

U.S. Department of Labor

Board of Contract Appeals  
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 In the Matter of :  
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 : Date: April 14, 1997  
 JAMES W. COLLINS ASSOC., INC., :  
 Appellant :  
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 : Case No. 92-BCA-8  
 Contract No. 99-1-4893-14-013-01 :  
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For Appellant:

Vincent Abell  
Modern Management Company  
6925 Fourth Street, N.W.  
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For Contracting Officer:

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BEFORE: MILLER, LEVIN

Miller, Member, Board of Contract Appeals

**DECISION AND ORDER**

By letter dated February 27, 1992, James W. Collins & Associates, Inc. d/b/a/ U.S. Abatement (“Appellant”) appealed the December 4, 1991, final decision of a U.S. Department of Labor (“DOL”) Contracting Officer partially denying Appellant’s claim for additional compensation under the differing site conditions clause of Contract No. 99-1-4893-14-013-01. A hearing in this matter was held on December 7-8, 1993, in Omaha, Nebraska. Vincent Abell, representative of Appellant, appeared with proper authorization on behalf of Appellant. The Contracting Officer appeared

through counsel.

### Findings of Fact

1. On October 17, 1990, the United States Department of Labor (“DOL”) issued an Invitation for Bids (“IFB”) for the abatement of asbestos in several areas of the Tulsa, Oklahoma, Job Corps Center (“the Center”). (AF 106; Exh. J-1.)<sup>1</sup> The work areas included Area 7, which is a 10,000 square foot area on the second floor of Building B of the Center, and the only area relevant to this proceeding.<sup>2</sup> (AF 179; Tr. 46, 210.)

2. DMJM/HTB, DOL’s engineering support contractor and project manager for the Center, contracted with the architectural firm of Quinn & Associates to write the IFB’s Specifications and Scope of Work. Quinn & Associates hired Stanley Engineering as a consultant and Industrial Hygienist for the asbestos abatement project at the Center. (Tr. 137-38, 176-77, 184, 297-98.)

3. Section C of the IFB’s Scope of Work and Section 21 of the IFB’s Technical Requirements described the preparation work to be performed by the successful bidder prior to asbestos abatement. This work included, inter alia, the following:

B. Shut down and lock out electrical power to all work areas. Hook up temporary power and lighting. Insure safe installation (including ground faulting) of temporary power sources and equipment by compliance with all applicable electrical code requirements and OSHA requirements for temporary electrical systems. All electrical work shall be coordinated with the Government and accomplished by a licensed electrician in the State of Oklahoma. The Government shall pay for electric power consumption.

C. Shut down and lock out all heating, cooling and ventilation system (HVAC) components that are in, supply or pass through the work area. Also seal any seams in systems components that pass through the work area.

(AF 173b-174, 176.) After completion of the preparation work, Section E of the IFB’s Scope of Work required the successful bidder to “[r]emove all asbestos containing pipe insulation, duct insulation and duct tape, as well as all asbestos contaminated batt insulation, ceiling tiles, and debris” in Area 7. (AF 176.)

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<sup>1</sup>“AF” references are to pages in the Appeal File which was admitted into evidence as Exhibit DOL-1 at the hearing held in Omaha, Nebraska, on December 7-8, 1993; “Exh J-1” references are to the Joint Statement of Facts submitted by the parties at the hearing; “Exh. DOL-X” references are to Contracting Officer’s Exhibits admitted into evidence at the hearing; and “Tr.” references are to pages of the hearing transcript.

<sup>2</sup>Building B is an academic building containing classrooms and offices. Building B does not contain any heavy equipment or machinery with extraordinary power requirements. (Tr. 212, 317.)

4. A pre-bid conference and walk-through of the Center was held on November 1, 1990. Representatives of Quinn & Associates, Stanley Engineering, the Center, Appellant, and other interested bidders attended the meeting. The prospective bidders toured the areas to be abated, and each prospective bidder had sufficient time to adequately survey the project and to ask questions regarding the specifics of the project. (Exh. J-1; Tr. 49, 112, 142.)

5. During the pre-bid conference, Center representatives indicated that the Center had three-phase power in two areas of Building B available for the successful contractor's use, but did not state the Center's power capabilities in terms of voltage and amperage. During the walk-through, Gary Martin, Sr., Appellant's chief estimator and secretary/treasurer, ("Martin") observed several three-phase power boxes.<sup>3</sup> Three-phase power is the type of power used in commercial buildings, and is generally sufficient to operate most machinery. There is no evidence that three-phase power is associated with any specific voltage and amperage capacities. (Tr. 46-48, 50, 74, 110, 122, 319-20.)

6. Center representatives also indicated at the pre-bid conference that a water pipe was leaking in Area 7, but the Center patched the leak prior to the completion of the preparation work by Appellant. (Tr. 49, 115, 327.)

7. As a result of questions raised by the prospective bidders at the pre-bid conference, Addendum Number One to the Solicitation was issued on November 14, 1990. According to the Addendum, Appellant was required to install new insulation and a new ceiling system in Area 7, and replace all furniture and fixtures removed in preparation for the asbestos abatement in Area 7 no later than January 7, 1991. (Exh. DOL-7; Tr. 142.) Clause 52.212-5 of the contract provided for the assessment of liquidated damages against Appellant in the event that Area 7 was not completed by January 7, 1991. (AF 130; Tr. 252-53.)

8. Appellant was the successful bidder, and on December 4, 1990, DOL awarded Contract No. 99-8-4893-14-013-01 ("the contract") to Appellant for the abatement of asbestos at the Center. The contract was a fixed price contract in the amount of \$222,000.00. (AF 104; Exh. J-1; Tr. 46, 145, 157, 215.) Contract modification number one, issued on September 24, 1991, increased the contract price by \$4,330.00 to \$226,330.00. (AF 100; Exh. J-1, Tr. 145.)

9. The contract contained the following clauses:

52.236-2 Differing Site Conditions (APR 1984)

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or

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<sup>3</sup>Three-phase power boxes are identifiable by their size, as they are generally bigger than, for example, the power boxes found in a residential home. (Tr. 110.)

(2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed unless the Contractor has given the written notice required: provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

#### 52.236-3 Site Investigation and Conditions Affecting the Work (APR 1984)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representations made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

10. The contract documents also stated that reasonable amounts of power would be provided, but did not specify the Center's power capacities in terms of voltage or amperage. (AF 191; Tr. 156-57.)

11. A pre-construction conference was held on December 11, 1990. Representatives of DMJM/HTB, Quinn & Associates, Stanley Engineering, the Center and Appellant were present at the meeting. (Exh. J-1; Tr. 216-17.) The DMJM/HTB project manager read the Pre-Construction Conference Text to Appellant, emphasizing the section on differing site conditions, and reiterated the January 7, 1991, deadline for completing Area 7. (AF 8-10, 89-91; Exh. J-1; Tr. 221, 232-33.) He also stated that all utilities, including heat, would be turned off, that Appellant would have to provide its own heat, and that reasonable amounts of electricity would be provided. (AF 59-60, 191; Tr. 222.) Appellant admitted, through the testimony of Martin, that Appellant understood the contract provisions regarding heat and other utilities. (Tr. 72-74.)

12. At the Pre-Construction Conference, the DMJM/HTB project manager specified that Appellant was to direct all inquiries or requests to Stanley Engineering or Quinn & Associates, who would forward the inquiry or request to DMJM/HTB. DMJM/HTB would forward the request or inquiry to the Contracting Officer with a recommendation for action by the Contracting Officer. The DMJM/HTB project manager did, however, specify that Appellant could contact him directly. (Tr. 84, 152, 243, 248.)

13. During the Pre-Construction Conference, Appellant had an opportunity to ask questions, but did not ask about the availability of electricity or the Center's power capacities in terms of voltage or amperage. Appellant did indicate that it wanted to use a three-phase heater, but did not identify the specific power requirements of the heater. (Tr. 75.) The only question regarding the availability of electricity was raised by a representative of the Center who was concerned about supplying power to the fire alarm system and the telephone system. (AF 8-10, 59-60, 89-91; Tr. 221-22, 228-29, 323.)

14. A Notice to Proceed was issued December 11, 1990, and work officially began on December 14, 1990. (AF 103; Exh. J-1; Tr. 157, 213.)

15. On or about December 23, 1990, Appellant completed the preparation work in Area 7. (Exhs. DOL-5, DOL-6.) Area 7 was sealed in polyurethane sheeting to prevent the flow of asbestos-contaminated air outside of Area 7. All air in Area 7 was filtered through a negative air machine to remove the asbestos particles. The negative air machines also brought uncontaminated air into Area 7 from outside of Area 7. Area 7 was considered to be "under containment," and referred to as a containment area. (Tr. 55, 78.)

16. On or about December 23, 1990, the Center turned off all utilities in Building B, including heat, in accordance with the Specifications. It was not possible to selectively shut down the utilities in specific areas of Building B. (Tr. 51, 56, 73-74, 226-27, 294, 319.)

17. The Center provided temporary 110 volt and 220 volt power lines for Appellant's use.<sup>4</sup> The Center made available to Appellant four breakers in the mechanical room located in the center of Building B. Appellant used these temporary power lines to operate its negative air machines, lights, vacuums and other electrical equipment. (AF 61, Tr. 73, 80-81, 319-20, 333.)

18. Between December 26, 1990, and January 8, 1991, when Appellant was removing asbestos in the containment area, the temperature in the containment area ranged from 32 to 40 degrees Fahrenheit. (Tr. 57.) Outdoor temperatures were as follows:

DATE	HIGH	LOW	AVERAGE
12/26/90	41	24	33
12/27/90	36	31	34
12/28/90	55	34	45
12/29/90	60	10	35
12/30/90	16	5	11
12/31/90	27	8	18
1/1/91	38	19	29
1/2/91	38	22	30
1/3/91	25	18	22
1/4/91	33	23	28
1/5/91	41	33	37
1/6/91	34	26	30
1/7/91	27	23	25
1/8/91	34	27	31

(AF 30, 33; Exh. DOL-3.) The average temperatures for December 1990 and January 1991 were similar to the average temperatures reported in previous years. (AF 30, 33; Exh. DOL-3; Tr. 155-56.) We find that the weather conditions were cold but not unusually cold during the time period in question. (AF 55; Tr. 154-55, 281, 300, 333.)

19. When Appellant returned to the Center from the Christmas holiday on December 26, 1990, it brought a three-phase electric heater for the containment area with power requirements of 150 KW, 240 Volts, 361.27 Amps. Appellant planned to use the Center's electrical panels as a power source for the heater. Due to the voltage and amperage requirements of the heater, the Center was

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<sup>4</sup>Appellant, through the testimony of Martin, disputes the Contracting Officer's contention that 220 volt power lines were available in the containment area. However, Martin also testified that he tried to find 220 volt heaters for the containment area, but was unsuccessful. It is unlikely that Martin would attempt to use 220 volt heaters if the power lines were not available. Therefore, we find that the Center did provide 220 volt power lines. (Tr. 82, 351.)

unable to provide sufficient power to operate the heater. This was the first time in Appellant's experience that it was not able to operate its heater due to a lack of sufficient power. (AF 20, 56, 60-61; Exh. J-1; Tr. 51, 75, 81, 110, 277.)

20. A three-phase power connection was available in Building B, but was turned off. It is unclear whether the power connection would have been sufficient to operate Appellant's heater. Appellant did not request that this power connection be made available for its use, nor did Appellant offer to make the necessary electrical connections. (Tr. 320-21.)

21. The Center's maintenance supervisor told Appellant that the Center did not have sufficient power to operate Appellant's heater at the end of Building B in which Appellant was working. He indicated that there was sufficient power at the other end of Building B, but that it would not be practical to use that power source due to its distance from the work area. (Tr. 52, 82.) Additional electrical connections were available in Buildings A and C.<sup>5</sup> The electrical connection in Building A was 250 feet from the containment area, and only provided 208 volts. The Center did not have the material, knowledge, or expertise to make the electrical connections for Appellant. Appellant did not request access to those outlets and did not make the necessary electrical connections for their use. Section 21(B) of the contract's Technical Requirements provided that Appellant was responsible for making all of the necessary electrical connections. (AF 61, 173b-174; Tr. 82, 319-22.)

22. To heat the containment area, Appellant placed propane heaters outside of the containment area, expecting that the negative air machines would draw the outside heated air into the containment area and keep the containment area above freezing. The Center also provided fans to draw in heat from outside of the containment area. These measures were not sufficient to heat the containment area above 32 to 40 degrees Fahrenheit. (Tr. 56-57, 85, 123, 129, 248.)

23. While working in an asbestos containment area, the workers are required to wear disposable Tyvek suits, made of thin paper-like material, to prevent asbestos particles from coming in contact with the worker's skin. Tyvek suits do not provide any warmth to the workers. The workers generally do not wear street clothes underneath a Tyvek suit, and any clothes that are worn underneath a Tyvek suit must be discarded and treated as asbestos waste. Due to the cold temperatures in the containment area, Appellant's workers wore four or five Tyvek suits at a time. (Tr. 58-63.)

24. Appellant contends that its workers left the containment area approximately every hour to warm up which required each worker to complete a fifteen to twenty minute decontamination process each time the worker left the containment area. Under normal conditions, the workers would

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<sup>5</sup>Buildings A and C are adjacent to, and appear to be attached to, Building B. (AF 177-79; Tr. 320-21.) Because the buildings are adjacent and Building B's mechanical room is located in the center of the building, references to the various ends of Building B may be references to Buildings A or C.

have remained in the containment area for approximately four hours before taking a break. Appellant claims that the cold temperatures within the containment area caused a 50 percent reduction in its workers' productivity, and resulted in a loss of four to five hours per day per worker. (Tr. 61-63, 348-49.)

25. The containment area log-in sheets for Area 7 do not substantiate Appellant's contentions that the cold temperatures inside the containment area caused its workers to take frequent breaks or caused a significant loss of productivity. The containment area log-in sheets for Area 7 indicate that Appellant's workers remained in the containment area three to seven hours at a time. Appellant's workers did not leave the containment area more than twice during a shift. (AF 72-74, 76.)

26. Appellant contends that because Area 7 used a steam heat system which would not circulate asbestos-contaminated air outside of the containment area, it was unnecessary to turn the heat off, despite the requirements of the Specifications. Appellant discussed the necessity of turning off the heat with the Industrial Hygienist, and orally requested that the heat be turned back on. The Industrial Hygienist denied the request because the Specifications called for the heat to be turned off. (Tr. 86, 103.) Clause 52.245-12 of the contract required strict adherence to the Specifications. (AF 136; Tr. 140.) The Industrial Hygienist was also concerned that the steam heat could melt or damage the polyurethane containment walls, which could transmit asbestos particles outside of the containment area. (Tr. 204.)

27. On or about December 26, 1990, Building B's roof developed leaks into the containment area, and Appellant notified the Center staff of the leaks.<sup>6</sup> (Tr. 52-54, 356.) During the first week in January 1991, the Center's maintenance supervisor went into the containment area, and observed two leaks. One leak was three feet by three feet, and one leak was five feet by five feet. He estimated that 50 to 75 gallons of water per day were leaking into the containment area. The maintenance supervisor did not observe any other leaks. (Tr. 324-27, 337.) There is no evidence of any other leaks.

28. Appellant, through Gary Martin, Jr., testified that one-quarter to one-half inch of water covered a large portion of the containment area floor on at least two mornings. On at least two occasions, the Industrial Hygienist required Appellant's workers to vacuum the water off of the floor, and remove and replace the polyurethane floor coverings. This clean-up process took four to six hours. (Tr. 66-68, 358-59, 364-66.) This is the only evidence of delay or additional work attributable to the roof leaks.<sup>7</sup>

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<sup>6</sup>Although Martin and Gary Martin, Jr., a former employee of Appellant, testified that the roof began leaking on or about December 26, 1990, Appellant has only claimed increased labor hours to clean up the water for January 7, 1991 through January 11, 1991. (AF 22.)

<sup>7</sup>Appellant contends that the water leakage created an electrical hazard which would have prevented Appellant from operating its heater even if there had been sufficient power available to

29. On or about January 15, 1991, after Appellant had completed the asbestos removal and had taken down the containment area, the Center's site representative entered Area 7 and did not observe any leaks or water damage. After January 15, 1991, there were no reports of leaks or water damage in Area 7.<sup>8</sup> (Tr. 329-30, 332, 338.)

30. On or about December 28, 1990, DMJM/HTB received a copy of a letter, dated December 26, 1990, from Stanley Engineering to Quinn & Associates noting delays in the asbestos abatement process at the Center resulting from "contractor personnel numbers, the absence of necessary equipment at the jobsite, and . . . inexperience on the part of the contractor." As a result of this letter, DMJM/HTB called a meeting for January 7, 1991. (Exh. DOL-4; Tr. 243-44, 258.)

31. Representatives of DMJM/HTB, Quinn & Associates, Stanley Engineering, the Center, and Appellant participated in the January 7, 1991, meeting. Appellant stated that the delays were the result of extremely cold weather and insufficient power at the Center to operate Appellant's heater. Appellant also cited the roof leak in the containment area as a minor cause of the delay. At the time, Appellant did not request an extension of time or seek reimbursement of its excess costs of performance. Appellant was primarily concerned with avoiding the assessment of liquidated damages. (Tr. 245-47, 252-53, 255, 304-05, 312, 332.)

32. Although Appellant did not directly notify DMJM/HTB prior to the January 7, 1991, meeting of the problems resulting from the cold weather and the leaking roof, Appellant had notified Stanley Engineering, the Industrial Hygienist, as it had been instructed, of these problems. As a result of the December 26, 1990, letter, received December 28, 1990, DMJM/HTB actually knew that Area 7 would not be completed on time. (Tr. 67-68, 245, 254-55, 257-58, 344.)

33. By letter dated January 15, 1991, Appellant provided its first written notice to Quinn & Associates of the delays due to the cold weather and the leaking roof. Appellant requested an extension "of the asbestos abatement portion of the contract to (20) twenty (10) ten hour shifts for completion." Appellant also requested an unspecified adjustment to the contract price, and a waiver of liquidated damages. (AF 11-12, 92-93; Tr. 350.)

34. By letter dated March 20, 1991, Quinn & Associates responded to Appellant's January 15, 1991, letter, stating that it did not recommend the requested extension of time, but that Appellant could submit its request directly to the Contracting Officer. (AF 92-93; Exh. DOL-2; Tr. 260.)

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operate the heater. (Tr. 56,83-84, 346, 359-60.) However, Appellant never notified the Center or the Industrial Hygienist of the perceived hazard. (Tr. 249, 334.)

<sup>8</sup>The Center replaced Building B's 30 to 35 year old roof on or about January 18-30, 1991. It was more economical to replace the roof because it was nearing the end of its useful life of approximately 35 years. The roof replacement was considered an emergency because funds had not been appropriated for the roof replacement during the Center's regular budget cycle. (Tr. 65, 279-80, 330-31, 335-36.)

35. The record does not indicate the date on which Appellant completed Area 7, but it is undisputed that Appellant did not complete its work in Area 7 by January 7, 1991. Although Appellant did not receive any formal extensions of time for the completion of Area 7, the Contracting Officer did not assess liquidated damages against Appellant. (Tr. 37, 255-57.)

36. On May 17, 1991, Appellant filed a claim with the Contracting Officer for additional costs incurred on the contract in the amount of \$45,937.28 resulting from alleged differing site conditions. Appellant's May 17, 1991, claim was the first notice provided to the Contracting Officer of Appellant's claim for additional costs allegedly attributable to differing site conditions. Appellant claimed \$41,438.28 for increased labor and supply costs due to unusually cold and adverse weather conditions, and the lack of sufficient power to operate its heater. Appellant also claimed \$4,499.00 for additional labor and supplies required to clean up water damage resulting from the leaking roof. Appellant did not cite a particular clause of the contract as the basis for its claim. (AF 5-26, 82-86; Exh. J-1.)

37. The Contracting Officer issued a final decision on December 14, 1991, partially granting and partially denying Appellant's total claim. The Contracting Officer found that Appellant was not entitled to any additional compensation for increased labor and supply costs due to adverse weather conditions or the lack of power to operate its heater, and denied the claim for \$41,438.28. Although only \$31,476.90 is noted as denied in the final decision, the Contracting Officer admitted while testifying that that number was an arithmetical error, and testified that the amount denied should be \$41,438.28 instead of \$31,476.90. We so find. (AF 27-29, 31-32, 96-97; Exh. J-1; Tr. 148, 150-53, 158, 162, 164.)

38. The Contracting Officer determined that the leaking roof caused "continuous water problems within Containment Area No. 7," and that Appellant is entitled to the additional costs of cleaning up the water. However, the Contracting Officer only allowed a recovery of \$3,570.57 instead of \$4,499.00 because Appellant failed to substantiate, through official payroll records, 8.5 labor hours of the claimed 171 labor hours. Appellant offered no evidence at hearing which would substantiate its claim for the disallowed additional 8.5 labor hours. Appellant has not been paid the \$3,570.57 to which it is entitled because Appellant has not executed contract modification number two, increasing the contract price by \$3,570.57, as requested by DOL. (AF 27-29, 31-32, 96-97; Exh. J-1; Tr. 148, 150-53, 158, 162, 164.)

### **Discussion**

In its May 17, 1991, claim, Appellant asserted entitlement to compensation for additional costs associated with the clean-up of water resulting from a leaking roof. In his final decision, the Contracting Officer determined that Appellant was entitled to compensation for the water clean-up, and awarded Appellant \$3,570.57, the amount of costs substantiated by Appellant. At the hearing, Appellant did not prove, through testimony or documentary evidence, that it was entitled to the additional 8.5 labor hours claimed but disallowed by the Contracting Officer for lack of

documentation. Appellant has the burden of proving its claim by a preponderance of the evidence, and Appellant has failed to prove that it is entitled to additional compensation beyond that already awarded by the Contracting Officer. Park Const. Co., ENGBCA No. 6113, 95-2 BCA ¶ 27,777.

Appellant has not proved that the cold temperatures experienced in the Tulsa, Oklahoma, area were so extreme and made the asbestos abatement work so difficult as to amount to a differing site condition. The temperatures encountered by Appellant were within the normal range for the Tulsa, Oklahoma, area during December and January.<sup>9</sup> “Encountering normal weather that is to be expected in an area at a particular time of the year is not abnormal, unusual or severe . . . .” Park Const. Co., *supra*. Even if the weather conditions were unusually cold, which we do not find in this case, extreme weather conditions are generally considered acts of God, and therefore outside the scope of the differing site conditions clause. The differing site conditions clause will not shift the risk of acts of God to the Government. Turnkey Enterprises v. United States, 229 Ct. Cl. 179, 597 F.2d 750 (1979). Under clause 52.236-3(a)(3) of the contract, Appellant was required to investigate “the general and local conditions which can affect the work or its cost including but not limited to . . . uncertainties of weather.” We find that Appellant did not do so in this case, and the Contracting Officer properly denied this portion of Appellant’s claim.

Appellant has not proved that the lack of sufficient power to operate its heater constituted a Type I or a Type II differing site condition entitling Appellant to an equitable adjustment. To prove entitlement to an equitable adjustment for a differing site condition, Appellant must prove either that it encountered a latent physical condition which was materially different from the conditions represented in the contract documents (Type I), or that it encountered an unusual or unknown condition materially different from those ordinarily encountered in such work (Type II).<sup>10</sup> In either case, the condition must not have been discoverable by Appellant after a reasonable pre-bid investigation or inquiry. See Midwest Environmental Control, Inc., LBCA No. 93-BCA-12, \_\_\_ BCA ¶ \_\_\_; Franklin Pavkov Const. Co., HUDBCA Nos. 93-C-C13, 93-C-C14, 94-3 BCA ¶ 27,078; Continental Flooring Co., VABCA No. 2065, 85-2 BCA ¶ 18,130; Sanders Const. Co., 270 Ct. Cl. 639, 618 F.2d 121 (1979).

The contract documents did not indicate, in any terms, the specific power capacity of the Center. The contract documents merely stated that reasonable amounts of power would be provided. Appellant cannot recover for a Type I differing site condition where, as in this case, the contract

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<sup>9</sup>Furthermore, Appellant’s workers were not directly exposed to the cold temperatures, as they were working inside of Building B. The indirect exposure to the cold outdoor temperatures resulted from the lack of heat in Building B.

<sup>10</sup>Appellant has not stated whether the claimed failure to provide adequate power constitutes a Type I or a Type II differing site condition. In his post-hearing brief, the Contracting Officer assumed that Appellant was asserting a Type I differing site condition. Appellant did not file a post-hearing brief, and did not reply to the Contracting Officer’s brief. However, we have considered Appellant’s claim under both types of differing site conditions.

documents are silent as to the conditions related to the specific power capacity to be encountered at the site. See P.J. Maffei Building Wrecking Corp. v. United States, 732 F.2d 913 (Fed. Cir. 1984); Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed. Cir. 1987); Midwest Environmental Control, Inc., *supra*.

Although Appellant was told by Center representatives that three-phase power would be available for Appellant's use, there is no evidence that three-phase power, by itself, guarantees specific voltage and amperage capacities. The contract documents make no particular representation in this regard, and there is no evidence that any deficiency in voltage or amperage capacity was latent or undiscoverable upon reasonable inquiry. Thus, Appellant has not proved that the absence of power to operate its 240 volt heater was inconsistent with any representation in the contract documents, or, indeed, with the representations of the Center representatives.

Although given at least two opportunities, Appellant did not ask about the voltage and amperage capacities of the Center, and mistakenly assumed, without any substantial basis, that the Center's three-phase power would be sufficient to operate Appellant's heater. Clause 52.236-3(a)(2) of the contract required Appellant to make appropriate inquiries to satisfy itself that electric power needed for work performance would be available. We find that Appellant did not make an adequate and reasonable inquiry into the power capacity of the Center, and thus, did not conduct an adequate site investigation.

To recover for a Type II differing site condition, Appellant must prove that the condition in issue was both unknown and unusual. See Midwest Environmental Control, Inc., *supra*; Franklin Pavkov Const. Co., *supra*. We find that the condition was neither unknown nor unusual. The Center representatives told Appellant that the Center would provide access to three-phase power. Appellant observed the three-phase power boxes during the pre-bid walk-through. Appellant also knew that all power would be turned off in Building B. Yet, Appellant did not ask the Center, Stanley, or Quinn if the three-phase power boxes would remain operational after the utilities had been turned off in Building B, and it did not request that any of Building B's three-phase power boxes be reenergized after the power in Building B was turned off. Nor did Appellant ask or confirm what level of power would be available, or whether the Center could accommodate the 240 volt heater that Appellant apparently intended to use. Furthermore, there is no evidence in the record, as we stated above, that three-phase power guarantees a specified level of amperage and voltage, and we have found that Appellant failed to determine whether the available power supply was sufficient to operate its particular heater. Because we find that Appellant could have determined the availability of power during a reasonable site investigation, the lack of adequate power to operate Appellant's particular heater cannot be considered an unknown condition. Midwest Environmental Control Inc., *supra*.

Appellant has also failed to prove that the available power supply at the Center was unusual. Appellant presented no evidence of any unusual characteristic of the Center's power capacities. Appellant did not prove, for instance, that the available power supply in a comparable building would be greater than that found at the Center, or that the Center's power supply did not comply with the applicable electrical code. Nor is there any evidence that the available power supply could not have

accommodated other types of conventional heaters that could have served the purpose. Upon the evidence before us, it would be plausible to conclude that Appellant's heater was unusual, not the power available. The absence of sufficient power for Appellant's particular 240 volt, 361.27 amp heater, if discoverable upon reasonable inquiry, would not have created a deviant site condition if other heaters could have been powered and used. There is substantial evidence that the power supply available on site was adequate to operate Appellant's other equipment, and that the Center fulfilled its duty to provide reasonable amounts of power. We find that Appellant's assertion that its particular heater had obtained sufficient power from three-phase power sources at unspecified work sites in the past does not prove an unusual site condition under the circumstances of this case. Appellant has not proved that the lack of adequate power to operate Appellant's particular heater was an unusual condition, or at variance with conditions Appellant would normally have encountered in such work.

Appellant has failed to prove that the lack of adequate power to operate its heater constituted either a Type I or Type II differing site condition. It follows that Appellant is not entitled to an equitable adjustment beyond that already awarded by the Contracting Officer.

### **ORDER**

Appellant's claim is DENIED, except that Appellant is entitled to \$3,570.57 as stated in the Contracting Officer's final decision of December 14, 1991. Appellant is directed to sign an appropriate contract modification to effect payment in that amount.

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Edward Terhune Miller  
Member, Board of Contract Appeals

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Stuart A. Levin  
Member, Board of Contract Appeals