

**PENN ENVIRONMENTAL
CONTROL, INC.****CONTRACT NO. V513C-220****VABCA-3726R****VA MEDICAL CENTER
BATAVIA, NY**

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**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY ON
REMAND FROM THE COURT OF APPEALS FOR THE
FEDERAL CIRCUIT**

In *Penn Environmental Controls, Inc. v Brown*, 66 F.3d 345 (Fed. Cir. 1995) the Court of Appeals for the Federal Circuit ("Court"), in an unpublished decision, vacated the Board's decisions in *Penn Environmental Controls, Inc.*, VABCA No. 3726, 94-2 BCA ¶26,790, *mot. for recon. den.*, 94-3 BCA ¶26,999 ("Opinion") and remanded this appeal to the Board to find whether the total labor hours claimed by Penn Environmental Controls, Inc. ("PEC") for removal of speed tile walls should all be considered as "extra" work for which PEC is entitled to an equitable adjustment in the contract price.

In our Opinion, the Board held that PEC was entitled to an equitable adjustment under Contract No. V513C-220 ("Contract"), for additional demolition and asbestos abatement in Wards B and D at the Department of Veterans Affairs Medical Center in Batavia, New York ("VAMC Batavia"). The Board awarded PEC \$19,620.53 as the amount of the equitable adjustment. The Board rejected PEC's MOTION FOR RECONSIDERATION of the amount awarded finding that the MOTION was grounded on PEC's mistaken factual assumption that speed tile walls, in all cases were part of a wall system consisting of a freestanding hollow plaster wall with a freestanding speed tile wall forming a void between the hollow plaster wall and speed tile wall.

In its appeal to the Court, PEC asserted that the Board incorrectly calculated the amount to which it was entitled and requested that it be awarded \$70,743.92 instead of the \$19,620.53 awarded by the Board. For the purposes of this decision, familiarity with the Board's Opinion is presumed. The record before the Board is the record as described in our Opinion together with the parties' briefs to the Court, and additional argument submitted by each party to the Board.

In our Opinion, the Board found that PEC was entitled to an equitable adjustment due to the unanticipated concrete ceiling, brick walls, speed tile walls, and acoustical tile encountered by PEC in the course of its performance. On remand from the Court of Appeals, we are concerned only with the computation of the amount of the equitable adjustment due as the result of PEC's demolition and asbestos abatement of speed tile walls.

FINDINGS OF FACT

After thorough review of the record and our Findings of Fact in our Opinion, we conclude that the Findings of Fact therein are correct. Accordingly, those Findings of Fact are incorporated herein and the following additional Findings of Fact are made.

PEC performed Contract work on a total of 2,236 square feet of wall on the second and third floors of VAMC Batavia. Of that total, 228 square feet out of a total of 664 square feet of wall on the second floor was speed tile wall and 1,469 out of a total of 1,572 square feet of wall on the third floor was speed tile wall. (Tr. 111, 119-120, R4, tab 29)

DISCUSSION

Our review of this matter, as mandated by the Court, is limited to the computation of the amount of the equitable adjustment to which PEC is entitled. We conclude that the computation of the quantum in our Opinion was correct.

We held in our Opinion, a holding cited by the Court with approval, that PEC is entitled to recover the difference between the cost of removing the unanticipated speed tile walls and the cost of removing plaster hollow walls.

This holding was predicated on the critical fact that, as we found in our Opinion, there were two wall conditions, relevant to our consideration here, encountered by PEC at VAMC Batavia. The first condition was a "hollow wall" consisting of plaster applied to wire mesh lath which, in turn, was attached to wall studs. The other wall condition encountered by PEC was a "speed tile wall" consisting of plaster applied directly to speed tile masonry blocks. We specifically rejected then, based on the evidence in the record, and we reject now, PEC's contention that, wherever it encountered a speed tile wall, it encountered double wall construction consisting of a plaster hollow wall separated from the speed tile wall by a void.

PEC continues to maintain that all speed tile wall removal and abatement was "extra" work for which it is entitled to be compensated. This assertion is based on two theories. First, PEC alleges that speed tile wall removal always involved double wall construction; and, second that it is entitled to an equitable adjustment for all speed tile wall work because the Contract did not provide for speed tile wall removal. As a consequence of its position, PEC maintains its entitlement to an equitable adjustment calculated by determining the total labor hours and associated material and disposal costs required to remove and abate a total of 1,697 square feet (228 square feet on the second floor and 1,469 square feet on the third floor) of speed tile wall at VAMC Batavia.

PEC is entitled to recover its additional costs resulting from Contract work on the unanticipated speed tile walls. These additional costs are calculated by determining the amount by which the costs of Contract work on speed tile walls exceeds the costs for work on the anticipated hollow walls. Thus, neither of PEC's assertions, on which it bases its claim for the award of \$70,743.92, correctly sets forth the basis of the recovery to which it is entitled.

As noted by the Court, we accepted, as fact, PEC's calculations that removal of speed tile walls required 1.5 hours of labor effort per square foot on the 2nd floor and .5 hours of labor effort per square foot on the third floor. We also accepted PEC's rate of .5 hours of labor effort per square foot to remove hollow walls as both the actual rate PEC experienced in performing this work and the rate on which its bid was calculated. We realize that PEC characterizes all speed tile work as "extra" labor effort; however, our acceptance of PEC's calculation of the effort it expended in removal of speed tile walls and the effort required to perform the Contract work on hollow walls does not necessarily result in all of the costs for speed tile wall work being compensable.

In its remand, the Court directs us to:

[d]etermine explicitly whether PEC's "extra labor hours" for removal of speed tile wall reflect the total amount of labor required to remove the speed tile walls on the second or third floors, or whether those figures reflect extra labor, beyond that for which PEC was paid under the contract.

This remand results from the Court's doubts as to the Board's original calculation of the amount of the equitable adjustment because of what the Court characterized as a "seemingly questionable proposition" that the per square foot labor hour requirement for work on the heavier, masonry blocks encountered in the speed tile wall on the third floor at VAMC Batavia was the same as that required for hollow wall work. On the surface, the third floor speed tile wall labor effort rate seems incongruous; but, as we found in our Opinion, any incongruity is resolved by the fact of PEC's ability to more efficiently deal with speed tile when it reached the third floor and by the VA's relaxation of the requirements to seal the third floor wall penetrations which substantially reduced the labor effort required.

Although we did not expressly so state in our Opinion, our calculation of the amount of the equitable adjustment due PEC, was clearly grounded on our determination that the 1,076.5 hours of labor effort expended by PEC for Contract work on 1,697 square feet of speed tile walls was the *total* labor effort expended by PEC for the work required by the Contract on speed tile walls. Consequently, based on its expectation that it would encounter only hollow walls for which 848.5 direct labor hours for the performance of Contract work would have been required, PEC is entitled to recover an amount based on the 228 additional direct labor hours resulting from the speed tile wall work. In addition, PEC is entitled to its additional abatement costs resulting from the increased weight and volume of the speed tile wall material removed.

Having explicitly found that PEC's labor hours for speed tile wall work were the total hours for work on the VAMC Batavia walls as required by the Contract, coupled with our previous holding that PEC was entitled to recover the difference of costs between speed tile wall work and hollow wall work, it is clear that the judgment awarded by the Board was correct.

DECISION

For the foregoing reasons, and the reasons stated in *Penn Environmental Controls, Inc.*, VABCA No. 3726, 94-2 BCA ¶26,790, the Appeal of Penn Environmental Control, Inc., VABCA No. 3726, under Contract No. V513C-220 is **SUSTAINED**. Accordingly, Appellant, Penn Environmental Control, Inc., is entitled to a judgment of \$19,620.53 plus interest pursuant to the *Contract Disputes Act* from April 27, 1992, the date on which the claim giving rise to this appeal was received by the Contracting Officer.

Date: **February 26, 1996**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur.

GUY H. McMICHAEL III
Chief Administrative Judge

JAMES K. ROBINSON
Administrative Judge