

L & L INSULATION, INC.

CONTRACT NO. V666C236

VABCA3734

VA MEDICAL CENTER
SHERIDAN, WYOMING

Bobb Haefner, General Manager, L & L Insulation, Inc., Rapid City, South Dakota, for the Appellant.

James Petersen, Esq., Trial Attorney; *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel; and *William E. Thomas, Jr., Esq.*, Assistant General Counsel, Washington, D.C., for He Department of Veterans Affairs

OPINION BY ADMINISTRATIVE JUDGE ANDERS

This appeal arises under a contract between the Department of Veterans Affairs (VA or Government) and L&L Insulation, Inc. (Appellant or L&L) for removal of asbestos containing material (ACM) and asbestos contaminated elements (ACE) at the VA Medical Center, Sheridan, Wyoming.

The record consists of the Rule 4 Appeal File, submitted by the VA Contracting Officer (CO), the pleadings, the transcript of hearing, held in Sheridan, Wyoming by the Board's Hearing Examiner, and briefs by the parties.

Appellant claims it is entitled to an increase of \$46,041 in the contract price for the removal of ACM and ACE from pipe fittings (consisting of elbows, valves, hangers and "Ts") in excess of the quantity indicated in the "Extent of Work" section of the Contract specifications. We find that Appellant performed no work beyond that required by the contract as reasonably interpreted and, even if we were to adopt Appellant's interpretation of the contract requirements, Appellant was aware of the possibility of a glaring error in drafting prior to the submission of its bid, failed to inquire about it, and must bear the consequences of its erroneous, unilateral interpretation.

FINDINGS OF FACT

On July 3, 1991, L&L was awarded a contract in the amount of \$256,739 for removal of asbestos at the VA Medical Center, Sheridan, Wyoming. (R4, tab 4)

Specification Section 01569, Asbestos Abatement, Part 1, General, Paragraph 1.1.2, EXTENT OF WORK, reads as follows:

1.1.2. EXTENT OF WORK: A brief summary of the extent of the work is as follows: (NOTE: This brief summary of extent of the work is nonbinding to the contract documents).

- A. Removal and disposal of asbestos containing materials (ACM) and asbestos contaminated elements (ACE) with full containment in the following approximate quantities:

5,600/425*/875**

Linear feet of piping (less than 6" in

	diameter) insulation
<u>410/185*</u>	Linear feet of piping (6" or greater in diameter) insulation
<u>30</u>	Linear feet of piping insulation debris
<u>10</u>	<i>Pipe feting insulation/each</i>
<u>140/125*</u>	Square feet of mechanical equipment insulation
<u>9,500</u>	Square feet of soil
<u>20</u>	Transitelike heat shield/each
<u>115</u>	Square feet of floor tile and mastic (VAT)
<u>2,200</u>	Square feet of attic insulation
<u>720</u>	Square feet of floor insulation

* Alternate No. 1

* Alternate No. 2

1.1.3 TASKS: Work summarized briefly as follows: Contractor shall remove and dispose of all asbestos-containing and asbestos contaminated material as indicated on drawings, general notes, specific notes and specifications in Building 1, 3, 6, 8, 9,12,13,17, 18, 24, 35, 37, 61, 71 Alternate No. 1, 71 Alternate No. 2, 95 and T102 located at the Veterans Administration Medical Center Sheridan Wyoming.

(Emphasis added)

Paragraph 1.2, Differing Site Conditions, reads as follows:

The quantities and location of ACM and ACE indicated on the drawings and the extent of work included in this section are only best estimates which are limited by the physical constraints imposed by occupancy of the buildings. Accordingly, minor variations ($\pm 10\%$) in quantities or location of ACM and ACE within the limits of containment for each abatement stage are considered as having no impact on contract price and time of this contract.... Where additional asbestos abatement work is required beyond the above, the contract price and time will be adjusted under provisions of clause entitled "Differing Site Conditions" (FAR 52.2362) of Section 01001, General Conditions.

Section 1.36 of the General Conditions, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (FAR 52.2363) (APR 1984), reads, in part, as follows:

The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

Contract Drawing X2 included a series of "SPECIFIC NOTES" pertaining to some sixteen buildings. Many of the notes contained references to "ASBESTOS-CONTAINING PIPING INSULATION," but only one such specific note referenced "pipe fitting insulation" as follows:

SPECIFIC NOTES: BUILDING 8 BASEMENT, FIRST AND PARTIAL SECOND FLOOR PLAN

1. ALL *PIPE Fittings* INDICATED ON THE FIRST AND SECOND FLOOR ARE *INSULATED* WITH ASBESTOS CONTAINING MATERIAL. STRAIGHT RUN OF PIPE IS INSULATED WITH NONASBESTOS MATERIAL.

(Emphasis added)

Contract Drawing ASB3 contained notes pertaining to nine (9) isolated fittings on the first floor of Building 8, at three locations, as follows:

ASBESTOS CONTAINING PIPE FITTING MUON ON NONASBESTOS INSULATED 1/2" LPS APPROXIMATELY ONE FITTING @ FLOOR LEVEL

ASBESTOS CONTAINING PIPE FITTING INSULATION ON NONASBESTOS INSULATED 1/2 ' DOMESTIC COLD WATER AND 1/2" DOMESTIC HOT WATER (APPROX. 5 FITTINGS) @ FLOOR LEVEL

ASBESTOS-CONTAINING PIPE FITTING INSULATION ON NONASBESTOS INSULATED 1/2" LOW PRESSURE SUPPLY APPROXIMATELY ONE FITTING AT EACH [OF THREE] LOCATION[S] @ FLOOR LEVEL

(Emphasis added)

Thus, the "approximate quantity" of asbestoscontaining "Pipe fitting insulation/each," associated with nonasbestos insulated 1/2" piping, to be abated, according to Specification Section 01569 and Drawings X2 and ASB3, in Building 8, was 9 to 10. Approximate quantities of asbestoscontaining pipe fitting insulation associated with the 5,600, 410 and 30 linear feet of asbestos-containing piping are not stated but are inherent in that piping.

Bobb Haefner, General Manager of L&L, prepared the "takeoff" for Appellant's bid. He calculated that there were 7204 feet of piping that required asbestos abatement. Mr. Haefner figured that all the elbows and fittings had asbestos on them, "They don't always have it on, but usually." (Tr. 128) When asked why he guessed the fittings had asbestos on them, Mr. Haefner responded, "Because if they want it off the piping, there's a good chance that the fittings are asbestos." (Tr. 129) Mr. Haefner participated in the prebid walkthrough. He testified that he saw "a lot" of hangers and that they extended into the insulation; that the pipe was insulated with asbestos and that the hangers went into the asbestos "and it was also covered with asbestos." (Tr. 7677) As to the Contract Drawings, Mr. Haefner testified that "by looking at the drawings there certainly appear to be a lot more fittings than ten that are asbestos." "By looking at the drawings I assumed that there would be asbestos fittings. You know, I've never tried to mislead Mr. Petersen or the VA or anybody else. To me it appeared there were some, a lot more fittings than ten fittings. But I was not going to include those in my price." He testified that, although not always, the fittings usually have asbestos on them, and he figured that all the elbows and fittings had asbestos on them. He further testified that he knew that if the VA wanted the asbestos off the piping, "there's a good chance that the fittings are asbestos, although you couldn't tell by looking at them. (Tr. 92, 12829)

When asked why he had not asked for clarification of this apparent discrepancy or error, i.e., a Government estimate of a total of only 10 fittings in the entire hospital piping system, Mr. Haefner responded "If I make an assumption that there's more to the scope of work than is actually listed by the person that did the design, I'm never going to get a job;" that had he made an inquiry about it the Government wouldn't have clarified it anyway, that they would say to bid it the way you see it. (Tr. 91)

The Contracting Officer was concerned at bidopening about the large variance between Appellant's bid and the others. She called Mr. Haefner and asked that he verify his bid, which he did, stating that the bid stood. (Tr. 443) Mr. Haefner was not concerned with the apparent large discrepancy between the 10 fittings indicated by the Government and the obvious much larger number of fittings that probably were contaminated with asbestos, stating that he wasn't concerned "because maybe they've misstated their, their quantities on their, their piping. Maybe they had more piping and it would have been adjusted back the other way." (Tr. 91) When he put the bid together he speculated that he would get a Change Order "for the differing site condition for number of fittings." (Tr. 92) Appellant encountered and abated 1338 fittings. (Tr. 498)

Mr. Leo Schaeffbauer, president and owner of L&L, signed the bid. He testified that he had no knowledge of the discrepancy, but that if he had, he would have inquired about it. (Tr. 322, 330) Appellant did not seek clarification of the apparent discrepancy, and proceeded to remove all of the fittings without requesting any information or making an issue of it until the work was done in the "two big areas of the project." (Tr. 166)

Vern Fhinney, Vice President of Horsley Specialties, a bidder on this project, testified that 10 fittings was not a reasonable number of fittings for the footage of piping on the project; that in preparing a bid he would use the linear footage measured from the drawings, add three fittings for each breakoff and at least one fitting for each angle, and that he would assume there were hangers placed at regular intervals along the pipe. (Tr. 16971) He further testified that when the Contract says that all piping systems shown are insulated with asbestos-containing material, as here, the term "piping systems" *includes* fittings such as hangers, valves' and Ts. When asked to look at the Contract Drawing for Building 8, Asbestos Sheet 3, Mr. Fhinney testified that from looking at that drawing you can count where there would be fittings, and that there would be substantially more than ten, that if you include the elbows, the valves, the hangers, there would be literally hundreds of them. (Tr. 16768, 196198) However, he also testified that he would bid based "strictly on the quantities indicated," and that he would include only ten fittings. He stated, "I've learned in my experience not to attempt to rationalize things," that he would rely for bid purposes on the number of fittings indicated by the Government. (Tr. 172, 193, 198, 280).

Dean Hochhalter, of Horsley Specialties, who prepared the bid on behalf of Environmental Hazard Control, and who was present during the prebid walk-through, testified that, while he would have used the ten fittings stated in the specifications for bid purposes, it was *very obvious* that the ten fittings indicated in the specifications didn't include all the fittings. (Tr. 29899) He did not recall how he had bid this project. (Tr. 301)

Perry Huber, Project Superintendent for Appellant at the time of bidding on this Contract, now president of Gopher Contracting, testified that when he saw the blueprints there were ten fittings that were addressed, and that he knew that there were more. (Tr. 307)

The actual number of contaminated fittings associated with contaminated piping was over 1,300. On February 28, 1992, L&L wrote the CO concerning alleged differing site conditions, i.e., asserting that more asbestos material had to be removed than was indicated in the specifications and drawings, and requested a change order in the amount of \$63,960. The request was denied by the CO in a letter dated March 23, 1992, followed by a formal final decision on May 13, 1992, which is the subject of this appeal. (R4, tabs 14, 16, 2324). Appellant's adjusted claim is in the amount of \$46,041 (A's Rebuttal brief).

DISCUSSION

Appellant's claim is based upon its assertion that, in spite of the fact that it knew prior to bidding that there were many more than 10 contaminated fittings, it was entitled to rely on the "Extent of Work" section of the specifications (111.1.2 of Part 1, Section 01569). That section estimated that there were only 10 pipe fittings that contained or were contaminated with asbestos. Appellant points out that Section 01569, Paragraph 1.2, Differing Site Conditions, provides that the Contractor will be compensated under the provisions of the Differing Site Conditions clause of the Contract (FAR 52.2362; Section 01001, General Conditions) where "additional asbestos abatement work is required beyond" a 10% variation in the quantities indicated in the 'Extent of Work' section.

What Appellant has failed to recognize was that the approximate quantity of 10 fittings

refers only to those specific 9 or 10 contaminated fittings associated with *non-contaminated* piping in Building 8 as shown on Drawings X2 and ASB3. That quantity has no bearing on the number of contaminated fittings on *contaminated* piping throughout the rest of the project. The number of such fittings must be estimated by the bidder based on the stated approximate quantities of contaminated piping.

It is a basic principle of contract interpretation that all