



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: October 29, 2008

CBCA 581-R

HERRE BROS., INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Jason A. Copley and Robert G. Ruggieri of Cohen, Seglias, Pallas, Greenhall & Furman, PC, Philadelphia, PA, counsel for Appellant.

Kenneth B. MacKenzie and Phillipa L. Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **SHERIDAN**, and **WALTERS**.

SHERIDAN, Board Judge.

Appellant has filed a motion for reconsideration and request to amend our decision in *Herre Bros., Inc. v. Department of Veterans Affairs*, CBCA 581, 08-2 BCA ¶ 33,870. The appeal arose out of a dispute Herre Bros., Inc. (Herre Bros.) had with the Department of Veterans Affairs (VA), regarding some asbestos abatement and lead paint removal that was required under a contract. We denied the appeal because the asbestos abatement and lead paint removal work that Herre Bros. was required to perform was clearly required by the terms of the contract. Familiarity with that decision is presumed. We deny Herre Bros.' motion for the reasons set forth below.

Herre Bros. asserts in its motion that the Board erred in failing to consider important evidence that showed that “Herre Bros. was required to perform work not contemplated or bargained for by the parties.” The evidence that was not considered, Herre Bros. asserts, was an estimate for the project “which provided clear and convincing support for Herre Bros.’ position that the parties never intended nor contemplated that Herre Bros. would be responsible for performing the lead paint and asbestos abatement work, to the extent required, on the project.”

The evidence to which Herre Bros. refers is an estimate prepared by Lewicki Estimating Services, Inc. (Lewicki). Appeal File, Exhibit 1. Lewicki was retained by Burdette, Koehler, Murphy & Associates, Inc. (BKM), the architecture/engineering firm the VA had used to design the project and prepare the specifications and drawings pertinent to the project. *Id.* In April 2004, BKM hired Lewicki to provide a cost estimate for the project. *Id.* This occurred about three months prior to the VA issuing the invitation for bids (IFB), which it did on July 8, 2004. *Id.*, Exhibit 2. The document in issue shows that Lewicki anticipated that the project would cost approximately \$1,995,909. *Id.*, Exhibit 1.

Under the “hazardous material abatement” portion of the estimate, Lewicki listed ninety linear feet of pipe insulation as needing to be abated at an estimated unit cost of \$20 per linear foot for an estimated cost of \$1800, twenty-seven pieces of pipe fitting insulation to be abated at an estimated unit cost of \$35 per piece for an estimated cost of \$945, lead paint removal listed as a lump sum estimated to cost \$3000, and abatement monitoring, also listed as a lump sum estimated to cost \$2500. Appeal File, Exhibit 1 at 2.

As we noted in our decision, the specifications and drawings set forth the requirement for asbestos abatement and lead paint removal, also including the locations and amounts. *Herre Bros.*, 08-2 BCA at 167,662. Herre Bros. acknowledged that “the instant dispute is not over the interpretation of ambiguous contract language. There is no dispute that the specifications include the abatement work.” *Id.* Finding the contract’s asbestos abatement and lead paint removal requirements, locations, and amounts to be clear and unambiguous, we applied the parol evidence rule to resist looking at extrinsic evidence to vary the contract’s clear and unambiguous terms. *Id.* (citing *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1327 (Fed. Cir. 2003); *Coast Federal Bank, FSB v. United States*, 323 F.3d 1035 (Fed. Cir. 2003); *HRE, Inc. v. United States*, 142 F.3d 1274 (Fed. Cir. 1998); *Sylvania Electric Products, Inc. v. United States*, 458 F.2d 994, 1005 (Ct. Cl. 1972)). However, we noted that “even if the appellant could overcome the parol evidence rule, it would still not prevail for several other reasons.” *Id.* We went on to discuss some disputed facts regarding oral statements the contracting officer was alleged to have made at the pre-bid conference, finding that appellant had failed to prove that the contracting officer had made the statements as Herre Bros. indicated. *Id.*

Although we did not state it in the decision, we also considered the Lewicki estimate and appellant's arguments regarding the estimate, prior to issuing the decision. While the Lewicki estimate was put into the record, no compelling documentary or testimonial evidence was presented to establish the facts giving rise to the estimate. Most notably, there were no facts addressing how the estimate was derived, what specifications and drawings were used to generate the estimate, or whether any hazardous materials abatement related changes were made to the specifications or drawings during the three months lapse between the estimate and the issuance of the IFB. On its face, the Lewicki estimate showed that some hazardous material abatement was anticipated on the project, albeit less than the amount that was ultimately required in the specifications and drawings in the contract as awarded to Herre Bros. In weighing these factors, we judged the Lewicki estimate to be neither probative nor relevant to our decision applying the parol evidence rule.

We considered the Lewicki estimate simply to be more extrinsic evidence that appellant was attempting to use to vary the contract's unambiguous terms. As we judged the Lewicki estimate to be of no probative value, we elected not to discuss the estimate in our written decision. However, the facts and issues presented by this appeal, including the Lewicki estimate, were fully and adequately considered in making the decision in this appeal.

Decision

The appellant's motion for reconsideration and to amend our decision in this appeal is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

RICHARD C. WALTERS
Board Judge