

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
EJB Facilities Services) ASBCA No. 57547
)
Under Contract No. N44255-05-D-5103)

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OPINION BY ADMINISTRATIVE JUDGE TUNKS

This appeal arises from unilateral Modification No. A00049 deleting a portion of the work required by a base operating and support contract and reducing the contract price by \$1,375,833.80. The Department of the Navy (Navy) based its deduction on EJB Facilities Services' (EJB) original proposal. EJB contends the Navy is entitled to deduct its estimated costs to perform the deleted work based on actual historical costs of performance. Both entitlement and quantum are before us.

FINDINGS OF FACT

1. On 24 November 2004, the Navy solicited proposals for a combination firm fixed-price (FFP)/indefinite-quantity contract (IQ) to provide base operating and support services at various facilities in the western Puget Sound area of Washington State (app. supp. R4, tab 1 at EJB1, -41).¹

2. The solicitation incorporated FAR 52.233-1, DISPUTES (JUL 2002)–ALTERNATE I (DEC 1991); FAR 52.243-1, CHANGES–FIXED-PRICE (AUG 1987)–ALTERNATE II (APR 1984); and DFARS 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) by reference (R4, tab 1 at GOV28, -29). The solicitation did not include FAR 52.243-6, CHANGE ORDER ACCOUNTING, a non-mandatory clause, which authorizes the contracting officer (CO) to require the contractor to maintain separate accounts, by

¹ We have dropped all leading zeros from the “Bates” numbers in the record.

job order or other suitable accounting procedure, of all incurred, segregable, direct costs (less allocable credits) of work, both changed and unchanged, allocable to a change.

3. NAVFAC 5252.215-9300, CONTENT OF PROPOSALS (MAR 2002), which was included in the solicitation, provided, in part, as follows:

(1) Offers are solicited on an “all or none” basis....
Failure to submit offers for all line items listed shall be cause for rejection of the offer.

(App. supp. R4, tab 1 at EJB87-88)

4. The Performance Work Statement (PWS) was divided into 20 “Annexes”:

Annex 0100000	General Information
Annex 0200000	Management and Administration
Annex 0300000	Visual Information Services
Annex 1000000	Supply
Annex 1401000	Family Housing
Annex 1402000	Bachelor Housing
Annex 1501000	Facility Management
Annex 1502000	Facility Investment
Annex 1503020	Pest Control Services
Annex 1503030	Refuse Collection
Annex 1503060	Street Sweeping and Snow Removal
Annex 1602000	Electrical
Annex 1603000	Natural Gas
Annex 1604000	Wastewater
Annex 1605000	Steam
Annex 1606000	Water
Annex 1607000	Compressed Air
Annex 1700000	Base Support Vehicles and Equipment
Annex 1704000	Crane Services
Annex 1800000	Environmental Services

(App. supp. R4, tab 11 at EJB224-26)

5. Annexes 1 and 2 were not separately priced. The Exhibit Line Item Numbers (ELINs) in Annexes 3 through 18 were separately priced in dollars. (R4, tab 2)

6. Specification item 1.8 of Annex 1² (General Information) provided, in part, as follows:

Annex 1 will always contain information that is relevant to the entire scope of the contract. Annex 2 contains on-site project management and administration requirements that are relevant to the entire scope of the contract. Annexes [3-18] contain the technical...requirements.... Within each technical annex, the organization of information and requirements are ...standardized. Specification item 1 will always contain General Information. Specification item 2 will always contain the management and administrative requirements. Specification item 3 will always contain the [FFP] requirements. Specification item 4 will always contain the [IDIQ] requirements. All costs associated with Annexes [1] and [2] and Specification items 1 and 2 must be priced and distributed within Specification Item 3 of Annexes [3-18].

(R4, tab 3 at GOV115)

7. The technical annexes (Annexes 3-18) were divided into ELINs and sub-ELINs corresponding to FFP work or IQ work under a specific annex (R4, tab 2 at GOV46-48).

8. Annex 10 (Supply), which is the subject of this appeal, involved the receipt, storage, and delivery of Navy-owned property on behalf of various Navy components. The work performed under Annex 10 was funded by the Fleet Industrial Supply Center (FISC), a Navy component, and was known as "FISC supply effort" (supp. R4, tab 57 at GOV5753). EJB Facilities Services (EJB) was not required to purchase any of the property handled under Annex 10 (R4, tab 3 at GOV161-78). In 2010,³ Annex 10 had four sub-ELINs: 010AA Supply Management; 010AB Warehousing; 010AD Property Management; and 010AE Subsistence Provisioning (app. supp. R4, tab 15 at EJB952).

9. The ELINs contain costs directly associated with the work in a particular annex as well as a share of Annex 2 onsite overhead management costs. Annex 2 (Management and Administration) defines onsite overhead management costs as those direct costs that overlap multiple annexes. EJB's onsite overhead management costs consisted of the following:

Program Manager; quality control personnel; environmental safety and health personnel with overarching support of

² We have shortened the annex numbers for ease of reading.

³ Sub-ELIN 010AC (Postal Operations) was deleted by bilateral Modification No. A00035 effective 2 November 2009 (R4, tab 7 at GOV1477-80).

multiple annexes; Business Management Office (Business Manager; Contracting Personnel; Human Resources Manager; Information Technology Manager; two accounting clerks; property administrator); Facility Support Management (Facility Support Manager; Construction Manager; three Planners/Estimators/Schedulers; service desk personnel; supply technicians; warehouse specialists; automotive personnel supporting multiple annexes; etc.) and associated supplies; materials; equipment; vehicles to support Annex [2] personnel.

The Annex [2] Management and Administrative Costs are distributed throughout the annexes managed by EJB personnel (all annexes except Annex [4], Security....[])

(Supp. R4, tab 47 at GOV5505)

10. Annex 2 also included non-FISC supply requirements (R4, tab 3 at GOV128). Specification item 2.5 of that annex, "Contractor-Furnished Items," stated that "[e]xcept for items identified as Government Furnished, the Contractor shall provide all equipment, materials, parts, supplies, components, and facilities to perform the requirements of this contract" (*id.*).

11. The Navy awarded Contract No. N44255-05-D-5103 (West Sound Base Operations Support Contract (WSBOSC)) to EJB on 1 August 2005 (R4, tab 1 at GOV1). The contract is a combination FFP/IQ contract. The minimum guarantee of work is the FFP portion of the contract. The maximum dollar value is the total dollar value of the fixed-price and indefinite-quantity items. (App. supp. R4, tab 1 at EJB41) The performance period consisted of a base year and seven option years.

12. The contract did not require EJB to segregate FISC and non-FISC effort (supp. R4, tab 57 at GOV5748; tr. 1/40). According to the CO's final decision, Annex 10 was approximately one percent of the FFP portion of the contract or \$41,000,000 per year (R4, tab 35 at GOV2432).

13. EJB included \$11.61, \$11.82, and \$12.04 per hour for Annex 2 (Management and Administration) costs for Fiscal Years (FYs) 11-13 in its original proposal (compl. and amended answer ¶ 37; supp. R4, tab 47 at GOV5506).

14. The EJB Supply Support crew supported overall performance of the contract, including the work required by Annex 10 (app. mot., Haunton decl. ¶ 1).

15. On 22 February 2006, EJB and the Navy entered into the "[WSBOSC] Modification Pricing Agreement" (Pricing Agreement) establishing the rates that would

be used to price all future additive or deductive modifications. The parties agreed to the following rates: general and administrative (G&A)--1%; fee (profit)--5%; business and occupation (B&O) tax--1.5%; and general liability insurance--.139%. The rates were the same as those proposed by EJB in its original proposal for the contract. DCAA reviewed the proposed rates and found that they were in accordance with general accounting practices. (App. supp. R4, tab 15 at EJB1000-01, tab 50)

16. On 13 March 2008, the Defense Contract Audit Agency (DCAA) issued Audit Report No. 4261-2008H26000001, "Report on Audit of Accounting System and Utility Outage Rate." With respect to EJB's accounting system, DCAA stated as follows:

In our opinion, EJB's accounting system is adequate for accumulating costs under Government Contract No. N44255-05-D-5103....

....

[However, we] did not perform a comprehensive examination of EJB's overall accounting system and its related internal control. Accordingly, we express no opinion on EJB's system of internal control taken as a whole.

(Supp. R4, tab 40 at GOV5450-52)

Proposed Change (PC) No. 10-037

17. On 23 February 2010, FISC notified the Navy that it planned to "insource" ELINs AA, AD, and AE of Annex 10 and terminate funding effective 1 October 2010. On 1 March 2010, FISC advised that it would also terminate funding for ELIN AB. (R4, tabs 10-12)

18. On 30 March 2010, the Navy forwarded PC No. 10-037 to EJB, requesting a proposal to delete Annex 10 in its entirety for FYs 11-13 (R4, tab 12 at GOV1604). No work was performed under Annex 10 for FYs 11-13.

19. According to EJB, the Navy requested it to use the format in FAR 15.408, Table 15-2 B, Change Orders, Modifications, and Claims for its proposal. That table and its accompanying instruction provide, in part, as follows:

Cost elements	Estimated cost of all work deleted	Cost of deleted work already performed	Net cost to be deleted	Cost of work added	Net cost of change	Reference
(1)	(2)	(3)	(4)	(5)	(6)	(7)

....

(2) Include [in column 2] the current estimates of what the cost would have been to complete the deleted work not yet performed (not the original proposal estimates), and the cost of deleted work already performed.

(R4, tab 34 at GOV2145)

20. The Navy amended PC No. 10-037 four times (R4, tabs 16, 19, 20, 23).

21. During negotiations, the Navy advised EJB that it intended to “zero out” the Annex 10 ELINs and redistribute the Annex 2 costs associated with Annex 10 among the remaining annexes (app. supp. R4, tab 54 at NAV3294).

22. EJB submitted its third revised proposal on 13 July 2010. Based on its estimated cost to perform the work, EJB proposed savings of \$521,399.94 for FYs 11-13, an offset of \$181,943.01 (finding 8), and \$8,319.01 in relocation/colocation and provisioning transition costs that would be incurred in contract year 4 due to the deletion of Annex 10. (R4, tab 32 at GOV2029-30)

23. On 14 July 2010, Mr. Rodney J. Cole, the Navy’s Senior Performance Assessment Representative (SPAR), issued a “TECHNICAL ANALYSIS” in connection with EJB’s third revised proposal (supp. R4, tab 48). He did not testify. Using EJB’s original proposal, which was in dollars, Mr. Cole concluded that EJB’s original proposal was based on 13,522.86 hours (app. supp. R4, tab 15 at EJB952). The method used to derive hours from dollars is not explained. Mr. Cole recommended that the “Absolute Minimum” number of hours that should be considered for negotiation purposes was 6,261 hours. He agreed that EJB was entitled to \$8,319.01 in relocation/colocation and provisioning transition costs. He also stated that the Navy might receive an accepted funding document for those costs prior to 15 July 2010. (Supp. R4, tab 48 at GOV5513, -5515-16) He further indicated that FISC had no control over retained overhead, that FISC would not pay anything toward overhead for FYs 11-13, and that the Navy would “distribute EJB’s overhead amongst the remaining annexes of the WSBOSC” (*id.* at GOV5514). He also recommended that the hours derived from EJB’s original proposal be reduced by 3,674 hours to 9,848.86 hours to reflect modifications issued since award:

Modifications since Award of Contract

P00026	PC 06-079 Reduction in Supply Workload	-240
P00033	PC 07-088 Supply Mod	-79
A00010	PC 08-117 Increase/Deduct Supply Store Inventory	-1,431
A00029	PC 09-113 Reduce ARSS Inventory	-141
A00029	PC 09-114 Reduce Inventory and DOPS reporting	-532
P00008	PC 05-001 Supply Deduct (proposal not found)	-1,251
		-3,674

(*Id.* at GOV5513)

24. After discussion with EJB, on 16 July 2010, the Navy forwarded a bilateral modification “to zero out the Annex [1] ELINs and to return the Annex [2] Overhead Costs” to EJB for review and signature. EJB refused to sign the modification. (App. supp. R4, tab 54 at NAV3294)

Unilateral Modification No. A00049

25. On 17 August 2010, the Navy issued unilateral Modification No. A00049, deleting Annex 10 and reducing the contract price by \$1,375,833.80 (R4, tab 33). Using the 13,522.86 hours Mr. Cole derived from EJB’s original proposal, the Navy estimated savings of \$638,507.23, \$642,670.66, and \$647,024.28, or \$1,919,883.16 for FYs 11-13 (supp. R4, tab 47 at GOV5508-09). The Navy did not reduce the number of hours in the calculation by 3,674 hours for prior modifications as recommended by Mr. Cole. The Navy did, however, award EJB \$8,319.01 in relocation/colocation and provisioning transition costs. The Navy offset its deduction by \$544,049.36 for Annex 2 costs, resulting in a net deduction of \$1,375,833.80. The offset was calculated by multiplying 5,129.49 hours, the number of hours decrease proposed by EJB for Annex 2, times the hourly rates for Annex 2 in EJB’s original proposal (\$11.61, \$11.82, and \$12.04) (finding 13). (R4, tab 35 at GOV2432; supp. R4, tab 47 at GOV5506-08)

Modification Summary – Firm Fixed-Price

PC	10-037		Total
Annexes	1000000	Annex 2	
Descr.	Unilateral Annex 1000000 Removal	Unilateral Annex 2 Overhead Cost Distribution	
Note	Rev 3		
Date	7/13/2010		
Base	\$0.00	\$0.00	\$0.00
Opt 1	\$0.00	\$0.00	\$0.00
Opt 2	\$0.00	\$0.00	\$0.00
Opt 3	\$0.00	\$0.00	\$0.00
Opt 4	\$8,319.01	\$0.00	\$8,319.01
Opt 5	-\$638,507.23	\$178,376.55	(\$460,130.68)
Opt 6	-\$642,670.66	\$181,432.18	(\$461,238.48)
Opt 7	-\$647,024.28	\$184,240.63	(\$462,783.65)
Total	-\$1,919,883.16	\$544,049.36	(\$1,375,833.80)

(R4, tab 33 at GOV2052)

26. The Navy’s post-negotiation memorandum of 5 August 2010 explained the failure to reach agreement as follows:

EJB’s proposal did not zero out the ELINs 010AA/AB/AD, and AE for Annex [10] for the ELINs which have not been exercised for FY11-13. The Government and EJB could not agree on EJB’s proposed deductive hours and Annex [2] Overhead Costs for the removal of Annex [10].... The modification is based on the basic contract pricing which was originally competed and all related PC’s negotiated after the basic contract associated with Annex [10]....

(App. supp. R4, tab 54 at NAV3302)

27. On 4 November 2010, EJB submitted a certified claim seeking a reduction of \$1,044,695.88 in unilateral Modification No. A00049, stating as follows:

Unilateral Modification A00049 removed Annex [10] (Supply) from the WSBOSC. The Government calculated the value of the deleted Annex based on EJB’s original Contract price proposal dated 13 June 2005 and as subsequently amended, rather than by the estimated cost to EJB to perform the deleted work based on actual historical cost of performance. The Government’s method calculates a net

deduction of -\$1,375,833.80, while EJB's method based on actual costs, calculates a net deduction of -\$331,137.92, a difference of -\$1,044,695.88 from the modification value.

(R4, tab 34 at GOV2145)

28. The CO denied EJB's claim on 7 December 2010, stating as follows:

The Government utilized EJB's original bid price for the deletion of Annex [10] for the following reasons: (1) The deletion of Annex [10] is a complete and severable item; (2) Annex [10] is composed of separately priced contract line items; (3) Annex [10] was deleted prior to the execution of option year five, and; (4) The Government has been unable over the life of the subject contract to obtain adequate cost and pricing data from your firm to negotiate fair and reasonable additive and/or deductive contract changes.

(R4, tab 35 at GOV2432)

29. Appellant timely appealed the denial of its claim to this Board on 4 March 2011. We docketed the appeal as ASBCA No. 57547 on 7 March 2011.

Other Matters

30. On 12 September 2011, EJB moved for partial summary judgment, alleging that the contract was not severable and that the Navy had improperly based Modification No. A00049 on EJB's original proposal prices. On 12 October 2011, the Navy moved for summary judgment, alleging that EJB was seeking anticipatory profits for work that was never performed. On EJB's motion, we held that the proper method for pricing the deleted work was the "would have cost" rule set forth in *Celesco Industries, Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604. We denied the Navy's motion on the grounds that it had abandoned the argument that the contract was severable and that there were disputed issues of material fact regarding its anticipatory profit argument. *EJB Facilities Services*, ASBCA No. 57547, 12-1 BCA ¶ 34,965.

31. On 22 August 2012, the Navy moved to dismiss the appeal for lack of jurisdiction, alleging that the individual who submitted EJB's claim was personally and substantially involved in the solicitation and award of the contract prior to his retirement from the Navy in violation of 18 U.S.C. § 207(a). We denied the motion on 12 October 2012. *EJB Facilities Services*, ASBCA No. 57547, 12-2 BCA ¶ 35,164.

32. On 11 October 2012, DCAA issued Audit Report No. 4261-2012S17200001 in connection with EJB's revised proposal of 28 February 2012. The proposal was based

on the difference between FISC and non-FISC labor hours as reflected in EJB's MAXIMO reports before and after deletion of Annex 10 and projected savings of \$468,000. (Supp. R4, tab 57 at GOV5744-46) This proposal is not in the record.

33. DCAA was unable to render an opinion on the 28 February 2012 revised proposal because EJB's accounting system does not segregate FISC and non-FISC effort. However, the report described EJB's accounting system in some detail. (Supp. R4, tab 57 at GOV5746) The report stated that EJB records its labor costs by payroll cycle using an in-house timekeeping application. For each payroll cycle, EJB inputs labor hours and the appropriate hourly rate into the timekeeping application. Once EJB enters the costs for the current payroll cycle, it sends an excel file to its parent company (EMCOR). The payroll information EJB sends to EMCOR summarizes labor cost for the pay period by work order and includes hourly pay rate, hours incurred, employee identification number, position, and work order. EMCOR adds the fringe costs. (*Id.* at GOV5748)

34. A few days before the hearing, EJB submitted an "Amended Response to Respondent's Discovery Request" and a supplemental Rule 4 file consisting of tabs 53-59. We admitted the documents over the Navy's objection on 11 December 2012. The submission set forth a revised pricing computation based in part on previous proposals for deductive change. The computation was based on a comparison of FISC and non-FISC supply labor hours before and after deletion of Annex 10. The source documents were EJB's MAXIMO documents and the Pricing Agreement. Based on these documents, EJB alleges that it would realize the following savings:

(Total Labor Cost) = \$174,273.25^[4]
\$174,273.25 x 1.01 (G&A of 1%) = \$176,015.9825
\$176,015.9825 x 1.05 (Profit of 5%) = \$184,816.781625
\$184,816.781625 x 1.018 (B&O Taxes of 1.8%^[5]) = \$188,143.48369425
\$188,143.48 x 1.00139 (General Liability Insurance .139%) = \$188,405.003
188,405 x 3 (for Option Years 5, 6, and 7) = \$565,215.009409755
EJB's estimated cost savings: \$565,215.01^[6]

(Finding 15; app. supp. R4, tab 50 at EJB1099)

⁴ See EJB's "Labor Hour and Cost Calculations" (app. supp. R4, tab 57 at EJB1161).

⁵ The Pricing Agreement indicates 1.5% for B&O taxes.

⁶ EJB's material, vehicle maintenance, and fuel cost data and calculations were inadvertently not included in the record. If these costs are included, EJB alleges that its labor costs would be \$195,562.33, resulting in savings of \$634,261.22. (App. br. at 30)

35. The hearing was held on 16 October 2012 at the offices of the Board in Falls Church, Virginia. The Navy presented two brief witnesses and rested. EJB rested without calling any witnesses, asserting that the Navy had failed to meet its burden of proof. Both parties submitted briefs and reply briefs.

DECISION

This appeal arises from unilateral Modification No. A00049, deleting Annex 10 and reducing the contract price by \$1,375,833.80. Annex 10 set forth the requirements for supply work funded by FISC (finding 8). On 30 March 2010, the Navy requested EJB to submit a proposal to delete Annex 10 in its entirety. The parties were unable to agree on price. On 17 August 2010, the Navy issued unilateral Modification No. A00049. The Navy based its deduction on EJB's original proposal prices on the assumption that the contract was severable (finding 28). As a result of the summary judgment motions filed by the parties, we concluded that the contract was not severable and that the "would have cost" rule was the proper method for pricing the deduction finding (finding 30). As the proponent of a downward adjustment, the Navy bears the burden of proving both the scope of the reduced effort and the amount of the adjustment by a preponderance of the evidence. The Navy also bears the consequences of a failure of proof. *CTA Incorporated*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,762; *Celesco*, 79-1 BCA ¶ 13,604 at 66,683; *Nager Electric Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971).

The Navy argues that it should be allowed to use EJB's original proposal prices to compute the amount of the deduction for the following reasons: (1) there are no current, reasonable estimates in the record; (2) EJB's original proposal prices "are a sufficient measure of the downward adjustment"; (3) EJB failed to maintain adequate accounting records; (4) EJB may not recover for non-existent overhead; and (5) EJB breached its implied duty to cooperate by failing to establish and maintain indirect cost and G&A pools. The Navy also argues that EJB has failed to prove an upward adjustment of \$8,319.01 for relocation/colocation and transitioning provision costs that resulted from the deletion of Annex 10. EJB does not dispute that the Navy is entitled to a downward adjustment for deletion of Annex 10, but maintains that the Navy has failed to carry its burden of proving the amount of the deduction.

Relying on *Control Line, Inc.*, ASBCA No. 50235, 98-1 BCA ¶ 29,722, the Navy first argues that this case is an exception to the "would have cost" rule. The "would have cost" rule generally requires that downward adjustments under the Changes clause be measured by the difference between the reasonable cost of performing without the deletion and the reasonable cost of performing with the deletion. *Olympiareinigung, GmbH*, ASBCA No. 53643, 04-1 BCA ¶ 32,458 at 160,563; *Celesco*, 79-1 BCA ¶ 13,604 at 66,683; *Fordel Films West*, ASBCA No. 23071, 79-2 BCA ¶ 13,913 at 68,298;

S.N. Nielsen Co. v. United States, 141 Ct. Cl. 793, 797 (1958). In *Control Line*,⁷ there were no cost estimates in the record and we allowed the government to use the contract's unit prices to calculate the deduction. In this case, EJB submitted at least three revisions of PC No. 10-037 (finding 22). Mr. Cole, the Navy's SPAR, prepared a Technical Analysis of revision 3 of EJB's proposal (finding 23), the Navy negotiators prepared a detailed Negotiation Memorandum and a Post-Negotiation Memorandum regarding the pricing of the adjustment (app. supp. R4, tabs 53, 54), and DCAA issued two audit reports relating to the contract (findings 16, 32). The fact that not all of these documents are in the record does not bring this case within *Control Line* because the Navy had all of these documents in its possession when it issued Modification No. A00049.

The Navy next argues that EJB's original proposal prices "are a sufficient measure of the downward adjustment." This argument has been considered and rejected many times. The Court of Claims addressed this issue as follows in *Bruce Construction Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963):

Equitable adjustments in this context are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract. Since the purpose underlying such adjustments is to safeguard the contractor against increased costs engendered by the modification, it appears patent that the measure of damages cannot be the value received by the Government, but must be more closely related to and contingent upon the altered position in which the contractor finds himself by reason of the modification.

As a result, deductive changes are usually based on the contractor's current estimate or "would have cost" projection rather than on original proposal prices. *E.g.*, *Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,513 (bid amount irrelevant to pricing deductive change); *Olympiareinigung*, 04-1 BCA ¶ 32,458 at 160,563 (amount allocated in bid for deleted work irrelevant to pricing a deduction); *Fordel Films*, 79-2 BCA ¶ 13,913 at 68,298 (contractor not bound by costs estimated in proposals in pricing a downward adjustment); *Celesco*, 79-1 BCA ¶ 13,604 at 66,683 (deduction should be based on the contractor's current estimate or "would have" cost for performing the deleted work); *S.N. Nielsen*, 141 Ct. Cl. at 797 (proper way to price deleted work is to ascertain what the work would have cost, not what it was estimated to cost when the contract was formed); *see also* 11 THE NASH & CIBINIC REPORT ¶ 39, *Equitable Adjustments for Deleted Work: The Severability Exception to the "Would have Cost" Rule* (1997); 12 THE NASH & CIBINIC REPORT ¶ 15, *Postscript: Equitable Adjustments for Deleted Work* (1998).

⁷ *Control Line* involved a deduction for defective work under FAR 52.246-12, INSPECTION OF CONSTRUCTION (JUL 1986).

The Navy next argues that EJB's accounting system is inadequate, asserting that EJB: (1) failed to maintain adequate job cost records; (2) failed to segregate the actual costs of the change; (3) failed to prove that it incurred any overhead; and (4) breached its implied duty to establish and maintain indirect cost and G&A pools. We do not find these arguments persuasive.

DCAA audited EJB's accounting system on 13 March 2008 and found that it was "adequate for accumulating costs" for this contract. The Navy has not offered any evidence that DCAA's conclusion is incorrect.

EJB was not required to segregate the costs relating to the deletion of Annex 10 because there is no contract clause requiring it to do so (finding 12). See *Neal & Co., Inc. v. United States*, 17 Cl. Ct. 511, 513 (1989) (contractor not required to keep accounting records in sufficient detail to ascertain the precise costs of a change absent a contract provision requiring segregation of costs); *Neal & Co., Inc.*, 945 F.2d 385, 389 (Fed. Cir. 1991) (grossly unfair to require contractor to keep one set of cost records for original contract work and another for extra work); *Keco Industries, Inc.*, ASBCA No. 15061, 72-1 BCA ¶ 9450 at 43,893 (contractor not required to segregate cost of performing a change in its accounting records). If the Navy wanted EJB to segregate Annex 10 costs, it could have added FAR 52.243-6, CHANGE ORDER ACCOUNTING to the contract, but it did not do so (finding 2). *Propellex Corp. v. Brownlee*, 342 F.3d 1335, 1342 n.3 (Fed. Cir. 2003), cited by the Navy, is inapposite. That case involved a contractor's attempt to use the modified total cost method, not a downward adjustment of the contract price.

The assertion that EJB's overhead is non-existent is without merit. The solicitation required EJB to price onsite overhead management costs in Annex 2 in its original proposal (finding 6). EJB included \$11.61, \$11.82, and \$12.04 per labor hour across all annexes for FYs 11-13, a fact that the Navy acknowledged in its amended answer (finding 13). These costs were distributed across all annexes managed by EJB. Moreover, the Navy used those hourly labor rates to calculate an offset of \$544,049.36, reducing the gross amount of its deduction from \$1,919,883.16 to \$1,375,833.80 (finding 25).

We need not address the Navy's argument that EJB failed to establish and maintain indirect cost and G&A pools except to say that the Navy entered into the WSBOC Modification Pricing Agreement with EJB on 22 February 2006, establishing the overhead rates and fee that would be used for all modifications issued in connection with this contract (finding 15).

The Navy has failed to meet its burden in proving that it would have cost EJB \$1,375,833.80 to perform the deleted requirements.

We conclude that the most credible evidence in the record as to what it would have cost EJB to have performed the deleted work was provided in EJB's supplemental Rule 4 file submitted before the hearing and admitted over the government's objection (app. supp. R4, tab 50 at EJB1099). The submission set forth an amount based on a comparison of FISC and non-FISC supply labor hours before and after deletion of Annex 10. Based on this evidence, EJB would realize an estimated cost savings of \$565,215.01 (see computation in finding 34). It is this evidence that EJB relies on in urging us to alternatively hold that the Navy has failed to prove a "would cost" amount of \$1,375,833.80, and in inviting us to find a "would cost" amount of \$565,215.01 (app. br. at 30). Absent credible contrary evidence from the Navy, we adopt EJB's proposed savings of \$565,215.01.

CONCLUSION

The Navy has failed to prove that it is entitled to a downward adjustment of \$1,375,833.80 of the contract price for deletion of Annex 10. We adopt EJB's proposed savings of \$565,215.01, and allow a downward adjustment in that amount. Accordingly, this appeal is sustained in the amount of \$810,618.79 (\$1,375,833.80 - \$565,215.01) plus interest from the putative date of 8 November 2010 when the CO should have received EJB's 4 November 2010 claim, in accordance with 41 U.S.C. § 7109.

Dated: 28 August 2013



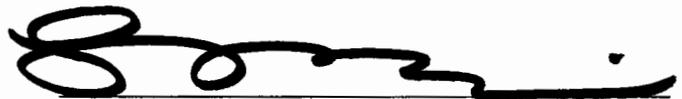
ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



MARK N. STEMPLER
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. 57547, Appeal of EJB Facilities Services, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals