

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
PCT Services, Inc.) ASBCA No. 48446
)
Under Contract No. DABT23-92-C-0023)

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APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Jeffrey D. Stacey, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a contracting officer's decision denying appellant's claim in the amount of \$1,252,192.80. The underlying contract is for housekeeping services at Ireland Army Community Hospital (Ireland), Ft. Knox, Kentucky. We sustain the appeal in part.

FINDINGS OF FACT

1. After submission of sealed bids, Contract No. DABT23-92-C-0023 was awarded to PCT Services, Inc. (hereinafter sometimes PCT or appellant) on 30 October 1991. The base period of the contract was 1 November 1991 through 31 October 1992. Four one-year options were included. The contract pricing was on a unit cost basis, and the base period was priced as follows:

ITEM	DESCRIPTION	QUANTITY	U/M	U/P	AMOUNT
0001	Critical, non-dedicated cleaning.	98945	EA	.8406	83173.17
0002	Critical, dedicated (not including emergency room) cleaning.	5200	EA	5.9983	31191.16
0003	Critical, dedicated, emergency room only.	12	EA	1600.00	19200.00
0004	Critical, lock-in cleaning.	79242	EA	2.6241	207938.93
0005	Subcritical, non-dedicated, emergency room only.	741885	EA	.4485	332735
0006	Subcritical, dedicated cleaning.	135332	EA	1.5365	207937.62
0007	Noncritical cleaning.	621798	EA	.2842	176714.99

0008	Carpet cleaning.	120794	SF	.03	3623.82
0009	Light fixture cleaning.	4524	EA	.23	1040.52
0010	Grounds maintenance.	12	EA	800.00	9600.00
0011	Snow/ice removal.	5	EA	200.00	1000.00
0012	Wall cleaning (paragraph C.5.12).	87896	SF	.02	1757.92
0013	Window cleaning.	4074	EA	1.00	4074.00
	TOTAL FOR THE BASE PERIOD				
	(CLINs 0001 through 001).....				\$1,079,987.55

(R4, tab 1) Pursuant to “Notes” under Section B, the designation “EA” for items 0001-0007 equals 100 square feet (*id.* at B-5). Thus, for example, contract line item no. 0001 (CLIN 1) requires critical, non-dedicated cleaning of 9,894,500 square feet.

2. The Scope of Work of the contract included the following definitions:

SECTION C-2

.....

DEFINITIONS

C.2.7. Dedicated Employee(s): Employees assigned to an area of primary responsibility who shall complete all work in that area before leaving that area. The employee(s) may work within the general area or same floor but shall respond without delay when requested to support the “dedicated” area.

.....

C.2.19. Lock-In Employee(s): Contractor employees who shall remain in the specified “lock-in” area during the hours specified in this contract.

It also stated at ¶ C.1.1.2 “References to locations and functions of rooms/areas are as they currently exist and the Government reserves the right to change these locations or function designations.” (R4, tab 1)

3. The contract specified as follows regarding the cleaning of critical, sub-critical and non-critical areas:

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C.5.3. Cleaning of Critical Care Areas:

C.5.3.1. Each day the contractor shall -

C.5.3.1.1. Damp wipe surgical lights and reflectors with disinfectant-detergent. The contractor shall not dry dust in surgical areas.

C.5.3.1.2. Rewipe surgical reflectors with a sterile, dry cloth.

C.5.3.1.3. Damp wipe wall surfaces and furniture with disinfectant solution.

C.5.3.1.4. Flood floor surfaces with disinfectant solution (using spray container) three to four feet around the operating room table. Before picking up with wet vacuum, the contractor shall roll operating bed/table and other furniture with wheels through the disinfectant solution.

C.5.3.1.5 Disinfectant fogging shall not be performed in surgical areas at any time.

C.5.3.1.6. For between-case cleaning (entering after removal of patient), the contractor shall place linen from any open packs (whether soiled or not) in hamper bags for the laundry, place used or soiled nonwoven disposable fabrics in plastic bags for disposal, discard soiled sponges and other waste in plastic bags, cleanse the horizontal surfaces of furniture and equipment used in the surgical procedure with a disinfectant-detergent, spot clean walls and ceilings and wipe overhead lamps clean with a disinfectant-detergent.

C.5.3.1.7. For terminal (end of day) cleaning and removal of the last patient of the day, the contractor shall bag, seal and remove soiled linen and waste to collection points; scrub furniture with disinfectant-detergent, clean wheels and casters of furniture and equipment (including transportation and utility carts) free of debris, clean wall-mounted or ceiling-mounted equipment with disinfectant-detergent (including spotlights and tracks), clean and disinfect kick buckets, waste receptacles and racks in the sink then scrub sinks; disassemble, clean and disinfect spray heads of faucets and

soap dispensers; clean doors of cabinets and surgical rooms around handle and push plates, scrub floors and pickup disinfectant-detergent solution with a wet vacuum. The contractor shall use disposable mops for each room and shall discard after use. For terminal cleaning in isolation rooms, the contractor shall also remove soiled linen from bed then place in linen bag; disinfect bed, mattress and pillow; spot wash walls, light switches, doorknobs and any area the patient or staff may come in contact; clean contaminated equipment with disinfectant-detergent then return to cart, remove then discard protective clothing, discard mops and rags, bag soiled items, seal linen bag after reusable soiled linen has been placed inside and label bag as infectious waste.

C.5.3.1.8. For isolation rooms, the contractor shall -

C. 5.3.1.8.1. Stock cart with equipment to minimize the number of trips into and out of the isolation room and shall position cart directly outside of room.

C.5.3.1.8.2. Prepare fresh solutions for each room, wear the protection clothing (disposable isolation gown, gloves and mask) indicated by instruction card on isolation room's door or by the nurse in charge and knock and announce oneself before entering room.

C.5.3.1.8.3. Collect, seal and deposit trash in biohazardous wastebasket liner outside the room, disinfect all horizontal surfaces, vents and fixtures above shoulder height; disinfect or discard books, magazines, toys or other articles that are visibly soiled with infectious material and damp wipe ledges, fixtures and furniture below shoulder height including doorknobs, telephone and walls using disposable rags.

C.5.3.1.8.4. Clean bathroom and damp mop entire room to include bathroom using a disposable mop head pursuant to paragraph 5.5.1.

C.5.3.1.8.5. Fill all dispensers leaving excess paper products in room.

C.5.3.1.8.6. Clean equipment used in room then return to cart, place disposable soiled mops and rags in a biohazardous plastic bag and remove protective clothing while in room then dispose in hamper.

C.5.3.1.8.7. Tie biohazardous bag then place outside the room, dispose of solutions, clean buckets then refill with fresh solutions and deliver sealed biohazardous plastic bag from outside isolation room to nearest collection point.

C.5.3.1.8.8. Wash hands before entering and upon leaving each isolation room even when gloves have been used.

C.5.3.1.8.9. Inform the area wardmaster of any special problems, severe stains or needed repairs (such as torn plastic mattress cover or pillow cover).

C.5.3.2. Each week the contractor shall -

C.5.3.2.1. Move equipment from the surgical area to the corridor, disinfect equipment and dry equipment then return to original site.

C.5.3.2.2. Vacuum air conditioning grills.

C.5.3.2.3. Clean shelves, cabinets, walls and ceilings.

C.5.3.2.4. Damp wipe the overhead lights.

C.5.3.2.5. Damp mop and scrub floor with an automatic machine equipped with abrasive brushes and disinfectant-detergent. After machine scrubbing, the contractor shall wet mop floor with disinfectant-detergent and shall return equipment when floor has dried.

C.5.3.2.6. Empty soap dispensers, change tubing, disassemble foot pedals and refill dispensers.

C.5.4. Cleaning of Sub-Critical Care Areas: The contractor shall clean floors by starting at the far end of the room and flowing toward the door. The contractor shall change

solutions, mop heads and cleaning cloths at least every three rooms. The contractor shall -

C.5.4.1. Remove trash in entire room, damp wipe inside and outside of receptacles and place clean liners in receptacles.

C.5.4.2. Beginning at the door of room, damp wipe everything to include spot washing of walls around light switches and doorknobs.

C.5.4.3. Clean bathroom pursuant to paragraph 5.5.1.

C.5.4.4. Disinfect the floor (damp mop).

C.5.4.5. Clean wheelchairs, gurneys and IV poles located on ward and in clinics on a weekly basis.

C.5.4.6. For terminal (discharge) (only after patient's belongings are not in room) cleaning, the contractor shall clean closets, drawers and bathrooms of private rooms and shall clean closets and drawers only of discharged patient in multi-bed rooms. The contractor shall remove trash left by patient and soiled linen from bed placing in laundry bag, shall disinfect entire bed including mattress, sheets, pillow, bed control unit, rails, headboard, and footboard and shall report any tears to the wardmaster. The contractor shall disinfect the inside and outside of bedside stand including the phone, the discharged patient's closet and drawer and the overbed table including the wheels, base and underside of top then place over bed. The contractor shall make the bed tucking the bottom sheet at the head of the bed and the top sheet and blanket at the foot of the bed and using one pillowcase. The contractor shall visually inspect bed, shall notify the hospital that the unit is ready for use and shall take soiled linen to hamper.

C.5.5. Cleaning of Non-Critical Care Areas:

C.5.5.1. For lavatories, the contractor shall -

C.5.5.1.1. Remove trash, perform high dusting and sweep floor before cleaning fixtures.

C.5.5.1.2. Scrub fixtures including pipes and faucets with disinfectant-detergent and wipe fixtures with a damp rag. If the sink or shower is heavily soiled, the contractor shall use liquid cleaner in addition to disinfectant-detergent and shall rinse. If mineral deposits are visible in the bowl, the contractor shall use an acid-based toilet bowl cleaner with caution on the inside of the bowl.

C.5.5.1.3. Clean both sides of the toilet seat, around the hinges and all bright work.

C.5.5.1.4. Clean the underside of the sink and the pipes.

C.5.5.1.5. Damp wipe the cover of the light fixture over the sink, the paper towel dispenser and the other wall-mounted fixtures.

C.5.5.1.6. Clean the mirrors and dry with a paper towel or dry cloth.

C.5.5.2. For other areas except corridors and stairwells, the contractor shall daily -

C.5.5.2.1. Collect trash, damp wipe the inside and the outside of the containers and place clean liners in containers.

C.5.5.2.2. Beginning at the door, dust everything above shoulder height.

C.5.5.2.3. Beginning at the farthest corner and working toward the door, dust mop the hard surface floor and vacuum the carpet.

C.5.5.2.4. Beginning at the door, damp wipe surfaces below shoulder level to include spot washing of walls around light fixtures, doorknobs and other dirty areas.

C.5.5.2.5. Clean lavatories pursuant to paragraph 5.5.1.

C.5.5.2.6. Starting at the far corner, damp mop the floor with disinfectant-detergent. The contractor shall change mop solutions at least after every three rooms.

C.5.5.3. For corridors and stairwells, the contractor shall use wet floor signs and shall mop only one-half of the corridor or stairwell at one time permitting a dry lane for passage of personnel. The contractor shall perform high dusting and damp wiping of handrails, door frames, fire extinguishers and hose cabinets.

C.5.6. Entrances: The contractor shall clean entrance and entrance platforms once each 24 hours. As a minimum, the contractor shall -

C.5.6.1. Clean foot scrapers, exterior entrance mats, interior mats, runners and individual trash and smoking receptacles. The contractor shall hose down exterior mats and shall remove soil and moisture from underneath mats and runners before returning to their original location.

C.5.6.2. Remove lint, cobwebs, mud, dirt and litter from the southside walls of and in the vicinity of entrances, from canopies and entrance lights.

C.5.6.3. Wash down the area (except when ambient temperature is 32 degrees Fahrenheit or lower) and remove any standing water from the entrance and adjacent sidewalks.

C.5.6.4. Police the bulk refuse container vicinity and five feet in each direction from entrance walkways.

C.5.6.5. Clean entrance windows and doors including all glassed-in areas of solariums and entrances.

C.5.6.6. Clean patios except during inclement weather.

(R4, tab 1)

4. Technical Exhibit (TE) 2 included at 2.4 a task and frequency chart that established how often certain tasks were to be performed. For Pathology, the listed tasks were floor maintenance, carpet; floor maintenance, other; furniture/counters/cabinets;

utility fixtures/dispensers; trash and trash containers; light fixtures, windows, interior; and windows, outside. TE 2.5, titled Frequency and Type of Cleaning with Square Footage contained square footage, type of cleaning, number of days per week, number of times per day, weekly and annual square footage, and whether the area required dedicated or lock-in employees. Pathology was listed twice - once as critical, once as sub-critical.¹ In both instances, cleaning was to be provided once daily, seven days per week. (R4, tab 1)

5. At G.3, the contract provided:

....

INVOICES

The contractor shall submit monthly invoices in triplicate by contract line item number for services actually performed the preceding month to the Contract Administration Division, Directorate of Contracting, Building 4022 Fort Knox, Kentucky 40121-5000. Additions or deletions to the total square footage may occur throughout the contract period and will be made at the unit price (per one hundred square feet) shown in the bid schedule (rounded to the nearest cent).

(R4, tab 1)

6. Section C-6 provided:

APPLICABLE DOCUMENTS

Mandatory (M) and advisory (A) documents applicable to this contract are identified below. The contractor shall follow those coded mandatory. The Government will furnish documents to the contractor at the start of the contract. The contractor shall post changes. If any change becomes effective during the contract period which affects the workload of this contract, the Contractor Officer will negotiate changes with the contractor.

C.6.1.1. Accreditation Manual for Hospitals dated 1991 (M).

C.6.1.2. AR 40-5 entitled "Preventive Medicine" dated 1985 (M).

C.6.1.3. AR 385-10 entitled “Army Safety Program” dated 23 May 1988 (M).

C.6.1.4. MEDDAC Regulation 420-16 entitled “Management of Regulated Medical Waste, Hazardous Waste, and Hazardous Materials” dated 20 March 1991 (M).

C.6.1.5. TM 5-609 entitled “Military Custodial Services Manual” dated 25 September 1969 (A).

(R4, tab 1) The record does not contain any of the listed documents.

7. The contract also included the following relevant clauses: FAR 52.222-53 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT--PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989); FAR 52.233-01 DISPUTES (APR 1984); and FAR 52.243-01 CHANGES--FIXED PRICE (AUG 1987)--(ALTERNATE 1 (APR 1984)). (R4, tab 1)

8. PCT had performed the same services at Ireland under the previous contract on a monthly fixed-price basis (R4, tab 66). PCT performed under that contract for four and one-half years. That contract required Pathology to be cleaned at a level that approximates the sub-critical level in the 1991 contract (*id.* at 67, 69, 84; tr. 1/61, 2/145).

9. By letter of 4 December 1991 PCT complained to the Army that it was cleaning certain areas at Ireland more than once a day while being paid for only one daily cleaning. The areas addressed were Pathology; Radiology; OB/GYN; Pediatric; basement and first floor corridors, stairwells, and latrines; Well Baby Clinic; Surgical Clinic; Orthopedics Cast Room; Shot Clinic; Outpatient Records; and Dental Clinic. (R4, tab 3) PCT’s Executive Housekeeper, Jeffrey Adams, visited the contracting officer, Maury Lynn Merritt, on 5 December 1991 to discuss the problems. Ms. Merritt reviewed TE 2 and found discrepancies. (Tr. 2/105) PCT sent a second letter dated 13 December 1991 in which it reiterated its position that, in essence, the task and frequency chart, TE 2.4, required multiple cleanings of certain areas that were not reflected in the square footage set out in TE 2.5 (R4, tab 4).

10. In addition to double-listing Pathology, TE 2.5 was inconsistent with TE 2.4. For example, in TE 2.5 corridors in building 851 designated non-critical areas were to be cleaned once per day, while TE 2.4 required cleaning on more than one shift. (R4, tab 1)

11. During December 1991 and January 1992 Ms. Merritt and Mr. Adams met to resolve discrepancies. Because the task and frequency chart did not call for all tasks in an

area to be performed the same number of times per day various percentages were negotiated to prorate the level of effort. For example, TE 2.5 was amended to provide for cleaning Pathology 2.9 times per day. (R4, tab 17; tr. 2/105-07)

12. PCT was originally required to clean Pathology as a critical area, which it did until issuance of unilateral Modification No. P00003 (Mod 3), executed by the contracting officer on 21 February 1992. In addition to changing Pathology from critical, non-dedicated to sub-critical, non-dedicated, retroactive to 1 January 1992, Mod 3 also decreased the cleaning frequency for corridors and stairwells in Building 851, retroactive to 20 January 1992. Mod 3 did not change the contract price. (R4, tab 7; tr. 1/83-85)

13. By letter of 17 June 1992 appellant filed a claim for \$34,667.00, representing the difference between its bid price of \$83,173.17 for CLIN 0001 and projected annual payments (R4, tab 10). Square footage for CLIN 1 had been reduced by several modifications, including Mod 3 which changed Pathology to sub-critical (R4, tabs 5, 7, 8).

14. Various changes to cleaning services in TE 2 were set out in bilateral Modification Nos. P00001, P00002 and P00004-P00006 (R4, tabs 5-9, 11). These culminated in Modification No. P00009 (Mod 9), issued unilaterally on 13 July 1992. Among other things, Mod 9 consolidated changes set out in Modifications Nos. P00001-P00006 and included a revised TE 2.5. Mod 9 increased the contract price by \$121,766.63. (R4, tab 17) While PCT refused to sign Mod 9, it agreed with all the provisions except for the cleaning of Pathology as a sub-critical area (tr. 1/83).

15. The contracting officer denied appellant's 17 June 1992 claim in a decision dated 20 August 1992. In addition to other reasons, the contracting officer relied on the clause at G.3.² (R4, tab 20)

16. Bilateral Modification No. P00013 (Mod 13), dated 19 November 1992, extended the contract through 31 October 1993 at a total price of \$1,123,927.86. Mod 13 made a new labor agreement applicable from 1 November 1992 through 31 October 1993. It also incorporated a new TE 2.5 which identified Pathology as sub-critical and maintained a cleaning frequency for Pathology of 2.9 times per day. The following sets out the square feet and prices for each CLIN based on the new labor agreement and changes in area sizes, with the corollary base period CLINs in brackets (finding 1):

0014 [0001]	3,318,065 SF	x	\$0.008095	= \$ 26,859.74
0015 [0002]	525,000 SF	x	\$0.057759	= \$ 30,323.48
0017 [0004]	10,023,245 SF	x	\$0.025269	= \$253,277.38
0018 [0005]	99,574,313 SF	x	\$0.004184	= \$416,618.93

0019 [0006] 11,063,880 SF x \$0.017755 = \$196,439.19
0020 [0007] 71,034,996 SF x \$0.002254 = \$160,112.88

(R4, tab 26) We find that Mod 13 constitutes the parties' agreement on prices and quantities from 1 November 1992 through 31 October 1993.

17. Unilateral Modification No. P00022 (Mod 22) was executed on 29 October 1993 and extended the contract through 31 October 1994. Mod 22 increased the contract price by \$892,803.47 and incorporated a revised TE 2.5. Mod 22 made a new labor agreement applicable from 1 November 1993 through 31 October 1994, while noting that appellant's failure to timely provide a cost proposal had resulted in unit prices remaining stable. Mod 22 also noted that changes in square footage incorporated by various contract modifications and a reduction in required housekeeping services had resulted in the following prices for CLINs as set out below:

0027 [0001] 3,327,947.50 SF x \$0.008095 = \$ 26,939.74
0028 [0002] 87,696.00 SF x \$0.057759 = \$ 5,065.23
0030 [0004] 8,241,095.00 SF x \$0.025269 = \$208,244.23
0031 [0005] 95,528,314.00 SF x \$0.004184 = \$399,690.47
0032 [0006] 4,583,972.00 SF x \$0.017755 = \$ 81,388.42
0033 [0007] 58,198,366.00 SF x \$0.002254 = \$131,179.12

(R4, tab 36) Appellant thereafter submitted a 10 December 1993 claim seeking an additional \$47,187.32 for wage increases (R4, tab 39).

18. Modification No. P00026 (Mod 26) was submitted to appellant with an effective date of 23 February 1994. Mod 26 decreased the square footage on CLIN 0030 by 563,500 and the price by \$14,239 through a series of listed changes, which included a change to Labor/Delivery that reduced daily square footage from 1,710 to 818. (R4, tab 48) By letter of 28 March 1994 PCT informed the Army it would not sign the modification because of the changes to Labor/Delivery (R4, tab 46). The Army issued Mod 26 unilaterally on 6 April 1994 (R4, tab 48). The change in Labor/Delivery did not result in additional work for PCT because the contracting officer's representative grouped services together. PCT did not have to hire an additional employee. (Tr. 3/131-33)

19. By letter of 28 March 1994 PCT, under signature of Melvin Johnson, General Manager, submitted an uncertified "claim" for \$495,966.22. The claim asserts that the Army arbitrarily changed the level of service in Pathology from critical to sub-critical while PCT's cost of performance remained unchanged. It also asserts that other changes violated "the standard 10 to 15% guideline of F.A.R. [which] governs both parties to negotiate whenever a line item exceeds these limits." No FAR citation is provided with respect to the "10 to 15% guideline." PCT submitted a certification by Mr. Johnson, as

“General Mgr./V.P.” by letter of 11 August 1994. The Army received the letter on 24 August 1994. As we understand the claim, PCT asserts it is entitled to the difference between its alleged cost of performance and the amounts paid as follows:

Base period	\$ 70,959.41
1st option period	96,018.65
2nd option period	<u>103,882.15</u>
Subtotal	270,860.21
2nd option period for CLINs 0028, 0030, 0032, 0033	<u>225,106.01</u>
Total	\$495,966.22

(R4, tab 53)

20. Bilateral Modification No. P00030 (Mod 30) was executed without reservation by Sandra Johnson, President of PCT, on 12 August 1994 and by the Army on 19 August 1994. It included a \$35,693.08 price increase for the current option year and settled PCT’s 10 December 1993 claim for a wage increase pursuant to its labor agreement. (R4, tab 54; tr. 3/23-24) Mod 30 set out prices and quantities for all CLINs from 1 November 1991 through 31 October 1994. The total quantities for the CLINs differed from those in the contract for the base period (finding 1) and prior option exercise modifications (findings 16, 17). It specifically incorporated changes issued through Mods 23 and 26, including the changes to Labor/Delivery (CLIN 0030). (R4, tabs 48, 54)

21. Bilateral Modification No. P00033 (Mod 33) was executed by PCT on 27 October 1994 and by the Army on 28 October 1994. Mod 33 extended the contract through 31 October 1995 and incorporated wage increases pursuant to PCT’s labor agreement. A new TE 2.5 was included and the total contract price was increased by \$960,001.03. It established the following quantities and prices which had been incorporated by previous contract modifications:

0040	3,327,947 SF	x	\$ 0.008843	=	\$ 29,429.04
0041	87,696 SF	x	0.063100	=	5,533.62
0042	12 MO	x	1,747.96	=	20,975.52
0043	7,401,595 SF	x	0.027606	=	204,328.43
0044	99,092,260 SF	x	0.004571	=	452,950.72
0045	4,143,324 SF	x	0.019397	=	80,368.06
0046	58,198,834 SF	x	0.002463	=	143,343.73
0047	120,794 SF	x	0.032775	=	3,959.02
0048	4,524 EA	x	0.251269	=	1,136.74
0049	12 MO	x	873.98	=	10,487.76
0050	5 EA	x	218.50	=	1,092.50

0051	87,896 SF	x	0.021850	=	1,920.53
0052	4,074 EA	x	1.09	=	4,440.66
0052AA	10 EA	x	3.47	=	<u>34.70</u>
Total					\$960,001.03

(R4, tab 57)

22. A contracting officer's decision denying PCT's certified claim of 11 August 1994 was issued on 5 January 1995. The decision relies, in part, on clause G.3., and questions PCT's calculations. (R4, tab 60) An appeal was filed by letter of 21 February 1995 (R4, tab 63).

23. Unilateral Modification No. P00043 (Mod 43) dated 31 October 1995 extended the contract through 30 November 1995 (R4, tab 83).

24. PCT filed a revised claim on 7 August 1997 in which it seeks an equitable adjustment of \$1,252,192.80. PCT's revised claim is calculated using unit prices and is based on an analysis of its performance over the entire life of the contract. With respect to Pathology (which the revised claim erroneously treats as changed from critical to non-critical), it seeks \$267,331.26, the difference between the amount paid to PCT and the amount it would have been paid for Pathology at the critical rate. For areas other than Pathology, it seeks, \$778,198.05. This represents, in essence, the difference between payment at the cleaning levels and square footage agreed to prior to Mod 9 and the post-Mod 9 levels and square footage for the life of the contract. (R4, tab 86)

25. The record contains 45 contract modifications. All but Modification Nos. 16, 24 and 25 change the type, quantity or frequency of service. All the modifications are priced using the unit prices in the contract. Modification Nos. 1, 2, 4, 5, 6, 10, 11, 13, 15, 17, 18, 20, 21, 24, 28, 30 and 33 are bilateral. (R4, tabs 5-9, 11, 1216, 17, 22-26, 29, 30, 32-36, 38, 41, 43-45, 48-50, 54-5961, 62, 64, 65, 79, 81-85)

26. PCT presented testimony from Mr. Johnson and Mr. Adams asserting that higher levels of cleaning than called for by the contract were mandated by the documents listed at C-6 (finding 6) and the Occupational Safety and Health Act (OSHA), or by PCT's peculiar expertise (tr. 1/95-98, 133-36; 2/37-38, 40-42, 83-84). There are no specific portions of the documents or OSHA identified. When asked whether Ireland or PCT is in charge of Pathology, Mr. Johnson stated "If it comes out in the cleaning, I am in charge because I have a contract with the Government." (Tr. 1/133) Mr. Adams testified that "[t]here was no way in the world I could reduce manhours and I wasn't going to even make an attempt to reduce manhours in these areas because . . . my customer is the patient." (Tr. 2/37-38)

27. Robert L. Petties was the contracting officer's representative at the beginning of performance of the contract and for the predecessor contract (ex. A-8, supp. dep. at 6). Mr. Petties disagreed with management on the level of cleaning for various areas of the hospital, but he nevertheless required only what was in the contract (*id.*, dep. at 23, 26). Mr. Petties never saw PCT deviate from the contract requirements (*id.*, dep. at 81). Mr. Petties also believes that the frequency of cleaning has a great deal to do with the level of cleaning. According to him, there is little difference between critical and sub-critical levels of cleaning (*id.*, dep. at 84-86). Mr. Petties' testimony on this point is unpersuasive, as it contravenes the definitions in the contract, which set out substantial differences in the cleaning levels (finding 3).

28. Each line item price included all elements of PCT's cost - *e.g.*, hourly rate, payroll additives, taxes, insurance, G&A and profit (R4, tab 10).

29. There is no evidence that PCT relied on an interpretation of G.3 as permitting deletions and additions between CLINs only in the event of a change in the physical size of the hospital (*e.g.*, the addition of a new wing), or that unit prices would not be used to price out additions and deletions to the CLIN quantities in preparing its bid.

DECISION

Appellant argues, *inter alia*, that clause G.3 did not give the Army the right to transfer between cleaning categories; that transfers to a lower cleaning category, *e.g.*, from critical to sub-critical, did not lessen either service requirements or appellant's cleaning costs; and that, because use of G.3 preempts the CHANGES clause, it cannot be inserted in the contract without proper authorization. The Army contends that G.3 gives it the right to transfer between categories at unit prices; that use of G.3 does not require special authorization (hereinafter "deviation"); and that if appellant cleaned at a higher level than called for by the contract as modified, it did so as a volunteer.

It is not disputed that the solicitation contained discrepancies and that correction of the discrepancies, including conflicts between TE 2.4 and TE 2.5, was negotiated between the parties (findings 9-11). PCT refused to sign Mod 9 because of the change from critical to sub-critical for Pathology (finding 14).³ Other, similar disagreements arose involving shifts between categories (finding 19). The crux of PCT's contention and the parties' dispute is G.3 and whether it was a proper vehicle for the Army to make changes between the cleaning categories represented in the CLINs. Appellant first argues that G.3 could only be included in the contract if the Army obtained a FAR deviation. Appellant relies on *Southwest Marine, Inc.*, ASBCA Nos. 34058, 34166-68, 91-1 BCA ¶ 23,323. In that case, we held that a clause which purported to preclude the contractor from asserting a claim for delay or disruption deviated from the provisions of the

CHANGES clause and was invalid because the Government had not followed the procedural requirements for such a deviation. While the Army agrees that any deviation from the CHANGES clause requires proper authorization,⁴ it asserts that G.3 does not constitute a deviation from the CHANGES clause. It further contends that *Southwest Marine* is distinguishable and that the relevant precedential decision is *Northwest Marine, Inc.*, ASBCA No. 43097, 92-2 BCA ¶ 24,861.

In *Northwest Marine* the Board considered its holding in *Southwest Marine* and reached a different conclusion with respect to the clause before the Board in *Northwest*. We see greater similarities in the facts of *Northwest Marine* and conclude that G.3 does not create a deviation from the CHANGES clause. First, like the clause in *Northwest Marine*, G.3 does not completely thwart the purpose of the CHANGES clause. Rather, we interpret G.3 as the parties' agreement on the prices at which PCT will be compensated when there are additions or deletions to the CLINs. G.3 therefore works in conjunction with, and not against, the CHANGES clause, as did the clause in *Northwest Marine*. *Id.* at 124,013. This is quite different from *Southwest Marine*, where the clause forbade recovery of certain elements of cost. Second, the net effect of G.3 is to allow the Army to shift between cleaning categories at a predetermined unit price. As the contract was awarded under sealed bidding procedures, the unit prices were the basis for determining the low bidder. *See* FAR 14.101(e). As in *Northwest Marine*, relieving PCT from G.3 and thus the unit prices would "seriously undermine the integrity of the bidding process" *Id.* at 124,012. Moreover, PCT's unit prices included all its cost elements (finding 28) and any failure to recoup its costs and make a profit was because of PCT's own formulation of unit prices in the bidding process. We conclude that G.3 is not inconsistent with the CHANGES clause and does not require a deviation pursuant to Subpart 1.4 of the FAR.

PCT next argues that G.3 cannot be reasonably read as permitting transfer of hospital areas between CLINs as “[m]erely transferring an area from one Line Item to another does not change the total square footage cleaned by the contractor over the course of a year” (app. br. at 34). Under PCT’s interpretation, an addition to the square footage of a CLIN would only be permissible if, for example, a new wing were added. (*Id.* at 34-35). We find this interpretation to be unreasonable and at odds with the way appellant manifested its interpretation of the contract during performance when it agreed to numerous such transfers (findings 14, 16, 20, 21, 25). However, even if we found PCT’s interpretation reasonable, the Army’s interpretation is also reasonable, so G.3 is at worst ambiguous. There is no evidence of reliance prior to award on the interpretation now advanced by PCT (finding 29). PCT cannot prevail based on its interpretation of an ambiguous provision without proof of actual and reasonable reliance when it entered into the contract. *Fruin-Colnon Corporation v. United States*, 912 F.2d 1426 (Fed. Cir. 1990); *Randolph Engineering Company v. United States*, 367 F.2d 425, 430 (Ct. Cl. 1966). Not only does PCT lack proof of reliance on its alleged interpretation, it conducted business at times as though it were in agreement with the Army’s interpretation, as there were many bilateral modifications which effected transfers between CLINs with no change in unit prices (findings 14, 16, 20, 21, 25). We hold that appellant has failed to establish reliance on the interpretation of G.3 it avers in this appeal.

PCT also argues that the unilateral modifications cite the CHANGES clause and that, as a result, they must be reevaluated under that clause in order to determine the appropriate equitable adjustment. We have found G.3 enforceable and we interpret it as authority for additions to and deletions from individual CLINs whether or not there have been actual additions to or deletions from the physical boundaries of the hospital. Under our interpretation, equitable adjustments are, pursuant to G.3, priced according to the unit prices for the affected CLINs. Thus, citation to the CHANGES clause is without substantive effect on the pricing of the changes effected by the modification containing that citation. We find PCT’s argument without merit.⁵

In its brief, PCT goes through a series of arguments on individual hospital functions in which it asserts that it is entitled to an equitable adjustment because, according to PCT, contractual changes to the level of cleaning did not alter PCT’s duty to clean at a higher level (app. br. at 21-27). Except for Pathology prior to Mod 3, we are unpersuaded by PCT’s arguments. The contract sets out standards of cleaning for critical, sub-critical and non-critical cleaning which establish clear and unequivocal levels of effort. It stretches credulity that those descriptions, if followed, would not result in a change in the contractor’s costs.⁶ The evidence of record establishes that, except as addressed below, if PCT actually performed at a higher level than required, it did so as a volunteer (finding 26).

With respect to Pathology, however, PCT was originally to clean it at the critical level (finding 12). Mod 3, dated 21 February 1992, unilaterally changed Pathology from critical, non-dedicated to sub-critical, non-dedicated, retroactive to 1 January 1992 (*id.*).⁷ A unilateral modification cannot retroactively diminish the Army's obligation to pay for services provided by the contractor at the contract price. The ambiguity as to how Pathology was to be cleaned was originally resolved by treating it as critical, and PCT cleaned it as critical until issuance of Mod 3 on 21 February 1992 (finding 12). Accordingly, we hold that PCT is entitled to be paid for cleaning of Pathology at the critical level from 1 January 1992 through 21 February 1992.

Finally, PCT appears to argue that OSHA and "other specifications and regulations" dictated cleaning levels (app. br. at 29, n.10). We assume the "other specifications and regulations" reference is to the documents referred to in C.6. As to the preeminence of the C.6 documents and OSHA, the documents are not in the record (finding 6), and appellant has not identified which sections of the documents or OSHA affect hospital cleaning (finding 26). As proponent of the claim, the burden of proof is on appellant. *Sphinx International Incorporated*, ASBCA No. 38784, 90-3 BCA ¶ 22,952. The burden is not carried by the nonspecific testimony of Mr. Johnson and Mr. Adams. Their testimony could easily have been supported by specific reference to the documents and OSHA, and the failure to do so is fatal to the probative value of the testimony. Such testimony is "intrinsically nonpersuasive." *Joseph Sternberger v. United States*, 401 F.2d 1012, 1016 (Ct. Cl. 1968).

SUMMARY

The appeal is sustained with respect to compensation for cleaning Pathology at the critical, non-dedicated level from 1 January 1992 through 21 February 1992 and otherwise denied.

Dated: 27 October 2000

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

(Signatures continued)

I concur

I concur

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

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

NOTES

¹ Appellant presented testimony that appellant brought this to the attention of respondent prior to bidding and was told Pathology was critical (tr. 1/71-72). None of respondent's witnesses remember this (tr. 2/229, ex. A-8 at 17, 54) and one of appellant's witnesses was inconsistent on this point (tr. 2/90-91, 97). It is not clear whether appellant actively argues this as it is mentioned only once in appellant's briefs (app. rep. br. at 2). In any event, appellant failed to carry its burden of proof on this point.

² An appeal dated 18 November 1992 was filed and docketed as ASBCA No. 45338 (R4, tab 27). It was dismissed without prejudice on 27 January 1993 (R4, tab 28). There is no evidence it was ever reinstated.

³ PCT otherwise agreed with the revised TE 2.5 in Mod 9 (finding 14).

⁴ The policy and requirements for deviations from the FAR are found at Subpart 1.4 of the FAR.

⁵ We are not clear as to whether this argument is based on PCT's original claim, which sought an equitable adjustment independent of unit prices (finding 19). The revised claim abandoned that approach and sought a price increase using unit prices (finding 24). Under either theory, the argument lacks merit.

⁶ In at least one instance (Labor/Delivery) a change to the square footage with the potential to increase PCT's costs was accompanied by an accommodation to PCT which resulted in no additional work for PCT (finding 18).

⁷ There is a handwritten memo by a deceased Army employee in the record (R4, tab 73) which can be interpreted as evidence that PCT was told on 3 January 1992 to clean Pathology at the sub-critical level. We find the document, and testimony based solely on the document (tr. 2/195-97), inadequate to support a finding that PCT was advised of the change on 3 January 1992.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 48446, Appeal of PCT Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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