UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 18, 2025

CBCA 8000

TROOP CONTRACTING, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Michael J. Matasich of Matasich Law, LLC, Medina, OH; and Michelle F. Kantor of McDonald Hopkins LLC, Chicago, IL, counsel for Appellant.

Laetitia C. Coleman, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **VERGILIO**, **GOODMAN**, and **KANG**.

KANG, Board Judge.

Appellant, Troop Contracting, Inc. (Troop), appeals a final decision by a contracting officer of respondent, Department of Veterans Affairs (VA), concerning Troop's contract to renovate the Edward Hines Jr. VA Medical Center (VAMC) in Hines, Illinois. The parties have filed cross-motions for summary judgment. We deny appellant's motion for summary judgment, grant respondent's motion for summary judgment, and thereby deny the appeal.

Background

In their motions, the parties ask the Board to affirm their respective interpretations of the contract. To decide these motions, we reviewed the parties' submissions under Board Rule 8(f) (48 CFR 6101.8(f) (2024)) and relevant information in the appeal file. We establish the following facts as material and undisputed.

I. Contract Award and Specifications

On August 8, 2022, the VA issued an invitation for bids to renovate Building 20 at the VAMC. Appeal File, Exhibit 010 at 001835.[1] The solicitation was set aside for service-disabled veteran-owned small businesses. *Id.* The renovation was to provide space for the VA's electronic health records modernization project at the VAMC. Exhibit 008 at 000797. The VA gave prospective bidders an opportunity for a site visit. Respondent's Statement of Undisputed Material Facts (RSUMF) ¶ 2. Troop did not attend the site visit, but two of its proposed subcontractors attended. Appellant's Statement of Undisputed Material Facts (ASUMF) ¶ 37.

The VA awarded contract number 36C77622C0158 (contract) to Troop on September 27, 2022, for a fixed price of $8,970,000. Exhibit 018 at 006062. The contract incorporated the solicitation's statement of work (SOW), specifications, and drawings. Exhibit 019 at 006101-02.

The SOW stated that the scope of work for the project "[i]ncludes all labor, management, and materials for renovating Building 20." Exhibit 019 at 006110. The SOW further stated that "[w]here a conflict exists between the Statement of Work (SOW) requirements and the requirements of other associated contract documents, the SOW requirements shall prevail." *Id.* at 006106. The SOW described separate categories of work for demolition and construction as follows in relevant part:

> 4) Demolition:
>
> . . . .
>
> d. All debris (garbage and trash) needs to be covered at all times. The dumpster needs to be covered at all times and emptied as

[1] All exhibits are found in the appeal file, unless otherwise noted. Page citations to the VA's exhibits are to the bates numbers added by the agency.

needed. It is contractor's responsibility to keep the area surrounding your dumpster clean at all times.

e. Dispose of all demolition material and construction debris in accordance with Federal, State and local environmental requirements.

5) Construction:

. . . .

c. Protect all existing utilities and any supporting equipment from damage during construction.

d. Construction work must adhere to the design drawings and specifications. Any deviation(s) must be discussed with and approved by the [contracting officer's representative] and the [contracting officer].

Id. at 006110.

Three sections of the specification are particularly relevant to the appeal. The first relevant section of the specifications is 01 00 00, General Requirements (general requirements section). This section stated that Troop was responsible for all required work unless "expressly stated otherwise" as follows:

1.3 STATEMENT OF BID ITEM(S)

A. To avoid any potential confusion all work, services, testing, materials, labor, supervision, safety, security, manuals, and instructions necessary to complete this project as indicated in the procurement package, Statement of Work, Drawings, and/or specifications shall be the responsibility of the Contractor to provide unless expressly stated otherwise.

B. GENERAL CONSTRUCTION: Work includes all general conditions, management, demolition, construction, and trade work necessary to successfully complete this project as outlined in the Statement of Work.

> C. Demolish existing walls, structures, systems, and fixtures as identified by and in accordance with the design documents. Abate hazardous materials as needed, in accordance with the design documents.
>
> D. Construct new walls, structures, systems, and fixtures as identified in the design documents. Replace all exterior personnel doors in accordance with the design documents.

Exhibit 019 at 006252.

The second relevant section of the specifications is 02 41 00, Demolition (demolition section),which stated that Troop was required to dispose of demolition materials as follows:

> D. Remove and legally dispose of all materials, other than earth to remain as part of project work, from any trash dumps shown. Materials removed shall become property of contractor and shall be disposed of in compliance with applicable federal, state or local permits, rules and/or regulations. All materials in the indicated trash dump areas, including above surrounding grade and extending to a depth of 1500 mm (5 feet) below surrounding grade, shall be included as part of the lump sum compensation for the work of this section. Materials that are located beneath the surface of the surrounding ground more than 1500 mm (5 feet), or materials that are discovered to be hazardous, shall be handled as unforeseen. The removal of hazardous material shall be referred to Hazardous Materials specifications.

Exhibit 019 at 006492. As discussed below, the provision regarding "materials that are discovered to be hazardous" is central to Troop's arguments.

The third relevant section of the specifications is 02 83 33.13, Lead-Based Paint (LBP) Removal and Disposal (LBP section). Paragraph 1.1 of this section stated as follows: "Any and all paint coatings encountered and to be disturbed as part of the project must be assume[d] and treated as containing lead and handl[ed] accordingly per this specification."[2] Exhibit 019 at 006786.

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[2] The text of this section uses the words "assume" and "handling," which leads to an ungrammatical construction. The parties' arguments are consistent with treating these terms as "assumed" and "handled." *See* Appellant's Motion for Summary Judgment (MSJ) at 12; Respondent's MSJ at 2.

The LBP section incorporated numerous regulations promulgated by the Department of Labor, Occupational Safety and Health Administration (OSHA), including 29 CFR 1910, Occupational Safety and Health Standards, and 29 CFR 1926, Safety and Health Regulations for Construction. Exhibit 019 at 006788. With regard to 29 CFR 1926, the lead-based paint section directed Troop to "[c]omply with laws, ordinances, rules, and regulations of Federal, State, and Local authorities having jurisdiction regarding removing, handling, storing, transporting, and disposing lead waste materials." *Id.* at 006790.

The LBP section identified the following relevant provisions that discuss removal of LBP:

> 3.3 WORK PROCEDURES
>
> A. Remove lead-based paint according to approved lead-based paint removal plan.
>
> . . . .
>
> B. Use procedures and equipment required to limit occupational and environmental lead exposure when lead-based paint is removed according to 29 CFR Part 1926.62.
>
> . . . .
>
> 3.4 LEAD-BASED PAINT REMOVAL
>
> A. Remove paint within areas indicated on drawings completely exposing substrate. Minimize damage to substrate.
>
> B. Comply with paint removal processes described lead paint removal plan.
>
> C. Lead-Based Paint Removal: Select processes for each application to minimize work area lead contamination and waste.

Exhibit 019 at 006794-95.

The demolition drawings attached to the contract showed six locations where paint was to be removed, each of which had the following instruction: "ALL CONCRETE

COLUMNS AND CAPITALS IN NEW WORK SCOPE SHALL HAVE PAINT STRIPPED - PREPARE TO RECEIVE NEW PAINT." Exhibit 019 at 006135-40.

II. Contract Performance and Claims

Troop states that it understood the contract to require Troop to abate LBP from the columns and capitals identified on the demolition drawings. ASUMF ¶ 30; Appellant's MSJ at 2. Troop's subcontractor completed this work in early 2023. ASUMF ¶¶ 59-60.

Troop also states that it understood the contract to require ductwork, mechanical piping, lighting, and cable trays to be affixed to the ceilings and where new walls needed to be installed and fastened to the ceilings. ASUMF ¶¶ 34-35, 60, 71. Troop further understood that affixation of these items would disturb the existing paint on the ceilings. *Id.* ¶ 56. During the preparation for this work, which took place during the abatement of LBP on the columns and capitals, Troop submitted request for information (RFI) 23 which asked for LBP testing data at the locations to be disturbed other than the columns and capitals. *Id.* ¶ 60; Exhibit 078 at 1.

In response to RFI 23, the VA advised that "[t]esting of lead-based paint was not done during design." Exhibit 078 at 1. The VA further stated that "[t]esting the paint for lead is the responsibility of the contractor." *Id.* With regard to responsibility for testing, the VA pointed to the contract specifications: "Per specification 02 83 33.13 Lead-Based Paint Removal and Disposal (first sentence), all paint is to be assumed to be lead-based paint and handled per the specification." *Id.*

Troop engaged a subcontractor to test the painted surfaces for LBP. ASUMF ¶ 64. The subcontractor identified LBP on the ceilings of the basement and first floor. *Id.* On February 7, 2023, Troop advised the VA during a weekly meeting that it would perform the LBP abatement "anywhere encountered as required to execute the scope of work" but that it would submit a request for modification for increased costs based on Troop's view that LBP abatement beyond the columns and capitals identified in the demolition drawings was not required by the contract. Exhibit 81 at 4.

During this meeting, the VA reiterated its view that the contract placed responsibility for testing of LBP on Troop and further stated that this matter was addressed by questions and answers in solicitation amendment 0004. ASUMF ¶ 70. The question asked: "Has the concrete column paint been tested for LBP? If not, will testing be required? If LBP is discovered will it be treated as an extra to the contract?" Exhibit 017 at 006060. The response referred to the contract specifications: "See specification section 02 83 33.13 Lead-based Paint Removal and Disposal, Part 1.1." *Id.*

To further clarify the matter of LBP removal, Troop submitted RFI 49, which stated its view that the contract drawings identified the only areas where LBP was to be removed. Exhibit 046 at 009570. Troop advised that "[l]ead-based paint has been identified in areas other than as identified in the contract documents." *Id.* Based on this information, Troop asked the VA: "Does the VA want Troop Contracting to abate lead-based paint other than as identified in the documents, specifically other than 'concrete columns and capitals in new work scope?' If yes, there will be a cost and time impact to the project. Please advise." *Id.*

The agency's response to RFI 49 stated: "VA does not want full abatement nor is the VA directing the contractor to do full abatement. Comply with OSHA 1926.62 -- use engineering control measures to minimize dust and disposal of lead base[d] paint, proper use of PPE and required OSHA 2 hour awareness training for lead." Exhibit 046 at 009569.

On May 16, 2023, Troop submitted a request for equitable adjustment (REA), seeking additional costs arising from the LBP abatement and an extension of time based on the LBP work. Exhibit 066 at 010394. In the REA, Troop asserted that: (1) the contract's LBP removal and abatement requirements were limited to the areas specified on the drawings, and (2) the contract specified that "materials that are discovered to be hazardous shall be handled as unforeseen," meaning that work required to abate LBP in places other than the drawings was out of the scope of the contract. *Id.* at 010396.

On July 26, 2023, the contracting officer denied the REA. Exhibit 072 at 011221. The contracting officer's denial cited the part of the LBP section which stated that "[a]ny and all paint coatings encountered and to be disturbed as part of the project must be assume[d] and treated as containing lead and handl[ed] accordingly per this specification." *Id.* at 011222. The denial also stated that "all ceilings were exposed and in plain sight during the site visit" and that "[b]etween the Specs, drawings, photos, and site visit there was ample opportunity to gauge the condition of the building and square footage of all paint coatings prior to bidding." *Id.*

On September 6, 2023, Troop submitted a claim seeking an equitable adjustment to the contract for costs totaling $527,791.50 in four areas: (1) $975 for LBP testing; (2) $290,000 for LBP abatement; (3) $218,892 for extended general conditions, based on delay arising from the additional LBP abatement work; and (4) $17,924.50 in attorney fees. Exhibit 074 at 011241; ASUMF ¶ 85. Troop also sought an adjustment of ninety days to the contract performance period based on delays arising from the LBP testing and abatement. Exhibit 074 at 011241.

On November 20, 2023, the contracting officer issued a final decision (COFD) denying the claim. Exhibit 076 at 011249. The COFD largely restated the rationale set forth in the denial of the REA. *Id.* at 011249-52; *see* Exhibit 072 at 011222-24.

III. Proceedings Before the Board

Troop timely filed an appeal of the COFD with this Board. Troop's complaint identifies six counts: (1) breach of contract; (2) differing site conditions under Federal Acquisition Regulation (FAR) clause 52.236-2; (3) breach of the implied warranty of adequacy of specifications; (4) constructive change; (5) breach of the implied covenant of good faith and fair dealing; and (6) superior knowledge. Troop seeks an equitable adjustment of its contract for increased performance costs and an increase of days to the schedule.

Discussion

Troop and the VA each argue that the contract language is clear and unambiguous and that summary judgment is appropriate. We conclude that there are no questions of material fact regarding the breach of contract claim and that the terms of the contract are clear and unambiguous. Based on the terms of the contract, the VA is entitled to summary judgment as a matter of law on Troop's breach of contract claim. We further conclude that each of Troop's other five claims is dependent on the facts and contract language upon which the breach of contract claim is based and that the VA is therefore also entitled to summary judgment as a matter of law with regard to those claims.

I. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Rule 8(f) (48 CFR 6101.8(f) (2024)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Genuine issues of material fact exist where a rational finder of fact could resolve an issue in favor of either party and the resolution of that issue would impact the outcome of the case under governing law. *Anderson,* 477 U.S. at 247-48. We must view all inferences in a light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). With cross-motions for summary judgment, each party must meet its own burden; however, the contract language here dictates the results.

Interpretation of contract language is primarily a matter of law, and disagreements concerning the legal interpretation of contract documents do not create factual disputes that preclude summary judgment. *Edgewater Construction Services, LLC v. Department of*

Veterans Affairs, CBCA 7399, 24-1 BCA ¶ 38,506, at 187,154; *see M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1205-06 (Fed. Cir. 2004); *South Texas Health System v. Department of Veterans Affairs*, CBCA 6808, 23-1 BCA ¶ 38,420, at 186,707. To resolve an issue of contract interpretation, we must look first to the plain language of the contract. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). Further, we must "give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning." *Harris v. Department of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir.1998). When interpreting a contract, the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996). 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. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

An ambiguity exists when a contract is susceptible to more than one reasonable interpretation. *See*, *e.g.*, *E.L. Hamm & Associates, Inc. v. England*, 379 F.3d 1334, 1341-42 (Fed. Cir. 2004). Contract terms can be clear and unambiguous even where parsing them requires close attention. *E.g.*, *Bank of America, National Ass'n v. Department of Housing & Urban Development*, CBCA 5571, 18-1 BCA ¶ 36,927, at 179,890 (2017) ("A contract may be so clear as not to require interpretation, but a mere lack of clarity on casual reading is not the criterion for determining whether a contract is afflicted with ambiguity within the rule as to the admission of parol evidence to explain its meaning." (quoting *McCann v. Glynn Lumber Co.*, 34 S.E.2d 839, 845 (Ga. 1945)). To establish that a contract term is ambiguous, it is not enough that the parties differ in their respective interpretations of a contract term; rather, both interpretations must be reasonable. *Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999).

Where an ambiguity is identified, it must be classified as patent or latent, as this distinction dictates which party's interpretation is adopted. *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,151. A patent ambiguity is defined as one that is "obvious, gross, [or] glaring, so that [the] plaintiff contractor had a duty to inquire about it at the start." *Wu & Associates, Inc. v. General Services Administration*, CBCA 6760, 21-1 BCA ¶ 37,965, at 184,386. A latent ambiguity, in contrast, is more subtle in comparison. *ACM Construction*, 14-1 BCA at 174,151.

If a contract term is latently ambiguous, the rule of contra proferentem applies so that the term is interpreted in favor of the nondrafting party. *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997). Where a contractor does not seek clarity regarding a patently ambiguous contract provision prior to accepting the contract, courts and boards rule for the Government "regardless of the reasonableness of the contractor's interpretation." *Harry L. Chupnick v. Social Security Administration*, CBCA 6539, 19-1 BCA ¶ 37,441, at 181,954 (quoting *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985)). Post-award inquiries regarding a patently ambiguous contract term drafted by the Government do not relieve a contractor of the duty to perform or entitle it to an equitable adjustment. *See Triax*, 130 F.3d at 1474-75; *Omniplex World Services Corp. v. Department of Homeland Security*, CBCA 5971, 19-1 BCA ¶ 37,209, at 181,149-50 (2018).

II. Breach of Contract

A claim for breach of contract contains four elements: "(1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." *San Carlos Irrigation & Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). The relevant questions in resolving the parties' cross-motions for summary judgment concern the second and third elements of a breach of contract. For the reasons discussed below, we conclude that Troop's interpretation of the contract is unreasonable and that the VA's interpretation is reasonable. Specifically, the work performed by Troop that is the subject of its claim was within the scope of the contract, and the VA did not breach the contract by requiring performance at the price and within the time frames established by the contract.

A. The LBP Section

Troop argues that the plain language of the LBP section required removal of LBP from the columns and capitals identified in the drawings but did not require testing for lead or abatement of LBP from any other areas of the building. For this reason, Troop contends that the VA breached the contract by requiring it to perform the testing and additional abatement. The VA argues that the LBP section broadly required treatment of "any and all" LBP that was to be disturbed as part of the work, that the procedures in the section required testing for lead, and that the directions regarding work identified in the drawings did not limit that requirement.

1. Testing for Lead in Painted Surfaces

The contract's LBP section stated: "Any and all paint coatings encountered and to be disturbed as part of the project must be assume[d] and treated as containing lead and handl[ed] accordingly per this specification." Exhibit 019 at 006786. The LBP section required Troop to "[c]omply with applicable requirements of 29 CFR Part 1926.62." *Id.* at 006790. These regulations apply to "all construction work where an employee may be occupationally exposed to lead," including "[d]emolition or salvage of structures where lead or materials containing lead are present" and "[r]emoval or encapsulation of materials containing lead." 29 CFR 1926.62(a). Relevant here, the regulations define the action level as "employee exposure, without regard to the use of respirators, to an airborne concentration of lead of 30 micrograms per cubic meter of air (30 μg/m3) calculated as an 8-hour time-weighted average (TWA)." *Id.* Additionally, the regulations define the permissible exposure limit as follows: "The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 μg/m3) averaged over an 8-hour period." *Id.*

When "lead is present" at a worksite, the employer "shall initially determine if any employee may be exposed to lead at or above the action level." 29 CFR 1926.62(d)(1)(i). Prior to conducting the employee assessment for lead exposure, the employer "shall treat the employee as if the employee were exposed above the [permissible exposure limit], and not in excess of ten (10) times the [permissible exposure limit], and shall implement employee protective measures." *Id.* 1926.62(d)(2)(i). Airborne lead concentrations must be monitored to ensure that employees are not exposed to specified levels of lead over specified periods of time. *Id.* 1926.62(c). Where the action level is met or exceeded, the employer is required to take additional steps such as notifying employees of the lead testing results, monitoring air quality, monitoring employee health, providing training, and providing safety equipment. *Id.* 1925.62(d)(6)-(9), (e)-(k).

Where testing shows that the action level is not exceeded, the contractor must make a written record of the determination. 29 CFR 1926.62(d)(6)(1). Further testing and protective measures are not required, except that new testing is required "[w]henever there has been a change of equipment, process, control, personnel or a new task has been initiated that may result in additional employees being exposed to lead at or above the action level or may result in employees already exposed at or above the action level being exposed above the [permissible exposure limit]." *Id.* 1926.62(d)(6)(1)(i), (d)(7).

The LBP section restated various provisions of 29 CFR 1926.62, such as the definitions for the action level and permissible exposure limit and requirements for monitoring and testing of lead exposure for workers. Exhibit 019 at 006786-87. The LBP section required Troop to hold a pre-work meeting with the contracting officer, to submit to the contracting officer a plan for removing LBP, and to establish a plan for handling LBP waste. *Id.* at 006791-92.

On this record, testing of LBP to determine the concentrations that trigger the action level was clearly required by the contract's LBP section and 29 CFR 1926.62. The contract required Troop to assume that painted surfaces to be disturbed contained LBP. Troop acknowledges that the contract required affixing items to the ceilings and that this work required disturbance of painted surfaces. The regulations require actions at all sites where employees could be exposed to lead and require that an employer "initially determine" whether workers could be exposed to lead above the action level or permissible exposure limit. Where either of those thresholds is exceeded, other requirements are triggered, such as use of protective gear, sealing work areas, and providing additional employee health monitoring. For these reasons, Troop's argument that it was not required to conduct tests for lead in painted surfaces is unreasonable.

2. Work Indicated on the Drawings

Troop contends that paragraph 3.4 of the LBP section directed it to remove paint from columns and capitals indicated on the drawings but that abatement of LBP encountered anywhere else was not required. Troop's interpretation of the contract fails for two reasons.

First, the LBP section states that "[a]ny and all paint coatings encountered and to be disturbed as part of the project must be assume[d] and treated as containing lead and handl[ed] accordingly per this specification." Exhibit 019 at 006786. As discussed above, the LBP section contained two provisions regarding removal of LBP:

3.3 WORK PROCEDURES

A. Remove lead-based paint according to approved lead-based paint removal plan. . . . .

B. Use procedures and equipment required to limit occupational and environmental lead exposure when lead-based paint is removed according to 29 CFR Part 1926.62.

. . . .

3.4 LEAD-BASED PAINT REMOVAL

A. Remove paint within areas indicated on drawings completely exposing substrate. Minimize damage to substrate.

B. Comply with paint removal processes described lead paint removal plan.

Id. at 006794-96.

Nothing in paragraph 3.4 stated that the only LBP that would be encountered in the building was that identified in the drawings. Rather, this paragraph identified specific areas that required full stripping of paint down to the substrate and preparation for painting. Thus, while the work in paragraph 3.4 directed Troop to remove paint from specific areas in the drawings, it did not state that this was the only work required.

This interpretation harmonizes and gives meaning to all parts of the contract because it does not require the negation of the requirement to handle "any and all paint coatings encountered and to be disturbed" in accordance with the LBP section. Further, this understanding is consistent with the general requirements section which states that Troop is required to perform all work necessary "to successfully complete this project as outlined in the Statement of Work" and further states that all work "indicated in the procurement package, Statement of Work, Drawings, and/or specifications shall be the responsibility of the Contractor to provide unless expressly stated otherwise." Exhibit 019 at 006252. Troop's argument, which relies on an implied limitation on the "any and all" provision does not satisfy the requirement for an "expressly stated" limit on the contractor's obligation.

Second, even if Troop's interpretation of the LBP section as limiting the work to columns and capitals was reasonable, the VA's interpretation that the "any and all" provision controls is also reasonable. In considering these two interpretations, they are in direct and obvious conflict and would therefore, at best, give rise to a patent ambiguity.

Further, a pre-bid inquiry and the agency's response put Troop on notice of this patent ambiguity. As noted, solicitation amendment 0004 included the following question: "Has the concrete column paint been tested for LBP? If not, will testing be required? If LBP is discovered will it be treated as an extra to the contract?" Exhibit 017 at 006060. The response stated as follows: "See specification section 02 83 33.13 Lead-based Paint Removal and Disposal, Part 1.1." *Id.* Part 1.1 of the LBP section contained the direction that "[a]ny and all paint coatings encountered and to be disturbed as part of the project must be assume[d] and treated as containing lead and handl[ed] accordingly per this specification." Exhibit 019 at 006786.

The question and answer in solicitation amendment 0004 put bidders on notice as to the VA's view that the contractor would be responsible for testing and abating LBP. *See Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). Moreover, the response to the question in amendment 0004 put Troop on notice that its interpretation of the specifications directly conflicted with the VA's interpretation. *See Triax*, 130 F.3d at 1474-75.

Where a solicitation contains a patent ambiguity, the bidder must inquire of the Government to seek clarification before submitting its offer. *Chupnick*, 19-1 BCA at 181,953-54; *see also TransOx, Inc. v. Department of Veterans Affairs*, CBCA 8336, 25-1 BCA ¶ 38,830, at 188,926 ("Even though another offeror had asked the VA to clarify the meaning of the line item at issue, [appellant] was required to inquire again before submitting its offer because the VA's response to the clarification request plainly did not resolve the ambiguity."). Therefore, even assuming Troop's interpretation was reasonable, the patent ambiguity that it creates must yield to the VA's reasonable interpretation. *See Chupnick*, 19-1 BCA at 181,953-54.

B. The Demolition Section

Next we address Troop's argument that, notwithstanding the plain language of the LBP section, the demolition section stated that "materials that are discovered to be hazardous, shall be handled as unforeseen." Exhibit 019 at 006492. Troop contends that this specification established that any LBP not identified on the demolition drawings that required abatement must be considered unforeseen. For this reason, Troop contends that the VA's direction to perform additional work and refusal to make an equitable adjustment to the contract for that work breached the contract. The VA argues that the LBP section required

Troop to assume that painted surfaces contained lead and that there was therefore no basis to treat any LBP as unforseen.

1. Definition of "Hazardous" in the Demolition Section

The contract does not define the term hazardous nor do the regulations cited in the LBP section.[3] Further, although the demolition section listed the LBP section as "Related Work," the provision in paragraph (D) does not directly reference LBP when using the term "hazardous." *See* Exhibit 019 at 006490.

Despite the lack of a definition for the term hazardous, the parties agree that it has the following meaning in the context of LBP for this contract: LBP is hazardous if it exceeds the action level or permissible exposure limit in 29 CFR 1926.62 and is not hazardous if it does not exceed these limits. Appellant's MSJ at 20-22; Appellant's Response to Board Questions at 5-7; Respondent's Response to Board Questions at 5-6. Therefore, to the extent the term hazardous is applied to LBP, we will follow the parties' mutual understanding of that term.

2. Applicability of the Demolition Section to the LBP Section

Troop argues that the demolition section's provisions regarding unforeseen hazards applied to the LBP section. Under this interpretation, abatement of any LBP that tested above the action level or permissible exposure limit was not within the contract's pricing and period of performance terms and would entitle Troop to an equitable adjustment. This interpretation unreasonably applies the provisions of the demolition section outside of its specified context.

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[3] The contract also incorporates FAR clause 52.223-3, Hazardous Material Identification and Material Safety Data Alternate I (Feb 2021) (48 CFR 52.223-3). Exhibit 019 at 006086. This clause states: "(a) 'Hazardous material,' as used in this clause, includes any material defined as hazardous under the latest version of Federal Standard No. 313 (including revisions adopted during the term of the contract)." Federal Standard No. 313, in turn, provides a lengthy definition of hazardous materials but does not define whether lead or LBP is hazardous in a manner relevant here. *See* Federal Standard No. 313, www.gsa.gov/system/files/FED-STD-313F%20final%20(1).pdf (last visited July 17, 2025).

Troop seeks additional costs for LBP abatement of the ceilings on the first floor and basement, which were disturbed during construction. ASUMF ¶ 80. As discussed above, both the SOW and the contract specifications distinguished between demolition work and construction work. Exhibit 019 at 006110, 006251-52. The general construction section of the specifications stated that Troop must provide "all general conditions, management, demolition, construction, and trade work necessary to successfully complete this project as outlined in the Statement of Work" and further distinguished demolition and construction as follows:

> C. Demolish existing walls, structures, systems, and fixtures as identified by and in accordance with the design documents. Abate hazardous materials as needed, in accordance with the design documents.
>
> D. Construct new walls, structures, systems, and fixtures as identified in the design documents. Replace all exterior personnel doors in accordance with the design documents.

Id. at 006252. Other references in the contract drawings and specifications similarly distinguished between demolition and construction work. *E.g.*, *id.* at 006395, 006135-40.

The demolition section applied to the removal of structures and disposal of those materials: "This section specifies demolition and removal portions of buildings, utilities, other structures and debris from trash dumps shown." Exhibit 019 at 006490. The specific provision cited by Troop in paragraph (D) of the demolition section stated: "Remove and legally dispose of all materials, other than earth to remain as part of project work, from any trash dumps shown. . . . Materials that are located beneath the surface of the surrounding ground more than 1500 mm (5 feet), or materials that are discovered to be hazardous, shall be handled as unforeseen." *Id.* at 006492.

The direction to strip paint from columns and capitals is listed in the "DEMOLITION" drawings. Exhibit 019 at 006135-40. In contrast, the work that required disturbing the painted surfaces on the ceiling to affix items was addressed in what Troop refers to as the component drawings, rather than in the demolition drawings. *Id.* at 006142, 006146, 006173, 006180, 006192, 006195, 006201, 006217, 006220, 006222, 006232. As Troop notes, these component drawings referred to the construction work identified in the SOW and specifications:

> The Component Drawings expressly dictate the location of ductwork, mechanical piping, plumbing, lighting, and cable trays, and the exact fasteners that must be used to affix components to the ceiling. The Component Drawings require affixing hanging wire to the original ceiling to support the new drop ceiling. The Component Drawings require new walls to be installed and fastened to the ceiling. And the Component Drawings require lighting, power, fire alarm and fire protection all to be affixed to the ceiling.

ASUMF ¶ 35.

In Troop's correspondence with the VA, such as RFI 49, it characterized this work as construction:

> Troop Contracting has identified, in general, areas that will be disturbed by executing new construction. All areas within the footprint of new work will be affected by the requirements of placing new fasteners into existing concrete. Fastened anchors are required for new ductwork, electrical and plumbing and sprinkler piping, acoustical ceilings, and for any fixtures and equipment fastened to the concrete ceilings and/or walls. The extent of fasteners that will be required to be located on an as needed basis makes it impractical to "spot locate" specific and isolated areas. All areas within the footprint of new work and any overlap where new work will tie-in to existing systems will be touched by mechanical fastening methods.

Exhibit 083 at 1.

Based on the plain language of the contract, the term "shall treat as unforeseen" from the demolition section does not apply to the requirements of the LBP section. The LBP section clearly and unambiguously requires Troop to assume that all painted surfaces contain LBP and to handle such LBP in accordance with the LBP section, and this requirement, in turn, clearly and unambiguously requires Troop to perform LBP testing and abatement. Finding that the "shall treat as hazardous" provision in the demolition section did not apply to the LBP section avoids the direct and obvious conflict between these two sections and avoids rendering the provisions of the LBP section meaningless or superfluous. Troop's interpretation of the demolition section as applying to the LBP section is unreasonable.

3. Patent Ambiguity

Even if Troop's interpretation that the demolition section applied to the LBP abatement required for the construction work that disturbed painted surfaces was reasonable, this interpretation would give rise to an ambiguity between the LBP section's requirement that Troop treat "any and all" painted surfaces as containing LBP and to handle it under that specification.

Troop seeks an interpretation of the demolition section that says, notwithstanding the plain language of the LBP section, any hazards encountered must be treated as unforseen and, therefore, eligible for an equitable adjustment. Additionally, a direct and obvious conflict arises between the demolition section's statement regarding hazardous materials and the general requirement section's instruction for demolition work that Troop must "[a]bate hazardous materials as needed, in accordance with the design documents." Exhibit 019 at 006252.

Troop's interpretation, at best, gives rise to a direct and obvious conflict between the demolition, LBP, and general requirements sections of the specifications. Thus, any potential ambiguity would be patent, rather than latent.

Further, as discussed above, solicitation amendment 0004 contained a question and answer regarding testing and responsibility for LBP abatement. Exhibit 017 at 006060. Rather than answering the question directly, the VA referred bidders to the LBP section's direction that "any and all" paint coatings must be assumed to contain LBP and handled per the LBP section. *Id.* Notably, this answer advised bidders that questions regarding responsibility for LBP testing and abatement would be addressed through the LBP section rather than the demolition section. Here again, we conclude that the questions and answers in the solicitation amendment put Troop on notice of the VA's contrary interpretation which would not permit recovery. Therefore, even assuming Troop's interpretation was reasonable, the patent ambiguity that it creates must yield to the VA's reasonable interpretation. *See Chupnick*, 19-1 BCA at 181,953-54.

4. Court of Federal Claims Decision in *George Sollitt Construction Co.*

Troop contends that the decision by the Court of Federal Claims in *George Sollitt Construction Co. v. United States*, 64 Fed. Cl. 229 (2005), identified a latent ambiguity in an LBP contract provision similar to the LBP contract provision at issue in this case and that,

therefore, Troop is entitled to an equitable adjustment. Decisions of the Court of Federal Claims are not binding on the Board. *CH2M-WG Idaho, LLC v. Department of Energy*, CBCA 3876, 17-1 BCA ¶ 36,849, at 179,566. In any event, the facts of that decision are different from those presented here and do not provide a basis to reach the same conclusions.

The contract in *Sollitt* stated that "[a]ll painted surfaces are suspected to contain lead" but also stated that "[a]ll known hazardous materials are indicated on the drawings." 64 Fed. Cl. at 262. In the event "additional material that is not indicated on the drawings is encountered that may be dangerous to human health upon disturbance during construction operations[,]" the contractor was to stop work and notify the contracting officer. *Id*. If that material was found to be "hazardous and handling of the material [was] necessary to accomplish the work, the Government may issue a modification." *Id.*

The court in *Sollitt* did not address any particular definition of the term hazardous. The court instead focused on the contract's statement that all known hazards were disclosed and that any hazardous material that required disturbing would be treated as requiring a modification. The court found that while the contract disclosed the existence of LBP, the drawings and specifications showed only low levels of lead that were not hazardous. 64 Fed. Cl. at 263. The court concluded that "[t]he unexpected presence of high levels of lead in the paint revealed the latent ambiguity in the contract specifications" because it was reasonable under the terms of the contract for the contractor to assume that any paint encountered would not require abatement. *Id.*

The contract language here is considerably different and does not support finding a latent ambiguity in the contract. Unlike the contract in *Sollitt*, the contract here did not state that all known hazards were disclosed, nor did the contract affirmatively state that any LBP that might be encountered contained low, but non-hazardous levels of lead. While the contract in *Sollitt* provided for a modification if hazardous material was encountered, the contract here expressly stated that all surfaces that will be disturbed must be assumed to contain LBP and handled pursuant to the LBP section and the requirements of 29 CFR 1926.62. The absence of a disclaimer and the inclusion of specific requirements to handle LBP pursuant to regulatory requirements distinguishes the contract here from the contract in *Sollitt*. We, therefore, find that the court's decision in *Sollitt* does not support Troop's interpretation of this contract.

In sum, reading the contract as a whole, the plain language of the LBP section required Troop to assume that all painted surfaces encountered and disturbed contained LBP

and to handle those painted surfaces in accordance with the specifications. These specifications, which include the requirements of 29 CFR 1926.62, required testing, monitoring, and other protective measures. Drawing all inferences of fact in favor of Troop, we assume that the contract required it to perform construction work that disturbed LBP in areas where work was affixed to the ceilings. Thus, the plain language of the contract required Troop to perform the LBP testing and abatement.

We conclude that there are no disputed issues of material fact and that the legal issues of contract interpretation show that the VA did not breach the contract. Troop is not entitled to summary judgment as to its breach of contract claim, and the VA is entitled to summary judgment on Troop's breach of contract claim.

III. Troop's Remaining Counts are Duplicative or Otherwise Merit Summary Judgment for the VA

Troop's motion seeks summary judgment only on its breach of contract claim in count I of the complaint. The remaining counts in the complaint are: (1) differing site conditions, (2) breach of the implied warranty of specifications, (3) constructive change, (4) breach of the duty of good faith and fair dealing, and (5) failure to disclose superior knowledge. The VA's motion for summary judgment specifically cites the breach of contract and differing site conditions claims but does not specifically state that it seeks summary judgment on all the remaining claims. The VA's motion, however, broadly seeks judgment as a matter of law in a manner that would deny the appeal. *See* Respondent's MSJ at 1.

Troop pled its breach of contract claim in a manner that makes the other claims moot or duplicative. In this regard, the remaining counts in the complaint either restate arguments

raised in its breach of contract argument[4] or rely entirely on matters of contract interpretation that we resolved against Troop in connection with the breach of contract claim.

A. Differing Site Conditions

Troop contends that it is entitled to an equitable adjustment under FAR clause 52.236-2, Differing Site Conditions, because it encountered LBP that was not described in the contract drawings. Complaint ¶ 58. Troop further contends that these conditions were not foreseeable at the time of bid submission because bidders were not allowed to conduct tests for LBP during the site visit.

To prove a type I[5] differing site condition, the contractor must show that: (1) "the conditions 'indicated' in the contract differ materially from those it encounter[ed] during performance," (2) "[t]he conditions encountered must have been reasonably unforeseeable based on all the information available to the contractor at the time of bidding," (3) "it reasonably relied upon its interpretation of the contract and contract-related documents," and (4) "it was damaged as a result of the material variation between the expected and the encountered conditions." *CI-Pond Solutions JV, LLC v. Department of Justice*, CBCA 7233, 22-1 BCA ¶ 38,077, at 184,913 (quoting *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 16-1 BCA ¶ 36,468, *aff'd*, 706 Fed. App'x. 681 (Fed. Cir. 2017)).

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[4] In its complaint, Troop argues that the VA breached the contract by "[f]ailing to provide adequate Specifications and Drawings," "failing to disclose material information concerning the prevalence of LBP and the method and manner in which it must be handled," "[f]ailing to adequately respond to Troop's inquiries for clarification and RFIs," "[f]ailing to act consistent with its implied obligations of good faith and fair dealing," "[f]ailing to cooperate with Troop to resolve latent ambiguities in the Specifications and Drawings," "[f]ailing to handle as unforeseen materials that are discovered to be hazardous," "[f]ailing to make an investigation into the differing site conditions raised by Troop and [to] make an equitable adjustment due to Troop's increased costs," "[r]equiring Troop to perform work outside the scope without an equitable adjustment," and "[u]nreasonably denying Troop's [request for modification], REA and Claim." Complaint ¶ 52.

[5] Although Troop does not identify in its complaint whether it alleges a type I or type II differing site condition, it alleges in its claim that there was a type I condition. Exhibit 074 at 011239.

Troop argues that the contract stated that LBP in areas other than the columns and capitals indicated in the drawings must be treated as unforeseen and that it is entitled to an equitable adjustment for performing this work. Complaint ¶¶ 58-59. As discussed, Troop's interpretation is unreasonable, and the VA, rather than Troop, is entitled to summary judgment. To the extent Troop contends in the alternative that the solicitation did not adequately advise prospective bidders of the presence of LBP in a manner that entitles it to an equitable adjustment, this argument is inconsistent with our findings regarding the breach of contract claim.

In this regard, the parties dispute whether there was an opportunity to test for LBP during the site visit. The VA contends that prospective bidders were permitted to request testing through exploratory demolition and that such testing could have revealed whether paint in the building had lead. Respondent's Statement of Genuine Issues ¶ 21. Troop contends that exploratory demolition is not used to test for LBP and that there was no indication from the agency that testing for LBP was permitted. ASUMF ¶ 21. This factual dispute is not suitable for resolution on summary judgment as each party has identified issues of genuine material fact.

Resolution of this matter is not required, however, because the plain language of the LBP section required bidders to assume that all painted surfaces to be disturbed contained LBP and must be handled pursuant to the requirements of the LBP section. Troop does not dispute that the site inspection permitted prospective bidders to view the relevant painted surfaces in the building. Thus, regardless of whether testing was allowed, bidders could see all painted surfaces that the specifications stated must be assumed to have LBP.

There are no disputed issues of material fact relevant to Troop's differing site conditions claim. Because Troop's interpretation of the contract is not reasonable, Troop is not entitled to summary judgment. In light of our ruling on the breach of contract claim and underlying conclusions regarding contract interpretation, the VA is entitled to summary judgment on the differing site conditions claim.

B. Implied Warranty of Specifications

Troop contends that the VA breached the implied warranty of specifications by providing contract drawings and specifications that did not adequately advise as to the extent of LBP elsewhere in the building and instead stated that LBP removal was only required for the columns and capitals. Complaint ¶¶ 62-65. This claim is duplicative of the arguments

raised and addressed in connection with the breach of contract and differing site conditions claim.

There are no disputed issues of material fact relevant to the implied warranty of specifications claim. Because Troop's interpretation of the contract is not reasonable, Troop is not entitled to summary judgment. In light of our ruling on the breach of contract claim and underlying conclusions regarding contract interpretation, the VA is entitled to summary judgment on the implied warranty of specifications claim.

C. Constructive Change

Troop argues that the VA ordered a constructive change to the contract by requiring it to perform testing for lead and to conduct LBP abatement in locations other than the columns and capitals identified in the contract drawings. *See* Complaint ¶¶ 67-70. Where the work that is the subject of the alleged change is within the scope of the contract, the claim must be denied. *See G2G, LLC v. Department of Commerce*, CBCA 4845, 15-1 BCA ¶ 36,115, at 176,310.

There are no disputed issues of material fact relevant to Troop's constructive change claim. Because Troop's interpretation of the contract is not reasonable, Troop is not entitled to summary judgment. In light of our ruling on the breach of contract claim and underlying conclusions regarding contract interpretation, the VA is entitled to summary judgment on the constructive change claim.

D. Good Faith and Fair Dealing

As the Court of Appeals for the Federal Circuit has explained, claims for breach of the duty of good faith and fair dealing are frequently duplicative of breach of contract claims when they arise out of the same operative facts. *See The Portland Mint v. United States*, 102 F.4th 1371, 1384 (Fed. Cir. 2024). Where a breach of contract claim and a breach of the implied covenant of good faith and fair dealing claim arise out of the same operative facts, the latter claim "should be dismissed as redundant." *Id.* (citing *BGT Holdings LLC v. United States*, 984 F.3d 1003, 1016 (Fed. Cir. 2020)).

Troop cites three examples of breaches of the duty of good faith and fair dealing, all of which are duplicative of issues addressed in our findings regarding the breach of contract claim. First, Troop contends that the agency breached its duty by failing to resolve latent

ambiguities related to the contract's requirements for LBP testing and abatement. As discussed, Troop's interpretation of the relevant contract terms is not reasonable, and the terms were not ambiguous. Further, even if Troop's interpretation was reasonable, it would, at best, raise patent ambiguities.

Second, Troop contends that the agency breached its duty by failing adequately to respond to its RFIs regarding LBP testing and removal of LBP. As discussed, the VA's response to the RFI directed Troop to the relevant contract terms, and Troop's interpretation of those provisions was not reasonable. *See* Exhibit 023 at 008511-12; Exhibit 083 at 3.

Third, Troop contends that the VA breached its duty by directing Troop to perform outside the scope of the contract without making an equitable adjustment. As discussed, the work was within the scope of the contract and did not require an adjustment.

In sum, all three arguments upon which Troop bases its breach of the duty of good faith and fair dealing claim are duplicative of its breach of contract claim. The duty of good faith and fair dealing claim is, therefore, dismissed as redundant. *See The Portland Mint*, 102 F.4th at 1384.

E. Superior Knowledge

Troop argues that the VA breached its duty to disclose superior knowledge regarding the prevalence of LBP in the building. This argument is duplicative of arguments raised in the breach of contract claim.

Under the doctrine of superior knowledge, the Government has "an implied duty to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000). A superior knowledge claim "focuses . . . upon the Government's knowledge of vital information *prior* to contract award and its failure to share it with an unknowing contractor." *NoMuda, Inc. v. Department of Homeland Security*, CBCA 7999, 24-1 BCA ¶ 38,662, at 187,945 (quoting *VSE Corp. v. Department of Justice*, CBCA 5116, 18-1 BCA ¶ 36,928, at 179,916 (2017)).

Troop's superior knowledge claim appears to be an alternative argument to its breach of contract claim in that it effectively assumes that Troop was required under the contract to perform LBP testing and abatement but that the VA failed to disclose the prevalence of LBP

in the building. As discussed in connection with the adequacy of the implied warranty of specifications claim, the contract plainly stated that Troop must assume that any and all painted surfaces encountered and disturbed contain LBP and that Troop must treat these painted surfaces per the specifications. Troop therefore knew or should have known that the specifications set forth in the solicitation (which were subsequently incorporated into the contract) advised that all painted surfaces must be assumed to contain LBP and that Troop would be required to address any disturbed paint pursuant to the LBP section. Further, Troop was provided an opportunity for a site visit, and Troop does not dispute that it would have been able to see the extent of the painted surfaces and thus the potential extent of the required work.

On this record, there are no disputed issues of material fact relevant to Troop's superior knowledge claim. Because Troop's interpretation of the contract is not reasonable, Troop is not entitled to summary judgment. In light of our ruling on the breach of contract and other related claims, the VA is entitled to summary judgment on the superior knowledge claim.

Decision

For the foregoing reasons, we deny appellant's motion for summary judgment, grant respondent's motion for summary judgment, and **DENY** the appeal.[6]

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

[6] The parties each raise other collateral arguments. Although we have not addressed every argument, we reviewed them all and find that none provide a basis for a different conclusion in this decision.