ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Cascade General, Inc. | ) | ASBCA No. 53041 |
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| Under Contract No. N00024-92-H-8033 | ) | |

APPEARANCE FOR THE APPELLANT: John T. Jozwick, Esq.
Paradise Valley, AZ

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
James D. Beback, Esq.
Trial Attorney
Supervisor of Shipbuilding,
Conversion and Repair
Everett, WA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
UNDER RULES 11 AND 12.3

Cascade General, Inc. (Cascade) appeals the denial of its claim under a ship repair contract for a second drydocking of the ship. Cascade has elected the Rule 12.3 Accelerated Procedure. Both parties have submitted the appeal for decision under Rule 11 without oral hearing. Pursuant to our order of 14 November 2000, we decide entitlement only.

FINDINGS OF FACT

1. On 1 October 1999, the Supervisor of Shipbuilding, Conversion and Repair, USN, Everett, Washington (SUPSHIP) awarded Job Order No. 007M01 to Cascade for specified work on the USS FIFE at the Puget Sound Naval Shipyard (PSNS) (R4, tab 1 at 1, 1A, 2; ex. A-58 at 2). Most of the work was to be performed on the ship in drydock. The scheduling work item (Work Item 042-11-001) specified that docking would occur on 21 October 1999, and that undocking would occur on 2 December 1999. (Exs. A-58, -99)

2. The FIFE and a submarine were both moved into PSNS Drydock No. 5 on 21 October 1999 as scheduled. However, due to added work on its controllable pitch propeller (CPP), the work on the FIFE had not been completed when the work on the submarine was completed on 6 December 1999. On that date the job order work on the FIFE was suspended while it was undocked and then redocked to permit removal of the submarine. (R4, tab 17; ex. A-82)

3. On 3 and 5 January 2000, Cascade signed proposed Modifications A00015 through A00018 which, among other things, incorporated into the job order various changes including the added work on the CPP. None of these modifications, however, added the second drydocking to the job order "milestone" schedule. (Exs. A-83, -84, -85, -86)

4. On 5 January 2000, Cascade submitted a no-cost price proposal for adding the second drydocking and other changes to the milestone schedule (R4, tab 15). Cascade's intent in submitting the no-cost proposal was to effect the administrative change of the schedule. It did not intend to waive its rights to claim any unrecovered costs of the second drydocking. (Ex. A-97, para. 44 at 9). Nevertheless, the SUPSHIP's form on which the proposal was submitted included a boilerplate clause stating that: "the above-specified work will be accomplished at the price stated above, which includes cost of all delays and/or disruptions involved in this work . . . ." (R4, tab 15)

5. On 6 or 7 January 2000, Cascade delivered to the contracting officer a request for equitable adjustment (REA) in the amount of $105,929 for the unrecovered costs of the second drydocking. The REA outlined the work and cost involved. It stated Cascade's readiness to negotiate a settlement "by 11 January 2000," and concluded with the statement: "Please contact me to schedule discussions or provide additional information." (Ex. A-82; Caudill affidavit, 24 Apr 01 at 3)

6. There was an obvious inconsistency between the stated terms of the no-cost schedule change proposal submitted on 5 January 2000 and the REA submitted no more than two days later. There is no evidence, however, that the contracting officer inquired of Cascade as to this inconsistency, or that he made any attempt to discuss or negotiate the REA prior to summarily denying it on 10 April 2000. *See* Finding 9. Instead, on or about 18 February 2000, he sent Modification A00025 to Cascade for signature.

7. Modification A00025 incorporated the no-cost schedule change and three other price proposals into the job order for an aggregate price increase of $37,397. It further stated that it was: "in full and final settlement of all claims arising out of this modification and any other modifications or change orders indicated above, including all claims for delays and disruptions resulting from, caused by, or incident to such modifications or change orders." (Ex. A-91) This "full and final" settlement provision was a boilerplate provision which appears in all of the job order modifications in evidence (exs. A-83, -84, -85, -86; G-16).

8. Modification A00025 was signed by Cascade on 18 February 2000 and by the contracting officer on 23 February 2000 (ex. A-91). There is no evidence of any negotiation, discussion, or consideration given by either party regarding the applicability of this modification to Cascade's pending REA.

9. By letter dated 10 April 2000, the contracting officer denied Cascade's REA. While admitting that "[t]here is no question that a second drydocking occurred and that it was not contemplated in the original contract," the contracting officer stated that the REA was

barred by Modifications A00015 through A00018 and A00025 (ex. A-93). By letter dated 22 May 2000, Cascade submitted the REA, less the coating subcontractor's costs, as a certified claim in the amount of $54,244 (ex. A-94). By final decision dated 22 September 2000, the contracting officer denied the certified claim REA (ex. A-96). This appeal followed.

DECISION

On appeal, the Government does not dispute that the second drydocking was not contemplated under the terms of the job order at award. It denies liability solely on the ground that Modifications A00015 through A00018 and A00025 bar recovery of the claimed costs. Modifications A00015 through A00018, however, did not directly address the second drydocking. Modification A00025 did. Therefore, we conclude that, if the parties intended to bar the present claim for costs of the second drydocking, they did so in Modification A00025 and not in the other cited modifications.

A meeting of the minds of the parties is an essential element of an accord and satisfaction. *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965). The provisions in Modification A00025 dealing with the second drydocking originated in the no-cost schedule change proposal submitted by Cascade on 5 January 2000. The REA submitted no more than two days later, however, put the contracting officer on notice that Cascade did not consider the costs of the second drydocking to be within the scope of that proposal. In the absence of evidence of any inquiry, discussion or negotiation on this point before the execution of Modification A00025, we conclude that there was no meeting of the minds of the parties as to the applicability of that modification to the pending REA.

The appeal is sustained on entitlement and remanded to the parties for settlement of amount.

Dated: 7 May 2001

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting 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. 53041, Appeal of Cascade General, Inc., rendered in conformance with the Board's Charter.

Dated:

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