ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Centurion Electronics Service	)	ASBCA No. 51956
	)	
Under Contract No. DABT19-94-C-0026	)	

APPEARANCE FOR THE APPELLANT: Mr. Anthony Drew
Owner

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Richard L. Hatfield, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING

Centurion Electronics Service (Centurion) appeals from a contracting officer's decision partially granting an equitable adjustment for ordering significantly less Automated Data Processing Equipment (ADPE) repair service hours and parts than those estimated in Contract No. DABT19-94-C-0026 (the 0026 contract). Both entitlement and quantum were heard.

We deny the appeal and reverse the contracting officer's decision granting a partial adjustment.

FINDINGS OF FACT

1. In June 1993, the Government awarded a contract for repair and maintenance of ADPE located in and around Fort Leavenworth to Pulau Electronics Corporation (Pulau). Centurion protested the award to the General Services Administration Board of Contract Appeals (GSBCA). (R4, tab 22) Because the Government was concerned that the selection of Pulau was not accomplished in accordance with the applicable evaluation criteria, the Government reached a settlement of the protest with Centurion. As a result of the settlement, and on Centurion's motion, the GSBCA dismissed the protest without prejudice on 20 July 1993 (R4, tab 23, 24).

2. As part of the settlement agreement executed by the parties on 14 July 1994, the Government agreed that the current contract would be allowed to continue through the term of the basic contract period which expired on 30 September 1993; that the Government would not exercise any of the options and would reassess its ADPE maintenance service requirements and issue a solicitation for award of a new contract to meet its needs; that

beginning 1 October 1993, it would issue competitive purchase orders to meet its ADPE maintenance service needs and Centurion would be offered the opportunity to compete for these purchase orders; that this use of competitive purchase orders would continue until the Government made award of a new contract for ADPE maintenance services; that as part of determining its needs, the Government would consider whether this new contract was appropriate for award under Section 8(a) of the Small Business Act, and that Centurion would be advised of the solicitation issued and be afforded the opportunity to compete for award. (R4, tab 22)

3. During the months leading up to award of the 0026 contract, Centurion was the recipient of monthly blanket purchase agreements (BPAs) (tr. 271-72). Under these BPAs, Centurion was paid a "fixed amount" per month for standby maintenance regardless of whether any ADPE actually needed repair (tr. 218-19). The issuance of monthly BPAs at a fixed price was an interim approach until the Government decided the best contracting approach to structure the ADPE maintenance contract. The Government ultimately decided that a fixed price maintenance contract was not a good idea because it did not know how much work would actually be needed. (Tr. 220-21)

4. On 2 May 1994, the Directorate of Contracting at Fort Leavenworth issued Solicitation No. DABT19-94-R-0007 for "time and materials type repairs on the miscellaneous Automated Data Processing Equipment (ADPE), as specified in Section J" (R4, tab 1 at 8-9). Section J contains a 38-page List of ADP Equipment[1] (R4, tab 31). Section C, ¶ C.8.2, of the solicitation allows the Government to add updated equipment similar to those listed under Section J at the same hourly cost with five days written notice (R4, tab 1 at 23). Initially, the base period of the contract to be awarded was for three months, from 1 July to 30 September 1994. The solicitation had four one-year options ending 30 September 1998. (R4, tab 1 at 9)

5. The Federal Acquisition Regulation (FAR) applicable as of 1 January 1994, identifies three types of indefinite delivery contracts – definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. FAR 16.501(a). The FAR directs that the contracting officer shall insert the clause at FAR 52.216-20, DEFINITE QUANTITY, in solicitations and contracts when a definite-quantity contract is contemplated (FAR 16.505(c)). Similarly, the CO is to insert the clause at FAR 52.216-21, REQUIREMENTS, when a requirements contract is contemplated (FAR 16.505(d)(1)), and the clause at FAR 52.216-22, INDEFINITE QUANTITY, when an indefinite-quantity contract is contemplated (FAR 16.505(e)). Section I of the solicitation relating to "CONTRACT CLAUSES," contains none of these clauses (*see* R4, tab 1 at I-1).

6. Section I of the solicitation incorporated by reference, however, the following FAR time-and-materials clauses: FAR 52.232-0007, PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (APR 1984) -- ALTERNATE I (APR 1984), and

FAR 52.243-0003, CHANGES -- TIME-AND-MATERIALS FOR LABOR-HOURS (AUG 1987). (R4, tab 1 at I-4)

7. Section C of the solicitation, "DESCRIPTION/SPEC./WORK STATEMENT" provides, in part:

> C.1 GENERAL. The Contractor shall furnish all necessary labor, transportation, supervision, materials, tools, equipment, supplies, and handling charges necessary to perform *all* per call repairs of miscellaneous Automated Data Process (ADP) equipment and associated network equipment. There are a large variety of models/types of equipment from numerous manufacturers (see Attachment in Section J under this contract). . . .
>
> . . . .
>
> C.1.1.1. Per call repairs of the miscellaneous ADP equipment. This work shall be performed on the computer equipment located at Fort Leavenworth, Kansas and at off-site locations in Leavenworth, Kansas, within a five mile radius of the primary facility. . . .

(Emphasis added) (R4, tab 1 at 16)

8. Section C.2.3 of the solicitation defines "Principal Period of Performance (PPP)" to mean "Per call repair services performed during normal work hours 7:30 AM-4:30 PM, Monday thru Friday, excluding legal holidays." Section C.2.4 defines "Outside the Principal Period of Performance ([O]PPP)" to mean "Per call repair services performed at times other than the normal operating hours of 7:30 AM-4:30 PM, Monday thru Friday, including legal holidays." (R4, tab 1 at 16-17) Section C.5.4, "Service Calls," specifies that "[t]he billable time starts when the technician arrives at the equipment location. The Contractor shall note time of arrival, as well as time of completion, and have the activity sign the ticket." Section C.5.11, "Billing," specifies that "[t]he Contractor's invoice shall be itemized separately by labor hours and parts. Invoice for parts shall be accomplished with vendor invoices." (R4, tab 1 at 19, 21)

9. Section B of the solicitation pertains to "SUPPLIES OR SERVICES AND PRICES/COSTS." The schedule in Section B as amended prior to submission of offers lists four contract line items (CLINs) for the base contract year (FY95) and each of the four option fiscal years. CLIN 0002AA is for "REPAIR SERVICES, PERFORMED DURING THE PPP." The "QUANTITY" listed is 3,500 hours. CLIN 0002AB is for "REPAIR SERVICES, PERFORMED OPPP." The "QUANTITY" listed is 120 hours. CLIN 0002AC

is for relocation ADPE within Fort Leavenworth.[2] CLIN 0002AD is for replacement parts. The CLINs for each option year were structured the same way but with different CLIN designations, *e.g.*, 0003AA, 0004AA. (R4, tab 1 at 9-15)

10. When the Government first issued the solicitation, the base contract period was for three months (1 July to 30 September 1994). In that solicitation, which Centurion received, PPP and OPPP service call hours were provided as estimated quantities. The Government subsequently decided to extend the base contract period to one year, from 1 October 1994 to 30 September 1995 (FY95). In amending the solicitation, the Government neglected to include the word "estimated" above the "QUANTITY" column (tr. 437, 439).

11. The 3,500 PPP and the 120 OPPP service call hours estimates came from the Director of Information Management (DOIM) and were based on "past history" (tr. 161, 216). "Past history" included "prior data and anticipated warranty expirations on a significant amount of equipment" (ex. 2006 at 19). There is no evidence that the estimates were not realistic or not current, or were negligently prepared. Nor is there evidence that the estimates were not prepared in good faith.

12. Subsequent to the issuance of the solicitation, Government representatives met with Anthony Drew (Drew), owner of Centurion, on 7 July 1994, to correct clerical errors in the solicitation documents. According to the notes taken by a Government contract specialist, at the meeting, Drew expressed his preference for a contract with "a flat rate, parts included, blanket amount no hourly rate" (ex. 2000).

13. After Centurion submitted its proposal, the parties met on 9 August 1994 to negotiate the terms of the contract. The Government was represented by its contracting officer, Elizabeth M. Bornman (CO Bornman) and representatives from DOIM. Centurion was represented by Drew and two others. CO Bornman's memorandum, dated 9 August 1994, reported:

> KR [Centurion] recommended we change the type of Contract to a Requirements with a guarantee minimum. He was advised that this didn't meet the government's requirement. The life cycle of the equipment was outside the maintenance period, not cost effective. Each Activity pays for their repairs, DOIM is coordinator to get the equipment repaired.
>
> . . . .
>
> KR tried to prosue [sic] a maintenance contract, again this does not meet the customers needs.

> KR wanted a better commitment from the government on workload, which has decreased in the last several months. There are no guarantees with this contract. If Activities don't have the funds to repair, it sits until they do. DOIM doesn't go out and generate work under the contract. Government records endicate [sic] the past year workload is what is proposed in the current solicitation.

(R4, tab 32; tr. 224-25) We find that Centurion unsuccessfully tried to insert a guaranteed minimum into the contract (and thus change the contract into an indefinite-quantity contract) and unsuccessfully tried to change the contract to a fixed-price maintenance contract. Moreover, we find that Centurion knew, prior to final negotiation on the price of the contract that the contract to be awarded did not guarantee any workload.

14. As a result of the parties' final negotiation on 19 August 1994, Centurion submitted its cost proposal worksheets reflecting its best and final offer (R4, tab 2). Centurion's proposal for the base contract year and the option years was made on "PROPOSAL FORMAT" sheets. These sheets were furnished by the Government to Centurion "[s]o he [Drew] would know what items that he needed to include when he came up with that hourly rate" (tr. 213). In this regard, FAR 52.232-0007, PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (APR 1984), specifies that the hourly rates shall include "wages, indirect costs, general and administrative expense, and profit." *See also* FAR 16.601.

15. Centurion's proposal format sheets show that it assumed it would receive 3,500 hours of service calls[3] and spend $80,000 on replacement parts each fiscal year. Deducting the parts costs from its total costs, and dividing the result by 3,500, Centurion arrived at an hourly rate of $46.17 for the base contract year (FY95), $47.99 for the first option year (FY 96), $49.88 for the second option year (FY97), $51.84 for the third option year (FY98), and $53.90 for the fourth option year (FY99). (R4, tab 2) Although Centurion used this method to derive its hourly rates, it was free to use other methods as well (tr. 164). The hourly rates Centurion proposed were in the "same ball park" as those paid under its BPAs (tr. 209)

16. On or about 7 October 1994, the Small Business Administration (SBA), the Department of the Army through its Directorate of Contracting in Fort Leavenworth, and Centurion, entered into Prime Contract No. DABT19-94-C-0026 and Subcontract No. 0709-94-2-00083 under the Section 8(a) program (R4, tab 1 at 7). The contract, in the estimated amount of $1,319,191.60, was for furnishing "all per call repairs of miscellaneous Automated Data Processing (ADP) equipment and associated network equipment" in and around Fort Leavenworth (R4, tab 1 at 16). The estimated contract amount was derived from projecting the estimated PPP, OPPP service call hours at the negotiated hourly rates plus parts costs ($80,000 per year) for the base and option years

(R4, tab 1 at 1-5). To the extent Centurion contends that it relied on the Government-furnished proposal format sheets in concluding that 3,500 service call hours would be ordered, we find that Drew was told, at the 9 August 1994 meeting, that there were no guarantees in the contract to be awarded (finding 13).

17. When Centurion's contract was in effect, the Government ordered all of its ADPE repair needs from Centurion (tr. 149-50).[4] We find that the Government used the 0026 contract as a requirements contract.

18. In a memorandum dated 11 April 1995, DOIM notified the Directorate of Contracting that during the six-month period from 1 October 1994 to 28 March 1995, a total of 240 services calls were placed with Centurion for a total cost of $23,451.17 (parts and labor). The memorandum stated that during the same period the previous year, a total of 458 service calls were placed resulting in a total cost of $72,672.32. The memorandum attributed the 67 percent reduction in service call dollar amount to (1) a vendor who had extended the original warranty on various equipment purchased under the SMC standard contract,[5] and (2) new equipment purchases during the latter part of FY94. The memorandum requested that a modification be processed decreasing the contract amount by $141,655.90. (Ex. 2006)

19. Centurion has not shown, and the record is devoid of any evidence relating to, the circumstances leading to the extension of the original warranty on the equipment purchased under the SMC standard contract. We cannot find on this record that the Government sought or paid for the warranty extension in disregard of its obligations under the 0026 contract. If there is such a case, Centurion has not proved it or brought it up. Moreover, the 0026 contract did not prohibit the Government from purchasing new equipment so that Centurion's workload would not be reduced.

20. In May 1995, seven months into the 0026 contract, the Government issued Modification No. P00002. This tripartite agreement added some ADPE to the equipment list pursuant to ¶ C.8.2 of the contract. In addition, based on usage up to that time, the modification reduced CLIN 0002AA (PPP repairs) from the estimated 3,500 to 1,680 hours, reduced CLIN 0002AB (OPPP repairs) from the estimated 120 to 10 hours, and reduced CLIN 0002AC (replacement parts) from the estimated $80,000 to $29,992.10. The modification had the effect of reducing the estimated value of CLIN 0002AA to $77,565.60 (1,680 hours X $46.17), and of CLIN 0002AB to $692.60 (10 hours X $69.26). (R4, tab 4)

21. Centurion has challenged the validity of Modification No. P00002. We digress momentarily here to put the issues raised to rest. Modification No. P00002 was issued in the form of a tripartite agreement. It was supposed to be signed by all three parties to the 0026 contract: Centurion, SBA, and the Army at Fort Leavenworth. The evidence shows

that Larry Henshaw, Chief of Contract Administration of the Directorate of Contracting at Fort Leavenworth, signed the modification on 13 June 1995. The modification was then forwarded to Centurion for Drew's signature. Drew was supposed to sign the modification and forward to SBA. Drew signed the modification on 7 July 1995. Instead of forwarding the modification to SBA, however, Drew returned it to the Government. (Tr. 274-79; R4, tab 4) The record shows that the Government forwarded the modification to SBA by letter dated 14 August 1995 (ex. 2006). Even though SBA's representative signed the tripartite agreement on 17 August 1995, she did not return a copy of the signed modification to the Government. Consequently, the Government did not have in its file Modification No. P00002 signed by all three parties. After the appeal was filed, Government counsel supplemented the Rule 4 file and furnished a copy of the signature page of Modification No. P00002 signed by all three parties. (Tr. 278-80)

22. At the hearing, Drew contended that Modification No. P00002 was issued unilaterally, implying that he did not sign the tripartite agreement. The following exchange took place:

> JUDGE TING: You keep saying that this is a unilateral situation . . . . You signed Modification 2, didn't you?
>
> MR. DREW: No, I said – I challenged that document –
>
> JUDGE TING: Do you challenge your own signature?
>
> MR. DREW: I challenged [sic] the incomplete part of it.
>
> JUDGE TING: But you don't dispute the fact that you sign it, do you?
>
> MR. DREW: Well, my signature was there. I will accept that.

(Tr. 346-47)

23. When the Board was preparing this decision, the Board noticed that the signature page of the tripartite agreement referenced Contract No. DABT19-94-D-0034 and SBA Subcontract No. 0709-94-2-0090 whereas the contract that gave rise to the dispute before the Board related to Contract No. DABT19-94-C-0026 and Subcontract No. 0709-94-2-00083. Faced with the possibility that the signature page might belong to an unrelated contract, the Board by letter dated 1 October 2002 asked the Government to search its files to see it if could locate the tripartite agreement (Modification No. P00002) executed under the 0026 contract. By letter dated 22 October 2002, Government counsel forwarded a statement from CO Bornman. She explained that "[t]he signature page previously submitted is the correct signature page for Contract No. DABT19-94-C-0026

even though it has the incorrect contract number of DABT19-94-D-0034," and that "Contract DABT19-94-D-0034 was for the previous 8A contract issued by the office in conjunction with the Small Business Administration and had nothing to do with Centurion Electronics." She stated that the tripartite agreement form was created by her office and kept in the office computer, and that the contract specialist who prepared the tripartite agreement might have forgotten to change the contract number on the template. Government counsel also pointed out that the 0026 contract was the only contract Centurion had with the Fort Leavenworth Directorate of Contracting.

24. In response to the Government's submission, Centurion by letter dated 11 November 2002, sought "production of the corresponding document from the SBA contract file and subsequent explanation of how such a document could exists [sic] as well as a full disclosure as to nature and details concerning contract # DABT19-94-0034." This request was denied.

25. Despite the confusion surrounding the signature page of Modification No. P00002, Drew admitted that he signed the tripartite agreement. This supports a finding that Modification No. P00002 was not unilateral, and that Centurion agreed to the reduction called for in the modification.

26. In September 1995, the Government issued Modification No. P00003. This unilateral modification further reduced CLIN 0002AA (PPP hours) from 1,680 to 1,000 hours, reduced CLIN 0002AB (OPPP hours) from 10 to 5 hours, and reduced CLIN 0002AC (parts) from $29,992.10 to $29,000. The modification had the effect of reducing the estimated value of CLIN 0002AA to $46,170 (1,000 hours X $46.17) and of CLIN 0002AB to $346.30 (5 hours X $69.26). (R4, tab 5)

27. The Government issued these modifications for fiscal reasons to "deobligate" funds so that they could be used elsewhere (tr. 11, 102).

28. On 14 September 1995, the Government issued Modification No. P00003[A][6] exercising its first option for FY96 (R4, tab 6).

29. On 31 October 1995, Drew d/b/a Centurion Electronics Service filed for bankruptcy under Chapter 13 of the Bankruptcy Code[7] in the United States Bankruptcy Court for the District of Kansas (R4, tab 25). Contrary to the requirement of Clause I.88, FAR 52.242-13, BANKRUPTCY (APR 1991), Centurion did not notify the contracting office responsible for administration of the contract of the bankruptcy.

30. Because much of the older equipment at Fort Leavenworth had been "excessed," and because the new equipment purchased under the then existing contract had warranties, the requirement for repairs under Centurion's contract "dropped significantly." As a result,

the Government advised Centurion at a progress meeting held on 10 April 1996 that the Government would not exercise the option for FY97 (second option year). (Ex. 2004; tr. 266-67)

31. In a letter dated 1 May 1996 to the Government, Centurion requested a contract modification be issued to increase the contract hourly rate on the basis that "the service volumes have not met the initial projections." Centurion asserted that the "extremely reduced volumes" had put it in a loss position. (R4, tab 26)

32. During the base contract year (FY95), the Government ordered 667.5 service call hours. During the first option year (FY96), the Government ordered 591.55 service call hours. (Ex. 2007) Total labor payments amounted to $56,736.47 in FY95, and $39,094.43 in FY96. Total payments for parts amounted to $1,179 in FY95, and $8,867.48 in FY96. (Ex. 2008)

33. Upon expiration of the first option year of Centurion's contract, the Government entered into three Basic Ordering Agreements (BOAs) to cover its ADPE maintenance requirements. The hourly rate for the Central Processing Unit (CPU) contractor was $60 an hour. The hourly rate for the printer contractor was $40 an hour, and the hourly rate for the monitor contractor was $45.95 an hour. (Tr. 439-40) We find these rate were in the same "ball park" as the hourly rates in Centurion's contract.

34. On 18 August 1997, the United States Attorney for the District of Kansas filed a Complaint to Determine Dischargeability on behalf of SBA and the Internal Revenue Service (IRS). The complaint alleged that SBA was the holder of a secured and unsecured claim against Drew in the sum of $143,814.95, and IRS was the holder of a secured, priority and general unsecured claim against Drew in the sum of $92,207.55. The complaint alleged that on 6 February 1996, the court had entered a final cash collateral order authorizing Drew to use cash collateral in the operation of his business. The complaint asked the court to deny a discharge of Drew's debt because he made unauthorized payments to himself and others, and an unauthorized transfer of all assets of his business to a corporation including the cash collateral accumulated during the course of the Chapter 13 proceeding. (R4, tab 18E, ¶¶ 4, 5, 10, 15)

35. On 20 February 1998, the United States Bankruptcy Court issued an order lifting the automatic stay and authorizing SBA to seek termination of Drew from further participation in the 8(a) program (R4, tab 18F).

36. By letter dated 4 August 1998, Centurion submitted to CO Bornman a certified claim in the amount of $346,129.53. The claim alleged there was a "change condition concerning our ADP maintenance contract with DOIM, Ft. Leavenworth." Centurion's claim was for the calendar years 1994, 1995 and 1996.[8] In computing its claim, Centurion added up all of the costs allegedly incurred in 1994, 1995 and 1996 and divided them by

3,620 hours[9] to arrive at the hourly rates of $36.44, $40.06 and $47.01 for these years. Centurion then multiplied these hourly rates by the "unused hours" for each year. The unused hours claimed for 1994 were 2,187 hours. The unused hours claimed for 1995 and 1996 were 3,097.05 and 3,028.45 respectively. Centurion asserted that it was owed $79,694.28 (2,187 hours X $36.44) for 1994, $124,067.82 (3,097.05 X $40.06) for 1995, and $142,367.43 (3,028.45 hours X $47.01) for 1996, for a total of $346,129.53. Centurion made no claim that in exchange for dropping the protest before the GSBCA, the Government promised to award a five-year, $1.25 million contract. (R4, tab 13)

37. CO Bornman issued her final decision by letter dated 13 October 1998. She denied Centurion's claim for 1994 because "the base period did not begin until FY95, October 1, 1994." She determined that Centurion was entitled to $10,360.72 for FY95 and $70,375.40 for FY96 for a total of $80,736.12. (R4, tab 14) From her calculations, we find that CO Bornman believed that Centurion was entitled to receive for FY95 the difference in costs and profit between the service call hours as reduced by Modification No. P00002 (1,680 hours) and the service call hours actually ordered during FY95 (667.5 hours) or 1,012.5 hours. The mathematics show that CO Bornman came up with $67,204.88 for FY95, but she mistakenly used $10,360.72, which is the difference between the projected price for CLIN 0002AA ($77,565.60) after the Modification No. P00002 reduction and $67,204.88 in her decision. For FY96, CO Bornman granted an adjustment of $70,375.40. This amount was derived by taking the difference between what Centurion indicated the contract amount was in its claim ($136,731.95) and what the CO calculated costs and profits were in FY96 ($66,356.55). (Exs. 2007, 2008) Because Centurion made no claim that in exchange for dropping its protest before the GSBCA it would receive a five-year, $1.25 million contract, the CO did not address this point in her decision.

38. CO Bornman testified that she made the adjustment as a matter of equity and not as a matter of right (tr. 236). She testified "Because by rights, I did not have to pay him a thing underneath the contract. But I felt because of the way the contract was set up. The way he was treated doing [sic] the performance of that contract that there was some -- I guess irregularities may be on the government's part in the way he was treated in entering into that contract" (tr. 238).

39. Centurion advised CO Bornman by letter dated 15 October 1998 that it did not consider her method of calculating the adjustment to be fair and realistic. Centurion stated that it would accept $80,736.12 as an initial payment toward final settlement of its claim. (R4, tab 15).

40. On or about 21 October 1998, CO Bornman contacted the SBA to advise that she was about to release funds to Centurion in partial payment of its claim. It was through this contact that CO Bornman first became aware that SBA believed that it was entitled to the money she was about to release to Centurion. (Tr. 204) SBA advised CO Bornman by FAX on 21 October 1998 that Drew had filed for bankruptcy and SBA had perfected a

security interest in Drew's contracts and accounts receivable, had obtained a cash collateral order which gave it a continuing post-petition security interest, and had filed a complaint to make SBA's debt non-dischargeable (R4, tab 18C).

41. On 30 November 1998, the United States Bankruptcy Court entered a judgment by default against Drew and in favor of the Government through its agencies, SBA and IRS. The court found SBA's claim in the amount of $143,814.95 and IRS' claim in the amount of $92,207.55 to be non-dischargeable. (R4, tab 28)

42. Drew advised CO Bornman by letter dated 1 December 1998 that the $80,736.12 the CO found in his favor was rejected and he intended to appeal the decision to the Armed Services Board of Contract Appeals (R4, tab 16). Centurion appealed the CO decision by letter dated 3 January 1999 (R4, tab 17). The Board received the notice of appeal on 11 January 1999.

43. Based on input from the SBA, CO Bornman issued Order No. DABT19-99-F-0034 (Standard Form 1449) authorizing the Defense Finance and Accounting Service (DFAS) in Rome, New York, to pay $80,736.12 to SBA (R4, tab 19A). A 12 March 1999 SBA Loan Status Information report show that $80,736.12 was received by SBA and credited to Centurion's account on 1 February 1999. The report shows that as of 12 March 1999, with accrued interest, Centurion still owed SBA $98,465.17. (R4, tab 29; tr. 239)

44. On 9 March 1999, in reviewing her calculations, CO Bornman found that she had used the wrong figure in granting the $80,736.12 equitable adjustment in her final decision. She determined that $67,204.88 was the number she should have used for FY95, but she had used $10,360.72 by mistake. (Ex. 2008) On 31 March 2000, CO Bornman issued Delivery Order No. DABT19-00-F-0032 (DD Form 1155), authorizing DFAS, Rome, New York, to pay the difference $56,844.16 ($67,204.88 - $10,360.72) to the United States Department of Treasury, Debt Collection Services, in Atlanta, Georgia. (R4, tab 34)

DECISION

I.

Breach of Protest Settlement

Centurion contends for the first time in its post-hearing brief that in exchange for dropping its protest before the GSBCA, Drew, the owner of Centurion and the Director of Contracting at Fort Leavenworth reached a "verbal settlement agreement . . . for a five-year, $1.25 million maintenance contract (8a set-aside)." It contends that since the Government

never carried out the original intent of the agreement, Centurion "is currently still owed the original terms of the settlement agreement." (App. br. at 3)

The proper scope of an appeal processed under the CDA is "circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom." *Stencel Aero Engineering Corp.*, ASBCA No. 28654, 84-1 BCA ¶ 16,951 at 84,315. We have dismissed, for lack of jurisdiction, contractors' claims advanced for the first time in a complaint or a post-hearing brief. *See, e.g., Modular Devices Inc.*, ASBCA No. 24198, 82-1 BCA ¶ 15,536; *L.T.D. Builders*, ASBCA No. 28005, 83-2 BCA ¶ 16,685. Because Centurion made no claim that in exchange for dropping its protest before the GSBCA it would be awarded a five-year, $1.25 million contract, because the CO did not decide the claim in her final decision, and because Centurion raised the issue for the first time in its post-hearing brief, we hold that we have no jurisdiction to decide the issue.

II.

Centurion contends that the solicitation did not indicate that the 3,620 labor hours (3,500 PPP hours and 120 OPPP hours) were estimates, and that the Government was therefore obligated to provide 3,620 hours of service calls and $1,319,191.60 in total contract work. (App. br. at 3) The Government counters that while it was its intention to enter into an indefinite-quantity type contract with a time-and-material payment structure, no contract was actually consummated because the Government did not guarantee a minimum number of service calls (Gov't. br. at 14).

Is the 0026 Contract a Definite-Quantity Contract?

In arguing that it was entitled to 3,620 hours of service calls, Centurion appears to suggest that the 0026 contract was a definite-quantity contract. The FAR identifies three types of indefinite-delivery contracts - definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. FAR 16.501(a). A definite-quantity contract is for use when it can be determined in advance that a definite quantity of supplies or services will be required during the contract period. FAR 16.502(b).

Here, Centurion was required to provide repairs of miscellaneous ADPE specified in the List of ADP Equipment attached to the solicitation. The Government had the right to add other similar equipment with five days written notice. It is clear that not all of the listed ADPE needed repair at the inception of the contract, and Centurion would be called only when the equipment was in need of repair. Since the contract did not specify in advance which of the listed ADPE would need repair and when repair would be necessary, we conclude that the 0026 contract could not be and is not a definite-quantity contract.

Is the 0026 Contract an Indefinite-Quantity Contract?

An indefinite-quantity contract is for use when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. An indefinite-quantity contract should be used only when a recurring need is anticipated. FAR 16.504(b). To make an indefinite quantity contract enforceable, the Government must agree to purchase from the contractor at least a guaranteed minimum quantity of goods or services. *Mason v. United States*, 615 F.2d 1343, 1346 at n.5 (Ct. Cl. 1980), *cert. denied*, 449 U.S. 830 (1980) ("To make such [indefinite-quantity] contract enforceable, the buyer must agree to purchase from the seller at least a guaranteed minimum quantity of goods or services"); *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); FAR 16.504(a)(1).

We agree with the Government that the 0026 contract is not enforceable as an indefinite-quantity contract because it did not guarantee a minimum number of hours of service calls the Government was obligated to order.

Is the 0026 Contract a Requirements Contract?

In arguing that no enforceable contract was consummated, the Government did not address whether the 0026 contract qualified as a requirements contract. A requirements contract is appropriate for acquiring any items or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services the designated Government activities will need during a definite period. FAR 16.503(b).

In a requirements contract, the contractor's promise to satisfy the Government's requirement and the Government's promise to purchase all its requirements from the contractor ensure mutuality of obligation. A requirements contract differs from an indefinite-quantity contract in that the Government need not guarantee a minimum purchase amount but it has to buy all of its requirements from the contractor. *Mason*, 615 F.2d at 1349; *Travel Centre*, 236 F.3d at 1318-19.

For a requirements contract, FAR 16.503(a)(1) requires that the Government state a realistic estimated quantity in the solicitation and resulting contract:

> (1) For the information of offerors and contractors, the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal.

> The contracting officer may obtain the estimate from records of previous requirements and consumption, or by other means, and should base the estimate on the most current information available.

Even though the Government did not insert FAR 52.216-21, REQUIREMENTS, in the solicitation and the contract, we conclude that, as it is structured, the 0026 contract is a requirements contract. First, the contract required Centurion to furnish "all per call repairs of miscellaneous Automated Data Processing (ADP) equipment and associated network equipment" in and around Fort Leavenworth (finding 16). This contract language appears to address a recurring ADPE maintenance requirement that cannot be pre-determined. Second, the solicitation and the contract did contain estimated quantities for PPP, OPPP and replacement parts as required by FAR 16.503(a)(1). Moreover, when Centurion's contract was in effect, the Government ordered all of its ADPE repair needs from Centurion. We have found that the Government used the 0026 contract as a requirements contract. (Finding 17)

In reaching this result, we are mindful of the Federal Circuit's holding that "a requirements contract necessarily obligates the Government to purchase exclusively from a single source." *Coyle's Pest Control, Inc. v. Cuomo,* 154 F.3d 1302, 1305 (Fed. Cir. 1998). In *Coyle,* the court found that the contract terms obligating the contractor "to furnish *all* labor, service, equipment, transportation, materials and supplies to provide subterranean termite control and related services on *assigned* properties by [HUD]" did not meet the exclusivity test because the contract provided that properties would be "assigned on an *as-needed basis*," and thus it "does not require HUD to assign Coyle *all* properties in the region." 154 F.3d at 1303, 1305-06 (emphasis and brackets in original).

The 0026 contract required Centurion to furnish "all necessary labor, transportation, supervision, materials, tools, equipment, supplies, and handling charges necessary to perform *all* per call repairs of miscellaneous Automated Data Process (ADP) equipment and associated network equipment" in and around Fort Leavenworth specified in Section J – a 38-page List of ADP Equipment provided to Centurion as a part of the solicitation (emphasis added) (findings 4, 7). Once included in that list, the Government was required to order from Centurion all per call repairs on that list. We conclude that the 0026 contract meets the "exclusivity" test to qualify as a requirements contract.

The very nature and use of a requirements contract presupposes uncertainty about actual purchases. *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). Even though a contractor has relied on the estimates in formulating its offer, estimated quantities are "not guaranteed or warranties of quantity." *Shader Constructors, Inc. v. United States*, 276 F.2d 1, 7 (Ct. Cl. 1960) Ordinarily, the Government is not liable even in situations where actual purchases vary significantly from Government estimates. *See Clearwater Forest Indus., Inc. v. United States*, 650 F.2d 233, 240 (Ct. Cl. 1981); *Womack v. United States*,

389 F.2d 793, 802 (Ct. Cl. 1968). In preparing estimates, however, the Government must act in good faith and use reasonable care in arriving at its estimated needs. *Medart*, 967 F.2d at 581. To hold the Government liable for damages, the contractor has the burden to show by a preponderance of the evidence that the Government estimates were "inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made." *Clearwater Forest*, 650 F.2d at 239.

In *Medart*, the contractor argued that taking last year's order alone was unreasonable in estimating next year's needs in a requirements contract, and argued that the Government should have resorted to more sophisticated techniques such as polling the end-users and using regression analysis. Citing the applicable 1991 FAR regulation which contained the same language as the applicable FAR regulation in this case, the Federal Circuit held that the Government had discharged its estimating responsibilities when it showed that it had complied with FAR 16.503(a)(1), *i.e.*, "[t]he contracting officer may obtain the estimate from records of previous requirements and consumption . . . ."

In this case, the RFP estimated that for the base contract year (FY95) and for each of the four option years (FY96-FY99) the Government would require 3,620 service call hours and $80,000 in replacement parts. As it turned out, for FY95, the Government ordered 667.5 service call hours (18 percent of the estimated hours) and $1,179 in parts (1.5 percent of the estimated amount). For FY96, the Government ordered 591.55 service call hours (16.3 percent of the estimated hours) and $8,867.48 in parts (11.08 percent of the estimated amount).

The only evidence in the record with respect to the service call and parts estimates was that they came from DOIM, and were based on "past history" (finding 11). And, according to a negotiation memorandum prepared by the CO, "the past year workload is what is proposed in the current solicitation" (finding 13). The significant reduction in service calls was attributable to a vendor who had extended the original warranty on various equipment purchased under the SMC standard contract, and to new equipment purchases during the latter part of FY94 (finding 18). There is no evidence that the estimate was negligently prepared, or not prepared in good faith. Nor is there evidence that the estimate was not realistic or current at the time it was prepared (finding 11). Based on the evidence in this record, we conclude that Centurion has failed to prove that the Government's estimate was inadequately or negligently prepared. *Clearwater Forest*, 650 F.2d at 239.

III.

Validity of the Contracting Officer's Adjustment

In response to Centurion's $346,129.53 claim submitted in August 1998, the CO granted an adjustment of $137,580.28 ($80,736.12 + $56,844.16) (findings 37, 44). In exercising the Government's right of setoff, $80,736.12 was paid to SBA and $56,844.16

was paid to IRS in partial discharge of debts Centurion owed to these agencies (findings 43, 44). The CO testified that she made the adjustment in favor of Centurion as a matter of equity and not as a matter of right (finding 38). Because we have concluded that the 0026 contract is a requirements contract, and Centurion has failed to prove that the Government negligently estimated the requirements, and because the Government discharged its contractual obligation in ordering from Centurion all of the ADPE repair requirements covered by the contract, there is no legal basis for awarding Centurion the $137,580.28. *Wilner v. United States*, 24 F.3d 1397, 1402 (Fed. Cir. 1994) (*en banc*) ("once an action is brought following a contracting officer's decision, the parties start in court or before the Board with a clean slate"); *Assurance Co. v. United States*, 813 F.2d 1202 (Fed. Cir. 1987) (under the CDA, the Board has the power to reduce the CO's award). We have no jurisdiction concerning the intra-Government transfers of the funds from the Army to SBA and IRS and express no opinion on the resolution of the matter *vis-a-vis* the respective agencies.

IV.

Public Law 85-804 Relief

Centurion also seeks relief under Public Law 85-804 allegedly because the Government "committed a myriad of processing and procedural errors during the history of this so called contract from inception thru [sic] the termination of the contract" (app. br. at 3). Pub. L. No. 85-804 permits the President of the United States to authorize any department or agency exercising functions related to the national defense to enter, amend, or modify contracts and make advance payments without regard to other laws relating to Government contracts. 50 U.S.C. §§ 1431-1435. We are not empowered to grant relief under Pub. L. No. 85-804. *See Paragon Energy Corp. v. United States*, 645 F.2d 966, 974-75 (Ct. Cl. 1981) (in amending § 8(d) of the CDA before its passage, Senator Byrd explained "the Act [does] not permit the Contracting Officer or the Agency Boards to grant the discretionary relief solely authorized by Public Law 85-804").

CONCLUSION

Because Centurion has failed to prove that the Government negligently prepared its estimates for ADPE repair requirements, and because the Government ordered all of its ADPE repair requirements during FY95 and FY96 from Centurion, albeit at a significantly reduced volume, we hold that Centurion is not entitled to an equitable adjustment, and the CO erroneously granted two adjustments which she paid over to SBA and IRS as offsets against Centurion's debts to these agencies.

For the foregoing reasons, this appeal is denied.

Dated: 5 December 2002

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

NOTES

[1] This list was provided to Centurion by way of Amendment No. 0001 to the solicitation. Centurion acknowledged receipt of the amendment on 15 August 1994. (R4, tab 1 at 67)

[2] This CLIN was deleted in the contract.

[3] Presumably, Centurion ignored the OPPP hours which are comparatively insignificant.

[4] Although one witness speculated that it was possible that repairs could have been paid for by credit cards under the Purchase Card Program began in 1992 at Fort Leavenworth, there is no credible evidence that any activity used credit cards to pay for repair work covered by the 0026 contract (tr. 67, 76, 97-98).

[5] The record does not explain what a "SMC standard contract" is.

[6] The modification number duplicated the number of a modification already issued and was in error. On 4 December 1995, the Government issued Modification No. P00005 changing the modification number to P00003A (R4, tab 8).

[7] Chapter 13 of the Bankruptcy Code is designed to enable a debtor to pay debts in full or in part over a period of time pursuant to a plan. Centurion's bankruptcy petition was converted to Chapter 7 on 5 February 1997. (R4, tab 18E at ¶ 3)

[8] Centurion acknowledged at the hearing that to the extent its claim covered the first nine months of 1994, it was in error because the base contract covered the period beginning 1 October 1994 and ending 30 September 1995 (tr. 363).

[9] This number was derived by adding the 3,500 PPP hours and the 120 OPPP hours.

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. 51956, Appeal of Centurion Electronics Service, rendered in conformance with the Board's Charter.

Dated:

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