

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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AST Anlagen-und Sanierungstechnik GmbH ) ASBCA No. 51854  
 )  
Under Contract No. DAJA76-87-C-0866 )

APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq.  
Glashuetten, Germany

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA  
Chief Trial Attorney  
CPT John T. Harryman, JA  
Trial Attorney  
Headquarters, U.S. Army Europe  
& Seventh Army

OPINION BY ADMINISTRATIVE JUDGE PAUL

This is a timely appeal of a contracting officer's decision granting appellant Anlagen-und Sanierungstechnik GmbH's (AST) delay claims and denying its claim for acceleration. The Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA) is applicable. Only issues of entitlement are before us for decision.

FINDINGS OF FACT

1. On 30 September 1987, the Army awarded construction contract No. DAJA76-87-C-0866 in a fixed-price amount of DM 2,798,000 to AST for repair, maintenance, and installation work on Building 1034 at Wiesbaden Air Base in Wiesbaden, Germany. The contract contemplated the overall renovation of an aircraft hangar and various connected offices known as the "annexes" (R4, tab 1; tr., *passim*). The building was to be used by an Apache helicopter unit which was scheduled for deployment from the United States in later 1988 (tr. 6/148-49).

2. The contract incorporated the following, pertinent clauses by reference: FAR 52.212-12, SUSPENSION OF WORK (APR 1984); FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); and FAR 52.243-4, CHANGES (APR 1984) (R4, tab 1).

3. In addition, the contract contained a host of "Special Contract Requirements," several of which are relevant to this appeal. One example is 3. LIQUIDATED DAMAGES CONSTRUCTION (APR 1984), which provided:

(a) If the Contractor fails to complete the work within the time specified in the contract or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of DM 140.00 for each day of delay.

(b) If the Government terminates the Contractor's right to proceed, the resulting damage will consist of liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If the Government does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted. (FAR 52.212-5)

(R4, tab 1 at 4)

4. Another example is 9. WORK SCHEDULE, which stated:

#### 9. WORK SCHEDULE

(a) Normal duty hours are 0730 hours through 1630 hours, Monday through Friday, excluding US holidays. When a US holiday falls on a Saturday, the preceding Friday is a holiday. When a holiday falls on Sunday, the following Monday is a holiday. A list of US holidays follows:

New Year's Day – 1 January	First Monday in September
Third Monday in January	Second Monday in October
Third Monday in February	11 November
Last Monday in May	Fourth Thursday in November
4 July	25 December

(b) Work during other than normal duty hours shall not be performed without prior written approval of the Contracting Officer. The Contractor shall submit requests for such approval to the Contracting Officer or his representative at least 48 hours in advance.

(R4, tab 1 at 8)

5. A final, relevant clause is 14. COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK, which provided, in part:

(a) The Contractor shall be required to (a) commence work under this contract within 20 calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work ready for use not later than 210 calendar days after receipt of notice to proceed. The time stated for completion shall include final clean-up of the premises. (FAR 52.212-3)

(R4, tab 1 at 11)

6. The parties held a pre-performance conference on 22 October 1987. Among the attendees was Herr Tomo Matasic, AST's general manager. The parties agreed that the hangar (Building 1034) would be vacated and made available to AST on 7 December 1987. But the memorandum of meeting noted that this availability was dependent upon AST's completion of a construction contract (DAJA76-86-C-0662) relating to two other buildings. The reason for this is that the personnel stationed in the hangar building were to be relocated to the other buildings; and the move could not take place if that contract were not first completed (R4, tab 3; tr. 4/127, 6/7-9).<sup>1</sup>

7. Unfortunately, the work on contract 0662 did not proceed as scheduled. In addition, because of the impending holiday season, AST determined that it did not desire to commence work on the instant contract, 0866, until January 1988 (tr. 4/126-28). Accordingly, on 20 November 1987, the parties executed Modification No. P00002 to contract 0866 which provided:

a. The purpose of this modification is to change Page 1 Block 11, of the basic contract to read as follows:

The contractor shall begin performance within 20 calendar days and complete it within 180 calendar days after receiving notice to proceed.

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<sup>1</sup> The Army also gave AST a notice to proceed on the same date, 22 October 1987 (R4, tab 4). During a 20-day period in October and November 1987, AST completed virtually all of the job site preparation and mobilization, as required by clause 14 of the contract (tr. 4/37).

- b. Contractor agrees to start performance on 88 Jan 04 and complete project on 88 Jul 04.
- c. This modification does not increase or decrease the amount of funds obligated.

(R4, tab 5)

8. The parties simultaneously executed Modification No. P00005 to contract 0662 which provided:

- a. The purpose of this modification is to extend the contract performane [sic] period from 29 Oct 87 to 20 Nov 87.
- b. In consideration for the granting of the time extension by the US Government, the contractor agrees to a decrease in performance period for follow-on contract DAJA76-87-C-0866, Hanger 1034, WAB from 210 days performance period to 180 days performance time. Contractor agrees to begin performance 88 Jan 04 and to complete the project on 88 Jul 04.
- c. Additionally, contractor agrees that due to delays in completing contract DAJA76-87-C-0662, no charges for delay costs for contract DAJA76-87-C-0866 will be assessed for the period 87 Sep 30 through 88 Jan 04.
- d. This modification doesnot [sic] increase of [sic] decrease the amount of funds obligated.

(R4, tab 6)

9. Prior to 4 January 1988, AST co-ordinated with its subcontractors so that it could commence work in a timely fashion. In addition, with the possible exception of the delivery of a trailer and some scaffolding to the job site, it had completed its mobilization and site preparation in November 1987. Accordingly, AST sent its job site supervisor, Herr Sporis, to the hangar on 4 January 1988 in a demonstration of its willingness promptly to commence the work; however, Herr Sporis was denied entrance to the hangar because it was still occupied by U.S. forces and their equipment (tr. 4/43-44). In fact, the hangar was not vacated for another month. On 5 February 1988, Mr. Walter Nielsen, the contracting officer's representative (COR), forwarded the following memorandum to the contracting officer (CO):

1. Reference contract DAJA 76-87-C-0866, Repair, Maintenance, and Installation Work, Bldg. 1034, WAB. Firm AST is the contractor.
2. AST was to start on this project on Monday, 04 Jan 88 but the hangar wasn't cleared and vacated by the occupying unit until yesterday.
3. Expect a request for time extension from the contractor shortly. Twenty days of the performance period is for site mobilization and since AST delivered the construction trailer and scaffolding to the job site I don't think a full month time extension is required. My concern is that we might have to give AST the full month since, technically and officially, we didn't allow the Contractor to proceed with the work under this Contract until today when we turned over the keys to the vacated building.
4. The POC for further questions is the undersigned at ETS (337-) 5869/5313.

(R4, tab 13) <sup>2</sup>(emphasis added). As a result of this government-caused delay, work was thus totally suspended from 4 January until 5 February 1988, a period of 31 calendar days.

10. AST commenced work on Friday, 5 February 1988 (tr. 4/48). But at some point, asbestos was discovered in the hangar (R4, tab 32; 4/48-49). Accordingly, on 9 February 1988, the parties executed bilateral Modification No. P00003 which provided:

- a. The purpose of this Supplemental Agreement is to suspend work on the northern portion of hangar # 1034 Wiesbaden Air Base, at no additional cost to the U S Government.
- b. You are directed not to perform or attempt to perform any further work on this portion of the project.

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<sup>2</sup> Record evidence does not support the COR's apparent conclusion that AST spent 20 days on mobilization and job site preparation in January and February 1988 (findings 6, 9).

c. This shall be effective until cancelled or extended by the Contracting Officer.

(R4, tab 7) On 12 February 1988, upon receipt of the modification, AST forwarded the following memorandum to the contracting officer (CO):

We confirm the meeting at your office on 8 Feb. 1988 and advise you that the work suspension as per Modification P00003 is without costs when the duration is two weeks.

We request for your expedited decision to remove the asbestos to avoid long delays and work stoppage.

Work suspension for over two weeks will have an impact on performance costs and time[.]

(R4, tab 18) At least two documents authorized by government personnel, one by Mr. Nielsen and the other by LTC McBride, Director of Engineering and House (DEH), confirm that the “no cost” element of Modification No. P00003 was limited to two weeks on the basis that, regardless of the partial suspension, AST could still productively employ its workers for that period of time (R4, tabs 29, 32).

11. Within a matter of days, additional asbestos was discovered in the hangar. Ms. Reckert, the contracting specialist, noted in a memorandum for record, dated 25 February 1988, that this discovery meant that “the plans will have to be amended to reflect the whole area concerned” (R4, tab 19). As a result, AST’s laborers could do no further work in the hangar and were restricted to working in the “annex” area (tr. 4/56).

12. On 19 February 1988, AST’s heating subcontractor, Firm (or Firma) Koeppel discovered that the insulation for the heating pipes in the annex area also contained asbestos (tr. 4/57). AST’s inspector, Herr Sporis, informed the government’s inspector, Mr. Schwab, of this fact, and Mr. Schwab, in turn, notified Mr. Nielsen. Apparently concerned that work might have to be suspended altogether, Mr. Nielsen directed Mr. Schwab to inform AST to continue work in the annex area “but not to disturb the heating lines until we determine if they contained asbestos” (R4, tab 24).

13. The government did not issue a stop work order for the annex area. Accordingly, AST continued the demolition work there. Firm Koeppel informed AST that it was “familiar with and knew how to remove asbestos. . . .” Therefore, because it could do no other work under the contract, AST instructed Firm Koeppel to remove the insulated heating pipes, to cut them into pieces, and to remove them (tr. 4/57-58). Subsequently, samples “taken from the heating lines before they were removed tested

positive for asbestos” (R4, tab 25). On 8 March 1988, the COR issued a stop work order for the annex area (R4, tab 32). Nevertheless, it appears that AST was able to accomplish at least some work in portions of the annex (R4, tabs 63, 65).

14. When the asbestos was initially discovered in the hangar, the parties met and determined that the government would prepare a performance work statement for the asbestos removal by 16 February 1988 so that AST could engage a subcontractor. The government completed the specifications by 22 February 1988; but, by that time, additional asbestos had been discovered and the plans had to be modified. AST did not receive the revised specifications until on or about 26 February 1988 (R4, tab 32; exs. A-10, A-11). AST then contacted various subcontractors to perform the asbestos removal work; however, on 4 March 1988, the government presented it with an alternate set of procedures. On 9 March 1988, AST forwarded an offer of DM 600,000 to the CO for performance of the work; and, on 10 March 1988, the government delivered a “final drawing” to AST. On 15 March 1988, AST informed the government that it had “completed all the work not directly related to the asbestos-containing material.” It also stated:

During the coming two days we will clean the site so that removal of asbestos-containing material can start.

Performance of work on this project will be stopped by Wednesday, March 16, 1988. [Emphasis in original]

Also on 15 March 1988, AST presented a firm offer to the Army for the asbestos removal in a total amount of DM 768,230. The Army did not accept AST’s offer; and, on 18 March 1988, AST forwarded a letter to the CO in which it stated:

[I]n consideration of time and costs of performance you have imposed upon us and the prevailling [sic] disagreement on your part concerning the method of execution we shall refrain from removing asbestos materials under our organizational centralized control.

We recommend the asbestos materials be taken care of by a sub-contractor under your management.

Please let us know when we can continue with the work performance.

Therefore, addendum and performance time become subject to separate negotiation.

You should reckon that we cannot perform any demolition work or any other installation work at the main building

specified in this project. Consequently, we can only deduct one week from the term of contract for the expired time until release of the project. Work performed till the present time would anyway have been parallel to the work at the main building. In this respect, said work does not concern any saving of time to us which would affect the total term of project.

(R4, tabs 25-28, 32)

15. Upon receipt of AST's letter, the Army approached other contractors to have the asbestos removed under its own auspices. The Army translated the specification for the work into German; and, on 22 March 1988, it received three offers. On 24 March 1988, AST informed the CO that it had ceased all work (R4, tab 31); however, the job site logs demonstrated that AST was able to perform at least some work with a relatively small crew, generally fewer than 15 workers, throughout the month of March (R4, tabs 63, 65). The Army accepted one of the offers, and awarded a contract on 30 March 1988 (R4, tabs 32-33). The contractor completed the asbestos removal in approximately three weeks. On 18 April 1988, the parties executed Modification No. P00005 to the contract, thereby lifting "the suspension issued by Modification No. P00003" (R4, tab 9). Excluding the grace period of two work weeks, AST's efforts were thus partially suspended from 23 February until 18 April 1988, a period of 55 calendar days. During this period of time, AST concluded that, based upon a detailed examination of job site logs and invoices, it was able to accomplish only 6.70 percent of the work (ex. A-5). It is true that the Army estimated that AST had performed fully 25 percent of the work during this period; however, the Army's estimate was based upon a walk through conducted by the COR in a portion of a single day (R4, tab 41). Mr. Nielsen admitted at the hearing that his conclusions were "somewhat subjective" (tr. 6/50). Accordingly, based upon the weight of the evidence, we find that AST performed only 6.70% of the work during the partial suspension period. Obviously some of this effort was accomplished during the two-week grace period which we have not included in our calculation of 55 days of partial suspension. Accordingly, any recovery by AST for this delay period must reflect AST's work efforts outside of the two-week grace period.

16. In a letter forwarded to the CO on 27 April 1988, AST's attorney, Mr. von Maur, stated his client's intention to file two delay claims based upon the suspensions of work. He also stated:

9. In addition, because of the overall length of the suspension, the contractor is not in a position to continue to accept the earlier negotiated total performance period of 180 days, but must in fact insist on the 210 days expressed in the

contract on the basis in which its calculation was made. While the contractor had proposed to you by letter of 18 April 1988 a performance period extended to 21 October (180 days), you did not accept that offer and in fact have in the interim insisted that the contractor complete the contract in a much shorter period of time to accommodate [sic] what appears now to be the Government's intervening requirements for Hanger 34. AST's offer of 18 April is accordingly withdrawn herewith.

10. AST is prepared to complete the contract in the further accelerated performance period which you have discussed with AST in recent weeks, but not at the same price as is reflected in the basic contract. The reason for this is that, as you can understand, for AST to perform this vastly accelerated schedule AST must have overtime- and weekend-pay commitments for all personnel, with corresponding increases in its general and administrative expenses and jobsite costs. (While the jobsite would be accelerated, it would be run more intensively and at premium hours than was initially anticipated.)

(R4, tab 40)

17. The parties were unable to reach agreement concerning a revised completion date (R4, tab 49). On 17 May 1988, the CO issued unilateral Modification No. P00006 which extended the performance period by 54 calendar days, thereby establishing a new completion date of 27 August 1988 (R4, tab 10). The CO calculated the delay periods as follows:

- i. 4 January 1988 thru 5 February 1988 – Delay mutually caused by the U.S. Government and the contractor - justifiable time extension – 11 days
- ii. 8 February 1988 thru 18 April 1988 – Partial Suspension - justifiable time extension – 43 days

(R4, tab 10 at 1) The CO did not grant AST any monetary relief as a result of her conclusion that it had been delayed (R4, tab 10). In explaining the CO's calculation, the Army asserted on page 38 of its brief that the "August 27 date of completion was calculated by taking the 31 days (January 4 – February 5) of initial delay, subtracting the 20 days of start-up time authorized by the Contract (R4, tab 1), then adding more than half of the period of partial suspension (February 8 – April 18, or 69 days), less the two

weeks that Matasic admitted he was not affected by the delay. (Tr. 4/157-58, 6/230; R4, tab 18).” In reaching her conclusion, the CO mistakenly assumed that AST had done its site mobilization work in January 1988. But record evidence demonstrates that this work was performed during a 20-day period in October and November 1987 (findings 6, 9). Further, the Army’s statements confirm the CO’s knowledge of the two-week grace period which qualified AST’s acceptance of Modification No. P00003 (finding 10). On 10 June 1988, AST informed the CO that the revised completion date set forth in Modification No. P00006 was unacceptable. It also stated: “Because of this [compressed] schedule, our firm will suffer extensive expeditures [sic] due to overtime required for completion of subject project as proposed which includes work to be performed Saturdays, Sundays, Holidays and night work” (R4, tab 53). Regarding its allegation that it was being forced to accelerate the work, AST stated, in a letter of 11 July 1988, that it would “assert these costs in the form of a claim after work completion” (R4, tab 54).

18. Work continued on the project; and, on 16 August 1988, the parties executed bilateral Modification No. P00007, which provided, in pertinent part:

- a. The purpose of this Supplemental Agreement is to amend the specifications as outlined on pages 3 thru 5 of this Supplemental Agreement.
- b. The contract performance period remains unchanged, except sub-line items # 1.296 and 1.303, which are extended thru 09 September 1988.
- c. In consideration for the increased scope of work the total contract amount is hereby increased by DM 71,500.00.
- d. If the Contractor fails to complete the work as specified above, liquidated damages as noted in the basic contract will be assessed.
- e. The parties hereto agree that the change in contract price and/or schedule constitutes both the consideration and the equitable adjustment due under any clause of the contract resulting from the modification effected herein.

(R4, tab 11)

19. In negotiations held between the parties in May 1988, Herr Matasic projected that “w/o acceleration,” a “full crew” would consist of between 36 and 41 workers timely

to complete the project (R4, tab 47 at 3). However, the extant job site records demonstrate that AST's workforce exceeded 41 workers on only two days prior to 22 August 1988. In addition, these documents show that AST did not work with a "full crew" during any weekend prior to 27 August 1988. In fact, there are no site logs for any Sunday until 21 August 1988 when AST had only 9 workers at the job site. In addition, AST worked on only two Saturdays prior to 20 August 1988 with substantially reduced crews. It is true that AST utilized from 51 to 68 workers in the period from 22 August until 27 August (ex. A-2). But it is more likely that AST was responding to the increased scope of work stated in Modification No. P00007 rather than to any requirement to accelerate the pre-existing work in order to meet the completion date of 27 August 1988. A similar conclusion can be reached regarding overtime work. Although AST proffered a bundle of untranslated German documents purporting to demonstrate in part that it had performed a great deal of such work, AST's own site logs show instead that it did not perform overtime until 22 August 1988 (exs. A-2, -7).

20. AST completed the work in a timely fashion. On 30 June 1996, it forwarded a certified claim to the contracting officer in a total amount of DM 1,185,000. AST alleged that its delay claims encompassed damages of DM 654,420 and that its acceleration claim comprised damages of DM 530,580 (R4, tab 55).

21. On 31 July 1998, the contracting officer issued a final decision in which he conceded "entitlement for work suspension from 04 January through 04 February 1988 and for partial work suspension from 09 February through 17 April 1988 . . ." (emphasis in original). The contracting officer denied AST's acceleration claim, contending that the "revised contract completion date of 27 August 1988 established by the Government is more than reasonable . . ." (R4, tab 59 at 1). This appeal followed.<sup>3</sup>

### DECISION

We agree with the CO that AST is entitled to recover damages it incurred with respect to its two delay claims.<sup>4</sup> By failing to make the hangar available to AST on the agreed commencement date for contract performance, the Army altered the contract's terms. It delayed the contract and extended the contract completion date by 31 calendar days (finding 9). Accordingly, AST is entitled to recover damages under the Changes clause.

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<sup>3</sup> At the hearing and in its briefing, the Army reversed its position and contended that AST's delay claims should be denied in all aspects.

<sup>4</sup> In reaching this conclusion, we are fully cognizant that our review of a CO's decision is *de novo*. See, e.g., *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987).

With the discovery of asbestos in the hangar and its annexes, AST encountered a differing site condition. As a result, its work was partially suspended for 55 calendar days plus the two-week grace period, and it was able to accomplish only 6.70 percent of the work during this partial suspension period (findings 10, 15). Through the unilateral execution of Modification No. P00006, the CO recognized that this partial suspension had a substantial impact on the contract completion date (finding 17). However, because AST was able to accomplish some work, we cannot extend the completion date on a day to day basis. Factoring in the two-week grace period yields a total impact period of 69 days which is 38% of the 180-day performance time. This represents the best record evidence of the work AST might have accomplished and results in an efficiency reduction of .82. Applying this reduction figure to the 69 days yields a delay period of approximately 57 days. In order to reflect the fact that AST was able to accomplish 6.70% of the work during the 69-day delay period, we allocate six days of the remaining 12 days to the two-week grace period (finding 15). Deducting the balance of the two-week grace period, we conclude that the completion date was delayed by 49 days as a result of the partial suspension (57 less (14-6)). AST is entitled to recover for 49 days of delay on this claim.

In sum, AST's performance under this contract was delayed by a total of 80 calendar days.<sup>5</sup>

We reject AST's acceleration claim. First, in formulating its arguments on this claim, AST largely ignores the fact that the CO did extend the contract completion date by 54 calendar days as a result of government-caused delays (finding 17). Moreover, as part of its burden on this claim, AST must show that it "in fact accelerated performance and incurred extra costs." *Phillips National, Inc.*, ASBCA No. 53241, 04-1 BCA ¶ 32,567 at 161,102, citing *Norair Engineering Corp. v. United States*, 666 F.2d 546, 548 (Fed. Cir. 1981). It has not done so. Herr Matasic stated that "w/o acceleration," a "full crew" would consist of between 36 and 41 workers timely to complete the project. But, until the last week of work, AST's workforce exceeded 41 workers on only two days. In addition, AST's own site logs demonstrate that it did not work with a "full crew" during any weekend prior to 27 August 1988. In fact, there are no site logs for any Sunday until 21 August 1988 when AST had only 9 workers at the job site. In addition, AST worked on only two Saturdays prior to 20 August 1988 with substantially reduced crews.

A similar conclusion can be reached regarding overtime work. Again, AST's site logs show that it did not perform any overtime until 22 August 1988.

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<sup>5</sup> We simply note that if, in Modification No. P00006, the CO had not mistakenly deducted 20 days for mobilization and site preparation from the first period of delay, she would have calculated a total delay period of 74 days (finding 17).

It is true that AST utilized from 51 to 68 workers in the period from 22 August until 27 August and that it worked overtime during this brief period. But it is more likely that AST was responding to the increased scope of work stated in Modification No. P00007 rather than to any requirement to accelerate the pre-existing work in order to meet the completion date of 27 August 1988.

We reject the Army's contention that AST waived any right to file a delay claim for the partial suspension period through the execution of Modification No. P00003 (br. at 70-71). Upon receipt of this no cost modification, AST informed the CO of its interpretation that the suspension would be without costs only for a two-week period during which it could still perform some work. It also stated: "Work suspension for over two weeks will have an impact on performance costs and time." Contemporaneous documentation shows that this interpretation was shared by the COR, Mr. Nielsen, and by the Director of DEH, LTC McBride. More importantly, as demonstrated by the Army's own brief, the CO was aware of this qualification and deducted the two-week period from her delay calculation in Modification No. P00006 (findings 10, 17).

We also reject the Army's contention that, by executing Modification No. P00007, AST released any right to file its acceleration claim (br. at 99-104). AST had placed the CO on notice as early as 27 April 1988 that it might be required to accelerate, and there is no specific language in the modification through which AST released this claim. It is also difficult to conclude that the modification solidified the completion date of 27 August 1988, thus depriving AST of its contention that it was required to accelerate. In fact, the modification is so poorly drafted that the only completion date that appears on the face of the document is 9 September 1988 which applies only to two sub-line items in the contract. By stating that the "contract performance period remains unchanged," the modification is silent as to whether it is referring to the date of 4 July 1988 set forth bilaterally in Modification No. P00005, the date of 27 August 1988 which appears in unilateral Modification No. P00006, or some other date. There is too little evidence of intent here to support a release claim (findings 16-17).

Finally, we deal with the Army's contention that we must admit a 1990 German court conviction of AST's principal, Mr. Matasic, for tax evasion pursuant to Fed. R. Evid. 609(a)(2) in order to impeach his testimony. That provision states: "For the purpose of attacking the credibility of a witness, evidence that any witness has been convicted of a crime shall be admitted if it involved dishonestly or false statement, regardless of the punishment." The Army suggested at the hearing that the Board had no discretion in its matter and was required to admit the conviction as part of an attack on

Mr. Matasic's credibility.<sup>6</sup> If this were a conviction processed under the American judicial system, that would probably be the case; however, the cited rubric and its advisory notes are silent on the issue of convictions in foreign courts. From the conviction itself, we can conclude that Mr. Matasic was placed in pretrial confinement immediately upon his arrest in December 1987. The document is silent regarding any arraignments or preliminary hearings. By the time Mr. Matasic was brought before the State Court in Koblenz in December 1990, he had been incarcerated for fully three years. Thereupon, under the threat of further confinement, Mr. Matasic entered a plea bargain and was sentenced to four years in prison. The court noted that he had no prior convictions. There is no evidence that Mr. Matasic was allowed to confront his accusers or that any live testimony was taken by the court. In a judgment issued on 29 June 1994 in *Tomo Matasic v. Allgemeine Ortskankasse (AOK) Rheinland-Palatinat*, No. 7 U 1234/93 – 40104/93 LG Mainz, the Superior Court of Koblenz noted Mr. Matasic's argument that his plea bargain was reached so that he could bring the criminal proceedings to a faster conclusion and held that the plea did not constitute an admission of guilt.

Under these circumstances, the Board concludes that admission of the conviction is within its discretion. However, we have decided to admit the document as well as the testimonial offers of proof elicited by the Army's counsel at the hearing. Impeachment is a credibility issue, and it is the Board's view that Mr. Matasic's hearing testimony was credible and supported by the evidence. The Board notes also that the conviction was over 9 years old at the time of the hearing and that there is no evidence that Mr. Matasic has ever been convicted for any other offenses.<sup>7</sup> Finally, the Army has not demonstrated any persuasive connection between the conviction and the underlying contract. Accordingly, the Board declines to give great weight to the conviction in the context of this civil matter.

Dated: 3 January 2005

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MICHAEL T. PAUL  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continue)

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<sup>6</sup> All of the proffered documents relating to the conviction have been maintained in the Rule 4 file as an offer of proof. Similarly, the presiding judge allowed extensive questioning on this issue during the hearing as a further offer of proof.

<sup>7</sup> See the time limit set forth in Fed. R. Evid. 609(b).

I concur

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

I concur

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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. 51854, Appeal of AST Anlagen-und Sanierungstechnik GmbH, rendered in conformance with the Board's Charter.

Dated:

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