

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Butt Construction, Inc.) ASBCA No. 52081
)
Under Contract No. F33601-97-C-W028)

APPEARANCE FOR THE APPELLANT: William T. Butt, Jr.
President

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
Jean R. Love, Esq.
CAPT Gregory A. Baxley, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE ELMORE
ON THE PARTIES'
CROSS MOTIONS FOR SUMMARY JUDGMENT

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. On 25 March 1997 Butt was awarded Contract No. F33601-97-C-W028 for "phase 11," base housing renovations, including the renovation of 14 senior officer quarter's (SOQ), at Wright-Patterson (W-P) AFB. Butt subcontracted with USA Asbestos Removal Co., Inc. (USA) to perform the asbestos abatement portion of the contract.

2. During demolition of the exterior walls of the 14 SOQ, two asbestos-insulated water pipes were encountered. The exposed pipes supplied hot water from the basement boiler to the first and second floor radiators and returned the water to the basement boiler. The two pipes were not shown on the contract drawings provided for phase 11.

3. Butt, on behalf of USA, on 27 January 1998 filed a claim with the contracting officer (CO) for an additional \$73,245, the alleged cost incurred to remove the asbestos-insulated hot water supply/return piping located inside the demolished exterior walls of the 14 SOQ (R4, tab 14).

4. The CO on 20 November 1998 denied the claim (R4, tab 20). On 5 March 1999 Butt appealed the CO's final decision.¹ On 25 August 1999 Butt filed a motion for summary judgment.² On the 4 November 1999 the Government filed a cross motion for summary judgment;³ and, on 23 November 1999 the Government filed an opposition to

appellant's motion for summary judgment. Butt, on 6 January 2000, filed its opposition to the Government's cross motion.

Appellant's Position

Butt, on behalf of USA, and in reliance upon USA's 13 April 1999 letter, attached to the complaint and motion, contends that the asbestos-wrapped piping was neither detailed on the drawings nor required to be abated; that, upon exposure, USA was instructed verbally to abate these pipes and that a change order was in the works; that the abatement work required USA to rebuild full containments, including acquiring the services of an industrial hygienist to oversee the work; and that the Government, approximately one year after the work was performed, reversed its original position contending that appellant should have been aware that the piping was in the wall. Appellant further contends, in its opposition to the Government's motion, that the Government knew of the existence of the asbestos-insulated piping when work was performed in Phases 8, 9, and 10, but neither noted this fact on the drawings or in the specifications nor eliminated other drawing notes that led to a conclusion that since the second floor radiator piping was to be reused, it was not located in the exterior walls to be removed.

Government's Position

The Government, in opposition to appellant's motion and in its cross motion for summary judgment, argues that Butt knew or should have known that the asbestos-insulated pipes would be present in the walls because:

(1) Butt Construction removed the same asbestos-insulated hot water return and supply pipes from the rear exterior walls in the same or very similar model housing units during an earlier phase of the housing renovation project and even included the cost of asbestos removal in this phase's bid; (2) the hot water supply and return pipes were clearly visible on the ceiling of the basement, running from the boiler main to the rear exterior wall, and clearly visible radiators were adjacent to the rear exterior living room wall on the first and second floors immediately above where the pipes entered the wall, all indicia that the hot water supply and return pipes must have been running through the rear exterior living room wall[;] and (3) the language of the drawings states that pipes contain asbestos.

(Br. at 2)

The Government interprets appellant's arguments as alleging a "Category I differing site condition." But it contends that appellant cannot prove that it reasonably relied on the

drawings to determine whether there were asbestos-insulated pipes in the rear exterior living room walls of the SOQ since it had first hand knowledge from working on a prior phase that the asbestos insulated hot-water supply/return pipes were in the wall to be removed. The Government further argues that the pipes were reasonably foreseeable and visible when observed running from the boiler across the basement ceiling and into the rear exterior wall. Therefore, appellant cannot recover on this claim.

DECISION

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) A material fact is one which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When deciding a motion for summary judgment, we do not resolve factual disputes but rather ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. The same applies when deciding cross-motions for summary judgment.

The contentions of both the Government and appellant are based on similar facts. Appellant contends that the Government issued defective specifications and drawings because it was aware of the existence of the asbestos-insulated water pipes due to their being encountered during prior phase work. The Government argues that appellant was aware that the asbestos-insulated water pipes were located inside the exterior wall of the SOQ's because it encountered them during prior phase work. The arguments postulated by the parties are factual and need to be better developed regarding the circumstances surrounding the parties' knowledge of the existence of the asbestos-insulated water piping in the exterior walls of the SOQ.

In view of the foregoing, the parties' cross motions are denied.

Dated: 19 January 2000

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

MICHAEL T. PAUL
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

- ¹ Butt states, and the Government does not dispute, that the final decision was received on 7 December 1998. Accordingly, we find the appeal notice was timely filed.
- ² Butt’s brief in support of its summary judgment motion is its complaint the last sentence of which states “[w]e request a summary judgment on this claim.”
- ³ The Government’s motion for summary judgment will be referred to as a cross motion for summary judgment.

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. 52081, Appeal of Butt Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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