ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
SAWADI Corporation	)	ASBCA No. 53073
	)	
Under Contract No. DACW31-99-D-0027	)	

APPEARANCE FOR THE APPELLANT: Mr. David A. Anderson, PE
Vice President

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Carl Jeffrey Lorenz, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Baltimore

OPINION BY ADMINISTRATIVE JUDGE REED
UNDER BOARD RULE 12.3

The appeal arises under a contract for maintenance services at local flood protection projects located in Steuben County, NY. SAWADI Corporation (appellant, SAWADI, or contractor) submitted four claims to the contracting officer (CO). Two claims are for extra work under two separate delivery orders (DOs), the third claim is for acceleration, and the fourth claim is for "start-up costs." The total of all claims amounts to $18,804.50.

In its notice of appeal, received by the Board on 6 October 2000, appellant elected the Board's accelerated procedure under Board Rule 12.3. During the hearing, appellant's *pro se* representative requested, for the first time, as further relief, that the Board direct the Government to award the fiscal year 2001 (FY 01) maintenance contract for local flood protection projects located in Steuben County, NY, to SAWADI. Such relief is beyond the Board's authority to award. Appellant's representative also renewed SAWADI's request for the costs of prosecuting the appeal, a matter that was premature at that and earlier stages of the proceedings. This decision addresses entitlement only.

FINDINGS OF FACT

The Contract

1. On 4 June 1999, Contract No. DACW31-99-D-0027 (the contract) was awarded to SAWADI by the U.S. Army Engineer District, Baltimore (Government or Corps). The contract, as pertinent here, provided for services to clear brush and vegetation, to remove

trees, and to remove debris and deposits from stream channels, all measured for payment based on hours of work, and to replace deteriorated concrete. Estimated quantities of these services were unit-priced for a base year ending 3 June 2000 and four option years.[1] (Tr. 51-52, 62; ex. G-3[2])

2. The contract specified that work under the contract was to be administered by way of DOs. For each proposed DO, following a joint site visit by appellant's experienced representative (SAWADI representative) and the alternate contracting officer representative (COR), during which the COR provided a verbal description of the work to be performed, appellant developed a scope of work (SOW). Based on the SOW for each prospective DO, appellant next developed a cost estimate (CE) proposing quantities of one or more contract payment items under which the work would be accomplished. The CE was submitted to the COR for review and acceptance or negotiation. Upon acceptance by the COR or agreement by the parties after negotiation, a DO was issued by the CO. The contract stated, in pertinent part: "Upon issuance, the [DO] becomes a firm, fixed-price order for the work specified." (Tr. 53-59, 106, 216, 255-69, 370-74; exs. A-6, G-3 (¶ C.2.12))

3. No provision for liquidated damages for late delivery or late completion of services was specified in the contract (ex. G-3).

4. The contract further provided, as relevant here:

I STATEMENT OF WORK

> C.1.1 Statement of Work: The Contractor shall furnish all necessary supervision, personnel, materials, supplies, parts, tools, equipment and vehicles required to perform the maintenance services [described in the contract and specified in each DO].
>
> Estimated quantities . . . are approximate and are provided only for the Contractors [sic] information to assist in preparation of bids. They are not guaranteed and the actual quantities may be more or less than shown. Variation in these estimated quantities shall not be justification for modification of the contract or request for additional payment. . . . Contractors work and responsibility shall include [but] shall not be limited to: all planning, programming, administration and management necessary to assure that all services are conducted in accordance with the contract . . . Contractor shall perform all related . . . work scheduling . . . .
>
> . . . .

II SPECIAL CONDITIONS

. . . .

C.2.3 Accident Prevention: . . . the Contractor shall furnish the following for approval by the COR:

[Safety plans and analyses]

. . . .

C.2.5 Superintendent: The Contractor shall . . . provide a Superintendent [to] conduct overall management coordination . . . to coordinate the work schedule . . . and to arrange satisfactory working agreements.

. . . .

C.2.8 Quality Control [QC] Program:

. . . .

(c) Inspections: The Contractor shall maintain a record of all [QC] Inspection Reports conducted by the Contractor and shall furnish a copy to the COR . . . . This daily record of inspection shall cover all work items being performed . . . .

. . . .

C.2.12 Notification of Work to be Performed: When the Contractor is notified of work required under these specifications, the Contractor shall begin work within forty-eight hours after receipt of such notification . . . . notification . . . will be by issuance of [DOs]. . . .

C.2.13 Minimum Man-Power Requirements: The Contractor shall provide an adequate number of fully qualified personnel to perform the work specified herein. . . .

C.2.14 Other Contracts: The Government may . . . have . . . volunteers performing certain work, and the Contractor shall

> fully cooperate with such . . . volunteers and Government employees . . . .
>
> C.2.15 Payment: . . . The Contractors [sic] administrative time to accomplish work, including time spent traveling to and from the job site and for the purpose of transporting personnel, equipment, materials, and supplies or other items to the job site will not be considered as work for payment under this contract.
>
> . . . .
>
> III SPECIFICATIONS
>
> . . . .
>
> C.3.7 Clearing, Trees, Brush and Vegetation: Clearing shall consist of the felling and satisfactory disposal of the trees and other vegetation designated for removal, including down timber, snags, brush, and rubbish occurring in the areas to be cleared . . . .

(*Id*.)

5. The contract includes other provisions that are germane to resolution of the claims, as follows:

> [FAR 52.212-4] CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (MAY 1997)
>
> . . . .
>
> (c) Changes. Changes in the terms and conditions of this contract may be made only be written agreement of the parties.
>
> (d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613) [the CDA]. Failure of the parties . . . to reach agreement an any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with . . . FAR 52.233-1. . . . The Contractor shall proceed diligently with performance of this

> contract, pending final resolution of any dispute arising under the contract.
>
> . . . .
>
> (f) Excusable delays. . . . The Contractor shall notify the [CO] in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith . . . .

(*Id*.)

6. SAWADI had performed under earlier contracts specifying the same or similar work in the same vicinity during the five-year period prior to award of the contract (tr. 20, 31, 123-24; exs. A-2, -21, -23, -28, -30, G-22, -30, -32, -57).

DO 5

7. The SAWADI representative developed the SOW for proposed DO 5. As pertinent here, appellant offered to cut brush outside and adjacent to a floodwall along a reach of about 900 lineal feet. The width of the cut was to be 6-10 feet outward from the floodwall. Cut brush was to be left in place or dragged away from the floodwall to the edge of the uncleared area. In relevant part, SAWADI proposed 74 hours at $25 per hour under the payment item for "Clearing Trees, Brush, and Vegetation," CLIN No. 0009 (CLIN 9). On that basis, DO 5 was issued. The total amount of the DO was $2,000, including work not relevant here. (Finding 4 (¶ C.3.7); tr. 135-43, 179-81, 239-40, 268-69, 293-96, 374-82, 431-33, 458-59; exs. A-8, -23, G-3, -10)

8. No written, contemporaneous records of the time needed to perform DO 5 work were produced by SAWADI (findings 4 (¶ C.2.8); tr. 167-79, 190-97, 229-32, 384-91, 414-20, 435, 456-57, 471-76; ex. G-54).

9. On 5 August 1999, during performance of DO 5 work, the COR discovered that some of the clearing would occur on private property. He directed SAWADI not to clear that area until permission had been obtained from the landowner. A meeting among the SAWADI representative, the COR, and the landowner was set for a later date. Appellant's crew did not suspend their work but continued to clear the area on 6 August 1999. On 7 August 1999, SAWADI notified the COR in writing that extra effort would be required to clear the private property. Without direction by the Government, but based on a separate meeting between the SAWADI representative and the landowner, cut brush and trees were hauled from the site. As DO 5 work was concluding, the COR suggested that SAWADI remove an approximate 6-foot fence, entangled brush, and three trees (3 to 5 inches in diameter) that were near but outside the work area. At the hearing, the CO, in her

testimony, agreed with appellant that removal of the fence and entangled brush and trees was extra work. She was aware that the COR, without authority, suggested performance of extra work; however, she effectively ratified the COR's direction, agreeing to pay for the extra time to perform at the contract rate specified for CLIN 9. The work to remove the fence was performed by appellant's two "working foremen." On 22 August 1999, appellant invoiced for services under DO 5 in the total amount of $2,000. There was no indication of extra services. (Finding 7; tr. 51, 59-69, 85-98, 137-49, 175-90, 220-48, 269-74, 283-307, 376-81; exs. A-6, -11 through -13, -23, G-2, -10, -14, -49)

10. In a letter dated 9 December 1999, SAWADI stated that all DOs (except DO 14) "were completed on time or ahead of time." By letter dated 26 December 1999, appellant asserted a delay under DO 5, while the COR obtained permission from the private landowner. In its claim letter dated 29 April 2000, in the amount of $1,560, SAWADI asserted (1) that the COR stopped the work while obtaining permission to clear private property, (2) that extra effort was required to remove cut brush and trees from the site on account of steep terrain, (3) that the COR directed the work to continue until finished even though SAWADI had given notice of an overrun of hours, and (4) that the COR directed appellant to perform extra work by removing a 6-foot fence and several trees, requiring six additional hours of work. (Exs. A-21, -23, -31/1-4, -31/6-13, G-11, -29, -30)

11. In a letter dated 16 June 2000, SAWADI explained that accessing the work site, including unloading and loading trucks and manhandling equipment to the site, required extra manhours. Appellant averred that cut trees and brush would fall into the stream channel from the steep terrain, potentially blocking water flow if not removed, and that cut brush and debris could not remain on private property. A time breakdown provided to the Corps by appellant on 1 July 2000, showed, among other things, that the fence removal required six additional hours. (Exs. G-12, -13)

DO 10

12. On 5 August 1999, after viewing the proposed work area, including the gravel disposal site, SAWADI's representative developed the SOW/CE for proposed DO 10. Appellant offered to remove gravel and to align a streambank using a subcontractor's dozer, loader, and limited use of 10-wheel dump trucks, and at least three smaller 6-wheel Town of Riverside, NY (town) dump trucks for a total price of $7,664. Appellant planned to accomplish the work in no more than the equivalent of three to four work days. DO 10 was issued by the CO on Wednesday, 18 August 1999. The COR obtained permission from the town for use of their trucks and directed SAWADI's representative to coordinate specific dates, times, and methods for use of town trucks. (Tr. 39-40, 158, 192-95, 218, 345-57, 362-67, 382, 442, 459-60; exs. A-14, G-19)

13. No written, contemporaneous records of the time needed to perform DO 10 work were produced by SAWADI (finding 8; tr. 193-99, 475-76).

14. Rain delayed work on 23 August 1999. DO 10 work was underway, aligning the streambank and preparing the site for gravel loading not later than 24 August 1999. On 25 August 1999, two subcontractor trucks and five town trucks were on hand for gravel loading and hauling. Work continued on 27 August 1999, with two subcontractor trucks and three town trucks. On 31 August 1999, appellant invoiced for services under DO 10 in the total amount of $7,664. There was no indication of extra services. (Tr. 158, 194-95, 356-69; exs. G-19, -24, -49)

15. In a letter dated 9 December 1999, SAWADI stated that all DOs (except DO 14) "were completed on time or ahead of time." By letter dated 26 December 1999, appellant asserted a delay of two weeks while waiting for town trucks and claimed extra costs for additional coordination efforts by SAWADI to schedule town trucks. Appellant alleged that the Government, not SAWADI, was responsible for coordinating the use of town trucks. In its claim letter dated 5 May 2000, in the amount of $1,191.45,[3] SAWADI added that the 6-wheel town trucks were smaller and less efficient than the 10-wheel dump trucks that appellant was required by the contract to provide. (Exs. A-21, G-20, -29, -30)

Acceleration

16. Seventeen DOs were issued under the contract, starting 30 June 1999, ending 8 September 1999 for a cumulative total original amount of $40,870. None of the DOs specified a completion date. (Finding 2; tr. 54-55, 260-61, 314, 323-34, 396, 437-38; exs. G-5, -10, -15, -19, -34 through -46, 56)

17. In late August 1999, the COR, based on information from another Corps employee, believed that all contract work funded by available FY 99 money had to be completed and invoiced by appellant not later than 30 September 1999. Therefore, the COR urged SAWADI and SAWADI's representative agreed to complete all work funded by FY 99 money accordingly. The SAWADI representative and the COR agreed to five proposed DOs (13-17) that were issued by the CO on 8 September 1999. In letters dated 25 July and 12 September 1999, SAWADI suggested its ability to perform additional work. Appellant did not assert any difficulty with completing work prior to 30 September 1999, except for concrete work and on account of an auger breakdown. (Tr. 208-09, 262-63, 311-12, 397-402, 436-40, 452-53, 461-66; exs. A-2, -9, -10, -21, G-24 through -30, -42 through -46, -49, -56)

18. All work was completed and invoiced by 21 September 1999, except under DOs 9, 12, and 14. Those DOs included concrete repair. Some concrete work was rejected by the COR, corrective work was directed on account of alleged defective work, and related disputes were later resolved.[4] (Tr. 104-28, 164, 331, 454-68; exs. A-2, -15 through -21, -29, -30, G-28 through -30, -39, -41, -43, -48 through -51, -53, -55, -57)

19. In letters dated 30 November, 9 December, and 26 December 1999, SAWADI asserted that the COR accelerated work under the contract by requiring that all work be completed by 30 September 1999, except DO 14 work, which was to be completed not later than 14 October 1999. In its acceleration claim letter dated 27 April 2000, seeking $12,500, appellant alleged that the COR threatened default termination, award of the work to other contractors, and non-award of options if DO work was not completed by 30 September 1999. According to SAWADI, work under previous contracts in prior years had been spread over the entire year to allow an efficient use of resources. Appellant asserted that loss of efficiency and productivity was caused by the issuance of all DOs during July-September 1999. However, no evidence of lost efficiency and/or productivity was produced that was shown to be caused by any Government action or inaction. (Tr. 149; exs. A-2, G-13, -22, -29, -30, -57)

20. The COR did not threaten termination. No work that should have been awarded under the contract was shifted to another. Additional DOs were contemplated; however, the COR did not pursue additional DOs after 30 September 1999, on account of a lack of available FY 00 funds, winter weather, and the lack of available Government personnel to surveil the work. On 12 January 2000, the COR's supervisor recommended to the CO that all concrete repair work be deleted from the remaining option years under the contract and that such work be addressed by a separate acquisition. By contract Modification No. P0001, the CO unilaterally deleted all concrete repair line items for the remaining option periods. By spring 2000, the COR had learned that many small maintenance projects could be accomplished using simplified Government credit card (or similar) acquisition processes. In addition, local towns wanted gravel from the streams maintained by the Corps and were willing to remove and retain gravel *quid pro quo*. (Tr. 123, 256, 267-68, 315-24, 336-43, 441-42, 452-53; exs. G-28, -47, -52). No evidence shows that additional FY 99 maintenance funds were available to the COR after 8 September 1999.

21. In a letter dated 17 June 2000, SAWADI stated that clearing brush is more efficient in cooler weather than during hot summer months. Appellant also complained that the accelerated schedule strained SAWADI's limited management, labor, and equipment resources, causing the hiring of new employees that were untrained and requiring the purchase of additional equipment. The claim was increased to $14,350, allegedly incurred on account of (1) lost efficiency and productivity, (2) rental equipment, (3) training, (4) purchased equipment, and (5) extra management effort. (Tr. 154-55; ex. G-23)

22. Throughout performance, appellant subcontracted some work and employed no more than three workers (mostly day laborers), at any given time, other than its two working foremen. No worker was paid any form of premium pay. In previous years, appellant typically hired one or two workers. However, during June-September 1999, appellant had the ability and equipment, with proper but straightforward training, to expand to three crews of three workers each. To perform work under the contract, appellant planned to hire up to two workers. Appellant bought three new "weed whackers" and two new chain saws while

performing under the contract. When appellant's soil auger needed repairs, appellant rented a replacement. (Finding 6; tr. 31-32, 154-74, 202-14, 230-31, 242-43, 395, 423-27; exs. G-27, -49)

Start Up Costs

23. On 7 April 2000, the COR recommended award of the first option year under the contract. On 1 May 2000, the COR reversed himself and recommended that the option not be awarded based on the determination that the services could more cost effectively be obtained by way of simplified acquisition processes. By letter dated 2 May 2000, the CO advised SAWADI that the Government would not award the option to extend the contract. Appellant received the letter on or about 5 May 2000. (Finding 20; tr. 29, 331-32; exs. A-4, -5, G-33)

24. By claim letter dated 8 May 2000, amounting to $3,502.65, SAWADI asserted that the Government ordered only about 60% of the estimated quantities during the base year, even though additional maintenance work was available. In a letter dated 30 June 2000, explaining the claim, appellant averred that the contract was "a 5 year contract" and that SAWADI experienced extra costs because "the COR unilaterally abbreviated the contract in terms of services ordered and in terms of schedule." According to SAWADI, the COR refused to award additional DOs after September 1999, because appellant had not accelerated "fast enough" and even though additional maintenance work and budgeted funds for that work remained, "essentially cancel[ing] the contract by ordering no additional services." However, because the money paid to appellant amounted to "only 21% below" the full estimated contract amount for the base year, the claim was reduced to $1,700. That amount was attributed to (1) "Un amortized [sic] safety plan," (2) "Un amortized hazards plan / MSDS," (3) "Un amortized training costs," (4) "un realized [sic] savings due to learning," (5) "Un amortized pre work [sic] meetings," (6) "Un amortized effort to develop estimates that were not used by the COR," and (7) "Un amortized equipment costs." (Exs. G-31, -32)

COD and Appeal

25. In her final decision dated 7 September 2000, the CO allowed entitlement for five extra hours payable at the contract rate for CLIN 9, under DO 5 for removal of the fence and entangled brush based on the extent of work and her view, without more, that the work "should involve, at most, five hours of labor." In all other respects, the claims were denied. SAWADI appealed to the Board by letter dated 5 October 2000. (Tr. 51, 97-98; exs. G-1, -2)

26. SAWADI provided no daily QC reports and no payroll records in response to Government requests (findings 8, 13; tr. 390-91, 414-22).

DECISION

DO 5

To recover for performance of changed work, appellant generally must prove liability, causation, and resultant injury. *Servidone Const. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991).

The COR suggested that the appellant remove a fence and brush and trees that were located outside the area to be cleared under DO 5. That action by the COR caused appellant to incur extra labor hours and any resultant costs. The CO ratified the COR's actions and the agreement with SAWADI to remove the six-foot fence and clear the entangled brush and trees. (Findings 9-11) SAWADI is entitled to recover at the contract rate for removing the fence and the entangled brush and trees. *Radcliffe Constr. Co.*, ASBCA No. 38478, 90-3 BCA ¶ 22,961, *reconsidering and modifying,* 90-2 BCA ¶ 22,863.

SAWADI asserts that it was delayed when the COR directed a work stoppage. Although the COR directed a work stoppage; appellant did not stop work. Therefore, no delay occurred. No contemporaneous notice of delay was provided by appellant and DO 5 work was "completed on time or ahead of time." (Findings 5 (contract excusable delays provision), 8-10)

Appellant also claims additional hours solely as an overrun. No proof linked those extra hours with a cause for which the Government is responsible. SAWADI attributes some of the alleged extra hours to manhandling equipment to the site, management time, and poor productivity. Any or all of those causes, if proved, would be a contractor responsibility. (Findings 2, 4 (¶¶ C.1.1, C.2.5, C.2.13, C.2.15), 7-8, 10, 26)

Finally, extra time allegedly was caused by a requirement to remove cut brush and trees from a steep slope adjacent to a flood prevention channel. The DO specified that satisfactory disposal of the cut brush and trees required only that cut brush and trees remain in place or be dragged to the edge of the cut area. No authorized Government representative either directed that the brush and trees be removed from the site or agreed to a suggestion by the landowner or the contractor that removal should be performed. Instead, the contractor responded to a request by a private landowner. (Findings 4 (¶ C.3.7), 7, 9-11). Therefore, no directed or constructive change occurred.

DO 10

The COR directed SAWADI to coordinate use of town trucks. That direction, essentially to superintend the work of volunteers, was contemplated by the contract and by DO 10. Alleged extra time spent in supervisory duties was no more than fulfillment of the

contractor's duties under the contract. (Findings 4 (¶¶ C.1.1, C.2.5, C.2.8, C.2.13-15), 12). Therefore, the COR's directive was not a change.

Appellant also claims that it was delayed waiting for town trucks or that smaller town trucks were less efficient. The delay aspect of the claim fails for lack of proof. SAWADI "completed [all DOs] on time or ahead of time." No proof of any delay was produced by appellant, except on account of adverse weather on 23 August 1999. Appellant planned to complete the work in about three to four work days. Available contemporaneous records show that work was accomplished on three days. Concerning the smaller town trucks, appellant was aware of the type and capacity of the trucks prior to proposing its price and other terms for DO 10. (Findings 12-15, 26)

Acceleration

Constructive acceleration requires proof, among other things, of an excusable delay giving rise to an acceleration order and extra costs. *Norair Eng'g Corp. v. United States*, 666 F.2d 546, 548 (Ct. Cl. 1981); *DANAC, Inc.*, ASBCA No. 33394, 97-2 BCA ¶ 29,184 at 145,152, *aff'd on recon.*, 98-1 BCA ¶ 29,454.

No contemporaneous evidence of delay or even any timely notice of delay has been shown by appellant. In general, the claim fails for lack of proof. *Park Constr. Co.*, ENG BCA No. 6113, 95-2 BCA ¶ 27,777 at 138,528-29.

Addressing the claim more specifically, time was not of the essence concerning performance of the contract as a whole. None of the DOs specified a completion date. We conclude that SAWADI was entitled to a reasonable time within which to complete work under each DO. Concomitantly, appellant was obliged to complete work under each DO within a reasonable time. (Findings 3, 4 (¶C.2.12), 5 (contract excusable delays provision))

This claim is not for acceleration in the usual sense. As we understand the claim, appellant is asserting that the DOs were not spread over the entire base year but were compressed into an abbreviated time period and rushed to completion by the COR. Indeed, the COR may have been incorrect that all DO work funded with FY 99 money had to be completed and invoiced by 30 September 1999. However, SAWADI was obliged to start work when directed by a DO and complete the work within a reasonable time. In late August-early September 1999, SAWADI was able to perform the directed work, was seeking more work, agreed to complete all relevant work by 30 September 1999, and did complete the work, to the extent practicable, by 21 September 1999. (Findings 4 (¶C.2.12), 16-22)

Appellant's concerns with completing all work by 30 September 1999, related to concrete work and tasks involving an auger. Issues related to concrete work are outside the scope of this appeal and were resolved separately. SAWADI's auger needed repairs prior

to 29 September 1999. Those repairs were not caused by any action of the COR. No proof of lost efficiency and/or productivity attributable to Government action was proved. (Finding 17-20, 22)

SAWADI rented additional equipment when its equipment needed repair. New employees were hired and trained when required. No extraordinary labor costs were proved. New equipment was purchased as needed. Supervision was provided by appellant to the extent necessary. None of this activity was shown to be unusual in a general sense, in relation to the contract terms, or by comparison with efforts under earlier contracts for the same or similar work. Such expenses are the normal ongoing costs of doing business and/or were required by the contract and the DOs. (Finding 1-2, 4 (¶¶ C.1.1, C.2.5, C.2.13), 19, 21-22)

Quantities of services were estimated and became firm only when DOs were issued. The contract guaranteed neither a certain amount of work nor any particular timing of the work ordered. SAWADI has failed to prove that the Government is liable for improperly compressing the performance period. (Findings 1-2, 4 (¶ C.1.1), 20)

Start Up Costs

This claim is related to the acceleration claim in that appellant asserts an underrun in the quantity of work and retribution by the Government in that no additional DOs were issued after September 1999. It fails for reasons similar to the above-discussed acceleration claim. The alleged additional costs are expenses that either would have been incurred in any event, as required by the contract (safety and hazards plans, pre-work meetings, and DO estimate preparation costs), or are the normal costs of doing business (contract administration, contractor employee training, learning, and equipment costs). None were shown to be the result of Government action or inaction that departed from the terms of the contract. (Findings 2, 4 (¶¶ C.1.1, C.2.3, C.2.5, C.2.13, C.2.15), 20, 22-24)

SAWADI's arguments related to pricing "amortized over" estimated quantities, founded on FAR 17.104 and the standard Indefinite Quantity provision at FAR 52.216-22, which is not included in the contract, are not persuasive. FAR 17.104 is not applicable to the acquisition method on which the contract was based. The contract is not a "multiyear contract" as defined. FAR 17.000, 17.101, 17.103(b). Appellant was guaranteed neither award of DOs for the full estimated quantities nor of any option under the contract. (FAR 17.201; Finding 2)

SUMMARY

The parties agreed to remove a fence with entangled brush and trees that was outside the area to be cleared under DO 5, causing additional hours of labor to be performed by

SAWADI's working foremen. SAWADI is entitled to payment under the contract for the extra work, plus interest pursuant to the CDA from 29 April 2000, until paid.[5] To that extent, only, the appeal is sustained and remanded to the parties for negotiation of quantum. In all other respects, the appeal is denied.

Dated: 27 March 2001

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

NOTES

[1] The CO testified that the contract is a requirement contract (tr. 74-75, 96-99). However, the contract does not include provisions mandatory for such a contract (FAR 16.506(d), 52.216-21). In any event, appellant did not show that it relied on that characterization of the contract until the hearing and no evidence in the record indicates that the Government failed to order its requirements for the base year from SAWADI.

[2] The Board consolidated all documents submitted under Board Rule 4 and those pre-filed prior to the hearing by each party. Documents submitted by the Government are "G" exhibits; appellant's documents are "A" exhibits.

[3] Appellant's complaint at 6, and at 11, asserts $1,194.45 and $1,194.50, respectively. The discrepancies are not explained in the record.

[4] The settlement of the concrete-related disputes did not address the four claims decided here (tr. 106-08, 463-68; exs. G-48, -53, -55). The concrete disputes are not within the scope of this appeal. The concrete work is pertinent here and below, related to the start-up costs claim, only as it concerns the timing of work completion.

[5] The CO recognized partial merit in appellant's claim in her COD dated 7 September 2000; however, no record evidence shows that that partial allowance of the claim was the subject of a contract modification or payment to SAWADI (findings 5 (disputes provision), 25).

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. 53073, Appeal of SAWADI Corporation, rendered in conformance with the Board's Charter.

Dated:

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