

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Corbett Technology Company, Inc. ) ASBCA No. 49478  
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Under Contract No. DAAH01-88-D-0002 )

APPEARANCE FOR THE APPELLANT: Kenneth A. Corbett  
Vice President

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA  
Chief Trial Attorney  
CPT Thomas C. Modeszto, JA  
CPT Melissa A. Miller, JA  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal involves a claim for reimbursement of cost overruns under a time and materials contract allegedly caused by defective Government-furnished equipment (GFE) and an acceleration order. Appellant argues that the Government coerced it to continue performance after it exceeded the revised ceiling price set forth in the contract schedule. Mr. Corbett represented appellant *pro se*. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 22 October 1987, the United States Army Missile Command (MICOM), Redstone Arsenal, Alabama, awarded Contract No. DAAH01-88-D-0002 to appellant Corbett Technology Company, Inc. (CTCI). The contract was a Time and Materials/Indefinite Quantity type contract for engineering and technical support for MICOM missile systems programs. The estimated contract ceiling price was \$9,045,738. (R4, tab 1 at 1-2, 41)

2. The contract included standard provisions "PAYMENTS UNDER TIME-AND-MATERIAL AND LABOR-HOUR CONTRACTS" (FAR 52.232-7) (APR 1984); "DISPUTES" (FAR 52.233-1) (APR 1984); and "GOVERNMENT PROPERTY (COST REIMBURSEMENT, TIME AND MATERIAL OR LABOR HOUR CONTRACTS)" (FAR 52.245-5) (JAN 1986) (R4, tab 1 at 18).

3. By letter dated 18 June 1990, appellant submitted its proposal in response to the Scope of Work entitled "Automatic Target Cuer for Helicopters" which was to be issued as a delivery order under the contract (R4, tab 2).

4. On 29 June 1990, Delivery Order No. 0028 (the delivery order) to the contract was issued to appellant in an amount not to exceed \$199,251.46 for the complete development of an automatic target cuer for helicopters. The contractor agreed to use its best effort in performance of the delivery order. The delivery order required the contractor to use GFE that was specified as the chassis assembly with power supply, circuit board assemblies, memory board assemblies and other items of equipment. Appellant had designed and fabricated the equipment listed as GFE under a prior contract and had kept possession of it until award of this contract. The delivery order required the contractor to fabricate or procure other circuit cards as necessary and integrate them with the GFE to produce an automatic target cuer capable of receiving analog video from a missile seeker or similar sensor and processing the video to allow cueing an operator on the most helicopter-like objects in the image. The delivery date of the cuer was 30 March 1991. The delivery order also required the contractor to provide field support for the maintenance and repair of the cuer and deliver a final technical report. (R4, tab 3; ex. A-10; tr. 30)

5. The delivery order included the following provision concerning the ceiling price:

THE CONTRACTOR IS NOT AUTHORIZED TO MAKE EXPENDITURES OR INCUR OBLIGATIONS IN THE PERFORMANCE OF THIS DELIVERY ORDER IN EXCESS OF \$199,251.46. THIS AMOUNT REPRESENTS THE CEILING PRICE WHICH THE CONTRACTOR EXCEEDS AT HIS OWN RISK. PURSUANT TO CONTRACT DAAH01-D-0002 THE TERMS AND CONDITIONS THEREIN ARE INCORPORATED HEREIN BY REFERENCE AND MADE A PART HEREOF.

(R4, tab 3 at 3) Thus the delivery order incorporated the following pertinent provisions of the Payments under Time-and-Materials and Labor-Hour Contracts clause:

(c) *Total Cost.* It is estimated that the total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments

and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the Schedule, the Contractor shall notify the Contracting Officer giving a revised estimate of the total price to the Government for performing this contract with any supporting reasons and documentation. . . .

(d) *Ceiling price.* The Government shall not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that the ceiling price has been increased and shall have specified in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract.

(R4, tab 1 at 18; emphasis in original)

6. By letter dated 18 December 1990, appellant requested additional funding as of 7 January 1991, in the amount of \$39,905.20, in order to complete the work required by the delivery order. Appellant's letter stated:

Additional funding is required due to the integration of the GFE on the subject delivery order having taken more effort than was originally estimated. Also, delays were caused by repairs and integration problems with the GFE. As a result of the additional costs associated with the GFE, we will not be able to complete the scope of work for the manhours and material dollars in the delivery order as issued.

(R4, tab 7) On 20 December 1990, the Government's contract specialist noted on the letter that he contacted appellant's contract administrator and "advised that all cost incurred over and above the not to exceed is at own risk" (*id.*).

7. By letter dated 22 January 1991, appellant informed the Government that it would stop work on the delivery order after 25 January 1991 due to lack of funds (R4, tab 9; tr. 163-64).

8. In mid-February 1991 the Government contacted appellant to ask about the status of subcontract work under Delivery Order No. 0029, another delivery order issued under the contract, to see if delivery could be made by 1 May 1991, which was two months earlier than the required delivery date.<sup>1</sup> When the request was made, Mrs. Susan Corbett, appellant's president, told the Government's contract specialist that the Government would need to issue a change order to obtain delivery earlier than the contractually required date. Mr. Kenneth Corbett, appellant's vice president, stated in a letter, dated 21 February 1991, that appellant was working toward the 1 May 1991 date as a goal to accommodate the Government and assist it in expediting its mission, but the date was not a contractually required delivery date. Appellant devoted resources that would have been expended in resuming Delivery Order No. 0028 work to expedite delivery under Delivery Order No. 0029. The Government did not direct an acceleration of Delivery Order No. 0029 or issue any acceleration order or modification of the 30 June 1991 delivery date in that delivery order. (AR4, tab 14, 15; tr. 112-13, 134, 144, 149-51) Appellant did not notify the Government of increased costs resulting from its decision to expedite delivery under Delivery Order No. 0029.

9. By letter dated 4 March 1991, appellant requested additional funding in the amount of \$45,388.51 to complete the work required by Delivery Order No. 0028. Appellant stated that it had stopped work as of 2 February 1991, pending a response to its estimate of required additional funding. The letter requested an extension of the delivery date to 28 July 1991. (R4, tab 10)

10. Bilateral Modification No. 002803, dated 13 March 1991, increased the ceiling price of Delivery Order No. 0028 by \$45,388.51 and extended the period of performance until 28 July 1991 (R4, tab 11).

11. Mr. David Anderson, who was employed by appellant, designed the GFE in the cuer and had the most familiarity with it. There was no one else in the company with direct knowledge of and experience with the GFE. Mr. Anderson decided to leave the company after appellant stopped work on Delivery Order No. 0028 due to lack of funding. He knew there was a general decrease in funding for appellant's projects. Appellant has asserted that the loss of this individual, which was "basically precipitated

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<sup>1</sup> In December 1990 Delivery Order No. 0029 under the contract was issued to appellant to perform the Statement of Work entitled "Hardware-in-the-Loop Support of the HOMS [HELLFIRE Optimized Missile System] HELLFIRE Program" for modification of an existing Laser Guidance Hardware-in-the-Loop facility at MICOM for simulation and analysis support of an HOMS seeker/autopilot development program. The date of delivery was 30 June 1991. (AR4, tab 7)

by the Government,” is part of the basis for its claim (tr. 156). Before Mr. Anderson left on 31 May 1991, Mr. Corbett asked him to ensure that the components of the cuer were operating correctly. Mr. Anderson assured Mr. Corbett that the hardware as it then existed was fully integrated and operating correctly. (Tr. 32, 35, 45, 50, 144, 150, 177)

12. After Mr. Anderson left, appellant completed design of the spatial filter and its integration with other components of the cuer. Appellant experienced technical difficulties with both the integration and operation of the cuer. Since Mr. Anderson had assured Mr. Corbett that the system was operating correctly when he left the company, Mr. Corbett assumed the problem was attributable to work that had been done later with the spatial filter. Appellant attempted, but did not understand how to resolve the problem. (Tr. 126, 146-47, 173, 180)

13. On 16 July 1991 appellant requested a no-cost extension of Delivery Order No. 0028 until 30 September 1991 due to continuing problems with the GFE (R4, tab 12).

14. Mr. Corbett called on Mr. Anderson for assistance to make the cuer operational. On 18 September 1991, he was able to analyze and repair the problem in a few hours. (Tr. 181) The problem was caused by “wire wrap wire” making poor contact with the wire wrap post on one of the GFE circuit boards (R4, tab 17; tr. 49). Appellant thought it was a problem for which it was responsible and did not believe there was defective GFE in the cuer until after the repair was made (tr. 127, 150, 153, 180).

15. A bilateral modification effective 2 August 1991 extended the period of performance of Delivery Order No. 0028 until 30 September 1991 (R4, tab 13).

16. On 16 September 1991 appellant submitted its monthly Performance and Cost Report for the period of 4 August 1991 through 31 August 1991. Appellant stated it had stopped work for one week due to the Government’s failure to provide a timely no-cost extension to Delivery Order No. 0028 and it was evaluating the impact of the delay. Appellant reported that the integration of the spatial filter with the GFE was being accomplished. The cost summary in the report showed that all of the estimated manhours had been used and there was a cost overrun of \$8,875.91. (R4, tab 13B; tr. 176)

17. On 25 September 1991 appellant delivered the automatic target cuer to the Government (R4, tab 14). Appellant did not furnish maintenance and repair services and did not deliver a final technical report (ex. A-10; tr. 168-69, 197). There was no additional funding available for the contract (tr. 217). The Government accepted appellant’s delivery (R4, tab 14; ex. A-11; tr. 78).

18. On 30 September 1991 appellant submitted a request under Delivery Order No. 0028 for reimbursement of expenses in the amount of \$22,603.84. Appellant had

not submitted an estimate of these costs before making delivery on 25 September 1991. Appellant requested amounts for estimated direct labor manhours for the staff engineer/scientist and the chief scientist. The letter stated in pertinent part that appellant had:

expended \$22,603.84 of its own resources since August 5 resulting in part from maintenance and repair problems with the GFE and also as a result of the STOP WORK period that resulted when the execution of the most recent delivery order extension was delayed by the Government. Problems with the GFE occurred causing work stoppage and costs for repair activities right up until the day before the equipment was delivered and returned to the Government on September 25, 1991.

(R4, tab 15) Appellant also included an “[e]stimate to [c]omplete” the delivery order in the amount of \$14,184 if the Government wanted the final technical report. The letter stated that the cause of the extra expenditures was defective GFE and the work stoppage. The letter did not mention impact from an acceleration order or threat or damage to appellant’s reputation (*id.*; tr. 78, 169-70).

19. The contracting officer did not authorize appellant to exceed the revised ceiling price in Delivery Order No. 0028 (tr. 186).

20. Mr. Corbett expressed his concerns that appellant had been excluded from Government contracting to Government representatives (AR4, tabs 11, 25). On 3 October 1991 he wrote to the contracting officer and made reference to “the Government perpetrators of the de facto debarment of Corbett Technology” (AR4, tab 25 at 1). This letter requested information on Government “formal investigation” methods and protection of contractor confidentiality (*id.*). Appellant received a response, dated 7 November 1991, from Army legal counsel (AR4, tab 26; tr. 157, 184-85). We find no collusion among Government representatives to harm appellant (tr. 194).

21. By letter dated 24 October 1991, the contracting officer responded to appellant’s request for reimbursement and told appellant to submit detailed cost data for the request to be evaluated as a claim (R4, tab 16).

22. On 5 October 1992 Mr. Corbett sent a letter to the contracting officer with appellant’s estimate of engineering time spent on checking several different aspects of the cuer considered to be causing its faulty operation. This letter stated that “[t]he faulty GFE caused excessive time to be spent in final software checkout” (R4, tab 17; tr. 171). The GFE impact subtotal was \$22,638.29. Appellant also claimed costs of \$4,442.13 for a

stop work order from 29 July 1991 through 2 August 1991 as a result of delays by the Government in providing a schedule extension to the delivery order. (R4, tab 17)

23. By letter dated 31 January 1994, appellant submitted eight separate claims under the contract which included the subject claim for defective GFE under Delivery Order No. 0028 in the amount of \$22,638.29. The claim referred to appellant's letter, dated 5 October 1992, for the basis of the claim.<sup>2</sup> (R4, tab 18; tr. 171, 182) Mr. Corbett stated in this submission that appellant had been reluctant to submit this claim because of alleged threats to its reputation. Mr. Corbett's letter stated that its reluctance was the result of:

a telephone conversation Mr. Corbett had with Mr. Jacobs [Director of the Guidance and Control Directorate at MICOM] on February 28, 1991 where Mr. Jacobs stated that he would see to it that our (Mr. Corbett's and CTCI's) reputation would be severely damaged if the processor was not completed. Rumors spread at RDEC [Research, Development, and Engineering Center] regarding CTCI and myself indicate that such a campaign to damage CTCI's reputation was and is being prosecuted.

(R4, tab 18 at 6) Appellant's evidence of its perceived threats to its reputation does not establish any improper Government actions were taken or that appellant suffered any injury as a result (*id.*; tr. 122, 149-50, 156, 182-84).

24. The contracting officer discussed appellant's claim in a letter, dated 5 April 1994, that requested answers to specific questions before issuing a final decision on the merits of the claim (R4, tab 19). Appellant submitted its response by letter dated 13 June 1994 (AR4, tab 28). The contracting officer requested further substantiation of the claim and received response from appellant, but did not issue a final decision (R4, tabs 23 through 25; AR4, tabs 29, 32, 36; tr. 76, 83-84, 87-88). Appellant appealed on the basis of a deemed denial of its claim.

### DECISION

Appellant has the burden of proving an affirmative monetary claim against the Government. *John T. Jones Const. Co.*, ASBCA Nos. 48303, 48593, 98-2 BCA ¶ 29,892 at 147,974, *aff'd sub nom. John T. Jones Const. Co. v. Caldera*, 178 F.3d 1307 (Fed. Cir. 1998 (Table)). An appellant is entitled to no special consideration because of its

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<sup>2</sup> The claim for stop work compensation was a separate claim that the parties settled, and it is not in issue in this appeal (R4, tab 18 at 2, 6; tr. 81, 172).

appearance *pro se*. *Shiffer Industrial Equipment, Inc.*, ASBCA Nos. 34027, 34028, 88-2 BCA ¶ 20,584. For appellant to recover, it must prove that Government wrongful action was the cause of its damage. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*); *C.F. Electronics, Inc.*, ASBCA No. 43212, 95-1 BCA ¶ 27,394.

Under a time and materials contract containing a standard Payments clause which limits payment to the ceiling price of the contract and requires the contractor to notify the contracting officer when it reaches 85 percent of the ceiling price or has reason to believe it will exceed the ceiling price, the Government is not required to fund an overrun in the absence of the prescribed formal written notice. Where the contractor has failed to give notice of a possible overrun, any work performed in excess of the ceiling price is at the contractor's risk. *Software Research Associates*, ASBCA No. 33578, 88-3 BCA ¶ 21,046.

The contract in this appeal required appellant to obtain authorization from the contracting officer before exceeding the ceiling price of Delivery Order No. 0028 or it would incur any extra costs at its own risk. The Government informed appellant of this requirement, and appellant understood it. Appellant not only provided notice of possible overruns, but also stopped work due to lack of funds in February 1991 (findings 6, 7, 9). Appellant's monthly report for August 1991 shows that it knew it had used all of the estimated manhours (finding 16). Appellant then chose to continue performance of the delivery order without notice to the contracting officer. Appellant exceeded the contract price without the knowledge, authorization, or approval of the contracting officer. Appellant proceeded at its own risk in delivering the cuer without direction or request from the Government. It acted as a volunteer. The Government is, therefore, not obligated to compensate appellant for these costs. *JGB Enterprises*, ASBCA No. 49493, 96-2 BCA ¶ 28,498.

To the extent appellant performed extra work attributable to defective GFE, that work was not caused by actions or inactions of the Government. Appellant was under no contractual obligation to perform the contract work after it reached the revised ceiling price. Appellant's allegations that there was an acceleration order pertaining to Delivery Order No. 0029 that caused its extra costs are also without merit. We have found that the Government's request for early delivery of other work was not a directive, and it does not constitute a compensable change order (finding 8). Moreover, appellant's failure to notify the contracting officer that it would exceed the revised ceiling price after it completed the Delivery Order No. 0029 work makes the work performed at appellant's risk.

We are not persuaded by appellant's allegations that the cause of its continued performance after it exceeded the revised ceiling price was Government coercion. Mr. Corbett's assertions in appellant's claim letter of rumors and a threat to damage

its reputation in a telephone conversation are not persuasive evidence of Government wrongdoing. Appellant refers to its “de facto debarment,” but has provided no evidence that it was improperly excluded from Government contracting (app. reply br. at 3). Appellant argues that actions of the contracting officer in inefficient administration of the contract were reason for its being unable to rely on the contracting officer to act either fairly or timely. Appellant was, nevertheless, required by the terms of the contract to notify the contracting officer of its possible cost overruns and cannot claim that administration of the contract, if it were inefficient, can excuse it from not giving the required notice.

We have considered all of appellant’s other arguments in support of its claim and found them without sufficient support in the evidence to warrant discussion.

The appeal is denied.

Dated: 29 February 2000

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LISA ANDERSON TODD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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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. 49478, Appeal of Corbett Technology Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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