

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Triad Logistics Services Corporation ) ASBCA No. 57790  
 )  
Under Contract No. FA2517-10-P-6033 )

APPEARANCE FOR THE APPELLANT: Edward J. Kinberg, Esq.  
Kinberg & Associates, LLC  
Melbourne, FL

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.  
Acting Air Force Chief Trial Attorney  
Jason R. Smith, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES ON RESPONDENT'S  
MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM OR FOR LACK OF  
JURISDICTION, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT  
AND APPELLANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This appeal arises from the contracting officer's (CO) 8 August 2011 decision denying appellant Triad Logistics Services Corporation's (Triad) 3 May 2011 request for equitable adjustment (REA). Respondent moves to dismiss the appeal for failure to state a claim upon which relief can be granted, or in the alternative for summary judgment, on the ground that appellant's complaint seeks a \$51,340.15 upward adjustment for a variation in quantity of 210 aircraft servicings, but admits that the contract contains no Variation in Quantity clause or similar provision. Appellant's response thereto included a cross-motion for summary judgment. Respondent's reply moves to dismiss for lack of jurisdiction, asserting that appellant's claim and complaint do not identify any contract term or legal basis for relief.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. Solicitation No. FA2517-09-R-6015 (RFP) on 1 June 2009 requested proposals to perform transient alert (TA) aircraft services and aerospace ground equipment (AGE) maintenance for Peterson Air Force Base (PAFB) and Ft. Carson Army arrival/departure air control group (ADACG) (R4, tab 1 at 1, 3-4).

2. RFP item No. 1001 was "Peterson Labor...In accordance with the [22 April 2009] Performance Work Statement" (PWS). RFP item No. 1002 was "Ft. Carson A/DACG

Support...IAW [PWS] and the Host/Tenant Support Agreement outlined in Appendix C [of the PWS]." These items stated "QUANTITY 12" and "UNIT Months." (R4, tab 1 at 3-4)

3. The PWS provided in pertinent part:

**1.0 SCOPE OF WORK**

**Description of Transient Aircraft Services.** In accordance with...this PWS, the contractor shall perform transient aircraft services, which include: ground aircraft operations, aerospace ground equipment (AGE) operations, program management, special events/emergency and exercise support, order and turn in of parts from the Air Force Supply system, and requested vehicle escorts. All services...will be performed on Peterson AFB to include the scheduled aircraft/departure air control group (ACACG) unless directed otherwise by the contracting officer.

**1.1. Ground Aircraft Operations.** The contractor shall perform ground aircraft operations on transient aircraft. Ground aircraft operations include aircraft movement, inspection of aircraft systems, minor aircraft maintenance, general aircraft servicing [refueling, defueling, deicing, and checking fluid levels on hydraulic systems and engines] and towing....

....

**4.2. Contractor Responsibilities.** Except for those items or services specifically stated as government responsibilities, the contractor shall furnish everything needed to perform this contract according to all its terms and conditions, in addition to the following:

**4.2.1. Hours of Operation.** The contractor shall perform the required services during normal duty hours of 0600-2200, seven days per week, to include holidays as required. The contractor shall also perform required services during the hours of 2201 to 0559 for only scheduled aircraft.

(R4, tab 1 at 38, 45) The PWS Appendix C list of five "HOST-TENANT SUPPORT AGREEMENTS" included U.S. Army Garrison Ft. Carson Agreement No. FB2500-346 to

“Perform T/A services at ADACG facility.” These agreements themselves were not included in Appendix C. (R4, tab 1 at 59)

4. The RFP provided, at the “Federal Business Opportunities” website, a list of 68 types of transient aircraft that frequented PAFB and the following information:

#### WORKLOAD ESTIMATES

1. The following information and workload data are the estimated workloads based on historical data. This information does not guarantee nor does it necessarily portray the future workload.

1.1. Average transient aircraft daily arrival/departure rate by month: (CY 2008)

<u>Jan</u>	<u>Feb</u>	<u>Mar</u>	<u>Apr</u>	<u>May</u>	<u>Jun</u>	<u>Jul</u>	<u>Aug</u>	<u>Sep</u>	<u>Oct</u>	<u>Nov</u>	<u>Dec</u>
125	109	137	166	189	108	175	55	100	129	91	55

Those monthly figures totaled 1,439. (R4, tab 4 at 1)

5. On 10 June 2009 the CO answered the following questions from offerors:

3) ...What is the quantity of refueling and defueling performed by TA personnel per month or year?

Response: Refueling data for the last year is part of the new updated workload data. Defueling very rarely occurs, if at all.

4) ...What is the quantity of deicing performed by TA personnel per month or year? What is the typical time frame for deicing to be performed? (i.e. November to March)

Response: The number of aircraft per month that requires deicing is in the workload data. The time to deice a plane is not recorded for historical information. Deicing timeframe is September through April.

5) Reference Workload Estimates, paragraph/Table 1.1: Is the A/DACG workload a part of the...referenced table?

Response. The A/DACG workload is included as part of the workload data for servicing TA aircraft.

(R4, tab 9 at 1)

6. Before the RFP was issued, effective 12 March 2009 the 21<sup>st</sup> Space Wing, PAFB, and Ft. Carson, ADACG, entered into Support Agreement No. FB2500-08063-0313, whose Attachment ONE-A, "MINIMUM MANPOWER REQUIREMENTS DOCUMENT FOR AERIAL PORT OPERATIONS AT NEW ADACG FACILITY AND CONTINUED MISSION OPERATIONS AT [PAFB]" was dated 8 May 2008. Attachment ONE-A stated, *inter alia*: "The workload at PAFB and the ADACG will significantly increase in the coming years so it may require adjusted manpower based on the increase of workload." (R4, tab 1B at 1, 6, 7, 9)

7. According to Triad's President, Mr. Glenn A. Bogalis:

6. At the time Triad prepared its bid, Triad understood that there could be variance in the number of servicings a contractor will have to perform. It has been my experience and Triad's that the typical variance between Government estimates and actual numbers experienced during contract rarely exceed 15% and the contractors typically can receive an equitable adjustment if the variance exceeds 15%.

....

8. Accordingly, Triad prepared its bid proposal based on a potential decrease/increase of 15% during the course of each year of the contract. Had the Agency disclosed the fact that a Memorandum entitled "Minimum Manpower Requirements Document for Aerial Port Operations At New ADACG Facility and Continued Mission Operations at Peterson AFB (PAFB)...prepared on May 8, 2008 stated that "[t]he workload at PAFG [sic] and the ADACG will significantly increase in the coming years so it may require adjusted manpower based on the increase of workload," Triad would have either inquired as to the expected increase or choose [sic] not to submit an offer based on the uncertain growth in workload indicated by this document.

(App. resp., Bogalis aff. ¶¶ 6, 8)

8. Based upon the RFP, on 16 March 2010 the U.S. Air Force awarded Contract No. FA2517-10-P-6033 (the contract) to Triad on a commercial item, fixed monthly unit price basis for item Nos. 1001 and 1002, TA aircraft and AGE maintenance services for PAFB and ADACG (R4, tab 1A at 1, 4-5, 35).

9. The contract did not include the RFP's workload estimates, the 10 June 2009 questions and answers or the 12 March 2009 Support Agreement (see SOF ¶¶ 4-6). Neither the contract schedule of service items nor the PWS stated a specific number of aircraft to be serviced in a day or month (R4, tab 1A at 3-17, 31-104).

10. The contract incorporated by reference, *inter alia*, the following clauses: FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (OCT 2008), ¶ (c): "Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties"; 52.233-1, DISPUTES (JUL 2002); DFARS 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998); and DFARS 252.232-7007, LIMITATION OF GOVERNMENT'S OBLIGATION (MAY 2006). (R4, tab 1A at 21, 25) The contract did not incorporate the FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY (APR 1984) clause which limits equitable adjustments to variations above 115% or below 85% of the estimated quantity.

11. As changed by Modification No. P00001, the contract included a 16-31 March 2010 phase-in period, a 1 April 2010 through 30 September 2010 base year, and five annual options whose performance expired 30 September 2015 (R4, tab 1A at 3-17).

12. Contract Modification Nos. P00002 through P00010 exercised the first option year and funded PAFB/ADACG services through 30 September 2011 (R4, tabs 17-25).

13. According to Mr. Bogalis:

Shortly after the contract started, Triad discovered the rate of aircraft servicings significantly exceeded the estimate included in the RFP. I immediately brought this matter to the attention of the Air Force Program Manager, Mr. Ken Kennedy. Mr. Kennedy subsequently scheduled "the first TA (transient alert) Day-Day Multi-Functional Team meeting (MFT)" to occur on June 8, 2010, approximately two months after Triad began work on this contract.

(App. resp., Bogalis aff. ¶ 9)

14. At the 8 June 2010 teleconference, according to Mr. Bogalis' notes, the parties discussed the ADACG flight increase:

We discussed the PWS and the reference to the ADACG in Appendix C [list of Host-Tenant Support Agreements] which never had a number for A/C handled. I brought up the site visit which they said 260 were estimated per year and Ken let everyone know the inter service agreement with the ARMY the number is 270 per year [sic]. They agree that we should submit a equitable adjustment and Karen [unidentified] was going to talk with the Army scheduler to try and get a feel for the rest of the year till Sept. Ken mentioned incorporating a variance so that we can be adjusted according to the number of aircraft.

....

It was a good session and I think we will be able to get some funding for the additional AC.

(Supp. R4, tab 27 at 1, 3) Mr. Bogalis also stated: "During the meeting, an agreement was reached to withhold submitting an REA/Claim until six months of data was [sic] accumulated to determine if the first three months were a short term spike or showed a consistent increase in the work required" (Bogalis aff. ¶ 10).

15. Triad's 10 September 2010 email to CO Addie Alexander stated that Triad serviced an average of 168 monthly arrivals and departures at PAFB from April through August 2010, compared to the RFP average workload of 120 per month, and serviced an average of 38 arrivals and departures at ADACG, compared to the RFP average workload of 22 per month (supp. R4, tab 28).

16. Triad's 10 September 2010 email to CO Alexander stated: "Triad will submit a Request for Equitable Adjustment for the 5 month period for this significant workload increase, but is unsure of the format you would desire. Please provide the format and instructions for submission." (Supp. R4, tab 29)

17. CO Alexander's 22 September 2010 email to Triad stated:

[T]he following documentation will need to accompany your request...validation of the cost incurred resultant from the increased service...Direct cost of added work...Indirect cost affected by the adjustment...validation of the increased number of planes serviced...and *Certification Requirements* (DFARS 243.204-70 and 252.243-7002).... While the Government understands your concerns with these increases

our workload estimates typically in these areas are not an exact science. There are variances in the workload and we realize that; however, we need to be able to validate/confirm the cost incurred by your company to allow us to pay for the adjustment. [Emphases in original]

(Supp. R4, tab 29)

18. Triad's 26 October 2010 letter to CO Alexander submitted a REA in the amount of \$40,172.16 for 200 "additional servicings" for PAFB and ADACG aircraft from April through September 2010 and included the DFARS 252.243-7002(b) certification (R4, tab 11).

19. Regarding the 20 December 2010 teleconference scheduled by CO Alexander, Mr. Bogalis asked, "Do you have the agenda for the meeting?" CO Alexander answered:

Yes just two things: The differences between a claim and a request for equitable adjustment and what is most appropriate in this case based on the increase in work and finally 2) the customer has taken issue with increase numbers you have indicated on your REA so that will also need to be discussed.

(Supp. R4, tab 31) At the teleconference Triad "was asked to submit a revised REA/Claim limited to the data for the ADACG servicing...in the same format as the prior REA/Claim" (Bogalis aff. ¶ 12).

20. Triad's 26 December 2010 letter to CO Alexander superseded its 26 October 2010 REA and requested a \$10,841.20 adjustment for 58 "additional servicings" for ADACG aircraft from April through September 2010 and included the DFARS 252.243-7002(b) certification (R4, tab 12).

21. CO Alexander's 14 January 2011 email to Triad stated:

The requiring activity has done a thorough review of the documents you sent 26 December 2010 with regards to an equitable adjustment on the contract. They have determined that an adjustment is appropriate...based on the information you provided [and Air Force records].  
The Government is now in [the] process of...making a final determination that the request meets the standard for fair and reasonable. A price analyst from within our office will be assigned the task of reviewing...and assisting me in the determination.

Once someone has been assigned the task (price analy[st]) I should be in a better position to tell you when the modification will be complete to allow for payment.

(Supp. R4, tab 32)

22. CO Alexander's minutes of the parties' 20 April 2011 meeting stated:

c. REA - The contractor was queried to determine if they have incurred any additional cost as a result of increased work. This was never confirmed. They discussed a number of things i.e., supporting the Peterson side of the flight line and supporting the ADACG but never confirmed any increased cost or hiring of people resultant from increased number of flights servicing. Once the CO determined that there would be no resolution [of PWS workload and 15% variance issues] at this meeting it was requested that the contractor submit their [sic] request in writing with the supporting documentation [for both Peterson AFB and ADACG for a 12-month period].

(R4, tab 13; Bogalis aff. ¶ 14)

23. Triad's 3 May 2011 letter to CO Alexander requested a \$51,340.15 equitable adjustment "for increased workload" for the period 1 April 2010 to 30 March 2011 at PAFB and ADACG. Triad alleged that it expected 1,440 servicings, experienced 1,866 aircraft arrivals and departures during those 12 months, expected variances in workload and hence adjusted the expected number of servicings by 15%, from 1,440 to 1,656 for 210 total additional servicings (1,866-1,656), including 52 additional servicings at ADACG based on an estimate of 260 servicings and 158 at PAFB. Triad included the DFARS 252.243-7002(b) certification. (R4, tab 14 at 1-3)

24. On 13 July 2011 contract price analyst Mark R. Bennett sent CO Alexander a memorandum recommending denial of Triad's REA (R4, tab 15).

25. CO Alexander's 8 August 2011 final decision denied Triad's REA, finding no "constructive change" to the contract requirements and stated:

b) We recognize that the contractor based their [sic] proposal and prices upon data provided in a solicitation package.... While it is reasonable to assume that offerors to a solicitation may use the workload estimates for a basis from which to estimate their pricing for a Firm Fixed Priced CLIN,

for an REA claim to exist against such estimates, the contractor must demonstrate that a constructive change has taken place on the contract and that the contractor has incurred additional costs due to this constructive change.

....

e) The contractor bases its claim on total number of aircraft serviced with respect to the number of aircraft the contractor estimated in its proposal for servicing at Peterson AFB. The contractor claims that there were 1866 aircraft arrivals and departures at both organizations, when the expected number of servicings was 1440 for the same time period. These numbers are not in dispute.

(R4, tab 16 at 1-4)

26. On 22 September 2011 Triad timely appealed from that decision to the ASBCA, which appeal was docketed as ASBCA No. 57790.

#### POSITIONS OF THE PARTIES

Respondent argues that Triad based its REA on the FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY clause that was not in the contract, and thus it cannot recover for work that exceeded the government's "estimated annual workload" (gov't mot. at 5-7); the contract did not specify a maximum number of aircraft servicings, but unambiguously "contemplated the contractor's employees servicing all aircraft arriving and departing PAFB and the ADACG during their work shifts, regardless of the number," so Triad "assumed the cost risk of increased volume of aircraft servicings," and Triad did not notify the Air Force when the cost of its work would reach 85% of the funding allotted to the contract and of the amount of funding needed to continue work, as the DFARS 252.232-7007 clause required (*id.* at 9-10).

Triad argues that it based its REA on a constructive change due to respondent's failure to disclose its superior knowledge that aircraft servicing would significantly increase during the period of the contract, resulting in unreasonable and unrealistic workload estimates. Its REA was based on the contract's Changes and Disputes clauses. The contract was a requirements contract which required respondent's work estimate to be realistic and based on the most current information available. Triad's actual aircraft servicings exceeded the RFP estimates. Triad used a 15% variation to respondent's workload estimate to determine the reasonable amount of work Triad performed outside the scope of the contract. (App. resp. at 11-20)

Respondent's reply moves to dismiss the appeal for lack of jurisdiction, because appellant's claim and complaint did not allege a constructive change and do not identify any contract term or legal basis for relief. It argues that the FAR 52.212-4(c) Changes clause only allows changes agreed upon by the parties, so "it is not possible to have constructive changes under a commercial item contract" and the Air Force-Army 12 March 2009 Support Agreement, Attachment ONE-A, was listed in the CLINs and Appendix C to the PWS, so Triad cannot prove undisclosed superior knowledge.<sup>1</sup> (Gov't reply br. at 2-3, 10-12)

## DECISION

### I.

With respect to respondent's jurisdictional motion, the FAR 52.233-1 DISPUTES (JUL 2002) clause, ¶ (c), defines a "claim" in relevant part to mean "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain." The U.S. Court of Appeals for the Federal Circuit has identified three requirements for a valid CDA monetary claim: (1) the contractor must submit the demand in writing to the contracting officer, (2) the contractor must submit the demand as a matter of right, and (3) the demand must contain a sum certain. *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995).

As to the first element, the CDA does not require a claim to be submitted in any particular form or to use any particular wording. All that is required is that the contractor must submit in writing "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987). Further, failure to identify a specific contract clause or provision as the basis for a contractor's claim does not negate its CDA claim status. See *CTA Inc.*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,758 (no requirement that contractor expressly cite the Changes clause).

Soon after contract performance began, Triad notified the government that the rate of aircraft servicings significantly exceeded the RFP estimate, and the parties had several meetings and exchanged considerable correspondence with respect to liability for and quantum of Triad's REA (SOF ¶¶ 13-21). Those communications culminated in the parties' 20 April 2001 meeting at which CO Alexander determined that the parties could not resolve the REA issues, requested Triad's 3 May 2011 REA and, by her 8 August 2011 final decision, denied that REA, which resulted in this appeal (SOF ¶¶ 22-26).

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<sup>1</sup> The record on the motion is inconsistent with the government's argument that the 12 March 2009 Support Agreement was listed in the contract.

Considering the context of Triad's REA, and the CO's statements in her final decision that Triad "bases its claim on total number of aircraft serviced with respect to the number of aircraft the contractor estimated in its proposal for servicing at Peterson AFB" and cites its specific numbers of aircraft arrivals and departures from both PAFB and ADACG, we have no doubt that Triad gave the CO "adequate notice of the basis and amount of the claim." Whether or not Triad may recover on the basis of a constructive change goes to the merits of the claim rather than the Board's jurisdiction. We deny respondent's motion to dismiss for lack of jurisdiction.

## II.

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In cross-motions for summary judgment, we must evaluate each motion on its merits and decide whether summary judgment is appropriate. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). We treat the government's motion to dismiss the appeal for failure to state a claim as one for summary judgment since we consider matters outside the pleadings.

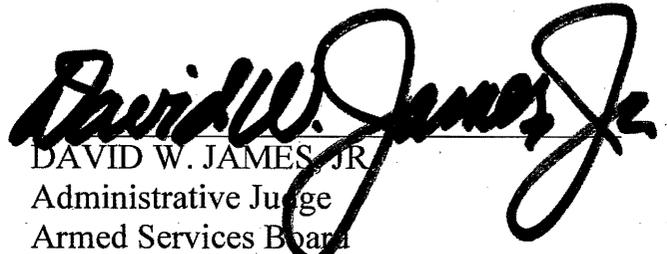
The RFP and resulting contract prescribed monthly fixed prices for transient aircraft services at PAFB and ADACG. The RFP and contract did not state any definite monthly quantity of transient aircraft, nor did they guarantee any future aircraft workload by month or year. (SOF ¶¶ 2, 4, 8) Triad based its proposed monthly fixed prices on the workload estimates provided in respondent's RFP (SOF ¶ 7).

The parties do not dispute the quantitative difference between the government's estimated transient aircraft workload and the actual quantity Triad experienced in the first 12 months of performance at PAFB and ADACG (SOF ¶¶ 4, 23, 25). They dispute what portion of the government's estimated workload applied to ADACG (260 versus 270) (SOF ¶ 14). The present record does not establish whether PAFB-Army Ft. Carson Support Agreement No. F2500-346 contains any information about the workload quantity of transient aircraft serviced in any time period(s) (SOF ¶¶ 3, 14). The parties dispute whether the PAFB-Ft. Carson ADACG Support Agreement No. FB2500-08063-0313 and its Attachment ONE-A are material to the issue of whether the government's transient aircraft servicing estimate was knowingly understated, i.e., whether the government failed to disclose its superior knowledge about an increasing workload trend at PAFB and ADACG (app. resp. at 17-18; gov't reply at 6, ¶ 12). The parties disagree whether the contract was a requirements type contract (app. resp. at 15; gov't reply at 11).

To resolve these disputed facts and issues, we believe that the appeal record needs further development. See *Cooley Constructors, Inc.*, ASBCA No. 57404, 11-2 BCA

¶ 34,855 at 171,457, and authorities cited therein. Accordingly, we deny both parties' motions for summary judgment.

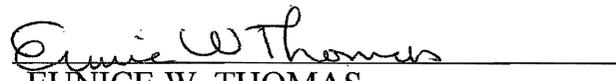
Dated: 20 June 2012

  
DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

  
MARK N. STEMPLER  
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. 57790, Appeal of Triad Logistics Services Corporation, rendered in conformance with the Board's Charter.

Dated:

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