ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Rig Masters, Inc.	)	ASBCA Nos. 52891, 54047
	)	
Under Contract No. DACW38-93-C-0010	)	

APPEARANCE FOR THE APPELLANT: Cyrus E. Phillips, IV, Esq.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Henry H. Black, Esq.
District Counsel
Lanny R. Robinson, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Vicksburg

OPINION BY ADMINISTRATIVE JUDGE PAGE

These timely appeals arise from the Value Engineering Change Proposal (VECP) of Rig Masters, Inc. (Rig Masters) which the United States Army Corps of Engineers accepted and implemented. ASBCA No. 52891 relates to the contractor's initial claim of 9 August 1999, and ASBCA No. 54047 to the amended claim of 19 November 2002. Rig Masters seeks full VECP development costs, and asserts it is entitled to additional savings due to reduced Level 2 services. Appellant has elected the accelerated procedures of Board Rule 12.3 in ASBCA No. 54047 and the parties have elected to have both appeals processed on the record without a hearing under Rule 11. Only entitlement is before us.

FINDINGS OF FACT

On 2 February 1993, Rig Masters was awarded Contract No. DACW38-93-C-0010 by the Vicksburg District (District), United States Army Corps of Engineers, Vicksburg, MS to deliver support services for a base year and four option years, from 26 February 1993 through 26 February 1998. (R4, tabs 4-5)[1] Rig Masters was required to furnish support services as necessary to inspect, operate, maintain, repair, and secure the Tensas-Cocodrie Pumping Plant, its Upper Weir, and associated gravity drainage structures, all located within Concordia Parish, Louisiana (R4, tab 4 at C-1).

The plant is located in the Tensas-Cocodrie Levee System, near Wild Cow Bayou, at mile fourteen on the Black River. The drainage area is about 42 miles long, with a

maximum width of some 20 miles. A dismal swamp occupies about 55 square miles of the lower end of the drainage area. The plant and the gravity drainage structures permit discharges from within this drainage area in periods of high and low stages, respectively, of the Black River. The plant is built on the west side of Concordia Parish, where ponding from Bayou Cocodrie is diverted down Wild Cow Bayou, and then pumped, in periods of high stages, into the Black River. (R4, tab 17; Jt. Stip. 4) Water enters the plant through a cutoff channel excavated from Wild Cow Bayou. Five 800 cubic feet per second (cfs) Allis-Chalmers vertical shaft axial-flow pumps (AC pumps) are used to remove excess sump water from the drainage area when high stages of the Black River do not permit discharges through the gravity structures. (R4, tab 17; Jt. Stip. 5)

Contract Terms

The contractor was required to provide Level 1 support services at the plant and associated gravity drainage structures for operations, during non-pumping periods, on a 40-hour per week basis, 8:00 a.m. to 5:00 p.m., Monday through Friday. Additionally, Rig Masters supplied security guard services after-hours and on weekends. The contract provided a fixed lump-sum price, per month, for payment of Level 1 support services furnished during the base year, and in each of the four option years. (R4, tab 4)

While Level 1 services were required during non-pumping periods, the contractor also had to furnish, as required on separate delivery orders, Level 2 support services for gravity structure openings and closures, and for pumping operations at the plant at those times when the water levels reached specified elevations at certain structures. These services were needed to satisfy the discharge requirements of the plant's Operation and Maintenance (O&M) manual, which recognized the complexity of balancing the hydraulic conditions of a large area regulated by multiple structures. Pumping operations were required when the sump elevation at the pumping plant was 35' and rising. Depending on water elevations, a maximum of six pumping plant shift operators were required to be available on-site within four hours. Once begun, pumping operations were continuous until discharge requirements were satisfied. Level 2 support services required skilled personnel, including pump plant shift operators, engineering equipment operators, industrial electricians and industrial equipment mechanics, during a three-shift pumping operation each day. The contract set forth both estimates for, and fixed hourly rates of, skill labor categories to perform Level 2 support services during the base year, and in each of the four option years. As an example, the contract included estimated yearly Level 2 requirements of 1920 hours each for six pumping plant shift operators during the base year, and in each of the four option years. (R4, tab 4; Jt. Stip. 7)

The plant's O&M manual contained "Standing Instructions to the Project Manager for Water Control" which included these requirements:

1. General Information and Responsibilities

(a) General Information

. . . .

(2) Authorized project purposes and water control objectives:

(a) Provide an appreciable reduction in stages on Bayou Cocodrie during periods when the Black River is above elevation 35.0 feet NGVD and the station is in operation.

. . . .

(c) Two weirs will provide minimum pool stages above mile 22 on Bayou Cocodrie and insure that low and medium range flows continue to pass down Bayou Cocodrie.

. . . .

2. Data Collection and Reporting

a. Normal Conditions. During normal conditions, landside and riverside water level gauges are read daily at the pumping plant. Gage readings and a report of the previous day's pumping should be reported to the Water Control Management Section by 8:00 a.m. each work day via telephone or radio. Weekend readings will be reported each Monday morning by 8:00 a.m.

b. Emergency Conditions. During flood events, water level gauges are to be read daily by 7:00 a.m., or as often as may be deemed necessary. Gage readings and a report of the previous day's pumping should be reported to the Water Control Management Section during emergency conditions. The project manager will be informed by the Water Control Management Section of regional hydrometeorological conditions that may/will impact the project.

3. Water Control Action and Reporting.

a. Normal Conditions.

> (1) Pumping Plant and Gravity Flow Structure. Both the pumping plant and the gravity flow structure are operated manually by an on-site operator. Operations of the pumping plant and gravity flow structure is [sic] the responsibility of the Corps of Engineers. They will be operated to divert flows from the Bayou Cocodrie drainage area into Black and Red Rivers by using the following procedures:
>
> (a) Close the gravity structure at the lower end of the area when the Red River is at a stage of between elevation of 30 and 35 [feet] and rising.
>
> (b) The gravity drainage structure at the pump station will be closed when the Black River stage at the pump station is near elevation 35.0 feet and rising and will be opened when the Black River stage at the pump station is near elevation 35.0 feet and falling.
>
> (c) The pumps will be turned on when the water level at the pumping station reaches an elevation of 35.0 feet and is rising. Generally, the pumping plant will be operated with one to three units pumping with ponding stages between elevation 35.0 and 37.0 and at full capacity for any ponding stage exceeding elevation 37.0. During rising ponding level periods prior to the ponding stages reaching 35.0 [feet] at the Old Bayou Cocodrie strucutre [sic] the pumps will operate to a capapcity [sic] equivalent to the flow rates over the two weirs near mile 22 less the flow rate of the existing channel on Bayou Cocodrie below mile 22. . . .
>
> (d) The pumps will be turned off when the sump is at 35.0 feet and falling.

(R4, tab 17, app. G at 1-3 (emphasis added))

Each of the plant's AC pumps is provided with a vacuum breaker system (VBS) designed to release air from the pump discharge line during the formation of the siphon between the pool of the channel excavated from Wild Cow Bayou and the pool of the ponded Black River, and to automatically break the siphon when pumping stops. Each VBS consists of a 24" diameter vent pipe, and a 24" butterfly valve with an electric motor operator and hand wheels. Each valve is designed to be fully opened, or fully closed, with no intermediate positions. The five VBSs were designed such that the vacuum breaker valves (VBVs) would close after start up if the pool-to-pool head differential was over 5';

otherwise, the VBVs would open when the pool-to-pool head differentials were less than 5', and open when pumping operations stopped. (R4, tab 17 at II-3-6, 7; Jt. Stip. 9)

Contract No. DACW38-93-C-0010 contained FAR 52.233-0001 DISPUTES (APR 1984). Also part of the contract was FAR 52.248-0001 VALUE ENGINEERING (MAR 1989) - ALTERNATE III (APR 1984) which provides:

> (a) General. The Contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECP's) [sic] voluntarily. The Contractor shall share in any net acquisition savings realized from accepted VECP's [sic], in accordance with the incentive sharing rates in paragraph (f) below.
>
> (b) Definitions. "Acquisition savings," as used in this clause, means savings resulting from the application of a VECP to contracts awarded by the same contracting office or its successor for essentially the same unit. Acquisition savings include –
>
> (1) Instant contract savings, which are the net cost reductions on this, the instant contract, and which are equal to the instant unit cost reduction multiplied by the number of instant contract units affected by the VECP, less the Contractor's allowable development and implementation costs;
>
> . . . .
>
> (3) Future contract savings, which are the product of the future unit cost reduction multiplied by the number of future contract units scheduled for delivery during the sharing period. If this contract is a multiyear contract, future contract savings include savings on quantities funded after VECP acceptance.
>
> . . . .
>
> "Instant contract," as used in this clause, means this contract, under which the VECP is submitted. It does not include increases in quantities after acceptance of the VECP that are due to contract modifications, exercise of options, or additional orders. . . .

> "Instant unit cost reduction" means the amount of the decrease in unit cost of performance (without deducting any Contractor's development or implementation costs) resulting from using the VECP on this, the instant contract. If this is a service contract, the instant unit cost reduction is normally equal to the number of hours per line-item task saved by using the VECP on this contract, multiplied by the appropriate contract labor rate.
>
> "Negative instant contract savings" means the increase in the cost or price of this contract when the acceptance of a VECP results in an excess of the Contractor's allowable development and implementation costs over the product of the instant unit cost reduction multiplied by the number of instant contract units affected.
>
> "Net acquisition savings" means total acquisition savings, including instant, concurrent, and future contract savings, less Government costs.
>
> . . . .
>
> (h) Contract adjustment. The modification accepting the VECP (or a subsequent modification issued as soon as possible after any negotiations are completed) shall - -
>
> . . . .
>
> (2) When the amount of instant contract savings is negative, increase the contract price, target price and ceiling price, target cost, or estimated cost by that amount;
>
> . . . .

(R4, tab 4 at I-75) The VALUE ENGINEERING (VECP) clause provided that under its fixed price contract, Rig Masters would share in 50% of net acquisition savings (*id*. at I-79).

The contract contained § C.2.1.4 which states:

> Level 2 Pumping Plant Pump Operations. At all times other than those described in paragraph C.2.1.3 [Level 1 services] the Contractor shall operate the pumping plant pumps as determined by the need described in the plant O&M manual as

> Level 2 work and as authorized by delivery order. All operations shall be in accordance with the plant operation and maintenance manual so as to satisfy the discharge requirements stated in the interim water control plan which is a supplement to the O&M manual. Once pumping begins, pumping operations are to be continuous when directed by the COR, until the required elevations are reached. . . .

(R4, tab 4 at C-5 (emphasis added))

As required by § C.1.2 of the contract and the plant's O&M manual, Rig Masters maintained records of landside and riverside water level gauge readings at the pumping plant as well as reports of pumping operations (R4, tabs 4, 17, 29; Jt. Stip. 10).

The Value Engineering Change Proposal

On 16 February 1994, the contractor conveyed an "initial" VECP to the District, suggesting that the O&M manual be modified to allow the VBVs to be closed when the pool-to-pool head differential was 2', rather than 5' (R4, tab 8; Jt. Stip 12).

In March 1994, Rig Masters retained the services of Dr. Richard R. Scott, P.E., an Associate Professor, Department of Mechanical Engineering, University of Louisiana at Lafayette, to "determine if any ill effect would be caused to the pumps, flow paths or equipment if the Vacuum Breaker Valve (VBV), on a flow path were kept closed until a ?H=0 [head differential] is reached between Bayou Cocodrie and the Black River" (R4, tab 18). In April 1994, Dr. Scott and Rig Masters personnel tested operation of the plant's AC pumps and the VBSs (R4, tab 25). On 16 May 1994, Dr. Scott wrote Rig Masters that:

> Based on information established with test data and calculations, it is possible to operate the pumping systems at the Tensas-Cocodrie plant for ?H values less than 5 [feet] and not cause cavitation to the pumping system. This will ultimately result in lower pumping costs and not pose any harm to the pumping systems. . . .

(R4, tab 18 at 4) Rig Masters forwarded Dr. Scott's report and conclusions to the District on 18 May 1994, and requested a meeting to discuss approval and implementation (R4, tab 19; Jt. Stip. 13).

On 13 July 1994, Dr. Scott, Rig Masters and Government personnel held a meeting at the plant to review the proposed VECP. Generally, the parties agreed that the operating sequence of the VBVs could be modified without impacting the safe operation of the AC pumps. (Jt. Stip. 14) The minutes of this meeting included the following:

> . . . The representative of our [District] Mechanical Design Unit have [sic] determined from the available data that the operating sequence of the vacuum breaker valves may be modified as follows without impacting the safe operation of th[e] pumps:
>
> Table I
> Modified Vacuum Breaker Valve (V.B.V.) Operation
>
> | Required Sump Elevation | Pool to Pool Differential Head | V.B. Valve Position |
> |---|---|---|
> | 35 feet or > | 2.5 feet | Closed |
> | 36 feet or > | 2.0 feet | Closed |
> | 37 feet or > | 1.0 feet | Closed |
> | 38 feet or > | 0 feet | Closed |
>
> The new operational procedure will not be approved for implementation until the pump's [sic] existing condition can be documented. When confined space personnel training is complete, the pumps will be inspected to determine the existing condition. The training has not been scheduled.

(R4, tab 20)

The District's Value Engineering Officer (VEO) agreed to provide Rig Masters a current rate schedule from Concordia Electric Cooperative, Inc., which provided electricity to the Corps, so that Rig Masters could "estimate the additional electrical cost of operating with the vacuum breaker valves open rather than closed in the special conditions described" (R4, tab 20). She did so on 27 July 1994 (R4, tab 21).

On 9 August 1994, the VEO wrote that while Rig Masters' VECP (now assigned as "VECP 94-10") had merit, the VE clause of the contract would not allow sharing of any savings of the cost of electricity, which was procured under a separate contract. Subsequently, although both the VEO and the District Commander recommended modification of the contract to allow Rig Masters to share in the collateral savings, *i.e.*, electrical energy costs that would be saved, the Acting Principal Assistant Responsible for Contracting, Headquarters, United States Army Corps of Engineers disapproved the request for waiver stating that the "contract must have allowed for collateral savings." (R4, tabs 10-11, 23; Jt. Stip. 16-17, 19-20)

By 8 September 1994, Rig Masters had paid Dr. Scott a total of $7,234 for his services (R4, tab 22; Jt. Stip. 18).

On 15 May 1995, the District advised the CO's Representative, the Area Engineer, Vidalia Area Office to "run the pumps with the siphon breaker closed during the remainder of this pumping season" (R4, tab 24). Each of the siphon breaker valves in the five VBVs provided for each of the five AC pumps thereafter was operated as requested by the District throughout the remainder of the term of the contract, through 26 February 1998 (Jt. Stip. 21). The parties agree that the VECP sharing period is 15 May 1995 to 26 February 1998 (Jt. Stip. 31).

Changed Operations

On those days when it was necessary to run the pumps, resulting in Rig Masters having to provide Level 2 services, Rig Masters changed operating procedures in accordance with the VECP to close the VBVs, depending upon head differentials and water elevations at the pumping plant. During the sharing period, Rig Masters' daily reports of landside and riverside water level gauge readings at the pumping plant, and of pumping operations, reveal that the changed operations occurred on 6 days in 1996, 10 days in 1997, and 26 days in 1998 (R4, tab 29; Jt. Stip. 24). These days are as follows: 17-22 December 1996; 1, 12-14 February and 21-26 May 1997; 9-15 January and 7-8, 10-26 February 1998. *Id*. On each of these 42 days: pool-to-pool head differential (landside versus riverside) was less than 5'; the flood gates at the gravity drainage structures were closed; the water level at the Tensas-Cocodrie Pumping Plant was above elevation 35' NGVD and rising; pumping plant shift operators were on-site for three eight-hour shifts of pumping operations; and one or more of the five pumping systems was in continuous operation. (*Id*.; Jt. Stip. 25)

The Claim and Appeal Docketed as ASBCA No. 52891

By letter dated 8 August 1995, Rig Masters presented its "formal request for payment" to the CO in the amount of $119,201.82 for electrical savings and $37,803.67 for "reduced level 2 support required" (R4, tab 12). By letter dated 24 August 1995, Rig Masters revised its request for payment based on a three year period (versus a one-year period in the 8 August 1995 letter) in the amount of $357,605.46 for electrical savings and $113,411.01 for "reduced level 2 support required" (R4, tab 13). Neither submission was certified, and no supporting documentation was included.

On 9 August 1999, Rig Masters submitted a certified[2] claim which: 1) requested payment based on electrical savings calculated at $357,605.46 (referencing the 8 August 1995 and 24 August 1995 letters); 2) requested compensation for the "reduction in manpower [which] produced instant savings"; 3) included Dr. Scott's report and documentation as attachments to the claim, but did not request an amount for developing and implementing the VECP; and 4) referenced the legal theory of breach of contract (R4, tab 3).

On 4 April 2000 the CO issued a COFD denying Rig Masters' claim in its entirety (R4, tab 2). The CO denied a share in any savings for Level 2 services, finding these efforts were dependent upon a determination of need, and the costs could not be decreased as the services were provided at the discretion of the Government. She further found that these were also "unallowable collateral costs." *Id.* at 9.

By letter dated 30 June 2000, Rig Masters timely appealed the COFD.[3] The appeal was docketed at the Armed Services Board as ASBCA No. 52891.

Appellant's complaint in ASBCA No. 52891 mirrored Rig Masters' 9 August 1999 claim but added requests for injunctive relief and specific performance. The Government filed a Motion to Strike. Following submission of briefs, the Board's opinion dated 13 June 2001 granted the Government's motion to the extent Rig Masters sought "specific performance or injunctive relief as opposed to monetary relief." *See Rig Masters, Inc.*, ASBCA No. 52891, 01-2 BCA ¶ 31,468.

On 24 October 2001, Rig Masters filed an amended complaint,[4] which requested "out-of-pocket costs for Dr. Scott's services" and implementation costs in the amount of $7,234 in ¶ 28 and 50% of the savings of the cost of Level 2 support services "for increased pumping efficiency" in the amount of $113,411 in ¶ 31.

Charles D. Little, Jr. Declaration

On 22 January 2002, the Government submitted the declaration of Charles D. Little, Jr., in support of its position that Level 2 support services were not compensable under the VECP. Mr. Little is a registered professional engineer. He has been employed by the District as a hydraulic engineer since 1984, and his current responsibilities as Chief, Water Control Management Section of the Engineering Division, include managing the regulation of all the District's water resources projects. The Tensas-Cocodrie Pumping Plant is one of the flood control projects over which he has responsibility. According to Mr. Little, the Water Control Management Section developed the Water Control Plan for the pumping plant, which includes the Standing Instructions to the Operations Manager, and he is thoroughly familiar with the requirements of the Water Control Plan for the plant. (R4, tab 27)

Attached to Mr. Little's declaration are documents that represent daily river stage data compiled from records maintained in the ordinary course of business by the Water Control Management Section. These records show daily river stages at various locations within the project, including the Tensas-Cocodrie Pumping Plant at both landside and riverside, and the Bayou Cocodrie Gravity Structure, also known as the "Lower Gravity Drainage Structure" (LGDS). (*Id.*) The LGDS is the last downstream structure in the Tensas-Cocodrie Levee System (*see* R4, tab 4 at ex. A).

According to Mr. Little,

> Pumps at the Tensas-Cocodrie Pumping Plant are operated when the interior, or "Landside," water level at the pumping plant is above elevation 35.0 feet National Geodetic Vertical Datum (NGVD) and the flood gates are closed (riverside higher than the landside). See Appendix G, Standing Instructions To Project Manager, Rule 4 Exhibit Number 17, page 3, paragraph 3.a.(1)(c). During rising sump levels prior to the lower sump reaching 35.0 feet NGVD at the Lower Gravity Drainage Structure (also referred to as the "Old Bayou Cocodrie Structure"), the pumps are operated to a capacity equivalent to the flow over the Upper Weir and the Louisiana Department of Wildlife weir near mile 22, less the channel capacity of the existing channel of Bayou Cocodrie below mile 22. . . . Pumping is stopped when the elevation at the pumping plant reaches 35.0 feet NGVD and falling. . . .
>
> When the pumping plant is operating under the above guidance the quantity of water available for pumping and the duration of pumping is controlled by (1) the flow capacity of Bayou Cocodrie above mile 22, (2) flow over the two weirs upstream of the pumping plant, (3) and channel capacity of Wild Cow Bayou and the connecting channel. Regardless of the efficiency of the pumping plant, it can only pump the water that is delivered to it. During the period of Rig Masters' claim, from May 15, 1995 through February 26, 1998, elevations at the Lower Gravity Drainage Structure equaled or exceeded 35.0 feet NGVD on June 22 to June 25, 1996, February 13 to May 16, 1997, and January 19 to February 3, 1998. Except for these periods the pumping plant should have operated under the above guidance.
>
> . . . [I]t must be remembered that prior to the lower sump reading 35.0 feet NGVD at the Lower Gravity Drainage Structure the factor controlling the duration the pumps will be operated is the inflow of water over the weirs at mile 22 on Bayou Cocodrie. I have reviewed the hydrological records maintained by the Vicksburg District from the Contract site and found that the only days that would have been impacted by this change in operating procedures are February 13 and 14, 1997. This is because the change to the operating procedure only

> occurs for those days when the pool-to-pool head differential is between 5 feet and 2.5 feet.

(R4, tab 27 at 2-3)

Mr. Little reviewed the operational logs maintained and submitted by Rig Masters (*see* R4, tab 29), and found that those logs confirmed and supported his previous finding that "the only days on which all conditions necessary for entitlement under the VECP are [13-14 February] 1997" (R4, tab 30).

We find Mr. Little's explanation persuasive.

Richard Young Declaration

In support of its claim that the VECP reduced Level 2 support services through increased pump efficiency, on 29 January 2002 Rig Masters submitted the declaration of Richard Young, President of Rig Masters since 1993. Mr. Young stated:

> 2. It is very easy to prove that better pumping flow is achieved when the vacuum breaker valves at the Tensas-Cocodrie Pumping Plant are closed. Consider the act of drinking soda through a straw—if one were to poke a hole in the straw, one would have to suck twice as hard to get the same amount of soda. Another example would be to poke a hole in a tube used to siphon gasoline into a portable can. We knew this from the onset when we began operation of the Tensas-Cocodrie Pumping Plant, but we needed experience to prove that we had enough atmospheric pressure to keep from creating a vacuum in the pumping systems, thus risking cavitation damage. These pumping systems are far larger than a soda straw: the pumps have thirteen-foot diameter suction bells and discharge elbows, and each system has a twenty-four inch diameter vacuum breaker valve. Once we did the engineering work, the effect of running the pumps with the vacuum breaker valves closed was evident—we could see the level of the ponded water dropping, something we couldn't see when pumping with the vacuum breaker valves open. We've estimated that pump output increases by thirty percent when running the pumps with the vacuum breaker valves closed.
>
> 3. We are required to operate more pumping systems at higher levels of ponded water in Bayou Cocodrie. Thus, for example, the first pumping system is to be turned-on when the

> ponded water rises to 36 feet; the first and second pumping systems are to be turned-on when the ponded water rises to 36.5 feet; the first, second, and third pumping systems are to be turned-on when the ponded water rises to 37.5 feet; the first, second, third, and fourth pumping systems are to be turn[ed]-on when the ponded water rises to 38 feet; and all five pumping systems are to be turned-on when ponded water rises to 38.5 feet. Now that we [run] the pumping systems with the vacuum breaker valves closed, we do not run with even one pumping system as frequently as we did before. And it takes longer for the ponded water to rise to levels where additional pumping systems are to be turned-on. Indeed, there are now lower levels of ponded water in Bayou Cocodrie, and the Corps of Engineers has lowered the levels at which the pumping systems are to be turned-on. Even with this directive, there have been fewer days when pumping is required. Our Operation Logs show 119 pumping days in 1994, 45 pumping days in 1995, and 6 pumping days in 1996.
>
> 4. All of our crews have seen the effect of running these pumping systems with the vacuum breaker valves closed. Larry Lewis, a Corps of Engineers employee who works for the Operations Division at the Vicksburg District, initiated, at the Lake Chicot Pumping Plant in Arkansas, running those pumping systems with the vacuum breaker valves closed, and he has seen this same effect. The Lake Chicot Pumping Plant is located in the Mississippi River levee system, is also a project of the Vicksburg District, United States Army Corps of Engineers, and is quite similar to the Tensas-Cocodrie Pumping Plant. Attachment, Plate 4, EM 1110-2-3102, February 28, 1995.

(R4, tab 28)

We do not find Mr. Young's declaration persuasive. There is insufficient data to support the estimate that pump output increased by 30%. Mr. Young was not qualified as an expert witness and we are unable to accept the assertion. Similarly, the statement from a Corps employee at another facility about increased pump efficiency at another plant is not persuasive regarding Rig Masters' claim for reduced Level 2 services at the Tensas-Cocodrie plant. Nor is Mr. Young's assertion that there were fewer overall pumping days after implementation of the VECP conclusive, as pumping operations were dependent upon many other factors.

The Amended Claim and Appeal Docketed as ASBCA No. 54047

By order dated 30 October 2002, the Board, *sua sponte*, required the parties to brief three matters: 1) whether the Board had jurisdiction over Rig Masters' request of the development costs described in ¶ 28 of the amended complaint; 2) whether Rig Masters intended by the amended complaint to narrow the scope of its appeal and limit the relief sought to only development costs and its share of savings for the reduced Level 2 support services; and 3) whether Rig Masters' 9 August 1999 claim provided notice of the amounts now sought in Rig Masters' amended complaint.

In its 19 November 2002 letter to the Government, Rig Masters: 1) maintained its position that development costs were included in its 9 August 1999 claim; 2) stated that it intended "to narrow the scope of its Appeal from the Claim of August 9th, 1999 that was before the [CO], and to limit the Board's decision on entitlement only to those costs described in [¶¶] 28 and 31 of the Amended Complaint," thus abandoning its breach claim; and 3) explained the difference between the amounts included in letters dated 8 August 1995 and 24 August 1995 which Rig Masters submitted to the Government for its share of savings of level 2 support services, *i.e.*, $37,804 and $113,411 respectively (*id.*; ASBCA No. 54047, R4, tab, 3). Rig Masters did not point to any then-contemporaneous correspondence to the CO quantifying the development cost claim.

A successor CO reviewed appellant's 19 November 2002 letter, which the Government regarded as an amended claim, and also reviewed the briefs, the Young declaration, the Little declaration and a supplementary declaration with attachments submitted in ASBCA 52891. That CO issued a COFD dated 10 December 2002 determining that three conditions must be met in order for Rig Masters to receive compensation under the VECP: 1) savings must be realized during the sharing period; 2) pumps must be operating under the changed procedures; and 3) the pool-to-pool head differential between the landside and riverside gauges at the pumping plant must be less than 5' and stages at the LGDS must be above elevation 35' NGVD. The CO identified two days on which all three conditions were met and concluded that "[a]t best Rig Masters would only be entitled to compensation on these two days." (ASBCA No. 54047, R4, tab 2)

The CO noted that, "[n]o supporting data was provided [by Rig Masters] for determining either the one-year ($37,803.67) or the three-year ($113,411) reduced Level 2 support services." To calculate instant contract savings, the CO reviewed invoices, contract requirements for personnel and hourly rates, and determined that the unit cost reduction was in the amount of $79.52. The unit cost reduction was multiplied by the number of contract units affected by the VECP, which the CO determined to be 32 hours, for instant contract savings of $2,544.64. From this total, the CO deducted the contractor's development costs of $7,234. Since this resulted in negative savings ($2,544.64 ? $7,234 ? negative $4,689.36), the CO granted Rig Masters an equitable adjustment in the amount of $4,689. (*Id.*)

On 19 December 2002, Rig Masters timely appealed the 10 December 2002 COFD and requested disposition under the accelerated procedures of Board Rule 12.3. Rig Masters confirmed that it claimed cost savings for 42 days instead of two days as granted by the CO. (ASBCA No. 54047, R4, tab 1)

The Board's Order dated 19 March 2003 advised the parties that the Board intended to dismiss ASBCA No. 52891 in the event all issues in that appeal had been resolved or withdrawn. By letter dated 5 February 2003 (received by the Board on 28 March 2003), Rig Masters informed the Board that one issue remained in ASBCA No. 52891, *i.e.*, whether Rig Masters was entitled to recover its full development costs.

DECISION

There are two issues now before the Board: whether Rig Masters is entitled to additional VECP savings and whether it is entitled to recovery of its full VECP development costs. The first was raised in the Parties' Joint Statement of Legal Issues, which stipulated in ¶ 7 that the Board is requested to determine the number of days for which Rig Masters is entitled to a share in VECP-related savings due to reduced Level 2 services. The parties in ¶ 8 tie this determination to whether appellant is correct that savings occurred on each of the 42 designated days when the water level at the Tensas-Cocodrie Pumping Plant reached an elevation of 35' and rising, or, whether the Government is correct that savings occurred only on those two days when the water level at the LGDS (not the plant) reached 35' and rising.

The second issue of Rig Masters' entitlement to full VECP development costs was not articulated in the Parties' Joint Statement of Legal Issues but was discussed in appellant's subsequent brief, in which it sought recovery of the entire $7,234 expended to develop the VECP (app. br. at 43-44), instead of the reduced amount granted by the second COFD (ASBCA No. 54047, R4, tab 2 at 5-6).

We determine the Board lacks jurisdiction over the matter of development costs in ASBCA No. 52891, as the underlying 9 August 1999 claim mentioned but did not contain a clear demand for their recovery, nor were the costs quantified. *See Zinger Construction Co.*, ASBCA No. 39843, 90-2 BCA ¶ 22,782 at 114,427-28. Rig Masters' assertion of development costs under ASBCA No. 52891 is dismissed for want of jurisdiction. However, the Board does have jurisdiction over the claim for these costs in ASBCA No. 54047, as they were asserted in appellant's 19 November 2002 letter which was treated by the parties as a claim (R4, tab 3), and the CO was provided information quantifying those costs (R4, tab 2).

VECP Development Costs

Appellant asserts that it is entitled to recover all of its VECP development costs, and not just the "negative contract savings" permitted by the successor CO (app. reply br. at 1-2). Both parties agree that Rig Masters' development costs are in the amount of $7,234. Deciding the extent to which the contractor is entitled to reimbursement of development costs is a matter of contract interpretation, in which we are guided by the rules set forth in *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965), which establish that an interpretation giving a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.

The policies underlying the Government's Value Engineering program are stated in the then-contemporaneous 1990 edition of FAR 48.101(b)(1), which stated in relevant part that "The contract provides for sharing of savings and for payment of the contractor's allowable development and implementation costs only if a VECP is accepted. This voluntary approach should not in itself increase costs to the Government." 48 C.F.R. § 48.101(b)(1)(1990). This policy is reflected in the VECP clause of Rig Masters' contract, which stated at ¶ (a) that the contractor was entitled to share in "any net acquisition savings realized from accepted VECP's [sic]." Paragraph (b) of that clause defines "acquisition savings" to include "instant contract savings." "Negative instant contract savings" result when the contractor's allowable development and implementation costs exceed the savings realized by implementation of the VECP. Paragraph (h) of the contract's VECP clause provides at ¶ 2 that the contract price is increased only by the amount of negative instant contract savings. Clearly, a contractor may not recover the full amount of its VECP development costs when the savings realized by the Government are less than those costs. We find the Government correctly subtracted the VECP savings of $2,545 from Rig Masters' development costs of $7,234 when it granted the contractor an equitable adjustment of $4,689, *i.e.*, the negative instant contract savings.[5] Although we liberally interpret whenever possible a contract's VECP clause to further the goal of encouraging contractors to submit such proposals, *see Gulf Apparel Corp.*, ASBCA No. 27784, 89-2 BCA ¶ 21,735 at 109,266, we are nonetheless constrained by the terms of the contract.

Additional VECP Savings

The parties have defined this issue in ¶¶ 7-8 of the Parties' Joint Statement of Legal Issues. They are in agreement regarding a number of key underpinnings for the contractor to share in VECP savings. They agree that Rig Masters provided Level 2 services under the changed VECP procedures for the 42 days in question, that these days were within the contract's sharing period, that the CO compensated Rig Masters for savings realized on 2 of those days, and that the CO properly calculated the unit cost reduction necessary to quantify

VECP savings. But the parties do not agree on the number of days for which the VECP resulted in a savings. Rig Masters claims recovery for each day VECP-changed procedures were used because greater pump efficiency reduced the need for Level 2 services, and alleges savings for the additional 40 days on which it provided Level 2 services. The Government argues that Rig Masters failed to prove that implementation of its VECP procedures resulted in either the efficiencies claimed or reduced Level 2 services for those days, and is entitled to nothing further. We decide only whether Rig Masters was entitled to a share of savings on the 40 additional days alleged. As in any affirmative claim, appellant bears the burden of proof. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991).

Rig Masters relies upon the declaration of its president, Richard Young, to support its contention that implementation of the VECP-changed procedures resulted in savings to the Government due to increased efficiencies. (App. br. at 46) We did not find that declaration to be persuasive, and the assertions therein do not prove Rig Masters' claim. Mere allegations without substantiated explanatory facts that support the statements or corroborative evidence are not sufficient to carry the necessary burden of proof. *See C Construction Co., Inc.*, ASBCA No. 47928, 96-2 BCA ¶ 28,499 at 142,313.

Rig Masters argues that the Government benefited from the VECP-changed procedures when the pool-to-pool head differential was less than 5', flood gates were closed, pumping plant operators worked three eight-hour shifts of pumping operations, one or more of the five pumping systems was in operation, and the water level at either the pumping plant or the LGDS reached 35' and rising. (App. br. at 46; app. reply br. at 3-7)

The Government disagrees, arguing that Rig Masters has failed to prove that use of the VECP-changed procedures necessarily resulted in savings and that water levels at the plant controlled. It focuses on what the contract and O&M manual required prior to the VECP, and what changed as a result; it notes that discharge requirements were not changed, nor was the requirement that pumping begin generally when water levels at the plant reached 35' and rising. As explained below, it is the Government's contention that as long as the contractor had to operate the pumps continuously to *maintain* certain water elevations, greater discharge efficiencies did not reduce the need for Level 2 services. Only when water levels reached 35' and rising at the LGDS did discharge requirements change, and the contractor had to *reduce* water elevations instead of maintaining them; increased pumping efficiencies due to the VECP arguably would then reduce the duration and amount of Level 2 services to operate the pumps.

We found persuasive the declaration of Charles D. Little, Jr. to explain the circumstances under which the VECP may result in reduced Level 2 services. As prior to adoption of the VECP, pumping was maintained as a continuous operation until water levels at the LGDS reached 35' and rising.[6] The number of personnel needed, and the amount of time Level 2 support services was required, were dependent on ponding stages, water

elevations at various locations and the number of pumps needed to meet the discharge requirements of the contract. Whenever the pumps were operating, Level 2 support services were needed. The VECP did not change the discharge requirements in the contract, but only affected operation of the pumps when pool-to-pool head differentials were below 5' and then only at varying elevations, and allowed for the operation of the VBVs in a closed position. Although appellant alleges in Mr. Young's declaration at p. 3 that the VECP-changed operations provided greater pumping efficiency, this has not been proven to equate to a reduction in Level 2 support services prior to the LGDS reaching 35' and rising because the contract's discharge requirements dictated that the contractor maintain the water elevation equal to the inflow rate over the weirs. Level 2 services were needed as long as the contractor had to maintain or match the required water elevation. Greater pump efficiency was not then a relevant factor with respect to the necessity for Level 2 support services; it was the volume of water over the weirs that determined the duration and extent of Level 2 support services needed to operate the pumps. The plant could only pump the water that was delivered to it. More efficient pumping due to VECP-changed procedures could reduce the duration of time the pumps were operated when pool-to-pool differentials were less than 5', and discharge requirements changed due to the water levels at the LGDS reaching 35' and rising. (R4, tab 27) That has not been proved to have occurred on more than two days, nor was there proof of additional days of reduced Level 2 services.

CONCLUSION

The remaining issue in ASBCA No. 52891 is dismissed for want of jurisdiction. We deny ASBCA No. 54047. Rig Masters failed to prove its claims by a preponderance of evidence, and has not shown that operating the pumping plant under the changed procedures of its VECP reduced Level 2 support services for the additional days sought. Rig Masters is not entitled to recover the full amount of its development costs and the Government correctly interpreted the contract in permitting the contractor to recover only "negative instant contract savings" where the costs exceeded the savings.

Dated: 18 June 2003

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur as to ASBCA No. 52891 and do not participate in the decision as to R12.3 ASBCA No. 54047

I concur

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

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

NOTES

[1] All Rule 4 references are to the original file in ASBCA No. 52891, unless otherwise indicated.

[2] On 25 April 2003, Rig Masters submitted a corrected certification which complied with the Contract Disputes Act, 41 U.S.C. § 605.

[3] The appeal was taken to the Corps of Engineers Board of Contract Appeals (Engineer Board). On 12 July 2000, the Engineer Board was merged into the Armed Services Board of Contract Appeals.

[4] Rig Masters was initially represented at the Board by Wheelis & Rozanski. By Board Order dated 4 September 2001, Wheelis & Rozanski was given permission to withdraw as appellant's counsel of record. On 14 September 2001, Cyrus E. Phillips, IV, Attorney at Law, entered a notice of appearance as counsel of record for appellant.

[5] The parties cite *Johnny F. Smith Truck and Dragline Service, Inc.*, ENGBCA No. 6261, 98-2 BCA 30,006. This decision was vacated in relevant part. *Johnny F. Smith Truck and Dragline Service, Inc. v. Caldera*, 232 F.3d 915, 2000 U.S. App. Lexis 8958 (Fed. Cir. 2000) (table).

[6] The O&M manual states at ¶ 3(a)(i)(c) that "[d]uring rising ponding level periods prior to the ponding stages reaching 35.0 [feet] at the Old Bayou Cocodrie [structure] the pumps will operate to a [capacity] equivalent to the flow rates over the

two weirs near mile 22 less the flow rate of the existing channel on Bayou Cocodrie below mile 22."

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. 52891 and 54047, Appeals of Rig Masters, Inc., rendered in conformance with the Board's Charter.

Dated:

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