UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: April 13, 2011

CBCA 1460

WALSH/DAVIS JOINT VENTURE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Edward J. Sheats, Jr., and Jason B. Bailey of Sheats & Associates, P.C., Brewerton, NY, counsel for Appellant.

Dalton F. Phillips, Leigh Erin S. Izzo, and Heather Cameron, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

DANIELS, Board Judge.

The General Services Administration (GSA) and Walsh/Davis Joint Venture (WDJV) entered into a contract for the construction of a complex of buildings in Washington, D.C., to be occupied by the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives. In this decision, we consider one element of the claim made by WDJV to GSA for additional compensation under the contract. This is a claim by WDJV's subcontractor for precast concrete, Global Precast, Inc. (Global). The claim asserts that due to changes GSA made to the face mix and finish of the precast concrete, Global incurred additional costs for which GSA is responsible.

We hold for WDJV as to most of the claim.

Findings of Fact

The contract required that architectural precast concrete (also known by the shorthand term "precast") be used as the facing of various structures within the complex. Precast consists of coarse aggregate, sand, cement, water, and chemical additives; pigment may be added as well. These elements are mixed together and poured into molds which have been constructed by cabinetmakers. Before the concrete is poured, hardware and reinforcing bars are placed appropriately in the molds.

Precast may be finished in any of various ways, two of which are smooth form and acid-etched.[1] A smooth form finish is achieved by simply stripping a panel from the mold once the concrete is cured. An acid-etched finish requires more work. To create it, a panel must be moved by crane to a specific facility and soaked with water for two or three days. The hardware is coated with an acid-resistant paint for protection, and the panel is then covered with diluted hydrochloric acid. Specially-garbed personnel scrub each side of the panel with special brushes to create a gritty texture. The panel is then pressure-washed with water to remove the acid, dried, and moved once again by crane to a location where it is kept clean.

The contract required that the precast for Buildings D, E, G, the garden wall,[2] and other locations as indicated on the drawings have a smooth form finish, and that the precast for Buildings A, B, C, and other indicated locations have an acid-etched finish. The smooth form finish was to have "surfaces free of pockets, sand streaks, and honeycombs, with uniform color and texture." All precast, "[w]hen viewed at a distance of 3 m[eters] in natural daylight," was to have surfaces "uniform in color, texture, and finish." A panel could be rejected by the architect if it had any of various defects, including "[e]xcessive air voids, commonly called bugholes, evident on exposed surface" and "non-uniformity of color within a panel or in adjacent panels due to areas of variable aggregate concentration."

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[1] The terms "acid-etched" and "acid-washed" are used interchangeably by the parties and in this decision.

[2] WDJV's base bid for the contract responded to a solicitation which contemplated that the garden wall – a significant architectural feature of the project – be constructed of cast-in-place concrete. In accepting WDJV's base bid, GSA also accepted the joint venture's bid for contract alternate number 1, which provided that the garden wall would be constructed instead with smooth form finish precast concrete.

The contract did not specify a color for the precast. As close as it came in this regard was requiring that the cement used in the mix be white and that any coloring agent employed be a "[m]aximum of 6% of cement by weight." The contract prescribed a process for submittal and approval of sample panels, and it gave the architect the right, during this process, to require the contractor to "adjust the pigment color of the panels before proceeding" further in the process.

In August 2004, not long after contract award, WDJV asked GSA for a sample from the architect of the building, Moshe Safdie Associates (MSA), to show the desired color of the precast. MSA gave Global a sample of a natural stone, limestone. The sample, which was provided to the Board as an exhibit, is from Indiana Limestone Company, Inc., and is marked as standard gray.

Global's vice president, Peter Cicuto, a licensed professional engineer with nearly forty years of experience in the precast concrete industry, was in charge of the company's efforts on this contract. Mr. Cicuto considered that a mix called G514 was a good match for the color of MSA's sample, and in October 2004, he provided it to the architect with a light sandblast finish to replicate the graininess of the limestone.

When Global sent MSA the G514 sample, a long and torturous process of sample submittal and review began. The events which marked this process are described in detail in our decision on the parties' cross-motions for summary relief, *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479. We note salient points here, supplementing them with testimony taken at our hearing in the case.

MSA's project architect, Victoria Steven, reported her firm's analysis of this and other submittals. She told WDJV and Global that the color of the G514 was "very good," but that MSA's principal, Moshe Safdie, wanted to see it "warmed up" a bit. She provided two new color samples, asking for a mix "a few shades towards" one of them and "a bit lighter than" the other. She also asked that the next samples be more uniform in color with less visible black flecks and with mica flecks added. Additionally, she wanted the next samples to have an acid-etched finish.

Global responded in November with five new samples, denominated G688, G707-2, G708, G709, and G710; all were acid-etched. These samples included different aggregate, sand, and pigment from those in the G514 mix. MSA was unwilling to accept any of them. Ms. Steven said that her firm thought the color was "very good," but "would still like to see a slightly more uniform coloration with less visible black and dark grey flecks." Mr. Safdie preferred the G688, but wanted to see a sample "a bit lighter." He also continued to be concerned about black flecks in the mix.

Global submitted another sample in January 2005 and four more – G720, 721, 722, and 723 – in February. Mr. Safdie liked G688 best of all, but wanted "a lighter version w[ith] less gray" and "some 'warm' tones." By warm, Ms. Steven explained, Mr. Safdie meant "cream and peach colors," making the color of the mix "somewhere between the G688 and [a sample he provided called Olympia Cream]."[3]

Mr. Cicuto was perplexed. "You know," he testified, "this type of comment really doesn't do anything. It's all so subjective and it's so unreal that you can't put your hands on it, you can't see it. . . . Precast concrete is a physical material and to talk in riddles like this was becoming very frustrating." He was confused by the responses on the color – very good, but warmer, like cream and peach. "[Y]ou look at [a] peach [and] it has a multitude of colors," he noted. He also did not understand the comments about the flecks in the concrete. Black flecks are inherent in aggregates, which are natural materials. "[Y]ou can't go and nitpick these small particles out of the mix. And these black specks are only visible when you're holding the sample nose to nose" – not at the distance prescribed by the contract's specification. Further, he explained, mica cannot be used in concrete; it is "a deleterious material" whose use does not comply with industry standards.

Notwithstanding his concerns, Mr. Cicuto recognized that Global would have to continue sending samples until one was approved by MSA. In March, the subcontractor sent samples of G715, G725, and G726. These were identical to each other with the exception of pigment concentration; G725 had the least pigment and G726 had the most. Mr. Safdie was unwilling to choose any of them until he had seen larger-sized samples. Global provided these later in the month. All of the March samples – indeed, all of the samples produced thus far, other than the initial G514 – had an acid-etched finish. Mr. Cicuto explained that this finish was requested and applied because of an agreed-upon decision to focus first on Buildings A, B, and C, which were required to have that finish.

Finally, on April 14, 2005, MSA approved the G715 mix with the acid-etched finish. The next day, GSA's project manager, Jean S. Hundley, told WDJV that the G715 sample panel was approved for use on the project.

GSA monitored work at Global's facilities in June and July. In June, a monthly report by GSA and Gilbane Building Company (the agency's construction manager for the project)

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[3] Mr. Safdie also expressed to his staff interest in having the precast look lighter, something like "a Portuguese stone of Savannah," or darker, like "some of the limestones commonly used on the government buildings downtown," and with a finish like that of Morgan Hall at Harvard University. These musings were never shared with Global, however.

stated that in a visit to the plant, "[q]uality of the pre-cast concrete production was found to be good. The finish was smooth, consistent and defect free on all of the finished surfaces of each piece inspected." In July, Rainer Goeller, a senior MSA architect who had much experience with precast concrete, examined a small number of panels and came away with a different impression. He was expecting a perfect piece of precast but did not see it, he testified. The panels he viewed had air bubbles, holes he considered to be synonymous with the term "pockets."

Mr. Goeller asked Global to submit samples of panels for the garden wall legs. The samples were to have four different finishes – smooth form, acid-etched, light sandblast, and medium sandblast. Global complied with the request. WDJV requested of GSA's Mr. Hundley that "the design team/owner review the finishes and select which option is preferred."

Although the contract mandated that the precast panels for the garden wall be produced with a smooth form finish, and MSA had confirmed to WDJV on December 6, 2004, that these panels should have that finish, the architect now changed that requirement. On August 8, 2005, WDJV sent to GSA a request for information (RFI) stating, "Please confirm, that per the site visit with Moshe Safdie on Tuesday, August 2, the acid-etched finish is approved for the Precast Gardenwall." On August 10, MSA's Ms. Steven responded, "This is correct." In GSA's brief in this case, the agency says that this response was "on behalf of GSA."

On August 11, Gilbane wrote to WDJV, "The Government has reviewed the response to this RFI and has found no cost or schedule impacts to the contract requirements. Should Walsh/Davis disagree, advise the Government in writing to obtain direction prior to proceeding with any associated work." In writing this letter, GSA says in its brief, Gilbane was "acting on behalf of GSA."[4] As we found in our decision on the parties' cross-motions

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[4] In our decision on the parties' cross-motions for summary relief, we asked GSA to clarify whether the architect (MSA) or the construction manager (Gilbane) had authority to speak for the agency in dealings with the contractor and the subcontractor. At the hearing, Mr. Hundley, the agency's project manager, testified that he is a warranted contracting officer who had authority to direct changes to the contract for amounts not in excess of $450,000. He stated that "everybody . . . come[s] to me as kind of the decision maker. . . . I am the decision maker." He explained, though, that "I can't be the decision maker for everything. There's just too many decisions that are out there. . . . So . . . anything that has to do with day to day operations, I allow, or give, or require my construction

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for summary relief, WDJV did not notify GSA of a potential claim for the cost impact of the change in the garden wall finish until the contractor sent a letter to Mr. Hundley on March 13, 2006.

Mr. Hundley's initial reaction to this letter, penned on April 17, was that any claim should be denied because the acid-etched finish had been proposed by Global and accepted by MSA. In a declaration submitted with GSA's motion for summary relief, Mr. Hundley offered a different reason for denying the claim: By the time WDJV notified him that a claim would be forthcoming, cost and scheduling considerations would have made impractical doing anything other than allowing Global to continue manufacturing panels with an acid-etched finish. At hearing, Mr. Hundley amplified this position. He testified that after he received WDJV's letter, he reviewed the contractor's payment applications. The most recent application showed that the value of Global's stored materials off site had increased by more than $500,000 from January 18 to February 19, and he assumed that this increase represented production of panels. He did not ask WDJV how many panels had been made, however, or what might be the impact of stopping the application of acid etching to panels in production.

Donny DiVincentiis, the head of Global's sales and estimating force, explained that most of the panels the firm produced in early 2006 were for Buildings A, B, and C, all of which were acid-etched per contract requirements. He further testified that the dollar figures included in payment applications include far more than production costs alone. A panel's cost does not begin to be incurred when concrete is poured, he explained. To make panels, Global also incurs costs for shop drawings, engineering, project management, purchase of materials (such as aggregates, sand, and hardware which is integrated into panels), preparation of trailers for transporting the panels, and transportation itself. These costs are also included in the payment applications. Mr. DiVincentiis testified that based on his review of corporate records, as of March 13, 2006 – the date on which WDJV informed GSA that a claim for acid-etching of garden wall panels would be forthcoming – Global had completed only 12.21% of the panels it eventually manufactured for the portions of the

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[4] (...continued)
manager, who is my 'eyes and ears' on the job site, to work the management of the construction." When questions arise, "the return [–] what is told back to the construction contractor [–] comes through our office. . . . I have [oversight] responsibility of it all." Similarly, he testified, he had ultimate responsibility for review of submittals, "as they were returned through my office." He relied heavily on MSA, and he was aware of MSA's responses to requests for information. In GSA's brief, the agency states that "[u]nder the contract, the Government gave MSA the authority to act on its behalf with regard to the selection of precast samples."

project that were not originally specified as acid-etched. He assured us that if Global had been told to stop acid-etching garden wall panels at that time, it would have done so, scrapping the panels that had already been made.

Global ultimately produced and provided acid-etched panels for all of the buildings in the complex – Buildings A, B, C, and the elevator tower, which were specified in the contract as being acid-etched; the garden wall, which was mandated by MSA (speaking for GSA) to be acid-etched; and Buildings D, E, F, and G, and other small structures. The presiding judge asked Mr. Cicuto why Global provided this finish for the last group of buildings. Mr. Cicuto explained:

> My opinion [was] that when the architect and the owners saw the towers [of Buildings A, B, C, and the garden wall] being in place and having this nice limestone look, . . . they would never accept an inferior finish as smooth form finish because we saw in one of the reports where they rejected the form finish that was provided by the forming contractor [of the cast-in-place concrete] on the job. . . . [H]ad we pursued a form finish . . . we would never ever get an approval. . . . I'm sure it was something [Mr. Safdie] would not like.

Global's claim was incorporated into a much larger claim that WDJV presented to the GSA contracting officer. In issuing a decision on the WDJV claim, the contracting officer did not address the claim with which we are concerned here. Consequently, the Global claim is deemed to have been denied.

This claim has two parts. The first, in the amount of $201,493.67, is for additional costs incurred in providing the face mix that MSA approved, rather than the face mix that Global expected to be able to provide. The second, in the amount of $233,965.40, is for additional costs incurred in acid-etching the precast that Global supplied for the garden wall, Buildings D, E, F, and G, and other small buildings. Each component is subject to a mark-up of ten percent for overhead and an additional ten percent for profit.[5]

At our hearing, Mr. DiVincentiis provided details about the claim. Global's price for the job was fixed when the firm was submitting proposals to several general contractors (WDJV among them) – even before GSA awarded the contract to WDJV. The price was premised on providing a standard gray face mix, which is industry standard, like G514. The G715 face mix that MSA (on behalf of GSA) ultimately required, like other mixes Global

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[5] The claim has undergone various permutations over time. The numbers we cite in this decision are the ones ultimately presented.

had proposed in the course of the submittal process, differed from G514 in that it contained more expensive coarse aggregate (Georgian limestone, rather than Dufferin limestone), more expensive sand (tan sand, rather than concrete sand), and a different concentration of pigment. Global ultimately needed 5105 cubic yards of concrete to make the panels it supplied for the project. The additional cost of the different ingredients of the concrete was $39.47 per cubic yard.

Mr. DiVincentiis testified further that the additional cost of acid-etching a panel, rather than providing a smooth form finish, was $2.10 per square foot – $1.40 per square foot for labor (including labor burden) plus about seventy cents per square foot for materials. The number of square feet which was acid-etched, though not specified by the contract to be acid-etched, was 111,392 – 84,284 for the garden wall and 27,108 for Buildings D, E, F, G, and other small structures.

The contract between GSA and WDJV incorporates by reference Federal Acquisition Regulation clause 52.243-1, "Changes–Fixed-Price (Aug 1987)." Under this clause, if any change made to the contract by the contracting officer "causes an increase . . . in the cost of . . . performance of any part of the work . . . under this contract, . . . the Contracting Officer shall make an equitable adjustment in the contract price."

The subcontract which Global entered into with WDJV has been included in our record. The subcontract states that its "Date of Agreement" is December 16, 2004. The instrument was signed on February 17, 2005, by Global and on February 22, 2005, by WDJV. The subcontract states, "All Claims must be made by written notice to the Contractor at least one (1) week prior to the beginning of the Subcontractor's Work or the date by which the Contractor is obligated to give notice to the Owner with respect to such claim, or within one (1) week of the Subcontractor's first knowledge of the event, whichever shall first occur, otherwise, such claims shall be deemed waived." Messrs. Cicuto and DiVincentiis both testified that WDJV did not require Global to comply with this notice requirement. To the contrary, they said, the claims process between the two companies was very informal, and a common aspect of it was reserving claims until the end of the project. Brian McGinty, WDJV's project manager for the core and shell, was called as a witness at the hearing; he was not asked about this testimony by the Global officials.

Discussion

WDJV maintains that GSA, acting through MSA, changed the contractual requirements pertaining to both the face mix of all of the precast concrete and the finish of much of it. Each change, according to the contractor, increased precast subcontractor

Global's costs of performance. WDJV believes that GSA should compensate it for these increased costs. We discuss the face mix and finish issues separately below.

The face mix

Global originally submitted a mix labeled as G514 to meet contract specifications. MSA rejected G514 and ultimately accepted a mix labeled G715 in its place. The parties have diametrically opposed views on whether these mixes were acceptable – WDJV says that G514 matched the standard gray limestone which MSA provided as a sample, but that G715 does not, whereas GSA says that G514 did not match the sample and G715 does. Because neither party provided a panel with either mix as an exhibit, we cannot decide this dispute through observation of the panels. We believe that the documentary record and hearing testimony provide a basis for resolution, however.

The contract contained many constraints as to the mix of the precast, but most of them deal with matters not at issue here, such as performance, quality assurance, and fabrication. As to matters which are at issue regarding the mix, the contract said only that the precast, "[w]hen viewed at a distance of 3 m[eters] in natural daylight," was to have surfaces "uniform in color, texture, and finish," and that the architect could "adjust the pigment color of the panels" during the submittal and review process. The parties appear to agree that the latter provision effectively required the contractor to match the color and texture of a sample selected by the architect.

MSA thought the G514 mix had "very good" color, but was concerned with uniformity of both the color and the texture of the mix. The concern – which was repeated throughout the process of reviewing numerous mixes -- seems to have been focused on black (and sometimes gray) flecks in the precast. This criticism was based on a misunderstanding of the product being evaluated. The coarse aggregates and sand in precast concrete are natural products, and as such, they do not have perfectly uniform color and texture. We agree with Global's Mr. Cicuto that a precast panel may appear to have black flecks when viewed close-up, but essentially uniform color when viewed from a distance (as was specified by the contract). We examined the limestone sample MSA gave WDJV, for example, and see that it has this quality. We find that MSA had no basis to reject the G514 mix – other than architect Safdie's uncertain, evolving idea of the color he wanted to see in the complex's structures. The contract did not require WDJV and Global to supply precast which satisfied this objective. Thus, in demanding that Global produce precast with a G715 mix, rather than G514, MSA constructively changed the contract.

When MSA did this, testimony by GSA project manager Hundley and acknowledgments in GSA's brief confirm, it was speaking for the agency. Mr. Hundley was

a contracting officer authorized to make agency determinations on changes not in excess of $450,000, and he delegated to the architect the responsibility for determining which precast sample to accept. Pursuant to the contract, this change required an equitable adjustment to the contract price. Global chief estimator DiVincentiis testified, without contest, that Global's price for its work was based on use of a mix such as G514. Thus, the amount of the equitable adjustment should be the difference in cost between G514 and G715, an amount Mr. DiVincentiis testified – and documents he prepared confirm – is $201,493.67. GSA has not objected to the markups of ten percent for overhead ($20,149.37) and another ten percent for profit ($22,164.30). Thus, if this part of the claim can survive GSA's defenses, the agency must pay to WDJV $243,807.34 for this agency-directed change.

GSA essays three defenses (in addition to its principal contention that G715 matched the sample of standard gray limestone and G514 did not). First, the agency contends that the mix became acceptable – a match to the sample – because Global added pigment, thereby masking the black flecks. An adjustment of pigment concentration, it will be remembered, was within the architect's authority. This theory does not square with the facts. MSA believed that black flecks were apparent in many of the mixes proffered by Global, and ultimately, it selected a mix (G715) that had less pigment than another alternative (G726). If adding pigment were the solution to the black fleck "problem," G715 would not have been the preferred mix.

GSA's other defenses are built around the subcontract entered into between Global and WDJV. In one of these arguments, the agency maintains that at the time the subcontract was signed, MSA had indicated that it liked G688 better than G514, so any comparison between base line cost and eventual cost should involve G688 rather than G514. We are persuaded by the testimony of the Global officials that while the subcontract may have been formalized midway through the submittal and review process, the price of the subcontract was established far earlier. Further, while MSA may have liked G688 more than G514, it never pronounced G688 acceptable. We see no reason to use G688 for comparison – especially because the subcontract price envisioned a mix such as G514.

GSA also notes that the subcontract provides that claims by the subcontractor are to be made before the subcontractor begins work or within a week of the subcontractor's first knowledge of the event. Global clearly did not even tell WDJV a claim would be coming until well after these events occurred. Global's Messrs. Cicuto and DiVincentiis both testified, however, that throughout contract performance, the claims process between WDJV and Global was informal; the contractor did not require the subcontractor to comply with the subcontract's notice requirement. A WDJV official was called as a witness at the hearing, and if the Global testimony was not true, we are confident that he would have been asked about it. He was not, confirming that the subcontract's words were not honored by the

parties to it. We also note that case law establishes that when claims are brought against the Government later than permitted by a contract, the claim will be heard unless the Government can prove it was prejudiced by the late notice. *See*, *e.g.*, *AAB Joint Venture v. United States*, 75 Fed. Cl. 414, 424 (2007); *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 699 (1994); *Calfon Construction Inc. v. United States*, 18 Cl. Ct. 426, 438 (1989), *aff'd*, 923 F.2d 872 (Fed. Cir. 1990) (table); *Powers Regulator Co.*, GSBCA 4668, et al., 80-2 BCA ¶ 14,463, at 71,319-20. Neither WDJV nor GSA could possibly have been prejudiced by the Global claim because the increased costs at issue resulted from a direction of the authorized representative of GSA whose artistic bent controlled all decisions regarding the mix of the precast concrete. The agency has provided no evidence that if it had known of these costs, it would have revoked the architect's authority to make precast decisions or countermanded this particular decision.

The finish

According to the contract, the precast concrete facing of Buildings A, B, and C, and other indicated structures was to have an acid-etched finish; the precast facing of the garden wall and Buildings D, E, G, and other structures was to have a smooth form finish. The project was completed, however, with an acid-etched finish on all the precast. Why this happened is a matter of dispute between the parties.

It is clear that in August 2005, MSA directed that the precast on the garden wall be acid-etched. WDJV maintains that the architect directed this change and that because the architect was speaking for GSA, the agency is responsible for the cost ramifications of the direction. GSA contends that Global requested the change, failed to inform the agency in a timely manner that it considered the modification to be compensable, and incurred less cost in providing an acid-etched finish than it would have in providing a smooth form finish.

We find that the decision to change the finish of the garden wall from smooth form was made by MSA, on behalf of GSA, for reasons known only to MSA. For the garden wall, Global submitted at MSA's request sample panels with four different finishes and asked which option the architect preferred. After reviewing the sample panels, MSA chose the one with an acid-etched finish. Global did not play any role in this decision.

Construction manager Gilbane, also acting on behalf of GSA, then asked WDJV to alert it to any cost impact of the decision to change the finish. WDJV did not respond for seven months, at which time it did assert that a money claim would be forthcoming. We find this failure to respond promptly to be troubling – but in the final analysis, it was nothing more than discourteous. As discussed above, with regard to the face mix aspect of Global's claim, the Government must prove prejudice to defeat a late (but otherwise meritorious)

claim. For two reasons, GSA cannot do that here. First, the finish of the garden wall was modified due to the artistic concerns of the entity to which the agency delegated authority over decisions regarding precast – MSA. As with the architect's decision regarding the mix, GSA has given us no reason to believe that if it had known that MSA's preference for an acid-etched finish would be more expensive than a smooth form finish, it would have revoked the architect's authority to make precast decisions or countermanded this particular decision. Second, when WDJV belatedly did make cost implications known, had the agency inquired into the status of garden wall panel production – rather than making unfounded assumptions based on the scant information it did have – it would have learned that production had scarcely begun. Costs incurred by Global to that point for production of acid-etched panels involved panels for portions of the complex which had been prescribed by the contract to have an acid-etched finish and for activities preliminary to production (such as purchase of materials).

Applying an acid-etched finish to precast clearly involves considerably more labor, materials, and time than applying a smooth form finish. GSA has advanced only one basis for concluding that the costs of the labor and materials presented by Global's chief estimator are not reasonable. That is the testimony of MSA's Mr. Goeller. We do not find this testimony compelling. Mr. Goeller provided no estimates of how much producing a smooth finished panel to his liking would cost. Further, his idea of smooth form finish is something far more exacting than what Global's Mr. Cicuto explained is commonly considered in the industry to be smooth form finish – and more important here, it is something far more exacting than what is required in the contract. The contract says that a panel with smooth form finish must be "free of pockets" and may not have "[e]xcessive air voids, commonly called bugholes, evident on exposed surface." Thus, the contract defined "pockets" – something it precluded – as different from "air voids, commonly called bugholes" – something it permitted in quantities which were not excessive. Mr. Goeller, however, considered a pocket and an air bubble (or void) to be one and the same, and thought that a smooth form finished panel could not have any of them. To achieve the objective this architect desired would have required much more work than what the contract demanded, panels with some air voids but no pockets. Because the cost of producing what Mr. Goeller wanted is more than the cost of producing what the contract required, comparing such a cost with that of producing a panel with an acid-etched finish is not appropriate.

GSA has cited several court and board of contract appeals decisions as to the finish portion of the claim. None of the decisions is applicable to the facts as we have found them regarding the garden wall, however. In *Ling-Temco-Vought, Inc. v. United States*, 475 F.2d 630 (Ct. Cl. 1973), for example, the contractor was precluded from recovering on its claim because it continued performance even after it knew that the basis of the claim was invalid. Here, the contractor always believed – and we have found – that the basis of the claim was

valid. In *J. A. Ross & Co. v. United States*, 115 F. Supp. 187, 190 (Ct. Cl. 1953), the court held, "Whenever the defendant orders work done which the plaintiff thinks is in violation of the contract, or in addition to its requirements, plaintiff is required to protest against doing it, or to secure an order in writing before doing it, [before making] a claim against the Government for additional compensation." Here, the contractor did secure an order in writing before providing a different finish from the one required by the contract. And in *Blake Construction Co.*, ASBCA 3406, 57-1 BCA ¶ 1281, at 3913, the Government accepted a contractor proposal to use a method different from the one required by the contract, but the claim was denied because the change in method was as "a voluntary act on the part of Appellant." The change in method in our case was directed by the agency's authorized representative; it was not voluntary.

All that we have said thus far concerning the change in finish applies to the garden wall. Global also supplied precast panels with an acid-etched finish to other structures which the contract said were to have a smooth form finish – Buildings D, E, F, and G, and other small buildings. Global did this because, in the view of its Mr. Cicuto, this finish was the only one MSA's Mr. Safdie could possibly accept. In making this judgment on its own, rather than seeking and receiving a directive from the architect, Global was acting as a volunteer. The analysis employed in *Blake Construction* therefore applies to the change in finish as to these structures; no compensation is appropriate.

WDJV's claim regarding the change in finish is for a total of $233,965.40 – $176,996.40 for the garden wall and $56,969 for the other buildings – plus markups of ten percent for overhead and an additional ten percent for profit. We conclude that the claim is valid as to the garden wall, but not as to the other buildings. Thus, GSA must pay to WDJV, as a consequence of the agency-directed change, $176,996.40, plus $17,699.64 for overhead and $19,469.60 for profit – $214,165.64 in all.

Decision

The appeal is **GRANTED IN PART**. The General Services Administration shall pay to Walsh/Davis Joint Venture $243,807.34 as a consequence of the agency's change to the face mix of Global's precast panels and $214,165.64 as a consequence of its change to the finish of some of those panels. The total amount is $457,972.98. Interest on this amount

shall also be paid for the period beginning with the date the contracting officer received WDJV's claim and ending on the date of payment. 41 U.S.C. § 7109 (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3825 (2011)).

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STEPHEN M. DANIELS
Board Judge

We concur:

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JAMES L. STERN
Board Judge

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CATHERINE B. HYATT
Board Judge