ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Encorp	)	ASBCA No. 51293
	)	
Under Contract No. 391-0488-C-00-8936-00	)	

APPEARANCES FOR THE APPELLANT: Philip L. Fortune, Esq.
James K. Bidgood, Jr., Esq.
Smith Currie & Hancock LLP
Atlanta, GA

APPEARANCE FOR THE GOVERNMENT: Diane A. Perone, Esq.
Counsel
United States Agency for
International Development
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE PEACOCK

This appeal involves the appellant' s claim for reimbursement of certain foreign taxes paid by the contractor during performance of a construction contract in Pakistan. The total amount claimed is $206,432. The parties have waived hearing and submitted the case for decision on the record pursuant to Rule 11. Both entitlement and quantum are before us. We deny the appeal.

FINDINGS OF FACT

1. On 10 July 1988, the United States Agency for International Development (USAID or Government) awarded the referenced contract to Encorp, a division of AMCA International Construction Corporation (Encorp, appellant, or contractor) for the construction of administration buildings, classrooms, other buildings, and improvements at the Northwest Frontier Province Agricultural University (NWFPAU) at Peshawar, Pakistan (the Project). The amount of the negotiated contract as awarded was 308,000,000 Rupees (Rs) which was allocated as Rs 215,967,720 and U.S. $5,258,987. (R4, tab A)

2. The vast majority of the construction activities required by the contract were performed by Encorp' s primary first-tier subcontractor, Murshid Builders, Ltd. (Murshid), a Pakistani construction firm (complaint ¶ 7; answer ¶ 7).

3. The Bilateral Agreement for Technical Cooperation Between the United States of America and Pakistan (1951) exempts U.S. technical and developmental projects from Pakistani taxes as follows (SR4, tab 36 at 4):

> Any funds, materials and equipment introduced into Pakistan by the Government of the United States of America pursuant to such program and project agreements shall be exempt from taxes, service charges, investment or deposit requirements, and currency controls.

4. The contract included the following clause (referenced sometimes hereinafter as the "Foreign Taxes" clause):

> 22. 52.229-6 TAXES - FOREIGN FIXED-PRICE CONTRACTS (APR 1984) (Deviation)
>
> (a) To the extent that this contract provides for furnishing supplies or performing services outside the United States, its possessions, and Puerto Rico, this clause applies in lieu of any Federal, State, and local taxes clauses of the contract.
>
> (b) . . . .
>
> Tax and taxes, as used in this clause, include fees and charges for doing business that are levied by the Government of the country concerned or by its political subdivisions.
>
> All applicable taxes and duties, as used in this clause, means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract, pursuant to written ruling or regulation in effect on the contract date.
>
> After-imposed tax, as used in this clause, means any new or increased tax or duty, or tax that was exempted or excluded on the contract date but whose exemption was later revoked or reduced during the contract period, other than excepted tax, on the transactions or property covered by this contract that the contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.

. . . .

(c) Unless otherwise provided in this contract, the contract price includes all applicable taxes and duties, except taxes and duties that the Government of the United States and the government of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.

(d) The contract price shall be increased by the amount of any after-imposed tax or of any tax or duty specifically excluded from the contract price by a provision of this contract that the contractor is required to pay or bear, including any interest or penalty, if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor' s fault, negligence, or failure to follow instructions of the Contracting Officer or to comply with the provisions of paragraph (i) below.

. . . .

(i) The Contractor shall take all reasonable action to obtain exemption from or refund of any taxes or duties, including interest or penalty, from which the United States Government, the Contractor, any subcontractor, or the transactions or property covered by this contract are exempt under the laws of the country concerned or its political subdivision or which the governments of the United States and of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.

(j) The Contractor shall promptly notify the Contracting Officer of all matters relating to taxes or duties that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs. The contract price shall be equitably adjusted to cover the costs of action taken by the Contractor at the direction of the Contracting Officer,

including any interest, penalty, and reasonable attorneys' fees.

The above clause is modified to the extent that A.I.D. is not permitted to finance identifiable taxes, duties or similar impositions of the Government of Pakistan and/or its political subdivisions or agencies. This requirement applies both to imported goods as well as to shelf item goods. Accordingly, unless A.I.D. shall otherwise agree in writing, no A.I.D. funds may be used, nor will they be reimbursed, to pay any identifiable customs duties, taxes, tariffs, or similar impositions of the government of Pakistan and/or its political sub-divisions or agencies.

The above paragraph is further elaborated as follows:

Host Country Taxes

1. USAID does not finance any identifiable host-country taxes or other imposition of levies.

2. (i) the bilateral "Agreement for Technical Cooperation Between Pakistan and The United States of America," dated 9th February, 1951, in Article III.2 provides:

"Any funds, materials and equipment introduced into Pakistan by the Government of the United States of America pursuant to such program and project agreements shall be exempt from taxes, service charges, investment or deposit requirements, and currency controls."

(ii) Section B.4(b) of the Standard Provisions Annex of all USAID Project Grant Agreements, provides:

"(b) To the extent that (1) any contractor, including any consulting firms, any personnel of such contractor financed under the Grant, any property or transaction relating to such contracts, and (2) any commodity procurement transaction financed under the Grant, are not exempt from identifiable taxes, tariffs, duties or other levies imposed under laws in effect in the territory of the Grantee, the Grantee will, as and to the extent provided in and pursuant to Project

> Implementation letters, pay or reimburse the same with funds other than those provided under the Grant."
>
> (iii) The Contractor is responsible for asserting and obtaining the necessary tax or other exemptions or refunds. On request, USAID will provide available documentation and certificates in support of allowable exemptions from host country taxes or other impositions or levies.

R4, tab A, Am. No. 003 at 3-4 and contract clauses at I-16 - I-18.

5. In providing clarifications and answers to questions raised by offerors, the Government emphasized in both Amendment Nos. 003 and 005 to the Request for Proposals (RFP) that "USAID does not finance any identifiable host-country taxes or other imposition of levies." Amendment No. 003 expressly listed "sales tax" and "Octroi" as exempt taxes which USAID would not pay. (R4, tab A)

6. The appellant alludes to an "Addendum No. 6" to the contract (app. br. at 6). It cites to a one page document bearing the letterhead of one of the architect engineers for the project that is dated 17 February 1987 (SR4, tab 30). The pertinent portion of the document (under the heading "Addendum No. 6") is entitled "6.l HOST COUNTRY TAXES' and purports to amend "Volume 1, p. CPA-23, clause 79" by adding a "Sub-clause (2)." The provision that "Addendum No. 6" purports to amend is not in the record. "Sub-clause (2)" states, "USAID Grant-Financed contracts are exempt from all host country taxes. If under any circumstances the contractor is compelled to pay local taxes, those will be reimbursed by the Government of Pakistan through the Agricultural University, Peshawar." *(Id.)* The parties apparently agree that the substance of this addendum was adopted by USAID and incorporated into a prior solicitation (not in the record) for the project (R4, tab C). In the recitation of questions and answers that were set forth in Amendment No. 003 of the instant RFP, USAID stated "All addenda from the previous bid have been incorporated in the present [RFP] unless superseded by Addenda of later date" (R4, tab A, Amendment No. 003 at 8). We find that, to the extent "Addendum No. 6" may have been incorporated into the earlier solicitation, it was superseded by the later and more extensive treatment of "Host Country Taxes" in the RFP now before us.

7. During performance, the contractor paid certain Octroi duties and taxes on steel reinforcing bars and billets which it seeks to recover in this appeal. It also claims that it is entitled to reimbursement for demurrage costs incurred pending payment of Octroi in November 1990. (R4, tab K at 35)

Octroi

8. Octroi charges are Pakistani import duties imposed on construction materials and equipment. In accordance with the international agreements between USAID and the Government of Pakistan, the appellant was exempted from payment of Octroi charges. (R4, tabs A, H; SR4, tab 36 at 4)

9. At times in 1990 and early 1991, import officials in the Northwest Frontier Province (NWFP), Peshawar imposed Octroi charges on construction materials transported to the project by Murshid' s trucking subcontractor (R4, tabs B, E).

10. By letter dated 21 July 1990, Murshid contacted the appellant notifying Encorp that Murshid had made Octroi payments over an indeterminate period to local Peshawar authorities totaling Pakistani Rs 306,503. The letter stated that Murshid had "tried our utmost [but failed] to obtain the [Octroi] exemption." Murshid expressly noted that imposition of the Octroi charges was contrary to the contract but Murshid considered it necessary to make the payments to avoid delays to the project. The letter requested Encorp to seek reimbursement of the charges from "the Government of Pakistan through Agricultural University Peshawar." (R4, tab B) Prior to this letter, there is no evidence of what actions, if any, were taken by Encorp or Murshid to obtain exemptions from Octroi levies or reimbursement of amounts paid.

11. By letter dated 4 August 1990, Encorp forwarded Murshid' s letter to USAID and requested that USAID issue a contract modification providing for reimbursement of the Octroi payments (R4, tab B).

12. On 29 August 1990, USAID issued its response denying Encorp' s request. The USAID response cited the "Foreign Taxes" clause set forth above and indicated that it agreed with Murshid' s approach of seeking reimbursement through appropriate Pakistani authorities. USAID also offered to assist by providing documentation and certifications. (R4, tab C) On 15 September 1990, Encorp forwarded Murshid' s 21 July 1990 letter to the NWFPAU (SR4, tab 7). There is no evidence that there was any further contact between Encorp and the NWFPAU on this issue until four years later. USAID' s offer of assistance was repeated at a 24 September 1990 "quarterly review meeting" attended by representatives of both Murshid and Encorp (R4, tab D).

13. Representatives of the contractor and USAID met on 23 December 1990 to discuss the Octroi issue. On 27 December 1990, Encorp notified USAID that it was implementing detailed written procedures to solve the issue. These measures included permitting the appellant to address the shipments to the USAID Liaison Office in Peshawar. (SR4, tab 26) Encorp also stated in the letter that it would submit its claim for reimbursement of Octroi paid to the Peshawar Municipal Corporation (*id*.).

14. On 14 March 1991, Murshid notified Encorp that it had made additional Octroi payments of Rs 406,078 during the period 20 June 1990 to 20 January 1991 bringing the total amount paid to Rs 712,581. Murshid requested that Encorp reimburse it for these payments. All of the Octroi duties that are in dispute were levied prior to 20 January 1991. In addition, with the exception of two very minor payments on 20 January 1991 totaling less than Rs 2000, all of the Octroi payments in dispute were made prior to 17 December 1990, *i.e.*, before implementation of the detailed Encorp instructions (finding 13). (R4, tab E)

15. Following receipt of Murshid' s request and also on 14 March 1991, Encorp requested that USAID reimburse the Octroi amounts paid by its subcontractor (R4, tab E).

16. By letter dated 29 May 1991, USAID denied the appellant' s request for reimbursement of the Octroi payments for substantially the same reasons stated in its 29 August 1990 correspondence, *supra*, reiterating contract and international agreements that precluded reimbursement (R4, tab F).

17. As it was preparing to demobilize over three years later, Encorp sent a letter dated 7 August 1994 to the Director of Works, NWFPAU requesting reimbursement of the Octroi duties. The letter enclosed USAID' s letter of 29 May 1991 denying the claim. (SR4, tab 29)

18. On 8 August 1994, the NWFPAU issued a one sentence handwritten denial of the appellant' s request as follows: "Rejected as not catered [?] for in the approved PCI GOP portion or [of ?] any agreement held with this office." No further explanation of this sentence is in the record. (SR4, tab 29)

19. On the same date, Encorp notified USAID of the NWFPAU rejection concluding that since no compensation would be paid "by them," *i.e.*, the NWFPAU, Encorp was again seeking reimbursement from USAID (R4, tab H).

20. On 19 September 1994, USAID wrote to the Ministry of Finance, Revenue and Economic Affairs, Government of Pakistsan (hereinafter Finance Ministry), on behalf of the contractor (R4, tab I). On 28 September 1994, the Finance Ministry sent a directive to the Government of NWFP, Peshawar requesting "that the amount of Rs 712,581 received from the contractor on account of Octroi charges on equipment and fixture[s] imported from USA . . . under USAID grant agreement may be reimbursed to him immediately (R4, tab I)." The Finance Ministry' s directive emphasized the tax-free status of the imported materials (*id*.).

21. As of 30 October 1994, the appellant had not been refunded the Octroi payments and Encorp so notified USAID that date (SR4, tab 34).

22. In October-November 1994, an employee of Encorp attempted to collect the Octroi refund from local Peshawar Government authorities. The education and training of the employee assigned to this task are not disclosed in the record. After being directed to several Government offices, the employee was informed that the matter was pending a decision by the "taxation officer." On 6 November 1994, the employee concluded "During my visits to these Govt. offices, I under[stood] that the money once paid by error/mistake to the Govt. exchequers can only be withdrawn at the expense of some unfair dealing." (SR4, tab 35)

23. There is no evidence of any further actions taken to obtain reimbursement of the Octroi charges in dispute.

Demurrage

24. The appellant' s demurrage claim involves the November 1990 detention of six trucks carrying materials for the project at a Peshawar Octroi Post pending payment of Octroi. Encorp claims the alleged idle equipment cost, *i.e.*, demurrage, for the trucks for the six days that they were detained by the Peshawar authorities.[1] (R4, tabs J, K)

25. On 31 October 1990, Encorp wrote to USAID' s office in the port city of Karachi requesting that USAID issue the necessary customs clearance/exemption documents to permit the duty free entry of construction materials arriving in Karachi by vessel (SR4, tab 8).

26. USAID' s Karachi office issued the exemption documents on 13 November 1990 and the materials entered Pakistan duty-free (SR4, tab 9). The exemption certification was addressed to the Octroi officials in the Karachi Metropolitan Corporation. The materials were placed in 14 trucks by Murshid' s hauling subcontractor for overland transport to the project in northwest Pakistan (R4, tab J).

27. On or about 22 November 1990, 6 of the 14 trucks were detained by a Peshawar Octroi Post which did not recognize the tax-exempt status of the shipped materials (R4, tab J, att. 9). On that date, Encorp requested the Chairman of Municipal Corporation Peshawar to release the shipments (R4, tab J). On 25 November 1990, Encorp also wrote to the Secretary, Local Council Board, Peshawar (SR4, tab 11). Both

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[1] Although there is evidence of one later episode in August 1993 involving minor demurrage charges related to an Octroi dispute, the appellant' s assertions in its briefs concerning the demurrage claim pertain solely to the November 1990 incident detailed herein. We consider that any claim related to the August 1993 incident has been abandoned.

letters noted the tax-exempt status of the construction materials and referred the Peshawar authorities to the USAID contracting officer in Islamabad for verification of the exemption (R4, tab J; SR4, tab 11).

28. By letter of 26 November 1990, Encorp asked USAID' s Islamabad office to issue an exemption certificate (SR4, tab 12). Islamabad instructed USAID Peshawar to issue the certificate. USAID Peshawar issued the certification on 26 November 1990, *i.e.*, the same date as Encorp' s letter request. (SR4, tab 13; R4, tab J)

29. The certificate was not accepted by the Peshawar Octroi Post for reasons not clarified in the record. On 28 November 1990, USAID' s Deputy Liaison Officer in Peshawar attempted to persuade local authorities to exempt the shipments but was unsuccessful. (R4, tab J; SR4, tab 14) The same date, Murshid paid the Octroi duties and the construction materials were released (SR4, tab 15).

30. By letter dated 1 January 1991, Murshid requested that Encorp reimburse it for the demurrage costs incurred pending resolution of the Octroi issue (SR4, tab 16). Encorp sought recovery of the demurrage expenses from USAID on 13 October 1993. Encorp' s letter indicated that no delay to the project occurred as a result of the detention of the trucks. (SR4, tab 27)

Taxes on Steel

31. Part I, Section H, Paragraph 30(e) of the contract stated in pertinent part (R4, tab A):

> 30. Variation in Prices:
>
> a) During the period of the Contract, no variation in prices of labor and/or materials or any other matters affecting the cost of the Works will be paid to the Contractor or reimbursed to USAID except as specifically stated in this clause.
>
> . . . .
>
> e) The building materials on which variation in prices shall be paid by or credited to USAID are cement, steel reinforcing bars, and first class burnt brick. The Contractor shall inform the Engineer and USAID of any admissible variation in price and of the quantity of materials affected.

. . . .

> ii) The admissible variation in prices of steel reinforcing bars shall be the difference between the rates set for billet steel by the Pakistan Steel Mills for the period under consideration as compared to the rates at the Time of Tender. Price variation due to any other cause will not be admissible.

32. The contractor included sales taxes in its base contract price for contract steel requirements (SR4, tab 18; R4, tab K at 37).

33. After award, the Pakistan Steel Mills increased the prices charged for its steel products (SR4, tab 18; R4, tab A-7 ¶ 15).

34. On 4 July 1989, the Government of Pakistan, Office of the Assistant Collector Central Excise & Sales Tax issued an Order (hereinafter the Order) imposing "flat rate" per ton sales taxes on steel "Ingots" and "H.S. Bars." However, the Order went on to state that the "flat rate shall not be applicable to C.S. billets i.e. C.S. billets shall remain liable to sales tax @13.5 % of the value [sic]." The Order also stated, "The billets manufactured by . . . Pakistan Steel Mills Corporation shall pay the sales tax @ 12.5%. In other words the position as of existing today on Central Excise duty and Sales Tax on Steel Mills actual products shall continue to operate . . . [sic]". The Order was to be implemented "immediately." The terminology and meaning of this Order are not further explained in the record. (SR4, tabs 2, 3, 5)

35. On 19 July 1990, Murshid notified the appellant in two separate letters of the imposition of the flat rate tax per ton on steel bars (SR4, tab 3) and the 12.5% sales tax "on all sizes of billet" (SR4, tab 5). Each letter enclosed a copy of the Order. Murshid' s letter pertaining to the steel bars indicated that it had purchased 2,478 tons of bars for the project. Of this total, the flat rate "steel bar" tax was levied on 1,794 tons that were purchased after 4 July 1989, *i.e.*, the date of the Order. With respect to the billets, Murshid indicated that the total quantity of steel used was 2,478 tons. Of the latter total, 604.58 tons were stated to have been purchased before the date of the Order. According to Murshid, the percentage tax was levied on the remaining 1,873.42 tons of billets. (SR4, tab 5) In each letter, Murshid provided information required for USAID to issue an "Exemption Certificate For Project-Funded Commodities" and asked Encorp to obtain the tax exemption. Neither of the letters identified the amount of any price escalation actually paid for either steel bars or billets following award of the contract. There is no evidence indicating when any sales tax was paid in connection with any of these purchases. In particular, there is nothing in the record that indicates that the appellant had requested exemptions prior to the date of the letters. (SR4, tabs 3, 5)

36. Two days earlier on 17 July 1990, Murshid sent a third letter to Encorp requesting issuance of an exemption certificate with respect to Murshid' s purchase of a large quantity of copper cables on June 26, 1990. There is no evidence or argument relating this purchase to any escalation in the price of steel or any increase in taxes on the copper cable. (SR4, tab 4)

37. In early August 1990, Encorp forwarded the above three letters to USAID/Islamabad and requested exemption certificates (SR4, tabs 3, 4, 5).

38. By letter dated 13 August 1990, USAID notified Encorp that the requests for exemption had been misrouted and should be sent to the Contracting Officer (SR4, tab 6). Murshid, on indeterminate dates, paid sales taxes on steel bar and billets purchased (SR4, tab 18). There is no evidence that that any further attempts were made by the appellant after 13 August 1990 to secure sales tax exemptions for steel purchases. Nor is there any evidence of efforts undertaken by Encorp to obtain refunds.

39. Pursuant to Modification Nos. 004 and 007 to the contract dated 23 October 1990 and 16 May 1991 respectively, USAID compensated the contractor for escalation in the price of steel reinforcing bars over the rates in effect at the time of award per the "Variation in Prices" clause above. There is no dispute that the amount awarded in the modification accurately measured the amount of escalation, exclusive of taxes. (R4, tabs A4, A7)

40. On 19 May 1991, Encorp requested that USAID reimburse it for sales taxes paid on steel bars and billets. The total amount sought was Rs 2,163,495. Of that total, the appellant attributed Rs 1,869,519 (or 86%) to payments of the 12.5 % sales tax and Rs 293,976 (or 14%) to the payment of the flat rate tax on steel bars. Recovery was sought under the "Foreign Taxes" clause because the appellant asserted that the "sales tax portion of the admissible variation in price for reinforcing bars" was an "after-imposed tax." The appellant noted that, "while sales tax was estimated and included for steel bars included under the base contract at the base contract rate, sales tax associated with the escalation amount included in this proposal was not included . . . . In essence, Encorp could not have bid on this tax since the escalation rate/quantities were not known at bid time." (SR4, tab 18)

41. The contractor' s request was rejected by USAID in a letter dated 22 October 1991. USAID stated that the sales taxes were not reimbursable under the "Foreign Taxes" clause, noting also that RFP Amendment No. 003 expressly identified the sales tax as one that USAID would not pay. (SR4, tab 19)

<u>The Claim and Final Decision</u>

42. Encorp' s requests for reimbursement of Octroi, demurrage and taxes on steel were incorporated into an omnibus claim, dated 7 August 1995, as extensively supplemented on 8 January 1997 (R4, tab K at 35-38, 45). With respect to the taxes on steel claim, the rationale for relief continued to be that, because the steel prices increases were recoverable, the increased sales taxes paid on the escalated steel prices were also recoverable (R4, tab K at 37-38).

43. USAID' s contracting officer issued a final decision dated 24 October 1997 that, *inter alia*, denied the tax-related claims involved in this appeal (R4, tab N at 42-46).

44. The appellant timely appealed by letter dated 9 January 1998. With the exception of the tax issues, all other claim items have been settled by the parties and dismissed by the Board pursuant to an order dated 18 June 1999.

DECISION

The appellant contends that it is entitled to reimbursement of Octroi and sale taxes erroneously levied by Pakistani authorities in disregard of the tax-exempt status of construction materials used on the project. Encorp also claims demurrage costs incurred by a hauling subcontractor pending resolution of a dispute concerning the imposition of Octroi duties.

Octroi and Demurrage

Encorp argues that USAID breached two contractual obligations to the contractor. According to the appellant, USAID first failed to provide adequate documentation supporting the tax-exempt status of the materials and second failed to enforce international agreements between the U.S. and Pakistan establishing the exemption (app. br. at 10).

The contractor' s breach arguments ignore the plain language of the "Foreign Taxes" clause and Encorp' s own duties under that clause. The "Foreign Taxes" clause relieves USAID from liability for reimbursement of Pakistani taxes paid by the contractor. The appellant does not argue that the clause is ambiguous in that respect.

USAID' s nonliability for such taxes was also addressed in its answers to questions preceding award. Octroi duties, among other taxes, were particularly emphasized. USAID' s sole obligation under the clause was to, "On request, . . . provide available documentation and certificates in support of allowable exemptions . . . ."

Despite the clear bar on reimbursement in the clause, the appellant contends that, because it was not exempted on occasion from the payment of Octroi duties, USAID must not have provided the requisite documentation and certificates supporting exemption. Therefore, Encorp concludes USAID breached its duty under the clause.

To the extent that the appellant paid Octroi duties, it was not because USAID failed to fulfill its obligation to provide available documentation upon request. We have made detailed findings supporting our conclusion that in every instance, USAID was prompt and responsive to Encorp' s requests. There is no evidence of any additional documentation/certifications that the Government should have furnished appellant. [2]

We further consider that the appellant shirked its duties under the "Foreign Taxes" clause to be "responsible for asserting and obtaining the necessary tax or other exemptions or refunds," and to "take all reasonable action" to obtain exemptions/refunds. There is no evidence that the appellant had any plan in place for "asserting and obtaining" exemptions prior to 27 December 1990. With two *de minimis* exceptions, all of the disputed Octroi payments predated Encorp' s implementation of detailed procedures on that date. Nothing in the record demonstrates that the appellant met at any time with cognizant Pakistani authorities to devise acceptable procedures for "asserting and obtaining" exemptions. Moreover, with one notable exception involving the demurrage claim discussed below, there is no proof regarding the circumstances under which these payments were made by Encorp' s subcontractors and whether USAID had been requested to provide documentation prior to payment.

Not only is there no evidence of preplanning before payment, the appellant' s attempts to obtain refunds from Pakistani authorities after payment were also wholly deficient. With the exception of one letter to the NWFPAU in September 1990, before incurrence of the majority of the taxes now claimed, the appellant waited four years to pursue its refund claim. Its dilatory attempts to seek redress within Pakistan consisted primarily of requesting USAID to intercede on Encorp' s behalf with the Government of Pakistan. Following issuance of the letter from Pakistan' s Finance Ministry to local Peshawar officials directing reimbursement, Encorp merely sent an employee (of unknown education/training) a few weeks later to ascertain the status of its refund claim. The status was that the claim remained under review by the Peshawar tax authorities.

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[2] In support of its breach argument, the appellant cites to SR4, tab 17, a memorandum prepared by the contracting officer and dated 18 February 1991. Pursuant to Rule 4(e), the Government timely objected to receipt into evidence of this document, contending that it set forth an offer to settle and was inadmissible under Federal Rule of Evidence 408. The appellant did not respond to USAID' s objection. Absent such a response, we sustain the Government' s objection and decline to consider the document.

Thus, the only definitive Pakistani action taken was the favorable directive from the Finance Ministry. The sole legal action instituted by appellant was submission of the claim to the contracting officer, without exhausting its remedies in Pakistan.

Encorp argues that the AU was required to reimburse it for taxes that it was compelled to pay. The appellant points to "Addendum No. 6" that purportedly was incorporated into the contract (*see* finding 6). The record does not disclose precisely what clause "Addendum No. 6" allegedly modified. Nor has the appellant substantiated that the pertinent language was actually incorporated by USAID into the earlier solicitation. Even assuming that it was, we have found that it antedated and was superseded by the later solicitation' s more extensive provision concerning "Host Country Taxes." There is no proof that the actual agreements between the AU and USAID relative to the project required that the sole Pakistani entity for reimbursement of erroneously-assessed taxes would be the AU. Regardless, the appellant made only one early attempt to obtain a refund that the AU in September 1990, prior to incurrence of most of the Octroi changes now claimed. There were no further relevant communications between the appellant and the AU until four year later. The cryptic hand-written response of the AU (finding 18) implies that it was not the appropriate entity for the appellant' s reimbursement claim. The Finance Ministry' s letter (finding 20) indicates that the Government of Pakistan considered that the reimbursing entity should be the local taxing authorities in Peshawar. For the reasons stated above, we consider that Encorp simply failed to pursue available avenues of relief and fulfill its contractual obligations in that respect.

There also was no reason for USAID to seek "enforcement" of international agreements between the U.S. and Pakistan. This was not an international dispute. It involved instances of local Peshawar authorities, for reasons that remain unclear in this record, not recognizing the tax-exempt status of certain construction materials. The official position of the Pakistani Government' s Finance Ministry was in accord with the international agreements, *i.e*., that the materials were entitled to tax-exempt status and the appellant to a refund.

Encorp' s claim for subcontractor demurrage costs incurred pending resolution of an Octroi dispute with NWFP, Peshawar officials is untenable for the same reasons. The appellant' s underlying premise for the claim remains that USAID was at fault for not providing the requisite documentation. To the contrary, USAID promptly responded once Encorp sought its assistance. As emphasized above, we consider that the root causes of the Octroi problems were the appellant' s failure to implement a plan for obtaining tax exemptions and establish working relations with taxing authorities during the early stages of performance. Although we cannot determine precisely why the documentation was not accepted for 6 of the 14 trucks on this occasion, we consider that USAID met its contractual duty to provide available documentation.

Taxes on Steel

Pursuant to the contract, Encorp was paid escalation costs resulting from the increase in prices charged by the Pakistan Steel Mills for steel reinforcing bars after award. The escalation costs were paid by USAID pursuant to the "Variation in Prices" clause. The appellant contemporaneously argued that it was also entitled to recover the corresponding increased Pakistani sales taxes paid by it on the escalated cost of the steel. The original rationale for relief in the claim was simply that, because the steel prices increased after award, the proportionate increase in sales tax was an "after-imposed tax" within the meaning of the "Foreign Taxes" clause entitling appellant to recover the taxes. The revised rationale for relief in the briefs attempts to link the basis for recovery more closely to the 4 July 1989 Order contending that any taxes assessed pursuant to, and after issuance, of the Order were "after-imposed taxes."

All of these assertions are unsound. Fundamentally, the "Foreign Taxes" clause in this contract expressly and unambiguously precluded price adjustments for Pakistani taxes, whether existing at the time of award or "after-imposed." The Order had no effect on the tax-exempt status of steel used on the project. Even if we concluded that the clause was ambiguous or internally inconsistent regarding the recoverability of "after-imposed" Pakistani taxes that the appellant was exempted from paying, the offerors were notified by USAID' s responses to questions prior to award of USAID' s interpretation that the provision comprehensively banned payment of Pakistani taxes. In particular, they were specifically advised that Pakistani sales taxes would not be paid. Encorp knew USAID' s interpretation and is bound by it. *Arkel International, Inc*., ASBCA No. 37469, 89-3 BCA ¶ 21,965.

In addition, after misrouting its letters to the wrong USAID office, there is no evidence that the appellant took any other action to obtain an exemption from the taxes. The appellant agrees that steel products for the project were exempt from sales taxes but there is no proof that it pursued that exemption. As with respect to the Octroi taxes, appellant did not fulfill its duty to "assert and obtain" exemptions from the sales tax at the time of payment, and did not endeavor to obtain a refund. In short, it failed to "take all reasonable action" to obtain exemptions and/or refunds. As emphasized above, Encorp' s first recourse was to pursue and exhaust avenues of relief available in Pakistan. It failed to do so.

CONCLUSION

The appeal is denied.

Dated: 7 November 2000

ROBERT T. PEACOCK
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

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. 51293, Appeal of Encorp, rendered in conformance with the Board's Charter.

Dated:

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