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United States Court of Appeals for the Federal Circuit

961289

PENN ENVIRONMENTAL CONTROL, INC.,
Appellant,

v.

Jesse Brown,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

DECIDED: May 14, 1997

Before NEWMAN, CLEVINGER, and BRYSON, Circuit Judges.

PER CURIAM.

DECISION

Penn Environmental Control, Inc. (PEC) appeals from a decision of the Department of Veterans Affairs Board of Contract Appeals. In that decision, on remand from this court, the Board found that the additional

hours of labor that PEC expended in the performance of its contract with the government do not entitle PEC to additional compensation beyond the equitable adjustment and interest the Board had already awarded PEC. We affirm.

BACKGROUND

The Board's original opinion discusses in detail the factual background of this case. See Penn Env'tl. Control, Inc., VABCA No. 3726R, 942 BCA para. 26,790 (Mar. 9, 1994), vacated, 66 F.3d 345 (Fed. Cir. 1995) (table). Briefly, PEC was awarded a contract for the removal and disposal of asbestos pipe wrapping at the Department of Veterans Affairs Medical Center in Batavia, New York. The project required PEC to make various wall and ceiling openings to gain access to the asbestos. Based on its understanding of the contract, PEC anticipated that it would encounter only hollow plaster walls and acoustical ceiling at the opening sites.

During the performance of the contract, however, PEC unexpectedly encountered "speed tile" walls (i.e., walls made of layers of plaster applied directly to hollow masonry blocks) on the second and third floors of the building. After removing and disposing of the speed tile walls, PEC submitted a claim for additional compensation above the contract price. The government denied PEC's request, and PEC appealed to the Board.

The Board found that the unexpected site conditions entitled PEC to an equitable adjustment plus interest, but it awarded PEC a total of only \$19,620.53, an amount less

than PEC had requested. PEC appealed, and we remanded the case to the Board with instructions to address the factual question whether the "additional hours" that the Board found were expended in the removal of the speed tile walls represented the total amount of work required to remove those walls. On remand, the Board found that the additional hours that PEC claimed constituted "the total labor effort expended by PEC for the work. . . .on speed tile walls." The Board therefore refused to increase PEC's compensation beyond the \$19,620.53 it had already awarded. PEC appeals again to this court.

DISCUSSION

PEC argues that the Board erred by denying it additional compensation for the "extra labor hours" it expended to remove and dispose of the speed tile walls. The premise of PEC's argument is that it removed two distinct and separate walls, i. e., a plaster wall and a separate speed tile wall, and that the "extra labor hours" were expended removing the speed tile wall after the plaster wall had been removed. Thus, PEC argues that because the contract paid for the removal of only the plaster wall, the Board should have afforded it additional compensation for removing the speed tile wall.

We disagree with PEC. In its original decision, the Board rejected PEC's "double wall" proposition and instead found as a factual matter that PEC was required to remove and dispose of only speed tile walls. On PEC's first appeal, we upheld that factual finding, and we find

no reason to reconsider that issue now.

On remand, we instructed the Board to clarify its finding as to whether it took PEC more time to remove the speed tile than it would have taken PEC to remove plaster hollow walls. In its opinion on remand, the Board explicitly found that the equitable adjustment and interest it awarded PEC compensated PEC for all of its labor in connection with the work on the speed tile walls. The Board buttressed its conclusion by noting that the government relaxed its requirements for sealing some of the wall penetrations, and by reiterating its prior finding that PEC's experience removing the speed tile walls on the second floor allowed it "to more efficiently deal with speed tile when it reached the third floor." Thus, the Board concluded that PEC was entitled to no more than the equitable adjustment and interest that the Board had already awarded. PEC argues that the Board's finding on remand is not supported by substantial evidence. While the record is less than clear regarding the additional hours of labor that PEC expended in removing the speed tile, above and beyond what would have been required to remove the material that PEC expected to find in the walls, the Board's interpretation of the evidence regarding the additional labor costs is not clearly incorrect. In sum, we are satisfied that substantial evidence supports the Board's finding that the 1076.5 hours of labor expended by PEC for contract work on the speed tile walls was the total labor expended by PEC for the work required by the contract on those walls, and not the extra work required by the presence of the speed tile. Because the Board's disposition of the one factual issue on which this case was remanded is supported by

substantial evidence, and because PEC has not pointed to any legal error affecting the Board's decision, we affirm.

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United States Court Of Appeals for the Federal Circuit

941518

PENN ENVIRONMENTAL CONTROLS, INC.,
Appellant,

v.

Jesse Brown,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

DECIDED: September 5, 1995

Before NEWMAN, CLEVINGER, and BRYSON, Circuit Judges.

BRYSON, Circuit Judge.

DECISION

Penn Environmental Controls, Inc. (PEC) appeals the decision of the Veterans Affairs Board of Contract Appeals in No. VABCA3726. The Board held that PEC is entitled to an equitable adjustment in the contract price for work it performed at a Department of Veterans Affairs facility, but the Board awarded PEC an amount less than PEC claimed. We vacate and remand.

BACKGROUND

On January 29, 1991, PEC was awarded a fixed price contract for the removal and disposal of asbestos pipe wrapping at the Department of Veterans Affairs Medical Center in Batavia, New York. The project required PEC to make wall and ceiling openings at the various removal sites within the building in order to obtain access to the asbestos. PEC performed the work under full asbestos containment conditions. Based on its understanding of the contract, PEC anticipated that it would encounter only hollow walls and acoustical ceiling at the opening sites.

Several months into the project, while making openings in walls on the second floor of the project site, PEC unexpectedly encountered "speed tile" walls. Speed tile walls are made of hollow masonry blocks to which coats of plaster are directly applied. Because they include masonry blocks, speed tile walls are more difficult to demolish and remove than hollow walls, i.e., walls consisting of a metal mesh to which coats of plaster are applied. PEC also incurred other unexpected costs on the

second floor due to the presence of brick wall, concrete ceiling, and acoustical tile. As a consequence of the unexpected labor and material costs incurred in connection with the work on the second floor, PEC submitted a claim for an additional \$41,240.51 above the contract price. In calculating the cost of removing the speed tile walls, PEC submitted that an additional 1.5 hours of work were required for each square foot of speed tile wall that was removed from the second floor.

PEC also encountered speed tile walls on the third floor and submitted a claim for an equitable adjustment of \$49,376.18 for the additional labor and material costs on that floor. In light of relaxed wall resealing requirements on the third floor and the experience gained by PEC's employees in removing the speed tile walls on the second floor, PEC submitted that removing the speed tile from the third floor required only an additional onehalf hour of labor per square foot.

The Board concluded that PEC was entitled to recover additional costs resulting from the unexpected conditions found during the asbestos removal procedure. In determining the amount of the recovery, the Board explained that PEC was entitled to "the difference between the reasonable, actual costs it incurred as a result of the actual wall and ceiling construction it encountered and the cost of the contract work for the anticipated plaster hollow wall and ceiling construction." In applying that measure of recovery, the Board accepted PEC's submission that onehalf hour of labor per square foot was required for the removal of plaster hollow walls. The Board also accepted PEC's submission that

removing speed tile on the second floor required an additional 1.5 hours of labor per square foot. The Board then determined that PEC was entitled to recover the cost of one additional labor hour per square foot of speed tile wall on the second floor the difference between the 1.5 hours for speed tile walls and the onehalf hour for plaster hollow walls.

Accepting PEC's submission that an additional onehalf hour of labor per square foot was required to remove the speed tile on the third floor, the Board determined that PEC was not entitled to any additional recovery for the labor and related material costs for the third floor work, since PEC estimated that the removal of plaster hollow walls would also have taken onehalf hour per square foot. Based on these calculations and some additional adjustments, the Board awarded PEC \$19,620.53 plus interest.

PEC moved for reconsideration of the Board's decision, asking that the award be increased to \$78,010. The Board denied the motion and adhered to its initial decision. It explained that PEC's argument was "rooted in an erroneous factual assumption" that PEC had encountered a "double wall" construction in which both a plaster hollow wall and a speed tile wall had to be removed. The Board reiterated its factual finding that PEC had encountered a single wall consisting of speed tile to which a plaster coat was applied, rather than the single plaster hollow wall that PEC had expected to find. PEC then took this appeal, once again protesting the amount of the recovery.

DISCUSSION

In determining the proper amount of PEC's recovery, the Board relied on PEC's evidence concerning the amount of additional work and the extra labor required to do it. In particular, the Board credited PEC's evidence that it removed 228 square feet of speed tile wall on the second floor of the Medical Center and 1469 square feet of speed tile wall on the third floor. The Board also credited PEC's evidence that the removal of the speed tile wall required 1.5 "extra labor hours" per square foot on the second floor and 0.5 "extra labor hours" per square foot on the third floor. The dispute between the parties is limited to whether the Board correctly interpreted PEC's labor estimates. The Board's analysis leaves us in doubt as to whether the Board correctly calculated the amount of the equitable adjustment due to PEC. PEC claimed that it devoted 342 "extra labor hours" to removing the speed tile on the second floor and 856 "extra labor hour[s]" to removing the speed tile on the third floor. The Board appears to have treated those figures as stating the total amount of labor required for the removal of the walls where speed tile was found, not the additional labor to remove the speed tile walls, over and above the amount that would have been required to remove plaster hollow walls.

PEC argues that the Board misinterpreted the figures on which it based its calculations. According to PEC, the "extra" labor hours for the removal of speed tile represent additional hours, for which PEC was not compensated in the contract, that were required to remove the speed tile walls encountered on the second

and third floors of the Medical Center.

In arguing that the Board's method of calculation does not make sense, PEC points to the calculations regarding the third floor work. PEC's evidence was that the additional work required to remove each square foot of speed tile on the third floor was equal to the amount of work that would have been required to remove plaster hollow walls. Accordingly, interpreting the "extra work" on the third floor to mean the gross amount of labor to remove the third floor walls, as the Board appears to have done, would mean that it took no more time to remove the speed tile on that floor than it would have taken to remove plaster hollow walls a seemingly questionable proposition on in light of the greater amount of material found in speed tile walls than in plaster hollow walls.

The difficulty in using PEC's work estimates to calculate the proper amount of the equitable adjustment stems from the fact that PEC generated those estimates on the basis of its contention that where it encountered speed tile construction, it had to separately remove both plaster hollow walls and speed tile. The Board permissibly rejected that contention on factual grounds, finding that the "speed tile walls" that PEC encountered consisted of speed tile with a plaster coating rather than a double wall construction. It does not necessarily follow from that finding, however, that the "additional hours" required to remove the speed tile walls represent the total amount of work required to remove the plastercoated speed tile, as the Board appears to have assumed. In order to ensure that PEC's labor calculations

have not been used in a manner that significantly understates the additional amount of work that PEC was required to perform in order to remove the unexpected speed tile walls, we conclude that a remand is required to address this narrow factual point.

On remand, the Board should determine explicitly whether PEC's "extra labor hours" for the removal of speed tile wall reflect the total amount of labor required to remove the speed tile walls on the second and third floors, or whether those figures reflect extra labor, beyond that for which PEC was paid under the contract.

Finally, we note that certain costs that the Board awarded to PEC were directly related to the amount of additional labor needed to remove the unexpected materials. Those additional costs, which include laborrelated material costs and the cost of a certified industrial hygienist, should be reconsidered on remand if the Board determines that PEC is entitled to additional compensation for its labor costs.

Each side shall bear its own costs for this appeal.