ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
American Renovation and Construction Company	)	ASBCA No. 53723
	)	
	)	
Under Contract No. F41622-97-C-0022	)	

APPEARANCES FOR THE APPELLANT: Robert G. Watt, Esq.
Edward J. Parrott, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Maj Kenneth W. Sachs, USAF
Maj Jeffrey A. Renshaw, USAF
Maj Stacie A. Remy Vest, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON APPELLANT'S MOTION FOR RECONSIDERATION

Pursuant to Board Rule 29, American Renovation and Construction Company (ARC) moves for reconsideration of our decision in *American Renovation and Construction Company*, ASBCA Nos. 53723, 54038, 09-2 BCA ¶ 34,199. Only ASBCA No. 53723 is before us on reconsideration. Familiarity with the underlying decision is presumed.

To prevail on a motion for reconsideration, the moving party must establish a compelling reason for modifying the original decision. In determining whether this standard has been met, we consider newly discovered evidence, mistakes in our fact-finding, or errors of law. *Zulco International, Inc.*, ASBCA No. 55441, 08-1 BCA ¶ 33,799 at 167,319; *L&C Europa Contracting Co.*, ASBCA No. 52617, 04-2 BCA ¶ 32,708 at 161,816; *Danac, Inc.*, ASBCA No. 33394, 98-1 BCA ¶ 29,454 at 146,219. Arguments that merely reurge contentions already considered and rejected are insufficient. *McDonnell Douglas Electronics Systems Co.*, ASBCA No. 45455, 99-1 BCA ¶ 30,132 at 149,057.

ARC first argues that we erred in finding that the government's slab-on-grade (SOG) design was "suitable for its intended service," arguing that the government breached its implied warranty of the specifications, that the deletions made by

amendment A0004 "weakened" the design, that the government's subsequent changes to the design prove that the original design was defective, and that, in any event, evidence of a contractor's noncompliance with the specifications cannot be used to justify a default termination. Second, ARC argues that we erred in "implicitly suggesting" that ARC and Soltek Pacific entered into a joint venture agreement. Third, ARC argues that we erred in allegedly finding that "the 25-month delay" between acceptance and revocation was reasonable. Fourth, ARC argues that we erred in finding that the government proved the elements of gross mistakes amounting to fraud.

When the government provides a contractor with design specifications, it impliedly warrants that, if complied with, the specifications are free from design defects. *United States v. Spearin*, 248 U.S. 132, 137 (1918); *Rick's Mushroom Service, Inc.*, 521 F.3d 1338, 1344 (Fed. Cir. 2008); *White v. Edsall Construction Co.*, 296 F.3d 1081, 1084 (Fed. Cir. 2002). The contractor, in turn, must follow the specifications "as one would a road map." *J. L. Simmons Company v. United States*, 412 F.2d 1360, 1362 (Ct. Cl. 1969). To prove that the government breached its implied warranty of the specifications, ARC must first prove that it substantially complied with the specifications and that the results were unsatisfactory. Once it makes that showing, the burden shifts to the government to show that defective workmanship or some other cause for which it is not liable produced the unsatisfactory result. *American Ordnance LLC*, ASBCA No. 54718, 10-1 BCA ¶ 34,386 at 169,780; *SPS Mechanical Co.*, ASBCA No. 48643, 01-1 BCA ¶ 31,318 at 154,692; *C.L. Fairley Construction Co.*, ASBCA No. 32581, 90-2 BCA ¶ 22,665 at 113,869, *aff'd on recon.*, 90-3 BCA ¶ 23,005 at 115,525-26; *Rosendin Electric, Inc.*, ASBCA No. 22996, 81-1 BCA ¶ 14,827 at 73,182.

ARC has neither alleged nor proven that it substantially complied with the specifications. Instead, ARC alleges that the damage to the housing units was caused by the changes made by amendment A0004, the government's budgetary crunch, or the soil conditions at the site. Moreover, aside from the changes made by amendment A0004, discussed below, ARC has not attempted to prove that there were any errors, omissions, ambiguities or other defects in the specifications. In an attempt to establish that the specifications were defective, ARC argues that remedial measures taken by the government in connection with later contracts prove that the specifications were defective. As a last resort, ARC argues that its noncompliances were authorized because the government's Title II inspectors observed its defective workmanship practices. None of these arguments prove that the specifications were defective. We are satisfied that the cause of the damage was ARC's failure to comply with the specifications.

The specifications prohibited the use of topsoil, organic material, debris, and frozen material in the backfill, and required that backfill be properly worked to obtain optimum moisture and compaction (finding 25, ¶¶ 2.01A, 2.02A, 3.04E). ARC often left unsatisfactory materials in the backfill, making it difficult to achieve the required percentage of compaction (findings 31-35, 37-47, 262, 269, 276). In particular, ARC left two-to-three foot dirt clods in the backfill without breaking them up. These large clods

caused gaps and voids. When the clods collapsed due to the weight of the overlying backfill or moisture, they caused settlement and negative compaction (finding 277). As a result of the large number of voids in the backfill, ARC had to "mudjack" several garage slabs and raise others using helical piers (findings 100-02, 105). ARC also left construction debris in the backfill, such as 2 x 8 pieces of lumber, steel stakes, and rebar, which made it difficult to achieve compaction (finding 48). Clods and debris left in the backfill also provide pathways for moisture to reach the fat clay subgrade below and heave (findings 2-3, 10, 269).

The specifications also required that backfill be placed in lifts "not to exceed 8 inches" (finding 25, ¶¶ 3.04B, 3.05I). Although ARC's equipment could only adequately compact lifts of 8 to 16 inches and Maxim's nuclear densometer could only test compaction to a depth of 10 to 12 inches, ARC routinely placed fill in lifts of 2 to 3 feet and, in some instances, 4, 6, or 8 feet (findings 74-79, 81-84, 86, 88, 89, 90, 93, 262). Notably, ARC's geotechnical engineering expert, Mr. Steven C. Haley, agreed that ARC did not place all the backfill "to the project specifications" (finding 290). When a lift is too thick, compaction may be proper in the upper portion, but the lower portion may receive little or no compaction. Thus, the thicker the lift, the greater the amount of soils that are potentially undercompacted and the more likely there will be significant settlement in the future. (Finding 279) The specifications also required that nonexpansive fill with liquid limits of 27 to 49 percent be used next to the basement walls (finding 25, ¶ 2.01B). A majority of the backfill used by ARC next to the basement walls was fat clay (clay with a liquid limit of over 49 percent) (finding 276).

In addition, the specifications required that backfill next to the foundation walls be compacted to 92 percent of ASTM D 698 (finding 25, ¶ 3.09B.c). Even though compacted fill generally gets denser over time, none of the samples taken from the backfill next to the basement walls was compacted to 92 percent even four years after construction. Mr. John R. Kovski, the government's geotechnical engineering expert, described the settlement process as follows:

> As water flows through the voids in the poorly compacted backfill and between the backfill and the basement wall, the backfill materials soften, compress, and move causing settlement under the self-weight of the backfill and the weight of the stoops and garages.

(Finding 281)

The approved QC plan, which was part of the contract, required ARC to perform "ONE TEST EACH 2000 SQUARE FEET OF EACH 8 INCH LIFT.... EACH LAYER AND SUBGRADE, MIN. 2 TESTS" (finding 22). Mr. Kovski interpreted this provision to require 2 compaction tests for each 8-inch lift (finding 282). This amounts to 1,464 tests in the backfill around 69 buildings or 21 tests in the backfill of each building

(finding 283). Using the compaction test reports prepared by Maxim Technologies, Inc. (Maxim), ARC's independent testing laboratory, Mr. Kovski found that Maxim performed 105 passing tests in the backfill or less than 2 passing tests per building (finding 284). This is a far cry from the 21 tests per building required by the QC plan. Thomas, Dean & Hoskins, Inc. (TD&H), the geotechnical engineering firm that performed the soils investigation for the solicitation, also reviewed Maxim's compaction test reports. TD&H's findings were consistent with Mr. Kovski's findings. TD&H found that Maxim performed 158 passing tests in the backfill or 2.2 passing tests per building. TD&H also found that Maxim did not take any tests in the backfill around 26.7 percent of the buildings. Although Mr. Haley initially asserted that ARC had met the testing requirement in the QC plan, he changed his mind at the hearing and agreed that ARC would not have met a "two-test-per-lift" specification (finding 299). Given the contract requirement to perform 21 tests in the backfill around each building, ARC's performance of 2 or 2.2 tests per building constitutes a grave deficiency.

The specifications prohibited overexcavation and required that footing excavations be cut to a flat bottom of undisturbed firm soil. ARC's soils engineer was required to observe the bottom of each excavation before placing concrete. (Finding 24, ¶ 1.08F.6, finding 25, ¶ 3.05C, E) ARC persuaded its soils engineer, Mr. Peter J. Klevberg of Maxim to allow it to routinely overexcavate the footings and replace excavated materials with "granular fill" *in lieu* of coming to the site and observing each excavation (findings 50, 51). Instead of granular fill, ARC used 6 to 27 inches of road base gravel, sand, or a layer of each under the footings (findings 53, 55, 271, 296). ARC failed to prove that these materials qualified as "compacted stabilized material" as required by ¶ 3.05F of specification section 02200 (findings 25, 271). Gravel and sand are very porous and "allowed the collection of free flowing water on the subgrade soils [causing] them to heave much, much sooner than if the moisture was not allowed access to the fat clay subgrade" (finding 271). To facilitate drainage from under the footings, Mr. Klevberg recommended that ARC lower the sump basins and drill 500 3/8-inch holes around the bottom of the basins. ARC essentially ignored these suggestions. (Finding 273) In his deposition, Mr. Haley rejected placing gravel under the footings because it provides more opportunity for water to access the expansive soils (finding 271). ARC overexcavated and replaced the excavated material with gravel and sand in 70 to 75 percent of the footings (finding 54).

The specifications required that excavations be dewatered and prohibited standing water in the excavations (finding 25, ¶ 1.07E). ARC often failed to dewater the excavations (findings 56-65, 262, 270, 285). Mr. Kovski estimated that 24 percent of the buildings had accumulated drainage water during construction (finding 270). In addition, the drawings called out trench footings with a perimeter foundation drain (PFD) on top of the footings. Shortly after work began, ARC changed from trench footings to spread footings without relocating the PFD. (Finding 66) As a result, the PFD was too high to intercept water moving through the backfill, allowing water to access the fat clay subgrade and heave (findings 66-69).

In addition, some of ARC's construction details interfered with the "unrestrained vertical movement" of the floating slabs. ARC attached the basement stairways directly to the floor slabs. As a result, when the slabs moved, the stairways moved, causing significant damage to the interiors. (Finding 268) ARC also failed to provide adequate slip joints or sufficiently large slip joints at the top of non-bearing partition walls resting on the basement floor slabs. When the slabs heaved, the load was transmitted upward, causing cracking and bowing. (Finding 265-66) The garage footings were founded on backfill and placed at a higher elevation than the basement footings. The basement footings were founded on natural soil. When the garages were attached to the houses, the differing support conditions created a high risk of structural distress. (Finding 263)

We are convinced that ARC's shoddy workmanship caused the damage to the housing units. Mr. Kovski explained as follows:

> It is my expert opinion that there was an inadequate design and construction of the foundation, inadequate foundation preparation to include mismanagement of water during construction, improper selection of foundation wall backfill, and that the backfill was inadequately compacted. All of these flaws combined to allow moisture to infiltrate the expansive foundation subgrade soil causing that soil to swell, which caused the basement slabs to heave. Because the structural design placed structural elements on the basement slabs, once the slabs heaved, the upward pressure was transferred from the slab to the walls, stairway and ultimately to all levels of the structure. Once that...occurred, those elements of the structure began to move differentially, which caused the interior distress we observed. As for the exterior damage to the stoops, driveways, sidewalks, roads and garages, this was caused by inadequately compacted backfill that has subsequently settled, causing the distress in these areas.

(Finding 262)

ARC next argues that the specifications were defective because of the changes made by Amendment No. A0004. We have already considered and rejected these arguments and need not address them again (findings 281, 284-85, 301-08). Suffice it to say that we were simply not persuaded that these changes caused or contributed to the premature failure of the housing units.

ARC also argues that the changes made to the specifications in connection with subsequent contracts prove that the design in ARC's contract was defective. In order to prove the government breached its implied warranty under *Spearin*, ARC must first show

that it substantially complied with the specifications. ARC has failed to make this showing.[1] *Spearin*, 248 U.S. at 137; *Rick's Mushroom*, 521 F.3d at 1344; *Edsall Construction*, 296 F.3d at 1084; *American Ordnance*, 10-1 BCA ¶ 34,386 at 169,780; *SPS Mechanical*, 01-1 BCA ¶ 31,318 at 154,692; *C.L. Fairley*, 90-2 BCA ¶ 22,665 at 113,869, *aff'd on recon.*, 90-3 BCA ¶ 23,005 at 115,525-26; *Rosendin Electric*, 81-1 BCA ¶ 14,827 at 73,182.

The cases cited by ARC, particularly *Big Chief Drilling Co. v. United States*, 26 Cl. Ct. 1276 (1992) and *Neal & Co., Inc. v. United States*, 36 Fed. Cl. 600 (1996), are inapposite. Neither case addresses the admissibility of subsequent remedial measures where the contractor has failed to substantially comply with the specifications. In any event, our case law generally excludes evidence of subsequent remedial measures offered for the purpose of proving culpability or negligence. *E.g.*, *AYA Technology, Inc.*, ASBCA No. 44374, 95-2 BCA ¶ 27,845 at 138,861; *Intram Co.*, ASBCA No. 44159, 94-1 BCA ¶ 26,375 at 131,180; *McMullan & Son, Inc.*, ASBCA No. 32460, 87-1 BCA ¶ 19,364 at 97,938.

Citing *D.E.W., Inc.*, ASBCA No. 35896, 94-3 BCA ¶ 27,182, ARC next argues that "Evidence of Deficient Performance Cannot Justify a Default Termination Where the Underlying Government-Issued Specifications Are Defective" (mot. at 16). The default termination in *D.E.W.* was converted to a termination for convenience on the basis of impossibility, which ARC has neither alleged nor proven. *D.E.W.* at 135,461. Moreover, the default termination of ARC's contract is fully sustainable under subparagraph (g) of FAR 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1996) (finding 18).

In summary, ARC has failed to prove that the government's SOG design was unsuitable for its intended service. The fact that the government did not select the "best" or most expensive design, or a design that would ensure the maximum number of years of service, or a design that would require minimal repairs does not render it defective. As Mr. Kovski explained:

[1] In support of this argument, ARC seeks admission of three documents from the 7D project, which was competed in 2009, asserting that they are "newly discovered" evidence. Board Rule 13(b) precludes receiving any evidence after completion of a hearing except as the Board may otherwise order in its discretion. On motions for reconsideration, however, we may consider "newly discovered evidence," *i.e.*, evidence of facts existing at the time of which the party was excusably ignorant and which could not, by the exercise of due diligence have been discovered in time to present in the original proceeding. To be admissible, the evidence must not be merely cumulative and must be of such a material nature as will probably change the outcome or produce a different result. *Sunshine Cordage Corp.*, ASBCA No. 38904, 90-1 BCA ¶ 22,572 at 113,277. The documents offered by ARC do not meet these criteria.

> Every foundation design carries with it some level of risk, with or without basements. With the design we have here, there was a risk of movement, but had the houses been constructed in accordance with the design,...we wouldn't expect to see noticeable distress for many years after construction [and certainly not] so quickly after construction if ever.... I think it would be 10 to 15 years before you would perceptibly notice the heave of the basement slabs.

(Finding 286)

ARC secondly argues that we erred in finding that it entered into a joint venture agreement with Soltek in footnote 2 of the decision. We did not intend to impliedly or expressly find that ARC entered into a joint venture agreement with Soltek. Footnote 2 was intended to simply explain why Soltek's name was added to the contract after contract award (*e.g.,* R4, tab 7). In any event, whether there was a joint venture is not material to the outcome of this appeal.

ARC thirdly argues that we erred in finding that the 25-month delay between acceptance and revocation was reasonable. This assertion misstates our holding. We held that when a contractor deliberately conceals critical information required by the contract, preventing the government from making an informed decision regarding termination, the time for measuring the reasonableness of the delay does not begin to run until the government has had an opportunity to familiarize itself with the facts. Since TD&H did not issue its report on Maxim's compaction test reports until 6 February 2001, the appropriate date to begin measuring the reasonableness of the actions of the contracting officer (CO) is 6 February 2001. To hold otherwise would be to reward ARC for its misconduct.

The specifications required that Maxim's compaction test reports be "promptly" submitted to the CO. In complete derogation of this requirement, ARC did not turn them over until 24 October 2000, almost a year after acceptance (findings 24, ¶ 1.08G.11, findings 135, 138, 162). The reports revealed that of the 21 tests required in the backfill around each of the 69 buildings in the contract, ARC performed approximately 2 tests per building (findings 162, 293, 294). TD&H concluded that "the settlement and the related damage are the direct result of insufficient compaction of the foundation backfill soils adjacent to the basement foundation walls." It also found that Maxim failed to take any tests in the backfill around 26.7 percent of the buildings. (Finding 162) This information heralded the widespread settlement and heave and related damage that occurred on the project. The specifications required ARC to submit these reports to the CO throughout performance of the contract. ARC's concealment of the reports is a breach of its contractual obligations.

After the TD&H report was issued, ARC continued to repair the stoops. By 7 February 2001, it had prepped four stoops and planned to begin repairs the following week. On 16 February 2001, ARC submitted a repair schedule for eight stoops, indicating that the stoop repair plan for the four-bedroom units and the rear stoops was being prepared and would be submitted for approval prior to starting work. (Finding 164) On 21 February 2001, ARC notified the government that it was ready to begin work on the front stoops (finding 165). In March 2001, ARC began repairing the front stoops using the "temporary" solution" it had previously submitted. On 6 April 2001, the CO asked ARC if the temporary solution was going to be the permanent solution. If not, she directed ARC to provide the permanent solution by 9 April 2001. The CO also directed ARC to submit a permanent stamped fix for the back stoops and grading by 9 April 2001. Also on 9 April 2001, ARC advised that it was trying to obtain a stamped plan for the front stoops and that the repair plan for the front stoops of the four-bedroom units was still under consideration. (Finding 167) On 30 April 2001, ARC submitted a stamped repair plan for the rear stoops and asked that the deadline for the rest of the plan be extended to 30 May 2001 (finding 168). On 14 May 2001, the CO returned ARC's front stoop plan with comments and requested resubmission by 22 May 2001 (finding 169). On 31 May 2001, the CO approved ARC's new architect/engineer (finding 172). On 11 June 2001, the CO notified ARC that it had failed to submit an acceptable stoop replacement plan or an acceptable plan to correct the soil subsidence issues and directed ARC to provide corrective action plans by 20 June 2001 (finding 173). The record does not reflect that ARC submitted the requested corrective action plans. On 10 July 2001, the CO suspended the contract indefinitely, drastically reducing ARC's costs (finding 175). On 26 July 2001, the parties unsuccessfully met to try and resolve their problems (finding 177). On 7 August 2001, ARC offered to repair the rock gardens, prepare drawings for the sinking stoops, and install helical piers under the garages if the government would pay for the work (finding 178). On 31 October 2001, the CO issued a show cause notice. ARC did not reply. (Finding 179) On 19 December 2001, the CO revoked acceptance and terminated the contract for default (finding 180).

Under the unique facts of this case—ARC's concealment of Maxim's compaction test reports, the issuance of the TD&H report on 6 February 2001, ARC's submission of a new architect/engineer for approval on 31 May 2001, ARC's continued work on the stoops with the possibility of developing a permanent fix through approximately 20 June 2001, the CO's indefinite suspension of the work on 10 July 2001, which substantially reduced ARC's costs, the parties' unsuccessful 26 July 2001 meeting to try and resolve the problems, and ARC's 7 August 2001 offer to continue working for a price—we find that the CO reasonably revoked acceptance and terminated the contract on 19 December 2001.

ARC lastly argues that we erred in finding that the government properly revoked acceptance based on gross mistakes amounting to fraud. To prove gross mistakes amounting to fraud, the government must show that (1) acceptance was induced by reliance on (2) a misrepresentation or concealment of a material fact; (3) made with knowledge of its falsity or in reckless or wanton disregard of the facts; and (4) it suffered

injury as a result. Notably, ARC does not deny that it concealed Maxim's compaction test reports from the government or that the reports were material to acceptance of the contract. Instead, ARC focuses on the first element, arguing that the government unreasonably relied on ARC's representations that the buildings were ready for occupancy.

Mr. Ronald LaRue, the government's Title II inspector, accepted the units on behalf of the government. He accepted the units in four increments: 29 units were accepted on 30 July 1999, 34 units were accepted on 30 August 1999, 31 units were accepted on 30 September 1999, and 28 units were accepted on 29 October 1999 (finding 138). The acceptance procedures were the same for each increment. He conducted a prefinal inspection (or walk-through) and issued a punch list. After ARC had corrected the punch list, Mr. Eugene Frederick, ARC's project manager, sent Mr. LaRue a memorandum indicating that the items had been corrected. In the event an item was not corrected, Mr. Frederick indicated the date on which it would be corrected or that it was in dispute. Mr. LaRue interpreted Mr. Frederick's memoranda to mean that the units were "complete and ready for occupancy." (Finding 137) The one-year warranty period began to run from the date of turnover and the government occupied the units immediately upon acceptance (finding 138).

Mr. Frederick described the acceptance process as follows:

> When our superintendent and Ron LaRue went through the final inspection, we had an individual that if they found a mark on the wall, the mark was fixed.
>
> Once they left that building, that building was signed off, as you showed me on this Final Inspection Report of that one unit. That's how the final acceptance with ARC and Ron LaRue.
>
> Q. So at that point in time, sir, were there any outstanding issues in that house that needed to be fixed?
>
> A. No.
>
> The keys were handed over, and there was a... Transmittal Cover Sheet [with] the garage door opener, O&M [operations and maintenance] manual and the keys. And this was given to Ron LaRue.
>
> Ron LaRue would give the enclosed packages to the Government, and the Government then would issue out the units to whoever was going to live in the units.

....

Q ...And again, this is taking place after both Mr. LaRue and your representatives have assured themselves that there are no deficiencies in the unit?

A. Yes, sir.

(Tr. 4/45-46)

Mr. Frederick admitted that there had been some settlement problems in June or July 1999, but testified that all those problems were resolved prior to turnover:

Q. [D]o you know for a fact whether each of those problems was resolved prior to the turnover of units.

A. Yes.

Q. And were they—do you know whether each and every one of them was resolved before turnover?

A. They were, or else we would have never turned them over to the Government.

....

[BY THE BOARD]: But it's your testimony that all of these problems were fixed at turnover?

THE WITNESS: Yes, ma'am. [T]hey were all fixed, yes, ma'am.

(Tr. 4/50, 53)

ARC argues that Mr. LaRue's reliance was unreasonable because, as a Title II inspector, he had observed ARC performing defective the work. Regardless of whether or not Mr. LaRue observed ARC's defective workmanship practices, ARC was required to repair those defects prior to acceptance. Mr. LaRue was responsible for ensuring that the visible defects in the work were corrected prior to acceptance. However, he was not responsible for discerning the unseen problems developing below the surface. ARC also argues that Mr. LaRue's reliance was unreasonable because its QC reports recorded instances of defects in the work. ARC misconstrues the QC requirements of the contract. ARC was required to submit its QC reports (one copy to the CO and one copy to the inspector) by noon of the next workday following the day of the report (finding 23).

Merely keeping the reports in its job site trailer and making them available upon request does not satisfy this obligation and does not impute knowledge of the contents of those reports to the government.

Contrary to ARC's suggestion, ARC was responsible to maintain an adequate inspection system. Specification section 01000 provided that "THE CONTRACTOR IS RESPONSIBLE FOR QUALITY CONTROL WHICH IS CONSIDERED BY THE GOVERNMENT TO BE A MAJOR INSPECTABLE ITEM OF THIS CONTRACT" (finding 21, ¶ 3.16A) (emphasis in original). In addition, FAR 52.246-12, INSPECTION OF CONSTRUCTION (AUG 1986), which was part of this contract provided, in part, as follows:

> (b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed...conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government.
>
> (c) Government inspections and tests are for the sole benefit of the Government and do not—
>
> (1) Relieve the Contractor of responsibility for providing adequate quality control measures;
>
> ....
>
> (d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the [CO's] written authorization.

(Finding 18) Thus, the fact that a Title II inspector may have observed ARC performing defective work does not excuse ARC from its obligation to meet the contract requirements. *See Granite Construction Co. v. United States*, 962 F.2d 998, 1003 (Fed. Cir. 1992), *cert denied*, 506 U.S. 1048 (1993); *Amigo Building Corp.* ASBCA No. 54329, 05-2 BCA ¶ 33,047 at 163,823; *The Ryan Co.*, ASBCA No. 53385, 03-1 BCA ¶ 32,077 at 158,522-23; *Taisei Rotec Corp.,* ASBCA No. 50669, 02-1 BCA ¶ 31,739 at 156,798; *Fred A. Arnold*, ASBCA No. 21661 *et al.*, 86-1 BCA ¶ 18,701 at 94,042, *rev'd on other grounds*, 18 Cl. Ct. 1 (1989); *Rosendin Electric*, 81-1 BCA ¶ 14,827 at 73,183-85; *Robert McMullan & Son, Inc.*, ASBCA No. 11408, 68-1 BCA ¶ 6940 at 32,093.

We have carefully considered each of ARC's arguments and find them to be without merit. ARC has failed to prove that the government's SOG specifications were defective. The evidence inexorably compels the conclusion that the cause of the damage

was ARC's failure to comply with the specifications. We have found, and ARC has not denied, that it concealed Maxim's compaction test reports until after acceptance. The reports revealed that ARC had not only failed to meet the specified levels of compaction, but had performed only a small number of the required compaction tests. This data was essential to the CO's ability to make a supportable decision regarding termination. We are also satisfied that Mr. LaRue reasonably relied on the representations of Mr. Frederick, ARC's project manager. While Mr. LaRue was responsible for ensuring that the visible defects were corrected, he was not responsible for discerning the problems looming below the surface. Through 20 June 2001, ARC was actively engaged in performing repairs and there appeared to be a chance that a permanent fix might be found. When that effort fell through, the CO indefinitely suspended the contract on 10 July 2001, drastically reducing ARC's costs. Subsequently, the parties tried to avert the impending termination for default without success. As a result, we affirm that the delay in revoking acceptance and termination was reasonable.

Accordingly, ARC's motion for reconsideration is denied.

Dated: 16 June 2010

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

I concur

I concur

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

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. 53723, Appeal of American Renovation and Construction Company, rendered in conformance with the Board's Charter.

Dated:

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