

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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MC II Generator & Electric) ASBCA No. 53389
)
Under Contract No. DAAK01-96-D-0062)

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APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
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OPINION BY ADMINISTRATIVE JUDGE PAGE

MC II Generator & Electric (MC II or appellant) seeks \$1,881,731 in additional costs for furnishing engines manufactured by John Deere, contending this was a constructive change directed by the government's project manager. Entitlement only is before us. Following a hearing, the parties submitted extensive briefs. We deny the appeal.

FINDINGS OF FACT

MC II was awarded five-year, firm fixed-price supply Contract No. DAAK01-96-D-0062 by the United States Army Aviation and Troop Command on 8 August 1996 (R4, tab 1A). On 3 February 1997, responsibility for the contract was transferred to the United States Army Communications-Electronics Command (CECOM) at Ft. Monmouth, New Jersey (R4, tab 2A at 2-3). The Army's Project Manager-Mobile Electric Power (PMMEP) in Virginia provided the contracting officer (CO) at CECOM with technical expertise, assistance regarding logistical issues, and monitored technical aspects of the contract (R4, tab 1A at 4; tr. 2/304-07, 327, 369-70, 394, 3/511).

After the Army determined its forces had a proliferation of makes and models of generator sets from multiple sources, it decided to standardize power sources to facilitate new purchases and the repair of existing assets. The purpose of the contract was to provide the United States Department of Defense with standardized tactical quiet

generator sets (TQGS) having digital displays similar to a computer screen instead of the analogue gauges and meters used in previous designs. (Tr. 2/457-60) The engine could be mounted on a skid, trailer, or elsewhere (tr. 3/540). Although engines previously provided on a sole source basis by John Deere were still in use, they were no longer acceptable because they failed to meet current United States Environmental Protection Agency emissions standards (R4, tab 11 at 1; tr. 1/451-52). The contractor was also to provide a field installable engine kit (FIKE) to replace damaged engines anywhere in the field, be it in Bosnia or at Ft. Hood (tr. 2/455-56).

The contract called for MC II to re-engineer and digitize existing 30 and 60 kilowatt (kW), 50/60 and 400 Hertz (HZ) TQGS (R4, tab 3 at 120/183). The contractor was also required to convert all existing TQGS control systems to a microprocessor-based Digital Control System (DCS) with minimal changes to the existing design (R4, tab 11 at 1-2). The contract contained performance specifications that left the method of performing up to the contractor; no particular make or model of engine was specified. The re-engineering portion of the contract required MC II to provide mockup TQGS followed by first article sets (R4, tab 2 at 1-2). The contract also contained an option for FIKE which the government exercised (R4, tab 11). Both competing offerors for the contract, Fermont and MC II, proposed to provide the same Caterpillar engines and DCS (R4, tab 15 at 3-6).

The contract integrated all provisions of the solicitation (R4, tab 1A at 1). Among standard contract clauses incorporated by reference was FAR 52.233-1 DISPUTES (OCT 1995). The contractor was advised by FAR 52.243-1 CHANGES – FIXED-PRICE (AUG 1987) in ¶ (a) that the CO may make changes to the contract, and in ¶ (b) that the CO shall make an equitable adjustment in contract price, the delivery schedule or both if the changes ordered increased or decreased the cost or time of performance. FAR 52.243-7 NOTIFICATION OF CHANGES (APR 1984) required the contractor to notify the administrative contracting officer (ACO) in writing within 30 days of “Government conduct (including actions, inactions, and written or oral communications) that the Contractor regards as a change to the contract terms and conditions.” (R4, tab 3 at 116/183) DFARS 252.243-7000 ENGINEERING CHANGE PROPOSALS (MAY 1994) provided that the CO may ask the contractor to prepare engineering change proposals, and gave special instructions for changes costing \$500,000 or more. (*Id.* at 129/183)

Minutes from a post-award conference on 18 September 1996 record that MC II was advised that only the “PCO” or ACO could change or modify the contract (R4, tab 18 at 1-2). Minutes from a government/MC II meeting on 1 October 1996 similarly stated that any comments were at best mutually agreeable recommendations; discussions that would result in a change to the contract were “not to be construed as official until such time as the contract is formally modified” (R4, tab 20 at 1). While it was not established that the disclaimer regarding the necessity of a contract modification was discussed during the meetings, the minutes are part of the official record.

Mr. Bruce Kueller, CO from early 1997 until about May 1998 (tr. 2/392-93), attended a government/MC II meeting on 4 February 1997 (R4, tab 28 at 2). Meeting notes recorded that “MC II will go back to Caterpillar” engines, and the contractor’s significant schedule slippage was discussed (*id.* at 1, 4-5). On 20 February 1997, CO Kueller issued a stop work order for the FIKE effort, and advised that a modification to terminate that portion of the contract for convenience would be issued. The deletion was recommended by PMMEP due to technical complexities, and because MC II had advised that work on the FIKE could adversely impact its TQGS efforts due to the contractor’s constrained resources. (R4, tab 252 at 1, 4; tr. 2/454-56)

At the time MC II was acquired by the Westwood Corporation (Westwood) on 28 May 1997, it planned to provide Perkins engines to perform the contract (joint stip., tr. 1/8). Westwood had some government contracting experience, primarily as a subcontractor. MC II was then delinquent in its performance of the contract although Westwood was not until later fully aware of the extent of the problems. (Tr. 1/20-22)

Despite assurances to the government regarding resolution, MC II continued to have difficulty obtaining engineering design information and drawings from Perkins, resulting in logistical problems, delays, and difficulty in providing spare parts (R4, tab 52 at 2; tr. 1/20-21, 91-93). Matters were complicated by Perkins being located in England (tr. 1/28), and by the change of its local administrative offices from Michigan to Virginia (R4, tab 52 at 2). About mid-May or June 1997 when delivery of the Perkins engines was in serious jeopardy, MC II of its own initiative developed a contingency plan and contacted Caterpillar, Cummins and John Deere as potential substitute suppliers in the event Perkins could not perform (tr. 1/27-31, 186-97). In discussions, MC II learned that Caterpillar and Cummins relied upon Bosch fuel pumps, not the Stanadyne pumps MC II preferred (R4, tab 52 at 2). On 25 June 1997, MC II finally received Perkins engines for the mock-ups, but discovered the engines’ certification was based upon the use of Lucas fuel pumps, which led to further testing and delay. MC II found additional problems with the Perkins engines, including the necessity of redesigning the fuel pump after the engines were mounted on skids. MC II also had difficulties with the Kurz & Root generators it had planned to provide. (*Id.* at 2-3; tr. 1/28-30) According to Westwood’s president Mr. Ernest McKee, the contractor did not advise Perkins of its inquiries to other suppliers as it did not wish to alienate Perkins and, despite the difficulties encountered, still believed Perkins could perform (tr. 1/19, 30).

An internal MC II memorandum dated 4 June 1997 memorialized a conversation between MC II and Perkins’ representatives, and noted among other things additional delay in meeting the contract’s delivery schedule, problems in making certain engines, and difficulties with the high-pressure fuel pump (R4, tab 151). MC II advised Perkins on 19 June 1997 that the Perkins engines it had received differed significantly from the engineering drawings previously supplied, and detailed numerous examples. MC II

sought updated drawings and related information from Perkins as soon as possible, noting the adverse impact upon contract deadlines faced by MC II. (R4, tab 157)

Government minutes from an in progress review (IPR) with MC II on 25-26 June 1997 noted numerous problems with contract performance and scheduling, particularly with the Perkins engines (R4, tab 49 at 1, 6, 8). MC II advised that it was now pursuing a Cummins engine from a schedule/delivery standpoint (*id.* at 6). The government expressed concern, especially because MC II had provided assurances that difficulties with Perkins were being resolved. In addition, MC II informed the government that it would be unable to meet the upcoming delivery deadline for the mockup engines (tr. 3/533-34).

Perkins' representative ADI Technologies, Inc. (ADI) wrote MC II on 3 July 1997 concerning the engine delivery schedule. ADI advised that Perkins planned to build the engines between 21-25 July 1997, and hoped to deliver the engines to MC II between 2-8 August 1997, contingent upon delay in getting the engines through customs. The letter acknowledged that this was "an aggressive, high risk schedule, but achievable [sic]" in an "extraordinary attempt to bring about success." (R4, tab 159) The contract as extended required six mockup generator sets to be provided to the government by 29 July 1997 (R4, tab 2B at 3-4).

On 9 July 1997, the parties held a program review and toured MC II's facilities in Dallas, TX. Mr. McKee agreed with PMMEP's project manager (PM) COL James B. Cross that MC II was ill-prepared, the review was poorly done by MC II, and that another meeting should take place. (Tr. 1/22-27, 2/342-43)

COL Cross spoke with John Deere on 16 July 1997 regarding repower engines (R4, tab 185). He testified that these engines were for the FIKE effort that had been deleted from MC II's contract, and were unrelated to the TQGS contract (tr. 3/538-39).

MC II on 16 July 1997 wrote CO Kueller in response to the government's request for specific information in the 25-26 June 1997 IPR. MC II cited numerous reasons for its failure to meet the contract schedule, especially technical problems encountered by Perkins in producing the engines. (R4, tab 52 at 2-3) MC II acknowledged having financial difficulties but noted it had recently received funds from Westwood and hired new personnel. MC II requested that the government extend the schedule and "forbear any contract termination." (*Id.* at 5-6) The government had serious doubts regarding MC II's ability to perform, and was considering termination of the contract (tr. 2/304, 307-08, 356-57).

On 17 July 1997, MC II and Westwood personnel met with PMMEP at Ft. Belvoir VA. Representing the contractor were Mr. McKee, Mr. Thomas Barry (program manager for the TQGS) and Mr. Bob Carriger (responsible for TQGS engineering). (Tr. 1/33,

135, 141) Attending for the government were COL Cross, Dr. Alayne Adams (deputy PM), COL James Wells (successor PM to COL Cross from August 1997 through June 2001), and Mr. William H. Merrill (senior project engineer for the TQGS contract) (tr. 1/38, 2/312, 317, 335, 450). During the two-hour general meeting, MC II introduced its new management, discussed Westwood's previous projects, and provided the status of problems encountered with the Perkins engines (R4, tab 179; tr. 1/35-36, 142-43, 167). COL Wells expressed the government's concerns, including the unmet delivery schedule, that Perkins was an offshore manufacturer, and the potential for inconsistent quality in the Perkins hand-built engines (tr. 2/346). Mr. McKee agreed that the government's concerns were legitimate (tr. 1/35-36, 122). There was little if any discussion of John Deere engines during the general meeting (tr. 1/36, 2/308-09).

A brief, second meeting lasting 15-30 minutes followed the general meeting that was attended by a small group including Mr. McKee, COL Cross, Dr. Adams, and COL Wells (tr. 1/38, 2/312, 317, 335, 3/547). The government's purpose was privately to emphasize its very serious concerns to Mr. McKee regarding MC II's lack of performance, and possible termination (tr. 2/317-18). COL Cross reiterated COL Wells's remarks, and stressed the government's dissatisfaction over Perkins' failure timely to furnish the engines. The parties discussed MC II's request that the government forbear termination, and explored alternative measures MC II might pursue to complete the contract (tr. 1/37, 2/317-18, 3/546-47). Reference was made to John Deere engines.

MC II's interpretation of events from the second meeting differs significantly from the government's, including who initiated discussion regarding the use of John Deere engines. It is appellant's position that the government was the proponent of the change. (App. br. at 14) Appellant contends that during the private meeting COL Cross directed MC II to use John Deere engines, and that MC II is entitled to recover additional costs for this change. (*Id.* at 14, 26) Mr. McKee supported that contention by testifying that COL Cross pointed out advantages to the government since John Deere parts were already in the supply chain, and that COL Cross had stated that PMMEP would assist MC II in disposing of any Perkins engines through other Army agencies (tr. 1/46-47). Mr. McKee recalled COL Cross saying that "off the record the government would prefer John Deere" (tr. 1/41), and made a handwritten notation to that effect which he later reduced to a memorandum to the file (R4, tab 193). Although Mr. McKee later testified that COL Cross did not "direct" MC II to use John Deere engines (tr. 1/42), he believed from COL Cross's comments that it was necessary for MC II to change from Perkins to John Deere engines if the latter met contract requirements. He conveyed this understanding to Mr. Barry and Mr. Carriger upon leaving Ft. Belvoir. (Tr. 1/43-45) Mr. McKee testified that until the time the claim was made, he looked upon the PMMEP "as running the [TQGS] program period," and did not understand that only the CO could bind the government (tr. 1/22).

By contrast, while COL Cross admitted providing information during the second meeting about John Deere, he placed the exchange in the context of assisting MC II to find an acceptable method of performance to avoid termination (R4, tab 7; tr. 3/544-45, 548-49), including ways to reduce MC II's costs if it chose to use John Deere engines (tr. 3/551-52). COL Cross recalled the private discussion to include exploration of alternative engine suppliers that might assist MC II in successfully completing the contract, and that John Deere was one of the potential suppliers mentioned. COL Cross remembered giving Mr. McKee the name and telephone number of a contact at John Deere. (Tr. 3/469-71) COL Cross testified that he did not then know whether the John Deere engines would meet the contract requirements, the costs of such engines, or if the schedule could be met (R4, tab 7; tr. 3/555-58). He emphasized that although John Deere was discussed as a potential supplier, engine selection was MC II's prerogative in this firm fixed-price contract (tr. 3/550-51).

COL Cross denied directing any change to the contract (tr. 3/556). Although he had extensive training and experience in federal acquisition, COL Cross was not a contracting officer and knew he could not obligate the contractor or the government (tr. 3/504-06, 508, 512). He regarded his role as giving technical assistance to contractors with performance problems, and previously had done so for MC II (tr. 3/517-18, 521-30). COL Cross testified that the contract's requirement for changes to be made by the CO was reiterated to MC II on multiple occasions (R4, tab 7; tr. 3/555-56). The testimonies of Dr. Adams and COL Wells, both present at the private meeting, were consistent with COL Cross's version of events, and they agreed that MC II was not directed by COL Cross to use John Deere engines (R4, tabs 9-10; tr. 2/318, 348).

CO Kueller did not attend the 17 July 1997 meetings. He was unaware during the time he served as CO of any allegations that MC II had been directed to change to John Deere engines (tr. 2/393, 414-15, 423). Throughout the contract, MC II corresponded routinely with the CO on matters pertaining to contract administration, including engineering change proposals and other issues. *See, e.g.*, R4, tabs 1-2, 5, 6B, 6C, 52, 68, 72, 74, 81-86.

The parties' conflicting perspectives on COL Cross's comments during the private meeting of 17 July 1997 regarding John Deere engines are at the heart of the appeal. Although appellant makes much of its assertion that COL Cross was the one to initiate consideration of John Deere engines to support its contention that COL Cross directed their use, we do not find the source of the suggestion regarding John Deere engines controlling. COL Wells and Dr. Adams gave credible corroborating testimony that COL Cross's remarks were made consistent with his role as project manager, and were provided in the context of technical assistance to the contractor. We find that COL Cross did not direct MC II to change from Perkins to John Deere engines.

MC II met with John Deere representatives on 23 July and 5 August 1997 to discuss contract requirements (R4, tabs 111-15). After the second meeting, Mr. McKee was satisfied that John Deere could supply the necessary engines (tr. 1/54).

MC II continued to correspond with ADI regarding the design and delivery of the Perkins engines. MC II's letter of 1 August 1997 requested that Perkins provide correct engineering drawings for engines previously received, and questioned how long MC II could "stand this high cost per engine/engine accessory illustration." (R4, tab 163) On 5 August 1997, ADI notified MC II that certain engines were being shipped to Detroit and that information regarding delivery in Dallas would be later provided (R4, tab 164). MC II and ADI exchanged further correspondence regarding problems with Perkins' drawings and engines (R4, tabs 165-66).

PMMEP was informed in a conference call of 7 August 1997 that MC II had again changed suppliers and now intended to provide John Deere engines (R4, tab 180; tr. 1/157). After a second conversation of that date with Mr. Merrill, Mr. Barry understood that the change to John Deere would be more easily approved if MC II, not PMMEP, wrote the CO, and explained its reasons for the change (tr. 1/157-58). Also that day, John Deere was notified that MC II had decided to use its engine to perform the contract (R4, tab 175).

MC II's letter of 12 August 1997 to CO Kueller provided contract history and acknowledged its performance was behind (R4, tab 6B). MC II advised that in early 1997 it had become concerned about the functional capabilities of the Caterpillar DCS and decided to substitute an upgraded DSC version MC II had developed. Although MC II earlier had changed from Caterpillar to Perkins engines in an effort to move the contract forward, MC II acknowledged it was unable to resolve major difficulties with Perkins, including its inability to obtain necessary engine configuration drawings. (*Id.* at 1-2) MC II stated that in a recent telephone conversation with PMMEP, "it was suggested that MC II revisit John Deere" to see if its products met the latest TQGS specifications (*id.* at 2). After making its evaluations, MC II determined that John Deere engines were a better value; among the significant advantages were John Deere's commercial practices, the depth and quality of the drawings, and the availability of support data. MC II advised that unless the CO directed otherwise, MC II intended to provide John Deere instead of Perkins engines. (*Id.* at 2-3)

Nothing in MC II's letter provided notice to the CO that MC II considered COL Cross to have directed the change in engine suppliers to John Deere, or that MC II faced additional costs in using those engines (R4, tab 6B). Mr. McKee testified that he did not write that COL Cross had directed the change because he understood remarks in the private meeting were made off the record, and he did not want to damage MC II's working relationship with PMMEP (tr. 1/60-61). CO Kueller received but did not respond to MC II's 12 August 1997 letter (tr. 2/394).

On 13 August 1997, CO Kueller issued a “Show Cause Letter” to MC II advising that the contractor had failed timely to deliver numerous contract items and that the government was considering terminating the contract for default. MC II was advised that it would be afforded an opportunity to respond prior to a final decision. (R4, tab 4)

On 20 August 1997, ADI advised MC II that Perkins was unable readily to comply with requirements for engineering drawings. Perkins’ shortcomings were admitted, and ADI advised “there is not an easy fix.” ADI mentioned a possible solution costing an additional 50,000 British pounds sterling with an additional two-month delay. (R4, tab 166)

On 22 August 1997, John Deere provided a price quote to MC II for the TQGS engines (R4, tab 120).

MC II on 25 August 1997 responded to ADI’s letter of 20 August 1997, and cancelled “all [Perkins] engines not currently received” as a result of problems “in obtaining valid information.” MC II noted especially the “discrepancies between the engines received and the engines represented.” (R4, tab 167)

On 26 August 1997, MC II replied to CO Kueller’s show cause notice. Mr. McKee attributed the contractor’s failures to the “documented inability of Caterpillar, Perkins” and other subcontractors to perform, and requested a project meeting within 15 days. (R4, tab 5) Mr. McKee testified that the government was within its rights in issuing the show cause notice because MC II had failed to meet the contract’s delivery dates (tr. 1/118). MC II provided supplemental information by letter of 28 August 1997, and noted it recently had switched to John Deere engines capable of meeting contract requirements after determining that the Perkins engines could not do so (R4, tab 64). That letter did not advise the CO of any additional costs associated with using John Deere engines (tr. 3/419-20) nor did it indicate that the change was prompted by government direction (R4, tab 5).

Correspondence over the next months evidenced the parties’ efforts to move the contract forward (*see, e.g.*, R4, tabs 62, 65-82). The government did not terminate the contract for default based upon MC II’s improved performance (tr. 1/64, 3/418-19), and a no-cost contract modification was made 12 November 1997 to extend the contract’s delivery dates (R4, tab 2F; tr. 2/420-22). MC II’s letter of 21 November 1997 to CO Kueller advised that although much progress had been made, changing the engine source from Perkins to John Deere had impacted its schedule. However, MC II did not seek any additional time or costs. (R4, tab 83)

In approximately May 1998, Ms. Vernay Salas succeeded Mr. Kueller as CO for the subject contract (tr. 2/367, 392-93, 422). CO Salas was visited in October 1999 by

Ms. Judy Poteet, contract administrator for MC II. Ms. Poteet sought compensation for the engine change to John Deere from Perkins. CO Salas advised Ms. Poteet that a certified claim was required because the amount sought exceeded \$50,000. (Tr. 2/372-373)

On 25 October 1999, Ms. Poteet wrote thanking Ms. Salas for their meeting of 14 October 1999; in addition to providing warranty information, Ms. Poteet advised that she was compiling data in support of the claim. No mention was made that the switch to John Deere was regarded by MC II as an alleged constructive change. (R4, tab 100) CO Salas responded by letter dated 28 October 1999, treated Ms. Poteet's letter as an uncertified request for equitable adjustment (REA), and advised the request could not be acted upon until proper documentation was provided (R4, tab 101; tr. 2/373-75). About 22 March 2000, Mr. McKee met with CO Salas regarding MC II's request for compensation, and gave her copies of uncertified cost spreadsheets previously furnished by Ms. Poteet (R4, tab 6B; tr. 1/72, 128, 195).

MC II did not submit a certified claim with supporting documentation until 3 January 2001, over a year after the conversation between Ms. Poteet and CO Salas (R4, tab 6). The REA sought a total of \$5,662,010 for constructive changes allegedly ordered by the government (R4, tab 6, REA at 10). This included \$210,176 for engineering work exceeding contract requirements in preparation for the change from Caterpillar to Perkins engines, a "course ultimately altered" due to government concerns over ultimate deliveries, potential problems associated with Perkins as an overseas supplier, and delays by Perkins in providing technical data to MC II (*id.* at 5). MC II summarized the alleged government's constructive change as the direction to change engine suppliers from Caterpillar to Perkins, and then to the more expensive John Deere. MC II asserted that the government was aware that additional costs would be incurred to implement these changes. (*Id.* at 8) The REA contended that the constructive change to John Deere as engine supplier occurred during the private meeting of 17 July 1997, when COL Cross "specifically and unambiguously directed MC II/Westwood to contact certain personnel at John Deere Engines" and told MC II that "additional costs incurred by MC II and CECOM as a result of the change would be more than offset by not having to introduce new parts" into government inventory. (*Id.* at 6) MC II alternatively argued that "authorized Army individuals approved and/or ratified Westwood's actions." The REA stated that the government was kept informed of the change to John Deere engines, and "at the very least had knowledge of and acquiesced to Westwood's expenditures of time and money. . . ." (*Id.* at 8-9) The contractor's lengthy delay in advising the government of alleged constructive changes and additional costs was not addressed.

CO Salas's investigations of MC II's certified claim included consultation with personnel in Administrative Contracting Offices in Tulsa and Dallas, former CO Kueller, and PMMEP (tr. 2/379-82). By final decision (COFD) dated 1 March 2001, CO Salas denied MC II's claim in its entirety (R4, tab 10). The COFD found that at no time did the

government direct MC II to change its engine supplier from Caterpillar to Perkins or from Perkins to John Deere (*id.* at 2-3). The CO denied that authorized government personnel ratified any alleged constructive changes. The decision stated that the contractor failed to comply with FAR 52.243-7 NOTIFICATION OF CHANGES that requires at ¶ (b) NOTICE the contractor to notify the ACO promptly within 30 days of government conduct the contractor regards as constituting a change. (*Id.* at 3-4) CO Salas admonished MC II that the firm fixed-price performance contract placed upon the contractor the “maximum risk and full responsibility on the contractor for all costs and resulting profit or loss.” (*Id.* at 4)

MC II timely appealed the adverse COFD to the Board. On 6 September 2002, MC II amended its Complaint, reduced the amount sought to \$1,881,731, and dropped that portion of the claim asserting that the Army ordered the change from Caterpillar to Perkins engines. (Amended compl. ¶ 30).

DECISION

MC II asserts additional costs, alleging that COL Cross constructively changed the contract by directing it to provide John Deere instead of Perkins engines. A constructive change is comprised of two elements: a change, *i.e.*, performance not required by the contract, and an order. The latter carries a note of force or coercion, and “differs from advice, comments, suggestions, or opinions which Government engineering or technical personnel frequently offer to a contractor’s employees.” *Space Services of Georgia, Inc.*, ASBCA No. 25793, 81-2 BCA ¶ 15,250 at 75,493 quoting *Industrial Research Associates, Inc.*, DCCAB No. WB-5, 68-1 BCA ¶ 7069.

To establish that a constructive change occurred, MC II must prove that (1) it was compelled by the government to perform work that was not required by the terms of the contract; (2) the person directing the change had contractual authority unilaterally to alter the contractor’s duties under the contract; (3) the contractor’s performance requirements were enlarged; and (4) the additional work was not volunteered, but was directed by a government officer. *Real Estate Technical Advisors, Inc.*, ASBCA Nos. 53427, 53501, 03-1 BCA ¶ 32,074; *Monterey Mechanical Co.*, ASBCA No. 51450, 01-1 BCA ¶ 31,380 at 154,953 citing *Len Co. and Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967).

To sustain the appeal under these principles, the Board would have to agree that (1) MC II was compelled by the government to change from Perkins to John Deere engines; (2) COL Cross had authority, either express or implied, to direct that change (or there was subsequent ratification); (3) providing John Deere engines exceeded MC II’s contractual requirements; and (4) the change to John Deere engines was not performed by MC II as a volunteer, but that it was directed to do so by COL Cross as an authorized government officer.

MC II has not surmounted these hurdles. Foremost, it has not proven that an “order” or “directive” was given, the fundamental underpinning of an alleged constructive change. We have found that COL Cross’s remarks regarding the efficacy of John Deere engines in meeting contract requirements were made as technical advice, consistent with his role as project manager; that is a role made separate from a contracting officer by the contract. It is noteworthy that MC II continued to pursue Perkins engines for over a month after the 17 July 1997 meeting, and the record shows that MC II did not change engine suppliers until 7 August 1997 (about the time COL Wells succeeded COL Cross as project manager), after delays and technical difficulties with Perkins did not abate. MC II did not even inform the government that it considered a constructive change to have occurred until more than two years after the alleged direction was made at the 17 July 1997 private meeting. MC II had throughout the contract been plagued by its inability to find suitable engine suppliers, and had changed sources more than once as it strove to perform; information that it had changed engines once more was, without more, unremarkable.

Further, there was no proof that COL Cross had contracting officer authority, or that MC II interacted with him in that role; his technical expertise did not imbue him with CO authority. MC II had already acknowledged that its failure to timely provide any satisfactory engines exposed it to possible termination for default prior to the meeting with COL Cross. With MC II’s admitted poor performance, we do not agree that the government’s 13 August 1997 show cause letter, issued after MC II had notified the government that it had changed to John Deere as its engine supplier, furnished the coercive element to transform COL Cross’s technical advice into an authoritative directive.

We reject appellant’s contention that the contracting officers’ alleged failures to act after learning that MC II switched from Perkins to John Deere engines constituted ratification of a constructive change (app. br. at 52-57). There is no proof MC II was directed to perform additional work, nor were the contracting officers even informed until more than two years after the shift that the contractor sought additional costs or considered the change to have been government driven. MC II has failed to meet its burden to prove by a preponderance of evidence that the action (or inaction) of authorized government representatives was tantamount to approval of a compensable change. *See Grumman Aerospace Corp.*, ASBCA Nos. 46834, 48006, 51526, 03-1 BCA ¶ 32,203 at 159,243.

CONCLUSION

The appeal is denied.

Dated: 26 March 2004

REBA PAGE
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

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. 53389, Appeal of MC II Generator & Electric, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals