ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Contel Advanced Systems, Inc.	)	ASBCA No. 49072
	)	
Under Contract No. N60530-90-D-0023	)	

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OPINION BY ADMINISTRATIVE JUDGE HARTY

Contract No. N60530-90-C-0023 (redesignated N60530-90-D-0023 in January 1996) was awarded by the Navy's Air Warfare Center Weapons Division (NWC), China Lake, CA in September 1990 to Contel Advanced Systems, Inc. (CASI). The contract required CASI to design, install, and maintain a new, state-of-the-art digital switching system known as the Center Telecommunications System (CTS). Performance was divided into two phases: (1) the implementation phase; and (2) an operation, maintenance and administration phase. The implementation phase of the contract was awarded based on CASI's firm fixed-price, 60-month lease to ownership price (LTOP) of $30,009,154.80.

This is one of a number of appeals[1] that arose from the project and the instant appeal involves the construction of the Main Switch Building (MSB) during the implementation

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[1] The appeals in ASBCA Nos. 49071, 49164, and 49772 have been decided: *Contel Advanced Systems, Inc.*, ASBCA Nos. 49071, 49164, 49772, 01-2 BCA ¶ 31,576. The other appeals are ASBCA Nos. 49073, 49074, 49075, 49076, 49603, 50648,

phase. CASI seeks $257,249.65 for all of its reasonable costs associated with the design and construction of the MSB on the grounds that it was not bound by a bilateral, not-to-exceed maximum price modification. It argues that the modification lapsed either because the Government failed to definitize it according to the schedule set forth in the modification or because the modification was an Undefinitized Contract Action (UCA), which lapsed when the Navy failed to timely definitize it. In addition, CASI argues that it was entitled to be compensated for certain alleged extra work: (1) enhanced perimeter fencing; (2) extended architectural services; and (3) construction of a larger splice chamber vault.

The appeal is sustained only to the extent that CASI is entitled to an equitable adjustment for the increase in the fence height. The appeal of the claim for extended architectural services is dismissed for lack of jurisdiction. The appeal is otherwise denied.

FINDINGS OF FACT

MSB Solicitation Requirements

The solicitation required offerors to propose any new buildings and modifications to existing buildings required to meet the performance requirements of the contract. Specifically, it read:

> 4.2 Buildings
>
> The Contractor shall propose any new buildings and modifications to existing buildings required to meet the specifications of the contract. The Center general development maps shall be used for referencing the CTS locations to existing facilities.
>
> The following requirements shall be met when proposing and constructing all buildings and modifications.
>
> A. As part of the proposal for buildings and modifications and before construction begins, the Contractor shall submit the following items to the Government.

50649, 51048, 51049. The decision in ASBCA No. 49073 is being issued together with this decision.

> 1. A complete description of all proposed buildings and/or modifications, including the purpose of the building or modification
>
> 2. [Blank]
>
> 3. Schedule for each phase of the project
>
> 4. Specifications of the buildings and/or modifications
>
> 5. Site plot drawings showing how new/modified buildings will coordinate with existing facilities and utilities
>
> B. The Government shall review all submittals and approve all plans and specifications for final construction. Final acceptance shall be subject to approval by the Western Division Naval Facilities Engineering Command. These reviews require approximately 2 to 5 weeks. Any modifications to the design, schedule, or cost of the proposed facility resulting from these reviews shall be the Contractor's responsibility.

(SR4, tab 1, attach. 2 at 73)

The solicitation also required offerors to propose a minimum of three switching subsystems with full stand-alone capability, including one at the Main Site:

> The Contractor shall, at a minimum, provide and install three switching subsystems: one at a Government-designated area within the Michelson Laboratory complex. . . . These subsystems shall have full stand-alone capability. They may be stand-alone remote switching units, multiple integrated switches, or a combination as long as the requirements of the SRS [System Requirements Specification] are met and additional attendants are not required. The Contractor may provide additional switching subsystems in the CTS switching topology. . . .

(SR4, tab 1, attach. 2 at 15)

CASI's Proposal

CASI proposed a prefabricated, "stand-alone structure, approximately 65' x 24' (1,560 square feet), built adjacent to the recently constructed Fiber Optics Termination site at Michelson Labs" on a "turn-key" basis (SR4, tab 3, Proposal, § 4.5 at I.4-22; § 4.5.1 at I.4-23). Because the proposed building would be adjacent to Michelson Laboratory, it would not require bathroom facilities, and it would be possible for CASI to tap into existing electrical and water lines. The purchase price for the proposed building was $182,062.22. (AR4, tabs 34, 77; app. br. at II.2.)

The Contract

The contract was awarded 6 September 1990, with an effective date of 24 September 1990, and incorporated CASI's proposal by reference (SR4, tab 1 at 1). The contract included FAR 52.233-1 DISPUTES (APR 1984) ALTERNATE I (APR 1984), FAR 52.215-33 ORDER OF PRECEDENCE (JAN 1986), and FAR 52.243-1 CHANGES-FIXED-PRICE (AUG 1987) ALTERNATE II (APR 1984). It also included CLAUSE H-38, applicable to the construction work, entitled ORAL MODIFICATION, which precluded the oral statement from any person to "in any manner or degree modify or otherwise affect the terms of this contract." CLAUSE I-10 (DFARS 52.243-7000) ENGINEERING CHANGE PROPOSALS (APR 1985) ALTERNATE I (APR 1985)) provided for engineering change proposals (ECP). This clause specifically provided for the submission of "not-to-exceed" or "not-less-than" prices for ECPs in the following terms:

> (a) The Contracting Officer may at any time, in writing, request the Contractor to prepare and submit an ECP as that term is defined in MIL-STD-480, within the scope of this contract, as hereafter set forth. Upon receipt of such request, the Contractor shall submit to the Contracting Officer the information specified by, and in the format required, by Paragraph 4 of MIL-STD-480.
>
> (b) Any Contractor ECP shall set forth a "not to exceed" price and delivery adjustment or a "not less than" price and delivery adjustment, acceptable to the Contractor if the Government subsequently orders such ECP. If ordered, the equitable increase shall not exceed, nor shall the equitable decrease be less than, such "not to exceed" or "not less than" amounts. . . .

(SR4, tab 1 at 51)

Changes to the MSB Contract Requirements

Shortly after contract award, CASI was notified orally that the location of the MSB would have to be changed (SR4, tab 240). By memorandum dated 2 October 1990, the contracting officer's technical representative (COTR), Mr. Jim Field, notified the contract specialist that the Public Works Department (Public Works) had determined that the Michelson Laboratory site was not available for the new MSB and that a new site, just north of Building 00002, had been selected. The COTR specifically requested that, "the contractor be notified of this change, and that he be requested to submit a proposal for the new building site." (AR4, tab 24) CASI was formally advised of the site change on 10 October 1990 (AR4, tabs 25, 321 at 2; tr. 2/14-15). The Navy's 10 October letter stated:

> 1. [The contract] requires you to place the new main-site switch in a location inside the Michelson Laboratory compound. I have been notified by the Naval Weapons Center, Public Works Department of the non-availability of that site.
>
> 2. A new site has been selected, see Enclosure (1). This site is just north of the current location of the Main Site Switch building 00002.
>
> 3. Please submit a cost or pricing proposal covering the proposed change to the contract.

(AR4, tab 25; tr. 5/33)

CASI'S Response to the Navy's Change Of MSB Site

By date of 14 November 1990, CASI submitted an ECP in response to the Navy's 10 October request. This November ECP contained alternate MSB proposals: the "original revised" and "proposed alternate # 1." (AR4, tab 34; tr. 2/15) The contracting officer felt that it was "normal" for CASI to submit alternate proposals (tr. 5/34). CASI's "original revised" proposal described a building similar to the structure that would have been built adjacent to Michelson Laboratory, except that it would include bathroom facilities. The size of this proposed structure was increased to approximately 1,800 square feet. CASI proposed parking space, security fencing, new underground electrical, water, and sewer service, and additional site fill and grading. CASI also indicated that it would need to conduct soil tests and engage an architect/engineering firm for the building design, per contract requirements. (AR4, tab 34)

The Navy did not act on CASI's November ECP and sought additional possibilities (AR4, tab 321; tr. 2/15-16; 5/35).

CASI submitted another ECP for the MSB construction dated 9 January 1991, indicating it was a revision to the November ECP. The January ECP included three options, with drawings and detailed pricing for each option (AR4, tab 77; tr. 2/16, 5/35). The three options for the MSB in the January ECP were: (1) a prefabricated structure providing 1560 square feet (24' x 65') of floor space, with a purchase price of $292,311.97 and an LTOP of $384,203.00; (2) a block structure providing 1800 square feet (30' x 60') of floor space, including a store room and a bathroom, with a purchase price of $378,406.52 and LTOP of $497,362.00; and (3) a block structure providing 3770 square feet (58' x 65') of floor space, with a purchase price of $657,664.58 and an LTOP of $864,408.00. The third option included office space for CASI's personnel, bathroom facilities, space for training, meetings, storage, mechanical rooms, and a main entry along with the CTS main switching equipment. (AR4, tab 77)

The proposal included a "Trade-off/Benefits Analysis," which outlined the savings the Government would realize by deciding to locate CASI's personnel in a revised MSB instead of remodeling Building 00002 (AR4, tab 77 at I-4). The proposal also noted that the two options based on block construction required additional engineering design (civil, structural, mechanical, electrical, architectural) and finish work (electrical, walls, floor, roof, HVAC, walks) beyond that required for the prefabricated, turn-key building originally proposed. In addition, the proposal indicated that due to the new site designation, any one of the three options would require the "development of parking, security fencing, and new underground electrical, water, and sewer service." (AR4, tab 77 at I-2)

By letter dated 15 January 1991, the Navy informed CASI that option three was selected and indicated that it hoped to start final price negotiations "within the next 45 days" (AR4, tab 87; tr. 2/16-17). Mr. Jafar Babaie, who had been CASI's proposal manager and was now CASI's implementation phase program manager, testified that after receiving this letter, CASI proceeded with the design of the new building in order to meet the contract schedule (tr. 2/17). Two weeks after the Navy selected option three, a meeting was held between the parties during which the Navy decided to increase the size of the MSB from 58' x 60' to 62'8" x 60'. The extra space was required to accommodate a coffee room and other interior layout changes. (Tr. 2/282, 3/244-45)

By letter dated 21 February 1991, the Government provided preliminary review comments on the architectural drawings for the main distribution frame in option three. The Government's notes warned that CASI was not leaving enough room in the vault splice chamber for the contemplated number of cable pairs. These notes read, in relevant part, as follows:

> 6. After reviewing the drawing, I cannot find where the cables will exit the vault. No conduit shown. The size of the vault will

> be directly affected by the entry point of the conduits and information contained in Number 8 below.
>
> . . . .
>
> 8. 12 holes are indicated for 12 verticals, which will allow only the termination of 9,600 pairs. As there are to be as many as 14,400 pairs terminated and possibly more, there seems to be a shortage of holes and verticals. . . . With this shortage of holes and verticals it appears that the splice chamber is not nearly large enough, especially if room for growth of each cable is taken into consideration. The additional frame space is going to impact the size of the frame room and the splice chamber. WARNING -- Special care should be used when sizing the splice chamber because what is built the first time is what will be there forever. This is true at all switch locations.

(SR4, tab 314 at R-08788)

CASI responded to the Government's concerns on 13 March 1991 and indicated that there was enough space and no change was planned:

> 8) The (12) holes provided in the floor are for the expressed [sic] purpose of passing "tip" cables; the drawings do not purport to reserve one "hole" for each imaginary "vertical," but are there to facilitate the greatest flexibility for routing present and future "tip" cabling.

(AR4, tab 127)

By cover letter dated 21 March 1991, CASI submitted a revised purchase price for option three ("Alternate #3") on a Standard Form 1411 (SR4, tab 363). The revised purchase price was $725,252.96.

<u>The Government's Evaluation of CASI's Proposal</u>

A DCAA audit of CASI's ECP 90-001.E R2 was requested on 2 April 1991 (AR4, tab 177 at R-15849, tab 213 at 2, 3). DCAA completed its audit of CASI's proposal on 24 April 1991. The audit was performed without the results of the related technical evaluation because the Government did not want to delay the audit waiting for the results. The audit also did not include an examination of CASI's G&A rate, which was the subject of a separate, on-going audit. DCAA's report stated that its "examination of the offeror's submissions disclosed no questioned items which would preclude acceptance of the

proposal as submitted," with the qualification that the examination was done without the benefit of the technical evaluation and on-going G&A audit. DCAA concluded that CASI's proposal was an acceptable basis for negotiation of a fair and reasonable price. (AR4, tab 177)

The DCAA audit report on CASI's G&A expense rate was issued on 9 May 1991. DCAA's examination "disclosed no questioned, unsupported, or unresolved items which would preclude acceptance of the proposed FY 1991 G&A rate of 7% as submitted." The DCAA opinion indicated CASI "submitted adequate cost or pricing data related to its G&A rate" and concluded that the proposed G&A rate was "acceptable as a basis for negotiation of a fair and reasonable price." (AR4, tab 205)

On 1 May 1991, the COTR provided the contracts branch with the technical evaluation for the MSB which noted several discrepancies and included the general comment, "It is impossible to determine by comparing the March proposal with the January proposal what would cause the price to be $73,589.00 higher!" (AR4, tab 187).

The Independent Government Cost Estimate (IGCE) for the MSB, which was based on the CASI's drawings, was completed and forwarded to the contracting officer on 23 May 1991. The Government estimate was for a purchase price of $718,705.00, an estimate that was $6,547.96 less than CASI's proposed purchase price for option three. (SR4, tabs 515, 529)

The Negotiation of Modification P00012

Because it was imperative to have a building in which to locate the main switch and the parties thought that the audits would take some time, they agreed to incorporate the requirement for the new MSB into a bilateral contract modification with a "maximum price (subject to downward negotiation)" (SR4, tab 2027 at Modification No. P00012; tr. 5/36-38). In their discussions, Mr. Richard Hackney, the contracting officer, testified he stressed to Mr. Babaie that the ceiling price would be binding and subject only to downward negotiation once CASI agreed to it in a bilateral modification. Mr. Hackney testified that he advised Mr. Babaie as follows:

> I – basically, I pointed out to him that the ceiling was a ceiling.
>
> You're going to be stuck with it, whatever happens, so make sure that you include in your proposed costs everything – all of the costs that you think you might run into.

(Tr. 5/38)

Mr. Hackney advised Mr. Babaie that the Government would use CASI's own proposed price as the maximum, not-to-exceed ceiling price in the implementing bilateral modification. He offered to let CASI revise its proposed price upward before finalizing the modification in order to ensure that CASI would be comfortable with the ceiling. (Tr. 5/38-40) Responding to his offer, CASI submitted a revised price by letter dated 14 May 1991, to be used as the ceiling price (AR4, tab 210). CASI's subject line for the letter read: "Maximum Price Data for the Main Switch Site Engineering Change Proposal (ECP), Number 90-002.E" (the March ECP). CASI's letter characterized CASI's revised price therein as "maximum price data." This submittal increased CASI's previously proposed purchase price to $787,909.00 with an LTOP of $1,035,600.00. The increase consisted of a flat 10% mark-up for both the "CTS Requirements" and "NWC Corporate Requirements" elements of CASI's previous pricing (with no mark up for Section II, which included the architectural services). CASI then applied a purchase price credit of $182,062.22 with an LTOP credit of $239,280.00 for the price of the original MSB, for a net proposed purchase price of $605,847.00 and an LTOP for the new MSB of $796,320.00. (AR4, tab 210; tr. 2/19-26) CASI's revised pricing contained an express reservation of rights for additional costs or schedule impacts resulting from delay, disruption, or similar impact caused by the change (AR4, tab 210). Mr. Hackney testified that CASI never raised the issue or expressed any concern that the new MSB might not be within the scope of the contract (tr. 5/40).

Modification No. P00012, effective as of 15 May 1991, incorporated CASI's March ECP by reference and used CASI's LTOP from its 14 May 1991 letter as the maximum price. The stated purpose of the modification was:

> . . . to provide approval for the commencement of construction of the main site switch building as stated in proposal ECP 90-001.E R2 dated 22 Mar 91 and establish a maximum price (subject to downward negotiation only) for this modification.

(SR4, tab 2027; tr. 2/22)

Paragraph 2 of the modification read:

> 2. MODIFICATION DEFINITIZATION
>
> (a) A Firm Fixed Type modification is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract modification that will include (1) all provisions and clauses required by the Federal Acquisition Regulation (FAR) and the Department of Defense Supplement (DFARS) on the date of execution of the maximum priced modification, (2) all provisions and clauses required by law on the date of execution

of the definitized contract modification, and (3) any other mutually agreeable provisions, clauses, terms, and conditions.

(b) The schedule for definitizing this modification is:

Event	Time
(1) Negotiate	60 Days*
(2) Execute Definitive Contract Modification	75 Days*

*Days after date in Block 3 of SF30 [15 May 1991]

(c) If agreement on a definitive contract modification is not reached by the target date in paragraph (b) above, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the Head of the Procuring Activity, determine a reasonable price in accordance with FAR Subpart 15.8 and Part 31, subject to the Disputes procedures established in this contract. In any event, the Contractor shall proceed with the completion of the contract, subject to the Limitation of Government Liability provision.

(1) After the Contracting Officer's determination of price, the contract shall be governed by ---

(i) All clauses required by the FAR and DFARS on the date of execution of this maximum priced modification for Firm Fixed Price contracts.

(ii) All clauses required by law as of the date of the Contracting Officer's determination, and

(iii) Any other provisions, clauses, terms and conditions mutually agreed upon.

(2) To the extent consistent with subparagraph (c)(1) above, all provisions, clauses, terms and conditions included in this modification shall continue in effect, except those that by their nature apply only to this maximum priced modification.

Paragraph 3 of the modification listed the price for the change and read:

a. Pending definitization of this Maximum Priced Supplemental Agreement, the Maximum Price Adjustment

> (subject to downward negotiation only) for this change is established at $796,320.00 In no event shall the equitable adjustment for this change exceed $796,320.00.

Funds in the amount of $796,320 were obligated by paragraph 3.c. of the modification.

The modification provided for a "target date" by which the parties would attempt to reach agreement on a final definitized price. Mr. Hackney testified that his purpose in including the provision for a target date for negotiation of a final definitized price for Modification No. P00012 was as follows:

> This kind of line in it had to do with [what] we expected after issuing the max mod to the contractor, he would reconsider his proposed price, and/or come in with all of the documented support for the price that he was proposing so that we could reach some kind of an agreement.
>
> For the most part, maximum price modifications went into the progress payment schedule down there, so the contractor, in effect, could collect the face value of the maximum price modification, even though we felt it wasn't worth that much.
>
> The Contractor, if he got more money than it really cost him, tended to be a little slow in coming in with the support for the price that it should be at – settled at, so we put this line in basically to try to get a contractual hammer on the contractor to force him to come in with this repricing proposal.
>
> And if he didn't come in with it, within the time that was shown here, that gave us a little more legal wherewithal to try to chase him down to force a price out of him – force a reproposed price out of him.
>
> . . . .
>
> So I expected him to come in with a price proposal that was slightly lower, and this was simply a – a target date for when he should expect to provide it to me, and I could expect to receive it.

(Tr. 5/45-46)

Mr. Hackney further explained the purpose of target dates in Modification No. P00012:

> Again, it was simply a target date, but it was a target date that – that had to be put in there on the chance that the contractor either didn't come in with a – with a revised price proposal, or that we couldn't reach any kind of an agreement on the price at all.
>
> That gave the Government, again, the legal wherewithal, if you will, to – if they – if they felt it was necessary to unilaterally set a price of some sort for this work.

(Tr. 5/47) Mr. Hackney also testified that he drafted the maximum modification based on sample provisions that he had acquired when he was involved in ship repair contracts and he had not used modifications of this kind for years. Modification Nos. P00012 and P00026[2] were the only two maximum price modifications he had seen at China Lake. (Tr. 5/43) In his view, the modifications were not UCAs because they were clearly within the scope of the contract and UCAs "only start [] kicking in when we either don't have a contract, or arguably, something's outside the scope" (tr. 5/57-58).

At the hearing, CASI did not contest any of Mr. Hackney's testimony on the reasons for using the maximum modification or the understanding that it set a not-to-exceed price.

Construction of the MSB

CASI started construction of the MSB on 28 May 1991 (AR4, tab 302 at 8). On 6 June 1991, the subcontractor installing the MSB vault for the main switch cables was told there was a "required change in [the] vault" and had to stop work (SR4, tab 567). The order reflecting that change was submitted 13 June 1991, with the following language: "Revise vault depth and details as per Drawing SD5 date June 11, 1991" (SR4, tab 568). The vault was revised again, as evidenced by a change order dated 21 June 1991 (SR4, tab 2029 at ex. 2-33). These change orders are internal orders and bear the signatures of the architect, the subcontractor, and CASI. This is the only evidence produced regarding the change to the vault. There is no indication that the contracting officer directed such a change.

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[2] Modification No. P00026, dealing with the Outside Plant Cable (OSP), is another maximum priced modification and is the subject of ASBCA No. 49073.

Failure to Definitize the Maximum Modification

By letter dated 26 July 1991, the Government advised CASI that it had extended the target date for definitization of Modification No. P00012 to 30 August 1991 (SR4, tab 680). By letter dated 5 September 1991, the Government advised CASI that it had further extended the target date for definitization to 30 September 1991 (AR4, tab 402). No evidence was presented that CASI either objected to these extensions or sought any extensions of its own.

The Government took no action to further extend the 30 September 1991 target date for definitization. CASI substantially completed construction of the MSB on 22 November 1991 (ex. A-28 at ex. #5). During the hearing, the contracting officer explained that Modification No. P00012 was not definitized within the definitization schedule because the Navy was awaiting a second DCAA audit requested in May 1992 (tr. 5/49-50, 125-30). He was unable to recall why the Navy did not negotiate and definitize the maximum modifications based on the earlier DCAA audit of CASI's proposal which had been completed in May 1991 (tr. 5/128-29). We find that the contracting officer could have initiated negotiations at anytime after receipt of the initial audit reports.

In the spring of 1992, the system was to be "cutover." This meant the telecommunications traffic would be transferred from the existing system to the newly installed CTS. This signified the end of the implementation phase and a move into the operational, maintenance, and administration (OM&A) phase of the contract. Since the LTOP pricing only applied to the implementation phase of the contract, Mr. Babaie testified he sought to complete negotiations on Modification Nos. P00012 and P00026 because the maximum modifications needed to be definitized to allow calculation of the final LTOP amount. He also was transferring responsibility to Mr. George Hardy, who was to manage the OM&A portion of the contract, and he wanted to finalize all implementation issues before he did so. (Tr. 2/92-93, 4/176-97)

By letter dated 17 March 1992, almost a year after signing Modification No. P00012, and four months after substantial completion of the MSB, Mr. Babaie sought additional compensation in a letter including "revised pricing data" for the March 1991 ECP for work associated with the MSB in "anticipation of commencement of negotiations. . . ." (SR4, tab 1286 at R-08779). Included under "Additional Requirements" was $108,076.38 for the architect, Kiran Mehra & Associates (*id*. at R-08785). This increase in the price of the architect's services was explained at the hearing by Mr. Babaie. He stated that at a technical meeting with Public Works, the need for an architect to oversee construction "came up," but he provided no detail as to when or where this meeting took place. He further testified CASI was not specifically directed to have a certified architect supervise the construction of the MSB full time by either the contracting officer or someone from Public Works but relied on the contractual approval required by Public Works to justify the use of the architect full-time. (Tr. 2/151-55)

By letter dated 6 April 1992, CASI submitted a "Revised Exhibit B to the Schedule" seeking to wrap up the pricing for all items which were part of the first phase of the contract (AR4, tab 674). This was followed by a 24 April 1992 letter on the same subject, which, among other things, stated that CASI had exceeded the maximum amount indicated in Modification No. P00012 and referred back to the 17 March letter for those specific costs (AR4, tab 690).

System Acceptance

The CTS was cutover on 10 April 1992 and system acceptance completed by 11 May 1992 (SR4, tab 2027 at Modification No. P00040 at 2 ¶2; AR4, tab 695; tr. 5/65). The project was to now move from the initial installation and implementation phase to the OM&A phase (SR4, tab 1; tr. 2/92-93).

As a result of CASI's revised pricing, a second DCAA audit was requested in May 1992 (tr. 5/126-30). At this point, some doubts about CASI's numbers came up, as recorded in CASI's internal weekly progress/status report for the week ending 21 August 1992:

> OUTSTANDING ECPs
>
> Ruth Post stated that she received a less than positive report from the DCAA Auditor. She stated the "the numbers were not matching up" with what CASI had proposed. She requested a meeting the week of August 24 to discuss this issue. Mike Bollinger and Sammy Del Castillo will also be contacted with a date and time, in order to attend.

(SR4, tab 1561 at A-04358)

The contracting officer testified that the second audit effort addressing Modification No. P00012 took substantial time to accomplish, because CASI had sent the necessary supporting documentation to one of its offices in Texas and it was difficult to get the information returned (tr. 5/127-32). This is amplified in the minutes from several of CASI's internal weekly progress/status reports indicating that in spite of repeated requests, information was not forthcoming (SR4, tabs 1576 at 5, 1580 at 6, 1584 at 6, 1594 at 5, 1599 at 9, 1614 at 6, 1619 at 5). When the office in Texas finally responded to DCAA's requests for data, some of the information provided was incomplete (SR4, tab 1621 at 6). Revised information was sought and this, in turn, took more time (SR4, tabs 1626 at 6, 1630 at 6, 1635 at 8-9, 1647 at 7-8, 1651 at 6, 1683 at 11, 1692 at 11, 1729 at 10, 1741 at 10). The material finally arrived in June 1993, and by date of 23 July 1993, DCAA issued its audit reports on CASI's actual costs for both the MSB and OSP (the subject of Claim 3

and ASBCA No. 49703) (SR4, tab 1746; tr. 5/132). The contracting officer received the reports in August 1993, and the Government then began putting together a negotiation position based on the reports (tr. 5/133-34). CASI's internal monthly progress/status report dated 12 November 1993 reflected CASI's view that they were in the process of finalizing both maximum modifications, Modifications Nos. P00012 and P00026 (SR4, tab 1816 at 5).

The contracting officer testified that the negotiations were effectively placed on hold during the holiday season. When the Government attempted to reopen negotiations after the holidays he recalled, "CASI put us off for some reason . . . . " (tr. 5/134). CASI's internal monthly progress/status report dated 7 January 1994 noted that its plan at this point in time was to negotiate the outstanding undefinitized maximum priced modifications "at Not to Exceed Prices" and to seek "additional costs" separately (SR4, tab 1826 at 2).

In response to a datacall from Naval Air Systems Command in June 1994, requesting a list of all UCAs not yet definitized, Ann Niessen, the contracting officer at the time, indicated that Modification Nos. P00012 and P00026 should be reported, although there is no indication they were reported. At the hearing, she testified that these modifications were only undefinitized "[i]n a large generic sense" in that they were still subject to negotiation and definitization, but they were not UCAs by the regulation definition. According to her, a UCA "in the regulation sense," is an "outside of scope contract action." (AR4, tab 838; tr. 5/197-198)

CASI's Claim, Appeal, and the Contracting Officer's Final Decision

CASI submitted a certified claim for $257,249.65 in connection with the MSB to the contracting officer by letter dated 1 February 1994 (SR4, tabs 2028, 2029). The claim amount was based on alleged total costs of $804,463.25 for constructing the MSB, plus 16 percent G&A and a 12 percent profit margin, bringing the total amount to $1,045,158.65 less: (1) a credit of $182,062.22 for the purchase price for the original MSB in the contract as awarded; and (2) a credit of $605,846.78 for a purchase price amount (equivalent to the ceiling LTOP amount of $796,320) in Modification No. P00012. For the first time, CASI made the argument that because the maximum modification had never been "definitized," it had been superseded. (SR4, tab 2029 at § E; tr. 5/50)

CASI's claim as submitted to the contracting officer included three items which it defined as "Additional Work Not Contemplated by the Parties When they Executed Modification P00012." These were: (1) $2,749 for adding one foot to the height of the fence surrounding the MSB; (2) $13,200 for an eight-inch waterline; and (3) $4,639 relating to the vault expansion for the MSB. (SR4, tab 2029 at 8-11) The $13,200 claim for an eight-inch waterline was subsequently withdrawn when CASI agreed that it had been included in the March 1991 ECP and ultimately Modification No. P00012 (app. br. vol. III, ex. 5 at 18). There is no specific request for the costs of extra architectural services

relating to the MSB in CASI's 1 February 1994 claim as submitted to the contracting officer (SR4, tab 2029).

The contracting officer did not issue a decision within 60 days from receipt of the claim or indicate within that period when a decision would be issued. CASI appealed to the Board on the basis of a "deemed denial" on 17 August 1995 and we have jurisdiction on this basis. 41 U.S.C. § 605(c)(5) The contracting officer subsequently issued a final decision on 12 December 1995 covering a number of CASI's claims in connection with the contract. With respect to CASI's 1 February 1994 claim, the contracting officer denied the claim for MSB costs above the not-to-exceed ceiling amount in Modification No. P00012. He also denied CASI's additional claims relating to the eight-inch water main and the vault. However, the contracting officer agreed CASI was entitled to reasonable costs for adding an extra foot to the height of the fence. (SR4, tab 2035) After CASI received the final decision, it filed a protective appeal, ASBCA No. 49603, on 21 February 1996.

On 24 October 1996, the Government unilaterally issued Modification Nos. P00095 and P00096 which, respectively, set the price of Modification Nos. P00012 and P00026 at the maximum price agreed upon by the parties when the modifications were originally executed, while confirming that "all other terms and conditions remain unchanged" (SR4, tab 2027).

DISCUSSION

CASI argues that it is not bound by Modification No. P00012 because it either lapsed or was void and seeks to recover its actual costs of performance. CASI argues that the modification either lapsed when the Government failed to timely "definitize" the price according to the agreed contract schedule as extended or was invalid or void because it was a UCA within the meaning of 10 U.S.C. § 2326, as implemented by DFARS 217.7401 (1991).

We deal first with the question of whether Modification No. P00012 was a UCA. Under 10 U.S.C. § 2326, in effect at the time, a contracting officer "may not enter into an undefinitized contractual action" unless the contractual action provides for agreement upon contractual terms, specifications, and price within the earlier of a 180-day period beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price or the date on which the amount of funds obligated or expended under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action. 10 U.S.C. § 2326(b)(1). The contracting officer was directed not to expend an amount that is equal to more than 50 percent of the negotiated overall ceiling price until the contractual terms, specifications, and price were definitized. However, if a contractor submits a qualifying proposal before 50 percent of the negotiated overall ceiling price is expended, the contracting officer could not expend more than 75 percent of the negotiated overall ceiling price until the contractual

terms, specifications, and price were definitized for the contractual action. 10 U.S.C. § 2326(b)(2) and (3).

An "undefinitized contractual action" is defined as "a new procurement action entered into by the head of an agency for which the contractual terms, specifications, or price are not agreed upon before performance is begun under the action," with certain exceptions not applicable here. 10 U.S.C. § 2326(g). The regulations have refined the definition. The parties have focused their arguments on the 1991 edition of the DFARS – DFARS 217.7400-406. However, 1991 was a period of transition from the 1988 edition of the DFARS – DFARS 217.7500-504. The 1991 edition was not effective until 31 December 1991 (56 Fed. Reg. 36,280 (31 July 1991)). Consequently, Modification No. P00012 was signed before the effective date. Modification No. P00026, however, was not effective until 21 January 1992. In any event, we find no material differences in the two editions and our discussion here considers both versions.

DFARS 217.7502 identified "letter contracts, unpriced orders under basic ordering agreements or provisioned items" as examples of UCAs. DFARS 217.7401(d) retained the same examples: "Examples [of UCAs] are letter contracts, orders under basic ordering agreements, and provisioned item orders, for which the price has not been agreed upon before performance has begun." On the other hand, DFARS 217.7501 defined "contract action" as "not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes." DFARS 217.7401(a) retained the exclusion for contract modifications "within the scope of the contract and under the terms of the contract" from the definition of "contract action," but added additional examples:

> (a) "Contract action" means an action which results in a contract.
>
> (1) It includes contract modifications for additional supplies or services.
>
> (2) It does not include change orders, administrative changes, funding modifications, or any other contract modifications that are within the scope and under the terms of the contract, e.g., engineering change proposals, value engineering change proposals, and over and above work requests as described in Subpart 217.77.

The principal focus of 10 U.S.C. § 2326 is on new procurement. In this appeal, we are dealing with a modification that stems from an ECP. The use of engineering change proposals here is more than happenstance as CASI's counsel suggests (app. reply br. at II-12). It is a practice that both parties followed throughout contract performance to deal with changes in the requirements and we are not prepared to ignore or question the parties'

contemporaneous practice and understanding of the Engineering Change Proposal provision. Modification No. P00012 implemented an ECP and included a "not to exceed" price as called for in the Engineering Change Proposal clause. The fact that the modification was bilateral is not significant since there is nothing that we are aware of that precludes the adoption of an ECP by bilateral agreement. Moreover, we are also unconvinced by CASI's counsel's argument that the modification constituted a "cardinal" change – a change outside the scope of the contract – and, consequently, subject to the requirements of 10 U.S.C. § 2326.

There is no exact mathematical formula for determining when a change is outside the scope of the contract. The determination turns on an assessment of the parties' intention at the time of contract formation, an evaluation of the quality and magnitude of the changed work, and the impact of the change on the whole project. *Air-A-Plane Corp. v. United States,* 408 F.2d 1030, 1032 (Ct. Cl. 1969); *KECO Industries, Inc. v. United States*, 364 F.2d 838, 843 (Ct. Cl. 1966), *cert denied*, 386 U.S. 958 (1967); *Bruce-Andersen Co. Inc.*, ASBCA No. 35791, 89-2 BCA ¶ 21,871 at 110,010; *Axel Electronics, Inc.*, ASBCA No. 18990, 74-1 BCA ¶ 10,471 at 49,517.

At no time prior to execution of the modification did CASI's representatives suggest that Modification No. P00012 was outside the scope of the contract. Indeed, this issue was not raised until after the appeal was filed. In addition, the solicitation clearly contemplated that offerors include new buildings as part of their proposed design. Nothing in the solicitation limited the size or design of the "stand-alone" buildings contemplated. CASI proposed its alternatives after it became clear that the original site for the MSB was unavailable and did so voluntarily, with no indication that the designs were beyond the scope of the contract. Under the circumstances, we do not believe that the increased size of the MSB and the associated increase in cost was so significant or its overall impact so great that one could conclude that the modification was a cardinal change.

In reaching the conclusion that Modification No. P00012 is a within scope modification, we have taken into account and found persuasive the contracting officer's testimony that it was not his intent in drafting the pricing provision of Modification No. P00012 to implicate the statutory requirements governing UCAs. Moreover, his intent finds concrete expression in the modification itself. The work requirements were completely spelled out. The modification was fully funded at the time it was signed and, as the contracting officer testified, CASI was able to obtain progress payments based on the maximum price.

However, the contracting officer went further and we recognize that the draftsmanship reflected in Modification No. P00012 injects an element of uncertainty. Once "definitization" is mentioned, a schedule proposed, and agreement to incorporate subsequent changes in law obtained, it is fair to ask whether a UCA might be involved, as a successor contracting officer did in 1994. We would also agree, as CASI's counsel has

noted, that the language used in the modification could have been drawn in part from a clause like FAR 52.216-25 CONTRACT DEFINITIZATION (APR 1984). In addition, it is doubtful that the contracting officer could have unilaterally insisted on CASI's agreement to additional contract terms and conditions. This issue was not raised at the time since CASI freely agreed to Modification P00012.

Nevertheless, we have resolved our uncertainty in light of the DFARS policy guidance. DFARS 217.7502 provides that "[i]n the case of . . . changes under the Changes clause, the policy set forth in this subpart shall be followed to the maximum extent practical." This policy guidance is carried forward in DFARS 217.7402. Given the policy direction to apply the regulation to the "maximum extent practical," even if a UCA is not involved, it is difficult to focus on the imposition of a schedule and the inclusion of additional terms and conditions as the decisive elements in evaluating the effect of the language used in the modification. On balance, though the modification may be atypical, the language used does not require us to treat it as a UCA, particularly when the work requirements are completely defined and the modification fully funded.

Since Modification No. P00012 implemented a within scope contract modification, it is not a contract action under either DFARS 217.7501 or DFARS 217.7401(a)(2) and, consequently, was not a UCA subject to the requirements of 10 U.S.C. § 2326.

Because we have concluded that Modification No. P00012 was not a UCA, we need not address CASI's argument that non-compliance with 10 U.S.C. § 2326 would render the modifications "invalid and void." We do note, however, that the fact of non-compliance would not automatically require a conclusion that the contract action is void. *See American Telephone and Telegraph Co. v. United States*, 177 F.3d 1368, 1374 (Fed. Cir. 1999) (*en banc*). The trial court's comments on the Federal Circuit's decision in *American Telephone and Telegraph Co.* are instructive in this regard: "[T]he Federal Circuit ruled that courts should refrain from invalidating government contracts, particularly where those contracts have been fully performed, unless that outcome is expressly required by the statute or regulation that the contract contravenes or is warranted on the basis of the offended law's legislative history." *American Telephone and Telegraph Co. v. United States*, 48 Fed. Cl. 156, 157 (2000).

What remains at issue here are the consequences, if any, of the parties' failure to negotiate the price in accordance with the modification's schedule as adjusted and its subsequent unilateral definitization many years later, after an appeal had been filed.

Bilateral Modification No. P00012 clearly established a maximum, not-to-exceed price for the work covered by it, subject to an express reservation for potential delay and disruption costs – a separate matter not presently before us. The salient provisions are straightforward. Negotiations to establish a "definitive" price were contemplated. In the event of a disagreement, the Navy had the right to unilaterally set the price, subject to

CASI's right to appeal under the Disputes clause. Upon a unilateral price determination, the parties agreed to be bound by all FAR and DFARS clauses required on the date of execution of the modification and "[a]ll clauses required by law as of the date of" the contracting officer's unilateral price determination.

The legitimacy of a bilateral modification that establishes a ceiling price, subject to downward adjustment only, is not questioned. *See Dawson Construction Co., Inc.,* GSBCA Nos. 5834, 6015, 81-2 BCA ¶ 15,349 at 76,033 (mutually agreed ceiling price for contract modification binding because "[t]he contractor was simply bound by its own bargain"); *Knutson Construction Co.,* GSBCA No. 2760, 69-2 BCA ¶ 7921. And, CASI has not suggested that it did not understand the import of the maximum ceiling price provision when it signed the modification. CASI was expressly told during the negotiations that the price it proposed, if accepted, would be the top price payable for the work. It even added a cushion to its price.

We would agree with Government counsel that a decision to impose a price lower than the ceiling was not mandatory – the use of the word, "may," makes the decision permissive. The definitization schedule, however, was not met and the Navy has offered no persuasive explanation for why it did not act in a more timely manner. Moreover, given the contracting officer's testimony, one would expect that an effort would be made to improve on the not-to-exceed price, while recognizing that setting a lower price unilaterally could result in a dispute. In any event, we think the Government had to act within a reasonable time – an inherently factual inquiry.

While CASI perhaps had no price incentive to engage in negotiations, the possibility of subsequent changes in law between the time of execution and agreement on a "definitive" price could be a concern. We note that the last extension expired on 30 September 1991, with the work covered by the modification substantially completed by 22 November 1991. CASI did not express concern about the failure to address the price of Modification No. P00012 until 17 March 1992 and then the concern was expressed in terms of the need to have a price so that an LTOP could be set.
Moreover, at no time prior to the spring of 1992 did CASI seek to begin negotiations and it has never suggested that the price should have been set at a price lower than the maximum.

CASI did agree at the time of the modification to accept clauses required by law at the time of definitization. Consequently, it could have no complaint as long as the price was set within a reasonable time. However, CASI has not suggested what a reasonable time would have been here. It argues instead that the modification is void because of its exposure to "clauses required by law" between execution of the modification and the Government's belated definitization at the not-to-exceed price. Moreover, it has not identified any provision of law, let alone an effective date of such a provision, which might be pertinent to determining a reasonable time, and the Government did not, in fact, seek to impose any new clauses when it did act.

As matters now stand, the Navy's subsequent definitization of the modification at the ceiling price has mooted any determination of whether there was unreasonable Government delay and has provided CASI all that it bargained for when it agreed to a maximum, not-to-exceed price for the work covered by the modification.

In reaching our decision with respect to Modification No. P00012, we emphasize that we are not addressing the Navy's alleged failure to timely establish an LTOP for the entire contract at system acceptance, which is the subject of the appeals in ASBCA Nos. 50648, 50649, 51048, and 51049, and how, if at all, a failure to definitize Modification No. P00012 earlier may have contributed to the alleged delay in establishing the LTOP at system acceptance.

With respect to the "extra work" for which CASI claims entitlement regardless of the status of Modification No. P00012, CASI's brief identifies three elements: enhanced perimeter fencing, construction of an expanded vault and extended architectural services.

The Navy admits CASI is entitled to reasonable additional costs incurred in increasing the height of the fence around the MSB by one foot (Gov't br. at II-66). We sustain CASI's appeal on the enhanced perimeter fencing claim on the basis of the admission.

The Navy's position regarding the vault size is that CASI's poor design and failure to respond to the Government's comments on the designs led to the increased costs and the responsibility lies with CASI. We agree. The vault was an integral part of the main site building. CASI had design responsibility and was warned its design was inadequate. On the record, the modifications to the vault were directed by CASI to its subcontractor without contracting officer intervention. There is no basis to conclude that CASI did any more than it was required to do under the contract.

CASI's 17 March 1992 letter to the Navy indicated that it was incurring additional architectural service expense in connection with the MSB. However, there is no separate request for the costs of extra architectural services relating to the MSB in CASI's 1 February 1994 claim as submitted to the contracting officer (SR4, tab 2029). The claim first appears in CASI's brief. Under the Contract Disputes Act, a claim must first be presented to the contracting officer for decision. Submission of the claim to the contracting officer is a prerequisite to our jurisdiction. *E.g., Trepte Construction Company, Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595. Since the claim was first raised in the brief, we are without jurisdiction. *E.g., Jonathan Corp.*, ASBCA No. 47059, 95-1 BCA ¶ 27,390 at 136,537.

DECISION

The appeal is sustained only to the extent that CASI is entitled to an equitable adjustment for enhanced perimeter fencing. The appeal of the claim for increased architectural expense is dismissed for lack of jurisdiction. The appeal is otherwise denied.

Dated: 12 March 2002

MARTIN J. HARTY
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 49072, Appeal of Contel Advanced Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals