

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
 )  
Management Resource Associates, Inc. ) ASBCA Nos. 49457, 50866  
 )  
Under Contract No. N62470-88-C-6017 )

APPEARANCE FOR THE APPELLANT: Mr. Matthew N. Robinson  
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Mark R. Wiener, Esq.  
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Management Resource Associates, Inc. (MRA) appeals the deemed and formal denials of its total cost and total time claim under the captioned contract. Pursuant to our Notice of Hearing dated 6 April 2001, we decide both entitlement and quantum. We find the claim not proven in any amounts over and above the price and time adjustments allowed by the contracting officer in one bilateral and three unilateral contract modifications. The appeals are denied.

FINDINGS OF FACT

1. The contract was awarded to MRA on 30 September 1988 for boiler repairs, replacement of hot water converters and designated piping systems, door replacements, painting and related work at Building 4000, Oceana Naval Air Station, Virginia Beach, Virginia. The firm fixed-price was \$165,000. (R4, tab 1 at 1-2) MRA's bid was \$50,000 (23 percent) below the Government estimate and \$75,000 (31 percent) below the only other bid (R4, tab 301). Before award, the Government requested MRA to review its bid for possible mistake. MRA confirmed its bid and expressly waived "any and all claims of a bid mistake." (R4, tab 303)

2. Prior to submitting its bid on 8 September 1988, MRA had never performed a boiler repair or piping system replacement contract (R4, tab 303 at 6-9; tr. 261). None of the personnel listed in MRA's pre-award submission with significant technical or skilled

trade experience relevant to the specified work performed any on-site skilled trade work on the contract (R4, tab 303 at 15 *et seq.*, tab 347 at L-8 *et seq.*).

3. The contract included among other provisions the FAR 52.225-5 BUY AMERICAN ACT – CONSTRUCTION MATERIALS (APR 1984) clause, the FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) clause, the FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) clause, the FAR 52.236-7 PERMITS AND RESPONSIBILITIES (APR 1984) clause, FAR 52.236-12 CLEANING UP (APR 1984) clause, the FAR 52.236-13 ACCIDENT PREVENTION (APR 1984) clause, the FAR 52.236-15 SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984) clause, the FAR 52.243-4 CHANGES (AUG 1987) clause, the FAR 52.246-12 INSPECTION OF CONSTRUCTION (JUL 1986) clause, and the Standard Form 19-A DISPUTES CONCERNING LABOR STANDARDS (1983 AUG) clause (R4, tab 1 at 103-04, 115).

4. The contract required MRA to begin performance within ten calendar days of notice of award (R4, tab 1 at 1). MRA, however, did not begin any significant work on site until 4 April 1989, five and 1/2 weeks before the required completion date of 13 May 1989. MRA alleges that the Government delayed the start of work on site and caused additional cost by requiring MRA to have an approved accident prevention/health and safety plan, progress schedule, schedule of prices, and demolition plan before starting work, by requiring an unreasonable level of detail in those documents, and by unreasonably delaying approval of MRA's payment and performance bonds, contract assignment documents, and material submittals. (R4, tab 45, Claim at 13-20)

5. An acceptable written, contract-specific accident prevention/health and safety plan was required by paragraph 01.A.03 of the Corps of Engineers (COE) Safety and Health Requirements Manual, EM 385-1-1, Oct 1987 revision, “[p]rior to commencement of work at a job site.” Compliance with this manual was specified in paragraph (b) of the Accident Prevention clause of the contract, and by paragraph 10. b. of section 01011 of the contract specifications (R4, tab 1).

6. An approved progress schedule was required by the Schedules for Construction Contracts clause of the contract, and by paragraph 12.1 of section 01011 of the contract specifications (R4, tab 1). The schedule of prices and the demolition plan were required respectively by paragraph 8 of section 01010 and paragraph 1.1 of section 02050 of the contract specifications (R4, tab 1). MRA has not stated what specific details it was required to provide in any of the required schedules and plans that were not required by the contract specifications or documents referenced therein.

7. MRA submitted its performance and payment bonds – both with individual sureties – on 30 September 1988 (R4, tab 45, exs. 10, 11). The bonds were returned for correction of errors and completion of missing information on 9 November 1988 (R4, tab 45, ex. 22). MRA did not submit acceptable bonds until 19 December 1988 (R4, tab 45, ex. 30). The contract assignment documents, although dated 6 October 1988, were not approved by the Government until 8 December 1988 (R4, tab 45, ex. 15). The delay in approval was due to the need for clarification of whether the lender/assignee was a financing institution for purposes of FAR 32.802(b), and was reasonable in the circumstances (R4, tab 45, ex. 22 at 2).

8. MRA did not submit its schedule of prices until 9 December 1988. The schedule was conditionally approved on 17 January 1989. (R4, tab 45, exs. 27, 44) MRA did not submit its demolition/removal plan and its accident prevention/safety plan until 8 February 1989. Both plans were approved by the Government on 15 February 1989. (R4, tab 45, exs. 121, 122) To the extent the time taken by the Government to review the initial submittals of the bonds and schedule of prices was unreasonable, these delays were concurrent with part of MRA's delay in submitting its demolition/removal and accident prevention/safety plans.

9. With respect to the alleged Government delay in reviewing material submittals, MRA's schedule of submittals shows that 65 submittals were made of which 53 were reviewed and returned to MRA within 15 days or less. None of the remaining 12, which were reviewed and returned within 22 days or less, are shown to have caused any delay in MRA's completion of the work. The submittal for the hot water converters, which were on the critical path for completion of the pump room piping, was reviewed and returned within eight days. (R4, tab 45, ex. 116) *See* Finding 18.

10. MRA alleges that it was ready to start work on site when its accident prevention plan was approved on 15 February 1989, but was prevented from doing so by the Government (R4, tab 45, Claim at 21-25). Due to weather conditions in February and March, the boilers could not be taken out of service until 1 April 1989. The Government, however, did not prevent MRA from beginning other work while waiting for availability of the boilers. To the contrary, the Government site inspector/construction representative (SI/CR) called Mr. Robinson (MRA's President) on 17 March 1989 and "encouraged him to start some work on this contract." (Ex. A-4; R4, tabs 334, 335)

11. MRA alleges that at a meeting with Government representatives on or about 23 March 1989 Mr. Robinson was instructed not to begin any other contract work until the boiler repairs were completed (R4, tab 45, Claim at 42). A contemporaneous written report states that this meeting took place on 4 April 1989, the first day MRA showed up to begin

work on the site (R4, tab 335). There is no credible evidence that the direction at this time to perform the boiler repairs first caused any delay or disruption of the overall performance of the contract.

12. There were three boilers in Building 4000 (Boilers A, B and C). The specified retubing, refractory repairs and gasket replacement in Boiler A were completed, inspected and tested, and the boiler placed on “standby condition” on 21 April 1989. The specified retubing, refractory repairs and gasket replacement in Boiler B were completed and the boiler was certified for return to service on 18 May 1989. The specified retubing, refractory repairs, gasket replacement and boiler “closing” were completed on Boiler C on 22 June 1989. (Ex. A-4)

13. On 25 May 1989, MRA submitted detailed cost proposals for additional refractory repairs to Boilers A and C. These proposals were based on estimated direct labor and direct material costs to accomplish the specific work plus applicable mark-ups. (R4, tab 45, ex. 57) Although not formally added to the contract until bilateral Modification No. P00001 on 26 September 1989, the added repairs in Boiler C appear to have been performed along with the originally specified repairs before the boiler was closed on 22 June 1989. For reasons not explained, the added refractory repairs in Boiler A were not begun until 23 October 1989 and were not completed until 2 November 1989. (Exs. A-4, -7)

14. Bilateral Modification No. P00001 increased the contract price by \$17,907 and extended the contract completion date to 25 September 1989 for the added repairs on Boilers A and C and “for government delays associated with the boiler repairs.” It also included an agreement by the parties that it was the “full and complete equitable adjustment and compensation attributable to the facts or circumstances giving rise to the changes directed hereby, including, but not limited to, any changes, differing site conditions, suspensions, delays, rescheduling, accelerations, impact, or other causes as may be associated therewith.” (R4, tab 2)

15. The contract specifications provided for two eight-hour service interruptions (“outages”). The first outage was intended for replacement of the six boiler header valves and the cold water make-up piping for the boilers. The second outage was intended for installation of the new hot water converters and related piping in the pump room. (R4, tab 1 at 01011-5) On 30 May 1989, MRA requested the first outage for 12 June 1989, and the second outage for 19 June 1989. The Government approved both requests, but on both dates the scheduled work could not be performed because MRA failed to have the necessary material and manpower on site. (Ex. A-4; R4, tabs 309, 319)

16. MRA replaced one boiler header valve on 3 July 1989 without an approved outage, and the remaining five during approved outages on 4 and 14 August 1989. While there was some difficulty in installing the valves on 4 August due to the pipes “closing in” when the old valves were removed, there is no credible evidence that this was an unusual condition not normally encountered in pipefitting work. The reason MRA was unable to complete the valve replacement in a single eight-hour outage was its failure to have sufficient skilled personnel and equipment on site. (R4, tabs 309, 319, 336; exs. A-4, -7)

17. MRA began cutting, threading and assembling the pipe for the boiler cold water make-up system on 26 June 1989. However, with the exception of 3 July 1989, no work of any kind was performed on the site from 27 June through 17 July 1989. MRA offers no explanation for this three-week suspension of the work. Work on the boiler cold water make-up piping was not resumed until 14 August 1989. (Exs. A-4, -7) On 16 August 1989, MRA was directed to substitute copper pipe for the specified black steel pipe in that system (R4, tab 336). Outages for installation of this system were scheduled at MRA’s request for 7 and 22 September 1989. On both days, however, MRA had insufficient personnel and material on site to complete the work. (R4, tabs 317-319) MRA installed the boiler cold water make-up piping on 25 September 1989, but it was repairing leaks in the system through 16 October 1989. (Ex. A-7)

18. The new hot water converters for the domestic hot water supply system were not delivered to the site until 8 September 1989, and were not installed in the pump room until 2 October 1989 (ex. A-7). All of the material required to complete the domestic hot water piping from the converters to the zone distribution piping was not obtained by MRA until 11 October 1989 (ex. A-7). The converters and piping materials were all contractor-furnished items. There is no credible evidence of any Government responsibility for the delay in the delivery of these items to the site.

19. MRA began assembly and fabrication of the domestic hot water piping on 12 October 1989 and installed that piping during an outage on 18-19 October 1989 (ex. A-7). The installation work was hampered by numerous leaks in other pipes in the pump room for which MRA was not responsible. There were also numerous leaks in the new piping installed by MRA, which MRA attempted to correct during the following month. (Ex. A-7) However, in a memorandum to the Assistant Resident Officer in Charge of Construction (AROICC) dated 21 November 1989, the SI/CR reported that there were still 11 leaks in the MRA-installed piping, and other deficiencies in MRA’s work (R4, tab 321).

20. At a meeting on 24 November 1989, the Government told MRA that it would repair the leaks in MRA’s work, charge MRA for the cost, and that MRA should submit detailed cost proposals for the various differing site conditions and changes it was then

alleging. On 30 November 1989, MRA submitted detailed cost proposals/estimates for installing thermowells, draw-off valves, zone isolation gate valves, a hot water line to the housing office, and the connection of new 3-inch lines to existing 4-inch lines in the domestic hot water system. These estimates, similar to the estimates submitted for the additional boiler repairs in Modification No. P00001, were based on estimated direct labor and material costs incurred for the specific item plus applicable mark-ups (R4, tab 324).

21. By unilateral Modification Nos. P00002 and P00003, dated 15 February and 26 March 1990 respectively, the Government increased the contract price by \$9,385 and extended the contract completion date to 6 April 1990 (R4, tab 2). The Government work papers for these modifications show that the price adjustment consisted of the following items and amounts: (i) \$6,000 for providing copper pipe in place of the specified black steel pipe for the boiler make-up water line (Item 1, Modification No. P00002); (ii) \$1,975.79 for installing four thermometers and thermowells required for proper operation of the temperature controls in the domestic hot water system (Item 2, Modification No. P00002); (iii) \$545.83 for installing two duplex receptacles and 20 feet of conduit (Item 3, Modification No. P00002); (iv) \$692.04 for installing a domestic hot water line to the housing office (Item 4, Modification No. P00002); (v) \$1,541.65 for installing three zone isolation gate valves (Item 5, Modification No. P00002); (vi) \$1,193.75 for connecting new 3-inch lines to existing 4-inch lines on the domestic hot water supply system (Item 6, Modification No. P00002); (vii) \$232.94 for installing two drain valves on the domestic hot water supply and return piping (not a line item in either modification but included in the calculation of the total price adjustment); and (viii) a deduction of \$2,797 for deleting MRA's responsibility to repair leaks in its newly installed piping (Modification No. P00003). (R4, tab 45, exs. 62, 84, tab 324)

22. The amount in Finding 21(i) above was the amount proposed in MRA's detailed cost proposal/estimate for that item less \$2,486.10. This reduction was based on the daily reports which show that MRA's proposed labor costs were substantially overstated. The amounts in Findings 21(ii), (iv), (v), and (vi) were the amounts proposed in MRA's detailed cost proposal/estimates for those items. The amounts in Findings 21(iii) and (viii) were the Government's estimates. MRA was requested to provide cost proposal/estimates for those items but failed to do so. (R4, tabs 45, exs. 62, 84, tab 324) There is no credible evidence that MRA's actual incurred costs for any of the items compensated in Modification Nos. P00002 and P00003 exceeded the amounts allowed in those modifications.

23. The Government also recognized in Modification No. P00002 at Items 7 and 8 that MRA was entitled to compensation for the impact of leaks for which MRA was not responsible on the installation of the zone gate valves and the new domestic hot water piping in the pump room (R4, tab 2). The daily reports indicate that this work took place on

18 and 19 October 1989. The daily reports further indicate that a total of 196.5 manhours were incurred on those dates of which 126.5 were incurred by employees of the welding subcontractor (ex. A-7). With this data available, it was not impracticable for MRA to estimate the actual cost impact of the leaks on that work. MRA, however, failed to provide the requested cost proposal/estimate, and the price adjustment in Modification No. P00002 did not include any amount for the cost impact of those leaks.<sup>1</sup> (R4, tab 45, ex. 84, tab 324)

24. From 27 November 1989 through 13 July 1990, MRA worked primarily on pipe insulation, touch-up painting, site clean-up, and deficiency list items. During this 229 calendar day period, there were 159 workdays on 78 of which no work was performed. There is no credible evidence of any Government responsibility for MRA's desultory work schedule during this period. (Exs. A-5, -7) The contract work was "beneficially complete" on 11 July 1990, and was accepted by the Government on 17 July 1990, subject to correction of final inspection deficiencies (R4, tabs 38, 39).

25. On 27 May 1993, MRA submitted a claim for a price increase of \$506,689.90 and a time extension of 135 days to 17 August 1990. The claim consisted of 11 priced sections for particular subdivisions of the work, an unpriced section for "Misapplication of Davis-Bacon Requirements," and priced sections for "Cost of Money" and claim preparation costs. (R4, tab 45, Claim) The amounts of the 11 priced sections for the subdivisions of the work were MRA's allocations of the difference (\$349,332) between its alleged total incurred cost plus profit (\$541,624) and the contract price as adjusted through Modification No. P00002 (\$192,292). (R4, tab 65 at 14-15)<sup>2</sup> These allocations, however, are not supported by detailed cost estimates of the specific items of alleged extra work, and do not change what is in substance a total cost claim in which all of the alleged incurred costs over and above the adjusted contract price through Modification No. P00002 are asserted to be the responsibility of the Government.

26. MRA's "budget" papers indicate that the contract price at award was based on hourly labor rates substantially lower than the rates allegedly paid during performance of the contract. Approximately 1,966 direct labor hours were charged to the job by four officers and directors of MRA for work at rates exceeding the budget rates, the Davis-Bacon Act wage determination rates, and the rates allegedly paid other employees for the same type of work by approximately \$20,000. The same four officers and directors also charged \$23,437 (827.2 hours) to the contract as direct labor for project supervision. (R4, tab 347 at L-8 *et seq.*, tab 351 at BJ) The original contract price of \$165,000 included only \$920.61 for project supervision as a direct labor cost. (R4, tab 347 at H-1) The excess wage rate and "supervision" payments to the officers and directors amounted to 49 percent of the total alleged direct labor cost (\$87,186) (R4, tab 65 at 15).

27. The original contract price was based on a production labor overhead (PLO) rate of 16.4 percent and a G&A rate of 2.8 percent (R4, tab 347 at H-1).<sup>3</sup> MRA's alleged total incurred costs have a PLO rate of 52.8 percent and a G&A rate of 21.0 percent (R4, tab 65 at 15).<sup>4</sup> There is no credible evidence of Government responsibility for the increase in the alleged incurred indirect cost rates over and above the rates provided for in the original contract price.

28. MRA's 27 May 1993 claim was audited by the Defense Contract Audit Agency (DCAA). The audit report dated 29 September 1993 questioned all but \$18,315 of the claimed incurred costs. (R4, tab 65 at 7) The audit report stated, and the auditor testified at the hearing, that the cost and pricing data submitted in support of the claim were "not adequate" because MRA did not provide verifiable source documentation to which its claimed costs could be traced and shown to have been in fact incurred (R4, tab 65 at 3-4; tr. 510-12, 514, 522).

29. More than six years after the audit report was issued, MRA provided trial balances, corporate tax and payroll tax returns. The auditor determined that the trial balances did not agree with the amounts listed in the claim, and that the corporate and payroll tax returns had not been filed. These documents did not change the auditor's opinion because "we could not reconcile the data." (R4, tab 354 at 3-4; tr. 523)

30. On 23 July 2002, eleven months after the close of the hearing, MRA moved to reopen the record for receipt of its financial statements for its fiscal years ending 30 April 1989, 1990 and 1991. The CPA who prepared these statements submitted them with a statement that they were "the representation of management," and that "[w]e have not audited or reviewed [them] . . . and, accordingly, do not express an opinion or any other assurance on them." Appeal File, Letter of Ralph L. Benson, Chartered, CPA's, dated 18 July 2002. The Government opposed reopening the record.

31. MRA has offered no cogent reason why these statements were not prepared and submitted to the Government auditor in 1993 when the audit of the claim was conducted and the financial statements were requested. Moreover, MRA's management financial statements that are unaudited and uncertified by an independent CPA have little credibility. The motion to reopen the record is denied. On the evidence of record, MRA has failed to prove that its claimed costs were in fact incurred. *See* Finding 28.

32. By unilateral Modification No. P00006, dated 17 September 1993, the contracting officer allowed a price increase of \$7,900 for 17 items he found valid in the



claim. The allowed amounts were based on the Government's estimates of the direct material, labor and equipment costs incurred, plus 4.5 percent for sales tax on material, 21 percent for insurance, taxes and fringes on labor, 10 percent for field office overhead, 3 percent for home office overhead, 7 percent for profit on costs incurred through and including field office overhead, and one percent for bond on the total cost and profit. (R4, tabs 2, 342)

33. The Government's estimate for Modification No. P00006 shows the amounts allowed therein for specific claim items were as follows: (i) \$979.33 for additional work in replacing Door 103; (ii) \$467.82 for replacing two valves on the boiler cold water "make-up" piping and a boiler davit arm bearing; (iii) \$230.43 for providing 6-inch piping for the domestic hot water supply piping;<sup>5</sup> (iv) \$204.89 for routing the 3-inch hot water supply piping to avoid a light fixture; (v) \$0.00 for providing a 4-inch pipe and fittings in place of a valve; (vi) \$575.12 for rotating an existing 4-inch valve on the boiler hot water return piping; (vii) \$185.74 for modifying the specified piping arrangement at the recirculation pumps to match the suction/discharge port arrangement; (viii) \$486.39 for providing four additional pressure gages for the boiler hot water supply and return piping at the base-mounted pumps; (ix) \$588.45 for leaking water interfering with MRA's work on 18-19 October 1989; (x) \$1,202.61 for modifying the hot water converter frames; (xi) \$488.48 for providing additional valve and pipe supports; (xii) \$189.25 for removing excess concrete at drains; (xiii) \$192.98 for repairing settlement cracks in exterior walls; (xiv) \$287.69 for patching holes in interior walls; (xv) \$571.34 for repairing water damaged pipe insulation; (xvi) \$336.54 for reconnecting a heating line not shown on the drawings; and (xvii) \$887.24 for providing additional project supervision. (R4, tabs 2, 342)

34. The total of the Government estimates for the claim items in Modification No. P00006 was \$7,873. The contracting officer rounded that amount up to \$7,900 for the total modification price. (R4, tabs 2, 342) There is no credible evidence that MRA's actual incurred costs for those claim items exceeded the amounts allowed in the Government estimates or in the modification price.

35. On 11 January 1996, MRA appealed the deemed denial of its claim for the amount in excess of that allowed in Modification No. P00006 (ASBCA No. 49457). By letter dated 17 December 1996, MRA increased the amount of its claim to \$583,589.90 (R4, tab 63). By final decision dated 20 May 1997, the contracting officer denied any additional compensation for the claim (R4, tab 66). MRA appealed that decision on 7 July 1997 (ASBCA No. 50866).

36. At hearing, Mr. Robinson testified that he wrote the claim and that the statements therein were true and correct to the best of his knowledge and belief

(tr. 242-43). MRA's other witnesses on technical issues were a sales manager for MRA's material supplier, and an officer of MRA who worked as a supervisor and pipefitter on the contract. Neither Mr. Robinson nor the other two witnesses were engineers, certified pipefitters or otherwise shown to have had skilled trade experience over a significant period of time in the boiler repair, pipefitting, masonry, door-hanging or other skilled work required for MRA's contract. (R4, tab 303 at 17-20; tr. 261-62, 309, 311, 321-22, 346, 431-32) In the absence of such experience, their testimony, uncorroborated by other evidence, that various specifications and drawings were defective, or that various conditions encountered were differing site conditions, was not persuasive. Our findings on the individual claim items follow.

37. "Contract Formalities": MRA claims \$44,512 and a 152 day time extension for alleged "untimely administration of contract formalities." By "contract formalities," MRA means the various documentary submissions it was required to make before starting work on the site. (R4, tab 45, Claim at 10-27). There is no credible evidence of any Government responsibility for the cost and delay allegedly incurred by MRA in complying with those requirements. *See* Findings 4-9.

38. "Misapplication of Davis-Bacon Requirements": MRA claims an unspecified amount for (i) alleged "compensation paid to MRA employees who should not have been subject to the Davis-Bacon Act"; (ii) alleged improper classification of unskilled work as skilled work; and (iii) alleged improper determination of subcontractor violations of labor standards. (R4, tab 45, Claim at 27-41) Each of these claim items is within the exclusive jurisdiction of the Department of Labor (DOL) pursuant to the Disputes Concerning Labor Standards clause of the contract.<sup>6</sup>

39. Door Demolition and Replacement: MRA claims \$10,531 for (i) an alleged direction by the SI/CR to use skilled workers to remove the old doors; (ii) the presence of poured concrete in the cores of the CMU blocks at the door openings; (iii) the specification of "COF" rather than toggle anchors for the new door frames; and (iv) allegedly misaligned walls causing the new doors to stick when installed (R4, tab 45, Claim at 43-70). The claimed amount is not broken down by, nor supported by detailed cost estimates for, the specific claim items. On the specific claim items, we find that:

(i) Paragraphs 16 and 17 of specification section 01010 designated the Officer in Charge of Construction (OICC) as the authorized representative of the contracting officer and further provided that "No oral statement of any person other than the Contracting Officer or his representative, as provided in the clause of this contract entitled 'Changes,' shall in any manner or degree modify or otherwise affect the terms of the contract." (R4, tab 1 at 01010-6) MRA knew that the SI/CR had no authority to change any terms of the

contract, and there is no credible evidence of any contemporaneous protest to, or ratification by, the OICC of the alleged direction (tr. 265-66; R4, tab 45, Claim at 49). To the extent this claim item is a complaint about the wage rate required to be paid the workers removing the doors (whatever their personal skill level might be), it is a labor standards dispute and not within our jurisdiction. *See* Finding 38.

(ii) There is no credible evidence that MRA gave timely written notice to the contracting officer of the alleged differing site condition before disturbing the condition. Moreover, MRA has failed to prove that the concrete filled cores of the CMU blocks at the door openings were in fact a differing site condition as defined by the contract.<sup>7</sup> *See* Finding 36.

(iii) MRA's statement that it installed a door frame "using a combination of toggle and COF anchors," is inconsistent with its allegation that the specified COF anchors were not suitable for that use (R4, tab 45, Claim at 68). The alleged defect in the specifications is not proven.

(iv) MRA was compensated in Modification No. P00006 for the additional work in installing Door 103 which MRA alleges was caused by a misalignment of the walls. *See* Finding 33(i). MRA has failed to prove the amount of any cost it allegedly incurred for the alleged wall misalignment problem in excess of the amount allowed in that modification for the installation of Door 103. There is no proof of wall misalignment as to any other doors.

40. Boiler Repairs: MRA claims \$22,649 for (i) "excessive" carbon build-up on the old boiler tubes; (ii) replacing substantial sections of the refractory on all three boilers; (iii) replacing two valves on the boiler make-up water line; and (iv) replacing a boiler davit arm bearing (R4, tab 45, Claim at 71-84). The claimed amount is not broken down by, nor supported by detailed cost estimates for, the specific claim items. On the specific claim items, we find that:

(i) There is no credible evidence that MRA gave the required timely written notice or that the alleged "excessive" carbon build-up was in fact a differing site condition as defined by the contract. *See* Findings 36, 39(ii), n. 7.

(ii) MRA was compensated for the additional refractory repairs to Boilers A and C in bilateral Modification No. P00001. *See* Finding 14. There is no credible evidence of additional refractory repairs to Boiler B. An invoice from the subcontractor who performed the refractory work refers to replacing the inner and rear door refractory on "Unit No. 'B'" from 6 through 13 June 1989 (R4, tab 45, ex. 124 at 4). MRA's daily reports for 6 through 13 June 1989, however, show that the refractory work during that

period was on Boiler C. The Boiler B repairs were completed and the boiler was certified for return to service on 18 May 1989. (Ex. A-4)

(iii) MRA was compensated for replacing the valves in Modification No. P00006. *See* Finding 33(ii). It has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(iv) MRA was compensated for replacing the davit arm bearing in Modification No. P00006. *See* Finding 33(ii). It has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

41. Boiler Water Piping System: MRA claims \$11,159 for (i) substituting copper tubing for the specified black steel pipe in the boiler cold water make-up system; (ii) the alleged impossibility of replacing the six boiler header valves within the specified eight-hour outage for their replacement; and (iii) the use of chain falls and come-alongs to close the gaps between pipe ends when the old boiler header valves were removed (R4, tab 45, Claim at 84-105). The claimed amount is not broken down by, nor supported by detailed cost estimates for, the specific claim items. On the specific claim items, we find that:

(i) MRA was compensated for the substitution of copper for black steel piping in Modification No. P00002. *See* Finding 21(i). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(ii) Specification section 01011, paragraph 12.2 required all six boiler header valves to be replaced in a single eight-hour outage (R4, tab 1 at 01011-5). MRA failed to have sufficient labor or material on site to accomplish the header valve replacements in the scheduled time. *See* Findings 15, 16. MRA has failed to prove that it was impossible or commercially impracticable to perform the specified work in the specified time, or that the specification was otherwise defective.

(iii) There is no evidence that MRA gave timely written notice of a differing site condition, nor is there credible evidence that the gaps in the piping when the old valves were removed were a differing site condition as defined by the contract. *See* Findings 36, 39(ii), n. 7.

42. Boiler Monitoring System: MRA claims \$5,910 for (i) the Government's rejection of a foreign-made computer component; (ii) installing two thermowells; (iii) removing an existing water meter; and (iv) a service call by the monitoring system vendor (R4, tab 45, Claim at 105-112). The claimed amount is not broken down by, nor

supported by detailed cost estimates for, the specific claim items. On the specific claim items, we find that:

(i) The monitoring system vendor replaced the foreign component with a domestic component. There is no invoice or other credible evidence that any cost was incurred by MRA or its vendor for this substitution.

(ii) The thermowells were necessary because the specifications prohibited the use of stab-type flow sensors. The specifications and drawings did not represent that there were existing thermowells in which the new flow sensors could be installed (R4, tabs 1, 3). The claim of defective specifications and drawings for this item is not proven.

(iii) The water meter was removed only because MRA chose to provide a combination flow-sensor/water meter where the contract drawing (4108178) required only a new flow-sensor (Item 14) separate from the existing meter (Item 8). Moreover, the existing water meter was expressly designated on the contract demolition drawing (4108176) as “to remain.” (R4, tab 3) The claim of a defective drawing for this item is not proven.

(iv) The service call was caused by the Government’s improper operation of the system (R4, tab 45, ex. 87). MRA, however, has failed to show the amount, if any, charged to it by the monitoring system vendor for this service call.

43. Pump Room Piping Systems: MRA claims \$50,438 for numerous claim items involving the pump room piping systems. The claimed amount is not broken down by, nor supported by detailed cost estimates for, the specific claim items. On the specific claim items, we find that:

(i) Pump Room Valves: MRA alleges that the cost of replacing 17 valves was increased as a result of (a) rusted nuts and bolts at valve flanges; (b) pipe section gaps closing down when old valves were removed; (c) a three or four hour wait for pipes to cool down before the valves could be replaced; (d) old valves having “smaller bodies” than their specified replacements; and (e) leaking valves in pipes that were not part of MRA’s contract (R4, tab 45, Claim at 113-19). With respect to the conditions described in (a), (b), (c) and (d), MRA has failed to prove that they were differing site conditions. *See Findings 36, 39(ii), n. 7.* With respect to condition (e), the cost impact of the leaking valves on the work in the pump room was compensated in Modification No. P00006. *See Finding 33(ix).* MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(ii) Cold Water Supply Piping: MRA alleges that it was required to provide an additional 90 degree elbow and additional tubing which were not shown on the contract drawings to bring the 6-inch cold water supply line into position between the converters. MRA states that the added change of direction is shown on the as-built drawing (R4, tab 45, Claim at 120-24). We have compared the as-built drawing prepared by MRA (R4, tab 45, ex. 81) with the contract drawings (R4, tab 3) and are unable to find the added change of direction which MRA has alleged. The claim item is not proven.

(iii) Domestic Hot Water Supply Piping between the Converters and Tempering Valves: The domestic hot water supply piping from the converters to the tempering valves is shown in one place on drawing 4108179 as 6-inch pipe and in a second place as 4-inch pipe. This was a defect in the drawing and MRA with the SI/CR's approval installed the entire line with 6-inch pipe. MRA was compensated for this change in Modification No. P00006. *See* Finding 33(iii). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(iv) Domestic Hot Water Supply and Return Piping Drain Valves: On MRA's recommendation "to facilitate future work," the SI/CR approved and MRA installed two shutoff drain valves on the domestic hot water supply and return piping. MRA alleges that it "understood" that a change order would be issued for this work. (R4, tab 45, Claim at 125) Although not specifically listed in Modification No. P00002, the Government's estimate for that modification shows that \$232.94 was included for the installation of those valves in the \$9,385 price increase allowed in that modification. *See* Finding 21(vii). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in Modification No. P00002.

(v) Direct Connection of 3-Inch Domestic Hot Water Supply from Converter No. 2: MRA recommended to the SI/CR, and the SI/CR approved, connecting the 3-inch domestic hot water supply line from Converter No. 2 directly to the 6-inch hot water supply line to the tempering valves, rather than to the 3-inch hot water supply line from Converter No. 1 as shown on the drawings. (R4, tab 45, Claim at 125-27) While the drawing arrangement may have been inadequate for the intended performance of the system, MRA has failed to prove the specific increased cost caused by this change.<sup>8</sup>

(vi) Rearrangement of Inlet/Outlet Port Piping at the Hot Water Converters: MRA contends that hot water converters with the tube-side, horizontal inlet/outlet port arrangement shown on the contract drawings were not commercially available. It alleges that a rearrangement of the piping was necessary to accommodate the vertical port arrangement on the converters which it installed. It has failed to show, however,

the specific increased cost of the vertical rearrangement over and above the cost of the horizontal arrangement shown on the contract drawing. (R4, tab 45, Claim at 127-30)

(vii) Reorientation of Tempering Valves: MRA alleges that limited space required a reorientation of the tempering valves and a rearrangement of the piping as shown on the drawings. While the drawings may have been deficient in this respect, MRA has failed to show the specific increased costs incurred for reorienting the valves and rearranging the piping. (R4, tab 45, Claim at 130-32)

(viii) Installation of 3-Inch Domestic Hot Water Piping to Zones 1, 2 and 3: MRA alleges that it incurred additional costs in the installation of the domestic hot water supply line to Zones 1, 2 and 3 for (a) providing zone isolation valves; (b) connecting the new 3-inch line to an existing 4-inch line; and (c) routing the line to avoid a light fixture not shown on the drawings (R4, tab 45, Claim at 132-37). MRA was compensated for the first two items in Modification No. P00002, and for the third item in Modification No. P00006. *See Findings 21(v), (vi), 33(iv)*. MRA has failed to prove the amount of any costs incurred for these items in excess of the amounts allowed in those modifications.

(ix) Removal of the Old Hot Water Converters: MRA alleges that it incurred additional cost in removing the old hot water converters because “accumulated . . . scale” made them heavier than expected and precluded their removal as planned using chainfalls from a roof joist (R4, tab 45, Claim at 137-39). There is no evidence of timely written notice to the contracting officer of this alleged differing site condition. There is also no credible evidence that the accumulation of scale was a differing site condition as defined by the contract. *See Findings 36, 39(ii), n. 7*. Moreover, the equipment and facilities needed to perform the work were within the risks assumed by MRA pursuant to the Site Investigation and Conditions Affecting the Work clause of the contract,<sup>9</sup> and MRA also has failed to prove the specific increased cost incurred in removing the old converters.

(x) Relocation of Converter By-Pass Valve: Due to piping congestion, the hot water converter by-pass valve had to be installed to the rear of, rather than alongside, the converters as shown in the drawings. Installation in the rear required additional elbows, flanges and welding. While the contract drawings may have been deficient in this respect, MRA has failed to show the specific amount by which the cost of the new arrangement exceeded the cost of the arrangement shown on the drawings. (R4, tab 3, tab 45, Claim at 139-45, tab 45, ex. 81)

(xi) Replacement of Gate Valve with Pipe Connection: MRA alleges that it incurred additional cost in providing a direct pipe connection in place of a gate valve shown on the drawing for the boiler hot water supply line to the converters (R4, tab 45, Claim at 145-47).

This change was included Modification No. P00006, but at no-cost. *See* Finding 33(v). MRA has failed to show on appeal the amount by which the cost of the direct connection exceeded the cost of the connection shown on the drawing.

(xii) Boiler Hot Water Return Piping Valve: MRA recommended that an existing valve specified for removal on the boiler hot water return line be retained and rotated to accommodate connection to a new line (R4, tab 45, Claim at 147-49). The Government concurred in this recommendation, and MRA was compensated for the change in Modification No. P00006. *See* Finding 33(vi). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(xiii) Rearrangement of Piping at Recirculation Pumps: MRA claims that it incurred additional costs for rearranging the piping at the recirculation pumps when it procured pumps with the suction and outlet ports reversed from the arrangement shown in the contract drawings (R4, tab 45, Claim at 150-53). MRA was compensated for this change in Modification No. P00006. *See* Finding 33(vii). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(xiv) Domestic Hot Water Piping to the Housing Office: MRA alleges that it incurred additional cost for installing domestic hot water piping from Building 4000 to the adjacent housing office (R4, tab 45 at 153-56). MRA was compensated for this work in Modification No. P00002. *See* Finding 21(iv). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(xv) Leaking Valves Interfering with the 18-19 October 1989 Work: MRA alleges that leaking valves on pipe systems in the pump room that were not part of the contract work interfered with the installation of the new piping systems during the outage on 18-19 October 1989 (R4, tab 45, Claim at 156-63). The Government compensated MRA for the cost impact of the leaks in Modification No. P00006. *See* Findings 23, 33(ix). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(xvi) Solder Specification: MRA alleges that it was unable to obtain a water-tight joint using the specified solder on the connection of the 3-inch to the 6-inch pipe in the domestic hot water supply line. The Government subsequently completed the joints and charged the cost to MRA as part of the \$2,797 deductive change item in Modification Nos. P00002 and P00003. (R4, tab 45, Claim at 163-66, tab 45, ex. 84 at 1) *See* Finding 21(viii). MRA alleges that “MRA personnel were advised by PWD personnel working at the site that the Navy did not use [the specified] solder to complete the connection . . .” (R4,



tab 45, Claim at 166) While hearsay evidence may be admissible in the sound discretion of the presiding judge under Board Rule 20(a), hearsay on hearsay from unnamed informants has little evidentiary weight. MRA did not call as a witness the person who allegedly provided this information. Without knowing why the specified solder was not used by the Government, if that in fact was the case, we cannot conclude that it was unsuitable for the specified use.

(xvii) Pressure Gages at the Base-Mounted Pumps: MRA alleges that (a) it provided four additional pressure gages for the boiler hot water supply and return lines at the base-mounted pumps as the result of a differing site condition; and (b) that it incurred additional labor cost as a result of leaking valves while installing the new gate valves at the pumps during the 18-19 October 1989 outage (R4, tab 45, Claim at 166-69). MRA was compensated for both items of additional work in Modification No. P00006. *See* Findings 33(viii), (ix). MRA has failed to prove the amounts of any cost it incurred for these items in excess of the amounts allowed in that modification.

(xviii) Hot Water Converter Frame: The contract drawing design of the frame for holding the hot water converters was not adequate for the weight of the specified new converters. MRA constructed the frame using larger members and more bracing than specified. (R4, tab 45, Claim at 169-74) MRA was compensated for this additional work in Modification No. P00006. *See* Finding 33(x). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(xix) Valve and Pipe Supports: MRA alleges that it provided valve supports not shown on the drawings and pipe supports where the new pipe runs deviated from the locations shown on the drawings (R4, tab 45, Claim at 174-76). MRA was compensated for this additional work in Modification No. P00006. *See* Finding 33(xi). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(xx) Thermowells: MRA claims the cost of providing ten thermowells for proper operation of the temperature controls in the domestic hot water system (R4, tab 45, Claim at 177-82). The Government compensated MRA in Modification P00002 for providing four thermowells and thermometers for this purpose. *See* Finding 21(ii). MRA has failed to prove the amount of any cost it incurred for those four thermowells in excess of the amount allowed in that modification, and there is no credible evidence that the Government is responsible for the other six for which claim is made

(xxi) Zone Bypass Valves: MRA claims that it incurred additional cost in replacing the zone by-pass valves because (a) the specifications and drawings did not indicate the

physical dimensions of the valve bodies being replaced; (b) the replacement work was in an area of congested piping; and (c) leaking water from piping that was not part of the contract work interfered with the valve replacement work during the 18 October 1989 outage (R4, tab 45, Claim at 182-84). On these items, we find that:

(a) The specifications and drawings did not specify, nor did the contract otherwise represent the valve body dimensions of the existing zone by-pass valves, nor did it specify the body dimensions for the new valves to be procured and installed by MRA (R4, tabs 1, 3). There is no credible evidence that the physical dimensions of the existing valves were a differing site condition as defined by the contract. *See Findings 36, 39(ii), n. 7.*

(b) MRA has not shown that the congested piping in the work area was not ascertainable from a site inspection, or otherwise outside the risks assumed by it under the Site Investigation and Conditions Affecting the Work clause of the contract. *See Finding 43(ix), n. 9.* The claim of a defective drawing or differing site condition is not proven. *See Findings 36, 39(ii), n. 7.*

(c) MRA was compensated in Modification No. P00006 for the additional work caused by the leaking pipes during the 18-19 October 1989 outage. *See Finding 33(ix).* MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(xxii) Floor Drains: MRA claims the alleged additional cost of removing two floor drains due to (a) the depth of the concrete floor; and (b) piping congestion in the area of the drains (R4, tab 45, Claim at 184-89). MRA was compensated for the depth of the concrete floor in Modification No. P00006. *See Finding 33(xii).* MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification. The pipe congestion in the area of the floor drain work was within the risks assumed by MRA under the Site Investigation and Conditions Affecting the Work clause of the contract. MRA has failed to show that the pipe congestion in the area of the specified work was not reasonably ascertainable from a site inspection. *See Finding 43(ix), n. 9.*

44. Painting and Wall Repair: MRA claims \$50,261 for five claim items in connection with the specified painting and wall repairs. The claimed amount is not broken down by, nor supported by detailed cost estimates for, the specific claim items. On the specific claim items, we find that:

(i) Boiler Room Roll-Up Doors: MRA alleges that (a) defective surface preparation specifications; and (b) Government use of the boiler room roll-up doors during the 24-hour drying period caused the paint to chip, spall and peel (R4, tab 45, Claim at 193-

96). The daily reports show that MRA began surface preparation of the boiler room roll-up doors on 20 July 1989, and that on the following day the SI/CR told MRA that the surface preparation was not satisfactory.<sup>10</sup> There is no record of any contemporaneous protest by MRA in the daily reports that the specified surface preparation procedures were inadequate or that Government personnel were using the doors during the 24-hour drying period. The allegations of defective specifications and Government interference with the work are not proven.

(ii) Additional Paint Required by Hot Weather: MRA alleges that it used 40 percent more paint than anticipated in the boiler and pump rooms because the high temperature in those rooms during the summer months caused the painted surfaces to absorb more paint (R4, tab 45, Claim at 196-97). There is no credible technical evidence in the record to support the allegation that hot weather caused a 40 percent increase in the amount of paint required. Moreover, the painting was delayed into the summer months because MRA did not start work on the site until 4 April 1989. MRA, not the Government, was responsible for that delay. *See Findings 4-11.*

(iii) Paint Chip Clean-Up: MRA alleges that on or about 20 June 1989, the SI/CR stopped the exterior painting work and demanded that MRA clean-up paint chips that were on the ground on one side of the building. MRA contends that the chips were not from its work, and that it believes they were “intentionally scattered . . . by one or more individuals intent on undermining MRA’s progress on the Contract.” (R4, tab 45, Claim at 197-200) Pursuant to the Cleaning Up clause of the contract, MRA was required to “at all times keep the work area . . . free from accumulations of waste materials.” Pursuant to paragraph 1.2 of contract specification section 01560 (“Environmental Protection”), MRA was required to “provide environmental protective measures to control pollution that develops during normal construction practice.” (R4, tab 1) There is no evidence of any contemporaneous protest by MRA to the contracting officer of the SI/CR’s directive to clean up the paint chips. On this record, we find that the paint chips were the result of MRA’s work, and that the clean-up was within its contractual responsibilities.

(iv) Repaint Smoke Stack and CMU Wall: MRA alleges that in the spring of 1990 it was required by the SI/CR to repaint a smoke stack and CMU wall that were stained by rain water runoff over which MRA had no control (R4, tab 45, Claim at 200-02). Pursuant to the Permits and Responsibilities clause of the contract, MRA was “responsible for all materials delivered and work performed until completion and acceptance of the entire work . . . .”

(v) Repair of Settlement Cracks and Holes in Interior Walls: MRA claims the cost of repairing settlement cracks in the exterior walls and holes in interior walls of Building

4000 (R4, tab 45, Claim at 202-08). MRA was compensated for this work in Modification No. P00006. *See* Findings 33(xiii), (xiv). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amounts allowed in that modification.

45. Pipe Insulation Repairs: MRA claims \$20,966 for repairing deteriorated insulation on existing pipe systems which it had not installed (R4, tab 45, Claim at 208-12). MRA was compensated for this work in Modification No. P00006. *See* Finding 33(xv). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

46. Electrical Work: MRA claims \$9,583 for (i) reconnecting a heating circuit that was not shown on the contract drawings; and (ii) providing temporary power for the air compressor, air dryer and recirculation pumps as a result of the allegedly defective solder specification (R4, tab 45, Claim at 213-19). The claimed amount is not broken down by, nor supported by detailed cost estimates for, the specific claim items. Our findings on those items are:

(i) MRA was compensated for reconnecting the heating circuit in Modification No. P00006. *See* Finding 33(xvi). MRA has failed to prove the amount of any cost it incurred for this item in excess of the amount allowed in that modification.

(ii) This item fails for lack of proof that the solder specification was defective. *See* Finding 43(xvi).

47. Project Supervision: MRA claims \$123,323 for “project supervision” allegedly caused by (i) “misapplication of the Davis-Bacon requirements;” (ii) delays and disruptions by the Government; and (iii) “loss of efficiency” (R4, tab 45, Claim at 219-26). MRA has failed to show any credible causal connection between misapplication of the Davis Bacon Act and its alleged project supervision costs. There is no credible evidence that the Government caused any delay, disruption or loss of efficiency on the contract other than that for which time and price adjustments were provided in bilateral Modification No. P00001, and unilateral Modification Nos. P00002, P00003 and P00006. The delay for which the time extension was granted in Modification No. P00003 was caused by MRA’s failure to install the designated piping systems in the pump room without leaks. That extension was not a compensable delay for MRA, but a waiver of the existing completion date and the setting of a new date by the Government at a reasonable time after the leaks in MRA’s work were repaired by the Government. *See* Findings 13-14, 21-22, 31-35.

48. Cost of Money: MRA claims \$106,366.68 for “Cost of Money.” MRA explains its calculation of this amount as follows: “The Contract price, as modified, was

increased from \$165,000.00 to \$192,292.00. Exhibit 13. The total cost of [sic] to MRA for the extra work and delays described herein was \$298,658.88 exclusive of profit. Thus MRA is entitled to recover the difference of \$106,366.88.” (R4, tab 45, Claim at 227) The claimed amount, as explained by MRA, is neither an interest calculation nor otherwise a measure of the cost of money.

49. Claim Preparation Costs: MRA claims \$50,991.45 for claim preparation costs “under the Equal Access to Justice Act” (R4, tab 45, Claim at 228). There is no documentation for the claimed amount (R4, tab 65 at 13). We find the claimed amount unproven.

### DECISION

Although broken down by the major segments of the work, MRA’s claim remains in substance a total cost claim in which the Government is alleged to have caused, or be otherwise responsible for, the difference between MRA’s alleged total costs of the job and the adjusted contract price through Modification No. P00002. To recover on this total cost claim, MRA must show (i) the impracticability of proving actual losses directly; (ii) the reasonableness of its original contract price; (iii) the reasonableness of its actual costs; and (iv) its own lack of responsibility for the added costs. *Servidone Construction Corporation v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991). MRA has failed to carry its burden of proof on any of these four requirements.

MRA submitted detailed bottom-up cost proposal/estimates for the actual direct and indirect costs incurred for six of the nine changes and differing site conditions that were the subject of Modification Nos. P00001 and P00002. *See* Findings 13, 20-23 above. There is no showing that it was impracticable for it to provide the same bottom-up cost estimation for all of the individual claim items asserted in its total cost claim.

MRA’s has failed to prove the reasonableness of its bid price. MRA had never previously performed a similar contract. Its bid price for the original contract work was 23 percent lower than the Government estimate and 31 percent below the only other bid. *See* Findings 1, 2. Moreover, its alleged incurred production labor overhead (PLO) rate was more than three times the PLO rate in the bid price, and its alleged incurred G&A rate was more than seven times the G&A rate in the bid price. There is no credible evidence of Government responsibility for these large differences between the bid and alleged incurred indirect cost rates. *See* Finding 27.

MRA has also failed to prove either the reasonableness of its alleged total incurred costs, or even that they were in fact incurred. MRA’s alleged incurred costs include

payments to its president and other officers and directors for work on the job at rates substantially in excess of the bid rates, the Davis-Bacon Act wage determination rates for the work being performed, and the rates allegedly paid to other employees performing the same work. MRA's alleged incurred costs also included \$23,437 as direct labor for "supervision" where the budget for the original contract price included only \$920.61 for supervision as a direct labor charge. *See* Finding 26. Moreover, in failing to provide the auditor, or the Board at hearing, verifiable source documentation to which its claimed costs could be traced and shown to have been in fact incurred, MRA has failed to prove that any of its alleged costs were in fact incurred. *See* Findings 28-31.

Finally, MRA has failed to show its own lack of responsibility for the claimed costs. We have considered the claim items individually and have found them unproven or otherwise without merit except to the extent allowed in Modification Nos. P00001, P00002, P00003 and P00006. The seven claim items for "contract formalities" all arise from MRA's failure to submit various documentation requirements within the time or in the detail specified by the contract. There is no credible evidence of any Government responsibility for MRA's failure in that regard. *See* Findings 4-11, 37. As to the three claim items for "misapplication of the Davis-Bacon requirements," we have no subject matter jurisdiction over those items. *See* Finding 38.

There are 56 distinct claim items in the eight priced claim sections for the technical areas of the work. MRA was compensated for 25 of those items in Modification Nos. P00001, P00002 and P00006 of the contract. *See* Findings 39(iv), 40(ii), (iii), (iv), 41(i), 43(i)(e), (iii), (iv), (viii)(a), (b), (c), (xii), (xiii), (xiv), (xv), (xvii)(a), (b), (xviii), (xix), (xx), (xxi)(c), (xxii)(a), 44(v), 45, and 46(i). One item was included in Modification No. P00006, but at no cost. *See* Finding 43(xi). Modification No. P00001 included an express acknowledgment by MRA that it was a full and complete settlement for the added boiler refractory repairs. *See* Findings 13, 14. As to the claim items compensated in unilateral Modification Nos. P00002 and P00006, and the no-cost item in Modification P00006, MRA has failed to prove the amount, if any, by which its costs for these specific items exceeded the amounts allowed in the modifications. *See* Findings 22, 34.

The remaining 30 technical claim items, that were not compensated in the contract modifications, are without merit. Nine technical claim items fail for lack of proof that the timely written notice required by paragraph (a) of the Differing Site Conditions clause was given, and for lack of proof that the alleged conditions were in fact differing site conditions. *See* Findings 39(ii), 40(i), 41(iii), 43(i)(a), (b), (c), (d), (ix), (xxi)(a). Nine technical claim items fail for lack of proof of the alleged defects in the specifications or drawings. *See* Findings 39(iii), 41(ii), 42(ii), (iii), 43(ii), (vi), (xvi), 44(i)(a), 46(ii).

Four technical claim items fail because they were within the risks assumed by MRA under the Site Inspection and Conditions Affecting the Work clause, the Cleaning Up clause, or the Permits and Responsibilities clause. *See* Findings 43(xxi)(b), (xxii)(b), 44(iii), (iv). Three technical claim items fail for lack of proof of the alleged Government interference with the work, or for lack of proof of the additional cost caused by the alleged interference. *See* Findings 42(iv), 44(i)(b), (ii). Three technical claim items, which might otherwise be valid, fail for lack of proof of the additional cost caused by the alleged defects in the specifications and drawings. *See* Findings 43(v), (vii), (x).

One technical claim item fails for lack of proof that the alleged change directed by the SI/CR was protested to, and ratified by, the OICC. Pursuant to paragraph (d) of the Inspection of Construction clause of the contract, and paragraphs 16 and 17 of specification section 01010, the SI/CR had no authority to direct any changes to the terms of the contract without the written authorization of the OICC acting as the contracting officer's authorized representative. *See* Finding 39(i). One technical claim item fails because the use of the rejected foreign-manufactured component was clearly prohibited by the Buy American Act – Construction Materials clause of the contract. *See* Finding 42(i).

MRA's claim item for additional supervision costs fails for lack of proof that the Government caused any of the claimed cost. *See* Finding 47. The claim item for "cost of money" is not in fact a claim for cost of money, or interest, but a reiteration of the total cost claim in a different amount. *See* Finding 48. The claim item for claim preparation costs "under the Equal Access to Justice Act" is unproven, and in any event premature. *See* Finding 49 and 5 U.S.C. § 504(a)(2)

The appeals are denied.

Dated: 16 January 2003

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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

NOTES

<sup>1</sup> Subsequently, the Government compensated MRA in unilateral Modification No. P00006 for the cost impact of the leaks using a Government cost estimate. *See* Finding 33(ix).

<sup>2</sup> Rounding errors on page 14 of R4, tab 65 should be corrected as follows: profit for electrical work should read \$1,049; total price for electrical work should read \$9,583; total price should read \$349,332; and claim preparation costs should read \$50,991. *See* R4, tab 45 at 20 and Claim at 218.

<sup>3</sup> Bid PLO rate:  $9,127.64 / (43,895.50 + 11,710.52)$ ;  
Bid G&A rate:  $4,030.87 / (43,895.50 + 35,029.75 + 11,710.52 + 9,127.64 + 44,769.51)$

<sup>4</sup> Incurred PLO rate:  $54,612 / (87,186 + 16,340)$   
Incurred G&A rate:  $76,308 / (87,186 + 68,270 + 16,340 + 54,612 + 137,266)$

<sup>5</sup> Modification No. P00006 (and MRA's claim at para. 5.5.2.2.2) incorrectly refer to the line in question as the domestic hot water return line. Contract drawing 4108179 clearly shows that the ambiguity in the specified pipe size (4 inches or 6 inches) was in the domestic hot water supply line running from the converters to the tempering valves. (R4, tab 3)



6 The issue of alleged improper classifications of the subcontract employees was referred to the DOL. A default judgment was entered in the DOL proceedings against MRA for failure to comply with a pre-hearing order and an order to show cause. (R4, tab 343)

7 The clause defines differing site conditions as “(1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.” FAR 52.236-2.

8 MRA states that it had to reconfigure the pipe and fittings on the exit stream from Converter No. 2 and that this required a “Tee” and three 90 degree elbows. MRA, however, does not show the cost of the material or labor for this configuration, nor credit the Government for the cost of the configuration shown on the drawing. (R4, tab 45, Claim at 126-27)

9 The clause states in relevant part: “(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to . . . (3) uncertainties of weather . . . and . . . (5) the character of equipment and facilities needed preliminary to and during work performance.” FAR 52.236-3.

10 MRA states in its claim that: “The SI/CR, Mr. Davis, blamed MRA for not adequately cleaning the door surfaces. However, Mr. Davis said nothing to MRA at the time he performed his original inspection” (R4, tab 45, Claim at 195-96). MRA’s daily report for 21 July 1989 includes the following comment by Mr. Davis dated 24 July 1989: “visited the site at 1035 and told Mr. Robinson that the surface preparation of the rollup doors was not satisfactory.” (Ex. A-4). We give more credence to the contemporaneous documentation in the regular course of business by Mr. Davis, than the statement in the claim made more than three years after the event.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 49457, 50866, Appeals of Management Resource Associates, Inc. , rendered in conformance with the Board's Charter.

Dated:

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