

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Contel Advanced Systems, Inc. ) ASBCA No. 49073  
 )  
Under Contract No. N60530-90-D-0023 )

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OPINION BY ADMINISTRATIVE JUDGE HARTY

This appeal arises from the contract awarded by the Navy’s Air Warfare Center Weapons Division (NWC), China Lake, CA in September 1990 to Contel Advanced Systems, Inc. (CASI) for the design, installation and maintenance of a new, state-of-the-art digital switching system known as the Center Telecommunications System (CTS). Performance was divided into two phases: (1) an implementation phase; and (2) an operation, maintenance and administration phase (OM&A).

The present appeal<sup>1</sup> involves provision of the outside plant cable (OSP) during the implementation phase. Appellant argues that it was required to install more OSP to more buildings than it has been paid for by the contract or modifications. Additionally, CASI argues that an important modification, Modification No. P00026, is not binding either because it did not comport with the requirements for an Undefined Contract Action (UCA) within the meaning of 10 U.S.C. § 2326, as implemented by Defense Federal Acquisition Regulation Supplement (DFARS) 217.7401 (1991), or lapsed by its own terms because the Navy failed to “definitize” the price in accordance with the contract schedule.

The Government takes exception to CASI's characterization of the modification. The Government also argues that the Board lacks jurisdiction over most of the buildings for which CASI is seeking compensation because the buildings were never presented in a claim to the contracting officer. In the alternative, the Government maintains if the Board did have jurisdiction, for numerous reasons CASI is not entitled to further payment. Only entitlement is before us.

We conclude that Modification No. P00026 was not a UCA and did not lapse when the Government failed to follow the contract schedule, for the reasons set forth in our decision in *Contel Advanced Systems, Inc.*, ASBCA No. 49072, \_\_\_ BCA \_\_\_, (12 March 2002). We also conclude CASI is entitled to compensation for providing OSP to eight of the twelve buildings over which we have jurisdiction, and deny its claims for the remaining four buildings. We dismiss CASI's claims for work allegedly performed on 39 buildings because the claims were not first submitted to the contracting officer for consideration. The appeal is sustained in part, denied in part, and dismissed in part.

### FINDINGS OF FACTS

#### OSP Solicitation Requirement

The solicitation required bidders to install OSP to support the CTS (SR4, tab 1, Attachment 1-Statement of Work (SOW), § 3.6.2(B)).<sup>2</sup> OSP was defined as follows:

The outside plant includes all cables and wires extending outward from the protectors on the MDF [Main Distribution Frame], supporting structures, and other associated apparatus necessary to connect the terminal equipment to the outside plant.

(SR4, tab 1, Attachment 5-Glossary at 19)

OSP provides inter-building capability, and is therefore outside of the building receiving service, while ISP (inside plant) provides within-the-building connectivity (tr. 1/57-58).

The requirement for OSP was expressed in sub-CLIN B003 of CLIN 0001 (SR4, tab 1, Attachment 3-Initial Installation (Exhibit B) (Attachment 3)). The quantity of OSP required for the initial installation was "1 Lot" (SR4, tab 1, Attachment 3, § B003). Attachment 8 to the solicitation, entitled Building/Telephone Line Inventory, indicated buildings by number, at specific locations, requiring the cabling at issue in the appeal, the outside cabling running up to the building (SR4, tab 2, Attachment 8 - Building/Telephone Line Inventory (Attachment 8)). Attachment 8 established the baseline service requirements for OSP (AR4, tab 545; tr. 1/206; 8/228-32, 244). Attachment 8

indicated that OSP service was required for 807 buildings. However, three buildings were identified twice. It is undisputed that once duplication is eliminated, 804 buildings were included in the baseline service requirement. (App. br. at III-133; tr. 1/197-201) Prior to contract award, both parties understood that the number of buildings listed in Attachment 8 would change, since NWC was a “dynamic organism” (tr. 1/205, 7/74-78).

#### Contract Award and Requirements for OSP

Contract No. N60530-90-C-0023 (redesignated N60530-90-D-0023 in January 1996) was awarded to CASI effective 24 September 1990. The implementation phase of the contract was awarded based on CASI’s firm-fixed, 60-month lease to ownership price (LTOP) of \$30,009,154.80. The contract included the following Federal Acquisition Regulation (FAR) clauses: FAR 52.233-1 DISPUTES (APR 1984) ALTERNATE I (APR 1984), FAR 52.243-1 CHANGES-FIXED PRICE (AUG 1987) ALTERNATE II (APR 1984), FAR 52.215-33 ORDER OF PRECEDENCE (JAN 1986), and FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984). The contract also included CLAUSE I-10 (DFARS 52.243-7000 ENGINEERING CHANGE PROPOSALS (APR 1985) ALTERNATE I (APR 1985)), which provided for engineering change proposals (ECPs). The clause specifically allowed the submission of “not-to-exceed” or “not-less-than” prices for ECPs in the following terms:

- (a) The Contracting Officer may at any time, in writing, request the Contractor to prepare and submit an ECP as that term is defined in MIL-STD-480, within the scope of this contract, as hereafter set forth. Upon receipt of such request, the Contractor shall submit to the Contracting Officer the information specified by, and in the format required, by Paragraph 4 of MIL-STD-480.
- (b) Any Contractor ECP shall set forth a “not to exceed” price and delivery adjustment or a “not less than” price and delivery adjustment, acceptable to the Contractor if the Government subsequently orders such ECP. If ordered, the equitable increase shall not exceed, nor shall the equitable decrease be less than, such “not to exceed” or “not less than” amounts. . . .

(SR4, tab 1 at 51)

The contract also required CASI to conduct a line and station survey, in coordination with the Government, to identify any changes in the service requirements from the baseline requirements in Attachment 8 (SR4, tab 1, Attachment 1, SOW §3.3.1(I) at 23; tr 6/169-70, 228).

CASI commenced its line and station survey to verify the Attachment 8 inventory in early October of 1990, and completed its survey by 2 November 1990 (AR4, tabs 23, 270 at A-23308; tr. 6/272). CASI's survey revealed numerous discrepancies between the buildings on the base and the buildings identified by Attachment 8 (*see, e.g.*, ex. A-13 (graphic); AR4, tabs 44, 68, 78; tr. 2/258-59, 6/184-86, 8/275-79). CASI required additional information and clarification from the Navy on both the need for service and the scope of service requirements because, at the time of the survey, some buildings listed on Attachment 8 were no longer in existence, some were identified incorrectly, some were not in the location indicated, and some had been totally or partially vacated (*see, e.g.*, ex. A-13 (graphic); AR4, tabs 23, 35, 44, 47, 56, 68, 78, 81, 91, 97, 216 at 2, 271, 339; tr. 7/118-19).

Following the completion of CASI's line and station survey in November 1990, the Navy responded to CASI's inquiries about the discrepancies from Attachment 8 by adding and deleting facilities requiring CTS service. These adjustments continued almost until "cutover" (the transfer of the telecommunications traffic from the existing system to the new CTS) which occurred on 10 April 1992 (ex. A-13 (graphic); SR4, tab 1359; AR4, tabs 236, 272, 337, 352 at 2, 385, 448-49, 451, 455-56, 459, 461-62, 489, 495-96, 503, 510, 519 at 13, 551 at 10, 572 at 10, 601 at 14, 602 at 5, 655; tr. 2/43-46, 279-89).

### Modifications and Proposals for Additional Requirements

Nine contract modifications compensated CASI for changes to the OSP requirements. Four of the modifications were executed by the Navy on 24 September 1991: Modification No. P00017 added the requirement to provide OSP to the FMS Compound at the Airfield (buildings A98028, A98029, A98030, A98031, A98032, and A98033) and Modification No. P00018 added the requirement to provide OSP to the Alarm Building 31622 at Thompson Lab. None of the buildings covered by these modifications appears on Attachment 8. Modification No. P00019 addressed adding fiber optic cable in specific places along with the cable that was already being installed between buildings 70049 and 70031, and Modification No. P00020 added laying fiber optic cable concurrently with the copper cable called for in the contract. Modification No. P00021, dated 25 September 1991, added a requirement for a bore press to be accomplished concurrently with the laying of contracted for OSP at a particular location. Modification No. P00025, dated 13 November 1991, provided for temporary, immediate connectivity for building 00671 before cutover, while the regular OSP for this building was included in the original contract. (SR4, tab 2027, Modification Nos. P00017, P00018, P00019, P00020, P00021, P00025)

Modification No. P00027, executed by the Navy on 31 December 1991, dealt with installation of certain Government provided fibers concurrent with the installation of previously contracted for copper cabling. When reading the ECP cover letter dated

18 September 1991, referenced in this modification, it is significant to note CASI's understanding of the cost of providing service to buildings through ISP wire from other buildings. CASI specifically states, in two different paragraphs, that particular buildings will be serviced by Inside Plant (ISP) wire from other enumerated buildings and "*therefore requires no OSP cable additions and no additional cost to the Government*" (emphasis added). (AR4, tab 422 at R-07453) One of the buildings specifically mentioned as being serviced with ISP at no additional charge to the Government is building M02187 for which CASI is now seeking compensation.

Modification No. P00036, executed 17 June 1992, was another direction for immediate connectivity before cutover for building 00879, while the regular OSP was included in the original contract (SR4, tab 2027, Modification Nos. P00027, P00036).

Of the eight modifications discussed thus far, Modification Nos. P00017 and P00018 required OSP for seven buildings not identified in Attachment 8. Modification No. P00026, signed by CASI's president on 17 December 1991 and executed by the Navy on 21 January 1992, also added an OSP requirement for certain buildings (SR4, tab 2027, Modification No. P00026). What is at issue in this appeal is the viability of the modification and, assuming its viability, the scope of Modification No. P00026. (SR4, tab 2030, Claim 3)

#### History of Modification No. P00026

By letter dated 12 March 1991, the Navy informed CASI of revisions to the Systems Requirements Specification (SRS), regarding requirements for the OSP and requested that CASI submit a cost proposal for the changes (AR4, tab 126). CASI responded to the Navy's request by submitting ECP 91-004.E, dated 17 May 1991 (May ECP) (SR4, tab 508; AR4, tab 216). CASI's May ECP provided a price comparison between CASI's original proposal price, the original engineering, and the final design. CASI's final design incorporated buildings found during the line and station survey, buildings under construction and requiring service by 1992, and the increased cable pair allocation referenced in the Navy's 12 March 1991 letter. The ECP noted that the final design activities were performed 29 December 1990 through 27 April 1991. (AR4, tab 216) CASI's May ECP specifically stated that it incorporated credits to the Navy for those buildings listed in Attachment 8 that no longer required CTS service, such as those not located during CASI's site survey, or those which had been demolished, and included a very detailed, separate section, specifying those buildings by number and including pricing information (AR4, tab 216 at ¶ B, Appendix 2, Part V, OSP Units to be Credited to the Customer). In the penultimate paragraph of the cover letter, CASI expressly reserved any rights or claims for additional costs or schedule impacts resulting from delay, disruption, or similar impact caused by the modification (AR4, tab 216 at 5). The impact of OSP changes as they relate to delay or acceleration, if any, is covered by CASI's appeal in ASBCA No. 49075.

By letter dated 11 June 1991, the Navy approved commencement of OSP work at the first site (SR4, tab 560). Work commenced at the other sites during the summer and into early fall (ex. A-28). On 13 June 1991, CASI revised its May ECP with a letter listing OSP changes included in the May ECP and those excluded. It also increased the proposed purchase price for OSP to \$2,058,057.00 (equating to an LTOP of \$2,705,027.70). (AR4, tab 254) DCAA issued an audit report on 25 July 1991, which addressed CASI's proposed purchase price of \$2,058,057.00. The report found that the revised proposal "disclosed no questioned, unsupported, or unresolved items which would preclude acceptance of the proposal as submitted." (SR4, tab 677)

During the summer of 1991, the Navy determined certain buildings needed wiring installed for current telephone service as well as the requirement for service at cutover. Also, new buildings needing installation of OSP were discovered. Some of these discoveries and changing needs were addressed in the other modifications referred to above. (*i.e.*, SR4, tab 775)

By date of 2 October 1991, CASI submitted what it termed a "price revision" to its May ECP. ECP 91-004.E.R1, dated 2 October 1991 (October ECP), included a three page cover letter, a table 1, and four exhibits, reflecting changes in CASI's OSP design criteria through 16 September 1991, and changes to the list of buildings requiring CTS service (SR4, tab 883; AR4, tab 443). The October ECP cover letter read, in pertinent part:

This revision encompasses all changes from inception to 16 September 1991. Upon approval, this ECP will establish the baseline prices for outside plant cabling activities. Any future authorized changes will be added/deleted against this baseline during the implementation phase only.

The methodology used to calculate this revised ECP is based on a comparison of CASI's originally proposed design and the final design as of 16 September 1991. It is summarized in Table 1 titled "Outside Plant Price Calculation". This summary outlines the cable requirements based on:

a) Attachment 8 . . . with six population centers, serving 807 [804] buildings.

b) CASI's proposal based on nine switch sites serving 807 [804] buildings.

c) Final design based on station survey and subsequent requirements and contract modifications serving over 1,000 buildings.

....

The final design, indicated in Table 1, is the result of cable spares being increased . . . and numerous buildings added (Exhibit 3) to the Attachment 8 requirement.

....

The details for the building addition and deletions are outlined in Exhibit 1.

....

Considerable analysis has gone into the development of Table 1 and Exhibit 1. As a result, CASI feels that all aspects of these scenarios have been covered and that they represent as close to actual costs as is possible.

(AR4, tab 443)

Table 1 is the “Outside Plant Price Calculation.” This is followed by a one-page document entitled “Building Additions and Deletions Summary,” along with a worksheet listing buildings by number entitled “Building Additions and Deletions Worksheet.” An unannotated copy of Attachment 8 follows as Exhibit 1. Exhibit 2 comes next, consisting of several diagrams picturing the difference in the cable pair breakdown when the six population centers were divided into nine switch sites. This is followed by Exhibit 3, the 25 September 1991 Facilities Report, listing buildings by number and location, and Exhibit 4, which sets out the labor and material pricing. (SR4, tab 883; AR4, tab 443) It is undisputed that the multi-paged section V titled, “OSP Units to be Credited to the Customer,” found in the May ECP, was not included in the October ECP (app. reply br. at III-32, 33).

We conclude that the October ECP was composed of the aforementioned documents and that Part V, “OSP Units to be Credited to the Customer,” from the May ECP was not incorporated either physically or by reference in the October ECP. Therefore, only those buildings listed by number in Attachment 8 or the Facilities Report and not excluded by the “Additions/Deletions Worksheet” are part of the October ECP.

At the hearing, Mr. Jeff Babaie, CASI’s proposal manager and later the implementation phase program manager, testified the October ECP included all buildings that had been discovered as of the September 1991 cut-off date indicated in the ECP (tr. 2/102-03, 195).

## The Terms of Modification No. P00026

The parties wanted to begin work but they knew that a DCAA audit was necessary before they could negotiate a final price for the October ECP, so they decided to incorporate it into a bilateral contract modification with a “maximum price (subject to downward negotiation only),” just as they had done in the case of Modification No. P00012, the subject of the appeal in ASBCA No. 49072. The contracting officer, Mr. Richard Hackney, explained at the hearing that he drafted the maximum modifications based on sample provisions that he had acquired when he was involved in ship repair contracts and he had not used modifications like these for years. Modification Nos. P00012 and P00026 were the only two modifications of this nature he had seen at China Lake. (Tr. 5/43) He testified that he included the provision for a target date for negotiation of a final definitized price for the modifications because the contractor could collect the face value of the maximum modification and if it cost the contractor less to do the actual construction, sometimes the contractor “tended to be a little slow in coming in with the support for the price that it should be. . . .” (Tr. 45-46) He went on to explain the target date simply gave the Government some “legal wherewithal” to set the price unilaterally if the parties were unable to reach any kind of an agreement on price (tr. 5/47). Neither Modification No. P00026 nor Modification No. P00012 were UCAs in his opinion. In his view, these modifications were clearly within the scope of the contract and UCAs “only start [] kicking in when we either don’t have a contract, or arguably, something’s outside the scope.” (Tr. 5/57-58) During the discussions leading to the decision to use a maximum modification for additional OSP, CASI was again reminded that the Government would use CASI’s proposed price as the ceiling price (tr. 5/54-55).

At the hearing, CASI did not contest any of Mr. Hackney’s testimony concerning the reasons for using the maximum modification or the understanding that it set a not-to-exceed price.

Modification No. P00026 provided approval for commencement of work described in CASI’s ECP 91-004.E.R1 dated 2 October 1991 and ECP 91-015.E dated 15 November 1991 (tr. 5/53-58). ECP 91-015.E concerned ISDN (Integrated Services Digital Network) capabilities. CASI has stated that this ISDN ECP is not part of this appeal and we are aware of no claim covering the ISDN ECP filed by either party (app. br. at III-12). However, the Government has indicated that the ISDN ECP part of Modification No. P00026 may figure in any quantum negotiations that might be required (Gov’t br. at III-2, -35, -44).

The stated purpose of Modification No. P00026, effective 21 January 1992, was:

. . . to provide approval for the commencement of outside plant construction as stated in proposals ECP 91-004.E.R1 dated 02 October 91 and ECP 91-015.E dated 15 November 91 and

establish a maximum price (subject to downward negotiation only) for this modification.

Paragraph 2 of the modification read:

2. MODIFICATION DEFINITIZATION

(a) A firm fixed Type modification is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract modification that will include (1) all provisions and clauses required by the Federal Acquisition Regulation (FAR) and the Department of Defense Supplement (DFARS) on the date of execution of the maximum priced modification, (2) all provisions and clauses required by law on the date of execution of the definitized contract modification, and (3) any other mutually agreeable provisions, clauses, terms, and conditions.

(b) The schedule for definitizing this modification is:

<u>Event</u>	<u>Time</u>
(1) Negotiate	150 days*
(2) Execute Definitive Contract Modification	180 days*

\* Days after date in Block 3 of SF30 [21 January 1992] for Modification P00026

(c) If agreement on a definitive contract modification is not reached by the target date in paragraph (b) above, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the Head of the Procuring Activity, determine a reasonable price in accordance with FAR Subpart 15.8 and Part 31, subject to the Disputes procedures established in this contract. In any event, the Contractor shall proceed with the completion of the contract, subject to the Limitation of Government Liability provision.

(1) After the Contracting Officer's determination of price, the contract shall be governed by –

(i) All clauses required by the FAR and DFARS on the date of execution of this maximum priced modification for Firm Fixed Price contracts.

(ii) All clauses required by law as of the date of the Contracting Officer's determination, and

(iii) Any other provisions, clauses, terms and conditions mutually agreed upon.

(2) To the extent consistent with subparagraph (c)(1) above, all provisions, clauses, terms and conditions included in this modification shall continue in effect, except those that by their nature apply only to this maximum priced modification.

Paragraph 3 of the modification listed the LTOP for the change and read:

a. Pending definitization of this Maximum Priced Supplemental Agreement, the Maximum Price Adjustment (subject to downward negotiation only) for this change is established at \$4,321,106.40. In no event shall the equitable adjustment for this change exceed \$4,321,106.40.

Paragraph 3.c. provided \$4,321,106.40 in funding. (SR4, tab 2027)

The target date for negotiations for Modification No. P00026 was 19 June 1992, and the target date for definitization was 19 July 1992.

#### Audit of Modification No. P00026 Pricing

According to a memorandum supporting Modification No. P00026 signed by the contract specialist and the contracting officer, a maximum modification was also necessary because the Government's CTS technical team had not yet completed the relevant evaluations, and the Navy could not finalize negotiations until these evaluations were complete. The modification memorandum indicated that the Navy would commence negotiations upon receipt of input from DCAA and completion of the CTS technical evaluations. (AR4, tab 545)

By internal memorandum of 17 March 1992, the Government noted concerns about CASI's methodology in pricing ECP 91-015.E (ISDN ECP), the other ECP which made up Modification No. P00026. In particular, the Government stated that CASI's pricing did not acknowledge its responsibility under the contract, and noted "[t]his has been the subject of numerous discussions." The memorandum goes on to state:

CASI, in taking the approach of cost sharing with the Government for the ECP, has avoided accepting responsibility

for providing an ISDN cable plant. This is not acceptable to the CTS Team.

(SR4, tab 1284) It is unclear from the record if the issue regarding the ISDN aspect of Modification No. P00026 contributed to the failure to negotiate the price of the modification.

The CTS technical evaluation of the October ECP for OSP was completed by 24 March 1992, and found the October ECP to be technically acceptable (SR4, tab 1307). At the hearing, the contracting officer, Mr. Hackney, claimed the Navy was unable to definitize Modification No. P00026 or Modification No. P00012, the maximum modification at issue in ASBCA No. 49702, because it was waiting for DCAA audits (tr. 5/49-50, 125-30). The DCAA audit of the October ECP was completed by 8 January 1992 and “disclosed no significant questioned, unsupported, or unresolved items which would preclude acceptance of the proposal as submitted,” with the exception of CASI’s G&A rate, which was undergoing a separate audit (AR4, tab 564). The separate assist audit of the G&A rate included in CASI’s October ECP was completed on 8 April 1992, and “disclosed no questioned, unsupported, or unresolved items” (AR4, tab 677). When asked why the Government did not negotiate the maximum modifications after the completion of the audits, Mr. Hackney was unable to recall (tr. 5/125-30). He clearly remembered, however, that CASI was not pressing for negotiations.

There was no compelling reason to do that [unilaterally set the price]. I thought everything was on track with regard to settling – agreeing on a cost for the work covered by – by both of the modifications.

The contractor was doing the work so it wasn’t holding up anything on the Contract. The money attached to the mods was incorporated into the contract, so it wasn’t as though the contractor was having to provide the Government with the required work, and didn’t have any money to show for it.

The contractor was not – as a matter of fact – was not banging on my door saying, “We’ve to get it fixed. . . . We’ve got to get it fixed, now.”

He seemed to understand that we were trying to settle these things bilaterally, and before we could, we needed certain kinds of information, and while we were out trying to get that information, he was providing most of the information that we needed for it.

(Tr. 5/138-39)

Failure to “Definitize” Modification No. P00026

CASI’s Mr. Babaie testified he wished to complete negotiations on Modification No. P00026 at the time of cutover for two reasons. First, he wanted to finalize all implementation issues before he transferred responsibility to Mr. George Hardy, who was to manage the OM&A portion of the contract. Second, the maximum modifications needed to be definitized to allow calculation of the final LTOP amount (tr. 2/92-93).

By letter dated 6 April 1992, Mr. Babaie submitted a “Revised Exhibit B to the Schedule,” which included an “Implementation Projected Total Revenue Summary,” which set forth the estimate at that time of the total value of the contract (AR4, tab 674). This was followed by a letter dated 24 April 1992, further explaining the 6 April letter and charts. In the letter, Mr. Babaie states that there are approximately 48 items “adding or deleting to the Original Basic Contract Value” and amongst those items, he lists the two maximum modifications. On the accompanying chart, CASI requests a revised purchase price of \$3,780,754.65 with a revised LTOP amount of \$4,969,272.60 for Modification No. P00026, an increase of \$648,166.20 over the LTOP set by the modification. (SR4, tab 1390 at A-08955)

The Government requested a second audit of CASI’s claimed costs. According to the Government, CASI understood the need for the second audit and was working with the Government to provide supporting documentation. However, the needed documents had been sent to CASI’s office in Texas and CASI had difficulty in getting them returned. (Tr. 5/126-130)

The CTS was cutover on 10 April 1992, and system acceptance was completed by 11 May 1992 (SR4, tabs 1359, 2027, Modification No. P00040; AR4, tab 695 at 1; app. br. vol. III ex. 2 at 18, Request for Admissions (RFA) no. 152; tr. 5/65).

Modification No. P00026 was scheduled to be “definitized” no later than 19 July 1992. However, the contracting officer was still waiting for the supplemental audit when that date passed. The Government never extended the date.

During the summer of 1992, DCAA had observed inconsistencies in CASI’s proposed pricing regarding Modification No. P00026 (as well as Modification No. P00012, the subject of ASBCA No. 49072) as reflected in CASI’s weekly progress/status report dated 21 August 1992 (SR4, tab 1561 at A-04358). These internal weekly progress/status reports also indicate the problems CASI was having getting the required documentation back from its office in Texas (SR4, tabs 1576 at 5, 1580 at 6, 1584 at 6, 1594 at 5, 1599 at 9, 1614 at 6, 1619 at 5). When CASI’s office in Texas finally responded to DCAA’s request for data, some of the information provided was not complete

and seeking revised information took even more time (SR4, tabs 1621 at 6, 1626 at 6, 1630 at 6, 1635 at 8-9, 1647 at 7-8, 1651 at 6, 1683 at 11, 1692 at 11, 1729 at 10, 1741 at 10). The contracting officer finally received the DCAA reports in August 1993, and the Government then began putting together a negotiation position based on the reports (SR4, tab 1746; tr. 5/133-34). However, negotiations were never held.

CASI's internal monthly progress/status report, dated 12 November 1993, indicates CASI was in the process of finalizing both Modifications Nos. P00012 and P00026 (SR4, tab 1816 at 5). According to the contracting officer, the negotiations were effectively placed on hold during the holiday season and when after the holidays, the Government attempted to reopen negotiations, "CASI put us off for some reason. . . ." (tr. 5/134).

In response to a datacall from the Naval Air Systems Command in June 1994, requesting a list of all UCAs not yet definitized, Ann Niessen, the contracting officer at the time, indicated that Modification Nos. P00012 and P00026 should be reported, although there is no indication they were reported. At the hearing, she testified that these modifications were only undefinitized "[i]n a large generic sense" in that they were still subject to negotiation and definitization but they were not UCAs by the regulation definition. According to her, a UCA "in the regulation sense," is an "outside of scope contract action." (AR4, tab 838; tr. 5/197-98)

#### CASI's Claim, Appeal, and the Contracting Officer's Final Decision

By date of 1 February 1994, CASI submitted its claim to the contracting officer, claiming it had been directed to install OSP in buildings for which it had not been compensated by the contract or any modification and listed the specific buildings for which it was seeking compensation:

- Building No. 91031 (Code 30 Analysis Lab), M/S
- Building No. 02629, M/S
- Building No. 20267, NAF
- Building No. 90146, CLPL
- Building No. 91081, M/S
- Central Site Turnstiles, EWTES
- MIDAS South Site, SNORT
- Building 00452
- Ordnance Administration Building, G/A
- Library Staff Facility, M/S
- Code 27 Department Office Building II, M/S
- Building 02640 Addition
- New Trailer next to Building No. 70116, EWTES
- Building No. 11091, CLPL
- Building No. 11092, CLPL

Building No. 30918, G/A  
Building No. 70129, EWTES

CASI also argued, for the first time, that Modification No. P00026 had never been definitized and was thus “superseded” and claimed \$2,585,723.31 in additional costs, over and above the maximum price. (SR4, tab 1830 at 4-6 and attach. at 3)

Our review of the record discloses that in the entries quoted above, “Ordnance Administration Building, G/A” refers to building 31060 and “Library Staff Facility, M/S” refers to building 02327 (app. br. vol. III, ex. 2 at 6). The “Central Site Turnstiles, EWTES” entry reflects four buildings: E99800, E99801, E99802, and E99803 (app. reply br. (Claim 3) at III-15 in rebuttal facts). Consequently, we understand CASI’s claim as submitted to the contracting officer to be for the provision of OSP service to 20 buildings.

Because the contracting officer failed to render a final decision on CASI’s OSP claim or indicate when a decision would be forthcoming, CASI appealed to the Board on 17 August 1995 on the basis of a “deemed denial” under the Contract Disputes Act. *See* 41 U.S.C. § 605(c)(5). The contracting officer subsequently issued a final decision on 12 December 1995, denying CASI’s claim for any additional money above the maximum, not to exceed price of Modification No. P00026, but agreed that CASI would be entitled to reasonable costs for all but two of the buildings included in the claim which were not covered by Modification No. P00026. The contracting officer’s decision read in part:

(a) Building “91031” does not exist, and appears to be an erroneous reference to Building 91081, which is separately (and, therefore, duplicatively) included in CASI’s claim; and (b) CASI did not provide any OSP for Building 70129.

(SR4, tab 1897).

Consequently, due to the listing of a non-existing building, CASI’s claim sought compensation for only 19 buildings. The final decision admits liability for all but one, Building 70129. After receiving the decision, CASI filed a protective appeal, ASBCA No. 49603.

Modification No. P00096, dated 24 October 1996, unilaterally set the price of Modification No. P00026 at an LTOP of \$4,321,106.40, the maximum amount set forth in the modification, while confirming that “all other terms and conditions remain unchanged” (SR4, tab 2027).

In September 1997, the Government responded to CASI’s Requests for Admissions, agreeing that CASI had provided OSP to 15 buildings listed in the claim and that the provision of service to the buildings was “outside the scope of Modification P00026.”

These were: 91081 Main Site; 11091 CLPL; 11092 CLPL; 30918 G/A; 02629 Main Site; 20267 NAF; 90146 CLPL; MIDAS South Site SNORT; 00452; Ordnance Administration Building G/A (additionally identified as building 31060); Library Staff Facility, Main Site (additionally identified as building 02327); Code 27 Department Office Building II, Main Site; building 02640 Addition; the trailer next to building 70116, EWTES (additionally identified as building 99812); and building 70129 (which in the final decision, the contracting officer had stated CASI had not provided with OSP). Further, the Government agreed that CASI was “entitled to an equitable adjustment” for providing OSP to all these, except building 31060. The Requests for Admissions apparently did not inquire about the “Central Site Turnstiles, EWTES” (buildings nos. E99800, E99801, E99802, E99803).<sup>3</sup>

### Changes to the Building Count

On 6 October 1997, a little over three weeks before the hearing and after discovery was to be completed, CASI filed a “List of Buildings Not Covered By Attachment 8, Modification P00026 or Any Other Modification.” The list dropped several of CASI’s originally claimed individual buildings and added 40 new buildings. CASI changed the list again by letter dated 22 October 1997, identifying 35 buildings, of which 26 were new buildings not included in CASI’s claim. Moreover, of these 26 buildings, several had not been included in CASI’s earlier list. On the Saturday before the hearing, CASI filed another “Revised List of Buildings Not Covered by Attachment 8, Modification P00026, or Any Other Modification.” This filing, prepared by Mr. Babaie and Mr. Hardy, identified 69 buildings, again dropping buildings that had been identified in CASI’s original claim and adding others not previously asserted. (Tr. 2/55-58)

During the hearing, Mr. Babaie addressed the methodology he used in arriving at his “final count” of 69 buildings (tr. 2/49-76). During cross-examination, Mr. Babaie admitted to numerous deficiencies and failures in this methodology and testified that some buildings on his list might not turn out to be supportable if researched further (tr. 2/173-209). The Board continued the hearing with respect to the building count so that the parties could meet and try to reach an agreement. The parties were unsuccessful in bridging their differences and a supplemental hearing was held in January 1998. (Tr. 9/140-46)

One week before the supplemental hearing, CASI submitted another list of alleged new buildings by letter dated 14 January 1998. This new list dropped almost half of the buildings on the list presented by Mr. Babaie at the hearing in the fall of 1997. However, the new list now added eight buildings not on the previous list, for a total of 52 buildings. (Tr. 10/10-15; 11/151-57).

At the beginning of the January hearing, CASI dropped one of the buildings from the list (app. reply br. at III-27; tr. 10/32). Evidence was presented on the remaining 51 buildings. CASI did not call Mr. Babaie, but relied on the testimony of CASI’s OM&A project manager, Mr. Hardy (tr. 10/51-214, 11/10-233). He testified that several buildings

did not have OSP cable terminated in them because they were fed from other buildings where the OSP was terminated. According to Mr. Hardy, although the buildings might have received service through ISP wire, ultimately they connected to the OSP backbone and thus there was still an impact on OSP. (Tr. 10/77-81)

Of the 51 buildings on CASI's final list (ex. A-47), we find that only 12 of the buildings correspond to the buildings enumerated in the claim presented to the contracting officer. The 12 buildings which appeared in the claim and CASI pursued at the supplemental hearing are: A20267; C11091; C11092; C90146; E99812 (appearing in the claim as "New Trailer next to Building No. 70116, EWTES"); G30918; M02327 (identified in the claim as "Library Staff Facility, M/S"); M91081; E99800, E99801, E99802, E99803 (these last four were listed in the claim as "Central Site Turnstiles, EWTES"). None of these buildings are part of the October ECP. The seven buildings which appeared in the claim and have been dropped are: 02629; MIDAS South Site SNORT; 00452; Ordnance Administration Building G/A (31060); Code 27 Department Office Building II M/S; 02640 Addition; and 70129. We find that CASI's claims for compensation for these seven buildings have been abandoned.

## DISCUSSION

### Jurisdiction

We have jurisdiction under the CDA over CASI's 17 August 1995 appeal on the basis of a deemed denial. *See* 41 U.S.C. § 605(c)(5). The question is the scope of the appeal. The Government objected on jurisdictional grounds to CASI's addition of "new buildings" shortly before the initial hearing because claims for OSP service to those buildings had not been submitted to the contracting officer first, and it has maintained its objection through the supplemental hearing (tr. 1/14, 2/81-83, 86, 10/13). The presiding judge deferred ruling on the objection, and accepted testimony without limitation in order to understand which buildings were considered by the contracting officer and which buildings remained in dispute and in the interests of fostering settlement (tr. 2/89, 10/13).

The Government argues that the only buildings properly before the Board were those which had been specified in CASI's claim to the contracting officer. In its view, the only buildings properly before us are buildings A20267, C11091, C11092, C90146, G30918, and M91081. (Govt. br. (OSP), at III-65-66) The Government does not address buildings E99812, M02327, and E99800-E99803 which, we found, also appeared in the claim.

The CDA requires the contractor to submit a properly certified claim to the contracting officer for a final decision as a prerequisite to our jurisdiction. *See, e.g., Grumman Aerospace Corporation*, ASBCA Nos. 46834, 48006, 97-2 BCA ¶ 29,180 at 145,114. The test is whether the claim in question turns on new underlying operative facts that were not alleged in the claim previously submitted to the contracting officer for a final

decision. *E.g., Trepte Construction Company, Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595; *Service Engineering Company*, ASBCA No. 42137, 94-3 BCA ¶ 27,064. The determination of whether OSP service was ordered and by whom is inescapably building specific. Consequently, we must conclude that we do not have jurisdiction over the claims for the 39 buildings addressed at the supplemental hearing which were not included in the claim submitted to the contracting officer.

### Merits

Our review is *de novo* and we are not bound by the contracting officer's final decision. *E.g., Kinetic Builders, Inc. v. Peters*, 226 F.3d 1307, 1318 (Fed. Cir. 2000); *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994)(*en banc*); *Space Age Engineering, Inc.*, ASBCA No. 26028, 82-1 BCA ¶ 15,766 at 78,032.

The Government argues that CASI is not entitled to compensation for provision of OSP to the six buildings for which it says we have jurisdiction because CASI has failed to allege that it was unaware of any of these buildings before the cut-off date established in the October ECP (Gov't br. (OSP) at III-65-66). The Government argues that all buildings CASI knew about at the time of the October ECP were included in Modification No. P00026, whether they were listed by number or not, because the ECP read, "This revision encompasses all changes from inception to 16 September 1991." The ECP also stated that it was based on the final design as of 16 September 1991. (Gov't br. (New Buildings) at VIII-104) Furthermore, CASI's witness, Mr. Babaie, testified the ECP included all buildings that had been discovered as of the cut-off date indicated in the ECP. Therefore, according to its theory, since the ECP included all buildings known about by September 1991, CASI had to affirmatively allege and prove that it was not aware of a building before the cutoff date of the ECP before the Government could be held responsible for payment (Gov't br. (OSP) at III-69; Gov't br. (New Buildings) at VIII-104).

We have found that the October ECP was comprised of buildings listed on the included Attachment 8, Facilities Report, and Additions/Deletions worksheet. Specifically, we held that those buildings listed by number in Attachment 8 and the 25 September 1991 Facilities Report and not excluded by the one page "Additions and Deletions" worksheet included in the October ECP are included in Modification No. P00026, and thus already paid for. The six buildings the Government says are properly before us were not listed in the documents making up the October ECP.

The Government admitted in its answers to the Request for Admissions that CASI was entitled to compensation for these six buildings and no evidence was adduced at the hearing which would undermine those admissions. Moreover, the Government's current argument depends on an out of context reading of the modification. It ignores, in our view, the fact that the line and station survey led to a specific identification of buildings for which CASI offered to provide OSP for additional compensation. It is what is referenced in the

modification that controls, not what was omitted. Therefore, we conclude that CASI provided OSP for the six buildings, the provision of service to those buildings was not covered by Modification No. P00026, and CASI is entitled to an equitable adjustment for providing the OSP.

The Board has identified two more buildings, E99812 and M02327, which do not appear in the October ECP and for which the Government admitted during discovery that CASI provided OSP. Providing service to the buildings also was outside the scope of Modification No. P00026, and CASI is entitled to an equitable adjustment. We therefore add these to the six noted above, finding entitlement for all eight.

Four more buildings are properly before us, buildings E99800, E99801, E99802, and E99803, and they do not appear in the October ECP. We address them in the next section.

#### Buildings Serviced Through Other Buildings

The Government argued that CASI did not provide any OSP to at least 17 of the 51 buildings on CASI's final list because the buildings were serviced through other buildings with ISP wire. The Government contends that CASI failed to prove that provision of service to any of these buildings by means of ISP fed from another building affected or changed OSP. (Gov't br. (New Buildings) at VIII-95) It is undisputed that buildings E99800, E99801, E99802, and E99803, received service through ISP from another building.

We have considered the definition of OSP, Mr. Hardy's testimony, and the pre-dispute language in Modification No. P00027, incorporating the 18 September 1991 ECP, which clearly stated that providing OSP through another building required no OSP cable and was done at "no additional cost to the Government." We find CASI's own September 1991 interpretation persuasive based on the familiar principle that the parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation. *E.g., Drytech, Inc., ASBCA No. 41152, 92-2 BCA ¶ 24,809.* We also note that one of the buildings for which CASI is seeking compensation, building M02187, is specifically described by CASI in the ECP implemented by Modification P00027 as receiving service through ISP and therefore, there is "no additional cost to the Government." Accordingly, we conclude that CASI is not entitled to additional OSP compensation for the four buildings properly before us, buildings E99800-E99803 (the Central Site Turnstiles, EWTES), that are serviced by ISP wire through other buildings.

#### Failure to Negotiate the Price of Modification No. P00026

We reject CASI's argument that Modification No. P00026 is void because the modification was a UCA and the modification price was not timely set. Modification

No. P00026, like Modification No. P00012, implements a within contract scope ECP and, consequently, is not a UCA within the meaning of 10 U.S.C. § 2326, as implemented by DFARS 217.7401, for the reasons more fully explained in *Contel Advanced Systems, Inc.*, ASBCA No. 49072, \_\_\_ BCA \_\_\_\_\_(12 March 2002).

As in the case of Modification No. P00012, at no time prior to execution of the modification, or until after the appeal was filed, did CASI's representatives suggest that Modification No. P00026 was outside the scope of the contract. Attachment 8 set the baseline for OSP. However, the parties recognized that the NWC was a "dynamic organism." Changes in the number of buildings to be made service-ready were expected during the course of performance. The required line and station survey practically guaranteed that changes would be necessary. CASI understood the realities of the situation and made no contemporaneous complaint.

Moreover, Modification No. P00026 did not otherwise lapse or become void because the parties failed to negotiate the price in accordance with the modification's schedule. Negotiations to establish a "definitive" price were contemplated at the time the modification was signed, with definitization set to occur on or before 19 July 1992. The definitization date passed and was never extended. Despite some plans for negotiations at the end of 1993, the parties never went forward, although it appears that no later than the middle of November 1993, both parties could have begun negotiations.

The Navy has offered no persuasive explanation for why it did not act in a more timely manner. If it was satisfied with the not-to-exceed price, nothing stopped it from saying so far sooner than it did. CASI, on the other hand, was expressly told during the negotiations leading up to Modification No. P00026 that the price it proposed, if accepted, would be the top price payable for the work. CASI expressed no objection to the not-to-exceed price. This was the second maximum price modification issued during the project. CASI clearly understood what it was doing and CASI has not suggested that it did not understand the import of the maximum ceiling price provision when it signed the modification. While CASI had no price incentive to engage in negotiations, particularly if the result was a price lower than the not-to-exceed price, it was interested in definitizing Modification No. P00026 for the same reason it wanted to wrap-up Modification No. P00012. CASI wanted to have certainty in the pricing so that the Government would be in a position to determine the overall LTOP, although it never suggested that a price lower than the not-to-exceed price would be warranted.

What we said in our decision in ASBCA No. 49702, in connection with Modification No. P00012, applies here. CASI agreed at the time it signed Modification No. P00026 to accept clauses required by law at the time a price was set. Consequently, it could have no complaint as long as the price was set within a reasonable time. However, CASI has not suggested what a reasonable time would have been here and it has not identified any provision of law, let alone an effective date of such a provision, which might be pertinent to

determining a reasonable time. In any event, the Government did not, in fact, seek to impose any new clauses when it did act. Furthermore, the Navy's subsequent setting of the modification price at the ceiling price has mooted any determination of when the Government's delay became unreasonable and in the absence of a specific claim has provided CASI all that it bargained for when it agreed to a maximum price for the work covered by the modification.

In reaching our decision with respect to Modification No. P00026, we emphasize that we are not addressing the Navy's alleged failure to timely establish an LTOP for the entire contract at system acceptance, which is the subject of the appeals in ASBCA Nos. 50648, 50649, 51048, and 51049, and how, if at all, a failure to negotiate the price of Modification No. P00026 earlier may have contributed to the alleged delay in establishing the LTOP at system acceptance.

### DECISION

The appeal is sustained as to buildings nos. A20267, C11091, C11092, C90146, G30918, M91081, E99812, and M02327, denied as to buildings E99800-E99803, and dismissed as to the remaining buildings for lack of jurisdiction. The appeal is denied in all other respects.

Dated: 12 March 2002

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

## NOTES

<sup>1</sup> The other appeals are ASBCA Nos. 49071, 49072, 49074, 49075, 49076, 49164, 49603, 49772, 50648, 50649, 51048, 51049. The appeals in ASBCA Nos. 49071, 49164 and 49772 have been decided and the decisions can be found at *Contel Advanced Systems, Inc.*, ASBCA Nos. 49071, 49164, 49772, 01-2 BCA ¶ 31,576. The decision in ASBCA No. 49072 is being issued together with this decision.

<sup>2</sup> We have adopted the abbreviations indicated for the following documents in the record: the Government's superseding Rule 4 file (SR4); appellant's supplemental Rule 4 file (AR4); the Government's post-hearing brief, Claim 3 OSP (Gov't br. (OSP)); the Government's post-hearing brief, Claim 15 New Buildings (Gov't br. (New Buildings)); appellant's post-hearing brief, Vol. I, Claim 3 Outside Plant Installation (app. br.); appellant's post-hearing brief, Vol. III Exhibits (app. br. vol. III); appellant's post-hearing reply brief, Vol. I argument (app. reply br.); and appellant's post-hearing reply brief, Vol. II Claim 3 rebuttal facts (app. reply br. vol. II).

<sup>3</sup> App. br. vol. III, ex. 2, Claim 3 RFA nos. 33, 48, 78 for building 91081 Main Site; 34, 49, 79, for building 11091 CLPL; 35, 50, 80 for building 11092 CLPL; 36, 51, 81 for building 30918 G/A; 38, 53, 83 for building 02629 Main Site; 39, 54, 84 for building 20267 NAF; 40, 55, 85 for building 90146 CLPL; 41, 56, 86 for MIDAS South Site SNORT; 42, 57, 87 for building 00452; 43, 58, 88 for Ordnance Administration Building G/A (31060); 44, 59, 89 for the Library Staff Facility, Main Site (02327); 45, 60, 90 for Code 27 Department Office Building II Main Site; 46, 61, 91 for building 02640 Addition; 47, 62, 92 for the trailer next to building 70116 (99812); and 37, 52, 82 for building 70129.

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. 49073, Appeal of Contel Advanced Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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

