ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
William D. Euille & Associates, Inc.	)	ASBCA No. 56486
	)	
Under Contract No. N62477-04-D-0171	)	

APPEARANCE FOR THE APPELLANT: Joseph H. Kasimer, Esq.
Kasimer & Annino, P.C.
Falls Church, VA

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Senior Trial Attorney
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Trial Attorney
Naval Facilities Engineering Command
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Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DICKINSON
UNDER BOARD RULE 12.3

A delivery order was issued by the Navy to appellant William D. Euille & Associates, Inc. ("Euille") under Small Multiple Award Construction Contract No. N62477-04-D-0171 to repair and replace certain water mixing tanks at the Marine Corps Base at Quantico, Virginia. Among the tasks required of Euille was the removal and replacement of paint on the interiors of Clarifiers 1308 and 1315. The government interpreted the interiors of the clarifiers as permit-required confined spaces (PRCS) which required certain specific safety and health measures and submittals to be provided by Euille. Euille disagreed with the government's interpretation and it submitted a claim under the Changes and Suspension of Work clauses of the contract. Euille appeals under Board Rule 12.3 accelerated procedures the Navy's denial of Euille's claim for compensation in the amount of $98,100 for alleged changes and government-caused delays to the contract. The parties submitted the appeal on the record under Board Rule 11. Appellant's submissions on the merits included the affidavits of Stephen Barna, George Tarantino, David H. Law and twelve documentary exhibits. The government's submissions on the merits included the affidavits of Michael Wischnewski, John W. Cass, Jr., Larry Carpenter, Donovan Grenz, Donald F.

Sisco and two documentary exhibits.[1] Only entitlement is before us for decision. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

SUMMARY FINDINGS OF FACT

1. On 27 September 2006 the Naval Facilities Engineering Command (NAVFAC) issued Delivery Order No. 11 (DO) in the amount of $1,044,000 to Euille under Contract No. N62477-04-D-0171[2] to Bypass Line and Repair/Replace Flash Water Mixing Tank @ Building 1303, Quantico Mainside Water Treatment Plant (WTP), Marine Corps Base, Quantico, Virginia (MCBQ) (R4, tabs 2, 7-8). Among other tasks, the DO required Euille to remove and replace the paint on the interiors of Clarifiers 1308 and 1315 (R4, tab 2) in accordance with specification section 09900. The performance period as amended was 28 September 2006 through 4 August 2007 (R4, tabs 8, 14, 33). Euille subcontracted with Bay Town Painting, Inc. to remove the existing coating and repaint the clarifiers (app. br., ex. 1, ¶ 9, ex. 2, ¶¶ 4-5).

2. The contract incorporated by reference the following clauses: FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); FAR 52.236-7, PERMITS AND RESPONSIBILITIES (NOV 1991); FAR 52.236-13, ACCIDENT PREVENTION (NOV 1991); FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997); FAR 52.243-4, CHANGES (AUG 1987); and, FAR 52.242-14, SUSPENSION OF WORK (APR 1984) (R4, tab 3 at 63-64 of 81).

3. The clarifiers were circular concrete structures 60 feet in diameter and 21 feet in depth with catwalks across the otherwise-open top (R4, tab 4 at Drawing C-2, Detail Note 2, tab 6 at 2; app. br., ex. 1, ¶ 13). The clarifiers, when in normal operation as designed, are filled with water (R4, tab 43, photo 1). As designed and in normal operation, they do not contain any means of ingress or egress from the top of the clarifier to the floor of the clarifier (R4, tab 43, photos 2, 3, 5). In the center of each clarifier is a large flocculation cone, the top of which was connected to the catwalk at the top of the clarifier and which descended into the clarifier to a diameter of 18 feet at the bottom of the apparently hollow cone. The cone did not extend to the floor of the clarifier, instead leaving enough space between the bottom edge of the hollow cone and the clarifier floor to allow a person to stand upright under the cone and potentially concealing from above the sight of a person who may have been injured or incapacitated. (R4, tab 6 at drawings (3rd and 4th pages from end of

[1] We grant appellant's motion to strike as untimely the 16 December 2008 supplemental affidavit of Ellen M. Evans submitted on an evidentiary question. We deny the government's motion to strike as untimely the 15 December 2008 affidavit of David H. Law.

[2] This Small Multiple Award Construction (SMAC) contract was executed on 21 July 2004 (R4, tab 1).

tab), tab 43 at photos 2-5) Given this feature of the clarifiers, we find appellant's various characterizations of the clarifiers as similar to a "large open bowl", a circular basement under construction or a swimming pool (app. br., ex. 2, ¶ 11; app. reply br., ex. 2) to be inapposite.

4. Specification § 01525, Safety and Occupational Health Requirements, incorporated into the contract, to the extent referenced, the Army Corps of Engineers Safety and Health Requirements Manual (EM 385-1-1) (2003) and OSHA regulations 29 C.F.R. § 1910 (Occupational Safety and Health Standards), 29 C.F.R. § 1915 (Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment), and 29 C.F.R. § 1926 (Safety and Health Regulations for Construction) (R4, tab 5, ¶ 1.1). 29 C.F.R. § 1910.12(b) defines construction as "work for construction, alteration, and/or repair, including painting and decorating."[3]

5. Specification § 01525 further required:

> Submit matters of interpretation of standards to the appropriate administrative agency for resolution before starting work. Where the requirements of this specification, applicable laws, criteria, ordinances, regulations, and referenced documents vary, *the most stringent requirements shall apply*. [Emphasis added]

(R4, tab 5, ¶ 1.4) Specification § 01525 also reiterated in Part 3, Execution:

> The Contractor shall comply with Federal and/or State OSHA regulations, and other related submittals and activity fire and safety regulations. *The most stringent standard shall prevail*. [Emphasis added]

(R4, tab 5, ¶ 3.1)

6. EM 385-1-1 (2003) defined a confined space as a space that:

> a. Is large enough and so configured that a person can bodily enter and perform assigned work; and
>
> b. Has limited or restricted means for entry or exit such that the entrant's ability to escape in an emergency would be hindered (e.g., tanks, vessels, silos, storage bins, hoppers, vaults, and pits

[3] All quotations from the Code of Federal Regulations are from the regulations as in effect on 1 July 2004.

> are spaces that may have limited means of entry; doorways are not considered a limited means of entry or egress); and
>
> c. Is not designed for continuous worker occupancy.

(R4, tab 40 at Q-15) The OSHA Standard at 29 C.F.R. § 1910.146(b) contains a nearly identical definition (R4, tab 41 at 1-2). The OSHA Confined Spaces Advisor provides:

> **Limited or restricted means for entry or exit** Any space where an occupant must crawl, climb, twist, be constrained in a narrow opening, follow a lenthy [sic] path or otherwise exert unusual effort to enter or leave, or where the entrance may become sealed or secured against opening from the inside.
>
> ….
>
> **Designed for continuous worker occupancy** Intended as a place of regular work and supplied with ventilation and other conditions necessary to support life

(R4, tab 36 at 147, 149; app. br., ex. E) The OSHA Standard at 29 C.F.R. § 1926.21(b)(6)(ii) specifically adds "open top spaces more than 4 feet in depth" to the list of examples that are "[c]onfined or enclosed spaces" under certain circumstances (R4, tab 36 at 88-89; *see also* finding 22).

7. Section 06.I.01 of the EM 385-1-1 manual required that confined space work covered by OSHA's Construction (29 C.F.R. § 1926) standards "shall be performed in accordance with 29 CFR 1910.146 and as provided herein" (R4, tab 40 at 113).

8. On its face, 29 C.F.R. § 1910.146 says it does not apply to construction and Part 1926 (R4, tab 41). However, we find, consistent with the contract's requirement that the most stringent requirements be applied (*see* finding 5), EM 385-1-1 required the application of 29 C.F.R. § 1910.146 to any construction under this contract. And because the definition of construction includes alteration, repair and painting (finding 4), 29 C.F.R. § 1910.146 is applicable to the work at issue. OSHA's Standard Interpretations also recommend this approach (*see* gov't br., ex. G-6).

9. A "Permit-required confined space" is defined in both 29 C.F.R. § 1910.146(b) and EM 385-1-1 as a confined space that has one or more of the following characteristics:

> (1) Contains or has a potential to contain a hazardous atmosphere;

….

(4) Contains any other recognized serious safety or health hazard.

OSHA Standard 29 C.F.R. § 1910.146(b) defines a hazardous atmosphere as:

> **Hazardous atmosphere** means an atmosphere that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (that is, escape unaided from a permit space), injury, or acute illness from one or more of the following causes:
>
> ….
>
> (4) Atmospheric concentration of any substance for which a dose or a permissible exposure limit is published in Subpart G, Occupational Health and Environmental Control, or in Subpart Z, Toxic and Hazardous Substances, of this part and which could result in employee exposure in excess of its dose or permissible exposure limit;
>
> NOTE*:* An atmospheric concentration of any substance that is not capable of causing death, incapacitation, impairment of ability to self-rescue, injury, or acute illness due to its health effects is not covered by this provision.
>
> (5) Any other atmospheric condition that is immediately dangerous to life or health.

10. A "Non-permit confined space" is defined in 29 C.F.R. § 1910.146(b) as a "confined space that does not contain or, with respect to atmospheric hazards, have the potential to contain any hazard capable of causing death or serious physical harm."

11. Nothing in the solicitation documentation indicated that the clarifiers were considered to be permit-required confined spaces (PRCS) (app. br., ex. 1, ¶ 6; app. br., ex. 2, ¶ 8). The first time the government indicated to Euille its belief that the clarifiers were PRCS was March 2007 (app. br. at 6, ex. 1, ¶¶ 6, 20, ex. 2, ¶ 8; *see* finding 18).

12. Euille submitted into the record the following "Standard Interpretation" from the Department of Labor website:

10/23/95 – Determining whether certain spaces routinely would be considered confined spaces by applying the (PRCS) standard's definition.

….

• **Standard Number**: 1910.146

….

Question 1. **Roll-Off Container**: This equipment consists of a rectangular open-topped body (typically 20-25 ft. Length x 7-8 ft. Width and 4-5 ft. Depth), steel construction, typically used for storage of waste, debris, material, etc. and varies in size—20/30/40 cubic yard capacity. Two configurations are used: Doors at one end and no doors.

Response. A open top roll-off refuse container would be considered a confined space when the second element in the standard's definition ("has limited or restricted means for entry and exit") would apply. When the doors are in a secured open position, the containers described above would not be considered a confined space either on or off the transport vehicle.

For those open top roll-off containers that do not have doors, the use of a temporary stair meeting the specifications for a fixed industrial stair, securely installed, would provide an unrestricted means of entry or exit.

(App. br., ex. K)

13. The contract required that Euille submit for the required government approval an Accident Prevention Plan (APP) and an Activity Hazard Analysis (AHA) (R4, tab 5 at 1-2).

14. With regard to the APP, specification section 01525 required:

Prepare the APP in accordance with the format and requirements of USACE EM 385-1-1 and as supplemented herein. Cover all paragraph and subparagraph elements in USACE EM 385-1-1, Appendix A, "Minimum Basic Outline for Preparation of

> Accident Prevention Plan". Where a paragraph or subparagraph element is not applicable to the work to be performed indicate "Not Applicable" next to the heading. Specific requirements for some of the APP elements are described below at paragraph 1.8.1.…
>
> …Work cannot proceed without an accepted APP….
>
> Once accepted by the Contracting Officer, the APP and attachments will be enforced as part of the contract. Disregarding the provisions of this contract or the accepted APP will be cause for stopping of work, at the discretion of the Contracting Officer, until the matter has been rectified.
>
> ….
>
> 1.8.1 EM 385-1-1 Contents
>
> In addition to the requirements outlines [sic] in Appendix A of USACE EM 385-1-1, the following is required:
>
> ….
>
> c. Confined Space Entry Plan. Develop a confined space entry plan in accordance with USACE EM 385-1-1, applicable OSHA standards 29 CFR 1910, 29 CFR 1915, and 29 CFR 1926, and any other federal, state and local regulatory requirements identified in this contract.…(If there is no confined space work, include a statement that no confined space work exists and none will be created.)

(R4, tab 5 at 7-9) The contract drawings also contained a General Note regarding Confined Space Entry Plans:

> CONFINED SPACE ENTRY PLANS (CSEP) WILL BE REQUIRED FOR ASSOCIATED DEMOLITION, INSTALLATION WORK AND EXCAVATIONS. FOLLOW ALL FEDERAL AND VIRGINIA REQUIREMENTS INCLUDING 29CFR1910.146 AND SPECIFICATION SECTION 01525.

(R4, tab 4, Drawing G-2, General Note 3)

15. The contract required:

> An activity requiring an AHA shall not proceed until the AHA has been accepted by the Contracting Officer's representative and a meeting has been conducted by the Contractor to discuss its contents with everyone engaged in the activity, including on-site Government representatives.…The AHA shall be continuously reviewed and, when appropriate, modified to address changing site conditions or operations.…

(R4, tab 5 at 10-11)

16. On 18 October 2006, Euille submitted its APP, which included various AHAs, to the government. The document was prepared by Stephen Barna, Euille's project manager and the plan made it his responsibility to assure and enforce compliance with contract safety and accident prevention requirements as well as all federal, state and local safety codes and regulations. (App. br., ex. A at 3, 22-23, ex. C) The APP identified David Law as the project safety officer (app. br., ex. A at 23, ex. C at 37). Euille stated in the APP that there "are no confined space work areas, hazardous materials or substances (asbestos, lead, solvents, etc.) required for the project. No atmospheric, etc. testing/monitoring is required" and on the next page it noted "Confined Space – Not Applicable" (app. br., ex. A at 54-55). Euille's APP further provided that, if a need arose for the use of hazardous materials, "the Government will be informed and the necessary measures taken" (app. br., ex. A at 55).

17. Euille's proposed APP was "Approved as Noted" on 6 November 2006. The government made no notations or comments to Euille's statement that confined space procedures were inapplicable to the work to be performed on the clarifiers. (App. br., ex. B) On 14 November 2006 Euille resubmitted its APP to the government (app. br. at 6). The APP was approved on 20 November 2006 (app. br., ex. D).

18. In the QC meeting minutes of 20 March 2007 it was noted that the first clarifier would be drained the weekend of 25-26 March and that Euille anticipated the new catwalks would be fabricated and ready to lift into place atop the clarifiers within two weeks. It was further recorded that:

> Mr. Cass[4] stated that the interior of the clarifiers was a Permit Required Confined Space and that a work plan conforming to the Army Corps of Engineers' Safety Manual and OSHA Standards was required prior to the start of work. Mr. Barna

[4] John W. Cass, Jr. is a NAVFAC, Washington, engineering technician (gov't br., ex. G-2).

> disagreed, but said he would consult with Bay Town Painting to confirm what their work procedures would be.

(R4, tab 15; gov't br., ex. G-2, ¶ 7)

19. In preparation for the work to be performed in the clarifiers by Euille, government personnel drained them and cleaned the sludge remaining at the bottom of the clarifiers. Euille's project manager observed that the government maintenance personnel used ladders to gain access to the sludge at the bottom of the interior of the clarifiers. The government personnel did not follow PRCS procedures under which Euille and its subcontractor were required to perform and which are the subject of this appeal. (App. br., ex. 1, ¶ 15)

20. On 23 March 2007 Euille submitted the AHA for the clarifier work indicating that it intended to use extension ladders for access to work areas inside the clarifiers (R4, tab 17). The AHA was disapproved by CO Lockett on 26 March 2007:

> The extent of the deficiencies in the submitted AHA is of significant concern, because careful reading of the contract documents, appropriate sections of the U.S. Army Corps of Engineers *Health and Safety Requirements Manual*, EM 385-1-1, along with the referenced Code of Federal Regulations citations clearly present a significantly greater scope of hazard analysis than your submittal provides. Consult John Cass, the engineering technician for your project, if you have any questions about what is required for your resubmission.
>
> Please be advised that any delay as a result of your failure to provide an approvable AHA is your responsibility. You are encouraged to submit an approvable AHA to Mr. Cass as soon as possible. While the government will expedite review of your resubmission for the AHA for painting, confined space work, and abrasive blasting, please provide future submissions of AHA's [sic] 15 days prior to start of each new work activity, in accordance with specification section 01525, paragraph 1.9.

(R4, tab 18 at 1) The review comments listed eight (8) specific deficiencies, including:

> 4. The clarifiers clearly meet the definition of "Permit-Required Confined Spaces" (PRCS) in 29 CFR 1910.146. No mention is made of this fact, and no AHA has been provided regarding entry, work, and emergency

> rescue procedures as required by EM 385-1-1, paragraph 06.I.01 and contract specification section 01525, paragraph 1.8.1. Provide an AHA which complies with section 06.I of EM 385-1-1 and with 29 CFR 1910.146, and the contract specifications.

(*Id*. at 2)

21. Euille responded on 27 March 2007 that:

> 4. The clarifier tanks are clearly NOT "permit-Required Confined Spaces". They are 60' in diameter and 21' tall, completely open to the sky with catwalks overhead. Bay Town Painting will be putting two extension ladders from the tank bottom up to the catwalk level. One ladder designated for entry and one for exit from the work area. Properly installed ladders have always been considered acceptable means of access to an area and do not meet the definition of "limited or restricted means for entry or exit." No internal combustion engines will be operated in the clarifiers, workmen will wear all appropriate safety gear during blasting and coating operations and the coating volatiles are lighter than air and will naturally disperse.
>
> The Government water treatment plant operation does not treat the clarifiers as confined space. Plant personnel routinely enter the empty clarifiers using a single ladder with no special protective gear or measures.

(R4, tab 19 at 2) We find Euille's description of the clarifier tanks as "completely open to the sky" incorrect because of the presence of the flocculation cone (*see* finding 3).

22. On 30 March 2007 Euille provided a more detailed explanation of its position, citing to industry standards, the EM 385-1-1 and OSHA Standards. It was Euille's position that EM 385-1-1 was concerned with the means for entry and exit such that the "***ability to escape in an emergency would be hindered***" and that, instead of OSHA standard 1910.146, which it claimed did not apply to construction, OSHA standard 1926.21(b)(6)(ii) would apply to the clarifiers only if they had both limited means of egress and there was "***the potential for the accumulation of toxic or flammable contaminants or for an oxygen-deficient atmosphere to develop***." This situation could never occur, Euille argued, because the clarifiers had never held anything but water and no agents of any kind would be employed that could possibly create an oxygen-deficient atmosphere inside the clarifiers. (R4, tab 21)

23. On 2 April 2007 CO Aiyelawo directed Euille to treat the clarifiers as PRCS under 29 C.F.R. § 1910.146 (R4, tab 22).

24. On 5 April 2007 Euille submitted to the CO the Confined Space Entry Plan for the clarifiers and stated that access would be provided by the installation of an OSHA-approved scaffold stairway (R4, tab 24, tab 43 at photos 7-8; app. br., ex. 1, ¶ 17). Euille's AHA also identified the use of scaffolding (app. br., ex. A at 16, 58, 64-67). The scaffold stairway was installed on or before 11 April 2007 in at least one clarifier at no additional cost to the government (R4, tab 31 at 1, tab 36 at 2). The scaffold stairway installed was 21 feet in height, the full depth of the clarifier, and required at least two turns at landings at the approximate midpoint of the stairway. The stairs were approximately two feet wide. We infer a similar stairway was installed at the other clarifier. (R4, tab 36 at 205, tab 43, photos 7-8)

25. On 10 April 2007 Mr. Cass recommended disapproval of Euille's AHAs. The next day LT Wischnewski advised Euille by e-mail that work on the contract was to stop until both the AHAs and PRCS plans were approved. (R4, tab 25)

26. By 12 April 2007 letter, Euille advised that it believed the government had failed to properly advise potential bidders that the clarifiers were PRCS as required by 29 C.F.R. § 1910.146(c)(8) (R4, tab 28; app. br., ex. 1, ¶ 7).

27. On 13 April 2007 Euille further argued that:

> A space is by EM 385 and OSHA Standard either a PRCS or it is not. That designation is not determined by the work to be performed. It is the same for the Government and its employees as it is for a contractor. If you are telling [Euille] that the Government does not ever consider the empty clarifiers a PRCS for its periodic maintenance and inspection purposes, that the Government does not have a PRCS plan for this space, the OSHA Standard required equipment, etc., then the Government's direction to proceed with the work as a PRCS is clearly a change to the Contract.

(R4, tab 30) Euille also stated that it was proceeding as directed by the government (R4, tab 30). Painting of the interior of the clarifier resumed on or about 30 April 2007 (app. br., ex. 2, ¶ 12; gov't br., ex. G-1, ¶ 13).

28. On 29 May 2007 Euille's painting subcontractor was observed mixing methyl ethyl ketone (MEK) into the paint to be applied to the interior of the clarifier in violation of EM 385-1-1. MEK is a hazardous material. Euille was directed by the CO to report certain

specified information concerning the use of MEK at the jobsite to the government no later than 15 June 2007. (R4, tab 35) Euille generally states that it did not use any hazardous materials (findings 16, 22), but it has not offered any evidence to rebut the government's specific allegation of the use of MEK. Euille has also offered general testimony from Mr. Tarantino, vice president of its painting subcontractor, that "the coatings directed by the government were not in any way hazardous. They did not contain lead or other contaminated or hazardous materials" (app. br., ex. 2, ¶¶ 9-11; app. reply br., ex. 2). The paint submitted and approved for use on the interior of the clarifiers was Tnemec Series 22 Pota-Pox 100 (R4, tab 35). The MSDS sheets for that paint state that it contains one or more substances which are "OSHA-Z" (R4, tab 42 at 2; gov't br., Cass Affidavit, ¶ 9, Sisco[5] Affidavit, ¶ 7; gov't reply br., Cass Affidavit, ¶ 1) which we interpret as substances published in OSHA, Subpart Z, Toxic and Hazardous Substances (see finding 9). The MSDS sheets for this paint also contain a lengthy list of health hazards from inhalation including severe burns, lung injury, cancer and death and require the use of respirators and protective clothing (*id.*). We find on the record before us that Euille added the hazardous material MEK to its paint which also contained substances defined as hazardous by OSHA. Euille admits that "coating volatiles are lighter than air" (finding 21) and we find that the hazardous substances in its paint had the potential to be introduced into the atmosphere inside the clarifiers during its work performance.

29. On 9 November 2007 Euille submitted to the CO a proposal for a change order to the contract in the amount of $95,900 for costs incurred as a result of treating the clarifiers as PRCS. Euille alleged that, as a result of the changed work (*i.e.* treating the clarifiers as PRCS), it was entitled to a 28-day extension of the contract completion date and reserved the right to submit an additional claim for associated costs. (R4, tab 36) On 12 December 2007 the government denied Euille's request for a change order (R4, tabs 37, 42).

30. On 4 January 2008 Euille submitted a claim to the CO in the amount of $98,100 and requested a final decision (R4, tab 38). On 7 May 2008 a final decision was issued denying the claim in its entirety (R4, tab 39). Euille appealed the final decision to the Board on 24 July 2008.

DECISION

A. Preliminary Evidentiary Matter

The government has offered evidence of what it claims to be an admission by Mr. Tarantino, made at a meeting of the parties and counsel on 24 October 2008 during the pendency of the appeal. The government argues the alleged admission must be imputed to

[5] Donald F. Sisco is the Confined Space Program Manager at MCBQ (gov't br., ex. G-5).

Euille (gov't br., ex. G-1, ¶¶ 14-15, ex. G-2, ¶ 13, ex. G-4 at 2). Counsel for Euille objects to this evidence as inadmissible under FEDERAL RULE OF EVIDENCE (FRE) 408 because the alleged admission occurred during settlement negotiations (app. reply br. at 5-6 and ex. 1). The government disputes that counsel for Euille invoked FRE 408 as applicable to any statements during the 24 October 2008 meeting (gov't reply br. and all attachments). We are persuaded that FRE 408 is applicable and grant Euille's motion to strike the admission allegedly made by Mr. Tarantino.

B. Merits

Euille alleges that neither the contract nor the government in any way indicated that the clarifiers were considered to be PRCS and that, when the government required Euille during performance to treat the clarifiers as PRCS, the government changed the contract requirements thus entitling Euille to compensation under the Changes and Suspension of Work clauses of the contract:

> Euille wishes to make clear that the issue in this appeal is **not** whether Euille was required to comply with Occupational Safety and Health statutes or other safety regulations. Euille concedes that [it] was. The anticipated references by the government to provisions of the contract which require Euille to comply with OSHA and other regulations are not the issue. The directive [by the Contracting Officer to treat the painting of the clarifiers as PRCS work] constitutes a change because the directive **EXCEEDS** the requirements of the Occupational Safety and Health law, and by directing work beyond the requirements of applicable law and regulation, the government changed the contract.

(App. br. at 12) (Emphasis in original) Euille also argues that regardless of the government's interpretation, as a matter of law, the clarifiers were not confined spaces and, therefore, could not be permit-required confined spaces.

We conclude, on the record before us, that the clarifiers were confined spaces as defined by EM 385-1-1 and OSHA Standard 29 C.F.R. § 1910.146(b). The clarifiers as they existed and were observed by Euille prior to bid met all the criteria of a confined space (finding 6). They were large enough that a person could bodily enter and perform assigned work. They had limited or restricted means for entry or exit because, other than catwalks at the top, there was no means of ingress or egress into or out of the 21-foot depth of the clarifiers. And, as they were designed to be filled with water, the clarifiers were not designed for continuous worker occupancy.

Our next point of analysis is whether the addition of ladders or temporary stairways changes our conclusion that the clarifiers were confined spaces. We hold it does not. In this case the temporary scaffold stairway installed by Euille required that, in order to escape the work area, workers had to climb a lengthy (21 feet), narrow (approximately two feet wide) path that involved multiple turns (*see* finding 24). Such a path meets the definition of limited or restricted means for entry or exit (finding 6). The OSHA Standard Interpretation submitted into the record by Euille (finding 12) is distinguishable because the space determined not to be a confined space after installation of a temporary stairway was only four to five feet in depth.

We next turn to whether the interiors of the clarifiers were permit-required confined spaces (PRCS) (*see* finding 9) or non-permit confined spaces (*see* finding 10). We conclude that the interiors of the clarifiers were PRCS because they contained or had the potential to contain a hazardous atmosphere (*see* finding 9). The hazardous substances contained in the paint applied inside the clarifiers and released into the atmosphere in the interior of the clarifiers had the potential to create a hazardous atmosphere (findings 9, 28). The structural configuration of the hollow flocculation cone in the center of the clarifiers accentuated the potential damage. The cone formed a covered work area 18-feet in diameter in the center of the clarifiers. Materials used in this area could not "naturally disperse" as claimed by Euille (finding 21). If we assume as correct Euille's statement that the materials used inside the clarifiers were lighter than air (finding 21), they would naturally rise up into the hollow cone and be trapped rather than disperse laterally to escape the cone. This would create a situation in which the workers would have to perform their work in this concentrated atmosphere where we have already found Euille used hazardous materials (finding 28). In addition, the presence of the 18-foot diameter cone would conceal from sight by anyone above an injured or incapacitated worker (finding 3).

Euille's arguments that the government did not put prospective bidders on notice that the clarifiers were considered PRCS is of no help to it here. The contract specifications required, and Euille admits it was required, to "comply with Federal and/or State OSHA regulations" (finding 5; app. br. at 12). The OSHA regulations place an affirmative obligation on every employer, including both Euille and its painting subcontractor, to make its own investigation and determination of the existence of confined space and/or PRCS so that it can provide appropriate notification to its employees about the nature of the work (29 C.F.R. §§ 1910.11(a), 1910.146(c)(1)-(5)).

We hold that the government did not change the contractual obligations of the parties by requiring Euille to treat the interior of the clarifiers as PRCS.

The appeal is denied.

Dated: 21 January 2009

DIANA S. DICKINSON
Administrative Judge
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 No. 56486, Appeal of William D. Euille & Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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