ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Hunt Building Corp.	)	ASBCA No. 50083
	)	
Under Contract Nos. N62474-85-C-5492	)	
N62474-86-C-4042	)	

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OPINION BY ADMINISTRATIVE JUDGE MOED

In settlement of a proceeding instituted by the United States Department of Labor ("DOL") under the Davis-Bacon Act, appellant ("Hunt") and its plumbing subcontractor, City Wide Mechanical, Inc. ("City Wide"), agreed to pay $154,822.81 in back pay to employees of City Wide who had been paid as laborers rather than as plumbers, a classification carrying a higher prevailing wage under the wage decisions incorporated in the above contracts. This appeal results from the contracting officer's denial of City Wide's claim, sponsored by Hunt, for reimbursement of the settlement amount plus add-ons for overhead and profit. Only entitlement is to be decided at this time.

In a decision dated 14 February 1997, published at 97-1 BCA ¶ 28,807, we denied the Government's alternate motions for dismissal of the appeal for lack of jurisdiction and for summary judgment denying the appeal on the ground that the underlying claim was barred by a release given by appellant ("Hunt"). The Government has elected not to press that defense (Gov't br. at 22).

FINDINGS OF FACTS

1. This appeal relates to two fixed-price contracts for the construction of military family housing. Contract No. N62474-86-C-4042, in the amount of $17,584,000.00, was awarded to Hunt on 1 August 1989 for the construction of 218 units consisting of 100

units at the Marine Corps Air Ground Combat Center, Twentynine Palms, CA and 118 units at the Marine Corps Air Station, Tustin, CA (hereinafter the "Tustin/Twentynine Palms prime contract"). Thereafter, on 15 September 1989, Contract No. N62474-85-C-5492, in the amount of $41,223,000.00, was awarded to Hunt for construction of 600 family housing units at the Marine Corps Base, Camp Pendleton, California (hereinafter the "Pendleton prime contract").

2. The contracts contained the clauses required by the Federal Acquisition Regulation (FAR) for inclusion in fixed-price construction contracts including: FAR 52.222-6 DAVIS-BACON ACT (FEB 1988); FAR 52.222-14 DISPUTES CONCERNING LABOR STANDARDS (FEB 1988); FAR 52.236-3 SITE INVESTIGATIONS AND CONDITIONS AFFECTING THE WORK (APR 1984); and FAR 52.243-4 CHANGES (AUG 1987).

3. On 21 December 1989, after receiving the Tustin/Twentynine Palms prime contract, Hunt awarded separate subcontracts to City Wide to "furnish and install all materials required for a complete installation of interior plumbing" at the Tustin and Twentynine Palms sites. On 9 April 1990, following award of the Pendleton prime contract, Hunt awarded a subcontract to City Wide to "[f]urnish all supervision, labor, materials . . . and incidentals for a complete job of building plumbing" for that project (R4, tab 42). These subcontracts were the first contracts received by City Wide for work under a U.S. Government prime contract.

4. City Wide's work consisted of underslab plumbing, followed by rough-in work, concluding with installation of fixtures, such as sinks, lavatories, and faucets (tr. 1/36). The work would be performed entirely within the building lines of the structures being erected by Hunt. The building line is an imaginary line, five feet out from the edge of the structure, around its entire perimeter. (Tr. 1/34-36) Installation of piping work outside the building lines was the work of Hunt's utilities subcontractors (tr. 1/35).

5. Among the attachments to the Tustin/Twentynine Palms prime contract was General Wage Decision CA89-2 (hereinafter "WD CA89-2") promulgated by DOL for application to various listed counties of southern California. WD CA89-2 contained a wage classification for "Laborer, Group 4." Among the occupations listed under that classification was "[p]ipelayer, including water, sewage, solid, gas or air." WD CA89-2 was included in the subcontracts awarded to City Wide. (R4, tab 40)

6. The Pendleton prime contract contained General Wage Decision CA89-1 with Modification No. 3, dated 26 May 1989 (hereinafter "WD CA89-1") promulgated by DOL for application to the county of San Diego, CA. WD CA89-1, which was incorporated into City Wide's subcontract for the Pendleton work, contained a wage classification for "Laborer, Group 2." Among the occupations listed as part of that classification was "pipelayer" which was described as follows:

> Pipelayer (performing all services in the laying and installation of pipe from the point of receiving pipe until completion of the operation, including any and all forms of tubular material, whether Pipe, Metallic or Non-metallic Conduit and any other stationary type of tubular device used for the conveying of any substance or element, whether water, sewage, solid, gas, air or other products whatsoever and without regard to the nature of material from which the tubular material is fabricated) . . . .

(R4, tab 1 at Amendment 0010)

7. WD CA89-1 also contained a classification for "Plumbers: Pipefitters: Steamfitters" with a prevailing hourly rate of $33.15 (including fringes). WD CA89-2 contained a classification for "Plumbers: Steamfitters" with prevailing hourly rates for the two sites of $30.90 and $27.40 (including fringes). The prevailing hourly rate (including fringes) prescribed in WD CA89-1 for Laborers, Group 2 was $22.54. The prevailing hourly rate (including fringes) prescribed in WD CA89-2 for Laborers, Group 4 was $24.10.

8. City Wide's quotations for the three subcontracts were first submitted to Hunt after award of the prime contracts (tr. 1/17-18). There is no evidence in the record as to the interpretation or effect given by Hunt to WDs CA89-1 and CA89-2 in the formulation of its prime contract bids. City Wide's quotations were prepared by Mr. Barry Tompkins, who was in charge of its plumbing division. He interpreted WDs CA89-1 and CA89-2 as permitting the use of pipelayers for putting together piping in all forms and stages of the subcontracts. That interpretation was the basis for his estimates of labor costs for the quotations submitted to Hunt (tr. 1/104-06).

9. The quotations prepared by Mr. Tompkins were reviewed by Mr. Robert Baylis, the president of City Wide, prior to submittal to Hunt. Mr. Baylis read the pertinent sections of WDs CA89-1 and CA89-2 as part of those reviews (tr. 1/169-70). In connection with the quotation for the Pendleton subcontract, he considered that the work description in WD CA89-1 for pipelayers under the Group 2 laborer classification (finding 6) to be "very plain on its face" in allowing the pipelayer to "fabricate and install any type of material and to convey any type of substance from start to finish." The language was "just as clear as it [could] be" in that regard. (Tr. 1/149) He perceived no ambiguity or uncertainty in the description of work under that classification (tr. 1/170). Notwithstanding the difference between WD CA89-1 and WD CA89-2 in the descriptions of pipelayer work (findings 5, 6), City Wide perceived no difference between the two in relation to scope of work which could be performed by pipelayers (tr. 1/171).

10. Mr. Charles K. Wall was Hunt's project manager for the Pendleton prime contract (tr. 1/25). He had been employed by Hunt for construction projects for approximately 27 years, primarily for contracts awarded by the U.S. Government. He testified that the Pendleton project was the first time, under such a contract, that he had been told that interior plumbing work would be performed by laborers. (Tr. 1/68) In his experience, plumbers were involved in all plumbing activities inside buildings, using laborers as assistants. There is no evidence that Mr. Wall imparted that information to City Wide. His tendency was to avoid getting into the details of subcontractors' work. In his view, City Wide "[knew] how to best achieve their maximum efficiency with their people" (tr. 1/78).

11. The record contains a letter, dated 1 August 1990, from the laborers' local union in San Diego to the plumbers' local union stating that "there is no question that internal piping and plumbing does not fall into any classification claimed by the Laborer's Union" and that "[t]his jurisdiction, traditionally, has belonged to the Plumbers and Pipefitters and continues to do so" (R4, tab 28). That assertion is consistent with the "Agreement of Work Jurisdiction," dated 21 August 1974, between District Council No. 16 of the plumbers' union and the Laborers District Council of Southern California. Among the types of work designated by the agreement to be performed by plumbers are "[a]ll piping under, inside or on a building or structure" and "[a]ll pipe handling, fabricating, assembling, stockroom work, loading and unloading in piping shops." (R4, tab 29)

12. These agreements and understandings reflected long-standing practice. Nationally, these were memorialized in the agreement entered into between Mr. Lee Lalor of the laborers union and Mr. Archie Virtue of the plumbers union. Under that agreement, the laborers were given the installation of main water and sewer trunks and laterals up to building property lines (referred to as "stub-outs") (R4, tab 29). The work of making connections to the stub-out and installing all piping from that point into, and inside, the structures was given to the plumbers (R4, tab 29; tr. 2/92-94). That was the prevailing practice in the counties of southern California in which the present facilities were situated (tr. 2/95).

13. Mr. Tompkins of City Wide was not aware of the prevailing practice of designating interior piping as plumbers' work. He did not inquire of DOL (tr. 1/127) or from others, so far as the record indicates, concerning the use of plumbers and laborers in plumbing work. However, as indicated by the facts above, said practice was well-established and recognized in the localities of contract performance with the result that by reasonable inquiry, Hunt and City Wide could have learned of it prior to submittal of the bids for the prime contracts and the quotations for the subcontracts.

14. In the performance of the subcontracts, laborers performed the majority of plumbing work inside the buildings, including the attachment and installation of fixtures (tr. 1/128, 140). However, at the beginning of work at Tustin, which was City Wide's first site, Mr. Tompkins told Mr. Tom Philley, Hunt's project manager, that City Wide interpreted WD CA89-2 as permitting the use of pipelayers for assembling pipe inside the buildings (tr. 1/81-82). Mr. Philley brought this to the attention of ENS Lauren Wisniewski, the Assistant Resident Officer in Charge of Construction (AROICC) for the work at Tustin. On the next day, she informed Mr. Philley that it was necessary to employ a journeyman plumber to supervise the crew and that an unspecified ratio of plumbers to laborers had to be maintained (tr. 1/83).

15. At Twentynine Palms, which was the second work site (tr. 1/88), the same inquiry was made to LT R.W. McDowell, the assigned AROICC at that site (R4, tab 62). He responded that laborers could be employed for plumbing work but that a 1:1 ratio of laborers to plumbers had to be maintained. City Wide complied with that advice, conveyed by Hunt, and made restitution of back pay to individuals who were newly designated as plumbers. Hunt understood that the AROICCs were authorized to render this type of advice. There is no evidence in the record to that effect. In this regard, the DOL regulations applicable to the Davis-Bacon Act and related statutes contain the following:

> § 5.13 Rulings and interpretations
>
> All questions relating to the application and interpretation of wage determinations (including the classifications therein) . . . shall be referred to the Administrator [of the Wage and Hour Division] for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative . . . .

(29 C.F.R. § 5.13)

16. At all relevant times, Ms. Gloria A. Cutler served as the labor advisor at the Southwest Division, Naval Facilities Engineering Command ("SouthwestDiv"), the organization which had awarded the prime contracts. In June 1990, Ms. Cutler received complaints of misclassification as laborers from two workers allegedly performing plumbing work for City Wide under the Pendleton subcontract. She then conducted interviews as to the nature of the work performed with the complainants and approximately 30 other City Wide employees who were engaged in the fabrication and assembly of piping at the site.

17. By letter of 23 July 1990, Ms. Cutler informed the Wage & Hour Division of DOL of the misclassification complaint from the Pendleton contract and requested advice as to the "prevailing practice in accordance with DOL requirements." Enclosed with her letter was the "Agreement of Work Jurisdiction" between the plumbers' and the laborers' unions (finding 11) and several daily reports prepared by the Government's construction representative describing the work in issue. (R4, tab 56) Ms. Cutler apparently also submitted a copy of the 1 August 1990 letter from the laborers' union (finding 11). DOL's response is contained in a letter dated 11 October 1990, in part as follows:

> Based on our review of the information submitted, the applicable Wage Decision (No. CA89-1) reflects collectively bargained rates for laborers and plumbers. As provided in your report, Laborers Local No. 89 has advised that laborers do not perform the installation of internal piping and plumbing. Thus, under area practice, the contractor could not classify and pay its workers as laborers for internal piping and plumbing work performed on this project.

(R4, tab 3)

18. Subsequently, in a letter to Hunt dated 11 March 1991, Ms. Cutler asserted that as the result of erroneous classification of workers, City Wide had underpaid wages due under the Davis-Bacon Act. According to that letter, all of the hours paid for at the Group 2 laborer rate for work under the Pendleton and the Group 4 laborer rate under the Twentynine Palms subcontracts should have been paid for at the higher prevailing rate for plumbers stated in the applicable wage determinations. The total alleged underpayment of wages was $283,970.90, consisting of $249,632.24 for Pendleton and $34,338.66 for Twentynine Palms. The finding of misclassification was based on the advice contained in DOL's letter of 11 October 1990 (finding 17). Hunt was requested to make restitution of the underpayment to the affected employees prior to 15 April 1991. Pending restitution, the claimed amount of the underpayment, $283,970.90, would be withheld from moneys owed to Hunt under the Pendleton contract. (R4, tab 6)

19. On 8 February 1991, City Wide had submitted a schedule to Ms. Cutler listing the employees engaged in the Pendleton subcontract; descriptions of their duties; tools used; and percentages of time working as laborer and/or installer. The schedule was intended to show that, based on the description of "pipelayer" in WD CA89-1 (finding 6), these employees were readily classifiable as Group 2 laborers (R4, tab 57). In its letter of 18 March 1991, City Wide also requested that DOL "review and reject Ms. Cutler's preliminary findings and render its own independent determination." The letter also asked that Hunt and City Wide "be afforded the opportunity to submit information to

the DOL for consideration when the DOL is rendering its determination on this matter." (R4, tab 45 at 4)

20. In her letter, dated 26 April 1991 (R4, tab 8), Ms. Cutler informed Hunt that inasmuch as the amount of restitution demanded had not been paid, an investigation report would be sent to DOL "as a dispute pursuant to [the DISPUTES CONCERNING LABOR STANDARDS clause] for further action." The amount of $283,970.90 which had been withheld from payments to Hunt and, in turn, withheld by Hunt from payments to City Wide (R4, tab 43) would be transferred to the U.S. General Accounting Office (GAO). It was subsequently determined that misclassification and underpayment of wages had occurred also at the Tustin site. In respect of such alleged underpayments, an additional $25,704.72 was withheld from contract payments due Hunt, this time from a contract for construction of family housing at La Mesa, CA (Contract No. N68711-85-C-0631) which is not in issue here (R4, tab 11).

21. Ms. Cutler prepared and forwarded to DOL an investigation report which stated that a total of $309,462.30 was owed to City Wide employees at the Pendleton, Tustin and Twentynine Palms sites for underpayments of prevailing wages under the Davis-Bacon Act. This was based on application of the wage rate for plumbers set forth in WDs CA89-1 and CA89-2 to 100 percent of the hours for laborers shown on City Wide's certified payrolls. (R4, tab 33) Subsequently, in a letter dated 8 October 1993 (referred to as the "Charge letter"), DOL furnished Navy's investigation findings to Hunt and City Wide and afforded them the opportunity to request a hearing pursuant to 29 C.F.R. § 5.11(b). Hunt and City Wide were also offered the alternative of making restitution of back wages to the affected workers in the amount of $309,655.62. The record does not explain the difference between that amount and the $309,462.30 stated to be due in the investigation report.

22. Hunt and City Wide requested a hearing before DOL on this matter. Prior to the hearing, however, on 6 January 1995, DOL, Hunt, and City Wide entered into a settlement agreement whereby Hunt and City Wide agreed to pay a total of $154,000 in back wages to 50 employees under the Pendleton, Tustin, and Twentynine Palms subcontracts. The settlement agreement was incorporated into a "Decision and Order Pursuant to Consent Findings," issued by the Deputy Chief Administrative Law Judge of DOL. The Decision and Order approved a series of stipulations contained in the agreement and directed that they be given "the same force and effect as if they were specifically stated in the body of this Order." (R4, tab 16)

23. City Wide had finished work on the Pendleton subcontract on or about 1 February 1991 (tr. 1/130-31). Prior to that date, DOL issued WD CA90-1 superseding WD CA89-1. In the form issued, WD CA90-1 contained a description of Group 2 Laborer-Pipelayer which was identical to that contained in WD CA89-1 (finding 6). On

25 January 1991, by Modification No. 9 to WD CA90-1, that description was modified to add the text shown in the inserted italics below:

> Pipelayer (performing all services *outside the building line* in the laying and installation of pipe from the point of receiving pipe until completion of the operation, ...

(R4, tab 64)

24. The above modification was carried over into the next version of that wage decision designated as WD CA91-1 (R4, tab 69). Among the stipulations in the settlement agreement is the following:

> (j) The addition of the phrase "outside the building line" contained in CA91-1 was applied to events which occurred during the performance of [the Pendleton and Tustin/Twentynine Palms prime contracts], *but the addition of that language did not reflect a change in the prevailing practice (that pipe laying tasks performed inside the building line were classified as the work of "plumbers" in the County of San Diego, California) which existed during the performance of said contracts.*
>
> (k) The terms of this agreement are intended to apply to work performed by the contractors' employees inside the building line on the projects related to [the Pendleton and Tustin/Twentynine Palms prime contracts].

(Italics inserted) (R4, tab 16 at 3)

25. In a letter to the contracting officer, dated 17 March 1995 (R4, tab 17), Hunt requested an increase in the contract to obtain reimbursement for the amount of $154,822.81 paid pursuant to the settlement agreement and the Decision and Order. Hunt alleged that the provision of the settlement agreement adding "outside the building line" to the description of "pipelayer" (finding 24) amounted to the retroactive application of WD CA91-1 to the Pendleton and Tustin/Twentynine Palms prime contracts and, on that basis, amounted to a constructive change of the contract (R4, tab 17).

26. The final provision of the settlement agreement (R4, tab 16) was as follows:

> Promptly upon approval of the Decision and Order by the administrative law judge, DOL will forward to the United

> States Department of the Navy a withdrawal of its request for withholding of funds (in excess of the amounts specified in the Decision and Order) for alleged violations of the Davis-Bacon Act arising out [of] work performed under [the Pendleton and Tustin/Twentynine Palms prime contracts].

Hunt's letter of 17 March 1995 contained a request for payment of the excess withheld funds. On 10 May 1995, GAO paid the amount of $154,832.81 to Hunt as the amount due for "excess withholding of back wages under the Davis-Bacon Act . . . for work performed" for Hunt by City Wide under the Pendleton and Tustin/Twentynine Palms prime contracts (R4, tab 51).

27. With respect to the claim for equitable adjustment claim in Hunt's letter of 17 March 1995, the contracting officer's position was that the subject matter came within the jurisdiction of DOL pursuant to the DISPUTES CONCERNING LABOR STANDARDS (FEB 1988) clause of the contract. In a letter dated 16 May 1995 (R4, tab 19), Hunt disputed that assertion and demanded a contracting officer's decision on its claim.

28. On 18 April 1996, Hunt resubmitted the equitable adjustment claim, increased to the amount of $221,826.84 in order to reflect FICA and other contributions, and overhead and profit of Hunt and City Wide on the amount paid pursuant to the settlement agreement (R4, tab 21). The request was accompanied by a certificate by Hunt's president conforming to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. As of 7 August 1996, the contracting officer had not issued a written decision on that claim. On that date, Hunt brought the present appeal based on the deemed denial of its claim.

DECISION

On behalf of City Wide, Hunt contends that it is entitled to reimbursement of the portion of the back pay award attributable to the Pendleton prime contract on the ground that the provision of the settlement agreement restricting the scope of the pipelayer classification in WD CA89-1 to services outside the building line was a retroactive modification of that wage determination, creating entitlement to an equitable adjustment for any added costs. As authority for such recovery, Hunt cites FAR 22.404-6(b)(5) which provides, in part, that:

> If an effective modification [of the wage determination] is received by the contracting officer after award, the contracting officer shall modify the contract to incorporate the wage modification retroactively to the date of award and equitably adjust the contract price for any increased or

> decreased cost of performance resulting from any changed wage rates.

Hunt's reliance on FAR 22.404-6(b)(5) is misplaced. The language of the settlement agreement restricting the pipelayer work description to services "outside the building line" was not an "effective modification" of the wage determination. As conceded by Hunt and City Wide in that agreement, the addition of that restriction was simply a confirmation of the practice prevailing during the existence of these contracts which classified piping work inside the building as being plumbers' work (finding 24). The added expense of back pay was caused, instead, by the failure of Hunt and City Wide to select and apply the "Plumbers: Pipefitters: Steamfitters" wage rate which was the appropriate classification under WD CA89-1 for City Wide's work (finding 7).

With regard to the portion of the claim for reimbursement of the back pay award related to the Tustin/Twentynine Palms prime contract, Hunt asserts that WD CA89-2 was reasonably interpreted as allowing the use of pipelayers for installation of piping both inside and outside the buildings. On that basis, Hunt contends that the importation, into the settlement agreement, of the provision of WD CA90-1 limiting the pipelayer wage rate to services outside the building line was a constructive change to the contract, entitling Hunt to an equitable adjustment under the CHANGES clause for the added costs of paying for services inside the building line at the plumber's rate. (App. br. at 25-26)

That position is without merit. There was nothing in the pipelayer description in WD CA89-2 relating to place of performance of the services (finding 5). In the subcontracts awarded to City Wide under the Tustin/Twentynine Palms prime contract, Hunt, itself, described the work as "a complete installation of interior plumbing" and "a complete job of building plumbing" (finding 3). WD CA89-2, which was included in the Tustin/Twentynine Palms prime contract, contained a wage classification for "Plumbers: Steamfitters" (finding 7).

Those provisions should have alerted Hunt to the need for investigating the applicability of that classification. Furthermore, in making any contract interpretations of the contract prior to bidding, Hunt was obliged to apply any relevant "technical and trade knowledge" which could be expected to be in the possession of a reasonably intelligent bidder. *Adrian L. Roberson*, ASBCA No. 6248, 61-1 BCA ¶ 2857 at 14,915. A well-established and recognized prevailing trade practice existed, in all three localities of contract performance, that the installation of interior piping was plumber's work (findings 11-13). That was "trade knowledge" which Hunt could reasonably be expected to have known or discovered prior to bidding. Taking that practice into account, the only reasonable interpretation of WD CA89-2 is that the installation of interior piping was plumber's work.

Knowledge of that trade practice is imputed to Hunt, also, under the SITE INVESTIGATIONS AND CONDITIONS AFFECTING THE WORK (APR 1984) clause. Therein, Hunt acknowledged that it had "investigated and satisfied itself as to the general and local conditions that can affect the work or its cost." Implicit in that acknowledgment is an "affirmative duty [upon Hunt] to clarify the DOL employee classification and the meaning of the wage determination for purposes of its compliance with the Davis-Bacon minimum wage requirements." *Outside Plant Engineering & Construction Co., Inc.*, NASA BCA No. 58-1191, 93-1 BCA ¶ 25,489 at 126,984. Included in the scope of the required investigation was "area practice in classifying workers." *Emerald Maintenance, Inc. v. United States*, 925 F.2d 1425, 1430 (Fed. Cir. 1991). Inasmuch as Hunt could have learned of the practice of assigning interior piping work to plumbers by reasonable inquiry prior to bidding (finding 13), it is charged with pre-bid knowledge of that practice notwithstanding that the inquiry was not actually made. *Ivey's Construction, Inc.*, ASBCA No. 47855, 95-1 BCA ¶ 27,584 at 137,463. The effect of such constructive knowledge is that Hunt is deemed to have included an allowance in its bid for the wage costs of employing plumbers for installation of interior piping and, accordingly, is not entitled to recover a price increase for that cost from the Government.

In its post-hearing brief, Hunt requested payment of interest under the Prompt Payment Act on the $154,832.81 excess withholding which was refunded on 10 May 1995 (finding 26). Hunt has not submitted a claim to the contracting officer for such amount. Lacking such claim and an actual or deemed denial thereof by the contracting officer, we have no jurisdiction to consider this request. *International Business Investments, Inc.*, ASBCA No. 38639, 91-2 BCA ¶ 23,899.

CONCLUSION

On the foregoing bases, the appeal is denied in its entirety.

Dated: 11 September 2000

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50083, Appeal of Hunt Building Corp., rendered in conformance with the Board's Charter.

Dated:

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