

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Edsall Construction Co., Inc.) ASBCA No. 51787
)
Under Contract No. DAHA24-96-C-0006)

APPEARANCE FOR THE APPELLANT: Jon G. Sarff, Esq.
Adamson & Sarff
Mankato, MN

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
Craig S. Clarke, Esq.
Deputy Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

Appellant, Edsall Construction Co., Inc. (Edsall), brings this appeal on behalf of its subcontractor Uni-Systems, Inc. (USI) alleging that the specifications for tilt-up canopy doors for an aircraft storage hangar were defective. Only entitlement is before us. We sustain the appeal.

FINDINGS OF FACT

Contract DAHA24-96-C-0006 was awarded to appellant on 14 May 1996 in the amount of \$12,025,858.00 for the construction of an Army Aviation Support Facility for the Montana National Guard in Helena, Montana. The facility consists of two large aircraft hangars, one for maintenance and one for storage, and associated administrative offices. (R4, tabs 1, 2; tr. 1/248-49)

The contract contained the following standard FAR clauses: 52.233-1 DISPUTES (DEC 1991) – ALTERNATE I (DEC 1991); 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) – ALTERNATE I (APR 1984); and 52.243-4 CHANGES (AUG 1987). The Specifications and Drawings clause provided in relevant part:

(f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or

does not involve a change in price or in time of performance, a modification need not be issued.

At issue in this appeal is the design of the storage hangar tilt-up canopy doors and truss (R4, tabs 1 through 3, 105). USI was the sub-contractor for the doors pursuant to a subcontract entered into with Edsall in mid-August 1996 (tr. 1/44-45). USI has substantial experience working with the Government, successfully performing consulting work, and the design, building and installation of hangar doors (R4, tab 285; tr. 1/41-42).

The hangar was designed by Schlenker and McKittrick Architects (SMA) under an Architect-Engineer (A&E) contract dated 6 March 1993 (R4, tab 201). SMA was not an expert in hangar doors and, prior to this project, it had never designed or prepared the specifications for an aircraft hangar (tr. 2/195-96, 200). It subcontracted with Design 3 Engineering, Inc. (Design 3) on 7 April 1993 to provide structural, mechanical, and electrical engineering for all phases of the hangar design, including “. . . design development, design, [and] contract documents . . .” (R4, tab 202; tr. 2/198). There was no evidence that Design 3 had ever worked on any aircraft hangars prior to this project.

Information for the hangar specifications was obtained “from a number of places,” including a consultant, John Graham & Associates, “brochures and specifications from various hangar door suppliers,” and “the master spec [sic] system” (tr. 2/200-01). Door Engineering and Manufacturing Company (Door) was among the door suppliers SMA consulted and, over a two-year period, Door provided information and drawings about canopy doors to either SMA or Design 3 on at least four different occasions (R4, tabs 200, 204, 225, 227). In order to raise or lift a canopy door, cables are attached to “pick points” on the door (tr. 1/46-47). The information and drawings that Door supplied to SMA and Design 3 always reflected at least four pick or lift points (R4, tabs 200, 204, 225, 227; tr. 1/148-54).

The written specifications for the four tilt-up canopy doors required for the storage hangar are found in DIVISION 8 - SECTION 08375 HANGAR DOORS of the contract. Also of relevance are structural drawings S13 ROOF FRAMING PLAN . . . STORAGE HANGAR and S15 TRUSS DETAILS. (R4, tabs 1 through 3, 105)

Section 08375 of the specifications was written as a performance specification (tr. 2/200). The “Coordination” provision of paragraph 1.5 QUALITY ASSURANCE of section 08375 provides: “The door manufacturers shall be responsible for reviewing all structural steel/concrete reinforcing steel drawings pertaining to or related to various portions of the hangar doors” (R4, tab 2 at 7). SMA intended the requirement to mean that a door manufacturer was to “basically take a look at the opening that their door was going into and the way that it was supported and make sure that the system that they were proposing would intermesh and work with the proposed opening in the supporting steel” (tr. 2/205).

The engineering work reflected in drawings S13 and S15 was performed by Mr. William R. Oakey, a Design 3 structural engineer who testified as an expert in structural design and engineering, but who readily conceded that he was not an expert in the design of tilt-up canopy hangar doors (tr. 2/40-44). He explained that schematic details on the drawings were shown with dotted lines or identified by such words as “schematic” and “verify,” or “v” for verify (R4, tab 3; tr. 2/68-71). Other drawing details which dictated required door specifications used notations such as “door fab. note – max deflection = 2.75[inch] (total D.L. + L.L.)” (R4, tab 105). Additionally, the drawings provided requirements regarding the exact width, height, and thickness of the four doors, the pick points, door insulation and sheeting, and the location of the sill locks (tr. 1/84-85).

Drawing S13 contains a detail of one canopy door, typical of the four required doors (tr. 1/45-46). It indicates that the estimated door weight is 21,000 pounds, with a “(contractor verify)” direction. It shows the outline of the door with dotted lines. It also depicts three pick or lift points and three lift cables, the latter of which are labeled “schematic.” The drawing directs that the three lift points “align with girders (typical 4 bays)” in the roof truss. The door opening is shown as 100 feet wide and the girders are shown as 26 feet apart with the girders and the truss intersecting in three places above each door. (R4, tab 3)

Drawing S15 contains the truss details. Each of the girder/truss intersection points is shown to carry 7,000 of the total 21,000 pounds of door weight. Mr. Oakey explained that he “designed that truss to support the 21,000 pounds distributed at the three points that we showed on the plans” (tr. 2/84), and that the drawings show door load of 7,000 pounds at those points (tr. 2/133-34). We find drawings S13 and S15 together set forth the design of how the tilt-up canopy doors are to be installed. No one from the Government verified the structural design (tr. 2/264-67).

Drawing S13 also contained the following note:

CANOPY DOOR DETAILS, ARRANGEMENTS, LOADS,
ATTACHMENTS, SUPPORTS, BRACKETS, HARDWARE, ETC MUST
BE VERIFIED BY THE CONTRACTOR PRIOR TO BIDDING. ANY
CONDITIONS THAT REQUIRE CHANGES FROM THE PLANS MUST
BE COMMUNICATED TO THE ARCHITECT FOR HIS APPROVAL
PRIOR TO BIDDING AND ALL COSTS OF THOSE CHANGES MUST
BE INCLUDED IN THE BID PRICE.

(R4, tab 3; tr. 2/66)

The note was written by Mr. Oakey to be “an informational flag” to advise door manufacturers that the design information shown was schematic in nature (tr. 2/66). He intended to advise the door manufacturer that, if it decided to follow the three pick point

design, it was expected to verify that its door could be supported by three pick points, including the three point spacing and loading indicated (tr. 2/67-68). However, if the door manufacturer wanted “to do something different” or “to provide a variation” from what was shown, it was expected to advise SMA of any changes before bidding (tr. 2/66-67). In order to obtain approval, he expected bidders to submit detailed structural engineering analyses signed by a professional (tr. 1/202-03).

The contracting officer’s representative (COR) interpreted the note to mean that “a [door] manufacturer [would] contact our architect if they had any conditions that they had issues with” the design (tr. 1/249-52). The A&E would have required bidders to “comply with the note” and to contact it “after all the drawings [were] compiled” to explain the ramifications of the proposed change, but would not have required detailed engineering drawings prior to approval (tr. 1/234-36).

We find that the written specifications for the door were performance specifications, but that the drawings incorporated significant design characteristics; specifically, the number of lift points and the requirement that the load be distributed to the three points on the truss above the door. The second sentence of the note on drawing S13, which requires the bidder seek permission from the architect to change the design shown on drawings S13 and S15, reinforces our finding that what was shown on drawings S13 and S15 were design features that a bidder was expected to follow.

Mr. Cyril J. Silberman, USI’s owner, thought that the Government’s three pick point design would be “very challenging,” but was concerned USI’s bid would be considered non-responsive if it did not bid on the basis of the design (tr. 1/137-38). He understood the words “ATTACHMENTS” and “SUPPORTS” used in the note on drawing S13 to include the pick points and cables (tr. 1/144). He did not see anything that was “obviously wrong” with the design (tr. 1/145). He thought that the drawings were very detailed and “pretty well-engineered” and did not interpret them to require full analysis by professional engineers (tr. 2/294). Thus, he prepared USI’s quote on the basis of a three point lift system (tr. 1/56).

Mr. Joe Hansen, Edsall’s owner, also reviewed the note on drawing S13. He was not advised of any changes to the design by USI prior to bid. No one at Edsall performed any engineering analysis of the three pick point design or the door information contained on the drawings. (R4, tab 155 at 5, 17-19, 26) Edsall used USI’s quote in its bid to the Government (R4, tab 156 at 33-36).

After contract award, by a letter dated 9 October 1996, USI provided to Edsall a design sketch using four lift cables instead of the three shown on the contract drawings. The letter explained:

. . . Our design uses four cables instead of three as shown on the contract drawings - the overhung load on the door ends is

much too great if only three cables are used. On the contract drawings, the cable lift points were lined up to the trusses - we are not able to do that and still satisfy the loading and deflection criteria for the door.

(R4, tab 234)

The sketch was prepared by Mr. Barton L. Riberich, a structural engineer employed by USI who was designated project engineer after contract award and who is currently USI's vice president of engineering. He studied drawing S15 to verify the safety and adequacy of the design and determined that the three pick points would not work as designed and that there was a risk of failure. (Tr. 1/58-59, 2/143-44, 147-48)

According to Mr. Silberman, it is not unusual for an A&E to rely on USI "to refine the designs" (tr. 1/43), or for USI to find that "there is something wrong with the load distribution" (tr. 1/61). In his experience, USI's "suggestions are by and large accepted by the U.S. Government and quickly woven into the project" and "very rarely" rejected (tr. 1/43). When USI first determined that there was a problem with the load distribution using the three lift points, he anticipated that little, if any, additional cost would be involved because the steel trusses had not yet been manufactured (tr. 1/61, 65-66). Mr. Silberman thought that it would have been "reasonably easy . . . to make a modest modification to the truss before it was built to accommodate the 4 point pick" (tr. 1/66).

Minutes from progress meetings held on 18 and 31 October 1996 establish that representatives of the Government, specifically including the contracting officer, Ms. Kathryn Mooney, the COR, MAJ Marjean Stubbert, and the A&E, were aware that USI's design used four pick points on each door instead of three. The contracting officer understood that this was a change from the Government's original design, but thought that there would be no additional cost to the Government. (R4, tabs 112, 113; tr. 2/244-46) On 14 and 19 November 1996, USI forwarded submittals to Edsall reflecting structural calculations and drawings for its four pick point design (R4, tabs 4, 5), which were forwarded to Design 3 for approval (R4, tab 115). It was agreed that evaluation of the new design would be left to Edsall and Mr. Oakey (R4, tab 114, 116). The contracting officer continued to believe that there would be no additional cost to the Government (tr. 2/247).

In a letter dated 16 January 1997 to Edsall, Design 3 raised several structural questions about the door/truss interface, rejected the design and suggested reverting to the three point system shown on the contract drawings (R4, tab 117). SMA rejected the design on 28 January 1997 (R4, tab 239) and the contracting officer did the same on 3 February 1997 (R4, tab 5).

Continued discussion of the USI's design is reflected in meeting minutes and other correspondence during the January/February 1997 time period, during which SMA and

Design 3 continued to express the view that the three pick point design be used. (R4, tabs 118, 119, 121 through 128, 240, 242 through 244)

On 12 February 1997, Edsall wrote the COR, advising her of the status of the new design and explaining that USI considered “the three point lift design [to be] completely unworkable” because of the load distribution and “that it appear[ed] there was never any specific door information used in preparing the design of the door trusses to support tip-out canopy doors” (R4, tab 9). Both the COR and the contracting officer understood from this letter that USI believed the Government’s design to be defective (tr. 1/271, 2/249). The subject of additional costs associated with the problem was not discussed (tr. 1/272). In late February 1997, it was agreed that Mr. Oakey and representatives of Edsall and USI would resolve the remaining technical issues (R4, tabs 125 through 127, 246).

On 12 March 1997, USI again submitted structural calculations and drawings for its four pick point design. The submittal was reviewed by Edsall and forwarded to the contracting officer who approved it on 7 April 1997, following review and approval by Design 3, SMA and the COR. (R4, tab 13) The contracting officer continued to assume that there were no additional costs associated with the new design (tr. 2/251). USI’s final shop drawings were submitted 9 April 1997, and approved 21 April 1997 (R4, tab 14).

On 25 March 1997, USI transmitted a draft request for a change order to Edsall which again explained that USI had proposed a four pick point design because the “three point support would not give the load distribution indicated in the contract drawings” and “would not give the redundancy necessary for safety” (R4, tab 256). Edsall requested that USI prepare a full analysis of the Government’s design (R4, tab 138). During a meeting on 9 July 1997, it advised SMA of a possible claim regarding the three pick point design (R4, tab 150).

USI’s load distribution analysis is dated 10 July 1997 and was prepared by Mr. Riberich who credibly explained that he concluded that the design was technically deficient because the outside two cables would carry all of the door weight, significantly overloading the roof truss vertical members, while the middle cable would essentially carry no load and could fall off the sheave or become tangled and cause a mechanical failure. He further concluded that the center cable would be required to carry the full 21,000 pounds of door weight if one of the outer cables broke. (R4, tab 15; tr. 2/153, 159-60) Mr. Riberich prepared additional calculations supporting his conclusions for the hearing (R4, tab 287; tr. 2/168-69).

Edsall forwarded the analysis to the contracting officer who responded in a letter dated 19 August 1997, informing Edsall that, because the issue had not been addressed prior to bid as required by the note on drawing S13, it was an internal matter between Edsall and USI (R4, tab 18).

USI responded to the contracting officer in a letter dated 26 August 1997, explaining that its project engineer did not discover the defect in the Government's design until after award and that it believed it had a responsibility to bring serious defects to the Government's attention, "especially when they might be life threatening causing collapse of the building and/or door." USI concluded that it was not too late to revert back to a three cable system, but again warned that the door would be "dangerously" supported and that failure of one or more components, including the main building truss, could occur. (R4, tab 19) After consulting with the Government's design team about the risk that the building would collapse, the contracting officer responded in a letter dated 9 September 1997 to Edsall which advised that, if USI felt it had been damaged by the Government, its claim should be submitted through Edsall (R4, tab 20; tr. 2/260). On cross-examination, the COR conceded a design error is not always obvious and may take some time to discover (tr. 2/16).

The storage hangar canopy doors were constructed using USI's four point lift design (R4, tabs 158 at 1, 162 at 4, 5; tr. 2/236-38). Additional steel was delivered to the job site, added to the trusses by USI and the material costs back charged to USI by Edsall (R4, tab 156 at 73-75).

On 6 April 1998, USI submitted its claim in the amount of \$70,288.26 for "extra work resulting from design deficiencies in the contract documents" to Edsall (R4, tab 22). The claim asserted that the three point support would not provide the load distribution indicated on the contract drawings and would not provide the redundancy necessary for safety. It asserted that the design changes acknowledged and approved by the Government were required for a functional door. USI claimed extra engineering, material, fabrication and installation costs, many of which were related to the structural steel it added to the trusses at the job site. Edsall certified the claim and submitted it to the contracting officer on behalf of USI on 9 June 1998 (R4, tab 23). The contracting officer issued a final decision denying the claim on 9 July 1998. She concluded that USI had not communicated the need for the design change prior to bidding as required by the note on drawing S13 and had not stated in its submittal that the new design would add additional cost (R4, tab 24). This timely appeal followed.

There is no evidence that the Government performed a full evaluation of USI's 10 July 1997 load distribution analysis either during contract performance or when the claim was submitted. At the hearing, however, Mr. Oakey attempted to defend his three pick point design. He generally disagreed with USI's analysis, but did not explain why. He relied upon computations he had recently performed using these loads which indicated that there was "no problem in the main truss" with either a full or a half live load (R4, tabs 163, 164; tr. 2/106-10). On the basis of another set of computations he had recently performed, he concluded that the truss would not collapse if the center cable carried the full 21,000 pounds of door weight (R4, tabs 169, 170; tr. 2/116-18). He thought that the over-stressing in a channel member identified by USI could be "fixed" by increasing the size of the channel

(tr. 2/112-15), and that a guide could be added to prevent a loose middle cable from falling off its sheave (tr. 2/116).

As we found, neither SMA nor Design 3 was experienced with hangar door designs and Mr. Oakey readily acknowledged his lack of expertise with tilt-up canopy hangar doors. The record does not contain any explanation about the computations he prepared for the hearing, for example, whether they are of the type typically used to evaluate load distributions for tilt-up canopy doors in a structure such as the storage hangar. Moreover, Mr. Oakey did not explain why or how these computations support his summary opinions that there was “no problem in the main truss” with the load and that the truss would not collapse.

Mr. Riberich again expressed his view that it was not possible to have equal distribution of the load at each of the three specified pick points in all phases of the door’s operation and also concluded that making various changes to the design suggested by the Government during the hearing still would not make the design viable (tr. 2/179). He explained that it was possible to tension the cables to provide an equal distribution of the load while the door remained on one plane, but that the loads would change “drastically” when the position of the door was changed by lifting or closing (tr. 2/157-59) and that reinforcing the structure so that the door could be lifted with only two of the cables if the middle cable was in compression might work, but would require a “completely different door” (tr. 2/163-64, 177-78, 187).

Other evidence established that, while a three pick point design is not inherently defective, the Government’s pick points were too close together (tr. 1/78). Mr. Riberich demonstrated that a three pick point design could work if the outer lift points were moved toward the edge of the door. That was not feasible with the Government’s design, however, because the points would not be aligned with the points on the trusses at which they intersected with the girders as required by drawing S15 (R4, tab 291; tr. 2/188-90). A technical representative of Edsall also expressed doubt about whether the Government’s design would work (R4, tab 156 at 114).

USI has substantial experience and expertise in the design, building and installation of hangar doors. We find that the record contains credible evidence to support the reliability of Mr. Riberich’s conclusions that it was not possible to have equal distribution of the canopy door load at each of the three pick points specified by the contract drawings during all phases of the door’s operation. Irrespective of whether the truss would have collapsed or some minor design adjustments could have been made, we conclude that the design was defective because the three point lift system would not provide the load distribution specified by the contract documents.

DISCUSSION

Appellant asserts that drawings S13 and S15 are design drawings for which the Government assumed the risk of design errors (app. br. at 20). The Government characterizes the written specifications as performance specifications, but agrees that the drawings are design specifications, except for requirements which are shown in schematic view or annotated (Gov't br. at 62). It contends that the canopy hangar door attachment and support system design features are annotated by disclaimers. It further asserts that the directions to verify the information contained in the annotations to details on drawings S13 and S15 and to verify the design "DETAILS, LOADS, ATTACHMENTS [AND] SUPPORTS" pursuant to the note on drawing 13 shifted the risk of discovering design defects in the drawings to appellant.

We understand the Government's position regarding the attachment and support system for the canopy doors to include the three point pick system and truss designed to lift the 21,000 pound tilt-up door. We further understand the Government to read the word "DETAILS" contained in the note on drawing S13 to include the annotated drawing details inasmuch as the drawing details, standing alone, do not require verification of the overall attachment and support design.

We have found that the written specifications were performance specifications, but that the drawings incorporated significant design characteristics, in particular the design for the three pick point tilt-up canopy door. *See T&G Aviation, Inc.*, ASBCA No. 40428, 00-2 BCA ¶ 31,147 (citing *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1362 (Ct. Cl. 1969) (performance specifications generally set forth an objective or standard to be achieved, leaving the contractor to select the method of reaching the required result, where as design specifications detail the materials and manner or method of performance)).

As the designer of how the door would be installed, the Government warranted that the door load could be evenly distributed to the specified three pick points and corresponding points on the truss if appellant adhered to its design. *See United States v. Spearin*, 248 U.S. 132 (1918). We are not persuaded that the disclaimers contained in the annotations to the design details and the note on drawing S13 shifted the risk of defective specifications to Edsall for a number of reasons.

First, the Government's contention isolates the disclaimers from the written specifications and the other design features it concedes are contained on the drawings. It therefore violates established rules of contract interpretation which require the contract to be read as a whole, with all of its parts harmonized. *E.g., Thanet Corp. v. United States*, 591 F.2d 629, 633 (Ct. Cl. 1979). Next, if the number of pick points and the requirement to distribute the load to three points on the truss were not design specifications because of the disclaimers as the Government asserts, there would be no reason for the note on drawing S13, because bidders would have been free to select the method of performance, and it would not have been necessary for them to seek the architect's permission to make "changes from the plans."

In any event, it is settled that a contractor is not obligated to inspect the Government's specifications and drawings to ascertain their accuracy and ferret out hidden ambiguities and errors in the documents. *See Blount Bros. Construction Co. v. United States*, 171 Ct. Cl. 478, 496 (1965); *Federal Contracting, Inc.*, ASBCA No. 48280, 95-2 BCA ¶ 27,792. Indeed, "Governmental disclaimers of responsibility for the accuracy of specifications which it authors are viewed with disdain by the courts." *Bromley Contracting Company*, ASBCA Nos. 14884 *et al.*, 72-1 BCA ¶ 9252 at 42,902. In this case, while appellant might be required to verify if the door weighs 21,000 pounds, it had no obligation to ferret out if the Government's three-pick point design would provide the proper load distribution.

The record here established that the Government did not verify the accuracy of the design, a fact which "weighs heavily" against it. *Bromley*, 72-1 BCA at 42,902. It also established that appellant's review of the specifications and drawings for purposes of bidding was entirely reasonable. In addition to the fact that USI's president saw nothing "obviously wrong" with the design, neither USI nor Edsall interpreted the note on drawing S13 to require a full analysis by professional engineers. USI prepared its quote on the basis of the three point lift system specified in the drawings and Edsall incorporated the quote into its bid to the Government. The A&E and the COR likewise interpreted the note as requiring bids to be based upon the three pick point design. They thought it also required bidders to obtain prior approval from the A&E of a design that deviated from that shown on the drawings. In short, only the drafter of the design was of the view that his note required bidders to undertake a full verification of the design itself.

We are satisfied, therefore, that the detail annotations and the note on drawing S13 did not shift the risk of any design inadequacies to appellant. *See e.g., Radionics, Inc.*, ASBCA No. 22727, 81-1 BCA ¶ 15,011 (Government disclaimer imposing design responsibility on contractor unenforceable where contractor's interpretation of an ambiguous clause was reasonable) and *Essex Electro Engineers Inc.*, ASBCA No. 49915, 99-1 BCA ¶ 30,229, *rev'd on other grounds*, 224 F.3d 1282 (Fed. Cir. 2000) (alleged notice disclaiming warranty and obligating contractor to identify incorrect drawings and to develop new, updated drawings not enforced).

Remaining is whether the design was defective. We conclude that it was, having found that USI has extensive experience in the design, building and installation of hangar doors and that there was credible evidence to support the reliability of Mr. Riberich's conclusions that the three point lift support system designed by the Government would not provide equal distribution of the canopy door load. Moreover, we are not convinced that the Government's design would have worked, even if modified.

The Government's next argument is that appellant is estopped from asserting that the three pick point design was defective. In order to prevail under this theory, the Government

must show that: (1) appellant knew the facts; (2) it intended that its conduct be acted upon or its conduct was such that the Government reasonably believed that it was so intended; (3) the Government was ignorant of the true facts; and (4) the Government relied to its detriment on appellant's conduct. *See Emeco Industries, Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973). *Accord American Electronic Laboratories, Inc. v. United States*, 774 F.2d 1110, 1113 (Fed. Cir. 1985).

The Government's estoppel argument is centered upon the contention that the Government did not learn that USI considered the three pick point design to be defective until it received Edsall's 12 February 1997 letter and that additional costs did not become an issue until 9 July 1977, when Edsall advised the A&E of a possible claim. Notwithstanding USI's 26 August 1997 letter to the contracting officer, the Government also asserts that, by the time it learned of a possible claim, it was too late to do anything other than proceed with USI's new design.

This argument has no merit. First, appellant did not discover that the Government's design was defective until after contract award, at which time it promptly sought the A&E's approval of its new four pick point design. The contracting officer understood that the new design involved a change to the contract requirements and the record reflects that the matter was the subject of considerable discussion and correspondence. By 12 February 1997, everyone, and in particular the contracting officer, knew that appellant wanted to change the Government's design because it thought the design was defective. The record leaves no doubt that the contracting officer understood that she was changing the contract requirements when she approved the structural calculations and drawings for the new four point pick design on 7 April 1997 and the final shop drawings on 21 April 1997. By doing so, she became obligated under the Drawings and Specifications clause, FAR 52.236-21, to issue a contract modification.

Beginning in October 1996, when she first learned that appellant had proposed a design change, the contracting officer continued to assume that there would be no additional cost associated with the change. Notwithstanding the contracting officer's assumptions, the fact that additional costs did not become an issue until 9 July 1997 does not mean that appellant agreed that the change was to be made at no cost. In *Service Engineering Company*, ASBCA No. 42126, 96-2 BCA ¶ 28,376, we observed that a contractor usually does not volunteer to do more work than is required by the contract if its costs are increased. In that case, we applied the rule stated in *Carl J. Bonidie, Inc.*, ASBCA No. 25769, 82-2 BCA ¶ 15,818 at 78,399, which provides that "the [G]overnment bears the burden of overcoming the presumption that a contractor does not perform extra work voluntarily." *See also S-TRON*, ASBCA Nos. 45466, 46466, 96-2 BCA ¶ 28,319. In this case, the Government did not overcome that presumption.

The evidence established that there would have been little, if any, additional cost if USI's new design had been approved when it was first proposed because the steel trusses

had not been manufactured. Approval, however, took seven months and there is no evidence that appellant ever agreed to perform the additional work associated with the approved design change at no cost, as a volunteer.

The Government's final contention is that USI quoted a four pick point door, and not a three pick point door, to Edsall. The contention is based upon conjecture and supposition. In the absence of reliable factual support in the record, we reject it.

DECISION

The appeal is sustained. The matter is returned to the parties for determination of quantum.

Dated: 21 May 2001

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

PETER D. TING
Administrative Judge
Acting 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. 51787, Appeal of Edsall Construction Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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