

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Job Options, Inc.) ASBCA No. 56698
)
Under Contract No. HDEC08-02-C-0014)

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

This timely appeal involves a claim by Job Options, Inc. (appellant or JOI) seeking recovery of amounts deducted by the government for alleged deficiencies in floor maintenance services provided under the referenced contract. We sustain the appeal.

FINDINGS OF FACT

1. The referenced contract, bearing an effective date of 18 April 2002, was awarded by the Defense Commissary Agency (DeCA or government), Fort Lee, Virginia (DeCA Hqs.) to “Pioneer Adult Rehabilitation” (Center) (PARC) for the provision of commissary stocking, storage and custodial services at the Hill Air Force Base (AFB) Commissary in Ogden, Utah. As awarded, the contract provided for an initial base period of 1 July 2002 through 30 June 2003, with options for four follow-on one year periods through 30 June 2007. (R4, tab 2 at 1-14) DeCA is divided into regions, including a western United States region (DeCA West) at McClellan AFB in Sacramento, California. Administration of the contract was delegated to DeCA West. (R4, tab 2 at 18-19, tab 3; tr. 14-17) The procurement was conducted pursuant to the Javits-Wagner-O’Day (JWOD) Act and PARC was a qualified non-profit entity for purposes of the JWOD program (R4, tab 30; tr. 367-85).

2. Work was to be performed in accordance with Attachment 1, Performance of Work Statement (PWS). Section C-1, General, of the PWS required the contractor to

establish a satisfactory quality control plan and inspection system and further provided as follows at ¶ 1.4 (R4, tab 2 at C1-6):

1.4. QUALITY CONTROL/QUALITY ASSURANCE

1.4.1. Quality Control...

....

1.4.1.3. Documenting Inspections/Results. The Contractor shall establish checklists for documenting all inspections conducted along with corrective actions taken. This documentation shall be immediately available to Government representatives designated by the Contracting Officer [CO] at anytime [sic] during the term of the contract.

1.4.2. Quality Assurance. The Government will monitor the Contractor's performance under this contract using Quality Assurance Evaluator (QAE) inspections. QAEs will inspect for compliance with contract terms. All surveillance observations will be recorded. Those that indicate defective performance shall be initialed by the PM [Project Manager]. If the PM nonconcurs with the QAE's surveillance observations indicating defective performance, the PM shall submit a written response to the [CO] or designated representative within 2 working days.

The contractor's written response is known as a "reclama."

3. The contract incorporated FAR 52.2456-4, INSPECTION OF SERVICES – FIXED PRICE (AUG 1996); FAR 52.233-1, DISPUTES (DEC 1998), FAR 42.243-1, CHANGES–FIXED PRICE (AUG 1987)–ALTERNATE I, and the following clause which stated in pertinent part (R4, tab 2 at 16):

**52.246-4500 INSPECTION AND ACCEPTANCE (NISH)
(OCT 1995)**

....

c. The rights of the Government and remedies described in TE-1 of the PWS are in addition to all other rights and remedies set forth in this contract. Specifically, the Government reserves its rights under the Inspection of

Services clause and the Adjustment and Cancellation of Orders provision. Any deductions taken pursuant to the Performance Requirements Summary (PRS) shall reflect the reduced value of services performed under the contract; however, the contract issues shall be resolved in accordance with the Disputes provisions contained herein....

4. Invoicing and payment were addressed in pertinent part by the following clause (R4, tab 2 at 18):

52.232-4504 INVOICE AND PAYMENT (OCT 1995)

a. The Contractor may submit monthly itemized invoices for services rendered under this contract. Invoices shall list each line item covered by the contract and the unit price per line item for services performed during the month.

b. Any monetary deductions for services not performed or Performed unsatisfactorily shall be deducted from the amount of the invoice prior to payment (See Technical Exhibit 1 of the [PWS]).

....

d. Original invoices shall be submitted to the designated payment office. One (1) additional copy of each invoice shall be forwarded to the office of the [CO] responsible for administering this contract.

5. Section C-4, Specific Tasks, and Exhibit 4-5, Custodial Services, of the PWS prescribed various custodial tasks to be performed by the contractor (R4, tab 2 at C4-11, -17). In particular, ¶ 2 of Exhibit 4-5 contained the following requirements (R4, tab 2 at C4-17):

2. FLOOR MAINTENANCE

2.1. General. ...The entire floor shall be free of debris, streaks or film, scuff or heel marks, dirt/wax build-up, food residue...or other stains discoloration. In addition, floor maintenance operations include removing splash marks, floor cleaning solutions and mop streaks from baseboards, furniture, trash receptacles, gondolas, display cases, shelf bases, checkout stands, and other store fixtures.

2.2. Tile Floor Coverings (Ceramic, Terrazzo, Vinyl, etc.) and Specialty Floors.

....

2.2.1. Vinyl Composition Tile (VCT). VCT is the floor covering most widely used in commissaries. In the absence of the VCT manufacturer's floor care specifications, the contractor shall develop a floor care program based on general guidance such as that available from the Resilient Floor Covering Institute or similar sources. A properly maintained VCT floor shall have a uniform coating of non-skid floor finish and present a uniform glossy appearance.

6. Exhibit 4-6-1 listed frequency and quality standards for floor maintenance (referred to by the parties as PRS 6) instructing the contractor to perform nightly maintenance of a total of 25,592 square feet (sq/ft) flooring in the sales areas of the commissary in accordance with the performance standard set forth in Exhibit 4-5 above. Over 98% of the total square footage, was indicated to be VCT (or a VCT composite). (R4, tab 2 at C4-23; tr. 56-57) Although the commissary was renovated in 2005, the approximate square footage of sales floor area to be maintained did not change (tr. 35). The cost associated with maintenance of the sales floor area represents approximately 55% of the total cost of all custodial requirements (tr. 58-59, 379).

7. Technical Exhibit 1, Performance Requirements Summary, of the PWS set forth the prescribed methodology for determining deductions and payment due the contractor and government quality assurance procedures, stating in part as follows (R4, tab 2 at TE1-1, -2):

1.1. PERFORMANCE REQUIREMENTS SUMMARY (PRS). A Performance Requirements Summary indicates the service outputs of the Contractor that the Government will evaluate to assure the Contractor meets standards of performance. The purpose of the PRS is to identify to the Contractor the levels of performance required to warrant full payment.

This PRS shows:

1.1.1. Those contract requirements considered critical to acceptable contract performance (Column A, Required Service, PRS chart)....

1.1.2. The standard of performance for each listed service (column B).

1.1.3. The maximum allowable degree of deviation (Acceptable Quality Level (AQL)) from each required service that the Government will allow before contract performance is considered unsatisfactory. Also, the lot used as the basis for surveillance and payment computation is defined (Column C).

1.1.4. The primary surveillance method the Government will use to evaluate Contractor's performance in meeting the contract requirements (Column D).

1.1.5. The percentage of the contract price that each listed required service task represents (Column E). This percentage would also represent the maximum amount of deduction that could be taken for unsatisfactory performance.

1.1.6. The procedure the Government will use in reducing the Contractor's monthly payment if the Contractor does not render satisfactory performance.

....

3.1. DETERMINING THE NUMBER OF DEFECTS THAT WILL CAUSE LESS THAN MAXIMUM PAYMENT.

....

3.1.2 Checklist Method. When the method of surveillance is checklist, the number of defects that will cause less than maximum payment will be determined as follows:

3.1.2.1. If the AQL is a constant number of defects (for example, two defects), the AQL plus one or more additional

defects (for example, three defects) will cause less than maximum payment.

3.1.2.2. If the AQL is percentage value, it will be multiplied by the lot size to determine the number of defects that will allow maximum payment. One or more additional defects will render the performance unsatisfactory and cause less than the maximum payment.

....

4.1. ACCEPTANCE OF REPERFORMANCE OR LATE PERFORMANCE

4.1.1. At the sole election of the Government, the Contractor may be required to reperform or perform late, at no additional cost to the Government, any or all defective or incomplete work disclosed by Government inspection. The Government will notify the Contractor promptly after inspection that specified defective services are required to be reperformed or performed late, and completed within a reasonable time as specified by the Government. In such cases, the Government will reinspect work and the Contractor may be held liable for any Government costs or damages associated with the reinspection.

4.1.2. When the Government requires re-performance or late performance because of defective service disclosed by random sampling inspection, the Government will not modify the original inspection results.

4.1.3. When the Government requires reperformance or late performance of any or all defective service in a lot disclosed by checklist inspections, the Contractor shall resubmit the portion reperformed for reinspection. Upon reinspection, the Government will revise the original inspection results to reflect the resubmitted service lot.

4.1.4. If the Government determines that it will not be possible to allow the Contractor to reperform or perform late, the Contractor will have to bear the consequences of poor performance, even if this might result in the Government issuing a CDR and reducing payment to the Contractor.

8. To illustrate the payment/deduction computation with respect to floor maintenance requirements, ¶ 5.1.2 of Technical Exhibit 1 set forth the following example (R4, tab 2 at TE1-3-4):

5.1. CONTRACTOR PAYMENT. When the AQL is exceeded, payment for services required will be calculated and reduced as follows:

....

5.1.2. Services Surveilled by Checklist. The Government will use the following formula when determining the amount of deduction for exceeding the AQL:

STORE: Camp Swampy Commissary
FOR: Perform Sales Area Floor Care
Lot Size: 550,000 SF (22,000 SF X 25 Days Contractor required to perform per month)
AQL: 1% (550,000 X .01 = 5,500 SF)
Acceptance Level: 5,500 SF or less
Reject Level: 5,501 SF or more

1. Contract line item per month	\$13,500.00
2. Maximum payment % for this service (PRS, Column E)	55.00%
3. Maximum payment for this service (Line 1 X Line 2)	7,425.00
4. Total number of defects found by the QAE per month	9,575 SF
5. Percent found unacceptable (Line 4 Divided by lot size = .0174 or 1.74%)	1.74
6. Amount of deduction (Line 3 X Line 5)	\$129.20

7. Total payment due for the month (Line 3 minus Line 6)	7,295.80
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(Emphasis in original)

9. Technical Exhibit 1 further stated in pertinent part (R4, tab 2 at TE1-5):

7.1 CONTRACT DISCREPANCY REPORT (CDR). If, at the end of the surveillance month, the surveillance record for a PRS item for that surveillance month indicates a number of defects that exceeds the AQL, the QAE shall prepare a proposed CDR. The QAE shall submit each proposed CDR, together with supporting documentation, to the [CO]. Upon validation/approval of the CDR, the [CO] will officially issue it to the Contractor. The Contractor shall reply, in writing, within 10 working days from receipt of any CDR, indicating corrective actions taken to prevent recurrence. The [CO] will evaluate the Contractor's response and determine if full payment, partial payment, or the contract termination process is applicable. The Contractor's failure to reply will be considered as concurrence with a CDR. The Government specifically reserves the right to make a temporary partial payment for services performed prior to receipt and evaluation of a Contractor response to a CDR.

10. Technical Exhibit 1 also contained a chart summarizing contract requirements (R4, tab 2 at TE1-6-8). With respect to floor maintenance the chart provided (*id.* at TE1-8):

A REQUIRED SERVICE	B STANDARD OF PERFORMANCE	C MAXIMUM ALLOWABLE DEGREE OF DEVIATION FROM REQUIREMENT (AQL)	D METHOD OF SURVEILLANCE	E MAXIMUM PAYMENT % FOR MEETING THE PERFORMANCE REQUIREMENT
....				
(6) Perform sales area floor care as shown in <u>Exhibit 4-6-1</u>	IAW frequencies and standards shown in <u>Exhibit 4-6-1</u>	1% The lot size is the number of square feet X the number of days that the Contractor is required to perform per month	Checklist	55%

11. DeCA guidelines for inspections by QAEs are set forth in its “Quality Assurance Surveillance Plan for Commissary Shelf Stocking, Receiving/Storage/Holding Area and Custodial Services” (QASP) (R4, tab 38). In ¶ 2-5.b(4) and (6), the QASP sets forth the following pertinent guidance regarding the documentation of the results of inspection (*id.* at 2-6, -7):

(4) The QAE shall record comments that support each assessment of UNSAT on the **DDO Form**. The QAE shall offer the PM the opportunity to initial each UNSAT and related comment. These initials indicate that the PM is aware of this information. In each situation in which a PM is either unavailable or refuses to initial, the QAE shall annotate the time, and, as appropriate, “PM Unavailable to Initial” or “PM Refused to Initial” in the surveillance documentation.

....

(6) At the end of the month, the QAE shall total the number of UNSATs recorded in the surveillance record for each service output throughout the month. If the total number of UNSATs for the month is greater than the AQL for any PRS element, the QAE shall prepare a proposed **CDR** for that PRS element. [Emphasis in original]

12. QASP ¶ 2-10 states in pertinent part (*id.* at 2-9, -10):

2-10. DETERMINING THE NUMBER OF DEFECTS THAT WILL CAUSE LESS THAN MAXIMUM PAYMENT.

a. When the **number of defects** found by a QAE during a surveillance month is **less than the AQL** percentage or the number of defects allowed in Column C of the PRS for a particular PRS item, the Government will accept and pay for the service output surveilled under that PRS at the maximum payment percentage of the monthly contract line item price specified in Column E of the PRS.

b. When the **number of defects** found by a QAE during a surveillance month is **greater than the AQL** percentage or number of defects allowed in Column C of the PRS for a particular PRS item:

....

(2) For services **surveilled by checklist**, the maximum payment percentage for the services in Column E of the PRS is multiplied by the monthly contract line item amount to determine the maximum payment the Contractor can be paid for the listed services. The total number of defects found, not just the defects in excess of the reject level, are used to determine the percentage of the lot found unacceptable. To determine the amount of reduction in payment for unacceptable services, multiply the percentage of the lot found unacceptable by the maximum payment for the listed service. The amount of reduction in payment subtracted from the maximum payment for acceptable service determines the payment to be made to the Contractor.
[Emphasis in original]

13. QASP ¶ 2-11 provides for monthly preparation and submission of proposed CDRs to the contracting officer (sometimes “CO”) as follows (*id.* at 2-10):

2.11. CONTRACT DISCREPANCY REPORTING. If, at the end of the surveillance month, the surveillance record for a PRS item for that surveillance month indicates a number of defects greater than the number of defects allowed by the

AQL, the QAE shall prepare a proposed **CDR** for that PRS item. No later than three working days after the end of a surveillance month, the QAE shall submit each proposed **CDR**, together with all supporting documentation, to the [CO].... [Emphasis in original]

14. The QASP reiterates the PRS 6 requirement to “Measure, to the nearest square foot, any area of sales floor found to be below standard” (*id.* at 2-54) and provides the following further guidance regarding floor maintenance (*id.* at 2-54, -55):

The entire floor shall be free of debris, streaks or film scuff or heel marks, dirt/wax buildup, food residue, scratches, or other stains and discolorations. *There is no variance associated with this standard. If during surveillance of completed floor care, regardless of the type of floor covering/surface, a QAE finds any portion of a floor area that the Contractor has not cleaned IAW the standard described above, the QAE shall assess as UNSAT every square foot of floor that the Contractor has not cleaned IAW this standard. This standard includes yellowing of any floor covering. If the floor finish is yellowing, the QAE shall assess every square foot of floor that is yellowing as UNSAT.*

In addition, floor maintenance operations include removing splash marks, floor cleaning solutions and mop streaks from baseboards, furniture, trash receptacles, gondolas, display cases, shelf bases, checkout stands, and other store fixtures. *There is no variance associated with this standard. If during surveillance of completed floor care, a QAE finds any portion of baseboard, furniture, display cases, etc., that the Contractor has not cleaned IAW the standard described above, the QAE shall assess as UNSAT 0.25 (one quarter) square foot for every linear foot of baseboard, furniture base, display case base, kickplates, etc., that the Contractor has not cleaned IAW this standard.*

2.2.1. Vinyl Composition tile (VCT). A properly maintained VCT floor shall have a uniform coating of non-skid floor finish and present a uniform glossy appearance. *There is no variance associated with this standard. If during surveillance of completed floor care, a QAE finds any portion of VCT tile floor covering subject to floor care by the Contractor that does not present a uniform*

glossy appearance, the QAE shall assess as UNSAT every square foot of floor on which the Contractor has not maintained a uniform glossy appearance. [Emphasis in original]

15. CDRs are again addressed at ¶ 3-2 of the QASP as follows (*id.* at 3-1):

3-2. CONTRACT DISCREPANCY REPORT (DeCA Form 70-60). At the end of each month, the QAE shall prepare a proposed **CDR** for any PRS for which the Contractor has exceeded the AQL. The QAE shall submit an original proposed **CDR** with the monthly surveillance documentation to the [CO]. Upon validation of any proposed **CDR**, the [CO] will issue the **CDR** to the Contractor for response. The Contractor shall reply, in writing, within 10 working days from the date of receipt of any **CDR**, indicating corrective actions taken to prevent recurrence. The [CO] will evaluate the Contractor's response and determine whether full payment, partial payment, or the contract termination is applicable. Failure to reply will be considered as concurrence with a **CDR**. The Government specifically reserves the right to make a temporary partial payment for services performed, prior to receipt and evaluation of the Contractor's response to a **CDR**, or if the Contractor fails to respond to a **CDR**.... [Emphasis in original]

16. Pursuant to Modifications No. P00005 and P00014, the government exercised the first (through 30 June 2004) and second (through 30 June 2005) follow-on periods, respectively (R4, tabs 7, 16).

17. Pursuant to Modification No. P00017, bearing an effective date of 1 July 2005, the government exercised follow-on year three (through 30 June 2006) and incorporated various changes to the schedule and new line items not pertinent to the present dispute (R4, tab 19).

18. Modification No. P00018, with an effective date of 1 April 2006, was issued "to change the NISH [formerly National Institute for Severely Handicapped] Work Center" and "transfer primary responsibility" for the contract from PARC to JOI. The modification stated that JOI "agrees to be bound by and to perform each contract service in accordance with the terms...in the contract," including its pricing terms. PARC was "released" because of its poor performance and the contract "awarded" to the "replacement" contractor JOI by DeCA Hqs. in accordance with procedures prescribed pursuant to the JWOD. (R4, tab 20; tr. 367-68, 373-74, 384-85)

19. JOI is a non-profit firm that operates under the “Ability One” program employing persons with disabilities for performance of service contracts (tr. 465-66). JOI works in consultation with NISH (a “central non-profit agency” in the program) to determine standard frequencies, *inter alia*, for various floor maintenance tasks, including stripping and waxing of floors. JOI’s pricing of the contract was based on stripping and waxing the floors twice per year, which is the predominant standard in the industry. At the time of the dispute, JOI had contracts with a total of seven commissaries including Hill AFB and has operated in the industry since 1987. NISH works with over 500 companies like JOI operating in the United States and is awarded a 4% commission on contracts awarded pursuant to the “Ability One” program. (Tr. 457-59)

20. The government exercised follow-on year four (through 30 June 2007) pursuant to Modification No. P00019 (R4, tab 21).

21. Modification No. P00026, dated 29 June 2007, documented the settlement of a JOI claim related to an adjustment of the total floor maintenance area following the commissary’s renovation covering the period April 2006 to June 2007 (R4, tab 28; tr. 375-76). The requirements regarding daily cleaning of the floor areas involved in the dispute were not materially revised (*id.*). During negotiation of the modification, there was no mention by the government of the condition of the floors or deductive adjustments taken for poor floor quality in pricing the adjustment (tr. 464-65, 468).

22. In late Spring 2007, responsibility for administration of the contract was transferred from DeCA West to DeCA Hqs., which negotiated the equitable adjustment reflected in Modification No. P00026 (R4, tab 27; tr. 14-17, 468).

23. Pursuant to Modification No. P00027, dated 29 June 2007, the government extended the contract for an additional six months from 1 July 2007 through 31 December 2007 (R4, tab 29).

24. The government again extended the contract’s performance period an additional three months through 30 March 2008 pursuant to Modification No. P00033 dated 26 December 2007 (R4, tab 35).

25. Appellant generally swept, mopped and burnished the floors on a nightly basis (tr. 171, 459). Appellant also completed QC forms evidencing satisfactory completion of floor maintenance tasks and presented them to the QAEs prior to their surveillance of the floors. During subsequent QAE inspections, appellant also corrected specific deficiencies as noted by the QAE to the extent possible, except for deficiencies covered with wax. Initials on the Contract Surveillance Checklist (CSC) forms by appellant’s employees at Hill AFB represent an “acknowledgement” of the daily determinations of defective square footage by the QAEs. Appellant submitted no reclaims during the

period August 2007 – January 2008. (Tr. 51, 243-45, 254-55, 268-69, 270, 302-03, 313, 488)

26. The QASP included a sample monthly CSC form for PRS 6 (floor maintenance) work with directions for its completion (R4, tab 38 at 2-58).

27. From August 2007 through January 2008, the CSC forms, as initially prepared by the QAEs at the Hill AFB commissary, were incorrectly completed. The QAEs listed the deficient square footage amount for the last day of the month in the space where the total month's square footage should have been written. The erroneous total defects were reported by the QAEs as follows for each month: August-10,627; September-13,801; October-12,217; November-8,330; December-17,493; and, January-11,150. (Tr. 54, 98-99; R4, tabs 55E, 56E, 57E, 58C, 59C, 60C)

28. Approximately 15 days following the end of each month, the QAEs prepared and forwarded to the contracting officer a proposed contract discrepancy report (CDR) package consisting of the CSC forms and other backup documentation supporting deficiencies noted during the prior month. No quantification of any deduction was developed or proposed by the QAEs. (Tr. 67-69) Prior to the transfer of contract administration functions to DeCA Hqs., DeCA West contracting personnel failed or declined to process CDRs or take deductions for floor maintenance despite the deficiencies reported by the QAEs at Hill AFB. After the transfer, DeCA Hqs. determined that it would not seek deductions for floor maintenance deficiencies that were reported by the QAEs prior to August 2007. (Tr. 23, 70, 89-90, 360-61, 444)

29. JOI management in San Diego received "preliminary" or "courtesy" CSC forms on a monthly basis but, because of the misreporting of the total floor maintenance deficiencies, considered that any deductions would be *de minimis*. No tentative deductions were calculated in the "courtesy" documentation. Appellant did not learn until mid-January 2008, that major deductions would be taken. The government considered that appellant had "always had" excessive floor deficiencies recorded by the QAEs even prior to the period for which deductions were taken. (Tr. 17-22, 67-69, 88-90, 353-56, 360-63, 426, 444-45, 474-77, 501)

30. By letters (termed CDRs) dated 11 January 2008, the CO at DeCA Hqs. notified appellant of proposed deductions covering the period August through October 2007 based on the total deficiencies for August (367,709), September (503,737) and October (419,200) 2007, as corrected by DeCA Hqs., or an increase ranging from approximately 3400% to 3600% increase over the total deficiencies reported by the QAEs on the CSCs for those months (R4, tabs 55E, 56E, 57E).

31. By CDR letters dated 25 February 2008, the CO at DeCA Hqs. notified appellant of proposed deductions for the period November 2007 through January 2008.

The deductions were calculated by DeCA Hqs. based on corrected total deficiencies for November (319,348), December (307,009) 2007 and January (503,459) 2008, representing an approximate increase in the total monthly deficiencies previously reported by the Hill AFB QAEs ranging from 1800% to 4500% (R4, tabs 58C, 59C, 60C).

32. The CSC for February 2008 again incorrectly indicated that the total deficient monthly area was the square footage listed for 29 February 2008 of 11,480 sq/ft. At some point prior to sending the CSC to the contracting officer, the QAEs at Hill AFB recomputed the total and, as finally recalculated by DeCA Hqs., the actual total was 253,924 deficiencies. The corrected CSC was attached to a CDR for the month sent to JOI by the contracting officer on 30 April 2008. The deduction calculated and proposed in the CDR was \$8,369.13 for the month. (R4, tab 61B)

33. The contract afforded appellant the opportunity to submit a rebuttal to potential deductions initially proposed by the contracting officer, who also had the discretion to “waive” imposition of the deductions. Following consideration of the contractor’s responses, further discussions and any additional evidence, the contracting officer finally determines whether and in what amount deductions should be taken. (Tr. 400, 402-03, 405-07)

34. NISH Senior Program Manager Joyce William (“Bill”) Trevathan visited the Hill AFB commissary on 16 October 2007. Mr. Trevathan has visited approximately 70 commissaries during his 13 year tenure with NISH. During his site visit, Mr. Trevathan observed the floors. He stated that he observed no significant floor deficiencies and that its “overall appearance...looked good” and “well kept.” The number of deficiencies indicated for the floors on the pertinent CSC form (and associated CDR) for 16 October 2007 was 13,801 sq/ft. Mr. Trevathan considered that the latter total grossly overstated the defective square footage. (Tr. 560-66, 569; R4, tab 57F; ex A-7)

35. Following receipt of the CDRs from the contracting officer, appellant began stripping and waxing floor areas more often and began preparing reclaims challenging the deficiencies (tr. 62, 311-12, 521). In addition, JOI terminated the employment of its Assistant Project Manager at Hill AFB who was charged with responsibility for floor maintenance (tr. 473-74).

36. JOI’s Commissary Division Manager, Ms. Carol Whiteley, also conducted a site visit to Hill AFB on 4 March 2008 to attempt to resolve the floor issues. She photographed the condition of the floor as of that time. The photos were taken after increased stripping and waxing of the floors by appellant. (Tr. 133; ex. A-8) The Division Manager considered that no more than 200 to 400 sq/ft of the floor was deficient on the date of her visit (tr. 481-82, 504-05). During her subsequent walk through with the government’s QAE, the QAE did not identify specific problems with the floor to her.

Following her departure, the QAE filed his CSC form indicating that there were in excess of 13,000 sq/ft of defective floor space on 4 March 2008. (Tr. 504-08, 512-13) We have reviewed the photos taken by Ms. Whiteley during her site visit and related testimony and find that the deficient square footage reported by the QAE for that date greatly exceeds the actual deficient area.

37. No contemporaneous photographs depicting the floor condition prior to 19 February 2008 are in evidence. On that date, the commissary's Store Director photographed the floors. We have reviewed those photographs and determine that they fail to show substantial deficiencies with the sales floor, much less that the square footage listed as deficient on the CSC for the date (5,982 sq/ft or more than 20% of the total floor area) failed to comply with the contract standards. (R4, tabs 48, 61A; tr. 130-33) The QAEs failed to measure deficient areas properly. Even though small portions of an aisle may have contained defects, the QAEs reported the entire aisle as deficient. (Tr. 557-58)

38. The commissary store director stated that the floors notably deteriorated during the winter months of late October-November 2007 (tr. 118, 128-29, 183). However, the amount of square footage reported deficient by the QAEs decreased from 503,737 sq/ft in September to 319,348 sq/ft in November 2007 (R4, tabs 56-58).

39. The "primary" or "lead" government QAE on this project was Mr. David Walters. Mr. Walters performed approximately 50% of the inspections in dispute and provided training and guidance to the other two project QAEs (R4, tabs 55-61; tr. 238). At the time of the hearing, Mr. Walters had retired and, at the government's request, the Board issued a subpoena requiring Mr. Walters' presence at the hearing of the appeal. Mr. Walters failed to appear at the hearing. At the hearing, the Board left the record open for a two-week period during which the government was to determine whether it would seek to obtain, *inter alia*, the testimony of Mr. Walters. (Tr. 598-600) The government timely requested that Mr. Walters' testimony be submitted by affidavit, telephonic deposition, or telephonic hearing. During a teleconference with the parties on 19 August 2009, the Board ordered that Mr. Walters' testimony would be taken by telephonic deposition on a date, and at a time and place, to be determined by the parties and the record would remain open to receive the deposition in evidence when filed. However, Mr. Walters was not present and could not be reached at the scheduled time and place arranged with the parties. (*See app. br.* at 12-13)

40. Based on our review of all evidence related to the condition of the floors during the period August 2007 through February 2008, we find that the QAEs substantially overstated the extent and square footage of deficiencies (*see also* tr. 481, 520-21, 535). The record does not permit us to reasonably estimate the actual extent of the deficiencies.

41. Based on the alleged deficiencies and CDRs, the government deducted a total of \$63,818.76 from payments under JOI's contract (R4, tab 40). The amount deducted covered the seven-month period from August 2007 through February 2008 and reflects a "waiver" by the contracting officer of approximately 30% of the approximately \$87,000 in total deductions that were calculated by DeCA Hqs. (tr. 416-18).

42. On 23 July 2008, JOI submitted a claim for recovery of the amounts deducted followed by a certified claim on 26 September 2008 which was received by the CO on 29 September 2008 (R4, tabs 42, 44).

43. On 26 December 2008, appellant received the CO's final decision denying the claim and filed this timely appeal on 2 January 2009.

DECISION

The government bears the burden of proving that deductions for deficient work were justified including the extent of the asserted deficiencies and the correctness of the amount deducted. *See, e.g., Clarkies, Inc.*, ASBCA No. 22784, 81-2 BCA ¶ 15,313 at 75,832; *Contract Maintenance, Inc.*, ASBCA No. 19603, 75-1 BCA ¶ 11,097 at 52,829; *see also Fraton, Inc.*, ASBCA No. 32935, 87-1 BCA ¶ 19,613 at 99,221; *Arden Engineering Co.*, ASBCA No. 24829, 83-2 BCA ¶ 16,603 at 82,553.

The government's case is based primarily on the total square feet of deficiencies reported by the QAEs and JOI's failure to file reclaims on an almost daily basis challenging the QAE determinations.

The deficiencies recorded in the CSCs by the QAEs are not persuasive for a number of reasons. Based on our review of all evidence related to the condition of the floors during the period August 2007 through February 2008, we have determined that the QAEs drastically overstated the extent and square footage of deficiencies

Among other things, we question the accuracy of the daily square footage measurements. The QAEs failed to measure the deficient area properly. Even though small portions of an aisle may have contained defects, the QAEs reported the entire aisle as deficient. At best, the square footages recorded by the QAEs were a rough estimate of entire areas of allegedly defective floor area. Although some imprecision is inherent in the process, the evidence wholly fails to support a conclusion that the deficient space was "measure[d]" by the QAEs to the "nearest square foot" (finding 14). *Cf. Clarkies*, 81-2 BCA ¶ 15,313 at 75,832 (government's practice of rejecting an entire area, without credit for partial performance, found improper).

There are also conflicts between the QAE deficiency totals and observations of the floor by others. The store director did not notice significant deterioration of the floors

until late October to November, 2007. However, the deficiencies reported by the QAEs declined from 503,737 sq/ft in September to 319,348 sq/ft in November. Moreover, Mr. Trevathan stated that he observed no significant deficiencies of the commissary floor during his site visit in October 2007 and that its “overall appearance...looked good” and “well kept.” On the 16 October date of his visit, the deficiencies reported by the QAEs totaled 13,801 sq/ft of the approximately 25,000 square foot area. Mr. Trevathan considered this total grossly overstated the extent of any floor deficiencies.

Moreover, available photographic evidence does not support a conclusion that extensive deficiencies existed. To the contrary, the photographs taken on both 19 February and 4 March 2008 lend credibility to appellant’s contentions that the deficiencies were overstated. The government argues that the March photos misrepresent the condition of the floors during the period in question because appellant had embarked on a more extensive stripping and waxing campaign during the days preceding the site visit. The implication is that the floors were in far better shape at the time of the site visit in early March 2008 than during the six-month period in dispute ending a few days earlier. This contention does not comport with the CSC data for the date. For 4 March 2008, the same date the photos were taken, the QAEs reported that more than one-half the floor (13,050 sq/ft) was deficient. The recorded deficiencies for the date were above average for the daily deficiencies reported for the period in dispute and conflict with the photographic evidence.

In addition, the “primary” or “lead” government QAE, who conducted approximately 50% of the QA surveillance, failed to appear and testify at the hearing despite a Board subpoena requiring his attendance. Following the hearing, the Board granted a government request to take his testimony by telephonic deposition to be offered into evidence. However, the inspector could not be reached by the parties at the date arranged with the parties for conduct of the deposition. The CDRs and deductions were substantially based on the QAE documentation, prepared by this individual. The accuracy of that underlying documentation, QAE surveillance and measurement methods are the central focus of this dispute. Under the circumstances, the absence of his testimony is particularly detrimental to the government’s case and its ability to sustain its burden of proof.

For all of the foregoing reasons, we consider that the CSCs lack the usual persuasiveness of contemporaneously-prepared documentation and the square footages reported by the QAEs were unreasonably overstated.

In reaching our conclusions herein, we have considered and weighed JOI’s failure to timely file reclamation objections to the daily deficiency determinations reported by the QAEs. This failure, of course, tends to support the government’s allegations. Nevertheless, appellant’s failure is not a decisive factor in this case. First, that failure is not dispositive on the issue of whether the government has satisfied its burden of proof.

For all of the reasons stated above, we have found that other more persuasive evidence in the record militated against any conclusion that the extensive deficiencies reported by the QAEs were present. Moreover, it was obvious from JOI's QC forms that appellant considered that the floors were satisfactory. These were shown to the QAEs immediately prior to their nightly surveillance of the floors. The government could not have been misled under the circumstances to believe that JOI agreed with the QAE computations of the defective square footage.

In addition, the government's emphasis on appellant's failure to comply with the letter of the reclama requirements (finding 2, ¶ 1.4.2) ignores its own failures to promptly process CDRs. The contract contemplated that the contractor was to be apprised of deficiency-related issues reasonably contemporaneous with performance of the deficient work. JOI was also to be afforded an opportunity to respond to any deductions proposed by the contracting officer. In this case, issuance of the CDRs did not occur until as long as four months following the work in question. In addition, the monthly CSC totals were initially miscalculated and not effectively tested as a result of the delay in their correction. Appellant was effectively deprived of the opportunity to timely investigate and respond to the CDRs and/or provide any appropriate corrective action to prevent imposition of future deductions. Prior to actual taking of the deductions, there was no management focus on discussing and refining the definition of acceptability and extent of maintenance required by the contract. Timely dialogue between JOI management and the government concerning the perceived deficiencies was prevented. Such dialogue would have been particularly helpful here where performance requirements and measurement of deficiencies were relatively subjective. In addition, appellant's maintenance regimen for the floors had remained substantially unchanged from the inception of its performance. There is no evidence that deductions for floor-related deficiencies were taken prior to the period in dispute. Once JOI learned of the deductions, it initiated reclamation, addressed the issues, and JOI's management visited the commissary to assess, discuss and resolve perceived deficiencies with the floor. (Findings 35, 36)

The government argues that the method of computing the monthly totals was self-evident from instructions on the CSC form and, therefore, JOI should have known the true extent of the monthly deficiencies. The government in essence contends that we should hold appellant to a higher standard than the QAEs who prepared the form.

The "preliminary" CDR-related forms reviewed by appellant failed to indicate the accurate totals and contained no calculation of possible deductions. Under the circumstances the "incorrect" monthly total was material. The QAEs were responsible for initially determining and recommending the deficiencies that would serve the basis for any deduction. The "incorrect" total listed on the CSCs and the failure to timely recompute and issue deductions based on the "correct" total, cumulatively support the reasonableness of appellant's belief that material deductions would not be taken.

The government places substantial reliance on our decision in *Pride Industries*, ASBCA No. 55771, 08-1 BCA ¶ 33,757. That case is inapposite. Here, unlike in *Pride*, the evidence presented by the government was less persuasive and insufficient to sustain its burden of proof. Among other things, the “primary” QAE failed to testify as detailed above, available photographic evidence does not support the deductions taken, certain government testimony was inconsistent with the documentary and photographic evidence, appellant offered credible rebuttal testimony, and its QC reports reflected its nonconcurrence with the conclusions of the QAEs. Moreover, DeCA West had failed to process proposed CDRs lending credibility to the reasonableness of appellant’s conclusions regarding the materiality and monetary impact of the deficiencies reported in the documents available to it.

In conclusion, we have no confidence in the QAE square footage totals that underpin the deductions. We also are presented with no reasonable method of approximating the actual extent of the deficiencies. The government has failed to sustain its burden of proof.

The appeal is sustained. Appellant is entitled to recover \$63,818.76 deducted by the government and interest in accordance with the Contract Disputes Act from 29 September 2008 until payment.

Dated: 20 May 2010

ROBERT T. PEACOCK
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. 56698, Appeal of Job Options, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals