ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of -- | ) | |
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| Standard Coating Service, Inc. | ) | ASBCA Nos. 48611and 49201 |
| | ) | |
| Under Contract No. N62472-93-C-5008 | ) | |

APPEARANCE FOR THE APPELLANT: Patrick Stern, Esq.
Indianapolis, IN

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Chuck Kullberg, Esq.
Senior Trial Attorney
Naval Facilities Engineering Command
Washington, D.C.

OPINION BY ADMINISTRATIVE JUDGE MOED

ASBCA No. 48611 is an appeal from the termination for default of a construction-type contract for painting of fuel piping and a supporting trestle at a naval installation. ASBCA No. 49201 is an appeal from the deemed denial of money claims submitted by appellant (hereinafter referred to as "SCS") for an unpaid portion of the contract price and for various alleged constructive changes.

FINDINGS OF FACT

1. These appeals relate to a fixed-price contract, in the amount of $175,000, which was awarded to SCS through sealed bidding on 23 September 1993 for painting fuel piping and structural steel trestles supporting the piping at the Naval Air Warfare Center (NAWC), Trenton, NJ. The trestles and supported piping were arranged in four sections, referred to by the parties as Sections 1, 2, 3, and 4. Section 09900, ¶ 1.9 of the specifications contains a separate, self-contained description of each section. In its performance of the work, SCS would complete all operations on an individual section before starting work on the next one (tr. 1/154).

2. The contract contains the standard clauses for fixed-price construction contracts awarded through sealed bidding, including the following: "Payments under Fixed Price Construction Contracts (APR) (1989)," FAR 52.232-5; "Site Investigation and Conditions Affecting the Work (APR) (1984)," FAR 52.236-3; "Permits and Responsibilities (NOV 1991)," FAR 52.236-7; "Changes (AUG 1987)," FAR 52.243-4; "Inspection of Construction (APR 1984)," FAR 52.246-12; "Default (Fixed-Price Construction) (APR

1984)," FAR 52.249-10; "Liquidated Damages-Construction (APR) (1984)," FAR 52.212-5; and "Disputes (DEC 1991),"FAR 52.233-1.

3. The completion date set forth in the contract, as awarded, was 24 August 1994. Section 01011, ¶ 1.5.2.1 of the specifications provides for liquidated damages for late completion at the rate of $200.00 for each day of delay. The completion date reflects a provision, added by Amendment 003 to the solicitation, stating that "work on site" was not to begin until 15 April 1994. That work consisted of pressure washing of surfaces, pretreatment and painting (tr. 1/32). Required activities outside the ambit of "work on site," such as submittal of various plans and schedules, were not affected by that provision.

4. Under § 01400, ¶ 1.6.3 of the specifications, SCS was required to submit a quality control plan, which was required to be approved prior to the start of construction. The plan, as originally submitted, was disapproved on 13 April 1994. SCS does not contest the disapproval. A revised plan had not been submitted as of 9 June 1994, almost two months after the date prescribed in the contract for commencing work on site (finding 3). (R4, tab 13)

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5. On 5 July 1994, SCS mobilized on site for the performance of work (R4, tab 48; tr. 1/73). On 12 September 1994, the contracting officer issued a "show cause notice," essentially in the form set forth in FAR 49.607, inviting SCS to present facts bearing on the question of whether the delay in performance of the contract was due to excusable causes (R4, tab 28). Previously, by letter to the contracting officer dated 16 August 1994 (ASR4, tab 6), SCS had requested an extension of the completion date from 24 August to 31 October 1994. The record does not disclose any response to that letter.

6. SCS responded to the show cause notice by letter dated 30 September 1994 (Rule 4, tab 40). Citing various alleged acts and omissions on the part of the Government, which are also the bases of the monetary claims in ASBCA No. 49201, addressed later in this decision, SCS claimed that the entire completion delay was excusable. SCS also made the following offer:

> [SCS] will agree to finish sections 1, 2, and 3 using brush and roll application by 30 November 1994 for $175,000. [SCS] will complete section 4 for: 1) $79,000 using spray application or 2) $89,000 using brush and roll.

The record does not indicate how SCS arrived at the above amounts for completion of Section 4.

7. At a meeting with SCS subsequent to receipt of the letter of 30 September 1994, the contracting officer denied the request for an additional payment for performance of the work on Section 4 on the basis that it had not been shown that SCS was entitled under the contract to an increase in price. He directed SCS to "continue working and finish the project in all due course, as quickly as possible" (tr. 2/143). Mr. Arup Das, the president of SCS, opposed that course of action for several reasons. First, during November, 1994, when Section 4 would be reached, following completion of Sections 1-3, it could be anticipated that outdoor temperatures would fall below the minimum values prescribed in the specification for application of coating. Section 09900, ¶ 1.7.1 of the specifications prohibited the application of oil-based paints when the surface temperature was less than 40° F. and less than 50° F. in the case of latex-based paints. SCS was worried about the possibility of periods of good weather for painting being followed by intervals of lower temperatures requiring a suspension of work. In the view of SCS, performing work on such a "stop and go" basis was "economic suicide." (Tr. 2/327, 333)

8. SCS believed that the best course was to start work on Section 4 in April-May, 1995 and asked for extension of the contract completion date until the actual completion of the work at that time. Mr. Das stated that the liquidated damages that would accrue until completion, for lack of that extension, would leave SCS financially unable to perform the work on Section 4 (tr. 2/147, 152). He also reiterated the request, made in the letter of 30 September 1994 (finding 6), for an additional payment for performing the Section 4 work. He stated that he "had spent nearly the amount of his bid on the first three sections and that without additional money, he could not complete the fourth section" (tr. 2/152). He "could not afford [to] and would not go bankrupt to complete this job" (tr. 2/148). The contracting officer did not agree to the requested time extension, stating, instead, that liquidated damages would be assessed for the entire period of delay in completion of the work, beginning with the completion date in the contract, 24 August 1994 (tr. 2/144).

9. SCS completed work on Sections 1, 2, and 3 on 9 November 1994. The Government conducted a punch list inspection on that day for those sections which resulted in a finding that "all items on [the punch] list were taken care of on this date" (R4, tab 49, Report No. 15). The inspection was conducted without waiting for completion of Section 4 inasmuch as SCS had given notice that it was demobilizing and departing from the site upon completion of Sections 1-3. Prior to demobilization and departure from the site on 12 November 1994, SCS returned all equipment rented for the work including the scissor jacks and scaffolds. These were used for above-ground work and, as such, were needed for Section 4 (tr. 1/155). Unexpended paint was returned to vendors for credit. SCS believed that it made more sense to "buy fresh in the spring" (tr. 2/328-29). Mr. Das hoped that "some kind of a deal" could be worked out that would allow SCS to return the site in the Spring of 1995 for completion of the work (tr. 2/331, 333-34).

10. The contracting officer's letter dated 18 November 1994 (R4, tab 45), issued after SCS had demobilized and departed the site, responded to the SCS letter of 30 September 1994. The contracting officer denied that the delay of completion was excusable in any part and also denied any fault or responsibility of the Government concerning the other matters alleged by SCS. He directed SCS to "begin preparation and painting of section 4 of the fuel pipe trestle as specified and complete all piping and conduit identification on sections 1-4" and "to begin the work on site by November 28, 1994."

11. The contracting officer's above direction was accompanied by the following:

> Although you may not agree with the Navy's position regarding the matters addressed herein, you are directed to comply with our instructions and proceed diligently with performance of the contract pending a final resolution of any of your requests for relief or claims in accordance with the Disputes Clause of your contract.

12. The contracting officer also instructed SCS that:

> Your performance must be accompanied by a reasonable schedule, for our approval, which shows the duration of the work, dates of delivery, and final completion. You must also provide a written commitment stating that you are going to perform the remaining contractual obligations as stated above.

(R4, tab 45)

13. During the entire month of November, 1994, the actual outdoor daytime temperatures ranged between 45° F. and 65° F., which was unusually warm for November in that area (tr. 2/92-93). In addition, SCS had a well-experienced crew of 6-8 workers on the site at the time of completion of Sections 1-3 on 9 November 1994 (finding 9) which would have allowed completion of work on Section 4, probably in two to three weeks. (R4, tab 72 at 2; tr. 1/203-04)

14. SCS did not resume work as directed by the contracting officer nor did it comply with any other directions contained in the letter of 18 November 1994. Indeed, the first subsequent communication from SCS was a letter, dated 28 December 1994 (R4, tab 46), from Mr. Stern, counsel of record for SCS in this appeal, informing the contracting officer that a claim against the Government with respect to this contract was in preparation and that SCS was "due about $150,000 from the United States Government." The letter also contains the following:

> [SCS] has authorized me to propose $49,500.00 as additional work to be done on section 4. This means the total contract price would be $214,000.00. [SCS] will start April 15, 1995 and will want 90 working days to finish. *These offers will be withdrawn if an agreement cannot be reached or a claim has to be filed.*

(*Id*., emphasis inserted)

15. On 3 January 1995, the contracting officer issued a written decision, conforming to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, terminating the contract in whole for default for "failure to perform, failure to make progress in the work, and breach of contract" (R4, tab 47). An appeal timely taken from that decision was docketed as ASBCA No. 48611.

16. *Claims of Government-Responsible Delay* - According to SCS, the entire 132 days of completion delay from expiration of the completion date stated in the contract (24 August 1994) until the default termination of the contract (3 January 1995) was caused by various Government-responsible acts and omissions, as enumerated in letters to the contracting officer dated 16 August 1994 and 30 September 1994 (findings 5, 6). SCS, however, adduced evidence as to only one of these listed causes, namely, the requirement for application of a full primer coat (finding 30). That evidence consists of testimony of Mr. Das that application of a full primer coat caused a 70 day increase in the time required for completion of work on Sections 1-3 (tr. 2/321). There is no evidence as to the effect of said requirement on the time for completion of the contract as a whole.

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17. On 3 July 1995, subsequent to the termination of the contract for default, SCS submitted various money claims to the contracting officer, in the total amount of $204,984.00. The document setting forth the claims was certified in conformity with the CDA and was received by the contracting officer on 10 July 1995. Of the total amount claimed, $104,065.00 was for the unpaid balance of the contract price. The remaining amount claimed, namely, $100,919.00, was for other monetary claims based on alleged Government-responsible acts and omissions. The submittal was accompanied by a request for issuance of a contracting officer's decision within 60 days. (R4, tab 74) The requested decision had not been issued as of 28 September 1995. On that date, SCS appealed to the Board from the deemed denial of its claims. The appeal, docketed as ASBCA No. 49201, relates to the claims set forth below.

18. *Claim for Unpaid Balance of Contract Price* - This claim was based on 94 percent physical completion of the contract (R4, tab 74). That percentage is incorrect. In its last invoice for payment, submitted on 9 December 1994 after it had completed Sections 1-3 and demobilized from the site, SCS stated the percentage of completion to

be 70 percent (R4, tab 54). That percentage of the contract price had been accepted by the Officer in Charge of Construction (OICC) in certifying the invoice for payment. On the final invoice, SCS was paid the amount of $8,732.00. In all, the Government withheld $12,065.00 in retentions. It is likely that the retentions relate solely to Sections 1-3 inasmuch as no work was performed on Section 4. The OICC also withheld $50,000.00 for liquidated damages from 24 August 1994, the completion date stated in the contract, until 1 May 1995, which was the estimated date for completion of the Section 4 work under a reprocurement contract (tr. 2/20, 22).

19. The "Liquidated Damages-Construction (APR 1984)" clause of the contract, FAR 52.212-5, provides that in the event of termination of the contract for default, liquidated damages are assessable "until such reasonable time as may be required for final completion of the work." On 12 April 1995, the OICC issued a sealed-bid solicitation for reprocurement of the work left uncompleted as the result of the default termination of this contract, consisting primarily of Section 4 of the fuel piping trestle (app. supp. 4, tab 17). After issuance of the solicitation, the Navy decided to close NAWC Trenton. As a result, the solicitation was canceled and the work was never completed.

*Other Monetary Claims*

20. *Cleaning of Metal Surfaces* - The trestles and piping were covered by corrugated metal roofing. Paragraph 1.9 of § 09900 of the specification required SCS to "prepare and paint" various installations including "the underside of the corrugated roofing." SCS claims that while cleaning the underside of the roofing, on all of Sections 1-3, it encountered a gritty substance, with the texture of sandpaper, deposited on the surface, which could not be removed with pressure-washing, necessitating, instead, hand scraping with wire brushes, which involved many additional man-hours of effort, slowing down the progress of the work and delaying the completion of the contract work.

21. The specification, however, prescribed a method for cleaning the roofing which was different from that employed by SCS. The roofing material was painted aluminum metal (tr. 1/163, 2/364). The method of cleaning prescribed in ¶ 3.1.4 of § 09900 of the specifications for "aluminum [and] other non-galvanized and non-ferrous surfaces" was "surface cleaning" whereby SCS was required to "[s]olvent clean in accordance with SSPC [Steel Structures Painting Council] SP1 and wash with a mild detergent to remove dirt and water soluble contaminates." SCS did not prepare the surfaces in accordance with these provisions. Instead, it employed the method prescribed in ¶ 3.1.1. of § 09900 of the specification for preparation of ferrous surfaces, namely, high pressure washing with water followed by cleaning with mechanical tools. There is no explanation in the record for the use by SCS of the incorrect cleaning method.

22. The alleged gritty substance was not reported to the contracting officer during the course of the work. Mr. Jim Gittings, the Government's construction representative, was never shown any gritty substance. The only condition on the underside of the trestle

roofing shown to him by SCS were some spots of oil, presumably from leakage, located predominantly in Section 3. (Tr. 2/366-68)

23. *Hanging of Side Tarpaulins* - Section 09900, ¶ 3.15 of the specifications ("Containment of Removed Paint and Rust") required SCS to "spread tarps under the fuel trestle to catch old paint and rust scraped off the fuel trestle and piping" and thereafter "gather the debris falling on the tarps daily" for collection. Other provisions of the contract imposed general requirements for cleanliness of the site. Under the "Cleaning Up (APR 1984)" clause, FAR 52.236-12, SCS was required "at all times [to] keep the work area . . . free from accumulations of waste materials." Section 01011, ¶ 3.3.11 of the specifications ("Extraordinary Cleanup Requirements") is to the same effect. During performance, the Government's construction representative, Mr. Gittings, instructed Mr. Jeffrey Hopson, the site superintendent for SCS, to hang tarpaulins also on the sides of the work area. This was intended to prevent dispersal, over surrounding areas, of debris that had been loosened from piping and other surfaces during cleaning operations.

24. The contract does not specifically require deployment of side tarpaulins and they were not needed. Under SCS' plan, which was feasible, any debris in the surrounding area would have been cleaned up by one man at the end of the work day. The deployment of side tarpaulins required greater effort, namely, one and one-half crew hours each day. (Tr. 2/233) Section 01010, ¶ 3.9 ("Optional Requirements") of the specifications provides that "[w]here a choice of materials or methods, or both, is permitted in this contract, the Contractor will be given the right to exercise the option unless otherwise required by the specification." SCS, however, complied with Mr. Gittings' direction. It did not complain or object thereto until its letter of 30 September 1994, responding to the Government's show-cause letter (finding 6). There it was asserted for the first time that the direction for deployment of side tarpaulins was beyond the contract requirements. SCS also claimed that the direction caused delay of completion of the contract (finding 16). There is no support in the record for the latter claim.

25. Under ¶ (d) of the "Inspection of Construction" clause of the contract, a Government inspector (now termed "construction representative") was not "authorized to change any term or condition of the specification without the contracting officer's written authorization." There is no evidence that such authorization was obtained with respect to the direction issued by Mr. Gittings.

26. *Limitations on Pressure Washing* - Section 09900, ¶ 3.1.1 of the specifications called for pressure washing prior to painting in order to remove bird droppings and mildew from the piping and pipe trestle supports. At the hearing, Mr. Hopson testified that he was directed by Mr. Gittings to limit the amount of pressure washing each day to the surfaces that would be painted on the same day (tr. 2/227). The specification does not contain such a limitation. SCS asserted that it was thereby prevented from making from full use, each day, of the crews and equipment deployed for these operations. This matter

is not among the claims contained in the SCS claims submittal of 3 July 1995, the deemed denial of which is the basis of the appeal in ASBCA No. 49201. It has not been separately submitted as a claim for decision by the contracting officer. Mr. Hopson's testimony is the first and only assertion of this matter.

27. *Spray Painting* - Section 09900, ¶ 3.2.2 of the specification requires that coatings be applied with "approved brushes and rollers." It is also stated that "NO PAINT SPRAYING SHALL BE PERMITTED" (Upper case and emphasis in original). In a letter dated 18 July 1994, SCS requested that the specifications be changed so as to permit spray painting of pipes, work platforms and the undersides of trestle roofs (R4, tab 15). SCS contended that certain sections of piping were not accessible to "an average size person" for application of paint by brush or roller.

28. In a letter dated 21 July 1994 (R4, tab 17), the Resident Officer in Charge of Construction (ROICC) denied the request stating that "[a]ll painting work can be performed by brush or roller and has been done so in the past." There is no evidence to the contrary and, accordingly, we find this statement to be fact. Specification § 09900, ¶ 3.2.1.c requires that finished surfaces be free from various imperfections including "brush marks." The record contains a letter to SCS, dated 7 August 1994, from Mr. Malcom McNeil, a coatings consultant stating that the thickness of the MIL-P-24441 paint specified in § 09900, ¶ 4.1 for the prime and intermediate coats is such that when applied by brush or roll "the resulting film will not be uniform and will most likely have brush marks" and that "application by spray will produce a uniform film providing longer lasting protection and a better appearance" (R4, tab 21). On the foregoing basis, SCS contends that there is a conflict and inconsistency between ¶¶ 3.2.1.c and 4.1 of § 09900 of the specifications. There is no evidence, however, of the presence of brush marks on the MIL-P-24441 coatings applied by SCS or that any work performed by SCS was rejected by the Government for that reason.

29. The prohibition of spray painting in the specification reflected long-standing practice at NAWC, Trenton. Windy conditions prevailed at that location because of its proximity to an airfield, creating substantial possibility for dispersion of spray. Because of the epoxy base of the paint, oversprayed paint was not easily removed (tr. 1/162). In its letter of 18 July 1994, SCS proposed to overcome the problems of overspray by various means including: (a) spray painting only a limited portion of the surfaces; (b) installing plastic tarpaulins around the work areas so as to contain any overspray; (c) performing spray painting only after the end of the workday at NAWC Trenton and on weekends when fewer vehicles would be parked near the work site; and (d) using narrow-fan spray tips and lower spray pump pressure.

30. *Full Prime Coat Vs. Spot Priming* - Section 09900, ¶ 4.1 ("Painted Surfaces") of the specification provides as follows:

> All surfaces to be painted shall receive a prime coat and intermediate coat each conforming to MIL-P-24441. Form 150. . . . All surfaces shall then receive a finish coat conforming to MIL-P-83286 with a dry film thickness of 1.5 to 2.0 mils.

31. Section 09900, ¶ 3.2.1 ("Coating Application") contains the following in subparagraph b. ("Primers and Intermediate Coats"):

> Each coat shall cover the surface of the preceding coat or surface completely and there shall be a visually perceptible difference in shades of successive coats.

32. SCS formulated its bid on the basis of spot priming only, *i.e.*, applying primer coat only on those portions of the surface where the existing coat had been removed during cleaning so as to expose bare metal. Spot priming would be followed by application of full intermediate and finish coats as provided in the specifications. The basis of the plan to spot prime only, was based upon, and was in conformity with, Table 1 of SSPC-PA, Guide 4, November 1, 1982 (tr. 2/253; app. supp. R4, tab 30). Section 09900, ¶ 1.1. ("References") lists six publications issued by the SSPC. Paragraph 1.1. of § 09900 states that listed publications "form part of this specification to the extent referenced." All of the listed SSPC publications are referred to in § 09900. Of particular interest is the reference contained in ¶ 3.1.2 of § 09900 ("Preparation of Metal Surfaces - Final Ferrous Surface Condition") which uses particular photographs in another SSPC publication to define the required appearance of "Rusted" and "Rusted and Pitted" ferrous surfaces after hand tool and power tool cleaning. SSPC-PA, Guide 4 relied upon by SCS is not listed or referred to in § 09900.

33. Mr. Das, the president of SCS, testified that Table 1 of SSPC-PA, Guide 4 stated industry practice with regard to application of primer in maintenance painting of structures. Table 1 contains a column titled "Paint System Condition," describing various rust conditions ranging from "Nondeteriorated (0 to 0.1% rust)" to "Totally Deteriorated (50 to 100% rust)." In another column of Table 1, titled "Cleaning and Painting Recommended," spot priming is specified for all conditions other than "Totally Deteriorated." For that condition alone, Table 1 requires that primer be applied "over entire repaint area." There is no evidence that the contents of Table 1 constitute existing industry practice.

34. *Hand Tinting of Paint* - Based on the interpretation that spot priming only was required, SCS believed that the requirement of § 09900, ¶ 3.2.1 ("Coating Application") for a "visually perceptible difference in shades of successive coats" (finding 31) did not restrict the choice of a color for the intermediate (second) coat inasmuch as any color chosen for that coat would be different from the mottled appearance of the base coat which would be the existing paint (gray color) with spot-priming (white color).

Accordingly, SCS believed that the requirement for "visually perceptible difference in shades of successive coats" applied only as between the intermediate (second) and final (third) coats. (Tr. 2/296-99)

35. SCS had intended to apply white paint for the second coat. After the Government's direction that the white-colored primer be applied as a full coat, it became necessary for SCS to change the color of the second coat from white to another color. The process of changing the color of the paint purchased for the second coat from white to another color through the addition of of a different-colored paint is referred to as "tinting." This was a time-consuming process in two respects. First, care had to taken to accurately duplicate the tint throughout the project. Second, because of the presence of a hardening agent in the paint, the quantity to be tinted at any one time was limited to the amount to be used on that day or during the next few hours. If the paint was not used within that time, it would harden in the can, becoming unusable. (Tr. 2/220) SCS seeks to recover the added cost incurred for tinting the intermediate coat.

36. *VOC Requirements* - The laws of the State of New Jersey relating to air pollution control authorize the cognizant state agency to implement "control technology rules" and "new source review regulations" with respect to "volatile organic compounds" (VOC) "as defined by the EPA [Environmental Protection Agency] in rules and regulations adopted pursuant to the federal Clean Air Act at 40 CFR 51.100 or any subsequent amendments thereto." N.J. Rev. Stat. § 26:2C-2 (1999). Under the EPA regulations, a VOC is defined, with stated exclusions, as "any compound of carbon . . . which participates in atmospheric photochemical reactions." 40 C.F.R. § 51.100(s)

37. The claim here relates to the paint to be applied for the prime, intermediate, and finish coats. The specifications, in § 09900, ¶ 4.1, designate paint conforming to MIL-P-24441, Form 150 for the prime and intermediate coats and to MIL-P-83286 for the finish coat. At the outset, SCS planned to purchase said paints from the Glidden Paint Co. In January, 1994, however, Glidden notified SCS that it could not supply materials conforming to MIL-P-83286 inasmuch as its product did not comply with regulations of the State of New Jersey. The Sherwin-Williams Co., however, was able to supply both types of paint in conformity with the New Jersey VOC regulations (R4, tab 55), but at prices higher than those quoted by Glidden. SCS purchased and used the Sherwin-Williams paints for this contract and now seeks to recover the differences in cost between these products and those offered by the Glidden Co. (tr. 2/282). Section 09900, ¶ 3.1.3 requires the application of DOD P-15328 ("Primer (Wash) Pretreatment") liquid for pretreatment of galvanized and aluminum surfaces. SCS asserts that this material also was not VOC compliant and, therefore, was not used. The claim which is the subject of this appeal does not include any increased costs for this item (R4, tab 74).

38. Under the "Permits and Responsibilities" clause of the contract, SCS was charged with "complying with any Federal, state, and municipal laws, codes and regulations." In addition, under § 01560, ¶ 1.3 ("Environmental Protection

Requirements") of the specifications, SCS was obligated to "[c]omply with Federal, state and local regulations pertaining to the environment, including but not limited to water, air, and noise pollution."

39. *Length of Piping and Trestles* - Paragraph 1.9 ("Description of Work") of § 09900 of the specifications contains detailed descriptions of the installations to be painted under the contract. The first subparagraph of ¶ 1.9 is as follows:

> The work to be painted includes a structural steel fuel piping trestle and the piping supported by the trestle. The trestle's total horizontal length is 1584 feet plus the additional structural steel and piping associated with 5 horizontal expansion loops. The fuel trestle varies in height from 4 feet to 33 feet high. The work also includes the 29 vertical feet of piping associated with the change in elevation.

40. The trestle was comprised of four sections each of which is separately described in detail in the succeeding paragraphs of ¶ 1.9. The lengths of trestle for each section, as stated at the beginning of each description, are as follows: Section 1 - 384 feet; Section 2 - 421 feet; Section 3 - 439 feet; and Section 4 - 240 feet. SCS based its bid on the total of these amounts, namely, 1,484 feet (tr. 2/248). The record does not explain the difference between that amount and the total of 1,584 feet stated to be the total horizontal length in the first paragraph of ¶ 1.9 (finding 39).

41. SCS contends that the actual lengths were greater than those stated in ¶ 1.9 and seeks to recover the resulting added costs. The evidence for that claim is a report, dated 22 September 1994 (R4, tab 34), prepared by Trenton Engineering Co., ("Trenton") and commissioned by SCS, as to the "linear feet of pipe measured and marked physically in the field from point to point" with respect to Sections 1-4. Trenton reported that the total actual length of piping was 1,767 linear feet comprised of the following: Section 1 - 363 linear feet; Section 2 - 545 linear feet ; Section 3 - 492 linear feet; and Section 4 - 367 linear feet. Although the lengths reported by Trenton appear to be greater than those stated in the specification, the two sets of data are not comparable. First, Trenton measured the length of piping whereas the specifications set forth lengths of trestle. Second, Trenton's measurements are stated in linear feet which takes into account the slope of the piping, incorporating both vertical and horizontal components (tr. 1/196). The specification, however, sets forth horizontal lengths only, except for a single total of 29 vertical feet allowed for "change in elevation" (finding 39). The record does not afford any means for allocating those 29 vertical feet among the individual horizontal lengths. Third, the routes followed by Trenton in measuring piping, as set forth in the report, are different from the routes of the stated lengths of trestle, as set forth in the specifications. Testimony from Trenton might have dissipated these apparent differences and shown comparability of the two sets of data. That evidence was not provided. On

this record, there is not a preponderance of evidence that the lengths of trestle stated in the specifications were erroneous.

## DECISION

*ASBCA No. 48611 - The Termination for Default*

The date stated in the contract for completion of work was 24 August 1994 (finding 3). As of 12 September 1994, the work had not been completed. On that date, the contracting officer sent a show cause notice to SCS asking for any facts that might indicate that the delay was excusable. SCS responded by letter of 30 September 1994 setting forth various matters which were allegedly the fault of the Government and which were claimed to have rendered the entire delay excusable. In addition, SCS proposed the re-pricing of the contract whereby it would "agree to finish" Sections 1-3 at the original awarded price of $175,000 and "complete" Section 4 for an additional payment ($79,000 for spray painting; $89,000 if brush or roll application were required). The additional amount demanded was not requested as compensation for the alleged Government-responsible items and the basis thereof was not stated.

The demand for an extra payment for painting Section 4 was the first of several demands asserted by SCS as preconditions to completion of the work. SCS also wished to postpone the painting of Section 4 until the Spring of 1995. At a meeting held after the Government's receipt of the above SCS response, the contracting officer directed SCS to "continue working and finish the project in all due course, as quickly as possible" (finding 7). That would mean starting Section 4 in November, 1994 following completion of Sections 1-3. SCS did not wish to undertake painting of Section 4 at that time because of the risk of outdoor temperatures falling below the minimum values in the specification for application of coating. SCS felt that it was "economic suicide" to proceed with that work at that time of the year.

In connection with that demand, SCS asked for an extension of the completion date in the contract until the actual completion of the work in the Spring of 1995. Coupled with its claim that the prior delays were excusable, this would have resulted in completely freeing SCS from liability for liquidated damages. SCS asserted that if had to pay liquidated damages, it would be financially unable to complete the contract. In the same vein, SCS stated that without an additional payment for painting Section 4, it could not complete that work. SCS said that "could not afford [to] and would not go bankrupt to complete this job." (Finding 8)

SCS asserted in its letter of 30 September 1994 that all delay that had occurred was excusable. To be entitled to a time extension on that basis, SCS was obliged to show that the individual alleged causes of delay were of an excusable nature and had increased the time for performance of the contract as a whole. *Essential Construction Co. & Himount Constructors, A Joint Venture,* ASBCA No. 18491, 78-2 BCA ¶ 13,314.

Of all of the causes listed in the letter of 30 September 1994, and later reiterated as the basis of the monetary claims, the only one as to which there is even an assertion of completion delay is the claim based on the Government's insistence upon application of a full primer coat, versus spot priming which had been intended by SCS in bidding on the contract. SCS claimed, without offering any supporting evidence, that compliance with this requirement added approximately 70 days to the time for completion of sections 1-3 (finding 16). Even if there were evidence of such delay, it would not qualify as excusable. As noted later herein, the application of a full primer coat was an existing contract requirement. As such, the work was required to be accomplished within the time allowed in the contract for completion of the entire work and SCS is not entitled to excusable delay therefor. Based on the foregoing record, SCS was not entitled to extension of the completion date for excusable delay. Accordingly, the period of 132 days from 24 August 1994, the completion date stated in the contract (finding 3), until the termination for default on 3 January 1995 (finding 15) was entirely nonexcusable delay.

SCS, likewise, was not entitled to postpone the completion of the contract until the Spring of 1995. The risk of outdoor temperatures in November, 1994 that were too low for painting did not excuse proceeding with the work at that time. There was no prohibition in the contract against painting in November or in any other month of the year. The actual weather conditions throughout November, 1994 were favorable for painting and SCS had an experienced, adequate-sized crew on site. (Finding 13)

It was immaterial that the liquidated damages assessable for completion delay would be financially ruinous to SCS, leaving it without funds to complete the contract. In undertaking the contract, SCS "assumed the risk of providing funds sufficient to perform the contract [and] neither undercapitalization nor insolvency (actual or impending) will excuse a failure to perform." *El Greco Painting Co.*, ENG BCA No. 5693, 92-1 BCA ¶ 24,522 at 122,378. The absence of needed funds would excuse performance if that condition was due to a cause for which the Government was responsible. *Preuss v. United States*, 412 F.2d 1293, 1302 (Ct. Cl. 1969). In the present case, however, the withholding of liquidated damages was occasioned by delay in completing the contract for which SCS was responsible.

SCS was not entitled to condition the completion of the contract on the payment of an additional amount for the work in Section 4. The price of that work was included in the awarded price of the entire contract. If SCS believed that it was entitled to an increase in the contract price for any reason, it was obliged to submit a written claim to the contracting officer therefor. Even in that instance, it was not entitled to stop work until decision, let alone payment, of such claim. Instead, as required by the "Disputes" clause of the contract, it was obligated to "proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer." The term "decision" includes an order issued by the contracting officer during

the course of performance even if not issued in the form of a written decision under the CDA. *Norcoast-Beck Constructors, Inc*., ASBCA No. 25261, 83-1 BCA ¶ 16,435. On 18 November 1994, the contracting officer issued a direction to "begin preparation and painting of section 4 of the fuel pipe trestle as specified and complete all piping and conduit identification on sections 1-4" and "to begin the work on site by November 28, 1994." The direction was entirely disregarded by SCS. The only response by SCS was a reiteration of the demand for an extra payment for Section 4 as a condition to proceeding with that work in the Spring of 1995. (Finding 14) The failure and refusal to comply with the contracting officer's direction, by itself, constituted a sufficient basis for the subsequent termination for default. *Stoeckert v. United States*, 391 F.2d 639 (Ct. Cl. 1968)

ASBCA No. 49201

*Claim for the Unpaid Balance of the Contract Price*

In making payments under the contract, the OICC withheld $50,000.00 for liquidated damages from 24 August 1994, the completion date stated in the contract, until 1 May 1995, which was the estimated date for completion of the Section 4 work under a reprocurement contract (finding 18). The Government was entitled to payment of liquidated damages for 132 days of nonexcusable delay at the prescribed rate of $200.00 per day for a total of $26,400.00. That leaves an excess deduction, payable to SCS, in the amount of $23,600.00.

SCS is not liable for liquidated damages after 3 January 1995, the date of the default termination. The "Liquidated Damages-Construction (APR 1984)" clause of the contract, FAR 52.212-5, provides that in the event of termination of the contract for default, liquidated damages are assessable "until such reasonable time as may be required for final completion of the work." Here, the reprocurement was canceled after issuance of the solicitation without making any award (finding 18). Liquidated damages may not be recovered for the period of the attempted, but uncompleted, reprocurement. The Government may not collect liquidated damages for work that it has decided that it does not want. *Manart Textile Co. v. United States*, 77 F. Supp. 924, 927, 111 Ct. Cl. 540, 550 (1948); *Tennis Court Specialties, Inc*., ASBCA No. 25510, 82-2 BCA ¶ 16,054 at 79,647.

The final payment invoice shows retentions by the Government totaling $12,065.00 (finding 18). The "Payments" clause of the contract provides that upon substantial completion of the work, "the Contracting Officer may retain from previously withheld funds . . . that amount the Contracting Officer considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds." As of 3 July 1995, the date on which SCS submitted its monetary claims, there was no need for further retention of these funds. The work on Sections 1-3 had been completed and accepted; the Government had decided against reprocurement of the Section 4 work;

and the amount deducted for liquidated damages was more than sufficient to satisfy that liability. On that record, continued retention of the withheld amount after receipt of the claim was unjustified and said amount should have then been paid to SCS. *Orbas & Associates,* ASBCA Nos. 32922, 33329 *et al.*, 87-3 BCA ¶ 20,051 at 101,525-26

*Other Monetary Claims*

*Cleaning of Metal Surfaces* - SCS claims that in the course of cleaning the undersides of the corrugated roofing, on all of Sections 1-3, it encountered a gritty substance, deposited on the surface, which could not be removed with pressure-washing, necessitating, instead, hand scraping with wire brushes, which involved many additional man-hours of effort, slowing down the progress of the work. (Finding 20)

The above-described methods employed by SCS were not those prescribed in the specification. The corrugated roofing was made of painted aluminum metal which was to undergo "surface cleaning" described as "[s]olvent clean in accordance with SSPC SP1 and wash with a mild detergent to remove dirt and water soluble contaminates" (finding 21). SCS is not entitled to recover on this claim inasmuch as the added costs incurred resulted from its own error and not from any fault of the Government.

*Limitations on Pressure Washing* - At the hearing, Mr. Hopson, the job superintendent for SCS, testified that he had been ordered by Mr. Gittings, the Government's construction representative, to pressure wash only as much as could be painted on the same day with the result that SCS was prevented from making full use, daily, of the crews and equipment deployed for these operations. We have no jurisdiction, however, to address the merits of this matter. It is not the subject of a written claim from SCS, submitted to the contracting officer, seeking added compensation in a sum certain and certified under the CDA, if necessary. (Finding 26) For lack of such a claim, it is necessary to dismiss this matter for lack of jurisdiction, without prejudice, however, to resubmission as a claim in conformity with the above requirements. *Software Design, Inc.*, ASBCA Nos. 23616, 24897, 82-2 BCA ¶ 16,073 at 79,742.

*Side Tarpaulins* - The specifications required the deployment of ground tarpaulins to catch old paint and rust. SCS was directed to install the side tarpaulins as a means of keeping the surrounding areas free of debris from cleaning operations (finding 23). Maintaining cleanliness of those areas was an obligation under the contract clauses requiring SCS to keep the work area "free from accumulations of waste material" (finding 23). The contract, however, did not expressly require the use of side tarpaulins (finding 24). SCS intended to meet the cleanliness requirement by another means, which was feasible, namely, the assignment of one worker to clean up any debris in those areas at the end of each work day. In the absence of a specific requirement for side tarpaulins, SCS was entitled, under the "Optional Requirements" provision of the specification (finding 24), to use its own method for meeting its cleanliness obligations. The direction for deployment of side tarpaulins, therefore, amounted to a constructive change.

The direction, however, came from Mr. Gittings who had no authority to issue changes. SCS was on constructive notice of the absence of such authority from the "Inspection" clause of the contract stating that a Government inspector (termed here "construction representative"), such as Mr. Gittings, was not "authorized to change any term or condition of the specification without the contracting officer's written authorization." There is no evidence that such authorization had been obtained for the direction issued by Mr. Gittings. In the absence thereof, SCS acted as a volunteer in complying with the direction and is not entitled to recover any resulting increased cost. *De Konty Corp.*, ASBCA No. 32140, 89-2 BCA ¶ 21,586, at 108,691, *aff'd on reconsid.*, 90-2 BCA ¶ 22,645, *rev'd on other grounds sub nom. United States v. DeKonty Corp.*, 922 F.2d 826 (Fed. Cir. 1991)

*Spray Painting* - In plain terms and with special emphasis, § 09900 of the specifications prohibits the use of spray painting, requiring, instead, that coatings be applied with "approved brushes and rollers" (finding 27). The contention of SCS that spray painting of the prime and intermediate coats was needed in order to avoid brush marks is mooted by the absence of any evidence that this actually occurred or that the Government rejected any work for that reason (finding 28). The prohibition of spray painting in the specification was reasonable given the local conditions which created a substantial risk of overspray (finding 29). The Government was entitled to chose application of coating with brushes and rollers as the means for overcoming that risk. That choice was not invalidated by the fact that spray application of coating, performed with proper precautions against overspray, might yield an equivalent or superior result. The choice of brushes and rollers was a valid and subsisting requirement of the contract as awarded. This precludes recovery on SCS's money claim based on the lower costs of spray painting which was prohibited by the contract. *Maxwell Dynamometer Co. v. United States*, 386 F.2d 855 (Ct. Cl. 1967); *Carothers Construction Co., Inc.* ASBCA No. 41268, 93-2 BCA ¶ 25,628

*Full Prime Coat vs. Spot Priming & Hand Tinting of Paint* - SCS asserts that spot priming embodied industry practice and therefore was reasonably relied on in bidding on this contract. Under Table 1 of SSPC-PA, Guide 4, primer was required to applied over an entire area only where the condition of the existing paint system was "totally deteriorated." Spot priming was sufficient under Table 1 for nondeteriorated or less deteriorated conditions. (Finding 33) The interpretation of SCS that spot priming under the conditions indicated in Table 1 of SSPC-PA, Guide 4 was permissible under the contract was inconsistent with ¶ 3.2.1 of § 09900 of the specifications which directed that "[e]ach coat shall cover the surface of the preceding coat or surface completely"(finding 31). The inconsistency was obvious, raising a duty on the part of SCS to inquire of the contracting officer as to the reasonableness of its interpretation prior to relying thereon in the formulation of its bid for the contract. SCS failed to make that inquiry and, therefore, is not entitled to recover added compensation on the basis thereof. *Newsom v. United States*, 676 F.2d 647 (Ct. Cl. 1982).

There is no evidence supporting the contention of SCS that Table 1 of SSPC-PA, Guide 4 constituted the practice in the industry (finding 33). All that we have in the record is the document itself which appears to be a standard promulgated by an industry organization which may, or may not, reflect existing custom or practice. Lacking either a demonstrated trade custom or practice or the inclusion of that standard as an operative element of the specification in § 9900, there is no basis for an interpretation that spot priming was allowed by the contract. The claim for hand tinting the paint for the intermediate coat was premised on the erroneous interpretation that spot priming was permissible (finding 34). Inasmuch as a full prime coat was required by the specifications, the cost of tinting the intermediate to create a "visually perceptible" difference from the color of the prime coat was necessarily part of the existing contract price. On that basis, the claim for these costs was properly denied.

*VOC Requirements* - SCS found it necessary to pay higher than anticipated prices for paint in order to obtain material that complied with State of New Jersey environmental regulations (findings 36, 37). Compliance with these regulations was required by the specifications and by the "Permits and Responsibilities" clause of the contract (finding 38). By virtue of these provisions, the cost of compliant paints was deemed included in the price of the awarded contract and no additional compensation is payable therefor.

*Length of Piping and Trestles* - SCS had the burden of showing, by a preponderance of the evidence, that the data in the specifications concerning the lengths of trestle were erroneous. It has failed to meet that burden (findings 40, 41). Accordingly, the denial of that claim was proper.

## CONCLUSION

The appeal from the termination for default (ASBCA No. 48611) is denied. With respect to the appeal in ASBCA No. 49201, the appeal is sustained to the extent that SCS shall recover the amount of $23,600.00 as and for the excess deductions for liquidated damages and the amount of $12,065.00 for payment of unreleased retentions, plus interest under the CDA on both amounts from receipt of the claim on 10 July 1995 (finding 17). In all other respects, ASBCA No. 49201 is denied.

Dated: 10 January 2000

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

CAROL N. PARK-CONROY
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting 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. 48611 and 49201, Appeals of Standard Coating Service, Inc., rendered in conformance with the Board's Charter.

Dated:

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