

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
CATH-dr/Balti Joint Venture) ASBCA Nos. 53581, 54239
)
Under Contract No. N68950-98-C-0104)

APPEARANCE FOR THE APPELLANT: Douglas C. Proxmire, Esq.
Patton Boggs LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Chief Trial Attorney
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Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant requests us to reconsider the denial of that portion of claim 21 relating to “the time and effort . . . expended on cleaning and removing pre-existing lead conditions and abating lead contamination left by others” (mot. at 8). *CATH-dr/Balti Joint Venture*, ASBCA Nos. 53581, 54239, 05-2 BCA ¶ 33,046 at 163,803. As grounds for the motion, appellant argues that the decision in claim 21 is inconsistent with our decision in claim 14. Appellant does not move for reconsideration of that portion of claim 21 which relates to project delay.

Claim 21, in relevant part, requested an equitable adjustment of \$276,707 for abating lead-containing paint (LCP) on 204 windows of the naval dental facility at the Great Lakes Naval Training Center, Illinois. We denied the claim due to appellant’s egregious failure to follow the lead abatement procedures in the contract (*id.* at findings 190-95). Claim 14 was a request for additional compensation of \$4,401 for complying with a government directive to clean all the carpeting and vacuuming equipment following the discovery of high lead readings inside the building. In the nature of a jury verdict, we sustained claim 14 as to 80 percent of appellant’s increased costs, stating that “the primary cause of the high readings in the building was deteriorating LCP.” *Id.* at 163,802. We reduced the award by 20 percent to reflect the lead contamination caused by appellant’s failure to follow the lead abatement procedures in the contract.

Paragraph 3.2.5.2 of specification section 13283 required appellant to obtain wipe samples of less than 100 micrograms (ug) per square foot inside and outside the lead

containment enclosures. Reasonably construed, this provision refers to the inside of the lead containment enclosures and the areas immediately outside the enclosures, not the entire inside of the building. As to the pre-existing contamination, Mr. Nicholas Peneff, appellant's lead abatement expert, testified that appellant was required to obtain wipe samples of less than 100 ug per square foot "[e]ven though [the] condition existed before they performed any work" (finding 77). Mr. Mark Lesko, the government's lead abatement expert, testified that appellant could not be "required to meet [the] 100 ug per square foot standard outside the work areas." We interpret Mr. Lesko's statement to mean that the 100 ug per square foot standard could be met inside the work areas.

However, we are of the view that appellant is entitled to recover any additional costs incurred in abating lead contamination caused by other contractors and/or Navy personnel outside the immediate vicinity of the lead containment enclosures, *e.g.*, beyond the scope of paragraph 3.2.5.2. Just as in claim 14, we reduce appellant's recovery by 20 percent to reflect the additional lead contamination caused by appellant's failure to follow the lead abatement procedures in the contract.

Accordingly, we grant the motion for reconsideration to that extent. In all other respects, the motion is denied.

Dated: 23 December 2005

ELIZABETH A TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

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. 53581, 54239, Appeals of CATH-dr/Balti Joint Venture, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals