Appeal of: FRANKLIN PAVKOV CONSTRUCTION COMPANY, INC., Appellant.

Contract Nos. C429P1AA001, C429P1AA002

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DECISION BY ADMINISTRATIVE JUDGE JEAN S.COOPER

Statement of the Case

On October 19, 1991, the United States Department of Housing and Urban Development ("HUD," "Department," or "Government") awarded Franklin Pavkov Construction Company ("Appellant") HUD Contract Nos. C429P1AA001 and C429P1AA002 for construction of attic wall separations, designated in the contracts as draftstops, and replacement of the roofs at Sabal Palms Apartments, in Fort Myers, Florida.

On May 27, 1992, Appellant filed claims totaling $429,348.85 with the contracting officer, based upon alleged differing site conditions, constructive changes, variations of estimated quantities, delay, acceleration, and failure to make progress payments to Appellant. Pursuant to Section 6 of the Contract Disputes Act of 1978 ("Act"), 41 U.S.C. § 605(c)(1), Appellant certified the claim on July 7, 1992.

The contracting officer did not issue a final written decision regarding Appellant's claims within 60 days of their certification, and, pursuant to Section 6 of the Act, 41 U.S.C. § 605(c)(5), the failure of the contracting officer to issue a written decision within sixty days is deemed a denial of the claims by the contracting officer. Such a denial authorizes an appeal of the claims to this Board. Appellant requested an appeal of the claims arising under these contracts by letter dated September 24, 1992.

On December 8, 1992, the contracting officer issued a final decision on Appellant's claims. The contracting officer approved claims in the amount of $33,215.86. All other claims were denied.

The claims are based, in large part, upon extensive deteriorated roof sheathing, penetrations by electrical conduits, vents and cables into the locations where the attic wall separations were to be constructed, and the fact that roof trusses were not located directly over party walls, making it necessary to use a method of constructing the attic wall separations other than the one Appellant had planned on. Appellant characterized these physical conditions as differing site conditions, variations in estimated quantities, defective specifications, and constructive changes. In addition, Appellant claims constructive acceleration and Government-caused delay. Appellant also seeks interest on the claims, claim preparation costs, and impact of lost revenues. This decision is limited to entitlement.

Findings of Fact

I. Bidding and Site Inspection

Sabal Palms I and Sabal Palms II ("Sabal Palms") comprise a 200 unit HUD-subsidized apartment complex of ten buildings in Fort Myers, Florida. In August, 1991, HUD became the mortgagee-in-possession of Sabal Palms. (Tr. 699, 727). Martha Littlefield ("Littlefield"), a HUD contracting officer, inspected the site in late August, 1991, and noted severe roof deterioration, including substantial exposed rotted sheathing. (Tr. 729). Because water was leaking into certain units, immediate, temporary repair was ordered, and the roofs were covered with tar paper and visquene, a heavy, transparent plastic. (Tr. 701-2, 730). Littlefield determined that the condition of the roofs posed an emergency situation, and that an Invitation for Bids ("IFB") for replacement of the roofs should be issued as soon as possible. (Tr. 700, 729). HUD had commissioned a study regarding the overall condition of Sabal Palms, but it would not be completed until sometime in late September, 1991. HUD decided not to wait to find out the precise amount and location of rotted roof sheathing, trusses, and roof framing that would need to be removed and replaced because the situation was so dire. The IFB would be issued without the amount of rotted sheathing, trusses, or roof framing indicated on either the drawings or in the specifications, because of its emergency nature. (Tr. 730, 897).

On September 3, 1991, two essentially identical IFBs for Sabal Palms I and Sabal Palms II were issued by HUD for replacement of the roofs, including removal and replacement of rotted or damaged sheathing, trusses and roof framing, and for the construction of attic wall separations identified as draftstops. The IFBs, the contracts at sections 1.04 and 2.00, and FAR 52.236- 3 required the contractor to inspect the site, and to base its bid on what it observed during the site inspection. (AF, Tab 2.1). Bidders would have access to the attics and roof interiors of the buildings through crawl spaces, and the apartment manager would be available to discuss the condition of the roofs with bidders. (Tr. 51, 698). The condition of the sheathing was apparent upon an interior site inspection of the roofs, as were other physical conditions that bidders would need to take into consideration, including the location of roof trusses, party walls, and penetrations through the attic walls by pipes and other conduits. (Tr. 888-92).

The bid package and both contracts contained drawings of attic wall separations, labeled draftstops, which indicated that there were two methods of construction which could be used, either "as drawn" or by "construct[ing] stud wall if exist[ing] trusses not located on party walls." The drawings did not indicate whether existing trusses were located on party walls, but the alternative method of construction detailed how the attic wall separations were to be constructed if the trusses were not located on party walls. (AF, Tab 2.2, at 7). The drawings also indicated that 5/8" X-rated gypsum board was to be used, a material which is commonly used for fire-rated walls, because it provides protection against fire. Penetrations were to be taped and bedded, which is consistent with a draftstop only, not a fire-rated wall. A fire-rated wall would require firecaulking around penetrations. (Tr. 867-68; Exh. G-1 at 8). The locations of penetrations were not indicated on the drawings of the attic wall separations, but the presence of penetrations was referred to in the contracts and the drawings.

Appellant is a family-owned small business located in Ohio. It is an experienced government contractor. Frank Pavkov**,** who calculated the bids for Appellant, decided to bid on both IFBs. Appellant planned to perform the contract in 30 days using its own work force which it would transport to Florida and house there, even though the contract performance time was 60 days (AF Tab 2.1, at 1), and Florida labor rates were less than those Appellant paid. (Tr. 216). Appellant was not a licensed Florida contractor, but it planned to obtain whatever licenses and permits were necessary, and to use a licensed Florida contractor on site. (Tr. 771).

Frank Pavkov relied on his brother, Vince Pavkov**,** to inform him about any unusual conditions that he had observed at Sabal Palms in August, 1991, prior to the issuance of the IFBs. At that time, Vince Pavkov had observed that the roofs were covered with tar paper and visquene. (Tr. 451-2, 938). Based upon looking up at the roofs from the

ground level only, and making no other inquiries, Vince Pavkov concluded that there was nothing unusual about the roofs at Sabal Palms. (Tr. 89, 452-3, 937-8). He made no subsequent inquiries or visits to the site after the IFBs were issued to perform a site inspection consistent with the work required by the IFBs. Vince Pavkov informed Frank Pavkov that he had not seen anything unusual about the roofs. (Tr. 937-8). There is no evidence that anyone from Appellant ever performed an actual site inspection based upon the work required in the IFBs.

Frank Pavkov did not factor sheathing removal and replacement into Appellant's bid, except for replacement around cut-ins to construct the attic wall separations, for which he bid a quantity of 200 square feet for "roof sheathing replacement," at a cost of $1 per square foot for each contract. (AF, Tab 2.1, at 3). He concluded that there was no rotted sheathing needing removal and replacement because there were no specific indications on the drawings where rotted sheathing would be located, and because Vince Pavkov had made no mention of rotted sheathing. (Tr. 907, 935). In fact, there was a substantial volume of rotted sheathing requiring removal and replacement. The contract had a separate line item for additional sheathing replacement work that might become necessary. Appellant bid $1 per square foot for replacement of additional sheathing. (AF, Tab 2.1).

The Work Schedule, at Item 06100.01 in each contract, stated "Replace damaged or deteriorated sheathing, trusses or roof framing per section 06100 of specifications." (AF, Tab 2.2 at 2). The specifications at 06100 stated "Remove and replace damaged/deteriorated roof sheathing, trusses and roof framing as indicated on drawings and as specified herein" (Emphasis added). (AF Tab 2.2 at 17). The fact that a substantial amount of rotted sheathing needing replacement would have been discovered by a visual site inspection.

While formulating Appellant's bid, Frank Pavkov called Carol Strayer ("Strayer"), the HUD contact person, to request clarification regarding the absence of estimated quantities in the bid package. Strayer told him to bid "as he saw it." (Tr. 902). Frank Pavkov did not seek clarification of the drawings of the attic wall separations because they clearly depicted draftstops to him. (Tr. 900, 910).

Appellant based its bid for the attic wall separation construction overwhelmingly on the simpler of the two methods provided in the contract. That method could only be used where trusses were located over party walls. The trusses were not, in fact, located over party walls, which meant that it was necessary to use the alternate method of construction indicated in the drawings. Appellant calculated that it would only need to use the more difficult alternate method for twelve of the attic wall separations. In calculating its bid, Appellant also did not allow for difficulties that might be caused by penetrations from pipes and vents, because the actual locations of the penetrations were not shown on the drawings. There were a number of penetrations of this nature, which was typical. The amount of rotted sheathing, the location of roof trusses, and the locations and types of penetrations would all have been apparent had Appellant performed a site inspection of the attic interiors. (Tr. 888-90).

The contracting officer was aware that it would be necessary to remove and replace a substantial amount of rotted sheathing. She did not verify Appellant's bid of removal and replacement of only 200 square feet of sheathing per contract because the contracts contained a clause to adjust the quantity of work based on quoted line-item bids. (Tr. 710-1, 747-8, 761-2, 764). Appellant's line item bid price of $1 per square foot for extra removal and replacement of sheathing was a common price for such work in large volume on construction jobs in the area. In addition, the price was also competitive with the other bidder on the contracts, who bid approximately 2,000 square feet for replacement of rotted sheathing at $1.05 per square foot. (Tr. 349, 859, 862).

II. Contract Award and Performance Preparation

On October 19, 1991, HUD awarded to Appellant Contract Nos. C429P1AA001 and C429P1AA002 to replace the roofs and to install attic wall separations in Sabal Palms.

Section 2.00 of the contracts required the contractor to certify that he had inspected the site and had correlated his observations with the requirements of the contract documents. (AF, Tab 2.1, § 1.04, FAR 52.236-3).
The contracting officer in charge of these contracts was Littlefield. (AF, Tab 2.1; Tr. 697). The government technical representative was Strayer. (AF, Tab 2.1; Tr. 698). The contracts, at section 2.11, contained the following provision:
The Contractor shall contact the Contracting Officer if any problems, questions, or complications arise that will alter the scope of work or the dollar amount agreed upon in the Contract. All changes, regardless of nature, will be submitted and handled in writing to the Contracting Officer. All work performed by the Contractor not covered on the Contract, and not covered by a Change Order approved by the Contracting Officer, will not be honored. (AF, Tab 2.1, § 2.11).
Under the terms of the contracts, Appellant was responsible for ensuring compliance with any Federal, state, and municipal laws, codes, and regulations. (FAR 52.236-7, AF, Tab 2.1, §§ 1.12(e) and (f), and 2.02). Furthermore, under section 2.02 of the contracts, Appellant was responsible for furnishing and posting all licenses, permits, and inspections required by state or local laws. (AF, Tab 2.1). Appellant did little or nothing to ensure compliance with state and local codes and requirements. It never showed the contract to the Fort Myers Building Department, and only did superficial verification of any permits and licenses that would be needed. At no time before arriving in Florida to begin performance did Appellant send any of its representatives to meet with local officials in person to determine whether there were any local code problems presented by the contracts. (Tr. 481).
Appellant had Philip Schwartz ("Schwartz") off Maranatha Roofing, a local licensed roofing contractor and one who would perform some work on the contract, obtain the required permits. (Tr. 106, 771, 798). Schwartz only obtained roofing permits for the work at Sabal Palms. Roofing permits were insufficient to cover the attic wall separation construction, for which a building permit was required. (Tr. 621, 624). It is unclear whether Appellant failed to accurately describe the scope of the contract work to Schwartz or whether Schwartz was unable to obtain a building permit. In any event, Appellant did not ensure compliance with either local codes and regulations, or obtain all of the necessary licenses and permits required by state and local laws.
Vince Pavkov was to be the on-site project manager for Appellant; Frank and Mark Pavkov remained in Appellant's Ohio office, and were responsible for contract administration. (Tr. 98, 100). On November 14, 1991, Vince Pavkov and Appellant's work force arrived at the site. (Tr. 107). Due to the fact that a notice to proceed was not received until the afternoon of November 14, work began the next day. (Tr. 109, 816; SAF, Tab 1, daily reports dated Nov. 14, 1991).

III. Contract Performance

On the morning of November 15, 1991, Appellant, while starting to perform the contracts, uncovered substantial amounts of rotted sheathing. Appellant considered this a differing site condition because it did not anticipate that it would encounter rotted sheathing. (Tr. 113, 135, 774; SAF, Tab 1, daily report dated Nov. 15, 1991). Appellant also discovered two other factors which it considered to be differing site conditions, both of which related to installation of the attic wall separations. (Tr. 113, 135, 813). First, it found penetrations by duct work, piping, telephone wires, and electrical conduits in the building attics. (Tr. 129, 132, 133). Second, it discovered that the roof trusses were not centered on existing concrete party walls. It also found top cord deterioration in the roof framing. (Tr. 132, 136, 155, 469-70).
Vince Pavkov immediately notified Strayer of the condition of the roof sheathing and the location of the trusses in relation to the party walls. (Tr. 113, 120-1, 201, 467, 469; SAF, Tab 1, daily report dated Nov. 15, 1991). Strayer was primarily concerned with the extent of the sheathing problem, and directed a HUD fee inspector, Phil Warren ("Warren"), to view the site to verify the extent of the sheathing problem. (Tr. 121,

122). On the afternoon of November 15, 1991, Warren examined the site. (Tr. 123, 125, 150; SAF, Tab. 1, back of daily report dated Nov. 15, 1991).

Vince Pavkov discussed with Warren alternate methods for performance that were at variance with the contract specifications and drawings, and their discussion covered more than the extent of rotted sheathing, which was the sole purpose of Warren's visit to the site. (Inspection report, SAF, Tab 3, at 5; Tr. 126, 130, 154, 156, 171-2, 177-8, 475, 696). Warren was confused about the limits of his authority as a fee inspector, and somehow believed he could orally approve Appellant's suggested contract changes. (Tr. 174-5, 177, 181, 184, 190). Vince Pavkov wanted to put new sheathing on top of the rotted sheathing, rather than remove and replace the rotted sheathing as required by the contracts. He also wanted to construct attic wall separations in a way that would not serve the function of a draftstop because no bottom would be constructed. (Tr. 688-9). Warren told Vince Pavkov that he concurred with and approved his proposed solutions concerning both the rotted sheathing and construction of the attic wall separations. Warren did not see the contracts or the specifications, and was apparently unaware of their requirements for removal and replacement of rotted sheathing and for the two methods for constructing the attic wall separations when he concurred with Vince Pavkov's plan to deviate from the contracts. (Tr. 180, 190).

Vince Pavkov knew that Warren was just being used as an interim inspector, and that he was not the inspector assigned permanently to the contract. (Tr. 123, 777; AF, Tab 3.23, at 1; SAF, Tab 1, daily report dated Nov. 15, 1991). Nonetheless, Vince Pavkov chose to treat Warren's concurrence with his suggested contract changes as an oral change order. Vince Pavkov did this based upon statements allegedly made by Aldrich Leinhase ("Leinhase"), a HUD official whom Vince Pavkov met at a pre-construction meeting on November 12, 1991. Leinhase, although designated a contracting officer, was not the contracting officer for the contracts at issue. (Tr. 693, 734). Because Leinhase allegedly stated there would be an on-site HUD representative with authority to direct changes, Vince Pavkov relied on Warren's authority to approve changes in the method of installing the attic wall separations and in dealing with the rotted sheathing. (Tr. 480). There was no corroboration in the record for the statements attributed to Leinhase.

The contracts contained FAR 52.246-12, Inspection of Construction. That clause states: 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 Contracting Officer's written authorization. (AF, Tab 2.1, FAR 52.246-12(d)).

Also, section 1.08(d) of the contracts states: Notice is given that any deviation from, or change in work required to be done by these specifications must be authorized in writing by the Contracting Officer prior to performance. The Government will not make payment of any unauthorized work. (AF, Tab 2.1, § 1.08(d)).

Without seeking authorization from the contracting officer, Vince Pavkov immediately began installing the attic wall separations and performing roofing work in the manner he had discussed with Warren. (Tr. 128). Appellant did not notify Littlefield regarding the changes it had made in the construction of the attic wall separations, and Littlefield did not know of, or approve these changes. Appellant completed three attic wall separations on November 15, 1991, none of which complied with the contract drawings. (SAF, Tab 1, back of daily report dated Nov. 15, 1991).

On November 15, 1991, at approximately 2 p.m., Vince Pavkov informed Strayer that he had exceeded 115% of the estimated bid quantities of sheathing. (Tr. 140, 201, 209, 470; back of daily report dated Nov. 15, 1991). During that conversation, and on November 16, 1991, Strayer rejected Vince Pavkov's suggestion to change the contract by allowing the overlayment of the rotted sheathing with new sheathing. She directed him to proceed with roof demolition by doing a complete "tear-off" and substrate repair, because the contracts required that damaged sheathing be removed and replaced. (Tr. 199, 474, 476, 646, 649; SAF, Tab. 1, daily report Nov. 16, 1991).

The contracts contained the following provision:

In the event the quantity of repair is greater than the Government's estimate, the additional work shall be accomplished pursuant to the change clause FAR 52.243-05, and the equitable adjustment shall be negotiated based on the quoted break-down of costs required in Section 1.02. (AF, Tab 2.1, § 1.08(f)).

On November 18, 1991, Appellant sought a negotiated price increase and a time extension based on the fact that the roofs would require considerably more sheathing than Appellant had anticipated when it bid on the contracts. (SAF, Tab 1, daily report dated Nov. 18, 1991; Tr. 749-50, 903). Appellant was orally notified that neither request would be granted. (Tr. 212, 214, 747-8, 752; SAF, Tab 1, daily report dated Nov. 19, 1991).

On November 18, 1991, Vernon Frye ("Frye"), an inspector from the Fort Myers Building Department, visited the site for the first time, but he performed no inspections. (Exh. G-1 at 43). Frye did not discuss any problems regarding the attic wall separations with Vince Pavkov on that date. (Tr. 211-2). In fact, neither Frye nor anyone else from the Fort Myers Building Department actually performed any inspections at Sabal Palms until after December 6, 1991. (Exh. G-1 at 43).

On November 20, 1991, Ann Preston ("Preston"), the fee inspector hired by HUD to be the inspector for the two contracts, visited the site for the first time as inspector. (Tr. 222, 230; SAF, Tab 1, daily report dated Nov. 21, 1991). Preston inspected the ongoing work and reported no problems regarding the attic wall separations to Vince Pavkov at that time. (Tr. 231, 236). Preston admits that it is possible that she had not reviewed the contract drawings or specifications when she made her first inspection on November 20, 1991. (Tr. 361-2, 367). However, after studying the drawings and specifications, she concluded that the draftstops were, in fact, fire-rated walls, and as such, would need to be firecaulked at penetrations to be in compliance with local building codes. (Tr. 378).

On November 26, 1991, Preston informed Vince Pavkov that firecaulking of penetrations was required by local codes, and that a permit for the attic wall separations construction was required. She directed Appellant to install firecaulk at the penetrations in the newly constructed attic wall separations. (Tr. 247; SAF, Tab 1, daily report dated Nov. 26, 1991). However, Appellant did not comply with Preston's directive to install firecaulk. Preston's directive would have changed the method of performance required by the contracts, which required Appellant to tape and bed penetrations, not firecaulk them. (AF Tab 2.2 at 7, Detail #02).

On November 27, 1991, Appellant submitted an unsigned written request for a change order to the contracting officer. It sought a quantity increase from the bid estimate of 200 square feet of sheathing to 40,000 square feet at an additional $0.82 per square foot, and a time increase of 60 days to complete the contracts. (AF, Tab 2.5 at 1-2).

At approximately 5 p.m. on November 27, 1991, the Fort Myers Building Department shut down work on the project for failure to have the required building permits for the attic wall separation construction. (AF, Tab 3.7, at 2; Tr. 251; SAF Tab 1, daily report dated Nov. 27, 1991).

On December 2, 1991, Vince Pavkov, at his request, met with Preston and representatives from the Fort Myers Building Department. (Tr. 257-8). The meeting was about the type of permits and licenses needed. It was also about whether the attic wall separations required by the contracts were draftstops or fire walls. The Fort Myers Building Code did not require fire walls to be installed at Sabal Palms. The head of the Fort Myers Building Department, James Jackson ("Jackson"), stated that because the contract specifications called for fire-rated qypsum board, the attic wall separations were fire walls requiring firecaulk. (Exh. G-1 at 8; SAF, Tab 2, at 1). The contract drawings and specifications required taping and bedding of penetrations, which is inconsistent with a fire wall. Jackson directed Appellant to obtain a Florida A or B (contracting) license, and to submit new drawings, indicating the locations of penetrations and firecaulk, for a one-hour fire wall. (Exh. G-1 at 3, 22, 31). That same day, Appellant resumed roofing work that did not involve the attic wall separations. (Tr. 264; SAF Tab 1, daily report dated Dec. 2, 1991).

Appellant had convinced Jackson, who in turn convinced Littlefield, that the contract drawing detail setting out the two methods for installing the wall separations needed revision. Firecaulking of all penetrations was being required by Jackson, in any event, because he considered the attic wall separations shown in the contract drawings to be fire walls, not draftstops. Inasmuch as a contract change would be needed to provide for firecaulking rather than taping and bedding, Jackson convinced Littlefield that she should allow Appellant to construct the fire walls by attaching them to the nearest roof truss. The fire walls would not be perpendicular, but slanted, by this method of performance. However, they would still accomplish the purpose of a fire wall. Jackson pointed out to Littlefield that the work done by Appellant to date did not accomplish the purpose of either a fire wall or a draftstop. (Tr. 680-3).

On December 5, 1991, Appellant submitted an unsigned request for a change order seeking an increase in the contract sum by $44,800 for additional unforeseen work resulting from the presence of "extensive cond[u]it and HVAC ducts at fire walls creating a nearly impossible condition to install draftstopping framing." Appellant also sought a 60 day time extension. (AF, Tab 2.5 at 3; SAF, Tab 4 at 3). On that same day and on December 6, 1991, Appellant submitted four additional requests for change orders for ridge vents, additional substrate, removal of flat roofing, and upgrading the attic wall separations from draftstops to firestops. (SAF, Tab 4). These requests, along with the November 27, 1991 request, were returned, by letter dated January 7, 1992, to Appellant because the requests did not contain the required breakdown of costs, the requests did not clearly describe the work to be done, and the requests were unsigned. (AF, Tab 3.29).

On December 6, 1991, Vince Pavkov faxed a drawing detail of the wall separations, created by him and Schwartz, with the architectural advice of Warren, to the HUD Jacksonville office. (Tr. 409-10; SAF, Tab 1, daily report dated Dec. 6, 1991). Littlefield approved Appellant's proposed modification of the attic wall separations, now called fire walls, on December 10, 1991. (AF, Tab 2.4; Tr. 685, 708). On December 13, Appellant received notice of HUD's approval of the fire wall drawing submitted December 6, 1991. (Tr. 420). Appellant then obtained the required building permits for installing the fire walls through Robert Petrow, a licensed Florida contractor, and resumed work on the attic wall separations. (Tr. 421; SAF, Tab 1, daily report dated Dec. 13, 1991).

Appellant had closed up approximately 60 attic wall separations, pursuant to contract section 1.18, which required Appellant to leave all buildings watertight at the end of each day, and not to remove any more roofing and decking than could be replaced in that same day. Appellant had to cut through the completed roofs to install the firecaulk and to have the work inspected and approved. (Tr. 421). The work had not been inspected and approved by the city of Fort Myers prior to being covered over. Appellant was aware that it had the contractual obligation to make work available for all required inspections, and this would entail cutting into completed work. (Exh. G-1 at 47; FAR 52.246- 12). Closing the roofs a second time after inspection would entail re-shingling the roofs.

Appellant sent its workforce home to Ohio prior to Christmas because it had not arranged for housing for the workforce after December 20, 1991. Most of Appellant's workforce did not return to Fort Myers, and Appellant hired local labor and contractors to complete the contracts. Work did not resume until January 7, 1992. (SAF, Tab 1, Contractor's Daily Reports Jan. 7, 1992 and following). The contracts were completed on time. On January 16, 1992, Preston indicated that all construction was completed, and released Appellant from the site. (Tr. 339; SAF, Tab 1, daily report dated Jan. 12-16, 1992)).

Building F in Sabal Palms II was infested with bats, and the contracting officer modified the contract so that Appellant was not required to reroof or to construct attic wall separations in Building F. John Leshor ("Leshor"), another contractor, subsequently constructed the attic wall separations and reroofed Building F. With the single change of firecaulk from taping and bedding, Leshor was able to construct the attic wall separations according to the original contract drawings and specifications, without

making the design changes that Appellant claimed were necessary, and that were the basis for the contract change approved by Littlefield on December 10, 1991. (Tr. 629-30, 637- 8).

Discussion

Appellant contends that it is entitled to equitable adjustments for differing site conditions, changes, ambiguous and defective specifications, variations of estimated quantities, and a failure of the contracting officer to verify an apparent mistake in bid. Appellant also claims an adjustment for Government-caused delay and acceleration. Appellant additionally requests interest on its claims, the cost of claim preparation, and the impact of lost revenue. Appellant has the burden of proof and must demonstrate by a preponderance of the evidence that it is entitled to be paid for its various claim items. Match Institution, HUDBCA No. 87-1850-C2, 88-1 BCA ¶ 20,291.

I. Differing Site Conditions, Superior Knowledge, and Variations in Estimated Quantity

Appellant claims that it encountered differing site conditions with regard to the extent of rotted roof sheathing, the presence of attic penetrations, and the location of the roof trusses in relation to party walls. As collateral issues, Appellant claims that the Government had superior knowledge of those conditions, which it did not share with Appellant, and that there was a compensable variation in estimated quantity of the roof sheathing needing replacement. Appellant further contends that the contracting officer effectively admitted that a differing site condition had been encountered when she directed Appellant to proceed with the removal and replacement of all rotted sheathing. The Government argues that no differing site condition existed with regard to all three of Appellant's claims because the conditions discovered do not meet the requirements for a differing site condition. The Government further states that the contracting officer never admitted, constructively or otherwise, that a differing site condition existed.
Pursuant to FAR 52.236-2, a contractor may receive an equitable adjustment when a contractor discovers and notifies the contracting officer of:
. . . (1) subsurface or latent physical conditions at the site which differ materially from those indicated in th[e] contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. (FAR 52.236-2(a)).
Appellant is, in effect, arguing that the location of the roof trusses, the extent of the rotted roof sheathing, and the location and number of penetrations were "latent physical conditions at the site which differ materially from those indicated in the contract," a "Type I" differing site condition, but it is also arguing that those same conditions were "unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract," a "Type II" differing site condition.
For a Type I differing site condition, the contract must, by express statement or lack thereof, lead a contractor to rely on the existence of conditions different than those discovered later, and those conditions must not be patent or discoverable by a reasonable site inspection. Sanders Constr. Co. v. United States, 270 Ct. Cl. 639, 618 F.2d 121 (1979). The evidence here does not demonstrate the existence of a Type I differing site condition. First, there were no site conditions specifically indicated in the contract. The Government made no express statements of conditions that would be encountered, and provided no inaccurate information as to any of the conditions characterized by Appellant as differing site conditions. Generally, such lack of specificity will operate against a claim for a Type I differing site condition. Wm. A. Smith Contracting Co. v. United States, 188 Ct. Cl. 1062, 412 F.2d 1325 (1969). Moreover,

Appellant's contracts made reference to the need to remove rotted sheathing, the need to tape and bed penetrations, and the need to choose among two different methods of constructing the attic wall separations, depending on whether the roof trusses were located over party walls or not. If anything, the contract alerted all bidders to the possible existence of each of these conditions.

Second, the conditions cited by Appellant were neither subsurface nor latent, which are required elements of a Type I differing site condition. All were patently obvious upon a reasonable site inspection of the attic interiors. In Mojave Enters. v. United States, 3 Ct. Cl. 353 (1983), the Claims Court held that a Type I differing site condition must be "reasonably unforseeable on the basis of all of the information available to the contractor at the time of bidding." What can be discovered by the contractor in performing a reasonable pre-bid site investigation is information available to the contractor at the time of bidding. See also Aguirre Assoc., AGBCA No. 78-129, 80-2 BCA ¶ 14,648; C & S Carpentry Services, Inc., ASBCA No. 43865, 94-2 BCA ¶ 26,704. Appellant had no basis to assume that there were no attic penetrations, no rotted sheathing, and no roof trusses not located over party walls simply because the contracts and drawings did not specifically identify the number, location and dimensions of each of these conditions. Such absence of information, in this case, was not a "contract indication" that Appellant would not encounter these conditions. Aguirre Assoc., supra. Indeed, the fact that the IFBs for Sabal Palms I and Sabal Palms II provided no exact or estimated amounts or measurements for any of the contract performance tasks, but left those amounts to be inserted by the bidder, made it impossible for any condition discoverable by a reasonable site investigation to be characterized as a Type I differing site condition. The only Type I differing site condition for which Appellant would be entitled to an equitable adjustment would be one truly subsurface or latent. No condition is latent that could be discovered by a reasonable site investigation. None of the conditions so claimed meet this test.

A Type II differing site condition, must be an "unknown" or "unusual" condition not discoverable by a reasonable site investigation. Continental Flooring Co., VABCA No. 2065, 85-2 BCA ¶ 18,130. The reasonableness of an investigation is determined by what a reasonable, intelligent, experienced contractor could be expected to discover. Townsco Contracting Co., ASBCA No, 39924, 94-2 BCA ¶ 26,707. When no conditions are indicated in the contracting documents, as in this case, a more detailed investigation may be required. S.T.G. Construction Co. v. United States, 157 Ct. Cl. 409 (1962). A contractor who fails to perform an adequate site investigation runs the risk of a Type II condition which could have been discovered by a reasonable site inspection. Continental Flooring Co., supra.

Appellant was required under both the terms of the IFBs and the contracts at issue to conduct a site investigation. The Government had provided access to the attic spaces, which allowed bidders to determine the extent of the rotted sheathing from an examination of the attics and interiors of the roofs. Furthermore, the property manager was available to discuss with any prospective bidders what she knew of the condition of the roofs. Appellant did not conduct any site inspection at all for purposes of bidding on these contracts. The IFBs had not even been issued at the time when Vince Pavkov went to Sabal Palms and looked up at the buildings from ground level.

Appellant failed to perform a site inspection as was contemplated in and required by the bid documents and the contracts. Had Appellant properly inspected the site, the fact that a vast quantity of sheathing was rotted, requiring removal and replacement, would have been readily apparent. This is also true for the presence of penetrations in the attic space where the attic wall separations were to be built, and for the location of roof trusses, which were not located over party walls, making a more complicated method of construction necessary. Therefore, the quantity of rotted sheathing requiring removal and replacement, the presence of attic penetrations, and the location of roof trusses are not the type of conditions which can be defined as Type I or Type II differing site conditions. Mojave Enters. v. United States, supra; Continental Flooring Co., supra. Appellant's failure to conduct a reasonable site inspection also precludes a finding of

superior knowledge on the part of the Government which would give rise to an equitable adjustment of the contract price. ECOS Management Criteria, Inc., VABCA No. 2058, 86-2 BCA ¶ 18,885; Penn Environmental Control, Inc., VABCA No. 3726, 94-2 BCA ¶ 26,790. We, accordingly, deny Appellant's claim to the extent that it is based on "superior knowledge."

Furthermore, there is nothing in the record to indicate that any HUD official ever agreed or admitted that a differing site condition existed. The contracts required that Appellant remove and replace all deteriorated sheathing. The fact that the contracting officer made sure that the contract work moved forward by agreeing to compensate Appellant for this work at its line-item bid of $1 per square foot for extra work was not tantamount to an admission that a differing site condition existed.

Appellant also argues that it is entitled to a price increase for the additional sheathing, and also for the amount of roof shingles that it utilized, because its bids varied in estimated quantity from that expected. The Government agrees with Appellant that the quantity of roof sheathing needing replacement was substantially greater than the quantity bid by Appellant. However, this cannot be characterized, as Appellant argues, as a variation in estimated quantity because the Government did not have a set numerical estimate at the time of either issuance of the IFBs or award of the contracts. Likewise, there was no Government estimate of the quantity of shingles that would be needed to reroof Sabal Palms.

In any event, Appellant has been compensated for the additional sheathing. However, Appellant argues that an equitable adjustment for additional sheathing should have been negotiated under FAR 52.212-11. The Government disagrees, stating that an adjustment price of $1 per square foot was specifically provided for in Section 1.08 of the Schedule of the Contract. Under FAR 52.214-29, Order of Precedence--Sealed Bidding, if specific provisions in the Schedule of a Contract conflict with a FAR provision, the Schedule provision takes precedence over the FAR section. The Schedule of this contract provided that additional quantities were to be paid at the price indicated in line-item bids listed in Section 1.08 of the contract. Appellant is therefore bound by its bid price of $1 per square foot of sheathing, and the contracting officer properly compensated Appellant for the quantity of sheathing not contemplated in the bid estimate by referring to Appellant's line-item bid of $1 per square foot for additional sheathing.

There is insufficient evidence to conclude that Appellant's bid for roof shingles was seriously deficient as to the quantity needed. Although Appellant's bid for shingles was less than half of the amount of the shingles it used, we can not find that Appellant is entitled to any further compensation for any additional costs associated with its copious use of roof shingles. Therefore, we must also deny Appellant's claims based on a variation in estimated quantity for both additional sheathing and roof shingles.

II. Mistake in Bid

Appellant's claim for an equitable adjustment for only bidding a total of 200 square feet of sheathing replacement when 40,000 square feet actually needed replacement, is, in effect, a claim based on an apparent mistake in bid. Appellant can recover for a mistake in bid if it establishes that the error was a clear cut clerical error, or a misreading of the specifications. United States v. Hamilton Enter., Inc., 711 F.2d 1038, 1046 (Fed. Cir. 1983). The mistake claimed by Appellant is not a mathematical or clerical error, nor did it involve a misreading of the specifications. It is the result of Appellant's failure to perform a site inspection. The error in Appellant's bid was the result of a mistake in judgment, and such a mistake is generally not compensable. Hamilton, supra at 1048.

The evidence in this case, however, raises an issue as to whether the contracting officer should have verified Appellant's bid with respect to the quantity of roof sheathing. A contracting officer must request verification of apparent mistakes in bid when the contracting officer has reason to believe, before award, that a mistake was made. FAR 14.406-1. Appellant bid a quantity of 200 square feet for roof sheathing replacement at

a cost of $1 per square foot for each contract. Littlefield did not know the precise amount of sheathing that was rotted, but she knew that it was substantially more than 200 square feet. Also, the only other bid received estimated approximately 2,000 square feet for replacement of rotted sheathing, substantially more than 200 square feet bid by Appellant.

Constructive notice of a mistake in bid exists where the error is so apparent that it must be presumed that the contracting officer knew of the mistake at the time of acceptance of the bid. Where the contracting officer fails to verify an apparent or suspected bid mistake, the Government may be liable for a price adjustment, which may be accomplished by a reformation of the contract. David Contractors, Inc., HUDBCA No. 87-2452-C15, 88-3 BCA ¶ 20,963; Chernick v. United States, 372 F.2d 492, 178 Ct. Cl. 498 (1967). Based upon the evidence in this case, we find that Littlefield had reason to suspect that Appellant had substantially underestimated the quantity of sheathing required, and, accordingly, should have requested verification of Appellant's bid for this item.

Although Appellant's mistake was a mistake of judgment, a mistake of this magnitude is also potentially compensable if to hold Appellant to its bid price would unconscionable. Appellant has been paid for replacing 40,000 square feet of sheathing at its bid price for extra removal and replacement of sheathing at $1 per square foot. Holding Appellant to its line-item bid price for extra removal and replacement of sheathing is not unconscionable. To recover on this theory, Appellant must show that the Government "got something for nothing" by holding Appellant to its line-item bid price. Montgomery Ross Fisher, Inc. & H.A. Lewis, Inc., VABCA No. 3696, 94-1 BCA ¶ 26,527, citing John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts, 2nd Edition, 239-48 (1985).

In this instance, the Government did not get something for nothing. It contracted for replacement and removal of rotted sheathing. Appellant removed and replaced rotted sheathing, and the Government paid Appellant a reasonable price for the work. The price was the most common and standard price for such work, regardless of the amount of work to be done. The price is also reasonable when compared to the price of $1.05 per square foot that was submitted by the only other bidder on the contracts. The contracts have been constructively reformed to reasonably compensate Appellant. Bromley Contracting Co., Inc., HUDBCA No. 81-624-C30, 84-2 BCA ¶ 17,493 Appellant has failed to establish that it is entitled to any further recovery arising out of the contracting officer's failure to verify Appellant's apparent mistake in bid for sheathing replacement.

III. Ambiguous and Defective Specifications

Appellant claims that the contract specifications regarding the presence of attic penetrations, the location of the trusses in relation to party walls, and the method of construction of the attic wall separations were ambiguous and defective. Moreover, it contends that the defective specifications made the contract impossible to perform. The Government argues that: (1) Appellant's failure to obtain all of the necessary permits, and to submit the plans and drawings to the Fort Myers Building Department places all risk of any ambiguity or defect on the Appellant, and prevents recovery by Appellant for any costs associated with any ambiguity or defect in the specifications; and (2) performance in accordance with the contracts' specifications and drawings was not impossible because performance in accordance with the original specifications, with only firecaulk added, was successfully completed by another contractor.

As a matter of law, design specifications depicting a method of performance are warranted by the Government to produce the intended result if followed accurately. The Government is responsible for failure of performance or increased cost of performance of a specification only if performance is either impossible or economically impractical. Inter Continental Manufacturing Co. v. United States, 4 Cl. Ct. 591 (1984).

With regard to the presence of penetrations in the attic area, the drawings did not show

the penetrations because the penetrations varied from building to building, and the contract drawing for the attic wall separations, the only part of the contracts affected by penetrations, was a general one, applicable to all buildings. The contracts, at Section 09260, required Appellant to tape and bed all seams and penetrations, indicating by that language the presence of penetrations in the attic areas. A site inspection would have revealed to Appellant the locations and number of penetrations in each attic that would affect its construction of the attic wall separations. The contract drawing and specifications were not defective simply because the locations and number of penetrations were not illustrated.

The contract drawings also did not indicate the locations of roof trusses, but that does not render the drawings either ambiguous or defective. The drawings depicted two methods for building the attic wall separations, and noted that, at the contractor's option, attic wall separations could be constructed by building stud walls if existing trusses were not located on party walls. By a reasonable site inspection, Appellant would have discovered that the trusses were not located on party walls. We find that the specification was neither defective nor ambiguous. Moreover, another contractor was able to build the wall separations in accordance with the drawing and specification, which demonstrates that the drawing and specification were not impossible to perform, and that the contracts were not economically impractical. Construction Management Engineers of Florida, ASBCA No. 29065, 85-1 BCA ¶ 17,757.

The contract drawings and specifications were also not defective because they required taping and bedding instead of firecaulking. The Fort Myers Building Department required Appellant to firecaulk all penetrations, and the contracting officer agreed to make that change. The mere fact that the Government agreed with the Fort Myers Building Department to require firecaulking does not mean that there was a defect in the specifications, or that there was Government fault in the way in which the specifications were written. Appeal of Plandel, Inc., HUDBCA Nos. 92-7171-C1, 92-G-7478-C3, 93-3 BCA ¶ 26,103.

IV. Changes

Appellant claims that it is entitled to an equitable adjustment due to constructive and formal change orders issued by the Government with regard to the roof sheathing, the construction of attic wall separations, firecaulking, and shingle work.

First, Appellant asserts that the directive not to do a sheathing overlay but to perform a complete removal and replacement of rotted sheathing constituted a constructive change order, because it meant that Appellant had to rent heavy equipment, purchase additional materials, hire more personnel, and hire a hauling and dumping service.

Second, Appellant contends that Warren issued a constructive change order with regard to the method of attic wall separation construction on November 15, 1991 when he was sent to the site to verify the extent of the rotted sheathing discovered by Appellant. Appellant claims that it believed that Warren had authority to change the contracts, based on oral assurances allegedly made by Leinhase at a pre-construction meeting.

Third, Appellant asserts that Preston issued an oral change order when she ordered Appellant to firecaulk all penetrations on November 26, 1991.

The Government argues, with respect to all three of Appellant's contentions, that Appellant is an experienced government contractor and it should have known that change orders could not be issued by anyone other than the contracting officer. In addition, the contracts clearly state that the contracting officer is the only person authorized to make changes to the contract, unless the contracting officer delegates her authority to another person, or ratifies the actions of another person. In this case, the contracting officer did not delegate her authority to make changes, and did not ratify any change allegedly made by Warren or Preston.

The primary purpose of the changes clause in public contracts is to compensate contractors for extra work performed beyond that required by the contract either because the work was ordered or agreed to by the Government, or caused by the fault

of the Government. Space Services of Georgia, Inc., ASBCA No. 25793, 81-2 BCA ¶ 15,250. The scope of the additional work required is a key element of the extent of compensable change. A constructive change is made up of two elements, a "change" element and an "order" element. To be compensable as an equitable adjustment under the Changes clause, the Government must require the contractor to perform work which is not a necessary part of the contract. This is different than advice, comments, suggestions or opinions which Government technical personnel frequently offer to a contractor. Astro Dynamics, Inc., NASA BCA Nos. 1067-38, 769-15, 75-2 BCA ¶ 11,479. Appellant has the burden of proof in establishing a constructive change. Watson, Rice & Co., HUDBCA No. 89-4468-C6, 90-1 BCA ¶ 22,499. Representations made by a Government representative other than the contracting officer do not normally effect a change to the contract. Development Management Consultants, Inc., HUDBCA No. 79-405-C28, 85-3 BCA ¶ 18,338.

We disagree with Appellant's assertion that the directive to remove and replace the rotted sheathing constituted a change to the contracts. The directive that Appellant comply with the contract terms and perform removal and replacement of rotted sheathing was not a change order because the work ordered was precisely that required by the contracts. Astro Dynamics, Inc., supra.

We find no order by Warren or Leinhase that would constitute a constructive change in the contract. Astro Dynamics, Inc., supra. Appellant was on written notice that neither Warren nor Preston had the authority to make changes to the contracts because the contracts and incorporated FAR provisions stated that only the contracting officer had such authority. In addition, the contracts specifically stated that inspectors had no authority to change the contracts. Moreover, Appellant was well aware that Warren had only been sent to the site for a limited purpose, and that he was not the inspector assigned to the contract. Furthermore, Leinhase was not the contracting officer on these contracts. Appellant's reliance upon statements of either Warren or Leinhase, without the approval of the contracting officer, was in error, and does not give rise to a right to an equitable adjustment. Any work done based on those statements was neither ordered nor authorized. In addition, there can be no change to the contracts based on Preston's directive to firecaulk penetrations because Appellant did not comply with Preston's directive. Appellant only began to apply firecaulk to penetrations in the attic wall separations after the contracting officer agreed in writing to such work. We therefore find no basis for an equitable adjustment based on Preston's directive alone. However, the contracting officer approved the change in the contract to require firecaulking of penetrations in the attic wall separations, in writing. She also approved the alternate method of construction of the attic wall separations. Although this written approval did not include a calculation of the cost of this additional work, the Government does not contest that the contracts were changed to require firecaulking instead of taping and bedding of penetrations in attic wall separations. In fact, the Government now concedes that Appellant is entitled to an equitable adjustment for the firecaulk. We agree.

The only work added to the scope of the contracts which Appellant had not previously been obligated to perform was the firecaulking. The change in the method of performance actually reduced some of the work Appellant had agreed to perform in its bid by eliminating the need for framing of any of the attic wall separations. Appellant had not constructed a single attic wall separation that complied with the contract drawings at the time when the December 2, 1991 meeting was held at the Fort Myers Building Department. Appellant was obligated by the terms of the contracts to construct attic wall separations. The fact that it obtained an approved change in the method of construction, in addition to that necessary to meet the requirement of firecaulking imposed by the Fort Myers Building Department, does not mean that it would be paid additional sums to perform that work, or to correct work that never complied with the contract requirements.

We find that Appellant's entitlement for an equitable adjustment under the Changes clause of the contracts is limited to the firecaulking. It is not entitled to any costs

associated with the change in the method of construction of the attic wall separations, including opening up the roofs and reroofing, because they had not been properly constructed nor inspected.
No specific evidence was offered regarding added costs resulting from work performed relating to shingles. We, therefore, assume that Appellant's reference to changes in regard to shingles referred to re-shingling after inspections. In any event, there is no entitlement to any additional costs, including the cost of additional shingles needed after opening up the roofs for inspection, because Appellant had the contractual duty to perform such re-roofing required after inspection.

V. Acceleration, Time Extensions, and Delay

Appellant claims that it is entitled to acceleration costs because of Government-caused delays, and the Government's refusal to grant it time extensions. The Government argues that Appellant is not entitled to any acceleration or delay costs because Appellant has not established the required elements for acceleration, and that the Government was the sole cause of the delays. In fact, the Government contends that Appellant was the sole cause of the delays. We agree with the Government's position on these issues.
First, Appellant must establish that the Government is the sole proximate cause of the delay. Where the delay is prompted by inextricably intertwined concurrent Government and contractor causes, the delay is not compensable. Plandel, Inc., supra; Commerce Int'l Co. v. United States, 338 F.2d 81, 167 Ct. Cl. 529 (1964).
Appellant argues that it is entitled to delay costs attributable to the stop work order issued by the Fort Myers Building Department on November 27, 1991. We disagree. At no time did HUD issue a stop work or suspension of work order. The Fort Myers Building Department, not HUD, shut down the project because Appellant had failed to obtain the necessary building permits. The shut down was due solely to Appellant's failure to have the required permits. Appellant is not entitled to any compensation for any delay related to the stop work order, which was caused by its own fault. Commerce Int'l Co. v. United States, supra.
Appellant also argues that it is entitled to delay costs because HUD took an unreasonable period of time to approve the drawings provided by Appellant to change the method of construction of the attic wall separations. Relief can be granted where the Government takes an unreasonable amount of time to approve a change. Day & Zimmermann-Madway, ASBCA No. 13367, 71-1 BCA ¶ 8622. The test of what is an unreasonable period of time is dependent on the circumstances of the particular case. Tri-Cor, Inc. v. United States, 458 F.2d 112, 198 Ct. Cl. 187 (1972).
Appellant submitted the drawings on December 6, 1991. The contracting officer approved the drawings on December 10, 1991, and Appellant received notification of the approval on December 13, 1991. A time lapse of seven calendar days was not unreasonable because the drawings had to be reviewed by various HUD personnel, including HUD architects and the contracting officer. We do not know why Appellant did not receive notification of approval until three days later. However, because Appellant requested this change, which in fact was unnecessary from the Government's vantage point, Appellant shares as much responsibility for any delay attributable to this as HUD. Therefore, the delay is not compensable because it was reasonable under the circumstances and because it was not solely attributable to the Government. Plandel, Inc., supra.
Appellant finally argues that it is entitled to delay costs because of delays experienced by it because it did not plan and arrange for lodging of its work force in Fort Myers during the holiday season. Appellant had planned to complete the contract in 30 days instead of the 60 days provided for in the contract, and made no arrangements for lodging of its workforce beyond December 20, 1991. Because of the November 27, 1991 shutdown, the time required to obtain proper building permits and drawing approval, and the lack of lodging for its workforce after December 20, 1991, Appellant's

employees returned home to Ohio for the holiday period. Most of Appellant's work force did not return to Fort Myers, and Appellant hired local labor and subcontractors to complete the contract. Appellant claims these factors delayed the resumption of work on the project until January 7, 1992, and attributes all of this delay to the Government. We disagree. Appellant was either the sole cause or the contributing cause for each of these delay factors, and as such, they are not compensable. Plandel, Inc., supra; Commerce Int'l Co., supra.

Constructive acceleration may occur due to an unreasonable denial of a request for a time extension when there are excusable delays and the Government's conduct amounts to an order to accelerate work. Fermont Div., Dynamics Corp. of Am., ASBCA No. 15806, 75-1 BCA ¶ 11,139, aff'd 216 Ct. Cl. 448 (1978). Appellant submitted several requests for time extensions, together with requests for change orders, on November 27, and December 5 and 6, 1991. These requests were returned to Appellant because they did not contain the required breakdown of costs, they did not clearly describe the work to be done, and they were unsigned. The Government was unable to consider Appellant's change order requests because they lacked sufficient information on which to make an informed decision.

However, even if Appellant had filed proper requests for time extensions and those requests were denied, such a denial, without more, is insufficiently compelling to constitute an acceleration order. Carroll Servs., Inc., ASBCA No. 8362, 1964 BCA ¶ 44365, mot. for recon. denied, 65-1 BCA ¶ 4613. The record demonstrates no order to accelerate nor any threats of default at any time during performance, and no course of conduct during performance sufficient to establish a requirement for accelerated performance. Plandel, Inc., supra. Instead, the record demonstrates that Appellant had decided before work began to complete contracts scheduled for 60 days in only 30 days, and that Appellant completed the contracts within the 60-day time span. We further note that Appellant was able to perform in a few days, work for which it requested 60-day extension. We see no need for the contracting officer to have granted the requests for time extensions, even if they had been properly presented. The elements for constructive acceleration attributable to the Government are lacking. Appellant's claim for compensation based upon constructive acceleration, Government-caused delay, and refusal to approve requests for extension of time is denied.

VI. Interest, Impact of Lost Revenue and Claim Preparation Costs

Appellant asks this Board for interest on amounts claimed from the date of certification of the claim, July 7, 1992, as provided for under the Contract Disputes Act. 41 U.S.C.A. § 611. Appellant is entitled to interest on any claim found in its favor. However, the amount of interest must be computed based upon the dollar value of the claim, and as this case decides entitlement only, the exact amount of this claim cannot now be determined.

The pertinent provision of the Contract Disputes Act of 1978 states that a Board of Contract Appeals "shall have jurisdiction to decide any appeal from a decision of a contracting officer." 41 U.S.C. §§ 605(a), 607(d). This Board lacks jurisdiction to hear or decide the issues of Appellant's request for $60,741.00 for "impact of lost revenue", and $6,619.00 for claim preparation costs, because those claims have not been either presented to the contracting officer for decision, or been the subject of a contracting officer's final decision. Match Institution, supra.

Conclusion

For the foregoing reasons, Appellant's claims are GRANTED in part and DENIED in part. All of Appellant's claims are DENIED, except for Appellant's claim for an equitable adjustment for applying firecaulk, and for interest on that claim as computed under the

Contract Disputes Act, quantum to be determined subsequently by the parties or in a separate proceeding.

Jean S. Cooper
Administrative Judge

Concur:
David T. Anderson
Administrative Judge
Timothy J. Greszko
Administrative Judge