

Don't be unreasonable: Equitable adjustment conditioned on government contractor's proof of reasonable interpretation of contract

By Doug Patin, Esq., Aron Beezley, Esq., and Aman Kahlon, Esq., *Bradley Arant Boult Cumming LLP**

JULY 17, 2020

The U.S. Court of Appeals for the Federal Circuit, in *U.S. Army Corps of Engineers v. John C. Grimberg Co., Inc.*, recently reversed an Armed Services Board of Contract Appeals (ASBCA) decision that a federal contractor was entitled to an equitable adjustment on a differing site conditions claim.

The Federal Circuit held that the contractor, in developing its proposal, did not demonstrate that its interpretation of government subsurface data was reasonable — a condition precedent to entitlement for an equitable adjustment.

Even though the ASBCA agreed that the subsurface conditions actually encountered far exceeded what a reasonable interpretation of the subsurface data would have allowed for, as discussed below, the Federal Circuit determined such a finding could not cure the contractor's initial deficient interpretation or justify an equitable adjustment.

THE FACTS

In 2009, the U.S. Army Corps of Engineers issued a solicitation for the design and construction of a biolab facility on an existing biodefense campus in Maryland. The solicitation called for the use of rock socket, drilled foundations.

The bid documents included a geotechnical report that disclosed 46 test borings, only two of which were located within the footprint of the new biolab building. Those two test borings showed clean rock in the subsurface with no intervening incompetent rock.

However, the geotechnical report advised contractors not to assume that rock on the site would be free of voids given information available from the other borings taken elsewhere on the existing campus site.

The contractor, John C. Grimberg Co., Inc., relied on the two test borings within the building footprint to bid the project and assumed that excavation of incompetent rock would not be required.

Once work began, however, the contractor encountered substantial incompetent rock and notified the Corps that, in its view, the additional rock drilling constituted a differing site condition.

At the end of the project, the contractor sought an equitable adjustment for an additional 683 feet of drilling through incompetent rock, which the Corps denied. The contractor appealed this decision to the ASBCA.

The ASBCA concluded the contractor did encounter a differing site condition based on the quantities of rock greatly exceeding the quantity reasonably foreseeable.

Specifically, the ASBCA found that, although it was unreasonable for the contractor to rely on just the two borings within the building footprint to quote the project, the contractor's approach was less unreasonable than the Corps' suggestion that the contractor should have relied on data from borings elsewhere on the campus site.

The Federal Circuit relied on past precedent holding that “to receive an equitable adjustment to the contract price, a contractor must prove that it reasonably relied on its interpretation of the contract.”

Some of these other borings were 300 to 500 feet away from the biolab building footprint.

The ASBCA also surmised that, even accounting for the other boring results, the actual quantity of incompetent rock encountered far exceeded what was reasonably foreseeable.

After evaluating the difference between the amount of drilling the contractor should have reasonably anticipated versus the actual amount encountered, the ASBCA awarded the contractor direct costs and delay damages for excess drilling through an additional 563 feet of incompetent rock.

The Corps appealed to the Federal Circuit, arguing that the contractor's failure to demonstrate a reasonable interpretation of and reliance on the contract documents, including the geotechnical report, foreclosed any entitlement to an equitable adjustment of the contract price.



The Federal Circuit agreed with the Corps and reversed the ASBCA's decision. The Federal Circuit relied on past precedent holding that "to receive an equitable adjustment to the contract price, a contractor must prove that it reasonably relied on its interpretation of the contract."

Because the ASBCA concluded that the contractor's interpretation of the contract documents was unreasonable, the Corps' higher relative degree of unreasonableness could not be used as a basis for granting the contractor an equitable adjustment.

Per the Federal Circuit, "the focus of [its] inquiry must be on the reasonableness of the contractor," which "serves the purpose of incentivizing contractors to carefully and reasonably interpret contract documents."

LESSONS FROM THIS DECISION

The result in *John C. Grimberg* is a harsh one for the contractor, given the acknowledgement that the contractor

encountered conditions that far exceeded what even a reasonable interpretation of the contract documents would have disclosed.

Nonetheless, the Federal Circuit's decision in this case serves as an important reminder to federal contractors that, while their interpretation of contract documents need not be the *only* reasonable one, their interpretation of and reliance on contract documents must at least be a reasonable one to recover under a differing site conditions claim.

This article appeared on the Westlaw Practitioner Insights Commentaries webpage on July 17, 2020.

* © 2020 Doug Patin, Esq., Aron Beezley, Esq., and Aman Kahlon, Esq., Bradley Arant Boult Cumming LLP

ABOUT THE AUTHORS



Doug Patin (L) is a partner at **Bradley Arant Boult Cumming LLP**. He is a member of the Construction and Government Contracts practice groups and serves as managing partner of the firm's Washington office. He can be reached at dpatin@bradley.com. **Aron Beezley** (C) is a partner in the firm's Washington office. He serves as co-head of the Government Contracts Practice Group. He can be reached at abeezley@bradley.com. **Aman Kahlon** (R) is a partner in the firm's Birmingham, Alabama, office. He is a member of the Construction and Government Contracts practice groups. He can be reached at akahlon@bradley.com. This article was originally published July 7, 2020, on BuildSmart by Bradley Arant Boult Cummings LLP. Copyright 2020. Republished with permission.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.