ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Sentara Health System	)	ASBCA No. 51540
	)	
Under Contract No. N00140-95-C-N009	)	

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OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the contracting officer's (CO) denial of the contractor's value engineering change proposal (VECP) claim regarding the Ambulatory Data System (ADS) under the captioned contract, on the basis that the CO discerned no prior ADS requirement whose cost the VECP reduced. The contractor contends that its VECP reduced the cost of an implied requirement to compile and report ADS data. We have jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. After a three-day hearing, the parties submitted post-hearing briefs. We decide entitlement only (tr. 6).

FINDINGS OF FACT

1. In April 1995 the Navy awarded Contract No. N00140-95-C-N009 (contract 9) to Sentara Health System (Sentara) for operation of designated Government-owned, contractor-operated (GOCO), and contractor-owned, contractor-operated (COCO), primary health care clinics (TriPrime clinics) in the Tidewater, Virginia, area, for the base year beginning 1 October 1995, and with options for four additional years (R4, tab 1 at 000002-6). Respondent exercised the first two annual options (R4, tabs 21, 46), and

probably exercised the third annual option (documented inferentially by Modification No. P00071, issued during the third option year (ex. G-15)).

2. Contract 9 included a clause entitled "AWARD-FEE GUIDANCE" that stated: "[T]his is a combined Fixed-Price-Plus-Award-Fee (FPAF)/Fixed-Price-Plus-Incentive-Fee (FPIF) type contract." The maximum quarterly award fee was $30,000. The incentive fee depended on monthly enrollment targets set forth in contract Attachment V. Contract line items 0007, 0014, 0020, 0026 and 0032 stated the quarterly "Earned Incentive Award" for the base year and the four option years with quarterly amounts ranging from $82,939 (first quarter) to $99,318 (last quarter) (R4, tab 1 at 000182-86).

3. Contract 9 incorporated by reference, *inter alia*, the FAR 52.248-1 VALUE ENGINEERING (MAR 1989) (sometimes VE) clause, which provided in pertinent part:

> (a) *General*. . . . The Contractor shall share in any net acquisition savings realized from accepted VECP's [sic] in accordance with the incentive sharing rates in paragraph (f) below.
>
> (b) *Definitions*. "Acquisition savings," . . . means savings resulting from the application of a VECP to contracts awarded by the same contracting office or its successor for essentially the same unit. Acquisition savings include—
>
> (1) Instant contract savings, which are the net cost reductions on this . . . contract, and which are equal to the instant unit cost reduction multiplied by the number of instant contract units affected by the VECP, less the Contractor's allowable development and implementation costs;
>
> . . . .
>
> "Collateral savings" . . . means those measurable net reductions resulting from a VECP in the agency's overall projected collateral costs [of operation, maintenance, logistic support, or Government-furnished property], exclusive of acquisition savings, whether or not the acquisition cost changes.
>
> . . . .

"Instant unit cost reduction" means the amount of the decrease in unit cost of performance (without deducting any Contractor's development or implementation costs) resulting from using the VECP on this, the instant contract . . . .

"Negative instant contract savings" means the increase in the cost or price of this contract when the acceptance of a VECP results in an excess of the Contractor's allowable development and implementation costs over the product of the instant unit cost reduction multiplied by the number of instant contract units affected.

"Net acquisition savings" means total acquisition savings, including instant, concurrent, and future contract savings, less Government costs.

. . . .

"Value engineering change proposal (VECP)" means a proposal that—

(1) Requires a change to this, the instant contract, to implement; and

(2) Results in reducing the overall projected costs to the agency without impairing essential functions or characteristics . . . .

. . . .

(f) *Sharing rates*. If a VECP is accepted, the Contractor shall share in net acquisition savings according to the percentages shown in the table below [which for "Incentive (fixed-price or cost)" type contracts was "Same sharing arrangement as the contract's . . . fee adjustment formula."]

(g) *Calculating net acquisition savings*. (1) Acquisition savings are realized when (i) the cost or price is reduced on the instant contract . . . . Net acquisition savings are first realized, and the Contractor shall be paid a share, when Government costs and any negative instant contract savings have been fully offset against acquisition savings . . . .

> (h) *Contract adjustment*. The modification accepting the VECP . . . shall—
>
> (1) Reduce the contract price or estimated cost by the amount of instant contract savings . . . .;
>
> (2) When the amount of instant contract savings is negative, increase the contract price . . . or estimated cost by that amount . . . .
>
> . . . .
>
> (j) *Collateral savings*. If a VECP is accepted, the instant contract amount shall be increased . . . by 20 percent of any projected collateral savings determined [unilaterally by the CO] to be realized in a typical year of use after subtracting any Government costs not previously offset. However, the Contractor's share of collateral savings shall not exceed (1) the contract's . . . target price . . . at the time the VECP is accepted, or (2) $100,000, whichever is greater . . . . [Italics in original.]

Contract 9 provided that only a CO had authority to issue a change order or to modify the contract. (R4, tab 1 at 000008, 000294, 000304)

4. Contract 9's work statement provided under § C 5.20, USE OF AUTOMATED INFORMATION SYSTEMS IN *TriPrime* GOCO CLINICS:

> 5.20.1 The Government has installed a hospital-wide automated information system, the Composite Health Care System (CHCS), to generate records and reports (GOCO Clinics only), to screen for patient eligibility for treatment, [to] provide automated medical management and to make appointments (within all *TriPrime* clinics). The system generates SF 600 forms which the Contractor shall use in *TriPrime* GOCO clinics . . . . The system . . . will be the only means of generating Treatment Records and entering patient administration data. The Contractor may request approval to use system generated forms in *TriPrime* COCO Clinics. [Italics in original.]

Under § C 5.23, REPORTING REQUIREMENTS, ¶ 5.23.2 required Sentara to report monthly patient statistics in 19 data "fields": visit date/time, birthday, sponsor's prefix and social security number, gender, zip code, origin, diagnoses, and clinic. Such report was data item No. A019 in the Contract Data Requirements List (CDRL). CDRL data items were not separately priced. (R4, tab 1 at 000002-06, 000259-61, 000318, 000352-55)

5. Rear Admiral W. R. Rowley was the "Lead Agent" for TRICARE Mid-Atlantic Region 2 (TMAR-2), at the Naval Medical Center, Portsmouth (NMCP) (R4, tab 98; tr. 23-24, 325, 331). The TriPrime Clinics Sentara operated were in TMAR-2 (tr. 24). The CO obtained medical advice from TMAR-2, NMCP, the Navy's Bureau of Medicine and Surgery (BuMed), and the Naval Medical Logistics Command, Fort Detrick, to administer contract 9. (Tr. 177)

6. In June-August 1995 Sentara designed, tested and began to use internally a data processing system, called its "Patient Management System" (PMS), including IBM "AS400" hardware. The PMS collected CHCS patient demographic and visit scheduling data through a CHCS-PMS interface, and generated the patient statistical report required by ¶ 5.23.2 of contract 9. (Tr. 68-70, 231-35, 243-44)

7. ADS is a computerized Department of Defense (DoD) system for inputting patient "visit" (or "encounter") information scanned from a manually prepared "Ambulatory Encounter Summary" or "bubble form" containing alpha-numeric patient data, "ICD" (International Classification of Diseases) diagnoses, evaluations, and "CPT" (Common Procedural Terminology) (exs. A-2, G-2; tr. 61-62). The ADS report included approximately 55 "fields" of data detailing the patient, provider (physician, physician assistant or nurse), appointment, encounter, health insurance, clinic, medical diagnosis, medical procedures, and patient disposition (R4, tabs 1, 99; exs. A-4, -5; tr. 396). ADS data are formatted in the "Standardized Ambulatory Data Record" (SADR), which is transmitted daily to, and stored at, Fort Detrick (tr. 196-98, 445). As awarded, contract 9 did not require collection and reporting of "ADS" data, as such (R4, tab 1; ex. G-5 at 1; tr. 85, 348-49, 506-07).

8. DoD memoranda to the Navy from January 1995 to July 1997 required the Navy to collect "interim" ADS data in Fiscal Year (FY) 1995, to complete deployment of ADS in TMAR-2 by May 1996, and to implement ADS at naval medical treatment facilities (MTF) "by approximately 1 August 1996" (R4, tabs 86, 87; ex. A-26). A 25 February 1997 Navy memo told MTFs: "You must implement ADS immediately in your commands." (ex. A-45). We find that the Navy implemented ADS from 1995 to 1997.

9. The CO's 11 December 1995 letter to Sentara requested proposals on four "proposed changes," one of which was to substitute for § C 5.20, a revised requirement entitled: USE OF AUTOMATED INFORMATION SYSTEMS IN *TriPrime* CLINICS, providing:

> 5.20.1 The . . . DoD has developed the Ambulatory Data System (ADS) to collect clinical workload data at the International Classification of Diseases (ICD) and Current Procedural Technology (CPT) levels within the DoD direct care system. TriPrime Clinics are considered extensions of the direct care system, therefore, the Contractor shall utilize the ADS to report all ambulatory encounter data for services provided at the TriPrime Clinics.

The frequency of ADS data collection and reporting to the Government was not stated. Paragraphs 5.20.2 and .3 stated that the Government would provide and install all ADS hardware, software, standard forms, and communication lines, would conduct site surveys at TriPrime Clinics to determine installation requirements, would maintain the ADS, and would provide ADS training to contractor personnel. (Ex. G-2)

10. Sentara's 10 January 1996 letter asked the CO whether the proposed ADS change would "replace the TPC program" and, if not, whether the Government would consider an interface to download data to Sentara's information system, and requested a copy of "the ADS Operations Manual" (ex. A-20). The "TPC program" referred to "third party collection" in contract 9's § C 7.7, which required Sentara to obtain and to update patient registration forms (DD Form 2569) for third party collection purposes, and to complete encounter forms with specific diagnoses and procedures for each patient visit (R4, tab 1 at 000268).

11. Sentara's 8 April 1996 letter proposed $1.8 million for "CHCS" changes, and asked 23 questions, five of which addressed the ADS change, stating, "Without the answers to these questions, Sentara cannot be bound to the prices quoted in this response" (ex. G-9). The CO's 9 April 1996 letter requested Sentara to provide a cost breakdown for the CHCS change, but did not answer Sentara's questions (R4, tab 60.1). Sentara's 15 April 1996 letter to the CO submitted cost breakdowns, including $60,314.67 for ADS "training," $1,586,849.24 "annual costs" for "CHCS (includes ADS)" and $100,000 "contingency" costs pending answers to Sentara's questions (R4, tab 61). The CO's 6 May 1996 letter requested Sentara to segregate CHCS and ADS costs (R4, tab 62).

12. On 12 June 1996 respondent furnished a computer disk to Sentara containing an ADS implementation guide (ex. A-29). On 26 June 1996 respondent asked Sentara to notify it if there were any problems on the disk (ex. A-30). Sentara notified respondent that the two ADS disks it received were "unreadable" (tr. 28, 166).

13. The CO's 16 July 1996 letter to Sentara stated that Sentara's questions about proposed changes were considered to be resolved by the Navy's amended proposed change texts, which clarified the 11 December 1995 original text, and Sentara was to identify separately the price of each proposed change (R4, tab 65).

14. Sentara's 30 July 1996 letter proposed $27,706.67 for training and $2,017,256.37 in "annual costs" to implement ADS using the Navy's methodology, recommended "an [undisclosed] alternative approach to the ADS requirements proposed which could potentially save the Government approximately $2 million"; and requested "an opportunity to discuss a Value Engineering arrangement" (R4, tab 66). The CO reviewed Sentara's letter, believed its proposed price to be "grossly excessive," did not so advise Sentara at that time, and did not take any official action to discuss a value engineering arrangement with Sentara (tr. 181, 387, 541).

15. On 13 August 1996 an ADS demonstration was held at NMCP with Sentara's representatives to provide them with additional details to price the ADS change. Sentara saw physicians, nurses and others filling out ICD diagnoses and CPT procedures codes on "bubble forms" that were scanned to collect data. The CO's 14 August 1996 letter to Sentara requested supporting data and downward revisions to reflect more realistic costs for the ADS and other proposed changes. (R4, tabs 68, 91; tr. 61-62)

16. Contracting Officer's Representative (COR) Robert Logan requested the CO on 17 October 1996 to "delete" the ADS, Prime Vendor (*i.e.*, Pharmacy), and ADD changes for contract 9, because they had "proven to be barriers" to resolving the other proposed changes (R4, tab 85). The CO's 23 October 1996 letter to Sentara stated—

> in order to bring these issues to a resolution, the potential changes have again been amended. The proposed changes related to ADS, Pharmacy, and ADD have been deleted. The potential changes related to CHCS and Accreditation remain, along with a few very minor issues.

(R4, tab 68.1) Government minutes of a meeting with Sentara on 24 October 1996 stated: "ADS proposal - removed from current discussions, as will be Prime Vendor; CHCS still in negotiation" (ex. A-34).

17. Thereafter the Navy continued to have a requirement to obtain ADS data under contract 9 (tr. 167, 340). Sentara's 27 January 1997 letter to the COR stated that since Government officials had expressed an interest in using the AS-400 system temporarily to begin gathering essential data, while the Government implemented ADS, Sentara requested permission to work with the TMAR-2 staff to run a test "at no expense

to the Government" to determine what portion of the data fields in SADR, Release 1.0, Sentara's AS-400 could produce (R4, tab 82; ex. A-3).

18. On 29 January 1997 COR Logan authorized testing to convert Sentara's AS-400 data into a format compatible with ADS requirements, on a no cost basis (R4, tab 83).

19. On 17 March 1997, LT Ernest Parrish of TMAR-2 sent to Sentara "SADR File Layout and Data Information ADS Release 1.0" dated about 29 July 1996, containing five columns entitled: "Field Positions," "Field Names," "Valid Values," "Data Sources," and "ADS Database Locations" for 55 data fields (ex. A-4; tr. 248, 303, 325).

20. By 24 April 1997 the initial test of Sentara's AS-400 data "was almost completely successful," with adjustment and an additional test to be done (R4, tab 95). TMAR-2's 6 May 1997 internal memorandum stated:

> ADS data. We have completed a test of submitting the contractor's data system to [Fort Detrick] in lieu of ADS data and have verbal approval from BUMED and HA (assuming no technical problems are encountered). This will necessitate a modification to require the additional data transmission, however it should be insignificant. The alternative, changing the clinics over to the ADS system, would be extremely costly . . . .

(R4, tab 96 at 00000008) Respondent told Sentara that its data were satisfactory (tr. 311, 316).

21. On about 15 May 1997 LT Parrish sent to Sentara: (a) SADR ADS "Release 2.0 (Formerly Release 1.1)," containing the same columnar information as in Release 1.0 for 54 data fields, and (b) four columns of information prepared by LT Parrish entitled: "Field Position," "Field Name," "Valid Values," and "Suggested Input from AS400," with sample entries (ex. A-5; tr. 248, 261, 303, 326). Sentara revised its AS-400 data to include the SADR Release 2.0 data fields (tr. 253-54). There is no evidence that Sentara received a 15 July 1997 "ADS Release 2.0" with 61 data fields (ex. G-18; tr. 256, 314).

22. The CO's 10 July 1997 letter requested Sentara to review the following potential change, among others, that was being considered by the Government:

> q. Contract Section 5.23.9 is ADDED as follows:

> "5.23.9 The Contractor will submit data to satisfy the Government's . . . (ADS) requirements. Data will be extracted from the Contractor's AS400 system and formatted to comply with ADS format standards. The data will be formatted in an SCI flat file format and forwarded to the COR via e-mail. Reports shall be forwarded by COB each Tuesday to reflect the previous week's visits and patient mix["].

(R4, tab 68.2) RADM Rowley's 10 July 1997 letter to BuMed said that the Sentara TriPrime contract "will include . . . Implementation of ADS" (R4, tab 98).

23. In response to the CO's 10 July 1997 letter to Sentara, which letter had forwarded the initial draft of the § 5.23.9 requirement, and the COR's subsequent letter (not in the record), Sentara's 21 August 1997 letter to the Navy proposed $4,488.18 for what it called "ADS Program Development" (R4, tab 70 at 1, 22).

24. The parties' 11 December 1995 through 10 July 1997 letters did not state, and the parties did not intend, that such letters constituted: (a) Sentara's acceptance of the CO's proposed ADS change, or (b) the CO's acceptance of Sentara's proposed price to implement the ADS change (tr. 83, 87-89, 132, 140-41, 507-24, 529-30).

25. During performance of contract 9, Sentara did not use or implement respondent's ADS in the manner the CO had proposed to Sentara in 1995-96, and respondent did not furnish to Sentara any Government-owned ADS equipment, terminals, scanners, "bubble sheet" forms, or communication lines (tr. 87-88, 97, 134, 528-29).

26. On 30 September 1997 Sentara submitted to respondent what it called a "Value Engineering Change Proposal" to implement ADS at the TriPrime clinics under contract 9. Sentara calculated cost savings to respondent by subtracting from its revised estimate of $1,182,096.97 annual costs to implement respondent's ADS system, the $4,488.18 per year cost of development and implementation to provide data from Sentara's AS-400 system. (R4, tab 74)

27. The COR's 30 September 1997 memorandum advised the CO that Sentara's proposed $4,488.18 for the ADS requirement was acceptable, and the COR's 22 October 1997 memorandum to the CO provided funding therefor (R4, tab 75).

28. The undated CO's memorandum justifying proposed Modification No. P00052 to contract 9 stated that on 20 November 1997 he approved a $3,381.76 price increase for what he designated, "Addition of Requirement for ADS Data Submission" (after deduction of a fringe burden from Sentara's $4,488 proposed

price), and a $85,287.85 price reduction for the two other changes, for a net price reduction of $81,456.10 for 10 months, or $8,145.61 monthly (R4, tab 77).

29. The CO's 25 November 1997 letter to Sentara rejected the 30 September 1997 VECP on the basis that the VECP was not valid because no savings could be realized therefrom, since contract 9 did not require Sentara to implement or to operate the ADS (R4, tab 79).

30. Effective 3 December 1997, the parties executed bilateral Modification No. P00052 to contract 9 which: (a) though not expressly accepting Sentara's 30 September 1997 VECP, added the work statement ¶ C 5.23.9 identical to the text that the CO had sent to Sentara on 10 July 1997, except "SCI flat file" was changed to "ASCI flat file" and "e-mail" was misspelled "e-mall"; (b) required Sentara to deduct $8,145.61 from its monthly invoices for December 1997 through September 1998, and slightly greater amounts in fiscal years 1999 and 2000 if those options were exercised, for the addition of the ADS data requirement and two other changes; and (c) excluded from Sentara's release of claims, the "VECP submitted by Sentara letter of 30 September 1997" (R4, tab 53 at 4; ex. G-21 at ¶¶ 9-10)

31. Modification No. P00052, ¶ C 5.23.9, did not state: (a) to which "ADS format standards" and "ASCI flat file format" Sentara's AS400 format was required to conform, or what SADR version was required, (b) any developmental test and evaluation or operational test and evaluation that the AS-400 system was required to satisfy, or (c) that DoD Regulation 5000.2-R of 15 March 1996 or its implementing directive, SECNAVINST 5000.2B of 6 December 1996, applied to Sentara's AS-400 system. These regulations themselves stated that they applied to DoD components, not to DoD contractors. (Exs. G-30, -31) Modification No. P00052 did not require program costs for ADS or for AS-400 exceeding $30 million, nor did it designate the ADS or AS-400 system as a "Major Automated Information System" under DOD Regulation 5000.2-R or 48 C.F.R. §§ 207.103(c)(i)(B) and 207.105(a)(8). (R4, tabs 68.2, 53; tr. 464)

32. Sentara's 9 March 1998 letter to the CO submitted a properly certified claim for alleged "acquisition savings" under the Value Engineering clause of contract 9 in the amounts of $505,261.85 for fiscal year 1998 (prorated), $628,326.20 for fiscal year 1999, and $644,517.35 for fiscal year 2000, totaling $1,778,105.40 (R4, tab 80).

33. The CO's 19 May 1998 final decision denied Sentara's claim in its entirety on the basis that the addition of ¶ C 5.23.9 changed no existing contract obligation and realized no savings (R4, tab 81). Sentara timely appealed to this Board on 20 May 1998.

34. On 26 May 1999 the CO issued unilateral Modification No. P00071 which provided: "Section C, paragraph 5.23.9, as referenced within P00052, is hereby DELETED in its entirety" (underscoring in original) (ex. G-15).

35. Sentara submitted AS-400 system data to the Navy from about January 1998 to approximately September 1999 (tr. 210-11, 278). The record contains no evidence that Sentara's AS-400 data did not comply with the ASCI flat file format requirement. After 28 July 1998 respondent decided that Sentara's AS-400 data were erroneous and incomplete (tr. 226), on the basis of comparing LT Parrish's typewritten data field list sent to Sentara on 15 May 1997 (ex. A-5), to data fields in SADR Releases 1.0E, 2.0 and 2.1 (exs. G-17, -18, -19; tr. 473-75, 477-79), none of which releases respondent had provided to Sentara. We find that such documents are not proof of errors or omissions in Sentara's AS-400 data.

DECISION

Appellant has the burden of proving its monetary VECP claim against the Government. *See ICSD Corp. v. United States*, 934 F.2d 313, 317 (Fed. Cir. 1991); *John T. Jones Const. Co.*, ASBCA Nos. 48303, 48593, 98-2 BCA ¶ 29,892 at 147,974, *aff'd sub nom. John T. Jones Const. Co. v. Caldera*, 178 F.3d 1307 (Fed. Cir. 1998) (table).

I.

Appellant argues that the DoD required the Navy to collect ADS data at military medical treatment facilities (finding 8). The CO requested the ADS change to contract 9, and considered the clinics Sentara operated under contract 9 as extensions of the military health care system (finding 9). Respondent viewed ADS as a mandatory requirement (finding 8), which respondent from 1995 to 1997 continually urged Sentara to include in contract 9 (findings 9-22). In 1997 respondent authorized and collaborated with Sentara in testing the capability of the AS-400 alternative system to provide data in compliance with the ADS SADR format (findings 17, 18). The AS-400 system was the logical extension of the patient encounter data collection and reporting functions Sentara already performed under contract 9 (findings 4, 9-10). From these contextual facts, Sentara deduces that when it submitted its VECP, it could reasonably conclude that it had the implied obligation to provide ADS under contract 9, citing the holdings of *McDonnell Douglas Corp.*, ASBCA No. 14314, 71-1 BCA ¶ 8859; *North American Rockwell Corp.*, ASBCA No. 14485, 71-1 BCA ¶ 8773.

Sentara also argues that its AS-400 system did not impair any essential ADS functions and characteristics, as shown by respondent's specification of the AS-400 system in Modification No. P00052 (finding 30); and Sentara's VECP produced net acquisition savings, derived from the difference between the proposed cost of implementing ADS in accordance with respondent's methodology and the proposed and

accepted cost of developing and implementing the AS-400 methodology, and produced collateral cost savings for computer hardware, printers, scanners, cabling, services, and employee training that respondent did not have to provide (findings 9, 26). Sentara concludes that its VECP was valid and entitled it to the specified shares of savings.

Respondent argues that contract 9 originally had no ADS requirement (finding 7), the internal Government ADS directives and protracted 1996-97 communications between Sentara and the CO regarding the technical work scope and costs to implement the proposed ADS change did not constitute an implied contract requirement for ADS (finding 24), respondent properly rejected Sentara's proposed VECP since it reduced no cost and caused no "instant contract savings" so as to satisfy the Value Engineering clause criteria (finding 29), and Sentara's AS-400 system impaired essential ADS functions and characteristics.

II.

Respondent views the Value Engineering clause as establishing a valid VECP only when a formal contract modification expressly requires specified work, the Government accepts a contractor's proposal to modify such work, and such modification results in cost savings to the contractor or to the Government or to both. Respondent's position is not materially different from that analyzed and rejected in *McDonnell Douglas, supra*.

In *McDonnell* we recognized a valid VECP when the contractor proposed an alternate methodology to accomplish a Government-requested air conditioning change, which the CO had not issued as a change order and for which there was no formal contract modification, which change order the CO could easily have issued and which the contractor could not have refused to perform as beyond the scope of the contract (*i.e.*, as a "cardinal change" or Government breach), and the contractor could reasonably conclude "from the total context of the contract and the surrounding circumstances" that it had the contractual obligation to provide the work that its proposal eliminated (71-1 BCA at 41,177). *Accord: North American, supra* (VECP submitted before issuance of a contract change and rejected by CO, but later accepted in a contract change notification and in a supplemental agreement reserving the contractor's VECP rights, was held valid).

Here, just as in *McDonnell*, the CO proposed the ADS change in December 1995 (finding 9), but issued no formal change order or contract modification for such change (finding 24). Thereafter, Sentara offered, and the Government authorized and cooperated in, testing of Sentara's alternative methodology (the AS-400 system for collecting and reporting patient encounter data originally required by contract 9) for compatibility with ADS format requirements, which testing was completed successfully by May 1997 (findings 19-21). On 10 July 1997 the CO proposed to extract data from Sentara's AS-400 system so as to comply with ADS format standards in order "to satisfy the Government's . . . (ADS) requirements," while concurrently the Government stated

internally that Sentara's contract "will include . . . Implementation of ADS" (finding 22). Sentara submitted a VECP to implement the ADS in the manner tested by the parties and proposed by the CO (findings 23, 26). The CO expressly "rejected" Sentara's VECP on 25 November 1997 (finding 29). However, on 3 December 1997 the parties agreed to Modification No. P00052 that added a ¶ 5.23.9 essentially identical to the CO's 10 July 1997 proposed change, in accordance with Sentara's alternative methodology (finding 30). We are persuaded that from the foregoing surrounding circumstances, like those in *McDonnell*, Sentara could reasonably conclude that it had the implied contractual obligation to provide the ADS change for which its VECP offered an alternative methodology.

Respondent seeks to distinguish *McDonnell* in that contract 9 incorporated the FAR 52.248-1 VALUE ENGINEERING (MAR 1989) clause, which, respondent contends, "requires acquisition savings to be 'realized,'" while McDonnell's contract contained the ASPR 1-1707.2 VALUE ENGINEERING INCENTIVE (OCT 1964) clause, which did not so require (Gov't brief at 23). Both the VEI and VE clauses use variations on the phrase savings "resulting from" and "realized in" adopting, applying or using the VECP. We are not persuaded that respondent's proposed distinction makes any difference in determining the scope of the FAR 52.248-1 VE clause.

III.

With respect to the requirement that a VECP not impair an essential function or characteristic of the contract work, respondent's arguments confuse immaterial, "worldwide" ADS requirements with the applicable ADS requirements specified in contract 9's Modification No. P00052. Those requirements were to submit data to satisfy the Government's ADS requirements with respect to the TriPrime Clinics to which the contract applied by extracting data from Sentara's AS-400 system and formatting it to comply with ADS format standards, *i.e.*, an ASCI flat file format (findings 22, 30). The record contains no probative evidence that Sentara's AS-400 data did not comply with the ASCI flat file format requirement or that Sentara's AS-400 data were erroneous and incomplete (finding 35).

CONCLUSION

We hold that Sentara's VECP was valid. We sustain the appeal as to entitlement..

Dated: 28 September 2000

DAVID W. JAMES, JR.
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. 51540, Appeal of Sentara Health System, rendered in conformance with the Board's Charter.

Dated:

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