

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Honeywell International, Inc. ) ASBCA No. 54598  
 )  
Under Contract No. N00383-98-D-008F )

APPEARANCES FOR THE APPELLANT: John W. Chierichella, Esq.  
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OPINION BY ADMINISTRATIVE JUDGE JAMES  
UNDER BOARD RULE 11

This appeal involves an indefinite delivery, indefinite quantity (IDIQ) maintenance and repair contract with Allied Signal, Inc. (Allied), predecessor in interest to Honeywell International, Inc. (appellant or Honeywell). Appellant claims reimbursement alleging that respondent ordered more than the specified maximum quantity of contract item 0035. The parties have elected a record decision on entitlement only under Board Rule 11.

FINDINGS OF FACT

1. On 5 February 1998 the Navy Aviation Supply Office (ASO), Philadelphia, awarded negotiated IDIQ Contract No. N00383-98-D-008F (contract 8F) to Allied for maintenance and repair services on three items of equipment designated items 0001, 0002 and 0003. Additional items were added to contract 8F by subsequent modifications.

Contract 8F included a base year and three option years. (R4, tab 1 at 1-2, 15, tab 2 at 1, tabs 3-4)

2. Contract 8F, § A, included: (a) the FAR 52.216-18 ORDERING (APR 1984) clause which provided in pertinent part:

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders [DOs] by the individuals or activities designated in the Schedule. Such orders may be issued for a period of One year from the date of award and the three successive twelve Month Option Periods.

(b) All delivery orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order and this contract, the contract shall control.

(b) an undated 52.216-19 DELIVERY-ORDER LIMITATIONS (DOL) clause that provided:

(a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than two units, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

(b) Maximum order. The contractor is not obligated to honor-

(1) Any order for a single item in excess of 200 units.

(2) Any order for a combination of items in excess of 500 units.

(3) A series of orders from the same ordering office within 30 days that together call for quantities exceeding the limitation in subparagraphs (1) or (2) above.

....

(d) Notwithstanding paragraphs (b) and (c) above, the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within 15 days after

issuance, with the written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, the government may acquire the supplies or services from another source.

(c) an undated FAR 52.216-22 INDEFINITE QUANTITY (IQ) clause that provided:

(a) This is an indefinite quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the schedule are estimates only and are not purchased by this contract.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the ordering clause. The contractor shall furnish to the Government, when and if order [sic], the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the "maximum". The Government shall order at least the quantity of supplies or services designated in the Schedule as the "minimum".

(c) Except for any limitations on quantities in the Delivery-Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. . . .

and (d) Note 2 that stated:

. . . Quantities identified in Attachment "A" represent the Government's best estimate of supplies or services that will be required under the base year contract and each of the three one year options. Additionally, per 52.216-22(b), Indefinite Quantity, minimum and maximum quantities are designated as follows: [annual quantities for item 0001 of 15 minimum and 110 maximum for years 1 and 2; for item 0002 of 5 minimum for all years and 45 maximum for years 1 and 2 and 50 maximum for years 3 and 4; and for item 0003 of 1 minimum and 12 maximum for all four years.]

The contract contained no Attachment "A" but rather an Exhibit "A," under whose columns headed "ESTIMATED [sic] QTYs BY YEAR (MIN/TRGT/MAX)" were

listed the same minimum and maximum quantities for each of items 0001-0003 as provided in Note 2. (R4, tab 1 at 14-15, 55)

3. Contract 8F incorporated by reference the FAR 52.243-1 CHANGES -FIXED PRICE (AUG 1987) clause with a 30-day notice provision and the 52.243-7 NOTIFICATION OF CHANGES (APR 1984) clause which did not state any number of days for notice of a constructive change (R4, tab 1 at 25).

4. On 22 September 1998 the Naval Inventory Control Point (NAVICP), successor to ASO, issued Solicitation No. N00383-98-R-0077 (solicitation 77) to repair, during a two-year base period and three, one-year options, part No. 3757302-3, the Stability Augmentation System Amplifier (SAS amp). Solicitation 77 included the FAR 52.216-19 ORDER LIMITATIONS (OCT 1995) clause, whose ¶ (b) provided:

(b) Maximum order. The contractor is not obligated to honor: (See Attachment "A" for quantities)

(1) Any order for a single item in excess of the maximum quantity for the item. . . .

Solicitation 77 also included the FAR 52.216-18 ORDERING (OCT 1995) and 52.216-22 INDEFINITE QUANTITY (OCT 1995) clauses, and a Note 2 similar to that in contract 8F referencing Attachment "A" (finding 2). Attachment A's columns headed "ESTIMATED [sic] QTYS BY YEAR (MIN/TRGT/MAX)" listed minimum and maximum quantities of 30 minimum and 100 maximum for each of 5 years. (Supp. R4, tab G-8 at 5-6, 58)

5. Allied's 21 December 1998 letter No. 8475:121898 responding to solicitation 77 stated: "The total quantity of repairs . . . shall be 100 maximum . . . per year" and proposed prices for four separate repair categories for each of the two years in the base period and prices "TBD" for the three option years. Its Standard Form 33 attached thereto stated that letter No. 8475:121898 "IS AN INTEGRAL PART OF OUR ACCEPTANCE." (Supp. R4, tab G-8 at 1, 10, 83) Allied's 19 January 1999 letter to NAVICP regarding its proposal for solicitation 77 repeated that the total repair quantity was to be 100 maximum per year and proposed different prices for each of four categories of repair (supp. R4, tab G-10 at 1, 10). On 12 April 1999 Allied submitted to NAVICP negotiated unit prices (supp. R4, tab G-19 at 2; app. supp. R4, tab A-172).

6. NAVICP decided to purchase SAS amp repairs by modification to contract 8F, using the solicitation 77 negotiated prices, rather than by awarding a contract under solicitation 77 (supp. R4, tab G-38, ¶ 6; app. supp. R4, tab A-172).

7. On 4 June 1999 contracting officer (CO) David Gioia issued: (a) contract 8F unilateral Modification No. P00016 (Mod. 16), adding item 0035, SAS amp, with the following provisions:

LEVEL ONE – NO FAULT FOUND - \$1451.00 EACH  
LEVEL TWO – 0 GYRO REPAIR - \$2973.00 EACH  
LEVEL THREE – 1 GYRO REPAIR - \$10,298.00 EACH  
LEVEL FOUR – 2 GYRO REPAIR - \$17,267.00 EACH

....

ORDERING PERIOD SHALL BE TWO YEARS  
COMMENCING WITH THE DATE OF THIS  
MODIFICATION. PAGE THREE OF THIS  
MODIFICATION REPRESENTS EXHIBIT A FOR ITEM  
0035. . . . AS A RESULT OF THIS MODIFICATION,  
\$345,340.00 IS OBLIGATED AGAINST THE SUBJECT  
CONTRACT TO FUND THE GUARANTEED MINIMUM  
(SEE EXHIBIT A) NOT COVERED UNDER ORDER 7007.

Exhibit A listed “ESTIMATED [sic] QTYS BY YEAR (MIN/TRGT/MAX)” for SAS amp repairs. The minimum and maximum quantities, respectively, were 30 and 100 for each of year one and year two. (R4, tab 3) (b) DO 7007 under Mod. 16 to repair 40 SAS amp units at \$17,267 per unit, totaling \$690,680. DO 7007 stated that the ACO would deobligate funding and create sub-CLINs for work that was priced at lower repair levels. (Supp. R4, tab S-1)

8. In 1998-99, when Allied submitted its proposal in response to solicitation 77, its Cheshire, CT, facility manufactured the only gyroscope qualified for use in the SAS amp. Allied calculated its proposed material costs based on its internal transfer costs of those gyroscopes. (App. supp. R4, tab A-180, ¶ 5) In December 1999 Allied merged with Honeywell (compl. and answer, ¶¶ 24, 25). In connection with the merger, and under direction from the United States Department of Justice, Allied sold its Cheshire, CT, facility to Condor Pacific Industries. As a result, beginning in 2000, successor-in-interest Honeywell began paying more in gyroscope costs for SAS amps than Allied had anticipated when it priced the gyroscopes based on internal transfer costs. (App. supp. R4, tab A-180, ¶ 8) On 15 August 2000 Modification No. P00026 to contract 8F substituted Honeywell for Allied as contractor (R4, tab 4).

9. NAVICP issued four DOs in the first year and two DOs in the second year under Mod. 16, for the following quantities of SAS amp repairs:

DO No.	Date	Quantity	Record Cite
7007	6-4-99	40	Supp. R4, tab S-1
7016	9-29-99	40	R4, tab 5
7028	1-7-00	40	R4, tab 12
7044	3-27-00	50	R4, tab 15
0004	11-6-00	45	R4, tab 22
7089	5-30-01	50	R4, tab 32

10. On 1 June 2001 respondent removed 7 units from DO No. 7044, reducing its quantity to 43 (R4, tab 21). Thus, in the first year respondent ordered 163 units (40+40+40+43), and in the second year ordered 95 units (45 + 50), totaling 258 units of SAS amp repairs under Mod. 16 (app. supp. R4, tab A-170 at 001048-50, tab A-180, ¶¶ 9, 10).

11. Honeywell’s 10 January 2001 letter to NAVICP stated:

**[DO 0004] exceeded the maximum amount listed on P00016 by a total quantity of 15 SAS amps . . . . P00016 . . . . states that the quantity for the first year would be . . . Max: 100. By June 2000 Honeywell had received orders for a total quantity of 170 units, which exceeded the maximum amount by 70 units. The estimated quantities for year two were . . . Max. 100. [DO] 0004 for a quantity of 45 exceeds the total maximum of 200 for both years by a quantity of 15. Therefore, Honeywell is requesting that the pricing for the additional 15 units be renegotiated per the attached quotation.**

(R4, tab 40)

12. Honeywell’s 5 June 2001 e-mail to NAVICP stated that DOs 0004 and 7089 “have exceeded the maximum amount listed on P00016 by a total quantity of 75 SAS amps . . . . **Therefore, Honeywell requests that the pricing for D/O 7089 (qty 50) be renegotiated per Flat Rate quote . . . sent to [NAVICP] on May 2, 2001**” (R4, tab 41).

13. Honeywell’s 21 September 2001 letter to the CO cited contract 8F’s DOL clause and asserted that: (a) its 10 January 2001 letter notified NAVICP that DO 0004’s quantity exceeded what Honeywell understood was the maximum quantity (200) by 15 units and “[i]n effect” rejected the total quantity (45 units) on DO 0004 and counter-offered to accept 30 units at the contract price and to renegotiate a new price for

the balance of 15 units, and (b) its 5 June 2001 e-mail did not agree to accept any quantity on DO 7089, and responded with a counter-offer (R4, tab 42).

14. The CO's 2 October 2001 reply to Honeywell stated that Mod. 16 "established estimated . . . maximum quantities by year for a two year ordering period." Since the maximum yearly quantity was 100 units, and DOs 0004 and 7089 were both in year two and totaled 95 units, NAVICP had not exceeded Mod. 16's maximum quantity "during this ordering period." (R4, tab 43)

15. Appellant's 23 October 2001 letter to the CO repeated that Mod 16's maximum quantity for the two-year ordering period was 200 units, which NAVICP did not exceed until issuing the first order in the second year and again requested NAVICP to renegotiate prices for units exceeding 200 (R4, tab 44). Appellant's 15 November 2001 e-mail to the CO stated that about 30 units had been placed in the government bond room and "Honeywell is not proceeding with induction or repair of these units" (R4, tab 45).

16. The CO's 5 December 2001 letter cited FAR 52.233-1, providing that the contractor was required to perform pending the resolution of any request for relief or claims, and directed Honeywell to continue to perform DOs 0004 and 7089 (R4, tab 46). Honeywell's 17 December 2001 reply said that it would deliver pursuant to DOs 0004 and 7089 without prejudice to its right to claim an equitable adjustment to recover the difference between the contract price and Honeywell's proposed price for repair of units exceeding 200 (R4, tab 47).

17. On 2 October 2003 Honeywell submitted a certified claim relating to Mod. 16. It tabulated Mod. 16's six delivery orders, their dates and quantities ordered, and asserted that the maximum order quantity thereunder was 200 units for the "combined two year period." It alleged that NAVICP ordered 258 units and thus it was entitled to \$1,676,529 for the "impact associated with the repair of the additional 58 units," reduced by \$952,703, the amount that had been billed to the time of the claim (for a net amount of \$723,826). (R4, tab 48)

18. The CO denied appellant's claim on 30 January 2004 (R4, tab 50). Honeywell filed a timely appeal, docketed as ASBCA No. 54598.

19. Honeywell's March 2004 handwritten notes regarding its 10 January 2001 letter (finding 11) state:

1/10/01	did notify NAVICP they exceeded 100 by 70 units	(true didn't reject it wanted to be a
good		contractor & work

with you [gov])

(R4, tab G-29 at 3) We find that Honeywell voluntarily performed the first year's orders in excess of 100 units for business reasons.

20. In a 12 October 2005 supplement to the record in this litigation, Messrs. Gerry Scheil, Pricing Manager, and Gary Kollar, Program Manager, at Honeywell's Teterboro, NJ, facility, calculated alternative excess material costs for SAS amp units under Mod. 16: (a) for 63 SAS amp units exceeding 100 for the first year, the difference between the Cheshire facility cost and the increased purchase price of gyroscopes after the December 1999 "forced" sale of the Cheshire facility to Condor Pacific Industries was \$656,972, or (b) for 58 units exceeding 200 for the two years, the difference was \$717,921 (app. supp. R4, tab 180, ¶¶ 8-14, tab 170 at 001051-52).

### PARTIES' CONTENTIONS

Appellant principally argues that: (a) Mod. 16 established an ordering period of two years with a maximum quantity of 200 units over those years, and respondent constructively changed Mod. 16 to the extent that it required appellant to perform orders exceeding 200 units (app. br. at 2-4, 40-50, 51-53); (b) the phrase "estimated quantities by year" in Exhibit "A" of Mod. 16 meant the "estimated distribution or 'spread' of orders over the course of the two year contract ordering period" and not "absolute maximums" (*id.* at 2, 44); (c) it was not required to notify the government of rejection of any DOs within 15 days, since no DO exceeded 200 units and no series of DOs issued within 30 days exceeded 200 units (*id.* at 54-55), and, in any event, NAVICP knew the relevant circumstances and appellant notified NAVICP of the basis for re-pricing DOs 0004 and 7089 and NAVICP was not prejudiced (*id.* at 52-53); and (d) alternatively, if the Board were to rule that the "maximum" quantity was 100 units in each year, Honeywell would still be entitled to relief because respondent exceeded that 100-unit maximum under Mod. 16 during year one (*id.* at 50-51, 53-56).

Respondent principally argues that Mod 16. established 100-unit maximum quantities for each year of the two year ordering period (gov't br. at 16), and that appellant's 21 December 1998 pricing proposal for solicitation 77 disclosed its understanding that each of the two years in the ordering period had a separate "enforceable" minimum and maximum quantity (gov't reply br. at 14). Respondent argues that it ordered 170 units in the first year, but is not liable therefor because appellant did not return any order exceeding the specified maximum quantity of 100 units within 15 days, as required by the DOL clause (gov't br. at 21-23). Respondent contends that "[i]t is clear from [the note quoted in finding 19 *supra*] that rejection of this order [in excess of 100] was something that the Appellant thought it could have done, but did not do" (gov't br. at 13). Respondent argues that the FAR 52.243-1 Changes clause required

appellant to assert its right to an equitable adjustment within 30 days of receiving a change order, the equitable doctrine of laches required appellant to assert its claim within a reasonable time and it did not comply with either such requirement, and delayed notice prejudiced respondent, which “might have been able to cancel or delay work orders into the following year” (gov’t br. at 24, reply br. at 19-23).

### DECISION

This appeal presents two issues. (1) What was the maximum quantity of item 0035, SAS amp repairs, that respondent had the right to order under Mod. 16? (2) Did appellant timely protest to respondent those orders exceeding such maximum quantity?

#### I.

Paragraph (b) of the IQ clause in contract 8F stated:

The contractor shall furnish to the Government, when and if order [sic], the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the “maximum”.

(Finding 2(c)). Appellant contends that Mod. 16’s maximum quantity for item 0035 SAS amp repairs was 200 units for the two year period. Respondent contends that Mod. 16’s maximum quantity for item 0035 was 100 units for each of year one and year two.

The maximum quantity limitation of 200 units in contract 8F’s “DOL” clause (finding 2(b)) is immaterial, because it limits only individual DOs, not all DOs that respondent had the right to order under the contract (finding 2(c)). The relevant and controlling provisions in contract 8F are the IQ clause and Note 2, which set maximum annual quantities “per 52.215-22(b), Indefinite Quantity” based on Attachment “A” (Exhibit “A”) (findings 2(c), 2(d)).

Solicitation 77 specified a maximum annual quantity of 100 SAS amp repairs for each of the five years solicited and provided for a base period of two years (finding 4). Allied’s 1998-99 responses to solicitation 77 priced the SAS amps upon this basis, insisting that the “total quantity of repairs . . . shall be 100 maximum . . . per year” (finding 5).

Mod. 16 to contract 8F included the SAS amp repair prices negotiated under solicitation 77 (findings 6, 7). Just as contract 8F originally prescribed maximum annual quantities “per 52.215-22(b), Indefinite Quantity” in its Exhibit “A” (findings 2(c), 2(d)),

so too Mod. 16 prescribed maximum quantities of 100 for each of year one and year two in its Exhibit “A” (finding 7(a)).

Appellant’s assertion that there was a single, two year ordering period tracks Mod. 16’s provision, “ORDERING PERIOD SHALL BE TWO YEARS,” but that provision did not mention or establish a maximum of 200 units to be ordered over that two-year period (finding 7(a)). Appellant’s assertion is contrary to the plain language of Mod. 16’s Exhibit A, which alone in Mod. 16 set forth a maximum quantity: 100 units for each of years one and two. Appellant’s contention that the phrase “estimated quantities by year” in Exhibit “A” meant the “estimated distribution or ‘spread’ of orders over the course of the two year contract ordering period,” rather than “absolute maximums,” is unpersuasive because it is inconsistent with its argument that there was a 200-unit maximum quantity for the two year period, which necessarily means that such maximum quantity is absolute. *See Lockheed Electronics Co., Inc.*, ASBCA No. 16667, 72-1 BCA ¶ 9442 at 43,866 (“estimated” maximum construed as an “absolute” maximum for purposes of the IQ clause). In summary, the acquisition history of Exhibit “A” clearly shows that the maximum quantity that respondent had the right to order under Mod. 16 was 100 units for each year of the ordering period, and we so hold.

## II.

Our foregoing holding rejects appellant’s first theory of recovery, but does not resolve its alternative argument that, even if we were to rule that the maximum quantity orderable was 100 repairs per year, it is still entitled to relief. Appellant’s October 2003 claim does not explicitly include this alternative theory of recovery (finding 17), nor does its complaint. Apparently as an afterthought, appellant articulated this alternative theory in October 2005 during the course of this litigation (finding 20).

Respondent indisputably ordered 63 more than the 100 maximum SAS amp repairs in the first year (finding 10). Assuming, *arguendo*, that this alternative argument is based upon the same operative facts stated in appellant’s 2 October 2003 certified claim and merely adds a new legal theory, nevertheless, this alternative argument is unsound. Appellant did not protest the issuance of the 63 excess orders for the first year, or notify respondent that such excess orders breached Mod. 16 (findings 11-13, 15, 17). Appellant deliberately chose not to reject those excess quantities because it “wanted to be a good contractor & work with” the government (finding 19). Such circumstances “indicated volition to perform . . . and do not spell out one or more constructive changes” *Lockheed, supra*, 72-1 BCA at 43,867. *See Flink/Vulcan v. United States*, 63 Fed. Cl. 292, 309 (2004), *aff’d*, 163 Fed. Appx. 890 (Fed. Cir. 2006) (no constructive change when contractor could have declined extra work or proceeded under protest, but elected to proceed without reservation, for business reasons); *cf. Northern Helix Co. v. United States*, 455 F.2d 546, 552-53 (Ct. Cl. 1972) (contractor promptly notified the government of its material breach and that contractor’s continued performance did not waive its rights

and remedies, held: breach remedies preserved). Appellant's argument that there was no prejudice to the government by its belated notice of breach is immaterial to its alternate theory regarding excess units ordered in year one, because it voluntarily chose to perform those excess units without any notice of such breach. Accordingly, we hold that appellant, for business reasons, did not timely protest respondent's issuance of the 63 orders exceeding the maximum quantity of 100 for the first year of the ordering period, which failure is fatal to recovery.

### CONCLUSION

We deny the appeal.

Dated: 20 June 2007

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

I concur

I concur

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

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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. 54598, Appeal of Honeywell International, Inc., rendered in conformance with the Board's Charter.

Dated:

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