

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Hawaii CyberSpace) ASBCA No. 54065
)
Under Contract No. F64605-96-M-7445)

APPEARANCE FOR THE APPELLANT: Mr. Philip Blackman
Director

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Mark H. Alexander, Esq.
Senior Trial Attorney
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Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from a contracting officer’s (CO) final decision that denied appellant’s 17 May 2002 claim alleging 10 items of directed changes and added work under the captioned contract. Our 5 November 2003 decision granted respondent’s motion to dismiss claim items 2 and 6 for lack of a signed CDA certification. *Hawaii CyberSpace*, ASBCA No. 54065, 04-1 BCA ¶ 32,455. Appellant’s 9 and 26 March 2004 letters to the Board withdrew claim item Nos. 1, 7, 9 and 10, and “combine[d] claims #4 and #5 into a single presentation.” Thus, only claim items 3, 4, 5 and 8 remain in dispute.

The Board has jurisdiction of the appeal under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. § 607. The parties elected to submit the appeal on the record pursuant to Board Rule 11 and have submitted briefs to the Board. We decide entitlement only.

FINDINGS OF FACT

1. In response to Solicitation No. F64605-96-Q-1043, Hawaii CyberSpace (“HCS”), a sole proprietorship owned by Philip Blackman, submitted a 28 August 1996 proposal for a “Flight Information System & Interactive Telephone Answering System” for \$59,800 to Hickam Air Force Base (AFB), HI, which stated, *inter alia*:

Our system design . . . has enhanced and extra features . . .
and combines COTS [commercial off the shelf] and custom
developed software and hardware. . . [and] operator
instruction

We will replace or repair any equipment that fails anytime within one year of the contract that is not covered by manufactures [sic] warranties. We have already coordinated our intended equipment installation at the cable TV station, and conducted a site survey at the terminal.

Current operation will be unaffected during our implementation effort. Each system will be brought on line with the old system equipment remaining in place during the validation and acceptance period. Installation, including a period of supported training and operation assistance is accomplished in less than four months.

HCS' proposed "enhanced and extra features" included, *inter alia*, (i) telephone system options "to Fax departure lists to the customer"; (ii) flight information system enhancements of "some additional data screens," improved "appearance and options of displayed screens," and acceptance of " 'Power Point' slides" as input to system displays; and (iii) added automation capabilities of "AUTOMATIC MISSION CHANGES ALERT MESSAGE LOG", "ON DEMAND PRINTED DETAIL DEPARTURE LISTS", and "EMERGENCY UPDATE PROCEDURES . . . if for any reason the APACCS is 'down.'" (R4, tab 1 at 4)

2. On 20 September 1996, the 15th Contracting Squadron, Hickam AFB, awarded to HCS Contract No. F64605-96-M-7445 ("the contract") to deliver a Video Display and Interactive Touch-Tone Telephone System by 18 March 1997 for \$59,800 (R4, tab 2).

3. The contract was a commercial item purchase order issued on Standard Form 1449, and incorporated by reference the FAR 52.212-4 CONTRACT TERMS AND CONDITIONS -- COMMERCIAL ITEMS (AUG 1996) clause, which provided in pertinent part:

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its postacceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

....

(c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with the performance of this contract, pending final resolution of any dispute arising under the contract.

....

(i) Payment. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. . . .

....

(o) Warranty. The contractor warrants and implies that the items delivered hereunder are merchant able and fit for the particular purpose described in this contract.

The contract did not include any standard clauses providing for unilateral CO directions and contract adjustments, such as FAR 52.242-14 SUSPENSION OF WORK, 52.243-1 CHANGES—FIXED PRICE, or 52.245-2 GOVERNMENT PROPERTY (FIXED PRICE). (R4, tab 2 at 1, 4-5)

4. The contract included Air Force specifications, Attachments 1-4, for the Flight Information System (FIS) (also called the “Flight Information Display System” (FIDS)) to be delivered and installed at building No. 2028, the passenger terminal at Hickam AFB, Air Mobility Command (“Hi-AMC” or “Hi_AMC”). Attachment 1 stated that the FIS was required “to be IBM compatible desktop PC driven” and to monitor and display all outbound and inbound flight information from designated menus and data fields of the “Aerial Port Automated Command and Control System” (APACCS) that originated from AMC at Scott AFB and terminated at Hickam AFB. Such information included “three

letter station identifiers” to be converted to “clear text English” and “to speech for access from four telephone lines incorporating an interactive telephone answering system”; required automated updating of all data whenever a change in any monitored data field occurred and the capability to transmit the video display to a local television station; and prescribed the outbound flight data display fields of mission identification number, type aircraft, destination, estimated time of departure, actual time of departure, and “seats released.” Attachment 2 prescribed similar requirements for inbound flight data displays, including “FR” – “where the mission is coming from.” Attachment 3 prescribed the video display format for “Departures” showing day and date, and columns entitled “DESTINATION,” “ACFT,” “MISSION #,” “SHOW” and “SEATS”, and for “Arrivals” showing day and date, and columns entitled “FROM,” “ACFT,” “MISSION #” and “ARRIVAL”, with all such columns aligned with the data displayed thereunder, with spacing between the column headings, and without data shadowing. Only the words “DEPARTURES” and “ARRIVALS” were in bold face type. Attachment 4 prescribed the interactive telephone answering system recording and menu requirements. The Attachments did *not*: (a) specify the color of “background screens” for departures or arrivals; (b) require all words to be bold face type, printing of hardcopy flight data reports; (c) designate how many screens were to be displayed on the video processor; and (d) require any government property or information, other than APACCS, for HCS’ use under the contract. (R4, tabs 1-2) The contract contained no requirements for HCS to submit proposed arrival and departure screen data to the CO for approval or to anyone for coordination with the Air Force user of the FIS, nor any provision that such screen data approved by the CO or coordinated with the user was to supersede the specified contract requirements.

5. Bilateral contract Modification No. P00001, dated 30 June 1997, *inter alia* incorporated HCS’s 28 August 1996 proposal with the “enhancements and additional automation capabilities listed” (see finding 1), stated six exceptions to the specifications, added a one year warranty of HCS-provided equipment starting 15 May 1997, increased the contract price by \$30,000 from \$59,800 to \$89,800, extended the delivery date to 30 June 1997, and provided, without reservation or exception:

IN CONSIDERATION OF THE MODIFICATION
AGREED TO HEREIN AS COMPLETE EQUITABLE
ADJUSTMENTS FOR THE CONTRACTOR’S CHANGES
STATED ABOVE, THE CONTRACTOR HEREBY
RELEASES THE GOVERNMENT FROM ANY AND ALL
LIABILITY UNDER THIS CONTRACT FOR FURTHER
EQUITABLE ADJUSTMENTS ATTRIBUTABLE TO
SUCH FACTS OR CIRCUMSTANCES GIVING RISE TO
THE PROPOSALS FOR ADJUSTMENTS.

(R4, tab 4)

6. On 30 June 1997 LT Frank Long, Chief, Passenger Services, 635th Airlift Mobility Support Squadron (AMSS), Hickam AFB, signed a document entitled “License and 15 day Maintenance Support for the Hi_AMC System” that provided:

4. The system is delivered with . . . additional features and equipment not required by the purchase order but developed nevertheless

. . . .

6. Delivery includes a free 15-day support maintenance plan (from 30 June 1997) to fix software deliverables that fail to function as designed and materially effect [sic] required functional capability. Software changes to effect visual elements and features, expand capability or changes for convenience or to achieve new characteristics or procedures is [sic] excluded. APACCA [sic], windows 95 [sic] and network idiosyncrasies are expected to occasionally require monitoring and manual user interaction, and such incidents are not covered. Correction to apparent software problems may be addressed by changing code, altering operating instructions, or otherwise as [HCS] may deem most appropriate.

and an “Acceptance Document” stating:

The delivery of the Hi_AMC system is in accordance with the requirements of the contracting officer and the terms and conditions of Contract #F6460596M7445, dated 19 [sic] Sept 1996, and modified by Contract Modification P00001, dated 30 June, 1997.

(R4, tabs 5-6)

7. HCS’s 18 July 1998 letter to the respondent claimed \$675,220 for ten enumerated items, of which items 3, 4, 5 and 8 were:

3. Directed extra work.
Amount: \$ 77,330

a) All work directed in the 25 July 1998 [sic 1997] directive by the [CO] was “extra work”. In fact the statement that a problem (“discrepancies”) existed was:

1) an observational error on the part of the user (conceded as such after we generated an extensive data capture and time stamp diagnostic) and

2) misstatement of fact since the work resulted from a user decided cosmetic modification to a screen design that had been seen by dozens of Air Force personnel, and accepted a month earlier!

b) Work performed as requested in the 15 day “maintenance period” represented new work modifying system characteristics already accepted at time of delivery. Screen color, font type, and other characteristics were known in January 1998 [sic 1997] to be “fixed” and not a user controlled feature. Such changes were explicitly excluded from “free” service under the maintenance period agreement.

c) Work in the 7 day quality control period.

d) Intensive follow-up to assure payment[.]

4. Directed delivery of equipment.

Amount: \$ 15,000

a) In pre-bid discussions the Air Force spokesman asserted the computers upon which the contractor provided software would run would be provided by the Air Force. No hardware requirements were listed in the contract, only the requirement that the software would run on “PCs” (Personal computers). The Air Force provided [IBM Model] 386 computers upon which the video display system was developed and delivered in December 1996. The user agreed with the contractor’s recommendation that the system should be built to operate on Pentium computers using the new AF standard PC operating system standard, Windows 95, which the contract did, but was not reimbursed for that equipment.

5. Directed delivery of a second signal generating video system.

Amount: \$ 12,000

a) In pre-bid discussions the Air Force spokesperson asserted that the video signal from the cable TV station was available within the terminal building. The contractor confirmed that the flight information to homes and at the terminal building TVs would be the same, and the cable companies [sic] signal would drive the displays. No requirement exists in the contract to directly drive the terminal televisions.

b) In a changed condition, the contractor was asked to install the system at a new terminal facility. The passenger services NCOIC negotiated with the cable company in a cost savings effort to not extend cable service to the new location. The contractor was directed to build the signal generator to substitute for the cable feed that no longer could be expected.

....

8. Non-payment for services requested under IMPAC card procedures.

Amount: \$ 3,000

a) At no time, since delivery 30 June 1997 to the expiration of the equipment warranty period 15 May 1998, has the Air Force requested service under the warranty. The warranty as required by the contract was presented and accepted as written 30 June 1997.

b) Mr. Honda has asserted that a fuse blowing is an "equipment failure". We do not agree with that definition, nor with his misstatement of fact as to the cause. Our costs derive from investigating the condition of the system at the time of the fuse blowing. This was as requested in writing (in the form of a IMPAC card maintenance request as had been received and paid on several earlier occasions) and discussed orally.

c) We disagree with Mr. Honda's contention that the procedures of the warranty we delivered in response to the contract do not have to be followed to gain warranty

coverage. In addition we contend the work was not nor should it be considered warranty work.

(R4, tab 11)

8. HCS' 10 April 2002 and 17 May 2002 letters to respondent incorporated its 18 July 1998 claim, increased its total amount to \$977,245 for "accrued interest" and taxes, and did not modify the dollar amounts of items 3, 4, 5 or 8 (R4, tabs 14, 17). The CO's 17 October 2002 final decision denied HCS' claim in its entirety (R4, tab 24). HCS timely appealed that decision to this Board.

FURTHER FINDINGS OF FACT ON CLAIM ITEM 3

9. On 2 July 1997 HCS sent its invoice No. AMC063097-5 to respondent for the \$30,000 price increase in Modification No. P00001 (exs. A-53, -127) and a 30 June 1997, unnumbered invoice for \$89,800 for the entire contract as amended (ex. G-29).

10. CO Clayton Honda's 7 July 1997 memorandum for HCS stated:

1. The following discrepancies have not been resolved as of this date:

a. Display screens on monitors.

i. "Departure" and "Arrival" screens.

- Correct the column heading to read "ACFT" vice "ACTF".

- Column headings shall be aligned with the displayed data.

ii. Departure screens. Need to place spacing between the ACFT and the mission number . . . as . . . done on the "Arrival" screen.

iii. "Announcements" display. Text needs to be left-justified on this PowerPoint format screen.

iv. Cropping of the Powerpoint screens when shown on the monitors in the PAX Terminal area.

b. Extraneous data from onward flights of the same aircraft is [sic] not being truncated from FIDS displays and telephony system.

i. Data being displayed does not truncate extraneous data when flights "layover" at Hickam and fly on to other destinations, then

return to Hickam. The FIDS system is currently displaying erroneous data for the subsequent flights to and from Hickam. The system is erroneous in that the subsequent onward flights do not arrive/depart on the dates being displayed.

ii. Data on the telephony system. Same discrepancy as above, data from onward flights are being played back on the wrong dates.

2. The above discrepancies needs [sic] to be resolved as soon as possible and prior to final payment. Request you respond with a date that you will be able to resolve the above issues.

(Ex. A-5)

11. HCS sent Mr. Honda's 7 July 1997 memorandum to LT Long on 8 July 1997 and requested him to "incorporate any ideas you feel have merit into a consolidated and complete list" and return it to HCS. LT Long's 9 July 1997 memorandum to HCS said:

2. In addition to the [CO's] list, we have found some other discrepancies. Our primary concern is . . . that the system is failing to read or display some missions. These missions do not show up to be posted or killed, and are not on the telephony system Additionally, the "destination" and "aircraft type" fields are overlapping, with some text appearing under the other text. This is similar to the other "cosmetic" changes we would like to see made as soon as possible.

3. . . . I have received calls from DFAS [Defense Finance and Accounting Service] indicating that you have filed invoices for payment. . . . [U]ntil the terms of the contract are fulfilled, any additional payments will not be made. Your system is not operational, and is of no use to us until such time that you have corrected the discrepancies and are transmitting the signals to the monitors, TV station, and the telephony.

(Ex. A-55)

12. HCS's 9 July 1997 memorandum to LT Long reported that HCS had spent eight man-days to revise captions, heading spacing, font size, and screen composition as the CO had directed and provided the status of four other "discrepancies" (ex. A-55).

13. Mr. Honda's 14 July 1997 internal Air Force message stated that HCS's "system is complete and was demonstrated . . . at the Air Freight Computer room in Bldg 4069 This morning, the system was relocated to the permanent site in the PAX terminal . . . (Bldg 2035)" (instead of the specified Building No. 2028) (ex. G-33).

14. Mr. Honda's 18 July 1997 letter requested DFAS to withhold all payments on the HCS contract due to a "receiving report" of "minor deficiencies" and "[o]ther major latent defects" (ex. A-6). HCS' 21 July 1997 memorandum to Mr. Honda challenged his 18 July 1997 statements to DFAS (ex. A-7).

15. Mr. Honda's 21 July 1997 memorandum of a "teleconference," in which he and CO Carol Allison discussed certain issues with HCS, stated:

2. The following issues were discussed:

a. Subject [FIS] does not print a complete hardcopy report of flight data requested. This latent defect has surfaced recently and will be demonstrated to the contractor shortly.

b. Shadowing effects on the monitor displays in the PAX terminal and CATV broadcast screens. Use of these effects were [sic] not specified in the SOW and shall be removed to improve readability.

c. Brown as the background color on the departure screens. The use of this color was not coordinated prior to implementation and does not provide the proper contrast for readability.

3. Contractor was advised to initiate corrective action and to submit a proper invoice upon completion. The discrepancies in para 1 (b) through 1 (c) [sic; probably meant ¶ 2] were not considered major fixes requiring considerable programming effort to correct. The effective date of acceptance is tentatively 16 Jul 97 when the system was turned on at the PAX terminal. This date is contingent upon correction of the remaining deficiencies listed above.

(Ex. G-35)

16. HCS' 23 July 1997 memorandum to LT Long stated that by 14 July 1997 HCS had resolved 100% of the items for which he had requested assistance and the Hi_AMC "was satisfactory" (ex. A-9).

17. HCS' 25 July 1997 memorandum to Mr. Honda requested a list of what HCS had to do to close the contract and protested his "unusual oral stop payment" to DFAS on HCS' pending invoices (ex. A-56). At a 25 July 1997 meeting, HCS said that the FIDS was "fully functional," but the Air Force stated that it had "a major operational defect" (ex. A-72 at 3-4).

18. Mr. Honda's 25 July 1997 letter to HCS stated:

1. The following [FIDS] discrepancies are directed to be resolved prior to acceptance by the government.
 - A. Some missions printed by APACCS do not appear on Hi-AMC printouts covering the same time period
 - B. Automated screens
 1. Convert the brown background screen of departures to the same blue background screens of arrivals
 2. Convert all mission field data of arrivals and departures to bold type
 3. Remove all shadowing from mission data
 - C. System currently repeats only a single screen on the local video processor
 - D. Provide updated users' manuals; i.e. additional training guidance sheets
2. \$25,000 will be paid to the contractor on or about 28 July 97 given the above items will be accomplished.
3. Remaining contract balance will be available to the contractor on 4 Aug 97 if at that date no functional problems remain. Convenience or cosmetic changes are not included. All system defects which are identified and requested to be fixed by the user within the first seven days of operation will be corrected by the contractor.

Mr. Blackman signed this letter beneath the added sentence: "Nothing contained herein constitutes contractor acceptance of this being contract required rather than additional work." (R4, tab 8)

19. HCS' 28 July 1997 memorandum for Mr. Honda stated that "Items A through D" of Mr. Honda's 25 July 1997 "directed work, have been completed," and noted HCS' pending \$25,000 invoice (exs. A-10, G-39).

20. Mr. Honda's 29 July 1997 message to HCS stated that the FIS was inoperative and needed "prompt corrective action" (ex. G-40). His 29 July 1997 letter to DFAS requested immediate payment of HCS' \$25,000 invoice of 28 July 1997 and stated that about 10% of the contract price was retained pending "completion of a 7-day QC period" on about 4 August 1997 (ex. G-41).

21. A 31 July 1997 "Memorandum For Record" for HCS of unidentified authorship and apparently signed by TSgt Townsend stated:

1. Problems identified as A through D in the [CO's] directive dated Friday 25 July have been acknowledged and resolved as attested to by 1LT. Long's signature the next business day, Monday 28 July 1997.

2. Work at the cable TV station plus problems identified as 1 through 3 on Tuesday, 29 July Fax from SSgt Townsend have been acknowledged, and resolved as attested to by SSgt Townsend's signature the next business day, Wed 30 July 1997.

3. At this time there are no pending problems or suspected problems that represent "deficiencies" or problems anticipated to require contractor assistance. Written identification of problems and early submission of them to the contractor is [sic] . . . a requirement of the 25 July directive of the [CO].

(R4, tab 9)

22. On 1 August 1997 TSgt Townsend of the 635th AMSS notified Mr. Honda of a problem of disappearance of each "0" seat posting, and stopping of telephony updates at about 0530-0545 each day (ex. G-43).

23. A "Memorandum For Record" signed on 3 and 4 August 1997 by MSgt Garth Glazier and another person (whose name is illegible), stated that issues regarding a seat release zero symbol and telephony updates after 0530-0545 hours reported to the CO on 1 August 1997 were resolved, and "we anticipate signing the final acceptance document tomorrow, 4 Aug. 1997" (exs. G-44, A-11).

24. HCS' 4 August 1997 invoice No. AMC080497-7 stated "contract completed" and sought payment of \$10,920 (ex. A-12). Its 4 August 1997 memorandum to the CO requested "immediate payment" of the balance (exs. G-48, -49). A "Final Receiving And Acceptance Document" on HCS' letterhead, apparently signed by MSgt Glazier, stated:

Video display and interactive touch-tone telephone system delivered 30 June 1997, received, inspected ~~and accepted in satisfaction of, and in conformance~~ with contract F640596M7445 (accepted ~~again on~~ this date, 4 August 1997, as provided for in the Contracting Officer's directive dated 25 July 1997.)

Each of the foregoing "strikethroughs" was initialed "Ch." Beneath the quoted text was handwritten: "Approved for payment (fixed). * Note: contracting officer's annotations above. Ch [signed by] Clayton I. Honda 4 Aug. 97." (Ex. A-145)

25. The CO's 4 and 6 August 1997 letters requested DFAS to make final payment on HCS' 4 August 1997 invoice; the second letter stated that "all known system deficiencies have been corrected at this date, the end of the 7-day QC test period" (ex. G-47; R4, tab 10). DFAS paid HCS' invoice No. AMC080497-7 for the \$10,920 contract balance on 13 August 1997 by electronic transfer (R4, tab 21; ex. A-16).

DECISION ON CLAIM ITEM 3

HCS has the burden of proving its affirmative monetary claims against the government. *See John T. Jones Construction Co.*, ASBCA Nos. 48303, 48593, 98-2 BCA ¶ 29,892 at 147,974, *aff'd*, 178 F.3d 1307 (Fed. Cir. 1998) (table). Appellant's basis for claim item 3 is that government directions to correct alleged "problems" and "discrepancies" in appellant's Hi-AMC system after its acceptance on 30 June 1997 were "extra work" or "new work" (finding 7). Respondent argues that appellant did not give timely notice of its claim, which is barred by laches; respondent did not finally accept appellant's Hi-AMC system until 4 August 1997; and the disputed work HCS performed prior to and after that date was to correct Hi-AMC system defects in accordance with the contract's FAR 52.214-4 Inspection/Acceptance and Warranty clauses, and Modification No. 1 warranty. (Gov't br. at 31-32, 36-37)

The parties principally dispute whether HCS' work on Hi-AMC system "problems" that the CO directed HCS to "correct" during the "free 15-day support maintenance" period from 1 to 15 July, during the period after the CO's 25 July 1997 letter direction, and during the QC period 29 July to 4 August 1997 (findings 6-7) were "added" work to "modify" system characteristics, as HCS argues, or were "discrepancies" that HCS had the duty to correct under the Inspection/Acceptance and Warranty clauses of the contract, as respondent argues.¹

¹ Since this contract includes the FAR 52-212-4 Contract Terms and Conditions—Commercial Items clause, which does not include a Changes clause authorizing unilateral changes, the question could be raised whether appellant's claims should

Respondent notified HCS of alleged Hi-AMC system defects on 7, 9, 21, 25 and 29 July and 1 August 1997 as they were discovered. Such notices were “within a reasonable time” after their discovery, and with no substantial changes in the system’s condition reported by HCS. (Findings 10-11, 15, 18, 20, 22)

To analyze the alleged specification changes *vs.* nonconformities, we have compared each reported “discrepancy” or “problem” with the pertinent requirement, or lack of requirement, in the specifications. Our conclusions regarding specification changes and nonconformities are tabulated, based on findings 1 and 4, as follows:

<u>Finding/Date</u>	<u>Specification Change</u>	<u>Non-Conformity</u>
10/ 7 July 1997	Left justify announcements	ACTF misspelling Columns misaligned ACTF & MISSION # spacing Flight date errors Powerpoint screen cropping
11/ 9 July 1997		Failure to read or display missions Overlapping destination and aircraft type fields
15/ 21 July 1997	Complete flight data print-out Eliminate brown background	Remove data shadowing
18/ 25 July 1997	Incomplete mission printouts Change background color from brown to blue Convert arrival & departure data to bold type	Remove data shadowing Single screen repeatability on local video processor Update user manuals
20/ 29 July 1997		FIS inoperative
22/ 1 August 1997		“0” seat posting disappearance Telephony update stoppage

be analyzed as claims for constructive changes or claims for breach of contract. We do not decide this question since the parties did not brief it and the critical issue for purposes of entitlement in this appeal is whether the CO directed work that was not required by the contract.

HCS gave respondent notice of such directed changes on 25 and 28 July 1997, and again on 18 July 1998 (findings 18-19, 7). Respondent's laches defense is not persuasive. Thus, HCS established constructive changes with respect to the unilateral specification changes, but not for the nonconformities requiring correction, as tabulated above.

FURTHER FINDINGS OF FACT ON CLAIM ITEMS 4 AND 5

26. Prior to HCS' August 1996 proposal to the Air Force, TSgt E. G. Gonzalez showed HCS the Air Force's APACCS system, available computers and FIS system so it would have an idea of what those systems looked like and what information flow would have to be on the system that HCS was proposing (ex. A-170, Gonzalez dep. at 2-3).

27. On 25 September 1996 HCS proposed to the Air Force to "[r]elocate and reinstall our equipment at your new hanger [sic] location. Install a NT server high speed multi-tasking platform" (ex. A-27).

28. On 16 April 1997 HCS proposed to the Air Force contract adjustments totaling \$48,100 and including:

2. Compensation is [to be] added for . . . developing a consolidated control platform implementing various enhancements. System capability will include an automatic WEB page, separate [sic] programming of information sets at the TV station and terminal facility, modified user interface and PowerPoint display type, and telephony additional prompts and error handling routines and reports to better meet customer needs. The entire system will utilize the 15 digit mission number reference rather than the 4 digits (non-unique) originally specified. The consolidated control platform will have a Windows 95 operating system, at least 32 Megs. RAM and a Pentium 200 processor.

(Exs. A-38, -110)

29. HCS' 21 April 1997 letter to respondent amended the 16 April 1997 proposal to add "data handling . . . to permit addition of modules in the terminal building to drive three separate [sic] presentations simultaneously; arrivals, departures, and . . . information and announcement sets; to effect "last minute changes . . . via the IMPAC card" and to "design and set up . . . banks of three monitors to simultaneously display arrivals, departures, and information and announcements" (ex. A-111).

30. HCS' 5 May 1997 letter to CPT L. Audet at Hickam AFB stated:

The consolidated platform and automated flight update system with World Wide Web update has [sic] been prepared as you requested. We intend to prepare for delivery and installation in the dispatch office as soon as you complete the communication links (network and telephone drops).

(Ex. A-113)

31. On 16 May 1997 LT Long requested “an itemized/detailed breakout” of figures for HCS’ April 1997 change proposal (ex. G-14; R4, tab 6).

32. HCS’ 2 June 1997 letter to CO Honda stated that HCS had provided “ball park estimates” for 26 “additional options” and “constructive changes,” including—

2. Site survey of Hanger [sic] 13 (second setup site).

....

4. Creation of a consolidated control platform using Pentium technology in lieu of AF equipment. Addition of IP addressable hardware and network guidance/configuration of new Pentium technology.

5. Addition of signal generator and video driver equipment at the terminal building.

(Ex. G-16 at 1-3)

33. HCS’ 23 June 1997 memorandum for Mr. Honda stated:

2. . . . The \$30,000 settlement cap you offered reflects only a small fraction of the additional product development effort. However, . . . we will concede to deliver Hi_AMC and to leave enabled, as they are now designed and functioning, many of the additional features we developed at our own cost.

....

5. We will deliver and leave enabled proprietary additional features of Hi_AMC including: Windows 95, Kermit 95, Pentium Processor based Consolidated Control Platform;

hardware and software to support a second video signal generator

(Ex. G-21)

34. Mr. Honda's 30 June 1997 memorandum stated how he determined the price for Modification No. P00001, which was negotiated "due to site varying conditions (relocation of PAX Terminal operations to Hanger [sic] 13 due to renovations), changes in the Govt-furnished data (changes to the online, 'realtime' flight data from APAACS [sic]) which outputs into the new system, and other factors":

. . . A list of 26 items was received from ktr on 2 Jun 97. Ktr subsequently provided manhours for each item Ktr also requested \$7,500.00 in additional equipment cost. . . . See attached spreadsheet.

. . . .

(2) The manhours for each of the 26 items was [sic] then negotiated with the ktr. . . .

(3) An upward adjustment was then made for G&A and profit

(4) The resultant total was then adjusted upwards again to account for additional equipment acquired by the contractor to upgrade GFE computers to Pentium-class computers. (Note that GFE computers was [sic] not specified in the purchase order but the using activity provided this equipment to the ktr at the onset of ktr's performance.)

The CO's attached spreadsheet showed that HCS proposed \$1,800, \$14,600 and \$9,700, and the parties agreed upon \$200, \$8,200 and \$2,500, respectively, for items 2, 4, and 5 stated in finding 32. (Ex. G-24) The parties signed bilateral contract Modification No. P00001 on 30 June 1997 (R4, tab 4). Finding 5 describes its terms and conditions.

DECISION ON CLAIM ITEMS 4 AND 5

HCS' allegations under claim items 4, "Directed delivery of equipment," *viz.*, Pentium computers, and 5, "Directed delivery of a second signal generating video system," were items 4 and 5 among the 26 change items that HCS proposed, and for which it released respondent from further liability, in contract Modification No. P00001

on 30 June 1997 (findings 5, 28-34). We hold that claim items 4 and 5 are barred by accord and satisfaction.

FURTHER FINDINGS OF FACT ON CLAIM ITEM 8

35. MSgt Glazier's 6 August 1997 memorandum for HCS stated that on the day before, "the telephony system [did] not list the destinations of outbound departures or the installation a mission is coming from. This makes the system virtually of no use to travelers requesting flight departure or arrival information. Request a technician be assigned to fix the problem as soon as possible." HCS submitted invoice AMC080897 for \$520.85 for "consulting services" to fix that telephony problem. (Exs. G-50, A-13)

36. MSgt Glazier's 12 August 1997 message to HCS said that for HCS' 6 August 1997 services \$285 "is fair and reasonable" for payment by 13 August 1997 (ex. A-62).

37. Mr. Honda's 15 August 1997 letter to HCS mentioned the 5-6 August 1997 telephony malfunction "which you have since corrected via separate actions from the subject contract using IMPAC procedures," stated that the system continued to malfunction, and requested HCS to "retract" its invoice (ex. A-16).

38. LT Long's 25 August 1997 memorandum for HCS stated that the FIDS cable TV display would not update and requested repairs, for which the government would pay "by government Visa IMPAC card" (ex. A-16 at 2). HCS' invoice No. AMC082697I billed \$1,533.90 for services performed on 25-26 August 1997. HCS made a \$692.73 "adjustment" for the "cost of offsite preparation effort contested . . . by the user" and revised the total to \$841.17. A sergeant signed that invoice on 28 August 1997. (Ex. A-18) HCS' invoice No. AMC092697I of 28 August 1997 billed the \$692.73 for "off-site preparation effort excluded from invoice #AMC082697I" (ex. G-73).

39. LT Long's 3 October 1997 memorandum for HCS stated that the FIDS video monitors did not update flight arrival and departure information, and requested repairs for which the government would pay by Visa IMPAC card. HCS' invoice AMC061097 billed \$290.65 for diagnosis and repairs performed on 4 October 1997. (Ex. A-151)

40. LT Long's 4 December 1997 memorandum for HCS stated that AMC could not re-boot the FIDS control platform and update information, "which renders the entire system inoperative," and requested repair services. On 5 December 1997 Mr. Blackman diagnosed the problem as a computer control processor and ordered a replacement part. HCS' invoice AMC121797 billed \$742.21 for repair service, excluding a charge for the "warranty part." (Ex. A-19)

41. HCS' 31 December 1997 invoice No. AMC123197 billed \$581.92 for repair service LT Long requested on 12 December 1997 when AMC could not re-boot the new

control processor. On 15 and 22 December 1997 HCS diagnosed the problem and added a new keyboard. (Ex. A-20)

42. LT Long's 7 January 1998 memorandum for HCS reported recurrence of the problem earlier reported on 4 and 12 December 1997 (ex. A-21).

43. HCS' 1 June 1998 letter to respondent requested payment of unpaid HCS invoice Nos. AMC092797I, AMC121797I and AMC123197I (ex. G-87). Neither MSgt Glazier nor LT Long was a CO or had any delegated authority to administer the contract or to bind the government to make contractual payments.

44. Mr. Honda's 2 June 1998 internal Air Force message stated:

The "outstanding" IMPAC card invoices . . . are for "repair calls" for hardware (keyboard controller) failures that should have been performed under the 1-year warranty. The contractor is attempting to collect the stated amounts which Lt Long has disputed. I agree with Lt Long, that the Govt should not pay the amounts billed.

The three billings are for the three attempts by the contractor to repair the above hardware problem. Each of the repairs were [sic] short-lived, and the same keyboard problems would reappear. A third-party performed the permanent repair to the hardware problem.

(Ex. G-88)

45. AMC's 11 June 1998 memorandum to HCS regarding "overdue billing" stated that "these items should have been under warranty at the time they were fixed" and that without proof of why the items were not under warranty or that government employee operator errors were the cause, AMC would not pay those bills (ex. G-89).

DECISION ON CLAIM ITEM 8

We have compared each discrepancy or non-operability report from the Air Force to HCS with the pertinent contract and specification requirements. We conclude that all Hi-AMC System failures reported to HCS on 6, 15 and 25 August, 3 October, 4 and 12 December 1997 and 7 January 1998 were nonconformities requiring correction under ¶ (a), "Inspection/Acceptance" of the contract's FAR 52.212-4 clause and its one-year warranty of HCS-provided equipment set forth in contract Modification No. P00001 (findings 3, 5, 35, 37-42).

Respondent exercised its FAR 52.212-4 Inspection/Acceptance clause rights of repair from 6 August to 12 December 1997 within a reasonable time – usually within 24 hours – after the FIS nonconformities were discovered, and before any substantial changes occurred (findings 35-41). The failure of MSgt Glazier and LT Long explicitly to invoke that clause and their actions relating to payment did not waive respondent’s rights, since HCS gave no consideration for any waiver and the record contains no evidence that HCS relied on their actions to its detriment. *See Mark Dunning Industries*, ASBCA No. 29599, 86-1 BCA ¶ 18,521 at 93,012-13.

Neither MSgt Glazier nor LT Long was a CO or had any delegated authority to administer the contract or to bind the government to make contractual payments (finding 43). Their statements that the government would pay HCS for the FIS repairs made from 6 August to 12 December 1997 (findings 35-36, 38-39) were contractually mistaken and were countermanded promptly by CO Honda (findings 37, 45). They did not bind respondent to make such payments. *See Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

We sustain the appeal with respect to the designated elements of claim item 3, and deny the balance of the appeal. The appeal is remanded to the parties to resolve quantum on the portion sustained.

Dated: 1 September 2004

DAVID W. JAMES, JR.
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. 54065, Appeal of Hawaii CyberSpace, rendered in conformance with the Board's Charter.

Dated:

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