



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT GRANTED IN PART:
September 21, 2026

CBCA 7881

JV6 CONTRACTING, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Casey J. McKinnon of Cohen Seglias Pallas Greenhall & Furman PC, Washington, DC, counsel for Appellant.

Laetitia Coleman, Office of General Counsel, Department of Veterans Affairs, Arlington, TX, counsel for Respondent.

Before Board Judges **RUSSELL**, **ZISCHKAU**, and **SULLIVAN**.

RUSSELL, Board Judge.

Appellant, JV6 Contracting, LLC (JV6), claims damages related to removal of lightweight insulating concrete (LWIC) as part of its contract to replace the roof system of a building at the Edward Hines, Jr. Medical Center (Hines VAMC) in Hines, Illinois. JV6 contends that requiring the removal of LWIC was a constructive change to the contract and created an unexpected differing site condition and a defective specification. The Department of Veterans Affairs (VA) moved for summary judgment. For the reasons stated below, the Board grants the VA's motion for summary judgment on JV6's defective specification claim and denies the motion on JV6's constructive change and differing site condition claims.

Background

I. Contract Requirements and Award

A. The Contract

On July 19, 2021, the VA issued an invitation for bids (IFB) to replace the roof system of a building at the Hines VAMC. Appeal File, Exhibit 6, Solicitation at 308.¹ As part of the IFB, a site visit was scheduled on July 29, 2021. *Id.* The purpose of the site visit was to provide potential bidders an opportunity to do a pre-construction walk through of the work site. Exhibit 4, Statement of Work (SOW) at 295. The SOW explained that “[a] pre-construction site walk through is encouraged and should be coordinated by the [Contracting Officer (CO)]. The intent of this walkthrough is to give the Contractor access to the project site so that an accurate evaluation of the project requirements and site assessment can be made.” *Id.*

Pursuant to the SOW, the contractor was required to, among other tasks, remove approximately 40,000 square feet (sq. ft.) of the existing coal tar roof assembly down to the deck; confirm the roof deck was structurally sound by hammer sounding 100% of the concrete deck and repairing any delaminated concrete; and install a new roof assembly (specifically, 40,000 sq. ft. of hot rubberized asphalt roofing). Exhibit 4, SOW at 294, 298-299; Exhibit 2, Drawings at 3. The SOW stated that “[w]here a conflict exists between the [SOW] requirements and the requirements of other associated contract documents, the SOW requirements shall prevail.” Exhibit 4, SOW at 295.

The contract was also governed by a Specifications Book which, similar to the SOW, included the requirement to “remove existing roofing system completely, exposing structural roof deck.” Exhibit 3, Specifications Book at 206. The book included the following on demolition:

1.2 **GENERAL NOTE ON ALL PROJECT DEMOLITION:**

- A. Demolition is general in nature as indicated by the Statement of Work, drawings, and/or specifications. Therefore details, dimensions, and construction materials are rarely provided. It is the responsibility of the Contractor to determine by their

¹ All exhibits, including those designated as tabs, are found in the appeal file unless otherwise noted. Page citations are to the Bates numbers on the exhibits.

means and methods the amount of necessary demolition needed in performance of their contract.

- B. Unless stated otherwise demolition shall constitute removing finish materials and other items necessary in the performance of the contract down to the structural members.

...

- D. The Contractor may request to perform exploratory demolition or inspections at the time of the bid. Such requests shall be submitted in writing to the [CO] and copied to the [Contracting Officer's Representative (COR)] and the Medical Center. Such requests shall indicate the type of demolition/inspections to be performed, tools to be used, and the estimated time needed to perform. Upon receipt of the request the [CO] and COR may require the Contractor to repair their exploratory demolition at the Contractor's expense immediately following such exploratory demolition/inspections.

Id. at 136.

Through amendments to the solicitation, VA answered contractor questions and agency responses:

CONTRACTOR QUESTION: Prime contractors can quantify the hammer sound testing prior to bid however until after the sound testing is complete, the contractor cannot quantify the extent of the repair work for the deck. Please indicate what percentage or [sq. ft.] of repair prime contractors should assume for bid purposes.

VA REPLY: Building was constructed in the early 1950s. No additional information is available on condition of [the] roof slab.

CONTRACTOR QUESTION: Are the[re] any photos of existing roofing conditions for existing roof deck condition.

VA REPLY: No.

Exhibit 12, Solicitation Amendment 2 at 968.

CONTRACTOR QUESTION: Please provide a repair detail for the anticipated concrete deck repairs.

VA REPLY: Repairs anticipated to be minor and standard. Details of such repairs are outlined in spec 03 01 00 [Exhibit 3, Specifications Book at 145 (Rehabilitation of Concrete)].

Exhibit 9, Solicitation Amendment 1 at 884. The solicitation was incorporated into the contract. Exhibit 15, Solicitation at 1062.

B. Site Visit

JV6 accepted a subcontractor proposal from Kedmont Waterproofing stating that Kedmont would “[r]emove existing roofing system down to the structural concrete deck.” Exhibit 58 at 3364. JV6’s project manager and a representative with its subcontractor had attended the pre-bid site visit. Respondent’s Statement of Undisputed Material Facts (RSUMF) ¶ 4; Exhibit 59, Deposition of Peter Cruz (May 8, 2025) at 3385. However, in deposition testimony, JV6’s project manager was unsure whether the subcontractor performed any core sampling during this pre-bid site visit. Appellant’s Statement of Genuine Issues ¶ 7. In his deposition testimony, in response to a question on whether JV6 performed exploratory demolition, JV6’s managing partner stated that, to determine the thickness of the roof, JV6’s subcontractor, using a two-inch saw, “drilled down through the roof, pulled out the core, stopped at the concrete, and said . . . the roof is this thick. And that’s it.” Cruz Deposition at 3389. It is unclear whether this exploratory demolition was performed before (pre-bid) or after award.

C. Contract Award

On September 27, 2021, the VA awarded a fixed price contract to JV6 for the roof replacement project. Exhibit 15. The total contract award was \$1,548,956. *Id.* at 1064. On October 12, 2021, the VA issued the Notice to Proceed to JV6, with a period of performance of 120 calendar days. Exhibit 20.

In a Request for Information (RFI) to the VA on or around March 15, 2022, JV6 reported that it discovered a lightweight topping on top of the structural concrete deck that was in very poor condition:

Upon removal of the existing coal tar roof assembly, we discovered a lightweight topping on top of the structural concrete deck. The Demo Roof Plan . . . shows removal of the coal tar roof assembly down to deck. . . . There

is nothing in the drawings or details showing that there is a lightweight topping on top of the structural concrete deck. The lightweight [topping] is in such poor condition that it is going to have to be removed in order to meet Barrett requirements for the warranty. Once the lightweight topping is removed, the drains will also have to be lowered. . . . Please advise on how to proceed.

Exhibit 31 at 1788.

On March 15, 2022, JV6's project manager sent an email to the VA's COR reiterating that it had discovered the lightweight topping on top of the structural concrete deck. Exhibit 24 at 1421-22. The project manager again explained that the topping was in such poor condition that it had to be removed to meet warranty requirements and, once removed, the drains would have to be lowered. *Id.* at 1421. By email a week later, the project manager added, "The lightweight insulating concrete is not an acceptable substrate to receive the new roofing system, so this component of the deck will have to be removed down to the structural concrete before installing the new system." *Id.* On April 5, 2022, JV6's project manager sent a similar email to the VA COR stating, "As the roofers continue the demo and removals of the existing coal tar roof assemblies, they have requested direction on reporting the time and equipment associated with the removal of the unforeseen failed lightweight topping found on top of the structural concrete deck." Exhibit 27 at 1450.

On November 3, 2022, the VA's COR responded that the VA sees "the lightweight concrete as part of the existing roof assembly, and the SOW called for removing the roof assembly down to the deck." RSUMF ¶ 29; *see also* Exhibit 31 at 1787. JV6 subsequently removed the topping, Exhibit 28 at 1459, stating in progress notes that it "[c]ompleted removals of the unforeseen failed lightweight topping found on top of the structural concrete deck." Exhibit 28 at 1459. In these same progress notes, JV6 stated that it completed the hammer sounding of the concrete decks and that no delamination of the structural deck was found. *Id.*

On February 6, 2023, JV6 submitted a request for an equitable adjustment (REA) in the amount of \$335,327.78, and a time extension of thirty-eight (38) days for removing the LWIC topping, which the VA denied, concluding that the work was part of the original SOW. Exhibit 41 at 2288, 2290-94. By letter dated March 15, 2023, JV6 submitted a certified claim alleging the same facts and seeking the same relief as in the REA. Exhibit 36 at 2218-2222; Exhibit 42. The VA denied the claim, again concluding that removal of the LWIC was part of the roof assembly, not the roof deck itself and, thus, part of the contract. Exhibit 47 at 2435-38. This appeal followed.

II. Proceedings Before the Board

A. JV6's Complaint

JV6's complaint includes three counts. Complaint ¶¶ 12-29. First, JV6 alleges that its work was constructively changed due to discrepancies between the contract's requirements and the work that it was required to perform. *Id.* ¶ 14. It asserts that the work to remove the LWIC was outside the scope of the contract and extended its period of performance. *Id.* Second, JV6 alleges that it incurred additional time and costs as a result of defective contract specifications. *Id.* ¶¶ 20-21. JV6 avers that "[t]he original contract documents required removal of the existing roofing to install new roofing, but did not mention lightweight insulating concrete." *Id.* ¶ 21. JV6 alleges that "[t]he defective specifications did not allow JV6 to properly prepare for the additional work it was required to perform" and resulted in thirty-eight days of delay for which it has not been compensated. *Id.* ¶¶ 21-22. And third, JV6 alleges that its performance was changed due to differing site conditions discovered at the project site. *Id.* ¶ 25. JV6 states that "[t]he original contract documents did not reference the existence of lightweight insulating concrete in the decking," and, "[a]s a result, the conditions encountered during performance were materially different than those represented in the contract documents." *Id.* ¶ 26. As in its REA and certified claim, JV6 avers that the costs associated with removing the layer of concrete totals \$335,327.78, and the extra work extended performance on the project by thirty-eight days. *Id.* ¶¶ 9-11.

B. The VA's Motion for Summary Judgment

As part of the proceedings in this appeal, the parties engaged in discovery, and the VA subsequently moved for summary judgment. The VA requests summary judgment on JV6's claims based on a constructive change to the contract, a differing site condition, and a defective specification.

1. Constructive Change

As for JV6's allegation regarding constructive change, the VA asserts that the scope of work remained unchanged during the performance period. Respondent's Motion for Summary Judgment (RMSJ) at 9.² The VA argues that, under the contract terms, JV6 was required to remove the existing coal tar roof assembly down to the deck and that the LWIC

² As the VA did not number the pages in its motion for summary judgment or reply brief, citations for these documents are to .pdf page numbers.

was part of the assembly. *Id.* at 3-4, 5-6. The VA also references a contract drawing which states that the coal tar roof assembly must be demolished down to the deck. Respondent's Reply Brief to Appellant's Opposition to Respondent's Motion for Summary (Respondent's Reply Brief) at 6.

The VA references JV6's post-award second RFI, in which JV6 stated, "We discovered a lightweight topping on top of the structural . . . concrete deck." RMSJ at 4. The VA asserts that JV6's own statement evidences that the LWIC was not part of the structural deck but, instead, part of the roof assembly that needed to be removed as part of the contract. *Id.* The VA additionally argues that the SOW required JV6 to confirm that the roof deck was structurally sound and repair it, if necessary, and that the removal of the LWIC was necessary to perform this work. *Id.* at 3, 6. The VA also notes that the SOW required JV6 to hammer sound 100% of the concrete deck and repair any delaminated concrete, which "would not apply to LWIC" and that this "further supports [the VA's] position that LWIC was part of the roof assembly, not the [structural] concrete" deck. Respondent's Reply Brief at 6-7. The VA argues that the contract placed JV6 on notice that the VA had no available information on the condition of the roof slab. RMSJ at 5, 6. Specifically, in a solicitation amendment, the VA stated that the building was constructed in the early 1950s and that no additional information was available on the condition of the roof slab. Exhibit 12 at 968. The VA thus argues that there was no constructive change to the contract because the work that was involved to remove the LWIC was within the contract scope. Respondent's Reply Brief at 6-7.

In support of its motion, the VA also relies on an excerpt from the National Roofing Contractors Association (NRCA) Roofing Manual that JV6 submitted as part of its Rule 4 file supplement. RSUMF ¶¶ 30-31. The manual defines a "roof assembly" as "[a]n assembly of interacting roof components including the roof deck, air or vapor retarder (if present), insulation and membrane or primary roof covering designed to weatherproof a structure." Tab 8, NRCA Roofing Manual: Membrane Roofing Systems—2019 at 12 Tab 8. And it defines a "roof system" as "[a] system of interacting roof components generally consisting of a membrane or primary roof covering and roof insulation (not including the roof deck) designed to weatherproof and sometimes to improve the building's thermal resistance." *Id.* at 13. The manual further states that, "[i]n general, a roof assembly consists of the structural deck and roof system" and that the "roof system includes every component above the deck." *Id.*

2. Differing Site Condition

The VA argues that JV6 fails to establish entitlement based on the presence of the LWIC being a Type 1 differing site condition. RMSJ at 8. The VA notes that the contract

(Solicitation Amendment 2) explicitly stated that “no additional information regarding the roof slab” was available, and, further, “[t]here was no indication in the solicitation or accompanying contract documents regarding the makeup of the roof assembly.” *Id.* at 8-9. The VA also argues that JV6 had the opportunity to perform exploratory demolition prior to award but failed to do so. *Id.* at 9. The VA reasserts that the LWIC was part of the roof assembly and needed to be removed to perform the contractually-required testing of the roof deck to confirm the deck’s structural soundness. *Id.* at 6.

3. Defective Specification

The VA asserts that JV6’s claim based on a defective specification must also fail. Here, according to the VA, the contract did not specify how the contract should be performed. Instead, “the specifications outlined the objective to remove the existing coal tar roof assembly down to the deck and install [a] new roof assembly[,]” with JV6 determining the appropriate methods to complete this work. RMSJ at 7. The VA argues that because the contract emphasized what work was required under the contract and left the “means and methods” of how to perform the work to the contractor, JV6 is not entitled to recover based on the VA’s alleged provision of a defective specification. *Id.* at 7-8. The VA asserts that JV6 has provided “no substantive support” for its characterization of the “contract as a design specification.” Respondent’s Reply Brief at 7.

C. JV6’s Opposition

JV6 opposes the VA’s motion for summary judgment arguing that the contract required three specific tasks: (1) removal of approximately 40,000 sq. ft. of existing coal tar roof assembly down to the deck; (2) hammer sounding 100% of the concrete deck and repairing any delaminated concrete; and (3) installation of approximately 40,000 sq. ft. of hot rubberized asphalt roofing. Appellant’s Opposition to Respondent’s Motion for Summary Judgment (Appellant’s Opposition) at 2, 5. Thus, according to JV6, “the VA’s pre-bid representations notified offerors that they would be required to perform repairs of any delaminated concrete, but at no time did the Contract requirements include mention of a lightweight concrete topping or demolition of portions of the deck.” *Id.* at 2. JV6 asserts that the LWIC topping was part of the deck and that the contract did not contemplate removal of this topping. *Id.* at 4.

JV6 also references the NRCA Roofing Manual to support its position that there is a genuine issue of fact on whether the LWIC was part of the structural deck, as JV6 asserts, or whether it was part of the roof assembly as the VA argues. The NRCA Roofing Manual describes LWIC as a type of roof deck. Appellant’s Statement of Genuine Issues ¶ 24. Thus, JV6 argues that the LWIC is considered part of the deck and that this concrete was not an

acceptable substrate to receive the new roofing system. *Id.* JV6 also argues that the VA's notification that it had no additional information on the condition of the roof, other than stating that the building was constructed in the 1950s, constituted a description of "the VA's knowledge of the repair work that would need to be performed, rather than the existence of a lightweight concrete topping that would need to be demolished before the new roofing assembly could be replaced." Appellant's Opposition at 2. Accordingly, JV6 asserts that removal of the topping that was part of the deck was a constructive change to the scope of work. *Id.* at 4-5.

As for its claim of a differing site condition, JV6 asserts that there are factual disputes as to its "performance of exploratory demolition and whether such testing would have revealed the existence of" the lightweight concrete topping. Appellant's Opposition at 6. JV6 also argues that contract requirements—namely, the requirements to remove approximately 40,000 sq. ft. of existing coal tar roof assembly down to the deck and hammer sound the concrete deck and repair any delaminated concrete—represented that "no other materials would be present to prevent the installation of the new roof." *Id.* at 6-7. JV6 avers that the existence of the "unforeseen" LWIC topping rendered this representation inaccurate and represented a differing site condition. *Id.* at 7.

JV6 additionally alleges that the VA's "specification" requiring it to demolish the coal tar roof assembly and then perform hammer sound testing and delaminated concrete repair did not permit it to successfully perform the work, thus rendering the "specification" defective. Appellant's Opposition at 5-6. JV6 asserts that "the VA has not, and cannot articulate how [JV6] could have successfully performed the Contract without deviating from the requirements to demolish the coal tar roof assembly, and then perform hammer sound testing and repair of any delaminated concrete." *Id.* at 6. JV6 adds that "[c]ompletion of [these] VA-mandated requirements was not sufficient to complete the required installation of the new roof assembly, rendering the specifications defective." *Id.*

Discussion

I. Standard of Review

Under the Board's rules, "[a] party may move for summary judgment on all or part of a claim or defense if the party believes in good faith it is entitled to judgment as a matter of law based on undisputed material facts." 48 CFR 6101.8(f). The Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance on deciding summary judgment motions. *Id.* Rule 56(a) states that a tribunal "*shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added). A fact is material if it "might

affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A dispute is genuine if a reasonable factfinder could find in favor of the nonmoving party.” *UnitedHealthcare Insurance Co. v. Office of Personnel Management*, CBCA 7357, 25-1 BCA ¶ 38,820, at 188,863.

“[A] party seeking summary judgment always bears the initial responsibility of informing the [tribunal] of the basis for its motion.” *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). “A party asserting that a fact cannot be or is genuinely disputed must support [its] assertion by” either “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c). A tribunal need only consider the materials cited in the parties’ briefing, but it may also consider other materials in the record. Fed. R. Civ. P. 56(c)(3).

II. JV6’s Claims

A Existence of Genuine Dispute on Constructive Change

“A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government.” *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007); *see also Caduceus Healthcare, Inc. v. Department of Health & Human Services*, CBCA 8422, 25-1 BCA ¶ 38,904, at 189,383. In general, where a federal agency “requires a constructive change in a contract, [it] must fairly compensate the contractor for the costs of the change.” *Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995).

We must decide whether the LWIC was part of the coal tar assembly or the structural concrete deck and whether its removal was within or outside of the scope of work. The VA argues that the LWIC was part of the assembly and, thus, its removal was required under the contract. JV6 argues that the LWIC was not part of the assembly—which JV6 was required to remove as part of the contract—but, instead, part of the underlying structural concrete deck itself on which the new roof assembly was to be placed.

The VA relies heavily on requirements in the Specifications Book to support its position. The book does include a provision requiring JV6 to “[r]emove [the] existing roofing system *completely*, exposing the structural deck roof.” Exhibit 3, Specifications Book at 206 (emphasis added). Further, the contract stated that “demolition shall constitute

removing finish materials and *other items necessary* in the performance of the contract *down to the structural members.*” *Id.* at 136 (emphasis added). Additionally, as the VA notes, JV6’s own communications to the VA reflects JV6’s possible view that the LWIC was on top of the structural concrete deck, not part of it. In an RFI to the VA on or around March 15, 2022, JV6 stated that “[u]pon removal of the existing coal tar roof assembly, we discovered a lightweight topping *on top of* the structural concrete deck.” Exhibit 31 at 1788 (emphasis added). On March 22, 2022, in an email communication to the VA COR, JV6’s project manager explained that the LWIC would have to be removed from the structural deck. Exhibit 24 at 1421. And, on April 5, 2022, JV6’s project manager sent an email to the VA COR about the “lightweight topping found on top of the structural concrete deck.” Exhibit 27 at 1450.

Underscoring VA’s point that the LWIC topping could be construed as separate from, and not part of, the structural deck is JV6’s description of work completed in a work progress note. In the note, JV6 describes (1) completing removal of the “failed” lightweight topping found “on top of the structural concrete deck” and (2) completing, as a separate matter, the hammer sounding of the structural concrete deck, noting that no delamination of this deck was found. Exhibit 28 at 1459. The VA argues that the requirement to hammer sound the concrete deck and repair any delaminated concrete only applied to the structural concrete deck, further suggesting that the LWIC was not part of the structural concrete deck but instead a separate material that was required to be removed to expose the structural concrete deck. *See* Respondent’s Reply Brief at 6-7.

Although the VA makes a strong argument that the LWIC should be considered as part of the concrete structural deck and not the roof assembly, we nevertheless find a factual dispute on this issue. Both parties rely on the NRCA Manual to support their respective positions. This manual describes a “roof assembly” as “[a]n assembly of interacting roof components including the *roof deck*, air or vapor retarder (if present), *insulation* and membrane or primary roof covering designed to weatherproof a structure.” Tab 8, NRCA Roofing Manual: Membrane Roofing Systems–2019 at 12 (emphasis added).³ It is unclear whether the LWIC at issue in this appeal can be construed as the insulating part of the roof assembly based on this description from the NRCA Roofing Manual. Additionally, the manual describes the roof deck as part of the roof assembly. And in another section, the manual describes LWIC as a type of roof deck. *See* Appellant’s Statement of Genuine Issues ¶ 24. Further, the solicitation, SOW, and specifications book do not include definitions of “roof deck”/“structural concrete deck” or “roof assembly.” *See* Exhibits 3, 4. The drawings

³ Here, neither party offered any evidence on what “insulation” means in the context of the description of the “roof assembly,” as applicable to this appeal.

are also not helpful on this issue, containing no description of the components of the roof to be replaced such that the Board can determine from them whether the LWIC was part of the roof assembly or the structural concrete deck. *See* Exhibit 2. Accordingly, because we find a genuine factual dispute as to whether the LWIC was part of the roof assembly or the structural concrete deck, we deny the VA's motion on JV6's constructive change claim.

B. Existence of Genuine Dispute on Differing Site Condition

A Type I differing site condition consists of “subsurface or latent physical conditions at the [work]site which differ materially from those indicated in th[e] contract.” 48 CFR 52.236-2(a) (2021). “In order to be eligible to recover for a Type I differing site condition, a contractor must first prove, as a threshold matter, that the contract contained some identification of the conditions to be encountered at the site.” *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1376 (Fed. Cir. 2007) (citing *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998); *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)). “The conditions encountered must have been reasonably unforeseeable based on all the information available at the time of bidding.” *Mergentime Corp./HT Construction, Inc. (JV)*, ENG BCA 5756, 94-3 BCA ¶ 27,119, at 135,168. Thus, a contractor is not eligible for an equitable adjustment for a Type I differing site condition unless the contract indicated what that condition would be. *Control, Inc. v. United States*, 294 F.3d 1357, 1363 (Fed. Cir. 2002). While “a contract ‘indication’ need not be explicit or specific, the contract documents must still provide sufficient grounds to justify a bidder’s expectation of latent conditions materially different from those actually encountered.” *P.J. Maffei*, 732 F.2d at 916 (citing *Foster Construction C.A. & Williams Brothers Co. v. United States*, 435 F.2d 873, 875 (Ct. Cl. 1970)). “[T]here must be reasonably plain or positive indications in the bid information or contract documents that such subsurface conditions would be otherwise than actually found in contract performance.” *Id.* (quoting *Pacific Alaska Contractors, Inc. v. United States*, 436 F.2d 461, 469 (Ct. Cl. 1971)). “Determining whether a contract contains such plain and positive “indications” is a matter of contract interpretation.” *Hamp’s Construction LLC v. Secretary of the Army*, 179 F.4th 1343, 1348 (Fed. Cir. 2026). “[A] proper technique of contract interpretation is for the [tribunal] to place itself into the shoes of a reasonable and prudent contractor and decide how such a contractor would act in interpreting the contract documents.” *Id.* (quoting *H.B. Mac*, 153 F.3d at 1345).

The VA argues that JV6 cannot show a differing site condition because the VA made no representations about the precise makeup of the roof assembly and that JV6 had the opportunity but failed to perform an exploratory demolition prior to award. The VA asserts again that the LWIC was part of the roof assembly because it was a component that needed to be removed to perform the contractually-required hammer testing of the roof deck to confirm the deck’s structural soundness.

JV6 counters that there are factual disputes as to its “performance of exploratory demolition and whether such testing would have revealed the existence of” the LWIC topping. Appellant’s Opposition at 2. On this point, JV6 should have firsthand knowledge on whether it or its subcontractor performed exploratory demolition and the results. At the very least, JV6, in an affidavit or declaration, should have explained in its opposition to VA’s motion why it does not have such information. *See* Fed. R. Civ. P. 56(d) (A party may show by “affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition.”).

What is in the record is the deposition testimony of JV6’s managing partner in which he stated, in response to a question on whether JV6 performed exploratory demolition, that JV6’s subcontractor, to determine the thickness of the roof, “drilled down through the roof, pulled out the core, stopped at the concrete, and said . . . the roof is this thick. And that’s it.” Cruz Deposition at 3389. Thus, it appears that JV6’s subcontractor did, in fact, perform an exploratory demolition, although it is unclear whether this was done before or after award. Even assuming that the exploratory demolition was performed prior to bid, merely stating that the subcontractor hit something hard during the demolition would be insufficient to defeat the VA’s motion—the deposition testimony is too vague to create a factual dispute on whether the hard substance could have been part of the structural deck as JV6 asserts. *See Traxcell Technologies, LLC v. Sprint Communications Co.*, 15 F.4th 1121, 1128 (Fed. Cir. 2021) (“[T]he non-movant can’t defeat summary judgment with . . . only a scintilla of evidence.”) (quoting *Batiste v. Lewis*, 976 F.3d 493, 500 (5th Cir. 2020)). JV6’s lack of (or vague) information on the timing (i.e., whether the exploratory demolition was done pre-bid) and specifics on its own exploratory demolition is problematic for JV6 because “a contractor cannot prevail on a differing site condition claim where the conditions complained of could have been observed or inferred from an examination of the site where, as here, bidders are given the opportunity to conduct a site visit.” *Kinetic Builders, Inc.*, ASBCA 32627, 88-2 BCA ¶ 20,657, at 104,399.

Also, simply questioning whether the exploratory demolition could have discovered the LWIC, as JV6 does here, is not sufficient to raise a factual dispute. *Anderson*, 477 U.S. at 247-48 (“[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.”); *Transworld Systems, Inc. v. Department of Education*, CBCA 6049, 22-1 BCA ¶ 37,994, at 184,503 (2020) (describing conjecture as insufficient to contest summary judgment); *see also United Paperworkers International Union, Local No. 35 Pension Plan v. Arlington Sample Book Co.*, No. Civ. A. 83-2828, 1984 WL 6625, at *4 (E.D. Pa. May 23, 1984) (The mere posing of questions is “insufficient to raise the genuine issue of fact needed to defeat a summary judgment motion.”). Without material information from JV6 on what it found during its own exploratory demolition as to

the composition of the roof, or, alternatively, why it could not provide such information, we cannot find a sufficient basis to conclude that there is a factual dispute regarding the conditions that JV6 encountered. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (“[A] party opposing summary judgment must show an evidentiary conflict on the record.”).

JV6 also asserts that two contract requirements—(1) to remove approximately 40,000 sq. ft. of existing coal tar roof assembly down to the deck, and (2) to hammer sound concrete deck and repair any delaminated concrete—served as a representation that no other materials would be present to prevent the installation of the new roof. Appellant’s Opposition at 6-7. Contrary to this assertion, the contract requirements provide no representations on the actual condition of the roof. In a response to a contractor question before bid submission, the VA noted that the building was constructed in the early 1950s but that it had “[n]o additional information . . . on [the] condition of [the] roof slab.” Exhibit 12, Solicitation Amendment 2 at 968. Similarly, in response to a question on whether the VA had any photos of the existing roofing conditions for the existing roof deck condition, the VA responded, “No.” *Id.*

However, we nevertheless find a genuine issue precluding summary judgment on JV6’s differing site condition claim. Again, referencing the NRCA Roofing Manual on which both parties rely and given the lack of definitions or descriptions in the SOW, specifications, or drawings, it is unclear whether the LWIC could be considered part of the roof assembly or, possibly, part of the roof deck given that LWIC is described as a type of roof deck in the roofing manual. If the latter, an argument can be made that a differing site condition does exist because the contract only required removal down to the deck, not removal of part of the deck itself. We cannot decide this factual issue on the current record. Accordingly, the VA’s motion for summary judgment on JV6’s differing site condition claim is denied.

C. Contract Did Not Include Defective Specification

“When the Government provides a contractor with design specifications, such that the contractor is bound by contract to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects.” *Drennon Construction & Consulting, Inc. v. Department of the Interior*, CBCA 2391, 13 BCA ¶ 35,213, at 172,795 (quoting *White v. Edsall Construction Co.*, 296 F.3d 1081, 1084 (Fed. Cir. 2002)).

In examining a claim based on a defective specification, the Board first decides whether the contract provision at issue describes a design specification or a performance specification. *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, 16-1

BCA ¶ 36,468, at 177,711, *aff'd*, 706 F. App'x 681 (mem) (Fed. Cir. 2017); *see also White*, 296 F.3d at 1084 (“Th[e] implied warranty attaches only to design specifications detailing the actual method of performance. It does not accompany performance specifications that merely set forth an objective without specifying the method of obtaining the objective.”). “Design specifications explicitly state how the contract is to be performed and permit no deviations. Performance specifications . . . specify the results to be obtained, and leave it to the contractor to determine how to achieve those results.” *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987).

JV6 alleges that the VA’s “specification” that it demolish the coal tar roof assembly and then perform hammer sound testing on the structural concrete deck and repair any delaminated concrete did not permit it to successfully perform the work, thus rendering the “specification” defective. Appellant’s Opposition at 5-6. JV6’s argument lacks merit. These tasks are performance specifications. As the contract specified, “Demolition is general in nature as indicated by the [SOW], drawings, and/or specifications. Therefore details, dimensions, and construction materials are rarely provided. It is *the responsibility of the Contractor* to determine by their means and methods the amount of necessary demolition needed in performance of their contract.” Exhibit 3 at 136 (emphasis added). The contract is clear that JV6 had the responsibility to determine the “means and methods” necessary to accomplish the performance of the contract, including “perform[ing] exploratory demolition or inspections” to expose the structural concrete deck and then repairing the deck as necessary. *Id.* Finding no genuine factual dispute here, we grant the VA’s motion on JV6’s defective specification claim. *See, e.g., Aleutian Constructors v. United States*, 24 Cl. Ct. 372, 379 (1991) (denying a defective specification claim where the contract “left” the determination on how the roofing system was to be installed to the contractor); *Engineering Technology Consultants, S.A.*, ASBCA 43600, 92-3 BCA ¶ 25,133 (denying contractor’s claim based on defective specifications where the contract “provided [the contractor] with discretion, and hence the responsibility, to shape and arrange” flashing roof installation “to suit jobsite conditions and contract requirements.”).

Decision

The VA’s motion for summary judgment is **GRANTED IN PART**. The VA’s motion is granted on JV6’s defective specification claim, and, therefore, the claim is denied. The VA’s motion on JV6’s constructive change and differing site condition claims is denied.

Beverly M. Russell

BEVERLY M. RUSSELL

Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge