

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: Robert C. Armstead
President

APPEARANCES FOR THE GOVERNMENT: Diana S. Dickinson, Esq.
Acting Chief Trial Attorney
Tedd J. Shimp, Esq.
Senior Trial Attorney
Sigurd R. Peterson, Jr., Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL

This is a timely appeal of a contracting officer's (CO) decision denying appellant Armstead & Associates, Inc.'s (Armstead) certified claim in a total amount of \$532,943.26 for service and maintenance calls allegedly in excess of stated estimated quantities. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, is applicable; and only entitlement is before us for decision. On 13 February 2004, the Board issued a decision denying the parties' cross-motions for summary judgment. *Armstead & Associates, Inc.*, ASBCA No. 52610, 04-1 BCA ¶ 32,533. Familiarity with that decision is presumed. The Board subsequently held a two-day hearing in Las Vegas, Nevada.¹ We deny the appeal.

FINDINGS OF FACT

1. The Air Force awarded requirements-type Contract No. F26600-97-C-DV014 to Armstead on 17 January 1997 for Military Family Housing (MFH) maintenance services at Nellis Air Force Base, Nevada, pursuant to § 8(a) of the Small Business Act (R4, tab 1 at 1). The contract's base period extended from 1 April 1997 to 31 March 1998 with total requirements for that year estimated at \$1,848,504.32 (R4, tab 1 at 11b). The contract also empowered the Air Force to exercise four, additional one-year option periods, the last of which would expire on 31 March 2002 (R4, tab 1 at 12-43b, 44).

¹ Administrative Judge Peniel Moed, who authored the summary judgment decision, has retired. Administrative Judge Edward G. Ketchen, who presided over the hearing, has also retired.

2. The maintenance services to be performed by Armstead were set forth in the contract's Performance Work Statement (PWS), and the estimated quantities of work were listed in "Technical Exhibit [TE] 2, Workload Estimates" (R4, tab 1 at 4). The services themselves were set forth in the form of contract line items or "CLINs." Those to be performed during the contract's base year were identified as CLINs 1000-1011 (R4, tab 1 at 4-11a).

3. CLIN 1001AA (maintenance of housing units and mobile homes) and CLIN 1004AC and AD (maintenance of playgrounds) were priced on a monthly fixed-price basis (R4, tab 1 at 4, 6). Compensation for all other separately priced services (CLINs 1003-1011), in the contract as awarded, was on either 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 – specialized maintenance services, including interior painting (CLIN 1003 AB), refinishing cabinets and doors (CLIN 1003 AH), and floor replacement (CLIN 1003 AK). The other unit-priced services in the awarded contract were CLIN 1004 AA and AB, grounds maintenance; CLIN 1008, maintenance of government-furnished appliances; and CLIN 1009, change of occupancy maintenance (COM) services (R4, tab 1 at 4-11a).

4. As awarded, the contract contained, *inter alia*, the FAR 52.216-21, REQUIREMENTS (OCT 1995) and the FAR 52.216-18, ORDERING (OCT 1995) clauses. Also included was the FAR 52.216-19, DELIVERY - ORDER LIMITATIONS (OCT 1995) clause setting a minimum dollar amount for the Air Force's obligation to place orders as well as minimum and maximum amounts with respect to Armstead's obligation to honor such orders (R4, tab 1 at 55).

5. Service calls were included in CLIN 1001, maintenance of housing units. They were for repair work on items in occupied housing and did not include work items included in CLINs 1002 through 1010AB (R4, tab 1 at 4-11a; supp. R4, tab 2 at 122-23). Work under CLIN 1001 was paid for on a monthly, fixed-price basis (finding 3). As defined in the contract, service calls did not include recurring equipment inspections, interior equipment maintenance and repair resulting from inspections, COMs, exterior maintenance or repair resulting from inspections, and ground and playground maintenance (supp. R4, tab 2 at 27; tr. 2/107-09). Also not included in the definition of service calls were environmental and hazardous material handling, maintenance management, appliance and equipment maintenance, and utility systems maintenance and meter reading (supp. R4, tab 2 at 21). TE 2a, entitled "Service Call Workload Estimates," listed the total service calls for the four most recent fiscal years [FY], before issuance of the solicitation, 1992-1995. It stated: "The quantities of output ... furnished by the contractor, as stated herein, are estimates and as such are subject to variations." The TE listed the total service calls for each year as: FY92 – 7,591; FY93 – 7,491; FY94 – 7,623; and FY95 – 6,587 (supp. R4, tab 2 at 62-63).

6. CLIN 1009, entitled "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 (finding 3). The Air Force would order the service particularly required on each occasion, and Armstead would be compensated accordingly. CLIN 1009 consisted of 61 subdivisions (sub CLINs) (1009 AA-1009 CP). Among the sub CLINs were 1009 AC (door hardware), 1009 AH (window sills, casing, and baseboards), 1009 BA (shower and bath doors), and 1009 BX (water heaters). Each sub CLIN consisted of a work description, estimated annual quantity, unit price, and an estimated total price which was the product of the unit price and the estimated annual quantity (R4, tab 1 at 7-11a; supp. R4, tab 2 at 27-29).

7. Soon after contract award, the Air Force became concerned about the practicality of buying COM on the basis of the individual sub CLIN services required on each occasion. Ms. Barbara Burnham, chief of the housing flight at Nellis AFB, wrote, in an internal memorandum dated 22 May 1997:

1. As discussed in ... meeting Tuesday, 13 May 1997, the contractor and government agree it is not feasible to utilize the contract bid schedule for Change of Occupancy Maintenance (COM) work as it is written. 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. The contract requires the contractor to utilize the COM checklist to identify the work required and yet, to do so with the current bid schedule line item pricing, is [sic] determining payment. All parties at meeting agreed this was unacceptable. Therefore, the following was created as an acceptable alternative and is presented for your concurrence and contractor's agreement.
2. To arrive at all inclusive monthly payment amount for COMs, all CLINs for COM were simply added (\$331,152.26) and divided by 12 to represent each month (\$27,596.02). The number of units requiring COM for the purposes of the contractor's line item bid price is unrealistically high (actual number of COMs FYs 93-95 average 520 units and contract provides estimate of 575 units). In addition, many of the estimated quantities in the bid schedule with a unit of measure of Units and Each are too high (i.e. appliances requiring repair are estimated at 400% or 100% of all appliances in

each unit to include stoves, refrigerators, disposals and dishwashers). For these reasons, the methodology to determine fair compensation for all work in all COMs was best determined by this simple mathematical process.

(Ex. A-2 at 16) Armstead was amenable to the Air Force's proposal, and the result of the parties' efforts was Modification No. P00003, dated 11 June 1997, which provided, in part:

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) Modification No. P00003 also deleted all of the COM sub CLINs for the base year and the option years and substituted, in each instance, a simple COM CLIN carrying a monthly lump sum price. For CLIN 1009, which comprised the base year's requirements, the monthly price was \$27,596.02 with a yearly amount of \$331,152.26. As modified, CLIN 1009 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] TE9, COM checklist, and PWS, all damaged or deteriorated items shall be restored or repaired to a serviceable condition.

(R4, tab 2 at 7) TE 26, entitled, "Change of Occupancy Maintenance Workload Estimates," listed the total COM's for the four most recent FY's before issuance of the solicitation 1992-1995. The total COM's for each year were as follows: FY92 – 1,283; FY 93 – 500; FY94 – 542; and FY95 – 517 (supp. R4, tab 2 at 64).

8. On 19 April 1999 Armstead forwarded to the CO a request for an equitable adjustment in the amount of \$532,943.26 "for the additional costs associated with performance of service calls" for the contract's base year "which significantly exceed the estimated quantities set forth in the contract." Citing TE 29, Armstead stated that it expected to make 7,323 service calls during the period from 1 April 1997 to 31 March 1998. Instead, Armstead alleged that it actually made 12,201 service calls which it contended were 4,878 calls over the Air Force's estimate. Armstead concluded that it was entitled to recover \$438,890.30 for these additional service calls. With respect to COM service calls, Armstead cited the discrete, sub CLIN items which appeared in the original contract and alleged that it had performed COM service calls in an amount of \$90,682.16 over an estimated total of \$331,152.26. Finally, regarding the indefinite quantity work (IQ) scheduled pursuant to 1003 AC (Exterior painting-under 200 SF),

1003 AK (Floor replacement-occupied units), and 1003 AP (countertops), Armstead contended that it had incurred \$3,370.80 in additional costs (R4, tab 7).²

9. Upon receipt of Armstead's amended REA, the Air Force requested that it provide documents to support its allegations. Accordingly, Armstead's project manager, Mr. Ken Fields, forwarded to Ms. Burnham computer disks listing all of the job orders under the contract. The disks comprised the only documentary evidence which Armstead offered to support its REA (tr. 2/96-98, 179-84).

10. Ms. Burnham examined every job order on the computer disk submitted by Armstead for the contract's base year (tr. 2/183-84). Similarly, working under Ms. Burnham's direct supervision, Ms. Susan Nelson, an Air Force paralegal, performed an identical analysis with respect to the second computer disk provided by Armstead which covered the contract's first and second option years (tr. 2/121; 215-16). Both Ms. Burnham and Ms. Nelson concluded that, in compiling its allegedly excessive service calls and COM's, Armstead had included many instances of preventive maintenance inspections and repairs, grounds work and playground maintenance which did not comprise either service calls or COM's and which, accordingly, should not have been part of its overcount allegations (tr. 2/117-21, 215-16; see finding 5). With respect to properly defined service calls, Ms. Burnham and Ms. Nelson discovered that when a housing occupant made a service call for more than one item to repair, Armstead had listed each item as a separate service call. Ms. Burnham provided un rebutted testimony that this was contrary to the industry standard of listing each call by an occupant as a single service call (tr. 2/112-13; 2/219-20). Finally, both Ms. Burnham and Ms. Nelson discovered that Armstead had improperly listed as separate service calls job orders to redo repairs which it had not properly performed on its initial visit. After Ms. Burnham and Ms. Nelson completed their painstaking analysis, Ms. Burnham compiled the results in a detailed memorandum dated 25 September 1998 (ex. G-1). She concluded that, as defined the contract, Armstead had actually performed only 6,457 service calls during the contract's base year and 7,141 and 6,364 service calls, respectively, during the contract's first and second option years (exs. G-1, -2). These numbers are directly comparable to the service calls for FY's 92-95 which appear in the "Workload Estimates" in TE 2 of the contract (finding 5).

11. Regarding COM's, Ms. Burnham concluded that Armstead had performed 492 job orders during the contract's base year, and Ms. Nelson counted 522 COM's during the first option year and 475 during the second option year (tr. 2/118, 224). Once again, this compared favorably with the four-year historical average of 710 COM's per contractual year (finding 7; ex. G-1 at 3). In addition, Modification No. P00003 paid Armstead to perform an estimated 575 COM's per contractual year (finding 7).

² Appellant subsequently amended its REA to include allegedly excessive service calls and COM's for the contract's first and second option years (ex. A-3 at 194-95).

12. On 28 April 1999, the CO advised Armstead to submit its REA “in the form of a claim so a Contracting Officer’s final decision can be made” (R4, tab 8).

13. On 25 June 1999, Armstead submitted a properly certified claim in the amount of \$532,943.26; however, the claim encompassed only the allegedly excessive service calls for the contract’s base year (R4, tab 10). In fact, Armstead never filed an amended claim covering the first and second option years of the contract.

14. In a final decision issued on 1 September 1999, the CO denied Armstead’s claim for excessive service calls during the contract’s base year in its entirety. The decision dealt only with the amounts claimed during the contract’s base year and was silent concerning the additional amounts allegedly incurred in the contract’s option years, as set forth in Armstead’s amended REA. Based upon the research of Ms. Burnham and Ms. Nelson, the CO found that the number of service calls in Armstead’s claim was “grossly overstated” and that “the actual number of work orders was consistent with anticipated quantities.” The CO made a similar finding regarding Armstead’s COM’s claim. Regarding Armstead’s claim with respect to “Indefinite Quantity for line items 1003AC, 1003AK, and 1003AP” in the amount of \$3,370.80, the CO noted that Armstead had been paid a unit price for each of the sub CLINs and that the quantities did not exceed the estimates in the bid schedule (R4, tab 11). This appeal followed.

DECISION

JURISDICTIONAL ISSUES

At the time when Armstead filed its claim, it asserted entitlement only to allegedly excessive service calls incurred during the contract’s base year. Based upon its amended REA which included amounts for the first and second option years, it is clear that Armstead was cognizant of these additional sums at the time when it filed its claim with the CO. But Armstead, for reasons not explained, did not include those sums in its claim, and the CO did not address them. On appeal, of course, the contractor may not assert a “new claim” and we could not countenance a “deliberate understatement of amount” or “careless initial appraisal.” *Tecom, Inc. v. United States*, 732 F.2d 935, 938 (Fed. Cir. 1984). This is not a case where additional facts developed after a claim was filed resulted in an enhanced claim. All of the prerequisite facts for filing a claim with respect to the first and second option years existed when Armstead filed its claim for the base year. Armstead did not amend its claim before the CO issued his final decision. On the basis of this peculiar fact pattern, we lack jurisdiction to review Armstead’s claims for the first and second option years.

THE MERITS

It is axiomatic that, in order to recover on a claim of negligently prepared estimates, a contractor must first satisfy a burden of production by showing a disparity

between the estimates and the actual volume of work performed. *See, e.g., Viktoria Fit Internationale Spedition*, ASBCA No. 39703, 92-2 BCA ¶ 24,968 at 124,417-18. Here, Armstead did not meet this threshold requirement. As demonstrated by the painstaking research of Ms. Burnham and Ms. Nelson, the properly defined service calls performed by Armstead during the contract's base year were directly comparable to the number of service calls contained in the "Workload Estimates" (finding 10). Moreover, with respect to COM's, Armstead performed only 492 job orders during the contract's base year. This was significantly fewer job orders than the estimated 575 contained in Modification No. P00003 (finding 11). Finally, Armstead was paid on a unit basis for indefinite quantity line items, and their number during the contract's base year did not exceed the contractual estimate (finding 14).

CONCLUSION

For reasons stated, this appeal is denied.

Dated: 22 August 2007

MICHAEL T. PAUL
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

PETER D. TING
Administrative Judge
Acting 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:

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