UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 25, 2007

CBCA 54, 84

BAY SHIPBUILDING COMPANY,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Daniel J. Borowski, Litigation Counsel, Bay Shipbuilding Co., Manitowoc, WI, counsel for Appellant.

Isaac Johnson, Jr., Office of Procurement Law, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **FENNESSY**, and **SOMERS**.

SOMERS, Board Judge.

Bay Shipbuilding Co. (BSC) appeals the denial of two claims by the contracting officer for the United States Coast Guard, Department of Homeland Security (USCG or Coast Guard). In CBCA 84, BSC asserts that the Government is not entitled to damages of $17,275.36 arising from BSC's alleged breach of the contract. In CBCA 54, BSC seeks $23,125 for costs incurred when it encountered excessive underwater hull paint during the course of contract performance.

The parties have elected to submit the case for resolution on the written record without a hearing. The written record includes the appeal files, the pleadings, and the submission by

both parties of multiple briefs with supporting affidavits, declarations, and documentary evidence.

I. CBCA 84: Repair or Replacement of Heat Exchanger Gasket Kits

Findings of Fact

On August 5, 2005, the Coast Guard awarded a fixed price contract to BSC for dry dock repairs of the USCG Cutter (USCGC) Hollyhock. The contract required BSC to perform routine maintenance on the cutter and to repair items as appropriate. The contract expressly stated that the contractor must "furnish all necessary labor, material, services, equipment, supplies, power, accessories, facilities, and such other things and services as are necessary, except as otherwise specified to perform dry dock repairs and alterations to the vessel." Appeal File, CBCA 84, Exhibit 4 at 2. Among other things, the contract required BSC to clean, inspect, repair, and reassemble heat exchanger gasket kits for the main diesel engine jacket water heat exchangers (MDE heat exchangers). Specifically, the contract stated as follows:

> 3.4 Cleaning requirements. The Contractor shall clean all interior and exterior heat transfer surfaces to a state free of all debris, scale and surface contaminants in accordance with the heat exchanger manufacturer's recommendations, and in compliance with all federal, state and local environmental regulations.
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> . . . .
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> 3.6 Reassembly. After all authorized repairs, the Contractor shall reassemble each heat exchanger. Renew all software (seals, gaskets, O-rings) and isolation fittings/mounts in accordance with the manufacturer's specifications. Renew fasteners, hoses, thermostats and anodes as applicable. Apply silicone rubber sealant conforming to CID A-A-59588 around all fasteners, nozzles or gaskets that penetrate the hull.

Id., Exhibit 5 at 23.

Paragraph 3.1 of the General Requirements section of the contract required the contractor to "conform to all requirements specified in Std Spec 0000_STD [the Coast Guard Maintenance and Logistics Command Atlantic (MLCA) Standard Specification 0000_STD,

2004 Edition]." Appeal File, CBCA 84, Exhibit 5 at 2. The paragraph emphasized in bold type the following:

NOTICE!

> The requirements of paragraph 3.1 (General) applies to all work under the scope of this contract, whether explicitly stated in work items or not, and also to all other work subsequently authorized by changes, modifications, or extensions to the contract.

Id. at 2-3.

Standard Specification 0000_STD listed and defined various terms used in the work items. Appeal File, CBCA 84, Exhibit 6C at 28. The word "renew" is defined as follows:

> Permanently remove an item and install, in its place, a new and unused item which is identical in material, form, fit, and function; the new item must:
>
> - Have the same shape, size, dimensions, and other physical parameters.
> - Have the same ability as the old item, to physically interface or interconnect with or become an integral part of another item.
> - Perform the same action or actions that the original item was designed to perform.

Id. at 30.

Todd Thayse, the Director of Contract Services for BSC, prepared BSC's bid for this work item, which included 560 hours in labor and $31,000 in materials for a total bid of $60,000. This amount did not include the cost of replacing the MDE heat exchanger gaskets. Appellant's Submission, Declaration of Todd Thayse (May 18, 2006) ¶ 46.

The contract required BSC to provide a technical representative authorized by the manufacturer of the MDE heat exchanger system, Alfa Laval, to provide advice about the manufacturer's proprietary information pertinent to the system, to ensure compliance with

the manufacturer's procedures and standards during disassembly, inspection, and reassembly, and to assist with the proper cleaning, inspecting, and testing of the heat exchanger. Appeal File, CBCA 84, Exhibit 5 at 24. As the contract required, BSC provided Corey O'Conner, who was the manufacturer's field technical representative. Mr. O'Conner inspected the gaskets in the MDE heat exchangers and opined that the gaskets could be reused. Thayse Declaration ¶¶ 49, 50.

Relying upon Mr. O'Conner's statement that the gaskets could be reused, BSC advised the Coast Guard in a condition found report (CFR) dated October 11, 2005, that the manufacturer's technical representative had visually inspected the heat exchanger. BSC informed the Coast Guard of Mr. O'Conner's recommendation that BSC clean the plates by hand and then reassemble them by using existing materials unless the materials were damaged. BSC stated that it would submit a second CFR if it determined that replacing the gaskets would be necessary. Appeal File, CBCA 84, Exhibit 8C. BSC suggested that if it determined that the gaskets would need to be replaced, it would seek to obtain new gaskets from the Government. *Id*. BSC's suggestion ignored the fact that the gaskets do not appear on the list of government furnished equipment identified in the contract. *Id*., Exhibit 5 at x-xiii.

Chief Warrant Officer (CWO) Derrick Johnson responded to the CFR by telling BSC that paragraph 3.6 of the contract required BSC to renew, i.e., replace the existing materials. CWO Johnson noted that paragraph 5.1.23 on page 30 of the standard specifications defined the term "renew" as to "permanently remove an item and install, in its place, a new and unused item which is identical in material, form, fit and function." Appeal File, CBCA 84, Exhibit 10, Declaration of Kathryn Stark, Contracting Officer (May 1, 2006) ¶ 15. Accordingly, CWO Johnson rejected BSC's contention that the contract permitted reuse of the materials under any conditions. *Id*.

Over the course of the next two days, the contracting officer exchanged email messages with BSC's contract administrator about the dispute. Appeal File, CBCA 84, Exhibit 10 at ¶¶ 16, 17, 19. BSC and the Coast Guard tried to resolve the issue during a conference call on October 10. *Id*. at ¶ 20. The Government stated that paragraph 3.6 required the contractor to renew all software. *Id*. The contractor responded that it was following the manufacturer's recommendations for gasket replacement and that the manufacturer did not recommend replacing them. *Id*. After the telephone conference, BSC stopped work on the item. On that same day, BSC's contract administrator, Julie Koch, sent an e-mail message to the contracting officer, stating:

> Bay Shipbuilding understands the Coast Guard's interpretation of para 3.6 as to the renewal of software, however, we feel that

> we are in following [sic] with the manufacturer's recommendations for gasket replacement as stated in para. 3.7. Work has stopped on this job and we cannot move forward until this matter is settled.

Id., Exhibit 8K. The contracting officer disagreed with BSC's characterization, responding that "[w]ork has stopped on this work item because you refuse to comply with the contractual requirements to replace the gaskets." *Id*., Exhibit 8L.

Mr. Thayse wrote in an e-mail message dated October 13, 2005, that "as stated many times in the last few days the work has stopped because your crew has refused to allow BSC to proceed with the work items. . . ." Appeal File, CBCA 84, Exhibit 8M. The Coast Guard responded by letter dated October 13, 2005, which stated in pertinent part:

> Bay Shipbuilding has refused to complete Work item 3 . . . . Specifically, Bay Shipbuilding has refused to purchase the gaskets needed to complete the work item in accordance with the specification.
>
> . . . .
>
> Bay Shipbuilding must proceed with the performance of this contract pending final resolution of any dispute arising under it. Bay Shipbuilding otherwise will be liable for default of this contract. Any delay in completion of this work item is the responsibility of Bay Shipbuilding. The Coast Guard will purchase the gaskets specified to be replaced in work item 3 in order to ensure that this work item is completed in accordance with the specification. However, the Coast Guard also reserves the right to deduct the cost of the gaskets from the total contract price as a requirement of your contract as awarded.

Id., Exhibit 8N. The Coast Guard purchased the gaskets for a cost of $17,275.26. *Id*., Exhibit 8O.

On October 13, 2005, Jack Dafgek, Alfa Laval's Technical Support Manager, sent BSC a letter in which he reiterated Mr. O'Conner's opinion that the gaskets could be reused. Appellant's Submission at 21; Appellant's Initial Position Statement, Exhibit P. BSC provided a copy of the letter to the Coast Guard. Thayes Declaration ¶ 53.

On October 13, 2005, CWO Johnson issued a contract deficiency report for BSC's failure to have timely ordered the proper gaskets for the main diesel engine coolers. Appeal File, CBCA 84, Exhibit 8E. In the portion of the form entitled "Contractor's Response," Ms. Koch contended that BSC would have ordered the replacement gaskets if necessary. *Id*. On October 14, 2005, BSC installed the gaskets for the MDE heat exchangers under the direction of the Alfa Laval technical representative. *Id*. at ¶ 55.

By final decision dated October 28, 2005, the contracting officer stated:

> Concerning work item 3 Clean, Inspect and Test Heat Exchangers, by Contract Deficiency Report 003 dated October 13, 2005, Bay Shipbuilding refused to perform the work item as written that specifically required at paragraph 3.6 to "renew all software (seals, gaskets, O-rings). . ." By definition RENEW means ". . . Permanently remove an item and install, in its place, a new and unused item which is identical in material, form, fit and function . . ." This definition is located in MLCA STD 000_STD 2004 Edition, General Requirements. Your refusal to perform places your company in breach of the contract. The US Coast Guard purchased the necessary gaskets at a cost of $17,275.36. This cost is being taken from your funds otherwise due your company under this contract.

Appeal File, CBCA 84, Exhibit 8P. BSC appealed the final decision by letter dated November 9, 2005. *Id*., Exhibit 3.

Discussion

The question presented in this appeal is whether the Coast Guard has established that it is entitled to damages of $17,275.36 for BSC's alleged breach of contract. As a matter of law, the Coast Guard bears the burden of proof for its claim. *Whitesell-Green, Inc*., ASBCA 53938, et al., 06-2 BCA ¶ 33,323 at 165,257 (citing *Southwest Welding & Manufacturing Co. v. United States*, 413 F.2d 1167, 1176 n.7 (Ct. Cl. 1969); *Insulation Specialities, Inc*., ASBCA 52090, 03-2 BCA ¶ 32,361, at 160,100-01). As the Government is claiming that it is entitled to collect damages from appellant, it must prove that it is entitled to assess damages in the amount claimed. *Id*. This means that the Government must prove each element by a preponderance of the evidence. *Id*. (citing *9 Wigmore, Evidence* § 2485 (Chadbourn rev. 1981)).

The Coast Guard states that the contract expressly required BSC to "renew all software (seals, gaskets, O-rings) and isolation fittings in accordance with the manufacturer's specifications." The contract defined "renew" as to "permanently remove an item and install, in its place a new and unused item which is identical in material, form, fit and function." Accordingly, the Coast Guard contends that the only option presented by the contract required BSC to replace all software, including the gaskets.

BSC challenges the Government's claim, contending that the contract did not require the gaskets to be replaced except in accordance with the manufacturer's specifications. BSC states that it intended to replace the gaskets if advised to do so by the technical representative from Alfa Laval. In that event, BSC intended to submit a CFR for the cost of replacing the gaskets. BSC asserts that the technical representative permitted re-use of the existing gaskets, and, accordingly, BSC was not required to replace the gaskets.

This dispute requires contract interpretation. The Board will interpret a contract in such a way as to give words their plain and ordinary meaning. *Id.* at 747-48 (citing *Moran v. Prather*, 90 U.S. 492, 499 (1874); *Forman v. United States*, 329 F.3d 837, 842 (Fed. Cir. 2003); *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996); *Elden v. United States*, 617 F.2d 254, 260-61 (Ct. Cl. 1980)). A contract must be "interpreted so as to harmonize and give meaning to all its provisions, and [thus] an interpretation which gives a reasonable meaning to all parts is preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Arizona v. United States,* 575 F2d 855, 863 (Ct. Cl. 1978); *see also*, *e.g.*, *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983).

Here, the contract required BSC to "renew all software (seals, gaskets, O-rings) and isolation fittings/mounts in accordance with the manufacturer's specification." "Renew" is defined by the contract to mean to "permanently remove an item and install, in its place a new and unused item which is identical in material, form, fit and function. . . ." The definition of "renew" did not include anything that could be interpreted as permitting an item to be "reused." Thus, the plain language of the contract called for the contractor to permanently remove all software and install, in its place, new and unused items identical to those items replaced.

BSC's argument that it could reuse the gaskets ignores the plain meaning of the contract definition of "renew." Consistent with the definition contained in the contract, "renew" means to replace the item, not to repair or reuse. Thus, the only reasonable interpretation is that the contract required BSC to replace the gaskets. The contract refers to the manufacturer's specifications for the purpose of requiring the contractor to follow the

manufacturer's procedures and standards for reassembly. This interpretation is consistent with the contract requirement that the contractor obtain the services of a technical representative who is authorized to "assist with the proper cleaning, inspecting, and testing of the heat exchanger, inspection and reassembly of the system." Even if the manufacturer's technical representative concluded that the gasket could be reused, that conclusion does not supercede the contractual requirement to replace, i.e., to renew, the gaskets.

In any event, even if the contractor disputed the Government's interpretation of the contract requirements, both the Contract Disputes Act (CDA) and the Disputes clause[1] of the Federal Acquisition Regulation (FAR) provide that pending a final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision. 41 U.S.C. § 605(b) (2000); 48 CFR 52.233-1 (2004). In this case, we find that because the contract did require BSC to replace the gaskets and BSC failed to purchase the gaskets necessary to fulfill the contract requirements, the Government is entitled to be reimbursed for costs arising from BSC's failure to act. The Government has presented uncontroverted evidence that it purchased the new gaskets for a total cost of $17,275.36. Therefore, we find that the Government is entitled to be reimbursed for the cost of the gaskets, i.e., $17,275.36.

II. CBCA 54: Hull Paint Thickness Claim

Findings of Fact

In 2002, the Coast Guard contracted with Marinette Marine Corporation (MMC) in Marinette, Wisconsin, to build the USCG Hollyhock. Lt. Loring A. Small, a Coast Guard engineer assigned to the Coast Guard Project Resident Office at MMC, conducted inspections during ship construction and assisted the contracting officer with basic contract administration. During the construction of the Hollyhock, Lt. Small observed that the paint thickness on the underwater body exceeded the paint thickness recommended by the construction contract and by the paint manufacturer's application guidelines. Appeal File, CBCA 54, Exhibit 27 at 3.

During a subsequent inspection of the underwater hull prior to delivery of the Hollyhock to the Coast Guard, a diver's inspection revealed that paint had fallen off,

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[1] Although the contract documents do not appear to contain a Disputes clause, the clause is incorporated as a matter of law into the contract pursuant to the Christian doctrine. *See G.L. Christian & Associates v. United States*, 312 F.2d 418, 426 (Ct. Cl. 1963).

exposing bare steel in places. Accordingly, MMC subcontracted with BSC to correct the defective paint.[2] Appeal File, CBCA 54, Exhibit 27 at 3.

BSC blasted the hull to remove all loose paint and then repainted the hull. BSC's paint foreman, Jack Schmidt, supervised the paint operation. The Coast Guard accepted delivery of the Hollyhock on October 24, 2004. Appeal File, CBCA 54, Exhibit 25 at 5.

On June 9, 2005, in response to the Government's solicitation of bids for drydock repairs of the USCGC Hollyhock, BSC submitted a bid of $53,800 for Work Item 2. Appeal File, CBCA 54, Exhibit 26 at 2. Work Item 2 of the contract required BSC to remove and reapply the underwater body hull paint system of the USCGC Hollyhock. BSC's bid included the cost of sandblasting paint from the underwater body hull. Appellant's Submission, Declaration of Todd Thayse (November 10, 2006) ¶ 17. However, the contract did not provide BSC with any information about the thickness of the paint to be removed, nor did BSC inquire about it. *Id.* at ¶ 20.

On August 3, 2005, the contracting officer sent an e-mail message to BSC, questioning the amount of BSC's bid for Work Item 2 because the bid was substantially lower than the Government's estimate. BSC responded to the contracting officer's inquiry at 12:38 p.m. on that same day, August 3, and asked to review the Government's estimates. Appeal File, CBCA 54, Exhibit 4. By e-mail message sent at 1:57 p.m., the contracting officer agreed to check on the item. *Id.*, Exhibit 5. The contracting officer contacted BSC by e-mail message at 3:51 p.m and told BSC that she had not yet received the information for the government estimate. Ms. Koch responded by e-mail message at 4:02 p.m., stating:

> Kathy, Underwater body detail – if you get it, fine, but let's keep the ball moving. We are ready to stand by the pricing submitted.

Id., Exhibit 6; Position Paper of Bay Shipbuilding Company in Support of its Claim for the Cost of Removing Excess Paint From the Underwater Body Hull of the Hollyhock (Appellant's Position Paper), Exhibit B, Declaration of Julie Koch (November 9, 2006) ¶ 12. The contracting officer did not provide BSC with any additional information about the government's estimate for Work Item 2.

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[2] The Manitowoc Company, Inc., owns both MMC and BSC. *See* Thayse Declaration ¶ 8.

The contract included a provision entitled Site Visit (APR 1984), 48 CFR 52.237-1, which stated:

> Offerors or quoters are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable. In no event shall failure to inspect the site constitute grounds for a claim after contract award.

Appeal File, CBCA 54, Exhibit 5 at 11. There is no evidence that BSC took the opportunity to perform a site visit,[3] request access to the ship, review the paint logs included in the documents of the hull history, or ask about the thickness of the underwater body paint prior to submitting its bid. *Id.*, Exhibit 25, Declaration of Vanessa A. Nemara (November 27, 2006) ¶ 19; Exhibit 26, Declaration of Kathryn E. Stark (December 4, 2006) ¶ 6.

Once BSC confirmed its bid on Work Item 2, the Coast Guard awarded the contract on August 9, 2005. On September 7, 2005, BSC reported to the Coast Guard that BSC had discovered higher than standard coating on the underwater hull of the vessel. Appeal File, CBCA 54, Exhibit 10; Thayse Declaration ¶ 30, Exhibit F. BSC noted that "especially high readings" were found in the sea chests (boxes inside the hull that take cooling water) and thruster tunnels (tunnels which help maneuver the vessel in port), which were part of the underwater body hull. Thayse Declaration ¶ 30, Exhibit F. BSC sought additional compensation for the cost of removing the excess paint.

CWO Johnson denied BSC's request for additional compensation on September 7, 2005. Thayse Declaration ¶ 31, Exhibit G. CWO Johnson stated:

> Bay Ship [Building] Company has been the only contractor to do any Underwater Body Paint repair on the Hollyhock. If the paint system has been applied not IAW [sic] they had some part in the process. For this work item BSC had more information than any other bidder, due to there [sic] past work. . . . Thruster tunnels and sea chests were not part of the paint repair in Oct 03. This area may need to be addressed.

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[3] BSC argues that it was not reasonable for the contractor to incur the costs of traveling to the site for a site investigation, nor would a site investigation have necessarily revealed the thickness of the paint on the underwater hull.

Appeal File, CBCA 54, Exhibit 11; Thayse Declaration ¶ 31, Exhibit G. CWO Johnson told BSC to prepare another CFR about the excess paint on the sea chests and thruster tunnels. Thayse Declaration ¶ 32, Exhibit H. Upon receipt, the Coast Guard approved an equitable adjustment of $4801 for the additional costs of removing the paint millage from the sea chests and thruster tunnels. Thayse Declaration ¶ 33, Exhibits H-J.

On December 7, 2005, BSC submitted a formal request for an equitable adjustment for $23,125, the costs incurred in removing the excess paint from the remainder of the underwater body hull. Appeal File, CBCA 54, Exhibit 34; Koch Declaration ¶ 30, Exhibit J. The contracting officer denied the request by decision dated January 30, 2006, asserting that BSC had superior knowledge of the thickness of the underwater hull paint based upon the fact that BSC had applied the paint in question during construction of the USCGC Hollyhock. Appeal File, CBCA 54, Exhibit 35; Koch Declaration ¶ 33, Exhibit K. The contracting officer stated:

> It is the Contracting Officer's determination that the U.S. Coast Guard is not responsible for compensating Bay Shipbuilding for the removal of the underwater body hull paint beyond what was paid as part of this contract. You can not [sic] create the situation under one contract [the construction contract] and obtain additional compensation under another for a situation that you alone created.

Appeal File, CBCA 54, Exhibit 35. BSC appealed the contracting officer's decision.

Discussion

BSC contends that it encountered difficulties in removing the paint from the underwater body hull because the existing coat exceeded the amount of paint that BSC had anticipated when it bid the project. BSC argues that the Government possessed superior knowledge about the condition of the hull based upon the fact that the Government initially questioned BSC's estimate as being too low. BSC states that the extra costs involved in removing excessive paint accounted for the difference between BSC's estimate and the Government's. BSC argues that it had no reason to suspect that the underwater hull had excessive paint and, therefore, did not account for the excessive thickness when it prepared its bid. BSC claims that it incurred actual additional labor and material costs of $23,125 to remove the additional millage from the underwater body hull.

BSC can establish entitlement to an equitable adjustment only if it can prove that the Government had misrepresented the amount of paint present on the underwater hull or

possessed superior knowledge about the paint thickness. *See Walker Boat Yard, Inc.*, DOTBCA 4133, 03-2 BCA ¶ 32,397, at 160,324 (citing *United States v. Spearin*, 248 U.S. 132, 136 (1918); *Marine Industries Northwest, Inc.*, ASBCA 51942, 01-1 BCA ¶ 31,201, at 154,043. As there is no evidence suggesting that the Government misrepresented the condition of the hull, BSC's argument must focus upon its contention that the Government possessed superior knowledge about the underwater hull.

BSC has the burden of establishing that the Government possessed superior knowledge about the condition of the underwater hull paint. *AT&T Communications, Inc. v. Perry*, 296 F.3d 1307, 1312 (Fed. Cir. 2002); *Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994). The superior knowledge doctrine imposes an implied affirmative duty upon a contracting agency "to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000). When analyzing a claim that the Government breached its duty to disclose superior knowledge, the Board "must focus its inquiry on the government's knowledge at the time of contracting and its relationship to the contractor's lack of knowledge." *L.W. Matteson, Inc. v. United States*, 61 Fed. Cl. 296, 316 (2004); *accord Max Jordan Bauunternehmung v. United States*, 10 Cl. Ct. 672, 679 (1986) ("The government's liability for failure to provide information arises from a conscious omission to share superior knowledge it possesses in circumstances where it permits a contractor to pursue a course of action known to be defective."). Appellant has not met this burden because it has failed to establish that the Government possessed knowledge that the contractor did not.

BSC presents declarations from various witnesses to show that the Coast Guard knew, but failed to disclose to BSC, that the paint on the hull was excessively thick. On this point, the Government does not dispute the fact that it knew about the condition of the paint when it accepted the ship in 2004. Rather, although the Government does not necessarily agree that the paint on the hull was excessively thick, the Government has submitted uncontroverted Declarations showing that the contractor had the same information as did the Government about the condition of the hull based upon the fact that BSC had been hired as the painting subcontractor in 2003 and painted the hull. Specifically, Lt. Small stated that he worked at the Coast Guard Project Resident Office at Marinette Marine Corporation (MMC) in Marinette, Wisconsin, from July 2002 until May 2004, as the contracting officer's technical representative. During that time period, Lt. Small conducted inspections during the construction of the USCGC Hollyhock and discovered the application of excessive paint on the underwater hull. He reported this to the prime contractor, MMC, which subcontracted with BSC to repaint the hull. The same BSC personnel, specifically BSC paint foreman Jack Schmidt and BSC's Julie Koch, worked on BSC's subcontract to repaint the underwater hull in 2003 and on the current contract.

We conclude that appellant has failed to meet its burden of proving by a preponderance of the evidence that the Government withheld superior knowledge. Both parties knew about the thickness of the paint applied during the construction of the ship. Appellant has presented no evidence to establish that the data available to each had changed based upon a subsequent paint job or any other circumstance known only to the Government.

Moreover, the fact that the Government asked BSC to review its bid for the paint work because it was substantially lower than the Government's estimate should have put BSC on notice that the its bid should be reexamined. However, when the Government did not respond to BSC's request for information regarding the Government's estimate as quickly as BSC wanted, BSC elected to confirm its bid without further investigation. This may have been poor judgment by BSC, but it is not a ground for recovery. In any event, as stated above, BSC knew or should have known the same information as the Government concerning the underwater hull.

In addition to its argument that the Government possessed superior knowledge about the condition of the paint, BSC contends that the Government's arguments on appeal must be rejected because they are different from the facts and conclusions set forth in the contracting officer's final decision quoted above. Appellant's Reply Brief at 4 ("[T]he appeal should be decided solely on the grounds set forth in the Contracting Officer's final decision."). BSC is incorrect on this point. "[W]here an appeal is taken to a board or court, the contracting officer's award" of time or money "is not to be treated as if it were the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal." *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987). Because the findings of fact in the contracting officer's final decision are not binding on the parties, the contractor bears the burden of proving by preponderant evidence "the fundamental facts of liability and damages de novo." *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994)(*en banc*). Further, "a contractor is not entitled to the benefit of any presumption arising from the contracting officer's decision. De novo review precludes reliance upon the presumed correctness of the [prior] decision." *Id*. (citing *Renegotiation Board v. Bannercraft Clothing Co*., 415 U.S. 1, 23 (1974)). Therefore, the Board is not bound by the contracting officer's final decision in reaching its findings on appeal.

Decision

These appeals are **DENIED**. The Government's claim for $17,275.36 in CBCA 84 is granted. BSC's claim for $23,125 in CBCA 54 is denied.

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JERI KAYLENE SOMERS
Board Judge

We concur:

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JAMES L. STERN
Board Judge

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EILEEN P. FENNESSY
Board Judge