



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND  
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON AUGUST 30, 2024**

GRANTED: August 22, 2024

CBCA 7625

FRAMACO INTERNATIONAL INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin and Erik M. Coon of Bradley Arant Boult Cummings LLP, Washington, DC; Sam Z. Gdanski and Abraham S. Gdanski of Gdanski Law PC, Teaneck, NJ, counsel for Appellant.

Thomas D. Dinackus, Matthew S. Tilghman, and Alexandra N. Wilson, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **RUSSELL**, and **O'ROURKE**.

**RUSSELL**, Board Judge.

Appellant, Framaco International Inc. (Framaco), has filed 131 cases with the Board (certain of which are consolidated) based on its contract with respondent, Department of State (State or agency), Bureau of Overseas Building Operations (OBO), to construct an embassy compound in Port Moresby, Papua New Guinea.

This decision is being issued in accordance with the Board's order on further proceedings of October 19, 2023 (Order), which largely adopted the parties' proposal to resolve approximately 100 of appellant's non-consolidated appeals brought pursuant to Board Rule 53 (48 CFR 6101.53 (2023)), along with certain claims in four of its consolidated appeals that were not based on Government-caused delay. *See* Rule 53 (governing accelerated procedures, which are available at an appellant's election and are limited to appeals in which there is a monetary amount in dispute of \$100,000 or less); *see also* Rule 1(a) ("The Board may alter [its] procedures on its own initiative or on request of a party to promote the just, informal, expeditious, and inexpensive resolution of a case."). The Order states that "[t]he presiding judge with the two members of the panel . . . will decide the following appeals for which the parties will submit briefing: CBCA 7508, 7512, 7513, 7549, 7561, 7572, 7573, 7625, 7695, 7712, 7847, and 7859 ('Selected Appeals')." The Order additionally states, "Decisions rendered by the panel will be in summary form either in writing or orally, if a hearing is held; will be final and conclusive; will not be set aside, except for fraud; and will not be precedential."

As agreed to by the parties, quantum in the non-consolidated appeals and certain claims in four of Framaco's consolidated appeals to which the Order applies will be decided based on a formula derived from any damage amounts awarded to Framaco in the Selected Appeals. In a subsequent joint response filed with the Board on March 19, 2024, the parties confirmed that the Order applies to the appeals described above.

In this appeal, Framaco challenges the contracting officer's deductive change to the contract that removed the requirement for Framaco to submit an updated basis of design and issued State a credit of \$35,918.23. While the Board agrees with State's interpretation of key contract provisions, we nevertheless find that State's deduction was improper. The applicable specification on which State relied for the deduction required Framaco to produce many final record documents during project closeout. State does not allege that these tasks were not completed. Further, we cannot be sure how Framaco allocated its cost for this work given that the contract was firm-fixed-price and the amount used by State for its deduction for the work was based on a payment estimate provided by Framaco that, per the contract, was not conclusive proof of the value of the work. Therefore, we grant the appeal.

## Background

### I. The Contract

In September 2015, State awarded Framaco a firm-fixed-price contract, initially valued at approximately \$97 million, to construct the New Embassy Compound (NEC) in

Port Moresby, Papua New Guinea.<sup>1</sup> Appeal File, Exhibit 1 at DOS-PTMO-00982321.<sup>2</sup> The project was originally designed in 2010 as a “Standard Secure mini-Compound” (SSmC) with a scope that included a lock-and-leave new office building, a perimeter security wall and fence, a main compound entry pavilion (MCAP), a service entry/utility building, and a support annex. Exhibit 2 at DOS-PTMO-00982414. Construction of the SSmC facility began in 2012. *Id.* In 2013, however, after forty percent of the project was completed, a future marine detachment was planned for Port Moresby and the embassy staffing requirement was increased. *Id.* State therefore descoped the work under the 2012 contract and closed out that contract. The project was redesigned under an expanded NEC, incorporating the completed portions of the SSmC project as well as surplus equipment and materials, as appropriate. *Id.* The redesigned project included the perimeter security wall and fence, the MCAP, a new service compound entry pavilion, a new four-story office building, a marine service guard residence, a service entry/utility building, an enlarged support annex, and a new recreation facility. *Id.*

## II. Applicable Contract Provisions

This dispute arose during the closing stages of the construction contract. *See* Exhibit 24. The contract incorporated Section 019115A, “OBO Generic Commission Plan,” which was required “on all OBO major construction projects.” Exhibit 6 at DOS-PTMO-00007772. The preface to the section explained:

[T]he term ‘Contractor’ means the Architect/Engineer of Record (A/E) for the project during the design phase and the Construction Contractor during the construction phase. The second aspect is that the Basis of Design created by the A/E must be updated by a responsible party to include all changes during the construction phase. *As a general rule, the A/E assigned for Title II consulting services shall update the Basis of Design. Otherwise the Commissioning Agent or OBO will update the Basis of Design. Updating of the Basis of Design will be coordinated with the construction contractor.*

*Id.* (emphasis added). The section defines “[c]ontractor” as “[d]esign and [c]onstruction [c]ontractor.” *Id.* at DOS-PTMO-00007773.

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<sup>1</sup> The contract was awarded on September 30, 2015. Appeal File, Exhibit 1 at DOS-PTMO-00982303-04.

<sup>2</sup> All exhibits are found in the appeal file, unless otherwise noted.

Under the heading “Commissioning Activities Description,” Section 019115A included the requirement that the contractor “prepare a project Basis of Design,” a document that “records the major thought processes and assumptions behind design decisions made to meet the Owner’s Project Requirements.” Exhibit 6 at DOS-PTMO-00007795. Section 019115A also included flow charts and matrices showing different tasks and those responsible for the tasks. *Id.* at DOS-PTMO-00007776-93. The charts/matrices identified “the contractor” as responsible for *developing* a “Basis of Design and Systems Manual Outline” during the design phase. *Id.* at DOS-PTMO-00007785. The chart/matrices also identified “the contractor” as responsible for *updating* the “Basis of Design” and *completing* the “Systems Manual” during the construction phase. *Id.* at DOS-PTMO-00007786; *see also id.* at DOS-PTMO-00007772, -00007779, -00007795-96. At both the developing and updating stages, the OBO is tasked with *reviewing and commenting*, while the Project Director/Contracting Officer’s Representative is required to *approve* the basis of design. *Id.* at DOS-PTMO-00007779, -00007785-86.

The contract’s “Closeout Procedures” contained in Section 017705 also required the contractor to submit “Final Record Documents,” to include an “Updated Basis of Design,” a full set of the latest as-built drawings, contract specifications, a full set of accepted product data submittals, and a full set of shop drawings. Exhibit 8 at DOS-PTMO-02230066, -02230073-74.

Section 017825, “Operation and Maintenance Data,” which included the contract’s administrative and procedural requirements for the preparation and submission of operation and maintenance data, states:

- D. Systems Manual: Required for LEED [Leadership in Energy and Environmental Design] Enhanced Commissioning Task 4

*Develop* a systems manual that provides future operating staff the information needed to understand and optimally operate all commissioned systems. The Systems Manual shall be provided in addition to the [Operation and Maintenance] Manuals. The Systems Manual shall generally focus on operating, rather than maintaining, the equipment. It shall also focus on the interactions between equipment and systems. Submit an electronic System Manual prepared in accordance with ASHRAE<sup>3</sup> Guideline 0, containing the following documentation:

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<sup>3</sup> ASHRAE stands for the “American Society of Heating, Refrigerating and Air Conditioning Engineers.” Appellant’s Opening Brief at 4 n.3.

1. Final Basis of Design: The Government will provide document to Contractor.

Exhibit 5 at DOS-PTMO-00992760 (emphasis added).

### III. The Parties' Dispute

In or around October 2017, Framaco submitted its Baseline Project Execution Schedule, budgeting \$35,918.23 and indicating forty-five (45) days of work for the “updated basis of design” task. Exhibit 35 at DOS-PTMO-01551208. Subsequently, in August 2019 and June 2020, Framaco included basis of design work on its monthly payment applications, under the heading “Closeout Procedures, Section 017705.” Exhibits 9 at DOS-PTMO-02797132, 12 at DOS-PTMO-02386987. In September 2020, it submitted a document identifying “Final Record Documents Markes [sic] As Built – Updated Basis of Design” as 80% complete. Exhibit 104. But in response to State’s denial of Framaco’s request for a certificate of substantial completion, Framaco denied that the contract assigned it responsibility to update the basis of design. Exhibit 16 at DOSPTMO-03102510 to -11. In a July 20, 2022, letter, Framaco wrote:

The updated basis of design is stated to be provided by the Government in various contract sections (including but not limited to) 017825 . . . and throughout 019115A where it stated: “As a general rule, the A/E assigned for Title II consulting services shall update the Basis of Design”. Therefore, Framaco has no required action for the deliverable. Please note that delay related to this item has implications on the other deliverables such as the Systems Manual, LEED submission.

*Id.* at DOS-PTMO-03102511.

On July 23, 2024, State responded:

Framaco disagrees with OBO’s statement that it is Framaco’s responsibility to update the design team’s final basis of design to reflect as-built conditions per specification 017705-3.04-C-1. While we still maintain this specification requirement applies to Framaco’s scope of work, we concur with Framaco’s explanation that specification 019115A states otherwise. The A/E uploaded the basis of design to the ProjNet Govt/Contractor exchange folder in 2017 for

access by Framaco. Please include this basis of design as part of the systems manual submission per specification 017825-1.03-D.

Exhibit 17 at DOS-PTMO-03101828.

State subsequently issued a modification eliminating the updated basis of design work from the contract tasks and issued itself a credit of \$35,918.23. Exhibit 20. This appeal followed.

In its briefing in support of its appeal, Framaco argues that the “basis of design” work was the responsibility of the Government, and, thus, “[t]here was no work to deduct from Framaco and credit the government.” Appellant’s Opening Brief at 1. Framaco additionally argues that the deduction was improper because it completed the work required under specification 019115A; specifically, it completed the systems manual document based on the updated basis of design provided by the Government and developed the final record documents (for specification 017705), which included the updated basis of design. *Id.* at 6-7. As relief, Framaco asks that the entire credit of \$35,918.23 be returned to it.

State relies on specification 017705 to argue that Framaco was contractually required to submit an updated basis of design as part of the final record documents. Respondent’s Initial Brief at 1-2. State also points to Framaco’s Baseline Project Execution Schedule in which Framaco listed the updated basis of design among the other records required by specification 017705 as deliverables. *See* Exhibit 35 at DOS-PTMO-01551304. On the schedule, the updated basis of design work was identified under the heading, “Closeout Procedures, Section 017705,” with the Activity ID of “DEM1420” and the Activity Name of “Final Record Documents Markes [sic] As-Built – Updated Basis of Design.” *Id.* The “updated basis of design” activity included a start date of August 7, 2019, an end date of September 20, 2019, and a budgeted cost of \$35,918.23. *Id.* This is the work for which Framaco sought payment. *See, e.g.*, Exhibit 104.

State asserts that Framaco’s actions “both identifying an updated [basis of design] as an activity in Framaco’s schedule and then representing to the Government that Activity DEM1420 was in progress, completely undercut [Framaco’s] . . . argument that Specification 017865 indicated an updated [basis of design] was to be provided solely by the Government and Framaco had no responsibility.” Respondent’s Initial Brief at 6. State adds that when the contracting officer “determined it was in the Government’s best interest to remove the work from the contract, it was entitled to a deductive change credit as outlined in the Changes Clause, particularly since the Government had already compensated Framaco for work that was never completed.” *Id.* at 6-7 (footnote omitted).

## Discussion

### I. Contract Interpretation

Determining which obligations this contract imposes on Framaco “begins with the plain language of the written agreement.” *Hercules Inc. v. United States*, 292 F.3d 1378, 1380 (Fed. Cir. 2002). We read the contract as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract’s plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). “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.” *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). As explained in *Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999):

When a contract is susceptible to more than one reasonable interpretation, it contains an ambiguity. *See Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992). To show an ambiguity it is not enough that the parties differ in their respective interpretations of a contract term. *See Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1578 (Fed. Cir. 1993). Rather, both interpretations must fall within a “zone of reasonableness.” *See WPC [Enterprises], Inc. v. United States*, 163 Ct. Cl. 1, 323 F.2d 874, 876 (1963). If [a tribunal] interprets the contract and detects an ambiguity, it next determines whether that ambiguity is patent. *See Newsom v. United States*, 230 Ct. Cl. 301, 676 F.2d 647, 649-50 (1982). The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem* which construes an ambiguity against the drafter. . . . *See id.*; *Sturm v. United States*, 190 Ct. Cl. 691, 421 F.2d 723 (1970). An ambiguity is patent if “so glaring as to raise a duty to inquire[.]” *Newsom*, 676 F.2d at 650. If an ambiguity is not patent but latent, this court enforces the general rule. *See Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988).

### II. The Parties’ Arguments

Both parties point to contract provisions to argue that their readings are textually supported. Framaco points to the “general rule” contained in the preface to Section 019115A, Exhibit 6 at DOS-PTMO-00007772, which states, “As a general rule, the A/E assigned for Title II consulting services shall update the Basis of Design. Otherwise the Commissioning Agent or OBO will update the Basis of Design.” Appellant’s Opening Brief

at 3. It also points to the requirement contained in Section 017825, Exhibit 5 at DOS-PTMO-00992760, “Operation and Maintenance Data,” that the Government provide the “Final Basis of Design,” to argue that it was not required by the contract to update the basis of design. Appellant’s Opening Brief at 3.

State’s argument that Framaco was required to update the basis of design has at least as clear a textual basis: Section 017705 required Framaco to provide the updated basis of design as part of its closeout documents. Respondent’s Opening Brief at 1. Additionally, State points to the requirement in Section 019115A that the construction contractor, Framaco, was required to update the basis of design and complete the systems manual. *Id.* at 3.

Not surprisingly, the parties’ interpretations clash as to whether the “final basis of design,” the term used in Section 017825, is the same as the “updated basis of design,” the term used in Section 019115A. Framaco asserts that they are the same, which would require it only to repackage the A/E’s basis of design as part of the systems manual. Appellant’s Opening Brief at 3-6. State asserts that the final basis of design refers to the design team’s final basis of design, which incorporates changes made during the solicitation process but not during the construction process. In this reading, Framaco would be responsible for updating the final basis of design to include as-built conditions and any post-solicitation changes. Respondent’s Initial Brief at 3, 5.

At best, Framaco’s position stands on the edge of the zone of reasonableness. Critically, the general rule contained in the preface to Section 019115A does not eliminate the specific requirements that follow, which plainly require Framaco to *update* the basis of design, not merely to deliver an updated basis of design. *See* Exhibit 6 at DOS-PTMO-007772, -007779, -007785-86, -007795-96. Framaco’s interpretation would unreasonably use the preface to render the specifics of the section meaningless. *See Columbia Construction Co. v. General Services Administration*, CBCA 3258, 15-1 BCA ¶ 35,856, at 175,319. State’s position does not contain similar issues; that is, if the “final” basis of design that State is required to provide is read to be the final product created by the design contractor, that reading still leaves room to require the construction contractor, Framaco, to provide any necessary updates that arise because of changes post-award. *See Metric Constructors, Inc.*, 169 F.3d at 753 (“Courts prefer . . . an interpretation of a contract that gives effect to all its terms and leaves no provision meaningless.”).

Even if the Board assumes that Framaco’s position is reasonable, extrinsic evidence would appear to demonstrate that Framaco relied on State’s offered interpretation and not its own. *See A-Son’s Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, 15-1 BCA ¶ 36,089, at 176,208 (“If a contract provision appears ambiguous on its face, extrinsic evidence may assist in discerning the parties’ intent . . .”). Framaco’s



Baseline Project Execution Schedule contains each of the requirements contained in the closeout procedures, including an updated basis of design. Exhibit 35 at DOS-PTMO-01551208. The schedule budgeted this task at a total cost of \$35,918.23, and Framaco estimated the task would take roughly a month and a half; other tasks were listed for substantially shorter time periods and billed as low as \$0. *Id.* And, well before State uncovered that Framaco had not actually begun to update the basis of design, Framaco repeatedly included the basis of design update work in its progress payment applications: first in August 2019, again in June 2020, and finally in September 2020, when it asserted that work on updating the basis of design was 80% complete. Exhibits 9 at DOS-PTMO02797132, 12 at DOS-PTMO-02386987, 104. Together, Framaco's actions prior to the dispute over the meaning of the contract are "especially strong evidence" that Framaco adhered to State's interpretation. *See Future Forest, LLC v. Department of Agriculture*, CBCA 5764, 19-1 BCA ¶ 37,238, at 181,263 (2018).

In its opening brief, Framaco points to this statement in State's July 23, 2022, denial of substantial completion to suggest that the agency acknowledged responsibility for updating the basis of design: "While we still maintain [specification 017705-3.04-C-1] applies to Framaco's scope of work, we concur with Framaco's explanation that specification 019115A states otherwise." Appellant's Opening Brief at 3. Framaco, however, distorts both the contents and context of the denial letter. The statement that Framaco points to does not show that State concedes that Section 017705 controls but that State acknowledges a potential conflict between the provisions. *See* Exhibit 17 at DOS-PTMO-03101828. In addition, because State's direction in that letter to submit the design contractor's basis of design without updates follows Framaco's stated refusal to update the basis of design, it is not evidence of the parties' actions prior to the dispute. *See Future Forest*, 19-1 BCA at 181,263.

Further, any ambiguity in the contract provisions is clearly patent. If an ambiguity is patent and the contractor fails to inquire, the ambiguity "will be resolved against the contractor." *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997). Here, the requirement for the construction contractor to update the basis of design is woven throughout multiple sections of the contract, *see* Exhibit 6 at DOS-PTMO-00007772, -00007779, -00007785-86, -00007795-96, and yet, the contract, in sections 019115A and 017825, also seemingly placed responsibility for that task on the Government. Exhibits 5 at DOS-PTMO-00992760, 6 at DOS-PTMO-00007772. The conflict is obvious and reasonably should have been noticed when the contract was awarded. Because Framaco did not inquire about the contradictory contract sections, it now must bear the risk of its misinterpretation.

Finally, Framaco does not argue that any ambiguity would be latent. Appellant's Opening Brief at 2-3. Instead, Framaco cites to *United Pacific Insurance Co. v. United*

*States*, 497 F.2d 1402, 1407 (Ct. Cl. 1974), to assert that *any* ambiguity must be resolved against the Government. Appellant's Opening Brief at 8. This contention ignores that the contra proferentum rule only applies to latent ambiguities. *See, e.g., NVT Technologies, Inc.*, 370 F.3d at 1162. So, even if Framaco's interpretation does fall "within the zone of reasonableness," Framaco has failed to meet its duty to inquire about a patent ambiguity and has thus waived its right to rely on its interpretation.

### III. State's Deduction from Contract Amount

State deducted \$35,918.23 from the contract amount, relying on Framaco's Baseline Project Execution Schedule in which Framaco listed the updated basis of design among the final record documents required by specification 017705 as a deliverable. *See* Exhibit 35 at DOS-PTMO-01551304. Although Framaco might have given the impression when submitting its pay applications that work was being done on *updating* the basis of design (along the lines of the requirement of specification 019115A), Framaco, in fact, did *produce* the updated basis of design as a final record document, consistent with the requirement of specification 017705. Specifically, it asserts, and State does not dispute, that Framaco used the final basis of design provided by the Government to develop the final record documents as it was required to do under specification 017705. *See* Appellant's Reply Brief at 6-7; *see also* Exhibit 17 (discussing uploading of basis of design to the ProjNet Govt/Contractor exchange folder for access by Framaco). State would have been on firmer ground had it somehow relied on an amount tied to specification 019115A, which required the contractor to *update* the "Basis of Design."

Further, as also pointed out by Framaco in its reply brief, the contract is a firm-fixed-price contract and includes the section "Detailed Estimate for Progress Payments." Appellant's Reply Brief at 5. That section states:

Before the first progress payment under [the] contract becomes due, the Contractor shall prepare a Detailed Estimate for Progress Payments itemizing the Contract Price in the form and in such detail as is required by the Contract Documents . . . . *The values in the Detailed Estimate will be used as a basis for determining progress payments, but will not be conclusive as to the amounts due the Contractor or as to the value of changes in the work.*

Exhibit 1 at DOS-PTMO-00982346-47 (emphasis added). This contract provision is further evidence of why the Board should not rely on the \$35,918.23 listed in Framaco's schedule as a basis for any deduction to which State might be entitled.

Decision

The appeal is **GRANTED**.

*Beverly M. Russell*  
BEVERLY M. RUSSELL  
Board Judge

We concur:

*Erica S. Beardsley*  
ERICA S. BEARDSLEY  
Board Judge

*Kathleen J. O'Rourke*  
KATHLEEN J. O'ROURKE  
Board Judge