2006-5093

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ACE CONSTRUCTORS, INC.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
IN 04-CV-299, JUDGE CHARLES F. LETTOW

BRIEF OF DEFENDANT-APPELLANT UNITED STATES

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September 20, 2006

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Pursuant to Rule 47.5 of the Rules of the United States Court of Appeals for the Federal Circuit, counsel for defendant-appellant states that we are unaware of any other appeal stemming from this same action before this or any other court.

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JURISDICTIONAL STATEMENT

Pursuant to 41 U.S.C. § 609(a)(1) (2000), the United States Court of Federal Claims possessed jurisdiction to entertain some of the claims of plaintiff-appellee, ACE Constructors, Inc. ("ACE"). This Court possesses jurisdiction to entertain the appeal from the decision of the trial court pursuant to 28 U.S.C. § 1295(a)(3) (2000). Defendant-Appellant, the United States, noticed this appeal on May 24, 2006, within 60 days of the trial court's March 31, 2006 final judgment. Therefore, pursuant to Federal Rule of Appellate Procedure Rule 4(a)(1), our appeal is timely.

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims erred in awarding damages based upon ACE's claim that, in a military airport "munitions loading pad" construction case, the Government changed the contract by ordering ACE to perform optional "profilograph testing" of concrete smoothness, where the only profilograph claim that was presented to the contracting officer was that the contract was defective in that it required profilograph testing that was unsuited to the project, and where the contract provided that "[t]he profilograph method shall be used for all longitudinal and transverse testing, except where the runs would be less than 60 m in length."

2. Whether the trial court erred in awarding damages based upon ACE's claim that the contract was defective in that it allowed an unsuitable "fixed-form" system for concrete paving (also known as "rigid-form" paving), where the only claim that was presented to the contracting officer related to concrete forming was that the contract was defective in that it required the use of three-meter rigid forms, and where ACE's president admitted that any reasonable contractor would have known that rigid-form paving was incompatible with the particular concrete "slump" that the contract specified.

3. Whether the trial court erred in awarding ACE damages upon its "differing site condition" earthwork claim without

taking into account in its calculation of damages that, during bidding, ACE expected to perform earthwork that, because of the differing site condition, it did not have to perform.

STATEMENT OF THE CASE

This is a Government-contract construction case pursuant to the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 (2000), et seq. On November 4, 2002, and August 6, 2003, ACE presented to the Government claims for equitable adjustments to the contract price and extensions of the contract completion date. A4300, A4840.[1] On March 7, 2003, and February 12, 2004, respectively, contracting officers denied those claims. A7010, A7014-15, A7031, A7037-38. ACE commenced an action in the Court of Federal Claims on March 5, 2004, appealing from the denial of those claims. A7000; A7001 ¶¶ 6-7. On March 31, 2006, after a five-day trial, the trial court entered judgment in favor of ACE. A1. The opinion of the Court of Federal Claims entering judgment in favor of ACE (A2-54) is reported at 70 Fed. Cl. 253.

STATEMENT OF THE FACTS

I. Background

On September 27, 2000, the United States Army Corps of Engineers contracted with ACE[2] to construct an "Ammo Hot-Load

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[1] "A___" refers to a page of the joint appendix that we will file within seven days of filing a reply brief.

[2] ACE was formed in 1998 and is in the business of heavy civil construction, including paving. A10199 at 1-6.

Facility" at Biggs Army Airfield, Fort Bliss, El Paso, Texas. A2584, A2586-87. The contract required the construction of roads, drainage ditches and drainage structures, a loading pad and shelter and a taxiway. A7300 ¶ 2. The contract incorporated by reference the provisions of Solicitation No. DACA63-00-B-0023. A2586. That solicitation included "Specifications for Ammo Hot-Load Area, Project No. 44921 (July 2000)." A2578.

On November 4, 2002, ACE presented to the Government a claim for an equitable adjustment to the contract price and an extension of the contract completion date based upon an alleged differing site condition. A4300. A contracting officer denied that claim on March 7, 2003. A7010, A7014-15. On August 6, 2003, ACE presented to the Government claims for equitable adjustments to the contract price and extensions of the contract completion date based upon alleged defects in the contract specifications, including related to profilograph testing of concrete smoothness and to the use of three-meter forms for concrete paving. A4840-41. A contracting officer denied that claim on February 12, 2004. A7031, A7037-38.

II. Profilograph Testing Claim

The trial court awarded damages holding that "profilograph testing was not required by the Contract" and that the "imposition [by the Government] of a requirement for profilograph testing constitute[d] a compensable constructive change." A45-

46. However, ACE's August 6, 2003 "profilograph" claim, which the contracting officer denied (A7031, A7037-38), was that:

> The third defect [in the contract specifications] was the requirement included in Specification Section 02753 Part 1.3.7 that profilograph testing to be used as the basis of acceptance of concrete smoothness for runs over sixty-meters in length. As described in Cambro's Request, the profilograph machine is designed to test roadway sections much longer than the sixty-meter minimum employed on this project. The machine design was not applicable to the subject project due to the short test runs and the test results were statistically inaccurate.

A4841 (emphasis added). Cambro Construction Company, Inc. ("Cambro") was ACE's principal paving subcontractor.[3] A7301 ¶ 11. In its statement, incorporated by ACE into its request for equitable adjustment, Cambro stated that the specifications were defective in that:

> they required the use of a Profilograph machine to test the compliance of the in-place concrete with the Specifications. The Profilograph machine was not suitable for determining the smoothness of the in-place concrete for contoured short sections of military aircraft taxiways and aprons . . . .

A4868 (emphasis added). Under the heading "Second Defect: Profilograph required as the acceptance method when it is not suitable or appropriate for this application," Cambro further stated that:

> The Specifications, Section 1.3.7, provide that a Profilograph machine shall be used for acceptance of

[3] ACE did not award a subcontract to Cambro until after ACE was awarded the contract, and did not base its bid upon any bid of Cambro. A10224 at 6-8; A10225 at 10-13.

> the concrete with respect to longitudinal and transverse surface smoothness of any run exceeding 60 meters in length. The Profilograph machine is designed for, and appropriate for, roadway sections of not less than one mile in length. . . . The Specifications specifically required the use of the Profilograph method, even though it was not suitable or appropriate.

A4869 (emphasis added). Specification § 02753 ¶ 1.3.7 provides that "[t]he profilograph method shall be used for all longitudinal and transverse testing, except where the runs would be less than 60 m in length and at the ends where the straightedge shall be used." A3141-42 (emphasis added).

On March 5, 2004, ACE commenced this action in the Court of Federal Claims alleging that the contract contained a "defective topographical survey" and "inaccurate contract drawings and specifications." A7000; A7002 ¶¶ 11, 13. In its pre-trial brief, ACE repeated its August 6, 2003 profilograph claim. Under the heading "The Project specifications contained inappropriate testing requirements," ACE stated "[a]s supplied to ACE by the Corps, the Project specifications contained a requirement that the concrete ACE poured on the Project be tested by a profilograph in order to be accepted by the Corps. . . . However, profilograph testing is not appropriate this [sic] Project." A7103 (emphasis added).

In its opening statement at trial, however, ACE's counsel stated that "[o]ur reading and understanding of the specs is that the profilograph was not required by the specifications for these

pavement surfaces." A10026 at 2-4. When asked to describe ACE's profilograph claim," ACE's president, John Fulkerson (A10198 at 21-23), who was primarily responsible for the preparation of ACE's bid for the contract (A10220 at 14-16), testified that:

> There were several components to this particular claim. The first, most obvious component is the cost for the [profilograph] test itself, which was done by Jobe Concrete Products. This test was not specified in the contract documents. It gave the contractor the option of using this test or a straight edge. We opted to use the straight edge, and we were told we had to use the profilograph, so that, we believe, is an additional cost.

A10407 at 25, A10408 at 1-8 (emphasis and bracketed material added). Mr. Fulkerson also testified that ACE included no cost for profilograph testing in its bid. A10408 at 9-11.

Mr. Fulkerson cited Specification § 02753 ¶¶ 1.3.7, 1.11.9, and 1.11.10 in support of ACE's claim that "the profilograph was not a required testing means." A10412-15, A10416 at 1-4. Specification § 02753 ¶ 1.11.9 provides that "[t]he Contractor shall furnish and maintain at the job site . . . one 4 m straightedge for each paving train for testing the hardened portland cement concrete surfaces." A3161. Specification § 02753 ¶ 1.11.10, which appears on the same page as ¶ 1.11.9, provides that "[t]he Contractor may furnish a 7.6 m profilograph for testing the finished pavement surface." Id. ACE never even mentioned ¶¶ 1.11.9 or 1.11.10 in the August 6, 2003 claim that was presented to the contracting officer. A4840-42.

III. Rigid-Form Paving Claim

The trial court held that "[t]he fact that the Corps designed the project for a slip-form paver while simultaneously approving the use of a fixed-form paver constituted a defective design specification," and awarded damages based upon that claim. A41, A46. However, in its August 6, 2003 request for equitable adjustment, ACE claimed that:

> The second defect in the Specifications was the requirement included in Section 02753 Part 3.5.5.1.b to use three-meter long steel forms for the concrete paving. As described in Cambro's Request, the grade contours resulting from the specified grade elevation points had grade breaks at random locations. These grade breaks made it impossible for three-meter long rigid forms to conform to the surface of the drainage layer.

A4841 (emphasis added).

A statement by Cambro, incorporated by ACE into its request, mirrored ACE's claim. Cambro stated that the specifications were defective in that:

> they required that the Contractor use rigid 3-meter steel forms to form the concrete, but the contours resulting from the specified grade elevation points could not be constructed within the specified tolerances from rigid 3-meter forms. Cambro submits that the tolerances specified in the Contract cannot, as a matter of mathematical certainty, be maintained with rigid 3-meter steel forms.

A4868. Under the heading "First Defect: Three-meter steel forms and an incompatible curved surface," Cambro further stated that:

> The contract documents described the surface of the hot ammo load pad as a "1% grade". In addition, a grid of topographical elevation points (represented

numerically, but not graphically) was contained in the Contract. Cambro reasonably believed that the data points were consistent with the "1% grade" description and with the rigid 3-meter steel forms specified in the Contract (that is, that the surface could be constructed from a series of rigid 3-meter steel forms placed on a 1% grade).

A4869. Specification § 02753 ¶ 3.5.5.1.b, however, provides that (except on some curves) "[s]teel forms shall be furnished in sections not less than 3 m in length." A3180 (emphasis added).

Specification § 02753 ¶ 2.10.1 provides that "[t]he maximum allowable slump of the concrete at the point of placement shall be 50 mm for pavement constructed with fixed forms." A3170. Fifty millimeters is approximately two-inches. A11183 at 15-16. At trial, the following colloquy occurred between Mr. Fulkerson and counsel for ACE:

Q: Was the slump of the concrete specified here, minimum slump?

A: Yes, it was.

Q: And what was the specification?

A: As I recall, it was two-inch maximum slump.

. . .

Q: And how would you characterize two-inch slump concrete?

A: It's concrete that's used for slipform machines. It's very -- it looks like a pile of rocks when it's manufactured and when it's placed. It's extremely difficult to work and finish, and to finish it to a smooth surface requires a tremendous amount of work.

Q: Now, is that the same with respect to when it's using a slipform paver or a form-riding paver?

A: It is the same, although because of the size and complexity of the slipform machine, the machine itself will do a better job of finishing this type of concrete. Form-riding paving machines are not made to finish concrete with this kind of slump, so - -

Q: That was my next question. From your view and experience, is a maximum two-inch slump concrete compatible with the use of a form-riding paver for this type of pavement work?

A: No.

Q: Why?

A: Because the machine is not designed and built to finish concrete with that low of a slump - -

. . .

Q: What happens when the machine - -

A: It comes out the back, and it's not smooth, and there's a tremendous amount of hand-finishing that needs to go on to smooth it out, and it's just very hard work and hard to do, and especially when you have the smoothness specifications that this particular contract had. It's extremely difficult to do. When you have forms on the side of the paving lanes to hold the concrete in place, there's no need to have concrete with that low of a slump. When it comes out the back of a slipform machine, it has to stand up on its own, and it can't slump or the lane is going to bend down at the edges. Here you have forms there to hold it in place. It isn't going anywhere. It can't go anywhere. It's not made for this application.

A10391-93.

The following colloquy occurred upon cross-examination of Mr. Fulkerson:

> Q: And so a two inch slump is incompatible with rigid form paving. Right?
>
> A: I believe so. It makes it much more difficult to do, and it might not be incompatible if you don't have the smoothness requirements that this contract had, but with this contract it was incompatible.
>
> Q: You were definitive yesterday that rigid form paving and two inch slump were incompatible, weren't you?
>
> A: Yes.
>
> Q: And any experienced concrete contractor would know that. Right?
>
> A: They would know how difficult it would be to finish the concrete, yes.
>
> . . .
>
> Q: So two inch slump is not incompatible with slipform paving. Right.
>
> A: No. It [sic] required for slipform paving.

A10749-50. Although Specification § 02753 ¶¶ 3.5.5 and 3.5.6 allowed both fixed-form paving and slipform paving, respectively, (A3179, A3181), ACE based its bid upon a potential subcontractor's quote that assumed the use of fixed-form paving (A10610 at 9-11, A10726 at 16-22, A10728 at 6-10), and ACE, through Cambro, chose to use the fixed-form paving method. A7302 ¶ 16.

IV. Differing Site Condition Earthwork Claim

ACE's pre-award bidding schedule does not indicate a specific amount for earthwork; rather, it indicates a lump sum for that and several other non-concrete activities. A2588. Nonetheless, on August 15, 2001, Mr. Fulkerson wrote that ACE's pre-bid takeoffs indicated that there would be approximately 20,000 cubic yards of excess dirt at the site. A4250-51. At trial, Mr. Fulkerson testified that, in bidding for the contract, he determined that the site would produce 40,000 to 50,000 cubic meters or cubic yards of excess fill. A10230 at 16-23. Later he testified that ACE's bid estimate sheets might show that ACE estimated that it would cost $20,000 to remove 5,000 cubic yards of excess fill from the site. A10527 at 24-27, A10528 at 1-5. In its November 4, 2002 claim that the contracting officer denied, ACE claimed that "an additional 125,000 cubic yards of fill was required to complete the project." A4301. The trial court found that ACE encountered a Type I differing site condition in that "[r]ather than being a balanced project as indicated by the cut-and-fill schematics, the site required approximately 129,000 additional cubic yards of soil." A22.

According to one of ACE's construction managers (A10056 at 11-13, A10057 at 6-15), removing excess fill from the site would have involved the same operation as bringing fill onto the site. A10167 at 6-10. The Court accepted ACE's calculation that

it incurred $58,954 for the cost of hauling dirt onto the site from a nearby work site. A32. Mr. Fulkerson testified that approximately 45,000 cubic yards was imported from that site. A10348 at 15-18. ACE did not pay any money to have excess fill removed from the site. A10528 at 21-23.

SUMMARY OF THE ARGUMENT

The Court should reverse the judgment of the Court of Federal Claims upon three of the four claims upon which the trial court awarded damages. Two of ACE's claims: a claim that a specification allowing "rigid-form" paving was defective, and a claim that the Government had changed the contract by ordering ACE to test concrete smoothness through optional "profilograph testing," had not been presented to the contracting officer. The trial court, therefore, did not possess jurisdiction to entertain those claims.

Even if the trial court had possessed jurisdiction to entertain those claims, the trial court erred in finding the Government liable to ACE upon those claims. The contract required profilograph testing, and any conflict with other contract provisions that may be interpreted as making profilograph testing optional was an obvious ambiguity that must be construed against ACE. In addition, to the extent that the trial court entertained the claim presented to the contracting officer that profilograph testing was unsuited to the project,

ACE cannot recover because it was not misled by the profilograph specification during the bidding process - ACE's president testified that ACE never planned to use the profilograph test; an element of the defective specifications test that the trial court failed to address.

With respect to the rigid-form claim, ACE also cannot recover because it had reason to know, prior to bidding, that a rigid-form paving system might not work well. Because ACE nonetheless chose rigid-form paving over the other, slipform paving system that the contract also allowed, ACE assumed the risk that it would encounter difficulties with rigid-form paving. Here, too, the trial court failed to address the "reliance" element of the defective specifications test.

Finally, with respect to its differing site condition earthwork claim, ACE is only entitled to the difference in the cost of the earthwork that, during the bidding process, it expected to have to perform and the earthwork that it actually had to perform. Although ACE claimed that it had to import approximately 125,000 cubic yards of fill onto the site, the testimony of ACE's president establishes that when ACE bid for the contract, it expected that it would have to remove up to 50,000 cubic yards of excess fill from the site at a cost of approximately $200,000. The trial court erred in not subtracting

from ACE's award any amount for ACE not having to remove that excess fill from the site.

ARGUMENT

I. The Court Erred In Awarding Damages Based Upon ACE's Profilograph Testing Constructive Change Claim

A. The Trial Court Did Not Possess Jurisdiction To Entertain ACE's Claim That The Government Changed The Contract By Requiring Profilograph Testing Because That Claim Was Never Presented To The Contracting Officer

The trial court held that the "imposition [by the Government] of a requirement for profilograph testing constitute[d] a compensable constructive change" to the contract, and awarded damages based upon that claim. A45-46. The trial court did not possess jurisdiction to entertain that claim because that claim was never presented to the contracting officer. The Court reviews without deference a determination of the Court of Federal Claims upon its jurisdiction. Taylor v. United States, 303 F.3d 1357, 1359 (Fed. Cir. 2002).

This is a CDA case. An action brought before the Court of Federal Claims pursuant to the CDA must be based upon the same claim previously presented to and denied by the contracting officer. Scott Timber Co. v. United States, 333 F.3d 1358, 1365 (Fed. Cir. 2003). A contractor may not present new claims to the trial court that were not presented to the contracting officer. See Santa Fe Eng'rs, Inc. v. United States, 818 F.2d 856, 858 (Fed. Cir. 1987). In order for the Court of Federal Claims to

possess jurisdiction to entertain a contractor's claim, the contractor must have submitted to the contracting officer a clear and unequivocal statement that gives adequate notice of the basis of that claim. See Scott Timber, 333 F.3d at 1365.

A contractor may advance different legal theories before the court than it did before the contracting officer, but a claim before the Court of Federal Claims must arise from the same operative facts as those underlying the claim presented to the contracting officer; in other words, the claim must be essentially the same as that presented to the contracting officer, in order for the claim not to subvert the statutory purpose of requiring contractors first to submit their claims to the contracting officer to allow the contracting officer to receive and pass judgment upon the contractor's entire claim. See id. at 1366.

At the root of the "same claim" principle is the concept of adequate notice, with the doctrine applying only where a previously filed claim revealed all of the operative facts. See Lockheed Martin Corp. v. United States, 70 Fed. Cl. 745, 755 (2006). The same set of operative facts has been found where the contractor submits additional evidence pertaining to damages to support the same factual claim, or where the claim merely "augments the legal theories" underlying the certified claim. Id. In contrast, the same set of operative facts has not been

found where the contractor files a different type of claim from that presented to the contracting officer, or where the facts require different kinds of proof. Id.

Here, ACE's August 6, 2003 claim that was presented to the contracting officer claimed that "[t]he third defect [in the contract specifications] was the requirement included in Specification Section 02753 Part 1.3.7 that profilograph testing to be used as the basis of acceptance of concrete smoothness for runs over sixty-meters in length." A4841 (emphasis added). ACE claimed that "the profilograph machine is designed to test roadway sections much longer than the sixty-meter minimum employed on this project. The machine design was not applicable to the subject project due to the short test runs . . . ." Id. ACE incorporated into its claim a statement by its subcontractor, Cambro, in which Cambro stated, referring to ¶ 1.3.7, "[t]he Specifications specifically required the use of the Profilograph method, even though it was not suitable or appropriate." A4869 (emphasis added).

ACE repeated that claim in its pre-trial brief. Under the heading "The Project specifications contained inappropriate testing requirements," ACE stated "[a]s supplied to ACE by the Corps, the Project specifications contained a requirement that the concrete ACE poured on the Project be tested by a profilograph in order to be accepted by the Corps. . . .

However, profilograph testing is not appropriate this [sic] Project." A7103 (emphasis added).

In its opening statement at trial, however, ACE's counsel stated: "Our reading and understanding of the specs is that the profilograph was not required by the specifications for these pavement surfaces." A10026 at 2-4. On the second day of trial, when asked to describe "the Ace profilograph claim," ACE's president, Mr. Fulkerson (A10198 at 21-23) testified that the profilograph test "was not specified in the contract documents. . . . We opted to use the straight edge, and we were told we had to use the profilograph . . . ." A10407 at 25, A10408 at 4-7 (emphasis added). Mr. Fulkerson cited Specification § 02753 ¶¶ 1.3.7, 1.11.9, and 1.11.10 in support of the claim that "the profilograph was not a required testing means." A10414-15, A10416 at 1-4.

ACE never presented to the contracting officer the constructive change claim that it presented to the trial court. Although the trial court held that the "distinction between inapplicability and the lack of a requirement" was "too attenuated to be significant" (A15), that reasoning is wrong. There is an enormous difference between a claim that a requirement imposed by a contract specification is defective and a claim that the contract does not contain the requirement in the first place. The former claim presents an engineering issue

related to whether, if followed, a contractor will achieve a satisfactory result; that is, whether the specification will "work well." The latter claim presents an issue only of contract interpretation that requires no consideration of engineering issues.

Moreover, ACE's claim to the trial court was based in part upon the interpretation of Specification § 02753 ¶¶ 1.11.9 and 1.11.10 as well as the allegation that the Government had "changed" the contract by ordering it to perform a test that was optional. A10408 at 6-7, A10415-16. Those "operative facts" of ACE's constructive change claim to the trial court were not part of ACE's August 6, 2003 claim; indeed, ACE never even mentioned Specification § 02753 ¶¶ 1.11.9 or 1.11.10 in the claim that was presented to the contracting officer. A4840-42. By entertaining a constructive change claim that was not presented to the contracting officer, the trial court subverted the statutory purpose of requiring that a contractor first submit its claims to the contracting officer to allow the contracting officer to receive and pass judgment upon the contractor's entire claim. Because ACE never presented to the contracting officer a claim that the Government changed the contract by requiring optional profilograph testing, the trial court did not possess jurisdiction to entertain that claim, and erred in awarding ACE damages upon that claim.

B. Even If The Trial Court Possessed Jurisdiction To Entertain ACE's Profilograph Testing Claim, The Trial Court Erred In Awarding Damages Upon That Claim Because The Contract Required Profilograph Testing

Even if the trial court possessed jurisdiction to entertain ACE's profilograph testing claim, the trial court erred in awarding damages upon that claim because the contract required profilograph testing. The trial court held that "profilograph testing was not required by the Contract." A45.

The interpretation of a contract or a solicitation is a question of law that the Court reviews de novo. NVT Techns., Inc. v. United States, 370 F.3d 1153, 1159 (Fed. Cir. 2004). Various contract provisions must be read as part of an organic whole, according reasonable meaning to all of the contract terms. Lockheed Martin IR Imaging Sys., Inc. v. West, 108 F.3d 319, 322 (Fed. Cir. 1997). Such interpretation must assure that no contract provision is made inconsistent, superfluous, or redundant. Id. The contract should be construed in its entirety, so as to harmonize and give meaning to all its provisions. Thanet Corp. v. United States, 591 F.2d 629, 633 (Ct. Cl. 1979). In addition, a contract ambiguity will only be construed against the Government if it was not obvious on the face of the solicitation and reliance is shown. NVT Techns., 370 F.3d at 1162.

Contrary to the trial court's conclusion, the contract required profilograph testing. Specification § 02753 ¶ 1.3.7

provided that "[t]he profilograph method shall be used for all longitudinal and transverse testing, except where the runs would be less than 60 m in length and at the ends where the straightedge shall be used." A3141-42 (emphasis added). Any interpretation of the contract that holds that profilograph testing was an option reads § 02753 ¶ 1.3.7 out of the contract.

In holding that profilograph testing was optional, the trial court relied upon Specification § 02753 ¶¶ 1.11.9 and 1.11.10. A43-44. Paragraph 1.11.9 provides that "[t]he Contractor shall furnish and maintain at the job site . . . one 4 m straightedge for each paving train for testing the hardened portland cement concrete surfaces." A3161. Paragraph 1.11.10 provides that "[t]he Contractor may furnish a 7.6 m profilograph for testing the finished pavement surface." Id. (emphasis added). Those provisions, however, can be read in harmony with ¶ 1.3.7 without adopting the conclusion that profilograph testing was optional.

When read together so as to harmonize and give meaning to all three provisions, the contract (1) required that the profilograph method be used for all longitudinal and transverse testing, except where the runs would be less than 60 meters in length and at the ends where a straightedge was to be used, (2) allowed the contractor to use straightedge or profilograph testing in all other cases, (3) required that all straightedge testing be performed with a four-meter straightedge, and

(4) allowed the contractor to use a 7.6 meter profilograph where profilograph testing was required. A3141-42, A3161. However, to the extent that the contract's concrete testing specifications provided both that profilograph testing shall be used and that profilograph testing was optional, that was an obvious ambiguity; indeed, ¶¶ 1.11.9 and 1.11.10, for their part, appear on the very same page of the contract. A3161. Because any ambiguity among the concrete testing provisions is obvious, that ambiguity must be construed against ACE.

Because the contract required profilograph testing, the trial court erred in concluding that requiring profilograph testing was a constructive change to the contract.

C. If The Trial Court Found That Specification § 02753 ¶ 1.3.7 Was Defective, That Finding Was Error Because ACE Was Not Misled by That Specification

If the trial court found that Specification § 02753 ¶ 1.3.7 was defective, that finding was error because ACE was not misled by that specification. The trial court also stated that "profilograph testing was neither applicable nor appropriate for this project." A44. To the extent that statement reflects a conclusion regarding a "defective specifications" profilograph claim, it is reversible error. Legal analysis involving the application of law to the facts is a legal question that is reviewed de novo. Crowley v. United States, 398 F.3d 1329, 1333 (Fed. Cir. 2005). Whenever the Government uses specifications in

a contract, there is an accompanying implied warranty that these specifications are free from errors. Robins Maintenance, Inc. v. United States, 265 F.3d 1254, 1257 (Fed. Cir. 2001). However, the test for recovery based upon inaccurate specifications is whether the contractor was misled by the errors in the specifications. Id. There can be no recovery upon a defective specifications claim if there was no reliance upon the defective specification in preparation of the bid. See Comtrol, Inc. v. United States, 294 F.3d 1357, 1364 (Fed. Cir. 2002).

Indeed, a contractor must prove that it relied upon its interpretation of the contract documents when calculating its bid. Renda Marine, Inc. v. United States, 66 Fed. Cl. 639, 655 (2005). Although we raised the issue of reliance to the trial court (A11529, A11533-34), the trial court failed to address it; indeed, in its analysis of ACE's defective specifications claims (A39), the trial court failed even to mention the reliance element of a defective specifications claim. (Although the trial court relied upon Essex Electro Engineers, Inc. v. Danzig, 224 F.3d 1283 (Fed. Cir. 2000), for its legal analysis, that case, apparently, did not involve an issue of whether a contractor was misled by an allegedly defective specification.)

The trial court's error was not harmless. ACE was not misled by Specification § 02753 ¶ 1.3.7. Mr. Fulkerson, testified that, in bidding for the contract, ACE opted to use the

straightedge testing method and included no cost for profilograph testing in its bid. A10408 at 6-11. That admission establishes that ACE was not misled by the profilograph specification during bid preparation and is fatal to ACE's claim that any specification requiring profilograph testing is defective.

Therefore, in the event that the Court finds that the trial court found that Specification § 02753 ¶ 1.3.7 was defective, the case should be remanded for the trial court to determine whether ACE was misled by that specification. Otherwise, the Court should reverse the trial court's judgment and either order the trial court to dismiss ACE's profilograph testing claim for lack of subject matter jurisdiction, or deny that claim upon its merits without remand to the trial court.

II. The Trial Court Erred In Awarding Damages Based Upon ACE's Claim That, Because It Allowed Rigid-Form Paving, Contract Specification § 02753 ¶ 3.5.5 Was Defective

A. The Trial Court Did Not Possess Jurisdiction To Entertain ACE's Claim That Contract Specification ¶ 3.5.5 Was Defective Because ACE Never Presented That Claim To The Contracting Officer

The trial court held that "[t]he fact that the Corps designed the project for a slip-form paver while simultaneously approving the use of a fixed-form paver constituted a defective design specification," and awarded damages based upon that claim. A41, A46. The trial court did not possess jurisdiction to entertain that claim because ACE never presented that claim to the contracting officer. The Court reviews without deference a

determination of the Court of Federal Claims upon its jurisdiction, Taylor, 303 F.3d at 1359, and a contractor may not present new claims to the trial court that were not presented to the contracting officer. See Santa Fe Eng'rs, 818 F.2d at 858.

The only "fixed-form paving" defective specification claim that was presented to the contracting officer was that "the requirement included in Section 02753 Part 3.5.5.1.b to use three-meter long steel forms for the concrete paving" was defective. A4841 (emphasis added). Incorporating Cambro's statement, ACE claimed that the specifications "required that the Contractor use rigid 3-meter forms to form the concrete," but that "tolerances specified in the contract cannot, as a matter of mathematical certainty, be maintained with rigid 3-meter forms." A4868. Nowhere in ACE's August 6, 2003 submission, however, was the claim presented to the contracting officer that rigid-form paving in general was not suitable to the project, that slip-form paving was the only appropriate paving method for the project, that Specification § 02753 ¶ 3.5.5 was defective, or that the contract design was defective because it allowed fixed-form paving. And, of course, ¶ 3.5.5.1.b did not require the use of three-meter forms, or any forms; it required (if forms were used) the use of forms of at least three meters in length. A3180. Because the claim presented to the contracting officer challenged only a non-existent contract "requirement" to use only three-

meter long forms, the trial court did not possess jurisdiction to entertain a claim that, in allowing fixed-form paving, Specification § 02753 ¶ 3.5.5 and, therefore, the contract, were defective.

B. Even If The Trial Court Possessed Jurisdiction To Entertain A Claim That Contract Specification § 02753 ¶ 3.5.5 Was Defective, ACE Did Not Reasonably Rely Upon That Specification

Even if the trial court possessed jurisdiction to entertain a claim that Specification § 02753 ¶ 3.5.5 was defective, the trial court erred in awarding damages upon that claim because ACE did not reasonably rely upon that specification. Legal analysis involving the application of law to the facts is a legal question that is reviewed de novo. Crowley, 398 F.3d at 329.

A contractor cannot establish a defective specifications claim where it cannot establish that it acted as a reasonably prudent contractor in interpreting the contract documents. Comtrol, 294 F.3d at 1365. An experienced contractor is not misled by a Government-prepared specification where it had reason to know that the specification was defective, because he has no right to make a useless thing and charge the customer for it. See L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285, 1290 (Ct. Cl. 1969). The rationale for that rule is that the contractor can rely upon the Government's representations as to how a desired product should and can be made, unless he ought to know better. See id. In the latter situation, he cannot argue

that he has been misled or that he had any right to make his bid upon the basis of the specifications which he knew (or should have realized) were not correct. Id. Although we presented a "lack of reasonable reliance" argument to the trial court (A11717-18), the trial court (A39-41) failed to address that argument.

That error was not harmless. If Specification § 02753 ¶ 3.5.5 was defective because it allowed a fixed-form paving system that was unsuitable to the project, Mr. Fulkerson's testimony reflects that ACE had reason to know of that defect when it bid for the contract. ACE is an experienced paving contractor. A10199 at 1-6. Mr. Fulkerson is ACE's president (A10198 at 21-23) and was primarily responsible for preparing ACE's bid. A10220 at 14-16. Mr. Fulkerson testified that "[f]orm-riding paving machines are not made to finish concrete with" the two-inch maximum slump for concrete specified by the contract. A10391 at 1-6, A10392 at 1-3, 12-14. He testified that, from his view and experience, a maximum two-inch slump concrete was not compatible with the use of a form-riding paver for the type of pavement work required by the contract because "the [form-riding] machine is not designed and built to finish concrete with that low of a slump." A10392 at 15-22.

Mr. Fulkerson explained that using a form-riding paver with two-inch slump concrete requires "a tremendous amount of

hand-finishing that needs to go on to smooth it out, and it's just very hard work and hard to do, and especially when you have the smoothness specifications that this particular contract had." A10393 at 1-5. He explained that a two-inch slump is "not made for [a form-riding] application" (A10393 at 13-15), and that a two-inch slump is incompatible with rigid-form paving. A10749 at 13-15. Mr. Fulkerson agreed that "any experienced concrete contractor would know that." A10749 at 16-19 (emphasis added).

Mr. Fulkerson further explained that, by contrast, two-inch slump concrete is not incompatible with slipform paving and, indeed, that two-inch slump concrete is used with, and is required for, slip-form paving. A10392 at 1-3, A10750 at 1-3. Nevertheless, ACE bid for the contract upon the assumption that it would use rigid-form paving (A10610 at 9-11, A10726 at 16-22, A10728 at 6-10) and chose to use rigid-form paving to perform the contract work. A7302 ¶ 16. Because ACE chose fixed-form paving over slip-form paving despite having reason to know the relative unsuitability of fixed-form paving to slip-form paving, it was not misled into bidding for the contract based upon any assumption of the suitability of fixed-form paving to the project. Because it was not misled by Specification § 02753 ¶ 3.5.5, ACE cannot recover upon a claim that ¶ 3.5.5 was defective, and the trial court's award upon this claim was reversible error. The Court should reverse the trial court's

judgment and order that the Court either dismiss ACE's fixed-form versus slip-form paving claim for lack of subject matter jurisdiction or address whether ACE was misled by Specification § 02753 ¶ 3.5.5.

III. The Trial Court Erred In Awarding Damages Based Upon ACE's Differing Site Condition Earthwork Claim Without Taking Into Account The Earthwork That ACE Expected But Did Not Have To Perform Because Of The Differing Site Condition

The trial court erred in awarding damages based upon ACE's differing site condition earthwork claim without taking into account the earthwork that ACE expected but did not have to perform because of the differing site condition. The Court reviews a trial court's damages decision for an erroneous conclusion of law, clearly erroneous factual findings, or a clear error of judgment amounting to an abuse of discretion. See Micro Chem. v. Lextron, Inc., 318 F.3d 1119, 1122 (Fed. Cir. 2003).

The trial court held that ACE encountered a Type I differing site condition in that "[r]ather than being a balanced project as indicated by the cut-and-fill schematics, the site required approximately 129,000 additional cubic yards of soil," and awarded damages based upon that claim. A18, A22, A38. To establish entitlement to an equitable adjustment due to a Type I differing site condition, a contractor must prove that it was damaged as a result of the material variation between expected and encountered conditions. Comtrol, 294 F.3d at 1362. The measure of an equitable adjustment, however, is the difference

between what it cost to do the work and what it would have cost the contractor if the unforeseen conditions had not been encountered. SAB Constr., Inc. v. United States, 66 Fed. Cl. 77, 85 (2005); Shank-Artukovich v. United States, 13 Cl. Ct. 346, 361 (1987) (quoting Tobin Quarries, Inc. v. United States, 84 F. Supp. 1021 (Ct. Cl. 1949)), aff'd, 848 F.2d 1245 (Fed. Cir. May 16, 1988) (Table).

ACE's pre-award bidding schedule does not indicate a specific amount for earthwork. A2588. Nonetheless, in bidding for the contract, ACE expected to have to perform at least some of the same type of earthwork that was required to import fill onto the site. On August 15, 2001, Mr. Fulkerson wrote to the Government that ACE's pre-bid takeoffs indicated that there would be approximately 20,000 cubic yards of excess dirt at the site. A4250-51. At trial, Mr. Fulkerson testified that he determined prior to bidding that the site would produce 40,000 to 50,000 cubic meters or cubic yards of excess fill. A10230 at 16-23. Later he testified that ACE's bid estimate sheets might show that ACE estimated that it would cost $20,000 to remove 5,000 cubic yards of excess fill from the site. A10527 at 24-27, A10528 at 1-5. ACE, however, did not have to pay any money to have excess fill removed from the site. A10528 at 21-23.

According to one of ACE's construction managers (A10056 at 11-13, A10057 at 6-15), removing excess fill from the site

would have involved the same operation as bringing it onto the site. A10167 at 6-10. For example, the Court accepted ACE's calculation that it incurred $58,954 for the cost of hauling dirt onto the site from a nearby work site (A32), and Mr. Fulkerson testified that approximately 45,000 cubic yards of fill was imported from that site. A10348 at 15-18. That 45,000 cubic yards is roughly the same amount of excess fill that ACE, when it bid for the contract, expected to have to remove from the site. A10230 at 19-23.

Although we raised to the trial court the evidence of ACE's pre-bid expectations (A11510-11, A11525-26), and argued that any estimate of the cost that ACE would have incurred removing expected excess fill from the site should have been subtracted from any damage award resulting from the need to import fill onto the site (A11714-15), the Court did not address that argument. In view of the evidence that ACE anticipated having to remove up to 50,000 cubic yards of excess fill from the site at a cost of up to $200,000, it was an abuse of discretion and clearly erroneous for the trial court not to take that savings into account in determining an award upon ACE's differing site condition earthwork claim. The Court, therefore, should reverse the trial court's judgment and remand for further proceedings in which the trial court takes into account that, because of the differing site condition, ACE did not have to perform earthwork

that, during the bidding process, it expected it would have to perform.

CONCLUSION

For the foregoing reasons, we request that the Court reverse the judgment of the Court of Federal Claims, in part, and remand the case for further proceedings.

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