ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Atherton Construction, Inc.	)	ASBCA No. 48527
	)	
Under Contract No. F41612-93-C-0026	)	

APPEARANCE FOR THE APPELLANT: Denver C. Snuffer, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE SCHEPERS

This timely appeal is from a contracting officer's decision denying a portion of appellant's claim in the amount of $190,746.95 for ten items, some with subparts, which arose under its construction contract to renovate military family housing in Phases II and III at Bunker Hill, Sheppard Air Force Base, Texas. Seven items were in issue as to entitlement at trial; the Government conceded liability as to entitlement with respect to the other three items (tr. 1/131).

Findings of Fact Pertinent to All Disputed Items

1. On 4 June 1993 appellant was awarded Contract No. F41612-93-C-0026 in the original amount of $968,654.00, increased by modifications, to renovate military family housing in Phases II and III at Bunker Hill at Sheppard Air Force Base (the contract). Notice to proceed was issued on 15 June 1993 establishing a contract completion date of 11 January 1994 (R4, tabs 2, 3).

2. The contract included FAR 52.243-4 CHANGES (AUG 1987), FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984), FAR 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (APR 1989), and FAR 52.212-5 LIQUIDATED DAMAGES AND CONSTRUCTION (APR 1984), which provided for liquidated damages of "$66.00 for each day of delay plus $15.32 daily loss for rent per

late unit in the possession of the contractor. . . ." Also included was FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) which states in part:

> (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.
>
> (b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice.

3. Appellant did not conduct a pre-bid site inspection (tr. 1/122).

4. Appellant completed the contract on 9 March 1994 (R4, tab 79 at 9a.3.14), and liquidated damages of $7,044.04 were assessed, resulting in a final contract amount of $977,999.39, as described at findings 48 *et seq.* below.

5. On 2 November 1994 appellant filed its claim in the amount of $190,746.95 for ten items, some with subparts, demanding costs due to alleged Government-caused delays, changes or constructive changes, differing site conditions, and breach of agreement. Appellant also sought Prompt Payment Act interest, costs for preparing (1) a rejected proposal and (2) its claim, and remission of liquidated damages. A brief summary of that portion of the claim before this Board includes the following assertions: The tub drain was set in concrete rather than "boxed out" approximately one foot with exposed dirt, thus appellant had to reframe the wall along the side of each tub (labor, $15,066.02). Eight units had more than one layer of asbestos-containing flooring material which required removal (labor hours and waste removal, $9,917.60). After award the Government asked appellant to submit a proposal to remove the existing ceiling diffusers and cut holes for the light fixtures, work the Government was required by contract to perform. Ultimately the contract to perform this work was awarded to a lower bidder, and appellant demands its cost of preparing its rejected proposal ($1,262.77). Appellant demands labor costs ($1,837.02) and extended home office overhead (10 days delay during the 26-day period between 29 July 1993 and 23 August 1993) for out-of-sequencing due to necessity to return to the units to install diffusers and light fixtures after completion of the contract awarded to a second bidder. To reduce the out-of-sequencing problems, appellant was granted access to more than the 14 units at one time provided for by the contract. Later the Government again granted appellant only 14 units at one time. Appellant contends the Government breached an agreement for greater access, and claims delay damages for the

change back to only 14 units at one time (14 days delay during the 22-day period between 20 October 1993 and 10 November 1993). Further, appellant contends there were delays resulting from utility outages and water leaks. Appellant asserts these various delays entitle it to Eichleay formula damages for 79 days of extended home office overhead, as reflected in a comparison of its as-planned and as-built bar charts. Appellant also sought Prompt Payment Act interest for late payment of one invoice ($385.55), costs of preparing its claim ($12,107.42), and remission of $7,044.04 in assessed liquidated damages. Before the Board, for purposes of extended home office overhead, appellant requests only a ruling that the time for overall performance was delayed. Also the Government asserts that certain of the remaining items are barred by the release language in Modification No. P00003. (R4, tab 79)

6. On 8 February 1995 the contracting officer issued his decision agreeing to certain amounts for three items and denying the remainder of appellant's claim (R4, tab 1). On 17 March 1995 appellant filed this timely appeal.

Findings of Fact on Tub Drains

7. Drawing Sheet 8 of 8, Mechanical/Plumbing Notes, stated (R4, tab 2):

> 4. Completely remove existing fiberglass combination tub/shower P-3 and replace with new tub P-3 as specified and scheduled. New tubs shall tie into existing supply branches and waste mains to provide a complete and useable system. Existing tub/shower unit is in a space only 58 inches long from existing inside wall to inside wall. Installation of new 5 foot long enameled cast iron tub will require a wall demolition and modifications to fit the new tub into place. Patch all bathroom wall demolition as specified in the architectural plans. An estimated quantity of 80 tub/shower units shall be replaced.

8. Drawing Sheet 8 of 8, Plumbing, General Purpose Notes, required (R4, tab 2):

> 3. SUBMITTALS: . . . Field measurements of existing plumbing rough-ins will be required to determine the exact lengths of pipe and fittings required to plumb new fixtures. All piping and fittings required to provide a complete and usable system in accordance with the drawings and specifications shall be provided at no additional costs to the government.

9. The contract required that the existing 32" wide fiberglass combination bathtub/showers be replaced with an American Standard tub or equal, which is an enamel cast iron tub, 30" wide and 60" long (tr. 2/8; R4, tab 2, Drawings Sheet 8 of 8, Fixture Schedule).

10. Appellant's submittal of an Eljer (R) tub, 30" wide and 60" long was approved (tr. 2/9). Appellant's proposal showed that the drain hole for the replacement tubs would be 14" from the side of the tub which was against the wall (tr. 2/11-12). The drain holes for the existing tubs and the replacement tubs were both "centered in the tub area" – "centered in the bathing area" (tr. 1/188, 213).

11. When appellant attempted to install the specified smaller width tub, the drain hole of the tub did not meet the drain in the floor. The drains were installed in concrete and could not be moved, so appellant had two choices to install the tubs: (1) "fur out" (or frame), a new wall; or (2) move the drain in the floor. (Tr. 1/23-25) Framing new walls was less expensive than moving the drains and the solution appellant chose (*id*.).

12. Mr. Lance McKinney who holds a bachelor of science in building construction management and at trial had more than 24 years experience in the construction industry (tr. 1/20), was appellant's vice president and later president during contract performance. Mr. McKinney testified that it is customary that the drain is "boxed out" approximately one foot and with dirt left exposed to allow the drain to be moved when a new tub is installed (tr. 1/24). There is no other evidence on this point.

13. Not until the existing tubs were removed was the manner in which the drains were installed visible (R4, tab 88; tr. 1/24-25). We find that the manner in which the drains were installed would not have been discovered from a site inspection by a reasonable, intelligent contractor, experienced in the particular field of work involved.

14. Seemingly the problem was discovered on 28 July 1993 (R4, tabs 6, 84 at 2). The daily logs of Mr. Greg Holley, appellant's project superintendent, for 29 July 1993 state in part (R4, tab 84 at 2):

> I told [Sidney Seligson, Government's project architect and project manager (tr. 2/7)] about the situation with the bath tubs being 2" smaller in width than the existing ones. he [sic] said it was up to us to have known this and it's our responsibility to make the tubs work.

There is no evidence or even a contention that the Government failed to have notice of this asserted differing site condition (Gov't br. at 20).

Decision on Tub Drains

Without specifying which type, appellant contends that under the differing site conditions clause it is entitled to its costs incurred when it "framed" one wall beside each of the tubs so that the drain from the tub would match the drain in the floor.

The Type I differing site condition pertains to subsurface or latent physical conditions at the site which differ materially from those indicated in the contract. To establish a Type I differing site condition, a contractor must prove five elements: (1) the contract documents positively indicated the site conditions that form the basis of the claim; (2) the contractor reasonably interpreted the contract documents and relied upon the indicated site conditions; (3) the conditions actually encountered at the contract site differed materially from those indicated in the contract; (4) the site conditions encountered existed at the time the contract was executed and were unforeseeable based on all the information available at the time of bidding; and (5) the contractor's injury was caused solely by the materially differing site conditions. *See Stuyvesant Dredging Co. v. United States,* 834 F.2d 1576, 1581 (Fed. Cir. 1987); *Skip Kirchdorfer, Inc.*, ASBCA No. 40516, 00-1 BCA ¶ 30,625. The contract drawings did not indicate the installation of the drains, and thus Type I condition is inapplicable.

The Type II differing site condition pertains to unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. When a contractor asserts a Category II claim, it has a relatively heavy burden of proof. *Charles T. Parker Constr. Co. v. United States,* 193 Ct. Cl. 320, 433 F.2d 771, 778 (1970); *CCI Contractors, Inc.,* AGBCA 84-314-1, 91-3 BCA ¶ 24,225, *aff'd,* 979 F.2d 216 (Fed. Cir. 1992) (table).

Appellant presented credible evidence that it is customary in the construction industry that drains are "boxed out" approximately one foot with dirt left exposed to allow the drain to be moved within a certain area. The Government presented no evidence or argument to the contrary, and does not address the point in its brief. It is undisputed that the drains we are concerned with were installed in concrete and could not be moved.

Appellant did not conduct a site inspection. However, a contractor who does not perform a site inspection, or performs an inadequate inspection, may recover for a differing site condition that would not have been discovered by a reasonable inspection. *Darwin Constr Co.*, ASBCA No. 27596, 86-1 BCA ¶ 18,645; *Vann v. United States*, 190 Ct. Cl. 546, 420 F.2d 968, 983 (1970). We found that the manner in which the drains were installed would not have been discovered from a site inspection by a reasonable, intelligent contractor, experienced in the particular field of work involved. Thus

appellant's failure to conduct a site visit does not preclude its recovery on this disputed item.

Appellant gave timely oral notice to the Government's project architect and project manager, and the Government does not dispute that it received notice of the facts asserted to be a differing site condition. Such notice satisfied the Differing Site Conditions clause. *Praught Construction Corp.*, ASBCA No. 39670, 93-2 BCA ¶ 25,896 at 128,815-20.

Appellant has carried its burden to established its right to compensation as a Type II differing site condition. This item is sustained and remanded to the contracting officer for a determination of quantum.

Findings of Fact on Asbestos Removal

15. Drawing Sheet 8 of 8, General Notes, paragraph 2, states: "Remove all existing resilient floor covering" (R4, tab 2).

16. On 17 June 1993 appellant and Total Abatement Systems Corp. (TASCO) entered into a subcontract in the amount of $161,572 for removal of asbestos-containing flooring material from the 100 units covered in the contract (R4, tab 81).

17. In eight units TASCO found several layers of asbestos (tr. 1/30-31). On 12 August 1993 TASCO proposed to appellant that its subcontract be increased by $980 for each unit with more than one layer of asbestos (R4, tab 93). Also on 12 August 1993 appellant submitted a letter to the contract administrator stating that two days earlier appellant encountered two layers of material in the floor covering at 103 Venus and concluding with: "Please advise. Thank you." (R4, tab 9). On 23 August 1993 the contracting officer responded to appellant that the contract required removal of all existing resilient floor covering without specifying the number of layers (R4, tab 18).

18. Mr. Lance McKinney testified: "The most that a reasonable contractor could assume is a single layer [of asbestos]." (tr. 1/32).

19. To TASCO's total of $7,840, appellant added 15% overhead and 10% profit, for a total of $9,917.60, the amount demanded in this appeal (R4, tab 79 at 2.2.1). Appellant's 27 April 1994 "All Cost Variance Report" showed asbestos removal estimated at $161,572 and actual cost was $161,572. Asbestos removal was the only item to show zero variance in comparing the cost estimated to the completion cost. (R4, tab 147)

Decision on Asbestos Removal

Without specifying the type, appellant claims that under the differing site conditions clause it is entitled to reimbursement of the costs incurred in removing all asbestos in excess of the first layer. The requirements to establish a Type I and II differing site condition are set out in this opinion, *see* Decision on Tub Drains, *supra*. The contract required the contractor to "[r]emove all existing resilient floor covering" and did not indicate any number of layers of asbestos, thus Type I is inapplicable. Mr. McKinney's testimony (finding 18) is insufficient to establish the several layers of asbestos to be "of an unusual nature, which differ materially from those ordinarily encountered and generally recognized." Appellant has not carried its burden of proof that a Type II differing site condition existed.

The Government also argues that appellant cannot bring this portion of its claim because it is not obligated to pay its subcontractor for the amount, and in fact the subcontractor was unaware appellant was pursuing this dispute. In light of our decision on this matter, the point is moot.

We deny this item.

Findings of Fact on Costs of Preparing Rejected Proposal, Out-of-Sequencing of Work, Alleged Breach of Agreement and Utility Problems

20. The contract required the Government to remove the existing ceiling diffusers and cut holes for the light fixtures (R4, tab 2, p. 5 of 50, drawing 8, sheet 8, General Notes, ¶¶ 17, 19). On 23 July 1993 the Government requested a cost proposal to modify the contract to require appellant to remove the existing ceiling diffusers and cut holes for light fixtures (R4, tab 4).

21. On 2 August 1993 appellant proposed a price of $19,583 for the work (R4, tab 5). On 13 August 1993 the Government asked that appellant resubmit its proposal because, the Government contended: (1) appellant's labor and material costs for removing the diffusers and cutting holes for the light fixtures were excessive; and (2) appellant's labor costs for diffuser installation should be deleted because that work was already appellant's responsibility under the contract. The Government requested the resubmittal by 20 August 1993. (R4, tab 12)

22. Appellant received units 1-14 between 4 August 1993 and 12 August 1993; demolition on these units began 5 August 1993. By 27 August 1993 appellant had finished two units, with the exception of the work which had to be performed out-of-sequence due to the pending modification (R4, tabs 21, 79 at 4b.3.15).

23. On 23 August 1993 the Government's contract administrator, Ms. Marcy Fragomeli, other representatives from appellant and the Government, met to discuss appellant's proposal to remove ceiling diffusers and cut holes for light fixtures (R4, tabs 17, 21). During the meeting an unnamed Government representative suggested that to facilitate appellant's work, appellant should take more than 14 units until the ceiling diffuser/light fixture work was awarded (tr. 2/122; R4, tab 21). Appellant resubmitted its proposal to remove the existing ceiling diffusers and cut holes for the light fixtures, but on 29 September 1993, the contract for this work was awarded to a lower bidder (tr. 2/108; R4, tab 32, tab 79 at 4b.3.1, 4c.3.5).

24. The record does not support a finding that appellant performed complex or costly preparatory work in submitting its price proposal to remove the existing ceiling diffusers and to cut holes for the light fixtures, or that there was any prior agreement that appellant would be compensated for the proposal.

25. The parties stipulated (tr. 1/135):

> [The parties disagree whether the amount is $918.50 which the Government offered or the $1,837.02 which appellant demands, but] stipulate that Atherton's entitlement is limited to the out-of-sequencing of this work – the mobilizing, the demobilizing and the effects that that had upon Atherton in getting back to perform this work out of sequence.

26. Between 3 September and 20 October 1993 appellant possessed more than 14 units (R4, tab 21; tr. 2/110). After 20 October 1993, the Government again, pursuant to the contract, restricted appellant to only 14 units at one time (tr. 1/46, 62, 2/109, 131). On 26 October 1993 Mr. Holley, appellant's project superintendent, complained that he had not received additional units since 20 October 1993 (R4, tabs 34, 79 at 8.3.4). There was no agreement to allow appellant to possess more than 14 units after 20 October 1993 (R4, tabs 24, 34; tr. 2/108).

27. During the contract, there were utility outages and leaking water which interfered with the contract work (tr. 1/39, 64; R4, tabs 40-42, 45, 46, 49, 62). The utility problems never affected all unfinished units in appellant's possession at one time (tr. 1/137).

Decision on Costs of Preparing the Rejected Proposal

Pursuant to the Government's request, appellant prepared and presented a proposal to remove the existing ceiling diffusers and cut holes for new light fixtures, work which

was ultimately awarded to another contractor. Appellant requests its preparation costs for its rejected proposal, but appellant gives us no authority for this request.

Normally, these costs are not recoverable. *See Arctic Corner, Inc.*, ASBCA No. 33347, 93-3 BCA ¶ 26,192 at 130,398 and cases cited. Appellant did not prove that there was a prior agreement that appellant would be paid for these proposal preparation costs, or that in submitting its price proposal it performed complex or costly preparatory work sufficient to enable it to recover these costs (finding 24). The costs appellant demands for this item are denied.

Decision on Out-of-Sequencing of Work

Our understanding of the stipulation at finding 25 is that the Government agrees that some liability exists for the labor costs resulting from out-of-sequencing. Therefore, this subpart of this item is sustained as to entitlement and remanded to the contracting officer for negotiation of quantum. The impact as a result of all the delays asserted by appellant is addressed below.

Decision on Alleged Breach of Agreement

Appellant asserts that due to the Government's alleged breach of agreement, appellant is entitled to the extended home office overhead which resulted from impact of the delay when the Government no longer allowed appellant more than the 14 units permitted by the contract. We found there was no agreement to allow appellant these additional units during the time appellant complains they were not available (finding 26). Appellant has not shown a breach of any agreement; thus this item is denied.

Decision on Utility Problems

Appellant contends it is entitled to extended home office overhead due to a Type II differing site condition or a constructive change because, it is undisputed, there were utility outages and water leaks which impacted appellant's contract work. The impact as a result of all the delays asserted by appellant is addressed below.

Findings of Fact on Modification Nos. P00003 and P00004 and Liquidated Damages

28. On 14 December 1993 the parties entered into bilateral Modification No. P00003 (tr. 1/146-64), which added work, increased the contract price to $985,043.43, extended the contract completion date, and stated (R4, tab 2):

> A. This modification is to include work to rebuild cabinet bottoms in 30 units and to rebuild drawers in 50 units [. . .

> and add] 18 additional units which require removal of underlayment. . . .
>
> . . . .
>
> O. Contract completion date is changed to 12 March 1994.
>
> P. The contractor hereby agrees to the changes as set forth above and unconditionally waives any claim against the government by reason of the same and does thereby release it from any and all obligations which may arise because of such changes.

29. Modification No. P00003 did not list or refer to any of the items included within appellant's claim (tr. 1/190). The contract was completed 9 March 1994, three days before the contract completion date (tr. 1/192).

30. Modification No. P00003 did not specifically vary the liquidated damages provisions for the individual units. Through correspondence in February 1994, the parties agreed that in light of the extension to the contract completion date granted by Modification No. P00003, appellant should have 16, rather than 14, calendar days to complete each unit (R4, tabs 55, 57). Appellant's as-planned typical unit was to be completed in 11 days (R4, tab 79 at 9a.3.1).

31. On 13 May 1994 the Government issued Modification No. P00004 which stated (R4, tab 2):

> a. This modification is written to assess Liquidated Damages for $66 for each day of delay plus $15.32 daily loss for rent per late unit for the period 9 Dec 93 through 10 February 94 for a total amount of $7,044.04.

32. The contracting officer assessed liquidated damages of $3,018.04 ($15.32 per day for 197 days) for 19 individual units (R4, tab 64). The remaining $4,026 assessed was seemingly $66 per day for each day the Government claims the contract completion was late, apparently 61.

33. Liquidated damages were assessed against only those individual units which appellant possessed on or after 9 December 1993 (R4, tab 64). The dates these units were started and completed are undisputed.

34. All appellant's claimed delays were prior to 9 December 1993 with the exception of some of the utility problems (R4, tab 79). Appellant set out the dates and units it was allegedly delayed due to the utility outages and water leaks (R4, tab 151 at 2-4). Liquidated damages were assessed on only one unit, 119 Lunar, on which appellant claimed delays from utility problems during the time appellant possessed that unit. The possession time for 119 Lunar was 18 January through 10 February 1994, liquidated damages were for 6 days and the claimed delay was from 27 January to 2 February 1994. (R4, tabs 64, 79 at 9a.3.15, tab 151 at 2-4; tr. 1/99) Appellant's proof of this delay was the testimony of Mr. McKinney who, from the review of the daily logs of Mr. Greg Holley and Mr. Joe Williams, appellant's assistant superintendent or foreman on the job site at the end of the contract (tr. 1/97-98), could find no entry of utility problems at 119 Lunar between 27 January to 2 February 1994 (tr. 3/30). Mr. McKinney stated only two days of the asserted delay pertain to 119 Lunar (tr. 3/14-16, 20, 31; R4, tab 79 at 6.2.1, 6.2.2, 6.3.1).

Additional Findings of Fact on Delay

35. Mr. McKinney testified to the impact of the claimed delays by comparing appellant's as-planned (R4, tab 79 at 9a.3.1 through 9a.3.13) and its as-built bar charts (R4, tab 79 at 9a.3.14), and asserted that the total contract work was impacted from 20 December 1993 to 9 March 1994, a total of 79 days (tr. 1/47-68). The asserted delays and impact reflected in those bar charts were allegedly primarily due to: (1) out-of-sequencing work caused by (a) change in the number of units available to appellant (tr. 1/62), and (b) delays in removing the existing ceiling diffusers and cutting holes for the lights (tr. 1/63); and (2) utility outages and water leaks (tr. 1/64). Mr. McKinney testified that all work was on the critical path and thus any delays would interrupt the flow of work and result in delay to the completion of the contract (tr. 1/35).

36. On cross examination, Mr. McKinney agreed that certain time requested for delay and the resulting impact on the contract work should be reduced (tr. 1/103-20). In making this determination Mr. McKinney agreed that: (1) three days of claimed delays for out-of-sequences could not be supported and further the claimed delays were at most a few hours (tr. 1/103-08); (2) not all units were unavailable due to a natural gas shut off thus the claimed 8 days of delay shown on the as-built bar chart is in error (tr. 1/136-37, 144-46); (3) the claim of 1-1/2 days delay for each of 17 units for faulty water valves should have been 1-1/2 hours for each of 17 units (tr. 1/118, 181-84, 200, 2/70); (4) a 2-day claimed delay was a weekend and should be deleted (tr. 3/36); (5) certain of the items common to all units could be performed concurrently (tr. 1/204-07; R4, tab 79 at 9a.3.1); and (6) the claimed delays have discrepancies and typographical errors (tr. 1/117, 2/67).

37. There is no proof or even an assertion that any of the claimed delays was incurred by a subcontractor to appellant.

38. There were no total suspensions of the contract work (app. reply br. at 32).

39. The contract did not consume so much of appellant's bonding capacity as to prevent appellant from bidding during the period (tr. 1/171-76).

40. Appellant made no effort to revise its bar charts due to evidence such as that set out in finding 36, and prove delay or impact to either the overall completion of the contract work, or delay and impact to the completion of any individual unit, specifically 119 Lunar.

41. We find, based on the entire record and specifically findings 33-40 that appellant has not proven that there were Government-caused delays which impacted the completion of the overall contract or impacted the completion of any of the units on which liquidated damages were assessed.

Decision on Delay and Liquidated Damages
Assessed Against Contract Completion

Appellant asks only that we find some delay, which we interpret as impact, so that it can negotiate with the Government for extended home office overhead pursuant to the Eichleay formula, and remission of liquidated damages (app. br. at 6; reply br. at 46). In bilateral Modification No. P00003, the parties extended the contract completion date to 12 March 1994; the contract was completed 9 March 1994. Appellant is entitled to no delay damages and the Government cannot assess liquidated damages of $66 a day for late completion of the contract. Further, we found that appellant had not proven any impact on the contract completion date due to Government caused delay (finding 41), a requirement prior to an award of damages for extended overhead.

Appellant's request that we find some delay to the contract completion so that it may pursue its claim for extended home office overhead is denied. Appellant's appeal of liquidated damages of $4,026 assessed against late completion of the contract (finding 32) is sustained.

Decision On Delay and Liquidated Damages
Assessed Against Completion of Individual Units

As stated above, appellant requests that we find that there was some delay, without specifying any particular units. We found that appellant did not prove impact due to Government-caused delay on the completion of any of the units on which liquidated

damages were assessed (finding 41). However, we are not confidant both parties understood that this trial on entitlement would include the number of days of delay to the individual units during the period of 9 December 1993 through 10 February 1994. Thus this issue must be remanded to the contracting officer for negotiations between the parties. Accordingly, appellant's appeal of liquidated damages of $3,018.04 assessed against late completed individual units is remanded to the contracting officer for action in accordance with this opinion to determine if any amounts should be remitted to appellant.

Findings of Fact on Interest
Under the Prompt Payment Clause

42. The contract included FAR 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (APR 1989) which provides for interest on invoices and states in part:

> Notwithstanding any other payment terms in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. . . . All days referred to in this clause are calendar days, unless otherwise specified. . . .
>
> . . . .
>
> (a) Invoice Payments.
>
> (1) . . . [T]ypes of invoice payments . . . .
>
> (i) Progress payments, if provided for elsewhere in this contract, based on Contracting Officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project:
>
> (A) The due date for making such payments shall be 14 days after receipt of the payment request by the designated billing office. However, if the designated billing office fails to annotate the payment request with the actual date of receipt, the payment due date shall be the 14th day after the date the Contractor's payment request is dated, provided a proper payment request is received and there is no

disagreement over quantity, quality, or Contractor compliance with contract requirements.

. . . .

(2) . . . If the [Contractor's] invoice does not comply with . . . requirements, the Contractor will be notified of the defect within 7 days after receipt of the invoice . . . .

. . . .

(3) An interest penalty shall be paid . . . if payment is not made by the due date and the [following] conditions . . . are met, ...

(i) A proper invoice was received by the designated billing office.

. . . .

(4) . . . .

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-1, Disputes.

. . . .

(6) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor --

. . . .

(iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pay such a penalty.

43. As early as 24 January 1994, the Government began advising appellant of the liquidated damages that were being assessed against certain of the units (R4, tabs 50-53).

44. On 23 March 1994 the contracting officer wrote appellant and stated in part (R4, tab 59):

> Liquidated damages must be computed before this contract can be closed out. In order to mitigate liquidated damages as much as possible, please provide specific incidents, with addresses, for delays experienced, referenced in your Jan 12, 1994 letter.
>
> Upon receipt of this additional information, a determination will be made and you will be advised.

45. On 6 April 1994 appellant submitted its invoice dated 5 April 1994 for $37,910.27 asserting 99.95% completion (R4, tab 79 at 9c.2.1). The Government did not prove the date the 6 April 1994 submission was received, thus pursuant to (i)(A) of the clause, payment was due on a proper invoice to the extent there was no disagreement over quantity, quality, or contract compliance on 20 April 1994.

46. On 6 April 1994 the contracting officer wrote appellant, repeated the substance of the 23 March 1994 letter, and stated if appellant provided no further information by 15 April 1994, the Government would assess liquidated damages on the available information (R4, tab 61).

47. On 11 April 1994 the Government returned the 6 April 1994 invoice and stated (R4, tab 79 at 9c.3.1):

> Your invoice for 99.95% completion on subject contract is being returned.
>
> Please refer to 6 Apr 94 letter regarding liquidated damages. If no response has been received by 15 Apr 94, liquidated damages will be assessed in accordance with our present records and contract price will be adjusted accordingly. You will receive a modification and can then resubmit your invoice.

The contracting officer did not object to the invoice as improper or disagree about the amount to be paid in any other respect.

48. On 25 April 1994 the contracting officer advised appellant that liquidated damages were $7,410.56 less a deduction of $366.52 for an amount of $7,044.04. The Government stated (R4, tab 64):

> Please evaluate this information and advise if you have further comments. A modification will be written to reduce the contract amount by $7,044.04 unless further information is received from you by 5 May 94.

There is no evidence the Government received any information from appellant or any other source between 23 March and 25 April 1994 which varied the above figures (R4, tab 146).

49. On 20 May 1994 appellant submitted a request for payment of $30,866.23 which took into account the $7,044.04 of liquidated damages, and pointed out the invoice was not a final billing. Appellant also reminded the Government that it had not received a modification for the liquidated damages. (R4, tab 69)

50. On 25 May 1994 the Government wrote appellant and stated in part (R4, tab 79 at 9c.3.2):

> Enclosed is a copy of modification P0004, which reduces the contract amount by $7,044.04 for assessment of liquidated damages.
>
> Your invoice is also being returned for correction. The amount of your final invoice is calculated to be $31,418.12.
>
> . . . .
>
> Upon receipt of payrolls marked "final" from your company and all subcontractors and a release of claims, you may submit your final invoice.

51. On 26 May 1994 appellant wrote the Government and stated in part (R4, tab 79 at 9c.3.3):

> We feel that you have violated good faith negotiations with us by assessing liquidated damages.
>
> The contract schedule was extended to allow additional days for Government caused delays, which impacted the project.
>
> The contract was completed early by us. Enclosed is a revised progress schedule which reflects that we accomplished exactly what was agreed upon.

52. On 1 June 1994 appellant wrote the Government and stated in part (R4, tab 79 at 9c.3.4):

> In response to your letter dated 25 May 94, I am enclosing payrolls marked "final" for our company and our subcontractors.
>
> Also enclosed is revised Contractors Request for Payment. As noted in our letter dated May 20, 1994, this is not a final invoice. The contract remains open with an outstanding balance of $489.00 to be billed at a later date.
>
> Since ACI had not received P0004 as of May 20, 1994, ACI acknowledged that $7,044.04 would be retained from the invoice as a result of the liquidated damages issue. The balance was to be paid to ACI.
>
> The original invoice was submitted to the Government on April 6, 1994 and has been returned twice without payment. ACI takes exception to the Government continually returning our request for payment without payment of undisputed dollar amounts. Therefore, ACI requests payment of the balance, including interest as of April 6, 1994.

53. The invoice enclosed was for $30,929.12 (R4, tab 79 at 9c.3.5). The Government has not proven when the Government received appellant's 1 June 1994 letter with the enclosed invoice, thus pursuant to (i)(A) of the clause, payment was due on a proper invoice, to the extent there was no disagreement, on 15 June 1994. The Government does not contest that the 1 June 1994 invoice was a proper invoice.

54. Appellant asserts without proof that it received payment of $30,929.12 on 6 July 1994. There is also no proof of the date of the $30,929.12 check, or the date that check was presented for payment, facts within the Government's control. We find the date of receipt of the $30,929.12 payment was 6 July 1994.

55. Appellant did not demand the additional penalty payment as referred to in the Prompt Payment for Construction Contracts clause at (a)(6).

Decision on Interest Under the Prompt Payment Clause of the Contract

Appellant claims a right to interest in the amount of $385.55 because the Government did not pay until 6 July 1994 the invoice submitted 6 April 1994 as to which the Government's only objection was that the invoice was not reduced for unspecified liquidated damages. According to the Prompt Payment for Construction Contracts clause in the contract, interest is due fourteen days after receipt by the Government on those undisputed portions of an invoice which is in all other respects, proper. *Donohoe Construction Company*, ASBCA Nos. 47310 *et al.*, 98-2 BCA ¶ 30,076 at 148,834. We found payment was due on the 5 April 1994 invoice in the amount of $37,910.27 (which was not reduced for liquidated damages of $7,044.04), on 20 April 1994. Also we found payment was due on the 1 June 1994 invoice in the amount of $30,929.12 (which was reduced for liquidated damages), on 15 June 1994.

We are mindful that as early as 23 March 1994 the Government was requesting additional information from appellant to determine any offsets from the liquidated damages claimed by the Government. However, we are given no justification why the Government did not pay appellant $30,866.23 by 20 April 1994 ($37,910.27 reduced by liquidated damages of $7,044.04), and pay the balance due appellant of $62.89 by 15 June 1994.

Accordingly, appellant is entitled to Prompt Payment Act interest on the amount of $30,866.23 from 20 April 1994 until paid on 6 July 1994, and Prompt Payment Act interest on $62.89 from 15 June 1994 until paid on 6 July 1994. This item is sustained and remanded to the contracting officer for calculation of quantum.

Findings of Fact on Claim Preparation

56. In its claim appellant included as its tenth and final item, a demand for $12,107.42 for claim preparation and stated (R4 tab 79 at 10.1.1):

> The preparation of the claim required time spent by various Atherton Construction personnel. We request equitable adjustment for the time spent in preparing the claim.

57. The contract was completed 9 March 1994 (tr. 1/166). All the hours claimed for preparation of the claim were incurred between 14 March and 3 November 1994 (tr. 1/167-69; R4, tab 79 subsection 10). Approximately half of the total claimed hours (191 of the 406) were incurred by appellant's on-site project superintendent who did not testify (R4, tab 79 subsection 10).

58. Of the 68 hours attributed to Mr. McKinney, approximately half consists of travel time to and from Fort Sill, Oklahoma (tr. 1/76, 79) and the remainder is the time required to pull and research time cards and organize correspondence (tr. 1/80).

59. Appellant made the decision to prepare the claim and was not directed to do so by any Government personnel (tr. 1/164).

60. There is no evidence from which we can infer the costs had a beneficial nexus with the contract administration or performance.

Decision on Claim Preparation

Costs of claim preparation are unallowable. FAR 31.205-47(f)(1); *Beckman Construction Co.*, ASBCA No. 48141, 96-1 BCA ¶ 28,205.

In its reply brief appellant states at 48:

> Respondent is correct that Atherton is not entitled, under existing legal precedent, to costs of claim preparation incurred after a dispute. . . .
>
> However, there are portions of the claim, such as preparation of cost proposals on penetrations, that were undertaken as part of negotiations and which are recoverable.

Appellant has not attempted to segregate any of the "cost proposals on penetrations," assuming they were other than the rejected proposal described at findings 20-21, or given us further information on these costs that seemingly were included within the claim. We have no basis upon which to grant this demand by appellant. This item is denied.

SUMMARY

Appellant's appeal is sustained and remanded to the contracting officer to determine the amounts together with CDA interest due appellant for:

1) Framing out walls because the tub drains were immobile;
2) Labor costs for out-of-sequencing of work;
3) Prompt Payment Act interest on the amount of $30,866.23 from 20 April 1994 until paid on 6 July 1994, and Prompt Payment Act interest on $62.89 from 15 June 1994 until paid on 6 July 1994;
4) Liquidated damages assessed at the rate of $66 per day ($4,026);
5) Liquidated damages to be remitted, if any, on the individual units in accordance with this decision; and
6) The three items as to which the Government conceded liability as to entitlement, to the extent they have not been resolved.

The appeal is in all other matters denied.

Dated: 31 May 2000

JEAN SCHEPERS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Acting 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. 48527, Appeal of Atherton Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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