



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

---

APPELLANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED;  
RESPONDENT’S MOTION FOR SUMMARY JUDGMENT DENIED:  
November 10, 2021

CBCA 6760

WU & ASSOCIATES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Sean T. O’Meara of Archer & Greiner, P.C., Haddonfield, NJ, counsel for Appellant.

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

Before Board Judges **RUSSELL, SULLIVAN, and CHADWICK.**

**RUSSELL**, Board Judge.

Appellant, Wu & Associates, Inc. (Wu), challenges the denial by respondent, General Services Administration (GSA), of Wu’s claim for additional funds to strengthen flooring to move heavy equipment for an elevator modernization project. GSA denied the claim, arguing that the work was within the scope of the contract and Wu was responsible for deciding the “means and methods” of moving the equipment. Wu has moved for partial summary judgment on entitlement, and GSA has moved for summary judgment. For the reasons stated below, we grant Wu’s motion and deny GSA’s motion.

## Background

### I. The Contract

In August 2018, GSA awarded a contract to Wu to provide construction services for an elevator modernization project located at the Ted Weiss Federal Building in New York, New York. Appeal File, Exhibit 8 at 272.<sup>1</sup> The project included, but was not limited to, providing all labor, materials, tools, and equipment to modernize eight low-rise and mid-rise elevators and two service elevators. *Id.*; *see also* Exhibit 30 at 539.

The contract incorporated Federal Acquisition Regulation (FAR) clauses 52.236-2 (“Differing Site Conditions (APR 1984)”) (48 CFR 52.236-2 (2018) (FAR 52.236-2)); 52.236-3 (“Site Investigation and Conditions Affecting the Work (APR 1984)”); and 52.243-4 (“Changes (JUN 2007)”). FAR 52.236-2 requires a contractor to give prompt written notice to the contracting officer of any “(1) [s]ubsurface or latent physical conditions at [a] site which differ materially from those indicated in [the] contract[.]” or “(2) [u]nknown physical conditions at [a] site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.” Pursuant to FAR 52.236-3, a contractor “acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work [under the contract], and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost.” And FAR 52.243-4 prescribes that “[a]ny . . . written or oral order” including “direction, instruction, interpretation, or determination . . . from the [c]ontracting [o]fficer that causes a change shall be treated as a change order,” provided that the contractor gives the contracting officer written notice stating “(1) [t]he date, circumstances, and source of the order” and “(2) [t]hat the [c]ontractor regards the order as a change order.”

The following pre-award request for information (RFI) from a bidder and response from GSA (referenced as RFI #37 in contract documents) were also incorporated into the contract:

RFI 37: There is quite a challenge with the unknowns around the false floor on 17. In looking at the type of Imperial machines needed for the low rise/mid rise part of the project, and the size of those machines, even after planning on breaking them down, the weight of the heaviest piece, adding in some weight for material handling equipment, will be approximately 4000 lbs. Can the

---

<sup>1</sup> All exhibits are in the appeal file, unless otherwise noted.

building engineer comment on the viability of moving that material down the 17th floor hallway and the type of floor protection he would recommend in order to distribute the weight?

Also, [f]or the two service elevators, even after breaking the necessary Imperial machine down, the heaviest piece will weigh approximately 5000 lbs. Does the building engineer see any issue moving that piece on the top floor to underneath the trap door?

Response 37: This would be “Means and Methods” by the contractor. It may be a challenge but requires careful planning. On 17th floor, proper skids are required over the raised floor to distribute the load.

Freight elevators can take up to 8,000 lbs. but may require distributing the load evenly on the cabs.

Exhibits 27 at 434-35, 53 at 773-74; *see* Exhibit 7 at 270 (incorporating RFI responses in the solicitation).

After award, Wu submitted a change order request for the project. Exhibit 10. Wu requested the change order to correct, protect, and strengthen the floor in the freight elevator lobby on the seventeenth floor so that Wu could move the new elevator machines over it and remove the existing ones. *Id.* at 310. Wu explained that, during a post-award walk-through, it “noticed that the existing raised flooring in the Freight Elevator lobby was damaged and probably not strong enough to accept the weight of the elevator machines being moved over them without further possible damage.” *Id.*

In subsequent correspondence, Wu questioned GSA’s response to the bidder question about moving heavy equipment on the seventeenth floor, specifically GSA’s response that proper skids would be required over the raised floor to distribute the elevator equipment load. Exhibit 15 at 340. In the correspondence, Wu opined that GSA’s method was infeasible based on drawings received post-award. *Id.* Relying on an engineering report it had ordered, Wu wrote:

**1. Install skids over the raised floor to distribute the load over multiple panels. (6 or 8 panels).**

Evaluation: The attached engineering analysis indicates that spreading the load over 6 or 8 floor panels causes the load on each panel to exceed the

manufacturer's load listed on the product data sheet. . . . ***This is not a feasible solution.***

Exhibit 13 at 322.

Additionally, Wu, in a request for interpretation and clarification, stated:

During the bid[,] a question was raised in RFI-37 about the viability of moving a nearly 4000 lb object down the 17<sup>th</sup> floor hallway and the type of flooring protection recommended to distribute the weight. The response received to that question would lead one to believe that an object that weighed that much could in fact be moved across the floor by using "proper skids" and distributing the load . . . . Our bid was based on the response to the RFI.

. . . .

Given the response to RFI 37, and the information uncovered post bid, Wu believes this is an unforeseen condition. Wu has previously submitted [change order request]#01rev for approval. If the government [chooses] not to elect to move forward with this suggestion, Wu is requesting that the government provide an alternative solution that would allow the equipment to be moved into the machine room.

Exhibit 28 at 501-02.

GSA denied Wu's change order request. Exhibit 16 at 360. The agency, referencing its response to RFI #37, which was incorporated into the contract, concluded that the removal and replacement of machinery and materials required under the contract were the contractor's responsibility and were to be provided by Wu at no additional cost to the Government. *Id.*

## II. Wu's Claim to GSA

After the denial of its change order request, Wu submitted a letter to GSA requesting a final agency decision under the Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018). Exhibit 26. In its letter, Wu reiterated its opinion that GSA's response to RFI #37 stating that "proper skids are required over the raised floor to distribute the load" meant that the existing floor could be used to move heavy equipment and machinery. *Id.* at 428.

GSA denied the claim, relying on the contract provision stating, "Unless otherwise expressly stated in the Contract, the Contractor shall be responsible for all means and

methods employed in the performance of the Contract.” Exhibit 30 at 539; *see also* Exhibit 8 at 275. GSA also relied on the Site Investigations and Conditions clause at FAR 52.236-3 as a basis for denying Wu’s request for additional funding. Exhibit 30 at 539-40. GSA found that this clause also supported the agency’s position that Wu was responsible for determining the means and method of moving the equipment, including whatever means and methods were necessary to distribute the load of the equipment over the raised floor.

### III. Wu’s Appeal to the Board

After GSA denied its claim, Wu filed this appeal. The parties completed discovery and filed cross-motions, with Wu filing a motion for partial summary judgment on entitlement and GSA filing a motion for summary judgment.

#### A. Wu’s Motion

In its motion for partial summary judgment, Wu argues that it is entitled to an equitable adjustment of the contract based on the Differing Site Conditions or the Changes clauses in the contract. Appellant’s Brief in Support of Its Motion for Partial Summary Judgment as to Entitlement (Appellant’s Motion) at 4-5. As to the latter, Wu argues that it is entitled to recover under the Changes clause due to the failure of GSA to disclose vital information about the contract or under the theory of an implied warranty of the specifications provided in the contract. *Id.* Wu asserts that it is entitled to relief under the two clauses because GSA misrepresented the load capacity of the raised floor on the seventeenth floor, resulting in additional costs to Wu. *Id.* at 4. Wu adds:

In this case, the GSA was not simply silent about the load capacity of the raised floor on the 17<sup>th</sup> floor, but in fact affirmatively misrepresented that capacity. Specifically, when asked in RFI 37 about this issue, the GSA responded (without performing any engineering calculations whatsoever!) that the elevator equipment could be moved across the raised floor if skids were used to distribute the loads, and provided that there was “careful planning.”

*Id.* at 6.

Wu’s president provided two certifications in support of the company’s motion. In the first, he asserted that, “[d]ue to security concerns, Wu and the other bidders were not provided with the floor plan of the 17<sup>th</sup> floor, nor were the bidders allowed to see the 17<sup>th</sup> floor prior to the bid. Thus, there was no way for Wu or the other bidders to verify the existing conditions on the 17<sup>th</sup> floor.” Certification of Kirby Wu in Support of Appellant’s Motion for Summary Judgment as to Entitlement (Jan. 27, 2021) (Mr. Wu’s First Sworn

Statement) ¶ 4. However, in a second certification, Wu's president modified his earlier assertion, stating:

I have learned that the initial Certification dated January 27, 2021 I submitted contained an error in paragraph 4, in which I stated that Wu and the other bidders did not have an opportunity to see the 17<sup>th</sup> floor prior to bidding. I now understand that Wu and the other bidders did have this opportunity. However, without the floor plan, an opportunity to get underneath the raised floor and the ability to have an engineer analyze and design a solution to the load problems of the raised floor, the inspection was not very informative.

Second Certification of Kirby Wu in Support of Appellant's Motion for Partial Summary Judgment as to Entitlement (Feb. 8, 2021) (Mr. Wu's Second Sworn Statement) ¶ 2.

According to Wu, it relied on information provided by GSA on the load that the seventeenth floor could bear, and that information turned out to be untrue – specifically, GSA's representation that, with careful planning, elevator equipment could be moved across the raised floor if proper skids were used to distribute the loads. Appellant's Motion at 6; Appellant's Brief in Opposition to GSA's Motion for Summary Judgment ¶ 6; Appellant's Statement of Undisputed Facts ¶ 6. Wu's president explained, "Contrary to the GSA's representations in RFI 37 that the elevator equipment could be moved over the raised floor on the 17<sup>th</sup> floor with 'skids' that could be used to distribute the load, skids in fact would not permit the equipment to be moved over the raised floor, and the load problems could not simply be addressed by 'careful planning' as the GSA had represented." Mr. Wu's First Sworn Statement ¶ 9. Wu's president additionally asserted that GSA's response to RFI #37 "implied that the GSA's Architect or Engineer had run calculations to verify this representation before providing [its response to RFI #37] to bidders, but Wu later learned that they did not." *Id.* ¶ 3.

Wu states that "[it] ultimately solved the raised floor problem by hiring a structural engineer to provide the necessary engineering to reinforce the stanchions that supported the raised floor." Appellant's Statement of Undisputed Facts ¶ 23. Wu seeks reimbursement for the cost it incurred to remedy the problem, which included the hiring of various engineers and culminated in a structural engineer designing stanchions to support the raised floor. Appellant's Motion at 6; Mr. Wu's First Sworn Statement ¶ 10.

GSA did not produce a Statement of Genuine Issues in Dispute to support its reply to Wu's motion but argued that, pursuant to FAR 52.236-3, Wu (1) was obligated to take steps to investigate the conditions of the seventeenth floor, including the conditions bearing upon the transportation and handling of equipment but did not take advantage of the opportunity

to tour the project site; (2) cannot prove the existence of a differing site condition pursuant to FAR 52.236-2; (3) cannot show a constructive change to the contract due to GSA's failure to disclose vital information; and (4) cannot show that it is entitled to recover under the theory of implied warranty because the theory only attaches to design specifications, not performance specifications. GSA's Reply to Appellant's Motion for Partial Summary Judgment at 2. As to the last of its arguments, GSA asserted that the work described in RFI #37 addressed performance, not design, specifications.

#### B. GSA's Motion

GSA, in its motion for summary judgment, argues that the terms of the contract, including its response to RFI #37, show that the challenge of moving equipment across the seventeenth floor was a "means and methods" issue for the contractor to determine and that Wu and the other bidders were aware of the challenge involved with moving the equipment over the floor. GSA's Motion for Summary Judgment and Supporting Memorandum of Law (GSA's Motion) at 3. In an affidavit supporting GSA's motion, the agency's project executive for the elevator modernization project states that "[b]idders were provided the opportunity to visit the building and to observe site conditions. On the 17<sup>th</sup> floor, bidders could have seen the raised computer floor, and should have noted that special measures might be needed to transport the heavy elevator equipment across the elevated section of that floor." *Id.*; see Affidavit of Marcelo Fuentes (Jan. 28, 2021) ¶ 5.

GSA asserts that its response to RFI #37 was "an express articulation that the movement of the elevator equipment constituted a performance specification, and that as such, the legal principle imposing responsibility on the contractor for the means and methods of performance was applicable." GSA's Motion at 6. Additionally, GSA urges that its statement in RFI #37 that proper skids would be required to distribute the load of the elevator equipment was a recommendation, not a warranty as suggested by Wu. *Id.* According to GSA, this "recommendation did not eliminate the possibility that other methods would be required, and did not detract from or otherwise negate Wu's ultimate responsibility to determine the means and methods of moving the equipment." *Id.*

GSA additionally argues that, to the extent that the statements in RFI #37 (1) requiring the contractor to determine the "means and method" of moving the elevator equipment across the floor and (2) requiring the contractor to use proper skids over the raised floor to distribute the load, create an ambiguity in the contract, the agency is still entitled to summary judgment. In its motion, GSA characterizes any ambiguity as a patent one which put the burden on Wu to seek clarification from GSA on the agency's statements in RFI #37 before entering into the elevator modernization contract. *Id.* at 7. GSA asserts that, to the extent that the Board finds that any ambiguity is not patent, extrinsic evidence (in the form of affidavits) supports

GSA’s position that bidders “knew or should have known of the challenge that the raised . . . floor posed.” *Id.* at 8.

Here, GSA provided an affidavit from the engineer who assisted GSA with drafting the specifications for the project. The engineer stated:

The raised computer floor was plainly observable to all bidders who availed themselves of the opportunity provided by GSA to inspect the building, and bidders were aware of the weight of the equipment to be installed on the 17<sup>th</sup> floor. In addition, to assist bidders in determining the means and methods for moving the elevator equipment on the 17<sup>th</sup> floor, GSA furnished bidders with a copy of the 1992 specification for the raised computer floor. The information set forth in the specification included the concentrated loads, rolling loads and impact loads of the floor panels; the loads of the pedestal assemblies; and the concentrated design load of the entire access floor system. A prudent bidder could have used this information to determine the means and methods to move the elevator equipment on the 17<sup>th</sup> floor.

GSA’s Motion, Affidavit of Gene Eng (Jan. 26, 2021) ¶ 7.

### Discussion

#### I. Standard of Review

Under the Board’s Rules, “a party may move for summary judgment on all or part of a claim or defense if the party believes in good faith it is entitled to judgment as a matter of law based on undisputed material facts. In deciding motions for summary judgment, the Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance.” Board Rule 8(f) (48 CFR 6101.8(f) (2020)). Rule 56(a) of the Federal Rules of Civil Procedure mandates the entry of summary judgment upon motion after there has been adequate time for discovery “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see P&C Placement Services, Inc. v. Social Security Administration*, CBCA 391, 07-1 BCA ¶ 33,492 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A dispute is genuine if the evidence is such that a reasonable trier of fact could decide for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “[I]n ruling on a motion for summary judgment, ‘[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [its] favor.’” *Tolon v. Cotton*, 572 U.S. 650, 651 (2014) (quoting *Anderson*, 477 U.S. at 255).

When a motion for summary judgment is properly supported, an adverse party may not rest upon the mere allegations or denials of its pleading. “[T]he party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

“The fact that both parties have moved for summary judgment[,]” as in this appeal, “does not mean that the [Board] must grant judgment as a matter of law for one side or the other . . . .” *Mingus Constructors, Inc.*, 812 F.2d at 1391. Rather, “each motion is evaluated on its own merits and reasonable inferences are resolved against the party whose motion is being considered.” *Marriott International Resorts, L.P. v. United States*, 586 F.3d 962, 968-69 (Fed. Cir. 2009).

Additionally, consistent with Fed. R. Civ. P. 56(e)(3), the Board must always satisfy itself that “the record and any undisputed facts justify granting summary judgment.” *Grimes v. District of Columbia*, 794 F.3d 83, 97 (D.C. Cir. 2015) (Griffith, J., concurring); *see also Perez v. El Tequila, LLC*, 847 F.3d 1247, 1254-55 (10th Cir. 2017); *Winston & Strawn LLP v. McLean*, 843 F.3d 503, 507-08 (D.C. Cir. 2016) (“What is crucially important here is that Rule 56(e)(3) plainly states that [a tribunal] may enter summary judgment only if, after fully considering the merits of the motion, it finds that it is warranted.”). “The purpose of summary judgment 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).

## II. The Parties’ Motions

### A. Wu’s Motion

#### 1. Wu’s Interpretation of RFI #37 is Reasonable.

In its motion, Wu asserts that it is entitled to an equitable adjustment for the additional expenses that it incurred to strengthen flooring to support the weight of moving the elevator equipment, specifically using stanchions, a method other than the one described in GSA’s response to RFI #37, which stated that, on the seventeenth floor, “proper skids are required over the raised floor to distribute the load.” GSA counters that RFI #37 did not prescribe any specifications and that it was Wu’s responsibility to determine how to move equipment along the flooring. We agree with Wu’s interpretation of RFI #37.

As a threshold matter, we look to the contract language to determine whether it can be interpreted as requiring the use of skids as Wu argues. Our examination starts with the

“plain language of the contract.” *Columbia Construction Co. v. General Services Administration*, CBCA 3258, 15-1 BCA ¶ 35,856. Contract language must be read in accordance with its express terms, *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1543 (Fed. Cir. 1993), and should be given the plain meaning that a reasonably intelligent person, acquainted with the circumstances, would derive from that language. *Portillo v. General Services Administration*, CBCA 2516, 12-1 BCA ¶ 34,925. “The contract must be read as a whole and in light of its purpose. Reasonable meaning must be given all parts of the [contract] 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.” *Columbia Construction Co.*

Although GSA, in its response to RFI #37, notes that the contractor must determine the “means and methods” for dealing with a number of the challenges detailed in the request for information, the language regarding distributing the load to move equipment across the seventeenth floor does not suggest discretion as to effectuating the task. GSA’s statement that “proper skids are required” does not reflect an option or a “method and means” among possibilities for distributing the load of the equipment. Instead, the statement sets forth what is required to successfully distribute the load of the elevator equipment for moving. Wu, and any other contractor choosing to bid on the contract, “would have no reason to believe that the language meant anything other than what it plainly stated.” *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004). To read the language as a recommendation or a suggestion signaling the need for additional inquiry or research by the contractor to determine a “means and methods” which actually departs from GSA’s specification in RFI #37 would be inconsistent with the plain language of the response. We interpret contract language in accordance with its plain and ordinary meaning, *see Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, 07-2 BCA ¶ 33,678 (“The Board will interpret a contract in such a way as to give words their plain and ordinary meaning.”), and a reasonable interpretation of the language of RFI #37 is that proper skids are mandatory for a contractor to successfully complete the task of moving equipment across the seventeenth floor. Perhaps a contractor would use its expertise to select the types of skids to use, but regardless, GSA’s response to RFI #37 clearly reflects that skids must be used.

Additionally, as for the language in RFI #37, a comparison of GSA’s response, “proper skids *are required* over the raised [seventeenth] floor to distribute the load,” with the agency’s response regarding the freight elevators, i.e., that the “elevators can take up to 8,000 [pounds] but *may require* distributing the load evenly on the cabs,” is worth noting. The former response does not suggest a choice as to how things should be done, whereas the latter does.

2. GSA's Interpretation of RFI #37 is Inconsistent with the Plain Language of the Provision.

As noted above, GSA urges that its statement in RFI #37 on the use of skids was a recommendation. However, GSA's position is inconsistent with the plain language of the provision. Further, GSA's position would require the Board to ignore the plain meaning of the language or decide it to be meaningless or superfluous. "[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void[,] insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible." *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285 (citing *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965)).

Having found Wu's interpretation of RFI #37 reasonable, we turn to whether the company is entitled to recover an equitable adjustment for any costs that it incurred due to GSA's response in RFI #37.

3. Wu is Entitled to Recover Under the FAR's Changes Clause.

Wu asserts that it is entitled to an equitable adjustment for the increased cost that it incurred due to GSA's misstatements in RFI #37 during the bidding process. It argues, in part, that it is entitled to recover based on an implied warranty of specifications. As explained by the Board, "[a] contractor may recover an equitable adjustment under the [FAR's] Changes clause using the theory of constructive change for both a claim of misrepresentation and defective specification." *Gardner Zemke Co. v. Department of the Interior*, CBCA 1308, 09-1 BCA ¶ 34,081. "To receive an equitable adjustment for a claim of misrepresentation, [a contractor] must show that the Government made an erroneous representation of a material fact that appellant honestly and reasonably relied upon to its detriment." *Id.* "To receive an equitable adjustment for a defective specification claim, [a contractor] must show that it was misled by an error in the specification." *Id.*

As this Board has previously explained, "[w]hen the Government provides a contractor with design specifications, such that the contractor is bound by contract to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects." *Drennon Construction & Consulting, Inc. v. Department of the Interior*, CBCA 2391, 13 BCA ¶ 35,213 (quoting *White v. Edsall Construction Co.*, 296 F.3d 1081, 1084 (Fed. Cir. 2002)). "The overall rationale for an equitable adjustment of this type is that the contractor experienced additional costs in

completing the project which were caused by its reliance on defective specifications or plans.” *Magnus Pacific Corp. v. United States*, 133 Fed. Cl. 640, 676 (2017).

In examining a claim based on a defective specification, the Board first decides whether the contract provision at issue describes a design specification or a performance specification. *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, 16-1 BCA ¶ 36,468; *see also Edsall Construction Co.*, 296 F.3d at 1084 (“Th[e] implied warranty attaches only to design specifications detailing the actual method of performance. It does not accompany performance specifications that merely set forth an objective without specifying the method of obtaining the objective.”). If the former, the Board must then decide whether (1) the design specification was defective, (2) the contractor relied on the defective specification, and (3) the defect was patent, in which case the contractor is not entitled to recover. *E.L. Hamm & Associates, Inc. v. England*, 379 F.3d 1334, 1339 (Fed. Cir. 2004); *Robins Maintenance, Inc. v. United States*, 265 F.3d 1254, 1257 (Fed. Cir. 2001). We examine each of these factors in turn.

a. The Statement in RFI #37 Regarding Use of Skids Was a Design Specification.

On the threshold matter of the type of specification at issue here, we find that the language in RFI #37’s provision on skids was a design specification. “Design specifications explicitly state how the contract is to be performed and permit no deviations. Performance specifications . . . specify the results to be obtained, and leave it to the contractor to determine how to achieve those results.” *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987). A contractor should be able to assume that, if work done pursuant to a Government-provided specification is done properly, the resulting outcome will be consistent with contract requirements. *Fru-Con Construction Corp. v. United States*, 42 Fed. Cl. 94, 96 (1998) (“An implied warranty is imported with respect to design specifications, such that compliance with the specifications will render an adequate outcome.”).

As discussed above, GSA’s statement in RFI #37 regarding the requirement to use proper skids is directional. Thus, it was reasonable for Wu to assume that, if proper skids were used, the floor would have been able to hold the load capacity of the elevator equipment. Accordingly, we find that GSA’s statement regarding the requirement to use skids on the flooring was a specification.

b. The Design Specification in RFI #37 Was Defective.

Next, as to whether the design specification was defective, Wu's president asserts that GSA's representation in RFI #37 that "heavy equipment involved in the project could be moved over the raised floor if 'proper skids' were used and if 'careful planning' was done" was false. Mr. Wu's Second Sworn Statement ¶ 3. Wu's president added that, without the floor plan, appellant's subsequent post-award inspection of the floor was not informative. *Id.*

GSA, for its part, essentially confines its argument against Wu's assertion to the agency's position that movement of the elevator equipment was exclusively a "means and methods" determination to be made by the contractor. GSA does not produce evidence, either in its own motion or in its response to Wu's motion, disputing Wu's assertion regarding the infeasibility of using skids on the floor for the purpose of moving the elevator equipment. *See* GSA's Statement of Undisputed Facts; Fuentes Affidavit; Eng Affidavit. The agency did not produce a statement of genuine issues in support of its opposition to Wu's motion, with supporting evidence, that the use of skids would have been feasible for the work. Nor did it dispute Wu's assertion regarding the importance of the floor plan to assessing the condition of the floor. *See* Rule 8(f)(2) (The party opposing a motion for summary judgment "shall file with its opposition a separate document titled, 'Statement of Genuine Issues.' This document shall respond to specific paragraphs of the movant's Statement of Undisputed Material Facts by identifying material facts in genuine dispute, citing appeal file exhibits, admissions in pleadings, and/or evidence filed with the opposition."); Fed. R. Civ. P. 56(e) ("If a party . . . fails to properly address another party's assertion of fact as required by [Fed. R. Civ. P. 56(c)], the [Board] may . . . consider the fact undisputed for purposes of the motion."). Accordingly, we find Wu's assertion that RFI #37 contained a defective specification is undisputed.

c. Wu Relied on the Defective Specification in RFI #37.

On the issue of whether Wu relied on the defective specification, in a request for interpretation and clarification submitted to GSA after award, Wu explained that it relied on GSA's response to RFI #37 when submitting its bid. Exhibit 28 at 501-02. Further, in a sworn statement submitted in support of Wu's motion, Wu's president reiterated that the company relied on GSA's representation in RFI #37. Mr. Wu's First Sworn Statement ¶ 2; Exhibit 28 at 501-02. The evidence, which is undisputed, shows that Wu relied on GSA's statements in RFI #37.

d. The Design Specification Error in RFI #37 Cannot Be Characterized as Patent.

GSA asserts that, to the extent that the Board finds any ambiguity in the language of RFI #37, such ambiguity should be found to be patent. Pertinent here, “[t]he implied warranty . . . does not eliminate [a] contractor’s duty to investigate or inquire about a patent ambiguity, inconsistency, or mistake when the contractor recognized or should have recognized an error in the specifications or drawings.” *Edsall Construction Co.*, 296 F.3d at 1085 (citing *Blount Brothers Construction Co. v. United States*, 346 F.2d 962, 972-73 (Ct. Cl. 1965)). “This duty requires contractors to clarify patent ambiguities.” *Id.* However, “it does not require them to ferret out hidden or subtle errors in the specifications.” *Id.* A patent ambiguity is defined as one that is “obvious, gross, [or] glaring, so that [the] plaintiff contractor had a duty to inquire about it at the start.” *H&M Moving, Inc. v. United States*, 499 F.2d 660, 671 (Ct. Cl. 1974); *States Roofing Corp. v. Winter*, 587 F.3d 1364, 1372 (Fed. Cir. 2009) (“[T]here must be a glaring conflict or obvious error in order to impose the consequences of misunderstanding on the contractor.”).

GSA produced an affidavit from the agency’s construction manager stating that “[b]idders were provided the opportunity to visit the building and to observe site conditions. On the 17<sup>th</sup> floor, bidders could have seen the raised computer floor, and should have noted that special measures might be needed to transport the heavy elevator equipment across the elevated section of that floor.” Fuentes Affidavit ¶ 5. However, the affidavit does not say that by observing the floor, a bidder would have known that “proper skids,” as described in RFI #37, would not have worked, and, thus, GSA’s statement in RFI #37 about using skids was a clear mistake requiring further investigation on the bidder’s part. Accordingly, the affidavit falls short of evidencing a patent ambiguity or showing a factual dispute on the issue. We also note that the affidavit is speculative as to both what a prudent bidder might have observed and what a prudent bidder might have determined needed to be done based on its observation. Thus, the affidavit is not helpful to show, as GSA seems to urge, that the ambiguity in the contract language is patent. *See Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1042 (Fed. Cir. 1994) (“conclusory, speculative affidavits of . . . company officials cannot raise” genuine issue of fact). Here, “[w]e have . . . an ambiguity, latent in character, as to require that it be construed against the author—here [GSA],” as we find that Wu construed RFI #37 in a reasonable manner. *H&M Moving, Inc.*, 499 F.2d at 716-17.

For the reasons stated, we do not find a patent ambiguity in the contract which would have obligated Wu to seek clarification on RFI #37. Instead, based on the foregoing, we find that Wu is entitled to summary judgment on its claim. Because we find that Wu prevails on its motion as a result of the defective specifications, we do not address the company’s other arguments.

## B. GSA's Motion

GSA's motion primarily rests upon the agency's position that the terms of the contract, including the agency's response to RFI #37, show that the challenge of moving equipment across the floor was a "means and methods" issue to be determined solely by the contractor. For the reasons discussed above, we find that RFI #37 included a defective specification upon which Wu relied and, to the extent that Wu can prove that it incurred additional costs to remedy issues resulting from the defective specification, it is entitled to an equitable adjustment for these additional costs. Accordingly, GSA's motion is denied.

Decision

Wu's motion for partial summary judgment on entitlement is **GRANTED**. GSA's motion for summary judgment is **DENIED**.

*Beverly M. Russell*

BEVERLY M. RUSSELL  
Board Judge

We concur:

*Marian E. Sullivan*

MARIAN E. SULLIVAN  
Board Judge

*Kyle Chadwick*

KYLE CHADWICK  
Board Judge