

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Armstead & Associates, Inc.) ASBCA No. 52610
)
Under Contract No. F26600-97-C-DV014)

APPEARANCE FOR THE APPELLANT: Mr. Robert C. Armstead
President

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Tedd J. Shimp, Esq.
Senior Trial Attorney
Sigurd R. Peterson, Jr., Esq.
MAJ Melissa Hagen, USAFR
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE MOED
ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

This appeal relates to three monetary claims under a requirements-type contract for military family housing (MFH) maintenance services. The government seeks partial summary judgment denying the appeal as to two of these claims, namely, those relating to excess service calls and change of occupancy maintenance (COM) services in excess of the stated estimated quantities. Armstead & Associates, Inc. (A&A) cross-moves for partial summary judgment in its own favor to the same extent. We conclude that neither party has established that it is entitled to judgment as a matter of law on either motion and that testimony is necessary to establish the relevant facts.

STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTIONS

1. This contract was awarded to A&A on 17 January 1997 pursuant to § 8(a) of the Small Business Act. The contract was for performance of MFH maintenance services at Nellis Air Force Base, Nevada for the period 1 April 1997 - 31 March 1998 with options in the government to extend the term of the contract for four additional one-year periods, the last of which would expire on 31 March 2002. The specifications for the work were contained in the Performance Work Statement (PWS) and the technical exhibits (T/E) attached thereto. (R4, tab 1 as supplemented on 23 July 2003)

2. The services were set forth in the contract schedule in the form of numbered contract line items (CLINs). The services to be performed during the base year were

identified as CLINs 1000-1011. CLINs for performance of those services during the option years were prefixed with the numerals 2, 3, 4, and 5. For convenience, only the base year CLINs are referred to herein.

3. CLIN 1001 (maintenance of housing units and mobile homes) and CLIN 1004AC and AD (maintenance of playgrounds) were priced on a monthly fixed-price basis. Compensation for all other separately priced services (CLINs 1003-1011), in the contract, as awarded, was on a unit price or not to exceed basis for quantities required and ordered. An annual estimated quantity was set forth for each unit-priced CLIN. The unit-priced services were as follows: CLIN 1003 was for unit-priced specialized maintenance services including interior painting (CLIN 1003AB), refinishing cabinets and doors (CLIN 1003AH), and floor replacement (CLIN 1003AK). The other unit-priced services in the awarded contract were CLIN 1004AA and AB (grounds maintenance), CLIN 1008 (maintenance of government-furnished appliances), and CLIN 1009 (COM services) (Statement Of Facts For The Purposes of the Motions (FS) 5). The contract contained the FAR 52.216-21, REQUIREMENTS (OCT 1995) and FAR 52.216-18, ORDERING (OCT 1995) clauses. Also included was the FAR 52.216-19, ORDER LIMITATIONS (OCT 1995) clause setting a minimum dollar amount for the government's obligation to place orders and minimum and maximum amounts with respect to A&A's obligation for honoring such orders.

4. The present appeal results from a written decision, dated 1 September 1999 (R4, tab 11), denying three duly certified claims submitted in A&A's letter of 25 June 1999 in the total amount of \$532,943.26. The present motions relate to the claim for excess COM services in the amount of \$90,682.16 and the claim for excess number of service calls in the amount of \$438,890.30. The third claim, which is not involved in the present motions, is in the amount of \$3,370.80, for quantities of work, exceeding estimated quantities, which were ordered under subCLINs 1003AC, 1003AK, and 1003AP (R4, tab 5 at attach. H).

COM Services Claim

5. CLIN 1009, titled "CHANGE OF OCCUPANCY MAINTENANCE," called for inspection of vacated MFH units, followed by maintenance, and restoration and repair of damage and deterioration so that the units would be clean and ready for occupancy by new occupants. Under the awarded contract, COM was set forth as a series of unit-priced services. The government would order the services particularly required on each occasion and A&A would be compensated accordingly. CLIN 1009 consisted of 61 subdivisions (subCLINs) (1009AA - 1009CP). Among the subCLINs were 1009AC (door hardware), 1009AH (window sills, casing, and baseboards), 1009BA (shower and bath doors), and 1009BX (water heaters). Each subCLIN consisted of a work description, estimated annual quantity, unit price, and an estimated total amount which was the product of the unit price and the estimated annual quantity. (R4, tab 1 at 7-11a of 90; PWS ¶¶ 5.10 *et seq.* at 27-29 of 146)

6. Soon after contract award, the government became concerned about the practicality of buying COM on the basis of the individual subCLIN services required on each occasion. The record contains an internal government memorandum, dated 22 May 1997, prepared by Ms. Barbara D. Burnham who was chief of the housing office at Nellis Air Force Base (app. mot. ex. 3). The memorandum states that A&A and the government agreed that “it [was] not feasible to utilize the contract bid schedule for [COM] work as it is written” inasmuch as “the government does not have the personnel to identify each specific individual item of work in each unit, prior to contractor performing work, and inspect each line item again prior to government acceptance.”

7. The memorandum states that attendees of a government meeting on 13 May 1997 agreed that an “acceptable alternative” was an “all inclusive monthly payment amount for COMs, [whereby] all CLINs for COM [would be] simply added (\$331,152.26) and divided by 12 to represent each month (\$27,596.02).” The memorandum goes on to state that “the methodology to determine fair compensation for all work in all COMs [is] best determined by this simple mathematical process.” The above scheme was embodied in bilateral contract Modification No. P00003, dated 11 June 1997, as follows:

Bid schedule has been revised to incorporate/consolidate CLINs 1009AA through 1009CP into CLIN 1009. Extended amounts for each CLIN (1009AA through 1009CP) have been totaled and divided by 12 months in order to arrive at an all-inclusive monthly flat-rate.

(R4, tab 2 at 3)

8. Contract Modification No. P00003 deleted all of the COM subCLINs for the base year and the option years and substituted, in each instance, a single COM CLIN carrying a monthly lump sum price. For CLINs 1009, 2009, 3009, and 4009, the monthly price was \$27,596.02 with a yearly amount of \$331,152.24. CLIN 5009 specified a monthly price of \$27,596.02 and the amount of \$331,152.25 for the year. These CLINs contained the following work description:

Change of Occupancy Maintenance (COM)

[In accordance with] Performance Work Statement. Estimated 575 housing units per year will require COM. [In accordance with T/E-9], COM Checklist, and PWS, all damaged or deteriorated items shall be restored or repaired to a serviceable condition.

(R4, tab 2 at 8 (7 of 90) *et seq.*)

9. A&A's claim was for COM services in excess of estimated quantities set forth in the former subCLINs of CLIN 1009. Credits to the government were allowed in those cases where the quantity of services performed was less than the estimated amounts. (R4, tab 10)

10. The movants have not submitted declarations or affidavits setting forth the discussions or correspondence between them at or about the time they entered into Modification No. P00003. Although we infer the government drafted the modification, neither party has confirmed that or indicated what statements were made to appellant concerning it. There is no evidence as to appellant's knowledge of the extent of COM effort prior to execution of the modification.

11. The record does not disclose how or when the dispute arose. There is no evidence of the parties' contemporaneous interpretation of the modification during the base year as it may be reflected in invoices and payments for the period before and after its effective date.

Claim for Excess Service Calls

12. The second claim addressed by these motions relates to performance of service calls under the contract. PWS § 2.2.38 defines "service call" as "repair and maintenance work applicable to housing required to maintain the facility, appliances, and equipment in such a condition that it may be utilized at its original design capacity and efficiency." PWS § 2.2.38 states also that "[s]ervice includes maintenance, repair, and replacement of parts and equipment." Service calls were not separately priced in the contract schedule. There is nothing in the record concerning invoicing or payment for service calls. (PWS at 14 of 146)

13. The contract contains T/E 2a (Service Call Workload Estimates) which sets forth "total service calls" for government fiscal years (FY) 1992–1995, as follows: 7,591 (1992); 7,491 (1993); 7,623 (1994); 6,587 (1995). T/E 2a states that "[t]he quantities . . . to be furnished by the contractor, as stated herein, are estimates and as such are subject to variations." A&A claims that it performed 12,201 service calls during the base year. It seeks to recover additional compensation for the 4,878 service calls performed during the base year in excess of the average of 7,323 service calls per year shown in T/E 2a. (PWS at 62 of 146; R4, tab 10 at 3)

14. The contracting officer's decision denying the claim asserts that "A&A has improperly counted the number of service calls" with the result that "the number of service calls is grossly overstated" (R4, tab 11 at 1). The decision contains the following examples of allegedly improper counting of service calls discovered during the review of the claim.

(a) A&A issued multiple work orders in cases where MHF occupants called in with several items requiring repair. Each work order was counted as a service call. The contracting officer contended that multiple work orders at one location should have been counted as a single service call.

(b) A&A had improperly counted, as new service calls, return visits to premises for further repair work.

(c) A&A had improperly counted requests for grounds maintenance as service calls.

15. Among the documents submitted by the government in support of its motion for partial summary judgment is an affidavit by Ms. Burnham (FS 6), dated 24 April 2003, stating that:

After receiving the . . . claim . . . my staff and I reviewed the number of service calls [A&A] alleged [that it] had for the first year of the contract. We discovered many duplications and counting of work that was not a service call as defined in the contract and the Technical Exhibits. Best as we could determine from [A&A's] records . . . the total number of actual service calls [A&A] had for the first year . . . was 6,457.

(Gov't mot., attach. 2)

16. The record does not identify the provisions which Ms. Burnham had in mind in stating that A&A's count of service calls included "work that was not a service call as defined in the contract and the Technical Exhibits" (FS 15). The government has not identified any criteria in the contract for determining whether a request for service qualifies as a separate service call. Also absent from the record are the criteria used by the government in arriving at the numbers of service calls shown in T/E 2a (FS 13).

17. The basis of this claim was stated in A&A's letter of 9 February 1999 to the contracting officer, as follows:

We relied on the Government for the data necessary to form our bid. . . . However . . . that data does not reflect the actual workload requirements for this contract. It is inaccurate to the extent that we have had an increase of nearly 67% in required responses to Government (Resident) initiated Service calls. All we are asking for is to fix that error and modify the contract to more accurately reflect the true work load associated with the tasking as it has actually been documented.

(R4, tab 5 at 1)

18. A&A's letter of 9 February 1999 states that "[w]e believed the Government then and we still believe that the Government used the best available data to them at that time." Furthermore, "[w]e do not feel that these estimates were negligently determined, but as represented by the Government personnel, were based on an accumulation of data which does not accurately reflect the actual workload." As a consequence, "due to the excessive number of Service Calls that no one envisioned, predicted or forecast, we have been providing services for which we have not been compensated." (R4, tab 5 at 1-3)

19. The contracting officer's written decision denying this claim asserted that the historical data furnished by the government had been found to be accurate after the service calls were "properly categorized in accordance with the contract." The result was that the "actual number of work orders was consistent with anticipated quantities." (R4, tab 11 at 1, 3)

DECISION

COM Services Claim

In the contract as awarded, the COM services were set forth in a series of 61 unit-priced subCLINs (1009AA through 1009CP), each with an estimated annual quantity, unit price, and estimated total amount (FS 5). In contract Modification No. P00003, these subCLINs were deleted and replaced by a single CLIN 1009 encompassing the services previously enumerated in the subCLINs. The prior pricing arrangement was replaced by a monthly price for the new CLIN 1009 (FS 7, 8).

Appellant states in its motion papers that the basis of the COM services claim is that "[w]hat [A&A] agreed to [in contract Modification No. P00003] was a fixed price for the work estimated." A&A states that it "did not give up, in [that modification], its right to be paid for work that exceeded the work estimates at the contract based unit price." (App. opp'n at 7) The government responds that "both parties understood that [contract Modification No. P00003] covered all payments for the COMs" (gov't reply to app. opp'n at 6).

In construing the language of the modification, we must give it "that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). While construction is ultimately a question of law, we conclude that the parties here simply have not provided enough evidence of the genesis and context both of the modification and ensuing dispute for us to decide that question. A fuller evidentiary record is required. The parties' cross-motions as to the COM claim are denied.

Claim for Excess Service Calls

Service calls are defined in the contract as “repair and maintenance work applicable to housing required to maintain the facility, appliances, and equipment in such a condition that it may be utilized at its original design capacity and efficiency” (FS 12). That describes work which is also covered by the CLINs in the schedule (FS 3). The CLINs were individually priced and, in the case of the unit-priced CLINs, contained estimated quantities for each annual contract period (FS 3). The duplication of work description coupled with the absence of prices or compensation provisions for service calls (FS 12) suggests that the service call was simply a type of order for services under a CLIN.

The parties dispute whether or not A&A was paid for all of the service calls performed, properly defined, or whether there was an excess. The record does not make clear either the criteria for counting service calls or the relationship between service calls and the prices in the various CLINs. We conclude that further development of the facts is needed before addressing the merits of A&A’s claim concerning excess service calls and the government’s defenses thereto. For that reason, this claim also is not amenable to summary disposition in favor of either party. *Marine Hydraulic International, Inc.*, ASBCA No. 46116, 94-3 BCA ¶ 27,057 at 134,825. Accordingly, the motion and cross-motion for summary judgment as to the claim are both denied.

CONCLUSION

The motion and cross-motion for summary judgment are denied in all respects.

Dated: 13 February 2004

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52610, Appeal of Armstead & Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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