

VECPS IN A PERFORMANCE SPECIFICATION CONTRACT¹

NEW ISSUES FOR THOUGHT

13 January 1999

A. BACKGROUND & PROBLEMS.

1. The use of performance specifications² (PS) in contracts has dramatically altered the impact of the Value Engineering (VE) clauses. There are clearly fewer, if any, design/configuration documents which "require[] a change, to this the instant contract, to implement."³ In fact, routine use of a VE clause in certain PS situations can put the Government at risk of paying money but not being contractually entitled to any specific benefit. Under a Firm-Fixed-Price (FFP) PS contract, the contractor is entitled to implement any design/configuration changes and to reap the entire instant contract savings⁴. In exchange for this benefit, the contractor assumes all the risk of meeting the PS⁵ and indirectly grants to the Government the future savings.⁶ Unless the change is processed under the authority of the VE clause, the contractor gets none of the savings in cost contracts.⁷
2. There are three situations in which the contractor may desire to use the VE clause in a PS contract: instant contract savings are negative and future savings are needed for a net savings; the contractor's share of future savings would be more profitable than 100% of instant savings; or in cost contracts.
3. There are two situations in which the Government may wish to have the VE clause available: when negotiations must be concluded without including the cost impacts of some potential change/development because it is as yet unproven; and when a potential change represents significant Government benefit but insufficient savings to motivate the contractor. In the first situation a reopenner clause might be used to avoid a potential windfall to the contractor should the unproven change become acceptable during performance. However, in both situations a mandatory VE clause might be considered.

¹ The author of this paper is Dayn T. Beam, AMCOM Legal Office, DSN 764-8195. Many of the issues and solutions were developed with the assistance of Janice Dovic, AMCOM Value Engineering Office, DSN 746-8164.

² In this context, the term "performance specification" is used in reference to a requirements statement which gives the contractor complete design/configuration (and generally process/procedure) control. The inclusion of any contract language which subjects any of these areas to Government control is contrary to current policy.

³ FAR 52.248-1 (b), under definition of VECF.

⁴ Outcome is identical to a "no-cost settlement" as described in FAR 52.248-1(i)(5).

⁵ Such risk includes obsolescences and redesign costs.

⁶ Once the savings idea is known and used, it becomes part of the information used to negotiate a fair and reasonable price on future contracts. Impacts to collateral costs and concurrent contracts would depend upon timing and contract type.

⁷ Unless the contract has another type of incentive for cost reduction.

4. The potential danger with routine application of the VE clauses in a PS contract arises any time the Government pays out savings to the contractor prior to realizing those savings. Typically, this arises when the contractor's share of the savings is paid as a lump sum based upon future savings. This also can arise in a cost contract where overruns or a failure to fully implement the change might negate any projected savings. Prior to the use of a PS, contract modifications captured the actual changes to the design/configuration, and the risk to each party, as to the success of the change in producing savings, was known. This known risk status cannot be achieved under PS unless you violate the PS concept and make the design/configuration change subject to Government control.⁸ Under a true PS, the contractor is not contractually bound to implement a design/configuration change that was the basis for a VE savings payment, and Government visibility as to proper implementation by the contractor and the actual savings realized may be limited.
5. A related problem arose during the development and implementation of a solution to the above conflict between early VE payments and the limitation on Government control over the design/configuration in a PS contract. Any solution which did not capture a change to the design/configuration was rejected by some individuals as failing to meet the VE clause requirement for a "required change" to the contract. While the usual VECP does involve a change to the design/configuration of the end item, a proper VECP is not limited to only those types of changes. The following analysis will focus primarily on design/configuration changes while noting, when relevant, that VECPs encompass a broader group of changes.
6. Although not a new issue, current emphasis on life cycle cost savings (versus production savings) raises a new twist to an old issue: "Who pays and how much?". Although the source of funds for "savings" paid to the contractor is not always the "instant" contract funds, the wording in the implementing regulations might seem to imply this. The proper source of funds (i.e., the party paying) must be determined based upon direct benefit received (e.g., different U.S. agencies, private industry, and foreign customers), and the amount to be paid by each party must be based upon percentage of direct benefit received by each party.⁹ The purpose statute and *bona fide* needs rule determine the proper type and year of funds. Simply stated, the established statutory rules for determining the proper source(s) and amount(s) for funding a given obligation are applicable to VECPs, and no short cut (i.e., utilizing instant contract funds or the same appropriation) may be substituted for a formal analysis as to correct funding. The situation is relatively easy to analyze when all the benefiting parties are in the instant contract and the percentage of benefit (i.e., units left to be delivered in most cases) is known. Attachment B explains some difficult timing issues for FMS cases.

⁸ As will be discussed later, there can be situations where the VECP does not focus on design/configuration changes.

⁹ See Attachment A for general discussion. See Attachment B for discussion of FMS buys in relation to VECP acceptance decisions and funding issues.

When a VECP reduces collateral, concurrent or future costs to other appropriations (e.g., spares and OMA activities), a PM may have trouble obtaining those funds to pay for those direct benefits. Those working this area must discuss individual fact situations with comptroller and legal advisors to determine proper funding.

7. With the increased use of commercial items, it is even more important to remember that "allowable development and implementation costs"¹⁰ includes only that portion of those costs which are allocable to the Government.
8. One final issue is another timing problem. A contractor with concurrent contracts under which a VECP might be submitted can manipulate the situation for an arguably unfair benefit. While several situations might be imagined when the contracts have different sharing rates (between contracts and as to concurrent and collateral savings), the clearest example is between a FFP PS contract and a cost contract. By first implementing the change outside of the VE program in the FFP PS contract, the contractor gets 100% of what would have been the instant savings for that contract. If the contractor then submits the same VECP "the next day" under the cost contract, the contractor will share in all concurrent, future, collateral and instant savings. However, the Government will not receive any savings from the non-VECP change to the FFP PS contract¹¹. The contractor gets to "eat his cake" and, also, have it.

B. SOLUTIONS.

1. The solution to the last issue above is to add a special provision (See Attachment C.) which gives the Government the right to designate which contract will be treated as the "instant contract" when there are at least two concurrent contracts at the time that the "change" is first developed or implemented.
2. The initial solution¹² to many of these issues was a clause which: retained the integrity of the PS reform; deferred payments until actual savings are realized in certain situations; and clarified that any change to the contract document, which was required to implement a VECP, was legally sufficient to invoke the VE clause even if there were no changes to the design/configuration of the end item.
3. Notwithstanding clear wording in the VE clause which requires only a change to the "contract" in order to implement the VECP, it was a common perception that a valid VECP required a change to the design/configuration of the end item. This perception impeded the acceptance of the solution. Such a perception is not supported by

¹⁰ FAR 52.248-1(b)(1) and 32.201-2(a).

¹¹ Since the FFP PS contract would not be impacted by acceptance of the VECP under the cost contract (because the change already has been made to the FFP PS contract), there are no "savings" under the FFP contract which result from acceptance of the VECP.

¹² Developed for FFP contracts some time ago and prior to recognition of these broader issues.

the clause language, logic, or case law.¹³ One example of the distinction is that a contract modification which implements the price adjustments (e.g., instant contract savings payments and future contract savings royalty agreement) but does not capture a design/configuration change¹⁴ in the contract is a valid VECF.

4. Cost types of PS contracts will always present a timing problem under the VE clause. Savings are based upon estimated/negotiated cost. Payment (via increased fee) is generally made at time of acceptance for instant contract savings. However, realization of those savings is not guaranteed for several reasons: unrelated overruns, related overruns; and the fact that frequently the contractor is not contractually bound to implement the change unless the PS concept is violated by subjecting a specific design/configuration change to Government control.

There are three potential solutions to this problem. The first solution is to delay payment until savings are realized. However, this requires sufficient cost data to track implementation costs and savings associated with a given change and to isolate those costs from all other impacts to cost which might affect the ultimate unit cost of the end item. The second is to capture the specific design/configuration change and, as an exception to the PS policy, take Government control of that limited area. The third is to consider an Award Fee (AF) incentive on the reduction of the overall system operation costs for changes which cannot be conveniently covered by the VE clause. The focus of such an AF would be on the impacts of the contractor's cost reduction efforts. It could not focus on actual cost results because Government actions will also impact the ultimate unit cost.

5. The last solution (currently being studied) concerns the use of mandatory VE programs when in the Government's interest. (See A.3 above.) The first question often asked is why we need a mandatory program. Even when the Government can task the investigation of a potential change via an existing or new contract, that may not be the most productive approach. If the Government buys the effort to develop or investigate the change, the Government would expect to retain the entire savings from implementing the change. If the Government can go to a source other than the prime contractor this will work. However, if the investigation/development is contracted with the prime, that prime will have a conflict of interest since success on the investigation/development of a change will likely lead to a decrease in the amounts of the prime contracts.

When the share rate under a mandatory program is less than the share rate under a voluntary program, it will be advisable to add specific language that excludes VECFs which are reasonably within the scope of the mandatory program from being submitted under any

¹³ ICSD Corporation, ASBCA No. 28028, 16 May 1990, 90-3 BCA 23,027, at page 115,629.

¹⁴ The design/configuration change may be described in the modification in order to determine if it has been applied to future contract units, but not so as to give the Government control over any part of the design/configuration.

voluntary program.¹⁵ The greatest difficulty lies with the monitoring of internal contractor performance to identify changes which should have been submitted under the mandatory VE program. The likely solution is to have only well-defined areas for the mandatory program and to have all contractor changes in that area be subject to Government review. With the addition of the language for concurrent contracts (See B.1. above.), the Government should be able to insure that multiple incentive situations are not abused.

6. Two methods for implementing these solutions are available. The first, and preferred method, is the incorporation of contract language which establishes a prenegotiated solution to the issues. Attachment C is an attempt at such a solution for these issues. In the alternative, the Government might in good faith refuse to accept a specific VECP due to its uncertainty for "...reducing the overall projected cost to the agency..."¹⁶ until suitable terms are negotiated for the VECP modification which address the specific issues applicable to that one action.

C. CONCLUSIONS.

1. Utilizing the VE program with a FFP PS contract is safe and workable with some additional agreements.
2. Utilizing a mandatory VE program with a FFP PS contract might be safe and workable if limited to very specific areas. It will result in some increased Government oversight of changes in that area.
3. Utilizing a VE program with a cost PS contract is easily workable only for those non design/configuration changes which can be captured in the modification and made binding on the contractor. All other changes would require significant increase in Government oversight (either cost or design/configuration control) in order to assure that the Government will get that for which it has paid.
4. The current emphasis on commercial items and PS necessitates a close examination of funding sources, allocation of costs, timing issues and potential abuse of multiple incentive situations.
5. At Attachment C is a special clause which incorporates the main features of these solutions.

¹⁵ FAR 52.248-1(k) establishes an order of priority for multiple incentives which should be considered when drafting specific solutions involving multiple incentives.

¹⁶ FAR 52.248-1(b) under definition of VECP.

ATTACHMENT A

29 Jan 96 (Revised 12 Jan 99)

MULTIPLE FUNDING SOURCES IN ONE CONTRACT

THEORY. The following principles are derived from statutory requirements (e.g., purpose statute, augmentation, *bona fide* need and the antideficiency act), regulations and Comptroller General decisions.¹⁷

- **Unique Effort.** Effort (supplies, services, R&D, etc.) which directly benefits a single party must be funded by an authorized funding source (i.e., IAW any statutory or administrative limitations on the funding documents) for that party and that purpose. If more than one unique effort is contained in a single contract, the effort and funding must be contractually "fenced" so that the commingling of neither effort nor funds is allowed contractually.

- **Common Effort.** When the effort directly benefits two or more parties, all who directly benefit must fund the effort. The funding ratio must equal the ratio of benefit received, as well as it can be determined under available guidance.¹⁸ This ratio is not impacted by the availability of funds. A party may not legally receive any more direct benefit than that which the party funds. Again, each party's source of funding must be authorized for that party and that purpose.

- **Timing.** The correct funding of contracts is required at every instant in time. If at any point in time the effort is funded with improper or insufficient funds, a violation has occurred. Later "adjustments to the books" may cause the violation to cease but do not alter the fact that a violation has occurred. Such violations may represent anything from an internal controls problem to an antideficiency act violation. The only exception is for common effort funded by two or more appropriations of the

¹⁷ The issue of multiple funding sources is rarely covered in a direct discussion. See B-238074, 28 Jun 91, at 70 Comp. Gen. 592; and B-225860, 12 Feb 88, at 67 Comp. Gen. 254.

¹⁸ On rare occasions, a subject matter regulation may provide some guidance on how to determine the benefit ratio. However, since these are not financial regulations, the guidance must be compared to proper legal theories. Some prior specific guidance (previous versions of AR 700-90 on engineering services) has been eliminated. This may have been in recognition that no easy test exists. Even the prior test of AR 700-90, which used the number of production units, is inaccurate. An ECP cut into the production line may have only a partial benefit to an almost completed unit, may have full benefit to a yet to be built unit, and may have no benefit to an FMS unit. The only acceptable ratio is one based upon the actual benefits received. Once established and documented in writing, the ratio cannot change except for mistake in facts (careful with possible funding violations) or the addition/deletion of beneficiaries.

same agency. 31 USC 1534 allows for final adjustments prior to the close of the fiscal year in such cases.¹⁹

PROCEDURE. The simple, and only practical, method for assuring compliance with the above is to structure the contract such that the contractor is told: what effort is for what party; what funds (PRONS) are authorized for a given effort (including ratio, if applicable); and that only those funds identified as available for a given effort may be billed for that effort.²⁰ This is not always as simple as it may appear. Effort for one party may be broken out into several CLINs (e.g., service, hardware and travel CLINS) with funding from other parties also under those same CLINS. The limitation of liability clauses (i.e., Limitation of Cost, Limitation of Funds, UCA and NTE Provisions) must be made applicable to each unique and each common effort, whether it be at the CLIN or SLIN level.

CAUTION When these funding principles are contractually imposed, there can be no funding violations. If the contractor errs, the Government is entitled to recapture the funds until such time as a legal basis for payment (e.g., quantum meruit) and source of funds are identified. If the contract does not impose these principles on the contractor, the Government would be required to engage in extraordinary coordination and oversight of the contractor. Even then errors are much more likely. However, when the Government assumes this responsibility, violations cannot always be corrected.

¹⁹ Matter of: Payment of U.S. Army Civilian Appellate Review Agency Investigative Travel and Per Diem, B-242199, 28 June 1991, 70 Comp. Gen. 601.

²⁰ See FAR 32.1004(c) and DFARS 204.7104-1(b) for related regulatory policy.

ATTACHMENT B

(Revised 13 January 1999)

THE ROLE OF FMS ACQUISITIONS IN THE ACCEPTANCE OF A VECP

A. TEST FOR ACCEPTING OR REJECTING A U.S. VECP.

There are several elements to the test for accepting or rejecting a VECP. The FMS unique aspects are discussed below.

TEST: "...results in reducing the overall projected cost to the agency...." (FAR 52.248-1(b))

"Agency" means DA/DOD and not the FMS customer. Each separate source of funds must pay its fair share of any effort based upon direct benefits received (See Attachment A.). There are specific statutory prohibitions on using U.S. funds to subsidize an FMS acquisition. Therefore, the VECP must represent an overall reduced cost to the U.S. in order to be accepted.²¹

"Projected cost" is not subject to the term "measurable" which applies only to collateral savings. The proper methods for projecting costs are addressed in various Government regulations and policies.

"Overall" is not specifically defined. It is, however, clearly broader than the terms "collateral savings" and "acquisition savings" combined. In certain regulations the term "life cycle costs" has been substituted.²² Additionally, the concept of avoidance of waste is mentioned in AMCR 70-8 as an objective of the VECP program.

²¹ However, when the contract in question is for an FMS customer (as opposed to a U.S. buy), the roles discussed in this paper would probably be reversed, but the definitions are not well suited for that situations.

²² See AMCR 70-8 and MICOMR 11-21.

B. THE ROLE OF AN FMS ACQUISITION IN THE TEST FOR ACCEPTING A U.S.VECP.

While FMS savings are not directly relevant to a U.S. decision to accept or reject a VECP, the FMS acquisition can affect the decision indirectly. The existence of an FMS buy at the time of a VECP decision means that another party exists to share the implementation costs of that VECP. When an FMS acquisition pays a portion of the implementation costs, the point at which the US experiences a reduction in "overall projected costs" occurs sooner. The FMS sharing of implementation costs can make the difference between acceptance or rejection of the VECP.

This role of the FMS acquisition is not well discussed in any source. It may well be that policy eventually could define the FMS savings as included within the overall reduction of cost to the agency. Certainly this seems reasonable where grants or FMS credits are being used. Also, FMS acquisitions are recognized as being for a U.S. national defense purpose, and the failure to consider the FMS factor can result in economic waste. However, until such time as clear guidance is provided to the contrary, the above limited FMS role is dictated by present language and funding rules.

In order to consider the FMS acquisition, even in the limited role of reducing implementation costs, there must be a signed LOA with sufficient funds to cover the FMS customer's share of the implementation costs.²³ Anything

²³ The FMS contribution to the implementation costs should be made when accepting the VECP. However, adjustments to the contract funds may be appropriate up to the time of contract closeout on a couple of theories: the LOA is a commitment to pay all costs of implementing the case; and if the VECP were acceptable even without the FMS buy sharing development and implementation costs, newly identified, directly benefiting parties should be required to contribute if the instant contract is not closed. It is doubtful that the FMS customer could be asked to pay retroactively (after closeout or completion of the contract) based upon current policy against assessing nonrecurring cost recoupments on FMS acquisitions.

less than this could result in the U.S. improperly subsidizing the FMS buy or accepting a VECP which does not meet the FAR requirements for acceptance.

C. RECOMMENDATIONS/SUGGESTIONS.

The proper test is to consider only the indirect impact (reduction of implementation costs) of signed LOAs on the overall reduction of projected agency costs. If the VECP is not acceptable based on timing problems (LOA not signed) or insufficient cost reductions, the following alternatives may be useful:

- Work with the contractor to delay the VECP decision until signed LOAs will produce a positive decision.
- Contractor could consider taking a present risk for a future benefit by lowering contractor implementation costs or agreeing to a NLT savings provision which assures that the Government breaks even. The contractor then has the opportunity to share in potential future savings such as FMS acquisitions.
- If the VECP is advantageous to the Government for reasons other than cost reductions, the Government might reject the changes as a VECP but incorporate it as an ECP. This would pay the contractor an equitable adjustment for the contractor's costs, but it would deny the contractor any share of savings.

ATTACHMENT C

SECTION H-X VALUE ENGINEERING (VE) COST SAVING CHANGES (CONTRACTOR CONTROLLED PRODUCT BASELINE):

- A. THIS CONTRACT REQUIRES DELIVERY OF SUPPLIES AND SERVICES DEFINED BY THE CONTRACTOR CONTROLLED [PRODUCT DEFINITION DATA PACKAGE (PDDP)] AS REFLECTED IN PARAGRAPH _____ OF THE STATEMENT OF WORK. CHANGES MADE TO THE [PDDP] MAY BE MADE BY THE CONTRACTOR WITHOUT A CHANGE TO THE CONTRACT. THE CONTRACTOR MAY SUBMIT ANY COST SAVING CHANGES TO THE [PDDP] OR THIS CONTRACT UNDER FAR 52.248-1, VALUE ENGINEERING, AS SPECIFIED IN THIS CONTRACT INCLUDING FAR CLASS DEVIATION DAR 97-00005.
- B. FOR VALUE ENGINEERING CHANGE PROPOSALS (VECPs) SUBMITTED PURSUANT TO SUBPARAGRAPH "A" THAT RESULT IN NEGATIVE INSTANT CONTRACT SAVINGS, AS DEFINED IN FAR 52.248-1, THE CONTRACTOR AGREES TO DEFER PAYMENT OF THE ALLOWABLE DEVELOPMENT AND IMPLEMENTATION COST WHICH IS IN EXCESS OF THE INSTANT CONTRACT SAVINGS ON AN ACCEPTED VECP. THE DEFERRED AMOUNT WILL BE PAID TO THE CONTRACTOR FROM CONCURRENT OR FUTURE SAVINGS, ONLY AS SUCH SAVINGS ARE REALIZED AND BEFORE ANY GOVERNMENT COSTS ARE OFFSET OR ANY SHARING OCCURS.
- C. FOR ANY VECP SUBMITTED PURSUANT TO SUBPARAGRAPH "A", THE GOVERNMENT DOES NOT ANTICIPATE OFFERING LUMP SUM SETTLEMENT FOR FUTURE SAVINGS AS PROVIDED IN FAR 52.248-1(I)(4). ROYALTY PAYMENTS WILL BE MADE UNDER THE PROVISIONS OF FAR 52.248-1(I) AS FUTURE CONTRACTS ARE AWARDED, PROVIDED THE SUBJECT VECP AS APPROVED (OR IF SUBSEQUENTLY REVISED BY THE CONTRACTOR, THE CURRENT VERSION) IS UTILIZED IN PERFORMING THE FUTURE CONTRACT AND RESULTS IN THE ANTICIPATED SAVINGS.
- D. FOR COST REIMBURSABLE CONTRACTS OR CLINS, THE PARTIES UNDERSTAND THAT CHANGES TO AREAS OF PERFORMANCE WHICH ARE NOT SPECIFICALLY CONTROLLED BY CONTRACT LANGUAGE (I.E., THE CONTRACTOR COULD IMPLEMENT OR DECLINE TO IMPLEMENT THE CHANGE WITHOUT GOVERNMENT APPROVAL) MAY REQUIRE THE NEGOTIATION OF ADDITIONAL AGREEMENTS PRIOR TO ACCEPTANCE.
- E. IF THIS CONTRACT CONTAINS FAR 52.248-1, ALT II, THOSE AREAS OF PERFORMANCE WHICH ARE SUBJECT TO THAT CLAUSE WILL BE DESCRIBED IN THE STATEMENT OF WORK FOR THE MANDATORY VE (I.E., ALT II) PROGRAM. ALL CHANGES WITHIN THE SCOPE OF THIS MANDATORY VE PROGRAM STATEMENT OF WORK SHALL BE SUBMITTED AS A VECP IAW FAR 52.248-1, ALT II. UNLESS FIRST REJECTED BY THE GOVERNMENT AS A VECP, A CHANGE SUBJECT TO THIS PARAGRAPH SHALL NOT BE OTHERWISE IMPLEMENTED BY THE CONTRACTOR. FOR THE PURPOSES OF THIS PARAGRAPH, A "CHANGE" IS DEFINED AS ANY VARIATION FROM THE CONTRACTOR'S STATED OR IMPLIED METHOD OF PERFORMANCE UPON WHICH AWARD OF THIS CONTRACT WAS BASED. A CHANGE WHICH IS DOCUMENTED AS HAVING A POTENTIAL NET ACQUISITION SAVINGS OF LESS THAN \$ _____ IS EXCLUDED FROM THE PROVISIONS OF THIS PARAGRAPH.

- F. THE GOVERNMENT SHALL HAVE THE RIGHT TO DESIGNATE WHICH CONTRACT WILL BE CONSIDERED THE "INSTANT CONTRACT" UNDER WHICH THE VECP WILL BE DEEMED ACCEPTED WHENEVER THERE ARE CONCURRENT CONTRACTS (UNDER WHICH THE VECP COULD HAVE BEEN SUBMITTED) AT THE TIME THE BASIS OF THE VECP WAS FIRST KNOWN OR FIRST IMPLEMENTED BY THE CONTRACTOR. THE CONTRACTOR SHALL, WITH THE VECP SUBMISSION, ADVISE THE GOVERNMENT OF SUCH CONCURRENT CONTRACTS. THE GOVERNMENT'S RIGHT TO MAKE THIS ELECTION WILL TERMINATE ONLY UPON EXECUTION OF A MODIFICATION TO THE CONTRACT WHICH SPECIFICALLY ADDRESSES THIS ELECTION ISSUE.

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Cited "90-3 BCA ¶....."

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acceptance of the battery adapter for the two specific night scope devices that were procured under its contract with the Government. Appellant's "new" claim requests relief based upon the Government's constructive acceptance of the reconfigured housing design on a different device under a contract in which it was not a party. There are clearly different factual predicates at work here, so much so that it is highly questionable whether appellant could legally pursue such a constructive acceptance claim under the VEI clause of this scope contract; see *John J. Kirlin v. United States* (SACCF ¶ 76,364), 827 F.2d 1538 (Fed. Cir. 1987). Since appellant did not have a contract for the goggles, it should have submitted its proposal for the goggles under (then) ASPR 1-1708, "Unsolicited VE Proposals."

We hold that the constructive acceptance claim was a new claim over \$50,000 and was required to be certified by the contractor and submitted to the contracting officer for his own independent evaluation and review, 41 U.S.C. § 605. These actions were not taken, and we have no jurisdiction to consider the claim at this time. In view of our decision, we strike all evidence of record related to this claim.

Similarly, the Government contends that the Board has no jurisdiction over the new matter pleaded in appellant's complaint which seeks to compute savings by changing the benchmark used to compare VECP costs. The use of the mercury battery benchmark greatly increased appellant's claimed battery savings share. The quantum computation for this and other claim changes (bringing the claim to \$12,300,000) was developed by one of appellant's witnesses one evening during the trial.

We need not decide whether this benchmark change was in fact a new claim, since assuming *arguendo* that it was the same claim as the one submitted to the contracting officer, we are still without jurisdiction to hear it. We have here an uncertified increase in claim of major proportions. While the \$3,127,553 amount was certified to the contracting officer, the current \$12 million claim figure was not. As we stated in *Toombs and Company, Inc.*, ASBCA Nos. 35085, 35086, 89-3 BCA ¶ 21,997 at 110,607:

The requirement for the certification of claims in excess of \$50,000 applies not only

to the facts of entitlement but also to those of amount. *This requirement is too easily circumvented if we allow an uncertified increase in amount based on facts that were clearly known to the appellant when the certified claims were submitted.*

(Emphasis added) *Accord, D.E.W., Inc.*, ASBCA No. 35173, 89-3 BCA ¶ 22,008. Here, the facts underlying the "mercury benchmark" (specifically, the Government's use of mercury batteries in the scopes) were clearly known to appellant at the time it submitted its certified claim to the contracting officer. The quantum nature of this claim should have been included and certified to the contracting officer. It was not. For this reason we have no jurisdiction to consider it at this late date, and we strike appellant's mercury benchmark computations accordingly.

Appellant's Proposal is a VECP

On appeal, the Government takes the position for the first time that appellant's proposal should not have been considered by the Government as a value engineering change proposal under the contract's VEI clause. The Government argues that in order to be considered a VECP under the clause, there must be a change to the "end item" to be delivered under the contract. According to the Government, since the battery adapter did not physically change the night vision scope, but was screwed down into the battery terminal at the top of the scope, the VEI clause was inapplicable.

The short answer to this is that the VEI clause does not limit a VECP to a physical change in the end item delivered to the Government. Aside from the VECP at issue here, such a restrictive reading would preclude many other legitimate cost savings proposals to the Government related to the contract which do not change the end item, including packaging changes, or changes to spare parts, support equipment, or supporting data, see *Philco Ford Corp.*, ASBCA No. 16197, 73-1 DCA ¶ 9917. In this regard, the VEI clause merely requires that the proposal "require a change to this contract to implement the VECP." L.60(a)(1). This serves to insure that the proposal provides something different from what the Government has already required by the design specifications, yet at the same time is not so far removed in subject matter as to be beyond the general scope of the contract. A VECP may not re-

* ASPR 1-1708 (DPC ¶ 76-8, effective 15 June 1977), provided a means by which the Government could purchase VECPs for an item on which a proposer did not have a contract. The award for

such an "unsolicited proposal" could be no more than 20 percent of annual net savings, the same percentage provided for in the collateral savings provision here.

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Board of Contract Appeals

sult in a "cardinal change" to the underlying contract, *John J. Kirlin, Inc. v. United States, supra*.

In this case both of these criteria are met. There is no question that the battery adapter was an addition to the existing contract requirement, and at the very least, the pertinent military specifications (which identified the scope's power source) should have been modified to reflect that addition and the introduction of "AA" batteries (findings 5, 69). That the Government chose to procure the adapter from appellant under a separate contract, and chose not to promptly modify the above specifications (finding 69), does not detract from the obvious change the adapter had on the original contract requirement. A VECP may change a contract just as easily by adding as by deleting items, *John J. Kirlin, Inc. v. United States, supra*. The Government implemented this VECP by issuing a change order, P00037, which expressly modified, *inter alia*, Section E of the existing contract schedule to include appellant's proposal. This change was identified as line item 0034AF in the contract schedule (finding 69).

For purposes of the VEI clause, we also view the adapter as falling within the general scope of the underlying contract. The adapter was closely related to the night scope and did not change the nature, function or purpose of the same. Its price was also modest in relation to the scope itself (finding 70), and it did not materially change the nature of the overall procurement. In view of these factors, we do not believe that the adapter was a cardinal change which required the contractor to perform duties materially different from those originally bargained for under its contract, *see generally, Edward R. Marden Corp. v. United States* [18CCF ¶ 80,368], 442 F.2d 364 (Cl.Cl. 1971).

Most importantly however, we rely upon the way the parties themselves interpreted the VEI clause during contract performance. Tribunals normally accord great weight to the interpretation placed upon the contract by the parties during contract performance, and prior to the entrance of the litigating lawyers, *Julius Goldman's Egg City v. United States* [30CCF ¶ 70,662], 697 F.2d 1051 (Fed. Cir. 1983); *Macke Co. v. United States* [18CCF ¶ 81,753], 467 F.2d 1323 (Cl.Cl. 1972). The parties have not suggested to us any reason to depart from this well settled law.

Appellant clearly submitted its adapter proposal as an alternate under the VEI

¶ 23,027

clause. The proposal was accepted for evaluation under the VEI clause by authorized Government representatives. The Government requested that appellant furnish additional information regarding its alternate VECP, and appellant furnished the same, incurring costs in reliance upon the Government's requests. A similar competitor's proposal was also submitted and evaluated as a VECP. The contracting officer, after apparently receiving input from various sources, accepted appellant's proposal as a VECP, and granted appellant a collateral savings award under the VEI clause. In response to appellant's challenge to the award, the contracting officer reversed the award, and ultimately issued a modification to the contract under the VEI clause. Appellant made a claim for additional money under the VEI clause, and the contracting officer issued a final decision denying further recovery under said clause.

At all times relevant during the performance of this contract, both the Government and the appellant interpreted the VEI clause as encompassing appellant's battery adapter proposal. We accord this interpretation great weight in this case, consistent with well recognized principles of contract interpretation. Indeed, the parties' contemporaneous interpretation is also consistent with the well settled policy of liberally construing the VEI clause so as to encourage submissions thereunder and future Government savings, *Airmotive Engineering Corp. v. United States*, 535 F.2d 8 (Cl.Cl. 1976); *Mishara Construction Co., ASRCA* 17957, 75-1 BCA ¶ 11,206 (1975).

For all the foregoing reasons, we are of the opinion that appellant's proposal is subject to the VEI clause.

Battery Savings are Collateral Savings Under the VEI Clause

Although appellant was not obligated to furnish batteries to the Government under its scope contract, appellant contends that it is entitled to "future contracts" savings on future battery procurements under this contract's VEI clause. According to appellant, since the scopes could now use inexpensive "AA" alkaline batteries in lieu of more expensive batteries due to appellant's adapter, it is entitled to a 50 percent share of "future contract" savings, per L.60(e)(3)(iii)(B), which are realized by the Government over a three year period in the purchase of alkaline batteries used in these devices. The Government recognizes that there will be savings over time through the use of alkaline batteries in the scopes, but contends

Statement of Work
For
Mandatory Value Management

1. Scope. This Statement of Work (SOW) establishes the minimum requirements for the contractor's mandatory Value Management (VM) Program Requirement.

2. Requirements for Mandatory Value Management Program Requirement.

2.1 General. Value Management Methodology to include opportunities for commercialization and obsolescence avoidance shall be used to reduce total life cycle costs.

2.2 Required Value Management Study Areas. The contractor shall focus on areas of maximum potential savings within the following components:

- 1) Fire Control Panel (FCP)
- 2) Launcher Interface Unit (LIU)
- 3) Weapons Interface Unit (WIN)
- 4) Position Navigation Unit (PNU)
- 5) Power Switching Unit (PSU)