

COATES INDUSTRIAL PIPING, INC.

CONTRACT NO. V660C-597

VABCA-5412

VA MEDICAL CENTER
SALT LAKE CITY, UTAH

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OPINION BY ADMINISTRATIVE JUDGE THOMAS

On November 12, 1992, the Department of Veterans Affairs (VA), awarded Contract No. V660C-597 to Coates Industrial Piping, Inc., (Coates or Contractor) to upgrade the boilers for maximum output and to replace the incinerator at the VA Medical Center, Salt Lake City, Utah (VAMC Salt Lake City). Coates alleges that it incurred extended overhead costs limited to the office trailer, the parts trailer pickup, and supervision costs from May 8, 1994, to January 15, 1995, as a result of the VA's failure to anticipate and prepare for the State of Utah's permitting process for the incinerator, boilers, LP tanks, and underground gasoline and diesel tanks. Coates argues that: (1) the VA failed to anticipate and prepare for the problems and delays associated with these items; (2) the project was impacted as a result; and (3) Coates was consequently required to remain on the job and incur additional field office and supervision expenses. Appellant seeks \$39,063 in extended overhead costs. The VA acknowledges that the contract completion date was extended, however the VA maintains that the extension of the completion date does not entitle Appellant to additional compensation. The VA argues that Appellant has failed to meet its burden of proof, and that Coates has already been compensated for performing the change order work by supplemental agreements. In addition, the VA argues that Coates cannot recover under the Contract Supplement to the Changes Clause which limits the amount of overhead that Appellant can receive on the changed work. A hearing was held in Salt Lake City, Utah. The record consists of the Complaint, Answer, Appeal File (R4, tabs 1 to 56), Appellant's Rule 4 File Supplement (R4 Supp, tabs 500 to 567), Respondent's Exhibits (Exh. G1 to G11), Appellant's Exhibits (Exh. A1 to A26), a hearing transcript (Tr. 1-228) together with post hearing briefs filed by the parties.

FINDINGS OF FACT

On or about August 24, 1992, Respondent issued an IFB entitled "Upgrade Boilers for Maximum Output", Project No. 91-101 and "Replace Incinerator", Project No. 91-106, at the VAMC Salt Lake City. (Rule 4, tab 1). The Project titles were wrong as the boilers were being replaced and the incinerator was being upgraded. The projects included general demolition and construction, electrical, piping, equipment, replacement and upgrades, site work, including asphalt and concrete, and excavation as required to replace

existing boilers and to upgrade an existing incinerator. The Contract was to be performed in five phases, each to begin after the previous phase was completed. The plans contemplated replacement of three natural gas heating boilers and refurbishment of a 20-year old medical waste incinerator. (Tr. 13, 114; R4, tab 1) The contractor was also to install a back-up liquid propane (LP) fuel system for the boilers. (Tr. 1415-18)

Mr. Ralph Coates, a principal in the company, prepared Coates' bid which was submitted on September 24, 1992. (Tr. 14) On November 12, the VA accepted the bid and awarded Contract No. V660C-597 to Coates in the amount of \$3,478,739. (Tr. 14; R4, tabs 1, 2) The VA issued the Notice to Proceed on November 23, 1992 establishing a completion date of May 7, 1994. (Tr. 32; R4, tab 6) Mr. Coates was also the project manager throughout the duration of the Contract. (Tr. 13)

Gary D. Moore was the Contracting Officer (CO) responsible for the projects from the time the solicitation was issued until March of 1993. (Tr. 135) Pamela McGuire was the CO from March of 1993 until November of 1993. (Tr. 136) Brenda Alverson became the CO in November of 1993 and is currently the responsible CO. (Tr. 180) Ray Ransdell was the Contracting Officer's Technical Representative ("COTR"). (Tr. 125) Brian McClung was the supervisor over the maintenance and operations of the boilers and incinerators. (Tr. 205)

Coates prepared an original schedule for completing the work on the Contract. (Tr. 15; R4 Supp, tab 6) The contract provided for liquidated damages if Coates did not complete the work of each phase by its scheduled time. (Tr. 15)

Phase 1 involved dismantling the existing incinerator building, constructing a new incinerator building, and installing a refurbished incinerator. (Tr. 16) Phase 1 was to be completed by June 1, 1993. (Tr. 16)

Phase 2 was the installation of a new boiler in a temporary location inside the incinerator building so that it could be used as one of the two operating boilers during the course of the project. (Tr. 16) Phase 2 was to be completed by July 31, 1993. (Tr. 16)

Phase 3 was the installation of a second boiler in a permanent location inside the boiler building which was to be completed by September 29, 1993. Phase 4 included the installing and bringing online of the third boiler in its final location with completion scheduled for no later than January 27, 1994. Phase 5 provided for moving the first boiler from its temporary location into its final position, bringing it online, closing out the project, and completing any punch list items by May 7, 1994. (Tr. 16-17)

The solicitation included, at Section 1.49, General Conditions, FAR Clause 52.243-04, the Changes Clause (AUG 1987). (R4, tab 1) In addition, the solicitation included the Veterans Affairs Acquisition Regulation (VAAR) Changes Supplement, (for changes costing \$500,000 or less) (June 1987) (VAAR 852.236-88), which specifically limits the permissible amounts of overhead and profit on changes as follows:

Allowances not to exceed 10 percent each for overhead and profit for the party performing the work will be

based on the value of labor, material, and use of construction equipment required to accomplish the changes. As the value of the change increases, a declining scale will be used in negotiating the percentage of overhead and profit. Allowable percentages on changes will not exceed the following: 10 percent overhead and 10 percent profit on the first \$20,000; 7-1/2 percent overhead and 7-1/2 percent profit on the next \$30,000; 5 percent overhead and 5 percent profit on balance over \$50,000. Profit shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs.

(e) The prime contractor's or upper-tier subcontractor's fee on work performed by lower-tier subcontractors will be based on the next increased cost to the prime contractor or upper-tier subcontractor, as applicable. Allowable fee on changes will not exceed the following: 10 percent fee on the first \$20,000; 7-1/2 percent fee on the next \$30,000; and 5 percent fee on balance over \$50,000.

The Changes-Supplement (for changes costing \$500,000 or less) states:

(j) Overhead and contractor's fee percentages shall be considered to include . . . field and office supervisors and assistants, . . . incidental job burdens, and general home office expenses and no separate allowance shall be made therefor.

General Conditions, Section 1.52, included FAR Clause 52.248.03, Value Engineering – Construction (MAR 1989), which states, in pertinent part:

(e) Government action. (1) The Contracting Officer shall notify the Contractor of the status of the VECP within 45 calendar days after the contracting office receives it. If additional time is required, the Contracting Officer shall notify the Contractor within the 45-day period and provide the reason for the delay and the expected date of the decision. The government will process VECP's expeditiously; however, it shall not be liable for any delay in acting upon a VECP.

The specifications at Section 11175, Incinerator Burner and Burner Control Upgrading Refractor Replacement required that all work on the incinerator, a Joy Systems model, be performed by either Joy Energy Systems, Inc., or its authorized representative. (R4, tab 1, Section 11175.

The solicitation also included the standard Suspension of Work Clause, FAR 52.212-2.

Before submitting a bid, Mr. Coates participated in a pre-bid walk-through on the projects. The VA did not indicate that any permits would be needed for the projects. In reviewing the Contract documents, Mr. Coates did not encounter any engineering effort required to prepare or obtain permits for the incinerator or boiler work. In the initial project schedule reviewed between Coates and the VA, no requirement for permitting was ever discussed or included as a project schedule item. (Tr. 35)

Coates testifies that he was led to believe that the VA did not need to obtain State approval for work on either the boilers or the incinerator. Changes were to be made only to the incinerator while more efficient and environmentally acceptable boilers were replacing the existing boilers. Coates began the project with this understanding which, he said, had been conveyed by the VA in its documents and interactions. (Tr. 34)

The Contract documents required that Coates engage a single vendor, Joy Energy System Inc. (Joy), or its authorized representative, to refurbish the VA incinerator. (Tr. 29, 164) Coates contacted Joy prior to its bid and requested a proposal for that particular task. (Tr. 29)

On September 24, 1992, approximately one hour before the bids were due, Coates received a telephone call from FM Systems, Inc. Coates mistakenly believed FM to be a representative of Joy, and used the FM number in its bid. (Tr. 29) Two hours after the bid deadline, Coates received a different proposal directly from Joy. (Tr. 29-30) The FM proposal was non-responsive to the project specifications since it proposed replacing rather than refurbishing the old incinerator. (Tr. 30; R4, tab 4, R4 Supp, tab 3) Coates alleges that the belated Joy proposal was also non-responsive, since it specified a different refractory and required the refurbishment work to be done off-site. (Tr. 30; R4, tab 4) The price of Joy's proposal was substantially more than the new incinerator offered by FM. (Tr. 30, 31)

Coates waited until November 13, 1992, the day after it was awarded the Contract, to advise the VA of the Joy/FM situation. (Tr. 29, 31; R4 Supp, tab 501) By letter dated November 13, 1992, Coates notified CO Moore that it did not have an acceptable proposal from Joy Systems to perform the incinerator work required in Specification Section 11175. Coates stated that it had based its bid on an unsolicited proposal from FM Systems, Inc. (R4, tab 3; Tr. 29, 31) Mr. Coates said that the VA's project engineer, Ray Ransdell, suggested that Coates consider preparing a Value Engineering Proposal although this was denied by Mr. Ransdell. (Tr. 31, 38, 126) "Value Engineering," as defined by the Contract, allowed the contractor to propose a change that might be beneficial to both the VA and the contractor. (Tr. 31-32; R4, tab 1 at 87)

On November 23, 1992, Coates submitted a Value Engineering Change Proposal ("VECP") that used the FM proposal rather than modifying it pursuant to the contract specifications. (R4, tab 5). On the same day the VA issued the Notice to Proceed. The Contract completion date was May 7, 1994, five hundred and thirty (530) calendar days after receipt of the Notice to Proceed. (R4, tab 6)

In the VECP, Coates indicated that it believed a Utah approval order would be needed

for the work the Contract originally required and for the work proposed in the VECP, even though the Contract did not state that an approval order would need to be obtained. (R4, tab 5) It is the VA's position that the project, as originally specified, would not require a new permit or approval order. (Tr. 208-09)

Case, Lowe & Hart ("Case Lowe"), the VA's architect-engineer (A/E) had several questions regarding Coates' VECP and recommended that a revised VECP be presented before a detailed review was conducted. (Exh. G5) After submitting his firm's proposal, Mr. Coates met with the State officials regarding permitting requirements. (Tr. 33) Based on this meeting, Coates determined that the permit obligation would not change as a result of the FM incinerator. Coates communicated this to the VA on November 25, 1992. Accordingly, Coates submitted a revised Value Engineering Proposal, eliminating any requirement that Coates obtain an approval order for the incinerator. (Tr. 32; R4, tab 7)

The VA did not accept the VECP initially because it was determined, after conversations between Patti Case, a Case Lowe subcontractor and consultant, and representatives of the State of Utah, that a new approval order or permit would be required before the incinerator could be replaced as proposed by the VECP. (Tr. 208, 209)

The A/E for the project reviewed Coates' revised VECP and recommended that the VA accept it. (Tr. 38, 112-17; R4 Supp, tab 508; Exh.. A-4) Bob Warlaumont, one of the principal project engineers, prepared the estimated costs and sent them to the VA. (Tr. 116; Exh. A-5) After submitting its November 25, 1992, revised proposal, Mr. Coates met with representatives of the VA. (Tr. 36) The parties discussed the need for permits, how to obtain a permit, and the VECP. The VA advised Coates to proceed with the FM proposal, determined that permitting would in fact be required, and noted that the VA would make the necessary arrangements to comply with the State approval order requirements. (Tr. 36-37; R4 Supp, tab 505) The VA approved Coates' Value Engineering Proposal at a project meeting on December 9, 1992. (Tr. 37; R4 Supp, tab 508) At that meeting, the VA determined to file a Notice of Intent with the State to obtain an approval order for the project. (Tr. 39) The Notice of Intent was to be prepared by Patti Case. (Tr. 38, 39; Exh. A24) The cost associated with preparing and submitting the Notice of Intent was \$3,900. (Tr. 39) The VA agreed to pay the expenses and fees associated with the permitting process. (Tr. 40, 41, 118; R4 Supp, tabs 508, 516; Exh. A4, A5, A24)

Preparing the Notice of Intent took substantial work, including engineering work, for both the boilers and the incinerator. (Tr. 42-43) Ms. Case did most of the preparation. (Tr. 117) Ms. Case submitted the VA's Notice of Intent to the State on January 19, 1993. (Tr. 120, 121; R4 Supp, tab 516) The ensuing process included extensive review by the State Division of Air Quality, public notice and opportunity to comment, and a formal hearing. (Exhs. A7 through A18)

Before beginning the permitting process, the VA had agreed that Coates could procure the new incinerator. (Tr. 41-42) Coates issued a purchase order to FM in November or December 1992 so that Coates could complete the incinerator work within the time specified in the Contract. (Tr. 42, 111) The VA discovered, however, that the permitting

process prevented the commencement of work on the new incinerator until an approval order was issued by the State. (Tr. 121, 142; R4, tabs 11, 12; Exh. A10) On March 24, 1993, the VA directed Coates to place a hold on its FM incinerator purchase order. (Tr. 42, 44; R4, tab 12)

By letter dated March 25, 1993, Coates requested that the Contract be changed in order to release Coates from liability for liquidated damages for each day after July 25, 1993 that the incinerator was inoperative. By letter dated April 22, 1993, CO McGuire informed Coates that once the VECF was approved, a supplemental agreement would be issued. CO McGuire also indicated that an "appropriate amount of time will be added to assure you have adequate time for completion of the new incinerator." (R4, tab 11)

On May 21, 1993, Coates informed the VA that its stop order on the incinerator was impacting the project schedule and costing Coates money. (Tr. 44; R4 Supp, tab 537) The VA's actions subjected Coates to a cancellation penalty for its incinerator. (Tr. 44) The VA's stop order also meant that Coates was forced to delay all other aspects of completing the installation of the incinerator and the other Phase 1 work related to the incinerator. (Tr. 44-45) The VA had originally anticipated that the permitting process would be completed within 45 days. (Tr. 41; R4 Supp, tab 508) On July 16, 1993, more than six weeks after Phase 1 was to have been completed, the State issued an Approval order to the VA for its boilers and incinerator. (Tr. 45; Exh. A18) Coates immediately re-ordered the incinerator but the manufacturer was backlogged and could not quickly respond. (Tr. 47-48) FM was unable to deliver the new incinerator, and Coates was unable to commence installation until late December 1993. (Tr. 47, 121) Installation of the incinerator was completed in early February 1994, approximately eight months after originally scheduled. (Exh. A25; Tr. 132-33)

The LP Tanks

During the permitting process, additional related problems and delays arose requiring unanticipated modifications to the Contract. (Tr. 45, 122) The Salt Lake City Fire Marshal objected to the installation of the aboveground LP tanks after receiving an anonymous telephone call. (Tr. 46, 121, 209; Exh. A12) The Fire Department was concerned with potential leaks and safety hazards in the zoned residential area. (Tr. 122, 210) Neighbors also complained and commenced a series of meetings and hearings. (Exh. A16, 24)

Coates had already undertaken construction of a foundation and associated structural elements to hold the LP gas tanks above ground and had completed concrete cradles or pillars to support the tanks. (Tr. 48, 122) That activity was halted and negotiations began to obtain approval from local authorities. (Tr. 48)

Subsequent to the VA's negotiations, Coates was given drawings requiring the tanks to be located completely underground. (Tr. 48) Mr. Warlaumont, a VA engineer, did the engineering redesign work. (Tr. 122-23) Coates was to excavate so that the new 11-foot-diameter tanks could be completely covered with earth and sand. (Tr. 48-49) When that decision was made, Coates had to cancel its order on the original tanks and obtain tanks with different wall thickness to reflect the different structural requirements of an underground installation. (Tr. 49) This also required a different arrangement for the

pumps and piping associated with those tanks. (Tr. 49) Completion of this backup LP system was necessary before final installation of two of the boilers could take place. (Tr. 47)

Gasoline and Diesel Fuel Tank Problems

During the course of the Contract, a problem also developed with the original Contract design for underground gasoline and diesel fuel tanks. (Tr. 49) The original project documents specified that Coates was to dig up existing diesel and gasoline tanks and relocate them approximately 200 feet away. (Tr. 49-50, 119) Once they were removed, however, the State of Utah refused to allow their reuse, insisting instead that they be replaced with new tanks. (Tr. 50, 119; R4 Supp, tab 518) As the redesign work took place, Coates and Case Lowe discovered a 12-inch water main not previously shown on the VA plans. (Tr. 50, 123) The discovery triggered preparation of new Case Lowe drawings for the locations. (Tr. 50-51; R4 Supp, tab 511)

Over the course of the Contract, Coates responded to a total of 157 requests for proposals, changes, and additions that it says impacted every major facet of the Contract. (R4, tab 42, Table 1; Tr. 26) These were incorporated in 27 written modifications to the Contract. (R4, tabs 9-10, 13-24, 26-30, 32, 35, 40, 43, 49-52)

Because of the various delays Coates encountered with the boiler and incinerator permitting, the LP gas situation, and the gasoline and diesel tank relocation, Coates alleges its actual schedule was substantially impacted and the phasing was abandoned. (Tr. 17; Exh. A26) The unanticipated work with the new gasoline and diesel tanks, together with the redesign of the location where those new tanks were to be buried, extended the completion of this task from mid-January 1993 into mid-April 1993. (Tr. 18; Exh. A26) The LP gas work, which was to be completed in mid-April 1993, could not be completed until October 1993. (Tr. 18; Exh. A26) The incinerator was to be installed by June 1993, but was not actually completed until early February 1994. (Tr. 21; Exh. A26)

The original schedule had Coates completing installation of Boiler 2 in its temporary location and Boiler 1 in its final location by mid-July 1993. (Tr. 21-22; Exh. A25) Because of the delays with the incinerator, there were delays of approximately two months in getting these boilers installed. (Tr. 22) Installation of Boiler 3 was to be completed in early November 1993, but was not completed until March 1994. (Tr. 22; Tab A26) This resulted primarily from the delay in having a back-up propane system fully functional before the work could be completed. (Tr. 22) Finally, the relocation of Boiler 2 to its final position was to have been completed in late April 1994, but could not be completed until July 1994. (Tr. 22) Contract modifications and other work pushed the completion date beyond the original date contemplated by the Contract. (Tr. 52-56, 78-79; R4, tab 42; Exh. A25, A26) Appellant's Bar Chart indicates all of the original work was completed by the May 7, 1994 completion date except the relocation of Boiler 2 which went past the original completion date by approximately 52 days. (Exh. 26)

Supplemental Agreements

Coates entered into a total of 27 Supplemental Agreements (S/A's) with the VA. (R4,

tabs 9-10, 13-24, 26-30, 32, 35, 40, 43, 49-52) S/As 5, 6, 7, 12, and 13 dealt with changes undertaken in the earlier portion of the Contract with respect to the incinerator, boiler, LP, gasoline and diesel tank issues. (R4, tabs 15-17, 22-23) Each contained the following provision: "This change constitutes full and complete compensation due to the contractor for all costs, direct and indirect, and all time resulting from the change set forth herein." (R4, tabs 15-17, 22-23) At the time he signed these S/As, Mr. Coates believed that he was waiving claims only with respect to the task of that particular S/A. (Tr. 67-68)

Coates says the process for entering into an S/A was fairly typical throughout the Contract. That is, the VA would generally ask Coates to provide estimates for several tasks, typically eight to ten tasks. (Tr. 25) Coates would prepare a separate estimate for each of those tasks. (Tr. 25) The VA would review the estimate and typically, would ask Coates to revise its estimates. (Tr. 25-26) Sometimes the tasks changed; most often, more than one estimate was required for each task. (Tr. 26) In most instances, Coates completed the work prior to each S/A being signed. (Tr. 28) Once invoiced, Coates says the VA was slow in paying, and that this put additional pressure on Coates to sign new S/A's to get paid. (R4 Supp, tabs 547, 564, 566; Exh. A25)

S/As 1 and 2, with effective dates of February 11 and February 24, 1993, increased the Contract by \$18,620 and \$18,799 respectively. Additional performance time was neither requested or given as part of the equitable adjustment. The S/A prices were the same as Appellant requested in its proposal.

S/A # 3, dated May 7, 1993, increased the Contract by a total of \$2,067.52, the amount requested in Appellant's proposal. S/A #3 required Appellant to make repairs to excavation activities. (R4, tab 13)

S/A #4, dated May 24, 1993, increased the Contract by \$7,899.00, in accordance with Appellant's proposal for laying masonry in the walls of the incinerator and shop rooms. (R4, tab 14)

S/A #5, dated July 2, 1993, increased the Contract by \$24,868.00, the amount requested in Appellant's proposal, and required Appellant to furnish and install the underground LPG storage tanks. (R4, tab 15)

S/A #6, dated August 9, 1993, increased the Contract by \$24,937.00, the amount requested in Appellant's proposal. Coates was to provide the labor and materials necessary for the installation of concrete pads to support the propane tanks. (R4, tab 16)

S/A #7, dated August 16, 1993, increased the Contract by \$23,167.00, the amount requested in Appellant's proposal and called for Coates to replace a fence, provide manholes and provide labor to compact the earth over the propane storage tanks. (R4, tab 17)

S/A #8, dated August 30, 1993, increased the Contract by \$20,147.00, and required Appellant to add a gas meter to each boiler, install sheet rock, add fluorescent fixtures, perform miscellaneous electrical work, clean and paint electrical room, and remove conduit. (R4, tab 18)

S/A #9, dated September 23, 1993, increased the Contract by \$20,697, the amount requested in Appellant's proposal and required Appellant to furnish and install an instrument console addition for the medical gas alarms. (R4, tab 19)

S/A #10, dated September 23, 1993, increased the Contract by \$14,641.00, in accordance with Appellant's proposal. S/A #10 required Appellant to provide additional by-pass lines and add a counter top and cabinet. (R4, tab 20)

S/A #11, dated September 23, 1993, increased the Contract by \$13,409.00, in accordance with Appellant's proposal. S/A #11 required Appellant to strip and paint the floors of two rooms. (R4, tab 21)

S/A #12, dated October 28, 1993, decreased the Contract by \$10,678 as part of the VECP. (R4, tab 22)

S/A #13, dated November 4, 1993, increased the Contract by \$10,678.00, pursuant to Appellant's request. By letter dated November 4, 1993, Appellant advised CO McGuire that it provided the wrong figures for the estimated costs of the Contract without the VECP. The CO recomputed the savings and, \$10,678.00 was added back in the Contract. (R4, tab 23)

On every S/A, Coates received the exact amount it initially requested. Coates did not ask for and did not receive any additional time for S/As # 1-13.

S/A #14, dated January 13, 1994, increased the Contract by \$10,566, the amount of Appellant's revised proposal. Coates was to provide and install transmitters and pressure gauges on the boilers, and 200 amp disconnects. (R4, tab 24)

By letter dated February 8, 1994, Appellant advised CO Alverson that Coates had reviewed the 14 change orders issued so far and "have concluded that it is likely that we will not complete all of the work by the Contract completion date of May 7, 1994." Coates requested that the Contract completion date be extended to June 6, 1994, citing the delays associated with the permits and approvals for the LP gas system and the incinerator as the principal reasons. Coates also requested an increase in the Contract amount of \$6,521 for 160 hours of additional project superintendent time and 30 days for maintaining a field office. (R4, tab 25)

S/A #15, dated March 7, 1994, increased the Contract price by \$14,994, the amount of Appellant's proposal. The completion date was not changed. S/A #15 required Appellant to perform several tasks that were necessary to improve the "function/safety of the boiler plant/incinerator." (R4, tab 26)

S/A #16, dated March 30, 1994, increased the Contract by \$3,159, the amount of Appellant's proposal and extended the completion date to May 14, 1994. As part of the negotiations for extended time, CO Alverson informed Mr. Coates that "[Coates] can't come in and ask for time after agreeing to the previously issued modifications. If he needs additional time, he needs to request it with each individual modification." (R4, tab 27)

S/A #17, dated March 30, 1994, decreased the Contract by \$549. The completion date was not changed. Appellant was required to furnish and install an oxygen probe for the incinerator and to furnish and install a 200 amp disconnect at each boiler. (R4, tab 28)

S/A #18, dated April 12, 1994, increased the Contract by \$17,271, the amount of Appellant's revised proposal. The Contract completion date was extended from May 14, 1994 to June 9, 1994. In its proposal for this work, Appellant stated, "[w]e request the Contract completion date be extended by 30 days to complete this and earlier change order work." A memorandum from the Chief of Engineering Service regarding S/A #18 stated, in pertinent part:

4. Due to long lead times in delivery and installation of the above equipment, it is requested that a twenty day time extension be included in the Supplemental Agreement.
5. No time extension is felt to be required at this time for past supplemental agreements.

(R4, tab 29.

S/A #19, dated May 25, 1994, increased the Contract by \$21,965, the amount requested in Appellant's proposal. S/A #19 required Appellant to provide fuel pressure transmitters, a water pressure gauge and wiring and a piping enclosure for the control panel

S/A #20, dated June 22, 1994, increased the Contract by \$16,207, the amount requested in Appellant's proposal, for fabricating platforms for blow down adjustments and flame port view access. The completion date was extended to June 23, 1994.

On July 8, 1994, Appellant wrote the CO advising her that due to the delays suffered with the permits, gas tanks and LP system, they had to keep a field office and project superintendent on the job for at least 14 weeks longer than anticipated. Coates asserted that: "A significant portion of this unanticipated cost might have been recovered from overhead charges on change order work if the overhead rates permitted by the Contract were more reasonable." (R4, tab 33) Mr. Coates testified that the time increase from 14 weeks to 8 months "resulted from the additional tasks that we were given subsequent to the initial claim as the need for further modification of the facility became apparent." (Tr. 80) At the hearing, Mr. Coates testified on cross examination that:

- A Basically, what we are saying is that the overhead and profit we were allowed on those supplemental agreements did not cover any extended overhead as we are claiming.
- Q Okay. So you were not really saying you were delayed. You were saying you did not get the extended overhead that you thought you were entitled to.
- A Right.

(Tr. 96)

S/A #21, dated August 23, 1994, increased the Contract by \$6,034.00, the amount requested in Appellant's proposal. The completion date was extended to August 19, 1994. The S/A required Appellant to revise the gas piping, install welding outlets and install a hydro-cleaner. (R4, tab 34S)

On November 22, 1994, Darrell Erickson, Chief, Engineering Service, advised the CO that Coates' letter of January 10, 1994, did not justify increased costs because "Apparently the contractor did not utilize his opportunity to review record drawings in our file of the stack prior to bidding as we recommended at the pre-bid walk through." In addition, Coates listed the wrong contractor as having done the stack demolition. As for the July 8, 1994 claim, Erickson said the data is not sufficient and does not take into account concurrent Contract work and supplemental agreements.

S/A #22, dated December 14, 1994, increased the Contract by \$19,063.00. The completion date was extended to November 18, 1994. According to the price negotiation memorandum for S/A # 22, "Negotiations were held on August 10, 1994 to reach an agreement on Contract completion. An extension of November 18, 1994 was agreed to by both parties." The S/A required Appellant to relocate condensate and boiler feed water pumps, install pipe, replace gate valve, install a floor drain and modify handrails for catwalks.

On January 23, 1995, CO Alverson discussed the claim letters of February 8, and July 8, 1994 with Coates, and memorialized the discussions in a letter to Coates dated January 24, 1995. The letter specifically stated it was not a final decision. The stack demolition was rejected because the information was on the "record drawings" and the amount was based on an estimate from a subcontractor who was not used. As for the Project superintendent and overhead claim, CO Alverson said the documentation was not sufficient and "Contract modifications agreed to and signed by both parties have included all costs and time extensions associated by changes to the Contract." (R4, tab 41)

Coates responded by letter dated February 3, 1995, in which it claimed the delays in obtaining the State of Utah's approval for the boilers, incinerator, relocating the gas and diesel tanks and installing the propane tanks resulted in 8 weeks (boilers), 11 weeks (gas and diesel), and 22 weeks (propane) weeks delay. The letter also complained about the value engineering process and the "arbitrary" decisions made by the VA. Coates pointed out that there had been delays resulting from changing the scope of the Contract and having to respond to 157 requests for proposals that resulted in 23 change orders. The letter states: "These change orders have formally extended the original Contract completion date from May 7, 1994, to January 15, 1995. This indicates an 8 months delay in completing the work. It also indicates that we have been required to maintain a field office and field supervisor and to provide home office support for 8 months longer than we planned when the job was bid." (R4, tab42}

In response to the allegation made in the VA's January 24 letter about the signed change orders, Coates pointed out in a February 3, 1995, letter that the time was arbitrarily determined by the VA and "none of the Contract modifications provided any reimbursement covering the cost of maintaining a field office and the cost of providing field supervision." The letter included a chart which purportedly showed overhead and profit for the change orders at 9.43% which "amount barely covered our home office

costs." The letter further stated:

We also wish to point out that in nearly all cases we were not given the written contract modifications and allowed to invoice for our costs until 4 to 8 weeks after the work had been completed. As we considered the written change orders individually, we accepted your change amounts and time extensions rather than being further delayed in being reimbursed for our work. However, considering all 23 changes that have been approved to date together, we believe it is unreasonable and unequitable for you to deny us compensation for our field office, field supervision and home office costs during the eight month extension period.

(R4, tab 42)

S/A #23, dated February 10, 1995, increased the Contract by \$9,620.00. The completion date was extended to January 15, 1995. S/A #23 required Appellant to re-hang overhead lights, modify chart recorders and furnish and install boiler feed watch pump suction gauges and piping. (R4, tab 43)

The original sequencing of work was essentially abandoned. On January 15, 1995, Coates removed the trailer from the site. (R4, tab 42) All of the original Contract work was completed within the original Contract period except the relocation of boiler 2, which was completed approximately 52 days after the original completion date. (R4, tab 26) All of the work performed after June 30, 1994, concerned change order tasks and closing out the Contract. (R4, tab 26)

S/As #24 - #26, were sent to Appellant in August 30, 1995. S/A #24, in the amount of \$38,090.00, was for the LPG/Air Mixer. S/A #25 converted change orders A, in the amount of \$14,246.00 and B, in the amount of \$80,492.11. S/A #26, in the amount of \$17,898.00, documents the VA's approval of Appellant's request for an equitable adjustment for the demolition and removal of an inner stack. (R4, tab 45)

Coates signed the first 23 supplemental agreements. By letter dated September 5, 1995, Appellant refused to sign S/A #24 unless the release language was deleted "because the \$38,090 increase does not cover supervision and home office costs resulting from extending the contract." (R4, tab 46)

By letter dated October 3, 1995, CO Alverson informed Appellant that it had voided the modifications by crossing out the release language. CO Alverson further indicated that the "statement" contained in S/As #24 and #25 did "not apply to your [February 3, 1995] claim for delay" and an audit was being requested on the delay claim. The letter further indicated that S/As #24-#27 were returned to Appellant for execution. (R4, tab 47)

S/A #27, with an effective date of October 5, 1995, increased the Contract by \$13,076.25. S/A #27 required Appellant to install a metal building over the LPG

equipment and replace a defective amplifier. The work was to be completed within 60 days from the date of the modification.

By letter dated October 4, 1995, Coates returned signed copies of S/As #24-#26. In the letter Appellant said it would not sign S/A #27 because overhead and profit of \$440 was not included. (R4, tab 48) However, Coates ultimately signed S/A #27 October 5, 1995. (R4, tab 52)

The release language changed over the course of the Contract:

S/A # 1-#2 provided:

This supplemental agreement constitutes full and complete compensation due the contractor for all costs, direct and indirect and all time, resulting from the change set forth herein.

In consideration of this modification agreed to herein for your proposal to accomplish the work described above dated February 4, 1993 (Revised on February 11, 1993), you hereby release the government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to this supplemental agreement. No additional monies are due the Contractor nor will any further claims for extended overhead and supervision caused by delays and disruption, etc., be submitted for the time extension enumerated herein.

If you are not in agreement with the terms and conditions of this Supplemental Agreement, return the document unsigned to the Contracting Officer for further consideration before commencing work.

(R4, tabs 9, 10)

S/A #3-#13 provided:

This change constitutes full and complete compensation due to the contractor for all costs, direct and indirect, and all time resulting from the change set forth herein.

S/As #14-#18 provided:

The changes in price or delivery dates described above are considered to be fair and reasonable and have been mutually agreed upon in full and final settlement of all claims arising out of changes covered by the modifications indicated above including all claims for

delays and disruptions resulting from, caused by, or incident to such modifications or changes.

(R4, tab 29)

S/A # 19-#22 provided:

In consideration of the modifications agreed to herein as complete and equitable adjustments for the Contractor's "proposal for adjustment" the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "proposal for adjustment".

Finally, S/A #23-#27 provided:

This change represents full and complete compensation for all costs, direct and indirect, associated with the work and time agreed to herein, including but not limited to, all costs incurred for extended overhead, disruption or suspension of work, labor inefficiencies, and the change's impact on unchanged work.

(R4, tab 43)

The VA confirmed that the specific disclaimer clause expressly mentioning extended overhead "pertains to the work outlined in the modification itself and does not apply to your claim for delay." (R4, tab 47) Throughout the course of the Contract, it was Mr. Coates' understanding that Coates' claim was treated separately from the modifications described specifically in each one of the S/As. (Tr. 70) Although somewhat difficult to reconcile with some of the release language, especially S/A # 23-#27, the Contracting Officer testified that she advised Mr. Coates that the release language did not prevent his filing an extended overhead claim. (Tr. 199)

Supplemental agreements extended the completion date by 408 days to June 16, 1995. (R4, tab 49) S/A #27 extended the completion date from October 5, 1995 through December 4, 1995. (R4, tab 52) On January 12, 1995, Coates disbanded its field office and removed its on-site supervisor. (Tr. 79) Work continued, however, on punch list and change items at the project site. (Tr. 85-86) SA #27 was signed October 5, 1995. The final completion date was approximately mid-1996. (Tr. 108) The Contract work was never formally suspended. (Exh. G 11; Tr. 95, 126, 128, 149, 184, 185)

The Defense Contract Audit Agency ("DCAA") subsequently conducted the requested audit. (Tr. 65; R4, tab 53) Mr. Coates participated and worked with the DCAA and on June 25, 1996, the DCAA issued an Audit Report in which it expressed an opinion as to the "allowability and reasonableness" of Coates' claim. (R4, tab 53) The Audit Report questioned \$3,741 of Coates' proposed costs but concluded that the remaining costs were acceptable. (Tr. 65; R4, tab 53)

On October 3, 1997, more than three-and-half years after Coates first submitted its extended overhead claim, the contracting officer issued a final decision denying it. (R4, tab 56)

DISCUSSION

While a certain amount of confusion has been engendered by the imprecise and inappropriate use of terms and legal theories in some of the briefs submitted, the relief sought by Appellant is simple and straightforward. The Contractor seeks \$42,000 for the "costs of maintaining a field office . . . longer [than] anticipated in our original bid." The bulk of the field office costs sought are Coates' field supervisor wages during this period together with some minor trailer rental costs. Appellant alleges that the extended performance period of the Contract and the resulting additional field overhead costs are due solely to delays caused by the Government's failure "to anticipate, foresee and provide for permitting" in connection with the required boiler and incinerator work together with problems associated with the gasoline and propane tanks. Entitlement is sought under the Contract's changes provisions and also apparently under the suspension of work clause.

In seeking recovery under the changes provision for field office expenses for the extended performance period from May 1994 to mid January 1995, the Contractor, in a February 3, 1995 letter, acknowledged the Contracting Officer's position that it had "agreed to and signed contract modifications which included all costs and time extensions associated with the changes." However, the letter goes on to assert that the VA had "arbitrarily decided the extent to which the contract should be extended by each change order and that *none of the contract modifications* provided any reimbursement covering the cost of maintaining a field office and the cost of providing field supervision." (Emphasis supplied)

Recovery under the changes provision is also apparently sought because of the "cumulative impact of numerous supplemental contract agreements incorporating more than 150 requested changes." Finally, Appellant argues that it is entitled to recover these costs because the VA "breached its implied duty of good faith and fair dealing."

The Government responds that notwithstanding Contractor's claims of "delay," there is "no evidence that the delays it is claiming are due to anything other than the time to perform changed work," for which it has already been compensated. Asserting that Coates was never suspended, the VA maintains that it cannot recover under the suspension of work clause. Moreover, the overhead limitations of the Changes-Supplement, which the Government says is the real source of the Contractor's discontent, prevent it from recovering any sums greater than was provided for in the 27 S/A's the parties executed. Finally, the Government argues that there is neither evidence of "cumulative impact" nor any "bad faith" by the VA in its dealings with the Contractor.

Supplemental Agreements

We begin our discussion by analyzing what the Supplemental Agreements provided and how they affected the Appellant's claim. Under these negotiated agreements, the Contractor received a total of \$379,050 and time extensions from the original Contract

completion date of May 8, 1994 to the substantial completion date of January 15, 1995. The S/As were subject to the provisions of the VAAR Changes-Supplement Clause. This clause limits the percentage mark-ups in Contract changes for profit and overhead to a maximum of 10% each. The clause further states at (j):

Overhead and contractor's fee percentages shall be considered to include . . . field and office supervisors and assistants, . . . incidental job burdens, and general home office expenses and no separate allowance shall be made therefor.

These maximum mark-up limitations, which numerous Contractors have objected to, have been consistently upheld by the Board and affirmed by the Federal Circuit. *Santa Fe Engineers, Inc. v. United States*, 801 F.2d 379 (Fed. Cir. 1986); *Amelco Electric*, VABCA No. 3785, 96-2 BCA ¶ 28,381

Appellant mistakenly argues that it was never paid for its field office and field supervisor from the original completion date to the date of substantial completion. Under the Contract terms, an equitable adjustment arising out of a contract change includes the direct costs of the change, plus the fixed markups for overhead and profit, and a time extension only, without separate compensation for extended or field office overhead. All overhead, whether field or other overhead, is deemed to be included in the fixed maximum markup on direct costs. *West Land Builders*, VABCA No. 1664, 83-1 BCA ¶ 16,235, *aff'd* 732 F.2d 166 (Fed. Cir. 1984); *Santa Fe Engineers*, VABCA No. 1832, 85-2 BCA ¶ 18,008, *aff'd* 801 F.2d 379 (Fed. Cir. 1986); *Jen-Beck Associates*, VABCA No. 2107, 87-2 BCA ¶ 19,831 When the VA added work and extended the performance period to accomplish the changed work, as here, appellant's continuous work, as augmented, generates a direct cost base to permit the absorption of overhead by the application of the overhead markups. Appellant's field overhead costs associated with original Contract work were paid in accordance with its bid. Under the Changes-Supplement clause the field office overhead and supervision are part of the maximum fee percentage specified in the clause. The costs associated with changed work were paid at the amount requested by Coates. Thus, Appellant has been compensated for all field overhead for the entire period of the Contract.

The Contractor has shown that relocation of boiler #2 exceeded the original Contract completion date by 52 days. However, the boiler relocation was concurrent with the change order work and was no longer on the critical path. Thus, Appellant has not met its burden of proving the relationship between the delay in the boiler relocation installation and any delay in the performance of the entire project.

As we said in *Jack Cooper Construction Co., Inc.*, VABCA No. 1663, 84-3 BCA ¶17,703:

[I]n the instant case, the Contractor has already been given either monetary compensation, including overhead, or a time extension, or both, for each and every day of the 318-day contract extension period. We do not perceive, nor has Appellant specifically

identified, any particular "impact" delay or cost with respect to which further extended overhead may be recovered. To the contrary, what we see here is an effort to circumvent the contractually specified flat percentage rate and to substitute actual overhead therefor. Accordingly, we reject the Contractor's "impact" theory of recovery.

Appellant's Bar Chart indicates all of the work was completed by the May 7, 1994 completion date except the relocation of Boiler 2 which went past the original completion date by approximately 52 days. (Exh. 26)

Suspension

Appellant, perhaps recognizing the formidable task of attempting to recover field supervision costs under the restrictive changes provisions in VA construction contracts, refers the Board to *P.J. Dick Contracting, Inc.*, VABCA Nos. 3386, 3387-97, 92-1 BCA ¶ 24,599 In *P. J Dick* the Contractor sought to recover actual extended overhead for 292 days of alleged Government-caused *suspensions* where time extensions totaling 292 days had previously been granted by the VA in connection with 12 Supplemental Agreements. In denying the Government's motion for summary judgment we noted that there were questions as to whether the time extensions granted by the supplemental agreements "were understood by both parties . . . to represent solely delays in performing changed work rather than suspension delays." *Id* at 122,728. Our Board has long recognized that "[t]he relief rights under the Changes and Suspension of work clauses are independent and separable." *Clover Builders, Inc.*, VABCA Nos. 2033, 2034, 88-2 BCA ¶ 20,629

Although in the present case there was no explicit reservation language concerning suspension claims in the Supplemental Agreements as there were in *P.J. Dick*, the Contracting Officer's testimony persuades us that there was no accord and satisfaction which would prevent Appellant from pursuing a suspension claim. But the right to pursue a suspension claim is different from proving it. Here, there is no real allegation, let alone proof, of Government caused compensable suspension.

There is no question that certain work was resequenced from the Contractor's original schedule due to the need for the Government to obtain required permits. But there is no showing that this resequencing affected the critical path and extended overall Contract performance. Time bar charts are ordinarily incapable of providing the standard of proof required to establish delays and impacts on a project. *H.W. Detwiler Co.*, ASBCA No. 35,327, 88-2 BCA ¶ 21612 Appellant's bar chart shows that all of the original Contract work was completed by the original completion date except for the relocation of boiler #2, which exceeded that period by approximately 52 days. There has been no allegation that the Appellant intended to complete the job early.

Appellant abandons its argument founded on *P.J. Dick* when it makes no distinction between alleged suspension and change order performance time. As we observed in *Dawson Construction Company*, VABCA Nos. 3306-3310, 93-3 BCA ¶ 26,177 at 130,314, *aff'd sub nom Dawson Construction Company v. Brown*, 34 F.3d 1080 (Fed.

Cir. 1994):

The essential burden of establishing the fundamental facts of liability, causation and resultant injury rests on the Contractor . . . Broad generalities that the Government must have caused some delay or damage because the Contractor took longer than anticipated to complete the contract, however are insufficient to meet the basic burden of proof requirements . . . the Appellant has the burden of establishing by a preponderance of the evidence not only the existence of . . . delay, but also the extent to which completion of the contract work as a whole was delayed thereby.
[citations omitted]

Cumulative Impact

Faced with the strictures of the Contract's changes provisions, Appellant seeks to recover costs associated with the "cumulative impact" of 27 S/As (consisting of 157 requests for proposals) that it says impacted every major facet of the job. We recently had occasion to consider what constitutes cumulative impact and the standard of proof necessary in order to sustain such a claim in *Centex Bateson Construction Corp., Inc.*, VABCA Nos. 4613, *et. al.*, 99-1 BCA ¶ 30,153. Cumulative impact is the unforeseeable *disruption of productivity* resulting from the "synergistic" effect of an undifferentiated group of changes. Cumulative impact is also known as the "ripple effect" of changes on unchanged work that causes a decrease in productivity and is not analyzed in terms of spatial or temporal relationships. This effect is unforeseeable and indirect. For the Government to be liable for cumulative impact, a contractor must show that the Government exceeded the permissible limits of its discretion under the Contract changes provisions serving to "materially alter the nature of the bargain" originally agreed upon. *Wunderlich Contracting Co.*, 351 F.2d 956, 965-966; *Aragona Construction Co., Inc. v. United States*, 165 Ct. Cl. 382, 394 (1964); *Dyson & Co.*, ASBCA No. 21,673, 78-2 BCA ¶ 13,482 at 65,970

We have previously recognized the existence of impact claims as a separate constructive change compensable under the Changes clause. This constructive change, although resulting from them, is independent of other contract changes and can survive an accord and satisfaction on a change, or a general release. *Centex Bateson Const. Corp., Inc.*, VABCA Nos. 4613, *et. al.*, 99-1 BCA ¶30,153.; *Ultra Construction Company*, VABCA No. 1873, 85-2 BCA ¶18,007 But as we said in *Centex*:

The mere existence of numerous contract changes in and of themselves, whether or not the number of changes is considered to be reasonable or unreasonable and whether or not the changes resulted from defective specifications, establishes no right to recover cumulative impact costs. Consequently, contract changes alone, regardless of their number or nature

combined with Government liability do not serve as a substitute for causation and do not necessarily give rise to cumulative impact damages.

(*Centex* at 149,259)

In the case before us there is no evidence of what the impact was, how it impacted the work, or at what cost to the Appellant. The only costs Appellant seeks to recover are for field supervisor and trailer costs that had previously been compensated under various supplemental agreements. It is difficult to see how these costs could be a component of a lost productivity claim. In sum, Coates fails to carry its burden to prove either the occurrence of impacts or the costs of impact.

Breach of Good Faith and Fair Dealing

Appellant asks us to find that the actions of the VA breached its duty of good faith and fair dealing. Appellant alleges that the VA took this claim "under review" from February 1994 until it issued its final decision in October 1997, all the while giving the Coates the impression that the claim would be granted. In support of its "bad faith" claim, Appellant cites only to a state case with no relevance to the appeal before us. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194 (Utah 1991)

The validity and construction of contracts with the United States, and their consequences on the rights and obligations of the parties, all present questions of federal law. 41 U.S.C. §602; see *Forman v. United States*, 767 F.2d 875, 879-80 (Fed. Cir. 1985); *United States v. County of Allegheny*, 322 U.S. 174 (1944); *United States v. Latrobe Construction Company*, 246 F.2d 357 (1957); *Flight Test Engineering Co.*, ASBCA No. 7661, 62 BCA ¶3606

The Government has "the ever-present obligation of any contracting party to carry out its bargain reasonably and in good faith." *Commerce International Co. v. United States*, 338 F.2d 81, 85 (Ct. Cl. 1964) Whether the Government has met that obligation "is to be gathered from the particular contract, its context, and its surrounding circumstances" *Id.* at 86. In *Maxima Corporation v. United States*, 847 F.2d 1549, 1556 (Fed. Cir. 1988), the appellate court stated that "the need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement." Appellant has no basis for relief unless it can establish that the Government has acted in a manner which violates its implied obligation to act in good faith and not to abuse its discretion or act arbitrarily or capriciously. *Monarch Enterprises, Inc.*, ASBCA No. 31,375, 86-3 BCA ¶ 19,227 The burden of proving bad faith by the Government is a very onerous one and for an action or an inaction of the Government to constitute bad faith or abuse of discretion, some specific intent to injure the other party or actions motivated by malice alone must be proven to overcome the presumption that public officials act in good faith in the discharge of their duties. A contractor bears the burden of presenting well-nigh-irrefragable proof of wrongdoing. *Kalvar Corporation, Inc. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977)

It is difficult to envision the VA's bad faith when, in most every instance, Appellant received exactly the amount it asked for on the S/As. Moreover, up until S/A # 7,

Appellant only asked for a 7% overhead and profit markup. It was the VA who advised Coates that it could get up to 10% for the markups. The Contract is quite clear that field office overhead and supervision costs are included in the mark-up allowed by the VA changes-supplement clause. Appellant's assertion that it was never paid for field office and supervision from May 8, 1994 to January 15, 1995 is simply wrong, because pursuant to the terms of the Contract those costs were included in the markups granted in the S/As.

Although it took too long for the Contracting Officer to deny this claim, we find no evidence to indicate that the VA was promising to grant the claim and Appellant failed to meet its burden of establishing bad faith or abuse of discretion.

Decision

Based on the foregoing the appeal of Coates Industrial Piping, VABCA 5412, pursuant to Contract No. V660C-597, is denied.

Date: July 26, 1999

William E. Thomas, Jr.
Administrative Judge
Panel Chairman

We Concur:

Guy H. McMichael, III
Chief Administrative Judge

Richard W. Krempasky *
Administrative Judge

*[Not available for signature
at time of dispatch]