

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Metro Machine dba General Dynamics ) ASBCA No. 61817  
NASSCO-Norfolk )  
 )  
Under Contract No. N00024-16-D-4408 )

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OPINION BY ADMINISTRATIVE JUDGE CLARKE

This appeal deals with an unsuccessful dry-docking attempt of the USS TRUXTUN (DDG 103) (TRUXTUN) and responsibility for costs of having to conduct a second successful dry-docking. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. We sustain the appeal.

FINDINGS OF FACT

*IDIQ Contract 4408*

1. On February 17, 2016, the Naval Sea Systems Command awarded Metro Machine Corp. IDIQ Contract No. N00024-16-D-4408 (Contract No. 4408) (R4, tab 8 at GOV000325). Contract No. 4408 authorized the issuance of Delivery Orders (DO) for the repair, maintenance and modernization of non-nuclear US Navy surface ships (*id.* at GOV000342). Contract No. 4408 requires that the dry-docking of all vessels after January 1, 1980 shall be accomplished in dry-docks certified in accordance with MIL-STD-1625D(SH) (R4, tab 8 at GOV000346, 000354). MIL - STD-1625D(SH) incorporates S9086-7G-STM-010/CH997, Docking Instructions and Routine Work in Dry-Dock, by reference (R4, tab 27 at GOV000615). MIL - STD - 1625D(SH), paragraph 4.7.1.1 Emergency procedures, required that emergency operating for system or component failures shall be specified in advance

(*id.* at GOV000625). Emergency operations will be carried out in accordance with the emergency procedures (*id.* at GOV000626).

2. NASSCO specified Dry Dock Emergency Operation in WI-Q-3026, 4/13/2015 (app. supp. R4, tab 2). WI-Q-3026 included instructions for Failure of Ship's Hauling/Centering System:

#### 5.9 Failure of Ship's Hauling/Centering System

**NOTE: The ship will be manually maneuvered and positioned within the dock with capstans and lines.**

5.9.1 In the event of a failure of any part of the ship hauling/centering system the immediate action of the Dockmaster will be to secure the ship by use of the installed safety lines. Additional breast and centering lines will be passed to the ship under the direction of the Dockmaster.

5.9.2 The Dockmaster will verify with the winch control operator that the hauling/centering system was centered at the time of system failure and the system brakes are set.

5.9.3 Once the ship is secured and centered in the dock, the Dockmaster will confer with the MARMC (Mid - Atlantic Regional Maintenance Center) Docking Observer, NASSCO-Norfolk Senior Director of Waterfront Operations to determine if the evolution (docking/undocking) should continue or be aborted.

5.9.4 If the decision is to undock the ship proceed to paragraph 4.6.<sup>1</sup>

5.9.5 If the decision is to dock the ship, proceed as follows:

5.9.6 For docking, the Dockmaster will direct the Rigging Department Supervisors to attach hauling lines to the forward center trolley and the shore-end dock capstans on both port and starboard sides of the dock.

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<sup>1</sup> There is no paragraph 4.6 in this document. The undocking procedure is at paragraphs 5.9.9 to 5.9.13 (app. supp. R4, tab 2 at GD000012).

5.9.7 The Dockmaster will direct the winch control operator to release hauling/centering system brakes.

5.9.8 Dockmaster centers the ship over blocks by directing the rigging crew in the operation of the dock capstans, port and starboard sides of the dock.

(*Id.* at GD000011-12) Another document, Process Instruction: PI-10, “Process Instruction for Line Handling Without Hauling/Centering System” Includes substantially the same instructions<sup>2</sup> (app. supp. R4, tab 57).

3. S9086-7G-STM-010/CH997, Docking Instructions and Routine Work in Dry-Dock, includes a section on “Vital Systems:”

997-1.5.2 VITAL SYSTEMS. Vital system docking requirements are as follows.

#### **CAUTION**

**Without satisfactory operational vital systems and elements, the safety of the dock and the docking evolution are in jeopardy and it is not prudent to undertake a docking evolution.**

a. It is mandatory that the Commanding Officer, Officer-in-Charge, Docking Officer, contractor’s Dockmaster, or any other person assigned responsibility of docking ships, ensure that the vital systems and equipments[sic] required for safe docking of ships be operational for each docking and undocking evolution and other evolutions requiring transfer of ballast water from one tank to another.

b. The systems and elements considered vital to safe operation of a floating dry dock,<sup>[3]</sup> and required to be available and operable before starting a floating dry-dock evolution, are:

1. Reliable and functioning ballast level and draft indicating system

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<sup>2</sup> PI-10 does include paragraph 4.6 presenting instructions on how to “undock” the ship (app. supp. R4, tab 57 at GD000173).

<sup>3</sup> “SPEEDE” is a floating dry dock used by NASSCO (app. supp. R4, tab 2 at GD000007).

2. Functional wing wall deflection indicating system or equivalent method on both wing walls

3. Reliable and properly functioning two-way communications system to all manned stations during dry-dock evolutions

4. Proper manning of all primary and secondary stations with adequately trained personnel to perform the evolutions in process, including provision for manual backup of motorized valves

5. Reliable and properly functioning ballast system

6. Primary electrical power source capable of operating all vital systems and a secondary (backup) power source capable of operating (as a minimum) 50 percent of all vital systems, including fire pumps (if installed).

7. Positive method of visually determining position of all ballast valves.

997-1.5.3 SUPERVISION. The operation of floating dry-docks must be supervised at all times by a Docking Officer in the case of a naval facility, or a Dockmaster in the case of a commercial facility. The Docking Officer or contractor's Dockmaster must be fully qualified in accordance with current instructions. If, in the opinion of the Commanding Officer, Officer-in-Charge, Docking Officer, or contractor's Dockmaster, the conditions of paragraph 997-1.5.2 are not fulfilled, it should be concluded that any further docking or ballast transfer operations are unsafe, and docking operations shall be terminated at once and suspended until satisfactory corrective action has been accomplished.

(R4, tab 28 at GOV000780-81)

4. Contract No. 4408 incorporates Federal Acquisition Regulation (FAR) 52.246-24, LIMITATION OF LIABILITY - HIGH VALUE ITEMS (FEB 1997) (R4, tab 8 at GOV000392). FAR 52.246-24(a) provides that the contractor shall not be liable for loss or damage to property of the government that "(1) occurs after

government acceptance of the supplies delivered under this contract and (2) results from any defects or deficiencies in the supplies.” The clause then itemizes four exceptions to the limitation of liability in (a). FAR 46.802(a) defines a ship as a high-value item. The contract also includes:

HQ C-2-0033 LIMITATION OF LIABILITY - HIGH VALUE ITEMS (NAVSEA) (JUN 1992) The following items are subject to the clause of this contract entitled "LIMITATION OF LIABILITY--HIGH VALUE ITEMS" (FAR 52.246-24): CLINs 0001, 0002, 0004, 0005, 0007, 0008, 0010, 0011, 0013, and 0014.

(R4, tab 8 at GOV000357)

5. Contract No. 4408 incorporates Defense Federal Acquisition Regulation Supplement (DFARS) 252.217-7012, LIABILITY AND INSURANCE (AUG 2003) (R4, tab 8 at GOV000393). DFARS 252.217-7012(b) provides that the contractor shall not “carry insurance against any form of loss or damage to the vessel(s) or to the materials or equipment to which the Government has title or which have been furnished by the Government for installation by the Contractor. The Government assumes the risks of loss of and damage to that property.” The clause then identifies exceptions to the government’s assumption of risk and provides that the contractor assumes the risk for the first \$50,000 of the government’s risk assumed under subparagraph (b).

#### *Navy Docking Observer*

6. NAVSEAINST 9997.2B, DOCKING OBSERVER PROGRAM FOR SUPERVISORS OF SHIPBUILDING, CONVERSION AND REPAIR AND NAVY REGIONAL MAINTENANCE CENTERS, establishes the requirements for the qualification and certification of Docking Observers responsible for oversight of dry-docking of Navy ships in commercial facilities (R4, tab 30). Dry-docking, undocking, transferring or launching of Navy ships will be referred to as “evolutions” (*id.* at GOV000901). NAVSEAINST 9997.2B defines the policy as:

4. Policy. This instruction establishes a cadre of docking personnel, referred to as “Docking Observers”, for the purpose of protecting Navy interests where the evolution could be jeopardized by the action or the inaction of contractor personnel. Docking Observers are required because the SUPSHIP/RMC is responsible for ensuring that contractors under its cognizance use facilities certified and operated under reference (a) in a safe manner and

consistent with the Facility Certification Reports. Docking Observers have the authority, delegated to them in writing by the SUPSHIP/RMC, to stop the evolution when the ship's safety or other Navy interests are jeopardized. To ensure that these responsibilities are carried out, a Docking Observer will be assigned who is knowledgeable and is responsible to the SUPSHIP/RMC for the safe use of the certified facilities.

(*Id.* at GOV000902) Reference (a) is MIL-STD-1625 (*id.* at GOV000901). “A Docking Observer must be assigned for each evolution. The assigned Docking Observer is the Navy’s point of contact for all matters relative to the evolution, and therefore must possess the required knowledge, skills and abilities” (*id.* at GOV000903).

7. Mid-Atlantic Regional Maintenance Center instruction, MARMCINST 9997.1C, TECHNICAL STANDARDS FOR CONUS DOCKING EVOLUTIONS WHERE MID-ATLANTIC REGIONAL MAINTENANCE CENTER IS THE NAVAL SHIPBUILDING ACTIVITY, includes the following:

I. Purpose

- a. To establish procedures and responsibilities for all phases of dry-docking U.S. Navy ships under the cognizance of the Mid-Atlantic Regional Maintenance Center (MARMC) in accordance with references (a) through (n) using enclosures (1) through ( 13). Any reference to Supervisor of Shipbuilding contained in references (a) through (n) is synonymous with the MARMC.
- b. To delineate the relationship between the Command Docking Observer (CDO), Assistant Command Docking Observer (ACDO), Docking Observer (DO), Docking Observers Under Instruction (DO (U/1)), and the contractor’s Dockmaster, to ensure safe docking and undocking of vessels in contractor operated dry-docks, marine railways, and vertical lift systems in accordance with references (a) through (e).

(R4, tab 32 at GOV000927) Reference (g) is MIL-STD-1625 and Enclosure (1) is MARMC 9997/1 (10-15); Qualification Requirements for Docking Observer (*id.* at GOV000926). MARMCINST 9997.1C also includes:

3. Background. Private contractors are legally responsible for docking and undocking evolutions for Navy vessels under their control by contract provisions and by case law principles. However, contracts for new construction of ships all repair and overhaul contracts limit the contractor's liability regarding damage to the vessel and to third parties. Thus, the Navy's risk of liability while docking and undocking Navy ships in private shipyards is significant. . . . In accordance with the content of these references, the contracts, and established law, the legal responsibility for docking and undocking evolutions is borne by the contractor, absent direction from the government. The DO protects the Navy's interest and will normally not give direction to the contractor. The only exception to this general principle exists when the DO considers the ship's safety or other Navy interests would be jeopardized by the action of the contractor. In this case, the DO shall direct the contractor's Dockmaster to refrain from such action until the issue is resolved. Such a procedure will not relieve the contractor of responsibility but will protect the Navy's interest even though there may be cost impact. Safety and protection of the Navy's interest in the vessel shall take precedence over concern for possible cost impact. Docking practices, which appear objectionable but do not involve the safety of the ship, should not be arbitrarily stopped in the above manner, but should be discussed with a view to persuade the contractor to correct them.

(*Id.* at GOV000927) The Duties and Responsibilities paragraph refers to paragraph 3:

6. Duties and Responsibilities. The duties and responsibilities of the personnel representing the MARMC CO must be clearly understood by both the government and the contractor. All necessary information must be correlated between the government and the contractor, and all parties must keep each other properly informed to ensure safe docking and undocking. As discussed in paragraph 3 above, the DO will only exercise operational control or authority over the contractor when he/she believes the safety of the vessel is in jeopardy.

(*Id.* at GOV000928)

*Requirement to Dry-Dock USS TRUXTUN*

8. The requirement for dry-docking the USS TRUXTUN is detailed in a document entitled “DRY-DOCK REQUIRED,” August 10, 2016, labeled as “ITEM NO: 997-11-001”, that requires dry-docking and undocking at the contractor’s facility (R4, tab 31 at GOV000919). Item No. 997-11-001 includes the following in paragraph 3.1:

3.1 Furnish a sound dock, dockmaster, qualified personnel and necessary equipment, all certified in accordance with 2.2<sup>[4]</sup>, to dock the ship in Position Number One of 2.3<sup>[5]</sup>.

(R4, tab 31 at GOV000919) Item 997-11-001 also includes the following in Note 4.2:

4.2 The SUPERVISOR’s designated representative (i.e., Docking Officer/Observer) is the government official certified by the government as qualified to execute the duties of a Docking Officer/Observer. The presence of a docking officer/observer or for the purpose of protecting the Navy’s interest, not to give direction to the contractor. However, the SUPERVISOR’s docking officer/observer shall have the authority to stop the docking, undocking, or launching when the ship’s safety or other Navy interests are jeopardized. This authority does not imply limitations on, or responsibility for, the actions of the contractor's Dockmaster/Launchmaster.

(R4, tab 31 at GOV000925)

*DO FC028 for USS TRUXTUN*

9. On August 10, 2017, the Navy’s Mid-Atlantic Regional Maintenance Center (MARMC) awarded Metro Machine dba General Dynamics NASSCO-Norfolk (NASSCO) (DO)<sup>6</sup> N5005417FC028 (DO FC028) pursuant to IDIQ Contract No. 4408, CLIN No. 0004, in the amount of \$31,630,336.00 (R4, tab 9 at GOV000414, 000416, 000441). CLIN No. 0004 read:

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<sup>4</sup> MIL-STD-1625, Safety Certification Program for Dry-docking Facilities and Shipbuilding Ways for US Navy Ships (R4, tab 31 at GOV000919).

<sup>5</sup> 801-7061436 Rev A, Docking Drawing, Selected Record Drawing (R4, tab 31 at GOV000919).

<sup>6</sup> Not to be confused with Docking Observer (DO).

The contractor shall provide all labor, materials, facilities, supervision and equipment to meet the requirements outlined in Section C. All work shall be completed in accordance with all applicable local, State, Federal and Navy rules and regulations, whether they are explicitly written/referenced in this DD 1155 or not.

(*Id.* at GOV000417) The DO required NASSCO to “prepare for and accomplish maintenance, modernization and repair” of the USS TRUXTUN (*id.* at GOV000434). The major milestones included docking and undocking the USS TRUXTUN (*id.* at GOV000449). DO FC028 was administered by MARMC (*id.* at GOV000416, 000454).

10. DO FC028, Section C, subparagraph 9. AUTHORIZED CHANGES BY THE CONTRACTING OFFICER included in part:

The contractor shall not comply with any order, direction or request of Government personnel unless it is issued in writing and signed by the Contracting Officer, or is pursuant to specific authority otherwise included as a part of this contract.

(*Id.* at GOV000437)

11. DO FC028 included HQ C-2-0033 LIMITATION OF LIABILITY – HIGH VALUE ITEMS (NAVSEA) (JUN 1992) that reads, “The following items are subject to the clause of this contract entitled “LIMITATION OF LIABILITY-HIGH VALUE ITEMS” (FAR 52.246-24): Item 0004” (*Id.* at GOV000439).

#### *Docking Conference*

12. A docking conference was held of October 6, 2017 (R4, tab 33). The presentation included a detailed chronology of the significant events anticipated for the docking starting at 0430 and ending at 1730 (*id.* at GOV000968-970).

13. LT Lewis attended the docking conference (tr. 1/138). He recalled that the main item to be covered is NASSCO’s procedures and sequence of events for how they plan to successfully dock the TRUXTUN (tr. 1/140). Sometime after the conference CPT Lannamann gave LT Lewis approval to proceed with the docking on October 9, 2017 (tr. 1/142).

*Dry-Docking of USS TRUXTUN*

14. The USS TRUXTUN was scheduled to be dry-docked at NASSCO's "SPEEDE" dry-dock on October 9, 2017. Mr. Trobaugh was NASSCO's Dockmaster. (Tr. 1/11; R4, tab 33 at GOV000973) LT Lewis was the Navy's Docking Observer (tr. 1/131). He was formally qualified as a docking observer by letter dated August 18, 2017, signed by CPT Lannamann (ex. G-1; tr. 1/132-33, 135). The qualification letter included the following:

2. As the Commanding Officer's representative, you are directed to carry out your duties in accordance with reference (a). As the assigned Docking Officer, you are to ensure safe docking and undocking of vessels in contractor operated dry-docks, marine railways and vertical lifts under cognizance of this command.

3. The Docking Observer protects the Navy's interest and normally will not give direction to the contractor. The only exception to this general principle exists when the Docking Observer considers the ship's safety or other Navy interests would be jeopardized by the actions or inactions of the contractor. In this case, the Docking Observer shall direct the contractor's Dockmaster to refrain or take such action necessary, including stopping the event until the issue is resolved. Docking practices which appear objectionable but do not involve the safety of the ship should not be arbitrarily stopped in the above manner but rather should be discussed with a view to persuade the contractor to correct the issue(s).

(*Id.*) Reference (a) was MARMCINST 9997.1B (*id.*). LT Lewis testified, "My job is to - - as it [qualification letter] states, is to ensure the safety of the vessel, and that's for that entire evolution" (tr. 1/136).

*Mr. Trobaugh's Testimony*

15. Mr. Trobaugh works for NASSCO as Facility Director and Senior Dock Master (tr. 1/11). He was the Dock Master during the attempted docking of the USS TRUXTUN on October 9, 2017 (tr. 1/11). He has thirty years of experience with dry-docks and conducted approximately 265 dry-dockings before October 9, 2017 (tr. 1/11-12). The dry-dock involved in the TRUXTUN docking was a floating dry-dock named "SPEEDE" (tr. 1/12-13). A picture of the SPEEDE dry-dock is in the record (tr. 1/13; app. supp. R4, tab 68). The dry-dock operates by placing blocks in

the dock to support the ship, submerging it in a “sinking basin,” positioning a ship over the submerged dock using ship power, then “hauling lines,” and finally raising the dock and ship (tr. 1/14-15, 17-19, 26). NASSCO also had three tugboats assisting in moving the TRUXTUN into the submerged dry-dock (tr. 1/20-21). Once the ship is far enough in the submerged dry-dock various lines are attached. These are the checking lines, inhaul lines, outhaul lines, centering lines and safety line. (Tr. 1/21-24; app. supp. R4, tab 79 at GD000242) Inhaul lines are used to pull the ship into the dock and outhaul lines are used to pull the ship out of the dock (tr. 1/25-26, 29; app. supp. R4, tab 80 at GD000244).

16. During hauling the TRUXTUN into the dock Mr. Trobaugh heard a noise and noticed that one of the inhaul cables was slack. He had the winch operator pull in the cable and it had severed. (Tr. 1/31-32) A picture of the severed cable is at government exhibit 2 (ex. G-2). He sent divers in to retrieve the other end of the cable (tr. 1/33). At the time the cable snapped the ship was about one third in the dock (tr. 1/57-58). The starboard inhaul cable was intact (tr. 1/33). Mr. Trobaugh recalled that the starboard inhaul cable had been replaced within the last three or four years and should be in good condition and had the capacity to haul in the TRUXTUN by itself (tr. 1/33). However, Mr. Trobaugh had to switch to manual operation when using only one inhaul cable. In manual mode the operator has to manually control the interplay between the two outhaul cables and the single inhaul cable so that the outhaul cables play out cable at the same rate as the single inhaul cable. While operating in manual mode the operator cannot see the winches and has to operate by “feel” and relying on radio contact with other observers. (Tr. 1/34-35) The automatic centering system still worked when hauling was operated manually (tr. 1/40-1, 75). NASSCO determined that the cable snapped due to internal corrosion (tr. 1/49).

17. As the TRUXTUN was being hauled into the dock with the remaining inhaul cable, one of the outhaul cables “came off the reel and started catching inside the box” (tr. 1/35). A picture of this cable is at government exhibit 2 (ex. G-2). Mr. Trobaugh testified that hauling in with one inhaul cable is what caused the outhaul cable to foul, “. . . bringing it in with one cable because we were bringing it in with one cable. That’s what created the fouling, the outhaul line.” (Tr. 1/37) Mr. Trobaugh testified that the centering system was still intact and they had “really good control of the stern” and they had the remaining inhaul cable that could pull the TRUXTUN into the dock<sup>7</sup> (tr. 1/36-39). LT Lewis, who authorized continued inhaul with only one cable, also testified that NASSCO’s automatic centering system was operational during the attempted docking on October 9, 2017 (tr. 1/167-68). Using the automatic centering system is safer than using a capstan and soft line/manual system

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<sup>7</sup> There is a mistake in the transcript that is inconsistent with the rest of the record, “. . . knowing that the one cable couldn’t stand the weight of the ship, we proceeded to try to bring it in” (tr. 1/36). We disregard this error.

(tr. 1/169). Mr. Trobaugh discussed his intention to complete the docking with his boss, Mr. Baker, NASSCO Senior Director of Waterfront Operations, and DO Lewis (tr. 1/37, 71, 73). Mr. Trobaugh recommended cutting the fouled outhaul cable and continue with the docking (tr. 1/64).

18. Mr. Trobaugh explained why he wanted to complete the docking on October 9, 2017:

Q: So on October 9th, 2017, why did you want to complete the docking with that configuration?

A: I believe it was a -- I don't want to say easier, but it was quicker. We could do it, and not take the time to take the soft lines out to bring in the capstans -- more soft lines to keep it centered. With me, I felt it was safe with the centering system and it was safe with the -- for the one cable and it just seemed to be the easiest, quickest decision to make.

(Tr. 1/38) Mr. Trobaugh testified there was no risk of damage to the TRUXTUN by pulling it with one inhaul cable and having a fully functioning automatic centering system and tugboats standing by (tr. 1/65-66). Mr. Trobaugh testified that had the evolution not been cancelled at around 2:00 p.m. the docking would have been completed by 4:00 p.m. with another hour to lift the ship. If they ran into darkness the dock had lights and it was no problem to dock at night. (Tr. 1/212-13) Mr. Trobaugh checked with his crew and there was no evidence of fatigue (tr. 1/214).

#### *LT Lewis' Testimony*

19. LT Lewis was at the dock when the starboard inhaul cable snapped. He took a picture of one end of the severed cable. (Tr. 1/147, 152; ex. G-2 at 4) LT Lewis recalled that when the cable snapped Mr. Trobaugh stopped the evolution and made sure the TRUXTUN was in a safe position (tr. 1/147). Divers went in the water to check for damage and recover the other end of the cable (tr. 1/149). LT Lewis called CPT Lannamann to discuss the situation. LT Lewis recommended that Mr. Trobaugh's plan to continue to pull the TRUXTUN into the dock be approved. CPT Lannamann concurred. (Tr. 1/150, 153) After the inhaul cable snapped, NASSCO had to shift from automatic to manual inhaul control (tr. 1/153). NASSCO continued to pull the ship into the dock and moved it another 10 to 15 feet

when the second casualty occurred (tr. 1/153). The port side outhaul cable bird caged.<sup>8</sup> LT Lewis took a picture of the cable on the drum (tr. 1/154; ex. G-2 at 6). At that time Mr. Trobaugh stopped the evolution to investigate (tr. 1/156). After investigation Mr. Trobaugh told LT Lewis he had two options. They could cut the cable and continue pulling the ship into the dock or cancel the evolution, move the ship out of the dock to untangle the cable.<sup>9</sup> (Tr. 1/158) Mr. Trobaugh wanted to cut the cable and continue pulling the ship into the dock (tr. 1/158). LT Lewis discussed the situation with Mr. Trobaugh (tr. 1/161). LT Lewis called CPT Lannamann and presented Mr. Trobaugh's recommendations (tr. 1/162). LT Lewis recommended cancelling the evolution and CPT Lannamann agreed (tr. 1/162). LT Lewis testified that he was concerned because NASSCO was five hours behind schedule meaning people were getting tired and he was concerned about NASSCO operating at night (tr. 1/160-61, 172-73). LT Lewis told Mr. Trobaugh, Mr. Terry and Mr. Baker to cancel the evolution and put the TRUXTUN pier-side (tr. 1/162, 164).

#### *CPT Lannamann's Testimony*

20. On October 9, 2017, CPT Lannamann was the Commanding Officer of the Mid-Atlantic Regional Maintenance Center (tr. 1/176). He considered dry-docking a ship to be a "high risk, high consequence endeavor" (tr. 1/179). Once a ship crosses the sill of the dock, responsibility for the ship shifts from the ship's commanding officer to CPT Lannamann. The DO is his representative to ensure safety of the ship during the evolution. (Tr. 1/179-80) However, NASSCO had control over the docking/inhaul of the ship (tr. 1/181-82). When the inhaul line severed, LT Lewis discussed the situation with CPT Lannamann and he approved LT Lewis' recommendation to continue docking (tr. 1/183). When an outhaul line bird caged, LT Lewis discussed the situation with CPT Lannamann. LT Lewis recommended cancelling the docking and CPT Lannamann agreed. CPT Lannamann explained that after the second casualty he had no idea what else could go wrong and he wasn't willing to jeopardize the ship. (Tr. 1/186-87) He recalled talking with Mr. Terry immediately after talking with LT Lewis and Mr. Terry said he thought they could successfully dock the ship but CPT Lannamann did not change his mind (tr. 1/188, 190). CPT Lannamann preferred to make the ship safe and repair the dry-dock before resuming the evolution (tr. 1/190).

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<sup>8</sup> Birdcaging is where the cable wraps around the spool of the winch due to slack on the cable (tr. 1/95).

<sup>9</sup> Mr. Trobaugh did not recall giving LT Lewis the option of cancelling the evolution (tr. 1/66-67).

### *Mr. Baker's Testimony*

21. Mr. Baker is NASSCO's Senior Director Waterfront Operations (tr. 1/73). He is Mr. Trobaugh's boss (*id.*). Mr. Baker was at the shipyard on October 9, 2017 (tr. 1/73-74). Mr. Trobaugh called Mr. Baker and informed him about the failure of the inhaul cable and bird caging of an outhaul cable. Mr. Baker informed his boss Mr. Terry, NASSCO General Manager, and they both went to the dry-dock and talked with Mr. Trobaugh. They all agreed to cut the outhaul cable and proceed. They talked with the DO, LT Lewis, who told them the Navy was shutting down the docking evolution. They explained that they could still pull the ship into the dock safely because the centering system was working. (Tr. 1/75-77) Mr. Baker testified that the TRUXTUN could have been docked safely (tr. 1/78-79). He testified that as long as the centering system was working keeping the TRUXTUN in the center of the dock there was no danger to the ship (tr. 1/80, 82).

### *Mr. Terry's Testimony*

22. Mr. Terry is NASSCO's general manager at the Norfolk, VA shipyard (tr. 1/87). He was at the shipyard on October 9, 2017 (tr. 1/91). Mr. Baker called him to tell him about the parted cable. He went to the dry-dock and saw the parted cable (tr. 1/92). The centering system was intact (tr. 1/93). He was then told about the bird caging of the outhaul cable and he authorized cutting that cable (*id.*). Mr. Baker told him that LT Lewis had cancelled the docking (tr. 1/93-94). Mr. Terry called CPT Lannamann to explain NASSCO's position (tr. 1/95). Mr. Terry felt that the bird caging was caused by the operator not being able to see the outhaul cable causing it to get slack and wrapping around the spool. He did not think it was related to the parted inhaul cable. He believed they had more than enough capability to proceed safely with the docking. (Tr. 1/95) CPT Lannamann did not agree and directed him to abort the docking and return the TRUXTUN to the pier (tr. 1/96). That was at about 2:00 pm and it was a beautiful, sunny day with no winds. Mr. Terry recalled they had plenty of time left to complete the docking. (Tr. 1/96)

23. Mr. Terry testified that NASSCO wanted to replace the cables on the dry-dock before docking the ship again. NASSCO actually replaced all of the cables on the dry-dock. (Tr. 1/97-98) The cable replacement was done on company overhead and is not part of this claim (tr. 1/101).

### *The Docking Memo*

24. LT Lewis wrote a Docking Memo after the incident (tr. 1/160; R4, tab 34). The Docking Memo concerning the docking of the USS TRUXTUN included the following chronology of events on October 9, 2017:

0530	Final walkthrough SAT
0658	Start ballasting dock
0809	Stop ballasting dock
0815	Sill Time/Ship enters dock
1020	Evolution paused due to Broken STBD (EAST Side) inhaul cable.
1136	Divers in water to check for the other broken end of the cable
1158	Broken STBD inhaul cable out of water
1200	Divers out of water. Continue Evolution
1245	Evolution paused due to fouled PORT (WEST Side) outhaul cable
1400	Docking Observer recommends CANEX to MARMC CO. MARMC CO Concurr. Directs KTR to CANEX Evolution.
1415	KTR begins preps to receive TRX at NASSCO Pier 2
1537	Pier 2 is ready to receive ship
1553	Commenced moving ship out of dock
1645	Sill time/ Ship out of dock.
1650	Deballasting dock.
1744	Pontoon deck dry
1803	Dock inshore position. TRX moored Pier 2.

(R4, tab 34 at GOV000981) The remarks section described the October 9, 2017, attempted docking as follows:

At 1020, KTR was hauling in TRX utilizing SPEEDE Dry-Dock cableway system when the STBD (East) side inhaul cable parted under approximately 30% tension. KTR, while maintaining positive control of the ship, proceeded to secure the parted cable and investigate for any additional damage due to parting of the cable. No additional damage to dry-dock was found. At approximately 1217, KTR continued to inhaul TRX using only the Port (West) side inhaul system in manual mode. A[t] approximately 1245, the Port (West) side outhaul cable came off the drum and became fouled. KTR proceeded to investigate fouled Port (West) side outhaul cable, while maintaining positive control of the ship. At approximately 1400, due to degraded dry-dock hauling system, and being five hours behind schedule Docking Observer made recommendation to MARMC CO to CANEX. MARMC CO concurred.

(*Id.* at GOV000982)

25. NASSCO also filled out a similar “Accident/Incident Report” having a chronology and discussion (app. supp. R4, tab 1 at GD00002 - 05). The NASSCO

chronology differs slightly from the Navy chronology. According to the NASSCO chronology at 1415 the Dockmaster, Mr. Trobaugh, still planned to continue the docking evolution:

1415 – Dockmaster makes decision to eliminate the outhaul cable in question and proceed. Docking Observer is notified along with Pilot and Ship C/O. In addition, the notification is given that upon further failure redundancies will be initiated such as auxiliary capstan inhaul and/or small tug assistance (two on standby during entire evolution).

(*Id.* at GD000003) After the outhaul winch “bird caged” the following was included in the discussion:

Once stopped, additional measures to bring ship into dock in a safe manner were reviewed and presented to the Docking Observer prior to taking action. Docking Observer requested NASSCO-Norfolk to put TRUXTUN to pier upon speaking with his supervision. Pier 2 was prepared according to the approved drawing and ship was safely moved to the pier.

(*Id.*)

#### *Corrective Action Report*

26. A Corrective Action Request (CAR) dated October 12, 2017, concerning the October 9, 2017 attempted docking of USS TRUXTUN included the following:

#### **Statement of Nonconformance:**

Contrary to NSI 009-60 para 4.1.6 the contractor failed to meet a major milestone. On 09Oct the USS TRUXTUN was scheduled to dock at NASSCO Dry-Dock, however, a cable incident prevented that from occurring. Contrary to Work Item 997-11-001 para 3.22 the contractor failed to dock the ship.

(R4, tab 36 at GOV000988-989) NASSCO’s response to the CAR was:

NASSCO-NORFOLK does not accept this CAR as a nonconformance that we did not meet the docking date.

As documented in NASSCO-NORFOLK's Docking Incident Report dated 10/11/2017 even with the severed cable NASSCO-Norfolk's dock has redundant systems that would have enable the docking to safely continue. It was the recommendation from the Dockmaster to the Docking Observer (government representative) that the docking should continue based on the redundant systems to safely dock the ship. The (government) Docking Observer directed NASSCO to stop the docking evolution and place the ship pier side. The decision not to dock the ship was made by the (government) Docking Observer even though NASSCO's Dockmaster clearly communicated our ability to safely dock the ship without the cable in question. Therefore NASSCO should not be held responsible for a government decision to change the docking evolution. NASSCO looks at the direction by the (government) Docking Observer to stop the evolution and place the ship pier side as a directed changed in docking schedule.

(*Id.* at GOV000989)

#### *Administrative Contracting Officer's Testimony*

27. Ms. Boyd was the Administrative Contracting Officer (ACO) for the TRUXTUN on October 9, 2017 (tr. 1/203-04). Ms. Boyd was not at the dry-docking and did not direct the DO, LT Lewis, to do anything (tr. 1/204-05). She had no involvement in NASSCO's decision to fix the dry-dock before resuming docking the TRUXTUN (tr. 1/205).

#### *USS TRUXTUN Successfully Docked*

28. After the October 9, 2017 evolution was cancelled, NASSCO repaired the dry-dock and attempted another evolution but had to cancel due to high winds. The USS TRUXTUN was successfully dry-docked on October 19, 2017. LT Lewis was the DO on October 19, 2017. (Tr. 1/166)

#### *NASSCO's Request for Equitable Adjustment (REA)*

29. By letter dated November 30, 2017 NASSCO notified MARMC that it is submitting "a Request for Equitable Adjustment, for the changes directed by the Government on October 9, 2017, during the docking evolution for the USS TRUXTUN (DDG-103)" in the amount of \$495,587 (R4, tab 23 at GOV000532). The REA included 53 pages of cost data supporting its request (*id.* at GOV000533-586).

30. By letter dated December 19, 2017, MARMC responded to NASSCO's REA (R4, tab 24). The letter included a time-line for the evolution and the following:

It is significant to note that your letter did not detail the entire series of events that led to the cancelling of the TRUXTON docking on 9 October 2017. Your company had successfully maneuvered half of the vessel into your dry-dock when the starboard inhaul cable completely severed. Valuable time was lost while your company secured the severed cables until the docking evolution was resumed at 1200. Once the starboard inhaul cable was compromised, the automatic mode of your dry-dock was no longer functional requiring you to shift to manual mode. Although the vessel can be successfully docked in manual mode, it does not allow for "auto tensioning" of the cables. Forty-five (45) minutes after recommencement of the docking evolution, it had to be paused again at 1245. Too much slack was allowed in the portside outhaul cable resulting in the cable wrapping or fouling around the drum assembly. After this casualty took place, GDNN no longer had starboard inhaul or portside outhaul capabilities to dock the ship. Finally, at approximately 1400, the MARMC Docking Observer cancelled the docking evolution and requested that the TRUXTON be moored at Pier 2. The MARMC CO, CAPT Daniel Lannamann concurred with this action.

The MARMC Docking Observer had lost confidence that a successful dry-docking could be accomplished due to the fact that the TRUXTON's docking was now approximately five (5) hours behind schedule, and with the dry-dock operating under a severely degraded operating system, there was a loss of confidence in GDNN's ability to manually dock the ship in a safe manner within the remaining daylight hours including time for divers to perform their final checks before sunset.

(R4, tab 24 at GOV000591) The Navy denied liability for the REA (*id.*).

31. By letter dated March 26, 2018 NASSCO provided "supplemental information" to the Navy prompted by the Navy's December 19, 2017 letter (app. supp. R4, tab 27). NASSCO stated that the dry-dock was not "severely degraded"

because even with the separated starboard inhaul cable the other 19,100 LT<sup>10</sup> inhaul cable was operational and NASSCO only needed 8,000 LT inhauling capacity for the USS TRUXTUN. Also, even with the fouled “bird caged” port outhaul cable the automatic centering system remained fully operational. Additionally the backup manual docking capability was available to complete the dry-docking evolution. (App. supp. R4, tab 27 at GD000093) NASSCO contends it only needed an hour to complete dry-docking evolution and the SPEEDE dry-dock had a lighting system that allowed operations at night (*id.*). The March 26, 2018 REA included a certification of the claim in the amount of \$576,912 (*id.* at GD000097).

32. On June 8, 2018 NASSCO submitted a “claim” certification of the REA and “demands” the Navy either pay \$576,912 or issue a Contracting Officer’s Final Decision by July 3, 2018 (R4, tab 25). On September 26, 2018, NASSCO appealed the deemed denial of its claim to the Armed Services Board of Contract Appeals (ASBCA). On September 27, 2018 the ASBCA docketed the appeal as ASBCA No. 61817.

#### *Expert Witness*

33. Mr. Hepburn works for Hepburn and Sons, LLC an insurance consulting firm primarily for Department of Defense (DoD) contractors<sup>11</sup> (tr. 1/104). NASSCO hired Mr. Hepburn to look at the two cable failures encountered during the TRUXTUN evolution and offer an opinion on if the docking could have been completed safely (tr. 1/109). Mr. Hepburn authored a report, dated 18 July 2018, including several pictures and numerous diagrams (app. supp. R4, tabs 63, 67-89). Using his report, Mr. Hepburn explained how he went about assessing the situation (tr. 1/109-119). Mr. Hepburn concluded that NASSCO had “the approved processes, knowledge, skills, equipment and ability to safely dry-dock USS TRUXTUN (DDG-103) in the SPEEDE floating dry-dock on the date originally scheduled, 9 October 2017” (app. supp. R4, tab 63 at GD000205; tr. 1/117-18).

### DECISION

#### *Positions of the Parties*

NASSCO offers two theories supporting its claim. First is that the Navy constructively changed the contract by cancelling the October 9, 2017 evolution and

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<sup>10</sup> The parties agreed that “LT” stood for “Long Tons.”

<sup>11</sup> Mr. Hepburn was called as an expert witness but was never formally offered as such. He discussed his education and professional experience (tr. 1/105-109). The Navy did not object to his testimony. Therefore we find that Mr. Hepburn qualifies as an expert witness in dry-docking Navy vessels.

thereby causing NASSCO to perform a second docking evolution on October 19, 2017 (app. br. at 25). NASSCO points to Navy instructions that state that the DO, LT Lewis, should exercise his authority to stop an evolution due to concerns over the safety of the ship without consideration of a cost impact. NASSCO states that such instructions “imply that the Government should bear the cost of cancelled docking evolutions.” (App. br. at 26) Mainly, NASSCO argues that LT Lewis, the DO, had authority to cancel the evolution but in so doing he caused NASSCO to perform additional work, i.e., the second docking evolution, and that is a constructive change. Also, NASSCO argues that it was operating its dry-dock in conformance with the Delivery Order and applicable standards and the Navy’s rejection of NASSCO’s method of performance was another basis for liability for a constructive change (app. br. at 27). Second, NASSCO argues that the decision to stop the evolution was based on a lack of knowledge of NASSCO’s operational procedures and a mistaken belief that the dry-dock was “severely degraded” (app. br. at 31). NASSCO does not say it, but seems to be arguing that the Navy’s rejection of NASSCO’s recommendation to continue the evolution after the outhaul cable fouled was unjustified and an abuse of discretion. NASSCO, relying on various cases including *Ensign-Bickford Aerospace & Def. Co.*, ASBCA No. 57929, 16-1 BCA ¶ 36,533, argues that the Navy must prove that its concerns over safety are correct “by a preponderance of evidence” (app. br. at 30-31). In its reply brief NASSCO provides a detailed rebuttal of the Navy’s arguments. First we note that NASSCO clarifies that it is not seeking delay and disruption damages (app. reply br. at 11). NASSCO contends it “is not required to prove that the Docking Observer acted unreasonable or that the cancellation was the Government’s fault.” Several sentences later NASSCO states, “. . . NASSCO has proven that the Navy acted unreasonably” because the “TRUXTUN could have been dry-docked safely on October 9, 2017.” (App. reply br. at 3-4) NASSCO repeatedly contends that the TRUXTUN was at all times safe (app. reply br. at 4, 7, 9, 11).

The Navy makes three arguments. First, the FFP contract includes no provisions allocating the cost risk to the Navy for cancellation of the October 9, 2017 evolution (gov’t br. at 14). Second, there is no constructive change because, even though the DO, LT Lewis, had “contractual authority to stop the docking,” NASSCO failed to prove that the DO “acted unreasonably or that the cancellation was government fault” (gov’t br. at 16). The Navy asserts that LT Lewis’s action “was reasonable under all circumstances” (gov’t br. at 17). Third, to the extent NASSCO claims delay damages, any delay was not caused by the Navy but rather was caused by the inhaul and outhaul cable failures that occurred on NASSCO’s dry-dock (gov’t br. at 18-19). In its reply brief the Navy reiterates that LT Lewis’ “decision not to allow the docking to continue was reasonable under the circumstances and it does not support a finding of government fault” (gov’t reply br. at 2). The Navy challenges NASSCO’s reliance on *Ensign-Bickford Aero. & Def. Co.*, 16-1 BCA ¶ 36,533, stating there was no failure of equipment in *Ensign-Bickford* as was the case with NASSCO (gov’t reply br. at 2). Finally the Navy urges the Board to put “little weight” on the

testimony of NASSCO's expert, Mr. Hepburn, because he is "not qualified to interpret the contract or render a legal opinion. . . ." (gov't reply br. at 3).

### *Discussion*

#### *Insurance Provisions*

The Navy points out that the contract includes provisions that limit NASSCO's liability for damage to a ship (findings 4-5; gov't br. at 6-7, 15). Specifically NASSCO's liability for damage to a ship is limited to \$50,000 (finding 5). Since there is no damage to the TRUXTUN involved in this case, we do not view the insurance provisions as material to our decision.

#### *"Other Navy Interests"*

The contractual language that the DO has authority "to stop the evolution when the ship's safety or other Navy interests are jeopardized" plays an important role in analyzing the DO's authority in this case (findings 6-7, 8, 14). Each party refers to this language but the focus is on safety not on what "other Navy interests" might be involved. Although we are not directly confronted with interpreting this language it is obvious that "other Navy interests" is too vague and indefinite to be enforceable. *W. H. Hinman, Inc.*, ASBCA No. 3662, 56-2 BCA ¶ 1139 at 1139 (To hold otherwise might well leave the contract so vague and indefinite as to be unenforceable for uncertainty . . .). Accordingly, we do not rely on "other Navy interests" in our decision.

#### *"Vital Systems"*

Docking Instructions include a list of "vital systems." If during a docking evolution any of the vital systems are not operational, "it should be concluded that any further docking or ballast transfer operations are unsafe, and docking operations shall be terminated at once and suspended until satisfactory corrective action has been accomplished." (Finding 3) The inhaul and outhaul systems are not on the list of "vital systems." Accordingly we conclude that the October 9, 2017, failure of one inhaul cable and fouling of one outhaul cable do not automatically require cessation of the evolution.

#### *Dry-Dock Emergency Operation*

MIL-STD-1625 required NASSCO to prepare emergency procedures in advance (finding 1). NASSCO had written instructions (WI-Q-3026) for dry-dock operation in the event of a failure of the dry-dock's hauling/centering systems to include how to proceed if the decision is made to continue docking the ship after the

failure (finding 2). Based on the testimony of NASSCO's Dockmaster, Mr. Trobaugh, and the Navy's Docking Observer, LT Lewis, who were both present on the dock when the failures occurred, (findings 15-19), LT Lewis' Docking Memo (finding 24) and NASSCO's Accident/Incident Report (finding 25) we conclude there is no disagreement over what happened on October 9, 2017. We rely to a lesser degree on the testimony of CPT Lannamann, Mr. Baker and Mr. Terry, who did not personally observe the failures, but whose testimony is consistent with Mr. Trobaugh's and LT Lewis' testimony (findings 20-23). Based on this testimony and documents we hold that NASSCO followed its emergency procedures after the failures.

*The Docking Observer's, LT Lewis', Authority*

Two provisions are the starting point for our analysis. First is Delivery Order (DO FC028), CLIN No. 0004 that we repeat here:

The contractor shall provide all labor, materials, facilities, supervision and equipment to meet the requirements outlined in Section C. All work shall be completed in accordance with all applicable local, State, Federal and *Navy rules and regulations, whether they are explicitly written/referenced in this DD 1155 or not.*

(Finding 9) (Emphasis added) We conclude that CLIN No. 0004 incorporates applicable "Navy rules and regulations" into the contract. Second is Delivery Order Section C, subparagraph 9, that we also repeat here:

The contractor shall not comply with any order, direction or request of Government personnel unless it is issued in writing and signed by the Contracting Officer, *or is pursuant to specific authority otherwise included as a part of this contract.*

(Finding 10) (Emphasis added) Read together, Delivery Order CLIN No. 0004 incorporates Navy rules and regulations into the contract and Delivery Order Section C bestows upon individuals empowered by these Navy rules and regulations authority to provide contractual direction to the contractor. In LT Lewis' case there are various rules and regulations that give him, the Docking Observer, authority to stop a docking evolution when he considers the ship's safety jeopardized (findings 6-8, 14). This authority extends to stopping the docking evolution. NAVSEAINST 9997.2B provides "Docking Observers have the authority, delegated to them in writing by the SUPSHIP/RMC, to stop the evolution when the ship's safety or other Navy interests are jeopardized" (finding 6). LT Lewis's Docking Officer qualification letter provides that LT Lewis may "direct the contractor's Dockmaster to refrain or take such action

necessary, including stopping the event until the issue is resolved (finding 14). The USS TRUXTUN dry-docking required document provides:

However, the SUPERVISOR's docking officer/observer shall have the authority to stop the docking, undocking, or launching when the ship's safety or other Navy interests are jeopardized. This authority does not imply limitations on, or responsibility for, the actions of the contractor's Dockmaster/Launchmaster.

(Finding 8) Based on Delivery Order CLIN No. 0004, Delivery Order Section C and the regulations cited above, we hold that the LT Lewis was vested with contractual authority equal to that of the contracting officer while acting within the scope of his authority as Docking Observer.

### *Constructive Change*

We considered the elements of constructive change in *The Sherman R. Smoot Corp.*, ASBCA No. 52150, 03-1 BCA ¶ 32,073:

To recover for a constructive change, a contractor must prove that: (1) the CO compelled the contractor to perform work not required under the terms of the contract; (2) the person directing the change had contractual authority unilaterally to alter the contractor's duties under the contract; (3) the contractor's performance requirements were enlarged; and (4) the added work was not volunteered, but resulted from the direction of the Government's officer. (Citation omitted).

(*Id.* at 158,502) We found above that LT Lewis had contractual authority to stop the evolution so element two is satisfied. There is no evidence that NASSCO volunteered to stop the evolution and perform another docking evolution so element four is satisfied. The problem for NASSCO are the first and third elements.

NASSCO's constructive change argument at its core is that the contract only required one docking and one undocking, "Pursuant to the Delivery Order, NASSCO was required to complete only one docking and one undocking evolution of the *TRUXTUN*" (app. br. at 25). We disagree. As we held above, LT Lewis had contractual authority to stop the docking evolution. NASSCO does not contest that authority. NASSCO writes, in cancelling the October 9, 2017 docking evolution, "LT Lewis and Captain Lannamann exercised their authority to direct contractor personnel pursuant to Navy regulations and implementing NAVSEA and MARMC instructions, which govern the docking and undocking of Naval ships in commercial shipyards"

(app. br. at 25). MARMCINST 9997.1C makes it clear that NASSCO is not relieved of responsibility for docking the ship when the Navy exercises its right to cancel a docking evolution due to safety concerns:

Private contractors are legally responsible for docking and undocking evolutions for Navy vessels under their control by contract provisions and by case law principles.

....

The DO protects the Navy's interest and will normally not give direction to the contractor. The only exception to this general principle exists when the DO considers the ship's safety or other Navy interests would be jeopardized by the action of the contractor. In this case, the DO shall direct the contractor's Dockmaster to refrain from such action until the issue is resolved. *Such a procedure will not relieve the contractor of responsibility* but will protect the Navy's interest even though there may be cost impact.

(Finding 7) (Emphasis added) The only reasonable interpretation of this language is that NASSCO remained responsible for docking USS TRUXTUN after DO LT Lewis cancelled the evolution. NASSCO's interpretation would have us find that when the October 9, 2017 docking was cancelled, NASSCO was relieved of any responsibility for docking USS TRUXTUN, which is directly contrary with the regulations and instructions that we found above are incorporated into and made part of the contract. It also makes sense from a common sense standpoint because, absent abuse of discretion discussed below, the second docking was caused by NASSCO's equipment failure. The contract informs NASSCO that it remains responsible for docking USS TRUXTUN after an authorized cancellation which means NASSCO is responsible for the second docking evolution. Elements one and three of constructive change are not satisfied.

Although we disagree with NASSCO's "second docking" theory of constructive change, we also must consider NASSCO's argument that LT Lewis' concern over safety was unjustified. We view this as an abuse of discretion argument. We considered abuse of discretion in *Raytheon Company*, ASBCA No. 57743, 17-1 BCA ¶ 36,724:

In determining whether a CO's decision is arbitrary or capricious or an abuse of discretion we consider (1) whether there is evidence of subjective bad faith on the part of the CO; (2) whether the CO had a reasonable,

contract-related basis for the decision; (3) the amount of discretion given to the CO; and (4) whether there was a proven violation of a statute or regulation. (Citations omitted). There is no need for each of the four factors to be present in order to establish arbitrary and capricious action by the CO. (Citation omitted).

(*Id.* at 178,846) There is no evidence of subjective bad faith or violation of a statute or regulation. However, we consider elements two and three. We start with element three. The regulations/instructions use a mix of terms to describe the breadth of LT Lewis' authority:

The only exception to this general principle exists when the DO *considers* the ship's safety or other Navy interests would be jeopardized by the action of the contractor. (Finding 7) (Emphasis added)

As discussed in paragraph 3 above, the DO will only exercise operational control or authority over the contractor when he / she *believes* the safety of the vessel is in jeopardy. (Finding 7) (Emphasis added)

However, the SUPERVISOR's docking officer/observer shall have the authority to stop the docking, undocking, or launching when the ship's safety or other Navy interests *are jeopardized*. (Finding 8) (Emphasis added)

The modifiers "considers" and "believes" are very broad indeed and seem to envision that the DO has the authority to stop an evolution even if there is minimal risk to the ship. The modifier "are jeopardized" is narrower and seems to envision that the DO has to be correct about the risk to the ship. We hold that the DO, LT Lewis, has broad discretion to pause or cancel a docking evolution even if the danger to the safety of the ship is minimal. Because NASSCO followed its emergency procedures, required by the Navy, (findings 1-2) we might hold otherwise if it were not for the extraordinarily broad discretion afforded to the DO, LT Lewis.

Based on the evidence before us, we reject NASSCO's argument that cases such as *Ensign-Bickford Aerospace & Def. Co.*, 16-1 BCA ¶ 36,533, demand that the Navy prove by a preponderance of the evidence that the ship's safety was threatened. *Id.* at 177,974. The decision in *Ensign-Bickford* had to do with "venting" of an explosive device during testing and had nothing to do with the broad authority afforded the DO in this appeal. Such broad authority, while not unlimited, does not imply that strict proof of risk to the safety of the ship is required. To hold otherwise

would create an adversarial relationship between the Navy and its contractors responsible for dry-docking Navy ships.

We are persuaded by a preponderance of the evidence that the October 9, 2017 docking evolution of the USS TRUXTUN most likely could have been completed successfully after the two cable failures (findings 17-18, 21-22, 25-26, 33). That means that NASSCO acted reasonably and LT Lewis and CPT Lannamann also acted reasonably and within their authority. When LT Lewis was confronted with the second cable failure and NASSCO's recommendation to cut the fouled outhaul cable and continue the evolution, LT Lewis' concern was justified. (Findings 19-20) We concluded above that LT Lewis's decision did not have to be absolutely correct on the matter of safety of the ship. LT Lewis did not abuse his discretion in cancelling the October 9, 2017 evolution. From that, we conclude that his decision to cancel the evolution does not entitle NASSCO to compensation for the October 19, 2017 successful evolution. We consider LT Lewis' concern over two cable failures was reasonable even given our finding that the docking likely could have been successfully completed. There was no abuse of discretion on the part of the Navy.

*Under Certain Circumstances the Contract Allocates Risk to the Navy*

The Navy contends that "the contract is silent as to who is financially responsible in the event the DO stops the docking" (gov't br. at 14). We agree that the contract does not explicitly allocate financial responsibility, but we do not agree that the contract is silent. There is language in the contract relating to "cost impact" that must mean something. The Navy must have inserted the language into MARMCINST 9997.1C for a reason. We therefore apply the rules of contract interpretation to guide our decision.

Before we proceed, we want to make it clear that our analysis, that favors NASSCO, only applies if the ship's safety is not clearly endangered. To decide that NASSCO is entitled to compensation even if its docking operations endangered the ship's safety would be absurd. Contracts should be interpreted so as to avoid such absurd results. *Ash Britt, Inc.*, ASBCA Nos. 55613, 55614, 09-1 BCA ¶ 34,086 at 168,536 ("Contract construction should avoid absurd results." (Citation omitted)); *Applied Companies*, ASBCA No. 50593, 05-2 BCA ¶ 32,986 at 163,478 ("Construction of contract terms should avoid absurd and whimsical results." (Citation omitted)); *C.S. McCrossan Construction, Inc.*, ASBCA No. 49647, 00-1 BCA ¶ 30,661 at 151,381 ("A contract should be construed in a reasonable manner to 'avoid absurd and whimsical results.'" (Citation omitted)). If the ship's safety were at risk, the Navy would not be liable for the "cost impact" of its cancellation of a docking evolution. With that understanding, we proceed with the contract interpretation analysis.

We held above that MARMCINST 9997.1C is incorporated into the contract. In it, the Navy twice states that the DO may stop docking without regard to a “cost impact.” We quote the language again here:

The DO protects the Navy’s interest and will normally not give direction to the contractor. The only exception to this general principle exists when the DO considers the ship’s safety or other Navy interests would be jeopardized by the action of the contractor. In this case, the DO shall direct the contractor’s Dockmaster to refrain from such action until the issue is resolved. Such a procedure will not relieve the contractor of responsibility but will protect the Navy’s interest *even though there may be cost impact*. Safety and protection of the Navy’s interest in the vessel *shall take precedence over concern for possible cost impact*.

(Finding 7) (Emphasis added) The “cost impact” language is susceptible to two interpretations, i.e., cost to the contractor or cost to the Navy. While it doesn’t make much sense to us that the Navy would be concerned about costs to NASSCO compared to safety of the ship, that interpretation is within the “zone of reasonableness.” *States Roofing Corp. v. Winter*, 587 F.3d 1364 at 1369 (Fed. Cir. 2009) (“A contractor’s reasonable interpretation need not be the best interpretation. It need only be within the zone of reasonableness.”). Two reasonable interpretations is the definition of ambiguous language. *M. A. Mortenson Co.*, ASBCA No. 50383, 00-2 BCA ¶ 30,936 at 152,705 (“It is a settled legal principle that a contract or its terms are considered ambiguous only when susceptible to two different reasonable interpretations, each of which is consistent with the contract language. (Citations omitted).”). When confronted with ambiguous language the Board may resort to extrinsic evidence to resolve the ambiguity:

Although the parol evidence rule bars the use of extrinsic evidence to supplement or modify a written agreement, the rule does not bar the use of extrinsic evidence to interpret the terms of a contract when the plain and ordinary meaning is not clear from the contract itself.

*Teg-Paradigm Environmental, Inc. v. U.S.*, 465 F.3d 1329 at 1339 (Fed. Cir. 2006). We know of no extrinsic evidence to assist us.

In the absence of extrinsic evidence to assist us in interpreting the “cost impact” language, we consider the nature of the ambiguity:

In addition, “[c]onstruction of the language of the contract to determine whether there is an ambiguity is a question of law which we review without deference.” *Gardiner, Kamyra & Assocs., P.C. v. Jackson*, 467 F.3d 1348, 1353 (Fed. Cir. 2006). “[W]hether ambiguities are latent or patent and whether the contractor’s interpretation thereof is reasonable are also questions of law subject to *de novo* review.” *Interwest Const. v. Brown*, 29 F.3d 611, 614 (Fed. Cir. 1994).

*States Roofing*, 587 F.3d at 1368. Establishing a patent ambiguity is difficult.

As we have stated, “[t]he doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter.” *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (quoting *E.L. Hamm & Assocs. Inc. v. England*, 379 F.3d 1334, 1342 (Fed. Cir. 2004)). For that reason, the bar to proving patent ambiguity is high, and the inconsistency must be so “obvious, gross, [or] glaring, so that plaintiff contractor had a duty to inquire about it at the start.” *NVT Techs.*, 370 F.3d at 1162 (internal quotation marks omitted, alteration in original).

*LAI Services, Inc.*, 573 F.3d 1306 at 1315-16 (Fed. Cir. 2009).

We do not consider the “cost impact” language used twice in the contract to be a patent ambiguity. We conclude that NASCO had no duty to inquire about the meaning of “cost impact.” Therefore, we look at latent ambiguity. If the ambiguity is latent the language will be interpreted against the drafter under “*contra proferentum*.”

As precedent explains, there must be a glaring conflict or obvious error in order to impose the consequences of misunderstanding on the contractor. *See HPI/GSA 3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004) (“Where an ambiguity is not sufficiently glaring to trigger the patent ambiguity exception, it is deemed latent and the general rule of *contra proferentem* applies.”); *Blount Bros. Const. Co. v. United States*, 346 F.2d 962, 973, 171 Ct. Cl. 478 (Ct. Cl. 1965) (“[Contractors] are not expected to exercise clairvoyance in spotting hidden ambiguities in the bid documents, and they are protected if they innocently

construe in their own favor an ambiguity equally susceptible to another construction, for . . . the basic precept is that ambiguities in contracts drawn by the Government are construed against the drafter.”).

*States Roofing*, 587 F.3d at 1372. We have a dilemma because there is so little language to interpret. We either construe “cost impact” against the Navy under *contra proferentum*, or we ignore it. As we said above, the Navy must have had a reason to put the “cost impact” language in MARMCINST 9997.1C and we cannot ignore it at the expense of contractors, both NASSCO now and contractors in the future. One reasonable way (though not the only one) of construing the Navy’s intent is that it envisioned encouraging the DO to halt the docking whenever he had safety concerns, but did not wish to punish the contractor for the exercise of that authority in the event that the DO was being overly cautious in retrospect. In any event, the Navy wrote MARMCINST 9997.1C and the Navy is free to clarify what it intends, but for now it must live with the ambiguity it created. We therefore construe the interpretation against the Navy and find that the contract, subject to the caution stated above, places responsibility for the “cost impact” of the DO’s decisions on the Navy. We do not criticize LT Lewis who reasonably exercised the broad authority he was given. If there is any criticism it is of the Navy’s poor drafting practice that created the ambiguity causing its liability.

### CONCLUSION

Based on the above we sustain NASSCO’s appeal and remand the case for determination of quantum.

Dated: June 10, 2020



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

(Signatures continued)

I concur



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**RICHARD SHACKLEFORD**  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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**J. REID PROUTY**  
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. 61817, Appeal of Metro Machine dba General Dynamics- NASSCO-Norfolk, rendered in conformance with the Board's Charter.

Dated: June 12, 2020



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**PAULLA K. GATES-LEWIS**  
Recorder, Armed Services  
Board of Contract Appeals