ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
The Sherman R. Smoot Corp.	)	ASBCA Nos. 52173 and 53049
	)	
Under Contract No. N62477-94-C-0028	)	

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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In June 1998 the contractor (Smoot) submitted a claim under the captioned building renovation contract. Smoot timely appealed the contracting officer's (CO) April 1999 final decision denying such claim in its entirety (ASBCA No. 52173). Later, Smoot certified two subcontractor claims included in the June 1998 claim and resubmitted the claim to the CO, who again denied it in a 26 July 2000 decision. Smoot timely appealed that decision on 18 September 2000 (ASBCA No. 53049), which we consolidated with ASBCA No. 52173. The two appeals have common pleadings and Rule 4 files. Respondent moves for summary judgment on the appeals. Smoot replied to the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 3 May 1996, the Navy awarded Smoot a contract (the contract) for completion of design and construction to renovate Buildings 33, 33A, 36, 37, 39, 109 and "Link" at the Washington Navy Yard (WNY) (R4, tab 1 at 2, 01010-1).

2. The contract incorporated by reference the standard fixed price construction contract terms and conditions, including the following pertinent FAR clauses: 52.212-12 SUSPENSION OF WORK (APR 1984), 52.243-4 CHANGES (AUG 1987), 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) and 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991), which provided: "The contractor shall . . . be responsible for . . . complying with any

Federal, State and municipal laws, codes, and regulations applicable to the performance of the work" (R4, tab 1).

3. The contract specifications § 01560, ¶ 3.7, "DUST CONTROL," provided: "Dry power brooming will not be permitted. Instead, use vacuuming, wet mopping, wet sweeping, or wet power brooming." Section 02050, ¶ 1.2, required the contractor to "Remove or encapsulate lead base paint," ¶ 3.1 required demolition of those structures and utilities indicated on the contract drawings, and ¶3.2 provided:

> a. All paint is assumed to contain lead.
>
> b. Contractor shall submit for approval a plan which includes worker protection and waste disposal for lead base paint.
>
> c. Contractor shall test representative samples of the debris to determine disposal requirements.
>
> d. For intact paint in good condition no action is required.
>
> e. For deteriorated paint, remove loose materials, clean the surface and top coat with an enamel paint or coating that results in a smooth surface.

(R4, tab 1 at 01560-9, 02050-1, -5, -6)

4. The 13 July 1995 environmental report provided to Smoot with the RFP for the WNY contract stated:

> Roy F. Weston, Inc. (WESTON) was retained . . . to conduct surveys in Buildings 33, 33A, 37, 39, and 109 at the [WNY] [and] to visually inspect . . . buildings for deteriorated suspect lead based paint (LBP). The surveys were performed from February 27 through March 2, 1995 . . . . WESTON was unable to access . . . catwalks located in Building 33 . . . . WESTON identified suspect . . . (LBP) in all of the buildings surveyed. The majority of the suspect LBP was deteriorated. The report describes more detailed locations of suspect LBP.
>
> . . . .
>
> 2.1.3 Lead-Based Paint

. . . . For purposes of this survey, all painted surfaces were considered as being coated with LBP . . . . Quantities of deteriorated LBP were not determined.

. . . .

3.3 WALK-THROUGH . . . (LBP) SURVEY

Walk-through LBP surveys were also performed . . . to assess the potential LBP hazards present in each of the buildings. No samples were collected of suspect LBP . . . . The objective of the survey was strictly to identify areas with severely deteriorated paint which could pose a LBP hazard. The results of the LBP survey for each building identified:

• Building 33

- Peeling and deteriorated paint on the walls of the office area. Additionally, paint on piping and paint on the crane rails was [sic] in poor condition.

• Building 33A

- The majority of the paint was is [sic] fair to good condition. Only minor deteriorate [sic] paint was observed on walls . . . .

• Building 37

- Peeling and deteriorated paint was observed on walls throughout the building.

• Building 39

- Generally, paint on walls and ceilings in Building 39 was in poor condition. Paint on the first floor walls and ceiling was extremely deteriorated and peeling. The majority of the paint on the second floor walls, especially in the bathrooms, was deteriorated and peeling.

• Building 109

- Paint on walls and floors throughout the building was observed to be deteriorated and peeling.

(R4, tab 2 at iii-iv, 3-3, 3-4; Spengler aff., ¶ 6)

5. 29 C.F.R. § 1926.62 of the Occupational Safety and Health Administration (OSHA) regulations in effect on 13 February 1996: (a) applied, *inter alia*, to demolition and renovation of structures where lead-containing materials are present, to removal or encapsulation of lead-containing materials, and to disposal, storage or containment of lead-containing materials at a construction site, (b) defined "Action Level" as exposure to an airborne concentration of lead of "30 micrograms per cubic meter of air (30 ug/m(3))," and "Permissible Exposure Limit" as exposure to lead at concentrations greater than 50 $\mu g/m^3$ of air averaged over an 8-hour period, (c) required in ¶ (h), "Housekeeping":

> (1) All surfaces shall be maintained as free as practicable of accumulations of lead.
> (2) Clean-up of floors and other surfaces where lead accumulates shall wherever possible, be cleaned by vacuuming or other methods that minimize the likelihood of lead becoming airborne.

and (d) did not mention or refer to OSHA Instruction CPL 2-2.58 (R4, tab 3).

6. Instruction CPL 2-2.58 dated 13 December 1993, Appendix A, contained OSHA "Inspection Guidance and Citation Policy" for 29 C.F.R. § 1926.62:

> 1926.62(i) . . . In determining whether an employer has maintained surfaces of hygiene facilities free from [lead] contamination, OSHA recommends the use of HUD's recommended level for acceptable decontamination of 200 $\mu g/ft.^2$ for floors in evaluating cleanliness of change areas, storage facilities, and lunchrooms/eating areas.

(R4, tab 4 at A-21).

7. On 9 July 1997, a WNY construction employee told OSHA that he removed "rivets that may have been covered with lead which was not removed during lead abatement efforts." OSHA reported such "alleged hazard" to the Navy on 10 July 1997, requested the Navy to investigate, to make any necessary corrections or modifications, and to report its inspection results to OSHA by 18 July 1997. (R4, tab 8)

8. Safety Manager Linda Goforth's 11 July 1997 memorandum to the WNY Resident Officer in Charge of Construction reported that she had walked through WNY Building 33, interviewed (subcontractor) Superior Ironworkers' crew, observed Smoot employee work practices, and found violations of the WNY contract and OSHA standards, including—

> Dry sweeping of construction dust, contaminated with suspect and confirmed lead paint (steel structural members have known lead paint coatings), observed on the third floor. Dry sweeping also evident on the fourth floor. No documentation that dust debris can be disposed as a non-regulated waste.

She recommended stopping of work on the third and fourth floors until completion of a lead assessment. (R4, tab 10) Safety Manager Clarence Settle's 14 July 1997 memorandum stated that "[w]ork on the third and fourth has stop" (syntax in original) (R4, tab 17 at 7).

9. Applied Environmental, Inc. (AEI)'s 14 July 1997 report to Smoot said that AEI's lead surface wipe results collected on 14 July 1997 at the first, second and third floors of an unidentified WNY building ranged from 1,150 to 12,000 micrograms per square foot ($\mu g/ft^2$) and averaged 4,528 $\mu g/ft^2$, and AEI had measured 28.7% and 31% concentrations of lead in paint, respectively, in Buildings 33 and 109. AEI stated:

> As per "Lead-Based Paint; Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing; Notice." September 1990, the interim guidelines for lead in wipe samples are as follows:
>
> | | |
> |---|---|
> | Floors: | 100 ug/ft2 |
> | Window Wells: | 800 ug/ft2 |
> | Window Sills: | 500 ug/ft2 |
>
> . . . .
>
> As per "Lead-Based Paint; Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing; Notice." September 1990, regulatory guidelines are 0.5% lead by weight or 1 mg/cm2 lead content by area.

AEI's 18 July 1997 report to Smoot cited lead surface wipe results collected on 15 July 1997 at WNY Buildings 109, 37 and 39 ranging from less than 6.0 to 14,800 $\mu g/ft^2$, and averaging 4,171.6 $\mu g/ft^2$. (Ex. G-1)

10. Smoot's 17 July 1997 letter to the CO requested a WNY contract modification pursuant to the contract's Changes and Differing Site Conditions clauses resulting from a suspension of work and implementation of a lead hazard assessment and action plan. Smoot alleged that the "specific work being undertaken and necessary delays are the result of unforeseen hazardous materials." (R4, tab 11 at 2)

11. Smoot's 18 July 1997 letter to the CO stated:

> Based on the Navy's July 11th site audit and direction, the 3rd and 4th Floors of Building 33 were vacated from continuing work by personnel who were not specifically trained to meet the circumstances, and did not have respiratory equipment and protection/hygiene measures as of July 11th Noon. Upon receipt of results [from AEI's lead testing], similar action was taken for the balance of floors and buildings as of July 14th Noon.

(R4, tab 11 at 9)

12. The CO's 28 July 1997 letter to Smoot stated that: (a) the presence of lead based paint was not a differing site condition requiring any increase in cost or time extension, (b) although "Smoot was advised to cease all operations on the third and fourth floors for the well being of your workers," there was no suspension of work under the subject contract, and (c) Smoot was to proceed with removal of all lead based paint in accordance with all contract requirements (R4, tab 15).

13. Smoot's 29 July 1997 letter to the CO alleged that "the Navy had specific information regarding the existing lead based paint conditions (*e.g.* copy of HAZWARP report, received July 15, 1997 from the Navy)" and "there appears to be no regulatory standard for surface concentrations [of lead] on a construction site" and sought "direction as to the applicable and the acceptable standard for 'decontamination'" (R4, tab 16).

14. Navy Project Engineer Andrew Trotta's 13 August 1997 letter cited OSHA's regulation in 29 CFR § 1926.62 dated 1 July 1995 and Instruction CPL 2-2.58, and stated that WNY Building 33 "is considered a public and commercial building and we will therefore expect 200 microgram p/s/f on items affecting interior surfaces" (R4, tab 22).

15. Smoot's 15 August 1997 letter to the CO said that it regarded the Navy's 13 August 1997 directions as a change and that it would not proceed in accordance with those directions without the CO's direction (R4, tab 23).

16. Navy Project Engineer LT Michael Zucchero's 10 November 1997 letter to Smoot stated that the "final lead cleanup requirements" for the contract were 200 $\mu g/ft^2$ for floors, walls, ceilings, and decking under access flooring; 500 $\mu g/ft^2$ for window sills; and 800 $\mu g/ft^2$ for window wells (R4, tab 29). The CO's 9 January 1998 letter to Smoot confirmed LT Zucchero's requirements for surface lead, explaining that those criteria were based on OSHA compliance inspection guidelines for assessing whether hygiene facilities were kept as free as practicable from lead contamination, and on Department of Housing and Urban Development recommendations for residential projects (R4, tab 30). Smoot

successfully cleaned the buildings under the contract to the Navy-prescribed standards (comp. ¶¶ 52-53).

17. Smoot's 29 June 1998 certified claim for $1,391,631.84 to the CO was captioned, "Claim for Changes, Differing Site Conditions and Suspension of Work." Smoot also based its claim on undisclosed superior knowledge, *viz*., a Navy report prepared in 1995 that identified "Immediate Lead Hazard(s)" in Building 33's ceiling. Smoot alleged: (a) In the spring and summer of 1997 it encountered deteriorated paint on the underside of the roof decking and, after stripping the paint, lead impregnated wood in the unpainted roof decking members. (b) The Navy suspended the work on 11 July 1997 and Smoot performed lead abatement and clean-up for about 90 days from 11 July until 9 October 1997, during which time subcontract work was stopped or diminished. (c) Smoot confronted three "unforeseen site conditions": (1) disposal of lead-containing wood debris from the roof decking, (2) scraping and sealing of deteriorated lead-based paint on the roof decking, and (3) Navy direction to clean up to more stringent standards than the contract required. (R4, tab 33)

18. LT Zucchero deposed: "Wood is a very porous material; paint will absorb into wood" (Ex. G-3 at 68).

19. Smoot in reply points out that specification § 01560, ¶ 1.5.1 provides:

> All known hazardous materials are indicated on the drawings or noted in the specifications. If additional material that is not indicated on the drawings or noted in the specifications is encountered that may be dangerous to human health upon disturbance during construction operations, stop that portion of work and notify the [CO] immediately. Intent is to identify materials such as . . . lead paint . . . . If the material is hazardous and handling of the material is necessary to accomplish the work, the Government will issue a modification pursuant to "FAR 52.243-4 Changes" and "FAR 52.236-2, Differing Site Conditions."

(R4, tab 1 at 01560-6)

20. Smoot's Vice President Bruce W. Spengler stated: "Nowhere in the Contract Documents is there any basis prescribed for the imposition of these standards" that the CO required on 9 January 1998, *viz*., the "lead-based paint standards for residential projects by the U.S. Department of Housing and Urban Development: Concrete decking under access floors: 200 µg/sq.ft.; window framing 500 µg/sq.ft.; window wells 800 µg/sq.ft." (Spengler aff. at ¶ 14). Jana H. Ambrose, an AEI "principal," stated that the 200 µg/sq.ft. for floors; 500 µg/sq.ft. for window sills and 800 µg/sq.ft. for window wells lead abatement criteria directed by the CO were not in 29 C.F.R. § 1926.62 (Ambrose aff. at ¶¶ 7-8).

DECISION

Of the four bases of Smoot's June 1998 claim – constructive change, differing site conditions, suspension, and undisclosed superior knowledge (SOF ¶ 17) – the motion for summary judgment addresses the first two. Judgment will not be rendered on all the relief sought, *see* FED. R. CIV. P. 56(d). Thus, we have restyled the motion as for partial summary judgment. In its response to the motion, appellant argues the superior knowledge issue as well. We do not address this issue since it was not advanced in the motion.

Generally, summary judgment on an issue is appropriate if there are no disputed material facts with respect to one or more essential elements thereof, and movant is entitled to judgment as a matter of law thereon. Summary judgment is precluded if there are disputed material facts with respect to such essential element or elements, and movant is not entitled to judgment thereon. Here, Smoot, the nonmoving party, will have the burden of persuasion at trial on the two issues. Thus, movant may satisfy its burden of persuasion by submitting affirmative evidence to negate, or may demonstrate a complete failure of proof to establish, an essential element of Smoot's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 331-32 (1986); *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994).

I.

To establish a Type I differing site condition, the contractor must show that: (1) the contract documents positively indicated the site conditions that form the basis of the claim; (2) the contractor reasonably relied upon its interpretation of the contract documents; (3) the conditions actually encountered differed materially from those indicated in the contract; (4) the conditions encountered were unforeseeable based on all the information available at the time of bidding; and (5) the contractor was damaged as a result of the material variation between the expected and the encountered conditions. *See Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987).

Movant appears to argue that Smoot cannot prove element (1), because the contract documents did not positively indicate the integrity of ceiling paint in building 33; element (2), because Smoot unreasonably interpreted the contract documents to indicate that Building 33's unobserved ceiling paint was not deteriorated; element (3), because Smoot encountered conditions not materially different from those positively indicated by the contract – "All paint is assumed to contain lead" -- a known condition; and element (4), accumulated lead in the work areas was not a pre-existing but rather a performance-produced condition, and lead in wood decking debris was foreseeable because unprimed wood is porous and absorbs paint. Movant did not identify any evidence showing to what extent Building 33's wood deck was primed.

Smoot argues that specification, § 01560, ¶ 1.5.1, provided: "All known hazardous materials are indicated on the drawings or noted in the specifications" (SOF ¶ 19), and the contract drawings and specifications did not indicate or note any hazardous deterioration of ceiling paint in Building 33 (Spengler aff., ¶ 8). Thus, Smoot reasonably interpreted the contract to indicate positively the absence of hazardous deterioration of Building 33's ceiling paint. Known lead in paint is immaterial to Smoot's claim alleging unknown, deteriorated paint on Building 33's ceilings, that differed materially from the conditions positively indicated. Smoot argues that the pre-existing condition relevant to its claim was not lead accumulated in work areas, but was undisclosed, deteriorated ceiling paint whose disturbance could produce hazardous lead accumulations, and that there was no way prior to bidding that it could visually inspect the condition of the paint on the wood deck, approximately 40 feet above the ground, since Building 33's catwalks were not accessible to WESTON (SOF ¶ 4). Smoot did not cite any proof of a 40 foot ground-to-deck dimension.

Considering the foregoing assertions and the documents and affidavits submitted, and the incompleteness of the present factual record, we conclude that there are genuinely disputed material facts, and we are not persuaded that movant is entitled to judgment as a matter of law, thus precluding summary judgment on the Type I differing site conditions issue.

II.

To prove a constructive change, a contractor must show that: (1) the CO compelled the contractor to perform work not required under the terms of the contract; (2) the CO had contractual authority unilaterally to alter the contractor's duties under the contract; (3) the contractor's performance requirements were enlarged; and (4) the added work was not volunteered, but resulted from the direction of the Government's officer. *See Len Company and Associates v. United States*, 385 F.2d 438, 443, 181 Ct. Cl. 29, 38 (1967).

Movant did not state specifically which essential elements of Smoot's alleged constructive change lack evidentiary proof. Movant appears to argue that Smoot cannot establish elements (1) and (3) -- work not required under the terms of the contract and enlarged contractor performance requirements. Movant contends that the CO's 9 January 1998 confirmation of final cleanup levels was based on inspection guidelines "used by OSHA to enforce the cleaning requirements of the OSHA construction standard" in 29 C.F.R. § 1926.62(h)(1), "All surfaces shall be maintained as free as practicable of accumulations of lead," and so Smoot's performance requirements were not enlarged.

Our review confirms that 29 CFR § 1926.62 did not refer to OSHA Instruction CPL 2-2.58 dated 13 December 1993 (SOF ¶ 5(d)), and Messrs. Spengler and Ambrose correctly stated that 29 CFR § 1926.62 did not prescribe surface lead criteria of 200 $\mu g/ft^2$ for decking under access floors; 500 $\mu g/ft^2$ for window frames; and 800 $\mu g/ft^2$ for window wells (SOF ¶ 20). Moreover, the record does not show that in Building 33 the lead-

contaminated surfaces were in hygiene facilities, change areas, storage facilities, lunchrooms, or eating areas to which the OSHA criteria applied (*cf.* SOF ¶ 6). We hold that there are genuinely disputed material facts which preclude summary judgment on the constructive change issue.

Dated: 22 January 2001

DAVID W. JAMES, JR.
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
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52173 and 53049, Appeals of The Sherman R. Smoot Corp., rendered in conformance with the Board's Charter.

Dated:

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