ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
L&C Europa Contracting Company, Inc.	)	ASBCA No. 52617
	)	
Under Contract No. N62470-95-C-1468	)	

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

This appeal involves eleven claims by L&C Europa Contracting Company, Inc. (L&C or appellant) for equitable adjustments under the referenced contract for the renovation of seven gymnasiums at Camp Lejeune, North Carolina. Appellant has withdrawn two additional claims. Only entitlement is for decision. We sustain the appeal with respect to two of the claims and deny the remainder.

FINDINGS OF FACT

1. The referenced contract was awarded to L&C on 26 September 1996 by the Navy (or government) for the renovation of gymnasiums at the Marine Corps Base, Camp Lejeune, North Carolina in the amount of $383,544. The contract called for removal and replacement of roofs, floor refinishing and various electrical, mechanical and painting work. (R4, tab 1) Appellant was required to "Commence work . . . within 10 calendar days after the date the Contractor receives the notice of award" and complete the work within 240 days "after notice of award" (R4, tab 1, § 00720 at 1-2). Pursuant to Modification No. P00002, the contract completion date was extended to 4 December 1997 and the re-roofing work on one of the buildings (BB-2) was deleted (R4, tab 2). The contract incorporated by reference, *inter alia*, FAR 52.233-1, DISPUTES (OCT 1995) and FAR 52.243-4, CHANGES (AUG 1987) (R4, tab 1, § 00721 at 1-2).

2. The solicitation for this contract was issued on 5 August 1996 (R4, tab 1). Prior to its issuance, Headquarters Marine Corps, in a memo dated 15 April 1996,

advised the contracting activity that fiscal year 1996 funding for morale and welfare work (such as the gymnasium renovations) would be "a finite amount" and that "INCREASES IN THE [CONTRACT WORK ESTIMATE] SHOWN, OR CHANGES TO THESE PROJECTS WILL BE MINIMIZED. ADDITIONAL FUNDING REQUIREMENTS WILL BE OFFSET BY DELETION OF SCOPE, OR ENTIRE CONTRACTS, AVAILABLE IN THIS ACCOUNT AT YOUR ACTIVITY" (ex. A-1 at 10). The pre-solicitation memo was routine and also decreased the authorized funding for the project (*id*; tr. 180-84).

3. Appellant commenced on site work on 1 May 1997. L&C's last daily report was for 4 September 1997. Appellant testified that the final building (bldg. M-129) was substantially completed on 29 September 1997, with only minor work performed thereafter that did not affect the government's beneficial occupancy of the gyms (tr. 330-34). The substantial completion date of 27 September was also asserted in a letter from appellant to the government of 15 June 1998 (ex. G-17). Appellant's 26 December 1997 invoice represents that the work was 97% complete with only $11,600 worth of work performed on windows and doors during the preceding month. In the January 1998 invoice, appellant represented that $9,000 of work was performed. The government initially withheld liquidated damages for late completion covering a 75-day period from 4 December through 17 February 1998 but later determined that appellant had substantially completed the work by the 4 December 1997 completion date established by bilateral contract Modification No. P00002. The government thereafter paid appellant the amount withheld for liquidated damages. No work continuing after 4 December 1997 prevented the occupancy and use by the government of the gymnasiums for their intended purpose and we find that the work was substantially complete on 4 December 1997 as determined by the government. (Exs. G-4, -5, -6, -7, -11, -15; tr. 260, 305, 329)

4. By letter dated 26 August 1999, appellant submitted 13 quantified and certified claims totaling $322,581.74 to the contracting officer (R4, tab 52). In a final decision dated 22 December 1999, the contracting officer denied all claim items (R4, tab 55) and this timely appeal was filed. L&C has withdrawn two claim items pertaining to the cupola roof work and roof exhaust caps (app. br. at 27, 29). Each claim item is discussed below. We treat the two claim items relating to time extensions as part of our overall discussion of time extensions and delays.

ASBESTOS ABATEMENT

FURTHER FINDINGS OF FACT

5. As modified, the contract required appellant to remove and replace the roofs on six gym buildings (R4, tabs 2, 3 at sheets A-1 through A-6). Sheet A-1 pertained to Building (bldg.) M-129, which had an existing shingle roof that was to be removed. The "HAZARDOUS MATERIAL NOTES" on that drawing stated that there was

"ASBESTOS CONTAINING MATERIAL" (sometimes hereinafter ACM) in the "ROOF FLASHING" (R4, tab 3).[1]

6. Note 4 of the pertinent drawing sheets for the remaining five buildings required the removal of existing metal roofs on bldgs. 300 (sheet A-3), 500 (sheet A-4), 115 (sheet A-5), and 401 (sheet A-6) or an existing metal roof and shingle roof in the case of bldg. RR-8 (sheet A-2). Note 4 on each of these five sheets also stated, "SEE HAZARDOUS MATERIAL NOTES THIS SHEET." The "HAZARDOUS MATERIAL NOTES" on each of the five drawing sheets indicated that "ASBESTOS CONTAINING MATERIAL" was in the "ROOFING" of each building and referred appellant to the "SPECIFICATIONS FOR HANDLING PROCEDURES." (R4, tab 3 at sheets A-2 to A-6)

7. Specification § 02080, ¶ 1.5.2 required appellant to submit an "Asbestos hazard abatement plan" (AHAP) (R4, tab 3). The AHAP was submitted to the Navy in Transmittal No. 1, dated 6 February 1997 but contained no abatement provisions for the five metal-roofed buildings. The government rejected the AHAP on 6 March 1997 because "Plan does not address removal of metal roofing which is coated with an asbestos containing 'COOLSEAL'." (R4, tab 4)

8. By letter to the Navy dated 18 March 1997, appellant indicated that the AHAP would be revised to incorporate asbestos abatement procedures in accordance with the government's comments (ex. A-1 at 6). Appellant notified the Navy, in a letter dated 11 June 1997, that it considered the presence of Coolseal-treated asbestos roofs to be a "changed condition" and sought to recover its increased costs of abating the metal roofs (R4, tabs 19). Appellant anticipated that it would encounter ACM only in roof flashing as indicated on drawing sheet A-1 (R4, tab 5; tr. 27-30, 35-36).

9. Coolseal is the trade name for an asbestos containing material used as roofing insulation. Appellant's asbestos abatement procedure would have been the same whether the ACM was Coolseal or some other asbestos-containing product. (Tr. 195-97) No evidence was presented establishing that Coolseal-treated roofs were more difficult to abate than other asbestos containing roofing products or treatments.

10. The firm of Stogner and Kanoy, P.A. (S&K) conducted an "Asbestos and Lead Paint Inspection" of the Camp Lejeune gymnasiums. S&K reported the results of its inspection to the government on 1 April 1996 (the S&K report), *i.e.*, prior to issuance of the solicitation. According to its report, S&K analyzed roof coating samples from three of the five metal-roofed buildings. Samples from two (bldgs. 300 and 401) of the

[1] The record contains as-built copies of the drawings with the exception of sheet A-13 which is an original. We have disregarded for purposes of our findings annotations placed on the drawings after award.

three tested roof coatings indicated that asbestos-containing material was present. (Ex. G-13 at 9-16) There is no evidence that asbestos containing materials were not encountered during actual removal of any of the metal roofs during performance. There is no evidence detailing how the S&K report was used by the Navy or what other information, if any, was relied on by the government in developing the plans and specifications for the project.

DECISION

Appellant claims that it is entitled to reimbursement of costs it incurred to remove asbestos roofing materials from each of the five metal-roofed buildings. The claim is without merit. The government did not "conceal" the presence of ACM. The contract drawings plainly advised appellant of the presence of asbestos containing materials in the "roofing" of each building and the need for implementation of specified abatement procedures.

It is irrelevant that the government did not state the particular trade name of the asbestos containing materials. The same abatement/removal procedures were applicable whether "Coolseal" or another ACM brand was present. No difference in the degree of difficulty has been proved.

The fact that the S&K report identified ACM on only two of the three sampled roofs is also irrelevant. There may have been other information available to the government indicating the presence of ACM on all metal roofs. There is no evidence that ACM was not present at the time the roofs were actually removed during performance. Moreover, the requirement for implementation of special procedures for handling potentially hazardous materials was unambiguous. Appellant should have made provision for use of the specified abatement procedures in its bid even if the procedures ultimately proved to be an "excess of caution" for one or more of the buildings.

Finally, we address a pervasive general contention that appellant makes with respect to all claims involved in this appeal. Appellant ascribes great importance to the pre-solicitation funding memorandum (finding 2) contending, *inter alia*, that as a result of the memorandum, the contract was "illegal[ly] advertis[ed]," "award[ed]," "breach[ed]" and the Navy's "illegal actions [broke] every rule and regulation in the issuance of Federal Competitive Bids" (app. br. at 1).[2] L&C argues that the memorandum colored the Navy's interpretation and administration of the contract and negatively impacted the government's consideration of its claims.

[2] Appellant contends that the government engaged in fraud and/or bad faith in connection with all of its claims. We have considered all of these allegations and find them to be without factual or legal basis.

Contrary to appellant's contentions, the memorandum was a routine funding document simply advising the contracting activity that project funds were limited and the contracting office was obligated to work within the authorized budgetary limitations. To the extent, the contracting activity opted to make changes in scope that increased the estimated cost of the work to be solicited, the memorandum further advised that such changes should be minimized and offset against deductive changes that eliminated less critical requirements. The routine communiqué had no sinister significance. The government denied the claims based on their lack of merit. For reasons detailed in this decision, we agree that the claims, for the most part, were properly denied.

This portion of the appeal is denied.

PORCH ROOFS

FURTHER FINDINGS OF FACT

11. Note 4 on drawing sheet A-1 (bldg. M-129) required the removal of the existing shingle roof. The note further stated in pertinent part: "PROVIDE NEW SHINGLE ROOF. SEE SHEET A9." Note 27 on sheet A-1 stated: "REMOVE PORCH ROOF & COLUMNS (SEE SHT. A9)." (R4, tab 3)

12. Note 4 on drawing sheet A-2 (bldg. RR-8) stated in pertinent part: "REMOVE EXISTING METAL ROOF & SHINGLE ROOF AT PORCH. PROVIDE NEW SHINGLE ROOF. SEE SHEET A10." (*Id*.)

13. Note 4 of each of the pertinent drawing sheets for the remaining four gymnasiums, in addition to requiring the removal of the existing metal roofs stated in part: "PROVIDE NEW SHINGLE ROOF. SEE SHEET A10." (*Id.*)

14. Drawing sheets A-9 "ROOF PLAN & ELEVATIONS-BULILDING M-129," and A-10, "ROOF PLAN & ELEVATIONS-OTHER 6 GYMS" show the required roofing work from above, front, back and side views referencing several details (2, 6 and 7) pertaining to the porches and directing the contractor to drawing sheet A-12 for the details. (*Id.*)

15. Details 2, 6 and 7 on drawing sheet A-12 depict requirements for a new porch roof for the buildings. (*Id.*; tr. 209-13). Drawing details also depicted the required installation of flashing on the porch roofs. Flashing would not as a matter of good construction practice be installed without removing the existing roofing. (R4, tab 3 at drawing sheets A-11 and A-12; tr. 163-68)

16. During a telephone conversation between the parties on 10 March 1997, a dispute arose concerning the porch roof work. The Navy maintained that appellant was

required by the contract to remove and replace the porch roofs on all buildings, not merely the main roof. (Ex. A-2 at 3-4) By letter dated 18 March 1997, appellant responded that only sheets A-1 and A-2 required porch removal work and only sheet A-2 (bldg. RR-8) required the contractor to provide a new shingle porch roof (ex. A-2 at 5-7).

17. By letter dated 15 April 1997, the Navy notified appellant that it considered that the contract required L&C to remove and replace the porch roofs on all gymnasiums and directed appellant to perform that work (ex. A-2 at 8).

DECISION

Appellant contends that the contract only required removal and/or replacement of the porch roof on bldgs. RR-8 and M-129 but not the other four gyms. Appellant's interpretation is unreasonable. It fails to reconcile the unambiguous drawing details and requirements for porch roof work on sheets A-9, A-10 and A-12 applicable to all buildings. Moreover, there is nothing in sheets A-3 through A-6 that excludes the porch roofs. The failure to single out the porches on the buildings in dispute does not mean that they were excluded from the comprehensive requirements to remove the existing roofs and provide new roofs. Appellant's interpretation must be rejected because it failed to adequately reconcile all provisions of the drawings and rendered portions of them meaningless. *Hol-Gar Manufacturing Corp. v. United States,* 351 F.2d 972, 979 (Ct. Cl. 1965).

As a minimum, appellant's interpretation created patent ambiguities that it was required to resolve prior to bidding the work. It failed to fulfill that duty to inquire and its claim must also be denied on that basis. *E.g. S.O.G. of Arkansas v. United States,* 546 F.2d 367 (Ct. Cl. 1976); *J.A. Jones Construction Company v. United States,* 395 F.2d 783, 790 (Ct. Cl. 1968).

This portion of the appeal is denied.

ROOF UNDERLAYMENT

FURTHER FINDINGS OF FACT

18. Details 1, 2 and 6 on drawing sheet A-12 "VINYL SIDING & TRIM DETAILS" state, among other things, that the contractor was to install "NEW ASPHALT SHINGLES OVER 2 NEW LAYERS OF #15 FELT" (R4, tab 3). General Note B on both sheets A-9 and A-10, containing "ROOF PLAN & ELEVATIONS" for the gyms states, in pertinent part that new roof shingles were to be provided "OVER 2 LAYERS OF #15 ASPHALT ROOFING FELT" and directs the contractor to sheet A-11 for details. Details on sheet A-11, "ROOF DETAILS," depict the felt underlayment but do not show more than one layer (*id*.).

19. Paragraph 3.3, "Application," of specification § 07311, "ASPHALT SHINGLES," directed the contractor to "Apply roofing materials as specified herein unless specified or recommended otherwise by shingle manufacturer's written instructions" (R4, tab 1, § 07311 at 3).

20. Subparagraph 3.3.1 of the same specification section required the contractor to provide roof slopes of four inches per foot or greater and to "Apply two layers" of underlayment to the roof deck (*id*.)

21. Appellant applied roofing shingles manufactured by Owens Corning Corporation (OCC). The manufacturer's "Guide to Installing Roofing Shingles" (Guide) stated one layer of underlayment "should be applied" on roofs with the specified slope. (Ex. G-14 at 10) Although the Guide generally proclaims OCC's prominence in the residential roofing market, the instructions are not expressly restricted to residential roofing applications (ex. G-14).

22. The government directed appellant to provide two layers of roofing underlayment and by letters dated 16 June and 18 September 1997 L&C objected stating, *inter alia*, that only one layer was required as per the OCC Guide and specifications. (Ex. A-4 at 6-10)

DECISION

The government argues that the specifications and drawings required appellant to apply two layers of felt underlayment. Appellant contends that only one layer was required. We agree with appellant. Two layers were not required if the manufacturer recommended otherwise under the specifications. Here the OCC Guide stated one layer "should be applied." Accordingly, appellant reasonably construed the conflicting provisions. The government maintains that the OCC Guide only applies to residential work. We have reviewed the Guide and found that, although it touts OCC's prominence in the residential roofing market, the Guide is not confined to residential roofing applications.

PORCH SUBSTRATE REPAIRS

FURTHER FINDINGS OF FACT

23. Detail 3 on contract drawing sheet A-11 states, "Existing wood roof deck to remain unless rotten or damaged then replace with new wood deck . . ." (R4, tab 3).

24. Appellant was required to submit, *inter alia*, a Contractor Quality Control Report and a Contractor Production Report (referred to herein as daily reports) "for each

day that work is performed" (R4, tab 1, § 01401 at 8-9). The daily reports of record cover only the period 1 May through 4 September 1997. The reports reveal that appellant commenced roofing work at bldg. 115, to which this claim relates, on 1 May 1997. (Ex. G-15) On 22 May 1997, the parties met to examine "porch substrate deterioration" at that building and the meeting was documented in a letter of that date from appellant to the government (R4, tab 16; ex. G-15). The parties agreed that appellant would repair the deteriorated substrate and appellant reserved its right to seek an equitable adjustment for the extra work (R4, tab 16).

25. By letter of the same date (22 May 1997) that the parties met to discuss the deteriorated porch roof on bldg. 115, appellant also responded to an earlier government request for "costing" information pertaining to the "additional porch work" for all of the gymnasiums. In the letter, appellant stated that the information would be submitted in the future. (R4, tab 17)

26. The daily reports indicate that the roofing work on bldg. 115 ended on 27 May 1997 and that appellant commenced roofing work on bldg. RR-8 on 28 May continuing through 20 June 1997 (ex. G-15).

27. By letter to the government dated 2 July 1997, appellant submitted to the government "our additional costs [totaling $4,755.23] for providing the roof work for Gym Building 115 to attend to the latent conditions that exists [sic] and other special requirements of the Navy . . ." (R4, tab 21). No attachment detailing the nature of the claimed extra work or costs is in the record.

28. By letter to the government dated 8 July 1997, appellant submitted "our costs for providing additional porch roof work to attend to the latent conditions that existed" in bldg. 115. The letter indicated that the "latent conditions included the replacement of 800 square feet of deteriorated substrate work" and an attachment to the letter provided details as to how the claimed price adjustment totaling $2,738.47 for the 800 ft. was determined. (Ex. A-6 at 2-3)

29. By letter dated 9 July 1997, appellant submitted to the government, "our additional costs [totaling $4,070.61] for providing the roof work for Gym Building RR-8 to attend to the latent conditions that exists [sic] and other special requirements that the Navy has determined should be incorporated in the work" (R4, tab 22). No attachment detailing the nature of the claimed extra work or costs is included in the record.

30. On 23 June 1997, appellant started roof work on bldg. 401 and continued through 11 July 1997. The roofing work on bldg. 500 started on 14 July and ended on 7 August 1997. Bldg. 300 roofing work was performed between 8 August through 22 August 1997 and work on bldg. M-129 from 25 August 1997 through 4 September 1997. No daily report for any building other than bldg. 115 indicated any damage or

deterioration of the porch substrate. (Ex. G-15) There are no letters in the record listing specific costs for substrate repairs for particular buildings other than those set forth above pertaining to bldgs. 115 and RR-8.

31. The government deleted the roofing work that the contract originally required on bldg. BB-2 pursuant to bilateral Modification No. P00002 (Mod. 2) bearing an effective date of 30 November 1997. Mod. 2 offset the cost of that deleted work against the cost of certain extra work and a time extension of 179 calendar days resulting in no change in the contract price. (R4, tab 2) Mod. 2 was "issued to accomplish the changes in the basic contract as shown in Schedule A" which indicated those "changes" to be (*id*.):

> a. Delete re-roofing BB2 from the contract
> b. Replace damaged/rotted wood in the roof of various buildings
> c. Replace damaged/rotted wood in various building floors
> d. Replace floor bldg 115 instead of bldg 300 per customer request
> e. Time extension

32. Prior to execution of Mod. 2, appellant submitted its estimates for the proposed changes in a letter to the government dated 7 October 1997. Appellant estimated a net increase of $17.61 in the contract price resulting from the deletion and addition of work. With respect to substrate repairs appellant claimed an "extra" of $21,366.26 for "Repair rotted plywood in various roofs under subject contract." (R4, tab 28 at 1) All roofing work had been completed. The accompanying proposal contained the following "Description" of the extra work, "Remove/restore Gym buildings 115, RR-8, 400, 500, 300, M-129 Roofs-LATENT CONDITIONS." (*Id.*) There is no evidence of negotiations conducted by the parties following receipt of appellant's above 7 October 1997 estimates and before execution of Mod. 2. Appellant's president, who executed Mod. 2, did not testify and there is no probative evidence concerning his intent in signing the document.

33. The modification, executed by appellant on 1 December 1997, stated: "Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full (for both time and money) for any and all costs, impact effect, and/or delays arising out of, or incidental to, the work as herein revised and the extension of the contract completion time" (R4, tab 2).

34. There is no evidence that appellant was seeking additional compensation for porch substrate repairs prior to appellant's claim letter of 26 August 1999 in which appellant sought $2,738.47 for porch roof repairs to bldg. 115 (R4, tab 52 at 4). The CO denied this claim item on the basis that appellant was fully compensated for the repairs

by Mod. 2 and that the modification constituted an accord and satisfaction (R4, tab 55 at 4).

DECISION

Appellant maintains that the repair/replacement of the porch substrate was not considered in the Mod. 2 price adjustment. Appellant argues that the porch roofs were the subject of another dispute and were excluded from its pricing estimate since the estimate only pertained to the main roof.

We consider Mod. 2 compensated appellant for porch roof repairs and operated as an accord and satisfaction barring the present claim. The relevant portion of Mod. 2 indicated it was issued in part to pay appellant for substrate repairs "in the roof of various buildings." Appellant argues that the scope of the term "roof" in Mod. 2 is delimited and means only the "main" roof but not the porch roof of the buildings. We consider that the term "roof" is not ambiguous. It is not made ambiguous by appellant seeking to extend its unreasonable interpretation of the contract drawings that we have rejected above to the interpretation of the modification. The modification was not confined to the "main" roof or part of the roofs of the buildings. It did not exclude porch roofs or some substrate repairs for separate treatment. Appellant was well aware that the government made no such division between the "main" roof and porch roof (finding 17).

The circumstances surrounding the pricing of the modification also indicate that all substrate repairs were covered by the modification. The present claim seeks $2,738.47 for porch roof repairs to bldg. 115. Well before the execution of Mod. 2, appellant had submitted its price proposal in that amount for that work. It had also previously sought compensation for substrate repairs to the roofs of both bldgs. 115 and RR-8 totaling approximately $8,800. There is no evidence concerning roof repairs to any other gymnasium. However, appellant's price proposal preceding issuance of Mod. 2 indicates that a price increase in the amount of $21,366.26 was sought for the "Repair [of] rotted plywood in various roofs." The language authored by appellant in the pricing proposal was substantially incorporated into Mod. 2. The pricing proposal did not differentiate between porch roofs and "main" roofs and was well in excess of the previously submitted estimates for all substrate repairs to all parts of the roofs. All roofing work, including all substrate repairs, had been completed at the time of execution of Mod. 2.

Under the circumstances, we consider that it was incumbent upon appellant to indicate to the government that L&C intended to seek separate compensation later for porch roof substrate repairs, thus making clear its differentiation between porch roofs and main roofs in pricing the modification. Instead, it remained silent. There is no evidence of communications or negotiations that should have placed the government on notice of

any such unexpressed subjective intent. The modification, which contained no reservation of rights preserving the claim, forecloses recovery here.

This portion of the appeal is denied.

FLOOR MARKING

FURTHER FINDINGS OF FACT

35. As originally issued, the solicitation required the removal and replacement of the existing wood floors of each gymnasium. Amendment No. A0001 (Amendment 1) to the solicitation, *inter alia*, changed the flooring requirements for four of the buildings (bldgs. M-129, 300, 500 and 401) and deleted all flooring work for the remaining buildings. Specifically with respect to bldgs. M-129, 300, 500 and 401, Amendment 1 deleted the requirement in drawing sheets A-1, A-3, A-4 and A-6, respectively, to remove the existing flooring and replace it with new flooring. Instead, Amendment 1 directed the appellant to "sand and refinish existing floor only" (bldg. M-129) or stated "Existing wood floors shall be sanded and refinished" (bldgs. 300, 500 and 401). (R4, tab 1, Amendment 1 at 2)

36. The existing floors of the gymnasiums contained laid out basketball and volleyball courts. Detail 2 of Drawing Sheet A-13 set forth a "COURT LAYOUT PLAN" indicating, among other things, new volleyball and basketball court lines with detailed painting instructions for the courts (R4, tab 3). Amendment 1 did not expressly mention Sheet A-13 (R4, tab 1).

37. Amendment 1 also did not expressly mention any of the specifications. Paragraph 3.3 of specification § 09641, "WOOD ATHLETIC FLOORING" contained detailed requirements pertaining to "SANDING, FINISHING, AND MARKING" the floors (R4, tab 1, § 09641 at 6). In particular, ¶ 3.3.2 "Finishing," stated (*id*.):

> Finishing shall be provided as specified in Section 0990 [sic], "Painting." Within one day after the final sanding, buffing, and sweeping have been completed, use a tacky rag to clean flooring with a solvent recommended by the manufacturer of the floor finish material. Follow cleaning with a coating of sealer; when thoroughly dry, burnish with No. 2 steel wool, using a power machine. After final burnishing and prior to application of final finish coat(s), layout and mark game lines as specified herein; after game lines are thoroughly dry, apply final finish coat. Floors shall be wiped with a tacky rag each burnishing. Finish floors in accordance with MFMA SSCLFMGF. Four Coat Specification: Group II finish shall

consist of one sealer coat and three finish coats. Allow 5 days for proper curing.

38. By letter dated 10 March 1997, appellant took the position that § 09641 had been deleted from the specifications (ex. A-3 at 4). Appellant particularly objected to "repainting" the court layout markings (R4, tab 23 at 2). The government disagreed, stating that the sanding, refinishing requirements of ¶ 3.3 of § 09641 remained applicable (*id*. at 5). There is no evidence of any pre-bid inquiry by appellant concerning the amended gym floor requirements nor is there any detailed description concerning what sanding/refinishing requirements appellant considered applicable to the gym floor work as amended.

DECISION

Appellant maintains that ¶ 3.3 of specification § 09641 no longer controlled the sanding and refinishing work after issuance of Amendment 1 to the solicitation. In particular, L&C alleges that it was no longer required to layout and paint the gym floor basketball and volleyball courts.

The principal problem with appellant's interpretation is that it created patent ambiguities concerning what work Amendment 1 deleted. First, the solicitation amendment did not expressly eliminate any specification section. Second the apparent purpose of the revised requirements was to provide a usable gymnasium suitable for its intended purpose of providing a venue for court games. Although a new floor was no longer required, it was unreasonable to assume without pre-bid inquiry that the gym could be turned over to the Navy without the game lines. *See Elias Pamfilis Painting Company,* ASBCA No. 30013, 86-2 BCA ¶ 18,913 at 95,389 (interpretations contrary to the principal apparent purpose of the contract are not favored). Third, appellant has not explained what requirements governed the sanding/refinishing work in the absence of ¶ 3.3. The layout/marking of the courts was required as part of the "finishing" work pursuant to that provision. For all these reasons, we consider that appellant should have inquired seeking an explanation prior to bidding concerning the scope of the amended requirements. Because it failed to fulfill that duty, this claim must be rejected.

This portion of the appeal is denied.

AS-BUILT DRAWINGS

FURTHER FINDINGS OF FACT

39. FAC 5252.236-9310, RECORD DRAWINGS (JUN 1994), was incorporated into the contract (R4, tab 1, § 00721 at 8). That clause required appellant to maintain two sets of drawings at the job site and update them as the work progressed showing all variations

between actual construction and that indicated. The clause further required appellant to deliver the two sets of marked up (commonly referenced by the parties as "as-built") drawings to the contracting officer "upon completion of the work" prior to final acceptance and payment. (*Id.*)

40. A letter from appellant's Mr. Edward Zahorak to the government dated 21 May 1998 stated, "We transmit herewith the project 'As Built Drawings.' If you require additional information please advise." (Ex. A-5 at 2) Mr. Zahorak testified that the "as-built" drawings were mailed with the letter (tr. 70-71).

41. Under cover of a form dated 28 May 1998, the government forwarded appellant a final release for its execution. The cover form noted that the government had received the "as-built" drawings. (R4, tab 46)

42. On 28 August 1998, the Navy notified appellant that it had not been provided with the "as-built" drawings (ex. A-5 at 3). Over approximately the next six months, there ensued a series of discussions and correspondence between the parties in which, *inter alia*, the government directed appellant to furnish the "as-built" drawings that the Navy claimed it had not received (ex. A-5 at 3-4). Appellant supplied the requested drawings on an indefinite date in early 1999. (R4, tab 3; ex. A-5) Appellant seeks "construction costs" of $1,265.00, a time extension and "unabsorbed overhead" costs.

DECISION

The sole issue is whether appellant furnished the "as-built" drawings to the government in late May 1998. The preponderance of the evidence in the record indicates that the drawings were furnished to the Navy. Appellant's letter and testimony of Mr. Zahorak indicate that they were transmitted on 21 May 1998 and the government acknowledged their receipt on 28 May 1998. Accordingly appellant is entitled to an equitable adjustment for furnishing the replacement sets. We further address whether appellant is entitled to a time extension and "unabsorbed overhead" costs in our discussion of appellant's delay claim *infra*.

This portion of the appeal is sustained.

METAL DRIP EDGES

FURTHER FINDINGS OF FACT

43. Specification § 07311 at ¶ 3.3.2 stated in part: "Provide metal drip edges as specified in § 07610, 'SHEET METAL AND CLADDING,' applied directly on the wood deck at eaves and over the underlayment at rakes" (R4, tab 1, § 07311 at 3).

44. Specification § 07610 at ¶ 2.1 stated in part: "Fabricate sheet metal items . . . to a thickness of 0.032-inch" (*id*. § 07610 at 1).

45. Specification § 07620, "METAL EDGE STRIP," requires appellant, *inter alia*, to indicate in a submittal the thickness of the edge strip. There is nothing in § 07620 that prescribes or addresses the permissible thickness of the edge strip. (R4, tab 1, § 07620)

46. By letter to the government dated 13 March 1997, appellant questioned the government's rejection of L&C's submittal regarding the metal drip edges. The letter indicates in pertinent part that the factory-fabricated drip edge proposed was only 0.019-inch thick. Appellant contended that its proposed drip edge should have been approved because to obtain the 0.032-inch thickness stated in § 07610 the edges would have to be custom-fabricated. Appellant asserted that off-the-shelf drip edges were not available at that thickness. (R4, tab 7) There is no evidence that appellant attempted to determine the availability of the drip edges prior to bidding. The record does not disclose the scope of its investigation of the market after bidding.

47. Appellant was required by the government to furnish the 0.032-inch thick drip edge. Appellant had the drip edges specially manufactured and now claims the additional cost of furnishing them rather than its originally proposed, off-the-shelf, drip edges. (Tr. 87)

DECISION

Appellant argues that the contract permitted it to install a 0.019-inch thick metal drip edge. This assertion ignores the unambiguous specification requirement to furnish 0.032-inch thick drip edges. Appellant's submittal proposed a drip edge that did not conform to that specification. Nothing in § 07620 addresses or alters the thickness requirement of § 07610. Even assuming appellant is correct that no manufacturer could supply off-the-shelf 0.032-inch drip edges, it was nonetheless responsible for custom manufacturing them to comply strictly with the clear mandate of the specifications. *E.g., Granite Construction Co. v United States*, 962 F.2d 998, 1006-07 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1048 (1993). The government made no representation in the contract or otherwise that the specified drip edge was available off-the-shelf. Appellant was responsible for furnishing the necessary materials and determining their availability prior to award. *E.g. National Construction Co.,* ASBCA No. 26234, 83-2 BCA ¶ 16,793.

BLDG. M-129 PAINTING

FURTHER FINDINGS OF FACT

48. Drawing sheet A-1 set forth a "Room Finish Schedule" (RFS) for bldg. M-129. The RFS addresses the painting for rooms in that building in two ways: by notation at the top of the schedule and in a columnar schedule directly beneath the rooms listed at the top of the schedule. (R4, tab 3) The rooms listed in the very top of the schedule were as follows (*id.*):

> Rooms 102, 108, 110, 112, 118-120, 122-125: Paint ceilings, walls & base. Do not paint vinyl base where occurs
>
> Rooms 100, 101, 107, 126; paint ceiling.
>
> Rooms not listed: Existing to remain, no new work.

49. An additional 16 rooms were listed in a seven-column schedule directly below the above notations. The headings for each of the seven columns were: Room Name; No.; Floor; Base; Walls; Ceiling; and Remarks. The vast majority of the columns for Base, Walls, and Ceiling associated with each Room Name and No. contained the words "NEW PAINT." (*Id.*)

50. By letter to the government dated 11 September 1997, appellant addressed a dispute concerning the painting requirements for bldg. M-129. In the letter, appellant contended that it was only required to paint rooms to the extent noted at the very top of the schedule but not rooms listed in the columnar portion of the RFS. According to appellant, the extensive notations of the words "NEW PAINT" indicated only that new paint was already present and therefore no repainting of the area was needed. (Ex. A-9 at 3-4)

51. No testimony or other evidence from a person involved in the preparation of appellant's bid were offered. There is no evidence concerning any site visit by appellant prior to preparation of its bid or that "new paint" had recently been applied to the surfaces indicated in the columnar section of the RFS.

DECISION

Appellant argues that it was only required to paint the rooms listed in the top portion of the RFS for bldg. M-129. This interpretation of the RFS is unreasonable because it fails to harmonize and give effect to requirements for rooms listed in the columnar section. Appellant's assertion that the words "NEW PAINT" simply meant the rooms and surfaces in question had recently been painted is wholly without merit. The

extensive call outs for "NEW PAINT" throughout the columns of the schedule are rendered superfluous. There is no evidence that recent pre-bid painting of the rooms had actually occurred that might support appellant's conclusion. Absent such knowledge and as a minimum, appellant should have inquired to resolve the patent ambiguity created by its interpretation.

ELECTRICAL WORK - BLDG. M-129

FURTHER FINDINGS OF FACT

52. The contract required the installation of a new heat pump outside and on the northwest side of bldg. M-129. It also required appellant to connect the heat pump to an existing electrical panel approximately 120 feet away that was located inside, and on the southwest side of, bldg M-129. The contract did not specify whether the electrical conduit connecting the pump and the panel was to be run inside or outside the building. (R4, tab 3, sheets E-1 and M-1)

53. In a submittal dated 23 February 1998, appellant sought approval of a plan to connect the pump to the panel by laying the conduit in a 120-foot long and 24-inch deep trench. The trench was to be dug beginning from the pump along the northwest side of the building, turning the corner and completing the run along the southwest side to the panel. The government approved the submittal on the date it was submitted. (R4, tab 38)

54. In appellant's claim submission of 26 August 1999, L&C contended that the Navy directed appellant to install the electrical conduit on the outside of the building depriving appellant of its preferred option of routing the conduit within bldg. M-129 (R4, tab 52 at 5). There is no earlier documentation (or documentation contemporaneous with performance of the work) in the record concerning appellant's allegation that it was ordered to route the conduit along the outside of the building. The record does not disclose: who allegedly issued the order to appellant, whether the alleged order was issued or ratified by an authorized official, who received the order, when the order was given, and whether appellant contemporaneously took issue with the order.

DECISION

Appellant contends that it was ordered by the government to route the conduit along the outside of the building and thus deprived of its preferred option of running the conduit inside the building. The claim lacks merit for several reasons. Most importantly, there is no evidence that an order constructively changing the contract was issued, and no identification of the person allegedly issuing the order or the authority of that individual. There is also no contemporaneous evidence that appellant ever planned to route the conduit inside the building. The submittal indicates only that it would be installed in a trench along the exterior of the building and there is no indication that appellant voiced

any objection to proceeding in that manner. We consider that appellant on its own initiative elected the method of performance. *Cf. Len Company and Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967); *S-TRON*, ASBCA No. 45893, 46466, 96-2 BCA ¶ 28,319; *Bruce Andersen Company, Inc.*, ASBCA No. 29558, 88-1 BCA ¶ 20,431.

TIME EXTENSIONS/DELAYS

FURTHER FINDINGS OF FACT

55. Mod. 2 (findings 31-33, above) extended the completion date 179 days from the originally scheduled date of 8 June 1997 through 4 December 1997, *i.e.*, the date that we have found that the contract was substantially complete (finding 3). Among other things, the modification covered "all costs, impact effect, and/or delays arising out of, or incidental to, . . . the extension of the contract completion time" (finding 33).

56. Appellant's claim sought compensation for certain alleged delaying events that transpired prior to the extended completion date of 4 December 1997 (hereinafter collectively referred to as pre-modification delays) (R4, tabs 44, 52, 54). The CO denied claims alleging pre-modification delays on the basis that they were barred by the Mod. 2 release (R4, tab 54 at 8). We also address appellant's assertions regarding three post-modification delay periods related to: the original assessment of liquidated damages for a 75-day period from 4 December 1997 through 17 February 1998 and validity of the substantial completion date of 4 December 1997 (finding 3); appellant's contention that it is entitled to additional compensation for a 42-day period from 17 February through what it now claims is the actual beneficial occupancy date of 31 March 1998; and, appellant's allegation that it is entitled to delay costs for the period from 31 March 1998 (appellant's claimed date of substantial completion) through the date that the "as built" drawing dispute was allegedly resolved on 21 March 1999.

57. There is no evidence that establishes that pre-modification delays were not concurrent with other delays that were not the fault of the government (other than those delays for which appellant has been compensated by Mod. 2). The record does not contain details defining time periods and delay impacts. To the extent that daily reports are available, they are cursory and generalized at best (ex. G-15). The record does not permit the segregation of contractor-caused delays from any government-caused delays. There are no schedules in the record that demonstrate the effect of any alleged cause of delay on overall completion of the project. With respect to our determination that appellant is entitled to compensation for providing the additional layer of underlayment for the roofs, appellant's 29 August 1999 claim letter does not allege that it is entitled to a time extension for installation of the additional underlayment (R4, tabs 44, 52).

58. With respect to the post-modification delays, appellant was performing some work between 4 December 1997 and 31 March 1998 (exs. G-4 to -19). However, there is

no evidence that the government interfered with or delayed the prosecution of the remaining minor work during that period. There are no daily reports addressing work during that period and its extent is uncertain. In addition appellant, not the government would have been responsible for delays associated with the interior painting work and heat pump installation for bldg. M-129 because we have found those claims to be without merit. Appellant has failed to identify, segregate and address any other activities that interfered with timely prosecution of the remaining work on bldg. M-129 or demonstrate that any delaying effects of the painting and electrical installation work were not concurrent with such other activities.

59. With respect to the "as-built" drawings, we have found above that appellant is entitled to an equitable adjustment compensating it for the cost of providing the additional replacement sets of drawings. Appellant also claims that it is entitled to recover a per diem amount of $234 per day for 345 days ($80,730) for the "delay" pending resolution of the dispute. Only underabsorbed overhead is claimed (compl. at 16). No other time-related cost, damage or impacts are claimed. (App. br. at 33). There is no evidence that any of appellant's personnel remained mobilized at the site after March 1998.

DECISION

Pre-Modification Delays

In its post hearing briefs, appellant has not explained, presented argument or sought additional compensation for pre-modification delays (app. br. at 31-34; app. reply br. at 69-80). Given appellant's failure to present more specific arguments, we have reviewed the limited record to determine if L&C has established entitlement to additional relief for pre-modification delays and conclude that there is no basis for recovery. The record contains no schedules or other evidence that define time periods, delay impacts or the effect of any alleged cause of delay on overall completion of the project. The daily reports are cursory and generalized at best and do not address construction activities after 4 September 1997. There is no evidence segregating alleged delaying events from delays that were not the fault of the government including those that we have found were appellant's responsibility. Nor can we determine whether potentially delaying events were concurrent with the 179 days of delay for which appellant was compensated in calculating the value of the added and deleted work considered in Mod. 2.

Post Modification Delays

As argued and briefed in this appeal, L&C requests that we determine that it is entitled to delay compensation at a daily per diem rate for three distinct time periods encompassing the entire interval between 4 December 1997 and 21 March 1999.

Most fundamentally, appellant's post-modification delay claims lack merit because we have determined that the contract was substantially complete on 4 December 1997. Substantial completion occurs when the project is capable of being used for its intended purpose. *Kinetic Builder's, Inc v. Peters,* 226 F.3d 1307, 1315-16 (Fed. Cir. 2000). There is no persuasive evidence supporting appellant's contention that substantial completion did not occur until 31 March 1998. Appellant itself contemporaneously contended that the contract was substantially complete as of 29 September 1997. Delays to any continuing minor work following substantial completion by definition cannot adversely impact overall completion of the contract. The establishment of an early substantial completion date generally benefits the contractor because, *inter alia*, it precludes assessment of liquidated damages by the government. Indeed, in this case the government's determination that the contract was substantially complete on 4 December resulted in the return of liquidated damages that previously had been assessed through 17 February 1998. If the contract was not substantially completed until some date after 4 December, appellant would have been exposed to potential liability for liquidated damages.

Appellant first alleges that it is entitled to a 75-day time extension for the period 4 December 1997 to 17 February 1998 during which the government withheld liquidated damages. The basis for the claim is that the government thereby established a new completion date of 17 February 1998 and that the government's later release of the liquidated damages withheld constitutes recognition that appellant was entitled to a time extension for the period. (App. reply br. at 69-71) Secondly, appellant claims entitlement to a 42-day time extension from the end of the "liquidated damages period" on 17 February 1998 to what appellant now argues was the actual "beneficial occupancy" date, at least for bldg. M-129, of 31 March 1998 (app. reply br. at 79). Appellant's claim regarding this period is based on its assertion that because some work was ongoing during the period on one of the gyms (*i.e*., bldg. M-129), the substantial completion date of 4 December 1997 determined by the government is incorrect (*id*.).

Apart from the fact that we have concluded that the contract was already substantially complete, appellant's time extension claims for the period between 4 December 1997 and 31 March 1998 lack merit because there is no evidence of any delay during the period that was the fault of the government. Appellant appears to be of the opinion that the government's decision to return the liquidated damages constituted an admission that the Navy was liable for delays occurring from 4 December 1997 through 17 February 1998. That is not the case. Once the 4 December 1997 substantial completion date was established, the assessment of liquidated damages thereafter was not authorized. The government was contractually required to return them. This development, however, did not relieve appellant of its normal burden of proving that events transpired after 4 December 1997 entitling it to compensation. It has failed to do so with the exception of the "as-built" drawing controversy addressed below. To the extent that minor work continued on bldg. M-129 between 4 December 1997 and

31 March 1998, we also note that appellant's claims regarding the additional painting and electrical work associated with that building were without merit. Appellant not the government was responsible for the failure to complete the minor remaining work on that building.

With respect to the "as-built" drawing dispute, we have concluded that appellant is entitled to additional compensation for furnishing the replacement drawings. However, appellant is not entitled to a time extension or "unabsorbed overhead" costs as part of the equitable adjustment. This dispute arose not only after substantial completion but also following the finishing of the minor work on bldg. M-129. There is no evidence that any of appellant's employees were present at the site after March 1998. The pertinent clause (finding 39) itself required furnishing the drawings only "upon completion of the work." Appellant here has shown no more than that it was a minor, administrative inconvenience to provide the replacement drawings. For that it is entitled to recover a monetary adjustment for providing the replacements but not a time extension or time-related damages on the facts of this case.

This portion of the appeal is denied.

CONCLUSION

The appeal is sustained with respect to the roof underlayment and "as-built" drawing claims to the extent indicated above and is remanded for determination of quantum. It is otherwise denied.

Dated: 23 December 2003

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52617, Appeal of L&C Europa Contracting Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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