

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
URS Federal Support Services, Inc.) ASBCA No. 59998
)
Under Contract No. FA8108-09-D-0006)

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OPINION BY ADMINISTRATIVE JUDGE CLARKE

This appeal involves a contract for aircraft maintenance services at various locations in the United States. The contract required both the maintenance and the number and skills of personnel required to perform the maintenance. We also dealt with challenges to our jurisdiction from both parties. We denied the parties' jurisdictional challenges. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. The parties agreed to adjudicate the appeal based on the written record pursuant to Board Rule 11. We deny URS' appeal with regard to Ft. Knox and Kingsville. However, the AF conceded entitlement to the change with regard to Ft. Hood.

FINDINGS OF FACT

1. URS is a division of AECOM and maintains offices throughout the United States, including Gaithersburg, MD. URS is engaged in providing operations and maintenance support services to government and military customers. (Stip. ¶ 1)¹ The government is the United States Department of the Air Force, Headquarters Oklahoma City Air Logistics Complex, Tinker Air Force Base, Oklahoma (stip. ¶ 2).

2. The Air Force (AF) administers the Contract Field Team (CFT) program, providing temporary and long-term labor support for a variety of technical service

¹ Citations to the "stip" refer to the parties' Joint Stipulations of Fact filed with the Board on February 16, 2016.

needs, including maintenance and repair, depot services, inspections and modernization for contingency support for aircraft, vehicles, weapons systems and other equipment. The AF's Air Logistics Complex in Oklahoma City, Oklahoma oversees the CFT program. (Stip. ¶ 3)

Contract No. FA8108-09-D-0006

3. On or about October 3, 2008, the AF awarded 11 multiple-award contracts to provide support services under the CFT program, including Contract No. FA8108-09-D-0006 (Contract 0006) to URS (stip. ¶ 4; R4, tab 1).

4. Contract 0006 is an indefinite-delivery, indefinite-quantity (IDIQ) contract under which the AF competes and issues task orders in support of the CFT program. The Contract contains contract line item numbers (CLINs) for the performance of services under the contract on time and material (T&M), firm-fixed-price (FFP), and cost reimbursement bases. (R4, tab 1 at 2-25²) T&M CLIN 0001, FFP CLIN 0004 and CLINs for option years incorporate Federal Acquisition Regulation (FAR) 51.216-18, Ordering that makes all delivery orders or task orders subject to the terms and conditions of Contract 0006. (R4, tab 1 at 2-25) FFP CLIN 0004 reads:

Firm Fixed Price

Services necessary to accomplish modification/maintenance/repair effort on-site at operational government locations as contemplated in AFI 21-102 and AFMCI 21-141 and in accordance with individual task orders issued. Orders issued pursuant to this CLIN will be issued on a Firm Fixed Price basis as set forth in the "Ordering" clause (52.216-18). Payment shall be made upon satisfactory performance of the work required by orders in accordance with the General Provision entitled "Payments" (52.232-1). Payment for labor shall be in accordance with the prices established in Attachment 1 and the hours negotiated in accordance with the Special Provision entitled, "Fixed Priced Work Procedures For CLIN X004 (Fixed Price Labor)". ACRN to be cited on individual task orders.

(R4, tab 1 at 3)

² Page numbers refer to PDF page numbers in Rule 4 documents.

5. Local or special clauses were provided in Part I, Section H, of the Contract, “Special Contract Requirements,” including Oklahoma City Air Logistics Complex (OCALC) clauses (R4, tab 1 at 33-53). Contract Clause OCALC 07-017, PROJECTED TEAM COMPLEMENT (APR 2007) stated:

The projected team complement (PTC) is the estimated number and skill classification of personnel expected to be required to accomplish a task. The government reserves the right to determine whether the PTC will be determined solely by the Contractor based on the number of personnel the Contractor believes to be necessary to accomplish the required task(s), or whether the Government will solely determine the PTC. Regardless of the contract type (FFP, FPIF, CPIF, or T&M) utilized for task order selection, the Contractor shall provide a breakout of the PTC on which their proposal is based.

(R4, tab 1 at 33)

6. Contract Clause OCALC 07-041, ORDERING PROVISIONS FIXED PRICE/FIXED PRICE INCENTIVE FIRM TARGET/COST PLUS INCENTIVE FEE/TIME AND MATERIALS (APR 2007), stated the following in pertinent part:

(a) A “task order” is a document (electronic transmission or DD Form 1155) which directs accomplishment of certain services and/or furnishing of direct material, and contains the information indicated below.

....

(d) Task orders issued under this contract shall contain the following:

(1) Services to be furnished (by [CLIN]);

(2) Appendix “A[,]” Performance Work Statement;

....

(7) Site or sites where services are to be performed;

....

(14) Projected team complements by numbers and skill classification;

(R4, tab 1 at 45-46)

7. Contract Clause OCALC 07-042, ACCEPTANCE OF TASK ORDERS (APR 2007), provided the following in pertinent part:

- (a) In consideration of the award of this contract, the contractor agrees to accept any task order issued in accordance with the terms and conditions of this contract. The Government reserves the unilateral right to adjust those provisions within the scope of the contract including . . . requirements that are within the scope of the Appendices of the Task Order . . . at the rates set forth in the schedule, of any task order.

(R4, tab 1 at 46)

8. Contract Clause OCALC 07-054, CRITERIA FOR ISSUING TASK ORDERS/FAIR OPPORTUNITY (APR 2007), required the government to issue a fair opportunity notice (FON) in anticipation of awarding a task order:

The Government shall comply with the requirements of DFARS 216.505 and shall issue fair opportunity notifications to all contractors. This notice may be provided either in writing, electronically, or orally. This notice shall make all contractors aware of new or continuing work. . . .

(R4, tab 1 at 50)

9. In Part II – Contract Clauses, the Contract incorporated by reference FAR 52.243-1, CHANGES—FIXED-PRICE – ALTERNATE II (APR 1984) (R4, tab 1 at 75). FAR 52.243-1, Alternate II, provides the following in pertinent part:

- (a) The Contracting Officer may at any time, by written order, . . . make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.

. . . .

(3) Place of performance of the services.

....

- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(FAR 52.243-1) It further states that “[f]ailure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.” (FAR 52.243-1(e))

10. The Contract’s Performance Work Statement (PWS), January 17, 2008, was Appendix A to Contract 0006 (R4, tab 1 at 79). PWS paragraphs 1.0 and 1.2 stated the following with respect to contractor’s obligation to furnish the required team complements as specified by the individual task orders (TO):

1.0 Scope The objective of this Performance Work Statement (PWS) is to provide supplemental on-site Organization, Intermediate, and Depot level maintenance support for modification, maintenance, inspections, and repair of various aircraft, missiles, ground support equipment and vehicles on-site at operational government locations worldwide. This effort also includes the modification, maintenance, inspection, and repair of associated support equipment for any Federal Agency or authorized Foreign Military Sales (FMS) customer locations both in the Continental United States (CONUS), and Outside the Continental United States (OCONUS). These requirements are not personal services.

....

1.2 Contractor Personnel The Contractor shall be responsible for the selection, recruitment, hiring, assignment of duties, and reassignment of duties, transfer, supervision, management, control, and

termination of Contractor employees in performance of this PWS. The Contractor shall make available qualified personnel as indicated in the individual Task Orders and shall develop a time-phased plan to achieve the required team complement.

(R4, tab 1 at 112-113)

Fair Opportunity Notice (FON) 13-DA-058

11. On February 15, 2013, the AF issued FON 13-DA-058 to large business CFT program contract holders for aircraft maintenance and depot support for the U.S. Army Reserve Command (ARC). The FON included a PWS that outlined the tasks required for aircraft maintenance and depot support for the ARC. (Stip. ¶ 6; R4, tab 6) The AF amended the FON, issuing the final version, Amendment 3, on April 26, 2013 (stip. ¶ 7; R4, tab 11 at 1). The FON included the April 22, 2013, Revision 2, PWS (R4, tab 11 at 1, 7).

12. The FON stated that the requirements of the PWS would be awarded as a firm-fixed-price task order with firm-fixed-price, time-and-materials and cost-reimbursement CLINs. The FON provided that the notional period of performance for the transition period of the task order would be from May 15, 2013 through June 14, 2013, with a basic period from June 15, 2013 through May 14, 2014 and an option period from May 15, 2014 through May 14, 2015. (Stip. ¶ 8; R4, tab 11 at 1)

13. Paragraph 10 of the FON required offerors to use government pricing sheets attached to the FON.³ Offerors were instructed not to use their own format to respond to the pricing requirement. (R4, tab 11 at 2) The FFP Labor pricing sheets attached to the FON specified the “Minimum Number of Full Time Equivalent (FTE)” for each of the “Labor Skills” listed. The total manning for the base and option years was 99. (R4, tab 10 at 9, 13) The FFP pricing sheets include Note 2: “[t]he proposed additional manning column is provided ONLY if the contractor wants to propose a HIGHER amount of personnel. The contractor cannot propose a lower complement of personnel than what is stated in the PWS.” (*Id.*)

14. The FON stated the following with respect to FTE:

³ The April 22, 2013 FON Amendment 2 includes all of the pricing sheets (R4, tab 10 at 7-14) for the base and option periods, including T&M (*id.* at 8, 12) and FFP (*id.* at 9, 13). For some reason the April 26, 2013 FON Amendment 3 omitted all but one T&M pricing sheet (R4, tab 11 at 6). Therefore, we refer to the pricing sheets in FON Amendment 2. (R4, tab 10 at 7-14)

[10]d. The Government requires a Full Time Equivalent (FTE) of 1,840 hours for each skill set provided in the attached pricing sheets. Listed on the pricing sheets, as well as Section 8.0 of the PWS, are the total skills the Government identified as required to adequately support historical and anticipated workload described in the attached PWS.

(R4, tab 11 at 3)

15. The FON stated the following (italics, underlining, and bold in original):

[10]e. The Government is establishing the “*minimum team complement*” on this requirement to be in accordance with the skills listed in section 8.0 of the attached PWS. Offerors shall **NOT** propose less than the “**minimum team complement[.]**” **or provide less than the specified skills/quantities at any time after award.** Offerors can propose more than the “*minimum team complement*” as illustrated in the attached pricing sheets. **Any proposal that does not meet the minimum manning levels will be ineligible for award.**

(R4, tab 11 at 3)

16. The “**FON EVALUATION CRITERIA**” stated:

11. This is a full and open Fair Opportunity Notice (FON) utilizing alternative source selection criteria in accordance with clause OC-ALC 07-054, Criteria for Issuing Task Order/Fair Opportunity. . . . To be eligible for award, an offeror must propose the following:
 - a. A minimum management approach IAW paragraphs 9(a)-(b), above
 - b. A minimum team complement IAW paragraph 10(e), above

- c. A Pricing Sheet with all proposed rates/ prices containing no more than two decimal places IAW paragraph 10, above
- d. A Pricing Sheet proposed IAW the offeror's basic contract NTEs as IAW paragraph 10(c), above

(R4, tab 11 at 4)

17. The Revision 2 PWS, attached to the FON, subparagraph 2.1 stated:

2.1 The contractor shall provide Aviation Field Maintenance and limited Sustainment Maintenance for AH-64, CH-47, UH-60, HH-60 aircraft and associated ground support equipment for all rotary wing aviation units assigned to the AR Command in accordance with the Army's established policies and procedures.

(R4, tab 11 at 9)

18. PWS, stated, in subparagraph 2.3, that the contractor would provide aviation maintenance support at nine specified aviation support facilities (ASF) and that contract maintenance may be required at four additional sites:

Contractor shall provide support at various Government owned [Army Reserve (AR) Aviation Support Facilities (ASF)] locations with the level of support being based on workload requirements as determined by the AR Aviation Program Manager (APM). The following are current sites where contract maintenance is or will be required.

ASF Knox, Ft. Knox, KY	ASF Conroe, Conroe, TX
ASF Clearwater, Clearwater, FL	ASF Bragg, Ft. Bragg, NC
ASF Los Alamitos, Los Alamitos, CA	ASF Carswell, Carswell JRB, TX
ASF Johnstown, Johnstown, PA	ASF Olathe, New Century, KS
ASF Kingsville, NAS Kingsville, TX	

Additional sites where contract maintenance may be required.

ASF Eustis, Ft. Eustis, VA	ASF Hood, Ft. Hood, TX
ASF Carson, Ft. Carson, CO	ASF Lewis, Ft. Lewis, WA

(Stip. ¶ 11; R4, tab 11 at 9)

19. PWS paragraph 4.1 PERFORMANCE SUMMARY (Metrics) explains:

This section describes the metrics used to measure contractor schedule and performance. Each permanent site will submit a Contractor Monthly Performance Evaluation, CFT Form 104, unless otherwise delineated here in this PWS that will then be averaged by the CFT Program Management Office (PMO). Once measured, these metrics will be used to arrive at a monthly score for the contractor based on whether they did not meet, met, or exceeded the stated goals. Metrics for all of a contractor's task orders will be rolled up into overall performance and schedule scores which will impact whether they are selected for further work on the CFT program.

(R4, tab 11 at 12) There are four metrics: Schedule Phase measurement, Performance measurement (Work presented to QAR / Quality), Performance measurement (Supply transactions), Performance measurement (Manning) (*id.* at 12-14). For each metric the PWS defined the criteria for ratings of excellent (“+1”), meets standard (“0”), and unacceptable (“-1”) (*id.*).

20. The fourth performance measurement standard covered manning and evaluated the contractor's ability to field the total team complement of full-time equivalent personnel at each site, every month. This staffing-related performance measurement, and its associated scoring criteria, were provided in subparagraph 4.1.4 of the PWS, as follows:

4.1.4 Performance measurement – Manning Measurement shall be based on the contractor's ability to provide required the [sic] total team complement at every site on a monthly basis.

4.1.4.1 To receive a score of “+1” or excellent, the Contractor must provide 100% of positions in the total team complement at every site.

4.1.4.1 To receive a score of “0” or meets standard, the Contractor must provide greater than 90% of positions in the total team complement at every site.

4.1.4.1 To receive a score of “-1” or unacceptable, the Contractor failed to provide at least 90% of positions in the total team complement at every site.

(R4, tab 11 at 13-14; stip. ¶ 14)

21. PWS, paragraph 6.0, “SPECIAL REQUIREMENTS/INSTRUCTIONS,” provided the following, in relevant part:

6.7 Over and above work: The team complement attached is not adjustable by the contractor. If manning levels must be increased due to additional workload, the task order will be funded for over and above. If manning levels are decreased due to unanticipated waning in the workload, the task order will be de-scoped and modified pending government/contractor negotiations of the decreased requirement.

(R4, tab 11 at 15, 20)

22. PWS, paragraph 8.0, “TEAM COMPLEMENT,” provided the following in pertinent part:

This section reflects a government required minimum essential to the operational mission of this site/these sites based on historical or anticipated workload.

T&M Complement – Basic Period and Option Period (I)

Level-Title	Total Requirements	Ft Bragg NC	Conroe TX	Knox KY	Clearwater FL	Los Alamitos CA	Johnstown PA	Kingsville TX	Carswell JRB, TX	New Century KS
Maintenance Test Pilot (Specialty, 8.1)	2	0	1	1	0	0	0	0	0	0
Total	2	0	1	1	0	0	0	0	0	0

Firm Fixed Price Complement – Basic Period

Level-Title	Total Requirements	FFP Ft Bragg NC	FFP Conroe TX	FFP Knox KY	FFP Clearwater FL	FFP Los Alamitos CA	FFP Johnstown PA	FFP Kingsville TX	FFP Carswell JRB, TX	FFP New Century KS
Aircraft Mech III (8.2)	10	1	2	2	2	1	1	1	0	0
Level II-Mechanic(s) (skill, 8.3)	8	1	1	2	1	1	1	1	0	0
Level I-Mechanic(s) (skill, 8.4)	39	4	7	16	7	0	4	1	0	0
Level I-Mechanic(s) (Avn Life Supt Equip) (skill, 8.5)	7	0	0	0	1	1	1	4	0	0

Level I-Mechanic(s) (Armament) (skill, 8.6)	5	0	2	2	0	0	0	1	0	0
Level I-Mechanic(s) (Flight Test)(skill 8.7)	0	0	0	0	0	0	0	0	0	0
Level I- Mechanic(s)/Engine (skill, 8.8)	2	0	0	0	0	1	1	0	0	0
Level I- Mechanic(s)/Electrician (skill, 8.9)	11	0	3	4	1	1	2	0	0	0
Level I- Mechanic(s)/Sheet metal (skill, 8.10)	7	0	2	0	1	1	1	2	0	0
Production Controller (skill, 8.12)	2	0	0	0	0	0	1	1	0	0
Supply Technician(s) (skill, 8.13)	7	1	1	1	1	1	0	1	1	0
Computer Analyst II (skill, 8.14)	1	0	0	0	0	0	0	0	0	1
Total	99	7	18	27	14	7	12	12	1	1

(R4, tab 11 at 25) (Border and shading added) The manning table for Option Period 1 was the same as for the basic period (*id.* at 26).

URS's Proposal in Response to FON 13-DA-058

23. On April 26, 2013, URS submitted a proposal in response to the FON using the AF required pricing sheets. URS proposed \$229,208.70 for the time-and-materials CLIN 4001; \$7,105,724.27 for the firm-fixed-price, Basic Year CLIN 4004; \$137,846.38 for transition CLIN 4007; \$250,758.90 for the T&M Option Period 1 CLIN 5001; \$5,069,880.80 for the firm-fixed-price, Option Period I CLIN 5004; and a total evaluated price of \$15,707,756.65 for all CLINs set forth in the FON (stip ¶ 18; R4, tab 12).

24. URS' Pricing Sheets for CLIN 4004, FFP Labor (Basic Year), included the following sheet:

<u>Labor Skills</u>	<u>Nation Wide Equivalent Codes</u>	<u>Full Time Equivalent (Hours)</u>	<u>Minimum Number of Full Time Equivalent (FTE)</u>	<u>Proposed Additional Manning</u>	<u>Total Manning</u>	<u>FFP Rate</u>	<u>Total FFP Price</u>
Aircraft Mech III (8.2)	23023	1687	10		10	\$47.06	\$793,745.33
Aircraft Mech II (8.3)	23022	1687	8		8	\$44.84	\$605,041.07
Aircraft Mech I (8.4)	23021	1687	39		39	\$42.69	\$2,808,148.20
Mechanics Level I - Avn Life Supt Equip (8.5)	23021	1687	7		7	\$42.69	\$504,026.60
Mechanics Level I - Armament (8.6)	23021	1687	5		5	\$42.69	\$360,019.00
Mechanics Level I - Flight Test (8.7)	23021	1687	0		0	\$42.69	\$0.00
Mechanics Level I - Engine Mech (8.8)	23021	1687	2		2	\$42.69	\$144,007.60
Mechanics Level I - Electrical Mech (8.9)	23021	1687	11		11	\$42.69	\$792,041.80
Mechanics Level I - Sheet Metal Mech (8.10)	23021	1687	7		7	\$42.69	\$504,026.60
Ground Support Mechanic (8.11)	23380	1687	0		0	\$42.69	\$0.00
Production Controller (8.12)	01270	1687	2		2	\$30.77	\$103,797.47
Supply Technicians (8.13)	01410	1687	7		7	\$35.30	\$416,775.33
Computer Analyst (8.14)	14102	1687	1		1	\$43.93	\$74,095.27
Totals			99	0	99		\$7,105,724.27
Total Basic Year Fixed Price	\$7,105,724.27						

(R4, tab 12 at 4) This sheet reflected the Team Complement tables in PWS paragraph 8.0. (R4, tab 11 at 25).

25. URS' Pricing Sheet for CLIN 5004, FFP Labor (Option Period I), included the following sheet:

Labor Skills	Nation Wide Equivalent Codes	Full Time Equivalent (Hours)	Minimum Number of Full Time Equivalent (FTE)	Proposed Additional Manning	Total Manning	FFP Rate	Total FFP Price
Aircraft Mech III (8.2)	23023	1840	10		10	\$30.78	\$566,352.00
Aircraft Mech II (8.3)	23022	1840	8		8	\$29.33	\$431,737.60
Aircraft Mech I (8.4)	23021	1840	39		39	\$27.92	\$2,003,539.20
Mechanics Level I - Avn Life Supt Equip (8.5)	23021	1840	7		7	\$27.92	\$359,609.60
Mechanics Level I - Armament (8.6)	23021	1840	5		5	\$27.92	\$256,864.00
Mechanics Level I - Flight Test (8.7)	23021	1840	0		0	\$27.92	\$0.00
Mechanics Level I - Engine Mech (8.8)	23021	1840	2		2	\$27.92	\$102,745.60
Mechanics Level I - Electrical Mech (8.9)	23021	1840	11		11	\$27.92	\$565,100.80
Mechanics Level I - Sheet Metal Mech (8.10)	23021	1840	7		7	\$27.92	\$359,609.60
Ground Support Mechanic (8.11)	23380	1840	0		0	\$27.92	\$0.00
Production Controller (8.12)	01270	1840	2		2	\$20.12	\$74,041.60
Supply Technicians (8.13)	01410	1840	7		7	\$23.09	\$297,399.20
Computer Analyst (8.14)	14102	1840	1		1	\$28.74	\$52,881.60
Totals			99	0	99		\$5,069,880.80
Total Basic Year Fixed Price	\$5,069,880.80						

(R4, tab 12 at 8)⁴

Task Order No. 0055

26. The AF awarded URS Task Order No. 0055 on May 17, 2013 for a one-year base period from June 15, 2013 to May 14, 2014 (with a one-month transition period from May 17, 2013 to June 14, 2013) and a one-year option period from May 15, 2014 to May 14, 2015 (stip. ¶ 19; R4, tab 14 at 1-2, 6, 12). The Task Order included a fixed-price CLIN for maintenance-support labor during the base period, CLIN 4004, with a value of \$7,105,724.27 (R4, tab 14 at 5-6). The Task Order also included a fixed-price labor CLIN for the performance of maintenance support for the first option year, CLIN 5004, in the amount of \$5,069,880.80, the requirements of which mirrored those of CLIN 4004 (R4, tab 14 at 11-12).⁵

⁴ We do not know why the FFP CLIN 5004 hourly rates were reduced resulting in a lower price for the same 99 FTEs.

⁵ CLINs 4004 and 5004 were the same as CLINs 0004 and 1004 in Contract 0006 (R4, tab 1 at 3, 6).

Manning Shortfalls

27. On June 14, 2013, CO Woods notified URS that the number of contractor personnel was below the minimum manning requirement. The CO's letter provided, in pertinent part:

By not meeting the contractual minimum manning number, URS is in clear non-conformance of the subject TO. Due to the low manning issue, two sites will not be fully operational until manning is met. If non-conformance continues the Government will explore all avenues for ensuring the Government receives consideration for the non-compliance of the Minimum Team Complement.

Therefore, the Government requests that URS increase the amount of contractor personnel provided to meet the minimum manning number as soon as possible. In addition, a corrective action specifically detailing how this will be accomplished is requested. The corrective action plan should include all sites in which there is a shortage, the job classes [a]ffected, and the anticipated timeframe when the positions will be filled.

....

Please respond with a written corrective action plan for both issues NLT COB^[6] 18 June 2013.

(R4, tab 63)

28. By letter dated June 19, 2013, URS responded to the CO's June 14, 2013 letter as follows, in pertinent part:

We would also like to point out that at the time of your letter URS was still in the transition period. . . . However, we recognize that the day after your letter (the first day of full performance) we were not fully staffed.

....

⁶ As used here, "NLT COB" means "not later than close of business."

Please be assured URS is continuing to hire employees at the multiple locations to ensure the mission is met. . . . Additionally, URS understands its responsibility on this contract to meet the mission and will have employees work overtime at no cost to the government to ensure the mission's success.

(R4, tab 65 at 1-2)

29. By letter dated June 21, 2013, URS responded to the CO's request for a corrective action plan to resolve URS' manning shortfalls. URS' corrective action plan stated the following in pertinent part:

URS has taken/is taking the following actions to address your concerns regarding mission success at each of the Army Reserve sites.

- 1) The URS program manager has been given the latitude to have employees work overtime to meet mission shortfalls due to manning delinquencies. These overtime costs will not be billed to the customer but rather absorbed by URS until manning delinquencies are addressed.
- 2) The URS program manager has established communications with each site in order to prioritize immediate fill needs and mission impacts.

(R4, tab 66 at 1)

The AF Suggests Adding Ft. Hood to the Maintenance Sites

30. By email dated July 9, 2013, CO Woods informed URS that the AF was requesting a "review" from URS for changes to the firm-fixed-price labor CLINs, 4004 and 5004 (R4, tab 16 at 1). The CO's email included proposed changes to the PWS:

1. Page 1, Added Revision 3: 27 June 2013
2. Page 3, Para 2.3 with the addition of Ft. Hood
3. Page 19, Para 8.0 (Team Compl[e]ment tables) with addition of team compl[e]ment to Ft. Hood and decreasing team compl[e]ment at Ft. Knox and Kingsville, TX for the base period.

4. Page 20, Para 8.0 (Team Compl[e]ment tables) with addition of team compl[e]ment to Ft. Hood and decreasing team compl[e]ment at Ft. Knox and Kingsville, TX for option period I.

(*Id.*) CO Woods requested a proposal for the cost changes (*id.*). The team complement tables for the Basic and Option I periods were changed reducing Ft. Knox to 24 from 27, reducing Kingsville to 10 from 12 and adding Ft. Hood with 5 (R4, tab 16 at 20-21). The CO requested URS submit a proposal for any cost changes resulting from the proposed changes to the PWS by close of business on July 11, 2013 (*id.* at 1).

31. By email dated July 16, 2013 to CO Woods, URS stated the following:

As we discussed on the phone, URS will agree to the change if we de-scope the 5 heads from the FFP CLIN. This would result in a decrease in the FFP which we will have to calculate and you will have to agree to. Then this same amount could be used to cover the plus up to open the new Ft. Hood site using the O&A CLIN. The customer would not have to come up with any additional funds. Also by using the O & A CLIN you are only going to be charged for hours worked which helps address the manning issue that we talked about previously. Finally, if we do it this way we can forgo any other adjustment that would otherwise be necessary to startup the new site.

(R4, tab 22 at 2)

32. By email dated July 18, 2013, CO Woods responded to URS' July 16, 2013 email. CO Woods reminded URS that it had not met the minimum manning of 99 since performance began on June 15, 2013. (R4, tab 23 at 1) She quoted the text of URS' July 16, 2013 email and noted that URS "has given no consideration to the Government" for failing to meet the minimum manning requirements (*id.*). CO Woods declined to open the Ft. Hood site using O & A funds (*id.*).

33. By email dated July 23, 2013, URS responded to CO Wood's request for proposal and subsequent July 16, 2013 email as follows, in pertinent part:

Despite the Government's assertion that the Team Complement provided in section 8 of the PWS was the, ". . . required minimum essential to the operational mission of this site/these sites based on historical or anticipated

workload[,”] we understand that the Government’s support requirements have now changed. We further understand that you wish to change the Team Complement at this time. The change you want is to reduce three Level I Mechanics at Ft. Knox, and one Level II Mechanic and one Level I Sheet Metal Mechanic at Kingsville, TX.

....

Fortunately, in this particular instance, URS can accommodate the requested change, this one time, without a cost increase. As a one-time gesture of good will, URS will even absorb the startup costs normally associated with standing up an additional site. This one time accommodation, however, should not be viewed as a precedent. Other such requests in the future would need to be considered, and treated, as a change.

However, because the majority of this effort is FFP, we need to better understand both qualitatively and quantitatively what work has been eliminated at Ft. Knox and Kingsville that would render the five positions no longer necessary. This understanding is necessary to ensure that continued performance at these two sites is in no way compromised particularly since those positions were previously identified as “minimum essential[.”] Similarly, we need to understand why and how the work now envisioned at Ft. Hood should not be considered additional FFP work.

(R4, tab 24 at 1)

34. By email dated August 1, 2013, CO Woods sent a draft bilateral modification for URS’ review (R4, tab 25). The draft modification incorporated the revised PWS, dated June 27, 2013, and summarized the changes in the PWS as follows:

- Para 2.3: Moved ASF Hood, Ft. Hood, TX from Additional sites where contract maintenance may be required to current sites where contract maintenance is or will be required.

- Para 8.0: Firm Fixed Price Complement Tables – Basic Period – Addition of team compl[e]ment to Ft. Hood and decreased team complement at Ft. Knox and Kingsville, TX

- Para 8.0: Firm Fixed Price Complement Tables – Option Period 1 - Addition of team compl[e]ment to Ft. Hood and decreased team complement at Ft. Knox and Kingsville, TX

SECOND: Both parties agree that there is no cost associated with the revision of the PWS and the contractor is authorized 30 days from date of signature to have the five personnel in place at ASF Hood, Ft. Hood, TX.

THIRD: As a result of the above, there is no change to the total amount obligated on this task order.

FOURTH: The contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to this modification.

(*Id.* at 3) URS was instructed to return a signed a copy of the modification to the CO by August 6, 2013 (*id.* at 1).

35. By email dated August 6, 2013, URS responded to the draft bilateral modification as follows:

As this is not a T&M effort, URS need[s] to understand the change in the work requirements (i.e. PWS) in order to be able to accept this modification. What work requirements are being deleted from Knox and Kingsville[?] This information was requested on July 23, 2013 via the attached email.

(R4, tab 26 at 1) CO Woods responded by email the next day, stating: “The work requirements are not being deleted. The Government has determined to change the place of performance to Ft. Hood” (*id.*).

36. According to the URS Weekly Manning Report, dated August 9, 2013, ASF Knox was undermanned by six out of the required 28 FTEs.⁷ ASF Kingsville was undermanned by four out of the required 12 FTEs. (R4, tab 72 at 1)

37. By email dated August 12, 2013, URS responded to the CO's August 7, 2013 email stating the following, in pertinent part:

Your last email on this subject simply stated that "The work requirements are not being deleted. The Government has determined to change the place of performance to Ft. Hood".

Respectfully, this answer cannot possibly be correct nor does it answer our questions. First, you are not changing the place of performance to Ft. Hood. Support is still required of URS at Ft. Knox and Kingsville so you are adding a place of performance not changing it from site A to site B. Also, the Government specified the minimum essential staffing in the PWS for Ft. Knox and Kingsville. So to now eliminate the requirement for 3 Mechanic 1s at Ft. Knox, a Mechanic 1 and a Mechanic 2 at Kingsville some work has to have been removed from these two sites. Otherwise, URS may be unable to perform the mission with the reduced staff. We simply need to know what work has been eliminated from these sites[.] Without identifying the work for which URS will no longer be responsible, how can we be assured that we can meet the mission at these two sites?

Similarly, we need to know what the new work now is at Ft. Hood? Specifically, what work previously envisioned for these minimum essential positions at Knox and Kingsville are now required to Ft. Hood? Were aircraft or responsibilities moved? If so which ones?

As we have stated previously this is not a T&M effort, URS needs to understand the change in the work requirements (i.e. PWS) in order to be able to accept this modification to this FFP Task Order. If you are, as you state, changing the location where the work will be performed we must understand what work is being deleted

⁷ The T&M maintenance pilot was included with the FFP FTE's (R4, tab 72 at 1).

at the two descope sites and what work is being added at Ft. Hood.

(R4, tab 28 at 1)

38. By email dated August 19, 2013, the CO queried the status of the modification and advised URS that negotiations regarding the modification were beginning to cause delays:

What is the status on this modification? I believe we answered your questions in the telecom last Monday, but I still don't have a signed modification.

We need to get this site up and this is delaying the start of it. Please give me a status on this today.

(R4, tab 29 at 1) The next day, August 20, 2013, URS responded by email to say that it would "have a cost estimate for Ft. Hood ready for [the CO] today" (*id.*).

39. By email dated August 21, 2013, URS submitted a cost proposal reflecting the cost impact for the additional five FTEs at ASF Hood (R4, tab 30). The proposed price for the remaining base year, firm-fixed-price effort was \$281,717.33 (*id.* at 5). The cost proposal did not address the option period, propose any transition costs associated with standing up the new site, nor take into account any price reduction for the value of the 5 FTEs deducted from ASFs Knox and Kingsville (*id.*).

40. By email also dated August 21, 2013, CO Woods responded to URS's cost proposal as follows:

I received your proposed costs for the work at Ft. Hood for the base period and need to clarify a few things. The Government requested a proposal from URS on 9 July 2013 to add a team of 5 to the Ft. Hood site and to decrease a total of 5 personnel from Ft. Knox and Kingsville, TX. URS was given until COB 11 July 2013 and URS requested an extension until 15 July 2013. On 16 July 2013, URS suggested the Government to make the change unilaterally or descope the 5 positions from the FFP CLIN and add the 5 positions to the Ft. Hood site using over and above. As you know, we rejected both of those and I sent URS a response on 18 July 2013. I received an email from URS on 23 July 2013 stating that URS would

accommodate the change without a cost increase once you understand the circumstances that gave rise to the change.

(R4, tab 31)

41. By email dated August 23, 2013, the CO rejected URS' August 21, 2013 partial cost proposal, as follows, in pertinent part:

The Government received your proposed costs for the work at Ft. Hood for the base period and I need to clarify a few things. The Government requested a review of a revised PWS from URS on 9 July 2013 to add a team of 5 FTEs to the Ft. Hood site and to decrease a total of 5 FTEs from Ft. Knox, TN and Kingsville, TX. . . .

On 21 August 2013, I received a proposal from URS for the additional work at Ft. Hood for the remainder of the base period. Is URS stating that to stand up this site it will cost the Government an additional \$281,717.33 for the FFP? Why is there an additional cost for the FTE FFP for a 5 to 5 swap? The Government is not asking for an additional 5 people on this task order. . . . We still need 99 people under FFP so why is URS requesting an additional amount under FFP? . . .

A [CO] must assess all proposals and make a price fair[ness] and reasonable[ness] determination in response to all proposals. There is no way, as the [CO] on this task order that I could prove that the Government is receiving a reasonable price on this since we are not asking for an additional 5 FTEs. . . .

The Government needs to stand up the Ft. Hood site and we have been requesting support on this with URS since 9 July 2013. As a contractor, URS is paid to support the warfighter and the Government expects to receive cooperation from a Government contractor. . . . Again, we have been requesting this change since 9 July 2013 and have not received support from URS for this effort.

(R4, tab 33 at 1) The CO concluded the email by requesting a response from URS by noon the following business day, August 26, 2013 (*id.*).

42. By email dated August 26, 2013, URS responded to the CO's August 21, 2013 email as follows, in pertinent part:

On the last conference call with you and your operations personnel on August 12, 2013 it was clear to us that the Government's position was that no work was being deleted from Ft. Knox and Kingsville. Furthermore, the Government confirmed that the work at Ft. Hood now being requested is, in fact, new work. We were told that the new work was to support several UH-60 L aircraft now located at Ft. Hood (Stan please verify this). If there is no work being deleted and there is new work being added, how can this be anything but a change?

As you know when you add work to a Firm Fixed Price contract the Contractor is entitled to be compensated for the additional work. Continuing to assert that this is just a change in work location when we all know it is new work is probably not the best path to get the new work on contract. This is a change and it should be handed as a change. It is also very reminiscent of the MS AVCRAD situation that took an ASBCA decision for the Government to recognize as a change. Ignoring the reality that what the Government desires is additional work while effectively trying to operate an FFP contract as a Time and Materials type contract is simple not an appropriate course of action.

URS is ready to support the additional effort at Ft. Hood, as soon as the additional work is authorized and funded.

(R4, tab 34 at 1)

43. By email dated September 5, 2013, CO Woods stated the following, in relevant part:

Is URS willing to sign the no cost, bilateral modification, that URS previously agreed to, in order to support the mission to change the place of performance for 5 FTEs? Again, the Government is not asking for an additional 5 people on this task order. We are changing the place of performance because it is most advantageous to the Government. URS has still not met the minimum manning requirements since the beginning of contract performance

and no consideration has been given to the Government and URS has still not met the minimum team complement at Ft. Knox, TN and Kingsville, TX and would not need to terminate anyone at either site.

(R4, tab 35 at 2)

44. By email dated September 10, 2013, URS responded to the CO's September 5, 2013 email as follows:

If we understand your position correctly you are saying that the Government is not asking for an additional 5 people on this task order rather you are changing the place of performance because it is most advantageous to the Government.

But that statement does not comport with the statements made previously by the Army Reserves. Those statements were that the work at Fort Hood was new work and furthermore, that no work at the two other sites, Ft. Knox and Kingsville, was being deleted.

Generally, URS does not accept contract changes involving additional work under Firm Fixed Price contracts without an adjustment in the contract price. With the host of other issue that persist on this contract we don't feel it would be prudent for us to accept a change for additional work without an adjustment in the contract price.

(R4, tab 38 at 2)

Modification No. 03

45. On September 20, 2013, the CO unilaterally executed TO Modification No. 03 (R4, tab 39). Modification No. 03 did the following, in pertinent part:

The Performance Work Statement for US Army Reserve Command Revision 2, dated 22 April 2013, is hereby replaced in its entirety with the attached PWS, Revision 3, dated 27 June 2013. Due to a change of Place of

Performance, a summary of changes to the PWS is as follows:

1. Page 1, Added Revision 3: 27 June 2013
2. Page 3, Para 2.3 moved Ft. Hood to a current site
3. Page 19, Para 8.0 (Team Complement tables) with change of team complement to Ft. Hood, Ft. Knox, and Kingsville, TX for the base period.
4. Page 20, Para 8.0 (Team Complement tables) with change of team complement to Ft. Hood, Ft. Knox, and Kingsville, TX for option period 1.

(R4, tab 39 at 2) ASF Ft. Hood was added to paragraph 2.3 “current sites where contract maintenance is or will be required” (*id.* at 6). The Firm Fixed Price Team Complement table for the Basic Period, located in the PWS under Paragraph 8.0, “TEAM COMPLEMENT” was updated as follows (highlighting in original; bold and shading added):

Firm Fixed Price Complement – Basic Period

Level-Title	Total Requirements	FFP Ft Bragg NC	FFP Conroe TX	FFP Knox KY	FFP Clearwater FL	FFP Los Alamitos, CA	FFP Johnstown PA	FFP Kingsville TX	FFP Carswell JRB, TX	FFP New Century KS	FFP Ft Hood TX
Aircraft Mech III (8.2)	10	1	2	2	2	1	1	1	0	0	0
Level II-Mechanic(s) (skill, 8.3)	8	1	1	2	1	1	1	0	0	0	1
Level I-Mechanic(s) (skill, 8.4)	39	4	7	13	7	0	4	1	0	0	3
Level I-Mechanic(s) (Avn Life Supt Equip) (skill, 8.5)	7	0	0	0	1	1	1	4	0	0	0
Level I-Mechanic(s) (Armament) (skill, 8.6)	5	0	2	2	0	0	0	1	0	0	0
Level I-Mechanic(s) (Flight Test)(skill 8.7)	0	0	0	0	0	0	0	0	0	0	0
Level I-Mechanic(s)/Engine (skill, 8.8)	2	0	0	0	0	1	1	0	0	0	0
Level I-Mechanic(s)/Electrician (skill, 8.9)	11	0	3	4	1	1	2	0	0	0	0
Level I-Mechanic(s)/Sheet metal (skill, 8.10)	7	0	2	0	1	1	1	1	0	0	1

Production Controller (skill, 8.12)	2	0	0	0	0	0	1	1	0	0	0
Supply Technician(s) (skill, 8.13)	7	1	1	1	1	1	0	1	1	0	0
Computer Analyst II (skill, 8.14)	1	0	0	0	0	0	0	0	0	1	0
Total	99	7	18	24	14	7	12	10	1	1	5

(R4, tab 39 at 22) The manning at Ft. Knox was reduced by 3 FTEs from 27 to 24.⁸ The manning at Kingsville was reduced by 2 FTEs from 12 to 10. Ft. Hood was added to the table with 5 FTEs. The Firm Fixed Price Team Complement table for Option Period I was identical to the Basic Year Team Complement table, above (*id.* at 23). Modification No. 03 stated that, “[a]s a result of the above, there is no change to the total amount obligated on this task order” (*id.* at 2; *see stip.* ¶ 20).

Post Modification No. 03 Manning Levels

46. The record includes a declaration from Mr. Frankel, URS’ CFT Operations Director (R4, tab 159). Attachment 1 to the declaration is a summary of manning reports for Ft. Knox, Kingsville and Ft. Hood⁹ from August 9, 2013 through August 20, 2014 (R4, tab 159 at 2, tab 160). Attachment 1 shows two numbers, “PWS” and “Filled,” for each of the three locations, Ft. Knox, Kingsville, and Ft. Hood, depicting the PWS required manning and actual manning (R4, tab 160). The manning reports are in the record (R4, tabs 72, 77-80, 82-85, 87-89, 91-94, 96-98, 100-03, 105-08, 110-12, 114-16, 118-21, 123-24, 126-27). For Ft. Knox the PWS manning number was 25 from September 4, 2013 through February 5, 2014 (R4, tabs 77-80, 82-85, 87-89, 91-94, 96-98, 100). On February 20, 2014 the Ft. Knox PWS manning dropped to 24 and remained at 24 through July 2, 2014 (R4, tabs 101-03, 105-08, 110-12, 114-16, 118-21, 123). The reason for this drop is that the number 25 incorrectly included a T&M maintenance pilot with the FFP FTEs. This can be seen in later manning reports where the T&M pilot was separately accounted for. (R4, tabs 112, 114-16, 118-21, 123)¹⁰ Only Ft. Knox and Conroe, TX (not relevant here) had maintenance pilots (*id.*). The manning reports showed Ft. Knox vacancies ranging from two to four FTEs the majority being two vacancies, Kingsville showed zero to three vacancies, the majority being one

⁸ The 24 FTE’s does not include one T&M maintenance test pilot required at Ft. Knox (R4, tab 39 at 22).

⁹ Ft. Hood first appeared in the September 25, 2013 manning report (R4, tab 79 at 2).

¹⁰ For some reason the pilot was not accounted for separately in the July 30, 2014, August 13, 2014 and August 20, 2014 reports (R4, tabs 124, 126-27).

vacancy, and Ft Hood showed full staffing of five except for two reports showing one vacancy (R4, tab 160).

CFT Form 104 Reports & CPARS Performance Evaluations

47. The Army Reserve prepared two monthly reports, the CFT Form 104 Performance and Schedule Metrics report, and the Contractor Performance Assessment Reporting System (CPARS) report. These reports are done for each individual site and are also “rolled up” to rate URS as a whole based on the average of individual ratings at each site. The record included rollup reports from July 1, 2013 through May 1, 2015. The CFT Form 104 uses metrics of +1 (excellent), 0 (meets standard), and -1 (unacceptable) to rate performance. The CPARS reports rate performance unsatisfactory, marginal, satisfactory, very good or exceptional. From July 1, 2013 to March 1, 2014 the CFT Form 104 rollup report rated overall performance for work quality and supply transactions as either +1 / excellent or 0 / meets standard. The rating for manning was -1 / unacceptable. The CPARS ratings for this period was generally not less than satisfactory for quality of service and cost control but unsatisfactory for personnel shortages. The CFT / CPARS unacceptable / unsatisfactory ratings for personnel through February 5, 2014 were affected by Ft. Knox incorrectly counting the T&M pilot with the FFP FTEs resulting in the PWS number of 25.¹¹ When the Ft. Knox PWS number was corrected to 24 on April 1, 2014 the overall rollup CFT manning rating rose to “0” / meets standard¹² and the CPARS manning rating was generally no less than marginal for reports from April 1, 2014 through May 1, 2015. We find that URS was incorrectly rated unsatisfactory at Ft. Knox when the FFP team complement was 25 due to including the T&M pilot. (R4, tabs 17, 20, 27, 70, 75, 81, 86, 90, 95, 99, 104, 109, 113, 117, 122, 125, 128-34, 136-37; see also R4, tab 11 at 12-14)

48. The record also contains individual CFT and CPARS ratings for Ft. Knox and Kingsville from July 1, 2013 through March 1, 2014. CFT Form 104 rated performance at Ft. Knox for work quality as +1 / excellent and supply transactions as +1/ excellent for all but one month. Ft. Knox manning was rated as -1 for all months. CFT Form 104 rated performance for Kingsville work quality and supply transactions as +1 or 0. Kingsville manning was rated 0 or -1. The CPARS ratings were typically “exceptional” for quality of service at Ft. Knox and “satisfactory” at Kingsville. Ft. Knox was typically rated “unsatisfactory” for personnel deficiencies and Kingsville marginal or satisfactory. The Ft. Knox personnel ratings through February 5, 2014

¹¹ Many of the “filled” numbers were 22. $22 / 25 = .88$ or “-1” unacceptable (finding 19). This rating was wrong because to get 25 it added the T&M test pilot in with the FFP maintenance FTEs.

¹² Many of the “filled” numbers were 22. $22 / 24 = .916$ or “0” meets standard (finding 19).

were inaccurate because the PWS manning number for those months was 25 that incorrectly counted the T&M pilot as a FFP FTE. (R4, tabs 140-57)

URS's Request for Equitable Adjustment (REA) and Certified Claim

49. By letter dated April 2, 2014, URS filed a REA asserting entitlement to an equitable adjustment of \$238,022.40 for the additional firm-fixed-price labor costs resulting from the addition of five FTEs at ASF Hood. The April 2, 2014 REA did not assert entitlement to any transition or start-up costs associated with standing up ASF Hood or factor in any downward adjustment for the value of the 5 FTEs deducted from ASFs Knox and Kingsville. The REA, which reserved the right to seek additional adjustment should the AF exercise Option Period I, does not appear to have been accompanied by any sort of certification. (R4, tab 42)

50. On April 17, 2014, the CO denied URS' April 2, 2014 REA (R4, tab 43). The CO reasoned that since URS had not achieved the manning levels required by the contract it had billed \$698,105.34 for required manning that was not provided. Accordingly, the CO concluded the AF did not owe URS any monetary adjustment. (*Id.*)

51. On January 30, 2015, URS submitted to the AF a certified claim demanding payment of \$477,316.72 for costs in the base period and Option Year I associated with the additional five positions directed in Task Order Modification No. 03 (R4, tab 46; stip ¶ 22). The January 30, 2015 certified claim did not assert entitlement to any transition or start-up costs associated with standing up ASF Hood or acknowledge any downward adjustment for the value of the 5 FTEs deducted from ASFs Knox and Kingsville. URS' certified claim focused on Modification No. 03:

Apart from the fact that the Air Force's directions embodied in Mod 03 are contrary to the terms of the Contract, the Air Force's actions clearly reflect a fundamental misinterpretation of the firm-fixed price portion of the Contract. The PWS directed offerors to submit a fixed-price proposal for aircraft maintenance at designated locations. URS complied with this requirement, and submitted a fixed-price proposal to perform maintenance at the designated locations. Nowhere in the PWS did the Air Force indicate that the contractor had to provide staffing at the Ft. Hood work site. Neither the Contract nor the PWS make any provision for the Air Force's ability to add work without a corresponding equitable adjustment to price. The Air Force's approach to administration of the Contract reflects a time-and-materials

approach, whereby the government can direct the allocation of resources provided by the contractor, rather than adherence to the fixed-price nature of the Contract.

(R4, tab 46 at 4)

52. When the contracting officer did not issue a final decision within the time specified by the CDA, 41 U.S.C. §§ 7101-7109, URS appealed the deemed denial to the Board on May 21, 2015 (stip. ¶ 22; R4, tab 47). That appeal was docketed by the Board on May 22, 2015 under ASBCA No. 59998.

53. In its Rule 11 brief, the AF took the position that it was entitled to \$523,937.30 for the downward adjustment in personnel at Ft. Knox and Kingsville (gov't Rule 11 br. at 68-70). In arriving at this position the AF used URS' proposal and pricing tables (*id.*). The AF conceded that URS was entitled to \$663,249.08 for the increase in work added at Ft. Hood (gov't Rule 11 br. at 71-72). The AF states: "[t]herefore, the Air Force respectfully requests that the Board grant the appeal only to the extent that appellant is entitled to an equitable adjustment of \$139,311.78 and otherwise deny it." Simply put, the AF calculates, based on the downward adjustment, that URS is due \$139,311.78. (Gov't Rule 11 br. at 73-77)

DECISION

In their briefs the parties presented numerous arguments, some more developed than others. Although we did not discuss each and every one in this decision, we considered each and discuss what we felt merited discussion.

Jurisdiction

Both parties presented challenges to our jurisdiction. We first deal with the Air Force's (AF) August 16, 2018 Motion to Dismiss for Lack of Jurisdiction. The AF contends that the September 20, 2013 unilateral Modification No. 03 (finding 45) was a final decision asserting a claim of entitlement to a resultant downward price adjustment which completely offset any upward price adjustment and that URS failed to timely appeal (gov't mot. at 2, 31). The AF then argues that URS was obligated to appeal Modification No. 03 within the 90 day statutory appeal period (*id.*). There is no dispute that Modification No. 03 was not identified as a final decision nor did it have any appeal rights. There is no evidence that CO Wood, or anyone else, intended Modification No. 03 to be a final decision at the time. However, existing law, under limited circumstances, allows contractors to appeal to this Board from a government document, such as Modification No. 03, that is not identified as a final decision, does not have appeal rights, and was likely not intended as a final decision when issued by the government. This limited right to appeal is predicated on the contractor's authority

to waive the defects (discussed below). The AF's motion asks this Board to expand this legal precedence to impose an obligation on a contractor to appeal such a document within the statutory 90 day period, 41 U.S.C. § 7104(a). Both parties agree on the existing law, however, they disagree on the expansion in the law suggested by the AF.

In its motion the AF discusses the nature of a "claim" and certain "formalities" such as identification as a final decision and appeal rights (gov't mot. at 32-33) that we take no exception to. The AF relies on *The Boeing Company*, ASBCA No. 37579, 89-3 BCA ¶ 21,992 for the proposition a document such as Modification No. 3 may be deemed by the Board as a final decision and appealed:

Normally, one of the hallmarks of contracting officers' decisions asserting Government claims is compliance with certain formalities, such as notice of appeal rights, prescribed by CDA section 5(a) and agency implementing regulations. *E.g.*, DAR 1-314(i) (1980), FAR 33.011 (1984). Absent such notice, a unilateral contract modification will not usually be treated as a contracting officer's decision from which an appeal may be taken.

However, "[t]he formalities associated with the content of the contracting officer's decision are for the protection of the contractor." Thus, we have carved a narrow exception to the foregoing rule in cases where a full-blown dispute between the parties has crystalized and the Government has issued a unilateral contract modification asserting its right to payment of money or to otherwise adjust the contract terms, such as to reduce the contract price. *Building Services Unlimited, Inc.*, ASBCA No. 33283, 87-3 BCA ¶ 20,135 at 101,931; *see Hunter Manufacturing Co.*, ASBCA No. 34209, 87-2 BCA ¶ 19,903.

Boeing, 89-3 BCA ¶ 21,992 at 110,597. Hence we have this "narrow exception" that is premised on the fact a contractor may initiate an appeal effectively waiving the "formalities" of notice because said "formalities" are for the contractor's benefit. We discussed the importance of waiver in *Outdoor Venture Corp*, ASBCA No. 49756, 96-2 BCA ¶ 28,490:

In its motion to dismiss, the Government asserts that the CO never issued a final decision pursuant to § 605(a) of the CDA. It argues that the CO's letter of 15 April 1996 letter does not conform to the requirements for a final

decision set forth in FAR 33.211. FAR 33.211 states that a final decision must describe the nature of the claim, the relevant contract terms, the relevant facts, outline the CO's decision, and notify the contractor of its appeal rights.

The Government's contentions are unavailing. As we held in *Cedar Construction*, ASBCA No. 42178, 94-2 BCA ¶ 26,838, it is well-established that the Board has jurisdiction over appeals taken by a contractor where the final decision omitted the notification of the contractor's appeal rights. The same holds true where a contractor elects to appeal from a decision asserting a Government claim which does not conform to the other requirements of FAR 33.211. Since these requirements exist for the contractor's benefit, the contractor has the right to waive non-compliance whenever the CO asserts a Government claim. In so doing, the contractor confers jurisdiction upon the Board.

Id. at 142,273 (footnote omitted); see *Industrial Data Link Corp.*, ASBCA No. 49348, 98-1 BCA ¶ 29,634 at 146,847. This right is a one-way street, the government cannot waive "formalities" intended to benefit only the contractor. This supports our conclusion that there was no obligation that URS appeal Modification No. 03 because the AF's position necessarily rests on the AF's right to waive the "formalities" of identification as a final decision and appeal rights. The AF has no such authority.

The AF also relies on the recent decision in *Greenland Contractors I/S*, ASBCA Nos. 61113, 61248, 18-1 BCA ¶ 36,942 (gov't mot. at 33). Greenland appealed a January 11, 2017 contracting officer's letter directing it to "immediately initiate and continue all actions" to repair certain electrical equipment. *Greenland*, 18-1 BCA ¶ 36,942 at 179,972. We held that the letter was a final decision even though it was not styled as such and did not contain appeal rights:

The Air Force asserts that the 11 January 2017 letter does not constitute a claim because it is not styled as a contracting officer's final decision, does not seek interpretation or adjustment of contract terms, and because Greenland's true goal is a monetary claim for work performed beyond the scope of the contract (gov't mot. at 2-3). None of the Air Force's arguments are meritorious. First, the fact that the 11 January 2017 letter was not captioned as a contracting officer's final decision, and does not satisfy the requirements of a final decision contained in the FAR is of no importance to determining

our jurisdiction. “The absence of an express styling of a document as a [contracting officer’s] decision or of notice of the contractor’s appeal rights, or of both, does not render a [contracting officer’s] decision ineffective or deprive the Board of jurisdiction.” *DynPort Vaccine*, 15-1 BCA ¶ 35,860 at 175,333.

Greenland, 18-1 BCA ¶ 36,942 at 179,973. Again the contractor initiated the appeal and the government argued the 11 January 2017 was not a final decision because it lacked identification as such and appeal rights, i.e., the “formalities.” Implicit in our decision is that the contractor waived the protection of the missing “formalities.”

For its part, URS does a good job distinguishing the case law the AF cites in its motion (*see app. opp’n br. at 33-37*). We need not repeat this entire analysis other than to say again that URS points out that the AF has not cited to any case that makes appeal of documents such as Modification No. 03 mandatory. We agree with URS’ position, “As discussed *supra*, URS could have treated Mod 03 like a contracting officer final decision and appealed it to the Board, but as the Board’s case law affirms, URS was not obligated to do so.” (*App. opp’n at 27*)

The AF’s reply brief focuses on the requirement for a contractor to show prejudice when appeal rights are either missing or defective (*see gov’t reply br. at 7-8*). When a contractor fails to appeal a document such as Modification No. 3, the obligation to appeal must be proven before the matter of prejudice comes into play. The AF jumps from discretion to appeal to an obligation to appeal without any support in the cases it relies upon. The AF seems to think that just because this Board will deem a unilateral modification, or even a letter, a final decision, that is enough to prove an obligation to appeal. Not so because the AF has no authority to waive the defects in the “deemed” final decision.

Here are some of the cases cited by the AF in its reply brief (*gov’t reply br. at 8*). *Medina Contracting Co.*, ASBCA No. 53783, 02-2 BCA ¶ 31,979 involved a Termination for Default decision that stated the contractor had a right to appeal but failed to identify appeal forums or deadlines. *Id.* at 158,020. The Board held that Medina failed to even allege prejudice¹³ and that the appeal was therefore untimely. *Id.* at 158,021. However, in *Medina* there was a final decision terminating the contract for

¹³ In fact Medina seems to have disappeared, “Appellant has not responded to the motion. All attempts by the Board to contact appellant have been unsuccessful.” *Medina*, 02-2 BCA ¶ 31,979 at 158,020.

default with incomplete appeal information. There was no doubt that the CO intended the termination to be a final decision. *Mansoor Int'l Dev. Servs.*, ASBCA No. 59466 *et al.*, 16-1 BCA ¶ 36,376 involved appeals filed more than one year after receiving the CO's final decisions terminating certain task orders for cause. The terminations failed to include appeal rights, however, a modification issued before the appeal was filed included reference to the terminations and included appeal rights. *Id.* at 177,336. The Board held that absent or defective notifications of appeal rights did not cause prejudice because the modification informed Mansoor of its appeal rights. Missing or defective appeal rights are harmless error where appellant knew of its rights.¹⁴ *Id.* at 177,336-338. *DCX-CHOL Enterprises, Inc.*, ASBCA No. 54707, 08-2 BCA ¶ 33,889 involved seven unilateral modifications issued on January 23, 2004 cancelling contract CLINs. The modifications did not include appeal rights. *Id.* at 167,727. We held that these unilateral modifications were "in reality, a default termination and consider its merits as such." *Id.* at 167,730. Subsequent to the unilateral modifications, DCX filed a June 25, 2004 claim and a final decision denying the claim issued thereafter with appeal rights. *Id.* at 167,727. The June 25, 2004 claim was filed 154 days from the January 23, 2004 unilateral modifications – well past the 90 day appeal period. According to the AF's position in this appeal, the Board should have dismissed the case because DCX did not appeal within 90 days of January 23, 2004. *Id.* at 167,730. Instead, the Board took jurisdiction based on an appeal of the final decision denying the June 25, 2004 claim. *Id.* at 167,727. *Range Technology Corp.*, ASBCA No. 51943 *et al.* 04-1 BCA ¶ 32,456 involved a January 30, 1998 termination for default stating Range had the right to appeal but with no appeal venue information. Range filed a claim on September 30, 1998, 243 days after the termination. *Id.* at 160,542. However, we accepted jurisdiction because Range was able to prove detrimental reliance. *Id.* at 160,544. The AF also relied on *Greenland*, 18-1 BCA ¶ 36,942 that we discussed above. None of these and other cases cited by the AF support the contention that contractors are obligated to appeal documents that are not identified as final decisions, do not include appeal rights and that no one considered or intended to be final decisions at the time.

In its opposition to the AF's Motion to Dismiss, URS included a section on estoppel starting with, "The Air Force should be estopped from seeking dismissal of URS's appeal through its jurisdictional challenge" (app. opp'n at 37-42). In its Rule 11 Reply Brief URS mentions estoppel, "By choosing not to pursue an equitable adjustment to reduce the Task Order's price during its performance, the Air Force is now estopped from lowering the amount of quantum to which URS is entitled as a result of the change directed by Mod 03" (app. Rule 11 reply br. at 2). The elements of estoppel are generally (1) misleading conduct, (2) reliance, and (3) material

¹⁴ The AF made this argument (gov't mot. at 36; gov't reply br. at 8) citing access to counsel's, "extensive government contract experience," and previous ASBCA litigation. These reasons are not sufficiently connected to Modification No. 03 to be persuasive.

prejudice. The burden to prove estoppel against the government is a “heavy one” and requires additional proof of “affirmative misconduct.” *Northrop Grumman Corp.*, ASBCA No. 57625, 14-1 BCA ¶ 35,501 at 174,023-024. Because URS did not analyze and prove the discrete elements of estoppel we conclude URS failed to meet its burden of proof.

To summarize, the AF’s argument fails because it requires as a prerequisite the waiver of the missing or defective rights warnings, i.e., the “formalities.” Since the “formalities” are for the protection of the contractor, the AF has no authority to waive them. This is the purely legal reason why the AF is wrong. There is another obvious reason, the AF asks us to condone what amounts to “secret final decisions” that impose the obligation to appeal within the 90 days from a document that is not identified as a final decision, does not have appeal rights, and that no one at the time considered to be final decisions. Such a decision by this Board would be completely at odds with the Contract Disputes Act. The AF’s motion is denied.

Now we address URS’ jurisdictional argument. The cases and argument presented above apply to our discussion of URS’ jurisdictional argument but are not repeated. In its reply brief URS asserts, “The Air Force’s failure to assert an equitable adjustment to reduce the Task Order price or to issue a contracting officer’s final decision for the claimed amount deprives the Board of jurisdiction over the Air Force’s deductive change request, and requires dismissal of the Air Force’s request to reduce the amount of recovery to which URS is entitled.” (App. Rule 11 reply br. at 9)

The scope of the Board’s jurisdiction is generally defined by the certified claim. *Envtl. Safety Consultants, Inc.*, ASBCA No. 54615, 07-1 BCA ¶ 33,483 at 165,979 (Jurisdiction will be determined by examining the claim as it was submitted to the contracting officer, not by subsequent correspondence to the Board). In this case URS’s claim squarely deals with Modification No. 03. (Findings 49, 51) Therefore, the scope of our jurisdiction is circumscribed by Modification No. 03 which is the focus of URS’ claim.

We start by reconciling URS’ argument in its Rule 11 Reply Brief and its argument in its Opposition to the AF’s Motion to Dismiss. In the Reply Brief URS argues, “The Air Force’s failure to issue a contracting officer’s final decision establishing the government’s claim for decreased costs effected by Mod 03 prevents the Board from exercising jurisdiction over the Air Force’s price decrease request.” (App. Rule 11 reply br. at 13) In its Opposition to Respondent’s Motion to Dismiss URS argues, “The Board’s decisions establish that the Board distinguishes between contracting officer communications that *may be* treated as a final decision and appealed to the Board and those that *must be* appealed in order to protect the contractor’s rights. Mod 03 falls within the former category, and URS properly decided to pursue a request for equitable adjustment (later a claim) to recover its additional cost to perform the

changed requirements directed by Mod 03.” (App. opp’n at 18) These two positions, though not directly contradictory, are at least inconsistent. In the first URS contends that Modification No. 03 was not a final decision and in the second URS acknowledges that Modification No. 03 was a final decision that may be appealed at URS’ discretion. We held above that Modification No. 03 was a final decision although not one that URS was obligated to appeal. Since Modification No. 03 is a final decision, there is no need for the AF to issue another.

Next URS argues that the AF failed to issue a contracting officer’s final decision “establishing the government’s claim for decreased costs effected by Mod 03 . . .” (app. Rule 11 reply br. at 13). We disagree. Modification No. 03 is a final decision that effectively reduced the price by reducing the manning at Ft. Knox and Kingsville. The only reason a dollar reduction was not stated was that it was completely offset by the increase in price for FTE’s at Ft. Hood. That does not mean that Modification No. 03 did not include a price reduction.

In its Rule 11 surreply the AF points out an interesting omission in URS’ Rule 11 reply brief. In its brief URS quotes *Unconventional Concepts, Inc.*, ASBCA No. 56065 *et al.*, 10-1 BCA ¶ 34,340 at 169,591 (citations omitted), “[T]he CDA requires that the CO issue a decision on each contractor and government claim. Such decision is required to establish a tribunal’s CDA jurisdiction to entertain a government claim. Further, a CDA claim cannot properly be raised for the first time in a party’s pleadings before the Board.” (App. Rule 11 reply br. at 13) The AF points out that URS failed to complete the quote. The next two sentences in the quote read, “The test for what constitutes a ‘new’ claim is whether ‘claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists.’” *Unconventional Concepts*, 10-1 BCA ¶ 34,340 at 169, 591 (quoting *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)). We conclude that the AF’s assertion in its reply brief that it is entitled to a price reduction caused by Modification No. 03’s reductions in FTEs at Ft. Knox and Kingsville is based on a “common or related set of operative facts” arising from URS’ claim, i.e., Modification No. 03. The AF also writes:

The Board’s jurisdiction to adjudicate the Air Force’s claim, even based solely on its Rule 11 brief, is supported by the U.S. Court of Appeals for the Federal Circuit, which has stated that the pertinent question, in determining whether the government’s assertion of entitlement to some adjustment must take the form of a separate claim, is whether it is “based on the same claim previously presented to and denied by the contracting officer.” *Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed.

Cir. 2014) (quoting *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)).

(Gov't sur-reply br. at 7) We agree with the AF's argument. We again quote the AF's argument with which we agree:

Here, appellant's claim for an upward price adjustment, the deemed denial of which it appealed to the Board, concerns the same facts as the Air Force's claim for a downward price adjustment. Appellant's and the Air Force's claims concern Modification No. 03, which adjusted the terms of the contract and firmly established the Air Force's asserted entitlement to a resultant downward price adjustment as the basis of the parties' dispute: the Air Force asserted entitlement to a downward price adjustment, appellant denied such entitlement, and the Air Force determined that its downward price adjustment completely offset appellant's upward price adjustment and modified the Task Order accordingly. The Air Force's assertions of entitlement to a downward price adjustment in its Rule 11 Brief do not present a single operative fact that was not part of the basis for the July 9, 2013 request for change proposal or the September 20, 2013 unilateral Task Order Modification No. 03 (gov't br. at 64-70). Rather than being a new claim, the Air Force's assertions of entitlement to an offsetting downward price adjustment are the very reason that this appeal is before the Board.

(Gov't sur-reply br. at 8) Accordingly, it is not a new "claim" that should have been the subject of a contracting officer's final decision.

To summarize, we have concluded that Modification No. 03 was a CO's final decision of the type that, due to missing "formalities" such as identification as a final decision, right's warnings, etc., did not have to be appealed at the time. Modification No. 03 asserted a claim for a downward adjustment in price for reductions in FTEs and Ft. Knox and Kingsville that was completely offset by an increase in price for adding FTEs at Ft. Hood. The AF's price reduction assertion is not a new claim because it relies on a common or related set of operative facts relating to Modification No. 03. URS's argument that we do not have jurisdiction over the AF's price reduction is unpersuasive – we have jurisdiction.

Contentions of the Parties on the Merits

The parties started out disputing whether the addition of five FTEs at Ft. Hood was a change entitling URS to additional compensation. In its brief, the AF conceded that the addition of Ft. Hood to the contract was a change that entitled URS to a price increase of \$663,249.08. However, the AF claimed it was entitled to a price reduction of \$523,937.30 attributed to the deductive change at Ft. Knox and Kingsville. The AF concludes that after subtracting the deductive change from the price increase, URS is entitled to \$139,311.78. (Gov't Rule 11 br. at 3) In its reply brief URS points out that its Ft. Hood claim is for \$667,220.558 a mere .6% more than what the AF recognized (app. Rule 11 mot. at 23; app. Rule 11 reply br. at 1-2, 7). The dispute is now primarily over if the AF has the right to a deductive change associated with the reduction of five FTEs at Ft. Knox and Kingsville.

URS interprets the contract to provide a specified level of aircraft maintenance, not a number of personnel. URS argues that the required level of maintenance at Ft. Knox and Kingsville did not change and therefore there is no right to reduce the price even though the AF reduces the number of personnel at the site. (App. Rule 11 br. at 22, 24-25; app. Rule 11 reply br. at 2-3, 8, 15-16) The AF agrees that the maintenance work at Ft. Knox and Kingsville did not change (findings 35, *see also* 42, 44). URS asserts that interpreting the contract to require a specified number of personnel would constitute an improper personal services contract (app. Rule 11 br. at 33-34). URS argues that the AF relies on extrinsic evidence that is not part of the contract to support its minimum team complement argument. The extrinsic evidence is terms of the FON, Q&As and the parties post-award conduct. (App. Rule 11 reply br. at 16-17) URS argues that the AF calculation of the deductive change amount is "flawed" because the AF did not use URS' actual costs data (app. Rule 11 reply br. at 18-19).

TO 55 Required URS to Hire and Maintain Maintenance Personnel in Accordance with the PWS Team Complement Table

This is predominately a contract interpretation case. We apply well known rules of contract interpretation. First, we enforce the "plain and ordinary" meaning of language that is clear and unambiguous. *TEG-Paradigm Env'tl, Inc. v. U.S.*, 465 F.3d 1329, 1338 (Fed. Cir. 2006). However, when interpreting contract language, we must consider the contract as a whole and interpret the contract so as to harmonize and give reasonable meaning to all of its parts. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). The law prefers an interpretation that does not leave

a portion of the contract “useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous.” *FSEC Inc.*, ASBCA No. 49509, 99-2 BCA ¶ 30,512 at 150,665 (citation omitted); *see also C.S. McCrossan Constr, Inc.*, ASBCA No. 49647, 00-1 BCA ¶ 30,661 at 151,379 (citations omitted). To be reasonable, an interpretation need not be the best interpretation, it need only be within the “zone of reasonableness.” *States Roofing Corp. v. Winter*, 587 F.3d 1364, 1369 (Fed. Cir. 2009). We avoid relying on extrinsic evidence to interpret clear and unambiguous language. *See Keco Indus., Inc.*, ASBCA No. 50524, 00-1 BCA ¶ 30,857 at 152,332-333.

Contract 0006, PWS paragraph 2.3, identifies where the aircraft maintenance services were to take place. Relevant to this decision is that two of the locations are Ft. Knox and Kingsville. Ft. Hood was identified as a location “where contract maintenance may be required.” (Finding 18) As we discuss below, the minimum team complement at Ft. Knox and Kingsville overstated the number of maintenance personnel needed to successfully perform the work by five personnel. Due to the way the AF required contractors to calculate their proposal prices (finding 24), the AF believed that it could simply transfer five maintenance personnel to Ft. Hood at no cost. (Findings 30, 34) URS disagreed. The AF made the transfer by unilateral Modification No. 03. (Finding 45) This started the dispute over whether the AF is entitled to a change for the reduction in FTEs at Ft. Knox and Kingsville.

Contract 0006 required the AF to issue a FON to all interested contractors prior to award of a TO (finding 8). The FON was issued on February 15, 2013 and in this case was essentially a cover letter providing instructions to interested contractors and transmitting the latest version of the PWS. We do not use the FON to interpret CLIN 4004 that, as we discuss below, is clear and unambiguous. However, the FON itself serves to explain how proposals were to be calculated by offerors and evaluated by the AF. (Findings 11-16)

In Contract 0006 the AF gave itself the right to pick whether the contractor or AF will “solely” determine the PTC,¹⁵ “The government reserves the right to determine whether the PTC will be determined solely by the Contractor based on the number of personnel the Contractor believes to be necessary to accomplish the required task(s), or whether the Government will solely determine the PTC” (finding 5). In the FON the AF exercised its right and picked itself, directing that the “minimum team compliment” must be in accordance with the personnel and skills listed in Section 8.0 of the attached PWS (finding 15). It is noteworthy to point out that the terminology was changed from “projected team complement” (PTC) that is the “estimated number and skill classification of personnel expected to be required to accomplish a task” in Contract 0006 to “minimum

¹⁵ PTC is not used exclusively in Contract 0006. The PWS, Attachment A to Contract 0006, paragraph 1.2 reads in part, “. . . Task Orders and shall develop a time-phased plan to achieve the required team complement.” (Finding 10)

team complement” that is required to be “in accordance with the skills listed in section 8.0” of the PWS in the FON and TO 55. (Findings 5, 15, 22) This change in terminology is significant but is not addressed by URS in its argument. URS bases its interpretation on the superseded language of Contract 0006. (App. Rule 11 br. at 32-33; app. Rule 11 reply br. at 15-16)¹⁶ Therefore, URS’ argument is unfounded.

Offerors were not allowed to propose less than the minimum team complement (findings 13, 15-16). The mandatory AF pricing sheets required that offerors calculate their proposal price using the PWS minimum team complement (findings 14, 16, 24-25). There is no evidence that URS objected to the FON before award of TO 55. We find that the FON and the PWS establish that URS entered into TO 55 knowing (or should have known) that the AF’s interpretation differed from its own, it did not object, and therefore URS is bound by the contrary interpretation. *Cf. C.S. McCrossan*, 00-1 BCA ¶ 30,661 at 151,380.

We find that CLIN 4004 is clear and unambiguous and requires “modification / maintenance / repair effort on-site at operational government locations” (findings 4, 10, *see also* 17-18). CLIN 4004, must be given its plain and ordinary meaning. *TEG-Paradigm*, 465 F.3d at 1338. The plain and ordinary meaning of CLIN 4004 is aircraft modification, maintenance and repair. CLIN 4004 does not mention the manning / team complement and therefore cannot be read to preclude requiring manning levels. (*See* findings 4, 5) In addition to the plain and ordinary meaning, CLIN 4004 must be read “harmoniously” with other contract requirements. *NVT Technologies*, 370 F.3d at 1159. URS interprets CLIN 4004 to preclude a mandatory minimum team complement, an interpretation that conflicts with other contract requirements relating to the team complement tables and performance metrics. (*See* findings 19-20, 22, 45) Harmonizing CLIN 4004 with team complement tables and performance metrics does not change the interpretation of CLIN 4004. We interpret TO 55 / PWS to require URS to provide and maintain a specific number of maintenance personnel with specific skills, i.e., the minimum team complement. (*See* findings 6, 10, 13-16, 19-22, 24-25) This is the only interpretation that reads all of these provisions of the contract harmoniously. URS’ interpretation, aside from relying on superseded language, renders the mandatory minimum team complement and the manning metrics “useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous” which is not a preferred interpretation. *FSEC Inc.*, 99-2 BCA ¶ 30,512 at 150,665 (citation omitted).

It is unusual for the government to contract for maintenance services and also dictate the number of personnel and skills to perform the maintenance. This contributed to the dispute in this appeal. We see this in the manning shortfall criticism

¹⁶ URS argues that since the team complement was “projected” and “estimated” the PTC “lacks any requirement to provide specified levels of staffing.”

by the AF.¹⁷ (See findings 27-29, 33, 36, 43, 46-48) As it turned out the number of maintenance personnel the AF required URS to provide at Ft. Knox and Kingsville was more than URS needed to successfully perform the maintenance work. URS consistently received good ratings on its maintenance services even though it employed fewer maintenance personnel than required by the team complement table. (See findings 47-48) Although there was no hearing that would have allowed testimony on this point, the record clearly supports our inference that the AF recognized that it had required five more maintenance personnel than were needed at Ft. Knox and Kingsville. The AF therefore decided to “move” these five excess personnel to Ft. Hood reasoning that it would not increase the cost of the contract because URS had been required to calculate its price using AF pricing sheets that listed the required number of maintenance personnel identified in the FFP Team Complement table.¹⁸ (See findings 22, 24-25) URS would not agree with the no-cost modification which resulted in much back and forth and eventually unilateral Modification No. 03 reducing Ft. Knox by three FTEs and Kingsville by two FTEs and moving them to Ft. Hood. (See findings 30-35, 37-45) The AF asked URS for a proposal for any cost changes resulting from the proposed changes to the PWS reducing the manning at Ft. Knox and Kingsville (finding 30). URS objected to this deductive change arguing that since the work at Ft. Knox and Kingsville had not changed, a change under the Changes clause was not merited. (See findings 33, 35, 37, 39, 42, 44) The AF agreed that the work had not changed at Ft. Knox and Kingsville (findings 35, see 42, 44, 47-48). Whether the work changed or not is irrelevant. We found above that the contract required URS not only to perform aircraft maintenance work, but also to maintain the number of personnel specified in the team complement tables. These are the services URS was to perform. Therefore, Modification No. 03’s reduction in the team complement at Ft. Knox and Kingsville was a change in the “Description of services to be performed” authorized by the Changes clause. (See finding 9)

One final argument we deal with. URS contends that if the contract required URS to maintain the team complement employees it would be an improper personal services contract (app. Rule 11 br. at 33-34). However, the PWS states it is not for personal services, “These requirements are not personal services” (finding 10). URS fails to prove AF supervision, the critical element of personal services. See *Charles F.*

¹⁷ Some of this criticism was based on faulty numbers caused by including the T&M test pilot in with the FFP FTE maintenance personnel at Ft. Knox (findings 47-48). The mistake skewed the manning metrics that allow some under manning because providing greater than 90% but less than 100% manning results in a rating of “meets standard” (finding 20).

¹⁸ This risk of higher prices is precisely why typical maintenance contracts do not specify the number and skill sets of employees the contractor must employ to perform the work.

Day & Associates LLC, ASBCA No. 60211 et al., 19-1 BCA ¶ 37,215 at 181,179 n.19 (citations omitted) (“CFD also presents an underdeveloped argument that actually requiring the hours set forth in CLINs 5 and 6 would create a forbidden personal services contract. This is incorrect. A personal services contract is not created by minimum manning requirements, but by continuous government supervision of contractor employees.”). URS failed to prove its personal services argument.

To summarize, we identified five reasons why we disagree with URS’ interpretation: (1) URS’ interpretation relies on superseded language, (2) URS entered into the contract knowing the AF’s interpretation differed from its own but did not object, (3) URS’ interpretation cannot be read in harmony with other provisions of the contract, (4) the reduction in FTEs at Ft. Knox and Kingsville is within the scope of the Changes clause, and (5) TO 55 is not a personal services contract. All in all, URS’s interpretation is not within the zone of reasonableness. *See States Roofing*, 587 F.3d at 1369. We deny URS’ appeal with regard to Ft. Knox and Kingsville. However, the AF conceded entitlement to the change with regard to Ft. Hood (finding 53). Accordingly, we will not stand in its way.

The AF Incorrectly Calculated the Claimed Price Reduction at Ft. Knox and Kingsville

Because the contract required URS to maintain aircraft and maintain a certain level of manning at Ft. Knox and Kingsville, a change to that manning falls within the authority of the Changes clause allowing changes in the description of services to be performed (*see* finding 9). Pursuant to that clause, the AF is entitled to a change and the CO is obligated to make an equitable adjustment either increasing or decreasing the contract price as merited.

The AF states it had no choice other than to use URS’ proposal and the pricing sheets to calculate the price reduction because URS refused to negotiate and disclose its actual costs (gov’t Rule 11 br. at 69). This appears to be true but does not support a decision on our part to agree with the AF’s calculation. Just because the AF required URS to price its proposal using the stated minimum team complement and AF pricing sheets does not mean that URS’ actual incurred cost matched those sheets. We agree with URS’ argument that the AF calculation of the deductive change amount is “flawed” because the AF did not use URS’ actual costs data. (App. Rule 11 reply br. at 18-19)

URS is entitled to negotiate a fair and reasonable change, up or down, based on its actual costs at Ft. Knox and Kingsville. We also leave to the parties the matter of the slight difference between the parties’ price increase for Ft. Hood. In this regard we sustain the AF’s right to a modification for the reduction in FTE’s at Ft. Knox and Kingsville, but do not accept its calculation of quantum.

CONCLUSION

URS' appeal is sustained in part as it relates to staffing at Ft. Hood, otherwise, the remaining portion of the appeal regarding Ft. Knox and Kingsville is denied and the matter is returned to the parties to negotiate the appropriate price for the change occasioned by Modification No. 03 and in accordance with the above.

Dated: May 26, 2020



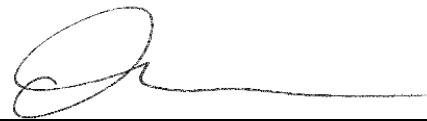
CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 59998, Appeal of URS Federal Support Services, Inc., rendered in conformance with the Board's Charter.

Dated: May 27, 2020



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals