

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Kurt Manufacturing Company ) ASBCA No. 51074  
)  
Under Contract No. N00164-93-C-0242 )

APPEARANCES FOR THE APPELLANT: William L. Roberts, Esq.  
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Minneapolis, MN

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.  
Navy Chief Trial Attorney  
Starr J. Sinton, Esq.  
Trial Attorney  
Naval Surface Warfare Center  
Port Hueneme, CA

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Appellant seeks an equitable adjustment beyond that already provided by the Government as a result of defects in the Government's technical data package. The Government contends that appellant has already been adequately compensated under bilateral contract modifications and has also released its rights to any further claims. A hearing was held on entitlement only. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. For reasons below, we deny the appeal.

FINDINGS OF FACT

1. The Government awarded this contract to appellant on 30 September 1993. The contract called for the manufacture of replacement parts for MK 75 Gun Mounts for the Department of the Navy. Specifically, the contract called for the manufacture of 70 right rocking arm assemblies and 70 left rocking arm assemblies, and provided the Navy an option to purchase up to 40 additional sets. These assemblies within the gun mount served to move rounds of ammunition at high speed from the magazine, or storage chamber, into position for loading into the breech for firing. (Tr. 1/20, 2/150)

2. As appellant began work on the first article, it discovered defects in the Government's technical data package (TDP). The Government issued notices of revision to the contract drawings (NORs) to address many of these defects. Appellant

contends that it agreed to abide by an oral request of the Government's program manager to defer noticing the Government of the cost impacts of these defects until after first article approval, which it characterized as a "standstill" agreement. However, insofar as pertinent, the contract provided as follows (R4, tab 1 at 14):

SUP 5252.243-9400 AUTHORIZED CHANGES ONLY BY THE  
CONTRACTING OFFICER (JAN 1992)

(a) Except as specified in paragraph (b) below, no order, statement, or conduct of Government personnel who visit the Contractor's facilities or in any other manner communicates with Contractor personnel during the performance of this contract shall constitute a change under the "Changes" clause of this contract.

(b) *The Contractor shall not comply with any order, direction or request of Government personnel unless it is issued in writing and signed by the Contracting Officer, or is pursuant to specific authority otherwise included as part of this contract.*

(Emphasis added)

The record does not show that the contracting officer requested or directed appellant to defer noticing of claims, or was aware of any standstill agreement. Nor does the record show that the program manager was authorized to seek such an agreement. The contract included the CHANGES clause, FAR 52.243-01 (AUG 1987) and the NOTIFICATION OF CHANGES clause, FAR 52.243-07 (APR 1984) which obligated the contractor to timely notify the Government of increased costs of performance attributable to contract changes. (R4, tab 1 at 19)

The TDP Defects

3. The contract provided that certain parts be surface hardened to a specified pattern while maintaining a specified hardening depth throughout the pattern in accordance with Military Specification S12515. The purpose of this requirement was to harden the surface area of that portion of the part that made contact with other parts without disturbing the strength of the core material. Military Specification S12515 specifies two alternative heat treating methods to achieve this surface hardening: flame or induction heat treatment. (Ex. A-59; tr. 1/59-60)

4. Appellant worked with a number of vendors to meet this contract provision. All indicated that they could not meet it. Appellant went to a firm that had previously manufactured the parts for the Government, but was told that the firm had to obtain a waiver or deviation of this specification during its own performance (tr. 1/68-69). The Government's engineer conceded the problem and believed a contract change was necessary (ex. A-61). Appellant filed Request for Waiver Nos. 0242-21, 22, 23, 24 dated 12 June 1995 with respect to four parts affected by this process, and which are the subject matter of its claim: stop lever (left, right); lever grips control (left, right). On each waiver form, DD Form 1694, appellant indicated that its request was "minor" (Block 3) and would have "no impact" on contract price (Block 19). These waivers were ultimately incorporated into bilateral contract modifications—for the first article under P00004 (adding \$1,134 to the contract price) and for the production units under P00007 (no change in contract price).

5. Appellant was allowed to use a laser treatment to harden the surfaces in question. The record does not clearly show whether the laser treatment was more or less expensive than the heat treat methods identified in the contract, which should have been included in appellant's bid. Appellant anticipated that the use of laser treatment would achieve cost savings over the long run because of reduced scrap rates (tr. 2/186).

6. There were also TDP defects with respect to the base clamp. The contract drawings contained a number of ambiguities requiring clarification and correction which the Government provided through a number of NORs and contract modifications. The most significant problem related to the specifications providing for a "net shaped forging" to build the base clamp. Appellant used this process to fabricate the part, but it did not pass first article testing upon assembly. After investigation by both parties, it was determined that a different manufacturing process was needed. The Government issued a NOR which provided for a change in the manufacturing process and a related grain flow requirement, for which appellant was compensated under Modification No. P00010.

7. The TDP for the right and left rocking arms also required correction. Among other things, the drawings failed to state certain dimensions and failed to provide adequate information to build the forging die. The Government issued a number of NORs for each part and incorporated these revisions in bilateral contract modifications – Modification Nos. P00001, P00003, P00004 and P00010. Under Modification No. P00010, appellant agreed to accept \$56,840 as compensation for the latest change to these parts, affecting the production units.

8. The TDP for the right and left nose clamps and the sector gear also required correction. The Government issued drawing revisions and incorporated these revisions in bilateral contract modifications – Modification Nos. P00001, P00002 and P00003. During the manufacture of the sector gear, appellant also had to scrap a number of parts due to holes or "porosity" in the body of the part (tr. 1/162-65). The record does not

establish that this porosity was attributable to defective Government specifications or drawings.

9. With respect to the right and left sector gears, certain tolerance discrepancies related to cadmium plating required grinding of the parts to get them to fit into the assemblies (tr. 1/155-58). Appellant filed and obtained waivers related to this matter – W-0242-27 and W-0242-28 – which were incorporated into bilateral contract Modification No. P00007. Appellant also obtained a deviation, DEV-0242-003, to build these parts “for ease of manufacturing” (exs. A-13, -14). This deviation was addressed by Modification No. P00001 for the first article and by Modification No. P00007 for all production units.

10. Appellant’s program manager testified that TDP defects, overall, caused appellant to incur additional costs, based upon his review of the work order history and input from his staff (tr. 2/105-12). He was unable to segregate any such costs by part or by drawing revision. Appellant provided no evidence of its planned or bid costs.

#### NORs and Appellant’s Statements of Impact

11. On or about 14 March 1994, the contracting officer provided appellant with eight NORs, including those pertaining to the correction of errors for the rocking arms (right and left), base clamp, nose clamp (right and left) and sector gear and requested that appellant provide the impact on price and delivery, if any, of the subject changes. (R4, tab 34)

12. By letter to the contracting officer dated 8 April 1994, appellant advised that these drawing changes “will not affect our current price” (R4, tab 36). Appellant failed to reserve its rights to file an adjustment, nor did it otherwise mention any agreement with the program manager to defer filing claims until after first article approval.

13. By letter to appellant dated 9 May 1994, the contracting officer provided appellant with additional NORs, including further revisions to the drawings for the rocking arm and rocking arm assembly, nose clamp and base clamp and requested that appellant provide the cost and time impact of these changes (R4, tab 38). Appellant replied on 20 May 1994, stating that the rocking arm assemblies would slightly increase in price from \$7,687.00 to \$7,690.68 (right) and from \$7,463.00 to \$7,466.68 (left) as a result of the changes (R4, tab 39). The Government’s program manager telephoned appellant to complain that appellant documented this impact. This complaint appears odd insofar as it was inconsistent with the contracting officer’s stated request. In any event, by letter to the contracting officer dated 17 June 1994, appellant chose to void its 20 May letter, stating that appellant “has a policy not to increase prices on any NORs unless it is agreed to by both parties” (R4, tab 41). Although appellant now contends that this 17 June letter was issued in accordance with its agreement with the program manager to

defer its claims, we find it significant that appellant neither mentions this agreement nor any reservation or deferral of claims in this letter.

14. By letter to appellant dated 25 July 1994 the contracting officer provided appellant with seven additional NORs, including revisions to the nose clamp and grips control lever, and requested that appellant provide the time and cost impacts of the changes (R4, tab 45). Appellant replied on 6 September 1994, stating that after due evaluation, the costs associated with these changes “will be absorbed by Kurt at no charge to the government” (R4, tab 46). Appellant again failed to mention anything about any purported agreement to reserve or to defer the filing of claims.

15. By letter to appellant dated 29 November 1994 the contracting officer provided appellant with additional NORs, including revisions to the rocking arms (left and right) and nose clamps (left and right), and requested again that appellant provide the impacts of these changes (R4, tab 65). Appellant replied on 2 December 1994, stating that based upon an evaluation of all the changes “[t]he cost related to the part numbers will be absorbed by [appellant] at no charge to the Department of The Navy” (R4, tab 66). Again, appellant failed to set forth any purported agreement to reserve or to defer the filing of claims.

16. In response to further NORs for the rocking arms (left and right) and base clamp in June and July 1995, appellant specified the monetary impact of the changes and stated that the rework costs – roughly a few thousand dollars – were “negotiable” (R4, tabs 81, 86). Again, appellant failed to identify any purported agreement to reserve or to defer the filing of claims. These NORs were negotiated under bilateral contract Modification No. P00004.

#### Deviations and Waivers and Appellant’s Statements of Impact

17. Appellant filed a number of requests for deviations and waivers under the contract. Generally, a request to deviate from a contract requirement is sought prior to the performance of the work, and a request for a waiver is sought after the performance. Deviations and waivers may be sought for the convenience of the contractor and may result in cost savings. They may also be sought to obtain relief from defects in the TDP. As this contract was administered, deviations and waivers were sought to achieve both purposes. Appellant sought deviations and waivers by filing a DD Form 1694, Request for Deviation/Waiver. In nearly every instance, appellant identified each request as “minor” (Block 3) with no effect on cost/price (Block 19). The Government granted these requests based upon appellant’s representations.

#### NORs, Deviations, Waivers and the Bilateral Contract Modifications

18. It was the Government's practice to incorporate NORs, deviations and waivers into the contract through the negotiation of contract modifications executed by both parties. With respect to a number of deviations and waivers, the Government sought consideration from appellant because they saved appellant money and provided the Government with less than what was required by the contract. There were also a number of deviations and waivers under which appellant sought consideration from the Government based upon defects in the TDP. Additional cost impacts were applied against cost savings. On a number of occasions this resulted in contract modifications with little, or no net additional increase in contract price (tr. 2/162). As stated by the Government's engineer with respect to the laser hardening waiver (ex. A-61):

I do believe that Kurt Manufacturing does have a legitimate cost impact regarding these four components. . . . However, their [sic] were many Waivers and Deviations that were incorporated that had significant cost savings to Kurt Manufacturing. Negotiations were conducted with each modification and should be final. . . . Kurt Manufacturing has simply chosen to point out the areas where there [sic] costs increased, while ignoring the areas where cost saving occurred.

19. Appellant and the Government executed Modification No. P00001 on 11 August 1994 and 15 August 1994 respectively. Insofar as pertinent this bilateral modification incorporated into the contract 10 NORs issued by the Government, including those identified in the Government letters of 14 March 1994 and 9 May 1994 (findings 11, 13) pertaining to the right and left rocking arms, base clamp, right and left nose clamps and sector gear. The modification also included eight deviations requested by appellant, a revised delivery schedule and a computer aided drafting file. Given this mix of changes to the contract, appellant agreed in writing to a decrease in contract price in the amount of \$250.60. Appellant also agreed to a release. No reservations or exceptions were filed (R4, tab 3).

20. Appellant and the Government executed Modification No. P00002 on 7 October 1994 and 13 October 1994 respectively. Insofar as pertinent, this bilateral modification incorporated into the contract the seven NORs issued by the Government that were subject of the contracting officer's letter of 25 July 1994 (finding 14) including changes to the left grips control lever and left nose clamp. It also included one deviation requested by appellant. Given the nature of these changes, appellant agreed in writing to perform this work at no change in contract price. Appellant also agreed to a release. No reservations or exceptions were filed. (R4, tab 4).

21. Appellant and the Government executed Modification No. P00003 on 6 April 1995 and 10 April 1995 respectively. Insofar as pertinent, this bilateral modification incorporated into the contract 11 NORs issued by the Government, including the 10 drawing revisions that were subject to the contracting officer's letter of 29 November 1994 (finding 15) for the left and right rocking arms and nose clamps. Also included were 11 deviations and 2 waivers requested by appellant and a revised delivery schedule. Given the above, appellant agreed to a decrease in the contract price in the amount of \$1,566.60. This modification also contained a release paragraph similar to that in Modification Nos. P00001 and P00002, except that the last five words of the paragraph appear to have been omitted. Appellant filed no reservations or exceptions. (R4, tab 5)

22. Appellant and the Government executed Modification No. P00004 on 24 July 1995 and 25 July 1995 respectively. Insofar as pertinent, this bilateral modification incorporated into the contract nine NORs issued by the Government including changes to the right and left rocking arms, base clamp, right stop lever and left grips control lever. Also included were 22 waivers requested by appellant, and a revised delivery schedule. Given all of the above, appellant agreed in writing to accept a net increase of \$1,134 to the contract price. This modification also contained the same incomplete release language as Modification No. P00003. Appellant filed no reservations or exceptions.

23. On 29 September 1995, the Government issued Modification No. P00006, which exercised the Government's option to obtain 40 additional left and right rocking arm assemblies.

24. Appellant and the Government executed Modification No. P00007 on 16 November 1995, after first article approval. Insofar as pertinent this bilateral modification incorporated into the contract those deviations and waivers that had been approved for the first article only, and now were to be applied to the production units and option quantities. The modification also contained additional deviations and waivers requested by appellant. Given this mix of changes, appellant agreed in writing to perform this work at no additional change to the contract price. This modification did not contain a release. (R4, tab 9)

25. Appellant and the Government executed Modification No. P00010 on 10 September 1996 and 11 September 1996 respectively. Insofar as pertinent this bilateral modification incorporated into the contract four notices of revision issued by the Government related to the rocking arms (left and right), the base clamp and one waiver requested by appellant and also provided for wood shipping crates and a revised delivery schedule. Appellant agreed in writing to accept \$298,461.32 for these changes. A complete release was also included. Appellant filed no reservations or exceptions.

## Claim and Appeal

26. At a meeting on 1 November 1995, after first article approval, appellant presented to the Government its estimated cost impacts attributable to TDP defects. Government representatives listened to the presentation but made no commitments. Appellant submitted revised cost estimates on 19 April 1996. By letter to the contracting officer dated 4 June 1996, appellant notified the Government of all claims it was asserting against the contract related to the TDP from the beginning of the contract to date, in the amount of \$442,184 for the left rocking arm assembly and \$373,927 for the right rocking arm assembly, for a total of \$816,111 (ex. A-51). With the exception of the most recent revisions to the rocking arms and the base clamp, this letter for the most part sought recovery of cost impacts for earlier drawing revisions which appellant had represented in writing did not impact contract price, or had otherwise been addressed in contract modifications which it had signed.

27. It appears that the Government sought further cost breakdowns from appellant related to the NORs for the base clamp and rocking arm assemblies that had not been previously addressed through bilateral contract modifications. Appellant provided these cost breakdowns by letters dated 18 June 1996 and 27 June 1996 (exs. A-53, -55). These NORs were addressed and negotiated under Modification No. P00010, which was executed by the parties in September 1996 (finding 25).

28. By letter to the contracting officer dated 15 October 1996, appellant advised that it still wished to pursue its claims related to the claimed cost impacts under all earlier drawing revisions from the beginning of the contract, per its letter dated 4 June 1996. Appellant contended that the Government still owed appellant roughly \$539,220 (R4, tab 97). Appellant did not certify this request for equitable adjustment (REA).

29. By letter to appellant dated 30 January 1997, the contracting officer denied appellant's REA, contending primarily that the subject drawing revisions had previously been addressed and settled by the parties under bilateral contract modifications (R4, tab 98). This contracting officer's decision was later withdrawn since appellant did not certify its claim.

30. By letter to the contracting officer dated 30 April 1997 appellant revised its REA, citing those deviations and waivers that it claimed had an impact on its costs. However these deviations and waivers also had been addressed in the parties' bilateral contract modifications. Notably, the REA provided the following (R4, tab 99):

It should be noted that even though several request for waivers submitted by the contractor contained a "no cost impact" statement, it was later found that there were indeed, substantial cost increases involved.

*Additionally, some known cost increases were not claimed at the time because of the implied “trade-offs” for approval of other waivers and deviations.*

*Kurt Manufacturing understands that these “no cost impact” statements could be legally binding on the contractor. We would however, request that the government consider these significant cost increases during evaluation of our revised claim.*

(Emphasis added) The REA amount remained the same, roughly \$539,220. Appellant again did not certify the REA.

31. On 3 July 1997 appellant submitted a revised REA. This document was in all material respects identical to the REA of 30 April 1997, except that it was certified (R4, tab 101). The contracting officer denied the claim by letter dated 18 July 1997, contending that appellant’s cited drawing revisions, waivers and deviations were previously addressed by the parties during negotiations of the contract modifications, and that no further compensation was warranted (R4, tab 102). The contracting officer did not assert that the releases in the contract modifications barred further recovery. Nor did the Government assert the defense of release in its pleadings or as an affirmative defense.

## DECISION

### I. The Purported Standstill Agreement

Appellant contends that it abided by the request of the Government’s program manager to defer the noticing of contract price adjustments until after approval of first article. However, under the contract any such request had to be issued by the contracting officer or authorized by the contract. Appellant has not shown that the contracting officer issued or approved this request, or that the program manager was otherwise authorized to issue it. If anything, the record strongly suggests that the contracting officer was unaware of the request. The contracting officer repeatedly sought appellant’s position on the price and delivery impact of NORs prior to first article approval. There would have been no need to make these inquiries if such matters were to be handled after first article approval. Appellant advised of the cost impacts, if any, in writing and not once did it reference any so-called agreement to defer these matters. Nor did it do so when it executed contract modifications prior to first article approval which expressly incorporated drawing revisions, deviations and waivers.

With respect to the vast majority of NORs, appellant did not abide by any standstill agreement. To the extent that appellant agreed to comply with the Government program

manager's wishes on certain occasions, such an agreement was unauthorized and of no legal import under this contract.

## II. The Claimed Impact of NORs

Appellant has the burden to prove its claim by a preponderance of the evidence. It must show that specific NORs caused it to incur additional costs beyond those required by the contract before the NORs were issued. Appellant has not met its burden.

We have no basis to question appellant's technical explanations of drawing discrepancies. However, we are not persuaded that any of these discrepancies caused any monetary impact for which appellant remains uncompensated. Appellant consistently represented to the Government in writing during the project that the NORs had little or no impact on contract price. We give such contemporaneous communications between the parties greater weight than any after-the-fact evidence appellant has presented.

Even if we were to assume that appellant incurred extra, unanticipated costs attributable to the NORs, these NORs were addressed in the negotiation of bilateral contract modifications. Tradeoffs were made between drawing changes and deviations and waivers sought by appellant. Appellant obtained due consideration under the contract modifications for the discrepancies it is now claiming.

## III. The Claimed Impact of Deviations and Waivers.

Appellant's claim related to deviations and waivers has similar infirmities. During performance, appellant represented in writing that the vast majority of its requests were minor and had no effect on contract price. Appellant's contention now that these items actually had a major impact on the costs of performance is simply not credible. Moreover, after first article approval the parties addressed, under Modification No. P00007, 20 deviations and 23 waivers sought and obtained by appellant to be applied to the production of all units plus option quantities. These include the very deviations and waivers under which appellant is now claiming sizeable sums of money. At that time, appellant agreed to accept all of these contract changes at no change in contract price. Appellant executed the modification without condition or reservation. Appellant may not reopen these negotiations on the deviations and waivers at this late date. The bilateral contract modification serves as the parties' agreement barring any further recovery with respect to these matters.

The appeal is denied.\*

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\* Given the disposition of the appeal, we need not address the Government's contention that the signed releases also bar appellant's recovery.

Dated: 17 May 2000

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JACK DELMAN  
Administrative Judge  
Armed Services Board  
of Contract Appeals

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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CARROLL C. DICUS, JR.  
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. 51074, Appeal of Kurt Manufacturing Company, rendered in conformance with the Board's Charter.

Dated:

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