ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Win Ballance, Inc.	)	ASBCA No. 53710
	)	
Under Contract No. DACA09-96-C-0028	)	

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OPINION BY ADMINISTRATIVE JUDGE HARTY
PURSUANT TO BOARD RULE 11

Win Ballance, Inc. (WBI) appealed from a U.S. Army Corps of Engineers (COE) contracting officer's decision denying WBI's claims in connection with the construction of Visiting Airmen Quarters (VAQ) at Nellis Air Force Base, Nevada. The project was the second phase of construction and was referred to as VAQ II.

During the appeal process, the parties reached an agreement to settle all outstanding claims,[1] with the exception of the two claims considered here. WBI's first

[1] The contracting officer's decision from which this appeal was taken denied all of WBI's claims. WBI did not appeal to the Board from the denial of what was styled the "Air Force 50th Anniversary delay" claim. On appeal WBI sought $503,029.80 and a 180-day time extension for alleged government-caused delay in the installation of the roof system and $273,871.78 and a 98-day extension for cumulative impact. As part of the settlement WBI has waived the roof installation delay claim and the cumulative impact delay claim. In exchange the COE has waived its liquidated damages claim. (Joint ltr. from counsel dtd. 27 July 2004, subject: Notice of Waiver of Certain Claims) Daniel J. Alexander II, Esq. represented the appellant during the submission and briefing of the appeal, but has since left Watt, Tieder, Hoffar & Fitzgerald, L.L.P.

claim seeks a 20-day compensable delay in connection with the installation of a fire line in the amount of $55,892.20. WBI's second claim alleges that the COE required it to install a more costly roof system than required by the contract and seeks an equitable adjustment of $54,022.38. The parties have agreed to submit the claims for decision on the record in accordance with Board Rule 11, Submission Without a Hearing.[2] Only entitlement is to be decided.

Based on our review of the record, we deny both claims because WBI has (1) failed to establish that installation of the fire line delayed overall completion of the project and (2) not persuaded us that the installation of the roof system was a compensable change.

FINDINGS OF FACT

Background

VAQ II was the second phase of a project to provide housing for visitors at Nellis Air Force Base. The VAQ II work involved the construction of two new dormitory-style buildings. The first phase of the project, or VAQ I, also involved the construction of similar dormitory-style housing. VAQ I and II were located on the same site and were intended to be part of the same complex with a physical connection between them. (R4, vol. I, tabs 1, 3; Joyner dep. at 20-21)

The COE issued Solicitation No. DACA05-96-B-0044 on 2 May 1996 (R4, vol. I, tab 3). A site visit was scheduled and the solicitation stated that the "offerors or quoters are urged and expected to inspect the site where the work will be performed." WBI knew of the site visit, but did not attend or visit the site prior to bidding on the project. (Christenson dep. at 45-46, and ex. 1 at 00100-2, ¶ 3)

Solicitation Amendment No. 2 included paragraph 16, entitled "SPECIAL CONSTRUCTION PROCEDURES." Subsection D, "Cooperation with Others," stated that there was "other work in progress" and a need for coordination "with other Contractors in order to minimize delays and interferences." It further provided that the "phase 1 contractor shall have priority in installing utilities and site features in the phase

[2] The record includes the communications between the parties and the Board, the pleadings, the briefs and the following items jointly designated by the parties: the Rule 4 file, consisting of volume I, tabs 1–44, and volume II, tabs 1-76; the deposition of Robert Joyner, including exhibits; the deposition of Tim Christenson, including exhibits; the declaration of Tim Christenson; and letter No. 96C0028-C-4897/11 August 1998, correspondence from Robert Joyner to Win Ballance, Inc., re: Request for Equitable Adjustment for Standing Seam Metal Roof.

2 contractor's area," and that one place where the successful VAQ II contractor would need access would "be available no earlier than 30 March 1997." WBI acknowledged this amendment in its bid. (Christenson dep., ex. 2 at 01500-8, ¶ 16.(D); R4, vol. I, tab 3)

A fixed price contract in the amount of $5,898,533.00 was awarded to WBI on 28 June 1996 (R4, vol. I, tab 3). The Notice to Proceed (NTP) was issued on 2 August 1996, and WBI began working on 6 August 1996 (R4, vol. II, tab 1). The term of the contract performance was originally 400 days from NTP, with performance scheduled to end on 6 September 1997. However, the completion date was extended three times. Contract Modification No. P00002 extended the performance period by 122 days and increased the contract price by $259,267.00. It was granted, in part, in response to WBI Request for Equitable Adjustment (REA) No. 01, dated 19 August 1997, as revised 17 October 1997, and the government obtained a release for the matters covered by the REA. (R4, vol. II, tab 2; gov't reply br. at 12, ¶ 4) Two other extensions, totaling an additional 70 days, extended contract completion to 16 March 1998. Beneficial occupancy occurred on 12 March 1999, almost one year later than the last scheduled completion date. (R4, vol. I, tab 1 at 5, ¶ 3)

Against this general background, our further findings of fact are confined to those necessary to a consideration and disposition of the two claims presented.

The Fire Line Installation Delay Claim

WBI's Schedule

The contract incorporated by reference the FAR 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984) clause. In addition, specification section 01311, entitled "Network Analysis System," required WBI to submit a schedule that included a network diagram describing the logical relationship of the construction activities to each other, the sequence of the work to be performed and the duration of each activity. WBI submitted a schedule using the critical path methodology (CPM) and had difficulty gaining COE approval. (App. br. at 9; gov't br. at 18) On 15 April 1997, almost 10 months after award, Mr. Robert A. Joyner, the contracting officer's representative or COR, noted that submission of a project schedule from WBI that could be approved was long overdue and that specified logic errors must be corrected (R4, vol. II, tab 13). This notice was followed up by another letter from the COR on 22 May 1997, noting that WBI's schedule contained unreasonably short durations and requesting that WBI "take action to establish a realistic schedule for the completion of the work" (R4, vol. II, tab 14). WBI acknowledges that the COE never approved or accepted its schedule (app. reply br. at 6).

However, in support of its claim and this appeal WBI had a revised baseline schedule prepared by Guardian Group, Inc., which was intended to correct the alleged

deficiencies noted by the COE (R4, vol. II, tabs 15-17). Based on its revised baseline schedule, as adjusted for the 122-day extension to contract completion granted by contract Modification No. P00002, WBI alleges that although the COE unreasonably delayed over 201 days—by its count—in providing a response to WBI's request for information, the installation of the fire line did not become "critical" until 11 July 1997. Since construction on the fire line resumed on 30 July 1997, WBI only claims a 20-day delay. (App. br. at 10)

During installation of the fire line, a WBI subcontractor encountered a pre-existing underground concrete electrical duct bank at the same elevation that the fire line was to be installed and advised that it could not proceed without guidance. The incident was recorded in the subcontractor's daily report to WBI dated 31 January 1996 (sic 1997). (R4, vol. II, tab 71) On 4 February 1997, WBI notified the COE of the problem with the fire line installation. As stated in its letter:

> A problem exists at the point of connection for the Building C 6" fire line. The Phase I contractor installed the 6" first [sic] line per plan. An electrical duct bank is installed at the same elevation between our water line and the existing water line. WBI cannot reach the P.O.C. Please notify the Phase I contractor to correct the situation. We will be unable to connect our fire system.
>
> The duct bank encasement is so close to the water line that it is touching the thrust block at the point of connection for Building C.
>
> If both the duct bank and the water line are installed per plan, please notify us in writing how you want us to proceed.

(R4, vol. I, tab 14)

The COR responded to WBI's 4 February letter with a suggested resolution of the problem. The letter, erroneously dated 7 February 1996 (sic 1997), stated that:

> [o]n 07 February 1997 the trench was not open to view the conditions described, but by your description it sounds as if the water line was extended several feet longer than required by the VAQ Phase I contractor. Being that the water line was extended longer than required by the VAQ Phase I contractor, it seems like a rather ordinary procedure to cut the water line at the point of connection, make the connection, and run the water line to the building.

The letter also requested that a designated point of contact in the Las Vegas resident office be contacted if there were any questions. (R4, vol. I, tab 18) WBI has not identified any further written inquiries on its part.

Fire line construction resumed on 30 July 1997, according to WBI's subcontractor (R4, vol. II, tabs 72, 73).

Discussion

"In order to establish entitlement to delay damages, the contractor bears the burden of demonstrating the extent of the delay, the causal link between the government's wrongful actions and the delay and harm to the contractor resulting from the delay." The contractor must also "account for any concurrent contractor-caused delay and it also bears the burden of proof in this regard." Moreover, "the focus is on an overall delay to the project—a delay on the 'critical path'—for which the government is responsible." It is not enough to show that the government delayed a particular work segment. The contractor must establish that the delay to the segment delayed overall completion. *Contel Advanced Systems, Inc.*, ASBCA No. 49075, 04-2 BCA ¶ 32,664, at 161,679-80, and cases cited therein.

The government argues that WBI has failed to carry any aspect of its burden of proof. We agree that WBI has not met its burden. However, we focus solely on the failure to establish a causal link between the government's alleged wrongful act and the delay.

WBI's position is predicated on the alleged failure of the COE to provide a timely and adequate solution to the problem created by the obstruction encountered by its subcontractor. The government argues that the matter was resolved by 7 April 1997. It has pointed to R4, vol. I, tab 15, which contains a duplicate of WBI's 4 February 1997 letter requesting guidance. It also includes a second page which contains the following hand printed entries:

> CQC Report 192 2-10-97 Delay Notification
> CANNOT FINISH CONNECTION OF FIRE MAIN IN C
>
> CQC Report 241 Verbal Instructions
> WE WERE ASKED TO GIVE THEM OUR
> RESOLUTION REGARDING THE FIRE RISER
> 3/31/97
>
> CQC Report 248 4/7/97

WBI IS PROCEEDING WITH THIS FIRE RISER
HOOKUP AND HAS DIRECTED ITS
SUBCONTRACTORS TO DO THAT

(R4, vol. I, tab 15). The second page is traced by the government to supporting documents contained in WBI's REA No. 01, specifically tab No. 112, sub tab b (R4, vol. I, Index).

WBI's counsel acknowledges the 7 February letter, but maintains that the actual procedure used to resolve the fire line issue was not the one suggested and, in fact, the COE later directed WBI and its subcontractor to reconfigure the fire line around the concrete duct bank. Support for this contention is traced to a similar, but unsupported, assertion in WBI's claim letter (R4, vol. II, Request for Contracting Officer's Decision at 48-49). (App. br. at 10; app. reply br. at 16-17) In addition, counsel has objected to reliance on R4, vol. I, tab 15 because the author of the notes has not been identified and the referenced CQCs have not been placed in the record.

The page with hand-printed entries is part of the record. Given the claimed origin of the notes, the government's position is not without merit. However, though admitted, we are reluctant to give any weight to the entries because the author is not identified and the referenced CQCs are not in the record. However, our putting to one side the 7 April entry does not advance appellant's position. The COR's 7 February letter suggests the solution to the problem. And, we are left with a record subsequent to the 7 February letter that sheds no credible light on why WBI was not able to proceed on the basis of the guidance in its possession. In the posture of the case it was WBI's responsibility to produce competent evidence to support its contention that it required further guidance and direction before it could proceed, particularly in light of the invitation to contact the Las Vegas resident office if there were any questions.

The claim is denied.

The Standing Seam Metal Roof System (SSMRS) Claim

The SSMRS Specification

The SSMRS specifications were the same for the VAQ I and the VAQ II contracts (R4, vol. I, tab 1 at 18, ¶ 46(a) (iv)). The SSMRS specifications did not mandate that the roof be the product of a particular manufacturer. Instead, the specifications required that the SSMRS be "the product of a recognized SSMRS manufacturer who has been in the practice of manufacturing SSMRS[s] for a period of not less than 3 years and has been involved in at least 5 projects similar in size and complexity to this project." (R4, vol. I, tab 7 at 07416-2) Regardless of the manufacturer selected, the SSMRS was required to meet certain design and performance requirements and the contractor was required to

make submittals. Two requirements are pertinent to our consideration here. The first deals with the configuration of the SSMRS. In describing the general configuration of the SSMRS, the specification states that, among other things, the "[h]eight of standing seams shall be not less than 2 inches" (R4, vol. I, tab 7 at 07416-8, ¶ 2.1). The second requirement deals with the color of the SSMRS. The specification states that the "[c]olor shall be the manufacturer's standard color most nearly matching the color indicated on the drawings." The color indicated on the drawings is "PUEBLO TAN." (R4, vol. I, tab 7 at 07416-8, ¶ 2.2, tab 9)

The Partnering Seminar

On 5-6 September 1996 the COE arranged a Partnering Seminar. In addition to WBI, other participants in the seminar included Skidmore Contracting Corporation (SCC), the VAQ I contractor, and representatives of Nellis Air Force Base, the end user of the VAQs. In general, the objectives of the seminar were to promote the construction of a quality project, without injury, through open communication, teamwork, informal conflict resolution, and financial accountability. (R4, vol. I, tab 12)

One of the topics discussed at the seminar was the SSMRS. The seminar was memorialized in a Partnering Seminar Report. With respect to the SSMRS, the report states:

> DIVISION 7 – THERMAL & MOISTURE PROTECTION
>
> ISSUE #1: SIMILAR COLOR AND SHAPES
>
> Recommendations:
> 1. Standing seam metal roof system.
> Color/configuration of Phase I must match.

(R4, vol. I, tab 12 at 10; vol. II, tab 3 at 10)

WBI's president, Mr. Timothy M. Christenson, was responsible for the management of its contracts. He reported to Mr. John Laing, who was one of the co-owners of WBI. (Christenson dep. at 19, 28) Mr. Christenson declares that at the seminar the COE informed WBI, for the first time, that the VAQ II SSMRS "must match" the color/configuration of the VAQ I SSMRS. WBI's president states that he placed the COE on notice that "its requirement for a matching SSMRS would likely result in a corresponding cost increase not accounted for in WBI's Contract price." He was assured, in reply, that the COE would work with WBI "to resolve this problem in good faith, including a necessary adjustment to WBI's Contract price." (Christenson decl., ¶ 11) The COR, Mr. Joyner, also attended the partnering seminar. He did not consider the requested match of configuration and color to be a change to the contract.

He emphasized that "we weren't changing the contract. We weren't trying to change the contract in the partner meeting." (Joyner dep. at 41-42) He did not recall WBI's president telling him that the recommendation that the configuration and color match the Phase I SSMRS amounted to a change. "Back at the beginning . . . that wasn't mentioned." "[T]he thought at the beginning[,] at this partnering session[,] was that: Well, it could well be that you go out and get a system that meets the specification and matches the existing. And that's where we were all headed at that time." (Joyner dep. at 44) He did recall a conversation with WBI's president at a "later stage of the job" where the issue did come up (*id.*). He also acknowledged that "at one point or other" he told WBI that "if it turned out that we had proprietarily spec'd the roof, we would end up paying. In other words, if all we would accept was exactly the same roof that the Phase I contractor[] provided . . . we would end up paying the change." In this context, he meant the "same make and model of roof." (Joyner dep. at 44-45)

As of the time of the partnering seminar, SCC had not selected a SSMRS manufacturer. WBI's president talked to SCC about who they had lined up and told them who WBI was planning to use. Mr. Christenson was not in a position to ask for a change order until he knew what roof system was going to be used by SCC. He expected to get a copy of SCC's SSMRS submittal from the COE as soon as it was approved. (Christenson dep. at 54-56)

We find that there was no direction given to WBI at the partnering seminar to depart from its SSMRS specifications. Moreover, there was neither a direction to use the same SSMRS as the Phase I contractor nor an agreement to compensate WBI for any additional costs over and above its bid price that might be incurred if it did furnish the same SSMRS as the Phase I contractor.

WBI's Bid and the SSMRS Submittal Process

SCC's SSMRS submittal was approved on 13 January 1997. SCC planned to use a Berridge Manufacturing Company, Inc., Zee Lock Panel system supplied and installed by its subcontractor, Noorda Sheet Metal Company. This Berridge system was certified by the COE for use on military construction projects, provided it met other project requirements. (R4, vol. II, tab 19) WBI did not automatically receive a copy of the approved submittal. WBI learned of the approval on 5 February 1997 and was told to submit a formal written request (R4, vol. II at 24-25). It did so on 6 February 1997, "formally request[ing] a copy of Skidmore Contracting's submittal on Section 07416 – standing seam metal roof system so that we can match existing work ongoing on Phase I." The next day, by letter erroneously dated 7 February 1996 (sic 1997), the Corps provided WBI with a copy of SCC's SSMRS approved submittal. (R4, vol. I, tabs 16, 17; vol. II, tabs 8, 9; Joyner dep., ex. 5)

WBI maintains that prior to award WBI secured a bid for the SSMRS from Creative Sheet Metal (Creative) (app. br. at 15). It later signed a subcontract, effective 28 January 1997, with Creative to furnish and install a SSMRS (R4, vol. II, tab 18). Creative's plan was to use a SSMRS from BHP Steel Building Products U.S.A., Inc. (BHP). The record contains a 23 November 1994 letter from the Chief of the COE's Engineering Division in Washington, D.C., approving BHP's Design Span Panel System for use on military construction projects, "provided that it also meets the project requirements." (R4, vol. II, tab 19)

WBI's president believed that the SSMRS WBI had based its bid on met the specifications and was a COE approved SSMRS. He believed that WBI had demonstrated its compliance. He admitted, however, that WBI had never made a full submittal to demonstrate compliance. He said this was a matter of contention between the parties. The COE "wanted information, a submittal on what we had bid, so we prepared not a complete submittal, but a submittal that we believed demonstrated that it met – fell within the guideline of the specification." We find that the COE's requirement for a submittal based on WBI's bid is consistent with the COE's view that it had not settled on a specific SSMRS supplier. (Christenson dep. at 61-62; Joyner dep. at 57-58)

WBI made its first SSMRS submittal on 13 May 1997. The submittal transmittal[3] sheet indicates that the submittal was rejected on 22 May 1997 by the COR because not all items that were stated as accompanying the submittal were submitted and certain tests and designs were not submitted. A sample was provided. The sample had a blue stripe down the middle and the height of the standing seam was less than 2 inches. A notation was included with the returned submittal that stated: "NOTE THAT THE PANELS DO NOT MATCH PANELS OF EXISTING BUILDINGS." (R4, vol. I, tab 7 at 07416-5 to -7, ¶ 1.5, tab 1 at 10, ¶ 24; vol. II, tab 20; Joyner dep. at 59, 61-62, and ex. 8)

On 30 August 1997, over three months later, WBI's project manager, Mr. Jim Wilson, responded by submitting Request for Information (RFI) No. 23. The form contains a block for a question. Inside the block, he typed:

> Need clarification on Standing Seam Metal Roof.
>
> 4025 Dated May 13, 1997.
>
> One of your comments was panels do not match existing building. Creative went to another supplier. He now had an

[3] The additional backup documents, which were part of the submission, are not part of the record.

> up-charge of $30,000.00. To me this is a directive. I am taking it as such.

(R4, vol. I, tab 26; vol. II, tab 31)

Mr. Joyner responded to the RFI in a letter dated 30 September 1997. The COR's letter stated:

> Your incomplete transmittal was received by the Corps of Engineers on 19 MAY 97. It was returned to you disapproved on 22 MAY 97, with the following comments:
>
> - Items 1 and 6 were not submitted.
> - Items 9, 10, and 13 will not be accepted until test and design are submitted. Note that the panels do not match panels of existing buildings.
>
> The submittal review comments are not a directive to provide and install standing seam metal roof materials from the same manufacturer that provided the standing metal roof materials as VAQ Phase I. [Emphasis added]

(R4, vol. I, tab 30; vol. II, tab 32)

However, on 3 September 1997, just four days after sending the RFI and before the Corps had an opportunity to respond to the RFI, WBI made a second SSMRS submittal. This submittal proposed the Berridge system in lieu of the BHP system. We note that Berridge by letter dated 13 June 1997 approved Creative to install the Berridge SSMRS for the project (R4, vol. II, tab 38). The face of the submittal noted that the samples were "Being Shipped @ a latter [sic] Date." The remarks section of the submittal says "SEE Review Comments." The review comments referenced were the comments made by the quality control contractor hired by WBI to review its submittals. This review noted seven deficiencies in the submittal that were not corrected before submission to the Corps. Those deficiencies included the lack of the following required items: design analysis, "Isometric View with related information" with the submitted drawings, certificates, samples, and test reports. This submittal was later disapproved by the COR. (R4, vol. I, tab 27; vol. II, tab 21; Joyner dep., ex. 9)

The third submittal was dated 29 September 1997. This submittal was disapproved on 30 September 1997, as incomplete. In addition, the remarks indicate that the sample needed to be "in color to be used" and there had been no independent review of the submittal as required. (R4, vol. I, tab 28; vol. II, tab 22; Joyner dep., ex. 10)

The fourth submittal, dated 5 November 1997, was for the roof purlins. This submittal was returned on 10 November 1997, with some questions in the remarks section along with the comment: "Submit Details of Bolted Connections." A resubmittal was required. (R4, vol. I, tab 35; Joyner dep. at 71-72, and ex. 11)

The fifth submittal was dated 21 November 1997 and was received on 24 November 1997. It was a resubmittal of WBI's second submittal of 3 September 1997. This submittal was also incomplete. No samples were provided. Additionally, a variation from the specifications was requested, but supporting data was not furnished and several items required by specification were noted as missing. Further, test data was submitted for purlin spacing different than the system detailed in the submittal. (R4, vol. I, tab 36; vol. II, tab 23; Joyner dep., ex. 12)

The sixth submittal was dated 24 November 1997 and was a resubmittal to address the concerns of the fourth submittal. It dealt with the purlins, not the entire SSMRS. This submittal was conditionally approved on 22 December 1997. (R4, vol. I, tab 37; Joyner dep. at 77, and ex. 13)

None of WBI's submittals was acceptable to the COE for the entire SSMRS (Joyner dep. at 75-76). However, on 10 February 1998, Mr. Joyner conditionally approved the 21 November 1997 submittal (Joyner dep., ex. 12) based on WBI's co-owner's offer to supply the same roof system as the Phase I contractor had. This approval was noted in a letter dated 31 March 1998 to WBI from Mr. Joyner responding to an allegation that WBI did not realize its estimated pay request because of the COE's failure to return a roof submittal. In response, Mr. Joyner stated that:

> [t]he roof submittal was not correct and never has been. Refer to our comments on the latest one. I conditionally approved the submittal based on Mr. Laing's personal assurances that the roof you proposed was exactly the same as the roof installed by the phase I contractor. The phase 1 contractor's submittal indicates that the roof meets the specifications; yours does not. You still must furnish a submittal showing that the roof meets the specifications.

(R4, vol. I, tab 42; Joyner dep., ex. 14) With respect to his approval, Mr. Joyner explained that in this time frame he learned that Mr. Laing was Mr. Christenson's superior. He recalled that Mr. Laing came to the site on one occasion, but believed that he dealt with him on the telephone with respect to the SSMRS. According to Mr. Joyner, Mr. Laing became involved when he realized the company was having difficulties with the COE. He recalled that at the time the roof was either holding the project up or about to and Mr. Laing wanted to get things going. He recalled Mr. Laing asking whether using exactly the same system that the Phase I contractor used would work. Mr. Joyner's

agreement was based on this understanding, although he still expected a submittal. He did not recall having a conversation with Mr. Laing about additional compensation if the cost of the roof offered exceeded the costs of the roof originally bid. However, if Mr. Laing did mention it to Mr. Joyner, he probably told him to submit a claim. (Joyner dep. at 78-80; R4, vol. I, tab 42)

On 2 March 1998, Creative advised WBI that it was unable to provide any further assistance, manpower or material on the project. Creative cited repeated delays and missed start dates, leading to the loss of trained personnel. Another factor was delay in payments for material delivered to the site on 27 August and 21 October 1997, for which it did not receive payment until 13 February 1998, and then only after filing claims with the bonding company. WBI contacted a number of other Berridge approved installation firms, received quotes from two firms, and ultimately entered into a contract with Noorda Sheet Metal Company on 23 March 1998, the subcontractor used by the Phase I VAQ contractor. (R4, vol. II, tabs 33-36)

WBI subsequently submitted an REA for the SSMRS, which was given priority review and found to have no merit in a letter dated 11 August 1998 from Mr. Joyner to WBI. The basis for the decision was explained in the following terms:

> First, the evidence does not indicate that the government required Win Ballance to provide a roof from a specific manufacturer or supplier. In fact there is evidence that Win Ballance was informed that the contract did not require any specific proprietary roofing system. Secondly the evidence shows that the various submittals for roofing systems, which were rejected, were rejected because they were not complete and did not demonstrate compliance with the requirements of the contract specifications. Some submittal items did not even pass Win Ballance's own quality control review.
>
> At this time there is still not a submittal which is complete and correct and has been accepted by the government. The government permitted the installation of the roof and made progress payments based on your promise that the roof was identical to the one used on the first phase o[f] the Visiting Airmen Quarters and therefore met the requirements of the contract specifications.

(R4, vol. I, tab 44)

Discussion

WBI alleges that the COE directed WBI to deviate from the design-build SSMRS specification called out in the contract when it directed WBI, in no uncertain terms, to "match" the VAQ I SSMRS. The COE's directive was first communicated to WBI at the partnering seminar, at which time the COE committed to increase WBI's contract if the VAQ I SSMRS proved more costly than the SSMRS that WBI contracted to procure. (App. br. at 14) Moreover, while the government contends that it was merely a recommendation to "match," the record is clear that the government accepted the VAQ II SSMRS only because it exactly matched the VAQ I SSMRS.

WBI's position depends on a premise that is not supported by the record. There was no direction given to WBI at the partnering seminar to depart from its SSMRS specifications. Similarly, there was neither a direction to provide the same SSMRS as the Phase I contractor nor a commitment to compensate WBI for any additional costs over and above its bid price if it did choose to furnish the same SSMRS as the Phase I contractor.

Moreover, WBI's apparent understanding of the requirement to "match" as meaning "identical to" is unreasonable in light of the SSMRS specifications. In the government's view, since the SSMRS specifications for both the VAQ I and VAQ II contracts were the same, if WBI had demonstrated compliance with the configuration and color specifications of its contract, it would have "matched" the VEQ I contractor's SSMRS. Both contractors would have produced SSMRSs with the same configuration, painted pueblo tan. "Match" in this context denotes one thing that "closely resembles" or "harmonizes"—as in appearance—with another, as opposed to "exactly like" another thing—a "counterpart." *E.g.*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 1391-92 (1986). We think this is the understanding of the requirement to "match" that reasonably flows from the specifications and the discussions at the partnering session, although we are not prepared to suggest that the user would not have preferred that both contractors use the same roof system.

WBI's conduct after the partnering meeting does not reflect an understanding that it was required to submit a roof from the same manufacturer being used by SCC. It submitted a roof proposed by another manufacturer and it continued to pursue this option after it knew the identity of SSC's SSMRS roof manufacturer.

In any event, as Mr. Joyner made clear, at the time of the partnering seminar, the government did not believe that it was requiring that both contractors use the same SMMRS system. The specifications in WBI's contract did not call for the product of one particular manufacturer. There is agreement in this regard that WBI was only required to obtain a SSMRS from a known manufacturer with at least three years of manufacturing experience and fabrication of similar roof systems on five similar sized projects.

The BHP SSMRS originally proposed by WBI was approved by the COE for use on its construction projects and WBI's president has maintained that it complied with the specifications. The sample submitted, however, was not in the manufacturer's version of pueblo tan and the standing seams were not a minimum of two inches. Ultimately, the truth of the president's assertion remains untested because after the rejection of the initial submittal, WBI did not follow up with a correction that demonstrated one way or another whether BHP's SSMRS could meet the configuration requirement and was available in pueblo tan. Instead, WBI took the disapproval as a direction to change to the Berridge system.

The project manager's decision to view the first submittal comment as an authorized directive to switch to another supplier was an unreasonable reading of the comment, although the phrasing of the comment could have warranted further inquiry before acting. Any thought that the submittal comment might have been a directive was dispelled by Mr. Joyner's 30 September 1997 response, clearly stating—what should have been reasonably apparent to WBI at the time—the "submittal review comments are not a directive to provide and install standing seam metal roof materials from the same manufacturer that provided the standing metal roof materials as VAQ Phase I."

We are left with a unilateral decision to change suppliers in an environment where the first submission was rejected, not because it was not the same system as the one offered by the VAQ I contractor, but because compliance with the minimum height requirement had not been demonstrated and there was no showing of the manufacturer's color matching pueblo tan.

Even after WBI's unilateral decision to switch suppliers and offer the same system as the Phase I contractor, WBI had substantial difficulty in submitting an acceptable submittal—something it was contractually required to do. Mr. Joyner's decision to allow WBI to proceed was indeed based on Mr. Laing's assurance that WBI would provide exactly the same roof as the VAQ I contractor. The agreement was made in the interests of moving the project forward by helping WBI overcome the problem of inadequate submittals. It was based on the knowledge that the Phase I contractor had an approved Berridge SSMRS system, so that the COE would have a reasonable assurance that WBI's SSMRS would comply with the specifications. There was no agreement to compensate WBI for any additional costs that it might incur incident to providing the Berridge SSMRS. In context, Mr. Joyner's agreement was a practical resolution of the problem created by WBI's inadequate submittals and not a validation of its unilateral decision to change SSMRS suppliers.

The claim is denied.

DECISION

The appeal is denied.

Dated: 28 September 2005

MARTIN J. HARTY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53710, Appeal of Win Ballance, Inc., rendered in conformance with the Board's Charter.

Dated:

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