ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Southwest Marine, Inc.	)	ASBCA No. 54550
	)	
Under Contract No. N00024-85-C-8506	)	

APPEARANCE FOR THE APPELLANT: Peter B. Jones, Esq.
Jones & Donovan
Newport Beach, CA

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Stephen R. O'Neil, Esq.
Assistant Director/Trial Team Chief
Evadne Sanichas, Esq.
Senior Trial Attorney

Lisa N. Mariner, Esq.
Associate Counsel
Supervisor of Shipbuilding,
Conversion and Repair,
Puget Sound
Bremerton, WA

OPINION BY ADMINISTRATIVE JUDGE THOMAS
ON CROSS-MOTIONS TO STRIKE

This is the quantum phase of ASBCA No. 47621. Southwest Marine, Inc. (SWM) appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from a contracting officer's final decision (COFD) asserting a government claim that the Navy had overpaid SWM's predecessor in interest, Northwest Marine Iron Works (NMIW), $2,161,287 on the captioned contract as a result of debt concessions by its subcontractors and was entitled to a credit in that amount. The Board sustained the appeal on cross-motions for summary judgment. The government appealed the decision to the Court of Appeals for the Federal Circuit, which, since this is a maritime matter, transferred it to the District Court for the Southern District of California. The District Court reversed the Board's decision as to entitlement and remanded the case to the Board for determination of quantum. The Court of Appeals for the Ninth Circuit affirmed the District Court's decision. *Southwest Marine, Inc.*, ASBCA No. 47621, 96-2 BCA ¶ 28,601 (Board decision), *rev'd*, *Dalton v. Southwest Marine, Inc.*,

No. 97-1488-IEG (LSP), Third Amended Order (S.D. Cal. Oct. 7, 1998) (hereinafter 3rd Am. Order), *aff'd*, 217 F.3d 1128 (9th Cir. 2000) (hereinafter Circuit opinion), *cert. denied*, 532 U.S. 1007 (2001).

On 29 March 2004, the Navy reported to the Board that the parties had been unsuccessful in reaching a negotiated settlement as to quantum and requested that the appeal be reinstated. The Board assigned docket number 54550 to the quantum phase of the appeal. The Navy subsequently filed Respondent's Statement of Costs (SOC) dated 21 May 2004, reducing the amount of the claim to $1,407,408 plus interest, and SWM filed Appellant's Response to the Government's Statement of Costs (Response) dated 23 July 2004.

Currently pending are the following motions: (1) Appellant's Motion to Strike Respondent's Statement of Costs and Sustain the Appeal (app. mot.), and (2) Respondent's Cross-Motion To Strike Entitlement Arguments From Appellant's Response To Respondent's Statement Of Costs And Opposition To Appellant's Motion To Strike Respondent's Statement Of Costs (gov't mot. and opp'n).

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. On 19 August 1985, the Navy awarded NMIW a fixed-price incentive contract for the overhaul of the USS DULUTH. The contract included Federal Acquisition Regulation (FAR) 52.216-16 INCENTIVE PRICE REVISION-FIRM TARGET (APR 1984) (the IPR clause) and FAR 52.232-16 PROGRESS PAYMENTS (APR 1984) ALTERNATE I (APR 1984) (the Progress Payments clause). NMIW redelivered the DULUTH to the Navy in June 1986. (R4, tab 1 at 1, 40, 46-49 of 53[1]; Board opinion, 96-2 BCA at 142,785)

2. The IPR clause provided:

> (a) General. The supplies or services identified in the Schedule as Items 0001, 0005 and 0009 are subject to price revision in accordance with this clause; provided that in no event shall the total final price of these Items exceed the ceiling price of one hundred thirty (130%) percent of the target cost for these Items. . . .
>
> (b) Definition. "Costs," as used in this clause, means allowable costs in accordance with Part 31 of the [FAR] in effect on the date of this contract.

[1] References to the Rule 4 file are to the Rule 4 file in ASBCA No. 47621.

(c) Data submission. (1) Within ninety (90) days after the end of the month in which the Contractor has delivered the last unit of supplies and completed the services specified by item number in paragraph (a) above, the Contractor shall submit on Standard Form 1411 or in any other form on which the parties agree —

(i) A detailed statement of all costs incurred up to the end of that month in performing all work under the items;

. . . .

. . . .

(d) Price revision. Upon the Contracting Officer's receipt of the data required by paragraph (c) above, the Contracting Officer and the Contractor shall promptly establish the total final price of the items specified in (a) above by applying to final negotiated cost an adjustment for profit or loss, as follows:

(1) On the basis of the information required by paragraph (c) above, together with any other pertinent information, the parties shall negotiate the total final cost incurred or to be incurred for supplies delivered (or services performed) and accepted by the Government and which are subject to price revision under this clause.

(2) The total final price shall be established by applying to the total final negotiated cost an adjustment for profit or loss, as follows:

. . . .

(ii) if the total final negotiated cost is greater than the total target cost, the adjustment is the total target profit, less thirty (30) percent of the amount by which the total final negotiated cost exceeds the total target cost.

(R4, tab 1 at 46-47 of 53) Contract Item 0001 required the overhaul of the DULUTH. Bilateral Modification No. A00188 (Mod 188), effective 22 September 1986, stated that "the billing price shall henceforth be equal to the contract ceiling price" (R4, tab 2).

3. Part 31 of the FAR includes FAR 31.201-5, sometimes referred to as the Credits Provision Clause, which stated as of the date of the contract:

> The applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund.

4. On 29 October 1986, NMIW filed a Chapter 11 petition. On 20 March 1987, the bankruptcy court approved NMIW's reorganization plan. The plan provided that unsecured claims in excess of $1,000 would be converted into interest bearing debentures of the reorganized company. Amongst the debenture holders were subcontractors who had worked on the DULUTH and not been paid. (Circuit opinion, 217 F.3d at 1132, 1140)

5. On 10 March 1987, NMIW submitted a Request for Equitable Adjustment (REA) (R4, tab 2, 2nd to last page).

6. On 30 April 1987, in accordance with IPR clause (c), NMIW submitted Standard Form 1411 indicating cost of $25,093,862, profit of zero, and total cost and profit of $25,093,862 (R4, tab 4). On 11 May 1987, NMIW reduced this amount to $24,497,798 which, with a $30,736 adjustment, resulted in cost of $24,467,062 (SOC, ex. D, lines 15-17).

7. Bilateral Modification No. A00202 (Mod 202), signed by NMIW and the contracting officer on 20 March and 3 April 1989 respectively, referenced five open modifications which had established maximum increases and the REA. The modification stated in part:

> NOW THEREFORE, the parties have achieved a final negotiated settlement with regard to the above five (5) maximum priced modifications and Request for Equitable Adjustment as follows:
>
> 1. The final negotiated Target Cost, Target Profit, Target Price, Ceiling Price and Section B manhours for the settlement of the above five (5) maximum priced

modifications and Request for Equitable Adjustment are adjusted as follows:

Target Cost is increased by	$1,808,793.00
Target Profit is increased by	$ 169,544.00
Target Price is increased by $1,978,337.00	
Ceiling Price is increased by	$2,351,430.00

The Section B manhour reservation is debited 40,450 manhours.

2. In accordance with the terms of the contract, the above Ceiling Price shall have interest added to it in the certain sum of $438,859.00.

(R4, tab 2, 2nd to last page) Shortly thereafter the government paid NMIW's invoice for $2,811,077, *i.e.*, the new ceiling price less all prior progress payments and an agreed upon sum for retainage (Circuit opinion, 217 F.3d at 1132).

8. On 17 April 1989, SWM purchased NMIW. As one of the conditions for the purchase, NMIW received debt concessions from its debenture holders. By letter of 21 April 1989, the Navy notified NMIW that it had learned that at least one of the company's creditors had agreed to forgive some indebtedness, and that it was considering a recoupment action for fees which it had paid NMIW, and for which NMIW was no longer liable as a result of the concessions. (Circuit opinion, 217 F.3d at 1133)

9. On 11 March 1994, the contracting officer issued the COFD asserting a claim of $2,161,287 for overpayment on the contract.[2] The COFD stated that "[t]he sole issue under consideration is overpayment to the Contractor and the Government's recoupment of such overpayment. The operative contract provisions in this matter are the IPR clause and [the Progress Payments clause]" (R4, tab 26 at 3). The COFD stated that contract modifications through Mod 202, exclusive of Modification No. A00121, which remained unexecuted, had increased original contract values to the following amounts:

Target Cost	$17,582,184
Target Profit	$ 550,724
Target Price	$18,132,908

[2] There are various references to a date of 11 May 1994 for the COFD. These references are erroneous.

Ceiling Price	$23,295,755

NMIW had invoiced, and the Navy had paid, $23,285,752, leaving $10,003 as retention. (*Id.* at 2-3) Meanwhile, NMIW had received debt concessions in the amount of $3,238,248. The COFD stated that those concessions were "deemed to fall within the meaning of the Credits provision," FAR 31.201-5 (*id.* at 5). The COFD continued that the amount of the overpayment should be calculated in accordance with the formula in paragraph (d) of the IPR clause:

> Because subtracting the $3,328,248.00 [sic] noted above from the audit computed total final cost of $24,467,062.00 would activate a price revision in accordance with paragraph (d) of the IPR clause, the computation of final price resulting from that revision is illustrated below:
>
> | | |
> |---|---|
> | Target Cost | $17,582,184 |
> | Target Profit | 550,724 |
> | Target Price | 18,132,908 |
> | Ceiling Price | 22,856,839 * |
> | | |
> | Total Cost | 24,467,062 |
> | Debt Forgiven | 3,238,248 |
> | Adjusted Total Cost (ATC) | 21,228,814 |
> | Target Cost Minus ATC | (3,646,630) |
> | Incentive Fee Adjustment Rate | 30% |
> | | (1,093,989) |
> | Target Profit | 550,724 |
> | Profit Adjustment | (543,265) |
> | Total Cost | 21,228,814 |
> | Billable Amount | 20,685,549 |
> | Amount Paid | 22,846,836 * |
> | | |
> | Amount of Overpayment | $ 2,161,287 |
>
> (Asterisk denotes ceiling price/amount paid exclusive of interest paid on claim by Modification A00202)

(*Id.* at 6) The COFD concluded that "[t]he Government is deemed entirely within its rights in demanding reimbursement in the sum certain of $2,161,287.00 in overpaid contract costs" (*id.* at 7).

10. On appeal, the Board concluded, based in part on an analysis of the operation of discharge in bankruptcy, that the Navy was not entitled to recovery. The District Court reversed the Board's decision, stating "[a]s the instant appeal resolves the issue of the Navy's entitlement to overpaid contract costs, the Court hereby REMANDS the matter to the ASBCA for a determination on the merits of quantum" (3rd Am. Order at 10). The Court of Appeals explained in its opinion affirming the District Court's order (217 F.3d at 1140):

> As the district court concluded, the correct focus should have been upon how the debenture holders' voluntary relinquishment of their rights affected NMIW's claim for costs on the Duluth project, a question wholly distinct from the operation of the bankruptcy discharge. Once the bankruptcy law aspect of the case is disposed of, the Navy's right to recoupment under straightforward government contracting law becomes clear. Under the Credits Provision Clause, Southwest was required to credit back to the Navy any income, rebate, allowance or other credit related to an allowable cost, which was received by or accrued to the contractor. The debenture holder's agreement to forego collection of the debentures satisfied this definition. It was related to the claimed cost—there would have been no debentures had NMIW actually paid its subcontractors for the Duluth work—and it accrued to the contractor since Southwest no longer had to pay them their full principle [sic]. Accordingly, the contracting officer's final decision that the debenture concessions fell within the meaning of the Credits Provision Clause was correct, the ASBCA's application of bankruptcy law was error, and the district court conclusion that the Navy was entitled to reimbursement was correct.

11. The SOC, as submitted on remand, includes two quantum components: an amount of $1,204,551 for "IPR Clause Price Adjustment For Supplies And Services" and an amount of $212,860 for "Overpaid REA Interest." Allowing for contract retention of $10,003 results in a total amount owed of $1,407,408. The SOC also claims interest from 15 August 1989. (SOC at 11)

(a) To arrive at the amount of $1,204,551, the SOC starts by quantifying the debt concessions at $1,857,192, reduced from $3,238,248 in the COFD. The SOC then plugs that amount into the same formula, derived from paragraph (d) of the IPR, used in the COFD (SOF 9). Thus, the SOC takes total cost of $24,467,062 and subtracts $1,857,192, resulting in an amount of $22,609,870. Applying the adjustment rate of 30% results in a

billable amount of $21,652,288. Subtracting that amount from the ceiling price of $22,856,839 results in the amount of overpayment of $1,204,551.[3] (*Id.* at ex. D) There are some changes of terminology between the COFD and the SOC. For example, where the COFD referred to "Adjusted Total Cost (ATC)", the SOC referred to "Total Final Negotiated Cost", and where the COFD referred to "Billable Amount," the SOC referred to "Total Price for Supplies and Services" (*id.*). In addition, the SOC said that the "IPR adjustment formula results in a final price of $21,652,288" (*id.* at 32).

(b) With respect to the amount of $212,860, according to the SOC, in Mod 202 the parties settled NMIW's REA for $2,483,463, and calculated interest of $438,859 on that amount. The SOC says that as a result of the overpayment of $1,204,551, "the full amount of the REA was not due and unpaid at the time the Government computed the interest due on the REA." The ratio of $1,204,551 to $2,483,463 applied to $438,859 results in interest due of $212,860. (*Id*. at 33-34)

12. The Response challenges the SOC on seven grounds, three of which are the subject of the parties' cross-motions: lack of jurisdiction, failure to prosecute and laches, and bar by contract and *res judicata*.

APPELLANT'S MOTION TO STRIKE RESPONDENT'S STATEMENT OF COSTS AND SUSTAIN THE APPEAL

Appellant moves to strike the SOC "on grounds that it purports to quantify Government claims which this Board has no jurisdiction to decide." Appellant contends that the Board lacks jurisdiction as to each of the amounts of $1,204,551 and $212,860. (App. mot. at 1-2, 4) It concludes:

> Because the Board has no jurisdiction over the claims quantified in Respondent's Statement of Costs, the RSC is impertinent and should be stricken. With that Statement stricken, the Government has failed to prove its claim quantum and the appeal should be sustained.

(App. mot. at 13) The Navy opposes the motion.

[3] There is a discrepancy in tabulation between the COFD and the SOC because the COFD subtracted the billable amount from the amount paid, which does not include the retention of $10,003. This difference does not matter for present purposes.

1. The Amount of $1,204,551

Appellant argues that the SOC seeks "a determination by the Board of the final price of the DULUTH contract, in accordance with the IPR clause, and a refund of any amounts paid to the contractor in excess of that sum." Appellant argues that the Navy did not submit this claim to SWM for negotiation, as required by the IPR clause, and, the contracting officer did not decide it. Appellant contrasts the SOC with the COFD, stating that "[a]t all times prior to Respondent's Statement of Costs, the Government's asserted claim was for overpayment of progress payments." (App. mot. at 6)

The Navy responds:

> SWM's argument is readily refuted by simple comparison of the Government's quantification of overpaid progress payments in the COFD and in the Statement of Costs. The Government's quantification of overpaid progress payments in both documents is identical, as both rely upon the same formula – the IPR Paragraph (d) Formula . . . . Therefore, under the Contract Disputes Act and the established case law, the Board has jurisdiction over this portion of the Government's Statement of Costs.

(Gov't mot. and opp'n at 29, *see also* at 37, "the Government's claim is not for establishment of a final price")

The COFD and the SOC both apply the formula in paragraph (d) of the IPR clause. As appellant points out, there are some differences in terminology. For example, where the COFD referred to "Adjusted Total Cost (ATC)", the SOC referred to "Total Final Negotiated Cost", and where the COFD referred to "Billable Amount," the SOC referred to "Total Price for Supplies and Services." The COFD stated that it "illustrated" the computation of final price; the SOC said that the "IPR adjustment formula results in a final price of $21,652,288." (SOF 9, 11)

As we found above, the COFD indicated that there was an outstanding modification which had not been executed (SOF 9). The COFD did not, therefore, purport actually to determine the total final price of the contract. Rather, as stated in the Board's opinion, and accepted by the courts:

> [S]trictly speaking, the issue before this Board is whether the Navy is entitled to the return of progress payments. In

> actuality, however, our determination of the issue will be *res judicata* regarding the treatment of those costs and control computation of a final contract price.

(96-2 at 142,788, *see* 3rd Am. Order at n.6, Circuit opinion, 217 F.3d at n.6)

Accordingly, we agree with appellant that the claim in the COFD was one for refund of an overpayment of progress payments, not for determination of total final price. The Navy concedes as much in its opposition, referring to a computation of overpaid progress payments.

We do not, however, strike the SOC as to this amount. As the Navy points out, the quantification in the SOC in fact tracked that in the COFD. There is no question that we have jurisdiction to determine the quantum of the claim set forth in the COFD.

2. The Amount of $212,860

On the REA interest element of the SOC, appellant argues:

> The [SOC's] calculation of a refund of interest provided by [Mod 202] is wholly new. Since that claim seeks to recover a portion of the "certain sum" of interest provided by [Mod 202], it is a claim to avoid that bilateral modification. That claim has never been the subject of a Contracting Officer's decision. This Board has no jurisdiction over that claim.

(App. mot. at 2) The Navy responds:

> In the present case, the Government's quantification of the portion of the Statement of Costs for overpaid CDA interest is based on the same underlying operative facts as set forth in the COFD. At the time it quantified the CDA interest due NMIW for the REA, the Government was unaware that NMIW would subsequently obtain the debt concessions decreasing its allowable costs. The Government, therefore, computed the interest due on the net amount it understood to be due NMIW – which later decreased as a result of the debt concessions.

(Gov't mot. and opp'n at 39, citations omitted)

Under the law as established by the Federal Circuit,[4] whether a claim is the same or different from another claim under the CDA depends upon whether it "involves proof of a common or related set of operative facts." *Placeway Construction Corp. v. United States*, 920 F.2d 903, 909 (Fed. Cir. 1990). An increase or reduction in the amount of a claim on appeal "does not render the monetary claim a new one, as long as the same operative facts are at issue." *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33,421 at 165,687.

Here, we conclude that the Navy's inclusion of the amount of $212,860 for "Overpaid REA Interest'' in the SOC depends upon the proof of different operative facts than the COFD, and represents a new claim rather than a permissible increase or reduction in amount. Mod 202 increased the ceiling price to $23,295,755. Included in that number was the REA interest element of $438,859. (SOF 7) Once the modification was signed, the interest element lost its character as interest *per se* and was subsumed in the increased ceiling price agreed to by the parties. *ReCon Paving, Inc. v. United States*, 745 F.2d 34, 40 (Fed. Cir. 1984). Consistent with that, the COFD, which sets forth the government's claim, did not question the validity of Mod 202. Rather, the COFD stated that various contract modifications including Mod 202 had increased the original ceiling price to $23,295,755. In calculating the alleged amount of the overpayment, however, rather than calculating the amount based on the ceiling price ($23,295,755), the contracting officer deducted the amount of the interest element, employing a ceiling price of $22,856,839. (SOF 9) Now, the SOC proposes to add an additional element of quantum to account for the interest that depends upon re-opening Mod 202 (SOF 11). Whatever the merits of that idea, we believe that re-opening the modification involves operative facts that are different than those underlying the claim in the COFD, which assumed the validity of the modification insofar as it increased the ceiling price. Accordingly, we strike this component of the SOC.

CROSS-MOTION TO STRIKE ENTITLEMENT ARGUMENTS FROM APPELLANT'S RESPONSE TO RESPONDENT'S STATEMENT OF COSTS

In its Response, SWM challenges the SOC on a variety of grounds including, under heading B, Failure to Prosecute and Laches, and under heading C, Bar by Contract and *Res Judicata* (at 12-18). The Navy moves to strike the defenses under headings B and C upon the basis that they are barred by law of the case as a result of the District Court's entitlement decision (gov't mot. and opp'n at 24-28).

Under Failure to Prosecute and Laches, SWM argues first that the government has delayed over eight years in prosecuting its claim for a credit. SWM identifies the

[4] The parties have not cited any 9th Circuit law on this question.

following periods of government inaction: 21 April 1989 to 11 March 1994 (period from the Navy's first letter about the debt concessions to the issuance of the COFD), 14 August 1997 to 19 February 1998 (period from transfer of the Navy's appeal to the District Court to a SWM motion to dismiss), and 30 April 2001 to 29 March 2004 (period from denial of *certiorari* to reinstatement of the appeal at the ASBCA). SWM argues that these delays are unreasonable and prejudicial.

SWM argues second that the government's "claim" for refund of interest paid in connection with Mod 202 is barred by laches. We do not reach this argument because we have stricken this element of the SOC for lack of jurisdiction.

At the District Court, SWM moved for dismissal of the action under FRCP 41(b) for failure to prosecute. SWM pointed to alleged periods of delay from April 1989 to May 1994, from February 1997 to August 1997, and from August 1997 to February 1998. The District Court denied the motion. It stated:

> The Court finds that, under the circumstances, the Navy has not unreasonably delayed in pursuing this action. Additionally, the Court finds that SWM has failed to demonstrate actual prejudice. As the Navy is seeking appellate review of an administrative decision and, therefore, there is no further evidence to collect or consider, the fact that seven months have passed since the transfer [in August 1997] is not dispositive. Furthermore, the disputed sum of $2 million is not insignificant and its rightful ownership should be determined by the completion of a review on the merits. [Citation] Accordingly, SWM's motion to dismiss is DENIED.

Dalton v. Southwest Marine, Inc., No. 97-1488-IEG (LSP), Order Denying Appellee's Motion to Dismiss at 4 (S.D. Cal. April 6, 1998) (gov't mot. and opp'n, tab 6). The Court of Appeals affirmed this ruling of the District Court on appeal. Circuit opinion, 217 F.3d at 1138.

Under the law of the case doctrine:

> [A] decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law

> applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 834 (9th Cir. 1982) (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)). *Accord Minidoka Irrigation District v. DOI*, 406 F.3d 567, 573 (9th Cir. 2005). Here, the District Court, affirmed by the Court of Appeals, has decided the failure to prosecute issue adversely to SWM. It is true that the final period of time cited, from 30 April 2001 to 29 March 2004, is subsequent to the decisions in the 9th Circuit. That makes no difference. It is perfectly clear that the logic of those decisions applies to this period of time as well.

Under Bar by Contract and *Res Judicata*, SWM argues that the government's agreement to pay the contract's ceiling price is "a defense to all claim items". Mod 188 stated that "the billing price shall henceforth be equal to the contract ceiling price." Mod 202 increased the ceiling price. SWM concludes that there was a binding agreement that it (actually its predecessor in interest NMIW) would be paid the ceiling price. SWM further argues that an agreement on indirect expense rates for FY 1986 and FY 1987, entered into in 1988, bars any reduction in indirect costs. Finally, it argues that Mod 202 settled an amount of interest to be paid. (Response at 15-18; SOF 2, 7)

On 28 August 1998, SWM moved the District Court to amend its initial order, reversing the Board's decision, in various ways including to allow SWM, on remand, to raise defenses of laches, Government breach, and accord and satisfaction (gov't mot. and opp'n, tab 8, memo. at 4). The District Court denied that motion in relevant part. The Court said:

> The Court is persuaded by the Navy's position on the ability of SWM to present additional defenses on the entitlement issues . . . . SWM also argues that it should be allowed to present additional defenses such as laches, breach, and accord and satisfaction. However, the Court notes that SWM failed to present these arguments either (a) in opposition to plaintiff's motion for summary judgment in front of the ASBCA or (b) in responding to the instant appeal. Therefore, the Court finds that SWM has waived these arguments. "It is well established in this Circuit that claims which are not addressed in the appellant's brief are deemed abandoned." Collins v. City of San Diego, 841 F.2d 337, 339 (9th Cir. 1988). Accordingly, the Court declines SWM's invitation to reconsider or amend this aspect of the order.

Dalton v. Southwest Marine, Inc., No. 97-1488-IEG (LSP), Order Granting in Part and Denying in Part Appellee's Motion to Amend the August 27, 1998 Amended Order at 3 (S.D. Cal. Oct. 1, 1998) (gov't mot. and opp'n, tab 10). Insofar as appears in the record before us, this order is final.

SWM's defenses under Bar by Contract and *Res Judicata* are defenses of accord and satisfaction and are precluded by the District Court's ruling that SWM had waived "defenses such as laches, breach, and accord and satisfaction."

CONCLUSION

Appellant's motion to strike the Navy's statement of costs as to the amount of $1,204,551 and sustain the appeal is denied. Appellant's motion to strike the Navy's statement of costs as to the amount of $212,860 for lack of jurisdiction is granted. The Navy's motion to strike entitlement arguments from SWM's response to the statement of costs, with the exception of that part of the motion relating to the amount of $212,860, as to which we lack jurisdiction, is granted.[5]

Dated: 28 January 2008

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

(signatures continued)

[5] In Appellant's Opposition to Respondent's Cross Motion to Strike Entitlement Arguments from Appellant's Response to Respondent's Statement of Costs at 10, SWM requests that the cross-motion be denied in an order that establishes what it is that the District Court actually held that the Government was entitled to recover. In view of our decision to grant the cross-motion to the extent we have jurisdiction, we do not reach this request. Specifically we do not reach such issues as, for example, whether the relevant debt concessions are limited to those by subcontractors or also encompass other creditors. These issues will be dealt with in the future as necessary.

I concur

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

I concur

RICHARD SHACKLEFORD
Administrative Judge
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. 54550, Appeal of Southwest Marine, Inc., rendered in conformance with the Board's Charter.

Dated:

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