ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
A & D Fire Protection, Inc.	)	ASBCA Nos. 53103, 53838
	)	
Under Contract No. N68711-96-C-3737	)	

APPEARANCE FOR THE APPELLANT: Mr. Andrew R. Otero
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TODD

These appeals arise from the contracting officer's denial of a subcontractor's claims for extra work on a roofing contract. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 18 June 1997, Contract No. N68711-96-C-3737 was awarded to appellant A & D Fire Protection, Inc. (A & D) in the amount of $1,255,000. The contract provided for replacement of the roofing and installation of new roofing, as well as HVAC and flooring work on Building B-24100 at the Marine Corps Base, Camp Pendleton, California. The contract completion date was 29 April 1998. (R4, tab 1)

2. Appellant's subcontractor for installation of the roof was R.L.P. Company, Inc. (RLP), a firm with 12 years experience. Mr. Rick L. Patterson, president of RLP, acting *pro se*, has presented appellant's claims under appellant's sponsorship (tr. 9). The roofing system manufacturer, from whom RLP acquired its roofing materials, was Farrow Manufacturing, Inc. (Farrow), whose representative, Mr. Vernon J. Farrow, Jr., has had approximately 35 years experience in the roofing business. (R4, tab 45; tr. 131)

3. Building B-24100 is a prison facility known as "The Brig." The contract specifications called for a cold process roof system with a parapet wall and concertina wire that would provide security against prisoner escape. The roof was designed to provide drainage and avoid the effects of ponding. The contract provided for walk pads to protect

the roof surface against penetrations from walking or the use of sharp tools that would cause deterioration or leaks in the roof. (R4, tab 1; ex. A-58; tr. 13, 76-77, 131)

4. The contract specifications in Section 02220, Site Demolition included paragraph 3.1.1, Roofing, which stated in pertinent part:

> Remove existing roof system and associated components in their entirety down to existing roof deck.

(R4, tab 1, § 02220 at 3) Paragraph 3.1.3, Patching, stated in pertinent part:

> Where new work is to be applied to existing surfaces, perform removals and patching in a manner to produce surfaces suitable for receiving new work. Finished surfaces of patched area shall be flush with the adjacent existing surface and shall match the existing adjacent surface as closely as possible as to texture and finish.

(*Id.*)

5. Section 07220, Roof and Deck Insulation, contained the following pertinent provisions:

> 2.1.2 Tapered Roof Insulation
>
> One layer of the tapered roof insulation assembly shall be factory tapered to a slope of not less than as indicated on drawings. Provide starter and filler blocks as required to provide the total thickness of insulation necessary to meet the specified slope.
>
> . . . .
>
> 3.1.1 Surface Inspection
>
> Check roof deck surfaces, including surfaces sloped to roof drains and outlets, for defects before starting work. The Contractor shall inspect and approve the surfaces immediately before starting insulation.
>
> 3.1.2 Surface Preparation

> Correct defects and INACCURACIES in roof deck surface to eliminate poor drainage and hollow or low spots . . . .

(*Id.*, § 07220 at 3-5) Contract drawing A-13 showed the tapered slope dimensions and the areas identified as "TAPERED INSULATION CRICKET"[1] with shading and a note to "PROVIDE POSITIVE DRAINAGE" (R4, tab 3 at 13).

6. Section 07535, Modified Bitumen Cold Applied Roofing, required the contractor to furnish the roofing system manufacturer's warranty for the roofing system for a period of not less than ten years. The warranty was against any excessive weathering because of defective materials or workmanship. (R4, tab 1, § 07535, ¶ 1.8)

7. The contract specifications described the roof walkways the contractor was required to install for traffic areas and access to mechanical equipment (*id*., ¶ 3.3.11). The material for walkway pads were specified as follows:

> Reprocessed rubber, 24-inches by 36-inches by minimum ½ inch thick, walkway pads compatible with the roofing system and as recommended by the roofing manufacturer.

(id, ¶ 2.2.7) The contractor was required to apply roofing materials as specified unless specified or recommended otherwise by the manufacturer's printed application instructions. (*id*., ¶ 3.3) Paragraph 3.3.6 Reflective/Protective Coating provided:

> Over all horizontal completed and cured "Cold Applied" roof system, apply reflective/protective coasting, immediately followed by a uniform application of ceramic granules, and then a second application of reflective roof coating. Minimum dry film thickness of each reflective roof coating application shall be 10 mils. Do not thin or dilute.

(*Id*., ¶ 3.3.6)

8. The contract specifications for submittal procedures stated that submittals of samples, *e.g*., physical examples of materials:

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[1] A cricket is the thick insulation material that goes underneath a roof which can be shaped and sloped in ways that will provide drainage (ex. A-10; tr. 18, 129). The function of a cricket is "to create a valley with the greatest slope possible and reasonable" (ex. A-9).

> are physically identical to a portion of the work, illustrating a portion of the work or establishing standards for evaluating the appearance of the finished work or both.

(*Id*., § 01330, ¶ 1.1.2.c.)

9. The contract incorporated by reference standard FAR contract clauses FAR 52.233-1 DISPUTES (OCT 1995), FAR 52.236-5 MATERIAL AND WORKMANSHIP (APR 1984), FAR 52.243-4 CHANGES (AUG 1987), FAR 52.246-12 INSPECTION OF CONSTRUCTION (AUG 1996), and FAR 52.246-21 WARRANTY OF CONSTRUCTION (MAR 1994) (*id.*, § 00721 at 13).

10. The contract included a standard provision, "FAC 5252.201-9300 CONTRACTING OFFICER AUTHORITY (JUN 1994)" that no understanding or agreement between the contractor and any Government employee other than the contracting officer would be effective or binding upon the Government (*id.*, § 00720-1). Ms. Kathy J. Gillespie was the contracting officer (R4, tab 52). Mr. David Diaz, a project engineer in the ROICC (Resident Officer in Charge of Construction) office, was the construction representative.[2] He was the inspector with responsibility to ensure that the work was performed in compliance with the contract. (Tr. 165-66, 176-77) He was the authorized representative of the Government for this purpose (tr. 78). Mr. George Ohanian and Mr. Ron Grenda were representatives of the Public Works design branch of the Navy (R4, tab 64).

11. On or about 14 July 1997, the roof design was discussed at a pre-construction meeting at which representatives of A & D, Messrs. Patterson, Farrow, Ohanian and Diaz, and representatives of the Government's architect engineer (A/E) firm were present. Mr. Ohanian had drafted a roof redesign in a sketch, dated 13 June 1997, that provided for less ponding and improved drainage in areas of the roof that would have drainage problems. Physical conditions and mathematical calculations revealed that the contract plans contemplated there would be some ponding on the roof. The redesign eliminated an aluminum embossed membrane and replaced the original cricket system with a second cricket system that had a 1/4-inch slope. The second cricket system did not have elevation requirements. Mr. Farrow knew from his extensive experience in the design of cricket systems, that the redesigned cricket system would be better than the design in the contract drawings. Since the change would require less materials, it was understood that the redesign would be at "no cost." (Exs. A-1, -2, -13, -41, -45; tr. 24, 26, 33, 38, 41-42, 46, 56, 88-89, 98, 101, 116, 133, 136, 143, 168-69)

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[2] Mr. Diaz did not testify at the hearing. He is retired. Government counsel attempted, but was unable to find him. (Tr. 19, 98)

12. A Request for Information (RFI), dated 15 September 1997, provides for the change in the roof design. Appellant stated:

> A & D and RLP propose to use the new roof drawing received from George Ohanian with the new cricket design. This will reduce the ponding of water on the new roof. . . There will be no additional cost to the government.

The A/E gave the following recommendation to the ROICC:

> We take no exception to the roof drawing prepared by George Ohanian. We only request the government receives a warranty by the manufacturer as outlined in Section 07535, Para. 18.

The ROICC sent the following response to A & D:

> Roof warranty as per Section 07535 Para 1-8 [sic] still applies. Any cost savings for the reduced parapet wall and insulation change is to be credited back to the government.

(Exs. A-6, -7) The contract administrator, whose somewhat illegible signature we find was that of Mr. Diaz, signed the RFI on behalf of the Government (*id.*; tr. 30). Thus the redesign was approved subject only to getting the roofing system manufacturer's warranty (tr. 37, 81).

13. The original sketch and other drawings of the redesign were not acceptable to the ROICC without a full drawing of the roof (ex. A-4; tr. 30, 140-41). Mr. Farrow prepared a full-size drawing including all sections of the roof that was approved by the Government on 18 September 1997 and provided to RLP. The drawing was signed and marked "APPROVED" (ex. A-19). RLP hung the drawing on an office wall and performed the roof installation in accordance with the details shown. (Exs. A-8, -19; tr. 31-32, 84-86, 151) RLP had no question that there was formal approval effecting a redesign of the roof (tr. 81, 101).

14. No formal contract modification incorporated the approved no-cost change in roof design (R4, tab 2; tr. 101-02).

15. There was no additional cost to the Government of the new roof system that was installed. When the installation was completed, there were problems with ponding. Farrow participated in the inspections of the roof installation to ensure that the ponding standard was met because of its responsibility as the roofing manufacturer to provide a warranty of roofing materials. The industry standard for ponding adopted by the Roofing Manufacturers Association and other national trade associations is 48 hours. Manufacturers in different

parts of the country adopt their own standard depending on the roof system, the type of materials used, and the climate of the area which can range from zero to 72 hours. While no one wants ponding, as a practical matter, some "rule of thumb" is needed (tr. 167). Some ponding can be expected before sunlight causes water on a flat roof to evaporate after a rainfall. (Exs. A-58, -59, -60; tr. 13, 40, 55-56, 67-68, 127-28) The contract did not provide a standard for the number of hours of acceptable ponding. The standard of Farrow for its roofs, based on climate conditions in the Southwestern United States, where most of its work is performed, is 72 hours (R4, tabs 41, 58; tr. 42, 138-39, 167-68).

16. A meeting was held on 17 November 1997 concerning the cricket system installed on the roof. Mr. Patterson, who was present with appellant's superintendent, discussed with Messrs. Ohanian and Diaz alternative measures to minimize the ponding. Mr. Patterson understood that Mr. Diaz would not require installation of more crickets if concrete was placed in the low areas of the roof surface to "float out what was considered ponding water" (tr. 35). RLP sent a letter, dated 18 November 1997, which offered to add concrete and stated in part:

> It was agreed that if R.L.P. Company would float out all ponding water areas with concrete and two ply the concrete areas with the Elastomeric Roof System. Then prior to the final white coating the ROICC and R.L.P. Company would water test to see if any additional ponding areas need to be addressed. These new area's [sic] of concern would be addressed in the same maner [sic].

(R4, tab 22; exs. A-11, -12; tr. 35-36, 89-90) The Government understood from this letter that RLP agreed to correct *all* the low spots with concrete *and* add other crickets that Mr. Diaz considered were needed. RLP intended to install concrete in low spots to meet a reasonable standard for ponding, but not add crickets in addition to the remedial work it was offering. (R4, tab 23 at 4; tr. 36, 43, 92) RLP in fact installed concrete that did not satisfy the Government's standard for ponding, but was useless additional work which resulted in low areas on other parts of the roof.

17. On 25 November 1997, Mr. Diaz told RLP that the roof was still not in compliance with the contract after attempting to correct with concrete because there was not enough height to the crickets. He stated that if the crickets were raised, "there shouldn't be any ponding at all" (R4, tab 27 at 3). Mr. Diaz erroneously thought that the failure to follow the elevations of the original cricket design was at least one of the causes of the ponding. It is the slope of the valley of the cricket rather than the height of the cricket, which is not a dimension in issue, that is critical for efficient drainage of water. (Exs. A-10, -48; tr. 34-35, 98, 101, 118, 129, 141, 160)

18. At a follow up meeting on 28 November 1997, that was attended by Mr. Farrow for the roofing system manufacturer and Messrs. Ohanian and Grenda, representing the Navy, as well as Mr. Patterson from RLP and Mr. Diaz from the ROICC, Mr. Diaz repeated his insistence that the contractor do "[w]hat ever it takes to get the water out" (R4, tab 28 at 1). Mr. Farrow explained that there would be some ponding because of irregularities, and Mr. Ohanian indicated that the Navy would "accept some ponding" (*id.*). Mr. Diaz, however, would not accept anything other than installing more crickets to bring the elevations up. (Tr. 48, 57, 66-67, 117)

19. RLP installed the second cricket system involving approximately 14 additional crickets at additional cost during the period 3-16 December 1997 (exs. A-20 through -40; tr. 36-38, 52, 144).

20. RLP performed the work during an unusually wet year caused by El Nino, which had been predicted, and had to expedite the roof installation. Work was suspended December to April because of rain. (Tr. 73, 77, 90-91)

21. At a meeting held on 14 April 1998, when the Government scheduled another water test to check for ponding, Mr. Diaz made the following comments:

> When the flood test is done on the roof, you need to mark out all areas of ponding and they are to be corrected. Your roofer said "per his letter of November 18th" that he would correct all ponding areas.
>
> The main part of this conversation is I don't want arguments when we do the flood test. if [sic] there is ponding it will be corrected, period. If you can show the government the design is wrong than we will talk about it. If there is an argument I will walk off and cancel this test. Comply with the contract. I do not want to talk to your subs. I'm holding A & D responsible.

(R4, tab 36 at 4) The Government issued a Construction Contract Non-Compliance Notice, dated 16 April 1998, to appellant for roof ponding (R4, tab 37).

22. Farrow stated in a letter, dated 24 April 1998, to RLP that its warranty is issued when the conditions were within its guidelines. Farrow stated its position on ponding that an area needed to be addressed if a pond did not dissipate after 72 hours. (Exs. A-41, -53; tr. 38-39, 52-53) On 27 April 1998, during the further inspection with a water test, Mr. Farrow saw approximately six ponds that he did not expect would disappear in 72 hours. These areas were marked for rework. RLP performed the rework by placing concrete in the low areas of the roof to smooth out the surface, which then met the standard of Farrow, the

roofing manufacturer, as was necessary for issuance of its warranty to the Government. (Ex. A-41; tr. 38-39, 52-53, 90, 138, 147)

23. On 5 May 1998, after rain, Mr. Diaz observed ponds on the roof in the same areas which had been corrected and instructed appellant to have RLP correct its work. Minutes of a meeting on that date record Mr. Diaz as stating, "I want ALL ponding areas corrected!" (R4, tab 42). By letter dated 7 May 1998, to A & D, RLP protested the installation of additional crickets and placement of concrete that had been required as not within the scope of the contract. There continued to be problems with roof ponding areas on 12 May 1998. (R4, tab 43; exs. A-42, -43, -54, -55; tr. 53-55, 106-10)

24. Mr. Diaz wanted no ponding and adopted an extremely rigid standard, which was much higher than the roofing industry standard for acceptable ponding. He did not testify about his standard, but it was considered by RLP to be four or six hours. (Tr. 30, 36, 40, 47, 126, 148)

25. Appellant submitted a sample of a walk pad that would be provided by Farrow and installed by RLP on the roof. The pad is given a reflective coating and covered with granules for an appropriate walking surface. RLP made the installation per the submitted sample. RLP applied a liquid emulsion to the deviations caused by placement of the stiff sheets on the irregular roof surface to seal the pads from water collecting underneath and feathered the edges to make them look smooth. (Exs. A-99, -101; tr. 14, 58-59, 61-63, 71, 103, 146)

26. In Mr. Farrow's professional opinion the walk pads were acceptable and would be covered by the roofing manufacturer's guarantee (ex. A-99; tr. 137, 146). RLP considered the system far superior to what was specified (tr. 61).

27. The appearance of the installed walk pads was different than the sample that had bee approved. There was no substantive deviation in material except the reflective coating was not gray. Mr. Diaz did not accept the pads for conformance to the contract requirements, but forced RLP to recoat the pads and reapply granules with a second and third coat that would restore the gray appearance at the edges of the walk pads. The Government did not test the adequacy of the walk pads or confirm that they were acceptable to the roofing system manufacturer. Mr. Diaz applied a purely visual standard. (Ex. A-101; tr. 14, 59-60, 71-72) Ms. Christina Neville-Neil an engineer in the ROICC assigned to review appellant's request for an equitable adjustment, considered that the additional coatings were rework to correct a deficient product that did not meet the sample (tr. 171, 175-76). The Government did not establish that the quality of the walk pads was inferior to the walk pad specified or the approved sample.

28. On 23 July 1998, RLP requested a meeting with A & D to obtain fair reimbursement for work over and above the specifications. Mr. Patterson's letter included

seven requests for reimbursement (REAs), which included in pertinent part the following items:

1. The 14 crickets installed after the 17 November 1997 meeting,
2. The installation of the cement,
3. The second and third installation of cement,
4. The 410 boxes installed at walls, and
5. The second and third coating of approved flex walk pads.

RLP did not include any dollar amounts for the separate requests in this letter. (R4, tab 46)

29. On 5 August 1998, RLP sent a five-page letter to appellant in support of its demand for payment for work performed beyond the scope of the contract. RLP quantified its REAs as follows:

Installation of the second cricket system - $24,000 (item 1)
All cement work done after December 1997 (*i.e.*, after installation of additional crickets) - $9,500 (item 3)
410 boxes - $9,483.60 (item 4)
Extra coatings on walk pads - $6,500 (item 5).

(Ex. A-116)

30. The roof installation was basically completed as of late April 1998, but not the remainder of the contract work. On 3 August 1998, the Government conditionally accepted appellant's work subject to a punch list which included ponding (R4, tab 48; tr. 125, 146). On 6 August 1998, RLP pulled its crew off the project with a statement from Mr. Patterson that "I've done enough" (tr. 115). The roof was not yet accepted as complete. By letter dated 6 August 1998, appellant advised RLP that it would test the roof to determine if there were any additional low spots requiring correction and hold RLP responsible for satisfactory completion of punch list items as required (ex. A-44; tr. 40-41, 115). On 21 August 1998, the Government took possession of the completed contract work without further punch list work required from RLP (R4, tab 52; tr. 121).

31. On 16 October 1998, a meeting was held with the Government for RLP to state its claim against A & D and the Government with respect to RLP's seven REAs. Mr. Patterson and two A & D representatives attended the meeting. The Government was represented by Ms. Kathy Gillespie, the contracting officer, Mr. Diaz, and Messrs. Ohanian and Grenda. Appellant hand delivered RLP's letter, dated 5 August 1998, to the Government at the meeting. The Government agreed to review unsolicited price proposals for work done over and above what was called for in the specifications in installation of cement (items 2 and 3) and the installation of 410 boxes (item 4). (Exs. A-117, G-2 at 8)

32. RLP's proposal/estimate for contract modification, dated 27 October 1998, for 410 boxes (item 4) was in the amount of $9,487.50 (ex. G-2). By letter, dated 4 November 1998, RLP provided the price of $22,118.66 for additional cement work to appellant. RLP segregated its proposal into two components: one prior to installation of the additional crickets for $11,266.75 (item 2) and one after installation of the additional crickets for $10,851.91 (item 3). (Ex. A-65) Appellant provided price proposals on the forms proposal/estimate for contract modification that included its mark-ups for items 3 and 4 to Mr. Diaz and the contracting officer in a letter, dated 6 November 1998, with copies of pricing information from RLP. Appellant enclosed the RLP letter, dated 3 November 1998, and RLP's price proposal form for $10,851.91 for additional work after 24 November 1997 for additional cement installed over and above what the specifications called for (item 3). With mark-ups, item 3 totaled $12,391.00. Appellant enclosed the first page of RLP's letter, dated 5 August 1998, concerning the 410 boxes. With mark-ups, item 4 totaled $10,837.83. Appellant did not include a price proposal form for additional cement before the installation of the additional crickets (item 2), additional crickets (item 1), or extra coatings on walk pads (item 5) in this request to the contracting officer. (R4, tab 67; ex. G-2) Appellant sent a letter, dated 17 February 1999, to the ROICC requesting a response to the price proposals that it had submitted.

33. On 3 March 1999, the contracting officer, in a response to appellant's letters, dated 6 November 1998 and 17 February 1998, discussed all of RLP's seven REAs and found that they were not additional work, but the responsibility of the contractor. The letter further stated that if appellant disagreed with the determination, it could request a final decision of the contracting officer. The letter included the following pertinent part:

> Several site inspections were conducted by [the Government] during installation of the new roof work. It was discovered and brought to your attention that the new roof work was not installed correctly or per plan. Poor drainage as well as low roofing elevations were observed by the Government representatives and brought to the attention of the Q.C. [Quality Control] representative and the roofing contractor. The contract clearly stated the steps required to [sic] preparing and installing the new roof work.

(R4, tab 64)

34. By letter, dated 30 March 1999, appellant responded to the contracting officer that it disagreed with the determination on installation of cement (items 2 and 3), and 410 boxes (item 4) and requested further review. Appellant said it had agreed that the installation of the cement was part of the contract, but that unforeseen site conditions may have caused there to be a need for more concrete to correct deficiencies and irregularities

in the roof deck. Appellant further said it had agreed with the contracting officer with respect to the other items in RLP's request for reimbursement. The letter itself did not include any claim amounts. The Government received this claim letter on 7 April 1999. (Ex. G-3) On 27 May 1999, appellant sent another letter to the contracting officer. It stated that it had responded to the letter dated 3 March 1999, concerning the seven REAs. On 30 March 1999, appellant stated that it had advised it was in disagreement with that decision and requested further review. Appellant's letter noted that RLP intended to file suit against appellant. (R4, tab 65) On 9 July 1999, appellant requested acknowledgment from the contracting officer that its two letters had been received (R4, tab 66).

35. The contracting officer issued a final decision, dated 25 July 2000, that denied appellant's claim. The contracting officer determined that the claim for additional roofing work was stated in appellant's letter, dated 27 May 1999, on behalf of appellant's subcontractor RLP in the amount of $23,228.83. The decision addressed only the amounts appellant claimed for additional cement after installation of the additional crickets (item 3), $12,391.00, and 410 boxes (item 4), $10,837.83. (R4, tab 67) Appellant filed this timely appeal.

36. Appellant's notice of appeal enclosed an unsigned letter, dated 5 October 2000, to the Board that the amount of $23,228.83 in the final decision was not correct in part because amounts for additional crickets (item 1) and extra coatings of walk pads (item 5) were omitted. The total amount for the separate items in the letter was $62,000.

37. Appellant's complaint in the appeal seeks a contract adjustment on behalf of RLP of $24,000 for the installation of additional crickets, $22,100.00 for additional cement, $6,500 for extra coating on the walk pads, and $9,400.60 for an additional 410 boxes. Appellant confirmed that it was seeking against the Government all monies that RLP was pursuing because RLP was in complete disagreement with the Government's position on its REAs and intended to file suit against A & D. (Compl. at 1) Appellant's claim for an additional 410 boxes was not presented at the hearing and has been considered waived (tr. 26, 76). Detailed supporting data for the amounts of all claim items total $61,788. (Ex. A-20, -65, -102; tr. 13-14, 37)

38. It appeared to the Board that appellant's complaint asserted new claims which had not all been submitted to the contracting officer in a sum certain for decisions prior to the initiation of the appeal. Pursuant to Board Rule 5 the Board raised the issue of its jurisdiction and requested further submissions from the parties. Appellant submitted a further claim letter to the contracting officer, which was received on 10 June 2002, that included quantification of each claim. On 11 June 2002, the contracting officer issued a final decision that denied appellant's claims in their entirety. Appellant filed a timely notice of appeal that has been docketed as ASBCA No. 53838. The parties made further submissions to the Board confirming their understanding that the amount of the claim for

additional cement was $22,100.00, as stated in the complaint appellant had filed in ASBCA No. 53103.

POSITIONS OF THE PARTIES

Appellant argues that installation of the additional crickets was extra work beyond that specified by the change in roof design incorporated in the Government-approved RFI and drawing. The change did not include roof elevations, according to appellant. Appellant submits that placement of concrete to minimize ponding on the roof in low areas that was required by the standard applied by Government's inspector was also extra work. Appellant maintains that the additional coating on the walk pads was not correction of deficient work, but required by the Government's arbitrary inspection standard not found in the contract. Appellant suggests that the failure of the Government's two potential key witnesses, Messrs. Diaz and Ohanian, to testify is "puzzling" and raises the question of whether the Government considered their testimony would be hostile to its defense of appellant's claim (app. reply br. at 1).

The Government maintains that appellant proposed no cost deviations in the roof design in which the Government acquiesced. According to the Government, the contract required appellant to correct any hollow or low spots and defects in the roof deck surfaces to eliminate poor drainage before starting work and there were to be no ponds. The Government argues that appellant's subcontractor only performed repair work made necessary by defective roof installation. The Government argues that the walk pads were properly rejected because they were different from the approved sample.

DECISION

Jurisdiction

The Board determined that appellant's quantified claim in ASBCA No. 53103 consisted of separate claims that were not adequately presented to the contracting officer in a sum certain (finding 34). After receipt of the parties' submissions in support of Board jurisdiction to decide the claims, we concluded that appellant had not submitted a claim to the contracting officer that met the requirements for a valid claim under the Contract Disputes Act, 41 U.S.C. §§ 601-613, as amended. Appellant submitted a new claim letter to the contracting officer which meets the requirements of stating to the contracting officer a sum certain for each of appellant's three claims that were previously only in appellant's complaint (findings 37, 38). The contracting officer denied those claims, and a timely appeal was filed which has been docketed as ASBCA No. 53838. We have jurisdiction to decide the merits of the claims for additional crickets (item 1), additional cement (items 2 and 3), and extra coatings on walk pads (item 5) in ASBCA No. 53838.

Merits

A constructive change can occur when a contractor performs work beyond that required under its contract, without a formal change order, and the work was informally directed by, or was the fault of the Government. *Maintenance Engineers,* ASBCA No. 52527, 01-2 BCA ¶ 31,472. The contract drawing that was approved by the Government did not incorporate dimensions, *i.e*., the height of the crickets, from the original contract drawing, but specified a ¼-inch slope. RLP was directed to install the roof in accordance with the drawing provided by the Government to appellant, subject to the requirement in the original specifications for a roof warranty. RLP did not volunteer to vary the design from what was agreed in the pre-construction meeting and RFI. The Government inspector, Mr. Diaz, insisted on installation of the additional crickets because he considered the specified height of the original cricket design part of the contract requirements. A contractor is entitled to an equitable adjustment as a constructive change when required to perform more or different work not called for under the terms of its contract as a result of a Government inspector's misinterpretation of specifications. *Atlantic Dry Dock Corporation,* ASBCA No. 42609 *et al.*, 98-2 BCA ¶ 30,025 at 148,553, *aff'd on reconsid.*, 99-1 BCA ¶ 30,208; *Allstate Leisure Products, Inc.,* ASBCA No. 35614, 89-3 BCA ¶ 22,003 at 110,623. We conclude that the work he directed was additional work beyond the contract requirements that increased appellant's costs of performance.

Inspectors with authority to accept or reject work have been held to bind the Government when they improperly reject the work. *Gonzales Custom Painting, Inc.,* ASBCA No. 39527 *et al.*, 90-3 BCA ¶ 22,950. An extremely rigid, unreasonable, and arbitrary course of conduct by a Government quality assurance representative constitutes an improper disruption of a contractor's performance that can work a constructive change entitling the contractor to an equitable adjustment under the Changes clause. *G.W. Galloway Company,* ASBCA Nos. 16656, 16975, 73-2 BCA ¶ 10,270 at 48,499-501, *aff'd on reconsid.,* 74-1 BCA ¶ 10,521. *See H.G. Reynolds Company, Inc.,* ASBCA No. 42351 *et al.*, 93-2 BCA ¶ 25,797 at 128,375 (work required by over-zealous inspectors in multiple punchlists is compensable); *Construction Foresite, Inc.,* ASBCA No. 42350, 93-1 BCA ¶ 25,515 at 127,073 (contractor held entitled to a monetary adjustment for an inspector's direction to install additional strapping beyond electrical code requirements and an additional electrical receptacle not shown on a contract drawing). The contract, as interpreted by the Government and appellant's representatives at the pre-construction meeting, contemplated that there would be some ponding on the roof surface. The contract provision for eliminating poor drainage cannot reasonably be interpreted as requiring a roof surface that would never hold surface water. There was no standard in the specifications for the number of hours ponding would be allowable. Where there are no contract provisions establishing acceptance criteria, the standard used to pass on contract work is the standard customary within the industry. *D.E.W., Incorporated,* ASBCA No. 37232, 93-1 BCA ¶ 25,444 at 126,712. The rejection of appellant's work by Mr. Diaz, who desired no ponding under a standard significantly in excess of the industry standard of 48 hours, as opposed to

the correction of ponding for purposes of obtaining the roofing system manufacturer's warranty, was unjustified. To the extent RLP placed concrete on the roof to alleviate ponding that would have disappeared in less than 48 hours, appellant's subcontractor's work was beyond the scope of the contract.

By withholding approval until appellant satisfied its interpretation of the contract requirements both by installing additional crickets and by placing concrete in low areas on the roof, the Government inspector changed the agreed contract requirements and caused appellant to incur extra costs in performing beyond contract requirements. Mr. Diaz was acting with the authority of the contracting officer in performing his inspection duties to obtain compliance with his interpretation of contract requirements. Appellant is, accordingly, entitled to compensation for the additional work.

The contract specifications provided for walk pads that would be "compatible" with the roofing systems and allowed for recommendation of the roofing system. manufacturer (finding 7). Appellant's subcontractor installed walk pads that conformed to the approved sample in a manner that made them compatible with the roofing system, but also changed the appearance of the edges of the walkway. The Government's evidence of defective work was not persuasive (finding 27). Moreover, we draw some adverse inference from the Government's failure to submit evidence from Mr. Ohanian who represented the Government on the job site and would be expected to give favorable testimony on a material area. *Maintenance Engineers, supra; M.A. Mortenson Company*, ASBCA No. 50383, 00-2 BCA ¶ 30,936. Although the Government offered some explanation for the purported unavailability of Mr. Diaz, no reason was presented for not offering testimony from Mr. Ohanian.

Appellant was required to perform additional work in applying additional coatings to make the walk pads look like the sample. The Government inspector's rejection of the installed material based solely on its appearance was an unreasonably strict subjective judgment that was not warranted by the terms of the contract. The visibility of the edges of the walkway on this flat roof was minimal and appearance, as opposed to the functional quality of the walkway, was unimportant. This inspection to an overly strict standard also constitutes a constructive change for which appellant is entitled to compensation.

CONCLUSION

The appeal in ASBCA No. 53838 is sustained and remanded to the contracting officer for determination of quantum in accordance with this opinion including interest pursuant to the Contract Disputes Act, 41 U.S.C. § 611, from 10 June 2002, the date the contracting officer received appellant's proper claims. The appeal in ASBCA No. 53103 is dismissed for lack of jurisdiction.

Dated: 28 October 2002

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 53103, 53838, Appeals of A & D Fire Protection, Inc., rendered in conformance with the Board's Charter.

Dated:

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