

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
CP of Bozeman, Inc., dba Maintenance) ASBCA No. 58533
Patrol)
)
Under Contract No. FA4613-06-C-0005)

APPEARANCE FOR THE APPELLANT: Mr. Raul Luciani
President

APPEARANCES FOR THE GOVERNMENT: Col Jennifer L. Martin, USAF
Air Force Chief Trial Attorney
Capt Joel B. Lofgren, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE CLARKE ON THE GOVERNMENT'S
MOTION FOR SUMMARY JUDGMENT

The Air Force first challenges the jurisdiction of this Board and, in the alternative, requests summary judgment. Although CP of Bozeman, Inc., dba Maintenance Patrol's (CP) appeal was well over a year after the final decision was issued, the record reflects actions by the Air Force that prejudiced CP's ability to appeal within the 90-day appeal period. We deny the Air Force's motion to dismiss for lack of jurisdiction. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109.

CP claims additional increases in wages and fringe benefits resulting from annual increases in its collective bargaining agreement (CBA) with its employee's union. However, CP previously signed contract modifications increasing wages and fringe benefits that included valid releases. We enforce the releases as far as they go, but they do not entirely protect the Air Force. We grant partial summary judgment for the Air Force.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. CP was awarded a contract with the Air Force for mess attendant services at Francis E. Warren Air Force Base's (F.E. Warren), Cheyenne, Wyoming, dining facility on 25 September 2006 with an effective date of 1 October 2006 (R4, tab 1 at 1-3).¹ The contract included a base year and four option years (*id.* at 3-15). There were four

¹ All Rule 4 page numbers are to the Bates numbers.

contract line item numbers (CLINs) for each year. CLIN 0001AA required food mess attendant services for 12 months at a firm fixed-price (FFP) of \$52,548.85 per month or \$630,586.20. CLIN 0001AB provided that the Air Force could order up to 1,680 hours of contingency cook I services for an FFP of \$21.21 per hour. CLIN 0001AC provided that the Air Force could order up to 1,120 hours of contingency cook II services for an FFP of \$24.55 per hour. CLIN 0001AD involved extended hours and is not directly involved in the entitlement case. (*Id.* at 3-5)

2. The contract incorporated the Federal Acquisition Regulation (FAR) 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (JUL 2005) clause (R4, tab 1 at 19). Pursuant to this clause, CP was obliged to pay its employees wages and fringe benefits provided in the CBA between the union and the predecessor contractor, Fresh Express (R4, tab 3 at 57-70).

3. The contract incorporated the FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT – PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) clause (R4, tab 1 at 19). This clause provides that the contract will be modified to increase wages and fringe benefits for each option year resulting from prior year changes in CBAs. The clause requires that the contractor submit a notice stating the amount claimed with supporting data such as payroll records and other data required by the contracting officer (CO).

Option Year 1 (FY08)

4. Unilateral Modification No. P00004, dated 7 September 2007, exercised the first option year (CLIN 0002) extending the term of the contract to 1 October 2007 through 30 September 2008 subject to the availability of funds (R4, tab 7 at 105-06).

5. CP and the International Brotherhood of Electrical Workers, Local Union 415, entered into a CBA effective 1 October 2007 (R4, tab 12 at 139-54).

6. Bilateral Modification No. P00006, dated 31 October 2007, provided funding for the first option year (R4, tab 9 at 111). CLIN 0002AA was for eleven months, 1 October 2007 to 31 August 2008, at \$54,125.32 per month for a total of \$595,378.52 (*id.* at 113). CLIN 0002AB was for one month, 1 September to 30 September 2008, at \$54,125.32 per month for a total of \$54,125.32 (*id.* at 114).²

7. Bilateral Modification No. P00009 was signed by Mr. Raul Luciani, President of CP, and the government on 1 February 2008 (R4, tab 12 at 135). The reason for the

² Modification No. P00008, effective 27 December 2007, increased funding for contingency cooks I and II (CLINs 0002AF and 0002AG) and included a release (R4, tab 11). The Air Force does not rely on this modification in its motion.

modification read: "THIS BILATERAL MODIFICATION INCORPORATES AN FY08 WAGE DETERMINATION INCREASE FOR THE PERIOD OF 1 OCT 07 THROUGH 30 SEP 08 AND SUBSEQUENT OPTIONS BASED ON A NEW CBA DATED 1 OCT 2007" (*id.*). Modification No. P00009 increased the monthly price for mess attendant services, CLINs 0002AA, 0003AA, 0004AA, and 0005AA, by \$1,373.23 for a total yearly increase of \$16,478.76. There was nothing in the modification increasing the amounts for contingency cooks I and II or extended hours (CLINs 0002AB, 0002AC, or 0002AD). The CBA was attached to the modification. The Air Force contends:

When submitting the new CBA, CP of Bozeman did not provide any statement of the amount claimed, any payroll records, or any supporting data. Nevertheless, the contracting office at F.E. Warren processed an adjustment and issued a bilateral modification incorporating the wage determination increase of \$16,478.76 per year.

(Gov't mot. ¶ 4) CP did not contest this assertion in its opposition to the motion.³ Bilateral Modification No. P00009 contained the following release:

CONTRACTOR'S STATEMENT OF RELEASE: IN CONSIDERATION OF THE MODIFICATION(S) AGREED TO HEREIN, THE CONTRACTOR HEREBY RELEASES THE GOVERNMENT FROM ANY AND ALL LIABILITY UNDER THIS CONTRACT FOR FURTHER EQUITABLE ADJUSTMENTS ATTRIBUTABLE TO SUCH FACTS OR CIRCUMSTANCES.

(R4, tab 12 at 136)

Option Year 2 (FY09)

8. Unilateral Modification No. P00011, dated 11 September 2008, exercised the second option year (CLIN 0003) extending the term of the contract to 1 October 2008 through 30 September 2009 subject to the availability of funds (R4, tab 14 at 171). A new CBA, dated 1 October 2008, was attached to this modification but no adjustment in price based on the CBA was included in Modification No. P00011 (*id.* at 176).

³ CP's entire one-page response was: "Appellant [sic] objects to the motion of dismissal under Motion for Summary Judgement [sic], the Respondent's [sic] is trying to sidestep the responsibility that is due to the Government contractors such as my self [sic]" (app. resp.).

9. Unilateral Modification No. P00012, 1 October 2008, provided funding for the second option year (R4, tab 15). CLIN 0003AA was for twelve months at a unit price of \$57,122.31 per month for a total of \$685,467.72 (*id.* at 192).

10. Bilateral Modification No. P00013 was signed by Mr. Luciani and the government on 1 December 2008 (R4, tab 16). The reason for the modification read: "THIS BILATERAL MODIFICATION INCORPORATES A[N] FY09 WAGE DETERMINATION INCREASE FOR THE PERIOD OF 1 OCT 08 THROUGH 30 SEP 09 AND SUBSEQUENT OPTIONS BASED ON A NEW CBA DATED 1 OCT 2008" (*id.*). Modification No. P00013 increased the monthly price for mess attendant services, CLINs 0003AA, 0004AA, and 0005AA, by \$1,413.56 for a total yearly increase of \$16,962.72. There was nothing in the modification increasing the amounts for contingency cooks I and II or extended hours (CLINs 0003AB, 0003AC, or 0003AD). The CBA was attached to the modification. The Air Force contends:

When submitting the new CBA, CP of Bozeman did not provide any statement of the amount claimed, any payroll records, or any supporting data. Nevertheless, the contracting office at F.E. Warren processed an adjustment and issued a bilateral modification incorporating the wage determination increase of \$16,962.726 [sic] per year.

(Gov't mot. ¶ 5) CP did not contest this assertion in its opposition to the motion.⁴ Bilateral Modification No. P00013 contained the following release:

CONTRACTOR'S STATEMENT OF RELEASE:
IN CONSIDERATION OF THE MODIFICATION
AGREED TO HEREIN AS COMPLETE AND EQUITABLE
ADJUSTMENTS THE CONTRACTOR HEREBY
RELEASES THE GOVERNMENT FROM ANY AND ALL
LIABILITY UNDER THIS CONTRACT FOR FURTHER
EQUITABLE ADJUSTMENT ATTRIBUTABLE TO SUCH
FACTS OR CIRCUMSTANCES.

(R4, tab 16 at 194)

⁴ See footnote 3.

*Option Year 3 (FY10)*⁵

11. Bilateral Modification No. P00018, dated 9 September 2009, exercised the third option year (CLIN 0004) extending the term of the contract to 1 October 2009 through 30 September 2010 subject to the availability of funds (R4, tab 21 at 246-48). A new FY10 CBA, dated 1 October 2009, was attached to this modification but no adjustment in price based on the CBA was included in Modification No. P00018 (*id.* at 253).

12. Bilateral Modification No. P00019, dated 1 October 2009, provided funding for the third option year (R4, tab 22). CLIN 0004AA included an estimated quantity of 26, a unit of "Each," a unit price of \$27,788.46, and an estimated amount of \$722,499.96 (*id.* at 269). Modification No. P00021, dated 18 December 2009, provided funding for contingency cooks I & II (CLINs 0004AB & 0004AC) (R4, tab 24).

13. Bilateral Modification No. P00020 was signed by Mr. Luciani and the government on 20 November 2009 (R4, tab 23 at 276). The reason for the modification read: "This bilateral modification incorporates a[n] FY10 Wage Determination increase for the period 1 Oct 2009 through 30 Sep 2010 and subsequent options based on a new CBA dated 1 Oct 09" (*id.*). CLIN 0005AA was increased to a total of \$40,278.16 (*id.* at 277). Modification No. P00020 added CLIN 0004AD,⁶ FY10 CBA WD Increase, FFP, with an estimated quantity of 26, a unit of "Each," a unit price of \$1,549.16 for an estimated amount of \$40,278.16 (*id.* at 277). There was nothing in the modification increasing the amounts for contingency cooks I and II (CLINs 0004AB, 0004AC). The CBA was attached to the modification. The Air Force contends:

When submitting the new CBA, again, CP of Bozeman did not provide any statement of the amount claimed, any payroll records, or any supporting data. Nevertheless, the contracting office at F.E. Warren processed an adjustment and issued a bilateral modification incorporating the wage determination increase of \$40,278.16 per year.

(Gov't mot. ¶ 6) CP did not contest this assertion in its opposition to the motion.⁷ Bilateral Modification No. P00020 contained the following release:

⁵ Modification No. P00016, dated 10 April 2009, changed CLINs 0003AA & 0003AE from firm-fixed-price to cost and changed CLINs 0004AA & 0005AA to increase the quantity from 12 to 26 and the unit costs (R4, tab 19 at 232). The Air Force did not discuss Modification No. P00016 in its motion.

⁶ This appears to be a mistake because CLIN 0004AD is extended hours (R4, tab 1 at 12). It should be 0004AA mess attendant services.

⁷ See footnote 3.

CONTRACTOR'S STATEMENT OF RELEASE: In consideration of the modification agreed to herein as complete and equitable adjustments, the contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances.

(R4, tab 23 at 276)

Option Year 4 (FY11)

14. Unilateral Modification No. P00024, dated 16 September 2010, exercised the fourth option year (CLIN 0005) extending the term of the contract to 1 October 2010 through 30 September 2011 subject to the availability of funds (R4, tab 27 at 290-91). A new FY11 CBA, dated 1 October 2010, was attached to this modification but no adjustment in price based on the CBA was included in Modification No. P00024 (*id.* at 296).

15. Unilateral Modification No. P00025, dated 1 October 2010, provided funding for the fourth option year (R4, tab 28). CLIN 0005AA had an estimated quantity of 26, a unit of "Each," a unit price of \$30,132.69 for a total estimated amount of \$783,449.94 (*id.* at 312-13).

16. On 7 April 2011, CP submitted a claim to the Air Force. The claim included the following:

- \$17,226.36 for wage adjustments that were erroneously calculated for FY08, FY09, and FY10.
- \$8,394.40 for FY08 contract modifications that CP did not receive.
- \$3,838.85 for unpaid contingency cooks I and II hours from 1 October 2006 through 30 September 2008.
- \$8,806.61 for contingency cooks I and II wage adjustments for 1 October 2006 through 30 September 2010 (FY 07-09).
- \$8,526.05 each for FY10 and FY11 contingency cooks I and II wage adjustments.

(R4, tab 56 at 472-73) After adjustments the claim amount was \$36,695.62 (*id.*).

17. On 28 July 2011, CO Sandra Rutherford, issued a memorandum to CP documenting the Air Force's decision on CP's 7 April 2011 claim. CO Rutherford denied all but one of CP's claims:

- The \$17,226.36 was denied because CP had been compensated for the annual Service Contract Act (SCA) wage adjustments.
- The \$8,394.40 was denied because funds not dispersed for contract performance by the end of the fiscal year do not go to the contractor, but are deobligated.
- The \$3,838.85 was denied for lack of substantiation.
- The \$8,806.61 was denied because the wage adjustments had been paid.
- The request for FY10 wage adjustments for contingency cooks I and II was denied but the request for FY11 wage adjustments for cooks was granted and CP was directed to submit "appropriate documentation."
- CP was advised to contact the contract specialist if it had any questions.

(R4, tab 57 at 487-88) The decision did not include appeal rights.

18. On 30 August 2011 CP emailed TSgt Andrea K. Jordan, contract specialist, stating: "We are again requesting the wage adjustments for Cook hourly rates for Option 4 FY11 and Option 3 FY10. There were no cooks in Option 2 FY09 therefore no CBA Wage Adjustment IGE forward pricing for FY10 and FY11." (R4, tab 58 at 489)

19. Bilateral Modification No. P00032, effective 12 September 2011, extended mess attendant services for six months 1 October 2011 to 30 March 2012 (FY12) (R4, tab 35). Wage Determination No. CBA-2007-1863, Revision No. 05, dated 9 September 2011 was incorporated into the contract (*id.* at 353). The extension added CLIN 0006 for "Food Mess Attendant Services" and had a quantity of 26, a unit of "Each," a unit price of \$26,901.88 and an amount of \$699,448.88 (*id.* at 354). There was nothing in the modification extending the CLINs for contingency cook I, CLIN 0005AB, contingency cook II, CLIN 0005AC, or for extended hours, CLIN 0005AD. There is no release.

20. On 16 September 2011 CP responded to the CO's decision (R4, tab 59 at 491). CP requested that the Air Force "review" its decision:

We respectfully request the following errors on the IGE wage adjustments be reviewed. The wage adjustments were calculated by Mr. Doug Reed and were not provided to us for

review. We received our copies years later during discussions of Cook hourly rates.

(R4, tab 59 at 492) On 19 September 2011 CP submitted documents relating to payroll transactions for 1 October 2006 through 1 December 2006 (R4, tab 60 at 499-703).

21. In a series of emails between 19 September and 21 September 2011, the Air Force and CP discussed a modification for FY11 contingency cook I and II hours (R4, tab 61 at 704). On 21 September 2011 CP wrote:

To reiterate our conversation regarding our three percent incremental yearly increase, which is what we had provided in our contract. This amount is used to account for the inflationary overhead cost of operation adjustment for every year, we cannot ever assume or know what the actual wage adjustments will be until the new rates are provided with the new option year then these amounts are negotiated for our new option year and added to our overall price.

This has always been our disagreement with Mr. Reed and Mrs. Jiron and one of our basis [sic] for the claim we had filed for wage compensation under the service contract act. Mr. James Evans (regional labor advisor) had concurred with our assessment in the adjustment.

I really appreciate a prompt resolution to this most unnerving and gross misinterpretation of the facts.

(R4, tab 61 at 704-05)

22. Bilateral Modification No. P00033, effective 15 September 2011, increased the hourly wage rates for contingency cooks I and II for option year 4 (FY11) (R4, tab 36).⁸ Contingency cook I went from \$23.89/hr to \$24.59/hr and contingency cook II went from \$27.65/hr to \$28.46/hr (*id.* at 358). It included CLIN 0005AG adding \$1,355.40 for contingency cook II usage from 16 March 2011 through 30 September 2011 (*id.*). The modification included a contractor's release:

CONTRACTOR'S STATEMENT OF RELEASE: In consideration of the modification agreed to herein as complete and equitable adjustments, the contractor hereby releases the Government from any and all liability under this

⁸ In its motion the Air Force erroneously cites to Rule 4, tab 26.

contract for further equitable adjustments attributable to such facts or circumstances.

(*Id.*)

23. On 27 September 2011 CP emailed the Air Force stating in pertinent part:

After my conversation with Ms. Rutherford 9/22/11, she recommended we sign and return the modification that brought the Contingency Cook I from \$23.89 to \$24.59 and Cook II from \$27.65 to \$28.46 per hour. She suggested that we then file a claim for the amount of the increase we requested for Contingency Cook hourly rates.

In our April 7, 2011 claim we requested that amounts be increased to \$26.36 and \$30.54. I have attached an excel spreadsheet that shows what we would have received if the actual hours were invoiced at adjusted hourly rates instead of forward priced from 10/1/06 to 9/30/11, \$391,227.79. After deducting the FY wage adjustments, \$15,484.60, we should have received \$375,743.19. We will have invoiced \$356,445.62 through 9/30/11 which leaves a difference of \$19,297.57.

(R4, tab 61 at 704) CP went on to make various requests for additional adjustments.

24. Unilateral Modification No. P00034, dated 1 October 2011, added \$699,448.88 to fund the six-month extension (R4, tab 38). This was the last modification signed by Ms. Rutherford as CO.⁹ Bilateral Modification No. P00035, effective date 23 January 2012, added \$2,318.07 to pay for “unbilled” hours for contingency cook II for FY11 (R4, tab 39). The modification contained a contractor’s release (*id.*).

25. By email dated 4 October 2011 CP inquired of TSgt Jordan about the status of an invoice for contingency cook II hours (R4, tab 51 at 433). CP inquired again by email dated 28 October 2011 (*id.* at 432). By email dated 1 November 2011 TSgt Jordan requested payroll information (*id.* at 431). CP submitted the payroll information for contingency cook II hours by return email on 1 November 2011 (*id.*).

⁹ Ms. Rutherford recalled that she left in August 2011 (R4, tab 64 at 727), but she signed Modification No. P00034 as CO on 1 October 2011 (R4, tab 38 at 361). CO John Hoffmeister signed Modification No. P00035 (R4, tab 39 at 364).

26. By email dated 17 March 2012, Subject: RE: FY12 CBA Wage Adjustment, TSgt Jordan wrote:

Is there any way you can submit the proposal how you think it should reflect? In your email below it's talking about adding it to your claim. Please submit your proposal so I can evaluate it.

(R4, tab 62 at 708)¹⁰ By email dated 21 March 2012 CP responded with wage adjustment information (*id.*).

27. On 26 June 2012 CP emailed CO Hilary Swanson:

During my conversation with you and Sgt. Jordan it was indicated that you will get back to me yesterday referencing my claim for wage adjustments not received as well as our instructions for hauling our equipment at the close out of our contract.

It is important that I receive this information as soon as possible to make the proper preparations, as well as my claim. This claim was filed in 2011 and as I understand any claim under \$100,000.00 should be answered within sixty days and I am still waiting. I appealed Mr. Reeds [sic] decision to Sandra Rutherford to which she agreed with the items in my claim after I disputed his decision to which she was supposed to review and I have never heard from anyone.

(R4, tab 64 at 728) An info copy of this email was sent to Ms. Rutherford (*id.*). Ms. Rutherford responded to CP with copies to TSgt Jordan and CO Swanson on 27 June 2012:

In regards to the e-mail below, I submitted to you the Contracting Officer's decision regarding your claim in August 2011. At that time, I told you that if you had any additional supporting documentation in regards to funds due to CP of Bozeman, I would address them once the documentation was received and validated. Although I did receive documentation from you, it was the same documentation that we had previously reviewed, and for

¹⁰ The "email below" from CP was dated 13 January 2012 but only the header was included in the Rule 4. The body of the email was omitted.

which I had already responded to in the August 2011 Contracting Officer's decision. If you do in fact have additional documentation that has not already been submitted, please submit to either John Hoffmeister or Hilary Swanson.

(R4, tab 64 at 727-28) On 27 June 2012 CP responded to Ms. Rutherford:

When I explained the situation to you after the initial denial you agreed to look at the information again because I was going to dispute the findings and you saw my point to which I resubmitted my files to you for your review. Sgt Jordan was looking into this for you and as of September 2011 the information was being researched, however I never received a written response but was told the issue was being worked out and that it was being look [sic] at in order of priority. We inquired again after the first of the year and were told the same thing and I have all the documentation to include your email 15 July 2011 6:45am. I never received a letter from you indicating your agreeing with the findings and or with the decision reached by the previous CO therefore I will ask you to give me a written response stating your position after your review of my papers.

(R4, tab 64 at 727) On 27 June 2012 Ms. Rutherford responded in pertinent part:

I believe there is some confusion, as the letter you received in August 2011 was the Contracting Officer's decision, and it was signed by me as the Contracting Officer. You may have stated that you were going to dispute the findings, but I did not ever state that I saw your point. I stand by my original statement, which is that if you have new information to submit, the Contracting Officer for your contract will gladly review, but a decision was provided to you in August 2011 regarding what was submitted up to that point in time.

I reviewed my e-mail from 15 July 2011 6:45 AM,^[11] and I did state that we were researching your request. However, you received a written response from 90 CONS in August 2011, which was our written response to your request for compensation.

¹¹ This email is not in the record.

In regards to your statement "I never received a letter from you indicating your agreeing with the findings and or with the decision reached by the previous CO therefore I will ask you to give me a written response stating your position after your review of my papers." I dispute this statement, as I provided the Government's decision to you, in writing, in August 2011. My signature is on that document, and there is nothing further that I will be providing to you.

I recommend that you review the letter provided to you in August 2011. I left the LGCB flight that month, and I no longer an the Contracting Officer on your contract, so if you have any new information that you would like to provide, please contact one of the LGCB Contracting Officers, either Hilary Swanson or John Hoffmeister, or you contract specialist, TSgt Andrea Jordan. In regards to what was submitted prior to August 2011, a decision was made and provided to you, and no further response is forthcoming from the Government.

(R4, tab 64 at 726-27)

28. On 23 November 2012 CP emailed the Air Force stating:

I have never received a response to this request for wage adjust and the unbilled cook hours that I sent all the time sheets for. When we spoke last, I thought you were getting close to completing your review. Please let me know when we can expect to receive a response. I am only here a few hours a week so please contact me by email.

(R4, tab 63 at 709) The email included a copy of a 16 September 2011 email from CP to the Air Force (*see* SOF ¶ 21 above). On 26 November 2012, Ms. Rutherford emailed CO Swanson, copy to CP, stating, "[c]an you please make sure this gets resolved" (R4, tab 63 at 709).

29. CP and the Air Force continued to exchange emails concerning this claim from November 2012 to December 2012 (R4, tabs 65, 67, 68). On 4 December 2012, the government convened a telephone conference with appellant to discuss the claim and appellant's supporting documentation (R4, tab 28 at 740-41). On 27 December 2012, CO Swanson emailed CP stating:

After a review of the documents that were received, no NEW information was presented. The information that was mailed is the exact same as previously received....the new information was consolidated annually.

I concur with the previous Contracting Officer's determination that no further money is due.

(R4, tab 69 at 742)

30. On 28 January 2013 CP appealed "the decision rendered by [C]ontracting Officer Hilary Swanson in reference to my letter to the same contending the fact that [Ms.] Rutherford wrongly denied my initial claim filed on April 07, 2011 and subsequent follow up September 16, 2011" to the Board. The Board docketed the appeal as ASBCA No. 58533 on 4 February 2013.

31. The record contains two declarations by TSgt Jordan and Ms. Rutherford submitted during the briefing process on the government's motion. TSgt Jordan declared in part:

I acknowledge that this final decision did not contain the language of FAR 33.211(v) which advises contractors of their rights to appeal a final decision. Beyond what is currently contained in the Rule 4 file, I have no further recollection of me or anyone else in the contracting office ever discussing or advising CP of Bozeman of its appeal rights. I am also unaware of how CP of Bozeman ultimately knew to file an appeal with the board on 28 January 2013.

(Gov't supp. filing, attach. 1, decl. of TSgt Andrea K. Jordan ¶ 2) Ms. Rutherford declared in part:

I acknowledge that this final decision did not contain the language of FAR 33.211(v) which advises contractors of their rights to appeal a final decision. Beyond what is currently contained in the Rule 4 file, I have no further recollection of ever discussing or advising CP of Bozeman of its appeal rights.

In June of 2012, Mr. Raul Luciani, President of CP of Bozeman, sent me an email indicating he was still awaiting a decision from me regarding the claim for wage adjustments. In my response to his email, I clarified that my August 2011

decision was my final decision and no further response was forthcoming from the government. These email communication [sic] can be found at tab 64 of the Rule 4 file. Additionally, at no time did I ever, either verbally or in writing, indicate to CP of Bozeman that my final decision would be reconsidered.

(Gov't supp. filing, attach. 2, decl. of Sandra L. Rutherford ¶¶ 2, 3)

32. In CP's 16 August 2013 response to the Board's 24 July 2013 letter requesting the parties to address the effect of the lack of appeal rights notification in the July 2011 decision, Mr. Luciani wrote¹²:

CP of Bozeman, Inc. was never informed in writing by the 341st CONS Mrs. Rutherford or TSgt Jordan, that CP of Bozeman had 90 days to appeal the decision rendered on 28 July 2011 or reconsideration thereafter. Furthermore although the response was issued as a final decision, CP of Bozeman, Inc. provided additional information disputing the CO's basis for her decision within the 90 appeal clause.

DECISION

Jurisdiction

First we must deal with the Air Force's motion to dismiss for lack of jurisdiction. This appeal is timely if CP can establish that it relied upon actions of the government that "actually prejudiced its ability to prosecute its timely appeal." *Decker & Co. v. West*, 76 F.3d 1573, 1580 (Fed. Cir. 1996). In *The Swanson Group, Inc.*, ASBCA No. 54863, 05-2 BCA ¶ 33,108 at 164,089, even though Swanson knew of its appeal rights, the Board found Swanson "appears to have understood that a further response to the claim would be forthcoming. Appellant thus relied to its detriment on the contracting officer's statement that the response was not a final decision." We believe that there is substantial evidence that CP was not aware that the 90-day appeal period was running, relied to its detriment on the government's failure to advise of its appeal rights, and that it relied upon confusing and contradictory Air Force actions that reasonably led it to believe the government was still considering its claim and that prejudiced its ability to prosecute its timely appeal.

¹² While this statement is neither in an affidavit or declaration (*see* 28 U.S.C. § 1746), it is fully corroborated by record evidence and does not appear to be disputed by respondent.

CP filed its claim on 7 April 2011 (SOF ¶ 16). CO Rutherford issued a “memorandum” denying the claim on 28 July 2011 (SOF ¶ 17). The memorandum did not identify itself as a “final” decision and did not include appeal right notification (*id.*). Thereafter, there occurred a litany of communications that made it clear CP did not consider that the 28 July 2011 memorandum was a final action, and at best made it confusing as to whether the government did (*see* SOF ¶¶ 18, 20-21, 23, 25, 27, 28-29). The record reflects that government actions and statements caused CP to believe that the government was reconsidering its decision.

The Air Force submitted declarations from Ms. Rutherford and TSgt Jordan in support of its position. TSgt Jordan affirmed that to her knowledge no one informed Mr. Luciani of his appeal rights (SOF ¶ 31). Ms. Rutherford stated that in June 2012 she received an email from Mr. Luciani “indicating he was still awaiting a decision from me regarding the claim for wage adjustments” and that she informed him that her decision was final (*id.*). She also stated: “[A]t no time did I ever, either verbally or in writing, indicate to CP of Bozeman that my final decision would be reconsidered” (*id.*).

The fact that the record does not reveal that Ms. Rutherford ever used the word “reconsider” does not mean that the government’s actions did not lead CP to believe the government was reconsidering the decision and thereby prejudiced his ability to appeal. There is substantial evidence that the government’s actions were either in fact a reconsideration or at least reasonably lead CP to believe the Air Force was reconsidering the decision based on their conversations and additional information he provided. *See Sach Sinha and Associates, Inc.*, ASBCA No. 46916, 95-1 BCA ¶ 27,499. CP’s actions are wholly consistent with a belief that the Air Force was in fact reconsidering his claim. Both sides agree that he was never informed of his appeal rights or that the 90-day appeal period was running (SOF ¶¶ 31, 32). We conclude both that CP detrimentally relied on the CO’s failure to provide appeal information in the “final decision” and on government actions indicating the matter was under reconsideration and was prejudiced in its ability to timely appeal as a result. Therefore, we have jurisdiction.

Merits of the Motion for Summary Judgment

The Air Force argues that releases in the yearly modifications increasing wages and fringe benefits pursuant to the SCA provide it a complete defense. For its part, CP submits a one-sentence response to the motion, “Appellant [sic] objects to the motion of dismissal under Motion for Summary Judgement, the Respondent’s [sic] is trying to sidestep the responsibility that is due to the Government contractors such as my self [sic]” (app. resp.). We consider each option year in turn.

At the outset we note that the Air Force contends that each year CP would submit a new CBA, but failed to submit the amount it claimed with supporting records as required by FAR 52.222-43, the Fair Labor Standards Act and Service Contract Act clause (SOF ¶¶ 3, 7,

8, 12). The Air Force would calculate what it believed the annual increase should be (gov't mot. at 4-5). CP does not contest this contention and there are no documents in the record contradicting the Air Force's contention. Accordingly, we find that CP failed to comply with the regulation's requirement that it submit the amount claimed with supporting data. The Air Force, however, did not seek to enforce that requirement.

Option Year 1 (FY08)

Option Year 1 was exercised by Modification No. P00004 on 7 September 2007 (SOF ¶ 4) and funded by Modification No. P00006 on 31 October 2007 (SOF ¶ 6). Bilateral Modification No. P00009, 1 February 2008, implemented a SCA wage adjustment due to the new FY08 CBA increasing CLINs 0002AA, 0003AA, 0004AA, and 0005AA by \$16,478.76 (SOF ¶ 7). No adjustment was made for contingency cooks I and II or extended hours, CLINs 0002AB, 0002AC, or 0002AD or for the other option years for those CLINs. Modification No. P00009 included a release:

CONTRACTOR'S STATEMENT OF RELEASE: IN CONSIDERATION OF THE MODIFICATION(S) AGREED TO HEREIN, THE CONTRACTOR HEREBY RELEASES THE GOVERNMENT FROM ANY AND ALL LIABILITY UNDER THIS CONTRACT FOR FURTHER EQUITABLE ADJUSTMENTS ATTRIBUTABLE TO SUCH FACTS OR CIRCUMSTANCES.

(SOF ¶ 7) We find the release language clear and unambiguous. The Board enforces such releases. *Colorado River Materials, Inc. d/b/a NAC Construction*, ASBCA No. 57751, 13 BCA ¶ 35,233 (Unambiguous release language enforced without resort to extrinsic evidence). This applies equally to releases in modifications pursuant to FAR 52.222-43, the Fair Labor Standards Act and Service Contract Act clause. *Swanson Group, Inc.*, ASBCA No. 47675, 99-2 BCA ¶ 30,403 at 150,311 (Appellant is bound by its release with respect to the increase in labor and administrative costs as a result of the new wage determinations). Accordingly, we will enforce the release as to the FY08 wage increases in CLINs 0002AA, 0003AA, 0004AA, and 0005AA – only. The release does not apply to the CLINs for contingency cooks I and II because they were not adjusted by the modification and therefore do not fall within the release language, "MODIFICATION(S) AGREED TO HEREIN."

Option Year 2 (FY09)

Option Year 2 was exercised by Modification No. P00011 on 11 September 2008 (SOF ¶ 8) and funded by Modification No. P00012 on 1 October 2008 (SOF ¶ 9). Bilateral Modification No. P00013, 1 December 2008, implemented the SCA wage adjustment due to the new FY09 CBA increasing CLINs 0003AA, 0004AA, and 0005AA

by \$16,962.72 (SOF ¶ 10). No adjustment was made for contingency cooks I and II or extended hours, CLINs 0003AB, 0003AC, or 0003AD or for the other option years for these CLINs. Modification No. P00013 included a release virtually identical to that in the FY08 modification (SOF ¶¶ 7, 10). As before, we find the release language clear and unambiguous. Accordingly, we will enforce the release as to the increases in CLINs 0003AA, 0004AA, and 0005AA – only. The release does not apply to the CLINs for contingency cooks I and II because they were not adjusted by the modification and therefore do not fall within the release language, “MODIFICATION AGREED TO HEREIN.”

Option Year 3 (FY10)

Option Year 3 was exercised by Modification No. P00018 on 9 September 2009 (SOF ¶ 11) and funded by Modification Nos. P00019 on 1 October 2009 and P00021 on 18 December 2009 (SOF ¶ 12). Bilateral Modification No. P00020, 20 November 2009, implemented an SCA wage adjustment due to the new FY10 CBA and added \$40,278.16 to CLINs “0004AD”¹³ and 0005AA (SOF ¶ 13). No adjustment was made for contingency cooks I and II or extended hours, CLINs 0004AB, 0004AC, or 0004AD or for the other option years for those CLINs. Modification No. P00020 included a release virtually identical to the FY08 release (SOF ¶¶ 7, 13). As before, we find the release language clear and unambiguous. Accordingly, we will enforce the release as to the increases in CLINs 0004AA and 0005AA – only. The release does not apply to the CLINs for contingency cooks I and II because they were not adjusted by the modification and therefore do not fall within the release language, “modification agreed to herein.”

Option Year 4 (FY11)

Option Year 4 was exercised by Modification No. P00024 on 16 September 2010 (SOF ¶ 14). The FY11 CBA was attached to Modification No. P00024, but no wage adjustments were included in the modification. Option Year 4 was funded by Modification No. P00025 on 1 October 2010 (SOF ¶ 15). There was no SCA wage adjustment for CLIN 0005AA as was the case in the previous option years. Bilateral Modification No. P00033, effective 15 September 2011, incorporated the FY11 CBA wage adjustment for contingency cooks I (\$23.89/hr to \$24.59/hr) and II (\$27.65/hr to \$28.46/hr) (SOF ¶ 22). Modification No. P00033 included a release virtually identical to those in previous modifications. As with the previous releases, we find this release to be clear and unambiguous. Accordingly, we will enforce the release as to the increases in contingency cook I, CLIN 0005AB, contingency cook II, 0005AC and the increase for contingency cook II for 16 March 2011 through 30 September 2011, CLIN 0005AG – only. The release does not apply to mess attendant services CLIN 0005AA because it was not adjusted by the

¹³ Should be 0004AA.

modification and therefore did not fall within the release language, "modification agreed to herein."

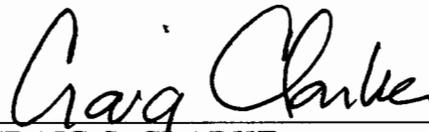
CONCLUSION

The Air Force's motion for summary judgment is granted as to the following SCA increases by FY and CLIN:

FY08 increase:	CLINs 0002AA, 0003AA, 0004AA, and 0005AA
FY09 increase:	CLINs 0003AA, 0004AA, and 0005AA
FY10 increase:	CLINs 0004AA and 0005AA
FY11 increase:	CLINs 0005AB, 0005AC, and 0005AG

Because of the valid releases signed by CP, the Air Force is not obliged to pay additional SCA increases for these FYs and CLINs. The entitlement case may continue as to any other claimed SCA increases that are not precluded by the releases, if any.

Dated: 1 November 2013


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

I concur



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

I concur



JACK DELMAN
Administrative Judge
Acting 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. 58533, Appeal of CP of Bozeman, Inc., dba Maintenance Patrol, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals