ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
PNL Commercial Corporation	)	ASBCA No. 53816
	)	
Under Contract No. NAFTJ3-00-C-0010	)	

APPEARANCE FOR THE APPELLANT: Francis X. Rapprich, III, Esq.
Fisher, Rushmer, Werrenrath,
Dickson, Talley & Dunlap, P.A.
Orlando, FL

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Dan A. Payne, Esq.
Stephen L. Sowell, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District,
Mobile

OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In this appeal under a construction contract with a nonappropriated fund instrumentality, appellant seeks additional time due to alleged Government-caused delays, as well as extended field and home office overhead, contending principally that it was not fully compensated in bilateral modifications that it signed under duress. Respondent chiefly defends on the ground that the claimed delays were resolved by bilateral modifications that were not the products of duress. Both entitlement and quantum are before us. We sustain the appeal in part.

FINDINGS OF FACT

A. *The Contract*

1. By date of 9 May 2000, respondent awarded appellant Contract No. NAFTJ3-00-C-0010 to construct two ten-unit temporary lodging facilities for families, to construct adjacent service buildings, and to perform related site work, at Patrick Air Force Base, FL. Ten of the units contained two bedrooms each, nine contained one bedroom each, and one unit was for families with handicapped members and, as such, had to comply with the requirements of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. The original contract price was $ 2,409,876. The contract work was to be completed within 360 calendar days of receipt of notice to proceed. (R4, tab 61 at 2, 01000-1, 01000-2; tr. 359,

398-99) Appellant acknowledged receipt of notice to proceed by date of 23 June 2000 (*id*. at 1), and we find that the original completion date was accordingly 18 June 2001.

2. The contract contained various standard clauses that were comparable to those prescribed for Federal construction contracts. However, it was awarded by a nonappropriated fund instrumentality (NAFI) of the United States, and contained variants of those clauses adapted for use by the NAFI. Thus, section 00700, CONTRACT CLAUSES, contained clause 3, CHANGES, which was substantially identical to the CHANGES (AUG 1987) clause prescribed at FAR 52.243-4, but contained the acronym "NAFI" in place of "Government" throughout. In addition, clause 15, DISPUTES, was similar to the DISPUTES (DEC 1998) clause prescribed at FAR 52.233-1, except that it provided in part:

> (a) This contract is subject to the rules and regulations prescribed by the Secretary of Defense and Secretary of the Army for NAF contracting.
>
> (b) The contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613).
>
> . . . .
>
> (g) The Contractor [sic] Officer's final decision may be appealed by submitting a written appeal to the Armed Services Board of Contractor [sic] Appeals . . . .

Clause 66, NONAPPROPRIATED FUND INSTRUMENTALITY, provided:

> The Nonappropriated Fund Instrumentality (NAFI) which is a party to this contract is a nonappropriated fund instrumentality of the Department of Army. NBO [sic] APPROPRIATED FUNDS OF THE UNITED STATES SHALL BECOME DUE OR PAID THE CONTRACTOR BY REASON OF THIS CONTRACT. This contract is NOT subject to the Contract Disputes Act of 1978.

(R4, tab 61 at 54, 67, 117) (capitalization in original) We find no provision of the contract that expressly authorized the payment of interest on contractor claims.

3. The contract also contained specifications, including: section 01320, PROJECT SCHEDULE. Paragraphs 3.3 and 3.3.1 required the use of the critical path method of network calculation to generate the project schedule (R4, tab 61 at 01320-1-2). Section 3.7, REQUESTS FOR TIME EXTENSIONS, required appellant to justify any requested time extension, providing that "[s]ubmission of proof of delay, based on revised activity logic,

duration, and costs . . . is obligatory to any approvals" (*id*. at 01320-8). Section 3.7.2, Submission Requirements, required that extension requests of less than two weeks be supported, *inter alia*, by a fragnet or ". . . sub-network of the affected area" (*id*. at 01320-8-9). We find that appellant was unaware of this requirement (tr. 215-16, 377-80, 411-12). Section 01330, SUBMITTAL PROCEDURES, set forth the requirements for submission, approval and disapproval of submittals. Paragraph 3.3, SCHEDULING, related to "submittals covering component items forming a system or items that are interrelated." For such submittals, "[a]dequate time (a minimum of 10 calendar days exclusive of mailing time) shall be allowed . . . for review and approval" (R4, tab 61 at 01330-2-3). Section 15400, PLUMBING, GENERAL PURPOSE, contained paragraph 3.9, PLUMBING FIXTURE SCHEDULE, which provided in paragraph P-5, LAVATORY, that "[f]aucets shall be single control, mixing type" with specified flows where a metering device was used, and where such a device was not used (*id*. at 15400-33).

B. *Performance*

4. During performance, appellant's only shareholder and president was Phillip W. Hall (tr. 8; R4, tab 61 at 1-2). Appellant's bookkeeper and office manager was Mae Whitworth (tr. 244), and its project manager was James Bell (tr. 255). On respondent's side, Dennis Newell was the resident engineer, and also served as the administrative contracting officer and the contracting officer's representative (tr. 358-59). He had overall oversight responsibility, which included signature authority to approve progress payments and submittals, and to sign responses to appellant's requests for information (RFIs) (tr. 359). He also had authority to approve and sign modifications up to $100,000 (*id*.). Stephan Hoyle was the project engineer (tr. 421-22). His responsibilities included on-site overview, particularly insuring that the quality control system was performed (*id*).

5. Effective 10 May 2000, respondent issued unilateral Modification No. P00001, administratively transferring authority for contracting actions to respondent's Mobile District, with no change in contract time or cost (R4, tab 50). On or about the same date, respondent also issued Modification No. P00002, designating Mr. Newell as administrative contracting officer and contracting officer's representative (tr. 376).

6. The contract was modified numerous times during performance to address specific problems. Thus, by date of 22 November 2000, the parties entered into bilateral Modification No. R00003 for the relocation of the north sanitary sewer manhole, for an $18,500 increase in contract price and four additional days of time (R4, tab 51 at 1-3). We find that the modification resulted from design deficiencies (*id*. at 5; tr. 377). In the negotiations preceding the modification, appellant submitted three consecutive proposals, the last of which sought $18,517 and 14 days of additional time, with no extended field overhead (*id*. at 6). After discussion, the parties agreed to a lump sum settlement of $18,500, plus four additional days (*id*. at 6-7). We find that respondent did not believe that appellant had established entitlement to the additional time, but agreed to it in the interest

of settlement (tr. 380). We further find that the parties negotiated field overhead cost, and that they included both that element and extended home office overhead in arriving at the lump sum amount (R4, tab 51 at 7; tr. 380).

7. By date of 19 December 2000, the parties entered into bilateral Modification No. R00004 changing the contract drawings to require the installation of a four-inch fire water main service to one of the service buildings. The parties agreed to a lump sum settlement, increasing the contract price by $10,800, and leaving the completion date unchanged (R4, tab 52 at 1 to 2). We find that the modification was occasioned by a drawing defect. We further find that appellant's original proposal was for $8,368.81 with no time, that this proposal went through several revisions during the negotiations, and that, in arriving at the lump sum amount, the parties included an overhead rate of 15 percent plus profit (*id*. at 5; tr. 382).

8. By date of 19 December 2000, the parties entered into bilateral Modification No. R00005 making various changes in the electrical service. The parties agreed to decrease the contract price by $6,004, and to leave the completion date unchanged (R4, tab 53 at 1-3). We find that the modification resulted from drawing deficiencies. We further find that, taking into account the balance of additive and deductive changes, appellant's proposal was not significantly revised in the negotiations (*id*. at 10; tr. 383-84). Appellant's proposal did not seek a change in contract time (R4, tab 53 at 10).

9. By date of 25 January 2001, the parties entered into bilateral Modification No. R00006 providing for concrete removal to permit construction of a new electrical ductbank. The parties agreed to increase the contract price by $7,254, and to leave the completion date unchanged (R4, tab 54 at 1-3). We find that the modification resulted from drawing deficiencies (*id*. at 4). We further find that, as a result of the parties' negotiations, appellant's proposal of $7,362.66 with 15 percent overhead and no additional time was reduced by a net amount of $108.66 (*id*. at 5, 7).

10. By date of 3 February 2001, the parties entered into bilateral Modification No. R00007 providing for revisions related to the exterior door openings, as well as to the equipment and room finish schedules. The parties agreed to increase the contract price by $12,431, and to leave the completion date unchanged (R4, tab 55 at 1-4). We find that the modification resulted from drawing deficiencies (*id*. at 5; tr. 385). We further find that, as a result of the parties' negotiations, appellant's proposal of $11,297 with no additional time was increased by a net amount of $1,134 (*see id*. at 6).

11. By date of 9 August 2001, the parties entered into bilateral Modification No. R00008 providing for: (a) submission of a sample kitchen cabinet for Government approval; (b) revisions to mow strip and soil elevations; (c) revisions related to the exterior door openings; and (d) in the Americans With Disabilities Act unit, relocation of the installed electrical panel and revision of the size of the grab bar. We find that the

modification resulted in part from design deficiencies. The parties agreed to increase the contract price by $15,317, and to leave the completion date unchanged. (R4, tab 56 at 1-4, 6)

12. We find that the negotiations for Modification No. R00008 were conducted initially by Mr. Bell for appellant and Messrs. Newell and Hoyle for respondent. We find that respondent concluded that some of the cost items had been substantiated, but that appellant had not provided information showing impact (tr. 387-88). Based on the negotiations, respondent forwarded a modification to appellant for signature. Mr. Hall thereafter returned the modification signed, but with qualifications regarding the cost and time settlement, chiefly related to a part of the settlement concerning fire extinguisher cabinets. After further negotiations resulted in an impasse, respondent deleted the fire extinguisher cabinets, and declined appellant's request for time as unsubstantiated. Respondent then forwarded a revised modification to appellant, which appellant signed without reservation of right. (R4, tab 35; tr. 144-45)

13. By date of 9 August 2001, the parties entered into bilateral Modification No. R00009 providing for: (a) revisions to the equipment schedule to change certain appliances in the kitchen of the Americans With Disabilities Act unit; and (b) revisions to the drawings regarding the location of the water closet, grab bar and toilet paper dispenser in the bathroom of that unit. The modification resulted from a design deficiency. The parties agreed to increase the contract price by $4,200 and to extend the completion date by 59 days. (R4, tab 57 at 1-4)

14. We find that the negotiations for Modification No. R00009 were conducted initially by Mr. Bell for appellant and Messrs. Newell and Hoyle for respondent. Appellant's proposal sought $13,293.25 and 16 additional days, although there was no supporting documentation for the time component (R4, tab 57 at 6; tr. 393). While the modification originally was to be issued for a $4,200 price increase, plus a 38 day time extension with no extended overhead costs, it was mistakenly issued to show the price increase as $4,000 (R4, tab 57 at 6, 11; tr. 394-95). Mr. Hall returned the modification with markings noting the erroneous price increase and requesting 30 more days, for a total time extension of 68 days. Appellant provided no justification for this additional time. (R4, tab 57 at 11) After further negotiations, respondent corrected the $200 pricing error, and added 16 days to the 38 days previously negotiated. Because the extended time included weekend days, the total time extension was computed at 59 days (tr. 395-96). We find that the parties included overhead in the price increase (R4, tab 57 at 7) and that, in granting the additional time, respondent extended the completion date for the 19 other units in the project, even though the modification involved only the Americans With Disabilities Act unit (tr. 392, 394-95).

15. By date of 13 August 2001, the parties entered into bilateral Modification No. R00010 providing for the addition of a key card interface module. The parties agreed to

increase the contract price by $3,124, and to leave the completion date unchanged (R4, tab 58 at 1-3) We find that, in the preceding negotiations, the parties agreed to reduce appellant's original proposal of $4,445.21, seemingly with no additional time, to $2,445, to which they added overhead and profit (*id*. at 5; tr. 388).

16. By date of 11 August 2001, respondent unilaterally issued Modification No. R00011 extending the completion date by 21 days, to 10 September 2001, with no increase in the contract price, for unusually severe weather (*id*., tab 59 at 1-2). We find that the parties had originally entered into a bilateral modification providing for a 15 day weather time extension, but a review by respondent's Mobile District (*see* finding 5) revealed that the extension had not been computed on a day-for-day basis from the original completion date, and respondent unilaterally reissued the modification for 21 days (tr. 389-90). We further find that Mr. Newell had the authority to issue unilateral modifications with the concurrence of the contracting officer (tr. 396), as he did here.

17. By date of 26 September 2001, the parties entered into bilateral Modification No. R00012 providing for sidewalk entrance cuts to make the Americans With Disabilities Act ramps accessible. The parties agreed to increase the contract price by $3,600, and to leave the completion date unchanged (R4, tab 60 at 1-3). We find that the modification resulted from drawing deficiencies. We further find that appellant's original proposal was for $8,110.67 and five additional days of contract time, and that there was no impact, the work having been performed by the 10 September 2001 completion date (*id*. at 9-10; tr. 391-92).

18. The majority of the foregoing bilateral modifications were negotiated by Mr. Bell, as appellant's authorized representative, Mr. Hall having stayed out of many meetings with Mr. Newell and Mr. Hoyle in the interest of amity (tr. 51, 138-40, 220, 289, 309-10). Following negotiations, Mr. Hall signed each bilateral modification (R4, tabs 51 at 1 to 58 at 1, 60 at 1). Each one contained a release. Except with respect to the date inserted for the relevant proposal, the release provided:

> In consideration of a modification agreed to herein as complete equitable adjustment for the Contractor's [date] proposal for adjustment, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances given [sic] rise to the proposal for adjustment.

(R4, tabs 51 at 2, tab 52 at 2, tab 53 at 2, tab 54 at 2, tab 55 at 2, tab 56 at 2, tab 57 at 2, tab 58 at 2, tab 60 at 2) We find that no release in any bilateral modification contained a reservation of rights or other language qualifying the scope of the release.

19. Mr. Hall testified that he had signed the bilateral modifications because of threats by Mr. Newell and Mr. Hoyle. He explained that the threats "were presented to me under the guise of a negotiation. I never agreed to the negotiations. They were always presented to me as sign or I would not receive payment. I clarified on every occasion, 'Do you mean not receive payment, my monthly payment?' 'That's correct.'" (Tr. 125) He reiterated that Mr. Newell and Mr. Hoyle told him repeatedly that, "[y]ou will not be paid [your monthly progress payment] if these mods aren't signed" and hence "I signed everything" (tr. 218, *see also* tr. 156, 217-18). He also asserted that he "had asked for a mod to be issued unilaterally and was refused" (tr. 128; *see also* tr. 454-55). With respect to the timing and frequency of the threats, Mr. Hall testified on direct examination that the threats were made by "Mr. Hoyle on a number of occasions and Mr. Newell on a couple towards the end" (tr. 126), and on cross examination that Mr. Hoyle made the threats "every months' end when I would contest him reducing the [progress payment] percentages" and "Mr. Newell three or four months in . . . told me the same thing" (tr. 217). Mr. Hall admitted, and we find, that there is no documentary evidence of the threats, and that there was no occasion on which appellant did not receive its progress payment (tr. 156, 218).

20. Appellant offered the testimony of Mr. Bell and Ms. Whitworth to corroborate Mr. Hall's account of threats. Mr. Bell testified that "[p]robably twice" he heard an unidentified representative of respondent tell Mr. Hall that he had to sign modifications or he would not get paid (tr. 308). We do not find this testimony credible because Mr. Bell testified on cross examination that he did not actually hear the unidentified representative use the words "progress payment," but that was his interpretation (tr. 301-11). For her part, Ms. Whitworth testified that "once or twice" she had overheard Mr. Hoyle tell Mr. Hall "that if he did not sign the modifications, he would not get paid, period" (tr. 251-53). We do not find this testimony credible because she admitted on cross examination that she never actually heard Mr. Hoyle say that appellant would not get its monthly progress payment and that "it could have been a possibility" that Mr. Hoyle was telling Mr. Hall that he would not get paid if the modification were not in accordance with the contract (tr. 253).

21. Mr. Newell flatly denied making threats, testifying that he "never told anyone with [appellant] that I would not pay them if they would not sign a mod. Never told them that." He added that he "[n]ever made any statements about connecting payment, progress payments with payments-- or not signing modifications." (Tr. 370, 371) He explained that "work is included in the basic contract. I would not withhold work from their basic contract or work that was already in their contract. I would not withhold payment for that because they did not sign a modification." (Tr. 371) He testified that withholding payment from a contractor was a serious action that required approval above his level (tr. 372). For his part, Mr. Hoyle testified that he "never told anyone" that they would not get paid for failure to sign a modification and that he too lacked the authority to withhold payment (tr. 435). He also explained that he was sure that he did tell appellant that respondent could not pay for work that was not included in either a bilateral or unilateral modification because the work would not be part of the contract (tr. 435-36). We find this explanation credible.

22. We find no persuasive evidence that respondent placed appellant in a desperate financial condition. While Mr. Hall testified that he felt that he had no option but to sign the bilateral modifications, because appellant "had reached an economic stop" (tr. 125-26), he also testified variously that appellant "wasn't broke. I had other jobs that were making money, but I was putting it into the Government job" (tr.177) and that "[w]e weren't broke, but I couldn't-- I couldn't run any other jobs outside of there, which is why I had to do just that job" (tr. 129).

23. The project was substantially completed on 10 September 2001 (tr. 49), which was the completion date specified in Modification No. R00011 (*see* finding 16).

C. *Claim and Appeal*

24. By date of 7 November 2001, appellant submitted a certified claim to the contracting officer, demanding $296,493.50 in costs, together with 65 days of time, which were said to be required to make appellant whole for: (a) additional field office overhead; (b) extended home office overhead; (c) outstanding change order # 13, relating to plumbing faucets; (d) removal and replacement of a handicap ramp; (e) the contract balance of $56,600; and (f) claim preparation costs (R4, tab 2 at 2, 19-20). The costs and time were said to have been caused by: (1) conflicts and deficiencies in the plans and specifications; (2) dilatory responses to important RFIs; (3) failure to resolve issues through RFIs; (4) dilatory change authorizations; (5) delayed approval of submittals; and (6) active interference by respondent's representative (*id*. at 1). Thereafter, by decision dated 27 February 2002, the contracting officer denied the claim (*id*., tab 3) and appellant subsequently filed this timely appeal. We determined that the certification accompanying the claim was defective, and directed appellant to cure the defect, which appellant timely did.

25. We find that appellant's claim is principally for work for which appellant was paid less through modifications than appellant sought (*see* tr. 209-11). Asked whether there was any work that appellant had done for which it had received absolutely no compensation, Mr. Hall explained that "there was a couple of them, but it was so nominal I never really brought them up. But I was always given a portion of what we requested the amount for" by modification (tr. 210). He added that "there was always some payment so as to close that out and be agreed upon, closed out and done. I never agreed with any of them" (*id*.). His testimony contains other similar expressions (tr. 72 (Modification No. R00009 monetary settlement not enough); tr. 101 (Modification No. R00007 did not compensate for all door and door frame issues); tr. 103 (Modification No. R00003 settlement for "less than half" of cost); tr. 119-20 (mow strip settlement in Modification No. R00008 "nominal"); tr. 146 (disagreement with settlements in Modification Nos. R00008, R00009, R00010); tr. 154 (seeming disagreement with all settlements); tr. 210 (Modification No. R00012 paid for "a portion" of sidewalk ramp revisions)). Mr. Hall agreed that there is no work for which he received absolutely no compensation (tr. 211).

26. With respect to the portion of the claim regarding extended home office overhead (*see* finding 24), we find no persuasive evidence that appellant was on standby during any of the period for which such costs are claimed (tr. 197-203).

27. With respect to the portion of the claim regarding delays due to conflicts in the plans and specifications (*see* finding 24), the record reflects that, after notice to proceed, respondent's field office personnel discovered that they were using a different set of plans from the set that appellant had. Both parties thereafter used the same set that appellant had bid upon (tr. 365-68, 402-03, 452). Mr. Hall testified that he could not specifically recall any conflicts between the two sets of plans that delayed the project, and Mr. Newell testified that there was no impact (tr. 220, 368). With respect to delays attributable to deficiencies in the plans and specifications, we find that such deficiencies were addressed in eight of the bilateral modifications (*see* findings 6-11, 13, 17), and the record does not establish other deficiencies, if any.

28. With respect to the portion of the claim regarding unreasonable delays in responding to RFIs and failure to resolve issues through RFIs (*see* finding 24), the record contains varying evidence that, during performance, appellant tendered either 72, 76 or 78 RFIs (tr. 24, 346, 422; R4, tab 2 at 6; app. ex. 160 at 2-3). At trial, Mr. Hall asserted that the number of RFIs, and the response time, delayed appellant (tr. 25). In its request for equitable adjustment, appellant asserted that, while "[t]he typical response time required by [respondent] was not unreasonable," nonetheless "the response time for certain of the RFIs was excessive" (R4, tab 2 at 6; *see also* tr. 346). We find this conclusion unpersuasive because appellant's scheduling expert determined that any response time longer than two weeks was *per se* unreasonable (tr. 346), because he did not evaluate the complexity of individual RFIs in determining excessive response time (tr. 347-49), and because some RFIs were answered in the field before the paper responses (tr. 423-24, 438-39, 456). Mr. Hoyle testified that some RFIs were "really not true RFIs. They are requests for deviations" (tr. 423). He compared the individual RFIs with the activities shown on appellant's network analysis, "and there was absolutely no delay shown" (tr. 424), and we so find.

29. We find no credible evidence that, apart from delays addressed in modifications, delays related to submittals (tr. 25-26, 209-10, 314-23, 349), change authorizations (tr. 349), or interference, if any, by respondent's representative (*id*.), affected project completion.

30. With respect to the portion of the claim regarding change order # 13 for faucets (*see* finding 24), the record reflects that appellant tendered a plumbing submittal that included lavatory faucets, seemingly under specification section 15400 (*see* finding 3). Respondent thereafter made the following comments:

> Revise and Resubmit: Provide a dual handle metering faucet that is capable of delivering both hot and cold water such as Chicago Faucets model 802A-665. Alternate manufacturers and models include T & S Brass model B-0831 and Symmons model S-60-G-H.

The comments, which also addressed other submittals, contained the following legend:

> THE ABOVE COMMENTS ARE PROVIDED AS A GUIDE FOR COMPLIANCE WITH AND CLARIFICATION. THEY ARE NOT INTENDED TO AUTHORIZE OR PROMOTE REVISIONS TO THE CONTRACT REQUIREMENTS. PLEASE ADVISE THIS OFFICE PRIOR TO ANY ACTION IF COMMENTS ARE INTERPRETED TO INCLUDE REVISIONS TO THE CONTRACT REQUIREMENTS.

(R4, tab 44 at 6) (capitalization in original) Appellant nonetheless treated these comments as a change order, purchased the Symmons model S-60-G-H faucets, and requested a $6,613.81 modification, which Mr. Newell refused by letter dated 26 September 2001 (R4, tab 44). While Mr. Hall testified that appellant continues to seek the additional costs because respondent specified "a cheap faucet and they asked for a better faucet [and] [w]e put a better faucet in" (tr. 72, 210, 241), we find no persuasive evidence that respondent ordered a change.

31. With respect to the portion of the claim regarding handicap ramps (*see* finding 24), the record reflects that appellant was directed to remove and replace the ramps several times for noncompliance with the plans and Americans with Disabilities Act requirements in that the slopes were too steep (tr. 51-54, 415-16, 432-34, 455-56). We find that this problem is distinct from the problem underlying Modification No. R00012 (tr. 390-91, 447-49; *see* finding 17). We further find that appellant seeks the cost of installing the ramps four times (tr. 54, 210), and that, while Mr. Hall opined that the problem was that the plans incorrectly depicted how the ramps should be installed (tr. 52), there is no persuasive evidence to support that conclusion.

32. With respect to the portion of the claim regarding claim preparation costs (*see* finding 24), we find no evidence that such costs were incurred incident to contract administration or to promote settlement.

33. With respect to the portion of the claim regarding the $56,600 contract balance (*see* finding 24), $30,000 remained unpaid at the time of trial (tr. 143, 160, 373-75), respondent was withholding the amount against punch list work (tr. 374), and Mr. Newell expressed the intention to refund the amount upon verification that the work had been satisfactorily completed (*id*.).

DECISION

A. *Contentions of the Parties*

In seeking additional time and money under its NAFI contract (*see* finding 2), appellant echoes much of what it raised in its claim (*see* finding 24). Thus, appellant contends that the plans and specifications were "seriously defective," that respondent unreasonably delayed in answering appellant's requests for information, and that respondent delayed reviewing and approving appellant's submittals. (Post Hearing Brief (app. br.) at 14-15) Appellant also argues that it was "burdened, intimidated and treated unfairly" by respondent's representatives, who unreasonably kept appellant on the site after project acceptance to perform punch list and warranty work (*id*. at 15). Asserting the major premise of its case, moreover, appellant insists that the bilateral modifications that it signed "should be held unenforceable, due to the economic duress exerted by the government" (*id*. at 17).

For its part, respondent stresses that "the disclaimers contained in the bilaterally signed modifications [*see* finding 18] result in an 'accord and satisfaction' between the parties, and that [appellant] cannot claim at this point to re-open these modifications" (government brief (gov't br.) at 12). Respondent also urges that appellant is barred as a matter of law from recovering *Eichleay* damages for time extensions reflected in bilateral modifications and that there is no factual basis for the time and overhead claimed (gov't br. at 13-14).

While both parties have erroneously treated the appeal as subject to the Contract Disputes Act (compl., ¶ 1; answer, ¶ 1), our jurisdiction derives from the Disputes clause of this NAFI contract (*see* finding 2).

B. *Duress*

The threshold issue is appellant's contention that the bilateral modifications should be disregarded as the products of duress. While some portions of appellant's claim appear to exist separately from the bilateral modifications, the merit of the duress allegations determines whether the majority of the claim stands or falls.

It is familiar that, to render a contract unenforcesible for duress, a party must establish that: "'(1) it involuntarily accepted [the other party's] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the other party's] coercive acts.'" *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir. 2003) quoting *Dureiko v. United States*, 209 F.3d 1345, 1358 (Fed. Cir. 2000); *see also Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983). Economic duress "emphasiz[es] the lack of a reasonable alternative." *Systems*

Technology, supra, 699 F.2d at 1387. Nonetheless, "pressure, even the threat of considerable financial loss, is not the equivalent of duress." *International Telephone & Telegraph Corp. v. United States*, 509 F.2d 541, 549 n.11 (Ct. Cl. 1975). Instead:

> [a] party induced by the want of money, to which the [respondent] has not contributed, to accept a lesser sum than he claims is due is not under legally recognized economic coercion or duress. Some wrongful conduct must be shown, to shift to [respondent] the responsibility for bargains made by [appellant] under stress of financial necessity.

La Crosse Garment Mfg. Co. v. United States, 432 F.2d 1377, 1382 (Ct. Cl. 1970). For Government action to be found wrongful, it must be "(1) illegal, (2) a breach of an express provision of the contract without a good-faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing." *Freedom NY, supra,* 329 F.3d at 1330.

Considering the record in light of these standards, we can only conclude that duress has not been established. The duress claim rests entirely upon the testimony of Mr. Hall, appellant's president and sole shareholder (*see* finding 4), that Mr. Newell and Mr. Hoyle each threatened to withhold progress payments if appellant did not sign the bilateral modifications (finding 19). Mr. Hall's testimony was not corroborated by documentation (*id*.), or by either Mr. Bell or Ms. Whitworth. Both were offered as witnesses to the threatening incidents. Both offered testimony on direct examination that supported Mr. Hall's account, but both qualified or recanted this testimony on cross examination. (Finding 20) Mr. Hall's testimony was flatly contradicted by Messrs. Newell and Hoyle (finding 21). Mr. Newell noted that he lacked the authority to withhold progress payments (*id*.), and, by contrast to *Freedom NY*, none were in fact withheld (finding 19). Mr. Hoyle's explanation of what he said – respondent could not pay for work that was not included in a bilateral or unilateral modification – is credible (*id*.).

Other considerations point to credibility problems with Mr. Hall's generalized duress testimony, which treats all of the modifications as an undifferentiated group (*see* finding 19). The negotiation history of the individual modifications undermines any conclusion that they were prompted by coercion or "[s]ome wrongful conduct." *La Crosse*, *supra*, 432 F.2d at 1382. Thus, the negotiations regarding Modifications Nos. R00004 and R00007 resulted in settlements that were increases, not decreases, over the costs proposed by appellant (findings 7, 10). Similarly, in Modification No. R00009, appellant won more time than it originally sought in its proposal (findings 13, 14), and in Modification No. R00011, respondent unilaterally increased the time accorded in the preceding bilateral modification (finding 16). In the case of Modification No. R00009, respondent extended the time for all units, although the delays pertained to only one unit (finding 14). These time extensions must be viewed in the context of respondent's waiver of the contractual

requirement that time requests be substantiated by "proof of delay, based on revised activity logic, duration and costs" (finding 3), which waiver is at odds with appellant's present claim of wrongful conduct. While appellant's cost proposals were revised downward in Modification Nos. R00009, R00010 and R00012 (findings 14, 15, 17), they were not significantly reduced in Modification Nos. R00003, R00005 and R00006 (findings 6, 8, 9). In addition, apart from the negotiation history of the modifications, Mr. Hall's testimony that appellant's financial situation "permitted no other alternative," *Systems Technology, supra*, 699 F.2d at 1387, is not persuasive (finding 22).

Inasmuch as we cannot conclude that the bilateral modifications were prompted by duress, the unambiguous releases in each modification, which were executed without reservation of right (finding 18), constitute accords and satisfactions that preclude reopening the matters addressed therein. *E.g, Bechtel National, Inc.*, ASBCA No. 51589, 02-1 BCA ¶ 31,673 at 156, 528, *aff'd*, 65 Fed. Appx.. 277, 279-80 (Fed. Cir. 2003). The question then becomes whether the scope of the bilateral modifications is as broad as the scope of the claim.

While the record is not as clear as it might be, we conclude that the bilateral modifications as well as other impediments, bar the majority of the claim. For his part, Mr. Hall admitted that the operative facts underlying the bilateral modifications and the claim are coextensive (finding 25). He identified six bilateral modifications specifically as among those for which appellant received insufficient compensation (*id*.). Moreover, the "seriously defective" plans and specifications in the claim (app. br. at 14) were addressed in eight of the bilateral modifications, which were prompted by drawing deficiencies (findings 6 to 11, 13, 17). And, while appellant claims both field and home office overhead (finding 24), the parties expressly negotiated overhead in some form in three of the modifications (findings 6, 9, 14) In addition, there is no basis for concluding that appellant is entitled to additional time beyond that bargained for in bilateral modifications Nos. R00003 and R00009 (findings 6, 13) and allowed in unilateral Modification No. R00011 (finding 16). Appellant completed the project within the time allowed in Modification No. R00011 (finding 23), and appellant expressly agreed to no additional time in seven of the bilateral modifications (finding 7-11, 15, 17). Moreover, the portion of appellant's claim for *Eichleay* damages suffers from two other severe impediments: such damages are not recoverable for periods covered by bilateral contract extensions, *C.B.C. Enterprises, Inc. v. United States*, 978 F.2d 669, 675 (Fed. Cir. 1992), and evidence to support a finding that appellant was on standby is required, *e.g., Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1058 (Fed. Cir. 1993), but is lacking (finding 26).

There are nonetheless eight areas raised in the claim that we cannot say are barred be the bilateral modifications, or otherwise. We address them below

C. *Matters Outside the Modifications*

Appellant cites eight areas in its claim that we cannot trace to the bilateral modifications. They are: (1) use of a different set of plans and specifications (as distinguished from defects therein); (2) RFI delays; (3) change authorization delays; (4) submittal delays; and (5) active interference by respondent's representative (*see* finding 24). In addition, aside from field and home office overhead (discussed above) appellant has sought further compensation for: (6) faucets and handicapped ramps; (7) claim preparation costs; and (8) the unpaid contract balance (*see id*.).

These matters are largely factual, and we have resolved the majority of them in our findings (*see* findings 27-31). Two of the matters require further mention. With respect to claim preparation costs, there is some ambiguity over whether appellant still seeks such costs. Nonetheless, the record fails to establish that the claimed costs were incurred for contract administration (finding 32). *See Grumman Aerospace Corporation*, ASBCA No. 50090, 01-1 BCA ¶ 31,316 at 154,672-74, *aff'd*, 34 Fed. Appx. 710 (Fed. Cir. 2002).

With respect to appellant's claim for the unpaid contract balance, it was undisputed at the time of trial that $30,000 in contract proceeds remained unpaid (finding 33). Appellant is entitled to this money if not already paid. The parties have not directed us to, and we have not found, any statutory authorization for the payment of interest on appellant's claim. The contract does not provide for such interest (finding 2). Hence, appellant is not entitled to interest on the unpaid amount. *E.g., Recreational Enterprises*, ASBCA No. 32176, 87-1 BCA ¶ 19,675 at 99,601.

CONCLUSION

The appeal is sustained to the extent that appellant is entitled to recover the withheld contract proceeds not already paid, without interest. In all other respects, the appeal is denied.

Dated: 30 October 2003

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

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. 53816, Appeal of PNL Commercial Corporation, rendered in conformance with the Board's Charter.

Dated:

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