

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Hensel Phelps Construction Company ) ASBCA No. 49270  
)  
Under Contract No. N62470-87-C-7071 )

APPEARANCES FOR THE APPELLANT: George P. Parker, Esq.  
G. Bruce Stigger, Esq.  
Parker & O'Connell, PLLC  
Louisville, KY

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.  
Navy Chief Trial Attorney  
Alan R. Caramella, Esq.  
Trial Attorney  
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Command  
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY  
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant has filed a motion for reconsideration of our decision in the above captioned appeal, reported at 99-2 BCA ¶ 30,531, denying claims asserted on behalf of its subcontractor, Stewart Mechanical Enterprises, Inc., for cumulative impacts and delay during construction of the new Plating Shop and Industrial Wastewater Treatment Facility (IWTF) at the Naval Ordnance Station, Louisville, KY allegedly caused by defective contract plans and specifications.

In its motion for reconsideration, appellant asserts that five of the Board's "findings/rulings" are not consistent with, or not supported by, the record. The Government says only that appellant's motion consists primarily of arguments previously raised and commentary on the Board's decision. Additionally, the Government objects to appellant's submission of selected pages from a book entitled Calculating Lost Labor Productivity In Construction Claims which was attached as exhibit 1 to appellant's motion for reconsideration.

With respect to the additional documents attached to appellant's motion, we agree with the Government that it is too late for appellant to present these documents to the Board. The record was closed at the end of the hearing. Appellant has not shown any

compelling reason for us to take the exceptionally rare action of reopening the hearing record to receive additional documentary evidence in support of its theories of entitlement. *D.E.W., Inc. and D.E. Wurzbach, A Joint Venture*, ASBCA No. 38392, 98-2 BCA ¶ 29,768.

With respect to the motion for reconsideration, appellant's first contention relates to factual findings relating to the use of the R.S. Means Guide (Means). It asserts that our finding that the parties' agreement to use Means was tantamount to a finding of accord and satisfaction on the issue of inefficiency and that we failed to recognize that Means addresses only the direct hours required to perform a certain task. We find no merit to this contention. As our decision makes clear, the Means productivity rates were adjusted to reflect the particular circumstances of each change before contract modifications were issued. Time and impact were not addressed. 99-2 BCA at 150,791-92. Our conclusion that appellant failed to show that it was entitled to be compensated for alleged inefficiency was based upon our evaluation of the evidence appellant offered to support its cumulative impact and delay claims.

Appellant's second ground for reconsideration relates to the number of Requests for Information (RFIs) and contract modifications issued during contract performance. It asserts that we fell "victim to the Government's mischaracterization of [its] arguments" and that it did not rely upon the number of RFIs and modifications alone to prove causation, but also provided expert testimony of the impact on Stewart's labor efficiency. As is apparent, appellant's second ground for reconsideration merely reflects disagreement with the Board's factual determinations and our rejection of the expert testimony it offered. This is not a basis for relief. *Columbia Engineering Corporation*, ASBCA Nos. 32139, 32679, 89-3 BCA ¶ 21,999.

Appellant's third ground relates to the testimony of its expert. As we understand its argument, appellant is of the view that we did not consider all of its expert's testimony. This is incorrect. Our finding that appellant's expert relied primarily upon the number of RFI's and change orders is amply supported by the record. Moreover, our conclusion that the opinions of appellant's expert were intrinsically unreliable is explained in depth. *See* 99-2 BCA at 150,794.

The fourth ground for reconsideration relates to the Government's exhibit 10(g), which is a summary of the punch list, changes, and test and balance work performed by Stewart during the period December 1991 through September 1992. It was one of a number of exhibits prepared by the Government's expert upon which we relied. In asserting that our reliance upon this exhibit was unfounded, appellant acknowledges that it is making the same challenge to the exhibit that it made in its Reply to the Government's Post-Trial Brief (app. br. at 14). We considered and rejected the argument before and find no reason to change our view on this issue. *See Columbia Engineering*

*Corporation, supra.* Nor are we persuaded that the testimony of Mr. Nichols cited by appellant should carry any more weight than we previously found it should be afforded.

Appellant's final ground relates to the substantial completion issue. Appellant asserts that the issue of substantial completion was not before the Board and that there was no basis for concluding that the facility could not have been used in December 1991. Appellant's delay claim was based upon early completion. Its present contentions ignore its burden of demonstrating that it either did (or could have) met its early completion date. *See Wickham Contracting Company v. Fisher*, 12 F.3d 1574, 1581-82 (Fed. Cir. 1994). Moreover, they reflect yet another disagreement with the Board's factual determinations, this time that it was contract work, not change order work that kept appellant at the job site and that the building could not be used for its intended purpose.

Having reconsidered our original decision in this appeal, we affirm it.

Dated: 19 January 2000

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CAROL N. PARK-CONROY  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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MARK N. STEMLER  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49270, Appeal of Hensel Phelps Construction Company, rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals