

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
C & S Services, Inc.) ASBCA No. 54032
)
Under Contract No. N62791-01-C-0080)

APPEARANCE FOR THE APPELLANT: Clinton D. Hubbard, Esq.
San Diego, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Kathleen A. Post, Esq.
Assistant Counsel
Pearl Harbor Naval Shipyard and
Intermediate Maintenance Facility
Pearl Harbor, HI

OPINION BY ADMINISTRATIVE JUDGE DICUS ON THE PARTIES' CROSS-MOTIONS
FOR SUMMARY JUDGMENT

The parties have moved for summary judgment, averring there are no genuine issues of material fact. Each party asserts it is entitled to judgment as a matter of law. The appeal arises from the contracting officer's denial of appellant's claim for \$97,574 due to excessive paint thickness in the bilges of the USS FREDERICK. The underlying contract is for maintenance on the USS FREDERICK. We deny the motions.

STATEMENT OF FACTS¹

The following statement of facts is solely for the purpose of resolving the motions.

The contract at issue is Contract No. N62791-01-C-0080, awarded 3 August 2001 under Agreement for Boat Repair No. N00024-01-H-8755. It involved phased maintenance on the USS FREDERICK. (Proposed Findings of Facts (PFF) 2; R4, tabs 4, 5) The successful bidder was required under the contract to remove paint in the bilge areas and repaint the bare metal areas (PFF 5, 7, 27). Bidders were told to base their bids on the bilges having epoxy paint (PFF 8). The USS FREDERICK was not available for pre-bid inspection, so the Navy made a ship of comparable age and class, the EX-USS BARBOUR

¹ For the most part the findings are taken from proposed findings to which there is no dispute. As the parties have numbered the proposed findings consecutively, we have cited to the number of the undisputed finding.

COUNTY, available for shipcheck (PFF 11). Appellant's Mr. John Henderson made a shipcheck on the EX-USS BARBOUR COUNTY on 11 June 2001, but appellant made no inquiries as to paint thickness aboard the USS FREDERICK (PFF 12, 13). The record does not disclose what Mr. Henderson observed. During performance appellant requested a change order based on its assertion that there was excessive paint in the bilges (PFF 14). On 28 February 2002, appellant filed a request for an equitable adjustment of \$97,574 which was denied on 6 March 2002 (PFF 15, 16). The claim was a "pass-through" claim from appellant's painting subcontractor, West Coast Cleaning and Preservation, Inc. (WCCP) (R4, tab 8). This was followed by a 22 April 2002 request for a contracting officer's decision and a 30 August 2002 contracting officer's decision denying the claim (PFF 17, 18).

Appellant has submitted the declaration of Mr. Roger Gruben of WCCP. Mr. Gruben asserts therein that for non-structural conditions it is pointless to make a site inspection of a ship of comparable class and age because conditions vary randomly from ship to ship. He also states that there were substantial differences in the USS FREDERICK and the EX-USS BARBOUR COUNTY. He states that he contributed to the estimating process for the bid. While he disputes that chipping paint is an accepted practice in the industry, he concedes that a "mil gauge" could be used during shipcheck and would show paint thickness.

The Navy has submitted an affidavit and photographs which it maintains demonstrate that the paint thickness in the bilges of the two ships was sufficiently comparable that inspection of the EX-USS BARBOUR COUNTY "would have revealed the same paint conditions that existed onboard the USS FREDERIC [sic] at the time of bidding and shipcheck." The Navy's photographs and affidavit document that a gauge for taking dry film thickness readings was used and that the measurements were taken from readily accessible places. (Navy mot., attachs. 3 at 2, 4) The Navy has submitted affidavits from which it could reasonably be inferred that the circumstances and industry standards required a shipcheck of the EX-USS BARBOUR COUNTY and the ascertainment of paint thickness (Navy mot., attachs. 1, 2).

DECISION

It is axiomatic that we are not to weigh evidence in resolving motions for summary judgment, but to ascertain whether legitimate disputes of fact exist. This principle is applicable where cross-motions have been filed. *Town of Port Deposit v. United States*, 21 Cl. Ct. 204, 208 (1990). Thus, even in the case of cross-motions, summary judgment may not be granted where there is a genuine issue of material fact. Such is the case here.

It is undisputed that appellant's Mr. Henderson made a shipcheck. We do not know what he saw. We have evidence which indicates that the paint conditions on the EX-USS BARBOUR COUNTY were similar to those encountered during performance of the

contract and that use of a gauge during inspection would have revealed those conditions. If Mr. Henderson came away from the shipcheck expecting to encounter the conditions demonstrated in the Navy's evidence, appellant cannot recover. Conversely, we have evidence from Mr. Gruben that there were substantial differences in the ships and that a non-structural shipcheck of a sister ship is pointless. From this we could reasonably infer² that under the circumstances, industry standards, or both, inspection of a sister ship is meaningless with regard to paint removal. If so, the Navy could not prevail. However, we have evidence from the Navy which disputes this. Thus, genuine issues of material fact exist and the parties' motions are denied.

Dated: 19 May 2003

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

² In summary judgment proceedings the non-moving party is entitled to all reasonable inferences. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847.

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

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. 54032, Appeal of C & S Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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