

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Olympia Reinigung GmbH) ASBCA Nos. 50913, 51225, 51258
)
Under Contract Nos. DAJA02-96-C-0042)
DAJA02-97-C-0029)

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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

ASBCA Nos. 50913 and 51258 are appeals from final decisions under Contract No. DAJA02-96-C-0042 and are consolidated for decision. One Rule 4 (R4) file applies to both dockets. Only entitlement is before us. ASBCA No. 50913 is also the subject of the Government's Motion to Dismiss alleging an untimely appeal.

ASBCA No. 51225 is an appeal from a final decision terminating for default Contract No. DAJA02-97-C-0029 and has its own appeal file (R4 (51225)). All three dockets, however, were heard in one continuous four-day hearing in Heidelberg, Germany.

FINDINGS OF FACT (ASBCA Nos. 50913 and 51258)

1. Olympia Reinigung GmbH (Olympia) is a German cleaning service firm founded in 1972 which specializes in cleaning hospitals and clinics (tr. 1/11-13). In 1988, Olympia was first awarded a contract to clean Heidelberg hospital, the U.S. military hospital located near Heidelberg, Germany and certain clinics and ancillary buildings associated therewith (sometimes hereinafter referred to collectively as the Hospital). At the conclusion of that initial contract, pursuant to a negotiated procurement, Olympia was awarded Contract No. DAJA02-91-C-0069 (Contract 0069) on 20 June 1991 for a base period and four option

years to continue to perform those services. With the options the term of Contract 0069 was set to end on 31 March 1996. (R4, tab 45; tr. 1/15-16)

2. On 12 March 1996, the Regional Contracting Office Seckenheim, issued Solicitation No. DAJA02-96-B-0039 (Solicitation 0039) seeking sealed bids for “housekeeping custodial services at Heidelberg Medical/Dental Department activities and outlying clinics in: Heidelberg, Mannheim and Stuttgart” with a performance period of 1 April 1996 through 31 March 1997 with two option years (R4, tab 3). The successful contractor was to “furnish all necessary personnel, materials, equipment and services . . . required to perform the work set forth in Attachment # 2, which is hereby made part of this contract” (*id.* at C-1). Attachment No. 2 was the Statement of Work (SOW) and included, among others, general requirements, definitions and acronyms, specific tasks, estimated workload information and Technical Exhibits (TE) 1 through 10 (R4, tab 2).

3. Because the use of sealed bids was a departure from past practice, the solicitation included a notice to bidders which explained the differences between sealed bid and negotiated procurements and further stated as follows:

If you see any errors or deficiencies in the requirements, or have any questions regarding what is required, it is important that you contact the contracting office in writing, and in sufficient time to allow for clarification of questions posed prior to bid opening, with reply and/or clarification to be furnished all potential offerors by means of amendment to IFB. Once the bids have been opened, the contracting officer cannot change the requirement, and must either proceed to make an award, or cancel the entire solicitation.

(R4, tab 3)

4. The solicitation also included Paragraph L.4 which incorporated FAR 52.214-3, AMENDMENTS TO INVITATIONS FOR BIDS (DEC 1989), which provided in part that “[i]f this solicitation is amended, then all terms and conditions which are not modified remain unchanged.” (R4, tab 3) Paragraph L.7 of the solicitation incorporated FAR 52.214-6, EXPLANATION TO PROSPECTIVE BIDDERS (APR 1984), which stated:

Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids. Oral explanations or instructions given before the award of a contract will not be binding.

(*Id.*)

5. Paragraph L.10 of the solicitation, FAR 52.214-12, PREPARATION OF BIDS (APR 1984), warned bidders that they were “expected to examine the drawings, specifications, Schedule, and all instructions” and that their “[f]ailure to do so [would] be at the bidder’s risk” (*id.*).

6. In addition to lump sum bids, the solicitation required bidders to show unit prices to perform individualized services in the buildings to be cleaned. For example, bidders had to show their unit prices for overall routine cleaning, light fixture cleaning, window cleaning, hard floor cleaning and carpet cleaning in each building. (R4, tab 1 at attach. 1)

7. Zahir Schmoeger (Schmoeger) was a custodial services worker employed at the 97th General Hospital in Frankfurt, Germany from 1972 until he joined Olympia in 1984 as branch manager. He was branch manager for Olympia responsible for the Heidelberg hospital contract at all times relevant to the three appeals. (Tr. 1/13-14). Schmoeger testified that when he received Solicitation 0039, he observed that:

it’s too late for putting a modification of this size, three weeks or four weeks before contract starting, but it was, so the first thing when I got the contract, I read through it and saw that a lot of confusing, first of all is the space, the square meter, was much less than the past contract. Then, the surfaces was not identified with three times a day, like we say bathrooms, okay, but tell me how many square meter, there is no information. Between case cleanings, patient check out, no number of cases. The seven day services, which area need to be cleaned seven days, and which is not?

(Tr. 1/24-25)

8. Schmoeger immediately contacted Major Philip Sadler (Sadler), Chief of the Logistics Division, U.S. Army Hospital, Heidelberg, Germany and orally communicated the problem he perceived he had in preparing a bid. Sadler in turn communicated that concern to Ms. Pikulik (Pikulik), the contact person for solicitation questions in the Regional Contracting Office. Pikulik told Schmoeger to put it in writing. (Tr. 1/25)

9. By letter of 14 March 1996 to Pikulik, Olympia stated four points needing clarification:

1. Key for the square meters for a 5-day-week and 7-day-week

2. Key for the square meters for twice daily and three times daily
3. Quantity of terminal discharge unit cleaning
4. Quantity of between-case cleaning

(R4, tabs 4, 5)

10. Pikulik discussed the matter at length with Sadler and in a memorandum for record made her decision as follows:

After a long discussion, it was decided to cancel those paragraphs, for above indicated points # 3 and 4, since there is no time left for providing fixed quantities. The administrator of the incumbent contract Ms. Cindy Durling was consulted too, and she agreed to foregoing decision.

The key for points # 1 and 2 is to be found under TE-5.

Informed firm Olympia Reinigung about the result of the foregoing telephical [sic] discussion and stated [to] them, that a written modification will follow.

(R4, tab 5)

11. In a memorandum dated 18 March 1996 Sadler confirmed to Pikulik the decision to make changes to the SOW as follows:

a. Delete the following paragraphs:

(1) 2.47 Patient Discharge Cleaning

(2) 5.2.2.4 Between Case Cleaning ... Including Subparagraphs. [Ellipsis in original]

(3) 5.2.2.9 Terminal (Discharge) Unit Cleaning of an Isolation Room.

(4) 5.2.2.12 Terminal (Discharge) Unit Cleaning

b. Use a Purchase Order to pay for Patient Discharge Cleaning until this can later be modified into the contract.

c. Change paragraph 5.1.1.3 to read, "Services as required by TE-5."

(R4, tab 6)

12. On 18 March 1996, the solicitation was modified by the issuance of Amendment No. 1 which in fact deleted Paragraphs 2.47, 5.2.2.4., 5.2.2.9., and 5.2.2.12. and changed Paragraph 5.1.1.3. to read "Services as required per Performance Frequency, TE-5." Amendment No. 1 to the solicitation also specified that the hour and date for receipt of bids was unchanged. (R4, tab 7)

13. On 22 March 1996 Olympia submitted its fixed-price bid for the contract base year (DM 1,724,787.97) and fixed-price bids for two option years (DM 1,724,787.97 for Option Year 1 and DM 1,776,294.73 for Option Year 2). By facsimile transmission dated 28 March 1996, Olympia's owner, Ernst Lieblang, acknowledged that Olympia's bid was based on the solicitation and the amendment to the solicitation. (R4, tab 1)

14. On 28 March 1996, the Government awarded Contract No. DAJA02-96-C-0042 (Contract 0042) to Olympia based upon its 22 March 1996 offer in response to Solicitation 0039 (R4, tab 1). The base year performance period for Contract 0042 was 1 April 1996 until 31 March 1997 (*id.* at F-1). The contract included the CHANGES - FIXED PRICE (AUG 1987) - ALTERNATE II (APR 1984) clause set out in FAR 52.243-1 (*id.* at I-6).

15. On 1 April 1996, the pre-performance conference (PPC) was held and was attended by Cindy Durling (Durling), the contracting officer, Sadler, Robert Snyder (Snyder) and Helen Smith (Smith) from the Logistics Division and two representatives from Olympia, Schmoeger and Irmtraud Krieger (Krieger), Olympia's executive housekeeper for the hospital and clinics. Pikulik could not attend. (Tr. 2/21) The memorandum of the proceedings of the conference was prepared by Durling and under the heading "Other subjects discussed" she entered:

Deleted items (from solicitation) need to be modified into [contract]. [Contractor] questioned [square meters] of several items (as compared to previous contract). COR to meet [with contractor] to go over CLINS/SOW on 4 Apr.

(R4, tab 8)

16. Smith recalls that the PPC was a relaxed and cordial meeting in which Durling, Schmoeger and Sadler discussed the new contract and what was missing from the new contract that was included in the previous contract (tr. 2/22). Smith recalled that Durling, Schmoeger and Sadler made a verbal agreement in the meeting that Olympia would continue to perform services missing from the contract until a modification could get prepared and

funded (tr. 2/25-26). Smith said she and Snyder were directed by Durling at the PPC to prepare a modification adding in the services that were not in the new contract (tr. 2/27-28).

17. Schmoeger recalled that during the PPC, the attendees discussed the issues he had raised prior to bidding. His understanding of the agreement made at that meeting was that Olympia was to continue cleaning with the same frequencies as under the prior contract and the contract would be modified as to the deleted terminal and between case cleanings. Schmoeger also testified that it was agreed at the PPC that he and Snyder were to jointly determine the space missing from the contract and that amount would also be added back into the contract. (Tr. 1/38-39) In response to a leading question from his counsel, Schmoeger agreed that continuing to perform as before to him meant performing additional frequencies, additional square meters, and additional tasks (between case and patient discharge cleaning) (tr. 1/40-41).

18. Prior to award of the contract, Durling was approached by Pikulik who put the solicitation together and was told items had been deleted from the solicitation and something about there not being enough time to add them back and asked if Durling were willing to talk to the contractor about putting the items back into the contract. Durling agreed to look at the issue and, according to Durling, this became part of the discussion at the PPC. (Tr. 2/112-13)

19. Durling testified that at the PPC, the parties discussed the deleted items (tr. 2/113) and she was informed by Sadler that the deleted items were critical to the hospital on the first day of performance (tr. 2/115). However, she informed Sadler that for her to modify the deleted items back into the contract, she needed a request from the hospital with the correct quantities as well as a confirmation that the hospital had the money to fund the additional work. Sadler agreed to meet those needs (tr. 2/116). Thus, Durling authorized Schmoeger to perform the services covered by the deleted items because she envisioned that the modification would be prepared and executed quickly (*id.*). Durling testified that she told Schmoeger that if the modification was not completed by the end of the month (April) Olympia should keep track of the work performed relative to the deleted items and submit it to her as a claim (tr. 2/116-17).

20. Durling testified contrary to Schmoeger and more specifically than Smith's broad and general recollection of what was agreed to at the PPC. Durling stated that she never told Olympia to perform as under the prior contract, because as a contracting officer, she would never do that (tr. 2/117). The minutes of the PPC, the only written reflection of what was agreed to at the meeting, support Durling's version and we find that she agreed only to allow Olympia to perform the between case and terminal discharge cleanings, both of which had been deleted from the solicitation and which later were supposed to be added back into the contract.

21. During the PPC, Durling heard, for the first time, an issue from Schmoeger concerning a discrepancy with respect to the number of square meters of space covered by the contract (tr. 2/113, 117). Schmoeger admitted that he knew the Government's estimated square meters were incorrect as soon as he saw the solicitation, that is, he knew that the square meter areas of the hospital buildings were larger than stated in the solicitation before he prepared his bid. (Tr. 1/76, 88) With respect to that issue, she directed Snyder to get with Schmoeger and perform a joint measurement of the hospital to verify the area set forth in the contract (tr. 2/115).

22. According to Schmoeger, he and Snyder met and with a copy of the old contract, compared it line by line with the new contract. They did not compare it room by room because the old contract showed how many square meters were to be cleaned and the frequency they were to be cleaned. Schmoeger testified that the result of that measurement showed that over 13,000 square meters were missing from the new contract that had been in the previous one and it was his view that if he performed those 13,000 plus square meters, it was extra work. (Tr. 1/42-44) Smith believed that Snyder gave her the measurements before he went on sick leave and she used this measurement to price the proposed modification she later prepared (tr. 2/58-59).

23. The day after the PPC, however, Snyder went on sick leave, he never returned, and eventually was released by the hospital, casting doubt on the veracity of the assertions that a joint measurement was done in April 1996. It thus fell upon Smith to become the primary contracting officer's representative (COR). (Tr. 2/28, 49-50) Beginning in April 1996, Smith inspected the work, both work which she believed was under contract and work she believed to be covered by the missing items as she perceived was agreed to at the PPC (tr. 2/29).

24. Each month, Krieger submitted reports of work performed to Smith who reviewed and signed them if she felt the work was within the scope of the contract (tr. 2/29-30). About the middle of the month, Krieger would submit two invoices to Smith for the previous month, one invoice for work believed to be in the contract and one for the work believed to be omitted from the contract (tr. 2/30, 32). For the former, Smith reviewed, approved and processed the invoices for payment by sending copies to finance and to Durling. For the latter, Smith left the invoices on her desk as they came in for April, May and June 1996. (Tr. 2/32) She had agreed with Durling that these special invoices for work omitted from the contract would be processed when the modification was executed and funded if Smith was still there (tr. 2/31).

25. Smith departed in July 1996 before the July invoices were processed (tr. 2/6, 32). While she did not certify the special invoices, she did verify the work was performed (tr. 2/33). Prior to leaving, Smith also prepared a modification, but it was not processed because funds were still not available (tr. 2/36-37, 39).

26. Following Smith's departure, Krieger continued to submit invoices as before but she submitted them to Captain Jacqueline Krogulski (Krogulski), who was appointed COR on 1 August 1996 (tr. 2/103, 3/239; R4, tab 12).

27. While Schmoeger and Smith both testified that Schmoeger and Snyder performed a space measurement prior to Snyder's departure, Durling never received word that it was completed. Durling ordered a joint measurement a year later and when it was prepared, neither Schmoeger nor anyone from Olympia brought the prior measurement to her attention. (Tr. 2/117)

28. After the PPC on 1 April 1996, Durling waited for the modification to be submitted to her by the hospital. But Snyder left in early April 1996, Smith left in early July 1996 and Sadler left in the same time frame as Smith. Thus, Durling did not have a COR until August 1996 at which time the special invoices came to her for consideration. (Tr. 2/119; R4, tab 9; finding 26) By letter of 29 August 1996 to Schmoeger, Durling referenced Olympia's special invoices submitted for the months of April through July 1996 and stated:

As discussed in our meeting held on August 26th, I must be able to justify all items as related to the contract, and determine the prices fair and reasonable. I have been in contact with the requiring activity and CPT Krogulski, my newly appointed representative. She is currently working on some of the claimed issues and the proposed modification.

In order to justify the prices as fair and reasonable, I must request a unit price breakout for all the items listed in your claims, to include what tariff rates were used when the calculations were made. I applied the standard (international) inflation rates to some of the items and find some discrepancy; such as for "scrubbing". I would also like a price comparison for high-speed buffing, i.e. paying per square meter versus by number of hours.

(R4, tab 10)

29. Schmoeger provided the requested cost breakdowns by letter of 8 September 1996 (R4, tab 11). In her determination and findings in support of the modification, Durling states that an in-depth review of the submission from Schmoeger "was conducted, resulting in finding all costs fair and reasonable." She also said:

Confusion regarding the funds and the departure of the Alternate COR left the modification undone, resulting in the

Contractor to submit [sic] a claim for the work not covered by contract.

(R4, tab 12)

30. Durling testified that when she received the stack of invoices she was disappointed that she did not know they had been compiled and did not know why the hospital did not get them to her sooner. She felt badly for the contractor and felt pressured to pay for the work which she believed to be the additional work deleted from the solicitation plus some items that Smith had inspected and accepted. She took the contractor's word for the costs and had no argument with the contractor over any of the charges on the invoices. She was under some pressure to pay for the invoices with current year money. (Tr. 2/121-24)

31. On 20 September 1996, the parties executed two modifications (R4, tabs 13, 14). Modification No. P00001 (P00001) realigned the contract's base and option years such that the base year was reduced by six months, ending on 30 September 1996 with the first option year commencing on 1 October 1996; P00001 also exercised the first option (R4, tab 13). Modification No. P00002 (P00002) which paid for the exact amounts of the special invoices covering the months of April through August 1996, provided in part as follows:

The purpose of this modification is to record and incorporate settlement agreement into basic contract under the authority of FAR clause 52.233-1, "Disputes (OCT 1995)."

a. Reference is made to invoices submitted claiming payment for services performed under subject contract, not covered by specific line items, for the months of April, May, June, July, and August 1996 as reflected below, forwarded to the paying finance office under separate cover:

Invoice # 20388 (April)	Amount: DM 110,299.04
Invoice # 20447 (May)	Amount: DM 107,720.89
Invoice # 20567 (June)	Amount: DM 110,782.73
Invoice # 20662 (July)	Amount: DM 111,316.39
Invoice # 20749 (August)	Amount: DM 121,725.62
	Total: DM 561,844.67

b. This modification effects payment of claims in the total amount of DM 561,844.67 (\$ 382,207.26). Funds are available under the accounting classification cited in Block 12.

c. The parties agree that this modification constitutes complete equitable adjustment for Contractor's proposal for adjustment in connection with claims cited above. The Contractor hereby releases the Government from any and all liability under this Contract for further equitable adjustments attributable to such facts or circumstances giving rise to this modification. The Contractor specifically releases the Government from claims for equitable adjustment in the contract price and performance period, in addition to any other claims, that are in any way related to this modification.

(R4, tab 14)

32. For the subsequent periods it was Durling's intention that the hospital prepare a modification incorporating the deleted work into the contract, but the hospital never proposed such a modification and Olympia continued to submit special invoices (R4, tab 12; tr. 2/127-28).

33. Krogulski eventually determined that the items on appellant's special invoices were for work already required under the contract or for work being performed by contractor personnel (dedicated and lock-in) whose presence was required under the contract regardless of the work performed (tr. 3/246). When Durling learned that dedicated and lock-in personnel were used to perform work under P00002 and work claimed on the special invoices which were continuing to be submitted, she asked Olympia on several occasions to provide proof of additional costs incurred as a result of the work on the omitted items (tr. 2/128-29).

34. Apparently not satisfied with the responses, Durling, by letter dated 14 March 1997, issued a final decision rescinding P00002, stating in part that:

Your claim was based on your contention that several requirements listed in the SOW were not listed on the bid schedule and that the square meters cited in the bid schedule were incorrect. Modification P00002, for the months of April, May, June, July and August 1996, provided you a total of DM 561,844.67 in compensation for the paragraphs that were removed from the SOW by Amendment 0001. However, that amendment did not reduce the requirement for custodial services in the Vital Care areas. The Vital Care areas had dedicated and lock-in personnel assigned to them that you were required to provide. Your claim for the removed paragraphs was actually for these dedicated and lock-in personnel.

Modification P000[0]2 is hereby rescinded. The amount of DM 561,844.67 must be immediately returned to the Government. Any portion of this amount that is not paid by May 15, 1997 will accrue interest charges at the rate established by the Secretary of the Treasury.

(R4, tab 24) The final decision included a notice of appeal rights.

35. The final decision was transmitted by facsimile to and received by Olympia on 15 April 1997 (Motion to Dismiss, exs. 1, 2). The final decision was mailed to Olympia on 16 April 1997 (*id.*, exs. 3, 4) and was received on 18 April 1997 (*id.*, ex. 5).¹ On 24 April 1997, Olympia wrote to the contracting officer, as follows:

Referring to your final decision as contracting Officer on Modification P00002 on contract DAJA02-96-[C]-0042 we are asking that repayment of Modification P00002 will be deferred.

In addition, we would like to point out that further payments concerning this Modification were supposed to be made by the Army since Sept. of 1996 in the amount of approximate 900.000.-DM. This amount is still due.

We do contest the Army's claim for repayment of any money stemming from this Modification. Furthermore, we maintain our claim for payment of the additional services performed that were ordered by the Army.

Payments made by you and payments still due to us are justified as we needed a considerable amount of personnel and materials to provide these additional services to you.

Your decision to cancel Modification P00002 retrospectively is based on wrong assumptions and, therefore, not acceptable. Contrary to your view of the matter, Modification P00002 includes not only compensation for those paragraphs deleted in Amendment 0001. Modification P00002 contains for the greater part the balance of additional services provided which

¹ The April fax and mail dates for the final decision suggest the contracting officer may have mistakenly dated her final decision, writing March instead of April.

were not included in the current contract plus only two positions of the Amendment.

....

We do feel that this case can be settled through common effort by May 2, 1997.

Otherwise we are forced to stop the additional services without further notice and to proceed to file a claim in court for due payments regarding the services provided and compensation for damages resulting from the matter.

(R4, tab 26)

36. By letter dated 16 July 1997, counsel for appellant purported to file a notice of appeal to this Board. Said appeal was docketed as ASBCA No. 50913. While the notice of appeal did not identify the final decision which was appealed, the complaint filed in the case makes clear that the appeal was from the contracting officer's final decision rescinding P00002. The envelope containing the notice of appeal shows a postmark date of 18 July 1997. (Motion to Dismiss, exs. 6, 7; Board files)

37. The date of mailing the notice of appeal, 18 July 1997, was 94 days after receipt of the faxed copy of the final decision and 91 days after receipt of the mailed copy of the final decision. Following the rescission of P00002, the Government recouped the entire sum of DM 561,844.67 paid by that modification over the final five months of Contract 0042 (May - September 1997) by offsetting the amount incrementally against the regular invoices submitted by appellant for those months (tr. 2/138; R4, tabs 33, 35, 40).

38. On 30 July 1997, appellant by counsel submitted "revised claims for additional services ordered under Contract No. DAJA02-96-C-0042" said to "encompass three time periods: April-August 1996, September 1996-January 1997, and February-June 1997." The difference between this and prior claims, according to the submission, was that the prior claims were based upon square meter "measurements provided by the government using hourly rates based upon contractor's full-time employees" while the revised claims were recalculated based upon "new joint-party measurements and the incorporation of part-time employee hourly rates into the hourly rate computations." (R4, tab 38) Appellant concludes as follows:

Contractor has filed a notice of appeal with the Board concerning the Contracting Officer's final decision dated March 14, 1997, rescinding Modification P0[0]002, regarding

the acceptance and payment of contractor's original claim (April-August 1996) in the amount of DM 561,844.67.

Consequently, for these legal reasons and in order for contractor to protect itself upon this appeal, these revised claims will nullify and supercede only claims for the periods September 1996-January 1997 and January-June 1997. For the April-August 1966 [sic] period this revised claim represents a bid for settlement purposes only and does not nullify or supercede contractor's original claim accepted and paid by the government.

(R4, tab 38)

39. The categories for which appellant sought additional money on a monthly basis included the following:

- Stairwell, 2nd + 3rd Bldg. 3613 holiday
- Stairwell, 2nd + 3rd Bldg. 3613 weekend
- Stairwell, 2nd + 3rd Bldg. 3613 weekday 74.4%
- Stairwell, 2nd + 3rd Bldg. 3613 weekday 25.6%
- Entrance Bldg. 3617, 2nd + 3rd holiday
- Entrance Bldg. 3617, 2nd + 3rd weekend
- Entrance Bldg. 3617, 2nd + 3rd weekday 74.4%
- Entrance Bldg. 3617, 2nd + 3rd weekday 25.6%
- Sanitary bathroom Bldg. 3613, 2nd + 3rd holiday
- Sanitary bathroom Bldg. 3613, 2nd + 3rd weekend
- Sanitary bathroom Bldg. 3613, 2nd + 3rd weekday 74.4%
- Sanitary bathroom Bldg. 3613, 2nd + 3rd weekday 25.6%
- NCD² 3617, 2nd + 3rd holiday
- NCD 3617, 2nd + 3rd weekend
- NCD 3617, 2nd + 3rd weekday 74.4%
- NCD 3617, 2nd + 3rd weekday 25.6%
- Additional sqm 5 days a week 74.4%
- Additional sqm 5 days a week 25.6%
- Maintenance-cleaning holiday
- Maintenance-cleaning weekend
- Daily Terminal
- Between Case Cleaning
- Extra Cleaning
- Shampooing Chairs

² Nutritional Care Division (NCD) or Dining Facility

High Speed Buffing
Scrubbing
Jalousie

(*Id.*) According to Schmoeger, the “2nd” and “3rd” in the list of alleged extra services refers to the second and third servicing of an area as he contends the first servicing of an area was included in the main square meters of the contract (tr. 1/50).

40. Except for the categories for stairwells, entrance to Building 3617 and maintenance cleaning, all of the categories for which additional money was claimed were included in the special invoices previously submitted (R4, tabs 9, 38). The 30 July 1997 submission was revised by letter of 1 August 1997 although the categories for which claims were made did not change (R4, tab 39).

41. On 30 September 1997, the contracting officer issued a final decision denying appellant’s 30 July claim as amended on 1 August 1997 and stating that said claim covered the period of April 1996 through June 1997. The final decision was received on 10 October 1997 and was timely appealed to the Board and docketed as ASBCA No. 51258. (Board files, ASBCA No. 51258) In its complaint for ASBCA No. 51258, appellant included a request for recovery of costs which included the period covered by P00002, April - August 1996. The complaint also stated as an affirmative defense that by the execution of P00002, the Government settled the issue of liability “and is estopped from further disputes based upon its bilateral execution of that document.” We examine the categories for which appellant seeks additional compensation below.

Terminal Discharge and Between Case Cleanings

42. Amendment No. 1 to the solicitation deleted terminal discharge and between case cleanings and it is undisputed that the Government directed appellant to perform those services intending to add the work back into the contract by modification at a later date while the contractor submitted invoices/claims for the costs of performing those two cleaning categories. Terminal discharge cleaning refers to the complete cleaning of a hospital room following the transfer or discharge of a patient from the hospital. (R4, tab 7; tr. 2/89, 3/252). Between case cleaning refers to the cleaning of a hospital operating room following a surgical procedure (R4, tab 7; tr. 1/129, 3/252-53).

43. The Government concedes that appellant would be entitled to the additional costs of performing terminal discharge and between case cleanings but contends appellant has not demonstrated that it incurred additional costs for these cleanings (Gov’t br. at 22, finding 65).

44. Paragraph 1.3.16, Dedicated and Lock-in Personnel, of the contract’s Performance Work Statement (PWS) provided:

Full-time “dedicated” and “lock-in” housekeeping personnel shall be permanently assigned to provide all disinfectant cleaning services required in vital care areas (Operating Suite, Recovery Room, Central Medical Supply, Newborn Nursery, Intensive Care Unit, Delivery Suites and selected outlying clinics) and during the hours specified in . . . Technical Exhibit 2.

(R4, tab 2 at C1-6)

45. Paragraph 9 of TE 2, Dedicated/Lock-in personnel, provided that “[f]ull time dedicated and/or lock-in personnel shall be assigned to the” areas listed as indicated therein. A total of nine dedicated and two lock-in employees were required in specified areas for specified hours on specified days of the week. For example, one dedicated and one lock-in employee was required in the hospital operating room from 0730-1530 five days a week and on holidays. In the hospital newborn nursery, delivery rooms, operating rooms and Ward 4, a dedicated employee was required 24 hours per day seven days per week and on holidays. In the emergency room, one lock-in employee was required 24 hours per day seven days per week and on holidays. The remaining dedicated employees required were for varying hours on varying days. (*Id.* at TE2-4)

46. Krogulski testified that Olympia performed terminal discharge and between case cleanings with dedicated and lock-in personnel required by and paid for by the contract (tr. 3/252-53). Krieger confirmed that lock-in personnel did indeed perform the majority of between case cleanings and only occasionally did she bring in persons from outside the lock-in area to perform between case cleanings and these were dedicated personnel (tr. 2/80-81). As for terminal discharge cleanings, Krieger testified that she did not use dedicated personnel to perform these services. She always sent someone to the area to perform terminal discharge cleanings. (Tr. 2/92) However, Krieger described terminal discharge cleanings as follows:

At a discharge . . . all the areas and surfaces that were close to the patient and could have been touched or were touched by the patient had to be washed. The bed, then, for example or the tray where the food is served, and then the containers where the food had been served, they had to be actually disposed of. The floor had to be cleaned. The bathroom had to be cleaned. The toilet had to be cleaned. All these things. All the areas, all the items that the patient would have touched. And of course, finally, then, the bed sheets had to be changed.

(Tr. 2/89) She testified that the person she sent up to perform the terminal discharge cleaning only changed the bed linens (tr. 2/92). Thus the dedicated personnel performed all of the remaining tasks she included in that required for a terminal discharge cleaning.

2nd and 3rd Cleanings for Stairwell (Building 3613), Entrance (Building 3617), Sanitary Bathroom (Building 3613) and NCD (Building 3617) - Holiday, Weekend, and Weekday

47. The claims for second and third cleanings are based on Schmoeger's contention that the contract only required services five days a week and not on holidays or weekends (tr. 1/32). Schmoeger further testified that Olympia's bid was based on five days per week and the square meters set forth in the solicitation (*id.*, 34, 36).

48. Paragraph 1.11., Section C-1, Hours of Operation set forth the hours of operation under the contract as follows:

The contractor shall perform the services required under this contract during the following hours:

1.11.1.1. Day shift 0700 - 1500 hours, Evening shift 1500 - 2300, Night shift 2300 - 0700 hours, 7 days per week.

1.11.1.2. Normal hours of operation for all outlying Medical and Dental clinics is 0730 - 1630 hours, Monday through Friday.

1.11.1.3. The work shall be scheduled and performed in such a manner that there shall be no interruption in, or interference with, the proper execution of Government business, and hospital functional activities.

(R4, tab 2 at C1-12) In addition, Paragraph 1.11.2.1. required the contractor to perform regularly scheduled housekeeping services throughout the hospital and outlying clinics on German holidays, while Paragraph 1.11.2.2. called for the performance of reduced housekeeping services during American holidays only in the outlying clinics and designated areas of the hospital in accordance with TE 2. (R4, tab 2 at C1-12, C1-13)

49. The cleaning frequency requirements for the contract were set forth in TE 5 (R4, tab 2). That document required that stairwells in Building 3613 be cleaned daily (*id.* at TE5-3); that the entrance to Building 3617 be cleaned daily (*id.* at TE5-7); and that bathrooms in vital care areas of Building 3613 be cleaned three times per day and in ancillary areas two times per day (*id.* at TE5-1, 3).

50. The PWS described the portion of the NCD to be serviced as follows:

2.29. Food Service (Nutritional Care) Areas. The areas requiring contractual custodial services include only the dining rooms and the floor at the serving line (the “public-use side” of the serving line floor). Food preparation, storage, and serving areas are excluded. All latrines and offices outside food preparation and storage areas are included.

(R4, tab 2 at C2-4)

51. According to TE 3, Maps and Work Area Layouts, which was included in the contract, the NCD was considered an ancillary area in Building 3617 and custodial services were to be performed in that area in accordance with the quality standards set forth in Paragraph 5.2.2.13. (*id.* at TE3-1, 3). Paragraph 5.2.2.13. of the PWS describes the cleanliness standards required in all ancillary areas which included the NCD (*id.* at C5-11, 12).

52. Olympia’s special invoices included an item called “NCD - Routine Cleaning, 2nd + 3rd Cleaning,” and on some invoices it claimed costs for cleaning 959 square meters and on others it claimed for 1,918 square meters (R4, tabs 9, 67). Schmoeger conceded Olympia was required to clean the NCD but contends the solicitation did not provide the precise square meters to be cleaned and thus he could not price this work (tr. 4/209). In addition to the narrative description of the NCD to be serviced, the contract also included a diagram of the dining facility with a scale (R4, tab 2, Bldg. 3617, sheet 4 of 7).

Routine Cleaning

53. In each of the monthly special invoices covered by rescinded P00002, appellant claimed costs for cleaning an additional 13,166 square meters of space. In its July 1997 claim, for each month, appellant claimed the added costs of cleaning an additional 4,517 square meters. The Government concedes that the square meters set forth in the bid documents were not accurate and contends that, overall the estimate was short by 2,636 square meters (Gov’t br. at 28-29). The Government contention is based upon a document resulting from a joint measurement done by Krieger and Bradley Lundquist (Lundquist) (tr. 3/257), and while it was only provided to appellant on the last day of trial (tr. 4/114-20), appellant’s updated estimate of the extra square meters in its July 1997 claim is totally unexplained. Thus we find that the solicitation understated the square meters to be cleaned by 2,636 square meters.

54. Schmoeger, however, in preparing Olympia’s bid was aware at that time that the square meters were incorrect (tr. 1/88). He also was aware of and reviewed TE 3 which included a drawing of all rooms in all the buildings under the contract prior to bid (tr. 1/98-

99) and agreed on cross examination that he could have used TE 3 to accurately compute the square meters to be cleaned but did not (tr. 1/102-03).

Scrubbing

55. A claim for scrubbing appeared on the July claim and on the special invoices. Paragraph 5.9. of the PWS, Floor Maintenance, provides in part as follows:

5.9.1. Floor Care.

The contractor shall accomplish the five essential steps of floor maintenance (stripping, sealing, finishing, finish enhancing, and cleaning) effectively by using products that match the needs of the facility's specific floor types.

5.9.1.1. No area of building maintenance takes as much time and work as the proper care of floors, especially since it involves different types of flooring and locations, all requiring specialized attention and care.

5.9.1.2. Numerous types of . . . floors exist, and each requires the choice of maintenance products specifically matched to the floor's characteristics, and to the job at hand (stripping, sealing, finishing, finish enhancing, or cleaning).

. . . .

5.9.4. Damp Mopping.

The contractor shall remove soil, film, dust, and dirt from floor surfaces and floor coverings, other than carpeted floor surfaces, with a liquid solution of water and hospital approved disinfectant-detergent in solution strength recommended by the manufacturer.

5.9.4.1 The mop shall be treated with disinfectant-detergent solution Mop heads shall be changed frequently to stop cross contamination.

(R4, tab 2 at C5-20-22) Moreover, in vital care areas under the contract, Paragraphs 5.2.2.2.3. and 5.2.2.2.4. set forth the quality standard for performance of total disinfection cleaning which was to be "achieved by the thorough, frictional cleaning (scrubbing, elbow grease) of all environmental surfaces in a systematic, step wise manner" (*id.* at C5-3).

56. When asked on cross examination whether the claim for scrubbing was merely “cleaning the floor,” Schmoeger testified that it was not (tr. 1/151). He insisted that scrubbing was more than cleaning the floors, that he used different people at higher cost (tr. 1/155). He finally testified that scrubbing was included as an extra because it was part of the prior contract and he was directed to continue to perform the work as before (tr. 1/155-56).

High Speed Buffing

57. This item appeared on some of the special invoices and in the July 1997 claim. Under Paragraph 5.9.8. of the PWS, Spray Buffing, appellant was to “spray buff the floors in Ancillary areas twice weekly with a solution and a buffing machine which will bring the floor surfaces to a uniform luster.” (R4, tab 2 at C5-23) We have considered Schmoeger’s attempts to distinguish his claim for high speed buffing from the contractually required spray buffing (tr. 1/151, 4/228-30, 277-79) and are not persuaded they are different.

Jalousie

58. Jalousies, which are venetian blinds (tr. 3/12), were included on some of the special invoices and in the July 1997 claim (R4, tabs 9, 38) and Schmoeger testified that the contract did not require them to be cleaned (tr. 1/156). Cleaning of venetian blinds is addressed in the PWS at Paragraph 5.16. as follows:

5.16. Venetian Blinds.

Where venetian blinds are installed, they are considered part of the window.

5.16.1. The contractor shall wash and clean venetian blinds in accordance with the recognized standards of the industry.

5.16.2. After cleaning, the venetian blinds shall be clean and free of dust and all foreign matter.

(R4, tab 2 at C5-25)

Shampooing Chairs

59. This item appeared on some of the special invoices and in the July 1997 claim. It is not explained in Schmoeger’s testimony or in appellant’s brief. Paragraph 5.8., Upholstery Cleaning, of the PWS provided in part as follows:

The contractor shall remove spots, stains, dust, dry soil, ash, hair, etc., from upholstery, utilizing vacuuming and shampooing.

(R4, tab 2 at C5-20)

Maintenance Cleaning - Holidays and Weekends; Extra Cleaning

60. Maintenance cleaning was included in the July 1997 claim but is not otherwise explained in the testimony or in appellant's brief. Extra cleaning was included on several special invoices but similarly is not otherwise explained in the testimony or in appellant's brief.

DECISION (MOTION TO DISMISS ASBCA No. 50913)

The evidence shows that appellant received the contracting officer's final decision rescinding P00002 by fax on 15 April 1997 and by mail on 18 April 1997 (finding 35). The notice of appeal was mailed on 18 July 1997, 94 days after receipt of the faxed final decision and 91 days after receipt of the mailed final decision (finding 37). The requirement under Section 6(b) of the Contract Disputes Act, 41 U.S.C § 605(b), that contractors file an appeal within 90 days of receipt of a contracting officer's decision is a statutory requirement which the Board may not waive. *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982); *Bonded Technology, Inc.*, ASBCA No. 52083, 00-1 BCA ¶ 30,589.

Appellant argues that the Government must honor P00002 "regardless of whether jurisdiction exists in" ASBCA No. 50913 because the execution of P00002 created an accord and satisfaction, which absent fraud or mutual mistake cannot successfully be rescinded. Appellant contends that no fraud or mutual mistake has been demonstrated. (App. br. 29-31) Appellant would have had the right to assert that argument in a timely appeal from the decision rescinding the modification. It failed to timely file such an appeal.

Next appellant contends that "the agency's motion to dismiss the appeal of their final decision to rescind the Modification does not deprive the Board of jurisdiction over Olympia's appeal or Olympia's claims to enforce the accord and satisfaction agreement." Olympia's entire argument in support of that contention is as follows:

In response to the Agency's denial of Olympia's claims for an equitable adjustment for payment of extra work invoice claims, appellant filed ASBCA no. 50913 [sic 51258]. As a part of its complaint, it asserted an affirmative defense to invoice claims covering April-August, 1997 [sic 1996] because of execution of its bilateral modification P00002

(Contract 0042). This appeal was properly and timely filed before the Board pursuant to the submission of a disputed claim to the Contracting Officer. Modification P00002 can be asserted as an affirmative defense to the Agency's denial of Olympia's equitable adjustment claims.

(*Id.* at 32)

While we agree that the affirmative defense may be read as asserting that by the execution of P00002 the Government settled the issue of liability for the April - August 1996 invoices, that again is an argument appellant would have the right to make had it made a timely appeal of the decision rescinding P00002. Having failed to timely file that appeal, under Section 6(b) of the CDA, the decision to rescind P00002 became "final and conclusive and not subject to review by any forum, tribunal, or Government agency."

ASBCA No. 50913 is dismissed for lack of jurisdiction.

DECISION (ASBCA No. 51258)

The effect of the rescission of P00002 was to relieve both parties, not just the Government, of their obligations under that modification. As a result, appellant is relieved of the effect of its releases set forth in paragraph c. of that modification. Consequently, the final decision left appellant with unresolved claims for April through August 1996. These claims were amplified upon in the 30 July 1997 claim and were specifically referenced in the contracting officer's final decision denying that claim. Thus the claims which were the subject of the rescission remained with the contracting officer, were decided and were timely appealed. We consider the claims for the earlier time period in conjunction with the later ones. *See Dow Chemical Co. v. United States*, 226 F.3d 1334, 1345 (Fed. Cir. 2000) ("Rescission has the effect of voiding a contract from its inception, *i.e.*, as if it never existed"); *ENCORP International, Inc.*, ASBCA Nos. 49474, 49619, 99-1 BCA ¶ 30,254 (the Government could not enforce releases in its favor where appellant could not enforce modification because it violated the Miller Act).

Appellant seeks recovery of costs for extra work it contends was authorized by the contracting officer at the PPC. Olympia claims it was authorized at that meeting to perform the same work under Contract 0042 as Olympia had performed under the predecessor Contract 0069. Schmoeger billed for several categories of work he believed were performed under the predecessor contract but were excluded from Contract 0042. In the monthly invoices he also billed for 13,166 extra square meters of area to be serviced in excess of what was estimated in the solicitation. In the July 1997 claim that amount was reduced to 4,517 square meters. We have determined that the actual amount underestimated was 2,636 square meters.

As our findings indicate, the only extra work authorized at the PPC was the performance of the work deleted from the solicitation - between case and terminal discharge cleanings. The contracting office did in fact direct that a joint measurement of the space be performed during the PPC, but we are not persuaded that this occurred until the spring of 1997.

The Changes clause provides that if a change causes an increase or decrease in the cost of performance, the contracting officer shall make an equitable adjustment to the contract. The use of dedicated and/or lock-in personnel to perform the terminal discharge and between case cleanings could not of itself give rise to an increase in the cost of performance because the cost of those personnel was included in the contract price. Krieger testified that she used personnel other than lock-in and dedicated to change the bed linens but appellant has not shown how such use caused an increase in its cost of performance. To justify entitlement to an equitable adjustment to its contract, Olympia “was required to establish the fact of damage, i.e., that it had suffered some monetary injury as a result of the change.” *Tri-States Service Company*, ASBCA No. 31139, 90-3 BCA ¶ 23,059 at 115,784; *see also, Assurance Company v. United States*, 813 F.2d 1202 (Fed. Cir. 1987) Consequently, the claim for terminal and between case cleanings is denied.

Appellant has not shown entitlement to additional costs for cleaning certain areas a second and third time based upon its contract interpretation that work was not required to be performed on holidays or weekends. Such interpretation is without merit and is contrary to a clear and unambiguous reading of the contract. Moreover, the solicitation documents clearly described and showed the dimensions of the NCD such that appellant’s argument to the contrary is unavailing.

As to the claim for performing extra square meters of work above what was estimated in the solicitation, appellant knew the estimate was wrong when its bid was submitted but did not bring it to the attention of the contracting officer prior to bid. Olympia could have determined the correct number from elsewhere in the solicitation, and had been performing essentially the same work in the space for many years and should have known the correct square meters to be covered. *Robins Maintenance, Inc. v. United States*, 265 F.3d 1254 (Fed. Cir. 2001).

FINDINGS OF FACT - ASBCA No. 51225

61. After the rescission of P00002 under Contract 0042, Durling decided to monitor the performance of Olympia under Contract 0042. In her view, the quality of the work deteriorated rather rapidly after the rescission (tr. 3/13). She required the COR to submit all discrepancy reports to her and these reports showed not only the alleged discrepancy but also the action taken by the COR and which items were corrected by the contractor (tr. 3/14). Because the Government was dissatisfied with the quality of the services it was receiving under Contract 0042, a decision was made to enter into a

new contract when the current option period expired on 30 September 1997 by using a different procurement procedure in the hope that the services would improve (tr. 3/15).

62. By letter dated 30 June 1997, contracting officer Steven G. Potoski issued a request for technical proposals (RFTP) for performance of custodial services at the U.S. Army Hospital, Heidelberg, Germany. The RFTP was part of a two step solicitation. Step one was submission of a technical proposal and for those proposals deemed acceptable, the second step was submission of a sealed bid. A site visit was required of all interested vendors. (R4 (51225), tab 3; tr. 3/16)

63. Olympia participated in this procurement and was represented during the site visit by Schmoeger, Krieger and Karl Kuenkel (Kuenkel), Olympia's president (tr. 3/17).

64. During the procurement process for the follow-on contract, on 5 September 1997, Durling issued a Show Cause Notice based upon the reported deficiencies under Contract 0042 (tr. 3/14; R4, tab 44). While she felt she was in a position to terminate Contract 0042 for default, she did not because she received legal advice not to do so. Moreover, she viewed the Show Cause Notice as "a wake up call letting Olympia know that we are looking very closely at the quality, and we expect our standards to be met" going into the next contract (tr. 3/15).

65. On 25 September 1997, the Government awarded Contract No. DAJA02-97-C-0029 (Contract 0029) to Olympia for performance of custodial services at Heidelberg hospital and the outlying clinics with base year work commencing on 1 October 1997 and ending on 30 September 1998 (R4 (51225), tab 1). In addition to the contract award document, Contract 0029 included the contractor's technical proposal (R4 (51225), tabs 6, 7), Section C-5 (Specific Tasks), TE 2 (Estimated Workload Information) and TE 5 (Performance Frequency for Vital and Ancillary Care areas) (R4 (51225), tab 2).

66. The scope of work for Contract 0029 was as follows:

The contractor shall furnish all necessary personnel, materials, equipment and services required to perform the work described in section B in accordance with its technical proposal, performance work statement section C-5, and technical exhibits 2 and 5.

Section C-5 of the performance work statement and technical exhibits 2 and 5 describe the minimum requirements which can be exceeded by the contractor.

Where the contractor's technical proposal conflicts with section C-5 or technical exhibits 2 and 5, the provision that provides the greater level of service shall control[.]

(R4 (51225), tab 1 at C-1)

67. The contract included the clause set forth in FAR 52.246-4, INSPECTION OF SERVICES - FIXED-PRICE (AUG 1996) (*id.* at E-1), and that set forth in FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984) (*id.* at I-3).

68. For Contract 0029, the Government began a new procedure for reporting what its inspectors believed to be deficiencies. Multiple inspectors reviewed the work, written lists of deficiencies were generated, provided to Olympia and due dates were set for responding. On previous contracts, anyone having a complaint about the work would bring it directly to Krieger and she would see that it was corrected and Olympia was not given due dates for responding to complaints. The number of inspectors went from two to over ten. (Tr. 4/350-53) Frau Krieger testified that Government inspectors intentionally placed punch-out holes on the floor in order to determine if appellant was cleaning the area. When confronted with this discovery, the inspectors ceased the procedure. (Tr. 4/356-58) It is unclear when this occurred.

69. Contract work began on 1 October 1997. On 7 October 1997, the PPC was held. It was attended by Kuenkel, Schmoeger and Krieger for Olympia, Lieutenant Colonel Saxen, Chief of the Logistics Division, COR Krogulski, CO Durling and Rosaleen Dolan (Dolan) the Government Contract Administrator. Dolan prepared the minutes of the meeting. (R4 (51225), tab 20)

70. Written complaints concerning the quality of the work for the first six days were attached to the minutes, provided to the contractor and discussed at the meeting. Olympia was warned that failure to conform to the terms of the contract might lead to a termination for default. They also did a walk-through on the day of the meeting and explained the areas on each floor where discrepancies were found. (Tr. 3/23-24; R4 (51225), tab 20) Among the deficiencies cited were (1) failure to remove trash often enough, (2) leaving standing water on the pharmacy floor after mopping, causing a hazardous condition, (3) failure to clean toilets, showers, sinks and bathrooms in vital care areas properly and three times per day as required by contract, (4) failure to perform floor buffing, (5) failure to clean stairwells, (6) failure to clean Pediatrics Clinic and remove trash in the afternoons, (7) failure to put paper towels in dispensers, rather than on top of dispensers, in restrooms, (8) failure to properly clean shower stalls, soap dispensers and urinals, (9) failure to have personnel available for operating room cleanup when called for, (10) failure to properly clean walls, dust lights, ledges, and radiators, and to clean floors, (11) failure to clean elevators, drinking fountains, and carpets, and (12) miscellaneous contract procedural deficiencies (R4 (51225), tab 20).

71. Krieger contended the complaints were not true (*id.*). Schmoeger testified that he told the Government at the PPC that some of the deficiencies had to do with a change in

services that came with the change of contract in that the frequency of some of the services was reduced. However, he did not specify which reduced services corresponded to which deficiencies. (Tr. 4/312) Dolan's minutes of the PPC stated as follows:

During the course of the meeting, the branch manager [Schmoeger] reacted strongly to the administrator when he was advised that the conditions existing in the early days of this contract could not be tolerated, and must be corrected without delay. He felt he was being negatively treated due to the past history but the administrator informed him that this contract was being viewed in its own right and would be treated as any new contract! He was advised by the administrator that the contract called for a **CLEAN HOSPITAL**, and anything less would not be accepted!

(R4 (51225), tab 20)

72. Thereafter, Dolan made weekly walk-through inspections of the areas covered by the contract and she continued to receive complaints from the hospital and the clinics (R4 (51225), tab 22).

73. In a memorandum dated 14 October 1997, Krogulski informed Dolan that even though Olympia reported to Lundquist, the Government's Quality Assurance Evaluator, that all deficiencies had been corrected from the first inspection report, it was evident from an attached second set of reports that the deficiencies were not corrected. (R4 (51225), tab 22 at 20-22) Indeed, several deficiencies appearing on Lundquist's 10 October 1997 inspection report were also on his 2 October 1997 inspection report (R4 (51225), tab 20 at 16-17, tab 22 at 21-22).

74. Dolan received a verbal complaint from Krogulski on 15 October 1997 that when the emergency room needed cleaning a call went out for the cleaning staff at 1600 hours, but Olympia personnel did not respond until 1900 hours (R4 (51225), tab 22 at 3). Dolan received complaints from Krogulski on 14 and 15 October 1997 that restrooms were being cleaned in the middle of the night and mornings but not three times per day as required by the contract. In fact she found that most were not being cleaned even two times per day. (*Id.* at 3-4)

75. On 19 October 1997 Krogulski reported to Dolan that a housekeeping employee attempted to clean a surgical suite in her civilian clothes, which was prohibited. When approached by surgical staff, she responded that she had not been trained in the proper way to clean the operating room. Krogulski also advised that she received complaints three times per week that dedicated personnel did not respond when a surgical room needed to be cleaned. Krieger advised Krogulski that her employees either did not

hear the overhead page or were on their break and the employee denied the allegation concerning street clothes in the operating room. (R4 (51225), tab 26 at 16-18)

76. On 20 October 1997, the hospital dental clinic complained that trash was not picked-up in seven rooms, the carpet was not vacuumed in three rooms, the dental lab was not swept and the staff latrines were not being cleaned three times per day. Olympia answered these complaints by stating that the problems were taken care of before the complaint was received and that the housekeeper who was responsible for those areas was let go because this was the second time the garbage did not get taken out completely. (*Id.* at 16)

77. Dolan conducted a walk-through inspection on 20 October 1997 and found the contract work to be unsatisfactory. She received more complaints and reports of many of the same deficiencies previously discussed with Olympia at the 7 October 1997 meeting. Among the deficiencies and complaints were: (1) restrooms not being cleaned three times per day as required by the contract, (2) paper towels on top of paper towel dispensers rather than inside the dispensers, (3) floors not properly cleaned, with visible scum marks and sticky surfaces, (4) cleaning agents not properly labeled, (5) stain on floor in vital care area, (6) mail room not being cleaned, (7) floor in canteen left too wet after mopping, creating safety hazard, (8) dedicated person not available when needed to clean Operating Room, (9) complaint that cleaning person cleaned operating room in street clothes instead of surgical scrubs, and (10) cleaning supply storage area door left unlocked. (R4 (51225), tab 23 at 1-48)

78. On 21 October 1997, Lundquist received a customer complaint that for the Heidelberg dental clinic, garbage was not picked up in two rooms, the dental lab was not swept, patient's latrine was cleaned only once on 20 October 1997, and there was no evidence the staff latrine had been cleaned since 15 October 1997 (R4 (51225), tab 24 at 10-11).

79. On 21 October 1997, Lundquist inspected the Heidelberg Hospital first floor, rated it unsatisfactory, and gave the results to Krieger and Krogulski. Olympia was directed to correct the errors and provide a written response documenting the corrective action by 23 October 1997. There were 45 specific findings of deficient performance of the contract work, including multiple areas that needed dusting, multiple area with spots and streaks, multiple areas where trash needed to be removed, multiple instances of mineral deposits needing removal, several empty towel holders, several instances of handprints on walls, as well as black spots on carpet and water spots on floor. (*Id.* at 12-15)

80. On 22 October 1997, Lundquist again inspected the Heidelberg Hospital first floor, rated it unsatisfactory, and gave the results to Krieger and Krogulski. Olympia was directed to correct the errors and provide a written response documenting the corrective action by 23 October 1997. Among the specific findings made by Lundquist in this vital

care area were paper towels stacked on towel holder in both latrines, mineral deposits in toilet and white spots on stalls and doors of male latrine, dust on stalls of female latrine, streaks on back of first door in to latrine, dirt on top of all radiators, black spots on carpet in pediatric waiting area, dust on cabinets in pediatric area, and spots and streaks in windows of pediatric area. (*Id.*, at 8-9)

81. By memorandum dated 23 October 1997, Krogulski informed Krieger (with a copy to Dolan) that a joint inspection of Olympia's shot and training records by Lundquist and Olympia's shift leader, Ms. Okmen, determined that appellant's shot training records were not in compliance with contract requirements in that of 38 employees, 11 were missing both shot and training records while another 16 employees were missing their shot records, placing employees and patients in danger of contracting a disease (*id.*, at 5-7).

82. Dolan performed another walk-through inspection of the hospital on 24 October 1997 and noted no improvement. Deficiencies noted and complaints received included: (1) trash not removed from administrative areas for over two weeks and hospital personnel removing it, (2) latrines in lab not being cleaned three times per day as required by contract, (3) hazardous waste not being removed from lab, requiring hospital staff to remove it, (4) floors not being cleaned properly and left sticky, (5) excessive dust and grime found on top surfaces of picture frames and "Suggestion Box", (6) no supervisory contractor personnel available after normal working hours even though contract required one to be available 24 hours in hospital, (7) contractor personnel not responding promptly to pager calls, and (8) cleaning supply storage closet left unlocked after Krieger was specifically told to keep it locked at all times. (*Id.*, at 1-4)

83. Other complaints about the work included:

(1) the contractor failing to clean the hospital mail room, which was included under the contract, from 1 October to 17 October 1997, and Krieger did not know it was under the contract (*id.* at 19), (2) as of 20 October 1997, Olympia had only two shift leaders when the contract required three and this led to complaints when emergencies occurred in the late evenings when no supervisor was available to approve required cleaning (*id.* at 20), and (3) for buildings located on Nachrichtern Kaserne, the work hours required by the contract were 0730 to 1830, and despite warnings, Olympia continued to clean at all hours of the night and on 20 October 1997 Krogulski reported that the bathrooms were being cleaned between 2400 and 0600 hours and the radiology clinic was being cleaned between 2200 to 2400 (*id.* at 22).

84. Dolan was provided copies of inspection reports from Lundquist, which documented that appellant was not cleaning the hospital, clinics and other buildings as required by the contract. Each of Lundquist's inspection reports directed that appellant correct the noted deficiencies and provide a written response to document the corrective

actions. (R4 (51225), tab 23 at 18-19, 23-26, 27-28, 30-31, 33, 35-36, 38-39, 41-42, 44, 47)

85. Appellant provided responses to Lundquist's inspection reports stating either that corrections had been made or that some cleaning, such as removing mildew and fungus from bathtubs and showers, and spots on walls, could not be done (*id.* at 20, 22, 29, 32, 34, 37, 40, 43, 46).

86. Re-inspections of deficiencies documented and reported to Olympia in the inspection reports determined that appellant had not corrected many deficiencies even though Olympia continued responding by saying they had in fact been corrected (tr. 4/77-84).

87. On 29 October 1997, contracting officer Durling issued a Cure Notice to Olympia outlining the various deficiencies in the work to date including recurring deficiencies and the assertion that the extent of the deficiencies and the fact that they were recurring indicated a lack of quality control. Copies of the reports were attached. Olympia was advised that Durling considered Olympia's failure to perform in accordance with the terms of the contract endangered performance of the contract and that, unless the conditions were cured within 10 days, the Government might terminate the contract for default. She also stated that she considered the lack of quality control a condition endangering performance of the contract and directed Olympia to "immediately take action to implement a quality control plan and ensure that future performance is in conformity with the contract requirements." A written response to all the issues raised in the Cure Notice was required within 10 days of Olympia's receipt of the notice. (R4 (51225), tab 26 at 3-5) Olympia received the Cure Notice on 31 October 1997 (*id.* at 1-2) such that the due date for response was 10 November 1997.

88. On 6 November 1997 counsel for appellant requested an extension to 19 November 1997 within which to respond to the Cure Notice, asserting incorrectly that the notice was received on 3 November 1997 and citing the fact that counsel was presently in the United States and would not return to Germany until mid-November 1997 (*id.*, tab 27). The request was denied by the contracting officer "[d]ue to the seriousness of the failures described in the cure notice" and because Olympia was represented by two attorneys, only one of whom was out of the country (*id.*, tab 28).

89. On 13 November 1997, Olympia submitted its response to the Cure Notice. The response was three days late. While the response offered several excuses that generally sought to explain the deficient performance, we could not correlate the general excuses with the specific citations of deficient performance cited in the Cure Notice. Nor did the submission respond to all the issues raised in the Cure Notice. (*Id.*, tab 29)

90. Primarily appellant contended that work was inspected that was not on the cleaning schedule and that Contract 0029 was a major departure from previous contracts (*id.*). In fact, the work was inspected in accordance with the schedule provided to the Government by appellant and Olympia was not held responsible for work that was not on its cleaning schedule (tr. 4/86-87). Moreover, the standards of cleanliness did not change between Contract 0042 and Contract 0029 (tr. 3/151, 262).

91. Deficiencies and complaints continued during the cure period, including: (1) employees smoking within 50 meters of the hospital (R4 (51225), tab 32 at 7), (2) failure to properly maintain cleaning supplies in storage closet and properly recycle trash (*id.* at 9), (3) failure to properly maintain immunization records (*id.* at 10), (4) failure to respond to a call to clean the Operating Room in a timely manner (*id.* at 14-15), (5) failure to properly clean, dust and remove trash (*id.* at 18-19), (6) failure to correct its procedure manual (*id.* at 20-26), (7) failure to clean a female locker room/bathroom (*id.* at 29-30), and (8) failure to properly clean, empty trash cans, dust and fill paper towel holders (*id.*, at 32-39, 41-43, 47-65, 67-70, 72-75; tr. 3/213-15).

92. On 17 November 1997, the contracting officer terminated Contract 0029 for default stating:

The cure notice informed you that failure to correct and improve performance could result in the termination of your contract for default. The cure notice gave you 10 days to respond. Your reply, dated November 13, 1997 was received late. Your failure to reply to the cure notice in a timely manner, your failure to address all of the issues raised in the cure notice, your failure to improve performance during the cure notice period and thereafter, is considered a failure to comply with the terms and conditions of the contract. As a result of these failures, your contract is terminated for default in its entirety, effective November 17th, 1997, under the provisions of Federal Acquisition Regulation (FAR) Clause 52.249-8 Default (Fixed-Price Supply and Service).

(R4 (51225), tab 30)

93. The final decision terminating Contract 0029 for default was timely appealed to the Board and docketed as ASBCA No. 51225.

DECISION (ASBCA No. 51225)

The contracting officer terminated Contract 0029 after the issuance of a 10-day Cure Notice for failure to reply to the Cure Notice in a timely manner and for failure

to improve performance during and after the cure period. As to the latter basis for termination, we stated in *Murcole, Inc.*, ASBCA Nos. 17230, 17473, 74-1 BCA ¶ 10,545 at 49,948:

In deciding whether the Government had a legal right under the contract to terminate the contract for default after the expiration of the cure period, we are primarily concerned with what happened after the issuance of the cure notice. After the expiration of the cure period, the Government had a right to terminate the contract for default for either (1) the contractor's failure to cure deficiencies in performance set out in the cure notice or (2) a new default or defaults occurring after the issuance of the cure notice.

Olympia was in default when the Government issued the 10-day Cure Notice on 29 October 1997. Such default has not been demonstrated to have been excusable. Appellant's tardy letter in response to the Cure Notice was an inadequate response to the issues raised in the Cure Notice. It did not respond to all the issues raised in the Cure Notice and it provided only general excuses that could not be correlated to the specific allegations of deficient performance. Moreover, new deficiencies arose during the cure period, some of which were repeats of previous ones. These deficiencies, in our view, were not insubstantial and the termination for default was warranted. Nor has appellant shown they were excusable.

Appellant argues in its brief that the Government was hostile to appellant and engaged in a course of inspection and review of the work with the intent to terminate the contract. While it is clear the Government aggressively inspected the work, there is no evidence it did so with the intent to terminate. More significantly, appellant never seriously mounts a rebuttal to the actual existence or seriousness of the deficiencies.

Appellant also contends that the termination for default was arbitrary and capricious and in support of that contention cites the fact that inspectors intentionally placed paper punch-out holes on the floor to determine if an area was being cleaned. Based upon the evidence as a whole which includes an enormous quantity of deficiencies found in the work prior to termination, we conclude this littering of the floor is insufficient to render the termination arbitrary and capricious.

Accordingly, the contracting officer properly exercised the Government's right to terminate the contract for default. The appeal is therefore denied.

Summary

ASBCA No. 50913 is dismissed for lack of jurisdiction. ASBCA Nos. 51225 and 51258 are denied.

Dated: 25 October 2002

RICHARD SHACKLEFORD
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 Nos. 50913, 51225, 51258, Appeals of Olympia Reinigung GmbH, rendered in conformance with the Board's Charter.

Dated:

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