

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
States Roofing Corporation) ASBCA Nos. 55500, 55503
)
Under Contract No. N62470-97-C-8319)

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

These are two of eleven appeals arising in conjunction with Contract No. N62470-97-C-8319 for repair and related work on the roof cells at Building W-143, Naval Operating Base (NOB), Norfolk, VA, awarded to appellant States Roofing Corporation (SRC). We previously issued decisions in ASBCA No. 54854, 08-2 BCA ¶ 33,912 and ASBCA No. 55506, 08-2 BCA ¶ 33,970, from which we incorporate relevant findings and conclusions. At issue here are matters of safety assurance in ASBCA No. 55500 and replacement of two skylights in ASBCA No. 55503. We deny the appeal in ASBCA No. 55500. We sustain the appeal in ASBCA No. 55503, in part, and award SRC \$1,166.22, plus interest under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613.

ENTITLEMENT FINDINGS OF FACT

Contract Requirements

Building W-143 was occupied by the Fleet and Industrial Supply Center (FISC) and was to remain open during contract performance (R4, tab 1 at 92-94). The contract was administered by the Resident Officer in Charge of Construction

(ROICC), CDR Peter B. Melin, USN, Naval Facilities Engineering Command (NAVFAC) (R4, tab 1 at 2). *States Roofing*, 08-2 BCA ¶ 33,912 at 167,797.

The contract incorporated the following standard FAR clauses of relevance to the issues in ASBCA Nos. 55500 and 55503: 52.236-2, DIFFERING SITE CONDITIONS (APR 1994); 52.236-6, SUPERINTENDENCE BY THE CONTRACTOR (APR 1984); 52.236-7, PERMITS AND RESPONSIBILITIES (NOV 1991); 52.236-9, PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS (APR 1984); 52.236-12, CLEANING UP (APR 1984); 52.236-13, ACCIDENT PREVENTION (NOV 1991); and 52.243-4, CHANGES (AUG 1987) (R4, tab 1 at 60).

The contract also incorporated the full text of the following two NAVFAC clauses: 5252.201-9300, CONTRACTING OFFICER AUTHORITY (JUN 1994) and 5252.242.9300, GOVERNMENT REPRESENTATIVES (OCT 1996) (R4, tab 1 at 70, 72). The Contracting Officer Authority clause provides that only the contracting officer has authority to bind the government to contract modifications, change orders and letter or verbal directions to the contractor (R4, tab 1 at 70). The Government Representatives clause states that the contract will be administered by an authorized representative of the contracting officer, but that no modification, change order or other matter deviating from the contract by anyone other than the contracting officer will be effective or binding on the government (R4, tab 1 at 72).

Contract section 01450, QUALITY CONTROL, required in paragraph 1.5.1.1, “Duties,” that there be a Quality Control Manager (QC) at the work site whose only duties and responsibilities were to manage and implement the QC program for the contract (R4, tab 1 at 136). Paragraph 1.5.3, “QC Specialists Duties and Qualifications,” further required a separate QC Specialist to assist the QC Manager in the area of installation and testing of the roofing system (*id.* at 137).

Contract section 01525, SAFETY REQUIREMENTS, contained a number of provisions of relevance. Paragraph 1.2, “REFERENCES,” incorporated the U.S. Army Corps of Engineers (Corps) EM-385-1-1 (1996) Safety and Health Requirements Manual (R4, tab 1 at 179). Paragraph 1.3, “DEFINITIONS,” specified in subparagraph 1.3(j) that there be a Safety Officer, who was the superintendent or another qualified or competent person responsible for site safety (*id.*; tr. 10/226-17). SRC did not include a separate, full-time Safety Officer in the original safety work plan that it submitted to and which was approved by the Navy (tr. 3/49-50).

Contract section 02220, SITE DEMOLITION, provided in paragraph 1.2, “GENERAL REQUIREMENTS,” that SRC was to remove rubbish and debris (R4, tab 1 at 227). Paragraph 1.6, “DUST AND DEBRIS CONTROL,” cautioned that dust and debris should be prevented and that the use of water should be avoided if it results in “hazardous or objectionable” conditions, such as flooding (*id.* at 228). Paragraph 1.7,

“PROTECTION,” required in subparagraph 1.7.1, “Existing Work,” that SRC protect existing work that was to remain in place, be reused or remain government property and in subparagraph 1.7.2, “Weather Protection,” that SRC protect the building interior and materials and equipment from weather at all times and provide adequate temporary covering of exposed areas (R4, tab 1 at 228-29). Finally, paragraph 3.1.9, “CLEANUP,” specified in subparagraph 3.1.9.1, “Debris and Rubbish,” that removal and transport of debris and rubbish was to be accomplished so as to prevent spillage (R4, tab 1 at 231).

General Work Note 1 on Sheet A3 of the drawings states:

THE CONTRACTOR SHALL PROTECT THE EXISTING FACILITIES AND ADJACENT ROOF AREAS AT ALL TIMES DURING THE CONSTRUCTION. ANY DAMAGE CAUSED AS A RESULT OF THE CONTRACTOR’S ACTIVITIES SHALL BE REPAIRED AT NO ADDITIONAL COST TO THE GOVERNMENT AND IN NO WAY SHALL ADVERSELY AFFECT REQUIRED SCHEDULES AND GUARANTEES.

(Ex. G-4 at 4 of 45)

Contract section 03920, CONCRETE REPAIRS, stated in paragraph 1.4, “GENERAL REQUIREMENTS,” that the work included “exterior and some interior spalled and cracked concrete members” and that the estimated quantities of work were shown on the drawings (R4, tab 1 at 245). The spalled concrete areas were due to weathering (tr. 6(2)/202). Sheet A42 of the drawings states in Note 1 of the “CONCRETE REPAIR NOTES:” “REPAIR SPALLS AND CRACKS IN CONCRETE WHERE SHOWN OR ON ELEVATIONS (COORDINATE WITH SCHEDULE OF NOTES SHOWN ON SHEET A-1)” (ex. G-3 at 43 of 45; tr. 4/147-50). Elevation 4, “SOUTH ELEVATION – AREA ‘H’,” on Sheet A26 of the as-built drawings depicts exterior areas above the lobby of the main entrance to Building W-143 at which spalled and cracked or loose concrete had been identified by the Navy with a diamond-shaped symbol as needing repair. (Supp. R4, tab 527 at 27 of 45¹; tr. 3/115-18, 6(2)/92-93, 196-97)²

¹ Appellant’s supplemental Rule 4 file tab 527, a full-size copy of the as-built drawings, was inadvertently omitted from the Board’s 7 January 2008 Order Settling the Hearing Record. The record contains testimony relating to the lobby skylight claim using the full-size drawings which included demonstrative markings by a witness (tr. 6(2)/91-94). The Board’s Order Settling the Hearing Record is amended to include appellant’s supplemental Rule 4 file tab 527.

² We continue designation of the transcripts from the third week of trial as volumes 6(2) through 10(2) to differentiate them from the transcripts from the second week of trial, both of which were numbered 6 through 10.

Pre-Construction and Pre-Roofing Conferences

The pre-construction conference held on 12 September 2000 reflects that SRC was provided with materials that contained the following statement:

This contract will be administered by the Officer in Charge of Construction/Resident Officer in Charge of Construction [OICC/ROICC]. Once awarded, all dealings and all correspondence concerning this contract shall be with this office....

Should the contractor receive any direction affecting the work at the site from anyone who is not a member of the OICC/ROICC organization, he shall immediately refer the matter to the OICC/ROICC. Refer problems of any kind to the Construction Representative for decision or for his further referral to superiors.

(R4, tab 4 at 703; tr. 7/209-10)

LT Darren R. Hale, USN, was the first Assistant Resident Officer in Charge of Construction (AROICC) on the contract and attended the pre-construction conference (tr. 7/198). Among the topics discussed at the pre-construction conference was the need for SRC to maintain watertight integrity and to be prepared to close-up the roof if it rained during demolition because Building W-143 was occupied by FISC and the floor directly below the roof housed administrative facilities (tr. 7/211-12). The impact of wind and the need to prevent debris from blowing and falling off the roof were also discussed (R4, tab 4 at 706-07; tr. 7/212-13).

The pre-roofing conference was held in SRC's site trailer on 17 October 2000. Mr. Leonard O'Dell, the ROICC's construction representative (ConRep), distributed an outline that included roofing work and safety issues. (Supp. R4, tab 217) Mr. O'Dell had approximately 40 years experience in construction and became an inspector for the ROICC in the mid 1980's, ultimately becoming its roofing inspector (tr. 2/8-10). He was responsible for inspections, quality assurance and preparation of the Navy's quality assurance comments on SRC's daily Production and Quality Control Reports (daily reports) (tr. 2/7, 61-65). He was also responsible for the ROICC weekly safety inspections which were documented on a "ROICC NORFOLK WEEKLY ROOFING CHECKLIST" (supp. R4, tab 383; tr. 8/80-81).

Initial Performance Issues

SRC began contract work in early November with the construction of the trash chute and ramps and demolition work on Roof Cell K (supp. R4, tab 380, rpts. 57-98).

As the ROICC's ConRep, Mr. O'Dell advised SRC's superintendent when problems surfaced. Mr. O'Dell explained that safety was a "big issue on the base." It was the first thing he looked at when he arrived at a roofing job and he always found it necessary to talk to roofing contractors about safety. It was his view that SRC "held their own. They did just as good as anybody else" with matters of safety. (Tr. 2/41-47)

Mr. O'Dell noted some initial issues on SRC's daily reports (supp. R4, tabs 262, 380, rpts. 74, 78, 89, 91, 132, 153). Additionally, three of the reports for November contain his comments about the QC, in particular the need to have him spend more time on the roof (supp. R4, tab 380, rpts. 85, 90, 93).

On 22 November 2000, LT Hale sent a letter to SRC in which he raised concerns about debris, the performance of SRC's QC Specialist and QC Manager, and ponding on the roof (supp. R4, tab 237; tr. 7/231-32). Mr. Hugh DeLauney, SRC's president, investigated the matters raised by LT Hale and responded by a letter dated 7 December 2000 in which he explained that the debris had been removed the same day it had been observed, an alternate QC Specialist had been designated and arrangements implemented for telephone communications with Mr. O'Dell, as needed, and that the ponding was due to field conditions (supp. R4, tab 241).

On 4 December 2000, a day on which SRC was not working due to high winds, a FISC engineering technician complained by e-mail to LT Hale that some debris had blown off the roof the prior week and that debris was accumulating due to the wind. LT Hale forwarded the e-mail to SRC and reminded it about the need to keep the site clean to prevent items from falling from the roof. (Supp. R4, tab 380, rpt. 103, tab 382)

On 7 December 2000, while SRC was removing asphalt from Roof Cell I, some small pieces of debris flew over the top of the parapet wall, causing minor damage to three vehicles below. SRC installed a protective tarp adjacent to the parapet wall demolition area and provided insurance information to the vehicle owners. (R4, tab 24; supp. R4, tab 200, subtab C at 242, 262; tr. 1/70-71, 7/213, 238, 8/97-98) After the incident, cars were no longer parked immediately next to the building (tr. 8/99).

Roof leaks were experienced during the early days of contract performance, the number of which SRC reduced as work progressed (supp. R4, tabs 239, 262; tr. 8/18-19). Some of the leaks were due to the poor condition of the roof, which had been leaking before the contract was awarded (tr. 1/81-82, 98-99, 2/51-53). Two leaks in Roof Cell I in early December resulted in water damage to the FISC offices, including that of CAPT William A. Kowba, the FISC commanding officer, and there was some ponding after demolition work (supp. R4, tabs 200(D), 200(E), 247, 262, 380, rpts. 108, 109, 110, 113; tr. 6(2)/56-62). There was also a problem on Roof Cell G, which Mr. O'Dell attributed to an expansion joint that SRC had removed, but had not properly sealed, resulting in a leak when it rained on 9 January 2001. Additionally, SRC did not properly

seal a roof drain on 16 January 2001. (Supp. R4, tabs 262, 380, rpts. 146 through 150, tab 383 at 8, 10; tr. 2/128-32; 8/18-19)

There are four daily reports in the late December and early January time period that do not show the presence of a superintendent at the site on days that contract work was being performed (supp. R4, tab 380, rpts. 126, 128, 135, 145; tr. 2/161).

The ROICC NORFOLK WEEKLY ROOFING CHECKLIST reports reflected in e-mails dated 12, 19 and 26 January 2001 do not identify any safety concerns (supp. R4, tab 383 at 6-13; tr. 2/152-57). On 24 January 2001, while SRC was demolishing the thin membrane on top of the parapet wall, a “dusting of debris” ranging from “1/8” thick flakes the size of a fingertip” fell on cars parked on the south side of Building W-143, without any injuries or damage to the cars (R4, tab 32; supp. R4, tab 268; tr. 8/7-11).

Lobby Skylights

On Friday, 26 January 2001, SRC’s asbestos subcontractor was “needle-gunning” (removing) asbestos on the inside and up to the top of the parapet walls located on Roof Cells H and J (supp. R4, tab 380, rpt. 156; ex. A-13 at 3980; tr. 3/92-94, 4/151-52). SRC had installed protective barriers as planned to capture airborne debris (supp. R4, tab 200, subtab E at 6, 13, tab 381 at 2; tr. 3/91-92). Around midday, concrete material ranging in size from quarters to golf balls fell from the exterior of the parapet wall of roof Cell H and shattered a skylight window in the lobby of the main entrance (supp. R4, tabs 262, 268; tr. 2/93, 8/11-12, 6(2)/93). This was in the general vicinity of the concrete that had been designated for repair on Elevation 4, “SOUTH ELEVATION – AREA ‘H,’” as reflected on Sheet A26 of the as-built drawings (R4, tab 41 at 1491-93; app. supp. R4, tab 527 at 27 of 45; tr. 3/115-20, 6(2)/201-02). However, the area from which the concrete fell was not an area that had been identified as needing repair (R4, tab 41; app. supp. R4, tab 527 at 27; ex. A-13 at 3980; tr. 3/90-95, 4/149). No one was injured and work was suspended (supp. R4, tab 267).

While covering the broken skylight with plywood, one of SRC’s workers slipped and broke an adjacent skylight, which was then also covered with plywood. Both skylights were subsequently repaired by SRC. (Tr. 3/95-96, 7(2)/270-71)

Mr. Joseph Hernandez, SRC’s superintendent, investigated the incident. He concluded that the “asbestos abatement work that was interfaced with unforeseen conditions, unidentified spalled concrete,” caused the concrete to fall from the exterior side of the parapet wall (tr. 5/70-71). LT Hale also concluded that the concrete had fallen from the exterior of the parapet wall. He notified “senior leadership” in the ROICC office, namely CDR Melin and Mr. Jerry T. Haste, supervisor of general engineering, of the incident in an e-mail that afternoon, advising he would send a “scolding letter” to SRC. (Supp. R4, tab 268; tr. 8/10-11, 101)

The following day, CAPT Kowba complained to CAPT Steven W. Johnson, the Navy Public Works Center (PWC) commanding officer responsible for Building W-143 maintenance, about SRC's performance, in particular roof leaks and two occasions upon which it had "rained" in his office, debris falling on cars and in the parking lot on windy days, and the broken skylight (supp. R4, tab 267; tr. 10/79-80). A copy of the e-mail was forwarded to CDR Melin, who sent it on to LT Hale and Messrs. Haste and O'Dell with the comment that he and LT Hale would meet with FISC "toot sweet" on Monday because FISC was a "very unhappy customer." (Supp. R4, tab 267)

LT Hale prepared a point paper for CDR Melin outlining the problems about which FISC had complained and proposing solutions, two of which were as follows:

- ... We feel these problems stem from the lack of supervision. We will re-analyze [SRC's] quality control and safety plan. We will make changes in the manner in which [SRC's] supervisors work.
- Contractor is reactive and they [sic] need to be proactive or we will [be] forced to find another contractor.

(Supp. R4, tab 267; tr. 8/12-18, 83) LT Hale acknowledged that the only way "to find another contractor" would be to terminate SRC first (tr. 8/102).

29 January 2001 Meetings

Two meetings were held on Monday, 29 January 2001. The first meeting was in the morning with CAPT Kowba during which CDR Melin and LT Hale committed to making changes in SRC's method of supervision (tr. 8/82-83, 102). There was no discussion of requiring a full-time safety officer at the FISC meeting (tr. 8/17).

The second meeting was in the afternoon with SRC. Mr. Haste requested the SRC meeting because the ROICC office was concerned about safety incidents that he considered serious enough to warrant action. Mr. Haste chaired the meeting which was attended by Mr. O'Dell and LT Hale, among others from the ROICC office, and representatives of SRC, including Messrs. DeLauney and Hernandez. (R4, tab 267; tr. 10/83, 109)

Mr. Haste was certain that he discussed the Navy's objectives with LT Hale prior to the meeting, in particular the two proposed solutions included in LT Hale's point paper. He did not recall whether termination was also discussed as an option. (Tr. 10/110-11, 118)

According to Mr. Haste, Mr. DeLauney acknowledged during the meeting that there were problems on the job and suggested that SRC provide an additional safety person and change its supervisory and QC personnel to have them perform duties that were more reflective of their individual areas of expertise. Mr. Haste specifically denied that he directed SRC to have a full-time safety person or that he had the authority to do so. (Tr. 10/83-86, 116-18)

LT Hale also testified that SRC suggested a full-time safety person and denied that either he or Mr. Haste had directed SRC to hire such a person (tr. 8/21-22). He acknowledged that this testimony differs from that given during his deposition when he stated he did not have any specific recollection from which to disagree with SRC's position that it was directed to furnish a full-time safety officer. He claimed his memory on the matter was refreshed by notes he took during the 29 January 2001 meetings. (Tr. 8/10-15)

Mr. DeLauney's testimony is substantially different than that of Mr. Haste and LT Hale. He stated he had not been aware of any issues or concerns about safety beyond that which was "normal business" (tr. 3/57). He agreed that the Navy's concerns were discussed, but recalled that Navy first suggested that SRC needed a full-time safety man to do a better job of being proactive and that a "pretty heated discussion" ensued (tr. 3/54). Mr. DeLauney expressed the view that a full-time safety person was not required by the contract and not necessary, a position that he believed caused Mr. Haste to become angry and threaten to terminate both SRC's roofing contract and the indefinite delivery, indefinite quantity (IDIQ) contract under which SRC had worked since 1993 if it did not provide a full-time safety person (tr. 3/55-56, 4/171-72).

Mr. Hernandez also was not aware of any significant or out-of-the-ordinary safety issues prior to the January meeting and thought SRC had corrected all of the safety items identified by Mr. O'Dell (tr. 5/22, 29). He testified that Mr. Haste told SRC that it needed a full-time safety director on the site, "otherwise [they] were going to be terminated" and that he also threatened the IDIQ contract (tr. 5/25-26, 28).

Mr. O'Dell confirmed that SRC had been responsive when he observed something that needed correction (tr. 2/41-44). It was his recollection that the recommendation for a full-time safety person came from the ROICC office (tr. 2/156).

Immediately after the meeting, LT Hale sent an e-mail to CAPT Melin and Messrs. Haste and Mark Airaghi, LT Hale's immediate supervisor, containing a draft of a letter to be sent to SRC. The last sentence of the e-mail concluded that, without immediate improvement, the Navy would be forced to take "more drastic and sweeping action." (Supp. R4, tab 267) The 29 January 2001 letter sent to SRC is virtually identical to the e-mail, except that the last sentence was changed to read that the Navy would be

forced “to take further steps to ensue a safe and acceptable project” (R4, tab 33). LT Hale explained that he was told to make the change by one of his superiors (tr. 8/105-06).

Both the e-mail and letter state that SRC expressed willingness to correct the problems discussed with “agreed upon measures” including: provision of a full-time safety officer; reorganization of superintendent and QC personnel and assignments, to be included in a revised safety and CQC plan; submission of a plan for approval by the Navy to ensure that no other debris would fall from the roof and to secure the worksite if falling material became a possibility; cleaning-up the jobsite by 31 January 2001; and correction of any future discrepancies noted by the ROICC’s weekly inspections by the close of the day (R4, tab 33; supp. R4, tab 267).

SRC provided a full-time safety person beginning 30 January 2001 (R4, tab 130 at 1120-21, 1131-45). Mr. DeLauney testified that he would not have furnished a full-time safety person if Mr. Haste had not threatened to terminate SRC’s contract for Building W-143 and its IDIQ contract (tr. 3/68). There is no evidence that Mr. DeLauney or anyone from SRC ever contacted the contracting officer about the alleged direction from Mr. Haste to modify the contract by requiring the provision of a full-time safety person.

By a letter dated 6 February 2001, SRC advised LT Hale that it considered the broken skylight to be an “unfortunate accident” due to loose concrete in a “hidden field condition.” It requested compensation for the cleanup and repair of the skylights. (R4, tab 41)

SRC’s Request for Equitable Adjustment (REA) submitted to the Navy on 25 February 2002 included an item for Safety Assurance that was among many items that had been discussed at a meeting held 14 February 2002 (R4, tabs 124, 130 at 1120-21, 1131-45). SRC asserted that the government directed it to provide a full-time safety manager for various reasons that were not SRC’s responsibility (R4, tab 130 at 1120-21). On 24 February 2002, SRC submitted cost proposals in the amount of \$53,253 for Safety Assurance/Safety Manager and \$3,849 for replacement of the Lobby Skylights. It asserted that the safety manager was not required or warranted and that the incident relating to the broken skylights was the result of a hidden field condition (R4, tab 147, subtab II.51 at 3046, subtab II.60 at 3311).

By a letter dated 18 April 2003, with a deemed receipt date of 21 April 2003, SRC converted its REA and the related cost proposal for Safety Assurance and its cost proposal for Lobby Skylights into formal certified claims (R4, tab 147, subtabs II.51, II.60). On 1 September 2004, the contracting officer issued a final decision that denied both claims (R4, tab 143). A timely notice of appeal that included both claims was filed with the Board on 24 November 2004.

DISCUSSION

SAFETY ASSURANCE

ASBCA No. 55500

The parties agree that the contract did not require a full-time safety officer. SRC asserts that the Navy's direction to furnish a full-time safety person from 30 January 2001 until the end of the project constituted a unilateral and compensable change to the contract work. It also contends that the Navy breached its duty of good faith and fair dealing when Mr. Haste threatened to terminate its roofing and IDIQ contracts, a threat which it alleges caused Mr. DeLauney to agree to the Navy's direction.

The Navy first argues that SRC suggested/volunteered to provide a full-time safety person. It then asserts that if Mr. Haste did direct SRC to provide one, he was not acting with authority on behalf of the contracting officer and that SRC did not protest this direction to the contracting officer.

Our decision in ASBCA No. 55500 is dictated by *Winter v. Cath-Dr/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007), a case in which the Court of Appeals decided an authority question that is very much like the one presented here. SRC's contract, like Cath's contract, included the FAR Changes clause and the NAVFAC Contracting Officer Authority and Government Representatives clauses, which stated that the contract would be administered by an authorized representative of the contracting officer, but that only the contracting officer could modify or change the contract and bind the government. As in *Cath*, the ROICC was delegated contract administration responsibilities, a matter discussed at the respective pre-construction conferences. *Id.* at 1341-42, 1345.

In *Cath*, the ROICC's day-to-day contract administration responsibilities were subsequently reassigned to the project Engineer in Charge (EIC) who then acted as the ROICC Project Manager (PM). In response to an inquiry from Cath following the reassignment, the Navy provided a lengthy explanation of the scope of the PM's responsibilities. Based upon the Navy's response, we found that the ROICC PM had express actual authority to direct contract changes that were compensable. *Id.* at 1343-44.

The Court of Appeals reversed our determination, holding that the contracting officer's limited delegation to the EIC/ROICC PM did not include the authority to make contract modifications despite the Navy's written explanation of his responsibilities. In doing so, the court acknowledged that the contracting officer could delegate authority to a designated representative, but relied upon the NAVFAC Contracting Officer Authority and Government Representatives clauses of the contract, together with Department of Defense FAR Supplement (DFARS) 201.602-2, RESPONSIBILITIES (1998), which provides that a contracting officer's designated representative has no authority to make

any changes that affect “price, quality, quantity, delivery, or other terms and conditions of the contract,” and DFARS 252.201-7000, CONTRACTING OFFICER’S REPRESENTATIVE (DEC 1991), which was incorporated into the *Cath* contract by reference and provided the same restrictions on a representative’s authority. *Id.* at 1344-45.

The court further held that the ROICC could not have had implicit authority under *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989), because the contract language and government regulation incorporated by reference made clear that only the contracting officer had authority to modify the contract. *Cath*, 497 F.3d at 1346.

Cath thus requires us to conclude here that the ROICC’s authority to administer the contract did not empower Mr. Haste, a member of the ROICC’s senior management, with either express or implied authority to modify the contract with a compensable change requiring SRC to provide a full-time safety person. The same DFARS and NAVFAC contract clauses are applicable and there is no other evidence relating to the ROICC’s delegated contract administration responsibilities.

Inasmuch as the authority issue is dispositive of this appeal, we do not decide the hotly disputed factual questions concerning the severity of the safety issues alleged by the Navy and whether Mr. Haste had valid reasons to, and actually did, direct SRC to provide a full-time safety officer because even if he did so direct SRC, such an action would be outside the scope of the ROICC’s delegated authority. Ratification is not an issue in the absence of evidence indicating that SRC brought Mr. Haste’s alleged direction to the attention of the contracting officer because ratification requires “knowledge of material facts involving the unauthorized act and approval of the activity by one with authority.” *Cath*, 497 F.3d at 1347.

LOBBY SKYLIGHTS
ASBCA No. 55503

In ASBCA No. 55503, SRC asserts that it is entitled to be compensated for cleanup and repair of the two broken lobby skylights. The first skylight was broken when concrete fell from the outside of the parapet wall on roof Cell H; the second skylight was broken by an SRC employee who was covering the first skylight with plywood. SRC asserts that it has no contractual liability for these events because the concrete did not fall from an area in which it was working and was not identified as one requiring repairs on the contract drawings.

The Navy argues that SRC was responsible for the skylights because they were directly below the area in which its asbestos subcontractor was working. It contends that SRC did not use reasonable care to avoid damage to government property as required by FAR 52.236-7, the Permits and Responsibilities clause, and FAR 52.236-9, the Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements clause, and

therefore is responsible for the repairs. It asserts that SRC should have performed soundings on the wall before proceeding with its work.

SRC responds that it did not insure all of Building W-143 simply because it was awarded the roofing contract and that there was no contractual requirement or other evidence to support the Navy's contention that it should have performed soundings.

Neither party has discussed whether the concrete fell because of a differing site condition, as SRC had initially asserted. Accordingly, we do not address it either.

The Permits and Responsibilities clause made SRC responsible "for all damages to...property that occur as a result of the Contractor's fault or negligence." The Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements clause required SRC to "preserve and protect all structures...on...the worksite" and "repair any damage to those facilities...resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work." The clauses do not impose strict liability upon a contractor; rather, the burden of proof is on the government to show that the damage to the skylights was due to SRC's fault or negligence or the failure to exercise reasonable care. *See Zimcon Professionals*, ASBCA Nos. 49346, 51123, 00-1 BCA ¶ 30,839 at 152,214; *J.A.K. Construction Co.*, ASBCA No. 43099, 94-1 BCA ¶ 26,536 at 132,074.

The evidence established, as SRC asserts, that the first skylight was broken by concrete that fell from the exterior of the parapet wall from a location that had not been identified on the contract drawings as a spalled area needing repair. It also established that SRC's subcontractor was removing asbestos from the inside of the parapet wall at the time of the incident and had installed a tarp to keep debris from flying over the top of the wall. The contract did not require soundings and there was no evidence of any trade practice relating to taking them. There also was no evidence of any failure to exercise reasonable care in the performance of the asbestos removal work.

The Navy's contention that SRC is responsible for the damage because it was caused by its subcontractor requires a finding of strict liability that is not imposed by either FAR 52.236-7 or FAR 52.236-9. We conclude that the Navy did not demonstrate that SRC should be held responsible for the breakage of the first skylight. The second skylight was broken when SRC's workman slipped while placing plywood over the first skylight. We attribute the responsibility for the breakage of the second skylight to SRC's failure to exercise reasonable care.

ADDITIONAL QUANTUM FINDINGS OF FACT
ASBCA No. 55503

SRC seeks \$2,535.15 to replace both skylights (ex. A-2, tab 2(U)). SRC paid Binswanger Glass \$1,284.67 to furnish and install two solar cool bronze tempered skylights (ex. A-2, tab 4 at 6178-79). Since we found entitlement to recover the cost of only one skylight, we divide the Binswanger cost by two and award SRC \$642.34 for this cost.

SRC covered the broken skylights with plywood and then removed it and assisted with the installation of the new skylights. The \$40.00 claimed for plywood and SRC's labor costs were estimated by Mr. DeLauney. (Tr. 9(2)/37-38) Ms. Cecelia Ambrose, of the Defense Contract Audit Agency (DCAA), who was stipulated to be an expert in the field of auditing government contractors, questioned the \$40.00 claimed for plywood in the Navy's Amended Response to Appellant's Statement of Costs (ARSOC) because SRC did not have an invoice for it (ARSOC, tab 12 at 142; tr. 10(2)/43-45). There is no dispute that plywood was used. We again divide the claimed material cost by two and award SRC \$20.00 for plywood. This is \$662.34 for direct materials, to which we add a stipulated 4.5% sales tax for a total of \$692.15 ($\$662.34 \times 4.5\% = \29.81).

SRC also claims 24 hours for roofers and 2 hours of foreman time (ex. A-2, tab (U)). The stipulated rate for roofers was \$11.15 per hour (ARSOC, tab 12 at 143-44; tr. 10(2)/58-61). A rate of 7% of direct labor man-hours was stipulated to compute the number of supervisor/foreman hours (tr. 8(2)/149). We previously concluded that the correct supervisor/foreman rate should be \$16.62 per hour. *States Roofing Corp.*, 08-2 BCA ¶ 33,912 at 167,799. We divide the claimed number of labor hours by two and award SRC \$150.42, \$133.80 for roofers ($12 \times \$11.15 = \133.80) and \$16.62 for a foreman. With the stipulated labor burden ($\$150.42 \times 20.14\% = \30.29) and stipulated field overhead ($\$150.42 \times 57.43\% = \86.39), the labor total is \$267.10. *See States Roofing Corp.*, 08-2 BCA ¶ 33,912 at 167,799. The total material and labor is \$959.25.

We add \$130.17 in overhead at the stipulated 13.57% rate ($\$959.25 + \$130.17 = \$1,089.42$) and \$76.26 in profit at 7% to bring the total to \$1,165.68 ($\$1,089.42 + \$76.26 = \$1,165.68$). We also apply facilities capital cost of money (FCCOM) mark-up of \$0.02 (at 0.0166% of direct labor costs without burden as per the parties' calculations) and bond mark-up of \$0.52 (at 0.045% of total costs plus profit, excluding FCCOM). *See States Roofing Corp.*, 08-2 BCA ¶ 33,912 at 167,799. SRC's recovery for one skylight is \$1,166.22.

Our computation compares favorably with the \$1,319 estimate prepared by Mr. Airaghi that was also based upon awarding SRC the cost of replacing one skylight (ARSOC, tab 15(F); tr. 9(2)/253-54).

CONCLUSION

ASBCA No. 55500 is denied. ASBCA No. 55503 is sustained to the extent indicated and otherwise denied. In ASBCA No. 55503, SRC is entitled to recover \$1,166.22, plus CDA interest running from 21 April 2003.

Dated: 9 December 2008

CAROL N. PARK-CONROY
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. 55500, 55503, Appeals of States Roofing Corporation, rendered in conformance with the Board's Charter.

Dated:

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