ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Chilstead Building Company, Inc.	)	ASBCA No. 49548
	)	
Under Contract No. DAKF36-92-C-0073	)	

APPEARANCE FOR THE APPELLANT: Mr. Terry J. Chilton
President

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Elizabeth G. Eberhart, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
UNDER BOARD RULE 11

Respondent revoked acceptance of work under the captioned contract after it discovered alleged latent defects. After appellant failed to repair such defects, respondent terminated the contract for default for alleged failure to make progress and for submission of allegedly false progress payment certificates. Appellant appealed from the default termination, which is the sole issue before us. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. The parties elected a record decision under Board Rule 11, and submitted evidentiary documents and briefs.

FINDINGS OF FACT

1. The U. S. Army, Ft. Drum, NY, awarded Contract No. DAKF36-92-C-0073 (contract 73) to Chilstead Building Co., Inc. (appellant) on 10 September 1992, to replace roofs on the Administration Building (AB), "Assembly Hall," and "Kitchen Connector" buildings at the Army Reserve Center at Plattsburgh, NY (ARC), for the fixed price of $107,825.00 (R4, tab 1 at 2, SW-1, SW-2).

2. Contract 73 required completion within 120 calendar days after receipt of notice to proceed. Notice to proceed was issued to appellant on 5 November 1992. Contract 73, clause SW-21, forbade "physical construction work" between 15 October 1992 and 15 April 1993 (R4, tab 1 at 7, SW-5). Therefore, the contract completion date was set at 13 August 1993 (R4, tab 4).

3. Contract 73 contained drawings numbered C-1, A-1, A-2, and A-3. Drawing A-1 depicted the new AB roof supported by 82 pre-engineered, pre-fabricated, wood roof trusses erected over existing roof decking. "General Note 9" in Drawing A-1 stated:

> 9. Roof Truss Note:
>
> TRUSS PROFILE IS SHOWN FOR GENERAL DESIGN INTENT ONLY. ALL ROOF TRUSSES SHALL BE ENGINEERED AND PRE-FABRICATED TO SUPPORT ALL LOADS APPROPRIATE TO SPAN, BUILDING LOCATION AND ALL APPLICABLE CODES. FABRICATION AND INSTALLATION SHALL BE IN FULL ACCORDANCE WITH MANUFACTURER'S INSTRUCTIONS AND RECOMMENDATIONS. FIELD ALTERATION OF ANY MANUFACTURED TRUSS IS NOT PERMITTED. REFER TO SPECIFICATIONS FOR ADDITIONAL INFORMATION.

The contract prescribed no specific truss inspections or tests. (R4, tab 1)

4. Drawings A-1 and A-2 depicted the truss "panel points" as the intersections of diagonal truss web members at the bottom truss chord. Drawing A-1, Section A, entitled "Roof Section @ Administration Building," depicts sections of two interior and two exterior walls, each of concrete masonry units (CMU), and a "pre-engineered roof truss" elevation. The exterior and interior wall sections are parallel to, and equidistant from, the center ridge line of the AB. The bottom chord of the truss is perpendicular to, and atop, the two exterior and the two interior walls. Truss "panel points" are aligned with each interior wall. A note in Section A, repeated in Detail D and in Drawing A-2, Section A, states: "Align truss panel points w/CMU walls below." (R4, tab 1)

5. Drawing A-1, Detail D, "Typical Wood Blocking Detail," depicted panel points aligned over the AB's interior walls. Atop the walls was a layer of existing wood roof decking. Blocking was shown between the roof decking and the bottom chord of the truss. Detail D showed the truss panel points and contained a note: "Fasten new wood blocking (2X4 min) so as to align w/CMU walls below." Drawing A-3, Detail A, "Typical Overhang Detail," depicts the truss above the AB's exterior wall. Detail A's notes state: "New blocking @ roof trusses shall bear on CMU portion of existing structural walls" and "Additional wood blocking as required, resting on load bearing CMU." (R4, tab 1)

6. Drawings A-1, Plan 1, and A-3, Detail G, required appellant to install four 24" x 18" minimum access holes with 1" by 2" perimeter wood trim, one at each end of the AB attic, and one each in the Assembly Hall and Kitchen Connector attics (R4, tab 1).

7. Contract 73 addressed the contracting officer's ("CO") authority in clauses SW-22 through SW-24. Clause SW-22 required appellant to direct all post-award questions to a designated address and telephone number of the Contract Administration Division of the Directorate of Contracting. Clauses SW-23 and SW-24 provided as follows:

> SW-23 IMPORTANT NOTICE: The Contractor will not accept any instructions issued by any person other than the [CO] or his/her authorized representative acting within the limits of his/her authority. No information other than that . . . issued by the [CO], which may be received from any person employed by the U.S. Government or otherwise, shall be considered as grounds for deviation from any provisions, conditions or other terms of this solicitation or any resulting contract.
>
> SW-24 CONTRACTING OFFICER'S REPRESENTATIVES AND THEIR AUTHORITY:
>
> a. The [CO] may designate individual(s) to act as the Contract [sic] Officer's Representative (COR) under this contract. Such designations will be made by letter from the [CO] with an information copy furnished to the contractor. The COR staff will represent the [CO] in any administration of the contract but will not be authorized to change any of the terms and conditions of the contract.
>
> b. No oral statements of any person, whomsoever, will in any manner or degree modify or otherwise effect [sic] the terms and conditions of this contract. The contracting officer shall be the only person authorized to approve changes in any of the requirements under this contract, and notwithstanding any provisions contained elsewhere in this contract, said authority shall remain solely with the [CO]. CORs shall be limited to the authority specified in their letter of appointment.

c. The COR staff may consist of a Quality Assurance Evaluator (QAE) or a Technical Representative, and they are appointed as technical assistant(s) by the COR.

(R4, tab 1)

8. Contract 73 incorporated by reference the FAR 52.233-1 DISPUTES (DEC 1991), 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989), 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), and 52.246-12 INSPECTION OF CONSTRUCTION (JUL 1986) clauses, the last of which clauses provided in pertinent part:

> (b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements . . . . All work . . . is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.
>
> (c) Government inspections and tests are for the sole benefit of the Government and do not—
>
> (1) Relieve the Contractor of responsibility for providing adequate quality control measures;
>
> . . . .
>
> (4) Affect the continuing rights of the Government after acceptance of the completed work under paragraph (i) below.
>
> (d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the [CO]'s written authorization.
>
> . . . .
>
> (i) Unless otherwise specified in the contract, the Government shall accept, as promptly as practicable after

> completion and inspection, all work required by the contract or that portion of the work the [CO] determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.

(R4, tab 1 at 3-5).

9. Appellant's 26 February 1993 revised letter to respondent stated:

> At the pre-construction meeting held for this project on 11-5-92, it was requested that we investigate the possibility of making three changes on this project. They were:
>
> 1. *To eliminate the additional wood blocking as shown on Detail 'D,' Sheet A-1.* This has been accomplished by raising the blocking elevation at Detail 'A' Sheet A-3 and by configuring a heavier truss (T3) to clear span the structure. [Italics in original.]
>
> . . . .
> Please find enclosed with this letter the following:
>
> A. Computer generated truss sheets T-1 thru T-5. (Once trusses are verified submittal will be sent with engineered drawings).

Appellant's proposed truss on sheet T-3 depicted panel points about 7' 10" on each side of a central vertical web member, *i.e.*, the panel points were about 15' 8" apart and were not aligned with the AB's interior walls, which were about 6' 9" center to center in respondent's Drawing A-1, Detail D (R4, tabs 1, 8).

10. The record contains Government "Inspector's Project Report (Daily)," (IPRD) memoranda signed by inspector G. Thomas Shaw and a "General Engineer," and addressed to "DOC-A," the CO's office. Mr. Shaw's Monday 5 April 1993 IPRD stated:

> Mr. [Leo] Smith [appellant's construction representative] and I discussed the changes that he was submitting, . . . they came up with a heavier truss therefore eliminating work and a credit to the gov't, said that he was going to start building the heavier trusses. I informed him that if he did that he was

> doing it on his own initiative, replied that he knew that. I asked him to wait until Mon and I would call him.

(R4, tab 23)

11. Appellant's 6 April 1993 wood truss material submittal, No. 001, included a clear span truss design and calculations by MITek Industries, Inc. (MITek), with the panel points located as appellant had proposed on 26 February 1993 (R4, tab 13).

12. Appellant's Monday, 12 April 1993, letter to the CO stated that it had "been directed to proceed with this project as per plan." The conflicts appellant alleged in so proceeding indicated that "per plan" meant per Government drawings. (R4, tab 9)

13. Respondent's IPRD dated 15 April 1993 stated:

> Mr. Smith and I discussed what had to be done to make the design work. I asked him if he would setup a transit and also cut some holes down to the roof deck so that we might establish what is needed to comply with dwgs. . . . . The dwg's [sic] also show the trusses setting on the 4" styrofoam insulation, when the roof receives a snow load this will break down the insulation and give you an uneven ridge line. [There follows, in another handwriting:] The drawings do identify minimum blocking requirements which the Contractor must comply with and provide the correct size materials for adequate blocking as required.

Mr. Shaw's 23 April 1993 IPRD disclosed no truss work. His 28 April 1993 IPRD stated:

> On my arrival the contractor had installed about half of the trusses over the adm bldg with sheathing covering 2/3 of the trusses. Leo [Smith] the foreman and I discussed the blocking that was already in place . . . .

Mr. Shaw's 7 May 1993 IPRD stated:

> Contractor setting trusses on corridors from Adm to drill hall. 2/3rds of adm has been shingled . . . . talked with foreman as to the complete cover of the adm relayed [sic] by time it would complete.

(R4, tab 23) Appellant did not notify respondent at any time before final acceptance that trusses installed in the AB were to the MITek truss design, not to Government drawings A-1, A-2, and A-3. Mr. Shaw did not measure the interval between the trusses' central panel points while they were in the parking lot or as installed on the AB, which simple measurement would have shown the trusses' nonconformity with contract 73's drawings.

14. Following the Army Construction Branch's 15 April 1993 recommendation to disapprove, on 30 April 1993 the CO disapproved appellant's submittal No. 001 with the notation: "Revised truss design rejected. Extra support blocking needed in the center of the truss." (R4, tab 13) The CO's 30 April 1993 letter to appellant reiterated his disapproval of the clear span truss design appellant had proposed on 26 February 1993, quoting the 9 April 1993 comments of respondent's Architect-Engineering (A&E) firm:

> - Item 1, Eliminate the additional wood blocking as shown on Detail "D", Sheet A-1. The purpose of the blocking is to distribute the load onto the four bearing walls (2 exterior walls and 2 interior corridor walls) and their respective foundations. A clear span truss design would impose all the roof load onto the exterior walls only and none onto the corridor walls. This would be unacceptable since the exterior walls and footings were not designed to carry the increased loading.

(R4, tab 14)

15. According to appellant, the A&E, the contracting office, the "engineers," and inspector Shaw, in oral statements to Mr. Leo Smith, appellant's construction representative, approved appellant's truss design, so long as blocking was installed where the trusses traversed the interior corridor walls. Such statements purportedly were in the IPRDs quoted above, an unsigned 16 January 1995 memorandum of or to "Terry" stating:

> The truss submittal was . . . rejected on 4/15/93 with the only comment being that "extra support blocking needed." . . . After talking with the inspector on 4/5/93 . . . (see his report) the truss fabrication was put on hold until the inspector called. When he called it was determined that the trusses could not be clear span and needed to bear on the blocking at the corridor walls. He stated that the trusses were rejected due to the lack of blocking (borne out by the submittal form pg. 2). Chilstead then reluctantly agreed to provide the additional blocking under protest to get the job moving. At that point the engineer thru the inspector agreed to approve the trusses

> based on the additional blocking being provided. This was done as outlined in the inspector's daily reports. (see 4/5/93 . . . 4/15/93 . . . 5/7/93. . . .) Note: no deficiencies were noted on any of the daily reports.

(R4, tab 51) and appellant's 9 May 1995 letter to the CO stating:

> In the inspector's progress report of April 5th, the inspector requested that we wait until Monday, April 12th before ordering the trusses. Subsequently, in telephone conversation with the consulting engineering firm and Mr. Leo Smith, these trusses were verbally approved and installed.

(R4, tab 45)

16. Since Mr. Smith did not support by affidavit the hearsay attributed to the A&E and Government officials, and it conflicts with the contemporaneous record, such hearsay has no probative value. Appellant's 12 April letter said it was directed to proceed per contract plan, and the A&E and CO disapproved appellant's truss design on 9 and 30 April 1993, respectively. We find that the A&E, CO, and "engineers" did not approve appellant's truss design.

17. Mr. Shaw's 15 September 1995 affidavit stated that he went on the roof before trusses were installed and saw trusses in the parking lot; he did not go on the roof after trusses were installed at the time of inspections because he "had problems with his knees"; he did not have authority to approve appellant's modified truss design; and he did not approve any modifications to the original truss plans. When asked, "did you ask [appellant] if the design plans had been followed," Shaw answered: "I did not physically inspect the trusses to see if they were in compliance with the contract. I took it for granted that [appellant] was following the requirements of the contract." When asked if he was aware of unapproved modifications and whether Shaw approved the trusses by accepting the job, Shaw answered that he accepted the roof because the external job "looked good" and he did not know there were unapproved modifications made by the contractor. (Ex. G-1) Mr. Shaw died after signing that affidavit.

18. Appellant made five progress payments requests, which respondent received on 16 December 1992, 3 May, 4 June, 28 June and 29 July 1993. Each progress payment request certified: "The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract." Each request required appellant to indicate if there were any exceptions to that certification. Appellant did not take any exceptions. (R4, tab 65) After Mr. Shaw verified the percentage of completion, the CO paid the full amount of each progress payment requested. (R4, tabs 24, 65)

19. On 4 August 1993, respondent conducted final inspection and accepted the contract 73 work, except for five punch list items (R4, tabs 23, 25). At the time of final acceptance, the AB trusses and blocking were covered by decking, insulation and roofing (R4, tab 30 at 3), and inspector Shaw was unaware of the truss deviations (ex. G-1).

20. In late April or early May 1994 respondent ascertained that there was no approved truss submittal for contract 73, and decided to investigate what trusses were installed. On 6 May 1994 a CO's representative pulled away insulation and photographed trusses not bearing on the AB's interior walls, with one to two inch gaps above the blocking visible below the bottom truss chord, and sketched the truss panel points, as installed, which did not bear on the interior walls. (R4, tab 30)

21. On 9 May 1994, respondent requested the A&E to determine if appellant's clear span truss design was adequate and if not, to identify required repairs. An A&E handwritten memorandum of that same date stated that the clear span truss, if properly fabricated, was adequate to support the design loads. The A&E reported that although there was no indication of an overstress condition in the trusses, walls or foundations, the load pattern should be distributed to eliminate the possibility of "differential settlement" between the exterior and interior walls, because the former were not originally subjected to a clear span load condition. The A&E calculated that the truss safety factor was 1.15, which was lower than the "preferred" 1.5 safety factor. (R4, tabs 29, 33)

22. The A&E made two site visits and provided a 7 October 1994 "Inspection and Structural Investigation Report" (Report) to respondent. The Report stated, and we find, that the as-built trusses in the AB did not conform to the specification in that: (1) the truss panel points did not bear on the interior walls, thus transferring more of the load onto the exterior walls, and (2) 50 percent of the blocking installed under the trusses was placed tightly against the bottom chord of the truss, but the lack of a panel point aligned above the interior walls produced unacceptable stress on the bottom chord, while the remaining 50 percent of the blocking was installed leaving a ½' to 1½' gap between the blocking and the bottom chord of the truss, providing no truss support. The A&E calculated that the existing load condition resulted in a "Factor of Safety of 1.15" which was "less than preferred minimum factor of 1.50," and recommended installation of additional web members to provide panel points over both interior bearing walls, consultation with the truss manufacturer to provide a revised analysis and load configuration and the web members sizes to be added, and additional blocking at each gap between the trusses' bottom chord and the interior wall blocking. (R4, tab 33)

23. The CO's 13 December 1994 letter to appellant revoked acceptance of contract 73 work due to the defects described in the A&E Report, cited the A&E's

recommendations, demanded that appellant correct those defects, and directed appellant to provide a schedule for completion of the work during fair weather (R4, tab 36).

24. Appellant's 22 February 1995 letter to the CO disputed the revocation of acceptance, but agreed to meet to "outline remedial steps . . . with regard to some minimal additional blocking to provide full compliance with the load bearing requirements of the trusses" (R4, tab 40).

25. The CO's 22 March 1995 letter requested appellant to provide a certified professional engineer's statement that the trusses installed under contract 73 were adequately sized to be supported at each interior corridor wall without causing truss component overstressing; to provide necessary modifications to conform the trusses to contract requirements; and to provide new truss design calculations, shop drawings showing existing field conditions, and shop drawings showing how and where to install the additional members so as to comply with contract requirements (R4, tab 43).

26. Appellant's 9 May 1995 letter forwarded a MITek drawing, adding a 2" x 8" x 18' plank to each face of the truss chords (R4, tab 45). After review and approval by the A&E on 25 May 1995, the CO's 5 June 1995 letter to appellant approved MITek's truss design modification (R4, tabs 46, 47).

27. Appellant continued to request clarification of the CO's 13 December 1994 revocation of acceptance, and reasserted that the "engineer thru the inspector" had approved the deviant truss, based on providing additional blocking. The CO did not answer all of appellant's questions, due to an ongoing fraud investigation of appellant. (R4, tabs 49-53)

28. In response to the CO's 8 September 1995 cure notice (R4, tab 52), appellant's 19 September 1995 letter stated that appellant would make no modifications, except to remove the existing blocking over the interior walls, as recommended by an engineering report from Pikul Engineering, which was enclosed. Dr. Richard R. Pikul reviewed the A&E's 9 May 1994 memorandum. He opined that clear span trusses were a reasonable structural support if interior blocking was removed and bracing requirements were verified. He did not define "bracing requirements." Dr. Pikul stated that the A&E's concern about "differential settlement" between the interior and exterior walls was legitimate, but that the "sustained footing pressure is low and I am not aware of any indications that such settlement has occurred." Dr. Pikul recommended to remove blocking over the interior walls to prevent truss damage under snow loads. (R4, tab 54)

29. The A&E's 26 September 1995 letter to respondent stated that the A&E had reviewed the Pikul report, the A&E agreed that the as-built trusses were not designed for interior blocking points, and the correct calculation of the bearing load yielded a 1.3

safety factor. The A&E was not willing to dismiss the possibility of differential settlement, and continued to recommend that the trusses be re-engineered to provide panel points as shown in the contract drawings. (R4, tab 68) The CO's 20 October 1995 letter to appellant stated that Pikul's recommendations were unacceptable, and required appellant to correct the truss defects (R4, tab 58).

30. Further communications failed to resolve this issue. The CO terminated contract 73 for default on 3 November 1995, citing appellant's failure diligently to prosecute the necessary repairs to correct the deficient roof trusses, and false progress payment certificates that the work was performed in accordance with all terms and conditions of the contract. Appellant timely appealed the termination decision to this Board. (R4, tab 60)

31. On 22 April 1996, the United States filed an action against appellant for treble damages and civil penalties under the civil False Claims Act or, alternatively, for damages for fraud, breach of contract, and unjust enrichment, in the U. S. District Court for the Northern District of New York (ex. G-2). The District Court's 18 August 1998 decision denied the Government's partial summary judgment motion on the False Claims Act and breach of contract claims, based on material facts in dispute concerning whether inspector Shaw had waived the contract requirements and allowed appellant to install the deviant truss system (ex. G-5).

DECISION

Respondent argues that the appellant's as-built roof truss constituted a defect since respondent did not authorize the appellant to change the truss design, and default termination was proper since respondent properly revoked its prior acceptance of the noncompliant trusses due to latent defect, fraud, or gross mistake amounting to fraud. Appellant argues that respondent waived the requirement for truss panel points to align with the interior walls, so long as appellant installed blocking between the interior walls and the bottom chord of the truss; truss defects were "patent"; appellant perpetrated no fraud and made no gross mistake; and so respondent had no right to revoke its prior acceptance of the contract work.

I.

The Government has the burden of proving that its default termination was justified. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 763-65 (Fed. Cir. 1987). Under the circumstances of this appeal, whether the default termination was justified turns on whether respondent validly revoked its final acceptance of the contract 73 work prior to the default termination. The Government may revoke (or "negate") its acceptance under the FAR 52.246-12 Inspection of Construction clause if there are latent

defects, fraud, gross mistakes amounting to fraud, or if it has warranty or guarantee rights. *See Kaminer Const. Corp. v. United States*, 488 F.2d 980, 985, 203 Ct. Cl. 182, 191-92 (1973).

Upon discovery of defects in a contractor's product "after acceptance and payment of the purchase price the Government was entitled to reopen the contract and to avail itself of all provisions of the original contract, notwithstanding the prior acceptance and final payment." *See Jo-Bar Mfg. Corp.*, ASBCA No. 17774, 73-2 BCA ¶ 10,311 at 48,685. Among such provisions is the right to terminate the contract for the contractor's failure to perform adequate or timely repairs of the defective original work. *See Cross Aero Corp*., ASBCA No. 14801, 71-2 BCA ¶ 9075 at 42,086-87 (under the exception to conclusive acceptance provided by the Inspection clause, a latent defect and a breach of warranty "when discovered, entitled the Government to set aside its prior acceptance and to terminate the contract in its entirety as to delivered . . . pins"); *Philos Const. Co., Inc.*, DOT CAB No. 67-33, 68-2 BCA ¶ 7110 at 32,938 (when the contractor failed to perform corrective work in a reasonably prompt manner after post-acceptance notice of defects, "the Contracting Officer properly terminated the contractor's right to continue the performance of the corrective work"). Revocation of acceptance must be done within a reasonable time after the latent defect, gross mistake, or fraud is discovered, or could have been discovered with ordinary diligence. *See Bar Ray Products, Inc. v. United States*, 162 Ct. Cl. 836, 837-38 (1963); *Ordnance Parts & Engineering Co*., ASBCA No. 40293, 90-3 BCA ¶ 23,141 at 116,186.

On 12 April 1993 appellant notified the CO that it was proceeding with the project "as per plan," which in context meant per the Government drawings (finding 12). After 23 April 1993, when the trusses were on the parking lot and newly installed in the AB, appellant did not notify respondent that the trusses were fabricated to the MITek truss design, not to Government drawings, and inspector Shaw did not measure the truss panel points (finding 13). Respondent inspected and accepted the contract 73 work on 4 August 1993 (finding 19). About nine months later, respondent found no approved contract 73 truss submittal, decided to investigate what trusses were installed, and discovered some truss defects on 6 May 1994 (finding 20). From 9 May to 7 October 1994 the A&E investigated the trusses' conformity to the contract requirements and recommended corrective measures (findings 21-22). The parties do not genuinely dispute that the trusses installed did not comply with the contract drawings, and we have so found (finding 22). Respondent revoked acceptance of the contract 73 work on 13 December 1994 (finding 23).

The seven-month interval between discovery of truss defects and revocation of acceptance, during which the A&E investigated to determine conclusively that the trusses were noncompliant, was reasonable. *See Jung Ah Industrial Co., Ltd.*, ASBCA No. 22632, 79-1 BCA ¶ 13,643 at 66,929, *recon. den.*, 79-2 BCA ¶ 13,916 (ten-month delay

after final delivery, while Government conducted tests to determine if wall paneling was "incombustible treated," was reasonable). We next analyze whether respondent had a valid ground to revoke its acceptance of the contract 73 work.

To revoke final acceptance based on fraud, the Government has the burden of proving—

> (1) that its acceptance was induced by its reliance on (2) a misrepresentation of fact, actual or implied, or the concealment of a material fact, (3) made with knowledge of its falsity or in reckless of wanton disregard of the facts, (4) with intent to mislead the Government into relying on the misrepresentation, (5) as a consequence of which the Government has suffered injury.

See Dale Ingram, Inc., ASBCA No. 12152, 74-1 BCA ¶ 10,436 at 49,331. To revoke final acceptance based on "gross mistakes amounting to fraud," the elements of proof are the same as for fraud, except that there is no requirement to prove intent to deceive (or mislead) the Government. *See Bar Ray Products, Inc. v. United States*, 340 F.2d 343, 351, n.14, 167 Ct. Cl. 839, 851, n.14 (1964).

There is unopposed evidence that respondent's inspector accepted the contract 73 work in reliance on the conformity of the AB roof trusses to the contract requirements, and was unaware of their non-compliance (finding 17). Appellant represented to the Government, shortly before installing the trusses, that it had been directed to proceed as per plan, meaning per the Government drawings (finding 12). Thus, the inspector's reliance on conforming trusses was not unreasonable. Appellant knew, but did not disclose to respondent, that the trusses and blocking it installed did not comply with the contract requirements (findings 10, 11, 13). Accepting non-compliant AB trusses and blocking injured respondent by causing potential differential settlement of the exterior and interior walls and unacceptable truss stress (findings 21-22, 25-26). Respondent satisfied the elements of proof of gross mistakes amounting to fraud.

Bar Ray's facts are quite analogous to those in the instant appeal. There, soon after award of photographic processing tray contracts, the contractor sought deviations from specified requirements, but the CO declined to approve them. When the first units were inspected, the contractor misrepresented to the Government inspector that the CO had approved the deviations and the test conditions being used, which did not comply with specified requirements, were "the way it was to be done." The inspector relied on such misrepresentations in determining that the units met specified requirements. The inspector did not ask the CO whether the deviations had been granted, as represented, nor did he familiarize himself with the specifications to verify the true test conditions, but

instead he relied on the contractor's misrepresentations in accepting the noncompliant units. After such units were inspected and paid for, the CO found that they did not meet specification requirements. The court held that "acceptance of the units was induced by such gross mistake as to amount to fraud." 340 F.2d at 351, 167 Ct. Cl. at 851.

Here, appellant told the CO that it was proceeding in accordance with the contract drawings, but shortly thereafter installed deviant trusses withholding such fact from the CO and the Government inspector. That the inspector in *Bar Ray* failed to confirm the deviation and to verify the specified test conditions was not fatal to holding that the contractor's gross mistakes amounting to fraud voided acceptance of deviant trays. That inspector Shaw failed to measure the truss panel point interval in April-May 1993 while on the parking lot and to inspect them before insulation covered them is not fatal to our holding that appellant's gross mistake amounting to fraud gave respondent a valid ground to revoke its prior acceptance of the contract 73 work.

That a defect is visible does not impair the right to revoke acceptance of defective items, when the undetected defect resulted from a gross mistake amounting to fraud. *See Mason's Inc. and Mason Lazarus t/a Mason's Inc.*, ASBCA Nos. 27326, 28183, 86-3 BCA ¶ 19,250 at 97,360-61 (pressure indicators visibly marked "217-00141" instead of specified "217-00241").

Government inspection failures do not nullify its right to revoke acceptance induced by a contractor's gross mistake amounting to fraud. *See Bar Ray, supra; accord Z.A.N. Co.*, ASBCA No. 25488, 86-1 BCA ¶ 18,612 at 43,489 (delivery of stop watches marked "6200" when contract required "Lemania 28260" stop watches was a gross mistake amounting to fraud. "[A]ppellant's gross mistakes outweighed any error of respondent's personnel"); *Jo Bar Mfg. Corp., supra* (contractor misrepresentation that no heat treatment was required was a gross mistake amounting to fraud, despite the Government's failure to perform inspection that might have revealed the defect); *Catalytic Engineering and Mfg. Corp.*, ASBCA No. 15257, 72-1 BCA ¶ 9342 at 43,369-70, *recon. den.*, 72-2 BCA ¶ 9518 (contractor's concealment of facts it had a duty to disclose, namely a prior drawing with polyvinyl chloride end pieces, while providing the Government inspector with revised drawings which induced Government to accept and pay for items with polystyrene end pieces, was a gross mistake amounting to fraud, despite the inspector's mistake of using the wrong drawing when he could have obtained the correct drawing from the CO).

Consistent with the rules regarding gross mistakes established in the foregoing legal precedents, we hold that acceptance of the contract 73 work was validly revoked on account of appellant's gross mistakes amounting to fraud.

II.

We found that the A&E, CO and Government "engineers" did not approve appellant's truss design (finding 16). The IPRD statements of 5, 15, and 28 April and 7 May 1993 appellant cites to support Mr. Shaw's waiver of truss requirements, if the trusses were supported by blocking, do not show that Shaw authorized such trusses (findings 10, 13). Both parties knew that contract 73 gave Shaw no authority to change or to deviate from contract requirements (finding 7). Appellant's 12 April 1993 letter shows that it knew by 12 April 1993 that respondent had informally rejected appellant's deviant truss submittal (finding 12), which was before appellant began installing the trusses on the AB between 23 and 28 April 1993 (finding 13). Shaw denied authorizing appellant's trusses (finding 17). We hold that appellant's argument that Shaw orally waived the prescribed truss requirements is untenable.

Conclusion. In view of our foregoing holding and conclusions we need not address or decide the fraud or latent defect grounds for the revocation and termination. We hold that respondent properly invoked its right to revoke final acceptance of the contract 73 work, and, after appellant declined to correct the defective trusses, properly terminated contract 73 for default. We deny the appeal.

Dated: 30 August 2000

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMPLER
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. 49548, Appeal of Chilstead Building Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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