

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Sherman R. Smoot Corp.) ASBCA No. 53115
)
Under Contract No. N62477-94-C-0028)

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OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the deemed denial of The Sherman R. Smoot Corp.’s (Smoot) time extension claim arising from “early delays” (app. br. at 35). The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 605(c)(5), 607. After a 10-day hearing, the parties have submitted post-hearing and reply briefs. The Board is to decide entitlement only in this appeal (tr. 12).

Under the captioned contract, the Board consolidated ASBCA Nos. 52145, 52146, 52147, 52148, 52149, 52150, 52173, 52261, 53049, 53115 and 53246. Appellant withdrew ASBCA Nos. 52145, 52146, 52147 and 52148 with prejudice (tr. 37, 80). (See Board’s 14 November 2001 ORDER OF DISMISSAL.) The Rule 4 documents for those four dismissed appeals, however, remain in the record (tr. 11-12). Citations to Rule 4 documents herein identify the appeal in which the document was filed.

FINDINGS OF FACT

1. On 3 May 1996, the Navy awarded Smoot Contract No. N62477-94-C-0028 (contract 28) for the firm fixed-price of \$19,073,139, to complete the renovation design, to demolish building 33A and a part of building 37, to renovate buildings 33, 37, 39, and 109, and to construct a “Link” building at the Washington Navy Yard (WNY) (ASBCA 53115, R4, tab 1 at 2, ASBCA 52173, R4, tab 1, spec. § 01010, ¶ 1.2.1).

2. Contract 28 incorporated by reference the standard fixed-price construction contract terms and conditions, including the FAR 52.243-4 CHANGES (AUG 1987) clause (ASBCA 52173, R4, tab 1 at 00721-12).

3. Smoot's 20 November 1996 letter to LCDR Andrew Trotta, Navy Project Engineer, identified (a) 14 "design changes," whose specific delay on contract 28's completion was not stated, and (b) 22 "construction changes," most of which were not on the "critical path," but two of which, Proposed Change Order (PCO) Nos. 58 and 65, allegedly rendered "all prior activities and delays . . . non-critical" and caused a "39 calendar day delay" to critical path activities 103013A and 18058D-2, respectively, as of 31 October 1996, and would result in an extension of the contract completion date from 9 March to 15 April 1998 (a 37 calendar day period) (ASBCA 53115, R4, tab 3, encl. 2 at 2, 8-9). PCO Nos. 58 and 65 alleged differing site conditions at building 33. The discrepancy between 39 and 37 days is not explained.

4. Smoot's 6 February 1997 letter to LCDR Trotta identified (a) 16 "design changes," whose specific delay on contract completion Smoot did not state, and (b) 10 "construction changes," two of which, PCOs #12 and #87, allegedly caused an additional 14 calendar day delay to critical path activities R06100-A, 102010A and 103016A as of 31 December 1996 and would result in an extension of the contract completion date from 15 April to 29 April 1998 (ASBCA 53115, R4, tab 3, encl. 3 at 3-5). PCO No. 12 involved work to remove pigeon excrement and PCO No. 87 involved redrilling auger cast piles at building 33 because of obstructions.

5. On 8 August 1997, Smoot submitted to the CO a claim designated "PCO #172 (Equitable Adjustment for Time Extension)" in the amount of \$448,115.00 for 53 calendar days of extended time at the uniform daily rate of \$8,455 (ASBCA 53115, R4, tab 3, encl. 1). PCO No. 172 was based on the cumulative effect of the delays referred to in the 20 November 1996 and 6 February 1997 letters.

6. LCDR Trotta's 11 August 1997 letter to Smoot stated—

Subj: 94-C-0028; CONSTRUCTION SCHEDULE
APPROVAL

Ref: (a) Mtg between SRS (PM and PE) and LCDR Trotta on
01 August, 1997

Bill [Piatnitza, Smoot's Senior Project Manager (tr. 563)],

Per our previous discussions, reference (a), the construction schedule recently submitted is approved with a completion date of 29 April, 1998. This date includes all changes up through SRS PCO #170 (please see my ltr dtd 11 August, 1997; subj: STEAM AND CONDENSATE SYSTEM ANCHORING in

regards to PCO #174). This time is fully compensable, and upon approval of the related costs associated with this time, a modification will be issued. This has been discussed and approved by the [CO].

....

Copy to: John Denton [CO]

(ASBCA 53115, R4, tab 3, encl. 4; tr. 365-66) Soon thereafter Mr. Denton received the foregoing letter, denied that he had “approved” full compensation for such time extension, and told Smoot not to take any directions from LCDR Trotta without the CO’s signature (tr. 1795-96, 1805-06).

7. The CO’s 6 October 1997 letter to Smoot referred to LCDR Trotta’s 11 August 1997 letter, stated that the “approved completion date” of 29 April 1998 “includes 53 [sic, 51 days] days of delay from the previously approved completion date of March 9, 1998,” and that –

[we] have determined that not all of the 53 days is the fault of the Government, and therefore is not compensable [sic]. We have determined that 21 of these 53 delay days are due solely to the Government and, therefore, 21 days are compensable [sic]. This 21-day delay resulted from delaying the start of Activity #103013A - Install Piles, which was caused by unforeseen underground obstructions. Since a contract modification for a time extension after March 9, 1998 has not yet been issued by the [CO], we will issue one for the date agreed to . . . April 29, 1998

You submit that your rate for extended overhead is \$8,500 per day. However, based on a preliminary analysis by this office, we estimate a daily rate of \$4,100 per day. We feel that this rate is fair and reasonable, however we are prepared to negotiate this rate with Smoot once our analysis is completed. We anticipate that negotiations will begin in early January 1998.

(ASBCA 53115, R4, tab 3, encl. 5)

8. Bilateral Modification Nos. A00055, A00056 and A00121 to contract 28 in May and October 1997 equitably adjusted the four PCOs that Smoot alleged had caused the 53 calendar day extension in its PCO No. 172 claim, and are tabulated as follows:

<u>Mod.</u>	<u>Date</u>	<u>PCOs Adjusted</u>	<u>Record Cite</u>
A00055	7 May 1997	12, 65*	Ex. G-65 at 5-7
A00056	7 May 1997	58	Ex. G-65 at 8-10
A00121	9 Oct. 1997	87**	Ex. G-65 at 13-14

* PCO No. 65 cited “Differing Site Conditions - Existing underground piping in Building 33” (ASBCA 53115, R4, tab 3, encl 2 at 8), and correlated to Navy “PC 5” which cited “DSC, underground 40 pipe B33” (ex. G-63 at 3). Modification A00055 definitized Modification A00003, which issued “PC 5” on 18 September 1996 (ex. G-63 at 5, 14).

** PCO No. 87 corresponded to Navy PC 59 (ex. G-62).

Modification Nos. A00055, A00056 and A00121 each contained the following provision:

Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

9. In November 1997 the CO sent to Smoot proposed bilateral Modification No. A00135 to contract 28 as a “complete equitable adjustment” for a “51 day time extension [from 9 March 1998 to 29 April 1998] to include all . . . changes up through SRS PC #174, excluding [sic] SRS PC #170” with the contract price unchanged (ASBCA 53115, R4, tab 3, encl. 6 at 2).

10. Smoot’s 12 November 1997 letter to the CO returned unsigned Modification No. A00135 to contract 28, stating:

Our agreement with the ROICC office is as stated in our November 12, 1997 letter to the ROICC [Resident Officer in Charge of Construction] (see separate correspondence), which is a fully compensable time extension, and therefore we do not accept your bilateral modification with the contract price unchanged.

(ASBCA 53115, R4, tab 3, encl. 6 at 4).

11. Smoot’s separate 12 November 1997 letter to CDR James Cowell, then ROICC, recited that the Navy’s 11 August 1997 letter had stated that the time extension to 29 April 1998 was “a fully compensable time extension”; the Navy’s 26 August 1997 letter asked

about the specific cost elements of Smoot's equitable adjustment; the CO's 6 October 1997 letter had stated that only 21 calendar days of such extension were compensable; the Navy Project Engineer had told Smoot orally on 7 October 1997 that the CO's 6 October 1997 letter would be rescinded; and proposed bilateral Modification No. A00135 confused Smoot about the Navy's intentions to provide an equitable adjustment (ASBCA 53115, R4, tab 3, encl. 6 at 5-7).

12. On 20 November 1997, Smoot certified its 8 August 1997 claim designated "PCO #172" (ASBCA 53115, R4, tab 3, encl. 7). On 25 November 1997, Smoot amended that claim amount to \$535,126.00 (ASBCA 53115, R4, tab 3, encl. 8).

13. On 4 March 1998, the CO issued unilateral Modification No. A00135, extending the contract completion date by 51 days for PCO No. 172, and 7 days for another delay, to 6 May 1998 (ex. A-185 at 30-31).

14. On 10 March 1998, the CO issued to Smoot unilateral Modification No. A00177 to contract 28. Block 14 of that modification stated:

MOD: FUNDING FOR SETTLEMENT COSTS ASSOCIATED WITH 51 DAYS OF CONTRACT EXTENSION

Pursuant to the Changes clause of this contract, this modification is issued to increase the amount of funding toward final settlement of . . . (Smoot PCO #172)

This modification includes the extended overhead costs associated with extending the contract completion date by 51 calendar days, to and including 29 April 1998 and is issued in addition to the amount of overhead previously paid for under contract changes negotiated to date as identified in Smoot's schedule update of 2 August 1997, (See Smoot letter of 12 January 1998). The amount previously paid:

Field Office Overhead	\$ 33,539.00
Home Office Overhead	\$ 14,757.00
Overhead on Subcontractors	\$ 65,252.00

TOTAL \$113,548.00

This total will be deducted from the final negotiated amount of this change. Only direct costs for the remainder of the unsettled changes included in the schedule update of 2 August 1997 will be negotiated. The indirect costs for the remaining unsettled changes will be negotiated as part of this change, excluding profit, labor burden and bond premium.

....

As a result of the above, the total contract price is hereby increased by \$80,000.00 from \$21,091,163.00 to 2,171,163.00.

(ASBCA 53115, R4, tab 3, encl. 10 at 2-4)

15. On 16 February 1999, Smoot amended its PCO No. 172 claim amount to \$462,931.00, including \$406,608 for 51 days delay at the uniform daily rate of \$7,973 and \$56,323 for “lump sum costs” (ASBCA 53115, R4, tab 3, encl. 13).

16. On 19 January 2000, the CO issued to Smoot unilateral Modification No. A00230 to contract 28. The purpose of that modification was not to be a final decision of the CO, but rather “to unilaterally definitize Modification A00177 and to reflect an increase in the total contract value in the amount of \$203,776.00.” (ASBCA 53115, R4, tab 3, encl. 14 at 1-2) Respondent paid Smoot the compensation provided by Modification No. A00230 (tr. 379-80).

17. On 1 August 2000, Smoot amended its PCO No. 172 claim to the final amount of \$179,155.00, net of the \$283,776 paid under Modification Nos. A00177 and A00230 (but not addressing the \$113,548 paid prior to Modification No. A00177; *see* finding 14), and requested a final decision of the CO (ASBCA 53115, R4, tab 3; tr. 383).

18. On 31 October 2000 Smoot appealed from the “deemed denial” of its 1 August 2000 claim, asserting that the CO had failed to issue a final decision thereon within a reasonable period of time. The Board docketed that appeal as ASBCA No. 53115.

19. In pre-trial proceedings, Smoot alleged that PCO Nos. 58, 65, 12 and 87 delayed critical path activities by 25, 14, 2, and 12 days, respectively, for a total delay of 53 days (*see* appellant’s letters dated 9 February and 29 March 2001 in corres. file).

20. At trial, respondent offered no evidence to rebut the presumption that the Navy was responsible for the 51-day delay arising from PCO No. 172.

POSITIONS OF THE PARTIES

Smoot argues that the Navy’s Project Engineer, LCDR Trotta, agreed with Smoot that all 51 calendar days of extension were compensable; the CO at first reneged on that agreement, but subsequently recognized that some of those 51 days were compensable by issuing unilateral Modification Nos. A00177 and A00230, which cumulatively paid Smoot \$283,776; and since Modification Nos. A00177 and A00230 were issued years after Smoot had signed Modification Nos. A00055, A00056 and A00121 containing accord and

satisfaction provisions, this meant that the CO did not regard such provisions as having any force or effect. (App. br. at 36-37.) Smoot apparently no longer contends that the PCO No. 172 delay was 53 days.

Respondent argues that: (1) bilateral modifications containing accord and satisfaction provisions bar the PCO No. 172 claim; (2) Smoot did not provide the narrative analysis of the CPM schedule and total float reports required by the contract when requesting a time extension to show that the relevant float had been exceeded for the allegedly delayed activities; and (3) Smoot called no CPM expert at the hearing, and its as-planned and as-built schedules are not in evidence. (Gov't br. at 97-99)

DECISION

This appeal presents three issues for decision. (1) Was respondent bound by LCDR Trotta's 11 August 1997 letter to Smoot stating that the contract completion date extension to 29 April 1998 was "fully compensable"? (2) Was Smoot bound by the accord and satisfaction provisions in contract Modification Nos. A00055, A00056, and A00121? (3) Did Smoot sustain its burden of proof that PCO Nos. 58, 65, 12, and 87 were Government-responsible change orders that caused 51 calendar days of non-concurrent delay and justified a 51-day extension of contract 28's completion date?

I.

LCDR Trotta was the Navy's Project Engineer in 1996-97 (finding 3). His 11 August 1997 letter to Smoot made it clear that Trotta himself was not a CO, but he represented that the CO had "approved" that the contract completion date extension to 29 April 1998 was "fully compensable." CO Denton promptly denied that he had approved full compensation for such extension, and notified Smoot not to take such directions from LCDR Trotta without the CO's signature. (Finding 6) On those facts, we hold that the CO did not ratify the Navy Project Engineer's August 1997 representation to Smoot about the full compensability of the extension to 29 April 1998, and respondent was not contractually bound by the 11 August 1997 letter.

II.

When the conduct of the parties in continuing to consider a contractor's claim after the contractor has executed a release, makes plain that they never construed such release as constituting an accord and satisfaction of the claim, that release will not be held to bar the prosecution of the claim. *See John T. Jones Const. Co.*, ASBCA Nos. 48303, 48593, 98-2 BCA ¶ 29,892 at 147,975 (unqualified release results in accord and satisfaction except when, as here, the parties continued to discuss the claim and the CO issued a unilateral contract modification providing a price increase for the claimed days of delay), citing *Winn-Senter Const. Co. v. United States*, 110 Ct. Cl. 34, 65-66 (1948).

Contract 28 Modification Nos. A00055, A00056, and A00121 were executed on 7 May and 9 October 1997 (finding 8). On 10 March 1998 the CO issued unilateral Modification No. A00177, providing Smoot \$80,000, and on 19 January 2000 issued Modification No. A00230, providing Smoot \$203,776, both incremental amounts on Smoot's PCO No. 172 claim (findings 14, 16). We hold that Modification Nos. A00055, A00056, and A00121 do not bar Smoot's prosecution of its PCO No. 172 claim.

III.

Smoot's 20 November 1996 letter to respondent stated that PCO Nos. 58 and 65 had caused a "39 calendar day delay" to critical path activities 103013A and 18058D-2, respectively, as of 31 October 1996, and would result in an extension of the contract completion date from 9 March to 15 April 1998, actually a 37 calendar day period (finding 3). Smoot's 6 February 1997 letter to respondent stated that PCO Nos. 12 and 87 had caused an additional 14 calendar day delay to critical path activities R06100-A, 102010A, and 103016A as of 31 December 1996, and would result in an additional extension of the contract completion date from 15 to 29 April 1998 (finding 4). Smoot alleged that those four PCOs delayed critical path work by 53 days.

On 4 March 1998, the CO issued unilateral Modification No. A00135 to contract 28, extending the contract completion date by 51 calendar days, with no prior increase, on account of PCO No. 172 (finding 13). That modification was issued after all the material facts of the delays had taken place and after deliberate consideration (see findings 9-11). Under those circumstances, a rebuttable presumption arose that the Navy was responsible for the 51-day delay. *See Thomas J. Papathomas*, ASBCA Nos. 49512, 50895, 97-2 BCA ¶ 28,317 at 145,780, *aff'd on recon.*, 98-1 BCA ¶ 29,460; *Robert McMullen & Son, Inc.*, ASBCA No. 19023, 76-1BCA ¶ 11,728 at 55,903.

The CO soon thereafter issued another unilateral Modification No. A00177, providing \$80,000 in addition to the \$113,548 previously paid for overhead for the 51-day extension (finding 14), and in January 2000 issued unilateral Modification No. A00230, increasing the compensation for such delay by \$203,776 (finding 16). At trial, respondent did not rebut the presumption that the Navy was responsible for the 51-day delay arising from PCO No. 172 (finding 20). Accordingly, we hold that Smoot has established that PCO Nos. 12, 58, 65 and 87 caused a compensable, 51-day delay in completion of contract 28.

We sustain the appeal, and remand the matter to the parties for resolution of damages.

Dated: 25 February 2003

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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 No. 53115, Appeal of The Sherman R. Smoot Corp., rendered in conformance with the Board's Charter.

Dated:

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