ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Weststar Revivor, Inc.	)	ASBCA Nos. 52837, 53171
(formerly Weststar, Inc.)	)	
	)	
Under Contract No. N68711-96-C-5048	)	

APPEARANCE FOR THE APPELLANT:	Clinton D. Hubbard, Esq. San Diego, CA
APPEARANCES FOR THE GOVERNMENT:	Susan Raps, Esq. Navy Chief Trial Attorney John S. McMunn, Esq Senior Trial Attorney Naval Facilities Engineering Command West Coast Litigation Team Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Weststar Revivor, Inc. (appellant),[1] seeks an equitable adjustment in the amount of $612,518 to perform additional concrete work under its contract. The government has denied any recovery. The Board conducted a 3-day hearing on entitlement only. We have jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* (CDA). For reasons stated below, we deny the appeals.

[1] This contract was awarded to and performed by Weststar, Inc. Weststar, Inc. filed the subject claims and took these appeals. While the appeals were pending, the state of California suspended Weststar's corporate license for failure to file tax returns and to pay related taxes. As such, Weststar did not have the capacity to prosecute legal actions. The Board dismissed the appeals for lack of jurisdiction, but granted appellant's motion for reconsideration and reinstated the appeals when Weststar's representatives provided the Board with a certified certificate of revivor pursuant to California law, under the name "Weststar Revivor, Inc." *See Weststar, Inc.*, ASBCA Nos. 52837, 53171, 03-1 BCA ¶ 32,248, *recon. granted*, 04-1 BCA ¶ 32,501. Accordingly, Weststar Revivor, Inc. shall be deemed the "contractor" or "appellant" for purposes of this decision.

FINDINGS OF FACT

1. On or about 17 July 1996, the Department of the Navy, Marine Corps Air Station (MCAS) at Yuma, AZ (government) issued the subject solicitation, Standard Form (SF) 1442, for Joint and Spall Repair, Aircraft Parking and Taxiway C, MCAS, Yuma, AZ. SF 1442, Block 10 stated in part as follows:

> DESCRIPTION OF WORK:
>
> Replacement of jet-fuel resistant joint fill material, repair of portland cement concrete (P.C.C.) pavement cracks and spalls, replacement of P.C.C. slabs, where required, crushing and thermal treatment of the removed P.C.C. materials, removal of 64 airstart units and airstart unit P.C.C. slabs, and restriping of the aircraft parking area and taxiway "C", and all related work.

(R4, 53171, tab 1)

2. Appellant was awarded the contract on 27 September 1996, and work was to be completed by 20 April 1997 (R4, 53171, tab 1, SF Form 1442, Block 21). The commencement of work was delayed by protest proceedings at the GAO and in federal court. As a result of these delays, the government unilaterally extended the performance period to 27 September 1997 under Modification No. P00003. Through Modification No. P00019, performance was extended to 31 December 1999. (R4, 53171, tab 3)

Claim for Additional Work On Parking Apron ("Airstart Claim") — ASBCA No. 52837

3. The airstart console or unit (ASU) was a piece of equipment that provided compressed air and power to certain aircraft (*see* finding 8 below, General Notes No. 1). ASUs were located at various locations throughout the parking apron area at the air station. Each ASU sat on a thin concrete pad or slab, measuring roughly 4 inches high/thick depending on the slope of the location (tr. 1/106), and roughly 3.5 feet wide and 7 feet long (tr. 2/256).

4. The raised ASU pad/slab sat on the concrete parking apron surface, which was for the most part made up of large, rectangular concrete slabs, measuring roughly 15 feet by 12.5 feet in most cases ("parking apron slabs"). The ASU was also surrounded and protected by vertical pipe bollards, known as guard stops. (R4, 53171, tab 2, D-1 at General Notes, No. 7; app. supp. R4, tab 20, *see* photographs 2, 3; tr. 1/108-09).

5. Insofar as pertinent, the contract drawing package contained Drawing Nos. C-2 through C-15 that depicted various concrete repairs to be performed at various locations in and around the parking apron. The concrete repairs included full depth repair, slab removal and replacement, partial depth slab repair, the repair of random cracks in the concrete surface and drill or core hole repair. On each of these drawings there was a "Legend" that provided a pictorial identification of each of these work activities, as well as the ASU. Each drawing depicted a section of the apron and identified the type of work to be performed at each grid location. (R4, 53171, tab 2)

6. A number of these C drawings depicted various concrete repairs to be performed on the parking apron slabs at which ASUs and bollards were located, including at the following drawing and grid locations:

C-9, BB/CC, 231/232
C-10, QR, 258/259
C-11, QR, 286/287
C-12, QR, 316/317
C-13, QR 343/344
C-14, QR 361/362
C-15, QR 388/389

(R4, 53171, tab 2)

7. These C drawings did not provide for the removal of the ASUs or the pads upon which they sat, or for the removal of the larger, typically rectangular parking apron slabs around the ASUs.

8. However, Drawing No. D-1, "Air Start Demolition", contained the following pertinent GENERAL NOTES:

GENERAL NOTES start [sic] Unit Removal

1. **Contractor shall remove 64 existing air start units from the aircraft parking apron.** The air start units are a pre-fabricated metal housing containing a mechanical system to dispenses [sic] compressed air for aircraft engine starting systems. The air start unit also contains an electrical distribution system which supplies 400 volt and 120 volt electrical service to parked aircraft.

2. Air start units locate [sic] on aircraft parking console lines #11 (pavement grid Q-R/119, BB-CC/119 and MM-NN/119)

and #12 (pavement grid Q-R/129, BB-CC/129 and MM-NN/129) shall remain in service. . . .

. . . .

6. Disassemble and remove the air start unit, to include the air start metal cover, frame, mechanical hardware and fixtures, electrical hardware and fixtures and other associated items located within the air start unit. Removed air start units are the property of the contractor and shall be removed from Government property.

7. **Remove pipe bollards and concrete slab adjacent to and beneath the air start unit**. Dispose of portland concrete cement in accordance with the contract specifications. **Remove the concrete slab to extent of existing slab edges. Nominal slab size is 15 feet by 12.5 feet.**

8. Terminate the electrical and compressed air distribution lines a minimum of six inches (6") below the bottom of the adjacent concrete slab. . . .

9. Install and compact base course to grade. Compaction shall be in accordance with the contact specifications. **Install new portland cement concrete slab in accordance with the contract specifications. Match thickness of adjacent slabs**. Install joints and joint seal in accordance with contract specifications and per details shown on the contract drawings.

(R4, 53171, tab 2) (Emphasis added)

9. We find material discrepancies between the C-series of drawings – that provided only for concrete repair at certain parking apron slabs containing the ASUs -- and the General Notes on Drawing No. D-1 that provided for the removal of the concrete slabs beneath and adjacent to the ASUs, and the installation of new slab.

10. The C drawings and Drawing No. D-1 were not prepared at the same time and by the same organization. The C drawings were prepared by an architect/engineering firm, Gilbertson & Associates, and were issued by the government as part of an earlier solicitation upon which appellant did not bid, and which was cancelled by the government prior to award. Thereafter, the government determined to change the scope of the work under a new, reissued solicitation. It was determined that 64 ASUs were no

longer needed on the parking apron and should be removed. The government chose not to return the drawing package to Gilbertson & Associates for revision, but prepared Drawing No. D-1 through the engineering division of the public works department at MCAS, and included this drawing with the rest of the C drawings for the resolicitation. (Tr. 3/172-78) The government was aware that Gilbertson's C drawings identified repair work on certain parking apron slabs that were now to be removed and repoured pursuant to D-1, General Notes 7 and 9 (finding 8), but believed that the value of the work involved was not substantial enough to warrant the additional cost to revise and reproduce a new set of drawings through Gilbertson (tr. 3/259).

11. Insofar as pertinent, appellant was of the view that D-1 merely required appellant to remove the ASUs and the concrete pad immediately beneath the ASUs, and to merely patch the larger, parking apron slab surface after the pad's removal. By RFI No. 3 dated 28 February 1997, appellant solicited the government's position as to whether it desired the complete removal and replacement of the parking apron slabs at each of the 64 ASU locations, which appellant indicated it would be willing to perform at an additional cost. (Supp. R4, tab 1)

12. The government replied on 19 March 1997, stating as follows:

> Drawing D-1, Note 7 directs removal of 15' x 12.5'concrete slab adjacent to & beneath air start unit. Dimensions given indicate entire slab to be replaced rather than "house-keeping" pad.

(*Id.*)

13. By letter to the government dated 28 March 1997, appellant disagreed with the government's position. Appellant stated that Drawing No. D-1 General Note No. 7, conflicted with the other 35 drawings, and stated that the drawing "contradictions are both deceptive and misleading." (App. supp. R4, tab 25)

14. It is undisputed, and we find that appellant did not make any prebid or preaward inquiry of the contracting officer (CO) regarding any contradictions in the contract drawings.

15. In early 1998, appellant sought an equitable adjustment to remove the relevant parking apron slabs. By letter to appellant dated 7 April 1998, the CO denied any entitlement, contending that this work was a contract requirement. (R4, 52837, tab 3)

16. Appellant again disagreed, and by letter to the government dated 18 May 1998, restated its position regarding the conflicts and contradictions in the drawings, as set forth in its letter of 28 March 1997 (*id.*, tab 4).

17. The CO reaffirmed the government's position by letter dated 15 June 1998. Insofar as pertinent, the CO stated that there were in fact differences between the C drawings and D-1, but these differences were superseded by the contract award document, SF 1442, which provided for the "removal of 64 airstart units and airstart unit P.C.C. slabs". (*Id*., tab 5)

18. On 3 March 2000, appellant filed a certified claim seeking $214,581 for this additional work (*id*., tab 7). Having failed to receive a CO decision or any CO notification when a decision would issue, appellant appealed to this Board. The appeal was docketed as ASBCA No. 52837.

Claim for Replacement of Delaminated Slabs—ASBCA No. 53171

19. As part of the contract work, appellant was to make partial depth repairs of concrete at locations indicated on the contract drawings. After removal of the top concrete layer - roughly 3 inches -- and the preparation of the underlying substrate, the contract provided that appellant was to use a sand-cement grout bonding course that was to be placed on the substrate prior to the placement of new concrete material. Section 02564-6, ¶ 2.3.2 stated as follows:

> 2.3 Mixes
>
> . . . .
>
> 2.3.2 Sand-Cement Grout Bonding Course
>
> Shall consist of equal parts of Type I, II or III, all low alkali portland cement and sand by dry weight, thoroughly mixed with water to yield a thick, creamy mixture. The water-cement ratio shall not be greater than 0.62 by weight. The sand shall meet the requirements of the fine aggregate specified herein, except 100 percent shall pass a 2.36 mm (No. 8) sieve. **Add microsilica additive equal to 20% of the weight of the portland cement.**

(R4, 53171, tab 1 at Section 02564-6) (Emphasis added) Microsilica within the bonding course provided a strengthening property to the concrete, and the government desired to increase bonding on the partial depth repairs (tr. 3/170).

20. Insofar as pertinent, Section 3.1 Preparation, provided as follows:

> 3.1 Preparation
>
> . . . .
>
> 3.1.4 Bonding Course
>
> Immediately prior to placing concrete, clean the previously prepared surfaces with a high pressure air jet, brushing, or vacuum to remove all loose and foreign material. Coat the clean and dry surface including sawed faces with an approximate 1/16-inch thick coat of sand-cement grout. **Place the grout just prior to concrete placement** and scrub with stiff bristle brushes to fill all voids and crevices in the spall cavity surface. Apply additional brush coats as needed to obtain the required thickness. **The concrete patch material must be placed before the grout dries or sets**. Remove dried or hardened grout by sandblasting and re-coat the cavity with fresh grout before placing concrete patch material.

(R4, 53171, Section 02564-7) (Emphasis added) This bonding course was also known as cement slurry, bonding or cement paste or grout.

21. The record does not indicate that appellant raised any questions prior to bid or award with respect to the use of this bonding course.

22. After award, however, appellant sought to change the contract's bonding course. By RFI No. 05 dated 18 March 1997, to Mr. Doug Van Cleave, the assistant resident engineer in charge of construction, appellant sought to substitute a concrete adhesive as a bonding agent in lieu of the contractually-prescribed bonding course, contending that the adhesive would be best under the more extreme heat conditions that would be prevalent at the base. (R4, 53171 tab 7) It does not appear that appellant advised the CO of its request for contract modification, nor does it appear that Mr. Van Cleave made the CO aware of this request. Insofar as pertinent, Section 00721, ¶ 1.8 of the contract provided as follows:

> 1.8 FAC 5252.242.9300, GOVERNMENT REPRESENTATIVES (JUN 1994)
>
> (a) The contract will be administered by an authorized representative of the Contracting Officer. In no event however, will any understanding or agreement, modification, change order, or other matter deviating from the terms of the contract between the contractor and any person other than the Contracting Officer be effective or binding on the Government, unless formalized by proper contractual documents executed by the Contracting Officer prior to the completion of this contract.

(R4, 53171, tab 1 at Section 00721-8)

23. Mr. Van Cleave did not approve appellant's request for contract modification. On 7 May 1997, appellant questioned the government's refusal to accept its substitute, contending that "separation" of the concrete layers in a partial depth repair, that is, delamination or debonding, could occur with the contractually-prescribed bonding course (R4, 53171, tab 8).

24. Mr. Van Cleave notified appellant in writing of his decision to deny the substitution on 30 June 1997. In his reply he indicated that a modification would be forthcoming for a water cement grout. Mr. Van Cleave did not testify, and it is unknown whether he was speaking on behalf of the CO in this regard. Mr. Van Cleave did not have the authority to issue contract modifications (tr. 3/143). Appellant did not pursue this matter with the CO at this time.

25. The CO did not issue a contract modification changing the bonding course, and appellant proceeded to use the contractually prescribed bonding course for the partial depth repairs.

26. By RFI No. 06 to Mr. Van Cleave dated 25 March 1997, appellant sought, and Mr. Van Cleave approved a contract change in the prescribed concrete mix design for the concrete to be used in full depth repairs, reducing the microsilica content from 20% to 10% (app. supp. R4, tab 1). Presumably, the microsilica within the bonding course was also reduced in this amount. It does not appear that appellant made the CO aware of its request for this contract change, nor does it appear that Mr. Van Cleave made the CO aware of appellant's request and his action thereon.

27. Mr. Van Cleave did not have the authority to make this contract change. The microsilica was expensive, and appellant saved a considerable amount of money as a

result of this contract modification (tr. 2/95-97). Appellant did not offer, and Mr. Van Cleave did not seek a reduction in the contract price.

28. Appellant began concrete placement in early May, 1997 (tr. 1/214). As Arizona temperatures climbed in May and June, appellant began to place concrete in the early hours of the morning when it was dark and cooler (tr. 1/162). We find the following contract provisions pertinent regarding the placement of partial depth repairs:

> 3.2 APPLICATION
>
> . . . .
>
> 3.2.2 Placing, Consolidating, and Finishing
>
> **Place concrete** within 45 minutes after the introduction of the mixing water to the cement and aggregates or the introduction of the cement to the aggregates, and before the concrete has obtained its initial set, and **before the sand-cement grout bonding course has dried** or obtained its initial set. . . . **Workmen shall not walk on the bonding course surface or in the concrete during placing and finishing operations**. . . . **Start finishing operations immediately** after placement of the concrete.

(R4, 53171, tab 1 at Section 02564-8, 9) (Emphasis added)

29. Appellant acknowledged that its workers walked on the bonding course surface during partial depth repairs (tr. 2/77). Appellant's foreman, Mr. Scott Cuenca, testified and we find that at times appellant's bonding course dried around edges of the slabs prior to concrete placement on the partial depth repairs, particularly on certain high spots on the underlying strata (tr. 1/169-72, 183-85; *see also* finding 30 below). Appellant also did not begin its finish operations immediately after concrete placement (*see* finding 30 below). We find that these practices did not comply with the specifications.

30. On 16 May 1997, Mr. Ronald L. Kruse, P.E., the base station civil engineer, observed appellant's performance of partial depth slab repairs, and confirmed these observations in a memo for the record. Insofar as pertinent, Mr. Kruse's memo indicated as follows:

- Arrive job site approximately 0215 hrs.

- Approximately 12 laborers and 1 foreman on site. The superintendent (Ed) and the CQC (Jerry) are not on site.

. . . .

- Met the job site foreman, Scott Cuenca, Weststar, Inc.

- Reviewed empty partial depth repair areas located near slabs 362/363 and PP/OO. . . . **Approximately 1' x 2' area of the eastern most slab was beginning to show drying of the surface area.**

. . . .

0303 hrs: First concrete delivery truck arrives on site.

The CQC and the project superintendent are not on site.

. . . .

0340 hrs: West of the center of Hangar 201 at taxiway C is a triangular shaped cut out section of concrete. Concrete was placed in the hole using a wheel barrow. **At 0404 hrs the concrete has not been tamped or troweled into place or provided any type of finish.**

-0344-0355: There are 3 small spall repairs that have been filled with concrete from a wheel barrow **but have been left unfinished, uncovered and uncured.**

. . . .

- Approx. 0530 hrs superintendent arrives job site.

Issues and additional comments:

I noted several areas in the areas to be poured where the ktr had installed the paste too early and the material was beginning to dry out.

(R4, 53171, tab 9) (Emphasis added)

31. Mr. Ed Grant, appellant's superintendent confirmed, as per Mr. Kruse's memo, that he and the CQC did not arrive at the site on 16 May until around 5:00 to 5:30 a.m. (tr. 3/292-93). Mr. Cuenca also recalled that Mr. Kruse advised him on the site during this period to make sure that the slurry/bonding paste did not dry prior to concrete placement, although he could not identify the dates of these conversations (tr. 1/166-67, 183). [2]

32. The specifications cautioned against the drying of the bonding course grout (findings 20, 28). Drying could cause a gap between the newly placed material and the old concrete material, allowing a void which would raise the potential for delamination (tr. 1/184, 2/119, 3/191).

33. By letter to appellant dated 27 June 1997, the CO issued a notice to suspend new concrete placement, citing "numerous cracks in the concrete placed and [what] appears to be inadequate bonding at the partial depth repair (3" overlay)." (R4, 53171, tab 12) The government also appears to have issued a cure notice on this date, but it is not of record.

34. By letter dated 3 July 1997, the CO directed the repair or replacement of defective slabs identified in attached drawings at no additional cost, and directed appellant to advise if it disputed the government's assessment of the work (R4, 53171, tab 13). Appellant advised the government that it disputed all of the rework items. The

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[2] Appellant urges us to disregard Mr. Kruse's 16 May memo based upon, *inter alia*, certain discrepancies between his documentation of certain temperature and slump readings on 16 May and those contained in appellant's records, other inconsistencies in the testimony and his overall lack of credibility as a witness (app. br., 53171, at 9-11). Mr. Kruse adequately explained away some of the claimed discrepancies in the 16 May memo (tr. 3/246-51). Appellant's CQC report dated 16 May 1997 stated that concrete was poured at 05:30 am on that date (app. supp. R4, tab 33), suggesting that concrete deliveries to the site were made earlier than 05:30 am, consistent with Mr. Kruse's memo and testimony. We also note that a number of Mr. Kruse's observations of 16 May were generally confirmed by appellant's witnesses (finding 31). Contrary to appellant's arguments, we also find that Mr. Kruse's trial demeanor was forthright and not evasive, obfuscatory or self-incriminating. Based upon our review of all of the evidence, we find that Mr. Kruse's observations of contractor performance, as documented in his 16 May memo, were genuine and accurate, and our findings so reflect.

CO, however, reaffirmed her 3 July direction by letter dated 15 July 1997 (R4, 53171, tab 16).

35. The government did not order appellant to redo all of the partial depth repairs. Some of appellant's partial depth repairs in May and June 1997 were acceptable, albeit very few (tr. 2/241). The microsilica bonding course did work, and did not cause debonding in certain, limited applications (tr. 2/114).

36. Appellant was of the view that its work was not substandard, and that the use of the contract's microsilica bonding course was the cause of the delamination. It decided it would no longer use this bonding paste. In furtherance of this objective, appellant proposed a test of alternative procedures to Mr. Van Cleave, neither of which was prescribed by the contract. Appellant proposed to pour two partial depth repair slabs, one with a bonding course of neat cement without microsilica, and one without any bonding course at all, and proposed to modify curing procedures in accordance with its last pour. Appellant would then present test cores to Mr. Van Cleave for review and action. Mr. Van Cleave orally agreed to this plan. (R4, 53171, tab 15) There is nothing in the record to show that either appellant or Mr. Van Cleave vetted the plan to the CO at this time.

37. By letter dated 11 July 1997, appellant sought written concurrence and direction from Mr. Van Cleave related to appellant's test plan (*id.*). Mr. Van Cleave did not provide such a writing. Appellant nevertheless proceeded with the plan.

38. After reviewing the test cores, Mr. Van Cleave orally advised Mr. David Grant, appellant's president, that the bonding results were acceptable, and he agreed to allow appellant to delete the contractually-specified bonding course in future partial depth repairs. By letter to Mr. Van Cleave dated 23 July 1997, appellant sought a letter of direction confirming the above, or a contract modification. (R4, 53171, tab 19) As we stated earlier, Mr. Van Cleave did not have the authority to modify this contract (tr. 3/143).

39. Mr. Van Cleave did not provide appellant with any written direction deleting the bonding course, nor did appellant receive a contract modification from the CO.

40. Absent written direction or contract modification, appellant proceeded nevertheless to make its partial depth repairs without the contractually prescribed microsilica bonding course (R4, 53171, tab 32 at 2).

41. On 31 July 1997, Mr. Kruse again visited the site to observe appellant's partial depth repairs. He observed that appellant was not applying the microsilica bonding course, and learned that Mr. Van Cleave had allowed appellant to delete this

contract requirement. Mr. Kruse contacted Mr. David Gilbertson of Gilbertson and Associates, the designer of the project. Mr. Gilbertson apparently advised Kruse that he did not agree with the placement of partial depth repairs without the use of the microsilica cement paste as a bonding agent. (R4, 53171, tab 21)[3]

42. By letter to appellant dated 4 September 1997, the CO advised, *inter alia*, that only the CO had the authority to modify the contract, and that appellant must inquire of the CO, prior to acting, if it had any questions about the authority of government personnel (supp. R4, tab 5). By two letters dated 16 September 1997, the CO advised appellant that since the CO had not provided any written direction regarding the bonding course, any work performed by appellant that was not covered by the contract was at appellant's risk (*see* R4, 53171, tab 22, *see* gov't letters "0498" and "0500").

43. By letter to the CO dated 17 October 1997, appellant stated that it relied on the verbal direction and the representations of Mr. Van Cleave. Appellant sought an immediate contract modification from the CO deleting the microsilica bonding course from the contract (R4, 53171, tab 23).

44. The CO did not issue a contract modification. By letter to the government dated 4 December 1997, appellant reiterated its demand for a contract modification to eliminate the microsilica bonding course (R4, 53171, tab 30).

45. At a 15 December 1997 meeting between parties, the bonding course issue and other matters of concern were addressed. Insofar as pertinent, the government advised appellant in essence that it would not issue a contract modification to delete the bonding course because it believed that use of the bonding course was appropriate, and appellant's inability to get good bonding was due to allowing the bonding course to dry prior to placing the new concrete, which was an example of poor quality control (R4, 53171, tab 31).

46. Appellant took issue with the government's position. By letter to the government dated 7 January 1998, appellant contended that the contractually-specified bonding course with microsilica was a defective specification; that the bonding course was the cause of the delamination; and the government had unjustifiably ignored all of appellant's warnings about the use of the product. Appellant sought compensation for all slab replacement costs. (R4, 53171, tab 33)

[3] Mr. Gilbertson did not testify at trial, and to the extent the government proffers his views as expert opinion, we deem his assertions to be hearsay to which we give little weight.

47. Appellant reiterated its position by letter to the government dated 27 January 1998, supplying supporting opinions of representatives from the Tanner Companies that delivered the project concrete. One Tanner representative was quoted as saying that use of the microsilica paste "seemed very unusual." (R4, 53171, tab 34) The Tanner representatives did not testify at trial, and we give their opinions little weight.[4] Mr. Schlamann, appellant's concrete testing technician on the site, did testify and also wrote a letter (app. supp. R4, tab 7) indicating that he had not seen the use of microsilica bonding course to bond slab prior to this contract (tr. 2/165). He later acknowledged that he was typically involved with new construction and not with concrete overlay repairs (tr. 2/178).

48. By letter to appellant dated 7 April 1998, the CO denied appellant's request for equitable adjustment (R4, 53171, tab 38). Appellant filed a certified claim with the CO on 28 August 2000, in the amount of $397,937 (R4, 53171, tab 43). Having failed to obtain a CO decision or any notice from the CO as to when a decision would issue, appellant appealed to this Board. This appeal was docketed as ASBCA No. 53171.

49. The record shows that at times the government moved planes and vehicles through newly poured concrete areas (tr. 1/256), and planes would occasionally blow off curing blankets (tr. 1/251). However the record does not provide any persuasive evidence linking these actions to partial depth repair delamination (tr. 2/60). Appellant's president testified that once it eliminated the microsilica bonding course, appellant "didn't have any other debonding issues, no more cracking, no more problems" (tr. 2/24). While the record does not show any subsequent bonding problems on the site, the record does show evidence of other concrete workmanship problems (supp. R4, tabs 10, 11).

[4] Mr. David Grant, appellant's president, testified that he had received opinions of a number of experts in the field who advised that use of the microsilica bonding course was not recommended (tr. 1/208-09, 211, 246), but appellant failed to call any of these persons as witnesses at trial, and we view these assertions as hearsay to which we give little weight. At the trial, appellant sought to introduce evidence from a proposed expert who was not listed on appellant's witness list, as required by the Board's Pretrial Order dated 29 January 2004. The Board's Order expressly stated, "A witness shall not testify on the direct case if not identified on this list, unless otherwise ordered by the Board for good cause shown." (Corresp. file) At trial, the government objected to this expert witness, appellant failed to show good cause for its failure to include the expert on its pretrial witness list, and the Board excluded the evidence (tr. 1/63-67, 3/319).

It is well settled that where contract documents provide a patent ambiguity -- an ambiguity that is substantial, obvious or glaring -- a bidder is under a duty to seek clarification from the CO prior to submitting its bid, and assumes the risk of its failure to do so. *Comtrol, Inc. v. United States*, 294 F.3d 1357 (Fed. Cir. 2002); *Commercial Contractors Equipment, Inc.*, ASBCA Nos. 52930 *et al*., 03-2 BCA ¶ 32,381.

We believe there were substantial, obvious and glaring discrepancies on the face of this contract with respect to the concrete work. The "C" drawings provided for the repair -- not the removal -- of certain parking apron slabs; however Drawing No. D-1 provided for the removal of these concrete slabs and the installation of new slabs (findings 6, 8). Such discrepancies should have caused a reasonably diligent contractor to make a prebid inquiry to the CO. Appellant failed to do so, and must assume the risk of that failure.[5]

Alternatively, for appellant to prevail it must prove that its interpretation was reasonable and it relied on its interpretation in the submission of its bid. A reasonable interpretation should give reasonable meaning to all contract provisions rather than rendering certain portions inexplicable, meaningless or superfluous. *See Blake Construction Co. v. United States*, 987 F.2d 743, 746-47 (Fed. Cir. 1993); *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). Appellant's interpretation – that the contract merely required the removal of the ASUs and the concrete pads immediately beneath the ASUs – failed to accord any reasonable meaning to the contract requirements that the contractor remove slab adjacent to and beneath the units, to remove slab to the extent of existing slab edges and to install new concrete slab matching the thickness of the adjacent slab (finding 8). Moreover D-1, Note 7, reasonably construed, required replacement and installation of new slab in the nominal size of 12.5 feet by 15 feet (finding 8). Appellant's interpretation failed to provide reasonable meaning to this contract requirement, since according to appellant the scope of work was limited to the removal of the pad/slab on which the ASU sat, which was

[5] We do not condone the government's act of appending Drawing No. D-1 to the C series of drawings with the knowledge that it would create inconsistencies amongst the drawings and likely confusion. However, we conclude that this action did not constitute bad faith with an intent to injure appellant so as to provide appellant a cause of action on this basis, *Am-Pro Protective Agency v. United States*, 281 F.3d 1234 (Fed. Cir. 2002), nor did it excuse appellant from seeking clarification from the CO, prebid, of these patently discrepant contract drawings.

only roughly 3.5 feet by 7 feet (finding 3). Further, appellant's interpretation that the contract merely required incidental concrete repair to the parking apron after removing the ASU pad is unsupported by the terms of the contract, and is unreasonable.

In light of the forgoing, we conclude that appellant has failed to prove entitlement on its claim under ASBCA No. 52837.

ASBCA No. 53171

It is well settled that when government plans or specifications specify, in design detail, the precise manner or method of performance, the government impliedly warrants a satisfactory performance result if the plans and specifications are followed. *United States v. Spearin*, 248 U.S. 132 (1918). This implied warranty, however, only runs to contractors that comply with the plans and specifications. *Al Johnson Construction Co. v. United States*, 854 F.2d 467, 469 (Fed. Cir. 1988). As the moving party, the burden is on the contractor to prove that it complied with the plans and specifications. *Maecon, Inc.*, ASBCA No. 31081, 89-2 BCA ¶ 21,855 at 109,945.

Appellant failed to carry its burden here. The record contains evidence showing that appellant violated a number of material contract provisions in its concrete operations (finding 29). When the evidence shows nonconformance with the specifications, the burden is on the contractor to prove that the nonconformance had no logical relationship to the performance failures. *Al Johnson Construction*, 854 F.2d at 470. Appellant also failed to meet this burden. It provided no credible evidence showing that these violations had no effect on delamination.

Appellant contends that once it eliminated the bonding course, it no longer had any debonding problems, which proves that the bonding course was defective. Assuming that this factual assertion is true, we do not believe that the suggested conclusion follows. The record shows that appellant had quality control problems with the bonding course. Obviously, the deletion of the bonding course served to eliminate these quality control problems, and appellant seemed to be able to achieve good bond through the use of other techniques. However, this is not proof that the bonding course prescribed by the contract was defective *per se* and could not be satisfactorily used in accordance with proper procedures.

We do not minimize the difficulty of this concrete repair work, particularly during the warm Arizona weather. However, the record shows that not all of appellant's partial depth repairs in May and June 1997 were rejected (finding 35). This suggests that neither the bonding course nor the weather was the culprit, but that appellant's workmanship was a material variable, and it was possible for appellant to achieve good bond if the bonding course was used properly.

We have duly considered appellant's other contentions but we find them to lack merit. We conclude that appellant has failed to show the contract's specified bonding course was defective. In view of our disposition, we need not address the government's other contentions supporting the denial of this claim.

CONCLUSION

For reasons stated, ASBCA Nos. 52837 and 53171 are denied.

Dated: 10 May 2006

JACK DELMAN
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 Nos. 52837, 53171, Appeals of Weststar Revivor, Inc. (formerly Weststar, Inc.) rendered in conformance with the Board's Charter.

Dated:

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