

GABIONS AND DIFFERING SITE CONDITIONS

By Richard D. Lieberman, Consultant and Retired Attorney

What's a "gabion?" For the non-construction types, it's a cage, cylinder or box that is filled with rock or concrete, and is used to build roads. It forms an important part of a case, *Drennon Const. Consulting, Inc. v. Dept of the Interior*, CBCA 2391, Jan. 4, 2013. In *Drennon*, the Bureau of Land Management ("BLM") awarded a contract to Drennon to widen a road. This project required the excavation of a hillside, and the construction of a gabion wall alongside it. As Drennon excavated, the hillside slopes collapsed, and ultimately the project was scaled back and the road was not widened. Drennon contended that the hillside slopes collapsed because the geotechnical information in the solicitation on which it relied was flawed, and it should recover the cost of time and the cost of gabions which were assembled but were of no use. BLM asserted that the problems were caused by Drennon's inappropriate approach to the project, which wasn't in accord with the recommendations of the engineers who prepared the technical information.

Here are some important facts:

- BLM used an engineering contractor to design the project, but the contractor realized that the available digital terrain model was inaccurate. When BLM refused to pay \$25,000 for an updated model, the engineering firm proposed that "weasel words" be placed in the solicitation for construction to warn potential bidders of possible inaccuracies in the model, and BLM agreed.
- The design required the road to be built two or three feet beyond a guardrail on the river side. This was impossible because the river was a designated wild and scenic river, and filling in the river to accomplish this design was not lawful. The road had to be shifted *into* the hillside, requiring more excavation and a higher wall to restrain the hill from falling onto the road. While the contract drawings set the wall at 9 feet "max" using 420 cubic yards of gabions, in reality the revised wall design required a 15 foot wall and 778 cubic yards of gabions.
- Whenever the contractor cut into the hillside, the soil collapsed, sliding into the hill and falling onto the crew and equipment. This was unanticipated. This happened even when the contractor cut in short sections, as recommended by the designer.
- The contractor stopped work, with BLM's approval, stating that the situation presented a safety hazard because of differing site conditions and defective specifications.
- BLM scaled back the project to one single row of gabions along the roadway. Drennon installed 108 cubic yards of gabions and was paid for them at the contract's per unit price.
- Drennon submitted his claim for costs incurred to purchase, transport, assemble and dispose of gabions which weren't used on the project and had to be scrapped. He submitted a second claim for equipment and manpower idled during the work suspension.
- A year after the project was completed, Drennon sent an expert witness to the site, who found that every time a bucket scooped up dirt, more dirt fell in immediately behind it.

The Court agreed with Drennon, noting that because of the bad terrain model, the design in the solicitation was flawed, and BLM knew it. "Weasel words" in the solicitation could not cure it.

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Although Drennon's technique for excavating the hillside wasn't ideal (because of design defects and differences in the geotechnical information in the solicitation and on the ground), the hillside would have collapsed no matter what technique the contractor had used. The court granted the appeal in the amount of \$191,000, excluding only the contractor's profit on the suspension of work claim (which is specifically not permitted in the FAR suspension clause).

The Court's reasoning was based on *Int'l Tech. Corp. v. Winter*, 523 F. 3d 1341 (Fed. Cir. 2008), which states that in order to prevail on a differing site conditions claim, the contractor must prove:

1. a reasonable contractor reading the documents would interpret them as making a representation on the site conditions
2. actual site conditions were not reasonably foreseeable to the contractor, with the information available outside the contract documents
3. it reasonably relied on the contract document representations
4. conditions differed materially from those represented and the contractor suffered damages as a result.

The court found all elements present—the contract documents clearly made representations as to site conditions; the actual site conditions were not reasonably foreseeable, Drennon relied on the documents, and the conditions differed materially from those represented.

The interesting aspect of this contract was the digital terrain model. BLM had refused to pay \$25,000 extra to buy an accurate model for the solicitation. (This resulted in the “weasel words” in the solicitation). Had an accurate model been used, the contractors could likely have developed reasonable bids, or if they were too high, BLM could have scrapped the project before it began. This reminds me of Benjamin Franklin's “Poor Richards Almanac” little proverb:

For want of a nail a shoe was lost,
for want of a shoe a horse was lost,
for want of a horse a rider was lost,
for want of a rider an army was lost,
for want of an army a battle was lost,
for want of a battle the war was lost,
for want of the war the kingdom was lost,
and all for the want of a little horseshoe nail.

For want of a proper \$25,000 terrain model, the Government spent \$191,000 to pay claims and didn't get its road. Contracting Officers should consider the tradeoff here.