, where we are considering motions for summary relief, we may not weigh the evidence. We are thus not in a position to determine the scope of asbestos referenced in RFI 175, which of the parties' statements in opposition to their current positions is more valid than the others, or what additional information might be persuasive on the issue. That sort of determination may be made only after the parties present more evidence and submit the case to us for a decision on the merits. We deny both cross-motions for summary relief as to when Grunley notified GSA of the additional asbestos for removal of which it seeks compensation.

There remains one issue presented in a motion for summary relief, which has an impact on the amount of recovery (if any) for the additional asbestos claim before us in CBCA 4545. This is the extent of markups to which prime contractor Grunley is entitled on subcontractor Goel's claim. GSA asserts that contract clause GSAM 552.243-71 – Equitable Adjustments (Apr 1984) should govern this matter. According to this clause, the allowable markup to the contractor on work performed by other than its own forces is a commission of no more than 10% unless the contractor demonstrates entitlement to a higher percentage. In response to GSA's motion, Grunley maintains that the Forward Pricing for Changes clause should govern. This clause says that for changes in accordance with the GSAM 552.243-71 Equitable Adjustments clause, the rate of 7% will be used for the contractor's overhead.

Thus, says Grunley, it "is entitled to the full combined mark-ups as allowed under the contract and by regulation, namely 10% plus 7%, for a composite of 17.7%."

We agree with GSA, and grant its motion for summary relief, on this matter. The two clauses must be read together. GSAM 552.243-71 allows a maximum commission of 10%, and no overhead whatsoever, to the contractor on work performed by other than its own forces. This clause allows markups for overhead and profit to the contractor only on work performed with its own forces, and the clause prescribes that the rate for overhead is to be negotiated. The Forward Pricing for Changes clause tells us what the negotiated overhead rate will be. The Forward Pricing clause does not override GSAM 552.243-71, however, in applying that rate to situations in which the latter clause does not allow for an overhead markup. To the extent that Grunley is entitled to an equitable adjustment for additional work that Goel performed, Grunley's markup on the amount we determine must be limited to a commission of 10%. *See Reliance Insurance Co. v. United States*, 931 F.2d 863, 866-67 (Fed. Cir. 1991) (enforcing contract limitations on markups); *Sefco Constructors,* VABCA 2747, et al., 93-1 BCA ¶ 25,458, at 126,804 (1992) (same).

Decision

Each party's cross-motion for partial summary relief is **GRANTED IN PART**, as prescribed above.

STEPHEN M. DANIELS
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

BEVERLY M. RUSSELL
Board Judge