

**VA VENTURE PUEBLO**

**LEASE NO. V101-183R-567-004-01**

**VABCA-6959 & 7006**

**VA NURSING HOME CARE UNIT  
PUEBLO, COLORADO**

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**OPINION BY ADMINISTRATIVE JUDGE SHERIDAN**  
(Rule 12.3 Accelerated Procedure)

These are appeals from a final decision of the Contracting Officer (CO) denying the claims of Appellant, VA Venture Pueblo, LLC (VAV or Lessor), regarding certain delay related costs associated with the construction phase of Lease No. V101-183R-567-004-01 for the VA Nursing Home Care Unit at Pueblo, Colorado.

Appellant has elected to process these appeals under Rule 12.3, “Small Claims (Accelerated)” procedures. The parties have waived hearing in these appeals and elected to submit these matters for decision on the written record pursuant to Rule 11.

The record consists of the pleadings including the Appellant’s Complaint (Compl.), Respondent’s Answer (Answer), the Appeal File (R4, tabs 1-12), and the Supplemental Appeal File (R4 Supp., tabs 500-525). The parties submitted briefs on these appeals including Appellant’s Brief, Respondent’s Answer to Appellant’s Brief (Respondent’s Answer) (with referenced Memorandum of July 31, 2003), and Appellant’s Reply Brief. Neither party submitted affidavit testimony in support of their positions.

### **SUMMARY FINDINGS OF FACT**

In accordance with Rule 12.3(ii), the evidence in the record supports the following summary of relevant facts.

On April 20, 2001, VA awarded Lease No. V101-183R-567-004-01 (Lease) to VA Venture Pueblo (VAV) for a one-story, engineered, steel frame building, the configuration and design of which had to be approved by the Department of Veterans Affairs in accordance with the Solicitation for Offers. The building was to be used for a VA Nursing Home Care Unit and was to be ready for occupation on December 10, 2001, 234 calendar days from the date of the Lease. (R4, tab 1)

Although the record does not indicate when construction work began, work progressed on the construction phase of the Lease following award. On November 9, 2001, the VA granted VAV’s request for a time extension of 26 calendar days for unforeseen delays caused by wind damage, extending the completion date from December 10, 2002, to January 5, 2002. (R4 Supp., tab 500)

On December 31, 2001, VAV wrote James Walker, the VA Senior Resident Engineer (SRE) assigned to the construction phase of the project, requesting another time extension to February 15, 2002. VAV cited unforeseen soil conditions (also referred to as design delays), excess time for city permitting process (also referred to as zoning/subdivision/final platting delays), weather related events . . . [and] the holiday season” in support of its time extension request. (R4 Supp., tab 504) The record does not indicate whether the VA responded to this request.

VAV asserts that during March 2002 there were several VA instigated items that changed the Lease and caused the completion of the construction portion of the Lease to be delayed. VAV refers to these items as the “concurrent items” because several of the items caused delays that overlapped. These claimed delays included: VA phone (communication) system delays, occurring from 3/04/02 – 3/28/02 (24 days delay); delays caused by VA added security door locks and tying to the fire alarm, occurring from 3/05/02 – 3/18/02 (13 days delay); delays associated with the reconfiguration of the kitchen by VA and late delivery of VA equipment, occurring from 3/11/02 – 4/04/02 (24 days delay) and delays caused by City subdivision improvements, occurring from 3/22/02 – 3/28/02 (6 days delay). (R4, tab 9)

VAV wrote CO Amelia McLellan on May 17, 2002, seeking a total of 72 calendar days of time extension. VAV explained that the 72 days requested were for zoning/subdividing/platting delays (35 days), delays associated with the holiday season (6 days), and delays associated with the VA-caused “concurrent items” (31 days). VAV sought \$31,567 for what it called “general conditions” expense associated with the 31 days of “concurrent items” delay. It also sought 30 days of interest on its construction loan at \$858.54 per day for a total of \$25,756.12. (R4, tab 9)

On May 21, 2002, William Brant from VAV met with SRE Walker who verbally indicated he was willing to grant VAV a 31 day time extension for the "VA last minute delays." (R4 Supp, tab 505)

The parties executed several Supplemental Agreements (SA) on June 4, 2002, to formalize the "concurrent items" changes. SA #1 compensated VAV \$4,777 for providing six extra receptacle outlets and a VA seal and lighting. In SA #1 the parties agreed there was no change in the time for completion. (R4, tab 2) In SA #2 VAV was compensated \$15,176 for installing a Patient Monitoring System. Again, the parties agreed there was no change in the time for completion. (R4, tab 3) SA #3 compensated VAV in the amount of \$17,467 for miscellaneous changes made to the smoking shelters, flag pole, fence, telephone outlets and security locks at the corridor fire door outside of room ADM-113 and the exit door to the Ambulance entrance and indicated there was no change in the time for completion. (R4, tab 4) SA #4 increased the Lease by \$2,234 with no change in the completion time in order to install emergency receptacles above the North, South, East and West corridors. (R4, tab 5) SA #5 covered the additional installation of dead bolts at two doors in the amount of \$833 with no change in time for completion. (R4, tab 6) Receptacle outlets were changed for \$170 and no change in time in SA #6. (R4, tab 7) The VA compensated VAV \$11,744 and no change in time for completion in SA #7 to make electrical and plumbing changes in the kitchen area. (R4, tab 8)

The price of each SA included amounts for overhead and profit computed at the maximum rate provided in the Lease's Changes provisions. (R4, tabs 2-8) The Lease places percentage limitations on the amount of overhead and profit a Lessor can recover on changes costing \$500,000 or less, providing in pertinent part:

**3.15 Contract Changes:**

(2) APPLICABLE TO CHANGES COSTING \$500,000 OR LESS

(a) When requested by the Contracting Officer, the contractor shall submit proposals for changes in work to the Contracting Officer or designee. Proposals, to be submitted within 30 calendar days after receipt of request, shall be in legible form, original and two copies, with an itemized breakdown that will include material, quantities, unit prices, labor costs (separated into trades), construction equipment, etc.

Allowances not to exceed 10 percent each for overhead and profit for the party performing the work will be based on the value of labor, material, and the use of construction equipment required to accomplish the change. As the value of the change increases, a declining scale will be used in negotiating the percentage of overhead and profit. *Allowable percentages on changes will not exceed the following: 10 percent overhead and 10 percent profit on the first \$20,000; 7 ½ percent overhead and 7 ½ percent profit on the next \$30,000; 5 percent overhead and 5 percent profit on balance over \$50,000.* Profit shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs.

j. *Overhead and contractor's fee percentages shall be considered to include insurance other than mentioned herein field and office supervisors and assistants, security police, use of small tools, incidental job burdens, and general home office expenses and no separate allowance will be made therefore. Assistants to office supervisors include all clerical, stenographic and general office help. Incidental job burdens include, but are not necessarily limited to, office equipment and supplies, temporary toilets, telephone and conformance to OSHA requirements. Items such as, but not necessarily limited to, review and coordination, estimating and expediting relative to contract changes are associated with field and office supervision and are considered to*

be included in the contractor's overhead and/or fee percentage.

(R4, tab 1) (Emphasis added)

On June 5, 2002, following discussions with VAV's Mr. Brant to close out the construction portion of the project, SRE Walker forwarded to Mr. Brant a memorandum titled "Close-out," asking for comments. The memorandum provided:

Extended completion date from Dec[ember] 10, 2001 to new date of Jan[uary] 5, 2002

Certificate of Occupancy issued 4/4/02

Jan[uary] 5, 2002 to April 4, 2002 = 89 days liquidated damage

Recommend 31 days time extension associated with Change Order work.

Recommend 27 days time extension of the 47 days claimed, associated with Zoning/Subdividing/Platting Delays, Holidays and City Subdivision Improvements.

Liquidated Damages for 31 days @ \$5,000.00 = \$155,000.00

Also, the contractor's letter dated May 17, 2002, has requested \$25,756.00 for Construction Loan Interest and \$31,567.00 for General Conditions Delay. Please review his request and provide your comments and/or recommendations.

(R4 Supp., tab 507)

The record indicates that the VA ultimately approved several time extensions as set forth in a Memorandum to the Record dated January 23, 2003, signed by VA Project Manager Wilber Mondie and SRE Walker:

The approved time extensions are:

1. Twenty six (26) days were due to wind damage to metal truss roof and outside partition walls on 10/9/01.
2. Thirty one (31) days associated with VA requested Field Change Orders (7 issued) and addition of Schedule B & C items.
3. Twenty seven (27) days associated with City of Pueblo, Colorado subdivision improvements and zoning delays.

(R4, tab 11) The wind damage extension (26 days) extended the completion date from December 10, 2001, to January 5, 2002; the time extension for the zoning delays (27 days) extended the completion date from January 6 to February 1, 2002; and the time granted for the VA changes (31 days) extended the completion date from February 2 to March 4, 2002. (R4, tab 11) For the 31 days between March 5, 2002, and the completion date of April 4, 2002, the Government assessed liquidated damages totaling \$155,000. (R4 Supp., tab 507; Respondent's Response, p. 3; Respondent's Memorandum of July 31, 2003) Project Manager Mondie and SRE Walker noted to CO George L. Szwarcman, in a memorandum dated January 23, 2003, that VAV's \$31,567 claim for general conditions delay expenses and its \$25,756 claim for construction loan interest were "left out of the Close-Out negotiations" but ought to be paid as they were "valid overhead expense[s] to effectively construct the building as offered by the Lessor." (R4, tab 11)

VAV wrote CO McLellan on November 12, 2002, asking it to issue a decision on the claims for extended general conditions and construction loan interest. (R4 Supp., tab 509) CO Szwarcman responded to the request on February 5, 2003, by issuing a final decision denying the \$31,567 claimed for general conditions expenses asserting that they were "not considered legitimate,

compensable expenses.” In the final decision, CO Szwarcman granted the \$25,756 sought by VAV for construction loan interest. (R4, tab 10)

VAV appealed the CO’s final decision on February 20, 2003, seeking payment of the construction loan interest, and asserting it was entitled to its general conditions expenses:

We were granted three extensions of time from the original completion date of December 10, 2001, amounting to 84 calendar days. We are asking for approval of only the 31-day extension which was granted due to changes and additional work completed as directed and approved by the VA. Enclosed you will also find supporting invoices of each General Condition cost item incurred during this time period.

(R4 Supp., tab 520) VAV’s appeal from the CO’s final decision was docketed on February 27, 2003 and assigned VABCA No. 6959.

To its appeal VAV attached a list it referred to as “General Conditions Costs for VA Extras,” asserting that these were the actual costs incurred during the extension period running from February 5 to March 4, 2002. Attached to the list are the invoices that VAV avers support the items on the list. (R4 Supp., tab 520) The list contained the following information:

VENDOR	DESCRIPTION	ACTUAL COST -VA EXTRAS 2/05/02-3/04/02 EXTENSION
Accu-Staff	Clean-up Labor	10,884.25
Brant Const.	Project Manager	8540.00
Brant Const.	Administrative	364.00
GE Capital	Field Office	119.60
Pueblo Disposal	Dumpsters	1,170.00
Pueblo Disposal	Temporary Toilet	434.57

Pueblo Prof. Cont.	Job Truck/Fuel	637.41
Pueblo Prof. Cont.	Supervision	5,000.00
Pueblo Water Works	Temporary Water	86.88
TempAir	Temporary Heat	3,672.07
Various	Travel (air/hotel/car)	3,275.13
West Plains Energy	Temporary Elect	3,071.66
Xcel Energy	Temporary Gas	1,590.91
Zircon Container	Temporary Storage	<u>284.70</u>
Total Out-of-Pocket Costs		39,131.18

(R4 Supp., tab 520)

Four AccuStaff invoices to Pueblo Professional Contractors, Inc. (Pueblo Professional), were also included that show named individuals classified as laborers and include a variety of dates on which the laborers worked, ranging from February 6 through March 2, 2002. The billed hourly rate for laborers was \$13.44 (\$10.77 per hour wage and \$2.67 an hour fringe benefits). VAV describes the invoices as being for “clean-up labor” and seeks \$10,844.25 for that work. (R4 Supp., tab 520)

VAV seeks \$8,540 for project manager services provided by Brant Construction Management, Inc.’s (Brant Construction) Project Manager, Richard Linsenmann. To support this expense VAV provides weekly time cards showing that Mr. Linsenmann’s services were billed at \$75 per hour and he worked on the project during the period running from February 2 to March 4, 2002. Seeking \$3,275.13 for what it characterizes as “Travel (air/hotel/car)” VAV provides several receipts and documents. The first is a series of receipts from the Wingate Inn Pueblo under the name of Richard Linsenmann for room charges and long distance calls for February 5-8, February 11-15, and February 18-21, 2002. VAV also provides two pages hand marked “Travel,” which appear to be a list of

credit card charges and the dates the charges were incurred. Appellant provides no further evidence relating to the charges. (R4 Supp., tab 520)

VAV also claims \$364 for “administrative services” and provides the weekly time cards of Brant Construction’s Judie Soutell as proof it incurred these costs. Per her weekly time cards, Ms. Soutell’s services were billed at \$28 per hour. Appellant provides no further evidence relating to the charge. (R4 Supp., tab 520)

By invoice from GE Capital Modular Space VAV claims \$119 for what it characterizes as “Field Office.” The invoice, which appears to be the lease of modular space, shows the lease was for the period running from January 18 through January 30, 2002. (R4 Supp., tab 520)

VAV seeks \$1,170 in costs for “dumpsters” by providing invoices dated February 28 and March 15, 2002 from Pueblo Disposal Services directed to Brant Construction. On their face the invoices appear to be for the dumping and return of rented dumpsters on or about February 18, 19, 20, 21, 26, March 4, and 13, 2002. (R4 Supp., tab 520)

VAV seeks \$434.57 for portable toilet rental and service by attaching invoices dated February 20 and March 20, 2002 from Pueblo Disposal Services to Brant Construction. (R4 Supp., tab 520)

VAV provides invoices dated February 20 (\$3,278), February 27 (\$117.10) and February 20, 2002 (\$276.16) showing that Brant Construction was billed a total of \$3,672.07 by Tempair for the rental of gas heaters and related equipment for the period of January 24 through February 21, 2002. (R4 Supp., tab 520)

By invoice from Xcel Energy billed to Pueblo Professional, VAV seeks \$1,590.91 for “temporary gas.” VAV hand notes on the invoice that it paid approximately \$59.65 per day for temporary gas and uses this as a basis to calculate the \$1,590.91 it claims is due. (R4 Supp., tab 520)

VAV provides three bills from Westplains Energy to Pueblo Professional showing billing dates of February 11, 19 and March 20, 2002. Based on these bills VAV seeks \$3,071.66 for what it lists as “temporary electric.” There is no indication in the record as to how this service was billed or timeframes to which the respective bills applied. (R4 Supp., tab 520)

By a bill dated February 26, 2002, the Board of Water Works of Pueblo, Colorado, billed VAV \$86.88 for water and sewer services provided from January 24 through February 22, 2002. (R4 Supp., tab 520)

Zircon Container Company (referencing VA Nursing) invoiced Brant Construction February 1 and March 1, 2002, for temporary storage containers. The invoices indicate that VAV was billed \$170 for containers for February 2002 and \$85 for March 2002. VAV seeks \$284.70. (R4 Supp., tab 520)

VAV seeks \$450 for what it describes as “Job Truck/Fuel.” It provides an invoice dated February 14, 2002, from Pueblo Professional to Brant Construction that shows “Truck Fee February,” in the amount of \$450. VAV also attaches a piece of paper bearing the handwritten word “Fuel,” showing a total of \$187.41 for six dates when unleaded gas was purchased. Appellant provides no further probative evidence relating to the charge. (R4 Supp., tab 520)

VAV also seeks \$5,000 in costs for services provided by Pueblo Professional for what it characterizes as “Supervision.” The record contains no probative evidence explaining this cost. (R4 Supp., tab 520)

On the request for 30 days of interest on its construction loan VAV attaches June 2002 statements that show monthly amounts due for interest from Pueblo Bank & Trust (\$18,689.93) and Mercantile National Bank (\$1,948.59). VAV also adds \$5,117.70 for what it characterizes as “equity interest” to bring the amount claimed to \$25,756.22. (R4 Supp., tab 520)

The VA has stipulated to VAV's entitlement to 31 days of delay and the direct costs of that delay as follows:

VA stipulates to 31 days of delay claimed by Appellant in its Complaint.

With respect to the extended conditions costs claimed under this appeal, the Government is willing to stipulate that Appellant is entitled to direct costs incurred as a consequence of the stipulated 31 day delay, provided that Appellant is able to prove that these costs are allowable, reasonable, and allocable in accordance with the case law, FAR and GSAR. In particular, Appellant must show that the supervisory, project management, and travel costs are allocable in whole or in part to the contract, as well as allowable.

The Government provides the following information relating to the close out of the contract

Original Lease (Schedule B) Items	\$900,000.00
Changes, Additional Work, and Supplemental Lease Agreement Costs	<u>\$ 154,584.23</u>
	\$1,054,584.20

VA Liquidated Damages Assessed (89 days) \$285,000.00

The parties negotiated and agreed to the following items:

The Contract completion date was extended from December 10, 2001 to January 5, 2002.

Total Amount Due on Lease	\$1,054,584.20
Agreed Liquidated Damages	<u>(-\$155,000.00)</u>
	\$899,584.20

Insofar as the Contract payments are concerned, VA has paid \$844,582.00, and released the retainage amounts totaling \$55,000.

As of today, VA has not paid Appellant any funds for the \$25,765 in loan interest claim or the \$31,567 for extended conditions claim.

(Respondent's Memorandum of July 31, 2003)

### **DISCUSSION**

VAV seeks what it characterizes as "General Conditions" expenses for the 31 day time extension granted by the VA as a result of last minute changes and what has been referred to as "concurrent items." The "concurrent items" were a series of overlapping VA changes that were memorialized in several Supplemental Agreements. When executed, the Supplemental Agreements provided that no additional time was due for the changes, but VA subsequently decided that the changes had delayed the project and that a 31 day time extension was due to VAV for the changes. VAV seeks direct and jobsite overhead costs associated with the 31 day time extension granted by VA.

The VA concedes both that the changes caused 31 days of delay and that VAV is entitled to direct costs it incurred as a result of the delay. While conceding entitlement on direct costs, it posits that the burden of proof is on the Appellant to prove the quantum portion of its claim and characterizes VAV's specific claims as indirect, not direct costs. (Respondent's Brief, p. 3-5)

With respect to VAV's construction loan interest claim, VA denies both entitlement and quantum. (Respondent's Brief, p. 3)

VAV avers that "all of the expenses were shown to have been incurred during the delay period and were attributable specifically to the project," and that it has provided appropriate invoices to support its claim for reimbursement

of these expenses. VAV acknowledges that “[a]lthough the Contractor was granted extensions totaling 84 calendar days, it sought extended general conditions expenses only for the 31 day time extension the VA granted due to the VA’s requested changes and additional work.” While the Appellant posits that the 31 days extended the project completion date from February 5, 2002, to March 4, 2002, we have determined, based on our review of the record, that the 31 day time extension actually extended the completion time from February 2, 2002, to March 4, 2002.

Before examining the quantum aspect of VAV’s claims, it is appropriate to review the burden of proof standards utilized by the Board. The parties have elected to proceed pursuant to Board Rule 11 which allows for submission of an appeal for decision on the record without a hearing. We regularly advise those appearing before the Board that submission of a case without a hearing “does not relieve the parties of the necessity of proving the facts supporting their allegations or defenses.” *Sefco Constructors*, VABCA No. 2747 *et al.*, 93-1 BCA ¶ 25458. Affidavits, depositions, admissions, answers to interrogatories and stipulations may be used to supplement other documentary evidence in the record in a Rule 11 proceeding. Neither party offered such evidence in the case at bar.

We have observed that a party seeking an equitable adjustment in a Rule 11 proceeding acts at its peril, when it fails to provide the Board sufficient factual information supported by affidavits or probative documentary evidence. *Sefco Constructors*, VABCA No. 2747 *et al.*, 93-1 BCA ¶ 25458; *Jen-Beck Associates*, VABCA Nos. 2107 *et al.*, 87-2 BCA ¶ 19,831. As we articulated in *Spanjer Brothers, Inc.*, “[a]n Appellant claiming additional compensation for claimed extra work must show with reasonable certainty wherein the extra work was performed. The burden is not sustained by general statements in Appellant’s

correspondence.” *Spanjer Brothers, Inc.*, VABCA No. 1819, 84-1 BCA ¶ 16,926, citing *Sefco* and *Jen-Beck*. In *Renette Johnson* we also noted that “[a] claimant’s failure to present affidavits of sufficiently clear and probative documentary evidence will almost surely result in denial of its appeal.” *Renette Johnson*, VABCA No. 5470, 98-2 BCA ¶ 30,060. Here, the Appellant, by electing a Rule 11 proceeding, took upon itself the responsibility of providing this Board adequate evidence that the claimed costs were actually incurred, allowable and reasonable.

### ***VABCA-6959, Extended General Conditions***

The Appellant claims \$31,567 for what it refers to as extended general conditions expenses incurred during 31 days of delay caused by the VA. Federal Acquisition Regulation (FAR) Subpart 31.2, which applies to the pricing of equitable adjustment under the Lease, lists five general factors to be considered in determining whether a cost is allowable: (1) reasonableness; (2) allocability, (3) standards promulgated by the Cost Accounting Standards Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances, (4) the terms of the contract, (5) any limitations set forth in the Subpart. FAR 31.201-2(a)

While it offers no affidavits or other testimony in support of its position, the Appellant’s Brief avers that “all of the expenses were shown to have been incurred during the delay period and were attributable specifically to the project.” We are satisfied after a review of the invoices that the invoices are attributable to costs incurred for the project, albeit under other names or entities involved in the Lease, *i.e.*, Brant Construction Management, Inc. and Pueblo Professional Contractors, Inc.

A further review of VAV's claim reveals that several of the costs sought are for field office overhead charges. The Lease's Changes Clause defines the costs considered to be overhead:

*Overhead and contractor's fee percentages shall be considered to include insurance other than mentioned herein field and office supervisors and assistants, security police, use of small tools, incidental job burdens, and general home office expenses and no separate allowance will be made therefore. Assistants to office supervisors include all clerical, stenographic and general office help. Incidental job burdens include, but are not necessarily limited to, office equipment and supplies, temporary toilets, telephone and conformance to OSHA requirements. Items such as, but not necessarily limited to, review and coordination, estimating and expediting relative to contract changes are associated with field and office supervision and are considered to be included in the contractor's overhead and/or fee percentage. (Emphasis added)*

The Changes Clause places percentage limitations on the amount of overhead and profit a contractor can recover on changed work. An equitable adjustment arising out of a lease change includes the direct costs of the change, plus fixed mark-ups for overhead and profit, and, if appropriate, an extension of time. All overhead, whether field or other overhead, is deemed to be included in the fixed maximum mark-up on direct costs. *West Land Builders*, VABCA No. 1664, 83-1 BCA ¶ 16,235, *aff'd* 732 F.2d 166 (Fed. Cir. 1986); *Jen-Beck Associates*, VABCA No. 2107, 87-2 BCA ¶ 19,831.

VAV received the maximum mark-up of 10 percent overhead and 10 percent profit on each of Supplemental Agreements it executed memorializing the changes that precipitated the 31 day time extension. Thus, when VA added work via the Supplemental Agreements, and paid the direct costs associated with the changes, a 10 percent mark-up for overhead, and a 10 percent mark-up for

profit, VAV received full compensation for the monies owed it pursuant to the Changes Clause. This included any monies due for extended field and home office overhead that was associated with the changed work. The fact that VA later extended the performance period 31 days to accomplish the work does not entitle VAV to additional overhead costs. As we stated in *Warbonnet Electric, Inc.*:

Even if the contract completion date had been proven to have been extended . . . the Contractor would not have been separately compensated on the basis of daily rates for extended and field office overhead since the time extension would be the result of a “change” rather than a “suspension of work.” In making an equitable adjustment under [the Changes] clause, the Contractor would be compensated for its direct costs plus fixed mark-ups for overhead and profit, and a time extension only, without separate compensation for extended or field office overhead. All overhead is deemed to be included in the fixed mark-up on direct costs.

*Warbonnet Electric, Inc.*, VABCA No. 3731 *et al.*, 96-1 BCA ¶ 27,938.

In VABCA No. 6959, VAV seeks additional costs associated with the 31 day time extension granted by the VA. It seeks \$10,844.25 for laborers provided by AccuStaff to Pueblo Professional. The AccuStaff invoices show a variety of dates on which it provided VAV laborers, ranging from February 6, 2002, through March 2, 2002. VAV describes the services the laborers provided as “clean-up labor.” The invoiced labor was provided during the 31 day delay period stipulated to by the Government. Clean-up labor is a direct labor cost which was increased because of the 31 day delay. However, we find that the number of laborer hours claimed for “clean-up” are unreasonable. A cost is unreasonable if it exceeds that which would be incurred by a prudent person in the conduct of competitive business. No presumption of reasonableness is

attached to the incurrence of costs by a contractor. (FAR 31.201-3(a)) The Appellant offers no probative evidence showing why so many laborers were needed for clean-up. As such, VAV fails in its burden to prove its costs. We find that one laborer, eight hours a day, paid at \$13.44 per hour (\$107.52 per day, including fringe benefits) would be more than sufficient to provide project clean-up. According to the invoices provided, during the delay period running from February 5 to March 4, 2002, clean-up was performed twelve days, February 6, 9, 14, 15, 16, 19, 22, 23, 25, 26, March 1 and 2, 2002. Based on the foregoing, we find VAV entitled to direct costs of \$1,290.24 for clean-up labor during the 31 day delay stipulated to by the VA. Under the Changes Clause the Appellant is also entitled to a 10 percent mark-up for overhead and a 10 percent mark-up for profit on the direct costs which brings the total amount due to \$1,561.

VAV also seeks \$8,540 in costs for project manager services. Project supervision costs associated with delays caused by changes are defined by the Lease's Changes Clause as being included in the 10 percent overhead mark-up granted. Consequently, VAV was fully compensated for these costs in the Supplemental Agreements. Similarly, the \$364 in claimed costs for administrative services is included in the Changes Clause mark-up restrictions. We also note that other than the notation "Administrative" we have no information on the services provided. Given the sparseness of the record in this regard, we were not willing to speculate further on the nature of these expenses. The \$3,275.13 VAV seeks for what it characterizes as "Travel (air/hotel/car)" appears to be associated with work performed by the project manager, whose services were a jobsite overhead expense covered by the 10 percent mark-up. Further, the Appellant provides no explanation for the charges and we can derive no tie for the charges to the delay, so even if they had not been already

compensated via the Changes Clause, we would not find them to be compensable.

VAV seeks \$119 for the lease of modular space that it characterizes as “Field Office.” The invoice shows the lease was for the period running from January 18 through January 30, 2002, and not within the time period covered by the 31 days, so even if it were not a jobsite overhead expense and limited by the Changes Clause, which we consider it to be, we would deny it.

VAV also seeks costs for the rental of dumpsters (\$1,170), portable toilets (\$434.57), gas heaters (\$3,672.07), and storage containers (\$284.70). All of these costs are specifically identified as, or are similar to, the incidental burden type of costs compensated by the mark-up for overhead provided for in the Changes Clause. The same is true of the charges for water and sewer (\$86.88), temporary electric service (\$3,071.66), temporary gas (\$1,590.91). VAV received the jobsite overhead to which it was contractually entitled via the 10 percent markup in the Supplemental Agreements issued for the changes.

VAV claims \$450 for what it lists as “Job Truck/Fuel.” It provides a \$450 invoice that says “Truck Fee February,” and a piece of paper hand noted “Fuel,” showing \$187.41 was spent on unleaded gas. There is no probative evidence in the record that explains these costs; lacking any understanding on these costs we deny them.

VAV also seeks \$5,000 in costs for services provided by Pueblo Professional for what it characterizes as “Supervision.” No timesheets or invoices or other probative evidence was provided to support this cost; the record is devoid of adequate explanation. Accordingly, these costs are denied.

### **VABCA-7006, Construction Loan Interest**

The Appellant seeks \$25,756.12 for the interest it claims it incurred as a result of the 31 day delay acknowledged by the VA. The Appellant posits that “[t]he VA approved construction loan interest of \$25,756 through Supplemental Lease Agreement No. 8.” Appellant’s Brief at 4. However, we see no SA #8 in the record. Without the Supplemental Agreement, we are left with the CO’s final decision granting the claim for \$25,756.12. In its memorandum of July 31, 2003, the Respondent informed the Board and opposing counsel that it had reconsidered its decision granting the \$25,756.12 for construction loan interest and that it was now taking the position that the \$25,765 was not an allowable cost. Since the construction loan interest was placed in dispute it was assigned VABCA No. 7006 and consolidated with VABCA No. 6959 for purposes of processing.

When considering a matter before us, we conduct our proceedings *de novo*. In applying the *de novo* standard of review, we do not presume that the agency’s actions were correct. When an appellant appeals from a contracting officer’s decision, the appeal is before the Board *de novo*, and the Board will increase, decrease or leave unchanged any award made by a contracting officer in a contracting officer’s decision, as the Board determines is correct. *Assurance Company v. United States*, 813 F. 2d 1202, 1206 (Fed. Cir.1987); *Sefco Constructors*, VABCA No. 2748 *et al.*, 93-1 BCA ¶ 25,458; *Jen-Beck Associates*, VABCA Nos. 2107 *et al.*, 87-2 BCA 19,831. Since the proceedings are *de novo*, the Board is empowered to correct mistakes made. *Sentry Insurance*, VABCA No. 2617, 91-3 BCA ¶ 24,094; *Long Elevator & Machine Co., Inc.*, VABCA No. 2246, 90-2 BCA ¶ 22,637. We find that via his final decision the CO incorrectly allowed the Lessor’s claim for interest on its borrowings incurred as a result of the delay.

The Appellant has cited two instances provided for in the Lease where the payment of interest is specifically authorized by statute. The *Prompt Payment Act* directs that agencies pay proper invoices on time or pay interest when payment is otherwise due and owed and are paid late. 31 U.S. C. §§ 3901-3907; (R4, tab 1). Interest is not owed, however, the delay in payment is due to a dispute between the contractor and the Government over the terms of the contract. 31 U.S.C. § 3907(c). The *Contract Disputes Act* provides for payment of interest on a successful contractor claim from the date the Contracting Officer received the claim until payment is made pursuant to a court or board order. 41 U.S.C. § 611. Neither of these statutes is applicable to the question of whether the Appellant can recover interest on borrowings it was required to pay as a result of the Government's delay.

Pursuant to the FAR, VAV is not entitled to recover the \$25,756.12 in interest that it incurred as a result of the Government's 31 day delay. FAR 31.205-20 specifically provides that "[i]nterest on borrowings (however represented) . . . costs of financing and refinancing capital . . . are unallowable." FAR 31.205-20; *Servidone Construction Corporation v. United States*, 931 F.2d 860, 863 (Fed. Cir. 1991). The interest sought by the Appellant is of the type prohibited by the FAR and therefore unallowable.

## DECISION

For the foregoing reasons, the Appeal of VA Venture Pueblo, VABCA No. 6959, is **GRANTED** in the amount of \$1,561 plus interest, pursuant to the *Contract Disputes Act*, from May 17, 2002, the date the Contracting Officer received the claim, until payment thereof. The Appeal of VA Venture Pueblo, VABCA No. 7006, is **DENIED**.

Date: **November 7, 2003**

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Patricia J. Sheridan  
Administrative Judge  
Panel Chair

I Concur:

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Morris Pullara, Jr.  
Vice Chairman