

Contractor battles NASA, wins federal case: David versus Goliath?

What is the difference in thickness between a resaturated and double-graveled roof? Therein lies the heart of an Alabama roofing contractor's legal dispute—and subsequent victory—against NASA

by Monique C. Mencacci, senior editor

Many roofing contractors feel that it's futile to fight the federal government when a contract dispute arises. After all, you're up against a giant adversary—the temptation to cut your losses and run can be overwhelming.

Not all contractors are willing to "bite the bullet," however, and walk away. Jerry Lathan, president of The Lathan Co., Mobile, Ala., refused to give up the fight against one of the most visible government agencies—NASA. And though it took more than three years of what he calls "blood, sweat and tears," Lathan ultimately was victorious in his federal court case as he heard those happy words, "I find for the plaintiff."

Landing the NASA job Lathan was thrilled when he learned in March, 1987, that he was the lowest of six bidders on a reroofing job at the Kennedy Space Center in Florida. Not only was the \$598,000 contract price appealing, but the jobsite—the Vehicle Assembly Building (VAB) where the space shuttles are assembled— would give Lathan a high degree of exposure and possibly future reroofing jobs at the space center. The contract called for Lathan to reroof the low-bay area of the VAB, which is about 220 feet high. Totalling approximately 1,000 squares, this multiple-roof project was to begin on May 5, 1987, with a completion date slated for October 1987.



During tear-off, workers loaded a skip bucket (which was attached to a crane) with debris, such as old BUR membranes and insulation. Then, after the debris was dumped into a truck on the ground, new materials were loaded into the bucket and hoisted up to workers.

During the bidding process, Lathan and other bidders asked NASA if they could take test cuts of the roof. Their requests were denied. Because Lathan was not allowed to take samples of the roof, he had to rely on the government's specifications. However, what he and his crew found once they began the job was a "horse of a different color."

Abnormally thick roof According to NASA's written specifications, the roof consisted of about 3 inches of insulation board on a concrete structural deck. The insulation under this aggregate-surfaced built-up roof was wet. In addition, NASA's specifications noted that the roof had been resaturated in 1974. "Going on the premise that this was a resaturated roof, I estimated that my crew would be able to tear off about 20 squares a day," says Lathan. "However, when the job began, I was getting reports that my crew was only tearing off about six squares a day, and that the roof was abnormally thick. I decided to investigate."

Lathan says the first thing he did was take an ax from a crewman to try and cut the roof. "The ax bounced right back at me and I thought, 'What have I got here?' I'd never quite seen a roof like this one."

He determined that instead of being resaturated—which experts have said would not materially change the thickness of a BUR—the roof had a double-poured aggregate surface. In other words, 400 to 500 pounds of embedded gravel and 75 to 100 pounds of asphalt had been added to the first aggregate-surfaced layer already on the roof.

Lathan notes: "During the course of removal, the crew was running into areas with 1 1/2 to 3 inches or more of embedded asphalt and gravel. It was more like a parking lot than a roofing membrane. Had I known about the roof's abnormal thickness, I would have compensated for that in my bid."

The contract called for Lathan's crew to tear off the old roof down to the concrete deck. Two-and-a-half inches of isocyanurate board insulation was to be mechanically attached to the concrete, and a tapered perlite system mopped in place on top of the isoboard for better drainage. Four plies of fiberglass felts would then be mopped in, with a flood coat of asphalt and gravel as the finishing touch.

Before work progressed much further, however, Lathan notified NASA in writing of the abnormally thick roof. He stated that it was a changed site condition, and not representative of NASA's pre-bid specifications. Lathan asked for an equitable adjustment of the contract price, as well as additional time to complete the project.

According to Hal Callaway, the Gulf Shores, Ala.-based construction claims consultant

hired by Lathan, the purpose of a notice of changed site condition is to give the owner (the government in this case) the opportunity to mitigate the costs involved in correcting that condition. Additionally, the absence of such notice may preclude recovery if the contractor later takes his dispute to court.

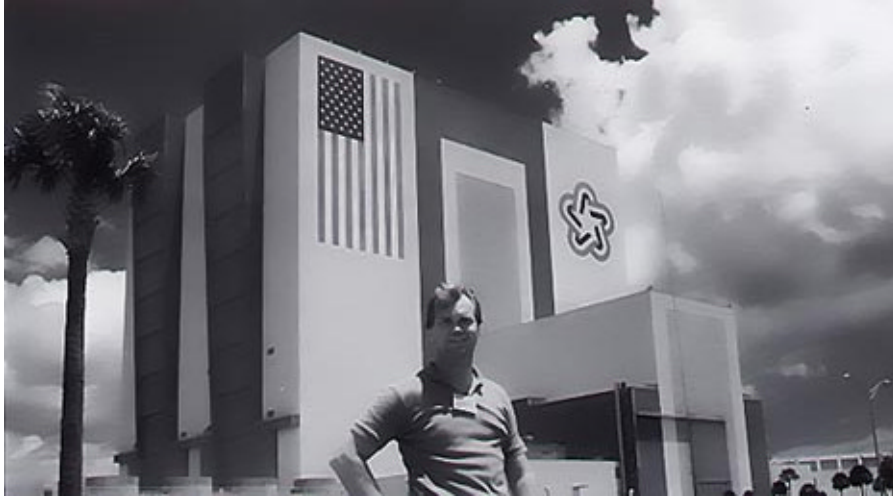


Photo of Jerry Lathan, president of The Lathan Co., Mobile, Ala., in front of NASA's Vehicle Assembly Building (VAB). Lathan was contracted to reroof the low-bay area of the VAB, which is about 220 feet high (shown to the right of Lathan)

Says Callaway: "The government may come back and say it doesn't want to take the roof off if it's going to cost extra money. The contractor must give timely notice to the building owner."

According to Lathan, NASA refused to grant the changed site condition or increase the contract price. The space agency stated that a resaturated roof is typically 1 1/2 inches thick, and that Lathan should have expected this when he bid the project. Lathan disagreed, as do other roofing experts.

In August 1987, Ed Lundin, president of Lundin Roofing Co., Baton Rouge, La., was sent a sample from the roof for his professional review. In a letter to Lathan, Lundin noted: "The government, in its specifications, described the roof as an 'aggregate surfaced built up roof.' A normal 'aggregate surfaced built up roof.' should have no more than 3/8 to 1/2 inch of firmly embedded gravel and asphalt over the membrane."

He added: "The average of the eight measurements I took around the perimeter of the sample was 1 1/16 inches. . . twice what would normally be considered typical built up roof surfacing. I don't feel the sample represents a normal resaturant job. Resaturation does not appreciably add to the thickness of a roof."

Lundin testified on behalf of Lathan at the subsequent trial. Judge Eric Bruggink, in his bench ruling, called Lundin ". . . a highly credible witness with a lot of relevant experience."

The plot thickens

Lathan knew he had a problem. Not only was work proceeding more slowly than the time period specified in the contract, but his crew kept running into trouble with a series of drains that had been installed by NASA after the building was originally constructed.

According to Lathan, these weren't typical fixed-drain bowl assemblies. The drains were riser pipe with a flared flange—similar to a compression fitting in gas piping, where it's the pressure that keeps the drain from leaking, not the physical seal. The drains were not screwed on or welded into place.

Says Lathan, "When the crew tore off the roof, the drain bowls and sumps dropped down, breaking the seal. Then, when it rained, the drains leaked and water went down the outside of the pipes instead of inside the pipes." [Editor's note: By the time Lathan's subsequent court case was over, it was proven that NASA had knowledge that the drains were defective prior to the reroofing project. The court found that NASA was remiss in not informing Lathan or any of the other bidders of the problem.]

Toward the end of August, Lathan said NASA started pressuring him to proceed at a faster pace. According to Lathan, the NASA contracting officer on the job issued a directive outlining Lathan's precise sequence of work. In essence, Lathan said NASA took control of the roofing contract, including the scheduling, the workload and the sequence in which the multiple roofs were to be completed.

"That's very unusual," says Lathan. "You can't tell a contractor how to perform the job.

It's assumed that the contractor is able to operate in the most efficient way."

Termination attempt

By October, Lathan said NASA was still unhappy with the pace at which the job was proceeding, and issued a "cure and show cause" letter. According to Callaway, this means you must show just cause to the government as to why your work is substandard and not in place according to what the work schedule says should have been done up to that point. Then, you must show how you are going to cure this problem.

"Whenever you get a cure and show cause letter, that's a red flag that the government is contemplating terminating your contract for default," Lathan adds.

Notes Callaway, "A termination for default [TFD] is usually lethal for a contractor in the construction business. If the government terminates a contractor for default, it can hire who it wants to finish the job at the original contractor's expense."

"No other contractor is going to pick up a half-completed contract at a reasonable price," he adds. "Essentially, the government can hire who it wants and you or your bonding company will be forced to pick up the tab."

Callaway adds that contractors must take every precaution not to get a TFD. "If you're [the contractor] not well-capitalized, with a large net worth to cover potential losses, the bonding company may cut you off and you won't be able to do any more work. It's a very serious thing."

In response to NASA's cure and show cause letter, Lathan sent NASA a series of letters, again asking the agency to assess the changed site condition. According to Lathan, however, NASA was non-responsive until mid-December, when the space agency notified him that it was preparing to issue a TFD. That's when Lathan decided to contact an attorney to pursue legal action against NASA.

After subsequent discussions with Lathan, his attorney and Callaway, NASA stopped the termination proceedings, and the two sides renegotiated a plan to complete the contract.

Lathan recalls, "We came to the understanding that as bad as it was between us, it was still in our best interest and in their best interest for us to complete this project. We essentially told them, 'You're not going to get your roof done for a long time if you have to hire another contractor at this point.' "

As a result of renegotiations, Lathan had to surrender control of the contract. The work was finally completed in March 1988—nearly a year after the project had begun, and more than five months past the original completion date.

Legal battle Although the job was finally completed, Lathan's legal fight against NASA

was just beginning. "A lot of people told me not to fight NASA. 'NASA's too big!' they told me. 'You'll never win!' But I couldn't give up that easily," says Lathan. "NASA owed me a lot of money, and I knew I was justified in trying to recoup some of my losses."

At Callaway's recommendation, Lathan submitted a certified claim at the end of March. This "official" claim letter stated that he had a changed site condition for which he had not been compensated.

The difference between Lathan's first notice of a changed site condition (given to NASA in June 1987) and the certified claim (submitted to NASA in March) was the official language contained in the certified claim, and the carefully documented costs.



During tear-off, it often took four men to lift one 3-foot by 3-foot section of the old BUR membrane. (Note: The flag on the building in the background is larger than the size of a football field.)

"You have to use specific language—verbatim—from out of the Federal Acquisition Regulations, and you have to itemize all of your claimed costs as a result of the changed site condition," says Callaway.

Possible costs that can be incurred in such a situation, according to Callaway, include additional labor, materials, overhead, extra equipment, extra dumpster rental, extra trailer rental, unabsorbed home office overhead, etc.

Callaway says that after a contractor submits his certified claim, the government has 60 days in which to respond if the amount of the claim is under \$50,000. If more than \$50,000, the government has the option of telling the contractor it needs a more reasonable time period in which to respond. Lathan's claim fell into the latter category, because he was seeking more than \$500,000 from NASA.

Lathan hand-delivered the certified claim. When six weeks went by with no action from NASA, he felt it was time to get his congressman involved.

At his congressman's suggestion, the two adversaries met on "neutral ground" in Washington, D.C. At that meeting, much to Lathan's surprise, NASA slapped him with a counterclaim, stating, among other things, that the crew had done damage to the interior of the VAB by allowing water from the roof drains to seep through the building.

"We were a bit surprised," says Lathan. "But we believed that NASA's counterclaim was just another attempt to make us back off."

After the meeting, which resulted in a deadlock without either side changing its position, Lathan says NASA decided to send an auditor to his office to try and determine just what costs, if any, had been incurred by the changed site condition.

"This was the first indication we had that NASA was actually admitting to a changed site condition," says Lathan.

The auditor was in Lathan's office for four days and, according to Lathan, verified about 80 percent of his claimed costs.

After two more meetings with NASA at Kennedy Space Center, Lathan says, "We found we were still miles apart as far as reaching a settlement. NASA finally offered us an adjustment on the original contract of about \$128,000. However, out of that, NASA wanted to take \$30,000 as part of its counterclaim."

Lathan notes that NASA's final offer to settle the contract dispute case was \$98,000, or about 19 percent of what Lathan was seeking. [Editor's note: Lathan ultimately collected about 97 percent of his costs, plus interest and legal fees.]

"It was September 1988, more than a year after the job was bid. We knew this would be NASA's final offer, so we asked the agency to write a final decision," says Callaway.

By federal law, the contracting officer's final decision gives a contractor two options. He has 90 days to appeal to the board of contract appeals (an administrative board within

the same federal agency), or he can file a court case with the U.S. Claims Court within 12 months. Lathan chose the latter.



Using a roof cutter, workers tear off the old BUR membrane on the low bay area of NASA's vehicle assembly building. The low bay area is 220 feet high.

The verdict

The trial began in September of 1990—some 20 months after Lathan first filed suit. During the trial, which lasted five days, both sides brought up expert witnesses and eyewitnesses, who testified in court about the differences between resaturated and double-graveled roofs.

Several things helped clinch the case, according to Callaway. First, Lathan had carefully preserved an overwhelming body of evidence. Samples had been taken from many locations on the roof and tagged for identification. All communication to and from the space agency had been carefully documented and saved.

Also, under Lathan's direction, a videotape of the difficult roof removal was made, as well as a videotape of a similar BUR roof removal at another site. This, according to Callaway, enabled the judge to see the contrast between two similar—yet dissimilar—reroofing jobs.

"I had the videotapes made because it's not always easy to explain the intricacies of roof removal to a layman, whether it be a judge or jury. It's much easier for them to see it for themselves," says Lathan.

Another factor helped clinch Lathan's case. In his opinion, Judge Bruggink wrote: "Non-experts, but people who have experience putting down roofs or observing them being put down, including some of the Defendant's [NASA] own witnesses, testified that this was the thickest roof they had ever seen." Here are some other noteworthy comments made by the judge in his Sept. 14, 1990 bench ruling:

- Regarding NASA's refusal to allow test cuts: "The Plaintiff [Lathan] would not have a claim here today if that [test cuts] had been done."
- Regarding resaturation versus double-poured aggregate: "The Court finds that a 12-year-old resaturation would not add appreciably to the standard roof. . . In sum, the Court finds that the Plaintiff should have expected a roof 1 inch thick including [the] built-up roof and embedded gravel."
- Regarding NASA's control over the contract: "The Court finds that NASA took over the sequencing of the work in a way that made it more difficult for the Plaintiff to do the work on time."
- In summing up: "The question remains then, did the Plaintiff encounter a differing site condition? The Court concludes that the answer is yes."

Lathan ultimately was awarded more than \$728,000 from NASA. This included the original claim amount plus interest and legal fees. NASA did not appeal the decision. A spokesman for the facilities and equipment office of the Kennedy Space Center procurement office, declined to comment on the case

Be sure to protect yourself on federal construction projects by Hal Callaway

On federal construction jobs, subcontractors must never assume that the contracting officer is going to be diligent when selecting a general contractor.

A case in point is a dispute at Kirtland Air Force Base, Albuquerque, N.M. A general contractor failed to pay more than 20 subcontractors and suppliers, leading to high-level inquiries and allegations that the contracting officer was negligent in selecting the general contractor.

Dave Miller, president of the American Subcontractors Association (ASA), says, "Unfortunately, ASA has seen variations of this tragedy played out across the country. The first and most common error subcontractors and suppliers make is trusting the

government to watch out for them."

The group recommends the following to subcontractors:

- Thoroughly check out the general contractor, and try to get financial information on the firm. Public work often brings in out-of-state contractors.
- Ask for a copy of the payment bond. If it is an individual surety, be especially wary, for it will be difficult to collect from.
- Enforce your rights under the federal Prompt Pay Act. Under this legislation, you are entitled to payment within seven days after the general contractor receives payment.
- Be sure to make a lot of official noise. Go to the news media, your senators and congressmen, and any other agency that could investigate the situation. Public pressure will often force a high-level investigation.

How to deal with discrepancies when working with the government

While working under a government contract can produce lucrative results, disputes between contractors and government agencies are not uncommon. Following are some helpful hints on ways to avoid such conflicts.

- When bidding on government contracts, it is essential that you document facts and differences of opinion you may have with the government.
- When preparing to bid a reroofing project for the government, perform a site inspection, and document any questions that have not been answered to your satisfaction. Be sure to document all requests, particularly when they've been turned down. These may include requests to take test cuts, the presence or absence of vapor barriers and the thickness of the existing built-up roof or the presence of additional roofs.
- After being awarded the contract, present the building owner's representative (such as the contracting officer) with your work schedule and your start and completion dates. Delays by others may tie up your bonding, overhead, equipment and labor force. You can be compensated for these losses under government contracts with proper documentation.
- If unanticipated conditions are discovered after reroofing work has begun, be sure to give written notice to the government agency involved. In that notice, request how you should proceed, and be sure to tell the owner you expect compensation for the change.

- Keep records of daily productivity during removal and replacement. Document a total inventory of equipment at the site. Document the start and completion of each phase of the project [particularly when working on multiple roofs].

- If you think the cost proposal in your written notice is going to be disputed by the owner, be sure to have that written notice certified in accordance with the language in the government disputes clause. This will start the interest meter running on your cost proposal.

- If a project is delayed before you get started, you may be due compensation for extended home office overhead, so keep up on the status of the project. In written form, let the prime contractor know of your interest in this schedule. You don't want to get stuck roofing during a less favorable time of the year than originally anticipated when the project was bid.

- Pay close attention to the "value engineering" clause in a government contract. As a contractor, it is not unusual for you to have a better, less expensive way of roofing than originally specified. Generally, the government will share about 50 percent of the savings with you. Be sure to put your time- or moneysaving idea into writing so that there is no question later as to its source.