ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Defense Supply Systems, Inc.	)	ASBCA No. 54494
	)	
Under Contract No. SP0760-02-C-6155	)	

APPEARANCE FOR THE APPELLANT: J. Douglas Scherling, Esq.
Colorado Springs, CO

APPEARANCE FOR THE GOVERNMENT: Vasso K. Monta, Esq.
Counsel
Defense Supply Center (DLA)
Columbus, OH

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal arises from the contracting officer's denial of a claim for additional compensation in the amount of $10,327 for costs allegedly incurred pursuant to two unilateral contract modifications. The government filed a motion for summary judgment which appellant opposed on the grounds that the government failed to identify undisputed material facts and legal authorities in support of its motion. Appellant requested that the Board consider imposing sanctions against the government and its counsel for filing a deficient and frivolous motion. The Board took the motion under advisement and subsequently held a full evidentiary hearing. The government's motion for summary judgment is denied as moot. Appellant's request for sanctions is also denied. Both entitlement and quantum are before us for decision.

FINDINGS OF FACT

1. On 2 July 2002, the Defense Supply Center Columbus awarded fixed price Contract No. SP0760-02-C-6155 to appellant Defense Supply Systems, Inc. (DSSI) for 34 units of a Dolly MK21-0 used by the military to carry torpedoes. The total price of the contract was $130,161. (R4, tab 2; tr. 1/120) The contract provided that first article testing was waived (R4, tab 2 at 11, 15). Delivery of the production units was required by
22 January 2003 (*id.* at 10).

2. The contract requirements for the manufacture and acceptance of the dolly were in Technical Specification PHST-141A, dated 1 March 2002, issued by the Naval

Sea Systems Command (R4, tab 1). Drawing No. 2644989 for the caster and Drawing No. 2644990 for the scissor jack, two of the components of the dolly, were part of the specifications[1] (R4, tab 1 at 2-3). These drawings listed suggested sources of supply (R4, tab 2 at 63-64).

3. Section 3.2 specified the performance characteristics of the dolly. When the dolly was examined in accordance with the provisions for first article testing and production quality inspection, it was required to comply with the fabrication and assembly requirements of the drawings and specifications. Section 3.2.1.2, "Static strength," specified that the dolly when load tested in accordance with the first article test requirement, "shall exhibit no visual evidence of permanent deformation" (R4, tab 1, § 3.2.1.2). The components also, when similarly load tested, "shall exhibit no visual evidence of permanent deformation" (*id.*).

4. Section 3.5.1 of the specifications provided in pertinent part:

> Subcomponent samples. When manufacturer supply sources differ from suggested sources listed on drawings 2644989 (Caster), 2644990 (Scissor Jack) . . . two samples of each shall be submitted for tensile yield testing with the first article.

(R4, tab 1 at 4)

5. The first article testing requirements in the specifications included a static overload test for the dolly of 2880 pounds for a period of two minutes (R4, tab 1, § 4.2.2). Similarly, tested separately, the caster was required to withstand a static tensile test of 1600 pounds for one minute and the scissor jack was required to withstand a static tensile test of 2400 pounds for two minutes (*id.*, § 4.3.3).

6. Section 4.3, which provided for production quality conformance inspection and testing, specified that each dolly was required to be tested in accordance with the first article static overload test (*id.*, § 4.3.2). The section stated in pertinent part:

> Unless otherwise specified in the contract or order, the contractor is responsible for the performance of all production quality conformance inspection requirements as specified herein. . . . *The Government reserves the right to perform any of the inspections set forth in this specification where such*

[1] The decision uses the term "components" for these items. The specifications provided that they were subcomponents (finding 5, *infra*).

> *inspections are deemed necessary to assure that supplier and services conform to prescribed requirements.*

(*Id.*, § 4.3.1; emphasis added.)

7. Inspection was to be provided at origin by the Defense Contract Management Command Denver (DCMA) designated as the authorized government inspector (*id.* at 1, 13). The contract stated that DLAD 52.246-9004, Product Verification Testing, applied with the following explanation:

> THIS CLAUSE IS A GOVERNMENT OPTION THAT CAN ONLY BE INVOKED UPON THE COGNIZANT CONTRACT ADMINISTRATION OFFICE NOTIFYING THE CONTRACTOR THAT PVT SAMPLES ARE TO BE SELECTED.

(*Id.* at 2) The Product Verification Testing (PVT) clause provides in relevant part:

> (b) The contractor is responsible for ensuring that supplies are manufactured, produced, and subjected to all tests required by applicable material specifications/drawings specified in the purchase description of the contract. Notwithstanding any other clause to the contrary, and/or in addition thereto, the Government reserves the right to conduct PVT to ascertain if any or all requirements of the purchase identification description contained elsewhere herein are met prior to final acceptance.
>
> (c) On any given contract, the Government may require PVT through a government designated testing laboratory on the contract or production lot at government expense. . . .
>
> . . . .
>
> (1) The PVT samples will be sent by the Government and at government expense, to a government-designated testing laboratory for product verification. . . .

(R4, tab 49 at 1)

8. The contract incorporated by reference FAR 52.246-2, INSPECTION OF SUPPLIES – FIXED PRICE (AUG 1996) (R4, tab 2 at 13).

9. The contract did not provide for provisional payments, and appellant was not contractually required to have any type of accounting system (tr. 1/95, 114, 2/224).

10. Mr. Jared Veteto, a co-owner of DSSI, was responsible for managing existing projects, bidding for new work, and appellant's accounting system (tr. 1/112-13). Mr. Jonathan Veteto, Jared Veteto's brother, was the other co-owner of DSSI. He had responsibility for sales and marketing. (Tr. 1/40) Mr. John Veteto, the father of Jared and Jonathan Veteto, was hired by appellant as a salaried half-time contract administrator to ensure compliance with the clauses in appellant's contracts and develop policies and procedures for handling government contract issues (tr. 1/31-32, 36-37).

11. When DCMA conducted a preliminary visual inspection of appellant's production units, it noticed that the casters and scissor jacks were not from the suggested suppliers, some parts were out of tolerance, and when the load test was demonstrated, the dolly appeared to bow out. Jared Veteto thought the DCMA representative did not understand the technical requirements of the contract and disagreed with the drawing requirement for suggested sources of supply. Appellant sent a request to Ms. Carla J. Smock, the contracting officer, that the Navy conduct the inspection instead of the local DCMA and offered to pay shipping costs. On 10 December 2002, the contracting officer denied appellant's request apparently because the contracting officer wanted DCMA involved in the inspection and acceptance procedure. She placed appellant on notice that the contract could be in jeopardy of a termination for default. (R4, tabs 10, 20; tr. 1/117, 123, 2/38-39, 109, 121-22, 128) On 11 December 2002, DCMA issued a corrective action request because appellant had not purchased the casters and scissor jacks from the suggested sources of supply. DCMA required appellant to submit corrective action no later than 25 December 2002. (R4, tab 13; tr. 2/39)

12. On 19 December 2002, appellant submitted waiver requests to DCMA. Appellant requested acceptance of the scissor jack it manufactured stating that it had previously been approved in March 2001. Appellant requested acceptance of the caster from a supplier other than the suggested source of supply because it met the requirements of the specification. Appellant stated that the Navy had previously weight tested the dolly unit with the components installed and that it had tested the scissor jack both as a part of and separately from the dolly unit. Appellant's prior contracts did not require first article testing. (R4, tab 15; tr. 2/36)

13. As of the end of December 2002, appellant had completed the production of all units required under the contract. The government was aware of the completion. (Stipulated Facts, dated 13 January 2005 (Stip.), ¶ 5; tr. 1/116)

14. On 10 January 2003, DCMA forwarded the requests for waiver it had approved to the contracting officer (R4, tab 15). Ms. Smock discussed the requests with the Navy. The Navy wanted the caster, scissor jack and a complete dolly subjected to the load tests. Ms. Smock advised appellant that the items needed to be tested in accordance with the first article testing requirements before she could approve the waiver requests and accept the dolly units. Jared Veteto told the contracting officer that the contract waived first article testing and all units met the contract test requirements (tr. 1/120-22, 2/37). There were numerous phone conversations between Ms. Smock and Jared Veteto in which she told him she needed to have the parts tested, and he told her appellant was a "waived source" (tr. 2/37). The government understood that appellant was taking the position that there should be no problem accepting the parts because they had passed first article testing on previous contracts. By letter dated 17 March 2003, Ms. Smock noted that the specification had been amended and directed appellant to proceed with "testing as called out in PHST-141A as required in the Contract" (R4, tab 17; tr. 1/59-60, 2/143-44). Appellant responded that per the contract appellant was "a waived source" and asked which testing per PHST-141A it would be required to complete (R4, tab 18). Ms. Smock did not say that she wanted appellant to remanufacture a new first article. (R4, tab 22; tr. 1/124, 2/41-44, 50, 59, 124-29)

15. On 3 April 2003, Jared Veteto sent an email message to DCMA that the estimated cost of the Navy's intention to impose a first article test of the two components was $18,000 and three months of time. Appellant offered to conduct the tests at its facility in the interest of saving the government time and money. Appellant stated it would have the tests designed by an outside engineer to duplicate the loads in the specifications and the tests could be witnessed by the government. The government rejected the offer. (R4, tab 23; tr. 1/125)

16. On 3 April 2003, the contracting officer issued unilateral Modification No. P00003 pursuant to the Changes clause (R4, tab 24; Stip. ¶ 1).[2] The modification included the following special language:

> FIRST ARTICLE TEST REQUIREMENTS FOR TESTING IS [sic] HEREBY INCORPORATED BECAUSE PARTS CANNOT BE ACCEPTED VIA SOURCE INSPECTION REQUIREMENTS. . . .

[2] The contracting officer used Standard Form 30, a form used by the government for contract modifications, and stated that the changes in the change order were made pursuant to FAR 52.243-1, which is the standard Changes – Fixed-Price contract clause.

(R4, tab 24 at 2) Ms. Smock included this unique language because appellant had already manufactured all the material. She issued the modification to force the contractor to submit the parts to the Navy for testing. (Tr. 1/57, 2/128-29) The modification added by full text FAR 52.209-4, FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (SEP 1989) and FAR 52.209-9C11, ADDITIONAL REQUIREMENTS – FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (JAN 2001) DSCC. The modification provided an exception to the standard clause requirement that DCMA first inspect the first article for compliance with specification requirements since it was known that the parts were nonconforming. The modification stated that the submission was "NECESSARY TO FACILITATE CONFORMANCE TO TEST SPEC PHST-141A WHICH ALLOWS FOR TESTING OF ALL NON-APPROVED SOURCES" (R4, tab 24 at 2). The modification required delivery on 1 May 2003, 30 days from the effective date of the modification. The modification changed the delivery date for all the production quantity to 16 June 2003. The modification threatened a termination for default for failure to comply by 1 May 2003. (*Id.*)

17. Appellant interpreted the modification as a change order that required manufacture of a preproduction sample, which would be a new first article, for testing and remanufacture of the entire production quantity. Jared Veteto understood that appellant was to "do exactly as directed" and "follow it [the modification] to the letter" (tr. 2/68). Appellant did not contact the contracting officer about the meaning of the modification, but asked legal counsel for advice. When J. Douglas Scherling, Esquire was unavailable, Jonathan Veteto telephoned Mr. J. Hatcher Graham, a government contracts attorney in Warner Robins, Georgia. Mr. Graham spent time reviewing documents, researching the issues, and advising appellant about the modification. (Ex. A-5 at 4; tr. 1/43, 2/12-13) Mr. Scherling was retained as counsel to represent appellant (ex. A-5 at 1). Appellant wanted assurance from counsel that its interpretation was correct. Since Jared Veteto was unable to communicate effectively with the contracting officer, appellant also wanted counsel to ameliorate the situation and get the issues resolved so that the units could be delivered and payment received. (Tr. 2/12, 75, 80-81)

18. By letter, dated 7 April 2003, Mr. Scherling advised Ms. Smock of appellant's interpretation of Modification No. P00003 (R4, tab 25; tr. 2/80). The letter stated that the delivery schedule was unconscionable and the threat of termination for default an abuse of discretion. Appellant asserted its right to an equitable adjustment pursuant to FAR 52.243.1(c) and (d) for the resulting, in Mr. Scherling's terms, "drastic" increase in the costs and time for performance. (R4, tab 25) The letter stated the increase in costs as more than $150,000 and described in detail the bases for the increase (*id.*). The wording of the letter led Ms. Smock to believe appellant intended to file a claim (tr. 1/70). She referred the letter to her legal counsel (tr. 2/130).

19. Counsel advised appellant to record costs and keep track of its efforts related to Modification No. P00003 (tr. 1/125, 2/25). Jared Veteto noted contemporaneously the dates and number of hours spent on a DSSI Daily Time Record form without reference to specific tasks during the period 2 – 22 April 2003, but noted his activities generally, *e.g.*, writing letters and emails (ex. A-4 at 2; tr. 2/7). Jonathan Veteto also noted the dates and number of hours spent on various tasks on a time sheet (ex. A-4 at 4; tr. 1/43). John Veteto researched the standard contract clauses, authority of the contracting officer to issue the modification, and contacted counsel (tr. 1/32). The only record of his time is a total number of hours written on Jared Veteto's timesheet and a typed spread sheet that has been labeled "Time Sheet" (ex. A-4 at 1). All the Vetetos spent time in phone conversations or meetings with counsel (ex. A-4).

20. Ms. Vasso K. Monta, government counsel, after discussions with Mr. Scherling, responded to appellant in a letter, dated 11 April 2003, that it was never the intent of the government that appellant manufacture new units. The letter directed that appellant not proceed with the manufacture of new units. (R4, tab 26) Appellant did not produce a first article pursuant to Modification No. P00003 (stip. ¶ 6).

21. Mr. Scherling sent a follow-up letter, dated 21 April 2003, to the government that took the position that the government could not unilaterally change testing and quality requirements pursuant to the Changes clause but could only effect a change in these requirements through a bilateral modification (R4, tab 27; tr. 1/34).

22. On 21 April 2003, discussion between counsel resolved the issue. The government would cancel Modification No. P00003, provided appellant agreed to provide an assembled unit and the caster and scissor jack components to the Navy for testing. Appellant would provide the items for testing as directed by the contracting officer in writing. (R4, tabs 28-29; tr. 2/81, 164)

23. On 22 April 2003, the contracting officer issued unilateral Modification No. P00004 pursuant to the Changes clause (R4, tab 30; stip. ¶ 2). The purpose of the modification was to partially rescind Modification No. P00003 and delete the first article approval clauses (R4, tab 30). The contracting officer's transmittal letter to appellant invoked PVT pursuant to DLAD 52.246-9004 (finding 7, *supra*; stip. ¶ 4). Since the PVT clause applies to finished products, the contracting officer knew that she could not use it to force a contractor to send in component parts for testing (tr. 2/131). The contracting officer's written order directed appellant to commercially package and ship an assembled and completed unit and the two component parts to the Naval Surface Warfare Center for government testing (R4, tab 30; stip. ¶ 3). Jared Veteto noted on a DSSI Daily Time Record form the number of hours he spent to disassemble, crate and ship the material on 22 and 23 April 2003 (exs. A-3 at 1, A-4 at 3).

24. Appellant responded to Ms. Smock on 22 April 2003 that the costs of PVT would include disassembly, packaging, shipping, and assembly and notified the government that costs pertaining to Modification No. P00003, which then totaled 48.75 hours of internal administrative time and unknown outside counsel costs, would be collected and presented to the government for payment (R4, tab 31). On 7 May 2003, appellant submitted a "claim" by fax for costs associated with Modification No. P00003 in the amount of $5,925, including $4,800 for internal administrative costs and $1,125 in legal fees (R4, tab 32; tr. 1/109-10). On 3 June 2003, appellant requested a contracting officer's final decision (R4, tab 34).

25. On 4 June 2003, the contracting officer sent appellant the PVT test report notifying it of six minor deficiencies and one major deficiency involving inadequacy of the scissor jack (R4, tab 35; tr. 2/30, 132).

26. By letter dated 30 June 2003, the contracting officer denied appellant's claim on the grounds that appellant did not perform any work towards manufacture of a first article and that the costs claimed are ordinary costs of doing business and not the result of performing changed work. She advised appellant that she was requesting the Defense Contract Audit Agency (DCAA) perform an audit to verify appellant's costs and accounting procedures to ensure that the costs were ordinary costs of doing business before she issued a final decision. (R4, tab 37)

27. On 10 July 2003, Mr. Roland Wick, DCAA auditor, requested that appellant provide specific information to him to support the claimed costs (R4, tab 38). On the same date appellant retained Ms. Betsy Ford, an accountant formerly employed by DCAA as a supervisory auditor, to compile the requested supporting documentation. She created overhead and G&A (general and administrative) rates on the basis of appellant's trial balance for the period ending 31 July 2003. She segregated direct and indirect costs by entering the amount of $1,608.39 as a line item "Direct Labor – 6155 – REA" on the trial balance compiled from appellant's records and removing the amount from the indirect expense pool covering other work as indirect expenses. (R4, tab 44; ex. A-3 at 4; tr. 1/95, 98, 103, 105, 108)

28. On 24 July 2003, the contracting officer issued Modification No. P00005 to accept appellant's corrective action for acceptance of the production units with a changed delivery schedule. For this procurement only the government accepted the qualification testing of the scissor jack assembly and approved appellant's waiver request for supply of the casters. (R4, tabs 40-41)

29. On 8 September 2003, Jonathan Veteto forwarded supporting data for the claim to DCAA preliminary to Mr. Wick's scheduled visit to appellant's facility on 10 September 2003 to conduct the DCAA audit. The data included a revised claim and

the appellant's trial balance as of 31 July 2003. Mr. Wick considered the submission a new claim because of the difference in costs claimed and advised appellant to submit it to the contracting officer. (R4, tab 44; tr. 2/172, 213)

30. On 11 September 2003, appellant forwarded the revised claim, entitled "Defense Supply Revised Request for Equitable Adjustment – 6155 as of 09/08/03," in the amount of $14,039.73 to the contracting officer with supporting data that included spreadsheets of the internal administrative time and activity performed and appellant's trial balance (R4, tabs 44, 46; tr. 1/46). The cost categories of appellant's revised claim were:

Direct Labor	$1,608.39	
Labor Overhead @ 219 %	3,521.68	
ODC Expenses	1,664.02	
SUBTOTAL		6,794.09
G&A @ 87.9 %	5,969.30	
SUBTOTAL		12,763.39
Profit @ 10 %	1,276.34	
TOTAL PRICE		$14,039.73

(R4, tab 44 at 4) In response to a request for further information, appellant advised the contracting officer that it was claiming the time and expense for disputing the cancelled Modification No. P00003 that required first article testing and the time and expense for packaging and shipping the PVT samples (R4, tabs 45-46).

31. The subject of the DCAA Audit Report, dated 29 September 2003, was appellant's original equitable adjustment claim of $5,925. DCAA questioned the total amount of claimed costs because appellant did not provide any basis for the costs. According to the report, DCAA requested but did not receive time cards, rates of compensation for the employees from payroll records, the job cost ledger, or any other accounting records. The report noted that appellant had prepared a revised claim because the basis for the current claimed costs was outdated. (R4, tab 42) In early September 2003, DCAA had received timesheets for the Vetetos, but Mr. Wick did not consider them contemporaneously made, verifiable, or reliable (tr. 2/191-92).

32. The supporting documentation for the direct labor costs of $1,608.39 in appellant's revised claim includes undated[3] timesheets and spreadsheets for each of the Vetetos showing 37.75 hours for Jared Veteto, 10 hours for John Veteto, and 8 hours for Jonathan Veteto. Each of the Vetetos was paid a salary of $60,000. Appellant calculated its direct labor claim at an hourly rate of $28.85. This rate represents the hourly

[3] The timesheets do not bear a date although entries show the month and day but not the year the activity took place.

equivalent of a $60,000 annual salary divided by a man year of 2080 hours. The claim is for $1,089.09 for Jared Veteto, $288.50 for John Veteto, and $230.80 for Jonathan Veteto. (Ex. A-3 at 4, 12; tr. 1/35, 44, 2/7-9, 25) Of the total 37.75 hours recorded by Jared Veteto, seven hours were claimed for PVT packaging and shipping (ex. A-3 at 1, A-4 at 2-3). The supporting documentation for other direct expenses (ODC) of $1,664.02 included invoices and cancelled checks for legal fees paid to Mr. Scherling in the amount of $1,181.25 and to Mr. Graham in the amount of $360. Mr. Scherling's services were for research, phone conversations, writing letters, and meetings during the period 7-23 April 2003. (Ex. A-5 at 3-6). The ODC expenses also included Federal Express charges evidenced by copies of a receipt, dated 23 April 2003, and appellant's check in the amount of $264.02[4] (ex. A-6; tr. 2/203).

33. On 10 November 2003, the contracting officer issued a final decision denying appellant's claim except for the $264 costs of shipping the PVT samples to the laboratory. The bases for the denial were that no additional work was performed in the manufacture of the contract items than was originally included in the scope of the contract and the claim for administrative time and legal costs was unwarranted (R4, tab 48; tr. 1/76-77). The contracting officer initially wanted to wait to pay the $264 because of appellant's claim, but submitted an authorization for payment after the government's answer in the appeal was filed on the advice of government counsel. There is no record that payment has been made. (Tr. 1/74-75, 91, 2/20, 134)

34. Appellant filed this timely appeal.

35. At government counsel's request, Mr. Wick reviewed appellant's timekeeping procedures for 2003. The purpose of the audit, as stated in the DCAA report, dated 27 October 2004, was:

> . . . to determine if (i) the accounting system had a timekeeping system that identified employees' labor by intermediate or final cost objectives (contracts) and (ii) if DSSI had a labor distribution system that charged direct and indirect labor to the appropriate cost objectives.

(Ex. G-2 at 2) Appellant did not have a timekeeping system that required employees to record their efforts on a regular, consistent basis on official time cards or a labor distribution system that identified costs to specific cost objectives. There were no job cost records, labor distribution reports, or policies governing labor. As a result Mr. Wick considered the transfer of administrative labor costs in the amount of $1,608.39 as a

[4] The parties have offered no explanation for the discrepancy between the total of $1,805.27 for these items and the amount of $1,664.02 claimed.

direct charge to the contract from indirect costs "artificial" and no more than an estimate taken from the trial balance (tr. 2/176, 196). He also found no indication that the claimed administrative labor costs represented increased costs on the contract because the salaried employees were paid as G&A no matter how many hours they worked (tr. 2/177).

36. Appellant has an undated written policy for accounting treatment of direct and indirect costs that provides that routine contract administration is an indirect cost, but contract administration required to support a change order is not routine contract administration, and the costs thereof will be specifically identifiable as direct costs to the contract (ex. A-4 at 4).

37. At the hearing Ms. Ford, after review of calculations made by Mr. Wick, corrected appellant's rates in the revised claim. The overhead rate was changed to 214 %, and the G&A rate calculated by Mr. Wick before the hearing was accepted by appellant. Appellant offered to recalculate the amount of its revised claim. (Ex. G-5; tr. 1/101-02)

38. At the hearing Mr. Wick testified with respect to errors in appellant's financial backup that changed certain calculations he made before the hearing. The correct rate for appellant's Labor Overhead remained 214 %. He changed the rate for G&A to 39.85 %. (Ex. G-6; tr. 2/200-02). Appellant has accepted these rates and revised the amount of its claim accordingly to $10,327 (app. br. at 7, 12, 17; tr. 1/102).

DECISION

Appellant claims that Modifications Nos. P00003 and P00004 constituted changes that entitle it to an equitable adjustment in the contract price for costs incurred to discuss, address and research the change and the contracting officer's threat of a default termination. Appellant asserts that it incurred increased direct costs to perform the work required under the contract as changed by Modification No. P00003 (app. br. at 12). Appellant further claims that the government's invocation of the PVT clause was a change that entitles it to an equitable adjustment for costs incurred to package and ship one dolly unit and component parts or that it is entitled to compensation for these costs as costs of compliance under the PVT clause. Appellant argues that the issuance of Modification No. P00003 as a change and the withholding of payment of the shipping costs associated with the PVT requirements because appellant intended to appeal denial of the claim constituted an abuse of discretion by the contracting officer.

The government argues that appellant is not entitled to the costs it has claimed because Modification No. P00003 did not effect a change to the contract and there is no entitlement to costs for administrative time that were indirect costs already compensated for and considered in the contract price. The government submits that appellant is not

entitled to PVT costs other than the $264 allowed by the contracting officer in the final decision because appellant has not sufficiently itemized the time and expense of packaging and, as administrative labor costs, they were also indirect costs that are not compensable. The government argues that appellant is not entitled to recover attorney costs because appellant incurred them to set the stage for filing a claim. The government also argues that the appeal should be denied because appellant has failed to prove an abuse of discretion.

To receive an equitable adjustment for changed work, a contractor must show that it incurred costs as a result of the change. Unless there is an increase in the contractor's cost of performing the contract work, the contractor is not entitled to receive an equitable adjustment. *B.V. Construction, Inc.*, ASBCA Nos. 47766, 49337, 50553, 04-1 BCA ¶ 32,604 at 161,358; *Lectro Magnetics, Inc.*, ASBCA No. 15971, 73-2 BCA ¶ 10,112 at 47,512. Under the terms of the contract the government had the right to test the production units for acceptance under the Inspection clause and used the modification to specify that the testing would be in accordance with the first article tests in the Technical Specification PHST-141A. The parties dispute whether Modification No. P00003 constituted a change. Appellant argues that it incorporated first article testing requirements back into the contract and relies on the parties' stipulation that it was issued pursuant to the Changes clause. The government submits that it was an attempt to have appellant comply with requirements that were already in the contract. We interpret Modification No. P00003 to require in accordance with the terms of the contract testing of a completed production unit and the two components which were not suggested sources of supply (findings 4, 6). The modification did not add any new tests or change any of the testing requirements specified in the contract. The modification also did not require manufacture of a new first article, but included special language to provide that the sample was to be from the manufactured units. Appellant was not required to perform changed work as a result of the modification. Appellant engaged in research and discussions of the modification, but those activities were not the required result of the issuance of the modification nor were they related to performance of changed contract work. A contractor who performs tasks at its own initiative is not entitled to an equitable adjustment. *Metric Constructors, Inc.*, ASBCA No. 46279, 94-1 BCA ¶ 26,532 at 132,058.

Similarly, the government was entitled to invoke the PVT clause for government testing to ensure acceptance of the completed units under the Inspection clause, and its written direction to package and ship a completed unit would not constitute a change. The directive also covered testing of the component parts, however, and thus constituted a change. Appellant is entitled to reimbursement of increased direct costs incurred to ship the samples and component parts resulting from the written change directive.

There is evidence of the amount of the shipping costs that was an additional incurred cost for PVT, but not the costs of disassembly and packaging claimed as seven hours of Jared Veteto's time (finding 32). The transfer of administrative labor costs from indirect costs to direct costs for purposes of the claim is without support in appellant's accounting records. Appellant did not have an established accounting system that involved timekeeping procedures and a labor distribution system that classified costs by cost objective on a regular, consistent basis. Costs incurred for the same purpose in like circumstances cannot be classified as both direct and indirect. *See* FAR 31.202 and 31.203. Appellant cannot recover administrative labor costs to package and ship the PVT samples for these reasons. Appellant is entitled to G&A at the rate of 39.85 percent and profit at the rate of ten percent on the amount of shipping costs we have found compensable, or the total amount of $406.15.[5]

In determining whether legal costs are compensable, the objective reason why the contractor incurred the cost is to be evaluated. When a contractor has incurred costs for the genuine purpose of materially furthering the negotiation process, such cost should normally be a contract administration cost even if negotiation fails and a CDA claim is later submitted. *American Mechanical, Inc.,* ASBCA No. 52033, 03-1 BCA ¶ 32,134 at 158,894; *Grumman Aerospace Corporation (on behalf of Rohr Corporation),* ASBCA No. 50090, 01-1 BCA ¶ 31,316 at 154,674, *aff'd,* 34 Fed. Appx. 710 (Fed. Cir. 2002). On the other hand, if the contractor's underlying purpose for incurring the cost is to promote the prosecution of a CDA claim against the government, then such cost is not compensable. Appellant argues that appellant retained counsel to avoid having to file a claim, prevent the adverse impact a requirement for first article testing would have on its operations, and resolve the issues that were precluding delivery and payment of the completed production units (app. reply br. at 8). The government maintains that the costs were incurred in furtherance of the prosecution of a claim (gov't br. at 19). After considerable discussion about testing the completed units before waivers could be granted and the production units could be accepted, the contracting officer issued a contract modification with the intention of obtaining appellant's cooperation in shipping units to the Navy for testing. Appellant incurred legal costs not in furtherance of performance of the contract or cooperative discussion with the contracting officer, but in pursuit of its interpretation that the contract did not provide for testing as specified for first article testing. Appellant recorded its efforts for the purpose of documenting the claim it intended to submit. The objective reason that appellant incurred the attorney costs was not to resolve issues of contract administration but to be prepared for claims litigation. Appellant is not entitled to compensation for the legal costs it incurred and paid.

[5] (264.02 x 39.85 % = 105.21 + 264.02 = 369.23 x 10 % = 36.92 + 369.23 = 406.15)

Appellant's arguments that the contracting officer's actions were an abuse of discretion are without merit. The contracting officer was unable to obtain appellant's cooperation to accomplish the acceptance testing due to objections raised in terms of first article testing and attempted to meet the objections by the issuance of Modification No. P00003 (findings 14, 16). We do not consider that the action taken was an improper "tool" to "force" contractor compliance or a "ruse" that somehow deceived the contractor as appellant has alleged (app. br. at 7, 15; app. reply br. at 10). Appellant has also asserted that the government had no reasonable basis to withhold payment of shipping costs. It was not improper to delay payment pending prosecution of this appeal since our proceedings are *de novo*.

Appellant is entitled to an equitable adjustment in the amount of $406.15 plus interest from 7 May 2003, the date the government received appellant's claim, in accordance with the Contract Disputes Act, 41 U.S.C. § 611. The appeal is otherwise denied.

Dated: 28 July 2005

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54494, Appeal of Defense Supply Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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