ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Fairchild Industries, Inc.	)	ASBCA No. 46197
	)	
Under Contract No. F33657-79-C-0502	)	

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Fairchild Industries, Inc. (Fairchild) appeals the denial of its claim for environmental clean-up and plant closing costs allegedly caused by the completion of the above-captioned contract. Entitlement only is before us. We find the claim without merit and deny the appeal.

FINDINGS OF FACT

1. On 9 May 1980, Fairchild and the Government entered into Contract F33657-79-C-0502 (Contract 0502) for the fiscal year 1980 (FY80) procurement of A-10 aircraft (R4, tab 1 at 1, 1A). This was the fourth in a series of A-10 production contracts awarded to Fairchild since 1973 (R4, tab 5 at 3). These contracts were performed by Fairchild primarily at its Farmingdale, New York plant.

2. On 12 June 1981, the Government issued an RFP for the FY82 A-10 procurement as a proposed modification to Contract 0502. The RFP stated that proposals "shall assume that this FY82 acquisition will be the final acquisition of A-10 aircraft." The RFP also requested a proposal for "phase-down costs associated with completion of the A-10 program." (R4, tab 73 at 1, 5)

3. In subsequent negotiations, Fairchild proposed $30 million for "phase-out" costs as part of a not-to-exceed (NTE) $40 million amount in the Business Volume Adjustment

(BVA) clause of the RFP (R4, tab 19 at 1, 2, 7). Fairchild's detailed estimate in support of its phase-out cost proposal did not identify either environmental clean-up or plant closing costs as A-10 "phase out" costs (R4, tab 17 at 3, tab 19 at 2, 7). Although the Government's phase-out estimate was only $7.5 million, it accepted Fairchild's proposal because it was "only an NTE" (R4, tab 18 at 1; tr. 1265-66).

4. On 30 September 1982, the parties entered into bilateral Modification P00150 for the FY82 A-10 procurement (R4, tab 21 at 1-2). The BVA clause in the modification stated in relevant part:

> (a) It is hereby recognized that the prices for the aircraft being acquired hereunder have been established on the basis of a follow-on FY83 Buy of twenty (20) A-10 Aircraft . . . Therefore, in the event of a change in the FY83 quantity actually acquired . . . the parties shall negotiate an equitable adjustment resulting from the impact of said change on the FY82 aircraft buy established hereunder.
>
> (b) For the purpose of this clause, for every FY83 aircraft less than 20, the FY82 aircraft contract price will be increased by an amount not greater than $400,000.00. In no event, however, will the price adjustment, to the FY82 contract price, be greater than $40,000,000.00, if there is no FY83 buy. . . .
>
> . . . .
>
> (d) In the event there is no FY83 Buy, Contractor Phase-out Costs will also be considered as being within the coverage of the $40,000,000.00 NTE figure set forth in subparagraph (b) above.

(R4, tab 21 at 21-22)

5. The Government did not purchase any FY83 A-10 aircraft. Fairchild delivered the last of the FY82 aircraft in February 1984 (R4, tab 55 at 3; tr. 395, 1387, 1486). From February 1984 through December 1987, Fairchild produced spare parts and performed modification work for the A-10 at Farmingdale in addition to other non-A-10 work at that plant (R4, tabs 646, 1022-34; tr. 232, 439, 1034-35, 1383-85, 1458). The A-10 contract was responsible for 55 percent of Farmingdale division sales in 1984, 21 percent in 1985, and 17 percent in 1986 (R4, tab 363 at 001340; R4, tab 667 at 002360, 002388).

6. Beginning in 1981, Fairchild was engaged at various times in the investigation and remediation of both on-going and past hazardous waste contamination of the Farmingdale site dating back to at least the 1940s. These environmental clean-up actions were required by law, and had not been completed as of 16 February 2000. They were not caused by the

completion of the A-10 aircraft procurement program in February 1984, and would have been performed even if that program had continued with an FY83 aircraft purchase. (R4, tabs 118, 256, 272, 366, 388, 486, 674, 708, 709, 918, 933; ex. G-2 at 1-4; tr. 467, 566-67) Fairchild charged the cost of these environmental clean-up activities in the regular course of business as overhead expense, and not as direct charges to any specific contract (tr. 364).

7. On 30 January 1984, one month before delivery of the last A-10 aircraft, Fairchild submitted to the Government an outline of "the major tasks required for A-10 Production Phase Out." The outlined tasks were the inventory and disposition of material, special tooling, and plant equipment used in the production of the A-10 aircraft, plant "reconversion," and record retention. The outlined tasks did not include environmental clean-up or plant-closing activities. (R4, tab 27)

8. In April, May and July 1984, Fairchild established separate direct cost accounts for the A-10 phase out work (R4, tabs 313, 321-323, 327; tr. 424-27). By letter dated 22 June 1984, Fairchild notified the Government that the "total effort" under the BVA clause of Modification P00150, "including Phase-out," would not exceed $10.6 million (R4, tab 844 at 002137). At that time, Fairchild considered the $10.6 million to include "the entirety of the phase-out costs" (tr. 321).

9. On 20 July 1984, Fairchild submitted a detailed cost proposal for the A-10 phase-out in the total amount of $7,338,928 (R4, tab 738 at 000259). This proposal defined the phase-out effort as the same tasks outlined in the 30 January 1984 letter (R4, tab 738 at 000262, 000274, 000287, 000299, 000310, 000321, 000333). The plant "reconversion" work was more specifically described as: "[d]isconnect all electric service from work benches and fixtures, disconnect air and water service from work benches and fixtures, remove overhead main lines, disassemble stanchions, remove all work benches/bins/racks to storage, recover work benches, resurface floors, remark all aisles . . . restore all major tool or IPE [industrial plant equipment] foundations and footings to pre-A-10 condition." (R4, tab 738 at 00320) "Reconversion" so described involved only the restoration of the plant to the "pre A-10 condition" and not the closing of the entire plant.

10. On 5 September 1984, the Government agreed in principle that most of the tasks outlined by Fairchild in its 20 July 1984 cost proposal were A-10 phase out tasks (R4, tab 338). Between 5 September 1984 and 13 March 1987, the parties exchanged other documents and held discussions on the scope and cost of the A-10 phase-out. At no point during this period did Fairchild allege that the completion of the A-10 contract would cause the permanent closing of the Farmingdale plant, or that it was the cause of the on-going environmental clean-up work at that plant. (R4, tabs 41, 94, 345, 346, 353, 354, 368, 401, 742, 789)

11. On 13 March 1987, Fairchild announced that it was closing the Farmingdale plant "as a result of reaching an agreement with the U.S. Air Force to terminate the T-46A trainer program." The announcement further stated that lack of funding "prompted the

termination," and that "without the T-46A and in the absence of new business to replace current work 'Fairchild has no choice but to close the facility.'" (R4, tab 802 at JS00405) In a related announcement on the same date, Fairchild's President stated that the T-46A termination was in the company's best interest "although it, regrettably, results in closing the . . . plant at Farmingdale" (R4, tab 803 at JS00403).

12. The T-46A contract had been awarded to Fairchild in July 1982. In September 1985, a Fairchild report stated that it was "our main product [at Farmingdale] for the rest of this decade and beyond" (R4, tab 765 at JS00495). When the Government subsequently decided not to fund the T-46A contract beyond the first ten production aircraft, a December 1986 Fairchild financial statement stated: "if the [T-46] program is not reinstated, the Company will be required to reduce the facility capacity significantly and probably eventually close the Farmingdale, New York facility." (R4, tabs 667 at 002375 and 774 at 1-2)

13. Fairchild's 13 March 1987 closing announcement referred to current work at Farmingdale on major sub-assemblies for the Boeing 747, Saab SF-340, and USAF C-5B. It did not mention the spare parts or modification "kit" work for the A-10. The announcement did not attribute the decision to close the plant to the completion of A-10 aircraft procurement three years earlier, or to any lack of prospective orders for A-10 spares and modifications. (R4, tab 802) Fairchild completed its existing A-10 spares and modification work in December 1987 (tr. 1034, 1458). However, as late as May 1988, Fairchild was still receiving requests for support of the A-10. It referred those requests to Grumman Aircraft Corporation (GAC). (R4, tab 833)

14. The announcement of the Farmingdale plant closing triggered the implementation of an environmental closure plan and "downsizing" activities at the plant. Separate indirect cost accounts were established in April 1987 for these activities (R4, tabs 808, 809).

15. In April 1987, Fairchild presented the Government with a proposed plan for "close-out of the open A-10 contracts." None of the listed activities related to plant closing or environmental clean-up. (R4, tab 810) One year later, in a letter to the Government dated 10 May 1988, Fairchild referred to this plan as containing "all the tasks necessary to close out the A-10 Contracts." (R4, tab 51) In February 1988, after all revenue-producing work had ceased at the Farmingdale plant, Fairchild notified the Government that it was "accumulating costs [at the plant] in accordance with generally accepted accounting principles for a discontinued operation," and that "[a]s a result, certain costs which would ordinarily be charged into overhead are instead being written off against Corporate profits" (R4, tab 50).

16. In April and July 1988, the Government and Fairchild negotiated a proposed modification (P00400) for removal, with floor restoration, of 72 items of Government owned A-10 industrial plant equipment. No environmental clean-up or plant closing costs were included in these negotiations. (R4, tabs 439, 844; tr. 1614-17, 1619, 1626-27) An

advance draft of the proposed modification was sent to Fairchild sometime before 19 August 1988 (R4, tab 844). For reasons unexplained, the final Modification P00400 was not executed until April 1989. (*See* Finding 18) On 16 May and 23 August 1988, Fairchild submitted proposals in the aggregate amount of $2,656,967 for five A-10 phase out activities. All five activities were related to shutdown of the A-10 production line. Neither proposal asserted that plant closing or environmental clean-up costs were A-10 phase-out costs. (R4, tabs 53, 444)

17. On 15 February 1989, five years after it began its A-10 phase out activities, Fairchild alleged for the first time that 70 percent of its "costs of facility clean up and restoration to meet Federal and New York State EPA requirements" were compensable A-10 phase-out costs. The 70 percent allocation was based on the alleged A-10 percentage of total sales at Farmingdale from award of the first A-10 contract in 1973 through 1986. (R4, tab 54)

18. On 25 April 1989, the parties entered into Modification P00400 incorporating into the contract the settlement negotiated in April and July 1988 (tr. 1619). Modification P00400 established a separate contract line item (CLIN 0036) for the settlement. CLIN 0036 was described as:

> THIS ITEM IS HEREBY ESTABLISHED FOR "PHASE OUT" ACTIVITIES AUTHORIZED UNDER SPECIAL PROVISION H-31B, PARAGRAPH (d), P00150, RELATIVE TO THE CANCELLATION OF THE FY83
> A-10 AIRCRAFT BUY (OPTION 11) AND SUBSEQUENT PLANT SHUTDOWN.

(R4, tab 55)

19. The phrase "and subsequent plant shutdown" was not in the draft modification sent to Fairchild at the conclusion of the negotiations in July 1988 (R4, tab 844; tr. 1622-23). The record does not indicate when or why that phrase was added. The Fairchild employee who signed the final Modification P00400 testified at the hearing on other issues, but not on the meaning or intent of that phrase. The contracting officer, who prior to being designated to review and sign the modification, had not been involved in A-10 phase-out matters, understood the phrase to mean that "it was very urgent to get the industrial property removed and returned to the Government . . . [b]ecause once they shut down, it may be very difficult to recover those things." (Tr. 1767-68, 1778-90)

20. On 9 June 1989, the parties entered into Modification A104. This modification settled the special tooling, special test equipment, military property, and OPE portions of Fairchild's A-10 phase-out proposal. The settlements for each of these items were set forth as sub-line items of CLIN 0036. (R4, tab 57)

21. On or about 21 October 1991, Fairchild submitted a certified claim in the amount of $14.9 million for alleged additional A-10 phase out costs consisting of its incurred plant closing costs and its incurred and estimated environmental clean-up costs since 1986 (R4, tab 72 at 1, 15-27). By decision dated 19 May 1993, the contracting officer denied the claim entirely (R4, tab 581). This appeal followed.

22. As restated and updated at hearing and in Fairchild's main brief, the claim is for $22,465,000 and consists of the following items (i) "downsizing;" (ii) implementation of closure plan; (iii) removal of PCB transformers and ballasts; (iv) demolition; (v) asbestos removal; (vi) site investigation; (vii) plume remediation and (viii) support (app. main br. at 36). The first five activities as described in the claim and brief were activities of closing the plant, and were not required for phasing out the A-10 aircraft production program. The last three activities were activities of the on-going environmental clean-up of the site. The A-10 production program contributed to, but was not the sole source of, the contamination at which the environmental clean-up and facility closure plan were directed. (R4, tabs 72 at 19-26, exs. 9, 16, 17, tabs 105, 256, 272, 365, 366, 486, 970-72, 1039, 1041; app. main br. at 38-47; ex. G-2 at i.-iii., 1-5; tr. 507-08, 514, 574-78, 974-76, 1003-04, 1078).

DECISION

Fairchild alleges that it is entitled to recover the claimed environmental clean-up and plant closing costs as A10 "Contractor Phase-out Costs" under subparagraph (d) of the BVA clause of Modification P00150. Under the express terms of the RFP for Modification P00150, subparagraph (d) of the BVA clause and the reference to subparagraph (b) therein, "Contractor Phase-out costs" means costs caused by the completion of the A-10 aircraft procurement program with no FY83 aircraft purchase. (*See* Findings 2-3) The evidence is overwhelming that neither the claimed environmental clean-up costs, nor the claimed plant closing costs, were so caused.

The claimed environmental clean-up costs were incurred for a continuation of environmental clean-up activities which began at least two years before the delivery of the last A-10 aircraft in February 1984. These clean-up activities were directed at both on-going and past contamination dating back to at least the 1940s, two decades before the first A-10 contract. They were required by law and would have been performed whether or not the A-10 aircraft procurement was completed with the FY82 purchase or continued with an FY83 purchase. (*See* Finding 6)

The claimed plant closing costs were incurred as a result of the Government's decision to terminate the T-46A program, and Fairchild's inability to obtain new business to replace that program. Fairchild's 13 March 1987 announcement of the plant closing was unequivocal in its statement of the reasons. It did not even include the A-10 spares and modification work in its list of significant current work at the plant, much less attribute the closing to completion of A-10 aircraft deliveries three years earlier. (*See* Findings 11-13) Nor did the announcement attribute the closing to a lack of orders for A-10 modifications

and spares. In fact, those requirements continued after the Farmingdale plant closed and had to be referred by Fairchild to another contractor. (*See* Finding 14)

Anticipating the delivery of the last A-10 aircraft in February 1984, Fairchild on 30 January 1984 submitted to the Government an outline of A-10 production phase out tasks. On 20 July 1984, it submitted a detailed cost proposal for those tasks. Between 5 September 1984 and 13 March 1987, Fairchild and the Government exchanged documents and held discussions on the scope and cost of the A-10 phase out activities. At no time during this three-year period did Fairchild allege that the on-going environmental clean-up costs were the result of the completion of the A-10 aircraft procurement program, or that the completion of that program would in fact cause it to close the Farmingdale plant. (*See* Findings 7-10)

For another 18 months after the 13 March 1987 decision to close the Farmingdale plant, Fairchild continued to submit cost proposals for the A-10 phase-out, none of which included the plant closing or environmental clean-up costs now claimed. (*See* Finding 16) Moreover, in the regular course of business, Fairchild charged those costs as overhead, and not as direct charges to any specific contract. When there was no more revenue-producing work in the plant, those costs were charged to corporate profit until at least February 1989. (*See* Findings 6, 14, 15, 17)

Fairchild's conduct over this extended period of time, before the dispute arose, is compelling evidence that the presently claimed costs were in fact not caused by the completion of the A-10 program, and are not within the meaning of "Contractor phase out costs" as understood by the parties when they entered into Modification P00150. *See Macke Co. v. United States*, 467 F.2d 1323, 1325 (Ct. Cl. 1972); *Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1058 (Fed. Cir. 1983) *cert. denied*, 464 U.S. 814 (1983).

Fairchild contends that the reference to "subsequent plant shutdown" in CLIN 0036 "establishes a factual and causal nexus between plant shut-down costs and recoverable Contractor Phase-out costs" (app main br. at 82). We disagree. The term "subsequent" means "following in time" or "coming or being later than something else." *Webster's New International Dictionary, Second Edition*, 1957 at 2513. It does not necessarily denote a cause-effect relationship between the referenced events or conditions. As we have already found, the plant shut down was caused by the termination of the T-46A aircraft program in March 1987, and not by the completion of the A-10 aircraft procurement program in February 1984. Given these circumstances, Fairchild's interpretation of the "subsequent plant shutdown" phrase in CLIN 0036 as implying a cause-effect relationship is not reasonable. *Restatement (Second) of Contracts* § 202(1) ("Words and other conduct are interpreted in the light of all the circumstances . . .")

The appeal is denied.

Dated: 19 April 2001

MONROE E. FREEMAN, 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. 46197, Appeal of Fairchild Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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