



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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CROSS-MOTIONS FOR SUMMARY RELIEF DENIED:  
July 9, 2018

CBCA 5272

UNITED FACILITY SERVICES CORPORATION  
dba EASTCO BUILDING SERVICES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Todd J. Canni of Pillsbury Winthrop Shaw Pittman, LLP, Washington, DC; Michael R. Rizzo of Pillsbury Winthrop Shaw Pittman, LLP, Los Angeles, CA; and Alexander B. Ginsberg of Pillsbury Winthrop Shaw Pittman, LLP, McLean, VA, counsel for Appellant.

Catherine Crow and Kristi Singleton, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **ZISCHKAU**, and **LESTER**.

**LESTER**, Board Judge.

Pending before the Board are the parties' cross-motions for summary relief, filed March 9 and 30, 2018. In the first-filed motion, respondent, the General Services Administration (GSA), asks us to find that, even though an equipment inventory list that

GSA included in a solicitation for facilities maintenance failed to identify all of the equipment that would have to be serviced under the anticipated contract, GSA is not responsible for any unanticipated performance costs that the contract awardee incurred because two provisions in the resulting contract – a clause requiring the contractor to make a pre-bid site visit and inspection, and a disclaimer indicating that the list may contain some errors – placed upon the contractor the risk of any defects in the equipment list. Conversely, in the second motion, appellant, United Facility Services Corporation doing business as (dba) Eastco Building Services (Eastco), asks that we find GSA’s inclusion of the equipment list in the solicitation to constitute a warranty regarding the facility’s equipment quantities that overrides the contract’s disclaimer and pre-bid site visit obligations.

Both parties have gone too far in attempting to excuse their own pre-award contract development failures. Under a proper interpretation of the contract, GSA is liable for increased costs that Eastco incurred for having to service unlisted equipment that Eastco could not reasonably have identified during its site visit. Nevertheless, because GSA expressly identified in the solicitation the possibility of some errors in the equipment list, Eastco cannot recover damages for maintaining unlisted equipment that it could or should reasonably have identified during a proper site visit. For the reasons discussed below, we deny both parties’ motions for summary relief, and we also address the parties’ questions about the type of proof that Eastco must provide to quantify any damages.

#### Statement of Uncontested Facts

1. Prior to December 2011, GSA awarded a contract (no. GS-21F-0129W) under the Federal Supply Schedule (FSS) for facilities maintenance and management (schedule-03FAC) to Eastco Building Services, Inc., an entity which later became United Facility Services Corporation dba Eastco Building Services.

2. On or about December 17, 2011, GSA issued solicitation no. GS-04P-12-EW-A-0043 (solicitation) to schedule-03FAC holders. Through the solicitation, GSA sought firm-fixed-price quotations for a blanket purchase agreement (BPA) for operations and maintenance services at three federal buildings in Miami, Florida. Under task orders issued pursuant to the BPA, the awardee would be required to “provide management, supervision, labor, materials, equipment, and supplies and [would] be responsible for the efficient, effective, economical, and satisfactory operation, scheduled and unscheduled maintenance, and repair of equipment and systems located within the property line” of the

three buildings. Appeal File, Exhibit 3 at 19.<sup>1</sup> Pursuant to section C-10 of the solicitation, the contract awardee would be “responsible for maintaining and updating the inventory of building equipment, to include nomenclature, part number, serial number, manufacturer name, component name and other data of value for maintaining the equipment, or defined as attributes in the required [computerized management maintenance system (CMMS)].” *Id.* at 38.

3. In section J.3 of the solicitation, GSA included a written equipment inventory list for three federal buildings. This inventory list was drafted by the incumbent contractor who was performing operations and maintenance at the buildings, although that fact is not identified in the solicitation. The equipment list for one of the three federal buildings to be serviced included the floor number, room number, and room name for each piece of equipment listed. Exhibit 2 at 1-72. The list for the second building identified the floor numbers, but not room numbers, for the identified equipment. *Id.* at 84-94. The list for the third building did not identify floor or room information for any listed equipment. *Id.* at 73-83.

4. A “note” within section J.3 of the solicitation contained the following language about the offeror’s ability to rely on the inventory list when developing its offer:

Note: The contractor, at the time the contractor is developing an offer in anticipation of the contract, is responsible for assessing the facility equipment inventory, condition of the equipment and systems, and effort needed to operate and maintain all the equipment and systems. The contractor is solely responsible for assessing the cost and effort needed to meet contract requirements. *Equipment inventory and any other maintenance records provided for review of offerors are provided in good faith for informational purposes only, but may contain some errors. The contract price will NOT be adjusted on the basis of errors in any government information reviewed by the contractor when preparing the offer.*

Exhibit 3 at 115 (emphasis added).

5. The solicitation also provided that the “General Services Administration will utilize the [Building Owners and Managers Association International (BOMA)] Experience Exchange Report (BEER) and/or Logistics Management Institute (LMI) Benchmark Data and Regional market analysis to determine a reasonable per square foot cost for these

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<sup>1</sup> All exhibits referenced in this decision are found in the appeal file.

services,” Exhibit 3 at 17, although neither the BEER nor the LMI market analysis were attached to the solicitation.

6. The solicitation contained the “Site Visit” clause set forth at Federal Acquisition Regulation (FAR) 52.237-1 (48 CFR 52.237-1 (2011)), which includes the following language:

Offerors or quoters are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable. In no event shall failure to inspect the site constitute grounds for a claim after contract award.

Exhibit 3 at 185.

7. On or about January 11, 2012, the bidders, including Eastco, participated in site visits to the federal buildings prior to submitting bids. Tours were given of the main machinery rooms (chillers and compressors), generator rooms, fire panel rooms, roofs, switchgear rooms, fire pump rooms, and three or four air handler rooms in each building, which were to serve as examples of what was in the building. The tours included open courtrooms and general offices, but did not include rooms where court was in session. During the tours, GSA did not open enclosed ceilings for viewings, but the record does not tell us whether Eastco or other offerors requested, but were denied, above-ceiling access during the visit. Eastco did not complain about the length or scope of the site visit before submitting its offer.

8. During the solicitation process, some offerors raised questions during the question and answer (Q&A) period about the solicitation’s inventory list. GSA responded to Question 11, which included a comment (by an offeror other than Eastco) about alleged visibly obvious defects in the equipment inventory list, as follows:

[Question:] Can GSA provide a copy of the building equipment inventories for each facility in Excel format? *After touring the facilities during the pre-proposal meeting it is visibly obvious the inventories in the solicitation package are not accurate.* Can GSA provide Excel format inventories that are more reflective of the systems presently in the facilities? [Answer:] The inventories provided in the presolicitation meeting and solicitation are all that are available. An Excel format was provided.

Exhibit 8 at 4 (emphasis added). GSA responded to Question 82, another question related to the inventory list, as follows:

[Question:] Reference the inventory for FL0010ZZ. Please provide quantities for the listed items. [Answer:] Each line entry in the attachment that was provided is a quantity of one unless noted.

*Id.* at 11. The Q&As were incorporated into the solicitation by modification effective January 18, 2012.

9. On February 8, 2012, Eastco submitted a firm-fixed-price bid of \$68,945 per month.

10. On or about November 1, 2012, GSA notified Eastco that it had been selected for the award of the BPA, with an initial term of December 1, 2012, to November 30, 2013, plus four option years running through November 30, 2017. On or about November 30, 2012, GSA awarded to Eastco a task order (no. GS-04P-12-EW-A-0007) for one year of the work covered by the BPA, with a right to exercise up to four one-year options.

11. Immediately after contract performance began, Eastco, as required by section C-10 of its contract, conducted a full survey of the three buildings and discovered that the amount of inventory present at the building differed from the inventory amounts listed in the solicitation. Through an email message on March 27, 2013, Eastco notified GSA of the inventory that it had discovered at each of the buildings and provided GSA with an Excel spreadsheet containing what it considered to be a list of the complete inventories for each of the three buildings. Exhibit 21. Eastco alleges that it found thousands of additional inventory pieces that were not captured on the solicitation's inventory list, although GSA suggests that many of the additional items identified are merely subcomponents of previously listed pieces of equipment without which the listed equipment could not function.

12. Eastco did not immediately seek additional compensation for maintaining what it contends are additional pieces of equipment unidentified in the solicitation.

13. On or about August 28, 2015, GSA chose not to exercise the third and fourth option years under the BPA and task order.

14. On December 28, 2015, Eastco submitted to GSA a certified claim seeking a contract adjustment of \$758,536.72 for servicing what Eastco alleged to be a substantially larger inventory of equipment in the buildings than it had anticipated based upon the information provided in the solicitation.

15. On February 16, 2016, the GSA contracting officer issued a decision denying Eastco's claim. Eastco filed an appeal of the contracting officer's decision with the Board, which was docketed on April 8, 2016.

16. On October 11, 2016, Eastco filed a four-count amended complaint alleging entitlement to an equitable adjustment for a constructive change caused by the solicitation's "outdated," "erroneous," and "materially inaccurate" equipment inventory list. GSA filed its answer on November 11, 2016, denying that it had breached Eastco's contract or that Eastco was entitled to any equitable adjustment or monetary damages.

17. Subsequently, GSA filed a motion to dismiss this appeal for lack of jurisdiction, which the Board denied by decision dated March 2, 2017. *See Eastco Building Services v. General Services Administration*, CBCA 5272, 17-1 BCA ¶ 36,670. The parties undertook discovery and then, on November 8, 2017, asked the Board to suspend proceedings to allow the parties to discuss the possibility of an amicable resolution, a request that the Board granted.

18. On February 6, 2018, the parties reported that they could benefit in their settlement negotiations from the Board's resolution of two dispositive legal issues, which they wanted to present through cross-motions for summary relief: (1) whether the language in section J.3 indicating that the "Equipment Inventory List" might contain "some errors," along with the solicitation requirement that Eastco undertake a pre-bid site visit, effectively barred a claim based upon errors in the inventory list; and (2) if not, whether Eastco can calculate damages by utilizing published guidebooks to estimate labor hours associated with the additional maintenance work. At the parties' request, the Board instituted an expedited briefing schedule. The parties have completed summary relief briefing, each seeking judgment in its favor on the contract interpretation issue, and each party has filed a statement of uncontroverted facts and responded to the opposing party's proposed facts.

19. GSA asserts that, despite discovery requests seeking payroll records or other proof of alleged damages, Eastco has not produced any documentation showing that it actually spent more money to service the alleged additional inventory than it anticipated when it submitted its bid. Respondent's Statement of Uncontested Facts ¶¶ 14, 15. GSA further alleges that Eastco's damages calculation is based solely on what Eastco now states it would have bid if the inventory list had been more complete. *Id.* Eastco disputes GSA's allegations, asserting that it has "used an acceptable and highly credible method of estimating the increased costs that resulted from GSA's inaccurate inventory listing," calculating its claimed damages "by identifying the number of additional pieces of equipment it found at the buildings and us[ing] the GSA guidebook to calculate the additional maintenance required for each piece of equipment." Appellant's Statement of Genuine Issues ¶ 15.

## Discussion

### Standard of Review

“Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts.” *Ahtna Environmental, Inc. v. Department of Transportation*, CBCA 5456, 17-1 BCA ¶ 36,600, at 178,303 (2016) (quoting *Au’ Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727, at 174,890). “‘The moving party bears the burden of demonstrating the absence of genuine issues of material fact,’ and ‘[a]ll justifiable inferences must be drawn in favor of the non-movant.’” *Id.* (quoting *General Heating & Air Conditioning, Inc. v. General Services Administration*, CBCA 1242, 09-2 BCA ¶ 34,256, at 169,264). “A fact is considered to be material if it will affect the Board’s decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing.” *Id.* (quoting *General Heating*, 09-2 BCA at 169,264). “When both parties have moved for summary relief, as here, each party’s motion will be evaluated on its own merits and all justifiable inferences will be resolved against the party whose motion is under consideration.” *SBBI, Inc. v. International Boundary & Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,722, at 178,813-14.

### The Parties’ Competing Pre-Bid Obligations

#### I. Eastco’s Site Visit Obligations

Under its contract, Eastco had an obligation to conduct a pre-bid site visit and to account for any issues that, as an experienced contractor, it reasonably should have identified through that visit. The contract at issue here contains a standard “Site Visit” clause, which expressly notifies offerors that, prior to submitting an offer, they are “expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable.” 48 CFR 52.237-1.

“[A] primary purpose of the site inspection [is] to ascertain what obstacles there would be toward the performance of the contract” and to place upon the contractor the burden of identifying them. *Ambrose-Augusterfer Corp. v. United States*, 394 F.2d 536, 546 (Ct. Cl. 1968). Pursuant to such a clause, the contractor “is charged with the knowledge that a reasonable site investigation would impart to a reasonably prudent contractor knowledgeable in the basic nature of the work to be performed.” *Stenberg Construction Co.*, IBCA 520-10-65, 72-1 BCA ¶ 9459, at 44,013; *see H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1346 (Fed. Cir. 1998) (“It is well-settled that a contractor is charged with knowledge of the

conditions that a pre-bid site visit would have revealed.”). During such a visit, the contractor “must observe what it had reasonable opportunity for knowing, and is presumed to know those things which reasonable diligence would bring to its attention.” *W.G. Cornell Co. of Washington, Inc.*, GSBCA 597, 1963 WL 802 (Jan. 31, 1963). An adequate site investigation includes asking questions about relevant matters not otherwise disclosed or conducting more thorough inspections if, through its initial investigation, the contractor uncovers clues that its original assumptions about the site’s conditions are suspect. *Midwest Environmental Control, Inc.*, LBCA 93-BCA-12, 98-2 BCA ¶ 30,058, at 148,697-99 (1996); *Vitro Corp. of America*, IBCA 376, 67-2 BCA ¶ 6536, at 30,368. If the contractor fails properly to fulfill its site visit obligations and on-site conditions differ from what it expected, “the contractor has no claim [against the Government] if the missing information would have been obtained through the inquiries contemplated by the [clause].” *Hunt & Willett, Inc. v. United States*, 351 F.2d 980, 985 (Ct. Cl. 1964).

Nevertheless, “[a] site visit does not exist in a vacuum.” *Pacific Western Construction, Inc.*, DOT CAB 1084, 83-1 BCA ¶ 16,337, at 81,199. A contractor can be barred from an equitable adjustment for conditions that differ from those described in the contract only if it “knew, or reasonably should have known[,] of the existence of the condition prior to bidding.” *Metal Trades, Inc.*, ASBCA 41583, 94-2 BCA ¶ 26,611, at 132,395 (1993). “[T]here are often limitations on what can be learned” during such a visit, *Triad Mechanical, Inc.*, IBCA 3393, et al., 97-1 BCA ¶ 28,771, at 143,573, and bidders are not obligated “to discover hidden . . . conditions unavailable to any reasonable pre-award inspection.” *Elliott Construction Co.*, ASBCA 23483, et al., 81-2 BCA ¶ 15,222, at 75,389; see *Lee R. Smith*, ASBCA 11135, 66-2 BCA ¶ 5857, at 27,181 (contractor cannot be charged “with knowledge of conditions at the site that could not be discovered by a visual examination of the site”). Further, if the Government denies or limits access to portions or all of the site during a site visit, or otherwise prevents a complete site inspection, that limitation affects the extent to which conditions at the site are viewed as “reasonably discoverable.” *Boland & Martin, Inc.*, ASBCA 8503, 1963 BCA ¶ 3705, at 18,514; see *Weston Solutions, Inc.*, PSBCA 5407, 09-1 BCA ¶ 34,106, at 168,649; *Hercules Construction Co.*, VABCA 2508, 88-2 BCA ¶ 20,527, at 103,772-73.

The determination of whether a site visit was reasonable is typically an inherently fact-based determination that depends upon the circumstances. *Key, Inc.*, IBCA 690-12-67, 68-2 BCA ¶ 7385, at 34,353.

There is no dispute that, in this case, an Eastco representative undertook a site visit. The record does not indicate, however, what the scope of that visit was, what the representative did during the visit, or whether and the extent to which the representative attempted to verify the quantity and types of equipment in the three facilities to be maintained

under the contract. Eastco argues, though, that any site visit requirements were essentially negated with regard to the equipment inventory because Eastco was entitled to rely upon GSA's representations in the solicitation listing that inventory. We discuss GSA's representations and their effect upon Eastco's site visit obligations below.

## II. GSA's Representations and Disclaimers

In its solicitation, GSA listed the inventory of equipment in the three federal buildings to be maintained, but indicated that the contract awardee was responsible for assessing the facility equipment inventory, that GSA's list was "for information purposes only," that the list might contain "some errors," and that, in any event, GSA would not be responsible through contract price adjustments for "errors in any government information reviewed by the contractor when preparing the offer." Eastco argues that, by including the inventory list in the solicitation and contract, GSA made a representation as to the equipment in the buildings, which limited Eastco's site inspection obligations, and that GSA is liable for mistakes in that list. GSA, conversely, argues that it disclaimed any responsibility for the accuracy of the list and effectively shifted all risks associated with ascertaining what equipment was in the buildings to Eastco.

To be sure, if GSA made representations in its solicitation about the facilities to be maintained, it had a responsibility to ensure that those representations were accurate. "A contractor can recover damages under a contract for misrepresentation by the Government in the contract documents." *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 728 (Fed. Cir. 1997). "Misrepresentation occurs when the government misleads a contractor by a negligently untrue representation of fact, or fails to disclose information it has a duty to disclose." *D.F.K. Enterprises, Inc. v. United States*, 45 Fed. Cl. 280, 285 (1999) (quoting *Meyers Cos. v. United States*, 41 Fed. Cl. 303, 311 (1998)). The Government will be liable if the contractor "show[s] that the Government made an erroneous representation of a material fact that the contractor honestly and reasonably relied on to the contractor's detriment." *T. Brown Constructors*, 132 F.3d at 729; see *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 667 (Fed. Cir. 1992) (Government is liable for misrepresentation in contract documents if "the party seeking relief both relied upon such misrepresentation, and was damaged thereby"). It matters not whether the Government's misrepresentation was innocent or intentional: it is the misrepresentation's effect upon the innocent contractor that establishes the Government's liability. *Roseburg Lumber*, 978 F.2d at 667; *Morrison-Knudsen Co. v. United States*, 345 F.2d 535, 539 (Ct. Cl. 1965); *D.F.K. Enterprises*, 45 Fed. Cl. at 285-86.

Nevertheless, "[a] contractor cannot be eligible for an equitable adjustment for changed conditions unless the contract indicated what those conditions would supposedly

be.” *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987) (quoting *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)). “Determining whether a contract contained indications of,” or an affirmative representation about, “a particular site condition ‘is a matter of contract interpretation,’” and “a proper technique of contract interpretation is for the [tribunal] to place itself into the shoes of a reasonable and prudent contractor and decide how such a contractor would act in interpreting the contract documents.” *H.B. Mac*, 153 F.3d at 1345 (quoting *P.J. Maffei*, 732 F.2d at 916). Further, even if the Government makes an affirmative misrepresentation, “[r]eliance is unreasonable when a contractor has reason to doubt the accuracy of [the] representation, such as knowledge of a flaw in the information underlying the representation.” *International Technology Corp. v. Winter*, 523 F.3d 1341, 1352 (Fed. Cir. 2008). In addition, “[a] contractor cannot call himself misled unless he has consulted the relevant Government information to which he is directed by the contract, specifications, and invitation to bid.” *Security National Bank of Kansas City v. United States*, 397 F.2d 984, 989 (Ct. Cl. 1968).

In the circumstances in this appeal, GSA obviously made representations about the equipment inventory in the three buildings by affirmatively listing it. The issue here is not whether representations were made, but the extent to which GSA’s disclaimers rendered Eastco’s reliance upon those representations unreasonable and shifted to the contractor the risk of inaccuracies.

In evaluating GSA’s disclaimers, we recognize that “broad exculpatory clauses in contracts are generally disfavored,” *D.F.K. Enterprises*, 45 Fed. Cl. at 289, and longstanding precedent warns us to be wary of automatically accepting and enforcing exculpatory language. More than a hundred years ago, the Supreme Court in *Hollerbach v. United States*, 233 U.S. 165 (1914), considered a contract in which the Government had affirmatively represented in one clause that a dam was backed under the surface by approximately fifty feet of broken stone, sawdust, and sediment, but had stated in two other clauses that quantities given were “approximate only,” that the contractor could make no claim based upon any excess or deficiency in the Government’s representations, and that the contractor was expected to visit the site and make its own estimates regarding conditions, other contingencies, and the nature of the work. During performance, the contractor discovered that the dam was backed not with fifty feet of broken stone and sawdust, but with five feet of a soft and slushy sediment and, below that, 4.3 feet of sound logs filled with stones. The Court of Claims initially absolved the Government of liability for its misdescription of the dam backing based upon the disclaimer and site investigation clauses, but the Supreme Court disagreed. It found that, because “the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants,” it “assured [the contractor] of the character of the material” in a manner upon which the contractor was entitled to rely when formulating

its offer. *Id.* at 172. Although the Court recognized that the contract included generalized disclaimer and site investigation clauses, it found them insufficient to eradicate the Government's affirmative positive statement about those conditions:

We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt. If the government wished to leave the matter open to the independent investigation of the claimants, it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity.

*Id.*

Subsequently, in *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920), the Court considered the effect of an even more caveated Government disclosure and more affirmative disclaimer about site conditions. There, the contract indicated that “[t]he material to be removed [through excavation in the Delaware River] *is believed to be* mainly mud, or mud with an admixture of fine sand,” but that “[b]idders were expected to examine the work, however, and *decide for themselves* as to its character and to make their bids accordingly, as the United States *does not guarantee* the accuracy of this description.” *Id.* at 2 (emphasis added). Although the riverbed material was ultimately found to differ from what the contract identified, the Government argued that the contractor could not assert a viable misrepresentation claim because the Government had made its representation in good faith, had disclaimed any guarantee, and had admonished bidders to make their own evaluations. The Court found, though, that the contractor acted responsibly in relying on the representation because, despite the disclaimer, the representation “was accompanied by the expression of belief, and conduct which was, in effect, a repetition and confirmation of the belief” and because the Government, reporting that its belief was based upon test boring reports that were not made available to the contractor, “gave assurance that [its belief] had a reliable foundation.” *Id.* at 11. In such circumstances, the Court held, “[t]he company . . . was justified in acting upon it,” and the Government was liable for its misrepresentation. *Id.*

Taking these precedents into consideration, courts have held that, for public policy reasons, broad exculpatory clauses will not always “be given their full literal reach, and ‘do not relieve the [Government] of liability for changed conditions as the broad language thereof would seem to indicate.’” *United Contractors v. United States*, 368 F.2d 585, 598 (Ct. Cl. 1966) (quoting *Fehlhaber Corp. v. United States*, 151 F. Supp. 817, 825 (Ct. Cl. 1957)). The Government will not necessarily be “relieved from liability by general

contractual provisions requiring the bidder to investigate the site or satisfy himself of conditions, or stating that the United States does not guarantee the statements of fact in the specifications, etc.” *Flippin Materials Co. v. United States*, 312 F.2d 408, 413 (Ct. Cl. 1963); see *Levering & Garrigues Co. v. United States*, 73 Ct. Cl. 566, 574-75 (1932) (specification provision stating that Government “does not guarantee the information given to be correct” and “does not assume any risk or responsibility in connection therewith” did not relieve the Government from damages arising out of misrepresentations as to latent conditions at the site).

Yet, despite this line of precedent, tribunals often enforce exculpatory disclaimer clauses in government contracts without limitation. In *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913 (Fed. Cir. 1984), for example, the contract referred bidders to a state agency office at which drawings of some of the existing conditions at a site of a building that was to be demolished were available, but it specifically disclaimed the quality, completeness, accuracy, or availability of those drawings. After incorrectly overestimating the amount of steel that would be available for salvage based upon those drawings, the contractor sought an equitable adjustment based upon the loss of salvage value arising from the incorrect representations on the drawings. The Federal Circuit rejected that request, enforcing the contract’s specific disclaimers about the drawings and the information contained therein as written:

From this vantage point of the “reasonable contractor” or “reasonable bidder,” we see that IFB provision 1.2 can be interpreted only as an effort by the Government to direct prospective contractors to information which might prove helpful in formulating their bids, but not as proffering any specific information bearing directly on the steel conditions to be found. . . . [T]he clause expressly stated that the drawings were “for information only,” that they would “not be part of the contract documents,” and that their “quantity, quality, completeness, accuracy and *availability* . . . [were] not guaranteed.” (Emphasis added.) The Government’s warning regarding availability provided a particularly clear signal to prospective contractors that the Government did not intend them to rely on the structural drawings, since it could not even guarantee that they would be able to view any or all of these drawings.

*Id.* at 917. The appellate court distinguished the situation in *P.J. Maffei* from prior decisions holding the Government responsible for misrepresentations despite exculpatory clauses, stating that the prior cases had involved efforts to use “general exculpatory clauses” to excuse “explicit or implicit representation[s]” that typically related to a “latent condition.” *Id.* at 918-19; see *Webco Lumber, Inc. v. United States*, 677 F.2d 860, 863-64 (Ct. Cl. 1982); *Gregory Lumber Co.*, 11 Cl. Ct. 489, 500-01 (1986), *aff’d*, 831 F.2d 305 (Fed. Cir. 1987);

*Peter Kiewit Sons' Co./J.F. Shea Co. (Joint Venture)*, ENG BCA 4861, et al., 85-2 BCA ¶ 18,082, at 90,776; *Wiggins Electric Co.*, DOT CAB 1102, 80-2 BCA ¶ 14,758, at 72,854; *Commercial Construction Corp.*, ASBCA 24087, 80-1 BCA ¶ 14,312, at 70,532-33.

Comparing various decisions that have enforced exculpatory disclaimers with those that have not, it is difficult to identify a definitive dividing line between enforceability and unenforceability, but it is clear that we cannot simply ignore exculpatory clauses. Except to the extent that an exculpatory clause violates public policy (such as when the Government attempts to preclude liability for its own willful misconduct), “it cannot [be] and is not denied that the law allows the Government to . . . disclaim[] any warranty by clear and unambiguous language.” *Rixon Electronics, Inc. v. United States*, 536 F.2d 1345, 1351 (Ct. Cl. 1976); see John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *Administration of Government Contracts* 319 (5th ed. 2016) (“If an exculpatory clause is not against public policy and is clearly worded to indicate to the contractor that the government does not expressly or impliedly warrant the accuracy or usefulness of information or material that it furnishes, it will be enforced.”). Reviewing various past decisions, it appears that the following factors play the most critical role in determining whether and to what extent a tribunal will enforce an exculpatory disclaimer:

*First*, “[e]xculpatory clauses are narrowly construed because they are drafted by the government and shift to the contractor risks that would otherwise be borne by the government.” John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *supra*, at 317; see *Morrison-Knudsen Co. v. United States*, 397 F.2d 826, 829 (Ct. Cl. 1968); *Thompson Ramo Wooldridge Inc. v. United States*, 361 F.2d 222, 228-30 (Ct. Cl. 1966); *Radionics Inc.*, ASBCA 22727, 81-1 BCA ¶ 15,011, at 74,278; *Bromley Contracting Co.*, ASBCA 14884, et al., 72-1 BCA ¶ 9252, at 42,902 (1971).

*Second*, the clearer the disclaimer language, and the more narrowly and specifically tailored to specific pieces of information or to specific site conditions it is, the more likely it is to be held effective and enforceable as written. See *Rixon Electronics*, 536 F.2d at 1351 (“So the question boils down to this: is the disclaimer clear enough, alone or as aided by [additional warnings during the bidding process]?”). While “general disclaimers requiring the contractor to check plans and determine project requirements” are unlikely to shift responsibility for a contractual misrepresentation from the Government to the contractor, “express and specific disclaimers” are significantly more likely to shift responsibility. *White v. Edsall Construction Co.*, 296 F.3d 1081, 1085 (Fed. Cir. 2002).

*Third*, exculpatory language disclaiming representations about *latent* conditions that a contractor would be unable to detect through a reasonable site inspection is less likely to be enforced than a disclaimer relating to information that a contractor, with some reasonable

effort, ought to be able to verify or about which the contractor could make its own independent reliable assessment. See *Morrison-Knudsen*, 345 F.2d at 539 (“A significant factor in this connection was the circumstance that the physical conditions dealt with in the defendant’s untrue representations,” which had been caveated by disclaimers, “were hidden in the subsurface, and the plaintiff could not determine the truth or falsity of the representations by mere observation.”); *Fehlhaber Corp.*, 151 F. Supp. at 825 (“[B]ecause of the inability of the plaintiff to bore, analyze the borings, and to compute, prepare, and submit its bid within the short time allotted, plaintiff is not bound by the caveatory and exculpatory provisions of the contract and specifications and, conversely, those provisions do not relieve the [Government] of liability for changed conditions as the broad language thereof would seem to indicate.”).

*Fourth*, disclaimers are more likely to be found ineffective if the Government possesses “the only information by which the [offerors] might have learned the truth” and the agency “denie[s] the [offerors] access to data prior to entering into the contract.” *Doherty v. United States*, 222 Ct. Cl. 511, 512 (1979) (discussing decision of trial court commissioner); see *Hercules Construction*, 88-2 BCA at 103,772-73; *Boland & Martin*, 1963 BCA at 18,514.

### III. Reconciling The Parties’ Competing Obligations

Where do the parties’ competing obligations leave the parties in this appeal? With regard to GSA, we cannot grant its request that we summarily find no liability on its part for defects in the inventory list. Typically, the question of whether a contractor reasonably relied on a contract representation is a question of fact. *International Technology*, 523 F.3d at 1352. In making such a determination, the Board must “place itself ‘into the shoes of a reasonable and prudent contractor’ and decide how such a contractor would act in appellant’s situation.” *P.J. Maffei*, 732 F.2d at 917 (quoting *H.N. Bailey & Associates v. United States*, 449 F.2d 387, 390 (Ct. Cl. 1971)).

Here, the exculpatory language that GSA used – that the equipment inventory list “may contain some errors” and that there would be no contract price adjustment for any such errors – is not a broad or general disclaimer, but specifically references the equipment inventory list, falling within one of the factors supporting enforceability. Nevertheless, the clause states only that there may be “some” errors in the list, which, reasonably construed, does not suggest the massive difference in equipment quantities that Eastco alleges actually existed. As one of our predecessor boards indicated in *Central Mechanical, Inc.*, DOT CAB 1234, 83-2 BCA ¶ 16,642, at 82,757 (citing cases), language of this nature in a disclaimer suggests “minor discrepancies” rather than the major inaccuracies alleged. Although GSA has indicated that many items within Eastco’s long list of unlisted equipment are actually

subcomponents of identified equipment, which a contractor knowledgeable about the type of work anticipated under this contract would reasonably have expected, we have no basis upon which to evaluate GSA's assertion on the current record. We can find only that, to the extent that there were massive quantities of equipment not listed in GSA's inventory list, the "some errors" disclaimer would not be sufficient wholly to shift liability to Eastco.

That being said, we cannot ignore Eastco's site investigation obligations or summarily grant relief in Eastco's favor on its entitlement to damages for any inaccuracies in the equipment inventory list. Eastco suggests that, because GSA made affirmative representations in the solicitation allegedly listing all equipment, Eastco was entitled to rely on that list without verifying it through a site visit. It is true that, "where the Government makes positive statements in the specifications or drawings for the guidance of bidders, . . . a contractor has a right to rely on them regardless of contractual provisions requiring the contractor to make investigations." *Arcole Midwest Co. v. United States*, 113 F. Supp. 278, 280 (Ct. Cl. 1953). Yet, that rule does not eliminate a contractor's obligation to look for, or notice, obvious defects in the Government's representation, particularly when the representation at issue makes clear that the information provided may contain errors and does not involve latent conditions. It is the contractor's burden to establish that "a reasonable site visit would not have disclosed actual conditions" or "revealed the discrepancies" between actual conditions and the Government's disclosure. *Schmalz Construction, Ltd.*, AGBCA 86-207-1, et al., 91-3 BCA ¶ 24,183, at 120,952. To the extent that Eastco, through its site visit, identified or reasonably should have identified defects in the Government-provided equipment inventory list, it could not put its head in the sand and ignore those defects. *See Daymar, Inc.*, DOT CAB 77-13, 78-1 BCA ¶ 12,903, at 62,854 ("a bidder may not legitimately induce his own state of ignorance by not making an investigation to learn the conditions at the site"); *Vitro Corp.*, 67-2 BCA at 30,367 (contractor cannot overlook potential issues if it had pre-award clues that its assumptions were incorrect).

Unlike situations involving government representations about subsurface conditions at a site, it would seem that there should have been at least some ability by Eastco to confirm the number and types of equipment in the buildings that it was going to have to service. In fact, in this case, one of the pre-bid Q&As, Question 11, which was made part of the solicitation, expressly reflected another offeror's comment that, "after touring the facility during the pre-proposal meeting[,] it was visibly obvious the inventory in the solicitation package was not accurate." Exhibit 8 at 4. Reading the solicitation as a whole, *see SMS Data Products Group, Inc. v. Defense Logistics Agency*, GSBCA 13413-P, 96-1 BCA ¶ 28,015, at 139,895 (1995), Eastco could not ignore that warning about "some errors" in GSA's equipment list, it had an obligation to be cognizant of possible defects in that list as it conducted its site visit, and it cannot obtain any adjustment for unlisted equipment that it discovered, or should have discovered, through such an investigation. *See Swepco Corp.*,

ASBCA 25118, 81-2 BCA ¶ 15,262, at 75,578 (“[T]he appellant is charged with the knowledge it could have obtained from a reasonable site investigation, which knowledge placed appellant on notice of the risk it would assume in omitting the additional work from its bid estimate.”).

Nevertheless, the “Site Visit” clause does not automatically shift to Eastco the entirety of risk of defects in GSA’s inventory, at least where, as here, the language used in the agency’s disclaimer was ineffective wholly to shift all risk of a misrepresentation to the contractor. To the extent that discrepancies were not “readily observable” from a reasonable and prudent site visit, GSA cannot impose liability for its own mistakes on Eastco. If GSA limited the scope of Eastco’s site visit (something that is unclear from the record here, even though GSA acknowledges that it did not open ceilings for visitors), that limitation could affect the scope of Eastco’s risk assumption if it impacted Eastco’s discovery of errors. *See Hercules Construction*, 88-2 BCA at 103,772-73; *Boland & Martin*, 1963 BCA at 18,514. Further, even if Eastco, as an experienced contractor, reasonably should have been able to identify some mistakes in the list during a site visit, it does not mean that Eastco automatically signed up for other errors that were not reasonably ascertainable through such a visit. *See Parsons of California*, ASBCA 20867, 82-1 BCA ¶ 15,659, at 77,416 (contractor’s discovery prior to bidding of minor deficiencies in drawings did not establish that contractor should have known of massive number of drawing defects). Although the record here establishes that Eastco sent a representative for a site visit, it contains no evidence about the representative’s efforts during that visit or the reasonableness of those efforts in the circumstances. Nothing in the record tells us whether extra equipment was unseen (either because it was above ceilings or in rooms not open to visitors), the extent to which GSA encouraged offerors to investigate all floors and rooms of the three buildings, the extent to which offerors sought but were denied access to unvisited areas, whether Eastco should have noticed extra equipment in rooms that it actually visited, or whether an experienced contractor reasonably should have anticipated the extra but unidentified equipment.

Based upon the undeveloped record on factual issues, we cannot grant either party summary relief on the contract interpretation issues.

### Damages

GSA asks that, if we do not enter summary relief in its favor on the contract interpretation issue, we reject Eastco’s theory of calculating damages for the alleged

constructive change at issue here. As Eastco explains it, its equitable adjustment request depends upon its estimates of what the extra work should have cost.<sup>2</sup>

“It is incumbent on the plaintiff, before it can recover, to establish by proof what it actually cost to do the work over and above what it would have cost had the . . . conditions at the site been such as the plaintiff had a right, from the representations made by the defendant, to assume they were.” *Levering & Garrigues*, 73 Ct. Cl. at 575. Normally, we would expect this proof to consist of actual contemporaneous data – accounting and payroll records, daily reports of contract activity, time records, and the like – supporting what the contractor believes constituted extra work beyond the scope of its contract. *See, e.g., Hof Construction, Inc. v. General Services Administration*, GSBCA 13317, et al., 96-2 BCA ¶ 28,406, at 141,849; *Production Corp.*, DOT BCA 2424, 92-2 BCA ¶ 24,796, at 123,695. As the Federal Circuit recognized in *Dawco Construction, Inc., v. United States*, 930 F.2d 872 (Fed. Cir. 1991), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 Fed. 3d 1572 (Fed. Cir. 1995), actual cost data is the preferred means of proving increased costs because it “provides the [tribunal], or contracting officer, with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that – equitable – and not a windfall for either the government or the contractor.” *Id.* at 882.

Eastco argues that, in lieu of actual cost data, a contractor can support an equitable adjustment request with “gut-feel” estimates. Appellant’s Motion at 8 (citing, among others, *Trustees of Devonshire West Realty Trust*, GSBCA 9650, 90-2 BCA ¶ 22,875). It is true that, in certain circumstances “[w]here a contractor does not accumulate cost data and cannot identify its actual costs attributable to changes, estimates may be used to quantify the increased costs a contractor incurred.” *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 1539, 11-2 BCA ¶ 34,882, at 171,563 (quoting *Environmental Safety Consultants, Inc.*, ASBCA 53485, 05-1 BCA ¶ 32,903, at 163,019). Yet, the Federal Circuit in *Dawco Construction* recognized that an award of damages based upon cost estimates – or, as the appellate court described it, the “guesstimate” of how much the contractor actually spent in response to a change – is permissible only “where the claimant can demonstrate a *justifiable inability to substantiate* the amount of his resultant injury by direct and specific proof.” *Dawco Construction*, 930 F.2d at 881 (quoting *Joseph Pickard’s Sons Co. v. United States*, 532 F.2d 739, 742 (Ct. Cl. 1976)). As discussed in *Dawco*, once a contractor is aware that it has a potential claim against the Government or that it is having

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<sup>2</sup> GSA argues that Eastco is essentially seeking reformation of its contract price, claiming damages based upon “its own speculation regarding how it would have bid if the Solicitation contained different information.” Respondent’s Motion at 6. Eastco disavows that it is seeking reformation, making it unnecessary for us to address that theory of damages.

to perform extra or changed work, it has an obligation to create and maintain contemporaneous records tracking and showing its increased costs and/or segregating increased costs from costs for unchanged work. *See id.* at 881 (awareness of a change “should signal to the prudent contractor that it must maintain records detailing any *additional* work, just as should the encountering of differing site conditions”). Inability to justify the absence of contemporaneous records can preclude or diminish a contractor’s recovery. *Id.* at 881-82; *see Douglas P. Fleming, LLC v. Department of Veterans Affairs*, CBCA 3655, et al., 16-1 BCA ¶ 36,509, at 177,880 (denying recovery of increased painting costs not segregated in records during performance because, “[w]here [the contractor] could have measured the actual painting performed, we are not inclined to use estimates.”); *Production Corp.*, 92-2 BCA at 123,696 (denying damages award for lack of actual cost data).

The Board has considerable discretion in determining the extent to which a contractor has supported, or is justifiably unable to support, its cost claim with direct cost data. *See Clark Construction Group, Inc.*, VABCA 5674R, 00-2 BCA ¶ 30,997, at 153,046 (“By definition, a ‘jury verdict’ entails substantial discretion and subjective judgment by the Board.”). In situations like the one here, where costs may have been incurred to maintain all equipment in the buildings – both that which was anticipated and the additional equipment – through a specific group of employees, there may very well be a need to rely to some degree on estimates, or to supplement hard cost data with reliable estimating guides, to identify the extent to which, because of a constructive change, costs were increased beyond those reasonably expected. *See Romac, Inc.*, DOT BCA 4028, 01-2 BCA ¶ 31,552, at 155,842 (indicating that, to prove damages, contractor should have made efforts to segregate costs related to added work from its actual total costs); *Clark Construction Group, Inc.*, VABCA 5674, 00-1 BCA ¶ 30,870, at 152,419 (recognizing “the impossibility of the precise quantification of impact or inefficiency costs”); *Service Engineering Co.*, ASBCA 40274, 93-1 BCA ¶ 25,520, at 127,112 (1992) (complexity of changes in work justifiably precluded contemporaneous segregation of costs). Yet, even in such circumstances, cost estimates need to have some demonstrated correlation with, and tie to, the actual costs that the contractor incurred in performing the changed work. *See Thomas & Sons Building Contractors, Inc.*, DOT BCA 3013, 01-1 BCA ¶ 31,386, at 155,006 (if “actual [cost] data is unavailable, estimates may be used where . . . accompanied by detailed substantiating data”); *Akcon, Inc.*, ENG BCA 5593, 90-3 BCA ¶ 23,250, at 116,663 (“The proper measure of an equitable adjustment is the cost impact on this Appellant, not a theoretical test.”); *Bregman Construction Corp.*, ASBCA 15020, 72-1 BCA ¶ 9411, at 43,716 (estimates must “be reconciled with the actual cost and quantity figures in evidence”).

Eastco is using estimates derived from what it alleges are well-accepted industry cost estimating manuals to establish how much it should have cost to maintain each piece of unlisted equipment. Even if that might be a good starting point in proving damages, Eastco

would still need to tie those estimates to records of its actual incurred costs. Although a proper equitable adjustment based upon estimates “should be founded upon reasonable statistical methods or estimating techniques,” it must also “have a demonstrable nexus to actual costs incurred.” *Hemphill Contracting Co.*, ENG BCA 5698, et al., 94-1 BCA ¶ 26,491, at 131,872 (1993). In no event can a contractor use cost estimating to recover a “should have cost” amount that exceeds what the contractor actually spent. *See Dawco Construction*, 930 F.2d at 882 (damage award cannot result in “unjustified windfalls”); *Beyley Construction Group Corp.*, ASBCA 55692, 08-2 BCA ¶ 33,999, at 168,141 (denying damages because contractor failed to prove costs claimed were incurred). It is the proponent’s burden to demonstrate the basis and accuracy of any estimates and the nexus to demonstrated costs. *Hemphill Contracting*, 94-1 BCA at 131,872. To the extent that there are problems with or questions about the estimates, the contractor bears the risk of downward adjustments or of no recovery at all.

In their cross-motions, neither GSA nor Eastco presents us with Eastco’s actual cost support. Accordingly, we cannot know the extent to which Eastco’s inability to present actual cost data is justifiable or if its cost estimates, developed by reference to trade manuals, are appropriate. To the extent that either party wants summary disposition of the proffered support for specific costs, it will have to put information into the record in support of its argument.

#### Decision

For the foregoing reasons, the parties’ cross-motions for summary relief are **DENIED**.

*Harold D. Lester, Jr.*

HAROLD D. LESTER, JR.

Board Judge

We concur:

*Patricia J. Sheridan*

PATRICIA J. SHERIDAN

Board Judge

*Jonathan D. Zischkau*

JONATHAN D. ZISCHKAU

Board Judge