UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: June 2, 2011

CBCA 1460

WALSH/DAVIS JOINT VENTURE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

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

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

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

DANIELS, Board Judge.

The General Services Administration (GSA), respondent, moves the Board to reconsider its decision on the claim made by Walsh/Davis Joint Venture (WDJV), appellant, on behalf of its subcontractor Global Precast, Inc. (Global). *See Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460 (Apr. 13, 2011). GSA maintains that the Board should reconsider because it "made several reversible errors in its statement or construction of the facts upon which it based its decision." We deny the motion.

As WDJV notes, the motion essentially re-argues points which GSA made in briefing this matter before we issued our decision. As provided in Board Rule 26(a), 48 CFR 6101.26(a) (2010), "Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration, for altering or amending a decision, or for granting a new hearing." We do comment on some of the principal objections made by the agency to our decision, however, to correct misimpressions on which the motion is based.

The contract in question was for construction of a complex of buildings in Washington, D.C., to be occupied by the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives. Global was the subcontractor which provided precast concrete for the facing of various structures within the complex. Global's claim was for equitable adjustments to the contract price on two distinct aspects of the panels, the face mix and the finish.

With regard to the face mix, GSA maintains that the Board incorrectly identified the contract's specification for precast concrete as a design specification; the specification was actually a performance specification, the agency says. The parties spent many pages of their posthearing briefs arguing which variety of specification was involved here. The distinction between the two has been established by the Court of Appeals for the Federal Circuit:

> Performance specifications set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection. Design specifications, on the other hand, describe in precise detail the materials to be employed and the manner in which the work is to be performed. The contractor has no discretion to deviate from the specifications, but is required to follow them as a road map.

P.R. Burke Corp. v. United States, 277 F.3d 1346, 1357 (Fed. Cir. 2002) (citing *Blake Construction Co. v. United States*, 987 F.2d 743, 745 (Fed. Cir. 1993), which quoted *J. L. Simmons Co. v. United States*, 412 F.2d 1360, 1362 (Ct. Cl. 1969) (internal quotation marks, emphasis, and ellipsis omitted)).

As the Court of Appeals has recognized, however, "the distinction between design and performance specifications is not absolute . . . . Government contracts not uncommonly contain both design and performance specifications." *Blake*, 987 F.2d at 746. As to precast concrete, the contract at issue here was one of those "not uncommon" contracts. Where the contract required WDJV to "[p]rovide assemblies complying with performance requirements indicated and capable of withstanding structural movement, thermally induced movement,

and exposure to weather without failure or infiltration of water into the building interior," it was clearly stating a performance specification. Where the document told the contractor, on the other hand, to "[u]se the following cementitious materials, of the same type, brand, and source, throughout Project: 1. Portland Cement: ASTM C 150, Type I III, white," it was prescribing a design specification. The requirement upon which the face mix dispute focused was an architect's subjective preference, which shifted over time and was expressed in equivocal terms. Whether this requirement should be called a performance or design specification does not help to resolve this case. For that reason, we avoided both labels and see no need to alter that practice now.

GSA has other misapprehensions about our analysis of the face mix aspect of the claim as well. It is true, as the agency notes and we found, that the contract did not provide that Indiana Limestone standard gray would be the color of the precast, and the architect, Moshe Safdie Associates (MSA), did not provide a sample of that material until after the contract was awarded. This does not mean, however, that Global's price to WDJV for the precast work could not have been based on a standard mix. We found, based on the testimony of Global's Donny DiVincentiis, that Global's price was based on manufacturing a standard gray concrete, which is industry standard, using Dufferin limestone, universal concrete, sand, and white cement.

It is also true, as the agency notes, that MSA did not ever specifically request that Global use more expensive materials than the ones it expected to use. This does not mean, however, that the architect's directions were not the cause of the company's decision to substitute materials. As we found, the only way for Global to make panels that met the architect's desires was to use the more expensive ingredients. We found fault with the architect's analysis in two significant regards. First, the contract allowed MSA to vary one of the ingredients of the precast – pigment – but the architect insisted on rejecting samples whose color he found "very good," thereby altering the contents of the panels for reasons other than pigment. Second, MSA's criticism of various samples for having excessive black (or gray) flecks could have been applied to virtually any panels, since all concrete panels are made from natural materials. We did not conclude, as GSA believes, that the early G514 sample "was essentially uniform in color when viewed from a distance." Instead, we found that "a precast panel may appear to have black flecks when viewed close-up, but essentially uniform color when viewed from a distance." Even the sample provided by MSA (as well as the G688 sample, which GSA seems to consider the base from which any cost comparison should be made) could be so characterized. We therefore found no sound basis for believing that this criticism should have been a valid reason for rejecting the G514 sample.

With regard to the finish aspect of the claim, GSA persists in believing that the agency's architect, acting on its behalf, did not direct that the garden wall be acid-etched.

MSA simply chose an acid-etched sample from among four offered as alternatives by Global, the agency maintains. The architect made this choice, GSA says, because MSA's Rainer Goeller, who visited Global's manufacturing facility, did not believe that Global's smooth form finish was acceptable. As we explained in our decision, we found the facts to be quite different from those preferred by the agency. MSA asked Global for samples with four different finishes. The architect selected the acid-etched finish for the garden wall and gave a specific direction that it be used. We discounted Mr. Goeller's opinion as to the acceptability of the smooth form finish because it was based not on the contract specifications, but rather, on his desires, which were far more exacting.

GSA also reargues the issue of prejudice from the fact that Global and WDJV took seven months to respond to the inquiry as to whether giving the garden wall an acid-etched, rather than smooth form, finish would increase manufacturing costs. The agency asks why it would have made the request if it did not want the option "to insist that the contractor honor its Contract." The agency also insists that WDJV's certified pay application submitted most recently before WDJV did respond demonstrated that Global had already produced a significant portion of the acid-etched precast by the time the response was made.

Our decision explains why we rejected GSA's position on this matter. The agency's question is misstated. By the time GSA asked for information as to increased costs, MSA, speaking for the agency, had already directed a change in the specifications, making the finish of the garden wall acid-etched, rather than smooth form. Thus, the question should have been, why would the agency have made the request if it did not want the option to countermand the architect's order? We concluded that in light of the vast discretion GSA gave MSA to dictate the look of the precast panels, and the absence of any evidence that the agency might have considered withdrawing this discretion, there is no reason to believe that cost could have caused such a withdrawal. The agency's belief that Global had produced large numbers of panels before it responded to the inquiry about costs is not justified by the documentation to which the agency points. GSA directs our attention to a bill of sale from Global to WDJV, which is contained within the pay application. The bill of sale shows "precast components" for various portions of the project. With the bill, Global warrants that "the property has been purchased and/or manufactured for the specific purpose of being used in construction of the Project." Global gives WDJV "equitable and legal title to the Property" and allows WDJV "to take physical possession of the Property" under certain circumstances. Nowhere in this document does Global state that panels have been manufactured. The document says only that "precast components" had been purchased; whether those components were materials with which to make panels or panels which have been made is not specified. Testimony by Global's Mr. DiVincentiis and business records presented by him – both of which we found persuasive – led us to a conclusion that the former alternative was vastly predominant.

Decision

The **MOTION FOR RECONSIDERATION** is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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JAMES L. STERN
Board Judge

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CATHERINE B. HYATT
Board Judge