

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Atlantic Dry Dock Corporation) ASBCA No. 54936
Under Contract No. N00024-92-H-8012)

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OPINION BY ADMINISTRATIVE JUDGE CLARKE

Atlantic Dry Dock Corporation (ADDC or appellant) appeals the Navy contracting officer's final decision denying its claim for \$618,772 relating to its contract to "blast and coat" the superstructure of the USS Hue City, a Navy guided missile cruiser. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. We consider entitlement only. We deny the appeal.

FINDINGS OF FACT

1. On 26 June 2002 the Navy issued Solicitation No. N62670-02-R-0018 for dry dock work on the guided missile cruiser, USS Hue City (R4, tab 1). Section L-2-26, "INSPECTION OF VESSEL(S)," stated that an alternate vessel, the guided missile cruiser, USS Philippine Sea, would be available from 8 to 10 July 2002 for inspection (*id* at 112). The USS Philippine Sea was a guided missile cruiser similar to the USS Hue City (tr. 3/47, 88). Drawings and technical data was available in accordance with solicitation paragraph C-2-12 (R4, tab 1 at 19-20).

2. The record includes a Navy cost estimate dated 3 July 2002 for the superstructure preservation work (app. ex., tab 8). The Navy estimated that the work would cost \$266,980 based upon 333 man days of work (*id.*; tr. 2/181).¹

¹ The name on the estimate is Mr. Kenneth Thompson but he testified that he was not involved in the Hue City contract and his name was likely generated automatically (tr. 2/112-14). The record sheds no light on how this estimate was calculated.

3. Mr. Dennis W. Rials and Mr. George Carter of ADDC conducted a ship check on the USS Philippine Sea (Coast Guard (CG) 58) on 8 or 9 July 2002 (R4, tab 110 at 39, tab 111 at 57-58).

4. On 8 July 2002, Amendment No. 0002 to the solicitation was issued (R4, tab 3). It added specification Item No. 631-21-901 for the blasting and coating of the USS Hue City's superstructure which read in pertinent part:

1. SCOPE

1.1 Title: Superstructure; preserve

1.2 Location of Work:

1.2.1 Superstructure, Including Vertical and Near Vertical Surfaces Above the 01 Level Deck (Including the Underside of Overhanging Decks/Platforms) From Frame 138 to 420 including Port Side (only) Plenum Chamber Louvers at Frame 196 to 213 and Frame 308 to 316, Catwalks, Ladders, Exterior Surfaces of the Helicopter Control Station, Helicopter Hanger Doors, Watertight Doors, Life Raft Frames, Life Boat Foundations, Appendages and Foundations/Brackets Attached to these Surfaces.

....

2. REFERENCES:

a. Standard Items

b. 631-5921949 Rev U, Paint Schedule

3. REQUIREMENTS:

3.1 Accomplish the requirements of 009-32 of 2.a, including Table 9, Line One or 2, for exterior surfaces of locations listed in 1.2, using 2.b for additional guidance.

(R4, tab 6)

5. Paint Schedule 631-5921949 Rev U identified a total of 25,600 square feet for all “EXTERIOR–VERTICAL ALUMINUM SURFACES–01 LEVEL AND ABOVE” (R4, tab 7 at 3, sheet 49). The paint schedule does not identify any square footage for non-vertical surfaces such as catwalks, ladders, exterior surfaces of the helicopter control station, life raft frames, lifeboat foundations, appendages and foundations/brackets attached to vertical and near vertical surfaces (*id.*).

6. Since 1994, Mr. Donald Doyle has been the port engineer for the USS Hue City (tr. 3/46). He is responsible for prioritizing, qualifying, planning and budgeting for all off ship maintenance (tr. 3/47). He testified that he is not aware of any drawing or other source of Navy data that states the square footage of non-vertical surfaces on guided missile cruisers (tr. 3/95-97, 101-02).

7. On 9 July 2002, the day after Amendment No. 0002 to the solicitation was issued, ADDC sent out a request for quotations for the superstructure blasting and coating for the USS Hue City to various potential subcontractors (R4, tab 19). Industrial Marine, Inc. (IMI), submitted a quotation for the Item 631-21-901 superstructure blasting and coating work in the amount of \$192,040 (R4, tab 20; tr. 1/33).² International Marine and Industrial Applicators, Inc. another subcontractor, submitted a bid for the same work in the amount of \$580,060.00 (R4, tab 23 at 2). Mr. Charles Hawkins, president of IMI (tr. 1/21), recalled that Mr. Cliff Thirtyacre, ADDC, called him and told him that IMI’s bid on the Hue City was “out of whack” or too low (tr. 1/31, 44). Mr. Hawkins decided that IMI should change its bid (tr. 1/48). He looked at the paint schedule and it indicated that there was 25,600 square feet of “EXTERIOR–VERTICAL ALUMINUM SURFACES–01 LEVEL AND ABOVE” (tr. 1/52, 154, 158-61, 172; R4, tab 7, sheet 49). Mr. Hawkins and Ms. Dorothy Ammons were working on the bid and they called Mr. Craig Wood, ADDC, to see if he had any additional information on the underdecks and appendages (non-vertical surfaces) (tr. 1/55-57, 164, 173). Mr. Wood suggested adding 20% of the 25,600 square feet of vertical surface to account for the underdecks and appendages (tr. 1/57). They used the 20% or 5120 square feet to calculate IMI’s bid (tr. 1/58). IMI’s new quote to ADDC was \$468,165.00 (R4, tab 25; tr. 1/64-66). Mr. Hawkins testified that when bidding on a job IMI likes to go on a ship check to assess the amount of wrapping and hand tool cleaning (tr. 1/142-45). However, scaffolding/staging is never in place during a ship check (tr. 1/143). Mr. Hawkins acknowledged if he were on the ship he could look at “most” of the underdecks and see what was there (tr. 1/192), he could also see the catwalks, ladders, and watertight doors (tr. 1/192-93). And, he could see the brass latches (“dogs”) on the watertight doors had to be protected (tr. 1/193-94), and the lifeboat/life raft foundations (tr. 1/195-98). IMI did not request or perform a ship check prior to submitting its quote to ADDC. Mr. Hawkins testified that he bid the work without a ship check because he was familiar with that type

² The copy in the record is unsigned and undated, but this fact is not disputed by the Navy (gov’t br. at 12, ¶ 43).

of ship (tr. 1/275-77). Mr. Doyle testified that the Philippine Sea, Gettysburg, and Hue City are similar CG vessels (tr. 3/47, 88). The Gettysburg was in port from 8-14 July 2002 (tr. 3/90). Generally the Navy responds favorably to requests for access to ships from potential contractors (tr. 3/91).

8. On 26 July 2002, ADDC submitted its proposal to the Navy (R4, tab 103). The proposal incorporated IMI's price of \$498,165 for Item No. 631-21-901 (R4, tab 103 at 18, tab 26 at 8, 31).

9. Mr. James Stokes is a planner for the U.S. Navy (tr. 2/123). He writes work specifications, estimates and performs ship checks for the Navy (tr. 2/123-24). Mr. Stokes performed a technical analysis review (TAR) on the Hue City superstructure blasting and coating work. The TAR involves reviewing both the contractor's and government's estimate. (Tr. 2/127) His TAR worksheet is at appellant's exhibit tab 17 and is dated 8 August 2002 (tr. 2/128). When he filled out the worksheet he had the file with the government and contractor estimates (tr. 2/129). He does not know where that file is today (tr. 2/130). He did not use the paint schedule when he prepared the TAR (tr. 2/134). He did a ship check on a CG and did a rough estimate to get a "ball park" estimate (tr. 2/134). He took "rough" measurements while he was on the ship (tr. 2/143). He spent approximately two hours taking measurements on the ship (tr. 2/145). He can't recall details because it was so long ago (tr. 2/136). His estimate entered on the TAR summary sheet was 2,664 man hours (tr. 2/151-52; app. ex., tab 17 at 3). He agreed with the contractor's estimate of "15,467" for materials and he estimated "193,000" for subcontracts (tr. 2/152; app. ex., tab 17 at 3). The differences between his estimate and the contractor's estimate were 8 man hours and "305,165"³ for subcontracts (tr. 2/153; app. ex., tab 17 at 3). He testified that his estimate was "\$305,000" lower than the contractor's estimate (tr. 2/155).

10. The Hue City contract was to be a sole source award to ADDC because of dry dock availability (tr. 3/104-07). Contract No. N00024-92-H-8012 (8012) was awarded to ADDC on 18 September 2002 (R4, tab 3). On 30 October 2002, bilateral Amendment No. 00001 to the 8012 contract added the Item No. 631-21-901 superstructure blasting coating work (R4, tab 4). On 7 November 2002, ADDC issued Purchase Order No. 8800073 to IMI in the amount of \$468,165 to "PROVIDE THE LABOR, EQUIPMENT, AND MATERIAL TO PERFORM THE REQUIREMENTS OF: NAVY ITEM 631-21-901" (R4, tab 29 at 2).

11. IMI began performing the work on 8 November 2002 (tr. 1/203; R4, tab 44-10). Once the staging was up and Mr. Hawkins was able to access the superstructure, he became concerned that there was more square footage than they had accounted for in their bid (tr. 1/78, 206-07). He obtained profile drawings of the ship

³ In testimony the question stated 306,165 but it looks more like 305,165 on the form.

but the drawings did not show appendages or overhangs or anything underneath them (tr. 1/77). As a result he and several others individuals began taking measurements (tr. 1/79, 300-01, 2/49-50; R4, tab 49 at 1, 36). The documents at Rule 4, tab 49 are the measurements taken (tr. 1/84-88, 302). The total square footage they measured was 38,624 and they had bid 30,500 (tr. 1/88, 305). The vertical surface of 25,600 square feet in the paint schedule was accurate within a few hundred square feet (tr. 1/132, 160). On 15 November 2002, IMI wrote ADDC reporting the results of the measurements and requested an additional \$206,430 (tr. 1/90-91; R4, tab 31). In another letter, dated 25 November 2002, to ADDC, IMI reduced its request to \$108,212 (R4, tabs 32, 33). The measurements were reported to the Navy in an Inspection Deficiency Report dated 26 November 2002 (tr. 1/96, 3/16-17; R4, tab 35). The Navy responded that it would not increase the contract price (tr. 1/98, 104; R4, tab 63). IMI completed the job and the work was accepted by the Navy (tr. 1/99, 3/18).

Testimony Relating to Estimating the Non-Vertical Surfaces

12. Mr. Hawkins testified that IMI sandblasts and paints mostly military vessels (tr. 1/21). He has experience estimating superstructure sandblasting and painting (tr. 1/24). He was involved in estimating the Hue City contract and was present during the work (tr. 1/26). He explained that flat surfaces were easy to do, but the underdecks and appendages were much more time intensive because things such as piping, cables, light sensitive equipment that had to wrapped to protect from blasting and painting (tr. 1/100-02). The record includes pictures of the wrapping required to protect items during blasting (tr. 1/108-12; R4, tab 44-3). A profile drawing looks at the side of the ship (tr. 1/120). The profile drawings of the ship cannot be used to determine square footage of the vertical and flat surfaces or the underdecks and appendages (tr. 1/115, 121; R4, tab 64 at 9, 10). He testified that a ship check would not have helped to determine the square footage of the non-vertical surfaces because they are not within reach (tr. 1/116). An arrangement drawing is a "bird's eye view" looking down on the ship (tr. 1/119-20). The underdecks and appendages cannot be measured from the arrangement drawings (tr. 1/119, 124). The top side of the flat surfaces can be measured on the arrangement drawings (tr. 1/125-26).

13. Mr. Bill Williams is employed by IMI as a draftsman, salesman and project manager (tr. 2/34). He testified that profile and general arrangement drawings of the ship cannot be used to calculate the square footage of appendages and underdecks because they do not provide sufficient "structure" (tr. 2/52-7; R4, tab 64 at 9, 10, tab 65 at 4, tab 66 at 4, tab 67 at 4). General arrangement drawings may be used to determine the square footage of the topside of platforms (tr. 2/94).

14. Mr. Mark Grimes is operations manager for IMI for the northwest (tr. 1/283). He has been with IMI for 35 years and started as a blaster and painter and worked his way up to his present job (tr. 1/284). He has experience estimating superstructure jobs

(tr. 1/285). He testified that one can't use profile or general arrangement drawings to estimate square footage (tr. 2/31-32).

15. Mr. Doyle, Hue City Port Engineer since 1994, testified at length about drawings of the USS Hue City (tr. 3/47-76). The drawings are to scale, 3/16 inch equals a foot (tr. 3/51; R4, tab 92), and the hull frames shown on the drawings are two feet apart (tr. 3/54-55, 69). He testified about the bow and stern view drawing and marked various features depicted on the drawing with green marker (tr. 3/51-53; R4, tab 93). He did the same for the starboard profile drawing (tr. 3/52-61; R4, tabs 98, 99), the port profile drawings (tr. 3/61-62; R4, tabs 100, 101) and plan views⁴ of the ship (tr. 3/63-65, 68-76; R4, tabs 85, 87, 89, 90, 94, 95). He also testified about pictures and the ability to view or access various features shown in the pictures (tr. 3/64-68; R4, tab 44-3). He testified that vertical surfaces, near vertical appendages, brackets, underdecks, plenum chamber louvers, catwalks, watertight doors, lifeboat foundations, life raft frames, etc., are all visible and many accessible during a ship check (tr. 3/75-83). He testified that he is not aware of any drawing that has the non-vertical square footage and that to calculate the total square footage of the super structure he would have to look at thousands of drawings and the result would "still be a mathematical equation" (tr. 3/96).

16. Mr. Raymond M. Challoner, III, was called by ADDC as an expert marine estimator. Mr. Challoner is the president of Main Industries in Hampton Roads, Virginia, a marine blasting and coating contractor (tr. 4/9). He has over 30 years of experience in blasting and coating (tr. 4/10). He has worked on CG ships (tr. 4/11). He has experience estimating jobs including superstructures (tr. 4/12). The Board accepted Mr. Challoner as an expert (tr. 4/8-9).⁵ He explained the steps involved in blasting and coating the superstructure of a ship (tr. 4/12-15). He was given documents relating to the USS Hue City solicitation and he generated an expert report concerning estimating the job (tr. 4/15-16; app. ex., tabs 1-15, 33). He testified that if he couldn't do a ship check, he would normally add 15-25% of the vertical/near vertical surfaces, depending on the ship, to account for the "non vertical, the non flat surfaces" (tr. 4/29-30). He would add 50-70% more man hours to do the non-vertical/non-flat surfaces because they take more labor (tr. 4/30). He testified that using scaled drawings to calculate non-vertical/non-flat surfaces would take "hours and hours and hours scaling it and you don't know if you've got it all or not" (tr. 4/34). Even if one has the general arrangement drawings, one will have to estimate the square footage for underdeck areas, appendages, and non-vertical surfaces by putting "a multiple" on the square footage provided for vertical and near vertical surfaces (tr. 4/34-35). He believes that IMI's adding 5,000 square feet for

⁴ Plan view drawings view the ship from above on a deck by deck basis (tr. 3/63).

⁵ The parties did not object to each other's experts, Mr. Challoner (ADDC) and Mr. Ariel Duchesne (Navy) and the Board accepted each as an expert in marine estimation (tr. 4/8-9).

non-vertical surfaces was reasonable (tr. 4/36). He testified that for a CG type ship he would use 15-25% as the multiplier and IMI's use of 20% "in the middle" (tr. 4/37). His opinion assumed that the Hue City or a sister ship was not available to IMI for a ship check (tr. 4/51, 54). He also assumed that IMI did not have ship drawings available to it (tr. 4/52, 54). He assumed that IMI had only the specification and the paint schedule (tr. 4/52). He testified that he used the 15-25% factor "all the time" (tr. 4/54). When asked by the trial judge where he got his 15-25% factor, Mr. Challoner responded in part, "just doing it" (tr. 4/80). When the trial judge asked, "[c]an you direct my attention to any place where it's written down in a, are you familiar with, are there any industry standard publications like ANSI...?" Mr. Challoner responded:

No, sir. The Marine industry, and I'm sure that Mr. Hick's witness is going to testify also, that it's a very unique industry and we are doing just niche work within that industry. *And each contractor will develop or estimate or will develop his own set of standards that he uses for bidding a job....*

(Tr. 4/80-81) (Emphasis added)

17. Mr. Ariel Duchesne was called by the Navy as an expert marine estimator to rebut Mr. Challoner's report and testimony. The Board accepted Mr. Duchesne as an expert (tr. 4/8-9). Mr. Duchesne is vice president of Ind-Mar Services Inc., a position he has held for two years (tr. 4/84-95). He has 24 years experience as a marine estimator and has done thousands of estimates (tr. 4/89). He was asked, "to render an opinion if had [sic] been given the specification, the specifications, references and solicitation documents and had, had the opportunity to do a ship check, could [he] develop a credible estimate" (tr. 4/92-93). He looked at drawings that were digitally generated and can be digitally read using his computer and an Adobe professional program (tr. 4/95-96). Using this program he could obtain measurements from the drawings (tr. 4/96). Mr. Duchesne testified about starboard (R4, tabs 98, 99), and port (R4, tabs 100, 101), profile drawings of the USS Hue City and how they showed various vertical and non-vertical features of the ship (tr. 4/98-103). He testified that since the paint schedule values were estimates, a prudent estimator would take measurements off the drawings of the areas to be "addressed" (tr. 4/104-05). He testified that he could look at the plan view drawings and determine the square footage of overhanging horizontal decks (tr. 4/106-07, 109). Then a "factor" could be applied to that area to estimate the area of work under the decks (tr. 4/110). However, it would be good to actually look at the underdecks (tr. 4/110-11). When asked how he would estimate life raft frames he testified that there were two choices: You could look at the drawings to see the exact configuration and construction "which is time consuming" or you can go look at them on the ship (tr. 4/118). He testified that you could see "some" of the appendages on the drawings (tr. 4/119-20). It is better to go on the ship to look at the appendages (tr. 4/120). Mr. Duchesne testified "[t]he most accurate way is to scale everything off" but that he

agreed with Mr. Challoner it is time consuming, “[a]nd like Mr. Challoner said, if you have time to do that then that’s a luxury. You know I respect that, that’s true. But if you don’t have time then you know, you get a feel for it. You look at each one, you can walk the decks with the drawing in your hand and you can mark the drawing as you’re walking the decks.” (Tr. 4/121) Referring to dimensioning everything from the drawings, he testified that “it takes time to do that” (tr. 4/126). The easiest way to do an estimate is to “walk the decks of the ship with drawings” (*id.*). Mr. Duchesne testified that the 20% used by IMI was not reasonable because it was a guess without a “determining factor that substantiates that” (tr. 4/127). He has never seen the 20-25% factor “written down anywhere or utilized across the industry” (tr. 4/128). He took measurements off of the Hue City drawings and ended up with approximately 53,000 square feet (tr. 4/140-41; app. ex., tab 40). He added a 15% “fudge factor” for a total of “61,200” square feet (tr. 4/141). He testified that the 15% was written guidance in estimating manuals (tr. 4/141). He did two ship checks, one in 2011 and another in 2012 (tr. 4/142). The first one was “ cursory” (tr. 4/143). He didn’t take any measurements off of the ships (tr. 4/144-45). A 15% risk factor (fudge factor) is recommended by estimating manuals to be applied after an estimate is completed (tr. 4/158).

18. On 17 July 2003, ADDC submitted a certified Request for Equitable Adjustment in the amount \$618,772 for the additional work associated with blasting and coating the non-vertical surfaces on the Hue City. ADDC sought the difference in costs between the 5000 square feet of blast and paint work in its bid and the 12,900 square feet of non-vertical surface it actually encountered. ADDC stated that it was not requesting a contracting officer’s (CO’s) final decision at that time. (R4, tab 8) On 15 October 2004, ADDC requested a CO’s final decision (R4, tab 13). On 15 December 2004 CO Leonard Overman, Jr., issued a final decision denying the claim (R4, tab 14). On 15 February 2005, ADDC appealed the CO’s final decision to the ASBCA. The appeal was docketed as ASBCA No. 54936 on 17 February 2005.

DECISION

Contentions of the Parties

Appellant makes two⁶ arguments. First, that its “interpretation that the non-vertical surfaces to be blasted and coated would be [sic] equal 20% of the 25,600 sq. ft. vertical surface area is the correct interpretation and that ADDC and IMI are entitled to be compensated for blasting and coating the additional square footage in the non-vertical surface areas” (app. br. at 26). Second, that the Navy possessed superior knowledge of the non-vertical surface square footage and failed to provide it to ADDC/IMI (app. br. at 27-29).

⁶ Appellant ends with a public policy argument, but it is in fact the same argument made in the superior knowledge section and we do not address it separately.

The Navy responds to the superior knowledge argument pointing out that there is no evidence in the record that the Navy knew what the square footage of the non-vertical surfaces was, and that the port engineer for the Hue City testified that, to his knowledge, no such data existed. Although the Navy argues that the specification was not misleading, it states, “[t]o the extent the specification was misleading, which it was not, there was a clear duty to inquire” (gov’t reply br. at 30). In response to appellant’s contract interpretation argument, the Navy counters that there is no 20% industry standard and that IMI should have requested a ship check—a request the Navy implies it would have granted (finding 7).

Superior Knowledge

Appellant argues that since the Navy built these ships, has years of experience with this class of ship, to include blasting and coating contracts, it should know the non-vertical square footage. Appellant puts it this way:

In its Reply Brief, the Navy argues that, because ADDC cannot produce evidence that could only be in the Navy’s possession, ADDC cannot prevail in this appeal. What that means is simple: the Navy unilaterally has given itself the ultimate “get out of jail free” card. As long as the Navy never produces documents that must have existed at some time, the Board cannot grant ADDC’s appeal. This is not a practice that this Board should encourage.

(App. reply br. at 9) (Citation omitted) There is no record evidence proving such knowledge and the Hue City Port Engineer, Mr. Doyle, testified that he was not aware of any data specifying the non-vertical square footage on this class of ships (finding 15). We cannot assume, as appellant suggests we do, that the square footage information exists somewhere in the Navy’s data repositories. Appellant makes its superior knowledge argument based on what the Navy “should have known.” While the concept of “should have known” counts in unilateral mistake/bid verification cases and unconscionability cases, we know of no case law supporting a finding of failure to disclose superior knowledge based on knowledge the government should have known. To the contrary, in *PGDC/Teng Joint Venture*, ASBCA No. 56573, 10-1 BCA ¶ 34,423, the Board held:

Appellant contends the government had superior knowledge of the government’s future needs with respect to the project in general and the disputed work in particular but failed to share such information with appellant (Teng memo. of law at 13). However, appellant fails to support these broad contentions with any evidence of specific, relevant

information or vital knowledge unavailable to appellant that the government possessed but failed to share with appellant prior to award. Appellant also fails to provide evidence of how the contract specifications misled appellant or did not put it on notice to inquire.

Id. at 169,924. There is no proof that the Navy has the information and is intentionally hiding it from appellant. Accordingly, appellant's superior knowledge argument must fail. Moreover, the square footage of the non-vertical surfaces was information ADDC knew it did not possess and it attempted to compensate for this lack of knowledge by using its business judgment and employing a percentage figure. Moreover, if as alleged, appellant assumed the Navy knew the square footage of the non-vertical surfaces, it begs the question as to why ADDC did not ask the government what that figure was prior to bidding.

Contract Interpretation Based upon Trade Practice

Appellant's contract interpretation argument relies upon trade practice (app. br. at 24), to support its conclusion that the Board should "conclude that ADDC's interpretation that the non-vertical surfaces to be blasted and coated would be [sic] equal 20% of the 25,600 sq. ft. vertical surface area is the correct interpretation" (app. br. at 26).

Trade practice may be considered when evaluating what appears to be clear and unambiguous language without violating the parole evidence rule:

Even when a contract is unambiguous, it may be appropriate to turn to one common form of extrinsic evidence—evidence of trade practice and custom. *Hunt Constr. Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). We have stated that "evidence of trade practice may be useful in interpreting a contract term having an accepted industry meaning different from its ordinary meaning—even where the contract otherwise appears unambiguous—because the "parties to a contract...can be their own lexicographers and...trade practice may serve that lexicographic function in some cases." *Id.* (quoting *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000)). Trade practice and custom may not be used, however, "to create an ambiguity where a contract was not reasonably susceptible of differing interpretations at the time of contracting." *Metric Constructors*, 169 F.3d at 752.

Teg-Paradigm Environmental, Inc. v. United States, 465 F.3d 1329, 1338 (Fed. Cir. 2006). The Board previously relied upon trade practice in a contract involving sandblasting of ship superstructure. *John H. Mathis Co.*, ASBCA No. 4076, 60-2 BCA ¶ 2681 at 13,516 (“Uncontradicted testimony of shipbuilders before us is to the effect that by usage shipbuilders understand that the hull of a vessel is that portion of the shell from the keel to and including the main deck.”).

Evidence of trade practice may be found if supported and recognized by written industry standards:

As previously noted, evidence of trade custom may be used to interpret terms of art such as “debris” and “residue.” The ASTM standard for asbestos abatement provides that debris and residue is “assumed” to contain asbestos. Therefore, we agree with the Court of Federal Claims that trade practice and custom demonstrates that in the asbestos abatement field any “debris and residue” found is assumed to contain asbestos. Thus, we affirm the Court of Federal Claims’s holding that the contract required TEG to clean all visible powder and dust found on inspection, including powder and dust in cracks and pores.

Teg-Paradigm, 465 F.3d at 1340-41 (citations omitted). Appellant presented no evidence that its use of 20% is supported and recognized by written industry standards.

Trade practice may be used to establish the meaning of ambiguous language in a contract. In *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 753 (Fed. Cir. 1999), the court employed trade practice to first find and then interpret ambiguous language:

Armed with these principles, this court examines anew whether the contract specifications at issue here are ambiguous, and finds that they are. Metric introduced sufficient evidence of trade practice and custom, and reasonable reliance on that trade practice and custom, to show that the specifications are susceptible to two different reasonable interpretations. The evidence shows that the electrical industry commonly uses the term “relamping” to mean the total replacement of lamps at a particular facility. Not only does that term not appear in the contract, relamping is rarely performed in connection with a newly constructed facility. This evidence is buttressed by NASA’s interpretation of the Canister facility contract which contained identical language to Section 16511 of the SSPF contract, but

which neither party interpreted as requiring relamping. Metric's reliance on its interpretation is reflected in its bid, which included labor to install only one set of lamps and the cost of only one set of lamps.

In *Western States Construction Co. v. United States*, 26 Cl. Ct. 818, 825 (1992), the issue was if underground pipe had to be wrapped:

The contract provision in question here, subparagraph 19.7 of the specifications, is ambiguous in the sense that it is susceptible of two different interpretations, each of which is consistent with the contract's language. Although the dictionary definition of "metallic pipes" would embrace CISP, plaintiff has created an issue as to the possible existence of a specialized meaning in the industry in the context of a wrapping requirement for underground CISP. If an informed person reading the contract would reasonably assume that wrapping is not required because cleaning and wrapping underground CISP makes no sense, and if that assumption would not deprive the specification of all meaning, i.e., if there is a more limited sense in which the requirement is apparently intended to apply, then the court is faced with conflicting meanings, not nullification. Such is the present circumstance. Plaintiff's reading is supported by its evidence that authorized representatives of the agency had, on earlier occasions, interpreted the words as plaintiff advocates.

The court therefore rejects, as a matter of law, defendant's assertion that the ordinary or "layman's" meaning of the term "metallic pipe" is controlling. The determination of whether the requirement of wrapping CISP was consistent with the contract permits consideration of plaintiff's evidence of a special meaning in the trade. Plaintiff, however, has not moved for summary judgment. The issue of what the contract calls for is thus not yet squarely presented.

See also W.G. Cornell Co. v. United States, 179 Ct. Cl. 651 (1967) (trade practice explains and defines "other suitable material"); *Gholson, Byars and Holmes Construction Co. v. United States*, 173 Ct. Cl. 374 (1965) (trade practice explains and defines "baked enamel").

Trade practice may also be used to supply missing terms in a contract:

Evidence of trade practice or custom provides an important interpretive aid where the contract specifications are silent on the precise scope of the work or method of performance. In such cases, the court or board will normally use trade custom and usage to fill in the missing term....

Supplying missing terms is a common use of evidence of trade custom and usage.

JOHN CIBINIC, JR., RALPH C. NASH, JR. & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 226 (4th ed. 2006). If substantial evidence supports the conclusion that it is trade practice or common trade usage within the Navy ship superstructure blasting and coating industry to estimate the non-vertical surface area by applying a percentage such as 20% to the vertical surface area identified in the contract, it would be reasonable for the Board to conclude that appellant's interpretation is correct. Trade practice would "fill in the blank" (for non-vertical surface area) in the Navy's specification and the Navy would be bound by that interpretation as if it was written in the specification.

Much time was spent at trial eliciting testimony about the role ship's drawings and a "ship check" play in estimating a blast and coat job. Mr. Hawkins appeared for appellant and testified that profile and arrangement drawings could not be used to calculate non-vertical square footage (finding 12). He testified that a ship check would not allow for calculation of non-vertical square footage because the areas were not accessible (*id.*). Mr. Williams and Mr. Grimes appeared for appellant and also testified that profile and arrangement drawings could not be used to accurately calculate the non-vertical square footage (findings 13, 14). Mr. Doyle appeared for the government and testified in detail that the drawings are drawn to scale and can be used to estimate non-vertical square footage but it would require looking at thousands of drawings and the result would still be a "mathematical equation" (finding 15). He testified that non-vertical surfaces could be observed during a ship check and that many were accessible and could be measured (*id.*).

Each party presented expert testimony at the trial. The Navy's expert was Mr. Duchesne an experienced marine estimator (finding 17). He testified that using the digital drawings and his computer he could obtain measurements of non-vertical surfaces but he agreed with Mr. Challoner that the process was time consuming (*id.*). He testified that walking the decks (during a ship check) with the drawings was a good idea when estimating such a job (*id.*). Finally he stated that he had never seen the 20-25% factor "written down anywhere or utilized across the industry" (*id.*). He did testify that he had

seen a 15% “fudge factor” in estimating manuals that was to be applied at the end of the estimating process to the entire amount (*id.*).

Appellant’s expert was Mr. Challoner, president of a marine blasting and coating contractor (finding 16). He testified that using scale drawings to calculate non-vertical square footage would take “hours and hours and hours scaling it and you don’t know if you’ve got it all or not” (*id.*). He testified that for a ship like the Hue City he would use a factor of 15-25% of the vertical surface area to estimate the non-vertical surface area. (*id.*). In response to questions from the trial judge, Mr. Challoner testified that the 15-25% came from experience (“just doing it”), that there was no written guidance and that “each contractor will develop or estimate or will develop his own set of standards that he uses for bidding a job” (*id.*).

Proof of trade practice however, must be supported by substantial evidence:

First of all, the evidence as to the existence of the trade practice consists solely of assertions to that effect made by the claimants themselves. This falls short of the standard of “substantial evidence that the practice is clear and well-recognized” that is a claimant’s burden of proof in seeking to take advantage of an alleged trade practice.

Turner Construction Co., ASBCA No. 25602, 86-2 BCA ¶ 18,966 at 95,768 (citing *Transco Contracting Co.*, ASBCA No. 25315, 82-1 BCA ¶ 15,515 at 76,972). We must conclude from the testimony, particularly from the experts Mr. Challoner, “each contractor will develop or estimate or will develop his own set of standards that he uses for bidding a job” (finding 16), and Mr. Duchesne, who had never seen the 20-25% factor “written down anywhere or utilized across the industry” (finding 17), that the record does not provide substantial evidence that the 20% factor used by appellant was based on “clear and well-recognized” trade practice.⁷ Appellant (IMI) knew the paint schedule was silent on the square footage of non-vertical surface and chose to accept the 20% factor provided by Mr. Wood without asking for a second ship check (finding 7). IMI’s decision in that regard was an exercise of business judgment. It is the nature of a fixed-price contract to place the risk on a bidder that exercises its business judgment to establish its price and during performance finds its price to be low. *Macro-Z Technology*, ASBCA No. 56711, 12-1 BCA ¶ 35,000 at 172,005-06.

⁷ We note that when the trial judge questioned Mr. Challoner, the record did not provide substantial evidence of trade practice. The trial judge’s question afforded appellant a final opportunity to make that proof. (Finding 16)

CONCLUSION

Because ADDC/IMI has failed to prove the Navy possessed superior knowledge, and because it has failed to prove by substantial evidence a clear and well-recognized trade practice in adding 20% of the cost of painting vertical surfaces to account for the costs of painting non-vertical underdecks and appendages in blasting and coating Navy vessels, the appeal is denied.

Dated: 20 June 2013



CRAIG S. CLARKE
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



PETER D. TING
Administrative Judge
Acting 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. 54936, Appeal of Atlantic Dry Dock Corporation, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals