ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
CATH-dr/Balti Joint Venture	)	ASBCA Nos. 53581, 54239
	)	
Under Contract No. N68950-98-C-0104	)	

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OPINION BY ADMINISTRATIVE JUDGE TUNKS

Appellant seeks $887,140 for multiple claims arising under a contract for the historical renovation of a dental research facility. Only entitlement is before us.

FINDINGS OF FACT

1. The government awarded the subject firm-fixed-price contract in the amount of $3,928,777 to appellant, CATH-dr/Balti Joint Venture, on 29 September 1998. The work consisted of the historical renovation of a dental research facility (building 1H) at the Great Lakes Naval Training Center, Illinois. The contract completion date (CCD) was 1 April 2000. (R4, tab 2)

2. Paragraph 1.2.1 of specification section 01110 required appellant to provide:

> [A]ll labor, material, equipment . . . and supervision for the historical renovation . . . of the exterior of Building 1H, constructed in 1909. Included in the . . . work is the cleaning of existing masonry, limestone and terra cotta. Also included is repointing of masonry joints, replacement of all terra cotta joints, selective replacement of . . . terra cotta, partial removal and reconstruction of the entire brick parapet with the addition of new terra cotta parapet, copings, cornices, ornamental finials, and pediments. Existing window sashes,

> frames, and operating devices are to be restored . . . with the exception of window openings where masonry, glassblock, . . . ventilation fans and ductwork, and miscellaneous other closures and devices have been installed. At those locations, the windows and closures will be . . . replaced with new . . . windows . . . . The existing canopy . . . will be demolished and a new canopy constructed . . . . The front entrance stairs will be replaced with new limestone clad concrete ornamental stairs . . . . [If] the roofing is disturbed or damaged during construction, replacement and/or repair of the roofing shall also be included in th[e] . . . work.
>
> . . . .
>
> [Abatement of] lead based paint . . . [is also] required . . . .

(R4, tab 1, A0004 at 7 of 76)

3. The contract included FAR 52.233-1 DISPUTES (OCT 1995)—ALTERNATE I (DEC 1991); FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984); FAR 52.236-9 PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984); FAR 52.236-15 SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984); FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997); FAR 52.242-14 SUSPENSION OF WORK (APR 1984); FAR 52.243-4 CHANGES (AUG 1987); Naval Facilities Engineering Command (NAVFAC) 5252.201-9300 CONTRACTING OFFICER AUTHORITY (JUN 1994); and NAVFAC 5252.242-9300 GOVERNMENT REPRESENTATIVES (JUN 1994).

4. Appellant mobilized to the site on 25 January 1999, and the government deemed the work substantially complete on 1 April 2000 (R4, tab 189, rep. nos. 1, 360; tr. 1/79).

5. At the outset of the work, appellant requested documentation of the level of authority of the personnel assigned to the contract, including the project manager (PM) and the construction representative (CR), and was advised as follows:

> Con Rep Responsibilities: Serves as the Government Quality Assurance Representative . . . . Responsibilities include inspection of the work . . . to ensure adherence to the contract . . . . Conrep decisions on the acceptability of construction methods and practices, workmanship, materials & finished

> product are . . . final. Also responsible to ensure complete adherence . . . to all safety requirements, with the authority to stop work being performed when life or limb is endangered by the existence of any unsafe condition.
>
> Project Manager: Serves as the Government Construction Manager . . . . Responsible for construction management and contract administration . . . while providing quality assurance and technical engineering construction advice. Provides technical and administrative direction to resolve problems encountered during construction. [A]nalyzes and interprets contract drawings and specifications to determine the extent of Contractors' responsibility.

(App. supp. R4, tab 24)

6. On 20 July 2000, appellant submitted a request for an equitable adjustment (REA) to the contracting officer (CO), seeking $879,945 for 37 alleged equitable adjustments, extended site and home office overhead, consultant's fees, and a 48-day extension of the CCD. Appellant's delay damages were based on a 142-day delay to its alleged early finish date of 30 December 1999. (R4, tab 169, tab 1)

7. On 19 December 2000, appellant certified its REA and requested a CO's final decision (R4, tab 176).

8. The CO issued a final decision on 27 July 2001. He found "some entitlement" on claims 1, 3, 7, 10, 29, 30, 31, 33, 35, 36, and 37, and recommended that the Resident Officer in Charge of Construction (ROICC) negotiate the amount of the equitable adjustment. The CO denied the remainder of the claims. (R4, tab 184) On 24 October 2001, appellant appealed the CO's final decision to this board, where it was docketed as ASBCA No. 53581.

9. The parties were unable to agree on the amount of the equitable adjustment and, on 23 May 2003, the CO issued a second final decision denying the claim in its entirety (ex. A-40). Appellant appealed the second final decision to this board on 9 July 2003, where it was docketed as ASBCA No. 54239 and consolidated with ASBCA No. 53581.

10. Nine of the thirty-seven equitable adjustment claims have been merged with other claims or withdrawn. As a result, the claim before the board consists of $638,049 for 28 equitable adjustment claims, $152,959 for extended site overhead, $55,522 for

extended home office, $40,610 for consultant's fees, a 48-day extension of the CCD, and a 142-day delay to its alleged early finish date.

CLAIM 1: DOOR D-5, TERRA COTTA, LIMESTONE

11. The government issued invitation for bids (IFB) No. N68950-98-B-0104 on 6 July 1998 (R4, tab 1). The plans and specifications in the IFB were prepared by the government and/or its architect engineer (A/E) (R4, tab 1, NAVFAC spec. no. 04-98-0104, tab 7).

12. Paragraph 1.2.1 of specification section 04530, New and Repair of Existing Terra Cotta for Restoration Work, required appellant to provide the materials necessary to install the terra cotta "as specified" and "as required by the job condition" (R4, tab 1).

13. Bid item 0001 consisted of all work complete in accordance with the plans and specifications with the exception of the terra cotta pieces specified in bid item 0002. Bid items 0002AN and 0002AP called out three terra cotta 32A (TC-32A) pieces and bid items 0002AQ and 0002AR called out four terra cotta 32B (TC-32B) pieces. No TC-32 pieces were called out in bid item 0002. (R4, tab 1 at 2-4; tr. 4/37-40)

14. Drawings A7-1 through A7-7 set forth the terra cotta details. Drawing A7-5 included a detail for TC-32 pieces, but did not include a detail for TC-32A or TC-32B pieces or a note relating to glazing. (R4, tab 7; tr. 1/49)

15. Although drawing A8-2 required appellant to replace door D-5, the work was performed by government shop forces (R4, tabs 7, 184).

16. Drawing A4-4 required appellant to install a TC-32B piece on either side of door D-5 (R4, tab 7).

17. Drawings A4-1 and TO-3 at hexagon 9 indicated that the existing terra cotta pieces on either side of door D-5 had already been removed (R4, tab 7).

18. Prior to award, Gladding McBean, appellant's terra cotta supplier, submitted a quotation to appellant for the project. In response to bid item 0002, the quotation included three TC-32A pieces and four TC-32B pieces. (R4, tab 190)

19. On 18 September 1998, appellant completed its final bid estimate. For bid items 0002AN and 0002AP, appellant included three TC-32A pieces. For bid items 0002AQ and 0002AR, it included four TC-32B pieces. (R4, tabs 2, 193 at 3) Appellant's bid for these items was identical to its final bid estimate (R4, tab 2). The

record does not reflect that appellant sought clarification of the "A" and "B" suffixes prior to bidding.

20. Since the IFB, Gladding McBean's quotation, and appellant's bid all called out TC-32A and TC-32B pieces and appellant failed to submit a pre-bid inquiry, we are convinced that appellant understood the meaning of these designations prior to award and we so find. (R4, tab 2 at 2, tab 190; ex. A-36 at 2, 24-25)

21. On 5 April 1999, appellant submitted request for information (RFI) #34 to the PM, asking if the TC-32B pieces on either side of door D-5 were to have glazed (finished) ends (ex. A-1 at 1; tr. 1/49).

22. In response to RFI #34, the PM directed appellant to provide pieces with glazed ends (ex. A-1 at 1).

23. As a result, appellant allegedly ordered two custom-made TC-32B pieces with glazed ends from Gladding McBean (ex. A-1 at 10; tr. 1/50-53).

24. On 7 May 1999, appellant advised the PM that the limestone base under door D-5 was partially missing (ex. A-1 at 2-3; tr. 1/51-52). The PM also directed appellant to provide limestone filler pieces (ex. A-1 at 4, 5, 6).

25. MBB Enterprises of Chicago (MBB), appellant's masonry subcontractor, installed the TC-32B pieces and the limestone filler pieces at door D-5. MBB executed a waiver of lien pursuant to the laws of the State of Illinois on 30 May 2000. Although the waiver did not include a release, it indicated that appellant paid MBB a total of $955,000, including extras. (R4, tab 453; ex. A-1 at 1; tr. 1/53)

26. On 20 July 2000, appellant submitted an REA in the amount of $2,597 for providing two TC-32B pieces with glazed ends and limestone filler pieces at door D-5 (R4, tab 169-1).

27. Gladding McBean bid $832,750 for the terra cotta work, the price of its subcontract was $832,750, and it was paid $832,750 (R4, tabs 206, 391). In a letter to the Defense Contract Audit Agency (DCAA) dated 23 September 2002, Gladding McBean stated that it did not file "any claim or [seek] any equitable adjustment on the . . . project" (R4, tab 446).

28. Mr. Albert Thewis, one of the joint venture partners and appellant's project manager, described appellant's payment arrangement with MBB as follows,

Q Is [it] your understanding that you owe [MBB] nothing if you recover nothing on brick items?

A It's my understanding that that would be the case, yes.

(Tr. 1/201)

CLAIM 1: DECISION

Appellant seeks $2,597 for providing two custom-made TC-32B pieces with glazed ends, installing the pieces on either side of door D-5, and providing limestone filler pieces under the base of the door alleging that the drawings were defective. According to appellant, the drawings did not include a detail for TC-32B pieces with glazed ends or indicate that the limestone base under the door needed repair. The government argues that the work was included in the contract, that the CO did not direct appellant to perform the work, that appellant did not provide the notice required by FAR 52.243-4 CHANGES (AUG 1987) (Changes clause), and that appellant did not incur any additional costs. In addition, the government seeks a credit for replacement of door D-5.

In order to prevail on an equitable adjustment claim, the contractor must establish liability, causation, and resultant injury. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965). The contractor bears the burden of proof. *Servidone*, 931 F.2d at 861.

Based on the IFB, which called out TC-32A and TC-32B pieces, Gladding McBean's quotation, which called out TC-32A and TC-32B pieces, appellant's bid, which called out TC-32A and TC-32B pieces, and the lack of a pre-bid inquiry, we have found as fact that appellant understood the meaning of the "A" and "B" suffixes. Thus, the drawings were not defective because they did not depict a TC-32B piece. As to glazing, there is no evidence that glazing the ends of terra cotta pieces abutting door openings was beyond the scope of paragraph 1.2.1 of the specification, which required appellant to provide the materials necessary to install the terra cotta "as specified" and "as required by the job condition."

Appellant has also failed to prove that it incurred any additional costs. Gladding McBean bid $832,750 for the project, invoiced appellant $832,750, and was paid $832,750. With respect to MBB's installation costs, appellant did not show that it was more difficult or more expensive to install a TC-32B piece with glazed ends than it was to install one without glazed ends. Finally, based on appellant's booklet for claim 1, we deem the claim for limestone filler pieces to be abandoned.

In its brief, the government contends that it is entitled to a credit for replacing door D-5. The government bears the burden of proving entitlement to a credit. *CTA Incorporated*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,762. The credit sought by the government is not a "claim" within the meaning of section 605(a) of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-13, because it has not been made the subject of a CO's decision. In addition, we do not consider the government's request for a credit for replacing the door to be a proper offset to the terra cotta claim which is the subject of this appeal. In any event, appellant has not proven that it is entitled to an equitable adjustment, so there is nothing to which a credit can apply.

Claim 1 is denied. The government's request for a credit is denied and its "claim" is dismissed.

CLAIM 2: REPLACE MISSING SASHES

29. Paragraph 1.2 of specification section 08611, Wood Windows—Restoration, provided as follows:

> [R]estor[e] existing wood sashes and window frames identified on the drawings . . . .
>
> For a description of the current deterioration of the existing window sashes and frames, refer to the appendix to this section . . . . This list . . . is to serve only as information on the general condition of the existing windows.

(R4, tab 1, A0004 at 40 of 76)

30. The appendix listed 274 windows. The sashes at windows #38, 39, 40, 93 and 99 were described as damaged and/or inoperable. Window #89 was described as having air conditioning equipment and a fan installed and being partially "blanked-off." (R4, tab 1, A0004 at 48-76)

31. Paragraph 2.1 of specification section 08550, Wood Windows—Replacement, required that new windows be installed as complete units (R4, tab 1). Drawings A4-1 through A4-3 and TO-3 at hexagons 2, 5, and 14 identified approximately 50 new windows (R4, tab 7).

32. On 20 April 1999, appellant submitted RFI #45, advising the PM that the sashes at windows #38, 39, 40, 89, 93, and 99 were missing (ex. A-2 at 2).

33. On 3 July 1999, the A/E responded as follows:

> These windows had air conditioner units &/or plywood blank-offs . . . during job site observations. If after these ac units &/or blank-offs have been removed, the window assemblies are lacking . . . one of the sashes . . . they need replacement.

(Ex. A-2 at 3)

34. On 6 July 1999, the PM advised appellant that he concurred with the A/E (ex. A-2 at 3).

35. On 10 April 2000, appellant's window restoration subcontractor, Signa System, Inc. (Signa), submitted an invoice to appellant requesting, among other things, payment of $460 for one "[n]ew copy of window sash" in connection with RFI #45 (ex. A-2 at 6).

36. On 14 April 2000, Signa submitted a cost breakdown for one new window sash. The cost of one window sash was $460. (Ex. A-2 at 7)

37. On 20 July 2000, appellant submitted an REA in the amount of $7,283 for providing seven new window sashes. The subcontractor portion of the breakdown alleged that Signa provided ten new sashes. (R4, tab 169-2)

38. Appellant has a "gentlemen's agreement" with Signa regarding payment of its claims. If appellant prevails, it will reimburse Signa; if it does not prevail, Signa will not be paid. Mr. Albert Thewis, one of appellant's joint venture partners, testified that appellant has not received a claim from Signa and that there is no pending litigation between appellant and Signa. (Tr. 1/199-200)

39. Although he agreed that it is sometimes less expensive to replace windows than to restore them, Mr. Ryszard Borys, Signa's president, testified and we find that Signa incurred additional costs to manufacture and install new window sashes for building 1H (tr. 3/82, 107).

CLAIM 2: DECISION

Appellant seeks $7,283 for replacing seven missing window sashes. The government argues that the work was included in the contract, that the CO did not direct

the work, that appellant failed to provide the notice required by the Changes clause, and that appellant did not incur any additional cost.

The specification required appellant to restore existing sashes and window frames. The sashes at issue here were not "existing." Accordingly, the work was not included in the contract.

The PM's delegation of authority stated that he was "[r]esponsible for construction management and contract administration." In carrying out this responsibility, he was authorized to provide "technical and administrative direction to resolve problems encountered during construction." In our view, this clothed the PM with express actual authority to resolve minor problems that arose during the work. In *Urban Pathfinders, Inc.*, ASBCA No. 23134, 79-1 BCA ¶ 13,709, we held that a Project Officer who did not have express actual authority to change the contract was impliedly authorized to make changes where expeditious action was required because he was the key government person with regard to performance. In this case, the PM was not only the key government person with respect to performance, he had express actual authority to make any changes that were necessary to resolve problems at the site. As a result, the PM's directive to replace missing sashes was binding.

The government also argues that the claim must be denied because appellant failed to provide written notice to the CO as required by subparagraph (b) of the Changes clause. Subparagraph (d) of the clause further provided that no adjustment would be made for any costs incurred more than 20 days before the contractor provided written notice except for an adjustment based on defective specifications. The requirement for written notice is construed liberally where the CO has actual or imputed knowledge of the pertinent facts. *Grumman Aerospace Corp.*, ASBCA Nos. 46834 *et al.*, 03-1 BCA ¶ 32,203 at 159,185. Since the CO had overall responsibility for the administration of the contract, he knew or should have known of the directive issued by the PM. As a result, we impute knowledge of the PM's directive to the CO. In any event, this claim is based on defective specifications, so appellant's recovery is not subject to the 20-day limitation in subparagraph (d).

The government next argues that appellant did not incur any additional costs. In order to prove entitlement to an equitable adjustment, the contractor must show that it incurred some damage or additional cost as a result of the change. *See Cosmo Construction Co. v. United States*, 451 F.2d 602, 605-606 (Ct. Cl. 1971) (there must be "some evidence of damage to support a finding on liability"); *EFG Associates, Inc.*, ASBCA No. 49356, 00-1 BCA ¶ 30,638 at 151,275 (contractor must show some increased cost to prove entitlement). Mr. Borys testified that Signa incurred additional costs to manufacture and install the new window sashes and the government did not offer

any evidence rebutting that testimony. Accordingly, we conclude that appellant has established that it incurred some additional cost.

The government also implies that the claim is barred by *Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944). It is settled law that the *Severin* doctrine does not apply where the contractor is pursuing a remedy redressable under the contract, such as a claim under the Changes clause. *Jordan-DeLaurenti, Inc*, ASBCA Nos. 45467, 46589, 94-3 BCA ¶ 27,031 at 134,726.

Claim 2 is sustained.

CLAIM 3: PROVIDE BUILT-UP ROOF IN LIEU OF EPDM

40. Drawing A2-5 stated that the five flat roofs over the first and second floors were EPDM (ethylene propylene diene monomer) (R4, tab 7). EPDM is a single-ply roofing material (tr. 1/55).

41. Note 1 of the roofing notes on drawing A2-5 required removal of the existing roofing system, including the flashing, to allow demolition and reconstruction of the parapets. Note 5 on drawing A2-5 and the notes on drawing A7-8 required that the new flashing system match the existing system. (R4, tab 7)

42. Appellant included $50,000 in its bid for EPDM (R4, tab 193 at CDB015300).

43. When appellant's roofing subcontractor, Julian's Roofing & Remodeling Co., Inc. (Julian's Roofing) began work, it discovered that the material on the roofs was bitumen or built up roofing (tr. 1/55-56).

44. On 7 May 1999, appellant submitted RFI #49, seeking clarification of the roofing requirements (R4, tab 93 at 6).

45. The A/E replied to RFI #49 as follows:

> Contractor is to install new flashing and counter flashing systems. The materials for new system shall match the membrane flashing removed per parapet demolition activities. Refer to note 5 on drawing A2-5; details [1], 5, [and] 7 . . . on drawing A7-8 . . . .

(Ex. A-3 at 1)

46. Appellant understood the A/E's reply to mean that it was to replace existing roofing materials with matching materials (tr. 1/57).

47. On 26 October 1999, Julian's Roofing advised appellant that it would be more expensive "to install flashing on [the] roof and up the parapet wall with [a] bitumen roof system" (ex. A-3 at 3).

48. The same day, appellant increased the price of Julian's Roofing's subcontract from $24,690 to $47,490 to include approximately 650 feet of bitumen on the first and second floor roofs (R4, tab 372).

49. On 20 July 2000, appellant submitted an REA in the amount of $15,297 for the work. The cost breakdown in the REA included an additional $8,800 on behalf of Julian's Roofing, increasing appellant's subcontract costs to $56,370 (ex. A-3 at 7).

CLAIM 3: DECISION

Appellant requests $15,297 for installing bitumen roofing materials around the parapets at the first and second floor roofs, asserting that drawing A2-5 erroneously indicated that the roofing material was EPDM. The government argues that the work was part of the contract, that the CO did not direct the work, and that appellant did not incur any increased costs.

FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) (Differing Site Condition clause), required the contractor to give the CO written notice of a differing site condition (DSC) "promptly, and before the conditions are disturbed." To prove a type 1 DSC, the contractor must also establish that (1) the contract contained reasonably plain or positive indications of the conditions that form the basis of the claim; (2) it reasonably interpreted the contract documents and relied on its interpretation; (3) the conditions actually encountered differed materially from those indicated in the contract; (4) the conditions encountered were reasonably unforeseeable; and (5) it was damaged as a result. *Sherman R. Smoot Corp.*, ASBCA Nos. 52713 *et al.*, 03-1 BCA ¶ 32,212 at 159,315-16, *aff'd*, 96 Fed. Appx. 718 (Fed. Cir. 2004).

Appellant met the notice requirement by submitting RFI #49. As to element one, drawing A2-5 clearly indicated that the material over the first and second floor roofs was EPDM. Thus, the contract documents contained plain indications of the condition that gave rise to the claim. With respect to element two, appellant's bid included $50,000 for EPDM, proving that it relied on the erroneous representations on drawing A2-5. As to the third element, we take judicial notice of the fact that bitumen is materially different

than EPDM. With respect to the fourth element, there was nothing in the contract documents that should have put appellant on notice that the material on the roofs was bitumen. As to the fifth element, appellant incurred additional costs.

Claim 3 is sustained.

CLAIM 4: REPLACE DETERIORATED BRICK

50. General note A on drawing TO-2 provided as follows:

> Because further deterioration may occur prior to bidding of this project, and because additional deterioration may be uncovered or discovered during construction, contractor shall include in the bid the following additional quantity of work beyond what is indicated or described in the contract documents: brick replacement 10%; terra cotta replacement 10%; terra cotta repair 10%.

(R4, tab 7)

51. General note L on drawing TO-2 required appellant to replace deteriorated brick with brick to match the existing brick (R4, tab 7).

52. Drawing A4-1 at hexagon 22 identified a wall on the south elevation. Drawing TO-3 at hexagon 22 indicated that the wall was "deteriorated" and was to be replaced with brick to match the existing brick. (R4, tab 7)

53. Appellant did not submit a pre-bid inquiry regarding general notes A or L, or the note at hexagon 22, and did not show how it interpreted these provisions during bidding (R4, tabs 82, 193; tr. 3/9-10).

54. MBB, appellant's masonry subcontractor, ordered 50,000 bricks on 16 June 1999. The purchase order required the supplier to deliver 11,130 bricks on 18 June 1999 with the rest to be delivered on 1 July 1999. (R4, tab 449; tr. 1/189-91)

55. The minutes of the QC meeting of 1 June 1999 indicated that MBB anticipated it would need about "300 units for replacement" (R4, tab 78).

56. On 22 June 1999, appellant submitted RFI #64, advising of a bowing wall between column lines 11 and 12, 7 and 8, and D and E on the north elevation (ex. A-4 at 1, 13, 14).

57. Appellant's daily production reports showed that 11,000 bricks were delivered on 18 June 1999, 24 pallets were delivered on 9 July 1999, and 24 "cubes" were delivered on 12 July 1999 (R4, tab 189 at rep. nos. 107, 122, 123). The record does not indicate the number of bricks comprising a cube or a pallet.

58. The CO sent proposed change (PC) #000001 for the bowing wall to appellant on 21 July 1999 (R4, tab 90).

59. On 28 July 1999, appellant submitted RFI #69, requesting guidance with respect to four-courses of brick between column rows 6 and 12 on the south and north elevations that did not match the color and texture of the approved replacement brick (ex. A-4 at 46). The PM directed appellant to replace the non-matching brick with brick from the replacement allowance (ex. A-4 at 4).

60. On 29 July 1999, appellant requested $32,544 in connection with PC #000001 (ex. A-4 at 44-45). The PM rejected the proposal due to the "10% rule" (R4, tab 95).

61. On 31 August 1999, Mr. Thewis advised the PM that, based on his take-off of the drawings, the replacement allowance was 244 square feet of brick (ex. A-4 at 41-43).

62. On 16 September 1999, the PM indicated that, using the approved schedule of prices, he calculated the replacement allowance to be at least 4,559 bricks. According to the PM, appellant had not exceeded that amount (R4, tab 114).

63. The A/E estimated that the project required a total of 102,186 bricks, resulting in a replacement allowance of 10,219 bricks (ex. A-4 at 29-35). In addition, the A/E testified that general note A only covered material costs (tr. 4/124-25).

64. MBB executed a waiver of lien pursuant to the laws of the State of Illinois on 30 May 2000. Although the waiver did not include a release, it indicated that appellant paid MBB a total of $955,000, including extras, and that MBB paid its brick supplier a total of $12,000. (R4, tab 453)

65. On 20 July 2000, appellant submitted an REA in the amount of $92,556 to the CO for "additional deteriorated masonry greater than 10% of 300 bricks" (ex. A-4 at 18).

66. At the hearing, Mr. Thewis took the position that general note A referred exclusively to the wall at hexagon 22 because the drawings did not specifically reference deteriorated brick at any other location. He estimated that the wall contained about 500 bricks, resulting in a replacement allowance of 50 bricks. (Tr. 1/62-63)

67. Mr. Kadera, appellant's QC manager, testified that he had worked on two other government contracts containing notes similar or identical to general note A, and that the government had interpreted those notes to refer to the number of deteriorated bricks in the project rather than the total number of bricks in the project (tr. 2/90-94). The contracts to which Mr. Kadera referred are not in evidence.

CLAIM 4: DECISION

Appellant requests an equitable adjustment of $92,556 for replacing deteriorated brick in excess of the 10 percent replacement allowance required by general note A. Appellant argues that it reasonably interpreted general note A to mean that the replacement allowance was to be calculated on the basis of the number of deteriorated bricks that had to be replaced. The government argues that the replacement allowance was to be calculated on the basis of the total number of bricks required for the project. The government also asserts that it is entitled to a credit for unused brick.

A contract is ambiguous when it is susceptible to more than one reasonable interpretation. *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). It is not enough to show that the parties interpreted the contract language differently. Both interpretations must fall within the so-called "zone of reasonableness." *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999). In addition to demonstrating that its interpretation was within the zone of reasonableness, the contractor must show that it relied on its interpretation during bidding. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990).

In our opinion, appellant's interpretation is not reasonable. General note A required that an additional 10 percent be included in the bid for deteriorated brick discovered prior to, or during, construction. Although appellant alleges that the drawings did not specifically identify any deteriorated brick other than the wall at hexagon 22, general note L on drawing TO-2 required appellant to replace deteriorated brick with brick to match the existing brick. General note L refers to deteriorated brick wherever found on the project. As a result, the only reasonable interpretation of general note A is that the replacement allowance was to be based on the total number of bricks to be replaced in the project. *Burnside-Ott Aviation Training Center v. Dalton,* 107 F.3d 854, 860 (Fed. Cir. 1997). Finally, we do not find Mr. Kadera's unsupported testimony

regarding the government's interpretation of similar or identical notes on prior contracts to be probative.

In its brief, the government asserts that it is entitled to a credit for unused brick. This contract was a firm-fixed-price contract. Under FAR 16.202-1, the price of a firm-fixed-price contract does not vary with the cost experience of the contractor. Thus, appellant is entitled to keep the cost savings if it performs for less than the bid price; conversely, it must absorb the loss if it exceeds the bid price. *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1303-04 (Fed. Cir. 1996). As a result, the government is not entitled to a credit for unused brick. In any event, appellant has failed to prove entitlement to an equitable adjustment, so there is no claim to which a credit can apply. Moreover, the CO has not issued a final decision with respect to this "claim."

Claim 4 is denied. The government's request for a credit is denied. The government's "claim" is dismissed.

CLAIM 6: WINDOW WELLS

68. Paragraph 1.2.1 of specification section 01110 indicated that the work included all labor, material, and equipment necessary to renovate the "exterior" of building 1H (R4, tab 1).

69. Paragraph 3.1 of specification section 08550, Wood Windows—Replacement, stated as follows:

> Protect and cover finishes, materials and furniture during interior work. Repaint surfaces including entire expan[ses] of wall or ceiling affected. Repaint/refinish any interior areas damaged during construction to match existing adjacent finishe[s] in . . . material, finish and color.

(R4, tab 1)

70. The lead paint notes on drawing TO-2 stated that the paint on the windows contained lead and that all activities involving painted surfaces were to comply with specification section 13283, Removal and Disposal of Lead-containing Paint (lead abatement specification) (R4, tab 7).

71. Paragraph 3.2.5.2 of the lead abatement specification required that final wipe samples taken inside and outside the work areas be less than 100 micrograms (ug) per square foot (R4, tab 1).

72. At the hearing, appellant offered a photograph of the walls adjacent to an unidentified window well. The walls shown in the photograph were flaking and peeling. The window well had been previously repaired and repainted, so its original condition was not observable. (Ex. A-6 at 7) Mr. Zaragoza, appellant's superintendent, testified that the original condition of the window wells was the same as the walls shown in the photograph (tr. 2/17-18).

73. Mr. Campion, the government's CR, testified that the window wells did not have "extensive blistering or damage but [that] they were not in pristine condition" (tr. 5/34).

74. On 28 July 1999, appellant submitted RFI #68 to the PM:

> Several window pockets [wells], out side [sic] of scope, are heavily damaged. We will patch and paint existing material damaged while performing work. However, this may leave the remainder of the pocket with an unacceptable appearance.
>
> Window pockets may need existing damaged material repaired. Should we price the additional work and proceed[?]

(Ex. A-6 at 1)

75. In reply to RFI #68, the A/E advised appellant to comply with paragraph 3.1 of the window restoration specification (ex. A-6 at 1). Appellant subsequently repaired and repainted 23 window wells (ex. A-6 at 17).

76. Mr. Zaragoza testified that appellant restored the window wells for the following reason:

> [A]fter we complete[d] the lead removal, the testing guy comes in and has to do a swipe wipe on the area before . . . anybody [can] start doing the restoration of the window.
>
> [In] a lot of these areas . . . we end[ed] up . . . cleaning two, three times because we couldn't get the area . . . clea[n] . . . [so] we didn't have a[ny] choice [but to] restore the window returns with new plaster and paint . . . .

(Tr. 2/19)

77. Mr. Nicholas Peneff, a senior consultant with Public Health & Safety, Inc. (PH&SI) and an expert in the field of lead abatement, interpreted paragraph 3.1 of the specification to require the following:

> Q [I]f these areas were inside the scope of work [was the Joint Venture responsible for obtaining wipe samples of 100 ug per square foot?]
>
> A [Yes.] [Those areas] would have to be cleaned down to a standard of 100 in order for the Joint Venture to be cleared and paid.
>
> Q Even though clearly that condition existed before they performed any work . . . .
>
> A Correct.

(Tr. 3/34-35, 39)

78. On 20 July 2000, appellant submitted an REA in the amount of $6,149 for restoring the window wells (R4, tab 169-6).

CLAIM 6: DECISION

Appellant requests an equitable adjustment of $6,149 for repairing and repainting 23 window wells. According to appellant, the work was beyond the scope of the contract because the project was limited to the "exterior" of the building. Appellant also argues that the pre-existing lead-containing (LCP) paint on the window wells and adjacent areas was so deteriorated that it was impossible to obtain wipe samples of less than 100 ug per square foot. The government argues that the work was part of the contract, that a reasonable site investigation would have disclosed the condition of the paint, that the CO did not direct the work, and that appellant did not provide the notice required by the Changes clause.

In our view, the work was required by the contract. Paragraph 3.2.5.2 of the lead abatement specification required appellant to obtain final wipe samples of less than 100 ug per square foot inside and outside the lead containment enclosures. Mr. Zaragoza's testimony is dispositive of this issue:

> [A]fter we complete[d] the lead removal, the testing guy comes in and has to do a swipe wipe on the area before . . . anybody [can] start doing the restoration of the window.
>
> [In] a lot of these areas . . . we end[ed] up . . . cleaning two, three times because we couldn't get the area . . . clea[n] . . . . [So] we didn't have a[ny] choice [but to] restore the window returns with new plaster and paint.

(Finding of fact 76)

Appellant also argues that its inability to obtain clean wipe samples was caused by severely deteriorating pre-existing LCP on the window wells and adjacent walls. Appellant's expert, Mr. Peneff, put this argument to rest. He testified that the specification required appellant to obtain wipe samples of less than 100 ug per square foot even if the contamination was pre-existing.

Claim 6 is denied.

CLAIM 7: PROVIDE NEW ROOF GUTTER

79. Detail 5 on drawing A7-9 contained a note requiring "repair [of the] roof as required to match existing where roof construction has been removed for parapet construction" (R4, tab 7).

80. On 2 August 1999, appellant forwarded a memorandum from Julian's Roofing to the PM via RFI #70. The memorandum stated that it was impossible to install flashing at the first floor because the roof deck was higher than the parapet wall. (Ex. A-7 at 1-2)

81. On 11 August 1999, the A/E advised the PM as follows:

> Since the existing roof system has a high point at adjacent exterior walls, it is critical that at the location where the new coping and the exterior wall meet, a proper depth of flashing and counterflashing is provided. A twelve-inch wide by eight-inch wide drainage depression along the reconstructed parapet may be able to provide for roof drainage (see attached sketches).

(Ex. A-7 at 2-3)

82. On the same date, the PM forwarded the A/E's advice and sketches to appellant with a note stating that he concurred and his signature. The form contained the following pre-printed notice:

> NOTICE: This reply is given with the express understanding that it does not grant a Change in the Amount nor the Time of this contract. If you do not concur, DO NOT PROCEED, and notify the Contracting Officer immediately.

(Ex. A-7 at 2)

83. On 8 September 1999, appellant submitted notice of changed condition (NOCC) #5 to the PM. Appellant advised that it considered the direction provided by the PM to be a changed condition and that the "costs of delay and/or performing this extra work will be documented and presented when they can be properly determined" and that work was stopped. (Ex. A-7 at 10)

84. In response to NOCC #5, the PM directed appellant to proceed with the work on 15 September 1999, stating that detail 5 on drawing A7-9 required the existing roof to be repaired as required (ex. A-7 at 11)

85. The roofer prepared an estimate of the cost to provide the drainage gutter on 22 October 1999 and, on 11 November 1999, appellant modified the roofer's subcontract to include construction of the gutter (ex. A-7 at 12, 13).

86. On 20 July 2000, appellant submitted an REA in the amount of $12,126 for installing a new gutter (R4, tab 169-7).

CLAIM 7: DECISION

Appellant argues that it is entitled to an equitable adjustment for providing a new gutter. The government argues that the claim should be denied because appellant was responsible for coordinating the work and making everything fit properly. The government also argues that the CO did not direct the work, and that appellant failed to provide the notice required by the Changes clause or the pre-printed notice provision on the RFI form.

During the work, appellant discovered that the roof deck over the first floor was higher than the parapet wall, making it impossible to install the flashing. After reviewing the problem, the A/E indicated that the existing roof would have to be partially removed

as specified on the drawings. In addition, he suggested that a new gutter be constructed to provide for roof drainage and prepared sketches. On 11 August 1999, the PM initialed the A/E's comments and sketches and forwarded them to appellant. On 8 September 1999, appellant submitted NOCC #5, stating that the work directed in response to RFI #70 was a change to the contract and that it would result in additional costs to the government and that work was stopped. In response to NOCC #5, the PM directed appellant to perform the work, taking the position that the work was required by detail 5 on drawing A7-9.

Detail 5 on drawing A7-9 required "repair [of the] roof as required to match existing where roof construction has been removed for parapet construction" (finding of fact 79). In our opinion, detail 5 does not include the construction of new structures, such as the roof gutter. Thus, providing a new gutter was beyond the scope of the contract. With respect to the PM's authority, we have previously held that the PM had the express actual authority to change the contract in order to resolve the day-to-day problems that arose during construction. In our opinion, the PM's directive to construct a gutter was within the scope of his authority. Appellant, of necessity, had to incur at least some additional costs to construct the gutter. Accordingly, we conclude that appellant is entitled to an equitable adjustment. *Servidone,* 931 F.2d at 831.

The government argues that appellant was required to coordinate the work and make everything fit properly. While the contractor is generally liable for the costs of fit-up, it is not liable for such costs when extra work is caused by defective government drawings. Thus, the government is responsible for the cost of the gutter. The government next argues that the CO did not direct the change. On the contrary, the PM directed it in response to appellant's RFI. The government lastly argues that appellant did not notify the CO that the work would result in additional costs as required by the Changes clause and the response to RFI #70. In our view, appellant complied with the notice requirement of the Changes clause by submitting NOCC #5. By submitting NOCC #5 and not proceeding with the work it satisfied the notice requirement on RFI #70. As a result, this claim is not precluded by lack of notice.

Claim 7 is sustained.

CLAIM 8: ADD ADDITIONAL COURSE BRICK TO FIT COUNTERFLASHING

87. Details on drawing A7-8 required appellant to install four courses of brick at the parapet on the third roof level (R4, tab 7). Claim 8 relates to brick laid on the third floor parapet on the north elevation (ex. A-8 at 4).

88. On 9 September 1999, appellant submitted RFI #86, notifying the PM of a conflict between the height of the parapet at the third roof level and the details on drawing A7-8 (ex. A-8 at 1).

89. On 7 October 1999, the A/E inspected the parapets. Paragraph 1d) of his field observation report of 12 October 1999 stated as follows:

> The existing parapet at third roof level along framing line 8, turning on E, and again turning on 11 line [h]as the existing parapet drainage gutter, behind it, at a high elevation, not allowing the standard flashing and counterflashing detail to be installed.
> In order to install flashing, an additional row of brick is required along this portions [sic] of parapet.

(Ex. A-8 at 2-4)

90. The PM initialed the A/E's report and sent it to appellant (ex. A-8 at 2).

91. Appellant installed an additional course of brick at the indicated location (ex. A-8 at 4, 8, 11; tr. 2/36).

92. On 20 July 2000, appellant submitted an REA in the amount of $12,893 for providing the additional course of brick (R4, tab 169-8).

CLAIM 8: DECISION

Appellant seeks $12,893 for adding an additional course of brick to fit flashing and counterflashing between lines 8 and 11 at the parapet on the third roof level on the north elevation. The government argues that the claim should be denied because appellant was responsible for making everything fit properly and the CO did not direct the work. The government also argues that appellant purchased and had delivered less than half the brick shown on the drawings for the parapets.

The details on drawing A7-8 indicated that four courses of brick were to be installed at the parapets on the third roof level. During the work, appellant discovered that it was impossible to install the flashing system if only four courses of brick were used. In order to resolve the problem, the PM directed appellant to install a fifth course of brick. As a result, appellant incurred additional labor and material costs. Thus, appellant has satisfied the elements of causation, liability, and injury. *Servidone*, 931 F.2d at 861.

The government argues that appellant was responsible for coordinating the work and making everything fit properly. Since the problem was caused by the government's failure to correctly detail the number of courses of brick required to permit installation of the specified flashing system, providing a fifth course of brick was compensable additional work. The government next argues that the CO did not direct appellant to perform the work. We held *supra*, that the PM had express actual authority to resolve the day-to-day problems encountered during the performance of the work. In our view, the PM's directive to provide an additional course of brick was within the scope of that authority. The government next argues that appellant purchased and took delivery of less than half the parapet brick shown on the drawings. As stated earlier, FAR 16.202-1 provides that the price of a firm-fixed-price contract does not vary with the cost experience of the contractor. Thus, if appellant completed the work using less brick than anticipated, it is entitled to the benefit of its bargain. *See Dalton*, 98 F.3d at 1303-04.

Claim 8 is sustained.

CLAIM 10: REPAIR VOID

93. General note A on drawing TO-2 required appellant to include a 10 percent replacement allowance for brick in its bid in case additional deteriorated brick was uncovered or discovered prior to, or during, the work (see finding of fact 50).

94. Paragraph 1.2.1 of specification section 01110 indicated that the work included partial "removal and reconstruction of the entire brick parapet" (R4, tab 1).

95. General note L on drawing TO-2 required appellant to replace deteriorated masonry units with brick to match the existing brick (R4, tab 7).

96. General note P on drawing TO-2 stated "Dismantle Existing Parapet Walls of Brick and as Shown on Drawings. Rebuild these areas . . . ." Drawings A4-1 through A4-3 and A7-8 delineated the extent of the brick to be removed. (R4, tab 7)

97. The A/E interpreted drawings A4-1 through A4-3 and A7-8 to mean that the "parapets . . . needed to be removed totally" (tr. 4/55).

98. On 8 September 1999, appellant's masonry subcontractor, MBB, dismantled the wall on the south parapet and discovered a void in the back-up brick (ex. A-10 at 1-4; R4, tab 169-10 at roof diagram dated 9 September 1999). MBB rebuilt approximately 100 square of deteriorated brick at that location (ex. A-10 at 4).

99. On 9 September 1999, appellant submitted NOCC #7, advising the PM of the void (ex. A-10 at 5).

100. On 15 September 1999, the A/E advised the PM that the existing gutter support was not to be disturbed (ex. A-10 at 5; tr. 1/73-75). The PM signed the A/E's advice on 15 September 1999 and forwarded it to appellant (ex. A-10 at 5).

101. In an undated note, appellant addressed the gutter issue as follows:

> [The PM's warning not to disturb the gutter support] fails to address the actual conditions . . . . The contractor did not remove the [gutter] support. [W]hile removing face brick . . . the contractor found that the support for the gutter was missing. Before installing replacement face brick. . . . [t]he contractor . . . install[ed] additional masonry [to support the gutter].

(Ex. A-10 at 7)

102. The PM did not provide any direction with respect to the void (tr. 1/75).

103. Mr. Thewis proceeded to repair the void for the following reasons:

> Q And what situation [were you] left in without . . . Navy direction [to repair the void]?
>
> A [I]f we [had not] filled in the wall, potentially there could be future falling of the wall on the inside.
>
> Q Was it an unsafe condition?
>
> A Yes, we felt it was unsafe . . . . [T]here would be nothing to tie the new material to which could cause problems in the future for the new material as well.

(Tr. 1/75-76)

104. MBB executed a waiver of lien pursuant to the laws of the State of Illinois on 30 May 2000. The waiver indicated that appellant paid MBB a total of $955,000, including extras, and that MBB paid its brick supplier a total of $12,000. The waiver did not indicate the quantity of brick purchased for the project. (R4, tab 453)

105. On 20 July 2000, appellant submitted an REA in the amount of $8,324 for repairing the void (R4, tab 169-10).

CLAIM 10: DECISION

Appellant argues that it is entitled to an equitable adjustment of $8,324 for repairing a void in the masonry on the south parapet. The void was not identified in the contract documents. The government argues that the CO did not direct the work, that voids are foreseeable in restoration work, and that the brick for the work should, in any event, be taken from the replacement allowance.

As stated *supra*, to prevail on a type 1 DSC claim, the contractor must provide written notice to the CO before disturbing the site and satisfy the five elements set forth in *Smoot*, 03-1 BCA at 159,315-16 (see claim 3). Appellant has met these requirements. The notice requirement is satisfied by NOCC #7. Element 1 is satisfied because the drawings plainly indicated the brick to be removed and the void was a latent condition. Element 2, reliance, is met because appellant could not have reasonably interpreted the drawings to mean there was a void at that location. Element 3 requires that the actual conditions differ materially from what is shown on the contract documents. This element is met because the drawings did not depict a void and appellant discovered a void behind one of the structural masonry walls. Although the government argues that voids are foreseeable in renovation work, it provided no evidence to support that proposition and there is no evidence suggesting that this particular void was foreseeable. Thus, element 4 is met. Element 5 is met because appellant had to use additional material and labor to repair the void.

The government argues that the CO did not direct appellant to repair the void. This argument fails because the PM did not reply to appellant's inquiry and repairing the void was essential to the completion of the work. The government also argues that the brick for the work should come from the replacement allowance required by general note A. The stated purpose of the replacement allowance was to provide a reserve in case additional deteriorated brick was discovered prior to, or during, construction. Since the additional work was caused by an error in the government's drawings rather than the discovery of unanticipated deteriorated brick, general note A is not applicable.

Claim 10 is sustained.

CLAIM 11: REPLACE DAMAGED CONDUIT

106. Above the footing at the south stairway, there was an existing ¾-inch low voltage conduit surface-mounted on the wall in plain view (tr. 5/19-20).

107. On 10 July 1999, appellant submitted a Utilities Locate Request to the base in preparation for the demolition of a stairway and a sidewalk (app. supp. R4, tab 30; tr. 1/87-88). The utility locator only investigated for underground utilities (tr. 5/20). On or about 21 July 1999, the utility locator advised appellant there was no live cable or wiring and that it could begin demolition (tr. 1/88).

108. On 19 August 1999, appellant damaged the conduit while excavating the stairway and repaired it on or about 8 September 1999 (ex. A-11 at 3, 4).

109. On 20 July 2000, appellant submitted an REA requesting $520 for repairing the conduit (R4, tab 169-11).

CLAIM 11: DECISION

Appellant requests an equitable adjustment of $520 for repairing a damaged conduit. FAR 52.236-9 PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984), which governs liability for damage to existing utilities, required appellant to repair any damage resulting from its failure to exercise "reasonable care" in performing the work.

On this record, the only effort appellant made to locate existing utilities was to request the utility locator to check the site. Appellant does not dispute that the utility locator only investigated for underground utilities. Since the conduit was above-ground and in plain view, relying upon the utility locator to check for utilities such as the conduit did not constitute reasonable care.

Claim 11 is denied.

CLAIM 12: SCAFFOLDING

110. Paragraph 1.6 of specification section 01525, Safety Requirements, required appellant to submit an accident prevention plan (APP). The APP was to be prepared in accordance with COE EM-385-1-1 (1996) Safety and Health Requirements Manual (safety plan), including appendix A, Minimum Basic Outline for Preparation of Accident Prevention Plan. (R4, tab 1)

111. Paragraph 13 of appendix A of the safety plan provided as follows:

> The contractor shall provide information on how they will meet the requirements of major sections of EM 385-1-1 in the [APP]. Particular attention shall be paid to . . . scaffolding [and] personal protective equipment . . . .

112. Specification section 01300, Submittal Procedures, classified the APP as an SD-08 statement (R4, tab 1 at 1 of 17). Paragraph 1.6 of that section defined an SD-08 statement as a shop drawing (R4, tab 1).

113. Paragraph 1.6.1h. of the specification, required appellant to include a fall protection plan (FPP) in the APP. The FPP was to be "site specific" and to protect all workers at elevations above 6 feet. (R4, tab 1)

114. Appellant's FPP, which was dated 21 December 1998, consisted of two-pages of general material describing the types of fall protection in use within the industry. The plan was not site specific and did not indicate the type of fall protection that would be used for this project. (R4, tab 215 at NAV03007)

115. The government approved appellant's APP, including its FPP, on 15 January 1999 (R4, tab 19).

116. Appellant mobilized to the site on 25 January 1999 (R4, tab 189, rep. no. 1).

117. Patent Construction Systems (Patent), appellant's scaffolding subcontractor, began erection of scaffolding on 15 February 1999 (R4, tab 189, rep. no. 16; tr. 1/34-35).

118. Among other things, Mr. Larry Campion, the CR, was "responsible [for] ensur[ing] complete adherence . . . to all safety requirements, with the authority to stop work being performed when life or limb is endangered by the existence of any unsafe condition" (app. supp. R4, tab 24).

119. On 17 February 1999, Mr. Campion observed the following:

> I, along with Mr. Zar[a]go[z]a observed . . . the . . . erectors . . . wearing personal fall arrest equipment, i.e. full body harnesses and lanyards but not utilizing or using that equipment . . . .
>
> Mr. Zar[a]go[z]a and I . . . went back into the

> . . . construction trailer, looked at the contract requirements and Mr. Zar[a]go[z]a agreed that they are to have fall protection while erecting and dismantling . . . scaffolding.

(Tr. 5/20-21)

120. On his daily production report for 17 February 1999, Mr. Zaragoza stated that he "stop[ped] scaffolding laborers [until] provi[d]ed [with a] fall protection plan by scaffolding engineer to meet w/requirement by Navy & safety plan." He also directed Patent to submit a FPP prepared by a scaffolding engineer "in order for you & my company to proceed." (R4, tab 189, rep. no. 18)

121. On 23 February 1999, Mr. Campion issued construction contract non-compliance notice (CCNN) #1, citing appellant for failing to tie-off lead erectors at elevations of over six feet and failing to provide a FPP (R4, tab 34).

122. On 4 March 1999, appellant submitted a FPP from Patent's safety manual (R4, tab 41 at 3).

123. On 15 March 1999, Mr. Richard C. Moore, a registered professional engineer employed by Patent, inspected the site. He concluded that parapet clamps and tie-offs, and tie-offs over the mansard roof were not feasible. Some air handling units had lugs that could have been used, but there were insufficient lugs to make it feasible to tie-off lead erectors using that method. He also concluded that the hazard involved in tying-off lead erectors was "materially greater than if [they were] allowed to work off of two scaffold boards." Overall, he concluded that it was not feasible to tie-off lead 100 percent. (R4, tab 169, app. A, Moore letter of 16 March 1999)

124. On 18 March 1999, Patent submitted a detailed site specific FPP showing how it planned to protect lead erectors. The record does not reflect that the government formally approved the plan. The new submission provided as follows:

> The following will summarize our [FPP] for this building:
> 1. The lead man will not be tied off during erection . . . .
> 2. The lead man will install diagonal bracing risers, and anchorages . . . adequate to assure stability of the scaffold.
> 3. All support erectors will be tied off to other structurally sound components of the . . . scaffold.
> 4. All erectors including the lead man will have a full body safety harness with a 4' 0" lanyard to limit falls to 4' 0". All standard O.S.H.A. safety standards . . . will be followed.

(R4, tab 169, app. A, Patent letter of 18 March 1999)

125. On 22 March 1999, Mr. Thewis met with the ROICC and government personnel to discuss the work (tr. 1/99). He recalled the meeting as follows:

> [T]hey wanted to know how the . . . job was going. [W]e said . . . there is no progress because we can't get our scaffolding up. . . . [W]e basically said . . . we don't know what [to do], you tell us what to do because right now, our erector can't do anything
>
> . . . .
>
> And then . . . [the PM] . . . said . . . why are we holding the contractor up? [W]hy are we not letting [him] finish? And then, suddenly the issue went away. [T]he very next day, they released us to go to work.

(Tr. 1/99-100)

126. Patent resumed work on 23 March 1999, tying-off lead erectors only when stationary. The government allowed Patent to use this method without objection for the remainder of the project. (R4, tab 189, rep. no. 42; tr. 1/101)

127. The scaffolding was completely erected as of 21 May 1999 (R4, tab 189, rep. no. 88).

128. On 20 July 2000, appellant submitted an REA in the amount of $18,564 and requested a 33-day extension of its early finish date (R4, tab 169-12 at 4).

CLAIM 12: DECISION

Appellant requests an equitable adjustment of $18,564 and a 33-day extension of its early finish date, alleging that the requirement to tie-off lead erectors 100 percent at heights of over six feet was not feasible. The government argues that the CO did not direct the suspension, that appellant unnecessarily prolonged the delay, that the delay did not impact the masonry or window restoration subcontractors, and that it did not affect overall completion of the project.

In order to recover under FAR 52.242-14 SUSPENSION OF WORK (APR 1984), appellant must show (1) that the CO suspended the work; and (2) that the resulting delay was unreasonable. A constructive suspension occurs when the work is stopped absent an express order by the CO and the government is found to be responsible for the work stoppage. *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1359 (Fed. Cir. 2002). Mr. Campion, the CR, was responsible for ensuring compliance with the safety requirements of the contract and he was authorized to stop work "when life or limb is endangered by the existence of any unsafe condition." On 17 February 1999, he observed lead erectors wearing, but not using, fall protection equipment while erecting scaffolding. Mr. Campion brought the non-compliance to the attention of Mr. Zaragoza, appellant's superintendent. Together, they reviewed the fall protection requirements in the specification. Mr. Zaragoza agreed that the specification required lead erectors to use fall protection while erecting scaffolding. Mr. Campion told Mr. Zaragoza that work could not continue until appellant submitted a FPP prepared by a scaffolding engineer. Mr. Zaragoza immediately stopped the erection of scaffolding. During the suspension period, the CO neither repudiated Mr. Campion's actions nor directed appellant to return to work. On these facts, we hold that the government constructively suspended the work.

We also conclude that the government's suspension of the scaffolding work was justified. The specification required appellant to protect all erectors at elevations above six feet. Although the government later relaxed the requirement, it had a contractual right to strict compliance with the fall protection requirements of the specification until it was changed. *Granite Construction Co. v. United States*, 962 F.2d 998 (Fed. Cir. 1992) (government has the right to insist on strict compliance with its specifications). In addition, the specification required appellant to submit a detailed site specific FPP prior to beginning the scaffolding. Appellant's December 1998 FPP consisted of two pages of general material describing the types of fall protection available within the industry. The plan was neither detailed nor site specific. Just as with any other specification requirement, the government was entitled to insist that appellant provide a compliant FPP. *See P.R. Burke*, 277 F.3d at 1359 (contractor's failure to submit required demolition plan constituted concurrent delay). Moreover, the fact that the government approved appellant's non-compliant FPP did not excuse its failure to provide a detailed site specific FPP. Subparagraph (e) of FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (Specifications and Drawings clause) provided that erroneous government approval of a shop drawing did not relieve the contractor from its contractual obligations. *M.A. Mortenson Company*, ASBCA Nos. 53123 *et al.*, 04-2 BCA ¶ 32,787 at 162,182-83.

Appellant submitted its final FPP on 18 March 1999. Under this plan, appellant proposed to tie-off lead erectors at elevations above six feet only when they were stationary. All other erectors would be 100 percent tied-off. The record does not reflect

whether the government formally approved appellant's revised plan. However, the government knowingly allowed appellant to erect the remainder of the scaffolding without tying-off lead erectors at elevations above six feet, thereby relaxing the specification requirement for 100 percent fall protection. On these facts, we conclude that the government properly suspended the work from 18 February through 18 March 1999. In the absence of any explanation as to why the government did not allow appellant to resume work on 18 March 1999, we hold that the five-day suspension between 19 and 23 March 1999, the day on which appellant was allowed to resume work, was unreasonable.

Claim 12 is sustained in part and denied in part.

CLAIM 13: GRINDING/REPAINTING OF STEEL LINTELS

129. Neither the plans nor the specifications provided for restoration of window lintels (R4, tabs 1, 7).

130. On 28 July 1999, appellant submitted RFI #69, advising that some steel window lintels were going to be exposed by the replacement of four-courses of non-deteriorated brick directed on 10 August 1999 (*see* finding of fact 59). Appellant asked if the government wanted the exposed lintels restored and stated that it had exposed a sample lintel for the government's inspection. Appellant also advised that the original lintels did not have flashing. (Ex. A-13 at 1)

131. In response to RFI #69, the PM notified appellant that the A/E would inspect the window lintels on 2 August 1999. The PM further stated:

> As per this message, I request that the Customer's Representative be present at that meeting, as the resolution of the deteriorated steel lintels could have significant cost and time delay ramifications. The contract does not call for repair or replacement of the window steel lintels.

(Ex. A-13 at 2)

132. On 2 August 1999, the A/E inspected the sample lintel (tr. 2/168).

133. The PM replied to RFI #69 on 10 August 1999, stating as follows:

> Provide flashing at the exposed lintels . . . . There is no structural steel restoration [required by the contract]. The

> "sample" lintels observed at jobsite . . . [did not show] substantial loss of structural strength to justify their replacement.

(Ex. A-13 at 1) The form included the pre-printed notice quoted at finding 82.

134. On 9 September 1999, MBB proceeded to grind and repaint the steel window lintels and install flashing at exposed lintels (R4, tab 189 at rep. no. 167).

135. On 20 July 2000, appellant submitted an REA in the amount of $14,532 for repairing the lintels and providing flashing (R4, tab 169-13).

CLAIM 13: DECISION

Appellant requests an equitable adjustment of $14,532 for restoring steel window lintels and installing flashing. According to appellant, the PM directed it to perform the work. The government denies that the CO directed the work and argues that appellant did not incur any additional costs for grinding or painting the lintels.

Appellant argues that the PM's 10 August 1999 reply to RFI #69 directed it to grind and repaint steel window lintels. We do not read the PM's reply to contain such a directive. The reply stated that the specification did not contain any provision for structural steel restoration and that the sample lintels inspected by the A/E did not show enough loss of structural strength to justify their replacement. This is not a directive to restore the window lintels.

The PM's reply did, however, direct appellant to provide flashing at exposed lintels. RFI #69 contained a pre-printed requirement requiring appellant to notify the CO if the work would result in additional costs and, if so, to stop work on the item in question. In a situation such as this where no reasonable person could think that anything but a change was being directed, we consider such pre-printed language to be surplusage and not intended to be enforced. Our conclusion as to the parties' intent is confirmed by the fact that the parties consistently ignored the pre-printed provision on the RFI form through-out the course of the contract.

Claim 13 is sustained in part and denied in part.

CLAIM 14: SEE CLAIM 21

CLAIM 15: RENDER UPPER SASHES INOPERABLE

136. Paragraph 1.2 of the window restoration specification required that upper and lower sashes be restored "to complete working order" (R4, tab 1, A0004 at 40 of 76; tr. 2/205-06).

137. On 2 September 1999, appellant submitted RFI #87, suggesting that it would be more energy efficient to render the upper sashes inoperable (or fixed) (R4, tab 330).

138. On 15 September 1999, the PM directed appellant to perform the work (R4, tab 330).

139. Signa, appellant's window restoration subcontractor, did not charge appellant for rendering the sashes inoperable (tr. 3/113). Signa's invoice stated that the "[c]redit to the owner is offset by the additional cost of extended bronze weather[stripping], additional labor from out side [sic] of the building and caulking" (R4, tab 169-15 at 5).

140. On 20 July 2000, appellant submitted an REA in the amount of $15,747 for the work (R4, tab 169-15).

CLAIM 15: DECISION

Appellant requests an equitable adjustment of $15,747 for rendering the upper sashes inoperable. The government argues that appellant is not entitled to an equitable adjustment because it was less expensive to render the sashes inoperable than to restore them to working order.

This claim fails because appellant has failed to prove that it incurred any additional costs. Signa, the subcontractor that performed the work, did not charge appellant for the work because the "[c]redit to the owner is offset by the additional cost of extended bronze weather[stripping], additional labor . . . and caulking." *See Cosmo,* 451 F.2d at 605-06 (there must be "*some* evidence of damage to support a finding on liability;" *EFG,* 00-1 BCA at 151,275 (the contractor must show that it incurred some increased cost or damage in an entitlement proceeding).

In its brief, the government asserts that it is entitled to a credit for the savings resulting from rendering the upper sashes inoperable. The government bears the burden of proof. *CTA,* 00-2 BCA at 152,762. Signa's invoice indicated that the costs incurred in

rendering the sashes stationary offset any savings resulting from not having to restore the sashes. The government did not provide any evidence to the contrary. Thus, the government has failed to prove that there were any savings. In any event, appellant has not proven entitlement to the underlying claim, so there is no claim to which a credit can apply. Moreover, the CO has not issued a decision asserting a deductive change.

Claim 15 is denied. The government's request for a credit is denied. The government's "claim" is dismissed.

CLAIM 16: EXCESSIVE MASONRY TOLERANCE

141. Paragraph 1.3.4 of specification section 04520, Masonry Restoration, provided, in part, as follows:

> 3. Execute a sample area 4 feet by 6 feet minimum, to show repointing preparation methods, including the removal of joint sealers and deteriorated mortar, repointing and application of joint sealers.
>
> 4. Work will not commence until samples are approved.

(R4, tab 1)

142. Paragraph 3.3.3a. of the specification provided as follows:

> Joints shall be pointed using a tool no wider than the joints and shall be tooled to match mock up or sample joints in depth and profile.

(R4, tab 1)

143. The government rejected appellant's first repointing mock up on 24 March 1999 (R4, tab 189, rep. no. 43).

144. On 5 April 1999, the A/E inspected the second repointing mock up. He concluded that "[t]he tooling was much improved from the first observation," but was of the opinion that "the joint profile should be flatter, and the mortar held back from the face of the brick a minimum of 1/16" to match the existing tooling." (R4, tab 189, field observation rep. no. 3; tr. 1/112-13)

145. Based on the A/E's comments, the PM rejected the second mock up on 30 April 1999 (R4, tab 275).

146. On 6 May 1999, appellant submitted NOCC #2, alleging that the standards set by the A/E were "impossible criterion exceeding industry standards, the specifications, and beyond the tolerances dictated by existing brick" (ex. A-16 at 1).

147. Mr. Janusz Barsh, MBB's president, has had 31 years of experience in masonry work and has worked on many renovation projects (tr. 2/161-62). At the hearing, he testified that, after the government rejected the second mock up, he asked "four probably six to eight gentlemen on the site" for suggestions. They told him to make the joints "look old because it's a landmark, it's historical" to which he replied "why didn't you tell me that in the beginning, I would have done it." (Tr. 2/173)

148. The government approved appellant's third mock up on 12 May 1999 (R4, tab 189, initial inspection dated 12 May 1999; R4, tab 283).

149. Mr. Thewis testified that MBB used a wooden dowel to repoint the third mock up (tr. 1/115). However, Mr. Kadera, appellant's QC manager, indicated in his 12 May 1999 inspection report that MBB used "the handel [sic] of [a] tooling-iron" (R4, tab 189, initial inspection 04520). We consider Mr. Kadera's contemporaneous inspection record to be more reliable on this point than Mr. Thewis' recollection several years after the fact and find as fact that MBB used the handle of a tooling iron to repoint the joints.

150. On 20 July 2000, appellant submitted an REA in the amount of $10,544 for "[e]xcessive masonry tolerance criterion" (R4, tab 169-16).

CLAIM 16: DECISION

Appellant requests an equitable adjustment of $10,544 for costs incurred in trying to meet "[e]xcessive masonry tolerance criterion" in connection with its repointing mock up. The government argues that appellant understood that this was a renovation project and that the goal was to restore the building, including its joints, to their original condition. The government also argues that appellant did not incur any additional costs. In its brief, the government asserts that it is entitled to a credit for the savings resulting from the use of a dowel instead of a repointing tool for the work.

The specification indicated that repointing could not begin until the government approved appellant's mock up. Discretion to accept or reject the mock up was vested exclusively in the government. The government rejected the first two mock ups because

they were too concave and, in its opinion, needed to be held back a little from the face of the brick to match the existing tooling. Appellant has not offered any evidence that these standards were unreasonable or unattainable. Thus, appellant has not established government liability as required by *Servidone*, 931 F.2d at 861.

In its brief, the government asserts that it is entitled to a credit because the dowel appellant used to repoint the work was less expensive than the repointing tools included in the contract price. Based upon the contemporaneous inspection records of Mr. Kadera, we have found as fact that appellant used the handle of a repointing tool to perform the work. Thus, the government has failed to prove any cost savings. In any event, appellant has not proven entitlement to an equitable adjustment, so there is no underlying claim to which a credit may attach. Moreover, the CO has not issued a decision asserting a deductive change.

Claim 16 is denied. The government's request for a credit is denied. The government's "claim" is dismissed.

CLAIM 17: ADD A WYTHE OF BRICK

151. Drawings A4-4 and A4-5 required appellant to remove and replace the existing coping at the second roof level (R4, tab 7; ex. A-17 at 6). Detail 9 on drawing A7-8 indicated that the parapet wall on which the coping was to be installed was 1 foot 5 inches wide and that the coping was 1 foot 9 inches wide (R4, tab 7; tr. 1/118-19).

152. On 8 September 1999, appellant's superintendent, Mr. Zaragoza, noted on his daily production report that the parapet wall would have to be widened by 4 inches in order to install the coping (ex. A-17 at 1).

153. On 9 September 1999, appellant submitted NOCC #6, advising that the parapet wall along line 14 on the west face of the east wing was bowing about 4 inches between approximately lines E and A (ex. A-17 at 2, 6).

154. In response to NOCC #6, the A/E stated as follows:

> As per jobsite observations made on Monday, Sep 13, 1999, the existing condition of masonry parapet was resolved as follows: keep 1'-5" wide masonry parapet; offset terra cotta coping 4" inches at corner 14E. This condition extends along col 14, at second floor roof.

(Ex. A-17 at 2)

155. The PM signed NOCC #6 and returned it to appellant on 15 September 1999 (ex. A-17 at 2).

156. On 18 September 1999, Mr. Zaragoza resubmitted NOCC #6, stating that the "A/E neglected to consider the contract requirement to install masonry true, plumb and in line." He also reiterated that the parapet would have to be widened by four inches to receive the coping. (Ex. A-17 at 3)

157. The minutes of the QC meeting for 21 September 1999 stated as follows:

> Conditions described in NOCC #6, the existing bowed parapet wall, was corrected by the [contractor] with an additional wyth[e] of brick. The opposite parapet is also bowed. [The PM] considered the Gov't may pay for the cost of correcting the parapets.

(Ex. A-17 at 4)

158. On 7 October 1999, the A/E conducted a walk-through of the parapets and observed that the parapet wall along line 5 on the east face of the west wing was also bowing. Paragraph 1a) of his field observation report of 12 October 1999 made the following recommendation regarding the bowing parapet walls.:

> The existing parapets at second roof level along framing lines 5 and 14 have four (4) inch bow at their mid point . . . . In order to install the terra cotta coping on these parapets, the solution is to keep parapets at 1'-9" from this terra cotta piece down to second roof surface. This increase has only a maximum four (4) inch increase at the mid point bow.

(Ex. A-17 at 5, 13)

159. The PM initialed the A/E's advice and sent it to Mr. Zaragoza, appellant's superintendent (ex. A-17 at 5-6; tr. 1/121-23).

160. On 7 October 1999, Mr. Zaragoza noted on his daily production report that the A/E had directed appellant "to proceed with reconstruction of new parapet wall increasing additional course of brick to accommodate new [pieces] of [terra cotta], on the E/ elev of W/ wing" (line 5) (R4, tab 189, rep. no. 192).

161. Appellant's daily production reports indicated that appellant commenced installation of masonry along line 5 on 7 October 1999 (R4. tab 189, rep. no. 194).

162. Appellant's masonry subcontractor, MBB, ordered 50,000 bricks on 16 June 1999 at a price of $16,000. According to MBB's waive of lien, it paid the supplier a total of $12,000. (R4, tabs 449, 453; tr. 1/190-92) Mr. Thewis did not have an independent estimate of the number of bricks required for the project and did not know how many bricks were actually used (tr. 1/196). Mr. Barsh, MBB's president, did not address this topic during his testimony.

163. On 20 July 2000, appellant submitted an REA requesting $26,742 for adding a wythe of brick to the parapet wall along line 14 on the west face of the east wing and line 5 on the east face of the west wing on the second roof level (R4, tab 169-17).

CLAIM 17: DECISION

Appellant requests $26,742 for adding a wythe (row) of brick along the parapet wall at lines 5 and 14 at the second roof level. The additional row of brick was added to correct approximately 4 inches of bowing at the mid points of the parapet wall on the west face of the east wing (line 14) and the east face of the west wing (line 5) of the building. The government argues that the claim is without merit because appellant performed the work before receiving any direction from the CO, chose the cheapest and quickest way to remedy the problem, and used fewer bricks than were delivered to the site.

With respect to the bowing parapet wall along line 5, the PM directed appellant to add a wythe of brick along lines 5 and 14 on 7 October 1999 and appellant proceeded with the work at line 5 the same day. Of necessity, appellant incurred additional costs to provide the materials and labor for the work. Thus, liability, causation, and injury have been established with respect line 5. *Servidone,* 931 F.2d at 831.

The government argues that the claim as to line 14 must be denied because appellant performed the work in advance of the PM's 7 October 1999 directive to add a

wythe of brick at lines 5 and 14. Although the PM directed appellant to offset the coping along line 14 on 9 September 1999, the PM reversed that direction on 7 October 1999 when he directed appellant to provide an additional wythe of brick along both lines 5 and 14. In the interim, appellant had already added a wythe of brick along line 14. Given the fact that the PM ultimately agreed with appellant's solution to the problem and the fact that the problem was clearly the result of the government's failure to accurately depict the existing conditions, we conclude that appellant is entitled to an equitable adjustment for the work performed at line 14. As stated in *Cable and Computer Technology, Inc.*, ASBCA Nos. 47420, 48846, 03-1 BCA ¶ 32,237 at 159,410, "[w]here changed work is performed due to defective specifications, the constructive change leading to that work is considered to have been issued by the Government's use of defective specifications in the contract."

The government also argues that appellant used the cheapest and quickest way to remedy the problem. We see no difference between what appellant provided and what the PM later directed it to do. Lastly, the government argues that appellant did not use all the bricks delivered to the site. Under FAR 16.202-1, the price of a firm-fixed-price contract does not vary with the cost experience of the contractor. Thus, appellant is entitled to the benefit of its bargain even if it did not use all the brick that was delivered. *See Dalton*, 98 F.3d at 1303-1304.

Claim 17 is sustained.

CLAIM 19: ADDITIONAL PAINT COSTS

164. Subparagraph (f) of the Specifications and Drawings clause provided as follows:

> (f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the [CO] approves any such variation, the [CO] shall issue an appropriate contract modification, except that if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(R4, tab 1)

165 Paragraph 1.3.6a. of the window restoration specification required appellant to submit a color sample with a shop applied finish (R4, tab 1, A0004 at 41 of 76).

166. Paragraph 2.5.1 of specification section 09900, Paint Finish, required appellant to provide one prime coat and one topcoat of paint (R4, tab 1, A0004 at 44 of 76).

167. Paragraph 3.2 of the painting specification required that "dirt, splinters, loose particles, grease, oil, and other substances deleterious to coating performance" be removed from the surfaces to be painted (R4, tab 1).

168. Appellant included $15,000 in its bid for painting (R4, tab 193 at CDB015300).

169. Appellant's paint submittal proposed products manufactured by West Marine. West Marine's literature recommended that one prime coat and two topcoats be applied to previously painted wood. The submittal did not separately describe the difference between the West Marine product and the specification. On 25 May 1999, the government returned the submittal marked "approved with corrections noted, resubmit w/corrections noted." The instructions on the submittal form stated that "[a]pproval does not release Contractor from responsibility of conforming to contract plans and specifications." The government's comments did not address the number of coats of paint to be applied. (Ex. G-11 at NAV09249) The record does not reflect whether appellant resubmitted its painting submittal or, if it did, whether the resubmittal was approved.

170. Appellant submitted its color sample on 19 May 1999 (ex. A-19 at 1; tr. 5/25-26). The color sample was a piece of new trim wood with four finishes: bare wood; prime coat; a prime coat and a topcoat; and a prime coat and two topcoats. (Ex. G-1; tr. 2/114, 4/102)

171. The government approved the color sample (ex. A-19 at 1). The government's comments, if any, on the color sample are not in the record.

172. On 13 September 1999, the A/E inspected the paint finish of a window mock up and found that the "quality of the paint finish [did] not [match] the smooth finish of the approved sample." The A/E observed "significant brush marks, and some rough surfaces indicating dirt trapped on the paint finish." He recommended that the mock up be rejected. (Ex. A-19 at 1, 3) The A/E did not have any concern about the number of coats of paint (tr. 4/68).

173. In response to the A/E's comments, appellant submitted NOCC #10 on 4 October 1999, which stated as follows:

> The approved sample submitted on May 19, 1999 does show brush marks, visible and tactile relief defining the wood substrate's grain, bubbles in the paint finish, "orange peel", sagging, and rough surfaces indicating dirt trapped on the paint finish. The approved sample . . . although demonstrating 2-top coats, showed also the contract required prime coat and one top coat. No Variance was identified on the submittal to suggest 3 or more coats of paint. The Contract has not been modified to add more coats of paint. The ROICC has directed a higher level of paint finish [than that required by the contract].

(Ex. A-19 at 4)

174. The A/E replied to NOCC #10 as follows:

> If the submitted sample for window paint finish is not going to be the guidance for the actual window paint work, then the contractor is to submit what is required by contract specifications. The window mock-up does not match the approved sample . . . .
> Also, the window observed on Sep 13, 1999 has dirt trapped on the paint finish. This is poor workmanship.

(Ex. A-19 at 4)

175. The PM signed the A/E's comments, stated that he concurred, and sent them to appellant (ex. A-19 at 4).

176. Mr. Borys, president of the window restoration subcontractor, testified that a government employee "ordered us to apply as many [coats of] paint as necessary so it looks acceptable to them" (tr. 3/109-110). He did not identify the government employee who allegedly provided the direction.

177. Mr. Kadera, appellant's QC manager, testified as follows:

> Q To your knowledge [did anyone in the Government direct] more or additional coats of paint on windows . . . ?
>
> A Per se, directly? Not directly but indirectly.

. . . .

> THE WITNESS: One day Larry Campion told me that they wanted more paint. And that I take it to mean more coats of paint.

(Tr. 2/157-58)

178. Under NAVFAC 5252.201-9300 CONTRACTING OFFICER AUTHORITY (JUN 1994), Mr. Campion did not have authority to change the contract, a fact which he acknowledged at the hearing (tr. 5/7-8). With respect to the contention that he directed appellant to apply additional coats of paint, Mr. Campion testified as follows:

> Q What if any suggestions did you give [appellant] as to the number of coats of paint they put on any window?
>
> A I never gave them a suggestion on any number of [coats of] paints. [T]hey had to . . . achieve the . . . finish that . . . they proposed to the Navy.

(Tr. 5/26-27)

179. According to Mr. Borys, Signa applied one coat of primer and "probably five layers of paint in order to satisfy the Navy" (tr. 3/84).

180. On 10 April 2000, Signa submitted an invoice for $25,500 to appellant for applying an additional coat of paint to 204 windows (ex. A-19 at 8).

181. Appellant has a "gentlemen's agreement" with Signa regarding payment. If appellant is "successful . . . , [it] will reimburse [Signa] for additional work that [Signa] performed at our behest." Appellant has not received a claim from Signa and there is no litigation pending between the companies. (Tr. 1/199-200)

182. Appellant submitted an REA in the amount of $57,217 on 20 July 2000 (R4, tab 169-19). The subcontractor portion of the cost breakdown in the REA alleged that Signa applied a "2nd, 3rd, and 4th top coats" of paint (ex. A-19 at 10).

CLAIM 19: DECISION

Appellant requests an equitable adjustment of $57,217 for applying additional coats of paint to the windows in order to match the approved color sample. The

government argues that Signa, appellant's window restoration subcontractor, used less expensive and inferior paint than that approved by the government and that the paint thickness did not consistently meet the thickness required by the specification. In its brief, the government seeks a credit for the difference between the amount appellant included in its bid for painting and the amount of Signa's claim.

In order to prove a constructive change, the contractor must establish that: (1) it was compelled to perform work not required by the contract; (2) the person directing the change had contractual authority unilaterally to alter the contractor's duties under the contract; (3) the contractor's performance requirements were enlarged; and, (4) the added work was not volunteered, but resulted from the direction of the government's officer. *Alfair Development Co.*, ASBCA Nos. 53119, 53120, 05-1 BCA ¶ 32,902. This claim fails because appellant has not proven that an authorized government official directed it to apply additional coats of paint.

The government asserts that it is entitled to a credit because Signa's "subcontract was for less than the amount [appellant] had in its bid" for painting and appellant "paid [Signa] less than the subcontract price" (gov't br. at 54). Signa's subcontract is not in evidence. Thus, we cannot determine the accuracy of the government's contention regarding the amount paid Signa. In addition, this was a firm-fixed-price contract. Under FAR 16.202-1, the price of a price of a firm-fixed-price contract does not vary with the cost experience of the contractor. As a result, appellant is entitled to the benefit of its bargain. *See Dalton*, 98 F.3d 1303-04. In any event, appellant has failed to prove entitlement to the underlying claim, so there is no claim to which a credit can attach. Moreover, the CO has not issued a final decision regarding a deductive change.

Claim 19 is denied. The government's request for a credit is denied. The government's "claim" is dismissed.

CLAIM 14: VACUUM CARPETING AND CLAIM 21: LEAD ABATEMENT

183. The contract required the removal of LCP from all window components in accordance with the procedures set forth in the lead abatement specification. The work included the restoration of 204 windows. (R4, tab 1, A0004 at 45 of 76, tab 315 at CDB000111)

184. The lead paint notes on drawing TO-2 indicated that the paint on the windows contained lead and that all activities involving painted surfaces were to be performed in accordance with the lead abatement specification (R4, tab 7).

185. Paragraph 1.3.2 of the lead abatement specification required appellant to hire a competent person (CP) to oversee the work. Among other duties, the CP was to inspect the work, ensure that personnel were not exposed to lead, and certify that air and wipe samples were below the levels established by the specification. (R4, tab 1, spec. § 13283 at 5). Appellant hired Clean World Engineering (CWE) to perform CP services. Mr. Victor Bhatia was CWE's CP. (Tr. 3/5-6)

186. Paragraph 1.5.3.3 of the lead abatement specification required appellant to prepare a Lead-Containing Paint Removal Plan (LCPRP) (R4, tab 1, spec. § 13283 at 9).

187. Paragraph 3.1.3 of the lead abatement specification required work areas to be marked with "caution lead hazard" tape. Paragraph 3.1.4 required that airtight lead containment enclosures consisting of two (2) layers of 6 mil polyethylene sheeting secured with duct tape be erected around work areas. Specified personal protective equipment (PPE) was to be worn inside the work areas. Paragraph 3.1.5 required appellant to protect the existing work. If the existing work was damaged or contaminated, it was to be restored to its original condition or better at no cost to the government. Paragraph 3.2.3 prohibited manual or power sanding. Paragraph 3.2.5.1 required that the surfaces of the work areas be kept free of accumulations of paint chips and dust. At the end of each shift and when the paint removal operation was completed, the work areas were to be cleaned with HEPA filtered vacuum cleaners, wet mopping and/or wet wiping. Appellant's CP was required to certify that the area had been cleaned of lead contamination before restarting work. Areas with residual dust, paint chips or debris were to be recleaned. If adjacent areas were contaminated, they were to be cleaned, visually inspected, and wipe sampled. Paragraph 3.2.5.2 required the CP to certify that wipe samples collected inside and outside the work areas were less than 100 ug per square foot. (R4, tab 1, spec. § 13283 at 12, 13, 16, 17)

188. Appellant submitted an LCPRP on or about 29 December 1998 (R4, tab 15). On 6 January 1999, the PM returned the plan with comments, stating as follows:

> Please review the specific comments made by the Navy's I[ndustrial] H[ygienist], Mark Lesko, and forward corrections for these plans to be considered APPROVED. Each comment within Mark Lesko's four page response must be addressed in writing and implemented into your plans.

(R4, tab 17)

189. On or about 12 February 1999, appellant's testing company, Environmental Assessment Group, Inc., took 33 background wipe samples inside the building. The tests

indicated that 25 samples had readings of over 100 ug per square foot, 10 samples had readings of 2,000 ug per square foot or more and 2 samples had readings of over 20,000 ug per square foot. (Ex. A-21 at 151-54, 160-61; tr. 3/38-39)

190. Calderon, appellant's lead abatement subcontractor, began work on the windows on or about 8 June 1999 (R4, tab 189, rep. no. 99). Calderon failed to comply with significant portions of the procedures set forth in the lead abatement specification. As observed by Mr. Campion, many of the lead containment enclosures were not airtight, allowing lead-contaminated dust and debris to migrate into the interior of the building (ex. G-2 at NAV11338; tr. 4/8, 5/31-35). Drop ceilings inside the lead containment enclosures were typically not sealed, creating an avenue for lead contaminated dust to migrate into the building (tr. 5/27-35). Some lead containment enclosures only had three sides (ex. G-2 at NAV11338, NAV11339, NAV11340, NAV11351). Calderon dry-sanded the windows, creating an excessive amount of dust and debris and did not keep the lead containment enclosures free of dust and debris (ex. G-2 at NAV11330, NAV11331, NAV11334; tr. 4/10, 5/32). In addition, the workers did not wear the specified PPE (R4, tab 189, rep. no. 182 at memo. dtd. 25 Sept. 1999; ex. G-2 at NAV11328, NAV11333, NAV11334, NAV11337).

191. On 4 August 1999, CPT Luke Shattuck, the customer representative for building 1H, reported the following:

> [T]he containment procedure . . . is non-existent. . . . Every single plastic shield on the second level of this building at one time or another has fallen partly or completely down. Even when the plastic shields were secure, they were not constructed in such a manner that personnel and the interior contents of this building were isolated from hazardous lead dust. The lead dust that was created and confined to these areas was never removed, and it is now spread over the entire inside of this building because the shields have not been maintained.

(R4, tab 314; tr. 1/42)

192. At Mr. Campion's request, OSHA inspected the facility on 15 September 1999 (tr. 3/86-87). Mr. Borys testified that no violations were found (tr. 3/87). OSHA records produced at the hearing indicated that the facility was cited for four health violations with an emphasis on lead on 15 September 1999. Two of the violations were classified as "serious" and resulted in fines. (Tr. 5/133-36; ex. G-3)

193. In September 1999, Mr. Campion asked Mr. Mark Lesko, head of the Industrial Hygiene Division at the base, to inspect the lead abatement work (tr. 5/29).

194. Mr. Lesko visited the site on 16 September 1999 and observed the following:

> A We went to [an area] . . . where there was active window restoration work . . . . [I] was looking for . . . things . . . such as air tight containments [and] air monitoring . . . .
>
> [They] did not have air tight barriers. I observed . . . plastic that was blowing in the wind[;] the outdoor air was blowing the plastic open. It looked like the plastic had been slit for worker access or egress.
>
> I didn't see the work area signs . . . . There was no air monitoring occurring that I witnessed.
>
> . . . .
>
> [I] asked for documentation of air sampling worker exposure assessment. Any . . . type of testing documentation, wipe samples and I didn't receive any. . . .
>
> . . . .
>
> Q And were they wearing respirators or any masks?
>
> A . . . I didn't see respiratory protection that met the OSHA standard.
>
> Q Did you observe any dust or debris on the floor?
>
> . . . .
>
> A I observed . . . paint chips, paint residue, dust on the floor underneath the window work areas.
>
> Q Did you observe any sanding?
>
> A . . . I saw workers with sandpaper wrapped around two by four blocks dry sanding the window facade.

(Tr. 4/7-10)

195. On 16 September 1999, the Industrial Hygiene Division took wipe samples and carpet samples from inside the building. The test results were as follows:

Sample Location	Sample Type	Ug/ft2
Room 108-On desk behind copier	Wipe	1,973
Room 107-On desk top outside room	Wipe	2,090
Ladies room on first floor	Wipe	3,676
Room 204-On refrigerator in room	Wipe	8,644
Room 202-Window sill outside room	Wipe	10,940
Room 209-Heater vent	Wipe	6,115
Room 206-Lab counter	Wipe	9,877
Room 209	Carpet	164
Room 204	Carpet	1,628

(Ex. A-21 at 147-49; app. supp. R4, tab 50; tr. 4/10, 34)

196. In Mr. Lesko's experience, wipe samples from old buildings were typically "to about 20 micrograms." Since lead usually moves by tracking and most of the readings taken on 16 September 1999 were in the thousands of micrograms, Mr. Lesko became concerned there might be a tracking problem. (Tr. 3/39, 4/10-11)

197. On 22 September 1999, the ROICC issued a stop work order for the lead abatement work. The order stated that the work was stopped "[d]ue to the unsatisfactory test results, [appellant's] disregard for proper work procedures, and [its] failure to implement Government comments to complete the lead abatement plan." (R4, tab 116)

198. In its brief, appellant argues that the unsatisfactory test results were caused by other contractors working in the building. The citations in the brief do not support this contention. The CP's memorandum of 28 March 2000 and the testimony at page 30 of volume 3 of the transcript relate to events that took place after issuance of the stop work order (R4, tabs 169-21, 389). Pages 2 and 3 of exhibit A-14 are proposed changes to appellant's lead abatement procedures. The documents at appellant's supplemental Rule 4, tabs 143 and 144, and pages 30and 31 of exhibit A-21, are excerpts from the Cape Report, which was part of the contract. All but two of the remaining citations referenced undated photographs (app. supp. R4, tabs 77, 100-101, 111-13, 129-30; ex. A-21 at 34-41, 77-83). The two dated photographs were taken after issuance of the stop work order (ex. A-21 at 33, 80).

199. On 24 September 1999, the government directed appellant to clean all the carpeting and vacuuming equipment in building 1H. Appellant performed the work over the week-ends of 25-26 September and 2 October 1999. (R4, tab 189, rep. nos. 180-82, 188, tab 350; ex. A-14 at 7-8).

200. On 26 September 1999, Mr. Bhatia observed that lead containment enclosures were missing from some windows and that the tape securing other enclosures was not secure (R4, tab 352).

201. On or about 1 October 1999, appellant hired PH&SI to provide additional CP services and rewrite its LCPRP (app. supp. R4, tab 59; tr. 3/44, 59-60). Mr. Nicholas Peneff was the senior consultant assigned to the project and Mr. Victor Ovsey was PH&SI's CP (R4, tab 389; tr. 3/34).

202. Appellant submitted its revised LCPRP on 18 October 1999 (R4, tab 124).

203. On 26 October 1999, the ROICC lifted the stop work order (R4, tab 124).

204. The government approved the revised LCPRP on 2 November 1999 (R4, tab 382).

205. On or about 3 November 1999, an electrical contractor was observed cutting lead-containing surfaces and moving ceiling tiles next to the lead containment enclosures without cleaning up its debris (R4, tabs 389, 423). Samples of the dust generated by the contractor revealed readings seven times higher than the specified level of 100 ug per square foot. (R4, tab 389; tr. 3/41-42)

206. Lead abatement work resumed on or about 4 November 1999 (R4, tab 189, rep. no. 215).

207. On 10 November 1999, Mr. Ovsey observed some lead containment enclosures that were not installed correctly and workers not wearing PPE (R4, tab 382).

208. On 13 December 1999, Mr. Ovsey reported that he obtained a reading of 80,000 ug per square foot from debris in the library (R4, tab 399).

209. On 25 January 2000, Mr. Ovsey directed Calderon to seal the inner flap of the enclosures with duct tape to reduce migration of lead from inside the work area. After Calderon sealed the flaps, all air samples taken outside the work area were below 30 ug per square foot. (R4, tab 418)

210. On 8 February 2000, Mr. Ovsey reported that there was a plumbing contractor in the building drilling and moving ceiling tiles. He noted that there had been many instances where the government and other contractors worked inside the building and left debris behind without properly cleaning up. (R4, tab 423)

211. As of 17 February 2000, Mr. Lesko had concluded that the level of lead inside the building was significantly lower since heightened abatement procedures were instituted (app. supp. R4, tab 176 at NAV10894).

212. On 28 February 2000, Mr. Lesko stated that it was impossible to obtain wipe samples of less than 100 ug per square foot outside the lead containment enclosures "due to lead sources in the building" (R4, tab 155 at 5; tr. 4/26). He also conceded that wipe samples taken inside the building would probably exceed 100 ug per square foot due to "other contractors working within the building, occupant's movement within the building, deteriorating surfaces which contain [lead], etc." (R4, tab 155 at 4).

213. Mr. Peneff concluded that the high readings were caused by paint deterioration, poor governmental maintenance practices, and the building users' lack of awareness of approved cleaning methods (R4, tab 423).

214. On 20 July 2000, appellant requested an equitable adjustment of $4,401 for cleaning the carpeting and the vacuuming equipment in building 1H (R4, tab 169-14 at section 2.1). On the same day, appellant requested $276,707, a 35-day extension due to delay to window restoration, and a 74-day extension due to delay arising from the suspension of the lead abatement work and the impact of more stringent lead abatement procedures on the work (R4, tab 169 at section 3).

CLAIM 14: DECISION

Appellant requests an equitable adjustment of $4,401 for cleaning the carpeting and vacuuming equipment in building 1H following the discovery of high levels of lead in the building on 16 September 1999. The specification required that wipe samples taken inside and outside the lead containment enclosures be less than 100 ug per square foot. The wipe samples taken during Mr. Lesko's visit on 16 September 1999 had readings ranging from a low of 1,973 ug per square foot to a high of 10,940 ug per square foot. The carpet samples had readings of 164 and 1,628 ug per square foot. Appellant argues that the high readings were caused by severely deteriorating pre-existing LCP and other contractors working in the building. The government argues that the contamination was caused by appellant's failure to follow the lead abatement procedures in the specification.

In our opinion, the primary cause of the high readings in the building was deteriorating LCP (see finding of fact 189). However, appellant's failure to follow the prescribed lead abatement procedures in its work areas contributed to the problem (*see* findings of fact 190-95). In particular, appellant failed to maintain airtight lead containment enclosures, failed to seal drop ceilings inside the enclosures, failed to keep the work areas free of dust and debris, and created unnecessary dust by dry-sanding. Although the record does not contain precise information regarding the amount of contamination caused by appellant's non-compliant lead abatement procedures, we are convinced that appellant's disregard of the lead abatement procedures contributed to the contamination of the building. As a result, we conclude, in the nature of a jury verdict, that appellant contributed 20 percent of the contamination. *See Perini Corp.*, ASBCA Nos. 51160, 51573, 04-1 BCA ¶ 32,530 (jury verdict method used to determine the number of days of delay). Thus, appellant is entitled to an equitable adjustment of 80 percent of the costs it incurred for cleaning the carpeting and the vacuuming equipment.

Claim 14 is sustained in part and denied in part.

CLAIM 21: DECISION

Appellant asserts that it is entitled to an equitable adjustment of $276,707 and a 35-day and 74-day extension due to government delays to the window restoration and lead abatement work. In support of its claim, appellant argues that the government suspended the window restoration work for 35-days without cause. Appellant asserts that it carefully followed its approved LCPRP and that the contamination inside the building was caused by other contractors and/or existing conditions. After the government lifted the suspension, appellant argues that its work was impacted for another 74-days because the lead abatement procedures in its revised LCPRP were more stringent than those in its original LCPRP. The government argues that appellant did not have an approved LCPRP and that the contamination inside the building was caused by appellant's failure to follow the lead abatement procedures.

It is abundantly clear that appellant failed to adhere to the lead abatement procedures in the specification. During his visit, Mr. Lesko observed lead containment enclosures that were not airtight. Appellant was not performing any air monitoring and workers were not wearing approved respirators. He observed accumulations of sand and dust in the work areas. He observed workers dry-sanding with sandpaper wrapped around two-by-four blocks. During his visits to the site, Mr. Campion observed lead containment enclosures that were not airtight, drop ceilings that were not sealed, accumulations of dust and debris in work areas, workers dry-sanding the windows, and workers without approved PPE. CPT Shattuck, the customer representative for building

1H, reported that all the lead containment enclosures on the second floor had fallen completely or partially down at one time or another and that, even when the enclosures were in place, they were not airtight. He observed accumulations of dust and debris in the work areas and was of the opinion that lead contaminated dust was migrating into the building.

Contrary to appellant's assertion, it did not have an approved LCPRP in place when it began the lead abatement work. Appellant submitted a LCPRP to the government on or about 29 December 1998. The PM returned the plan on 6 January 1999, stating that the plan could not be considered approved until appellant had addressed each of the government's comments in writing and incorporated them into the plan. Appellant did not submit a revised LCPRP until 18 October 1999. A contractor's failure to submit required submittals, such as the LCPRP, constitutes contractor fault, precluding recovery under FAR 52.242-14 SUSPENSION OF WORK (APR 1984). *See Singleton Contracting Corp. v. Harvey*, 395 F.3d 1353, 1356 (Fed. Cir. 2005) (contractor's failure to submit a required certificate of insurance held to be concurrent delay).

Appellant did not offer any evidence that the revised LCPRP contained more stringent procedures or that appellant's work was impacted for another 74 days after the suspension was lifted. Appellant's revised LCPRP is not in the record so we were unable to compare the plans and none of appellant's witnesses described the alleged differences. In addition, appellant did not offer any evidence showing how its work was impacted during the 74-day period after the suspension was lifted.

Claim 21 is denied.

CLAIM 24: CR'S INTERFERENCE WITH THE WORK

215. Mr. Larry Campion was the CR at all times relevant to this claim (R4, tab 124). Under this contract, he had the following authority:

> Con Rep Responsibilities: Serves as the Government Quality Assurance Representative . . . . Responsibilities include inspection of the work . . . to ensure adherence to the contract . . . . Conrep decisions on the acceptability of construction methods and practices, workmanship, materials & finished product are . . . final. Also responsible to ensure complete adherence . . . to all safety requirements, with the authority to stop work being performed when life or limb is endangered by the existence of any unsafe condition.

(App. supp. R4, tab 24)

216. Mr. Campion was also responsible for conducting labor standards interviews and reviewing payrolls (5/77, 80). He was not authorized to direct the performance of a subcontractor, modify the contract or issue a stop work order except for safety reasons (app. supp. R4, tab 24; tr. 5/7-8, 12).

217. If Mr. Campion observed a deficiency, he was authorized to issue a CCNN (R4, tab 8, slide 42; tr. 5/13-14). CCNNs were informal written notices that were issued to bring a contract non-compliance to the attention of contractor and higher authority within the government (tr. 5/13-14, 35).

218. Paragraph 1.7.2 of specification section 01110 required contractor employees to be United States citizens. The CO was authorized to grant exceptions. (R4, tab 1, A0004 at 9 of 76)

219. Before work began, Mr. Campion approached Mr. Zaragoza and asked him if he was a United States citizen (tr. 2/56-58). Mr. Zaragoza replied affirmatively. Mr. Zaragoza described the exchange as follows:

> A . . . I thought it was just like a conversation, just chatting, talking. All of a sudden he starts asking me questions that kind of ring my bell, like this is not a regular conversation.
>
> Q And what kinds of things was he asking you?
>
> A Well, he asked me if I was legal and what was my status in the United States.
>
> . . . .
>
> Q Was Mr. Campion hostile?
>
> A Kind of.

(Tr. 2/56-57)

220. Mr. Borys, a partner in Lorenz/Signa, one of appellant's window restoration subcontractors, testified that Mr. Campion complained a number of times in his presence

that the majority of the window and masonry workers were not citizens. According to Mr. Borys, this made Mr. Campion "very upset." (Tr. 3/88) We give these subjective impressions little weight.

221. The record reflects that the PM granted numerous exceptions to the citizenship requirement (R4, tabs 20, 24-26).

222. Mr. Zaragoza testified that Mr. Campion created a hostile work environment. He described the problem as follows:

> A To me doing a restoration of the building, it's, I'm an artist. I mean, that ['s] what I consider myself. It's supposed to be a fun job . . . . [F]rom day one I didn't hear nothing but depression and arguments and insults. And it was terrifying. I mean, I wasn't happy from the beginning.

(Tr. 2/58)

223. Mr. Zaragoza also testified that Mr. Campion created a safety hazard on the site:

> A . . . There were several times when I had people working on scaffolding . . . . He was directing or yelling and screaming at the workers. You know, not because for some reason somebody wasn't – it wasn't he's entitled to do that kind of thing. He's supposed to inform me and then I would take action on whatever problem it was.

(Tr. 2/59)

224. On 23 February 1999, Mr. Campion issued CCNN #1 for failure to enforce 100 percent fall protection and failure to have a FPP (ex. A-24 at 84).

225. Mr. Campion issued CCNN #3 on 17 August 1999 for failure to soak terra cotta pieces and dampen back-up walls. The record indicates that CCNN #3 was in error. (Ex. A-24 at 79-83)

226. On 18 August 1999, Mr. Campion issued CCNN #4 for failure to provide a 75 mph certification for the windows. The certificate was actually submitted on 19 May 1999. (Ex. A-24 at 73-78).

227. Paragraph 1.5.1b. of the window restoration specification required appellant to submit the experience of its proposed window restorer to the government for approval prior to beginning the work (R4, tab 1, A0004 at 42 of 76). On 31 August 1999, Mr. Campion issued CCNN #6, inquiring as to whether Construction & Removal Equipment, Medical (CREM), the then-current window restorer, had been approved (ex. A-24 at 70; tr. 68-72, 114-18).

228. Mr. Campion issued CCNN #6 for the following reasons:

> [Lorenz/]Signa . . . got the contract and then . . . [Mr.] Borys got sick. [A]ll of a sudden . . . his workers went away and . . . I remember Mr. Zar[a]goza saying that he had hired or he being the Joint Venture had hired some friends of his [to] work on the windows.
>
> And then [those people] showed up and started [working.]
>
> So I asked a number of times who these people were employed by . . . I heard that they were employed by Signa. I heard from the Joint Venture that they were employed directly by the Joint Venture. I heard that they were paid by the Joint Venture but assisting Signa and then during the interviews the name of [CREM] came up.
>
> So I'm not sure who anybody is working for and I couldn't find a trail of payments [showing] whether they had been paid according to Davi[s]-Bacon . . . .

(Tr. 5/73-74)

229. The record does not reflect that CREM was approved.

230. On 31 August 1999, Mr. Campion issued CCNNs #7 and #8. The CCNNs arose from six labor standards interviews taken by Mr. Campion from CREM workers on 29 August 1999. Mr. Campion initiated the interviews because he had been told that CREM had not been paid and was only going to get $50 a window (tr. 5/71-72). CCNN #7 stated that "[w]orkers [were] not paid according to the Davis-Bacon Wage Determination" and that "weekly payrolls [were] not up to date." CCNN #8 stated that "Mr. Kadera repeatedly inter[fered] with [the] labor standards interviews" taken on 29 August 1999. (Ex. A-24 at 60, 67; tr. 2/138-39)

231. During the interviews, Mr. Kadera, one of appellant's QC managers, approached Mr. Campion and asked what was going on (tr. 2/139-40). Mr. Campion

explained that he was taking labor standards interviews and did not want Mr. Kadera to listen to them (tr. 2/139-40). Mr. Kadera listened in for a while and questioned the accuracy of what Mr. Campion wrote down (tr. 2/140-41). Mr. Campion believed that Mr. Kadera was "interfering and intimidating the workers" and asked him to leave (tr. 5/68).

232. On 10 September 1999, Mr. Campion issued CCNN #9 alleging that daily reports #164 and 166 were missing follow-up inspection schedules (ex. A-24 at 37; tr. 5/81-82).

233. On 17 May 1999, Lorenz/Signa, CREM's predecessor, leased an off-site facility for the window restoration work (R4, tab 281).

234. Mr. Campion made several visits to the off-site facility. During his visits, he found that "the [lead] controls [were not] up to what they should have been," conducted labor standards interviews and took samples of paint and caulk (R4, tab 189, rep. no. 159; tr. 5/47-48).

235. At Mr. Campion's request, OSHA inspected the facility on 15 September 1999 and found four health violations with an emphasis on lead, two of which were classified as "serious" and resulted in fines (tr. 3/86-87, 5/133-36; ex. G-3; *see* finding of fact 192)

236. Mr. Borys also testified that Mr. Campion directed the laborers to stop work for several hours during his visits (tr. 3/86-87). Mr. Campion denied directing the workers to stop work and testified that he did not have the authority to issue such an order (tr. 5/39). Mr. Borys was not at the facility during the alleged work stoppages. For various reasons, including the fact that Mr. Borys was not truthful about the results of the OSHA inspection, we find Mr. Campion's testimony to be more credible (tr. 3/87; ex. G-3).

237. CREM stopped work on 21 September 1999 (R4, tab 189, rep. no. 177, tab 345). The record does not contain any documentation from CREM explaining its decision to stop work. No one from CREM testified.

238. The weekly QC minutes for 21 September 1999 stated as follows:

> . . . As of now window work is stopped due to uncertainties. [CREM] explained how [it] had, on [its] own, reworked three or four windows . . . . No other person was known to have directed the rework. The brothers requested permission from

> Con Rep to depart the meeting. The Con Rep nodded approval.

(R4, tab 117 at 3)

239. When asked about 21 September 1999 QC minutes, Mr. Campion denied directing CREM's work (tr. 5/55).

240. On 23 September 1999, Mr. Borys gave CREM 24 hours to return to work. When CREM did not return, Mr. Borys canceled its subcontract (tr. 3/108).

241. On the same day CREM walked-off the job, Government Compliance Consultants, Inc. (GCCI) wrote the CO on behalf of appellant, requesting that Mr. Campion be removed. GCCI asserted that CCNNs #8 and #9 were incorrect and only issued to harass appellant. Although GCCI stated that it did not intend to file a formal discrimination suit, it suggested that since "there is only one white Caucasion non-immigrant" on the project that "the race composition of the joint venture team may have something to do with how they have been treated." (R4, tab 115)

242. On 25 September 1999, appellant wrote Mr. James Nelson, Mr. Campion's supervisor, alleging that Mr. Campion was interfering with its relationship with CREM. Appellant alleged that CREM had increasingly refused to follow its direction since 28 August 1999 and was performing work that it had not been directed to do. Appellant also alleged that CREM had repeatedly met with Mr. Campion and that CREM had missed an important meeting on 23 September 1999, during which time it was meeting with Mr. Campion. (Ex. A-24 at 1)

243. On 28 September 1999, Mr. Nelson wrote appellant as follows:

> . . . Each of [Mr. Campion's contacts] were either at the work site . . . or at the off site . . . facility. These visits [were] made with my knowledge and approval . . . . The purpose of [the visits was] to inspect the quality of ongoing work or to verify the receipt and storage of materials for which you are asking to be paid. These are functions he is expected to perform and are clearly within the realm of his duties and responsibilities.
>
> . . . .
>
> The problems identified by Mr. Campion have all been real failures of either your quality control organization or [your]

> production staff . . . The current problem of lead contamination . . . is an excellent example . . . . It was Mr. Campion who identified this problem, yet your firm is the one responsible for lead abatement, cleanup, and clearance . . . . Regardless of who is . . . the [CR] you will still be required to fulfill the requirements of the contract.

(Ex. A-24 at 7)

244. On 29 September 1999, Mr. Campion sent an e-mail to the ROICC, which stated as follows:

> [Y]ou asked me if the F.H. Paschen [project] was as bad as 1-H . . . . In a word NO. But they went about it the same way i.e. trying to get the con-rep (myself) removed. [O]ur team just went back to administering the letter of the contract . . . . F.H. Paschen on their own fired the superintendent, project manager [and] the entire q. c. organization . . . .
>
> My suggestion is to hold the contractor to the spec. requirements for manufacturers[’] [and installers’] qualifications . . . . This alone could be time consuming or they will be forced into providing the proper subcontractor. In a very short period of time they will be in trouble with weather . . . . If they have trouble with this which I assume they will because of the schedule. Commander you could offer them an out . . . . and we all go out to dinner.

(App. supp. R4, tab 158; tr. 5/89-90, 95-99)

245. The day before his reassignment, Mr. Campion advised the PM to be very careful what he said to appellant. He also stated that he believed appellant was in “great financial trouble and on the run.” (App. supp. R4, tab 196; tr. 5/90-92)

246. At the hearing, Mr. Campion conceded that he had no specific information about appellant’s financial status (tr. 5/90). He explained as follows:

> . . . I was trying to say that they . . . appeared [to be] attacking my credentials and credibility and trying to get me removed

> from the job because I felt that the contractor had an obligation to supply the contract that he had signed.

(Tr. 5/91)

247. On 20 July 2000, appellant submitted an REA in the amount of $18,994 for costs allegedly incurred as a result of Mr. Campion's interference with the work (R4, tab 169-24).

CLAIM 24: DECISION

Citing *Apex International Management Services, Inc.*, ASBCA Nos. 38087 *et al.*, 94-2 BCA ¶ 26,842, *aff'd on reconsid.*, 94-2 BCA ¶ 26,852, appellant argues that it is entitled to $18,944 as a result of Mr. Campion's intentional and malicious interference with its performance. In particular, appellant alleges that Mr. Campion improperly inquired into the citizenship of appellant's workers and complained about the number of foreign-born workers on the job, created a hostile and unsafe work environment, issued "multiple meritless CCNNs" without first consulting appellant, over-zealously inspected the work, and interfered with appellant's relationship with its window restoration subcontractor, causing it to walk off the job. The government argues that Mr. Campion was only performing his job.

There is a presumption that government officials act in good faith in the performance of their duties. *Librach v. United States*, 147 Ct. Cl. 605 (1959). Traditionally, this presumption could only be overcome by "well-nigh irrefragable proof." *Knotts v. United States*, 121 F. Supp. 630, 128 Ct. Cl. 489 (1954). In many instances, the courts have interpreted this to require evidence of an intent to injure the contractor. The Court of Appeals for the Federal Circuit recently considered the meaning of well-nigh irrefragable proof in *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234 (Fed. Cir. 2002). The Court equated the standard of well-nigh irrefragable proof used in earlier cases to the more modern standard of clear and convincing evidence. The Court went on to define clear and convincing evidence as follows:

> A requirement of proof by clear and convincing evidence imposes a heavier burden . . . than that imposed by requiring proof by preponderant evidence but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt. "Clear and convincing" evidence has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is "highly probable."

Am-Pro, 281 F.3d at 1240.

We have carefully weighed the evidence offered by appellant in light of the standard set forth in *Am-Pro* and conclude that appellant has not proven by clear and convincing evidence that Mr. Campion acted in bad faith in carrying out his duties. Appellant first argues that Mr. Campion improperly inquired into the citizenship status of its workers, suggesting that these inquiries reflected a personal bias against foreign-born workers. We disagree. A major portion of Mr. Campion's duties was to ensure that appellant complied with the specifications. Paragraph 1.7.2 of specification section 01110 required contractors and their employees to be United States citizens.

Citing the testimony of Mr. Zaragoza, appellant next argues that Mr. Campion created a hostile work environment. Mr. Zaragoza testified that he considered himself to be an "artist" and that restoring old buildings was "supposed to be a fun job." According to Mr. Zaragoza, he "didn't hear nothing but depression and arguments and insults." Mr. Zaragoza misconstrues the nature of Mr. Campion's job. Mr. Campion was not responsible for making the job fun or creating a happy environment. His job was to inspect the work to ensure adherence to the specifications. When Mr. Campion discovered deficiencies, he was obligated to report them, even if it created hostility.

Appellant also argues that Mr. Campion created unsafe conditions by yelling and screaming at workers while they were on the scaffolding. This allegation is supported by the testimony of Mr. Zaragoza. In our view, Mr. Zaragoza's testimony is self-serving and, given his animosity towards Mr. Campion, we cannot accord these allegations much weight.

Appellant next argues that Mr. Campion issued multiple meritless CCNNs without first consulting appellant. We are not aware of any requirement that the CR consult with a contractor prior to the issuance of a CCNN. With respect to CCNN #1, the specification required 100 percent fall protection at elevations of over six feet. At the time the notice was issued, appellant was not in compliance that requirement. The fact that the government ultimately relaxed the requirement does not have any bearing on Mr. Campion's motivation for issuing CCNN #1. CCNN #3 inquired if appellant had submitted a 75 mph certification for the windows when, in fact, it had already been submitted. All appellant had to do to resolve CCNN #3 was to produce the certificate. With respect to CCNN #6, there is no evidence that CREM was ever approved. With respect to CCNNs #7 and #8, Mr. Campion's duties included taking labor standards interviews and 29 C.F.R. § 5.6(3) (1998) required that the interviews be taken "in confidence." CCNN #9 involved some missing inspection reports. All appellant had to

do to resolve this CCNN was to produce the reports. We find appellant's contentions regarding the CCNNs to be without merit.

Appellant alleges in its brief for the first time that Mr. Campion over-zealously inspected the work. We do not agree. Mr. Campion's inspections led to the discovery that lead erectors were wearing, but not using, fall protection equipment while erecting scaffolding and that appellant had not submitted a detailed site specific FPP. His inspections also led to the discovery that appellant was not adhering to the lead abatement procedures in the specification, which contributed to the contamination of the interior of the building. The government had a contractual right to insist that appellant comply with these specification provisions. In addition, Mr. Campion's inspections of appellant's off-site facility were appropriate. Indeed, when OSHA inspected the site on 15 September 1999, it found four violations with an emphasis on lead, two of which were serious and resulted in fines. Mr. Campion also correctly asserted that he had the right to take labor standards interviews and discuss Davis-Bacon issues with appellant's subcontractors in private. A few requests for missing daily reports and other information, whether in error or not, do not constitute over-inspection. *Cf. Kilbride Construction Inc.*, ASBCA No. 19484, 76-1 BCA ¶ 11,726 (example of over-zealous inspection).

Appellant next argues that Mr. Campion interfered with its relationship with CREM and caused CREM to abandon the job. Other than appellant's unsupported assertion that Mr. Campion caused CREM to walk off the job, there is no evidence on this point. Appellant was not present during the meetings between Mr. Campion and CREM and no one from CREM testified. Our review of the record did not reveal any contemporaneous documentation from CREM. This allegation fails for lack of proof.

Claim 24 is denied.

CLAIM 25: RFI REGARDING WINDOW DEPTH

248. Paragraph 1.2.1 of specification section 01110 provided as follows:

> [At] window openings where masonry . . . and miscellaneous other closures and devices have been installed[,] the windows . . . will be removed and replaced with new . . . windows which will be designed so that their profiles, trim, brickmolds, sills, color, finish, etc. will match the original window in design profile and character.

249. General Note F on drawing TO-2 provided as follows:

> Window work to include: Removal of all existing exterior windows, storm windows, sills, brickmolds, trim, and miscellaneous blocking. Installation of new window units complete with all blocking, trim, hardware, sealant, etc., required for a complete and weather tight installation . . . .

(R4, tab 7)

250. Drawing A4-1 identified window #64 as an exterior window. The window was further identified by a hexagon with the number #14 in it. (R4, tab 7)

251. The note explaining hexagon #14 on drawing TO-3 stated as follows:

> Existing masonry openings have been infilled with brick. Remove masonry infill. Prepare opening for new window. Install new window. Repair any damaged finishes to interior spaces to match the adjacent finishes . . . .

(R4, tab 7)

252. Appellant submitted RFI #97 on 8 December 1999, requesting clarification of the intended position of window #64:

> [Contractor] discovered that condition at opening #64 was not similar to #65 as shown. Existing window was not a double hung, and was located toward the interior . . . . Condition does not show where original window pocket should be positioned. Please direct intended position of new replacement window. (i.e. distance from exterior façade to brick mould). ([P]lease note: The distance is not typical in this area)

(Ex. A-25 at 1)

253. The PM replied as follows on 13 December 1999:

> Locate new window, at opening #64, at a distance from exterior façade to brick mould, same as openings 65 & 66. Refer to drawing no. A2-1, for plan view of window openings #64, 65 & 66. These three windows are to be located same distance from exterior façade.

(Ex. A-25 at 1)

254. On 11 January 2000, appellant submitted revised RFI #97:

> Revised RFI #97. [Contractor] placed window in opening #64 as directed . . . . The terra cotta sill is not as deep as the placement depth indicated . . . . Currently the exterior sill is terra cotta and brick. Please provide direction. (Leave as is? Install new terra cotta sill? other?)

(Ex. A-25 at 3)

255. On 20 January 2000, the PM replied as follows:

> Locate window in opening #64 at a depth where the exterior sill is terra cotta only. Do not leave any brick sill exposed.

(Ex. A-25 at 3)

256. At the hearing, the A/E explained the rationale for this directive as follows:

> [T]he proper way to install a window is to fit [it] in such a location where there is no gap between the window frame seal itself and the terra cotta seal adjacent to it.
>
> [W]e cannot leave any gap at that point because that would be a point of penetration. . . .
>
> Q What other location if any would be appropriate for window 64?
>
> A I'm afraid in this case [it] is probably . . . common sense that that is the location where it belongs. All windows in this facility come to a terra cotta seal so it's in compliance with the rest of the work.

(Tr. 4/72)

257. On 20 July 2000, appellant submitted an REA in the amount of $801 to the CO (R4, tab 169 at section 4).

CLAIM 25: DECISION

Appellant seeks $801 for alleged additional work performed in connection with the positioning of window #64 in the window opening. The government argues that the CO did not direct any additional work and that, in any event, appellant did not incur any additional costs.

The PM's replies to RFI #97 did nothing more than reiterate what was already required by general note F on drawing TO-2 and paragraph 1.2.1 of specification section 01110.

Claim 25 is denied.

CLAIM 26/32: ADDITIONAL BRICK AT PARAPETS

258. Details on drawing A7-8 indicated that four courses of brick were to be laid at the parapet on the third roof level (R4, tab 7). Claim 26/32 relates to brickwork performed on the south elevation (A-26/32 at 6, 8).

259. On 9 September 1999, appellant submitted RFI #86, advising the government that there was a conflict between the height of the parapet at the third roof level and the details on drawing A7-8 (ex. A-26 at 1, 4, 6).

260. In response to RFI #86, the PM directed appellant on 15 September 1999 to "remove existing flashing system at high point of existing gutters to allow for watertight installation" (ex. A-26 at 1, 3).

261. On 7 October 1999, the A/E inspected the parapets. Paragraph 1c) of his field observation report of 12 October 1999 stated as follows:

> The existing parapet at third roof level along framing line A.5, between 8 and 9, also between 10 and 11, has the existing parapet drainage gutter, behind it, at a high elevation, not allowing the standard flashing and counterflashing detail to be installed.
> In order to install flashing, an additional row of brick is required at these two locations.

(Ex. A-26 at 2, 8)

262. The PM initialed the A/E's advice and sent it to appellant's superintendent, Mr. Zaragoza (ex. A-26 at 5).

263. On 20 July 2000, appellant submitted an REA in the amount of $4,728 (R4, tab 169-26).

CLAIM 26/32: DECISION

Appellant seeks $4,728 for adding an additional course of brick at two locations along the parapet at the third roof level on the south elevation. See claim 8 which relates to similar work performed on the north elevation. The government argues that appellant failed to provide notice of a change as required by the Changes clause. In the event we find that the claim is not precluded by the notice provisions in the Changes clause, the government argues that the brick used for the work must be taken from the 10 percent replacement allowance required by general note A.

It is undisputed that the drawings failed to accurately depict the number of courses of brick required to reconstruct the parapet. After inspecting the area, the A/E recommended that an additional row of brick be added to allow installation of the specified flashing system. The PM initialed the A/E's recommendation and sent it to Mr. Zaragoza, appellant's superintendent. As held *supra,* the PM had actual authority to resolve day-to-day problems such as this during the performance of the contract. By initialing the A/E's recommendation and sending it to appellant, the PM directed appellant to perform the work. Since appellant had to purchase the materials and provide the labor to install the fifth course of brick, we conclude that it incurred additional costs, satisfying the requirement for a showing of some damages. *Cosmo,* 451 F.2d at 605-606; *EFG,* 00-1 BCA at 151,275. Consequently, we conclude that appellant has proven causation, liability, and resultant injury. *Servidone,* 931 F.2d at 861.

The government argues that the claim should be denied because appellant did not provide written notice of the alleged change to the CO. As stated *supra,* the requirement for written notice under the Changes clause is construed liberally where the CO has actual or imputed knowledge of the pertinent facts. *Grumman,* 03-1 BCA at 159,185. Since the CO had overall responsibility for the contract, he knew or should have known of the PM's directive. Thus, we impute knowledge of the PM's directive to the CO. Alternatively, the government argues that the brick must be taken from the 10 percent replacement allowance required by general note A. The purpose of general note A was to provide a source of brick to replace deteriorated brick discovered prior to, or during, construction. Since the additional course of brick was required as a result of a defect in the drawings rather than the discovery of additional deteriorating brick, appellant's recovery is not subject to the replacement allowance.

Claim 26/32 is sustained.

CLAIM 29: DEMOLISH DUCTWORK

264. Drawing A4-5 required installation of two new TC-9 pieces at window #20 (R4, tab 7).

265. Paragraph 1.2.1 of specification section 04530 required, in part, as follows:

> Repair and restoration of terra cotta construction, including . . . replacement of non-repairable terra cotta units with new terra cotta units. Provide materials, labor, equipment and services necessary to furnish, deliver, repair and install all work of this section as shown on the drawings and/or photographs, as specified herein, and as required by the job condition.

(R4, tab 1)

266. On 25 February 2000, appellant discovered existing ductwork that was not shown on the drawings behind some plywood under window #20. The ductwork was physically separate from the window and interfered with the installation of the new terra cotta pieces. (Ex. A-29 at 5, 6; tr. 2/48)

267. On 28 February 2000, appellant submitted RFI #101, requesting direction (ex. A-29 at 5).

268. On 1 March 2000, the PM directed appellant to "abandon ductwork if possible, PWC [Public Works Center] can remove at later date" (ex. A-29 at 5).

269. Appellant removed the ductwork on 3 March 2000 because it was installed at the location where the new TC-9 pieces were to be installed (ex. A-29 at 6; tr. 2/48). A photograph confirms that the ductwork blocked installation of the TC-9 pieces (ex. A-29 at 2).

270. In addition to removing the ductwork, appellant constructed a backing wall to support window #20 and permit installation of an anchor support system for the TC-9 pieces (ex. A-29 at 7; tr. 2/49-51).

271. On 6 March 2000, appellant submitted NOCC #13, advising that it considered the work to be a changed condition (ex. A-29 at 9).

272. On 20 July 2000, appellant submitted an REA in the amount of $2,893 for removal of the duct and construction of the back-up wall (R4, tab 169-29).

CLAIM 29: DECISION

Appellant seeks $2,893 for demolishing some ductwork and constructing a back-up wall to support window #20. Appellant argues that the ductwork was not shown on the drawings and that it could not be left in place because it would interfere with the installation of the new TC-9 pieces that were required at that location. The government argues that the contract required appellant to remove ductwork as necessary to perform the work, that appellant proceeded with the work without the approval of the CO, that the PM told appellant to leave the duct in place, and that appellant failed to prove that it incurred any additional costs.

Under paragraph 1.2.1 of specification section 04530, appellant was required to provide materials and labor "as specified" and "as required by the job condition." The job condition required appellant to remove the ductwork in order to install the new TC-9 pieces.

Claim 29 is denied.

CLAIM 30: REPLACE CRACKED SIDEWALKS

273. Drawing A2-2 required appellant to replace a portion of the existing concrete sidewalk in front of the main stairway on the south elevation. The portion to be removed was identified by cross hatching and the portion that was to remain was identified by notes stating "existing sidewalk to remain." (R4, tab 7)

274. Hexagon 4 on drawings A2-2 and TO-3 further required appellant to "repair existing sidewalk and curbs where damaged and as required" (R4, tab 7).

275. General note C on drawing TO-2 indicated that materials damaged during the work were to be repaired or replaced at no cost to the government (R4, tab 7).

276. In addition to replacing the sidewalks in front of the main stairway identified on drawing A2-2, appellant replaced some cracked sidewalks at the building entrances on the east elevation (tr. 1/165-66). According to Mr. Thewis, appellant replaced the sidewalks on the east side for the following reasons:

> Q Were there other sidewalks there that you did not damage but were cracked that the Navy asked you to repair?
>
> A Yes, there were some along the east elevation. There were some at these entrances . . . [A]fter we reviewed it with the Navy, we said, oh, we're ready to pour up the sidewalk, is there any of these you want to have replaced? And you know, we discussed it with the intent of trying to pick those up if that's what their desire was.
>
> . . . .
>
> [And] we believed we had their approval to go ahead.

(Tr. 1/164-66)

277. Appellant presented several photographs of the sidewalks in question at the hearing (ex. A-30 at 10-14). The photographs were taken on 3 March 1999 and showed the existing condition as of that date (ex. A-30 at 10).

278. On 20 July 2000, appellant submitted an REA in the amount of $2,298 for replacing cracked sidewalks (R4, tab 169-30).

CLAIM 30: DECISION

Appellant claims $2,298 for replacing cracked sidewalks not delineated on the contract documents. Appellant argues that it replaced the sidewalks at the direction of government. The government denies that it directed the work.

In order to prove a constructive change, the contractor must establish by probative evidence that the work was performed as a result of an order, or through the fault, of the government. *Advanced Engineering & Planning Corp.*, ASBCA Nos. 53366, 54044, 05-1 BCA ¶ 32,806 at 162,286 and cases cited therein. Mr. Thewis' unsupported testimonial assertion that an unidentified government representative directed appellant to replace the sidewalks at the east elevation is insufficient to carry this burden. On this record, it appears that appellant acted as a volunteer in replacing the cracked sidewalks.

Claim 30 is denied.

CLAIM 31: REMOVE EXHAUST DUCT

279. Drawings A2-1, A2-2, and A4-3 depicted metal ductwork from the ground level through the existing and new vestibule roof/canopy (R4, tab 7; tr. 4/74-77). A note on drawing A2-2 stated that the existing ductwork was "to remain in place undisturbed" (R4, tab 7; tr. 2/78).

280. During the work, appellant discovered that the ductwork was deteriorated and that it would interfere with the canopy work (ex. A-31 at 2).

281. On 8 December 1999, appellant submitted RFI #98, requesting direction with respect to the ductwork (ex. A-31 at 2).

282. On 10 December 1999, the PM relied to RFI #98, stating that the government would determine if the ductwork was operational. If it was not operational, the PM indicated that it could be removed. (Ex. A-31 at 2)

283. As of 25 January 2000, the government had not advised appellant whether the ductwork was operational (ex. A-31 at 3).

284. Appellant removed the ductwork on 31 January 2000 (ex. A-31 at 3; R4, tab 189, rep. no. 283).

285. Mr. Zaragoza testified that appellant removed the ductwork for the following reason:

> A [W]e needed to do some . . . steel work for a canopy . . . . [I]t was going to be like a new entrance to the building. . . . [W]e ha[d] this piece of duct work and we ke[pt] waiting for a response if they want[ed] us to remove it or leave it. By then . . . the Steel Subcontractor [was] waiting . . . .
>
> . . . .
>
> Q And to complete the canopy work you needed the duct to be removed?

A Definitely. Or just to let us know if they wanted to leave it, so we [could] do modifications around the top of it.

(Tr. 2/52-53)

286. On 20 July 2000, appellant submitted an REA in the amount of $405 for removing the ductwork (R4, tab 169-31).

CLAIM 31: DECISION

This is a claim for $405 for removing collapsed rusted ductwork at the canopy roof. Appellant argues that it had to remove the ductwork because it interfered with the canopy work. The government argues that the ductwork collapsed on its own and was thrown out by appellant's subcontractor.

Drawing A2-2 stated that the ductwork was to "remain in place undisturbed." During the work, appellant discovered that the ductwork was deteriorated and was going to interfere with the canopy work. Appellant notified the PM on 8 December 1999, but the government did not provide guidance. Appellant removed the ductwork on its own on 31 January 2000. On these facts, we conclude that appellant removed the ductwork for its own convenience and cannot recover its costs.

Claim 31 is denied.

CLAIM 33: ADD ROWLOCK COURSE

287. Section 6 on drawing A7-8 detailed the flashing system that was to be installed around the large ornamental pediment on the roof (R4, tab 7; tr. 4/51).

288. General note A on drawing TO-2 required appellant to include a 10 percent replacement allowance of brick in its bid in case further deteriorated brick was discovered prior to, or during, the work (R4, tab 7) (see finding of fact 50).

289. On 7 October 1999, the A/E inspected the third floor parapet and observed an existing roof drainage gutter behind the pediment. The drainage gutter caused a two-inch void between the pediment and the parapet, making it impossible to install the specified flashing system (ex. A-33 at 4, 7; tr. 1/167-69).

290. In his field observation report of 12 October 1999, the A/E recommended that the course of brick directly under the pediment be installed as a rowlock course in

order to fill the void (tr. 4/78-81; ex. A-33 at 4). A rowlock course is laid on edge rather than flat and requires more bricks than a standard course (tr. 1/168-69).

291. The PM initialed the A/E's advice and sent it to appellant (ex. A-33 at 4).

292. The A/E testified that the contract required appellant to "install flashing and counter flashing that works" (tr. 4/51).

293. On 20 July 2000, appellant submitted an REA in the amount of $1,088 for installing a rowlock under the pediment (R4, tab 169-33).

CLAIM 33: DECISION

This is a claim for $1,088 for installing a rowlock course of brick under the large ornamental pediment on the front of the building in order to fit the specified flashing system. During the work, appellant discovered a two-inch void between the pediment and the parapet that was caused by an existing roof drainage gutter. The void was not depicted on the drawings. Appellant argues that it is entitled to an equitable adjustment for installing a rowlock course. The government argues that appellant was responsible for making the flashing system fit and that, in any event, appellant did not incur any additional costs. The government also asserts that it is entitled to a credit for unused brick under general note A on drawing TO-2.

The rowlock course was needed to correct a defect in the government's drawings. As indicated *supra,* the PM had actual authority to direct such a change. Since it takes more bricks to install a rowlock than a standard course of brick and the government does not deny that appellant performed the work at its direction, we conclude that appellant is entitled to an equitable adjustment. *Servidone,* 931 F.2d at 831.

The government's arguments are without merit. The contractor is not required to absorb the costs of correcting defects in the government's plans and specifications. Thus, the argument that appellant was required to provide a rowlock course at no additional cost must be rejected. In addition, the government misconstrues the purpose of the replacement allowance required by general note A. The purpose of the replacement allowance was to provide a ready source of brick in case additional deteriorated brick was discovered prior to, or during, the work. The additional brick required to install a rowlock course was not caused by the discovery of additional deteriorated brick; it was caused by a defect in the drawings. Finally, the CO has not issued a final decision asserting a "claim" for the unused brick.

Claim 33 is sustained. The government's request for a credit is denied and its "claim" is dismissed.

CLAIM 34: CONFISCATION OF PAINT AND CAULK

294. Pursuant to paragraph 1.3.3 of specification section 09900, Painting, the government was authorized to take "samples of paint at random from the products delivered to the job site and test them" in order to verify compliance. Paragraph 3.9 of the specification further provided that the government could take "samples of paint at random . . . to verify that products either conform to the referenced specifications or approved substitution." (R4, tab 1)

295. Mr. Campion visited appellant's window restoration subcontractor's off-site facility on 28 August 1999. He recalled the visit as follows:

> . . . Mr. Anguiano, [one of CREM's owners] mentioned to me that . . . they were given empty paint cans of the approved paint and . . . [a] lesser grade paint to put in those cans to use . . . in the field.
>
> . . . I asked . . . if I could sign out for . . . a can or two of paint and primer, and . . . caulk . . . and verify what was being used . . . .
>
> I asked him who was directing him . . . to use an inferior paint in an approved paint can and he mentioned it was the Joint Venture . . . .
>
> So . . . I asked if I could borrow these cans. I would return them or give them back to him at the job site. I requested to sign out for them. He said there was no need to sign out for them. To take them and he'll get them from me at the job site.
>
> [A] week later . . . . I gave Mr. Anguiano the paint samples back. Complete. Unopened.

(Tr. 5/37-38)

296. At the hearing, Mr. Borys testified that the materials were never returned (tr. 3/93).

297. On 20 July 2000, appellant submitted an REA in the amount of $111 for the cost of replacing the confiscated materials (R4, tab 169-34).

CLAIM 34: DECISION

This is a claim for $111 for replacing the paint and caulk allegedly confiscated by Mr. Campion from CREM's off-site facility on 28 August 1999. Appellant argues that the government did not have a contractual right to take the materials and that they were never returned. The government argues that paragraphs 1.3.3 and 3.9 of the painting specification authorized it to take samples for testing and that, in any event, the samples were returned to CREM unopened.

The painting specification allowed the government to take samples of materials delivered to the job to verify that they complied with the contract. Although Mr. Borys testified that the materials were never returned, Mr. Campion testified that he returned them to Mr. Anguiano, one of CREM's owners. Appellant did not call Mr. Anguiano to testify. We find Mr. Campion's testimony to be more credible.

Claim 34 is denied.

CLAIM 35: REPLACE TC-32B UNITS WITH TC-9 UNITS

298. In addition to requiring appellant to include an additional 10 percent for brick replacement, general note A on drawing TO-2 required appellant to include an additional 10 percent for terra cotta repair and replacement (R4, tab 7; tr. 4/84, 6/20-21) (see finding of fact 50).

299. Drawing A4-4 called out four TC-32B pieces, two of which were to be installed at window #63 (R4, tab 7; ex. A-35 at 7; tr. 1/171-73).

300. Gladding McBean quoted four TC-32B pieces on 31 July 1998 (ex. A-35 at 5).

301. When MBB began work on window #63, it discovered that the TC-32B pieces were too small (ex. A-35 at 6; tr. 1/172).

302. On 4 January 2000, appellant ordered two TC-9 pieces and installed them at window #63 (ex. A-35 at 1; tr. 1/172-74).

303. Although appellant alleges that it notified the government of the discrepancy, the record does not contain an RFI on the subject or any direction from the PM regarding this matter (tr. 1/172).

304. MBB did not charge appellant for installing the TC-9 units (tr. 1/173-74; 6/19-20; ex. A-35 at 5, 10-11).

305. Gladding McBean did not charge appellant for the two TC-9 units (R4, tabs 206, 391, 446).

306. On 20 July 2000, appellant submitted an REA in the amount of $2,378 for performing the work (R4, tab 169-35).

CLAIM 35: DECISION

Appellant seeks $2,378 for providing two TC-9 pieces at window #63 in lieu of the specified TC-32B pieces. According to appellant, the TC-32B pieces were too small and had to be replaced with TC-9 pieces. The government argues that the PM did not direct the work and that appellant did not incur any additional costs.

This claim fails because appellant did not incur any additional costs. Gladding McBean did not charge appellant anything extra for providing the two TC-9 pieces and MBB did not charge appellant any installation costs.

Claim 35 is denied.

CLAIM 36: PROVIDE ADDITIONAL TERRA COTTA SHAPES AND MOLDS

307. Specification section 04530 required the following:

> 1.2.1 General
>
> [R]eplace . . . non-repairable terra cotta units with new terra-cotta units . . . as shown in the drawings and/or photographs, as specified herein, and as required by the job condition.
>
> . . . .
>
> 2.1.1 Terra Cotta Shapes and Tolerances

> Provide replacement units complete with all shapes indicated, or as necessary for proper installation.
>
> . . . .
>
> d. Where necessary to secure accurate dimensions . . . terra cotta shall be sized by grinding or cutting with a diamond tipped blade.

(R4, tab 1)

308. Bid item 0001 of the schedule required appellant to provide the following:

> All work complete in accordance with the drawings and specifications except for terra cotta specified under Bid Item 0002 . . . .

(R4, tab 2, A0005 at 2)

309. Bid item 0002 listed certain shapes and molds (TC-9, -18, -26, -29 through -34, -36 through -39, -42, -49) (R4, tab 2, A0005 at 2-4).

310. Drawings A7-1 through A7-7 depicted 49 different terra cotta shapes (TC-1 through TC-49). Drawings A4-4 through A4-6, A7-8 and A7-9, which contained the building elevations, parapet details, and terra cotta details, called out virtually all of the 49 shapes depicted on drawings A7-1 through A7-7. (R4, tab 7)

311. Selective demolition note A on drawing TO-2 required appellant to "verify extent, location, quantities, dimensions of all existing materials to be repaired, replaced cleaned, etc." (R4, tab 1).

312. Appellant submitted an REA in the amount of $20,577 on 20 July 2000, including $11,200 for providing 17 additional shapes and 16 additional molds (R4, tab 169-36 at 2).

313. Appellant did not identify which shapes and molds were included in its claim. The cost breakdown also indicates that appellant incurred $5,350 to add glaze and texture to 6 "AB3" pieces and 6 "AB4" pieces. The record does not indicate how these designations relate to the nomenclature used in the terra cotta details at drawings A7-1 through A7-7. Appellant also included $2,935 for remaking four TC-9 pieces that were too short. (Tr. 1/175-76, 179-80; ex. A-36 at 2, 27-28)

314. Mr. Thewis testified that appellant incurred additional costs to procure these pieces:

> Q And you had to increase the price of your contract with Gladding McBean to get these pieces?
>
> A That's correct. That's correct.
>
> . . . .
>
> Q So, you incurred additional costs for these extra terra cotta pieces?
>
> A Yes. We paid our supplier for this material.

(Tr. 1/181-83)

315. Appellant entered into a subcontract with Gladding McBean to provide the terra cotta for the project on 18 November 1998. The subcontract price was $832,750. (R4, tab 220) Appellant paid Gladding McBean $832,750 for the work (R4, tab 391).

316. On 23 September 2002, Gladding McBean advised DCAA that it "bid $832,750.00 . . . ," that it "invoiced $832,750.00" and that it "received $832,750.00." Gladding McBean further stated that it had not "filed any claim or sought any equitable adjustment on the . . . project." (R4, tab 446)

CLAIM 36: DECISION

Appellant argues that it is entitled to $11,200 for ordering 17 additional shapes and 16 molds, $5,350 for adding glaze and texture to six "AB3" pieces and six "AB4" pieces, and $2,935 for remaking four TC-9 pieces that were too short. The claim totals $20,577 with mark-ups. The government argues that the claim should be denied because appellant did not notify the CO that it was reordering the pieces and the CO did not direct it to reorder the pieces.

Appellant asserts that the IFB only detailed 15 shapes and 16 molds. Our review of the IFB did not confirm this assertion. Bid item 0001 stated that "[a]ll work complete in accordance with the drawings and specifications except for terra cotta specified under Bid Item 0002." The drawings called out virtually all of the 49 shapes depicted on the terra cotta details. Thus, the scope of the work was not limited to the terra cotta pieces

listed in bid item 0002. With respect to adding glaze and texture to the "AB3" and "AB4" pieces and shortening the TC-9 pieces, paragraphs 1.2.1 and 2.1.1 of specification section 04530 required appellant to replace non-repairable terra cotta units with new terra-cotta units "as required by the job condition" and as necessary to provide "for proper installation." These provisions make appellant responsible for adding glaze and texture and sizing pieces as needed to achieve a proper installation. In any event, appellant has failed to prove that it incurred any additional costs. Gladding McBean bid $832,750 and was paid $832,750, and did not submit a claim or request for an equitable adjustment in connection with the work.

Claim 36 is denied.

CLAIM 37: ADDITIONAL BRICK UNDER WINDOWSILL

317. On 8 December 1999, appellant submitted RFI #96, which provided as follows:

> Window protection has been removed at window #58. During preparation for terra cotta window sill installation, [contractor] uncovered that window stool and sill was supported by a 2" x 8" piece of lumber. [Contractor] recommends installing brick as new foundation, and typical for building. Please provide direction.

(Ex. A-37 at 1)

318. The A/E concurred with appellant's suggestion on RFI #96 and the PM signed the A/E's concurrence and forwarded it to appellant (ex. A-37 at 1). The RFI included the pre-printed notice quoted at finding of fact 82.

319. On 20 July 2000, appellant submitted an REA in the amount of $709 for providing a new foundation for the sill under window #58 (R4, tab 169-37).

CLAIM 37: DECISION

Appellant argues that it is entitled to $709 for providing a new foundation for the sill under window #58. The government argues that the CO did not direct the work, that appellant did not provide the notice required by the response to RFI #96, and that appellant used less than half the bricks shown on the drawings. The government also asserts that it is entitled to a credit for unused brick.

By signing RFI #96 and forwarding it to appellant, the PM directed a binding change to the contract. As stated previously, the PM had actual authority to direct minor changes to the work in order to resolve problems that arose during construction. In our view, directing construction of a new foundation for the windowsill was within the scope of that authority. RFI #69 contained a pre-printed requirement requiring appellant to notify the CO if the work would result in additional costs and, if so, to stop work on the item in question. In a situation such as this where no reasonable person could think that anything but a change was being directed, we consider such pre-printed language to be surplusage and not intended to be enforced. Our conclusion as to the parties' intent is confirmed by the fact that the parties consistently ignored the pre-printed provision on the RFI form through-out the course of the contract.

The government asserts that it is entitled to a credit because appellant purchased and had delivered less than half the number of bricks shown on the drawings. Inasmuch as FAR 16.202-1 provides that the price of a firm-fixed-price contract does not vary with the cost experience of the contractor, the government is not entitled to the requested credit. If appellant was able to perform the work with less brick than anticipated, it is entitled to keep the cost savings. *Dalton*, 98 F.3d at 1303-1304. Finally, the CO has not issued a final decision seeking a deductive change for unused brick. Thus, there is no CDA "claim" before us.

The claim is sustained. The government's request for a credit is denied and its "claim" is dismissed.

UNABSORBED AND EXTENDED FIELD OFFICE OVERHEAD

320. Paragraph 1.6.2 of specification section 01321, Network Analysis Schedules, required submission of a project schedule within 45 days of award. Once approved, paragraph 1.6.4 provided that the project schedule would be the baseline for analyzing all changes. (R4, tab 1) Appellant's approved project schedule is not in the record.

321. Mr. Ramirez, one of the joint venture partners, testified that appellant planned to finish the work by December 1999. According to Mr. Ramirez, appellant used December 1999 in its initial project schedule, but the PM told it to use 1 April 2000, the CCD specified in the contract (tr. 2/204). The initial project schedule referred to by Mr. Ramirez is not in the record.

322. As evidence that it planned to finish the project early, appellant pointed to a telefax from the PM to appellant dated 10 March 1999, which stated that "[i]f you plan on finishing the work earlier than indicated in the contract, that is your call, and no LDs

[liquidated damages] could be levied if you do not finish by your projected early finish date . . . ." (R4, tab 256).

323. Mr. Joseph E. Manzi, appellant's scheduling expert, prepared an after-the-fact as-planned schedule for his 20 July 2000 report. The schedule reflects a finish date of 30 December 1999. (R4, tab 169, ex. 5 at 4 of 4) Mr. Manzi testified that he used a schedule with a data date of December 1998 as the baseline for preparing the schedule in his report (R4, tab 169, ex. 4; tr. 3/144).

324. The record does not contain a project schedule with a data date of December 1998 or a project schedule with a finish date of 30 December 1999 (tr. 3/144, 157).

325. Based on the testimony of Mr. Thewis, appellant's daily production reports, and the punch lists, we find that the project was substantially complete on 1 April 2000 (tr. 1/79; R4, tab 189 *passim*).

326. Based on an early finish date of 30 December 1999, Mr. Manzi concluded that the government caused a 142-day delay to appellant's early finish date, consisting of (1) a 33-day delay to scaffolding; (2) a 35-day delay to window restoration; and (3) a 74-day delay to lead abatement. All three activities were on the project's critical path. (R4, tab 169-2; tr. 3/143-51)

UNABSORBED OVERHEAD: DECISION

Appellant argues that it is entitled to unabsorbed overhead of $55,522 because the government prevented it from meeting its early finish date of 30 December 1999 by 142 days. According to appellant, the government delayed scaffolding by 33 days, window restoration by 35 days, and lead abatement by 74 days. Appellant also argues that these delays extended its work to 19 May 2000. We have already found that appellant has only proved five days of delay attributable to unreasonable suspension of scaffolding.

To prove entitlement to unabsorbed overhead where, despite government delays, the contractor finishes by the contract completion date, *i.e.*, within "the originally bargained for time period," it must prove in addition to all the other prerequisites for Eichleay damages, "that from the outset of the contract, it: (1) intended to complete the contract early; (2) had the capability to do so; and (3) actually would have completed early, but for the government's actions." *Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1058-59 (Fed. Cir. 1993); *see also Frazier-Fleming Co.*, ASBCA No. 34537, 91-1 BCA ¶ 23,378 at 117,287-88 (overhead costs).

Appellant has failed to prove that it planned to finish the contract by 30 December 1999. Although Mr. Ramirez testified that appellant used a finish date of 30 December 1999 in its initial project schedule, that schedule was not offered into evidence. Mr. Manzi testified that, based on a schedule with a data date of December 1998, he used a finish date of 30 December 1999 to prepare the as-planned scheduled in his 20 July 2000 report. Our review of the record did not disclose a schedule with a data date of December 1998. Appellant also failed to produce its approved project schedule. As evidence that it planned to finish the project early, appellant pointed to a 10 March 1999 telefax from the PM to appellant regarding liquidated damages. That communication, which took place many months after award, does not prove that appellant planned to finish the contract by 30 December 1999. In addition, Mr. Ramirez's unsupported testimonial assertion that appellant planned to finish early is insufficient to carry appellant's burden of proof on this issue. *See Interstate*, 12 F.3d at 1060 (testimony from an officer of the contractor that it would have finished earlier but for government delay was rejected as "post facto, conclusory, [and] self-serving").

Since appellant has failed to prove that it planned to complete the project by 30 December 1999, it is not entitled to any recovery upon the basis of a planned early completion.

Appellant's claims for unabsorbed and extended field office overhead are denied.

PROFESSIONAL AND CONSULTANTS' FEES

327. Appellant seeks $25,833 in consultants' fees for the services of Mr. Joseph E. Manzi, J.E. Manzi & Associates, Inc., who prepared the 20 July 2000 report which is the basis of appellant's REA (R4, tab 169 at ex. 1). He did not have a written contract with appellant, but his report is in the record (R4, tab 169). Mr. Manzi testified that he invoiced for his services on a monthly basis and that he has been paid in full (tr. 3/164).

328. Appellant also included $1,777 for the services of Friedman, Eisenstein, Raemer and Schwartz LLP, an accounting firm that assisted in preparing appellant's REA (R4, tab 169 at ex. 1).

329. Appellant's claim also includes $13,000 for consultants' fees for the services of Mr. Kadera, who prepared the NAVFAC 4330s claim forms in the claim packages appended to appellant's REA (R4, tab 169 at ex. 1; tr. 1/202). Appellant will pay Mr. Kadera only if it recovers on the subject appeals (tr. 1/202).

330. On 20 July 2000, appellant submitted an REA in the amount of $40,610 for professional and consultants' fees (R4, tab 169 at ex. 4).

PROFESSIONAL AND CONSULTANTS' FEES: DECISION

FAR 31.205-33(b) (1997) provides that the cost of professional and consultant services are allowable when reasonable in relation to the services rendered and when not contingent upon recovery from the government. Paragraph (f) further provides that fees for services rendered are allowable only if supported by evidence of the nature and scope of the service furnished, such as:

> (1) Details of all agreements (*e.g.*, work requirements, rate of compensation, and nature and amount of other expenses, if any) with the individuals or organizations providing the services and details of actual services performed;
> (2) Invoices or billings submitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided; and
> (3) Consultant's work products and related documents . . . .

We are satisfied that Mr. Manzi, assisted by the accounting firm of Friedman, Eisenstein, Raemer and Schwartz LLP, prepared appellant's REA and to the extent that the costs incurred for these services are reasonable, they are allowable. *See American Mechanical, Inc.*, ASBCA No. 52033, 03-1 BCA ¶ 32,134 at 158,894.

The costs incurred by appellant for Mr. Kadera's consulting services are not allowable. FAR 31.205-33(b) provides that fees contingent upon recovery from the government are unallowable.

Appellant's claim for professional fees is sustained in part and denied in part.

SUMMARY

The claims are sustained and denied as follows:

Claim 1: Denied. The government's request for a credit is denied. The government's "claim" is dismissed.

Claim 2: Sustained.

Claim 3: Sustained.

Claim 4: Denied. The government's request for a credit is denied. The government's "claim" is dismissed.

Claim 6: Denied.

Claim 7: Sustained.

Claim 8: Sustained.

Claim 10: Sustained.

Claim 11: Denied.

Claim 12: Sustained in part and denied in part.

Claim 13: Sustained in part and denied in part.

Claim 14: Sustained in part and denied in part.

Claim 15: Denied. The government's request for a credit is denied. The government's "claim" is dismissed.

Claim 16: Denied. The government's request for a credit is denied. The government's "claim" is dismissed.

Claim 17: Sustained.

Claim 19: Denied. The government's request for a credit is denied. The government's "claim is dismissed.

Claim 21: Denied.

Claim 24: Denied.

Claim 25: Denied.

Claim 26/32: Sustained.

Claim 29: Denied.

Claim 30: Denied.

Claim 31: Denied.

Claim 33: Sustained. The government's request for a credit is denied. The government's "claim" is dismissed.

Claim 34: Denied.

Claim 35: Denied.

Claim 36: Denied.

Claim 37: Sustained. The government's request for a credit is denied. The government's "claim" is dismissed.

Unabsorbed and Extended Site Overhead: Denied.

Professional and Consultants' Fees: Sustained in part and denied in part.

Dated: 17 August 2005

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge

I concur

EUNICE W. THOMAS
Administrative Judge

Acting Chairman
Armed Services Board
of Contract Appeals

Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53581, 54239, Appeals of CATH-dr/Balti Joint Venture, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals