



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON SEPTEMBER 10, 2024**

DENIED: September 6, 2024

CBCA 7712

FRAMACO INTERNATIONAL INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin and Erik M. Coon 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, 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 but limited to appeals involving amounts 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 (CBCA 7712), Framaco seeks costs for landscaping work that it performed but which it alleges was outside the scope of the contract. For the reasons stated below, the appeal is denied.

## 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. Appeal File, Exhibit 1 at DOS-PTMO-00982321.<sup>1</sup> The project was originally designed in 2010 as a “Standard Secure mini-Compound” (SSmC) with a scope that included 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

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

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

## II. Applicable Contract Provisions

The contract's statement of work provided that "CLIN 0005 - *OPTION*" was for "[l]andscaping outside of the perimeter wall along Poreporena Highway" and that, "[s]hould this CLIN not be elected[,] the alternate plan for this area provided in Attachment J.3.6 shall be provided." Exhibit 2 at DOS-PTMO-00982416. However, CLIN 0005 contained a typo. Attachment J.3.6 is a pricing document that does not mention landscaping. Exhibit 25. The document containing the drawings that set out the alternate plan for CLIN 0005 was attachment J.3.7.1. Exhibit 10. Before award, one potential bidder inquired about this discrepancy and asked for clarification. Exhibit 18 at DOS-PTMO-01400508. State responded that, if CLIN 0005 was not exercised, "the contractor shall be required to perform the scope shown in *Attachment J-3-7-1 CLIN 003 and 005 Alternate Drawings on Sheets CMPD LI401A, LI402 and LP402A.*" *Id.* (emphasis added); *see also* Exhibit 10 at DOS-PTMO-01038330 (index identifying CLINs with landscaping requirements, including 0005). In a separate response to another potential bidder, State again stressed that the contract required landscaping in the same area affected by CLIN 0005, even if the CLIN was not exercised. Exhibit 18 at DOS-PTMO-1400505.

## III. The Parties' Arguments

Framaco asserts that its interpretation – that the landscaping work it performed was out of scope – should prevail because the contract did not reference any alternate landscaping work to be performed if CLIN 0005 were not exercised and instead referenced a pricing document (attachment J.3.6). Appellant's Opening Brief at 6. Framaco also argues that "the existing site conditions did not match the drawings" in attachment J.3.7.1, proving that the attachment was prepared only for CLIN 0005, which was not awarded. *Id.* at 5. For these reasons, Framaco submitted a claim for \$99,999 for landscaping costs in this area.

State argues that its instruction to perform the alternate landscaping plan in attachment J.3.7.1 was not a constructive change because the contract stated that an alternate landscaping

plan would be required should State not exercise CLIN 0005. State maintains that it clarified pre-award (1) that “J.3.6” was a typographical error and (2) that the alternate plans the contractor was required to use in the event that CLIN 0005 was not exercised were in attachment J.3.7.1. Respondent’s Initial Brief at 1-3. State also argues that Framaco has not met its burden of proof in arguing that there was a differing site condition or a constructive change regarding the site for the landscaping because Framaco (1) did not provide a proper analysis or evidence for whether a type I or type II differing site condition existed and (2) did not show an increase in its cost of performance between the contract requirements and its actual performance. *Id.* at 6-7.

### Discussion

When the Government clarifies the contract’s requirements before award in response to offeror inquiries and the contractor does not object, the contractor is determined to have known, or should have known, about the clarification and is thus bound by it. *See Cresswell v. United States*, 173 F. Supp. 805, 811 (Ct. Cl. 1959) (“If one party to a contract knows the meaning that the other intended to convey by his words, then he is bound by that meaning. The same is true if he had reason to know what the other party intended.”).

We find that the contract’s requirements are clear. If State did not elect to exercise CLIN 0005, which described landscaping work, then Framaco was required to perform the alternate landscaping plan set out in attachment J.3.7.1. Although the contract erroneously cited attachment J.3.6 (a pricing document) instead of J.3.7.1, State repeatedly corrected this error, pre-award, in response to inquiries from potential offerors. We find that a reasonable contractor would have understood State’s clarification that attachment J.3.7.1 was the correct document and that the contract required landscaping per J.3.7.1 if State did not exercise CLIN 0005.

As for Framaco’s arguments regarding differing site conditions, Framaco has not offered an analysis of how a type I or type II differing site condition existed or how any such condition increased its costs of performing the landscaping. *See, e.g., CI-Pond Solutions JV, LLC v. Department of Justice*, CBCA 7233, 22-1 BCA ¶ 38,077, at 184,913 (explaining the elements required to prove type I and type II differing site conditions); *see also Tucci & Sons, Inc. v. Department of Transportation*, CBCA 4779, 16-1 BCA ¶ 36,258, at 176,886 (“The appropriate measure of damages for a differing site condition is the additional cost incurred by the contractor as a result of the differing site condition.”). Indeed, in arguing a “differing site condition,” Framaco focuses on issues related to scope of work rather than the physical condition of the site. Appellant’s Reply Brief at 5-6.

Decision

For the foregoing reasons, 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