

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Ellis Environmental Group, LC ) ASBCA No. 55375  
 )  
Under Contract No. N69272-04-C-1006 )

APPEARANCE FOR THE APPELLANT: Charles M. Laycock, Esq.  
Corporate Counsel

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.  
Navy Chief Trial Attorney  
Audrey J. Van Dyke, Esq.  
Associate Counsel (Litigation)  
Naval Facilities Engineering Command  
Litigation Headquarters  
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of our decision in *Ellis Environmental Group, LC*, ASBCA No. 55375, 08-2 BCA ¶ 33,918 to the extent it sustained all but seven days of liquidated damages. Familiarity with that decision is presumed. Appellant argues that we erred in finding that a design/build contract for diesel exhaust ventilation systems was not substantially complete until 28 July 2005. Appellant argues that it started up all three systems by 31 January 2005 and that they were used to remove diesel exhaust fumes from the fire stations. As a result, appellant urges us to find that the work was substantially complete by 31 January 2005. In *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1316 (Fed. Cir. 2000), the Court of Appeals for the Federal Circuit held that substantial completion requires more than evidence that the system was "installed, operational, or capable of being successfully tested." We are bound by the decisions of the Court. Although appellant started up all three systems by 31 January 2005, the tests required by the contract were not completed until 28 July 2005. The delay in completing the tests was caused by appellant's failure to provide a current certification for its test and balance agency and submit an acceptable test and balance submittal.

Accordingly, we found that substantial completion took place on 28 July 2005. Nothing in appellant's motion persuades us that this finding is in error.

Dated: 1 October 2008

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ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 55375, Appeal of Ellis Environmental Group, LC, rendered in conformance with the Board's Charter.

Dated:

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