

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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National Salvage and Service Corp. ) ASBCA No. 53750  
 )  
Under Contract No. N68950-98-D-3082 )

APPEARANCE FOR THE APPELLANT: Michael L. Carmin, Esq.  
Andrews, Harrell, Mann,  
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Bloomington, IN

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Richard A. Gallivan, Esq.  
Assistant Director

OPINION BY ADMINISTRATIVE JUDGE MOED

This appeal relates to a requirements-type contract awarded to appellant (NSSC) for maintenance and repair of railroad trackage on a government installation. Upon completion of the contract, the actual purchases of services under the two principal contract line items (CLINs) 0001 and 0002 were significantly smaller and greater, respectively, than the estimated quantities set forth in the solicitation and ensuing contract. This is an appeal from the denial of a monetary claim for added compensation by reason of the shortfall in orders under CLIN 0001 and the excess quantity ordered under CLIN 0002. Only entitlement is now to be decided.

FINDINGS OF FACT

1. This contract resulted from a sealed bid solicitation issued on 17 February 1998 by the Officer in Charge, Naval Facilities Engineering Command (NAVFACENGCOM) Contracts, Crane Division, Naval Surface Weapons Center, Crane, Indiana (OIC Crane). The solicitation and resulting contract were for the acquisition of the government's requirements for maintenance and repair of railroad trackage at the Crane Division, during the period 6 May 1998 – 6 May 1999 (R4, tab 1 at 1, § 01010.7; R4, tab 9). The supplies and services which could be ordered under the contract were grouped in the schedule under CLINs 0001-0005. This appeal relates only to CLIN 0001 (Routine Work With 15 Day Response) and CLIN 0002 (Trouble Call "TC" Type Work [With] Three Day Response). CLINs 0001 and 0002 were comprised of sub-CLINs beginning with 0001AA and 0002AA. Each sub-CLIN consisted of a description of a supply or service, an estimated quantity which had been set forth by the government in the solicitation and

carried over into the contract, and unit and extended prices inserted by the successful offeror in its proposal and carried over into the awarded contract. (R4, tab 1 at Division O, pages 1-15; R4, tab 9)

2. Section 1.16 of the INSTRUCTIONS TO BIDDERS section of the solicitation stated that for the purposes of award, the low bidder would be the “conforming, responsive, responsible bidder offering the lowest total price for [CLINs] 0001 through 0005” (R4, tab 1 at Document 00200, p. 6). Sealed bids in response to the solicitation were opened on 26 March 1998 and NSSC was found to be the apparent low, responsive offeror (R4, tab 5). The contract was awarded to NSSC on 21 April 1998 at a total estimated price of \$2,636,740, which included \$2,148,337.64 for CLIN 0001 and \$326,899.25 for CLIN 0002 (R4, tab 9).

3. The contract contained the FAR 52.216-21 REQUIREMENTS (OCT 1995), ALTERNATE I (APR 1984) clause. Para. (a) of that clause provides, in part, as follows:

The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government’s requirements do not result in orders in the quantities described as “estimated” or “maximum” in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.

4. Mr. Thomas Pinnick, a planner and estimator at OIC Crane (tr. 2/29), developed the government estimate for the contract. The estimate was based on estimated quantities and estimated unit prices which also were developed by Mr. Pinnick. The estimated quantities were carried over into the schedules of the solicitation and the ensuing contract. (Tr. 2/12-13, 63, 241) Mr. Pinnick submitted the government estimate to the contracting officer on 28 April 1997, nine months before the solicitation was issued. On 28 March 1998, after the solicitation was issued, he increased the estimate by \$7,000 to reflect the cost of new sub-CLIN 0002BB added to the schedule by Amendment No. 00002. This resulted in a total government estimated price of \$2,818,788.50 which included \$2,323,317.71 for CLIN 0001 and \$336,248.67 for CLIN 0002. (R4, tab 84, encl. (6))

5. Mr. Pinnick testified that the estimated quantities were based on his personal knowledge of the condition of the rail system, the expected useful life of railroad ties, and the level of funding for maintenance and repair (M&R) of the system which historically had been provided to OIC Crane (tr. 2/108-12).

6. The contracting officer’s decision found that the government estimate was “reasonable at the time it was prepared.” The decision, however, set forth a basis for the

government estimate and estimated quantities which differed from Mr. Pinnick's testimony. The decision in this appeal states that the estimated quantities were derived from "historical data related to similar type work requirements and contracts," in particular, the contract values for the previous four years; potential future funding sources; the Annual Inspection Summary which documented the condition of the trackage; and anticipated track usage information. (R4, tab 120 at 1-3)

7. In his testimony, Mr. Pinnick contradicted the assertions in the contracting officer's decision to the extent of stating that when he prepared the government estimate, he had no knowledge concerning the availability of future funding from the Department of the Army and did not take expected future funding into account in arriving at the estimated quantities (tr. 2/80, 90, 103-04, 114-15). He stated that the estimated quantities also did not take into account the actual expenditures for services under the prior railroad maintenance contract (tr. 2/77-78, 86), nor did he review data in OIC Crane's files as to track condition or needed repairs (tr. 2/57-58, 60, 61-63). Mr. Pinnick, alone, prepared the government estimate (tr. 2/241). Based on that fact and the absence of challenge to his above testimony, we find that testimony to be fact.

8. The data set forth below as "Amount of Work Ordered" were furnished by the government in § 1.24 (CONTRACT HISTORY) of the INSTRUCTIONS TO BIDDERS section of the solicitation:

<u>Year</u>	<u>Amount of Work Ordered</u>
1994	\$2,195,000
1995	\$8,563,550
1996	\$4,418,000
1997	\$1,571,000

(R4, tab 1 at Instructions to Bidders, § 1.24)

9. NSSC's preparations for submission of a bid included investigations concerning the reasonableness of the estimated quantities. Mr. Curtis Schopp, one of the owners of NSSC, visited the site several times during the solicitation period. He observed that the main lines for moving rail cars in and out of Crane Division to, and from, interchanges with commercial railroads and the trackage in the switching and classification yards had been maintained in conformity with the highest standards of the industry. The trackage to individual storage bunkers ("fingers"), however, was maintained to a less stringent standard. These sections experienced fewer movements usually involving no more than two rail cars moving slowly. (Tr. 1/147)

10. There was testimony that much of the trackage at the Crane Division employed light weight rail purchased second-hand and installed during World War II. The light weight rail combined with extreme grades and curvatures in the system resulted

in considerable degradation of the installed ties. Crane had a program for replacement of light weight rail with heavier rail which would lengthen the life of the ties. (Tr. 2/19-20)

11. NSSC was knowledgeable as to maintenance standards and procedures employed by the principal commercial railroads (Class 1 railroads) relating to wear on rail and degradation of ties. This knowledge was gained during performance of contracts from private railroads for removal of surplus rail and ties which required NSSC to operate immediately behind railroad repair gangs. (Tr. 1/116) In bidding for the present contract, NSSC assumed that the use of the rail system at Crane Division for movement of munitions meant that there was a maintenance program in place which was at least as rigorous as that of a Class 1 railroad (tr. 1/117-18).

12. Section 05650 (Railroad Maintenance), ¶ 1.2, of the contract specification lists various applicable specifications including the American Railway Engineering Association (AREA) publication titled "Construction and Maintenance Sections." NSSC considered the listing of industry standards to be significant because it indicated a practice, at Crane Division, of periodic renewal of the trackage (tr. 1/41). Applying its knowledge of how AREA standards were followed and enforced in commercial railroad maintenance, NSSC believed that "there was going to be a . . . certain baseline amount of work that would have to be performed" (tr. 1/39).

13. At the hearing, NSSC agreed that the estimated quantities in CLIN 0001 "made sense in terms of how you expect a railroad maintenance program . . . to operate" (tr. 1/42). NSSC said that in submitting its bid for the contract and thereafter confirming the same, it "never had any reason to think that we weren't going to do" work in the amount of \$2,636,739.51 which was the total estimated price offered (tr. 1/161; R4, tab 4).

14. NSSC relied upon the estimated quantities for CLIN 0001 in pricing and planning the work. The large amounts of some of these led NSSC to conclude that specialized production equipment was needed for efficient performance of orders under CLIN 0001 (tr. 1/124, 126). Cited by NSSC as an example of large estimated quantities were sub-CLINs 0001AA and 0001AB showing a total estimated quantity of 15,000 grade ties to be furnished and installed (tr. 1/125-26).

15. NSSC compiled a list of specialized production equipment for the CLIN 0001 work as part of its bid preparation process. The list was based on observation of the incumbent contractor's operations and recommendations from an individual with many years of experience in railroad maintenance (tr. 1/35). The costs of acquiring and operating that equipment were included in the unit prices offered for the estimated quantities (tr. 1/127). After award of contract, the listed pieces of equipment were acquired at a total cost of \$544,520. The most expensive pieces were a Mark III tamper regulator at a cost of \$153,825 and a Fairmont tamper costing \$113,967 (R4, tab 80 at

Attachment C). A smaller tamper would have been adequate for type of work which was actually ordered and performed under the contract (finding 23). An automatic spiker was also acquired particularly for the CLIN 0001 work. (Tr. 1/69-70)

16. NSSC, “most likely,” would not have submitted a bid for this contract had it known that the work actually ordered under the contract would consist, predominantly, of TC work under CLIN 0002. The CLIN 0001 work was the attraction. “We kind of have to take the [CLIN 0002] to get the [CLIN 0001].” (Tr. 1/68) NSSC would not have acquired the specialized equipment solely for the CLIN 0002 work. That work, typically involving removal of a small section of rail and changing out a few ties (tr. 1/36), could usually be accomplished with a back hoe, air compressor, hand tools, and a light truck (tr. 1/123-24).

17. The contracting officer convened a pre-award meeting with NSSC on 7 April 1998. A memorandum summarizing that meeting, prepared and signed by Mr. Mark Bault, the business manager for public works at OIC Crane (tr. 2/208), contained the following statement made by Mr. Bault (tr. 2/215-16):

2. Anticipated Work – At this time due to funding constraints it is unrealistic to project how and what work will be ordered during the contract period. On the current contract there has been an increased emphasis on “TC” type work since Dec[ember 19]97. Due to reduced funding dollars the “project type” work has been reduced. It is thought that the emphasis will continue to be on “TC” type work at least through the end of the fiscal year. However this could change if additional funding becomes available from off station sources.

(R4, tab 84, encl. (4))

18. The Crane Army Ammunition Activity (CAAA) was the primary occupant of the Crane Division and the primary user of the rail system. Under an inter-service support agreement with NAVFACENGCOM, CAAA provided 92 percent of the funds for M&R of the rail system. The funds for M&R provided annually by CAAA historically ranged between \$1,000,000 - \$1,400,000. (Tr. 2/137-38) These funds were used for TC work and for routine maintenance and small projects under CLIN 0001 (tr. 2/217). Orders for large projects would be funded by the Department of the Army under the Army Strategic Mobilization Plan (ASMP) (tr. 2/216-17). During federal fiscal years (FYs) 1996 and 1997, approximately \$6,800,000 and \$4,200,000, respectively from the ASMP had been expended for rail system projects (R4, tab 120 encl. (2)). The Crane Division always had projects ready to proceed with funding from the ASMP but the availability of such funds could not be predicted (tr. 2/110).

19. The announcement made at the pre-award meeting regarding anticipated work (finding 17) was based on a determination previously made by the Department of the Army, and communicated to OIC Crane, approximately during December, 1997, that the Department “had invested enough [and] wanted to minimize what they were going to put into the trackage” (tr. 2/214). Mr. Bault testified that as a consequence of that determination, approval of funding for new projects from the ASMP had become increasingly difficult (tr. 2/215). ASMP funds are also referred to in the record as “off station sources” (tr. 2/217). After December, 1997, orders under the existing rail maintenance contract (the predecessor to the present contract) consisted mostly of TC work (tr. 2/215). The solicitation did not inform prospective bidders of the decision to minimize additional investments in trackage nor did it contain the information presented at the pre-award meeting, as set forth above (finding 17), nor did it change the estimated quantities in CLIN 0001 to reflect the reduction in “project type” work.

20. Mr. Curtis Schopp, one of the owners of NSSC (tr. 1/10), attended the pre-award meeting. Although he was uncertain as to the meaning of the statement concerning continued “emphasis” on TC work, he believed that this had not “really changed the contract” inasmuch as it had not been quantified. (Tr. 1/160-61) Moreover, the government’s representatives “never said that the government estimate was wrong” (tr. 1/160-61) nor stated that the “estimated quantities are incorrect [and] go back and look at it” (tr. 1/59-60).

21. The statement also seemed to be consistent with the normal situation whereby funds for “project-type” work under CLIN 0001 would dwindle down during the course of the existing fiscal year (1998). NSSC expected to start work under the contract on 15 May 1998 (R4, tab 8). Its interpretation of the statement was that “the first few months of the contract may be predominantly TC” and that “it would probably be the end of the fiscal year before program work started up or was significant” (tr. 1/56, 91). NSSC expected that “it just may not be a grand and glorious through the summer and then when the new funding year comes up, that is when we will get our big work.” (Tr. 1/60-61)

22. Finally, NSSC “assumed that anything [the government] did was reflected in the estimated quantity [that] we just submitted a bid on” (tr. 1/56-57). Based on that assumption, NSSC reviewed its bid and “verified that [it was] still satisfied with [its] numbers based on the schedule that [the government] published” (tr. 1/57). Thereafter by letter dated 8 April 1998, NSCC confirmed its bid, notifying the government that it had “reviewed our bid numbers, and we are confident that we can perform for the stated prices.” (R4, tab 8)

23. NSSC’s expectations of eventual large orders under CLIN 0001 were not realized. At the conclusion of the contract term, NSSC’s final invoice, dated 20 July 1999, showed total payments of \$848,798 (R4, tab 135). That amount included \$362,096 for work under CLIN 0001 (R4, tab 117 at 3). That fell short of the estimated price of

\$2,148,337.64 for that work set forth in the contract (finding 2). A total of \$444,678 was paid for TC work under CLIN 0002 (R4, tab 117 at 3). That amount exceeded the estimated price of \$326,899.25 for that work set forth in the contract (finding 2).

24. The government estimate of the CLIN 0002 quantity was similar in that it failed to consider the most current information available when the solicitation was issued. It did not consider the actual orders either on the current contract or on the contracts for the two preceding years. When the solicitation for the 1998-99 contract was issued, the 1997-98 contract had been underway for ten months, and when it was completed a total of approximately \$700,000 of the TC work had been ordered. While the 1997-98 contract total was high in relation to the two preceding years, the average for all three years was approximately \$533,333 per year, or 60 percent more than the government CLIN 0002 estimate for the 1998-99 contract year. (R4, tab 120, encl. 6)

25. By letter dated 23 October 2001 to the contracting officer, NSSC submitted an uncertified request for equitable adjustment in the amount of \$656,537 (R4, tab 115). NSSC asserted that the government had been negligent in preparing estimated quantities in the solicitation in that it had failed to consider certain available, current information which had a “direct causal relationship to the significant reduction of actual work, experienced under the contract” (R4, tab 115 at 1). NSSC asserted that it had been induced by the estimated quantities for CLIN 0001 to acquire equipment which was not needed, resulting in unrecovered fixed costs. It further alleged that the CLIN 0002 work was priced lower than it otherwise would have been on the basis that it would be “filler” work rather than the major portion of work under the contract. (R4, tab 115 at 9-10)

26. The information allegedly not considered was the “imminent” construction of a “transload” facility at the Crane Division. NSSC asserted that this facility “was designed to replace the railroad as the primary means for intra-facility transfer of munitions.” According to NSSC, this facility had “dramatically reduced the role of the rail system with an attendant reduction in repair and maintenance which would otherwise be required under the present contract.” NSSC asserted that had it known these facts, it would not have submitted an offer for this contract. (R4, tab 115 at 1-2)

27. The term “transload” facility refers to a new ammunition container complex at the Crane Division for transfer of production munitions and storage and staging and cribbing in support of container stuffing operations. Supporting facilities to be provided included rail trackage, access roads and rail spurs. (R4, tab 84, encl. (8)) The solicitation for construction of the transload facility was issued on 22 May 1998 (R4, tab 122). A contract was awarded on 10 August 1998 calling for completion of the work on 19 October 1999 (R4, tab 84, encl. (3)).

28. The transload facility would increase the capacity of CAAA for receiving and shipping containerized ammunition to Atlantic and Pacific outports (tr. 2/91; R4, tab 133

at 2). Through its connections to the rail system, the facility would likely have increased, rather than reduced, the utilization of that system (tr. 2/91). On the foregoing record, we find that the transload facility would not have caused a reduction in the amount of services ordered under this contract.<sup>1</sup>

29. By letter dated 5 November 2001, the contracting officer responded that there was no basis for granting NSSC's equitable adjustment request (R4, tab 116). By letter dated 21 November 2001 (R4, tab 117), NSSC resubmitted the request as a claim in the amount of \$656,537, duly certified pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The claim was denied in its entirety in the contracting officer's written decision dated 25 February 2002 (R4, tab 120). This timely appeal ensued.

### DECISION

Mr. Pinnick developed the government estimate and the estimated quantities in the contract on the basis of his personal knowledge concerning the condition of the rail system, the expected useful life of railroad ties, and past annual M&R funding for the system (finding 5). NSSC contends, however, that the data enumerated in the contracting officer's decision for arriving at the estimated quantities (finding 6) constituted "the steps required for the proper preparation of an estimate." NSSC asserts that by listing these data in the decision, the government had "implicitly acknowledged its own negligence" in permitting Mr. Pinnick to develop the estimates on another basis. (App. br. at 9)

The argument is without merit. Mr. Pinnick was not prohibited from developing estimated quantities on the basis of his personal experience. FAR 16.503(a)(1), relating to requirements contracts, authorizes the contracting officer to obtain an estimated quantity from "records of previous requirements and consumption, *or by other means*" (emphasis added). Moreover, the decision states that the government estimate, which had been developed by Mr. Pinnick, was "reasonable at the time it was prepared" (finding 6). That precludes interpreting the contracting officer's recitation of an alternative method of determining estimated quantities as a disapproval of the method used by Mr. Pinnick.

NSSC contends, alternatively, that the government estimate was defective because it had not been revised to reflect changes in conditions which occurred after its submission in April, 1997, specifically, that "the increased emphasis on TC was not reflected in the estimate" (app. br. at 6). Under FAR 16.503(a)(1), relating to requirements contracts, the contracting officer was obligated "[f]or the information of offerors and contractors, . . . [to] state a realistic estimated total quantity in the solicitation and resulting contract," and to "base the estimate on the most current information available."

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<sup>1</sup> There is no reference to the transload facility in NSSC's post-hearing submissions, from which we infer that NSSC no longer urges this matter as the basis of claimed negligence in the preparation of the estimated quantities.

Under the FAR 16.503(a)(1) standard, NSSC's claim of negligence in the preparation of the estimated quantities for both CLINs 0001 and 0002 has merit. With regard to CLIN 0001, prior to the issuance of the solicitation in February 1998, OIC Crane had been notified of a determination by the Department of the Army to "minimize" new investment of ASMP funds in the rail system (finding 19). The ASMP was a source of funds for work to be ordered under CLIN 0001, which comprised the largest portion (\$2,323,317.71) of the total government estimate of \$2,818,788 for this contract (findings 4, 18).

The availability of ASMP funding had been unpredictable in the past. However, in recent years, large amounts of those funds had been provided. (Finding 18) That experience made it reasonable to use substantial estimated quantities of CLIN 0001 work in arriving at the government estimate submitted in April 1997 (findings 4, 18) even though uncertainty remained as to the amount of work actually to be ordered. The decision to "minimize" new investment of ASMP funds in the rail system was significant because it served to change the prospects for orders under CLIN 0001 from uncertain to unlikely. That change, however, was not reflected in the estimated quantities for CLIN 0001 included in the solicitation for this contract issued in February 1998 (finding 4). Those quantities were the same as those used in April 1997 for the government estimate, prior to the decision to "minimize" new investments in the rail system.

The failure to take the Department of the Army's decision into account with respect to the estimated quantities in the solicitation for CLIN 0001 was a breach of the government's obligation under FAR 16.503(a)(1) to "base the estimate on the most current information available." *Contract Management, Inc.*, ASBCA No. 44885, 95-2 BCA ¶ 27,886 at 139,107. If it was impracticable to adjust the estimated quantities under CLIN 0001 to reflect the decision, prospective bidders should have been informed of the same in the solicitation so that they could make their own assessments as to the impact on ordering under CLIN 0001. *Chemical Technology, Inc. v. United States*, 645 F.2d 934, 948 (Ct. Cl. 1981) (solicitation for food services requirements contract should have included reserve training information reasonably available prior to issuance of the solicitation). Similarly, the failure to take into account the quantity of TC work on the current contract and on the contracts for the two preceding years was a breach of the same obligation with respect to the CLIN 0002 estimate (finding 24).

In order to recover for the breach of contract as to the estimated quantities, NSSC was required to show reasonable reliance on the amounts in the solicitation and injury resulting from such reliance. *J.A. Jones Management Services, Inc.*, ASBCA No. 46793, 99-1 BCA ¶ 30,303 at 149,833. There is ample evidence in the record in both respects.

NSSC relied on the estimated quantities for CLIN 0001 in deciding to submit a offer for the contract and by including, in that offer, the costs of specialized equipment

deemed necessary for efficient performance of work of the magnitude of those quantities (findings 14-16). NSSC believed that the estimated quantities in CLIN 0001 “made sense in terms of how you expect a railroad maintenance program . . . to operate” (finding 13). That belief was based on NSSC’s experience and knowledge concerning maintenance of rail systems, the characteristics and condition of the rail system as determined from site visits, and the provisions of the specification for the contract indicating the applicability of standards prescribed for private railroads (findings 9-12). On that record, it is plain that NSSC relied on the estimated quantities in the solicitation and that such reliance was reasonable. The facts of resulting injury are equally clear. As the result of the substantial shortfall of orders on CLIN 0001, NSSC was unable to recover costs expended for specialized equipment acquired for accomplishment of work under that CLIN (finding 25). Moreover, had the estimate for both CLINs 0001 and 0002 been based on the most current information, they would have indicated that the contract would be predominantly for TC work and one on which NSSC “most likely” would not have bid (finding 16).

CONCLUSION

The appeal is sustained. NSSC is entitled to compensation for the government’s negligence in estimating the CLIN 0001 and 0002 requirements. The matter is referred to the parties for negotiation of quantum.

Dated: 18 June 2004

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PENIEL MOED  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Acting 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. 53750, Appeal of National Salvage and Service Corp., rendered in conformance with the Board's Charter.

Dated:

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DAVID V. HOUBE  
Acting Recorder, Armed Services  
Board of Contract Appeals