

YOUNG ENTERPRISES, INC.

CONTRACT NO. V101DC0101

VABCA-6480-6482

VA MEDICAL CENTER  
WACO, TEXAS

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**OPINION BY ADMINISTRATIVE JUDGE ROBINSON  
(Pursuant To Rule 12.2)**

Young Enterprises, Inc. (Young or Prime Contractor) has filed three appeals from final decisions of the Contracting Officer (CO) for the Department of Veterans Affairs (VA or Government) denying its claims. These appeals are sponsored by Young on behalf of its subcontractor, Johnson Roofing, Inc. (Johnson or Subcontractor). In VABCA-6480, Johnson claims that the VA improperly rejected the clay roof tiles that it had previously approved. Because they had been shipped to the site and installation had begun, some of the tiles

had to be returned and other tiles had to be specially ordered, thereby causing it to incur additional costs of \$17,751.46 to order, purchase and install “custom” tiles from the manufacturer. In VABCA-6481, Johnson claims that it was required by the VA to install closed valley tiles in lieu of “mudded valleys,” since the “mudded valleys” would have met the Government’s needs because they matched the valleys of other existing buildings, and that this cost an additional \$11,029.72. In VABCA-6482, the Subcontractor claims that because of the delay caused by having to locate and order the second batch of clay roof tiles, it had to remove a temporary roof over Building No. 7 that the Prime Contractor had built to protect the exposed area while awaiting tile delivery, at a cost of \$11,978.42.

The Government denies liability in all three claims, asserting that its initial approval of new tiles did not override the specified submission of sample tiles to assure the VA that the color blend would match the existing roof tiles, as required by the Contract Specifications. The VA also avers that installation of “mudded valleys” was not in accord with Specifications. In the Government’s view, because of Johnson’s extensive delay in securing conforming roof tiles, it was necessary that the Contractor provide, at its own expense, temporary roofing protection from the elements.

The Appellant elected the Board’s Expedited Procedure pursuant to Rule 12.2. Both parties chose to submit their respective positions on the Record, in accordance with Board Rules 11 and 13. Both entitlement and quantum are to be decided in this Opinion. Both parties submitted briefs.

The Record for decision consists of: the Pleadings, including Exhibits “A” through “M” attached to Complaint; the Government’s Rule 4 Appeal File, tabs 1-27; Government Exhibits “G-1” through “G-13”; Appellant’s Affidavits by C. R. Blackwell (with Attachments “A-1” through “A-11”) and Robert J. Carr (with Attachments “A-11” and “A-12”); Government’s Affidavits by Frank

Sullivan and Larry Irwin; Appellant's Response Affidavit by C. R. Blackwell; Government's Response Affidavit by Frank Sullivan (with Attachment "A").

## FINDINGS OF FACT

On August 1, 1994, the VA issued Solicitation No. 9411-AE (the Solicitation) for the renovation of Building 7 at the VA Medical Center (VAMC) in Waco, Texas. One of the items of work required was the replacement of Building 7's existing tile roof. The price for this particular work was included within Deductive Alternate 2, that was included in the Contract awarded to Young, who then subcontracted the roofing work to Johnson.

Two sections of the Contract's Specifications are relevant to these disputes, Section 07321 and Section 09050. Alternate 2 is described in Specification Section 01010 as an "[a]lternate to provide salvaged mission straight barrel clay tile roofing in accordance with Specification ♣ 07321, Clay Tile Roofing."

Pertinent portions of Section 07321 are as follows:

Part 1.2.A , SUBMITTALS, provides, *inter alia*:

- a. [S]ubmit in accordance with Section 01340, SAMPLES AND SHOP DRAWINGS.
- b. Samples: Tiles to show color range.

Part 2.1, CLAY ROOF TILES, provides:

- A. ASTM C1167, grade 1, providing resistance to severe frost action, Types I, high profile, Type II, low profile, Type III, other, including flat.
- B. Special shapes: Eave closures, under eave piece, gable rake, end bands, valley, ridge covers, top fixtures, and other shapes required.
- C. Match existing tile for color blend and shape.

D. Alternate for salvaged tile:

1. Contractor shall certify sufficient quantity of salvaged tile of one color blend to match existing buildings.
2. Tile will be in good condition (exposed surfaces clean, no broken, cracked or otherwise damaged tiles).
3. Submittals in accordance with Part 1.2.

(R4, tab 1)

In addition, Part 1.1.B.3, RELATED WORK, contains the following important information: "Style, size, exposure, color blend and texture of clay tile: Section 09050, COLOR DESIGN."

Section 09050, COLOR DESIGN, reads as follows:

Part 1.1, DESCRIPTION: This Section contains a coordinated color system in which requirements for materials specified in other sections of this specification and/or shown on the drawings are identified by color codes and/or paint finishes.

Part 1.2, MANUFACTURERS: Manufacturers' (mfr) trade names and numbers used herein identify colors, finishes, textures and patterns. Subject to the approval of the contracting officer, products of other manufacturers will be considered, provided they are equivalent to the colors, finishes, textures and patterns of the manufacturers listed, and meet the requirements of the technical specifications and drawings.

Part 1.3, SUBMITTALS: In accordance with Section 01340, samples and shop drawings, furnish quadruplicate samples for color approval of all materials, colors and textures specified in this section.

Paragraph 2.13.A of Section 09050 *originally* specified that the color of the clay roof tiles was to be “xx,” which was the FINISH SCHEDULE symbol for “to match existing.” Amendment No. 1 to the Solicitation deleted the “xx” symbol for “to match existing,” and substituted this language: “Random Color, Ludowici, Celadon.” The Amendment did not change the language of Section 07321, Part 2.1.C, which continued to require that clay roof tiles “[m]atch existing tile for color blend and shape.”

There are several buildings within the Waco VA Medical Center. They all, including Building 7, have clay tile roofs, consisting of various color blends. Not all of the buildings have the same type of color blend. Not one of the buildings’ roofs has a single color of tile. According to CO Frank Sullivan, Specification Section 07321 required that any *salvage tiles* match the *existing buildings*. On the other hand, any *new tile* would have to “match the *existing tile*” on Building 7 for color blend and shape. (Sullivan Aff.; Exhibit G-6)

The Solicitation incorporated FAR 52.214-6 (APR 1984), which cautioned the bidders that any explanation or interpretation of the specifications and drawings, etc., had to be submitted in writing to the agency in sufficient time to allow a reply/clarification to be furnished all prospective bidders in a timely manner. Neither the Appellant nor any other prospective bidder made any such pre-bid request to the VA. (Sullivan Aff.)

The Contract was awarded to Young Enterprises, Inc. on September 30, 1994, at a total price of \$10,273,138, and included the roof replacement work on Building 7 as set forth in Bid Alternate No. 2. The duration of the Contract was to be 630 calendar days from Notice to Proceed. Liquidated damages of \$1,600 were to be charged by the VA for each day of (unexcused) delay beyond the Contract’s 630 day completion date. (R4, tabs 1-3)

On December 22, 1995, Young, on behalf of its roofing Subcontractor, Johnson, presented a clay roof tile submittal for Building 7 pursuant to Specification Section 07321. The submittal consisted of a Ludowici catalog and shop drawings showing installation procedures, with a cover sheet stating that “[w]e are using tile in VA yard, new to match per spec section 07321-2.1D,” and “Mission clay tile will be supplied by VA per 07321-2.1D.” This submittal did not include any tile samples. C. R. Blackwell is employed by the Subcontractor, Johnson. He states that his firm intended to utilize the VA’s own stockpiled tiles to satisfy the *salvage* alternate to match the existing buildings, “supplemented with new Ludowici tiles, matching the salvage tiles as closely as possible to finish the job.” (R4, tab 8; Sullivan Aff., Erwin Aff.; Blackwell Aff.)

Larry Erwin, the VA’s Senior Resident Engineer (SRE), responded on January 31, 1996, informing the Contractor that it could not use the VAMC’s stockpile of *repair tile*, but that it could resubmit “with source and quality samples meeting the salvage specifications for the entire new area.” Erwin further stated that “[i]f the Contractor elects to provide all new tile, the submittal is approved for new tile.” These statements were essentially repeated at the conclusion of the SRE’s Return Of Submittal. (R4, tab 9)

SRE Erwin states that his January 31, 1996 response was intended only to approve the [tile composition and color] information contained in the Ludowici literature. He still expected the Contractor to submit a tile sample for *color blends* to match the existing tile, as called for by Specification Section 07321, Paragraph 2.1.C, should the Contractor not elect to install salvaged tile. Although new clay roof tiles were delivered to the project site on June 17, 1996, the VA received no color blend submittal until September 30, 1996. (Erwin Aff.)

Mr. Blackwell explains that when he read the statement by SRE Erwin in the VA’s January 1996 Return Of Submittal, he interpreted this as an approval

and so instructed his supplier to order new Ludowici tiles “that matched *the existing buildings.*” In Mr. Blackwell’s view, this was consistent with Specification Section 07321, Subparts 2.1C-D. According to this witness, the following sequence of events occurred:

On June 19, 1996, roof tiles matching the existing buildings and manufactured by Ludowici were delivered to the project site. After two days of installation, the [VA] shut down the roofing operations, complaining that the roof tile colors were not satisfactory. The [VA] now wanted a color blend of tile different from what ever had been mentioned in the contract documents or had ever been mentioned as part of any approvals. Many of the tiles originally purchased, “to match existing” were abandoned in favor of roof tiles refired by the manufacturer to meet previously unknown contract standards. The color blend that was eventually approved by the [VA], over 90 days after the original tiles had been delivered to the job site, [was] not mentioned in any of the contract specifications.

(Blackwell Aff., Attach. A-9)

The VA’s position is exemplified in the first paragraph of SRE Erwin’s letter to the Contractor of June 19, 1996, in which he related that on the prior day he had been notified that roof tile installation had begun at Building 7 and, upon inspection, he rejected the tile that the Contractor had thus far installed.

Tile color blend does not match the existing building per Specification requirements under 07321-2.1.C. We find that the samples have not been submitted as required under 07321-1.2.B. We called Mr. Mike Longo, Sales Manager from Ludowici, and he has suggested to pick the different color tile from the existing buildings and photographs so that he can determine the percentages and color ranges for manufacturing. Samples will be taken from the Stations [sic] stockpile and sent so that the tile can be sent to the job site for

completion of this activity. This needs to be done as [soon] as possible so as not to delay the project. If this is a long lead item the roofing felt that has been exposed for approximately three months shall be covered so it does not deteriorate any more.

(R4, tab 10)

The Government submitted a construction progress photograph (#313) dated June 27, 1996, and identified as the Northwest side of the project site. This is a view of the suspended roof installation on Building 7. The photo shows at least fourteen rows of clay tile, over 2 by 4's, over felt paper. There appear to be no more than two shades or colors in the mix. The predominant tiles (149) are reddish, while the other tiles (20) are a very pale flesh or pinkish color. Rather than blending, the lighter colored tiles are so few and contrast so starkly against the much darker red tiles, that there does not appear to be what even a layman would consider to be a "color blend" as required by Section 07321, Part 2.1.C. This two-color starkness is made even more noticeable when comparing the roof of an adjacent building shown in the same photograph. On that building, the several shades of color, three - possibly four, are distributed so that their various colors blend rather than contrast. Likewise, two photographs taken of Building 7 on January 31, 1995 show a subtle blending of several different shades of color.

(R4, tabs 11, 6, 7)

As of August 15, 1996, the VA and the Contractor were still attempting to reach agreement on the roof tiles. In a letter of that date, SRE Erwin reminded the Contractor of the prior submittal and explained that he had approved only the Ludowici literature but that a sample for any new tile must still be submitted to and approved by the VA. With respect to tile colors, Erwin stated, *inter alia*:

Tile colors on site do not match the existing roof. We are getting close to the color variations and Mr. Longo [of Ludowici] will be sending a color board to match the

colors. Mr. Longo suggested that after the color chips are approved a 10' X 10' sample panel should be installed on the new roof to match existing for final approval. Delivery of tiles will be from 6 to 8 weeks at best. \* \* \* After reviewing the existing roof is between 30 to 50% orange color; blending during installation should be taken from a minimum of five (5) crates.

The SRE concluded the letter by reminding the Contractor that the roofing felt paper installation had been installed four months prior and there could be a possible deterioration of the felt and warping of the wood. He "strongly" suggested applyin an approved emulsion "as soon as possible." (R4, tab 12)

In a Return Of Submittal dated September 30, 1996, the SRE approved the Contractor's roof tile samples with the "correct color blend percentages" as follows: New Light color - 30%; New Dark color - 15%; Fire Flashed (On-site) - 15%; Red (On-site) - 40%. This followed a verbal approval given to the Prime Contractor and its Subcontractor on September 25, 1996. The two "new" colors were refired over Ludowici's Standard Red. The new color tiles produced by Ludowici were acceptable to the VA. (Exh. G-5, G-7; R4, tabs 17, 18)

After a considerable period of time, marked by several misunderstandings and errors between the Subcontractor, its supplier, and the tile manufacturer - none of which reasonably can be attributed to any actions or omissions of the VA - the correct blend of tiles (as reflected in the VA's September 25, 1996 Return Of Submittal) was shipped to the site and installed on Building 7 in June 1997.

In the meantime, in December 1996, the Contractor installed a temporary roof over the exposed top of Building 7, in order to protect the work in place as well as to insure the habitability of the building. This temporary roof had to be removed prior to installation of the clay tiles in June 1997. The Contractor attributes the cost of this protective measure to what it considers the VA's

unreasonable rejection of the initial tile shipment and the considerable delay that followed. (Blackwell Aff.)

The VA takes the position that the Prime Contractor determined that the temporary roof installation would be prudent and that removal of the structure was also the Contractor's responsibility. By erecting the temporary roof, Young was able to allow the VA to take beneficial occupancy, thereby avoiding the imposition of liquidated damages. (Sullivan Aff.)

The Contractor proposed to the VA that it be allowed to "mud" the valleys of the roof of Building 7. Other of the existing buildings at the VAMC had similar installations. The VA would not accept mudded valleys, and insisted on closed valley tiles. The Contractor installed the valley tiles and contends that it incurred an additional cost of \$11,029.72. (Blackwell Aff.; Carr Aff.)

SRE Erwin stresses that the existing roof of Building 7 had valley tiles and that the VA was requiring only what the Specifications called for. Section 07321, Part 1.2.B, "CLAY ROOF TILES"), calls for "special shapes" for the valley, among other roofing fixtures. (Erwin Aff.)

## **DISCUSSION**

### **VABCA-6480**

The Appellant points to what it characterizes as the VA's "unconditional approval of roof tile color if all new tiles were to be used" on Building 7. The SRE's language in his January 31, 1996 Return Of Submittal ("the submittal is approved for new tile") appears on its face to be unconditional. However, one must ignore other requirements of the Specification to reach such a conclusion. Section 07321, Part 1.2.A requires submission of new tile samples that show the range of color, while Part 2.1.C of the same Section requires that new tiles "match existing tile for *color blend* and shape." (Emphasis added) Furthermore, Section

09050, Part 1.3, calls for submission of “samples for color approval.” Section 09050 is cross-referenced in Section 07321. The submission of a brochure from the manufacturer containing information concerning its product does not meet this requirement. While the SRE’s cryptic comments leave much to be desired, the Contractor is expected to understand what the Contract requires in the way of adequate submittals. As the Government correctly points out in its Brief (at pgs. 11 &14), the Contract must be read as a whole and meaning must be given to all its parts, leaving no language meaningless: *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965); *Saturn Construction Co., Inc.*, VABCA No. 2600, 88-2 BCA  $\partial$  20,632; *Conner Brothers Construction Company*, VABCA Nos. 2519, 2656 & 3595, 95-1 BCA  $\partial$  27,409.

Even if we were to conclude that the Government somehow waived the requirement for the tile samples, the risk that any tile ordered would not meet the blending and matching requirements still must borne by the Contractor. The purpose of sample submission prior to ordering and shipping is to preclude just such a situation as occurred on this project. The Appellant has not met its burden of persuasion that the tiles it initially ordered and began to install on Building 7 matched that building's existing blend of colors. Neither did the installed tiles match the blend of colors on the adjacent building. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 159 (1985) defines *blend* as “(1b) to combine into an integrated whole” and “(2) to produce a harmonious effect.” THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE – UNABRIDGED 222 (2<sup>nd</sup> ed. 1987) defines *blend* as “(1) to mix smoothly and inseparably together” and “(7) to have no perceptible separation.” The best evidence presented was in the Government’s Rule 4 Appeal file, the building roof photographs. The contrast between Appellant’s originally-installed roof tiles and the roof tiles on the existing buildings was obvious. While the existing roofs showed several colors

blended with light, dark and intermediate shades, the two roof tile colors in the original Building 7 installation were striking in their contrast between dark and light colors. No attempt was made to mix them, by using intermediate colored tile, to blend the roof smoothly and inseparably into a harmonious whole.

While we do not endorse direct contacts between Government contracting personnel and a Contractor's suppliers, it appears that only when the SRE finally "took the bull by the horns" and communicated directly with the tile manufacturer, was the correct color blend of tiles achieved. We will not now hear Appellant complain that the VA somehow changed the specifications or caused it to have to pay for what it refers to as "custom tiles." If the Contractor had fully complied with the Contract's submission requirements, the SRE would not have had to do its job for it. This appeal is *denied*.

#### **VABCA-6481**

The Specification, Section 07321, Part 2.1.B, is quite *clear* in calling for "Special shapes," of clay roof tiles, including any "valley" for Building 7. The Contractor was obligated to comply with this requirement and was not free to use its own judgment in "mudding" the valleys. Whether any roofs of the other existing buildings at the VAMC had "mudded" valleys is irrelevant to this dispute. This appeal is *denied*.

#### **VABCA-6482**

We have found no portion of the lengthy delay between the VA's January 1996 Return Of Submittal and the June 1997 installation of approved roof tiles on Building 7 to be attributable to unreasonable delay by the Government. The Record shows that the decision by the Prime Contractor to construct a temporary roof over portions of the incomplete work on Building 7 was for its own benefit. Not only did the roof protect the unfinished work, it also allowed the VA to occupy the building and thus saved the Contractor from imposition of liquidated

damages. The cost of removal of that roof would appear to be a matter to be settled between Young and Johnson. This appeal is *denied*.

### **DECISION**

For the reasons stated, these three appeals are *denied*.

Date: **April 16, 2001**

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JAMES K. ROBINSON  
Administrative Judge