Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: **Contract Dispute of Carmon Construction, Inc./GAVTEC, Inc. Under Contract No. DTFASO-05-C-00028**

Docket: **07-ODRA-00425**

Appearances:

For Carmon Construction, Inc./ GAVTEC, Inc.:	Mr. Carmon Smith President
For the Southern Region:	Robert B. Dixon, Esq. Office of the Regional Counsel

I. Introduction

On December 4, 2007, Carmon Construction, Inc./GAVTEC, Inc. ("Carmon") filed a Contract Dispute with the Federal Aviation Administration ("FAA") Office of Dispute Resolution for Acquisition ("ODRA"). The Contract Dispute, docketed as 07-ODRA-00425, arises under Contract DTFASO-05-C-00028 ("Contract"), which was awarded and administered by the FAA Southern Region ("Region"). The Contract was for the construction of security system modifications at the Air Route Traffic Control Center ("ARTCC") in Miami, Florida. Specifically, it included all civil, architectural, structural, mechanical, and electrical work, as well as security systems wiring and raceway work necessary to complete the systems and site improvements indicated in the drawings and specifications for the requirement.

The Contract Dispute is comprised of two separate claims totaling $114,071.39. They consist of: (1) a claim in the amount of $83,108.00, which represents the difference between the bid amount "budgeted for the roof installation" and the actual cost of the

metal roof; and (2) a claim in the amount of $30,963.39[1] for an alleged escalation in the costs of site work resulting from Hurricane Katrina. Carmon Letters to the ODRA, both dated June 24, 2008.

For the reasons set forth below, the ODRA finds that Carmon has failed to prove legal entitlement to the amounts claimed. Thus, the ODRA recommends that this Contract Dispute be denied in its entirety.

II. Findings of Fact

1. The Region issued Screening Information Request ("Solicitation") DTFASO-05-R-00027 on May 25, 2005 for the construction of security system modifications at ARTCCs in Jacksonville and Miami, Florida. The contracts were of the firm fixed price type. The Solicitation specified two locations, but indicated that offerors could submit a bid on one or both locations, and an award would be made to the overall best offer or any combination of offers, price and other factors considered. Solicitation, page 2.

2. For each location, offerors were instructed to bid a total amount, which was set forth in the form of a cost breakdown based on sixteen discrete items correlating to the specifications plus overhead, profit, insurance, and bond costs. Solicitation, pages 3A and 3B.

3. The Solicitation provided that contract performance would commence within 10 calendar days of, and be completed within 180 calendar days after, the effective date of the Notice to Proceed, and that the specified performance period was mandatory. Solicitation, page 1; Clause 3.2.2.3-71, page 10.

[1] This claim amount consists of the following items: $5,729.00 for the difference between the price of the original subcontract with Siteworks Building and Development Company ("Siteworks") and the cost to complete the work; $13,750.00 for the amount paid by Carmon to settle a lawsuit brought by Hertz Equipment Rental Corporation ("Hertz") against Carmon; and $11,484.39 in legal fees incurred by Carmon to defend against lawsuits brought by Hertz and Siteworks. Carmon Letter to the ODRA, dated June 24, 2008.

4. The Solicitation further provided that, in the event the contractor failed to complete the work within the time specified or any extension, the contractor would pay the FAA liquidated damages in the sum of $500.00 for each day until the work was completed or accepted. Solicitation, Clause 3.2.2.8-5, page 10.

5. Section J of the Solicitation contained the project specifications ("Specifications"). Section 07410 of the Specifications pertained to the "Metal Roof." Region Response, dated April 15, 2008, Attachments ("Region Response Attachments"), page 5 of 66. In particular, Part 2 of Section J, entitled "Products," provides with respect to the roofing system as follows:

> 2.1 MANUFACTURER
>
> A. **Basis-of-Design: CENTRIA**, 1005 Beaver Grade Road, Moon Township, PA 15108-2944
>
> 1. Product SR8 3 Structural Standing Seam Roof System
> 2. Color and Finish: As indicated in "Exterior Material Finish Schedule"
>
> 2.2 STANDING-SEAM METAL ROOF PANELS
>
> A. General: Provide factory-formed metal roof panels designed to be field assembled by lapping and interconnecting raised side edges of adjacent panels with joint type indicated and mechanically attaching panels to supports using concealed clips in side laps. Include clips, cleats, pressure plates, and accessories required for weather tight installation.
>
> B. Panel Design, provide the following:
>
> 1. Roof panels shall be 12-inches coverage width with 3-inch nominal high vertical ribs at every 12-inches on center. Ribs shall be designed to snap over thermally responsive anchor clips.
> 2. **All components shall be of the gage [sic] as indicated and be furnished to resist wind loads required by the local building code for the specific building category, location and height.**
> 3. Structural design calculations as certified by a registered professional engineer shall be submitted to verify load-carrying capacities of the panel system, including fastener calculations.

4. Sheets shall be in longest length possible to avoid end lap.

C. Metallic-Coated Steel Sheet Prepainted with Coil Coating: Steel sheet metallic coated by the hot-dip process and prepainted by the coil-coating process to comply with ASTMA 755.

1. Zinc-Coated (Galvalume) Steel Sheet: ASTM A 792, Aluminum zinc alloy coated steel sheet, structural quality Grade 50, coating AZ50 hot-dipped galvalume steel sheet.
2. Surface: Smooth, flat finish.
3. **Exterior panel shall be 20 gage [sic]**, 0.036-inch thick.

Region Response Attachment, page 5 of 66 (emphasis added).

6. Carmon entered into a subcontract with Nicon Contracting & Engineering, Inc. on March 20, 2005. In part, the subcontract required Nicon to furnish and install a new Aeicor SS-1, 16.5-inches wide, Miami-Dade approved 24-gauge prefinished metal roof panel system in accordance with approved shop drawings. The total price for the metal roof panel system was $30,110.00. Carmon Claim, dated November 19, 2007 ("Carmon Claim"), Exhibit 1; Carmon May 27, 2008 Response ("Carmon Response"), page 2.

7. According to Carmon, prior to submitting its bid, it solicited a price from suppliers of CENTRIA roof panels, but that it could not obtain a firm price from the suppliers. Carmon also states that in bidding on previous FAA projects, in which CENTRIA was specified as the basis of design for the roofs and panels, the FAA had permitted the submission and use of other manufacturers' products. Carmon Response, page 2.

8. On June 30, 2005, in response to the Solicitation, the Region received proposals for both locations from Carmon. Only one other company submitted a proposal for the Jacksonville site. On August 17, 2005, the Region awarded one contract to Carmon for the work in Miami ("Miami Contract") in the amount of $1,197,844,

and a second contract to another company for the work in Jacksonville ("Jacksonville Contract"). Region Response Attachment, page 22 of 66.

9. Within weeks after contract award, Hurricane Katrina impacted the Gulf Coast. Carmon Response, page 4.

10. Carmon states that Cladding Systems, a CENTRIA dealer, quoted a price of $113,218.00 on September 14, 2005, long after the bid. Carmon Response, page 2, citing to Cladding Systems Contract, dated March 28, 2006 attached to Carmon's Claim, Exhibit 11. Carmon also asserts that Burt Preformed Metal Systems, another supplier of the same products manufactured by CENTRIA, was used at the Jacksonville project, and that the price for doing the same work on the Jacksonville building of the same design was $22,531.00 in contrast to the Cladding Systems' price for the Miami building, which was greater. *Id.*, Exhibit 8.

11. On September 16, 2005, Carmon entered into a subcontract with SiteWorks, Inc. in the amount of $168,632.00 to perform all work required by the following specification sections: 02220-Demolition, 02230-Site clearing, 02300-Earthwork, 02530-Sanitary sewerage, 02630-Storm drainage, 02700-Hot-mix asphalt paving, 02785-Pavement joint sealants, and 03300-Cast-in-place concrete. Carmon Claim, Exhibit 3.

12. On September 29, 2005, Carmon submitted a Request for Information ("RFI") to the Region regarding the roof specification inquiring whether the specification would permit use of a 24-gauge material for the roof instead of the 20-gauge material as articulated in the specification. The RFI further inquired whether the Region would identify one or more alternate products to satisfy the roof specifications' CENTRIA system basis of design. Region Response Attachments, page 28 of 66.

13. On September 29, 2005, by letter, Carmon raised concerns about the tentatively scheduled pre-construction conference and Notice to Proceed ("NTP") in January 2006, stating: "Due to the devastation caused by Hurricane Katrina and other market pressures, availability of various construction materials have been drastically declining of late, and is expected to continue doing so." Carmon Letter, dated June 24, 2008 (Carmon Letter, dated September 29, 2005 attached). In response to the concerns raised in Carmon's September 29, 2005 letter, the Contracting Officer memorialized a telephone conversation he had with Carmon by letter, dated October 5, 2005, which states: "During a telephone conversation between us [Region and Carmon] … I inquired of the possibility of your company purchasing materials now and storing them until you receive an actual notice to proceed. Payment for materials purchased and certified as received by the RE [Resident Engineer] may be invoiced for as progress payment 001." The Contracting Officer recommended that Carmon identify the materials that it intended to use during performance of the contract by forwarding material submittals to the Region's Resident Engineer, so that he could determine the appropriate storage options. Region Response Attachments, page 30 of 66.

14. With respect to the RFI regarding the metal roofing and soffits, the Region's Response stated that the 20-gauge material was necessary to handle Miami area wind intensities in accordance with the Miami-Dade codes, and that it was unaware of any alternatives to the CENTRIA system. Region Response at 2. Specifically, the Region's response to the RFI, dated October 18, 2005, stated that: "The FAA will **NOT** consider approving 24-gauge roof and soffit in lieu of the 20-gauge." Region Response Attachments, page 29 of 66 (emphasis in original).

15. Notwithstanding the Region's response, Carmon, by letter, dated November 3, 2005, continued to press its position with respect to the standing seam metal roof, metal soffit, and metal fascia specified for the project. Specifically, the letter explained that in pricing this portion of the job, Carmon did not interpret the specifications to require the CENTRIA product but, rather, incorporated into its

lump sum pricing, a product (an AEICOR SS-1) from another source, which Carmon believed to be comparable to the specified CENTRIA product. The letter states: "Upon closer scrutiny, we found out that although the AEICOR system we priced is approved for local hurricane code, it does not quite meet all the specifications of the CENTRIA. The principal difference is that the CENTRIA product is made of 20-ga. panels while the AEICOR product is made of thinner 24-ga. [p]anels." Region Response Attachments, page 32 of 66. The letter further states: "Unfortunately, we were not able to get a price for the CENTRIA products until after we turned in a bid to the FAA. Once we did get a price for them, we found the CENTRIA products to be more than three times as expensive as the AEICOR ones. The price difference … is roughly $78,000." *Id.*

16. On February 13, 2006, Carmon by email attachment sent a letter to the Contracting Officer regarding the roof issue it previously raised on November 3, 2005. The letter states:

> While the specifications for this contract list CENTRIA as the "basis of design" for the standing seam metal roof, metal soffit, and metal fascia products, they do not preclude the use [of] products from other manufacturers. I have informally approached … the FAA COR [COTR] (sic) and Resident Engineer on the job, with products from alternate manufacturers and was told that the FAA will only consider approving a submittal for the materials in question if the alternate products meet the following criteria:
>
> 1) The materials must have the same or greater thickness as the specified CENTRIA products (i.e., 20-ga. for roof panels and soffit panels) and otherwise meet the specification requirements in Section 07410.
>
> 2) The product assembly must have a Miami-Dade Notice of Approval (NOA) indicating that it has been tested and approved for hurricane conditions in Miami-Dade County.

> I explained in my letter dated November 3, 2006 that we did not get a price for the specified CENTRIA products in time for bid date, and that we based our bid amount on pricing for a Miami-Dade approved roof system of thinner gauge than the CENTRIA products described in the specifications. After we were awarded the contract, we discovered that the CENTRIA products cost about three times as much as, and about $75 more than, the product on which we based our bid. This is why we have been looking to submit a less expensive alternate.
>
> However, we have found it impossible so far to find a product that meets both requirements listed above. That is, either we can find a Miami-Dade approved product made of thinner gauge metal than what the specifications call for, or we can find a product that meets the specifications but does not have an NOA for Miami-Dade.
>
> We had asked … [the FAA COTR] in our RFI-005, dated September 29, 2005, for an alternate to the CENTRIA products. He indicated in his response that he did not know of one.
>
> It is our understanding that the FAA may not sole-source products unless there is a justifiable reason to do so, and then only if it is specifically stated in the bid documents. Since we believe neither of these conditions to be present in this case, we are requesting that the FAA provide us as soon as possible with an acceptable alternate manufacturer for the products in question. If no alternate exist, then we ask that the FAA issue a Request for Proposal for us to furnish the CENTRIA roof, soffit, and fascia in lieu of the Miami-Dade approved products on which we based our bid.

Carmon Claim, Exhibit 4.

17. On February 26, 2006, Carmon sent another letter to the Contracting Officer advising the Region of the likely impacts on the project timeline if it was to supply the CENTRIA products. The letter indicates that, based on the pricing proposal Carmon had received for the CENTRIA products, it found that the vendor had included substantial lead times for submittals and fabrication that would delay the project by approximately three months. *Id.*, Exhibit 5.

18. On February 28, 2006, the Contracting Officer, by letter, responded to Carmon's letters dated February 13 and 26, 2006. The Contracting Officer states:

> Your initial inquiry [regarding the roof/soffit design and metal fascia products specified for the project] was submitted on September 29, 2005, via RFI-0005. You received a reply from the Resident Engineer … on October 18, 2005, advising that your proposal to use alternate sources with a similar 24-gauge roof and soffit, was not approved. The specifications (Sec 07410-6, Part 2, Products) clearly identify CENTRIA as the basis-of-design, and specified to all Offerors as a base for resultant pricing in their proposal. Therefore, please adhere to the specifications referenced herein when submitting material submittals for roof/soffit, and metal fascia products intended for use on this contract.
>
> In your letter dated 2-26-2006, you mention a three month delay in completing the project if the FAA insists upon using CENTRIA products. Please provide me with the timeline schedule you reference to justify this delay. **A Notice to Proceed date is contingent upon favorable consideration of that information**.

Region Response Attachments, page 40 of 66 (emphasis added).

19. On March 2, 2006, Carmon responded to the Contracting Officer's letter of February 28, 2006, advising that Carmon would "proceed as directed" with respect to the submission of the CENTRIA product, and indicating that it would be filing a contract dispute with the ODRA in that regard. Carmon explained that:

> [O]ur initial inquiry regarding the roof materials was in the form of RFI-005 dated September 29, 2005. However, as far as we were concerned, the issue was far from settled at the point that [the] Resident Engineer … issued his response to that RFI. … [He] simply stated that the FAA would not consider approving a 24-ga. roof and soffit, and that he did not know of an alternate roof that would meet the specifications. He did not say that a 22-ga. roof, for example, would not be acceptable. Nor did he say that an acceptable alternate roof does not exist. As such, we did not interpret the FAA's response as a directive to supply the CENTRIA products.

> Since [the] … RFI response did not clear up this matter for us … I wrote a letter on November 3, 2005 asking you to advise us on how to proceed. In that letter … since no one seemed to be able to find an alternate, the FAA may have inadvertently sole-sourced the roof, fascia, and soffit products from CENTRIA without clearly stating it in the bid documents.
>
> … [N]o products seem to exist other than the CENTRIA ones to meet the specifications written for the roof, fascia, and soffit on this job. We believe this to be a case of sole-sourcing, which … the FAA is not allowed to do without justification and without clearly stating it is doing so.
>
> … I take issue with the last part of your letter [dated February 28, 2006]. Specifically, I disagree that in October 2005 (presumably in the FAA's response to RFI-005) we were informed that the CENTRIA products were not to be substituted by any other. I have explained … why we did not interpret … [the Resident Engineer's] answers as a directive to supply the CENTRIA products. I have also outlined how we did not receive a written response from you regarding this issue for almost four months after first approaching you about it. As such, I do not consider our not having submitted roof, fascia, and soffit products our "failure" as you state it. In fact, we consider the FAA's delay in providing direction on this matter to be the greatest contributor to there being no submittals for these products to date, and to any delays resulting from such lack of submittals.

Carmon Claim, Exhibit 6.

20. Carmon's March 2, 2006 letter also transmits a schedule entitled "Procurement Activities for the CENTRIA Products," which includes such milestones as: the negotiation of a subcontract with a CENTRIA installer on March 2, 2006; the submission of shop drawings to the Region on March 7, 2006; the resubmission of shop drawings on May 12, 2006; the Region's approval of shop drawings after a second review on June 22, 2006; and installation to begin on October 12, 2006. The schedule states: "With roof installation being on [the] critical path, and beginning 10/12/06, the entire critical path, including NTP, must be moved back by the difference between 6/28 and 10/12, or just over 15 weeks." Region Response Attachments, page 45 of 66.

21. In another letter, dated March 14, 2006, Carmon describes its attempts to seek alternate sources for a 20-gauge roof that would meet the specifications, stating that it had located another company in Jacksonville, Florida with a product that could meet the specifications, but lacked the Miami-Dade County Notice of Acceptance ("NOA"). The letter also states that the Resident Engineer informed Carmon that he would categorically disapprove any roof product that lacked the NOA. The letter reiterated Carmon's position that "unless the FAA could come up with an acceptable alternate for use to submit, we considered this to be a case of sole-sourcing, which we understand is generally forbidden by Part 6 of the Federal Acquisition Regulations." Carmon Claim, Exhibit 10.

22. On May 16, 2006, the FAA issued the NTP, 271 days after contract award (August 18, 2005 through May 16, 2006). Region Response Attachments, page 50 of 66.

23. On July 5, 2006, Carmon submitted a change request to the Contracting Officer for an increase in the cost of materials for its site subcontractor, Siteworks Building & Development ("Siteworks"). The requested amount included, among other things, additional costs for asphalt, concrete, aggregate and base, and fuel passed along to the subcontractor from its suppliers. Carmon Claim, Exhibit 12.

24. On August 10, 2006, Carmon transmitted by email to the Contracting Officer additional documentation amending and increasing the change order request submitted on July 5, 2005 by Carmon on behalf of Siteworks. The total amount of the request was for $63,814.42. Region Response Attachments, page 52 of 66.

25. By letter dated August 18, 2006, the Contracting Officer denied Carmon's claim on the basis that costs were not considered substantial and increases were within a range of normal expectation and should have been considered in the original bid price. Region Response Attachments, page 60 of 66.

26. By letter dated August 20, 2006, Carmon took issue with the Contracting Officer's determination that the cost increases experienced by the site subcontractor were "not considered substantial." In this regard, Carmon noted that its subcontract with Siteworks amounted to $168,632, and that "[t]he cost increases cited by Siteworks in our request total $63,814, or 38% of their subcontract for this job." Region Response Attachments, page 61 of 66. Carmon considered these increases to be substantial. *Id.*

27. By letter dated October 16, 2006, the Contracting Officer responded to Carmon's letter, dated August 20, 2006 concerning increased costs of materials claimed by its subcontractors. The letter advises Carmon that the position stated in the Contracting Officer's August 18, 2006 letter remained unchanged. Carmon Claim, Exhibit 20.

28. By letter dated October 20, 2006 to the Contracting Officer, the Carmon identified the following two change order issues in need of resolution: (1) $90,000.00 increase in roofing costs; and (2) the escalation of material costs caused by the hurricane. Carmon Claim, Exhibit 14.

29. By letter to the Contracting Officer of December 21, 2006, Carmon notified the Contracting Officer that it had been served with a lawsuit by Siteworks and expected indemnification from the FAA in the event that any part of the suit was successful. Carmon Claim, Exhibit 17.

30. By letter dated July 5, 2007, Carmon requested a "final decision" from the Contracting Officer with regard to its claims for additional costs in the amount of $7,064 for performing site work and $83,108 for installing a metal roof and soffit. Carmon Claim, Exhibit 19.

31. With regard to the claim for additional costs relating to the site work, Carmon's July 5, 2007 letter states:

> [O]n 7/5/06 we initiated a request on behalf of Siteworks, our original site subcontractor on this job, for additional funds on the basis of price escalations between the time the job was bid and the time the work was being performed. Their request was for an additional $63,814. Siteworks indicated to us that they would be unable to continue working on this job without the additional funding. Once we forwarded to Siteworks the 8/18/06 FAA letter in which you deny the request for additional funds, they defaulted on their subcontract as they had warned. GAVTEC moved immediately to subcontract with other companies to finish Siteworks' scope of work. The cost of doing so exceeded the dollar amount remaining in Siteworks' subcontract by $5,729. In his 12/21/06 letter to you, Carmon Smith of Carmon Construction advised that Siteworks had initiated a lawsuit against Carmon Construction / GAVTEC, A Joint Venture as a direct result of the FAA's denial of Siteworks' request for additional funds. The claim amount is based on the additional construction costs incurred plus $1,335.00 paid in legal fees defending against the Siteworks law suit. Please note that the amount of our claim is for actual costs incurred, and not for what might be argued to be fair escalations of materials and petroleum-based product prices.

Carmon Claim, Exhibit 19.

32. With regard to the claim for additional costs relating to installing a metal roof and soffit, Carmon's July 5, 2007 letter states:

> The second claim item is for additional costs incurred in procuring the CENTRIA roof and soffit materials we were directed by the FAA to install in lieu of the materials on which our bid was based. The $30,110 quote from Nicon Contracting & Engineering that we used for our bid was for code-compliant, hurricane-rated roof and soffit materials. The CENTRIA products are listed as the "basis of design" in the project specifications. Nowhere in the plans or specifications does it state that the materials to be installed "shall" or "must" be CENTRIA. When we requested alternate sources for materials that would meet the specifications, the FAA was unable to provide any. We understand that the FAA sole-sourced this material without clearly stating it anywhere in the plans or

> specifications. Such sole-sourcing is unfair in that it limits competition from manufacturers and roofing contractors who can furnish a variety of quality, code-compliant, hurricane-rated roofs and soffits. At the time we submitted a bid to the FAA, we fully expected to be able to use competitive roof and soffit pricing when it came time to subcontract this portion of the job. Our subcontract with Cladding Systems to furnish and install the CENTRIA products as directed by the FAA was for $113,218. The claim is for the difference between this subcontract amount and the dollar amount we used in our bid for the roof and soffits.

Carmon Claim, Exhibit 19.

33. By letter dated July 19, 2007, the Contracting Officer responded to Carmon's July 5, 2007 letter requesting a "final decision." Referencing prior correspondence with Carmon, dated February 28, 2006; August 18, 2006; and October 19, 2006, the Contracting Officer's letter states that the Region had not changed its position with respect to the two claim items. Carmon Claim, Exhibit 20.

34. On December 4, 2007, Carmon filed a Contract Dispute with the ODRA, claiming (1) extra costs for site work resulting from Hurricane Katrina and a "drastic price escalation of petroleum products"; and (2) costs arising from a "mistake-in-bid" pertaining to the metal roof.

35. The parties entered into an alternative dispute resolution ("ADR") Agreement on January 28, 2008 to attempt to resolve the matter with the assistance of an ODRA Neutral Mediator. Despite the good faith efforts of the parties to achieve an ADR resolution, they were unable to achieve a settlement of the matters under Docket No. 07-ODRA-00425, and the Default Adjudication Process began on March 18, 2008, pursuant to the ODRA Regulation at 14 C.F.R. § 17.39.

36. On April 15, 2008, the Region filed its Agency dispute file together with a statement of the Region's position with respect to the facts and issues in dispute.

37. On May 12, 2008, Carmon filed a letter stating among other things that it had "received and reviewed" the Region's dispute file and did not wish to add to it.

38. By letter dated May 13, 2008, the ODRA directed Carmon to file its statement of position with respect to the facts and issues in dispute by no later than May 27, 2008.

39. On May 27, 2008, Carmon filed its statement of position on the facts and issues in dispute.

40. After the ODRA received both submissions, a status conference was convened on June 13, 2008, to determine the need for any further development of the administrative record. Carmon confirmed to the Region that Carmon's May 27, 2008 submission consisted of 5 pages. During the conference, the parties indicated that they were not requesting a hearing in this case, and the ODRA directed to parties to provide additional documentation and information with respect to factual issues in the record that needed clarification by June 25, 2008.

41. The additional documentation and information was timely filed with the ODRA and the administrative record was closed on July 2, 2008.

III. DISCUSSION

In contract disputes, the burden of proof generally lies with the claimant, who must prove the case by a preponderance of the evidence, and must demonstrate liability, causation, and injury. *Contract Dispute of Strand Hunt, 99-ODRA-00142, citing E. Avico, Inc.,* 00-ODRA-00149.

A. Claim for Costs of Compliance with Roofing Specifications

Carmon's claim for $83,108, which represents the difference between the price of the roof as bid and the actual cost of the CENTRIA roof installed, is based on the contention that the $30,000 roof Carmon based their bid on should have been approved by the Region. Carmon's position is based on the fact that the same products were used in the Jacksonville site, which originated from the same Solicitation as the Miami site. Carmon Letter, dated May 27, 2008 at 3. Carmon also puts forth a related sole-source argument, claiming the FAA improperly specified a sole source CENTRIA product by not approving Carmon's submission of an alternative product that allegedly met the contract specifications. Findings of Fact Nos. ("FF") 16, 19 and 32. Finally, Carmon makes a third argument that compliance with the specifications set forth in the Contract was impossible under the circumstances. FF 16 and 19.

It is axiomatic that the government is entitled to strict compliance with contract terms. *Appeals of Caddell Constr. Co., Inc.*, 1990 WL 181884 (GSBCA 1990); *Ideal Restaurant Supply Co.*, VACAB 70, 67-1 BCA ¶6237 (purpose of the rule is to discourage low bids based on less expensive non-complaint materials); *R.B. Wright Constr. Co. v. United States*, 919 F.2d 1569 (Fed. Cir. 1993). Contractors are allowed to employ the least expensive means of achieving contract performance, but they must fully comply with contract specifications. *Appeals of Wil-Freds, Inc.*, 1976 WL 1997 (DOTCAB 1976). Simply because the contract terms may be restrictive in nature, does not exempt a contractor from compliance. *Appeals of Land O'Frost*, 2003 WL 22331872 (ASBCA 2003) (difficulty in meeting specifications or added expense are not grounds to avoid strict compliance with specifications).

The record shows that the metal roof specifications employed by the Region were clear and unambiguous. FF 5. The Contract specified that "[a]ll components shall be of the gauge as indicated and be furnished to resist wind loads required by local building code for the specific building category, location and height." *Id.* The Contract expressly states that the "[e]xterior panel shall be 20 gauge, 0.036-inch thick." *Id.* The record also shows

that Carmon admittedly bid this contract based on an alternate roofing product of a thinner gauge. FF 6 and 7. Carmon also admits that it bid with the expectation that the Region would allow an alternative product. FF 7. Carmon has not alleged that the Region ever expressly authorized Carmon to base its bid on an alternative roofing product.

Carmon challenges the Region's disapproval of its proposed alternate 24-gauge product, which had a Miami-Dade NOA, as not meeting the specification requirements. FFs 6 and 15. Carmon essentially argues that the Region interpreted the same specification requirement inconsistently as between the Jacksonville and Miami locations, and therefore the Region's insistence that Carmon provide the 20-gauge product at the Miami site was unreasonable. Carmon Letter, dated May 27, 2008. In effect, Carmon argues that because the Jacksonville project used Nicon roofing material, which does not have the Miami-Dade NOA, the Contracting Officer should have accepted the Nicon products for the Miami project as well. However, this contention overlooks the fact that Miami and Jacksonville have different local codes. In response to the ODRA's request for information on this point, the Region explained that "[t]he roof panels approved and installed at the Jacksonville site were 20-gauge and complied with Jacksonville's local building code." Region Letter, dated June 25, 2008. As Miami and Jacksonville have different local codes, what was acceptable at one site was not indicative of what would be acceptable at the other. Miami is subject to differing hurricane conditions than Jacksonville, and, consequently, this is reflected in the code. Region Letter, dated June 25, 2008. The record shows that Carmon sought the Region's approval for alternate roofing products that either lacked the proper gauge, FF 14, or lacked the specified Miami-Dade NOA. FF 21. Inasmuch as the Region is entitled to strict compliance, the ODRA finds the Region's rejection of these alternative roofing products as non-compliant to be consistent with the express terms of the Contract specifications. *Caddell Constr. Co., Inc, supra; Ideal Restaurant Supply Co., supra; R.B. Wright Constr. Co. v. United States, supra.*

To the extent that Carmon argues that the specification of the CENTRIA product was an improper sole source, it is well established that if a bidder believes that the specifications in the SIR are unduly restrictive, it must either protest the specifications before bidding or not bid. Once the contract is awarded, the specifications must be complied with in their entirety. *Appeal of Standard Dayton Corp.*, 1973 WL 1728 (ASBCA 1973). The basic principles and authorities regarding the timeliness of bid protests are well established in the ODRA Procedural Regulations and ODRA caselaw. Protests seeking to challenge the terms of a solicitation must be filed prior to the date set for the receipt of proposals, or the closing date for receipt of proposals after the incorporation of the terms being objected to in the Protest. *Protest of Water & Energy Systems Technology, Inc.*, 06-ODRA-00373; ODRA Procedural Regulations, 14 C.F.R. §17.15(a)(1). As such, any challenge to the terms of the solicitation based on an alleged improper sole source would have to be raised prior to the due date for bids, or otherwise be found untimely. In any event, such issues cannot properly be raised in a post-performance contract dispute.

To the extent that Carmon argues that compliance with the roofing specifications set forth in the contract was impossible or commercially impracticable in a post-Hurricane Katrina environment, FFs 13 and 16, Carmon has the burden of proving not only whether performance was impossible or commercially impracticable, but also that its difficulties were not self inflicted. *Contract Dispute of Strand Hunt Construction, supra; see also Appeal of HLI Lordship Industries, Inc.*, 1985 WL 17639 (VABCA 1985); *Appeal of GTE Sylvania, Inc.*, 1979 WL 2194 (DOTCAB 1979).

In order to prove actual impossibility, the contractor must demonstrate that it was impossible to achieve the technical specifications as required, and that no other contractor would be able to perform under the same specifications. *GTE Sylvania, supra.* The record here belies any claim of actual impossibility. There is no evidence to suggest that the CENTRIA product was unavailable during the contract period. Moreover, Carmon ultimately purchased and installed the CENTRIA products.

The record also does not show that compliance with the roofing specification was commercially impracticable. Commercial impracticability is grounded on the assumption that adherence to contract terms would result in excessive or unreasonable cost. *Natus Corp. v. U.S.*, 371 F.2d 450 (Ct.Cl. 1967). When the government requires certain specifications for materials to be met, it does not warrant that the materials can be pursued without difficulty or other unanticipated problems. *Appeal of Lee Mfg. & Engineering Co., Inc.*, 1969 WL 454 (ASBCA 1969). The warranty is not breached simply because performance becomes more costly than anticipated, as the government is not in a position to guarantee the contractor's profit. *Id*. In order to maintain a claim of practical impossibility, the contractor must prove that something unexpected occurred, the risk of occurrence was not assigned by the contract, and the occurrence rendered performance commercially impossible. *Appeal of Southern Dredging Co., Inc.*, 1992 WL 47920 (ENGBCA 1992); *HLI Lordship, supra*.

Here, the Contract was of the firm fixed price type. A firm fixed price contract "places the risk of incurring unforeseen costs on the contractor rather than on the Government." *Strand-Hunt Construction, supra, citing Sagebrush consultants*, L.L.C. 2000 IBCA LEXIS 11 (IBCA 2000). Where a contractor bids a non-compliant alternate product, the fact that the alternate is not approved by the government cannot be viewed as unexpected or unforeseeable. *See Appeal of Holland Construction Co.*, 73-2 BCA P 10142 (1973) ("The doctrine of legal impossibility . . . in no way permits relief merely because a contractor incurs additional expenses occasioned by the necessity to forego an economically advantageous method of performance concededly inconsistent with the contractual requirements."). Moreover, even assuming that Hurricane Katrina constituted an excessive and unforeseen event, and, as a consequence, the price of CENTRIA products rose excessively,[2] Carmon's assumption that the Region would approve a substitute, non-compliant products is unjustified. Thus, any claim of commercial impracticability must also fail.

[2] There is no indication in the record that this was the case.

In sum, the ODRA finds that the metal roof specification was clear and unambiguous; Carmon was aware of the metal roof specifications prior to bidding; and Carmon assumed the risk of bidding a non-compliant product with the unjustified expectation that it would be approved by the Region. Under the circumstances, it is Carmon that must bear the cost of its bid mistake. *Southern Dredging Co., supra* (erroneous prediction or judgment as to future event does not qualify as compensable mistake). As such, Carmon's claim for increased roofing costs must be denied.

B. Claim For Cost Escalation Resulting From the Delay in the Issuance of the Notice to Proceed.

Carmon requests compensation for increased costs of $30,963.39 allegedly caused by the 271-day delay in the Region's issuance of the Notice to Proceed ("NTP"). Carmon asserts that the delay, and accompanying significant increase in materials prices caused the loss of its first subcontractor and forced it to complete the job at greater expense. FF 31. Carmon also seeks compensation for related costs of litigating and settling lawsuits with its subcontractors. FN 1, *supra.*

In order to prevail on a claim for damages resulting from government-caused delay in the performance of a contract, the contractor must show that: (1) the government was at fault for the delay, (2) the delay was unreasonable, and (3) damages resulted. *Bell BCI Co. v. U.S.*, 81 Fed.Cl. 617, 636 (2008); *see also Avedon Corp. v. U.S.*, 15 Cl.Ct. 648 (1988) ("The contractor must show that the Government was the 'sole and proximate cause' of the delay, and that no concurrent cause would have equally delayed the contract regardless of the Government's action or inaction."). The burden of proof in such cases falls on the contractor, *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1316 (Fed.Cir. 2000), and unless government fault can be shown, a contractor is not entitled to compensation for delays. *Fritz-Rumor-Cooke Co. v. U.S.*, 279 F.2d 200, 201 (6th Cir. 1960).

The record here shows that in late September of 2005, Carmon sought approval to use 24-gauge material for the roof instead of the 20-gauge material specified in the Contract. FF

12. Around this time, Carmon also raised concerns about the unavailability of construction materials and increases in prices, given the tentatively scheduled dates for the pre-construction conference and proposed NTP. FF 13. The Region responded by proposing to purchase the materials in advance via the first progress payment, and encouraged Carmon to forward its material submittals to the Resident Engineer for approval so that he could determine the appropriate storage options. *Id.*

As previously discussed, the record also shows that on October 18, 2005, the Region unequivocally informed Carmon that it would "**NOT** consider approving 24-gauge roof and soffit in lieu of the 20-gauge." FF 14 (emphasis in original). Nevertheless, Carmon continued to seek approval for its less expensive, non-compliant alternate, and advised the Region that it "found it impossible" to find a less expensive alternate to the CENTRIA product that meets all the specification requirements. FF 15 and 16.

Finally, on February 26, 2006, Carmon advised the Region that it had found a vendor for the CENTRIA product and indicated that the submittal and fabrication process would delay the project by approximately three months. FF 17. In response, the Region requested a timeline schedule from Carmon to justify the delay and advised that an NTP would be "**contingent upon favorable consideration of that information**." FF 18 (emphasis in original). Subsequently, on March 2, 2006, Carmon transmitted to the Region a timeline schedule, advising that it would "proceed as directed," and file a contract dispute with respect to the metal roofing specification.[3] FF 19 and 20. The timeline schedule contemplated FAA approval of the shop drawings for the CENTRIA product on June 22, 2006, with installation beginning on October 12, 2006. FF 20. In this regard, Carmon's schedule stated that roof installation was on the critical path, and therefore the issuance of the NTP would have to be "moved back" approximately 15 weeks. *Id.* The Region, however, approved Carmon's timeline schedule and issued the NTP on May 16, 2006. FF 22.

[3] Even so, Carmon, by letter, dated March 14, 2006, continued to question the disapproval by the Region of any roof product that lacked the Miami-Dade NOA, and asserted that the Region had conducted an improper sole sourcing with respect to the CENTRIA product. FF 21.

Carmon asserts that the delay in issuing the NTP was the fault of the Region. As discussed in Section A above, the ODRA finds that the roofing specification was clear and unambiguous, and the Region's insistence that Carmon comply strictly with its terms was proper and in accordance with the express terms of the Contract. It is undisputed Carmon took from October 18, 2005, when it was advised that the FAA would "**NOT**" consider approving a non-compliant 24-gauge roof, FF 14, through February 26, 2006, when it obtained a pricing proposal from a CENTRIA vendor, FF 17, to seek approval of a less expensive alternative to the CENTRIA product that failed to meet all the specification requirements. Carmon's efforts in this regard were at its own risk, particularly when the record also shows that the metal roof installation was on the critical path of the job. FF 20. In sum, the ODRA finds that Carmon has failed to demonstrate that the Region was the sole and proximate cause of the delay in the issuance of the NTP. Therefore, its claim for damages that allegedly resulted from that delay must be denied. *See Avedon Corp., supra*.

CONCLUSION

For the foregoing reasons, the ODRA concludes that Carmon has failed to meet its burden of proving that the Region was unjustified in requiring that Carmon comply with the roofing specification, or that the Region delayed the project. Rather, the record supports a conclusion that Carmon proposed using a roofing product that clearly did not meet the specifications and was promptly informed by the Region of the Region's position on that issue. The ODRA therefore recommends that the Contractor's claims be denied in their entirety.

_____-*S*-_____
Marie A. Collins
Dispute Resolution Officer
FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____-*S*-_____
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