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: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Stephen R. O'Neil, Esq.
Assistant Director

OPINION BY ADMINISTRATIVE JUDGE THOMAS
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 16 June 2011, the Board issued its decision in this appeal determining that the Navy was entitled to recover $1,104,479 plus interest from 14 August 1989. *Southwest Marine, Inc.*, ASBCA No. 54550, 11-2 BCA ¶ 34,784 (hereinafter *SWM V*). Appellant has timely moved for reconsideration of the decision on the basis of four alleged errors of law. The government opposes the motion for reconsideration. We summarize the facts relating to the appeal and its procedural history and then address appellant's arguments.

In 1985, the Navy entered into the captioned fixed-price incentive contract with Northwest Marine Iron Works (NMIW or Northwest) for overhaul of the USS DULUTH. NMIW redelivered the DULUTH to the Navy in June 1986. Subsequent to performance NMIW filed a Chapter 11 petition, and entered into a reorganization plan in March 1987 pursuant to which its creditors, including subcontractors which had performed work on the DULUTH, received debentures. On 5 April 1989, following negotiations settling various requests for equitable adjustment, NMIW submitted an invoice to the Navy requesting a progress payment in the amount of $2,811,077, and the contracting officer approved payment of the invoice. On 17 April 1989, Southwest Marine, Inc. (SWM) acquired NMIW. In connection with the acquisition, the creditors agreed to debt concessions in lieu of full payment of the debentures. On 11 March 1994, the contracting officer issued a final decision in which he determined that the Navy had overpaid NMIW $2,161,287 because of the debt concessions, which in his opinion should have been

credited to the Navy to the extent allocable to the captioned contract. Appellant timely appealed to this Board pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109.

Under ASBCA No. 47621, we sustained the appeal as to entitlement on the basis that the Chapter 11 proceedings barred the Navy's claim. The United States District Court for the Southern District of California reversed that decision and remanded the appeal for determination of quantum. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court. *Southwest Marine, Inc.*, ASBCA No. 47621, 96-2 BCA ¶ 28,601 (*SWM I*), *rev'd, Dalton v. Southwest Marine, Inc.*, No. 97-1488-IEG (LSP), Third Amended Order (S.D. Cal. Oct. 7, 1998) (hereinafter District Court opinion), *aff'd*, 217 F.3d 1128 (9th Cir. 2000) (hereinafter Circuit opinion), *cert. denied,* 532 U.S. 1007 (2001).

The District Court, in reversing the Board's decision in *SWM I*, stated that "[e]ssentially, the Navy argues that unless it is allowed to seek recovery of funds, NMIW will recover a windfall because it will have obtained post-petition payments [in response to the 5 April 1989 invoice] from the Navy for subcontractor work on the Duluth project which the subcontractors subsequently excused." District Court opinion at 8. Upholding the Navy's argument, the Court determined that "[t]he Navy is entitled to reimbursement under the Credit[s] Provision Clause, FAR 31.205-5, and the IPR Clause, FAR 52.216-16." The Court remanded the matter to the Board "for a determination on the merits of quantum." *Id.* at 10 (footnotes omitted). The Circuit Court affirmed, stating that "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." Circuit opinion, 217 F.3d at 1140.

Upon remand, the Board assigned ASBCA No. 54550 to the quantum proceedings. We issued three opinions under that docket number resolving motions: *Southwest Marine, Inc.*, ASBCA No. 54550, 08-1 BCA ¶ 33,786 (*SWM II*), 08-2 BCA ¶ 33,981 (*SWM III*), and 09-1 BCA ¶ 34,116 (*SWM IV*). Following a hearing we issued our 16 June 2011 decision in *SWM V*, analyzing the Navy's claim, and determining, as stated above, that the Navy was entitled to recover $1,104,479 plus interest from 14 August 1989. We now turn to the grounds for the motion for reconsideration.

1. SAIF Corp. – Amount of Debt Concession

In our decision we found that the Oregon State Accident Insurance Fund (SAIF) conceded $607,456 of debt relating to the DULUTH. We noted that appellant argued that any credit should be made to NMIW's costs for insurance in its fiscal year 1989, when the debt concession occurred. The effect of this argument, apparently, would be to eliminate any credit relating to this debt concession under the captioned contract because NMIW completed performance in its fiscal year 1987. We concluded, contrary to appellant's argument, that under the Credits Provision Clause, FAR 31.201-5, the credit related to fiscal year 1986, the year to which the cost for insurance was charged as part of the incurred cost submissions. 11-2 BCA ¶ 34,784 at 171,196 (findings 67, 68), 171,202; slip op. at 20 (findings 67, 68), 31.

Under Point One of its motion, appellant states that Cost Accounting Standards (CAS) 416, Accounting for Insurance Costs, requires that any "refund, dividend or additional assessment" be entered "as an adjustment to premium costs in the year in which the adjustment was received, 1989." Appellant argues that any debt concession was "plainly a refund, dividend or negative assessment." (Mot. at 3) It also asserts that SWM, which acquired NMIW in 1989, was subject to CAS and, after its acquisition, NMIW was treated as a consolidated part of SWM. "Therefore, after April 1989, Southwest and Northwest were subject to Cost Accounting Standards." (Mot. at 2)

As of the date of award of the captioned contract, 19 August 1985, the CAS were not applicable to contracts awarded to small business concerns. 4 C.F.R. § 331.30(b)(1) (1985). NMIW was a small business (tr. 1/154). Accordingly, the CAS did not apply to the captioned contract. Apparently SWM was subject to CAS, and, after the acquisition on 17 April 1989, NMIW's financial statements were consolidated with SWM's for financial reporting purposes (tr. 3/174). SAIF agreed to the debt concession in question, however, in connection with the acquisition. The letter memorializing SAIF's agreement to the debt concession is dated 27 March 1989 (appx. A, tab 27). We conclude that CAS 416 was not applicable to the accounting for the debt concession. We need not, therefore, address whether appellant's interpretation of CAS 416 in the context of this appeal is correct.

2. Interest

In our decision in *SWM V* we held that the government was entitled to interest pursuant to the Incentive Price Revision (IPR) and Interest clauses of the captioned contract from 14 August 1989. *SWM V*, 11-2 BCA ¶ 34,784 at 171,202-03; slip op. at 31-33. Without repeating all of the analysis here, *SWM V* held that the Navy had overpaid

NMIW $1,104,479 because the Navy was entitled to a credit for the debt concessions pursuant to the Credits Provision Clause, FAR 31.201-5, as determined by the District and Circuit courts. Under the IPR clause, NMIW should have reported that overpayment in its quarterly statement for the period when the debt concessions occurred (the quarter ending 30 June 1989). NMIW did not do so. NMIW's failure to file the quarterly statement, coupled with our determination that the Navy had overpaid it, triggered the provision in the IPR clause of the contract relating to interest:

> (3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

SWM V, 11-2 BCA ¶ 34,784 at 171,202; slip op. at 32. The Interest clause in turn required interest to be paid from "[t]he date fixed under this contract," which we found was 14 August 1989. *Id.*

Under its Point Two, appellant challenges the award of interest. It makes two arguments, "A. On Facts Conclusively Established, The Contractor Was Forbidden by Law to Restate Its Contract Costs in 1989," and "B. Northwest Was Not Overpaid But Was Paid in Accordance With A Bilateral Accord" (mot. at 4, 5) (emphasis deleted).

With respect to A, appellant argues that "NMIW's recorded costs did not change based on the debt concessions." It maintains that:

> [A] contractor cost report in August 1989 was required to be consistent with its recorded costs and could not lawfully reflect any change in the contract costs by reason of the creditor debt concessions. It may well be, as the Board concludes, that the Government had a claim under the FAR "Credits" provision, but that is distinct from the legal requirements for recording and reporting of costs by the contractor.

(Mot. at 4-5)

From our perspective, appellant's argument A misses the mark. First, NMIW was indubitably required to file quarterly statements at the relevant time and did not do so. Secondly, it was later determined that the Navy had overpaid NMIW. That is all that is required to trigger the interest provision.

Apart from that, we are not persuaded that NMIW "could not lawfully" file a quarterly statement indicating that it had received debt concessions, when the Credits Provision Clause, FAR 31.201-5 states that "[t]he applicable portion of any...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." NMIW may not have recorded the debentures themselves as costs, but it did record costs, and the debt concessions represented credits against those costs.[1]

With respect to B, appellant notes that bilateral Modification No. A00188 (Mod 188) dated 22 September 1986 stated that "NOW THEREFORE, the billing price shall henceforth be equal to the contract ceiling price." It also stated that it was "agreed upon in full and final settlement of all claims arising out of this modification and any other modifications...." (Appx. A, tab 2 at 6901-02) Appellant argues: "On the contract as the parties modified it, Northwest was not 'overpaid,' but was paid exactly what the Government agreed to pay." It concludes "it was error for the Board to ignore and fail to enforce the bilateral accord and settlement of Modification 188." (Mot. at 5, 6)

Here, we do not write on a clean slate. In *SWM II*, we dealt with the Navy's motion to strike appellant's defense of accord and satisfaction based in part on Mod 188. Appellant had argued that the Navy's agreement to pay the contract's ceiling price was "a

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[1] Appellant also takes exception to our statement, in connection with NMIW's failure to file a quarterly statement for the quarter ending 30 June 1989, that "Presumably there would be no practical problem if there were no change in the relevant [cost] figures. Here, however, a major event, the creditor debt concessions, occurred in April 1989. Accordingly, appellant was required to file a quarterly statement...." *SWM V*, 11-2 BCA ¶ 34,784 at 171,203; slip op. at 32. Appellant states that it was error "to add an entirely new and unstated (or even implied) requirement in the IPR clause for the contractor to resume quarterly reports after performance based on a 'major event'" (mot. at 6). The fundamental problem here is that the IPR clause requires quarterly statements and NMIW failed to file them. Our statement was not intended to introduce a new requirement but, rather, make the point that a failure to file, when there has been a change in the cost picture on the contract, may have financial consequences for the contractor.

defense to all claim items." We pointed out that the District Court had already ruled in one of its orders that SWM had waived "defenses such as laches, breach, and accord and satisfaction" and that the Court's ruling precluded appellant's defense based on Mod 188. *SWM II*, 08-1 BCA ¶ 33,786 at 167,221-22. The Court's ruling precludes appellant's argument on motion for reconsideration as well.

3. Target Cost

One of the elements for determining the amount of overpayment pursuant to the IPR clause is "target cost." The parties disputed what the amount of target cost was. Resolution of this dispute depends upon the proper interpretation of Modification No. A00202 (Mod 202). After analyzing that modification we concluded that the government's interpretation resulting in target cost of $17,582,184 "best gives meaning to all of the provisions of Mod 202, and is consistent with that expressed by appellant at the time in its 5 April 1989 invoice." *SWM V*, 11-2 BCA ¶ 34,784 at 171,198 (finding 87); slip op. at 24 (finding 87).

Under its Point Three, appellant argues that the Board failed to interpret the modification in accordance with its plain meaning. We considered this argument in connection with our decision, and conclude that our analysis in *SWM V* is correct.

4. Port of Portland – Amount of Debt Concession

NMIW and the Port of Portland (the Port) were parties to several leases and agreements. On 7 April 1989, the Port, NMIW, and SWM entered into a Debt Settlement Agreement. This Agreement addressed both pre-petition debt of $4,112,466 (relevant to this appeal) and post-petition debt of $1,759,628. We found that the Port had conceded $594,561-worth of pre-petition debt relating to the DULUTH. Appellant argued that the Port did not concede any of the debt relating to the DULUTH. Appellant relied upon a statement by the Port's Controller in a 2002 e-mail that "For the DULUTH and KAWISHIWI, no invoices for these jobs were covered under the Debt Settlement Agreement...." We found, to the contrary of appellant's argument, "that in context, the Controller more likely was referring to the post-petition debt of $1,759,628.30, which he refers to in the beginning of his statement, and which was based upon the list of 26 invoices, not the pre-petition debt of $4,112,466." *SWM V*, 11-2 BCA ¶ 34,784 at 171,195 (findings 52, 54); slip op. at 18 (findings 52, 54).

Under its Point Four, appellant argues that the Board's finding is erroneous "because it applies the wrong standard of proof in its conclusion as to what the Port's statement 'more likely' meant." Appellant continues:

In the matter of quantum of damages in a contract case:

> "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." Restatement of Contracts 2d § 352.

> The Government's claim of Port of Portland debt concessions related to DULUTH is certainly not established with "reasonable certainty." The Port's statement that no DULUTH invoices were covered under the Debt Settlement Agreement deprives the Government's proof of any reasonable certainty.

(Mot. at 8-9)

We recognize that damages in a contract case must be established with reasonable certainty. We have reread the relevant documents in light of appellant's argument. Paragraph 1 of the 2002 e-mail to which appellant refers is concerned with the pre-petition debt. It states:

> I [the Port's Controller] do not have copies of documentation of the debentures provided during the bankruptcy proceedings related to the $4.1 million. However I can tell you that the $4.1 million arose from individual invoices billed to NMIW. Once the Reorganization Plan was confirmed, the total of those invoices was replaced by a note and any payments were applied against the note, not against individual invoices.

(Appx. A, tab 75 at 4949) Paragraph 3 of the e-mail, quoted in *SWM V* at finding 52, contains the language upon which appellant relies. We think it reasonably clear that paragraph 3 is concerned with the post-petition debt of $1,759,628, and that interpretation is supported by paragraph 1, which states that payments relating to the pre-petition debt were applied to the note, not individual invoices. 11-2 BCA ¶ 34,784 at 171,195; slip op. at 17. We conclude, therefore, that the government proved its damages with reasonable certainty.

CONCLUSION

Upon reconsideration, we affirm our 16 June 2011 decision in *SWM V.*

Dated: 1 November 2011

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

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