

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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The Sherman R. Smoot Corp.) ASBCA Nos. 52173, 53049, 53246
)
Under Contract No. N62477-94-C-0028)

APPEARANCE FOR THE APPELLANT: Christopher L. Grant, Esq.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE JAMES ON
APPELLANT'S MOTION FOR SUMMARY JUDGMENT

In October 2000, respondent moved for partial summary judgment in ASBCA Nos. 52173 and 53049, which concern claims of The Sherman R. Smoot Corp. (Smoot) and two of its subcontractors relating to the presence of lead-based paint (LBP) at a construction site. We denied the motion in *The Sherman R. Smoot Corp.*, ASBCA Nos. 52173, 53049, 01-1 BCA ¶ 31,252 (*Smoot*). Our opinion sets forth background facts relevant to the present motion and familiarity with it is assumed.

Also in October 2000, Smoot submitted a certified LBP claim on behalf of a third subcontractor, C. J. Coakley Co., which claim the contracting officer denied. Smoot appealed that decision, which the Board docketed as ASBCA No. 53246. We consolidated that appeal with Nos. 52173 and 53049. The three appeals have common pleadings and Rule 4 files and are set for hearing 13 November 2001.

On 15 October 2001, appellant moved for “partial summary judgment” on the grounds of differing site conditions, undisclosed superior Government knowledge, and constructive change (but *not* on the ground of suspension of work also at issue in these appeals). Pursuant to our 28 July 1999 and 21 August 2001 orders, the Board is to decide only entitlement in these three appeals. If appellant were to succeed on any of the three grounds in its motion, judgment would be rendered sustaining the appeal. *See* FED. R. CIV. P. 56(a), (d). Accordingly, we have restyled the motion as one for summary judgment. Respondent replied to the motion.

In its October 2000 motion, respondent moved for summary judgment on the differing site conditions and constructive change claim grounds. We found disputed material facts with respect to both those grounds in *Smoot*. Those same material facts remain in dispute at present with respect to the differing site conditions and constructive change grounds for liability.

With respect to superior knowledge, it is undisputed that the Government did not provide Smoot with a 1995 Naval District Washington (NDW) Report prior to contract award. The report listed three “objects” surveyed in Building 33’s wood ceiling within lead “Hazard Classifications” C and D, but did not identify which, if any, of the three “objects” was in the “good,” “fair” or “poor condition” criteria within classifications C and D (AR4, tab 41). Smoot’s Vice President stated: “The information contained in [the NDW Report], had it been provided to Smoot timely, would have caused Smoot . . . to approach the project as necessitating pre-construction removal of lead materials” (ex. A, ¶ 10). Since the contract required lead material abatement, Smoot’s affidavit does not identify what different or additional work Smoot would have included in the price it offered for the contract, had it known of the NDW report.

Movant argues that a 29 August 1996 Elizabeth Freese memorandum (ex. I) also was undisclosed superior knowledge of LBP dust on the floors of Buildings 33 and 109 in August 1996. In reply to respondent’s October 2000 motion for partial summary judgment, Smoot argued that lead accumulated in the work areas, such as the floor, was irrelevant to its claims. Moreover, Ms. Freese’s knowledge post-dated the contract award. Thus, the Navy could not have been aware of Smoot’s ignorance of such facts before contract award. *See H. N. Bailey & Associates v. United States*, 449 F.2d 376, 381 (Ct. Cl. 1971) (Court affirmed Board’s ruling that Government did not possess superior knowledge at the time the contract was executed); *AIW-Alton, Inc.*, ASBCA No. 47917, 95-2 BCA ¶ 27,875 at 139,066 (no superior knowledge when Government first learned of alternate manufacturing technique three years after contract award).

Movant argues that it is entitled to summary judgment by virtue of ¶ 1.5.1 in specification § 01560—

Unforeseen Hazardous Material

All known hazardous materials are indicated on the drawings or noted in the specifications. If additional material that is not indicated on the drawings or noted in the specifications is encountered that may be dangerous to human health upon disturbance during construction operations, stop that portion of work and notify the [CO] immediately. Intent is to identify materials such as . . . lead paint If the material is hazardous and handling of the material is necessary to accomplish the

work, the Government will issue a modification pursuant to “FAR 52.243-4 Changes” and “FAR 52.236-2 Differing Site Conditions.”

It is not certain whether the foregoing phrase, “additional material that is . . . encountered that may be dangerous to human health upon disturbance” meant deteriorated existing LBP material, or intact existing LBP material, disturbed by Smoot’s construction operations. Furthermore, respondent points to the 15 August 1997 facsimile of Smoot’s subcontractor, Applied Environmental, Inc., to Smoot stating that the lead paint exposures on iron workers—

appear to be a result of roof work conducted & flaking paint from the roof deck. . . . As long as lead-based paint flakes off of the roof decking, either as a result of impact, or normal deterioration there will be a potential for worker exposures and contamination of the 4th floor.

(SR4, tab 105) Respondent argues that this message shows that the LBP contamination which Smoot abated was caused by its disturbance of existing intact paint, not by disturbance of existing deteriorated LBP.

Considering that all inferences should be drawn in favor of the non-moving party, there are disputed material facts. We deny appellant’s motion for summary judgment.

Dated: 7 November 2001

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

EUNICE W. THOMAS
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 Nos. 52173, 53049, and 53246, Appeals of The Sherman R. Smoot Corp., rendered in conformance with the Board's Charter.

Dated:

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