



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: January 9, 2017

CBCA 5240

BLUEGRASS CONTRACTING CORPORATION,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Dave Luttrell, Vice President of Bluegrass Contracting Corporation, Lexington, KY, appearing for Appellant.

Grace Reidy, Office of Chief Counsel, Federal Highway Administration, Department of Transportation, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **GOODMAN**.

**SOMERS**, Board Judge.

Bluegrass Contracting Corporation (Bluegrass) entered into a contract with the Department of Transportation, Federal Highway Administration (the Federal Highway Administration or the Government), to repair and improve drainage chases and to mill and overlay asphalt roadway at the Devil's Courthouse Tunnel along the Blue Ridge Parkway in North Carolina. On October 7, 2015, Bluegrass submitted a claim for \$71,522 for additional costs incurred during the project. Upon denial of its claim, Bluegrass submitted its appeal.

The parties have elected to submit this appeal for decision on the written record pursuant to CBCA Rule 19, 48 CFR 6101.19 (2015).<sup>1</sup> The record consists of appellant's notice of appeal, which has been designated by appellant as its complaint, the Government's answer, Bluegrass's single-paged memorandum of law, the Government's memorandum of law, and the appeal file. We deny Bluegrass's appeal.

### Findings of Fact

The Government issued a solicitation for contractors to "repair deteriorated drainage chases, drainage improvements, mill and overlay of approximately 1,068 linear feet of asphalt roadway and other miscellaneous work." The solicitation incorporated the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects (FP-03) U.S. Customary Units, U.S. Department of Transportation, Federal Highway Administration (Standard Specifications). It also included Schedule A (the bid schedule), with blanks for quantities and prices to be completed by the bidder, and Section J (Special Contract Requirements). The special contract requirements amended and supplemented the standard specifications.

#### I. Standard Specifications and the Bid Schedule

Standard Specifications section 552 (Structural Concrete) described the requirements for "furnishing, placing, finishing, and curing concrete in bridges, culverts, and other structures." Subsection 552.03 required the contractor to design and produce concrete mixtures that conformed to standard specifications. Subsection 552.21 provided that quantities accepted for work under section 552 "will be paid for at the contract price per unit of measurement for the section 552 pay items listed in the bid schedule . . . . Payment will be full compensation for the work prescribed in this section." The special contract provisions supplementing this subsection instructed the contractor to "repair concrete lining using shotcrete according to Section 566."<sup>2</sup>

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<sup>1</sup> Under this Rule, the parties are entitled to include in the written record (1) any relevant documents or other tangible things they wish the Board to admit into evidence; (2) affidavits, depositions, and other discovery materials that set forth relevant evidence; and (3) briefs or memoranda of law that explain each party's positions and defenses. *See* 48 CFR 6101.19.

<sup>2</sup> The term "shotcrete" is used to describe a construction technique in which mortar or concrete is pneumatically applied or sprayed. *See Guide to Shotcrete* (ACI 506R-16) American Concrete Institute, June 2016, [www.concrete.org/Portals/0/Files/PDF/Previews/506R\\_16\\_preview.pdf](http://www.concrete.org/Portals/0/Files/PDF/Previews/506R_16_preview.pdf).

The bid schedule listed the item number, pay item number, description, quantity, unit, unit price, and amount on a chart. The contract line items here followed the numerical pattern of the sections set forth in the standard specifications. Thus, item 55205-000, which identified work arising from Standard Specifications section 552, required the contractor to repair concrete through (1) full-depth patching, (2) partial depth patching, and (3) failed lining patch repair. The bid schedule indicated that these three items would be paid for by square yard units.

Standard Specification section 566 (Shotcrete) describes the “work consist[ing] of constructing one or more courses of shotcrete on a prepared surface.” Subsection 566.10 states that the contractor is to “measure shotcrete by the cubic yard in place.” The special contract provisions supplementing subsection 566.10 required the contractor to “[m]easure shotcrete used for concrete repairs under Section 552 except for shotcrete used to fill voids between the geocomposite sheet and the drainage chase and native rock.”

Subsection 109.05 stated that “payment for all contract work is provided, either directly or indirectly, under the pay item shown in the bid schedule.” The subsection concludes: “Work measured and paid for under one pay item will not be paid for under any other pay item.”

## II. Contract Award

Before contract award, the contracting officer asked Bluegrass to verify its bid. Appellant’s president confirmed that the “total contract price of \$847,334.00 for Schedule A on the Bid Summary sheet is what I intended to bid.” The bid schedule, as completed by Bluegrass, included the following bids for shotcrete to be used in concrete repair as detailed under section 552:

Item No.:	A2100
Pay Item No:	55205-0000
Description:	Repair Concrete (Full-Depth Patching)
Quantity:	1
Unit:	SQYD [square yard]
Unit Price:	\$3,300
Amount:	\$3,300
Item No.:	A2150
Pay Item No:	55205-0000
Description:	Repair Concrete (Partial-Depth Patching)
Quantity:	25

Unit: SQYD  
 Unit Price: \$1,300  
 Amount: \$32,500

Item No.: A2200  
 Pay Item No: 55205-0000  
 Description: Repair Concrete (Failed Lining Patch Repair)  
 Quantity: 130  
 Unit: SQYD  
 Unit Price: \$310  
 Amount: \$40,300

Also included in the Bid Schedule is an item for shotcrete work performed under Section 566. Bluegrass bid as follows:

Item No.: A2350  
 Pay Item No: 56602-0000  
 Description: Repair Concrete (Failed Lining Patch Repair)  
 Quantity: 130  
 Unit: CUYD [cubic yard]  
 Unit Price: \$310  
 Amount: \$40,300

The Government awarded Bluegrass the contract on August 29, 2014.

### III. The Dispute

In a June 1, 2015, letter to the contracting officer, Bluegrass asserted that all shotcrete work, including work performed under section 552 (concrete repair), should be paid in accordance with section 566 (void filling). That is, Bluegrass wanted all shotcrete to be paid per cubic yard in place, pursuant to Section 566, and not per square yard, pursuant to section 552. Bluegrass claimed that it interpreted the contract as follows:

Specification Section 552 which covers full-depth and partial-depth patching along with failed lining patch repair references using shotcrete for lining repairs according to Section 566. Per Section 566 of the standard specifications shotcrete was to be paid per cubic yard in place at the contract unit price for this item. We have a unit price for shotcrete in this project.

Specification Section 605 which covers draining chase work indicates placing shotcrete per Section 552 which in turn refers to Section 566 for shotcrete. As stated in the previous paragraph Section 566 says that shotcrete is to be paid per cubic yard in place [sic] at the contract unit price for this item. We have a unit price for shotcrete.

It is apparent from the way the specifications are written that it is their intent to pay the contract for the actual quantity of shotcrete used in the various lining repair methods.

In response, in a letter dated June 8, 2015, the Government stated:

[T]he pay item you refer to has within its very name the limits for its use – Item 56602-0000 Shotcrete Lining Repair (Fill Voids Between Drainage Chase and Native Rock). Regardless of your past experience on other projects, this project and this particular item are clear as to the limits of payment for shotcrete. When the specifications refer to Section 566 from a different section, such as Section 552, the purpose is to direct the construction of the material and has nothing to do with the payment for that material. [Your quality control manager] and I were careful to quantify the shotcrete material that was used in the void filling. Therefore, I cannot justify paying separately for shotcrete that was not used to fill the voids between the drainage chase and native rock.

The Government's contemporaneous payment records reveal that Bluegrass received payment in full for work performed under the line numbers A2100, A2150, and A2200, i.e., work performed under section 552. The Government made payments based upon a measurement of square yard units, consistent with the unit reflected on the bid schedule, and Bluegrass accepted these payments without issue. The same progress payment reports show that the Government paid appellant in full for work under the line number A2350, associated with section 566. Payments were made using a measurement of cubic yards in place, again consistent with the bid schedule.

Over the course of a few months, the parties continued to disagree about the meaning of the contract. Ultimately, on October 7, 2015, Bluegrass requested an equitable adjustment and sought a contracting officer's final decision:

The details on Drawing Sheet R02 for partial depth concrete lining repair and Section B-B on Sheet R04 for drainage chase repairs indicate that shotcrete is to be used for these repairs. Shotcrete is referenced in Section 552 of the

Special Contract Requirements. Failed lining path repair would also be covered under Section 552. Section 522 [sic] indicates to “Repair concrete lining using shotcrete according to Section 566.” Specifically Section 566.10 in FP-3 states to measure shotcrete by the cubic yard in place. However, Section 566.10 was amended in the Special Contract Requirement with the following: “Measure shotcrete used for concrete repairs under Section 552 except for shotcrete used to fill voids between the geocomposite sheet at the drainage chase and the native rock.” As indicated above Section 552 refers shotcrete work to Section 566. Although these specifications appear ambiguous it all leads back to Section 566 which indicates that shotcrete will be measured and paid by cubic yard in place.

Bluegrass claimed that a total of 32.51 cubic yards should have been paid under item 56602-000. As a result, it seeks \$71,522 in compensation for the amount of shotcrete that had been used but had not been paid under that pay item.

The contracting officer disagreed. In a final decision dated November 16, 2015, the contracting officer denied the request for equitable adjustment, rejecting Bluegrass’ contract interpretation and finding that Bluegrass had been fully paid for all work performed under the contract.

After the contracting officer denied Bluegrass’ claim, Bluegrass appealed to the Board, submitting a notice of appeal that mirrored its claim to the contracting officer. After the Board denied the Government’s motion to dismiss for lack of jurisdiction, *Bluegrass Contracting Corp. v. Department of Transportation*, CBCA 5240, 16-1 BCA ¶ 36,415, the parties elected to submit the appeal for decision under Board Rule 19.

### Discussion

The central issue in this appeal involves a question of contract interpretation. The dispute before us is whether Bluegrass is entitled to be paid for shotcrete using a cubic yard measurement under section 566, or whether section 552, which calls for a square yard measurement, applies. “In resolving disputes involving contract interpretation, we begin by examining the plain language of the contract.” *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004). When interpreting the language of the contract, we must give reasonable meaning to all parts of the agreement and not render any portion meaningless, or interpret any provision so as to create conflicts with other provisions of the contract. *Hercules, Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed. Cir. 2002); *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985). The nature of the contract is determined by an objective reading of its language, not by one party’s

characterization of the instrument. See *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); See also *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,061. “An 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, at 176,954 (citing *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 97 (Ct. Cl. 1965)).

Bluegrass argues that the portion of section 552 which states “repair concrete lining using shotcrete according to Section 566,” converts the pay items for work done pursuant to section 552 to the pay items associated with section 566. Thus, appellant’s argument follows that all shotcrete is to be measured and paid according to section 566 work, which calls for cubic yards in place, as opposed to square yards for work performed under Section 552.

Bluegrass’s interpretation of the contract is incorrect. In order to accept appellant’s interpretation, one must ignore several contract sections. First, appellant’s position is inconsistent with the bid schedule, which provided that the contractor would be paid for shotcrete used in full-depth patching, partial depth patching, and failed lining patch repair, using the measurement of square yard units. Only shotcrete used to fill voids between drainage chase and native rock would be paid for by cubic yard units. Bluegrass knew, or should have known, of the distinction between the units of measurement set forth on the bid schedule because the measurement unit is expressly identified for each item number. In sum, the two distinct payments for shotcrete are one for filling voids and one for concrete repairs. The two items are paid using different units of measurement. Thus, Bluegrass’s interpretation that all shotcrete should be paid and measured by cubic yards in place ignores the requirement in the bid schedule that certain items be paid for by square yard units.

Second, Bluegrass’s interpretation ignores section 552, which spelled out the requirements for performing concrete repair. While it is true that special contracting section 552 contains a reference to section 566, this reference is for the purpose of providing technical direction for the shotcrete work. The special contract provisions supplementing subsection 566.10 distinguish between shotcrete used for concrete repairs under section 552 and shotcrete used to fill voids, stating that the contractor should “measure shotcrete used for concrete repairs under Section 552 except for shotcrete used to fill voids between the geocomposite sheet at the drainage chase and the native rock.” These contract provisions only make sense if they are read to maintain a distinction between the shotcrete used for concrete repairs and that used to fill voids. Consistent with the bid schedule, the first is measured by square yards, the second by cubic yards.

Third, Bluegrass attempts to compare the requirements of this contract with other contracts in which it claims to have “performed the same types of tunnel repairs previously with identical specifications and shotcrete paid per cubic yard.” However, appellant never identified these other contracts, leaving us with no ability to evaluate this assertion.

Finally, Bluegrass suggests that “these specifications appear ambiguous and it all leads back to Section 566 which indicates that shotcrete will be measured and paid by cubic yard in place.” In order to find the ambiguity suggested by Bluegrass, we must determine whether the contract is susceptible to more than one reasonable interpretation. *See, e.g., E.L. Hamm & Associates, Inc. v. England*, 379 F.3d 1334, 1341 (Fed. Cir. 2004); *SOS International, Ltd. v. Department of Justice*, CBCA 3678, 14-1 BCA ¶ 35,751 at 174,955. We find that it is not. Bluegrass’s interpretation is not reasonable because it renders portions of the contract, in particular the bid schedule, meaningless. *See Bell/Heery v. United States*, 739 F.3d 1324, 1331 (Fed. Cir. 2014) (“A contract must also be construed as a whole and in a manner that gives meaning to all its provisions and makes sense.” (citations and quotation marks omitted)).

#### Decision

For the foregoing reasons, the appeal is **DENIED**.

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JERI KAYLENE SOMERS  
Board Judge

We concur:

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STEPHEN M. DANIELS  
Board Judge

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ALLAN H. GOODMAN  
Board Judge