

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Elter S.A.) ASBCA Nos. 52349, 52354, 52358,
) 52371, 52385, 52391, 52409, 52415,
) 52416
)
Under Contract No. N33191-96-C-0716)

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OPINION BY ADMINISTRATIVE JUDGE HARTY

The subject contract was awarded to Elter S.A. (Elter) for multiple construction projects at Souda Bay, Crete, Greece, in support of the United States Navy. These nine appeals¹ involve claims for additional costs and time extensions in connection with various of the projects based on alleged oral changes ordered by Government officials. We are to decide entitlement only. We deny the appeals principally because Elter has failed to establish that a contracting officer either authorized or ratified the claimed changes.

GENERAL FINDINGS OF FACT

Background

The Department of the Navy, Engineering Field Activity Mediterranean Contracts Office, Souda Bay, awarded Contract No. N33191-96-C-0716 to Elter on 28 September 1996 for multiple construction projects at the U.S. Naval Support Activity, Souda Bay, Crete, Greece (52327 R4, tabs 1, 3; tr. 14). The contract incorporated provisions typical in overseas construction contracts, including: FAR 52.233-1 DISPUTES (OCT 1995) -

ALTERNATE I (DEC 1991); FAR 52.243-4 CHANGES (AUG 1987); FAR 52.214-34 SUBMISSION OF OFFERS IN THE ENGLISH LANGUAGE (APR 1991); FAR 52.225-14 INCONSISTENCY BETWEEN ENGLISH VERSION AND TRANSLATION OF CONTRACT (AUG 1989); and a choice of law provision choosing U.S. substantive law in the event of a dispute. Paragraph 15, entitled “Correspondence in the English Language,” of contract Section 01110 required the contractor to prepare all correspondence relating to the contract in English, while not ruling out the preparation of correspondence in the local language for a contractor’s own record purposes, and provided that “[i]n case of dispute or claim, the English version will govern.” (52327 R4, tabs 6, 7 at § 01110-9)

The contract included FAC 5252.201-9300 CONTRACTING OFFICER AUTHORITY (JUN 1994), which provided:

In no event shall any understanding or agreement between the contractor and any Government employee other than the Contracting Officer on any contract, modification, change order, letter of verbal direction to the Contractor be effective or binding upon the Government. All such actions must be formalized by a proper contractual document executed by an appointed Contracting Officer. The Contractor is hereby put on notice that in the event a Government employee, other than the Contracting Officer, directs a change in the work to be performed, or increases the scope of the work to be performed, it is the Contractor’s responsibility to make inquiry of the Contracting Officer before making the deviation. Payments will not be made without being authorized by an appointed Contracting Officer with the legal authority to bind the Government.

(52327 R4, tab 6)

The Authority of the Parties’ Representatives

The authority of the Government’s representatives was discussed at a 17 October 1996 pre-construction conference. The minutes of the meeting were memorialized and sent to Elter by letter dated 22 October 1996. The minutes identified the contract’s administrative contracting officers as LT Jason Fournier and Mr. David Sellman and stated: “These are the only people who can direct work or change the contract. Do not take direction from anyone else that increases, decreases, or changes the scope of the work.” (52349 R4, tab 4 at 2)

On the date of contract award, 28 September 1996, LT Jason Fournier was the military officer assigned to the position of deputy resident officer in charge of

construction. LT Fournier remained at Souda Bay through December of 1997. (Tr. 298-99) He was replaced by LT Mark R. Weller. LT Weller arrived prior to LT Fournier's departure in December of 1997 and remained through May of 1999. He was replaced by LTJG M. B. Moore, who had no involvement until after the projects were completed. (Tr. 44, 140, 158-59) In August of 1997, Mr. Patrick Donnelly took Mr. Sellman's place as contracting officer. He was responsible for all contracts at Souda Bay. (Tr. 48-49, 87, 163) Both civilian and military contracting officers reported to the public works officer, who also had contracting officer authority, but rarely exercised it. When the contract was awarded, Lieutenant Commander Weil was the public works officer; later he was replaced by Lieutenant Commander Johnston. These individuals were the only authorized contracting officers. (Tr. 163)

Mr. Wayne Uhl was the Government's project engineer throughout the construction portion of the contract. He was stationed at Souda Bay from 1994 through April of 1999. Though he played an important role in the administration of the project, he was not an authorized contracting officer. However, he had contracting officer authorization to negotiate changes up to the point of signature. During the contract he negotiated changes that were then signed by a contracting officer. There were three construction representatives involved in the contract: Mr. David Cates, Mr. Loizos Papakyriakou and Mr. Thomas Morris. They worked for Mr. Uhl and were not authorized to bind the Government. They operated under instructions not to direct additional work. (Tr. 108, 166-67, 213, 245, 248-53)

Elter's authorized representatives were its president, Mr. Dimitrios Messadakos, its vice-presidents, Mr. John Messadakos and Mr. Vassilios Messadakos, and Elter's site supervisor, Mr. Dionisis Paraskakis. Mr. Paraskakis was present at the site and handled the day-to-day, on-site contract administration throughout the performance of the contract. He was authorized to negotiate and agree to contract changes on behalf of Elter and, in fact, signed all but one of the bilateral modifications issued under the contract. (52327 R4, tab 15; tr. 147-48)

Professor Constantinos Damatis was Elter's senior mechanical/electrical engineer - quality control. Professor Damatis is a qualified mechanical engineer with over 35-years experience, a retired professor, who taught his subject area at the Technical Institute of Athens, and a consultant to major companies. In 1996, he joined Elter and was on-site from 1 July 1997. (Tr. 208-10)

Professor Damatis was not authorized to represent Elter in its contractual dealings with the Navy, although he consulted closely with Mr. Paraskakis. Professor Damatis testified on several occasions during the five-day hearing on these multiple appeals that neither he nor the Navy's construction representatives had authority to change the contract. (Tr. 388-90, 476, 600-01, 783, 830-31)

Professor Damatis was aware of the proper procedures to follow if Government actions were considered a change. Professor Damatis also acknowledged that Elter had submitted notices to the Navy on occasions when it considered oral instructions by the contracting officer, or a construction representative, to be a change. On more than one occasion a signed contract modification followed the notice. (Tr. 481-82)

The Process for Making Changes to the Contract

The parties discussed the process for making changes to the contract at the pre-construction conference. Mr. Uhl testified that Elter's representatives were informed that there were several avenues open to it for notifying the Government of changes to the contract. According to Mr. Uhl, if the contractor felt that there was additional work, it could: (1) discuss it at the weekly meetings held under the contract and Elter's view would be recorded in the meeting minutes; (2) state so in the daily report, which was required for every working day; or (3) submit a Request for Information (RFI). The RFI was a way for Elter to submit questions to the Government for items on which it needed additional information. Elter used the RFI process during contract performance, and in a number of instances, an inquiry led to a contract modification. (Tr. 248-50, 270-71) Mr. Donnelly also testified that Elter's site superintendent, Mr. Paraskakis, understood the necessity of giving the Navy notice of those conditions which Elter considered a change and had done so during performance (tr. 904-05).

One of the methods for affecting a change identified at the pre-construction conference was the use of a "No Cost Field Change" (NCFC). An NCFC was defined as "a bi-lateral agreement between the ROICC [Resident Officer In Charge of Construction] and contractor for deviations that do not effect time or contract cost." It was noted that "Changes - other than minor technical issues can only be accomplished through a formal modification of the contract signed by LT Fournier or Dav[id] Sellman." (52349 R4, tab 4 at 3, 6) Mr. Uhl testified persuasively that he made it clear to Elter's site supervisor, Mr. Paraskakis, that he was not to proceed with any changes to the contract without a contract modification or a signed NCFC (tr. 248-49).

GENERAL DISCUSSION

It is basic that Government representatives must have actual authority to contract in order to obligate the Government. "[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Insurance v. Merrill*, 332 U.S. 380, 384 (1947). *See also City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991); *R & R Marine and Industrial Repair*, ASBCA No. 34279, 88-2 BCA ¶ 20,747 at 104,826-27. We recognize that a contractor does not usually volunteer to do more work than is required under a contract if its costs are increased. *See Service Engineering Co.*, ASBCA No. 42126, 96-2

BCA ¶ 28,376 at 141,703; *Carl J. Bonidie, Inc.*, ASBCA No. 25769, 82-2 BCA ¶ 15,818 at 78,398-99. However, the burden of proof is on the party seeking to enforce an alleged agreement to show that the official with whom the agreement was made had the authority to bind the Government. *See S.E.R., Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 4 (Fed. Cir. 1985); *S-TRON*, ASBCA Nos. 45893, 46466, 96-2 BCA ¶ 28,319 at 141,397. An unauthorized contract action may be ratified in appropriate circumstances by an official with contracting authority. *E.g., Reliable Disposal Company, Inc.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895 at 119,717-18.

The record is clear that Elter understood the limitations and authority of the Government's agents and Elter has not suggested otherwise in its briefs. Mr. Paraskakis was unavailable and did not testify. Elter's only witness concerning the alleged oral changes which are the subject of the nine appeals before us was Professor Damatis. Professor Damatis knew which individuals were authorized to make changes on behalf of the Government. Nevertheless, in a number of instances, Professor Damatis has identified the Government's construction representatives, either Mr. Cates or Mr. Papakyriakou, as the source of oral orders. None of the construction representatives was authorized and there can be no recovery in these instances. In a number of other cases Professor Damatis attributed alleged oral orders with varying degrees of certainty to LT Fournier, LT Weller, or Mr. Donnelly. Both LT Fournier and Mr. Donnelly testified and denied ordering any of the alleged changes, pointing out that Elter's representative was Mr. Paraskakis and they dealt with him. Though LT Weller was unavailable to testify, Mr. Donnelly, who had overall responsibility for the contract and was in a position to know, was unaware of any order by LT Weller in the specific cases identified by Professor Damatis. Mr. Uhl also supported Mr. Donnelly's testimony in this regard. Although not authorized to enter into changes, Mr. Uhl played an important role in the day-to-day contract administration. We credit their testimony, particularly in light of the procedures that the parties established for raising contract issues and their recourse to them throughout contract performance. Elter knew how to seek approval for items it considered to be changes and did so in other instances.

The unavailability of Mr. Paraskakis – who had the authority to act on Elter's behalf and was central to its contract administration – has complicated Elter's proof. We cannot ignore the negative impact that his absence has on the adequacy of Elter's proof. The record offers little explanation of the extent of his involvement in the alleged oral changes. We have two instances (which we treat as admissions) reported by Professor Damatis in connection with ASBCA No. 52349, *infra*, that highlight the importance of understanding Mr. Paraskakis's actions. First, Professor Damatis acknowledged that Mr. Paraskakis orally agreed to sign a no-cost change. Since he was authorized to represent Elter, we are left wondering if he took the same approach in connection with some of the other alleged oral instructions. Second, Professor Damatis testified that Mr. Paraskakis told him that funds were not available for the specific project and that funds should be found on another project so that Elter could be compensated later for the work in a modification. This approach requires us to infer that Mr. Paraskakis acted contrary to the understanding that Elter's

representatives had about how to gain approval of contract changes. However, it can as easily be inferred that Elter's representatives simply performed the work without authorization and took a business risk that it would be compensated later.

In addition, Elter's proof in these appeals is further handicapped by the absence of contemporaneous written evidence of the alleged oral changes. Indeed, in all of the appeals, the Government first received notice of the changes with Elter's claims – from one year to over two years after the alleged events. As the Government points out, the failure to give timely notice under the Changes clause may in certain circumstances bar recovery. *See Central Mechanical Construction, ASBCA Nos. 29431 et al., 85-2 BCA ¶ 18,061 at 90,657-59* (failure to comply with notice requirements will not support a claim denial without a showing of prejudice to the Government). However, in view of our conclusion that Elter has not established that the alleged oral changes were authorized or ratified by a contracting officer, we do not address the other ground for decision advanced by the Government. *See Clark v. Department of the Army, 997 F.2d 1466, 1469-70* (Fed. Cir. 1993), *cert. denied*, 510 US 1091 (1994).

In the final analysis, we must conclude that Elter has failed to meet its burden of proof. In light of our general findings and legal conclusion, we deal with each of the appeals briefly, *infra*.

ASBCA No. 52349

This appeal arises from the contract's C5-94 UPGRADE FIRE STATION project. The project's scheduled completion date, as amended, was 2 July 1997. Elter did not complete the project as scheduled. On 16 July 1997, the Government's architect-engineer contractor for the project, Benspo Hellas (Benspo), visited the fire station to survey the situation. Based on the visit, Benspo submitted several recommendations to Mr. Uhl by letter dated 22 July 1997. The work noted by Benspo included: (1) interlock a toilet roof exhaust fan with a toilet light switch; (2) interlock an outside air intake hood motorized damper with a bunk room exhaust fan, with the fan being operated by a manual starter installed in the bunkroom; (3) connect a motorized damper with a roof exhaust fan in maintenance room, interlocked with the air intake louver, and operated by a manual starter installed in the maintenance room; (4) an inline exhaust fan was to be omitted if heat pump provided by contractor included an optional economizer accessory; (5) power to the fans to be from LP4 as show in the drawings; (6) all fractional HP magnetic motor starters on exhaust fans were to be deleted and weather proof disconnect switches provided at the fans; (7) disconnect switch for rooftop heat pump shall be non-fusible. (52349 R4, tab 8; 12; tr. 202-04, 219-20) In response, Mr. Uhl generated NCFC No. 12, dated 24 July 1997, incorporating the Benspo letter, and forwarded it to Elter. In the "Reason for change" block, Mr. Uhl wrote, "[t]o provide clarifications." Typed on the form, in bold print, was the statement: "This Change will NOT result in a change in contract time or amount." (52349 R4, tab 9)

At a 7 August 1997 jobsite meeting, Elter advised the Government that it would sign NCFC No. 12. Professor Damatis acknowledged in this respect it “was stated that they [Elter] would proceed signing this no-cost field change.” (Tr. 222) Professor Damatis also testified that after receipt of the 24 July 1997 NCFC, Mr. Paraskakis told him that funds were not available for the specific project and that funds should be found on another project so that Elter could later be compensated for the work in a modification. He testified that this had been done before on the same project and previously on a different project, but he did not elaborate. (52349 R4, tab 12 at 3; 52327 R4, tab 15; tr. 213-15)

The Government took beneficial occupancy of the fire station on 8 August 1997 and later assessed 37 days of liquidated damages (52349 R4, tab 11 at 3; tr. 217, 222). Neither Elter nor the Government ever signed NCFC No. 12 (tr. 248).

By letter dated 30 April 1999, Elter submitted a claim to the Government in the amount of 1,120,882 drachmas and requested a 15-day time extension (52349 R4, tab 12). In its claim, Elter alleged that on 24 July 1997 the contracting officer “by means of an oral order instructed ELTER’s representative Mr. Damatis . . . to regard the requested work items stated in [NCFC] No. 12 . . . as a change....” (52349 R4, tab 12) Items 4, 5 and 6 of the Benspo letter were not part of the claim. However, Elter also included a claim item for installing a drain system for the heat pump that was not mentioned in the NCFC (52349 R4, tabs 9, 12).

The claim was the first notice the Government had concerning the items forming a basis for a claim (tr. 252-53, 271). By letter dated 19 July 1999, the contracting officer denied the claim, but indicated that he would entertain a settlement with regard to interlocking the toilet exhaust fan with the toilet light switch (52349 R4, tab 15). This timely appeal followed.

Professor Damatis identified the contracting officer for this specific project as LT Fournier, with the implication that he might have ordered the work. LT Fournier denied that he directed Elter to perform the changes in Elter’s claim and was not aware of anyone else directing Elter to do so (tr. 211-12, 298-99). We find the denial credible.

Mr. Uhl testified persuasively that taken as a whole the changes reflected in proposed NCFC No. 12 amounted to a deductive change, although the connection of the exhaust fan to the light switch would, standing alone, be an extra item of minimal cost. With respect to the claim item for installing a drain system for the heat pump, Elter acknowledged that a drain was required, but maintained that it extended the drain further than was required (tr. 231, 247, 265).

DISCUSSION

In view of LT Fournier's testimony, even assuming the extension of the drain was a change, there can be no recovery. Since Mr. Paraskakis had the authority to contractually bind Elter, we see no need to look further with respect to the other items. His agreement ended the matter. Moreover, in view of Mr. Uhl's testimony the agreement was apparently a prudent one. If Mr. Paraskakis intended to seek compensation at a later date, there is no evidence this intent was communicated to anyone on the Government side. If either he or Elter management had a change of heart, the matter should have been raised with a contracting officer before any work was performed. Under the procedures agreed to by the parties, the no-cost change order was just that – no cost. It would not be reasonable for Elter to rely on a proposed, unsigned NCFC, without more, as direction by the Government to perform extra work for compensation. *See Construction Foresite, Inc.*, ASBCA No. 42350, 93-1 BCA ¶ 25,515 at 127,067 (no-cost field change did not by itself amount to Government direction).

DECISION

The appeal is denied.

ASBCA No. 52371

ASBCA No. 52371 is one of several appeals involving Project R-500, the bowling center. The project's last scheduled completion date was 15 April 1998 (52327 R4, tab 15 at P00028). The Government took beneficial occupancy on 14 May 1998 and assessed 29 days of liquidated damages (52327 R4, tab 15 at P00034).

After the Government took beneficial occupancy on 14 May 1998, it completed a discrepancy checklist. Included in the discrepancies, at line item number 125, was a statement that "[e]lectrical panel A-1 - this panel was not shown in specifications." The Government was willing to accept the discrepancy upon the condition that Elter take corrective action to include showing the panel on the red line drawings and providing a NCFC. (52358 R4, tab 13) Elter did not sign a NCFC associated with this discrepancy (tr. 599-600).

By letter dated 5 May 1999, Elter sought 3,149,000 drachmas and a 20-day time extension for alleged oral changes requiring wiring changes to the interior lighting system, particularly the installation of an additional circuit panel, and interlocking the center's exhaust fans with various appropriate light switches. (52358 R4, tab 13) The contracting officer denied the claim in a final decision dated 13 July 1999 and this timely appeal followed (52358 R4, tab 16).

Professor Damatis testified that the oral directions pertaining to the lighting system were allegedly given on 19 June 1997 to Mr. Paraskakis, while the directions for interlocking the exhaust fans were given to him on 6 November 1997. He testified that he

spoke directly with Mr. Cates concerning the interlocking of the exhaust fans. However, since the oral direction concerning the lighting system occurred before he arrived, his testimony was that he had heard that Mr. Cates had directed Mr. Paraskakis. Professor Damatis testified that that he did not know who, if anyone, had instructed Mr. Cates (tr. 593). He also testified that he discussed the issue of compensation for the work claimed with Mr. Paraskakis and he was told that all of the items would be incorporated into a modification. He also indicated that he mentioned compensation to Mr. Cates, but did not elaborate. (Tr. 592-97)

The parties agree that three panel boards were installed, while only two panels are shown on the contract drawings (tr. 612). Elter's shop drawings did not indicate a deviation from contract requirements. Mr. Uhl testified that the other work claimed by Elter to be a change was already required by the contract drawings and specifications or submitted in Elter's shop drawings. (Tr. 612, 617-35, 638-41)

DISCUSSION

Prior to Elter's claim of 5 May 1999, there is no evidence that Elter gave notice of changes to the Government. Putting to one side the hearsay character of Professor Damatis's testimony concerning the alleged direction given to Mr. Paraskakis in June, the oral orders were traced in both instances to Mr. Cates, who did not have contracting officer authority. Both Mr. Donnelly and LT Fournier denied ordering the changes. Neither the Government's proposal of a NCFC for the extra lighting control panel nor Elter's decision not to sign it is material. If anything, the Government's after-the-fact proposal of a NCFC is consistent with a Government view that it was not prepared to compensate Elter for the work. Elter has failed to carry its burden of proof. In view of our conclusion, we make no findings about whether the alleged changes were required by the contract.

DECISION

The appeal is denied.

ASBCA No. 52416

This appeal also involves the bowling center, Project R-500 and concerns oral directions allegedly given at the same time as those involved in ASBCA No. 52371 (tr. 658). By letter dated 28 May 1999, Elter sought 3,050,169 drachmas and a 20-day time extension for alleged oral direction given on 19 June and 6 November 1997 to (1) provide power line circuits to the bowling lane monitor system and bowling computer system and a new electrical panel board to house these line circuits and (2) provide receptacles for the emergency lighting system and chemical feeder unit. (52416 R4, tab 5D)

The initial direction on 19 June 1997 was attributed to Mr. Cates, while the November 1997 direction was allegedly given by Mr. Cates to Professor Damatis (tr. 592-93, 663). However, the discussions on 19 June focused on the first element of the claim and were alleged to have been reflected in Elter shop drawing R500-144, which was approved by the Government on 8 August 1997. No deviation from contract requirements is noted on the drawing. (Tr. 652, 672) The 6 November direction involved the addition of a requirement for the provision and installation of receptacles and plugs for the emergency lighting fixtures. This direction led to Modification No. P00025 dated 27 February 1998, which provided compensation for six receptacles. (52327 R4, tab 15 at P00025; tr. 662-63)

By letter dated 4 October 1999, Elter appealed on the basis of a “deemed denial” (41 U.S.C. § 605(c)(5)) from the contracting officer’s failure to issue a final decision on the claim within 60 days of receipt and we have jurisdiction on this basis. By letter dated 20 October 1999, the contracting officer issued a final decision denying Elter’s claim, with the exception of the emergency lighting element of the claim (52416 R4, tab 6).

On 22 November 1999, Mr. Donnelly issued unilateral Modification No. P00042, which provided compensation for two additional receptacles and plugs for the emergency lighting. Mr. Uhl explained that it was his fault that all of the emergency lighting receptacles and plugs were not covered by Modification No. P00025. He testified that Mr. Paraskakis raised the matter with him as a change and he agreed. Together he and Mr. Paraskakis surveyed the building and counted six receptacles, missing two. Modification No. P00025 was prepared on the basis of six receptacles. When the error was discovered after receipt of Elter’s claim, the matter was corrected in unilateral Modification No. P00042, which authorized compensation for two additional receptacles. (52416 R4, tabs 2B, 6; tr. 664, 659, 670-72).

Mr. Uhl also testified that with the exception of the receptacles and plugs for the emergency lights, all of the items at issue in this appeal were required by the contract and shown in the contractor’s shop drawings without indication of any change from contract requirements (tr. 670-83).

There is no evidence that Elter gave notice of the claim items to the Government prior to its 28 May 1999 claim (ex. G-19; tr. 678).

DISCUSSION

Based on our own review and Mr. Uhl’s testimony, which we found persuasive, Elter has not persuaded us that it has did more than was already required by the contract – apart from the emergency lighting issue. The way the emergency lighting issue was handled underscores the Government’s arguments throughout these appeals that Elter knew how to raise a matter to the Government when it considered that a change was involved. In this

case, the discussion led to a contract modification, which was corrected when later found to be in error.

DECISION

The appeal is denied.

ASBCA No. 52354

This appeal also arises from the bowling center, Project R-500. By letter dated 27 April 1999, Elter made a claim for 1,435,896 drachmas and a 15-day time extension for installing: (1) air vent collectors to the cold/hot water return piping system installed at the highest point on the completed heating, ventilation and air-conditioning (HVAC) system installation, followed by a drain system operated through gate valves installed at a lower point; (2) automatic air vents, with gate valves to the HVAC cold/hot water supply piping system installed at the highest point on the system; and (3) a drain system to the HVAC expansion tank and air separator operated through gate valves installed at a lower point. These changes were allegedly made due to a contracting officer's oral instructions on 9 April 1998. (52354 R4, tab 5E; tr. 373-77, 406-10) Elter's claim was denied in a final decision dated 24 June 1999 (52354 R4, tab 6) and Elter filed this timely appeal.

The Government acknowledges that all of the work in question was performed, but maintains it was required by the contract (tr. 365, 424). There was considerable testimony focused on whether the alleged changes were actually changes from contract requirements. Elter's own evidence was equivocal on the question of whether it did more than the contract required (tr. 391-96). The Government's evidence was more persuasive (tr. 406-10), with the possible exception of the vent collectors. However, the importance of the collectors to the proper functioning of the venting system was not established (tr. 419, 426, 438-39).

With respect to the oral direction, Professor Damatis identified Mr. Cates as the construction representative involved (tr. 369). He testified that it was "possible the Contracting Officer of this project, . . . after discussion[s] we had with the construction representative, Mr. Cates," ordered the work because he understood the installation was an improvement (tr. 374-76). Later in his testimony, when asked to identify who ordered the additional work Elter claimed on air vents, Professor Damatis said, "[i]t was discussed when I was on site, I told Mr. Paraskakis, about it. And Mr. Paraskakis, about after one day he told me to proceed as it was ordered and asked." When pressed, he identified LT Weller as involved in the discussions. (Tr. 396-97)

Based on his investigation, Mr. Donnelly, the primary contracting officer responsible for the contract, knew of no oral order being issued for the items in question. He testified that at no time did Mr. Paraskakis come to him or, to his knowledge, LT Weller to indicate the items were contract changes. (Tr. 420, 422-25) Mr. Uhl testified that he

spoke with LT Weller regularly, if not daily, and was unaware of any oral order (tr. 405-06). Both testified that they first learned that Elter considered the claimed items to be a change from contract requirements when Elter filed its claims (tr. 403, 425).

DISCUSSION

With the possible exception of the vent collectors, Elter has not established that the changes in question were a departure from contract requirements. If we were to assume that the addition of the vent collectors was an “extra,” we would nevertheless conclude that Elter has failed to establish that the collectors were authorized by a contracting officer. The record is silent on what, if anything, may have transpired between LT Weller and Mr. Paraskakis during subsequent conversations since neither testified. It may be that Mr. Paraskakis shared the Government’s view that the items were not changes to contract requirements. Or, there might be some other explanation. In any event, Mr. Cates lacked the authority to contract. Although LT Weller did not testify, Mr. Donnelly, who had overall responsibility for the contract and was in a position to know, testified that he knew of no order. His testimony was supported by Mr. Uhl. The construction representatives worked for him and, although he lacked contracting officer authority, he played an important role in contract administration. Neither Mr. Donnelly nor Mr. Uhl was aware that Elter considered the items changes until the claim was filed. We found their testimony persuasive.

DECISION

The appeal is denied.

ASBCA No. 52358

This appeal involves alleged oral direction given to Professor Damatis on 22 January 1998 to install grounding and communication system handholes, connect an irrigation system timer control to an electrical panel, and install a grease trap ventilation pipe in connection with the bowling center, Project R-500. Elter’s claim was initiated by letter dated 14 May 1999, and sought 2,239,390 drachmas for the alleged changes, together with a time extension of 25 days. (52358 R4, tab 14) The contracting officer denied the claim in a final decision dated 13 July 1999 (52358 R4, tab 16). Elter subsequently filed this timely appeal.

Professor Damatis testified that the change was ordered “through a question” asked by LT Weller to one of the Navy’s construction representatives, Mr. Papakyriakou (tr. 480). Professor Damatis explained that often direction would be given through construction representatives, and that he “would be crazy to do additional works on [his] own, voluntarily.” He emphasized that while he did not have authority to make changes, he always discussed matters with Mr. Paraskakis. (Tr. 457-58, 461, 476)

Professor Damatis acknowledged that the contract required Elter to ground the electrical system, but maintained that it did not require handholes. He testified that handholes were preferred as a way of locating the grounding system, dismantling and testing the system. Professor Damatis acknowledged that the contract required the irrigation timer to be connected to the nearest electrical panel board, but said that the schedule for the nearest panel board did not include a connection for the irrigation timer. The result was that Elter power fed the irrigation timer through a plug and receptacle which was wired to the nearest electrical panel. With regard to the ventilation of the grease trap, Professor Damatis stated that the contract design drawings mention a grease trap vent system, but did not indicate a route for the venting. (Tr. 464-66, 471-72, 474-75, 478-80)

Mr. Donnelly testified that to his knowledge no oral change directions had been given for the items in question (tr. 510). Mr. Uhl also testified Elter never provided notice that it considered the items at issue to be changes during his tenure (tr. 483). Moreover, Mr. Uhl believed that all of the items in Elter's appeal were either required by the contract or, in one instance, incorrectly stated in the claim (tr. 488). He testified that additional communication system handholes were not installed or required (tr. 494, 503-04) and the irrigation control timer installed by Elter was connected as required by the contract (tr. 495-97). Mr. Uhl also confirmed that ventilation was installed as required for the kitchen grease trap (tr. 498).

With respect to the electrical grounding system handhole, Mr. Uhl testified that while the contract required grounding, the contract was silent insofar as the provision of handholes, but Elter provided the electrical grounding system through local subcontractors and it was the custom at Souda Bay to provide handholes. In sum, he believed the items claimed did not represent changes. (Tr. 489-91, 505-07)

Three handholes were provided (tr. 517). Mr. Uhl testified that a precast concrete handhole placed over a grounding rod (which was required by the contract) and filled with gravel would cost less than \$100 U.S. per handhole (tr. 518-20) or \$300. Elter's claim places the value for three handholes at 296,250 drachmas (52358 R4, tab 14), which amounts to roughly \$953 based on a rate of 311 drachmas to one U.S. dollar.

DISCUSSION

The oral order in this appeal is traced to Mr. Papakyriakou, who did not have authority, and Professor Damatis, of course, lacked authority to commit Elter. However, we appreciate Professor Damatis's testimony that he would not act alone and consulted with Mr. Paraskakis. We are, nevertheless, unable to trace the alleged oral order to an authorized contracting officer and we do not know how Mr. Paraskakis viewed the matter. Mr. Paraskakis was authorized to make decisions on behalf of Elter as to what was or was not a change or, for that matter, whether to pursue a change. The evidence shows that Elter

did no more than conform to contract requirements, with the possible exception of the handholes for the electrical system grounding. If the grounding system were a change, its effect was quite limited – from \$300 to \$953. Without Mr. Paraskakis’s testimony, we are left to speculate whether he agreed with the Government entirely or did not consider the matter worth pursuing in view of the relatively modest amount involved. In any event, Elter has not established that the alleged changes were ordered or ratified by an authorized contracting officer.

DECISION

The appeal is denied.

ASBCA No. 52385

This is a timely appeal from a contracting officer’s final decision dated 2 August 1999 (52385 R4, tab 6), which denied Elter’s 1 June 1999 claim in connection with Project CR12-96, REPAIR/REPLACE THREE SUBSTATIONS (52385 R4, tab 5K). Elter was required to furnish all labor, materials, equipment and supervision to replace three existing electrical substations with new substations similar to others at Souda Bay (52327 R4, tab 14). The original project completion date was 7 July 1997 (52385 R4, tab 5B). Due to circumstances beyond Elter’s control, the transformers were delivered late. By letter dated 6 September 1997 (NSA/LR-0716/462), Elter requested a time extension of 90 days from 7 July 1997 to 6 October 1997 (52385 R4, tab 5D). The Government took beneficial occupancy of the project on 26 October 1997 (52385 R4, tab 5K), 111 days after the scheduled completion date.

On 26 November 1997, a month after the Government took beneficial occupancy, the parties negotiated bilateral Modification No. P00017. Elter’s site supervisor, Mr. Paraskakis, executed the modification on 1 December 1997 and Mr. Donnelly signed for the Government on 2 December 1997 (52327 R4, tab 15; tr. 770). The modification resolved Elter’s 6 September 1997 request and covered the following additional requirements:

Provide for all unforeseen excavations, underground cables, and splices encountered as a result of replacement of substations #1, #2 and #3.

....

Grade area around substation #2 and apron edge lighting regulator and backfill with gravel to resolve drainage problems.

The modification extended the completion date from 7 July 1997 to the date the Government took beneficial occupancy, 26 October 1997. By extending the contract completion date to the beneficial occupancy date, the Government relieved Elter from 22 days of liquidated damages. The modification stated that “[a]cceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect and for delays and disruptions arising out of, or incidental to the work as herein revised.” (52327 R4, tab 15)

LT Fournier prepared a memorandum of 26 November 1997 that recommended approval of the modification. The memorandum noted that “during installation several additional low voltage splices were required. This extra work was completed by the contractor to make the system complete and usable, without prior ROICC approval, but will most likely have merit if claimed.” In recommending approval of the modification, LT Fournier advised that the “contractor will agree to release his rights to all claims on this project . . . if we grant a 111 day time extension with no cost.” (Ex. G-26)

On 1 December 1997, Mr. Uhl wrote a recommendation that the modification be signed by the contracting officer with the understanding that it resolved all issues (ex. G- 25, tr. 790-92). He also testified that at no time after the agreement was reached on the modification did Mr. Paraskakis approach him or any other Government representative to allege that additional work was performed (tr. 789-90).

Mr. Donnelly subsequently concurred in LT Fournier’s recommendation (ex. G- 26) and in Mr. Uhl’s recommendation (ex. G-25) and signed the modification. He testified that prior to his receipt of the claim giving rise to this appeal, he received no indication from Elter that it had a claim that was not resolved by Modification No. P00017. He thought that “the substation project had been put to bed a long time ago” by the modification. (52327 R4, tab 15; tr. 802-03)

By letter dated 1 June 1999, Elter filed a claim seeking 5,153,019 drachmas in additional compensation for the following items:

1. Connecting the Arms Trailer to substation No. 2 with appropriate cable;
2. Connecting the Joint Venture office to substation No. 2 with appropriate cable;
3. Providing 100 meters of spare cable to the manhole at substation No. 4 for future placement;
4. Replacing exposed conduit runs from substation No. 1 to the Galley facility and modifying the Galley’s master distribution panel (MDP).

(52385 R4, tab 5K; tr. 765-67, 775)

Elter's claim stated that the contracting officer orally instructed Professor Damatis to perform the work on 24 July 1997. The claim did not identify the contracting officer who ordered the changes. Professor Damatis testified that the "on-site construction representative from the ROICC office instructed" him. He later identified Mr. Cates as the representative and expressed the belief that he would not act without authority. (Tr. 773, 783) Professor Damatis did not identify a contracting officer in his testimony. At the hearing, LT Fournier testified that he had no recollection of ordering any of the changes identified in the claim (tr. 807-08).

Mr. Uhl was present for the negotiation of the modification. He testified that the only other individuals who attended the negotiation were LT Fournier, LT Weller and Mr. Paraskakis (tr. 788-89). LT Fournier confirmed the attendance at the meeting and his role, noting that LT Weller was there principally as an observer since he had just reported aboard. LT Fournier testified that he went to great lengths to make certain that Mr. Paraskakis understood that the modification resolved all outstanding matters. He considered the modification a "global" resolution of all issues on the substation project. He considered connecting the cable feeder to the arms trailer and the joint venture office to be part of the provision for "all unforeseen excavations, underground cables, and splices encountered" as a result of replacement of the substations. (Tr. 805-08)

Mr. Uhl confirmed LT Fournier's understanding of the meeting. He testified that the modification was executed not only to grant an extension due to late arrival of the transformers, but also for additional excavation work, low-voltage splices and energizing buildings and facilities that were associated with the project. He also testified that there was no evidence that Elter supplied extra cable to substation No. 4 or that the Government ever requested the cable. (Tr. 790-91)

The parties are in agreement that Elter had connected the arms trailer and the joint venture office with substation No. 2 at the time Modification P00017 was signed. However, contrary to the allegation in Elter's claim that all of the claimed work was completed prior to the beneficial occupancy date, Professor Damatis testified that the galley work was not finished until almost a year after the modification was signed. The work had begun, but was halted to allow a different contractor to work on another contract. He also testified that Elter's claim for providing spare cable for substation No. 4 had nothing to do with the substation installation project subject of this appeal and the cable was also provided later. (52385 R4, tab 5K; tr. 774-76, 778-82) Mr. Uhl confirmed at hearing that not all work associated with the substation project was complete by beneficial occupancy; however, he maintained that that only punch-list items remained (tr. 789). Mr. Uhl testified that in his view the galley work was required by the contract. He also maintained that based on his investigation, no spare cable was found, let alone requested. (Tr. 790-91) Professor Damatis maintained that it been supplied (tr. 819-20). For the reasons discussed below, we need not resolve these disagreements.

DISCUSSION

This is another case of an oral order by a construction representative that cannot be traced to a contracting officer. Professor Damatis did not suggest who the contracting officer might have been. At the hearing, LT Fournier had no recall of issuing any orders concerning the items covered by the claim. We find his lack of recall credible and conclude that he did not issue or authorize the alleged July 1997 orders. Moreover, the memorandum of 26 November 1997, prepared much closer to the events in question, suggests that the additional connections or “splices” were done on Elter’s own initiative and were not authorized.

Elter has urged that Modification P00017 did not deal with the subject matter of its claim. However, there is significant evidence that the parties intended the modification to be a resolution of all outstanding matters between them insofar as this project is concerned. Nevertheless, assuming, without deciding, that Modification P00017 was not intended to be a global settlement, the appeal cannot be sustained because the July 1997 oral directions, if given, were unauthorized. If, on the other hand, connecting the cable feeder to the arms trailer and the joint venture office were intended to be part of the “splices encountered” that are addressed in Modification P00017 – as LT Fournier testified and as seems reasonable to us – the modification could be viewed as a ratification of the unauthorized splices noted in LT Fournier’s 26 November 1997 memorandum. This eventuality would not aid Elter since it would not be entitled to any compensation for the connections beyond that provided by the modification itself.

DECISION

The appeal is denied.

ASBCA Nos. 52391 and 52415

These appeals relate to identical changes made by Elter in the installation of the HVAC systems in three buildings at Souda Bay. The specifications called for a manually operated system controlling the chilled/hot water circulating pumps. (As designed the pumps were to be directly connected to their disconnect switches.) Based on alleged oral orders, Elter installed an automatic system. As claimed, the system involved the installation of an automatic on/off, alternating system to the water pumps, including a transfer switch, a power panel to house the system, and a power feeder connection. (52391/52415 R4, tabs 5E, 5F; tr. 821-22, 835-36, 851)

Elter’s claim giving rise to ASBCA No. 52415 was initiated by letter dated 16 June 1999 and covered both the aircraft operations building, Project P-040 (1,169,434 drachmas), and the bowling center, Project R-500 (1,778,009 drachmas and a 15-day time

extension). The claim covering the marine general operations building, Project P-140 (1,405,368 drachmas and a 15-day time extension), was initiated by letter dated 28 June 1999 and is the subject of ASBCA No. 52391. (52391/52415 R4, tab 5E, 5F; tr. 829) The claims were denied in a contracting officer's final decision dated 14 October 1999 (52391/52415 R4, tab 6). Elter filed these timely appeals.

The alleged oral directions were first given to Professor Damatis on 13 November 1997 in connection with the aircraft operations building, on 8 January 1998 for the bowling center and between 9 and 14 June 1998 for the marine general operations building (52391/52415 R4, tab 5E; tr. 826, 829). He testified that he received the instructions in each instance from Mr. Cates and he believed that the contracting officers knew of Mr. Cates' instructions. He mentioned LT Fournier's name in connection with one of the projects and LT Weller in connection with the other two, although he did not identify the projects with which each was associated. (Tr. 829-32) The reference to LT Fournier was in connection with the aircraft operations building project since he left at the end of December 1997 and the reference to LT Weller was in connection with the other projects.

Professor Damatis's opinion was that the system was changed from manual to automatic so: (1) there was no longer a need for daily maintenance; (2) continuous operation of pumps was not required, thereby saving energy; and (3) the transfer relay switch would increase the system operating life (tr. 833).

By letter dated 15 July 1999, the architect-engineer firm that designed the projects in question advised the Navy that severe budget restrictions led to the selection of a manual pump operation system, instead of an automatic system. The letter also stated a separate power feeder connection to the control panel was not required on the system. (52391/52415 R4, tab 5D; ex. G-33) Mr. Uhl confirmed that cost was a consideration in selecting the system. He also testified that from a maintenance standpoint, a customer might prefer a manual system because it was a simpler system. However, if money were not an issue, Mr. Uhl said that he would have an automatic system. (Tr. 851-53, 862) LT Fournier was of the view that Elter's "up-grade" to the automatic system was not beneficial to the Navy at Souda Bay. He also testified that if he were the public works officer responsible for maintenance, he would not want an automatic system because he believed the manual system would be easier for less skilled forces to maintain (tr. 866-68).

LT Fournier testified that to his knowledge no directive was given to the contractor. Moreover, he was not aware that Elter was installing an automatic system at anytime during his tenure at Souda Bay. (Tr. 866, 869) Mr. Donnelly also testified that he did not order any of the changes. He was not aware that Elter was installing an automatic system and first learned of the installation when he received the claims. (Tr. 870-71) Mr. Uhl testified that the installation of an automatic system was never brought to his attention during his entire tenure at Souda Bay, which ended on 19 April 1999. He also testified that Mr. Paraskakis

never raised the issue of the automatic system as a change or that it was departing from the design requirements at any of their weekly meetings. (Tr. 851-54)

DISCUSSION

The testimony is that the directions came from Mr. Cates, although Lieutenants Fournier and Weller are identified as contracting officers who would have known of any changes since Mr. Cates was consulted by everyone. Mr. Cates was not an authorized contracting officer. His superior, Mr. Uhl, testified that the installation of an automatic system was never brought to his attention during his time at Souda Bay. Moreover, both LT Fournier and Mr. Donnelly testified that they had not ordered the changes. Mr. Donnelly also confirmed that he first learned of the installation of an automatic system when he received Elter's claims. Though Elter's installation may have been more advantageous, the Government's choice of a manual system was a conscious one driven principally by budgetary constraints and there was some evidence that the Navy preferred the manual system for ease of maintenance. Under the circumstances, Elter has failed to prove that the installation of a more expensive system was ordered or ratified by a contracting officer.

DECISION

The appeals are denied.

ASBCA No. 52409

By letter dated 21 May 1999, Elter sought additional compensation for installation of an automatic shut-off/re-start system on water heaters and the hot water systems' re-circulating pumps in the aircraft operations building, Project P-040 (1,225,811 drachmas), the bowling center, Project R-500 (15 days and 661,472 drachmas) and the marine general operations building, Project P-140 (25 days and 1,445,609 drachmas) (52409 R4, tab 7; ex. G-35). The Government denied Elter's claim in its entirety by a final decision dated 23 July 1999 (52409 R4, tab 11). Elter subsequently filed a timely appeal.

Professor Damatis testified that the dates he received the oral directions were the same dates that he received the oral directions alleged in ASBCA Nos. 52391 and 52415 (tr. 885): 13 November 1997 for the aircraft operations building, 8 January 1998 for the bowling center and between 9 and 14 June 1998 for the marine general operations building. The directions were also attributed to Mr. Cates (tr. 885), with no discussion of a role, if any, of an authorized contracting officer.

The Government admits that the work done by Elter was a change from the original plan, and that it had beneficial aspects, albeit minor. It maintains, however that it had the right to decide whether it wanted to proceed or not. As Mr. Uhl expressed it, the benefits of the change may outweigh the costs of the change; in which case the Government would

proceed with a modification. On the other hand, the cost of the change may outweigh the benefits and a decision would be made not to proceed. (Tr. 896-98, 900) The Government's witnesses, Mr. Uhl, LT Fournier and Mr. Donnelly testified that Elter provided no notice that it considered the work a change prior to receipt of the claim on 25 May 1999. Mr. Uhl emphasized that Mr. Paraskakis never mentioned the changes to him. Mr. Donnelly also emphasized that Mr. Paraskakis understood the change order process, but never mentioned the changes to him. (Tr. 893, 900-02, 904-06)

DISCUSSION

We found the testimony of the Government's witnesses persuasive and must conclude as we did in connection with ASBCA Nos. 52391 and 52415 that Elter has failed to carry its burden of proving that the changes were ordered or ratified by a contracting officer.²

DECISION

The appeal is denied.

SUMMARY OF DECISIONS

The appeals in ASBCA Nos. 52349, 52354, 52358, 52371, 52385, 52391, 52409, 52415 and 52416 are denied.

Dated: 25 July 2001

MARTIN J. HARTY
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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

¹ These are the remaining nine of fourteen appeals lodged in connection with the contract and its multiple projects that were the subject of a hearing in Naples, Italy in April of 2000. The other five appeals are: *Appeal of Elter S.A.*, ASBCA No. 52441, 01-1 BCA ¶ 31,327 (no agreement to convert contract from payment in drachmas to payment in U.S. dollars); *Appeal of Elter S.A.*, ASBCA No. 52451, 01-1 BCA ¶ 31,373 (no proof that delay in issuance of notice to proceed was unreasonable or caused injury or that review of quality control plan was unreasonable or delayed performance); *Appeal of Elter S.A.*, ASBCA No. 52327, 01- __ BCA ¶ __ (3 May 2001) (Government approval of exterior lightening submittal did not constitute authorization to furnish nonconforming anchor bolts); and *Appeals of Elter S.A.*, ASBCA Nos. 52491, 52492, 01- __ BCA ¶ __ (29 May 2001) (in 52491, contract required Elter to bear cost of replacing cable severed by its subcontractor; in 52492, claimed demolition work was already required under the contract).

² In view of the admittedly beneficial aspects of the changes identified in ASBCA No. 52409, as well as the evidence in ASBCA Nos. 52391 and 52415 that an automatic system may be preferable, although more costly, our decisions should not be viewed as precluding a Government determination whether FAR 1.602-3, Ratification of Unauthorized Commitments, is available for use in these 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 Nos. 52349, 52354, 52358, 52371, 52385, 52391, 52409, 52415 and 52416, Appeals of Elter S.A., rendered in conformance with the Board's Charter.

Dated:

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