ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Applied Companies	)	ASBCA No. 50593
	)	
Under Contract No. DAAK01-85-D-B013	)	

APPEARANCE FOR THE APPELLANT: Peter B. Jones, Esq.
Jones & Donovan
Newport Beach, CA

APPEARANCE FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Acting Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE REED
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant's motion (app. mot.) and memorandum of points and authorities in support (app. mot. br.) argues for reconsideration of the amount awarded and asks that it be increased. The government opposes (gov't opp'n). Appellant submitted a response to the government's opposition (app. resp.) and supplemental authority. The Board previously issued published decisions on the merits, *Applied Companies,* ASBCA No. 50593, 04-2 BCA ¶ 32,786, and on cross-motions for partial summary judgment, *Applied Companies,* ASBCA Nos. 50593, 52102, 99-2 BCA ¶ 30,554.

Future Unit Cost Reduction

Appellant argues: "it was error for the Board to require the Contractor to prove the dollar amount of future unit cost reductions [because] the [value engineering] VE Clause
. . . burdens the Government to come forward with proof of any adjustment to the dollar amount that the Government considers necessary" (app. mot. at 2). The allocation of the burden of proof, according to appellant, is to the government.

The previous decision on the merits addressed this issue. 04-2 BCA at 162,169.

The government's opposition to this assertion is bound up in its suggestion that appellant's VE change proposal (VECP) submittal was useable only for the one configuration of air conditioner that was the subject of the contract and the VECP, as previously determined by the Board. According to the government, it "must be able to implement the idea . . . or at least calculate, the savings." However, "Appellant did no

design work for the rest of the 'family' of air conditioners and is not entitled to future savings for those units." (Gov't opp'n at 1-2) The government argues correctly that absent the contractor's engineering and cost estimating analysis and submittal, the government had no basis upon which to implement the VECP to other AC configurations or to calculate cost savings achieved by those configurations, if any.

The Board, on the merits in the main opinion, stated:

> . . . The VECP submittal identified specific component parts that could be deleted, replaced, modified, or reconfigured within the particular 36K BTU/HR horizontal [air conditioner] AC unit and included a detailed estimate for VECP savings and ancillary expenses per unit. The VECP addressed no savings for any other AC unit. . . . (Finding . . . 10 . . .)
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> . . . .
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> . . . (Findings 14, 24) . . . no VECP submittal addressed the component parts to be substituted, deleted, replaced, modified, or reconfigured for the other 21 configurations. No cost savings estimates were provided.

04-2 BCA at 162,169-70.

Judge Kienlen's concurring opinion was in accord: "the appellant proved the cost savings only for the 36K horizontal units." 04-2 BCA at 162,173. Judge Thomas, with Judge Stempler agreeing, concurred: "other than the 36K BTU/HR horizontal air conditioners . . . there has been a complete failure of proof as to quantum with respect to those air conditioners." 04-2 BCA at 162,177.

Appellant did not follow through with its VECP by submitting the technical and cost details necessary to test, adopt, and apply the VECP to other AC configurations[1].

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[1] Judge Kienlen's concurring opinion here, second paragraph, states that "appellant's VECP provided for the substitution of any equivalent commercial parts for source-controlled parts in government designed air conditioners." This is correct only as to the 36K BTU/HR horizontal configuration under the pertinent military specification (mil spec). In a separate VECP submitted under a separate contract, appellant also suggested commercialization changes applicable to the 36K BTU/HR vertical configuration under the same mil spec. 04-2 BCA at 162,157-58 (finding 10), 162,160-61 (findings 13-14).

Appellant's motion brief at 21 quibbles with the characterization of the nature of appellant's intent as regards the VECP, stating that "it was not Applied's 'subjective intent' [quoting the Board, 04-2 BCA at 162,170] to apply the VECP to other" AC configurations. However, appellant earlier argued, in its post-hearing brief at 21, that "[b]y their subjective intentions, discussions, and actions, the parties clearly evidenced an interpretation that all sizes of military air conditioners were 'essentially the same' for purposes of realizing and sharing the Government's savings from Applied's idea and efforts." Regardless of the character of appellant's intent, it failed to provide a basis for determining the unit cost reductions that might be obtained by applying the commercialization idea to all configurations of ACs. *See M.C. & D. Capital Corp. v. United States*, 948 F.2d 1251, 1257-58 (Fed. Cir. 1991) (contractor failed to follow through with intent to submit VECP (and later agreed to a contract modification that resolved the change without reference to VECP - there was no non-VECP modification in Applied's case)).

Put simply, lacking a "description of the difference between the existing contract requirement and the proposed requirement" and a "detailed cost estimate for (i) the affected portions of the existing contract requirement and (ii) the VECP," there is no proposal that qualifies as a VECP for configurations other than the 36K BTU/HR horizontal AC.[2] 04-2 BCA at 162,155 (finding 2 quoting the contract VECP provision, FAR 52.248-1(c)(1), (4)); *see Schnider's of OKC*, ASBCA No. 54327, 04-2 BCA ¶ 32,776 at 162,075 (later VE provision), quoting *Erickson Air Crane Co. of Washington, Inc.*, 731 F.2d 810, 815-16 (Fed. Cir. 1984) (earlier COST REDUCTION INCENTIVE (VE) provision).

Appellant argues that the VECP provision of the contract requires that the contracting officer (CO) use the instant unit cost reduction, adjusted as the CO considers necessary, to calculate future unit cost reductions. We agree. That is what the Board did in the main opinion. 04-2 BCA at 162,162-64 (finding 18), 162,169 (quantum decision parts b.-c.), and 161,173 (quantum decision part d.(4)). The concurring opinions agree. But our agreement with appellant extends only to the 36K BTU/HR horizontal AC because that configuration was the only one for which appellant produced proof of the changes needed and the cost estimate of savings achieved by those changes.

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[2] Evidence of a different change in technical details and a different instant unit cost reduction estimate for the 36K BTU/HR vertical AC configuration was also available and was used under a separate contract to calculate savings for that unit. The parties settled matters related to savings for that configuration. 04-2 BCA at 162,154 (decision introduction), 162,160 (finding 13).

What appellant overlooks or fails to address here is the lack of any evidence of the changes needed and the instant unit cost reductions for the other AC configurations[3]. Before the CO could adjust an instant unit cost reduction amount or use it to calculate future unit cost reductions under this contract and claim, appellant was required to submit to the CO the savings amount and technical basis for each configuration. The only instant unit cost reduction amount available under this appeal, because it was the only amount in evidence, was the amount for the 36K BTU/HR horizontal configuration.

In appellant's pre-hearing brief, statement of facts ¶¶ 19, 21 at 7, and in the discussion at 9, appellant recognized its obligation to prove its "actual savings," "the unit cost savings realized," or the "instant contract savings [that] are the net savings actually realized by the contractor." As evidence of this, appellant's opening brief, statement of facts ¶ 12 at 5 and argument at 23 correctly point to the supporting evidence in appellant's estimate of the savings as presented in the VECP submittal. The starting point for a VECP award is the cost avoided and thereby saved by the contractor on account of the VECP.

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[3] Judge Kienlen's concurring opinion here, in the fourth paragraph, implies that the only failure by appellant was "to establish the amount of the unit savings for those other units within the family of air conditioners." However, the record shows, by comparing the contractor-suggested changes to the 36K BTU/HR horizontal configuration and the 36K BTU/HR vertical configuration, that different components would be substituted, deleted, replaced, modified, or reconfigured in each, at different per unit savings amounts. 04-2 BCA at 162,157-58 (finding 10), 162,160 (finding 13). In the context of the so-called commercialization VECP at issue here, the different configurations were not essentially the same. Even if the different changes in the two configurations, by happenstance, yielded essentially the same savings, it would be clear that the changes to each differed. Such savings could not necessarily be applied across all configurations under the pertinent mil spec absent proof of the change(s) for each different configuration. The facts are that appellant, in addition to its failure to prove the amount of unit savings for other units, did not prove the changes "for those other units within the family of air conditioners" that would be necessary for commercialization of those other units.

There is substantial evidence that the different configurations are not essentially the same in the context of the subject VECP. Judge Kienlen's concurring opinion here, in the 15th paragraph, would skip over this point "because we have reason to conclude that the unit savings for all the units of the family . . . are not essentially the same . . . ." In fact, there is good reason to conclude that the unit savings would not be the same, that the changes for each configuration would not be the same, and that the various configurations or units are not essentially the same in the context of this VECP.

Appellant implies that the Board required something more or different than a preponderance of the evidence as it relates to "the amounts of the Government's future unit savings" (app. mot. br. at 2). As stated above, there is a complete lack of evidence as concerns unit cost reductions for AC configurations other than the 36K BTU/HR horizontal configuration. A complete lack of evidence fails to meet any standard of proof, preponderance or otherwise.

Appellant further states that the motion here "is Appellant's first opportunity to address that conclusion [referring to the Board's determination that appellant failed to prove unit cost reductions on AC units other than the 36K BTU/HR horizontal configuration] as to burden and failure of proof. No such argument was made by Respondent in pleadings or brief" (app. mot. br. at 6). In that connection, we note that the CO final decision dated 27 November 1996, stated that appellant "has failed to provide any basis to support entitlement to additional VECP savings realized outside the above referenced contracts" (R4, tab 110). In addition, the government's pre-hearing brief, at 1, broadly states that the contract "had no future savings."

Appellant submits that even if it had the burden to prove unit cost reductions for other AC configurations, that burden was carried by the testimony of government officials. The testimony of Mr. Mabrey at page 55 of the transcript, cited by appellant in the motion at 8 and 14, was that the future savings should be based on the unit savings in the instant contract. His testimony is general and begs the question whether it applies to the AC configuration under the contract or more broadly to all configurations. That question is answered on page 56 of the transcript when Mr. Mabrey makes clear that "if the [VE] change worked out, it would be applied to future procurements of air conditioners." When asked by appellant's counsel "What had to be done to work out or to approve the change," Mr. Mabrey answered: "We had to build, you know, one or more units and perform the test to see that they past [sic] the test specified and in fact performed as the -- at least as good as the unmodified unit." That testimony is part of the evidence supporting the findings and decision that appellant did not follow through with formulating and testing the application of the VECP to all configurations. 04-2 BCA at 162,156-57 (finding 7). The facts are clear - appellant did not follow through with technical and cost details necessary to apply the VECP to other AC configurations.

Appellant also relies on the testimony of COL (retired, tr. 10) Mills for evidence of savings that the Board should extrapolate to other AC configurations. COL Mills opined that, "[b]ased on what we had seen [the duration and scope of which was not specified], I thought that on our air conditioning, we were probably in the neighborhood of probably 45 percent of where cost had been, 40 to 45 percent . . . if the air conditioner cost us $1,000, hypothetically we're going to save 450" (tr. 27).

By way of comparison, appellant's proposed VECP savings, including profit, for the 36K BTU/HR horizontal unit amounted to about 60% of the unmodified contract price ($3,629.28 divided by $5,990.00). 04-2 BCA at 162,154 (finding 1), 162,158 (finding 10). However, appellant's proposed VECP savings, including profit, for the 36K BTU/HR vertical unit amounted to about 21% of that unmodified contract price ($1,807.38 divided by $8,550.00). 04-2 BCA at 162,157 (finding 9), 162,160 (finding 13). COL Mills' testimony does not hold up under scrutiny. Appellant confuses unsupported opinion with proven facts. Appellant's suggestion that we apply 40-45% savings across a range of prices during 1984-86 (not the sharing period determined by the Board, 04-2 BCA at 162,161 (finding 15)) for other AC configurations is not supported by persuasive evidence.

Appellant's alternative suggestion in its response to the government's opposition (app. resp. n.1 at 4), using app. supp. R4, tab 925, is an arithmetically derived weight-adjusted average of averages that is not connected with probative evidence in the record. Neither party contemporaneously approached the application of the VECP in the manner presented in note 1 of the appellant's response. The known original unmodified contract price for the 36K BTU/HR horizontal unit, $5,990.00, is not employed. Rather, appellant calculates an average of 36K BTU/HR horizontal, vertical, and "(B) BAS/MNT" configuration prices in 1984-86. We have no record explanation for a "B" configuration. No justification for use of cost data from 1984-86 has been presented. No evidence in the record shows that the various configurations used in appellant's calculations were bought in the same proportionate volume during the sharing period established in the record (15 October 1990 through 14 October 1993) as were bought in 1984-86. There is no proof that the same technical changes would be made on other AC configurations and no proof that the instant unit cost reductions, if any, would be achieved in the same proportion as with the 36K BTU/HR horizontal configuration.

More generally, appellant's alternative suggestion of a calculation method departs from the calculation method defined in the applicable VECP provision. When the parties agreed to a lump sum calculation of future savings, they adopted a forward-pricing scheme, not one based on retrospection.

In fact, we have probative evidence that the technical details of commercialization changes would vary for different configurations and that instant unit cost reductions would differ among the various configurations. 04-2 BCA at 162,157-58 (finding 10), 162,160 (finding 13). No supportable basis for a calculation of unit cost reductions for any configuration other than the 36K BTU/HR horizontal AC has been proved.

Future Procurement Quantities

Appellant contends that the Board's requirement that appellant prove "future procurement quantities" is error (app. mot. br. at 2). Appellant complains that information concerning future procurements and savings was in the custody, control, or direct knowledge of the government and that proof related to such matters should come from the government. Appellant does not assert that the government withheld information requested by appellant. The circumstances of this case are not unique in requiring a party in litigation to discover information from the opposing party from which to develop supporting evidence for its claim.

Contrary to appellant's assertions, we applied a preponderance of evidence standard. *Rig Masters, Inc.*, ASBCA Nos. 52891, 54047, 03-2 BCA ¶ 32,294 at 159,794, *aff'd*, 96 Fed. Appx. 683 (Fed. Cir. 2004). Our determination of the future unit cost reductions generated by the VECP for the 36K BTU/HR horizontal configuration and the quantity of units projected for future purchase was made by measuring and weighing the evidence of record by that standard.

Appellant takes issue with our use of the term "sufficient certainty" at 04-2 BCA 162,172, and has somehow determined, without explanation, that the term conveys a standard of proof "far beyond" a preponderance (app. mot. br. at 10). Our use of that phrase is in the context of a situation, as here, where liability is clear and a fair and reasonable determination of quantum is possible. In such situations, we follow the Court of Claims formulation: "It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation." Accordingly, sufficient certainty in that context arises out of a quantity of evidence that allows a fair and reasonable approximation based on "more than mere speculation." *Electronic & Missile Facilities, Inc. v. United States*, 189 Ct. Cl. 237, 257, 416 F.2d 1345, 1358 (1969), quoting *Specialty Assembling & Packing Co., Inc. v. United States*, 174 Ct. Cl. 153, 184, 355 F.2d 554, 572 (1966); 04-2 BCA at 162,172.

Cases cited by appellant in the motion brief at 9-13 and in the motion response at 5 describe what the Board did. Rather than improperly deny recovery for a lack of specific, segregable evidence of quantities of 36K BTU/HR horizontal units projected for purchase, we examined the record to ascertain, by direct evidence and by inference, the most just result that was more than a guess. We appropriately applied the degree of leniency and liberality suitable to a VECP quantum claim, formulated the fair and reasonable projection that the CO should have made, and rejected the CO's "zero" forecast that was incorrect as a matter of law. 04-2 BCA at 162,171-73 (quantum decision part d.(3)).

What appellant characterizes as "two Government records of annual purchases of air conditioners" (app. supp. R4, tab 967; app. mot. br. at 9, app. resp. at 5 (underlining in original)) are the records of planned acquisitions from FY85-94 and briefing charts for FY89-96 we described in our findings. 04-2 BCA at 162,159-60 (finding 12 b.-c.). The basis for the rejection of those documents as probative evidence for determining the quantity of future units to be purchased was that they included configurations other than 36K BTU/HR horizontal ACs, for which we have no unit cost reductions evidence. An essential premise for their use is missing. The testimony by COL Mills, asserted to be corroborating (tr. 28), has the same defect in that his "offhand" estimate included all ACs, and was not limited to 36K BTU/HR horizontal ACs, the only configuration for which we have proof of future savings.

SUMMARY

Having reconsidered our decision on the merits, it is hereby affirmed.

Dated: 13 June 2005

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result (see separate opinion)

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result (see separate opinion)

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

I concur in result (see separate opinion)

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

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
CONCURRING ONLY IN THE RESULT
AND WRITING SEPARATELY ON THE ISSUE OF BURDEN OF PROOF

Concurring in Result

Our original decision reflects that we were of differing views. That continues to be the case. Much of Judge Reed's opinion cannot be reconciled with the facts or the record – see my concurring opinion in the board's initial decision. *Applied Companies*, ASBCA No. 50593, 04-2 BCA ¶ 32,786. We did, and do, however, agree on the amount to which the appellant is entitled.

The appellant's VECP provided for the substitution of any equivalent commercial part for source-controlled parts in government-designed air conditioners. The contractor argued that the VECP applied to the entire family of air conditioners.

We held that the updated 36K horizontal air conditioning units that included the enhanced MPI technology – although not identical to the 36K units in the instant contract – were essentially the same as the 36K horizontal units in the instant contract, for purposes of applying the VECP and the VECP clause. (This new 36K unit permitted any equivalent commercial substitution as did the VECP.)

As to the other units within the family of air conditioners, we agreed – albeit from different perspectives or with different emphasis – that the appellant failed to establish the amount of the unit savings for those other units within the family of air conditioners. Judge Reed concluded "that the different AC configurations are not essentially the same unit for purposes of costing a commercialization process." (04-2 BCA ¶ 32,786 at 162,170) My opinion noted that we did not have "sufficient evidence that the savings to be achieved by substituting commercial components in these different size air conditioners would be the same – or essentially the same – as the savings for the 36K horizontal air conditioner." (04-2 BCA ¶ 32,786 at 162,176) Judge Thomas, with Judge Stempler concurring, said, "there has been a complete failure of proof as to quantum with respect to those air conditioners [other than the 36K horizontal units]." (04-2 BCA ¶ 32,786 at 162,177) As a result, we did not need to decide whether those other units were essentially the same for purposes of the VECP.

In its motion for reconsideration, the appellant primarily contends it was error to require it to prove the amount of the future unit cost savings (cost reduction) on air conditioners, because the clause provided a formula for determining the future savings: multiply instant unit savings by the number of future units.

The VECP clause does provide, as appellant asserts, that the instant unit cost reduction (adjusted for projected learning or changes in quantity) is to be multiplied by the number of other contract units that are essentially the same and that are scheduled for delivery during the sharing period, in order to determine future savings. Thus, the appellant is correct, once it is determined which units are essentially the same, the clause provides that instant unit savings are multiplied by the number of future procurements of the units that had been determined to be essentially the same as the instant contract unit.

That formula cannot be implemented without determining which units are "essentially the same" as the unit under the instant contract. Thus, the central issue in this case was a factual one – which units were essentially the same for the purpose of implementing the VECP clause?

The clause must be interpreted to have a reasonable meaning if a reasonable meaning is discernable. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978). Business contracts should be construed with business sense. *Deloro Smelting and Refining Co. v. United States*, 317 F.2d 382, 387 (Ct. Cl. 1963). All of the terms of a contract must be considered together and the terms should not be interpreted so as to subvert the spirit and purpose of the contract clause. *Global Van Lines, Inc. v. United States*, 177 Ct. Cl. 829, 835 (1966). Construction of contract terms should avoid absurd and whimsical results. *Northwest Marine Iron Works v. United States*, 493 F.2d 652, 657 (Ct. Cl. 1974). We look then to the clause for guidance as to the meaning of essentially the same.

The VECP clause is designed to determine the amount of the savings from an accepted VECP and then to share those savings equally with the contractor in the instant contract as well as future contracts. The clause itself reveals several underlying premises: (1) the government will apply the VECP savings to instant and future units to which the VECP is applicable; (2) the application of the VECP will result in savings that will be duplicated in all the units to which it is applicable; and (3) if the savings are duplicated, the savings will be essentially the same in all units to which the VECP is applied.

Thus, the clause provides the formula: total future contract savings equals instant unit cost reduction – adjusted for projected learning or changes in quantity – multiplied by the number of future contract units scheduled for delivery during the sharing period. (Para. (b) (3) of the clause)[4] The clause does not look to variances in future bid prices or

[4] The formula is constructed by reading together the definition of "future contract savings" and the definition of "future unit cost reduction." Future contract savings means "the product of the future unit cost reduction multiplied by the number of future contract units in the sharing period." (In the 2000 version the word "period" was changed to "base.") Future unit cost reduction means "the instant

competition to determine the savings, but projects the current savings into the other units. To put it another way, the clause presupposes that the savings on all units that are essentially the same will have essentially the same unit savings.

If the clause contemplated that the savings of other units would vary significantly from the unit savings, it would have been irrational to use instant unit savings as the constant by which the number of other units would be multiplied. That is, if the drafter of the clause envisioned that instant unit savings would be $3,000, and that future savings would be $3,000 on ten units but only $100 on ninety other units, the drafter would have directed that the future savings would have been $3000 x 10 units plus $100 x 90 units equals $39,000. It would have been irrational to have directed that $3000 be multiplied by 100 units for a total of $300,000, with actual savings of only $39,000.

That means that in order for a unit to be essentially the same, the savings must be essentially the same as the savings in the instant contract units. The VECP clause would not make sense if the savings of other units under other contracts would be significantly different. That is, if the savings resulting from the application of the VECP are significantly different, the units are not essentially the same for purposes of implementing the VECP clause.

This does not, of course, resolve the issue of whether a VECP could apply to an entire family of air conditioners. Two considerations apply. First, the VECP clause defines unit as "the item or task to which the Contracting Officer and the Contractor agree the VECP applies." This clearly allows the parties to agree that the VECP applies to the entire family. Second, an identical item or task, common to each unit within the entire family, could result in essentially the same unit savings. For example, each unit might have an identical on/off switch that a VECP might propose to change. In that situation a VECP applied to the entire family could be essentially the same for purposes of applying the VECP clause and could be essentially the same for purposes of the VECP itself.

In discussing the failure to prove the quantum of savings in other units, we did not mean that in every case the appellant must prove the quantum of savings in each of the units that is essentially the same. In the usual case, it ought to be anticipated that the unit savings to which the VECP applies will be essentially the same for both the instant contract units and other units that are essentially the same. In such cases there would be no need to seek proof of the essential sameness of the savings.

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unit cost reduction adjusted as the Contracting Officer considers necessary for projected learning or changes in quantity during the sharing period."

Where, as here, there is *prima facie* evidence that the savings of other units, that are alleged to be essentially the same, are significantly different, the appellant ought to have the burden to establish that the unit savings of those other units are essentially the same as the savings on the instant contract units. If the appellant establishes that the savings are essentially the same, then those units might be found to be essentially the same. However, because we have reason to conclude that the unit savings for all the units of the family of air conditioners are not essentially the same for purposes of the VECP clause, we need not decide whether all the units of the family of air conditioners are technically essentially the same for purposes of applying the VECP itself.

I would affirm our original decision, with the clarification that in order for the appellant to be entitled to additional savings from the family of air conditioners, where there is evidence to rebut the presumption that the savings from the units are essentially the same, the appellant must establish that the savings from the other units within the family of air conditioners are essentially the same. Because the appellant has not made such a showing, there is no reason to determine if the other units within the family are essentially the same and the appellant is not entitled to savings from the future purchases of those other units within the family of air conditioners.

Burden of Proof

In its motion, the appellant argued that "it was error for the Board to require the Contractor to prove the dollar amount of future unit cost reductions" because the value engineer clause "burdens the Government to come forward with proof of any adjustment to the dollar amount that the Government considers necessary" (app. mot. at 2). My colleagues respond to this central allegation by the appellant with the conclusion that the initial decision used the appropriate burden of proof. Such an assertion must be fairly and carefully read, because the only citation to authority for the assignment of the burden of proof was contained in Judge Reed's initial decision. In that decision (04-2 BCA at 162,169) he addressed burden of proof as follows:

> a. Burden of Proof
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> As with any contractor claim, Applied bears the burden of proof for VECP savings. *See ICSD Corp. v. United States*, 934 F.2d 313, 316-17 (Fed. Cir. 1991) (burden of proof for collateral savings; earlier VE provision); *Rig Masters, Inc.*, ASBCA No. 52891, 03-2 BCA ¶ 32,294 at 159,793, *aff'd*, 96 Fed. Appx. 683 (Fed. Cir. 2004) (later VE provision); *Sentara Health System*, ASBCA No. 51540, 00-2 BCA ¶ 31,122 at 153,723, *recons. denied*, 01-1 BCA ¶ 31,198 (later VE provision). "Mere allegations [of VECP

> savings] without substantiated explanatory facts that support the statements or corroborative evidence are not sufficient to carry the necessary burden of proof." *Rig Masters, id.*

In *ICSD* the issue was primarily one of collateral savings. That case also dealt with contract interpretation issues. It did not deal with burden of proof issues on questions of quantum. With respect to burden of proof the court (at 317) had the following to say:

> According to ICSD, the Board erred by placing the burden on ICSD to prove the cost savings. We disagree. Under the contract, when there is a "measurable" net reduction in the "documentable" collateral costs, ICSD is awarded a 20% share in the "ascertainable" collateral savings. The Board found that several of the alleged collateral savings were not "measurable," "documentable," or "ascertainable," and that ICSD's proffered estimates of the savings amounts were neither reasonable nor credible. ICSD has shown no error in those findings, and we do not see how the burden is on the government to "ascertain" a share of "unascertainable" savings. Therefore, under its contract, ICSD is not entitled to an award for those savings.

Clearly, this discussion about the quantum of collateral savings in *ICSD* has nothing to say about proving quantum of future savings in the current circumstances.

Rig Masters was a support services contract. It contained a later VECP clause at FAR 52.248-1, entitled VALUE ENGINEERING (MAR 1989) (ALTERNATE III). The contractor's VECP called for a change in procedures for closing the vacuum breaker system, allowing the system to be closed for longer periods of time and thus using the pumps less. Using the pumps less resulted in a savings. The savings were based on the extra number of days that the pumps were closed. The contracting officer determined the instant unit savings. There was no dispute about the quantum of the savings. The cited portion of *Rig Masters* states:

Additional VECP Savings

> The parties have defined this issue in ¶ ¶ 7-8 of the Parties' Joint Statement of Legal Issues. They are in agreement regarding a number of key underpinnings for the contractor to share in VECP savings. They agree that Rig Masters provided Level 2 services under the changed VECP

> procedures for the 42 days in question, that these days were within the contract's sharing period, that the CO compensated Rig Masters for savings realized on 2 of those days, and that the CO properly calculated the unit cost reduction necessary to quantify VECP savings. But the parties do not agree on the number of days for which the VECP resulted in a savings. Rig Masters claims recovery for each day VECP-changed procedures were used because greater pump efficiency reduced the need for Level 2 services, and alleges savings for the additional 40 days on which it provided Level 2 services. The Government argues that Rig Masters failed to prove that implementation of its VECP procedures resulted in either the efficiencies claimed or reduced Level 2 services for those days, and is entitled to nothing further. We decide only whether Rig Masters was entitled to a share of savings on the 40 additional days alleged. As in any affirmative claim, appellant bears the burden of proof. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991).

In *Rig Masters* there was no dispute about the value or quantum of the instant or future unit savings. The dispute was about the number of future units (*i.e.*, the extra number of days) to which the savings applied. That is, the number of units that were "essentially the same."

In *Sentara Health Systems*, ASBCA No. 51540, 00-2 BCA ¶ 31,122 at 153,723-24, *recon. denied*, 01-1 BCA ¶ 31,198, the only issue decided was entitlement. That issue was whether or not the contractor submitted a VECP to substitute for an implied contract requirement. In finding that the contractor did submit such a VECP we said in *Sentara* that the contractor had the burden of proving that a valid VECP was submitted and accepted by the government. Burden of proof on quantum was not an issue in Sentara; but, even if it had been, that case is inapposite to the burden of proof issue with respect to the quantum question in the instant case.

None of the cited cases tell us anything about who has the burden of proof to establish a differential cost savings between the unit savings on the instant contract and unit savings on future procurements of essentially the same units. My colleagues' reliance on those cases – which deal with collateral savings, the number of future units, or whether a valid VECP was submitted – is misplaced.

To the extent that our initial decision can be read as the appellant reads it – that the appellant must establish the unit savings to be achieved on future buys – our decision was

in error. At least one commentator has read our decision in the same way that the appellant reads it. In the *Nash & Cibinic Report*, Professor Ralph Nash writes:

> All of the board judges agreed that even if the broad interpretation of "essentially the same unit" had been adopted, the contactor had not met its burden of proving the savings on the other configurations of air conditioners covered by the specification. The main opinion states:
>
> > Even if the VECP could be considered to apply to the entire family of ACs, a proposition not supported by the record, appellant could not obtain savings on
> > the total number of the various configurations of ACs because the savings per unit for each configuration were not demonstrated. It is [the contractor's] burden to prove those savings. *See Whitaker Corp*, 81-1 BCA ¶ 15,055 at 74,479 (VECP claim not proved by 'theoretical possibilities and conjecture;' earlier VE provision). The gross savings claimed by the contractor are speculative.
>
> This can present a real problem for a contractor because even if it wins on the "essentially the same" issue, it will have a very difficult time coming up with evidence of savings on contracts held by other contractors. To overcome its burden of proof, the contractor would have to show what the units cost before the adoption of the VECP and what they cost when they were manufactured by a new contractor. This information would have to be obtained from the Government in the discovery process, and many agencies might strongly resist such discovery.

Ralph Nash, *VALUE ENGINEERING: Inducement Without Fulfillment?*, 19 The Nash & Cibinic Report, 41-42 (March 2005).

To the extent that anything said in any of our initial opinions can be read as requiring the appellant to establish the unit savings on the future buys, our opinions were in error. Our opinions were in error because, once the instant savings per unit is determined, the clause provides that the savings per unit on future unit buys is the savings on the instant unit, subject only to adjustment by the contracting officer due to projected learning or changes in quantity, as provided in the VECP clause.

However, the appellant does bear the burden of proving which items are essentially the same for purposes of the VECP. As I discussed above, evidence that the savings on other units is significantly different from the instant savings is *prima facie* evidence that those units are not essentially the same as the instant units. It is my view that in those circumstances, where the evidence in the record shows that the savings of other units within the family are not the same as the savings on the instant units, then the appellant has the burden of coming forward with additional evidence to show that the savings on the other units within the family are the same as the savings on the instant units, in order to show that for purposes of applying the VECP to those other units, that those other units are essentially the same.

Conclusion

Although Judge Reed's conclusion – that the VECP was not understood to be the commercialization of the entire family of air conditioners – is not supported by substantial evidence; nevertheless, our disagreements over this matter – fully explored in our initial opinions – do not change the outcome in this case. If the Board were to find that the VECP (as approved by Col. Mills and Mr. Mabrey, and as signed by Ms. Jones – in a ministerial act – as the nominal contracting officer) was the substitution of any compatible commercial part within the entire family of air conditioners, the outcome would still be the same.

The problem with this case, in my view, is that the principals agreed to apply the commercialization VECP to the entire family of air conditioners and to share all the savings; but, did not fully contemplate or discuss how those savings would be computed. Those savings cannot be computed under the multiplication rules set forth in the VECP – for the reasons stated above. Instead, the savings on all the future buys would have to be determined separately for each of the different units within the family. If we were to find that the parties had so agreed, it would then be appellant's burden to establish the savings for the other units. It would be the appellant's burden because we would no longer be applying the formula in the VECP clause that provided for the savings on the future units to be presumed to be the same as the savings on the instant units.

As a final matter, the appellant has in a supplemental filing called our attention to what we said about the burden of proof in *Environmental Safety Consultants, Inc.*, ASBCA No. 53845, 05-1 BCA ¶ 32,903 at 163,030. In that decision we pointed out that if the appellant makes a *prima facie* showing of facts to establish its quantum recovery, the government is required to come forward with evidence to contest the *prima facie* case. In the instant case, although there is sufficient evidence in the record to find that there were some currently planned procurements of other sizes of air conditioners within the family of air conditioners, during the three year sharing period, there is insufficient

evidence to determine what the savings would be for those units. The evidence as to savings on the other units is speculative, it does not make a *prima facie* case. As stated above, I would affirm our original decision on the award to which the appellant is entitled.

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

CONCURRING OPINION BY JUDGES THOMAS AND STEMPLER

We concur in the denial of appellant's motion for reconsideration on the basis of our concurrence in the Board's original decision, which properly formulated and applied all burdens.

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50593, Appeal of Applied Companies, rendered in conformance with the Board's Charter.

Dated:

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