ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Cape Romain Contractors, Inc.	)	ASBCA Nos. 50557 and 52282
	)	
Under Contract No. N62467-93-C-4009	)	

APPEARANCE FOR THE APPELLANT: Stan Barnett, Esq.
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APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
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OPINION BY ADMINISTRATIVE JUDGE DICUS
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant has moved for reconsideration of the Board's decision, *Cape Romain Contractors, Inc.*, ASBCA Nos. 50557, 52282 (15 December 1999) ("*Cape Romain*"), in which we denied ASBCA No. 52282 in its entirety for lack of proof and sustained ASBCA No. 50557 in part. The essential holding in ASBCA No. 50557 was that the contract required appellant to have an approved safety plan prior to commencement of work and that the time consumed by appellant in obtaining the approved safety plan was concurrent with, and reduced the effect of, a Government-caused delay. Respondent opposes the motion.

We have carefully considered the parties' submissions and, except for the stipulated matter addressed below, affirm our opinion. While appellant takes strong exception to the Board's decision, appellant's motion is not based upon any newly discovered evidence or legal theories which the Board failed to consider in formulating its original decision. However, we do address several of appellant's arguments.

Appellant argues that respondent waived the safety plan. Appellant now contends that it mobilized and moored a loaded and manned barge adjacent to the degaussing range prior to submitting its safety plan. The safety plan was submitted on 12 November 1993 (*Cape Romain*, finding 2). According to appellant, respondent, by not objecting to mobilization,

thereby waived the requirement for a safety plan. Appellant relies on the proximity of the barge to the degaussing range to establish Government knowledge. Assuming, *arguendo*, that the Government was aware of the mobilization, we are not persuaded that the Government waived the safety plan because it did not object to mobilization or cause the barge to be moved from its mooring. Appellant cites to *Gresham & Co., Inc. v. U. S.*, 470 F.2d 542 (Ct. Cl. 1972). We do not find that decision fully supports appellant, as the Court there observed: "There can be no doubt that a contract requirement for the benefit of a party becomes dead if that party fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead." *Id.* at 554. As appellant's president (the only witness in the appeal) did not testify that the plan had been waived (*Cape Romain*, finding 3), we cannot find from the record that appellant "reasonably believed the requirement to be dead." Moreover, the period in question was not extensive and the daily report for 13 December 1993 indicates that the crane and other equipment were loaded on the barge on that date (R4, tab 6). We find appellant's arguments unpersuasive.

Several other points bear comment. Appellant argues that the safety plan and other submittal requirements could only be completed after the instrument locations were known. This argument is unpersuasive in light of the fact that the safety plan was submitted on 12 November 1993 and approved on 3 December 1993, prior to appellant learning the location of the instruments (*Cape Romain*, findings 2, 4). Appellant also argues that the safety plan was not on the critical path and did not delay completion, and that "considerably more" than the contract clauses should be required to bar its recovery. With respect to the first argument, there is no critical path evidence in the record. There is, however, evidence of the difficult conditions encountered diving in the Cooper River (*Cape Romain*, finding 5; tr. 34-37). Moreover, the preconstruction meeting minutes emphasize the importance of the safety plan - "A safety plan is required." (R4, tab 5, emphasis in the original.) Appellant submitted the plan within three days of the meeting (*Cape Romain*, finding 2). We cannot, on this record, find that the safety plan was unnecessary or merely a belated ploy through which the Government seeks to avoid an otherwise meritorious claim. As to the contract clauses, they are not ambiguous and appellant undertook performance of the contract in accordance with those unambiguous requirements. Appellant has not established a basis for sustaining its appeals in the face of those clear requirements.

By letter of 20 January 2000 appellant informed the Board that, contrary to a statement in appellant's brief, which the Board relied on in its decision, appellant has never been paid the $30,272.49 awarded by the contracting officer's decision, as recalculated. At the Board's request, counsel have provided a stipulation to that effect. Accordingly, our decision is modified to reflect the parties' stipulation by deleting note 4.

We grant appellant's motion to the extent indicated and otherwise affirm the Board's decision.

Dated: 8 March 2000

CARROLL C. DICUS, JR.
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

RONALD JAY LIPMAN
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 Nos. 50557 and 52282, Appeals of Cape Romain Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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