ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Nobe General Construction	)	ASBCA No. 51105
	)	
Under Contract No. F41612-96-C-0005	)	

APPEARANCE FOR THE APPELLANT: Mr. Toshi Nobe
President

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
John M. Taffany, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE ELMORE[1]

Nobe General Construction (NGC or appellant) has appealed the contracting officer's (CO) 26 September 1997 final decision denying NGC's claim for an equitable adjustment (EA) in the amount of $47,679.73 including delay costs and an extension of the contract performance period of 26.5 calendar days (R4, tab 74; Bd. corr. file).[2] This decision addresses entitlement only (tr. 1/20-22).

GENERAL FINDINGS OF FACT

1. On 28 March 1996 NGC was awarded negotiated firm fixed-price Contract No. F41612-96-C-0005 (C-0005) to "REPLACE FAMILY HOUSING MAINTENANCE FACILITY" at Sheppard Air Force Base, Texas (SAFB). The Government, in line with a statutory cost limit of $750,000, negotiated a "Best and Final Offer [BAFO] (3/19/96)" wherein NGC agreed to provide one totally furnished and installed metal building and 450 tons of asphalt, and wherein a number of deductive items were agreed to which reduced NGC's base price from $775,940 to $722,410. The Standard Form (SF) 1442 informed NGC that the quantities shown on AF Form 3052 (3052), Construction Cost Estimate Breakdown, were estimates only which were to be verified; and contract performance was to commence within 10 calendar days and be complete 240 calendar days after receipt of the notice to proceed (NTP). The NTP was issued effective 23 April 1996.[3] The contract completion date was extended through a series of bilateral modifications to 13 May 1997.[4] The Government took beneficial occupancy on 28 May 1997. (R4, tabs 1-6, 8; tr. 1/166-67, 2/67-68, 78; ex. G-4)

2. NGC filed a claim with the CO on 24 July 1997, subsequently revised 15 December 1997, requesting an equitable adjustment in the amount of $47,679.73[5] as follows (R4, tab 72; AR4, tab Y; ex. A-1):

		MATERIAL COST			LABOR COST		
ITEM	UNIT OF MEASURE	QUANTITY	UNIT	TOTAL	TOTAL	OTHER DIRECT COSTS	LINE TOTAL
Testing	LS	1					$3,319.50
Asphalt Overage	Tons	101	$40.00				$4,040.00
Downspout Boots	EA	9		$2,438.63	$250.00		$2,688.63
Reveal Joint							$250.00[6]
Column Furr-outs	LS	1		$200.00	$100.00		$300.00
Computer Grommets	EA		$20.00	$120.00		$50.00	[$170.00][7]
Pre-engineered Bldg Overage	LS	1					$23,897.00[8]
Delay Costs							$13,184.60
Punch List and Beneficial Occupancy							[$6,004.66][9]
					TOTAL		$47,679.73

DELAY TO SCHEDULE	DAYS OF DELAY	LINE TOTAL
Reveal Joint	5	
Tempered Hdbd modification	[7][10]	
Furr-out modification	7	
Texture Issue Hardbd	14	
HVAC Problems	0.5	
TOTAL	26.5	
Field overhead cost	26.5 days x $4,781.69 / 30 days	$4,223.83
Office OH	26.5 days x $184,000 / 365 days x 722,410 / 1,108,562	$8,705.52
Bldrs Risk	.04 / $100 month x 722,410 x 26.5 days / 30 days	$255.25
	TOTAL DELAY COSTS	$13,184.60

3. On 26 September 1997 the CO issued a final decision denying NGC's EA and time extension claims except for $250 and a two day time extension awarded for NGC's reveal joint claim[11] (R4, tab 74; AR4, tab A). On 31 October 1997 NGC appealed the final decision (Bd. corr. file).

Testing Requirement

FINDINGS OF FACT

4. Solicitation Amendment No. 0002 changed, in pertinent part, the following item in the Statement Of Work (SOW) (R4, tab 1; tr. 1/166-67, 2/67-68):

> (8) Reference Section 02222, page 6 of 6, paragraph 3.4.2. Delete requirement for testing. Trenches shall be compacted to 95% density; however, no testing shall be required.

5. Section 02222, ¶ 3.4.2, Field Density Tests, stated (R4, tab 9):

> Tests shall be performed in sufficient numbers to ensure that the specified density is being obtained. A minimum of one field density test per lift of backfill for every 50_feet [sic] of installation shall be performed.

6. Mr. Nobe during BAFO eliminated $1,500 originally quoted on the form 3052 for testing (tr. 1/53, 128; ex. G-4).

7. NGC, in its 13 May 1996 letter signed by its project manager, Mr. Robert B. Miller, III, asked the Government to: (1) approve a no cost change request to reduce the two trenches for the electrical conduit to a single trench; and (2) permit NGC to follow UL-90 requirements in lieu of the Uniform Air Pressure Difference test because "test[ing] . . . was not included in [NGC's] price during the negotiations for [the] contract." (R4, tab 12)

8. On 31 May 1996 NGC requested that the Government clarify the contract's testing requirements because the $1,500 included in NGC's bid proposal for this purpose was negotiated out at the BAFO (R4, tab 14).

9. The CO on 10 June 1996 informed NGC it was the Government's position that the testing eliminated at the BAFO and memorialized in solicitation Amendment No. 0002 was for the fill for the utility lines required by § 02222, ¶ 3.4.2 (R4, tab 17).

10. On 14 June 1996 the CO, memorializing a 14 June 1996 telephone conversation with NGC, stated that although the only testing deleted from the contract was the utility trench testing, that due to "some confusion about the testing" the Government was amenable to modifying the contract to include the $1,500, deleted by NGC during negotiations, as the allowance for testing (R4, tab 19).

11. By facsimile (FAX) dated 10 April 1997 NGC proposed deleting the contract requirement for phone telletes in exchange for the $1,500 NGC was to be reimbursed for performing testing (R4, tab 55).

12. The CO documented in her Price Negotiation Memorandum of 29 April 1997 her acknowledgment that NGC was entitled to $1,500 for testing; that the contract required NGC to provide telletes; that NGC agreed to substitute contractor constructed telletes and accept a two-week time extension and $500 in exchange for the original prefabricated telletes and $1,500 to be paid for testing (R4, tab 87).

13. On 1 and 9 May 1997 NGC and the CO, respectively, executed bilateral Modification No. P00007 which provided in pertinent part (R4, tab 8):

> B. Modification is written to allow contractor $500 and a two-week time extension in exchange for $1,500 for testing which was accomplished. Contractor will provide shop

> fabricated, plastic laminate covered phone telletes of the same general configuration and size as the specified telletes. . . .
>
> . . . .
>
> K. Contractor hereby agrees to the change as set forth above and unconditionally waives any claim against the government by reason of the same and does thereby release it from any and all obligations which may arise because of such changes.

14. On 24 July 1997 NGC filed a claim with the CO stating (R4, tab 72):

> Testing was rigidly enforced by the Base in accordance with the contract. The Base agreed to modify the contract to add the original testing fee of $1,500 into the contract. However, the actual cost to perform the testing to date is $4,819.50 and the base is requesting additional lab tests on the asphalt in place. We are requesting a sum of $3,319.50. [Emphasis in original]

15. On 26 September 1997 the CO issued a final decision stating (R4, tab 74; AR4, tab A):

> The government intended to only delete compaction testing of the utility trenches from the negotiated contract. We did not intend to eliminate all of the testing. Your original proposal included a cost of $1,500 for testing which you dropped from your Best and Final Offer. However, since there did appear to be confusion over the required testing, Modification P00007 was written to allow you $500 and a two-week time extension in exchange for the $1,500 which you requested for testing in your letters and which was also included in your initial estimated costs for the work. Therefore, your request for additional costs of $3,319.50 is denied.

DECISION

The essential elements of an effective accord and satisfaction are: (1) proper subject matter, (2) competent parties, (3) meeting of the minds of the parties, and (4) consideration. *Omega Services, Inc.*, ASBCA No. 38885, 93-3 BCA ¶ 25,980 at 129,186, citing, *Infotec Development, Inc.*, ASBCA Nos. 31809, 32235, 91-2 BCA ¶ 23,909 at 119,786. We see no reason to belabor this issue for NGC does not argue, and we do not

find, that any of the cited elements were missing when NGC executed Modification No. P00007 without reservation (finding 13). The law is clear and we find that NGC's claim for additional compensation for the testing performed prior to 1 May 1997, the date Modification No. P00007 was executed without reservation, is precluded based on the general scope of the release and the legal principle of accord and satisfaction. *Id.*; *Barling Company*, ASBCA No. 45812, 95-1 BCA ¶ 27,542 at 137,249.

The testing requirement portion of NGC's appeal is denied.

Asphalt Overage

FINDINGS OF FACT

16. Solicitation Amendment No. 0002 changed, in pertinent part, the following SOW item (R4, tab 1):

> (2) Change 3-inch HMAC [Hot Mixed Asphalt Cement] to 2-inch HMAC.
>
> (3) Change reinforced concrete drives to asphalt pavement section to match balance of parking lot.

17. The Government's lead civil engineer, Mr. John T. Gilmore, III, in accordance with the changes made in the SOW and using the contract drawings, allowing for minor construction tolerances, estimated 450 tons of asphalt was needed for the parking lot and parking lot entry points (R4, tab 94). The Government's asphalt estimate prior to the change was 675 tons (R4, tab 74; AR4, tab A).

18. The Government, in accordance with the changes in the SOW and Mr. Gilmore's calculations, revised the contract SCHEDULE, Section B, Supplies or Service and Prices/Cost to estimate a total of 450 tons of HMAC was to be provided. NGC's BAFO dated 19 March 1996 offered a unit price of $40 a ton, and a total price of $18,000, to provide asphalt. (*Id.*; R4, tab 94)

19. Contract § 02551, Bituminous Courses For Pavement (Central-Plant Hot-Mix), ¶ 12, Measurement for Payment, and ¶ 13, Basis for Payment, provided (R4, tab 9):

> 12.1 Hot-Mixed Asphalt Cement (HMAC) Pavement: The quantity of hot-mixed asphalt cement (HMAC) pavement to be paid for will be the number of 2000-pound tons of hot-mixed asphalt concrete (HMAC) pavement mixture

> installed when paving asphalt pavements as specified herein, as directed by the Contracting Officer, and accepted in the completed work. Deductions will be made for any material wasted, unused, rejected, used for the convenience of the contractor, or used for purposes other than those stated herein. Bituminous mixture shall be weighed after mixing.
>
> . . . .
>
> 13.1 Hot-Mixed Asphalt Cement (HMAC) Pavement: Payment for the quantity of hot-mixed asphalt cement (HMAC) pavement, determined as specified above, will be made the contract unit price per ton, as established in the bid schedule, or at a reduced price adjusted in accordance with paragraph ACCEPTABLITY OF WORK. Such payment shall constitute full compensation for all labor, materials (Including prime and tack coats), equipment, overhead, profit, supervision, and other incidentals necessary to compete the work.

20. NGC, prior to submitting its proposal, did not verify the Government's estimate that 450 tons of asphalt was needed for paving the parking lot and parking lot entry points (tr. 1/89-90). On 8 April 1997 NGC provided the CO with the last load ticket from its asphalt subcontractor showing that a total of 551.05 tons of asphalt had been provided. (R4, tab 54; tr. 1/103-05)

21. The CO, in her 25 April 1997 correspondence to NGC, stated that since NGC installed the asphalt three to four inches deep, as verified by Mr. Charles Brodell, the Government inspector, and Mr. Russell Ritter, NGC's project superintendent, although the asphalt lifts were reduced from three inches to two inches and the need for 450 tons of asphalt was negotiated, no compensation for the overage would be made (R4, tab 58). Mr. Brodell testified he was not at the site during the entire time the asphalt was being laid; that no systematic verification was made; his verification of the asphalt thickness was based on his "looking at it [in] two or three places" and noticing "in one or two spots where [asphalt] was against a curb" that it exceeded two inches; and he expected to see the asphalt lifts go from "an inch and three-quarters [to] an inch and a half" (tr. 2/115, 124, 128-30). Mr. Ritter was not called to testify and the Government did not introduce evidence, *i.e.*, a report or other documentation describing the location and number of tests performed, which supports the contention Messrs. Ritter and Brodell verified asphalt depth to be three to four inches.

22. On 24 July 1997 NGC filed a claim with the CO stating (R4, tab 72):

> The quantity of asphalt was priced as a unit price in the contract. . . . The amount included in the contract documents was 450 tons at $40/ton or $18,000. The actual amount of asphalt installed was 551 tons. . . . The base responded . . . that the asphalt was installed at a thickness greater than 2" in some locations. This may be true considering the tolerance requirements for the parking. I do not think it is realistic to state that the asphalt would be exactly 2" in every location tested. The asphalt price was apparently included as a unit price to account for this type of discrepancy. The Base has determined that we are not entitled to compensation. . . . We are requesting you re-evaluate the situation. We are requesting a sum of $4,040. [Emphasis in original]

23. On 26 September 1997 the CO issued a final decision stating (R4, tab 74; AR4, tab A):

> The quantity of asphalt was listed as a unit priced item in the contract and it was your responsibility to provide the weight tickets before payment was made.
>
> The project, as originally designed, required a parking area with 3 inches of asphalt with concrete approaches on each of the three access driveways. Through negotiations, the thickness of the asphalt was reduced from 3 inches to 2 inches and the access driveways were changed from concrete to asphalt of 2 inches thickness.
>
> After the changes to the parking area were made during negotiations, the total area of the parking area to receive asphalt was determined to be 3,763 square yards. The necessary asphalt tonnage to complete the work was calculated as 220 pounds per square yard (220 LB/SY x 3,763 SY = 827,860 LB) (827,860 LB divided by 2,000 LB/TN = 413.93 TON). Considering that minor deviations due to construction tolerances are probable, we allowed a negotiated quantity of 450 tons, an 8.71% increase over the calculated amount if 413.93 tons. In fact, your test reports indicate an average specific gravity of asphalt of 2.336 which translates into a weight of 218.65 pounds per square yard at 2 inch thickness, slightly less than the 220 pounds used in our

> quantity calculations. If 218.65 TON/SY is used, the calculated tonnage is 411.39, even less than 413.93.
>
> The 450 tons was an adequate amount to cover the entire area to be asphalted [sic]. Therefore, your request for an additional $4,040 is denied.

DECISION

NGC has produced evidence, undisputed by the Government, that 551.05 vice 450 tons of asphalt were used to complete coverage of the parking lot and its three entry points (finding 20). The Government contends, in effect, that some of the asphalt was used other than as required by the specifications.

Prior to Amendment No. 0002 the Government estimated NGC would need 675 tons of asphalt to provide a 3-inch covering in the parking lot. After Amendment No. 0002 NGC would need 450 tons of asphalt to provide a 2-inch covering in the parking lot and the entry points. The Government contends the new total of 450 tons of asphalt resulted from calculations made by Mr. Gilmore which took into account the parking area and three entry points which were not originally to be covered with asphalt (findings 17, 23). We find the Government's computation resulting in the estimated 450 tons strained. First we note that if we take the 675 tons, originally estimated to provide the parking area with a 3-inch asphalt covering, and reduce it by one-third (225 tons) for the deleted 1-inch lift, the parking area would require an estimated 450 tons for the new 2-inch asphalt cover. We are hard pressed and the Government has not explained how the three entry areas that now require a 2-inch asphalt covering also could be accommodated out of the same estimated 450 tons necessary for the parking area.

We find that Mr. Gilmore's testimony of how he reached the need for 450 tons of asphalt lacks credibility and accordingly is unpersuasive. The Government has not established that any deductions should be made. Under the payment provisions for bituminous course for pavement, NGC is entitled to be paid for the actual amount of asphalt used (finding 19, *supra*).

The asphalt overage portion of NGC's appeal is sustained.

Downspout Boot

FINDINGS OF FACT

24. Specification § 13120, ¶¶ 1.4.5 and 2.5 provided in pertinent part that cast iron downspout boots as indicated in the drawings should be furnished and installed at all downspouts (R4, tab 9; tr. 1/169-70).

25. Architectural drawings A3, at the north and south elevation detail, and A4, at the exterior wall section, included a statement that cast iron downspout boot, McKinley type DS8 or approved equal painted to match downspouts were typical at all downspouts (R4, tab 10; tr. 1/170-72).

26. NGC does not dispute the Government's contention that the specifications and the drawings state cast iron downspout boots were to be provided but argues they were not listed on the 3052 as a separate item misleading NGC to conclude "just a regular downspout boot" was to be provided. Mr. Nobe admitted that when he prepared his bid proposal he compared the 3052 with the drawings and specifications and was aware of the need for downspouts but he "missed" the requirement for the steel boots. (Tr. 1/60, 106-08, 2/50-52, 56-57)

27. On 24 July 1997 NGC filed a claim with the CO stating (R4, tab 72):

> Downspout boots were reflected in the drawings on detail 2 on sheet A4. . . . The cost of these downspout boots was $2,438.63 for the material, approximately $100 to paint them and $150 to install them. The Sheppard Air Force base breakdown did not include these boots. In fact the unit price for the downspouts was a total of $474. The downspout boots were required in addition to the downspouts. We are requesting a sum of $2,688.63. [Emphasis in original]

28. On 26 September 1997 the CO issued a final decision stating (R4, tab 74; AR4, tab A):

> As you stated in your letter, downspout boots were reflected in the drawings on detail 2 on sheet A4 of the drawings [sic]. The AF Form 3052 which you were provided did show a line item for downspouts. Since downspout boots were shown on the drawings, the downspout boots should have been included in the cost with the downspouts. If you had a question concerning this requirement which was shown on the

> Statement of Work, you should have posed the question during the negotiations. Therefore, your request for $2,688.63 is denied.

DECISION

It is black letter law that to preserve the integrity of the bidding process, contractors must bid on the basis of meeting the contract requirements. *Troup Bros., Inc. v. United States*, 643 F.2d 719, 723 (Ct. Cl. 1980). Although not stated as such, Mr. Nobe argues that the contract should be reformed and the Government be made to pay the cost NGC allegedly spent to provide cast iron downspout boots which he, Mr. Nobe, missed when preparing his bid (finding 26).

The Federal Acquisition Regulation, 14.407-4(c), provide that where a contract has been awarded before a mistake in bid is alleged, the contract will be reformed "only on the basis of clear and convincing evidence that a mistake in bid was made." A contract will not be reformed because of a unilateral mistake in a bid unless the contractor establishes *inter alia* that the error resulted from a "'clear cut clerical or arithmetical error, or misreading of the specifications.'" *United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038, 1046 (Fed. Cir. 1983), quoting *Aydin Corp. v. United States*, 669 F.2d 681 (Ct. Cl. 1982). Mr. Nobe's unilateral bid mistake did not result from a misreading or arithmetical error but rather was due to carelessness which is not an established ground for reformation (*id.*).

Assuming, *arguendo*, we had found that a mistake had been in fact made, NGC's claim would still be denied for there is no proof the Government had actual or implied knowledge of the error. *Wender Presses, Inc. v. United States*, 343 F.2d 961, 962 (Ct. Cl. 1965).

The downspout boot portion of NGC's appeal is denied.

Reveal Joint

FINDINGS OF FACT

29. Architectural drawing A10, Detail At Hardboard Joints, states that galvanized steel "Shallow V" plaster reveal joint will be placed between panels of 1/4-inch fire retardant hardboard the full height of the joint (R4, tab 10).

30. The Government inspector's Daily Inspection Record (DIR) for 10 March 1997 indicated that NGC was experiencing problems installing the metal joint between the hardboard. The DIR for 12 March 1997 indicated NGC had started installation of the

hardboard wall in the open bay area. (Ex. G-5) Neither Mr. Nobe nor Mr. Miller testified that the project was delayed because of the problem associated with the reveal joints.

31. On 24 July 1997 NGC filed a claim with the CO stating (R4, tab 72):

> Tempered Hardboard was included as Alternative #5. Detail 5 on sheet A10 shows a Keene Shallow "V" plaster reveal joint. This detail would not work without a modification to the shallow "V". The lath that was attached to the Shallow "V" had to be field modified (the lath cut off) for the tempered hardboard to set against the wall. This detail would not work as specified. The cost to field modify this shallow "V" was approximately $250 and approximately 1 week of delay. We are requesting a sum of $250.00 and one (1) week of delay. [Emphasis in original]

32. On 26 September 1997 the CO issued her final decision stating (R4, tab 74; AR4, tab A):

> We concur that you performed modifications to plaster reveal joints. However, the government did not observe more than 2 days of work to cut these joints. We agree to payment of $250.00 for these joints.

DECISION

The tempered hardboard in the shop area was to have a metal reveal joint between the panels; the specifications called for a plaster reveal joint; and NGC had to modify (snip off) the plaster reveal joint and install the correct reveal joints (tr. 1/199, 2/115-16).

The CO conceded in her final decision that NGC's claim for an equitable adjustment of $250 to modify the reveal joints was meritorious.[12]

NGC, seeking an extension in performance time and associated delay costs, has the burden of showing that the delay impacted its performance schedule. *TPI International Airways, Inc.*, ASBCA No. 46462, 96-2 BCA ¶ 28,602, *aff'd*, 135 F.3d 776 (Fed. Cir. 1998) (table), *cert. denied*, 525 U.S. 874 (1998). NGC has not provided evidence (*e.g.*, daily inspection reports, contractor construction logs, or testimony) that the overall contract completion date was delayed beyond the two-day extension granted by the CO for the reveal joint modification which is not in issue. Mere assertions and unsupported allegations of increases in contract completion time cannot serve to prove a party's

position. *Harvey Honore Construction Co., Inc.*, ASBCA No. 47087, 94-3 BCA ¶ 27,190 at 135,509. NGC's claim for an additional three calendar days of delay fails for lack of proof.

The reveal joint portion of NGC's appeal is denied.

Column Furr-Outs

FINDINGS OF FACT

33. NGC, during the pouring of the concrete foundation, prepared an anchor bolt hole pattern, which was sent to METCO, NGC's steel building provider, for use in manufacturing the steel columns. NGC installed the anchor bolts into the concrete foundation according to its prepared bolt hole pattern. When the METCO steel columns arrived the anchor holes were misaligned because METCO manufactured them using their own anchor bolt pattern. (Tr. 1/112-13, 142-45, 188-89)

34. Mr. Clark, the Government's project manager/architect during a site visit noticed that the two end-wall columns on the facility's west side had to be toed-in and installed out of plumb by pulling in the bottom of the column to set it on the anchor bolts. Mr. Clark opined that the problem resulted from either the foundation slab being too short for the building or the building being too long for the slab. When the walls were set in there was a distinct variation between the plumb line of the wall and the plumb line of the column. Mr. Ritter, NGC's superintendent, in a conversation with Mr. Clark suggested that the two columns be furred around to hide the mistake. (Tr. 1/161, 194-95) Mr. Ritter was not called to testify.

35. On 24 July 1997 NGC filed a claim with the CO stating (R4, tab 72):

> SAFB BCE required a furr-out at the End columns and Intermediate columns in Parts/Supply area and Work shop to be constructed of wood in lieu of sheetrock. The cost of these furr-outs was $200 to install and $100 to prime and paint. This requirement was not shown on the drawings. In addition, approximately 1 week of delay to the schedule was caused by our having to submit a sketch for approval. This design should have been provided by the Base. We are requesting a total of $300.00 with a delay of one (1) week. [Emphasis in original]

36. On 26 September 1997 the CO issued her final decision stating (R4, tab 74; AR4, tab A):

> The plans show the metal stud and gypsum board walls to terminate into the web of the column behind the column flange. The problem stems from the fact that the foundation is constructed too small for the metal building frame. The building erector had to "toe-in" the end wall columns approximately 1" to 2" at the base plates to make the frame fit on the foundation. This resulted in the end wall columns being installed out of plumb. The metal stud and gypsum board walls were subsequently installed and butted into the out-of-plumb columns. This created an unacceptable and unsightly gap between the out-of-plumb column flange and the plumb walls. When we indicated that this was unsightly and not acceptable as a professional installation, your superintendent suggested building a column furr-out of gypsum board to conceal the columns and their error at no additional cost to the government. We agreed to wood in lieu of gypsum board due to the abuse these walls receive in day-to-day operation. Further, the endwall columns are not installed in accordance with American Institute of Steel Construction (AISC) requirements regarding plumbness as required by the specifications. Your request for $300.00 and a delay of one week is denied.

DECISION

NGC has the burden of proving its affirmative claim against the Government by a preponderance of the evidence and in a case heard on entitlement only, to establish liability and at least the fact of resultant injury. *TPI International Airways, supra.* Under the facts of this appeal we attribute great evidentiary weight to the Government's uncontroverted testimony that the variation was caused by NGC having to toe-in the base plate of two columns to make them fit the anchor bolts; that this toe-in caused the gap between the column flange and the wall. Mr. Ritter suggested furr-outs as a fix which the Government accepted to mitigate NGC's liability. Appellant, except to assert in its claim that it incurred added material and labor costs to correct the out-of plumb variations between the wall and the affected columns, failed to prove these costs were due to the Government's specifications and drawings. Claim letters and pleadings are not proof of disputed facts. *Peterman, Windham and Yaughn, Inc.*, ASBCA No. 21147, 77-2 BCA ¶ 12,674. NGC failed to provide evidence proving that the alleged added costs and additional performance time to provide the furr-outs were not the result of its mis-designed slab.

The column furr-out portion of NGC's appeal is denied.

Pre-Engineered Building

FINDINGS OF FACT

37. Mr. Nobe, when preparing NGC's bid proposal, provided "a number of metal building suppliers," including METCO its metal building supplier, with a set of drawings and in return received prices which he found to be within the published price guideline. Prior to NGC and the Government BAFO negotiation NGC received from METCO a verbal unit price estimate, a "ballpark figure," for the manufacture of the metal building. (Tr. 1/61-62, 67, 2/107-08, 111-12; finding 1 *supra*)

38. After contract award NGC approached METCO to negotiate the cost to manufacture the metal building but METCO "stalled on pricing," refusing to hold to their verbal price estimate alleging: (1) the building was not a standard metal building but a "custom designed" vice a "pre-engineered" building; (2) the steel sizes, steel spacing and square footage weren't viewed as a "standard size" building; (3) and they, METCO, were busy with many other jobs (tr. 1/63-67, 108-10). METCO's original estimator was no longer employed at METCO when the price negotiations were ongoing (tr. 1/109). Mr. Nobe contends he was left with "no other recourse" but to accept METCO's $23,897 price increase for the metal building and on 10 July 1996 NGC issued a purchase order to METCO (tr. 1/62-63; R4, tab 40). A METCO spokesperson was not called to testify.

39. On 19 November 1996 NGC requested a contract time extension of 35 calendar days due in part to the late shipment of steel material. NGC stated the original delivery date for the steel was "09-09-96" but the actual delivery did not occur until "10-01-96" (R4, tab 37). Mr. Todd Frischmuth, NGC's employee assigned to help in getting pricing for metal buildings testified that in the metal building industry the price "depends on supply and demand pretty much" (tr. 2/110).

40. On 4 December 1996 NGC requested a contract time extension of 61 calendar days due to inclement weather and late steel delivery. NGC contended, in pertinent part, that METCO, when contacted on "07-10-96" to provide the metal building, verbally promised delivery on "09-07-96"; NGC received the steel shipment on "09-30-96"; the actual delays were "09-07-96 through 09-30-96" (23 calendar days or 16 working days); that NGC, per the progress reports, completed no actual direct work between "08-31-96 and 09-27-96", the period NGC expected to receive the steel shipment. (R4, tab 40)

41. On 19 December 1996 the parties executed bilateral Modification No. P00001, effective 17 December 1996, extending the contract completion date 61 calendar days, to 18 February 1997, with no increase in the contract price. NGC, agreeing to the extension

of the performance period, did not reserve a right to any additional specific claim and "unconditionally waive[d] any claim against the government by reason of the same and . . . thereby release[d] it from any and all obligations which [could] arise because of such extension of performance period." (R4, tab 2)

42. On 24 July 1997 NGC filed a claim with the CO stating (R4, tab 72):

> The Division 4 price breakdown reflects that the Lump Sum cost for the "pre-engineered Metal Building" was $39,403. Design drawings were required for this particular building based on the wind loads in this area; this design time delayed construction and drove up the costs. Actual cost was $47,300.14 for the material and $16,000 for erection. This does not take into account the delay to the schedule between 8-21-96 when concrete was poured and 10-1-96 when the steel was finally delivered. We were given a change order only to add time for this issue. A pre-engineered building is a building which is generally readily available. The Purchase Order for steel on this job was placed on 7-10-96. Steel was not delivered until nearly 3 months later; a pre-engineered building is normally available within 30-45 days. <u>We are requesting a sum of $23,897.00</u>. [Emphasis in the original]

43. On 26 September 1997 the CO issued her final decision wherein she stated in pertinent part (R4, tab 74; AR4, tab A):

> The requirements for the pre-engineered metal building were clearly stated in the specifications . . . including all design requirements. None of these requirements were altered or amended during the negotiations. . . .
>
> You were advised on 22 November 1996 that you were 23.9% behind schedule. Your letter dated 19 November 1996 was received on 26 November 1996 requesting a time extension because steel which was scheduled to be delivered on 9 September 1996 was not received until 1 October 1996. The government did not cause any delay in the receipt of the steel. Any delays were a lack of coordination between your company and the metal building supplier in coordinating the shop drawings and anchor bolt placement.

> . . . . Your company did not coordinate the foundation and anchor bolt design with the metal building manufacturer; hence a metal building arrived that did not line up with the anchor bolts and was too small for the foundation already cast in place. The anchor bolts had to be cut and new adhesive type anchors installed; this led to much of the delay and is a marginal to poor fix at best.
>
> You requested a time extension of 16 working days for the delay in receipt of the steel and Modification P00001 was written to extend performance period for 61 calendar days to include 16 working days for the steel delays and weather days as you requested. The government did not delay you in any way and the government has no obligation to reimburse you for delays caused by your subcontractors or suppliers. Work could have been accomplished in the other areas in which you were behind during this period. Your request for $23,897[13] is denied.

DECISION

The elements of accord and satisfaction, as previously discussed in the testing claim above, were in place when NGC executed bilateral Modification No. P00001 (finding 41). Accordingly, NGC's execution of Modification No. P00001 without reservation precludes it from being awarded additional compensation due to delay in receiving the steel from METCO.

Assuming, *arguendo*, that Modification No. P00001 excluded NGC's equitable adjustment request, NGC still could not prevail in this matter. NGC argues entitlement to $23,897, the price increase it allegedly experienced to acquire and erect the metal building, due to the metal building being misdescribed as a pre-engineered building when in reality it was a custom building. NGC contends the misdescription of the metal building misled METCO into thinking the building was an off-the-shelf item, that after award of the subcontract it was determined the building was not an off-the-shelf item but a custom built building requiring designing by METCO which in turn delayed the building's delivery (findings 38, 42).

NGC's contention that METCO's increased price resulted from a determination the metal building was custom designed vice pre-engineered is meritless. Mr. Nobe concedes METCO, prior to submitting its original verbal price estimate, was provided a set of drawings and did not raise any questions regarding the metal building's dimensions;

METCO submitted a verbal unit price estimate for the manufacture of the metal building, assumedly on the basis the metal building was an off-the-shelf pre-engineered building; the Government was never advised of an issue regarding the metal building's dimensions prior to awarding the contract to NGC; and METCO, after being awarded the subcontract by NGC, increased its original verbal unit price estimate by $23,897, raising for the first time the contention the metal building was a custom design vice a pre-engineered metal building (findings 37-38). Clearly, METCO was, or should have been, aware of the metal building requirements at the time it submitted its verbal estimate to NGC and it was at this time METCO should have raised any issues regarding the metal building's dimensions. The Board draws an adverse inference from Nobe's failure to call a METCO representative to corroborate the allegation that it, METCO, concluded the contract called for a custom vice a pre-engineered metal building. *Grunley-Walsh Construction Co. Inc., W.G. Cornell Co. of Washington, Inc., a Joint Venture*, ASBCA No. 33004, 90-1 BCA ¶ 22,362 at 112,343.

NGC's acceptance and submittal of METCO's verbal estimate in its bid proposal and during BAFO negotiations was a business decision for which NGC assumed the risk. *Tri-States Service Company*, ASBCA No. 31139, 90-3 BCA ¶ 23,059 at 115,773, citing, *Liebherr Crane Corp. v. United States*, 810 F.2d 1153 (Fed. Cir. 1987).

The pre-engineered building portion of NGC's appeal is denied.

Tempered Hardboard

FINDINGS OF FACT

44. Contract § 09900, Painting, General, ¶ 3.8, Painting Schedule, stated that tempered hardboard will be painted with primer and paint as specified (R4, tabs 9, 84).

45. On 21 March 1997 NGC's project manager, Mr. Miller, informed the CO that the subcontractor indicated additional money would be required for the application of texture on the tempered hardboard, as required by the Government, and the installation of the hardboard molding and the painting of the tempered hardboard was held up awaiting resolution of the issue. Mr. Miller conceded he was not at the site when this issue arose but that he "believed" he was notified immediately by his superintendent, Mr. Ritter. (R4, tab 52; tr. 1/146) A representative of the subcontractor was not called to testify.

46. Mr. Clark testified the drawings called for the hardboard to be adhered to the gypsum board with glue; that NGC was using common roofing nails which was incompatible for adhering hardboard to the gypsum board at the metal studs; that NGC had to remove the nails which resulted in some damage to the face of the hardboard, and

Mr. Ritter suggested that a texture covering be used to hide the imperfections in the hardboard resulting from the removal of the nails (tr. 1/200-02; R4, tab 52).

47. On 24 July 1997 NGC filed a claim with the CO stating (R4, tab 72):

> NGC was delayed for approximately 2 weeks related to the issue of the tempered hardboard. The Base inspectors were requiring texture on this hardboard which was not required by contract. We submitted a request to the base on this issue on 3-21-97 and indicated that we could not proceed with this installation. We are requesting a delay of two (2) weeks. [Emphasis in original]

48. On 26 September 1997 the CO issued a final decision stating (R4, tab 74; AR4, tab A):

> You were never directed to use texture on the hardboard walls. The question was asked by your superintendent in an attempt to cover some of the fasteners and wallboard imperfections since nails had been used to fasten the hardboard to the metal studs in lieu of drywall screws. We allowed you the option to use texture if you desired. Your letter dated 21 March 1997 was received concerning the texture and our letter dated 1 April 1997 in reply stated that hardboard should be painted with primer and paint as stated in the specifications. . . . Your request for a delay of 2 weeks is denied.

DECISION

NGC, seeking an extension in performance time and associated delay costs, has the burden of showing the delay impacted its performance schedule. *TPI International Airways, supra.* NGC at the very least should have provided evidence such as a schedule of work or certified payroll records, showing when the tempered hardboard was ready for painting, who did the work when, and how the use of texture increased the contract performance time by two weeks. NGC, except to assert it was delayed two weeks, has provided no discernible proof the performance schedule was impacted or additional cost incurred. It is black letter law that mere assertions and unsupported allegations of increases in performance costs and/or contract completion time cannot serve to prove a party's position. *Harvey Honore Construction Co., Inc.*, *supra*; *Zinger Construction Company, Inc.*, ASBCA Nos. 28788, 32424, 87-3 BCA ¶ 20,196 at 102,291. Appellant

has not provided evidence upon which we can conclude that its contract was delayed due to the use of texture on the tempered hardboard.

In any event, we draw an adverse inference from appellant's failure to rebut Mr. Clark's testimony that the use of texture on the tempered hardboard was Mr. Ritter's suggestion to hide the imperfections in the hardboard resulting from appellant's use of nails vice screws and glue and hence appellant has failed to demonstrate entitlement to this element of its claim.

The tempered hardboard portion of NGC's appeal is denied.

HVAC Delay

FINDINGS OF FACT

49. On 28 May 1997 the Government took beneficial occupancy of the building ending the Government's assessment of LDs (tr. 2/78-79).

50. On or about 2 July 1997 the Government informed NGC that the heating, ventilating, air conditioning system (HVAC) was not working properly and requested the system be inspected (R4, tab 68; tr. 2/78). By FAX transmittal dated 7 July 1997 NGC informed the CO the HVAC equipment had been inspected by the plumbing subcontractor, F.G. Haggerty Plumbing Co., Inc., and was found to be operating properly but that the air quantities were approximately 20 percent short of what was designed on the plans, a problem attributable to undersized ductwork (R4, tab 70).

51. On 24 July 1997 NGC filed a claim with the CO stating (R4, tab 72):

> HVAC was apparently missized [sic] by the designer in terms of duct sizes and the building is not adequately cooling. This issue had required approximately 4 hours of coordination time. We are requesting a delay of 1/2 day. [Emphasis in original]

52. On 26 September 1997 the CO issued her final decision stating (R4, tab 74; AR4, tab A):

> Return air ductwork may have been undersized by the mechanical engineer and we have received the letter which you forwarded from Haggerty Plumbing; however, we do not agree that you are entitled to 1/2 day of delay for this. Your request for a delay of 1/2 day is denied.

DECISION

NGC, seeking an extension in performance time and associated delay costs has the burden of showing the delay impacted its performance schedule. *TPI International Airways, supra.* The Government took beneficial occupancy of the building on 28 May 1997. NGC's review of the HVAC system took place on 7 July 1997, one month after beneficial occupancy. NGC except to assert it was delayed 1/2 day has provided no proof its contract performance schedule was impacted or additional cost incurred. We are hard pressed, and NGC has failed, to show how its contract performance was delayed when the HVAC issue was after beneficial occupancy. It is black letter law that mere assertions and unsupported allegations of increases in performance costs and/or contract completion time cannot serve to prove a party's position. *Harvey Honore Construction Co., Inc., supra* at 135,509; *Zinger Construction Company, Inc., supra* at 102,291.

The HVAC delay portion of NGC's appeal is denied.

SUMMARY

NGC's appeal, except for the asphalt overage portion which is sustained and remanded to the CO for settlement discussions, is, in its entirety, denied.

Dated: 23 August 2000

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

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

NOTES

[1] References to the record will be as follows: appeal (R4) file; appellant's supplemental appeal file (AR4); Government (ex. G-) and appellant (ex. A-) exhibits; Board's correspondence file (Bd. corr. file); transcript (tr.).

[2] NGC's original EA and time extension claims were $51,332.32 and 33.5 calendar days respectively. During the hearing NGC abandoned or withdrew some of its EA and time extension claims. Although we are deciding entitlement only, for accuracy we reduce NGC's EA and contract time extension claims to $47,679.73 and 26.5 calendar days respectively. (R4, tab 72; AR4, tab A; finding 2 *infra*; notes 6-10 *infra*)

[3] We find the statements in the memoranda at R4, tabs 77 and 77A that the NTP was issued "23 Aug 96" to be typographical errors.

[4] At award the date for contract completion was 19 December1996.

[5] NGC submitted three delay claim computations (R4, tab 72; ex. A-1; AR4, tab Y). We have combined these submittals with the evidence produced during the hearing to produce the charts at finding 2.

[6] The $250 was used to offset assessed liquidated damages (LDs) for late completion of the contract. NGC did not appeal the assessment of LDs. (Tr. 1/71, 76-80)

[7] NGC abandoned this portion of the claim (tr. 2/150-51) and the claimed amount was deducted from NGC's claim total.

[8] We find the amount claimed by NGC was rounded down to the nearest dollar and, fourteen cents, the difference between the sum requested and the alleged cost to purchase and erect the metal building, was dropped.

[9] NGC "waived" this item since it was never appealed to the CO (tr. 1/74). We do not include this amount in the total claimed.

[10] NGC modified ex. A-1 removing the 7-days of delay claimed for the tempered hardboard (tr. 2/61-62). The Board reduced the delay by 7 days and re-computed the total delay costs accordingly.

[11] See note 6 *supra*.

[12] See note 6 *supra*.

[13] See note 8 *supra*.

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. 51105, Appeal of Nobe General Construction, rendered in conformance with the Board's Charter.

Dated:

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