ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Bath Iron Works Corporation	)	ASBCA No. 54544
	)	
Under Contract No. N00024-98-C-2306	)	

APPEARANCES FOR THE APPELLANT: Richard C. Johnson, Esq.
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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 24 January 2006, appellant timely moved for reconsideration of the Board's 22 December 2005 decision, *Bath Iron Works Corp.*, ASBCA No. 54544, 06-1 BCA ¶ 33,158 ("the decision"), which sustained the appeal and awarded BIW $1,130,314.05. Familiarity with the decision is assumed. Respondent did not move for reconsideration, and replied to appellant's motion on 24 February 2006. We address movant's grounds for reconsideration seriatim. We increase the amount of the award to $1,171,855.39.

I. CDA Interest.

The decision found that:

> 38. BIW included the costs to repair and to replace damaged DDG 90 FOFT piping in its progress payments of actual, allowable costs under the contract (tr. 2/68-69). If BIW were to prevail in this insurance claim, the parties will modify the contract to treat such costs outside of the contract's incentive pricing provisions (tr. 2/73-76).

The decision stated: "BIW is not entitled to recover Contract Disputes Act interest [on the principal amount awarded], since interest runs until payment and respondent has already paid those costs in the course of BIW's progress payments under the contract (41 U.S.C. § 611; finding 38)." (Slip op. at 23, 06-1 BCA at 164,308)

Movant does not challenge finding 38 as such, but argues that CDA interest is recoverable because: (1) BIW introduced evidence that, though BIW billed the costs of repairing and replacing damaged DDG 90 FOFT piping in the normal course, "the amount that we are reimbursed are [sic] affected by the share lines in the contract. So we're not reimbursed for the full value of the matter. . . ." (tr. 2/73; app. mot. at 2). (2) Once the CO issues a modification to reimburse an insurance claim previously denied *in toto*, as in the instant case, the full value of reimbursable claim costs is transferred from the shipbuilding CLIN to a "separate vehicle account" that BIW bills again to the Navy on the basis of actual cost plus reasonable profit, without affecting the incentive cost, profit and ceiling price (tr. 2/73-75). Thus, BIW will "once again" incur the insurance claim costs and receive full payment of the amount recoverable under the decision. (App. mot. at 3-4) (3) Since the appeal record contains no evidence by which to distinguish BIW's DDG 90 FOFT piping repair and replacement costs that were previously "paid" from the costs not yet paid, BIW proffers new evidence, to wit, the 23 January 2006 affidavit of BIW's Director of Finance and Accounting, Joseph C. Kuklewicz, who states:

> BIW received a maximum reimbursement of INS 896 costs [to repair and replace damaged DDG 90 FOFT piping] of $1,200,697 under Invoice No. 358 dated October 28, 2003. However, the reimbursed amount changed thereafter under the provision of the payments clause of the contract until it reached the present level of $326,058 on January 3, 2006. This decrease was due to the fact that the DDG 90 incurred costs reached and then exceeded the contract price ceiling.

(Kuklewicz affid., ¶ 4; app. mot. at 8-11)

Movant also argues that the Board's decision is contrary to *Servidone Construction Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991), and *Caldera v. J. S. Alberici Construction Co.*, 153 F.3d 1381 (Fed. Cir. 1998). It asserts that "the fact that BIW will once again 'incur' **all** the costs when it reverses the debit of allowable costs to contract cost brings BIW's case squarely within the holdings of Servadone [sic] and Alberici." (App. mot. at 7; emphases in original).

Respondent argues that (a) movant conceded that the claimed FOFT costs were incurred in 2003, were included in periodic billings, and were paid before BIW submitted

its certified claim, (b) when payment precedes a claim submission, "interest stops before it even starts to run" and is "zero" pursuant to 41 U.S.C. § 611, and (c) with or without the proffered new evidence the Board's decision on interest was correct (gov't resp. at 4).

We are persuaded as a result of the motion for reconsideration that this issue warrants a fuller examination. Accordingly, in the exercise of our discretion, we delete the last sentence of the decision, denying CDA interest, and remand to the parties the determination of whether, or to what extent, any CDA interest is due on the principal amount allowed in this appeal, as modified on reconsideration hereafter. In that connection, the parties should consider not only the cases cited in the motion for reconsideration, but also *Richlin Security Service Co. v. Chertoff*, 437 F.3d 1296 (Fed. Cir. 2006), decided after the motion was filed, and any other pertinent authority. In the event the parties are unable to resolve this issue, they may apply to the Board to reinstate the appeal for such further proceedings as may be appropriate.

II. Legal Fee Recovery.

Our finding 35(b) stated that BIW's Insurance claim included:

> legal fees of $66,483, of which $13,776.80 were documented by Smith Pachter invoices from 17 June to 13 November 2003 for conferences, legal research, document review and preparation of the Insurance clause claim for FOFT piping damage (supp. R4, tab 370; app. supp. R4, tab 306A at 4-7, 12; R4, tab 22 at 1128-29). We find no evidence that before 5 September 2003 BIW had adopted and maintained a litigation stance for the DDG 90 FOFT piping claim.

We held that –

> $13,776.80 of BIW's attorney fees incurred to research and prepare its Insurance clause claim up to 5 September 2003 (finding 31), before which date it had not adopted and maintained a litigation stance (finding 35(b)), are recoverable costs of contract administration. *See Grumman Aerospace Corp.*, ASBCA No. 50090, 01-1 BCA ¶ 31,316 at 154,674-76 (one must determine the objective reason for which legal, accounting and consultant costs are incurred before or after the filing of a CDA claim, to wit, to further the negotiation process or to promote the prosecution of the claim; Board denied costs because the subcontractor never backed away from its initial litigation stance).

(Slip op. at 23, 06-1 BCA at 164,308)

Movant points out, and we find, that Smith Pachter invoices document $39,156.80 (not $13,776.80) in legal fees from 17 June to 13 November 2003. Of those fees, $9,609.80 were incurred from 17 June to 14 August 2003. The remaining fees, $29,547, were incurred from 1 October to 13 November 2003. Appellant claims no fees for the period from 15 August to 30 September 2003. Accordingly, assuming appellant was only entitled to fees for the period up to 5 September 2003, the recoverable costs of contract administration should have been $9,609.80. Movant contends, however, that the entire amount of its invoices, $39,156.80, should have been recoverable (app. mot. at 11-18).

In *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1991) (*en banc*), the court provided the following guidance:

> In classifying a particular cost as either a contract administration cost or a cost incidental to the prosecution of a claim, contracting officers, the Board, and courts should examine the objective reason why the contractor incurred the cost. [Citation omitted] If a contractor incurred the cost for the genuine purpose of materially furthering the negotiation process, such cost should normally be a contract administration cost allowable under FAR 31.205-33, even if negotiation eventually fails and a CDA claim is later submitted. [Citation omitted] On the other hand, if a contractor's underlying purpose for incurring a cost is to promote the prosecution of a CDA claim against the Government, then such cost is unallowable under FAR 31.205-33.

See also Grumman Aerospace Corp., ASBCA No. 50090, 01-1 BCA ¶ 31,316, *aff'd*, 34 Fed. Appx. 710 (Fed. Cir. 2003).

We first address the invoices for the period from 17 June to 14 August 2003. On 27 June 2003, BIW submitted a request for equitable adjustment (REA) under the Insurance clause in the estimated amount of $1,846,928 (finding 26). On 1 August 2003, BIW transmitted additional information and stated it believed it was "in the interest of both parties to enter into negotiations as soon as possible in order to reach an equitable resolution of this matter" (R4, tab 20). On 14 August 2003, the SUPSHIP contracting officer denied the REA (R4, tab 21; finding 29). The contracting officer made no

mention of negotiations. On 5 September 2003, BIW sent SUPSHIP its final report on the causes of FOFT corrosion and its efforts to remediate the damages on DDG 90 (finding 31). We inferred that BIW had not adopted and maintained a litigation stance at that time. Movant asserts that the 5 September 2003 report is irrelevant (app. mot. at 14-15). If so, it makes no difference for purposes of this decision, since appellant did not claim legal fees for the period from 15 August to 5 September 2003. We conclude that appellant carried its burden of proof as to the legal costs incurred in the period from 17 June to 14 August 2003.

We turn next to the invoices for the period from 1 October to 13 November 2003. Movant cites no evidence from this period other than the invoices themselves (see app. mot. at 16-18). On 19 November 2003, BIW submitted its certified CDA claim. To all appearances, the legal fees incurred in this period related to preparation of the claim. Movant cites two documents subsequent to submission of the claim. On 12 December 2003, BIW made a power point presentation to SUPSHIP recommending that the parties enter into negotiations and that BIW, upon negotiated resolution, would withdraw the CDA claim, thus eliminating the accrual of interest (R4, tab 23, last page). On 19 December 2003, a SUPSHIP representative e-mailed BIW that following the 12 December 2003 meeting, SUPSHIP was "internally evaluating a possible path of recovery," not pursuant to the Insurance clause, that might support recovery of 60 to 70% of production costs (app. supp. R4, tab 225A). On 16 January 2004, the contracting officer issued a final decision denying the claim (finding 33).

Movant argues that "[i]t thus seems clear beyond any possible contrary inference that, given the persisting sincere desire by BIW to settle the matter as late as December 2003, the parties – several months earlier and prior to the submittal of a certified claim on November 19, 2003 – were 'in a settlement mode as distinguished from a litigation mode.'" (App. mot. at 18, citation omitted) We are unable to agree that the fact that BIW met with SUPSHIPS after submission of the claim and recommended a negotiated settlement establishes that its underlying purpose for incurring the legal costs relating to preparation of the claim was furthering the negotiation process as opposed to promoting the prosecution of the claim. *Advanced Engineering & Planning Corp.*, ASBCA Nos. 53366, 54044, 03-1 BCA ¶ 32,157 at 158,995, *aff'd*, 292 F. Supp. 2d 846 (E.D. Va. 2003) (costs incurred in updating an REA and converting it into a CDA claim were not allowable). Accordingly, appellant has not carried its burden of proof as to this period.

III. The Cost of Re-Performing the Water Flush.

In the decision, we held that BIW could not recover the cost of "re-performance of the post-hydrostatic test flush with rinse water containing hydrogen peroxide" (re-flushing). Slip op. at 19, 06-1 BCA at 164,306. We found that those costs, before mark-ups for fee and FCC, consisted of engineering costs of $13,747.73, including in-

house labor hours for Mr. Gerrish (finding 37) and material costs of $50,492.66 for Clean Harbors and $279.80 for hydrogen peroxide (finding 35 (b)), totaling $64,520.19. Slip. op at 23, 06-1 BCA at 164,308; see also finding 24.

Movant takes no issue with the holding that it may not recover re-flushing costs. It argues that its 19 November 2003 original, and 27 October 2004 revised, Insurance claims did not include any costs of re-flushing the DDG 90 FOFT in 2003 because each such document contained the statement:

> After the ripout and replacement of the impacted piping sections had been completed, the system was hydro tested to ensure system integrity. However, a reflush of the system was not performed. No costs are included in this proposal for a reflush of the system. [Emphasis in original]

(R4, tab 22 at 1124; app. supp. R4, tab 306A at 3; app. mot. at 19) Further, it argues that if there were such costs, the $64,520.19 cost of the re-flush was overstated and should be no more than $23,788.52, including $22,874.50 for Clean Harbors, $279.80 for hydrogen peroxide, and $634.22 for Mr. Gerrish (app. mot. at 26).

We have re-examined the evidence relating to whether there was a re-flush of the FOFT piping system and, if so, what the cost was. In light of movant's analysis, we have concluded that the evidence we relied on in findings 35(b) and 37 was not germane to the FOFT re-flushing. The issue then arises whether any of appellant's claimed costs related to re-flushing. We have no reason to doubt the good faith of the statements quoted above that no costs were included for a re-flush of the system. On the other hand, it is appropriate to verify those statements by examination of other evidence in the record. Neither party points to any testimony on this issue. As movant points out, Clean Harbors' daily report for 3 July 2003 shows that Clean Harbors performed a water flush with hydrogen peroxide after completion of hydrostatic testing (supp. R4, tab 85 at 94; app. mot. at 26 n.23). Clean Harbors' invoice for the period from 1 July through 8 July 2003 totaled $22,874.50, and movant states that "the cost of the water flush cannot be reliably culled from the entire effort undertaken by Clean Harbors during those days and, thus, it is BIW's position that $22,874.50 is the maximum amount that, in the light most favorable to the Government, may properly be deducted from the Insurance claim for the Clean Harbors effort" (app. mot. at 26). Appellant has the burden of proof on its claim. We conclude that appellant has proved that re-flushing costs were no more than $22,874.50 for Clean Harbors and $279.80 for hydrogen peroxide, for a total of $23,154.30, which is the amount (plus mark-ups) that should be deducted from appellant's recovery. We conclude that no in-house labor hours should be deducted for

re-flushing because the record does not identify any specific work BIW personnel performed during the relevant period.[1]

IV. Four Additional Alleged Factual Errors.

Finally, movant "calls the Board's attention to four additional factual findings believed to be materially inaccurate, three of which, although not critical to the Board's decision, could pose difficulties between the parties in the future under the DDG 51 Class program" (app. mot. at 1). We address each finding in turn.

(1) Finding 8. Movant contends that the statement in finding 8 that "Drawing No. 802-5774118 made BIW responsible to select DDG 90's FOFT piping configuration, dimensions and arrangement" is in error because that drawing was a "contract guidance drawing" which "had no further role to play" on DDG 90, since contract § C-9 forbade BIW to depart from the DDG 90 "Configuration Control Baseline" which included "the Ship Specifications . . . contract drawings . . . mandatory subsidiary specifications . . . referenced in the Ship Specifications **excluding Contract Guidance Drawings**" (app. mot. at 30-31, emphasis in original). It was not our intent in this decision to address the issues appellant raises. Accordingly, we delete the last sentence of finding 8.

(2) Finding 11. Movant asserts that our finding 11 is subject to misinterpretation with respect to (a) visual inspection of socket welds, and (b) acceptable "melt-through" and "burn-through" criteria. We clarify that our description of, and text excerpted from, the specification in finding 11(a) did not address the extent to which BIW was required to inspect the interior of socket welds. In finding 11(b) we clarify that the requirements of NAVSEA 0900-LP-003-8000 (app. supp. R4, tab 307A at 7) were:

> 5.2.1.2 BURN-THROUGH
> Welds shall be free of burn-through (see melt-through below).
>
> 5.2.1.3 MELT-THROUGH
> Melt-through and repaired burn-through area [sic] are acceptable provided the areas do not contain cracks, crevices, excessive oxidation, or globules, and provided the root convexity and concavity limits are not exceeded.

[1] Movant offered "new evidence" showing the dates that its in-house labor hours were incurred. We have not found it necessary to determine whether movant has shown good grounds for the admission of such evidence on this motion for reconsideration.

> 5.2.1.4 OXIDATION
>
> Internal weld surface showing oxide scale accompanied by a wrinkled or crystalline surface appearance shall be cause for rejection. However, tightly adhering, iridescent temper films shall be considered acceptable.

(3) Finding 16. We stated in finding 16:

> SUPSHIP's inspection records of DDG 90's FOFT flush reported acceptance on 10 September 2002 by SUPSHIP's Dominic Vella of inspection step "C": "contractor is in compliance of [sic] each paragraph/sub-paragraph of the process identified within Release." Those records do not state or prove that Mr. Vella personally observed the 9 September 2002 FOFT flush, or how he determined that BIW complied with the process in DOI 10-014, ¶ 5.10.1. (App. supp. R4, tab 291A at 7-8; supp. R4, tab 388 at 4; tr. 3/62, 5/146-47, 150) Mr. Vella did not testify at the hearing.

Movant asserts that our concluding statement -- "Those records do not state or prove that Mr. Vella personally observed the 9 September 2002 FOFT flush, or how he determined that BIW complied with the process in DOI 10-014, ¶ 5.10.1" -- is "contrary to the uncontradicted testimony of two Navy witnesses," Perry Golden and Edward Cummings (app. mot. at 34-35). Respondent contends that the above-quoted statement in finding 16 is correct, but does not oppose its deletion as unnecessary to the Board's decision (gov't oppn. at 12).

The testimony movant cites described what actions a SUPSHIP QA specialist "would" perform with respect to inspection or audit of BIW's flushing of DDG 90 FOFT, and that on 23 July 2003 Mr. Golden's e-mail stated that "regarding the fill system flush on DDG 90 records indicate Dominic Vella was present for at least a part of it" without identifying which part (tr. 3/71, 5/146-47; app. supp. R4, tab 291A at 8, 197A; supp. R4, tab 388 at 1, 5). Movant concludes that "the testimony and Navy records are in perfect harmony to the effect that Mr. Vella **had** to have gone out on the ship and observed the water flush on DDG 90" (app. mot. at 35). However, movant apparently overlooks finding 15, stating that "Mr. Gerrish saw no SUPSHIP personnel on site when he began the flush on 9 September 2002," and citing Mr. Gerrish's following testimony:

> A . . . The release was for ten o'clock, and unfortunately SUPSHIP didn't show up, so shortly after ten o'clock we

started to flush – it's not unnormal [sic] for SUPSHIP not to show up for a release, they spot check them . . . . [Tr. 1/142]

. . . .

Q And there was no one there from the Navy at the time you did this flush of DDG-90 of the fuel pipe. Is that correct?

A I did not see anybody. [Tr. 1/174]

. . . .

Q Okay. You were asked about whether you observed any Navy personnel present when you performed the flush in the DDG-90. To what extent would it have been possible for a Navy person to be present at least part of the time without your seeing them?

A . . . I released that at 10:00, and the location that I said that I would meet them is the crew's mess. Historically, we render out if the Navy doesn't show up, we usually wait 10 to 15 minutes as a courtesy because they're running behind. After that, we go and do whatever test or DOI that we're doing, and a lot of times in the past, the SUPSHIP guy that if he is running late, he knows where we're going to be doing this and he'll come to that job site and either see myself or one of my mechanics that's doing the function.

Q. Okay. Do you know, as a fact, whether or [sic] SUPSHIP person in fact observed any part of this flush?

A. I did not personally see anybody show up for DDG-90. [Tr. 1/181-82]

Based on the foregoing, we find no error in finding 16.

(4) Movant asserts that our statement in finding 21 that "BIW sent Thielsch's 30 May 2003 report to SUPSHIP and to expert witnesses . . . Richard Hayes [sic] and Terry McNelley" is mistaken because BIW did not send the report to Messrs. Hays and McNelley (app. mot. at 36). Respondent does not object to deletion of Messrs. Hays and McNelley from the end of the last sentence in finding 21, or to adding "and the Navy provided that report to" between the words "Borenstein" and "Richard Hayes [sic]"

(gov't oppn. at 12). The record shows that experts Borenstein, Hays and McNelley received Thielsch's May 2003 failure report. Accordingly, we revise finding 21 as set forth below.

CONCLUSION

Based on the foregoing, we modify our decision as follows:

(1) Finding 8, delete the last sentence.

(2) Finding 11 is clarified as set forth in IV(2), *supra*.

(3) Finding 21, last sentence, is modified to state:

> Thielsch's 30 May 2003 report was sent by BIW to SUPSHIP and to witness Susan Borenstein, and by the Navy to witnesses Richard Hays and Terry McNelley (see findings 31, 39(b), 41, 43).

(4) Finding 24, first sentence relating to May-June 2003, is modified to delete "and reflushed the FOFT piping."

(5) Finding 35(b), third sentence, is modified to state:

> . . . Of Clean Harbors' $172,364.94 price, $22,874.50 was to flush the FOFT in early July 2003 (supp. R4, tab 85 at 87-90, 92-94, 105-06).

and sixth sentence is modified by striking $13,776.80 and inserting $39,156.80.

(6) Finding 37 is deleted.

(7) The final three paragraphs on page 23 of the slip opinion are modified to state:

> It remains to determine the extent to which BIW's accumulated DDG 90 FOFT piping costs pertained to the "defects themselves," *viz*., re-performance of the post-hydrostatic test flush with rinse water containing hydrogen peroxide. BIW's reflushing costs are comprised of $22,874.50 billed by Clean Harbors for FOFT flushing performed in July 2003, and $279.80 for hydrogen peroxide

(finding 35(b)). BIW did not prove entitlement to $56,873.20 of the claimed $66,483 in attorney fees ($66,483 - $9,609.80).

To the foregoing amounts, totaling $80,027.50 ($22,874.50 + $279.80 + $56,873.20), we add BIW's 10% fee of $8,002.75 and FCC cost of $1,339.36 ($80,027.50 x .0167362), for a total of $89,369.61. We reduce BIW's revised claim of $1,311,225 (finding 35(d)) by $89,369.61 to $1,221,855.39, and subtract therefrom the $50,000 Insurance clause deductible, leaving a balance of $1,171,855.39 for the costs and fee to investigate, repair and replace DDG 90's corroded FOFT piping.

We sustain the appeal to the extent of $1,171,855.39 to be treated in accordance with the parties' representations (see finding 38), and deny the balance of the appeal. We remand to the parties the determination of whether, or to what extent, any CDA interest is due on the principal amount of $1,171,855.39.

We grant appellant's motion for reconsideration to the extent set forth above.

Dated: 21 April 2006

DAVID W. JAMES, 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

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. 54544, Appeal of Bath Iron Works Corp., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals