BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of COLT INSULATION, INC.	)	
	)	Docket Nos. MSBCA
Under DHMH Contract No.	)	1426 and 1446
SFC 11/9/87-500	)	

December 5, 1989

Contract Interpretation - Contra Preferentem. The contractor's interpretation of a specification containing a latent ambiguity concerning the amount of soil required to be removed in an asbestos abatement project was found to be reasonable and the ambiguity was thus construed against the drafting agency.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for a thirty-seven (37) days compensable time extension, comprised of seven (7) days for utility outages and thirty (30) days for additional soil removal under an asbestos abatement project at Springfield Hospital, Sykesville, Maryland. Additionally, Appellant appeals the assessment of liquidated damages.

Findings of Fact

1. This dispute involves a Department of Health and Mental Hygiene (DHMH) contract for asbestos abatement at the Warfield Dining Room of the Springfield Hospital Center. DHMH awarded the contract to Appellant on November 9, 1987. The amount of the contract was $38,500.00.

2. The contract primarily involved asbestos abatement in the basement crawlspace of the dining room. A brief description of the work is as follows:

(a) the removal of insulation materials from mechanical piping;

(b) removal of asbestos debris from the earthen floor of the crawlspace;

(c) demolition and disposal of approximately 200 square feet of wooden decking and associated joists;

(d) surface removal of a minimum half inch of contaminated hard pack soil; and collection in the crawl space of rocks, stone, rubble, loose soil and wood for permanent containment;

(e) enclosure of the permanent containment area;

(f) encapsulation of all soil with a sprayed on chemical process known as Earth-Kote; and

(g) "lockdown" of mechanical equipment, walls, ceilings, hard-floor and other surfaces with a latex spray paint.

(Subsection 1.1 of Section IV of the Specifications, Rule 4, Vol. I, Tab 2).

3. The contract required all work to be substantially completed within thirty (30) days after notice to proceed.

Appellant began setting up the work area on January 20, 1988 and notice to proceed was issued with an effective date of January 25, 1988. This made the original contract completion date February 23, 1988.

4. The contract was substantially completed on March 31, 1988, or 37 calendar days later than originally required.

5. At the beginning of the project, Appellant's work was disrupted and delayed by utility outages at the hospital. Performance time was lost while DHMH repaired the outages and re-established access to the work area for Appellant.

6. DHMH determined that five (5) working days of delay were incurred by Appellant due to the utility outages and granted Appellant a five (5) working day time extension for them. Five working days corresponds to one week, or 7 calendar days.

7. The remaining thirty (30) days of additional performance time were spent by Appellant in soil removal and containment in accordance with DHMH's instructions. Appellant contends that DHMH instructed it to remove more soil than that required or contemplated by the contract.

8. The dispute centers specifically on interpretation of Subsection 1.1(d) of Section IV of the Specifications which provides in relevant part:

> (d) Surface removal to a minimum depth of one-half inch (1/2") of contaminated hard pack soil. Collection for permanent containment within the basement crawlspace all rocks, stone, rubble, loose soil wood which are to be treated as asbestos-contaminated.

9. Appellant interpreted the above provision as requiring it to remove a minimum 1/2 inch of soil from the <u>surface</u> of the earthen floor of the crawlspace. The limited work area of the crawlspace required the use of hand tools and Appellant determined that in order to be sure it was removing a minimum of 1/2 inch, it would remove up to one inch of soil using the back of a metal rake to skim the soil, and shovels and buckets to collect the material.

Appellant interpreted the reference to "loose soil" in Subsection 1.1(d) above to refer to the disturbed soil generated from the removal of the top one inch of the surface soil which was packed down or compressed as a result of among other things people walking on it. DHMH agreed that the

disturbed soil generated by the removal of the top one inch of the surface soil would become loose soil to go to containment chambers. However, DHMH interpreted the specification as requiring that the Appellant remove not only the first inch of surface soil which was compacted but also to require removal of several more inches of soil below the surface until another layer of compacted soil was encountered which DHMH termed the "hardpack". To determine where its version of the hard pack layer began, DHMH representatives used the heel or toe of their boots or applied "moderate" hand pressure and the DHMH Industrial Hygienist on the project at times would use a "scrubbing action" with his deep cleated boots to determine where he believed the hard pack soil began.

10. Eight or nine bidders attended the pre-bid site visit conducted by DHMH.[1] The crawl space was divided up into various areas,[2] some of which were designated for containment. The bidders spent approximately 15 to 20 minutes in the crawl space, including 5 to 10 minutes in the "racetrack" area (Areas N through U). No bidder conducted any subsurface investigation of soil conditions. Before putting the project out to bid, two representatives of DHMH spent a half hour to an hour examining the depth of the soil in the crawlspace. They made several subsurface probes of soil conditions to determine where, in their view, the "hardpack" soil began. In the racetrack area, the DHMH representatives could not determine where the "hardpack" layer began (using DHMH's interpretation) without digging substantially (6"-8") below the surface of the soil.

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[1]Appellant visited and inspected the site a day after the pre-bid site visit conducted by DHMH. It likewise conducted no subsurface investigation.
[2]These areas were denominated by letter (A, B etc.) and/or nickname i.e. "racetrack".

11. The specifications did not define the term "hard pack soil." The term had not been used or seen by the DHMH representatives in any other specification. The term does not appear in any dictionary of the English language. Determining where hard pack soil occurs is not a subject taught in courses regarding asbestos abatement.

12. Mr Henry Paetow, President of Appellant, testified at the hearing. Mr. Paetow has been in the insulation business over thirty (30) years, and Apppellant has performed approximately 350 asbestos removal projects about 50 of which involved asbestos removal in crawl spaces. Mr. Paetow personally has visited 30 to 40 crawl spaces. In Mr. Paetow's experience, the surface of the soil in a crawl space is usually naturally compacted, forming a top crust. Below the top crust, the soil is usually soft or loose. Once disturbed, the top crust becomes loose soil. According to Mr. Paetow, the surface removal to a minimum depth of 1/2 inch of contaminated hard pack soil required the removal of the naturally compacted top layer of soil. In Mr. Paetow's experience, there is not a hard pack soil layer in a crawl space which lies beneath a loose surface layer of soil.

13. Mr. Roland Paetow, Vice President of Appellant, has been in the insulation business over twenty-eight (28) years. He has seen 35 to 50 crawl spaces. Mr. Roland Muncy, Appellant's foreman for this project, has performed 20 to 25 asbestos abatement jobs, some involving crawl spaces.

Mr. Roland Paetow testified that, during his pre-bid inspection, he found the crawl space soil to be "solid" or "firm". Mr. Muncy testified that, when he arrived on the site, the undisturbed soil in the crawl space was "pretty hard". When he walked on it, it would leave "maybe a footprint and that was it." Mr. Muncy further testified that the soil for this project was about the same as the soil he had seen on other crawl space jobs.

14. The purpose of the project was asbestos abatement and containment, not elimination. After soil removal, the entire surface of the crawl space was to be covered with an encapsulant. Appellant believed that its interpretation of the specification, namely, as requiring surface removal of only the top 1/2 inch of contaminated soil, was consistent with the purpose of the project and the way in which an encapsulant works. The manufacturer of the encapsulant (Earth-Kote) told Mr. John Ingalls, the drafter of the specifications for DHMH, that Earth-Kote would work over a loose, fine grain or dusty surface. He further indicated to Mr. Ingalls that the soil did not have to be cleaned to eliminate visible asbestos residue, because the Earth-Kote would "lock-down" any asbestos containing materials in the soil. After contract award, Mr. Roland Paetow spoke to an Earth-Kote representative who said that Earth-Kote is an encapsulant which is designed to lock in fibers and thus the Earth-Kote would actually work better with absorbent (less hard) soil.

15. After the first soil removal effort, Appellant was forced to change its method of performance in order to comply with the DHMH interpretation of what constituted hard pack soil. While Appellant had initially used rakes to skim the soil, as it had on its other crawlspace projects, it was now required to use a shovel to dig into the earth. It also had to use a pick to loosen material in a portion of the racetrack area.

16. On March 7, 1988, a meeting was held between representatives of Appellant and DHMH. DHMH directed Appellant to continue removing the soil per its interpretation. Appellant requested written confirmation of this instruction. (Rule 4, Vol. II, Tab 22). By letter of March 11, 1988, Appellant wrote DHMH advising that the additional soil removal had extended the project by thirty (30) days, for which Appellant would seek an adjustment in

contract time and price. (Rule 4, Vol. II, Tab 23). By letter of March 14, 1989, DHMH provided Appellant with the written confirmation of the instructions issued on March 7, 1988. (Rule 4, Vol. II, Tab 24).

17. Appellant followed the directives of DHMH regarding the amount of soil to remove. As a result thereof, Appellant ended removing two to three times the total amount of soil it had anticipated. In the racetrack area, Appellant removed 6 to 8 inches of soil. In Area S, Appellant removed 12 to 14 inches of soil before DHMH accepted the work. In area T, Appellant removed 12 inches or more.

18. As noted above, the project was substantially completed on March 31, 1988, or thirty-seven (37) calendar days late. Eliminating the seven calendar days of delay due to utility outages leaves thirty (30) days of delay that Appellant attributes to the DHMH position on soil removal.

19. At the hearing of the appeal, DHMH argued that the thirty (30) days of delay involving soil removal were due to Appellant's own inefficiencies or lack of manpower. The Board, however, finds that the delays were attributable to the additional soil removal. Removal of 2 to 3 times more soil as required by DHMH took additional time to accomplish. Concerning the alleged lack of manpower, the record reflects that Appellant planned to have approximately five (5) workers in the somewhat cramped crawl space. This intention was communicated to DHMH at the work initiation conference without objection. (Rule 4, Vol. II, Tab 17). At no point during the work did DHMH complain about Appellant's workforce. Appellant's actual workforce averaged more than five (5) men per day, including the working foreman. (Rule 4, Vol. II, Tabs 1 and 2). In addition, Appellant worked three (3)

Saturdays and two (2) Sundays in an attempt to minimize the delays. On the last weekend day Appellant was allowed to work, it had six men at the site plus Mr. Roland Paetow.

We also find, contrary to the assertion by DHMH, that Appellant did not experience unusual or excessive worker turnover, so as to cause job delay, given the difficult job conditions and the unskilled nature of the work. In short, the Board finds that the job was properly manned.

The Board also rejects any finding that Appellant's own inefficiencies caused the delays. DHMH asserts that Appellant approached the work in an inefficient manner when it determined to carry the dirt from Area R to Area Q at the opposite end of the crawl space instead of dumping it in nearby Area S. Appellant's foreman, however, explained that the soil was moved this way because there were several hot pipes in Area S which hindered movement. Instead of passing the heavy buckets by hand around the hot pipes, Appellant put the buckets on a cart and rolled them to the dump point at Area Q.

20. On May 11, 1988, Appellant submitted its claim based on additional soil removal and utility outages. (Rule 4, Vol. II, Tab 28). Appellant requested an adjustment in contract time of thirty-seven (37) calendar days and an adjustment in contract price of $32,683.00.

21. Appellant appealed to the Board from the lack of a final decision on its claim on November 28, 1988. On April 14, 1989, Appellant appealed from a final decision of the procurement officer assessing liquidated damages on this project in the amount of $3,450.00 for late completion. The appeals were consolidated for hearing. The appeals have proceeded on the basis of entitlement only.

Decision

I. Utility Outages

Appellant is entitled to an equitable adjustment in price and time for seven (7) calendar days of delay due to utility outages. The outages were recognized to be the responsibility of DHMH. DHMH issued a time extension of 5 working days for this problem. An agreement by the government to extend the time for performance of a contract gives rise to a rebuttable presumption that the government was responsible for the delay and that the contractor is entitle4d to an equitable adjustment for additional costs caused by the delay. See Elrich Construction Company, Inc., ASBCA No. 29547, 87-1 BCA ¶19,600 (1987). DHMH submitted no evidence to rebut such presumption and we thus find Appellant to be entitled to an equitable adjustment for five working days (seven calendar days).

II. Soil Removal

Appellant asserts that Subsection 1.1(d) of Section IV of the Specifications was ambiguous with regard to how much soil was to be removed and that it did not (nor should it have) perceive such ambiguity prior to contract award and only became aware of DHMH's interpretation during performance. As such it argues that the Board should apply the rule of contra proferentem under which a latent (hidden) ambiguity in a specification will be construed against the drafter provided that the other party's reliance upon its interpretation of the actual meaning of the specification is reasonable.

The Board finds that Subsection 1.1(d) of Section IV of the Specifications contains a latent ambiguity concerning the appropriate amount of soil to be removed which ambiguity the Board will construe against DHMH, the drafter of the specification. As drafter of the contract, DHMH

bears the risk of non-clarity in its specifications. The rule of contra proferentem, which this Board recognizes, [see generally American Building Contractors, Inc., MSBCA 1125, 1 MSBCA ¶104 at pp 5-7, 10 (1985)], is especially applicable to public contracts where the contractor usually has little to say about their provisions.

Having construed the ambiguity against DHMH, the Board next looks to Appellant's interpretation of the specification to determine whether it is reasonable.[3] We first note that it is not necessary that Appellant prove that its interpretation is the only reasonable one or even the best one, as long as it is within the "zone of reasonableness". See Worsham Construction Co., Inc., GSBCA No. 5469, 80-2 BCA ¶14,516 at 71,541 (1980).

In this case, however, the Board finds that Appellant's interpretation was clearly a reasonable construction of the contract. The key provision of Subsection 1.1(d) is the language in the first sentence which states: "Surface removal to a minimum depth of one half inch of contaminated hard pack soil." (Emphasis added). It was clearly reasonable to interpret this provision, as Appellant did, to require the removal of approximately the top half inch of the soil's surface in the crawl space. The surface of the soil in the crawl space or the earthen floor, is naturally compacted from gravity and traffic. Appellant reasonably understood this to be the hard pack soil referred to. The top half inch of the surface soil was expected to be "contaminated" from the asbestos debris which had fallen on it, thus its removal and encapsulation of the entire crawl space area is consistent with the purposes of the project. We also note that no bidder conducted a subsurface investigation of soil conditions.

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[3]Because the Board has found that the specification was ambiguous, resort to extrinsic evidence as set forth in the findings of fact is permissible to ascertain the reasonableness of the Appellant's interpretation. Compare Intercounty Construction Corporation, MSBCA 1036, 2 MSBCA ¶164 (1987).

The interpretation of DHMH on the other hand, leaves words of the contract inoperable. In the view of DHMH, the "hardpack" layer of the soil was beneath a surface layer of "loose" soil. In other words, the hard pack was not at the surface, it was below it. DHMH witnesses referred to removing the loose soil "down into" the hard pack, even though such words do not appear in the contract. In essence, DHMH's interpretation would ignore the phrase "surface removal", in effect replacing it with the word "excavation" (which DHMH had deleted during its pre-bid, specification review process). An interpretation which gives meaning to all words of the contract is preferred to one which leaves portions inoperable or meaningless. See State of Arizona v. United States, 575 F. 2d 855 (Ct. Cl. 1978); Peabody, N.E., Inc., ASBCA No. 26410, 85-1 BCA ¶17,867 (1985).

DHMH next argues, that the phrase in the second sentence requiring the collection of "all rocks, stone, rubble, loose soil . . . " should have put Appellant on notice of the presence of a hard pack layer beneath the surface of a layer of "loose soil". We disagree. Appellant reasonably interpreted this language as requiring it to place in the containment areas all the loose soil generated from the removal of the surface layer of the hard pack soil. In other words, the hard pack soil would become the loose soil when removed by scraping with metal rakes and would then have to be placed in the containment areas.

DHMH emphasizes use of the word "all" in the sentence. However, words must be read in context. Even though the sentence required the removal of "all" loose soil, we find such verbiage as only requiring Appellant to remove all loose soil created from the surface removal of the hard pack soil, and nothing more.

An interpretation of the language of a specification is also favored when it is consistent with the purpose of the contract. State of Arizona, supra. In this case, the purpose of the contract was asbestos abatement and containment. The contractor was not to create an asbestos free, white glove environment. He was, instead, to place the asbestos materials in "containment" chambers, to "encapsulate" the remaining contaminated soil with Earth-Kote, and "lock down" any asbestos fibers on walls, equipment and ceilings with spray paint. Under DHMH's reading of the contract, Appellant was obligated to remove a hidden, subsurface layer of soil that was undefined in the contract, and whose meaning was unknown in ordinary usage or trade practice.

Finally, under Appellant's interpretation of how much soil was to be removed, it was possible to complete the project within the thirty (30) days allotted under the contract. However, under DHMH's interpretation which required the removal of over twice as much soil it was not possible and the performance time, in fact, doubled. These circumstances further support Appellant's position that a constructive change was imposed by DHMH's interpretation. See Triax Co., ASBCA No. 33899, 88-3 BCA ¶20,830 at 105,344; Guy F. Atkinson Co., ENG BCA No. 4771, 88-2 BCA ¶20,714 at 104,675. Based on the record we find that Appellant has established its entitlement to a thirty (30) day compensable time extension for soil removal.

In total we therefore find Appellant entitled to a thirty-seven day compensable time extension comprised of seven (7) days for utility outages and thirty (30) days for additional soil removal. Based on such finding, DHMH's assessment of liquidated damages is denied. The appeal is therefore sustained and remanded to the parties for negotiation of quantum.