

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Cascade General, Inc.) ASBCA No. 53040
)
Under Contract No. N00024-92-H-8033)

APPEARANCE FOR THE APPELLANT: John T. Jozwick, Esq.
Paradise Valley, AZ

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
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Trial Attorney
Supervisor of Shipbuilding,
Conversion and Repair
Everett, WA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
UNDER RULES 11 AND 12.3

Cascade General, Inc. (Cascade) appeals the denial of its claim under a ship repair contract for the Government's positioning of the vessel in drydock. Cascade has elected the Rule 12.3 Accelerated Procedure. Both parties have submitted the appeal for decision under Rule 11 without oral hearing. Pursuant to our order of 14 November 2000, we decide entitlement only.

FINDINGS OF FACT

1. On 1 October 1999, the Supervisor of Shipbuilding, Conversion and Repair, USN, Everett, Washington (SUPSHIP) awarded Job Order No. 007M01 to Cascade for specified work on the USS FIFE at the Puget Sound Naval Shipyard (PSNS). The work was to begin on 13 October 1999 and be completed by 23 December 1999. (R4, tab 1 at 1, 1A, 2; ex. A-58 at 2) Most of the work was to be performed on the ship in drydock. Work Item 042-11-001 specified that docking would occur on 21 October 1999 and that undocking would occur on 2 December 1999. The Navy was responsible for positioning the keel blocks in the drydock, and for docking and undocking the vessel. (Exs. A-58, -99)
2. Prior to submission of bids, bidders' questions and the Navy's replies were provided to the bidders including Cascade. Question 0007 asked what were the "vehicle size/equipment restrictions" with respect to the hull preservation work on the ship in

drydock. The Navy answer referred to the PSNS Work Practices document which did not indicate any restrictions. (Exs. A-3, -6 -38, -97 at 3, -99 at 5; R4, tab 8)

3. The FIFE and a submarine were both moved into PSNS Dry Dock No. 5 on 21 October 1999. Drydock No. 5 was 1,000 feet long. The FIFE was 563 feet long. The submarine was 292 feet long. The FIFE was placed in a corner of the drydock with its starboard side within three feet of a ledge at the side of the drydock, and with its stern overhanging the rear ledge. This position prevented access by mobile manlift equipment on the drydock floor to 40 percent of the starboard side of the ship and the stern. As a result, Cascade and its hull coating subcontractor had to use cranes, “spider staging,” and “scissors lifts” to access those areas. (Exs. A-47, -99 at 5, -105 at 1, G-9 at 2).

4. By letter dated 3 November 1999, Cascade notified the contracting officer that the positioning of the vessel would have a substantial impact on cost and schedule and that it intended to submit a request for equitable adjustment (REA) (ex. A-47). On 16 November 1999, Cascade submitted a price proposal to the Navy ship surveyor for erection of “spider staging.” The stated reason for the proposed work was “[p]osition of keel block does not allow movement of equipment between ship and drydock wall.” (Ex. A-50) The surveyor certified that the proposed work “as described” was correct and necessary for repair of the vessel (ex. A-50).

5. On 13 January 2000, Cascade requested a price adjustment of \$204,652 for the positioning of the vessel. Of the requested amount, \$142,000 was for the increased costs claimed by its hull coating subcontractor. (Ex. A-52 at 1, 6, 8) By letter dated 22 February 2000, the contracting officer admitted that the positioning of the ship was “less than optimal from the standpoint of access for accomplishing work required by the contract.” Nevertheless, he denied the request on the ground that “no guaranty” was provided in the contract as to the exact or relative positioning of the vessel. (Ex. A-53)

6. By letter dated 22 May 2000, Cascade submitted a certified claim for \$34,252 for the “nonstandard” positioning of the FIFE in the drydock. This claim did not include the hull coating subcontractor’s costs. Cascade stated that it would separately certify and submit the subcontractor’s claim. (Ex. A-54) By final decision dated 22 September 2000, the contracting officer denied Cascade’s claim (ex. A-57). This appeal followed.

7. The coating subcontractor’s project manager states in his affidavit that he has participated in 20-25 multi-vessel drydock jobs, that the positioning of the vessels in this case was “so extraordinary as to be bizarre,” and that without moving the submarine “there was still room to move the USS FIFE another 15 [feet] from the wall, thus eliminating the entire problem we encountered on that side” (ex. A-105).

8. Of the two Navy affidavits which address the positioning issue, one is limited to the generality that “when two or more vessels are to share a drydock, accommodations

must be made from what might be considered ‘ ideal’ conditions for either one alone” (ex. G-10). The second is limited to the generality that it “should have come as no surprise that the blocks for the FIFE would have been shifted to one side of the dock” since another vessel coming into the dock “would need room to get around FIFE’s blocks to get to its own docking position” (ex. G-9).

9. The statement in the Navy affidavit that the positioning of the keel blocks for the FIFE was necessary to avoid interference with the docking of the submarine is unsupported by any details as to the width of the drydock, the beam and draft of the respective vessels, the height of the keel blocks, or the necessity of docking the submarine at the head of the dock (ex. G-9). We find the affidavit of the subcontractor’s project manager more credible, and that the positioning of the FIFE was unreasonable in light of the space available, and the work to be performed. *See* Findings 3 and 7-8.

DECISION

While the Navy made no express representations in the contract as to the position of the FIFE in the drydock, it had an implied obligation to position the vessel, if reasonably possible, in a manner that would not hinder or delay the contractor’s work. *See Essex Electro Engineers, Inc. v. Danzig*, 224 F. 3d 1283, 1291 (Fed. Cir. 2000). The positioning of the FIFE in the drydock was undertaken by the Navy after award of the contract, and in such close proximity to the corner walls as to hinder access to 40 percent of the starboard side and stern of the ship. *See* Finding 3. Positioning the ship no more than 15 additional feet from the walls would have eliminated the access problem, and the evidence does not show why this could not have been done. *See* Findings 7-9.

The appeal is sustained as to entitlement and remanded for settlement of amount.

Dated: 4 May 2001

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signature continued)

I concur

MARK N. STEMLER
Administrative Judge
Acting 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. 53040, Appeal of Cascade General, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals