ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Aeronca, Inc.	)	ASBCA No. 51927
	)	
Under Contract No. F09603-96-C-0010	)	

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

This appeal involves a claim for equitable adjustment and breach damages related to the partial termination for convenience of the captioned contract. The appeal has been submitted for decision on the record pursuant to Rule 11. The record includes the depositions of 18 witnesses and several hundred documents submitted under Rule 4. Both entitlement and quantum are before us for decision. We deny the appeal.

FINDINGS OF FACT

1. The referenced contract involves the overhaul/repair of aft cowl doors (doors) of C-141 aircraft engines. The doors are part of the structure that forms the outer surface of each jet engine. At the time relevant to this appeal, one of the functions of the Warner Robins Air Logistics Center (WRALC) was to ensure that an adequate supply of serviceable doors was available. While limited repairs of the doors could be performed at various air bases in the field, non-field (or depot) level repairs were performed by Government civilian employees at the Technology and Industrial Support Directorate (TI) within WRALC. (AR4, tab 111 at 12-13, tab 112 at 13, 21, 101, tab 114 at 11, 13; tab 115 at 44; R4, tabs 5, 97)

2. During 1995, a critical shortage of the doors developed and in September, 1995, WRALC determined that an emergency requirement for 100 doors existed that exceeded

TI's capacity to timely repair them. WRALC sought to locate a commercial source for the required overflow maintenance work. (AR4, tabs 7, 19, 26, 99, tab 111 at 12-13, 25, 27-28, 192, tab 114 at 11; R4, tabs 5, 93, 97)

3. Aeronca, Inc. (Aeronca or appellant) was the most recent producer of new doors and was informally approached in August 1995 to determine its interest in performing the work. However, various Government civilian employees of TI and their union opposed contracting with Aeronca after learning that the Government was considering that course of action. During a visit to WRALC, Aeronca employees were denied access to the TI facilities by TI's shop foreman. That initial attempt to tour the facility had not been properly coordinated within WRALC and appellant was authorized to visit TI's facilities later the same day. (AR4, tabs 3, 7, 23, 113, 115, tab 111 at 39, 60-62; R4, tab 55, tab 73 at 32-33, tab 74 at 32-33, tab 75 at 28-31)

4. Aeronca also requested additional information concerning the condition of the doors to be repaired from WRALC non procurement personnel. On or about 25 September 1995, Lieutenant Colonel Carter furnished appellant with a "computed material requirement" list (referred to by the parties as the "hit list") which contained the names and national stock numbers of door components and TI historical repair and replacement experience. Lt. Col. Carter expressly told appellant that the information on the "hit list" should not be taken as "gospel" and that Aeronca could expect that any doors that it might repair would likely be in worse condition than what might be implied by any data on the list. Aeronca knew that Lt. Col. Carter had no contracting authority and that the furnishing of the "hit list" had not been authorized by procurement officials. The "hit list" was not incorporated into, attached to or otherwise noted in the subsequent solicitation or contract. (AR4, tab 111 at 67-68; R4, tabs 1-3, 6, 27-28, 53, 56-57, tab 75 at 43)

5. On 13 October 1995, the Procuring Contracting Officer (PCO) at WRALC requested a proposal from appellant for the disassembly, repair and reassembly of 100 doors. The request solicited a firm fixed unit price, or alternatively a not-to-exceed unit price. The request further stated that a letter contract was anticipated with definitization 180 days after award. (AR4, tab 10)

6. On 19 October 1995, appellant proposed an NTE unit price of $67,722 per door, subject to changes to the Statement of Work and the following condition (hereinafter the variance reservation): "In the event that the repair requirements are significantly different than the expected replacement rate as provided in the data from [WRALC], Aeronca will have the right to submit a claim for over and above requirements and WRALC agrees to negotiate in good faith to establish the additional requirement." (R4, tab 1 at attach. A)

7. Aeronca proposed inclusion of the variance reservation because it "did not know what shape all of the doors would be in when they arrived." (R4, tab 2). The PCO refused to accept the variance reservation and asked appellant to delete it. She requested that

appellant "take into account the worse case scenario" in pricing the work and assume the risk of any variance between the actual work and any preaward information contained in the "hit list" provided by Lt. Col. Carter (*Id*; AR4, tab 114 at 29-31).

8. On 23 October 1995, Aeronca submitted a revised proposal deleting the variance reservation and increasing its proposed NTE price to $72,500 per door, plus $224,407 for tooling, tests and reports. The total NTE price proposed was $7,472,407. (R4, tab3) TI's cost per unit was approximately $44,000 to $50,000 (AR4, tab 38; R4, tab 5)

9. Effective 1 November 1995, the parties entered into a letter contract for disassembly, repair and reassembly of 100 doors. The FAR 52.216-24 LIMITATION OF GOVERNMENT LIABILITY (APR 1984) clause of the contract set the maximum authorized contractor expenditure and maximum Government liability at $3,726,203.50 (50 percent of appellant's proposed total NTE price). The FAR 52.216-25 CONTRACT DEFINITIZATION (APR 1984) clause set 26 April 1996 as the "target date for definitization" of firm-fixed prices and delivery schedules. Paragraph (c) of the clause provided that if the definitization target date was not met, "the Contractor shall proceed with completion of the contract, subject only to the Limitation of Government Liability clause." The letter contract also included, among other provisions, the FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) clause (hereinafter the TFC clause). (R4, tab 6)

10. On 7 December 1995, appellant submitted its first definitization proposal following award of the letter contract. This proposal offered a firm fixed unit price of $74,597 for disassembly, repair and reassembly of 100 doors plus $12,636 for tests and inspection reports. Notwithstanding the previous advice by the Government that the "hit list" should not be relied upon for pricing the work (*see* findings 4 and 7 above), the cost and pricing data section of the proposal stated that: "The estimate for replacement of parts other than the bonded panel assemblies was based on the ' hit' list provided by WRALC." (R4, tab 8 at 13) The same statement also appeared in the cost and pricing data section of a revised definitization proposal submitted by appellant on 5 January 1996 (R4, tab 10 at 5).

11. During the latter part of 1995, TI substantially exceeded its goals for repairing the doors. As of early 1996, the Government's critical need for the doors was also decreasing causing the Government to consider terminating appellant's contract. TI's production goals for the doors were also reduced as a consequence of the declining need for the doors. Beginning in approximately February 1996, the Government requested information from Aeronca concerning the likely costs of termination. During subsequent negotiations definitizing the letter contract, appellant was aware of the termination possibility. (AR4 tabs 15, 31, 49, 51, tab 111 at 175-78, 205-06, 232, tab 112 at 31, 70 tab 114 at 47-50, 79; R4, tabs 15, 19, 25, 77, 93, 97)

12. On 26 March 1996, Aeronca submitted a third definitization proposal. This proposal made no reference to the hit list as a basis for the price. To the contrary, it indicated that the proposed price was based on "our experience with the doors we have disassembled." The proposed unit price of $74,145 provided for 55 labor hours for disassembly and 585 labor hours for repair/reassembly. (R4, tab 13)

13. On or about 1 April 1996, the Government requested Aeronca to provide data on the impact of reducing the contract quantity to 50 units. On that date appellant, *inter alia*, transmitted a total "rough order of magnitude" estimate of $1,288,241 if 50 doors were terminated. The "major impact contributors" were listed as: "expended labor on units and details beyond 50"; "materials purchased beyond 50 units"; "Tooling amortization over last 50 units"; "Additional documentation required to ship disassembled doors and provide material certification for raw materials"; and, "Learning curve now spread over 50 units rather than 100." Although a one page breakdown of an 85% learning curve was attached by appellant, there is no detailed explanation as to all assumptions and details used in computing the impact. However, the attachment indicates that appellant estimated that 599 hours would be expended on average for repair/reassembly of the first 50 units and 571 hours on average for the second 50 units. Appellant's estimated impact "hours assertable for learning curve" was 1,419 hours if 50 units were terminated. (R4, tab 15)

14. On or about 17 April 1996, the Government submitted a counter offer to Aeronca of $60,152 per door for disassembly/reassembly (inclusive of amortized tooling costs) plus $14,065 for testing. The counter offer proposed disassembly hours of 45 "based on actuals to date with learning applied to balance" and 499.77 hours per door for repair/reassembly operations. (R4, tab 17)

15. On 26 April 1996, following completion of negotiations, the parties reached final agreement on prices for definitization of the contract. At the Government's behest given the possibility of termination, agreement was reached on separate prices for disassembly of $8,440 and repair/reassembly of $59,825 for each of the 100 units. Appellant's proposed price for qualification testing was $15,052. (R4, tab 20) The Government's invitation to separate the disassembly work permitted more rapid payment for that work in the event of termination (AR4, tab 113 at 148, tab 114 at 55-56, 75; R4, tab 90). The negotiated profit percentage was 12.1% (R4, tab 79 at 57). A Government memorandum indicates that the Government considered learning curve information based on data from appellant's original manufacturing contract in developing the Government's price negotiation objectives for "one small part" of the work (R4, tab 96; AR4, tab 97).

16. As of the time of the agreement definitizing prices, appellant had completed disassembly work on 92 of the 100 doors. Disassembly of the remaining units was completed by 6 May 1996. (R4, tab 90) As part of the disassembly work, appellant prepared "Condition Found" reports which described repairs needed for each door as determined by appellant after it was disassembled. In addition, Aeronca had begun

repair/reassembly on 20 of the doors. These 20 doors had been selected by Aeronca. (R4, tab 76 at 79, tabs 86, 88, 90, 94; AR4 tab 114 at 74, 83-84, tab 117 at 114-15)

17. On 6 May 1996, Aeronca made a slide show presentation to the Government. As of that date, appellant had completed the work associated with disassembly on all 100 doors. Aeronca indicated at the presentation that, "Engineering review of each door has been completed. The reassemble process of approximately 20 doors has begun." (R4 tab 76 at 26, 32-33, and ex. 1; tab 90)

18. As of early May 1996, the Government had not made a definite assessment and determination as to the number of doors that it needed Aeronca to repair and reassemble. The Government considered various alternative scenarios including reducing the requirement and terminating for convenience. With respect to termination, the Government evaluated: the potential expenses associated with a complete or partial termination; the relative costs of repairs if performed by TI and appellant; the value to the Government of maintaining appellant as an alternative commercial source of repair; certain technical advantages offered by Aeronca; the precipitate decline in the need for the doors from approximately 190 per quarter from June 1994 through September 1995 to 160 and 100 in the quarters ending December 1995 and March 1996 respectively; and TI's markedly increased production of doors from an average of 64 doors per quarter in the five quarters ending in June 1995 to an average of 108 doors per quarter in the three quarters ending in March 1996. (AR4, tab 73, tab 112 at 31, 70, tab 114 at 47; R4, tabs 93, 97).

19. On 13 May 1996, after obtaining additional facts concerning potential costs of termination, the Executive Director of WRALC determined that it would be in the Government's best interest to terminate the repair/reassembly work on the 80 doors as to which Aeronca had not commenced reassembly (R4, tabs 78-79, 95). At 1411 hrs. on that date, the CO transmitted a letter to appellant by facsimile notifying Aeronca that a contract modification would be issued in the future partially terminating the contract for convenience. The letter directed appellant "Effective immediately …[to] terminate all actions necessary for the re-assembly of eighty doors." (R4, tab 23) There is no evidence that the Executive Director or the CO harbored any malice toward appellant, acted in bad faith, or attempted to harm appellant in deciding that termination was in the Government' s interest (R4, tabs 88, 95).

20. Also on 13 May 1996, approximately one hour after issuing the above notice to appellant, the CO transmitted proposed contract Modification No. P00001 (Mod P1) to Aeronca by facsimile. The stated purpose of Mod P1 was "to partially definitize by establishing" the CLINs set forth therein. The definitization pertained to CLINs 0001AA and 0002AA for disassembly of 100 (left-hand and right-hand) doors. The firm fixed unit price of $8,440 proposed was that agreed to by the parties on 26 April 1996. Also set forth in Mod P1, at prices "to be negotiated," were CLINS 0001AB and 0002AB for repair and reassembly of 100 doors. The term reassembly includes the process of repairing and is

also variously referred to by the parties and hereinafter as refurbishment or overhaul of the doors. Aeronca signed Mod P1 as proposed on 13 May 1996, followed by the CO on 14 May 1996. (R4, tab 27) On or about 17 May 1996, the Government "accepted the completed performance of Aeronca regarding the disassembly of 100 cowl doors." (R4, tab 86)

21. On 17 June 1996, the parties entered into Modification No. PZ001 (Mod PZ1). The bilateral modification states at the outset that "[b]y issuance of this document, [the referenced] letter contract …is both definitized and partially terminated." In § B ("Supplies or Services and Prices/Costs") of Mod PZ1, CLINs 0001AA and 0002AA for disassembly of 100 doors were carried over at the existing unit price of $8,440 previously agreed in Mod P1. New CLINs 0001AC and 002AC, for "termination of reassembly" of 80 doors were established at prices "to be negotiated by the [termination contracting officer]." The CLINs for repair and reassembly of the doors (CLINs 0001AB and 0002AB), which were unpriced in Mod P1, were priced at $59,825 for each of the remaining 20 doors as agreed to on 26 April 1996. (R4, tab 28)

22. Repair and reassembly of the first of the 20 doors was completed by appellant on or about 26 July 1996 and the work as to all units was completed and accepted by the Government on or about 9 December 1996 (R4, tab 90 at 3-4).

23. The 80 doors that were disassembled but not repaired/reassembled by Aeronca were not later repaired upon their return to WRALC by TI or any other Government entity or commercial contractor (R4, tab 90 at 3; AR4, tab 116 at 73-75).

24. On 14 February 1997, Aeronca submitted a termination settlement proposal (TSP) with respect to the terminated portion of the work. Among other things, appellant claimed $205,000 for "[l]earning curve cost allowance necessary to achieve 19.66% total overall gross margin." (R4, tab 30) The Defense Contract Management Agency (DCMA) was authorized to negotiate matters relevant to the termination and its settlement as well as any equitable adjustment relative to the continued portion of the contract (R4, tab 29).

25. On 24 February 1997, appellant submitted a request for an equitable adjustment (REA) in the amount of $1,283,116 pertaining to the unterminated quantity "for unrecoverable fixed manufacturing, general, administrative overhead caused by partial termination for convenience." The amount sought reflects the difference between appellant's "budgeted" direct labor hours (240,730) less its "actual" hours (207,660) for 1996 multiplied by its claimed manufacturing overhead rate ($31.31 per hour) and its general/administrative overhead (G&A) rate ($7.49 per hour) for 1996. (R4, tab 31) As explained by appellant's Chief Financial Officer, the calculation reflected Aeronca' s belief that a "shortfall of direct labor hours leading to alleged unabsorbed fixed overhead" occurred as a consequence of the partial termination. (R4, tab 79 at 27)

26. By letter dated 22 April 1997, Aeronca, *inter alia*, increased the amount sought in its TSP for a learning curve allowance from $205,000 to $455,588, basing the claimed increase on revised computations of the amount "necessary to bring program to gross margin of 19.66%" (R4, tab 32).

27. The Defense Contract Audit Agency (DCAA) issued an audit report on the TSP on 9 May 1997. DCAA questioned the allowance sought for learning curve expenses, among other things, on the basis that it represented lost anticipatory profit and suggested that to the extent that any learning curve expenses were incurred, they were properly for consideration as part of any equitable adjustment of the price of the unterminated units. (R4, tab 33)

28. In response to the DCAA audit comments regarding the learning curve, appellant in a letter to the Government dated 2 June 1997 asserted that the amount sought was for "additional costs incurred to only repair 20 doors as opposed to …100" and was not a claim for lost profit. Appellant indicated that if learning curve costs were not recoverable as part of the termination settlement, it would amend its REA to include those costs. (R4, tab 34)

29. On 20 June 1997, the DCAA issued an audit report on appellant's REA (R4, tab 36) and, following appellant's response of 30 July 1997 (R4, tab 38), a further audit report dated 29 September 1997 (R4, tab 39). Based on the results of these DCAA audits, we find that appellant incurred no additional overhead expenses allocable to the contract. To the extent that appellant did not expend its "budgeted" hours in performance of the contract, it was able to obtain new substitute work and increase/accelerate the labor hours expended on other contracts. The overhead allocable to the replaced/substituted and accelerated work more than offset any overhead that would have been allocable to the terminated work. In addition, DCAA concluded and we find that that the actual indirect rates experienced by appellant in 1996 did not materially differ from those proposed and negotiated and did not increase as a result of the partial termination.[1] The audits also noted that appellant purposely underbid its estimate of the total number of labor hours (67,141) by 8,171 hours in reaching the negotiated total of 58,970 hours. (R4, tabs 37, 39, 80, AR4, tab 113 at ex. 8)

30. On 1 October 1997, appellant submitted a third and "final calculation" of its allegedly unrecovered learning curve costs in the revised amount of $364,161. This computation was based again on the prior "gross margin" (of 19.66%) analyses and assumptions. (R4, tab 40) Appellant's Chief Financial Officer in his deposition later conceded that this and prior "gross margin" analyses could not properly be considered as a learning curve computation (R4 tab 79 at 33, 45).

31. The Termination Contracting Officer (TCO) and appellant executed Modification No. A00001 (Mod A1) in early October 1997 in settlement of Aeronca's

TSP in the gross settlement amount of $1,038,325 with a net payment to appellant of $166,920 after deduction of unliquidated progress and partial payments. Modification No. A00001 states that payment of the above amount constituted "payment in full and complete settlement of the amount due the contractor for the terminated portion of the contract" but further provided that: "nothing in this agreement shall impair or affect any covenants, terms, or conditions of the contract relating to the completed or continued portion of this contract." (R4, tab 41) During negotiations, the parties elected to defer resolution of the learning curve issues and agreed that the alleged loss of learning costs "will be recalculated and reconsidered as part of a separate claim for equitable price adjustment." (R4, tab 85 at 7)

32. On 31 October 1997, appellant responded to the Government's request for extensive information and explanations regarding the alleged learning curve. The explanation offered by the contractor was based on development of a "gross cost percentage" of 79.35% (the inverse of a revised "gross profit percentage" of 20.65% rather than 19.66%). The contractor determined what its "gross costs" should have been using the 79.35% rate multiplied by "net actual revenue" and then subtracted the result from the "net actual program gross costs" (alleged to be $2,697,556) to derive "total unrecovered costs." According to the contractor's computation, the "total unrecovered costs consisted of two elements, *i.e.*, "unrecovered costs attributed to tooling" in the amount of $196,300 and "unrecovered costs due to learning curve costs" totaling $351,770. (R4, tab 45, exs. E-F)

33. In early November 1997, the Government analyzed appellant's 31 October 1997 letter and noted, with respect to the "learning curve" issue, that there was no understanding regarding any "gross profit percentage." This analysis also emphasized that the contractor had entered into a firm fixed-price contract placing the risk on it for any variations from manufacturing cost estimates made by appellant during negotiations, including those attributable to underestimates, mismanagement and other factors for which the Government was not responsible during performance. (R4, tab 50) There is no contemporaneous documentation in the record supporting the claimed "gross profit" agreement. The term "gross margin" is not defined and there was no agreement or understanding between the parties that appellant was entitled to the 19.66% or any other percentage rate (AR4, tab 114 at 80).

34. On 24 December 1997, DCAA issued an audit report evaluating appellant' s learning curve and unrecovered tooling cost calculations. With respect to the learning curve computation, DCAA emphasized many of the same risk factors noted in the Government's November, 1997 analysis that were assigned to appellant under the firm fixed-price contract. The audit also noted that appellant's calculation showed no "learning" improvement curve at all over the quantity of the 20 remaining units and that the calculation simply represented an attempt to recover "lost profit" premised on an undocumented "gross profit" agreement. Regarding appellant's unrecovered tooling cost

calculation, DCAA found that the tooling costs of $325,000 were included in the agreed disassembly cost and fully amortized and recovered in the price previously paid by the Government for the disassembly of all of the 100 doors. (R4, tab 49)

35. Prior to 15 May 1998, there were three primary issues that had been identified by appellant as entitling it to an equitable adjustment of the unit price for the 20 remaining doors: unabsorbed overhead costs, learning curve costs, and unrecovered tooling costs (R4, tabs 45, 50-52).

36. By letter dated 15 May 1998, appellant submitted a certified claim to the TCO in the total amount of $1,566,033 plus interest and requested a final decision. The total claimed was comprised of two components: $1,152,990 for additional labor (the labor hour claim) on the 20 doors and $413,043 for profit on the terminated work (the profit claim). Aeronca expressly withdrew any claim for unrecovered tooling costs.[2] (R4, tab 53). No attempt was made in the claim to reconcile previously asserted theories, bases for entitlement and associated dollar and labor hour amounts with those set forth in the claim.

37. The additional labor hour claim was a modified total cost claim calculated as follows:

(a) Alleged total manufacturing labor hours incurred on contract……31,979
(b) Less paid disassembly hours for all units……4,800
(c) Less paid repair/reassembly hours in Modification No. PZ0001….4,893
(d) Less bid hours for repair/reassembly of 20 units (540 x 20)……10,800
(e) Total hours for loss of learning and "hit list" [(a)-(b)-(c)-(d)]…..11,486
(f) Less contractor-responsible rework hours……232
(g) Plus engineering hours for missing technical orders……1,088
(h) Total claimed hours……12,342
(i) Total additional labor hour claim (12,343 x $93.42)……$1,152,990

(R4, tab 53, 70 at 5-7)

38. The labor hour claim was computed by multiplying an hourly labor cost (marked up for indirect costs and 12% profit) of $93.42 by appellant's "total claimable hours" alleged to be 12,342. The amount of 12,342 hours was derived by first determining the alleged total manufacturing labor hours of 31,979 and subtracting from that total the labor hours that Aeronca considered had previously been recovered from the Government, *i.e*., 9,693 hours "for which we have been paid" (R4, tab 70 at 6), pursuant to payments of the contract price for the disassembled units (4,800 hours) and pursuant to Mod A1 in settlement of appellant's TSP (4,893 hours). As to the claimed 22,286 excess or overrun hours, appellant reasoned that these costs represented the actual total hours for reassembly of the 20 remaining units and that the average time expended on each of the units was, therefore, 1,114 hours. Aeronca contended that since its proposal contemplated only 540

hours per unit for reassembly it was entitled to compensation for 11,486 (sic) extra hours (20 x 574 = 11,480). The difference between the latter 11,486 hours and the total of 12,342 hours claimed is attributed by appellant to 1,088 increased hours caused by the Air Force's alleged failure "to provide [technical data] as required and because of obsolete Mil Specs" (described further below as the technical information claim) minus 232 hours (approximately 1.88% of the total claimed overrun) as an adjustment or "modification" of the total hours to reflect additional "rework" which the contractor conceded was its responsibility. The labor hour claim was supported by allegations that the following three factors caused the increased overrun hours expended on the contract:

i. Additional unrecovered "learning curve" expenses were incurred during reassembly because of the termination of 80 of the original 100 doors. No information from which a learning curve could be determined was presented in the claim and no specific number of hours were attributed by appellant to this alleged cause of the overrun. The claim acknowledged that repairs were unique to each door because the doors were subjected to different operational histories. The claim abandoned the "gross margin percentage" approach that had prior to this time had been advanced as the basis for recovery.

ii. The condition of the doors was worse than indicated by the "hit list." Variants of this contention that can be discerned in the claim are that the Government negligently estimated or misrepresented the amount of work and/or withheld knowledge concerning the actual condition of the doors. No specific number of hours were attributed to this factor.

iii. The lack of timely-provided technical information that allegedly caused an increase of 1,088 hours expended on the contract.

Appellant also claimed for the first time that the contract's fixed unit price for reassembly was not binding either because: 1. the Government engaged in bad faith negotiations during definitization with knowledge that the contract would be terminated; or, 2. the contract was improperly terminated before it was definitized. (R4, tab 53)

39. The profit claim seeks 12% anticipatory profit on the terminated work. Appellant derived the $413,043 amount of the claim by multiplying the negotiated profit rate of 12% by $3,442,030. The rationale for using the $3,442,030 amount is not stated in the claim. As support for the recovery of the lost profit, appellant alleges that the Government acted in bad faith and/or abused its discretion in terminating the contract because: (i) the Air Force was considering termination before the contract was definitized; (ii) the Air Force preferred that TI perform the work; and, (iii) the Air Force planned to terminate the contract at the same time that it was definitized. (R4, tab 3)

40. On 4 September 1998, DCAA issued an audit report on the certified claim. The following opinions, among others, were contained within the audit report: (i) labor charges

were posted incorrectly to jobs, labor reports and backup data were incomplete or missing, and appellant's accounting records were unreliable; (ii) appellant's backup information allegedly supporting the 1,088 engineering hours claimed for the lack of timely technical information did not show when these costs were incurred and whether they were paid as part of the disassembly work or pursuant to the termination settlement; (iii) disassembly hours were included in the claim and the total amount deducted for disassembly in computing the claimed hours for the equitable adjustment was inaccurate; (iv) hours that had been included and paid in the termination settlement were included in the claim; (v) appellant did not deduct hours for the qualification testing for which it had previously received payment; (vi) tooling hours were included which had been previously paid as part of the payments for disassembly; (vii) the estimated "rework" cost of 232 hours "modifying" the total hours claimed were unsupported. During the audit, appellant reduced its alleged total incurred manufacturing and engineering labor hours from 33,067 to 29,947. This reduced its claimed hours from 12,342 to 9,202. Assuming that these fundamental problems with appellant's accounting data were disregarded and assuming that entitlement to an equitable adjustment was otherwise established, the auditors concluded that appellant may have incurred 6,872 "total add' l hours" rather than the 12,342 hours claimed (R4, tabs 61, 67). Based on the inadequacies cited in the audit report, inconsistencies in the various presentations supporting the REA and other evidence of record, we conclude that appellant's computation of the direct labor hours supporting its claim is unreliable. (R4, tabs 33, 36, 61, tab 72 at 17, 23-24, 35). We have reviewed the generalized descriptions of appellant's accounting system in the record (*e.g.*, R4, tabs 70, 72) and conclude that these descriptions do not offer explanations that establish the reliability of the hourly computations.

41. With respect to the technical information claim there is no evidence as to precisely why the alleged additional engineering hours were incurred or what specific delays in providing technical data occurred. Appellant has failed to explain precisely what data was missing, during what period it was missing, who was at fault, the increased number of engineering hours incurred as a result of the particular missing or defective data and/or how it adversely impacted or delayed appellant's performance. To the extent we are cited by appellant to documentation in the record pertaining to the issue, the documentation for the most part either predates price definitization or was prepared long after the termination (R4, tabs 7, 58; AR4, tabs 12-13, 18). We are unable to determine what increased costs, if any, occurred prior to completion of negotiations definitizing the contract price, prior to completion of disassembly operations, and/or prior to execution of Mod A1 resolving the termination settlement. There is no explanation as to how appellant negotiated or determined its contract prices at the time of definitization without pertinent technical information, if it in fact lacked relevant information. There is no contemporaneous evidence or notice supporting appellant's contentions that incomplete or delayed transmission to appellant of technical information increased the costs of appellant's repair/reassembly operations. There is no evidence that the Government failed to cooperate timely and fully with appellant in attempting to resolve any problems created by

lack of technical information. To the extent that any technical information may have been delayed or defective, the evidence does not support a conclusion that appellant was not able to "work around" the problem without delays or inefficiencies.

42. With respect to the alleged inaccuracy of the "hit list," Aeronca and TI did not repair the doors in the same manner. The Government replaced parts that appellant either found to be serviceable or chose to repair rather than replace, while Aeronca may have replaced parts that TI elected to repair. Although neither approach was incorrect provided a serviceable door was delivered, the respective methodologies and repair/overhaul decisions of TI and appellant are not identical or necessarily comparable. (R4, tab 62)

43. No learning curve information was provided in the certified claim in support of the alleged loss of learning due to the termination of the 80 units (R4, tab 53). Nor was it provided in appellant's April 2001 response to the Government's discovery requests for the information (R4, tab 70). On the final date for supplementation of the record, 21 November 2001, the Board received affidavits by Aeronca's project manager and estimator purporting to support its loss of learning claim.[3] (AR4, tabs 108-09) The estimator's affidavit stated that Aeronca had an actual 88 percent learning curve on its prior production contract for 193 doors, and then opined that "[a] 70% learning curve is more indicative for the 20 doors repaired and reassembled [under the repair contract]." Although the estimator stated that he prepared appellant's price proposals, he did not state that he used a 70 percent learning curve, or any learning curve, in preparing those proposals for the repair contract. (AR4, tab 109)

44. Apart from the estimator's opinion, there is no evidence to support a 70 percent learning curve for the repair/reassembly work either as a factor in appellant' s proposals for the definitized price, or as the actually experienced learning curve on the 20 units which were repaired and reassembled, or as an historically established learning curve for work of the type specified. Moreover, the claimed 70 percent learning curve is inconsistent with appellant's submission of 1 April 1996 indicating an 85 percent learning curve applicable to that work. *See* Finding 13 above. It is also inconsistent with the evidence that the actual learning curve experienced on the previous production contract for 193 units was 88 percent (R4, tab 14 at 2), and with the production manager's affidavit, indicating that, unlike the production contract, the repair/reassembly work involved at most only 80 percent repetitive work subject to learning improvement (AR4, tab 108). On this record, appellant's loss of learning claim is not proven in the claimed amount or in any other amount.

45. Appellant' s claim was denied in its entirety by the contracting officer in a final decision dated 27 October 1998. With respect to anticipatory profit, the contracting officer noted that portion of the claim pertained to the terminated quantity and denied recovery, in part, because it was "completely settled" by Mod A1. (R4, tab 69) This timely appeal followed by letter of 28 December 1998.

DECISION

I. ENTITLEMENT TO AN EQUITABLE ADJUSTMENT

The claim arose out of the partial termination of the referenced contract for convenience. Aeronca entered into a settlement with respect to the terminated portion of the contract. This claim ostensibly relates to the increased costs associated with the post termination work, *i.e*., the continued portion of the contract involving reassembly of the remaining 20 doors. However, certain elements of the claim do not pertain directly and solely to the continued portion of the contract. Instead, the claim essentially catalogues alleged problems experienced by appellant on the project from its inception. Appellant seeks to recover its "total costs" (with minor modification) allegedly incurred in the performance of the entire contract less amounts previously paid, grounding entitlement to recovery on the presence of lost learning benefits and perceived Government faults and maladministration of the contract.

It is axiomatic that the contractor must establish liability, causation and resultant injury to receive an equitable adjustment. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994); *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965). In the case of a partial termination, a contractor may request an equitable adjustment of the continued portion of a contract and bears the burden of proving the amount of that adjustment. *R.G. Robbins & Co., Inc.*, ASBCA No. 27516, 83-1 BCA ¶ 16,420 at 81,692; *E.W. Eldridge, Inc.*, ENGBCA No. 4879, 93-1 BCA ¶ 25,355 at 126,289. Here, appellant has failed to prove that it is entitled to further relief.

Appellant asserts three primary bases for entitlement: 1. the Government misrepresented or negligently estimated the extent of required repairs to the doors by furnishing an inaccurate "hit list" to appellant; 2. required technical information was missing, defective and/or not timely furnished to appellant; and, 3. anticipated labor learning benefits were not realized because of the reduced quantity of doors to be repaired and reassembled following the partial termination. We address each of these contentions in turn.

A. The "Hit List"

Appellant's contentions regarding the "hit list" lack merit. The hit list was not incorporated into the contract. It was not provided to appellant by the contracting officer or any authorized representative of the CO. It was not represented to be an accurate estimate. In fact it was expressly and pointedly disowned by the contracting officer. Appellant was specifically instructed that the "hit list" could not be taken as "gospel" and that the doors it would be receiving would likely be in worse shape than implied by the hit list. Finally, the risk of variances was specifically discussed by the parties, assigned to appellant during

negotiations with appellant knowingly assuming that risk. It would be improper, in the context of pricing an equitable adjustment to revise the allocation of risks intentionally negotiated by the parties.

Any reliance on the "hit list" was unreasonable for other reasons as well. Appellant had the best and most pertinent information concerning the condition of the 20 unterminated doors at its disposal prior to price definitization. Not only had it already dismantled all 100 doors, completed its "engineering review," and prepared "Condition Found" reports for all disassembled doors, but work was proceeding on reassembly of the 20 unterminated units which Aeronca itself had selected. The price that was agreed to at the time of definitization, seven months after appellant had received the "hit list," presumably took any inferior condition of the doors into consideration. Appellant had greater and more current knowledge than did the Government concerning the specific condition of the 20 doors in dispute. Appellant is not entitled to an upward adjustment of the definitized price that it negotiated for that reason alone.

We have also found that TI's repair/replacement history for door parts is not identical or necessarily comparable to that experienced by appellant because different methods were used. To the extent the methodologies may have been comparable, there is no evidence establishing the specific nature, extent and labor impact of any discrepancies or detailed contrasting of the hit list with conditions found accompanied by explanations as to why any variances increased appellant's costs.

For similar reasons, appellant's alternative theory that the Government negligently estimated its requirements must be denied.

B. Technical Information

In its certified claim, appellant alleges that missing, untimely transmitted or deficient technical information caused it to incur an additional 1,088 labor hours. In our findings, we have detailed appellant's failure to prove that missing or deficient technical information increased its costs or delayed its performance (finding 41). In this regard, the general supposition that missing or defective technical information has potential disruptive effects is not enough to establish entitlement. There must be objective proof of the specific adverse impacts on appellant's production. In particular, here we are unable to determine precisely when alleged impacts occurred including whether the problems arose and were resolved prior to the partial termination and contract definitization. To the extent that impacts predated the partial termination, the evidence does not permit us to conclude that they were not given due consideration in the price definitization process or the termination settlement. Regardless, appellant has failed to prove this claim for the reasons found.

C. Learning Curve

Appellant's "learning curve" allegations have undergone a bewildering evolution. The claim is traceable back to Aeronca's original assertion that an unproved 19.66% "gross margin" rate should be applied in computing the equitable adjustment. The certified claim contained no detail, support or proof of any learning curve. In its final submission prior to closing the record, appellant for the first time claims that it expended over 3,000 labor hours on the first unit when only 540 labor hours per unit were included in the definitized price.

There is no persuasive evidence of the incurrence or amount of compensable "unamortized" labor learning costs. There is no proof of a clear causal nexus between the reduction in quantity and any increased costs. Data, information and analyses traditionally associated with proof of labor learning have not been introduced. *E.g.*, *Sierracin/Sylmar*, ASBCA Nos. 27531 *et. al.*, 85-1 BCA ¶ 17,875; *Celesco Industries, Inc.*, ASBCA No. 21928, 81-2 BCA ¶ 15,260 (and cases cited). Appellant offers no explanation of general learning curve theory much less its application to this case. There is no comprehensive description of the repair processes, techniques, flow and operational methods that could be expected to benefit from progressive improvement in efficiency leading to a gradual reduction in the cost of each door. No expert testimony substantiating the claims of appellant's employees has been introduced. We will not presume that a learning curve effect would have been experienced or that any increased per unit costs were per se attributable to the reduction in quantity as opposed to appellant's own below-cost pricing, mismanagement or other fault for which the contractor remains responsible. In this regard, we note that the learning curve information in the record according to appellant is proffered only generally to "corroborate" (*e.g*., App. br. at 4; app. reply br. at 13) the magnitude or amount of its "modified total cost" claim. It is not intended to stand alone.

This was not a manufacturing contract. It required two separate operations: 1. disassembly and inspection of 100 doors; and, 2. reassembly of 20 doors with repairs made depending upon the conditions found in each. At the time of the partial termination, Aeronca had completed the first operation. As to the second operation, however, specific door repairs appear to have been individual to each unit and the repair/reassembly process has not been established to be sufficiently repetitious that material labor learning effects could have been anticipated. To the extent that there may have been particular steps in the repair/reassembly process that were repetitious, appellant has not isolated those steps and presented specific evidence concerning the impact of the partial termination on them. Even if certain operations might recur, there is no labor hour data that is specific to those operations. The only evidence offered by appellant is on a gross door by door basis that assumes that all repairs to all doors could be presumed to be identical. Appellant fails to offer specific competent reliable production data from this particular contract.

Appellant substantially relies on the Government's (not its own) use of learning curve assumptions during price negotiations. The only learning curve data considered

during negotiations was that used by a Government price analyst obtained from a prior manufacturing contract in reaching the Government's negotiating position on one narrowly defined segment of the work. However, the limited use of that information at the pricing stage does not establish that such benefits would actually accrue during performance. *Cf., VHC, Inc. v. Peters*, 179 F.3d 1363 (Fed. Cir. 1999).

Appellant's further reliance on various Government-generated documents estimating possible impacts of the termination for budgeting/funding purposes are misplaced. It is apparent that the Government since the date of termination has been willing to give appellant the benefit of the doubt that its labor costs may have been increased as a result of lost learning subject to later substantiation. However, these documents are highly generalized, variable, conclusory and based on unknown information and analyses, if any. They are not a substitute for particularized evidence of appellant's own subjective repair/reassembly experience.

Assuming *arguendo* that appellant had proved that it is entitled to compensation for lost learning, which it has not, appellant has failed to quantify the amount of compensation owed it. At various times, appellant has advocated a learning curve of between 70% to 88%, without any of the supporting data and analyses noted above. It has not settled on any one curve within that range and we also will not simply "pick a number" in that ballpark. Aeronca admits, as emphasized above, that lost labor learning merely "corroborates" the validity of the amount of its "modified total cost" quantum claim. Appellant's reliance on this "total cost" approach to quantum is fundamentally flawed. In particular, appellant has commingled the claimed lost learning hours with other increased hours attributable to the "hit list." The "hit list" claim has no merit. There is also evidence that appellant intentionally under priced the work, below its anticipated cost to perform. It originally underbid the number of labor hours that it estimated would be incurred per door. Even its actual anticipated unit price was apparently unrealistic because it underestimated the labor required per door as a result of reliance on the "hit list." As discussed above, to the extent that any such underestimation occurred it was appellant's fault and the contract's unit price was unrealistically low. We also have no confidence in the reliability of appellant' s records of total costs or the accuracy of its accounting system (finding 40).[4] In addition, if lost labor learning costs were incurred to the extent claimed, it is improbable, indeed incredible, that appellant would not have developed the requisite information to substantiate this cost earlier, if not during performance.

II. BREACH OF CONTRACT AND PROFIT CLAIMS

It bears reemphasis that the primary issue in this appeal is whether appellant is entitled to additional compensation for reassembly of the 20 unterminated doors, *i.e.*, the continued portion of the contract. Appellant, however, has raised several arguments that sound in breach of contract pertaining to the terminated portion of the contract. The

apparent thrust of these contentions is to establish a basis for recovery of "anticipatory profit." Appellant is not entitled to breach damages.

First, the parties have executed modifications effecting a termination settlement and definitizing contract prices. Such modifications serve as an accord and satisfaction barring claims related to the propriety of the termination and timing of the formal price definitization. If appellant intended to challenge the propriety of the termination or definitization of the contract, it should have done so prior to entering into the settlement and executing the modifications. As best we can determine from the contemporaneous correspondence at the time of execution of these modifications, the "learning curve" dispute and appellant's right to pursue an equitable adjustment of the definitized price for the reassembly of the 20 unterminated doors were the only pertinent items reserved by appellant. The claim, however, seeks anticipatory profits asserting that the contract was terminated in bad faith. We have been cited to no case (and are aware of none) where appellant has negotiated a termination settlement, entered into a modification reflecting that settlement, accepted payment pursuant to the modification and then sought to revisit the issue of whether the termination was proper in the first instance.

To the extent, if any, that appellant's claim for breach damages is not barred by the bilateral modifications, it is otherwise without merit. Absent bad faith or a clear abuse of discretion, the Contracting Officer's decision to terminate will be upheld. *T&M Distributors, Inc. v. United States,* 185 F.3d 1279, 1283 (Fed. Cir. 1995). The contractor has a "weighty" burden of proving bad faith and there is a presumption that contracting officials act in good faith. *Krygoski Construction Co., Inc. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996), *cert. den.*, 520 U.S. 1210 (1997). To overcome the good faith presumption, the contractor must generally establish that the Government had a specific intent to injure appellant when it terminated the contract. *Caldwell & Santmyer, Inc. v. Glickman,* 55 F.3d 1578, 1581 (Fed. Cir. 1995). The fact that the CO followed the instructions of the Executive Director in terminating the contract, where the Executive Director's reasons were entirely proper, was not tantamount to bad faith and does not entitle appellant to any compensation other than that provided by the convenience termination clause. *James E. McFadden, Inc. v. United States*, 215 Ct. Cl. 918, 922 (1977).

The decision to terminate was fully justified. The evidence demonstrates the Government's thoughtful and considered analysis of the unanticipated turn of events resulting in that decision. Circumstances materially changed from the time of award of the contract to the time of termination. The Air Force requirement for depot-level door repairs had significantly declined, and TI's productivity had significantly increased, since the award to Aeronca, and TI could perform the work at less cost to the Government than Aeronca. *See* Finding 18. The sole basis for the bad faith termination allegation appears to be that prior to award, there were problems arranging for appellant to make a plant visit to the TI facility and possible animosity of the union over the contracting out of the work. Any such

animosity was obviously not shared by WRALC management which advocated the out sourcing of these then critical items that TI lacked the capacity to timely repair. There was clearly no animosity toward appellant on the part of the contracting officer who thereafter negotiated and awarded the contract to appellant on a sole source basis.

The Government also did not negotiate in bad faith or "fail to cooperate" in definitizing the contract prices. The Government kept appellant apprised of its deliberations, as the critical need for the doors disappeared. As of the time of agreement on prices, no final decision had been made to terminate. Appellant was afforded the opportunity to provide the Government with an estimate of the potential costs of any such termination and to consider the likelihood of a complete or partial termination during the definitization negotiations. Appellant, thereafter executed Mods P1, PZ1 and A1 without reservation.

In any event, appellant was not damaged by the price definitization *per se*. That definitization provided appellant with a means to receive payment for work without engaging in prior lengthy negotiations concerning appellant's actual costs of performing the terminated work or the amount of the equitable adjustment pertaining to the continued portion of the contract. It facilitated faster payments to appellant. Whether appellant was adequately compensated is the subject of this appeal. Appellant has been given opportunities to prove entitlement to recover costs, an equitable adjustment, damages or other relief either in connection with the settlement of its TSP or pursuant to this appeal. It has failed to make good on those opportunities.

Finally, the purpose of the breach allegations is to provide a basis for recovery of anticipatory profits. No other types of breach damages are sought. However, appellant' s own proof in this appeal attests that the claimed labor hours required for repair and disassembly for the 20 terminated units more than doubled from its estimated 540 to 1,114 per unit. No basis to increase the contract prices has been proven in this appeal. In other words, appellant was fortuitously saved from suffering a large loss if its assertions are accepted and if the contract had been fully performed. There was no profit to be anticipated.

III. IMPLIED CONTRACT

In this appeal, appellant for the first time contends that it was performing under an implied contract and seeks *quantum meruit* damages (app. initial br. at 45-48). It now assigns critical significance to the fact it received the partial termination facsimile approximately one hour before Mod P1 and about one month before receiving Mod PZ1. It alleges, apparently in the alternative, that the end result of the allegedly improper juxtaposition of the definitization and termination was that it performed without a contract, or more precisely under a cost reimbursable implied contract, the manner of formation and terms of which remain unclear.

Appellant has a fundamental misunderstanding of its entitlement to relief based on the timing of events surrounding the partial termination and definitization of the contract. Prior to the 13 May 1996 partial termination, the parties reached agreement definitizing prices on 26 April 1996, *i.e*., the target date for definitization. Even if no agreement had been reached, the CONTRACT DEFINITIZATION clause (finding 9) required Aeronca to continue and complete performance subject to prescribed funding limitations. The same requirement was set forth in the contract's TFC clause in the case of partial termination. The contract remained in full force and effect to the extent not terminated. As emphasized by the Government, appellant executed Mods P1 and PZ1, continued and completed its performance under the captioned express contract encompassing the same subject matter alleged to be the subject of the implied contract. *Cf., Atlas Corp. v. United States,* 895 F.2d 745 (Fed. Cir. 1990), *cert. denied* 498 U.S. 811 *(1990)*; *Arieb Development Co., Ltd.,* ASBCA Nos. 44953 and 47821, 95-2 BCA ¶ 27,857 at 138,905; *Northeast Air Group, Inc.,* ASBCA No. 46350, 95-2 BCA ¶ 27,679 at 138,005; *William Golangco Construction Corp.,* ASBCA No. 22423, 79-1 BCA ¶ 13,817 at 67,762. Thereafter, it entered into bilateral Mod A1 of the referenced contract resolving its TSP.

Appellant's implied contract theory is a belated alternative argument first raised by appellant in its complaint in this appeal several years following the completion of the work and after executing Mods P1, PZ1, and A1. *Aeronca, Inc.,* ASBCA No. 51927, 01-1 BCA ¶ 31,395. The theory has no relation to contemporaneous factual reality. All of the parties' contemporaneous actions and their course of conduct repudiate the existence of an implied contract and appellant is barred from seeking relief on an implied contract basis. Both parties considered that the express terms of the contract governed their rights and obligations and executed modifications to that effect that operate as an accord and satisfaction. To the extent appellant seeks relief under an implied in fact contract, the facts surrounding its alleged formation and the details of its content are also unproven. To the extent that appellant seeks *quantum meruit* relief under an implied in law contract we are without jurisdiction. *Coastal Corp. v United States,* 713 F.2d 728 (Fed. Cir. 1983).

The appeal is denied.

Dated: 21 May 2003

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

NOTES

[1] In briefing the appeal, appellant has not contended that it is entitled to unabsorbed, or otherwise unrecovered, overhead and we consider this REA contention to have been abandoned.

[2] In an earlier decision in this appeal on a Government motion to dismiss various counts of the complaint, the Board also noted that it lacked jurisdiction over Count 2 (and related ¶ 22) of the complaint seeking relief for the Government's alleged failure to furnish special tooling concluding that a claim for any such failure had not been asserted in appellant's certified claim of 15 May 1998. *Aeronca, Inc.*, ASBCA No. 51927, 01-1 BCA ¶ 31,395.

[3] On 12 December 2001, the Government moved to strike the affidavits (as well as two others) alleging that they represented a substantial revision and expansion of appellant's learning curve theory that the Government had not had an opportunity to address or rebut. We deny the Government' s motion because in the circumstances

of this appeal we do not consider that the Government has been prejudiced by our consideration of the affidavits.

[4] Because we have concluded that appellant has established no basis for recovery, we need not address other issues associated with its proof of quantum.

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. 51927, Appeal of Aeronca, Inc., rendered in conformance with the Board's Charter.

Dated:

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