ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
All Star Maintenance, Inc.	)	ASBCA Nos. 54283, 54313
	)	
Under Contract No. N62467-00-D-0375	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals are taken from contracting officers' decisions denying claims for equitable adjustments of $70,500 (flooring) in ASBCA No. 54283 and $423,018.26 (painting) in ASBCA No. 54313. The underlying contract between appellant All Star Maintenance, Inc. (hereinafter appellant or All Star) and the United States Navy (hereinafter respondent or Navy) is for maintenance of military housing at the Naval Weapons Station, Charleston, SC (NWS). Only entitlement is before the Board. We deny the appeals.

FINDINGS OF FACT

GENERAL

1. Three-quarters of the housing at NWS was at least 30 years old. Some units dated from 1961, with other units constructed in 1974 and 1986. (Tr. 1/63, 78-79) The Navy issued a solicitation seeking proposals for maintenance of military family and bachelor housing at NWS on or about 18 January 2001. The solicitation provided for a

pre-proposal site visit to be held on 5 February 2001. (R4, tab 1)[1] The solicitation was for a base year and four option years and included both fixed-price and indefinite quantity portions (*id.*, § B at 1-41). Neither the solicitation nor the contract contained FAR 52.216-21, REQUIREMENTS (OCT 1995), or an equivalent provision (R4, tab 1 *passim*).

2. All Star had three representatives at the site visit (R4, tab 1, amend. 0002 at 6). The contract in the amount of $5,054,323.52 was awarded to All Star on or about 1 August 2001 (R4, tab 1). Performance was to commence on 1 October 2001 (*id.*, § F at 1). The contract incorporated by reference, *inter alia*, FAR 52.233-1, DISPUTES (DEC 1998), FAR 52.243-1, CHANGES – FIXED-PRICE (AUG 1987), ALTERNATE I (APR 1984), ALTERNATE II (APR 1984) and FAC 5252.216-9310, COMBINATION FIRM FIXED-PRICE/INDEFINITE QUANTITY CONTRACT (OCT 1966). This last clause provides that the fixed price work constitutes "The minimum guarantee of work to be ordered." (*Id.*, § I at 2, 14 of 15)

3. The contract included the following clause:

> H.1 FAC 5252.216-9313 **MAXIMUM QUANTITIES (JUN 1994)**
>
> As referred to in FAC 5252.216-9310, "COMBINATION FIRM FIXED-PRICE/ INDEFINITE-QUANTITY CONTRACT" clause, the minimum guarantee of work is the firm fixed-price portion of the contract. The maximum dollar value of the contract is the total dollar value of the Fixed-Price and Indefinite Quantity Items. The maximum shall not be exceeded except as may be provided for by formal modification to the contract.

(R4, tab 1, § H at 1 of 1)

4. The contract provided that contract line item (CLIN) quantities could be exceeded by the greater of one line item or 25 percent "so long as the total estimated contract price is not exceeded." The contractor's agreement was necessary for greater quantities. (R4, tab 1, § B at 1 of 41) The contract also provided that quantities in the indefinite quantity schedule are only estimates (*id.*, § I at 2 of 15, ¶ (b)).

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[1] In this section, if no appeal number is indicated the Rule 4 is the same in both appeals. In succeeding sections, the reference is to the Rule 4 file in the appeal being addressed.

5. Attachment J to the solicitation and contract contained inventory data, including square footage per unit type, and three years of historical data showing the quantities and types of work performed at NWS (R4, tab 1, attach. J). These included charts showing the number of indefinite quantity work orders and change of occupancy maintenance, as follows:

NUMBER OF INDEFINITE QUANTITY WORK ORDERS ISSUED BY MONTH

	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP
FY98	1204	410	1139	719	770	789	689	1110	1077	866	1146	367
FY99	1171	638	674	1077	569	494	440	519	689	418	665	594
FY00	551	523	399	391	428	514	448	628	700	627	702	900

NUMBER OF COMs BY MONTH

	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP
FY98	106	73	120	25	82	81	99	100	98	100	106	48
FY99	113	61	67	121	88	85	77	99	96	89	82	25
FY00	130	66	120	79	72	94	67	115	112	112	85	30

(*Id.* at J-C7-6 to -7) COMs totaled 1,038, 1,003 and 1,082 in, respectively, FY98, FY99, and FY00, for an average of 1,041. Our review of Attachment J indicates the relevant estimates are supported by historical data.

6. All Star performed the base year and one option year (tr. 1/160).

ASBCA No. 54283

7. The contract and solicitation contained the following at paragraph C.5b.:

> (4) Asbestos Removal Submittals. The following submittals shall be provided to the KO for approval within 15 calendar days after contract award. Submittals shall be updated when changes occur.
>
> (a) Plan for removal and disposal of asbestos-containing textured ceilings, floor tile, sheet vinyl, and mastic. The plan shall include:
>
> 1 Worker protection and protective equipment

2 Engineering control for prevention and containment of asbestos fiber release

3 Work methods to be used in removal of asbestos-containing materials

4 Name and qualifications of the designated worker(s)

5 Plan for handling, preparation, and disposal of the asbestos containing materials

6 Ultimate disposal site for asbestos-containing materials

7 Air monitoring plan and qualifications of testing laboratory

(b) Proof of Contractor licensing by the South Carolina Licensing Board, and Asbestos certification and licensing by the South Carolina Department of Health and Environmental Control (DHEC), Bureau of Air Quality Control.

(c) Written evidence that the landfill is approved for the disposal of asbestos-containing materials as required by EPA, State, and Local Regulatory Agencies.

(d) For each task order issued for removal of asbestos-containing material, submit the following for KO approval:

1 Contractor certification that the information in the approved plan for removal, proof of Contractor and employee licensing, and landfill approval is accurate for the individual task order. Identify the task order and provide the date and location of work.

2 Results of any monitoring.

3 Detailed delivery tickets which were prepared, signed and dated by an agent of the landfill

> certifying the amount of asbestos-containing material delivered to the landfill.

(R4, tab 1, § C at 6-7 of 67) Offerors were thus informed of the existence of asbestos and the requirement for asbestos removal.

8. Under indefinite quantity work replacement of 100,000 square feet of tile was included at CLINs 0002BJ and OOO4BJ. CLINs 0002AA and 0004AA under indefinite quantity work called for removal of 15,000 square feet of floor tile containing asbestos pursuant to an approved asbestos removal plan for a unit price of $2.43. (R4, tab 1, § B at pages following Award) At the pre-proposal site visit potential offerors were made aware of the report of a 1995 survey conducted at NWS regarding asbestos and lead-based paint. The report was available for offerors to review. (Tr. 2/90) None asked to see the report (tr. 2/14). All Star was provided with the report after award (tr. 1/57). NWS records did not provide information as to the number of layers of asbestos tile (tr. 2/94-95). Those at the site visit were told that the government did not know the number of layers (tr. 2/14).

9. Amendment No. 0003 to the solicitation contained the following question and answer:

> 5. QUESTION: Reference paragraph C.9.i. Asbestos Material.
>
> This paragraph clearly identifies that asbestos material or asbestos containing material (ACM) may be encountered or reasonably expected to be encountered in the performance of work. Will you quantify how much ACM tiles are exposed and that are still beneath carpeted or vinyl flooring? Paragraph C.15.d (5) identifies that vinyl composition tile, not ACM, may be underneath carpeted floors.
>
> ANSWER: Quantity is not known. Delete "(possibly vinyl composition tile)" from paragraph c.15.d (5).

(R4, tab 3, amend. 0003 at 2-3) There is no evidence NWS knew the quantity of layers over the asbestos-containing tiles.

10. NWS maintains unit history data that show the work performed at each housing unit. The data is kept for four years. (Tr. 2/93-94) This included orders to replace tiles containing asbestos (tr. 1/70-72). The data base showed only square footage,

not layers, as the Navy's order and the response from the contractor were stated in number of square feet replaced (tr. 2/94-95).

11. There is a conflict in testimony regarding whether NWS ordered sheet vinyl to be placed over asbestos-containing tile without removal of the tile. As this would potentially affect the number of layers and NWS' knowledge of the number of layers, it must be resolved. Dane Harvey of All Star, who worked for the predecessor contractor, Day & Zimmerman (tr. 1/34), testified that NWS "[f]rom time to time" ordered sheet vinyl over floor tile without removal of the tile (tr. 1/50-51). Perry Elrod, of NWS, testified that asbestos-containing tile was found only in the kitchen/dining areas and that NWS never ordered vinyl sheeting over asbestos-containing tile in those areas (tr. 1/71-72). We resolve the conflict in Mr. Elrod's favor for two reasons. First, Mr. Harvey's testimony did not specifically state that the sheet vinyl was ordered over *asbestos-containing* tile (tr. 1/50-51). Secondly, the contract at issue provides specifically at C.15 d.(4) Vinyl Sheet Flooring: "(b) If flooring in an entire room or area is to be replaced, the existing flooring shall be removed and replaced with new vinyl flooring" (R4, tab 1, § C at 35 of 67). The contractual provision on sheet vinyl is consistent with Mr. Elrod's testimony. We find that NWS did not order vinyl flooring over asbestos flooring. Mr. Elrod's testimony indicates, however, that prior to the decision to use sheet vinyl, asbestos-containing tile was not always removed (tr. 1/72).[2]

12. The asbestos abatement subcontractor used by All Star encountered multiple layers of flooring, ranging from two to five, on a recurring basis (tr. 1/147). The firm charged on a square feet "per layer" basis for asbestos work (tr. 1/145). We interpret this to mean that the subcontractor would have charged for 200 square feet of tile if it encountered two layers in 100 square feet of flooring. Eventually All Star negotiated a price of $6.19 per square foot regardless of the number of layers (tr. 1/147). The price was later lowered to $5.23 (tr. 1/210).

13. All Star sought a price increase from the Navy, but the Navy would not increase the price (tr. 1/148-49). However, once 125 percent of the contract estimate was met, the Navy agreed to reimburse All Star at a price of $6.19 for CLIN 0002AA. The parties executed Modification No. P00014 (Mod 14) on 23 August 2002. (R4, tab 2, Mod 14) During the option year the price reverted to the original contract price for CLIN 0004AA. When 125 percent was again exceeded, Modification P00034 (Mod 34) was executed on 7 and 8 May 2003 at a per unit price of $5.23. This reflected the price All Star had negotiated with its subcontractor. (R4, tab 2, Mod 34; tr. 1/207, 210)

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[2] "Q But in those two areas there, there had been a history of taking out asbestos-tile?
A We did when we started going to the vinyl . . . sheet flooring, instead of just vinyl 12 by 12 floor tile . . . ." (Tr. 1/72)

14. During performance All Star did not inform the Navy as to the number of layers over tile containing asbestos which its subcontractor had removed (tr. 1/48).

15. On or about 17 January 2003 All Star prepared and submitted a request for equitable adjustment (REA) in which it sought $70,500 for excess asbestos abatement costs. All Star maintained that at the time of the solicitation the Navy had superior knowledge as to multiple layers of tile and vinyl flooring throughout NWS housing. It asserted that it replaced 18,750 square feet of flooring at a unit cost of $6.19 and that it was paid $2.43 per square foot, a difference of $3.76. Thus, it sought $70,500 ($3.76 x 18,750). (R4, tab 4) By letter of 18 March 2003 All Star asked for a decision pursuant to the Disputes clause (R4, tab 5).

16. On or about 21 May 2003 the Navy issued a contracting officer's decision denying the claim (R4, tab 7). An appeal was taken on 19 August 2003 (R4, tab 8).

DECISION

All Star argues that the Navy had superior knowledge and that it was obligated to disclose the most current available information. It asserts that information as to the number of layers of tile was available to the Navy. The Navy argues that appellant has the burden of proof with respect to superior knowledge and that appellant has not met its burden.

All Star has the burden of proving superior knowledge. *Teledyne McCormick-Selph v. United States*, 588 F.2d 808 (Ct. Cl. 1978). The doctrine of superior knowledge arises where the government withholds information that is crucial to successful performance of the contract, thereby misleading the contractor and causing injury. *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774, 777-78 (Ct. Cl. 1963). Indeed, in such circumstances the government cannot remain silent, as it has an affirmative obligation to provide such information. *Id.* at 778. Thus, the first step in the process is to prove the government possessed the vital information.

Superior knowledge also requires the party asserting that doctrine to prove: (1) that it undertook performance without vital knowledge of a fact that affected the cost or duration of performance; (2) the government knew the contractor had no such knowledge of and had no reason to obtain the information; (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire; and (4) the government did not provide the relevant information. *Petrochem Services, Inc. v. United States*, 837 F.2d 1076, 1079 (Fed. Cir. 1988).

The record establishes that the buildings in question ranged from 40 to 15 years old and that unit histories in the government's possession only went back four years

(findings 1, 10). The evidence further establishes that the government did not maintain records regarding layers of flooring and that it did not order sheet vinyl to be installed without removal of existing asbestos-containing tiles (findings 9, 11). The sole evidence that the government ordered installation of sheet vinyl over existing asbestos-containing tiles is the testimony of Mr. Harvey. We have, however, found Mr. Elrod's contrary testimony more probative. (Finding 11) Vinyl tile was installed over existing asbestos-containing tile, however (*id.*). We consider this fact and the inherent knowledge of flooring layers above the asbestos-containing tile to have been imparted to offerors at the site visit and through the question and answer in Amendment No. 0003. There is no evidence NWS knew the extent thereof. (Findings 8, 9) We hold, therefore, that the government told what it knew, and thus did not possess superior knowledge.

All Star also argues that the government must provide information if it has the "means of knowledge" (app. br. at 15). All Star cites Gregory G. Sarno, Annotation, *Public Contracts: Duty of Public Authority to Disclose to Contractor Information, Allegedly in its Possession, Affecting Cost or Feasibility of Project*, 86 A.L.R. 3d 182 (1978). While the article uses that term (*id.*, § 2a, Background and overview), All Star does not cite, and we cannot find, any federal law supporting that proposition in the context of superior knowledge. If All Star is attempting to argue that the government was under some obligation to go beyond what was reasonably available, we are not persuaded. Moreover, All Star does not set forth the factual support for what that "means of knowledge" might be. Logically, we can not identify such "means of knowledge" here. As noted above, the buildings range in age from 15 to 40 years and NWS has data going back only four years which does not break down flooring data so as to include layers (findings 1, 10). The "means of knowledge" thus eludes us.

All Star also looks to *Womack v. United States*, 389 F.2d 793 (Ct. Cl. 1968). That case and its progeny stand for the proposition that the government breaches a requirements contract when it negligently prepares estimates. They are not applicable, however, to indefinite quantity contracts that include a guaranteed minimum. *DynCorp*, ASBCA No. 38862, 91-2 BCA ¶ 24,044, *aff'd*, 972 F.2d 1353 (Fed. Cir. 1992) (table). In any event, the record is devoid of proof that the estimate at issue was negligently prepared.

ASBCA No. 54313

17. The decision to paint the interior of family housing units at NWS with a lighter shade of white than existed in most units was made prior to issuance of the solicitation (tr. 1/98-99). Linda Miller, NSW's Housing Director (tr. 2/86), and the contracting officer, Vadris L. Thigpen, testified that at the pre-bid site visit offerors were

shown units at NWS where the color had been changed from the original shade of white[3] to a lighter shade. Potential offerors were informed that NWS intended to lighten the units during change of occupancy maintenance (COM) as part of performance of the contract at issue. (Tr. 2/11-12, 90-93) The solicitation did not state specifically that a color change was contemplated (tr. 2/114-15). Dane Harvey, All Star's Assistant Project Manager, worked for the predecessor contractor, Day & Zimmerman, at the time and was at the site visit (R4, tab 1, amend. 0002 at 6). His manager, after seeing the solicitation, told him that he thought that equivalent first and second coats were unusual. At his manager's suggestion he inquired of Mr. Elrod at NWS as to whether a color change was in the offing, and was told the color might change. (Tr. 1/37-38) He had previously seen color changed from oyster shell to vellum in the Bachelor Officer's Quarters (BOQ) at NWS (tr. 1/39). The record is not clear as to the sequence and timing of Mr. Harvey's observations at the BOQ and the conversation with Mr. Elrod as they relate to the site visit. We find that during the site visit potential offerors were shown units where the walls had been lightened and told that the walls would be lightened.

18. Section B of the contract and solicitation estimated 42,000 squares of interior paint for the first coat and 42,000 squares[4] of interior paint for the second coat in the first year (R4, tab 1, § B at 9 of 41). In the first option year 42,000 squares of interior paint were estimated for the first coat and 9,000 squares for the second coat (*id.* at 17 of 41). All Star proposed $7.68 for first coat and $4.18 for second coat for both the base and option years (R4, tab 3).

19. The contract set forth the following at section C.23 GENERAL PARAGRAPHS FOR INTERIOR/EXTERIOR PAINTING: "f. Selection of Colors. Colors of finish coats will be selected by the Housing Department from the appropriate specifications listed in Attachment J-C4." (R4, tab 1, § C at 54 of 67) Attachment J-C4 listed standards and specifications for contractor-furnished items including, *inter alia*, paint (R4, tab 1 at J-C4-1, J-C4-2).

20. Section C.23 also provided: "g. Description of Work. Painting applies to previously coated surfaces and surfaces not previously painted . . . . All painting, whether interior or exterior, partial or complete, shall include all work necessary for a finished job . . . ." (R4, tab 1, § C at 54 of 67) Subparagraph i.(3) of section C.23 required workmanship of a standard that rendered defects "practically imperceptible" (*id.* at 57 of 67). In enforcing the standard, inspectors generally required that no blemish

[3] The original color was referred to as "egg shell," "oyster shell," and "bone white," but the parties agreed they were talking about the same shade of white, which was a darker shade of white than vellum (tr. 1/159-61).

[4] The term "square" refers to 100 square feet of surface to be painted (tr. 1/22).

should be seen from approximately five feet. Some inspectors were more exacting than others. A few paint jobs failed the standard. (Tr. 1/44-46)

21. In the course of negotiating the contract NWS informed All Star that its price for interior first coat, but not second coat, was excessive (tr. 2/68, 103).

22. Ms. Miller selected the color to be used in the housing units. All Star's representative brought submittals to her office and Ms. Miller selected the color from those materials. (Tr. 2/88-90) As it was NWS' intent to leave its options open, no specific color had been decided on until then (tr. 2/114). She selected the color "vellum," made by Sherwin-Williams (tr. 1/125, 2/116).

23. Mark Crabtree, All Star's Division Manager, testified that in his experience a second coat is needed when there is a color change (tr. 1/192-93). Mr. Harvey testified that a color change "would probably take two coats" (tr. 1/40).

24. Dane Harvey, All Star's Assistant Project Manager, testified as follows as to inspection standards during performance of the contract:

> Q What about with All Star. When you were with All Star did -- what was your experience as far as the inspection practices?
>
> A In the beginning it did -- was kind of tight. There was some looking at the walls up close.
>
> Q And did you object to any of that when you were Assistant Project Manager with All Star?
>
> A There were a few paint jobs that failed because of blemishes that were discovered. And when -- each one of those I would go out to look behind them.
>
> And yes, there might be a mark or two on the wall, or a blemish. But my response was that the product, when taken in total, should not fail because of one or two blemishes that might be on the wall.
>
> Q While you were working for All Star, were there any occasions where the Government required the repair of defects that existed under a prior contractor such as Day & Zimmerman?

A I'm sure that we did do that from old patches, or from previous contracts.

Q Did the lighter color of paint have any impact on the visibility of those defects?

A They will show up.

(Tr. 1/45-46) Mr. Harvey's testimony simply does not describe over-zealous inspection or a condition giving rise to additional preparation or repair of the walls to be painted. Steve Lindridge, All Star's Contract Manager, testified that use of a lighter color required that "considerably more" preparation was required (tr. 1/128). His testimony is conclusory and not supported by comparisons between the amount for preparation in All Star's proposal and the amount actually incurred.

25. Mark Crabtree believed that the explanation for an equal number of squares for the first and second coats in the contract's first year was to keep money in the contract "[s]o . . . if [NSW] ran out of money on a CLIN [it] can pull it out of this CLIN and pull it over [to another item]" (tr. 1/217). Mr. Lindridge testified that painting is an area where the government traditionally puts extra money it intends to use on other line items, and that it did so in this contract (tr. 1/118). Mr. Thigpen denied that NWS inflated the second coat quantities to use the money elsewhere (tr. 2/17-18). Ms. Miller testified in explanation of the first coat/second coat controversy that a consensus was reached by the team assembling the solicitation that they would lighten the interior of the units and they would, as a result, need to order first and second coats throughout. This led to the estimate of 42,000 squares for each coat in the first year. (Tr. 2/117-18) Ms. Miller testified as to the typical number of squares per unit: two bedroom – 39; three bedroom – 42; four bedroom – 55 (tr. 2/119-120). All Star's Mr. Harvey testified that two equivalent coats would be necessary if the color was lightened, but that normally a second coat is estimated at 18-20 percent of first coat (tr. 1/39, 120). Ms. Miller stated that the second year estimate of 9,000 squares for second coats arose because NWS believed they would have already lightened the majority of units during the prior year's COMs (tr. 2/120-22). This was not the case, however, as the second coat estimate was exceeded in the option year (tr. 2/121). We find the testimony of Mr. Crabtree and Mr. Lindridge to be speculative. We find Mr. Thigpen's and Ms. Miller's testimony credible and probative. We believe Mr. Harvey's testimony corroborates the estimate for equivalent coats in the first year and for a second coat of 9,000 squares (21 percent) in the option year. We find NWS intended to lighten the color of the units, that, as a result, it recognized the need for and included in the contract equivalent first and second coats for the first year, and miscalculated the quantity of the option year's second interior coat requirement. We further find that NWS did not intentionally overestimate the second

interior coat of paint in the first year for the reasons put forth by Mr. Crabtree and Mr. Lindridge.

26. Three All Star employees testified. Mr. Lindridge testified that he did not participate in preparing All Star's offer (tr. 1/150). Mr. Harvey worked for Day & Zimmerman pre-award, helped prepare Day & Zimmerman's offer, and provided no information to All Star prior to award (tr. 1/34-36, 52). We find that he did not participate in preparing All Star's offer. Mr. Crabtree testified that he did not see the contract documents until after award (tr. 1/193). Thus, we find he could not have participated in preparing All Star's offer. We find that no one who prepared the offer for All Star testified, and there were no documents explaining how All Star's offer was prepared. The record is therefore without probative evidence as to what All Star relied on in preparing its proposal for interior painting except the proposal itself. Ms. Miller testified that, as a source selection board member, she reviewed All Star's offer and revision. The revision resulted from a letter that was sent to All Star questioning some prices, including first-coat interior paint which was thought to be too high. Her review satisfied her as to the price and made her confident that All Star understood the interior paint requirements and she testified that All Star's final proposal specifically addressed using 42,000 squares for the second coat, and specifically explained the calculation of the personnel necessary to do so. (Tr. 2/65-68, 101-05) We find All Star did not change its price for interior paint as a result of the letter.

27. The parties executed bilateral Modification No. P00006 (Mod 6) on 19 and 20 February 2002. Mod 6 changed the contract to require white ceilings at no increase in price, but with one extra day per unit where ceiling and wall paint were different. (R4, tab 2) All Star sought an increase in price, but ultimately acquiesced to the one-day extension and executed Mod 6 in the interest of a good working relationship (tr. 1/203). By Modification No. P00026 (Mod 26), dated 7 March 2003, NWS changed the color back to the original color (R4, tab 2). This was done in the option year because contract quantities were about to be exceeded and the price quoted for maintaining two colors was too high (tr. 2/9-10)

28. All Star submitted a REA dated 9 December 2002 claiming $423,018.26 in additional costs. As performance began on 1 October 2001, we find the REA is for the base year. All Star asserted that 1) it reduced its price based on NWS' statement that its pricing was excessive "on the knowledge that a one coat application of the existing color paint would meet all contractual requirements;" 2) All Star reduced its pricing when, after being told its price was excessive, it "concluded that our interpretation of the paint standard was equally excessive;" 3) the change to a lighter color caused additional repairs; and 4) the government failed to make the color change known prior to award. (R4, tab 4) When no response was received, All Star sent an 18 March 2003 letter informing NWS that it sought relief under the Disputes clause and certifying the claim

(R4, tab 5). The claim was denied in a 16 June 2003 contracting officer's decision and appealed on 5 September 2003 (R4, tabs 7, 8).

DECISION

All Star characterizes the issue here as being whether NWS failed to disclose the best information available (app. br. at 1). As in ASBCA No. 54283, All Star argues superior knowledge on the part of NWS. Here, the superior knowledge alleged is the change in the color of the interior paint. The Navy argues that All Star's position is neither reasonable nor supported by the contract. As set forth in detail below, we believe that All Star has failed to establish predicate facts necessary for specific elements of its position. All Star's position is also fatally undermined by the contract provision which gave the Housing Department the right to select the color (finding 19). In agreeing to that provision All Star assumed the risk that the color would change.[5] However, we address All Star's individual arguments below.

All Star correctly points out that the decision to lighten the interior was made before issuance of the solicitation (finding 17). It argues that NWS was duty bound to disclose this information. In this regard, we have set forth the governing case law in our discussion in ASBCA No. 54283 and see no need to repeat it here. We have found in this appeal that, at the pre-award site visit, NWS did disclose the relevant information as to lightening the interior color (*id.*). Moreover, All Star's assertion in its claim that it intended to use only one coat, and the alleged injury inherent in the assertion, are unpersuasive since All Star proposed two coats and willingly signed a contract that committed it to providing two coats (finding 18). Further, the solicitation set forth equivalent quantities in estimates for first and second coats in the first year (*id.*). That equivalency, reasonably construed, told All Star to expect to provide a second coat throughout. All Star did not ignore this requirement, as its REA seems to suggest, but proposed and agreed to $4.18 per square for the second coat in the base and option years, thereby assuming the risk of performing at that price. Further, Ms. Miller credibly testified, and we have found, that All Star's final proposal specifically set forth the personnel necessary for painting 42,000 squares in the second coat (finding 26). It thus represented to NWS not only that it intended to apply a second coat, but how it proposed to do it. Finally, All Star produced no evidence on preparation of its proposal (*id.*). On this record, other than Ms. Miller's testimony on review of the revised proposal, we have no credible information on how All Star derived its pricing for interior painting (*id.*).[6]

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[5] We note that both the old and new were shades of white (finding 17).

[6] All Star presented one exhibit (ex. A-1), a 3 July 2002 letter in which it seeks a price increase and states that it originally developed a price of $9.20 for the first coat, but changed it when it was told its price was excessive. All Star has not mentioned this exhibit in its brief, and in introducing it, explained that its purpose

We have also found, despite the assertion in the REA that NWS' letter telling All Star its first coat costs were excessive, that the letter had no effect on its painting price (*id.*). All Star's argument is without merit

All Star's position is based in part on its argument that the explanation for the equivalent first and second coats is that NWS was hiding money in the contract to be used elsewhere in the contract (app. br. at 11-13). The argument is based on testimony which we found to be speculative and outweighed by the credible and probative testimony of Ms. Miller and Mr. Thigpen (finding 25). All Star's witnesses had nothing to do with preparing the proposal, offered no testimony on reliance (finding 26), and thus had no standing to offer credible and trustworthy testimony on whether that position was reflected in the proposal in some way. Moreover, the 42,000 squares estimated is supported by the historical data on COMs, which averaged 1,042 over the prior three years, and the number of first-coat squares typically necessary to paint the various units (findings 5, 25). We can discern no real dispute as to the need for second coats if a color is changed (finding 23). If All Star knew, as it should have, that the 42,000 squares was accurate, as the Attachment J data would have told them (finding 5), that a second coat is required where a color is changed, and that "lightening" of the units was in the offing, as they were told at the site visit and we have found (finding 17), it strains credulity that they could have submitted a proposal based on the assumption there was hidden money in the second coat CLIN.

In connection with the "hiding money" argument, it must be noted that All Star is effectively accusing NWS of misrepresentation, bad faith, or both. As the contract is crystal clear on first and second coats and pricing, any relief to All Star must come by way of reformation. All Star must therefore prove by clear and convincing evidence that it relied on the misrepresentation and was induced thereby to act to its detriment. *Associated Traders, Inc. v. United States,* 169 F. Supp 502, 505-06 (Ct. Cl. 1959). In this it has failed utterly.

As to bad faith, "The contractor's burden to prove the Government acted in bad faith . . . is very weighty." *Krygoski Construction Co. v. United States,* 94 F.3d 1537, 1541 (Fed. Cir. 1996), *cert. denied,* 520 U.S. 1210 (1997). It is not proved by speculation or theory. We note that All Star relies on witness testimony to support its position, but that testimony presented only speculation and theory, in the Board's view.

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was to support its position on accord and satisfaction (tr. 2/45-46), which has not been raised by the Navy. All Star used it only to establish that it had sought relief and that a meeting was held (tr. 2/46-47). Moreover, the exhibit was introduced through Mr. Thigpen even though its author, Mr. Crabtree, testified. We find ex. A-1 lacking in evidential value with regard to the truth of the matters asserted therein.

Such testimony does not substitute for the recounting of observations by a percipient witness. All Star's "hiding money" argument is without merit.

All Star argues that Mod 6 (finding 27) did not adequately compensate it for the cost of using a different color on the ceilings. All Star cites no authority that would entitle it to relief from Mod 6, which is a bilateral agreement. Indeed, All Star sought monetary compensation but it ultimately acquiesced to compensation of one day per unit in order to maintain a good working relationship (*id.*). Those negotiations are merged into the contract and we are left with an unambiguous document. We have no allegation of coercion, misrepresentation, fraud in the inducement, unconscionability or other basis to set Mod 6 aside. All Star's argument has no merit.

Although the REA raised over-inspection, All Star makes no argument on that issue. We assume All Star is not pursuing the matter and, in any case, the record does not support it (finding 24). Accordingly, we do not address it. ASBCA No. 54313 is denied.

Dated: 19 August 2005

CARROLL C. DICUS, JR.
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 Nos. 54283, 54313, Appeals of All Star Maintenance, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals