

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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United Paradyne Corporation ) ASBCA No. 55374  
)  
Under Contract No. FA8601-05-C-0006 )

APPEARANCE FOR THE APPELLANT: Mr. Joseph J. Hasay  
President

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF  
Chief Trial Attorney  
John R. Hart, Esq.  
Senior Trial Attorney  
CAPT Steven M. Sollinger, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN  
UNDER RULES 11 AND 12.3

United Paradyne Corporation (UPC) appeals the denial of its claim for a price adjustment in the amount of \$51,618.28 for providing additional manning for a fuels management contract.<sup>1</sup> UPC has requested the Rule 12.3 accelerated procedure. Pursuant to Rule 11 and the Board’s order of 17 April 2006, the parties have submitted the appeal for decision without oral hearing. On the merits, we deny the appeal.

FINDINGS OF FACT

1. On 8 November 2004, UPC was awarded the above-captioned contract (hereinafter “Contract 0006” or “the contract”) to manage aviation and ground vehicle fueling and related services at Wright Patterson Air Force Base (WPAFB), Ohio. The base term of the contract was 1 December 2004 through 30 September 2005. The contract provided for four successive one year option periods thereafter. (R4, tab 1a at 1-11, 13-14) The contract also included the FAR 52.217-8 OPTION TO EXTEND SERVICES (NOV 1999) clause, the FAR 52.233-1 DISPUTES (JUL 2002) clause, and the FAR

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<sup>1</sup> In its opening and reply briefs on appeal, UPC presents two additional claims not previously submitted to the contracting officer. *See* finding 25 below. Those claims are not within our jurisdiction on the present appeal and are not decided here.

52.243-1 CHANGES (FIXED PRICE) (AUG 1987) - ALTERNATE I (APR 1984) clause (R4, tab 1a at 19-20).

2. The work was to be performed in accordance with the Performance Work Statement (PWS) and Air Force Instruction (AFI) 23-201 (R4, tabs 1 at 2-11, 2b at 4). Paragraph 1.3.1. of the PWS stated that requests for aviation fueling service would be made by Maintenance Operations Control Centers (MOCCs) to the contractor's Resource Control Center (RCC) and it required that the requested service be provided within 10 minutes, 30 minutes or 60 minutes of the request according to the priority assigned by the MOCC (R4, tab 2b at 5).

3. The "Fuels Management Structure" organizational chart in AFI 23-201 showed the RCC as a component under the "FISC [Fuels Information Service Center] (Superintendent)", and fuels "Distribution" as a component under the "Operations (Superintendent)" (ex. G-2, Atch. 4).<sup>2</sup>

4. Paragraph 4.4.1.1. of the PWS specified that: "RCC Control and Fuels Operations (Building 154, Area C): Shall be operational 24 hours per day, seven days per week, including Federal Holidays" (R4, tab 2b at 27). Paragraph 3.7.2. of the PWS required the RCC accounting and administration functions to be performed at Building 1, apart from the RCC control function in Building 154 (R, tab 2b at 21). Building 154 was in the bulk fuel storage area. This was a controlled area access to which was controlled from Building 154. (R4, tab 2b at 21, 27, 50, tab 8 at 1)

5. Paragraph 7.3.11 of AFI 23-201 expressly required the RCC to have "immediate contact with the Maintenance Operations Control Center (MOCC)," "positive control over all fuels facilities and flight line operations," and "at least three telephone lines" including "[a] direct line to [the] MOCC" (ex. G-2 at 44-45).

6. Paragraph 7.4 of AFI 23-201 expressly required the RCC "resource controller" to notify each element of the fuels management flight, the squadron commander, and the Wing Command Post of any disaster or other emergency incident (ex. G-2 at 45).

7. Paragraph 7.6 of AFI 23-201 required the "NCOIC RCC or controller" to notify fuels personnel of weather warnings, record the pertinent weather data, and direct termination and resumption of fueling activities as appropriate (ex. G-2 at 46).

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<sup>2</sup> After submission of briefs, the Board requested the government and UPC to provide respectively copies of AFI 23-201 and AFI 63-124. Both documents are referred to in the contract and by one or another party in their briefs. The parties have complied and we admit AFI 23-201 as exhibit G-2 and AFI 63-124 as exhibit A-4.

8. Certain aircraft fueling operations required two persons. If only two persons were on duty during a shift at the RCC Control and Fuel Operations location at Building 154, the location would be unmanned whenever a fueling request requiring two persons was being performed (R4, tab 9 at 3).

9. Prior to submitting its proposal for Contract 0006, UPC requested the government to delete the PWS provision for separate location of the administration and accounting functions of the RCC in Building 1 apart from the RCC control function in Building 154. The request and the government answer in Amendment No. P0003 to the solicitation were as follows:

9) Contrary to the notion of Performance Based Contracting, several requirements of the Performance Work Statement are driving inefficiencies which we believe could be avoided were we allowed to use managerial discretion. We also note where PWS requirements deviate from AFI 23-201. Would the Government consider deleting the below PWS paragraphs?

a. **Paragraph 3.7.2**, citing real-world contingency requirements and safety constraints, requires that the RCC accounting and administration function be located in building 1. AFI 23-201, Chapter 7, places this function within the Resource Control Center of the Fuels Information Service Center. In fact, Paragraph 1.4.1. of the PWS still depicts this relationship. We are unsure as to what contingency requirements and/or safety constraints are necessitating this physical separation but firmly believe that unnaturally splitting the RCC functions of monitoring fuel operations and maintaining fuel accounts between buildings 154 and Building 1 will degrade performance [sic].

**ANS: in accordance with (IAW) AFI 23-201, Chapter 7, the function of the Resource Control Center (RCC) is within the Fuels Information Service Center (FISC), but, it is not site specific. Therefore, the Contractor can have a Fuels Controller in Bldg 154. However, IAW the PWS, Paragraph 3.7 and 3.7.2, the Accounting and Administration function shall be located in Bldg 1 to facilitate Customer communication and access.**

(R4, tab 2e at 12-13)

10. UPC was the incumbent contractor on the WPAFB fuels management contract that immediately preceded Contract 0006. UPC's contract manager for the predecessor contract, Mr. Dembinski, assisted in the preparation of UPC's proposal for Contract 0006. Mr. Dembinski states by affidavit:

I was the Contract Manager for UPC under UPC's contract for Fuels Management at Wright-Patterson Air Force Base (WPAFB), Ohio, from September 1999 to December 2004. I served in this capacity from the start of the contract in September 1999 through preparation of UPC's proposal for the new contract, award of the new contract, and for a short period into performance of the new contract, which began in December 2004. As UPC's Contract manager at WPAFB, I assisted in the preparation of the technical aspects of UPC's proposal for the new contract, including all manning. I knew from the SOW, pre-bid correspondence with the government, and conversations that I had with the QAE, Mr. Gomez, that the Government interpreted the phrase "operational 24/7" to mean that the RCC needed to have a minimum of three people on the third shift, or "C" shift." In preparing the UPC's technical proposal, I included sufficient C Shift manning to man the RCC with three people on the C Shift. I prepared the Manning Matrix in Figure 1.2.3. of the proposal. My intent was to have a full-time FDSO/Lead and FDSO/Tech present in the RCC seven days a week and to continuously man another FDSO/Tech position, the third person for the RCC, with numerous part-time employees. That is the reason I indicated three FDSO/Tech (PT) on the Manning Matrix Monday through Friday and two FDSO/Tech (PT) for Saturday and Sunday. The technical proposal and proposed cost I submitted to UPC's business managers included manning and cost for three people to man the RCC on the C Shift.

Immediately after we learned that UPC won the award of the new contract I was on a conference call with the UPC's President, Vice President of Business Operations, Director of Safety, discussing the win. The President congratulated me and said, Fred, now you just have to make it work, or words to that effect. I replied, "that won't be a problem with the

manning I proposed.” At this time the president asked what was the number I proposed, I told him the number I proposed and he got upset with me telling me that was not true. At that time the Vice President of Business Operations Mr. Corby Clark interrupted and informed both of us that he reduced the total number of bodies that I had proposed in order to reduce overall cost and to guarantee UPC a win.

I have no doubt that UPC’s senior leaders understood prior to submitting its bid for the new contract that the Government desired three people on the C Shift. I know this because I informed them prior to bid submission that this was my interpretation of the SOW, and that I knew it to be the Government’s interpretation of the SOW.

(Ex. G-1)

11. Mr. Dembinski’s affidavit is not contradicted by any other affidavit or declaration under penalty of perjury in the record. We find the facts stated in that affidavit to be true.

12. In response to government statements at the post award meeting on 1 December 2004 regarding manning the RCC “24/7”, UPC in an email to the contracting officer dated 3 December 2004 stated:

We contend that the RCC remains ‘operational’ via the maintenance of radio contact with the MOCC during those infrequent occasions (estimated at 8 hrs per month) when mission requirements dictate two person operations. We appreciate the safety considerations mentioned during the course of our meeting but simply cannot provide the 56 hours of effort necessary to overcome this estimated 8 hour requirement within the FTEs identified within our technical proposal.

(R4, tab 7 at 1-2)

13. In an undated reply to UPC’s email of 3 December 2004, the contracting officer noted that “already” in the month of December there were ten occasions when the RCC was not manned and stated:

[W]e do not agree that the RCC is operational when there are periods of time when base operational/functional personnel cannot reach the Center by telephone or gain access to the bulk storage area via the controlled access gate. . . . not everyone has the capability to reach your team by radio. Anytime there is a refueling requirement on the West Ramp, the phone cannot be answered and the gate cannot be opened. As we see it, the RCC is not operational at these times.

(R4, tab 8 at 1)

14. UPC does not dispute that in the existing facility the controlled access gate to the bulk fuel storage area could not be opened when the RCC was not physically manned.

15. During January and February 2005, there were nine occasions on the C (night) shift when the RCC was unmanned because the assigned two-man crew was absent refueling aircraft. The duration of these unmanned periods ranged from 38 minutes on 25 January to one hour 14 minutes on 18 January. The average duration was 58 minutes. (R4, tabs 9 at 3, 11 at 2)

16. In response to a Contract Performance Evaluation report finding that the RCC had been left unmanned during two periods totaling 69 minutes on the C shift on 25 February 2005, UPC's president in a letter to the government dated 16 March 2005 stated:

We were unaware of the requirement to have the RCC staffed on a full-time basis. . . . Under our previous contract, we did not staff this position on a full-time basis and for five years this was not an issue. Consequently, we did not allocate the necessary costs to pay a full-time FDSO to sit and monitor the phone.

(R4, tab 12 at 1)

17. According to UPC, the predecessor contract stated that: "Fuels Operation Branch: Shall be operational 24 hours per day, seven days per week, including Federal Holidays" (app. br. at 8).

18. UPC's 16 March 2005 letter proposed four "potential compromises" for manning the C shift as follows:

- 1) We could have our guys equipped with cell phones that have the same number tied into the RCC.
- 2) We could stagger the hours of our 2<sup>nd</sup> shift supervisor, thereby fulfilling our PWS paragraph 4.1.1. requirement and thereby having the RCC manned half the time.
- 3) We could install an answering machine with instructions for contacting our guys via the MOCC while they are on the flight-line.
- 4) We could have a surveillance TV monitoring system set up in the MOCC that would monitor the gate and building while our guys are on the flight-line during fueling operations.

(R4, tab 12 at 1)

19. On 13 April 2005, the RCC was left unmanned for one hour and 41 minutes during the C-shift while the two persons on duty serviced an aircraft (R4, tab 15 at 2).

20. By letter dated 3 May 2005, the contracting officer provided UPC with the following reasons why its proposed alternatives to full time manning of the RCC during the C shift were not acceptable:

- a. Restrictions on the use of cell phones within 10 feet of fuel vents, open port refueling servicing, fuel spills, all defueling operations and truck fill stand operations makes forwarding RCC calls to the cell phones of fuels operators impractical.
- b. Having the 2<sup>nd</sup> shift supervisor straddle both shifts is also not a viable option as it would still not allow the RCC to be operational 24/7 and would further render you non-compliant relative to the 2<sup>nd</sup> shift supervisor requirement.
- c. Installation of an answering machine with instructions for contacting the fuels operators via the MOCC would require additional duties for MOCC personnel which we have no authority to require. The same flight line cell phone usage issue discussed in paragraph 2(a) above would also apply. Further, how could you comply with the timelines associated with the priority call system outlined in PWS paragraph

1.3.1.1. if you received a call while performing a fueling mission? It could take an hour or more for you to complete the fueling process (which requires 2 individuals) before being able to respond to any calls. This would be especially problematic should there be an imminent weather emergency.

d. A surveillance TV monitoring system set up in the MOCC that would monitor the gate would present the same problems identified in paragraph 2(c).

(R4, tab 16 at 1, 3)

21. UPC has not disputed (i) that cell phones could not be used within 10 feet of fuel vents, open port refueling servicing, fuel spills, defueling operations and truck fill stand operations, (ii) that staggering the hours of the second shift supervisor would fail to provide a supervisor for one-half of the second (B) shift and would provide a third person for only one-half of the third (C) shift, or (iii) that answering machine referral of calls to the MOCC and remote monitoring by the MOCC of the controlled access gate at Building 154 when the two-person crew was absent on a fueling mission would impose additional duties and responsibilities on the MOCC. We accordingly find that those statements in the contracting officer's letter of 3 May 2005 were correct.

22. At the conclusion of her 3 May 2005 letter, the contracting officer directed UPC to "take whatever action is necessary to ensure the RCC is physically manned at all times" (R4, tab 16). UPC complied with this direction, and on 18 September 2005 it submitted a constructive change order claim in the amount of \$44,084.95 for the labor plus overhead cost of staffing the third shift with a minimum three person crew for the remainder of the base term of the contract. (R4, tabs 17, 18)

23. Pursuant to Modifications Nos. P00004 and P00008 and the Option to Extend Services clause of the contract, the government required continuation of the contract services by UPC through 31 December 2005 (R4, tabs 1e, 1i). By letter dated 31 October 2005, UPC increased its claim to \$51,618.28 to cover the increased C shift manning cost for the period of extended services (R4, tab 19 at 1).

24. UPC's constructive change order claim as amended for the increased C shift manning cost was denied summarily by the contracting officer by letter dated 20 January 2006 (R4, tab 20). This appeal followed.

25. In its opening brief on appeal, UPC included an additional claim for \$29,137.63 for its bid and proposal costs plus G&A as breach damages for the contracting officer's alleged "failure to follow FAR mandated Performance Based

Service [Contract] Acquisition directives” (app. br. at 20). In its reply brief on appeal, UPC included an additional claim for \$131,023.24 for “lost Value Engineering Cost Proposal Savings” as breach damages for the contracting officer “establishing the requirement [in the PWS] for a Second Shift Supervisor” (app. reply br. at 8). Neither of these additional claims has been submitted for decision by the contracting officer.

### DECISION

We consider in this decision only UPC’s claim for a cost-based price adjustment for the alleged constructive change requiring it to have a third person on the C shift to assure manning of the RCC control function at all times during that shift. The additional claims in UPC’s briefs for recovery of its bid and proposal costs and for its “lost Value Engineering Cost Proposal Savings” are new claims for different categories of compensation based on different grounds of entitlement. (*See* finding 25) These new claims have not been submitted to the contracting officer for decision and, therefore, are not within our jurisdiction on this appeal. *Paragon Energy Corp. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981).

On its constructive change order claim for providing a third person on the C shift, UPC argues that the term “operational” in paragraph 4.4.1.1. of the PWS was ambiguous as to whether physical manning of the RCC control function at Building 154 was required for the RCC to be operational. In support of this argument, UPC states that the government’s answer to its inquiry about the location of the RCC accounting and administration function in a different building apart from the RCC control function was “the major source of ambiguity in that it unclearly splits responsibility for the relocated RCC functions.” (App. br. at 13) The government’s answer to UPC’s inquiry stated that since AFI 23-201 did not specify a location for the RCC, the PWS could specify performance of the RCC control function in Building 154 and the accounting and administrative functions in Building 1. (*See* finding 9) We see no ambiguity in the PWS paragraph 4.4.1.1. requirement for 24/7 operation of the RCC control function in Building 154 arising out of the government’s answer to UPC’s inquiry about the separate location of the RCC accounting and administration function in Building 1.

The PWS expressly required the RCC control function to be located in Building 154 and that it respond to MOCC requests for aviation fueling service within 10 minutes, 30 minutes or 60 minutes of the request according to the priority assigned by the MOCC. (*See* findings 2 and 4) AFI 23-210 expressly required that the RCC have “immediate contact” with the MOCC and that there be a direct telephone line between the RCC and the MOCC. (*See* finding 5) AFI 23-201 also expressly required, among other things, (i) that the RCC “resource controller” notify all elements of the fuels management flight and higher headquarters of any disaster or emergency incident, and (ii) that the “RCC NCOIC or controller” notify the fuels personnel of weather warnings, record the pertinent

weather data and direct suspension and resumption of fueling operations as appropriate. (See findings 6 and 7) These express contract requirements for the location and operation of the RCC fuels control function were not met by a fueling crew engaged in fueling aircraft on the flight line with only radio contact with the MOCC.

Reading the contract as a whole, and specifically considering the contractually prescribed control functions of the RCC noted above, we find no ambiguity in paragraph 4.4.1.1. of the PWS as requiring at all times a physical presence at Building 154 to perform the specified RCC functions at that location. UPC's interpretation to the contrary is unreasonable. See *CKY, Inc.*, ASBCA No. 54181, 05-2 BCA ¶ 32,994 at 163,540. Moreover, before UPC submitted its proposal for Contract 0006, its contract manager knew that the government interpreted paragraph 4.4.1.1. of the PWS as requiring a minimum three-person crew on the C shift at Building 154 to ensure a physical presence at that location throughout the shift, agreed with that interpretation and included in the draft proposal he submitted to his superiors at UPC the manning and cost for three persons on the C shift. (See finding 10) We impute the contract manager's knowledge to UPC, and there is no evidence that UPC indicated to the government any disagreement with the government's interpretation of the RCC operational requirement prior to submitting its proposal. Therefore, even if its own interpretation were reasonable, which it is not, UPC by entering into the contract with knowledge and no protest of the government's interpretation, is bound by that interpretation. See *Shah Construction Company*, ASBCA No. 50044, 00-1 BCA ¶ 30,667 at 151,429, 151,433.

UPC argues that when it submitted its proposal on Contract 0006, it was entitled to rely on the "acceptability of our past practices under the predecessor contract" where it manned the C shift with only two persons. According to UPC, the predecessor contract provided that the "Fuels Operations Branch" shall be operational 24/7 and "we failed to note any substantial difference" between that provision and paragraph 4.4.1.1. of the PWS for Contract 0006. (App. br. at 8, 19) In light of the AFI 23-201 organizational chart for the fuels management structure showing the "RCC" as a distinct component under the FISC and separate from the fuels operations component, the addition of "RCC Control" to "Fuels Operations" in the paragraph 4.4.1.1. requirement for 24/7 operation was significant, indicating that both RCC control and fuel operations functions were required to be operational 24/7. But in any case, since UPA knew of the government's interpretation of the RCC control operational requirement in the PWS for Contract 0006 before it submitted its proposal, its reliance on the past practice under the predecessor contract without inquiry was not reasonable.

UPC argues that the contracting officer's direction to provide three persons on the C shift denied it the "acquisition flexibilities" and "managerial discretion to implement cost effective use of resources" to which it was entitled under AFI 63-124 (app. br. at 13). The cited Air Force Instruction "prescribes and explains how to develop and implement

the requirements of [FAR Part 37.6] for performing acquisition planning, describing agency needs, acquiring services, implementing performance-based service contracting and quality assurance” (ex. A-4 at 1). We find, however, nothing in the provisions of AFI 63-124 that permits a contractor in the name of “acquisition flexibilities” or “managerial discretion to implement cost effective use of resources” to fail to meet the specified operational requirements of the contract. Under Contract 0006, a minimum three-person crew on the C shift was necessary to perform the specified RCC control functions at the specified RCC control location.

The appeal is denied.

Dated: 27 September 2006

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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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. 55374, Appeal of United Paradyne Corporation, rendered in conformance with the Board's Charter.

Dated:

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