ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Cottman Mechanical Contractors, Inc.	)	ASBCA No. 48882
	)	
Under Contract No. N62472-84-C-4744	)	

APPEARANCE FOR THE APPELLANT: David M. Macfarlan, Esq.
Horsham, PA

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
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OPINION BY ADMINISTRATIVE JUDGE LIPMAN

This is an appeal from an adverse decision of the contracting officer on appellant's claims under this construction contract. Appellant is seeking compensation due to Government changes, delay, and a unilateral price reduction for deleted work. The record includes documentary evidence as well as the transcript of hearing.

FINDINGS OF FACT

1. On 29 March 1989, appellant was awarded the captioned construction contract for a price of $214,000 to repair the steam and condensate lines at Buildings 1, 2 and 3 at the Naval Air Development Center, Warminster, Pennsylvania. The contract work included the provision of all labor, material and equipment for (a) a new condensate tank with condensate pumps and electronic power connections in the vicinity of Boiler Room No. 3, (b) new pumped condensate piping in all three buildings, and (c) the reconnection of approximately 25 existing condensate receiver/pump units to new pumped condensate lines. The contract performance period was 275 days with a completion date of 15 January 1990. (R4, tab 1)

2. The contract included or incorporated the following clauses: FAR 52.212-12 "SUSPENSION OF WORK (APR 1984)", FAR 52.232-5 "PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989)," FAR 52.236-6 "SUPERINTENDENCE BY THE CONTRACTOR (APR 1984)," and FAR 52.236-7 "PERMITS AND RESPONSIBILITIES (APR 1984)." The contract specification included the following:

SECTION 01011 - ADDITIONAL GENERAL PARAGRAPHS

. . . .

5. EQUITABLE ADJUSTMENTS: WAIVER AND RELEASE OF CLAIMS

(a) Whenever the Contractor submits a claim for equitable adjustment under any clause of this contract which provides for equitable adjustment of the contract, such claim shall include all types of adjustments in the total amounts to which the clause entitles the Contractor, including, but not limited to, adjustments arising out of delays or disruptions or both caused by such change. Except as the parties may otherwise expressly agree, the Contractor shall be deemed to have waived (i) any adjustments to which it otherwise might be entitled under the clause where such claim fails to request such adjustments, and (ii) any increase in the amount of equitable adjustments additional to those requested in its claim.

. . . .

SECTION 16011 - GENERAL REQUIREMENTS, ELECTRICAL

. . . .

2.3 Standards Compliance: When materials or equipment must conform to the standards of organizations such as the . . . Underwriters Laboratories (UL), proof of such conformance shall be submitted to the Contracting Officer for approval. If an organization uses a label or listing to indicate compliance with a particular standard, the label or listing will be acceptable evidence, unless otherwise specified in the individual sections.

(R4, tab 1)

3. Appellant's president, Mr. John Morris, was a contractor with 40 years of experience, a substantial amount of which was with the Navy (tr. 1/16). During that time, he maintained a practice of writing many letters during contract performance (tr. 2/125).

4. Appellant experienced problems, including those resulting from deficient design, during performance of this contract, and the parties entered into several contract modifications, including extensions of the performance period (R4, tab 1; tr. 1/18). Bilateral Modification No. P00002, with an effective date of 2 October 1990, increased the contract price and extended the contract completion date from 15 January 1990 to 30 November 1990 (R4, tab 1).

5. By letter of 11 February 1991, appellant advised the Government that it had "determined during start up" that it could not control the speed of the motors on the pumps and that it was "stopped" on being able to start the system (R4, tab 50). On 12 February 1991, appellant again wrote that "there is no design specified to tell the variable speed drive what speed they should run the motors on the pump" and that it was "at a standstill until you advise us" (R4, tab 51).

6. By letter dated 19 February 1991, the contracting officer advised appellant that the contract was in a "delinquent" status, but that, because of appellant's efforts to perform, the Government would "forbear from default action" until 15 March 1991. It stated, further, that the contract completion date was still 30 November 1990, that liquidated damages would be applied, and that appellant was required to provide a schedule for the completion of the remaining work items. (R4, tab 18)

7. Appellant responded by letter of 21 February 1991 and advised that it would have to stop work on 22 February 1991 due to the lack of Government answers with regard to the "control defectiveness," and that a change order would have to be issued with respect to that matter. It also made general reference to other alleged change orders and delay claims. (R4, tab 19)

8. Appellant stopped work at the site on 22 February 1991 (R4, tabs 47, 57).

9. On 5 March 1991, appellant submitted its invoice number 11, which represented that 95 percent of the contract work had been completed, calculated the value of completed work to be $260,648, and requested payment of $20,915. The Government concluded that the value of the completed work was $256,908 and that unfinished cost categories at 90 percent completion included the down stream of pumps, pipe valves and fitting, pipe insulation, electric rough wire and conduit, and electrical devices. It paid $9,375 on the invoice and retained $11,140. (R4, tab 52; tr. 1/127-28)

10. By letter of 20 March 1991, the Government provided appellant with the speeds for the variable frequency drive settings for each of two pumps. That information was necessary to maintain the correct water flow in the system and to keep the tanks filled to the correct level. It also advised that, with that information, appellant should be able to

perform start-up and operation testing of the overall system. (R4, tab 53) At that point, appellant should have been able to resume performance (tr. 1/130).

11. On 9 May 1991, the contracting officer sent appellant a letter advising that the installed variable frequency drives were not in conformance with the contract specification because there was no evidence that they were UL listed or labeled. He requested appellant to provide "supportive documentation" within 10 days. (Ex. A-55) This matter was not related to the issue regarding the variable speed settings addressed in appellant's letter of 11 February 1991 (tr. 2/33-34, 49).

12. In a letter dated 15 May 1991, the contracting officer again advised appellant of the contract's delinquent status, of the possibility of liquidated damages, and again requested that appellant provide a schedule for completion. (R4, tab 55)

13. Appellant responded on 20 May 1991, as follows:

> In answer to your bizzare [sic] letter dated May 15, 1991. You have breeched [sic] our contract by not providing answers and directions.
>
> You finally supplied information that will enable us to come back on the job site and will complete the contract after we negotiate all of the following matters:
>
> 1. Extension of Time to Complete the Contract
> 2. Settlement of All Outstanding Change Orders
> 3. Remobilization and Demobilization Cost
> 4. Extended Overhead Delay Claim for [appellant] and [subcontractor]
>
> When you are ready to negotiate, please call. We have been ready since we had to stop work for the second time on this contract. Your extended overhead claims are running until we settle.

(R4, tab 74) None of the listed items pertained to technical or design issues (tr. 1/75, 131).

14. By letter of 5 June 1991, appellant responded to the Government's 9 May 1991 letter regarding the missing UL certification and indicated that it was enclosing information to satisfy the specification requirements (ex. A-55-2). That information was a letter from the supplier stating that the drives supplied did not carry a UL label, but

were approved by ETL Testing Laboratories, whose testing program was "virtually identical" to that of UL, and that the supplied drives, therefore, "conform to the spirit if not the letter of the specification." (Exs. A-55-3 thru A-55-7)

15. Appellant performed no work on the contract from 22 February 1991 until 28 October 1991 (R4, tabs 46, 48, 49, 57; tr. 1/131).

16. The parties met in early October 1991 to discuss appellant's resumption of performance and some requests for equitable adjustments which had been included in correspondence, and to attempt to agree upon work remaining to be performed or corrected. At that point, the work which required correction included a differential switch which had been improperly piped in and appellant's installation of a one-inch relief valve rather than the required half-inch valve. (Tr. 1/139-40) In preparation for the meeting, the Navy's contract specialist prepared a pre-negotiation memorandum which indicated that appellant was seeking to recover extended overhead for the period 22 February 1991 to May 1991, but that it was entitled to recover only from 22 February 1991 to 28 March 1991, the period during which it was awaiting an answer with respect to the frequency drive speeds (R4, tab 56; tr. 2/64).

17. Negotiations at the meeting produced agreements which led to bilateral contract Modification Nos. P00003, P00004, P00005 and P00006, which were all later signed in January 1992. In Modification No. P00003, appellant was paid $8,674.65 for "[d]emobilization and [r]emobilization for government stoppage." Modification No. P00004 provided for payment to appellant of $5,383.01, plus a two-day time extension for "[l]ost time associated with setting of the frequency drive and return after clarification." In Modification No. P00005, appellant was paid $14,043.03, plus a 90-day time extension to and including 2 March 1991, for "[i]ncreased wages and direct supervision for 90 days beginning 21 October 1991." Modification No. P00006 provided for payment to appellant of $3,743.74, plus a 325-day time extension to and including 21 January 1992 for the following reason: "[e]xtend overhead for the period of 22 February 1991 to 28 March 1991 due to frequency drive settings and further concurrent delays totaling 325 days associated with this issue." Each of the modifications included a release by appellant of the Government "of and from all liabilities, obligations and claims whatsoever in law and in equity under or arising out of said modification." (R4, tab 1; tr. 2/67)

18. Attendees at the meeting were Mr. John Morris, appellant's president, CDR John D'Onofrio, the contracting officer, Mr. Vincent Martucci, the Government's supervisory engineer, and Mr. Gerald Watkins, the Government's project manager. CDR D'Onofrio was present for only the beginning of the meeting and Mr. Martucci was present for part of the time. (Tr. 1/32-33, 139, 2/66, 102)

19. The hearing testimony included differing accounts as to the agreements reached at the meeting and whether there were any subsequent negotiations or discussions. Mr. Morris, appellant's president, testified that, at the meeting, he was told that he would receive funding on change orders within two to three weeks and that execution of the modifications was deferred for that purpose. He testified, further, that the modifications were executed in January 1992 when funding was received, that he did not waive the claim for extended overhead, and that, in an undocumented telephone conversation in which he questioned the language of Modification No. P00006, CDR D'Onofrio told him that appellant's claim for extended overhead was not included in the modification because no funds were available and that a later contract modification would cover that issue. (Tr. 1/33, 45-48)

20. CDR D'Onofrio, who has retired from the military, did not appear at the hearing despite having been served with a subpoena at appellant's request; appellant did not move to enforce the subpoena. Other Government attendees at the meeting testified that: (a) at the meeting, Mr. Morris stated that appellant required 30 to 60 days to complete the contract and that the Government gave it 90 days to do so; (b) that Mr. Morris requested payment for extended overhead for the period 22 February 1991 until the resumption of work, but that he agreed to (1) compensation from 22 February 1991 until 28 March 1991, the date that appellant received the Government's letter containing the information as to the settings for the variable speed drives and (2) a time extension, and Government forbearance from the imposition of liquidated damages, for 325 days to and including 21 January 1992; and, (c) that CDR D'Onofrio did not tell them about any subsequent telephone conversation with Mr. Morris. (Tr. 2/65-69, 104, 113-16) The record actually before us--the witnesses' testimony, the language of Modification No. P00006, the absence of an express reservation of rights as required by the contract's "EQUITABLE ADJUSTMENTS: WAIVER AND RELEASE OF CLAIMS" clause, and Mr. Morris' failure to document his alleged later conversation with CDR D'Onofrio despite his practice of prolific letter writing--lead to our finding that appellant agreed to (a) and (b) above and that the agreement was not modified by a subsequent conversation.

21. Appellant resumed performance. On 15 November 1991, its subcontractor set the variable speed settings of the pumps at the speeds which the Government had provided in its letter of 20 March 1991 (R4, tab 95).

22. Pumps contain packing gland material which wraps around the shaft to prevent water from entering the pump assembly (tr. 1/142). On 22 November 1991, appellant had to replace the packing glands on the two new pumps because they had dried out from lack of use. Appellant could have prevented that condition by pumping water through the lines to keep the pumps moist. (R4, tab 45; tr. 1/142-43, 2/54-55) On that date, appellant sent a letter to the Government seeking compensation for the costs incurred (R4, tab 24). The Government responded by letter of 11 December 1991, which advised appellant that

the pumps were appellant's responsibility until they were tested and accepted by the Government and that, if appellant disputed that conclusion, it could request a decision of the contracting officer (R4, tab 26).

23. On 22 November 1991, appellant sent the Government another letter asking for an extension of time due to a delay in getting a subcontractor on the job (R4, tab 23).

24. By letter of 6 December 1991, appellant's president told the Government that he had "just realized that once our new system is started, I feel that there will be no treatment of the make up water" (R4, tab 83). The Government responded by letter of 12 December 1991 and advised that appellant had installed the 1-1/2 inch make-up water line in the wrong location and of other installation errors (R4, tab 86; tr. 1/133).

25. On 10 December 1991, appellant sent the Government another letter advising that it had installed its 1-1/2 inch make-up water connection into the existing make-up line and that if the Government wanted "treated make up water to the deareators [it] will have to show us with a sketch where to make this connection" (R4, tab 85). The Government responded by letter of 16 December 1991 and explained that appellant had improperly installed the 1-1/2 inch line to a hard water source, and it set forth the appropriate contract drawing and view for appellant to consult to make the proper connection to a soft water source (R4, tab 88; tr. 1/133-35).

26. By letter of 17 December 1991, appellant alleged that the location for the connection was different than shown in the contract drawings and was, therefore, a change order for which appellant would not "charge" the Government, but for which it "insisted" on a three-week time extension (R4, tab 89). The Government responded by letter of 23 December 1991, in which it advised appellant that the work was not a change and that, if appellant disputed that conclusion, it could request a decision of the contracting officer (R4, tab 90).

27. Appellant's Contractor Quality Control Reports do not reflect the performance of any work after 18 December 1991 (R4, tab 45).

28. Appellant's invoice no. 12, dated 12 January 1992, represented that appellant had completed 99 percent of the contract work. The Government determined that appellant had completed 98 percent, and that the items of work which remained incomplete included (a) the down stream of pumps, pipes, valves and fittings, (b) pipe insulation, (c) the control system, (d) wiring and conduit, and (e) variable speed motors. The Government reductions from the amount of the invoice totaled $5,711. (R4, tab 93)

29. By letter dated 24 January 1992, the Government advised appellant that, in view of the contract completion date of 21 January 1992, its performance was delinquent and it warned of the possible assessment of liquidated damages (R4, tab 97).

30. On 6 February 1992, appellant notified its electrical subcontractor, J.P. Sulzbach, Inc., (Sulzbach) that the two pumps still reflected the incorrect speeds and that appellant wanted the drives corrected by 24 February 1992 (R4, tab 98). By letter of 7 February 1992, Sulzbach notified appellant's surety that it had not been paid by appellant (R4, tab 99).

31. By letter of 17 February 1992, appellant informed the Government of several matters. It stated that, pursuant to a meeting between the parties, it would change the pressure differential switch which it had installed incorrectly and would "change the relief valve piping to correspond with the drawings." Appellant contended that it had been "aware" of both items and that they "had no bearing on the performance of this system that is giving us problems." In the same letter, appellant enclosed a change order request for the installation of two 4-inch valves. The purpose of those valves was to allow a "shift" back to the old system, a capability which the Government did not want and the contract did not require. Appellant also proposed that, although mandated by the contract to do so, it not be required to remove the old four-inch condensate line which fed the existing deaerator tanks. The Government agreed and took a credit for the work deletion. Appellant also enumerated items for which it claimed the Government was responsible and which caused delay and stated that it "would like all the items in this letter settled before we come back to complete the contract." (R4, tab 100; tr. 1/154-55, 2/6)

32. In February 1992, appellant sent Sulzbach away from the job site and the subcontractor did not return. The contract work Sulzbach left incomplete included as-built drawings, punch list items, and final testing of the pumps. *United States for the use and benefit of Joseph P. Sulzbach, Inc. v. Cottman Mechanical Contractors, Inc. and International Fidelity Insurance Co., Inc.*, 39 CCF ¶ 79,609 (E.D. PA, No. 92-4373, 23 December 1993).

33. As of February 1992, work which appellant had not yet completed included pipe removal, pipe tie-ins, pump testing and correction of deficient work. The system did not work. (Tr. 2/7)

34. By letter of 19 March 1992, Sulzbach advised appellant's surety that it had not been paid in full and that, unless it was paid in seven days, it would file suit on appellant's bonds (R4, tab 101). On 24 March 1992, appellant advised the Government that Sulzbach was no longer its subcontractor (R4, tab 102).

35. On 8 April 1992, the Government responded to appellant's letter of 17 February 1992. The response reiterated the Government's direction to appellant (a) to not install the 4-inch condensate lines that feed the deaerator tanks and (b) to correct the piping of the differential pressure switch and the relief valve. It also directed that appellant complete the contract within 30 days and reminded appellant of its obligation to perform contract work pending resolution of any requests for relief. (R4, tab 65)

36. Government personnel conducted a field inspection to determine what work remained unfinished and Mr. Watkins, the Government's supervisory engineer, prepared an estimate, dated 14 February 1992, of the work remaining. The estimate was based on a scaling from the drawings of the remaining pipe removals and tie-ins and an application of the Means Guide to arrive at the dollar value of the work. The price reduction for the deleted work was estimated to be $17,788.09. (R4, tab 64; tr. 2/9-15) Although he did not contemporaneously perform such an analysis, at the hearing appellant's Mr. Morris took issue with some of Mr. Watkins' conclusions regarding whether certain portions of the work remained undone (tr. 1/53-59). We find Mr. Watkins' analysis and testimony to be more persuasive.

37. Mr. Watkins also prepared an estimate to correct deficient work, including the replacement of piping and valves and testing, that was based on labor and material information from the Means Guide. Correction of the deficient work was estimated to be $2,879. (R4, tab 67; tr. 2/19-24)

38. The Government unilaterally issued Modification No. P00010, with an effective date of 9 October 1992, to (a) delete the work items from the contract for a price reduction of $17,788, (b) assess liquidated damages of $25,000 (125 days at $200 per day), and (c) delete "deficient items" from the contract for a price reduction of $2,879. The required contract completion date was not changed. (R4, tab 1)

39. In an internal Government memorandum dated 17 December 1992 providing the "contract status," the Navy's project manager noted that 98 percent of the work had been completed, that, due to appellant's "non-responsiveness," the Government had issued cure letters and show cause letters, and had issued the unilateral contract modification deleting remaining and deficient work and assessing liquidated damages (R4, tab 104). The percentage of work completed had not changed since appellant's invoice of 13 January 1992 (tr. 2/47-48).

40. The Government used its own resources to complete the unfinished contract work, and the heating and condensate system was ultimately operable using the old pumps; the new pumps and the variable speed controllers were not used. After completion of the contract work, the facility was used for several years, with heat supplied by the system, before it was closed due to downsizing. (Tr. 2/36, 52-53)

41. By letter of 31 October 1992, appellant submitted a list of alleged changes for which it felt it was due compensation. The list included delay for the period 17 February 1992 to 6 October 1992, for which appellant claimed overhead costs for 232 days, for a total of $80,267.01. The letter included no delay allegations for any other time period. (R4, tab 33)

42. The Government responded by letter of 5 January 1993, which requested that, with respect to its delay allegations, appellant provide additional information, including whether, and in what specific way, appellant was prevented from bidding upon or taking on new work or to conduct its business operations during the delay period (R4, tab 34).

43. By letter of 8 January 1993, appellant included the following in its response to the Government's questions:

> 1. We were not prevented from taking on new work during your delay period.
>
> 2. We were not awarded any contracts.
>
> 3. We were not prevented from bidding work.
>
> 4. We bid work during the delay period.
>
> 5. Mr. Morris performed work on the contract during the delay. He also performed his normal CEO work for other company business.

(R4, tab 35)

44. The parties met on 30 December 1993, at which time appellant's Mr. Morris alleged that the Navy's Public Works Plant Manager had directed appellant's personnel to stop work. The Navy's project manager investigated the allegation and was told that no one at Public Works had given appellant such a direction. (R4, tab 69; tr. 2/25)

45. Bilateral contract Modification No. P00011, which appellant signed on 7 February 1994 and the Government signed on 18 February 1994, increased the contract price by $10,308 and extended the required completion date by six days to 27 January 1992. The modification was issued to compensate appellant for change orders resulting from the additional work required to circumvent an obstruction, the costs to bring a vendor representative to the site to restart and check the new pumps, and to compensate appellant for lost tools. (R4, tab 1; tr. 2/26-27)

46. By letter of 7 February 1994, appellant confirmed its understanding of the results of the "negotiations" of 30 December 1993. It listed the change orders for which the Government had agreed to provide compensation, the claim items which it had withdrawn, and the outstanding items for which it requested a contracting officer's decision, which included (a) a claim of $25,602.41 for alleged delay from 1 November 1991 to 17 February 1992 and (b) a claim of $80,267.01 for alleged delay from 17 February 1992 to and including 6 October 1992. (R4, tab 36)

47. In response to an inquiry from the contracting officer, on 21 April 1994 appellant advised that it considered that Modification No. P00006 had included payment for extended overhead for the period 22 February 1991 to 28 March 1991, and did not waive appellant's right to seek compensation for extended overhead for the period from 1 November 1991 to 17 February 1992 (R4, tab 38).

48. By letter of 20 May 1994, the contracting officer advised appellant that the Government considered that all costs and time for the delay period 1 November 1991 to 17 February 1992 were included in Modification No. P00006, and that "[t]he reason for the long time extension with no monetary compensation was due to concurrent delays which were agreed to at the 03 OCT 91 negotiation" and that "Modification No. P00006 brought the contract completion date up to 21 JAN 92." The Government requested that appellant provide its daily reports from 12 February 1991 until the end of the project to enable the Government to complete its analysis. (R4, tab 39) On 27 May 1994, appellant responded that it kept no daily reports during the time period in issue since "no new work was being performed on the contract" (R4, tab 40).

49. In a letter dated 27 July 1994, appellant contended that, in Modification No. P00006, it had been paid for extended overhead only for the period 22 February 1991 to 28 March 1991 and that, despite the modification's time extension to 21 January 1992, appellant had agreed to "postpone" recovery of the overhead cost for that additional period in exchange for the Government's agreement to "immediately" answer appellant's design questions and to settle outstanding change orders. Appellant also indicated that it had recalculated the amount it sought for alleged delay to meet the "Eichleay" formula requirements (a) from $25,602.41 to $46,037.58 for the period from 1 November 1991 to 17 February 1992 and (b) from $80,267.01 to $98,895.53 for the period from 17 February 1992 to and including 6 October 1992. (R4, tab 42)

50. By letter of 29 September 1994, appellant submitted a certified claim in the total amount of $258,363.37, which included the following elements:

1. Delay from 29 March 1991 to 1 November 1991 $92,501.42
2. Delay from 1 November 1991 to 17 February 1992 46,037.58

3.	Delay from 17 February 1992 to 6 October 1992	98,895.53
4.	Replacement of packing glands (pump seals)	3,902.00
5.	200 additional hours (elimination of variable speed, change control valves, start-up and test system)	11,707.84
6.	Two additional four-inch valves	5,319.00

The claim also sought to reverse the unilateral credit taken by the Government and its assessment of liquidated damages in Modification No. P00010, which totaled $45,667. (R4, tab 43)

51. The claim element for the 200 additional hours included (a) 40 hours in connection with restarting the pumps which were paid for in Modification No. P00011, (b) 40 hours related to repair and replacement of the pump seals, (c) 16 hours to assist the motor manufacturer to "eliminate" the variable speed feature on motors, and (d) 88 hours associated with attempts to achieve "compatibility" between the new system and the old system and to get the new system to work. The costs claimed in (a) were paid by the Government in Modification No. P00011. With respect to the costs claimed in (c), there was no contract requirement to eliminate the variable speed feature and the Government did not direct appellant to perform that work. At the hearing, appellant withdrew its claim for some of the costs claimed in (d) (tr. 1/96).

52. On 31 May 1995, the contracting officer issued a decision denying most of appellant's claim, but determined that the beneficial occupancy date had been 27 January 1992 and that the liquidated damages of $25,000 had been erroneously assessed. He added that amount to the contract price and, comparing that price to the amount of payments, concluded that appellant had been overpaid in the amount of $2,148, for which the Government demanded payment. (R4, tab 44)

53. Appellant made timely appeal.

DECISION

Appellant is seeking to recover for alleged compensable delays in performance, Government changes in the contract requirements and a Government unilateral contract price reduction for deleted work.

Delay

In Modification No. P00006, the Government, recognizing its responsibility for performance delay incurred while appellant awaited the frequency drive speed information, compensated appellant for its extended overhead for the period 22 February 1991 to 28 March 1991. In addition, it provided a 325-day time extension for "further

concurrent delays . . . associated with this issue." The Government contends that Modification No. P00006 constituted an accord and satisfaction of appellant's claim for all extended overhead for the period 22 February 1991 to the date that appellant resumed work at the end of October 1991.

The essential elements to prove an effective accord and satisfaction are proper subject matter, competent parties, meeting of the minds of the parties, and consideration. *Aydin Corporation (West)*, ASBCA No. 42760, 94-2 BCA ¶ 26,899 at 133,944, *citing*, *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965). Our findings reflect that the language of Modification No. P00006 itself, the testimony at hearing, the absence of an express reservation of rights as required by the contract's "EQUITABLE ADJUSTMENTS: WAIVER AND RELEASE OF CLAIMS" clause, and appellant's contemporaneous conduct indicate an agreement which would constitute an accord and satisfaction. However, we do not end our analysis there.

Appellant is entitled to recover the costs incurred, including those for extended overhead, as a result of delay caused by the Government. In order to recover, appellant has the burden of proving that the delay was proximately caused by Government action or omission and that the delay caused it harm. *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994) (*en banc*). Recovery is limited to delay periods where the Government is solely responsible for the delay, and the presence of a concurrent cause for which the contractor is responsible frees the Government from any obligation to pay for delay during the period of concurrency.

Appellant seeks to recover its extended overhead for the period 29 March 1991 to 1 November 1991. The record reflects that, on 11 February 1991, appellant questioned the Government regarding the speeds of the pump frequency drives, that it informed the Government that it would have to stop work on 22 February 1991 because it still lacked that information, and that the Government provided the information by letter of 20 March 1991. At that point, appellant should have been able to resume performance. However, we have found that appellant performed no work until 28 October 1991 and there is nothing to indicate that the failure to perform was in any way attributable to the Government. Appellant has, therefore, failed to prove that it is entitled to compensation for extended overhead for the period 29 March 1991 to 1 November 1991.

Appellant also seeks to recover extended overhead for the periods 1 November 1991 to 17 February 1992 and 17 February 1992 to 6 October 1992. Our findings reflect, however, that there is no cause of delay for which the Government is responsible, the Government never told appellant to stop work, and that problems during those periods consisted of appellant either performing defective work requiring correction or failing to perform at all. There is simply no basis for appellant to recover the costs of extended overhead.

Repair and Replacement of Pump Seals

Appellant contends that it is entitled to recover the costs to repair and replace the pump seals which it had installed early in performance and which had dried out during the performance delays. In order to receive its claimed equitable adjustment, appellant must demonstrate Government liability, causation, and resultant injury. *Servidone Constr. Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991).

Under the PERMITS AND RESPONSIBILITIES clause, appellant was responsible for the maintenance of equipment such as the pumps until completion and Government acceptance of the entire work. *Fidelity Constr. Co.*, ASBCA No. 24882, 81-1 BCA ¶ 15,022; *N.J. Riebe Enterprises, Inc.*, ASBCA No. 41691, 92-2 BCA ¶ 24, 917. Appellant points to our decision in *Fishbach & Moore Electrical Contracting, Inc.*, ASBCA Nos. 19040, *et al*., 75-1 BCA ¶ 11,173, where we concluded that, despite the presence of the clause, the contractor was able to recover the costs of repairing a pump motor. In that appeal, however, the Board found that the contractor overcame the general rule imposing the risk of damage on the contractor by establishing that the damage was caused by the Government. Here, the pump seals became dry due to lack of care during delay, and we have found that appellant could have provided that care. The record also reflects that the only delay attributable to the Government was of short duration–from 11 February 1991 to 20 March 1991–and, even in the absence of the risk of loss imposed on appellant by the PERMITS AND RESPONSIBILITIES clause, there is no allegation, much less proof, that the pump seals dried out due to that delay. Appellant is not entitled to compensation for the repair and replacement of the pump seals.

"Additional" Hours

Appellant's claim included 200 hours allegedly performed between 1 November 1991 and 17 February 1992 to perform tasks which were "additional" to the contract requirements. We have found that much of the work claimed was either paid for by the Government in a contract modification, not required by the contract nor directed by the Government, or withdrawn from the claim at the hearing. Appellant has not otherwise established that it is entitled to compensation. *See Servidone*, *supra.*

The Four-Inch Valves

We have found that the purpose of the four-inch valves was to allow a "shift" back to the old system, a capability which was neither required by the contract nor desired by the Government. There is, therefore, no basis for appellant to recover any costs associated with the effort to install those valves.

Deductive Modification No. P00010

In issuing a deductive change, the Government bears the burden of proving the cost savings to the contractor resulting from the work deletion. *Nager Electric Co., Inc. v. United States*, 194 Ct. Cl. 835, 853 (1971). In meeting that burden, estimates derived from the Means Guide constitute a *prima facie* case for the amount of the deduction. *U.C. Construction Co.*, ASBCA No. 49592, 96-2 BCA ¶ 28,462.

Our findings reflect that the Government unilaterally issued Modification No. P00010 which, in part, deleted certain specified work items remaining to be performed and deducted $17,788 from the contract price. Our record reflects that the Government used estimates from the Means Guide to quantify its deduction and we have found that analysis to be persuasive.

Appellant primarily argues that, following the Government's payment of invoice no. 12, recognizing that 99 percent of the work was complete, the $5,711 of the contract price yet unpaid was the appropriate measure of the work remaining under the contract and constituted the limit of the amount the Government could recover as a credit for the deletion of that work from the contract. We do not agree.

The Government is entitled to a price reduction based on the amount that the contractor would have spent to perform the deleted work. That amount is best determined, in the absence of evidence of actual costs, by competent estimates and generally without reference to the amount included in the contractor's bid. *Nielson Co. v. United States*, 141 Ct. Cl. 793 (1958); *see Bruce Anderson Co.*, ASBCA No. 29412, 89-2 BCA ¶ 21,872. By logical extension, the amount of the price reduction should be calculated without reference to the amount of the contract price yet unpaid which, at least in part, is based upon the bid. Accordingly, the fact that only $5,711 of the contract price remained unpaid did not limit the price reduction for the work deletion to that amount.

The Government has established that it used a reasonable basis for the price reduction due to deleted work and appellant is not entitled to recover.

CONCLUSION

The appeal is denied in its entirety.

Dated: 16 February 2000

RONALD JAY LIPMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

ALEXANDER YOUNGER
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 48882, Appeal of Cottman Mechanical Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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