

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
COSTAR III, LLC) ASBCA No. 56479
)
Under Contract No. N62477-00-D-0085)

APPEARANCE FOR THE APPELLANT: Joseph J. D'Erasmio, Esq.
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Rockville, MD

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Ellen Evans, Esq.
Trial Attorney
Naval Facilities Engineering Command
Litigation Office
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE CLARKE

Appellant COSTAR III, LLC (COSTAR) seeks to recover costs incurred for health and welfare (H&W) benefit payment increases during the base and option years of a multi-year contract. The government contends that the increases were only allowable commencing with the first option year and beyond and that the claim is barred by accord and satisfaction as to those years. The parties have elected to proceed on the record pursuant to Board Rule 11. Jurisdiction arises under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. We deny the appeal as to the base year and option years and sustain the appeal as to the final five month extension period.

FINDINGS OF FACT

1. On 22 October 2001, COSTAR was awarded Contract No. N62477-00-D-0085 (the 0085 contract) for Base Operating Services for Naval Air Station, Patuxent River (NAS Patuxent River). COSTAR is a joint venture. SEAIR Transport Services, Inc. (SEAIR) was the member of the joint venture responsible for providing transportation services (R4, tab 1 at GOV291, tab 2 at GOV356). The contract had a 90-day phase-in period commencing on 22 October 2001, base year, and three options to extend the term of the contract (R4, tab 1 at GOV296-339, tab 144). The base period commenced on 1 February 2002 and ran through 31 January 2003 (R4, tab 20 at GOV3712).

2. The contract contained Wage Determination No. 91-0554, Rev. 6, dated 30 November 1999 (WD 0554) which required in part a H&W rate of \$2.80 per hour worked (R4, tab 16 at GOV1027, tab 150, CBA at 12, tab 155 at 2).

3. The contract incorporated by reference FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989) that included the following:

(f) *Successor contracts.* If this contract succeeds a contract subject to the Act under which substantially the same services were furnished in the same locality and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rates and fringe benefits, neither the Contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreement, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement....

....

(m) *Collective Bargaining Agreements Applicable to Service Employees.* If wages to be paid or fringe benefits to be furnished any service employees employed by the Government Prime Contractor or any subcontractor under the contract are provided for in a collective bargaining agreement which is or will be effective during any period in which the contract is being performed, the Government Prime Contractor shall report such fact to the Contracting Officer, together with full information as to the application and accrual of such wages and fringe benefits, including any prospective increase, to service employees engaged in work on the contract, and a copy of the collective bargaining agreement. Such report shall be made upon commencing performance of the contract, in the case of collective bargaining agreements effective at such time, and in the case of such agreements or provisions or amendments thereof effective at a later time during the period of contract

performance such agreements shall be reported promptly after negotiation thereof.

4. FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT – PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989)¹ includes the following:

(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements.

(b) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(c) The wage determination, issued under the Service Contract Act of 1965, as amended, (41 U.S.C. 351, *et seq.*), by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract....

(d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor’s actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period....

....

¹ FAR 52.222-43 was omitted from Section I, the list of clauses incorporated by reference, included in the Rule 4 (R4, tab 4 at GOV697); it is unclear from the record if the omission was corrected by solicitation amendment 0001 (R4, tab 7 at GOV764). However, the Board concludes that it is incorporated by operation of law in any event pursuant to the “Christian Doctrine.” *G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl.), *reh’g denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

(f) The Contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a new wage determination unless this notification period is extended in writing by the Contracting Officer.

5. SEAIR's employees are members of the International Association of Machinists and Aerospace Workers, AFL-CIO (the union) (app. br. at 3; gov't br. ¶ 4). As a result, SEAIR operated under a Collective Bargaining Agreement (CBA) which governed SEAIR's compensation of its employees, including H&W benefits (*id.*). As of 1 July 1999, SEAIR and the union entered into CBA No. CBA070199-0001, which provided for a rate of \$2.80 per hour for H&W benefits (R4, tab 150, CBA at 12). The "duration" of the CBA was from 1 July 1999 through 30 September 2002 and "shall continue from year to year, thereafter, unless either party indicates a desire to modify or terminate this Agreement by serving written notice on the other party at least sixty (60) days prior to the expiration date" (*id.* at 16).

6. SEAIR was the incumbent contractor on the prior contract for transportation services at NAS Patuxent River, Contract No. N62477-95-D-3032 (the 3032 contract), dated 31 July 1995. On 21 November 2000, SEAIR and the Navy entered into Modification No. P00050 on that contract. The modification reads in part:

As an equitable adjustment to the subject contract, the contractor is hereby compensated for wage increase[s] necessitated by the compliance with the Collective Bargaining Agreement (CBA) incorporated into the contract and approved by the Department of Labor for the option year of 1 OCTOBER 1999 through 30 SEPTEMBER 2000.

(App. br., ex. 4) We infer that the referenced CBA was the 1 July 1999 CBA. We find that if a H&W benefit payment was part of the wage increase included in Modification No. P00050 for SEAIR, the amount SEAIR was obligated to pay under the existing CBA was \$2.80. There is no evidence in the record supporting COSTAR's contention that the Navy and SEAIR had already agreed to pay an increased amount of \$3.22 as a result of Modification No. P00050 (app. reply br. ¶¶ 4, 5). Modification No. P00050, 21 November 2000, predated the first appearance of the \$3.22 figure in the 10 September 2001 MOA (*see* finding 7).

7. On 10 September 2001, SEAIR and the union entered into a Memorandum of Agreement (MOA) providing for a \$.42 increase in fringe benefits to \$3.22 per hour effective 1 November 2001, subject to approval from the Department of Labor ("DOL"). There is no evidence that DOL approved the MOA or otherwise adopted it in a wage determination. (R4, tab 150 at 11). There is also no evidence in the record that SEAIR or

COSTAR provided the Navy a copy of the MOA until it was included in the claim letter of 20 February 2007. We find that neither SEAIR nor COSTAR “promptly”² reported the 10 September 2001 MOA to the Navy during performance of the 3032 contract.

8. During the base year of the contract, on 17 and 22 October 2002 respectively, SEAIR and the union negotiated and signed an addendum to the 1 July 1999 CBA (R4, tab 146 at 1, 3).³ Among other things, the addendum established the hourly H&W payments for four consecutive periods as follows:

Effective 1 October 2002 - \$3.22 per hour
Effective 1 February 2003 - \$3.72 per hour
Effective 1 February 2004 - \$4.22 per hour
Effective 1 February 2005 - \$4.72 per hour

(*Id.* at 4) The duration of the addendum was 1 October 2002 through 31 January 2006 (*id.* at 3).

9. On 2 December 2002, SEAIR sent the contracting officer (CO) a “Memorandum for the Record” concerning the predecessor 3032 contract claiming \$5,517.12 to compensate it for the \$.42 increase in health and welfare benefits paid from 1 November 2001 to 31 January 2002. The CO did not reply to the memorandum, and did not increase the amount due under the 3032 contract to reflect the adjustment. (App. br., ex. 5; *see also* app. br. at 4)

10. Modification No. P00044 exercising the first option year was signed by the Navy on 29 January 2003 with an effective date of 1 February 2003 (R4, tab 62). The modification included the following:

The attached Department of Labor Wage Determination Number 94-2103 (Rev 28) dated 4 October 2002 and 91-0554 (Rev 6) dated 30 November 1999, are hereby incorporated and made part of this contract. A modification to adjust the contract price in accordance with the revised wage determination will be forthcoming, if warranted.

(*Id.* at GOV5191)

² FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED, (MAY 1989) (m) *Collective Bargaining Agreements Applicable to Service Employees* requires that amendments to a CBA that occur during the performance of a contract subject to the CBA “shall be reported [to the government] promptly after negotiation thereof.”

³ It is referred to in the record as both the 17 October 2002 and 22 October 2002 addendum.

11. On 6 February 2003, SEAIR sent a copy of the 17 October 2002 addendum to the 1 July 1999 CBA to the CO and COSTAR (R4, tab 146). In the letter SEAIR requested that the addendum be sent to the DOL “for ratification” (*id.* at 1). SEAIR also stated:

We realize [that] the CBA submittal was due before the February 1, 2003 anniversary of the contract. However, because of mis-communications between SEAIR and the Union Business Manager the CBA failed to be timely submitted. Industry practi[c]e is to leave the submittal of the CBA to the Union. In this case the Union assumed that we were submitting the CBA for ratification.

We beg your understanding and sincerely hope that this matter can be routinely processed to continue the harmonious labor relations SEAIR has enjoyed for so long under this and prior contracts.

(*Id.*)

12. On 13 February 2003, COSTAR wrote the CO referencing the 17 October 2002 addendum and asking that the Navy “initiate the appropriate approval process culminating in a contract modification to include the aforementioned Addendum as part of Prime Contract N62477-00-D-0085” (R4, tab 147).

13. On 20 June 2003, the DOL issued Wage Determination No. 2000-0162, Rev. 2 (WD 0162), incorporating the 17 October 2002 addendum to the 1 July 1999 CBA between SEAIR and the union effective 1 October 2002 through 31 January 2006 (R4, tab 150 at 48). WD 0162 increased the H&W payments for option years one through three to \$3.72, \$4.22, and \$4.72 respectively (finding 8).

14. Modification No. P00063 was signed by COSTAR and the Navy on 14 August 2003 with an effective date of 7 August 2003 (R4, tab 81). The modification incorporated WD 0162 into the contract effective 1 February 2003, the first day of option year one. The modification stated that WD 0162 included a CBA dated “1 July 2002 Effective October 1, 2002 through January 31, 2006” (*id.*). While the reference to a 1 July 2002 CBA as opposed to a 1 July 1999 CBA is unexplained, we find the relevant rates are those in the 17 October 2002 addendum (*viz.*, \$3.22 as of 1 October 2002).

15. The parties executed Modification No. P00079 on 15 January 2004 adding \$199,353.08 for wage increases in option year one. The modification expressly included wage increases for transportation services: “AS AN EQUITABLE ADJUSTMENT TO THE SUBJECT CONTRACT FOR A WAGE INCREASE ON OPTION ONE, THE

CONTRACTOR IS HEREBY COMPENSATED FOR THE INCREASE IN HEALTH AND WELFARE BENEFITS FOR THE TRANSPORTATION ANNEX” (R4, tab 96 at GOV3073). The modification included the following, “ACCEPTANCE OF THIS MODIFICATION BY THE CONTRACTOR CONSTITUTES AN ACCORD AND SATISFACTION AND REPRESENTS PAYMENT IN FULL FOR BOTH TIME AND MONEY FOR ANY AND ALL COSTS, IMPACT EFFECT, AND FOR DELAYS AND DISRUPTIONS [A]RISING OUT OF, OR INCIDENTAL TO, THE WORK HEREIN REVISED” (*id.* at GOV3074). COSTAR took no exception to this language. Modification No. P00093, dated 29 September 2004, added further amounts relating to option year one and included the same accord and satisfaction language quoted above (R4, tab 109 at GOV1171).

16. Modification No. P00081 exercising the second option year was signed by the Navy on 11 March 2004 with an effective date of 1 February 2004 (R4, tab 98). The modification incorporated WD 0162 in the contract (*id.* at GOV2206).

17. The parties executed Modification No. P00095 on 30 September 2004 (R4, tab 112). The modification included an equitable adjustment of \$203,407.49 for the following:

1. AS AN EQUITABLE ADJUSTMENT TO THE SUBJECT CONTRACT FOR A WAGE ADJUSTMENT FOR OPTION YEAR TWO, THE CONTRACTOR IS HEREBY COMPENSATED FOR THE INCREASE IN HEALTH AND WELFARE AND DEPARTMENT OF LABOR WAGES SHOWN IN WAGE DETERMINATION 94-2103, REV 30, AND CBA AGREEMENT DATED 2/1/04 FOR THE FOLLOWING ANNEXES:

 GROUNDS ANNEX
 CUSTODIAL ANNEX
 TRANSPORTATION ANNEX (CBA)
 HOUSING ANNEX
 COSTAR III ADMINISTRATION

(*Id.* at GOV1289) The increase for the above wage adjustment was \$203,407.49 (*id.*). We find that the reference to the CBA agreement dated 1 February 2004 is the 17 October 2002 addendum as effective 1 February 2004. The modification also included an equitable adjustment of \$111,408.71 for “THE FIRM FIXED PRICE ROLLOVER AMOUNT OF THE 1ST OPTION TRANSPORTATION WAGE INCREASE THAT WAS NOT OBLIGATED IN MODIFICATION P00081 OPTION YEAR TWO AWARD” (*id.*). Finally the modification included the following: “ACCEPTANCE OF THIS MODIFICATION BY THE CONTRACTOR CONSTITUTES AN ACCORD AND SATISFACTION AND REPRESENTS PAYMENT IN FULL FOR BOTH TIME

AND MONEY FOR ANY AND ALL COSTS, IMPACT EFFECT, AND FOR DELAYS AND DISRUPTIONS [A]RISING OUT OF, OR INCIDENTAL TO, THE WORK HEREIN REVISED” (*id.* at GOV1290). COSTAR took no exception to this language.

18. Modification No. P00101 exercised the third option year effective 26 January 2005 (R4, tab 118). The modification included the SEAIR CBA dated 1 July 2002, effective 1 October 2002 through 31 January 2006 incorporated as WD 0162 into the contract (*id.* at GOV1429).

19. The parties executed Modification No. P00110 on 29 September 2005 (R4, tab 127), effective date 27 September 2005, adding an equitable adjustment of \$219,939.62 for:

As an equitable adjustment for a wage adjustment to Option Year Three of the subject contract, the contractor is hereby compensated for the increase Health and Welfare and Department of Labor wages shown in Wage Determination 94-2103, dated 5/27/04, and Collective Bargaining Agreement effective 1/5/05 through 1/5/06 for the following annexes:

Grounds Annex
Custodial Annex
Transportation Annex
CoStar III Administration

(*Id.* at GOV1711) The modification also included the following: “The foregoing is agreed to as constituting full and complete equitable adjustment and compensation attributable to the facts or circumstances giving rise to this change including, but not limited to any change, differing site condition, suspension, delays, rescheduling, acceleration, impact or other causes as may be associated therewith” (*id.*). COSTAR took no exception to this language.

20. Modification No. P00113, effective 30 January 2006, as corrected by Modification No. P00115, extended the contract an additional five months from 1 February 2006 through 30 June 2006 pursuant to FAR 52.217-8, OPTION TO EXTEND SERVICES (AUG 1989) (R4, tabs 130, 132). The modification incorporated WD 0162 (R4, tab 132 at 3). Modification No. P00122, dated 16 August 2006, adjusted the price for H&W benefits and DOL wages (similar to Modifications Nos. P00079, P00095 and P00110) for the extended period of performance. Modification No. P00122 referenced WD 94-2103, dated 23 May 2005, and listed the Grounds Annex, Custodial Annex and COSTAR III Administration. The modification did not list WD 0162 or the Transportation Annex. There was no accord and satisfaction language in Modification No. P00122. (R4, tab 139)

21. SEAIR, a member of the joint venture, filed a certified claim in the amount of \$259,773.63 on 20 February 2007 (R4, tab 150). The claim included a CDA certification and was signed “Tsdale M. Carver, CEO, SEAIR, COSTAR III, Policy Member” (*id.* at 5).⁴ SEAIR requested reimbursement for three issues: (1) its payment of \$3.22 per hour for H&W benefits during the base year pursuant to the MOA and 17 October 2002 addendum (an increase of \$.42) and “rollover” during the option years, (2) payment of rollovers during option years two and three and the extension period for increased H&W benefits during option year 1, and (3) reimbursement for increased worker’s compensation insurance costs during option years 1, 2, and 3.

22. The CO denied the claim as to the first two issues by final decision to SEAIR dated 8 April 2008; it was reissued to COSTAR on 6 August 2008 (R4, tabs 154, 155). The CO remanded the claim as to the worker’s compensation insurance costs for negotiation. This issue has been resolved and is not part of this appeal. (Bd. corr. ltr. dtd. 28 May 2009)

23. Appellant timely filed this appeal of the final decision to the Board.

DECISION

Contentions of the Parties

COSTAR contends that on 1 November 2001, it commenced paying \$3.22 for H&W in accordance with a 10 September 2001 MOA that amended its CBA and that it continued to pay that rate during the base year of the 0085 contract. COSTAR contends that the Navy is obligated to reimburse it for the increased payments made pursuant to its amended CBA. COSTAR also contends that it is entitled to rollovers for the first option year increase in option years two and three and the extension period. The government contends that the \$3.22 rate was first approved by DOL in WD 0162 and incorporated in the 0085 contract by Modification No. P00063 during the first option period. The government contends that pursuant to FAR 53.222-43, COSTAR is not entitled to reimbursement for increased H&W costs until the first option period. The government also contends that the option year claims are barred by accord and satisfaction. It does not expressly address the extension period. The accord and satisfaction argument does not apply to the base period or the five month extension period at the end of the contract. Therefore, we will consider the base period first, the affirmative defenses second and the final extension period last.

⁴ The Board requested the parties to address whether we have jurisdiction under the CDA. We conclude that we have jurisdiction under *Sadelmi Joint Venture v. Dalton*, 5 F.3d 510, 513 (Fed. Cir. 1993).

COSTAR's Remedy, If Any, is Derived From FAR 52.222-43

FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT – PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) provides a remedy for increases in costs due to changes in a CBA, incorporated into a DOL wage determination, when a contract is renewed⁵:

(d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period....

(Finding 4) Essentially, in a fixed-price contract with option years, if a contractor negotiates a change to its CBA during any period of its contract, FAR 52.222-43 provides for a price adjustment increasing the price to reflect increased costs due to the change in the CBA, incorporated in a DOL wage determination, when the next contract option is exercised. The remedy is not available during the period when the change to the CBA is agreed upon.

The 10 September 2001 MOA

COSTAR makes much of the 10 September 2001 MOA, but in reality, it plays no role in the resolution of this appeal for several reasons⁶. First, it was conditioned upon approval by DOL and there is no evidence in the record that DOL approved the MOA (finding 7). There is no evidence in the record that the MOA was adopted in a wage determination or that the \$3.22 rate was incorporated into the predecessor 3032 contract (findings 6, 7). Even if the \$3.22 rate had been incorporated into the 3032 contract it would still be immaterial because the price adjustment remedy afforded by FAR 52.222-43 does not apply to successor contracts. FAR 52.222-41 mandates that contractors pay rates in predecessor contracts (finding 3), but it is incumbent upon the contractor to incorporate those rates in its prices for a successor contract. FAR 52-222-41 is not a remedy granting clause as is FAR 52.222-43. Therefore, if, as it alleges, COSTAR commenced paying the

⁵ "Renewal" does not include award of a new separate contract. It applies to pre-priced "renewals" by option exercise or multiple year contracts.

⁶ For this reason, SEAIR's 2 December 2002 letter (finding 9) to the Navy providing notice as to the 3032 contract that SEAIR commenced paying \$3.22 for H&W benefits as of 1 November 2001 is likewise of little materiality.

higher \$3.22 rate on 1 November 2001, it did so voluntarily as to 3032 contract and it should have included the increase, or a contingency⁷, in its prices for the 0085 contract.

The 17 October 2002 Addendum

SEAIR and the union signed an addendum to the 1 July 1999 CBA dated 17 October 2002 (finding 8). The addendum established the per hour payment for H&W benefits at \$3.22 (effective 1 October 2002), \$3.72 (effective 1 February 2003), \$4.22 (effective 1 February 2004) and \$4.72 (effective 1 February 2005) (finding 8). There is no explanation why SEAIR would agree to commence paying \$3.22 per hour on 1 October 2002 if it was in fact already paying \$3.22 as of 1 November 2001 as it alleges in this appeal.

A copy of the addendum was not provided to the Navy by SEAIR until 6 February 2003 (finding 11). It was provided to the Navy by COSTAR on 13 February 2003 (finding 12). By the time the Navy received notice of the addendum, it had already exercised the first option year via Modification No. P00044, dated 29 January 2003 (finding 10). Modification No. P00044 incorporated the CBA having the \$2.80 per hour rate for health and welfare benefits (finding 11). On 20 June 2003, the addendum was adopted in WD 0162 (finding 13).

The Navy Incorporates the CBA Addendum in the Option Years

Even though arguably it had no obligation to do so because of the late notice, the Navy incorporated WD 0162 in option year one via Modification No. P00063⁸ (finding 14), option year two via Modification No. P00081 (finding 16), and option year three via Modification No. P00101 (finding 18). By so doing the Navy agreed to pay the higher per hour H&W benefits in the three option years.

⁷ The prohibition against contingencies in FAR 52.222-43(b) (finding 4) does not prohibit contingencies in the base year of a new contract because the price adjustment provided for in FAR 52.222-43 is not available until the first renewal. *Ameriko, Inc. d/b/a Ameriko Maintenance Co.*, ASBCA No. 50356, 98-1 BCA ¶ 29,505 at 146,383. COSTAR, therefore, could have protected itself when pricing the 0085 contract base year.

⁸ In its brief, COSTAR asserts that Modification No. P00063 raises a “valid inference that the parties fully intended to include the requirements of the CBA in the base year as well” (app. br. at 9). We find no support for this suggested “inference.”

The Navy is Not Obligated to Reimburse SEAIR at the \$3.22 Rate in the 0085 Contract Base Year

The Navy correctly relies upon *Ameriko, Inc. d/b/a Ameriko Maintenance Co.*, ASBCA No. 50356, 98-1 BCA ¶ 29,505. In *Ameriko* the contractor entered into a CBA during the base year of its contract with the Army obligating it to pay higher wages during the base year. The Army would not reimburse Ameriko for the increase in wages during the base year. In denying Ameriko's appeal the Board noted, quoting *Professional Services Unified, Inc.*, ASBCA No. 45799, 94-1 BCA ¶ 26,580, "The FAR 52.222-43 FLSA/SCA Price Adjustment clause in the instant contract does not provide a vehicle for adjusting the contract price with respect to changes in wages or fringe benefits effectuated during the base period of a multiple year or option contract to which the SCA applies." *Ameriko*, 98-1 BCA at 146,384. The Board agreed with the Army and held that Ameriko "assumed the risk" of a wage increase during the base period. *Ameriko*, 98-1 BCA at 146,383. Similarly, in this case, the 17 October 2002 addendum to the CBA was effective as of 1 October 2002, well into the base period of performance of the 0085 contract. Just as in *Ameriko*, SEAIR assumed the risk that it would not be reimbursed when it modified the CBA requiring it to pay the higher rate of \$3.22 during the base year of the 0085 contract.

The Board's decision that the Navy was not obligated to pay the increased rate during the base period resolves the claims for base year "rollovers" associated with the option years in the Navy's favor.

Affirmative Defenses/Accord and Satisfaction

Contract 0085's options were exercised by Modifications Nos. P00044, P00081 and P00101 (findings 10, 16, 18). The Navy incorporated the WD 0162 into the 0085 contract by Modification No. P00063 (finding 14). WD 0162 required a H&W payment of \$3.72 during the first option year (findings 8, 14). Modifications Nos. P00079, P00095, and P00110 added price adjustments to option years one, two and three respectively for wage adjustments (findings 15, 17, 19). Modifications Nos. P00079 and P00095 included the following language:

Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money for any and all costs, impact effect, and for delays and disruptions [a]rising out of, or incidental to, the work herein revised.

(Findings 15, 17) Modification No. P00110 included the following language:

The foregoing is agreed to as constituting full and complete equitable adjustment and compensation attributable to the facts or circumstances giving rise to this change including, but not limited to any change, differing site condition, suspension, delays, rescheduling, acceleration, impact or other causes as may be associated therewith.

(Finding 19) COSTAR took no exception to the language quoted above when it signed the three modifications (findings 15, 17, 19).

Citing different precedent, both COSTAR and the Navy agree on the elements of accord and satisfaction:

The essential elements of an effective accord and satisfaction are proper subject matter, competent parties, meeting of the minds of the parties, and consideration.

Mil-Spec Contractors, Inc. v. United States, 835 F.2d 865 (Fed. Cir. 1987); *Kanag'Iq Construction Co. v. United States*, 51 Fed. Cl. 38 (2001).

Bilateral Modifications Nos. P00079, P00095, and P00110, provided price adjustments for wage increases during the three option years. This satisfies the elements of proper subject matter and consideration. Each modification was signed by authorized representatives of COSTAR and the Navy. This satisfies the element of competent parties. Each modification included unambiguous accord and satisfaction language that COSTAR accepted without reservation. (Findings 15, 17, 19) This satisfies the element of meeting of the minds. Appellant argues that for option years two and three "there is no 'accord and satisfaction' language in a document signed by Seair" (app. br. at 11). This is immaterial since COSTAR was the contractor.

We hold that Modifications Nos. P00079, P00095, and P00110 each constitute an accord and satisfaction that bars any additional payments for wage increases during the three option years.

The Five Month Extension

By Modification No. P00113, the government extended the contract an additional five months from 1 February 2006 through 30 June 2006. Modification No. P00113, corrected by Modification No. P00115, incorporated WD 0162. (Finding 20) Modification No. P00122 adjusted the price for H&W payments for the Grounds Annex, Custodial Annex and COSTAR III Administration. It does not appear to make any adjustments for the

Transportation Annex (SEAIR). There is no accord and satisfaction language in Modification No. P00122. (Finding 20) Since there was no change to WD 0162, the third option year H&W rate applied to the final extension period. There is no indication that the contract was adjusted to account for rollover for the first option year increase for SEAIR's transportation annex. Because there is no indication that COSTAR's claim during this period is barred by accord and satisfaction, we hold that, to the extent that it was not compensated, COSTAR is entitled to its option year roll over costs during the five month extension.

CONCLUSION

SEAIR assumed the risk of non-payment by amending its CBA and agreeing to an increase in fringe benefit payments during the base year of contract 0085. Therefore, SEAIR cannot recover for its increased payments for fringe benefits during the base year of the 0085 contract. This also precludes the option year claims associated with base year "rollover." The option year claims are barred by accord and satisfaction. COSTAR is entitled to unreimbursed Transportation Annex rollover costs, relating to the first option year increase, incurred during the five month extension period. In all other respects, COSTAR's appeal is denied. The appeal is remanded to the parties for determination of quantum as to the five month extension period.

Dated: 17 August 2011



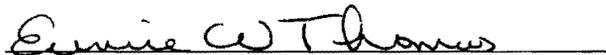
CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals



EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56479, Appeal of COSTAR III, LLC, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals