ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Catel, Inc.	)	ASBCA Nos. 54632, 54633
	)	
Under Contract No. DAAB08-01-D-0012	)	

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LTC Thomas C. Modeszto, JA
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OPINION BY ADMINISTRATIVE JUDGE KETCHEN

The appeals involve the claims of Catel, Inc. (Catel or appellant) in the amount of $100,170.95 for additional work (ASBCA No. 54632) and unabsorbed home office overhead (ASBCA No. 54633) under the captioned contract to remove the windows in Building 1202 (Bldg. 1202) at Ft. Monmouth, NJ and replace them with blast resistant windows. The Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA) is applicable. Both parties waived a hearing and elected to proceed under Board Rule 11. We decide entitlement only.

FINDINGS OF FACT

GENERAL

1. On 29 September 2001, the Army (government or respondent) awarded Contract No. DAAB08-01-D-0012 to Catel for a twelve-month base-year period of performance extending from 27 August 2001 to 26 August 2002. The contract is a firm fixed-price task order (indefinite quantity, indefinite delivery (ID/IQ)) contract for various repairs, rehabilitation, modifications, alterations and additions to various real property facilities throughout Ft. Monmouth, NJ and elsewhere. The task order involved in the captioned appeals relates to work solely at Ft. Monmouth. The contract contained various standard FAR clauses. (R4, tab 1)

2. The contract provided in relevant part that the contracting officer (CO) could appoint a contracting officer's representative (COR) to act on the CO's behalf but the COR did not have authority to make any commitments or changes that would affect price, quality, quantity, delivery, or any other term or condition of the contract (R4, tab 1). Paragraph 10 of bilateral Modification No. P00005 (Mod 5) to the contract contains provisions to the same effect (R4, tab 2 at 7).

3. The contract required pricing and description of the various tasks under each task order issued to Catel to be based on use of the R. S. Means Facilities Construction Cost Book (RS Means) and the Supplemental Items List (SIL) Percentage locally for Ft. Monmouth (R4, tab 1 at 3-5). The contract also provided that the government and Catel would negotiate non-pre-priced work items that the RS Means and SIL costs did not include (R4, tab 1 at 9). The government exercised options extending the contract for two years. The second option year ended on 31 March 2004 pursuant to Mod 5 (R4, tab 2). The contract provided a maximum ceiling for expenditures under the contract of $10,500,000.00 (R4, tab 1 at 3).

4. The contract did not require the government to issue a notice to proceed with performance of a TO but provided the regular start date for a TO "shall be calculated as beginning five (5) working days after the award date of the task order. . ." and Catel had 30 days to provide the required submittals, *e.g.*, shop drawings, to the government for approval (R4, tab 1 at 10; Deposition of Terry L. Matthews (Matthews dep.) at 86). The contract required Catel to give written notice to the CO or COR with reasons in the event it could not perform within a TO schedule and to request a time extension. The contract also required Catel to notify the COR immediately of any problems in order to minimize them and allow for schedule adjustment, if necessary. (R4, tab 1 at 3, 7, 10, 16) The contract required the CO to acknowledge in writing all contract alterations or time extensions and for the CO or COR to notify the contractor in writing or electronically of a change in schedule (R4, tab 1 at 9-10).

5. Mr. Terry Matthews was the onsite government construction official and also served as one of the government inspectors for the Ft. Mammoth Department of Public Works (DPW). He advised Catel with respect to resolution of problems that arose and performed inspections of completed work. Mr. Matthews emphasized in his deposition testimony that he explained to Catel at the beginning of Catel's performance that neither he nor Mr. Pat Ward, a government inspector, had authority under the contract to direct a change to TO work. Mr. Telmo Pires, Catel's president, fully understood that only the CO could direct a change to the work or agree to use of equipment at a higher price than specified by a TO. (Matthews dep. at 14, 16-17, 35-36, 39-42, 54-56, 60-61) Mr. Pires acknowledged that he understood that Mr. Matthews lacked contracting officer authority (Deposition of Telmo Pires (Pires dep.) at 178-80, 232-33, 241-44).

6. Catel filed a claim on 24 March 2004 in the amount of $37,735.05 for additional work under TO 1 and an appeal on 27 May 2004 based on a "deemed denial" that was docketed as ASBCA No. 54632 (R4, tab 19, *see* tabs 14-17; Bd. corres. file). Catel's complaint of 15 July 2004 increased the claim amount to $50,231.35, including markups, for the alleged extra TO 1 work (Bd. corres. file).

7. On 29 September 2001, the government issued TO 1 in the lump sum amount of $428,968.67. The period of performance (POP) was from 4 October 2001 to 5 November 2001. TO 1 required Catel to remove the existing windows on Bldg. 1202 and to replace them with blast resistant, laminated glass windows. The order required Catel to perform all work in accordance with attached worksheets that listed the work items and unit costs priced according to the RS Means and SIL price lists. (R4, tabs 3, 22; ASBCA No. 54633, compl., ex. 5) The window specifications required that "[t]he completed installation shall be watertight" (R4, tab 3, drawing sheet 11 of 11, ¶ 3.1, Installation).

8. TO 1 provided $4,854.43 to caulk the windows and $14,742.24 to re-install the "Exterior Insulation & Finish System" (EIFS) after installation of the new blast windows. The EIFS is a thick Styrofoam layer of insulation material that covers the building's outer walls. (R4, tabs 3, 11 at 3, 13)

9. Catel generally performed TOs through subcontractors, although it employed several office personnel as well as administrative personnel to supervise its subcontractors (Deposition of Catherine Matthews at 4-5). During the initial POP in the fall of 2001, Catel was not prepared to begin the TO 1 work since it was negotiating with a subcontractor to install the windows (R4, tab 3; Matthews dep. at 76; Supplemental Rule 4 file (SR4), tab 164). Mr. Matthews believed that Catel's attempt to employ the subcontractor in the fall of 2001 to perform the work fell through (Matthews dep. at 79; SR4, tab 164). The record shows, however, that one of the subcontractor's employees removed part of a column in Bldg. 1202 on 20 November 2001 in order to investigate its interior construction. Catel also conducted negotiations with other subcontractors regarding installation of the windows (Matthews dep. at 77-81; R4, tab 23). The record does not reflect that either Catel or a Catel subcontractor performed work under TO 1 again at the site of Bldg. 1202 until 4 April 2002, when Catel installed a pilot or test window (test window) prior to ordering windows for production from the manufacturer.

10. Catel did not provide to the government in the fall and early winter of 2001-2002 the submissions the contract required before Catel could begin work. In particular, Catel did not provide the required shop drawing submittal for the blast windows for approval. (Matthews dep. at 79-80, 83-85; R4, tab 25) On 13 December 2001, Catel notified Thomas Manufacturing, Inc. (Thomas), the manufacturer of the windows, to proceed with preparation of the shop drawings, although Catel delayed

Thomas' preparation. It did not provide Thomas with necessary information such as the window measurements or the deposit Thomas required. Catel did not have a properly trained window installer who could perform the appropriate measurements of the building and furnish window sizes and related information to Thomas. (Deposition of Thomas Lukowiak (Lukowiak dep.) at 12-14; SR4, tab 164) According to Mr. Lukowiak, the president of Thomas, Paphian Enterprises, Inc., a potential subcontractor to a possible Catel subcontractor for the window installation work, spent months negotiating with Thomas regarding the manufacture of the windows as well as with various window installers who were not qualified to install the Thomas windows on Bldg. 1202 (SR4, tab 164). We find Catel did not establish by credible evidence that any government action prevented Catel from submitting shop drawings and other required submittals for approval, or from beginning and continuing with performance of TO 1 during the initially prescribed POP of 4 October 2001 to 5 November 2001. The evidence does not establish that Catel had labor forces, subcontractors or equipment standing by during this period in the fall of 2001 ready to begin performance of TO 1 work.

11. Mr. Pires maintained that Catel could have worked during the good weather that occurred from October 2001 into December 2001, but for Mr. Matthews' directive to shutdown the TO 1 work (Pires dep. at 199-200). However, we find Mr. Pires did not provide any credible proof that Mr. Matthews directed Catel not to perform TO 1. We also find Catel did not provide plausible reasons explaining why Mr. Matthews allegedly did not want the TO 1 work performed during the initial TO 1 period of performance or during the winter months or how Mr. Matthews otherwise prevented Catel from performing TO 1. As explained by Mr. Matthews, during the fall 2001 period, Catel had not provided the required contract submissions – for example, the shop drawings – and had not obtained the required government approvals. According to Mr. Matthews, Catel requested a deferral of TO 1 work during the winter beginning in 2001 because Mr. Pires informed Mr. Matthews that Catel did not want to incur the added cost of working during adverse winter weather and a deferral of the work during the winter period would give Catel more time to find and employ a subcontractor. (Matthews dep. at 79-81, 83, 85) We find based on Mr. Matthews' testimony, which we find credible, delay of TO 1 work during the fall and winter of 2001 was due to Catel's failure to provide shop drawings and other required approvals for the government's review and approval. Furthermore, Catel elected to seek government approval to defer performance during this period in order to avoid the added cost of working in adverse weather and to search for a subcontractor to install the windows.

12. The government did not object to Catel's request for a deferral of performance for its benefit for the October-December 2001 period or to the deferral of performance during the winter months until February 2002 (Matthews dep. at 79-81). We find that based on Catel's request in early December of 2001 the parties mutually agreed to a

no-cost deferral of TO 1 performance during the 2001-2002 winter season so that Catel could find and employ a subcontractor to perform and, at the same time, avoid the added expense of working during adverse winter weather (Matthews dep. at 79-81, 83, 85). This hiatus also gave Catel time to obtain the required shop drawings from Thomas to submit to the government for approval. The record does not indicate that the parties agreed to a specific date for the deferral of TO 1 work to end.

13. Catel finally submitted shop drawings for the window installation for government approval on 8 February 2002. The government approved the shop drawing submittal on 25 February 2002 and scheduled installation of a test window by Catel for 1 April 2002. (R4, tabs 24, 26) Catel does not establish by any credible evidence that the government's schedule for installing the test window was unreasonable. Nor did Catel present any credible evidence establishing that the delay between 25 February 2002 and 4 April 2002, the latter being the date when Catel installed the test window, was unreasonable, that the government was the sole cause of this delay or that Catel's forces or those of a subcontractor were standing by waiting to perform TO 1. In addition, Catel did not present any credible evidence proving that the period of delay from the date of the test window installation on 4 April 2002 to 12 April 2002, when the government furnished Catel with detailed installation instructions for the production windows, was unreasonable. (*See* finding 18, *infra*)

14. In sum, we find that the government did not unilaterally defer TO 1 work from 4 October 2001 to 25 February 2002 and was not the cause of the delay to Catel's performance of TO 1 through 25 February 2002, when the government scheduled installation of the test window for 1 April 2002. The delay was caused by Catel's failure to employ a subcontractor, by its failure to provide and receive approval of the required contract submittals and by its agreement to a mutual no-cost deferral of TO 1 performance based on its request made to the government so it could obtain a subcontractor and avoid working in adverse winter weather.

15. By letter dated 26 March 2004, Catel submitted a claim to the CO in the amount of $42,313.84 for unabsorbed home office overhead based on the Eichleay formula for 195 days of alleged government-caused delay to the work. The period of Catel's Eichleay claim runs from the date of issuance of TO 1 on 29 September 2001 to 12 April 2002, the date the government issued the installation instructions based on the test window and authorized Catel to order the windows for production. (R4, tab 37) Catel filed a notice of appeal on 20 July 2004 based on a "deemed denial" of its claim in the amount of $51,253.43 for government-caused delay. The Board docketed Catel's appeal of its Eichleay claim as ASBCA No. 54633. Catel revised the amount of its Eichleay claim to $49,939.60 by an amended complaint filed on 26 July 2004. (Bd. corres. file)

DECISION ON UNABSORBED OVERHEAD
CLAIM – ASBCA NO. 54633

Catel contends it is entitled to unabsorbed overhead damages calculated under the Eichleay formula for the period of alleged government-caused delay from the date of issuance of TO 1 on 29 September 2001 to 12 April 2002, the latter the date when the government issued the installation instructions for the production windows approving their production by the manufacturer (app. br. at 27). The government maintains Catel is not entitled to Eichleay damages because the government did not cause any delay and Catel was not required to remain ready to perform TO 1 during the alleged delay period (gov't br. at 71).

A contractor may recover damages under the Eichleay formula for unabsorbed home office overhead if it proves the government was the sole cause of the delay and establishes two, strictly applied prerequisites: (1) it was on standby during the delay or suspension of work period of uncertain duration and remained ready to perform and (2) it was unable to take on other work during the delay or suspension period. *Charles G. Williams Construction, Inc. v. White*, 271 F.3d 1055, 1058 (Fed. Cir. 2001). *See Nicon, Inc. v. United States*, 331 F.3d 878, 889 (Fed. Cir. 2003); *B.V. Construction, Inc.*, ASBCA Nos. 47766 *et al.*, 04-1 BCA ¶ 32,604 at 161,359. The contractor initially has the burden of proving the government was the sole cause of the delay, that is, the government delay was non-concurrent, substantial, unreasonable and of indefinite duration. *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1370-71 (Fed. Cir 2003). *See Nicon, Inc. v. United States*, 331 F.3d at 887; *Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000).

We deny Catel's Eichleay claim to entitlement for unabsorbed home office overhead damages. Catel failed to prove that from 29 September 2001 to 12 April 2002 the government was the sole cause of the delay for an unreasonable period of time of indefinite duration or that labor and equipment were on standby waiting to perform. The delay here occurred because Catel failed timely to employ subcontractors to perform TO 1, and Thomas' preparation of the shop drawings was delayed due to Catel's delay in furnishing needed information to Thomas, which in turn caused Catel's failure to submit shop drawings timely to the government for approval. Catel requested and for its benefit also agreed to a mutual deferral of work during the fall and winter of 2001 so that it could find a subcontractor to perform the work and, at the same time, avoid the added cost of working in adverse winter weather. Catel otherwise did not prove by a preponderance of the evidence that the government was solely responsible for the delay or suspension from 25 February 2002, when the government issued the test window installation schedule, to 12 April 2002, when the government issued detailed installation instructions for the production windows, or that the suspension during this period was for an unreasonable period of time. In addition, there is no credible proof that Catel had labor or equipment

standing by ready to perform during the delay period. In sum, Catel has failed to prove the government was the sole cause of delay for the period alleged or that Catel had a labor force and equipment on standby ready to resume work immediately. Based on our decision, we determine it unnecessary to address the second perquisite necessary to find Eichleay damages allowable.

ADDITIONAL FINDINGS OF FACT
TEST WINDOW – ASBCA NO. 59632

16. Catel claims additional costs of $2,840.46 to install the test window. TO 1 did not include an express requirement for Catel to install a test window. Mr. Pires stated that the parties did not discuss installation of a test window prior to issuance of TO 1 but did so afterwards (Pires dep. at 156-58). Mr. Matthews stated that prior to the parties' bilateral agreement to TO 1 the parties discussed and agreed that Catel would install a test window under TO 1. While Mr. Matthews did not have contracting authority, he conducted negotiations of TO 1 with Catel and presented the proposed bilateral agreement to the CO for acceptance. The parties negotiated TO 1 prior to issuance on a bilateral basis and agreed that Catel would install a test window. The purpose of the test window was to assure accurate measurements for manufacture of the production windows and their proper installation on Bldg. 1202. We realize that TO 1 did not expressly call out installation of a test window and that the CO did not weigh in on this point. However, we find Mr. Matthews' testimony credible that TO 1 provided expressly for payment for all windows on a total square foot basis. Installation of a test window was incorporated into the total square footage allowed and Catel billed accordingly when it installed the test window. (Matthew dep. at 70-73)

17. Catel's daily job report for 4 April 2002 records that the government directed Catel to reverse the receptors when installing the windows and that the approved shop drawings did not provide a drawing note directing reversal of the receptors, as Mr. Matthews had stated (R4, tab 18; ASBCA No. 54633, compl., ex. 8). Mr. Lukowiak explained that reversing the receptors and the windows would not affect their performance from a technical standpoint. Reversing the receptors and windows improves their strength with respect to a bomb blast and provides additional protection from heavy winds. He also explained that the large blast windows could not have been moved easily through the building elevators and the existing cubicles without considerable disturbance. In order to avoid this circumstance in buildings with internal configurations similar to those in Bldg. 1202, Thomas reverses the receptors and installs the windows from the exterior of a building and then applies the required caulking. (Lukowiak dep. at 10, 22) Thus, the government's directive to reverse the windows was not inconsistent with the manufacturer's instructions for window installation, since Thomas did not have a typical method for installing the receptors and windows, and it was easier to install clips holding the windows and receptors together from the outside (SR4, tab 163; Lukowiak dep. at 5).

According to Mr. Lukowiak, the window system installed in Bldg. 1202 did not have weep holes, and water could not get into the windows themselves if they were installed properly (Lukowiak dep. at 4, 6, 9-11, 14-15, 22; SR4, tab 163). We found Mr. Lukowiak's testimony persuasive.

18. Following the test window installation on 4 April 2004, Alternate Contracting Officer's Representative (ACOR) Kevin Dooney, Chief, Engineering & Construction, DPW, in a letter to Catel dated 12 April 2002, provided Catel with detailed installation instructions that permitted Catel to order the windows for production. This letter also requested Catel to submit a proposed schedule for window installation to DPW for review and comment. (R4, tab 27) The record does not indicate Catel ever provided, or the government approved, a schedule as ACOR Dooney had requested. Catel did not provide any credible evidence that Catel's forces or equipment, subcontractor labor forces or equipment were on standby on site between 4 and 12 April 2002 waiting to perform TO 1 during the time the government prepared the installation instructions for the windows for production; that the government was solely responsible for the delay during this time period; or that the delay for this period was unreasonable.

19. When installing the production windows, Catel removed the test window and replaced it with a production window (Pires dep. at 155-61). According to Mr. Matthews, Catel received payment under TO 1 for installing the test window through its billing under TO 1 for installing all the windows (Matthews dep. at 71-73). Although Mr. Pires explained that Catel had personnel and equipment on site for one full day installing the test window, we find Catel did not provide credible evidence showing that this work was not included within the payment it received for installation of all the windows under TO 1 (Pires dep. at 148-49; 157-59; Matthews dep. at 70-73).

DECISION ON TEST WINDOW – ASBCA NO. 54632

Catel contends it is entitled to an equitable adjustment in the amount of $2,840.46 for the time and materials it expended to install the test window that TO 1 did not require (ASBCA No. 54632, compl. at 4; app. br. at 25). The government argues that the RS Means price measured on a square foot basis for installing the windows under TO 1 covered the cost to install the test window (gov't br. at 69).

Catel has failed to meet its burden of proving the government changed the work when it required Catel to install the test window. While TO 1 was not specific with respect to the requirement or specifications for installation of the test window, the parties mutually agreed prior to issuance of TO 1 that TO 1 included installation of the test window and, as we have found, TO 1 included the RS Means price for installing all windows under TO 1 (finding 16). Catel otherwise has not proved that installation of the test window caused an increase in its costs above the TO 1 RS Means price provided for

installing the windows in Bldg. 1202. Thus, Catel is not entitled to an equitable adjustment for a change to the work. *Wilner Construction Co. v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994); *Cosmo Construction Co. v. United States*, 451 F.2d 602, 606 (Ct. Cl. 1971).

ADDITIONAL FINDINGS OF FACT REMOVAL AND DISPOSAL OF BLINDS IN BLDG. 1202 – ASBCA NO. 54632

20. TO 1 provided for installation of new blinds in Bldg. 1202 based on RS Means prices for the amount of $6,025.16. TO 1 did not provide for removal and disposal of the existing blinds for which Catel seeks reimbursement in the amount of $557.75. (Pires dep. at 176) The government agrees that TO 1 did not include this work and that Catel incurred the additional cost for the extra work to remove and dispose of the existing blinds (govt. br. at 70).

DECISION ON REMOVAL AND DISPOSAL OF BLINDS IN BLDG. 1202 – ASBCA NO. 54632

Catel contends the government is liable for the cost of $557.75 it incurred when it removed and disposed of the existing blinds on the windows of Bldg. 1202. The government concedes that TO 1 did not include a line item price based on RS Means to remove and dispose of the existing blinds. The record reflects that Catel removed the existing blinds and disposed of them. We determine that Catel is entitled to an equitable adjustment for the change to remove and dispose of the existing blinds.

ADDITIONAL FINDINGS OF FACT CAULKING – ASBCA No. 54632

21. TO 1 provided a Means price of $4,854.43 for "caulking and sealants, backer rod, polyethylene, ½" diameter" (R4, tab 3). During Catel's window installation Thomas' president, Mr. Lukowiak, visited the site in June 2002, after Catel's subcontractor had installed from one half to three quarters of the windows. He observed that Catel's subcontractor had installed the required gasket material and caulk on the windows improperly at the point where the glass meets the glazing stop. Catel's subcontractor employees had some, limited experience installing windows on residential housing but, for the most part, only had experience installing aluminum siding. They were not familiar with and had never installed the Thomas-type blast window system that required mounting the window frame into the receptor followed by installation of the glass into the frame and securing this configuration with a clip. Mr. Lukowiak testified that the subcontractor's employees were not qualified to install this type of window. (Lukowiak dep. at 9-10, 16-19, 22)

22. Mr. Lukowiak had Thomas factory technicians come to the site at Thomas' expense and seal the glass to the window frame properly by caulking the windows where the glass meets the metal glazing stop. Thomas factory technicians only caulked this specific part of the window with black caulk. According to Mr. Lukowiak, Catel's forces caulked other parts of the windows and along the tops of the windows with clear or bronze caulk. (Lukowiak dep. at 16-21; SR4, tab 163) Mr. Pires insisted, however, that due to the reversal of the windows it had to perform additional caulking using black caulk (Pires dep. at 155). However, Mr. Pires in a letter dated 30 December 2002 to the government stated that due to the window reversal, Thomas had installed the additional caulk at Thomas' cost (R4, tab 11 at 3). In light of Mr. Lukowiak's testimony, we find Mr. Pires' testimony unpersuasive. In addition, we find that Catel's subcontractor improperly installed and caulked the windows elsewhere. (R4, tabs 9-10) In sum, Catel has not presented credible evidence showing how the government's directive to reverse the receptors and windows required it to perform additional caulking, for which it seeks an equitable adjustment in the amount of $5,345.00. In addition, we find that Catel's documents do not establish that Catel incurred additional costs for caulking the windows above the amounts it was paid under TO 1. (ASBCA No. 54632, compl. at unnumbered pp. 3, 7, 13, 27, 35).

DECISION ON CAULKING – ASBCA NO. 54632

Catel contends it is entitled to the additional amount of $5,345.00 plus overhead and profit for additional caulking required by the government's directive to install the receptors and windows in reverse. Catel also maintains additional caulking was required to plug the weep holes that faced inward due to the reversed receptors and windows that would have allowed water to come into the building through this path. (App. br. at 25-26; ASBCA No. 54632, compl., attach. 1 at unnumbered p. 3) Catel argues for the first time in its brief that additional caulking also was required to address concerns about water leaking into the building as a result of Thomas' defective manufacture of the windows (app. br. at 25-26). The government contends that Thomas, not Catel, performed extra caulking of the windows as a volunteer and at no additional cost to the government to cure deficiencies in Catel's installation and caulking of the windows. It maintains also that there was no agreement with Catel to install extra caulking. (Gov't br. at 67)

Thomas voluntarily and at its cost provided the additional black caulking that Catel contends its forces installed for which Catel seeks additional costs (finding 22). Furthermore, the window system installed in Bldg 1202 did not have weep holes which Catel maintains it caulked (finding 17). Catel otherwise has not proved that it provided additional caulking that entitles it to an equitable adjustment.

Catel's argument that the Thomas' defective windows required it to use additional caulk is not supported by any credible evidence. Catel's argument thus does not rise above the level of a mere, unpersuasive allegation without plausible support that we have long held does not constitute proof or evidence of government liability for a change. *Maggie's Landscaping, Inc.*, ASBCA No. 52462, 52463, 04-2 BCA ¶ 32,647 at 161,569; *M.A. Mortenson Co.*, ASBCA Nos. 53105 *et al.*, 04-2 BCA ¶ 32,713 at 161, 845. Catel also did not prove by any credible evidence that its subcontractor's costs for caulking were increased above the TO 1 RS Means price due to the reversal of the windows. Catel thus has failed to establish government liability that caused it damage. *Wilner Construction Co. v. United States*, 24 F.3d at 1401.

ADDITIONAL FINDINGS OF FACT
USE OF A 60-FOOT LIFT INSTEAD OF A 40-FOOT LIFT – ASBCA No. 54632

23. TO 1 authorized use of a 40-foot lift ("Rental, aerial lift, telescoping boom to 40' high, 750 lb cap") at $267/day for 20 days for a total price based on RS Means of $5,309.30. When the government and Catel conducted negotiations of both the price and equipment prior to the time the government issued TO 1, Mr. Matthews closely questioned Mr. Pires as to whether the 40-foot lift would meet Catel's requirements. The government issued TO 1 based on the parties' bilateral agreement only after Mr. Pires agreed to the price and that the equipment, including the 40-foot lift, would adequately support performance. (Matthews dep. at 35-36, 48-62)

24. Mr. Matthews or Mr. Ward, as alleged by Catel, mentioned to Catel that it had a choice of locating the lift on the grass adjacent to Bldg. 1202 or the nearby sidewalk, located 12-15 feet from the building. However, if Catel elected to use the lift on the grass, it would be responsible for repairing any damage to the grass or grounds. (Matthews dep. at 49, 54-57) Mr. Matthews did not direct Catel to obtain other than a 40-foot lift with the attached eight-foot boom that in Mr. Matthews' view was sufficient to reach the height necessary to install the windows from the sidewalk. He pointed out that the lift with its angled boom had to be some distance from the building to operate. (Matthews dep. at 49, 74-75) Mr. Matthews also stated, and we find, that Mr. Ward, as a government inspector, was not authorized to make contract changes, if he had done so as Mr. Pires alleged. Mr. Ward would have come to Mr. Matthews to process a modification if Catel had indicated to Mr. Ward that there was a problem with the size of the specified lift. Mr. Matthews would have agreed to negotiate a price and process a modification through the CO for use of a larger lift if Catel had made such a request, but Catel never did. (Matthews dep. at 54-62; *see* finding 5) We found Mr. Matthews' testimony persuasive.

25. Catel used a lift placed on the sidewalk adjacent to Bldg. 1202 to install the windows, although Mr. Matthews did not know the size of the lift that Catel used. He pointed out that Catel had the discretion to use any size lift it chose, but the government would only pay for use of a 40-foot lift that Catel had agreed to use under TO 1. (Matthews dep. at 57, 61-62) We find that Catel did not request a change to TO 1 for use of a larger lift or notify the CO that these government employees, who did not have contracting authority, had allegedly indicated to Catel it would have to repair any damage from use of the lift on the grounds. We also find that Catel, during the time of performance, otherwise did not advise the government that it considered the alleged government directive that required it to use a larger lift located on the sidewalk a change, or that Catel intended to file a claim as a matter of right. (Matthews dep. at 58-62)

26. After completion of the window installation and roof repairs on Bldg. 1202 under a bilateral contract modification, the lift remained idle on site at Bldg. 1202 during part of October and November 2002. The lift rental company retrieved the lift in December 2002.[1] (Matthews dep. at 89-91; R4, tab 79 at 3; SR4, tab 165)

27. Catel claims reimbursement for use of a 60-foot lift during performance of TO 1 in the total amount of $41,249.25 ($392.85 per day (calculated based on an extrapolation from the TO 1 price using RS Means for a 40-foot lift) x 105 days) less $14,049.00 it received as payment by the government for use of a 40-foot lift for 54 days to perform TO 1 Bldg. 1202 window installation and roof repairs. Catel thus claims the net amount of $27,200.25 for use of a 60-foot lift for the initial 54 days of performance and for an additional 51 days the lift remained idle at the site. Catel maintains it kept the lift idle at the site because the government would not close out TO 1 and make final payment due to deficiencies the government alleged remained in Catel's work. (R4, tab 11; *see* tabs 9-10) We find Catel has not established by credible evidence that the government was responsible for Catel's decision to leave the lift on site and idle at Bldg. 1202 until December 2002. During that time, the lift remained on site due to the parties' disagreement concerning deficiencies in Catel's window installation, the refusal of Catel's roofing subcontractor, Hammerhead Contracting, LLC (Hammerhead), to begin the roofing work under TO 6 on Bldg. 1210 because of Catel's failure to comply with the preconditions set by Hammerhead's president, Mr. Nick Famulary, for Hammerhead to

[1] In a related appeal, ASBCA No. 54625, the Board in a Rule 12.2 non-precedential decision rejected Catel's claim of $7,250.00 that apparently involved the same lift or lifts. Catel there maintained the lift was idle on site during October and November 2002 while Catel waited to perform TO 6 issued for roof work on Bldgs. 1209 and 1210 (app. br. at 15, 32). In addition, in ASBCA No. 54625, we determined the lifts involved remained idle on site because Catel had not presented an acceptable materials list or schedule to the government for TO 6 and could not get its subcontractor to perform (*see* finding 27).

begin TO 6 work and Catel's failure to pay Hammerhead for the Bldg. 1202 roof repairs. (R4, tabs 69, 75, 79 at 2-3; deposition of Nick Famulary at 48-50, 52; *see* finding 26, n. 1, *supra*)

28. In any event, assuming, *arguendo*, that Catel used the larger 60-foot lift, Catel did not incur any increase in its costs from leaving the lift on site for the additional 51 days or during its performance of TO 1 for 54 days. Mr. Pires explained that Catel negotiated with the lift rental company for purchase of the lift for $17,000 to $18,000 upon completion of TO 1. In return, the lift rental company would exact only a small charge from Catel for use of the lift. (Pires dep. at 170-172) However, as stated by Mr Pires, ". . . we had a deal. I've only paid for one month. The truth of the matter [is] I've never heard from the man again" (Pires dep. at 172).

29. During Catel's TO 1 performance, the lift rental company billed Catel based on one month's use of a 4 x 4 fifty (50) foot boom lift [2] in the total amount of $2,782.50 (ASBCA No. 54632, compl., invoices dated 16 June 2002, 25 July 2002, 29 August 2002, 30 September 2002 and 30 October 2002). The lift rental company in a letter sent by facsimile dated 8 July 2004 to the government explained that Catel had the lift in its possession longer than the period of 10 June 2002 through 7 July 2002. However, the lift rental company also explained that when Catel complained that it had not used the lift after 7 July 2002, the lift rental company and Catel settled the matter based on Catel's payment of $1,325.00 for one month's rental that Catel had already paid. (SR4, tab 165) Catel thus reimbursed the lift rental company for use of the lift in the amount of $1,325.00, leaving a balance of $1,457.50 that Catel has not paid and will not have to pay to the lift rental company.

30. In sum, Catel seeks payment from the government in the net amount of $27,200.25 ($41,249.25-$14,049.00 (credit)) for rental of a larger lift than specified by TO 1 for 54 days and for the additional 51 days the lift remained idle at the site, although it only paid $1,325.00 in total for one month's lift rental (SR4, tab 171 at 21, n. (3); R4, tab 32).

DECISION ON USE OF A 60-FOOT LIFT INSTEAD OF A 40-FOOT LIFT – ASBCA NO. 54632

Catel contends the government changed the work entitling it to reimbursement above the TO 1 price it was paid of $14,049.00 for lift rental costs for the net additional

[2] The parties refer to a 40-foot lift and a 60-foot lift and we have used this convention as appropriate as well, although TO 1 authorized only use of a 40-foot lift and the lift rental company billed for a 50-foot lift (R4, tab 3; ASBCA No. 54632, compl., invoice dated 15 July 2002).

amount of $27,200.25 for 105 days use of a 60-foot lift instead of a 40-foot lift. Catel's claim includes prorated costs for the additional 51 days the lift remained idle at the site. Catel alleges that either Mr. Matthews or Mr. Ward by their actions in informing Catel it would have to repair any damage from use of the lift on the grounds changed the work because this required Catel to use a larger 60-foot lift on the sidewalk next to Bldg. 1202. (App. br. at 11, 25) The government maintains a government official with contracting authority did not direct or require use of a larger 60-foot lift; Catel never afforded the government the opportunity to negotiate a price for use of a larger lift as required by contract note 10 for non-pre-priced items; the government would have negotiated the best price possible for use of a larger lift if it had had the opportunity to do so and had authorized use of a larger lift; and the government paid $14,049.00 for use of a 40-foot lift that more than covered the $1,325.00 Catel paid for its alleged use of a larger lift for 105 days. (Gov't br. at 67-69)

Catel has failed to prove a change to the work that entitles it to an equitable adjustment for use of a larger lift. Neither Mr. Matthews nor Mr. Ward had contracting authority to direct a change to the work. Nor did Catel notify the CO it considered the advice received from either Mr. Matthews or Mr. Ward regarding Catel's responsibility to repair damage from use of a lift on the grass and grounds that allegedly caused Catel to use the lift placed on the sidewalk adjacent to Bldg. 1202 constituted a change to the work or that it intended to submit a claim as a matter of right in accordance with the Changes clause. Moreover, Catel made no attempt to negotiate with an authorized contracting official for use of a larger lift, contrary to the contract requirement that the parties negotiate and agree on a price increase for non-pre-priced items necessary to perform the work. (Finding 3) Catel has failed also to prove the 40-foot lift was incapable of performing TO 1 from the sidewalk adjacent to Bldg. 1202 (finding 24). Catel thus acted as a volunteer when it elected in its discretion to use a larger lift, as it alleges, placed on the nearby sidewalk based on the general remarks by government employees who did not have contracting authority. *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (". . . a contractor will not get relief where the contractor knew of the limitations on the government employee's authority and had a ready means of verifying the orders or statements of the employee and failed to do so."); *Bermite Division of Whittaker Corp.*, ASBCA Nos. 19211, 20474, 77-2 BCA ¶ 12,675 at 61,512-513 (contractor cannot recover for volunteered work not ordered by an authorized government official). *See Len Co. and Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967).

Assuming, *arguendo*, the government employees' actions regarding the lift's location on the grass constituted a change to the work, Catel has not proved the change caused it any damage. The lift rental company accepted Catel's payment of $1,325.00 in full settlement of the cost for Catel's use of the lift. Catel did not incur any further obligation to pay the lift rental company above that amount for its alleged use of a lift

larger than TO 1 specified. Catel also was responsible for the lift remaining idle on site for the additional 51 days due to its disagreement with Hammerhead regarding the start of performance of TO 6 for which it did not incur any additional rental cost. Under these circumstances Catel has failed to show that the alleged change to TO 1 for use of a larger lift caused it any damage, a requirement necessary for it to prove entitlement. *Wilner Construction Co. v. United States*, 24 F.3d at 1401. *Cf. GAP Instrument Corp.*, ASBCA No. 51658, 01-1 BCA ¶ 31,358 at 154,867 (damage must be real and not academic).

ADDITIONAL FINDINGS OF FACT
STORM WATER CLEANUP – ASBCA No. 54632

31. As a result of rainstorms that occurred on 29 and 30 August 2002, water leaked into Bldg. 1202. At the time, Catel and government representatives thought the water had leaked into the building through the roof. (R4, tab 18, daily job report dated 29 August 2002) Based on a government directive, Catel cleaned up the water for which it seeks reimbursement in the amount of $1,791.59 for labor and materials (ASBCA No. 54632, compl., unnumbered p. 4).

32. On 25 September 2002, the CO issued unilateral Modification 01 (Mod 1) to TO 1 for repair of the roof on Bldg. 1202 through which rain water had leaked during the August rainstorms, increased TO 1 for Mod 1 by $53,999.94 from $428,968.67 to $482,968.61, changed the POP start date from 4 October 2001 to 25 September 2002 and extended the POP end date from 5 November 2001 to 17 December 2002 (R4, tab 8). Catel's subcontractor, Hammerhead, using the lift Catel had on site, completed the roof and gutter repairs on or about 16 October 2002. (R4, tabs 45 at 2, 46; *see* finding 34, *infra*)

33. After observing a water test of the windows conducted on 18 October 2002, Mr. Lukowiak concluded Catel had improperly installed the lag bolts vertically through the bottom, aluminum sill and sill flashing of the windows instead of through the wood. He stated that this allowed water to penetrate into the building around the lag bolts. Water also came in through the flashing beneath the improperly installed windows. (R4, tab 12) Mr. Pires stated that Catel installed the windows properly and water could not leak beneath the underside of the windows around the lag bolts and through the metal sills because they were completely covered by the window structure, flashing and other materials (R4, tab 11; Pires dep. at 177). On this point, we find the testimony of Mr. Pires the more persuasive.

34. During the fall of 2002 and into 2003, the government and Catel continued to disagree as to the source continuing water leaks into Bldg. 1202. They disputed whether water leaked into the building through the windows, including through the caulking and the adjacent EIFS installed by Catel, through the building's deteriorated EIFS system the

government previously installed on the building walls, or through the roof both before and after Hammerhead repaired it. (R4, tabs 9-13) Weighing the evidence as a whole, we find that on 28 and 29 August 2002 water from the rainstorm came into the Bldg. 1202 from several causes but, primarily, the water entered the building through the defective roof prior to its repair and the cracks in the EIFS installed by the government on the building walls (Pires dep. at 177, 183-86, 192; R4, tab 13).

DECISION ON STORM WATER CLEANUP – ASBCA NO. 54632

Catel contends the government directive to clean up the water that leaked into Bldg. 1202 during the 28-29 August 2002 rainstorms constituted a change that entitles it to an equitable adjustment for its costs in the amount of $1,791.59. It maintains the water leaked through the roof or the EIFS walls of the building for which the government is responsible. (App. br. at 25) The government contends that Catel is responsible for cleaning up the water that came into the building during the rainstorms because Catel failed to install the windows and surrounding EIFS properly (gov't br. at 70-71).

The evidence establishes the water leaked into the building on 28 and 29 August 2002, as we have found, primarily through the roof and EIFS on the building walls for which the government is responsible. The government thus is liable for the change due to its directive to Catel to clean up the water.

CONCLUSION

The appeal in ASBCA No. 54632 is sustained in part. ASBCA No. 54632 is remanded to the parties to negotiate quantum in accordance with this opinion. The appeal in ASBCA No. 54633 is denied.

Dated: 25 August 2006

EDWARD G. KETCHEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures Continued)

I concur

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

I concur

MARTIN J. HARTY
Administrative Judge
Acting 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. 54632 and 54633, Appeals of Catel, Inc., rendered in conformance with the Board's Charter.

Dated:

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