



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 30, 2026

CBCA 8034

ALL PHASE SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Lawrence J. Sklute of Sklute & Associates, Potomac, MD, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **SHERIDAN**, and **SULLIVAN**.

SULLIVAN, Board Judge.

All Phase Services, Inc. (APS) appealed the termination of its contract for default. Previously, the Board found that the Department of Veterans Affairs (VA) established its *prima facie* case of default. *All Phase Services, Inc. v. Department of Veterans Affairs*, CBCA 8034, 25-1 BCA ¶ 38,894, *reconsideration denied*, 25-1 BCA ¶ 38,923. In its complaint, APS alleged that its default should be excused because the contracting officer ignored evidence of a mistake-in-bid. We determined that we possessed jurisdiction to consider the defense, *All Phase Services, Inc. v. Department of Veterans Affairs*, CBCA 8034, 25-1 BCA ¶ 38,893, but found that APS failed to provide clear and convincing evidence of the mistake-in-bid and that APS waited too long to assert its mistake-in-bid. *All*

Phase Services, Inc. v. Department of Veterans Affairs, CBCA 8034, et al., 26-1 BCA ¶ 38,945 (2025).

The Board conducted a hearing in February 2026 to hear evidence on APS's defense that its performance on the contract should be excused because of a defect in the specifications. Because APS has not proven that the specifications were defective, we deny APS's appeal.¹

Findings of Fact

I. Design Specifications Resulted in Buried Thru-Walls

VA contracted with APS for the re-roofing of fifty-five roofs on the VA Medical Center located in Buffalo, New York. APS worked on seven roofs before VA terminated the contract for failure to make progress. *All Phase Services*, 25-1 BCA at 189,324. APS alleges that the drawings and specifications for the project contained a defect that would allow water into the roofing system. The purportedly defective specification required APS to build the roofing material to a height that buried structures, called thru-walls, located just above the roof deck. APS contends that, because the thru-walls would be buried, any water that drained out of them would end up in the roofing system and void the warranty of a watertight roof that APS was contracted to provide.

The medical center is a multi-story, limestone-covered building. When it was built, thru-wall structures were inserted at every floor level and above every door and window. Appeal File, Exhibits 411, 412; Transcript, Day 2 at 346-48; Day 4 at 54.² The purpose of the thru-wall structure is to allow any water that enters behind the limestone panels to be directed back to the outside of the building. Transcript, Day 2 at 81. The thru-wall structure is lined with thin copper flashing that is bent to allow the water to weep out of the building.

¹ APS also appealed a demand from the contracting officer, issued in January 2025, for the costs to replace the seven roofs that APS had worked on because the roofs were found to contain water. The Board docketed that appeal as CBCA 8425 and consolidated it with this appeal. The Board also heard evidence at the hearing concerning the issues raised in that appeal. However, because the Board requires further briefing from the parties on several issues presented in CBCA 8425, the Board has unconsolidated the appeals in a separate order issued with this decision.

² All exhibits are found in the appeal file, unless otherwise noted. The page numbers cited are the Bates numbers on the exhibits. "Transcript, Day X at X" refers to the transcript of the hearing conducted February 23-26, 2026 (Days 1-4).

See Transcript, Day 2 at 79, 95. If the water runs down the building to a roof deck, the water drains out from that roof. *Id.* at 132.

There are also thru-wall structures on the parapet walls surrounding the roof decks. The drawings required the contractor to either cut or leave the flashings for these thru-walls. Exhibit 1 at 32 n.1, 2. Regarding the thru-wall structures on the non-parapet walls, the contract directed that the contractor again either cut or leave the flashings but did not describe the structures to which they were attached as thru-walls. *Id.* at n.8, 9. Five of the seven roofs that APS completed have non-parapet or rising walls. Transcript, Day 2 at 159. APS did not provide information on how many of the other forty-eight roofs covered by the contract had non-parapet walls with thru-wall structures.³ VA did not change the design or the specifications for the contract that were issued after APS was terminated for default. Transcript, Day 4 at 91.

The lowest thru-wall structure in the non-parapet walls is located approximately four-and-a-half inches off of the roof decks. Transcript, Day 2 at 77. When the building was initially constructed, roofs did not have any insulation so any water seeping through the lowest thru-wall structure would drop onto the roof deck. *Id.* Subsequent building codes required insulation to be installed which raised the top of the roofing material to above the lowest thru-wall structure. *See id.* Thus, when completed, the lowest thru-wall structure would be blocked by the roofing material. *Id.* The roofing material that APS was contracted to replace also covered or buried this lowest thru-wall. *Id.* at 361. VA did not report any problems with water entering the building prior to APS's contract. Transcript, Day 4 at 67.

II. Expert Opinions

Both parties had experts testify on this issue. Mr. McDonnell, an architect registered in New York and APS's expert, was qualified by the Board as an expert in roofing systems and thru-wall flashings. Transcript, Day 2 at 9-10, 65-66. Mr. McDonnell testified that water weeping out of the buried thru-wall flashings would go into the upper layers of the insulation on the roof. *Id.* at 85. Mr. McDonnell opined that limestone is "a relatively absorptive stone" that will become more absorptive as it ages and is abraded by weather and pollution. *Id.* at 122-23. Mr. McDonnell testified that the buried thru-wall flashing would not result in a watertight roofing system because water would enter the system through the thru-wall structure. *Id.* at 156-57. Mr. McDonnell opined that these buried thru-walls could

³ When asked by the Board, APS's expert could not say how many roofs had these non-parapet walls with thru-wall structures. Transcript, Day 3 at 42-43. He explained that he was focused on the seven roofs on which APS had worked. *Id.* at 42.

be the cause of the water found in the roofing material, following the heavy amount of precipitation in the winter of 2024-2025. *Id.* at 262-65, 284. However, Mr. McDonnell also testified that the water could have been caused by other factors. *Id.* at 284. And Mr. McDonnell acknowledged that he had seen no evidence of water coming through the buried thru-walls and could not estimate how much water may be present. *Id.* at 336, 348-49.⁴

Mr. Sobeck, VA's expert, was qualified as an expert in roofing and building envelopes. Transcript, Day 1 at 196. Mr. Sobeck testified that, in his experience, when a thru-wall flashing is buried and it causes a problem, the water finds its way into the building itself. Transcript, Day 4 at 45. Mr. Sobeck saw no evidence that water was leaking through the thru-walls when he inspected the roofs that APS worked on and testified that he had no concerns about the buried thru-walls on the project. *Id.* at 46, 47. He opined that the building was "well protected" with thru-wall structures above every window and at every floor level to weep out water that may get in behind the limestone. *Id.* at 74.

III. VA and the Architect Examined the Thru-Wall Issue

APS first raised the issue of the buried thru-walls in a request for information (RFI), submitted in September 2022. Exhibit 334 at 303. APS submitted the RFI following a site visit by the contractor that had installed the previous roof.⁵ Transcript, Day 3 at 116. According to the RFI, APS was concerned that water infiltration would void the manufacturer's warranty:

Tremco stated that moisture infiltration has been seen to shorten the life span of nearly every roofing system. Accordingly, All Phase Services has concerns that the roofs containing these through walls will not be able to be warranted under Tremco due to this moisture infiltration. Tremco will notify All Phase whether it will not warranty the roof given the Government's design defect. Accordingly, All Phase is apprehensive to allocate more time and resources into roofs that will potentially need to be demolished and re-roofed due to the Government's defective design to be able to warranted.

⁴ Mr. McDonnell disagreed with Mr. Sobeck's opinion regarding a "shot glass" of water but did not offer his own estimate of the amount of water that may have entered the building. Transcript, Day 2 at 143-44, 337.

⁵ APS had asked that contractor to become its subcontractor for the contract. Transcript, Day 3 at 116.

Exhibit 334 at 303.

The architect of record for the project investigated the issue and determined that the project could be completed as designed. According to the architect, “any water entering the walls or the parapets would be cut off from the existing wall flashing above and not be able to continue down to the old flashing.” Exhibit 334 at 306. VA also received assurances from Tremco, the manufacturer of the roofing material specified for use on the contract, that it would still warranty its product with the presence of the thru-wall structures. *Id.* at 305; Transcript, Day 4 at 84-85. In response to the RFI, VA directed APS to proceed with the roofing work as designed. Exhibit 334 at 302.

At the time that APS submitted the RFI, it had completed the roofing work on seven roofs. Transcript, Day 4 at 78. Following VA’s RFI response, APS never mentioned the issue again during contract performance, although it provided responses to one cure notice, Exhibit 112, and two show cause notices, Exhibits 117, 121, regarding its delinquent performance.⁶ APS presented no trial testimony regarding difficulties that it experienced during construction as a result of the presence of the thru-walls.

APS offered no other evidence at hearing as to why its performance should be excused.

Analysis

APS contends that the contract specifications that required the lowest thru-wall structures on the non-parapet walls to be buried would allow water into the roofing system installed by APS. The presence of this water, APS argues, would void the warranty for the roofs. APS asserts that, because the roofs could not be warrantied, the specifications were defective and its default should be excused.

Defective specifications can excuse non-performance or default by a contractor. In the face of drawings or direction that cannot “produce the desired result,” a contractor has “a legal right of avoidance, thereby discharging his duty to perform, and relieving him of the default termination and the consequences which flow therefrom.” *Seven Sciences, Inc.*, ASBCA 21079, 77-2 BCA ¶ 12,730, at 61,877. “A failure of a contractor to comply with

⁶ APS also did not allege defective specifications in its complaint. *See* Complaint (Apr. 26, 2024). APS first raised its allegation regarding the buried thru-walls as part of a discovery dispute following the issuance of VA’s expert report. Motion to Compel Discovery (Aug. 31, 2025) at 2.

defective specifications may not serve as the basis for a default termination because by writing those flawed directions, the Government has made performance with them impossible.” *American Power, Inc.*, GSBCA 8752, 90-2 BCA ¶ 22,811, at 114,556, *reconsideration granted in part on other grounds*, 90-3 BCA ¶ 33,983. When seeking to excuse performance due to defective specifications, the contractor must prove three elements: (1) that the specifications were defective; (2) “that the contractor’s difficulties were caused by the defect; and (3) that the defect affected the contractor’s performance in such a way that entitles the contractor to an extension of time or an excuse for stopping the performance.” *Rowe, Inc. v. General Services Administration*, GSBCA 14211, 01-2 BCA ¶ 31,630, at 156,275. APS failed to prove these elements.

APS did not establish that the specification requirement to build the roofing material with insulation so that the thru-wall structure is buried is a defect. The roofing systems that APS was hired to replace had buried thru-walls. VA’s expert testified that, if buried thru-walls are causing water to collect, the water will leak into the building. VA did not report problems with the water leaking into the building with the prior roof. Although APS’s expert testified that the thru-wall structure could allow water in, he did not quantify the amount of water. VA’s expert testified that the structure would not allow water to enter and that the other building thru-wall structures above the buried one would be sufficient to weep out any water that did enter. VA’s expert testified that the amount of water that could possibly collect was negligible. APS has not established that the specification was defective.

APS also provided no evidence that its contract difficulties were caused by the purported defect or that the purported defect delayed its performance. APS notified VA of the issue in an RFI. In response, VA’s architect determined that the roof could be installed as designed, and VA received assurances that Tremco, the roofing material supplier, would warranty the roof. At the time that APS submitted the RFI, it had already completed its work on the seven roofs on which it worked under the contract. It did not mention the thru-wall issue in response to the contracting officer’s cure notice or show cause notices.

We have previously found that VA established its *prima facie* case that it properly terminated APS’s contract for default for failure to make progress. *All Phase Services*, 25-1 BCA at 189,326. APS failed to establish that the specification was defective and provided no other reason why its failure to make progress on the contract should be excused. *See I-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,553. Therefore, we deny APS’s appeal of VA’s termination for default.

Decision

APS's appeal is **DENIED**.

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge