ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Schnider's of OKC	)	ASBCA No. 54327
	)	
Under Contract No. F34650-96-D-0036	)	

APPEARANCE FOR THE APPELLANT: Debby Toland, Esq.
Midwest City, OK

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Thomas S. Marcey, Esq.
CAPT Teresa G. Love, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
ON GOVERNMENT MOTION FOR SUMMARY JUDGMENT

This appeal involves a contract to provide floorboards for government aircraft. Appellant, Schnider's of OKC, seeks $12,825,000 as collateral savings based upon an asserted value engineering change proposal (VECP). The government has moved for summary judgment. The motion is granted.

STATEMENTS OF FACT FOR PURPOSES OF THE MOTION[1]

1. The government awarded Contract No. F34650-96-D-0036 to appellant in April 1996. Under the contract, appellant was to supply the government with replacement finished plywood floor panels in C/KC 135 aircraft. The contract included FAR 52.243-1 CHANGES -- FIXED-PRICE (AUG 1987) and FAR 52.248-1 VALUE

[1] The Statements of Fact for Purposes of the Motion, ¶¶ 1-20, have been taken from the government's motion for summary judgment, and appellant's agreement to the facts as set forth by the government as being an accurate reflection of the history of the appeal. Except for minor editorial and stylistic changes, ¶¶ 1-20 of the Statements of Fact are quoted from the government's motion with two exceptions. Paragraph 1 has been revised to include the relevant paragraphs of the FAR 52.248-1 VALUE ENGINEERING (MAR 1989) clause cited in the quoted paragraph. Additionally, a sentence has been added to ¶¶ 3, 8, 13, 15, and 18 to the effect that the correspondence referenced in each of those paragraphs did not contain the information required by the Value Engineering clause.

ENGINEERING (MAR 1989) clauses. (R4, tab 1) The VALUE ENGINEERING clause provided, in pertinent part:

> (c) *VECP preparation*. As a minimum, the Contractor shall include in each VECP the information described in subparagraphs (1) through (8) below. . . . The VECP shall include the following:
>
> (1) A description of the difference between the existing contract requirement and the proposed requirement, the comparative advantages and disadvantages of each, a justification when an item's function or characteristics are being altered, the effect of the change on the end item's performance, and any pertinent objective test data.
>
> (2) A list and analysis of the contract requirements that must be changed if the VECP is accepted, including any suggested specification revisions.
>
> (3) Identification of the unit to which the VECP applies.
>
> (4) A separate, detailed cost estimate for (i) the affected portions of the existing contract requirement and (ii) the VECP. . . .
>
> (5) A description and estimate of costs the Government may incur in implementing the VECP, such as test and evaluation and operating and support costs.
>
> (6) A prediction of any effects the proposed change would have on collateral costs to the agency.
>
> (7) A statement of the time by which a contract modification accepting the VECP must be issued in order to achieve the maximum cost reduction, noting any effect on the contract completion time or delivery schedule.
>
> (8) Identification of any previous submissions of the VECP, including the dates submitted, the agencies and contract numbers involved, and previous Government actions, if known.

. . . .

(e) *Government action*. . . .

. . . .

(3) Any VECP may be accepted, in whole or in part, by the Contracting Officer's award of a modification to this contract citing this clause and made either before or within a reasonable time after contract performance is completed. Until such a contract modification applies a VECP to this contract, the Contractor shall perform in accordance with the existing contract. The Contracting Officer's decision to accept or reject all or part of any VECP and the decision as to which of the sharing rates applies shall be final and not subject to the Disputes clause or otherwise subject to litigation under the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

2. The original Statement of Work (SOW) required the floorboards to be 3/8" Douglas fir 5 ply A-B exterior or marine grade plywood. The contract price was based on the lower grade exterior plywood. During the first year of deliveries, the outer ply (painted surface) began to crack and curl up, resulting in unsightly conditions and the potential for accelerated degradation. These problems generally began after the expiration of the 65-day acceptance period and before the aircraft left their scheduled Program Depot Maintenance (PDM). (R4, tabs 1-6)

3. In a proposal dated 12 February 1997, entitled "VALUE ENGINEERING PROPOSAL FOR KC-135 FLOORBOARDS," appellant noted that it had determined that the "failed results" (cracking and curling of the veneer) were "stress checks" that were caused by thin and/or weak face veneer or by excessive "flexing movement" due to improper mounting. As a solution, appellant proposed the use of a "high-finish structural plywood such as [high-density overlay/medium-density overlay] (HDO/MDO)" to the face and back. Appellant asserted this would eliminate checking problems and produce a smooth and durable surface, and that it could be done "at little or no additional cost." Appellant did not address this proposal, and it is unclear from the record to whom it was sent. In any event, notwithstanding its title, this proposal does not contain the information required by the Value Engineering clause set forth above. (R4, tab 5)

4. On 18 February 1997, appellant wrote a memorandum to Mr. Milton T. Halleckson, Contracting Officer for the Specialized Contracting Branch, Directorate of

Aircraft, at Tinker AFB, entitled, "A study to determine process of efficiently re-establishing cosmetic finish on stress checked panels." The letter addressed the stress-checked floorboard panels issue, and proposed *refinishing* floorboard panels as opposed to replacing them. The panels would be sanded and given an application of a polyurethane product as both a filler/primer and as a top coat/finish coat. The proposed change would repair existing checks, but not prevent future ones. Appellant did not mention the use of HDO/MDO. The memorandum did not refer to its subject as a "Value Engineering Change Proposal," nor did it reference the 12 February 1997 proposal. (R4, tab 4)

5. Appellant wrote a memorandum, dated 25 February 1997, to Mr. Halleckson, entitled "Proposal for Alternate Material for Floorboard Contract F34650-96-D-0036." In this memorandum, appellant proposed the "use of a high-finish structured MDO [marine grade] plywood" using the paint called for in the SOW. Appellant proposed an increase in price of 60 cents per square foot. Alternatively, appellant proposed the "use of high-finish structured MDO plywood coated with a polyurethane paint with rubber additive" with a corresponding increase in price of 70 cents per square foot. Appellant did not refer to either proposal as a value engineering change. This memorandum did not reference the 12 February 1997 proposal. (R4, tab 3)

6. Mr. Halleckson wrote the C/KC-135 Engineering Office at Tinker AFB on 27 February 1997, requesting an analysis of appellant's proposals of 12 February, 18 February, and 25 February 1997. That office determined that MDO marine grade plywood was the best alternative, and in turn requested the concurrence of the Air Force Reserve, the Air National Guard, and the Air Mobility Command. The chief of that office wrote Mr. Halleckson on 3 April 1997 confirming that all such concurrences had been obtained, and approved an additional $156 per aircraft. None of the letters referred to a value engineering change. (R4, tabs 2-4, 13)

7. During the process of obtaining concurrence as to the proposal, one of the contacted offices, HQ Air Mobility Command, raised an issue regarding the toxicity and burn rate of MDO in a letter, dated 26 March 1997, to the C/KC-135 Engineering Office. The Engineering Office informed Mr. Halleckson, who contacted the MDO manufacturer, Simpson Timber Company, about the problem on 27 March 1997. Simpson replied in a letter that same day, stating that overlay had been used for 55 years as a result of the loss of higher quality old growth trees. Simpson promised a lifetime warranty on any failed panels. None of the referenced letters spoke of a value engineering change. (R4, tabs 8-9)

8. On 27 March 1997, after being informed by Mr. Halleckson of Simpson's letter, appellant wrote a memorandum to Mr. Halleckson, with the subject: "Modification of contract/order no. F34650-96-D-0036-0001." Appellant wrote that

MDO plywood was superior to the currently used plywood, but that the proposed warranty might not extend to materials, latent defects, and panels. Appellant did not provide therein the information required by the Value Engineering clause. The letter did not reference the proposed modification as a VECP, nor did it reference appellant's 12 February 1997 proposal. (R4, tabs 5, 7, 10).

9. In a memorandum dated 28 March 1997 to Mr. Halleckson, entitled "Request for the following information for modification of contract/order no. F34650-96-D-0036-0001." Appellant specifically requested an "engineering change order for 3/8" exterior MDO 5-ply Douglas Fir plywood." Appellant also requested authorization to order the plywood while clarification and contract negotiations continue. The memorandum did not reference the Value Engineering clause and appellant's prior correspondence, nor did it contain any information required for a VECP as set forth in that clause (FAR 52.248-1(c)(1)-(8)). (R4, tab 11)

10. On 14 April 1997, appellant signed Contract Modification No. P00005, which changed the specified flooring material to "Exterior Grade, Medium Density Overlay (both sides), 5 Ply Douglas Fur [sic] Plywood," at a price increase of 60 cents per square foot. The modification did not state that there were any cost savings contemplated or any arrangements for sharing cost savings. Block 13D of the Standard Form 30 indicated that the change was accomplished pursuant to the FAR 52.243-1 clause of the contract, CHANGES—FIXED-PRICE (AUG 1987). The modification did not contain release language. (R4, tab 1, P00005)

11. The Price Negotiation Memorandum prepared by Mr. Halleckson for Modification No. P00005 on 14 April 1997 stated that the floorboard material was changed to MDO due to the decrease in plywood quality. According to the Price Negotiation Memorandum, market research had revealed that smaller and younger trees were being harvested, which reduced the overlay of plywood, resulting in a cracking process. The MDO boards would alleviate the problems of cracking which could compromise the integrity of the floorboards in strength, durability, reliability, aesthetic and uniform functions. Based on that, the price increase was considered fair and reasonable by both the Air Force and appellant. (R4, tab 14)

12. There was no correspondence between the parties in the record indicating that the use of MDO would produce cost savings of either an instant or a collateral nature. There was no file documentation in the record concerning Modification No. P00005 that indicated that the Air Force was aware of any such savings.

13. There was no correspondence between the parties in the record concerning the use of MDO after the issuance of Modification No. P00005 until 17 May 2001. On that date, appellant addressed a letter to Tinker Contracting Officer Gary Lindley, stating that

it wished to submit a VECP for the change allowing the use of MDO in floorboards. Appellant's letter of 17 May 2001 did not contain any of the information required by the VECP clause other than its calculation of the potential collateral cost saving to the government. Appellant asserted that the MDO floorboards lasted three to five times longer than the original 3/8 Douglas fir floorboards, allowing for savings of $20,000 to $23,000 per aircraft. Appellant calculated that it had made floor panels for at least 160 aircraft, amounting to total savings of $9,600,000 to $11,000,000. This letter was not certified as a claim. (R4, tab 19) Appellant had not, prior to this letter, asserted that the MDO plywood would increase the durability of the floorboards and save the government money as a result of that alleged durability.

14. The Contracting Officer sent appellant a memorandum on 17 August 2001 requesting a 90-day delay in considering the requested value engineering change (R4, tab 21).

15. Appellant renewed its request for approval of the 17 May 2001 VECP by a letter to the Contracting Officer dated 29 April 2002. In this letter, appellant stated that it had "submitted a Value Engineering Proposal to Tinker OC-ALC/LADCA on May 17, 2001." Appellant further stated therein that "from the beginning, over a year ago, this Value Engineering Change Proposal has not been handled according to the Federal Regulation." Appellant did not refer to its 12 February 1997 letter, or any of the subsequent correspondence in this 29 April 2002 letter. (R4, tab 23) Moreover, there was no information in its 29 April 2002 letter required by the Value Engineering clause.

16. Darrell A. Davis, Acting Chief, C/KC-135, B-52 & Missiles Contracting Branch, Directorate of Contracting at Tinker, wrote appellant on 24 June 2002 rejecting the "original" VECP of 17 May 2001. Mr. Davis' letter stated that the use of MDO was based on aesthetics and greater availability and that the MDO board did not provide better protection, wear capabilities, or damage resistance than the originally specified floorboard. Mr. Davis stated that aircraft 58-0121, which had left PDM at Tinker in September 1999, had been inspected and found to have already suffered damage to several of the MDO floorboards installed at that time sufficient to warrant replacement at the next scheduled PDM in September 2004. (R4, tab 24)

17. Appellant appealed the Contracting Officer's rejection of the claimed VECP by a letter to the Board dated 19 September 2002. Appellant's attorney filed a complaint with the ASBCA dated 11 October 2002. The appeal was dismissed without prejudice on 29 January 2003 because the 17 May 2001 claim had not been certified. (R4, tabs 25-26)

18. Appellant resubmitted its VECP to the Contracting Officer on 20 February 2003. In it, appellant referred to the proposal of 12 February 1997 as the "first" VECP. Appellant also referred to the letter of 17 May 2001 as "another formal request" for a

VECP. This letter was essentially a chronology of the correspondence and contract modification relating to the floorboard issue. In its 20 February 2003 letter, appellant stated that the new MDO boards would last three to five times longer than the originally specified floorboards and calculated the cost savings as two replacements times a full set of floor panels ($19,000), times 450 aircraft (the entire KC-135 floor), or $17,100,000. According to appellant, seventy-five percent of that amount, the maximum award allowed under the Value Engineering clause, was $12,825,000. Except with respect to its proposed substitution of the MDO floorboard for the previously specified floorboard and its calculated savings, appellant did not include the information required in the Value Engineering clause. Appellant claimed that maximum amount because it asserted that MDO was a new material. The claim was properly certified in accordance with the Contract Disputes Act of 1978, as amended. (R4, tab 27)

19. The Contracting Officer denied the claim by letter dated 13 June 2003. The denial was based on the fact that the 12 February 1997 letter did not meet the requirements of the Value Engineering clause, the fact that Modification No. P00005 incorporated the proposed change into the contract under the Changes clause, and the fact that no cost savings were proposed or in fact realized. (R4, tab 30)

20. Appellant appealed the contracting officer's final decision on 8 September 2003 (R4, tab 31).

DECISION

The government argues that appellant did not submit a value engineering change proposal and that the parties did not agree on a value engineering change to the contract. Appellant contends that the document dated 12 February 1997 (R4, tab 5) proposed an engineering change that led to contract Modification No. P00005, which modification constituted the government's constructive acceptance of the VECP (R4, tab 1, Modification No. P00005). According to appellant, it later provided the government with information on the cost savings resulting from the change, and requested a portion of the savings in its letter of 17 May 2001. The claimed savings were based on the assertion that the change from the plywood initially called for in the contract to MDO plywood resulted in increased floorboard durability. As we stated above, the contract price increased as a result of the change. Appellant does not specifically identify whether it is claiming instant, concurrent, future, or collateral savings. However, based on our reading of the record, appellant's brief in opposition to the government's motion, and the VECP clause, it is clear to us that appellant is asserting a claim for collateral savings.

In moving for summary judgment, the government must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

To survive the government's motion for summary judgment, appellant must establish that there is a genuine issue of material fact as to whether appellant submitted a VECP in accordance with the contract clause and that the government accepted it in whole or in part, by a contract modification, citing the clause and made either before or within a reasonable time after contract performance was completed. In response, appellant, as the nonmoving party, "must come forward with specific facts showing there is a *genuine issue for trial[,]*" and must show what specific evidence could be offered at trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (emphasis in original). As stated in Rule 56(e), Federal Rules of Civil Procedure, as quoted by the U.S. Supreme Court in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. at 586,

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986), which also held at 248 that:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . . That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.

The government may meet its initial burden by showing that there is an absence of evidence supporting an element of appellant's case. If it does so, and appellant fails to make a showing sufficient to establish the existence of an element essential to its case, and on which it has the burden of proof at trial, the government is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *White Sands Construction, Inc.*, ASBCA No. 52875, 02-2 BCA ¶ 31,858 at 157,437.

As stated in *Celotex Corp. v. Catrett*, 477 U.S. at 323:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court

> of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But . . . we find no express or implied requirement in Rule 56 [Federal Rules of Civil Procedure] that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. . . . The import of these subsections [Rules 56(a) and (b)] is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c) [namely, that there has been a showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law], is satisfied.

As provided in the Value Engineering clause, the contracting officer's decision to accept or reject all or part of any VECP and the decision as to which of the sharing rates applies shall be final and not subject to the Disputes clause, or otherwise subject to litigation under the Contract Disputes Act of 1978. Since we are not reviewing the government's decision to accept or reject all or part of the alleged VECP, or the decision as to which sharing rate shall apply, the question of whether or not the government constructively accepted appellant's proposal is properly before us.

In its proposed findings of fact and argument that appellant did not propose a VECP in its 12 February 1997 letter, the government has focused our attention on each of the elements required for a VECP as set forth in the Value Engineering clause and the specific documents in the record, including appellant's 12 February 1997 letter, to support its contention that there is no genuine issue of material fact and that the government is entitled to judgment as a matter of law.

As set forth above, the Value Engineering clause required the contractor to include *inter alia*, as a minimum, in each VECP: (1) a description of the difference between the existing contract requirement and the proposed requirement, the comparative advantage and disadvantage of each, etc.; (2) a list and analysis of the contract requirements that must be changed if the VECP is accepted; (3) identification of the unit to which the VECP applies; (4) a separate, detailed cost estimate for the affected portions of the existing contract requirements and the VECP; (5) a description and estimate of costs the government may incur in implementing the VECP; (6) a prediction of any effects the proposed change would have on collateral costs to the agency; (7) a statement of the time

by which the contract modification accepting the VECP must be issued to achieve the maximum cost reduction; and (8) identification of any previous submissions of the VECP and previous government actions, if known.

Appellant must present evidence that is more than colorable. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). It may not rely on mere allegations and denials in the pleadings, *id.* at 248, or on cryptic, conclusory, or generalized responses, *Durable Metal Products, Inc. v. United States*, 27 Fed. Cl. 472, 477 (1993), *aff'd*, 11 F.3d 1071 (Fed. Cir. 1993) (Table). Appellant has not identified any portions of the pleadings, depositions, answers to interrogatories, admissions on file, or affidavits if any, tending to show that there is a genuine issue of material fact. Indeed, appellant has not disputed the government's proposed findings and, based on our review of the record, we have adopted them as presented by the government. Rather, appellant asserts that its difference with the government is a matter of interpretation of the documents, specifically appellant's 12 February 1997 letter and its subsequent letters, and the government's interpretation of these letters and the government's proposed findings as they apply to the law. Appellant further contends that the government, by accepting contract Modification No. P00005, constructively accepted the VECP represented in appellant's 12 February 1997 letter and subsequent letters. Citing *Covington Industries, Inc.,* ASBCA No. 12426, 68-2 BCA ¶ 7286, appellant argues that:

> This board has held that a contractor who submits a cost reduction proposal to the Government without specifically identifying it as a value incentive proposal as required by the value engineering incentive clause, was nevertheless entitled to share in the resulting savings because the government knew it was a VEI proposal and treated it as such over a long period of time.

(App. br. at 3)

However, the Value Engineering clause clearly sets forth specific requirements which a proposal must meet in order to qualify as a VECP. *Erickson Air Crane Company of Washington, Inc. v. United States*, 731 F.2d 810, 815-816 (Fed. Cir. 1984); *C.A. Rasmussen, Inc. v. United States*, 52 Fed. Cl. 345, 349 (2002). Therefore, to qualify as a VECP, the contractor "must *initiate* the proposal; *develop* the proposal; and *submit* the proposal *in writing.* The proposal also is *required* to '*contain a description* of the difference between the existing contract requirement and the proposed modification, *an itemized and detailed estimate* of the anticipated reduction in the contractor's costs, *the time within which a decision must be made* by the Government and other appropriate information.' " *Erickson Air Crane Company of Washington, Inc. v. United States*, 731 F.2d 810, 815-816 (Fed. Cir. 1984) (emphasis in original). In *NI Industries, Inc.*,

ASBCA No. 29535, 87-2 BCA ¶ 19,688 at 99,657, we held that appellant was not entitled to share in savings under the Value Engineering provision of the contract because it failed to timely identify its cost reduction proposals as a VECP. Rather than submit its cost reduction proposal as a VECP, NI submitted its cost reduction proposal first as an attachment to its bid, and later as an ECP, rather than a VECP, because it was interested in accommodating the machinery and the manufacturing and inspection process it had previously used.

Appellant's reliance on *Covington Industries, Inc.*, ASBCA No. 12426, *supra*, is misplaced. First, the revised 1962 Value Engineering Incentive clause in that case is completely different from the clause in the instant appeal and does not contain the specific requirements contained in the clause in the appellant's contract. As a result, the rationale in *Covington Industries, Inc.*, and in *B. F. Goodrich Company v. United States*, 185 Ct. Cl. 14, 398 F.2d 843 (1968) (reversing *B. F. Goodrich Compan*y, ASBCA No. 10373, 65-2 BCA ¶¶ 4910 and 4953) on which this Board relied in *Covington Industries, Inc.*, are inapposite in the instant appeal. The clause in both *Covington Industries, Inc.*, and in *B. F. Goodrich Company v. United States* did not prescribe the type of information to be submitted as a Value Engineering proposal, and merely provided that such proposals be submitted to the government in the same form as prescribed for any other proposal which would likewise necessitate a change in the contract requirements. Moreover, as the court held in *B. F. Goodrich Company v. United States*, the clause was inserted in the contract for the benefit of the contractor and the government was free to waive its technical requirements. Further, it was clear to the Board, and to the court, in both these cases, that the government considered the contractors' proposals to be under the Value Engineering Incentive clause, even though the contractors failed to submit their proposals in the proper form. There is no evidence in the record that the government waived the technical requirements of the VECP clause.

In this case, we believe that, at a minimum, appellant must show that it submitted a valid VECP and that the government accepted the VECP. The only reference in appellant's 12, 18, and 25 February 1997 documents to value engineering was the label on the 12 February 1997 document. However, the only proposal made in that document was for the use of "high-finish structural plywood such as HDO/MDO" which could be done "at little or no additional cost." The document did not indicate that appellant anticipated government cost savings as a result of the change or expected the government to share such savings. Appellant's 18 February 1997 memorandum dealt with the floorboards that had already begun to check not a change to new floorboard material. Appellant's 25 February 1997 letter simply set out the added cost of using MDO plywood under two different scenarios. These February documents did not provide the information required by, or even indicate that they were submitted under the VECP clause. In particular, they did not contain estimates of the cost savings to be generated by the proposed change to MDO plywood. Such information is crucial to the government's

consideration of a valid VECP and, without it, none of the February 1997 documents can be deemed a VECP. In addition, because the February 1997 documents also lacked any reference to the VECP clause as well as cost information, other than the label on the 12 February document, the government did not receive the required notice that appellant was proposing a change under that clause. *Cf., Erickson Air Crane Company of Washington, Inc. v. United States*, 731 F.2d 810, 815-816 (Fed. Cir. 1984); *NI Industries, Inc.*, ASBCA No. 29535, 87-2 BCA ¶ 19,688 at 99,657. We have reviewed the documents identified in the government's motion, as well as the entire record, and have concluded in our statements of facts that the correspondence which appellant asserts to contain its VECP does not, indeed, contain the information required by the clause.

According to the record, no document between 12 February 1997 and the effective date of Modification No. P00005, mentioned value engineering and only one referred to the durability of floorboards. One of the documents, appellant's memorandum to the contracting officer dated 28 March 1997, requested an "engineering change order" and permission to begin ordering MDO plywood.[2] In the price negotiation memorandum regarding Modification No. P00005, the contracting officer justified an increase in the contract price by noting that the quality of plywood was decreasing and that MDO plywood would alleviate cracking problems which could compromise the integrity of floorboards in "strength, durability, reliability, aesthetic and uniform functions." There are no genuine issues of material fact, and we see no VECP in any of the above-referenced documents. The documents did not mention value engineering, value engineering change, or value engineering change proposal. Further, there is no indication, in the documents generated by the government, that it thought it was dealing with a VECP. It is also noteworthy that, following appellant's submission of the February 1997 documents, the contracting officer did not, as the VECP clause requires, notify appellant of the status of the asserted VECP or provide appellant with an expected date for decision. FAR 52.248-1(e)(1). The record does not indicate that appellant ever complained about noncompliance with this aspect of the VECP clause or attempted to force the government to comply with the clause.

Contract Modification No. P00005 does not mention the VECP clause, increased durability of floorboards, cost savings, or the sharing of cost savings. The modification was issued solely under the Changes clause and cannot, in any way, be considered the

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[2] The Department of Defense supplement to the Federal Acquisition Regulation previously provided for the submission of "engineering change proposals". DFARS 252.243-7000 ENGINEERING CHANGE PROPOSALS (MAY 1994). This clause did not provide for the sharing of cost savings. However, this clause was not included in appellant's contract.

government's acceptance or constructive acceptance of a VECP. The record contains no documents between the parties between the issuance of Modification No. P00005 and appellant's 17 May 2001 letter.

Appellant contends that its "17 May 2001 letter put the government on notice with enough specificity that the government was aware that it was in fact a request for a VECP, even though it might not have been properly styled" (app. br. at 3). Appellant did not, before this letter, assert that MDO plywood would increase the durability of floorboards resulting in any acquisition savings.

Because the 17 May 2001 letter was submitted long after the contract was modified to require the use of MDO plywood, it does not meet the contract definition of a VECP – a proposal requiring "a change to this, the instant contract, to implement." FAR 52.248-1(b); *NI Industries, Inc.*, 87-2 BCA ¶ 19,688 at 99,658. "In order to share in VE savings, a contractor must make the Government aware that it is submitting a VE proposal before the proposal is accepted." *Id.* Moreover, as we held in *NI Industries, Inc.*, 87-2 BCA at 99,658, once the government accepts a proposed change proposal, there is a binding agreement that cannot be abrogated by appellant's subsequent identification of the proposals as a VECP without the acquiescence of both parties. In order to share in VE savings, the contractor must make the government aware that it was submitting a VECP before its proposal for a change is accepted. Appellant did not do so here.

To the extent that appellant may be arguing that the 17 May 2001, 29 April 2002, and 20 February 2003 letters constitute a VECP that somehow "relates back" to appellant's February 1997 submissions, the contract, by definition, precludes a VECP after the change that is the subject of the VECP has already been made part of the contract. The VECP clause contemplates government review and an informed government decision on a VECP. *Erickson Air Crane Company of Washington, Inc. v. United States*, 731 F.2d at 816. That cannot occur when an alleged VECP is submitted after the contract has already been changed. The 17 May 2001 letter is the first document in which we see an assertion that MDO floorboards would not have to be replaced as often as floorboards made with the plywood originally called for.

While there may be genuine issues of material fact regarding whether or not appellant's proposal to use the MDO plywood instead of the specified floorboard plywood provided for better protection, wear capabilities, or damage resistance than the originally specified floorboard, whether or not there were acquisition savings or collateral savings resulting from the government's acceptance of a change proposal submitted by appellant in its February 1997 correspondence to the government, and if so, the amount of acquisition savings and/or collateral resulting from the change, there are no genuine issues of material fact regarding whether or not appellant complied with the requirements

of the Value Engineering clause in its pre-Contract Modification No. P00005 submissions.

Accordingly, we hold that there are no genuine issues of material fact and that the government is entitled to judgment as a matter of law. We, therefore, grant the government's motion and deny the appeal.

Dated: 7 October 2004

ROLLIN A. VAN BROEKHOVEN
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

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. 54327, Appeal of Schnider's of OKC, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals