

DTM CONSTRUCTION CORP.**CONTRACT NO. V533C-544****VABCA-4712****VA MEDICAL CENTER
CASTLE POINT, NEW YORK**

John E. Francis, P.E., Vice President, DTM Construction Corp., Bayside, New York, for the Appellant.

Patrick J. LaMoure, Esq., Trial Attorney; *Charlma J. Quarles, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE McMICHAEL

DTM Construction Corp. (DTM or Contractor) appeals a termination for default issued by the Department of Veterans Affairs (VA or Government), in connection with a contract to "Seal Coat Buildings" at the VA Medical Center at Castle Point, New York.

The Record consists of the pleadings; the Appeal File (R4, tabs 1-45), Appellant's Prehearing Brief, the transcript of a hearing held in Washington, DC, plus an exhibit filed by the Government (Exh. G-1) and post-hearing briefs filed by the parties. Judge Dan R. Anders who presided at the hearing has since retired.

FINDINGS OF FACT

On July 2, 1993, the VA issued Invitation for Bids (IFB) No. 533-5-93 entitled "Seal Coat Buildings" for a project at the VA Medical Center Castle Point, New York. The base bid which involved 13 buildings plus a CT Scanner Suite required the contractor to:

completely perform, repaint, caulk, seal, scrape, power wash, slurry blast, paint and seal coat buildings, along with replacing existing wood fa[s]cias and copings with new aluminum or vinyl as specified

(R4, tab 1)

In addition to the base bid, there were 14 bid alternates that progressively deleted various work items from the base bid. The IFB indicated that it "anticipated" awarding the base bid (estimated by the VA to cost between \$250,000 and \$500,000), but in the event offers exceeded funds available, an award would be made on one of the alternates. The IFB indicated that submittal process was to "begin before April 1994 and construction work will be through September 1994." The work was to be completed within 120 calendar days following receipt of a Notice to Proceed.

A prebid conference was held on July 16, 1993. No official of DTM attended the

conference. However, Kostantinous (Dino) Mavroudis, President of DTM, did ask a friend to visit the site who reported back that the buildings were in "pretty good" condition. Mavroudis testified that he based his bid basically on "pictures of the site and on the specifications." (Tr. 20)

Following a prebid conference, the VA issued Amendment #2 to the IFB containing information and clarifications apparently in response to questions raised at the prebid conference. (R4, tab 1b; tr. 82) Item # 1 states that the contractor is to be responsible for "providing window and door protection during power washing and sealing." Item # 10 notified bidders that the "presence of lead or similar toxic coatings is unknown." In this connection, new Occupational Safety and Health Administration (OSHA) regulations had been promulgated about two months prior to the issuance of the IFB concerning the protection of construction workers who might be "occupationally exposed to lead." (29 CFR § 1926.62; R4, tab 31)

Amendment No. 2 further required bidders, *in addition* to providing a lump sum bid on the base bid and the alternates, also to provide unit prices on various items, stating that:

The quantities of these materials are as indicated.
The contractor shall include costs for these materials in his total bid price. In addition the contractor shall supply unit costs.

If less is accomplished during construction, the contract will be reduced by the amount times the unit price. If more is accomplished during construction, the amount will be increased by the amount times the unit price.

Estimated Quantities:

Fascia & Soffit	1,500	LF
Repointing	77,600	SF
Clear Coat Painting	151,400	SF
Powerwashing	151,400	SF
RegROUT and Paint Lintels	996	EA
RegROUT Concrete Sills	925	EA
Painting	10,100	SF

1. Fascia & Soffit: \$ _____ /LF

2 Repointing: \$ _____ /SF

3. Clear Coat Painting: \$ _____ /SF

4. Powerwashing: \$ _____ /SF

5. RegROUT and Paint Lintels: \$ _____ /EA

6. RegROUT Concrete Sills: \$ _____/EA

7. Painting: \$ _____/SF

Eight bids were received and opened on August 20, 1993. (R4, tab 2) The base bids ranged from a low of \$249,500 to a high of \$1,393,195. Award was made on Bid Item 5 (Alternate #4) which consisted of the Base bid minus Buildings Nos. 35, CT Scanner Suite, 15-0, 12 and 44. DTM's low bid of \$213,995 was 29.6 % below the next lowest bid. The average and median bids were \$570,250 and \$402,500, respectively.

Despite the bid disparity there is no record that the VA ever sought bid verification. The Government notified DTM on September 30 that it had accepted the Contractor's bid on Item 5. It enclosed a copy of the executed contract which contained the standard clauses from the Federal Acquisitions Regulations (FAR) and the Veterans Affairs Acquisition Regulations (VAAR) usually found in such contracts, including FAR § 52.249-10 "Default (Fixed-Price Construction)" and VAAR § 852.236-88 "Contract Changes."

A preconstruction meeting was held on March 22, 1994 where the Contractor was handed a "Notice to Proceed" which noted that the contract required:

completion of the work within one hundred
twenty (120) calendar days beginning
April 1, 1994, for the submittal process with
the construction work June 1994 through
September 1994.

(R4, tab 6)

On June 1, Rhode, Soyal & Andrews, the VA's Architect/Engineers (A/E) on this project wrote to DTM noting, *inter alia*, that they had not received an Environmental Protection Plan as required by Specification Section 01568. (R4, tab 8) That section required the Contractor, prior to commencement of work, to develop and submit for approval an Environmental Protection Plan to include a "list of Federal, State and local laws, regulations and permits concerning environmental protection . . . applicable to the Contractor's proposed operations" together with the "[p]rocedures to be implemented to provide the required environmental protection and to comply with the applicable laws and regulations."

At the time he submitted his bid on this project, the President of DTM was unaware of the new OSHA rules, promulgated a few months earlier, which required his company to safeguard its employees from exposure to lead contaminants. He observed that his practice in the past was that he "wouldn't even wear a mask" when he sprayed. (Tr. 30) But at a preconstruction meeting on July 1, Michael Shaughnessy, the Contracting Officer's Technical Representative (COTR) for the project testified that Mr. Mavroudis informed him:

Look at these windows and this. From my

experience I'm telling you that all these have lead paint on them from all my years of experience.

(Tr. 82-83)

This news came "out of the clear blue" according to Shaughnessy who said that he had no prior knowledge about lead paint being present at the Medical Center. The COTR immediately sent an E-mail to the Contracting Officer requesting her to "suspend the above project due to the fact that the contractor feels that there is LEAD PAINT in the 1 [i]ntels, corni[ces] and walls of the project area." (R4, tab 11) He requested that the A/E provide a proposal for testing of all areas "so [that] we can proceed with the project." Bertha Geraghty, the Contracting Officer (CO) suspended the project the same day, pursuant to FAR § 52.212-12, informing DTM that the VA would take "necessary steps to ascertain if there is lead, in the paint in question, and then advise you on how to proceed." (R4, tab 11) When questioned at the hearing, the VA's A/E testified that "[g]iven the age of the buildings" there was a "very good likelihood that [the buildings] would have lead-based paint on them" and that a "reasonable contractor" should have so assumed its presence. (Tr. 168)

Approximately three months later the VA's A/E reported back that lead based paint was found in a majority of the sample locations at the Castle Point VAMC and that all of the cornices and door overhang samples were "positive for lead content." (R4, tab 13) DTM was furnished with a copy of the report for its "use and reference." DTM was again reminded of the Contract's requirements that an Environmental Protection Plan be submitted and the Contractor was asked to submit that plan within 30 days. DTM's attention was also directed to the recently promulgated OSHA rules concerning lead exposure and asked to "provide one copy of your written compliance plan" for the VA's files. (R4, tab 14)

DTM responded that it had passed the information on to a consulting engineer, John Francis, P.C., who would deal directly with the VA to "establish a program for us to deal with this matter." (R4, tab 15) Thereafter a meeting involving DTM, VA, the A/E and John Francis was held on November 30, 1994 to discuss the matter. In a Field Report summarizing the meeting, DTM said that it "did not take into account the existence of lead in the paint" when it prepared its bid, which it believed, was an "extra." The Contractor added that it would "not submit the Compliance Plan until concurrence as an extra is confirmed." CO Geraghty responded that, if DTM believed extra work was involved, it was necessary for DTM to provide in writing "both the justification for the extra work" and a "detailed breakdown" of claimed costs to "allow for evaluation of the proposal." (R4, tab 17)

John Francis, DTM's consulting engineer responded on December 23rd claiming that the presence of lead constituted a "differing site condition" and asserting that the Contractor was "very conversant with the procedures, both environmental and health, associated with the removal of lead-based paint and for the containment of debris generated during paint removal operations." (R4, tab 18) DTM sought an additional \$885,430 for "lead abatement only" which was a compilation of lump sum costs for each

of the 11 buildings together with \$50,000 for "out of pocket expenses." The letter stated that:

The Total costs for each building includes complete removal and disposal of all toxic lead-based paint from the areas indicated. This includes Direct Technical Labor, Direct and Indirect Expenses, Overhead and Profit.

The Contractor's proposal also included the "arbitrary sum of \$50,000" which was for various "out-of-pocket expenses" associated with:

laboratory work, instrument monitoring and instructions by appropriate qualified personnel to all workers to satisfy qualification and certification requirements prior to commencement of work.

After reviewing the lead abatement proposal, the Project Supervisor informed the Contracting Officer on January 9, 1995, that "funding and contractual limitations restricted the VA's ability to make "such a vast expansion of the contract scope." He suggested that the contract be limited to a "seal coat of the buildings and installation of aluminum fascia." Because it was "anticipated" that the Contractor would request additional funds for installation of aluminum fascia *over* existing lead contaminated wood fascia, VA requested that the A/E provide an opinion on what, if any, precautions must be taken during installation and the approximate cost thereof. (R4, tab 19)

On January 18, the Contracting Officer directed DTM to "pursue completion of two items in the original project: seal coat of the buildings and installation of the aluminum fascia." The Contractor was "directed to proceed with this work and to provide a proposal for deletion of the remaining work from the contract." (R4, tab 20) Michael Soyka, a principal of the VA's A/E testified that, by limiting the contract to seal coating (also referred to herein as "clear coating") and aluminum fascia installation, he did not believe that "there were any lead abatement items to be involved" in the remaining work. (Tr. 183) That is, lead abatement was only required "if you are disturbing a surface" which was not the case involving those two items. (Tr. 184-85)

John Francis responded for DTM saying that he expected to have a revised proposal to the Government by mid-March. (R4, tab 22) Prior to submittal of a proposal, however, a meeting involving the VA, DTM, Mr. Francis and the A/E was held on March 23rd in which there was extensive discussion of whether the unit prices furnished by the Contractor in response to Amendment No. 2 of the IFB should be used to price the remaining work. DTM had submitted a unit price of \$5.00 a linear foot (LF) for installation of "Facia & Soffitt" and a total of \$0.65 a Square Foot (SF) for "Clear Coat Painting" (which included \$0.20 SF attributable to required preliminary "Powerwashing"). According to DTM's unit prices, the items remaining in the contract constituted about 45% of the total value of the contract bid when multiplied by the VA's estimated quantities.

The Government's position was that the unit prices should be used to price the remaining work. The Contractor argued that this would be unfair because there was a "loss in the economy of scale," and further, that there were "lead abatement" procedures to take into account. The VA's A/E responded that DTM should give:

Serious consideration to encapsulating the existing lead containing paint without disturbing it. Such a plan should drastically reduce the need for extraordinary means of respiratory protection.

DTM said that it would provide a "separate cost by labor, material and equipment for lead exposure abatement for the fascia on Buildings No. 15, 16, 17 and 18 as well as a "detailed plan for worker protection."

The VA also said that the Contractor should provide the VA with the "details of worker protection and additional cost involved if the contractor believes that special precautions must be taken on the other buildings (i.e., Buildings 7, 8, 9, 13, 19, 20 and 21) in order to seal coat the buildings."

Four days later on March 27, 1995, DTM submitted a revised proposal totaling \$501,775 consisting of \$352,820 to seal coat the buildings, \$98,955 to install aluminum fascia, plus \$50,000 for "out-of-pocket expenses." (R4 tab 24) With respect to seal coating the Contractor presented a unit price of \$2.95 a square foot comprised of Labor costs (\$1.76 SF), Material costs (\$0.67 SF) and Equipment costs (\$0.52 SF). Labor costs, identified only as "person-days," were asserted to consist of 135 person-days to apply the "clear coating" and 90 person-days to "manufacture, install and seal plywood containment frames" around windows, sills and lintels as a "preparatory step to clear coating." Costs of material were not individually identified but rather described generally as either "guided by installation ratios" specified in the contract, or "preparatory materials such as plywood, duct-tape, masking tape, plastic sheeting . . . [for] individual sealing of windows . . . and for masks and other pertinent protective outerwear." Equipment costs were listed as "rental equipment consisting of cherry pickers and scaffolding" without accompanying specific cost information.

The unit price for installation of aluminum soffit and fascia was increased to \$65.97 per linear foot comprised of Labor costs (\$35.77 LF), Material costs (\$19.97 LF) and Equipment costs (\$10.23 LF) For labor costs DTM said that two persons would be able to accomplish 25 to 30 LF per day "as a result of direct exposure to lead based paint already identified" thus requiring "120 person-days to completion of the task." In addition to materials specified in the contract, plywood, tape, plastic sheeting were listed, but not specifically broken out by cost or quantity, as necessary for "containment purposes." "Special protective gear" for workers during "inspection and rehabilitation" of the existing soffit was listed as required without any additional cost or quantity information.

The A/E reviewed the cost proposal and reported back to the Contracting Officer noting that the cost of power washing and clear coating had increased from \$73,000 to \$352,820 while the fascia and soffit work had increased from \$7,500 to \$98,955 with

little explanation or justification. (R4, tab 25) He observed that DTM did:

not seem to understand the purpose of the request for the definition of what is considered by him to be extra work . . . if the Contractor believes that there are additional costs due to the presence of lead, these additional costs should be individually identified as the cost for labor material and equipment.

The A/E concluded that the "breakdown of costs presented indicate that the Contractor grossly underestimated the original cost of the work to be performed." At the hearing, the A/E's representative, Mr. Soyka, testified that it was impossible to understand the Contractor's proposal due to the "lack of detail." (Tr. 182) There was no detail as to:

what action will taken for lead abatement,
what material will be used for that action,
what individuals will be used on that action,
what is the base cost for each of those individuals,
material and equipment that may be needed;
what is the overhead and profit attributed to
that base cost; and therefore . . . are the base
costs reasonable?

(Tr. 180) Although John Francis maintained at the hearing that the proposal submitted was in accord with the Changes clause, he did concede that the proposal did not include hourly wage data, basic cost per gallon of seal coat, nor the unit cost for the rental rate of tools needed to apply the seal coat. (Tr. 67-68)

The Contracting Officer notified DTM, by letter dated April 25th, that its cost proposal was deficient. She noted that the contract provisions concerning changes were "very specific" as to what must be submitted and, that if the Contractor believed there were additional costs due to the presence of lead, then those costs should be "individually identified as to the cost for labor, materials and equipment." DTM was instructed to resubmit an "itemized cost proposal for changes" together with its Environmental Protection Program by May 15, 1995. (R4, tab 26)

DTM responded on May 10th that it believed there were only two options available for the VA: either accept the previous proposal or "[c]omplete the work . . . on a Time and Materials basis." Mr. Mavroudis added that it "would serve no purpose to develop and submit an Environmental Protection Plan . . . until we have received your acceptance of the basis of the proposal." This prompted a Cure Notice by the VA dated May 18, 1995, stating that performance of the contract was being endangered by the Contractor's refusal to return to work as directed on May 2nd, together with its failure to submit either the required Environmental Protection Plan or a proper "itemized cost proposal" for any contract changes. (R4, tab 29) The Contractor was informed that:

Unless you can specify how you will be able

to complete by the completion date of June 1, 1995, the Government may terminate for default.

DTM was given ten days from receipt of the Cure Notice to respond.

The Contractor did not respond to the letter, nor did it return to work. Mr. Mavroudis testified that he left these matters in the hands of Mr. Francis (who subsequently became an officer of DTM). Mr. Francis testified that DTM did not respond to the Cure Notice "[b]ecause the Government didn't cure its own faults." More specifically, DTM did not respond because the VA had refused to pick one of the two pricing options the Contractor had stipulated in its May 10th letter. (Tr. 76)

On June 20, 1995 the Government issued a Notice of Termination, finding the Contractor in default, reiterating the matters previously communicated and noting that DTM had not responded to the Cure Notice. (R4, tab 34) The Contracting Officer testified that she had given DTM "one more chance" with the Cure Notice and when she received no response she "felt I had no other choice . . . I had a contractor who was refusing to go to work." (Tr. 146) A timely appeal followed.

DISCUSSION

In justifying its action, the VA points to the language of the Default Clause (FAR § 52.249-10) giving the Government authority to terminate the right to proceed where the Contractor "*refuses* or fails to prosecute work . . . with the diligence that will insure its completion within the time specified . . ." (emphasis added) It argues that the Contracting Officer was justified in terminating the contract when she concluded that performance was endangered when Appellant "repudiated the contract by refusing to continue . . . unless the contract price was agreed to . . . as dictated by DTM's March 27, 1995 change order proposal." (Gov't Br. At 14) It cites *A. N. Xepapas, AIA*, VABCA No. 3087, 91-2 BCA ¶ 23,799 and other cases in support of the proposition that the existence of a contract dispute does not excuse a refusal to perform.

The Appellant submitted a Post Hearing Brief and a Reply Brief. DTM's initial Post Hearing Brief does not deal directly with the propriety of the default termination or address the issue of whether it could, as a matter of legal right, refuse to perform unless the Government agreed to the terms of its cost proposal. Rather, the brief focuses on the "[e]xtreme ambiguity of the Government's Specifications" and on the VA's "complete failure" to respond to the Contractor's "request for clarification" of the contract's "inherent ambiguity and contradictions." It argues vigorously that the cost information it submitted in support of its request for additional funding was complete and should have been accepted by the VA. Finally, it argues that the Government's procurement following the termination, a matter that is not presently before the Board, was defective.

In its Reply Brief, Appellant again fails to cite any cases supporting the proposition that it was not obligated to proceed in the absence of VA agreement with its change order cost proposal. Nor does it challenge the reasoning of the cases cited by the Government. For example, it observes that "[t]ermination for default was proper" in the *Xepapas* case.

In *Jodie Hermes*, ENGBCA No. 5676, 90-1 BCA ¶ 22,520, another case cited by the Government, DTM concedes that the case was "rightly considered as 'abandonment.'" Appellant does assert, however, that the case now before the Board is "'unique' in the annals of public contracting" and that the "facts are far different" than in the cases cited by the Government. Indeed "not one case was uncovered which may be considered a close parallel to the instant case." (App. Reply Br. at 2-4) These "unique" facts, according to Appellant, are (1) the suspension of work for a "relatively long period" and (2) the VA's refusal to recognize the "vastly increased scope change" of the project.

Initially, it should be acknowledged that there are a number of troubling facts in the case before us. The most obvious is the VA's failure to seek verification of DTM's bid which was almost 30% lower than the next lowest bid and 47% below the median bid. Had there been such an inquiry subsequent problems might well have been avoided. Similarly, a three-month suspension to the Contract, occasioned by VA testing for the presence of lead, could also have been avoided if this testing, which the Government believed was necessary before work could commence, had been accomplished *prior* to contract solicitation. Given the testimony of VA's own A/E that it was highly likely that the Medical Center's old buildings contained lead-based paint, the COTR's surprise at discovering this possibility, after contract award, is reminiscent of Claude Rains' "shock" in *Casablanca* of learning that there was gambling at Rick's Place.

Notwithstanding the foregoing, Appellant made no claim of mistake in its initial bid nor did it allege damages as a result of the three-month suspension of work. Nor did it allege that it had no contractual obligation given the changes ordered by the Government. Instead, DTM represented to the Government that it was competent to complete the project's reduced scope, but that the unit prices contained in its bid were an inappropriate costing mechanism for the remaining work because the presence of lead and lost "economies of scale" had increased its costs. While the Government's position was not free from ambiguity, we conclude that it was at least open to the possibility of an equitable adjustment if the Contractor could show increased costs occasioned by having to work with or near lead based paint.

As the record reveals, no agreement had been reached on whether the remaining work had increased in cost beyond the bid unit prices, and, if so, the amount of any equitable adjustment to which the Contractor was entitled. The Government concluded that the information submitted by the Contractor did not comply with the detailed requirements of the Changes Clause for an "itemized breakdown." It also suspected, not without reason, that Appellant was attempting to transmute lead into gold by substantially re-pricing a contract that had been inadequately bid in the first place. In any event, the VA could not clearly identify what costs were being claimed as caused by changed conditions, and was not receptive to such items as "out of pocket" expenses in the amount of \$50,000. For its part, the Contractor contended it had submitted appropriate costing information.

At its core then, we are faced with a dispute over an equitable adjustment to the Contract. In such cases the contract provisions are clear and unequivocal:

The Contractor shall proceed diligently with performance of this contract, pending final

resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

Here, the Contractor did not seek a final decision nor seek to have its dispute adjudicated by the Board or a Court. Rather, Appellant refused to submit its Environmental Protection Plan, and refused to proceed with the work in the absence of the Government agreement to its alternative change order cost proposals. As we noted in *A. N. Xepapas, AIA*, VABCA No. 3087, 91-2 BCA ¶ 23,799 (quoting *Eriez Construction, Inc.*, VACAB No. 1273, 78-2 BCA ¶ 13,547):

[T]he existence of a dispute regarding contract specifications does not excuse a refusal to perform. The fact that the parties are involved in a contract dispute does not justify abandonment of the contract.

The merits of the controversy have no effect on the requirement that a contractor continue performance during the pendency of the dispute . . . To the extent the Contracting Officer's instructions constitute a change in the specification or the performance of the work not required by the contract, the Contractor would be entitled to an equitable adjustment in the amount due and/or in the time required for performance. ***But he may not stop work pending final decision for equitable adjustment.*** (citations omitted) (emphasis added)

While we sympathize with the circumstances in which the Contractor found itself, existing precedent requires that we sustain the Termination for Default in the face of its refusal to perform.

DECISION

For the foregoing reasons the appeal is Denied.

Date: **March 29, 1999**

Guy H. McMichael III
Chief Administrative Judge
Panel Chairman

We Concur:

Morris Pullara, Jr.
Administrative Judge

Richard W. Krempasky
Administrative Judge