

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of)
)
JC&N Maintenance, Inc.) ASBCA No. 51283
)
Under Contract No. F01600-95-C-0020)

APPEARANCE FOR THE APPELLANT: Donald E. Lowrey, Esq.
Las Vegas, NV

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE PAGE

JC&N Maintenance, Inc. (JC&N or appellant) was awarded a vehicle operation and maintenance contract for a base period and four option years. Appellant timely has appealed the denial of two claims, one for the base year in the amount of \$58,598.06, and one for the first option year in the amount of \$80,045, for materials, subcontract and off-base repairs, accident repair costs, and low cost bench stock (LCBS). Among other arguments, JC&N contended it is entitled under the contract to the amounts by which appellant's total costs for these items exceeded 115% of the Government's estimate. Appellant filed a motion for summary judgment, after which the parties elected to submit this matter under Board Rule 11, mooting the motion. This appeal is before us on entitlement only.¹

FINDINGS OF FACT

The Solicitation and the Contract

1. The Maxwell Air Force Base, Alabama, contracting office issued Solicitation No. F01600-94-R-0031 on 9 May 1994 for a vehicle operation and maintenance contract. The solicitation contemplated a base period and four option years. (R4, tab 4; ex. A-30)

2. The amended solicitation in § B "SUPPLIES OR SERVICE AND PRICES/COST" for the base period 16 April - 30 September 1995 required a fixed price for Contract Line Items (CLINs) 0001 and 0001A, and not to exceed (NTE) amounts for costs to be reimbursed under CLINs 0005, 0006 and 0008. As proposed by JC&N and accepted by the Government, CLIN 0001 required the contractor to furnish all labor, equipment, tools, materials, supervision and other services to perform vehicle operations, maintenance and

analysis at a fixed price of \$94,660.20 for 15 days; CLIN 0001A required the same items for five months for the fixed unit price of \$189,320.38 (\$946,601.90 for the entire five months). The contractor was required by the Performance Work Statement (PWS) under CLIN 0005 to provide parts and accessories in accordance with § C, ¶ 4.7.1 for an amount NTE \$5,000; perform CLIN 0006 “Cosmetic Repairs” pursuant to § C, ¶ 4.7.2 for an amount NTE \$7,500; and make repairs over the one-time repair limit in accordance with § C, ¶ 4.7.4 under CLIN 0008 for an amount NTE \$2,500. (R4, tab 4) For each of the four option years, the corresponding unit price for the fixed-price CLIN was \$184,179.69 (\$2,210,156.28 for the entire year). (*Id.*)

3. The contract contained the standard DISPUTES, FAR 52.233-1 (MAR 1994) clause and the following non-standard clauses:

G 2. VARIATION IN WORKLOAD: If at the end of a contract period, the total number of contractor operated vehicle dispatches based on Government request may vary 15%, scheduled bus workload may vary 15% of total mileage (excludes surrey or bluebird buses), 15% variation of driver’s licenses issued, and 15% variation in total number of vehicles assigned to the contractor including command vehicles [sic]. Negotiations for an equitable price adjustment may be initiated by either party. Any increase or decrease in price shall be based on the net of all increases or decreases in this workload. Adjustment to the contract price shall be made only for that portion of the total net increase or decrease in excess of 15 percent.

....

G-701. PARTS AND MATERIALS

a. The Government shall reimburse the Contractor for parts and materials used in the maintenance of equipment to be maintained under this contract as follows: cost of parts, allowable shipping and handling, and approved G&A rate. . . .

(R4, tab 4 at 11 of 50)

4. The PWS was comprised of six sections and several Technical Exhibits (sometimes TE). Section C-4 “CONTRACTOR FURNISHED ITEMS AND SERVICES” required the contractor to “furnish everything” to perform the PWS, with exceptions not relevant here. Paragraph 4.4 required the contractor to provide “all oil and lubrications products.” Paragraph ¶ 4.7 provided for limited reimbursement for certain items:

4.7 GOVERNMENT REIMBURSEMENT FOR ITEMS.

4.7.1. REIMBURSABLE PARTS. Upon notification by the Contracting Officer, the contractor shall provide parts to the Maxwell AFB, Gunter Annex vehicle fleet, i.e., parts for vehicles approved by the LG as 048 (unauthorized vehicle asset) status after the contract start date, or when parts have been determined by the Contracting Officer to be above and beyond the contract specifications. Cost of such parts shall be reimbursable to the contractor. Cost of contractor labor shall not be considered unless it is determined by the Contracting Officer that the repair was in excess of what would normally be considered part of the vehicle fleet. If determined by the Contracting Officer that such repair exceeds in-house capability, the contractor shall be reimbursed for the total cost of off-base repairs, upon proper submission of invoices for services with copies of contractor paid invoices for parts and services from his suppliers. *Line Item 0005 of the basic contract year and all option years shall apply to this paragraph.*

4.7.2 COSMETIC REPAIRS. When determined necessary by the Contracting Officer, the contractor shall make changes in cosmetic appearance of vehicles (beyond safety and serviceability) to meet certain operational needs. Contractor shall be reimbursed by the Government for all parts incurred. If determined by the Contracting Officer that such repairs exceed in-house capability, the contractor shall be reimbursed for total cost of off-base repair upon submission of proper invoice for his services with copies of contractors paid invoices for parts and services from his supplier. *Line item 0006 of the basic contract year and all option years shall apply to this paragraph.*

....

4.7.4 REPAIRS OVER THE ONE-TIME REPAIR LIMIT. Reference Section C-5. *Line Item 0008 of the contract year and all option years shall apply to this paragraph.*

(*Id.*, § C at 26-27) (emphasis added)

5. Section C-5 provided in relevant part:

Section C-5
SPECIFIC TASKS

5. GENERAL. The contractor shall provide all supervision, supplies, equipment, and services necessary to perform all tasks as identified in the [PWS]. The contractor shall provide the services of Vehicle Operations, Driver Evaluation, Fleet Management and Vehicle Maintenance to include Maintenance Control and Analysis section. Standards for these services are specified in Technical Exhibit 1. Workload factors are included in Technical Exhibit 2. . . .

. . . .

5.2. VEHICLE MAINTENANCE

5.2.1. The contractor shall provide vehicle maintenance and maintenance control and analysis as described in AFR 77-310, VOL II and AFM 77-320, VOL I for all vehicles/equipment located in [TE] 5h. Performance requirements are in [TE] 1. Workload estimates are in [TE] 2. . . .

. . . .

5.2.1.11. The contractor shall be responsible for repair costs up to the one-time repair limits . . . The Government shall reimburse the contractor for all negotiated costs in excess of the one-time-repair limit upon submission of paid invoices to his suppliers from the contractor. This cost shall be the cost of parts only. Labor shall not be included unless the repair exceeds the contractor's on-base capability and a written explanation establishing that fact was presented and accepted by the Government during negotiation of acceptable costs in excess of the one-time repair allowance for the repair. . . .

. . . .

5.2.4. Costs of repairs associated with accidents, abuse, and incidents shall be the responsibility of the contractor up to the one-time repair limits as established IAW T00-00-249 (ref para 5.2.1.11)

(R4, tab 4; § C at 28, 40, 43)

6. Technical Exhibit 2b (TE 2b) was as follows:

TECHNICAL EXHIBIT 2b

ESTIMATED WORKLOAD DATA FOR VEHICLE MAINTENANCE

This exhibit lists the estimated workload the contractor is likely to encounter during this contract period. All figures are based on historical data, unless otherwise stated. [sic] for a given period. There will be a specific workload estimate for all output type services listed on the Performance Requirements Summary. The government may add or subtract from this number based on projected needs. These variances will be so noted. The quantities of output to be furnished by the contractor, as stated herein, are estimates and, as such, are subject to variation. Reference section G, G-2, "Variation in Workload" [sic].

WORKLOAD VARIATION

Should the total number of vehicles decrease by more than 15% or increase by more than 15% during the contract period, this line item shall be subject to variation, reference section G, G-2, "Variation in Workload" [sic].

. . . The workload variation shall be based on the vehicle equivalents as stated herein. If at the end of the contract period, the number of vehicle equivalents varies above or below 15% from the equivalents shown in this [TE], negotiations for an equitable price adjustment may be initiated by either the government or the contractor. Adjustments to the contract amount will be made only for that portion of the increase or decrease in excess of 15%.

. . . .

Maintenance Projected Workload and Historical Data

<u>MONTH</u>	<u>NUMBER OF</u>	<u>DIRECT LABOR</u>	<u>COST OF</u>	<u>OFF-BASE CONTRACT</u>
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	<u>WORK ORDERS</u>	<u>HOURS</u>	<u>PARTS</u>	<u>(LABOR & PARTS)</u>
OCT 92	371	1353	14835	2406
NOV 92	341	1327	18444	2105
DEC 92	341	1403	15750	1742
JAN 93	338	1245	16560	3347
FEB 93	339	1547	14765	1733
MAR 93	453	1490	20649	2699
APR 93	372	1218	18353	1779
MAY 93	341	1348	18556	4088
JUN 93	432	1456	17792	2199
JUL 93	387	1241	13328	2425
AUG 93	446	1724	19136	3338
<u>SEP 93</u>	<u>406</u>	<u>1458</u>	<u>17201</u>	<u>2438</u>
TOTALS	4567	16810	205369	30299

(*Id.*) (emphasis in original)

7. The estimated amounts provided in TE 2b of the solicitation (later made part of the contract) for ESTIMATED WORKLOAD DATA FOR VEHICLE MAINTENANCE were prepared for the Government by Ms. Betty Ballard. According to her sworn statement, she used information from records compiled by the prior contractor Jamitch Enterprise Corporation (Jamitch). Jamitch had reported costs for Fiscal Year (FY) 1993 in accordance with the On-Line Vehicle Interactive Management System (OLVIMS) report No. SB0004-032 (-032 report), which required recording both direct and indirect costs for vehicle maintenance. Direct costs included labor and parts for in-shop and off-base work. Historical costs for “one time repair” were included in the TE 2b estimate since these were considered part of direct materials. Ms. Ballard asserted that she did not consider a change from the “one time repair limit” to the “whole vehicle concept” to be significant and did not provide a specific estimate for any associated costs.² Ms. Ballard did not include an estimate for any increases for the “Vehicle In Commission” (VIC) rate, regarding that as a function of the quality of work of a particular contractor. She did not include information on the cost of painting 15% of the entire vehicle fleet, because this had not been part of the Jamitch contract and there was no historical data. Indirect costs including those for LCBS were not part of the TE 2b estimate. (R4, tabs 4, 11; exs. G-15, -23, -27)

8. Contract § C-6 APPLICATION [sic] PUBLICATIONS AND FORMS incorporated by reference certain Government regulations and manuals. Mandatory provisions included AFM 77-320, VOL I (MAY 92), the ON-LINE VEHICLE INTERACTIVE MANAGEMENT SYSTEM, a data base for vehicle maintenance records (§ C-2, ¶ 2.2.25; § C-5, ¶ 5.2.; § C-6). At all pertinent times, AFM 77-320, VOL I identified, and we find, that the following items are “indirect” costs: antifreeze, cleaning supplies, oils and lubricants,

windshield washing solution, LCBS, custodial and office supplies, and other items not relevant here. (Exs. G-25, -27; R4, tabs 18-19).

The Jamitch Contract

9. The Government did not exercise an available option year of incumbent contractor Jamitch, because it anticipated a substantial change in the scope of its requirements. The Jamitch and JC&N Performance Work Statements differed in four aspects relevant to this appeal. (a) The Government provided certain items to Jamitch which JC&N was required to furnish. These included engine oils, internal gear lubricants, transmission fluid, chassis lubricants, and antifreeze (collectively referred to as low cost bench stock), which we find were “indirect” cost items. These Government-furnished items were not reported in OLVIMS by Jamitch. (b) Jamitch did not have a requirement, as did JC&N, to paint a minimum of 15% of the vehicle fleet each year. (c) The JC&N contract did not utilize the “whole-vehicle” repair concept used in Jamitch’s contract in determining whether the “one-time repair limit” had been exceeded. The “whole vehicle” repair concept found in the Jamitch contract allowed the contractor to group needed repairs. If the sum exceeded the “one-time repair limit,” which is the maximum amount that can be spent for repairs at any given time, the Government would negotiate the additional cost and reimburse the contractor for that amount. The JC&N contract instead required that the contractor only consider one repair at a time in determining whether the one-time repair limit had been exceeded. (Ex. A-45) (d) JC&N had a higher “Vehicle in Commission” standard than Jamitch, *e.g.*, “general purpose” vehicles had a 90% VIC rate under the Jamitch contract, and a 95% VIC rate under the JC&N contract (R4, tab 4; exs. A-45, G-23; Ferry deposition at 23, 38-42). The solicitation did not inform the prospective bidders of these differences (R4, tab 4).

10. Included in the record is a statement by Ms. Margaret Prestridge, an employee of both Jamitch and JC&N during their respective contracts. Ms. Prestridge contrasted the requirements of the Jamitch and JC&N contracts. She alleged that JC&N incurred indirect LCBS costs of approximately \$10,000 per year as of FY 1997, but that the figure was understated. Ms. Prestridge asserted that virtually no LCBS was entered into OLVIMS under Jamitch’s contract beyond a few hundred dollars’ worth per year.³ She also contended engine oils, internal gear lubricants, transmission fluid, chassis lubricants, and antifreeze were indirect cost items provided by the Government in the Jamitch contract and were not put into the OLVIMS database. Ms. Prestridge declared that the “one-time repair” concept resulted in more repairs with fewer reimbursable costs to JC&N than the “whole vehicle” repair standard for Jamitch. She said that in 1997, JC&N painted approximately 63 vehicles at an average cost of \$700 each to meet the additional requirement of annually painting 15% of the fleet. (Exs. A-45, G-24)

Preaward Questions and Answers

11. On 24 May 1994, the Air Force sponsored a site visit attended by JC&N's president and representative in this appeal, Mr. Lowrey. By letter dated 20 June 1994, the Government responded to 57 questions from prospective offerors concerning the PWS. Appellant did not pose any questions. A copy of the Government's letter, hereinafter referred to as the "preaward Q&A," was sent to all prospective offerors, including appellant. (R4, tabs 1, 2; ex. G-3 at 15). The preaward Q&A at question 54 specified that the "cost of parts" estimate did not include oil-related costs. The following questions and responses are also relevant:

51. RE: Page 11 of 50; para C [sic - G]-701

QUESTION: Will the Government reimburse the contractor for ALL materials used in the maintenance of equipment?

ANSWER: The contractor shall provide all materials and parts in the maintenance of equipment. A break down of these items are found in Section C-4, contractor furnished items. The Government will reimburse the contractor for parts approved by the LG to repair unauthorized vehicle assets or when parts have been determined by the contracting officer to be above and beyond the contract specifications. These reimbursement items are also found in section C-4, paragraph 4.7.1 of the performance work statement.

....

53. Refer to T.E.2b page 96

QUESTION: Please provide indirect labor hours.

ANSWER: This Technical Exhibit 2b only provides direct projected workload and historical data not indirect (overhead) data. Contract operated OLVIMS bases do not use the man hour system.

(R4, tab 2) We find that appellant was on notice after receipt of the preaward Q&A that ¶ G-701 was to be interpreted as pertaining only to CLINs 0005, 0006, and 0008, and that the TE 2b estimates did not include indirect costs.

Appellant's Proposal

12. Mr. Lowrey and Mr. Jimmie L. Moulder, appellant's general manager, reviewed the preaward Q&A upon receipt. Prior to award, they did not request clarification of any contract provision. Both Mr. Lowrey and Mr. Moulder understood that question 54 of the preaward Q&A notified them that oil costs were not included in the TE 2b estimate for "cost of parts." (Ex. G-3 at 15, 37-38, ex. G-6 at 105-07)

13. Mr. Moulder and Mr. Lowrey prepared and submitted appellant's proposal on or about 8 July 1994. Mr. Moulder was primarily responsible for the pricing proposal and both prepared the technical proposal. The proposal indicated that Mr. Moulder had "hands-on" experience with OLVIMS. (Ex. G-3 at 14, ex. G-6 at 6, ex. G-9 at 7) Appellant's pricing proposal for the base period and first full option year for CLINs 0001/0001A was comprised of labor costs, "other direct cost," G&A, and profit. Relevant excerpts included:

	BASE PERIOD 1 DEC 94 30 SEP. 95	0.00% OPTION 1 1 OCT. 95 30 SEP. 96
OTHER DIRECT COST		
.....		
VEHICLE PARTS, MATERIAL, SUPPLIES	66,666.67	80,000.00
.....		
OFFICE SUPPLIES	1,250.00	1,500.00
<u>COPIER, AND SUPPLIES</u>	<u>1,666.67</u>	<u>2,000.00</u>
TOTAL OTHER DIRECT COST	111,416.20	123,483.14
[TOTAL, with labor, G&A, profit]	1,696,787.60	2,037,305.28

(Ex. G-10 at 5) (emphasis added) Appellant's rates for G&A and profit were 5.5% and 3.5%, respectively (*id.*).

14. Appellant's proposal explained its entry for "vehicle parts, materials, supplies":

From our past experience and information we have been able to obtain we anticipate the expenditure of approximately \$80,000 per year for the necessary parts, material and supplies it will take to provide the service for this vehicle fleet.

(Ex. G-8)

15. By letter dated 1 December 1994, appellant revised its proposed price for parts, material and supplies in response to the Government's 23 November 1994 clarification request:

Deficiency:

1. Your proposal prices for providing these services, especially for parts appear extremely low (reference Technical Exhibit 2b of the [PWS]). Please examine your proposal in this area. This is a deficiency.

Response:

1. We have examined the area identified and concur that the pricing is low. This has resulted from a mathematical error in our spreadsheet. A fully corrected pricing spreadsheet, and Section B are attached.

(Ex. G-17) Appellant's prices for "parts, material, supplies" for the Base Period (at the time 1 March 1995 through 30 September 1995) and Option Year 1 were now \$123,789.33 for the base period and \$185,684 for each of the option years. (Ex. G-17 at 11)

16. The declaration of Mr. Moulder regarding preparation of JC&N's proposal does not demonstrate reliance upon the Government's estimate in TE 2b when preparing the proposal. It does evidence JC&N's reliance upon use of the workload variation method for reimbursement of costs exceeding 115% of the Government's estimate, "with the Company accepting the risk of increases up to 15% over the Government's estimates." (Appellant's exhibits in support of motion, tab 4)

Final Offer and Award

17. Appellant submitted a "Best and Final Offer" by letter dated 3 February 1995. Appellant reduced its overall bid price for CLIN 0001, and its G&A rate to 4.5% and profit to 1.25%, but amounts for "other direct costs," including those for "parts, materials, supplies," did not change. The Government awarded the contract to appellant on 14 April 1995. (R4, tabs 3-4)

Appellant's Claims

18. Mr. Ronald C. Brown was hired by JC&N in May 1995, after award of the contract. Mr. Brown prepared the initial claims dated 22 and 25 March 1996. He testified that he first became involved with this contract in March 1996. Mr. Lowrey reviewed the claims prior to submission to the contracting officer (CO). Mr. Moulder did not prepare or review the claims. (R4, tabs 6, 7, 10; ex. G-6 at 108-09; ex. G-2 at 8-10)

19. By letters dated 22 and 25 March 1996, appellant submitted its claims. The 22 March 1996 "claim" was for the costs in excess of the sum of the Government's estimate for "cost of parts" plus 15%, plus accident repair and bench stock costs, in the amount of \$55,520.98 (revised to \$30,271.34 on 3 May 1996). The 25 March 1996 "claim" for \$1,855.30 was comprised of costs incurred in excess of the sum of the "off-base contract (labor & parts)" estimate plus 15% and provided documents relating to the amounts sought. (R4, tabs 6-7, 10)

20. By letter dated 11 June 1996, contracting officer Shirley M. Chames addressed the “off-base contract (labor and parts)” claim of 25 March 1996. She did not dispute appellant’s entitlement to reimbursement or take exception to JC&N’s using costs exceeding 15% over the Government estimate (the workload variation method) as the basis for its claim. The Government did not allow \$10,770.06 for off-base repairs the Government believed should have been performed on-base by JC&N, and excluded \$969.31 attributed to input errors and \$210 for towing charges not considered as maintenance costs. Ms. Chames calculated the claim using amounts as revised by the Government; determined JC&N failed to prove it had incurred costs in excess of the Government’s estimate for off-base contract maintenance; and concluded that no monies were owed the contractor. (R4, tab 9)

21. In a letter dated 2 August 1996, Ms. Chames addressed the 3 May 1996 revised “cost of parts” claim. She again did not dispute appellant’s use of workload variation as the basis for its claim; denied that any monies were owed; and explained that appellant’s errors in calculation were due to its failure to use the correct -032 reports to retrieve the cost of parts. She denied the amounts claimed for accident repair and bench stock as costs not included in the “cost of parts” estimate at TE 2b. Ms. Chames enclosed the -032 reports for April through September 1995 and concluded: “[W]e are holding any further action on this claim until we hear from you.” (R4, tab 11)

22. After several requests by appellant for clarification of the Government’s 11 June and 2 August 1996 letters, the contractor’s letter of 17 September 1996 raised specific questions to which then-contracting officer David J. Neukamm responded in a letter dated 12 March 1997. JC&N asked in question 3:

You stated in your August 2 letter that “You can only use the Vehicle Management Report, PCN SB004-032 to support your claim for over and above Government estimates”. Please identify the contract paragraph, FAR clause or other regulation which is incorporated into this contract which supports this statement. If none, so state.

Mr. Neukamm responded in ¶ 1c:

There is no contract paragraph, FAR clause or other regulation that requires the use of OL VIMS to support your claims. As a practical matter, however, this is the only source which provides valid data to support any claim for reimbursement.

Appellant asked in question 4:

Is the Vehicle Management Report, PCN SB004-032 sufficient in and of itself to establish the amount of the contractor's expenditures for the purpose of reimbursement for over and above Government estimates?

Mr. Neukamm responded in ¶ 1d:

d. The Vehicle Management Report, PCN SB004-032 is sufficient to determine the amount of reimbursement for over and above Government estimate. However, if J.C.&N. [sic] were reimbursed for a particular part, this amount should be deducted from the amount claimed.

Appellant asked in question 5:

What is the method to be used to calculate the amount of contractor reimbursement for over and above Government estimates?

Mr. Neukamm replied in ¶ 1e:

e. Start with the estimates in technical exhibit 2b. Then compare the OLVIMS report, non-shop contract cost (for off-base contract repairs) or In-Shop Direct Materials (for reimbursable parts) with the historical workload data in technical exhibit 2b. If the former numbers (OLVIMS) exceed the historical data in the technical exhibit 2b more than 15 percent, any amount in excess of the 15 percent is reimbursable to J.C. & N [sic]. Any costs reimbursable under some other provision of the contract would not be reimbursable again under this method. The excess reimbursable [sic] is done on an annual basis at the end of the performance period only using annual figures from the OLVIMS report and technical exhibit 2b.

The contractor asked in question 6:

Please identify the contract paragraph, FAR clause or other regulation which is incorporated into our contract; which [sic] supports your statement of the method for the calculation of contractor reimbursement for over and above Government estimates.

Mr. Neukamm advised in ¶ 1f:

f. There is no FAR clause or contract reference that specifies any particular method for calculation of contractor reimbursement.

(R4, tabs 12-15, 17)

23. By letter dated 13 March 1997, appellant stated it remained unclear regarding the manner and method of computation of the reimbursement amount for parts and materials:

Your response indicates that parts costs are reimbursable to the extent that they exceed the Government's workload estimates by 15%. We do not find in our contract any term which applies to costs of parts as workload variations. This is of course the reason for asking [Question 5] in our 17 September 96 letter.

Your attention is directed to C-2 [sic - G 2] Variations in Workload. That paragraph refers to a 15% workload variation reimbursement but is silent as to the cost of parts and materials. However, Para C-701 [sic - G-701] is specific to this issue and provides that parts are fully reimbursable.

(R4, tabs 12, 20)

24. By letters dated 15 April 1997, appellant resubmitted its claims, one for the base period, and the second for Option Year One, for parts' costs in support of work under the fixed price CLIN, summarized as follows:

	Base Period 15 Apr -30 Sept 1995	Option Year One 1 Oct 95 - 30 Sept 1996
SB4-32 Material Cost	\$133,009.00	\$242,954.00
Subcontract & Off-base Repairs	22,880.00	50,491.00
Accident	2,060.00	4,741.00
Low Cost Bench Stock [LCBS] (L9999)	14,863.00	32,357.00
Less Previously Reimbursed	(6,278.00)	(14,830.00)
Subtotal	166,534.00	315,713.00

Less TE 2b Workload Estimate	(107,935.94)	(235,668.00)
FY95/96 Reimbursement Claim	\$ 58,598.06	\$ 80,045.00

(R4, tabs 18, 19; app. br. at 1) Included with each claim were multiple attachments, including applicable -032 reports (attachment A). The claims as resubmitted sought all appellant's expenses which exceeded the Government's estimates in TE 2b (R4, tabs 18-19), unlike its initial claims of 22 and 25 March 1996 which sought only costs exceeding 115% of that estimate (R4, tabs 6-7).

25. After numerous exchanges, appellant questioned the Government's failure finally to resolve its claims. The letter dated 14 July 1997 stated that the Government had already acknowledged that the contractor was entitled to an equitable adjustment for costs in excess of the Government's estimate, plus 15%, "less reimbursable," and that "[w]hat remains in dispute is the 15% difference" (R4, tab 23).

26. Successor contracting officer Charlie H. Foster, Jr., denied the claims by final decision dated 9 January 1998, and stated that the claims arose under line item one, a firm fixed-price line item not subject to cost adjustment. He denied that the contract allowed any reimbursement for parts' costs, and expressly denied that clause G-701 provided such a vehicle, as it pertained only to the reimbursable line items referenced in the PWS, ¶¶ 4.7.1, 4.7.2, and 4.7.4. Mr. Foster did not use the workload variation method to assess the claim. (R4, tab 26) Appellant filed a timely appeal of this decision.

27. The record contains sworn statements by Mr. Foster, who stated that a "[c]ontracting [o]fficer's clarification is an interpretation of the contract that binds the Government to that interpretation," and by Ms. Chames and Mr. Neukamm asserting that they had made a mistake when they agreed that appellant was entitled to reimbursement for costs under clause G 2. (Foster dep. at 18-19; exs. G-20, -21)

DECISION

JC&N's 22 and 25 March 1996 claims sought entitlement to additional costs under contract ¶ G 2 VARIATION IN WORKLOAD which permitted recovery of certain costs exceeding 115% of the Government estimate in TECHNICAL EXHIBIT 2b, ESTIMATED WORKLOAD DATA FOR VEHICLE MAINTENANCE, and ¶ G-701 PARTS AND MATERIALS. The contractor's revised claims of 15 April 1997 sought all costs in excess of the TE 2b estimate. Among other arguments, appellant contends that the Government is bound by undisputed, contemporaneous contract interpretations by contracting officers Shirley M. Chames and David J. Neukamm that JC&N is entitled to recover using the workload variation method.

Ms. Chames issued two letters in which she evaluated JC&N's March 1996 claims using that method. Her letter of 11 June 1996 denied recovery for failure to show contractor costs exceeding the Government estimate by 15%. Of the expenses sought, the CO rejected only an amount attributed to input error, towing charges which the Government did not class as maintenance, and a portion of charges for off-base repair which the Government believed should have been performed onsite by the contractor. Her letter of 2 August 1996 also did not dispute use of clause G 2. Mr. Neukamm's letter of 12 March 1997 directed the contractor to use the workload variation method in revising its claims, and instructed JC&N that its -032 reports were "the only source which provides valid data to support any claim" and that the reports were "sufficient to determine the amount of reimbursement for over and above Government estimate." Mr. Neukamm emphasized that the contractor could not recover costs "reimbursable under some other provision of the contract."

While not disputing these actions, the Government noted that letters from Ms. Chames and Mr. Neukamm assessing the claims using the workload variation approach were superseded by the 9 January 1998 final decision of contracting officer Charlie H. Foster, which did not follow that methodology and denied the claims. Sworn statements by Ms. Chames and Mr. Neukamm made after the appeal was filed attempted to recant their former positions regarding the workload variation method. The Government asserted that even though Ms. Chames and Mr. Neukamm mistakenly permitted JC&N to use the workload variation method, both contracting officers denied recovery because the contractor failed to prove its costs exceeded the requisite threshold.

The Parties' Contemporaneous Contract Interpretation

Appellant argues that the parties' pre-dispute interpretation of the contract that the contractor should be reimbursed for parts and material costs exceeding 115% of the Government estimate is determinative on the issue of entitlement (app. br. at 4-8). The parties' initial agreement to use of the workload variation method in evaluating the claims does not control here. The COs' letters responded to claim submissions and were not, therefore, pre-dispute. The letters were not styled as CO final decisions, nor did JC&N treat them as such. Negotiations continued, and the positions of both parties evolved. The statements of Ms. Chames and Mr. Neukamm lacked finality, do not rise to the level of binding the Government to a course of action, and do not serve as an admission of fact. The Government may later reverse a non-final position. *Structural Finishing, Inc.*, ASBCA No. 31925, 86-2 BCA ¶ 18,958 at 95,732. *Cf. Honeywell Federal Systems, Inc.*, ASBCA No. 39974, 92-2 BCA ¶ 24,966 (the Government may not retract the exercise of what it subsequently regards as poor judgment when binding action was taken within the scope of the CO's authority). Even had the actions of Ms. Chames and Mr. Neukamm been final decisions, *de novo* review precludes either granting deference to a final decision or "treating that decision as reflecting the government's contemporaneous interpretation of

the contract.” *White v. Delta Construction International, Inc.*, No. 01-1253 (Fed. Cir. March 12, 2002), slip op. at 9.

Interpretation of the Contract

At issue is whether appellant can recover costs exceeding the Government estimate in TE 2b. We regard the instant appeal as a “matter of contract interpretation” (*i.e.*, as a matter of law). *Max Drill, Inc. v. United States*, 192 Ct. Cl. 608, 427 F.2d 1233 (1970). In matters of contract interpretation we are guided by the rules set forth in *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965), which establish that an interpretation giving a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.

Contract provision TE 2b ESTIMATED WORKLOAD DATA FOR VEHICLE MAINTENANCE contains an “estimated workload the contractor is likely to encounter,” and details on a monthly basis from October 1992-September 1993 the number of work orders and direct labor hours among other information. It also provides historical data for the same period for the cost of parts and off-base contract work (labor and parts). TE 2b states that information on these “output type services listed on the Performance Requirements Summary” are estimates subject to variation, and references ¶ G 2 VARIATION IN WORKLOAD as a guide for equitable adjustments using the workload variation method. TE 2b also provides that should the total number of vehicle equivalents increase or decrease “by more than 15%, this line item shall be subject to variation.” At the end of the contract period under paragraph G 2, either the Government or the contractor may initiate negotiations for an equitable price adjustment.

TE 2b must be read in conjunction with additional contract provisions to understand fully what costs are included in the estimates and can be recovered when they exceed 115%. The contractor is obliged to provide all oil and lubrication products as part of its firm fixed price (¶ 4.4), and knew from the preaward Q&A that the TE 2b estimates did not include either indirect or oil-related costs (findings 4, 11). The TE 2b estimates thus did not include LCBS (finding 8).

Contract ¶ 5.2 VEHICLE MAINTENANCE, especially paragraphs 5.2.1, 5.2.1.11, and 5.2.4, establishes that the contractor is responsible for accident repair costs up to the one-time repair limit. JC&N cannot recover excess costs unless it negotiates with the Government, provides paid invoices from suppliers, and shows Government agreement that cost of labor was beyond the contractor’s on-base capability and in excess of the one-time repair limit. The record does not establish that the Government has failed to pay any accident repair costs for which these requirements were met.

We interpret the workload variation provision of TE 2b, read together with ¶ G 2 VARIATION IN WORKLOAD and other relevant provisions limiting recovery of certain costs, to permit JC&N at the end of the contracting period to recover costs exceeding 115% of the Government estimate for “output type services” (*i.e.*, the number of work orders, direct labor hours, cost of parts, and off-base contract (labor & parts)). Appellant’s revised claims of 15 April 1997 seeking all costs beyond the TE 2b estimate are inconsistent with workload variation provisions which impose responsibility for the first 15% above the Government estimate upon the contractor, and with assertions by JC&N that it prepared its proposal accepting that risk. *See Womack v. United States*, 389 F.2d 793, 801 (Ct. Cl. 1968) (irregular township issue). Assuming *arguendo* that JC&N is correct that the workload variation method does not apply, it still cannot recover the first 15% above the Government estimate because to do so is contrary to the manner in which it structured its proposal. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990).

JC&N also sought recovery under ¶ G-701 PARTS AND MATERIALS. We reject that argument, and interpret that clause to permit recovery of costs incurred under CLINS 0005, 0006, and 0008 which require the contractor to provide parts and materials in a “NOT TO EXCEED” amount in conjunction with the PWS, § C, paragraphs 4.7.1, 4.7.2, and 4.7.4. Paragraph G-701 does not allow for recovery of the cost of parts exceeding the Government’s estimate in TE 2b or for LCBS, nor does it provide an equitable adjustment for expenses exceeding the TE 2b estimate for off-base contract maintenance costs. We have found that appellant was on notice after receipt of the preaward Q&A that ¶ G-701 was to be interpreted as pertaining only to CLINs 0005, 0006, and 0008. Even if we determined that the contract was ambiguous on this point, which we do not, appellant knew the Government’s interpretation prior to award and is bound by it. *Cresswell v. United States*, 173 F.Supp. 805, 811 (Ct. Cl. 1959).

We need not address appellant’s argument that the Government estimate was negligently prepared where there is no proof the contractor relied upon that estimate in preparing its proposal. *Emerald Maintenance, Inc.*, ASBCA No. 42908, 94-2 BCA ¶ 26,904.

CONCLUSION

The appeal is sustained to the extent appellant can prove with respect to each of the base and option periods that it incurred costs exceeding 115% of the Government

estimate in TE 2b for cost of parts and “off-base contract” costs. The appeal is otherwise denied in all respects. We remand the matter to the parties for resolution of quantum.

Dated: 15 March 2002

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

NOTES

¹ The record consists of the Rule 4 appeal file (R4), the parties' supplementary filings (SR4; ex. A-1, etc.), and the parties' briefs. In addition, appellant provided copies of deposition transcripts from several Government personnel.

² Presumably, Ms. Ballard meant the reverse, since the Jamitch contract had the "whole vehicle concept" while the JC&N contract did not.

³ Ms. Prestridge also stated, inconsistently, that LCBS costs were approximately \$20,000 per year (ex. A-45).

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. 51283, Appeal of JC&N Maintenance, Inc., rendered in conformance with the Board's Charter.

Dated:

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