ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Precision Dynamics, Inc.	)	ASBCA No. 50519
	)	
Under Contract No. N00102-88-C-0105	)	

APPEARANCE FOR THE APPELLANT: Jeffrey A. Donner, Esq.
Stryker, Tams & Dill, LLP
Newark, NJ

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
David Agazarian, Esq.
Office of Counsel
Portsmouth Naval Shipyard
Portsmouth, NH

OPINION BY ADMINISTRATIVE JUDGE HARTMAN

In this appeal, appellant asserts it is entitled to equitable adjustments in the price of its contract to refurbish submarine pumps because the Department of the Navy delayed its contract performance by: issuing a "stop work" order to modify a defective specification regarding "gasket crush"; issuing a "stop work" order to allow a review of its employees' qualifications; failing to timely deliver it government furnished material; and delivering it defective government furnished material. Appellant also asserts it is entitled to equitable adjustments in contract price because: it performed, at Navy direction, work not required by contract (a second hydrostatic test); it inspected some government furnished material (impellers) twice due to the initial government furnished material being defective; and it incurred additional cost to comply with a "change" the Department of the Navy made to the "gasket crush" specification. Finally, appellant asserts it is entitled to: an award of monies from the Navy due to its performance of "unplanned work" pursuant to the terms of the parties' contract (nozzlehead assembly, crossover and endcover, and undersized recirculating flange repairs); an award of "lost profits" due to the Navy's "denial" of its contract right to supply first through sixth stage impellers as "unplanned replacement" parts under the contract; and an award of damages for contract "breach" because the contracting officer negligently or deliberately provided "misinformation" to its motor subcontractor about monies the Navy owed it causing the subcontractor to discontinue
its line of credit. Entitlement only is before us.

FINDINGS OF FACT

The company that manufactured main feed pumps for the Navy's submarines (Ingersoll-Rand) performed refurbishment of those pumps under a "sole source" contract for years. During 1987, various components of this "sole source" contract were "broken out" for competition and General Electric (GE) received the first "competed" contract for refurbishment of such pumps. During GE's contract performance, the Navy experienced a problem with leakage around the main feed pump gasket. To prevent leakage, the pump manufacturer, Ingersoll-Rand, had utilized a gasket "seal," which was proprietary to that company. Since the seal was not available to GE, the Navy tried to resolve the leakage problem by having GE maintain the channel ring groove at ".130 inches." After some trial and error, however, the Navy ascertained that, because gaskets varied in thickness, the problem could not be resolved by its specifying a depth for the channel ring groove. The Navy awarded its main feed pump refurbishment contract for 1988 to another company, Dresser Industries, Inc. (Dresser). A third company, Precision Dynamics Industries (PDI), a small business and the appellant here, obtained the Navy's main feed pump refurbishment contract "for 1989." (Tr. 3/87, 92-94; *see* R4(b), tab 5(O))

In August 1988, Contracting Officer (CO) Lloyd P. Cotton of the Department of the Navy, Portsmouth Naval Shipyard (PNS), awarded Contract No. N00102-88-C-0105 in the amount of $392,074.00 to PDI for the "refurbishment" of three submarine "main feed pumps" or "shipsets" consisting of four pumps and motor assemblies each. The contract provided that the pumps and motors would be delivered to the contractor by the government as follows:

		CID NUMBERS		SCHEDULED ARRIVAL AT VENDOR'S PLANT
ITEM	QTY	PUMP	MOTOR	
AA	4	016187000	174342118	1 JAN 1989 . . .
AB	4	016187000	174030977	1 FEB 1989 . . .
AC	4	016187000	174342118	1 FEB 1989 . . .

(R4, tab 1) The parties' contract expressly noted, however, that:

> The scheduled arrival dates of GFM pumps and motors at the contractor's plant are estimated. Consequently, required delivery of refurbished pumps and motors shall be 4 months after receipt of units at vendor's plant.

(*Id.*) The contract provided that, in addition to shipset pumps and motors, the contractor would receive the following government-furnished material (GFM): nameplates; seventh-stage multivane impellers; shims; and thumbtack spacers. The contract stated the

"contractor shall request delivery of nameplates at least three months prior to intended use" and that "[m]ultivane impellers, shims and thumbtack spacers will be provided by 30 June 1988" [sic]. (R4, tab 1)

The parties' contract required PDI to disassemble a shipset, replace specified parts (planned replacement parts), examine other parts to determine whether those parts should be replaced or repaired, prepare a condition report regarding the other parts to be verified by a Defense Contract Administration Services Management Area (DCASMA) Quality Assurance Representative (QAR), perform necessary work on the other parts (unplanned replacement parts/repairs), reassemble the shipset pumps and motors, accomplish "hydro, performance, and structureborne noise tests on [re-]assembled pumps and motors," and deliver the items to "destinations to be added to th[e] contract at a later date, without [any] change to contract pricing or delivery dates." With respect to "unplanned parts" and "unplanned repairs," the contract stated:

> The amount included for unplanned parts is for funding purposes only and is just an estimate. The contractor is authorized to proceed with repair upon approval of the DCASMA Quality Assurance Representative. Prices to be paid for unplanned parts/repairs shall be in accordance with prices shown on exhibits . . . . If parts or repairs are required that are not included on exhibits . . . , prices will be negotiated as needed.

Included among the approximately 140 unplanned replacement part contract line items set forth on a contract exhibit were: "impeller – 1st stage"; "impeller 2d thru 6th stg."; and nameplates. Included among 19 unplanned pump repairs set forth on a contract exhibit were: reface suction flange, reface recirculation flange, reface suction vent flange, and refacing to reestablish gasket sealing surfaces on both the nozzle head and shell. Included among approximately 75 planned replacement part line items on a contract exhibit were: shims; thumbtack spacers; and 7th-stage multivane impellers. (R4, tab 1; tr. 1/193-94, 3/85-86)

The parties' contract contained various standard clauses, including Federal Acquisition Regulation (FAR) 52.212-15 GOVERNMENT DELAY OF WORK (APR 1984), 52.230-3 COST ACCOUNTING STANDARDS (AUG 1986), and 52.245-2 GOVERNMENT PROPERTY (FIXED PRICE CONTRACTS) (APR 1984). The contract required that work be accomplished in accordance with Refurbishment Instruction No. 4320-208-069 REV N dated May 1987, which invoked the following technical repair standards (TRS):

0208-086-014F, MAIN FEED PUMPS MODIFIED – NOFORN
0208-086-021B, MAIN FEED PUMPS MODIFIED – NOFORN
6105-086-005H, MAIN FEED PUMP MOTORS MODIFIED – NOFORN.

(R4, tab 1) Both TRS 0208-086-014F and TRS 0208-086-021B expressly provided "Hydro test shall be accomplished twice." While the contract indicated each TRS was attached, it stated that copies of specifications cited could be "obtained by submitting a written request" to a Navy office, which in the case of "'NOFORN' specifications" was "Naval Sea Systems Command, Washington, D.C." (R4, tabs 1, 28; TRS 0208-086-014F; TRS 0208-086-021B)

On 28 December 1988, PDI received three of the four pumps for its initial shipset. It received the fourth pump for the initial shipset on 13 April 1989. (Tr. 1/41-42)

During 1989, in addition to the main feed pump contract, PDI was performing five other contracts for PNS: Nos. N00102-88-C-0116 (0116), N00102-88-C-01115 (0115), N00102-88-C-0102 (0102), N00102-87-D-0013 (0013), and N00102-86-D-3220 (3220). These five contracts were for refurbishment of auxiliary seawater ("ASW") pumps and motors. Under each of these contracts, the Navy would remove from submarines a pump and motor coupled together and in need of repair, and ship the unit to PDI for evaluation and refurbishment. PDI would disassemble the unit and send the motor to a subcontractor specializing in motor repair. PDI and the subcontractor would then inspect and clean the respective components, and prepare "condition" reports addressing any need to replace parts not "planned" for replacement. These condition reports were to be sent to the Navy within 30 to 60 days of PDI's pump/motor receipt. The CO, who also was Mr. Cotton, would obtain an evaluation of the condition reports from Navy technical personnel while the planned refurbishment was being performed and issue a contract modification adding work if performance of "unplanned" refurbishment was desired. Upon completion of refurbishment, PDI would reassemble the unit and perform various tests. If testing was satisfactory, PDI would deliver the pump/motor unit to the Navy. The ASW contracts, which were not identical, specified that delivery of the units to the Navy was to occur between 120 and 180 days after PDI's receipt of the units as GFM. *Precision Dynamics, Inc.*, ASBCA Nos. 41360, *et al.*, 97-1 BCA ¶ 28,722 at 143,367-68.

While Dresser was completing performance of its main feed pump contract during April 1989, technical personnel for the Submarine Maintenance, Engineering, Planning and Procurement Activity (SUBMEPP) of the Naval Sea Systems Command (NAVSEA) decided the only way to resolve the main feed pump leakage problem was to specify a specific "crush" for the gasket. On his first post-award visit to PDI's plant in April of 1989, Stephen Montembeau, SUBMEPP's component engineer and the CO's technical representative (COTR), advised Wes Hendrickson, plant manager and engineer for PDI, of the gasket crush leakage issue and Navy's plan to specify a required gasket crush

(R4(b), tab 10(H)). Mr. Montembeau knew Mr. Hendrickson because he had seen him almost everyday when Mr. Hendrickson was employed as a SUBMEPP component engineer at PNS before he joined PDI. Mr. Hendrickson had been with PDI for about three years, ran daily operations of PDI while the company's president (Mark Dyevoich) was looking for new business, and had "signatory power" for the company. (Tr. 1/93, 2/22-23, 3/82-84, 94-107, 234-35) Mr. Montembeau also advised Mr. Hendrickson of the requirement for "a double hydrostatic test" and the "reasons for doing so," giving a history of problems experienced by the Navy with failing hydrotests (R4(b), tab 10(H)). Finally, Mr. Montembeau advised that some pumps PDI would receive for refurbishment may not require a 7th stage, "multi-vane" impeller designed to make the pump "quieter" and a related "impeller kit" because the original single vane impeller may already have been replaced with a multi-vane one and therefore, to avoid having impellers and kits sit at a contractor's facility and possibly be damaged, the Navy desired PDI request supply of necessary 7th stage impellers and related kits after preparation of pump condition reports. Mr. Hendrickson understood and acquiesced in Mr. Montembeau's request PDI notify the Navy of 7th stage multi-vane impellers required by it. During his visit, Mr. Montembeau observed that: the units for the first shipset PDI had received had been disassembled; PDI had submitted condition reports with respect to the three units received during December 1988; PDI had not begun work on the fourth unit received only two weeks earlier; PDI's motor subcontractor had returned one of the motors refurbished to PDI; and PDI was manufacturing and buying necessary parts for the units. (R4(b), tab 10(H); tr. 3/127-34).

On 10 May 1989, PDI received the second shipset for refurbishment under the main feed pump contract. At approximately the same time, on 16 May 1989, CO Cotton sent PDI letters stating that he was considering terminating ASW contracts 0102, 0115, and 0116 in part for default based on PDI's failure to timely deliver eight units. After receiving a response to his letters from PDI, CO Cotton decided not to establish new delivery dates for the eight units, but leave PDI "in a delinquent status" because he thought it in the best interest of the Navy to "forebear" and furnish PDI a chance to recover. *Precision Dynamics, Inc.*, ASBCA Nos. 41360, *et al.*, 97-1 BCA ¶ 28,722 at 143,368.

By letter dated 30 May 1989, Mr. Hendrickson notified Mr. Montembeau that, pursuant to a prior conversation concerning modification of channel ring gasket sealing surfaces to allow for adequate gasket crush, he was submitting applicable data for Mr. Montembeau's consideration and approval, and PDI would proceed with the modification upon receiving formal authorization (R4(b), tab 8). Mr. Montembeau thereafter had one or more conversations with Mr. Hendrickson about "gasket crush," and advised him he could not assume all gaskets were the same size and SUBMEPP did not wish to introduce welding heat to the gasket area due to the possibility of "warping." (Tr. 3/101, 105, 194-210)

On 28 and 29 June 1989, the parties executed contract Modification No. P00002, adding the gasket crush requirement to PDI's main feed pump contract. The modification provided, in pertinent part, that "Channel Ring gasket groove shall be of such a depth to accommodate a 'gasket crush' of 0.050-0.055." The modification also "definitized" over $40,000.00 in funding for unplanned repairs on the first shipset. (R4, tab 3)

On 18 and 20 July 1989, PDI received at its plant the third and last shipset it was to refurbish (tr. 1/43). At approximately the same time, Mr. Hendrickson resigned as PDI's plant manager/engineer, asserting PDI had received overpayments from the Navy. On the day he departed, Mr. Hendrickson took with him PDI's lead machinist, lead mechanic and salesman to work for a new company he formed to perform refurbishment of pumps. (Tr. 1/215-17, 3/234, 4/50-51)

When the Navy's contract specialist, Patricia Vachon, learned Mr. Hendrickson had resigned, she told PDI by telephone on 18 July 1989, at the request of SUBMEPP, "to stop work on new units that just arrived" because it had no engineer on staff and the Navy wished to see the resume of the new engineer it indicated would be joining its staff before PDI proceeded with "the newly arrived units." Ms. Vachon believed SUBMEPP wanted the third shipset to "be in whole condition," not pieces, if SUBMEPP had to remove the shipset from PDI and give it to a different contractor for refurbishment. She also believed PDI had other work to perform on the first two shipsets and its ASW contracts. (R4, tab 4; tr. 1/208-10, 3/10-14, 28-44, 4/42)

By letter dated 26 July 1989, PDI notified CO Cotton it intended to do everything in its "power to accelerate all efforts to complete and ship" units under the ASW contracts and furnished an accounting of "delinquent" ASW units and their status. Of 41 units PDI listed, 12 were awaiting receipt of a refurbished motor from PDI's motor subcontractor, Hansome Energy Systems (Hansome). *Precision Dynamics, Inc.,* ASBCA Nos. 41360, *et al.,* 97-1 BCA ¶ 28,722 at 143,368-69. Hansome had agreed to allow PDI to pay it for motor refurbishment within 10 days after PDI's receipt of payment from the Navy for that work. While Hansome was prepared to extend this line of credit to PDI to $300,000.00, Hansome was not receiving payment from PDI for its work and was concerned about its lack of payment. (Tr. 2/63-82)

In a letter dated 27 July 1989, PDI notified the CO with respect to its main feed pump contract that: it had disassembled, cleaned, inspected and submitted condition reports for 8 of 12 units received; the 4 remaining units were "on hold"; the planned and unplanned parts for all 12 units were complete and in house, and installed on 6 units ready for final machining; it had received the information regarding "a design change"; and will begin final machining and assembly. PDI added that: three motor assemblies

had "been completed entirely," been received from Hansome, its subcontractor, and were "ready for final assembly"; the test facilities for the pumps were complete except for piping, which would be done when it "mount[s] the first pump for test"; and four additional motors were ready to be shipped to it by Hansome. (R4, tab 5)

In a letter dated 28 July 1989, PDI furnished CO Cotton a list of its "full and part time employees," including Michael Magera, who was stated to be the "[e]ngineer for overhaul and testing (starting 31 July 1989)." PDI concluded this letter by stating that "[a]ll personnel are on unlimited overtime, shop personnel are working approximately ten to twelve hours/day and at least six days per week"; "some of the shop personnel are also working Sundays"; and PDI is "committed . . . to put this program back on schedule and once again become a contractor in good standing." (R4, tab 6)

Because Hansome had not received payment from PDI for some work performed refurbishing motors and was very concerned about payment, during August of 1989, Al Rapozi, its chief executive officer, contacted CO Cotton. Mr. Rapozi told CO Cotton that Hansome had extended PDI a line of credit, PDI owed Hansome a specified sum for refurbishment work performed, PDI had told Hansome that PDI was not being paid for work by the Navy, and he needed to know whether the amount of money the Navy owed PDI on all of the refurbishment contracts was greater than the amount of money that PDI owed Hansome and when the Navy would be making payment. CO Cotton said he would have to check on the amount of money the Navy currently owed PDI and get back to him. Shortly thereafter, after reviewing work awaiting acceptance or accepted by the Navy and outstanding contract modifications, CO Cotton advised Mr. Rapozi the sum the Navy currently owed PDI was about half the sum that PDI owed Hansome. CO Cotton did not address when the Navy would be making payments to PDI or advise Mr. Rapozi there were other items for which PDI was claiming payment from the Navy that had not been processed and/or approved for payment as of that date because "claims were not specific monies owed" and Mr. Rapozi asked for "specific monies owed." The number CO Cotton provided to Mr. Rapozi was correct to the best of his knowledge. Because Mr. Rapozi felt he was "too close" to PDI's president and the matter "was getting out of hand," he turned the issue of PDI's payments over to Hansome's new president, Selma Rosen. Ms. Rosen immediately placed PDI in a "COD" status, *i.e.*, no refurbished motors would be released to PDI until Hansome had received payment for its work. (R4(b), tab 13(A); tr. 2/63, 68-71, 74-75, 80, 236-45).

On 1 August 1989, the day after Mr. Magera arrived as PDI's engineer, PDI's president, Mark Dyevoich, directed Mr. Magera to "recheck everything" because he no longer trusted Mr. Hendrickson (tr. 1/214-19). Mr. Magera thus re-inspected all of the impellers previously inspected and stated to be satisfactory in condition reports submitted to the Navy (R4(b), tab 4(A); tr. 1/214, 217-20, 4/182-88).

During early August, Mr. Magera and Vinyl Look, a PNS employee who also worked part time for PDI, examined the method of obtaining gasket crush sent to Mr. Montembeau by Mr. Hendrickson in May 1989. They concluded that there were three glaring errors in the calculations used and that the proper crush would not be obtained by the methods indicated. They thus expended time calculating the machining necessary to be done on each last stage channel ring to obtain the required crush and obtain necessary waivers from Portsmouth as a result of some dimensions no longer being within tolerance due to the crush requirement. (R4(b), tab 8; tr. 4/127-135)

By letter dated 10 August 1989, Mr. Magera notified Ms. Vachon that: "the gasket crush requirement of .050 - .055 cannot be obtained without modification of each of the eight last stage channel rings"; "[t]he crush with existing sizes would range from .044 to .070"; and PDI suggests "machining and/or welding to re-establish sizes B, C and/or D on each piece." PDI added in a letter dated 17 August 1989 that on pump 0237 it could obtain the required crush by machining the H and S surfaces, but this will "take dimension D to .988 which will be out of the manufacturer's specs of .995 $\pm$ .005". (R4(b), tab 8(C); tr. 4/137-44) In another letter dated 18 August 1989, PDI notified Ms. Vachon that the second shipset "did not arrive equipped with multi-vane impellers" and "[p]lease provide four . . . impeller kits as GFM, as provided for in Section F.14 of the contract" (R4(b), tab 7(A)) (emphasis deleted).

Ms. Vachon, Mr. Montembeau, Mr. Magera, and Mr. Dyevoich participated in two telephone conference calls regarding gasket crush during mid-August. On 23 August 1989, the DCASMA QAR verified/approved a condition report prepared by PDI setting forth measurements with respect to the last stage channel ring and gasket crush work to be performed with respect to pumps for the first and second shipsets (R4, tab 20). PDI notified Ms. Vachon by letter dated 24 August 1989 that "we are proceeding to modify each of the eight Last Stage Channel Ring Assemblies to establish the required .050 - .055 crush." PDI added:

> Please note, in most cases we will become undersized on the "D" dimension (manufacturer's specs. .995 $\pm$ .005). Some of the pieces are already undersized on this dimension. This is being done with your approval. Also, the two sealing surfaces "B" and "C" must be machined to obtain a phonographic (serrated) finish of 60 cuts per inch.

(R4(b), tab 8; tr. 4/155-56) Mr. Montembeau, with the approval of his supervisor, Herb Mathewson, subsequently prepared a response to a technical evaluation request (TRE) stating that, "[a]fter review we have agreed with [PDI] that welding to build up the channel ring surfaces described . . . is not a preferred method of repair" and "[m]ethod of

repair will be . . . that discussed per phonecons b/t SUBMEPP and [PDI] on 8/17/89 & 8/23/89" (R4, tab 24).

On the same date that the DCASMA QAR verified/approved condition reports prepared by PDI setting forth measurements regarding the last stage channel ring and gasket crush work to be performed, 23 August 1989, the QAR verified/approved "supplementary" condition reports prepared by PDI for first stage and second through sixth stage impellers on the first and second shipsets. The "supplementary" reports found 13 impellers previously determined satisfactory in the original condition reports to be unsatisfactory and in need of replacement at a cost of approximately $113,000.00. (R4(b), tab 4(A)); tr. 4/162-72)

In a "condition report" dated 25 August 1989 verified/approved by the QAR, PDI advised that:

> Reinspection of the nozzle head flanges prior to assembly has determined that they contain erosion/corrosion beyond the TRS limits (.010 in maximum depth allowable). These flanges can be machined to remove these defects and we will be forwarding supplemental condition reports stating the appropriate additional charges.
>
> Two of the pumps . . . have an additional defect. This is that the recirculation flanges are already at or slightly below the minimum average thickness allowed by the TRS . . . . Two alternatives exist to repair these unacceptable conditions.
>
> A. Repair weld in accordance with MIL-STD-278E. . . .
>
> B. A preferred alternative, if acceptable, would be to flame spray the face as allowed by paragraph 11.2.2.1 of MIL-STD-278E. We feel this procedure would result in less internal beating of the material thereby removing the necessity for post-weld bent treatment. . . . We would flame spray over the existing flange and th[e]n finish machine to the plan finish thereby not disturbing the parent material of the flange. . . .
>
> Please reply at your earliest convenience, and provide any additional technical requirements that may apply in order that we may proceed.

(R4, tab 16)

By letter dated 1 September 1989, PDI notified Ms. Vachon that "the cost for engineering time to determine 'gasket crush'" was $4,500.00 (60 hours at $75 per hour) (R4(b), tab 10(B)). On 6 September 1989, Mr. Magera performed inspections necessary for PDI to prepare condition reports regarding unplanned repairs for pumps 0236, 0237, 0238, 0239, 0216, 0217, 0218, and 0219 of the first two shipsets, *i.e.*, machining of suction, suction vent, and recirculation flanges of nozzle head assembly and, with respect to the latter four pumps, additionally machining the flexitalic gasket seating surface to a "phonographic finish" (R4(b), tab 10(D), (E); *see* R4(b), tab 1(A)). On 8 September 1989, the QAR approved those reports. Seven days later, on 15 September 1989, Ms. Vachon advised PDI that, because a "full staff is now on board," the Navy "feels confident in allowing work to proceed" and PDI should "proceed with the units received in July," *i.e.*, the third shipset (R4, tab 7; tr. 3/15). Although PDI was free to disassemble the last shipset and send those motors for refurbishment during September, it did not do so. Instead, PDI held onto the motors because it desired to locate a subcontractor other than Hansome to perform motor refurbishment work. The motors for the last shipset, however, ultimately were sent to Hansome several weeks later when PDI's attempts to locate another subcontractor were deemed unsuccessful. (Tr. 1/242, 265)

Pursuant to the terms of the parties' main feed pump contract, PDI was to deliver the first two shipsets refurbished by 15 September 1989. On or before that date, however, PDI did not deliver either shipset to the Navy. (R4, tab 1)

By letter dated 28 September 1989, PDI notified Ms. Vachon that the first shipset "can be completed for delivery by 31 Oct 1989 provided we can substitute (2) units that have flange thickness below the minimum thickness with units with acceptable flange thickness." PDI added that its "review and implementation of design change required by Submepp took longer than anticipated and, therefore pushed our deliveries behind approximately thirty (30) days." (R4, tab 9)

By letter dated 4 October 1989, PDI notified Ms. Vachon that the Navy's request for payment of monetary consideration for extending the delivery date of the first shipset to 31 October was "unwarranted." PDI stated that: the Navy "caused . . . a delay on the first (4) units due to the design change and a stop work order issued on them while this design change was given"; it was still awaiting a modification "waiv[ing] these dimensional requirements" for component parts caused "to go out of tolerance" by design change; it still had not received GFM for the contract, including the multivane impellers and shims; and it was awaiting a configuration diagram from Mr. Montembeau. (R4, tab 9; R4(b), tab 7(C))

By letter dated 16 October 1989, PDI advised Ms. Vachon that the TRS for its contract called for only one hydro test, a revised TRS required two hydro tests, and its extra cost for the second test was 12 man hours per unit at a cost of $68.19 per man hour multiplied by 12 units or $9,819.36. According to PDI, it received with the solicitation a copy of the TRS dated 16 May 1986, rather than a copy of the revised TRS dated 22 May 1987. Both Mr. Montembeau and his supervisor, Mr. Mathewson, recommended against PDI's request for additional monies to perform a second hydro test. They advised that: in their experience, 2 1/2 (not 12) man hours are expended for a typical hydrostatic test, their records "indicate that TRS 0208-086-014F dated May 22, [']87 was issued with the solicitation that went out for bid," and "paragraph 1.4.1d of this TRS . . . clearly states that hydrostatic tests must be performed twice." (R4, tab 18; R4(b), tab 10)

The next week, on 23 October 1989, PDI received from the Navy the nameplates the contract required be furnished to the contractor (R4(b), tab 7(D)). During the latter part of October 1989, the parties executed a contract modification, No. P00003, which did not set forth any waiver or release of claim, extended the delivery date for the first shipset to 31 October 1989, and decreased the contract price by $300 in "consideration for [the Navy] extending the delivery date" (R4, tab 10). PDI, however, did not deliver the first shipset to the Navy by 31 October 1989.

In response to a Request for Technical Evaluation (RTE), SUBMEPP advised on 31 October 1989 that funding was not being provided for the supplementary 8 September 1989 condition reports because: the original condition reports indicated pitting to the suction, vent and recirculation flanges was cosmetic in nature and did not exceed the specifications; the repairs were performed by PDI without knowledge of SUBMEPP; the charges for repairs performed exceed those listed in the contract; and the only repairs the Navy should pay for are those made to flexitalic gasket sealing surfaces (R4, tab 24).

On 1 November 1989, Ms. Vachon received the "supplemental" condition reports prepared by PDI regarding impellers (R4(b), tab 5). A few days later, the parties executed a contract modification, No. P00004, which "definitized" funding for over $74,000.00 in unplanned replacement parts and repairs (R4, tab 11).

During the first half of November, both Mr. Montembeau and Mr. Mathewson approved "Repair Alternative B" proposed by PDI regarding recirculation flanges. Ms. Vachon notified PDI by technical evaluation reply dated 17 November 1989 that, with respect to its correspondence dated 25 August 1989, "Method B is acceptable" for repair of recirculating flanges that are at or below the minimum average thickness allowed by the TRS. (R4, tab 16)

At approximately the same time, in a letter dated 16 November 1989, PDI advised Ms. Vachon that the initial shipset was ready for final inspection and Mr. Montembeau

was expected to inspect the units on approximately 28 November 1989. PDI added that it had asked the Navy to allow the QAR to inspect the units for "shipment-in-place" and was told "no, not on the first shipset." (R4, tab 12) By letter dated 27 November 1989, PDI further advised Ms. Vachon that its records indicate it received TRS 0208-086-014F (modified) dated 16 May 1986 with . . . the solicitation, "[t]his copy of the TRS calls for only (1) hydrostatic test," and thus it is "entitled to additional monies" for performing a second hydrostatic test (R4, tab 18).

During Mr. Montembeau's November inspection of the first shipset, there was a problem with "high head." While Mr. Montembeau advised PDI it only had to retest one of the four units after resolving the problem with the high head, he subsequently learned he was incorrect and PDI would have to retest all four units in order for him to be able to accept the shipset. When Ms. Vachon advised PDI of the need to retest all four units on 5 December 1989, Mr. Dyevoich told her he would have to completely disassemble three units and remove all of the preservative, which would require compensation to PDI. (R4, tab 13)

On 6 December 1989, PDI informed Ms. Vachon it could complete the second shipset by 15 January 1990 (R4, tab 13). The next day, 7 December 1989, PDI sent Ms. Vachon a letter stating its "consternation at being told" of the Navy's "unwillingness to pay for flange machining on nozzle heads" for pumps 0216, 0217, 0218, 0219, 0236, and 0239 "which failed to pass TRS requirements, with DCAS concurrence"; PDI had two more pumps, 0237 and 0238, which failed to pass the TRS requirements and "should be done"; and, if the defects found "are now allowable, [PDI] would suggest modifying the TRS 0208-086-014F" to so reflect. PDI's 7 December 1989 letter was misdirected at PNS and not received by Ms. Vachon until 2 March 1990. (R4, tab 22)

Between August and mid-December 1989, PDI delivered to the Navy 14 ASW units contractually specified to be delivered earlier. PDI sent CO Cotton a status report on 11 December 1989 indicating that 10 of the remaining delinquent ASW units were awaiting a motor from its motor subcontractor. *Precision Dynamics, Inc*., ASBCA Nos. 41360, *et al*., 97-1 BCA ¶ 28,722 at 143,369-70.

On 12 December 1989, Ms. Vachon advised PDI by telephone that it was not to purchase replacement impellers set forth in supplemental condition reports she received on 1 November 1989 until Mr. Montembeau visited its plant on 14 December to inspect the impellers PDI had deemed acceptable and later determined were unacceptable (R4, tab 20; R4(b), tab 5(A)). Because there were 22 ASW units still delinquent, by letter dated 13 December 1989, CO Cotton notified PDI that:

> At your facility on August 2, 1989, you stated to . . . [the contract specialist] you would have *all* delinquent units out of

> your facility by October 31, 1989. . . . There has been little or no progress since Sept 1989. Many telephone discussions between yourself and [the contract specialist] concerning your delinquencies have taken place since August 1989. Non receipt of motors from your subcontractor is no excuse, as you are the prime contractor. . . . All delinquent ASW units must be refurbished, tested, Final Software accepted by SUBMEPP and be ready to ship by Jan[.] 31, 1990 or Termination for Default proceedings will commence. [Emphasis in original]

Precision Dynamics, Inc., ASBCA Nos. 41360, *et al.*, 97-1 BCA ¶ 28,722 at 143,370.

Mr. Montembeau inspected the impellers on 14 December. He told PDI that three could be used, one could be used with a simple keyway repair, four could not be used, and he would get back to PDI about the other eight. On 18 December 1989, Mr. Montembeau advised PDI by telefax that he had found four additional impellers to be unsuitable and no new impellers need be procured by PDI because the Navy will provide eight impellers as GFM to replace those found unsuitable. (R4(b), tab 5(B))

PDI advised CO Cotton by letter dated 19 December 1989 that, "due to the lack of motors," progress on the ASW units has "slowed down." According to PDI, its delay in progress was "due to many factors, many of which . . . were caused by the government directly and indirectly." PDI stated initially that:

> The main reason we are not able to appropriate motors is due to a lack of monies. These are monies due on our . . . [main feed pump] contract.
>
> . . . .
>
> We had, until this contract, been allowed to ship in place and now we cannot. This has placed an extremely severe financial hardship on our company.
>
> . . . .
>
> I have stated many times in the past of Mr. Montembeau's friendship with one of my competitors, Mr. Wes Hendrickson, of Northeast Fluid & Power Co. Mr. Montembeau openly
> stated that he socializes with Mr. Hendrickson at his

> (Mr. Montembeau's) home. I believe this to be an obvious conflict of interest. . . . Mr. Montembeau has repeat[ed]ly held up monies and final inspection visits to [PDI].
>
> . . . .
>
> In conclusion, the factors that are causing the ASW program not to progress faster are:
>
> 1. Inability to ship in place motors.
> 2. Long lead time for approval to bill additional work (modifications)
> 3. Two government caused delays.
> 4. Mr. Montembeau's continual delays and rejections of justified monies to [PDI].
>
> . . . .
>
> P.S. All, I repeat all of the pump end work on all ASW contracts is completed and accepted by DCAS QAR. . . .
>
> P.P.S. The inability to ship in place alone has damaged our ability to pay our motor vendor . . . . They have reduced our line of credit from $300,000 to "0". We are now on a C.O.D. basis.

(R4, tab 14)

In Modification No. P00005 dated 21 December 1989, the parties mutually agreed to extend the delivery date for the first shipset to 15 January 1990, for the second shipset to 15 February 1990, and for the third shipset to 5 March 1990 without payment of any consideration because "the lateness is partially due to government caused delays." The modification once again did not contain any waiver or release of claim. (R4, tab 15) In a letter also dated 21 December, PDI advised CO Cotton it had received Mr. Montembeau's 18 December telefax regarding impellers, "impellers are a pre-priced firm fixed item" in its contract, GFM impellers are only "multi-vane 7th stage" impellers, it makes a profit on impellers it supplies pursuant to the contract and it should be allowed to supply them, and Mr. Montembeau has a "personal relationship" with a competitor of PDI's and no right to change its contract's terms. (R4(b), tab 5(B))

In a memorandum to Ms. Vachon dated 21 December 1989, Mr. Montembeau and his supervisor, Mr. Mathewson, stated that PDI's 27 November 1989 request for payment

for performing a "second Hydrostatic Test" is unacceptable. They explained that their records indicated that the TRS provided with PDI's contract "clearly states that hydro-tests shall be performed twice." (R4, tab 18)

In another memorandum to Ms. Vachon dated 27 December 1989, Mr. Mathewson and Mr. Montembeau stated that, after review of supplemental condition reports and an on-site physical inspection, it was determined only eight impellers needed to be replaced. They added that "[t]hese impellers will be provided to the contract as GFM" so "PDI need not procure any new impellers." (R4, tab 20)

On 15 January 1990, PDI advised Ms. Vachon that the eight impellers supplied from the stockpile as GFM were unacceptable. Mr. Montembeau inspected the GFM impellers on 17 January 1990. He agreed to replace one impeller, but directed PDI to utilize the others, which he deemed acceptable. PDI advised Ms. Vachon by letter that the Navy must put its directive to use these impellers "in writing" and that responsibility for successful performance of the units must "fall" on the Government. PDI also billed the Navy $518.14 for "re-inspecting" and "verifying" the GFM impeller defects in the presence of Mr. Montembeau. PDI stated it would comply with the directive to use the impellers "under protest," but it should have been allowed to provide the "replacement" impellers "at the price pre-determined" when its contract was awarded. (R4, tab 27; R4(b), tab 5)

By letter dated 16 January 1990, which was received by PNS on 29 January 1990, PDI advised Ms. Vachon that Mr. Montembeau "instructed" PDI to "repair the undersized recirculating flanges by method of plating and then machining" on pumps 0237 and 0238, and it was seeking a total of "$5,999.08" for this repair. PDI requested that Ms. Vachon "[p]lease send a modification to cover this repair." (R4, tab 19; R4(b), tab 10(S))

On 25 January 1990, Ms. Vachon received from PDI four supplementary condition reports dated 22 December 1989, which were verified/approved by the QAR. The reports stated that, for pumps 0216, 0217, 0218, and 0219, PDI needed to "[g]rind back first stage inlet guide vanes to template" on the Crossover and "machine off second step" on End Cover. (R4(b), tab 10(K), (L), (M), (N)) She also received supplementary condition reports of the same date verified/approved by the QAR, which stated, for nozzle head assemblies on pumps 0237 and 0238, PDI needed to expend engineering time, machine the recirculation flange in preparation for metal spray, spray metal on the flange, and then machine and serrate the flange at a cost per pump of $958.00 (R4(b), tab 10(O), (P)).

By letter dated 29 January 1990, PDI notified the contract specialist that, because she "had placed a stop work order on the last (4) main feed units," those units will "be

refurbished after 01 JAN 1990 . . . requiring U.S. manufactured bearings to be used by law." PDI stated that U.S. made Barden Bearings were available, but there would be "a delivery [time] of 30 weeks and a significant price increase." At the time, it was not clear to contractor or government personnel whether existing contracts were "grandfathered" and not required to use only American made bearings or whether the new American made bearing requirement also applied to such contracts. (R4, tab 17; tr. 1/120-24, 227-33, 248, 2/119-22, 124, 229-33, 3/18-23, 44-50)

During the month of January 1990, PDI received from the Navy the multi-vane, seventh stage impeller kits it required for the second shipset (R4(b), tab 7(B)). On 31 January 1990, there were 25 ASW units which had not been delivered to the Navy within the contractually specified time after their receipt by PDI and which were not ready to be shipped to the Navy. *Precision Dynamics, Inc*., ASBCA Nos. 41360, *et al*., 97-1 BCA ¶ 28,722 at 143,370.

On 6 February 1990, PDI rejected the additional replacement impeller Mr. Montembeau agreed to supply as GFM in January. PDI advised Ms. Vachon that it was being delayed in its work by the Navy's supply of faulty impellers and, if it was forced to use the GFM impellers, it required a statement from the Navy it was not liable for any problems with the pumps arising due to faulty impellers. (R4(b), tab 5)

On 9 February 1990, a DCASMA quality assurance engineer prepared a report stating he dimensionally checked and visually inspected the impellers deemed defective by PDI, found deviations from the drawings for the impellers, concurred with PDI that using these parts "may" affect pump performance, and recommended the impellers be rechecked by PNS "since these main feed pumps are considered for critical applications and some parts of the pump are Level 1 parts" (R4(b), tab 5(K)). In a letter dated 23 February 1990, PDI notified Ms. Vachon the impellers had been "rejected" by the DCASMA QAR and an engineer with DCASMA on 1 February 1990, and DCASMA will be sending her notification of its findings. PDI added the "impellers are causing a delay in our production." (R4, tab 27)

In letters dated 28 February and 2 March 1990, CO Cotton notified PDI that, because it had not delivered 25 units under the five ASW contracts, he was considering terminating the contracts for default and PDI should present any facts bearing on whether its failure to perform arose out of causes beyond its control and without its negligence and fault. *Precision Dynamics, Inc*., ASBCA Nos. 41360, *et al*., 97-1 BCA ¶ 28,722 at 143,371.

In a 14 March 1990 response to a RTE, Mr. Mathewson advised Ms. Vachon that he "will not authorize payment" of $5,999.08 for repairs of the recirculating flanges on pumps 0237 and 0238 sought by PDI in its 16 January 1990 letter forwarded by her on

6 March 1990 "because the charges are exorbitant." Mr. Mathewson noted that PDI's supplementary condition reports of 22 December 1989 for that work listed "a price of $1,916." (R4(b), tab 10(Q))

On 15 March 1990, PDI sent Ms. Vachon another letter requesting reimbursement for the engineering hours expended regarding gasket crush (R4, tab 24). Mr. Mathewson advised Ms. Vachon the same day that: the decision to provide GFM impellers in lieu of procuring them from PDI was made by him, not Mr. Montembeau; he was not aware of any contract requirement precluding use of new GFM impellers; he would not authorize payment of $518.14 to PDI for inspecting the GFM impellers; Mr. Montembeau spent less than one hour inspecting the eight GFM impellers on 17 January and found seven acceptable; all impellers accepted "did not meet all drawing requirements" but the "minor defects found will not affect form, fit or function when installed"; waivers to accept the minor defects will be recorded on form DD1694 as a permanent record; and he did not consider use of new GFM with defects recorded as voiding PDI's warranty responsibility, but PDI would not be responsible to warranty GFM if it could show that installed GFM caused the problem being considered under warranty.

In a 16 March 1990 response to a 2 March 1990 RTE with respect to four of the condition reports received by Ms. Vachon on 25 January 1990, Mr. Mathewson advised Ms. Vachon:

> 1. $340 per pump (total of $1360) for machining end cover and crossover to accomplish 7th stage multivane impeller modification on SMIC(s) 0216, 0217, 0218, and 0219. PDI has also requested the same funding for the same work on pumps with serial numbers 0768-124, 125, 126, and 127 on RTE(s) 530.3T-170, 171, 172, 173-90. It is our understanding that only 4 of the 12 pumps received by PDI under this contract required the multivane impeller modification and PDI has only requested 4 multivane impeller kits supplied as GFM. We will not authorize funding for this work until PDI identifies which specific pumps received under this contract required the 7th stage multivane impeller modification.
>
> 2. $958 per pump (total of $1916) for the repair of nozzle head recirculating flange on SMIC(s) 0237 and 0238. The $1916 total includes a $400 charge for engineering time which is not unplanned work. PDI was awarded this contract based on their experience as an established pump restorer and, hence, the Government should not have to pay

> engineering time to develop the procedure. Remaining costs ($758 per pump) appear excessive for flange preparation, metal spraying, and machining. Request PDI provide a breakdown of costs with supporting documentation.

(R4(b), tab 10(Q))

By letter dated 27 March 1990, PDI notified the CO's legal advisor that it was being treated differently than the last contractor who performed refurbishment work, Dresser Industries. PDI asserted that Dresser had been paid by the Navy to inspect and repair impellers furnished as GFM, and received payment within six weeks rather than PDI's "average time of three to four months." SUBMEPP commented on PDI's letter that: the 51 impellers provided Dresser were "used" impellers which had been left over from the FY86 GE refurbishment contract and rejected by GE as failing to meet TRS acceptance criteria; Dresser had experience repairing pump impellers; it was deemed "cost effective" to provide GE's leftover impellers to Dresser as GFM and pay Dresser to fix impellers that were "repairable"; Dresser repaired 17 impellers with defects in bearing or wearing areas and scrapped the remainder; the impellers supplied to PDI as GFM were "new" impellers from the National Stock System (NSS); impellers that PDI deemed defective had initially been found acceptable by PDI and DCASMA; the Navy needed delivery of refurbished pumps from PDI to support its ship availability schedules; and Mr. Montembeau was sent to inspect impellers to ascertain if the Navy could waive some deficiencies, use any of the impellers deemed defective "as is," and "save time." (R4, tab 27)

The same day, 27 March 1990, PDI notified Ms. Vachon by letter with respect to overhaul of ASW and main feed motors that: its motor subcontractor, Hansome, is having "great difficulty working on [PDI's] units" due to "an enormous work load"; PDI therefore decided to send motors for overhaul to another vendor, National Electric Coil, "who will commence work immediately on the motors," and the only possible delay PDI "will then encounter will be the acquisition of bearings for the motors" because "Barden, whose delivery schedule is 33 weeks," is now the "only approved source." PDI added that, possibly, PNS could "obtain and supply bearings as GFM in a more expeditious manner than we can." (R4, tab 37)

On 12 April 1990, Mr. Mathewson advised Ms. Vachon with respect to PDI's request for extra monies for gasket crunch engineering that: leakage problems occurred on the GE and Dresser contracts; he resolved the problem on the Dresser contract by requiring a gasket crush of 0.050 to 0.055 inch; the technical package for the FY89 requirements was prepared with the same TRS as the GE and Dresser contracts, *i.e.*, without a gasket crush requirement of 0.050 to 0.055 inch; and he thus instructed Mr. Montembeau to advise PDI of the gasket crush change during the post award survey.

Mr. Mathewson added:

> 1. The original PDI contract, paragraph C.1, required that work be accomplished in accordance [with] Refurbishment Instruction 4320-208-069N dtd May 1987 which, in turn, invoked TRS(s) 0208-086-014F (Modified) and 0208-086-021B (Modified). Both TRS(s) required that the channel rings be measured for depth of gasket sealing area as planned work. If PDI took these measurements before Mr. Hendrickson was advised by Mr. Montembeau of the 0.050 to 0.055 inch gasket crush change, then PDI is entitled to claim re measuring as unplanned work on a condition report . . . .
>
> 2. The requirement to measure the flexitalic gaskets (12) for thickness and all machining, including grooving, is unplanned work. If they have not already done so, PDI should submit condition reports for this work with a cost breakdown.
>
> 3. The contract does not require PDI to obtain approval for taking pieces out of drawing dimensions since the gasket crush change in itself authorized these dimensional changes. PDI is required, by contract, to submit a deviation request only when [it] institute[s] the change and not the Government.

(R4, tab 24) The next day, 13 April 1990, Mr. Montembeau advised Ms. Vachon in response to her 2 March 1990 RTE regarding nozzlehead repairs that: the 2 June 1989 condition reports for pumps 0216, 0217, 0218, 0219, and 0239 indicated the inspection performed by PDI and witnessed by the QAR revealed that the nozzle head suction and discharge flanges were "Acceptable as is"; PDI was not contractually authorized to re-inspect and machine the flange faces; a different QAR witnessed the reinspection set forth in the supplemental condition reports and should have been advised of the prior inspection; and the flange faces of pumps 0237 and 0238 were not machined by PDI. (R4, tab 22)

From 31 January until 11 April 1990, PDI provided the CO with reports each week about the status of ASW units "currently in house." The 11 April 1990 report stated that PDI was performing work upon or recently had completed work upon 22 different ASW units. *Precision Dynamics, Inc.*, ASBCA Nos. 41360*, et al.*, 97-1 BCA ¶ 28,722 at 143,371-72.

On 16 April 1990, CO Cotton terminated all five of PDI's ASW contracts for default. *Precision Dynamics, Inc.*, ASBCA Nos. 41360, *et al.*, 97-1 BCA ¶ 28,722 at 143,373. At approximately the same time, the parties executed Modification No. P00007 to the main feed pump contract, which "definitized" funding of more than $58,000.00 for unplanned repairs and replacement parts (R4, tab 21).

After termination of the five ASW contracts for default, PDI performed additional work on three of its delinquent ASW units and the Navy accepted those units. *Precision Dynamics, Inc.*, ASBCA Nos. 41360, *et al.*, 97-1 BCA ¶ 28,722 at 143,373.

By letter dated 24 April 1990, PDI advised Ms. Vachon that: condition reports for the impellers were submitted by PDI; Mr. Mathewson's 15 March 1990 response to Ms. Vachon's RTE was not signed by a CO and cannot be accepted as official authority for PDI "to accept these impellers in their out of tolerance state"; if the Navy still insists PDI use defective impellers, the Navy must put that in the correct form, which is a modification signed by a CO; this contract requires "MIL-I-45208 Q.E. management, which mandates total receipt inspection of all in-coming material," GFM or otherwise, because "[t]his is a pump for a submarine and is a critical application item"; Mr. Mathewson authorized payment during 1988 to another pump refurbishment contractor, Dresser, for inspection of the same type of impeller on the same type of contract; and PDI does not have acceptable impellers to use or a waiver to use defective impellers and "[t]his is clearly a government caused delay." PDI attached to its letter a copy of a final inspection and receiving report for Dresser's refurbishment of 17 impellers, a modification to Dresser's contract executed by CO Cotton stating Dresser was to prepare condition reports on impellers being furnished by the Navy, and an RTE executed by Mr. Mathewson and Mr. Montembeau authorizing Dresser to inspect 51 impellers and repair 17 of the impellers at a cost, respectively, of $4,352.00 and $6,664.00. (R4, tab 27; R4(b), tab 5(O))

By letter dated 26 April 1990, PDI notified Ms. Vachon that: the 0216, 0217, 0218, 0219, 0412, 0413, 0414, and 0415 pumps were not "previously modified on the end cover, crossover, spacers etc. to accomplish the 7th stage multivane impeller modification"; the only pumps previously modified were pumps 0236, 0237, 0238, and 0239 now in the Navy's possession; the 0216 and 0218 pumps were "fully completed"; the other six pumps were disassembled and SUBMEPP was welcome to verify PDI's determinations; DCASMA already had verified PDI's determinations; and thus monies were due PDI. PDI added that the "sealing surface on the shells require serrations in order to pass hydro" and "also require skim cuts due to scale build up." (R4, tab 29)

On 1 May 1990, PDI advised Ms. Vachon that its 16 January 1990 letter was in "error." PDI explained that it was seeking only $1,916.00 ($958.00 per pump) for repair of undersized recirculating flanges. (R4(b), tab 10(Q))

In a letter dated 4 May 1990, a Congressman wrote the Department of the Navy that: the President of PDI had met with Naval Investigative Services regarding the CO's refusal to allow PDI to supply impellers for the contract; the CO was ordering PDI to use materials certified to be defective; and the Congressman desired "an IG investigation" of the CO's actions. With respect to the Congressman's letter, SUBMEPP commented that, in lieu of procuring eight new impellers from PDI at a cost of $71,000.00, it provided PDI impellers as GFM from the NSS at a cost of $24,365.00, saving taxpayers $46,635.00. SUBMEPP explained: the eight NSS impellers were accepted previously by the Government; NAVSEA had requested a "draw down" of NSS impeller stock because the system was "overstocked"; the alleged defects on the eight new GFM impellers were insignificant casting defects which would have no effect on impeller form, fit or function; an approved DD form waiving these impeller non-conformances was on file at SUBMEPP; and PDI was not paid for inspecting new GFM because the contract only authorized inspection of "used" GFM parts. (R4, tab 27)

In a telephone conversation and letter on 8 May 1990, PDI requested Ms. Vachon supply motor bearings for the last shipset due to "government requirement for American made bearings" (R4, tab 29). At approximately the same time, CO Cotton advised PDI by letter that, during a telephone conversation on 7 May 1990, he had told PDI "to install the Government furnished impellers on the main feed pump units . . . under refurbishment." CO Cotton attached to his letter a "Diviation/waiver from SUBMEPP" [sic]. By letter dated 14 May 1990, PDI notified CO Cotton that the waiver accompanying his 7 May 1990 letter addressed only the seven impellers rejected by PDI in January 1990 and not the impellers rejected in December 1989, which PDI also was directed to use. In a letter to PDI dated 16 May 1990, CO Cotton stated that: a SUBMEP engineer had determined the additional impellers "were within TRS requirements" and "suitable for use on this contract"; the impellers were to be installed on the pumps; and refurbishment of the units was to be completed within 30 days of receipt of his letter, the number of days PDI had stated during a 15 May 1990 telephone conference were needed. (R4, tab 27; R4(b), tab 5(T)) By letter of the same date, 16 May 1990, PDI advised CO Cotton it would comply with his order to use the impellers "under protest" because it is being ordered to use impellers that are "non conforming to specifications" and it should have been allowed to provide "these parts as per the terms of the contract." (R4, tab 27)

On approximately the same date, PDI advised Ms. Vachon by letter that the TRS dated 16 May 1986 requiring only one hydro test was "received with the solicitation" and was the basis for its "bid," and the TRS dated 22 May 1987 requiring two tests was "received [by it] after the contract was awarded." Based upon these circumstances, PDI stated it believed the second hydro test was "additional work" for which it was entitled to be reimbursed by the Navy. The records at SUBMEPP and Portsmouth purchase

division, however, both indicated that the correct TRS, which required two hydro tests (TRS 0208-086-014F (Modified) dated 22 May 1987), was issued with the solicitation for PDI's contract. Ms. Vachon therefore continued to maintain PDI was not entitled to receive additional monies for performing the second hydro test. (R4, tab 27)

By letter dated 18 May 1990, which was addressed to CO Cotton and copied to two Admirals and three Congressmen, PDI once again indicated it would comply with the CO's order "to use non-conforming impellers" on the shipsets "under protest." PDI, however, proposed substituting "conforming" impellers received on the third shipset on the second shipset, which possessed nonconforming impellers, and having it manufacture new impellers for the third shipset. PDI stated that: it will manufacture new impellers to replace defective ones; it would take approximately four to six weeks to manufacture the required impellers; if the CO agrees to its proposal, he will insure the "highest quality of components are being used in this 'critical application' Level 1 overhaul" and the Navy will "be living up to its contractual obligations to allow PDI to supply these impellers"; and although PDI had started re-assembly of the last two pumps of the second shipset, it "can still deliver the two (2) pumps . . . within the thirty-day period" it indicated on 15 May was necessary for completion (R4, tab 27).

By letter dated 21 May 1990, PDI requested it be allowed to "ship in place" motors on the contract. In a letter dated 22 May 1990, CO Balz advised PDI shipping in place was not authorized for any motors on this contract. He explained that the Navy had experienced problems with shipping in place on contracts by other vendors and would not be allowing such shipment anymore.[1] (R4(b), tab 9(A))

On 22 May 1990, Ms. Vachon asked SUBMEPP in a RTE whether the Navy could supply PDI bearings for the last shipset due to "procurement lead time required to obtain American manufactured bearings." The same date, in another RTE, she asked SUBMEPP about PDI's repeated assertion of 15 May 1990 that it was entitled to extra monies for performing the second hydro test. The next day, 23 May 1990, PDI received from PSN GFM impeller kits (shims and thumbtack spacers) for the four units of the third, *i.e.*, last, shipset. (R4, tabs 29, 31, 34)

---

[1] "Shipment in place" constituted "acceptance" by the Navy and allowed a contractor to obtain payment for refurbishment work without actually having delivered the item to the Navy. Earlier refurbishment contracts contained a provision specifically authorizing a contractor to "ship in place." PDI's contract, however, did not contain any such provision. After it experienced problems with QARs incorrectly "verifying" that refurbishment work had been performed when it had not, the Navy decided as a matter of policy it was not going to permit refurbishment contractors to "ship in place" and subsequently declined to include ship-in-place provisions in its refurbishment contracts. (R4, tab 1; tr. 2/103-06)

During May, the parties executed a contract modification, No. P00008, which "definitize[d]" funding of $1,925.68 for unplanned work. In addition, Mr. Montembeau advised that PDI's request to be paid for channel ring repairs related to gasket crush was acceptable; PDI's request to be paid for end cover and crossover repairs was acceptable also because SUBMEPP had determined that multivane impeller kits were requisitioned from the Navy; and PDI's request to be paid for repair of recirculating flanges on pumps 0237 and 0238 was acceptable at a reduced cost of $501.25 per unit, which eliminated engineering and transportation costs (R4, tab 29).

On 4 June 1990, SUBMEPP (Mr. Montembeau and Mr. Mathewson) replied to Ms. Vachon's recent RTEs. They said the bearings had been requisitioned from the Stock System and will be provided as GFM, but the Navy will not be responsible for any delays caused by the two week lead time because bearings are a planned replacement part and PDI has had the motors in its possession for nearly a year. They added PNS Code 533 states that "there is no likely way that another TRS was issued [to PDI] since they have in their possession a copy of the solicitation that went out for bid" and SUBMEPP "consider[s] this [hydro test] issue closed." (R4, tabs 29, 31, 34; R4(b), tab 7(E))

On 5 June 1990, Mr. Mathewson and Mr. Montembeau rejected PDI's proposal with respect to impellers. They noted that: MIL-STD-481 invoked in the contract permits use of non-conforming material provided its use is approved and recorded on DD Form 1694; an approved DD Form 1694 waiving the impeller non-conformances was on file with SUBMEPP and a copy of the form provided to PDI; and SUBMEPP engineers had examined the alleged defects on the new GFM impellers and determined that they were insignificant casting defects, which would have no effect on form, fit, or function of the impellers. Ms. Vachon notified PDI on 7 June 1990 it was to "use the Government furnished impellers provided to [it]" on the second shipset. (R4, tab 27)

During early June 1990 (*see* R4, tab 28), the Navy substituted another CO, John Balz, for CO Cotton. *Precision Dynamics, Inc.*, ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,890, *aff'd*, 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998). In a unilateral contract modification, No. P00009, dated 6 June 1990, CO Balz set forth required "firm fixed price contract clauses . . . omitted from th[e] contract during typing." These included FAR 52.233-1 DISPUTES, ALT I (APR 1984), 52.243-1 CHANGES – FIXED PRICE (APR 1984), 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED PRICE) (APR 1984), and 52.249-8 DEFAULT (FIXED PRICE SUPPLY AND SERVICE) (APR 1984). (R4, tab 28)

By mid-June 1990, PDI delivered to the Navy, and the Navy accepted, seven of eight pump/motor assemblies comprising the first two shipsets to be refurbished (R4, tab 26). *Precision Dynamics, Inc.*, ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,890,

aff'd, 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998). In a letter dated 26 June 1990, PDI advised Ms. Vachon it had received four sets of single ball bearings as requested, but did not receive the duplex ball bearings also needed for motor overhaul of the third shipset. PDI asked it be advised when it will be receiving the duplex bearings. (R4, tab 31) By letter dated the following day, 27 June 1990, PDI additionally advised Ms. Vachon that: McGraw Edison recently had returned to it the motors for the last shipset untouched because it is no longer in the business of overhauling motors; PDI has made arrangements with Hansome to do the motor overhaul; estimated time for the completion of the motor overhaul is 10 to 12 weeks; and please advise when PDI will receive the duplex bearings. (R4, tab 32) About five weeks later, on 8 August 1990, Hansome completed condition reports for the last shipset motors (R4, tab 29).

During summer 1990, newly-assigned CO Balz sent PDI for execution a contract modification, No. P00010, which transferred funding among contract line items and increased the total contract price (R4, tab 29). PDI returned the modification with a letter dated 15 August 1990 stating it had executed the modification "under protest" since it was "in desperate need of monies." Because PDI took exception to the terms of the modification, the CO did not execute that modification. *Precision Dynamics, Inc.*, ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,890, *aff'd*, 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998).

By letter dated 28 August 1990, PDI advised Ms. Vachon that it had received from the Navy "single" rather than "duplex" bearings for the last shipset motors. PDI asked that it be supplied with the necessary duplex bearings. (R4, tab 37)

After conducting further discussions with PDI, CO Balz prepared another contract modification, No. P00011, which authorized and reimbursed performance of "unplanned work." The modification stated that, with respect to recirculating flanges for pumps 0237 and 0238, machining of flanges would be reimbursed at $150.00 per repair, spraying of flanges would be reimbursed at $221.00 each repair, serrating and machining of sprayed flanges would be reimbursed at $150.00 each repair, engineering costs would not be reimbursed because they are considered unallowable expense, and transportation costs would not be reimbursed because PDI used its own truck which was covered by the G&A Pool. The modification further stated that, with respect to pumps 0412, 0413, 0414 and 0415 of the last shipset, crossover and endcover repairs will be reimbursed as PDI requested, except shell gasket sealing surfaces will be reimbursed per exhibit line item 6008B at $250.00 each. The modification provided:

> DELIVERY DATE FOR THE FINAL SHIPSET OF UNITS . . . IS REVISED TO 20 NOV 1990. . . .
>
> . . . .

> The consideration negotiated for this . . . agreement is intended to compensate the contractor in full and settle any and all claims, matters and events arising out of the contract and any charges [sic] thereto, to date. It is accepted by the contractor as the full, final, complete and entire equitable adjustment to which he [sic] is entitled for complying with any and all charges [sic], (whether express, implied or constructive) issued or in effect on or before this date. The contractor hereby covenants not to sue, litigate or claim for any additional compensation under this contract modification in excess of the contract price as amended herein.

(R4, tab 29) PDI signed this modification, but notified the contract specialist prior to her receipt of the modification that it had executed the modification mistakenly and desired to revoke its signature (*id.*). The CO allowed PDI to revoke its signature and did not execute the contract modification after receipt. *Precision Dynamics, Inc.*, ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,890, *aff'd*, 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998).

During September of 1990, the Navy accepted the eighth and last pump/motor assembly for the first two shipsets. In addition, PDI submitted to the Navy a certified claim for "$586,091.00," regarding the parties' contract, which according to PDI "was subject to increase" for future developments. (*Id.*; app. br. at 1)

By unilateral Modification No. P00012 executed 29 September 1990, the Navy modified the parties' contract to provide that: it would supply PDI with four motor bearings for the last shipset as government furnished material; reduce the line item for such bearings by the cost of four bearings and transfer that amount to another line item; and increase the total contract price from $399,307.28 to $404,559.78, *i.e.*, by $5,252.50. This modification also "deleted" unexecuted contract Modification Nos. P00010 and P00011 "in their entirety." (R4, tab 29; tr. 2/228)

CO Cotton sent PDI a letter on 17 October 1990 advising he had received PDI's claim for additional monies, had determined that the claim would need considerable input from several individuals within the government before he could formulate a decision, and therefore would not be able to issue a final decision on the claim within 60 days. The CO stated that to make a final decision he would also need a "complete breakdown of each cost element to show separately the associated labor, material overhead, general and administrative charges and any profit for each portion of the claimed amounts," "copies of all journal/ledger entries" and "associated deposit slips," a description of PDI's accounting system, itemized billings and canceled checks for all attorney fees claimed,

records of payments to PDI for this contract, and "[c]ertified cost and pricing data" from PDI for a complete audit of the claim. (R4, tab 36)

On 18 October 1990, PDI received the last duplex bearing it needed for the third shipset. When the Navy sent the bearings earlier it had sent only three even though a bearing is required for each of the four shipset motors. (R4, tab 37; tr. 3/49-54) The week following PDI's receipt of the last duplex bearing, Hansome, its subcontractor, completed refurbishment of the third shipset motors. *Precision Dynamics, Inc*., ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,890, *aff'd,* 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998).

Shortly thereafter, CO Balz sent to PDI for execution Modification No. P00013 (R4, tab 30), which did not contain a release of claims, but revised the delivery date for the last shipset to 20 November 1990. PDI, however, also declined to execute that modification. *Precision Dynamics, Inc*., ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,890, *aff'd,* 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998).

Throughout fall 1990, PDI advised the Navy repeatedly "the motors were still the hold up" in completing the shipsets. During those months, PDI's motor subcontractor declined to release refurbished motors to PDI until PDI paid it amounts owed for work on this and other Navy refurbishment contracts. *Precision Dynamics, Inc*., ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,890-91, *aff'd,* 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998).

On 4 December 1990, CO Balz unilaterally issued contract Modification No. P00015 re-establishing a delivery date of 4 January 1991 for the last shipset (R4, tab 44). PDI, however, did not deliver the last shipset on or before 4 January 1991. By letter dated 18 January 1991, CO Balz advised PDI that, since it had failed to deliver the last shipset within the time required by the contract, the Navy was considering terminating its contract pursuant to the TERMINATION FOR DEFAULT clause, FAR 52.249-8 (APR 1984). CO Balz stated he was giving PDI the opportunity within 10 days of receipt of his letter to present in writing any facts bearing upon whether PDI's failure to perform arose out of causes beyond its control and without fault or negligence on its part. (R4, tab 39)

On 1 February 1991, CO Cotton advised PDI that he could not discuss its claim until two to three weeks after he received an audit recommendation from the Defense Contract Audit Agency. He added that he did not expect to be able to discuss PDI's claim before mid-March 1991. (R4, tab 36)

On 4 February 1991, PDI advised Ms. Vachon that the last shipset motors were to be delivered to PDI that day, and assembly and testing would be completed 15 February

1991 (R4, tab 39). On 13 February 1991, PDI furnished its subcontractor a letter, which purportedly assigned Navy payment for refurbishment of the shipset motors to the subcontractor, and the subcontractor released the four motors to PDI. PDI did not, however, deliver the last main feed shipset to the Navy on or before 15 February 1991, as PDI had advised may occur. *Precision Dynamics, Inc*., ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,891.

On 25 February 1991, the QAR advised CO Balz that: the motors were still at Hansome on 8 February 1991 and were not transferred to PDI until 14 February. The QAR said that, when he had visited PDI on 19 February, PDI performed one hydrostatic test on one unit, the second unit was not ready for the test, and the third and fourth units were not even assembled. The QAR added that one of the units still had parts "on order," which were holding up assembly of that unit. (R4, tab 42)

The same date, 25 February 1991, CO Balz issued a contract modification, No. P00016, terminating the contract in part for default. During May of 1991, PDI filed a timely appeal of the CO's decision with this Board. (R4, tabs 42, 45, 52) In a two-count complaint, PDI challenged both the partial default termination (compl. ¶¶ 1-19) and deemed denial of PDI's affirmative claim, which had not been the subject of a final decision (compl. ¶¶ 20-27).

At the request of PDI, the Board bifurcated the termination appeal from PDI's monetary claim, which subsequently was assigned its own appeal number (ASBCA No. 50519). Additionally, at PDI's request, the Board consolidated conduct of trial concerning default termination of the main feed pump contract with conduct of trial regarding default termination of the five ASW contracts (ASBCA Nos. 41360, 41361, 41362, 41363, and 41364).

After conducting a five-day hearing, we denied PDI's appeal with respect to the Navy's default termination of the main feed pump contract. *Precision Dynamics, Inc*., ASBCA No. 42955, 97-1 BCA ¶ 28,846. We, however, sustained PDI's appeals with respect to the five ASW contracts and converted the default terminations to terminations for convenience because CO Cotton had waived the delivery dates and never established new reasonable delivery dates. *Precision Dynamics, Inc*., ASBCA Nos. 41360, *et al.*, 97-1 BCA ¶ 28,722. While PDI appealed our denial of its appeal with respect to the main feed pump contract default termination, the Court of Appeals for the Federal Circuit affirmed our decision. *Precision Dynamics, Inc. v. Dalton*, 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998).

We subsequently conducted a four-day hearing with respect to PDI's monetary claims on the main feed pump contract. At the hearing, Mr. Dyevoich, PDI's president, testified that: he spoke to Ms. Vachon two to three times a day; he spoke to CO Cotton

two to three times a month; and Ms. Vachon told PDI on 15 April 1989 to "cease and desist" its contract work due to gasket crush problems being experienced by another contractor and, during July 1989, with the knowledge of CO Cotton, told PDI to "cease and desist all work until the Navy could be sure proper personnel were on board" at PDI (tr. 1/77, 92, 97-102, 191, 262-63). Mr. Dyevoich further testified the impellers deemed not to satisfy TRS requirements spanned two shipsets, but the Navy granted permission to consolidate the impellers on one shipset (tr. 1/234-35). Finally, Mr. Dyevoich testified: based on a review of his correspondence in 1990, he "believe[s] [he] did not" receive TRS "0208086021B," which he is "sure" was the one that "addressed hydrostatic testing" (tr. 2/28-29); he could not know to ask for TRS 0208086021B because it "was not listed in [his] original solicitation" (tr. 2/30-31); and "what was given to [him] to review" in preparing PDI's bid "was not an identical document to what . . . [he] signed when we ultimately went to contract" and thus "was incorporated into the [parties'] contract" (tr. 2/31, 55-57).

Ms. Vachon testified at trial that she never directed PDI to stop work on shipsets pending resolution of gasket crush. She added that: CO Cotton learned of her direction to PDI to delay work on the last shipset pending review of its engineering capability about a week after she made the oral statement; CO Cotton said she should not have issued such a direction; and CO Cotton told her he had advised Mr. Dyevoich by telephone that if PDI ran out of work, it was free to start work on the last shipset. (Tr. 3/9, 11-14, 17-18, 34-37, 69-70)

CO Cotton testified that PDI had performed a number of shipset refurbishment contracts and that shipset arrival dates are estimated in such contracts because shipsets are often directly taken off docked submarines and overhaul of submarines is subject to fleet commander determinations regarding deployment for national defense (tr. 2/89-101). CO Cotton further testified that he never issued a stop work order to PDI due to gasket crush, he did not authorize anyone else to issue such a stop work order, and he does not recall PDI, which was not hesitant in alerting him to problems it believed were caused by the Navy, ever making him aware it believed work was stopped due to gasket crush (tr. 2/108-10). CO Cotton added that he learned of Ms. Vachon's oral direction to PDI to delay work upon the last shipset shortly after issuance of the direction and he promptly advised Mr. Dyevoich by telephone that: the Navy was not issuing a "stop work order" and, while the Navy's "wishes" were to resolve questions of technical capability before disassembly of the last shipset, if there was no other work, PDI should proceed with work upon that shipset (tr. 2/112-14). Finally, Mr. Cotton testified that: the impellers supplied by the Navy from the government stockpile had not been made using original contract drawings but were "reversed engineered" by GE to meet shipset performance criteria because the impeller "vanes" were a trade secret; he spoke with PDI's president quite often and told him the Navy was free to require PDI to use impellers from the stockpile; he was "directing" PDI to use the impellers when he

delivered them to PDI; liability rests with the Navy for government furnished property; PDI did not need a written directive to do its job; and he gave PDI an order directing use of the impellers when he became "fed up" trying to convince PDI's president that there was no need for written direction (tr. 2/125, 127-29, 196-99, 207, 210, 218-19, 222-24).

Finally, Mr. Montembeau testified at the hearing that main feed pumps and motors can only be provided for refurbishment based upon estimated dates because the time that a submarine docks for overhaul is based upon its "operation and mission criticality." He added it "wouldn't be unusual to see pump motor combinations roll in up to seven or eight months after . . . estimated dates in the contract." (Tr. 3/88-92) Mr. Montembeau further testified that while the June 1989 contract modification concerning gasket crush constituted "a new unplanned requirement to the contract," PDI was not delayed by the contract change because its work relating to gasket crush could occur after all planned replacement parts were in place and all other parts had been machined (tr. 3/99, 122-25, 4/80). Mr. Montembeau added that PDI also was not delayed by the Navy's delivery of motor bearings because bearings are needed at the conclusion of motor refurbishment when the contractor is ready to re-assemble the motor (3/123-24). With respect to PDI's claim for an adjustment to perform a second hydro test, Mr. Montembeau testified that Navy records indicate PDI received as part of the solicitation the TRS specifying two hydro tests be performed (tr. 4/66-67).

DECISION

In this appeal, PDI seeks equitable adjustments in the price of its contract pursuant to standard clauses set forth in its contract, monies for work that it asserts was performed pursuant to the terms of its contract, and damages for "breach" of contract. We address each of PDI's claims separately.

I. Equitable Adjustment Claims

PDI argues that it is entitled to receive equitable adjustments in its contract price due to delays in contract work caused by the Navy and changes to contract work made by the Navy. To receive an equitable adjustment, a contractor must show three elements — liability, causation, and resultant injury. *Servidone Constr. Corp. v. United State*s, 931 F.2d 860, 861 (Fed. Cir. 1991); *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965). A contractor bears the burden of proving its affirmative claim against the government and establishing its entitlement to an equitable adjustment by a preponderance of the evidence. *Tri-State Services of Texas, Inc*., ASBCA No. 38019, 89-3 BCA ¶ 22,064 at 110,990-91; *R.J. Crowley, Inc*., ASBCA No. 28730, 86-1 BCA ¶ 18,739 at 94,298.

A. Delays

PDI initially contends that different actions of the Department of the Navy delayed its contract performance. PDI asserts that it is entitled to receive equitable adjustments in its contract price for "unsupported overhead" totaling $310,317.00 because the Navy (1) issued a stop work order to allow modification of a defective contract specification, (2) issued a stop work order to allow review of PDI's employees' qualifications, and (3) failed to timely deliver suitable GFM. (App. br. at 7-10, 34-37; app. reply at 4-13, 19-20, 28-31)

Government contractors, such as PDI, incur indirect costs that are not attributable to any one contract, but arise from their general operations. These costs, such as general insurance, accounting-payroll services, senior management salaries, heat, electricity, taxes, and depreciation, generally are incurred even when there is no activity on a government contract. *West v. All State Boiler, Inc*., 146 F.3d 1368, 1372 (Fed. Cir. 1998); *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1058 (Fed. Cir.1993). A contractor recovers these costs by allocating the expenses on a proportionate basis among all of its contracts. If the government suspends work on a contract, the contractor's indirect costs often accrue beyond the amount originally allocated to that contract. The additional costs thus may be "unabsorbed." *All State Boiler*, 146 F.3d at 1372; *Mech-Con Corp. v. West*, 61 F.3d 883, 886 (Fed. Cir. 1995). In *Eichleay Corp*., ASBCA No. 5183, 60-2 BCA ¶ 2688 at 13,574, we adopted a formula for estimating proportionate home office overhead unabsorbed due to a suspension, which commonly is referred to as the "Eichleay formula." It is now well-established that, if the government suspends or delays work on a contract for an indefinite period, the Eichleay formula will be utilized to calculate the amount of unabsorbed home office overhead the contractor may recover. *E.g*., *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003); *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1375 (Fed. Cir. 1999).

To recover under the Eichleay formula, a contractor must first show that there was a government-caused delay to its planned contract performance "that was not concurrent with a delay caused by the contractor or some other reason." *P.J. Dick, Inc*., 324 F.3d at 1370; *Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1347-48 (Fed. Cir. 2000). The contractor must also show its original contract performance time was thus extended or, alternately, it completed performance on time or early but incurred additional, unabsorbed overhead cost because it planned to finish even earlier. *P.J. Dick, Inc*., 324 F.3d at 1370; *Interstate Gen*., 12 F.3d at 1058-59. Finally, after proving the above elements, the contractor must show it was required to remain on "standby" during the delay. *P.J. Dick, Inc*., 324 F.3d at 1370. Where a contractor proves these elements, "it has made a prima facie case of entitlement" and the burden of production shifts to the government "to show that it was

not impractical for the contractor to take on replacement work and thereby mitigate its damages." *Id.*; *Melka Marine,* 187 F.3d at 1376; *All State Boiler,* 146 F.3d at 1373-82.

We, thus, examine each of the alleged delays to ascertain if the parties have made their required showings.[2]

1. Gasket Crush "Stop Work Order"

PDI contends that it incurred "lengthy delay" through issuance of a "stop work order" to "allow redesign to correct a gasket crush problem" (app. br. at 8). According to PDI, "a stop work order under the Contract was issued by Portsmouth on or about April 15, 1989," and "stayed in effect during a four and one-half (4-1/2) month period ending on or about September 1, 1989" (app. br. at 16, 36).

The record before us, however, contains no evidence that a "stop work order" was issued or imposed by the Navy due to "gasket crush," other than an assertion by PDI's president, who was not overseeing daily company operations at the time in question, that such an order had been issued or imposed. While Mr. Montembeau, the Navy COTR, did inform PDI's plant manager/engineer, Mr. Hendrickson, in April of 1989 that the Navy was going to issue a change to the contract requiring a specific gasket crush, there is no documentary or testamentary record evidence that Mr. Montembeau or Mr. Hendrickson believed such a change required PDI to stop working on the contract. Rather, all record evidence is to the contrary. Mr. Montembeau's report for his April visit to PDI stated, as of that date, PDI had disassembled and submitted condition reports for three units, started manufacturing and buying necessary parts for the units, and received from its motor subcontractor one refurbished motor. About 10 weeks after Mr. Montembeau's visit, by letter dated 27 July 1989, PDI's president informed the CO that, as of that date, PDI had: disassembled, cleaned, inspected and submitted condition

[2] While agreement to a new performance schedule eliminates from consideration causes of delay occurring prior to that extension, *Precision Dynamics, Inc.,* ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,892, *aff'd*, 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998), *Sach Sinha and Assocs., Inc.,* ASBCA No. 46916, 96-2 BCA ¶ 28,346 at 141,562-63, if the contract modification does not include a waiver or release of claim and circumstances do not indicate the parties' intention to include delay costs, as here, failure of a contractor to reserve a claim for delay costs is not fatal to its presentation of such a claim. *Do-Well Mach. Shop, Inc.,* ASBCA Nos. 34565, 40895, 99-2 BCA ¶ 30,548; *JDV Constr. Inc.,* ASBCA No. 37937, 89-3 BCA ¶ 22,012 at 110,665-66; *Chantilly Constr. Corp.,* ASBCA No. 24138, 81-1 BCA ¶ 14,863 at 73,396-98.

reports for 8 of 12 units received under the contract; completed planned and unplanned parts for 12 units, and installed such parts on 6 of the units ready for final machining; received from its subcontractor 3 completed motor assemblies and was awaiting shipment of 4 additional completed motor assemblies; and finished the test facilities for the pumps, except for piping which would be done when PDI "mount[s] the first pump for test." PDI's president further informed the CO by letter of 28 July 1989 that all its personnel were on unlimited overtime, shop personnel were working approximately 10 to 12 hour days at least 6 days per week, and some shop personnel were also working Sundays. Thus, based on the record, there simply is no basis to conclude that the Navy issued or imposed a "stop work" order between 15 April and 28 July 1989 due to gasket crush.

Similarly, there is no evidence for us to conclude that the Navy issued or imposed a stop work order between 29 July and 1 September 1989 due to gasket crush. The record indicates that early August 1989 was spent acclimating new personnel to the project and rechecking work previously performed. As found above, during the last two weeks of July 1989, PDI lacked a plant manager/engineer and other key personnel because those individuals quit their jobs to work for a new company formed by Mr. Hendrickson. After Mr. Magera, PDI's new engineer, started work on 31 July 1989, PDI's president required him to "recheck everything" done to date on the contract because the president no longer trusted Mr. Hendrickson. Within 10 days of commencing work for PDI, Mr. Magera rechecked work performed on the contract, and (along with another new PDI employee) performed the measurements and determined the machining necessary for each last stage channel ring to obtain the .050 - .055 gasket crush mandated for the first time in the 29 June 1989 contract modification. In mid-August, PDI personnel participated in two conference calls with the Navy regarding Mr. Magera's gasket crush determinations and prepared new condition reports for verification by DCASMA based on Mr. Magera's re-examination of contract work and gasket crush measurements. PDI advised the Navy in a letter dated 24 August 1989 that it was "proceeding to modify each of the eight Last Stage Channel Ring Assemblies to establish the required .050 - .055 crush." Accordingly, during July and August 1989, the record shows there were delays to contract work for which PDI bears responsibility, *i.e.*, the need to hire key personnel and bring those personnel "up to speed" regarding the performance of contract work, but no order issued by the Navy which was perceived by PDI personnel as mandating their stoppage of work due to "gasket crush."

Moreover, as we found above, on 6 September 1989, Mr. Magera performed inspections necessary to complete condition reports and begin performance of nozzlehead repair (machining) work for the first two shipsets. Mr. Montembeau testified at trial, and PDI did not dispute, that gasket crush work could be performed by PDI after all planned replacement parts were in place and all other parts were machined. Prior to September 1989, performance of gasket crush work was, therefore, not necessary or critical for the performance of other contract work. Thus, although there appears to have been a brief

delay to the performance of one "segment" of PDI's work, *i.e.*, "gasket crush work," in mid-August while Mr. Magera performed some measurements and made determinations necessary to obtain the required crush, PDI has not established that the Navy's imposition of the new gasket crush requirement delayed its overall completion of the contract.

It is well-established that, when a claim being asserted by a contractor is based on alleged government-caused delay, the contractor has the burden of proving not only the extent of the delay, but that the delay was proximately caused by government action and that the delay harmed the contractor. *E.g., Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*). The contractor, in sum, has the burden to show that it *could* have finished the *contract work* earlier and *would* have done so but for the Government's delay. *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1582 (Fed. Cir. 1994). It is not sufficient, therefore, for a contractor to show that the Government delayed completion of a segment of the work. Rather, in order for the contractor to recover, it must establish that completion of the entire project was delayed by reason of the delay to the segment.
Contel Advanced Systems, Inc., ASBCA No. 49075, 04-2 BCA ¶ 32,664 at 161,680; *Donohoe Constr. Co.*, ASBCA Nos. 47310, 47312, 99-1 BCA ¶ 30,387 at 150,190; *Rivera Constr. Co.*, ASBCA Nos. 29391, 30207, 88-2 BCA ¶ 20,750 at 104,856. PDI has not made such a showing here. Accordingly, PDI has failed to establish any compensable delay with respect to gasket crush.

2. Employee Qualification Review "Stop Work Order"

PDI also contends it incurred "lengthy delay" through issuance of a "stop work order" to allow the Navy "to review the qualifications of personnel at PDI" (app. br. at 8). According to PDI, "following the abrupt resignation of Wesley Hendrickson, PDI's . . . plant manager, on 20 July 1989," the Navy issued a stop work order for "a two and a half month period from on or about 1 August 1989 through 15 October 1989" in order to "'review' PDI's technical personnel" even though PDI "immediately hired . . . Michael Magera and Vynal Look, both experienced pump and mechanical engineers known to PNSY" (app. br. at 37).

The record before us contains no evidence the CO ever issued a "written" stop work order to PDI with respect to this contract. It is well-established, however, that if a contractor's work effectively has been suspended and the CO fails to issue a "written" order of suspension, tribunals will consider "that done which ought to have been done" and treat the circumstances legally as a "constructive" or "*de facto*" suspension of work. *E.g., Merritt-Chapman & Scott Corp. v. United States*, 429 F.2d 431, 443 (Ct. Cl. 1970); *A.C.E.S., Inc.*, ASBCA No. 21417, 79-1 BCA ¶ 13,809 at 67,721-22 (CO suspend work order not reduced to writing treated as a constructive suspension and compensated under

Delay clause). We, therefore, examine the record to ascertain whether PDI's work was "effectively" suspended by the Navy to review PDI personnel qualifications.

We found above that, when Ms. Vachon, the Navy's contract specialist, learned Mr. Hendrickson resigned, at the request of SUBMEPP, she told PDI by telephone on 18 July 1989 "to stop work on new units that just arrived," *i.e.*, the third shipset, because PDI had no engineer on staff and the Navy wished to see the resume of the new engineer it indicated would be joining its staff before it proceeded with "the newly arrived units." PDI advised the Navy of the qualifications of its new personnel on or about 1 August 1989. About six weeks later, on 15 September 1989, Ms. Vachon advised PDI that, because a "full staff is now on board," the Navy "feels confident in allowing work to proceed" and PDI should "proceed with the units received in July," *i.e.*, the third shipset. A contract administrator or specialist, such as Ms. Vachon, usually lacks authority to order a contractor to suspend work. *See, e.g.*, *Weinschel Engineering Co.*, ASBCA No. 7046, 1962 BCA ¶ 3348 at 17,236. There is nothing in the record here indicating to the contrary, *i.e.*, showing that Ms. Vachon possessed authority, by herself, to order PDI to suspend or stop work. Accordingly, as a matter of law, we cannot conclude that her oral statement regarding work on the third shipset, in and of itself, was an "effective" suspension of the work. *Compare Earl F. Stephenson d/b/a AAA Roofing Contractors*, ASBCA No. 38027, 95-1 BCA ¶ 27,546 at 137,267-68 *with Hom-Russ, Inc.*, ASBCA No. 46142, 94-2 BCA ¶ 26,635 at 132,483.

More importantly, however, even if we were to deem Ms. Vachon's oral statement regarding the third shipset to have been ratified by CO Cotton, we could not conclude that the statement was an "effective suspension" of contract work. As discussed above, the record indicates that, during August and early September 1989, PDI performed work upon the first two shipsets to be refurbished under the contract. PDI personnel also devoted attention to performing work on 41 delinquent units under the ASW contracts. Indeed, in its 28 July 1989 letter to CO Cotton, PDI stated that, during July 1989 and the weeks following, "[a]ll personnel [we]re on unlimited overtime," "shop personnel [we]re working approximately ten to twelve hours/day and at least six days per week," and "some . . . shop personnel [we]re also working Sundays." Further, as found above, refurbishment of the four motors for the third shipset did not commence until July 1990, over nine months after Ms. Vachon told PDI it could disassemble the third shipset. Thus, during the disputed period, *i.e.*, between 15 July and 15 September 1989, nothing in the record shows PDI personnel "effectively" were precluded from working on the main feed pump contract or could have performed additional work on that contract. Before delay damages can be assessed, a contractor must show any government caused delays were not concurrent with delays within the contractor's control. As stated by the U.S. Court of Appeals for the Federal Circuit, a "contractor generally cannot recover for concurrent delays for the simple reason that no causal link can be shown: A government act that delays part of the contract performance does not delay 'the general progress of the work'

when the 'prosecution of the work as a whole' would have been delayed regardless of the government's act." *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000), *quoting Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 702, 714-15 (1944); *Technical & Management Services Corp.*, ASBCA No. 39999, 93-2 BCA ¶ 25,681 at 127,753, *aff'd*, 16 F.3d 420 (Fed. Cir. 1993) (table). PDI, accordingly, also has failed to establish any compensable delay with respect to the Navy's review of PDI personnel qualifications.

3. "Delay" In Furnishing Suitable Government Property

PDI additionally contends that it "experienced consistent extreme late deliveries of units [to be refurbished] and other GFM" (app. br. at 7-8). According to PDI, the Navy "incontrovertibly failed to provide the Units [to be refurbished] and other GFM on a timely basis" (app. br. at 36).

The Government Property clause in PDI's contract, FAR 52.245-2, requires the Navy to furnish all property in a timely fashion. Timely delivery occurs when property is delivered at the times and places stated in the contract. If no specific time for delivery is set forth in the contract, timely delivery occurs if the property is delivered in "sufficient time to enable the Contractor to meet the contract's delivery or performance dates." FAR 52.245-2(a)(2); *see Peter Kiewit Sons' Co. v. United States*, 151 F. Supp. 726, 731 (Ct. Cl. 1957); *Thompson v. United States*, 124 F. Supp. 645, 649-50 (Ct. Cl. 1954); *Franklin Pavkov Constr. Co.*, ASBCA No. 50828, 00-2 BCA ¶ 31,100 at 153,608, *aff'd*, 279 F.3d 989 (Fed. Cir. 2002); *Oxwell, Inc.*, ASBCA Nos. 27523, 27524, 86-2 BCA ¶ 18,967 at 95,776.

a. Units To Be Refurbished

PDI argues that the four units comprising the third shipset were delivered to it by the Navy "five and one-half (5-1/2) months late" (app. br. at 30-31), and that one of the four units of the first shipset and all four units of the second shipset were delivered to it by the Navy from two and one-half to three and one-half months late (app. br. at 7, 40-41). It asserts that: while the third shipset was to be delivered on or before 1 February 1989, it did not receive the units until 18 and 20 July 1989; while the second shipset was to be delivered on or before 1 February 1989, it did not receive the units until 10 May 1989, and while all four units of the first shipset were to be delivered on or before 1 January 1989, it received one of those units on 13 April 1989 (R4(b), tab 1(A)).

Contract interpretation begins with the plain language of the written agreement. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1204 (Fed. Cir. 2004). PDI's contract for refurbishment of shipsets lists a "scheduled arrival date" for the first set of pumps and

motors as 1 January 1989, and for the second and third sets of pump and motors as 1 February 1989. PDI's contract further expressly states: "[t]he scheduled arrival dates of GFM pumps and motors at the contractor's plant are *estimated*" and "[c]onsequently, required delivery of refurbished pumps and motors shall be 4 months after receipt of units at vendor's plant" (emphasis added). Wherever possible, the words of a contract are to be given their "ordinary and common meaning." *Hills Materials Co. v. Rice*, 982 F.2d 514, 515 (Fed. Cir. 1992); *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 976 (Ct. Cl. 1965). The word "estimated" is defined in dictionaries and commonly understood as meaning "to calculate approximately," "tentatively," or "roughly." *E.g.*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 444 (1988). Moreover, when construing a contract, the document is to be considered as a whole and interpreted to harmonize and give reasonable meaning to all its parts. *NVT Technologies, Inc. v. United States*, 370 F.3d at 1159; *Hunt Constr. Group, Inc. v. United States*, 281 F.3d 1369, 1372 (Fed. Cir. 2002). A contract construction which gives a reasonable meaning to all parts of a contract is preferred to one which leaves a portion of the contract useless, inexplicable, inoperative, insignificant, void, meaningless or superfluous. *NVT Technologies, Inc. v. United States*, 370 F.3d at 1159; *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d at 979. The plain language of the contract here, when read in its entirety, clearly provides the scheduled arrival dates set forth are approximate or rough dates that the GFM will be furnished and that PDI will be required to deliver the GFM refurbished to the Navy four months after date of "actual receipt" of the GFM. Any party reading the contract language would have no reason to believe that the language means anything other than what it plainly states. *See, e.g., M.A. Mortenson Co.*, 363 F.3d at 1206; *Hunt Constr. Group*, 281 F.3d at 1372-73; *accord Craft Mach. Works, Inc. v. United States*, 926 F.2d 1110, 1113 (Fed. Cir. 1991) ("[i]n contract interpretation, the plain and unambiguous meaning of a written agreement controls").

To construe the GFM shipset arrival provisions to be firm, "fixed" dates for the arrival of GFM, as does PDI, we would have to ignore or read out of the parties' contract a significant portion of the GFM arrival provisions, *i.e.*, that "scheduled arrival dates of GFM pumps and motors at the contractor's plant are estimated" and, "[c]onsequently, required delivery of refurbished pumps and motors shall be 4 months after receipt of units at vendor's plant." Such a reading simply is not permissible. *See, e.g., Textron Defense Systems v. Widnall*, 143 F.3d 1465, 1468 (Fed. Cir. 1998); *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985). Thus, PDI's contract interpretation — as providing fixed dates for delivery of the GFM shipsets — is not reasonable. *See M.A. Mortenson Co.*, 363 F.3d at 1207; *Hunt Constr. Group*, 281 F.3d at 1372-73 ("[w]hen the contract language is unambiguous on its face, our inquiry ends, and the plain language of the contract controls).

When no specific time for GFM delivery is specified in the contract, as here with respect to GFM shipsets, timely delivery occurs if the GFM is delivered in sufficient time

to enable the contractor to meet the contract's delivery dates. FAR 52.245-2(a)(2). PDI does not dispute that its contract allowed four months for the refurbishment of the GFM shipsets and that it received all three GFM shipsets four months or more before it was expected to complete refurbishment of the shipsets (*see* app. br. at 9; app. reply at 5). PDI, therefore, has no basis to complain that it is entitled to an equitable adjustment under the government property clause for late delivery.

b. Shims & Thumbtack Spacers

PDI argues that GFM shims and thumbtack spacers were delivered late by the Navy by "a period of nearly two (2) years beyond the time allotted in the . . . Contract provision." It asserts that, while the impeller kit shims and spacers were to be delivered on or before 30 June 1988, it did not receive them until 23 May 1990. (App. br. at 7, 40-41; app. reply at 6-7)

The date that PDI contends it was entitled to receive the shims and thumbtack spacers (30 June 1988) is a date nearly two months prior to award of its Navy contract. Ordinarily, the Navy cannot be expected to deliver GFM to a contractor months before it awards the contract to which the GFM pertains. However, we need not address here the issue of when PDI was contractually entitled to receive the shims and thumbtack spacers. Even if we assume PDI was entitled to receive the GFM nearly two months prior to award of its contract, it has not demonstrated entitlement to an equitable adjustment for the late delivery. Failure to receive GFM by a contractually specified date does not, in and of itself, automatically entitle a contractor to an award of monies. Rather, to receive an award, a contractor must establish it was "adversely affected by the Government's failure to timely deliver" GFM. *NavCom Defense Electronics, Inc.*, ASBCA Nos. 50767, *et al.*, 01-2 BCA ¶ 31,546 at 155,763, *aff'd in relev. part*, 53 Fed. Appx. 897 (Fed. Cir. 2002); *Fairfield Machine Co.*, ASBCA No. 22704, 85-2 BCA ¶ 17,969 at 90,081; *see Blaine Co. v. United States*, 157 Ct. Cl. 53, 57 (1962). PDI has not shown in the record before us that it was "adversely affected" by PSN's delivery of shims and thumbtack spacers during May 1990. As discussed above, PDI received the impeller kits for the second shipset during January of 1990, about five months before it delivered the first shipset and three units of the second shipset to the Navy. PDI received the impeller kits for the third shipset in May 1990, more than eight months before the CO terminated the contract in part for default with respect to the third shipset. The contract provided that PDI was to complete refurbishment of a shipset within four months of receipt of a shipset, a period of time less than the period it possessed the impeller kits prior to completion of the shipsets. Thus, the dates PDI received the impeller kits, on their face, do not indicate that PDI was "adversely affected" by the delivery dates. While the record contains bald assertions by PDI's president that PDI was being delayed by the Navy's handling of impellers, there is no evidence here that PDI was ready and waiting for the impeller kits, *i.e.*, in need of the kits to continue completion of its refurbishment work.

Moreover, the record is replete with evidence that, during this period, PDI was experiencing numerous problems it was attempting to address instead of completing assembly of the main feed pump shipsets. For example, PDI personnel were working overtime attempting to complete work on many delinquent units under the ASW contracts and attempting to obtain refurbished motors for the main feed pumps, a prerequisite to assembly of a shipset for a second hydro test. PDI, therefore, has failed to show it is entitled to an equitable adjustment under the government property clause for late delivery of impeller kits.

c. Bearings

PDI argues that "[j]eweled bearings, while not initially included as GFM under the Contract, were to be supplied [to it] by the Government by mutual agreement." According to PDI, "[m]ost of the NTN bearings supplied by the Government were not delivered until approximately sixteen (16) weeks after agreement by the Government to do so," *i.e.*, "three and one half months late" in early October 1990, and "[o]ne (1) set of duplex bearings was not provided [to it] until October 17, 1990." (App. br. at 7-8; app. reply at 8-10).

While PDI's contract was modified to provide that the Navy would supply duplex bearings as government furnished material for the third shipset, the modification did not specify any date by which the bearings would be furnished. As discussed above, when no specific time for delivery of GFM is specified, timely delivery occurs if the GFM is delivered in sufficient time to enable the contractor to meet its contractual delivery date. FAR 52.245-2(a)(2). The only evidence in our record regarding when bearings are required to avoid delay in completion is Mr. Montembeau's testimony that bearings are simply needed at conclusion of motor refurbishment when a contractor is ready to re-assemble a motor. Since PDI advised the Navy on 27 June 1990 that it had recently forwarded the motors to Hansome for refurbishment and Hansome may require 12 weeks to perform that work, it does not appear that reassembly of refurbished motors was anticipated until on or about 1 October 1990. Thus, PDI appears to have received all but one of the bearings on or about the time required for reassembly of the motors. The record does not reveal when Hansome was ready to reassemble each of the four motors for the last shipset, but we found previously that third shipset motor refurbishment was complete in late October 1990 or about one week after supply by the Navy of the last required duplex bearing. *Precision Dynamics, Inc.*, ASBCA No. 42955, 97-1 BCA ¶ 28,846 at 143,890, *aff'd*, 1998 U.S. App. LEXIS 10587 (Fed. Cir. Apr. 13, 1998). No basis, therefore, is apparent to conclude that GFM bearings were not delivered within sufficient time for PDI to meet its refurbishment schedule for the third and last shipset. *See* FAR 52.245-2(a)(2). Moreover, PDI has not shown, and cannot show, it was adversely affected by the dates the Navy delivered GFM bearings. We found above that, due to a payment dispute, PDI's motor subcontractor refused for weeks to release to PDI

the third shipset refurbished motors. PDI did not receive the refurbished motors until February of 1991, or more than three months after the Navy furnished all bearings. Any delay by the Navy in supplying the GFM bearings, therefore, would have been concurrent with a delay for which PDI was responsible, *i.e.*, a subcontractor payment dispute. *See, e.g., Wilton Corp.*, ASBCA No. 39876, 93-2 BCA ¶ 25,897 at 128,825. It is well-established that overlapping delays which are caused by the government and its contractor do not afford either party a basis for an award of delay costs against the other. *R-W Contracting, Inc.*, ASBCA No. 25459, 85-1 BCA ¶ 17,785 at 88,857. Accordingly, PDI has not shown it is entitled to an equitable adjustment under the government property clause for any late delivery of GFM bearings.

d. 1st Through 6th – Stage Impellers

PDI argues that: the first two GFM shipsets delivered to PDI "contained fourteen (14) unsatisfactory impellers First (1st) Stage and Second (2nd) Stage through Sixth (6th) Stage"; 14 replacement impellers "subsequently supplied by [PNS] were also defective"; and PNS ultimately directed PDI to use 7 impellers "which PDI . . . had determined to be unusable," but the written order to use these impellers and "waive these defects" was "not issued until May 16, 1990, over twelve (12) months after the affected seven (7) Units were delivered to [it]" (app. br. at 9-10, 12, 14-15). According to PDI, it "sustained delays to its performance by reason of these issues" from "late August 1989" when "PDI required impellers capable of meeting specifications which it was denied" until "May 16, 1990[,] when the [CO] finally confirmed in writing that PDI was authorized to utilize the defective impellers," a "period of nearly ten (10) months" (app. br. at 13, 15; app. reply at 12-13).

Under the government property clause, the government warrants in effect that it will provide the contractor GFM suitable for use in performing the contract. *S.S. Mullen, Inc. v. United States*, 389 F.2d 390, 393 (Ct. Cl. 1968); *Thompson Ramo Wooldridge, Inc. v. United States*, 361 F.2d 222, 232 (Ct. Cl. 1966). Whether GFM is suitable for use in performing a contract is a question of fact. *Whittaker Corp. v. United States*, 443 F.2d 1373, 1385 (Ct. Cl. 1971); *Topkis Bros. v. United States*, 297 F.2d 536, 541 (Ct. Cl. 1961). GFM suitability is "measured by the overall use that can be made of the property" and decided "by reference to the requirements of the contract as a whole." *Whittaker Corp. v. United States*, 443 F.2d at 1385; *Preuss v. United States*, 412 F.2d 1293, 1300-01 (Ct. Cl. 1969); *Hart's Food Service, Inc., d/b/a Delta Food Service*, ASBCA Nos. 30756, 30757, 89-2 BCA ¶ 21,789 at 109,641.

The first and second through sixth stage impellers PDI asserts were defective on the first and second shipsets were among the more than 140 components of the shipsets set forth in the parties' contract as "unplanned replacement parts" for which there was a line item price set forth if replacement was determined to be necessary. While the two

shipsets, and their components, were "government property" which was "furnished" to PDI, the expressly stated purpose for the furnishing of this property was to replace parts determined to be worn and allow the property to be "refurbished" by PDI. The contract, when read as a whole, therefore, discloses that the shipsets' "intended use" by PDI was "refurbishment." *See, e.g., Preuss v. United States*, 412 F.2d at 1300-01; *S.S. Mullen, Inc. v. United States*, 389 F.2d at 397. In sum, possible replacement of shipset impellers was contemplated by the parties and clearly one of the reasons this contract was awarded. The shipsets, and impellers contained therein, supplied to PDI by the Navy were thus "on the whole" fit for their "intended purpose," *i.e.*, to be refurbished, and cannot serve as a basis for an equitable adjustment.

Moreover, PDI initially advised the Navy the disputed impellers were "not" in need of replacement. It did not notify the Navy that its new plant manager, Mr. Magera, disagreed with its former plant manager, Mr. Hendrickson, regarding the suitability of the impellers until 1 November 1989 when it submitted its "supplementary" condition reports to Ms. Vachon. Accordingly, even if we concluded the impellers were not fit for their "intended purpose," PDI would not be entitled to an award for the period August through October 1989 because it contributed to the "delay" by initially advising the Navy that the GFM was suitable and then waiting until 1 November to advise the Navy it had decided otherwise. *See Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000) (no recovery where government delay is concurrent or intertwined with other delays); *Commerce Int'l Co. v. United* States, 338 F.2d 81, 90 (Ct. Cl. 1964) (contractor must show delay was not concurrent with others caused by it); *Sermor, Inc.*, ASBCA Nos. 29798, *et al.*, 94-1 BCA ¶ 26,303 at 130,837 (contractor must establish delay was caused by government and overall completion date was delayed as a result).

As discussed below, during December 1989, the Navy constructively changed the work of PDI's contract. It deleted the requirement that PDI supply first through sixth stage impellers needed as replacements for deficient impellers and specified that, like seventh stage replacement impellers, first through sixth impellers installed by PDI as replacements be ones from the government's stockpile. While the Navy assumed the burden of supplying to PDI additional government property in making this constructive change, the directive "changing" the contract did not specify any date by which the Navy would supply PDI that property. When no specific time for delivery of GFM is specified, as here, timely delivery occurs if GFM is delivered within sufficient time to enable a contractor to meet its contractual delivery date. FAR 52.245-2(a)(2). As found above, PDI received all of the replacement impellers between 15 January and 6 February 1990. PDI, therefore, received the replacement impellers about four or more months prior to its completion of the units. The parties' contract stated all refurbishment work on shipsets was to be completed within "four months." The dates that PDI received the replacement impellers thus do not, on their face, indicate that PDI lacked sufficient time to meet its refurbishment schedule for the shipsets. *See* FAR 52.245-2(a)(2).

PDI asserts that, even though it received the impellers by 6 February 1990 and had been directed to use them by the COTR, it was not authorized to use them until ordered to do so in writing by the CO because the government stockpile impellers contained pitting and were not identical to the original impeller "specification." While the parties disagree about whether the impellers were within TRS requirements, *i.e.*, required completion of an approved form waiving non-conformances, SUBMEPP prepared such a form on or about March 1990. PDI asserted by letter dated 24 April 1990 that this waiver form was inadequate and it required a written CO directive to use the GFM replacement impellers. The CO issued such written directives to PDI during mid-May 1990 because he "was fed up trying to convince" PDI's president that there was no need for such written direction. Although PDI continues to maintain, and the Navy disputes, that contract refurbishment specifications precluded PDI from using the impellers absent such a directive, PDI did not present at trial TRS or other specification provisions it deemed to mandate a written directive to use the impellers or any specific testimony regarding those provisions or the suitability of the disputed impellers. PDI, as contractor, bears the burden of showing that GFM was not suitable for its intended use. *E.g.*, *Lentino's Chauncey Clothing Co.*, ASBCA No. 8447, 65-1 BCA ¶ 4646; *Leader Mfg. Co*., ASBCA No. 3532, 58-2 BCA ¶ 1899. We need not determine here, however, whether PDI required a written CO directive to use the impellers. Even if we were to assume PDI required such a directive, PDI has failed to show that it is entitled to an equitable adjustment for delayed issuance of the directive and the receipt of "suitable" impellers.

As discussed above, to receive an award, a contractor must establish it was adversely affected by the government's failure to timely deliver GFM. *NavCom Defense Electronics, Inc.*, ASBCA Nos. 50767, *et al.*, 01-2 BCA ¶ 31,546 at 155,763, *aff'd in relev. part*, 53 Fed. Appx. 897 (Fed. Cir. 2002); *Fairfield Machine Co.*, ASBCA No. 22704, 85-2 BCA ¶ 17,969 at 90,081; *see Blaine Co. v. United States*, 157 Ct. Cl. at 57. While the record once again contains bald assertions by PDI's president that PDI was delayed by the Navy's actions here, there simply is no evidence that PDI was ready and waiting for the impellers, *i.e.*, in need of the impellers prior to May 1990 to proceed with completion of its refurbishment work. Instead, the evidence available indicates that, during the last two months of 1989 and first four months of 1990, PDI personnel were busily attempting to complete work upon numerous, delinquent units under five ASW contracts to avoid the Navy terminating those contracts for default. *Precision Dynamics, Inc*., ASBCA Nos. 41360, *et al*., 97-1 BCA ¶ 28,722 at 143,370-73. Additionally, as PDI advised the CO, during this period, it was having difficulty obtaining from its subcontractor refurbished motors required for re-assembly of a shipset and performance of the second hydro test. Thus, there appear to have been other, concurrent delays for which PDI was responsible during most, if not all, of the period that preclude PDI from receipt of an equitable adjustment for government delay. *See Sauer, Inc. v. Danzig*, 224 F.3d at 1348 (contractor must separate government-caused delays from its own delays to

establish a compensable delay); *Commerce Int'l Co. v. United* States, 338 F.2d at 90 (contractor must show delay not concurrent with others caused by it); *Sermor, Inc.*, ASBCA Nos. 29798, *et al*., 94-1 BCA ¶ 26,303 at 130,837 (contractor must establish delay caused by government and that its overall completion date delayed as a result). Moreover, PDI's 18 May 1990 proposal — to substitute conforming impellers received on the third shipset on the second shipset and have it manufacture new impellers for the third shipset — indicates that PDI was not adversely affected by the 7 and 16 May 1990 written CO directives to use the replacement impellers. In its proposal, PDI stated, as of that date, it had started re-assembly of the last two pumps of the second shipset, but could "still deliver the two (2) pumps within the thirty-day period" it had indicated on 15 May 1990 was necessary for completion if the Navy accepted its proposal. If the CO could tell PDI to use different impellers on the shipsets "after" 18 May 1990 without delaying completion of their refurbishment, it is not apparent how his actions specifying impellers prior to that date delayed their completion. Accordingly, we simply are unable to conclude here PDI was "adversely affected" by the CO's actions with respect to replacement impellers. *See Sermor, Inc*., ASBCA Nos. 29798, *et al*., 94-1 BCA ¶ 26,303 (the appellant has not presented its case in a manner that we can distinguish between events and identify with particularity the consequences of specific actions addressed in the claim); *Peterman, Windham, and Yaughn, Inc.*, ASBCA No. 21147, 77-2 BCA ¶ 12,674 (the claim itself is not proof of disputed fact); *Metal-Tech Inc.*, ASBCA No. 14828, 72-2 BCA ¶ 9545 at 44,460 (verbal allegations and innuendoes are not sufficient when there is specific evidence otherwise).

B. Changed Work

PDI contends that four actions of the Navy – providing first through sixth stage impellers as GFM, imposing a specified gasket crush, requiring performance of a second hydro test, and reviewing qualifications of its new plant manager/engineer – "changed" the scope of its contract work and increased its costs of performance (app. br. at 21-23, 25-26, 28-31, 34, 42; app. reply at 11-14, 20, 22-25). PDI asserts that the Navy "does not have carte blanche power to rewrite the provisions of a contract by . . . increasing the scope of applicable work" and its actions here also "constitute a basis for equitable adjustment under the Contract" (app. br. at 42).

The Changes clause (FAR 52.243-1) set forth in the parties' contract provides: the CO may make specified changes in contract terms; whenever one of those changes causes an increase or decrease in the cost of, or time required for, performance of contract work, the CO shall make an equitable adjustment in contract price; and a failure to agree to an adjustment shall be a dispute under the Disputes clause (FAR 52.233-1), which requires a contractor to proceed with contract work pending final resolution of any dispute arising under the contract. *E.g., CTA Inc*., ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,760. The formula or measure for an equitable adjustment is "the difference between the

reasonable cost of performing without the change or deletion and the reasonable cost of performing with the change or deletion." *E.g., Celesco Indus., Inc*., ASBCA No. 22251, 79-1 BCA ¶ 13,604 at 66,683; *accord Sauer, Inc. v. Danzig*, 224 F.3d at 1348. Because the purpose underlying an equitable adjustment is to safeguard both contractors and the government against increased costs engendered by modifications, an equitable adjustment must be closely related to and contingent on the altered position in which the contractor finds itself by reason of the modification. *Nager Elec. Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971); *Bruce Constr. Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963). An adjustment should not increase or reduce a contractor's profit or loss, or convert any loss to a profit or vice versa, for reasons unrelated to a change. *Pacific Architects & Engineers, Inc. v. United States*, 491 F.2d 734, 739 (Ct. Cl. 1974); *Keco Indus., Inc. v. United States*, 364 F.2d 838, 850 (Ct. Cl. 1966); *see S.N. Nielsen Co. v. United States*, 141 Ct. Cl. 793, 796-97 (Ct. Cl. 1958). Simply put, equitable adjustments are corrective measures used to keep a contractor whole when the government modifies a contract. *Bruce Constr. Corp. v. United States*, 324 F.2d at 518.

1. 1st & 2nd Through 6th - Stage GFM Impellers

PDI asserts that, when the Navy furnished first through sixth-stage replacement impellers from a government stockpile, rather than allow it to supply and be reimbursed for supplying the impellers as unplanned replacement parts, it was required to perform work beyond its contract requirements, *i.e*., extra work inspecting each of the government furnished impellers for which it was not compensated. According to PDI, its "inspection of these replacement impellers required one (1) hour of set up at $68.14 per hour and six (6) hours of engineer inspection time at $75.00 per hour for a total of $518.14," but the Navy rejected its request to be paid for that work on the basis "no authorization was provided for PDI to make this inspection." (App. br. at 25-27, 42; app. reply at 12-13)

A "constructive change" occurs where a contractor performs work beyond contract requirements, without a formal order under the Changes Clause, either due to an informal order from, or through the fault of, the government. *Ets-Hokin Corp. v. United States*, 420 F.2d 716, 720 (Ct. Cl. 1970); *Len Co. & Assocs. v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967). "[W]here a contract contains the standard 'changes' provision and the [CO], without issuing a formal change order, requires the contractor to perform work or to utilize materials which the contractor regards as being beyond the requirements of the pertinent specifications or drawings, the contractor may elect to treat the [CO's] directive as a constructive change order and prosecute a claim for an equitable adjustment under the 'changes' provision of the contract." *Ets-Hokin Corp.*, 420 F.2d at 720. To determine if a constructive change occurred, a tribunal generally reviews the language of the contract. *Aydin Corp. (West) v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995).

PDI correctly notes (app. reply at 13-14) that the list of "unplanned" replacement parts to be provided by it set forth in the parties' contract "includes these impeller stages at firm, fixed prices." As found above, the seventh-stage impeller, which is a "planned" replacement part, is the only impeller listed in the contract as property to be furnished by the government. Consequently, the contract required PDI to provide first through sixth-stage impellers when they were needed as replacement parts and provided PDI would be paid a specified sum under the contract's line item for "unplanned" replacement parts as compensation for any such work. Accordingly, when the CO furnished PDI first through sixth stage impellers as replacement impellers, rather than allowing PDI to furnish those impellers and receive payment for that work under the contract line item for unplanned replacement parts, the CO modified the parties' contract under the Changes or Government Property clause. CO Cotton, in effect, deleted contract work, *i.e.*, producing or otherwise acquiring first through sixth stage impellers, and added other work, *i.e.*, handling of additional government furnished property. The work deleted was work for which PDI could obtain compensation. The work added was imposed by the CO with no provision for payment of compensation to PDI for performance of that work. While the Navy appears to suggest that PDI did not have to inspect the government-furnished impellers and thus was not forced to incur any additional cost in performing its contract as a result of the CO's constructive change, the Government Property clause requirement that notice be furnished if GFM is not suitable for its intended use (FAR 52.245-2(a)(3)) implicitly requires prompt inspection of such property by the contractor. *E.g.*, *Logicon, Inc.*, ASBCA No. 39683, 90-2 BCA ¶ 22,786. PDI therefore incurred costs as a result of its use of first through sixth stage impellers furnished by the Navy, *i.e.*, materials beyond specification requirements. Accordingly, PDI is entitled to an equitable adjustment for increased costs incurred from the change regarding impellers. *See Aydin Corp. (West),* 61 F.3d at 1577; *J.B. Williams Co. v. United States,* 450 F.2d 1379; 1394 (Ct. Cl. 1971).

2. Gasket Crush

PDI asserts that, after its contract was modified in June of 1989 to provide that the "Channel Ring gasket groove shall be of such a depth to accommodate a 'gasket crush' of 0.050-0.055," it also was required to perform work beyond the contract requirements for which it received no compensation, *i.e.*, extra work to determine how to achieve the new gasket crush on each pump. According to PDI, "[t]he standard for gasket crush and the methodology by which that standard was achieved on a Unit by Unit basis constituted a design change for which the Government, not PDI, was responsible to solve," and PDI should receive an equitable adjustment for the "engineering work expended by Messrs. Magera and Look on behalf of . . . the gasket crush design problem." (App. br. at 17-18; app. reply at 11-12, 22-24)

The June 1989 modification concerning gasket crush constituted a "change" to the parties' contract, *i.e.*, that the Channel Ring gasket groove must "be of such a depth to

accommodate a 'gasket crush' of 0.050-0.055." As the Navy's COTR, Mr. Montembeau, testified at trial this represented "a new unplanned requirement to the contract."

While the Navy appears to suggest the change did not require PDI to perform any "engineering" work, but simply take some measurements, the modification language does not set forth or describe how the specified gasket crush is to be achieved by PDI. Design specifications describe in precise detail the manner in which work is to be performed. A contractor is "required to follow them as one would a road map." *J.L. Simmons Co. v. United States*, 412 F.2d 1360, 1362 (Ct. Cl. 1969). Performance specifications, on the other hand, set forth an objective or standard to be achieved and a contractor is expected to exercise "ingenuity in achieving that objective or standard of performance," selecting the means and in turn assuming a corresponding responsibility for that selection. *Blake Constr. Co. v. United States*, 987 F.2d 743, 745 (Fed. Cir. 1993); *J.L. Simmons Co. v. United States*, 412 F.2d at 1362. Here, PDI and Navy personnel exchanged letters and participated in conference calls with respect to a "preferred method of repair" during August of 1989 and the COTR prepared a TRE response approved by his supervisor stating that the gasket crush "[m]ethod of repair will be . . . that discussed per phonecons b/t SUBMEPP and [PDI] on 8/17/89 & 8/23/89." The Navy's new contract requirement, therefore, does not resemble a design specification setting forth a roadmap, as the Navy appears to suggest, but a performance specification requiring use of some ingenuity to achieve a specific objective. *See J.L. Simmons Co. v. United States*, 412 F.2d at 1362; *Dynamics Corp. of America v. United States*, 389 F.2d 424, 430-31 (Ct. Cl. 1968) (acts occurring prior to a "dispute" are highly relevant in determining parties' interpretations). PDI thus was required to, and did, expend resources implementing the new gasket crush requirement. Accordingly, PDI is entitled to an equitable adjustment for increased costs it incurred due to the gasket crush change. *See, e.g., Bruce Constr. Corp. v. United States*, 324 F.2d at 518 (equitable adjustment is "corrective measure" to keep contractor whole when government changes contract).

3. 2nd Hydrostatic Test

PDI additionally asserts that it was required to perform work beyond contract requirements for which it received no compensation by the Navy's insistence that it perform a second hydrostatic test. According to PDI, the "second hydro test for all units required twelve (12) hours of work for each unit at the rate of $68.19 per hour or $818.28 per [pump assembly multiplied by] . . . twelve (12) units totals $9,819.36." (App. br. at 21-23; app. reply at 24-25)

The 1988 contract executed by PDI and made part of the record incorporates two TRS, Nos. 0208-086-014F and 0208-086-021B, dated May 1987 which specifically require the performance of two hydro tests and ordinarily would preclude PDI from asserting that performance of a second hydro test constituted a "change" to its contract.

PDI contends, however, that the Navy furnished with the contract solicitation for purposes of obtaining bids a 1986 TRS requiring performance of only one hydro test and it did not receive a TRS specifying two hydro tests until 10 October 1989 (app. br. at 22-23). PDI argues that, while its president, Mr. Dyevoich, did not actually testify that he failed to receive a TRS 0208-086-014F dated May 1987, but only that he "believes" he did not receive TRS "0208086021B" requiring two hydro tests, we must credit PDI's assertion that, prior to bidding, it never received a TRS requiring two hydro tests because (a) Mr. Montembeau noted in a May 1989 trip report that he had discussed the issue of a second hydro test with Mr. Hendrickson and (b) the Navy did not "account for the 16 May 1986 TRS which Mr. Dyevoich attached in his correspondence to Ms. Vachon dated 27 November 1989" (app. reply at 25).

Based on the record before us, we cannot credit PDI's contention it did not receive a TRS requiring two hydro tests prior to bidding. Documentary and testimonial evidence presented by the Navy shows that the solicitation was furnished bidders with two 1987 TRS requiring two hydro tests. The fact that the COTR noted the requirement to perform two hydro tests, an apparent change from the earlier TRS, during a post-award audit for the contract does not demonstrate that PDI did not receive the two 1987 TRS specifically requiring the performance of two hydro tests. Moreover, the Navy had no obligation here to "account for" the 1986 TRS PDI submitted to Ms. Vachon. As we found above, during its contract performance, PDI produced copies of several documents from an earlier main feed pump contract performed by Dresser that a competitor would not ordinarily possess. PDI could have obtained a copy of the 1986 TRS from the same source it acquired the Dresser documents. We, therefore, cannot say its possession of the 1986 TRS, by itself, demonstrates that it did not receive either of the two 1987 TRS requiring two hydro tests. Moreover, PDI presented no bid preparation documents showing it actually bid the contract based on performance of only one hydro test. PDI possessed the burden of demonstrating liability by a preponderance of the evidence. *Servidone Constr. Corp.*, 931 F.2d at 861; *Tri-State Services of Texas, Inc.*, ASBCA No. 38019, 89-3 BCA ¶ 22,064 at 110,991. PDI did not satisfy this burden with respect to its claim that the performance of a second hydro test was a contract "change." Accordingly, PDI is not entitled to an equitable adjustment for performing two hydro tests.

4. Plant Manager/Engineer Qualification Review

PDI asserts that, as a result of the Navy's review of the qualifications of its new plant manager/engineer, it "was deprived of sufficient time for Hansome to schedule" overhaul of motors for the third shipset during calendar year 1989, thereby causing it to incur "a total additional cost of $7,332.00 (*i.e.*, $1,833.00 per motor unit x 4 motor units) for Hansome to do the basic overhaul work on the motor components in these Units." According to PDI, its agreement with Hansome, its motor subcontractor, was that "all Units repaired and delivered by Hansome during calendar year 1989 would be charged

by Hansome at the basic net price of $5,892.00 per motor unit for a basic overhaul while all Units repaired and delivered in 1990 would be charged by Hansome at the price of $7,725.00 per motor unit, a difference of $1,833.00 per motor unit. (App. br. at 30-31)

PDI's contract specified that delivery to the Navy of refurbished shipsets was to occur within four months and that PDI was to perform hydrostatic tests on reassembled shipsets prior to delivery to the Navy. As we found above, Ms. Vachon notified PDI the Navy's review of the qualifications of its new personnel was complete on 15 September 1989 and PDI was free to disassemble the third shipset. The period of 16 September to 31 December 1989, *i.e*., the remaining days in 1989, comprised three and a half months. Because PDI needed to reassemble refurbished shipsets and perform hydrostatic tests on the shipsets before delivery of the shipsets to the Navy, in order to meet its contractually specified delivery time of four months for the shipsets, PDI needed to obtain refurbished motors from its subcontractor a significant period of time prior to its delivery deadline. Based upon PDI's actual performance of refurbishment work on the shipsets, it appears PDI required refurbished motors approximately two or more weeks before delivery of a refurbished shipset. The three and a half month period PDI had during 1989 to obtain refurbishment of motors for the third shipset without incurring additional refurbishment expense under its subcontract thus appears more than adequate for the performance of that work.

Moreover, as set forth above, PDI experienced difficulties obtaining refurbished motors from Hansome due to the lack of or delayed payment of its subcontractor. PDI expressly advised the CO in December 1989 that "[t]he main reason we are not able to appropriate motors is due to a lack of monies." A contractor is responsible for ensuring labor, materials, and equipment necessary for timely delivery are available to it. *Sach Sinha and Assocs.*, ASBCA No. 46916, 96-2 BCA ¶ 28,346 at 141,563; *Eppco Metals Corp.*, ASBCA No. 38305, 90-1 BCA ¶ 22,349 at 112,304. If a contractor fails to so ensure, it must suffer any consequences arising from that failure. *B & H Constr. Co.*, ASBCA Nos. 24558, 24587, 80-2 BCA ¶ 14,568 at 71,841.

Accordingly, even if we assume the Navy's mandated review of qualifications of PDI's new personnel constituted a "change" to the parties' contract, no basis is apparent in the record to conclude the Navy's personnel review was the "cause" of any additional expense PDI incurred with respect to motor refurbishment. PDI possessed the burden of showing causation by a preponderance of the evidence. *Servidone Constr. Corp.*, 931 F.2d at 861; *Tri-State Services of Texas, Inc*., ASBCA No. 38019, 89-3 BCA ¶ 22,064 at 110,990-91. PDI did not satisfy that burden with respect to its claim for additional motor refurbishment costs and, therefore, is not entitled to receive an equitable adjustment for any such cost.

II. Claims For Payment For Contract Work

PDI additionally contends it is entitled to receive in excess of $22,000.00 for performance of "unplanned" work under the contract because, while it "submitted timely written requests to the [CO] seeking appropriate Contract modifications in order to enable [it] to submit invoices for these additional services and materials under a line item of the Contract . . . the [CO] has failed or refused to provide such modifications to date." PDI argues that it was authorized to proceed with "unplanned" repairs upon "approval" of the DCASMA QAR and, in the event that work was not included on the contract's list of "unplanned" work for which a price was specified, the CO had to negotiate a price for performance of that work and issue a contract modification allowing PDI to bill for the work. (App. br. at 15-16, 18-20, 23-25, 27)

A. Nozzlehead Assembly Repairs

PDI asserts it performed unplanned repairs in the amounts of $4,992.00 and $7,872.00, respectively, on four nozzlehead assemblies for the first and second shipsets, consisting of detailed machining of the suction, suction vent, and recirculation flanges to bring them within specification while maintaining minimum average thickness, and also machining of flexitalic gasket sealing surfaces to a phonographic finish on assemblies for the four second shipset pumps. According to PDI, "since [it] has an established record of providing cost effectiveness regarding the work it performs," CO Cotton should have accepted that the work was necessary and its payment request constituted "reasonable prices for this work." (App. br. at 18-20)

The parties' contract here, unlike the ASW contracts performed by PDI, provided that PDI was authorized to proceed with unplanned repair work "upon approval of the DCASMA Quality Assurance Representative" and the "[p]rices to be paid for unplanned parts/repairs shall be in accordance with prices shown on [contract] exhibits" or, if "not included on [contract] exhibits," "will be negotiated as needed." As found above, a QAR from DCASMA "approved" PDI's condition reports setting forth the need for unplanned repairs of the suction, suction vent, and recirculation flanges and flexitalic gasket sealing surfaces for the first two shipset pumps on 8 September 1989. Thus, under the contract's express terms, PDI was entitled to payment for performance of those unplanned repairs at prices which are set forth in the contract or, if not set forth, at prices negotiated by the parties. The Navy (gov't br. at 18, 36-37) and COTR Montembeau appear to believe that PDI is not entitled to receive payment for the repairs performed because PDI did not list a need for performance of such repairs in its "initial" condition reports for the pumps. No provision of the refurbishment contract, however, bars PDI from concluding that one or more aspects of its pump review was faulty and submitting a revised or supplementary pump condition report for review by a DCASMA QAR, as occurred here. Accordingly, PDI is entitled to receive payment for these unplanned repairs.

B. Crossover, Endcover & Nozzlehead Repairs

PDI asserts that it made unplanned repairs in the amount of $1,360.00 on the crossover and endcover for the second shipset, consisting of grinding back the first stage inlet guide vanes to the template and "machining off" the second step, respectively, and additional nozzlehead assembly repairs in the amount of $1,916.00 on two pumps (0237 and 0238) for the first shipset, consisting of machining and serrating the recirculation flange. According to PDI, SUBMEPP arbitrarily rejected its payment request for these repairs because SUBMEPP desired a breakdown of costs claimed and deemed the total sought to be exorbitant. (App. br. at 23-25)

We found above that, in December 1989, a QAR from DCASMA approved PDI's condition reports setting forth the need for these unplanned repairs. Thus, as discussed above, under the express terms of the parties' contract, PDI was entitled to payment for performance of the unplanned repairs at prices set forth in the contract or, if not set forth, at prices negotiated by the parties. The Navy notes in its brief that SUBMEPP ultimately determined during May of 1990 that the unplanned repairs to crossover/endcover for the second shipset pumps and undersized recirculating flanges for first shipset pumps 0237 and 0238 were acceptable (gov't br. at 20-21, 23, 37-38). Although the Navy appears to dispute the "amount" of payment to which PDI is entitled for these repairs, it does not dispute that PDI is entitled to receive payment for the repairs (gov't br. at 37-38 and n.1). Accordingly, we hold that PDI is entitled to receive payment for the unplanned repairs.

C. Undersized Recirculating Flange Repairs

Finally, PDI asserts it made unplanned repairs in the amount of $5,999.08 on pumps 0237 and 0238 for the first shipset, consisting of the "building up" and repairing of undersized recirculating flanges through plating and machining. According to PDI, although COTR "Montembeau directed the performance of this work," PNS rejected its request for payment. (App. br. at 27)

While PDI requested by letter dated 16 January 1990 that PNS pay it $5,999.08 for unplanned repairs on pumps 0237 and 0238 of the first shipset, *i.e.*, the "building up" of undersized recirculating flanges through plating and machining, PDI expressly advised Ms. Vachon its 16 January 1990 letter was in "error" on 1 May 1990. As found above, PDI explained it simply was seeking $1,916.00 ($958.00 per pump) for unplanned repair of undersized recirculating flanges, as set forth in its 22 December 1989 "supplemental" condition reports for pumps 0237 and 0238. This unplanned repair work is part of PDI's claim for crossover, endcover and nozzlehead repairs discussed directly above for which we have held PDI is entitled to payment. PDI is not entitled to receive payment twice for

the same work. We, therefore, deny the second claim for payment of unplanned work on pumps 0237 and 0238 as duplicative.

III. Breach of Contract Claims

Finally, PDI contends that the Navy twice breached its contract. According to PDI, it is entitled to an award of damages for both of those breaches.

A. Non-Supply of 1st Through 6th Stage Impellers

PDI argues it is entitled to an award of "lost profits due to government denial of contractual right of PDI to provide unplanned replacement impellers for first (1st) Stage and Second (2nd) through Sixth (6th) Stage." PDI asserts that: it sent the Navy condition reports failing 3 first stage and 11 second through sixth-stage impellers; pursuant to the contact it "was authorized to supply replacement impellers" at a "fixed price per impeller" of $9,500.00 for first stage and $8,500.00 per impeller for second through sixth stage, "constituting a profit of $91,800.00 to PDI"; and the Navy "does not have carte blanche power to rewrite the provisions of a contract by . . . deleting contractual rights or functions which the contactor is entitled to perform." (App. br. at 10-13, 42; app. reply at 3, 13-14)

PDI is correct that its contract, as awarded, includes first and second through sixth stage impellers among the over 200 replacement parts it was to supply for refurbishment of shipsets if such parts were determined to be necessary. PDI's contract, however, also contains three standard clauses allowing a CO to delete work from the contract. Under the Government Property clause, Changes clause or Termination for Convenience clause set forth in PDI's contract, a CO may alter the contract to delete work originally specified to be performed. *See, generally, General Builders Supply Co. v. United States*, 409 F.2d 246, 250 (Ct. Cl. 1969); *A.C.E.S., Inc.*, ASBCA No. 21417, 79-1 BCA ¶ 13,809 at 67,721. Thus, deletion of contract work by the CO was not a "breach" of contract.

It is well-established that, if a CO deletes contract work to be performed pursuant to a Termination for Convenience clause, the recovery of profits is limited to profits upon work actually performed prior to the termination. Anticipated (but unearned) profits upon deleted or terminated work simply are not allowable. *Dairy Sales Corp. v. United States*, 593 F.2d 1002, 1005 (Ct. Cl. 1979); *Kalvar Corp. v. United States*, 543 F.2d 1298, 1303 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977); *William Green Constr. Co. v. United States*, 477 F.2d 930, 936 (Ct. Cl. 1973), *cert. denied*, 417 U.S. 909 (1974); *G.C. Casebolt Co. v. United States*, 421 F.2d 710, 713 (Ct. Cl. 1970). Similarly, if a CO deletes contract work under the Government Property or Changes clause, any resulting equitable adjustment may allow for profit on work actually performed, but cannot encompass anticipated (but unearned) profits upon unperformed deleted work. *E.g.*,

General Builders Supply Co. v. United States, 409 F.2d at 249; *A.C.E.S., Inc.*, ASBCA No. 21417, 79-1 BCA ¶ 13,809 at 67,721 The record before us indicates PDI did not manufacture or procure replacement impellers prior to the Navy's deletion of supply of such impellers from the contract work. PDI, therefore, is not entitled to an award of anticipated profits for supply of replacement impellers, an item of work deleted from the parties' contract prior to PDI's performance of that work.

B. Information Supplied To Motor Subcontractor

PDI argues that it is also entitled to an award of damages "sustained as a result of [Hansome's] credit line termination arising from [CO] Cotton's wrongful actions." PDI asserts that, "[e]ven though [CO] Cotton knew that [PNS] owed PDI much more than the amount [PDI had] outstanding to Hansome, he did not impart this information to [Mr.] Reposi, but, instead, informed [Mr.] Reposi that PDI was not owed a sufficient amount to pay" its motor refurbishment bill from Hansome. (App. br. at 31-32, 42-43; app. reply at 2-3, 25-26, 31)

It is an implied provision of every government contract that neither party will do anything to prevent or hinder performance by the other party. *E.g.*, *Lewis-Nicholson, Inc. v. United S*tates, 550 F.2d 26, 32 (Ct. Cl. 1977). While PDI suggests that the CO either negligently or deliberately provided misinformation to its motor subcontractor, Hansome, regarding monies the Navy owed PDI under the main feed pump and ASW contracts, the record reveals CO Cotton simply construed Hansome's inquiry literally, *i.e.*, he did not advise Hansome during August of 1989 that there were other items for which PDI was claiming payment from the Navy, which the Navy had not processed and/or approved for payment as of that date, because "claims were not specific monies owed" and Hansome had asked for "specific monies owed." Since PDI had failed to timely deliver various units under the five ASW contracts and appeared unlikely to timely deliver some of the units under the main feed pump contract, we cannot fault the CO for acting prudently, *i.e.*, being cautious in stating the amount of monies then owing PDI. CO Cotton testified that, based upon his understanding of the inquiry, the dollar amount he provided Hansome was correct to the best of his knowledge at that time and PDI has not shown otherwise in the record before us. Moreover, while PDI makes various assertions that Navy personnel "failed to deal with [it] fairly or in good faith regarding administration of this Contract" and thus CO Cotton's actions should be viewed suspiciously, the record here does not support any finding that Navy personnel acted in bad faith. Rather, the record shows PDI was experiencing financial difficulties prior to CO Cotton's response to Hansome, and that CO Cotton and other Navy personnel made various efforts to assist PDI with its contract performance, including waiving required delivery dates, not required of them. Accordingly, we cannot conclude that CO Cotton's response to Hansome's inquiry regarding Navy money owed constituted a breach of the Navy's implied obligation to not hinder or interfere with PDI's performance of the main feed

pump contract. *Compare B.V. Constr., Inc.*, ASBCA Nos. 47766, *et al.*, 04-1 BCA ¶ 32,604 at 161,353-56.

CONCLUSION

The appeal is sustained in part, as set forth above, and otherwise denied. We remand to the parties to negotiate an appropriate contract price adjustment.

Dated: 14 September 2005

TERRENCE S. HARTMAN
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. 50519, Appeal of Precision Dynamics, Inc., rendered in conformance with the Board's Charter.

Dated:

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