ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
The Sherman R. Smoot Corp.	)	ASBCA Nos. 52173, 53049, 53246
	)	
Under Contract No. N62477-94-C-0028	)	

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OPINION BY ADMINISTRATIVE JUDGE JAMES

These timely appeals arise from The Sherman R. Smoot Corp.'s (Smoot) certified lead based paint (LBP) claims and sponsored subcontractor claims under the captioned contract. The contracting officer's (CO) denial of the 29 June 1998 claim of Smoot and several subcontractors led to ASBCA No. 52173. The CO's denial of Smoot's 24 April 2000 claim for subcontractors Mona Electrical and Superior Iron Works (SIW) led to ASBCA No. 53049. The CO's deemed denial of Smoot's 27 October 2000 claim for subcontractor C. J. Coakley Co. led to ASBCA No. 53246. The Board has jurisdiction of these appeals under the Contract Disputes Act of 1978, 41 U.S.C. §§ 605(c)(5) and 607. After a 10-day hearing, the parties have submitted post-hearing and reply briefs. The Board is to decide only entitlement in these three appeals (tr. 12).

Under the captioned contract, the Board consolidated ASBCA Nos. 52145, 52146, 52147, 52148, 52149, 52150, 52173, 52261, 53049, 53115 and 53246. Appellant withdrew ASBCA Nos. 52145, 52146, 52147 and 52148 with prejudice (tr. 37, 80). (*See* Board's 14 November 2001 ORDER OF DISMISSAL.) The Rule 4 documents for those four dismissed appeals, however, remain in the record (tr. 11-12). Citations to Rule 4 documents herein are to ASBCA No. 52173 unless otherwise stated.

FINDINGS OF FACT

1. On 3 May 1996, the Navy awarded Contract No. N62477-94-C-0028 (contract 28) to Smoot to complete the Navy's renovation design, to demolish building 33A and the "lean-to" abutting building 37, to renovate buildings 33, 37, 39, and 109, and to construct a "Link" building at the Washington Navy Yard (WNY) by 31 December 1997 for the firm fixed-price of $19,073,139 (R4, tab 1 at spec. § 01010, ¶ 1.2.1; ASBCA 53115, R4, tab 1 at 2).

2. Contract 28 incorporated by reference, *inter alia*, the following FAR clauses: 52.236-2 DIFFERING SITE CONDITIONS (APR 1984), 52.236-12 CLEANING UP (APR 1984), requiring work areas to be kept free from accumulations of waste materials at all times, 52.242-14 SUSPENSION OF WORK (APR 1984), 52.243-4 CHANGES (AUG 1987), 52.236-7 PERMITS AND RESPONSIBILITIES (NOV 1991), requiring compliance "with any Federal . . . regulations applicable to the performance of the work" and 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 1 at 00721-12, -13, Amend. 0004 at 4 of 13).

3. Contract 28's specifications included: (a) § 01220, in which ¶ B2010.11.4, "EXISTING EXTERIOR MASONRY WALLS," provided:

> After all other repairs are made to Building 33, 37, 39 and 109, remove lead based paint (LBP) from areas of external walls noted on the plans, on Buildings 33, 36 . . . 109, 37 and 39. The paint removal shall be in accordance with [§] 02050.

and ¶ C3010, "INTERIOR WALL FINISHES," required interior exposed existing brickwork to be cleaned and stripped to bare brick finish, and noted that existing paint was LBP; (b) § 01311, in which ¶ 1.8 required Smoot to submit narrative and total float reports for requests for time extensions under the Changes, Default, Differing Site Conditions, and Suspension of Work clauses; (c) § 01560, in which ¶ 1.5 required Government approval of Smoot's "SAFETY PROGRAM," including procedures for protecting personnel from LBP pursuant to 29 C.F.R. § 1926; ¶ 1.5.1 provided:

> 1.5.1 Unforeseen Hazardous Material

> 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 contracting officer immediately. Intent is to identify materials such as PCB, lead paint and friable and nonfriable asbestos . . . . 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."

and ¶ 3.7 provided, "Dry power brooming will not be permitted"; and (d) § 02050, in which ¶ 1.2 required Smoot to "[r]emove or encapsulate [LBP]," and ¶ 3.2 provided:

> 3.2 LEAD BASED PAINT
>
> a. All paint is assumed to contain lead.
>
> b. Contractor shall submit for approval a plan which includes worker protection and waste disposal for [LBP].
>
> 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 01560-6, -9; 02050-1, -5, -6; 01120-18)

4. Contract drawings R3.1, R3.3 and R3.4 required removing all coatings and finishes from exterior walls forming the link interior and those exposed after demolition of buildings 33A and 37 "lean-to," and drawings A3.8, -10, -11, -12 and -14 depicted gypsum wallboard over insulation on the inside of exterior masonry walls and ceilings of buildings 33, 39 and 109 (ex. A-2 at S000872, -77, -79, -80, -912 to -19; tr. 181-86). The contract specifications and drawings gave no indication as to whether the LBP on the WNY buildings would or could continuously generate lead contamination, whether disturbed or undisturbed by construction activity.

5. The 13 July 1995 "WESTON" environmental report, referenced in specification § 02050, ¶ 3.3, and § 02076, ¶ 1.2, and provided to Smoot with the solicitation, 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 [LBP]. The surveys were performed from February 27 through March 2, 1995 . . . . [Because of their unsafe condition,] WESTON was unable to access . . . the catwalks located [under the ceiling] 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 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.

The Weston report did not identify deteriorated and peeling paint on any ceiling area in building 33. (R4, tab 1 at 02050-5, 02076-1; tab 2 at iii-iv, 3-3, 3-4)

6. The 13 February 1996 Occupational Safety and Health Administration (OSHA) regulations, 29 C.F.R. § 1926.62, (a) applied to demolition and renovation of structures if lead-containing materials were present, and to removal, encapsulation, disposal and containment of such materials at a construction site; (b) in ¶¶ b, c, defined "Action Level," requiring personal safety measures, as exposure to an airborne lead concentration of "30 micrograms per cubic meter of air" [?g/m^3], and "Permissible Exposure Limit" (PEL), requiring stricter safety measures, as exposure to a lead concentration greater than 50 ?g/m^3, both as averaged over an 8-hour period (TWA); (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 . . . by vacuuming or other methods that minimize the likelihood of lead becoming airborne.
>
> . . . .
>
> (5) Compressed air shall not be used to remove lead from any surface unless the compressed air is used in conjunction with a ventilation system designed to capture the airborne dust created by the compressed air.

(d) in ¶i dealt with hygiene facilities and practices such as clean change areas; and (e) did not refer to OSHA Instruction CPL 2-2.58, require surface lead sampling and laboratory analysis, or prescribe a maximum of 200 ?g/ft.^{2} for surface lead concentration (R4, tab 3).

7. Appendix A of OSHA Instruction CPL 2-2.58 dated 13 December 1993, set forth "Inspection Guidance and Citation Policy" for 29 C.F.R. § 1926.62. With respect to § 1926.62(i), it stated: "In determining whether an employer has maintained surfaces of hygiene facilities free from contamination, OSHA recommends the use of HUD's recommended level for acceptable decontamination of 200 ?g/ft.^{2} for floors in evaluating cleanliness of change areas, storage facilities, and lunchrooms/eating areas." (R4, tab 4 at A-21) We find that CPL 2-2.58 was not included in 58 Fed. Reg. 26590 of 4 May 1993.

8. In 1995 Smoot's estimator, Joel Monger, inspected WNY building 33, climbed its interior catwalks, and saw no peeling paint on the ceiling of the roof and nothing on the roof or anywhere in building 33 that caused him concern about a lead dust hazard (tr. 927-29, 932-36). After award, before roofing operations commenced, William Piatnitza, Smoot's project manager, found the roof deck paint in relatively sound condition with a little bit of peeling (tr. 719-21). Considering that Weston did not access the catwalks beneath the ceiling of building 33, and Mr. Piatnitza's foregoing testimony, we find that Mr. Monger's inspection of building 33 in 1995 was not thorough or complete. We further find that the lead-impregnated wooden substrate of building 33's roof deck was not visible on a reasonable pre-award site inspection.

9. Smoot's 28 August 1996 "DEMOLITION PLAN" required laboratory analysis of bulk samples of various types of paint to determine their lead percentages prior to demolition and safety monitoring of workers during demolition and removal of debris containing LBP, and stated that, with two exceptions, "the exterior walls are permanently concealed by drywall . . . thus no removal of lead paint is required" (R4, tab 5 at 11; tr. 209-13). The Navy approved Smoot's demolition plan in April 1997 (tr. 216-17).

10. The 29 August 1996 memorandum of Elizabeth Freese, Environmental Safety and Health Director, Naval District of Washington (NDW), to Linda Goforth, Safety and Health Director, Engineering Field Activity, Chesapeake, located at WNY, stated that on 21 August 1996 dust from the floor of building 109 was tested "to qualitatively identify the presence of lead" and construction workers in WNY buildings 33 and 109 potentially could be exposed to lead indirectly linked to LBP, because over time lead-containing materials had deteriorated and settled on horizontal surfaces. She recommended that "[a]ll Smoot . . . employees and their contractors be notified of the presence of lead in the settled dust of Buildings 33 and 109." (R4, tab 17 at 11-13; tr. 1731-32) Before 11 July 1997, the Navy did not provide such notice to Smoot, and Smoot had no knowledge of pre-existing lead dust, though Ms. Goforth had such knowledge (tr. 219-20, 568, 1763, 1766-68).

11. From August 1996, when demolition began, to 11 July 1997, Smoot's periodic ambient and personal monitor air samples in the WNY buildings were within OSHA's "PEL" for lead (R4, tab 11 at 8; ex. A-10 at S002482-91; tr. 251-52).

12. Smoot installed new concrete floors in building 33 as follows: floor 1 from 21 January to 21 February 1997; floor 2 from 24 February to 13 March 1997; floor 3 from 27 March to 14 April 1997; and floor 4 from 24 April to 6 June 1997 (ex. A087 at S009656 to -63). Navy inspector Charles Crouse saw contractor laborers use a high-pressure air hose to clean out debris, including paint chips, from the metal pan forms prior to pouring concrete for the fourth floor of building 33 without engineering controls to contain lead dust and paint chips (tr. 1696-99). The dates by which Smoot installed floors in buildings 37, 39 and 109 are not in evidence.

13. Smoot and its subcontractors: (a) removed building 33's existing slate roof from 15 April to 23 May 1997; (b) cut about thirty 2' by 76' ventilation openings at about 16' intervals perpendicular to the peak of building 33's roof from 25 April to 16 May 1997; the cuts severed the unpainted tongues of the tongue-and-groove roof planks lengthwise; (c) performed LBP abatement by means of a paperbacked chemical applied to building 33's trusses from 17 April to 3 July 1997; (d) cut rivets on 23 May 1997, and modified those trusses from 27 May to 10 July 1997; (e) removed the existing slate roof of buildings 37, 39, and 109 from 23 to 27 May 1997; and (f) removed nails from building 33's roof from 1 to 9 July and cut 18 skylight penetrations in that roof on 8 July 1997 (exs. A-2 at S000914, -19, A-10 at S002482-91, A-11 at S003083 to -3114, A-75 at S007822, -27, -45, -37, -42, -52, -62, -69, -75, A-87 at S009664; tr. 281-82, 573-75, 711-13, 765-66).

14. Smoot's as-built drawings of the roof of building 33 depict six 8' x 4' and twelve 3' x 3' skylight openings, for a total perimeter of 300 linear feet (ex. A-89 at S008902). Bruce Spengler, Smoot's vice president, believed that there were six 8' x 3' and twelve 3' x 3' skylight openings, totaling 276 linear feet, and a saw blade width was 1/8". He calculated 2.88 square feet cut through LBP in the 38,850 square foot roof of building 33. Buildings 37, 39 and 109 had no skylights. (Ex. A-65; tr. 533-35)

15. On 9 July 1997, a construction worker at WNY building 33 told OSHA that he was required to remove "rivets that may have been covered with lead which was not removed during lead abatement efforts." On 10 July 1997, OSHA reported such "alleged hazard" to the Navy and requested it to investigate, make necessary corrections or modifications, and report its inspection results to OSHA by 18 July 1997. (R4, tab 8; tr. 282, 1736)

16. Linda Goforth's 11 July 1997 memorandum to WNY's Resident Officer in Charge of Construction (ROICC) reported that on that date in WNY Building 33 she interviewed SIW's crew working on overhead structural steel, observed skylight openings

cut in the roof, photographed the building, observed Smoot employee work practices, reviewed Smoot's site documents, including demolition submittals, and found violations of the WNY contract and OSHA standards, including dry sweeping of construction dust and paint chips on the third floor and newly poured fourth floor, and people with "clothing covered in lead contaminated dust." She recommended to stop work on the third and fourth floors of building 33 until completion of a lead assessment. (R4, tab 10; tr. 1732, 1738-49, 1762, 1767) Ms. Goforth and Mr. Piatnitza testified, and we find, that one cannot tell by the naked eye whether dust is lead dust (tr. 568, 1761).

17. On 11 July 1997, the Navy Project Engineer and ROICC, LCDR Andrew Trotta, told Mr. Piatnitza to cease operations in building 33 (R4, tab 11 at 1; tr. 703). At noon on that day Smoot and its subcontractors vacated the third and fourth floors of building 33, but continued exterior work (R4, tab 11 at 9; tr. 253, 281, 1171).

18. Smoot's subcontractor, Applied Environmental, Inc. (AEI), took and tested surface wipe samples in the WNY buildings starting 11 July 1997 and continuing to September 1998, with test results showing the following peak lead concentrations:

Date	?g/ft.^{2}	Record cite
7-11-97	12,000	Ex. A-10 at S002031
7-15-97	14,800	Ex. A-10 at S002022
7-22-97	41,800	Ex. A-10 at S002035
7-29-97	79,500	Ex. A-10 at S002066
8-5-97	34,000	Ex. A-10 at S002092
8-13-97	27,300	Ex. A-10 at S002119
9-12-97	12,000	Ex. A-10 at S002192
10-30-97	38,793	Ex. A-81 at S008192
1-30-98	2,710	Ex. A-10 at S002344
4-8-98	1,370	Ex. A-10 at S002346
7-1-98	123	Ex. A-10 at S002253
9-2-98	15	R4, tab 34 at 2

19. At noon on 14 July 1997 Smoot directed all employees to vacate building 33 (R4, tab 11 at 11; tr. 253-54).

20. On 15 July 1997: (a) Smoot's subcontractor TBN began to clean up lead dust on the fourth floor of building 33 (ex. A-11 at S003082); and (b) LCDR Trotta gave Smoot NDW documents described as "HAZWRAP . . . All database Reports from Phase 1, Lead Based Paint Program, Building 33, Collected Sept./Oct. 1995," which antedated the solicitation for contract 28, and designated four lead hazard classifications:

A) No Apparent Hazard (No lead found)

B) Potential Lead Hazard (Detectable levels of lead, Paint in good condition)
C) Immediate Lead Hazard (Detectable levels of lead, Paint in fair or poor condition) OR (High levels of lead, Paint in good condition)
D) Immediate Lead Hazard (High levels of lead, Paint in fair or poor condition)

The NDW report listed 443 instances of Classifications C and D hazards by items and substrates in building 33, including the wood ceiling, concrete floor, brick walls, steel trusses, window columns, jambs, ledges, moldings and sills, and described the ceiling wood paint as poor and unsatisfactory. (R4, tab 41 at 2-3, 5-6, 41-43)

21. Had Smoot been aware of the foregoing NDW report prior to award of contract 28, it would have asked the Navy why more extensive abatement work was not specified for complete removal or containment of LBP (tr. 352-54).

22. Smoot's 17 July 1997 letter to the CO requested a modification of contract 28, citing the Changes and Differing Site Conditions clauses, due to an alleged suspension of work and Smoot's 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," but stated no specific delay period (R4, tab 11 at 2).

23. Smoot's 18 July 1997 letter to LCDR Trotta 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 [of AEI's testing], similar action was taken for the balance of floors and buildings as of July 14th Noon.

(R4, tab 11 at 9) On 22 July 1997 Smoot notified its employees and subcontractors in writing not to enter affected areas of the WNY buildings without training and proper equipment, and encouraged employee blood sampling (ex. A-125).

24. The CO's 28 July 1997 letter to Smoot did not disavow LCDR Trotta's 11 July 1997 suspension direction to Smoot; stated that "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 contract 28, and the presence of LBP was not a differing site condition requiring any increase in cost or time extension; and ordered Smoot to proceed with removal of all LBP "in accordance with all contract requirements" (R4, tab 15).

25. Smoot' s 29 July 1997 letter to the CO reasserted a work suspension and differing site condition, and stated that "the Navy had specific information regarding the existing [LBP] conditions (*e.g*. copy of HAZWARP [sic] 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).

26. Smoot observed paint chips generated from the roof deck on the fourth floor of building 33, and from about 30 July to 5 August 1997 isolated that floor with polyethylene sheeting. Starting 1 August 1997, Smoot retained an additional subcontractor, Southern Insulation, to clean up lead dust in the WNY buildings. (Ex. A-10 at S003057, -3055; tr. 258-61) On 13 August 1997 AEI measured a 1,110 ?g/m^3 lead concentration on a SIW worker moving equipment and beams on the fourth floor of building 33, apparently as a result of work on the roof above (ex. G-105 at 1).

27. LCDR Trotta's 13 August 1997 letter to Smoot stated that 200 ?g/ft.^{2} set forth in CPL 2-2.58, p. A-21, were appropriate for designated eating, drinking and tobacco areas, were the "clean-up criteria . . . for buildings under construction" and "we will therefore expect 200 [?g/ft.^{2}] on . . . interior surfaces at building occupancy" (R4, tab 22; tr. 621-24). The CO received a copy of that letter, and did not disavow LCDR Trotta's direction to Smoot.

28. 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).

29. On 18 August 1997, Smoot's subcontractors Mona Electrical, C.J. Coakley and Hess Mechanical resumed work in building 33 on floors 1, 2 and part of 3 (ex. A-87 at S009668, -72, -76, A-11 at S003009, -3016; tr. 284-85).

30. Smoot's 21 August 1997 letter to the CO requested a final decision on its alleged suspension of work, unforeseen site conditions and undisclosed superior Government knowledge of hazardous lead in the WNY buildings, but stated no sum certain in monetary damages and no specific number of days of delay (R4, tab 25). On 28 August 1997, the CO advised Smoot that he would issue no final decision until Smoot submitted a claim setting forth a sum certain, and certified if needed (R4, tab 26).

31. The 3 September 1997 letter of successor Navy Project Engineer, LT Michael J. Zucchero, to Smoot stated that specification § 02050, ¶ 3.2(e), required Smoot to remove loose, deteriorated paint and to clean and re-paint such surfaces. "Therefore, an equitable adjustment . . . will be denied. You will, however, be expected to complete the work as required in the contract." (Ex. A-30)

32. LT Zucchero's 8 September 1997 to Smoot stated: "At present the contract completion date is April 29, 1998, and any indication of a later contract completion date is unacceptable" (ex. A-197).

33. Smoot's 19 September 1997 letter to the CO submitted laboratory test results showing 28,800 mg/kg of lead in an unpainted WNY roof wood sample, which Smoot described as an "unforeseen condition, which when disturbed creates lead bearing debris and a potential airborne hazard" under specification § 01560, ¶ 1.5.1, which would require "containment and hazardous material removal" (AR4, tab 46).

34. Smoot's 9 October 1997 letter to the CO alleged that the Navy's 11 August 1997 letter to Smoot (ASBCA 53115, R4, tab 3, encl. 4) had "directed that April 29, 1998, was the latest occupancy date, [1] and accordingly, we had already undertaken to accelerate all work to mitigate the delays resulting from the unforeseen hazardous materials following your direction"; and 6 October 1997 letter to Smoot (*id.*, encl. 5) provided a 7-day extension of the contract completion date, [2] which Smoot understood was dictated by the Navy's need to occupy the WNY buildings no later than 6 May 1998. Smoot concluded:

> We are accelerating the schedule at your direction, (i.e. over a schedule which would otherwise show a much later occupancy date due to the unforeseen hazardous materials) to show a May 6, 1998 completion date. The attendant impact costs will be submitted as part of the sum certain amount requested [by the Navy's 28 August 1997 letter].

(AR4, tab 48)

35. Smoot's "Daily Job Logs" for contract 28 (ex. A-11) show that lead dust abatement work was started and finished so as to permit resumption of other interior construction activities, with days elapsed after 11 July 1997, as follows:

Bldg(s).	Floor	Start	Finish	Days Elapsed	Ex. A-11 at pp.
33	4	7-15	9-27	78	S003082, -4063

1 That 11 August 1997 letter "approved . . . a completion date of 29 April, 1998. This date includes all changes up through SRS PCO #174, with the exclusion of PCO # 170," (emphasis added) which became Smoot's designation for the present LBP claims.

2 That 6 October 1997 letter discussed the 29 April 1998 completion date, and did not mention any 7-day extension to 6 May 1998.

33	3	7-29	9-4	55	S003065, -2905
33	2	8-6	8-16	36	S003042, -3016
33	1	8-8	8-18	38	S003033, -3009
37/39/109	3	9-9	10-8	89	S002870, -3968
37/39/109	2	9-12	10-6	87	S004194, -3993
37/39/109	1	9-12	9-30	81	S004194, -4041

36. LT Zucchero's 10 November 1997 letter to Smoot stated that the "final lead cleanup requirements" for final occupancy under contract 28 were 200 ?g/ft.^{2} for floors, walls, ceilings, and decking under access flooring; 500 ?g/ft.^{2} for window sills; and 800 ?g/ft.^{2} for window wells (R4, tab 29).

37. The CO's 9 January 1998 letter to Smoot confirmed LT Zucchero's beneficial occupancy requirements for surface lead, explaining that those criteria were based on the 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 at 2).

38. On about 12 January 1998, subcontractor C. J. Coakley finished installing gypsum wallboard on the interiors of the exterior masonry walls and the undersides of the roofs in the WNY buildings (tr. 117; ex. A-75 at S007994 to -8028).

39. Without submission of the narrative report and total float report required by specification § 01311, ¶ 1.8, for Smoot's requests for time extension, by unilateral Modification No. A00135 on 4 March 1998, the CO extended contract 28's completion date by 58 calendar days to 6 May 1998, including 7 calendar days for Government delay in directing removal and disposal of lead contaminated paint (ex. A-185 at 30-31).

40. Smoot's 1997-98 correspondence stated that subcontractor C.J. Coakley's material submittal delay caused a critical path delay of 1-16 October 1997 (ex. G-115), which overlapped 1-8 October 1997 of the period for LBP abatement in the second and third floors of buildings 37, 39 and 109 (*see* finding 35).

41. By unilateral Modification No. A00178, dated 26 March 1998, the Navy changed the floor layout of WNY buildings 33, 39 and 109 (ex. A-185 at 49-50). We find that Smoot's decision to accelerate work while performing LBP clean-up ended 26 March 1998 (tr. 681-83). On 18 June 1998, the CO issued unilateral Modification No. A00188, which extended the contract completion date to 6 July 1998 for the floor layout change (ex. A-185 at 51-52).

42. Smoot's 29 June 1998 letter submitted to the CO a certified claim for $1,391,631.84, with considerable records showing labor, material, and other cost elements thereof, alleging that: (a) the 1995 NDW report identifying "Immediate Lead Hazard(s)"

in building 33's ceiling was undisclosed superior knowledge; (b) in the spring and summer of 1997 Smoot encountered a type 1 "differing site condition" of deteriorated paint on the underside of, and lead impregnated wood in unpainted, roof decking members; (c) the Navy suspended work on 11 July 1997 and Smoot performed lead abatement and clean-up until 9 October 1997, while other interior work stopped or diminished; (d) Smoot confronted three "unforeseen conditions" -- disposal of lead-containing wood debris from the roof decking, scraping and sealing of deteriorated LBP on the roof decking, and the Navy' s direction to clean up LBP to more stringent standards than the contract required; and (e) though entitled to a 76-day extension from 29 April to 14 July 1998 due to the 11 July 1997 suspension, at Navy insistence Smoot accelerated and completed performance by 29 April 1998 (R4, tab 33). On 24 April 2000, Smoot supplemented its 29 June 1998 claim with a claim on behalf of Mona Electrical and SIW, and on 27 October 2000, with a claim on behalf of C.J. Coakley.

43. In connection with Hess Mechanical's payment request No. 38 for $59,056 subcontract retainage, on 8 November 1998, Hess executed a general release of Smoot and the owner, *i.e.*, the Government, from liability for all claims with respect to Hess' WNY subcontract (ex. G-142 at 2).

44. The CO's 28 April 1999 final decision denied Smoot's 29 June 1998 claim in its entirety, finding that Smoot's work practices had caused lead contamination because from 20 June to 3 July 1997, TBN, Smoot's lead abatement subcontractor, had not completely removed LBP from the roof trusses, since a worker had found LBP on rivets he was required to remove, and from 7 to 10 July 1997 Wrecking Corp. of America (WCA), Smoot's demolition subcontractor, had cut skylight openings in the roof, which caused peeling and deteriorated paint on the roof deck below to flake off and fall into pans set up for concrete floor pours, from which LBP dust and debris were blown into perimeter gaps, elevator shafts and window chases, contaminating the entire building 33 (R4, tab 40 at 2-3). Smoot's timely appeal was docketed as ASBCA No. 52173. The CO's 26 July 200 final decision denied Smoot's 24 April 2000 LBP claims on behalf of its subcontractors SIW and Mona Electrical. Smoot's timely appeal was docketed as ASBCA No. 53049. On 26 January 2001, Smoot filed an appeal from the CO's deemed denial of Smoot's 27 October 2000 LBP claim on behalf of its subcontractor C.J. Coakley, which was docketed as ASBCA No. 53246.

45. John V. Cignatta, respondent's expert in removal or disturbance of LBP in complex industrial structures (tr. 1630), opined that: (a) LBP can "wick down" or permeate the gaps between riveted lap joints on tresses, which LBP cannot be removed completely by chemical strippers; (b) the wooden roof deck had tiny cracks allowing LBP to permeate the wood; (c) Smoot did not adhere to the specified OSHA regulations; (d) Smoot's demolition and construction work created hazardous conditions by disturbing LBP; and (e) Smoot's subcontractor TBN did not implement sufficient engineering

controls and practices in a manner to control the dispersion of lead dust (tr. 1630; ex. G-52 at 4-5, 7, 9, 11-12).

46. Mr. Cignatta did not know the volume or number of rivets torch-cut, the type of chemical stripper used to remove paint from building 33 trusses in 1997, the actual amount of paint not removed from such trusses (tr. 1648-51), or the dates on which the WNY buildings were sufficiently clean of lead dust to resume normal construction work (tr. 1646-47).

47. Mr. Cignatta opined that: (a) the pre-construction warehouse operation in building 33 could have caused lead dust to precipitate and remain on its surfaces, and the WNY buildings were contaminated by lead before Smoot began construction (tr. 1639-40); (b) the primary means of lead poisoning is by inhalation of, or by food contamination by, microscopic lead particles (tr. 1684); and (c) possible sources of lead contamination in the WNY buildings were: (1) existing, ambient lead dust, (2) lead from paint on surfaces disturbed by construction activity, (3) lead continuously released from paint even absent disturbance by construction activity, and (4) migration of lead dust by diffusion and air flow from high concentration work zones to nearby clean zones without maintaining a negative pressure and dust collectors to control the air flow (tr. 1636-37, 1653-54, 1679-83).

48. Mr. Cignatta opined that, both before and after Smoot cleaned the lead from the WNY buildings in the summer of 1997, there was a 10,000 times greater possibility that lead from paint on surfaces disturbed by construction activity contaminated those buildings, than from pre-existing ambient lead dust. He cited the following reasons for that opinion: (a) rivet-busting on the trusses in building 33 imparted "incredible vibrations" to the LBP thereon, and construction workers walked through paint chips on the floors before Smoot removed such debris (tr. 1628, -85, -62); (b) before mid-July 1997, personal body monitor air-test samples showed 10,000 times greater level of lead than ambient air test samples in areas adjacent to work (tr. 1654-55); (c) after the WNY buildings were cleaned of lead, he would have expected that no lead could have come from source (1), and all lead would have come from source (2) (tr. 1655-56, 1659); and (d) certain air test data substantiated the 10,000 to 1 ratio (tr. 1685-92). Those data Mr. Cignatta designated were:

Date	?g/m³ Ambient	TWA ?g/m³ Personal Monitor	Ex. A-10 at S00-
8-5	3.3	4.7	-2094
8-6		5,947; 12,431	-2446, -2447, -2448
		5,947; 12,431	
8-28	LTQL*		-2167
	18, 4.8		
8-28-29		274.9, 81.6	-2422
8-29	LTQL, 8.9,		-2169

	4.3		
9-5	LTQL, LTQL, 3.8, 5.4		-2176
9-5	13	17,400	-2177
10-6	LTQL, LTQL, 8.6, 42.6		-2232
10-6		92.0	-2233, -2370

* "Less than quantitation [sic] limit" of 2.0 ?g/m^3

49. The foregoing test results do not support Mr. Cignatta's conclusion about the primary source of lead dust in the WNY buildings because of incomplete and faulty data: (a) none of the designated samples was taken before 11 July 1997, before lead abatement work commenced, or taken after 8 October 1997, when the lead abatement work was finished for purposes of resuming other interior construction activities (finding 35); (b) his conclusion did not account for lead continuously released from paint even absent construction activity; (c) none of the ambient air samples and only three of the personal monitor air samples were 8-hour TWAs prescribed by the OSHA regulation (finding 6(b)); and (d) AEI calculated the 13 and 29 August 1997 TWAs by multiplying the recorded "lead concentration" by the ratio of exposure time to 8 hours (ex. A-10 at S002422, S002459), but the 6 August 1997 TWAs are inconsistent with such calculation (ex. A-10 at S002446).

50. On 7 November 2001, Smoot moved to exclude the testimony and written report (ex. G-53) of proposed Government expert witness, Dr. Paul Kauffmann, who had prepared a CPM schedule analysis (tr. 1517). At the hearing, after receiving argument on Dr. Kauffmann's qualifications and reviewing his curriculum vitae, deposition transcript and proposed expert report, the presiding judge granted Smoot's motion to exclude from evidence the testimony and written report of Dr. Kauffmann in these appeals and ASBCA No. 52261. We have set forth the facts relating to the ruling in findings 26 and 27 of our opinion in ASBCA No. 52261 dated 26 February 2003 and reference those findings here.

51. The parties' August-September 1996 correspondence and later trial testimony regarding TPH (total petroleum hydrocarbons) and PCB contaminated concrete and pigeon excrement on the roof trusses and window ledges of building 33 did not mention the § 01560, ¶ 1.5.1, Unforeseen Hazardous Material clause, but consistently cited the FAR 52.243-4 Changes clause for authority for compensating Smoot for removing and disposing of such materials (ex. A-15 at S007079-80, S007086-90; tr. 173-75). Unilateral Modification Nos. A00003, A00025, and A00035, and bilateral Modification No. A00055, did not mention the § 01560, ¶ 1.5.1, Unforeseen Hazardous Material clause; all cited the FAR 52.243-4 Changes clause, as authority for those modifications compensating Smoot, *inter alia*, for removing and disposing of contaminated concrete and pigeon excrement (ex.

A-13 at S006689-91, 6751-52, 6793-94, 6808-09). The record contains no evidence of how Smoot interpreted the solicitation and contract documents with respect to the extent of deteriorated and peeling LBP, lead-impregnated wooden roof decking, and continuously generated lead from LBP in the WNY buildings, or whether Smoot relied on any such interpretation. The record does not permit the Board to segregate which portion of LBP clean-up delay was due to lead continuously released from the WNY buildings' paint, and which portion was due to Smoot's engineering controls and practices that were insufficient to confine lead dust dispersion.

DECISION

Respondent contends that, "[i]n a clearly erroneous ruling, the Board refused to allow Respondent's expert, Prof. Kauffmann, to testify regarding the alleged impact on the CPM schedule" (Gov' t br. at 83). For the reasons set forth in our opinion in ASBCA No. 52261 dated 26 February 2003, the Board concludes that Dr. Kauffmann is not qualified to testify as an expert in construction CPM schedule analysis and affirms the exclusion of his testimony and report on that basis.

Smoot alleges five theories of liability for its LBP clean-up claims: (i) type 1 differing site conditions (DSC), (ii) undisclosed superior knowledge, (iii) constructive changes, (iv) suspension of work, and (v) constructive acceleration of performance.

I.

In the context of its differing site conditions argument, Smoot asserts that contract specification § 01560, ¶ 1.5.1, Unforeseen Hazardous Material, entitles it to recover the costs of disposing of "additional" LBP "not indicated on the drawings or noted in the specifications." That clause provides that "[a]ll known hazardous materials are indicated on the drawings or noted in the specifications," and sets forth two initial requirements for issuance of a "modification pursuant to ' FAR 52.243-4, Changes' and ' FAR 52.236-2, Differing Site Conditions'": (i) the contractor must encounter "additional [hazardous] material . . . not indicated on the drawings or noted in the specifications" and (ii) such additional material "may be dangerous to human health upon disturbance during construction operations" (finding 3). Smoot seeks to support its contention by arguing that when it encountered concrete contaminated by TPH and by PCBs and pigeon excrement on roof trusses and window ledges of building 33, both the Navy and Smoot construed ¶ 1.5.1 to require compensation for those unforeseen hazardous materials (app. br. at 25-26). However, the parties' correspondence and modifications with respect to TPH and PCB contaminated concrete and pigeon excrement did not mention § 01560, ¶ 1.5.1, but rather cited the FAR 52.243-4 Changes clause as authority for compensation for removing and disposing of those materials (finding 51). The parties' contemporaneous interpretation of the contract provisions in question does not support Smoot's construction of ¶ 1.5.1.

Neither party analyzes or cites any legal authority deciding whether ¶ 1.5.1's concluding phrase "pursuant to" the FAR Changes and Differing Site Conditions clauses requires the contractor to establish the elements of proof of a differing site condition or a constructive change. Our research uncovered only one decision in which a Navy contract included an Unforeseen Hazardous Material provision essentially identical to contract 28's § 01560, ¶ 1.5.1. However, the issue there was default termination and the Board did not interpret its "pursuant to" provision. *See G & G Western Painting, Inc.*, ASBCA No. 50492, 01-2 BCA ¶ 31,492.

An earlier decision addressed a Navy contract containing § 01012, ¶ 7, "LOCATION OF UNDERGROUND UTILITIES" which was very analogous to contract 28's § 01560, ¶ 1.5.1. That § 01012, ¶ 7, concluded, "For any additional work required by reason of conflict between the new and existing work, an adjustment in contract price will be made in accordance with Clause 4 of the General Provisions," *viz*., Differing Site Conditions. The Board held that the contractor had not established a differing site condition, because the underground condition in dispute was known to the contractor or could have been reasonably anticipated at the time of contract award. The Board stated that § 01012, ¶ 7, "adds nothing to appellant's rights provided by the Differing Site Conditions clause which under the admitted facts, is not applicable in this appeal." *Luke Construction Co., Inc.*, ASBCA No. 24889, 81-1 BCA ¶ 15,023 at 74,343. We conclude that ¶ 1.5.1 does not provide an equitable adjustment independent of the Changes and Differing Site Conditions clauses.

Smoot further argues that: (1) deteriorated paint and lead impregnated wood on the underside of unpainted roof decking members were a type 1 DSC (finding 42(b)), and (2) before and after award of contract 28 building 33's ceiling and walls continuously generated LBP contamination, which also was a type 1 DSC (app. br. at 8-11). Smoot cites *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987), for the elements of proof of a Type 1 DSC: (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 (app. br. at 26).

The Government argues that contract 28's § 02050, ¶ 3.2a specified that "all paint is assumed to contain lead," deteriorated LBP on the roof decking members was a visible surface condition which Smoot saw or should have seen during its pre-award site visits, so deteriorated LBP was not a DSC, and lead in wood debris from the ceiling is not unusual or unforeseeable (Gov' t br. at 5, 68-69).

With respect to DSC element (1), specification § 01560, ¶ 1.5.1, contained the positive indication that "[a]ll known hazardous materials [including LBP] are indicated on the drawings or noted in the specifications." The specifications stated that "all paint is assumed to contain lead" and referred to the "WESTON" report. Weston surveyed and assessed "the potential LBP hazards present in each of the [WNY] buildings," identified deteriorating and peeling paint on the walls and other surfaces of those buildings and extremely deteriorated paint on the ceiling of building 39, did not identify deteriorated and peeling paint on any ceiling area in building 33, and did not identify any lead-impregnated wooden substrate of the roof deck of building 33 (finding 5). However, contract 28 made no positive indication as to whether the LBP in the WNY buildings would or could continuously generate lead contamination, whether disturbed or undisturbed by construction activity (finding 4).

With respect to DSC element (2), Smoot points to no evidence, and our review of the record discloses no evidence, of how Smoot interpreted the solicitation and contract documents with respect to the extent of deteriorated and peeling LBP, lead-impregnated wooden deck roofing and continuously generated lead from the LBP in the WNY buildings, and whether Smoot relied on any such interpretation (finding 51). With respect to DSC element (3), both the lead-impregnated wooden substrate and the extensive deterioration and peeling paint on the ceiling of building 33 that Smoot encountered differed materially from what the contract indicated.

With respect to element (4), deteriorated and peeling paint on the ceiling of building 33 (i) was foreseeable, since the Weston report accompanying contract 28's solicitation found extremely deteriorated and peeling paint on building 39's ceiling (finding 5), and (ii) probably was visible before contract 28 was awarded, despite Smoot's estimator's testimony that he saw no peeling paint on building 33's ceiling during his pre-award site visit (finding 8), since we have found that his pre-award inspection of building 33 was not thorough or complete, the 1995 NDW report described building 33's ceiling paint as poor and unsatisfactory (finding 20), and before roofing operations began Smoot's project manager saw paint peeling from building 33's roof deck (finding 8). Smoot did not establish DSC element (4) with respect to building 33's deteriorated and peeling LBP ceiling paint. The lead-impregnated wooden substrate of the roof deck was not visible on a reasonable pre-award site inspection (finding 8), nor was the continuous generation of lead contamination from LBP foreseeable at the time of Smoot's best and final offer, with respect to which items Smoot established DSC element (4). With respect to DSC element (5), Smoot established that it was damaged by the cost of cleaning and disposing of contaminated LBP materials from the WNY buildings as a result of the three foregoing causes (finding 42).

In summary, Smoot did not establish: (a) DSC element (1) with respect to continuously generated lead from LBP; (b) DSC element (2) for the deteriorated and peeling LBP, lead-impregnated wooden substrate of the roof deck, or continuous

generation of lead from LBP; and (c) DSC element (4) for the deteriorated and peeling LBP. Accordingly, we hold that respondent is not liable for the alleged type 1 DSC.

II.

Smoot bases its superior knowledge claim on the belatedly disclosed 1995 NDW report. The Navy argues that the Weston report put Smoot on notice, and provided it with essentially the same information as the NDW report contained, about deteriorating and peeling LBP, and Smoot could have conducted the same tests, or performed the same sort of site inspection, as the NDW report disclosed.

To recover for undisclosed superior knowledge, a contractor must show that: (1) it undertook to perform without vital knowledge of a fact which affected performance costs or duration, (2) the Government was aware that the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied by the Government misled the contractor or did not put it on notice to inquire, and (4) the Government failed to provide the relevant information. *See Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994), *aff'd on other grounds*, 516 U.S. 417 (1996).

The Weston report stated that Weston was unable to access the catwalks under Building 33's ceiling because they were unsafe, did not identify deteriorated and peeling paint on any ceiling area in building 33, and did not include the detailed and specific information set forth in the 1995 NDW report on building 33, which listed 443 substrates having Classifications C and D immediate lead hazards, including the wood ceiling, brick walls and steel trusses, and described the ceiling paint as in poor and unsatisfactory condition. Smoot first learned of the NDW report on 15 July 1997, long after award of contract 28. (Findings 5, 20) The Navy knew Smoot had no knowledge of, and no reason to seek, information more detailed than that set forth in the Weston report about building 33, the Government's specifications misled Smoot to the extent such specifications were not complete, and the Navy did not provide such information to Smoot before contract award.

However, it is apparent that cutting or otherwise disturbing existing LBP surfaces, whether they are in perfect, fair or badly deteriorated condition, can create LBP chips and dust. Thus, whether the NDW report information on the Classification C and D immediate lead hazards on the ceiling of building 33 was a "vital" fact that could affect Smoot's performance costs or duration, element (1) of proof of superior knowledge, is doubtful.

Moreover, undisclosed superior knowledge is negated when the contractor could have obtained such information from a pre-bid site visit that it chose not to make, or made without sufficient care. *See Ambrose-Augusterfer Corp. v. United States*, 394 F.2d 536, 547, 184 Ct. Cl. 18, 38 (1968) (though Government plans disclosed only 308 lighting fixtures, a careful site visit should have disclosed 20,000 plainly visible, lighting fixtures attached to ceiling ducts); *National Concrete and Foundation Co. v. United States*, 170

Ct. Cl. 470, 476 (1965) (despite an undisclosed Government report citing "limited areas of boulder," the bidder's site visit revealed considerable surface boulders indicating presence of subsurface boulders).

The evidence on the pre-award condition of the ceilings of the WNY buildings is sparse. The Weston report found extremely deteriorated and peeling paint on the ceiling of building 39, but said nothing about the ceiling of building 33 (finding 5). On his pre-award site visit, which was not thorough or complete, Smoot's estimator saw no peeling paint on the roof of building 33. After award, before roofing operations began, Smoot's project manager observed building 33's roof deck paint in relatively sound condition with a little bit of peeling. (Finding 8) Though somewhat weaker than the facts in *Ambrose-Augusterfer* and *National Concrete*, we conclude, consistent with our holding on DSC claim element (4), that Smoot should have observed deteriorated and peeling paint on building 33's roof deck members.

Smoot also contends that the 29 August 1996 Freese memorandum constituted superior knowledge of specific LBP hazards in buildings 33 and 109, undisclosed to Smoot until after 11 July 1997. The Freese memorandum post-dated the 3 May 1996 award of contract 28 (findings 1, 10). Thus, the Navy could not have been aware of Smoot' s ignorance of that memorandum before contract award. *See H. N. Bailey & Associates v. United States*, 449 F.2d 376, 381, 196 Ct. Cl. 166, 174-75 (1971) (Government did not possess superior knowledge at time contract was executed); *AIW-Alton, Inc.*, ASBCA No. 47917, 95-2 BCA ¶ 27,875 at 139,066 (no superior knowledge when Government first learned of alternate manufacturing technique three years after contract award).

We hold that respondent is not liable for undisclosed superior knowledge.

III.

Smoot argues that the disposal of lead-containing wood debris, scraping and sealing of deteriorated LBP on the roof decking, and the Navy direction to clean up LBP to more stringent standards than contract 28 required, were "unforeseen conditions" and constructive changes. To establish 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 person directing the change 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).

Contract 28's Cleaning Up clause required work areas kept free of waste materials, including disposal of lead-containing wood debris, and its specification § 02050, ¶ 3.2e, required removal of loose materials, cleaning and coating by enamel paint of deteriorated

LBP surfaces, including roof decking (findings 2, 3). Thus, such disposal and cleaning tasks were foreseeable, and those two alleged constructive changes are unsound.

Contract 28's Permits and Responsibilities clause required Smoot to comply with any federal codes and regulations applicable to the performance of the work (finding 2). Specification § 02050, ¶3.2, stated that "all paint is assumed to contain lead" (finding 3). OSHA's 13 February 1996 regulations, 29 C.F.R. § 1926.62, (i) applied to demolition and renovation of structures if lead-containing materials were present, and to removal, encapsulation, disposal and containment of such materials at a construction site, (ii) required airborne lead monitoring and personal safety measures to its defined Action Level of airborne lead concentrations of 30 ?g/m^3 or higher, and stricter measures to its defined PEL of airborne lead concentrations exceeding the 50 ?g/m^3, each averaged over an 8-hour period, and (iii) did not specify CPL 2-2.58, require surface lead sampling and laboratory analysis, or prescribe a maximum of 200 ?g/ft.^{2} for surface lead (finding 6).

On 29 July 1997, Smoot asked the CO what was the acceptable level for cleaning surface lead dust (finding 25). LCDR Trotta, Navy project engineer, by letter of 13 August 1997, directed Smoot to clean up surface LBP dust to the 200 ?g/ft.^{2} criterion set forth in CPL 2-2.58, page A-21 (finding 27). Respondent argues that Smoot knew that LCDR Trotta had no contracting authority to direct a change. The CO knew of the 13 August 1997 letter and did not disavow LCDR Trotta's direction (finding 27).

Therefore, to require Smoot to perform surface wipe lead sampling and laboratory analyses, and to clean up LBP to the 200 ?g/ft.^{2} criterion set forth in CPL 2-2.58, p. A-21, required more stringent standards, and greater performance, than the airborne lead concentration monitoring that contract 28 required. On 15 August 1997 Smoot protested such direction to the CO (finding 28), so it is clear that Smoot did not volunteer to perform such work. We hold that the Navy's direction to clean accumulated surface lead dust to the 200 ?g/ft.^{2} criterion was a constructive change.

IV.

To recover for suspension of work under a construction contract, a contractor must prove that: (1) the Government ordered, explicitly or by its act or failure to act timely, a suspension, delay or interruption of performance, (2) the suspension, delay or interruption was for an unreasonable period of time, and (3) such performance would not have been suspended, delayed or interrupted by any other cause, including the fault or negligence of the contractor or for which an equitable adjustment is provided or excluded by any other contract term or condition. *See* FAR 52.242-14, redesignated from FAR 52.212-12; *Chaney and James Constr. Co. v. United States*, 421 F.2d 728, 731-32, 190 Ct. Cl. 699, 706-07 (1970); *CS&T General Contractors, Inc.*, ASBCA No. 43657, 93-3 BCA ¶ 26,003 at 129,262.

On 11 July 1997, after finding lead contaminated dust in building 33, WNY's safety and health director Ms. Goforth recommended that the ROICC stop work on, and ROICC LCDR Trotta ordered Smoot to cease operations within, the third and fourth floors thereof, though exterior work continued (findings 10, 16-17). Smoot ordered all employees to vacate building 33 on 14 July 1997 (finding 19). Smoot's 19 July 1997 letter advised the CO of the partial suspension of work (finding 22). The CO did not disavow the ROICC's 11 July 1997 direction, which, he said, was "for the well being of your workers" and was not a suspension of work (finding 24). Smoot completed the initial clean-up of building 33's second, first, third and fourth floors 36, 38, 55 and 78 days, and of building 37, 39 and 109's first, second and third floors 81, 87 and 89 days after the 11 July 1997 suspension order (finding 35).

The CO extended contract 28's completion date by seven days to 6 May 1998 for Government delay in directing removal and disposal of lead contaminated paint (findings 34, 39). The CO asserted in the 28 April 1999 final decision that Smoot's fault or negligence – removing rivets to which LBP adhered from the roof trusses, and cutting skylight openings in the roof and allowing LBP chips and dust to fall and to contaminate building 33 – was the proximate cause of the 11 July 1997 work suspension (finding 44). Mr. Cignatta, the Navy's expert witness, opined that construction activity was the primary cause of the LBP contamination in the WNY buildings (findings 45-48). Respondent argues that a such a suspension is not compensable under the contract's Suspension of Work clause.

LBP dust accumulated in the WNY buildings 33 and 109 before contract award (findings 10, 16). However, pre-contract LBP dust accumulated on the floors of building 33 was gone between 21 February and 6 June 1997, as Smoot sequentially installed its new floors (finding 12). Nonetheless, LBP on the inside surfaces of existing exterior walls and the undersides of roofs of all the WNY buildings was not covered by wallboard until 12 January 1998 (finding 38), after Smoot completed its initial decontamination of the WNY buildings (finding 35), but before 8 April 1998, when surface wipe sample tests last showed lead concentrations exceeding 200 ?g/ft.^{2} (finding 18). Mr. Cignatta opined that lead continuously released from paint even absent disturbance by construction activity was a possible source of LBP contamination of the WNY buildings (finding 47(c)(3)). His opinion that construction activity was the primary source of lead dust (finding 48) was discredited, *inter alia*, by the lack of data before and after the 11 July-8 October 1997 partial suspension period, and by failure to account for lead continuously released from paint even absent disturbance by construction activity (finding 49).

Our foregoing findings compel the conclusion that the LBP contamination of the WNY buildings after 10 July 1997 was caused concurrently by Smoot's construction activity, which did not implement sufficient engineering controls and practices to confine LBP dust dispersion (finding 45), and by lead continuously released from paint even absent

disturbance by construction activity, and the record provides no means of segregating or apportioning the extent or periods of each such cause. In such circumstances, the Suspension of Work clause precludes a price adjustment. *See Blinderman Constr. Co., Inc. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982). We hold that Smoot is not entitled to a compensable suspension of work.

V.

Smoot argues that the Navy insisted upon contract completion by 29 April 1998 (finding 32), Smoot notified the CO that it was accelerating performance in order to complete by 6 May 1998 as the CO directed, although Smoot was entitled to unspecified additional time for LBP delay (finding 34), the CO granted a 7-day extension to 6 May 1998 for the LBP delay (finding 39), Smoot accelerated work until 26 March 1998, when the Government issued the floor layout change (finding 41), and thus Smoot is entitled to recover for constructive acceleration.

To recover for constructive acceleration under the Changes clause, a contractor must prove: "(1) that any delays giving rise to the [acceleration] order were excusable, (2) that the contractor was ordered to accelerate, and (3) that the contractor in fact accelerated performance and incurred extra costs." *Norair Engineering Corp. v. United States*, 666 F.2d 546, 548, 229 Ct. Cl. 160, 164 (1981). Footnote 5 to the *Norair* decision cited *M.S.I Corp.*, GSBCA No. 2429, 69-1 BCA ¶ 7750, for the foregoing rule, stating, "In some cases, two more requirements have been added—that the contractor specifically request an excused delay and the request be denied—but, as these are in effect equivalent to the requirement of an order to accelerate, we do not insist on them."

With respect to acceleration element (2), Smoot asserts that the Navy's 11 August 1997 letter directed Smoot that 29 April 1998 was the latest occupancy date for the WNY buildings, and accordingly it accelerated performance to meet that date, although it was entitled to a much later contract completion date due to the unforeseen hazardous LBP materials (finding 34). That 11 August 1997 letter stated that the Navy approved--

> a completion date of 29 April, 1998. This date includes all changes up through SRS PCO #174, *with the exclusion of PCO #170* [emphasis added] . . . .

PCO #170 is Smoot's designation for the LBP claim in these appeals. (Finding 34, note 1) That 11 August 1997 letter did not unconditionally order Smoot to meet the 29 April 1998 completion date, but instead expressly excluded from such date the time extension for the LBP claims subject of these appeals. Given those facts, we hold that Smoot did not establish acceleration element (2), and need not address or decide acceleration elements (1) and (3).

We deny Smoot's constructive acceleration claim.

VI.

Conclusion. We sustain these appeals to the extent of the Navy's direction to clean accumulated lead dust to the 200 ?g/ft.^{2} criterion, and deny the balance thereof.

Dated: 21 March 2003

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, 53049 and 53246, 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