



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON JULY 31, 2024**

DENIED: July 25, 2024

CBCA 7573

FRAMACO INTERNATIONAL INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin, Erik M. Coon, and Jennifer M. Ersin of Bradley Arant Boult Cummings LLP, Washington, DC; and Sam Z. Gdanski and Abraham S. Gdanski of Gdanski Law PC, Teaneck, NJ, counsel for Appellant.

Thomas D. Dinackus, Matthew S. Tilghman, and Alexandra N. Wilson, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **RUSSELL**, and **O'ROURKE**.

RUSSELL, Board Judge.

Appellant, Framaco International Inc. (Framaco), has filed 131 cases with the Board (certain of which are consolidated) based on its contract with respondent, Department of State (State or agency), Bureau of Overseas Building Operations (OBO), to construct an embassy compound in Port Moresby, Papua New Guinea.

This decision is being issued in accordance with the Board's order on further proceedings of October 19, 2023 (Order), which largely adopted the parties' proposal to resolve approximately 100 of appellant's non-consolidated appeals brought pursuant to Board Rule 53 (48 CFR 6101.53 (2023)) and certain claims in four of its consolidated appeals not based on Government-caused delay. *See* Rule 53 (governing accelerated procedures available at an appellant's election, though limited to appeals involving disputes of \$100,000 or less); *see also* Rule 1(a) ("The Board may alter [its] procedures on its own initiative or on request of a party to promote the just, informal, expeditious, and inexpensive resolution of a case."). The Order states that "[t]he presiding judge with the two members of the panel . . . will decide the following appeals for which the parties will submit briefing: CBCA 7508, 7512, 7513, 7549, 7561, 7572, 7573, 7625, 7695, 7712, 7847, and 7859 ('Selected Appeals')." The Order additionally states, "Decisions rendered by the panel will be in summary form either in writing or orally, if a hearing is held; will be final and conclusive; will not be set aside, except for fraud; and will not be precedential."

As agreed to by the parties, quantum in the non-consolidated appeals and certain claims in four of Framaco's consolidated appeals (to which the Order applies) will be decided based on a formula using Framaco's prevailing damages in the Selected Appeals.

In this appeal, Framaco requests damages in the amount of \$99,999 for having to use fire-retardant-treated plywood (FRTP), also referred to as fire-rated plywood or fire-treated plywood, for partition walls and ceilings in areas purportedly not specified in the contract for its use. *See* Appellant's Opening Brief at 1-2. State counters that the contract unambiguously required use of fire-rated materials in the areas at issue. Respondent's Initial Brief at 1. For reasons stated below, we deny the appeal.

Background

The Project

In September 2015, State awarded Framaco a firm-fixed-price contract, initially valued at approximately \$97 million to construct the New Embassy Compound (NEC) in Port Moresby, Papua New Guinea.¹ Appeal File, Exhibit 1 at DOS-PTMO-00982321.² The project was originally designed in 2010 as a "Standard Secure mini-Compound" (SSmC)

¹ The contract was issued on July 6, 2015, and awarded on September 30, 2015. Appeal File, Exhibit 1 at DOS-PTMO-00982303-04.

² Unless otherwise noted, all exhibits referenced in this decision are contained in the appeal file.

with a scope including a lock-and-leave new office building, a perimeter security wall and fence, a main compound entry pavilion (MCAP), a service entry/utility building, and a support annex. Exhibit 2 at DOS-PTMO-00982414. Construction of the SSmC facility began in 2012, but in 2013, after forty percent of the project was completed, a future marine detachment was planned for Port Moresby and the embassy staffing requirement was increased. *Id.* State therefore descope the work under the 2012 contract and closed out that contract. The project was redesigned under an expanded NEC, incorporating the completed portions of the SSmC project as well as surplus equipment and materials, where appropriate. *Id.* The redesigned project included the perimeter security wall and fence, the MCAP, a new service compound entry pavilion, a new four-story office building (NOB), a marine service guard residence, a service entry/utility building, an enlarged support annex, and a new recreation facility. *Id.*

Contract Provisions

Federal Acquisition Regulation (FAR) 52.236-21, Specifications and Drawings for Construction (FEB 1997) (48 CFR 52.236-21(a) (2014)), was incorporated into the contract. Exhibit 1 at DOS-PTMO-00982393. This FAR provision states, in part, “Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of [a] difference between drawings and specifications, the specifications shall govern.” 48 CFR 52.236-21(a).

Section C.2.1 of the contract states that “[c]onstruction of this project is governed by the following building codes: . . . [the] 2006 International Building Code (IBC), amended by the 2012 OBO International Codes Supplement (OBO-ICS).” Exhibit 2 at DOS-PTMO-00982417. The IBC contains a list of the combustible materials that are allowed in Type I and Type II buildings for construction projects; the latter type is at issue in this appeal. Exhibits 18 at DOS-PTMO-02290682, 92 at DOS-PTMO-KCCT-0221633-34. The IBC provides that fire-retardant-treated wood is permitted in nonbearing partitions, nonbearing exterior walls, and roof construction. Exhibit 92 at DOS-PTMO-KCCT-0221634. Non-fire-retardant-treated wood is not on the list of materials that can be used for these items. *Id.* at DOS-PTMO-KCCT-0221633-34.

The contract specification, 061000, Rough Carpentry, includes a “DEFINITIONS” section, including definitions for two items – “Boards or Strips” and “Dimension Lumber.” Exhibit 6 at DOS-PTMO-KCCT-0039534 at 1.2. Section 2.3 of specification 061000, discussing fire-retardant-treated materials, states in part:

- E. Application: Treat items indicated on Drawings, and the following:
1. Concealed blocking.
 2. Plywood backing panels.³

Exhibit 6 at DOS-PTMO-KCCT-0039537. Specification 061000 also includes the following:

2.5 PLYWOOD BACKING PANELS (PBP)

- A. Equipment Backing Panels: . . . fire-retardant treated, in thickness indicated, or if not indicated, not less than 19-mm nominal thickness.

Exhibit 6 at DOS-PTMO-KCCT-0039538.

Framaco's Installation of Materials

Framaco asked State's Project Director (PD)/Contracting Officer's Representative (COR) whether certain rooms needed to be fire rated since there were no plywood backing panels for equipment in those rooms. Exhibit 15 at DOS-PTMO-03069002. In an email dated March 26, 2020, the PD/COR replied that "[t]here are no plywood backing panels for equipment in these rooms so fire rating is not required." *Id.* The PD/COR also advised that "[t]he specification requires plywood backing panels and blocking to be fire rated. Plywood backing is defined by the specification as being used for equipment (electrical etc.). Our conclusion is the plywood does not need to be fire rated unless it's blocking, equipment backing or specifically called out as fire rated construction in the life safety plans." Exhibit 14 at DOS-PTMO-02031006-07.

After Framaco had used non-fire-rated plywood on the project, State's PD/COR asked the Life Safety Senior Engineer, who worked for a private contractor, whether Framaco should have exclusively used fire-rated plywood for everything that requires plywood, considering that the construction project involved a Type II building. Exhibit 18 at DOS-PTMO-02290680-82. The PD/COR explained that his understanding, based on a reading of

³ As explained by State in its reply brief, backing panels are constructed of plywood. Respondent's Reply Brief at 1. Certain of the "backing panels at issue [in this appeal] provided support to wood paneling that was used in certain spaces to provide a pleasant, up-scale appearance," and "[o]ther backing panels provided support to various types of equipment." *Id.*

specification 061000 and design drawings, was that fire-treated plywood was only required in three locations: where specifically noted on drawings, at concealed blocking, and at equipment backing panels. *Id.* at DOS-PTMO-02290682. The engineer responded, in part, that “[g]enerally, code requirements are picked-up in the design” and that “[a] full restatement of all code requirements would not be included in the contract documents.” *Id.* at DOS-PTMO-02290681. He added:

As related to interior construction, [Fire-retardant-treated wood (FTRW)] shall be permitted in nonbearing partitions where the required fire-resistance rating is 2 hours or less. FTRW shall be permitted to be used in partitions dividing offices occupied by one tenant only and that do not establish a corridor serving an occupant load of 30 or more.

Untreated wood may be used as blocking or nailers used to support fixtures, railings, cabinets, and window and door frames. Untreated wood may also be used as furring strips not exceeding 44 mm in concrete construction for securing trim and finishes.

The use of FTRW as equipment backing panels as specified in section 061000 does not conflict with the IBC, and is specifically required by the owner.

Id.

State subsequently determined that the installed non-fire-rated plywood was not compliant with contract requirements. Exhibit 19 at DOS-PTMO-02367395-96; Appellant’s Opening Brief at 3. Specifically, State realized that the NOB building was designed as a Type IIA construction building, which does not allow the use of regular plywood in wall partitions. Exhibit 79 at DOS-PTMO-03090031. In an email, a State official explained, “The OBO field office has indicated that non [fire retardant treated (FRT)] plywood has been used extensively throughout the NOB” and asked, “Is anyone aware of a listed surface coating that can be applied to one side that provides the equivalent of FRT plywood?” and “Does anyone have a suggestion for mitigation to provide an equivalent level of safety while keeping non FRT plywood installed?” Exhibit 19 at DOS-PTMO-02367396. State considered some type of paint coating as a remedy, but ultimately it determined that painting the plywood would not address the fire rating issue. Exhibit 27 at DOS-PTMO-01923460.

Framaco eventually installed fire-rated plywood in partition walls and ceilings. The company requested a contracting officer’s (CO’s) final decision on its claim seeking \$99,999 to compensate it for what it considered a Government-directed change to install the fire-rated plywood. Exhibit 79 at DOS-PTMO-03090027. However, the CO concluded that Framaco’s

installation of non-fire-rated plywood deviated from contract specifications and code requirements and, therefore, denied Framaco's claim. Exhibit 80 at DOS-PTMO-03101794-803. This appeal followed.

Framaco's Appeal

In its brief, Framaco notes that both it and State's PD/COR (i.e., OBO), along with others, interpreted specification 06100 at section 2.5 as a definition of "plywood backing panels," meaning that such panels only referred to "equipment backing panels." Appellant's Opening Brief at 4-5. Thus, Framaco argues that State's demand that the company install fire-treated material that was not identified in the drawings at concealed blocking or at "equipment backing panels" was beyond the requirements of the contract. *Id.* at 1, 5. Framaco further argues that, pursuant to *United States v. Spearin*, 248 U.S. 132, 136 (1918), because State prepared the plans and specifications, it should be responsible for the defects contained therein. Appellant's Opening Brief at 1-2. State, on the other hand, argues that "the contract unambiguously required the use of [fire-rated] plywood . . . at the locations at issue." Respondent's Initial Brief at 1; *see* Respondent's Reply Brief at 2.

Discussion

Framaco seeks compensation for the installation of the fire-rated plywood in areas that were not specified in the contract. To determine whether Framaco can recover for its claimed damages, we start with a review of the contract's plain language. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). We read the contract as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). "An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); *see* Restatement (Second) of Contracts § 203(a) (1981) (contract interpretation should not leave a part of a contract "of no effect").

We deny the appeal based on the plain language of the contract. First, the IBC, incorporated into the contract by reference, defined the types of combustible materials that were allowed in the building's construction (specifically, the partitions). Non-fire-retardant-treated wood is not among the combustible materials permitted for construction of the type of building at issue here. Exhibit 92 at DOS-PTMO-KCCT-0221633-34.

Second, although Framaco argues that the drawings did not direct the use of fire-retardant-treated wood, the specifications did require, at sections 2.3(A) and 2.3(E), such material to be used for backing panels. Exhibit 6 at DOS-PTMO-KCCT-0039536-37. To the extent that there was a discrepancy between the drawings and specifications, the contract is clear that specifications took precedence over the drawings. Exhibit 1 at DOS-PTMO-00982393.

Third, Framaco argues that contract specification 061000 at section 2.5(A) narrowly defined “plywood backing panels,” a term initially mentioned in 2.3(A), to mean “equipment backing panels” only. However, specification 061000 had a definition section, and neither “plywood backing panels” nor “equipment backing panels” was included among the terms defined in the section. Exhibit 6 at DOS-PTMO-KCCT-0039534. Section 2.3 of specification 061000 stated that fire-retardant-treated materials are used where indicated and apply to items indicated on drawings, to concealed blocking, and to plywood backing panels. *Id.* at DOS-PTMO-KCCT-0039536. Separately, section 2.5(A) shows “equipment backing panels” under the heading “PLYWOOD BACKING PANELS (PBP).” *Id.* at DOS-PTMO-KCCT-0039538. A reasonable interpretation of section 2.5(A) is that it reflects “equipment backing panels” as a type of “plywood backing panels” and also describes the thickness of fire-retardant treatment required for equipment backing panels. There was nothing in section 2.5(A) narrowly defining or limiting “plywood backing panels,” initially mentioned in 2.3(A) as exclusively “equipment backing panels.” Not limiting the definition in such a way reconciles with the IBC’s requirements for use of fire-retardant-treated wood for non-bearing partitions – here, plywood backing panels which include equipment backing panels.

Finally, Framaco’s argument concerning its communication with the PD/COR who apparently, based on his own interpretation and that of others who were not the CO, agreed with Framaco’s narrow definition of “plywood backing panel” is unhelpful to Framaco’s case. The PD/COR did not have authority to change the contract, including modifying specifications. *See Pearson E. Dubar v. Department of Agriculture*, CBCA 1895, 10-2 BCA ¶ 34,497, at 170,147 (“The actions of a government employee without actual authority cannot bind the Government.”); 48 CFR 43.102(a) (“Only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government.”). Additionally, Framaco’s interpretation failed to consider the IBC provisions for combustible materials that were incorporated into the contract. Pursuant to the IBC, the only combustible material allowed in nonbearing partitions was fire-retardant-treated wood. Indeed, the issue here is not a defective specification, as Framaco urges, but a failure to install materials required by code provisions that were expressly incorporated into the contract. Ultimately, Framaco remained responsible for compliance with the contract terms, including those stated in the IBC, and as such, is not entitled to compensation for correcting non-compliant work.

Decision

The appeal is **DENIED**.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge