UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON APRIL 17, 2024

GRANTED IN PART: April 9, 2024

CBCA 7572

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 129 appeals 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 under the Board's order on further proceedings of October 19, 2023 (Order), largely adopting 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 a subsequent joint response docketed with the Board on March 19, 2024, the parties confirmed their agreement that the Order applies to the appeals described above.

This appeal (CBCA 7572) arises from State's final decision denying Framaco's claim ($80,319) for work on the embassy construction contract due to State's alleged constructive changes. The alleged changes concern: the placement of a chlorine analyzer, signboard, and fence at the embassy site; the grade elevation of a wastewater treatment plant; repair of bollards; and replacement of a chain-link fence with an anti-climb fence. For reasons stated below, we deny the appeal except for Framaco's claim related to replacement of the chain-link fence.

Background

I. The Project

State awarded the embassy construction project to Framaco on July 6, 2015. 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. Appeal File, Exhibit 2 at DOS-PTMO-00982414.[1] Construction of the

[1] All exhibits are found in the appeal file of CBCA 7572, unless otherwise noted.

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 New Embassy Compound (NEC), incorporating the completed portions of the SSmC project as well as surplus equipment and materials, as 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.*

II. Relevant Contract Provisions

The contract's statement of work (SOW) provides that the "MCAP . . . [has] been designed and shall be constructed according to the 2012 Building Code of the Overseas Buildings Operations, (2006 International Building Code (IBC), amended by the 2012 OBO International Codes Supplement (OBO-ICS))." Exhibit 2 at DOS-PTMO-00982417. The 2012 OBO-ICS defines a "clear zone" as follows:

> The clear zone is an area extending inward from the protected side of the perimeter barrier, free of any auxiliary structures, parking areas, or other man-made features . . . . Only the [compound access control guard booth], and, as agreed to by OBO, transformer/utility building(s), may be located at the perimeter wall. In these cases, the clear zone shall extend 6 [meters (m)] inward from the innermost encroachment of those buildings. Limit planting in the clear zone to items that will not obscure local guard or camera vision. Maximum plant height when fully grown shall not exceed 400 [millimeters (mm)]. Limit the number of light pole bases and other infrastructure items so that they will not obscure local guard and camera vision. Light pole bases and other infrastructure objects shall not exceed 150 mm height above grade.

Exhibit 52 at DOS-PTMO-01651617.

The SOW also provides that the project must be constructed in accordance with "Construction Documents (drawings and specifications) provided in [attachment]." Exhibit 2 at DOS-PTMO-00982415. Drawing GEN G099, titled "Architectural Notes and Abbreviations," states:

> The contractor shall thoroughly review the construction documents and shall visit the site and shall familiarize himself with the existing conditions, materials, equipment, fixtures, finishes, [etc.,] prior to start of work. If any

> discrepancy is detected, it should be brought to the attention of the architect or [contracting officer's technical representative] immediately, with recommendations for proper correction for approval. The contractor acknowledges that these contract documents are sufficiently complete and detailed for the contractor to perform the work required to produce the results intended by the contract documents. As such, the contractor shall guarantee that no change orders be brought against the owner unless changes are requested by the owner and/or caused by differing concealed conditions, beyond those reasonably inferable by a skilled and knowledgeable contractor. Any such change order shall be presented to the owner within three days of the owner's request or discover[y] of the severe deviation in concealed conditions and shall include itemized costs for material, labor, contractor overhead and profit and any extended time costs.

Exhibit 7 at DOS-PTMO-0191563 n.16.

Drawing CMPD G1.000, titled "Civil General Notes, Abbreviations and Legend," states:

> All drawings are considered to be part of the contract documents. The contractor shall be responsible for the review and coordination of all drawings and specifications prior to the start of construction. Any discrepancies that occur should be brought to the attention of the contracting officer's representative [(COR)] prior to the start of construction so that a clarification can be issued. Any work performed in conflict with the contract documents *or any code requirements* shall be corrected by the contractor at their own expense and at no expense to the government or architect.

Exhibit 15 at DOS-PTMO-KCCT-0029406 n.5 (emphasis added).

As for government furnished equipment (GFE), the SOW provides that "GFE Surplus Materials and Equipment from the previous project are being made available to the Contractor for incorporation into the NEC project subject to [certain limitations] . . . . [However,] the Contractor remains responsible for providing the total quantity of equipment and materials required to complete the work." Exhibit 2 at DOS-PTMO-00982418. The project-specific requirements documents section of the contract includes the following provision on GFE: "No warranty is expressed or implied as to the accuracy, type, quantity or condition. It shall be the Contractor's responsibility to review and confirm the type, quantity and condition as part of their pre-proposal site investigation due diligence."

Exhibit 57 at DOS-PTMO-00778073 (excerpt from Section J of contract); *see* Exhibit 1 at DOS-PTMO-00982411 (stating that Section J is a contract document).

III. Facts Related to Issues in Dispute

A. Chlorine Analyzer

One contract drawing (CMPD Drawing C5.017, titled "Wastewater Treatment Plant – Details") locates the chlorine analyzer in the clear zone. Exhibit 12. However, the OBO zoning code requirement (the OBO-ICS) indicated that the clear zone must be "free of any auxiliary structures, parking areas, or other man-made features." Exhibit 52 at DOS-PTMO-01651617.

Framaco initially placed the chlorine analyzer in the clear zone. State subsequently told Framaco to move the chlorine analyzer outside of this zone, which Framaco did. *See* Exhibit 32. Framaco challenges State's refusal to reimburse Framaco for the cost of moving the analyzer.

B. Signboard

Almost six years after award, on June 8, 2021, State's Security Engineering Branch issued an inspection report (SEB Report) informing Framaco of multiple code violations in the work it had completed thus far. Exhibit 27. The SEB Report stated that Framaco's placement of the signboard violated clear zone code requirements. Exhibit 27 at DOS-PTMO-02548960. Framaco moved the signboard, but State refused to compensate Framaco for that cost. Exhibits 28 at DOS-PTMO-02094411, 44 (contracting officer's final decision (COFD) (Sept. 23, 2022)) at DOS-PTMO-03099103.

Framaco argues that it is not responsible for the cost of relocating the signboard because it installed the signboard per State's design drawing. Framaco also argues that any conflict between the clear zone code requirements and the design drawing was not Framaco's responsibility because such conflict was a design defect for which the Government was responsible. Appellant's Opening Brief at 7.

State argues that the applicable drawing was only diagrammatic, with no dimensions or exact locations given. Respondent's Initial Brief at 3. State also argues that Framaco was required initially to place the signboard outside of the clear zone (as shown in another drawing, CMPD L401, titled "West Compound Materials/Layout Plan"), and when Framaco placed the signboard inside the clear zone, such placement was noncompliant. *Id.*; *see also* Exhibit 16. State therefore asserts that any additional expense incurred for correcting the

location of the signboard is the responsibility of Framaco because the additional work was done to fix noncompliant work rather than to comply with a State-imposed change to the contract. *Id.*

C. Type B Fence

The contract required Framaco to install a new Type B fence to be attached to an existing Type B fence constructed by the previous contractor. Exhibits 9-10. Framaco submitted shop drawings for construction of the new Type B fence. Appellant's Opening Brief at 4. According to Framaco, State approved these drawings, and Framaco built and attached the new fence per the shop drawings. *Id.*

Months after Framaco completed the new fence, the SEB Report revealed that both the old fence and the new fence did not comply with the setback requirements of the contract. Exhibit 27 at DOS-PTMO-02548959. The OBO-ICS, which were the zoning code requirements, contained a setback requirement of 30 m. Exhibit 52 at DOS-PTMO-01651617. Framaco removed and relocated the old and the new fences to a new location, but State did not compensate Framaco for the cost it incurred for this work. *See* Exhibits 30, 31, 34 at DOS-PTMO-02773144, 44 at DOS-PTMO-03099111.

Framaco argues that the applicable contract drawing unambiguously indicates "that the existing fence had previously been relocated." Appellant's Opening Brief at 7. Framaco also argues that certain drawings conflict because one (CMPD A182) says "Relocated Type B" fence while another (CMPD A487) says "Relocate Existing Type B Fence." Appellant's Opening Brief at 7; Appellant's Reply Brief at 4-6. It additionally argues that it is not Framaco's responsibility to ensure the drawings in the contract comply with zoning requirements. Appellant's Opening Brief at 7.

State argues that, under the contract, Framaco was required to relocate the existing fence because the contract explicitly stated "Relocate Existing Type B Fence." Respondent's Initial Brief at 4. State argues that the drawings do not conflict because, even though CMPD A182, Detail 1, does state "Relocated Type B" fence, the drawing indicates, immediately next to the Type B fence drawing, that the Type B fence had to be relocated next to the "Existing Type E" fence. *Id.* State concludes that Framaco's interpretation requires ignoring part of CMPD A182 and all of CMPD A487, which explicitly states, "Relocate Existing Type B Fence and Foundations." Exhibit 10. State also argues that, even if there were a conflict between two drawings, such conflict would be a patent ambiguity signaling Framaco's duty to inquire. Respondent's Initial Brief at 4.

D. Wastewater Treatment Plant

Framaco argues that it complied with the contract regarding the grade elevation for the wastewater treatment plant. One of the construction drawings showing the spot elevation plan indicated that the grade elevation of the plant is supposed to be "about 300-400 mm" and Framaco poured 300 mm. Exhibit 135 (Drawing, CMPD C1.205, Spot Elevations Plan); *see* Exhibit 148. While the contract drawing did indicate that the grade elevation of the plant was supposed to be "about 300-400 mm," this drawing directly conflicts with the OBO-ICS (the zoning code requirements), which provides for a different height requirement: 150 mm or less. Exhibit 52 at DOS-PTMO-01651742.

Framaco argues that having to fix the grade elevation, based on the SEB Report's finding that the 300 mm grade elevation violated the clear zone code requirements, was a constructive change to the contract. Framaco also notes that the COR had informed Framaco that the grades did not need to be adjusted and that any cost for additional concrete/corrections could be negotiated. Appellant's Opening Brief at 2; Exhibit 146.

Among other arguments, State notes that the OBO-ICS, which Framaco was required to follow, states that "[l]ight pole bases and other infrastructure objects . . . not exceed 150 mm heigh[t] above grade." Respondent's Initial Brief at 3. Framaco's initial work at the wastewater treatment plant conflicted with this requirement. *Id*. at 2-3. State asserts that it is not required to compensate Framaco for the cost the company incurred to remedy the noncompliant work. *Id*. at 3. State additionally asserts that the COR's representations to Framaco neither waived the clear zone requirements nor relieved Framaco of its obligations to comply with all contract provisions. Respondent's Reply Brief at 4-5.

E. The Bollards

Framaco states that it fixed deficient bollards constructed by the previous contractor. Appellant's Opening Brief at 5. It asserts that the top elevation of the steel bollards and the top of the existing concrete beam were each not level. Exhibit 39 at DOS-PTMO-03085754. Framaco argues that State must compensate Framaco for fixing the bollards because State warranted the bollards in the contract. Appellant's Opening Brief at 5. The SOW states that the "partially completed MCAP . . . [exists] on the site" and that "[t]he government warrants [this] concrete structure[] as being designed and constructed in accordance with OBO requirements." Exhibit 2 at DOS-PTMO-00982415.

State argues that Framaco is responsible for the cost of fixing the bollards because Framaco was required to field-verify the bollards for accuracy and completeness and would only receive compensation for "changes . . . caused by differing concealed conditions,

beyond those reasonably inferable by a skilled and knowledgeable contractor." Respondent's Initial Brief at 5 (quoting Exhibit 7 n.16 (Drawing, GEN G099, Architectural Notes and Abbreviations), and citing Exhibit 19 n.1 (Drawing, CMPD EX A181, Architectural Existing Conditions Site Plan ("Contractor is responsible to field verify installed components for accuracy and completeness.")). State asserts that the bollards' conditions were not concealed. *Id.* State concludes that Framaco should have reasonably inferred the required adjustments and is, therefore, responsible for the cost of the adjustments. *Id.*

F. Windows

Framaco installed GFE windows in 2019 after State had accepted Framaco's proposal (i.e., its "submittal documents") to use surplus security windows. *See* Exhibit 22. Subsequently, the SEB Report, issued in June 2021, stated that the windows did not comply with security glazing requirements and provided Framaco with the option to use film installation to remedy the issue. Exhibit 27 at DOS-PTMO-02548963-64; *see* Exhibit 38 at DOS-PTMO-02672819. Framaco remedied the issue by using film installation; however, State did not provide compensation for this extra work. Exhibit 44 at DOS-PTMO-03099108-09.

Framaco argues that, because State warranted that the GFE windows were acceptable, Framaco should be compensated for the extra work required by State to fix the windows. Appellant's Opening Brief at 9. Among other arguments, State asserts that it did not warrant that the GFE windows were fit for use under the contract.

G. Anti-Climb Fence

Framaco installed a chain-link fence as required by the contract. Exhibits 8, 9, 10. In response to the SEB Report's direction that the fence needed to be an anti-climb fence, State directed Framaco to replace the chain-link fence with an anti-climb fence, which Framaco did. *See* Exhibits 27 at DOS-PTMO-0308960-61, 42. In its COFD, State seems to concede that the contract was unclear as to the requirements to install an anti-climb fence. Exhibit 44 at DOS-PTMO-03099106 (concurring that the documents are unclear about the requirements for an anti-climb fence). Framaco asserts that it is entitled to $11,984.60 for this work. Exhibit 43 (Claim 60 and Request for Contracting Officer's Final Decision (July 25, 2022)) at DOS-PTMO-03089541.

Discussion

The Chlorine Analyzer, Signboard, Wastewater Treatment Plant, and Type B Fence

The United States Court of Appeals for the Federal Circuit has stated the following about ambiguities in federal contracts:

> An ambiguity will only be construed against the government if it was not obvious on the face of the solicitation and reliance is shown. *See, e.g.*, *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). If the ambiguity is patent, it triggers a duty to inquire. A patent ambiguity is one that is "obvious, gross, [or] glaring, so that plaintiff contractor had a duty to inquire about it at the start." *H & M Moving, Inc. v. United States*, 204 Ct. Cl. 696, 499 F.2d 660, 671 (1974). If an ambiguity is obvious and a bidder fails to inquire with regard to the provision, his interpretation will fail. *Triax Pac[ific], Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997).

NVT Technologies, Inc. v. United States, 370 F.3d 1153, 1162 (Fed. Cir. 2004).

We find that the contract is patently ambiguous as to the locations of the chlorine analyzer and the signboard. The contract drawings at issue, showing these items in the clear zone, clearly conflict with clear zone code requirements precluding structures from being installed in this zone. Framaco should have resolved the patent ambiguities – namely, between the drawings placing the items in the clear zone and the zoning code requirements precluding such – by inquiry to State before starting work. *See Triax Pacific, Inc.*, 130 F.3d at 1474-75; *see also* Exhibits 7 n.16, 15 n.5 (stating "*[a]ny work performed in conflict with* the contract documents or *any code requirements* shall be corrected by the contractor at their own expense and at no expense to the government or architect" (emphasis added)), 52. Since Framaco did not inquire with regard to these contractual ambiguities, it cannot now argue that locating the items per the drawings and, thus, inside the clear zone, was permissible. *K-Con, Inc. v. Secretary of the Army*, 908 F.3d 719, 722 (Fed. Cir. 2018) (holding contractor could not "argue that its interpretation was proper unless [it] contemporaneously sought clarification of the language from the [Government]"). Framaco, therefore, is not entitled to recover its claimed costs for moving these items.

Framaco's claims for damages for the additional work to adjust the grade elevation at the wastewater treatment plant and relocate the Type B fence are denied for the same reason. As for the plant, while the contract drawing did indicate that the grade elevation of the plant was supposed to be "about 300-400 mm," this drawing directly conflicted with the zoning code requirements (the OBO-ICS), which contained a different height requirement:

150 mm or less. Exhibit 52. As for the Type B fence, to the extent that there were discrepancies in the setback length as presented in Framaco's shop drawings and the clear zone code requirements, as well as discrepancies in contract drawings showing where the fence should be located, these discrepancies were patent. Thus, Framaco should have addressed these patent ambiguities in contract documentation with State prior to starting work. Having failed to do so, Framaco is responsible for any additional costs that it incurred to ensure that the grade elevation for the wastewater treatment plant complied with the clear zone code requirements and to relocate the Type B fence. *See Triax Pacific, Inc.,* 130 F.3d at 1474-75.

Further, the fact that Framaco may have incurred costs for the grade elevation work of the wastewater treatment plant due to its reliance on information from the COR, which turned out to be erroneous, does not lead to a decision in Framaco's favor. The COR did not have the authority to change the contract to waive Framaco's obligation to comply with the clear zone code requirements. *Pearson E. Dubar v. Department of Agriculture*, CBCA 1895, 10-2 BCA ¶ 34,497, at 170,146-47; 48 CFR 43.102.

The Bollards

To receive compensation for any additional costs that it incurred to fix the bollards, Framaco was required to "visit the [project] site and . . . familiarize [itself] with the existing conditions, materials, equipment, fixtures, finishes, [etc.,] prior to start of work." Exhibit 7 n.16. If any discrepancies were detected, those should have been brought to the attention of the architect and COR immediately, with recommendations for proper correction for approval. *Id.* Framaco also guaranteed "that no change orders [would] be brought against [State]" unless State requested a change or a change resulted from "differing concealed conditions, beyond those reasonably inferable by a skilled and knowledgeable contractor." *Id*.

The record does not evidence that Framaco familiarized itself with the conditions of the bollards prior to the start of work and brought the issues with the bollards to the attention of the architect or COR. Additionally, Framaco does not assert that any other circumstances existed for which a change order would have been warranted (such as a contracting officer's request or a concealment in the conditions of the bollards). Thus, Framaco has not presented a contractual basis to support its claim for damages for repairing the bollards. Accordingly, the claim is denied.

The GFE Windows

Framaco's assertion that State warranted the GFE windows is without support. The contract made clear that, as for GFE, there was "[n]o warranty . . . expressed or implied as to the accuracy of the type, quantity or condition." Exhibit 57. Framaco was ultimately responsible for ensuring that materials met the contract requirements. Exhibit 1 at DOS-PTMO-00982418. As there was no warranty, there was no breach. Therefore, State is not responsible for any costs incurred by Framaco to bring the exterior windows into compliance with contract requirements.

The Anti-Climb Fence

We agree with Framaco that the contract did not require installation of an anti-climb fence, only a chain-link fence, and even State seems to concede as much. *See* Exhibit 44 at DOS-PTMO-03099106. Accordingly, State must compensate Framaco for any additional costs the company incurred installing the anti-climb fence.

Framaco claims that it is entitled to $11,984.60 for this work. Exhibit 43 at DOS-PTMO-03089541. 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 in which Framaco prevails.

Decision

Framaco's appeal in this docket is **GRANTED IN PART** as to appellant's claim for costs to replace the chain-link fence with an anti-climb fence. All other claims are 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