ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Edward H. Foran	)	ASBCA Nos. 51596, 51674
	)	51718, 52143
Under Contract No. NAFDPI-96-C-0006	)	

APPEARANCE FOR APPELLANT: Mr. Edward H. Foran
Owner

APPEARANCES FOR THE NAFI: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ David Newsome, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PEACOCK

These timely appeals concern a concessionaire contract for the management and operation of a cafeteria located at Ft. Monmouth, NJ. ASBCA Nos. 51596 and 51674 arise from appeals of the contracting officer's deemed denial and subsequent final decision denying appellant's March 1998 claim. Appellant alleges that the NAFI failed to make promised repairs to the cafeteria facility as well as other breaches of the contract. ASBCA No. 51718 concerns the contracting officer's August 1998 final decision asserting a claim of $13,300 plus interest for unpaid concessionaire and utilities fees. ASBCA No. 52143 involves appellant's resubmission of its March 1998 claim and an additional claim seeking $200,000 for loss of anticipatory profits for the four unexercised one-year option periods of the contract. Only entitlement is before us for decision. Our jurisdiction is pursuant to the Disputes clause of this nonappropriated fund contract.

A. The Contract

1. The referenced flat fee concession contract was awarded to Edward H. Foran (appellant or concessionaire) by the Non-Appropriated Fund Procurement and Contracting Branch, Fort Monmouth, New Jersey (NAFI, Fund) on 27 August 1996 for the management and operation of a cafeteria. The contract was for a base year with four option years. The flat fee paid by the concessionaire was $4,225 per month. An estimated additional $250 per month was required for utilities resulting in total monthly and base year payments of $4,475 and $53,700 respectively. A charge of 2% was to be assessed on late payments but the contract did not provide for accrual of interest on any delinquent amounts. (R4, tab 1)

2. The contract's SECTION C - DESCRIPTION/SPECS WORK STATEMENT contained the following pertinent provisions:

C.1 SCOPE OF WORK (SOW)

C.1.1 The Concessionaire shall provide the necessary personnel to manage and operate the Cafeteria and designated cart services, in strict accordance with this SOW and subject to terms and conditions of this contract, for the Fort Monmouth Morale, Welfare and Recreation Fund (FMMWRF) at Fort Monmouth, New Jersey.

C.1.2 This contractual agreement by and between FMMWRF hereinafter referred to as "The Fund" and the Concessionaire is for the production, sale, and services of consumable products serving Buildings (Bldg) 1200, 1201, and 1202. . . .

C.1.2.1 The Concessionaire may operate additional cart and/or kiosk services in unrestricted centralized areas of each of the specified buildings as designated by the Contracting Officer.

C.1.2.2 The Concessionaire shall not deliver to any other areas of Fort Monmouth.

C.1.3 Concessionaire shall provide all necessary supplies, equipment and food items for breakfast and lunch service normally associated with cafeteria operation . . .

. . . .

C.1.8 The following information is provided to assist the prospective offerors in their proposals:

a. This facility was previously used as a troop dining hall and was not a retail operation.

b. Fort Monmouth is reorganizing, and this cafeteria will provide food service to approximately 1,500 employees in Bldg 1200, 1201 and 1202. This facility is also open to all persons visiting Fort Monmouth.

. . . .

C.4 ADVERTISING. . . . All advertisement by the Concessionaire shall be preapproved by the Contracting

Officer's Representative (COR) and contain a statement that the advertisement was neither paid for nor sponsored, in whole or in part, by the U.S. Government.

C.5 FUND-FURNISHED FACILITY AND EQUIPMENT

C.5.1 FACILITY. The Fund will furnish and make available the Cafeteria Area, Building 1200 in **"AS-IS"** [emphasis in original] condition. Facility has been inspected for compliance with Occupational Safety and Health Act (OSHA). . . .

C.5.2 EQUIPMENT. The Fund will provide Fund owned equipment "AS IS", listed in Section J (attachment 1). . . . Except for normal and reasonable wear and tear; lost, damaged misplaced, oraltered [sic] Fund property and equipment is the sole responsibility of the Concessionaire, and shall be replaced or repaired at the discretion of the Fund, at the Concessionaire's expense.

C.5.3 Equipment which has been considered inoperable due to reasonable wear and tear will be disposed of by the Fund, but will not be replaced. Concessionaire shall supply all necessary equipment to continue operation.

. . . .

SECTION G - CONTRACT ADMINISTRATION DATA

G.1 PAYMENT. Concessionaire shall pay the Fund a flat rate as specified in Part 1, Section B. Payment of fees due shall be due thirty (30) days in advance of the [sic] each month. A late charge of 2% will be assessed on all fee payments not received at the payment office by the close of business on the date due.

. . . .

(R4, tab1)

3. SECTION H - SPECIAL CONTRACT REQUIREMENTS of the contract stated in part:

H.1 UTILITIES

H.1.2 Utilities are provided as a service to the concessionaire and the Fund/Government will not be liable in the event that

> utilities [sic] services are disrupted. Monthly utilities are estimated as indicated at Section B, Part I.
>
> H.1.3 If a problem arises with facility utilities, i.e., heat/air conditioning, water, electricity, the COR is to be contacted immediately.
>
> . . . .
>
> H.1.5 The Concessionaire will be billed quarterly for utilities through the [NAFI's] Finance and Accounting Office. . . .
>
> . . . .

(R4, tab 1)

4. The contract incorporated standard provisions for "nonappropriated fund supply and service contracts" including the DISPUTES (SEP 1984) clause which provided for resolution of all disputes arising under or relating to the contract and stated that the contract was not subject to the Contract Disputes Act of 1978, 41 U.S.C. 601-613, as well as the CHANGES - FIXED PRICE SUPPLY (AUG 87) and "short form" TERMINATION FOR CONVENIENCE (SEP 1984) clauses. Part III - Section J, ¶ J.2 "APPLICABLE DOCUMENTS" listed Technical Bulletin MED-530, "Occupational and Environmental Health Food Service Sanitation" (the OEHFSS Bulletin), with instructions that the "Concessionaire is obligated" to follow it. (R4, tab 1)

B. Pre-award Matters

5. Buildings 1200, 1201, and 1202 were located at the western end of Ft. Monmouth. The buildings ran parallel to one another from northeast to southwest. The cafeteria was located in Building 1200 on the west end of the group. Building 1202 was on the east and Building 1201 was in between. It was approximately a quarter-mile between Buildings 1200 and 1202. There were no covered walkways between the buildings. Accordingly, employees in Building 1201 or 1202 had to walk outside to access the cafeteria in Building 1200. At the time of award, employees in Building 1202 could cut through Building 1201 as a short cut to Building 1200. (R4, tab 34; AR4, tab X; tr. 42)

6. The underlying Request for Proposals (RFP or solicitation) was issued by the NAFI on 15 June 1996. Appellant, prior to submitting his proposal, had served since July 1987 as the manager of operations and chef at the cafeteria in the Communications Electronic Command (CECOM) building located within about four to five miles of Ft. Monmouth. This cafeteria was the only cafeteria in the CECOM building and served 3,000 to 6,000 employees daily, or approximately one-third of the employees in the building. The

Government leased the CECOM building from a privately-owned company and the cafeteria contract was not issued by the Government. Appellant had no prior experience with Government contracting. Employees at the CECOM building were gradually being relocated to Buildings 1200, 1201, and 1202. (R4, tab 1; tr. 9, 22-23, 27-28, 81)

7. In formulating his offer, Mr. Foran did not conduct any research, consult with or hire a business consultant, or confer with any of the other food establishments located at Ft. Monmouth. Appellant's proposal was based upon his previous experience working at the CECOM building and the loyalty of customers served at that location. During appellant's tenure at the CECOM building, all business projections had been based upon serving one-third of CECOM employees. Accordingly, appellant calculated his bid based upon the assumption that on a daily basis he would serve one-third of the approximately 1,500 employees that were to be relocated to Building 1200, 1201, and 1202 at Ft. Monmouth. In addition to the cafeteria located in Building 1200, there were four other food establishments on the grounds of Ft. Monmouth. Although, appellant's bid amount did not factor into consideration serving the general public or visitors, he planned to build his business with their patronage. (Tr. 23-27, 38)

8. Offerors were urged by the solicitation's SITE VISIT (FEB 86) clause to inspect the site and "satisfy themselves regarding all general and real conditions that may affect the cost of contract performance . . ." Mr. Foran attended a pre-proposal meeting and site visit scheduled by the NAFI to be conducted on 10 July 1996. The meeting was conducted by the contracting officer, Maritza Rivera; Glenn Perlakowski, Chief, Business Operations; and Salvatore Impollonia, Supervisory Support Services Manager. During the question and answer segment of the meeting, prospective offerors were advised, *inter alia*, that the concessionaire would not be permitted to provide catering or food delivery services; however, the concessionaire could provide take-out services and would be authorized to operate cart and/or kiosk services in unrestricted centralized areas of both Buildings 1201 and 1202. (R4, tab 20; AR4, tab I; tr. 105)

9. At the time of the pre-proposal site visit, the Government was renovating the cafeteria, previously a troop dining hall, to make it suitable for commercial service. At that time, bathroom facilities which were located in both the east and west wings of Building 1200 were available for unrestricted use by the general public. No security access measures restricted access to the building. Handicapped egresses were located at both the east and west wing of Building 1200, but were not directly into the cafeteria. There was no restricted parking in the lots near the cafeteria. There were several unreserved short-term parking spaces at the back of the cafeteria that could be used by carry-out order patrons. (R4, tabs 1, 11; tr. 13, 14, 18, 31, 75-76, 80, 105, 113, 121, 172-73)

C. Modification No. P0002

10. The contract provided that it would commence on 1 October 1996 or on the first day of the month following issuance of an occupancy permit. There were prolonged delays renovating the cafeteria facility. The actual date of commencement was 1 April 1997 and appellant opened for business on or about 15 April 1997. Previously, on 16 September 1996, Modification No. P0001 was issued, changing the NAFI's contracting office from Ft. Monmouth to Headquarters, Army Materiel Command, Morale, Welfare and Recreation (MRW) Contracting Office, Alexandria, Virginia. Mr. William M. Cartis replaced Ms. Rivera as CO. Mr. Impollonia was the contracting officer's representative (COR). From the commencement of performance through mid-September 1997, appellant experienced problems. (R4, tabs 1, 2; tr. 30, 79, 80, 106).

11. Soon after opening for business, appellant informed the NAFI that the ceiling was leaking in several locations. Several leaks had been evident to Government personnel during renovation of the cafeteria. The record does not disclose whether the Government properly fixed those leaks before appellant began performance. (Tr. 14, 106, 109-11; AR4, tabs F, X)

12. As of 12 July 1997, additional new security measures had been implemented precluding Building 1202 personnel from walking through Building 1201 to access the cafeteria in Building 1200 (R4, tab 33; AR4, tab X; tr. 17-18, 156-57).

13. The air conditioning in the cafeteria was activated on 15 June 1997 and was scheduled to operate until 15 October 1997. However, the air conditioning was not functioning properly during the entire summer of 1997, resulting in uncomfortable temperatures for cafeteria patrons. Despite repeated requests by Mr. Foran, the air conditioning system was never repaired during performance of this contract. (R4, tab 24, AR4, tab X; tr. 15, 34, 35, 49, 135)

14. Restricted parking in the lots near the cafeteria was implemented approximately one month after appellant began performance. Parking was limited to the employees in Buildings 1200, 1201, 1202, 1209, 1210, and 1211 which are in close proximity to one another. Appellant was not informed, nor had the CO been notified by authorities, that restricted parking would be implemented. Unrestricted but limited visitor parking was approximately one-quarter mile (a five minute walk) from the cafeteria. Yellow lines, designating a no parking zone, were placed over the areas adjacent to the loading dock behind the cafeteria. There were no remaining unrestricted parking spots that could be used for pick-up service making it impracticable for Mr. Foran to offer this service. Had the CO known that parking restrictions would be imposed, prospective offerors would have been so advised in the RFP. (R4, tabs 9, 34; AR4, tab X; tr. 35, 38-40, 82, 92-94, 113-15, 121-22, 175, 181-82)

15. By 12 July 1997, the Government had begun preparations to install an area access control system in Building 1200. Once the system was installed, only personnel

assigned to the building would be granted security access by swiping a security card through a lock to deactivate it. The locks were to be placed on doors that lead out of the cafeteria into the halls in the building wings where the restrooms were located. Signs were to be placed above each lock explaining that only authorized personnel had access to that part of the building. The record does not disclose when the locks were actually installed. Final inspection of the system occurred on 22 June 1998. The locks were not activated and did not physically prevent unauthorized personnel from gaining access to Building 1200 until after appellant's performance period. However, signs were installed sometime prior to 16 August 1997 stating that the area had limited access and that special badges were needed for entry. Cafeteria patrons who did not have security access to Building 1200 would have had to ignore the signs to enter the hallways where the restrooms were located. The OEHFSS Bulletin required dining/cafeteria facilities to have "adequate, convenient toilet facilities" for patrons. (R4, tabs 24, 33; AR4, tab X; tr. 17-18, 58-62, 76, 156-57)

16. In an undated letter received by the NAFI on 12 July 1997, appellant requested a rent reduction for the following reasons: (1) the amount of people relocated to Building 1200, 1201 and 1202 was considerably less than the contractual estimate of 1,500; (2) reduced accessibility of the cafeteria to patrons from other buildings because new security restrictions meant Building 1202 personnel could no longer walk through Building 1201 to get to Building 1200; (3) the shuttle bus route to Building 1200 was not convenient; (4) kitchenettes in Buildings 1200, 1201, and 1202 which were to provide coffee and food refrigeration for Government employees were also being used to sell snacks; and (5) the air conditioning was still broken as appellant asserted "it has been for the last four weeks." (R4, tab 3; tr. 34, 41, 81)

17. In a second undated letter to Mr. Impollonia on or about 29 July 1997, appellant requested a one-third reduction in the monthly fees because of the same five items listed in his previous undated letter along with three additional items: (1) inaccessibility of the cafeteria to wheelchair patrons, (2) the loss of unrestricted parking space for customers picking up orders, (3) a malfunctioning kitchen exhaust system since commencement of performance. Appellant added that "[a]s of 7/21/97 the Exhaust System is 90% better than it had been in the past." The contractor noted that the requested fee reduction was intended to compensate for "the $200.00 per day in sales that my business has lost, since June 13, 1997, when the major problems began, with the air and exhaust system and also future relief if [the] air conditioner is not fixed properly by the end of the summer season." Appellant offered to allow the NAFI to place vendors in the cafeteria "to make up the difference in the suggested rent reduction." Only the Government could subcontract the area to vendors. In July 1997, there were approximately 1,000 employees in the three buildings. (R4, tab 5)

18. In an undated response to these letters, Mr. Impollonia declined to lower appellant's rent. However, he did offer to consider: (1) waiving the utility charge from 15 June 1997 through 15 September 1997 in the amount of $750; and, (2) having the Government work with appellant to provide vendors in the cafeteria to try to attract more

patrons. He also stated that a problem with the placement of the air duct in front of the entrance to the cafeteria would be corrected before Summer 1998. Mr. Impollonia explained that: (1) the workforce was still in the process of relocating to the Building 1200 area; (2) that appellant could provide cart service to Buildings 1201 and 1202 to help his business; (3) the shuttle bus route was designed to minimize traffic on the compound regardless of destination; and (4) the kitchenettes did have some bagels, coffee and packed snacks, all "authorized by the Commander but should not interfere significantly with people coming to your cafeteria." (R4, tab 6; tr. 83-84)

19. By letter to the NAFI dated 10 August 1997, appellant stated his dissatisfaction with the decision not to reduce the concession fee. Appellant reiterated the various problems he had been experiencing. In particular, appellant expressed his dissatisfaction with the offered reduction of the $750 utility charge. Mr. Foran considered it "a far cry from the amount of business lost due to the lack of the air and exhaust system not working properly." In discussing the potential for vendors in the cafeteria the contractor stated that the "approximately $2000.00 more a month" that the NAFI would receive from vendor fees should be considered in reducing his monthly rent. Mr. Foran did recognize that "the vendors may generate more business traffic for my cafe . . . ." He also noted that he was seeking the rent reduction as compensation for the continued slow relocation of the estimated 1500 people over four months after commencement of the contract. (R4, tab 7)

20. By letter dated 12 August 1997, appellant notified the Fund that he would withhold concessionaire fees due under the contract until the parties reached a final agreement on appellant's "contract dispute." Appellant provided evidence that $8,500 to cover the withheld fees had been put into an escrow account. (R4, tab 8)

21. By letter dated 25 August 1997, in his first written correspondence to appellant, the CO stated:

> In reference to our telephone conversation on August 15, 1997, I want to express my desire to come to an agreeable solution to your situation. I contacted Sal Impollonia the Contracting Officer Representative (COR) and Glenn Perlakowski, his supervisor. We discussed your requests for consideration regarding your agreed upon concession fee and utilities payment due to the distance to open parking for those who may want to use your facilities but do not have an authorized parking sticker, the initial low building personnel rate and the high temperature of the cafeteria this past summer.
>
> I directed the temperature of the cafeteria to be taken and an actual count of personnel be obtained for the personnel

> office. I also requested the distance from the open parking lot location to the cafeteria. The results of the investigation show the temperature is currently comfortable, but we acknowledge this past summer it was not comfortable for your customers. The distance of the open parking lot from the cafeteria is about five minutes and does make it difficult to draw people from outside building B-1200, 1201, and 1202 though not impossible. The personnel count at present is 1300 plus or minus five percent and I feel it is unreasonable to believe the number of personnel would go from 0 to 1500 in the first several months of operation.
>
> Considering these points, I have decided to make you an offer that I feel is fair and reasonable at this time. My offer is to reduce your concession fee from $4,225 to $3,500 for the months of May, June, July and August of 1997 and keep your utilities charge at $250 for the same period. Additionally, from September through the end of this base year [emphasis in original], the concession fee will be $3,750 plus utilities of $250 instead of $4,225 plus $250. The difference of $2,900 for the stipulated months you will be permitted to deduct directly from your September concession fee payment. The utility payment cannot be deducted because it is Congressionally mandated and must be paid. Furthermore, all discussions about the terms of the contract must come through me as I am the only authorized agent of the government for this contract. The COR has the responsibility to assist both of us, but is not authorized to make any changes to the contract.
>
> Should you agree to this offer I will modify your contract to reflect the changes in the terms and conditions to your contract. . . .

(R4, tab 10; tr. 129)

22. Appellant responded by letter dated 25 August 1997 agreeing to the $3,500 for the months of April, May, June, and July and asking for a fee of $2,625 beginning in August to take into account the $1,600 per month in vendor's fees the Government would earn from consignment contractors in the cafeteria. Mr. Foran also offered to "honor my offers" for the option years "but deduct the $1,600.00 vendors fees," with the understanding that appellant would make up any short fall if the vendor fees paid to the NAFI fell below $1,600. Mr. Foran ended his letter stating "I also want you to know that Bldg. 1200 will

soon { [sic] in the next month or so] [sic] become a secured building with no access to bathroom facilities for my customers." (R4, tab 11)

23. By letter dated 5 September 1997, the CO replied to appellant's counteroffer of $2,625 per month, stating in pertinent part:

> . . . I have studied your counter offer [sic] and have researched the additional comments you made concerning the consignment contracts in the cafeteria seating area and the environmental conditions of the facility. I am working on getting the repairs executed on your facility, but I can't guarantee when the air conditioning is going to be fixed.
>
> Consequently, I am offering you a concession fee of $3,500 for the months of May, June, and July due to the material changes in the cafeteria site condition from the onsite inspection prior to award of contract. Also, due to the income being earned by the NAFI from the concessionaire vendors in your cafeteria space I will reduce your concession fee to $2,950 starting August 1997 and continue through the base year of the contract. . . . The utility payment will stay at $250 for the base year of the contract. . . .

(R4, tab 12; tr. 132)

24. Attached to the CO's letter was, bilateral Modification No. P0002 (Mod. 2), effective 5 September 1997, which reduced appellant's flat fee for the months of May, June, and July 1997 from $4,225 to $3,500 and for the months of August 1997 through March 1998 from $4,225 to $2,950. Utility payments remained the same, $250, and were to be made in conjunction with the flat fee payments. The contracting officer signed the modification on 15 September and appellant signed 24 September 1997. The modification contains neither a waiver/release of claims nor any exceptions or claim reservations. Apart from making the fee adjustments noted above the only additional pertinent language stated in the modification was "All other terms and conditions remain the same." The modification contained no recitation or description of the reasons for its issuance, the scope of its coverage, or the agreements reached. (R4, tab 12; tr. 46-53, 58-63, 132)

25. Prior to executing the modification, Mr. Foran had several telephone conversations with the CO. During these conversations, the CO promised to expedite and assure prompt performance of repairs to the cafeteria, including those required for the air conditioning and exhaust systems and to fix the leaks. Appellant entered into the agreement with the understanding that the NAFI would "get everything fixed." In addition Mr. Foran considered that the CO had agreed to provide handicapped access and access for patrons to

the bathrooms in building 1200. Appellant and the CO agreed that the unstated intent of the modification was to resolve all problems mentioned in correspondence between the parties beginning 12 July 1997 (finding 16) through the CO's letter of 5 September 1997. The CO conceded that the NAFI was responsible for making expeditious repairs to the facility and that the fee reduction was to provide compensation for the "difference in site conditions" that appellant reasonably should not have anticipated prior to award. (Tr. 16, 17, 21, 47-48, 52, 53, 56 - 58, 67, 88, 129-35, 137-38, 145-46)

D. Post-Modification No. P00002 Performance

26. In September 1997, the Government removed appellant's cardboard advertising sign placed in August 1997 under the post locator sign in front of Building 1200. The sign was returned to appellant on 9 December 1997. Appellant presented no evidence that the sign was approved or compliant with installation regulations. (AR4, tab X; tr. 64, 118-19, 171)

27. A work order was placed on 22 September 1997 to check the exhaust fan system. On 31 October 1997, the system was tested and parts were ordered. On 17 December 1997, a second work order was issued to repair the exhaust fan in the hood vent system, and to order additional parts. As a result of the malfunctioning exhaust system, fire alarms were frequently activated and necessitated evacuation of the cafeteria. On 17 December 1997, 5 January, and 6 January 1998, the fire department was dispatched to the Building 1200 cafeteria because the smoke alarms sounded when appellant's employees cleaned the grills. To remedy the alarm problem the Government changed the smoke detector to a heat detector. Nevertheless, the exhaust problem remained. The exhaust system was not fully repaired during the base contract year. (R4, tabs 14, 31; tr. 15-16, 67-69, 140-41)

28. The NAFI admitted that the Department of Public Works (DPW) at Ft. Monmouth, that was responsible for performing repairs, was "downsizing" and did not timely respond to numerous NAFI requests to fix the cafeteria facility. The air conditioning system was not repaired during the remainder of the operating season, *i.e*., through 15 October 1997. DPW stated that it would not be repaired prior to the next summer season in June 1998. (tr. 15, 49, 108-9, 135, 139-42, 157-58). Although ceiling leaks were present in the facility throughout the base year, the leaks worsened in February, 1998. At that time, the DPW did fix some of the leaks but other leaks remained or recurred despite repeated repair requests. (Tr. 14-16, 67, 90-91, 98, 111, 139)

29. Appellant stopped paying his utility and concession fees in October and December 1997, respectively. Appellant based his nonpayment on the NAFI's failure to make promised repairs in the cafeteria including roof leaks, and the exhaust system and failure to provide access to bathrooms and entrances for handicapped patrons. (R4, tab 19; tr. 57-58)

30. During the winter of 1997-98, appellant complained to the CO that the facility's heating system was not providing adequate heat. In response, by letter dated 3 February 1998, Mr. Cartis explained that the heat was turned down during the night to conserve energy and that the practice would not be modified. The CO also stated that the NAFI was aware that the exhaust, the ceiling, and the air conditioning have not been repaired and notified appellant that work orders had been submitted for each repair. The CO assured appellant "we will continue to actively pursue completion of these repairs" and reminded appellant that the NAFI "gave you considerable consideration for the above conditions back in September, by reducing your monthly concession fee." The CO concluded by informing appellant that no discussion concerning the exercise of the first option year would take place until appellant paid the late concession and utility payments. After several more complaints from appellant about the heat, the NAFI determined that the system was broken and fixed it. It is not clear when the heating system repairs were made. (R4, tab 15; tr. 53-56, 136-37)

31. In early February, Government security personnel confirmed that, once the security system was activated, personnel without security passes for Building 1200 could only access the cafeteria from the outside entrance at the back of the building. They could no longer walk through from the front of the building. In addition, cafeteria patrons from outside Building 1200 would have no have access to the restrooms in Building 1200. (R4, tabs 16, 17)

32. By letter dated 8 February 1998, appellant responded to the CO's letter of 3 February 1998. Along with a list of items, all of which had previously been brought to the NAFI's attention and which appellant contended affected his business operation over the course of the base year, appellant stated ". . . whether or not my monthly concessions fee was reduced, these services, i.e. heating, air conditioning, and air ventilation were to be provided to me, as per my contract and they have not yet been provided." Appellant concluded by stating he would close his business at the end of his lease, 31 March 1998. (R4, tab 18)

33. Effective 4 March 1998, the NAFI issued Unilateral Modification No. P0003 to incorporate the following changes to the contract:

> 1. The IMWRF Ft. Monmouth, New Jersey will not renew the first Option Year of this contract.
>
> 2. The Contractors [sic] last days [sic] of operation shall be March 27, 1998. . . .
>
> . . . .

> 4. The contractor shall pay to the IMWRF Ft. Monmouth for the delinquent concession fees of $11,800.00 for Dec 97 - Mar 98, and $1500.00 utilities from Oct 97 - March 98.

(R4, tab 19)

34. There is no evidence that non-exercise of the options was arbitrary capricicious or resulted from bad faith or an abuse of discretion. By letter dated 6 March 1998, the CO notified appellant that his contract would end on 31 March 1998, and that appellant owed $13,300 for delinquent concession fees and utility services (R4, tab 19).

E. The Claims and Appeals

35. By letter dated 30 March 1998, received by the NAFI on 2 April 1998, appellant forwarded a claim to FMMWRF office, Ft. Monmouth, New Jersey in the amount of $60,000 for start-up costs and requested relief from the $13,300 sought by the NAFI for delinquent concession fees and utility fees. Accordingly, the total amount of appellant's claim was $73,300. Under the terms of the contract, appellant should have submitted its claim to the MWR contracting office in Alexandria, Virginia. Nevertheless, the FMMWRF office forwarded the claim to the MWR office in Alexandria. (R4, tabs 1, 20)

36. By letter dated 14 June 1998, appellant appealed the CO's failure timely to issue a decision. The Board docketed the appeal as ASBCA No. 51596. (R4, tab 23)

37. On 25 June 1998, Ms. Carol Cantley who had taken over as contracting officer from Mr. Cartis, issued a final decision on appellant's 30 March 1998 claim, denying it in its entirety. In her final decision, the CO stated that the concession fee reduction provided for in Mod. 2 was in consideration for: (1) the shortfall in the number of relocated employees; (2) the restrictions on parking imposed following award; (3) the malfunctioning air conditioning; (4) the malfunctioning ventilation and exhaust systems; (5) the lack of restrooms for patrons, although the CO asserted, contrary to our findings above, that restrooms were available to employees of all three buildings; (6) the leaks in the ceiling which the CO asserted occurred only in the summer and were the result of condensation from the air conditioning, contrary to our findings above; and, (7) the inaccessibility of the cafeteria to handicapped patrons, although the CO asserted, again contrary to our findings above, that handicapped entrances were available to employees of all three buildings. With respect to the advertising sign's removal the CO stated that it had not been approved as contractually required and was not compliant with the standards established by Ft. Monmouth for such signs. The final decision also asserted a claim of $13,300, $11,800 for concession fees for the months of December 1997 through March 1998 and $1,500 for utilities for the months of October 1997 through March 1998. (R4, tab 24; tr. 153) Appellant filed a timely appeal of this decision which was docketed as ASBCA No. 51674.

38. On 13 August 1998, Ms. Cantley issued a second final decision asserting the NAFI claim for delinquent concession fees and utility expenses in the amount of $13,300 plus interest. Appellant filed a timely appeal of this decision which was docketed as ASBCA No. 51718. (R4, tabs 25, 26)

39. In its complaint in ASBCA Nos. 51596 and 51674, appellant sought, in addition to $60,000 and relief from payment of $13,300, an amout of $200,000 in anticipatory profits for the four-year option period based on the assumption that he would make $50,000 profit per year. The NAFI moved to dismiss this portion of the complaint for lack of jurisdiction. To resolve this issue, by letter to the CO dated 7 February 1999, appellant reasserted his previous claim and submitted an additional claim with respect to $200,000. No evidence was presented to support entitlement to lost anticipatory profits for the option years. The CO issued an undated final decision denying the claim in its entirety. With respect to the original claim items, the CO reasserted that the concession fee:

> reduction was based on cafeteria site conditions that differed from the original onsite inspection prior to award of the contract and some environmental conditions. The agreed upon differences being:
>
> Site Conditions
>
> a. 1300 employees instead of approximately 1500 employees.
> b. No public restrooms for other than the employees of the 1200 buildings.
> c. No parking for other than the employees of the 1200 buildings and guest parking across the street.
> d. Handicap egresses only for employees who have key cards.
> Environmental conditions
> a. Faulty air conditioning
> b. Problems with the exhaust system in the kitchen
> c. Dripping water on the ceiling tiles.

(R4, tabs 28, 29; tr. 72)

40. By letter dated 12 April 1999, appellant appealed the undated final decision. The appeal was docketed as ASBCA No. 52143.

DECISION

I. ASBCA Nos. 51596, 51674 and 52143 - Claim for $60,000

These appeals are duplicative in part. ASBCA No. 51596 involves appellant's appeal from the contracting officer's failure timely to issue a decision on its claim of 30 March 1998 for $60,000 and relief from payment of $13,300. ASBCA No. 51674 is appellant's appeal from the contracting officer's later decision denying that claim. ASBCA No. 52143 is appellant's appeal from the contracting officer's decision denying that claim as resubmitted together with an additional claim for $200,000. Because ASBCA No. 52143 encompasses the subject matter of the two former appeals, as well as an additional claim, we dismiss ASBCA Nos. 51596 and 51674 as duplicative.

The NAFI contends that appellant's claim for $60,000 was substantially resolved by Modification No. P00002 (Mod. 2) to the contract. According to the NAFI, Mod. 2 constituted an accord and satisfaction barring consideration of appellant's present claim to the extent it was covered by the modification. To the extent that appellant's claim may not be addressed and resolved by Mod. 2, the NAFI further maintains that it did not breach the contract and that Mr. Foran has failed to prove entitlement to recovery. Therefore, the NAFI concludes that appellant's claim should be denied and the NAFI's claim for unpaid rent and utilities in the amount of $13,300 sustained. Mr. Foran contends that the NAFI failed in numerous respects to fulfill contractual commitments and provide a suitable cafeteria facility. We consider that Mod. 2 did not operate as an accord and satisfaction barring appellant's claims and that appellant is entitled to recover for NAFI breaches of the contract for the reasons explained below.

A. Accord and Satisfaction

In this appeal the NAFI bears the burden of proving its affirmative defense of accord and satisfaction. *See Ralcon, Inc.*, ASBCA No. 43176, 94-2 BCA ¶ 26,935 at 134,140 (citations omitted). The accord is "an agreement by one party to give or perform and by the other party to accept, in settlement or satisfaction of any existing or matured claim, something other than that which is claimed to be due." The satisfaction is "the execution or performance of the agreement, or the actual giving and taking of some agreed thing." *See Chesapeake and Potomac Telephone Co. of Virginia v. United States*, 654 F.2d 711, 716 (Ct. Cl. 1981), citing and quoting 1 Am. Jur. 2d, *Accord and Saisfaction* § 1. "To reach an accord and satisfaction there must be mutual agreement between the parties with the intention clearly stated and known to the contractor." *Metric Constructors, Inc.*, ASBCA No. 46279, 94-1 BCA ¶ 26,532 at 132,058. As stated in 6 *Corbin On Contracts* § 1277 (1962):

> There must be accompanying expressions sufficient to make the creditor understand, or to make it unreasonable for him not to understand the performance is offered to him as full satisfaction of his claim and not otherwise. If not so rendered there is no accord, either executory or executed, for the reason

> that there are no operative expressions of agreement - no sufficient offer and acceptance.

Depending on the intent of the parties determined on a case-by-case basis, an accord and satisfaction may occur in two ways: (1) the agreement itself may be considered a new or "substituted contract" comprising both the accord and the satisfaction, extinguishing the subject claims and permitting suit only to be brought on the "substituted contract" or, (2) the parties may enter into an "executory accord" that discharges the claims only if the agreement is later performed and, if not performed, the original claims may be reopened. *See Paramount Aviation Corp. v. Agusta*, 178 F.3d 132 (3d Cir. 1999), *cert. denied*, 528 U.S. 878 (1999); *Koenig Iron Works, Inc. v. Sterling Factories, Inc.*, No. 89 Civ. 4257 (THK), 1999 U.S. Dist. Lexis 3973 (S.D.N.Y. March 30, 1999); *GE Capital Mortgage Services., Inc. v. Pinnacle Mortgage Investment Corp*., 897 F. Supp. 854 (E.D. Pa. 1995); *River Road Development Corp. v. Carlson Corp*., Nos. 89-7037, 90-2386, 1992 U.S. Dist. Lexis 13103 (E.D. Pa 1992); *Cibinic and Nash, Administration of Government Contracts*, at 1219-21 (3rd ed. 1995). Proof establishing a mutual agreement or "meeting of the minds" of the parties is a critical prerequisite to finding that claims are barred by accord and satisfaction. *See Brock & Blevins Co., Inc. v. United States*, 343 F.2d. 951, 955 (Ct. Cl. 1965); *Central Mechanical Inc.*, ASBCA No. 29193, 85-2 BCA ¶ 18,005. In this case, the NAFI has failed to establish that a meeting of the minds occurred. Specifically, the parties did not agree concerning the extent of the NAFI's responsibilities to remedy certain conditions at the cafeteria. Moreover, assuming *arguendo* that an accord could be found, any accord was executory and dependent on the future fulfillment of promises to repair the facility that the NAFI made to Mr. Foran. Because those promises were not fulfilled, appellant's claims were not discharged. Whether there was no agreement or the NAFI failed to execute material provisions of any agreement, the affirmative defense is without merit and appellant is not foreclosed from pursuing its claims.

1. Meeting of the Minds

Neither the terms of Mod. 2 nor the attendant facts support the NAFI's contention that the agreement was an accord and satisfaction. Mod. 2 itself sets forth no recitation or description of its purpose, intended scope or the agreements reached. Nor does it contain a release. There is also no evidence that the CO ever communicated to this appellant either orally or in writing that the NAFI intended the modification to be an accord and satisfaction and release/waiver of appellant's original claims. Any such subjective intent was not reasonably manifested to appellant. A release is not an absolute prerequisite to a finding that the bilateral NAFI modification constituted an accord. *See McLain Plumbing & Electric Service v. United States*, 30 Fed. Cl. 70 (1993). Nevertheless, a release connotes immediacy, finality and an intent to substitute new obligations in place of those originally set forth in the contract. Absent a release, the modification is to be strictly construed. *See Wright Associates, Inc.*, ASBCA No. 33721, 87-3 BCA ¶ 20,056 at 101,535 (citations omitted). In this case, there were extended and wide-ranging letters and discussions

between the parties. What portions of the correspondence and discussions actually comprised the agreement should have been spelled out unmistakably and reduced to writing. This did not occur and the generalized, nebulous, inconclusive testimony of the NAFI witnesses wholly failed to establish the precise contents of any "offer and acceptance."

Although the parties agree that Mod. 2 was intended generally to resolve all problems that had been the subject of their correspondence prior to its effective date, their understanding of the agreed solution to these problems differed substantially. The NAFI now argues implicitly that the reduction of appellant's monthly payment relieved the NAFI of any further responsibility to remedy the bathroom and handicapped access problems or to expeditiously accomplish repairs to the cafeteria. We have found that, in fact, the CO promised to expedite accomplishment of needed repairs and that this promise was essential to obtaining appellant's agreement.

Moreover, Mr. Foran considered that the inaccessibility of the bathrooms and the lack of handicapped egresses would be corrected, i.e., access provided, as part of the consideration offered by the NAFI. The NAFI contends that these inaccessibility problems were simply recognized as being two of the "different site conditions" that entitled appellant to the concession fee reduction. According to the NAFI, appellant was not promised that access would be arranged. Whether the NAFI actually promised to resolve the inaccessibility issues, as well as consider them in determining the concession fee reduction, is irrelevant. The salient point is that the parties simply never saw eye-to-eye with respect to those issues. They were discussed but no mutual understanding was reached as to the extent of the consideration flowing to appellant.

The uncertainty of what was considered during negotiations preceding Mod. 2, not to mention what was resolved by its execution, is emphasized by the NAFI's post hearing briefs. In its briefs, the NAFI alleges that the roof leaks and bathroom access disputes were not considered by the parties apparently in the belief that these issues were not raised in the pre-modification correspondence. As noted in our findings, any such belief was erroneous. Those disputes were presented to the CO prior to issuance of Mod. 2 and mentioned in two CO decisions, although the roof leaks presented a continuing problem throughout performance.

We conclude that there was no mutual agreement extinguishing appellant's claims.

2. Executory Accord

At best for the NAFI, if there was an accord, it was executory. As mentioned above we have found that the NAFI in fact promised that it would expedite completion of repairs to the facility. Any accord contained and was conditioned upon the NAFI promise to make timely repairs. The executory repair obligations inherent in any bargain struck by the parties were material and not segregable conditions. Mod. 2 was not a "substituted

contract" that immediately discharged appellant's antecedent claims. Mr. Foran did not cede his rights to pursue those claims unless and until the defects were timely corrected.

In fact, repairs were not timely accomplished if completed at all. The exhaust and air conditioning systems were never fixed. Some leaks in the ceiling were repaired, others were not. We do not doubt that NAFI personnel timely asked DPW to fix the problems, but DPW unfortunately did not execute the repairs. There were fundamental if not systemic problems with the heating, air conditioning and exhaust systems. Those systems never worked properly.

Because any "accord" reached by the parties was materially breached by the NAFI, appellant had the option of enforcing its rights under either the original contract or the accord. *Cf. Mercury Machine & Manufacturing Co.,* ASBCA No. 20068, 76-1 BCA ¶ 11,809 (contractor permitted to reopen merits where Government failed to keep promise inducing settlement); *P.J. Dick Contracting, Inc.,* PSBCA No. 992, 84-1 BCA ¶ 16,992, *recon. den.*, 84-1 BCA ¶ 17,218. Mr. Foran has elected to seek relief under the original contract. The promise to perform the repairs is of no value now.

B. Breach of Contract

In its post hearing briefs, the NAFI argues that it did not breach the contract. It now maintains that the 1,300 employees relocated to the three buildings is "approximately" the contractually-stated 1,500. With respect to the air conditioning, the NAFI states that the system was working to its capacity and, even if it was not, the contract expressly relieved the NAFI from liability for disrupted utility services, including the defective exhaust/ventilation system, as well as the air conditioning. Regarding the leaky ceiling, the NAFI asserts that, "Pipes burst and leaks occur" and that the NAFI is only liable for these "everyday experiences" if it failed to fulfill its "duty to cooperate" by promptly repairing the leaks which it allegedly did. Patrons from buildings other than Building 1200 were not denied use of the bathrooms, according to the NAFI because the security system was not fully operational until after completion of appellant's performance. The NAFI further maintains that handicapped patrons could access the cafeteria through Building 1200 which had handicapped access ramps. With respect to the restrictions on parking, the NAFI states that the contract contains no promises that parking would be provided and that the post award restrictions only affected visitors who could park in the visitor's lot five minutes from the cafeteria. The NAFI also argues that the heating system was fixed after it was notified of the problem and that the removed sign was unauthorized.

With the exception of its contentions concerning removal of the sign, the NAFI's arguments are untenable. First and foremost, they contradict the contemporaneous NAFI interpretations of what Mr. Foran was entitled to expect when he entered into the contract. The record is replete with NAFI admissions and concessions that conditions affecting operation of the cafeteria changed materially from the time of award of the contract in

August 1996 through the delayed commencement of operations in April 1997 to the September 1997 issuance of Mod. 2. We accord great weight to these contemporaneous understandings of the conditions and Government repair responsibilities that appellant was implicitly entitled to expect when he entered into the contract. *E.g., Max Drill, Inc. v. United States*, 427 F.2d 1233, 1240 (Ct. Cl. 1970); *ICSD Corp.*, ASBCA No. 28028, 90-3 BCA ¶ 23,027, *aff'd*, 934 F.2d 313 (Fed. Cir. 1991). The CO decisions cite Mod. 2, *i.e*. accord and satisfaction as the basis for denial of the claim. The tenor of those decisions is that appellant has been afforded relief not that Mr. Foran is not entitled to relief. Nor was there any attempt by the NAFI's witnesses at the hearing to retract their concessions that numerous implied conditions and duties related to the operation of the cafeteria were infringed reducing appellant's income. The record does not support the arguments that the NAFI belatedly makes in its post hearing briefs. Moreover, many of the NAFI's contentions are factually incomplete and/or inaccurate.

The NAFI's semantic argument that 1,300 employees in September 1997 is "approximately" 1,500 ignores both the parties' contemporaneous interpretation and the fact that in July 1997, three months after commencement of performance, only 1,000 employees were working in the three buildings. The parties recognized that there were significant unforeseen delays in relocating the employees to Ft. Monmouth that materially reduced appellant's potential patronage base.

With respect to air conditioning, the parties agreed that the system was not cooling the cafeteria properly during the 1997 season and DPW agreed to fix the system in time for the 1998 season after performance of this contract. The contract provision addressing the NAFI's nonliability for interruption in "utilities" concerns the interruption in electrical/gas/water services. Prior to its post-hearing briefs, the NAFI had never contended that this contract provision relieved it of the duty to make timely repairs to the air conditioning, exhaust and heating systems. That contention is meritless. These systems never functioned properly during performance of the contract despite repeated requests and sporadic DPW attempts to repair them.

Likewise, DPW did on occasion repair the ceiling leaks but we have found that they persisted throughout performance. DPW, perhaps because of its workforce reduction, simply did not timely or adequately execute its repair responsibilities.

The parking restrictions imposed following award made it impracticable to offer the "carry-out" service permitted by the contract and made it less convenient for visitors to use the cafeteria.

Finally, the NAFI's arguments with respect to bathroom and wheelchair accessibility disregard the security access restrictions affecting Non-Building 1200 employees that prevented them from using the access ramps or bathrooms. Applicable regulations required that bathroom facilities be available to cafeteria patrons. Patrons could not reasonably be

expected to ignore the signs prohibiting unauthorized access to the building, even though they physically may have been able to gain entry to the restricted areas.

Appellant is not entitled to any recovery with respect to removal of the advertising sign. There is no evidence that it was authorized and compliant with pertinent regulations. Approval should have been obtained prior to its posting.

We conclude that cumulatively the above-discussed changes in circumstances adversely and materially affected operation of the cafeteria and appellant is entitled to damages for breach of the implied contract conditions as acknowledged by the NAFI and discussed above. Because only issues pertaining to entitlement are presently before us we make no comment concerning the nature, type or extent of damages that may be appropriate.

ASBCA No. 52143 is sustained to the extent indicated with respect to the claim for $60,000 and remanded to the parties for determination of quantum

II. ASBCA No. 51718

This appeal concerns the NAFI's claim for concession and utility fees that appellant ceased paying in December and October 1997. The amounts sought by the NAFI are based on the reduced concession fees set forth in Mod. 2. Appellant does not dispute that the contract requires payment of the fees but asserts that they should not be assessed because of the breaches of contract that we have found above. Inasmuch as we have concluded that Mod. 2 was not a substituted contract, that the doctrine of accord and satisfaction is inapplicable, and appellant may pursue its original claims, appellant remains liable for concession fees pending establishment of the amount of breach damages on remand. The parties have consistently conducted their negotiations based on reducing the concession fee. They have treated the actual amount of any concession fee owed the NAFI as ultimately a matter of quantum. Accordingly, the amount, if any, of appellant's indebtedness for these fees after allowance for damages owed by the NAFI is properly to be addressed by the parties during their negotiations on remand.

The appeal is denied to this extent and remanded for determination of quantum in connection with ASBCA No. 52143.

III. ASBCA No. 52143 - Claim for $200,000

The remaining portion of this appeal concerns appellant's claim for anticipatory profits in the amount of $200,000 that appellant allegedly would have earned during the four unexercised option years. The claim for unearned profits for those years is groundless. The NAFI had extensive discretion in determining whether to exercise the options under this contract. *See Government Systems Advisors, Inc. v. United States*, 847

F.2d 811 (Fed. Cir. 1988); *Plum Run, Inc.*, ASBCA Nos. 46091, 49203, 49207, 97-1 BCA ¶ 28,770. The option clause has no pertinent restrictions on the exercise of that discretion. Here, the non-exercise of the options has also not been proven to be arbitrary, capricious or to have resulted from bad faith or an abuse of discretion.

The appeal is denied to that extent.

CONCLUSION

ASBCA No. 52143 is sustained and ASBCA No. 51718 is denied to the extent indicated. The appeals are remanded to the parties for negotiation of quantum. ASBCA Nos. 51596 and 51674 are dismissed as duplicative.

Dated: 27 February 2001

ROBERT T. PEACOCK
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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 51596, 51674, 51718, and 52143, Appeals of Edward H. Foran, rendered in conformance with the Board's Charter.

Dated:

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