



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: October 23, 2013

CBCA 3411

PROJECT SOLUTIONS GROUP,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Joseph A. McManus, Jr., Eric J. Darden, and David J. Butzer of McManus Darden & Felson LLP, Washington, DC, counsel for Appellant.

Lynn Deavers, Bonnie Angermann, and Terrence Carlson, Office of General Counsel, Department of Transportation, Washington, DC, counsel for Respondent.

**SHERIDAN**, Board Judge.

Appellant, Project Solutions Group (PSG), elected to have this appeal processed under Board Rule 52, Small Claims Procedure, requiring a decision on the appeal within 120 calendar days from receipt of the election. 48 CFR 6101.52 (2012). Appellant meets the requirements for the small claims procedure as set forth in the Contract Disputes Act, as it is a small business concern and its claim is for \$150,000 or less. 41 U.S.C. § 7106 (b) (Supp. IV 2011). Due to the shutdown of the Federal Government, from October 1 through October 17, 2013, the Board was unable to issue this decision within 120 calendar days from the date of election. The decision in this appeal is final and conclusive and cannot be set aside except in case of fraud. 48 CFR 6101.52(b). The decision has no value as precedent. *Id.*

On September 25, 2009, Department of Transportation (DOT) entered into contract GS-29F-0022T with PSG to provide planning, design management, construction management, and coordination services associated with renovations of the cafeteria and kitchen at DOT's headquarters building in Washington, D.C. As part of contract performance, PSG was to replace the kitchen flooring to fix drainage problems. PSG suggested the use of PROTECT-ALL flooring in the kitchen, and DOT approved its use.

On November 7, 2010, PSG's subcontractor began demolition of the area and removed the pre-existing quarry tile flooring. Dennis Davidson, who was DOT's project manager on the job site, remembers that during the demolition of the floor, PSG's subcontractor hosed water over the floor for three consecutive days, in an attempt to keep the dust down in the area. Nearby areas remained occupied by DOT staff, so it was important that the demolition dust be controlled. David Zorger, partner and co-founder of PSG, noticed that the concrete slab under the quarry tile was extremely wet. Soon after demolition was complete, on November 25 and 26, PSG's subcontractor poured Combimix over the concrete floor slab. Combimix is a cement-based sub-flooring and leveling material. On November 29, water was poured on the floor to check the slope of drainage. Also around November 29, PSG's subcontractor noted that the Combimix underlayment was "still too moist" to install the PROTECT-ALL flooring.

Prior to installing the PROTECT-ALL flooring, PSG was required to test the relative humidity (RH) levels of the concrete floor slab that was under the Combimix installation. RH tests taken at four locations on November 29, 2011, showed RH readings of 96%, 95%, 100%, and 93%. Tests taken on December 2, 2011, showed the RH readings had lowered slightly to 95%, 95%, 99%, and 92%. On December 6, the RH readings were 94%, 94%, 99%, and 91%.

On December 8, 2011, PSG wrote George Fields, the senior project executive for DOT's headquarters building, to inform DOT that PSG had concerns regarding the RH level in the concrete floor slab in the kitchen. PSG informed Mr. Fields that, as of December 8, 2011, the RH levels of the concrete slab "have exceeded the acceptable RH range," and that the PROTECT-ALL flooring "requires a constant RH level of 70% to 75%" to be properly installed. PSG went on to reference "continued delay to PSG work and the costs being incurred by PSG and its contractors as a result of the delay." PSG stated that it and its contractors and consulting engineers "have investigated the sources that may be contributing to the higher than normal or expected RH levels . . . [and] we believe the issue may be related to the lack of control of the relative humidity below the first floor concrete substrate within the area of work." PSG stated:

The unstable and high RH levels continue to prevent PSG from moving forward with the installation of the new flooring product along with the remaining project tasks required to complete this project.

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As of this date, the project is approximately two weeks delayed due to the ongoing high RH levels. Without specific direction from DOT as to how to address and resolve this matter, the delays in completing this project continue. Be advised that the issue of direction is critical as the present delay is severely impacting our cost.

RH tests were taken at four locations on December 9, 2011, that showed RH readings of 73%, 83%, 81%, and 84%. Tests taken on December 14 showed the RH readings had lowered to 59%, 67%, 64%, and 71%. After the December 14<sup>th</sup> readings, subsequent RH readings taken in the following week showed that the RH levels remained below 75%, and in the range of 69% to 47%.

On December 15, 2011, Mr. Fields responded to PSG's December 8 letter, noting that PSG had requested "specific direction" as to how DOT wanted to resolve the RH matter to move the project forward. Mr. Fields directed:

Based on the most recent RH readings in the construction area, we hereby authorize PSG to immediately move forward with the installation of the PROTECT-ALL flooring in the kitchen area. These readings were taken using the RH Rapid situ probes having an accuracy of +/- 2% from 50% to 90% range. The testing results for December 14, 2011, are listed below for your review. These readings are below the [PROTECT-ALL flooring manufacturer's] requirements listed inside the September 2011 installation manual 3b-ii-2 of 75% to 80% relative humidity.

Test Results:

<u>Probe #</u>	<u>RH</u>
1	59%
2	67%
3	64%
4	71%

PSG did not resume work on the project. On January 19, 2012, DOT contracting officer Cynthia Vass-Lassiter issued a cure notice giving PSG ten days to correct, among

other things, its failure to install the PROTECT-ALL flooring, or face possible termination. PSG asked to meet with the contracting officer but a meeting was not able to be convened until January 26; Ms. Vass-Lassiter extended the deadline for PSG's response to the cure notice to January 31, 2012.

At the January 26 meeting, DOT agreed to pay a \$99,110.57 progress payment which had been previously invoiced but rejected.<sup>1</sup> According to Mr. Zorger, when he left the January 26 meeting, he believed that DOT had acquiesced to his position that PSG would not resume working on the project until it received the \$99,110.57 payment. DOT disputes Mr. Zorger's impression and posits that after Mr. Fields' December 15 directive, DOT never told PSG it could continue to not work. DOT emphasizes that its employees were greatly inconvenienced by a non-working kitchen and it incurred extra costs to its food services contractor while the kitchen was not able to be used. Completion of the kitchen renovation was a priority for DOT.

Notwithstanding the agreement made on January 26 that DOT would pay PSG the \$99,110.57 invoice, because of what appears to be confusion and/or lack of attention on the part of DOT, payment was not made until mid-March 2012. PSG did not resume work on the project until after it received the payment; the project was completed approximately three weeks later.

On January 31, 2012, PSG provided the contracting officer a breakout of the costs it was seeking to complete the kitchen (\$34,394.17), delay costs (\$19,983.39), and a completion schedule showing it would be resuming work on the site on February 2, 2012. A request for an equitable adjustment seeking \$116,063.23 followed on April 20, 2012. On March 19, 2013, PSG submitted a certified claim to the contracting officer seeking \$136,628.77, "based on the hidden condition of unusually high moisture encountered in the existing concrete slab under the kitchen flooring." When the contracting officer failed to issue a final decision, PSG appealed the deemed denial of its claim, which was docketed as CBCA 3411.

### Discussion

This Board in *Quality Forests, Inc. v. Department of Agriculture*, CBCA 123, 07-1 BCA ¶ 33,490, made clear that, with regard to latent differing site conditions:

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<sup>1</sup> DOT had concluded that PSG had not completed the percentage of work PSG asserted was complete.

The contractor bears the burden of establishing by a preponderance of the evidence that “the unknown physical condition must be one that could not be reasonably anticipated by the contractor from his study of the contract documents, his inspection of the site, and his general experience[,] if any, as a contractor in the area.” *Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1276 (Fed. Cir. 2001) (quoting *Perini Corp. v. United States*, 381 F.2d 403, 410 (Ct. Cl. 1967)).

Thus, PSG bears the burden of establishing that it encountered a unknown physical condition when it discovered high RH levels in the kitchen slab. Considering the facts presented by this case, we do not believe that the high RH levels in the kitchen should have been unknown to a knowledgeable contractor, which PSG purports to be.

To keep the dust down, PSG used significant amounts of water hosing the concrete slab over several days of demolition; it then poured an underlayment material on top of that. PSG’s first testing of RH levels showed levels of 96%, 95%, 100%, and 93%. Other than asking DOT to increase heat levels in the building, it does not appear that PSG or its subcontractors used any means, such as large fans or electric heaters, to dry the area. A reasonable contractor, planning to saturate the concrete floor slab with water to keep down dust, should have included processes and time in its schedule to dry out the area. PSG failed to include either in its planning.

Reviewing the December RH testing data, it appears that beginning December 9, the RH levels began to decrease dramatically and steadily. As of December 14, the RH levels of the concrete slab were below the levels needed for installation of the PROTECT-ALL flooring. Yet PSG did not return to the job site and begin the installation.

While PSG offered a few theories on what caused high RH levels in the concrete slab, none of those theories was compelling. We conclude that the early high RH levels in the concrete slab were caused by appellant’s own actions, when it saturated the slab with water for three days during demolition and then failed to allow time for the slab to dry out before covering it. Appellant further delayed the project by failing to resume work once the slab was sufficiently dry. Appellant has not established any government-caused delay associated with the high RH levels in concrete slab. The fact that at some point the contracting officer offered to pay PSG for five days of delay has no bearing on our decision because the Board considers claims *de novo*.

Any delay associated with the high RH levels in the concrete slab that may have occurred was caused by PSG and/or its subcontractors when the area was hosed down to control demolition dust. Even though it was able to install the PROTECT-ALL flooring, and

directed by DOT to do so, PSG refused to return to the project until it had actually received the \$99,110.57 progress payment.

Decision

For the reasons set forth above, the appeal is **DENIED**.

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PATRICIA J. SHERIDAN  
Board Judge