

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Franklin Pavkov Construction Co.) ASBCA No. 50828
)
Under Contract No. F38601-96-C-0004)

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

This is an appeal from a contracting officer's decision denying claims under a construction contract at Shaw Air Force Base, South Carolina. A hearing was held in Sumter, South Carolina. Only entitlement is before us for decision (tr. 1/7-8).

FINDINGS OF FACT

1. In 1991, the 20th Contracting Squadron at Shaw Air Force Base, South Carolina (Government) entered into a contract with a construction company for Project No. SHA 87-0014, to perform work on four sets of stairs in two buildings on the base, two sets per building. That work was to be performed in accordance with specifications and drawings furnished in connection with the solicitation (hereinafter referred to as "1991 specifications" and "1991 drawings"). The 1991 contract was terminated for default prior to completion of the work. (Tr. 2/227-29) At the time of termination only the structural work on one set of stairs had been completed and that set lacked the exposed aggregate finish (tr. 2/232-33).

2. John Milling (Milling) was the Government's project engineer on the 1991 contract which was terminated for default and when the decision was made to solicit a contract to complete the work, Milling was responsible for preparing the bid specifications and drawings. He saw that as an opportunity to correct the ambiguities and other problems encountered in the 1991 contract. (Tr. 2/227) Thus, he took the 1991

specifications and five drawings which had originally been prepared by an architect-engineer firm and made certain revisions to each (creating what will be referred to as “1995 specifications” and “1995 drawings”). He also made revisions to six shop drawings prepared by Debnam and Hughes on behalf of the terminated contractor under the 1991 contract (D&H drawings). (Tr. 2/228, 230; R4, tab 48)

3. Millings assembled the 1995 specifications and 1995 drawings along with the D&H drawings and gave them to the office of contracting for distribution to potential bidders (tr. 2/229-30, 238-39). It was the practice in the office of contracting, upon receipt of specifications and drawings, to prepare the solicitation schedule, which was referred to as the “front end,” using a computer program. They would then put the solicitation, the project specifications, the drawings and Air Force Form 66, Schedule of Material Submittals, together as a package and send it out for reproduction. Prior to the time the package is sent for reproduction, typically only one copy exists and it is kept in the contracting office’s file. (Tr. 3/238) After reproduction the solicitation package is mailed to prospective bidders. After award, at the pre-performance conference, it was the practice to give five sets of drawings and specifications to the contractor, from the copies left over from reproduction. (Tr. 3/239)

4. From August 1994 up to the time of trial, Benjamin Kosses (Kosses) was in charge of the office that prepared and issued solicitations at Shaw Air Force Base (tr. 3/236-37). Prior to trial, Kosses reviewed the original solicitation file for the subject contract and found specifications in that original file dated March 1995 identical to the specifications under that date in this record (1995 specifications) (tr. 3/240; R4, tab 1). Kosses also determined, based upon his review of the original solicitation file, that the original set of drawings contained therein were identical to the eleven drawings in this record said to be the drawings intended for soliciting a contractor to complete the terminated work (1995 drawings and D&H drawings) (tr. 3/240; R4, tab 48).

5. On 1 May 1995, Solicitation No. F38601-95-B-A024 was issued for Project No. SHA 87-0014/Shaw AFB, S.C., repair stairs at Dorms 418 and 430 (R4, tab 1). The front end of that solicitation was numbered page 1 of 43 through 22 of 43. There were no numbered pages 23 to 43 of 43. The front end of the solicitation delineated the documents and exhibits attached thereto by including the following language:

a. Specifications for Repair Stairs at Dorms 418 and 430
Project SHA 87-0014, dated 3 March 1995.

b. Drawings for Repair Stairs at Dorms 418 and 430 Project
SHA 87-0014, 40 Pages.

c. AF Form 66, Schedule of Material Submittals, Project SHA 87-0014, 2 Pages.

(*id.* at 21 of 43) Although the list of attachments to the solicitation indicated the project drawings numbered 40 pages, in fact only eleven pages (five 1995 drawings and six D&H drawings) were intended by Milling for inclusion in the package (tr. 3/60). Although the AF Form 66 was attached, no material submittals were scheduled on the form (tr. 2/16).

6. Mark Pavkov is vice president and 40% owner of Franklin Pavkov Construction Company (FPC) of Doylestown, Ohio, a family-owned business (tr. 1/33). Mark Pavkov became interested in FPC performing the work called for in the solicitation after FPC completed a concrete project on Shaw Air Force Base and he became acquainted with Shaw personnel, saw the project advertised and thought it was the type of work the company wanted to perform (tr. 1/35).

7. Mark Pavkov testified that several months prior to issuance of the 1 May 1995 solicitation the project was initially solicited based upon the 1991 specifications and the 1995 drawings but since FPC was the only bidder the solicitation was canceled (tr. 1/36-37; AR4, tab A; R4, tab 48). Government officials found no evidence of an earlier canceled solicitation (tr. 2/229, 3/166-67, 210-11).

8. In any event, Mark Pavkov ordered the 1 May 1995 solicitation package and, for reasons the parties have been unable to explain, the Government sent him the 1991 specifications and the 1995 drawings as opposed to the 1995 specifications, 1995 drawings and D&H drawings. FPC prepared its bid on the basis of the 1991 specifications and the 1995 drawings. (Tr. 1/39-40)

9. On 26 October 1995, the Government awarded Contract No. F38061-96-C-0004 (the contract) to FPC. The contract generally required FPC to “furnish all labor, material, equipment, and transportation and perform all operations necessary to repair stairs at Bldg 418 and 430” at Shaw Air Force Base. The contract was a firm, fixed-price contract in the amount of \$158,100. (R4, tab 1) It included Federal Acquisition Regulation (FAR) 52.214-29 ORDER OF PRECEDENCE-SEALED BIDDING (JAN 1986), which provides as follows:

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

At the time of award, appellant believed the work should be performed in accordance with the 1991 specifications and five 1995 drawings. At the time of award, the Government believed the work should be performed in accordance with the 1995 specifications, the five 1995 drawings and six D&H drawings. It was not until performance was well underway that the parties discovered the discrepancy between the sets of drawings and specifications each party was relying upon.

10. The contract provided that notice to proceed would be issued within 45 days of award, work was to begin within 10 days of receipt of notice to proceed and work was to be completed within 365 days of receipt of notice to proceed (*id.*). The preconstruction meeting was held on 16 November 1995 (R4, tab 82, book 1, report 1). Notice to proceed was received on 27 November 1995 (R4, tab 2) establishing the contract completion date as 26 November 1996. On 7 December 1995, FPC mobilized at the jobsite and began demolition of the stairs at Building 418 (R4, tab 82, book 1, report 2). The actual work was performed by Pavkov Contracting Co., Inc., Vince Pavkov's company, under an oral subcontract agreement with FPC, the terms of which are unspecified. Vince Pavkov, Mark's brother, lived in Sumter, S.C. The parties differ over whether the Government had notice any time prior to trial that a company other than FPC was performing the work. In any event, Vince Pavkov spoke for FPC on the project. References hereinafter to one of the Pavkov brothers are to Vince Pavkov unless otherwise indicated. (Tr. 1/48-49, 100)

11. Vince Pavkov attended the preconstruction conference on behalf of FPC and in his view it was a typical one. The Government's contract administrator, Roy Harris (Harris), conducted the meeting. Vince Pavkov testified that Harris gave him five sets of the August 1991 specifications and five sets of the 1995 drawings, each set consisting of sheets 1 through 5 of 5. (Tr. 1/95-97) While the contracting officer could conceive of no reason to believe Harris provided the wrong documents to FPC and could only speculate as to how Vince Pavkov came to have the wrong documents (tr. 3/182-84), we find more credible the affirmative testimony of Vince Pavkov about what he received than the Government's speculation about how that might have happened. We find as a fact that Vince Pavkov was provided five copies of the 1991 specifications and 1995 drawings at the preconstruction conference.

12. Both the drawings and the specifications Pavkov was given had the same project number and same job title, so he did not think it odd that the specification said 1991 because he knew it was from a contract that had been terminated at some point prior to 1995 (tr. 1/97).

13. The contract included the clause prescribed at DOD FAR SUPP. 252.236-7001, CONTRACT DRAWINGS, MAPS, AND SPECIFICATIONS (DEC 1991), which when blanks were filled in with information supplied, provided as follows:

(a) The Government-

(1) Will provide the Contractor, without charge, 5 sets . . . of large-scale contract drawings and specifications except publications incorporated into the technical provisions by reference;

(2) Will furnish additional sets on request, for the cost of reproduction; and

(3) May, at its option, furnish the Contractor one set of reproducibles, or half-size drawings, in lieu of the drawings in paragraph (a)(1) of this clause.

....

(e) The work shall conform to the specifications and the contract drawings identified on the following index of drawings:

Title[:] repair stairs
File[:] sha 87-0014 and
Drawing No. 7001450

(*id.* at 18 of 43)

14. Sometime in mid-September to early October 1996, when the concrete work for all stairwells was complete and the roughing and flashing were done, and the work in Vince Pavkov's opinion was about 90% complete, it came to his attention that the inspector was saying things about the specifications that were at odds with his view of what the specifications provided and so he went to the engineering office and asked Randy Barrett (Barrett), the inspector, if he could look at his specifications. When they compared the inspector's specifications with Vince Pavkov's jobsite and project binder specifications, they discovered that they were different in appearance and in type font, and that the inspector's copy was dated March 1995 and Pavkov's were dated August 1991. (Tr. 1/165-66)

15. Pavko called his brother Mark who told him his specifications were dated 12 August 1991 as well (tr. 1/166). He then contacted the contract administrator and they sat down together, compared their respective specifications and drawings and confirmed there were differences between Pavko's and the Government's (tr. 1/167-68).

16. During his testimony, Vince Pakvov compared the 1991 specifications with the 1995 specifications. Those differences, along with Vince Pavkov's explanation of the effect on the work are detailed below.

a. The list of Government furnished material (GFM) in the 1995 specifications included a column which gave the quantity of each item required to be incorporated into the work (tr. 2/6; R4, tab 1, § 01000, ¶ 1.19). There was no list in the 1991 specifications, and the list in the schedule did not include such a column. According to Vince Pavkov, having the quantity required would have allowed "a more accurate take off," a more accurate bid and would have facilitated more orderly scheduling to prevent delays (tr. 2/7).

b. Under the 1991 specification for steel joists, § 05200, ¶ 1.01 required the submission of shop and placement drawings. In the same section and paragraph of the 1995 specification for steel joists, it indicated that shop and placement drawings were provided in the bid package for identification and installation of GFM. (Tr. 2/6-7) Aside from efficiencies in ordering materials, if Vince Pavkov had had the shop drawings earlier during performance, he would have had more information which would lead to more efficient performance of the work. Having the shop drawings earlier would have eliminated the necessity of stopping work to check and double check the accuracy of measurements. (Tr. 2/7-8)

c. Under § 05310 of the 1991 specification for the metal roof deck, ¶ 1.01 required submittals whereas ¶ 1.01 of the 1995 specification states that shop drawings are provided as part of the bid package (tr. 2/9-10). Vince Pavkov never saw those shop drawings (tr. 2/10). Without the shop drawings the contractor had to rely on its experience in installing this work whereas, an accurate and detailed layout in a shop drawing would have reduced labor and other associated costs (tr. 2/10) and it would have taken less time to perform the work (tr. 2/11).

d. In Section 05320 of the 1991 specification, metal floor deck, ¶ 1.01 required the submission of manufacturers product descriptions and installation instructions. The same paragraph in the 1995 specification stated that any additional decking required beyond the GFM provided should be furnished by the contractor to match the GFM (R4, tab 1; tr. 2/11). To Vince Pavkov, the 1995 specification is almost

indicating to him that they would be short on the GFM for floor decking material. With that knowledge, he testified, he could have better prepared for the work (tr. 2/12-13).

e. Section 05510, Steel Stairs, in the 1991 specifications required submission of shop drawings for fabrication and erection of stair work whereas the 1995

specifications states that shop drawings are provided as part of the bid package. According to Vince Pavkov, FPC never received those shop drawings. (Tr. 2/14-15)

f. The cover page of the 1991 specifications and the cover page of the 1995 specifications are signed by two different contracting officers. (Tr. 2/15)

g. Section 07513, Built-up Roofing, ¶ 1.04, in the 1991 specifications required a warranty, whereas the same paragraph was expressly not used in the 1995 specification and no warranty was required (tr. 2/15). FPC made some effort to secure a warranty (tr. 1/157), but when they learned none was required by the 1995 specifications, the problem was solved (tr. 1/160).

17. The 1991 specifications had submittal requirements, but FPC did not make any submittals and did not think it odd that the Government did not insist on submittals because:

The reason why I [Vince Pavkov] didn't is because we were given a submittal schedule and these spec sections, that we just discussed the differences, none of those required to provide the submittals.

He never questioned the inconsistency, stating that "in hind sight it doesn't . . . make any sense." (Tr. 2/16-17, 117-18)

18. Around January or February 1996 (two or three months into the job), FPC hired Marion Sanders (Sanders), who had worked for the terminated contractor on stair 418B, the set of stairs that was already constructed (tr. 1/102-03). Sanders told Vince Pavkov that FPC did not have the shop drawings that were submitted and were used under the terminated contract, so he made inquiries of the inspector about that other set of drawings and the inspector gave Vince Pavkov a set of six pages of D&H shop drawings on 12 March 1996 (tr. 1/103-04). Receipt of those drawings expedited the work insofar as layout and installation were concerned and removed the necessity of guess work and the chore of running back and forth to check the accuracy of the work (tr. 1/105).

Exposed Aggregate Finish System (AFS)

19. Section 03310 of both the 1991 and 1995 specifications describes the finish to be applied to exposed vertical surfaces as "Exposed river rock" (R4 tab 1; AR4, tab A at 03310-5).

20. Sheet 2 of 5 of the 1995 drawings includes a side elevation with a note pointing to exposed concrete and requiring concrete columns and beams “to match existing” (R4, tab 48, sheet 2 of 5).

21. According to Vince Pavkov, he and his brother Mark discussed the existing aggregate finish prior to bid and, according to Vince:

What it appeared to be was a white Portland cementitious matrix, probably some acrylic latex as a binder or adhesive. And our plan was to [go] ahead and trowel it on and trowel the stone in place and rinse it off, brush it off.

(Tr. 1/95) He does not explain the contractual or technical basis for that plan.

22. While a sample board for the exposed aggregate was not required under either the 1991 or the 1995 specifications, Vince Pavkov put together a sample board of white Portland cement matrix plastered on with pea gravel (also referred to as 789 stone and river rock) embedded into it and took that to Milling in base engineering (tr. 1/116-17). He did that to preclude the Government later disapproving installed work (tr. 1/117). Milling deemed it too light, so Vince Pavkov asked him where he could get darker color stone (tr. 1/118). Milling said he did not know, although there were several buildings on base with the darker stone (tr. 1/119).

23. Vince Pavkov ultimately located the darker rock needed in North Carolina and, after calling, found it was called Chocolate B rock and was expensive, costing \$65 per ton as compared to \$10-11 per ton for the 789 stone he initially used on the sample board (tr. 1/122-23).

24. A sample board with the chocolate B rock was submitted to Milling and approved. At this time Pavkov did not inform the Government of the additional cost associated with the Chocolate B aggregate. (Tr. 1/124)

25. Neither the 1991 nor the 1995 specifications said anything about application of the exposed river rock or the system to use, so it was up to the bidders to devise the application process (tr. 1/125). After several unsuccessful attempts at getting the right mix of rock, Portland cement and sand to get the proper adhesion (tr. 1/125-26), FPC submitted a letter to the contracting officer asking for help with the matrix adhesive (tr. 1/126-27). While the gravel was a perfect match with existing gravel, a problem of appearance and adhesion remained (tr. 1/128).

26. In a meeting and a telephone conversation between Vince Pavkov and Government personnel on 11 June and 20 May 1996 respectively, Pavkov identified a

continuing problem with the river rock finish applied to the exterior surfaces. On 11 June 1996, the contracting officer advised FPC as follows:

As I explained at the site, the government does not have an established procedure for applying the River Rock finish. The contract specifications call for the finish to match the existing. The method of application used to achieve the prescribed finish is left to industry standard and the discretion of the contractor.

(AR4, tab I; tr. 1/129)

27. By letter of 17 June 1996, FPC formally requested help as follows:

Please be advised we are in process of removing the exposed aggregate surfaces which are deemed unacceptable to the government. The method and materials we have utilized did not produce the desired end result, industry standard for exposed aggregate is in a pre-cast/preformed state. We request the government's guidance and assistance to furnish the contractor with the manufacturer of the actual existing material and method of application so we may proceed (there is none indicated in the contract specifications). We will then order and apply this system as soon as it can be determined.

(AR4, tab J)

28. During a meeting on 27 June 1996, the Government officials gave FPC two specifications for exposed aggregate on different surfaces "in an effort to assist [FPC] in obtaining an acceptable bonding agent and to clarify other concerns" of FPC (AR4, tab K; tr. 1/133), one was for a wooden surface and the other was for work on a concrete or masonry surface (tr. 1/133).

29. The specification provided with respect to bonding on a concrete or masonry surface included a section on special aggregate and epoxy matrix for coating on exterior concrete and masonry walls that FPC was able to use (tr. 1/134). Neither the 1991 nor the 1995 specifications contained a special aggregate coating section like the one provided on 27 June 1996 (tr. 1/134-35). That specification explained to Vince Pavkov "exactly what I need to know to perform the work." Further he testified that FPC understood the preparation and application, but the 1991 specification he was using or the 1995 specification "did not provide what material to use in this particular situation and this [new specification] did" (tr. 1/135-36).

30. Vince Pavkov perceived several differences between the specification given to them during performance to assist in performing the work and the specification upon which his brother based the FPC bid. FPC had been using a cementitious matrix and the new specification called for an epoxy matrix, brand named Romantex II by Vitricon, a division of Polymer Plastics Corporation (tr. 1/136, R4, tab 14). The new specification described the aggregate as “Well-worn river gravel, average diameter 1/4 inch, tan to brown in color. Match aggregate on existing building” (tr. 1/137; R4, tab 14). Neither the 1991 nor the 1995 specifications included such language. The specification provided by the Government to assist FPC included a provision on application by hand seeding. Neither the 1991 nor the 1995 specification had such a provision. (Tr. 1/140-41; R4, tab 1; AR4, tab A)

31. Vince Pavkov went about trying to purchase the Romantex II by asking the Government, local suppliers and his brother. He finally received the manufacturer’s phone number from a supplier in Ohio (tr. 1/137-38), placed an order with the manufacturer at the end of June and it came in early September 1996. During the interim, the Government permitted FPC to proceed with demolition work in building 430. (Tr. 1/140)

32. After FPC received the Romantex, it took a while to get it right, but after going through a trial and error period, the work improved and was ultimately accepted (tr. 1/144-46).

33. Vince Pavkov testified that he believed that FPC was held to the performance standard of the specification given to assist them (tr. 1/141). We find otherwise, as the evidence does not support that contention.

34. Vince Pavkov testified that if he had known he had to hand seed and achieve certain density requirements, his estimate of the cost of performing the work would have been substantially higher. He further testified that the Romantex product was extremely expensive and it was more labor intensive than he had planned (tr. 1/142-43) in that he had planned on performing the exposed aggregate work by using a trowel and making up a manual type hopper, but had in fact had to hand seed the aggregate. (Tr. 1/144) Because Vince Pavkov did not prepare the bid, we are not persuaded by his contentions in regard to what was planned and what was required.

Drain Grate

35. In performing the work, FPC encountered a drain grate over a catch basin which was not indicated on the drawings. The elevation of the grate was higher than the sidewalk elevation such that water would not flow into the catch basin. Vince Pavkov

offered to lower the brick in the basin a couple of courses and use the same parts and pieces for the grate to alleviate the problem. (Tr. 2/43) The contract administrator requested a cost proposal but Vince Pavkov represented that it was minor work that he would perform without additional cost and was not worthy of the effort necessary to prepare and seek approval of a cost proposal (tr. 2/44; *see also* R4, tab 16; tr. 3/22).

36. Contract administrator Deana Hodge (Hodge) recorded a memorandum for the record concerning a telephone call she received from Vince Pavkov on 17 July 1996 inquiring about a drain grate he had encountered. She confirms in that memo that Vince Pavkov did not want to prepare paperwork for such a small amount of work. She further states that she discussed the matter with the contracting officer and the inspector and both agreed that the contractor was proceeding at its own risk and she so advised Mr. Pavkov. (R4, tab 16; tr. 3/222)

37. Pavkov testified that in his absence the Government's inspector and engineer directed his crews not only to remove the drain grate and ring and lower it, but also to cover it, reinforce it and pour concrete over it, work he had not agreed to perform (tr. 2/44).

38. The parties made entries in their respective daily reports during the time the issue arose. The Government's daily inspection report for 17 July 1996 records that on that day FPC:

Placed plywood and rebar over existing inlet located in sidewalk area & concrete placed.

(R4 tab 82, book 8, report 7)

39. On 17 July the FPC report states as follows:

2 men 2 hrs . . . as per discussion w[ith] John Milling to lower grate to sidewalk elevation. Then Randy [Barrett] came back and said that engineering decided to cover completely. We installed a 3/4 ply bed w[ith] # 7 rebar Randy came back and said there was no one to sign off on the method so I called it a day. But then Vince spoke with Randy and we received permission to pour without Randy present.

(R4, tab 83, 7/17 report)

40. Based upon the foregoing we find as a fact that initially FPC agreed to perform a minimal amount of work on the grate at no cost increase but that the

Government directed additional work which was in fact performed by FPC. Vince Pavkov informed the contracting officer that the latter work involved additional costs in July 1996 shortly after encountering the grate and performing the additional work (tr. 2/44).

Government Furnished Materials

41. The contract incorporated FAR 52.245-4 GOVERNMENT-FURNISHED PROPERTY (SHORT FORM) (APR 1984), which provides in pertinent part as follows:

(a) The Government shall deliver to the Contractor, at the time and locations stated in this contract, the Government-furnished property described in the Schedule or specifications. If that property, suitable for its intended use, is not delivered to the Contractor, the Contracting Officer shall equitably adjust affected provisions of this contract in accordance with the Changes clause when -

(1) The Contractor submits a timely written request for an equitable adjustment; and

(2) The facts warrant an equitable adjustment.

.....

(c) Upon delivery of Government-furnished property to the Contractor, the Contractor assumes the risk and responsibility for its loss or damage, except -

(1) For reasonable wear and tear;

(2) To the extent property is consumed in performing this contract; or

(3) As otherwise provided for by the provisions of this contract.

(R4, tab 1 at 17 of 43)

42. The Schedule included a clause H-125, IDENTIFICATION OF GOVERNMENT-FURNISHED PROPERTY, which provided in part:

Pursuant to the “Government Property” clause herein, the Government will furnish the item(s) of property listed below as Government-Furnished Property to the Contractor, F.O.B. destination, for use in performance of this contract.
[emphasis in original]

The list included 30 items in three columns, - item number, property description and quantity of each item furnished. The clause further provided that the “material is ‘as is’ and any cleaning, scraping, painting or other forms of reconditioning required to make the material meet specifications shall be the responsibility of the contractor.” (R4, tab 1 at 7 of 43)

43. In preparing his bid, Mark Pavkov went through the drawings and specifications he had and estimated the number of pieces of material he would need and it was relatively close to that provided in the list of GFM, but he did not “inventory or anything like that to find out exactly what [they] would need or not need prior to bid” (tr. 1/61). He prepared the bid without ever looking at the GFM (tr. 1/51).

44. Prior to submission of the bid, in mid to late Spring 1995, Mark Pavkov asked his brother, Vince, who lived in Sumter, South Carolina and had performed work on Shaw Air Force Base, to “go take a look and see if he saw anything unusual.” (Tr. 1/37-38, 64, 2/90) Vince Pavkov visited the site without the benefit of specifications and drawings (tr. 2/90) to determine if there were any obstructions or obstacles that might affect site access and determined that other than some tree branches that would have to be trimmed back, he saw nothing unusual and saw no problems (tr. 1/44, 64).

45. After submission of its bid, the Government asked FPC to extend its bid acceptance period and prior to doing so, in late Summer 1995, Mark Pavkov asked his brother Vince Pavkov to take another look at the site. When he made this second site visit, Vince Pavkov still did not have the specifications and drawings and felt that he did not need them because his brother’s request was specific - he was to look at the exposed aggregate and determine if the trees were of a size requiring removal for site access. Mark did not ask Vince to look at the GFM. (Tr. 2/92-94)

46. When he started the job, Vince Pavkov had the 1991 specifications and 1995 drawings but did not have the Schedule where the list of GFM was located. He did not even look at the GFM until after the preconstruction conference. (Tr. 1/99-100)

47. One or two weeks prior to issuance of the solicitation Milling personally conducted an inventory of the GFM. At that time, the material was not under lock and key but was moved to a fenced compound several weeks after the inventory. (R4, tab 41) The fenced location was 100 - 200 yards from the jobsite (tr. 2/127-28, 3/8), which we

find to be a reasonable location for delivery of GFM to the contractor. The GFM had been purchased by the terminated contractor under the earlier contract (tr. 2/121-23).

48. Vince Pavkov attended the preconstruction conference conducted by Harris, the Government's contract administrator. Barrett, the Government's contract inspector, also attended and at that time established a date for meeting with Vince Pavkov to take a look at the GFM. (Tr. 1/95-97) Barrett made two attempts to meet with Vince Pavkov in November 1995, shortly after the preconstruction meeting, but before commencement of work, in order to take an inventory of the GFM. For the first scheduled meeting, something came up and Pavkov did not show up. They met for the second scheduled meeting in late November 1995 at the fenced location of the GFM near the jobsite and began to take the inventory, but before they got to the smaller items, Pavkov had to leave to take care of something else. (R4 tab 42; tr. 3/82-83, 133, 159-60) They succeeded in taking an inventory of the large pieces such as bar joists, railings and stringers but they did not get to the stair nosings (tr. 3/131-32).

49. The stair nosings were devices that prevented slipping on the steps (tr. 1/149-50). The GFM list in the schedule indicated 87 nosings were provided (R4, tab 1). When FPC went to retrieve the stair nosings to incorporate them into the work, they found only 10 nosings (tr. 1/150-52). Since Vince Pavkov did not have and had never seen the schedule which included a list of GFM and did not have and had never seen the 1995 specification which also included a list of GFM, he asked the contract administrator to send him a copy of the list of GFM and at the same time Vince asked his brother Mark in Ohio to also send a list. His brother faxed the list from the schedule which said 87 nosings were furnished and on 9 May 1996 the contract administrator provided the list in 1995 specifications which included not only the quantity furnished, but the quantity required as well (90). (Tr. 1/151, 2/6; AR4, tab F)*

50. FPC advised the Government of the missing nosings on 14 May 1996 (AR4, tab G). Since the quantity of nosings on hand was less than the quantity required, FPC would have had to go out and get them specially fabricated (tr. 1/154), but because the procurement of the stair nosings had a 10-12 week lead time, FPC got permission from the Government to substitute aluminum channels with abrasive (non-skid) inserts in place of the nosings (tr. 1/155). Presumably, the aluminum channels had a shorter lead time for delivery.

* While one could conclude that Pavkov had actual notice of the existence of the 1995 specification as early as 9 May 1996 as opposed to September/October 1996 (see finding 14) the exact date of notice, so long as it was after bid and award, is irrelevant.

51. The 1995 drawings depicted the typical direction of the stairwells and only one direction was shown (R4, tab 48). When FPC was installing the metal stair pans between two stair stringers, they discovered that pieces of the same items were not all the same size - some were wider than others. This condition lead Vince Pavkov to conclude that certain pieces were designated or designed for certain locations on certain floors. (Tr. 1/106)

52. When FPC received the D&H drawings, a note thereon, "verify all stairs to be same hand," alerted them that the stair directions were not typical as depicted and the parts that were to be incorporated into the stairs might not be typical as the typical beam elevation on the 1995 drawings showed (tr. 1/108). This problem occurred on the first unit (418A) and thereafter that work went smoothly (tr. 1/109).

53. FPC had another problem with the stairwell rails. After hoisting a heavy rail to an upper floor, they found it did not fit and had to lower it back down and retrieve the correct piece. (Tr. 1/109-10) The item in question was a 2" diameter rail welded to spindles which in turn were welded to a fastener plate for attachment to the concrete slab or beam (tr. 1/111) The correct piece fit the way the stairs had been built which was typical for that elevation and FPC installed that one (tr. 1/112).

54. There were six of these pieces, one each for the second and third floors of three stairwells. Two were fabricated as typical (opening to the right) and four were in the opposite direction (opening to the left). The four that were opposite would not have worked on stairs running in the direction shown on the 1995 drawings. (Tr. 1/112-13)

55. The impact of encountering GFM with opposite railing configuration presented a dilemma as to whether to buy new stairwell rails or reconfigure the concrete beam form work to run in the opposite direction (tr. 1/113). FPC did not have to change the form work for stairwell 418A because they found the correct railing (tr. 1/114). However, for building 430, FPC had to construct new concrete forms to accommodate the discrepancy in the stairway directions as opposed to reusing the forms (tr. 1/148-49).

56. Milling agreed that the beam detail on the 1995 drawings could not simply be reversed if the stairs went in the opposite direction (tr. 3/35). However, FPC never brought the problem of the stair direction to the Government's attention when they encountered it (tr. 3/36-37). FPC never asked permission to run the stairs in a different direction than shown on the 1995 drawings and if they had, Milling could conceive of no reason why he would not have allowed it (tr. 3/37).

57. The Government deemed all the work acceptable on 21 March 1997 and the work was formally accepted as of that date (R4, tabs 37, 82, book 16, report 6). No liquidated damages have been assessed.

58. After unsuccessfully seeking to resolve requests for equitable adjustments, on 28 March 1997, FPC submitted certified claims to the contracting officer, essentially as follows:

Defective Specifications (AFS)	\$17,582
Defective Specifications (GFM)	28,904
Changes in the Contract Specifications (AFS)	36,067
Changes in the GFM	16,157
Modifications to GFM	6,846
Field changes	719
Acceleration	9,130
Delays	1,724
Interest	To Be Determined.
 Total Claim Amount	 \$117,129
 Contract Balance Amount	 \$5,930
P00003 Time Extension Amount	704

(R4, tab 38) The claims were received by the contracting officer on that same date (R4, tab 43).

59. On 17 June 1997 the contracting officer denied the claims (R4, tab 43) and said denial was timely appealed to this Board and docketed as ASBCA No. 50828.

DECISION

Applicable Specifications and Drawings

The Government argues initially in its brief that it sent appellant the 1995 specifications and drawings along with the D&H drawings and only those documents apply. Our findings are otherwise - appellant received and bid only on the 1991 specifications and the 1995 drawings.

The Government next argues that even if FPC received a solicitation package as alleged, there can still be no relief because the Order of Precedence clause, requires that the schedule which referenced the 1995 specifications takes precedence over an inconsistently dated 1991 specification. While one might argue that there was no inconsistency that required a choice between the specifications and the schedule since no actual document which conflicted with the 1991 specifications was in the schedule, it is

unnecessary for us to decide which specification applies because the result is the same in either event as can be seen in our discussion of the individual claim items.

Aggregate Finish System

FPC claims \$17,582 for what it terms its increased costs of performing from a defective specification, defective because it excluded the details of how to perform the work, while leaving that decision to the contractor (R4, tab 38 at 6). Citing *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774 (Ct. Cl. 1963), appellant argues in its brief that the Government's knowledge of the special nature of the aggregate rock and the method of application of the aggregate finish system constituted superior knowledge which should have been disclosed in the contract.

To establish superior knowledge, FPC has the burden of demonstrating that the Government had vital knowledge of a fact affecting contract performance which it did not share and was aware that FPC did not have. *Helene Curtis, id.* at 778; *Reflectone, Inc.* ASBCA No. 42363, 98-2 BCA ¶ 29,869. The specification for the exposed aggregate required the contractor to locate the materials and devise the method of installation in order to match the existing exposed aggregate finish on the buildings. While the Government had a specification from an earlier project which was more detailed in the products and methodology that could be used and which was later furnished to appellant, the Government did not impose that specification on appellant. Indeed, appellant was free to use any product or methodology which achieved the desired result, *i.e.*, to match the existing buildings.

No vital knowledge was withheld or even possessed by the Government such that it had a duty to give that information to FPC. To accomplish the matching finish called for under the specification, appellant used a trial and error method both before and after receiving the copy of an earlier specification, leading us to conclude that the problem was more likely the competence of the contractor rather than the nature of the specification for the work.

Appellant had the opportunity to observe the exposed aggregate finish on the existing buildings prior to bid and if it had questions about duplicating that finish, those questions should properly have been raised before submitting a bid or appellant could have declined to bid. The claim for a defective exposed aggregate finish is denied.

Defective Specification (GFM)

Appellant's claim for defective specification as it relates to GFM attributes increased costs and delays to the omission of information from the 1991 specifications that were in the 1995 specifications and the absence of the D&H drawings. The claim

does not state a basis for recovery. When Mark Pavkov formulated the FPC bid, he did not know of the existence of the shop drawings. Moreover, the so-called omissions from the 1991 specifications that were in the 1995 specifications and were of any significance consisted of (1) a list of the number of each GFM item required (finding 16a), (2) three instances where the 1991 document called for a shop drawing submittal and the 1995 document purported to supply those drawings (findings 16b, c, e) and (3) one instance where the 1991 specification required a manufacturer's product description for the metal floor deck and the 1995 specification said that if more metal floor deck is needed than that provided, the contractor should purchase such decking to match the GFM (finding 16d).

In the absence of information given on how much material was required to perform the work, it was incumbent upon FPC, in formulating its bid, to make the determination of the amount of metal hardware it would need to supplement the GFM. To that extent, FPC should have included an amount in its bid to cover the additional GFM required over and above that which was represented to be furnished.

As to the so-called missing shop drawings, it was similarly incumbent on FPC to include an amount in its bid to either prepare shop drawings for its own use in performing the work or an amount to cover the trial and error process necessitated by the absence of shop drawings.

This claim is based on the absence of information FPC did not even know existed at the time of its bid. While this information might have made the work easier to perform, there is no evidence the work was impossible to perform without this information. If supplying the missing information made the work easier to perform, then FPC's costs should have been reduced from that which was bid, not increased. FPC's price should have been lower, not higher if it had received the 1995 specifications. Therefore this claim item is denied.

Changes in the Contract Specifications (AFS)

The basis for seeking increased costs for this item is described by appellant in its claim in part, as follows:

When this project was bid, the Contractor anticipated the existing AFS to be cementitious and aggregate materials easily and locally obtainable. This proved not to be the case and an unsuccessful attempt was made by the Contractor to comply with the defective specifications. On June 27, 1996 . . . the Government furnished the Contractor with the information considered necessary to complete the AFS. In his

letter dated July 3, 1996, according to Mr. Alverson [a government official], “in an effort to assist you in obtaining an acceptable bonding agent and to clarify other concerns you have, you were provided specifications on aggregate finish from previous projects.”

....

In conclusion, the specifications added to our contract were certainly not the ones the Contractor based their bid on. The specification the bid was based on, dated August 12, 1991, were not even the same ones the Government was using whcih [sic] were dated March 16, 1995 and contained revisions the earlier ones did not. It was the Government’s responsibility to issue the correct specifications for this project and they failed to do so resulting in increased costs to the Contractor in the amount of \$36,067.

(R4, tab 38 at 42)

We have denied the claim for increased costs of trying to comply with defective specifications. The distinction between that claim item and this one, is that the current item alleges the Government imposed a new specification for the AFS on appellant and that imposition caused increased costs and delay. There is nothing in the 1991 or the 1995 specifications or in the 1995 drawings or the D&H drawings which could lead appellant to anticipate the existing AFS to be cementitious and the aggregate easily and locally obtainable. No representations were made. Moreover, the person preparing the bid did not observe the existing finish on the buildings prior to bid, nor did he ask his representative to observe the existing finish prior to bid, only after bid, but before award. Thus, not only did the Government make no representation concerning the nature of the mix to be used for applying the aggregate or any representation concerning the availability of the aggregate, but appellant made no effort to observe the existing finish or ask questions prior to bid.

Finally, as our findings indicate, the specification given to appellant during performance was not imposed but was given to FPC to assist in getting the job done. The claim is denied.

Changes in GFM

This claim is for the cost of purchasing GFM when appellant says items represented to be furnished were either not furnished or furnished in lesser quantities than

stated in the schedule. The Government and the contractor never completed inventorying the GFM, and the Government never formally delivered the GFM to the contractor as contemplated by the Government furnished property clause in the contract, even though the GFM was available for use by FPC from the day the work began.

Paragraph (a) of the Government-furnished property clause required the Government to deliver the GFM to the contractor at the times and places stated elsewhere in the contract, and if that property so delivered is not suitable for its intended use, an equitable adjustment is due so long as the contractor submits a timely written request. No other provision of the contract specified the time and location for delivery of the GFM to the contractor. When no specific time for delivery of GFM is set forth in the contract, the Government is obligated to deliver the GFM in sufficient time for it to be installed in the ordinary and economical course of performance. *Peter Kiewit Sons Co., Inc. v. United States*, 138 Ct. Cl. 668, 674-75, 151 F. Supp. 726 (1957); *Oxwell, Inc.*, ASBCA No. 27523, 86-2 BCA ¶ 18,967 at 95,776. We hold that delivery occurred when Vince Pavkov and Barrett met at the fenced location of the GFM near the jobsite to take an inventory in late November 1995 prior to commencement of work. While the inventory was not completed (due to the fault of Vince Pavkov), the contract had no requirement for a joint inventory; however, the provision requiring written notice if the GFM is not suitable for its intended use implicitly requires prompt inspection of the property by the contractor upon receipt, *Logicon, Inc.*, ASBCA No. 39683, 90-2 BCA ¶ 22,786, and since such written notice was not given until at the earliest 14 May 1996, over five months after delivery was made and work began on site, such notice was not timely.

Paragraph (c) of the Government-furnished property clause provides that upon delivery of GFM to the contractor, the contractor assumes the risk and responsibility for its loss. Delivery occurred in late November 1995 and risk of loss shifted to the FPC on that date. In the absence of timely notice that the GFM was deficient, appellant may not recover for any material shortages. The claim is denied.

Modifications to GFM

Appellant alleges in its claim that it had to make several modifications to the GFM that were not called for under the contract, but only one was the subject of a contract modification. The claim includes instances in the contractor's daily reports where comments are made about alterations made to certain materials. In its brief, appellant proposed a finding of fact as follows:

18. The GFM which was provided did not conform to the drawings. As a result FPC had to refabricate and replace some of the materials in order to make them suitable for their intended use. Transcript, 1-154.

(App. br. at 7) This proposed finding does not provide enough detail for us to determine whether and the extent to which the GFM had to be altered. Moreover, the transcript citation does not support that contention. In fact, the testimony on that page is that where the quantity of GFM on hand was less than the quantity required FPC had to go out and get them specially fabricated. That is precisely what appellant was required to do under the contract, at its own expense, when the need exceeded what was specified as provided.

Having discerned no credible evidence in the record to support this claim, it is denied.

Field Changes

This claim is for the additional time and cost alleged to be due for an unforeseen site condition for which the Government directed additional work as follows:

On July 17, 1996, an unforeseen site condition was encountered. A drain grate had to be removed, hauled from the site and the opening had to be reinforced before we could continue our work as scheduled. A verbal field change was issued and the work completed. We requested additional money for the work involved in a meeting with Mr. Alverson on July 22, 1996 and he directed us to include the amount in a claim due to the lack of [f] modification funds.

(R4, tab 38 at 109)

Based upon our findings we find appellant is entitled to recover for the additional costs incurred in overcoming the drain grate problem other than the cost of lowering the brick which Mr. Pavkov agreed would be performed without additional cost.

Acceleration and Delays

No claim is made for delay due to the drain grate issue. Since appellant has not prevailed on any other issue, no Government-caused delays were experienced by FPC. As to the acceleration claim, since we find no Government-caused delays, the Government was within its rights to ask the contractor to get back on schedule.

The appeal is sustained in part as to the drain grate claim only and in all other respects is denied. Appellant is entitled to recover its increased costs (including subcontract costs) on that issue only together with interest from 28 March 1997 until paid. The matter is remanded to the parties to negotiate quantum.

Dated: 29 August 2000

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50828, Appeal of Franklin Pavkov Construction Co., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals