

Warranty Work or Change Order?

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When additional work is directed by the Government after contract completion and acceptance, it is in the Government's best interests to attempt enforcement of the contract's warranty clause. However, the Government must prove that the work was required because of some deficiency in the contractor's performance to invoke the clause.

In this case, the contractor sealed cracks and joints in the pavement at an Air Force base. The contract required that machines, tools, and equipment be approved by the Contracting Officer, and that a trial joint sealant installation be performed prior to work starting on the entire project. In addition, the Contracting Officer would not permit sealing until cleaning and condition of the joints had been inspected and approved as meeting contract requirements. Both the Government and the contractor monitored the equipment used to heat the sealant to assure it was in proper condition prior to being installed.

The contractor completed performance, the government gave final acceptance and payment and the contractor executed a release. Later, the Government notified the contractor that some of the sealant had come out of the joints and that the contractor was to correct the situation under the warranty provisions of the contract.

The contractor visited the site and did not find any fault with its preparation, application, or installation. It did find water pumping from the high water table under the runway, taxiway, and apron. There were also sealant failures at other parts of the base caused by subsurface water pressure. Those failures were in areas sealed by other contractors.

The Government maintained that faulty workmanship was the cause of the failures and insisted on repair under the warranty clause. The contractor subcontracted the repair work to another contractor and paid for the work. The subcontractor found the joints to be "pretty clean" and used sealant from the same batch used previously. The subcontractor also observed water coming up from below the joints where the sealant had come loose.

The Contracting Officer denied the contractor's request for equitable adjustment, but on Appeal, the Armed Services Board of Contract Appeals found that the Government failed to

prove that the contractor's work did not conform to contract requirements. The contractor's equipment, materials, and work were continually inspected and approved by the Government. The Government, in fact, admitted that the equipment, materials, and workmanship were satisfactory. The Board held that, "The mere fact that some of the sealant came out of some of the joints approximately two months after its installation is not proof, by itself, that [the contractor] was responsible for the same." The contractor was not required by the contract to perform the added work and the Government's demand amounted to a change order for which the contractor was entitled to an equitable adjustment. *Blakelee, Inc.* 94-3 BCA ¶127,

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