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United States Court of Appeals for the Federal Circuit

951336, 961154

CONNER BROTHERS
CONSTRUCTION COMPANY, INC.,
Appellant,

v.

Jesse Brown,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

DECIDED: April 30, 1997

Before MAYER, SCHALL, and BRYSON, Circuit Judges.
SCHALL, Circuit Judge.

DECISION

Conner Brothers Construction Company, Inc. (Conner) appeals from two decisions of the Department of Veterans Affairs Board of Contract Appeals (Board), Conner Brothers Construction Co., Inc., VABCA Nos. 2519, 2656, and 3595, 951 BCA para. 27,409 (Dec. 30, 1994), and Conner Brothers Construction Co., Inc.,

VABCA Nos. 2504, 2657, 27422744, and 38363837, 952 BCA para. 27,910 (Aug. 17, 1995). In these decisions, the Board sustained in part and denied in part Conner's appeals of the contracting officer's (CO's) final decisions, which granted in part and denied in part Conner's claims for additional compensation and time under a fixed-price contract between Conner and the United States Department of Veterans Affairs (VA).¹ Conner has appealed the Board's decisions to the extent that they sustained the CO's denial of Conner's claims, and the appeals have been consolidated. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10) (1994). We affirm.

¹ Some of the CO's final decisions were in the form of deemed denials. See 41 U.S.C. § 605(c)(5) (1994).

DISCUSSION

I.

The contract was for the replacement of a hospital building and related work at a VA Medical Center in Tuskegee, Alabama. Generally, the contract called for (i) constructing a new patient building (Building No. 120) with a tunnel and bridges to connect it to an existing building (Building No. 3A), (ii) constructing an addition to another building (Building No. 5), and (iii) demolishing a third building (Building No. 62). Conner received Notice to Proceed on October 29, 1984. Work was to be completed by December 28, 1986, with

liquidated damages of \$800 per day for late completion. From almost the start of its performance, Conner encountered numerous problems, for which it submitted a number of claims to the CO. The bulk of Conner's claims were denied by the CO.

II.

We review the Board's decision under the standard set forth in the Contract Disputes Act, 41 U.S.C. §§ 601613 (1994). Under that standard,

the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

41 U.S.C. § 609(b).

The Board's conclusions of law are reviewed de novo. See FruinColnon Corp. v. United States, 912 F.2d 1426, 1429 (Fed. Cir. 1990). The interpretation of a contract provision is an issue of law. Blake Constr. Co. v. United States, 987 F. 2d 743, 746 (Fed. Cir. 1993). Whether

a contract contains an ambiguity, and whether the ambiguity is patent or latent, are issues of law which we review de novo. Interwest Constr. v. Brown, 29 F.3d 611, 614 (Fed. Cir.1994).

Our review of the Board's findings of fact is extremely limited. The Board's decision on a finding of fact may not be set aside unless the appellant here, Conner can meet its burden of establishing that the finding is arbitrary, capricious, so erroneous as to necessarily imply bad faith, or not supported by substantial evidence. Erickson Air Crane Co. of Wash., Inc. v. United States, 731 F. 2d 810, 814 (Fed. Cir. 1984); see William F. Klingensmith Inc. v. United States, 731 F.2d 805, 809 (Fed. Cir. 1984); J.M.T. Mach. Co., Inc. v. United States, 826 F.2d 1042, 1046 (Fed. Cir. 1987). In challenging the Board's findings of fact, Conner must do more than simply point to evidence supporting its own position, because "even though the record may contain evidence which supports a contrary position, we will not alter a board's finding if substantial evidence supports it." Erickson, 731 F.2d at 814; see William F. Klingensmith, 731 F.2d at 809.

Conner's arguments on appeal, as explained in more detail below, are as follows: (i) the Board incorrectly determined that the contract contained a patent ambiguity relating to the installation of electrical conduit (VABCA No. 2504); (ii) the Board erred in finding (a) that Conner's construction of a bridge connector was delayed for only twelve days on account of a differing site condition in the form of a steam trench and steam lines that were discovered after contract work had begun, and

(b) that the delay was concurrent with delay for which the VA was not responsible (VABCA No. 2742); (iii) the Board incorrectly concluded that the parties did not reach a binding agreement as to the amount of credit Conner would receive for the deletion of the demolition of Building No. 62 (VABCA Nos. 2656 and 3595); (iv) the Board erroneously denied Conner delay damages for condensation problems that it encountered while working in Building No. 5 (VABCA No. 3837); and (v) the Board erroneously found that Building No. 120 was not substantially completed when a first final inspection of the project took place (VABCA No. 2657). For the reasons which follow, we reject each of Conner's contentions.

III.

A.

The first issue raised by Conner relates to electrical conduit work performed in constructing Building No. 120. The contract specifications, section 16111, paragraph 3.3.A.4, contained a prohibition against installing conduit "in concrete which is less than three inches thick." At the same time, structural drawings which were part of the contract depicted composite floor slabs of concrete poured on a corrugated metal deck, where concrete thickness was shown as 2 1/2 inches. NOTE #3 of the drawings stated that the "[s]lab of 2 1/2" is min. thickness at supports. This dimension will increase away from supports due to deflection of beams and deck This should be taken into account figuring concrete

quantity [sic]." In addition, a number of electrical drawings which were part of the contract showed electrical conduit concealed in floor slabs. After Conner began installing conduit in the floors of Building 120, the VA objected and directed that the conduit be removed and placed in the ceilings. Conner complied and then filed a claim for additional compensation, asserting that the directive amounted to a constructive change. The CO denied the claim.

In addressing the claim, the Board concluded that the contract contained a patent ambiguity in view of the conflict between the specifications and the drawings. The Board interpreted the specification as placing a clear prohibition on placing conduit in any concrete less than three inches thick, without regard to whether that concrete was part of a composite slab or a slab of uniform thickness. In addition, the Board found that electricians would consult the structural drawings and specifications to determine the placement of conduit. The Board concluded that "[t]his discrepancy was obvious."

On appeal, Conner claims that the conflict between the specifications and the drawings amounted to only a latent ambiguity and that its interpretation that conduit could be placed in floor slabs was reasonable and therefore controlling. Conner argues that a reasonable busy bidder could rely on the preparer of the plans and specifications to ensure that sufficient concrete would be present in the floor slabs. Further, Conner asserts, a reasonable bidder for electrical work would have looked only to the electrical drawings, and even if such a bidder had reviewed the structural drawings, it would have

encountered NOTE #3 indicating that the slab dimension of 2 1/2 inches was a minimum.

A "patent ambiguity is one that is 'obvious, gross, [or] glaring.'" Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 997 (Fed. Cir. 1996) (quoting H & M Moving, Inc. v. United States, 499 F.2d 660, 671 (1974)). It "does not exist where the ambiguity is 'neither glaring nor substantial nor patently obvious.'" Community Heating & Plumbing Co., Inc. v. Kelso, 987 F.2d 1575, 1579 (Fed. Cir. 1993) (quoting Mountain Home Contractors v. United States, 425 F.2d 1260, 1264 (1970)). When a contract contains a patent ambiguity, the contractor is under a duty to seek clarification, and if no clarification is sought, the contractor cannot later argue that its interpretation is correct. Grumman Data Sys., 88 F.3d at 998; see Lockheed Martin IR Imaging Sys., Inc. v. West, 1997 WL 88998, at *3 (Fed. Cir. Mar. 4, 1997); Forte Constructors v. United States, 760 F.2d 1288, 1291 (Fed. Cir. 1985). The same rule applies to ambiguities in contract drawings. See Community Heating, 987 F.2d at 1580.

In this case, the specification places a clear prohibition against placing conduit "in concrete which is less than three inches thick." The electrical drawings show conduit being placed in the floor slabs, but the structural drawings depict the concrete in the slabs as only 2 1/2 inches thick. Therefore, placing conduit in floor slabs plainly violates the prohibition in the specifications. Thus, a patent ambiguity existed. NOTE #3 in the structural drawings does not alter our conclusion. Even with the note it was clear that there

would be locations in the floor where there would be less than three inches of concrete. Since Confer did not inquire, it is barred from recovery.

B.

Conner's second contention relates to its construction of a bridge connector to connect Buildings 120 and 3A. On about August 14, 1986, Conner discovered a steam trench and steam lines both unanticipated that would interfere with the planned placement of footings for the connector. The VA issued field change orders modifying the connector work to reflect the work required in connection with the differing site condition. In due course, Conner submitted a claim seeking further compensation for direct costs and for costs associated with 127 days of delay resulting from the work.² The claim was denied.

² The claim was later modified to request 62 days of delay.

The Board awarded Confer some compensation for direct costs, but denied its claim for costs associated with days of delay. The Board found that Conner failed to show that all of the claimed delay days were caused by the steam trench and steam lines. In determining the proper amount of delay, the Board found an October 30, 1986 Critical Path Methodology (CPM) Update to be the most persuasive evidence. This update, the Board said, indicated that the last work relating to the connector was to be done by January 7, 1987,³ twelve days after the

scheduled completion date for the project (i.e., December 28, 1986). Accordingly, the Board assigned twelve days of delay to the bridge connector work. However, the Board determined that any delay arising as a result of the steam trench and steam line work was concurrent with delay for which the VA was not responsible, so that Conner was not entitled to recover damages for the delay. The Board found that by the fall of 1986, most activities were critical because of the impending completion date (December 28, 1986). The Board noted that Conner still was performing courtyard work at the time of the first final inspection in May of 1987, which was well beyond the original completion date.

³ The date should have been January 9, 1987.

Conner argues that the Board erred in evaluating the October 30, 1986 CPM Update, because it improperly compared the finish date for one activity the bridge connector with the completion date for the entire project, even though the connector was not the last item in the chain of critical path activities. According to the October 30, 1986 CPM update, Conner asserts, followup activities delayed project completion until February 13, 1987, which was fortysix days after the scheduled contract completion date. In addition, Conner contends that the contract required using the CPM update existing at the time the bridge connector problem arose to measure delay.⁴ Conner contends that, consequently, the applicable CPM update is the August 30, 1986 update, which shows project completion thirteen days early. Therefore, Conner asserts, it is entitled to a total of

fifty-nine (46+13) days of delay. Finally, Conner argues that the Board erroneously found concurrent delay because, according to the October 30, 1986 CPM Update, delay attributable to Conner was not on the critical path and therefore should not have been used to offset critical path delays.

⁴ The Network Analysis System section of the contract stated in pertinent part that: "The Contracting Officer's determination as to the total number of days of contract extension shall be based upon the current computer produced calendar dated schedule for the time period in question and all other relevant [sic] information." NAS13

To receive an equitable adjustment, a contractor must establish three things liability, causation, and resultant injury. Servidone Constr. Corp. v. United States, 931 F.2d 860, 861 (Fed. Cir. 1991). "This means that when the claim being asserted by the contractor is based upon alleged government-caused delay, the contractor has the burden of proving the extent of the delay, that the delay was proximately caused by government action, and that the delay harmed the contractor." Wilner v. United States, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (in bane). Conner asserts that the discovery of the steam trench and steam lines resulted in substantial delay, as shown by the October 30, 1986 CPM Update.

In this case, substantial evidence supports the Board's finding that Conner failed to show causation between all of the alleged delays it suffered and government action or inaction. While the October 30, 1986 CPM update did indicate that completion of the project would be delayed until February 13, 1987, Conner has not shown that all of the delay was directly attributable to the steam trench and steam lines.

The Board found that, once concrete pouring for the connector footings began on September 19, 1986, the steam trench and steam lines caused no further substantive delays to the bridge connector work. Substantial evidence supports this finding. Specifically, evidence in the form of construction logs and photographs reflects the limited impact of this work. In addition, as noted by the Board, during this time Conner performed required work that was unrelated to the steam trench and steam lines.

We also find that substantial evidence supports the Board's findings that by the fall of 1986, most of the work on the project was time critical and that Conner's delays in performing courtyard work were concurrent with any delay arising from the steam trench and steam line work.⁵ For example, in a letter dated May 14, 1987, an architectural/engineering consultant informed the VA that "[l]andscaping, plaza electrical, grading, sprinkler system, pavers, cleaning of brick, etc. still need to be completed." In addition, the Board noted that Conner's courtyard work was not completed until June of 1987 months after the scheduled completion date even though Conner could have accessed the courtyard by September

of 1986 and completed the bulk of the work before the winter of 1987.

⁵ Concurrent delay prevents either party from recovering damages. William F. Klingensmith, Inc. v. United States, 731 F.2d 805, 809 (Fed. Cir.1984).

C.

The third issue Conner raises concerns the deletion of the demolition of Building No. 62 under "Alternate No. 6" of the contract. Following contract award, the VA decided not to have the building demolished and requested that Conner submit a change order proposal to delete this work. Conner's submission presented a credit of \$141,340.00; the VA responded with a proposed credit of \$322,000.00. Negotiations were held to determine the proper amount of the credit. One meeting was held on August 6, 1986. The meeting was described in a August 12, 1986 memorandum by a VA project supervisor: "[T]he contractor has accepted the \$192,000.00 offer for settlement for deletion of Alternate No. 6 Demolition of Building No. 62. However, the contractor now claims that a credit is due him for salvage items which would have generated greater profit had the demolition activity been completed." Shortly thereafter, the VA's Estimating Service Office stated: "We do not feel that the VA should receive any less of a credit then [sic] that offered in the amount of \$192,000. This amount has already taken into account possible monies for salvaged material." In a

letter dated September 23, 1986, Conner wrote to the CO that "[i]n our onsite meeting of August 6, 1986, a mutual agreement was reached on the fair value of the demolition of building 62 and site restoration." Conner further stated that the only issue remaining was "how to consider the value of the salvageable material from building 62."

The CO responded, stating that the government was not allowing Conner any salvage value. In addition, the CO restated the government's offer of \$192,000.00. On October 6, 1986, Conner replied:

1) We do not accept your offer of \$192,000.00 as a fair reduction to our contract amount for omitting this work.

2) We do agree that \$192,000.00 is a reasonable cost for the demolition of the building and site restoration; however, it is our position that this figure needs to be reduced for items that would be salvageable prior to the demolition process.

In a further letter dated November 7, 1986, Conner notified the CO that "[s]ince we have previously reached an agreement with the VA that \$192,000.00 is a reasonable cost for the demolition of the building and site restoration, we will confine our discussion to the value of the salvageable materials that we feel needs to be subtracted from the \$192,000.00 figure in order to

arrive at a proper credit." Conner submitted a claim for a further deduction of \$49,232.00 from the credit to be received by the VA on account of the elimination of the demolition of Building No. 62.

After further unsuccessful negotiations, on June 29, 1987, the CO issued a final decision, in which he stated: "This claim in the amount of \$49,232.00 is for the cost of salvageable material and equipment which you feel your company is entitled to beyond the agreed upon amount of \$192,000.00 for the demolition and site restoration of Building No. 62. This claim deals solely with Alternate No. 6, Demolition of Building No. 62." The CO denied the claim.

Conner appealed the CO's decision to the Board on October 9, 1987, alleging in its complaint that: "Conner and the VA reached an agreement that \$192,000.00 was a reasonable cost for the demolition of the building and site restoration. The VA took the position that Conner was not entitled to any reduction in the \$192,000.00 amount for the salvage value of materials within Building 62." In its answer, filed November 6, 1987, the VA admitted the allegation. Subsequently, on December 2, 1987, the CO issued a unilateral change order setting \$192,000.00 as the amount of the reduction resulting from the elimination of the demolition work. The change order stated that "[p]ending the issuance of a Supplemental Agreement, the contract price (for fiscal purposes) is being decreased by the amount of [\$192,000.00]". This change order was not signed by Conner. Thereafter, on January 20, 1987, the VA again offered Conner \$192,000.00 as the total credit, but Conner again rejected

the offer by letter dated February 3, 1987. Eventually, the CO issued another final decision, which reduced the contract price by \$325,000.00. In so doing, the CO stated: "This settlement by determination cancels and supersedes change order No. 6 dated December 2, 1987, issued in the amount of \$192,000.00."

The Board ultimately determined that \$221,448 was the amount of the credit to which the VA was entitled by reason of the elimination of the demolition work. It determined that no bilateral agreement had been signed before Conner requested that the \$192,000.00 figure be reduced by the amount of the salvage value of the materials in Building No. 62. On appeal, Conner asserts that it and the VA reached a binding agreement on this matter, as evidenced by the correspondence noted above, after which the parties sought to address the separate issue of whether Conner was entitled to a further reduction in the VA's credit for the salvage value of the materials in the building.

We disagree. No binding agreement was reached on the amount of credit for deleting the demolition of Building No. 62 from the contract. "Whether a legally enforceable contract has been formed by a meeting of the minds depends upon the totality of the factual circumstances." Texas Instruments Inc. v. United States, 922 F.2d 810, 815 (Fed. Cir. 1990). As the correspondence noted above makes clear, the issue of the amount of credit for deleting the demolition of Building No. 62 involved the intertwined considerations of (i) the proper credit for performing the demolition and (ii) whether Conner was entitled to credit for salvage items in the

building. As noted above, the CO's letter of September 24, 1986 stated the government's offer of \$192,000.00, which Conner explicitly rejected in its letter dated October 6, 1986. Further, in the same letter, Conner explained that while \$192,000.00 represented a fair figure for performing the demolition, the figure had to be reduced for items that would be salvageable. Conner's November 7, 1986 letter provided a similar explanation. This evidence indicates that the parties attempted to reach agreement on the issue, but that they could not agree on the two underlying considerations. In addition, the VA issued a change order in the amount of \$192,000.00 as a possible avenue for facilitating agreement, but Conner did not sign the change order and when the VA again offered this amount to Conner, Conner rejected it. Therefore, no binding agreement was ever reached.

D.

Conner's fourth contention relates to a steam/condensation problem it encountered while working in the corridors of Building No. 5. In this building, Conner was finishing ceilings and performing electrical work, fire alarm work, elevator work, and other finish activities. On April 27, 1987, Conner informed the VA that it was encountering condensation that was preventing it from carrying out the finish work, which included "floor and wall covering, ceilings, and systems sensitive to rust and or corrosion." Further, Conner stated that it could not guarantee against elevator parts rusting due to condensation. The next day, the VA issued

a field change order, F.C.O. "II," to delete all the finish work. However, the change order stated that all mechanical and electrical work still had to be done in accordance with the contract specifications. Conner agreed to this change order on February 9, 1988. By May 6, 1987, VA personnel had installed a window fan and had unclogged floor drains to remedy the problem, and by letter dated May 15, 1987, Conner stated that "[t]he [steam] problem still exists although the impact has been lessened." Eventually, Conner submitted a claim for this work, which was denied by the CO.

In rejecting Conner's claim, the Board found that, prior to the April 27, 1987 notification, no evidence existed showing that Conner was being delayed by the steam problem. In addition, the Board noted, F.C.O. "II" deleted the items about which Conner complained in the April 27 letter. The Board found persuasive the fact that Conner did not complain about the steam problem when it agreed to the change order, even though the change order stated that all nondeleted work had to be installed according to the specifications.

Conner now argues that the Board improperly treated F.C.O. "II" as an accord and satisfaction on any claim for delays occurring prior to its issuance. In addition, regarding its failure to raise concerns about delay when agreeing to the change order, Conner asserts that it had no reason to do so because it had already given sufficient notice of delay and of its intent to file a claim. Conner further argues that, contrary to the Board's finding, evidence existed in the form of oral testimony by Conner officials establishing that it was being delayed by

condensation even after the change order was issued.

The Board, however, did not treat F.C.O. "II" as an accord and satisfaction. Rather, it considered the change order to be strong evidence that Conner had not suffered any delay due to the steam problem. In addition, substantial evidence supports the Board's finding that Conner suffered no delay from the steam problem. In its April 27, 1987 letter, Conner complained about completing specific work due to the steam problem; the next day, F.C.O. "II" was issued deleting all such work. In subsequent correspondence, Conner expressed concerns about corrosion and the operability of certain systems, such as the elevator and fire alarm systems, but did not establish that the problems were causing delays. Conner also points to oral testimony indicating that elevator work was delayed by the steam problem. However, as noted above, by May 6, 1987, station personnel had largely alleviated the steam problem, as acknowledged by Conner in its May 15, 1987 letter. The burden was on Conner to show that the steam problem it encountered caused it delay. See Wickham Contracting Co., Inc. v. Fischer, 12 F.3d 1574, 1582 (Fed. Cir. 1994). It failed to carry that burden.

E.

Conner's final argument concerns the VA's rejection of Building No. 120 at a first final inspection held on May 11, 1987. The VA rejected the building based on finding certain deficiencies, namely (i) smoke doors not being operational, (ii) exits from the building No. 120 not being completed, and (iii) a test and balance report [of the

HVAC system] not being completed or certified. The building was later accepted in a second final inspection held on July 2, 1987. Liquidated damages were assessed against Conner for the time period between the first and second final inspections, which Conner argued were improper because the building was substantially complete as of May 11, 1987.

In rejecting Conner's claim, the Board stated that substantial completion is determined by "whether the project is capable of being occupied or used by the Government for its intended purpose, notwithstanding that work on punchlist items may remain to be done." Conner Brothers, 952 BCA para. 27,910, at 139,290 (quoting Dawson Constr. Co., VABCA Nos. 33063310, 933 BCA para. 26,177, at 130,324 (1993)). The Board found the deficiency in the smoke doors to be material, considering the importance of fire alarm systems in hospitals and language in the contract requiring a complete fire alarm system that would function "in every respect." In addition, the Board determined that the VA had a contractual right to request a final report on the HVAC system before deeming the project substantially complete, and that no such final report was produced before the first final inspection. Finally, the Board found the unfinished entrance to Building 120 to be more than a punchlist item, considering that it represented "the only public entrance to the building readily accessible from the parking lots and streets.

On appeal, Conner argues that the Board's legal analysis was incorrect. Conner cites Thoen v. United States, 765 F.2d 1110 (Fed. Cir.1985), where this court

held that the trial court had improperly relied exclusively on the contract specifications and had failed to properly consider the contractor's substantial completion argument. See *id.* at 1115. Conner contends that the Board erred here, just as the trial court did in Then, by relying exclusively on the specifications and by not adequately considering the actual circumstances under which the building would be used for its intended purpose. In this respect, Confer argues that at the time of the first final inspection, telephone wiring, furniture, and fixtures still had to be installed before patients could occupy the building. Therefore, Confer asserts, the initial intended purpose of the building was for accomplishing these tasks, not for housing patients. Confer argues that for this intended purpose, the building was substantially complete.

We disagree. The Board applied the correct legal analysis and properly considered the impact of the deficiencies noted above on operating the building for its intended purpose as a patient housing facility of a hospital. The fact that the building was not actually occupied by patients on the day it was completed is not important. Substantial completion is a question of fact, see Then, 765 F.2d at 1115, and based on all of the facts, substantial evidence of record supports the Board's finding that the building was not substantially completed as of the date of the first final inspection.

Therefore, we reject Conger's claim.

For the foregoing reasons, the decisions of the Board are affirmed.⁶

No costs.

⁶ We have fully considered Conger's other arguments on appeal, and have found them to be without merit.