

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Hartman Walsh Painting Company) ASBCA No. 57742
)
Under Contract No. W912BV-09-D-1010)

APPEARANCES FOR THE APPELLANT: Mr. Steven D. Chism
President
Mr. Mikil R. Knight
Vice President & Secretary

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Keith S. Francis, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Tulsa

OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the contracting officer's (CO) decision which denied the \$89,908.15 claim of Hartman Walsh Painting Company (Hartman) for alleged extra work performed to contain abrasive blast materials at the contract work site. Hartman elected the accelerated procedure pursuant to 41 U.S.C. § 7106(a) and Board Rule 12.3. At the conclusion of the abbreviated hearing at St. Louis on 22 November 2011, at which neither party presented a witness to testify, the parties agreed to rely on the written record and briefs (tr. at 36). The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109. We decide entitlement only.

SUMMARY FINDINGS OF FACT

1. On 23 March 2009 the Army Corps of Engineers (ACOE), Tulsa District, issued Request for Proposals (RFP) No. W912BV-09-R-1010 for a Multiple Award Task Order Contract (MATOC) for preparation and painting, *inter alia*, of large hydraulic structures within the ACOE Southwestern Division. The MATOC was to be a multiple award, indefinite delivery/indefinite quantity type contract, providing for issuance of firm-fixed price task orders. The RFP included a March 2009 Initial Task Order to sandblast and paint the eight tainter gates of the Fall River Dam, Kansas. The contract clauses included FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997), whose ¶ (e) provided that: "Approval by the [CO of shop drawings] shall not

relieve the Contractor from responsibility for...complying with the requirements of this contract....” (R4, tab 2 at 5, 7, 35, 408, 418¹)

2. A tainter gate at Fall River Dam is a rectangular, 50 by 25 foot structure installed near the top of the dam over the spillway to control water flow. The gate’s skin plate is curved vertically, with the convex side toward the upstream side, and is supported on its downstream side by vertical T-ribs, horizontal girders and perpendicular strut arms attached to trunnions anchored into two dam piers at the sides of the gate. Steel hoist chains at the gate’s sides raise and lower the gate. (R4, tab 2 at 440-42, 447-48)

3. On 19 September 2009 the ACOE awarded Hartman Contract No. W912BV-09-D-1010 (the MATOC contract) (R4, tab 2 at 486-87).

4. On 21 September 2009 the ACOE awarded Hartman Task Order No. 0001 (TO 1) under the MATOC contract to sandblast and paint eight tainter gates of the Fall River Dam for the fixed price of \$2,782,747.00 (R4, tab 2 at 509-11, tab 28 at 22-28).

5. The MATOC contract and TO 1 included the following pertinent requirements:

(a) In § 01 00 00, SCOPE OF WORK, ¶ 1.1 (a), (b), stated: “Clean all surfaces [of the tainter gates] to SSPC [Society for Protective Coatings] SP5 (White Metal) and apply paint system 5-E-Z,” and ¶ 1.3, LEAD PAINT, stated: “The existing paint contains lead. Lead level is shown to be 12,800 mg/Kg. Data was [sic] analyzed on February 5, 2009.” (R4, tab 2 at 304-05)

(b) In § 01 33 00, SUBMITTAL PROCEDURES, ¶ 1.3, APPROVED SUBMITTALS, provided: “Approval [of a submittal] will not relieve the Contractor of the responsibility for any error which may exist, as the Contractor...is responsible for...the satisfactory construction of all work” (R4, tab 2 at 66-67).

(c) In § 01 35 26, GOVERNMENTAL SAFETY REQUIREMENTS, ¶ 1.4 stated: “Where the requirements of this specification, applicable laws, criteria, ordinances, regulations, and referenced documents vary, the most stringent requirements govern” (R4, tab 2 at 77).

(d) In § 09 97 02, PAINTING OF HYDRAULIC STEEL AND CAST IRON STRUCTURES, INCLUDING REMOVAL OF LEAD PAINT, ¶ 1.1, REFERENCES, included SSPC Guide 6, “Guide for Containing Debris Generated During Paint Removal Operations” (2004); EM 385-1-1, ACOE Safety and Health Requirements Manual (2008);

¹ All Rule 4 file page citations are to Bates numbers, excluding their prefatory zeros.

29 C.F.R. 1910.94 Ventilation; 29 C.F.R. 1926.62 Lead; and 40 C.F.R. 58 Ambient Air Quality Surveillance. Section 09 97 02 further provided as follows:

1.6 SAFETY AND HEALTH PROVISIONS

Work shall be performed in accordance with the requirements of 29 CFR 1910, 29 CFR 1926, EM 385-1-1, and other references as listed herein. Matters of interpretation of the standards shall be submitted to the Contracting Officer for resolution before starting work. Where the regulations conflict, the most stringent requirements shall apply....

1.6.1 Abrasive Blasting

The Contractor shall comply with the requirements in Section 06.H of EM 385-1-1.

....

1.6.3 Cleaning with Solvents.

1.6.3.1 Ventilation

Ventilation will be provided where required by 29 CFR 1910.146 or where the concentration of solvent vapors exceeds 10 percent of the Lower Explosive Limit (LEL). Ventilation shall be in accordance with 29 CFR 1910.94, paragraph (c)(5).

....

1.9 ENVIRONMENTAL PROTECTION

....

1.9.2 Containment

The contractor shall contain debris generated during paint removal operations in accordance with the requirements of SSPC Guide 6, Class 4a. Where required the containment air pressure shall be verified visually. Where required the minimum air movement velocity shall be 100 fpm for cross-draft ventilation or 60 fpm for downdraft ventilation.

(R4, tab 2 at 165-69, 175, 179-80)

6. SSPC Guide 6 stated in ¶ 1, Scope:

1.1 This guide describes methods of paint removal, containment systems and procedures for minimizing or preventing emissions from escaping the work area....

1.2 The containment systems are categorized in up to four classes per type of paint removal method, based on the extent to which emissions are controlled.

(R4, tab 2 at 1592) Paragraph 4.2.2 stated that “[t]he degree of emissions control is greatest for Class 1 and least for Class 4” (*id.* at 1594).

7. SSPC Guide 6, Table A, ABRASIVE BLAST CLEANING COMBINATIONS OF CONTAINMENT AND VENTILATION SYSTEM COMPONENTS, specified the following containment components for classes 2A and 4A (R4, tab 2 at 1604): (a) Class 2A: (i) Materials (¶ 5.3.1), Type A1 rigid (¶ 5.3.1.1) or Type A2 flexible (¶ 5.3.1.2). (ii) Penetrability (¶ 5.3.2), Type B1 air impenetrable materials “impervious to dust or wind” (¶ 5.3.2.1). (iii) Support structure (¶ 5.3.3), Type C1 rigid, no movement (¶ 5.3.3.1), or Type C2 flexible, minor movement (¶ 5.3.3.2). (iv) Joint requirements (¶ 5.3.4), Type D1, Full Seal, of all structure and containment joints (¶ 5.3.4.1). (v) Entryway (¶ 5.3.5), Type E2, resealable doors (¶ 5.3.5.2) or Type E3, multiple flap, overlapping door tarps (¶ 5.3.3.3). (b) Class 4A: (i) Materials, Type A1 rigid (¶ 5.3.1.1) or Type A2 flexible (¶ 5.3.1.2). (ii) Penetrability, Type B2a, air penetrable material, tightly woven (¶ 5.3.2.2) or Type B2b, air penetrable, open mesh (¶ 5.3.2.3). (iii) Support structure, Type C3, minimal support, except for cables and chains to affix materials (¶ 5.3.3.3). (iv) Joint requirements, Type D2, Partial Seal, of containment materials with recommended overlapping seams (¶ 5.3.4.2). (v) Entryway, Type E4, entry through open seams (¶ 5.3.5.4). (R4, tab 2 at 1598-99)

8. SSPC Guide 6, Table A, ABRASIVE BLAST CLEANING COMBINATIONS OF CONTAINMENT AND VENTILATION SYSTEM COMPONENTS, specified the following ventilation components for classes 2A and 4A (R4, tab 2 at 1604): (a) For Class 2A: (i) Air Make-Up (¶ 5.4.1), either Type F1 air supply controlled by baffles, louvers, flap seals, filters and ducts (¶ 5.4.1.1) or Type F2 open air supply (¶ 5.4.1.2). (ii) Input Air Flow (¶ 5.4.2), either Type G1, Forced Input Air Flow (¶ 5.4.2.1) or Type G2, Natural Input Air Flow (¶ 5.4.2.2). (c) Air Pressure Inside Containment (¶ 5.4.3), Type H2, Visual Verification, negative pressure to be verified through the concave nature of wall, ceiling, or floor materials (¶ 5.4.3.2). (iv) Air Movement Inside Containment (¶ 5.4.4), Type I1, minimum air movement by mechanical ventilation to establish a specified minimum air velocity (in “fpm”) or air volume (in “cfm”) (¶ 5.4.4.1).

(v) Exhaust Air Flow/Dust Collection (¶ 5.4.5), Type J1, air filtration by forced exhaust air flow into dust collectors or baghouses (¶ 5.4.5.1). (R4, tab 2 at 1599-1600) (b) For Class 4A: (i) Air Make-Up, Type F2, open air supply (¶ 5.4.1.2). (ii) Input Air Flow, Type G2, natural input air flow (¶ 5.4.2.2). (iii) Air Pressure Inside Containment, Type H3, negative pressure was not required (¶ 5.4.3.3). (iv) Air Movement Inside Containment, Type I2, minimum air movement not specified (¶ 5.4.4.2). (v) Exhaust Air Flow/Dust Collection, Type J2, air filtration not required (¶ 5.4.5.2). (R4, tab 2 at 1599-1600) SSPC Guide 6, Table A, Note 5, stated: “Certain combinations of components within each class may not be suitable when removing hazardous paints (e.g., forced air input in combination with penetrable containment materials in Class 4.A)” (R4, tab 2 at 1604).

9. EM 385-1-1, § 06.H, Abrasive Blasting, included the following paragraph which provided in pertinent part:

06.H.02 Blast Cleaning Enclosures and Rooms:

a. Blast cleaning enclosures shall be exhaust ventilated in such a way that a continuous inward flow of air will be maintained at all openings in the enclosure during the blasting operation.

b. All air inlets and access openings shall be well baffled to prevent the escape of abrasive and the recommended continuous inward air velocity at the air inlets is a minimum of 250 fpm (4.6 kph).

c. Negative pressure should be maintained inside during blasting.

d. The rate of exhaust shall be sufficient to provide prompt clearance of the dust-laden air within the enclosure after cessation of the blasting.

....

g. In the room, a cleanup method other than broom sweeping or compressed air blowing should be used to collect the abrasive agent after blasting (e.g., vacuum cleaning)....

(R4, tab 2 at 680, underlining in original)

10. We find that, in terms of SSPC Guide 6 ventilation components (finding 8), EM 385-1-1, ¶ 06.H.02 required the equivalent of Class 2A ventilation.

11. On 25 November 2009 Hartman submitted to ACOE Transmittal No. 099702-2, for item 10, “Containment,” *inter alia*, which stated:

The containment required by specification [¶ 1.9.2] is SSPC Guide 6 – Class 2A containment.

Containment materials are A-2 Flexible: The tarping to be used is lightweight, high strength nylon.

Penetrability B-1 Impermeable: Tarping is impermeable.

Support Structure C-2 Flexible: Support structure would consist of 5/16 airplane cable.

Joints D-1 Full Seal: A full seal will be utilized by overlapping the tarps grommet seams.

Entryway E-3 Overlap: Multiple flap over-lapping door tarps.

That transmittal did not identify ventilation components. (R4, tab 45 at 1-16) Hartman’s foregoing components were those specified for Class 2A (finding 7).

12. The ACOE’s 22 December 2009 review of Transmittal No. 099702-2 stated, *inter alia*, that the requirement specified in ¶ 1.9.2 was SSPC Guide 6 Class 4A, asked Hartman which requirement it intended to follow and required its resubmittal (R4, tab 45 at 17).

13. On 13 January 2010 Hartman submitted Transmittal No. 099702-2.2 to ACOE for item 10.1, which stated:

The containment required by specification is SSPC Guide 6I – Class 4A containment.

Containment System

Containment materials are A-2 Flexible:	The tarping to be used is lightweight, high strength nylon.
Penetrability B-2 Penetrable:	Tarping will be either impermeable or penetrable.
Support Structure C-3 Minimal:	Support structure would consist of 5/16 airplane cable.
Joints D-2 Partial Seal:	A partial seal will be utilized by overlapping the tarps seams.
Entryway E-4 Overlap:	Containment materials are mated together. Entry is through unsealed seams.

Hartman designated ventilation components F2, G2, H3, I2 and J3 (presumably J2). On 3 March 2010 the ACOE approved Hartman's 13 January 2010 submittal. (Compl. tab N at 4, 14) We find that SSPC Guide 6 specified component types A2, B2, C3, D2, E4, F2, G2, H3, I2 and J2 for Class 4A containment and ventilation.

14. The ACOE's 12 April 2010 memorandum discussed deficiencies per EM 385-1-1 found during the ACOE's 6 April 2010 inspection at the Fall River Dam, including:

[Deficiency] (d) 06.H.02 Blast Cleaning Enclosures and Rooms: a. Blast cleaning enclosures shall be exhaust ventilated in such a way that a continuous inward flow of air will be maintained at all openings in the enclosure during the blasting operation. b. All air inlets and access openings shall be well baffled to prevent the escape of abrasive and the recommended continuous inward air velocity at the air inlets is a minimum of 250 fpm (4.6 kph). c. Negative pressure should be maintained inside during blasting. d. The rate of exhaust shall be sufficient to provide prompt clearance of the

dust-laden air within the enclosure after cessation of the blasting.

OBSERVATION: Contractor representative stated that exhaust ventilation (baghouse) will not be used for this project because the contract only required SSPC Class 4A containment.

DISCUSSION: Contract shall provide exhaust ventilation. The certified industrial hygienist can calculate the required velocities needed for adequate air exchanges and negative pressure.

(R4, tab 8 at 2-3)

15. On 14 April 2010 Hartman replied to the 12 April 2010 memorandum: **“Deficiency Item:** (d) 06.H.02 Blast cleaning Enclosure and Rooms. **Response:** All blast enclosures meet or exceed the specified and approved submitted Class 4A containment as per SSPC guide 6” (R4, tab 11 at 2).

16. On 17 April 2010 Hartman told an ACOE inspector that it did not have containment complying with deficiency item 06.H.02. The ACOE’s James McDonald told Hartman that it could not paint tainter gate 1 unless it complied with EM 385-1-1 requirements and the project specifications. (R4, tab 18)

17. Hartman’s 29 April 2010 e-mail to the ACOE provided the following “Supplemental Response” to Deficiency Item (d) 06.H.02: “As directed by USACE we have upgraded the containment by reducing or eliminating openings during abrasive blasting operation and adding dust collection equipment to create negative pressure.” The ACOE opined that it had not directed an upgrade, but directed Hartman to comply with EM 385-1-1. (R4, tab 22)

18. On 7 February 2011 Hartman submitted an \$89,908.15 Request for Equitable Adjustment (REA) for abrasive blast containment. Hartman stated:

Actual requirements related to abrasive blasting of Tainter Gates at the site included more stringent containment and control than is required under the specified SSPC Guide 6, Class 4a containment (09.97.02-1.9.2). These more stringent requirements were not anticipated nor priced into the project. Hartman Walsh relied substantially, and placed the most significant weight on, the SSPC 4a specification requirement.

It further alleged that a review of personnel air monitoring showed 17 air samples taken from 6 April through 23 July 2010, of which the highest lead was 2.3 $\mu\text{g}/\text{m}^3$ (micrograms per cubic meter), below the 30 $\mu\text{g}/\text{m}^3$ action level in 29 C.F.R. 1926.62, and that lead dust was not hazardous. (R4, tab 39 at 1-3)

19. On 12 April 2011 the CO denied Hartman's REA (R4, tab 40).

20. On 4 May 2011 Hartman submitted a \$89,908.15 claim regarding abrasive blast containment and requested a CO's decision (R4, tab 41 at 1).

21. The CO's undated decision, received by Hartman on 18 July 2011, denied its 4 May 2011 claim in its entirety (R4, tab 1 at 1).

DECISION

This dispute and appeal present two issues. (1) Did TO 1 require containment and ventilation components more stringent than SSPC Guide 6 Class 4A? (2) If so, did respondent's approval of Hartman's January 2010 submittal for SSPC Guide 6 Class 4A containment and ventilation components preclude respondent from directing Hartman in April 2010 to provide exhaust ventilation, baffled air inlets and openings, minimum 250 fpm continuous air velocity, maintenance of negative air pressure and clearance of dust-laden air so as to cure deficiency ¶ (d) 06.H.02?

As to the first issue, specification § 09 97 02, ¶ 1.9.2, provided: "The contractor shall contain debris generated during paint removal operations in accordance with the requirements of SSPC Guide 6, Class 4a" (finding 5(d)). Section 09 97 02, ¶ 1.6.1 required Hartman to comply with the requirements in § 06.H of EM 385-1-1 (*id.*). EM 385-1-1 required the equivalent of Class 2A ventilation (finding 10). Specification § 01 35 26, ¶ 1.4, provides that where the specification and referenced documents requirements vary, the most stringent requirements govern (finding 5(c)). Therefore, TO 1 clearly prescribed requirements additional to, and more stringent than, Class 4A containment and ventilation.

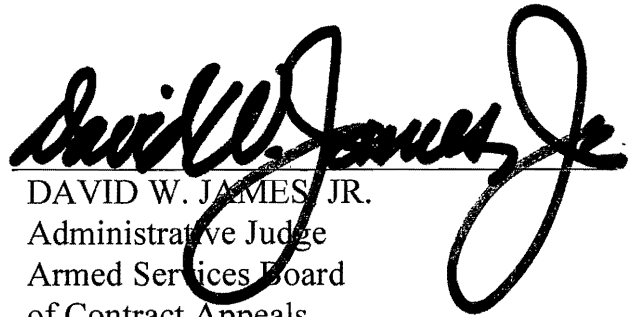
Appellant argues that sample tests of the air at Fall River Dam showed that the lead content was less than the 30 $\mu\text{g}/\text{m}^3$ action level in 29 C.F.R. 1926.62, so lead dust was not hazardous (finding 18). It also argues that the lead concentration in the existing coating would not be considered hazardous (app. br. at 7-12). However, the requirements of specification § 09 97 02, ¶¶ 1.6 and 1.6.1, and EM 385-1-1, § 06.H.02, were not restricted to instances when blasting debris showed lead in the air at or greater than the 30 $\mu\text{g}/\text{m}^3$ action level or hazardous lead; they applied irrespective of hazardous lead. The absence of hazardous or action level lead in Hartman's test samples is immaterial.

As to the second issue, the ACOE's approval of Hartman's January 2010 submittal for SSPC Guide 6 Class 4A containment and ventilation components did not preclude it from directing Hartman in April 2010 to cure deficiency ¶ 06.H.02. See specification § 01 33 00, ¶ 1.3, "Approval [of a submittal] will not relieve the Contractor of the responsibility for any error which may exist, as the Contractor...is responsible for...the satisfactory construction of all work" and the Specifications and Drawings for Construction clause (findings 1 and 5(b)); see also *Ellis-Don Construction, Inc.*, ASBCA No. 51210, 99-1 BCA ¶ 30,346 at 150,072 (government's approval of erroneous color submittal did not estop it to reject noncompliant work before acceptance; contractor's extra work claim denied).

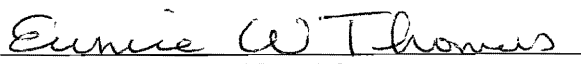
CONCLUSION

We deny the appeal.

Dated: 17 February 2012


DAVID W. JAMES, JR.
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. 57742, Appeal of Hartman Walsh Painting Company, rendered in conformance with the Board's Charter.

Dated:

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