UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: March 17, 2011

CBCA 1966

SINGLETON ENTERPRISES-GMT MECHANICAL

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Wayne Singleton, Joint Venture Partner of Singleton Enterprises-GMT Mechanical, Luthersville, GA, appearing for Appellant.

Lisa M. Clark, Office of the Regional Counsel, Department of Veterans Affairs, Brecksville, OH, counsel for Respondent.

Before Board Judges **BORWICK** and **POLLACK**.

POLLACK, Board Judge.

This appeal arises out of contract no. VA541-C-0089, between Singleton Enterprises-GMT Mechanical, a Joint Venture (JV or appellant), and the Department of Veterans Affairs (VA) for replacement of approximately 36,000 square feet of polyisobutylene (PIB) roof on the second floor of a building at the VA Medical Center, Wade Park, Ohio, along with new underlying insulation, associated masonry, carpentry, and other items. Supplemental Appeal File , Exhibit 1; Transcript at 83, 117, 119. This case centers on contract provisions dealing with the placement of new insulation on the roof deck (using asphalt), and how that related to the contract's requirement for a twenty-year manufacturer warranty on the PIB roof being installed.

A hearing on this appeal was held on November 9, 2010, in Cleveland, Ohio. Each party provided testimony from various witnesses. Appellant, however, provided only one affirmative witness, Mr. Wayne Singleton, and thus when testimony of appellant is referenced below, it refers to his testimony. The VA appeal file was divided into sections; however, it was not otherwise tabbed or numbered. Appellant provided a tabbed supplemental appeal file, which included most of the documents in the VA file. Because the supplemental appeal file has been numbered, we use it as the primary citation source in this decision. Additionally, the parties provided limited documents at the hearing. The Board here issues a two-judge decision, as appellant elected the Board's accelerated procedure. Rule 53 (48 CFR 6101.53 (2010)).

Facts

The contract called for appellant to place layers of insulation on the roof deck and to attach to that insulation a new PIB roof (PIB membrane). The roofing membrane was to be attached to the insulation by means of specified proprietary adhesives manufactured by Republic Powdered Metals, Inc. (RPM). Supplemental Appeal File, Exhibit 1; Appeal File, sec. 4. While not stated in the specifications, the testimony of various VA witnesses makes it clear that the VA wrote the PIB roofing specification for this contract around RPM's PIB product. Supplemental Appeal File, Exhibit 1; Transcript at 9, 119, 225, 246, 327. There was no evidence, however, that the insulation provisions of the contract were written around any particular manufacturer's product.

Appellant submitted a bid of $777,020. The VA opened bids on September 28, 2007, and awarded the contract on October 12, 2007. The contract initially called for five months to complete from the date of award. That was later changed at the time of notice to proceed (NTP) to 180 days. Supplemental Appeal File, Exhibit 1, 3; Transcript at 42.

Section 07220, Roof and Deck Insulation (eight pages) set out the requirements for providing and installing new insulation on the project. It clearly addressed using asphalt for adhering insulation to the existing concrete roof deck. It detailed the type (grade) of asphalt to be used, as well as included details such as heating temperatures and coverage rates for application of the material. Nothing in the section made reference to the use of adhesive as the means for adhering insulation to the roof and deck. Supplemental Appeal File, Exhibit 20.

Section 07531, Elastomeric Sheet Roofing Polyisobutylene Tear Off And Replacement, which ran eighteen pages and contained parts of two separate roofing specifications, addressed the tearing off of the existing roof and replacement with a new PIB membrane which was to be attached to the new insulation by means of RPM adhesives.

Portions of section 07531 were confusing and could only be explained as a mistake. Appeal File, sec. 4; Transcript at 206-08, 231. For example, as set out below, the roofing specification had two warranty paragraphs, rather than one. While there were differences in the two warranty specifications, each called for a twenty-year warranty and thus the duplication does not materially affect our analysis in this appeal. The following provisions from section 07531 are relevant to the claim. We list the warranty provisions in the order they appeared in the specification.

> 1.10 WARRANTY
>
> A. Provide manufacturers standard twenty (20) year warranty covering materials and labor. Must be 100 mil. Polyisobutylene membrane adhered with GEOTAC or GEOBOND Adhesive.
>
> 1.6 WARRANTY
>
> Roofing work subject to the terms of the Article "Warranty of Construction" of Section, General Conditions, except extend the warranty period to twenty years.
>
> 3.03 ROOF INSULATION.
>
> A. Apply insulation neatly fitted to penetrations, projections, and nailers. Install tapered or feathered insulation around roof drains in such a way as to provide proper slope (maximum 3: 12 pitch) for drainage.
>
> B. Adhere insulation with Manufacturers Insulation Adhesive, or mechanically fasten per manufacturers recommendations.

Paragraph 3.03, above, although in the roofing specification, addressed the placement of insulation. It was clear from the testimony of various VA witnesses that the VA wanted insulation attached by adhesive (as set out in Paragraph 3.03) and the VA had not meant to include asphalt as either the preferred method or an option. Transcript at 183-93, 222, 327. However, nothing in the specifications conveyed that intention or even suggested that asphalt could not be used. The VA's best explanation as to how the two methods were to be treated was from Mr. Edward Hazel, current chief of construction at the VAMC. He described asphalt and adhesive as alternatives and also said that while asphalt was provided in the specification, the Government did not intend or imply that appellant had to use asphalt. Transcript at 117, 120, 180-81.

There is no dispute between the parties as to appellant's responsibility for providing a twenty-year roof warranty. However, as addressed below, the central dispute in this case turns on how the use of asphalt meshed with appellant's ability to secure that warranty.

Although the VA did not name a roof membrane supplier, the VA wrote the PIB roofing specification around use of the RPM PIB roof. The VA did specify the RPM adhesive in section 07531. Further, although RPM was not specified as the sole source for the roof membrane, the VA wanted that product on this project. As noted by Mr. Brian Rice, the contracting officer's technical representative (COTR), had a contractor on this project come in with a different roof (non-RPM), the VA would have probably disapproved it. Transcript at 225, 246, 327. The VA had used RPM roofs at this facility for ten to fifteen years and had approximately fourteen roofing areas with the RPM PIB roofing product. Supplemental Appeal File, Exhibit 10-11; Transcript at 222-23. Mr. Rice explained the VA had a policy at the facility to standardize, so it would not have to deal with ten different roofing companies or ten different processes. Transcript at 327.

The VA held a pre-bid conference. Appellant did not attend; however, Gire Roofing Construction (Gire), the firm appellant used for the roofing work, attended, as did another potential subcontractor, Warren Roofing & Insulation Co. (Warren). Warren was a local contractor with prior experience at the site. Gire was from Illinois, and there was no evidence it had previously worked on the facility. Supplemental Appeal File, Exhibit 10-12; Transcript at 196. Mr. Nick Carrozza, a VA engineer, and Mr. Rice represented the VA. Supplemental Appeal File, Exhibit 22; Transcript at 94-95, 254, 323-26. Neither VA official, however, addressed specifics as to roofing at the meeting. Instead, that was handled by Tom Dornbrook, sales representative for RPM. On roofing matters, it appeared that the VA had essentially turned its program over to Mr. Dornbrook. In a 2008 memo, where the VA was seeking some advice on this claim from the Corps of Engineers, Mr. Hazel referred the recipient to Mr. Dornbrook for details and described Mr. Dornbrook as "the VA's main contact for the roofing materials system in use for the entire hospital." Supplemental Appeal File, Exhibit 34. Under questioning from the VA counsel, Mr. Dornbrook confirmed that on this project, he assisted as a consultant to the VA. Transcript at 236.

Mr. Dornbrook testified as to what he said at the pre-bid conference. He confirmed that his presentation essentially focused on the RPM product and its requirements. He did not address the use of asphalt during the meeting, and stated that at the time of the pre-bid conference, he was in fact unaware that the VA even had provided an asphalt specification in its contract. He acknowledged he did not say anything involving the operation of the RPM warranty and use of asphalt, nor did he say that the use of asphalt would void the warranty. At the close of the meeting he provided the attendees with an RPM material sheet. The sheet

was not later distributed by the VA to other potential bidders. Transcript at 236, 245, 255-56, 262, 265-66.

Appellant received three to four bids on roofing, including bids from Gire and Warren. Gire provided a single price, based on seating the insulation in asphalt. Transcript at 11-12. Warren provided two prices. The first was a primary price of $645,000 (based on providing adhesive to attach insulation). The second specified a $50,000 deduct to the first price if asphalt was used. Warren appended the following note to its bid: "For Asphalt as the insulation adhesive, DEDUCT: $50,000. Asphalt is specified as the insulation adhesive but in (sic) not compatible with warranty requirements." Supplemental Appeal File, Exhibit 9.

Warren's bid was based on using the RPM roof, and its comments as to the warranty referred to that product. Supplemental Appeal File, Exhibit 9. After appellant received Warren's bid, it attempted to contact the VA for clarification, but was unsuccessful. It then proceeded to provide its bid, relying on its understanding that the specifications clearly provided for the use of asphalt and relying upon Gire's pricing, which was based on asphalt. Transcript at 12, 42, 333. Because appellant had utilized RPM's price for the roof membrane, appellant planned on using the RPM roof on top of the new insulation. While RPM was local, there were other manufacturers that could furnish a PIB roof. Insulation was not being provided by RPM. Transcript at 17, 26. The firm, quoting asphalt to appellant, verbally agreed to keep its price firm for ninety days from bid. Supplemental Appeal File, Exhibit 12; Transcript at 18-19, 45.

When asked to explain how it reconciled bidding with the note in Warren's bid as to the warranty, appellant stated it relied on the fact that the specifications called for the use of asphalt and further that it saw nothing in the specifications that led it to believe that RPM would not accept asphalt for attaching insulation, or that asphalt would void an RPM warranty. Essentially, appellant was stating that because the specifications were explicit as to the suitability of asphalt, there was no reason to assume a connection between how the insulation was being connected and the roofing membrane warranty. At the time of bid, appellant believed that the warranty could be issued. Appellant also pointed out that Warren's letter related solely to RPM and that Gire's bid contained no similar qualification or concern as to the use of asphalt. Supplemental Appeal File, Exhibit 24; Transcript at 331-37.

After award, appellant proceeded with gathering information for submittals from RPM. During that process, appellant was advised, either directly by Mr. Dornbrook or through Gire, that RPM would not provide a twenty-year warranty unless insulation was laid with adhesive. Appellant testified that this was the first it knew of the problem; however, as noted above, Warren had warned of a possible problem in its bid. Transcript at 13-14.

Based on what it had learned from RPM as to the warranty, appellant provided a letter, dated November 27, 2007, to the VA along with an asphalt submission. The letter advised the VA that RPM had said that the use of asphalt was not compatible with the RPM warranty and appellant would have to use adhesive. Appellant advised that adhesive would be more costly. Supplemental Appeal File, Exhibit 21; Transcript at 14.

The VA did not respond, so on December 28, 2007, appellant sent a letter seeking a decision on the submittal. Appeal File, sec. 3. At this time, appellant was in contact with Mr. Dornbrook as to the roofing materials. From those contacts and conversations it became obvious to appellant that it was going to have to use adhesive for the insulation and do that regardless of whether the Government issued a formal change order or not. Appellant testified that after several discussions with Mr. Dornbrook, it was evident that the PIB roof was to be supplied using RPM materials and Mr. Dornbrook "was calling the shots." Appellant characterized the use of RPM for the roofing material as essentially cast in concrete. With that in mind, appellant, even without a change order, took steps to secure adhesive so as to protect the price. Accordingly, Gire ordered 200 pails of insulation adhesive from Dornbrook Marketing LTD on January 11, 2008. Notice to proceed (NTP) was finally issued by the VA on January 14, 2008. Supplemental Appeal File, Exhibit 13; Transcript at 15, 18, 55, 276.

The COTR explained the VA's failure to respond, saying that the VA could not reject a submittal until there was a NTP. Transcript at 100. The VA, however, did begin an internal analysis. In his January 4, 2008, memo to engineering, the contracting officer (CO) stated, "The specifications called for asphalt as the adhesive for insulation, but the manufacturer may not honor the warranty using asphalt, according to the contractor." Supplemental Appeal File, Exhibit 5; Transcript at 14, 42.

On February 12, 2008, the VA rejected appellant's submittal and provided under Remarks, "Revise and resubmit in accordance with design bulletin No. 1." Three days later, the VA issued Bulletin No. 1, which provided: "The adhesive to be used to secure the roofing insulation shall be RPM Insulation Primer and RPM Insulation Adhesive as manufactured by Republic Metals, Inc. Asphalt shall not be used to secure insulation to the roof deck." Supplemental Appeal File, Exhibit 23. Mr. Hazel described the bulletin as a clarification and not a contract modification. He said it addressed an ambiguity in the specifications. Transcript at 181-82. Pursuant to the direction, appellant provided a new submittal noting that the use of adhesive was based on the Government's direction. Supplemental Appeal File, Exhibit 24.

On March 13, 2008, the VA asked appellant for a proposal to delete a segment of construction services in the southwest corner of the roofing project. This is relevant to the

claim, in that it reduced the square footage to be replaced. After negotiation, the parties agreed that appellant would provide a credit for the deleted work. The VA has asserted that the claim must be adjusted for the reduced area. Appellant has contended otherwise, pointing out that in the modification, appellant gave the VA a credit based on the use of adhesive instead of asphalt as planned. Supplemental Appeal File, Exhibit 28-32; Transcript at 103. Appellant in this claim seeks to recoup the difference between what it provided in the credit for adhesive and what that credit would have been if it had been based on asphalt.

On April 22, 2008, appellant submitted what it designated as its claim and change order proposal, seeking $56,004 for changing the originally specified asphalt to RPM insulation adhesive. The claim included a breakdown for subcontractor costs (Gire) of $47,774. The remainder of the claim sought markups for the prime of 7.5% for overhead, 7.5% for profit, and 1.44% for bond. The subcontractor costs were broken down as follows:

Delete Asphalt	14 Ton @ $500	($ 7,000)
Delete Asphalt Labor	14 Ton @ $ 90	(1,260)
5-Gallon Pails Adhesive	200 EA @ $216	43,200
Labor for Pails of Adhesive	200 EA @ $ 32	6,400
		41,340
7.5% overhead		3,101
		44,441
1.5%(sic) profit		3,333
Total		47,774

The 1.5% for subcontractor profit was intended to be 7.5%. Supplemental Appeal File, Exhibit 6.

Although not provided to the VA in April 2008, appellant provided at the hearing a further breakdown from Gire, dated April 25, 2008. It includes comparative labor prices for asphalt and adhesive and shows 1344.75 manhours @ $46.55 per manhour for a total of $62,598 for installing insulation with adhesive; and 1207.25 manhours @ $46.55 per manhour for a total of $56,198 for installing insulation with asphalt. Supplemental Appeal File, Exhibits 12, 29; Transcript at 58-59, 103, 106-07.

On May 7, 2008, Mr. Rice authored an estimate comparing the costs for using asphalt versus adhesive based on 844.70 squares of roof insulation (versus 899 squares used by appellant). His estimate provided no breakdown as to labor or material, but rather set out an estimated combined cost of $56.67 per square for labor and material for laying insulation in

asphalt, and $43.22 per square for laying it with adhesive. He concluded the VA was entitled to a net credit of $11,905.92. Supplemental Appeal File, Exhibit 36; Transcript at 65-66. The numbers he used in the estimate were figures he secured from Mr. Dornbrook, who in turn had secured the information from contractors he had contacted. Supplemental Appeal File, Exhibit 36-37; Transcript at 87-88. There was no background information as to what information was provided to the sources, and Mr. Rice under questioning stated that he did not have any work papers with him. It appeared he had not reviewed any work papers prior to the hearing. Transcript at 207-08. At some point, the VA tweaked its numbers and in a June 12, 2009, memo increased the cost of the asphalt work to $57.87 per square. The change was never addressed nor explained. Supplemental Appeal File, Exhibit 41.

On May 27, 2008, the VA and appellant spoke by telephone regarding appellant's costs, with VA advising that it needed more justification for appellant's numbers. Transcript at 296. On the same date, appellant wrote two letters to the contracting officer (CO). The first, referencing the earlier conversation as to costs, addressed seven cost issues. Among those were explanations as to how appellant arrived at square footage, appellant's labor cost differences, and how appellant arrived at the asphalt credit. In the letter, appellant stated that by that point, asphalt cost was approaching $700 a ton, as compared to the $484 a ton it had bid. Supplemental Appeal File, Exhibit 17. In the second letter, appellant stated the following, "Unless directed otherwise in writing from the Contracting Officer, we are going to proceed with changing the application material from asphalt to adhesive and consider it to be a constructive change order coming from the Contracting Officer." Supplemental Appeal File at 18. As of May 27, work had not yet begun on the roof. Roofing commenced some time in June or July.

The VA provided no response to either of the two letters. It did continue to review the claim, focusing on pricing and still contending that using adhesive was cheaper. On November 6, 2008, Mr. David Sabel, chief of engineering, provided a memorandum to the acting CO. The memo affirmed confidence in Mr. Rice's estimate, stating that it had been provided to the VA from the roofing supplier (RPM), and further addressing alleged flaws in appellant's cost breakdown. Mr. Sabel claimed (1) appellant used the wrong size for the roof (896 squares versus 844 squares), (2) used too low a cost per ton ($487) for asphalt, since it based its figure on a September 2007 date (before asphalt increases in the summer of 2008), and (3) asserted that appellant failed to include costs such as transport, maintenance, and delivery of hot asphalt to the roof in its comparison of costs. In his memo, Mr. Sabel provided no dollar figure for any of the purported omitted items; he similarly provided no figures at trial. Finally, the memo said engineering had confirmed its costing through a contact person with the Corps of Engineers (who got her information through a subconsultant) and that the Corps concluded that there should be little difference in price between the two processes, with any cost increase for adhesive being be offset by reduced labor costs in placing adhesive in lieu of asphalt. Supplemental Appeal File, Exhibit 39.

On February 1, 2009, appellant asked for a final CO decision. Again it received no reply. On June 12, 2009, Mr. Sabel authored another internal memorandum that in general tracked the prior one. Supplemental Appeal File, Exhibit 41. Still having received no reply, appellant filed its appeal with the Board on a deemed denial basis. Transcript at 32-33.

In order to resolve this dispute we must determine (1) whether a twenty-year PIB roof was available from a manufacturer other than RPM and (2) whether a twenty-year warranty could be secured if insulation was placed in asphalt. Mr. Dornbrook said he knew of at least two RPM competitors that could have bid the project to provide the roof membrane. He additionally confirmed that in some instances RPM had allowed use of asphalt and honored warranties with asphalt. Transcript at 247-52. Mr. Sabel testified that he understood that RPM installed material with asphalt and he further acknowledged that the use of asphalt was an accepted method in certain situations. Transcript at 224. He also confirmed that there were "a few manufacturers that provided" a PIB system. He also testified that he assumed that there was another manufacturer that could have provided the roof with a warranty, stating, "My assumption is that if it's a method that's accepted, that there is a warranty available to install appropriately." Transcript at 225-27. Finally, he testified that it was his understanding that if a contractor installed insulation with asphalt, and installed the appropriate security devices around it, "that would have a warranty to it." Transcript at 224-25.

As noted earlier, Mr. Rice's estimate provided that the combined labor and material costs for adhesive should be $43.22 per square. When that figure is multiplied by 844 squares, claimed by the VA, the result is $36,477.68. Adhesive comes in five gallon pails, which on this project cost $216 a pail. Each square requires a gallon of adhesive. Accordingly, using the VA number of 844 squares, one would need 169 pails. When 169 pails are multiplied by the cost per pail, the total comes to $36,504 for material only. If we use what was purchased on the project (200 pails), the number increases to $43,200. In each instance, the cost of materials alone exceeds Mr. Rice's price for materials as well as labor. Multiplying the VA cost of $56.67 a square for asphalt by 844 squares, the result is $47,830 for both labor and material to lay insulation in asphalt. Even if we were to assume the cost of asphalt at $1000 a ton (a number we do not find valid, but use for ease of calculation), the difference (between $47,830 less $14,000 (for 14 tons)) would leave $33,830 for labor costs to place insulation in asphalt. Obviously, the comparisons make no sense. Mr. Rice's calculation (once one accounts for material) yields no labor costs for adhesive, but labor of $33,830 for asphalt. Additionally, since the VA provided no breakdown for Mr. Rice's numbers, his estimate is impossible to analyze. Finally, Gire's labor breakdown shows total labor costs of $56,000 for asphalt and $62,500 for adhesive. Supplemental Appeal File, Exhibit 12, 36-37.

At the hearing, appellant provided further confirmation as to its costs. It could not provide a written quote for asphalt on this job, because it had proceeded on a verbal quote.

It did, however, provide an August 2007 pricing proposal on another project, where prices ranged from $415 to $450 a ton. Supplemental Appeal File, Exhibit 7; Transcript at 45. Appellant also provided an excerpt from R.S. Means Building Construction Cost Data (65th ed. 2007) (Means). The excerpt showed comparative costs for using asphalt and adhesive with roofing (it had no insulation listing). The comparisons showed labor of $44.50 per square for adhesive, versus $33 for asphalt, an approximate 35% difference. Supplemental Appeal File, Exhibit 42; Transcript at 211-14. That compares to an 11% difference in Gire's labor estimate. Supplemental Appeal File, Exhibit 12; Transcript at 211-12. Finally, and a further buttress to appellant's labor claim, Mr. Sabel in his testimony referred to "Means" several times as a valid industry source. Transcript at 206-08. His attempts to backtrack on that were unconvincing.

As a final point, one of the VA bases for claiming that the credit for asphalt material was understated by appellant, is that the appellant should have used the prices in effect for the summer of 2008 and further (particularly of concern to Mr. Hazel), that the appellant was not comparing like periods, since appellant was using a September 2007 date for asphalt and an April 2008 date for adhesive. Transcript at 139-40, 145-46. The record shows, however, that adhesive at $216 a pail was ordered in early January 2008, and the September 2007 price (while quoted at that time) was firm until late December. Thus, appellant compared prices for similar time frames. Supplemental Appeal File, Exhibit 13; Transcript at 18-19.

After the hearing, each party filed a brief. The VA brief consisted of two pages and listed four conclusory positions with two record cites and no legal analysis. The VA points were that appellant's claim was overstated, that appellant knew at bid time that adhesive was required, that appellant failed to properly seek clarification, and finally, that appellant did not follow proper procedures in submitting its claim. As an aid to the Board in assessing the procedural defense, the VA provided, as one of its record cites, pages 31 to 78 of the contract.

Discussion

When all is said and done, this case turns on the fact that in February 2008, the VA changed appellant's method of performance by first rejecting appellant's submittal calling for the use of asphalt to secure insulation to the existing roof; and then coupled that with issuing what the VA called a design bulletin. That design bulletin required appellant to use an RPM adhesive product to secure insulation to the roof, instead of asphalt, as appellant had bid.

The contract clearly specified that asphalt could be used to attach new insulation to the existing roof deck. In fact, asphalt was the only material mentioned in the section of the contract specifically addressing insulation. While we recognize that the contract's PIB roofing specification also contained limited provisions that addressed using adhesive to attach insulation to the roof deck, that limited treatment, at best, permitted an alternative means of

performance to the asphalt. The roofing provision's limited inclusion of directions for use of adhesive (to attach insulation) in no way negated appellant's right to set its insulation in asphalt, as set forth in the insulation specification. There was no patent ambiguity in the contract created by the two performance methods. The methods could be harmonized. Accordingly, in forbidding appellant from using asphalt and in directing it to use adhesive, the VA imposed a method of performance that appellant was not contractually required to provide.

However, to resolve this dispute, we need to address additional facts. In addition to identifying means of adhering the insulation to the roof deck, the contract also required that the contractor provide the VA with a twenty-year manufacturer's warranty for the PIB roof it would install on top of the insulation. At least on this particular contract, RPM (the manufacturer around whose products the VA wrote the roofing specifications) would not provide a twenty-year warranty with its roofing product, unless adhesive was used to secure the insulation below (which RPM was not providing). It would not provide the warranty if insulation was set in an asphalt base. That was the case, even though the VA did not appear to know at the time it prepared the specifications, or at the time of contract award, that RPM would impose such a condition on its warranty.

In pricing this project, the record shows that appellant anticipated using asphalt for securing the insulation and anticipated using the PIB roofing membrane as manufactured by RPM. RPM had been providing roofs at the facility, and that fact was highlighted at the pre-bid conference, well established on the facility, and a logical choice for contractors to bid. It was implicit that the VA wanted and was familiar with an RPM roof, and logical that VA specifications would reflect that familiarity and not conflict with RPM requirements. Additionally, we find that despite the fact that RPM was not specified as a sole source, it was highly likely that it's the only roofing product the VA would have accepted for this project. Further, while the VA included asphalt as a means of attaching insulation, the VA clearly did not want that product and likely would never have allowed it. That said, the VA not only included, but also highlighted asphalt in its specifications as the means for setting insulation.

Mr. Singleton testified that by the time appellant provided its asphalt submittal to the VA, it had learned from RPM that RPM was not willing to provide a twenty-year warranty, absent the use of its adhesive. Appellant had also concluded from conversations that the VA was going to require the use of the RPM roof. Given those circumstances, appellant appended a letter to its asphalt submittal, advising the VA of a potential RPM warranty problem. In the letter, appellant did not contest its obligation to provide the specified warranty, nor did it give up its intention to use asphalt. Instead, the letter was advising the VA of a potential problem.

The VA did not respond to the submittal until February 12, 2008, when it returned the submittal and marked asphalt as rejected. The VA followed that with the design bulletin,

which explicitly provided appellant could not use asphalt to secure the insulation and directed appellant to use a specific RPM adhesive product in order to adhere the insulation.

Once the VA received the asphalt submission in November 2007, it could have entered into a dialogue with appellant as to possible solutions. Alternatively, it could have simply sent the submittal back to appellant with a note specifying its concerns as to the warranty and the use of asphalt, and directed appellant to advise the VA as to how (with using asphalt) appellant intended to provide the warranty. Had appellant been unable to provide assurance as to the warranty, then the VA may have had a basis to issue a direction. However, the VA first was obligated to give appellant an opportunity to meet the contract specifications. The VA action, in issuing the bulletin and directing how appellant was to perform, took matters out of appellant's hands. Once the VA issued the bulletin, setting out directions, appellant no longer had control of its performance. It no longer had the opportunity to pursue the option of finding its own way of complying with the contract. The VA action in denying appellant that opportunity constituted a change. Moreover, thereafter, appellant made its disagreement with the VA position clear, but the VA did nothing to change its position.

In finding the VA action to be a change, we are mindful of the argument that appellant had a duty to inquire because of the "note" in the Warren letter. However, it is critical to our decision that Warren's statement as to a possible conflict only involved one potential supplier, RPM. That is particularly significant, because testimony of government witnesses has led us to conclude that there were likely other manufacturers who could have provided a conforming PIB roof and it was likely that those manufacturers would have been willing to provide a warranty that would not have been voided due to setting insulation in asphalt.

The fact that appellant's bid had contemplated using the RPM roof does not change our view. A contractor is not obligated to stay with its intended bid, if after bidding it learns that due to mistake, improvident analysis, or changed conditions it needs to move to an alternate (but contract compliant) means of performance in order to comply with the contract. As long as the contractor performs in compliance with the specifications, it has the right to proceed as it finds best, even where that varies from how it bid. That is particularly the case where, as here, appellant appeared to have other options.

In *Shirley Construction Corp.*, ASBCA 46670, 94-2 BCA ¶ 26,868, at 133,690, the Armed Services Board of Contract Appeals addressed the relationship between a claimed conflict and a contractor's right to perform. There, the Government asserted that there was a conflict between the contractor's reading of the specifications and a clear specification requirement as to a required wind resistance warranty. Specifically, the Government claimed that the contract required a warranty that covered damage from sustained winds up to seventy-five miles an hour, and such a warranty was only available from the manufacturer specified in the contract if the contractor employed a combined system of roof application. The

Government contended that appellant's reading, which was otherwise reasonable, did not result in the needed combined system, and therefore, the appellant's reading created a patent conflict with the warranty. In addressing the matter, the board said the following:

> We cannot conclude the requirement of the 75 mph warranty created an obvious conflict. Indeed we believe the 75 mph warranty was a clear and unambiguous contract requirement the successful bidder was obligated to supply under any interpretation of the installation specifications. Whether it was attainable under appellant's interpretation from a manufacturer other than JPS is not discernable from this record. However, respondent's directions to appellant effectively precluded appellant from pursuing its own interpretation and attempting to provide a 75 mile per hour sustained wind warranty. In this regard, we note respondent's directions to appellant were focused on the method with the warranty to be complied with "in addition" as part of the combined system installation required under respondent's interpretation.

In *Shirley*, the board ruled in favor of the appellant, even though it could not discern from the record whether the appellant would have been able to secure the disputed warranty and thereby proceed as it planned.

In summary, while we recognize that on the disputed contract, appellant initially intended to use the RPM roof, and that the combination of that roof and the use of asphalt was incompatible (at least on this facility), the fact remains that the contract permitted appellant to pursue finding an alternate roofing manufacturer (even contrary to how it bid). Had it had that option, it is likely that it could have provided asphalt and otherwise fully complied with the contract. We find the VA's actions in directing the use of adhesive, instead of asphalt, to be a change.

Appellant has claimed $56,004.76. In reviewing the evidence on quantum, the primary disputes involve the comparative costs of adhesive versus asphalt and the comparative labor costs for placing the insulation with one product versus the other. On both material and labor, we find appellant's evidence to be significantly more convincing. The bulk of appellant's claim is the material cost differential between the $43,200 paid for adhesive versus the $7000 expected to have been expended for asphalt. As to the cost of adhesive, there was no real dispute that it cost $216 per pail. While the VA challenges appellant's pricing of asphalt, the VA provides no credible evidence of a substitute number. In fact, the only credible contemporaneous information as to the price of asphalt was provided by appellant. It showed the cost in late December to be approximately $475 and in May to be as high as $700. In evaluating this claim, we accept the price for asphalt of $500 a ton, as claimed by appellant. We find that price is in line with the firm price it had up until the end of December 2007 and further find that given an October award, that firm price should have held. Finally, the

adhesive price used in the claim is the early January 2008 price and therefore, by using a late December date for asphalt pricing, we are using comparable time frames. As to labor, we find the VA evidence as to labor costs to be second hand, on its face unreasonable, and the VA estimate based on it to be incapable of logical analysis. In contrast, appellant's numbers for adhesive and asphalt, particularly in comparison to each other, appear generally reasonable. Additionally, appellant provided sufficient data to allow a critical analysis of its labor costs.

As to the VA's contention that because of the modification deleting part of the roof, we must reduce appellant's claim, we again find in favor of appellant. While some roofing was deleted, the fact is that in pricing the deletion, appellant gave the VA a credit based on laying the insulation with adhesive. Now that we have found that the requirement for adhesive was a change, appellant is entitled to recoup the difference between the credit it gave the VA for adhesive and the credit it would have given if it had been priced on the basis of using asphalt.

Finally, we find that interest should start on April 22, 2008, the date on which appellant first identified the dispute as a claim.

Decision

Based on the foregoing, we **GRANT** the appeal in the amount of $56,004 plus interest under the Contract Disputes Act, 41 U.S.C. § 7109 (as amended by Pub. L. No. 111-350, 124 Stat. 3677, 3825-26 (2011).

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HOWARD A. POLLACK
Board Judge

I concur:

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ANTHONY S. BORWICK
Board Judge