

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Patriot Maintenance, Inc./Grosse Pointe)
Capital Corporation;) ASBCA No. 47331
)
All Star Maintenance, Inc.) ASBCA No. 52478
)
Under Contract No. N62467-89-D-C915)

APPEARANCE FOR THE APPELLANT: David W. Croysdale, Esq.
Michael Best & Friedrich LLP
Milwaukee, WI

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals¹ are taken from contracting officers' decisions denying appellant's claims for equitable adjustments. The underlying contract is for repair and maintenance of family housing units at Mayport Naval Station, Mayport, Florida (Mayport). Pursuant to the Board's 13 August 1999 order, both entitlement and quantum are at issue. We dismiss ASBCA No. 47331 and deny ASBCA No. 52478.

FINDINGS OF FACT

The Contract

1. Contract No. N62467-89-D-C915 was awarded to appellant on 19 December 1989. The contract called for appellant to provide specified repair and maintenance services at the fixed price of \$78,000 per month for the base period for 1,081 housing units, 681 of which were on the base at Bennett Shores and 400 of which were off the base at Ribault Bay, and 50 trailer spaces. Major repairs, defined as any single repair or replacement with a total estimated cost of over \$2,000, were not within the scope of the contract pursuant to C.11.b. The base period of the contract was from 1 October 1989 to

30 September 1990. However, at F.2 respondent reserved the right to award the contract for a base period of less than 12 months, and appellant knowingly accepted the award for a base period of less than 12 months. Appellant was also to provide additional services on an indefinite quantity basis. The contract incorporated by reference the FAR 52.233-1 DISPUTES (ALTERNATE I) (APR 1984) and FAR 52.243-1 CHANGES - FIXED PRICE (ALTERNATE II) (AUG 1987) clauses (R4, tab 1; tr. 1/7, 89-90).

2. The contract at Section B, Supplies or Services and Prices/Costs, provided as follows:

FIRM FIXED PRICE WORK: Price for the BASE PERIOD (1 October 1989 through 30 September 1990) for all work specified in the contract, except for work specifically identified as being included in the indefinite quantity portion of the contract.

The contract identified the “Quantity” as 12 and “Unit” as months for the base period and all option periods. However, the contract contained at I.6 the clause at FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT SERVICES (APR 1984), which permitted respondent to extend the contract for additional periods of from 1 to 12 months at the prices bid, with the proviso that the total contract duration, including option exercises, could not exceed 60 months. Four option periods were provided for, and appellant bid \$72,500 per month for the first option period and \$63,000 per month for the remaining option periods. The contract repeated the above “FIRM FIXED PRICE WORK” paragraph for the option periods. (R4, tab 1 at B-1, B-5, B-9, B-13, B-15)

3. Service calls were categorized as emergency, urgent and routine. In all instances, upon completion of the service call appellant was required to provide to respondent a work authorization form with a description of the work completed and materials and parts used; date and time for the start and completion of the work; the signature of the unit’s occupant to indicate that the work was, in fact, performed; and the signature or initials of appellant’s craftsman to indicate the work was completed. (R4, tab 1 at C.12)

4. The contract provided the following historical data on service calls per month:

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1986						1101	1398	1417	1372	1226	943	1272
1987	1491	1297	1283	1296	1329	1554	1661	1586	1492	1383	1534	1426
1988	1556	1424	1567	1549	1509	1404	1247	1466	1518	1517	1333	1488
1989	1518	830	706	1512	1805	1815						

(R4, tab 1, J-C11)

5. Pursuant to C.19.e, appliances were to be cyclically replaced based on operating condition or economic life as identified by respondent. The replacement cycle was to last 10 months and begin during the second month of the contract. Historical data on replacements over the period of a year was as follows:

Refrigerators	100
Dishwashers	35
Garbage disposal	50
Water Heaters	100
Ranges	100

(R4, tab 1, C.19.e, J-C11)

6. The following historical data was provided for non-cyclic appliance replacement under service calls and change of occupancy requirements. The replacements are included in the historical data for service calls per month:

	<u>FY 87</u>	<u>FY 88</u>	<u>FY 89</u>
Refrigerators	151	150	77
Dishwashers	97	70	18
Garbage disposal	101	235	58
Water Heaters	105	130	78
Ranges	143	150	77

(R4, tab 1, J-C11)

7. The contract provided the following historical data on appliance calls:

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1986						176	N/A	N/A	N/A	184	152	N/A
1987	N/A	137	110	124	92	165	49	134	143	129	118	139
1988	161	150	133	146	116	128	100	120	115	111	124	118
1989	156	23	N/A	160	111	118						

(R4, tab 1 at J-C11)

8. The contract contained the following under TYPICAL SERVICE WORK:

The following maintenance and repair items are typical of those performed as service calls. THE LIST IS NOT ALL-INCLUSIVE.

Plumbing

Leaking faucets, drains/garbage disposals stopped up/pipe breaks in ceiling or walls/pipe breaks in front yards, pipe breaks in exterior storage room or equipment room/stopped up commodes, broken commode lines, broken commode seats/secure strainers in tubs/replace work [sic] shower heads, commode flappers [sic]

Replace elements water heater.

Adjust or repair thermostat water heater. Caulk bath tub/commode.

....

Air Conditioner

Freon leak.

Faulty thermostat.

Replace filters.

Replace compressor.

....

Appliances

Refrigerator

Replace gaskets.

Replace door liners.

Remove rust from shelves.

Regulate thermostat.

Open drain lines.

Replace compressor.

Repair leak and charge freon.

Adjust doors for tight close.

Level unit.
Repair/replace broken handles.
Tough [sic] paint damaged or rusted exterior.
Replace crisper tops and tees.
Replace ice trays.

(R4, tab 1 at J-C11)

9. The contract advised that the water piping at Bennett Shores was plastic (R4, tab 1 at J-C1-6). Floor plans for the units were included in the contract (*id.* at J-C1-9 through 27).

Extension of the Contract

10. On 27 August 1990 respondent exercised its option for the first option period and extended the contract for 6 months through 31 March 1991 (R4, tab 15). The option for the second option period was exercised on 22 March 1991, extending the contract for 6 months through 30 September 1991 (R4, tab 38). Appellant was paid at the first option period rate for the 12 month period from 1 October 1990 to 30 September 1991 (tr. 1/97).

11. Appellant's president, John Junge, testified that he prepared the bid (tr. 1/57). He also testified that he interpreted "option" to mean "usually . . . a year or one of a number of years that the government may extend the performance by exercising its option after the base year or base period of the contract" (tr. 1/70-71). He interpreted "extension" to "[refer] to a period where the government is seeking continued performance for a shorter period or unspecified period of time. Most commonly, that's after the exercise of all the options, but it's often common in terms of a period of time after a base year or earlier options." Mr. Junge could not identify where the contract afforded a means to extend the contract other than through the option provisions (tr. 1/94). Appellant's general manager, Toby Henry, helped prepare the bid (tr. 1/142). He offered no testimony on the anticipated duration of extensions under the contract's option provisions or the pricing thereof.

Polybutylene Piping

Exhibit A-21

12. Appellant claims an equitable adjustment for performing excessive service calls for polybutylene pipe repairs at Bennett Shores. At the hearing appellant for the first time produced Exhibit A-21, which was admitted without objection through a witness with no connection to contract performance (tr. 2/14). The exhibit consists of copies of approximately 536 work authorization forms and lists of service calls allegedly

involving polybutylene pipe and fitting repairs for the period from January 1990 through 13 September 1991. Appellant provided through the same witness as Exhibit A-22 a chart summarizing Exhibit A-21 by listing the number of forms per month and purporting to show the number of variances with the forms at tab 230 of the Rule 4 file. There is credible, reliable testimony that the forms in the Rule 4 file represent the work authorization forms submitted by appellant at the time the work was performed and that the Rule 4 file contains all such contemporaneous work authorization forms (tr. 1/185-89, 2/157). We find that the work authorization forms in the Rule 4 file at tab 230 are the only work authorization forms provided to respondent by appellant during contract performance. Appellant has provided no credible evidence as to how the work authorization forms comprising Exhibit A-21 were prepared, why the copies of numbered work authorization forms in Exhibit A-21 vary from the identically numbered forms in the Rule 4 file or otherwise supporting the trustworthiness of Exhibit A-21. Although the Board is not required to examine an exhibit of this size put into the record at the last minute without explanatory testimony, we have done so for January 1990. Seventeen of the 20 documents for January 1990 are copies of work authorization forms also found in the Rule 4 file. We find the Exhibit A-21 documents have information added, such as additional parts or labor. We find variations in handwriting. While there may be valid reasons for the changes and appellant's failure to produce the documents prior to the hearing, no credible explanation has been tendered. We find Exhibit A-21 unreliable. The Board's analysis of appellant's claim for polybutylene pipe and fitting repairs at Bennett Shores is, accordingly, conducted without further reference to Exhibit A-21. Outside of Exhibit A-21, the only evidence of the cost of pipe repairs at Bennett Shores in the record is Tab 230 of the Rule 4 file, which contains some information on hours and no cost information. Tab 230 ends at 16 April 1991. It provides no realistic basis to establish the cost of piping repairs at Bennett Shores.

13. A pipe that bursts behind a wall or in a ceiling requires repair work by several crafts. In addition to the pipe or fitting repair, drywall may need to be replaced, compound applied to the seams and the drywall painted. If a full sheet of drywall must be replaced, more than one trip would be required. This would typically take 4 to 6 hours. (Tr. 2/27-39, 66) Mr. Junge did not prepare the bid expecting to experience a large number of pipe breaks, and he did not realize the plastic piping identified in the solicitation was polybutylene (tr. 1/59, 62). However, the problems with polybutylene piping did not become well known in the housing industry until 1991, after the bid was prepared (tr. 1/64). Had he anticipated 400 to 600 pipe break service calls at Bennett Shores, it would have affected the bid (tr. 2/65). Mr. Junge did not testify as to how it would have affected the bid, and there is no evidence on this point. Mr. Junge could not be specific as to whether there were multiple breaks at Bennett Shores, or whether there was piping other than polybutylene (tr. 1/67).

14. Marc Campbell, appellant's project manager from 15 March 1991 to 30 September 1991 (tr. 2/27, 67), testified that the number of concealed pipe break service calls at Bennett Shores was unusually large. He further testified that appellant had personnel dedicated to repairing pipes and installing and painting new drywall to replace drywall damaged by pipe breaks (tr. 2/39).

15. Appellant received additional compensation for pipe leaks at Ribault Bay where there were pin hole leaks in copper piping. Rebecca Wood, respondent's housing director, believed the pin hole leaks in the copper were harder to locate and caused more recalls than the polybutylene breaks, which involved fittings that were obvious and "[o]nce they were fixed, they were fixed" (tr. 1/177-79).

16. A comparison of the same work authorization forms in the Rule 4 file against the work authorization forms identified by number in the claim (which does not include the work authorization forms it identifies) establishes significant variations with respect to labor hours claimed, type of pipe, and the location of the break. The work authorization forms in the Rule 4 file do not have any cost information for materials. (R4, tab 230; ex. G-2, tab 2; tr. 2/152-64)

17. An audit was performed of the polybutylene pipe claim. Appellant offered no work orders, payrolls or other records of significance to support the claim. All costs were questioned. (Ex. G-1; tr. 2/132-34)

Appliances

Cyclic Replacement

18. By unilateral Modification No. P00001, dated 17 January 1990, the appliance replacements originally required by the contract (finding 5) were reduced on a pro rata basis to conform to the 8.5 month base period actually awarded (R4, tab 3). The number of appliance replacements was thereafter increased to the original contract levels (finding 5) by bilateral Modification No. P00002, also dated 17 January 1990, and the contract price was increased by \$44,140.29. The performance period was unchanged. The modification stated:

Acceptance of this modification constitutes an accord and satisfaction and represents payment in full (for both time and money) for any and all costs, impact effect, and/or delays arising out of, or incidental to, the work as herein revised and extension of the contract completion time.

(R4, tab 4)

19. The first option was exercised for 6 months, from 1 October 1990 through 31 March 1991, by unilateral Modification No. P00013, dated 27 August 1990 (R4, tab 15). In a 9 October 1990 letter respondent informed appellant that cyclic replacement should be complete and any discrepancies would be reconciled soon (R4, tab 110). By bilateral contract Modification No. P00034, dated 8 March 1991, appellant agreed to the following Schedule of Deductions for installation of appliances between 1 October 1990 and 31 March 1991:

a. Refrigerator	Each	50	\$660.84	\$33,042
b. Ranges	Each	50	\$403.84	\$20,192
c. Dishwashers	Each	17	\$275	\$ 4,675
d. Garbage Disposal	Each	25	\$ 72	\$ 1,800
e. Water Heaters	Each	50	\$235	\$11,750

The modification adjusted labor rates to conform to Wage Determination No. 87-065 and established the agreed-to price for the 6-month extension as \$435,284.70, representing the monthly rate appellant bid as increased by the Wage Determination. It contained the same “accord and satisfaction” paragraph as Modification No. P00002. (R4, tab 36)

20. The second option was exercised for the 6-month period from 1 April 1991 through 30 September 1991 by unilateral Modification No. P00036, dated 22 March 1991. That modification included the same Schedule of Deductions with regard to appliances as Modification No. 34. The total price was \$482,016.34. (R4, tab 36) Other sections of the Schedule of Deductions were changed by unilateral Modification No. P00038, including a reduction in the total price to \$481,731.64, but the appliance portion was unchanged (R4, tab 40).

21. In a series of letters, replacement schedules conforming to the number of appliances in each category under Modification No. 36 except for dishwashers were proposed by appellant (R4, tabs 126, 134-36, 193-97). Appellant’s 31 May 1991 letter proposed to install 18 dishwashers (R4, tab 195). However, by letter of 12 August 1991 appellant notified respondent that it would not be replacing one of the identified dishwashers (R4, tab 213). Subsequent correspondence documents a disagreement between the parties with respect to which appliances were to be replaced (*e.g.*, R4, tabs 205, 213, 215).

22. Appellant’s bid documents show that for the base period it estimated total cost of \$173,060 for cyclic appliance replacement, as follows: 151 refrigerators at \$575; 148 ranges at \$310; 74 dishwashers at \$215; 125 hot water heaters at \$145; and 158 garbage disposals at \$40 (R4, tab 48; tr. 1/120). The estimates show substantially higher numbers of appliances than the historical data (finding 5). Mr. Junge testified

the bid when submitted was “lower [than the estimate at Tab 48] in the cost of some individual appliances, and probably lower in the number of appliances, in some cases” (tr. 1/122). Appellant has submitted two exhibits purporting to represent summaries of appliance purchases for Mayport totaling \$165,785 for both the base and option periods. Invoice numbers are identified for most of the appliances. (Exs. A-6, -8) According to the exhibits, appellant purchased 157 refrigerators, 119 ranges, 102 dishwashers, 230 water heaters and 204 garbage disposals. Fifty of the hot water heaters were allegedly purchased on 6 August 1991, less than 2 months from the completion of contract performance. No invoice numbers are identified for the 50 hot water heaters. (Ex. A-8) There is no evidence that all the appliances listed were actually installed. There is no evidence as to whether any of the appliances were purchased for replacements that were not cyclic but resulted from service calls on worn-out appliances. The exhibits were introduced through Melvin Sweet, appellant’s director of finance and administration (tr. 1/212-213). He did not prepare the exhibits and he only examined a few of the underlying invoices (tr. 1/213-217).

23. Appellant did not replace appliances in quantities in excess of the contract’s historical data (findings 5, 6; tr. 1/119).

Refrigerator Compressor Failures

24. A total of 22 service calls during contract performance were for faulty compressors. These service calls involved refrigerators that were under warranty so that appellant did not actually have to repair the refrigerators. (Tr. 2/147-50). More than half of all refrigerator service calls involved refrigerators that were under warranty (ex. G-2, tab 1).

Air Conditioning

25. The previous maintenance contractor abandoned the job, a fact of which Mr. Junge was aware at the time of bid preparation (tr. 1/61-62, 182). From August 1989 to contract award repairs were effected by individual service orders (tr. 1/182).

26. Mr. Campbell considered there to be more complaints than he had expected with regard to inadequate cooling by air conditioning units at Mayport (tr. 2/49). He believed that the units had not been properly maintained over the years and his technicians thought the air conditioning compressors were smaller than the 2 tons indicated on the data plate (tr. 2/50-51). He made a personal inspection of “probably . . . 15 or 20” units and found that some were inaccurately labeled (tr. 2/86-87). However, the volume of calls on air conditioning units was not unusual according to Mr. Sweet (tr. 1/149) and Mr. Campbell testified the time spent per service call, although hard to quantify, was “not inordinate” (tr. 2/54). Mr. Campbell estimated that, in the context

of the older units at Ribault Bay, an extra 15 minutes per service call was required (tr. 2/54-55, 84).

27. The cost of technician time for air conditioning repairs was \$24.27 per hour (tr. 2/91-92).

28. An analysis of the contemporaneous records submitted to respondent by appellant for air conditioning calls at Ribault Bay and Bennett Shores indicates the following:

	<u>Bennett Shores</u>	<u>Ribault Bay</u>
Units	681	400
Total calls	2755	1877
Calls per unit	4	4.7
Frequency per unit	1 every 5 months	1 every 4 months
Preventive maintenance	1012 (37%)	771 (41%)
Repair work	781 (28%)	422 (23%)
Replacement work	594 (22%)	365 (19%)
No work performed	368 (13%)	319 (17%)

(Ex. G-2, tab 3; tr. 2/165-75)

29. There is no evidence as to how appellant bid the contract with respect to air conditioning calls. There is no evidence that the historical data on service calls was exceeded.

The Claim - ASBCA No. 47331

30. On 25 September 1992 appellant submitted a claim in the amount of \$945,418.64, comprised of 10 separate elements (R4, tab 44; complaint). Only 4 elements remain at issue (Stipulation, letter of 7 September 1999). The claim seeks \$77,839.20 for the polybutylene piping portion; an estimated total of \$105,000 for the appliances portion; \$203,716.80 for the air conditioning portion; and \$66,000 for the extension portion. The claim is certified by “Ron A. Zika, Sr. Project Manager.” (R4, tab 44) Mr. Zika had been replaced as project manager at Mayport prior to Mr. Campbell’s arrival. There had been numerous project managers at Mayport. (Tr. 2/63, 74) There is no evidence Mr. Zika was a company officer or connected with the contract when he certified the claim.

31. The claim was denied in a 30 November 1993 contracting officer’s decision (R4, tab 45) and an appeal filed by letter dated 1 March 1994 (R4, tab 46).

The Protective Claim-ASBCA No. 52478

32. On 19 October 1999 an appeal was filed including the four elements remaining at issue (finding 30). The claim was certified by Mr. Junge (Gov't br., ex. 1). A contracting officer's decision dated 19 November 1999 denied the claim. A notice of appeal was received by the Board on 30 November 1999.

DECISION

ASBCA No. 47331

The claim in this appeal was certified by Ron Zika, a senior project manager (finding 30). There is no evidence that at the time he certified the claim he was a company officer or in any way connected with the contract (*id.*). The governing regulation at the time required certification by “[a] senior company official in charge at the contractor’s plant or location involved” or an officer or general partner. FAR 33.207(c)(2). Mr. Zika does not meet any of the FAR criteria. Moreover, the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, did not at the time of certification provide for retroactive correction² of defective certifications. Accordingly, we hold the claim was not properly certified and the certification cannot be corrected. Proper certification was a jurisdictional requisite for claims filed in September 1992. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 580 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 919 (1991). ASBCA No. 47331 is dismissed for lack of jurisdiction.

ASBCA No. 52478

Extension of the Contract

Appellant argues that upon completion of the base period, any increase in the contract performance period of less than 12 months was an extension that must be paid at the rate the contract establishes for the previous period. In this instance, the contract provides that 4 options may be exercised by respondent, and that each such exercise may be for a period of from 1 to 12 months (finding 2). Respondent exercised 2 options and thereby twice extended the contract for periods of 6 months each, for a total of 12 months (finding 10). Appellant was paid at the rate of the first option period for the 12 months of the extensions (*id.*). According to appellant’s interpretation, it did not experience the full effects of the learning curve it expected because the base period was less than one year, and it should have been paid at the base period rate during the contract extensions. Appellant would have us distinguish between options and extensions. We find appellant’s position unreasonable. We have previously upheld the right of the Government to exercise an option for less than 12 months at the option period

prices involving virtually identical contract terms. *Grover Enterprises, Inc.*, ASBCA No. 44331, 94-2 BCA ¶ 26,933, *aff'd* 47 F.3d 1180 (Fed. Cir. 1995) (table). This element of appellant's claim is denied.

Polybutylene Piping

Appellant argues that the polybutylene piping at Bennett Shores caused it substantially more work than anticipated. While there is no doubt that pipe breaks behind walls or ceilings would result in a substantial amount of work, and while there was testimony to the effect that this occurred unusually often (findings 13, 14), we cannot reconcile the testimony with the contemporaneous records. The contract required appellant to turn in work authorization forms after completion of work showing materials used and hours worked. The form was to be signed by both the craftsman and the unit's occupant. (Finding 3) Those forms are in the record as Tab 230 of the Rule 4 file and they do not support the claim (finding 12). We cannot rationalize appellant's craftsmen consistently turning in forms reporting less work than was actually performed or the willingness of occupants to consistently sign inaccurate statements regarding service calls, and appellant has failed utterly to establish why this would have happened. Under the circumstances, we find the credibility of the Tab 230 documents outweighs that of the testimony of Mr. Campbell and Mr. Junge. We have also found appellant's Exhibit A-21 to be unreliable (*id.*). Accordingly, we hold that appellant has not met its burden of proof and deny the polybutylene piping portion of the claim.

Appliances

Cyclic Replacement

The contract contains historical data, which is tantamount to estimated quantities. A bidder is entitled to rely on such data. *Timber Investors, Inc. v. United States*, 587 F.2d 472 (Ct. Cl. 1978). If a contractor's actual experience does not vary significantly from the data, it is not entitled to an equitable adjustment. *Apex International Management Services, Inc.*, ASBCA Nos. 37813 *et al.*, 94-1 BCA ¶ 26,299. We have found that appellant did not replace appliances in quantities exceeding the contract's historical data (finding 23). Appellant has produced summary exhibits showing that it purchased 151 refrigerators, 148 ranges, 74 dishwashers, 125 water heaters, and 158 garbage disposals. There is no breakdown of how many were purchased for service calls and how many were purchased for cyclic replacements, so we infer that the numbers represent total purchases. There is no evidence the appliances allegedly purchased were actually installed. (Finding 22) Assuming, *arguendo*, appellant's exhibits are reliable, the comparison of historical data for annual cyclic and 1989³ service call replacement of appliances to appellant's purchases is as follows:

	<u>Cyclic</u>	<u>Service Call</u>	<u>Total</u>	<u>Purchased</u>
Refrigerators	100	77	177	157
Dishwashers	35	18	53	102
Garbage Disposals	50	58	108	204
Water Heaters	100	78	178	230
Ranges	100	77	177	119

(Findings 5, 6, 22)

It can thus be seen that appellant, in the two years it performed the contract, claims to have actually purchased less than the historical data shows for one year for refrigerators and ranges. Further, in none of the remaining 3 categories did appellant purchase twice the annual historical estimates. Appellant was also paid an amount above the monthly fixed price for the difference between the pro rata number of cyclic replacements based on 8.5 months and the number of appliances for 12 months (finding 18).

Further, appellant agreed to cyclic replacement of 100 refrigerators, 35 dishwashers, 100 water heaters, 50 garbage disposals, and 100 ranges in the base period in bilateral Modification No. P00002 and approximately half those amounts for the first option period in bilateral Modification No. P00034. Appellant waived any claims arising from such cyclic appliance replacement through 31 March 1991. (Findings 18, 19) Yet appellant argues that a letter addressing cyclic replacement sent 5 months before the bilateral modification which established the numbers of appliances to be installed during the first option period (finding 19) “was an admission and acceptance by the Navy that the requirement to install cyclic appliances was a one time contractual requirement.” (App. br. at 28) Appellant seems to have forgotten that it executed a contract modification which not only committed it to provide cyclic replacement within the monthly price (as amended for a wage determination) in the option period, it waived any claims arising therefrom. If it is contending that it was only required to provide cyclic replacement in the base period, it ignores its own agreements and the clear language of the contract which was the same for base and option periods. (Finding 2) Appellant’s argument is meritless.

Compressor Failures

Appellant offers no argument on compressor failures. Accordingly, we conclude appellant has abandoned this portion of its claim. In any event, the evidence of record establishes that compressors were still under manufacturer's warranty (finding 24).

Air Conditioning

Appellant's claim is limited to the air conditioning units at Ribault Bay. Appellant appears to argue that because respondent used individual work orders for the period immediately preceding award of the contract the air conditioning units were, *ipso facto*, left in such condition that it is entitled to an equitable adjustment. Appellant also relies on Mr. Campbell's testimony that he found some undersized compressors and that there were frequent complaints about inadequate cooling. Mr. Campbell also testified that he believed an extra 15 minutes per service call was expended because of the condition of the units. (Finding 26) Mr. Campbell offered no standard of comparison, however, and appellant offered no evidence that historical service call data was exceeded. Neither did it offer evidence on how it bid the air conditioning portion of the contract (finding 29). It did offer testimony that the volume of calls was not unusual (finding 26).

Respondent offered an analysis of the service calls based on the contemporaneous documentation which appellant submitted to respondent. This revealed that the number of calls per dwelling was slightly higher at Ribault Bay than at Bennett Shores, but the number of calls is not at issue. It also indicates that the percentage of calls where no work was necessary was higher at Ribault Bay than at Bennett Shores. (Finding 28) Respondent's analysis neither rebuts nor supports the claim of more time per call except that there was a higher percentage of calls where no work was necessary, and therefore an inference of less time per call, at Ribault Bay.

Appellant has the burden of proof, *Sphinx International Inc.*, ASBCA No. 38784, 90-3 BCA ¶ 22,952, and it has provided precious little. We note that Mr. Campbell's time at Mayport was limited to the last 6 months (finding 14), and even his testimony that 15 additional minutes were spent on certain calls was in the context of a statement where he concluded that any extra time was hard to estimate and not inordinate (finding 26). Accordingly, we do not find Mr. Campbell's testimony probative. We conclude that appellant has failed to meet its burden of proof.

Summary

ASBCA No. 47331 is dismissed for lack of jurisdiction. ASBCA No. 52478 is denied.

Dated: 9 May 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

NOTES

- ¹ ASBCA No. 47331 was taken from a 30 November 1993 contracting officer's decision. The underlying contract was with All Star Maintenance, Inc. ("All Star"). However, at the time of the appeal from that decision appellant's assets related to the contract were held by Patriot Maintenance, Inc. and Grosse Pointe Capital Corporation (tr. 1/10) and the appeal was filed with those entities as the appellant. When an apparent jurisdictional problem surfaced at the hearing in ASBCA No. 47331, a protective claim was filed in the original contract name of All Star (resp. br., ex. 1). That claim was denied in a 19 November 1999 contracting officer's decision and appealed on behalf of All Star on 29 November 1999. By stipulation, the record of ASBCA No. 47331 is included in the record of ASBCA No. 52478 (tr. 1/159-60). The parties are in agreement that the name All Star shall be used (letters of 2 September 1999 and 7 September 1999).
- ² Pub. L. No. 102-572, which amended 41 U.S.C. § 605(c) to permit correction of defective certifications, did not become law until 29 October 1992.
- ³ Service call replacements for 1989 were significantly lower than 1987 and 1988, presumably because the maintenance contractor abandoned performance in 1989 (findings 6, 25).

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 47331 and 52478, Appeals of Patriot Maintenance, Inc./Grosse Pointe Capital Corporation and All Star Maintenance, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals