

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
E. L. Hamm & Associates, Inc.) ASBCA No. 48601
)
Under Contract No. N62470-94-D-4445)

APPEARANCE FOR THE APPELLANT: Edward L. Hamm
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Audrey J. Van Dyke, Esq.
Associate Counsel (Litigation)
Naval Facilities Engineering
Command
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE KIENLEN

INTRODUCTION

This appeal arose out a contract for grounds maintenance, and custodial services for family housing, the housing office, and the community center, at Navy housing areas near Norfolk, Virginia. The start of the contract was delayed by a protest. After the protest was resolved, the parties signed a modification. Later, the Government asserted there were mutual mistakes. The appellant disagreed. The Government unilaterally reduced quantities and prices. Only entitlement was tried. We find for the appellant.

FINDINGS OF FACT

The contract included firm fixed-price work and indefinite quantity work. The firm fixed-price portion of the contract was the guaranteed minimum portion of the work. (R4, tab 1 at B-2; tr. 123-24) The schedule contained three line items. The first was the firm fixed-price work, the second and third were indefinite quantity unit priced and labor-rate priced work. For purposes of the Schedule, both the firm fixed-price and the indefinite quantity work were quantified in service units, such as square feet, acres, linear feet, or months. Award of the contract was to be for “the Firm Fixed Price amount.” (R4, tab 1, B.1) The following instructions governed the preparation of the bid:

B.4. CONTRACT SUBLINE ITEMS

a. Offerors shall enter unit prices and amounts for contract line items and subline items as indicated in the schedules.

b. In the event there is a difference between a unit price and the extended total amount, the unit price will be held to be the intended bid and the total of the subline items will be recomputed accordingly. The line item which includes this subline item will also be recomputed to take into account the change in the subline item. If the offeror provides a total amount for a contract subline item but fails to enter the unit price, the total amount divided by the quantity will be held to be the intended unit price.

c. The Schedule of Firm Fixed Price Work and the Schedule of Indefinite Quantity Work will be used as the basis of deductions pursuant to the “CONSEQUENCES OF CONTRACTOR’S FAILURE TO PERFORM REQUIRED SERVICES” clause, Section E.

The following is an extract of firm fixed-price items from the schedule:

<u>Item Number</u>	<u>Supplies/Services</u>	<u>Quantity</u>	<u>Unit</u>	<u>Unit Cost</u>	<u>Total Cost</u>
0001	FIRM FIXED PRICE WORK: Price to perform work in accordance with all terms of this contract. The price of Contract Line Item 0001 is the sum of the Subline Items 0001AA - 0001EN, Section B.				
	<u>SCHEDULE OF FIRM FIXED PRICE SERVICE CALLS</u>				
0001AA	Service Calls (Per Clause C.7)	12	MO	_____	_____
0001AB	Emergency (After Hours) (Per Clause C.7)	12	MO	_____	_____
	<u>PROVIDE CUSTODIAL SERVICE FOR THE HOUSING OFFICE AND COMMUNITY CENTER</u>				
0001AC	Room Cleaning (Per Clause C.9)	1,049,052	SF	_____	_____
0001AD	Trash Removal (Per Clause C.9)	7,199,890	SF	_____	_____
0001AE	Drinking Fountain (Per Clause C.9)	1,559	EA	_____	_____
	<u>PROVIDE GROUNDS MAINTENANCE SERVICE</u>				
....					
0001BD	General Mowing (Per Clause C.11)	4,751	AC	_____	_____
0001BE	Prestige Mowing (Per Clause C.11)	213	AC	_____	_____

0001BF	Maintain Wooded Area (Per Clause C.11)	15	AC	_____	_____
0001BG	Policing of Grounds (Per Clause C.11)	39,427	AC	_____	_____
0001BH	Edging/Vegetation Removal (Per Clause C.11)	2,951,214	LF	_____	_____
0001BJ	Raking (Per Clause C.11)	637	AC	_____	_____
.....					
0001BM	Garbage Containers Refuse Carts (One Time Only-Base Year) (Per Clause C.14)	600	EA	_____	_____
.....					
TOTAL PRICE FOR CONTRACT		XXX	XXX	XXX	_____
LINE ITEM 0001 (0001AA THROUGH 0001BN)					

(R4, tab 1) The quantities in the schedule were based on a 12 month fiscal year of contract performance. The fixed-price quantities shown in the schedule were represented to be “accurate estimates for this contract period.” (R4, tab 1, H.19 at H-7)

The first subline item, 0001AA, in the firm fixed-price portion was for monthly service calls as specified per clause C.7. Service call quantities were indicated in attachment J-C24, which contained historical service call data. The monthly data for routine service calls for October through March totaled 9,496, while the total for April through September was 10,710. This reflected a heavier (12.8%) workload in the April through September period. An unnumbered note provided a +/- 10 per cent variation in quantity clause; the only such clause in the contract. Numbered note (1) in the attachment provided that, “By 1 October 1993, All Quarters in the Ben Moreell Housing Project will be closed. Only minimal interior/exterior maintenance services may be required.” (R4, tab 1; ex. A-3)

CLINs 0001BD through 0001BJ covered firm fixed-price work for both year round and seasonal work, including general mowing, prestige mowing, maintaining wooded areas, policing grounds, edging/vegetation removal, and raking, in accord with clause C.11, which read in relevant part:

C.11 GROUNDS MAINTENANCE SERVICE (FIRM FIXED PRICE WORK) (PRS NO. 0028 THRU 0033)

The Contractor shall be responsible for providing complete care and maintenance of all grounds to include but not limited to improved, semi-improved and unimproved areas.

(See PWC drawing numbers 12,628 through 12,628R for area locations.[]] (See attachment J-C17 for Historical data).

....

d. Lawn Maintenance:

(1) Lawn Maintenance for all Areas (Mowing): The cutting edges of all mowing equipment shall be kept in a sharp condition. . . .

(2) Prestige Mowing: Work shall be performed weekly based on 32 cutting[s] during the growing season from the first full week in April thru October [Although this clause specifies 32 weeks, there are only 30 weeks during this period]. . . . All lawns that are predominantly Fescue grass shall be cut at a 3-1/2" height. All lawns that are predominantly Bermuda grass shall be cut at a 1" height.

....

(4) Policing of Grounds: Work shall be performed daily (all year). The Contractor shall police all grounds under his responsibility for lawn maintenance as well as all streets, sidewalks, playground areas, parking lots, gutters and alleys each day. . . .

(5) Edging/Vegetation Removal: Work shall be performed from the first full week in April thru October. Grass shall be edged along all common sidewalks (both sides), curbs, driveways, flag poles, stepping stones, alleyways, concrete curbs, playground equipment and vegetation shall be removed from joints and cracks in pavements. . . .

(7) Maintain Wooded Area: The Contractor shall be required to cut wooded area to a height of 10 inches. The Contractor shall reference Navy Public Works Center, Carper Housing Grounds Maintenance, Drawing No. 12628H. Wooded area mowing shall be accomplished once per month from April thru October. . . .

(R4, tab 1 at C-48-50)

Prior to submitting appellant's bid, its president, Mr. Edward L. Hamm discussed within the company the fact that the minimum guarantee was quantified as the total of the fixed-price work, as opposed to a specific dollar amount. The appellant reasonably understood that it was guaranteed the total of the fixed-price work; and, that it would get paid the total firm fixed-price for all of that fixed-price work, plus the unit prices for any indefinite quantity work which was ordered. The appellant concluded that the firm fixed-price work was significant, would require 40 to 50 people, and was enough to spread its administrative costs and profit. (Tr. 198-200, 240-41) Because the contract provided that the firm fixed-price work in the contract was guaranteed, the appellant prepared its bid so that the firm fixed-price work covered most of its overhead and profit. (Tr. 124-25, 199-200) There was no separate CLIN for overhead or profit.

In preparing its bid for the firm fixed-price work the appellant did not rely solely on the unit quantities listed in the schedule. For instance, the appellant took into account the fact that the Ben Moreell housing would be closed prior to the contract award, and contemplated that the firm fixed-price portion of the grounds maintenance work would actually be less than the quantity specified for some subline items. (Tr. 199-200; ex. A-2)

The initial solicitation was issued on 15 March 1991. It called for bids based on performance over a twelve month period coinciding with the Government's fiscal year of 1 October through 30 September. The initial award was planned for one year plus four option years. However, bidders were cautioned that the initial award of the contract might be for a term less than a full year.

If the initial award period was for less than one year, clause B.6 provided that the Government was to reduce individual line item quantities to reflect work remaining during the initial contract term. (R4, tab 1) The B.6 clause did not define the formula or criteria which would be used to reduce the individual line items from a twelve month period to a period of less than twelve months. The clause did not specifically mention or define the impact, if any, on the firm fixed-prices if there were a reduction in the individual line item quantities.

The contract also contained the standard clause entitled CHANGES—FIXED-PRICE (AUG 1987) ALTERNATE - I (APR 1984), which was incorporated by reference from the forms of the clause found at FAR 52.243-1. 48 C.F.R. § 52.243-1 (1999). That clause read in part as follows:

CHANGES—FIXED-PRICE (AUG 1987)
ALTERNATE I (APR 1984)

- (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes

within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (i.e., hours of the day, days of the week, etc.).
- (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.

(R4, tab 1 at I-21) The contract also provided that:

A single invoice shall be submitted for 1/12 of the Contract Line Item 0001 and for completed/accepted Indefinite Quantity work after completion of the first month's performance and once monthly thereafter.

(R4, tab 1 at G-2 and J-G2-2, ¶ 5)

The contract as actually awarded contained unit quantities in the schedule which were unilaterally adjusted downward to cover a performance period of ten months. The quantities, even seasonal ones, were divided by 12 and then multiplied by 10 months. The Government made no change in the unit prices. The Government adjusted all of the total prices by simply multiplying the listed unit prices times the reduced quantities which the Government determined would be required during the 10 months of the award. No adjustment was made for overhead or seasonal work load changes. The mobilization or start date was Monday, 1 November 1993. (R4, tab 16, tr. 134-35)

The following is an extract of the adjusted schedule from the unilateral award of the firm fixed-price work for the ten month period beginning 1 November 1993 and ending 30 September 1994:

<u>Item Number</u>	<u>Supplies/Services</u>	<u>Unit</u>	<u>Unit Cost</u>	<u>Prorated Award Quantities (10 Months)</u>	<u>Prorated Extended Total (10 Months)</u>

0001	FIRM FIXED PRICE WORK: Price to perform work in accordance with all terms of this contract. The price of Contract Line Item 0001 is the sum of the Subline Items 0001AA - 0001BN, Section B.				
	SERVICE CALLS				
0001AA	Service Calls (Per Clause C.7)	MO	\$116,346.48	10	\$1,163,464.84
0001AB	Emergency (After Hours) (Per Clause C.7)	MO	\$6,651.30	10	\$66,513.04
	PROVIDE CUSTODIAL SERVICE FOR THE HOUSING OFFICE AND COMMUNITY CENTER				
0001AC	Room Cleaning (Per .clause C.9)	SF	0.018	874210	\$15,735.78
0001AD	Trash Removal (Per Clause C.9)	SF	0.0006	5999908	\$3,599.94
0001AE	Drinking Fountain (Per Clause C.11)	EA	2.278	1299	\$2,959.12
....					
	PROVIDE GROUNDS MAINTENANCE				
0001BD	General Mowing (Per Clause C.11)	AC	24.237	3959	\$95,954.28
0001BE	Prestige Mowing (Per Clause C.11)	AC	35.755	178	\$6,364.39
0001BF	Maintain Wooded Area (Per Clause C.11)	AC	41.464	13	\$539.03
0001BG	Policing of Grounds (Per Clause C.11)	AC	3.322	32856	\$109,147.63
0001BH	Edging/Vegetation Removal (Per Clause C.11)	LF	0.0388	2459345	\$95,422.50
0001BJ	Raking (Per Clause C.11)	AC	58.792	531	\$31,218.55
....					
	TOTAL PRICE FOR CONTRACT LINE ITEM 0001 (0001AA THROUGH 0001BN)				\$2,083,706.92

(R4, tab 16) The award was made on 14 October 1993, with a stated mobilization date of 1 November 1993 (block 18 of SF 26). Mr. Hamm had not thought that the prices would automatically be reduced by a one-twelfth reduction per month if less than 12 months were awarded. He had expected some negotiation of the firm fixed-price. (Tr. 243) There was no evidence that the adjustment made by the Government actually reflected the expected workload or cost adjustments to be experienced by the appellant. Subsequent events make this a moot issue.

Shortly thereafter a General Accounting Office bid protest was filed. Unaware of the protest, the appellant mobilized on Monday, 1 November 1993. The next day the appellant was orally notified that a protest had been filed. The appellant was not, however, instructed to stop work. The appellant did not receive any direction to stop work until 4 November 1993, when Mr. Hamm called the contracting officer to inform him that he was incurring mobilization costs, including the hiring of staff, and entering into subcontracts. (R4, tab 4)

In early November 1993 the Government issued a unilateral modification suspending work effective 2 November 1993 (unsigned Modification No. P00001, R4, tab 2). This suspension was in accordance with the provisions of the PROTEST AFTER AWARD (AUG 1989) clause which was incorporated by reference from the forms of the clause found at FAR 52.233-3. 48 C.F.R. § 52.233-3 (1993). That clause provided for an equitable adjustment upon termination of the suspension. (R4, tab 1 at I-21) The protest was resolved in March of 1994. Ms. Linda R. Hazzard, the new contract administrator, was instructed by her contracting officer to work out a bilateral modification of the contract, rather than simply terminate the suspension (tr. 195-96).

Ms. Hazzard contacted Mr. Hamm. She did not have an independent recollection of her conversations or negotiations with the appellant. However, she testified, based on her notes, that on 16 March 1994 they discussed and agreed to “use the cost of the contract between April 1st and September 30th, rather than using a one-twelfth figure” (tr. 131). She testified that they agreed to do that because there is “a heavier volume of seasonal work, for example, grass cutting and grounds maintenance.” Again, based on her notes, she testified that “I advised him that I would requantify the contract based on seasonal work, and divide that by six.” Although she had no recollection of faxing a draft to Mr. Hamm, her notes indicate that she faxed the draft modification to Mr. Hamm on 17 March 1994. (Tr. 131; R4, tab 5) Ms. Hazzard further explained:

A. Well, the contract requires the contractor to perform grounds services between April -- the first full week of April, and the end of October. Which, if I had taken a straight one-twelfth value of his firm fixed price, and multiplied that by six, it would not have adequately compensated him for the volume of grounds work that he had to perform.

So, in fairness to the contractor, I made -- I offered to him to pay him basically for six months of his grounds bid price, and he agreed to that.

Q. Was there one line item that was eliminated altogether?

A. Yes, there was. Leaf-raking is not done until the wintertime, which doesn't -- is not covered -- that period of time is not covered in this modification. So I offered to Mr. Hamm to eliminate that.

And there was also one other line item, the policing of grounds, which is simply going around picking up stray papers and trash and so forth. That would be done on a six-month basis, half a year, because that is all year round, that is not done in just the April through October period.

(Tr. 132-33)

Ms. Hazzard described what she intended to do with respect to adjusting the general mowing requirement in CLIN 0001BD. What she intended to do was "to pay him for his full six months worth of services, rather than prorate it, multiply times six." She testified that she used the full 4751 acres from the 12 month solicitation in Modification No. P00002. She then testified that using 4751 acres was an error which was brought to her attention by another contracting officer. (Tr. 137)

Ms. Hazzard contended that grass mowing was to take place during the seven months from April through October and that since the contract only ran for the six months from April through September, she took back the month of October when she re-figured CLIN 0001BD for Modification No. P00003, where she showed only 3,860 acres and a reduction in the total firm fixed-price for CLIN 0001BD. This was based on only 26 weekly grass mowings, versus the 32 noted in the contract. Thus, Ms. Hazzard incorrectly deleted 6 weekly mowings for the month of October. The modification inconsistently reflected the total acres for policing the grounds in CLIN 0001BG, which was changed or corrected by Modification No. P00004. Both modifications reflected that the total reduction in price for all grounds maintenance services was \$41,290.23. The amount was incorrectly added. It should have read \$41,290.24, the amount claimed by the appellant. (Tr. 137-39)

Ms. Hazzard testified that the appellant never indicated that a higher unit price should be used for any of the firm fixed-price work, nor that more work be put into the contract than actually remained. (Tr. 142) Further, Ms. Hazzard explained that in accord with clause B.4 and pursuant to clause E.7 the Government was authorized to take deductions based on the schedule unit prices "for work that was either not performed, either through no fault, or complete fault of the contractor . . ." (Tr. 143) As set forth in the contract, clause E.7 read:

E.7 52.249.10113 CONSEQUENCES OF CONTRACTOR'S
FAILURE TO PERFORM REQUIRED SERVICES (ALTERNATE I)
(NAVFAC)(MAR 1989)

a. The Contractor will be held to the full performance of the contract. The Government will deduct from the contractor's invoice or otherwise withhold payment for any items of nonconforming service as specified below.

....

b. The Government will give the Contractor written notice of deficiencies by copies of the Inspector's Daily Reports or otherwise prior to assessing liquidated damages or deducting for nonperformed or unsatisfactory work. Therefore

....

(R4, tab 1 at E-4, -5) This clause addresses situations where the contractor fails to perform or deficiently performs a task. The clause does not address situations where the Government makes a deductive change or otherwise deletes work. The Changes clause is the only clause applicable to deductive changes.

Mr. Hamm recalled Ms. Hazzard's telephone call of 16 March 1994. He testified that they talked at length about the firm fixed-price work because that was where Mr. Hamm had spread most of his overhead costs. He was willing to negotiate a revised contract if he could get a total price for the firm fixed-price work which would cover his costs. (Tr. 201-07) During the negotiations, Ms. Hazzard faxed a copy of a draft of Modification No. P00002 to Edward L. Hamm. That copy reflected that the total dollar amount of the firm fixed-price work was proposed to be reduced from the \$2,083,706.92 contained in the unilateral award to \$1,350,470.06. (Tr. 148-49; ex. A-2)

During the hearing Ms. Hazzard acknowledged (because she recognized her handwriting on the telefax), that the draft of Modification No. P00002 (ex. A-2) was a document sent by her to Mr. Hamm, but testified that she did not recall having any discussion with Mr. Hamm concerning that draft. Mr. Hamm recalled that there was such a discussion and that he disagreed with the bottom line price for the firm fixed-price work in that draft modification.

Mr. Hamm testified that he was concerned about the total, bottom line price for the guaranteed work, because 1 April to 30 September was the "heaviest six months of the contract." He explained to her that not only was the grounds maintenance the heaviest during that time, but also most of the transfers out of family housing occurred in May, June, and July. He wanted to be sure that he covered his fixed costs. He mused briefly about the costs to his company of having "to gear up, and then put people on hold, trying to find assignments to keep people in order to have them available at any time that it [the contract] is turned back on" He recalled discussing things that they would not have to do during

that period, like leaf raking. However, he also recalled discussing other things “where the overwhelming bulk of the effort would be required in that period, and we would not agree to any reduction in the grounds mowing part of the contract.” (Tr. 202-04) We find, based on the observations of the trial judge who presided at the hearing, that Mr. Hamm’s testimony and recollection are credible, and that Ms. Hazzard’s recollection, based solely on the content of her notes, is not. We note that there were many instances where Ms. Hazard did not have a good recollection of events (tr. 131, 147, 148, 149, 153, 180).

Mr. Hamm said that they negotiated a higher total price which was acceptable for the firm fixed-price work. The revised modification provided a total of \$1,379,049.56 for the firm fixed-price work. That modification was signed as Modification No. P00002. (Tr. 205-08, 232; R4, tab 2, Modification No. P00002) It read in part as follows:

<u>Item Number</u>	<u>Supplies/Services</u>	<u>Unit</u>	<u>Quantity</u> <u>1 APR –</u> <u>30 SEP 94</u>	<u>Unit Cost</u>	<u>Tptal Cost</u> <u>1 APR –</u> <u>30 SEP 94</u>
0001	FIRM FIXED PRICE WORK: Price to perform work in accordance with all terms of this contract. The price of Contract Line Item 0001 is the sum of the Subline Items 0001AA - 0001BN, Section B.				
	SERVICE CALLS				
0001AA	Service Calls (Per Clause C.7)	MO	6	\$116,346.48	\$698,078.90
0001AB	Emergency (After Hours) (Per Clause C.7)	MO	6	\$6,651.30	\$39,907.82
	PROVIDE CUSTODIAL SERVICE FOR THE HOUSING OFFICE AND COMMUNITY CENTER				
0001AC	Room Cleaning (Per Clause C.9)	SF	524,526	0.018	\$9,441.47
0001AD	Trash Removal (Per Clause C.9)	SF	3,599,945	0.0006	\$2,159.97
0001AE	Drinking Fountain (Per Clause C.11)	EA	780	2.278	\$1,775.70
....					
	PROVIDE GROUNDS MAINTENANCE				
0001BD	General Mowing (Per . . . C.11)	AC	4,751	24.237	\$115,149.99
0001BE	Prestige Mowing (Per . . . C.11)	AC	213	35.755	\$7,615.82
0001BF	Maintain Wooded Area (Per C.11)	AC	15	41.464	\$621.96
0001BG	Policing of Grounds (Per . . C.11)	AC	19,714	3.322	\$65,488.25
0001BH	Edging/Vegetation Removal (Per Clause C.11)	LF	2,951,214	0.0388	\$114,507.10
0001BJ	Raking (Per Clause C.11)	AC	0	58.792	\$0.00

....					
0001BM(a)	Garbage Containers Refuse Carts (One Time Only -Base Year) (Per Clause C.14)	EA	600	95.265	\$57,159.00
....					
	TOTAL PRICE FOR CONTRACT LINE ITEM 0001 (0001AA THROUGH 0001BN)				\$1,379,049.56

(R4, tab 2) The modification was signed on 28 March 1994 for the appellant by Robert N. Davis, appellant's vice-president, and by the Government on 30 March 1994.

Mr. Hamm testified that he considered Modification No. P00002 a bilateral final deal:

A. I viewed it as firm and final, and that we had a deal, and that a deal was a deal, and that in relying on that, we could incur certain costs, and operate in a certain manner, in terms of the firm fixed price amount of the contract.

We would have costs that were more, in some areas, less in others. And because it was a multitude of things to be done, you know, that was just the nature of the work.

(Tr. 220)

Two weeks later Ms. Hazzard faxed a 13 April 1994 letter to the appellant. The letter stated that "it was determined through a review of the subject contract that there were numerous errors/miscalculations in the quantities of the firm fixed price schedule." (R4, tab 6) Ms. Hazzard testified that the purpose of the 13 April 1994 letter was to open negotiations with Mr. Hamm on changes to Modification No. P00002 (tr. 166-67).

The letter suggested that changes were needed in the number of preventive maintenance (PM) services at CLIN 0001AZ, based on the number of housing units and the service schedule listed in clause C.10 of the contract. The letter suggested that one half of the PMs should be performed during 1 April through 30 September, for a total of 2447 PMs. Modification No. P00002 listed only 1,247 PMs. The solicitation listed 2,493 PMs. Clause C.10 required PMs for heating units and heat pumps to be conducted between 1 August and 31 October of each year. Since the contract only ran until 30 September, it is

unclear how the allocation between contract periods was originally distributed and remained unclear how the Government now thought it should be distributed.

The letter next addressed a proposed increase in the number of filter changes during the 1 April through 30 September period. Additional changes were outlined, but they were marked to be postponed for another modification. Another item related to playground equipment, CLIN 0001BK. In this area the Government proposed to lower the appellant's unit price from \$4,793.41 per month to \$3,797.01 per month. However, the letter indicated that the quantities of playground equipment were under review and that when the correct quantities were received that the appellant would be notified.

The letter proposed decreasing the number of garbage/trash removals in CLIN 0001BM from 31,252 to 25,012, presumably because the Government believed that there were fewer housing units, primarily because 90 housing units in the Ben Moreell area had been closed. However, the appellant had relied on the information in the solicitation that all the Ben Moreell housing units were to be closed by 1 October 1993 (ex. A-3, note (1) in attachment J-C24). The letter also proposed changes in CLIN 0001BN, which provided for disposal of bulk trash at a quantity of 52 weekly units in the solicitation; which had been changed to a quantity of 26 weekly units. (R4, tabs 1, 2) The letter suggested that all of this was based on 600 housing units and that since the number of housing units had been reduced that the appellant's unit price should be reduced from \$374.78 per week to \$299.38 per week.

After reviewing Ms. Hazzard's letter of 13 April 1994, the appellant replied by letter of 5 May 1994, rejecting the Government's position and noting that the deductive changes suggested by the Government would not have any impact on appellant's fixed costs, while the additive changes for PM and filters would result in an increase of \$106,800.00 in total prices for the firm fixed-price portion of the contract:

E.L.HAMM signed modification P00002 on 28 March 1994 which established the firm fixed price of \$1,379,049.56. Our agreement to this firm fixed amount was based on an analysis of our bid, which includes commitments for equipment and material purchases, allocation of management and administrative staffing, proportionate [sic] of corporate overhead and G&A, as well as a core staffing to accomplish the firm fixed priced portion of the contract. Relatively minor reductions in workload, therefore, will not allow staffing reductions and will have no impact on this fixed price, while increases in contract workload, on the other hand, have a more significant impact on our price requiring us to add resources, both human and material, to accomplish additional work beyond

our proposed price. Specifically, the workload adjustments identified in your letter have the following impact:

....

The overall impact of the changes addresses [sic] in your letter is an increase of approximately \$106,800.00. Please modify the contract accordingly to reflect these changes.

(R4, tab 7)

On 7 May 1994 Ms. Hazzard responded to Mr. Hamm. She changed her mind with respect to the additional PMs and filter changes, concluding that her calculations were erroneous. She also revised her position with respect to the playground equipment, but delayed clarification of this area until a later time. She concluded by saying that, "It is the Government's contention that a reduction in quantities is due on this contract. The overall result of these changes is a reduction in the value of the contract. My calculations are shown on the attached schedule. If you have any questions regarding the above, please contact me by the close of business Tuesday, 10 May 94." (R4, tab 8)

The appellant replied on 10 May 1994 that it "bid a core staffing for this effort, as well as made fixed commitments for equipment, supplies, management/administrative, overhead, etc. These costs are fixed and will not go away." The appellant asserted further that it had "agreed to the Firm Fixed Period [sic] dollar value stated in Modification No. P00002, as the amount for performing the period April through September. There are no material changes in your letter which would affect that dollar amount." (R4, tab 9)

Upon receiving this rejection the Government, on 11 May 1994, notified the appellant that it would issue Modification No. P00003 unilaterally (R4, tab 10). On 13 May 1994 the Government unilaterally issued Modification No. P00003 with an effective date of 18 May 1994. Ms. Hazzard testified that this modification was issued to correct mistakes in bilateral Modification No. P00002 (tr. 167). In paragraph 4 the modification separately repeated the deductions in the grounds maintenance service for a deduction of \$41,290.23.

Modification No. P00004, like P00003, was unilaterally issued to "correct" the prior modification. (at tr. 182-) Ms. Hazzard testified as follows:

Q. So mod number 4 corrected mod number 3, is that correct?

A. Right.

Q. Mod number 3 corrected mod number 2?

A. That is correct.

Q. And there are two versions of mod number 2, two drafts of mod number 2?

A. Correct.

Q. At least two drafts of mod number 3?

A. Correct.

(Tr. 182) Modification No. P00004 read in pertinent part as follows:

<u>Item Number</u>	<u>Supplies/Services</u>	<u>Unit</u>	<u>Unit Cost</u>	<u>Quantity</u> <u>1 APR –</u> <u>30 SEP 94</u>	<u>Tptal Cost</u> <u>1 APR –</u> <u>30 SEP 94</u>
0001	FIRM FIXED PRICE WORK: Price to perform work in accordance with all terms of this contract. The price of Contract Line Item 0001 is the sum of the Subline Items 0001AA - 0001BN, Section B.				
....					
	PROVIDE GROUNDS MAINTENANCE				
0001BD	General Mowing (Per . . . C.11)	AC	24.237	3,860	\$93,554.82
0001BE	Prestige Mowing (Per . . . C.11)	AC	35.755	173	\$6,185.62
0001BF	Maintain Wooded Area (Per C.11)	AC	41.464	13	\$539.03
0001BG	Policing of Grounds (Per . . C.11)	AC	3.322	19,165	\$63,666.13
0001BH	Edging/Vegetation Removal (Per Clause C.11)	LF	0.0388	2,529,612	\$98,148.95
0001BJ	Raking (Per Clause C.11)	AC	58.792	0	\$0.00
....					

(R4, tab 2)

On 23 June 1994 the appellant submitted a claim in the amount of \$41,290.24 for the reduction in seasonal grounds maintenance which the Government unilaterally made by issuing Modification Nos. P00003 and P00004. The Navy denied this claim by letter of 17 February 1995 and the appellant timely appealed by letter of 23 March 1995. (R4, tabs 14, 15)

DECISION

This contract called for a combination of firm fixed-price and indefinite quantity work. None of the indefinite quantity work was guaranteed. The guaranteed work was the

firm fixed-price work. The dispute arises from the manner in which the Government changed the prices and quantities in Schedule B.

The quantity of services ordered from the indefinite quantity portion of the contract was determined by individual service orders issued after award of the contract. Although there are quantities listed in Schedule B for each of the firm fixed-price items, those quantities are estimates of the work required and were not the actual quantities required under the contract. The quantity, frequency, nature, and extent of the services required under the guaranteed firm fixed-price portion of the contract were set forth in the various detailed substantive provisions of the contract. Unlike the work required in the units of the indefinite quantity portion, the work required in the units of the firm fixed-price portion often varied seasonally; *e.g.*, services calls were heavier in the summer months, and grounds maintenance was heavier during the spring and summer growing season.

The services at issue in this appeal are the grounds maintenance services. Those services are firm fixed-price services. Unlike the indefinite quantity work, which was unit priced, the grounds maintenance work was bid at a total firm fixed-price for all the services described and required by the contract.

We found that Mr. Hamm, when asked to negotiate Modification No. P00002 after the resolution of the bid protest, was insistent that he get his full bid price for the grounds maintenance work, since the period of April through September was the heaviest part of the season. As to the other work, including the service call work, he was willing to take the risk of doing the work for one half the contract price. This characterization of the negotiations was consistent with the notes taken by Ms. Hazzard and was reflected in Modification No. P00002.

Nearly two weeks after signing bilateral Modification No. P00002, the Government contended that the parties had made a mutual mistake in calculating the quantities of grounds maintenance services to be performed between 1 April and 30 September 1994; and, that this mistake led to a mistake in the firm fixed-prices. Because the appellant did not agree that there was a mistake, the Government recalculated the quantities of grounds maintenance services and unilaterally reduced the firm fixed-prices for those services by \$41,290.24.

In seeking to reduce the contract prices agreed to in bilateral Modification No. P00002, the Government claims it is entitled to reformation of the contract based on the theory of mutual mistake. To establish its claim the Government must prove (1) that the parties to the contract were mistaken in their belief regarding a fact; (2) that the mistaken belief constituted a basic assumption underlying the contract; (3) that the mistake had a material effect on the bargain; and (4) that the contract did not put the risk of the mistake on the party seeking reformation. *Atlas Corporation v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990), citing RESTATEMENT (SECOND) OF CONTRACTS §§ 151-152, 155 (1981)

and *National Presto Indus., Inc. v. United States*, 338 F.2d 99, 107-09 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965).

The purpose of reforming a contract on the basis of a mutual mistake is to make a writing conform to the agreement of the parties upon which there was in fact a meeting of the minds. *American President Lines, Ltd. v. United States*, 821 F.2d 1571, 1582 (Fed. Cir. 1987).

The Government argues that there was a mutual mistake as to the correct unit quantities of services to be performed with respect to the seasonal grounds maintenance work. The Government argues that what the parties agreed to was accurately reflected in the unilateral modifications it made in P00003 and P00004. In those modifications the Government recalculated the unit quantities as if the work reflected in those units was equally distributed, as was the case in the indefinite quantity units. Thus, the Government made no allowance for the seasonal nature of the work reflected in the unit quantities for the firm fixed-price grounds maintenance work.

We found that the appellant prepared its bid based on a recognition of the seasonal distribution of the firm fixed-price work. We also found that the appellant agreed to the total firm fixed-price in P00002 based on a recognition of the seasonal distribution of the firm fixed-price work. Appellant's understanding is not reflected in the Government's unilateral modifications. The appellant's understanding is consistent with Modification No. P00002.

The Government has failed to establish that there was a mutual mistake reflected in P00002. What happened here is simply that Ms. Hazzard entered into an agreement and was later confronted by someone who told her that she should have treated the firm fixed-price work as if it were unit priced the same way as the indefinite quantity type work. There was no contractual basis to do that; and, the bilateral agreement did not reflect that methodology. There was no mutual mistake between the parties. Any mistake was solely among Government personnel as to the nature of the contract.

The Government has failed to carry its burden of proof. Any mistake, if there was one, was unilaterally made by the Government. The appeal is sustained. The parties are directed to reach a resolution of the amount, plus CDA interest, to which the appellant is due. If they fail to agree, either party may return to this board for determination of the amount due the appellant.

Dated: 31 January 2001

RONALD A. KIENLEN
Administrative Judge

Armed Services Board
of Contract Appeals

I concur in result only
(see separate opinion)

I concur in result only
(see separate opinion)

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

CONCURRING OPINION BY
ADMINISTRATIVE JUDGES STEMLER AND THOMAS

We concur in result upon the basis that the Government has not carried its burden of proving by clear and convincing evidence that appellant would have agreed to a price other than that set forth in bilateral Modification No. P00002. Appellant is entitled to recover in accordance with that modification.

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 48601, Appeal of E. L. Hamm & Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals