Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

GRANTED AS TO ENTITLEMENT: October 29, 2003

GSBCA 16127-TD

CORNING CONSTRUCTION CORPORATION,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Joseph H. Kasimer of Kasimer & Annino, PC, Falls Church, VA, counsel for Appellant.

Marvin Kent Gibbs and Diane Mullaney, Office of Chief Counsel, Bureau of Engraving and Printing, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman) and **HYATT**.

HYATT, Board Judge.

Respondent, the Bureau of Engraving and Printing (BEP), Department of the Treasury, contracted with appellant, Corning Construction Corporation (Corning), for the replacement of the roof on its main building in Washington, D.C. This appeal was brought by Corning on behalf of its subcontractor, Prospect Waterproofing Company (Prospect). Corning seeks an equitable adjustment for extra work it says it was required to perform in connection with repair of the concrete roof deck. Corning has elected to have this case processed in accordance with the accelerated procedure provided in Board Rule 203.

The Board denied respondent's motion for summary relief on August 26, 2003, and a hearing was held on September 4, 2003. At the hearing, appellant informed the Board that the parties planned to litigate entitlement only and that quantum and time issues would be

reserved for further proceedings.[1] For the reasons stated, we grant the appeal as to entitlement.

Findings of Fact

1. On July 7, 1999, BEP and Corning entered into Task Order Number 4, under the terms and conditions of contract TEP-97-28 (TN), for the replacement of the roof on respondent's main building, located at Fourteenth and C Streets, S.W., in Washington, D.C. The fixed price agreed to for the task order was $5,679,000. The notice to proceed was issued on July 20, 1999. The contract required Corning to remove the existing roof and replace it with a stainless steel roof system, including gutters, drains, lightning protection, and safety restraints. Appeal File, Exhibits A, B.

2. The roof has four wings -- A, B, C, and D. Work commenced on the south side of the D Wing of the building. Another Corning subcontractor, Marcor, performed the demolition of the existing roof. Marcor's work preceded that of Prospect, which had the initial responsibility to install a temporary membrane designed to prevent water damage, and subsequently to install the new roofing system. Transcript at 32-36, 54-55. To prepare the surface for the permanent roofing system, Prospect first bolted Z-shaped channels, or purlins, into the deck. Insulation was then placed between the purlins and plywood was used to cover the purlins. The actual replacement roofing system was then constructed on the plywood. Transcript at 76-78; Hearing Exhibit A-4.

3. The contract plans showed the purlins to be fastened to the concrete deck without indicating a need for shims or other leveling devices. Transcript at 66-67. Once demolition was started on the south side of the D Wing, it became evident that the existing concrete deck was not level. Specifically, that part of the deck had deflections, or uneven areas in the concrete substrate, running parallel from the bottom of the sloped roof to the top of the sloped roof. The deflections meant that the purlins would require shims or other devices to ensure that they were flat on the deck so that the plywood would be level for the installation of the new roof. Transcript at 66.

4. At a construction project meeting held on December 23, 1999, Prospect advised the Government that the existing concrete roof deck had undulations in all directions and that shims and longer screws would be necessary to ensure an even surface for the installation of the replacement roof. Affidavit of John T. Menocal (Menocal Affidavit) (Aug. 4, 2003) ¶¶ 3-4. At this time Prospect was still working on the south side of the D Wing. When the contracting officer agreed that the purlins should be shimmed, Prospect undertook to prepare a proposal. Transcript at 66-67.

5. By letter dated January 19, 2000, Prospect furnished a proposal to Corning for the performance of the extra work occasioned by the conditions encountered on the roof of

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[1] Transcript at 17. Although the parties have essentially removed the resolution of quantum issues from the time constraints of the accelerated proceedings election, the amount of quantum recovery will continue to be limited to the $100,000 ceiling inherent in the initial election and in the resolution of entitlement issues under the accelerated procedure.

the D Wing. Prospect's itemized cost proposal, in the amount of $131,033, was accompanied by the following statement:

> As per the discussion at previous progress meetings, the area of the roof currently exposed has excessive deflection and will require the use of 1-1/2" by 2" "U" shaped high impact plastic shims to level the framing members. This is as recommended by the Architect in previous progress meetings. We assume the concrete deck for the entire project will be similar to the south side of wing "D".

Corning forwarded Prospect's proposal to the contracting officer under cover of a letter dated January 21, 2000, advising that it was enclosing the breakdown of "Change Order Request #8 for Shimming Purlins by Prospect Waterproofing Company." After itemizing and adding its own costs attributable to the roof deflection issues, Corning requested a change order for the total amount of $174,242 and a time extension of forty-two days. Appeal File, Exhibit N.

6. Following receipt of Corning's proposal, Prospect, presumably at the request of the Government, submitted further information in support of its estimated cost of performance, including the following statement:

> It is our estimate that the need to shim these purlins every eight inches in the amount of 1/8 inch to one inch in some places will double our labor for this construction activity.

Supplemental Appeal File, Exhibit 1. This letter was also forwarded to BEP. Transcript at 24-25.

7. Modification 004 to the contract extended the contract completion date by forty-two days and added $174,242 to the contract price "[p]ursuant to the attached Statement of Work dated February 10, 2000, and contractor's proposal dated January 21, 2000." The attached statement of work called for the contractor to "shim between the new Z perlins [sic] and the existing concrete roof deck as required to achieve an even plane, using 'U'-shaped high impact plastic shims and the approved concrete fasteners of appropriate length." Modification 004 also stated that this was a "complete equitable adjustment for all additional costs associated" with this additional work and further provided that:

> The contractor hereby releases the Government from any and all liability under this contract for further equitable adjustment due to this modification, including but not limited to labor, materials, equipment, overhead, profit, bonds, insurance and indirect costs such as impact and delay.

Appeal File, Exhibit O. Corning's president signed the modification on February 21, 2000; the contracting officer signed the modification on March 7, 2000.

8. As Prospect continued with the demolition work on the north side and east end of the D Wing, it encountered conditions different from those encountered on the south side of the D Wing. These conditions continued to differ from those initially encountered as Prospect moved from the south side of the D Wing to the north side and then on to the Headhouse and the A Wing of the BEP building. See Transcript at 81-92.

9. The testimony reflects that the north side of the D Wing and the south side of the A Wing, along with the Headhouse, were characterized by deflections that ran in multiple directions, rather than consistently from top to bottom as they had on the south side of the D Wing, where work began. The deflections were greater than those initially uncovered, and, in addition, when wood battens were removed on the east and north sides of the D Wing, south side of the A Wing, and the Headhouse, they left a rough surface, which further magnified difficulties in leveling the purlins. In addition, Prospect's initial proposal was based on the need to shim the surface one inch or less, while subsequent conditions required shimming well above one inch to achieve a level surface. Findings 5-6; Transcript at 79-87, 91, 100-02. This required Prospect to install considerably more shims and thicker shims than would have been required had the conditions on the roof throughout the project been consistently similar to those on the south side of the D Wing. In addition, some custom fabrication of shims was also necessary. Transcript at 130-34.

10. The thicker shimming necessitated using longer fasteners in the wood batten area to accommodate the number of shims and the deflection. Thus, Prospect needed to use

several lengths of fasteners, rather than one consistent size. This, in turn, required Prospect to use an entirely different drill bit from that used on the south side of the D Wing, and to alternate between drill bits while installing purlins on the remaining surfaces. Transcript at 136-38.

11. The rough surface created by the removal of the wood battens also created another problem in that the purlins could not be installed as evenly as they had been on the south side of the D Wing. This meant that the insulation and plywood had to be custom cut to accommodate varied spacing of the purlins. Transcript at 98-99, 136, 142; Hearing Exhibit A-10.

12. In a letter to Corning dated May 10, 2000, Prospect noted that conditions differed from those evident early in the demolition process and repeated that its prior estimate had been predicated on the assumption that "the substrate for the entire project would be similar to the South side of 'D'." Prospect added:

> Now that we are nearing completion of the purlin installation at "D" wing we can more accurately provide a cost estimate for the purlin installation at areas where the batten roofs were installed. These areas have much worse deflection in the deck and require modifications in the purlin spacing to account for the removed battens. Below is an itemization of our additional costs associated with reduced labor production and increased fasteners/shims at all the existing batten roof areas (South and East of Wing "A" and West Side of Head House). Again this assumes that the remainder of the batten seam areas will be similar to the areas at Wing "D".

Prospect's proposal requested an equitable adjustment in the amount of $65,223. By letter dated June 20, 2000, Corning submitted another change order request to the Government, seeking the amount of $94,877, which included Corning's added costs associated with the additional work to be performed by Prospect. Prospect's proposal was again included as an attachment to Corning's change order request. Appeal File, Exhibit P.

13. By letter dated September 7, 2001, the contract specialist responded to Corning's June 20, 2000, change order request:

> This letter is to follow up several meetings and discussions held between yourself and Bureau representatives concerning [the subject change order request]. Per your change order you are requesting $94,877.00 for additional work due to roof deck irregularities in addition to monies and time already provided to Corning under Modification No. 004. . . .
>
> Prospect's proposal dated January 19, 2000 under which [the prior change order] was issued is based on the conditions actually found on the south side of D Wing and the assumption

> that these conditions would be constant throughout the entire project, i.e., D Wing, A Wing and the Headhouse.
>
> Prospect's proposal under [the subject change order request] states that now they are nearing completion of the purlin installation at D Wing, that the roofing irregularities are much worse than anticipated and provides for additional costs for D Wing, A Wing and the Headhouse. Prospect's proposal under [the subject change order request] is dated May 10, 2000, however work had not occurred on A Wing or the Headhouse at the time the proposal was submitted. Per the Government's records, work did not occur on A Wing or the Headhouse until July 10, 2000.
>
> The Government has provided compensation to Corning under Modification No. 004 for roof irregularities for D Wing, A Wing and the Headhouse. It is unclear to the Government how Prospect can submit a proposal on January 19, 2000 for roof irregularities on A Wing and the Headhouse when work had not occurred in these areas. Furthermore, the original proposal of Prospect states that shimming is between 1 ½" to 2." It has been shown that 2" has been the worst case scenario throughout the project and that the shimming on A Wing nor [sic] the Headhouse has [not] exceeded 2".
>
> Based on the above, your request for additional costs and time due to the [subject change order request] is denied unless further information can be provided to support your position.

Appeal File, Exhibit Q.

14. In a letter dated September 25, 2001, addressed to Corning and forwarded by Corning to the Government, Prospect stated its understanding that the contract specialist had acknowledged that the conditions on the roof had varied from those that were anticipated in the estimate and that the contractor had reserved its right to seek an equitable adjustment for additional work. Appeal File, Exhibit R.

15. By letter dated February 6, 2003, the contracting officer formally denied Corning's claim for a second equitable adjustment based on irregularities in the roof deck. Appeal File, Exhibit T. Corning's appeal followed.

16. At the hearing, Corning's president and Prospect's project manager consistently testified that they understood modification number 004 to the contract to include Prospect's proposal and its qualification of the price quoted as being based upon conditions in other areas of the roof being the same as those on the south side of the D Wing. Corning did not intend to release any claims based on conditions that differed from those encountered on the south side of the D Wing. Transcript at 23-25. Although Prospect had not started to work on the A Wing or the Head House, it had by that time completed enough work on the

remainder of the D Wing to "forward price" an estimate for the remainder of the work. Finding 12. As work progressed under the contract, it became evident that conditions on much of the roof were significantly worse than those initially discovered on the south side of the D Wing, giving rise to Prospect's submission of a proposal to Corning and Corning's request for a second equitable adjustment based on the condition of the roof. Transcript at 27.

Discussion

BEP argues that, as a matter of law, appellant's claim for an equitable adjustment is barred by an accord and satisfaction as evidenced by bilateral modification 004 to the contract. Specifically, BEP asserts that the release language in the modification bars Corning and its subcontractor from pursuing additional compensation for work attributable to the deflection in the roof.

The Government's assertion that the appellant's claim is barred by accord and satisfaction is an affirmative defense. The party raising an affirmative defense bears the burden of proving it. Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 988 F.2d 1157, 1161 (Fed.Cir.1993); Brunswick Bank & Trust Co. v. United States, 707 F.2d 1355, 1360 (Fed. Cir. 1983); Security State Bank v. United States, 221 Ct. Cl. 942, 946 (1979); David J. Tierney Jr., Inc., GSBCA 7107, et al., 88-2 BCA ¶ 20,806; Jimenez, Inc., ASBCA 52825, 01-1 BCA ¶ 31,294. The Board has recently delineated the legal standard applicable to showing that a modification of a contract operates as an accord and satisfaction sufficient to discharge a claim:

> Generally, when a bilateral contract modification does not contain any reservation of claims, the modification constitutes an accord and satisfaction as to the subject matter of the modification and the contractor cannot later narrow the scope of the modification. . . . An accord and satisfaction has the effect of discharging an existing right. The accord occurs when one party to a contract agrees to give or to perform something other than what the second party claims the contract requires, and the second party agrees to accept the alternate thing or performance in satisfaction of the claim. The satisfaction occurs when the parties perform their agreement. . . . The essential elements of an accord and satisfaction are competent parties, proper subject matter, consideration, and a meeting of the minds.

Trataros Construction, Inc. v. General Services Administration, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,471 (citations omitted); accord Washington Development Group-JWB, LLC v. General Services Administration, GSBCA 15137, 16004, 03-2 BCA ¶ 32,319; 2160 Partners v. General Services Administration, GSBCA 15973, 03-2 BCA ¶ 32,269; see also Precision Standard, Inc., ASBCA 54027, 03-2 BCA ¶ 32,265 (accord and satisfaction requires mutual agreement between the parties with the intention clearly stated and known to the contractor); Trataros Construction, Inc. v. General Services Administration, GSBCA 15344, 02-2 BCA ¶ 31,910; Roxco, Ltd. v. Department of the Treasury, GSBCA 14430-TD, 01-2 BCA ¶ 31,465, aff'd, 36 Fed. Appx. 453 (Fed. Cir. 2002) (table).

BEP asserts that the plain language of the release in the modification precludes further adjustments to the contract price to reflect the worse than anticipated level of deflection on the remaining areas of the roof. Specifically, it urges that the reference to Prospect's proposal in Corning's proposal was not incorporated by reference in the modification as executed and that the release definitively forecloses any further payment for corrective actions needed to address the deflection issues on the concrete deck. Corning argues that the release language must be read in the context of the entire modification, which incorporated by reference both the Corning proposal and a statement of work. The Corning proposal, in turn, incorporated Prospect's proposal, which specifically qualified the estimate, noting that it was predicated on the assumption that conditions elsewhere on the roof would be comparable to those on the south side of the D Wing. Corning thus maintains that neither it nor Prospect intended to release the right to seek further compensation should conditions elsewhere be worse than those encountered initially.

The heart of the parties' disagreement, then, is evidenced by their differing takes on the effect of Corning's reference to Prospect's proposal in its own proposal, which was accepted by the contracting officer in modification 004 to the contract. Finding 7. Incorporation by reference is a common practice in government contracting, routinely recognized as an effective way to include a term, condition, or standard in the contract without further spelling it out in the document signed by the parties. See Klinger Constructors, Inc., ASBCA 41006, 91-3 BCA ¶ 24,218, at 121,126; Wright-Dick-Boeing, ENGBCA 3576, 77-1 BCA ¶ 12,437, at 60,205. The term "incorporation by reference" generally requires a reference in one document to the terms of another. Further, the incorporating document must not only refer to the incorporated document, but also bring the terms of the incorporated document into itself as if fully set out. Sucesion J. Serralles, Inc. v. United States, 46 Fed. Cl. 773, 785-86 (2000); Firth Construction Co., Inc. v. United States, 36 Fed. Cl. 268, 275 (1996).

BEP concedes that the Corning proposal was incorporated into the modification by reference, but contends that Corning did not successfully incorporate the Prospect proposal by reference in its own proposal. That is, BEP asserts, the attachment of Prospect's proposal to Corning's proposal did not expressly state that the Prospect proposal was included in the Corning proposal in its entirety, but rather, simply referred to it as providing a breakdown of Prospect's added costs to perform the changed work. This, in BEP's view, is not sufficient to constitute an "incorporation by reference" as defined in Serralles and Firth. Since Corning did not contain any independent reservations in its own proposal, BEP believes that the modification as executed does not contain any language qualifying the release language and thus Corning waived the right to seek further adjustments based on deflections in the roof deck.

Corning's response to this is that it did in fact incorporate Prospect's proposal by reference, including the qualifying language, in its own proposal. Although the Corning proposal does not use the term of art "incorporated by reference," it was sufficient to accomplish the purpose. The Prospect proposal was referenced and attached to the Corning correspondence submitted to the Government. The qualifying language used by Prospect precedes the cost breakdown provided and is set forth on the same page with that pricing information. The purpose of incorporation by reference is to put the other party to the contract on notice of all the applicable terms and conditions. See Champion, Inc., ASBCA

27704, 1983 WL 7515 (Mar. 15, 1983). In these circumstances, the Government should have been on notice of Prospect's qualification of its proposal when it executed the modification.

We consequently further conclude that BEP has not met its burden to prove that the modification serves as an accord and satisfaction to bar Corning's efforts to be paid further compensation for deflection costs. The testimony received from Corning's and Prospect's witnesses corroborates that they did not intend to relinquish the option to seek further adjustments to the contract price and time for performance in the event the conditions in other areas of the roof differed from those present on the south side of the D Wing. There is no evidence of negotiations or discussions concerning the proposed change request other than the inquiry responded to by Prospect in its February communication. Finding 6. It thus appears that the Government accepted Corning's proposal wholesale. No testimony was received from the contracting officer as to BEP's understanding of the proposal, or its intent, and the letter written by the contract specialist in September 2001 acknowledges that the earlier proposal was based on the conditions on the south side of the D Wing and the assumption that like conditions would prevail throughout the project. Finding 13. Given all of these factors, we conclude that this modification does not bar appellant's claim.

We next address BEP's contention that even if the claim is not barred by the language of modification 004, Corning has not shown (1) that the deflection conditions constituted a differing site condition or (2) that they were actually worse than those contemplated under the modification so as to justify its claim for increased compensation.

First, we address the differing site condition argument raised by BEP. BEP's argument is that Corning's claim is premised on the discovery of a differing site condition warranting an increase in the contract price. To qualify for an equitable adjustment based on the Differing Site Conditions clause the contractor must prove the existence of one of two categories of compensable conditions: Category I (site conditions which differ materially from those indicated in the contract) and Category II (conditions which are unknown and unusual and differ materially from those generally encountered in the type of work being procured). E.g., Imbus Roofing Co., GSBCA 10430, 91-2 BCA ¶ 23,820. According to BEP, Corning has not met its burden to establish that either of these categories applies. BEP contends that Corning fails as to the first category because the condition of the roof was not indicated in the contract documents and fails as to the second category because it has not shown that the surface conditions encountered differ materially from those generally encountered in the type of work being procured.

Without analyzing this issue in detail, we agree with Corning that the differing site condition analysis is not particularly germane here. As Corning points out, it did not actually claim an equitable adjustment under the Differing Site Conditions clause of the contract. Instead, its claim was predicated on the need to change the work as initially required under the contract to accommodate unanticipated conditions present on the roof. That is, the contract did not initially require that the purlins be shimmed, and, in fact, there would have been no need to use shims and fasteners had the concrete deck not contained deflections, which apparently were not anticipated by either party prior to demolition. At the time the issue was raised, the Government recognized and treated the deflections as a changed condition and issued the requested equitable adjustment on this basis. Modification 004 establishes that both parties, at the time the modification was executed, considered that the contract contemplated that the roof was sufficiently level to permit installation of the purlins without the need for shimming. The main issue to be resolved here, thus, is whether Corning has established entitlement to further compensation for the even more extensive and severe deflections it subsequently encountered, requiring it to install more shims, and to install the purlins in a different manner than it had expected based on the condition of the roof it had examined at the time it submitted the initial claim.

We note that Corning's witnesses provided unrebutted testimony that in fact appellant encountered significantly worse deflections on the other areas of the roof than were present on the south side of the D Wing, which served as the baseline for Prospect's initial proposal. The deflections ran in multiple directions, rather than simply up and down; the removal of wood battens left rough surfaces, further interfering with the leveling of the purlins. These conditions prevented the installation of the purlins with even spacing and required that Prospect custom cut the insulation and plywood. More and thicker shims were required than would have been the case otherwise. Longer and more fasteners were also needed. Findings 8 through 11.

Respondent did not adduce any evidence showing that conditions on the rest of the roof were similar to those existing on the south side of the D Wing. Instead, the Government challenged Corning's evidence on two other bases. The first is that Prospect's description of the shims stated that it would use one and one-half by two-inch shims to level the purlins. The Government notes that there was no need for shims of greater depth than two inches. Second, the Government argues that appellant had access to more than just the south side of the D Wing when it formulated its proposal and could have investigated to determine that conditions would be worse in other areas of the roof.[2]

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[2] Two Government witnesses stated that scaffolding was erected on at least part of the north side of the D Wing when the change request was made and that it would have been feasible for Prospect to investigate conditions beyond the south side of the D Wing. Transcript at 151-52, 174-75, 180-81. These witnesses were not at the site daily, however -- indeed, one of the witnesses had no first-hand knowledge of the extent to which other areas of the roof would have been available for inspection when the proposal was first submitted because he was on an extended leave of absence from his job at the time. Transcript at 167.

The Government's point about the size of the shims appears to be based on the statement in Prospect's initial proposal that the shims would be one and one-half inches to two inches in dimension. Finding 5. This was amplified however, by the February 9 letter describing the depth of the shims, finding 6, and was also addressed by a Prospect witness, who explained that the one and one-half to two-inch dimensions described in its January proposal referred to the length and width of the proposed shims -- not to the depth of the shims to be used. The south side of the D Wing required shims of no more than one inch in depth, whereas the north side of the D Wing, the A Wing, and the Headhouse all required shims of up to two inches in depth or thickness. Findings 9-10. This "discrepancy" does not establish a basis to preclude recovery of additional compensation for changed work in these circumstances. Additionally, Prospect's witnesses provided unrebutted testimony of extra costs incurred beyond the thickness of the shims. Specifically, Prospect needed to use more shims, some of which had to be customized, than it had otherwise anticipated, and was also required to install more purlins and to customize the insulation and plywood, which it would not have had to do if conditions throughout had been as observed on the south side of the D Wing.

Finally, BEP's argument that Prospect should have investigated further and determined the true state of the roof before seeking a forward-priced change order is also unpersuasive. Corning did in fact visit the site prior to submitting a bid, but the condition of the surface substrate was in no way discernible with the old roof in place. Transcript at 30-31. Once Marcor started demolishing the old roof, Prospect was able to view the cement deck and did so on the south side of the D Wing, but was limited by safety issues from observing other areas.[3] In any event, it is not clear that Prospect would have been required to make such an inspection. It submitted a change claim predicated on plainly identified assumptions and conditions concerning the basis on which the proposal had been formulated. The Government had notice of what those assumptions were and issued the modification using the proffered conditioned pricing, without entering into further discussions or negotiations. It is not free now, after the fact, to impose a requirement to make further inspections.

Decision

The appeal is **GRANTED** as to entitlement.

CATHERINE B. HYATT
Board Judge

I concur:

[3] Prospect would have incurred additional costs to provide fall protection on the scaffolding. In addition, further cutting of the concrete deck to investigate substrate surface conditions could have resulted in the premature release of hazardous materials. Transcript at 34, 54-55, 68-69.

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STEPHEN M. DANIELS
Board Judge