

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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BAE Systems San Francisco Ship Repair ) ASBCA No. 57934  
 )  
Under Contract No. W912SU-04-D-0005 )

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

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
MAJ Samuel E. Gregory, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAGE

This appeal arises from the contracting officer's (CO) final decision (COFD), which denied a \$10,290 claim for additional work due to flooding caused by leaking valves while drydocking a vessel undergoing repair. We have jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. The parties agreed to submit the appeal for decision on the record in accordance with Board Rule 11. The record consists of the Rule 4 file, the parties' briefs, and additional exhibits (ex.) submitted by each party. Both entitlement and quantum are before us.

FINDINGS OF FACT

1. On 2 April 2004, the Department of the Army, Northern Regional Contracting Center (NRCC), Ft. Eustis, Virginia (government or Army), awarded indefinite-quantity, delivery order (DO) Contract No. W912SU-04-D-0005 to San Francisco Drydock Inc., subsequently BAE Systems San Francisco Ship Repair (BAESFSR or appellant), in the total estimated amount of \$22,301,001.42 for a base period and up to \$99,476,431.91 if all four option periods were exercised. The contract called for "Programmed and Unprogrammed Drydocking, Cleaning, Painting, Repairs and/or Modifications to Reserve and Active Army Vessels" stationed on the West Coast and in Hawaii including Logistics Support Vessel (LSV)-class vessels. (R4, tab 1 at 1, 4)

2. Contract clause DFARS 252.217-7003, CHANGES (DEC 1991) provides, in relevant part, at ¶ (a) for the CO to "make changes within the general scope of any job order issued under the Master Agreement...." Paragraph (b) states:

If a change causes an increase or decrease in the cost of, or time required for, performance of the job order, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the price or date of completion, or both, and shall modify the job order in writing.

(R4, tab 1 at 340-41)

3. The contract also provided in "OFFEROR'S FULLY BURDENED LABOR RATE FOR THE SECOND OPTION PERIOD" that, because "[c]hanges are inherent to vessel repair contracts and should be expected by the Contractors," a fully burdened labor rate of \$73.50 was to be used "in negotiating changes for new or additional work" (R4, tab 1 at 393).

4. Contract clause DFARS 252.217-7028, OVER AND ABOVE WORK (DEC 1991) ("Over and Above Work clause") defined that effort in ¶ (a) as "work discovered during the course of performing overhaul, maintenance, and repair efforts that" although within "the general scope of the contract" is not "covered by the line item(s) for the basic work under the contract" and is "[n]ecessary in order to satisfactorily complete the contract." Paragraph (b) directs the contractor and contracting officer's representative (COR) to develop procedures to handle "over and above work requests." The contractor must furnish data "sufficient to satisfy contract requirements and obtain the authorization of the [CO] to perform the proposed work," including "the type of discrepancy disclosed, the specific location of the discrepancy, and the estimated labor hours and material required to correct the discrepancy." The government is required at ¶ (d) to "[p]romptly review the work request" and "[a]uthorize over and above work as necessary" after verifying that "the proposed work is required and not covered under the basic contract line item(s)" and that "the proposed corrective action is appropriate." After negotiating a settlement for the over and above work, ¶ (e) states that "[c]ontract modifications will be executed to definitize all over and above work." (R4, tab 1 at 350-51)

5. The CO for the instant contract is Ms. Kathleen S. Panton, Chief of the Vessels Division, Mission and Installation Contracting Command (MICC), Ft. Eustis, Virginia. She was the CO throughout the period in question and assumed the additional duties of a contract specialist mid-way through performance due to a shortage of experienced personnel. (Ex. G-2, Decl. of CO Kathleen S. Panton ¶¶ 1, 4).

6. DFARS 252.201-7000, CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991), which is incorporated into the contract by reference, provides, in relevant part at ¶ (b), that "[t]he COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract" (R4, tab 1 at 329). Mr. Denny D. Large, Jr., a Marine Surveyor assigned to the Watercraft Inspection Branch of the U.S. Army Tank-Automotive Command (TACOM),

also at Ft. Eustis, Virginia, became the COR and technical advisor for the contract on 26 March 2007. COR Large performed his duties at BAESFSR's San Francisco, California, shipyard (ex. G-1, Decl. of COR Denny D. Large, Jr. ¶¶ 1, 3-4).

7. The government on 27 December 2006 issued DO No. 0002 (DO No. 2) to BAESFSR for repairs to an LSV-5 known as the "MG Charles P. Gross," which was stationed at Hickam Air Force Base, Hawaii. DO No. 2 is in the overall estimated amount of \$4,889,413.73, including the firm fixed-price of \$3,290,910.80 for "TOTAL ALL DEFINITE ITEMS" and an estimated \$1,598,502.93 for "TOTAL ALL INDEFINITE ITEMS." (R4, tab 2 at 1-3, 8; ex. G-2, ¶ 7) Among definite items are Item Nos. 2026 "Drydocking" in the fixed-price of \$163,770.69 and 2032 "Hull Cleaning and Painting (Underwater and External Hull)" in the fixed-price of \$276,314.34 (R4, tab 2 at 5). The performance period for DO No. 2 is 120 calendar days (*id.* at 9).

8. Contract § C.26 DRYDOCKING provides general information and dimensions for the LSV-5. Placing a vessel in drydock allows the ship to be taken out of the water to provide access to those portions of the vessel that normally are below the surface so that the contractor can, in accordance with ¶ C.26.3.1, accomplish "underwater repairs, sandblasting and painting of [the] hull." Paragraph C.26.3.2 requires the contractor to "[s]hift [the] vessel on blocks for 100 percent cleaning and painting." (R4, tab 1 at 84) Shifting a vessel on blocks requires refloating the vessel (called "fleeting") (ex. A-1, Decl. of Mr. Ron Bain, BAESFSR's Ship Manager ¶¶ 1, 5-6).

9. A floating drydock is basically another boat that is significantly larger than the vessel it will be used to service. This type of drydock has multiple advantages over a traditional, land-based system in that it can be taken to the location of a damaged ship or moved about in a shipyard to permit more efficient use of limited dock space. The floating drydock typically has a large, open deck upon which blocks are arranged according to a pre-engineered "docking plan." The government provided this plan to BAESFSR, although appellant was responsible for carrying out the drydocking. After filling internal ballast tanks with water, the floating drydock is lowered into the water so that the deck is submerged with the pre-arranged blocks in place. The vessel to be serviced is moved into the waters above the sunken drydock and aligned with the submerged blocks. The drydock is then pumped out and refloated, leaving the vessel to be serviced sitting up on the blocks with sufficient clearance to allow access to the hull and those portions of the ship which are typically submerged. (Ex. G-1, ¶¶ 8-11)

10. Proper ballasting of the vessel to be repaired is necessary to ensure, as with the initial drydocking, that the vessel is level and will settle safely and securely onto the blocks according to the docking plan. Ballasting is accomplished by moving seawater into or out of special tanks within the hull of the vessel being repaired. The filling of the ballast is done through a system of pumps, piping and valves. Depending upon whether the tank is to be filled or emptied, the contractor opens or closes certain valves, starts the

pump, and monitors the system to ensure the results sought are achieved. BAESFSR used the forepeak tank, located in the bottom of the "MG Charles P. Gross," as a ballast tank. (Ex. G-1, ¶¶ 16-17)

11. On 16 April 2007, after the LSV-5 was delivered to the contractor's shipyard, the vessel was placed in BAESFSR's drydock (ex. G-1, ¶ 8).

12. On or about 24 April 2007, BAESFSR personnel conducting arrival tests and inspections on the LSV-5 found that seven butterfly valves (sometimes referred to as "BF valves") located in the forward area of the vessel were leaking. Mr. Bain reported the leaking valves on 25 April 2007 to COR Large in Condition Found Report (CFR) No. 080 (CFR No. 80), and recommended that the government issue a change order to remove and replace the leaking valves. (R4, tab 3; ex. A-1, ¶ 3) COR Large returned CFR No. 80 to Mr. Bain on 27 April 2007 after annotating it with "[p]lease provide quote" (R4, tab 3). In CFR No. 138 marked "Received" on 11 May 2007, BAE asked the government to issue a change order to the contract authorizing replacement of the faulty valves (R4, tab 4). BAESFSR submitted an estimate of \$14,403.22 for the valve replacement work to COR Large on 15 May 2007 (R4, tab 5; ex. A-1, ¶ 4).

13. At the parties' Friday, 18 May 2007 weekly progress meeting, BAESFSR informed COR Large that BAESFSR would be filling the LSV-5's forepeak tanks over the weekend so that the vessel could be shifted on 23 May 2007 (ex. G-1, ¶ 15). Although the government had not yet issued a change order authorizing replacement of the leaking valves, Mr. Bain authorized BAESFSR drydock personnel to proceed with fleeting the vessel to maintain the 120 calendar-day contract schedule. At that time, Mr. Bain was aware of the leaking ballast valves but uncertain whether the leakage would interfere with the fleeting operation. (R4, tab 2 at 9; ex. A-1, ¶¶ 7-8)

14. During the fleeting operation, appellant's personnel determined that valve leakage interfered with that process. BAESFSR Superintendent Russ Giacalone prepared CFR No. 183, submitted 24 May 2007 (R4, tab 7), explaining the problem. (Ex. A-1, ¶ 9) CFR No. 183 advised the government that "the forepeak ballast tank had to be filled with fresh water" to "properly trim the vessel for shifting [it] on blocks." Mr. Giacalone wrote that, because the valves leaked and allowed water to flood the ballast tanks, BAESFSR had "to pump out forepeak and #3 P/S [three port/starboard] ballast tanks, remov[e] the inoperative isolation valve at the forepeak and install[] a blank in its place." CFR No. 183 noted the leaking valves were reported to the government in CFR No. 80. BAESFSR did not price CFR No. 183, but included a log showing 92 man-hours as the additional effort needed to address the flooding and requested that the government compensate BAESFSR "for extra labor incurred while attempting to fill [the] forepeak tank." (R4, tab 7)

15. In Worksheet No. 22 dated 24 May 2007, BAESFSR sought \$14,403.23 “to furnish materials, parts and equipment to replace the seven (7) defective ballast valves”; “[p]erform a satisfactory 50 psi leak-free, hydrotest of each valve in the presence of the Ship Surveyor”; “[p]rove repairs satisfactory during the ‘Trials and Tests’ item of this specification”; and “[l]eave [the] system ready for service.” Worksheet No. 22 was approved by CO Panton on 6 June 2007. (R4, tab 6)

16. Bilateral contract Modification No. 04 (Mod. No. 4) was signed by CO Panton on 6 July 2007 and BAESFSR on 5 July 2007. The modification carried the effective date of 5 June 2007, and changed the contract in accordance with the Over and Above Work clause. Among other things, Mod. No. 4 granted BAESFSR \$14,403.23 in additional costs for “Ballast Valve Replacement.” (R4, tab 8 at 1-3) Mod. No. 4 in relevant part referenced Worksheet No. 22 (*id.* at 3), which in turn cited CFR No. 138. Each of these documents speaks to replacement of the leaking butterfly valves but does not mention costs for additional drydocking work due to flooding. (R4, tabs 6, 8 at 1-3)

17. Mod. No. 4 provided that:

The changes in delivery and/or completion dates or prices described below are considered to be fair and reasonable and have been mutually agreed upon as of the effective date in full and final settlement of all claims arising out of this modification and any modifications or change orders indicated below, including all claims for delays and disruptions resulting from, caused by or incident to such modification or change orders.

(R4, tab 8 at 3) Mr. Bain declared that, although BAESFSR accepted the \$14,403.23 stated in Worksheet No. 22 for valve replacement costs described in CFR No. 138, this “price did not include any compensation for the additional drydock work for fleeting of the vessel that was required because of the leaking valves” (ex. A-1, ¶ 10).

18. Mod. No. 4 did not mention the contractor’s existing request in CFR No. 183 seeking payment for the “extra labor incurred while attempting to fill [the] forepeak tank” (R4, tab 7).

19. On 19 October 2007, BAESFSR submitted CFR No. 418 to the government (R4, tab 10). This document contains the same information as CFR No. 183 (R4, tab 7), with the exception that CFR No. 418 includes a “CHANGE ORDER ROUTE SLIP” in which BAESFSR sought \$11,307.63 for 152 additional man-hours to drain the forepeak ballast tank, remove the leaking valves, install sealed blanks, then refill the ballast tanks (R4, tab 10 at 4).

20. On 8 July 2009, BAESFSR submitted request for equitable adjustment 010 (REA No. 10) in the amount of \$11,307.63. REA No. 10 sought a change order for "Extra Labor Expenditure to Trim the Vessel for Shifting on Blocks During Drydocking" and referenced CFR No. 80, Mod. No. 4 and CFR No. 418. (R4, tab 11 at 1, 3, 7-11; ex. G-2, ¶ 15) Appellant asserted that "the Government failed to compensate [BAESFSR] for the effort required to shift ballast, remove a valve and install a blank due to an existing leaking isolation valve" (R4, tab 11 at 1). BAESFSR calculated its charge for additional labor using an hourly rate of \$73.50 (*id.* at 3), an amount established by the contract for new or additional work (R4, tab 1 at 393).

21. On 30 March 2010, CO Panton wrote BAESFSR, addressing several of the contractor's REAs associated with DO No. 2 and denying REA No. 10 (R4, tab 14). She stated that because BAESFSR "was aware of the condition of the valve as of April 24, 2007, almost one month prior to the shifting," the contractor was not entitled to "any additional compensation for time wasted in 'rediscovering' the defective valve." CO Panton noted that appellant already had been compensated \$14,403.23 for replacing the valves in accordance with Worksheet No. 22. (*Id.* at 6)

22. BAESFSR responded to CO Panton's comments regarding REA No. 10. Appellant referenced the sequence of events leading to the flooding, and reminded her that the government was aware of the problem but did not authorize replacement of the faulty valves until after the vessel was fleeted on 23 May 2007. The contractor reduced additional man-hours from 152 to 140, and lowered the amount sought to \$10,290 including materials. (R4, tab 15) Mr. Bain opined that the extra labor for additional fleetting included reasonable estimates for cleaning up leakage, blanking, and standby time for drydock personnel while the extra work was being done (ex. A-1, ¶ 15).

23. CO Panton replied to the contractor on 15 July 2010 (R4, tab 16), and affirmed her unchanged position denying REA No. 10 (*id.* at 3). BAESFSR furnished the CO with additional information regarding REA No. 10 on 18 August 2010 (R4, tab 17). It attributed the additional work to the government's failure to timely approve replacement of the reported leaking butterfly valves prior to the time to fleet the LSV-5, and contended that this omission caused the drydocking problems (*id.* at 7). CO Panton again rejected REA No. 10 on 3 November 2010 (R4, tab 18).

24. By correspondence of 11 July 2011, BAESFSR converted REA No. 10 to a claim for \$10,290 and requested a COFD (R4, tab 19). CO Panton denied the claim by final decision dated 21 October 2011 (R4, tab 20), and the contractor timely appealed the adverse COFD to the Board on 10 January 2012 (R4, tab 21).

## DECISION

The contractor must prove liability, causation, and injury to receive an equitable adjustment from the government. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991). As to the threshold issue of liability, BAESFSR argues that the government “fail[ed] to act promptly to correct a problem within the Army’s responsibility and control, before the problem interfered with the contractor’s performance.” According to appellant, this “was a breach of the Army’s duty of cooperation” and it is “entitled to recover the increased costs caused by that breach.” (App. br. at 7) In addition, the contractor denies that it released the government from liability for this claim by bilateral Mod. No. 4, which addressed extra work set forth in Worksheet No. 22. “To the contrary, BAESFSR’s increased costs were caused by the Army’s delay in issuing and authorizing” replacement of the leaking butterfly valves before appellant filled the forepeak tank, which it intended to use as ballast in the drydocking process. (*Id.* at 9)

The government does not deny that the leaking valves were an unexpected, “over and above” condition or that BAESFSR was entitled to compensation for their replacement (gov’t br., *passim*). This is a contract for the refurbishment of seagoing vessels in which both parties understood that the ships could be in worse condition than anticipated and require work beyond that contemplated. The government agreed in Mod. No. 4, signed by the CO on 6 July 2007 after the additional drydocking effort took place, that appellant was entitled to an additional \$14,403.23 to (among other things) “furnish materials, parts, and equipment to replace the seven (7) defective ballast valves” encountered on the LSV-5 “MG Charles P. Gross” (findings 15, 16).

However, the government denies responsibility for the \$10,290 appellant seeks for flooding clean-up and faults BAESFSR for failing to obtain timely approval for replacing the valves prior to filling the tank (gov’t br. at 29-31). The government argues that appellant is liable for consequences of the leakage, as it chose to “fill[] the ballast tanks with water” even though BAESFSR “was fully aware of the leaking valves [and] was in total control of which ballast tanks were filled and when” (*id.* at 21). The government asserts that “Any increased costs BAE-SFSR encountered are solely the result of its own negligence, as BAE-SFSR was in the last, best position to avoid any such damages” (*id.* at 20).

The government further defends against this appeal by contending that appellant’s release in Mod. No. 4 waives compensation for the underlying claim (gov’t br. at 28-29). The government alleges that this modification “for the replacement of the seven faulty butterfly valves connected to the ballast system” encompasses work relating to “the same valves BAE-SFSR here claims had to be replaced during the shifting process” (*id.* at 28).

The government's duty to cooperate with the contractor "is a part of its implied obligation of good faith and fair dealing." *Free & Ben, Inc.*, ASBCA No. 56129, 11-1 BCA ¶ 34,719 at 170,957 (citing *Malone v. United States*, 849 F.2d 1441, 1445, *modified*, 857 F.2d 787 (Fed. Cir. 1988) (holding that the failure to cooperate in the other party's performance is a violation of the implied duty of good faith and fair dealing)). In determining whether the government breached this duty, "we examine the reasonableness of its actions, considering all of the circumstances." *Versar, Inc.*, ASBCA No. 56857 *et al.*, 12-1 BCA ¶ 35,025 at 172,127 (citing *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,127 at 168,742).

According to the Over and Above Work clause of the contract, once BAESFSR informed the government of the problem and estimated the cost to remedy, the government had to respond promptly. What is prompt "is determined by 'the reasonable expectations of the parties in the special circumstances in which they contracted.'" *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1291 (Fed. Cir. 2000) (citing *Commerce Int'l Co. v. United States*, 338 F.2d 81, 87 (Ct. Cl. 1964)).

Appellant has not shown that the government failed to cooperate by not approving replacement of the leaking valves prior to BAESFSR's drydocking attempt. BAESFSR notified the government on or about 24 April 2007 by CFR No. 80 that the valves leaked, but did not provide the government the requisite cost information until 15 May 2007 (finding 12). Although the contractor informed the government on Friday, 18 May 2007 that it intended to fill the forepeak tank over the weekend so the vessel could be shifted on 23 May 2007 (finding 13), there is no proof (nor does appellant contend) that BAESFSR then raised the need for government direction on the valves before it did so. Despite appellant's knowledge that the valves leaked, that it was uncertain whether the leakage would interfere with the fleeting operation, and that it lacked government guidance, BAESFSR nonetheless filled the forepeak tank (finding 14), thereby assuming the risk. At that point, the government had been given three days to review the matter and estimated cost to repair, whereas the contractor had waited roughly 21 days before furnishing the estimate for the valve replacement. BAESFSR did not convey a need for immediacy in pricing the valve work nor did it advise the government that a decision was necessary forthwith. Under these circumstances, we do not find the government unreasonable in exceeding the three-day window to consider BAESFSR's request, or that the government's failure to provide direction before appellant began fleeting a breach of its duty to cooperate with the contractor.


Having decided that the government is not responsible for the costs asserted here, it is unnecessary that we determine whether BAESFSR released the underlying claim in Mod. No. 4.



CONCLUSION

We have considered all arguments advanced by the parties. We deny the appeal.

Dated: 26 November 2012



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REBA PAGE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

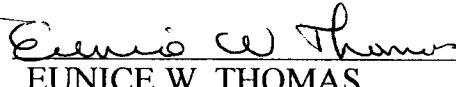
I concur

I concur



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



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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. 57934, Appeal of BAE Systems San Francisco Ship Repair, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals