ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Atherton Construction, Inc.	)	ASBCA Nos. 44293, 46053,
	)	51178
Under Contract No. F24604-90-C-0006	)	

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OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN

Appellant submitted two claims in the amounts of $141,429.00 and $15,131.57, respectively to the contracting officer, both of which were denied. Appellant timely appealed these denials, and the appeals were docketed as ASBCA Nos. 44035 and 44293, respectively. The Board dismissed ASBCA No. 44035 on jurisdictional grounds. Appellant subsequently resubmitted its claim in the amount of $141,429.00, and it was again denied by the contracting officer. Appellant timely appealed this final contracting officer decision denying its claim. This latter appeal was docketed as ASBCA No. 46053. Appellant thereafter increased its earlier claim in the amount of $141,429.00 to $153,951.00, and submitted its revised claim to the contracting officer. This claim was essentially a restatement of the earlier claim with the addition of several additional claim items not previously asserted. It subsequently filed an appeal from a deemed denial of its claim and the appeal was docketed as ASBCA No. 51178. The appeals were consolidated for hearing and decision. Only entitlement is before the Board for decision.

FINDINGS OF FACT

1. On 7 December 1989, the Government awarded appellant the subject contract for the repair of 23 Wherry military family housing 4-plex units at Malmstrom Air Force Base, Montana (R4, tab 1). Appellant was to begin performance within 10 calendar days after receiving the notice to proceed and complete performance within 360 calendar days after its receipt of the notice to proceed.

2. The project was an "exterior envelope" project that involved a complete exterior upgrade (tr. 4/9-10). For the firm, fixed-price of $1,171,656.00, appellant was required to

provide and install new prefinished lap siding, new dimension furring/sheathing, new soffit, new fascia, additional insulation, new trim, new gutter and downspouts, new roofs, new insulated exterior door/storm door assemblies, and new clad wood windows on the four-plex buildings. The contract work required the removal of existing siding, soffit, trim, windows, doors, door frames, trim, and storm doors.

3. Appellant did not perform a pre-bid site visit (tr. 1/70-71, 2/32). According to appellant, estimators relied on input from local supply houses, and appellant's standard business practice was not to make pre-bid site visits because it believed that site visits were cost prohibitive. Indeed, in instances in which appellant had made a pre-bid site walk-through when at a job site for some other reason, it did not closely measure or examine the buildings to determine their condition because it viewed design as the responsibility of the Government and believed that the Government was responsible for determining and representing the actual conditions at the site.

4. Paragraph 1.1A(2), Section 01000 of the contract provided that all dimensions on the drawings, whether scaled or dimensioned, are approximate. This paragraph further provided that the contractor was required to verify all dimensions in the field prior to ordering materials to assure proper fit and interface, and to call discrepancies to the project inspector's attention before executing affected work. Paragraph 1.1E(3) required the contractor to include field verification "of all existing dimensions, and feasibilities of intended work in order to allow for prompt, early adjustment in scope(s) if required." Section 06100 of the contract specifications provided instructions with respect to requiring performance to insure an accurate fit and plumb and level conditions for the new construction as follows:

> 1.5 Project Conditions:
>
> Coordination: Fit carpentry work to other work; scribe and cope as required for accurate fit. Correlate location of furring, nailers, blocking, grounds and similar supports to allow attachment of other work, and to existing framing members. Employ metal framing anchors. Employ shimming if/as required.
>
> . . . .
>
> 3.1 Examine the areas and conditions under which work of this section will be performed. Reframe rough openings at doors, windows, and vents if required to obtain level and plumb openings sized to fit item to be installed. Correct conditions detrimental to the proper and timely completion and sound, weather tightness, of the work. Do not proceed until unsatisfactory conditions have been corrected, and inspected.

3.2 Installation:

. . . .

B. Set carpentry work to required levels and lines, with members plumb and true and accurately cut and fitted.

. . . .

F. Shimming: Shim existing walls, fascia, and soffits to provide a true, even plane for anchoring new siding/soffit/fascia system.

Section 06300 of the specifications, paragraph 3.3 INSTALLATION, further provided:

B. Install the work plumb, level and straight with no distortions. Shim as required using concealed shims. Install to a tolerance of 1/8" in 8'0"; and with 1/16" maximum offset in flush adjoining 1/8" maximum offset in revealed adjoining surfaces.

Paragraph 3.2 A of Section 08100 required the contractor to modify the existing rough openings and siding systems "as required to make rough openings square, true and plumb so that the new frame can be installed in accordance with the manufacturer's installation instructions."

5. According to paragraph 3.7 of the specifications, Section 01000, the contracting officer was to assign one 4-plex building and one garage to be used as models at the start of the contract and appellant was to complete all the work on both of these buildings within 30 working days. According to paragraph 3.9, the model buildings were to be "inspected and accepted at al [sic] key stages of the construction," and all deficiencies noted during these various inspections were to be corrected prior to proceeding with the next phase. Paragraph 3.7 further provided that upon completion and acceptance of the model buildings, the Government would assign up to five four-plex buildings and five garage buildings. All the work on each of these buildings was to be completed within 20 working days from the start date approved by the contracting officer. Paragraph 1.5 stated that each building included in the contract would be occupied by tenants when it was made available to the contractor. Paragraph 1.4 provided that the project inspector would be responsible for making arrangements with, and notifying the housing occupants prior to the contractor entering the premises for accomplishing the work. The contractor was required to perform the work in a manner that would create a minimum disturbance and inconvenience to the occupants.

6. Item 3, Addendum No. 1 to the specifications, Section 07100, Blanket Insulation, referencing Drawings, Sheets 3, 4, and 5 of 12, provided:

> Include rigid insulation board behind steel siding as follows:
>
> 1. Boards shall be Polystyrene beads molded under heat to density of 1.25 pounds PCF and heat formed, or cut, to conform to the configuration of the steel siding. Insulation shall be certified by manufacturer(s) as being compatible with steel siding and conforming to Fed. Spec. HH-I-524C. Warranty of composite job is required.

(R4, tab 1) Sheet 3 of the drawings depicted the front and rear elevations. Sheet 4 depicted the end elevations. Sheet 5 depicted the garage front, rear, and right side elevations, which side elevation was typical for both sides. None of the referenced drawing sheets contained any drawings or notes relating to the insulation board behind the steel siding, and item 3 contains no reference to Plate No. 1 attached to the Addendum.

7. Item 4 of this Addendum No. 1, referenced the same section of the specification and Drawings, Sheets 3 and 4 of 12. This item required the deletion of horizontal clapboard steel siding, furring, insulation, and plywood sheathing from the lower 4 siding courses of the 4-plex buildings, and required the contractor to include in the place of the horizontal siding, 16 inch vertical steel siding over 3/4-inch CT foam board, mounted on plywood sheathing. The installation was to be completed in accordance with all manufacturers' recommended accessories, finish trim and coil stock flashings needed to cover wood and foam board as depicted on Plate No. 1, attached to Addendum No. 1. Although Plate No. 1 was not labeled to indicate whether it applied to all the walls, or just to the garage walls, the only siding depicted on Plate No. 1 was horizontal steel clapboard siding. There was nothing in Plate No. 1 attached to Addendum No. 1 that reflected that the insulation referred to in Item 3 was limited to the wall area covered by the new vertical siding. The original drawings contained in the contract depicted horizontal siding. By contract Modification No. P00003, drawing sheet 3 of 12 was revised to require the installation of vertical siding so that the bottom of siding was even across the front of the building to an elevation coordinated with the contract inspector.

8. The contract contained the standard clauses for construction contracts, including FAR 52.233-1 DISPUTES (APR 1984), FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984), FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984), FAR 52.236-5 MATERIAL AND WORKMANSHIP (APR 1984), FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION, ALTERNATE II (APR 1984), 52.246-12 INSPECTION OF CONSTRUCTION (JUL 1986), and FAR 52.246-21 WARRANTY OF CONSTRUCTION (APR 1984). The SPECIFICATIONS AND DRAWINGS, ALTERNATE II clause provided in pertinent part:

> (a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern.

In addition to the foregoing, the contract contained FAR 52.236-1 PERFORMANCE OF WORK BY THE CONTRACTOR (APR 1984), which contained the following added language:

> The Contractor shall perform on the site, and with its own organization, work equivalent to at least 20 percent of the total amount of work to be performed under the contract.

9. The Government issued the Notice to Proceed on 19 January 1990, with work to begin within 10 days of receipt of the Notice to Proceed (tr. 3/107-08). Appellant submitted a progress schedule that projected that construction work at the site was to begin in April (tr. 1/46-47, 3/107-08). The Government had no objection to this schedule. Most of appellant's submittals were forwarded to the Government in February and March and were approved or returned for additional information or corrections within two weeks of the dates of their receipt by the Government (tr. 4/9-10, 45-52).

10. The contract required installation of a new, pitched roof with a truss system over the existing flat roof (R4, tab 1; tr. 1/40-46, 3/169-72, 4/9-10). The existing roofs were flat with electrical lines running to the rear of the buildings. The new roof with its truss system would have interfered with the electrical lines because the existing masts did not extend high enough for the wiring to clear the new roof line. This problem was discovered in January 1990 and appellant notified the Government that electrical work had not been identified in the contract plans and specifications. The Government provided a statement of work for the additional electrical work modification to accommodate the new roof systems and requested appellant to submit a proposal for masts that would permit the wires to clear the new roof. During the period of May through August 1990, appellant submitted several cost proposals ranging from $195,073.41 to $97,656.34. The Government estimate for this work was $47,265.00. The delay in finalizing a possible modification to add the electrical work to the scope of work during the period of May through August 1990 was due to several factors (tr. 3/116-19, 169-72). First, when the Government submitted a statement of work for this effort, appellant refused to submit a proposal for approximately one month because it asserted that this statement of work would not meet the National Electrical Code, and did not want to submit a proposal for the work that would not meet the National Electrical Code because appellant was not responsible for designing this part of the work. There is no evidence, however, that this statement of work for the added electrical work violated the National Electrical Code, as suggested by appellant when it

refused to submit a proposal for that work. Nevertheless, the statement of work was revised several times during negotiations. Second, there were frequent delays during negotiations, because appellant had no one at the negotiations that could agree to accept the changes or bind the company to any contract modification. There is no persuasive evidence that appellant was idle during this period because it was engaged in the performance of another contract at Malmstrom Air Force Base on the relocatable housing project, and was moving employees from one project to the other as required (tr. 1/39, 47-48, 109, 3/119).

11. The parties executed contract Modification No. P00001 in September 1990, effective 31 July 1990 (R4, tab 1). This modification provided in pertinent part:

> REASON FOR MODIFICATION: DUE TO DESIGN ERRORS, NO REFERENCE WAS MADE IN THIS CONTRACT TO THE REQUIRED ELECTRICAL WORK NECESSARY TO COMPLETE THIS PROJECT. THIS MODIFICATION INCORPORATED ALL WORK IDENTIFIED ON THE STATEMENT OF WORK (SOW) DATED 15 MAY 90 AND THE CORRESPONDING ATTACHMENT NO. 1 AND NO. 2. IT ALSO PROVIDED FOR THE INSTALLATION AND REMOVAL OF TEMPORARY ELECTRICAL CONNECTIONS. A TIME EXTENSION WAS ALSO NEGOTIATED.

The modification increased the contract price by $86,700.00 to $1,258,356 and extended the period of performance by 127 calendar days thereby providing for a revised completion date of 21 May 1991. The contract adjustment represented by this modification included total material and labor costs, other direct labor costs, overhead, increased bond costs, and profit (R4, tab 1; tr. 1/179-81). According to the Price Negotiation Memorandum for this modification, the parties negotiated and agreed to a total prime contractor overhead in the amount of $10,438.78, or 15 percent on the total amount of direct material costs, labor costs, other direct costs and total subcontractor costs, total prime contractor profit of $5,080.21, or 10 percent on material and labor only, and increased bond costs in the amount of $1,702.22, or 2 percent on the total amount (*Id*.). Although this modification provided that in consideration of the modification agreed to therein as the complete and equitable adjustment, and that appellant released the Government from any and all liability under the contract for further adjustments attributed to this modification, appellant reserved its right to request monetary compensation for costs incurred that were "ATTRIBUTABLE TO, AND AS A DIRECT RESULT OF THE DELAY IN PERFORMANCE DUE TO DELAYS, IMPACTS OR RIPPLE EFFECTS, ASSOCIATED WITH THIS MODIFICATION." (R4, tab 1; tr. 1/179-81)

12. In late January 1990, appellant raised the issue as to the number of doors and windows required to be installed under this contract (R4, tabs 2, 3, 53; tr. 1/41, 97-102).

The specifications provided in section 01000, paragraph 1.1E, that the work included, but was not necessarily limited to the following principal features:

> (2) Removal of existing front & rear entrance doors, frames, trim and storm doors.
>
> . . . .
>
> (8) Include new insulated entrance doors, frames, trim & insulated storm doors. Provide storm door hardware package as specified.

(R4, tab 1) Drawing Sheet 2 of 12, Demolition Plan, depicted the removal of eight existing storm doors/exterior doors, with the notation at each location that there were eight per four-plex building (R4, tab 53). Drawing Sheet 3 of 12, failed to include the replacement symbol on one of the doors, although all the doors were drawn the same and indicated raised panel doors (R4, tab 53; tr. 2/7-12, 3/189-94, 198). Appellant's initial bid sheets working copies with the original take-offs indicated the removal and replacement of eight doors (tr. 1/183-94). According to appellant's president, he thought that this was before he discovered an "error" in his estimator's take-off, and scratched out the indicated "8" doors and substituted "7" therefor for the installation of replacement doors. Appellant's estimator did not testify. Nevertheless, appellant's president did not know what number had been used in the bid and did not know when this handwritten change to the number of replacement doors had been made. Accordingly, there is no basis for finding that at the time appellant submitted its bid, it interpreted the contract specifications and drawings as requiring replacement of less than the eight doors indicated on Drawing Sheets 2 and 3 of 12.

13. By letter dated 25 January 1990, appellant stated that the far right front entry door on the front elevation (drawing sheet 3) was not scheduled for replacement, and that the windows leading into the basement storage area were not indicated on Drawing Sheets 3 and 4 of 12 (R4, tab 2). The Government responded by letter dated 30 March 1990 that although the door mark was erroneously omitted from the contract drawings, the intent was to have all four front and all four rear doors replaced, and that the doors and windows on the basement storage area were not to be replaced (R3, tab 3).

14. Except with respect to appellant's claim, and the reference to the windows leading into the basement storage area in appellant's letter of 25 January 1990, there is no other reference to the number of windows in any of the correspondence in the record. Although appellant's president testified that he believed that its subcontractor raised the issue in its letter of 21 November 1990 that there were an additional 46 type 4 aluminum clad windows that were installed on the project beyond what was shown on the window schedule, there was no testimony or other evidence that addressed what was required by the specifications and drawings, whether or not the specifications and drawings were defective,

and the actual number of windows provided (supp. R4, tab A-6; tr. 1/119, *cf*. tr. 2/18-19). However, the subcontractor's president testified that the number of windows was an "issue that was out there," and was discussed with appellant to see if the subcontractor could share with appellant for extras, but that "this is a shot in the dark," with no guarantees (tr. 3/70-72).

15. Appellant began on-site construction work on the model unit in August 1990 (tr. 1/47, 52). Prior to 14 September 1990, appellant was permitted to work only on the model unit and its garage (finding 5; R4, tab 1, § 01000, ¶ 3.7; tr. 1/52). On 5 September 1990, the Government accepted the model unit in an out-of-true condition. By letter dated 13 September 1990, appellant informed the Government that the existing four-plex buildings were out of square, and that this had affected appellant's ability to frame the model building in a timely manner and requested monetary consideration for the existing conditions (R4, tab 6). During a meeting between the parties on 14-15 September 1990, the parties completed negotiation on contract modification No. P00003 (R4, tab 1; app. supp. R4, tab A-5; 2/64-68, 3/130-33). Under the terms of this modification, appellant was permitted to proceed immediately with work on the roofing, electrical, windows, and doors on up to five units. Notwithstanding this and the Government's directions to appellant to proceed immediately with the work, appellant did not proceed with work on any of these additional units, asserting at that time that it could not proceed with the work until it received the formal, executed contract modification (tr. 2/66-67, 3/134-36).

16. On 21 September 1990, appellant essentially repeated its complaint about the out of square condition of the buildings in connection with problems found during the prefinal inspection on the model unit (R4, tab 7). In the Government's response to appellant's letter of 21 September 1990, the contracting officer denied that there was a differing site condition and referred to the contract's SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK clause (R4, tab 8). The contracting officer further stated that there had been a site visit held on the project on 25 July 1989 which appellant did not attend.

17. The 4-plex buildings were approximately 120 feet long and 25 feet deep, and according to appellant, the settling was differential, that is, corners settling at different rates, the buildings were slightly twisted so that they were out of plumb, level, and square (R4, tab 13; tr. 1/62). The buildings in this Wherry Housing area appeared to be quite old. The Air Force estimated that, from the appearance of the buildings, they were at least 30 years old, perhaps built in the 1950s, according to as-built drawings in Malmstrom Air Force Base files (tr. 4/9). Some buildings were out-of-square, out-of-plumb, where the verticality of the exterior walls was at variance with true vertical, and out-of-level with some variance from true level, and in the case of at least one building, these variances were significant (tr. 2/29-30, 4/14-17). While there were some buildings where the out-of-plumb and out-of-level variances may have been significant, many of these variances fell within what might be expected for buildings of this age. Indeed, appellant acknowledged that it was not unusual for buildings of this age to settle over time (tr. 2/54).

18. On, or before 25 September 1990, appellant obtained engineering surveying services of Delta Engineering, P.C. (R4, tab 13). Appellant had requested the services of Delta Engineering to go to the site and shoot grades and establish the amounts by which the buildings were out-of-plumb, out-of-square, and out-of-level (tr. 1/77-80). Appellant picked the firm and picked the building to be surveyed (tr. 3/146, 188-89). The most out-of-plumb wall for this building was 11/16th of an inch, and it was less than one degree out-of-square (R4, tab 13; tr. 1/77-79, 2/30-31, 50-52). The out-of-level amount diagonally from one corner to another on the 120 foot building was 4-9/16th of an inch. Since this survey was performed on only one building of 23 buildings to be renovated, and since each building, and portion of a building settled at a different rate, the calculations of out-of-plumb, level, and square cannot be considered representative of the out-of-plumb, level, and square conditions of all the buildings.

19. There is some evidence that appellant may have had some trouble framing the model unit building so that the envelope would be plumb, level, and square, a problem which appellant projected would occur for the remaining 22 units (R4, tab 6; tr. 1/52-53, 56-61). By letter dated 21 September 1990, appellant complained to the contracting officer that the buildings were out-of-plumb, level, and square, and that appellant had been directed by the Government's base civil engineer, who was the contracting officer's technical representative (COTR), to submit a set of blueprints showing how appellant proposed to install framing members to alleviate the unlevel conditions of installed sidings (R4, tab 7; tr. 1/64-68; *see* finding 16). According to appellant's president, reading from a letter written by his project superintendent, the Government's COTR said that the work could not proceed because the contract required buildings to be plumb, level, and square. Appellant's president was not present at the pre-final inspection during which the COTR was alleged to have made this request, and appellant's project superintendent did not testify at the hearing.

20. The contracting officer responded to appellant that although the COTR had no authority to commit the Government to changes in the contract or direct appellant to make changes, what the COTR was requesting was the submission of a quality control plan, as required by section 01000, paragraph 3.16B of the contract, which plan consisted of plans, procedures, and organization necessary to ensure that the materials, equipment, workmanship, fabrication, construction, and operations complied with the contract requirements (R4, tab 8). However, in a further letter dated 10 October 1990, the contracting officer denied that the Government had requested blueprints (R4, tab 15). Rather, what was requested was a sketch and/or written version of the procedure appellant's project superintendent verbally portrayed for projecting line and grade onto the building, to assure uniform level and plumb construction. Additionally, the contracting officer stated therein:

> 2. In reference to your concerns over your responsibilities for plumb and square construction, your attention is directed to the following contract requirements:

a. Section 01000, Para. 1.1A(2), requires the contractor to review the project site in advance of initiating work to raise any question of his ability to deliver a job in accordance with industry standards.

b. Section 06100, Para.3.1, requires installation of window and door openings in a level and plumb fashion.

c. Section 06100, Para 3.2 B, requires carpentry work to be set to required level and lines, with members plumb and true.

d. Section 06100, Para. 3.2 F, requires shimming of existing walls, facia [sic], and soffits to provide a true, even plane for anchoring new siding, soffit, and facia [sic].

e. Section 06100, Para. 3.3 A, requires wood furring to be installed plumb and level and must be shimmed with wood as required for tolerance of finished work.

f. Drawing 6 of 12 (roof framing plan), Note No. 1 states that the contractor must field verify all dimensions.

g. Drawing 8 of 12, detail 5 (typical building eave, [sic] requires the contractor to provide new continuous dimension blocking to level and secure trusses.

21. Notwithstanding the foregoing and the contract requirement that appellant construct the buildings so that the walls were plumb, level, and square, the Government never required appellant to meet this standard in light of the difficulty which appellant had doing so (tr. 1/82-83, 3/141-43, 210-12, 4/22). Indeed, during appellant's meeting with the contracting officer and other Government representatives on 12 October 1990, the Government accepted the model unit through its current state of completion (R4, tab 18). In his letter of 16 October 1990 to appellant, the contracting officer stated that although the issue of plumb, level, and square, had been discussed at great length during this meeting, and was the key issue during a site visit conducted on 21 September 1990, the parties had agreed at the 12 October 1990 meeting that "straight and parallel" lines in relation to the existing structure were more attainable and appropriate than level lines, and that all work accomplished on future units should follow the same standards (R4, tab 18; tr. 1/82-83). We are not persuaded, however, that the specifications were defective, and that appellant could not have, employing proper construction procedures, constructed the walls plumb, level, and square as required by the contract (tr. 4/19-24). The contract specifications

included provisions for making adjustments for out-of-plumb, level, and square conditions, such as methods of attachment and shimming (finding 4; tr. 4/21-22).

22. At the conclusion of a meeting between the parties on 14-15 September 1990, appellant notified the Government that it intended to subcontract all the remaining work to James Talcott Construction, Inc. (finding 15; tr. 3/132-33, 183, 4/26-28, 68). The Government conducted a framing inspection on the model unit on 5 September 1990 and informed appellant of the deficiencies on the model unit to be corrected (tr. 3/137-40). Then, on 3 October 1990, there was an inspection on the windows and doors on the model unit and appellant was provided a punch list of the deficiencies to be corrected. Appellant's representatives were present at the times of the inspections and these two punch lists were given to appellant at the time of inspections or shortly thereafter. There were no deficiencies on either of these punch lists that related to the questions of out-of-plumb, level, or square condition of the model unit. There was no evidence that appellant objected to any of the deficiencies noted on the punch lists. Moreover, although there was a brief period between 20 September and 12 October 1990 during which appellant was under instruction to comply with the contract requirements to build the walls plumb, level, and square, prior to the Government's relaxation of this requirement, appellant was not delayed from proceeding with the correction of the deficiencies listed on the two punch lists and with the work on the roofing, electrical, windows, and doors on an additional five units (finding 15; tr. 3/140-42, 4/28-34).

23. On 15 October 1990, appellant contracted the entire remaining portion of the contract work and completion of any warranty work that might arise to Talcott (R4, tabs 20, 21, 82; supp. R4, tab A-25; tr. 1/147-50, 3/5-8). By letter dated 23 October 1990, appellant submitted its list of proposed subcontractors to the Government for approval (R4, tab 20). This letter indicated that the proposed subcontract was to be awarded to James Talcott Construction, Inc., for the performance of framing, window/door installation, roofing, siding, and concrete work. Talcott had previously submitted a bid on this project as a general contractor, and had been performing work at Malmstrom Air Force Base at the time of appellant's award of the subcontract to Talcott. It had made a pre-bid site visit before submitting its bid and was familiar with the project. The subcontract price was $570,000.00, and in addition, Talcott received an International dump truck and seven trailers as part of the compensation. The subcontract provided that Talcott was to provide all labor required to complete the siding installation on the model unit and to complete the remaining work on the contract. Talcott was told that all materials had been supplied by appellant and were at the site (tr. 3/8-10, 73-74). Appellant had not told Talcott, however, that the buildings were not plumb, level, or square (tr. 3/10-12). Nevertheless, Talcott knew at the time it entered the subcontract with appellant that this was the case, and that it was not unique in this part of Montana because of the soil conditions.

24. Appellant's president testified that he believed that the Government was attempting to run appellant out of business through overzealous inspections, slow payment of invoices, that appellant received markedly different treatment from the Government than

accorded Talcott, that it was the Government's base engineer's position that the Government inspectors were not doing their jobs unless appellant lost money on the project, and that there was an anti-Mormon bias against appellant at Malmstrom Air Force Base (tr. 1/129-30, 136-43, 147, 2/85-88, *see also*, 2/149-55). As a result, according to appellant's president, he made a business decision to award all the work to Talcott in a subcontract because appellant was having problems with the Government representatives at Malmstrom and Talcott appeared to get along well with them. Appellant's president stated that it appeared to him that this was the only way to successfully complete the contract work within the contract completion date, that is, "to finish the job for us to get out of this contract." (Tr. 1/147-150, 2/46-47) There is no evidence that the Government had accorded Talcott different and more favorable treatment than it accorded appellant.

25. When Talcott arrived at the site to perform the work, it discovered that appellant had not provided all the materials necessary to complete the work (tr. 3/9-10, 56-60, 102-03). Indeed, appellant's superintendent told Talcott that appellant had misfigured the amount of material needed to complete the project, particularly since appellant had not made any allowances for plywood sheathing for mechanical room roofs and garages, or had missed the mechanical rooms and garages, and that a bundle of insulation board had blown away in a windstorm (tr. 3/83, 102-03). During the first weeks or month of Talcott' s performance, appellant provided additional materials as required. Thereafter, appellant declined to provide the needed materials to complete the work and, since Talcott was under time pressures to meet the construction schedule, it purchased the materials necessary to complete the project. Talcott started laying the siding for the first building up plumb, level, and square, but determined quickly that the finished work would not look good and that to do so would be to increase its labor costs significantly (tr. 3/14-18). Therefore, Talcott followed the lines of the existing buildings. This building became the model unit for Talcott and once this was approved by appellant and the Government, Talcott had no problems with the remaining buildings in the project. This effort occurred in the first day or two of Talcott's performance and did not cause any delay or increased cost. As a result, Talcott did not request any equitable adjustment from appellant for this element of its performance (tr. 3/17-18; *but see*, R4, tab 29; tr. 3/31-35). Although Talcott did ask for additional time, it did so as protection from potential liquidated damages (R4, tab 29; tr. 3/67-70). Moreover, when Talcott first talked with appellant at the beginning of the subcontract work, Talcott was told that appellant planned to submit requests for change orders.

26. The first time appellant raised the allegations of overzealous inspection and anti-Mormon bias as a basis for an equitable adjustment was approximately three years after the contract was completed (tr. 2/78-80). Appellant's president was not present during any of the Government inspections and, indeed, testified that he never saw this alleged overzealous inspection (tr. 1/154, 2/61-63). However, one example he cited, based on what he was told by a subcontractor he terminated for cause and poor workmanship, was that the Government inspector attempted to rip some siding off the framing of the model unit (tr. 1/61, 2/61-63). He did not, however see this, and did not report it to Government

personnel complaining about possible improper and overzealous inspection. Since there were windy conditions in the Great Falls, Montana area of Malmstrom Air Force Base, the COTR pulled on siding during his inspection of the model unit in order to determine if it was properly attached in accordance with the manufacturer's instructions (tr. 3/212-13). He did not during this inspection of the model unit attempt at any time to rip the siding from the model unit.

27. In October 1995, appellant filed a lawsuit in a Federal District Court against the Air Force for this alleged anti-Mormon bias (tr. 2/86-87). Notwithstanding appellant's assertions of overzealous inspection and anti-Mormon bias, appellant's president was never present during the inspections of the model unit, during which time the alleged overzealous inspections occurred, and never heard any Government representatives express any prejudice or bias against Mormons (tr. 1/154, 2/86-87). In support of its claimed anti-Mormon bias on the part of Government officials, appellant referred to a contract awarded by Malmstrom Air Force Base to a company, Praxis Limited, and a paper appellant's president wrote about this contract when he was a student at Brigham Young University (tr. 2/39-43). Although the Praxis contract was not in evidence, according to the testimony, that contract was performed in the 1970s on Wherry housing at Malmstrom Air Force Base and drew the attention of the General Accounting Office, Senator Orin Hatch, and nationally syndicated columnist, Jack Anderson (tr. 2/178-202). We are unable to make any findings concerning the alleged anti-Mormon bias on the part of the Government and alleged overzealous inspection by the Government of Praxis work based on the testimony concerning this prior Praxis contract. The testimony concerning this contract was, at best vague, and was not relevant to the instant appeals of Atherton. Based on our review of the entire record, including conflicting testimony concerning the alleged anti-Mormon bias, we are unable to find any persuasive evidence of anti-Mormon bias on the part of Government officials and employees (tr. 2/39-43, 85-88, 149-50, 154-55, 157-57, 178-98, 209, 214-19, 3/205-06).

28. Appellant had performance problems throughout its attempted construction of the model unit. Appellant had been performing another contract at Malmstrom Air Force Base on a relocatable housing project and intended to accomplish work concurrently on both projects with effective management on the site for both contracts (tr. 1/39, 47-48, 109, 157-59). Although appellant had staged deliveries of materials scheduled over the course of the construction; there was "such a [sic] inventory nightmare. . . . it was an absolute nightmare with materials coming out the ears and no place to put it [sic]." (Tr. 2/69) As appellant's president testified, "by the time we actually started construction, we were getting deliveries that we should have been using to incorporate in the work to finish out the project." (*Id.*; *see also*, tr. 2/69-72 regarding appellant's problems with suppliers providing timely deliveries) Appellant experienced cash flow problems in May 1990 in its other contract that had caused concern expressed by its bonding company (tr. 1/174-75) Appellant's employees moved from one contract project to the other (tr. 1/182-83). Appellant's president was not satisfied with his job superintendent's progress on the contract, so in August 1990, he hired another superintendent to manage the project because

he "wanted new blood to kick the project out" (tr. 2/55-61). As of September 1990, appellant was still having problems getting more employees for the contract work. Shortly after taking over his responsibilities, the new superintendent told appellant's president that the budget for this project was too tight and appellant's president told him that he would get directly involved in looking into local subcontractors. There was no evidence that this was done.

29. Appellant's siding subcontractor went to Malmstrom Air Force Base to install the steel siding, soffit, and fascia on the model unit for appellant (tr. 4/127, 129-34). It only worked on the project four or five hours, when a dispute arose over whether rigid insulation board was required behind the horizontal siding. This siding subcontractor had not included the price of the insulation in its bid, and disagreed with the Government' s position that it would provide support for the siding to reduce denting of the siding. Moreover, the subcontractor had not seen Addendum No. 1 to the specifications in which the rigid insulation board was addressed (*see* finding 6; tr. 4/135-36). Nevertheless, appellant's subcontractor left the work site after four or five hours and never completed installing the steel siding (tr. 1/60-61, 4/129-34).

30. In late September and early October 1990, appellant objected to Government direction to install rigid foam insulation behind the horizontal siding on the garage model unit (R4, tabs 10, 16, 17; tr. 1/81-82, 84-94). The issue arose when the Government inspector at the site observed appellant installing horizontal steel siding without rigid foam insulation board behind the siding (tr. 3/148). Appellant had interpreted Plate 1, Addendum No. 1 to the specifications as requiring rigid foam insulation only behind the vertical siding (findings 6-7, *supra*; tr. 1/88-90, 2/20). Appellant relies on its interpretation of Plate 1 without regard to the fact that Item 4 of Addendum No. 1 references Plate 1, and drawing sheets 3 and 4 of 12, neither of which applied to the garages. The Government, on the other hand, interprets Addendum No.1, Item 3, as clearly requiring rigid insulation board behind all of the steel siding, not just vertical, since Item 3, which references rigid siding, references drawing sheets 3, 4, and 5 of 12 (R4, tab 10; tr. 3/146-49, 335-38). According to drawing sheet 5, the garages were to have horizontal steel siding only.

31. By letter dated 10 October 1990, appellant stated that it did not agree with the Government's direction to install the rigid foam insulation board behind the horizontal siding, but will proceed to install the product as requested by the Government (R4, tab 14). However, since it already had the siding on the model garage, appellant offered a credit for the foam insulation on this unit in the amount of $77.00 and suggested that the Government accept a credit for all the garages since the garages were non-climate controlled areas. By letter dated 10 October 1990, the contracting officer rejected appellant's offer and stated that the Government had decided to adhere to the contract requirement and design for rigid foam insulation behind the horizontal siding as designed, and to require appellant to install the rigid foam insulation behind the siding already installed on the model garage unit (R4, tab 17).

32. Appellant continued to assert its interpretation that the contract did not require rigid insulation, and even if it did under Addendum No. 1, Item 3, then the contract specifications were flawed. The main point of disagreement between the parties was appellant's insistence that the rigid foam insulation was not necessary for insulation purposes since the garages were non-climate controlled areas and the insulation would not provide protection of the steel siding from the risk of denting, versus the Government position that siding manufacturers recommend the installation of rigid insulation board behind steel siding, that the insulation reduces the potential for denting of the siding, and that it has some insulation value. (Tr. 1/85-93, 2/19-22, 3/146-49, 213-14, 225-31, 235-38). Indeed, appellant tried to talk the Air Force out putting rigid insulation behind the horizontal siding. The common industry practice in this part of Montana was to install rigid insulation behind siding and that was required in all contracts at Malmstrom Air Force Base (tr. 3/23-26, 86-89). Appellant was not familiar with the local custom and common industry practice in this part of Montana, and had never done any work in this area except the two contracts at Malstrom Air Force Base (tr. 2/23-24). The insulation factor was regarded secondary to the rigidity that the foam insulation added to the siding. Talcott ultimately removed the siding on the garage model unit and installed the rigid foam insulation and did not request, nor was it paid for "extra" rigid insulation board (tr. 1/93-95, 2/86-89).

33. By letter dated 14 February 1991 to James Talcott Construction, Inc, appellant's superintendent stated that he had talked with the siding crew and asked why it was installing finish trim on certain areas (R4, tab 26). According to the appellant's superintendent, he pointed out to the siding crew that finish trim had not been installed on the model unit, nor was it on any inspection punch list. He stated, moreover, that appellant was not asked to install the finish trim, but that he had been informed by the siding crew that the Government's COTR and another Government official had inspected building 3012 and requested that finish trim be installed. In further correspondence between appellant and the Government, there was further discussion concerning whether or not finish trim was required, particularly since the issue of finish trim did not become an issue until appellant's subcontractor siding crew were working on building 3008 and appellant's approved submittals indicated that finish trim was to be installed only under windows on horizontal siding (R4, tabs 27, 28, 29).

34. In its letter of 19 March 1991 to appellant, Talcott requested 19 days delay to complete the siding work since the Government delayed giving direction to Talcott on the finish trim (R4, tab 29). Additionally, Talcott requested an additional 23 days due to the out-of-plumb and square conditions of the buildings. However, Talcott's president testified that most of these delay days requested were due to weather conditions, and because he faced possible liquidated damages, he wanted as many days' extension as possible (tr. 3/85-86). Appellant, on 21 March 1991, forwarded Talcott's letter of 19 March to the contracting officer requesting an extension to the contract due to weather and other delays, and requesting a reply to Talcott's letter (R4, tab 29).

35. By letter dated 6 March 1991, the contracting officer stated that the issue of finish trim was not a field directed change, and referred to Addendum No. 1 to the contract specifications as requiring the installation of finish trim (R4, tab 27). On 27 March 1991, the contracting officer responded to appellant's letter of 21 March 1991 (R4, tab 30). The contracting officer stated therein that:

> . . . In your letter you are also claiming that a 19 working day delay occurred as a result of an alledged [sic] failure on the part of the Government to give you direction on how to complete your finish trim. As stated in our letter to you dated 9 Jan 91, Mr. Korslien/DEEC was asked while on site, which he preferred to see installed, "J" channel or drip strips. Mr. Korslien responded that he would prefer to see "J" channel. You were never directed by the Government to install "J" channel. Your claim, however, is unreasonable, since the first time you brought the problem to the attention of this office was in your letter dated 20 Dec 90. At that time the problem had already been resolved. . . .

The contracting officer denied the requested 19 days extension because it was unreasonable to assume that progress was delayed since appellant had full crews working at the site, and the siding crew moved to the next building when the problem surfaced. Nevertheless, although the contracting officer denied the 23 working day extension requested by appellant, he did grant an extension of 11 working days as a result of unusually severe weather.

36. Section 07400, paragraphs 1.1A.(2) and 3.1B of the contract specification required the installation of the new steel siding in accordance with the manufacturer' s standard instructions (R4, tab 1). Item 4 of Addendum No. 1 referenced Specifications, Division 7, and Drawings, sheets 3 and 4 of 12, and provided:

> Delete horizontal clapboard steel siding, nom. 2 x 4 furring, R-11 insulation and 5/8" plywood Sheathing from lower four siding courses (approx. 32") of Four Plex Buildings, and include the following in its place:
>
> 1. 16" vertical steel siding over 3/4" CT foam board, mounted on 5/8" plywood sheathing, which is secured to existing concrete. Installation shall be complete with all mfr's. recommended accessories, finish trim & coil stock flashings needed to cover wood and foam board, and as depicted on Plate No. 1, (attached). . . .

(R4, tab 1) Plate No. 1 depicted the new bronze "J" channel below the new window in the window jamb detail. According to Alcan Building Products, the manufacturer of the new

steel siding, "Normal practice in the siding industry requires finish trim to be run along and over longitudinal cuts." (R4, tab 41; *see also*, R4, tab 28, depicting finish trim running along and over the longitudinal cuts in the drawings furnished to appellant during contract performance)

37. Although there was some confusion in the record concerning when the finish trim issue arose, when the Government's COTR performed the final inspection on the model unit, there was no finish trim and the Government simply overlooked the absence of the trim (tr. 3/212). However, the COTR discovered that appellant had not installed the finish trim when he went to the job site with an experienced siding inspector and no other units were accepted before the COTR discovered his mistake in overlooking the absence of finish trim.

38. Appellant has also claimed additional costs for "J-Boxes." However, no direct evidence on this element of its claim was presented, and the mere fact that it was contained in its revised claim does not rise to the level of evidence on which we can base any findings.

39. The contract, as modified, provided for a completion date of 21 May 1991 (R4, tab 1). Although the contracting officer did state in his letter of 24 March 1991 that he would grant an extension of 11 working days as a result of unusually severe weather, there is no evidence that appellant accepted this extension or that the contract was modified accordingly (R4, tab 30). Appellant completed the contract work the first week of June 1991 (tr. 3/143).

40. Appellant claimed 127 days of Government caused delays, which according to appellant were admitted by the Government for design errors in the contract documents. As we found above, the contract was modified in contract Modification No. P00001 extending the contract completion date 127 days and granting an equitable adjustment to compensate appellant. Appellant reserved the right to request additional compensation for costs incurred that were attributable to this delay, including impacts or ripple effects. (Finding 11) We also found that there is no persuasive evidence that appellant was idle during this period leading up to the execution of this modification because appellant was engaged in the performance of another contract at Malmstrom Air Force Base on the relocatable housing project, and was moving employees from one project to the other as required. Indeed, there was no evidence that appellant was idle at any time prior to its subcontracting the entire project to Talcott due to any actions or inaction on the part of the Government. While the duration of the delay attributable to the design defect with respect to the required electrical work to allow electrical lines to enter the buildings without interference from the new truss roofs may have been of an uncertain duration, that uncertainty was largely attributable to appellant's initial delay in submitting a proposal and delays in completing negotiation of the modification (finding 10). There was no evidence that the Government required appellant to remain ready to perform prior to the execution of the modification. Further, there was no evidence that appellant was unable to take on other work not relating to the contract during the period of this delay, or at any time prior to its award of the subcontract

to Talcott. Indeed, the evidence establishes, and we find, that during this period, appellant was engaged in performance of the relocatable housing project at Malmstrom Air Force Base, and that during the period of August 1989 to May 1991, appellant bid on at least seven other Government projects and was awarded at least one contract in the amount of $1,280,898 (tr. 1/170-72). Appellant also bid on an additional nine projects in August 1990. As of May 1990, appellant's bonding agent authorized appellant to bid on other projects (tr. 1/172-74). To the extent that appellant's bonding agent expressed caution to appellant, this was due to appellant's cash flow problems and problems with other contracts, not related to the instant contract.

41. On 8 April 1991, appellant submitted a claim in the amount of $141,429.00 (R4, tab 31). The gist of this claim was that the Government delayed appellant's contract performance in three respects and that the Government required appellant to perform work outside the scope of the contract. The three periods of alleged delay included 127 days associated with the electrical work, which delay was granted in contract Modification No. P00001, an unspecified period of delay due to the out-of-plumb, level, and square condition of the buildings, and an unspecified period of delay associated with the dispute concerning the installation of rigid insulation behind the horizontal steel siding. Appellant sought damages under the Eichleay doctrine for the alleged unabsorbed overhead associated with these alleged delays. In addition to the claim for unabsorbed overhead for these alleged delays, appellant sought recovery for labor and material costs due to the alleged extra work in installing doors, locksets, and closures and the installation of insulation behind the siding.

42. Appellant subsequently filed an additional claim on 2 August 1991, in the amount of $15,131.57, for an alleged constructive change due to the Government' s direction to appellant to install "J" channel finish trim at all vertical cuts in the vertical siding (R4, tab 45).

43. The contracting officer denied both of these claims by final decision dated 12 December 1991 (R4, tab 47). Appellant timely appealed this decision, which appeals were docketed as ASBCA Nos. 44035 and 44293. The Board dismissed ASBCA No. 44035 on jurisdictional grounds, namely, that appellant's vice president who signed the certification did not have overall responsibility for appellant's affairs. Appellant then resubmitted its claim in the amount of $141,429.00, which was again denied by the contracting officer (R4, tabs 50 and 51). The only difference between this claim and the earlier claim for $141,490.00 was the signatory officer on appellant's certification, namely, appellant's president. Appellant appealed the contracting officer's final decision denying its claim, which appeal was docketed as ASBCA No. 46053.

44. Appellant revised its previous claim (ASBCA No. 46053) on 23 March 1988, increasing it prior claim to $153,951.00 (R4, tab 88). The only difference between the revised claim and its prior claim in the amount of $141,490.00, was the addition of two claim items, namely, the alleged unavailability of two units and the required alleged

installation of J-Boxes. The contracting officer denied this claim, and appellant timely appealed the denial, which appeal was docketed as ASBCA No. 51178.

DECISION

We first address appellant's claims for additional insulation, finish trim, doors, locksets, hardware, windows, and J-Boxes. Central to the disputes concerning the alleged additional work is the differing interpretations of the parties regarding the contract specifications and drawings. Under established rules of contract interpretation, an interpretation which gives reasonable meaning to all the parts of the instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous. *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384, 351 F.2d 972 (1965). Moreover, a contract is ambiguous only when it is susceptible to two or more different and reasonable interpretations, each of which is consistent with the contract language. *Bennett v. United States*, 178 Ct. Cl. 61, 371 F.2d 859 (1967).

No such ambiguities exist here. The requirement for rigid insulation board was clearly and unambiguously set forth in Item 3, Addendum No. 1 to the specifications, section 07100. Appellant's reliance on the absence of a reference to rigid insulation board in Plate No. 1 of Addendum No. 1, and the absence of details and drawing depiction of rigid insulation in drawing sheets 3, 4, and 5, is unreasonable. The contract further unambiguously required appellant to install siding with all of the manufacturer' s recommended accessories and finish trim as set forth in Item 4 of Addendum No. 1, and section 07400, paragraphs 1.1A(2) and 3.1B. Alcan Building Products, the manufacturer of the siding recommended finish trim along and over the longitudinal cuts of the siding.

As we found in finding 12, the specifications clearly provided for the removal and replacement of existing front and rear doors with the appropriate hardware. Drawing sheet 2 of 12 depicted the removal of the existing eight doors, with the notation of each location. Drawing sheet 3 of 12 contained the same door drawings for all eight doors, although the replacement symbol and notation for one of the doors was missing. Moreover, although the bid documents regarding the doors have been altered, we were unable to find, based on the evidence and testimony of appellant's president when that alteration occurred and therefore, what appellant's interpretation of the specifications and drawings was at the time it submitted its bid. However, the SPECIFICATIONS AND DRAWINGS, ALTERNATE II clause adequately addresses the omission of the replacement symbol on drawing sheet 3, and we hold that there is no ambiguity regarding the number of doors to be replaced. We hold that appellant's interpretation of this requirement in the specifications and drawings is not reasonable. We further hold that appellant's claim concerning the possible ambiguity or defect with respect to the number of windows has not been supported in the record.

We hold that there is no basis for awarding entitlement to appellant for the alleged change regarding the installation of J-Boxes. Other than the mention of the J-Box issue in

appellant's claim, there is no evidence on which we could make any findings concerning alleged additional costs for installing J-Boxes. The mere assertion of a claim or contention is not a sufficient basis on which to determine that appellant is entitled to relief. Generalized conclusory, unsupported opinion type statements do not demand weight when such statements are little more than self-serving conclusions. *L. B. Samford, Inc.*, ASBCA No. 32645, 93-1 BCA ¶ 25,228 at 125,660; *Newell Clothing Co.*, ASBCA No. 28306, 86-3 BCA ¶ 19,093, *aff'd*, 818 F.2d 876 (Fed. Cir. 1987) (table).

Appellant claimed additional costs and time relating to its contentions regarding the condition of the buildings, which according to appellant, were out-of-plumb, level, and square. Appellant seeks both direct costs due to the alleged additional effort, and delay damages. Appellant asserts that the contract specifications were defective, and that the Government, based on its superior knowledge of the conditions of buildings that were approximately 40 years old, had a duty to disclose those conditions to the bidders and to design the project so that the contract could be performed in reliance on the adequacy of the specifications. The Government argued that the contract required appellant to construct the buildings plumb, level, and square, and that requiring appellant to do so did not constitute a change. Moreover, the Government contends that appellant failed to establish the basic elements of differing site conditions. Notwithstanding that, the Government relaxed the contract requirements and did not require appellant to construct the model unit, the only unit on which appellant performed any direct work, to be plumb, level, and square. As a result, the Government accepted the model unit in an out-of-true condition on 5 September 1990.

First, as we have held, under the SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK clause of the contract, potential contractors are required to take all steps reasonably necessary to ascertain the nature and location of the work, and to satisfy themselves as to the local conditions affecting the work. *Pitt-Des Moines, Inc.*, ASBCA Nos. 42838, 43514, 43666, 96-1 BCA ¶ 27,941 at 139,575; *Constructora Experta, S.A.*, ASBCA No. 39262, 90-2 BCA ¶ 22,932. The duty of bidders to investigate the job site does not require them to conduct time-consuming or costly technical investigations to determine the accuracy of the Government's drawings or other indications in the solicitation documents. *Foster Constr. C.A. v. United States*, 435 F.2d 873, 888-89 (Ct. Cl. 1970). Rather, the SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK clause instructs the bidders to take steps reasonably necessary to ascertain the nature and location of the work, including the general and local conditions which can affect the work or its costs. Having failed to conduct a site investigation, "the appellant is charged with the knowledge it could have obtained from a reasonable site investigation." *Swepco Corp.*, ASBCA No. 25118, 81-2 BCA ¶ 15,262 at 75,578. Similarly, we have held that "by electing not to make such site visit appellant assumed the risk of, and agreed to be bound by, whatever conditions existing at the site that would have been disclosed by a reasonable site investigation." *Metroplex Industrial Constructors, Inc.*, ASBCA No. 26242, 82-1 BCA ¶ 15,749 at 77,952. Here, appellant made a business decision based on its standard business practice, not to make a pre-bid site visit. Had it done so, it may have determined the age and

condition of the buildings, although without detailed surveys, it may not have been able to determine the exact extent of out-of-plumb, level, or square condition, if any, it now alleges.

Second, appellant alleges differing site conditions with respect to the alleged out-of-plumb, level, and square conditions of the buildings. As we said in *Pitt-Des Moines, Inc.*, *supra* at 139,574:

> Thus, in order to recover for a Category 1, differing site condition, appellant must establish that: (1) the contract documents affirmatively indicated or represented the subsurface conditions which form the basis for the claim; (2) it acted as a reasonably prudent contractor in interpreting the contract documents; (3) it reasonably relied on the indications of the subsurface conditions in the contract; (4) the subsurface conditions actually encountered differed materially from the subsurface conditions indicated in the contract; (5) the actual subsurface conditions were reasonably unforeseeable; and (6) its claimed excess costs were solely attributable to the materially different subsurface conditions. *Weeks Dredging & Contracting, Inc. v. United States* [34 CCF 75,356], 13 Cl. Ct. 193, 218 (1987); *aff'd* 861 F.2d 728 (Fed. Cir. 1988).
>
> In a Category 2, differing site condition, appellant must establish: (1) what were the recognized and usual physical conditions at the work site; (2) what were the actual conditions encountered; (3) whether or not the actual conditions encountered differed materially from the known and usual conditions; and (4) if so, that they caused an increase in the cost of performance. *Charles T. Parker Construction Co.*, 193 Ct. Cl. 320, 333, 433 F.2d 771 (1970).

Appellant, without attempting to establish each of the elements required for recovery of either a Category 1 or Category 2 differing site condition, merely states that each of its claims litigated herein, "satisfies the required elements for recovery under one or more of the cases discussed above." (App. br. at 23) We disagree. There was no showing that the contract affirmatively indicated or represented that the buildings were plumb, level, and square, or that appellant reasonably interpreted the contract provisions, drawings, and indications concerning the condition of the buildings, and that it reasonably relied on these indications. There was no evidence that the conditions encountered by appellant differed materially from those indicated in the contract documents and that the actual conditions were reasonably unforeseeable. Moreover, as we found above, appellant had trouble framing the model unit. There is no persuasive evidence that this trouble was due solely to the alleged out-of-plumb, level, or square condition, and that appellant could

not have, with proper construction techniques, constructed the buildings in accordance with the contract requirements. We hold that there were no Category 1 differing site conditions.

Appellant does not fare any better with respect to a possible Category 2 differing site condition. There simply is no evidence that appellant established what were the recognized and usual physical conditions at the work site, whether the actual conditions encountered differed materially from the known and usual conditions, and that these unusual and unforeseeable conditions caused an increase in its cost of performance. Indeed, as we found above, although appellant did not inform Talcott that the buildings were out-of-plumb, level, and square, Talcott knew that this was the case since it was not unique in that part of Montana because of the soil conditions.

Appellant's reliance on *Helene Curtis Industries, Inc. v. United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963), is unavailing in support of its claim to entitlement for increased costs and time due to the alleged out-of-plumb, level, and square condition. According to appellant, the Government violated its duty to disclose material information concerning this condition of the buildings. The construction work in the instant contract was neither novel nor within the sole purview of the Government knowledge. There is no evidence that the Government knew much more about the condition of these buildings considering their age, the tendency of buildings to settle over time, and the soil conditions of this part of Montana. There is no evidence that it knew that more costly construction practices would be required in order to meet the requirements of the specifications.

Notwithstanding the foregoing, as we found above, while there may have been some variances in the plumb, level, and square conditions of the buildings, many of these variances fell within what might be expected for buildings of this age, and that it was not unusual for buildings of this age to settle over time. Moreover, although there was at least one building, the one surveyed by appellant, which may have had significant variances from plumb, level, and square, the calculations on this one building cannot be considered representative of the alleged out-of-plumb, level, or square conditions of the remaining 22 buildings since each building and portion of the building settled at a different rate. Nevertheless, the Government accepted the work performed by appellant on the model unit and did not require appellant to build the model unit plumb, level, and square as required by the contract. Since appellant subcontracted the entire performance of the remaining buildings to James Talcott Construction, Inc., and the Government permitted Talcott to follow the existing lines of the buildings, Talcott had no problems with the remaining buildings in the project. The effort by Talcott to build the first building plumb, level, and square occurred in the first day or two of its performance and did not cause any further delay or increased cost. Talcott did not request any equitable adjustment from appellant for this element of the work. We hold that appellant has not established its entitlement to an equitable adjustment due to the alleged out-of-plumb, level, and square conditions of the buildings.

Although appellant asserts its claims to additional costs due to the required installation of additional insulation, finish trim, doors, locksets, hardware and windows, and J-Boxes, and the added costs due to the alleged out-of-plumb, level, and square conditions of the building, the underlying complaint was the Government caused delays and disruptions due to alleged design deficiencies, overzealous inspection, and bad faith on the part of certain Government officials. Specifically, appellant seems to contend that its troubles were largely attributed to the "anti-Mormon bias," and bias against contractors from outside Montana, on the part of the COTR who controlled the contract administration, as well as a bias in favor of local contractors, most specifically evident in the case of his relationship with Talcott, a "favorite" at Malmstrom (app. br. at 9, 35-37; app. reply br. at 15). The tone of appellant's position in this regard is captured from its brief in which it alleges that the Government, through its overzealous inspections and Government caused inefficiencies, attempted to run the contractor out of business:

> From the beginning of contract performance, Atherton was repeatedly subjected to harsh and unreasonable inspections by Air Force personnel, particularly Larry Antonich [the COTR]. The condition of the existing buildings were [sic] not taken into account in determining how new components would fit. The out of plumb, level and square condition was certainly known to the Air Force. They [sic] had been through this before with Praxis on the very same buildings. However, once again, these unusual local conditions were used as the basis for harassing a contractor who was disfavored.
>
> Among other things, Atherton was required to go extra lengths to cope with unusual problems unique to these buildings. Atherton was subjected to inspections more demanding than other contractors at Malmstrom, they were repeatedly forced to tear down completed work and rebuild it, often three or four times and Atherton was often given different instructions by Air Force personnel in an effort to increase costs.
>
> . . . It is clear from this testimony that Antonich treated Atherton with extreme animosity because of his characterization of Atherton as a "Mormon" contractor.
>
> The earlier experience of Praxis shows a consistent record by Mr. Antonich. He was the head of engineering and inspection during the Praxis contract also. He was as much a thorn to Praxis as he was to Atherton. Praxis was unaware of the religious basis of Mr. Antonich's contempt. They [sic]

> believed it was because they [sic] were [sic] an out-of-state contractor.
>
> Faced with a hostile and impossible working environment, Atherton had no choice but to alter its original plans and subcontract out the work. Talcott was a local contractor with ties to Malmstrom. Talcott was not going to be characterized as a "crooked Mormon contractor." Talcott would be inspected fairly by the Air Force, a privilege not enjoyed by Atherton. Atherton was effectively forced to "buy" reasonable inspection standards from the Air Force by hiring Talcott at great expense to itself. Because of overzealous and unfair inspection, Atherton suffered a pecuniary loss which threatened the very existence of Atherton.
>
> . . . .
>
> In the long run, it is the Air Force and taxpayers who suffer when this sort of thing is allowed to continue. But it has gone on for years. It will not be corrected by this case. It may, however, be noticed. And, if noticed, perhaps the Air Force will do something to clean up its act.

(App. br. at 36-37)

The presumption that Government officials act in good faith is well-established in the jurisprudence of this Board and of the United States Court of Appeals for the Federal Circuit, and its predecessor, the United States Court of Claims. Indeed, so strong is this presumption that until recently, the courts and this Board have repeatedly said that it takes, and should take, "well-nigh irrefragable proof" to induce us to hold that the Government has acted in bad faith. *E.g.*, *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002); *T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1285 (Fed. Cir. 1999); *Torncello v. United States*, 231 Ct. Cl. 20, 45, 681 F.2d 756, 770 (1982); *Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 198-99, 543 F.2d 1298, 1301-02 (1976), *cert. denied*, 434 U.S. 830 (1977); *Marine Construction & Dredging, Inc.*, ASBCA Nos. 38412 *et al.*, 95-1 BCA ¶ 27,286 at 136,026, *aff'd on recon.*, 95-2 BCA ¶ 27,699 (opinion of Van Broekhoven, J.); *Apex International Management System, Inc.*, ASBCA Nos. 38087 *et al.*, 94-2 BCA ¶ 26,842 at 133,549-50, *aff'd on recon.*, 94-2 BCA ¶ 26,852. The Court of Appeals for the Federal Circuit, in *Am-Pro Protective Agency, Inc. v. United States*, in discussing the three standards of proof, namely, preponderance of the evidence, clear and convincing, and beyond a reasonable doubt, held that:

> [W]e believe that clear and convincing most appropriately describes the burden of proof applicable to the presumption of

> the governments [sic] good faith. This is so because, for one, the presumption of good faith, as used here, applies only in the situation where a government official allegedly engaged in fraud or in some other quasi-criminal wrongdoing. . . . In addition, we believe the clear and convincing standard most closely approximates the language traditionally used to describe the burden for negating the good faith presumption, namely, the "well-nigh irrefragable" proof standard. Specifically, we have described clear and convincing burden as such:
>
> > A requirement of proof by clear and convincing evidence imposes a heavier burden upon a litigant than that imposed by requiring proof by preponderant evidence but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt. Clear and convincing evidence has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is " *highly probable*."
>
> *Price [v. Symsek]*, 988 F.2d [1187] at 1191 [(Fed. Cir. 1993).]

281 F.3d at 1239-40.

Although we reviewed the evidence concerning the Praxis contract and Praxis experience at Malmstrom Air Force Base, we have made no findings concerning this contract and the alleged treatment of Praxis by the Government because we did not find this evidence particularly relevant to appellant's contract experience and did not find it persuasive for the purpose of determining an allege anti-Mormon bias on the part of the Government and particularly, on the part of Mr. Antonich with respect to the instant appeals. Moreover, even were we to give weight to the testimony of anti-Mormon remarks allegedly attributed to Mr. Antonich, we are not persuaded by the evidence that Mr. Antonich was biased against Mormons and that such alleged bias adversely influenced his administration of the instant contract. There is simply no persuasive evidence that the Government' s actions were motivated by specific intent to injure appellant or motivated alone by malice, or designedly oppressive. *Kalvar Corp. v. United States*, *supra*, at 199, 1302. Nor do we have "an abiding conviction that the truth of" appellant's factual contentions that it was "faced with a hostile and impossible working environment," and that it suffered a pecuniary loss which threatened its very existence, is " *highly probable*."

Paragraph (c) of the INSPECTION OF CONSTRUCTION clause provided:

> 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;
>
> . . . .
>
> (3) Constitute or imply acceptance; or
>
> (4) Affect the continuing rights of the Government after acceptance of the completed work under paragraph (i) below.

We agree with appellant that unjustified Government interference resulting in a breach of the implied duty not to hinder or interfere with the contractor's performance can occur in various ways during performance, including overzealous inspection. *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968). However, the Government is entitled to insist on strict compliance with the contract requirements, and has no obligation to accept substitutes, even if the substitutes are equivalent or superior to that which is specified. *Carothers Construction Co.*, ASBCA No. 41268, 93-2 BCA ¶ 25,628.

The crux of appellant's claim here is that the Government improperly rejected appellant's work thereby resulting in additional costs and delays to appellant' s performance of the contract. Under paragraph (f) of the INSPECTION OF CONSTRUCTION clause, the contractor is required to correct without charge, "work found by the Government not to conform to the contract requirements," thereby reflecting the principle that the Government is entitled to strict compliance with its drawings and specifications. Although appellant has lodged a generalized attack on the unreasonableness and arbitrariness of the Government's alleged overzealous inspection, it has provided no evidence to that effect except some hearsay testimony that the Government inspector attempted to rip siding off the framing of the model unit. We conclude, however, from the record before us, that there is no admissible and persuasive evidence to that effect.

Appellant contends that in light of Government caused delays due to the defective specifications concerning the installation of new trusses as a result of the electrical supply lines entering the housing units, the requirement to frame buildings plumb, level, and square, and reframe the model unit when the original framing proved unsatisfactory, it is entitled to damages for unabsorbed overhead in accordance with *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recon.*, 61-1 BCA ¶ 2894, and its progeny. In order to recover its claimed unabsorbed overhead under the *Eichleay* formula, appellant must establish that: (1) there was a Government imposed delay, (2) appellant was on "standby" during this period of delay, and (3) appellant was unable to take on other work. *Charles G. Williams Construction, Inc. v. White*, 271 F.3d 1055 (Fed. Cir. 2001); *Sauer Inc. v.*

Danzig, 224 F.3d 1340 (Fed. Cir. 2000); *Melka Marine, Inc. v. United States*, 187 F.3d 1370 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000).

First, we are not persuaded that there were any Government-caused delays other than the delay attributable to the design error resulting in the conflict between the electrical lines and the new truss roof, and the difficulties in negotiating the contract modification relating to the new work. Moreover, although appellant was granted an equitable adjustment which included its direct costs, overhead, profit, and increased bond costs, and was granted a time extension of 127 days in consideration of this modification, and although appellant reserved certain rights to request additional compensation for costs attributable to the delays, impacts, or ripple effects associated with the modification, we hold that appellant has not established that it was further delayed or impacted as a result of the additional work represented in contract Modification No. P00001. We have also held that there is no ambiguity or defect in the contract specifications and drawings concerning the number of doors and windows, the J-Boxes, and the finish trim, and that there was no differing site condition with respect to the out-of-plumb, level, and square condition of the buildings. We further found that appellant had experienced performance problems with its superintendent, with obtaining employees to work on the project, with cash flow due to its work on other contracts, and difficulty in framing the model unit so that the envelope would be plumb, level, and square. As stated in *Sauer Inc. v. Danzig*, *supra*, at 1348 (bracketed material in original), "In order to establish a compensable delay, a contractor must separate government-caused delays from its own delays. . . . (applying ' the rule that there can be no recovery where the [government's] delay is concurrent or intertwined with other delays')." Appellant has not done so here. We, therefore, hold there is no basis for holding that the Government unreasonably delayed appellant's performance of the contract because of these alleged deficiencies.

Secondly, "The proper standby test focuses on the delay or suspension of the contract performance for an uncertain duration during which the contractor is required to remain ready to perform." *Charles G. Williams Construction, Inc. v. White*, at 1058 quoting from *Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1058 (Fed. Cir. 1993). As we found above, there is no evidence that appellant was in standby status during the period of exchange of statements of work and proposals, and the negotiation of contract Modification No. P00001, nor at any time thereafter and prior to the award of the entire remaining contract work to Talcott. There was no evidence that any of appellant's employees were idle during any of the period in question. Indeed, appellant was engaged in the performance of the relocatable housing contract work and moved employees from one project site to another during this period.

Thirdly, "the contractor's inability to take on outside work - requires ' the government to demonstrate that it was not *impractical* for the contractor to take on *replacement* work and thus avoid the loss.' " *Charles G. Williams Construction, Inc. v. White*, *supra*, at 1058. The Government has done so here. We found that during the alleged delays, appellant was performing on its other contract at Malmstrom Air Force

Base, moving employees between the two projects as needed, and that it submitted bids and was awarded contracts on other unrelated projects. There is simply no evidence that it was impractical for appellant to take on other work during the relevant period.

Accordingly, we hold that appellant has not established its entitlement to recover on its claims and we deny the appeals.

Dated: 15 July 2002

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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 Nos. 44293, 46053, and 51178, Appeals of Atherton Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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