ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
L&C Europa Contracting Company, Inc.	)	ASBCA No. 52848
	)	
Under Contract No. N62470-96-C-4379	)	

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

This timely appeal originally involved 20 claims for extra work and delays under a contract to renovate a recreation center at Camp Lejeune, North Carolina. Seven claims were partially settled during the hearing of the appeal. Only entitlement is for decision. The appeal is denied.

FINDINGS OF FACT

1. The referenced contract was awarded to L&C Europa Contracting Company, Inc. (appellant or L&C) on 24 September 1996 by the Navy for renovation of a recreation building at the Marine Corps Base, Camp Lejeune, North Carolina. As awarded, the contract price was $257,500 and the completion date was 8 March 1997. Pursuant to bilateral Modification No. P00001 (Mod. 1), the contract price remained unchanged, but the completion date was extended to 7 May 1997 (R4, tabs 1, 2).

2. The work included, "interior renovation of existing building including new finishes, suspended ceiling system, toilets and accessories, . . . lights, VAV boxes and ductwork, VCT with non-friable asbestos containing mastic shall be removed, existing music/PC system shall be replaced and incidental related work" (R4, tab 1, § 01010 at 1).

3. The solicitation for the contract was issued in August 1996 (R4, tab 1). In April 1996, a Headquarters Marine Corps memorandum had notified the contracting activity that certain funding limitations were imposed on other planned work to be contracted for at Camp Lejeune. That memorandum did not pertain to the recreation

center involved in the subject contract. It contains no language suggesting that legitimate change orders or claims would not be paid. The official primarily responsible for administration of the contract by the government was the Assistant Resident Officer in Charge of Construction (AROICC). The AROICC was not aware of the memorandum until the week prior to the trial and the memorandum had no effect on his administration of the contract. (Ex. A-1 at 15; tr. 341-42)

4. Numerous disputes between the parties arose leading to the submission of an omnibus claim by appellant in a letter dated 12 October 1999. The aggregate amount of the 20 claim items identified in the letter was $231,231.34 (R4, tab 51). The first 16 of the 20 claim items sought recovery for both "construction costs" and "time costs." Claim items 17 and 18 sought solely "time costs." Claim item 19 sought return of liquidated damages withheld by the government in the amount of $68,800. Claim item 20 sought recovery of the cost of furnishing "As Built" drawings and associated "time cost." (*Id*.) The contracting officer denied all of the claim items in a final decision dated 31 March 2000 (R4, tab 53). Appellant timely appealed by letter dated 26 June 2000. In its complaint, appellant refers to "construction costs" (in the claim letter) as "direct costs" and seeks the identical amount of "direct costs" for each claim item as had been claimed as "construction costs" for the corresponding item in appellant's claim letter (compl. at 2-9; R4, tab 51).

5. Following opening statements on 26 March 2003, the first day of the hearing of the appeal, the parties indicated that they were engaged in settlement discussions and moved to defer presentation of appellant's case-in-chief pending completion of negotiations. The Board granted the parties' request and negotiations continued throughout the remainder of the day. (Tr. 18-26)

6. On the morning of 27 March 2003, the parties announced that they had reached a partial settlement of the appeal. Specifically, the parties announced that they had settled the "direct cost" portion of six claim items, but they had failed to reach agreement on whether appellant was entitled to any "time costs" with respect to any of the six items. The government agreed to pay appellant the amount of "construction" or "direct" costs claimed, totaling $4,340.00, "inclusive of all interest, attorney's fees [and] other expenses associated with pursuing those direct costs" (tr. 32) for claim items 1-4, 7 and 9, as listed in appellant's claim letter (R4, tab 51 at 4-6). Although not specifically mentioned by government counsel at the hearing, it is evident from the settlement amount and the parties' conduct and briefing of the appeal that the settlement of claim item 9 encompassed the closely related claim item 10. In particular, the settlement amount of $4,340 is $300 greater than the total amount of "direct costs" claimed by appellant for the six items mentioned at the hearing by the government's attorney. The $300 excess is precisely the total "construction cost" amount claimed by appellant for claim item 10. (R4, tab 51 at 7) The contracting officer's final decision discussed both items jointly as one claim (R4, tab 53 at 5) and appellant's post-hearing brief also lists them together as one item and indicates

they were "settled" (app. br. at 31; see also tr. 68). We conclude that claim item 10 was treated and included as part of settled claim item 9. The seven claim items thus settled in part were as follows (tr. 32-33; R4, tab 51 at 2-7): 1. Exterior work; 2. Music room door change; 3. Music room receptacle work; 4. Game room soffitt removal; 7. Rotating light fixture; and, 9. Chase floor for electric work (including 10, electrical work relocation).

7. In its claim letter, appellant also sought relief for a total of 56 days of delay for the above seven claim items (R4, tab 51 at 4-7). With respect to the delay days claimed by appellant, counsel for the government stipulated at the hearing,

> The parties have specifically not resolved the time issues associated with [the partially settled claims]. The government would continue to maintain that there was no delay associated with any of those changes . . . . Therefore, the government would continue to believe that it's entitled to the full assessment of liquidated damages. The contractor, of course, conversely maintains its right to assert entitlement to extended overhead delays for each of those items.

(Tr. 32-33) Appellant's counsel concurred with the government's stipulation of the terms of the partial settlement (tr. 33). The Board, thereafter, summarized its understanding of the delay/time extension issues as follows, "So all the delay issues are still before us with respect to each of these six items as well as the other items that are in dispute?" (*Id.*) The government agreed with the above statement; appellant declined the opportunity to modify or amend the government's and/or the Board's statements regarding the scope of the delay issues or the partial settlement generally (*id.*).

8. Following the partial settlement, the remaining claims in dispute (as identified above or in appellant's claim letter) are organized for purposes of discussion (with its corresponding claim number in appellant's claim letter) as follows: a. Preconstruction conference delay ("17. Initial Time Extension") and roofing repair delay (identified in the claim letter as "18. Subsequent Time Extension"); b. Claims for delay costs associated with the partially settled items (identified above); c. Deteriorated concrete (claims 5 and 6); d. Entry mat recess work (claim item 8); e. Counter top work (claim item 11); f. Ceiling height (claim item 12); g. Sprinkler system modifications (claim item 14), escutcheons (claim item 13) and leak (claim item 15); h. Miscellaneous items (claim items 16 and 20); and i. Liquidated damages (claim item 19). Following our findings concerning appellant's proof of delay and the nature of the evidence generally, we address each of the above disputes in turn.

PROOF OF DELAY AND EVIDENTIARY DEFECTS GENERALLY

9. Appellant was required to submit a Quality Control (QC) plan within 30 days after it received the Navy's Notice of Award (R4, tab 1, § 01401 at 1). Government approval of the QC plan was required prior to start of construction (*id.* at 4). Appellant also was required to submit, *inter alia,* Contractor Quality Control Reports (QC reports) "for each day that work is performed and for every seven consecutive calendar days of no-work and on the last day of a no-work period" (*id.* at 9).

10. Appellant commenced on-site work on 13 February 1997. The daily reports indicate appellant performed intermittently from February to September 1997. During that time, there are no QC reports, no proof that work was performed, and no evidence establishing that appellant was excusably delayed for the following periods between February and September 1997: 13 March to 2 April; 5 April to 4 August; and, 11 August to 23 September. From 23 September 1997 to 11 February 1998, daily reports generally were filed on a regular basis; however, the performance of subcontractors was delayed because sufficient materials were not available on site. Although some work was performed during the period 11 February through April 1998, there are no daily reports in the record for that period. (Exs. G-1, -5, -6; tr. 216-19) Appellant had other contract work that it was performing contemporaneously with the work under this contract. Appellant did not properly staff this contract because its crews were performing the other contract work contributing to the frequent gaps in the daily reports submitted under this contract. If no daily report was submitted for a date, no work was performed on that date, with the exception of a few items of work performed just prior to substantial completion of the contract which occurred on 17 April 1998. (R4, tab 37; ex. G-1; tr. 210-14, 217-18)

11. With respect to all of the delay/time extension claims asserted by appellant, unless discussed elsewhere in this opinion, there is no evidence detailing precisely when the alleged delaying events transpired or their specific impact on overall completion of the contract. To the extent that daily reports are available, they are cursory, generalized and inconclusive at best (ex. G-1). In no instance, has L&C attempted to identify and track the allegedly delayed work in the daily reports and account for the delay period. Only the planned, preconstruction schedule is in evidence (ex. G-2). There are no updated schedules in the record that might demonstrate the relationship of the alleged delays to other work at the site, or the timing and impact of alleged delays on overall completion of the contract. The record does not permit segregation of any delays attributable to government fault from other non-compensable delays including delays caused by appellant and/or delays extending over unexplained gaps in appellant's on-site performance.

12. With respect to the nature of the proof offered by appellant generally, appellant for the most part relies on general, unspecific and conclusory testimony that

was not credible. Appellant's sole witness was evasive, argumentative and often nonresponsive during cross-examination and his testimony was often based on hearsay (tr. 34-180). He was "on and off" the site for indeterminate periods (tr. 166). The government's AROICC had no discussions with the witness and did not observe the witness at the job site prior to June 1997 (tr. 203-04). L&C's briefs contain arguments that lack supporting citations to the record and we are sometimes unable to determine precisely the bases for its contentions. Appellant's arguments are sometimes contradictory and we are unable to pin down its ultimate position. We are cited to no legal authority supporting its arguments.

PRE-CONSTRUCTION CONFERENCE AND ROOF REPAIR DELAYS—FURTHER FINDINGS OF FACT

13. The contracting officer notified L&C of the award by letter dated 24 September 1996. The letter directed appellant to submit, within ten days, performance and payment bonds, a schedule of prices and a schedule of work. The letter also informed appellant that "other administrative items are required before you may start work at the job site" and directed the contractor to contact the Navy's project manager within ten days to discuss the additional items and to arrange a preconstruction meeting. (R4, tab 4) The contract required appellant to submit its "construction schedule" and "schedule of prices" within 15 days following notice of award (R4, tab 1, § 01310 at ¶ 1.3, § 01025 at ¶ 1.2). Appellant failed to submit its "construction schedule" until 20 December 1996 (ex. G-2; tr. 101-02). There is no evidence concerning when the "schedule of prices" was submitted.

14. As of early November 1996, the preconstruction meeting had not been scheduled. At that time, the Navy's AROICC telephoned appellant's president to schedule the conference. Appellant notified the government during the conversation that L&C could not schedule the conference prior to 26 November 1996. The parties arranged to conduct the conference on that date. Appellant's president expressed no concern to the AROICC about any delay in scheduling the conference, instead indicating that the contract was "minor," "not very complicated" and could be completed within the allotted time. (R4, tab 5; tr. 186-90)

15. Shortly before the preconstruction conference, appellant visited the recreation center. During the visit, appellant noted that the roof leaked and voiced concerns to the government that the leaks would impact commencement of the work. At the preconstruction conference, the government informed appellant that it would have the roof repaired. Hurricane Fran had caused the damage shortly before award of this contract in September 1996 and the government arranged to have the repairs made by another contractor that was engaged specifically to repair hurricane damage throughout Camp Lejeune. The government was aware of the roof damage prior to the

preconstruction conference but its contractor had not performed the repairs earlier. (Tr. 36, 41, 191-93)

16. On 14 January 1997, the government notified appellant that the repairs had been completed (R4, tab 6).

17. There is no evidence regarding the extent and nature of any damage to appellant caused by any delay in the scheduling of the pre-construction conference or delays caused by Hurricane Fran with respect to the roof other than generic statements that the appellant "lost" certain subcontractors. There is no evidence concerning the allegedly impacted subcontracts, including when the subcontracts were entered into, and pertinent details regarding the terms of the subcontracts and circumstances surrounding the "loss" of the subcontractors. Nor is there evidence concerning how and when L&C attempted to remedy the problem, other than general statements that unidentified subcontractors did not like to work at Camp Lejeune or were too busy (R4, tab 19). There is no evidence that appellant asserted any claim for delayed scheduling of the pre-hearing conference until approximately three years later at the time of submission of its claim in October 1999.

18. On 5 February 1997, appellant's safety plan was disapproved. A satisfactory plan was not submitted until on or about the time appellant commenced on-site work on 13 February 1997. (R4, tab 7; exs. G-3, -4; tr. 105-07)

19. By June 1997, the parties had commenced negotiation of an equitable adjustment to compensate appellant for the delay associated with the repairs to the roof damaged by Hurricane Fran. The government forwarded to appellant proposed contract Mod. 1 extending the time for completion by 60 days through 7 May 1997. (R4, tabs 2, 19) The time extension was issued "Due to delays caused by hurricane damage and remobilization" (*id*.). How the 60-day period was developed and computed is unclear in the record but it was first proposed by appellant (R4, tab 53 at 9).

20. By letter dated 10 June 1997, appellant's project manager, Mr. Zahorak, maintained that the time extension was inadequate. The letter referred to a prior meeting between the parties on 27 February 1997 during which appellant informed the government that potential "Plumbing/HVAC" subcontractors were either "too busy to take on additional work" or "were not interested in working at Camp Lejeune." Appellant indicated that it did not retain a "Plumbing/HVAC" subcontractor until May 1997. (R4, tab 19)

21. In a subsequent discussion of the letter with the AROICC, appellant's Mr. Zahorak told the AROICC that appellant's intent was to qualify acceptance of the 60-day time extension even though it would execute the release. The AROICC also conceded

that the modification was not intended to preclude appellant from claiming that the delay caused it to lose subcontractors. (Tr. 45-46, 47, 100, 197-200)

22. On 27 June 1997, appellant's President, Mr. Louis Sodatovic, executed proposed Mod.1 containing the 60-day time extension without express written reservation or qualification. Mr. Soldatovic did not testify but he was advised by Mr. Zahorak that appellant's 10 June 1997 letter was sufficient to preserve appellant's rights to claim additional delays relative to the subcontracting problems raised in that letter (tr. 47-48). The government executed Mod.1 on 6 July 1997 (R4, tab 2). The modification contained the following language: "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" (*id*.).

23. Appellant's claim seeks a 222-day time extension for the roof repair delay (R4, tab 51 at 9). There is no explanation of how the period was calculated.

PRE-CONSTRUCTION CONFERENCE AND ROOF REPAIR DELAY-DECISION

Appellant claims that it is entitled to a time extension for the delayed scheduling of the pre-construction conference and an additional time extension for the delay allegedly associated with the roof repairs. Neither claim has merit.

With respect to the pre-construction conference, appellant was at fault for not timely submitting all documentation specified in the notice of award. In addition, there was no contemporaneous notice from appellant that it considered the government at fault for the delay and requesting that the conference be scheduled more promptly. During the early November telephone call initiated by the AROICC to set a date for the conference, the appellant's president expressed no concern that any delay was impacting its planned performance. Appellant negotiated Mod. 1 without raising the issue. Moreover, there was no indication that appellant would seek an equitable adjustment for the delay until the submission of its claim approximately three years after the events in question.

With regard to the roof repairs, the government contends that Mod. 1 operates as an accord and satisfaction barring appellant's claim for further relief based on its problems locating subcontractors. We disagree. Although appellant failed to expressly reserve its claim for additional time, it is clear from the contemporaneous correspondence and discussions between the parties that appellant intended to preserve its right to seek additional time for the subcontracting delays. The AROICC understood this to be the case at the time of appellant's execution of the modification. We consider that appellant was not precluded from asserting a claim for the alleged subcontracting delays and seeking an additional time extension beyond the 60 days granted in the modification.

Nevertheless, there is insufficient evidence explaining the circumstances, timing and reasonableness of appellant's actions with respect to the electrical and mechanical subcontracts. We cannot find that appellant was without fault and did not contribute to any delays associated with its subcontracting problems. Accordingly, its claim for additional time beyond the 60 days granted in Mod. 1 fails for lack of proof.

Finally, as a general contention pertaining to all its claims, appellant assigns great importance to the April 1996 memorandum to the contracting activities from Headquarters Marine Corps. L&C argues that the memorandum caused the contract to be solicited, awarded and administered "illegally" and adversely impacted the Navy's consideration of its claims without any citation to legal authority (*e.g.*, app. br. at 13-14). We have previously considered and rejected that argument concerning the same memorandum. *L&C Europa Contracting Company, Inc.*, ASBCA No. 52617, 04-1 BCA ¶ 32,495 at 160,751. There are additional reasons to reject the appellant's pervasive contentions in this appeal. The memorandum was not addressed to this contract and was not seen by the government's AROICC until the week prior to the trial of this case. It had no effect on the administration of the contract.

The claims related to the pre-construction conference and roof repair delays are denied.

SETTLED CLAIMS-FURTHER FINDINGS OF FACT

24. With respect to the settled items, appellant has "dropped the delay claim" with respect to six of the seven settled claims (app. br. at X-1 to X-5). Specifically, the abandoned delay claims associated with items 2, 3, 4, 7, 9 and 10 (described in finding 6 above). (See also tr. 62, 68-69, 121-22, 124-27, 141-42) There is no proof in the record that establishes any entitlement to an equitable adjustment for any delays that may have been related to the above six items.

25. With respect to claim item 1 (Exterior Work), appellant claimed entitlement to $2,100 in direct costs and a 14-day time extension because, in part, it encountered shrubbery where the contract called for construction of a new sidewalk. The government admits that the shrubbery was not shown on the drawings. Appellant also alleges that design modifications of the sidewalk were necessary to comply with statutory requirements pertaining to disability access. At the hearing as noted above, the parties settled the direct cost portion of the claim, leaving for disposition only appellant's claim for the time extension. (R4, tab 53; gov't br. at 7; app. reply br. at 30)

26. Appellant's claim for 14 days of delay is based on alleged government delay in providing direction to appellant regarding the removal of the shrubbery. The record does not substantiate that the government failed to promptly resolve the problem. The time extension claim is based solely on uncorroborated hearsay testimony from

appellant's sole witness who testified that an unidentified L&C employee on an unidentified date orally asked an unidentified government employee for direction and that the direction was untimely issued on an unidentified date (tr. 115-16). There is no written request from appellant substantiating the hearsay testimony. We find that testimony to lack credibility.

27. Appellant also raises a contention that design modifications were required to provide access for the disabled. There is no evidence in the record explaining, much less proving this assertion. In particular, appellant has not identified specific contract provisions that were deficient and how or when they were modified to remedy the alleged deficiencies. There is also no persuasive evidence tending to prove that appellant is entitled to a time extension for alleged government delays related to any such modifications.

28. Appellant's witness testified that he had "no idea" how long it actually took to remove the shrubs and install the new sidewalk (tr. 119). Appellant's original schedule indicates that seven days were planned for this work (tr. 116-18; ex. G-2). The daily reports for the first week of performance indicate that the required time for performance of the work was three days (ex. G-1; tr. 109-13, 208-10).

SETTLED CLAIMS-DECISION

Appellant has expressly abandoned all delay claims associated with the settled items with one exception (finding 24). To the extent that its briefs can be construed as an attempt to resurrect any delay issues associated with the abandoned claims, there is no evidence in the record sufficient to support a time extension for any of the "dropped" time extension claims. (See also findings 9-12)

Only the additional exterior work remains as an alleged basis for entitlement to a time extension. Appellant, however, has failed to satisfy its burden of proof. Its allegations regarding the request for guidance from the government and resultant delayed response were founded on hearsay testimony that we conclude was not credible. Moreover, we cannot determine that any time taken by the government to review the issue was unreasonable. Nor is there persuasive evidence that any delayed response or the actual removal of the shrubbery delayed overall completion of the contract for a definable period.

Insofar as the alleged problem with the design of the sidewalk is concerned, there are no foundational facts describing the specific contract provisions that were involved, why they were defective and the specific time required by the government to remedy the alleged defects. Nor has appellant proved why it took longer to construct the sidewalk as allegedly changed than it would have taken as specified originally. All of the exterior

work (including shrubbery removal) actually took substantially less time than appellant's original schedule indicated.

This portion of the appeal is denied.

DETERIORATED CONCRETE-FURTHER FINDINGS OF FACT

29. Sheet D-1, DEMOLITION FLOOR PLAN, of the contract drawings required appellant to remove certain existing flooring and replace it with new flooring. In particular, note 3 of that drawing stated: "REMOVE EXISTING QUARRY TILE FLOOR AND BASE. CHIP AND REMOVE ALL LOOSE MORTAR AND SCARIFY SURFACE TO RECEIVE NEW FLOOR FINISH. PATCH ANY DEPRESSIONS GREATER THAN 1/8" DEEP." (R4, tab 3)

30. Appellant claims that it encountered deteriorated concrete that necessitated the removal and replacement of more concrete than it should have anticipated in renovating the floor areas in dispute. There is no persuasive evidence that appellant performed additional work. The most credible evidence on the issue was presented by the government's AROICC who stated that appellant merely performed the work set out in the demolition plan required to prepare the floors for the new tile (tr. 226-28). There is no evidence concerning the amount of concrete removal and replacement work appellant contemplated at the time of bid, why that amount was reasonable and to what specific extent it was exceeded when the work was actually performed. The person that prepared appellant's bid did not testify. Nor is there any evidence defining with specificity the amount of preparation work normally inherent in similar work and the amount actually required for the recreation center floors. There is also no evidence identifying precisely when the allegedly extra work was performed and how it delayed or otherwise impacted overall completion of the contract.

DETERIORATED CONCRETE-DECISION

Appellant contends that it performed extra work in preparing the concrete. For the reasons stated in finding 30, this claim also fails for lack of proof. In particular, there is no comparative evidence establishing what preparation and patching work appellant should have expected contrasted with that actually performed. The most persuasive evidence in the record was the AROICC's testimony that the preparation work did not exceed what appellant should have anticipated given the drawing instructions (finding 30).

There is also no proof establishing delay resulting from the alleged extra concrete work for many of the general reasons discussed in findings 9-12. In particular, appellant has not argued or proved how overall completion of the contract was delayed by the deteriorated concrete work.

This portion of the appeal is denied.

ENTRY MAT-FURTHER FINDINGS OF FACT

31. Sheet A-1 of the contract drawings required L&C to install a new "ENTRANCE MAT INTO EXISTING ½" DEPRESSSION IN CONC. SLAB. SEE DETAIL 7/A2" (R4, tab 3).

32. Detail 7 on drawing sheet A-2 indicates the depth of the recess where the new mat was to be installed as ½-inch plus or minus and required appellant to "FIELD VERIFY" that dimension (R4, tab 3; tr. 305-06).

33. Without verifying the actual dimension of the recess, appellant sent the government a submittal for a 3/8-inch mat sometime in late 1996. According to appellant, "Just because the architect puts a stupid note on the drawing doesn't mean we're going to follow it" (tr. 66-67, 127-30).

34. The Navy rejected the submittal because the depth had not been field verified and therefore the appellant was requested to supply a ½-inch mat to fill the recess indicated in the above two drawings (*id*.).

35. Appellant contacted its supplier and was told that a ½-inch mat could not be purchased "without going into special conditions" (tr. 66-67). There is no evidence addressing: what "special conditions" were entailed, whether appellant made further inquiries of other suppliers, or the scope of its investigation of the market generally. There is no proof that appellant could not obtain a mat that would fit the recess.

36. Sometime in the spring of 1997, appellant ordered the 3/8-inch mat from its supplier even though the Navy had rejected the mat. On an indeterminate later date, appellant verified the actual field dimension of the recessed area and determined that it actually exceeded one inch in depth. Rather than order a thicker mat to fill the recess, appellant built up the depression with concrete and installed the 3/8-inch mat. (Tr. 68, 130-37)

37. There is no evidence identifying specific dates that appellant may have been impacted by any delays associated with the recess dimension or indicating how completion of the contract may have been delayed by the entrance mat issue. Appellant concedes, however, that any delay resulting from the entry mat issue was concurrent with the delay claimed for the bar counter top claim discussed *infra* (tr. 145).

ENTRY MAT-DECISION

Appellant argues that the actual dimension of the recess for the entry mat exceeded the ½-inch specified and that the ½-inch dimension required that a "proprietary" doormat be installed (app. br. at 20-21).

Appellant's problems relative to the mat stem from its failure to field verify the depth of the recess. Field verification was expressly required by the drawings. Its initial submittal was properly rejected because it called for the supplying of a 3/8-inch mat that on its face failed to comply with the ½-inch plus or minus dimension without field verification. Rather than timely field verify the dimension, appellant talked to its supplier and was told that a ½-inch mat would require custom manufacture, which appellant asserts made any ½-inch mat "proprietary." When appellant subsequently did verify the dimension, the recess actually exceeded one inch. At that point appellant elected to partially fill the recess with concrete so that it could install the 3/8-inch mat purchased prior to field verification. It was not directed to install that mat in that manner by the government.

Appellant has failed to prove that it is entitled to a time extension for any delays in installing the entry mat (finding 37).

Appellant has not offered persuasive proof that mat thickness is a "proprietary" feature. In any event, alleged proprietary aspects of the specifications should have been protested at the time of bidding not post award.

This portion of the appeal is denied.

COUNTER TOP-FURTHER FINDINGS OF FACT

38. Note 22 on the demolition drawing sheet D-1 directed appellant to "REMOVE EXISTING COUNTERS – LEAVE ANGLE SUPPORTS FOR INSTALLATION OF NEW COUNTERS" in the bar area of Room 106 (see sheet A-1) (R4, tab 3).

39. Note 23 on sheet D-1, referencing the same bar area, also required appellant to "REMOVE EXISTING COUNTERS COMPLETE" (R4, tab 3).

40. In the area where the existing bar counter top was to be removed, drawing sheet A-1, NEW WORK, showed a new counter top and referred appellant to Detail 4 on drawing sheet A-2. None of the "NEW WORK NOTES" on sheet A-1 mentioned the counter tops. (R4, tab 3)

41. Detail 4 on sheet A-2 was entitled "BAR SECTION @ SERVICE BAR" and set forth instructions regarding installation of new bar counter tops (R4, tab 3).

42. By letter dated 4 April 1997, L&C contended that the contract did not require replacement of the bar counter top (R4, tab 15). According to appellant, the notes did not state "who is going to provide it" (tr. 144). The government interpreted the above drawings to require installation of a new counter top and directed appellant to provide a replacement (R4, tab 53).

43. The record fails to establish that overall completion of the contract was delayed pending resolution of the bar counter top dispute. However, any delay paralleled delays caused by the entry mat dispute (tr. 145).

COUNTER TOP-DECISION

Appellant maintains that notes 22 and 23 on sheet D-1 did not expressly tell it that L&C itself would install the new counter tops. Appellant's position is that it considered that another contractor would install the new counter tops later.

Appellant's contention is without merit. Its interpretation was unreasonable. Assuming *arguendo* that its interpretation of the demolition requirements of sheet D-1 was otherwise reasonable, that interpretation failed to consider and reconcile the demolition notes on sheet D-1 with the clear requirements for the installation of new counter tops on sheets A-1 and A-2. Appellant failed to read and reconcile the contract as a whole and harmonize its provisions. Its interpretation rendered portions of the contract meaningless. *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965).

Moreover, the interpretation created patent ambiguities concerning the furnishing of the new counter tops. Appellant failed to fulfill its pre-bid duty to reconcile the patent conflicts created by its interpretation. *E.g., J.A. Jones Construction Co. v. United States*, 395 F.2d 783, 790 (Ct. Cl. 1968).

This portion of the appeal is denied.

CEILING HEIGHT-FURTHER FINDINGS OF FACT

44. The contract required appellant to replace certain ceilings in the recreation center (R4, tab 1 at § 09510, tab 3 at sheet A-4). Paragraph 1.2 of § 13930 of the contract specifications also required appellant to, "Modify existing automatic wet pipe fire extinguishing systems for complete fire protection coverage where the existing system is impacted by the work." (R4, tab 1) Specification § 13930 went on to place extensive requirements on appellant to perform the necessary sprinkler design/modification work including the furnishing of pipe layout and working drawings to the government (*id*; tr. 316-17).

45. By letter of 24 October 1997, appellant notified the government that if the contractor installed the new ceiling at the height indicated in the drawings the existing sprinkler heads would be above the new ceiling rendering the sprinklers useless (R4, tab 23; tr. 149).

46. Rather than require appellant to modify the existing sprinkler system by lowering it to the ceiling height indicated in the drawings, the government permitted appellant to install the new ceiling at the pre-renovation height to match the level of the existing sprinkler heads. In a letter to the Navy dated 28 October 1997, appellant confirmed that it had been instructed by the government that it could leave the ceiling height at the existing level. (R4, tab 24 at 2; tr. 318-19)

47. Appellant's claim letter of 12 October 1999 indicates that the Navy's election to permit appellant to install the ceiling at the existing sprinkler height "eliminate[d] the additional construction costs," and L&C claims $400.00 for "Coordination Supervision Costs" as well as "Time Costs (21 days)" (R4, tab 51 at 7).

48. The government originally sought a credit for the decreased work associated with deleting the requirement to install the ceiling at the height indicated in the drawings (R4, tab 25). The government maintained that the intent of the contract was to have appellant extend the sprinkler heads down to the indicated level in the drawings under § 13930 of the specifications (finding 44). Subsequently, the government determined that it would not seek a credit for the changed work (tr. 320-21).

49. There is no persuasive evidence that the ceiling height issue delayed performance of the contract.

CEILING HEIGHT-DECISION

The parties agree that either the ceiling height indicated in the drawings after renovation or the level of the existing sprinkler system had to be adjusted. Rather than require appellant to lower the sprinkler heads, the government permitted appellant to install the new ceiling at its original height to correspond with the height of the sprinkler heads. Appellant claims that it is entitled to recover costs associated with resolution of the conflict between the ceiling and sprinkler system heights. Although appellant indicates that it incurred no additional "Construction Costs," it claims "Coordination Supervision Costs" and a time extension of 21 days.

Appellant's arguments concerning the sprinkler system work are addressed in greater detail below. With respect to the ceiling height issue, suffice it to say that we agree with the government's analysis. The contract required appellant to install the new ceiling at the height indicated in the drawings and provide extensions of the sprinkler

heads down to the lowered level of the ceiling. Specification § 13930 indicated that appellant was to make necessary modifications to the sprinkler system to the extent that it was impacted by the renovations. The required adjustment of the ceiling height necessitated adjustment of the sprinkler heights. Appellant was relieved of the obligation and attendant cost of adjusting the sprinkler system by the government. It is not entitled to recover for the cost of this deductive change.

This portion of the appeal is denied.

SPRINKLER SYSTEM MODIFICATIONS/ESCUTCHEONS AND LEAK-FURTHER FINDINGS OF FACT

50. The existing sprinkler system required modification in two areas: where appellant was to renovate a bathroom and where it was to install a new wall. The parties refer to the latter location as the "storefront" area. At the bathroom area, appellant was required to convert one large bathroom into two smaller bathrooms and construct an entryway. As part of that work, it was necessary to remove and replace part of the existing sprinkler system and provide a new pipe and sprinkler head in each of the two rooms and the entryway. At the storefront area, the new wall to be built by appellant interfered with the existing sprinkler system, and it was necessary to modify the sprinkler system in that area. (R4, tab 1, § 13930 at ¶¶ 1.2, 1.3, tab 3, sheets D-1, A-1, P-1; tr. 320-27) The height of the ceiling had no effect on these two renovations at the storefront and bathroom (tr. 151-53, 320-21).

51. A dispute developed between the parties as to who was responsible for designing and constructing the necessary modifications to the sprinkler system at the bathroom and storefront. Appellant disagreed that it was required to perform any design/modification work for the sprinkler system, including that necessitated by the renovation of the bathroom and storefront areas. The government maintained that the contract (finding 44) required appellant to modify/redesign the sprinkler system to the extent that the renovations impacted or interfered with the existing system. (R4, tabs 27, 29)

52. Under cover of a letter dated 23 December 1997, the government attempted to resolve the impasse by sending appellant sketches and instructions for a possible redesign of the sprinkler system in the two impacted areas. The letter stated:

> In the interest of moving this contract towards completion, this office has attached what we consider as the minimum requirements for necessary sprinkler modifications. Your alternative to the attached Government design would be to acquire the services of a certified wet-pipe suppression

> specialists [sic] and submit a design for Government approval in accordance with Contract specifications section 13930 paragraph 1.4. By providing this assistance, we hope that you will preclude any further delays in completing this contract.

(R4, tab 29) In furnishing the design assistance, the government did not represent to L&C that appellant had no contractual responsibility to perform the redesign itself (tr. 327, 339-40).

53. In a letter dated 6 January 1998, appellant again asserted that it was not responsible for modifying the sprinkler system. Appellant also considered that the furnishing of the redesign by the government in its 23 December 1997 letter indicated that the government recognized its duty to redesign the system. Appellant eventually hired a sprinkler subcontractor to perform the work. The subcontractor may or may not have used the government-provided redesign. Appellant reserved its right to file a claim for additional time and compensation. (R4, tab 31; tr. 341)

54. Appellant asserts that it received a government estimate of the cost of the work that was prepared by the government prior to bidding. According to appellant's witness, the pre-bid government estimate establishes that the government's estimator did not consider that any sprinkler work was required by the contract. Although appellant was afforded time to produce a copy of the estimate and offer it as evidence, it failed to avail itself of this opportunity (tr. 75-77). Absent a copy of the document, and without further foundation for the conclusions of appellant's sole witness, we assign no weight to appellant's conclusions regarding the alleged contents of the pre-bid estimate.

55. At the hearing, appellant claimed that it was delayed a total of 42 days by all claim events associated with the sprinkler work (tr. 80). It has failed to identify the period that it was delayed and the claim otherwise is subject to evidentiary defects noted above (see findings 9, 12).

56. Note 1 on drawing sheet D-1 required appellant to remove the existing ceiling. Escutcheons are trim plates surrounding sprinkler heads where the heads are exposed in the ceiling. To remove the ceiling, appellant had to remove the escutcheon plates. (R4, tab3; tr. 313-14).

57. In connection with installation of the new ceiling, specification § 13930, ¶ 2.3 "ESCUTCHEON PLATES" required appellant to "Provide split hinge metal plates for piping entering walls, floors and ceilings in exposed spaces. Provide polished steel plates or chromium-plated finish on copper alloy plates in finished spaces. Provide paint finish on metal plates in unfinished spaces" (R4, tab 1, § 13930 at 4).

58. By letter dated 28 October 1997, appellant objected to providing replacement escutcheons (R4, tab 24). Appellant's claim letter of 12 October 1999 (at item 13) contends that, "Sprinkler escutcheon work was not part of the Contract" (R4, tab 51 at 8). There is no evidence that the existing escutcheons complied with the requirements of § 13930, ¶ 2.3 above. The government directed appellant to provide the specified escutcheons (R4, tab 24).

59. There is no testimony by the person that prepared appellant's bid or bid preparation documents explaining how appellant interpreted the sprinkler-related provisions at the time of bid preparation.

60. On an indeterminate date in late 1997, the parties discussed the repair of a leak in the sprinkler system where the water line entered the building. By letter dated 5 December 1997, the government asked appellant to prepare a cost proposal for this proposed extra work. (R4, tab 26)

61. By letter dated 15 December 1997, appellant asked the government to provide it with "detailed engineering data" and indicated it would furnish a cost proposal when "proper documentation" was provided (R4, tab 27).

62. By letter of 23 December 1997, the government rescinded the proposed repair and change to the contract (R4, tab 29).

SPRINKLER SYSTEM MODIFICATIONS/ESCUTCHEONS AND LEAK-DECISION

Appellant essentially maintains that the contract did not require it to perform design work on the sprinkler system. That assertion is without merit. The contract placed clear responsibility on L&C to perform design work necessitated by its renovations of the recreation center. Pursuant to ¶ 1.2 of § 13930 of the contract specifications, appellant was expressly required to, "Modify existing automatic wet pipe fire extinguishing systems for complete fire protection coverage where the existing system is impacted by the work." The work impacted the existing system, *inter alia*, at the bathroom and storefront areas. The redesign sketch furnished by the government was merely an attempt to assist appellant if L&C elected to use it. In the alternative, appellant was required to perform its own redesign to comply with its obligations under the contract. It is frivolous to assert that the gratuitous design offered in good faith by the government was an admission of government liability.

Appellant's briefs also contain arguments based on a pre-bid government estimate that it purportedly obtained during discovery. According to appellant, the pre-bid estimate confirms that the government also considered that no sprinkler work was required. That estimate is not in evidence and we consider that arguments based on

Mr. Zahorak's hearsay interpretation of the alleged government estimate lack credibility and are without probative value (see finding 54).

The specifications also required appellant to furnish escutcheon plates that complied with the requirements of ¶ 2.3 of § 13930 (finding 57). To the extent that L&C continues to broadly assert that "escutcheon work" was not part of the contract, the assertion is also frivolous. To the extent that it argues that appellant was permitted to reinstall the existing escutcheons, it has failed to prove that the existing plates complied with ¶ 2.3, *supra*.

Appellant fails to explain why it considers that it is entitled to recover for the sprinkler leak discussions. The government originally considered authorizing appellant to repair the leak as added work under the contract and sought a cost proposal from appellant. Appellant requested extensive additional information from the government that L&C considered was required to prepare a proposal. When the government learned that the preparation of a proposal would be problematic for appellant, it had the repairs performed by other forces. Appellant never submitted a proposal and did not perform the work. We find nothing that would provide a basis for an equitable adjustment to the contract.

The sprinkler-related claims are denied.

MISCELLANEOUS CLAIMS-FURTHER FINDINGS OF FACT

63. Appellant's claim letter of 12 October 1999 also seeks compensation for sound system work (claim item 16) and "as built" drawings" (claim item 20) (R4, tab 51 at 9-10). Appellant's "Claim Cost Summary" in its brief does not indicate that it continues to seek recovery for these items (app. br. at 31).

64. With respect to the sound system, appellant's claim letter seeks $8,000 for "construction costs" and "time costs" for 60 days, totaling $15,527.40. The letter alleges that the sound system was "proprietary." (R4, tab 51 at 9) There is no proof explaining or supporting this allegation. We are unable to assess, for example, whether the system was proprietary, or whether appellant offered an alternative "equal" system that satisfied pertinent salient specification requirements. There is also no evidence concerning the basis for appellant's bid with respect to this item and why it did not timely protest the alleged proprietary requirements prior to bidding.

65. With respect to the "as built drawings" item, appellant's claim letter sought $992 for "As Built Drawings Cost" and "Time Cost" of $7,763.70 for 30 days. The letter asserts that the contract did not require submission of as built drawings. (R4, tab 51 at 10)

66. The contract required appellant to submit "as built" drawings upon completion of the work (R4, tab 1 at § 00721 ¶ 1.8, § 01700 ¶ 1.1, § 13930 ¶ 1.4, § 15901 ¶¶ 1.5.5.1, 3.1.5).

67. There is no evidence tending to prove the extent of delay to overall completion of the contract associated with either the sound system or "as-built" drawing claims.

MISCELLANEOUS CLAIMS-DECISION

Appellant has failed to offer persuasive evidence in support of either claim. To the extent that the record contains any explanation of the claims, the evidence consists solely of broad assertions in claim letters that fail to substantiate entitlement. For these reasons and those contained in our findings, the two miscellaneous claims must be rejected.

This portion of the appeal is denied.

LIQUIDATED DAMAGES-FURTHER FINDINGS OF FACT

68. By letter of 25 March 1998, the government notified appellant that liquidated damages were accruing because appellant had failed to timely complete the contract. The letter noted that construction of the handrails (or guardrails) and the wood counter top remained to be completed. (Ex. G-7)

69. In its response of 27 March 1998, appellant acknowledged that the guardrail and counter top work had not been completed. With respect to the delayed completion of the guardrails, appellant explained that its subcontractor had defaulted. (Ex. G-8)

70. The work was substantially completed and accepted by the government on 17 April 1998, subject to completion of minor corrective work (R4, tab 37; exs. G-9, -10; tr. 219-22). The government accepted beneficial occupancy of the recreation center on 17 April 1998 (R4, tab 53 at 9-10). There is no contention and no proof that the contract was substantially completed prior to 17 April 1998.

71. The contract's LIQUIDATED DAMAGES - CONSTRUCTION (APR 1984) clause (FAR 52.211-12) provided for assessment of liquidated damages in the amount of $200 per day for failure to timely complete the work.

72. The government assessed liquidated damages at the $200 *per diem* rate for the period covering 7 May 1997 (the extended contract completion date) to 17 April 1998 (the beneficial occupancy date). The total amount thus assessed and withheld ultimately by the government was $68,800. (R4, tabs 42, 53; compl. at 9)

LIQUIDATED DAMAGES-DECISION

Appellant has failed to prove that it is entitled to a reduction of the amount assessed. Apart from the 60-day time extension granted in Mod.1, appellant has not established that it was excusably delayed. Nor is there any contention by L&C that substantial completion or beneficial occupancy occurred prior to 17 April 1998, the extended contract completion date. Its sole argument is that the liquidated damages assessment was void and unenforceable as a "penalty" because the government allegedly did not incur any actual damages. As the party challenging the liquidated damages provision, appellant had the burden of proving that it was unenforceable. *DJ Manufacturing Corp. v. United States,* 86 F.3d 1130, 1134 (Fed. Cir. 1996). Moreover, the law is well-settled that it is irrelevant whether the government suffered any actual damages from delayed completion of the recreation center. *E.g., Henry Angelo & Co.* ASBCA No. 44648, 93-3 BCA ¶ 26,131 at 129,897. Appellant cites no evidence or case law supporting its position. There is no evidence to show, for example, that the *per diem* amount represented an "unreasonable forecast of potential damages" or had "no reasonable relation to damages for delay." *Id., quoting Rivera-Cotty Corp.,* ASBCA No. 32291, 86-3 BCA ¶ 19,148 at 96,771.

This portion of the appeal is denied.

CONCLUSION

The appeal is denied.

Dated: 27 April 2004

ROBERT T. PEACOCK
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 No. 52848, Appeal of L&C Europa Contracting Company, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals