ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Advanced Engineering & Planning	)	
Corporation, Inc.	)	ASBCA Nos. 53366, 54044
	)	
Under Contract No. N00024-94-H-8687	)	
Job Order No. 0072	)	

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

Advanced Engineering & Planning Corporation, Inc. (AEPCO) timely moves for reconsideration of virtually every aspect of the entitlement portion of our decision. *Advanced Engineering & Planning Corporation, Inc.,* ASBCA Nos. 53366, 54044, 05-1 BCA ¶ 32,806 (*AEPCO).* The Navy has filed an opposition to the motion.

Normally, we would address each ground for reconsideration presuming that the reader is already familiar with our earlier decision. Because that decision is both factually complex and lengthy, and in the interest of avoiding the need to constantly refer back to our initial decision, we briefly summarize what went on before, setting the stage for our disposition here of each ground for reconsideration.

I. The *Southwest Marine* Case

The first issue AEPCO asks us to reconsider relates to whether radiographic testing (RT) of P-1 piping of the main feed pumps (MFPs) was required. We decided this issue in favor of the Navy, holding that "[b]ecause the drawings refer to Tech. Pub. 278 where the RT requirements are set forth in TABLE IX, and because AEPCO's

interpretation ignores the drawing requirements . . . the contract required RT of the MFP P-1 piping" (*see AEPCO*, 05-1 BCA at 162,319).

AEPCO contends that *Southwest Marine, Inc.*, ASBCA No. 34799, 90-2 BCA ¶ 22,658, *recons. denied,* 90-2 BCA ¶ 22,820, is directly on point and must control the outcome of the RT entitlement issue in this case (motion at 7). *Southwest Marine* involved a situation where the contractor was required to remove the old expansion joints in the bleed air system of a destroyer and to replace them with new ones. The dispute in that appeal was whether the contractor was required to perform RT of new welds. SUPSHIP San Diego contended that Table VIII of Mil Std 278 was applicable. The contractor contended that Table VIII was superseded by footnote 1 of Table VIII, Mil Std 278, and that Table XX of Appendix A was applicable.

AEPCO points out that *Southwest Marine* and the case before us are similar because "In *Southwest Marine* the Government relied on Table VIII of MIL-STD-278 to impose a requirement for RT inspection whereas here the Government relies on Table IX of NAVSEA Tech. Pub. 278 to accomplish the same end. Clearly the two tables are the same and NAVSEA Tech. Pub. 278 is the successor to MIL-STD-278" (motion at 7).

In our 19 November 2004 decision, we distinguished *Southwest Marine* on the bases that (1) "footnote 1 to Table VIII makes the table inapplicable," and (2) "Unlike *Southwest Marine*, we have found neither Note 1 nor Note 2 of TABLE IX, Tech. Pub. 278, exempt or render inapplicable P-1 piping butt welds from the NDT requirements, *i.e.,* RT of TABLE IX" (05-1 BCA at 162,318-19).

In its motion for reconsideration, AEPCO points out that we failed to consider a second aspect of the holding in *Southwest Marine.* AEPCO points out in *Southwest Marine* the Board granted the appeal also because SUPSHIP San Diego violated ¶ 3.2.1 of Mil Std 271. That paragraph imposed the following requirements on the Navy when RT was required:

> 3.2.1 *Extent of radiographic inspection*. All procurement documents, drawings, or both shall specify the extent of radiographic inspection, when it is required. This information shall include the number of areas and items to be radiographed, the point in fabrication when radiography shall be performed, the quality level of inspection and the acceptance standard to be applied. Drawings specifying radiographic coverage requirements shall employ radiographic symbols that are in accordance with AWS A2.4.

(90-2 BCA at 113,841)

In *Southwest Marine,* SUPSHIP San Diego did not comply with the foregoing requirements. The Board found:

> 7. To get to Table VIII of Mil Std 278 a bidder is required to read the notes on the 9 drawings made applicable by the Base Work Item. Note 24 on Drawing 204-6117327 states that "fabrication and inspection of welded piping shall be [in accordance with] Mil-Std 278, P-1 piping . . ." Paragraph 10, "Inspection Requirements" of Mil-Std 278 states under ¶ 10.3.2 that Classes P-1, P-2 and P-LT piping "shall be inspected in accordance with the requirements specified in Table VIII."

(90-2 BCA at 113,840)

The *Southwest Marine* Board went on to hold alternatively that failure on the part of SUPSHIP San Diego to comply with ¶ 3.2.1 of Mil Std 271 would relieve the contractor from complying with the RT requirements of Table VIII, Mil Std 278:

> We also find that the Government violated ¶ 3.2.1 of Mil Std 271, quoted in finding 13. Paragraph 3.2.1 is directed to Government procurement and technical personnel and is obviously designed to avoid the situation we have here. As the evidence shows, making welds that meet radiographic standards adds significantly to the contractor's work and to the Government's costs. Accordingly, when radiographic inspection is required, *all* procurement documents and drawings are required to specify the extent of it. The meaning of ¶ 3.2.1 is that radiographic inspection is costly and the decision to use it should be made consciously and before the solicitation documents are issued. When issued, the solicitation should spell out the decision with sufficient clarity that litigation of the sort we have here is not required. We disagree with the respondent's argument that the Basic Item contains a "clear and unambiguous" requirement for the contractor to perform radiographic inspection of butt welds for the expansion joints. The Basic Work Item No. 551-93-001 makes no mention of radiographic inspection nor do any of the drawings. As the findings indicate, it is by tracing the P-1 piping from Note 24 on the drawing to ¶ 10 of Mil Std 278 that one learns of the possible applicability of

> Table VIII. Footnote 1 makes Table VIII inapplicable because Appendix A Line 10 specifically lists inspection requirements for expansion joints. It is impossible to argue that the solicitation documents reasonably require radiographic inspection of expansion joint welds much less that they comply with ¶ 3.2.1 of Mil Std 371 [sic].

(90-2 BCA at 113,841-42)

Tech. Pub. 271, dated 30 April 1997, is the successor for Mil Std 271 used in *Southwest Marine*. Paragraph 1.1 of Tech. Pub. 271 sets out its coverage:

> 1.1 General. This document covers the requirements for conducting nondestructive tests (NDT) used in determining the presence of surface and internal discontinuities in metals. It also contains the minimum requirements necessary to qualify nondestructive test and inspection personnel, procedures, and nondestructive test equipment. . . .

(R4, tab 573 at Original 1)

Except for changing the word "procurement" to "acquisition," ¶ 3.3.1 of the updated Tech. Pub. 271 repeats word for word ¶ 3.2.1 of Mil Std 271 the Board relied upon in *Southwest Marine*:

> 3.3.1 Extent of radiographic inspection. All acquisition documents, drawings, or both shall specify the extent of radiographic inspection, when it is required. This information shall include the number of areas and items to be radiographed, the point in fabrication when radiography shall be performed, the quality level or inspection, and the acceptance standard to be applied. Drawings specifying radiographic coverage requirements shall employ radiographic symbols that are in accordance with AWS A2.4.

(R4, tab 573 at Original 7) The parties are in agreement that Tech. Pub. 271 was a part of Job Order No. 0072[1].

[1] *See* the government's 5 April 2005 response and appellant's 11 April 2005 response to the Board's 31 March 2005 inquiry.

In the case before us, the MFP shipalt specification did not mention much less highlight the RT requirements. To get to TABLE IX of Tech. Pub. 278 where the RT requirements were set forth, AEPCO would have had to get there by way of two separate notes on two separate drawings (*see* findings 45, 05-1 BCA at 162,277). We conclude that in issuing the MFP shipalt, SUPSHIP Portsmouth failed to comply with ¶ 3.3.1, Tech. Pub. 271.

Because Tech. Pub. 271 requires that all acquisition documents including the specification specify RT when it is required, and because we are bound by our precedent, we reverse our original decision and hold that AEPCO is entitled to recover as a constructive change the cost incurred in performing RT.

The evidence shows that AEPCO contracted with Scientific Technical Inc. (Si-Tech) to perform RT of the MFP P-1 piping (findings 39, 74, 05-1 BCA at 162,276, 281). The record shows that AEPCO paid Si-Tech a total of $29,228 (including overtime) for performing RT inspections between 7 and 28 March 2000 (R4, tab 534). We hold AEPCO is entitled to recover $29,228 plus markup.

In light of our decision above, we need not address the other grounds AEPCO raised in connection with whether RT of P-1 piping was required (*see* motion at 4-7, 9-10).

II. The Over Inspection Issue

In our decision, we found that "the higher than normal rejection rate was attributable inherently to the tight conditions in the spaces in the MFP area where AEPCO had to work" (finding 87, 05-1 BCA at 162,283). AEPCO contends that this finding cannot be squared with evidence of over-inspection by SUPSHIP Portsmouth's Level II RT inspector Alfonso B. Villorente (Villorente) and with the high rejection rate experienced by AEPCO's replacement, NORSHIPCO, "when it performed welds under ideal conditions in its own shop." AEPCO also contends that our decision "gave no weight to the testimony of AEPCO's expert, Mr. Spooner, a pre-eminent expert in the area of radiographic inspection and interpretation." (Motion at 10-11).

That the locations of the welding contributed substantially to the high rate of rejection was supported by the following evidence in the record: first, William Tate, NORSHIPCO's production manager, testified that the locations of some of the joints were very difficult – welders were standing on ladders welding in the overhead using a mirror for assistance; the deck plate would move when people walked by; and there were three or four people grinding and welding in the same general location. Second, the welds that failed multiple rounds of inspection were those located in tight spaces where it was difficult for a welder to do his work. And third, the MFPs were in "one corner of the

engine room. . . . [they] were so close together that one of them you couldn't even walk between it. It had a huge rat's nest of piping on top of it." (Finding 86, 05-1 BCA at 162,283).

AEPCO tries to discredit the testimony of Villorente. Villorente was called as a witness by both sides on numerous occasions during the course of the hearing (tr. 183-214, 533-637, 1604-94, 1869-1900, 1949-52). On the whole, he appeared to be an honest and conscientious inspector. At the time he interpreted the RT films, he was certified as a Level II inspector in RT under the Navy program pursuant to Tech. Pub. 271, the same level as R. Harrington (Harrington) whom Si-Tech sent to MT. WHITNEY. Daniel B. Lovingood (Lovingood), a Level III RT examiner from SUPSHIP Newport News, independently studied the RT films and confirmed Villorente's findings (finding 77, 05-1 BCA at 162,282). The Board finds Lovingood to be a competent, objective and credible witness. Moreover, as we have found, even Bobby Dennis (Dennis), president of Si-Tech, a Level III examiner, agreed with Villorente's and Lovingood's findings once they worked out "some difference[s] of opinions about what to call certain indications." He also admitted that Harrington, his Level II RT inspector, was "under a lot of pressure from the contractor due to the short time frame." (Finding 78, 05-1 BCA at 162,282) In contrast, AEPCO did not call Harrington as a witness, the one person who was most knowledgeable and would be able to defend Si-Tech's initial findings. We have also found that in reviewing the RT films, both Villorente and Lovingood followed the acceptance criteria set out in MIL-STD-2035A (SH). Since Harrington did not testify, we were uncertain what acceptance criteria he followed, if at all. (Finding 92, 05-1 BCA at 162,284)

Nor was it clear what criteria Spooner followed in his evaluation. The record does not show Spooner was called as an expert witness. Based on our evaluation of the record, we do not believe Spooner's report and testimony were sufficiently compelling to overcome SUPSHIP Portsmouth's evaluations, and the admission of Si-Tech's president.

We are not persuaded that our conclusion that the high rate of weld rejection was due to the tight spaces in which AEPCO had to work and not to over-inspection was in error. Accordingly, AEPCO's motion for reconsideration on the ground of over-inspection is denied.

III. SUPSHIP Portsmouth's Duty to Cooperate

To the extent AEPCO initially cast most of its claims as constructive changes, we decided those claims on that basis. On page 13 of its motion, AEPCO tells us that, "with regard to Constructive Changes C.1, C.2, C.5, C.8 and elements of C.14, the gravamen of the constructive change was the Navy's failure to cooperate in the performance of the work." In a table on pages 13 and 14 of its motion, AEPCO lists the alleged "Nature of

Government Lack of Cooperation." AEPCO contends that we must reconsider our decision in the cited constructive changes when "the Opinion fails to even acknowledge this obligation, much less address it." (Motion at 13)

The government's implied duty to cooperate is "to do what is reasonably necessary to enable the contractor to perform." *SEB Engineering, Inc.,* ASBCA No. 39728, 94-2 BCA ¶ 26,810 at 133,352; *Coastal Government Services, Inc.,* ASBCA No. 50283, 99-1 BCA ¶ 30,348 at 150,088. Determination of a breach of that duty requires a reasonableness inquiry. "The nature and scope of that responsibility is to be gathered from the particular contract, its context, and its surrounding circumstances." *Commerce International Co. v. United States,* 338 F.2d 81, 86 (Ct. Cl. 1964). In contrast, the implied duty of noninterference is a negative obligation that "neither party to the contract will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance." *Lewis-Nicholson, Inc. v. United States,* 550 F.2d 26, 32 (Ct. Cl. 1977). Also, "Once a breach of this type has been established, the contractor must still show, as in all contract cases, that damage ensued." *Commerce International,* 338 F.2d at 86.

<u>Constructive Change C.1 – Waste Pulper Enclosure</u>

With respect to Constructive Change C.1, AEPCO's motion for reconsideration contends that "Erection of the tarp was redundant to the fire watch provided by AEPCO and the requirement to replace the tarp because the original tarp was unsightly was clearly overreaching" (motion at 13). On this constructive change, we held that the Navy did not constructively change the contract because the contract required AEPCO to segregate the waste pulper enclosure being constructed from adjacent areas (National Fire Protection Association (NFPA) Standard 51B, ¶ 3-1.1), and because the contract required AEPCO to shield combustibles (in this case the awning and the quarterdeck) from ignition (NFPA 51B, ¶ 2-2.2) (05-1 BCA at 162,287).

We have found that AEPCO was required to replace the tarps because they were not fire-retardant as required by the contract, not because they were unsightly (findings 102-03, 05-1 BCA at 162,285). Even if the requirement for tarps could be argued to have been redundant, the Navy was nonetheless entitled to strict compliance with its contract. *Cascade Pacific International v. United States,* 773 F.2d 287, 291 (Fed. Cir. 1985). Because we do not consider insisting upon contract compliance to be lack of cooperation, AEPCO's motion on this basis is denied.

Constructive Change C.2 – Government Interference With AEPCO's Performance of Main Feed Pump Shipalt 1265K

In its motion for reconsideration, AEPCO contends "Failure to coordinate other contractors and other ship activities to avoid disruption of work in the fire room was clearly uncooperative." In making this argument, AEPCO refers to pages 82-83, 100-102 and 114-117 of its post-hearing entitlement brief. (Motion at 13)

With respect to the fire room, based on the captain's testimony, we found that there were no interferences with AEPCO's work by NORSHIPCO or the ship's force because each was working in a "different space" in the fire room and AEPCO had not refuted this evidence (finding 116, 05-1 BCA at 162,288). AEPCO's motion contends that we made a factual error because the captain's testimony was refuted by the testimony of William H. Hunt (Hunt), SUPSHIP Portsmouth's ship surveyor (tr. 933-34), and by the testimony of Samuel T. Winder (Winder) (tr. 384).

We have reviewed the transcript pages AEPCO cited. Hunt's testimony does not pertain to interferences at all. Winder's testimony did not address interferences either. He merely testified that the fire room was a "busy environment," and "In order to try and meet PCD [Production Completion Date] you had to fill a lot of people within that small space" (tr. 384). Since Winder, as AEPCO's general manager, was not on the deck plate every day and did not seem to be testifying from his personal observation, we do not give his general testimony much weight.

Because AEPCO has failed to persuade us that our original holding was erroneous, its motion for reconsideration insofar as it relates to Constructive Change C.2 is denied.

Constructive Change C.5 – Non-Availability of Assigned Staging Area

This constructive change claim involved a staging area SUPSHIP Portsmouth initially assigned to AEPCO. Before AEPCO could move into the area, however, snow fell and the Norfolk Operating Base (NOB) used the staging area to pile snow. In our decision, we held that because the Navy was not contractually required to provide AEPCO a staging area in the first place, AEPCO did not perform "beyond the requirements of the pertinent specifications or drawings" when it performed work without a staging area. (05-1 BCA at 162,290-91) Under the rubric of the Navy's alleged failure to cooperate, AEPCO contends that "[p]lacing supplies and excess snow debris in obvious staging area clearly was demonstrative of a lack of cooperation" (motion at 13).

The evidence is not entirely clear as to whether AEPCO notified SUPSHIP Portsmouth when the staging area was put to other use. We have found that no condition

report was submitted, and that had AEPCO done so, SUPSHIP Portsmouth might have been able to remove the snow to make room for AEPCO's equipment. (Finding 136, 05-1 BCA at 162,291) The point here is not that the submission of a condition report – which AEPCO consistently did for what it considered additional work – is a prerequisite to recovery as it argued in its motion (*see* motion at 12). The point is, the Navy must in fairness be given an opportunity to remove or minimize any impediment to performance of contract work. To assert a claim for the first time long after the offending event has passed deprives the government of the opportunity to fulfill its duties of cooperation and non-interference.

Absent a specific contract requirement, there is no basis for concluding that SUPSHIP Portsmouth breached its implied duty of cooperation.

Constructive Change C.8 – Work Stoppages Due to Ship Visitors

Constructive Change C.8 involved the issuance of three change orders: Sequence Nos. 49G, 50G and 51G that paid AEPCO a total of $12,030 for work stoppages when dignitaries visited the vessel on 6, 7 and 13 March 2000. The sequences were later incorporated into bilateral Modification No. 1K which released the Navy from "all claims for delays and disruptions resulting from, caused by, or incident to such modifications or change order." (Findings 154-58, 05-1 BCA at 162,294)

In claiming 90 additional manhours (MHs) for "the non-productive time incurred by AEPCO in stopping and re-starting its work on these occasions" (finding 158, 05-1 BCA at 162,294), AEPCO provided no proof that the MHs were actually incurred beyond the unsubstantiated estimate by its claims consultant. It also provided no explanation why the hours claimed were not released by bilateral Modification No. 1K. In our decision, we held Constructive Change C.8 was barred by release (05-1 BCA at 162,294-95).

Because Constructive Change C.8 is not, and never has been, an issue related in any way to the Navy's failure to cooperate, AEPCO's motion for reconsideration on that basis is denied.

Miscellaneous Constructive Change C.14.A – Ship's Force Fire Drill

AEPCO cites this constructive change as another example where we allegedly failed to address the Navy's duty to cooperate. In this claim, AEPCO alleged that its workers were prevented from doing their assigned work during a part of most fire drills (finding 199, 05-1 BCA at 162,300). Based on the captain's testimony, we found the ship's force conducted fire drills after AEPCO's work force had completed its work,

around the time of shift change, so as not to interfere with AEPCO's work. He also maintained that AEPCO did not have to stop work on account of the fire drills. (Finding 201, 05-1 BCA at 162,300)

While Patrick T. Hill (Hill), AEPCO's principle witness, did testify about fire drills, the testimony lacked specifics with regard to what work was in fact impacted (tr. 2116-19). The lack of condition reports also cast doubt on whether AEPCO was truly impacted. Weighing the evidence before us, we chose to believe the Navy did what it could to avoid interfering with, and did not in fact interfere with, AEPCO's work when fire drills were conducted. Because AEPCO has failed to persuade us that we improperly weighed the conflicting evidence, its motion for reconsideration is denied.

Miscellaneous Constructive Change C.14.B – Hot Work Requests

AEPCO cites this constructive change as another example of the Board's failure to address the Navy's alleged failure to cooperate. It contends, "Clearly hot work necessitates cooperation by the ship's force as welding can't be performed in the vicinity of fuels and other combustibles" (motion at 13)

AEPCO's claim had alleged that its work was delayed because the ship's force would only approve Hot Work Requests (HWRs) for 8-hour periods instead of 24-hour periods. AEPCO alleged that trade practice required hot work be approved for 24-hour periods. We found, however, that it failed to prove such was the case. (Finding 204, 05-1 BCA at 162,301) In our decision, we did not find the ship force's approving HWRs for 8-hour periods unreasonable inasmuch as there were numerous contractors and government agencies all working on the vessel at the same time, and in view of the fact that AEPCO did not have a schedule of where it would be performing hot work. Also, according to the captain, towards the latter part of the availability, there was only one place (fire room) where hot work was being done, and processing hot work chits was a matter of minutes because the ship's force was "right there," "all the time." (Finding 205, 05-1 BCA at 162,301)

Weighing the evidence before us, we believe the Navy fulfilled its obligation in cooperating with AEPCO and not interfering with its work. AEPCO's motion for reconsideration on this constructive change is therefore denied.

Miscellaneous Constructive Change C.14.C – Incremental Release of Firemain Work

This constructive change involved a situation where AEPCO was required to install a number of valves in the firemain. AEPCO contended "Partial release of the fire main system was unreasonable" (motion at 14). In our decision, we found that the

firemain system was used to flush toilets (finding 208, 05-1 BCA at 162,301), and shutting down the entire firemain for an extended period would not have worked with sailors living aboard the vessel (finding 211, 05-1 BCA at 162,302). We found that there was no evidence that AEPCO had a viable plan to install firemain valves in sections, and the firemain was released to AEPCO one section or one compartment at a time (finding 211, 05-1 BCA at 162,302).

In its motion for reconsideration, AEPCO contends that we made a factual error because "Mr. Potter testified that AEPCO never intended to shut down the entire system and instead intended to perform the fire main work using cross lines around particular sections undergoing work" (motion at 17), suggesting that the Navy interfered with its planned method and manner of performing work.

AEPCO exaggerates Cameron L. Potter's (Potter) testimony. He never testified AEPCO intended to use cross lines and was prevented from doing so. What he testified was "I never expected to shut down the whole fire main. That will never happen on any ship. And there is a lot the ship can do also cross-connecting . . . to provide fire main isolated from here." (Tr. 2139) As the following exchange shows, Potter did not know for sure what was actually done in installing the fire main valves:

> JUDGE TING: Well, did you plan on working the entire fire main all at once?
>
> THE WITNESS: No, Sir.
>
> JUDGE TING: How did you plan to work on this fire main?
>
> THE WITNESS: In full sections.
>
> JUDGE TING: In full sections?
>
> THE WITNESS: Yes, sir.
>
> JUDGE TING: Isn't that how the fire main would [sic] turn[ed] over to you, in sections?
>
> THE WITNESS: I don't believe so. No sir.
>
> JUDGE TING: How was it turned over to you?

THE WITNESS: I'm not sure. It has been so long. I need to talk to my pipe fitter. He would know. He would probably remember. But I don't . . . .

JUDGE TING: Well. you've got this production schedule. Didn't you put in the production schedule how you were going to –

THE WITNESS: Yes, sir.

JUDGE TING: How did you plan to do that?

THE WITNESS: I don't know. Without looking at the schedule, Your Honor, I can't tell you.

(Tr. 2140) It is not clear from AEPCO's only witness on this issue how it planned to install the fire main valves, and to what extent actual installation deviated from what was planned.

Because AEPCO has failed to demonstrate that we erred in our fact finding, and because it has failed to support its allegation of failure to cooperate or interference on the part of the Navy, its motion for reconsideration on this constructive change is denied.

Miscellaneous Constructive Change C.14.D – Access Route Restrictions

Throughout the vessel's availability, AEPCO was told to use its rear entrance because the front entrance housed the flagship's ceremonial area. This rule applied to "anybody that works on the ship" not just AEPCO. (Findings 216, 217, 05-1 BCA at 162,302) We found that AEPCO did not consider using the rear entrance an impediment to its contract performance because it said nothing about it and did not complain about it at the time in any condition reports. AEPCO alleged for the first time it lost productivity when it filed its claim. (Finding 218, 05-1 BCA at 162,302-03) AEPCO cites this constructive change as yet another example of SUPSHIP Portsmouth's failure to cooperate. It contends that "Restricting access to the work . . . is a classic example of breach of the Government's duty to cooperate" (motion at 14).

Whether the Navy breached its duty of cooperation requires a reasonableness inquiry as to the nature and scope of that responsibility as gathered from "the particular contract, its context, and surrounding circumstances." *Commerce International Co., supra.* Because AEPCO was not entitled to use the vessel's front entrance as a matter of contract right, and because it had free and unimpeded access through the vessel's rear

entrance like all contractors, we are not persuaded that the Navy breached its obligation to cooperate. Accordingly, its motion in that regard is denied.

Miscellaneous Constructive Change C.14.E – Non-Availability of Ship's Force with Keys

Because the MT. WHITNEY was the flagship of the Second Fleet, certain areas of the vessel were locked because they housed classified material (finding 222, 05-1 BCA at 162,303). In its motion for reconsideration, AEPCO contends that "locking work spaces is a classic example of breach of the Government's duty to cooperate" (motion at 14).

In our decision, we did not find having to go to the quarterdeck to locate duty officers to unlock secured spaces where work needed to be performed to have been onerous. We also found "There is no evidence that duty officers were slow or uncooperative once summoned." (Finding 223, 05-1 BCA at 162,303).

Inasmuch as AEPCO's motion for reconsideration is not based on any newly discovered evidence, errors in our fact finding or legal theories, it is denied. *L&C Europa Contracting Co.,* ASBCA No. 52617, 04-2 BCA ¶ 32,708.

Miscellaneous Constructive Change C.14.F – Late Condition Report Responses
Miscellaneous Constructive Change C.14.G – Improper Condition Report
Miscellaneous Constructive Change C.14.H – Planning Yard Delays

These three constructive changes are dealt with together because they all stemmed from how SUPSHIP Portsmouth responded to condition reports. At the hearing, AEPCO dealt with all of these constructive change issues under C.14.H and offered virtually no evidence under C.14.F and C.14.G. In writing our decision, we did not go through a sorting exercise to determine which condition reports fell under the headings of C.14.F and C.14.G.

In Constructive Change C.14.F, AEPCO alleged that SUPSHIP Portsmouth was "very late in answering many of the Numerous Condition Reports submitted by AEPCO" causing labor hours to be lost attempting to work around the lack of timely responses (finding 227, 05-1 BCA at 162,303). In its motion for reconsideration, AEPCO listed Constructive Change C.14.F as yet another example of SUPSHIP Portsmouth's failure to cooperate. The motion stated "AEPCO documented in the record several instances where the Navy's responses to condition reports were unreasonably slow or simply wrong" (motion at 14), and referred us to pages 109-113 of its post-hearing entitlement brief. In that brief, AEPCO referred to Condition Report Nos. 43, 46, 47, 54 and 64 (app. entitlement br. at 109-111).

Condition Report Nos. 43, 46, 54 and 64 were addressed in our decision as a part of Constructive Change C.14.H (*see* findings 236, 237, 239 and 241, 05-1 BCA at 162,304-06). Condition Report No. 47 was not addressed. This condition report was submitted on 4 February 2000 (Friday) for a drawing relating to fabrication of a vent trunk. SUPSHIP Portsmouth furnished the requested drawing on 9 February 2000 (the following Wednesday), five days later (R4, tab 107 at Report 047).

In its motion, AEPCO contends that we made a factual error in Finding 229 where we found "the principle witness AEPCO called to support entitlement did not appear to know much about the details of its claim" (05-1 BCA at 162,304). With respect to the issue of late condition report responses, AEPCO's witness, Hill, testified that he "wrote a lot [of condition reports] on this vessel" that he had not "gone back and looked through all of the initial reports" (tr. 2133-34). With respect to any specifics of the condition reports, Hill testified "I don't have specific [sic], but I know there was numerous ones that were late" (tr. 2134). When asked which condition report and for how long AEPCO was held up," Hill testified "I haven't had an opportunity to look at each condition report, and I can't tell you" (tr. 2134). This testimony is not helpful to AEPCO or the Board.

In Constructive Change C.14.G, AEPCO contended that certain condition reports were answered "NAR" (No Action Required) which later turned out to be wrong. It alleged AEPCO's action "to turn the matter around was added work." (Finding 230, 05-1 BCA at 162,304) Because AEPCO referred to no specific condition report to support its claim, we held that AEPCO had failed to establish, by a preponderance of the evidence, the basis for a constructive change. (05-1 BCA at 162,304) AEPCO contends that we ignored Potter's detailed testimony concerning Condition Report Nos. 27, 60 and 120 (motion at 18). In its motion for reconsideration, AEPCO listed Constructive Change C.14.G alongside C.14.F as examples of SUPSHIP Portsmouth's failure to cooperate, and referred us to pages 109 to 113 of its post-hearing entitlement brief (motion at 14). AEPCO's brief referred to Condition Report Nos. 27, 60 and 120 (app. entitlement br. at 111-113). While not specifically addressed in Constructive Change C.14.G, as we stated before, Condition Report Nos. 27, 60 and 120 were addressed as a part of Constructive Change C.14.H (*see* findings 235, 240 and 242, 05-1 BCA at 162,304-05).

In Constructive Change C.14.H, AEPCO alleged that the Navy's shipalt drawings were not work-proven and contained errors that often required AEPCO to seek clarification. AEPCO did acknowledge, however, that "[t]he Supervisor was generally responsive" (finding 233, 05-1 BCA at 162,304). After reviewing all of the condition reports AEPCO cited, we concluded that with a few borderline cases, "SUPSHIP Portsmouth responded quickly in most instances" (05-1 BCA at 162,305).

Because the evidence in the record does not support AEPCO's contention of the Navy's failure to cooperate, its motion for reconsideration relating to Constructive Change Nos. C.14.F, C.14.G, and C.14.H is denied.

Miscellaneous Constructive Change C.14.I – Government-Responsible Work Interferences

AEPCO cites Constructive Change C.14.I as another example of the Navy's failure to cooperate. This constructive change was based on its witness' testimony at the hearing that his work was (1) impeded by a deck contractor who was chipping up and putting down underlayment and deck tiles in the area adjacent to the quarterdeck, (2) slowed down by an electrical contractor using a conveyor to bring up its gear adjacent to the solid waste pulper, and (3) stopped in the fan room every time the captain had a meeting. As we have found, the specifics of these alleged incidents were rather sketchy. (Findings 246-249, 05-1 BCA at 162,306)

In our decision, we found that AEPCO had no exclusive right to the common areas of the vessel, and that AEPCO failed to prove how the amount it claimed bore any relationship to its work stoppages. We found also:

> Given that AEPCO submitted extensive contemporaneous condition reports in other situations where it believed its work was affected or delayed, we find the lack of any documentary evidence of the alleged interferences and the uncertainties of the witness' testimony render AEPCO's proof less than credible. . . .

(Findings 247, 05-1 BCA at 162,306) If the Navy is to be held responsible for these alleged interferences, it is not unfair to require AEPCO to show that the Navy was told about the alleged incidents at the time. Had that been done, the Navy could have done something to either eliminate or mitigate the interfering events. There is no evidence that the Navy was aware of these incidents that AEPCO brought up for the first time in its REA over a year later. This essentially left the Navy defenseless. Having considered AEPCO's motion as it pertains to Constructive Change C.14.I, it is denied.

IV. Motion For Reconsideration On The Basis Of Factual Errors

Constructive Change C.6[2] -- Issuance of Job Order No. 0089
Constructive Change C.10 – Demobilization/Mobilization for Ship Deployment

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[2] AEPCO's reference to Constructive Change C.5 was in error (motion at 15). The narrative on page 15 of its motion relates to Constructive Change C.6.

Constructive Change C.6 involved replacing the ship's main lube oil purifier. Because SUPSHIP Portsmouth did not actually have a replacement unit, it decided to overhaul the existing unit. Instead of issuing a change order under Job Order No. 0072, SUPSHIP Portsmouth decided to issue a RFP for the work. AEPCO bid and won the job under a separate contract – Job Order No. 0089. SUPSHIP Portsmouth established a "split availability" for the work covered by Job Order No. 0089: (1) 11 February through 8 March 2000 and (2) 14 April through 30 April 2000 through Modification No. 1B. (under Job Order No. 0089). (Findings 138-142, 05-1 BCA at 162,291-92).

As originally framed, AEPCO claimed "when the Government elected to increase the scope of work under Job Order 72 by the device of issuing growth work under another 'Job Order' for performance on the same ship concurrently with Job Order 72 work, a constructive change occurred" (finding 143, 05-1 BCA at 162,292). As to this issue, AEPCO provided no elaboration when Constructive Change C.6 was heard. Incomprehensibly, AEPCO sought to recover for providing hotel steam over a weekend under Job Order No. 0089 (finding 147, 05-1 BCA at 162,292-93). We denied Constructive Change C.6 because we did not believe adding new work by way of a separate job order (No. 0089) constituted a constructive change under Job Order No. 0072, and AEPCO had not explained why costs incurred in connection with another job order should be paid under Job Order No. 0072 (05-1 BCA at 162,293).

In Constructive Change C.10, AEPCO alleged that it was required to leave the ship before returning to finish its work because SUPSHIP Portsmouth established a "Split Availability," and when it resumed work on 14 April 2000, the remaining job order work was performed less efficiently (finding 162, 05-1 BCA at 162,295). AEPCO acknowledged that it was allowed access to the ship between 1 to 14 April 2000 to perform discrepancy corrections (finding 163, 05-1 BCA at 162,295). In our decision, we found that SUPSHIP Portsmouth did not establish a split availability from 14 to 30 April 2000 for Job Order No. 0072. Rather, that availability was established by a modification under Job Order No. 0089. We held that AEPCO was not entitled to recover demobilization and mobilization costs as a constructive change because AEPCO was performing corrective work and completing contract work during the 2-10 and 14-30 April 2000 availabilities. (05-1 BCA at 162,295-96)

In its motion for reconsideration, AEPCO tells us:

> Clearly the non-MFP work under Job Order 72 and the work under Job Order 89 were combined and deferred until the second availability was established. This is because the non-MFP work under Job Order 72 and the hotel steam work under Job Order 89 were overtaken by the Government's

> drive to require AEPCO to accelerate performance of the MFP ShipAlt. The establishment of the second availability to allow AEPCO to complete Job Order 72 and accomplish Job Order 89 unequivocally demonstrates this reality.
>
> In addition, the Opinion's conclusion that AEPCO was not entitled to compensation for the Job Order 72 demobilization and remobilization costs because AEPCO was performing corrective work is a non-sequitur. Opinion at 48. Regardless of whether AEPCO was performing other work, it still incurred the demobilization and remobilization costs at issue and the Board's conclusion does not address AEPCO's legal theory in support of this portion of its claim.

(Motion at 15)

In this case, no modification was issued establishing a split availability for MT. WHITNEY under Job Order No. 0072 (finding 264, 05-1 BCA at 162,308). After sea trials that took place on 30 March 2000 (finding 255, 05-1 BCA at 162,307), the vessel was made available to AEPCO during (1) 2-10 April 2000 (9 days), (2) 14-30 April 2000 (17 days), and (3) 4-6 May 2000 (3 days) (05-1 BCA at 162,324). The 14-30 April 2000 availability coincided with the split availability SUPSHIP Portsmouth gave AEPCO in connection with Job Order No. 0089 for it to overhaul the lube oil purifier (finding 262, 05-1 BCA at 162,308). Also, the work AEPCO performed during 4-6 May 2000 was attributable to its failure to order the E-10 valve until 3 May 2000 (finding 270, 05-1 BCA at 162,309).

It now appears clear that during the (1) 2-10 April 2000 and (2) 14-30 April 2000 availabilities AEPCO was completing (a) corrective work, (b) lube oil purifier overhaul required by Job Order No. 89, and (c) large solid waste pulper, metal/glass shredder shipalt and other contract work which had to be deferred when SUPSHIP Portsmouth accelerated AEPCO's work by imposing the PCD (findings 289, 290, 293, 05-1 BCA at 163,312). While AEPCO is not entitled to the cost of demobilization and mobilization in connection with (a) and (b) above, we believe it is entitled to such costs resulting from having to defer contract work to focus on the MFP to meet the PCD. We therefore modify our original decision concerning Constructive Change C.10 to this extent.[3]

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[3] AEPCO claimed $32,983 for Constructive Change C.10 (*see* Appendix A to app.'s quantum brief, page 42 of 60; finding 164, 05-1 BCA at 162,295). Since not all costs are recoverable, and AEPCO has not separated out what demobilization and mobilization costs were attributable solely to the performance of deferred contract work, we remand to the parties for negotiation the quantum of adjustment.

Constructive Change C.11 – Work Stoppages and Extra Work Due to Additional Cleaning Requirements

Under this constructive change, AEPCO was directed to clean the camel daily to prevent the metal shavings it generated from the waste pulper area from rusting the camel. In our decision, we held there was no constructive change because FAR 52.237-2, PROTECTION OF GOVERNMENT BUILDINGS, EQUIPMENT, AND VEGETATION (APR 1984), made a part of the job order, required AEPCO to use reasonable care to avoid damaging equipment on the government installation, and because Standard Item No. 009-06 required AEPCO to maintain cleanliness of the worksite including areas immediately under and adjacent to the work site. (05-1 BCA at 162,297)

AEPCO's motion again contends that the camel was not a part of the ship, and there was no way it could have anticipated the cleaning costs when it prepared its bid (motion at 16). In rendering our decision, we have considered these arguments. AEPCO has raised nothing new. Nor has it identified what factual error was made. *Local Contractors, Inc.*, ASBCA No. 37108, 92-1 BCA ¶ 24,693 (30-page motion for reconsideration denied because it reargues position raised earlier). Accordingly, AEPCO's motion, insofar as it relates to this constructive change, is denied.

Miscellaneous Constructive Change C.14.A – Ship's Force Fire Drill
Miscellaneous Constructive Change C.14.B – Hot Work Requests
Miscellaneous Constructive Change C.14.C – Incremental Release of Firemain Work
Miscellaneous Constructive Change C.14.F – Late Condition Report Responses
Miscellaneous Constructive Change C.14.G – Incorrect/Improper Condition Report Responses

AEPCO contends that we made factual errors in deciding Constructive Changes C.14.A, C.14.B, C.14.C, C.14.F, and C.14.G (motion at 16-18). We have addressed all contentions of factual error in connection with our discussions relating to AEPCO's allegation of lack of cooperation and interference on the Navy's part. As indicated above, we have found AEPCO's allegations lacking in merit and thus have not changed our decision.

V. Delay Analyses

On the issue of delay, we found that AEPCO was entitled to a 23-day time extension (due to Sequence No. 56G) based on an analysis by the Navy's scheduling expert (Cummings analysis), but that such time extension would run concurrently with the periods MT. WHITNEY was made available for AEPCO-responsible work (finding

306, 05-1 BCA at 162,314). AEPCO's motion contends that we "disregarded contemporaneous evidence supporting AEPCO's claim in favor of a conclusions [sic] contained within a fundamentally flawed after-the fact CPM analysis" (motion at 18).

In this case, the specification required AEPCO to comply with Standard Item No. 009-60 which required AEPCO to use a Critical Path Method (CPM) schedule "*as a means of planning, tracking, and coordinating the accomplishment of contract work"* (emphasis added) (finding 276, 05-1 BCA at 162,310). Standard Item No. 009-60 also required the CPM schedule be updated weekly to account for changes and progress (finding 275, 05-1 BCA at 162,310). AEPCO did not comply with Standard Item No. 009-60.

AEPCO reads our decision to say that its "failure to update its production schedule as required under Standard Item 009-60 *precluded* AEPCO from subsequently proving that its performance was delayed and disrupted by the Navy" (emphasis added) (motion at 18). Lest it be misunderstood, we did not say failure to comply with Standard Item No. 009-60 would *per se* preclude AEPCO from proving delay. What we found was that "AEPCO's failure to fully comply with Standard Item No. 009-60 left it with an inability to demonstrate what impact occurred as a result of the various Navy actions it now alleges to have occurred" (finding 281, 05-1 BCA at 162,311).

To justify its failure to comply with Standard Item No. 009-60, AEPCO argues in its motion that it nonetheless submitted "a production schedule in a Microsoft Project bar chart format," and that SUPSHIP Portsmouth's ship surveyor "received regular updates" (motion at 18-19). The bar chart AEPCO submitted on 12 January 2000 (finding 277, 05-1 BCA at 162,310) was not regularly updated (tr. 923). In any event, AEPCO did not submit any bar chart updates to prove its delay claim.

Without either CPM or bar chart updates, AEPCO had to resort to after-the-fact analyses based on In-Plant Availability Reports (IPARs). In our decision, we found AEPCO's IPAR analyses lacking for two reasons: first, the approach did not address how impacted items could affect other work items. Second, the analyses made no effort to separate out Navy-caused delays that had been foreclosed by bilateral modifications. (Finding 294, 05-1 BCA at 162,312)

In its motion, AEPCO repeats its argument that "there was virtually no interdependence among the items that ultimately controlled project completion and thus there was no basis for establishing logic ties between the individual items on the production schedule" (motion at 19). This argument seeks to convince us there was really no need for a CPM on this project. We note that Standard Item No. 009-60 provided that the factors in determining critical path include "*space limitations, manpower available, and the interface between Work Item activities"* (emphasis added)

(finding 276, 05-1 BCA at 162,310). Had AEPCO prepared a CPM, any lack of interdependence, not only in terms of the nature of the work, but also in terms of resource allocation, could have been persuasively demonstrated. Without it, all we had was AEPCO's unsupported argument. As for our observation that AEPCO's IPAR analyses did not address or separate out settled delays, it has no rejoinder.

Cummings' analysis, on the other hand, made a serious effort to construct a CPM network required by Standard Item No. 009-60 (*see* findings 300-302, 05-1 BCA at 162,313). While not perfect, the Cummings analysis incorporated all of the work items and the sequences (except inconsequential constructive changes) and produced a 23-day delay as a result of Sequence No. 56G (findings 302-306, 05-1 BCA at 162,313-14). The Board's 27 June 2002 pre-hearing order required the exchange of written expert testimony by no later than 4 November 2002. Cummings' CPM analysis was a part of the written expert testimony exchanged. If AEPCO did not agree with the analysis Cummings performed, it had ample time to run its own as-built CPM analysis prior to the hearing. It chose not to do so. This was what we meant when we found "AEPCO has not challenged the CPM methodology Cummings employed; it has presented no CPM analysis of its own" (finding 306, 05-1 BCA at 162,314).

Weighing the relative credibility of the parties' expert analyses is our task as fact-finders. In this case, we conclude Cummings' analysis is a more reliable reconstruction of the critical events of the MT. WHITNEY availability. Accordingly, AEPCO's motion for us to essentially reject Cummings' analysis and to accept instead its IPAR analyses is denied.

VI. Disruption Methodology

On the issue of disruption, we found that formal and constructive changes had minimal impact, and that AEPCO, not the Navy was responsible for the bulk of the loss of productivity experienced in performing Sequence No. 23G. We held:

> Because AEPCO has failed to establish a causal connection between the disruption factors or variables used in its methodology and the disruptive events that are the subject of its claim, and because AEPCO has failed to allocate its claim disruption costs between itself and the Navy, we hold that AEPCO is not entitled to recover any such costs.

(05-1 BCA at 162,326)

In moving for reconsideration, AEPCO says since it challenges (1) the requirement to perform RT, and (2) our conclusion that the Navy was not responsible for

the high incidents of weld rejection, we must reconsider our decision denying disruption damages as well. AEPCO also argues that in requiring a cause and effect relationship between the claimed changes and the disruption they caused, we have failed to follow our precedents such as *Coastal Dry Dock & Repair Corporation*, ASBCA No. 36754, 91-1 BCA ¶ 23,324 and *Triple "A" South*, ASBCA No. 46866, 94-3 BCA ¶ 27,194. (Motion at 22-23)

As indicated above, we have now concluded, on the basis of the *Southwest Marine* case, that AEPCO was not chargeable with notice of the RT requirement, and we have, accordingly, awarded an equitable adjustment of $29,228 plus markup, for the work. We are not persuaded, however, that the high rate of weld rejection was attributable to over-inspection on the part of the Navy. Thus, we remain of the view that AEPCO is not entitled to an equitable adjustment for any disruption that might have arisen out of the requirement to correct any rejected welds. As far as any disruption damages that might have arisen out of any formal and constructive changes (to which entitlement has been found) we have distinguished *Coastal Dry Dock* (*see* 05-1 BCA at 162,325-26), and will not further belabor the point here.

Triple "A" South, however, requires discussion. In *Triple "A" South*, the contractor was awarded a job order to overhaul the USS BAGLEY. Sometime during the overhaul, the contractor began adding "Estimated Contingency Delay Costs," to its change order proposals. The contingency factors, in different percentages, did not reflect a specific cause and effect relationship between the change orders issued and any resultant impact claimed. At the hearing, the contractor's evidence concerning the disruptive effect of changes on unchanged work consisted of theoretical discussions of the general subject of disruption in the shipbuilding and ship repair programs. Several Navy studies, not unlike the studies AEPCO used in this case, were used. The contractor also attempted to rely on a separate and unrelated understanding it reached with SUPSHIP San Diego for evaluating impact of change orders that would begin with three specific vessels, one of which was the USS TARAWA (referred to in the decision as the TARAWA Memorandum of Agreement (MOA)). The TARAWA MOA established a methodology for forward pricing change order impacts with ranges of specific factor percentages applying to each impact variable.

Triple "A" South held unless there was an applicable agreement to use impact variable-weighted factor methodology, such methodology was inappropriate for after-the-fact pricing of disruption costs because no causal relation between particular changes and their actual impact on other overhaul work was shown:

> Although TAS and SUPSHIP later agreed to use such a methodology for forward pricing impact costs during the TARAWA overhaul and upon the particular percentages

> assigned to specific impact variables for that purpose, the parties never agreed to use factors for retrospective pricing of disruption costs on the BAGLEY overhaul and the validity of those factor percentages for that purpose has not been demonstrated. Instead, we have found that the factor percentages used by appellant showed no causal relation between particular changes and their actual impact on other overhaul work and amounted essentially to a variation on the "total cost" method for computing damages. . . . Thus, we simply hold that appellant has failed to establish the appropriateness of applying its proposed factor percentages in this case.

Triple "A" South, supra, 94-3 BCA at 135,542.

While the parties were themselves free to use disruption factor percentages to forward price local and cumulative impact in resolving formal (directed) sequences, it became a burden of proof issue once litigation started. As a litigation issue, pricing local and cumulative impact by disruption factor percentages without regard to any causal connection between the percentages and the actual disruptive event simply does not satisfy the burden of proof that AEPCO, as the claimant, must carry by a preponderance of the evidence. *Triple "A" South, supra.*

DECISION

AEPCO's motion for reconsideration is granted to the extent indicated. Our original decision is modified to the extent indicated. In all other respects, the motion is denied.

Dated: 14 April 2005

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

(signatures continued)

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 Nos. 53366, 54044, Appeals of Advanced Engineering & Planning Corporation, Inc., rendered in conformance with the Board's Charter.

Dated:

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