

**SISKA CONSTRUCTION
COMPANY, INC.**

CONTRACT NO. V608C-263

**VABCA-3470,
3524 & 3547**

**VA MEDICAL CENTER
MANCHESTER, NEW HAMPSHIRE**

A. F. Siska, President, Siska Construction Company, Inc., Pelham, New Hampshire, for the Appellant.

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OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

Siska Construction Company, Inc. ("Siska" or "Appellant"), has timely appealed the Department of Veterans Affairs ("VA" or "Government") Contracting Officer's ("CO") final decision or deemed denial of Siska's claims for equitable adjustments in these three appeals. The Board consolidated these appeals for hearing and decision.

The appeal in VABCA No. 3470 results from the final decision denying Siska's claim for its alleged "extraordinary engineering efforts" in performing Contract No. V608C-263 ("Contract") for renovation of the dietetic kitchen at the Department of Veterans Affairs Medical Center in Manchester, New Hampshire ("VAMC Manchester"). The appeals in VABCA Nos. 3524 and 3547 are from the CO's deemed denials of Siska's claim for interest accruing from the VA's alleged late payments under the Contract and Siska's claim for the costs of State court litigation with one of its subcontractors.

These appeals are the continuation of the litigation of Siska's claims involving the Contract. The Board has issued six previous decisions on these claims: *Siska Construction Company, Inc. (Siska I)*, VABCA No. 3381, 91-3 BCA ¶ 21,144; *Siska Construction Company, Inc. (Siska II)*, VABCA No. 3470, 92-1 BCA ¶24,578; reconsid. denied, *Siska Construction Company, Inc. (Siska IIR)*, VABCA No. 3470R, 92-1 BCA ¶ 24,729; *Siska Construction Company, Inc. (Siska III)*, VABCA No. 3381E, 92-1 BCA ¶ 24,730; and, *Siska Construction Company, Inc. (Siska IV)*, VABCA Nos. 3524, 3547, 92-2 BCA ¶24,825; reconsid. denied, *Siska Construction Company, Inc. (Siska IVR)*, VABCA Nos. 3524R, 3547R, 92-2 BCA ¶ 24,904; and, *Siska Construction Company, Inc. (Siska V)*, VABCA Nos. 3524, 3547, 92-3 BCA ¶25,150. Familiarity with the previous decisions is presumed and we will refer to these previous decisions by the parenthetical notations indicated above.

The record before the Board consists of the pleadings in each appeal, the consolidated Appeal File (cited as "R4, tab ___"), 347 Exhibits introduced into evidence by Appellant at the hearing (cited as "Exh. A- ___"); the transcript (cited "Tr. ___") of the hearing in

these appeals held in Manchester, New Hampshire, and the parties' briefs. In addition, the Board has made extensive findings of facts in the previous decisions noted above. Citations to those findings of fact will be identified by reference to the parenthetical notation of the appropriate prior decision.

FINDINGS OF FACT

GENERAL

Contract No. V608C-263 for the renovation of the dietetic kitchen at the VAMC, Manchester was awarded to Siska on July 22, 1986, in the amount of \$460,000. At the time of completion of the Contract, as determined by the VA, the Contract value was \$515,064. Siska received the Notice to Proceed with the Contract work on August 29, 1986; the Notice to Proceed established the original Contract completion date as August 20, 1987. (R4, tabs 7, 8; *Siska I*)

The Invitation for Bids (IFB) on which the Contract is based required four alternate bids; Bid Item No.1 required a lump sum bid for all work indicated in the solicitation drawing and specifications. Alternate Bid Items Nos. 2-4 required lump sum bids from which various items of work included in Bid Item No. 1 were deleted. The Contract award was for Bid Item No. 4, the most limited in scope of all of the alternate Bid Items. (R4, tabs 2-4, 6)

The Contract (R4, tab 4) contains the standard provisions usually found in VA construction contracts, as required by the Federal Acquisition Regulations ("FAR"), 48 CFR Chapter 1, and the Department of Veterans Affairs Acquisition Regulations ("VAAR"), 48 CFR Chapter 8. Of particular relevance to the matter before the Board here are the following Contract provisions:

INTEREST ON OVERDUE PAYMENTS, Federal Procurement Regulations Temporary Regulation Number 66, § 1-29.104, October 18, 1992;

PAYMENT DUE DATE, Federal Procurement Regulations Temporary Regulation Number 66, § 1-29.202, October 18, 1992, as amended by Supplement 1, October 6, 1983;

INVOICE REQUIREMENTS, Federal Procurement Regulations Temporary Regulation Number 66, § 1-29.301, October 18, 1992, as amended by Supplement 1, October 6, 1983;

PAYMENTS UNDER FIXED PRICE CONSTRUCTION CONTRACTS, FAR 52.232-5 (APR 1984);

USE AND POSSESSION PRIOR TO COMPLETION, FAR 52.236-11 (APR 1984);

SCHEDULES FOR CONSTRUCTION CONTRACTS, FAR 52.236-15 (APR 1984);

CHANGES, FAR 52.243-4 (APR 1984);

INSPECTION OF CONSTRUCTION, FAR 52.246-12 (APR 1984);

WARRANTY OF CONSTRUCTION, FAR 52.246-21 (APR 1984);

INSPECTION OF CONSTRUCTION, VAAR 852.236-74 (APR 1984);

GUARANTY, VAAR 852.236-75 (APR 1984);

PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS
(WITHOUT NAS), VAAR 52.236-82 (APR 1984);

SCHEDULE OF WORK PROGRESS, VAAR 52.236-84 (NOV 1984);

CHANGES-SUPPLEMENT (FOR CHANGES COSTING \$500,000
OR LESS), VAAR 852.238-88(b) (JULY 1985);

As awarded, the Contract required the abatement of a minor amount (100 square feet) of asbestos. (Exh. A-176; Tr. 99)

Additional latent asbestos was discovered in the dietetic kitchen at VAMC Manchester in late November or early December, 1986. On January 7, 1987, Siska, at the VA's request, submitted a proposal to abate this additional asbestos, (an estimated 200 linear feet (lf) of asbestos pipe insulation). The proposal, in addition to proposing a price for the work, contained a phasing schedule and methodology for dealing with the asbestos. On January 22, 1987, the parties entered into a modification of the Contract, entitled "Change Order E", in which Siska was to abate the additional asbestos, and perform, other additional work, for a price of \$40,297. Siska actually abated a total of 375 lf of asbestos pipe insulation. (*Siska I*)

On September 18, 1991, Siska submitted, by certified mail, a request for final decision on several claims, including the Late Payment Interest and Third Party Litigation claims at issue here, to the VA; the request was received at VAMC Manchester on September 19, 1991. However, the CO denies that he ever received the request; the VA never issued a final decision on this request. By a Notice of Appeal, dated November 18, 1991, Siska appealed the deemed denial of its claims to the Board. This appeal was docketed as VABCA No. 3524. On December 16, 1991, Siska presented the CO, by hand, another request for final decision involving the same claims at issue in VABCA No. 3524 to the CO; the CO issued a final decision denying Siska's claims on January 31, 1992; the Board docketed Siska's appeal from this decision on February 6, 1992 as VABCA No. 3547. (Exhs. A-13-15; *Siska IV*)

EXTRAORDINARY ENGINEERING EFFORTS

On September 5, 1986, Siska forwarded Submittal #24 entitled, "SCOPE OF WORK, NOTES, TAKE-OFFS" and a "SCHEDULE OF VALUES" to the VA. By "RETURN OF SUBMITTAL #24", Mr. Richard Neff, the VAMC Manchester Chief of Engineering Services, approved Siska's submission on September 9, 1986. Submittal #24 summarized

and restated the scope of work to be accomplished and identified the deletions encompassed within Bid Item No 4. In addition, referencing the section of the technical specifications pertaining to project phasing, Submittal #24 included a "Simplified Phasing Schedule" which outlined the manner in which Siska would prosecute the work. The SCHEDULE OF VALUES, submitted as part of Submittal #24, listed the work categories in the Contract and a price for each category; the total of the prices stated equaled the Contract price as awarded of \$460,000. (Exh. A-175-76; Tr. 97-107)

By letter dated May 3, 1991, Siska requested a final decision from the CO on five claims, one of which was as follows:

a.) The Contractor demands payment in the amount of \$2,500 for extraordinary engineering effort in its effecting complete revision and clarification of the Scope of Work and development of a workable Phasing Plan, ordered, presented, and accepted by the V.A.M.C. as the superseding definitive documents.

By a final decision dated May 29, 1991, the CO denied all of Siska's claims on the basis that Siska had released the United States from liability for these claims in the April 4, 1991 Release. (R4, tab 21) This extraordinary engineering efforts claim is the subject of the appeal in VABCA No. 3470 currently before the Board. On July 16, 1991, Siska filed its Notice of Appeal of the CO's final decision; this appeal was docketed by the Board on the same date.

LATE PAYMENT INTEREST

Siska submitted 9 Progress Payment ("PP #_") requests during the course of the Contract as provided for in Contract payment terms. The following schedule reflects the processing schedule of those payments and the Board's findings with regard to the dates a proper invoice was submitted to the VA and the date of the VA's payment.

DATE CO. APPVD. PAYMNT.

<i>PP #</i>	<i>SUBMTD.</i>	<i>AMOUNT</i>	<i>APPVL.</i>	<i>AMT</i>	<i>DATE*</i>
1**	9/9/86	\$20,250	9/19/86	\$20,250	10/20/86
2	10/26/86	\$55,731	10/30/86	\$55,731	10/31/86
3	11/26/86	\$42,045	12/12/86	\$42,045	12/12/86
4	12/26/86	\$66,912	NIR	\$66,912	2/18/87
5***	1/26/87	\$78,891	3/3/87	\$78,891	3/12/87
6****	2/26/87	\$55,198	3/23/87	\$55,198	3/23/87
7	4/16/87	\$57,608	4/22/87	\$57,608	4/30/87
8	4/28/87	\$76,950	5/19/87	\$71,397.60	5/20/87
9*****	5/26/87	\$15,165	NIR	\$15,165	7/8/87

SCHEDULE NOTES

* Payment dates are taken from the payment ledger of the VA

Finance Office (R4, tab 10); while there is no evidence in the record as to the actual date Siska received the payments, the dates indicated in the table are the dates of the VA payment checks.

** The copy of PP #1 in the record indicates that it was originally dated 8/22/86 and received by the VA on 9/3/86. The VA RE approval date is shown as 8/29/86 and the CO approval date is 9/8/86. However, PP #1, for reasons not explained in the record, apparently was resubmitted by Siska on 9/9/86; PP #1 was forwarded as approved to the VA payment office on 9/19/86. In light of the confused sequence of submission and approval dates with regard to PP #1, the dates stated in the schedule reflect the Board's determination, based on the evidence in the record, of the submission and approval dates.

*** There is no evidence in the record to establish the VA's receipt of PP #5; the submission date reflected in the schedule reflects our finding that PP #5 is for the period ending 1/25/86 and the evidence in the record indicating that Siska's payment requests were usually submitted within one day of the period ending date.

**** The submission date for PP #6 was determined in the same manner as that used for PP #5; as explained above.

***** The submission date for PP #9 was determined in the same manner as that used for PP #5; as explained above.

The term "NIR" in the schedule, indicates that there is no evidence in the record to support a finding of the date for CO approval of the payment request.

Contract retainage at the rate of 10% of the amount due Siska was withheld in each of the nine payments. The total retainage as of PP # 9 was \$51,466. The CO reduced the retainage to 7% on September 23, 1987, and the VA made a payment of \$15,439.92 on September 25, 1987, reflecting that reduction. Another payment of \$3,085 was made on March 31, 1988; this payment was identified as "short pmt. on [PP] #8." As of March 31, 1988, the VA indicated a balance of \$33,341.48 remaining under the Contract. (R4 tabs 9-10; Exh. A-128)

As a result of a March 13, 1987, request by the U.S. Department of Labor ("DOL") due to apparent wage rate violations under other, unrelated Federal contracts held by Siska, the VA began withholding, as part of the Contract retainage, \$34,618.22. DOL notified the VA of Siska's settlement of its wage case on January 24, 1991, and directed the VA to forward \$27,780 to the Comptroller General of the United States; the VA effected this transfer on March 21, 1991. (*Siska I*)

Also on March 21, 1991, the VAMC Manchester Office of Facilities forwarded a settlement recommendation for final payment of Siska to the CO. This recommendation

included an accounting of all payments made to Siska, the retainage, and the amount forwarded to the Comptroller General as a result of Siska's settlement with DOL. Included in the final accounting was a \$3,085 deduction for a November 11, 1990, VA "Bill of Collection." The Bill of Collection resulted from the CO's final decision, dated November 19, 1990, responding to Siska's claim for an equitable adjustment for the asbestos work in Change Order E, that the VA's "short payment" on PP #8 was an overpayment. Thus, the final Contract payment reflected on the settlement recommendation was \$2,476.48; Siska executed the settlement and release on April 4, 1991. (*Siska I*; R4, tab 23)

The final Contract price, upon completion of the Contract, was \$517,793. (*Siska I*)

Beginning in June 1987, Siska made continuous demands for payment of the remaining amount of the Contract price up to its initial appeal in VABCA No. 3381. (*Siska I*)

On April 22, 1987, Siska submitted a "Certificate of Substantial Completion" to the CO and requested a "pre-final" inspection the next week. A pre-final inspection was conducted on May 5, 1987, and a "punch list" developed therefrom. (Exhs. A-86, A-90)

By letter dated June 8, 1987, the CO requested Siska to submit a request for final inspection based on his understanding that work would be sufficiently progressed to conduct a final inspection that week. On June 12, the CO again requested Siska's submission of a request for final inspection based on his conclusion that the work was substantially complete. (Exhs. A-121, 122)

A "final" inspection was conducted on July 24, 1987; however, this inspection was discontinued shortly after it began because of the number of deficiencies found. In a July 29, 1987, letter, Siska demanded the reduction of retainage and other Contract payments and asserted that the May 5 punchlist items had been corrected. Siska further maintained that non-conforming work apparently found on July 24 were warranty items and could not serve as basis for the VA's failure to accept the Contract work as complete. The CO responded to Siska on August 12, 1987, stating that the July 24 inspection was terminated because of numerous outstanding deficiencies found; the CO further informed Siska that final payment would be processed as soon as the work is completed. (R4, tab 51; Exh. A-90)

Another final inspection was conducted on September 9, 1987; this inspection revealed 6 relatively minor work items remaining to be accomplished and 2 substantive electrical items of work uncompleted. The CO determined the work to be substantially complete on September 23, 1987, and directed reduction of retainage from 10% to 7%. (R4, tab 52; Exh. A-128)

After completion of some remaining electrical work, the VA accepted the Contract work as finally complete on December 28, 1987. (Exhs. A-129-134, 138)

THIRD PARTY LITIGATION

Siska's asbestos abatement subcontractor was National Surface Cleaning, Inc.

("NSC"); the original subcontract at the time of Contract award envisioned NSC's abatement of 100 linear feet ("lf") of asbestos pipe wrapping. As a result of Change Order E to the Contract, Siska subcontracted with NSC for additional asbestos abatement at a price of \$16.00 per lf. NSC eventually completed, and billed Siska \$6,000 for, the abatement of 375 lf of asbestos pipe wrapping. Siska paid NSC \$3,000 pursuant to the subcontract. The VA paid Siska \$6,178.75 for the abatement of 375 lf of asbestos pipe wrapping in PP #7; however, subsequent to the payment of PP #7, the VA asserted that it had overpaid Siska for asbestos abatement and took steps to withhold amounts previously paid for asbestos abatement. (*Siska I*; Exhs. A-149-153)

Sometime following a February 23, 1989, demand by NSC's counsel to Siska to pay an alleged \$3,000 balance due to NSC under the subcontract, NSC filed suit against Siska in Nashua District Court in Nashua, New Hampshire. On March 8, 1990, the Nashua District Court entered a default judgment against Siska in the amount of \$3,232 (\$3,000 for the claimed balance due, \$200 interest and \$32 for costs). (Exh. A-150-151)

By letter to the Clerk of the Nashua District Court, dated April 27, 1990, Siska objected to the Court's judgment on several grounds including the assertion that the real party in interest was the VA and that Siska was simply the VA's hiring agent. (Exh. A-152)

DISCUSSION

PRELIMINARY MATTERS

As has been the case throughout the tortuous course of the litigation of Siska's claims under the Contract, the precise nature, bases, and amount of Siska's claims before the Board in the case at bar remain elusive and ephemeral. Because Siska employed the rather unique strategy of attempting to elucidate and prove its case solely through the documentary record and the examination of VA personnel rather than calling its own witnesses at the hearing in this matter, the hearing added little to clarify or define either the basis for Siska's entitlement to the recoveries it seeks or to support the amounts requested.

In *Siska V* at 125,377, the Board defined the scope of the instant proceedings as follows:

- 1) VABCA No. 3470: The claim for extraordinary engineering efforts in the amount of \$2,500.
- 2) VABCA Nos. 3524 and 3547: The claim for interest for late payments in the amount of \$42,902; and,
- 3) VABCA Nos. 3524 and 3547: The claim for third party litigation in the amount of \$2,450.

In its briefs, Siska persists in its attempts to enlarge the scope of these appeals and to increase the amounts in dispute by reasserting already decided issues and by attempting to interject new issues. We will not consider these additional issues since they have either already been finally disposed of by the Board or are beyond the Board's jurisdiction. The

scope of our consideration in these appeals is that which we set forth in *Siska V*.

As we noted in our decision in *Siska IV*, there is a question of when the claims and request for final decision we consider here in VABCA Nos. 3524 and 3547 were submitted to the CO. Siska submitted a request for final decision on these claims on September 18, 1991, a request the CO denied receiving. Based on the evidence in the record we are satisfied that the VA received Siska's request for final decision on September 19, 1991. However, Siska appealed on November 18, 1991. November 18 was the sixtieth day after the VA's receipt of the decision. Under the terms of the *CDA*, the CO had 60 days to issue a final decision and Siska's right to appeal did not accrue until after the 60th day following the Government's receipt of Siska's request for final decision. Consequently, Siska's November 18, 1991, Notice of Appeal was premature since Siska's right to appeal did not accrue until November 19. Therefore, the appeal in VABCA No. 3524 would ordinarily be subject to dismissal without prejudice as premature. 41 U.S.C. § 605(c); *Moulder Bros.* ASBCA Nos. 32673, 32674, 86-2 BCA ¶ 18,981; *Sharman v. United States*, 2 F.3d 1564 (Fed Cir. 1993). However, the VA's subsequent final decision and the Board's docketing of the appeal from the final decision in VABCA No. 3547 moots the effect of the premature appeal and dismissal in VABCA No. 3524; consequently, we will consider VABCA No. 3524 as dismissed with prejudice. *Solar Flame, Inc.*, ASBCA No. 37935, 89-2 BCA ¶ 21,852. Thus, we will consider the appeals from VA's denial of Siska's September 19, 1991, claims for late payment interest and third party litigation under VABCA No. 3547.

EXTRAORDINARY ENGINEERING EFFORTS

As we understand Siska's claim for extraordinary engineering efforts, the Contract drawings and specifications were so defective and incomplete that Siska was required to almost entirely redesign the project. Siska asserts that Mr. Neff's approval of its Submittal #24, entitled "Scope of Work, Notes, and Take-Offs", constructively changed the Contract and that Siska is entitled to recover the costs of the preparation of the submittal.

Under the Contract SCHEDULES FOR CONSTRUCTION CONTRACTS, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (WITHOUT NAS), and SCHEDULE OF WORK PROGRESS, Siska was required to submit its proposed construction schedules and other information with regard to how it intended to progress the work and Siska was also required to submit a schedule of values for the purposes of progress payments.

While Siska, as part of its submission requirements elected to also restate or clarify the Contract scope of work as a result of the numerous deletions in Bid Item 4 of work items contained in Bid Item 1 and to propose a revised phasing schedule for the work, there is nothing in Submittal #24 that would lead us to conclude that Mr. Neff's acceptance of Submitta