ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Paranetics Technology, Inc. | ) | ASBCA No. 54629 |
| | ) | |
| Under Contract No. N00406-01-C-5144 | ) | |

APPEARANCE FOR THE APPELLANT: Mr. Joseph R. Little
President

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
Chief Trial Attorney
William F. Manley, Esq.
Trial Attorney
Defense Contract Management Agency
Boston, MA

OPINION BY ADMINISTRATIVE JUDGE DELMAN
UNDER BOARD RULE 12.3

Appellant, Paranetics Technology, Inc., seeks a recovery of unabsorbed overhead due to a claimed government delay under its contract with the Department of Navy. The government opposes any recovery. We have jurisdiction of the appeal under the Contract Disputes Act, 41 U.S.C. §§ 601, *et seq*. Appellant elected to prosecute the appeal under Board Rule 12.3, Accelerated procedure, and the parties waived hearing and agreed to submit their positions on the record under Board Rule 11. Entitlement only is before us. Pursuant to Board Rule 12.3(b), we enter summary findings of fact and conclusions of law.

SUMMARY FINDINGS OF FACT

On 10 August 2001 the Navy awarded appellant Contract No. N00406-01-C-5144 ("Contract 5144") to furnish 175 air torpedo stabilizers for the amount of $393,750. The contract had a rating of DO-A7 (R4, tab 1 at 1, Block 1) and required appellant to comply with the requirements of the Defense Priorities and Allocations System (DPAS), incorporated into the contract by reference per FAR 52.211-15, DEFENSE PRIORITY AND ALLOCATION REQUIREMENTS (SEP 1990) (R4, tab 1 at 20).

Under the contract schedule identified as the "desired" schedule, appellant was to deliver first articles within 120 days after contract award and then deliver 40 stabilizers

within 120 days of approval of the first articles, with a delivery of up to 40 units every 30 days thereafter until all quantities had been shipped. Under the contract schedule identified as the "required" schedule, appellant was to deliver the first articles within 180 days after contract award and then deliver 40 stabilizers within 180 days after approval of the first articles, with a delivery of up to 40 units every 60 days thereafter until all quantities had been shipped. (R4, tab 1 at 14, 15)

The solicitation provided appellant with the opportunity to propose a delivery schedule for production items in the event of a waiver of first articles. Appellant did not propose such a schedule. After award, the government waived first articles at appellant's request. Given this waiver, it appears that the parties' understanding of the schedule was that appellant was to complete all deliveries under the required schedule within 420 days of award, or by 4 October 2002 (see compl., answer, ¶ 2). Pursuant to this schedule, appellant was to provide the first 40 units by on or about 6 February 2002.

There were two cartridge-activated "cutters" that were part of each stabilizer. Each production lot also included additional cutters for destructive testing. A contract drawing listed "Roberts Research Laboratory" (RRL) as a suggested source for the cutters (R4, tab 4). It does not appear that any other source had been approved or prequalified by the government to provide this part.

Appellant placed a purchase order with RRL for 500 cutters on 2 October 2001. Under this purchase order, RRL committed to a delivery of 86 cutters within 8 weeks of the date of the purchase order, or by 27 November 2001, with the balance to be delivered eight weeks thereafter, or by 26 January 2002. (R4, tab 24)

RRL did not deliver the 86 cutters by 27 November 2001. By letter dated 21 December 2001, RRL informed appellant of a delay in delivery. RRL stated that it was obligated under the DPAS to work on DX-rated orders before DO-rated orders such as that from appellant. It cited two priority Air Force contracts, but did not indicate when it planned to complete these contracts. RRL stated at the beginning of this letter that it expected to ship the 86 cutters in the second or third week of January 2002, but at the end of the letter it stated that it would seek to deliver in early January. (R4, tab 33)

RRL actually shipped these units on 18 February 2002 (R4, tab 41). RRL also did not deliver the balance of the cutters within the next eight weeks as per the purchase order. Rather, RRL made partial deliveries on 17 June 2002, 12 August 2002 and completed deliveries on 23 December 2002, almost one year late (R4, tabs 46, 48, 54). The record contains no further evidence from RRL explaining the reasons for this additional delay.

On 3 January 2002, the Defense Contract Management Agency (DCMA) issued Delay Notice No. 1 to the PCO advising that appellant would be approximately six weeks late in delivering the first lot of stabilizers because RRL was working on higher rated orders and could not timely deliver the cutters. DCMA recommended that the Navy modify the contract to extend the delivery dates by a period of six weeks, with consideration, or accept the units as delinquent. (R4, tab 34) This delay notification was reiterated on 8 February 2002 through DCMA's issuance of Delay Notice No. 2 (R4, tab 37).

On 15 February 2002, the Army awarded appellant Delivery Order No. 0001 to Contract No. DAAH01-02-D-0013 for 88 parachute assemblies in the amount of $315,000 (R4, tab 40 at 1, 2). On 21 February 2002, the Army awarded appellant another contract, in the amount of $10,605.30, to furnish parachute drogues (R4, tab 42).

On 24 April 2002, DCMA accepted the first production lot of 40 air stabilizers from appellant under the subject contract (R4, tab 44). On 20 September 2002, DCMA accepted production lot #2 (R4, tab 50). On 23 October 2002, DCMA accepted production lot #3 (R4, tab 52).

On 9 January 2003, the Army issued Delivery Order No. 0004 under Contract No. DAAD15-01-D-0013 to appellant in the amount of $1,039,860 to furnish 1800 cargo parachutes (R4, tab 55 at 1, 2).

On 9 April 2003, DCMA accepted production lots #4 and #5 under the subject contract (R4, tab 58). All production units on the contract were delivered by this date.

By letter dated 28 October 2003, appellant requested an equitable adjustment (REA or claim) in the amount of $64,686 for unabsorbed overhead. Appellant claimed it was delayed 305 days in the performance of this contract (the difference between planned completion of 303 days and actual completion of 608 days), due to late deliveries of the cutters from RRL who was required to put higher rated government work ahead of appellant's purchase order. Appellant calculated its recovery using the Eichleay formula, claiming daily overhead allocable to the contract in the amount of $212 which, when multiplied by the claimed 305 days of delay, came to a total of $64,660 (incorrectly calculated as $64,686) (R4, tab 59).

On 22 December 2003, the DCAA issued an audit report on appellant's claim. The DCAA questioned $7,601 of appellant's costs, and qualified its findings based upon its inability to assess the impact of replacement work in the mitigation of appellant's delay claim. (Supp. R4, tab 2 at 3)

By letter to appellant dated 2 March 2004, the contracting officer denied appellant's claim (R4, tab 61). This appeal followed. On appeal, appellant reduced its claim to $57,085.

From before the award of this contract and throughout the early contract period, appellant sought the inclusion of a progress payments clause in the contract. Appellant does not assert that the government was obligated to include a progress payments clause in the contract, and we find the government had no such obligation. On a number of occasions appellant advised the government that it was delaying its contract obligations pending word from the government on this matter: "We're holding placing POs [purchase orders] with our vendors at the moment as this will effect [sic] terms of the POs" (R4, tab 9); "This is hurting PO placements at this time, so we are anxious to get this resolved" (R4, tab 11 at 1); "[T]his delay is impacting our delivery capability" (R4, tab 14). Also at the postaward conference, appellant stated as follows:

> Joe [appellant] indicated that without progress payments he would probably not be able to get the cutters delivered on time and would not meet the required delivery schedule.

(R4, tab 19 at 2) The government did not add a progress payments clause to appellant's contract.

The record includes an affidavit from appellant's engineering and purchasing manager, Mr. Alamat. Mr. Alamat states generally that appellant's placement of purchase orders and deliveries thereunder were not affected by any financial considerations, that there were no significant production delays on the end units other than for the late receipt of the cutters, and that the manufacture of the end units was held pending receipt of the cutters.

The contract included by reference the clause entitled Government Delay of Work (APR 1984), FAR 52.242-17, which states in pertinent part as follows:

> GOVERNMENT DELAY OF WORK (APR 1984)
>
> (a) If the performance of all or any part of the work of this contract is delayed or interrupted (1) by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract, or (2) by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract

> caused by the delay or interruption and the contract shall be modified in writing accordingly. Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. However, no adjustment shall be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.

(R4, Tab 1 at 14) Appellant has not offered any evidence that actions or inactions of the contracting officer in the administration of the contract caused a delay to the contract work.

## DECISION

Appellant seeks a recovery of unabsorbed overhead resulting from government-caused delay to its work under the formula promulgated by this Board in *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recon*, 61-1 BCA ¶ 2894. Appellant has the burden to prove its entitlement.

Over the 44 years since we issued the *Eichleay* decision, we have generally viewed a recovery of unabsorbed overhead as one element of a contractor's contractual right to an equitable adjustment under its contract, specifically, to an equitable adjustment owed for government action or inaction under a remedy-granting contract clause. The relevant clause here is the "Government Delay of Work" clause, which in brief, affords a contractor an equitable adjustment when the work is delayed by actions or inactions of the contracting officer in the administration of the contract.

Appellant has failed to provide any evidence that the contract work was wrongfully suspended or delayed by the CO in the administration of this contract. Nor has appellant adduced evidence establishing any breach of contract by the CO. Clearly, the CO's refusal to include a progress payments clause in the contract would not fall into either category.

In view of the foregoing, we conclude that appellant has not shown entitlement to an equitable adjustment for the recovery of unabsorbed overhead under the Eichleay formula, or otherwise.

This appeal is denied.[1]

Dated: 20 December 2004

JACK DELMAN
Administrative Judge
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. 54629, Appeal of Paranetics Technology, Inc., rendered in conformance with the Board's Charter.

Dated:

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

[1] Given our disposition of the appeal, we need not address whether appellant has otherwise met its burden to prove entitlement under *Eichleay* in all other respects. *See P.J. Dick Inc. v. Principi,* 324 F.3d 1364, 1371-73 (Fed. Cir. 2003).