



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**

GRANTED: July 29, 2024

CBCA 7549

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)), along with certain claims in four of its consolidated appeals that were not based on Government-caused delay. *See* Rule 53 (governing accelerated procedures, which are available at an appellant's election and are limited to appeals in which there is a monetary amount in dispute 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 derived from any damage amounts awarded to Framaco in the Selected Appeals. In a subsequent joint response filed with the Board on March 19, 2024, the parties confirmed that the Order applies to the appeals described above.

In this appeal, Framaco seeks \$81,452 for the cost of purchasing and installing an X-ray machine that Framaco claims was not required by the contract. Exhibit 23 at DOS-PTMO-03088660. Alternatively, Framaco asserts that, if the machine were required, it should have been furnished by State. *Id.* State asserts that the contract unambiguously required Framaco to provide the X-ray machine. Respondent's Initial Brief at 1. For reasons stated below, we grant the appeal.

Background

I. The Contract

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) 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 descoped 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, a marine service guard residence, a service entry/utility building, an enlarged support annex, and a new recreation facility. *Id.*

Regarding the X-ray machine at issue, the contract required Framaco to “complete all work, including furnishing all labor, material, equipment and services as called for and required by the terms and conditions of this contract document and all attachments hereto.” Exhibit 1 at DOS-PTMO-00982319. Contract specification 281354 (technical security access equipment) stated that Framaco must “provide package x-ray machines at . . . Public Access Control (PAC) areas at each [compound access control (CAC)]” location. Exhibit 5 at DOS-PTMO-01403335. The 2013 OBO Design Standards, incorporated into the contract by reference, defined a PAC as “a personnel screening process inside all [campus access pavilions (CAPs)] and office building entrances that admit the public.” Exhibit 108 at DOS-PTMO-01346116. A CAP, also referred to as a CAC, is a “[s]ystem of gates, barriers and guard booths used to prescreen personnel and vehicles entering a secure perimeter.” *Id.* at DOS-PTMO-01346106.

According to the OBO Design Standards, “[t]he service CAP [(SCAP)] serve[d] as the main shipping/receiving and official vehicle fleet entrance to the campus and [was] normally located at the rear entrance. It also provide[d] a large x -ray machine/transshipment area and trash pickup area *on a case-by-case basis*. In some cases, depending on the location of staff parking, the SCAP [might] serve to screen *staff* pedestrians.” Exhibit 94 at FRAM-1820292 (emphasis added). “The SCAP [was] designed to create an area where a vehicle . . . stop[s] for screening prior to entering the campus. It consist[ed] of a sheltered area housing

¹ The contract was issued on July 6, 2015, and awarded on September 30, 2015. Appeal File, Exhibit 1 at DOS-PTMO-00982303, -00982321.

² All exhibits are found in the appeal file, unless otherwise noted.

a guard booth, equipment storage, rest room, mechanical/electrical room and sub-EC room, an explosives detector and a vehicle screening area sally port.” *Id.* The OBO Design Standards also stated, “At the [SCAP], provide a shipment receiving/screening area with loading dock and room for large-format x-ray machine, along with secure storage.” *Id.*

Drawing SCAP FF131S provided the architectural furniture and finish plan for the SCAP. Exhibit 13 at DOS-PTMO-KCCT-0029089. The drawing document did not list an X-ray machine in the schedule lists of contractor-furnished contractor-installed (CFCI), Government-furnished contractor-installed (GFCI), or Government-furnished Government-installed (GFGI) items of equipment or furniture to be installed in the area.³ *Id.* Framaco did not include an X-ray machine for the SCAP in its proposal. Exhibit 20 at DOS-PTMO-03085953.

On January 8, 2020, Framaco submitted request for information (RFI) no. 846174, noting that the SCAP drawing did not include an X-ray machine and requesting that State “confirm that there will not be [X]-ray machine (GFGI) [sic] in this building.” Exhibit 14 at DOS-PTMO-02103930. On January 15, 2020, State’s construction executive replied to the RFI as follows: “The SCAP will have both the X-Ray machine and walk through metal detector (WTMD). Both units are GFGI. The X[-]ray machine is Smith Hi-Scan 6040 Please install the power requirement per the electrical drawings. Both units will be installed *when the SCAP construction is finished and prior to accreditation.*” Exhibit 15 at DOS-PTMO-02044445 (emphasis added). On March 11, 2020, the contracting officer’s representative (COR) responded to a February 12, 2020, RFI from Framaco inquiring about the proper location for the X-ray receptacle. State directed Framaco to “[p]rovide [a] dedicated floor mounted receptacle . . . as shown in drawing SCAP E162.” *See* Exhibits 16 at DOS-PTMO-02044451, 17 at DOS-PTMO-02044449.

Nearly two years later, on December 7, 2021, State uploaded its Port Moresby *pre-final* inspection findings report, which noted that an X-ray machine had not been provided at the SCAP entry area. Exhibit 101 at DOS-PTMO-03086115_005. Referencing specification 281354 and the 2012 OBO Building Code, the report noted the discrepancy as “not installed” and stated, “Contractor to provide x-ray machine. Suggested model: Smiths Heiman 5030si.” *Id.*; *see* Exhibit 92 (OBO Building Code).

In a letter to the contracting officer dated December 23, 2021, Framaco addressed the conflicting information about the X-ray machine, including the purchase, make, model, and

³ The X-ray machine at issue is distinct from the walk through metal detectors listed as GFGI items in the equipment schedule. Exhibit 13.

installation of the machine. Framaco informed State that it would consider procuring the X-ray machine as an addition to the contract work. Exhibit 20 at DOS-PTMO-03085953. On December 28, 2021, the contracting officer replied, indicating that the SCAP X-ray machine was a requirement under specification 281354 and within the scope of Framaco's firm-fixed-price contract. Exhibit 21 at DOS-PTMO-03085809. The contracting officer additionally noted that State's previous RFI response did not change Framaco's contractual obligations. *Id.* at DOS-PTMO-03085810.

II. Framaco's Claim

On August 11, 2022, Framaco submitted a claim in the amount of \$81,452 for the costs of purchasing and installing the X-ray machine at the SCAP. Exhibit 23 at DOS-PTMO-03088660. In its claim, Framaco asserted that it was entitled to reimbursement for the costs of the X-ray machine because it should have been a Government-furnished item. *Id.* On October 13, 2022, the contracting officer issued a final decision denying Framaco's claim and reiterating that providing the X-ray machine at the SCAP was Framaco's responsibility. Exhibit 24. This appeal followed.

In its brief, Framaco argues that it should not have to bear the costs of purchasing and installing the X-ray machine at the SCAP, especially given OBO's representations that the machine would be provided as GFGI. Appellant's Opening Brief at 1. Framaco additionally asserts that it should prevail because its interpretation of the contract was reasonable. *Id.* at 4. State, in its brief, asserts that "[t]he contract unambiguously required Framaco to provide an X-ray machine at the [SCAP]." Respondent's Initial Brief at 1. We find that Framaco's interpretation of the contract—that it was not required to purchase and install the X-ray machine at the SCAP—is a reasonable one. We therefore grant the appeal.

Discussion

To decide this claim, we look to the plain language of the contract documents. *See Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). "Contract language should . . . be given the plain meaning that would be derived by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Columbia Construction Co. v. General Services Administration*, CBCA 3258, 15-1 BCA ¶ 35,856, at 175,319 (citing *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971)). "[A]n interpretation which gives a reasonable meaning to all of [the contract's] parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (quoting *Arizona v. United States*, 575 F.2d 855, 863 (1978)). When the contract language is "clear and unambiguous, [it] must

be given [its] plain and ordinary meaning,” and the Board “may not resort to extrinsic evidence to interpret [it].” *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (citations omitted).

If, however, “the contractual language at issue is susceptible of more than one reasonable interpretation, it is ambiguous, and it is the Board’s task to determine which party’s interpretation should prevail.” *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,151. “When a dispute arises as to the interpretation of a contract and the contractor’s interpretation of the contract is reasonable, tribunals apply the rule of *contra proferentem*, which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document.” *Id.* The Board in *ACM Construction & Marine Group, Inc.* further explained:

If an ambiguity exists, the next question is whether that ambiguity is patent. An ambiguity is patent if the ambiguity is so glaring that it is unreasonable for the contractor not to discover and inquire about it. The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter. More subtle ambiguities are deemed latent, and the general rule that such language is interpreted in favor of the nondrafting party will apply. *See Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997); *Interstate General Government Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434-35 (Fed. Cir. 1992).

Id.

Turning to the issue in this appeal, we note that contract specification 281354 required Framaco to provide X-ray machines in PAC areas, with the term PAC defined as “a personnel screening process inside all CAPs and office building entrances that *admit the public*.” Exhibit 108 at DOS-PTMO-01346116 (emphasis added). Under the OBO Design Standards, the purpose of the SCAP, located at the rear entrance, was to serve as the main shipping/receiving location and official vehicle fleet entrance to the embassy campus. Exhibit 94 at FRAM-1820292. According to these standards, the SCAP might additionally be used to screen staff pedestrians. *Id.* Thus, a reasonable interpretation of contract specification 281354 is that the SCAP was not intended as an access or entrance point for the public at large, i.e., a PAC location for which Framaco was obligated to install an X-ray machine. This interpretation also supports the distinction between the SCAP and CAP requirements and explains the “case-by-case basis” language in the OBO Design Standards. The fact that an X-ray machine had not been installed at the time of State’s pre-final inspection was not a result of any omission by Framaco but rather of the timing of the

inspection. The agency's earlier statement that the X-ray machine was GFGI and would be installed "when SCAP construction [was] finished and prior to accreditation" places the responsibility on the agency.

Furthermore, although the OBO Design Standards explained that the SCAP included an X-ray *area* and *room* for an X-ray, the standards did not state that Framaco was responsible for purchasing and installing the X-ray machines at the SCAP. *Id.* Notably, the drawing for the SCAP did not list an X-ray machine in the schedule of CFCI or GFCI equipment to be installed in the area—nor did Framaco propose one. Exhibit 13 at DOS-PTMO-KCCT-0029089. Further, OBO Building Code section 424.3.4.4, which State referenced in the pre-final inspection report as support for the agency's position that Framaco was responsible for the X-ray machine, is inapposite; that section only addresses requirements for a security intercom system. Exhibit 92 at DOS-PTMO-KCCT-0220746. Thus, we cannot find that the contract terms and conditions "called for and required" Framaco to purchase and install the SCAP X-ray machine. *See* Exhibit 1 at DOS-PTMO-00982319. To the contrary, considering the specifications and drawings, Framaco's interpretation that it was not responsible for purchasing and installing an X-ray machine at the SCAP was a reasonable one.

Further, in its brief, State identifies no contract provision, specification, building code, or drawing that would have put Framaco on notice of a patent ambiguity (e.g., facially inconsistent contract provisions identifying the SCAP as a PAC area on one hand and, on the other, expressly signaling the contrary) and, thus, a duty to inquire pre-bid. *Triax Pacific*, 130 F.3d at 1475. And even when Framaco did inquire, post-award, OBO confirmed that the X-ray machine in the SCAP would be GFGI. Exhibits 15 at DOS-PTMO-02044445, 23 at DOS-PTMO-03088664. Thus, based on the foregoing, we find that Framaco is entitled to reimbursement for its cost incurred to procure and install the SCAP X-ray machine.

Framaco claims that it is entitled to \$81,452 for its work. However, as indicated above, quantum for all of Framaco's non-consolidated appeals, including this one, and certain of its claims in four of its consolidated appeals, will be resolved by a formula agreed to by the parties based on the "Selected Appeals" on which Framaco prevails.

Decision

The appeal is **GRANTED**.

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