

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Olympiareinigung, GmbH) ASBCA No. 53643
)
Under Contract No. DAJA22-97-C-0038)

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OPINION BY ADMINISTRATIVE JUDGE ROME

Appellant Olympiareinigung GmbH (Olympia) has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer's (CO's) final decision asserting a Deutsche Marks (DM) 831,235.53 claim for overpayment under appellant's Contract No. DAJA22-97-C-0038 (sometimes contract 0038) to provide custodial services at hospital clinics. The Board conducted a hearing in Heidelberg, Germany, covering liability and quantum.

FINDINGS OF FACT

1. On 3 December 1996, the United States Army's Wiesbaden Regional Contracting Center, Germany, issued an invitation for bids (IFB) for a firm fixed-price contract for custodial services at 25 clinics outlying the Army's Heidelberg hospital. The base period, amended from nine months to eight, was from 3 February through 30 September 1997. The contract also included two one-year government options. (R4, tab 1 at 1-2)

2. Section B of the IFB, Supplies or Services and Prices/Costs, at section B.1, Statement of Services, stated in part:

Contractor shall furnish all labor, supervision, management support, transportation, equipment and materials to provide these custodial services.

The resultant contract will be firm fixed price. . . .

Offerors are required to price each line item; quantity indicated is for the time per year that particular service will be provided. Additionally, a square meter/per window price is required under line items 0001AA thru 0001AD. This price will be utilized in the event changes occur affecting size of clinic(s) in the future.

(R4, tab 1 at 2) With respect to the last-quoted paragraph, which was not included in the contract, contract line item (CLIN) 0001 literally covered only the Babenhausen Health & Dental Clinic. Sub-CLIN 0001AA covered general custodial services; 0001AB, exterior window cleaning; 0001AC, floor stripping and refinishing; and 0001AD, carpet shampooing, at that clinic. However, it is apparent in context, and we find, that the paragraph was intended to refer to all of the clinics.

3. Section B.1 continued with: (1) an identification of each CLIN (clinic) and sub-CLIN (service involved) by number; (2) a description of the services, which gave a fixed quantity of square meters, windows or light fixtures per sub-CLIN and called for the bidder to insert a price per square meter and per window; (3) the quantity of services; (4) the “U/I” (unit of issue) (tr. 18), indicating whether the services were on a monthly or by-the-each basis; (5) a “unit price” to be inserted by the bidder; and (6) the total amount for each sub-CLIN, to be inserted by the bidder (R4, tab 1 at 2). There were 18 CLINs. Some covered more than one clinic in the same building. An example follows:

<u>ITEM</u>	<u>DESCRIPTION</u>	<u>QUANTITY</u>	<u>U/I</u>	<u>UNIT PRICE</u>	<u>AMOUNT</u>
0001	B[a]benhausen Health & Dental Clinic Building 4585				
0001AA	Custodial services to be performed in accordance with para. C.5.4 through C.5.12 and all subparagraphs of statement of work (SOW) except for the items below. (698 sq meters)	[8.00]	MO	-----	-----
	PRICE PER SQ METER: dm _____				
0001AB	Clean exterior windows in accordance with para 5.4.1 plus technical exhibit	2.00	EA	-----	-----

(TE) 3-1, section J. To be scheduled by contracting officer's representative (COR). 60 each

PRICE PER WINDOW: _____

0001AC Stripping and refinishing of floors in accordance with para. C.5.4.2, plus TE 3-1, section J. To be scheduled by COR. 600 sq meters 2.00 EA _____-_____

PRICE PER SQ METER: _____

0001AD Carpet shampooing in accordance with para. 5.4.4 plus TE 3-1. To be scheduled by COR. 600 sq meters 4.00 EA _____-_____

PRICE PER SQ METER: _____

0001AE Light Fixture cleaning interior and exterior in accordance with para 5.4.6 (80 each). To be scheduled by the COR. 1.00 EA _____-_____

(Id. at 2-3) Bidders also were to insert a "Subtotal" price for the base period and each option year (R4, tab 1 at 20, tab 3 at B-19, B-37, B-55).¹

4. The IFB included the FAR 52.214-12, PREPARATION OF BIDS (APR 1984) clause, which provides in part:

(c) For each item offered, bidders shall (1) show the unit price . . . and (2) enter the extended price for the quantity of each item offered in the "Amount" column of the Schedule. In case of discrepancy between a unit price and an extended price, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.

(R4, tab 3 at L-3)

5. Section M.4 of the IFB, All or None Award, stated:

Only one contract will be awarded from this solicitation. Award will be on an "ALL OR NONE" basis. Offers for less

¹ Hereafter, we refer to CLINs by their base number, e.g., "CLIN 0001" as "CLIN 1," for all contract periods.

than all of the solicited work will be rejected as nonconforming and unacceptable to the solicitation.

(R4, tab 3 at M-2)

6. Statement of Work (SOW) section C-1, ¶ 1.1., Scope of Work, stated in part:

1.1.1. The contractor shall furnish all labor, management, management support, transportation, equipment and materials, except as specified herein as US Government furnished and accomplish the complete medical facilities housekeeping . . . services at the facilities listed in the Individual Medical Facility Exhibit (IMFE).

1.1.2. All references to locations or functions within a building, on blueprints and drawings are as they exist at the contract commencement date. Such references do not necessarily indicate that these location or function designators will remain stable; they may be changed by the medical facility staff when necessary to adjust operational procedures. Any change as contemplated by this paragraph which requires permanent adjustments in frequency, location or type of performance, shall be directed by issuance of a change order or modification prior to the initiation of the performance of such a change.

(R4, tab 3 at C-4) The referenced IMFE, Technical Exhibit 1 to the SOW, listed the 25 clinics by location; type; building number; square meters per clinic or, in some cases, combination of clinics at the same location; and gave a total number of square meters for all clinics of 20,436 (R4, tab 3 at C-38), which was the total listed in the IFB for “AA” services only, during the contract’s base period. The services at issue in this appeal are “AA,” “AC,” and “AD” - - those which included specified numbers of square meters. The total number of square meters specified for those three services, for the base period, was 55,819. (R4, tab 3 at B-1 to B-19) The parties have focused upon “AA” services, which were performed and billed monthly. The other services, far less frequent, were billed when performed. (R4, tabs 32, 34; tr. 77)

7. The IFB contained the FAR 52.237-1, SITE VISIT (APR 1984) clause:

Offerors or quoters are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the

information is reasonably obtainable. In no event shall failure to inspect the site constitute grounds for a claim after contract award.

(R4, tab 3 at L-5)

8. A pre-bid “clinic walk-through” was held at the Butzbach Health clinic. Potential bidders were also allowed to visit other clinics. The record suggests that Olympia, which was located in Mannheim, and which had offices in Frankfurt, attended the walk-through and made at least some pre-bid site visits. (R4, tab 3 at 1, amend. no. 0001; tr. 31, 191, 213-14)

9. As of the IFB, Olympia held cleaning contracts at the Army’s Heidelberg and Frankfurt hospitals. It was the incumbent contractor for at least nine of the 25 clinics covered by the IFB, unidentified in the record. (Ex. A-1 at 2, ex. A-2 at 1; tr. 211-12)

10. Olympia called only one witness at the hearing - - Mr. Karl Kunkel, its former managing director (although one of its executive housekeepers (below), called by the government, was also on its witness list). Mr. Kunkel had been involved in bidding on private contracts and four to five United States Army contracts. He reviewed the solicitation and performed 80 percent of the bid calculations, with the remainder “done by the person who inspected the facilities, if at all” (tr. 211). In bidding for contract 0038, Mr. Kunkel worked with Mr. Zahir Schmoeger, Olympia’s branch manager, who supervised its executive housekeepers, who, in turn, supervised and trained its employees, among other duties. (R4, tab 3 at C-4 to C-5, ¶ 1.2.1., C-14, ¶ 2.17.; tr. 210-13, 245-46)

11. Olympia did not submit documentary evidence of its bid calculation. According to Mr. Kunkel, he and Mr. Schmoeger used their experience under Olympia’s other contracts, but the bid calculation was very complicated because the clinics were widespread. Mr. Schmoeger informed him about the number of transport vehicles and supervisors he would need; difficulties in cleaning the different types of carpets involved; and workload capacities per square meter. To those costs, Mr. Kunkel added a 10 to 15 percent factor for profit and risk contingencies for absent workers and unexpected difficulties, and a fixed amount of overhead, not calculated separately. Olympia bid the project expecting to make a profit. In Mr. Kunkel’s experience, it had never performed a government contract at a loss. (Tr. 212-16, 255-56)

12. Mr. Kunkel testified that square meters played “a very important role” (tr. 214) in the bid calculation process and that “the building size is very important” (tr. 218). He stated that it was easier and faster to clean larger spaces than smaller ones; it was not easy to attract a laborer to clean a smaller space that did not require much time; and because several individuals worked on a large area, if one were absent, the impact would be less than if one person assigned to a small building were absent. However, he also testified that

Olympia's bid was based upon the entire project and that, except for a few clinics near Olympia, for which a lower price per square meter was calculated due to lower transportation and other costs, it offered the same square meter prices for each building. (Tr. 214-15, 218-19)

13. Olympia's unit prices for "AA," "AC," and "AD" services were the product of the specified number of square meters involved and its bid price per square meter. Its prices per square meter for "AA," "AC," and "AD" services for the base period were the same - - DM 3.29, DM 1.60, and DM 2.40, respectively, for CLINs 1 and 3 through 15, whether they included a large or a relatively small number of square meters. For "AA" services at clinics located in Mannheim (CLINs 16 and 17) and at the Patrick Henry Village (PHV) veterinary clinic (CLIN 18), the square meter price was lower, at DM 3.05; the "AC" and "AD" prices were the same as at the majority of the clinics. Olympia's square meter price for "AA" services at the Boeblingen veterinary clinic (CLIN 2) was also DM 3.05; its price for "AC" services was the standard DM 1.60, but its "AD" price was DM 2.80, higher than at any other clinic (unexplained in the record). The option year prices followed the same pattern. (R4, tab 3 at B-1 to B-55; tr. 191, 218; *see* finding 3)

14. Olympia's bid, for the base and option periods, was DM 2,803,947.76, ultimately corrected, apparently due to mathematical error, to DM 2,840,983.71. The government's estimate was substantially higher, at DM 4,996,999.00. The other bids were DM 1,164,906.00, DM 2,330,546.96, DM 2,457,212.66, and DM 7,303,309.54, but they were not responsive. (R4, tabs 2; 3 at B-1; exs. A-1, A-2) The Army found Olympia to be responsible and its price to be fair and reasonable, although it was below the government's estimate, because its price was competitive with other bids, when the lowest and highest, considered extreme, were disregarded; it had performed the work previously; and it was thought that the government's estimate might have included work from a prior contract (*e.g.*, laundry) no longer required. (Exs. A-1 at 2-4, A-2)

15. The CO's representative (COR), Second Lieutenant (now Captain) Jacqueline Krogulski, helped compile the solicitation. The square meters in the solicitation came from the "Department of Public Works Corps of Engineers." The facilities chief, responsible for providing the square meters for all buildings managed by the Heidelberg hospital, verified to the COR that the numbers were correct before she included them in the specifications. (Tr. 15, 17, 19, 20, 29)

16. On 27 January 1997, the Army awarded the contract to Olympia in the total amount of DM 2,840,983.71. Mr. Schmoeger signed the contract for Olympia. It was awarded on the basis of a firm fixed-price, lump sum. Section B, Supplies or Services and Prices/Costs, including Section B.1's list of clinics and services and the designated square meters for each, and Olympia's bid prices per square meter and resulting unit and total sub-CLIN prices, were incorporated into the contract as part of the contract Schedule, as was

the IMFE listing the total square meters at the clinics for “AA” services. (R4, tab 3 at 1, B-1, C-38; tr. 34)

17. Per contract section C-1, ¶ 1.3, Quality Control/Quality Assurance, the contractor was to maintain an inspection system and the COR was to conduct on-site inspection of all facilities. The contract also contained the FAR 52.246-4, INSPECTION OF SERVICES--FIXED-PRICE (AUG 1996) clause and an Inspection and Acceptance clause. The latter clause provided for the COR’s inspection of services and for final acceptance by the COR’s verification of services performed and certification of the contractor’s invoices. Under the Contractor Payment Procedures clause, the contractor was to submit invoices to the COR, who would verify and certify that services had been provided in accordance with the contract; verify and certify correctly completed invoices; and authorize payment. (R4, tab 3 at C-8 to C-9, E-1 to E-2, G-1 to G-2)

18. The contract incorporated the following clauses by reference:

FAR 52.232-1, PAYMENTS (APR 1984), which provides in part: “The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract.”

FAR 52.243-1, CHANGES--FIXED-PRICE (AUG 1987) ALTERNATE I (APR 1984), which states in part:

(a) The [CO] may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

....

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the [CO] shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

....

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(R4, tab 3 at I-2 to I-3) It also incorporated FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996) (*id.* at I-3). It did not contain a Variation in Estimated Quantity clause.

19. On 6 February 1997, the CO terminated the contract in part for the government's convenience, eliminating the Mannheim clinics (R4, tab 4).

20. During a 10 February 1997 post-award conference, Mr. Schmoeger asserted that measurements at six clinics, including the Butzbach Health clinic, the location of the pre-bid site visit, were incorrect and that Olympia would not start work until they were corrected. No square meter discrepancies had been raised during the site visit or the solicitation period. Mr. Schmoeger did not advise how the errors had come to his attention.

² The CO directed joint re-measurements of the six clinics. The COR, Mr. Bradley S. Lundquist, who was the government's quality assurance evaluator (QAE), or inspector; Mr. Schmoeger, and Ms. Cornelia McMillan, Olympia's executive housekeeper for several clinics, re-measured each room at the six clinics. The government and Olympia concurred that there was a net increase in square meters for "AA" services as follows: Babenhausen Health and Dental (CLIN 1), from 698 to 972.13; Buedingen Health and Dental (CLIN 3), from 691 to 904.33; Butzbach Health (CLIN 4), from 451 to 821.78; Giessen EFMP (also listed as Giessen EFMS) (CLIN 9), from 170 to 902.46; Giessen Veterinary (CLIN 10) from 170 to 306.84; and Hanau EFMP (CLIN 11), from 227 to 357.69. (R4, tabs 5, 15, 35 at 2; tr. 20-25, 43-45, 48-49, 65, 190-91, 206)

21. On 19 May 1997, Mr. Schmoeger and the CO executed bilateral Modification No. P00001 (modification 1), effective 3 February 1997, which added cleaning requirements at one of the six clinics, noted that certain areas and rugs would not be cleaned, and incorporated the net increases in square meters for "AA" services at the six clinics, as well as square meter increases for "AC" services. The number of square meters listed for "AD" services remained the same. Olympia's square meter prices as bid remained the same; and, although the modification did not mention the IFB paragraph pertaining to changes affecting clinic sizes, the parties applied appellant's square meter prices in arriving at the new unit and total prices of the affected sub-CLINs. The modification also deleted the Mannheim clinics terminated for convenience, effective 8 February 1997. The net effect of the modification was that the clinics were reduced from 25 to 21; the total number

² Olympia's counsel wrote to the CO in February 2000 that it had discovered the alleged errors "in reviewing old previous contracts" (R4, tab 25 at 2), but he did not state when they had been discovered.

of square meters for “AA” services was reduced from 20,436 to 20,114; the total square meters for “AA,” “AC,” and “AD” services, from 55,819 to 53,052; the contract amount for the base period from DM 760,918.20 to DM 736,926.46; and the total contract amount from DM 2,840,983.71 to DM 2,757,275.49. (R4, tab 3 at B-1 to B-5, B-9 to B-12, tech. ex. 1; tab 6 at 2-6, 9-11, 38-39, tech. ex. 1)

22. Bilateral Modification No. P00002 (modification 2), effective 3 June 1997, temporarily halted services at the Darmstadt/Griesheim veterinary clinic (CLIN 6) through 1 September 1997 and called for the same services at a different building during that period (R4, tab 7). The modification stated: “The square meters to service and subsequently (sic) the total contract amount will remain unchanged” (*id.* at 2, ¶ b.).

23. By letter dated 22 July 1997, the CO notified Olympia that the government intended to exercise its first option “at the price specified in line items 1001 through 1018 of the schedule of supplies/services of the contract” (R4, tab 10 at 3).

24. Bilateral Modification No. P00004, effective 1 September 1997, relocated the KirchGoens Dental Clinic (CLIN 15) to the Giessen Dental clinic as of 1 August 1997. It reduced the frequency of services at KirchGoens for the base period and eliminated that CLIN for the option years. It added CLIN 19, to cover Giessen for the rest of the base period and for the option years. The number of square meters for which “AA” and “AC” services were required at Giessen (563.56 each) was higher than at KirchGoens (410 and 310), but Olympia’s square meter prices remained the same. The modification’s net result was to decrease the contract’s base period amount from DM 736,926.46 to DM 735,704.87, and to increase its total amount from DM 2,757,275.49 to DM 2,774,316.22. (R4, tab 3 at B-15 to B-16, tab 9 at 12, 14-15, 25, 37, 39)

25. By unilateral Modification No. P00005, the government exercised its first option, effective 1 October 1997, extending the contract to 30 September 1998 and increasing its price to DM 1,746,394.69 (R4, tab 10 at 1-2).

26. On 15 July 1998 the CO wrote to Olympia that the government intended to exercise its second option “at the prices specified in Section B, contract line item numbers # 2001 thru 2018, pages B38-B55 of contract award document, as well as all modifications thereto” (R4, tab 13 at last page). By letter dated 31 August 1998, the CO again notified Olympia of its intent to exercise its second option, stating “[c]ompensation will be based upon the unit prices in Section B of the contract” (R4, tab 13 at 20).

27. Bilateral Modification No. P00008 (modification 8), effective 14 December 1998, memorialized the government’s exercise of its second option, which extended the contract to 30 September 1999, and added CLIN 20 (Hanau building #247; 371.5 square meters each for “AA” and “AD” services) to the contract (R4, tab 13). Olympia’s square meter price for “AA” services at the new clinic (DM 3.42) was slightly higher than for such

option year services at most other clinics (DM 3.35) (*see id.* at 4-17). The record does not address the difference. The total listed square meters for “AA” services, as of the second option year, was 20,639.06 and the combined total for “AA,” “AC” and “AD” services was 53,892.12 square meters. The modification, the last to which the parties agreed, increased the total contract price to DM 2,783,316.70.

28. For each clinic that was her responsibility, Ms. McMillan would review the work performed with a local government representative, obtain an acceptance certificate, and certify that the services had been performed. Mr. Schmoeger checked her material and forwarded it to a holding company (below), which prepared Olympia’s invoices. He managed the process for clinics not covered by Ms. McMillan. Because most clinics were far from Heidelberg, the local government representatives would verify for the COR that the services had been performed. The COR would also check with the QAE that the services had been completed and would then certify that invoiced services had been received in compliance with the contract and that payment was authorized. (R4, tab 32; tr. 32, 35-37, 193, 200, 205, 232)

29. Olympia invoiced and was paid based upon its unit prices (*see* R4, tabs 3, 6, 32-34).

30. On 9 February 1999, Ms. Kelli L. Iacovetta replaced COR Krogulski (R4, tab 14; tr. 25). In about April 1999, upon examination of the contract, COR Iacovetta noticed that the stated square meters for the PHV veterinary clinic (CLIN 18) would render it about the size of the Army’s large health clinics, when she knew, because she lived in the community and had taken her cats to the clinic, that it was very small. She also questioned the stated size of the Hanau Social Work Services (SWS) building (CLIN 13), which was unusually large for such a clinic. The QAE informed her that it was very small. At her direction, he measured both clinics, revealing major discrepancies between actual size and the contract-stated square meters. The COR then directed him to verify the measurements of all contract clinics. (Tr. 50-51, 60, 69-71)

31. It appears that the government notified Mr. Kunkel in about April or May, 1999, of alleged square meter errors in the contract (tr. 233). In any event, it ceased paying Olympia’s invoices, commencing with that for April 1999 (R4, tabs 18, 33 at 3).

32. The QAE had attempted to visit all clinics at least monthly. His work had focused upon evaluating the quality of Olympia’s services for compliance with the contract specifications, rather than upon square meters. Prior to the COR’s inquiry, he had been unaware of the size discrepancies revealed by his measurements and did not know of anyone who had been aware. (Tr. 46-47, 59-61, 64-65)

33. The record does not reflect whether Olympia had been the incumbent contractor for the Hanau SWS and/or the PHV veterinary clinics. Mr. Kunkel was not asked, and did

not state, whether Olympia knew of the size discrepancies prior to the government's raising the issue. Regardless, the government does not contend that Olympia had prior knowledge, and there is no evidence that Olympia submitted a deliberately low bid, expecting that it would not have to clean the number of square meters stated in the contract.

34. Ms. McMillan was present when the QAE re-measured buildings in Hanau in 1999. The PHV clinic was under another executive housekeeper. The QAE prepared spreadsheets covering all of the clinics, including square meters to be cleaned in each building and whether floors were tiled or carpeted. Ms. McMillan did not recall any major floor surface changes and, based upon the QAE's knowledge and inquiries, his designations substantially represented the areas to be cleaned, and the floor surfaces, for the contract's duration. He provided his spreadsheets to the COR, and to Olympia to examine for any disagreements. (*See, e.g.*, Supp. R4, tabs 53, 56, 58-60; tr. 52-54, 61, 194-97, 205-06)

35. Based upon the QAE's data, Olympia's contract prices per square meter, and its invoices, the COR calculated that it had been overpaid. On 2 September 1999, the CO issued a final decision, citing FAR Subpart 32.6, Contract Debts, stating that the government was retaining DM 690,703.92 as an offset for work paid but not performed. He named 13 affected CLINs: 1 through 6, 8 through 13, and 18, which included the 6 changed in modification 1, and appended the COR's analyses of alleged overpayments and occasional underpayments. (R4, tab 17; tr. 72-78)

36. On 3 September 1999, the CO issued unilateral Modification No. P00009 "to recoup funds for work invoiced and paid but not performed" (R4, tab 18 at 1), which provided for the offset of the alleged DM 690,703.92 overpayment against the contractor's April through September 1999 invoices and other contracts.

37. Although the government had ceased paying its invoices, Olympia performed the contract work until the end of the contract term (*see* tr. 236).

38. On 23 November 1999, Olympia appealed to the Board (ASBCA No. 52477). On 28 December 1999, the CO revoked his final decision on the ground that the amount of funds sought might have been inaccurate and to give Olympia the opportunity to "explain" its invoicing (R4, tab 19 at 1). Pursuant to the parties' request, the Board dismissed the appeal without prejudice on 2 February 2000 (R4, tabs 20, 23, 24).

39. In March 2000, the COR, other government personnel, and Mr. Schmoeger examined blueprints and jointly re-measured the Hanau SWS and PHV clinics, the facilities that differed the most from the contract's specifications. The contract had listed 3,094 square meters at Hanau SWS for "AA" services; the actual amount was 321.7. It had listed 2,002 square meters for "AA" services at PHV; the actual amount was 363. (R4, tab 40A at 1) The discrepancies originated when blueprint measurements—3,094 square feet and

2,002 square feet—were erroneously recorded by the government in the IFB and contract as square meters. (R4, tabs 1, 3, 26 at 2, tab 40; supp. R4, tabs 46-50; tr. 30-31, 83-84, 96)

40. The COR tabulated any differences between the square meters stated in the contract, as modified, and the actual square meters at each clinic, based upon the re-measurements (R4, tab 40; tr. 72, 77, 80, 83-85). Whereas the total specified square meters for “AA” services for CLINs in effect as of bilateral modification 8 was 20,639.06 and the combined total for “AA,” “AC,” and “AD” services was 53,892.12 (finding 27), the COR’s calculations for the same period resulted in an actual total for “AA” services of 15,187.76 square meters, and a combined total for “AA,” “AC,” and “AD” services of 30,448.51 (*see* R4, tab 40A).

41. After Olympia’s contract expired on 30 September 1999, the government combined the services covered with those of another contract, ultimately awarded to GEG Gebaudedienste (GEG). The solicitation had contained the government’s re-measurements and had required independent measurements. The government’s re-measurements were confirmed by GEG. (*See* R4, tab 26 at 3, tab 35 at 3, ¶ 14; tr. 85-88)

42. On 20 December 2000, the CO sent to appellant’s counsel measurements for “AA” services only, partially revised from his rescinded final decision. They included those agreed to in bilateral modification 1 for the six clinics then at issue; the joint Hanau SWS and PHV re-measurements; and the government’s re-measurements of the remaining buildings. Based upon the revised measurements, and alleged billing errors during the contract’s final six months not previously considered, the CO stated that he was contemplating increasing the government’s claim to DM 831,235.53. He attributed the majority of alleged overcharges to the “grossly overestimated areas” of the Hanau and PHV clinics and the remainder to alleged erroneous charges for carpeted or tiled areas that, although listed in the contract, did not exist. He stated that he would consider any re-measurements by Olympia and requested its response before he issued a new decision. (R4, tab 26; tr. 81-82)

43. The parties discussed, but did not achieve, a settlement (R4, tabs 27-30, 37). On 19 September 2001, the CO issued a new final decision, stating in part:

Based on the mutual mistake of the parties that led to the contract incorporating quantities that were grossly erroneous, I have decided to adjust the contract pricing to reflect the real scope of the contract. This adjustment results in your having overbilled in the amount of DM 831,235.53 under the contract.

(R4, tab 35 at 4) The CO claimed DM 831,235.53, of which DM 514,238.87 had been withheld from Olympia's invoices, and demanded payment of the DM 316,996.66 difference.

44. By letter dated 17 December 2001, Olympia appealed to the Board and filed its complaint (R4, tab 38; Bd. corr. file). The appeal was docketed as ASBCA No. 53643. Olympia alleged that the government's price reduction would force it to perform a "loss" contract and sought the DM 514,238.87 withheld from its invoices (R4, tab 38, ¶ 20). In the alternative, it claimed the full contract amount, less cost savings due to work deletion (*id.*, ¶ 22). It further alleged that the government had acted in bad faith and had breached its obligation of good faith and fair dealing by withholding payment with specific intent to harm Olympia (*id.*, ¶¶ 23, 24), but it has not pursued these allegations, and there is no evidence to support them.

45. Olympia's counsel responded on 11 October 2001 that: an equitable adjustment should be based upon performance costs; the government's pricing method would result in a "loss" contract; the Changes clause controlled; and, to the extent Olympia's costs remained unaffected by the reduced number of square meters, the government was not entitled to recover. It was entitled only to any cost savings realized by Olympia due to the reduction. (R4, tab 36)

46. Ms. Sherrie Nye Miller, an auditor at the Defense Contract Audit Agency (DCAA) and a certified public accountant, testified concerning quantum, but not as an expert. In June 2002, in response to Olympia's "cost savings" contention, she had conducted a verification of its contract costs. Olympia had cooperated fully, providing spreadsheets detailing its direct and indirect contract costs, and a statement of administrative costs, through its accountant and Mr. Kunkel, who was substantially involved. The indirect costs were all of Olympia's costs for Mr. Schmoeger, who managed its government contracts. The administrative costs were accounting, finance, bookkeeping and personnel costs billed to Olympia from Lieblang Dienstleistungsgruppe GmbH, a holding company that managed several companies, including Olympia and Lieblang Service GmbH. Olympia had been absorbed into Lieblang Service in 2000 and Mr. Kunkel had become its managing director. Ms. Miller reviewed Olympia's spreadsheets, accounting system printouts, payroll records, invoices, and a sampling of back-up information. (Supp. R4, tab 44 at 3-7; tr. 98-99, 101-03, 120-27, 145, 150, 155-56, 246-47, 253)

47. In a draft report, based upon Olympia's accounting reports, Ms. Miller allocated certain of its FY 1997 indirect and administrative costs between contract 0038 and Olympia's Heidelberg hospital contract. Olympia challenged some of her analysis, but did not submit any alternative calculations. On 5 September 2002, DCAA issued its "Report on Verification of Contract Cost," concluding that Olympia had incurred total costs under contract 0038 of DM 2,583,765, of which DM 1,993,276 were direct, DM 436,575 were

indirect, and DM 153,914 were administrative. (Supp. R4, tab 44 at 2, 4-6, 11; ex. G-2 at 3, 4; tr. 113-15, 117-18, 165)

48. In connection with her report, Ms. Miller evaluated Olympia's alleged cost savings due to the reduced amount of work it had to perform. Using the government's revised measurements, she calculated what she considered to be Olympia's cost per square meter to perform the contract and concluded that it would have incurred additional direct costs of DM 1,016,875, had it cleaned the additional square meters stated in the contract—a 51 percent increase over its DM 1,993,276 direct costs actually incurred. (Ex. G-2 at 6, exs. G-5, G-6; tr. 119-20, 127-28, 130-34, 136, 148-49)

49. Although it had some material costs, Olympia's direct costs were primarily for labor, predominantly for part-time employees who worked two hours a day, for whom Olympia did not have to pay "social taxes." For the most part, Olympia performed the services itself, but there were some subcontract costs for shampooing and/or stripping and waxing. (Tr. 106, 131, 199-200, 280) There is no evidence that Olympia overpaid any amounts to others on account of the square meter discrepancies at issue.

50. For the clinics supervised by Ms. McMillan, most of the workers were already in place under Olympia's predecessor contract. For all of the contract clinics, there was no change in the number of personnel Olympia hired during the contract period, although some were replaced from time to time, increasing the time necessary to perform the work during their initial training periods. (Tr. 199, 231-32)

51. During contract 0038's final year, Olympia incurred an unexpected cost when German law concerning employment of part-time workers changed. Many of its employees could not work anymore and it had to hire new ones, who had to be trained. Mr. Kunkel estimated that the negative labor cost impact was two to five percent of Olympia's projected costs as bid. (Tr. 237-38, 242-43)

52. Olympia's indirect contract costs—those of Mr. Schmoeger—were allocated principally to contract 0038 after its Heidelberg hospital contract was terminated for default in 1997. However, in determining what costs Olympia would have incurred had it cleaned the number of square meters specified in contract 0038, Ms. Miller allocated to that contract only those costs that would have been allocable if the hospital contract had not been terminated. She also adjusted the base to reflect increased direct costs. She concluded that Olympia would have had indirect costs of DM 244,800 had it cleaned all of the given square meters. (Ex. G-2 at 6, ex. G-7; tr. 134-37)

53. According to Ms. Miller, Olympia's administrative costs would remain the same. Combining its increased direct, decreased indirect, and administrative costs, she calculated that its total costs would have been DM 3,408,865, had it cleaned the

contract-stated square meters. (Supp. R4, tab 44 at 6; ex. G-2 at 6, ex. G-5; tr. 131-32, 137)

54. Olympia recorded total revenue of DM 2,599,368, based upon the contract as invoiced, which would have yielded a profit of DM 15,603 (DM 2,599,368 less total incurred costs of DM 2,583,765) had the government paid all of the invoices. However, when Ms. Miller subtracted her calculation of Olympia's DM 3,408,865 costs to complete the contract, had the square meters been as stated, from Olympia's recorded revenue, the result was a loss of DM 809,497. (Ex. G-2 at 6, 12, ex. G-5; tr. 128-29, 137)

55. Given Olympia's alleged loss of DM 809,497 and the profit of DM 15,603 that its revenue reflected, had it been paid as invoiced, Ms. Miller concluded that Olympia had realized a cost savings of DM 825,100 due to decreased work requirements (ex. G-2 at 8; tr. 139).

56. For purposes of the hearing, Ms. Miller performed alternate calculations adding insurance and other administrative costs, in the amount of DM 53,000, that Olympia claimed should be allocated to contract 0038, although she did not agree with that allocation. She concluded that its cost savings remained the same, DM 825,100, or close to the same, DM 822,376. (Ex. G-2 at 3-5, 9-14; tr. 114-19, 139-43)

57. Mr. Kunkel considered Ms. Miller's calculation of cost savings to be oversimplified and to have incorrectly assumed a direct relationship between the number of square meters and cost to the contractor (tr. 250-56). However, Olympia did not submit any quantum calculations or documented quantum evidence to the Board.

DISCUSSION

The government claims DM 831,235.53 based upon a constructive, deductive, change under the Changes clause, or due to mutual mistake requiring contract reformation, because the contract overstated the number of square meters to be cleaned. The claim amount is derived from appellant's contract prices per square meter, on the ground that this comports with the IFB's statement concerning clinic size changes and with the parties' conduct in bilateral modification 1. Alternatively, the government claims DM 825,100, appellant's alleged cost savings due to the alleged work reduction.

Appellant counters, *inter alia*, that: the government accepted and paid for appellant's work, until the final option year; it should have terminated the contract in whole or in part for convenience; its cost savings calculation is fundamentally flawed because appellant did not bid on a square meter basis, but upon the project as a whole; and appellant is entitled to the full contract amount. Appellant also contends that the government breached the contract by negligently including substantially incorrect square meters for the PHV and Hanau SWS clinics and that appellant is entitled to compensatory damages.

However, it does not specify damages and concludes by requesting that the Board award it the invoiced funds withheld by the government, plus interest. In any case, it did not submit a breach claim to the CO; thus, no such affirmative claim is before us. *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997).

Preliminarily, the government's claim is not barred by its acceptance of and payment for appellant's work for much of the contract term. There is no question that the government's claim was within the CDA's six-year limitations period, 41 U.S.C. § 605(a), and, if the contract does not provide otherwise, the government can claim a retroactive price adjustment, even after contract completion. *Maxima Corp. v. United States*, 847 F.2d 1549, 1555 (Fed. Cir. 1988). Contract 0038 did not contain any provision precluding the government from seeking recovery of an overpayment. Indeed, it is incumbent upon it to do so. *United States v. Wurts*, 303 U.S. 414 (1938); *Fansteel Metallurgical Corp. v. United States*, 145 Ct. Cl. 496, 500-01 (1959).

The government bears the burden to prove that it is entitled to an equitable adjustment decreasing the contract price due to deleted work and, if so, to prove the amount of the adjustment. *Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971); *CTA Inc.*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,762; *Celesco Industries, Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604 at 66,681. An equitable adjustment is not to be used to reduce or increase a contractor's profit or loss or to convert a loss to a profit or vice versa, for reasons unrelated to a change. *Pacific Architects and Engineers Inc. v. United States*, 491 F.2d 734, 739 (Ct. Cl. 1974).

Appellant did not submit any documentary evidence of its bid calculations. Mr. Kunkel testified that workload capacities per square meter were considered; that square meters played "a very important role" in the bid calculation process; and that building size was very important. At the same time, he testified that appellant's bid was based upon the project as a whole. (Findings 11, 12) The project, as a whole, included the total number of square meters listed in the contract. That total was part of the contract Schedule. (Finding 16) There is no evidence that appellant submitted a deliberately low bid, expecting that it would not have to clean that number of square meters (finding 33). Even if it had done so, this would not affect the amount of any recovery due the government (*see infra*).

Contract 0038 contained the FAR Payments clause, which provided that appellant was to be paid the contract prices "for services rendered" (finding 18). Appellant's unit prices for the "AA", "AC," and "AD" services at issue were the product of the contract-specified number of square meters involved and its bid prices per square meter (finding 13). Nothing in the contract guaranteed appellant a lump sum payment, in the amount of the total contract price, regardless of the amount of work it performed. *See B.F.I. Waste Systems*, ASBCA No. 30076, 86-2 BCA ¶ 18,842 at 94,958. Rather, it was entitled to receive payment, at its specified prices, only for square meters actually cleaned. *See Armada, Inc.*, ASBCA Nos. 27354, 27385, 84-3 BCA ¶ 17,694 at 88,240.

This interpretation coincides with that of the parties during the course of the contract. The IFB provided that appellant's square meter prices would be used in the event of future changes affecting clinic size (finding 2). Although that paragraph was not included in the contract (*id.*), the parties applied its pricing method for contract changes pertaining to clinic measurements. In bilateral modification 1, which resulted in part from appellant's allegations that measurements had been understated at six clinics and its demand that it would not start work until they were corrected, the parties applied appellant's square meter prices as bid in arriving at the unit and total prices of the affected sub-CLINs (findings 20, 21). Bilateral modification 2, which temporarily halted services at one clinic and substituted services at another, provided that "[t]he square meters to service and subsequently (sic) the total contract amount will remain unchanged" (finding 22). When the government notified appellant of its intent to exercise its options, it stated that it was doing so based upon the prices set forth in Section B of the contract (findings 23, 26). With respect to the second option, it specifically noted that "[c]ompensation will be based upon the unit prices in Section B of the contract" (finding 26).

It is evident that the amount of work appellant actually performed was substantially less than that it was being paid to perform (findings 39, 40). A contractor is not entitled to be paid "for work not performed" when no injury follows from the government's "innocent error." *H.B. Nelson Construction Co. v. United States*, 87 Ct. Cl. 375, 385 (1938), *cert. denied*, 306 U.S. 661 (1939). In *Nelson*, the court determined that a deductive change after the completion of contract work was justified when the contract called for square yards to be paved that already had been paved. The court found the contractor, which could have discovered the error through a pre-bid site visit, as much to blame as the government.

Appellant has not shown that it has been injured by the government's square meter errors. The contract Schedule specified a total number of square meters to be cleaned. Due to the quantity errors, appellant was not, in fact, required to clean that number, but was mistakenly paid for doing so. The government first recognized a problem in April 1999 and did not delay in notifying appellant, which participated in at least some of the re-measurements (findings 30, 31, 34). There is no evidence that appellant overpaid any amounts to others on account of the square meter discrepancies (finding 48). Further, as in *Nelson*, appellant is not entirely without fault in this matter. The IFB contained the FAR Site Visit clause, and the record suggests that appellant conducted at least some pre-bid site visits (findings 7, 8). Thus, it had the opportunity to discover at least the blatant errors in the specified square meters for the Hanau SWS and PHV clinics before it submitted its bid.

We conclude that the government is entitled to a downward contract price adjustment based upon a constructive deductive change and, therefore, do not reach its alternative mutual mistake contention. The government principally alleges that, in accordance with the parties' past practice, the adjustment should be based upon appellant's square meter prices, which it equates to unit prices. However, it acknowledges that unit

prices normally are not the proper measure of what it would have cost to perform deleted work. Unit prices have been used if they are the only available evidence upon which to base a downward contract price adjustment, *Control Line, Inc.*, ASBCA No. 50235, 98-1 BCA ¶ 29,722 at 147,374, and/or if there has been a complete deletion of a severable item, *CTA Inc., supra*, 00-2 BCA at 152,762. Mere recitation of a separate unit price does not make an item severable. *Id.* Here, the sub-CLIN services at issue continued to be required. There was not a complete deletion. Moreover, because the IFB called for an “ALL OR NONE,” firm fixed-price lump sum award (findings 5, 16), the services were not severable.

Most typically, in the case of a deductive contract change, any downward price adjustment is based upon the cost savings to the contractor, that is, the costs “the contractor would have incurred had the work not been reduced or deleted.” *Celesto Industries, Inc., supra*, 79-1 BCA at 66,683. The amount of a contractor’s bid allocated to performance of deleted work is generally irrelevant, even if, based upon expectations arising from a site visit or otherwise, it did not include any amount for the work. *S. N. Nielsen Co. v. United States*, 141 Ct. Cl. 793, 797 (1958); *Knight’s Piping, Inc.*, ASBCA Nos. 46985, 46987, 94-3 BCA ¶ 27,026 at 134,715; *Noblebrook Contractors, Inc.*, ASBCA No. 9736, 1964 BCA ¶ 4283, *aff’d on recon.*, 1964 BCA ¶ 4408.

DCAA auditor Miller calculated that appellant saved, at a minimum, DM 822,376, by being spared the expense of cleaning the contract-specified number of square meters (finding 56). Appellant offered no concrete quantum evidence and no specific alternative to Ms. Miller’s analysis. Accordingly, we find that a constructive deductive contract change is warranted in the amount of DM 822,376.

DECISION

The government is entitled to DM 822,376 (less amounts already withheld) due to a constructive deductive change based upon appellant’s cost savings, rather than the DM 831,235.53 it claimed based upon appellant’s square meter prices.

The appeal is sustained in part and otherwise denied.

Dated: 7 November 2003

CHERYL SCOTT ROME
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
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53643, Appeal of Olympiareinigung, GmbH, rendered in conformance with the Board's Charter.

Dated:

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