

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
COSTAR III, LLC) ASBCA Nos. 55296, 55297
) 55298, 55299
Under Contract No. N62477-00-D-0085)

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OPINION BY ADMINISTRATIVE JUDGE PAUL

These are appeals of a deemed denial by the contracting officer (CO) of COSTAR III, LLC's (COSTAR), four claims in a total amount of \$1,722,940.13. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, is applicable. We deny the appeals.

FINDINGS OF FACT

1. On 22 October 2001, the Naval Facilities Engineering Command, Chesapeake District (Navy), awarded Contract No. N62477-00-D-0085 for base operating services at the Naval Air Station, Patuxent River, to COSTAR, a joint venture (R4, tab 1).¹ This entity consisted of three member companies: Capitol Hill Building Maintenance, Inc. (CHBM) which was responsible for custodial services under the contract; SEAIR Transport Services, Inc. which provided working capital, as well as transportation services under the contract; and S.C. Jones Services, Inc. which also provided working

¹ We cite to the original R4 file as "R4, tab -"; to the Navy's supplemental R4 file as "supp. R4, tab -"; to appellant's supplemental R4 file as "app. supp. R4, tab -"; and to appellant's second supplemental R4 file as "app. 2nd supp. R4, tab -."

capital, as well as grounds maintenance services, under the contract (supp. R4, tab 139 at 1-4). CHBM is the member company which is the underlying claimant in these appeals.²

2. As awarded, the contract contained a base year, as well as three option years. The base year extended from 1 February 2002 through 31 January 2003, followed by the three option years (R4, tab 20 at 8-9 of 15, tab 129).

3. Section C of the contract entitled “DESCRIPTION/SPECIFICATIONS/WORK STATEMENT,” contained a host of provisions which are pertinent to these appeals. For example, subsection b., under section C.3, “DEFINITIONS – TECHNICAL” stated: “Where ‘as directed’, ‘as required’, ‘as permitted’, ‘approval’, ‘acceptance’, or words of similar import are used, reference is made to the direction, requirement, permission, approval, or acceptance of the Contracting Officer is [sic] intended unless stated otherwise.” Also, subsection d. under section C.3 provided: “Contracting Officer – The Contracting Officer is a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.” (R4, tab 5 at 2 of 58)

4. Subsection i. of section C.3 defined “Frequency of Service” as varying from “Annual” to “Daily.” Subsection k. stated: “Major maintenance and repair is any individual incident of repair with a total estimated cost (labor and direct material) exceeding \$2,500.00;” whereas, subsection r. defined service calls “as maintenance, repair, alteration, construction, or other miscellaneous work requirements which are called into the work reception center by customers (building or family housing occupants), or are generated by designated Government representatives.” (R4, tab 5 at 3-4 of 58)

5. Subsection h. of section C.6 “MANAGEMENT” provided:

Additions and Deletions — During the term of the contract, the Government will add and delete facilities and spaces to the scope of this contract. These additions and deletions will result from new construction, renovations, alterations, modernization, demolition and other factors. Changes, additions, or deletions that result in an increase or decrease in contract requirements will result in adjustments to the contract

² COSTAR reorganized as a limited liability corporation on 16 January 2002 (supp. R4, tab 139 at 1, tab 165 at 9).

price in accordance with the “CHANGES” clause and the bid prices for additions and deletions to the scope of the contract.

(R4, tab 5 at 7 of 58)

6. Subsection b. of section C.7 “GENERAL REQUIREMENTS AND PROCEDURES” is also pertinent. It stated:

Replacement, Modernization, Renovation – During the term of the contract, the Government may replace, renovate, or improve equipment, systems, facilities, components, and fixtures at the Government’s expense and by means not associated with this contract. All replaced, improved, updated, modernized or renovated equipment, fixtures, facilities, components, and systems shall be maintained, operated, and/or repaired by the Contractor at no additional cost to the Government unless such changes result in an increase or decrease in contract requirements. Changes, replacements, or deletions that result in an increase or decrease in contract requirements will result in adjustments to the contract price in accordance with the “CHANGES” clause, Section 1.

(R4, tab 5 at 7 of 58)

7. In addition, the prefatory paragraph to section C.8, “GENERAL REQUIREMENTS FOR SERVICE CALL WORK,” provided:

All service call work shall be performed under the firm fixed-price portion of the contract. The total estimated cost of a service call will not exceed \$2,500.00. Refer to Attachment J.3 Unit Price Book for procedures for determining the price of service calls. Multiple maintenance and repair requirements received for the same building or structure shall be combined into one service call.

(R4, tab 9 at 4)

8. Subsection a. of section C.10 “GENERAL REQUIREMENTS AND PROCEDURES FOR INDEFINITE QUANTITY WORK,” stated:

Contract requirements which cannot be defined in sufficient detail to be included in the firm fixed-price portion of the contract, or which are beyond the scope of a service call, shall be performed under the indefinite quantity portion of the contract.

a. General Procedures – The Contracting Officer will provide the Contractor a detailed scope of work and request a detailed cost proposal. Either the Contractor or the Contracting Officer may request that a site visit be scheduled and attended by both parties to the contract. Provide written recommendations for revisions, alternative methods or deviations from the Government’s scope of work, as specified. The Contractor’s recommendations shall be narrative descriptions, drawings, or sketches and shall include references to technical specification requirements. All recommendations shall be submitted to the Contracting Officer within two working days after the site visit. The Contracting Officer will review the recommendations and will approve or disapprove, in whole or in part, for use in the prosecution of work. Upon acceptance of any recommendations proposed by the Contractor, the Contractor shall be responsible for their accuracy, sufficiency and completeness. Proposals shall be completed in accordance with the requirements of Section B and returned to the Contracting officer within fifteen (15) calendar days after receipt of the request for proposal. The proposal shall also include a completion schedule.

(R4, tab 5 at 11 of 58)

9. Particularly pertinent to CHBM’s work effort were the provisions set forth in section C, subsection 9, “CUSTODIAL SERVICES.” For example subsection 9.1, “GENERAL REQUIREMENTS,” stated in part: “Provide all labor, supplies, supervision, tools, materials, equipment, and transportation necessary to provide custodial services in accordance with this specification. Custodial service applies to all designated spaces including, but not limited to, halls, restrooms, offices, work areas, entrance ways, lobbies, storage areas, elevators, and stairways.” “CUSTODIAL

SERVICES REQUIREMENTS,” as provided in subsection 9.2, included basic services, service call work, and indefinite quantity work. Included among basic services were sweeping/dust mopping, vacuuming carpets and rugs, emptying waste containers, low dusting/cleaning, cleaning walk-off mats, emptying smoking urns, damp mopping floors, spray cleaning and buffing floors, machine scrubbing floors, cleaning rooms, and servicing rooms. Examples of service call work were clean-ups of spills, stripping and re-waxing floors, shampooing carpets and rugs, cleaning light fixtures, high dusting and cleaning, cleaning under raised flooring, cleaning interior and exterior glass, industrial cleaning, and temporary cleaning. Indefinite quantity work comprised custodial services required on an irregular unscheduled basis that exceeded the scope of service call work. Specifically, it included the industrial cleaning of three buildings. (R4, tab 5 at 32-34 of 58)

10. Section C of the contract also contained several attachments, some of which are pertinent to these appeals. For example, attachment J-C4, “SPECIFICATIONS,” contained a section entitled, “CUSTODIAL SERVICES,” which stated in part:

Paper towels shall suit the existing paper towel dispensers. The Contractor shall furnish adapters as required to suit existing paper towel dispensers at no additional cost to the Government. Paper towel rolls shall be commercial grade, highly absorbent, wet-strength type, and approximately 4½ inches in diameter and 11 inches wide.

(R4, tab 5 at 50 of 58)

11. In addition, attachment J-C8, contained, in pertinent part, an “INVENTORY OF FACILITIES,” which defined the various custodial service classifications. It stated:

Annex 09 – CUSTODIAL SERVICES – The attached file <<J-C8 Custodial Inventory.xls>> specifies the facilities that shall be provided custodial services under the requirements of this contract. A single room may consist is [sic] several defined areas. Floor plans will be made available to the Contractor after award but prior to the start of work. The table below defines the frequencies of basic custodial services by service classification specified for each space in the equipment inventory.

<u>SERVICE CLASSIFICATION</u>		<u>B3</u>	<u>B5</u>	<u>B7</u>	<u>BS</u>	<u>BAH</u>
Sweep/Dust Mop Floors	2W	D5	2W	2W	D5	
Vacuum Carpet and Rugs		2W	2W	2W	2W	D5
Empty Waste Containers		3W	D5	D7	3W	D5
Low Dust/Clean		W	W	W	W	W
Service Walk-off Mats		2W	2W	2W	2W	2W
Damp Mop		W	D5	W	W	D5
Spray Clean & Buff		W	W	W	W	W
Machine Scrub quarry and ceramic tile		M	M	M	M	M
Service Landings/Steps/Ramps		D5	D5	D7	D7	D5
Wash/Disinfect Bathroom, Laundry and Locker Room Fixtures, Floors and Walls		D5	D5	D7	D7	D5
Empty Bathroom, Laundry and Locker Room Waste Containers	D5	D5	D7	D7	D5	
Replenish Bathroom, Laundry and Locker Room Janitorial Supplies		D5	D5	D7	D7	D5
Clean Metal Fixtures and Hardware		D5	D5	D7	D7	D5
Clean Washers, Dryers and Lockers		D5	D5	D7	D7	D5
Service Smoking Ums		W	W	W	W	W

SERVICE CLASSIFICATIONS B3 – Basic services Monday through Friday excluding holidays

SERVICE CLASSIFICATIONS B5 – Basic services Monday through Friday excluding holidays

SERVICE CLASSIFICATIONS B7 – Basic services seven days a week excluding holidays

SERVICE CLASSIFICATIONS BS – Basic services seven days a week from Memorial Day to Labor Day including holidays. In addition to regular weekly service, these building [sic] require twice daily restroom cleaning on Saturday and Sunday from 6:00am to 8:00am and 1:00pm to 4:00pm.

SERVICE CLASSIFICATIONS BAH – Basic services Monday through Friday excluding holidays, after regular working hours.

SERVICE CLASSIFICATIONS SP – Special services in addition to basic services.

<u>Building</u>	<u>Service</u>
103	B3 plus vacuuming first floor in Saturday and Sunday
110	B3 plus cleaning and replenishing first floor men’s restrooms twice daily
111	B3 plus cleaning and replenishing first floor men’s restrooms twice daily
401	B5 plus daily dusting and vacuuming of medical rooms 12:00am to 1:00pm

401	B5 plus use of approved hospital disinfectant and hospital soap in medical rooms
436	B5 plus daily dusting and vacuuming of medical rooms 12:00am to 1:00pm
436	B5 plus use of approved hospital disinfectant and hospital soap in medical rooms
458	B7 plus twice daily cleaning and servicing of restrooms and locker rooms by 7:30am and 1:00pm respectively
458	B5 plus daily dusting and vacuuming of medical rooms before 7:30am
458	B5 plus use of approved hospital disinfectant and hospital soap in medical rooms
1370	B5 plus basic services after 5:00pm Monday through Friday
1370	B5 plus daily dusting, vacuuming and damp mopping
1370	B5 plus use of approved hospital disinfectant and hospital soap
1370	B5 plus basic services after 2:00pm on Saturday
1490	B3 plus cleaning and replenishing women's restroom twice daily
2133	B3 plus cleaning and replenishing restrooms twice daily at 7:00am and 4:00pm
2168	B5 plus machine scrubbing floors weekly
2173	B7 plus break room and office cleaning 4:30am to 8:30am
2173	B7 plus clean butcher shop and equipment 6:30pm to 8:00pm Tuesday through Friday, 4:30pm to 6:00pm Saturday and Sunday. Butcher shop and equipment shall be cleaned, degreased and sanitized using U.S. Department of Agriculture approved solutions, applicators, disinfectants and procedures.
2187	B3 plus every six months, strip and wax rubber tile flooring. Strip with "Shineline Emulsifier Plus" using a 175 rpm single dish machine equipped with a brush. Pick up solution with a wet/dry vacuum. Rinse with "Floor prep" and pick up the rinse with a wet/dry vacuum and allow to dry. Apply "Sunshine Seal" with a mop, applying in very thin coats to avoid puddling.

(R4, tab 5 at 54-55 of 58)

12. Section G of the contract, entitled "Contract Administration Data," contained two NAVFAC clauses which are relevant to these appeals. They stated:

**5252.201-9300 CONTRACTING OFFICER AUTHORITY
(JUN 1994)**

In no event shall any understanding or agreement between the Contractor and any Government employee other than the Contracting Officer on any contract, modification, change order, letter or verbal direction to the Contractor be effective or binding upon the Government. All such actions must be formalized by a proper contractual document executed by an appointed Contracting Officer. The Contractor is hereby put on notice that in the event a Government employee other than the Contracting Officer directs a change in the work to be performed or increases the scope of the work to be performed, it is the Contractor's responsibility to make inquiry of the Contracting Officer before making the deviation. Payments will not be made without being authorized by an appointed Contracting Officer with the legal authority to bind the Government.

5252.242-9300 GOVERNMENT REPRESENTATIVES (OCT 1996)

(a) The contract will be administered by an authorized representative of the Contracting Officer. In no event, however, will any understanding or agreement, modification, change order, or other matter deviating from the terms of the contract between the Contractor and any person other than the Contracting Officer be effective or binding upon the Government, unless formalized by proper contractual documents executed by the Contracting Officer prior to completion of this contract. The authorized representative as indicated hereinafter:

___(1) The Contracting Officer's Representative (COR) will be designated by the Contracting Officer as the authorized representative of the Contracting Officer. The COR is responsible for monitoring performance and the technical management of the effort required hereunder, and should be contacted regarding questions or problems of a technical nature.

___(2) The designated Contract Specialist will be the Administrative Contracting Officer's representative on all other contract administrative matters. The Contract Specialist should be

contacted regarding all matters pertaining to the contract or task/delivery orders.

___(3) The designated Property Administrator is the Administrative Contracting Officer's representative on property matters. The Property Administrator should be contacted regarding all matters pertaining to property administration.

(R4, tab 6 at 54 of 83)

13. The contract also included the NAVFAC 5252.216-9315, AWARD FEES, clause which provided for an award fee to COSTAR of a maximum amount of five percent of the total value of all completed work during each six-month period of contractual performance (supp. R4, tab 165 at 39-41, tab 149).

14. In addition, the contract incorporated by reference a host of DFARS clauses. Of pertinence to these appeals is 252.201-7000, CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991), which stated:

(a) *Definition. Contracting officer's representative* means an individual designated in accordance with subsection 201.602-2 of the Defense Federal Acquisition Regulation Supplement and authorized in writing by the contracting officer to perform specific technical or administrative functions.

(b) If the Contracting Officer designates a contracting officer's representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the contracting officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

(R4, tab 6 at 57 of 83)

15. Finally, the contract contained a number of FAR clauses which were quoted in full text. Among them were:

52.216-18 ORDERING (OCT 1995)

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from date of award through contract completion.

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

(c) If mailed, a delivery order or task order is considered “issued” when the Government deposits the order in the mail. Orders may be issued orally, by facsimile, or by electronic commerce methods only if authorized in the Schedule.

....

52.216-22 INDEFINITE QUANTITY (OCT 1995)

(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 ordered, 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 Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(d) Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor's and Government's rights and obligations with respect to that order to the same extent as if the order were completed during the contract's effective period; provided, that the Contractor shall not be required to make any deliveries under this contract after [insert date].

....

52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT
(MAR 2000)

(a) The Government may extend the term of this contract by written notice to the Contractor within 30 days; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least [] days (60 days unless a different number of days is inserted) before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 4 years.

(R4, tab 6 at 58-59 of 83)

16. Prior to award, the solicitation was amended on 14 occasions. Amendment No. 0004, with an effective date of 1 September 2000, added the following pertinent NAVFAC clauses to the eventual contract:

FAC 5252.216-9300, APPOINTMENT OF ORDERING OFFICERS (JUN 1994)

Ordering Officers under this contract are authorized by the Contracting Officer to execute delivery orders or task orders provided the total price for the delivery order or task order does not exceed the individual Contracting Officer(s) warrant

limitations. The ordering officers and their specific authority shall be stated in this contract or in an appointment letter.

FAC 5252.216-9306, PROCEDURES FOR ISSUING ORDERS (MAY 1995)

a. Services to be furnished under this contract shall be furnished at such times as ordered by the issuance of task orders on DD Form 1155 by the Ordering Officer designated by the contracting officer. All orders issued hereunder are subject to the terms and conditions of this contract. This contract shall control in the event of conflict with any order. When mailed, a delivery order or task order will be considered "issued" for the purpose of this contract at the time the Government deposits the order in the mail or, if transmitted by other means, when physically delivered to the Contractor.

b. Task orders may be modified by the Ordering Officer. Modifications to task orders will be issued on Standard Form (SF) 30.

c. Task orders may be modified/ordered orally by the Ordering Officer in emergency circumstances. Oral modifications/orders are limited to a maximum of \$10,000 and will be confirmed by issuance of a written modification/order within two (2) working days from the time of the oral communication.

(R4, tab 9 at 1, 5)

17. Subsection (a) of FAR 52.237-1, SITE VISIT (APR 1984) clause, which was included in the contract, stated:

Offerors or quoters are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable. In no event shall failure to inspect the site constitute grounds for a claim after contract award.

(R4, tab 6 at 75 of 83)

18. Accordingly, NAVFAC 5252.237-9302, SITE VISIT (JUL 1995) clause, provided:

(a) A pre-proposal conference and site tour has been scheduled for 18 and 19 July 2000. All parties are to meet at the Officer's Club both days. The current schedule calls for the pre-proposal conference to start at 9:00 a.m. on 18 July followed by the first part of the site tour. Visitors will reconvene at 8:00 a.m. on 19 July to finish the site tour. A question/answer session will follow the end of the site tour. Time will be allotted for lunch.

Please fax a list of attendees, including full name, company name, and social security number to LaWanda Robinson at (301) 342-3141 no later than 4:00 p.m. 14 July 2000. You may reach Ms. Robinson by telephone on (301) 757-4880. Ms. Robinson is ONLY handling the list of attendees for the pre-proposal conference and site tour. PLEASE DO NOT CONTACT HER REGARDING ANY OTHER INFORMATION OR QUESTIONS.

(b) Visitors may be required to present documentation evidencing personal identification and firm affiliation.

(R4, tab 6 at 78 of 83) Ms. Sarian Bouma, CHBM's president and chief executive officer, attended this site visit. She testified that, in performing the "walk through," "everything was business as usual" (tr. 37-39).

19. In accordance with NAVFAC 252.242-7000, POST AWARD CONFERENCE (DEC 1991) clause, the parties held a pre-performance conference on 7 November 2001.³ The minutes of the meeting stated that the CO was Ms. Jacqueline M. Lacey who was "solely responsible for authorizing changes in the contract plans and specifications" and for administering the contract through her authorized representatives. Also representing the Navy at the meeting was Mr. Richley E. Taylor who was designated as both the supervising facilities support contract manager (FSCM) and the custodial services representative (CSR). The meeting minutes stated, in part:

³ The NAVFAC clause was added to the contract through Modification No. P00001 (R4, tab 20 at 15 of 15).

a. Problems encountered by the Contractor shall be first referred to the Government CSR. The CSR has the authority to see that the work is completed within the requirements of the plans and specifications, but no authority for change orders affecting time, price, methods, or procedures so long as safe practices are observed. The Contractor is advised to accept no instructions or directions from anyone other than the Contracting Officer, Contract Specialist or FSCM.

The meeting minutes also provided that work would commence on the “Custodial Annex” on 8 February 2002 and that the Navy would provide updated inventories for all annexes prior to the “contract start date.” The meeting minutes concluded with the following statement:

IT IS UNDERSTOOD THAT THIS IS NOT THE CONTRACT AND THAT ONLY THE TERMS OF THE CONTRACT ARE BINDING. THIS IS A GENERAL STATEMENT OF THE TOPICS DISCUSSED TO ENSURE A MUTUAL UNDERSTANDING BETWEEN THE GOVERNMENT AND THE CONTRACTOR.

Listed among the attendees at the meeting were Mr. T.J. Coulter, COSTAR’s contract manager, as well as Ms. Bouma. (App. 2nd supp. R4, tab 4 at 1, 3, 5, 6, 7 of 7)

20. On 9 January 2002, Mr. Coulter provided to the CO, Ms. Lacey, COSTAR’s unit cost proposal for the contract’s base period to “ADD/DELETE” services. For the custodial services portion of the contract, Mr. Coulter, after consultation with CHBM, provided a unit price per square foot for each basic service classification. This pricing arrangement allowed calculation of building square footage changes, including addition or deletion of buildings not included in the contract. (Supp. R4, tab 165 at 13, 16-17, tab 166, exs. 2, 5)

21. Shortly before commencement of contractual performance, on 17 January 2002, Mr. Coulter sought acknowledgement from COSTAR’s corporate members that they had read proposed Modification No. P00001, a conformed version of the contract (supp. R4, tab 166, ex. 3). The members had no objection; and, accordingly, the modification was bilaterally executed with an effective date of 1 February 2002 (R4, tab 20).

22. Work commenced under the contract; and in late March 2003, Ms. Bouma contacted Mr. Coulter regarding purported population increases on base and a resulting increase in supplies and services that CHBM was allegedly having to provide in order to

fulfill its contractual responsibilities (supp. R4, tab 165 at 19-20). In fact, Ms. Bouma stated that she received literally “[h]undreds of complaints” from Navy personnel relating to inadequate service on CHBM’s part (tr. 53-54). Unfortunately for CHBM, the record does not contain “[h]undreds of complaints,” and the support for these allegations is largely anecdotal.

23. About this time period, Ms. Bouma came to Mr. Coulter’s office “with some information related to essentially population increases on base and indicated that she was going to submit a request for equitable adjustment based on these population increases, amongst other things, and asked if we would sit down and spend some time with her to review the data.” Mr. Coulter and his assistant, Mr. Gordon Henry, complied with Ms. Bouma’s request. Subsequently, Mr. Coulter instructed Mr. Henry “to go ahead and review the data that was provided, and to determine whether it justified an REA [request for equitable adjustment] or not.” (Supp. R4, tab 165 at 20)

24. On 10 April 2003, Mr. Henry forwarded an e-mail to Mr. Coulter in which “he in summary told me [Mr. Coulter] that he did not believe that the data provided justified an REA, and that we...should not proceed” (supp. R4, tab 165 at 20). Mr. Coulter concurred (supp. R4, tab 166, ex. 6).

25. The issue arose again during the Summer of 2003. On 29 July, Mr. Mark Armendaris, CHBM’s accountant (supp. R4, tab 165 at 16), forwarded an e-mail to Mr. Coulter in which he wrote, in part:

I am in the process of evaluating the costs of the CHBM contract. It has come to my attention that populations may be fluctuating on the base at the Patuxent job. Can you help in locating any data reflecting base populations starting with July, 2000? I am interested in seeing periodic total population figures at the Patuxent site. I presume they are maintained by those who issue the passes for access to the base.

Mr. Coulter responded in an e-mail of 31 July 2003. He stated:

I thought we put this to bed back in April. Sarian [Ms. Bouma] came down for a meeting. She had copies of charts showing population data obtained from a website (I am note [sic] sure which one and the documents are not stamped). The NAVAIR Wingspan website which we use to log onto Pax River has been recently updated and is still under construction but as of today it does not contain this

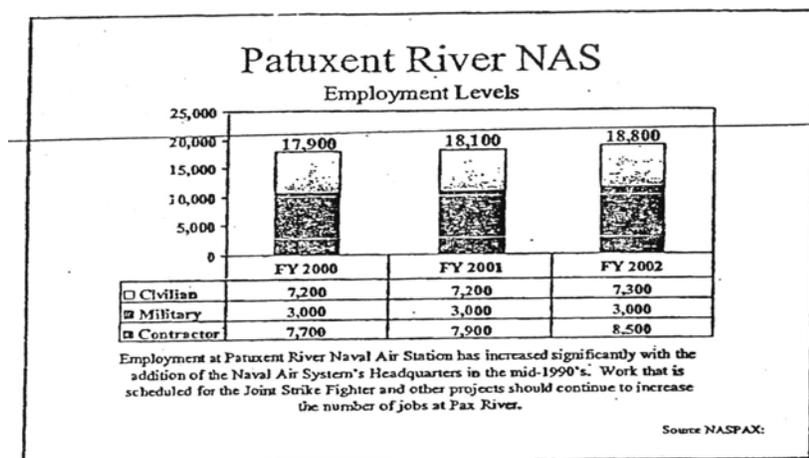
type of historical data. Please check with Sarian to find out what website she downloaded the information from.

As I indicated back in April, the likelihood of reimbursement on a request for equitable adjustment using population increase as a basis is slim to none. I ran this past contracting, it will not hold water. This is a performance based contract with a built in mechanism to reimburse CHBM for custodial service changes based on square footage under the add/delete provision.

If we must move forward, I will provide whatever help I can.

(Supp. R4, tab 166, ex. 8)

26. The chart referred to by Mr. Coulter was downloaded by Ms. Bouma from a website maintained by the Maryland Economic Development Commission, specifically information provided by St. Mary's County, Maryland, where the Naval Air Station was located. Dated 3 September 2001, the chart depicted actual and projected employment levels at the base as follows:



(Supp. R4, tab 166, ex. 9 at 10; tr. 143-46)

27. The record is devoid of supporting documentation for this chart, but several conclusions can be gleaned from it. First, the chart indicates that employment had increased significantly in the mid-1990's with the transfer of the Naval Air Systems Command to the base. This was, of course, many years before the events at issue in these appeals had transpired. Moreover, the figures projected only a moderate increase in employment levels from Fiscal Year (FY) 2000 to 2002. Civilian employment in that two-year period was projected to increase by only 100 employees; there was no projected increase whatsoever in military personnel; and contractor employees were projected to

increase by only 800 persons. (Supp. R4, tab 166, ex. 8 at 10) And, again, these were only projections.

28. Much more pertinent to the issue of the number of persons employed at the base around the time of COSTAR's contract are the base loading reports produced by the Navy (supp. R4, tabs 154-57). The report for FY 2001 states that a "GRAND TOTAL" of 20,532 personnel were employed at the base during that year (supp. R4, tab 154 at 3). The report for FY 2002 states a "GRAND TOTAL" of 21,147 persons (supp. R4, tab 155 at 3); whereas, the report for FY 2003 states a "GRAND TOTAL" of 21,125 persons (supp. R4, tab 156 at 3). The reports for January 2004 through December 2006 with one exception, state totals of employed personnel ranging from 20,105 to 21,395 (supp. R4, tab 157).⁴

29. The population figures reflected during this period in the loading reports are corroborated by the sworn deposition testimony of CAPT Patrick J. Hovatter, U.S.N. (Ret.), who was the base's commanding officer from July 2000 to August 2002 (supp. R4, tab 161 at 5). CAPT Hovatter testified that an influx of personnel arrived at the base between 1995 and 1997 when he was the executive officer. For example, "NAVAIR [Naval Air Systems Command] came down here in '97, Trenton and Warminster, Pennsylvania and parts of Minneapolis came down here to the Navy Avionics Centers. They closed and they moved here to Pax River '95, '96, '97." Regarding personnel increases, CAPT Hovatter concluded that "after that everything went pretty much stable by the late nineties." CAPT Hovatter also testified that, when he was commanding officer, the base population had stabilized at an upward range of 20,000. (Supp. R4, tab 161 at 20-21) In addition, CAPT Hovatter testified that the events of 11 September 2001 did not result in an influx of new personnel to the base. He stated: "[T]he numbers of people on the base pretty much stayed constant, and if anything maybe had a little dip in there because of 911" (*id.* at 25).

30. On 31 December 2003, COSTAR filed a request for equitable adjustment (REA) on CHBM's behalf in a total amount of \$72,200.14. It alleged that the Navy had constructively changed the contract by increasing the number of employees working in the buildings which it maintained, by requiring paper materials such as paper towels and

⁴ That exception was January 2004, which stated 23,778 personnel. That total was revised in the following month to state a total of 20,220. The report explained: "The February report shows a decrease of approximately 2,000 people. This change is primarily due to the way people are counted and a greater effort to eliminate counting the same person twice. It is also due to a process change whereby food vendors, sales/delivery, and construction workers are not counted." Of course, none of these personnel would have been serviced by CHBM under the contract.

toilet paper in amounts exceeding those which it had inventoried during its walk through of 18/19 July 2000, and by increasing the numbers of open hours for official use at the facilities which it serviced. (Supp. R4, tab 166, ex. 9 at 4-6) To substantiate its contentions regarding population increases, COSTAR simply enclosed the projections dated 30 September 2001 which we have previously analyzed (finding 26). To support its allegations regarding excessive use of paper materials, COSTAR contrasted the detailed results of its walk-through with purported actual results inventoried on 7 February 2002 (supp. R4, tab 166, ex. 9 at 5). Based upon Ms. Bouma's testimony at the hearing, both on direct and cross-examination, these allegations fall short. Specifically, Ms. Bouma testified on direct that the "2000 walk through...was very brief" (tr. 39). Moreover, on cross, Ms. Bouma agreed that she "didn't review all the buildings that were covered under this contract during the walk through." Further, Ms. Bouma agreed that, she "only reviewed a portion of the building when [she] looked at a particular building." (Tr. 95- 96) Finally, to bolster its contentions that the opening hours for the buildings which it serviced had expanded during the life of the contract, COSTAR provided no support. It simply stated: "The contracting officer is in a much better position than CHBM to identify, precisely, the number of hours that each hangar and building are open" (supp. R4, tab 166, ex. 9 at 5).

31. On 30 March 2004, Mr. John R. Denton, contract specialist, forwarded the following response to COSTAR's REA:

This office has reviewed your Request for Equitable Adjustment of 31 December 2003 wherein you requested compensation for escalating costs. You state, since award Capitol Hill Building Maintenance, Inc. (CHBM) has performed work under Annex 09 satisfactorily, however, the company has been burdened with ongoing, escalating cost increases associated with performance as a result of:

- a. Increase in quantity of paper products;
- b. Increase in tenant population
- c. Increase in facility usage (beyond normal working hours and five (5) day work week)

You claim that population levels in certain facilities have increased and that service levels are not adequate to support the current population. You also state that recent evidence suggests that CHBM was directed by other than the Contracting Officer to perform services not covered under the terms of the contract.

Prior to proposal submission all prospective bidders were provided detailed information in the solicitation for each facility to prepare a price proposal. We are not aware of any change to the facilities under the contract that might result in an overall increased use of paper products.

The data provided to support your claim of increased population levels demonstrates that employment levels have increased at Patuxent River Naval Air Station since the mid 1990's. It makes no references specifically to the tenant population in facilities covered under the contract.

Your claim that many of the hangars and buildings are in use for more than 8 hours per day and 5 days a week is admittedly, on your part an opinion and is not based on any factual data.

With respect to performing services not covered under the terms of the contract, please be aware that the contract is clear as to which person(s) have authority to implement changes to the contract. To date, you have failed to produce a modification that substantiates any increases directed or agreed to by the Contracting Officer.

The information provided does not warrant an equitable adjustment to the contract. For the reasons stated, this office will conduct no further review of your Request for Equitable Adjustment of 31 December 2003.

(Supp. R4, tab 166, ex. 9 at 14-15)⁵

32. On 5 March 2004, COSTAR forwarded its first supplemental REA in a total amount of \$494,912.02 for increased costs allegedly incurred during the contract's base and first option years. In addition to relating the allegations contained in its original REA, COSTAR made the following statement:

In fact, by not issuing a Service Call or Contract Modification yet directing technicians to perform a service more frequently than was originally ordered, the Government has de facto imposed a higher service standard resulting in a material

⁵ The custodial services provided by CHBM covered only ninety percent of the base's buildings (tr. 149).

change to the Scope of Work. If we do not perform at the higher level, customers perceive a poor quality of service, complaints increase and performance ratings are negatively impacted even though the level of service originally requested is being provided in accordance with the terms and conditions of the Contract. Further complicating matters, there is recent evidence to suggest that certain customer personnel have directed custodial technicians to perform services not covered under *any* service level and that technicians have complied. In accordance with the terms and conditions of the Contract, only a duly authorized Ordering Officer can bind the Government to a commitment. This then has become an Unauthorized Commitment on the part of the originator for which we are not properly compensated.

(R4, tab 131 at 3) COSTAR thus admitted that a portion of the extra work which it purportedly performed had not been authorized by the CO.

33. Of equal significance, COSTAR enclosed as an attachment to its first supplemental REA a letter from Mr. Mark Armendaris, CHBM's accountant, in which he alleged for the first time that the Navy had improperly calculated amounts in contractual modifications for the first option year (R4, tab 131 at 11-12). On 4 November 2004, Mr. Armendaris forwarded to Mr. Coulter, COSTAR's project manager, an explanation of his analysis regarding improperly calculated modification amounts, which at this point, also included option year 2 of the contract. Attached to Mr. Armendaris' verbal summary were two and one-half pages of spreadsheets (supp. R4, tab 166, ex. 13). In response to Mr. Armendaris's letter, Mr. Coulter instructed his "operations manager to review every modification up to the time and including month...October, and re-address each of the calculations that was in each one of the modifications, as it had to do with the addition or deletion of square footage under annex 9" (*see* finding 5). COSTAR's operations manager performed the analysis in accordance with Mr. Coulter's instructions. The result was "that every mod and every calculation was accurate, and that the annualized amounts had been properly rolled forward from year to year." (Supp. R4, tab 165 at 33-34)

34. On 25 June 2004, COSTAR forwarded a properly certified claim to the CO in a total amount of \$494,912.02, based upon its earlier REAs (R4, tab 133).

35. On 28 July 2004, COSTAR and CHBM entered into a liquidating agreement, signed by Mr. Coulter and Ms. Bouma, respectively, through which COSTAR agreed to sponsor CHBM's claims against the Navy (supp. R4, tab 146).

36. On 5 August 2004, Ms. Karen Williams, the CO, forwarded the following letter to COSTAR:

A letter was forwarded to your company from Mr. John Denton on 30 March 2004, addressing your Request for Equitable Adjustment (REA), dated 31 December 2003 in the amount of \$72,200.14. Another Supplemental Request for Equitable Adjustment dated 5 March 2004 was received by our office for a total compensation of \$494, 912.02, which also included the \$72,200.14.

This letter is to confirm that the determination forwarded in Mr. Denton's letter will also include the Supplemental Request for Equitable Adjustment dated 5 March 2004. Documentation forwarded in the supplemental request is not sufficient; therefore, for reasons stated in the previous letter, there will be no further review of either REA.

(R4, tab 134)

37. On 17 November 2004, COSTAR forwarded to the CO a letter stating additional costs and a request for a final decision. It stated, in part:

On a related issue, CHBM (through COSTAR III) is entitled to an equitable adjustment of \$133,055.63. The rates for compensation for various modifications have not been appropriately calculated by the Navy. You may recall CHBM contended it was entitled to an additional \$20,480.96 for a similar reason, by letter dated June 22, 2004 (Enclosure 1 to the letter dated June 25, 2004). As shown by the attached memorandum and spreadsheet (see Enclosure 2), CHBM is entitled to \$133,055.63, and [sic] reflected in this updated, certified claim letter of November 16, 2004. Properly executed Contract Disputes Act Certifications for both COSTAR III and CHBM can be found at Enclosure 3.

Under the circumstances, I request, again, a formal decision of the Contracting Officer which expressly indicates it is the "Final Decision." On a related matter, please specifically express the final decision of the Contracting Officer on the claims for: a) \$471,344.78 separately for the 4 items summarized on p.1 of CHBM's letter of February 25, 2004;

(b) \$23,567.24 for COSTAR III administrative costs per CHBM’s certification of June 25, 2004; (c) any reasonable costs for additional supplies, and additional manpower incurred through the present; and (d) \$133,055.63 adjustment for erroneous calculation of financial impact associated with modifications 4 through 85, per spreadsheet and memorandum.

(R4, tab 135)

38. On 5 April 2005, COSTAR filed a certified claim in a total amount of \$1,722,940.13. It broke its demand down into four claims as follows:

These four claims request payment for uncompensated contract performance during the period February 7, 2002 through February 6, 2005 in the amount of \$1,722,940.13, including compensation for 39 contract modifications for which the government has failed to make full payment (Claim # 1 - \$135,540.16); supplies and labor required to service significantly increased building populations and operating hours (Claim # 2 - \$405,523.96); increased supplies and labor for SP Services on restrooms twice-a-day (Claim # 3 - \$670,181.49); and custodial services for barracks (Claim # 4 - \$511,694.52).

Claim # 1 – Contract Modifications	\$135,540.16
Claim # 2 – Population Increase	\$405,523.96
Claim # 3 – Twice-a-day SP Services	\$670,181.49
Claim # 4 – Barracks	\$511,694.52
Total	\$1,722,940.13

Regarding its first claim, COSTAR alleged that when “a modification was made, the government increased the contract price during the year of modification, but failed to increase the contract price to reflect the modification in subsequent option years.” COSTAR concluded: “[T]he government has systematically failed to pay in option years 1 and 2 for 19 modifications made during the base year and has systematically failed to pay in option year 2 for 10 modifications made during option year 1. The total underpayments owed by the government for modifications performed by CHBM amount \$135,540.16.” (R4, tab 136 at 1-2) It will be recalled that Mr. Coulter, COSTAR’s project manager, attempted to substantiate an earlier version of this claim, but was unable to do so. In fact, his operations manager confirmed that the government’s calculations were correct (finding 33). Similarly, upon receipt of COSTAR’s four-part claim, the CO assigned Ms. Iris Jenkins, a NAVFAC procurement analyst, to evaluate claim 1. She

performed a painstaking analysis of the claim which she summarized in her testimony as follows:

A I actually went and got the modifications. I actually went and asked if there was any documentation. Because when I got the mods, I would look and there would be a lump sum figure in there. Well, that didn't explain to me what was in that number. So I asked if there was anything that the activity could provide to me that would show me what went into that number. And they – I did get documentation from them. And then I actually reviewed that documentation. I also took a site visit to the activity, met with the contracting officer and we actually went through every modification to see what it was based on and that's how I came to the conclusion that there was no merit to that portion of the claim.

(Tr. 181-84) On cross-examination, COSTAR's attorney did not even challenge Ms. Jenkins' analysis (tr. 189-90). The Board credits her testimony concerning claim 1.

39. Through claim 2, COSTAR contended that its labor and supply costs for the contract's base year and first two option years exceed its "firm fixed price bid by \$405,523.96." COSTAR stated:

This astronomical increase in supply and labor costs can only be explained by a dramatic population increase following the events of September 11, 2001 and the Afganistan [sic] and Iraq deployments. Indeed, CHBM's final firm fixed price proposal was submitted on August 22, 2001—more than two week before September 11, 2001. Thus, the changes to base security regulations and personnel needs in response to the September 11, 2001 terrorist attacks impacted the Contract price for CHBM's services, especially since the result of those heightened security conditions increased the number of personnel on base and the number of hours they spent using the base facilities—the very facilities that CHBM used to price its proposal. Because the government was either mistaken about the likely base population during the contract term or withheld information regarding a likely population increase, CHBM is entitled to recover \$405,523.96 in increased costs.

Based upon its factual premise of dramatic population increases on the base, COSTAR concluded, as a legal matter, that the Navy had “breached its duty to disclose Superior Knowledge,” or, in the alternative, that it was entitled to reformation based upon mutual mistake. (R4, tab 136 at 2-3)

40. Through claim 3, COSTAR alleged, in part, as follows:

Twenty-four buildings were included in the Contract as requiring only once a day cleaning and restocking. This service level was lower than the previous contract that provided for twice a day cleaning and restocking of these same bathrooms. When performance started under the Contract, building tenants were not satisfied with the new, less frequent, service level. When tenants complained about the less frequent service level, the government warned that CHBM’s award fee was in jeopardy as a result of the complaints. At risk of losing the award fee, CHBM began performing twice a day services in these twenty-four buildings.

COSTAR concluded that it was entitled to \$670,181.49 for the extra work which it purportedly performed. COSTAR did not explain the pertinence of the cleaning levels of the prior contract; nor did it document that any of the “building tenants” with whom it dealt had any contractual authority to bind the government. (R4, tab 136 at 5-6)

41. As for claim 4, COSTAR stated:

On April 26, 2002, pursuant to Modification P00014, the government added custodial services at service level B3 for Buildings 1451, 1452, 1453, 1454, and 1455. However, unlike the other buildings (all office buildings) serviced under the Contract, these 5 buildings are living quarters that demanded a higher level of service to maintain. In partial recognition that the living quarters require a higher level of service, on June 3, 2002, the Government upgraded the service classification for these buildings from B3 to B5. Modification P00019. However, even the B5 service classification is a janitorial service classification for *office buildings*, not living quarters. The only service classification in Annex 09 of the Contract that could be utilized by the government to clean living quarters is SP services. The

hourly rate for SP services under the contract is \$22.99 per hour.

Modification[s] P00014 and P00019 modified the contract to require CHBM to clean 4 [sic] buildings containing living quarters. The government, however, in executing these modifications chose to compensate CHBM at a janitorial service rate for cleaning office buildings instead of the only contract rate that could be used to purchase other than office building cleaning, the SP rate of \$22.99 per hour. As a result, CHBM is entitled to an equitable adjustment as detailed by Exhibit 5 for the difference between cleaning services at the SP level and cleaning services at the B5 service level.

(R4, tab 136 at 6-7) COSTAR failed to mention that Modification Nos. P00014 and P00019 were executed bilaterally (R4, tabs, 32, 37).

42. Unlike earlier claims filed by COSTAR, its claim of 5 April 2005 was certified by Ms. Bouma of CHBM as Principal Member, COSTAR III, LLC, not by Mr. Coulter. He stated: “To the best of my recollection, I refused to sign a certification on behalf of COSTAR for this claim because it had gone so far afield, in my opinion, from anything that was justified, that I refused to sign the claim.” (Supp. R4, tab 165 at 36)

43. On 26 April 2005, Mr. John R. Denton, in his capacity as CO, responded to COSTAR’s claim.⁶ Regarding COSTAR’s claim 1, “Full Payment of Contract Modifications,” the CO stated the Navy’s position thusly:

Contrary to what the contractor states, the Government has not failed to compensate Costar III equitably for additional services provided under Annex 09, Custodial. At the time of award of each option year all modifications issued during the previous period carried over to that option. For example, if a janitorial service for a new facility was added for six months in the base year, the pre priced square foot cost was agreed to and simply multiplied by the total square footage of that facility for a total cost per month. When the subsequent option was exercised that facility was included in the option

⁶ Mr. Denton did not denominate his letter as a “final decision” (app. 2nd supp. R4, tab 24).

price, reflecting a full twelve months of service. The contractor agreed to these terms as fair and equitable, signed each modification and to date has accepted each option year

modification without reservation. The contractor's claim is without merit and should be denied.

(App. 2nd supp. R4, tab 24 at 1)

With respect to claim 2, "Population Increase," Mr. Denton responded:

The contractor's arguments are unsubstantiated. The contractor has failed to provide any evidence that shows increases in tenant population in those facilities covered under the contract. By letter of 30 March 04, and supplemental letter of 5 August 04, the request for equitable adjustment filed by CHBM was denied for the following reasons:

- a.) CHBM, along with all other prospective bidders were provided adequate information in the solicitation for each facility to provide a price proposal. This office was not aware of any change to the facilities that might have resulted in an overall increased use of paper products.
- b.) The data provided to support CHBM's claim of increases in tenant population levels makes no reference to any facilities covered under the contract. The information simply shows that employment levels have increased at the Patuxent River Naval Air Station, since the mid-1990's. Please note, one of the largest commands on the station, Naval Air Systems Command, has a separate stand alone janitorial contract with another contractor. That contract also provides janitorial services at Webster Field and the Solomon's Annex.
- c.) Claims by CHBM that many of the hangars and buildings are in use for more than eight (8) hours per day, five days a week, was admittedly an opinion and not based on any factual data.

The contractor has failed to provide proof of any increases in cost to perform work under the contract. The information provided does not substantiate claims of the increased tenant population, increased use of paper products, and increased

usage of any facility covered under the contract. With respect to suggestions that employees of CHBM were directed to perform work not within the scope of the contract, this office knows of no such occurrences. The contract is clear as to who from the Government is authorized to formally direct the contractor to makes [sic] changes in work.

With respect to the Government's failure to disclose Superior Knowledge, this office finds no basis for the contractor's position. The contractor was provided ample opportunities to revise their proposal to and including submission of a best and final offer, with award in November 2001. Paper product dispensers were added over the duration of the contract; however, they were installed in facilities where they previously did not exist. This did not put any additional burden on CHBM to provide any additional paper products; it provided a dispenser in lieu of placing products on bathroom countertops.

The contractor's request for reformation of the contract is baseless. We find no entitlement is warranted, claims should be denied entirely.

(App. 2nd supp. R4, tab 24 at 2-3)

As for claim 3, "Twice-a-day SP Services at Restrooms," the CO stated this position:

The levels of service between a past contract and the current contract is [sic] irrelevant. The 24 buildings outlined in the Costar III claim of 5 April 2005 by contract requires [sic] once a day Services. The contractor, if in fact they are providing twice a day services, has done so without direction from the contracting officer. To date they have failed to provide the emails mentioned that suggest otherwise. Claim in its entirety should be denied.

(App. 2nd supp. R4, tab 24 at 3-4)

Finally, with respect to Claim 4, “Custodial Services Performed in Living Quarters,” Mr. Denton responded:

Again, the contractor has exceeded what was required by contract modification without any further written direction of the contracting officer. The contractor does not dictate the janitorial requirements of the contract. The modifications was [sic] negotiated and executed by both parties. They made an error in judgment to exceed the requirements of the modification. The contractor is entitled to no further adjustment, claim should be denied in its entirety.

(App. 2nd supp. R4, tab 24 at 4)

44. These appeals followed. Claims 1 through 4 were docketed as ASBCA Nos. 55296 through 55299, respectively.

ASBCA No. 55296

DECISION

This appeal centers on COSTAR’s allegation regarding the Navy’s calculations of contractual modifications. For example in paragraph 11 of its complaint, COSTAR states: “When a modification was made, the Government increased the contract price during the year of modification, but failed to increase the contract price to reflect the modification in subsequent option years.” When COSTAR first raised this issue, COSTAR’s project manager instructed his operations manager to examine the relevant documents to determine whether the underlying calculations were correct. The result of this analysis was “that every mod and every calculation was accurate, and that the annualized amounts had been properly rolled forward from year to year” (finding 33). Similarly, after COSTAR forwarded its final claim package on 5 April 2005, the CO tasked Ms. Iris Jenkins, a NAVFAC procurement analyst, with the responsibility of evaluating this claim. After a painstaking analysis, Ms. Jenkins concluded that “there was no merit to that portion of the claim.” Her testimony in this appeal went unchallenged on cross-examination. (Finding 38) Based upon the record evidence, the Board concludes that COSTAR’s claim must fail.

ASBCA No. 55297

DECISION

In paragraph 15 of its complaint, COSTAR alleges that the terrorist attacks of 11 September 2001 led to a dramatically increased population at the base which itself caused COSTAR's supply and labor costs to increase. In paragraphs 23 to 25 of the complaint, COSTAR reasons from this factual premise that the Navy had superior knowledge of this alleged population increase and that the contract should be reformed as a result of a mutual mistake by the parties regarding the base's population. Unfortunately for COSTAR, there is no record evidence demonstrating that the base's population dramatically increased after the events of 11 September 2001. Neither contemporaneous employment projections nor base loading reports for the period at issue support such a conclusion (findings 26-28). More to the point, the base's commanding officer at the time, CAPT Hovatter, testified that "the numbers of people on the base pretty much stayed constant, and if anything maybe had a little dip in there because of 911" (finding 29). Thus, the gravamen of COSTAR's claim is without merit. As a result, COSTAR's legal conclusions regarding superior knowledge and mutual mistake must also fail.

ASBCA No. 55298

DECISION

In paragraph 17 of its complaint, COSTAR stated:

Twenty-four buildings were included in the Contract as requiring only once a day cleaning and restocking. This service level was lower than the previous contract that provided for twice a day cleaning and restocking of these same bathrooms. When performance started under the Contract, building tenants were not satisfied with the new, less frequent, service level. When tenants complained about the less frequent service level, the government warned that CHBM's award fee was in jeopardy as a result of the complaints. At risk of losing its award fee, CHBM began performing twice-a-day services in these twenty-four buildings.

Initially, we simply point out, as COSTAR admits, that the contract clearly set forth the service levels for these buildings (finding 11). Moreover, COSTAR refers to unidentified, complaining tenants as a cause for its unilaterally increasing the service at

the specified buildings. In so doing, it ignores a host of contractual provisions, as well as statements made at the pre-performance conference, which required it to take directions only from the CO or her authorized representatives (findings 3, 12, 14, 15, 16, 19). In fact, the meeting minutes of the pre-performance conference advised COSTAR that the CO was “solely responsible for authorizing changes in the contract plans and specifications” (finding 19). Nowhere in its claim does COSTAR refer to any direction from the CO as a basis for increasing service at the designated restrooms. Therefore, its claim must fail.

ASBCA No. 55299

DECISION

In paragraph 20 of its complaint, COSTAR stated: “On April 26, 2002, pursuant to Modification P000014 [sic], the Government added custodial services at service level B3 for five separate buildings. However, unlike the other buildings (all office buildings) serviced by CHBM under the Contract, these 5 buildings were living quarters that demanded a higher level of service to maintain.” COSTAR also asserted: “On June 3, 2002, in partial recognition that the living quarters require a higher level of service, the Government upgraded the service classification for these buildings.” But COSTAR also contends that this “higher level of service” was inadequate, that it allegedly provided an even higher level of service than was required under the twice modified contract, and that it is entitled to recover \$511,694.52. (Compl. ¶ 21)

There are several problems with this claim. First, COSTAR fails to mention that Modification No. P00014, which added these buildings to the contract, and Modification No. P00019, which upgraded the service for these buildings, were both bilaterally executed and did not result from unilateral actions on the CO’s part. Hence, in both instances, COSTAR agreed to provide the specified level of service. Moreover, when it contends that it was required to provide an even higher level of service than those set forth in the contractual modifications, COSTAR does not point to any direction from either the CO or her authorized representatives. (See findings 3, 12, 14, 15, 16, 19) Therefore, any actions which it undertook in this regard were those of a volunteer and are not compensable.

CONCLUSION

The appeals in ASBCA Nos. 55296, 55297, 55298, and 55299 are denied.

Dated: 31 December 2009

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

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. 55296, 55297, 55298, 55299, Appeals of COSTAR III, LLC, rendered in conformance with the Board's Charter.

Dated:

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