ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Custom Blending & Packaging, Inc.	)	ASBCA No. 49819
	)	
Under Contract No. SPO300-94-C-0242	)	

APPEARANCE FOR THE APPELLANT: Francis Louis Zarrilli, Esq.
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APPEARANCE FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal involves a claim for an equitable adjustment in price due to defective specifications and delays from Government inspections. The United States Department of Agriculture (USDA) performed inspections of appellant's plant and acceptance testing of appellant's production of milk shake mix for the contracting agency, the Defense Personnel Support Center (DPSC).[1] The Government filed a motion for summary judgment on the grounds that appellant had failed to state a cause of action upon which relief could be granted. Appellant opposed the motion. The Board deferred decision for consideration with the merits after hearing the appeal. Our decision is rendered on the fully developed record. The Government's motion is dismissed as moot. Both entitlement and quantum are before us for decision.

FINDINGS OF FACT

1. On 2 December 1993, DPSC awarded appellant Custom Blending & Packaging, Inc.,[2] Contract No. SPO300-94-C-0242 for the supply of ice milk-milk shake mix in No. 10 cans for use with soft serve ice cream or milk shake machines. The contract scheduled deliveries for 9 February 1994 and 11 May 1994.[3] The total contract price for 208,800 cans was $921,420. The unit price varied between $4.27 and $4.47 according to the delivery point designated in the contract. The contract included the Government's Solicitation No. DLA13H-93-R-9011 (the solicitation) and appellant's offer in response. (R4, tab 2; tr. 1/42)

2. The mix was to be manufactured in accordance with military specification MIL-I-43717D, dated 30 June 1989 (the specification), revised in part and included in the contract and the solicitation (R4, tab 2 at 2). Paragraph 3.1.2.5 in the specification required the product to be manufactured in a plant listed in Dairy Products Surveyed and Approved for USDA Grading Service (R4, tab 56 at 6). In addition to the specification, the contractor was required by the contract to comply with the master solicitation identified as "DPSC FORM 3595, DPSC MASTER SOLICITATION FOR SEMIPERISHABLE SUBSISTENCE," dated January 1992 (R4, tab 1 at 42).

3. The contract provided that the inspection responsibility was "origin contractor paid USDA inspection" and that the office responsible for inspection was the Dairy Grading Section, Dairy Division, AMS (Agricultural Marketing Service), USDA in the Chicago, Illinois area (R4, tab 2 at 4, tab 56 at 15).

4. Paragraph 3.3 in the specification listed the finished product requirements including an analytical requirement for 3.0% maximum oxygen in the head space. The oxygen level was required to be evaluated seven days after packaging. (R4, tab 56 at 12) The head space is the area between the top of the powder mix and the bottom of the lid on the can (tr. 1/45-46). The Government revised the specification before contract award to provide the following description of the inspection method to test for oxygen content:

> 4.4.1.1 OXYGEN CONTENT IN HEADSPACE ANALYSIS. THE DETERMINATION OF HEADSPACE OXYGEN CONTENT FOR . . . PRODUCTS SHALL BE BY USING AN ELECTRONIC OXYGEN ANALYZER WHICH OPERATES ON THE PRINCIPLE OF THE DIFFERENCE IN PARTIAL PRESSURE OF OXYGEN BETWEEN AN OXYGEN REFERENCE AND THE OXYGEN CONTENT OF THE SAMPLE AS DETECTED BY A POROUS CERAMIC ZIRCONIA SENSOR SUCH AS THE ILLINOIS INSTRUMENTS AND MOCON ANALYZERS OR EQUIVALENT; OR ON THE PRINCIPLE OF PARAMAGNETIC RESONANCE AS DETECTED BY A SERVOMEX ANALYZER OR EQUIVALENT. THE OXYGEN ANALYZER SHALL BE CALIBRATED TO A KNOWN SAMPLE PRIOR TO TESTING THE PRODUCT.

(R4, tab 1 at 12-13)

5. The clause in the master solicitation entitled, "ALTERNATIVE INSPECTION REQUIREMENTS FOR SELECTED ITEMS (JAN 1992)," gave the contractor an option to perform or have performed by an independent laboratory contractually required tests in order to expedite shipment. USDA could permit shipment if it ascertained compliance

and could conduct verification testing of the contractor's testing system to determine it was reliable. (R4, tab 1 at 17, tab 54 at 6-8)

6. The clause in the master solicitation entitled, "DELAYS IN SHIPMENT OF PRODUCTS REQUIRING USDA LABORATORY ANALYSIS (JAN 1992) DPSC," required the contractor to notify the contracting officer if there were delays in performing or receiving USDA analyses. The clause provided in pertinent part:

> When all production lots intended in offered unit were produced at least 12 calendar days in advance of the Required Delivery Date (RDD) specified in the contract, and the laboratory results for the samples taken from these production lots are not made available to the contractor by the Estimated Shipping Date (defined as date scheduled to ship in order to meet the RDD), the RDD will be extended by that number of days that receipt of the results by the contractor exceeds the Estimated Shipping Date.

(R4, tab 54 at 10)

7. The contract incorporated by reference the standard contract clauses FAR 52.212-15 GOVERNMENT DELAY OF WORK (APR 1984), FAR 52.243-1 CHANGES – FIXED PRICE (AUG 1987), FAR 52.246-2 INSPECTION OF SUPPLIES - FIXED-PRICE (JUL 1985), FAR 52.233-1 DISPUTES (DEC 1991), and DFARS 252.243-7001 PRICING OF CONTRACT MODIFICATIONS (DEC 1991) (R4, tab 1 at 17, 19, 29, 31). The Pricing of Contract Modifications clause provides that "[w]hen costs are a factor in any price adjustment under this contract, the contract cost principles and procedures in FAR Part 31 and DFARS Part 231, in effect on the date of this contract, apply."

8. On 16 July 1993, DPSC issued the solicitation for the subject contract. The closing date for submission of offers for a negotiated contract was 16 August 1993. (R4, tab 1) The solicitation incorporated by reference the master solicitation which advised potential offerors of the requirements for USDA plant approval and inspection[4] (R4, tab 1 at 17, 43, tab 54 at 16-17). After receipt of plant approval, subsequent surveys are automatically performed at a specified frequency of six months or less to maintain approved status (R4, tab 82 at 8).

9. Appellant submitted its offer on 4 August 1993. Appellant bid on the basis of an estimated labor cost of $1.50 per case although at the same time it bid its commercial contracts on the basis of an estimated cost of $2.50 per case. Appellant estimated $3 per case in overhead costs for the contract while it used a $6 per case figure for its commercial contracts. Appellant expected that the size of the contract would justify the

reduction in labor and overhead costs. Appellant verified its offer when asked by the Government whether it was correct. (R4, tab 55, exs. 2, 4, 9; ex. G-1; tr. 1/111, 116-18, 2/48)

10. Appellant had begun business in Little Rock, Arkansas in March 1993 with two co-owners and a consultant. The company converted a warehouse so that it was suitable for the blending and packaging business. In August 1993 appellant had approval from the Food and Drug Administration and had requested USDA inspection and approval, but decided to coordinate an inspection trip to Arkansas with two USDA-approved plants to save expenses. Appellant had no experience with DPSC before submission of its offer. (Ex. G-2; tr. 1/31, 104)

11. Ms. Victoria A. Ferguson, the purchasing agent for the solicitation, contacted Mr. Richard M. Plezia, appellant's president and sole executive, and advised that appellant was the apparent low offeror. Ms. Ferguson mentioned the requirement for USDA inspection and asked if Mr. Plezia had made arrangements for USDA inspection services. Ms. Ferguson gave appellant a USDA point of contact since no arrangements had been made. (R4, tab 57; tr. 1/32-33)

12. In September 1993, Mr. Plezia contacted USDA and discovered that plant approval status was required to perform the contract. USDA sent appellant a manual for guidance to establish a USDA-approved plant. (Tr. 1/33)

13. Mr. William C. Smith, the contracting officer, requested that Defense Contract Management Area Operations (DCMAO), Birmingham conduct a pre-award survey to determine appellant's capabilities for performance of the contract. The report of the survey conducted 1 September 1993, showed appellant technically capable, but lacking both the necessary production and financial capabilities for contract performance. The report recommended no award due to the lack of USDA plant approval and inadequate working capital to sustain performance. (Ex. G-3; tr. 1/149) A later report, dated 17 September 1993, re-evaluated appellant's financial capabilities based on additional information received about a factoring arrangement that would provide appellant loaned funds based on a percentage of amounts invoiced if needed. The later report did not alter the overall recommendation of no award. This report stated:

> The original report specifies that the offeror has not obtained the necessary USDA approval. This office accordingly still recommends no award. Should the offeror obtain this approval, or your office determines that it is not necessary, the offeror would be able to comply with the solicitation requirements.

(Ex. G-4 at 3; tr. 1/150)

14. By letter dated 21 September 1993, Mr. Plezia telephoned USDA and requested a plant inspection as soon as possible. On 5 October 1993, USDA inspector Mr. Jon Geheber visited appellant's plant. He informed Mr. Plezia about the more detailed inspection guidance manual for compliance with USDA requirements. USDA did not approve the plant, but made recommendations for correction of deficiencies, including advice that special emphasis should be placed on "[p]rovid[ing] approved dairy ingredient sources." (ex. G-5 at 1). Appellant obtained the additional manual[5] from USDA. Appellant purchased equipment and made renovations to its plant to obtain USDA plant approval. (Tr. 1/37-38)

15. Mr. Geheber made an unsolicited inspection on 8-9 November 1993, and reported numerous deficiencies (ex. G-6; tr. 1/39). On 19 November 1993, the same USDA inspector gave appellant's plant temporary approval for three months with a "P" rating. The "P" status meant that appellant's plant had both approved ingredients and non-approved ingredients on hand. Therefore, a USDA inspector was required to be present, which would be at appellant's cost, to observe all blending and packaging operations on-line to ensure that only the approved ingredients were used. (R4, tab 82 at 7; ex. G-7; tr. 1/40-41) On 29 November 1993, a further pre-award survey report recommended contract award to appellant based on the USDA plant approval (ex. G-8). The contract was awarded after appellant received the "P" status plant approval without any revision to the contract delivery dates.

16. With an "S" rating, appellant's plant would be certified as having only approved ingredients, and appellant could engage in production without a USDA inspector in its plant. On or about 20 December 1993, appellant requested a USDA inspection to upgrade its rating to "S." No inspection was scheduled because of the unavailability of inspectors during the holidays. Appellant could not have obtained a USDA inspector for continued surveillance if it had wanted to incur that additional cost. Appellant laid off all personnel and shut down the plant waiting for USDA for 31 days until it received "S" plant approval status on 20 January 1994. (R4, tab 38 at 15; ex. G-9; tr. 1/43-44, 125-27, 168)

17. By letter dated 27 January 1994, appellant requested a delivery extension and stated that the need for the extension was due to the following three reasons: (1) appellant requested a survey of its plant on 20 December 1993, but USDA did not perform the survey until 20 January 1994; (2) appellant had discovered that it had to run its equipment at a slower speed than originally expected; and (3) USDA delayed making plant surveys prior to contract award. Appellant enclosed its plant production schedule which showed a start date of 24 January 1994. (R4, tab 19; tr. 1/166)

18. On 5 February 1994, USDA inspected appellant's first production lot in appellant's plant and selected random samples for submission to the USDA laboratory in Chicago for testing. Mr. Plezia estimated that the test results would be received in 21 days after any in-plant USDA inspection. The estimate was based on USDA advice that testing took 10 business days, the fact the product had to be seven days old before shipping, and time for shipping. (Ex. G-10; tr. 1/48-52)

19. Mr. Plezia did not receive test results from USDA as anticipated, but on 3 March 1994 learned that samples from appellant's first production lot had failed the oxygen test. Appellant did not accept the validity of the results because it had tested cans for oxygen level in the head space and received satisfactory results. By letter dated 3 March 1994, appellant advised DPSC that it was stopping production until oxygen testing discrepancies were resolved. Appellant was unable to ship product without USDA authorization and had no space left in its building. Appellant also did not want to invest in additional inventory. Additional production lots inspected and tested in February and March 1994 failed the oxygen test. On 4 March 1994, appellant laid off its employees and shut down its plant. (R4, tab 20, tab 38 at 22, tab 60; exs. G-10 through -12; tr. 1/56)

20. By letter dated 8 March 1994, appellant informed DPSC that it had discovered the source of the oxygen test problem. USDA's equipment did not test properly because the product cans were sealed with a slight vacuum. Appellant offered to alter its process to eliminate sealing the cans with a vacuum, and the problem would be corrected. Appellant requested a waiver on all of the product that had been produced up to that time. The Government did not acknowledge these two letters. (R4, tab 21; tr. 1/57-58)

21. Appellant complained to both USDA and DPSC about the length of time USDA was taking to inspect and analyze product samples. On 18 March 1994, appellant requested that the Government allow it to use a local independent laboratory so that test results could be obtained immediately. On 30 March 1994, the administrative contracting officer (ACO) suggested that a request for approval to use alternative inspection facilities be made to USDA to help prevent problems with future shipments. USDA advised appellant that it would not permit alternative inspection unless authorized by DPSC. By letter dated 2 April 1994, appellant requested that DPSC authorize USDA to permit alternative inspection. USDA advised DPSC that it would not accept any product that had not been tested through its laboratory. DPSC took no action in response to appellant's request. Appellant has not shown how its production was impacted by the inability to use an independent laboratory for its product testing. (R4, tabs 22 through 25, tab 35, tab 38 at 15, tabs 39, 61, 75; tr. 1/65-69, 2/15-17)

22. Appellant requested assistance from a consulting firm in business to resolve contract performance problems between contractors and Government officials.

Ms. Ferguson assured him that DPSC was doing everything possible to help resolve the problems with USDA and did not want third parties involved. (R4, tab 60; tr. 1/58-60)

23. Appellant developed an alternative methodology for sealing the cans that eliminated the problems associated with the oxygen testing. On 30 March 1994, appellant resumed production. Appellant's plant was shut down for 27 days. (Ex. G-14 at 1; tr. 1/141-45)

24. There was disagreement between USDA and DPSC on an oxygen testing methodology that would give accurate results. A DPSC Quality Assurance Determination, dated 22 April 1994, recommended that appellant be granted a waiver on the nonconforming oxygen test results "until such time as an accurate method of determining oxygen in headspace can be determined" (R4, tab 66 at 3). The Government has qualified this statement to apply to test results based on how appellant produced the cans. Appellant produced the cans as allowed by the specifications. (R4, tabs 61, 65, 66; tr. 2/57, 100-01)

25. Bilateral Contract Modification No. P00002, dated 2 May 1994, resolved the oxygen test problem. The modification waived nonconforming oxygen testing results for lots already produced and for future lots until further notice from the Government. The modification stated in pertinent part:

> ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED. THIS IS A COMPLETE SETTLEMENT OF ALL MATTERS RELATED TO THE REQUESTS FOR WAIVERS ON LOTS 1401 THROUGH 1415. THERE ARE NO CLAIMS, DEMANDS, OR RESERVATIONS.

(R4, tab 4) Mr. Plezia read the modification and called Ms. Ferguson before signing it to ask what it was going to cost. He received assurance that there were no costs involved for appellant such as the administrative processing fee of $100 assessed with a prior modification (tr. 1/61-63, 2/18-19). The Government did not inform appellant before issuing the modification of the evaluation of the USDA oxygen testing that was made by the DPSC Quality Assurance Division (finding 24, *supra*; tr. 1/64-65).

26. On 17 March 1994, appellant received test results that are USDA AMS Inspection and Laboratory Certificates for its first production lot. Appellant also received test results on later production lots after delays of six weeks or more. In May 1994, appellant began receiving authorizations from USDA, based on the test results, that it could ship production lots. (R4, tab 38 at 2, tab 55, ex. 1)

27. Bilateral Contract Modification No. A00001, effective 9 June 1994, provided a no-cost delivery schedule extension. The modification provided for monthly deliveries

during the period 30 June 1994 through 30 November 1994. The modification stated that "[w]ith this supplemental agreement, Contractor relieves the Government of any and all claims resulting from this change in delivery schedule." (R4, tab 5 at 1) Mr. Plezia read the modification before signing it and contacted the ACO to request an explanation of its terms (tr. 1/79-80, 2/19).

28. On 1 June 1994, USDA had performed a survey of appellant's plant and given a probationary status rating with the requirement to correct deficiencies within ten days. On 16 June 1994, USDA performed a follow-up survey and noted several remaining deficiencies. Appellant's plant was given an ineligible status, which appellant protested. USDA performed another survey on 13 July 1994, and appellant's plant received a three-month approved status with an "S" rating. Appellant's plant was shut down for 27 days as a result of the USDA plant survey. (R4, tab 71; exs. A-5, G-15 through -17; tr. 1/69-71, 74-78, 2/40-42)

29. Appellant bid in response to Solicitation No. SPO300-94-R-8974 for the same or similar product and was the apparent low offeror. Appellant elected to withdraw its bid because of USDA inability to inspect the product in a timely fashion. (R4, tab 55, ex. 2; tr. 1/72-73)

30. By letter dated 14 November 1994 to DPSC, appellant requested cost relief under the Government Delay of Work clause in the contract due to the length of time it took USDA to approve appellant's plant and the time USDA took to test the product submitted. In the letter, appellant stated that it had anticipated product testing would be done within 21 days. Appellant stated that its first production lot inspection had begun on 4 February 1994, and that it was not complete until 17 March 1994, approximately six weeks later. Appellant alleged that "[a]ll the inspections have taken this long and due to the length of time for inspection we have continuously shut down our production as we could not invest funds into inventory with [sic] still waiting for results of product shipped to USDA." (R4, tabs 27, 38)

31. Bilateral Modification No. A00002, effective 23 January 1995, provided a second no-cost delivery schedule extension that revised the contract completion date to 16 August 1995. The modification stated:

> ALL OTHER TERMS AND CONDITIONS NOT REFERENCED
> REMAIN UNCHANGED.

(R4, tab 7) Appellant transmitted the signed modification by cover letter, dated 10 January 1995, which stated that Mr. Plezia was signing the modification with the following understanding:

> The delivery extension is at no-cost to either party meaning that the modification fee is being waived to process this amendment and has no reference to problems or costs that created the cause for this delay.

(R4, tab 78; tr. 2/20-22) Mr. Plezia intended in signing the modification to protect appellant by leaving it "open ended [so] that I could go back and seek recovery" (tr. 1/82).

32. Unilateral Modification No. P00003, effective 9 November 1995, extended the contract completion date to 30 November 1995, at no cost to either party. This modification also stated that all other terms and conditions remained the same. (R4, tab 6)

33. By letter dated 6 December 1995, appellant submitted a two-page claim in the amount of $338,391 for additional costs due to defective specifications and delayed Government inspections. Appellant alleged the following elements of additional incurred costs:

(1) labor costs due to plant shutdowns	$ 63,870.00
(2) interest costs due to loss of credit	15,289.00
(3) overhead due to plant shutdowns	31,276.00
(4) inventory waste	13,500.00
(5) gross margin loss on a bid on Solicitation No. SPO300-94-R-8974 that it withdrew	94,446.00
(6) costs to obtain outside financing	50,000.00
(7) loss on stock sold to secure financing	70,010.00

(R4, tab 45; tr. 1/83) The Government received appellant's properly certified claim on 27 December 1995 (R4, tabs 46 through 48).

34. On 22 December 1995, a USDA plant survey found appellant's plant ineligible. The USDA findings included use of certain non-USDA-approved ingredients, cracks and seams in the floors and at the base of the walls that needed to be sealed, and insect and rodent infestation. On 12 December 1995, appellant had asked USDA to inspect production lots that were ready for shipment and was told that no inspectors would be available until after the first of the year because of the holidays. Mr. Plezia believes that the ineligibility rating was given in retaliation for the submission of appellant's claim. The USDA inspector advised appellant that all finished product could not be shipped and would not be accepted by USDA. The value of 11,400 cans, the finished product on the floor, was $48,844.80. Appellant destroyed the product.

Since no sale of the product to a commercial customer was attempted, the entire value of the product was lost. Another plant survey on 17 January 1996 gave appellant an approved "S" status. (R4, tab 55, exs. 2, 22; ex. G-27; tr. 1/88-93, 102)

35. Appellant has alleged that during the performance of the contract it lost its major customer, Only 8, Inc., because the USDA caused it excess costs and it lacked funds and credit. Appellant has also alleged that it was unable to take care of its customers during the winter and spring of 1995 because of its depleted finances. (R4, tab 55, ex. 1; tr. 1/101-02)

36. Appellant failed to meet the delivery schedule as a result of USDA inspection delays and other causes. Appellant misjudged the capacity of its equipment, no product could be produced until appellant was reinspected and approved after its plant approval status was revoked by USDA in December 1995, and appellant had cash flow problems which stopped its production until it could obtain additional financing. On 2 February 1996, the Government issued appellant a show cause notice for failing to perform within the time required by the contract. Appellant responded on 8 February 1996 that the causes of its failure to deliver were beyond its control and without its fault or negligence. On 23 February 1996, appellant agreed to a no-cost cancellation of the contract. Appellant failed to deliver 28,080 cans of the contract quantity. (R4, tabs 19, 49, 50, 52; tr. 1/169-70, 2/32-33)

37. The claim was denied in its entirety by the contracting officer's final decision, dated 29 April 1996 (R4, tab 8). Appellant filed this timely appeal.

38. Appellant submitted a revised certified claim, dated 17 June 1996, in the amount of $362,751.49 together with detailed cost data in support of the claim to the Government. Appellant corrected amounts for elements of the claim to more accurate numbers and added the following amounts allegedly attributable to USDA shutdowns:

Major customer loss	$44,187.26
Harassment by USDA	48,844.80

(R4, tab 55, ex. 2 at 13; tr. 1/83-84, 116).

39. A Defense Contract Audit Agency (DCAA) Audit Report, dated 10 January 1997, of an equitable adjustment proposal, dated 20 September 1996, submitted by appellant in the amount of $362,751,[6] disclosed questioned costs. The report stated that the appellant's proposal for an equitable adjustment was "an acceptable basis for negotiating a fair and reasonable price" (ex. A-2 at 4). The audit did not address the issue of entitlement. The report noted that appellant's costs were based on budgetary data developed at the time of submitting its offer, but appellant had no prior experience

in production of the contract items. The report stated that actual costs could not be determined because appellant did not have a job cost accounting system. The report questioned $197,379 of appellant's claimed costs. (Ex. A-2; tr. 1/85-86, 93-102) Based on the DCAA Audit Report, DPSC developed the amount of $165,372 as a basis for negotiations with appellant. This amount represented the revised claim elements for labor costs, overhead, inventory waste, and harassment by USDA. (Ex. A-4)

DECISION

Appellant claims that the Government is responsible under the contract for delays caused by USDA in granting plant approval required for beginning production of the milk shake mix and improperly revoking its approved plant status. Appellant also claims that the Government is responsible for defective specifications, *i.e.*, the requirement to comply with a specification requirement for oxygen content for which the Government lacked testing capability to ascertain adherence to the requirement. Appellant submits that its production was delayed by USDA's delayed return of test results when USDA and DPSC could not agree on the methodology for the oxygen testing. Appellant relies for proof of quantum on the DCAA audit report and an alleged agreement by the contracting officer with the DCAA recommendations. Appellant also presented the testimony of Mr. Plezia at the hearing to support the amount of the monetary recovery to which it claims entitlement.

The Government defends against appellant's claim on the grounds that the shutdowns of appellant's plant were not caused by Government fault, but by appellant's business decisions to delay production, its lack of diligence, and its negligence. The Government argues that it cannot be held responsible for pre-contract delay or any other delays caused by USDA when it was functioning in its regulatory capacity. The Government submits that appellant is barred from recovery of all its claimed additional costs by the provision in the contract that the remedy for USDA delay in product inspections was a day-for-day extension in the time of delivery which has been granted. The Government also maintains that the claim is barred by appellant's agreement to contract modifications which constitute an accord and satisfaction. The Government further argues that appellant is barred from recovery of some elements of its claim by provisions in the Federal Acquisition Regulation (FAR) that make certain costs not recoverable.

There were four shutdowns of appellant's plant that appellant claims increased its costs. The first shutdown occurred before the contract was awarded when appellant's plant was given a "P" rating by USDA instead of an "S" rating (finding 15). The second occurred in December 1993, when appellant requested a survey to upgrade its plant status to an "S" rating, but USDA did not make the survey until 20 January 1994 (finding 16). The third shutdown occurred in March 1994, after problems developed with USDA's

laboratory testing of product samples for oxygen content (findings 19, 23). The fourth shutdown occurred in June 1994, when appellant's plant was given an ineligible status by USDA (finding 28).

The first, second, and fourth shutdowns are related to USDA plant approval, a function that was a pre-condition of appellant's contract performance. The actions taken by USDA were those of an independent agency in its regulatory capacity and not in connection with its inspection and testing responsibilities for DPSC.

Appellant argues that USDA was an agent of DPSC in all its functions based on the relationship the contractor had with USDA. Appellant had no control over the contract requirements that it engage USDA to perform product inspections, that production take place in a USDA-approved plant, that it was subject to announced and unannounced plant inspections by USDA, and that it furnish product samples to USDA for compliance with specification requirements. Appellant also had no role in providing information to USDA regarding a memorandum of understanding between DPSC and USDA, the USDA governing manual, or the Government procedures for the processing of inspection and acceptance documents. The facts which appellant considers relevant to this argument are not disputed (app. br. at 18-20; Gov't reply br. at 11-13). They do not, however, support appellant's position that DPSC should be held responsible for all actions of the USDA. To the extent the contract requirements over which appellant states it had no control apply to USDA's performance of quality assurance functions, *i.e.,* product inspection and testing, the Government does not deny that USDA was acting as its agent and it was responsible for its actions (Gov't reply br. at 12-13). The contract requirements that governed USDA's performance of its plant approval functions, however, were outside the control of both the contractor and DPSC. We have held that we have no authority to review the actions or determinations of an agency that is not party to the contract when it is acting in its capacity as an independent, regulatory body, as USDA was in granting plant approval. *See TPI International Airways, Inc.*, ASBCA No. 46462, 96-2 BCA ¶ 28,373, *aff'd on reconsid.,* 96-2 BCA ¶ 28,602, *aff'd*, 135 F.3d 776 (Fed. Cir. 1998) (Table), *cert. denied*, 525 U.S. 874 (1998). Appellant's attempt to distinguish this case is without merit. Appellant chose to accept the requirements for plant surveys and approval in submitting its offer in response to the solicitation and is bound by them. We conclude that appellant is not entitled to recovery of any increased costs of the first, second, and fourth shutdowns caused by the alleged delays or other improper action of USDA.

With regard to the third shutdown, which followed the oxygen test problem, the Government argues that the contract provided for a delivery schedule extension as the sole remedy for USDA delay. The standard Government Delay of Work clause in the contract forecloses any recovery under the clause when an adjustment is provided under other terms of the contract. The relevant language in the clause, after providing for an

adjustment for any increase in the cost of performance of the contract caused by delay, states:

> Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. However, no adjustment shall be made under this clause for any delay or interruption . . . for which an adjustment is provided or excluded under any other term or condition of this contract.

FAR 52.212-15(a). In this contract an adjustment in time as a day for day extension of the contract delivery schedule was specified in the Delays in Shipment of Products Requiring USDA Laboratory Analysis clause as the remedy for delays in performing or receiving USDA analyses of production samples (finding 6). As an exclusive remedy, it bars appellant's claim for delay.

Alternatively, the Government argues that appellant's delay claims were waived by modifications which provided for extended delivery schedules. The parties' mutual agreement to a new delivery schedule eliminates from consideration the causes of delay occurring prior to their agreement. *SRM Manufacturing Co*., ASBCA Nos. 44750, 45729, 00-1 BCA ¶ 30,618; *Orion Electronic Corporation,* ASBCA No. 18918, 80-1 BCA ¶ 14,219, *aff'd*, 230 Ct. Cl. 989 (1982). For these reasons, appellant is not entitled to recovery on its claim for delay.

Appellant has responded that its claim for an adjustment is not for delay, but made under the Changes clause for defective specifications: the oxygen content requirement could not be evaluated with the Government's test methodology and was deleted from the contract by Modification No. P00002. Appellant argues that the Government issued a compensable change for which it is entitled to a monetary recovery for costs attributable to a two-month shutdown of the plant before the modification was executed[7] (app. reply br. at 3).

The Government defends against any claims related to the oxygen content specification on the ground that Modification No. P00002 acted as a complete accord and satisfaction of any and all claims arising out of the testing of lots that appellant had produced. The Government has the burden of proof to establish that the parties' agreement constitutes an accord and satisfaction that operates to bar the claim. The essential elements of accord and satisfaction are proper subject matter, competent parties, meeting of the minds of the parties, and consideration. To reach an accord and satisfaction there must be mutual agreement between the parties with the intention clearly stated and known to the contractor. *Mil-Spec Contractors, Inc. v. United States,* 835 F.2d 865 (Fed. Cir. 1987); *Pacific Ship Repair & Fabrication, Inc.,* ASBCA No. 49288, 99-1

BCA ¶ 30,222; *Biggs General Contracting, Inc.,* ASBCA No. 46979, 97-2 BCA ¶ 28,999. Appellant argues that the record is silent as to whether the Government knew that the maximum oxygen requirement was unrealistic and that, if the Government did know, it had a duty to provide such information to appellant. Appellant asserts that its execution of the modification under these circumstances was without informed consent and there could be no meeting of the minds. The Government responds that it had no obligation to reveal such facts indicating weakness of its position to a contractor when negotiating a settlement or modification. We are not persuaded that appellant was unduly influenced to sign the modification. To render a release unenforceable for such reasons, appellant must establish that (1) it involuntarily accepted the Government's terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of the Government's coercive acts. *See Dureiko v. United States,* 209 F.3d 1345 (Fed. Cir. 2000). Appellant's allegations do not establish that DPSC engaged in improprieties in negotiating the modification that could render it unenforceable.

Appellant further argues that there was no meeting of the minds because when Mr. Plezia signed Modification No. P00002 which waived the oxygen testing requirements, he considered it a waiver of a claim for administrative costs and did not intend to release all claims regarding the Government's inability to test for oxygen content. The unambiguous, plain language of the modification reveals the parties' mutual intent to settle all claims (finding 25). The subjective, unexpressed intent of one of the parties is irrelevant to contract interpretation. *See Andersen Consulting v. United States,* 959 F.2d 929, 934 (Fed. Cir. 1992); *City of Oxnard v. United States,* 851 F.2d 344 (Fed. Cir. 1988); *Dana Corporation v. United States,* 200 Ct. Cl. 200, 214, 470 F.2d 1032, 1041 (1972). The scope of the release language in the modification here was broad, and appellant did not take any exception to it. Appellant did not reserve the claim subsequently presented for defective specifications. The Government has met its burden that the change in the delivery schedule was being accepted without qualification, and we have concluded that there was a meeting of the minds and an accord and satisfaction that bars appellant's claim.

Appellant also argues that DPSC improperly failed to respond to requests it made for alternate inspection procedures by an independent laboratory. As a result of appellant's inability to use an independent laboratory to substantiate satisfactory compliance with the specification requirements, appellant argues it was delayed, but we have concluded that appellant's claims for delay are barred by the Government Delay of Work clause and by appellant's agreement to a new delivery schedule. Assuming that appellant is claiming alternatively that the Government's failure to obtain consent from USDA for alternative testing was a constructive change, and assuming that it was not barred by accord and satisfaction, which we need not decide, appellant has the burden of proving the fundamental facts of its affirmative claim by a preponderance of the evidence and must show liability, causation, and resultant injury. *Wilner v. United States,*

24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*); *Metric Constructors, Inc.*, ASBCA No. 48423, 96-2 BCA ¶ 28,459. We have not found how appellant's production was impacted by the inability to use an independent laboratory for its product testing.

In lieu thereof, appellant has claimed increased labor and overhead costs and inventory waste allegedly caused by the defective specifications and delayed Government inspections (elements (1), (3) and (4) of the claim). Appellant calculated its labor and overhead costs using a total cost methodology. Appellant argues quantum on the basis of the DCAA audit report that "accept[ed]" these elements of appellant's claim and the Government's agreement with the DCAA audit report (app. br. at 28-29). The total cost method is a disfavored means of measuring a contractor's recovery. Under this method, the contractor must show: (1) the impracticability of proving actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs. *Servidone Construction Corporation v. United States,* 931 F.2d 860 (Fed. Cir. 1991); *C & C Plumbing & Heating,* ASBCA No. 44270, 94-3 BCA ¶ 27,063. As the Government has noted in its briefs, the DCAA findings were qualified. Appellant has not established that its bid was reasonable or that its actual costs were reasonable or, in the absence of a job accounting system, that they were attributable to the contract. Moreover, DCAA did not address the issue of entitlement. Appellant has the burden of proving not only entitlement, but the amount of loss with sufficient certainty so that the amount of damages will be more than mere speculation. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987); *Deval Corporation,* ASBCA Nos. 47132, 47133, 99-1 BCA ¶ 30,182, *aff'd on reconsid.,* 99-2 BCA ¶ 30,522. Appellant's claim for inventory waste seeks recovery of the cost of ingredients which spoiled and were not usable as a result of the USDA delays. Appellant provided no support for this element of its claim other than its reliance on the DCAA audit report that there were losses. We have not found that the spoilage occurred at a time attributable to improper actions of the Government. If there were entitlement, the record here would not provide a substantial basis for the Board to decide the issue of quantum.

With respect to entitlement to other elements of appellant's claim, we conclude there is no entitlement. Appellant is not entitled to recover interest costs, costs to obtain outside financing, and loss on the sale of stock (elements (2), (6), and (7) of appellant's claim). Interest on borrowed funds and costs of financing are unallowable under FAR 31.205-20. We have interpreted this provision as a bar to recovery of the types of costs appellant claims. *See Superstaff, Inc.*, ASBCA No. 48062 *et al.*, 97-1 BCA ¶ 28,845; *Tomahawk Construction Co.,* ASBCA No. 45071, 94-1 BCA ¶ 26,312.

Appellant is also not entitled to recover losses from its withdrawal of a bid in response to Solicitation No. SPO300-94-R-8974 (element (5)). The claimed loss was possible profit that appellant could have received if it had not experienced USDA delays, if it had not withdrawn its bid, and if it had been awarded the advertised contract. Such

losses are not recoverable for Government delay. FAR 52.212-15. Moreover, they constitute remote, speculative damages that are not recoverable as a matter of law. *See Ramsey v. United States*, 121 Ct. Cl. 426, 101 F. Supp. 353 (1951), *cert. denied*, 343 U.S. 977 (1952); *Cramer Alaska, Inc.*, ASBCA No. 47725, 96-1 BCA ¶ 27,971.

Appellant has alleged that the USDA finding of plant ineligibility on 22 December 1995 was retaliatory in nature and that it is entitled to recovery for alleged harassment by USDA. The USDA plant surveys were performed in USDA's capacity as an independent, regulatory body. We have no authority to review those actions.

We also conclude that appellant is not entitled to recovery for major customer loss. Appellant has not established that it would not have lost its major custormer but for the alleged Government delays and, in any event, customer loss constitutes consequential damages that are not recoverable under Government contracts as a matter of law, absent a special provision. *Northern Helex Company v. United States*, 207 Ct. Cl. 862, 524 F.2d 707 (1975), *cert. denied*, 429 U.S. 966 (1976); *Cramer Alaska, Inc., supra.*

For the reasons stated, the appeal is denied.

Dated: 31 August 2000

LISA ANDERSON TODD
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

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

NOTES

[1] The DPSC changed its name to Defense Supply Center Philadelphia (DSCP) on 13 January 1998, after the events that are the subject of this appeal.

[2] The contract was awarded to appellant in the name Custom Blending & Packing, Inc., which the record shows was a former name of appellant's company (R4, tabs 2, 8, 9, 13, 45).

[3] The solicitation had provided that the delivery dates were based on the assumption that the Government would make award by 23 September 1993. It further stated that each delivery date in the delivery schedule would be extended by the number of calendar days after that date that the contract was in fact awarded. (R4, tab 1 at 22)

[4] Section H, Special Contract Requirements, of the master solicitation included the provision "52.246-9P31 SANITARY CONDITIONS (JAN 1992) DPSC", which states in paragraph (a)(1) in pertinent part:

> Establishments furnishing food items under DPSC contracts are subject to approval by . . . [an] agency acceptable to . . . [DPSC]. The Government does not intend to make any award for, nor accept, any subsistence products manufactured or processed in a plant which is operating under such unsanitary conditions as may lead to product contamination or constitute a health hazard, or which has not been listed in an appropriate Government directory as a sanitarily approved establishment when required.

(R4, tab 54 at 16-17)

The clause in the master solicitation entitled "GENERAL INSPECTION REQUIREMENTS (JAN 1992) DPSC" specifically provided that the contractor shall employ the services of the USDA AMS or other agency "to accomplish origin inspection (examination and testing) and sampling as required herein and in the

applicable commodity specifications. The contractor shall bear all expenses incident thereto, including costs of samples and all associated costs for preparation and mailing. . . . Offerors may contact the appropriate USDA . . . office to discuss inspection procedures prior to submitting offers." (R4, tab 54 at 4)

[5] The applicable guidance manual is DA INSTRUCTION No. 918-70, reissued 8 October 1991, by USDA, Agricultural Marketing Service, Dairy Division, Dairy Grading Branch (R4, tab 82).

[6] The proposal that was the subject of the DCAA Audit is not in the record. It was submitted to the Government by SP Form 1411, dated 20 September 1996 (ex. A-1). The amounts in the proposal that were audited are identical to the amounts in appellant's revised claim, dated 17 June 1006 (R4, tab 55, ex. 2; ex. A-2 at 4).

[7] We have found appellant's plant was shut down for only 27 days as a result of the discrepancies appellant found in the oxygen test results and for other reasons (findings 19, 23).

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. 49819, Appeal of Custom Blending & Packaging, Inc., rendered in conformance with the Board's Charter.

Dated:

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