

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Jaynes Corporation ) ASBCA No. 58385  
 )  
Under Contract No. W912PL-09-C-0010 )

APPEARANCE FOR THE APPELLANT: Judith Ward Mattox, Esq.  
Colorado Springs, CO

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
John F. Bazan, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District, Los Angeles

OPINION BY ADMINISTRATIVE JUDGE CLARKE  
PURSUANT TO BOARD RULE 12.3

This is a Rule 12.3 accelerated appeal that the parties elected to submit on the record pursuant to Rule 11. Jaynes Corporation (Jaynes) claims costs related to the government's rejection of pipe to be used in a building's sprinkler system. The Board has jurisdiction pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. We consider entitlement only. For the reasons stated herein, we sustain the appeal.

FINDINGS OF FACT

1. The Army Corps of Engineers (COE) awarded Contract No. W912PL-09-C-0010 to appellant on 26 May 2009 for the design and build of an unmanned aircraft systems (UAS) operations facility at Creech Air Force Base (AFB), Indian Springs, Nevada (R4, tab 2 at JC00039, 41). The contract included section 01 10 10, Specific Technical Engineering and Design Criteria, which required the following:

7.3.6.1 Each facility except those specified shall be fully protected with an automatic wet pipe sprinkler system.

....

7.3.11.1 UFGS Section 28 13 00<sup>[1]</sup> shall be edited to include the following additional minimum requirements: Sprinkler piping shall be black steel with iron fittings. All pipe shall be Schedule 40. Fittings and joints shall be threaded, flanged, grooved, or shop-welded. Fittings employing plain-end pipe or devices which bite the pipe surface shall not be used....

(R4, tab 5 at JC00993, 0998)

2. The contract also included section 21 13 13.00 10, Wet Pipe Sprinkler System, Fire Protection, which provides:

### 2.3 REQUIREMENTS FOR FIRE PROTECTION SERVICE

Provide Materials and Equipment that have been tested by Underwriters Laboratories, Inc. and are listed in UL Fire Prot Dir or approved by Factory Mutual and listed in FM P7825a and FM P7825b. Where the terms “listed” or “approved” appear in this specification, such shall mean listed in UL Fire Prot Dir or FM P7825a and FM P7825b[.]

....

### 2.5 ABOVEGROUND PIPING COMPONENTS

Aboveground piping shall be black steel.

#### 2.5.1 Steel Piping Components

##### 2.5.1.1 Steel Pipe

Except as modified herein, steel pipe shall be black as permitted by NFPA 13 and shall conform to applicable provisions of ASTM A 795/A 795M, ASTM A 53/A 53M, or ASTM A 135/A 135M. Pipe shall be marked with the name of the manufacturer, kind of pipe, and ASTM designation.

(R4, tab 6 at JC01006-7)

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<sup>1</sup> UFGS (United Facilities Guide Specifications) 28 13 00 does not exist, it should be UFGS 21 13 13.00 10 (R4, tab 7 at JC01305 ¶ 10; gov’t br. at 3, ¶ 7).

3. The ASTMs referenced in paragraph 2.5.1.1 above have the following scope and other paragraphs:

ASTM A795

Standard Specification for Black and Hot-Dipped Zinc-Coated (Galvanized) Welded and Seamless Steel Pipe for Fire Protection Use

....

1. Scope

1.1 This specification covers black and hot-dipped galvanized welded and seamless steel pipe in sizes NPS 1/2 (Note 1) to NPS 10 inclusive, with wall thicknesses as given in Tables 2 and 3. Pipe having other wall thicknesses may be furnished provided such pipe complies with all other requirements of this specification and the outside diameter is limited to those in the tables. Pipe ordered under this specification is intended for use in fire protection systems....

(R4, tab 36 at JC02132) (footnote omitted)

ASTM A 53

Standard Specification for Pipe, Steel, Black and Hot-Dipped, Zinc-Coated Welded and Seamless

....

1. Scope

1.1 This specification covers seamless and welded black and hot-dipped galvanized steel pipe in NPS 1/8 to 26 (Note 1), inclusive, with nominal (average) wall thickness as given in Tables X2.2 and X2.3. Pipe having other dimensions (Note 2) may be furnished provided such pipe complies with all other requirements of this specification.

....

NOTE 2 - A comprehensive listing of standardized pipe dimensions is contained in American National Standard ANSI B36.10.

(R4, tab 36 at JC02113) (footnotes omitted)

ASTM A 135

Standard Specification for Electric-Resistance-Welded Steel Pipe

....

### 1. Scope

1.1 This specification covers two grades of electric-resistance-welded steel pipe in NPS [Nominal Pipe Size<sup>[2]</sup>] 2 to NPS 30 inclusive, with nominal (average) wall thickness up to 0.500 in. (12.70 mm), inclusive, and in nominal sizes 3/4 to 5 in. (19 to 127 mm) inclusive with nominal (average) wall thickness 0.083 in. (2.11 mm) to 0.134 in. (3.40 mm), depending on size. Pipe having other dimensions (Note 1) may be furnished provided such pipe complies with all other requirements of this specification....

NOTE 1—A comprehensive listing of standardized pipe dimensions is contained in ANSI B36.10.

(R4, tab 36A at JC02137b; app. supp. R4, tab 44 at JC02227) (footnotes omitted) ASME B36.10M, WELDED AND SEAMLESS WROUGHT STEEL PIPE (B36.10M), includes tables of “wall thickness” for numerous schedules including Schedule 40 for various NPS sizes (app. supp. R4, tab 46 at JC02243, JC02245-60). B36.10M also includes:

### 6. PERMISSIBLE VARIATIONS

Variations in dimensions differ depending upon the method of manufacture employed in making the pipe to the various specifications available. Permissible variations for dimensions are indicated in each specification.

(App. supp. R4, tab 46 at JC02243) ASTM A135 includes the following:

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<sup>2</sup> (See app. supp. R4, tab 46 at JC02260 n.1).

## 12. Dimensions, Weight (Mass), and Permissible Variations

12.1 *Weight (Mass)*—The weight (mass) of any length of pipe other than Schedule 10 shall not vary more than 3.5% under or 10% over that specified, but the carload weight (mass) shall be not more than 1.75% under the nominal weight (mass).

(App. supp. R4, tab 44 at JC02230) ASTM A795 includes the following:

## 14. Dimensions, Weight, and Permissible Variations

14.1 *Weight*—For the pipe covered by Table 1 and Table 2, the weight shall not vary more than  $\pm$  [plus or minus] 5% from that prescribed.

(App. supp. R4, tab 45 at JC02240)

4. Appellant submitted to the Creech AFB Project Office a “TRANSMITTAL OF SHOP DRAWINGS, EQUIPMENT DATA, MATERIAL SAMPLES, OR MANUFACTURER’S CERTIFICATES OF COMPLIANCE,”<sup>3</sup> dated 2 December 2011, received on 8 December 2011, requesting approval of listed items (R4, tab 14). Item 4 was “Materials and Equipment” (*id.*). The government comments section for Item 4 reads in pertinent part, “Item 4 Materials and Equipment – “G”, Resubmit...c)) Sprinkler piping (21 13 13.00 10 para 2.4.1a)”<sup>4</sup> (*id.* at JC01994). There is also a handwritten “E”, meaning disapproved, on the face page of the submittal, entered in the column “FOR CE USE CODE” (*id.* at JC01993, tab 24 at JC02053). Tab 3 to the submittal included manufacturer’s documentation from Allied Tube & Conduit (Allied) entitled “Schedule-10/Schedule-40” (*id.* at JC02000). Appellant, through its subcontractor, Southland Industries, had proposed Allied fire sprinkler piping identified as “Allied Sched 40 ASTM A135/A795” (R4, tab 27 at JC02058). The documentation reads in part:

When you specify Allied Schedule-10/Schedule-40 sprinkler pipe you get a UL listed and FM approved product. Although these products do not require separate approvals, Schedule-10/Schedule-40 gives you the extra quality assurance you demand. Our Sch-10 (1¼"-8") pipe and

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<sup>3</sup> This type of form is referred to herein as “submittal.”

<sup>4</sup> There is no paragraph 2.4.1.a in specification 21 13 13.00 10, however, paragraph 2.4 is for underground piping components and 2.4.1 is for pipe and does not relate to the aboveground pipe involved in this appeal (R4, tab 6 at JC01007, tab 16 at JC02010, ¶ 6).

Sch-40 (1"-2½") pipe have passed the same thorough lab testing as our other listed pipe products, and receive periodic mill inspections from both UL and FM agents to ensure consistent quality.

....

**Specifications & Approvals**

Schedule-10/Schedule-40 pipe are in compliance with the following: ASTM A-135, Type E Grade A, and NFPA 13. All pipe products have a rated working pressure of 300 psi...

(R4, tab 14 at JC02000)

5. Mr. Robert Caskie, the Administrative Contracting Officer (ACO) (R4, tab 2 at JC00259), sent an internal government email dated 2 February 2012 to Mr. Alan Morita<sup>5</sup>, explaining why he did not follow Mr. Morita's recommendation to approve all submitted materials:

The purpose of this message really is to let you know of an issue. Wherein you recommended approval for all the materials submitted basically, we have change [sic] that to an "E" Code disapproved, for the sprinkler piping.

The attached sheet is taken from the submittal and is for the sprinkler piping. For the FY09 Ops Fac we require Sched 40 Pipe to be used. Well, that is exactly what was submitted, right??

Well not exactly. The Allied Tube and Conduit Company are a little crafty with their product line as I discovered a few years go. The Allied "Sched 10" and "Sched 40" materials are their trade names for their product. The Sched 40 pipe is actually Sched 10 from a[n] ASTM material stand point.

Real Sched 40 pipe has to conform to ASTM A53 or ASTM A795 Grade 2. The Allied stuff conforms to ASTM A135, which is a Sched 10 pipe from an ASTM material stand point. Allied used to include conformance with ASTM A795 on

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<sup>5</sup> The record does not reflect what Mr. Morita's position was other than being in the government by virtue of the email address symbol "SPK" and the context of the email (R4, tab 24 at JC02053).

their product data as well, but they would not go the extra mile and say that their Sched 40 Pipe product meets ASTM A795 Grade 1 only. The ASTM A795 Grade 1 is Sched 10 (same as ASTM A135) pipe material....

(R4, tab 24 at JC02053)

6. Jaynes re-submitted the Materials and Equipment submittal. Creech AFB received the re-submittal on 10 April 2012. The government review remarks for Item 4, Materials and Equipment, were, “[p]rovide further documentation that submitted sprinkler pipe meets the requirements of ASTM A795, such as nominal wall thickness, and specified outside diameter.” (R4, tab 16 at JC02007-08)<sup>6</sup>

7. In an email dated 3 May 2012 from ACO Caskie to Mr. Steve Zohner, Jaynes’ Project Manager (R4, tab 29 at JC02064), and others on the “Jaynes Team,” ACO Caskie wrote:

I understand that the disapproved Allied Sprinkler Pipe “Sched 40” arrived on site. As noted in the disapproved submittal data, this pipe shall not be used and is disapproved for use. It is not Sched 40 pipe. The Sched 40 on the pipe is Allied’s Trade Name. It is actually Sched 10 pipe by ASTM pipe material standards.

We have a big problem on this project with getting the level of field management that is required by contract. You all need to fix it or we will fix it for you.

(R4, tab 25) Mr. Zohner responded:

The pipe delivered to the site is Schedule 40. Allied Pipe makes a Schedule 40 “replacement” called Dynaflo that does not meet the ASTM requirements, but that is not the product delivered. The submittal for the product was “G” coded requesting to provide additional documentation of compliance with the ASTM for Schedule 40 pipe. We are compiling back-up supporting data to submit that confirms this and will provide as soon as possible. Southland has also offer [sic] onsite destructive testing to verify compliance with

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<sup>6</sup> Although the submittal documents in the record do not identify the pipe manufacturer, we infer that at this point the Allied pipe was still being proposed.

required nominal wall thickness and outside diameter of the pipe.

(R4, tab 26 at JC02056) ACO Caskie responded to Mr. Zohner:

The Allied Sched 40/Sched 10 pipe has been submitted several times before on other contracts and not approved. The only thing that can make it approved is Manufacturers [sic] pipe data that demonstrates full compliance with the requirements of ASTM A53 Sched 40 pipe (which can also be the same as ASTM A795 Sched 40 pipe[ ]). On-site self destruction has also been offered in the past and actually completed in the past, but was not allowable to demonstrate acceptable conformance.

Once again, the Sched 40 that you submitted to the site has been disapproved.

(R4, tab 26 at JC02056)

8. ACO Caskie wrote another email on 3 May 2012 to Mr. Zohner:

The pipe delivered to the site is identified as follows:  
“Allied Sched 40 ASTM A135/A795”.

This is the pipe that was disapproved for not being “real” Sched 40 pipe. The reference to Sched 40 on the pipe that is on the jobsite is their trade name.

Real Sched 40 pipe conforms to ASTM A53. ASTM A795 is a spec for “real” Sched 10 “real” Sched 40 (it has both types). ASTM A135 is Sched 10 only. The pipe that you have on site conforms [sic] to ASTM A135 (i.e. Sched 10) and ASTM A795 (also the Sched 10 weight).

You need to get the right pipe on site so that the project does not have any more stupid delays. This would be a real big stupid delay if you cannot get the correct pipe fabricated and delivered based on the disapproved submittal comments (two different submittals disapproved to date[]).

That pipe that is on the project site shall not be utilized on the FY09 Operations Facility contract. I need to know if you are

going to issue a directive to your subcontractor to get the correct pipe on the site before the end of the day. If you do not, then I will issue you a letter directing you accordingly. We have no time remaining on this contract to play games.

Please identify Jaynes' proposed way forward immediately.

(R4, tab 27 at JC02058)

9. On 4 May 2012, ACO Caskie wrote a letter to Jaynes reiterating what he said in his emails and further explained his position:

A review of the original Contract RFP Documents, Section 01 10 10-7.3.11.1, identifies that all above ground fire sprinkler piping shall be Schedule 40 steel piping. This would eliminate the possible use of ASTM A135 and certain types of ASTM A795 steel piping. The fire sprinkler piping that you currently have on site is "Allied Schedule 40 ASTM A135/A795". This is the pipe that was previously disapproved for not being "real" Schedule 40 pipe. The reference to Schedule 40 on the pipe that is on the jobsite is that manufacturer's trade name. Real Schedule 40 pipe conforms to ASTM A53 and certain types of ASTM A795 pipe. ASTM A795 is a specification for "real" Schedule 10 and "real" Schedule 40 (it has both types). ASTM A135 is Schedule 10 only. The pipe that you have on site conforms to ASTM A135 (i.e. Schedule 10) and ASTM A795 (also the Schedule 10 weight).

The Allied Schedule 40 ASTM A135/A795 fire sprinkler pipe that is currently on the project site shall not be utilized on the FY09 UAS D-B Operations Facility contract.

(R4, tab 28 at JC02060-61)

10. Jaynes replied to ACO Caskie by letter, also dated 4 May 2012, presenting its interpretation of the contract's requirements for sprinkler pipe:

In summation of your letter, you interpret that ASTM A135 is strictly for Schedule 10 pipe while ASTM A795 is for both Schedule 10 and Schedule 40 pipe. Therefore, a pipe manufactured to meet the requirements of both A135 and A795 could only possibly be Schedule 10.

The ASTM specifications A53, A135 and A795 do not define the size or schedule of piping, nor are they specific to a certain size of pipe. Pipe size is defined and governed by ASME B36.10M. The ASTM's only define manufacturing processes, chemical composition and properties of the materials used to manufacture the pipe as well as testing procedures to ensure compliance with the specifications.

(R4, tab 29 at JC02062) After further explanation of its interpretation, Jaynes sums up:

In summation, ASTM A135/A135M does not define or govern pipe size nor is it restricted to only Schedule 10 piping. The manufacturing processes defined therein apply to many sizes and classifications of pipe. The material delivered to the project is Schedule 40 pipe as defined by ASME B36.10M and is in compliance with ASTM's A135 and A795. The material is therefore compliant with all of the requirements of the RFP and specifications. I have included for your review a summary letter from Giulio Scartozzi, Metallurgy Manager from Allied Tube and Conduit which is in agreement with my analysis and conclusions. It should also be noted that Mr. Scartozzi is a committee member of ASTM 109.09 as well as the sponsor of the ASTM A135 Pipe Standard.

(R4, tab 29 at JC02063) Mr. Scartozzi's letter reads:

Allied has manufactured Fire Sprinkler Piping for over 40 years. We can assure you that the ASTM A135 standard encompasses not only schedule 10, but also schedule 40 pipe. ASTM A135, A795, and A53 are manufacturing standards. They do not designate pipe schedule. Pipe schedule is defined by ASME B 36.10M, and is referenced in all three standards.

ASTM A 135 therefore allows for not only schedule 10 piping but other pipe dimensions such as schedule 40 provided that such pipe complies with all other requirements of this specification.

(R4, tab 29 at JC02066)

11. Jaynes again resubmitted the Materials and Equipment submittal. Creech AFB received the re-submittal on 8 May 2012. Jaynes proposed a different pipe manufacturer – Wheatland Tube Company. The submittal was received at Creech AFB on 8 May 2012. (R4, tab 17) The government review remarks include, “Allied Tube has been rejected by USACE for use on this project. Submitted material is acceptable.” (*Id.* at JC02013) The submittal included manufacturer’s documentation from Wheatland for ASTM A 53 Schedule 40 sprinkler pipe (*id.* at JC02014-15). The Wheatland piping was again approved on 29 May 2012 (R4, tab 18).

12. On 8 May 2012 ACO Caskie responded to Jaynes’ 4 May 2012 letter stating:

Your 4 May 12 letter has been reviewed and it is not agreed with. Fire sprinkler piping shall be Schedule 40 Steel piping and shall comply with the published standards for same as identified in ASTM A 53 (Schedule 40) and ASTM A795 (Schedule 40), for outside diameter, nominal wall thickness, weight plain end, weight thread and couplings and test pressure. Note that these parameters are identical in both Standards as listed.

The Allied piping on site does not meet these listed standards and therefore shall not be used for this contract. In the event you disagree with the information above, you may submit your Claim in accordance with Contract Clause (FAR 52.233-1) “Disputes”.

(R4, tab 30)

13. By 9 May 2012 email to ACO Caskie, Mr. Zohner attached copies of documents from Allied’s website explaining that the Allied pipe was “consistent with ASME standards for Schedule 40 pipe” (R4, tab 31 at JC02068; *see* finding 4). He also included information from Bull Moose Tube Company that indicated compliance with ASTM A135 as well (*id.*). ACO Caskie responded on 11 May 2012 stating that “[t]o change my position, I really need something from Allied’s public website that links it to the Sched 40 ASTM A53, or the Sched 40 ASTM A795” (R4, tab 32).

14. On or about 22 May 2012, during a project meeting attended by ACO Caskie and others from the government, and by Mr. Zohner and others from Jaynes, appellant advised the government that it was preparing a revised submittal sheet to address the government’s concerns about the fire sprinkler pipe. However, the government again advised that the Allied pipe was not to be used. (Compl. ¶ 29, ex. 15 at 1-2; answer ¶ 29)

15. Jaynes submitted a certified CDA claim dated 20 June 2012 to the contracting officer in the amount of \$56,305.00 for its alleged costs pertaining to the ACO's rejection of the Allied pipe stating, "[p]lease refer to the below summary and attached back-up documentation for the cost of replacing the schedule 40 sprinkler piping for fire protection which was fabricated and delivered to the project, but was subsequently rejected and replaced" (app. supp. R4, tab 39 at JC02188). The COE failed to respond and Jaynes appealed to the Board based on a deemed denial. The Board received the appeal on 14 November 2012 and docketed it as ASBCA No. 58385. Jaynes elected accelerated procedure under Board Rule 12.3.

16. In support of its appeal, appellant has submitted the affidavits of Giulio Scartozzi, Allied's Metallurgy Manager, and Peter Pobjoy, Southland Industries' Chief Design Officer. Both state that the pipe submitted by appellant complied with ASTM A135 and A795. Mr. Scartozzi currently serves on the ASTM subcommittee that maintains the industry standards and specifications for steel fire sprinkler pipe (aff. ¶ 4). The government has not submitted any testimony.

## DECISION

### *Contentions of the Parties*

The government contends that the Allied pipe submitted for approval "was .01 [pound per foot] under both ASTM A135 and A795 [weight] standards" and therefore noncompliant with the contract requirements (gov't br. at 6, ¶¶ 19, 20, at 9-10). We are compelled to point out that nowhere in the contemporaneous record or the government's answer is this .01 pound per foot weight difference asserted as the reason for rejection of the Allied pipe. Indeed, the government's brief is strangely silent on what appears from the record to be the motivating force behind the rejection – that is ACO Caskie's opinion that the Allied pipe is not "real" Schedule 40 pipe and that the "Schedule 40" marking on the pipe is Allied's "trade name." (Findings 5, 7, 8, 9, 12)

Appellant contends that ASTM A135, A795 and A53 "only define manufacturing processes, chemical composition and properties of the materials used to manufacture the pipe as well as testing procedures to ensure compliance with the specifications" and "do not define the size or schedule of piping, nor are they specific to a certain size of pipe" (finding 10; app. br. at 9-11). Appellant asserts that rejection of the Allied pipe was improper for two reasons: "(1) the Government blindly ignored the contract specification that allowed for Schedule 40 pipe that conformed to the ASTM A135 standard and, (2) the Government misinterpreted the ASTM standards as they apply in the industry to fire sprinkler piping" (app. br. at 14). We agree with appellant.

## *Contract Provisions*

There are two<sup>7</sup> contract provisions at play here. First is the requirement for Schedule 40 steel pipe (finding 1). The term “schedule” refers to tables of wall thicknesses for various nominal pipe sizes (finding 3). Second is the requirement that the steel pipe “shall conform to applicable provisions of ASTM A 795/A 795M, ASTM A 53/A 53M, or ASTM A 135/A 135M” (finding 2). We interpret the use of “or” as a conjunction that indicates each of the three listed ASTMs are alternatives, any one of which may apply if “applicable.” Therefore, we conclude that the only reasonable interpretation of these two provisions is that Schedule 40 steel pipe must be used and it must conform to either ASTM A 795/A 795M, ASTM A 53/A 53M, or ASTM A 135/A 135M.

## *ASTM A135*

The contemporaneous dispute between the parties illustrated in the record may be narrowed to a disagreement over the proper interpretation of ASTM A135 and if it is limited to Schedule 10 steel pipe or not (findings 5, 8, 9, 10, 12, 13). ACO Caskie believed that “[r]eal Sched 40 pipe has to conform to ASTM A53 or ASTM A795 Grade 2. The Allied stuff conforms to ASTM A135, which is a Sched 10 pipe from an ASTM material stand point.”<sup>8</sup> (Finding 5) The record includes copies of the three ASTMs (finding 3). ASTM A135 states that it “covers two grades of electric-resistance-welded steel pipe in NPS 2 to NPS 30 inclusive, with nominal (average) wall thickness up to 0.500 in. (12.70 mm), inclusive, and in nominal sizes 3/4 to 5 in. (19 to 127 mm) inclusive with nominal (average) wall thickness 0.083 in. (2.11 mm) to 0.134 in. (3.40 mm), depending on size” (finding 3). However it also states, “[p]ipe having other dimensions (Note 1) may be furnished provided such pipe complies with all other requirements of this specification” (*id.*). Note 1 refers to ANSI B36.10 that contains tables listing numerous pipe wall thicknesses including Schedule 40 for various NPS’s (*id.*). Our reading of ASTM A135 aligns with that of appellant (finding 10). The government does not dispute that 2-inch pipe was used and ASTM A135 applies to 2-inch pipe (finding 3). ASTM A135 also applies to wall thicknesses up to 0.5 (*id.*). There is a “catch all” clause, “[p]ipe having other dimensions (Note 1) may be furnished” (*id.*). This means that ASTM A135 is not limited to Schedule 10 pipe and that it relates to all pipe (NPS’ and schedules) identified in ANSI B36.10, including Schedule 40 (app. supp. R4, tab 46 at JC02246). The record establishes that the government dismissed appellant’s explanation of the proper interpretation of ASTM A135 without any principled analysis of its own (findings 10, 12, 13). Appellant submitted un rebutted affidavits in support of its appeal from Giulio Scartozzi, Allied’s Metallurgy Manager,

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<sup>7</sup> Other requirements such as “NFPA 13,” “UL” and “FM” are not involved in the dispute (finding 2).

<sup>8</sup> ACO Caskie thus admits that the Allied pipe “conforms to ASTM A135.”

and Peter Pobjoy, Southland Industries' Chief Design Officer, each stating that the Allied pipe complied with ASTM A135 and A795 (finding 16). ACO Caskie's interpretation of ASTM A135 was wrong and the government had no factual basis to reject Allied's pipe.

*Weight/Wall Thickness/Data*

The government raised the weight issue for the first time in its brief. The government points to Allied's data that indicates "the weight per foot for its 2" Schedule 40 pipe was 3.65" (gov't br. at 5, ¶ 19; R4, tab 31 at JC02070). It then points out that ASTM A135 (Note 1) and ASTM A795 require that 2" Schedule 40 pipe "have a weight per foot of 3.66" (gov't br. at 6, ¶ 19). It concludes, "[a]ccordingly, the Allied pipe was .01 under both ASTM A135 and A795 standards" (*id.*).

The government, however, as aptly pointed out by appellant in its reply brief, totally neglected to account for the "Permissible Variations" allowed in ASTM A135 and ASTM A795. ASTM A135 allows a variation of 3.5% under and 10% over (finding 3). Three and one half percent (3.5%) of 3.66 pounds per foot (.035 x 3.66) is .1281 pounds per foot resulting in an authorized underweight of 3.5319 pounds per foot. The Allied pipe weight of 3.65 pounds per foot was therefore within the authorized variance. The same would be true for ASTM A795 where the authorized variance is plus or minus 5% (*id.*). Allied's pipe conformed to the applicable weight specifications.

The government's wall thickness argument is based on speculation that if the weight was wrong so must the wall thickness be wrong (gov't br. at 6, ¶ 20). Since the weight was within tolerance, the government's wall thickness argument fails.

Finally, the government's argument that appellant failed to provide data illustrating that the Allied pipe was "real" Schedule 40 pipe is not supported by the record. Appellant not only submitted manufacturer's information (findings 4, 5, 13), but submitted a correct explanation of why its pipe satisfied the specifications (findings 7, 10; *see also* finding 17). The government's newly minted justification for its rejection of the Allied pipe fails.

The government changed the contract when it rejected appellant's initial pipe submittal. Appellant is entitled to recover its costs associated with the change, plus CDA interest on that amount from the date of receipt of the claim by the contracting officer.

CONCLUSION

For the reasons stated above the appeal is sustained. The matter is remanded to the parties to determine quantum.

Dated: 7 May 2013



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CRAIG S. CLARKE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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CHERYL L. SCOTT  
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 No. 58385, Appeal of Jaynes Corporation, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals