

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Universal Yacht Services, Inc.) ASBCA No. 53951
)
Under Contract No. N00033-01-C-1018)

APPEARANCE FOR THE APPELLANT: Edward J. Tolchin, Esq.
Fettmann, Tolchin & Majors PC
Fairfax, VA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Charna J. Swedarsky, Esq.
Associate Counsel
Military Sealift Command
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
PURSUANT TO RULE 11

INTRODUCTION

This appeal involves the charter of a vessel for transfer services from ships afloat. The government delayed performance of services until the vessel was upgraded with additional fendering, a more powerful winch, a more secure brow turntable, larger brow wheels, and an additional fairlead chock. The contractor was losing revenue to the holdover contractor; and, in order to have its vessel accepted by the government, the contractor made the changes required by the government inspectors. The dispute over whether the upgrades were required by the contract was submitted on the record under ASBCA Rule 11. We find that the contractor is entitled to an equitable adjustment and sustain the appeal.

FINDINGS OF FACT

1. On 22 September 2000 the Military Sealift Command, Department of the Navy, issued a small business set-aside solicitation (N00033-00-R-1033) for a fixed-price time charter.¹ The charter was for one personnel transfer vessel (PTV) to provide personnel transfer and other services in and around Port Canaveral, Florida. (R4, tab 1; ex. G-2 at ¶ 1)

¹ We note, without deciding, that a time charter is a maritime contract for the exclusive use of a named vessel for a designated period of time (R4, tab 3 n.1).

2. The solicitation contained performance characteristics for the PTV. The relevant minimum performance characteristics set forth in the Statement of Work are:

SURFACE FENDERING: Fendering sufficient to prevent metal-to-metal contact with surface vessels under all conditions of pitch and roll.

SUBSURFACE FENDERING: Non-marking fendering, clean and sufficient to prevent metal-to-metal contact with sub-surface vessels under all conditions of pitch and roll. Fendering should be firmly secured to vessel along the entire length. Fendering includes propeller guards, if applicable.

BROW: One brow on the port side to allow for the safe transfer of two passengers at a time. The brow shall be a minimum of two feet in width for the entire length. Such brow shall be of sufficient length to reach the deck of a Trident Submarine. The end of the brow shall be fitted with rubber-coated rollers to prevent metal-to-metal contact between brow and submarine deck; Brow shall have a turntable or similar device to allow radial movement; each side shall have handrails and midrails. Brow shall be tested while simply supported at both ends in a horizontal position, under a static test load of 300 pounds per linear foot, held for 10 minutes without any damage or permanent distortion. Transfer to submarines other than TRIDENT class will be required. TRIDENT is only identified as the worst case brow transfer arrangement.

CAPSTANS/WINCHES: Sufficient for services performed under this contract.

LINES: Sufficient for services performed under this contract.

(R4, tab 1 including amendment 3 at ¶¶ 2, 4) There were requirements in addition to those for personnel transfer services; however, none is relevant to the issues in this case.

3. The government clarified the performance characteristics in a series of Q & A's issued as amendments to the solicitation, including the following:

Question: Is there any technical guidance available on sub-surface fendering?

Answer: There is no specific guidance for sub-surface fendering of a PTV. However, the MILSTD for tug fendering is provided on MSC's Website. It can serve as an example, for guidance only, of a successful sub-surface fendering system.

(R4, tab 1 at amendment 2)

Question 1. How will the government determine the suitability of the sub-surface fendering and conclude that it is suitable to prevent metal to metal contact?

Answer 1. The Government will determine suitability based on diagrams, information supplied by the contractor, and if necessary the government reserves the right to inspect the individual vessels.

Question 4. Is metal to metal contact to be precluded under all conditions of pitch and roll?

Answer 4. The surface and sub-surface configuration of the vessel shall be such that there is no metal-to-metal contact between surface and sub-surface vessels under all conditions of pitch and roll.

(R4, tab 1 at amendment 3)

Question 1. Is it the intent of this solicitation to utilize the PTV as a tugboat vessel with all capabilities and requirements that a tugboat would require?

.....
Answer 1. No.

Question 3. Is the PTV required to handle/transfer baggage and equipment?

Answer 3. No.

....

Question 7. Must the boom have a powered winch for raising and lowering of the brow?

Answer 7. Neither a boom nor a power winch is required under this RFP, but the brow arrangement shall be such that there is negligible lateral movement of the brow once it is in position and personnel transfer has commenced. If a boom or power winch is necessary to facilitate this, then it is required.

Question 8. What are the weather limitations for conducting personnel transfers?

Answer 8. Weather limitations for conducting personnel transfers are dependent upon the PTV Master's judgment, with input from the Submarine Master and other authorized Navy personnel in charge of the transfer. Both the vessel and Master should be capable of providing such services in wind and sea state conditions normal to the area.

(R4, tab 1 at amendment 4)

4. Award was made to the then current contractor, Petchem. On 10 January 2001 Universal Yacht Services, Inc. filed a protest with the General Accounting Office (GAO). Its protest was granted on 4 April 2001. The GAO recommended that discussions be reopened. (R4, tabs 2, 3; B-287071, B-287071.2; 2001 CPD ¶ 74) Discussions were reopened (R4, tab 1 at amendments 7, 8, 9). Award was then made to Universal Yacht Services, Inc. That award was protested by Petchem on 15 June 2001. (R4, tab 4 at 1)

5. In the meantime, due to the protest of the award to Universal Yacht Services, Inc., the Military Sealift Command had extended services under its existing contract with Petchem; and, on 6 July 2001, had reissued the solicitation as N00033-01-R-1018 in order to provide interim vessel services until final award could be made under N00033-00-R-1033. Both solicitations contained identical terms, except that the period of performance was shorter under N00033-01-R-1018. (R4, tabs 6, 7)

6. In response to RFP 1018, Universal submitted the same technical proposal and vessel it submitted under RFP 1033 (R4, tabs 5, 6, 17, 18; ex. G-4 at ¶ 3). Universal offered the vessel Ocean Express (R4, tabs 17 to 19, 25, 27, 34). It was not configured to meet the requirements of the solicitations at the time it was offered (R4, tab 5 at 3-5, 15, 17, 18; ex. G-1 at ¶ 4). Universal's proposal contained drawings detailing how the Ocean Express would be configured to meet the requirements of the RFP (R4, tab 18; ex. G-4 at ¶ 2, attach. 4, 5, ex. A-3). The government concluded that the Ocean Express could be configured to meet those requirements (R4, tab 5 at 3-5, tab 18; ex. G-1 at ¶ 4, ex. G-4 at ¶ 2).

7. On 30 July 2001, Universal was awarded interim Contract 1018 on the basis that the Ocean Express would be outfitted and configured to comply with the specifications prior to delivery and acceptance of the vessel (R4, tab 17 at 1, tabs 18, 21 at 9-10, 12; *see also* R4, tab 5 at 3-4). Prior to acceptance the vessel was subject to the government's inspection as to its suitability for the required service (R4, tab 1 at 14, tab 8 at 9).

8. As part of its protest under RFP 1033, Petchem alleged that, even if the Universal Yacht Services' vessel was outfitted as proposed, the vessel would still "ride the hull" and have "metal to metal contact" (R4, tab 4 at 5-6). The GAO concluded that the contracting officer had evaluated the proposals by Petchem and by Universal Yacht Services as technically equal. According to the GAO, "the contracting officer did not consider the decreased technical risk associated with Petchem's already-installed fendering and brow to be a significant advantage because Universal Yacht Services submitted a detailed plan for the installation of these items on its proposed vessel." (R4, tab 5 at 4) The GAO found that the Universal Yacht Services' proposal met the requirements of the solicitation. The protest by Petchem was denied by the GAO on 1 August 2001 (R4, tabs 4, 5; B-287071.3).

9. The contracting officer appointed Mr. Mark Delventhal, the MSC Naval Fleet Auxiliary Force Program Officer since September 1999, as head of the technical evaluation team for RFP 1033 and RFP 1018 (ex. G-3 at ¶ 3). Mr. Delventhal holds a BS degree in Marine Engineering from the United States Merchant Marine Academy (1985). He also holds a U.S. Coast Guard 3rd Assistant Engineer's license.

10. After obtaining his BS degree in Marine Engineering in 1985, he worked until 1990 as a Shipyard Construction Representative, where he obtained experience inspecting the construction and repair of vessels for compliance with government requirements. From 1990 to 1996 Mr. Delventhal was responsible for shipboard maintenance programs. From 1996 to 1999 Mr. Delventhal was responsible for design approval and inspection of modifications for Navy stores ships, as well as life cycle maintenance. In his current position, Mr. Delventhal is responsible for vessel design, construction, modification and maintenance to meet Navy requirements, including harbor tugs and boats. There is no evidence that Mr. Delventhal's general experience was relevant to the specific issues in this appeal. (Ex. G-1 at ¶¶ 2, 3, ex. G-3 at ¶ 3)

11. Chief Warrant Officer, Second Class, Alvin C. Hughes, Jr., USN, Port Services Officer, Naval Ordnance Test Unit (NOTU), Port Canaveral, Florida (March 1999 to May 2002), was the contracting officer's representative for contract 1018. In his position as Port Services Officer, he was responsible for all pier side services, wharf maintenance, contractor support and the safe mooring and undocking of all incoming naval vessels.

12. As Port Services Officer, he was responsible for the requirements and contract for tug and (PTV) services at NOTU in support of the Submarine Forces Atlantic Fleet. As part of his responsibility he participated in vessel inspections and testing, and verified expenditures and availability of funds relating to the PTV requirement. There is no evidence as to how his general experience relates to the specific issues in this appeal. (Ex. G-2 at ¶¶ 1, 2, ex. G-3 at ¶ 3)

13. The appellant's president is Mr. Jess Cooley. He is the owner of the Ocean Express. He graduated with honors from Chapman University, Orange, CA, and, completed his Masters Degree as a Distinguished Graduate at Webster University, St. Louis, MO. He holds a U.S. Coast Guard 100 Ton Masters License. He served as an enlisted man in the U.S. Navy for twelve years, attaining the rank of Master Chief Boatswain's Mate (E-9) and was designated as an Enlisted Surface Warfare Specialist and a Deep Sea Diver. He was commissioned as a Limited Duty Officer (Submarine Deck) in 1987 and retired from the Navy as a Lieutenant Commander in 1998.

14. While serving as a commissioned officer, Mr. Cooley qualified as a Submarine Warfare Officer, Surface Warfare Officer, and Saturation Diving Officer. His experience at sea included service on six surface ships and one submarine. Related specifically to the personnel transfer vehicle, while on active duty, he had oversight on an earlier PTV contract at Port Canaveral (1994-1997). He subsequently was the Operations Director at Naval Submarine Base, Kings Bay, GA (1997-1998), with the responsibility for staffing, maintaining, and deploying a 65-foot vessel employed as a Submarine PTV.

15. On 2 and 13 August 2001, the government conducted post-award/predelivery inspections and fit tests of the Ocean Express (R4, tabs 22, 23; exs. G-1, -2). The government inspectors thought that the vessel was unacceptable and in need of further upgrading in several respects – (1) subsurface fendering, (2) brow wheels, (3) mounting design for the brow turntable, (4) motorized brow handling winch, and (5) an additional fairlead chock (R4, tabs 22, 23, 45; ex. G-1 at ¶ 9, ex. G-2 at ¶¶ 4, 5, ex. G-3 at ¶ 4, ex. G-4). The contracting officer agreed fully with the inspectors (ex. G-3).

Subsurface Fendering

16. The configuration of the Ocean Express included a "winged chine" or splash rail – a triangular finlike projection installed on both the port and starboard side of the vessel below

the surface and running from stern to bow, where it extended above the surface of the water (Ex. G-1 at ¶ 5, attach. 1-3; ex. G-2 at ¶ 3, attach. 1 at 2-8).

17. During the post-award delivery inspection on 13 August 2001, Mr. Delventhal and CWO2 Hughes observed that the fendering of the splash rail stopped above the waterline, although the splash rail was fendered below the waterline (ex. G-1 at ¶¶ 7, 9, attach. 1-3, ex. G-2 at ¶¶ 4, 5, attach. 1 at 2, 3, 6, 7). The government concluded that fendering of the splash rail along the entire length of the vessel was required by the contract, in order to prevent metal-to-metal contact with subsurface vessels. (R4, tabs 21 at 4-5; ex. G-3)

18. Mr. Delventhal opined that, because the fendering did not cover the splash rail in the bow area of the vessel, “it was likely that at some time the bow, and, therefore, the metal rail, could contact a submarine and potentially damage the hull tiles.” He further stated that “[t]he representatives of UYS at the inspection did not disagree with this finding, and did not provide any evidence or engineering analysis to refute the finding [*i.e.*, Mr. Delventhal’s opinion] at the time of this inspection.” Mr. Delventhal provided an affidavit that he had expressed such an opinion at that time. (Ex. G-1 at ¶ 7) He stated in relevant part:

7. On August 13, 2001, I participated in a post-award/pre-delivery inspection I again observed that the fendering installed by UYS . . . did not cover the metal rail in the bow area During this inspection, a fit test with a submarine was conducted in the water at pier side. . . . In a static environment, the OCEAN EXPRESS could be in a perfectly parallel position without the rail contacting a submarine. However, the Contract required UYS to perform open ocean transfers with dynamic sea states, in all conditions of pitch and roll. Under such conditions, I stated that it was likely that at some time the bow, and, therefore, the metal rail, could contact a submarine and potentially damage the hull tiles. The representatives of UYS at the inspection did not disagree with this finding, and did not provide any evidence or engineering analysis to refute the finding at the time of this inspection.

(Ex. G-1, ¶ 7)

19. CWO2 Hughes noted during the 13 August 2001 inspection that the splash rail was not fendered in the bow area. He opined that “during any kind of vessel approach or breakaway angle in an open ocean transfer, this metal ridge could cause metal to metal or metal to hull contact between the Ocean Express and a submarine, particularly during rough seas.” CWO2 Hughes informed Universal that without the additional fendering of the splash rail above the surface, the vessel was not acceptable. (Ex. G-2 at 4)

20. Mr. Cooley did not refute Mr. Delventhal's opinion concerning the need for additional splash rail fendering because, while on the scene, Mr. Delventhal authorized the installation and described the process for submitting a claim for the installation of the additional fendering (ex. A-1, ¶ 6).

21. There is no evidence in the record from Mr. Delventhal, CWO2 Hughes, or anyone else that describes or explains how or why the vessel as originally submitted would not have prevented metal-to-metal contact. There are no drawings, sketches, or technical analyses that would explain or show how the absence of fendering of the splash rail above the waterline would result in metal-to-metal contact.

22. In response to Mr. Delventhal's and CWO2 Hughes' objections to the absence of fendering the full length of the vessel, Universal installed additional fendering on the port side of the Ocean Express to provide fendering the full length of the vessel (R4, tabs 32, 41). Mr. Cooley, president of Universal, acquiesced in the additional fendering because Mr. Delventhal "authorized the installation and described the process of how to submit a claim" for the costs of installing the additional fendering. (Cooley affidavit, ex. A-1 at ¶ 6)

23. In his final decision, the contracting officer concluded that because "the vessel did not have fendering along the *entire length of the vessel*, the vessel did not meet this performance requirement." (R4, tab 47 at ¶ 1) (Emphasis added)

Brow Wheels

24. During the inspection and fit tests of the Ocean Express, CWO2 Hughes thought that the walkway design of the brow created a steep angle between the vessel and an LA class submarine, making passage up and down the brow more difficult (R4, tab 45 at 4; ex. G-2 at ¶¶ 4, 5; *see also*, ex. G-2 at attach. 8). CWO2 Hughes opined that the metal edge of the brow practically scraped the deck of the submarine, because the brow wheels were too small and set back behind the front edge of the brow. (R4, tab 45 at 4; ex. G-2 at ¶ 5, attach. 6-7) The metal edge of the brow did not in fact scrape or touch the deck of the submarine. Notwithstanding that fact, CWO2 Hughes would not recommend acceptance of the vessel unless a change was made. Because of those objections, Mr. Cooley agreed to install larger wheels. Those wheels satisfied the objections of CWO2 Hughes. (Ex. G-2 at ¶ 5; R4, tab 41)

Mounting Design for the Brow Turntable

25. During the inspection and fit tests, CWO2 Hughes observed that the brow was secured only by "an extremely short, three-inch round hollow pipe welded only to the roof." It was his opinion that "[t]his mounting design appeared inadequate to withstand the safe transfer of two passengers at a time, in all sea states, particularly given the size, weight and steep angle of the brow from the Ocean Express cabin roof to the deck of a submarine." (Ex. G-2 at ¶ 4, attach. 3-5) In fact, the brow angle on the Ocean Express was virtually identical to the brow

angle on the Petchem vessel (ex. A-1 at ¶ 5, attach. 2). The contract merely required that the brow have a turntable that allowed radial movement and that would allow the safe transfer of two persons at a time. (R4, tabs 23, 45 at 3, tab 47; ex. G-1 at ¶ 6, attach. 4, ex. G-2 at ¶ 4, attach. 3-5)

26. The government has not explained why this mounting was inadequate to ensure that the turntable, and hence the brow, would remain in place for the safe transfer of passengers during all conditions of pitch and roll. CWO2 Hughes opined that, because of this mounting mechanism for the turntable, the brow did not meet the contract requirements; and, he said that the vessel could not be accepted until corrected. Neither Mr. Delventhal nor CWO2 Hughes provided any drawings, sketches, or technical analysis that would explain or show in what manner the turntable was unsafe or insecure. In response to that objection, Universal lengthened the turntable shaft to extend the fitting for the turntable. The government found this acceptable. (R4, tabs 26, 41)

Motorized Brow Handling Winch

27. The winch for raising and lowering the brow was a 2,500-pound winch with a cable size of 3/16 of an inch (R4, tab 23 at 2, tabs 41, 43). The contract did not specify a particular size for the winch, nor did it require that the winch be motorized. The Q & A's made it clear that "Neither a boom nor a power winch is required under this RFP, but the brow arrangement shall be such that there is negligible lateral movement of the brow once it is in position and personnel transfer has commenced." (R4, tab 1 at amendment 4)

28. CWO2 Hughes opined that the winch "did not appear to be sufficient to operate in all sea states." Therefore, he advised Universal that he could not recommend acceptance of the vessel. (Ex. G-2 at 4) Neither Mr. Delventhal nor CWO2 Hughes provided any drawings, sketches, or technical analysis that would explain or show that the original winch was insufficient to fulfill the task of lowering, raising, or maintaining the brow in position; or, would explain or show that the winch allowed lateral movement of the brow. On 9 August 2001 Universal notified the contracting officer that it had added a larger handling winch to the Ocean Express. The government found this acceptable. (R4, tabs 26, 29)

Additional Chock

29. Universal's technical offer did not indicate the location of the chock used to run a line to keep the PTV properly placed alongside a submarine. (A chock is a heavy wooden or metal fitting secured on a deck or on a dock, having jaws through which line or cable passes, and for which it serves as a fair lead. Rene deKerchove, *International Maritime Dictionary* (2d ed. 1948).) (R4, tab 18; ex. G-4 at ¶ 7) During the inspection and fit test, the forward chock was used for this purpose (R4, tab 45 at 3). The government inspectors thought this arrangement placed the line too far forward to maintain the PTV vessel and brow in a stable, safe position during a transfer (ex. G-1 at ¶ 8, ex. G-2 at ¶ 5, *see also*, ex. G-2 at attach. 8).

30. Mr. Delventhal thought that the chock should be located so that the line is perpendicular to, or forward on the submarine, not the PTV, in order to stabilize the PTV vessel and keep the brow on the submarine (ex. G-1 at ¶ 8). The government did not explain why the chock as originally installed would not sufficiently secure the vessel. Nevertheless, CWO2 Hughes would not recommend approval of the vessel without a chock located further aft on the Ocean Express. (R4, tab 45 at 3; ex. G-2 at ¶ 5, *see also*, ex. G-2 at attach. 8)

31. The contract did not specify the placement of tending lines. Neither Mr. Delventhal nor CWO2 Hughes provided any drawings, sketches, or technical analysis that would explain or show how the absence of the additional chock caused the vessel to be unstabilized in relationship to the submarine. In order to obtain approval of its vessel, Universal installed an additional chock further aft on the vessel. (R4, tabs 41, 43)

Additional Facts

32. The contracting officer relied on the evaluations of Mr. Delventhal and CWO2 Hughes regarding the technical acceptability of the UYS vessel. Mr. Broennimann, the contracting officer, concluded that the “recommended additional fendering, improved brow installation and configuration, including larger winch and wheels, and relocation of the tending line was necessary to meet the Contract’s requirements.” (Ex. G-3, ¶ 4)

33. The appellant, Mr. Cooley, faxed a letter to the contracting officer on 16 August 2001 concerning the changes required by the government. That letter reads in relevant part:

Additionally, I am writing to document the additional costs I have incurred, and expect to incur, based on requirements generated by NOYU, MSC, and the USCG.

The following challenges and changes have significantly impacted our delivery schedule and concurrently resulted in a drastic increase in our programmed start up costs.

. . . .

Brow Handling Winch

The NOTU and COR raised an objection to the winch we had installed for handling the brow and stated plainly that it would not be acceptable. In response to this we removed the winch, ordered a winch with a larger capacity and paid to have it installed. The increased cost of the winch was approximately \$900.00 and the additional cost of installation was approximately \$300.00.

Brow Platform Pedestal Pin & Socket Assembly

NOTU raised a further objection to the Brow Platform Pedestal Pin & Socket Assembly, claiming that it was a potentially unsafe installation. We have completely changed this based on their concerns at a cost of approximately \$200 for materials and approximately \$600 for machining and welding the new assembly.

Fendering

Both MSC and NOTU representatives raised concerns over the fendering above the waterline on the port bow during the fit check. Personnel representing NOTU and MSC previously had the opportunity to inspect the fendering while the vessel was out of the water in the shipyard. The current fendering was installed per the drawings submitted. The additional fendering has been ordered and should be delivered today. The approximate cost of the materials will be somewhere between \$500-\$800 plus the labor effort.

....

I understand that the Navy is currently without a PTV capability until we are "On Hire". However, I feel that it is important to note that some of the delays I have encountered were based on the Navy's requests for changes.

(R4, tab 29)

34. On 20 August 2001, Universal issued a Notice of Readiness to perform under the contract to the contracting officer (R4, tab 31). The next day the government conducted a final inspection and sea trial of the Ocean Express (ex. G-2 at ¶ 6, attach. 8). On 22 August 2001, after confirmation from CWO2 Hughes that the Ocean Express was configured to meet contract requirements, the government accepted the vessel for delivery (R4, tab 35; ex. G-1 at ¶ 10, ex. G-2 at ¶ 6). Thereafter, the government modified the contract to reflect a period of performance between 21 August 2001 and 30 September 2001 (R4, tabs 37, 38).

35. On 24 September 2001, the appellant faxed a letter to the contracting officer in which he expressed concern about a misunderstanding by CWO2 Hughes of what caused a vessel to ride up on a submarine. Mr. Cooley also stated:

To briefly summarize our first Trident operation with this vessel, we had an uneventful approach, came alongside smoothly, the brow was deployed at ninety degrees and the position was exactly as predicted, right on centerline near the safety track. Interestingly, the former crewmembers of the Christine S observed that our brow platform is actually lower than the one on the Christine S. . . .

While alongside we experimented with various engine, rudder and speed combinations to achieve the best performance and stability. The submarine was reasonably stable but did manifest a slow steady roll consistent with the direction of wind and sea. Intermittently, the submarine would roll towards us and the propeller guard would make contact, as designed. When this happened we would feel the slight shudder as you might expect when a boat landed alongside a pier, etc. Observing this and seeing the curvature of the submarine hull beneath our vessel, the NOTU COR mistakenly commented, “the boat is riding up the submarine hull and I have to report this”, or words to that effect. Plainly, this demonstrates that there is not a clear understanding of the design, function of the fendering, propeller guard and general dimensional relationship between a surface vessel with a draft less than that of the submarine.

(R4, tab 40)

36. On 24 September 2001 the appellant faxed a certified claim to the contracting officer for the configuration changes made at the request of the government. The claim sought recovery for additional fendering, an upgraded brow winch; the brow platform and turntable attachment systems; and larger brow wheels and an additional chock. (R4, tab 41)

37. On 26 September 2001 the appellant complained to the contracting officer that CWO2 Hughes had called the USGC to report that the vessel was “riding up the hull” of the submarine. The appellant had addressed this issue two days earlier. The appellant felt that, since that was not a matter within the purview of the USGC, the notice to the USGC was apparently only meant to suggest that the vessel was operating in an unsafe condition. Mr. Cooley asked, rhetorically, “If the conditions were unsafe, why did he [CWO2 Hughes] allow the transfer of personnel to continue?” (R4, tab 42)

38. On 23 October 2001, the appellant faxed supplemental information concerning the basis for the claim to the contracting officer. By a “FAXLETTER” dated 10 June 2002, but not faxed until 2 July 2002, the contracting officer issued a final decision denying Universal’s claim. (R4, tabs 43, 47, 48)

39. The appellant offered the views of Mr. Eric Roehl, an engineer from Structural Composites, Inc., of Melbourne, FL. While Mr. Roehl's specific qualifications are not set forth in the record, he is represented as an engineer, and he does provide some rationale for his opinions. For example, he discusses the issue of pitch and roll in various sea states.

Also note that the height of a surfaced Trident submarine above the water is 6 feet (less for other classes of submarines). At a sea state of 3, even with the random waves of greater than 6 feet in height, the waves would have minimal impact on the deck of the submarine. However, in the wave conditions required to achieve a 30 degree roll of the [Ocean Express] or other similar vessel (assumed to be sea state 5 or greater) would result in the deck of the submarine being awash from the waves as well as the increased probability the submarine would begin to be affected by sea conditions. Such a condition is not suitable for personnel transfer due to the potential of personnel being washed overboard by waves of a random sea and the interaction of the submarine and any 80'-90' vessel.

....

We also bring your attention to Figure 8 of MIL-STD-2040 (SH) dated 3 March 1992. . . . This theory is reinforced by the statements of PTV crewmembers I reviewed. Based on these statements, it appears that the transfer vessel would rarely encounter any conditions of roll in excess of 5-10 degrees, particularly while transfer operations were underway. A roll of 20 degrees would certainly cause the gangway, or brow to become displaced on any vessel and, if the conditions persisted, the transfer operation would be aborted. Should weather conditions resulting in a dynamic rolling condition of such magnitude occur, it would not be wise to even attempt a personnel transfer for safety reasons.

(Ex. A-3 at 2) Mr. Roehl goes on to discuss other issues related to the compliance of the Ocean Express with the contract specifications. He states in part:

The only major difference [between the Ocean Express and the Petchem craft] is the hull construction material [aluminum versus steel]. . . .

With regard to the statement by Mr. Kawasaki “Moreover, in speeds of 5-6 knots, the hull of the [Ocean Express] would physically come out of the water. . .”, I assume that this is referring to the hydrodynamic lift created by the hull shape. . . . Furthermore, using Section 1/1.5.1 of the 1997 ABS Guide for Building and Classing High Speed Craft, a speed of 6 knots on a vessel 80 feet in length [Ocean Express is 90’ and the Petchem craft is 96’] (approximate ABS rule length of the [Ocean Express]) is not considered to be planning [sic]. In order for the [Ocean Express] to be considered a High Speed Craft (a portion of the weight of the craft is supported by hydrodynamic forces) the speed would have to be at least 11.6 knots. According to ABS, the [Ocean Express] will be in a displacement mode (minimal dynamic affects) until it reached a speed of 11.6 knots. At this speed the dynamic affects become predominate over hydrostatic forces on the hull and the vessel will experience the lifting as described by Mr. Kawasaki.

It is our conclusion that the analysis submitted by Petche[m] is flawed. The facts are that that fendering design for the [Ocean Express] will prevent metal to metal contact. Furthermore, that [Ocean Express] can adequately and safely operate in the conditions outlined in the solicitation.

(Ex. A-3 at 6)

40. On 26 September 2002 Universal filed with the Board its Notice of Appeal in this case (R4, tab 49).

DECISION

This dispute arose from the government’s initial rejection of the Ocean Express for noncompliance with the specifications and from the changes made to the vessel by Universal in order to gain the government’s acceptance of the vessel. The appellant wants to be reimbursed for its costs of re-configuring the vessel. The government contends that it was entitled to have the vessel configured to its satisfaction. The government maintains that the changes the appellant made were necessary in order for the vessel to comply with the minimum requirements of the specifications.

The government rightly chose to be cautious in its assessment of whether the Ocean Express would in fact avoid metal-to-metal contact in all conditions of pitch and roll in the sea states normal to the area and operation of the vessel; and, in exercising its right to reject the vessel for noncompliance with contract requirements.

However, it is axiomatic that the party asserting a right has the burden of proof. *Total Maintenance, Inc.*, ASBCA No. 30450, 88-1 BCA ¶ 20,393 at 103,153. In order for the vessel to be rejected, there must be proof that the vessel is in fact nonconforming. We have held in a long line of cases that, as the proponent of the proposition, the government has the burden of proof to establish that the vessel is nonconforming. *Southwest Welding & Mfg. Co. v. United States*, 413 F.2d 1167, 1176 n.7 (Ct. Cl. 1969); *Propellex Corp.*, ASBCA No. 50203, 02-1 BCA ¶ 31,721 at 156,729, *aff'd* 342 F.3d 1335 (Fed. Cir. 2003); *Couch Construction, L.P.*, ASBCA No. 51495, 01-1 BCA ¶ 31,265 at 154,446; *Tempo, Inc.*, ASBCA Nos. 37589 *et al.*, 95-2 BCA ¶ 27,618 at 137,661, *aff'd* 108 F.3d 1391 (Fed. Cir. 1997) (table), *cert. denied* 522 U.S. 993 (1997); *Gaffny Corp.*, ASBCA Nos. 37639 *et al.*, 94-1 BCA ¶ 26,522 at 132,007; *George Bernadot Co.*, ASBCA No. 42943, 94-3 BCA ¶ 27,242 at 135,743; *Pams Products, Inc.*, ASBCA No. 15847, 72-1 BCA ¶ 9401 at 43,651 (the Board found that the samples tested were not representative, and that the manner of “eye balling” the surface to determine areas of even distribution was of doubtful validity); *Hardeman-Monier-Hutcherson*, ASBCA No. 11785, 67-1 BCA ¶ 6210 at 28,748-49.

We turn first to an examination of the sea conditions in which the vessel was to operate. The contracting officer contends that Ocean Express was expected to operate in weather conditions that “are not limited to moderate sea states.” (Ex. G-4 at ¶ 4) The appellant contends that the government is imposing the conditions of the “Perfect Storm.” It is not clear what sea state level the contracting officer has in mind. But we look to the language of the contract. The only language in the specifications is that the “surface fendering” and the “subsurface fendering” must be sufficient to prevent metal-to-metal contact under “all conditions of pitch and roll.” In the absence of any evidence to the contrary, we read “all conditions of pitch and roll” to refer to all conditions of pitch and roll in the sea states in which the vessel would be expected to operate.

However, there is no specification that specifically defines the weather conditions in which the vessel would operate. There was a Q & A that addressed the issue of the weather conditions. The answer was that the weather limitations would be determined by the PTV Master’s judgment, with input from the Submarine Master and other authorized Navy personnel in charge of the transfer. The only other clarification was that both the vessel and the Master should be capable of providing services in wind and sea state conditions normal to the area in and around Port Canaveral, Florida. Because the safety of the personnel being transferred was of particular concern, we conclude that the vessel would not operate in sea states that would pose a danger to the personnel transferring to or from the submarine.

The only evidence on this safety issue is contained in the views of Mr. Eric Roehl, the engineer from Structural Composites, Inc. It was his opinion that it was unlikely that the vessel would provide personnel transfer services in conditions of roll in excess of 5-10 degrees, because more severe weather conditions would not be safe for personnel transfer. He also discussed rolls of 30 and 20 degrees. He suggested that it would take a sea state of at

least 5 in order to have a roll of 30 degrees. He also opined that such a sea state is not suitable for personnel transfer because the waves in such a sea state would “result in the deck of the submarine being awash from the waves” and had the “potential of personnel being washed overboard by waves of a random sea” in such a sea state.

The government has not provided any contrary evidence of the normal weather conditions or sea states in which personnel transfer services would be provided. We turn then to determine whether the government has established that the vessel did not conform to the specifications for service in sea states normal to the area in which personnel transfer services would be provided.

In five specific areas the government rejected the initial configuration of the vessel. The government required Universal to make changes to each of those five vessel configurations. In each instance the government has contended that those changes were required in order to conform the vessel to the requirements of the contract, and that without those changes the vessel would have been noncompliant and not accepted for service. (Gov’t brief at 17) We examine each of those five areas to determine whether the government has established that the vessel did not meet the specification requirement with respect thereto.

Subsurface Fendering

The government argues that the subsurface fendering specification “clearly requires that Universal fender the Ocean Express along its entire length and install the fendering in such a manner that it will prevent metal-to-metal contact and metal-to-hull contact with the Navy’s vessel in all sea state conditions.” (Gov’t brief at 18)

The subsurface fendering specification contains three parts. The first part, although not a grammatical sentence, provides a performance type fendering requirement. That requirement is for the installation of a non-marking fendering that is clean, and that is sufficient to prevent metal-to-metal contact with subsurface vessels under all conditions of pitch and roll. Having described the performance requirement for the fendering, the second part of the specification describes how the fendering shall be attached to the vessel. It requires that the entire length of the subsurface fendering be firmly secured to the vessel. Finally, the specification declares that propeller guards must also be fendered.

Now, the government argues that the provision describing how the fendering is to be secured also requires that there be enough fendering to attach the fendering “along the entire length of the vessel.” But the quoted words do not appear in the contract. Moreover, they are inconsistent with the performance provisions of the specification, which only provides for sufficient fendering to prevent metal-to-metal contact with subsurface vessels. Further, this requirement only applies to subsurface fendering. The government’s interpretation of “along the entire length of the vessel” is not supported by the language of the clause.

The specification does, however, require that the fendering perform in such a manner that metal-to-metal contact with subsurface vessels is prevented. The government asserts that the splash rail would come in contact with the hull of a submarine during any kind of vessel approach.

There is no evidence that there was in fact any metal-to-metal contact. Instead the government offers the opinions of its two inspectors that there would have been metal-to-metal contact under at least some conditions of pitch and roll. Because the parties agreed to submit this appeal on the record pursuant to Rule 11, the testimony of the witnesses was submitted in the form of affidavits, was not subject to cross examination, and not objected to on grounds of admissibility.

No effort was made to formally qualify any of the witnesses as experts in the subject matter of their testimony. Nevertheless, except where the witnesses were stating their factual observations, we treat the statements in their affidavits as expert opinion evidence. The Supreme Court has held that reliability is the touchstone for the admissibility of expert testimony concerning scientific knowledge. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). This reliability requirement also applies to the admissibility of technical and other specialized knowledge. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). These criteria are reflected in FED. R. EVID. 702 (Dec. 1, 2000):

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

However, our rules are more flexible than the Federal Rules when it comes to the admissibility of evidence. ASBCA Rules 11 and 20. Nevertheless, expert opinion must be credible; and, to be credible, expert opinion must be reliable. In order for expert opinion to be reliable, it must meet the same standards set forth for the admissibility of expert testimony. *Libas, Ltd. v. United States*, 193 F.3d 1361, 1366 (1999).

Both of these affidavits (see findings 18, 19) provide merely conclusory opinions on the fact we are called upon to decide; which is, that the subsurface fendering initially installed on the vessel would not prevent metal-to-metal and metal-to-hull contact with sub-surface vessels under all conditions of pitch and roll. Neither affiant observed any interaction between the vessel and a subsurface vessel that would give rise to their opinion that the initial fendering would not prevent metal-to-metal contact. Neither affiant took any measurements or made any calculations that would give rise to their opinion that the initial fendering would not prevent

metal-to-metal contact. Neither affiant related the position of the initial fendering to their past experiences that would give rise to their opinion that the initial fendering would not prevent metal-to-metal contact.

We have only the witness's opinion that metal-to-metal contact would occur. If we are to accept such opinions, it must be because such opinions are expert opinions entitled to weight. Expert opinion evidence is not entitled to weight when "there is simply too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). Likewise, expert opinion is not entitled to weight when the expert opinion is connected to the existing facts "only by the *ipse dixit* of the expert." *Kumho Tire*, 526 U.S. at 157.

There is nothing in the record to explain the basis for the opinions of Mr. Delventhal and CWO2 Hughes. Neither inspector gave sound reasons for his opinion. We have only their *ipse dixit* that the initial configuration of the Ocean Express would not prevent metal-to-metal contact. Such testimony is not credible. *Libas, Ltd. v. United States*, 193 F.3d 1361, 1365 (Fed. Cir. 1999); *Propellex Corporation*, ASBCA No 50203, 02-1 BCA ¶ 31,721 at 156,726, *aff'd on other grounds*, 342 F.3d 1335 (Fed. Cir. 2003); *Mega Construction, Inc.*, ASBCA No. 32127, 88-1 BCA ¶ 20,427 at 103,319.

We must therefore conclude that the government has simply failed to offer any credible evidence to support the assertion that the subsurface fendering would not have prevented metal-to-metal and metal-to-hull contact.

The Brow Winch

The government asserts that CWO2 Hughes "believed" that the original winch was "inadequate to sustain safe operation over time in a marine environment, and in rough sea conditions." The government argues that "[t]he nature of this specification is subjective." (Gov't brief at 22) We understand the government to assert that the appellant could never know whether or not it had complied with the specification until the government made a determination, since the determination was a subjective one made only by the government. This makes the subjective standard urged by the government nothing more than the whim of the government inspector. The subjective standard applied by an individual inspector is not an acceptable standard. Contract interpretation is based upon the objective standard of a reasonable person. (Compare the application of subjective judgment exercised by test pilots in *Reflectone, Inc.*, ASBCA No. 42363, 98-2 BCA ¶ 29,869 at 147,810-11, 147,838).

Unfortunately, the affiants have given us only their *ipse dixit* opinions. As we discussed above, those opinions are not credible. We must therefore conclude that the government has simply failed to offer any credible evidence to support the assertion that the initial winch was inadequate to sustain safe operation.

Turn Table

The subjective standard applied by the government was that the winch had to be “sufficient to perform transfer services under the Contract . . . operating under all conditions.” (Gov’t brief at 22-23) The government asserts that CWO2 Hughes “reasonably determined that the risk of injury being caused by the failure of this turntable pin to remain inserted in the cabin roof and hold the brow in place made the brow inadequate to safely transfer two passengers at a time, thus failing to comply with Contract specifications and warranties.” (Gov’t brief at 24)

It may well be that the specifications were inadequate to protect against the risk of injury to passengers. But the risk itself did not establish that there was a violation of the specification. In order to establish that there was a violation of the specification, it is necessary to identify the specification and the nature of the failure to comply with the specification.

Essentially, the government argues that the specification provides that the government inspector is the sole judge of whether the vessel meets the contract specifications; and, that whenever the government inspector believes that the vessel might not meet the performance specifications, that the contractor must make modifications to the vessel.

As we said above, the subjective standard applied by an individual inspector is not an acceptable standard. Contract interpretation is based upon the objective standard of a reasonable person. The affiants have given us only their *ipse dixit* opinions. We must therefore conclude that the government has simply failed to offer any credible evidence to support the assertion that the turntable posed a safety risk contrary to the specifications.

Brow Wheels

The government argues that “[s]ince the wheels installed on the end of the brow had the *strong potential* to cause metal-to-metal contact with the deck of a submarine, this feature was not in compliance with the brow specification.” (Emphasis added) The difficulty with the government’s position is simply that the specification did not provide that the wheels had to prevent the *potential* of metal-to-metal contact. The specification provided that the wheels only had to prevent actual contact. Since the original configuration prevented actual metal-to-metal contact, additional wheels were not required by the specifications. If the government wanted a minimum of 2 or 3 inches of clearance, it merely had to specify that in the specifications.

Chock

The government asserts that the appellant was required to provide a vessel which had tending lines sufficient for performance of the contract; and, that an additional chock was necessary to provide a tending line to safely secure the vessel to the submarine.

The affiants have given us only their *ipse dixit* opinions. We must therefore conclude that the government has simply failed to offer any credible evidence to support the assertion that the initial chocks were insufficient to provide a tending line to secure the vessel to the submarine.

Further Comment

I want to clearly disassociate myself from the concurring opinion to the extent it expresses the view that the inspector's conclusory opinions make a *prima facie* case that the Ocean Express did not meet the contract requirements; or, that those conclusory opinions are entitled to any evidentiary weight.

The sole evidence for each alleged deficiency is an *ipse dixit* opinion of one or both of the inspectors. Those opinions are not supported by any explanation that would provide a basis for weighing the validity or credibility of the conclusion. Those opinions might be right or wrong; but, without more than the *ipse dixit* conclusion, they are conclusory opinions or assertions that, as taught by the cases cited *supra*, are entitled to no weight, and thus do not constitute sufficient evidence to make a *prima facie* case.

The reader would do well not to conclude that the government failed to carry its burden of proof simply because of an inadequate "resume." As the Supreme Court has made clear, an expert's opinion does not derive its weight and persuasiveness from the resume of the expert, but from the expressed reasoning and analysis by which the expert reaches a conclusion. *See also, Jefferson Construction Co.*, ASBCA No. 7008, 1962 BCA ¶ 3409 at 17,494, *aff'g* 61-2 BCA ¶ 3222.

CONCLUSION

The appeal is sustained. The appeal is remanded to the parties who are to consult on the issue of quantum. If the parties fail to reach agreement on quantum, either party may, on motion, return to this Board for resolution of quantum.

Dated: 24 May 2004

RONALD A. KIENLEN

Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result; I concur in
Judge Thomas' concurring opinion

I concur in result (see separate opinion)

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

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

OPINION CONCURRING IN RESULT
BY ADMINISTRATIVE JUDGE THOMAS

I concur in result and write separately. I do not agree that the government's evidence is insufficient to make a *prima facie* case. However, weighing the evidence, I concur that the government has not carried its burden of proof.

As stated in the principal opinion, the government inspectors required modifications to the Ocean Express because of alleged deficiencies in the fendering, brow handling winch, brow turntable and attachment system, brow wheels and chocks. Appellant modified the vessel to meet the government's requirements and submitted a claim for its "direct major costs" of \$6,681.16¹ (R4, tab 41 at 1). The contracting officer denied the claim and this timely appeal followed.

Pursuant to Rule 11, the government initially submitted the declarations of Mark Delventhal, CWO3 Alvin C. Hughes, Jr., USN (CWO2 at the time of the events), and Achille Broennimann (the contracting officer) (exs. G-1 to G-3). Appellant submitted in rebuttal the declaration of Jess Cooley and letters dated 8 May and 2 July 1991 from Eric J. Roehl, a marine engineer, to the contracting officer and GAO (exs. A-1 to A-3). In further rebuttal, the government submitted an additional declaration of Mr. Broennimann (ex. G-4).

The declarations of Messrs. Delventhal, Hughes and Cooley include mixed fact and opinion testimony. I found all of them (as well as the contracting officer's) useful and credible.

As pointed out in the principal opinion, the government has the burden of proving that the vessel, as tendered, failed to meet contract requirements. I conclude that the government has failed to carry that burden for the reasons set forth below:

1. Fendering

The contract statement of work requires the subsurface fendering to "prevent metal-to-metal contact with sub-surface vessels under any conditions of pitch and roll." The contract incorporated by reference appellant's "VESSEL CHARACTERISTIC SHEET" for the Ocean Express (formerly the Captain Roy). The sheet stated that the subsurface fendering would be secured to the vessel along its entire length and cross-referenced drawings that were enclosed. Drawing UYS-1 dated 19 April 2001 showed the fendering installed "ON CHINE," apparently to the point where the chine rose above the waterline. Following award of the contract, appellant installed fendering to the point indicated in the drawing. It did not fender the chine beyond that point. (R4, tabs 18, 21 at 4-5, attach. 3 at 3, tab 23 at 4; ex. A-1, ¶ 3)

¹ In its complaint, appellant seeks Prompt Payment Act interest; however, that was not part of the claim.

The contracting officer contends that as of May 2001, appellant “represented that the [chine] could be removed to prevent metal to metal contact” (ex. G-4, ¶ 3). Although the record is not free from doubt, I conclude that appellant did not actually promise to remove (or fender) the chine in its entirety.

On 13 August 2001, government inspectors Delventhal and Hughes were present for a “waterborne fit check” of the Ocean Express with an LA class submarine. They were concerned about the remaining portion of the chine. They stated their opinions that the chine could cause metal-to-metal contact in “dynamic sea states” or “rough seas.” (Ex. G-1, ¶ 7, ex. G-2, ¶ 5) Mr. Cooley disagreed. As he states in his declaration:

[D]uring the waterborne fit check, we proved that while alongside the submarine, we were adequately fendered to prevent metal-to-metal contact. The only point we agreed upon after a long, protracted discussion, was that if we had some severe and unrealistic attack angle while approaching the submarine, some portion of the bow probably could contact the hull of the submarine.

(Ex. A-1, ¶ 6) The upshot was that the government inspectors required fendering to cover the remaining portion of the chine. Their declarations include pictures of the Ocean Express. The pictures, while useful in helping the reader visualize the vessels, do not depict the Ocean Express in proximity to the LA class submarine. There is also a videotape of a subsequent open ocean transfer test between the Ocean Express and an LA class submarine. The record does not explain how the videotape demonstrates the potential for metal-to-metal contact. (Ex. G-1, attachs. 1-3, ex. G-2, ¶ 6 and attachs. 1, 8)

In the end, we have a battle of declarations. Mr. Cooley has extensive maritime experience including a commission as a Limited Duty Officer (Submarine Deck) and oversight of an earlier personnel transfer vessel contract. I am unable, based solely on their qualifications as set forth in the record, to give more weight to Messrs. Delventhal and Hughes’ opinions than to his (*cf.* ex. G-1, ¶¶ 2, 3, ex. G-2, ¶ 1 and ex. A-1, ¶¶ 2, 5, 6). Accordingly, the government has not proved its case by a preponderance of the evidence.

2. Brow Handling Winch

The statement of work says that the winches shall be sufficient for services performed under this contract. On 2 August 2001, CWO2 Hughes inspected the Ocean Express in dry dock. He did not think that the winch for the brow was adequate. In response to CWO2 Hughes’ concerns, appellant added a larger winch. (R4, tabs 21, 22, 23, 26) According to Mr. Cooley, the original winch was rated at 2,500 pounds and the brow weighed approximately 300 pounds. CWO2 Hughes’ declaration sets forth his opinion that the winch “did not appear to be sufficient to operate in all sea states” and includes a picture of the original winch without

any explanatory detail. (Ex. A-1, ¶ 5, ex. G-2, ¶ 4 and attach. 2) I conclude that appellant's specific information concerning the rating of the winches is more persuasive.

3. Brow turntable and attachment system

The statement of work required that the "Brow shall have a turntable or similar device to allow radial movement" Appellant's Vessel Characteristic Sheet said that "[a] power turntable will be installed" (R4, tab 21 at 5, 3-3) When CWO2 Hughes inspected the Ocean Express on 2 August 2001, he expressed concern about the strength of the assembly. (Ex. A-1, ¶ 5) Mr. Cooley changed the brow platform to address CWO2 Hughes' concerns (R4, tab 26). According to Mr. Cooley, the securing pin design which appellant proposed is in wide use on brows and platforms throughout the Navy (ex. A-1, ¶ 7). CWO2 Hughes states that the mounting design appeared inadequate. His declaration includes pictures, again without explanatory detail (ex. G-2, ¶ 4 and attachs. 3-7). As in the case of the fendering, although the government declarant may be correct, I am unable on this record to attach more weight to his declaration than Mr. Cooley's.

4. Brow wheels

The statement of work provides that the brow was to be fitted with rubber-coated rollers to prevent metal-to-metal contact between the brow and the submarine deck. It did not specify their size. Appellant's drawing UYS-5 depicted a 4" rubber coated roller. (R4, tabs 18, 21) During the fit check on 13 August 2001, CWO2 Hughes concluded that the rollers were too small and set back behind the edge. Appellant agreed to install larger rollers. CWO2 Hughes' declaration includes pictures of the brow showing the original rollers. The pictures do not, however, show the brow and rollers resting on a surface. Rather, they show the brow and rollers extending outward from the upper deck of the Ocean Express. (Ex. G-2, ¶ 5 and attachs. 6, 7) I conclude that the government has not proved that larger rollers were necessary to prevent metal-to-metal contact.

5. Chocks

The statement of work says that the lines shall be sufficient for services performed under this contract (R4, tab 21). At the fit check on 13 August 2001, the Navy representatives insisted on the addition of a fairlead chock on the port bow. They considered that the angle of a line from an existing chock to the submarine would not provide the necessary stability during a passenger transfer. Mr. Cooley disagreed. (Ex. A-1, ¶ 8, ex. G-1, ¶ 8, ex. G-2, ¶ 5). Again, we have a battle of the declarations. I conclude that the government has not established by a preponderance of the evidence that a modification was required.

Dated: 24 May 2004

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. 53951, Appeal of Universal Yacht Services, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals