ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
NMS Management, Inc.	)	ASBCA No. 53444
	)	
Under Contract No. N63387-98-D-8041	)	

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

This appeal involves 13 claims for constructive changes to the referenced contract to provide family housing and grounds maintenance services, as well as additional requests for relief that raise jurisdictional issues. Only entitlement is for decision. We sustain the appeal in part as to two of the claims, deny the remaining eleven claims and dismiss the additional requests for relief for lack of jurisdiction.

FINDINGS OF FACT

1. The referenced contract to provide comprehensive family housing and grounds maintenance services at the Murphy Canyon Heights Military Family Housing (Murphy Canyon) site in San Diego, California was awarded to NMS Management Inc. (appellant or NMS) in August 1998 pursuant to Small Business Administration subcontracting procedures set forth in section 8(a) of the Small Business Act (15 U.S.C. § 637(a)). The Contracting Officer (CO) was the Officer In Charge of Construction, Navy Public Works Center, San Diego California (Government or Navy). (Ex. G-6 at 1-3, I-4, -5)

2. The contact provided for a one year base period extending from 1 October 1998 through 30 September 1999, a six month option period 1 from October 1999 through March 2000, and option periods 2 and 3 each with a duration of four months. The Government exercised options 1 and 2 and also exercised the first three months of (the four month) option period 3, as authorized by contract provision FAC 5252.217-9301 OPTION TO EXTEND THE TERM OF THE CONTRACT (SERVICES) (JUN 1994). The contract was completed on 31 October 2000 (exs. G-6 at Schedule B and I-9, -94, -123, -146).

3. The contract schedule contained a combination of monthly fixed-price and "indefinite quantity (requirements)" (IQ) Contract Line Item Numbers (CLINs). The last two numbers of each CLIN were identical for each period and, for convenience, relevant CLINs are referenced herein as XX01 through XX95 omitting the first two digits which vary by, and identify each option period. Unless otherwise noted, the CLINs were substantively identical for each period and citations to the record are to the base period schedule only. In particular, the IQ CLINs were priced on an estimated quantity basis with identical estimated quantities for the base period as well as for each option period, regardless of the length of the period. (Ex. G-6 at Schedule B)

4. Among the contract clauses incorporated by reference were FAR 52.233-1 DISPUTES (OCT 1995) – ALTERNATE I (DEC 1991), and FAR 52.243-1 CHANGES-FIXED-PRICE (AUG 1987) – ALTERNATE I (APR 1984).

5. Appellant's President is Mr. David Guaderrama and its Director of Operations is Mr. Stephen Ryan. NMS retained Mr. Lloyd Brown and Mr. Don Mantz as consultants to prepare its cost and technical proposals. (Tr. 127-28, 135, 182-83) Appellant's Best and Final Offer (BAFO) was substantially prepared by them (tr. 208-09, 212, 229, 349 50, 228-32, 307-08, 337, 350-51, 1011, 1197-99; exs. G-19 at 7, -45, -46, 172 at 113).

THE CLAIM AND JURISDICTION

6. During performance, appellant encountered numerous problems that culminated in the submission of claims to the Government set forth in a letter dated 26 April 2001 (ex. A-69). No final decision was issued by the CO with respect to the claims and appellant appealed from their deemed denial. The letter listed, discussed and certified the following quantified claims that were grouped in two general categories, *i.e.,* housing maintenance and grounds maintenance:

The Housing Maintenance Claims:

i. COM Cleaning
ii. Thermostats
iii. Boarded Windows
iv. Ceiling Paint
v. Faucet Repairs
vi. Primer
vii. Floor Tile
viii. Appliance Repairs
ix. Recycling

The Grounds Maintenance Claims:

x. Over Inspection
xi. Calsense Alerts
xii. Seed v. Sod
xiii. Tree Pruning/Removal

In addition, the letter asserted a claim for recovery of various deductions that were taken by the Government from amounts otherwise due appellant. The deductions are related to the COM cleaning, primer, ceiling painting, recycling, and grounds maintenance claims and are addressed in connection with our discussion herein of the various claims to which the deductions relate. (Ex. A-69 at 23-32, 43-44)

7. In addition, the 44-page letter of 26 April 2001 contained allusions to various additional possible grounds for relief that were not quantified in a sum certain. Generally, the additional bases for relief were also not clearly explained but allegedly contributed to "excessive labor" costs and were addressed at the hearing to varying extents, including allegations that: a new irrigation system was improperly designed and/or installed (tr. 629-30, 657, 668); increased areas required grounds maintenance after renovations of various family housing areas to include more parks and "tot lots" (tr. 121, 928-29, 947-48); the Government failed to recognize the presence of deficient "pre-existing" grounds conditions (tr. 720, 962); the Government failed to furnish appellant a "plant list" (tr. 842-52); the Government delayed appellant's access to sports fields (tr. 637); the Government ordered appellant not to use a "Steiner mower" because it failed to comply with contractual requirements for a mulching mower (tr. 656-57). (Ex. A-69)

8. During the hearing, the Government made numerous objections to receipt of evidence concerning the alleged additional bases for relief on the grounds that the Board lacked jurisdiction and the Government had insufficient time to prepare a defense (tr. 605, 608, 720, 788-96, 806). The Board reserved a ruling on the Government's objections pending issuance of this decision but permitted the parties to introduce evidence concerning the additional requests for relief. The parties were also considering the option of moving to incorporate the evidence received at the hearing into any subsequent appeal should the Board rule that it lacked jurisdiction and should appellant file an additional claim and appeal from any adverse decision of the contracting officer thereon. (Tr. 608-09, 794-98, 806-07, 844-54)

DECISION ON JURISDICTION

Our jurisdiction over a contractor claim under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 601-613 (as amended) and implementing regulations, is dependent on prior submission of the claim to the CO. To suffice, contractor claims for monetary relief must, *inter alia*, demand "payment of money in a sum certain." *See* FAR 33.201; *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995); *Essex Electro Engineers,*

Inc. v. United States, 960 F.2d 1576, 1580 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992); *Logus Manufacturing Co.*, ASBCA No. 26436, 82-2 BCA ¶ 16,025 at 79,415-16. Here, appellant's letter of 26 April 2001 set forth both claims that were stated in a "sum certain" (set forth in finding 6) and other requests for relief that were not quantified (*see* finding 7). We have jurisdiction over the quantified claims but lack jurisdiction to address the other unquantified requests for relief. Accordingly, the latter requests are dismissed without prejudice to appellant's right to submit a valid claim to the CO and appeal any adverse CO decision. To that extent, the Government's trial objections referred to in finding 8 are also sustained. We turn now to appellant's claims over which we have jurisdiction.

THE HOUSING MAINTENANCE CLAIMS

A. COM CLEANING

FURTHER FINDINGS OF FACT

9. Contract Line Item Number (CLIN) XXO1 set forth monthly firm-fixed prices for performance of "Management and Maintenance of Military Family Housing Facilities as Specified in Section C, Annex 1." For the base year, the monthly prices ranged from $170,256.50 to $171,116.24 with a total firm-fixed price for the base year of $1,025,120.87. (Ex. G-6 at B-3)

10. Section C4, Annex 1, "MAINTENANCE OF MILITARY FAMILY HOUSING FACILITIES FIRM-FIXED-PRICE LUMP SUM," (hereinafter Annex 1, FFP Maintenance) of the contract specifications sets forth many maintenance/repair tasks to be performed by appellant at the fixed monthly price established by CLIN XX01. The specific tasks involved in this portion of the appeal pertain to the unit cleaning requirements during Change of Occupancy Maintenance (COM), *i.e.*, after the military tenant permanently vacated his housing unit. COM involved numerous cleaning and repair tasks to be performed after a housing unit was vacated by a resident and turned over to appellant for COM prior to the new resident's occupancy of the unit. In particular, ¶ 1.9.38 (hereinafter ¶ 38) stated that "The contractor shall provide janitorial service to clean entire units during [COM]" and then detailed approximately 1 1/2 pages of cleaning requirements that "shall" be performed by the contractor covering, *inter alia*, every room, closet, floor, wall, carpet and major appliance as well as the exterior of the units. (Ex. G-6 at B-3, C4-1-26, -27; tr. 247-48)

11. CLINs XX06 through XX10 set forth "INDEFINITE QUANTITY (REQUIREMENTS) HOUSING MAINTENANCE, ANNEX 1A." CLIN XX08 established a base period price of $.12 per square foot (SF.) to provide "'Unit Cleaning' service as specified in Section C Annex 1A" for an estimated quantity of 100,000 SF. of "Vacant Units" (CLIN XX08AA) and 10,000 SF. of "Occupied Units" (CLIN XX08AB). (Ex. G-6 at B-4)

12. ANNEX 1A, INDEFINITE QUANTITY (REQUIREMENTS) HOUSING MAINTENANCE WORK (hereinafter Annex 1A, IQ Maintenance), at ¶ 1A.5 UNIT CLEANING states, "[t]he Contractor shall provide service to clean housing units when ordered by the Contracting Officer at the price established in [CLIN XX08]. Performance work standards for unit cleaning are shown in [Annex 1, FFP Maintenance, ¶ 1.9.38, above]" (ex. G-6 at C4-1A-1, -2).

13. The Government conducted a site visit on 15 January 1998. It was attended by prospective offerors including the following representatives of appellant: Mr. Guaderrama, Mr. Ryan, Mr. Brown, and Mr. Mantz. Two pre-com units, one post-com unit and one unit undergoing Whole House Renovation (WHR) (discussed in detail below) were visited. We have reviewed and considered the extensive testimony and documents relating to the cleanliness of the units during the site visit and find that evidence to be conflicting, vague and inconclusive with descriptions of the units ranging from "fairly clean" to "dirty, dilapidated." (Exs. G-10, -11, -173a, A-77 at 5-19, 22; tr. 130-35, 276-77, 355, 1001-02, 1088-90, 1090-96, 1113-14, 1128, 1133, 1207-08, 1294-99, 1304-05, 1311-13, 1321, 1473, 1553-55). No standard of cleanliness to be anticipated was established by the available proof of the condition of the pre-COM units visited. The evidence does not establish whether the cleanliness of the units visited was representative or not representative of the units that would be turned over to appellant for COM cleaning during performance. Similarly, there is no persuasive evidence that the Government selected units that were not representative for the site visit.

14. Following the site visit, appellant determined that very minor COM cleaning would be required, in part to clean up after itself after performing other maintenance tasks. It also considered that orders would be placed under IQ CLIN XX08 whenever more than minimal cleaning was required. (Tr. 253-54, 276-79, 1172-73, 1217-19; ex. G-15 at 8) This conclusion was based not only on appellant's perception of the condition of the units at the time of the site visit but also requirements contained in the "Handbook For Residents of Military Family Housing" (hereinafter the Handbook), dated June 1994, that was issued to all military residents. NMS obtained a copy of the Handbook prior to preparing its offer. Both Mr. Brown and Mr. Mantz had extensive military backgrounds before retiring from the military and also were familiar with similar Handbooks and the requirements typically imposed on military members at the time of vacating family housing following reassignment. Appellant considered that the Handbook's instructions were more extensive than the cleaning requirements imposed on NMS by ¶ 38, *supra*, and that military members would comply with them. (Ex. A-1; tr. 258-60, 263, 269-75, 278-79, 283-85, 311, 360-62, 1204) Assuming that the tenant complied the cleaning duties specified in the Handbook prior to vacating the unit, a Government Housing Manager agreed that the contractor's COM cleaning responsibilities would merely involve "sprucing up" with the contractor "not having much" cleaning to do as a practical matter (tr. 1061-62). The Housing Manager considered that the good units would "balance out" the bad (tr. 1071).

15. Extensive requirements relative to cleaning and final inspection were set forth in the Handbook and "CLEANING GUIDELINES" were established in the Handbook's Figure 1-D (ex. A-1 at 1-3, 1-8). In addition to the numerous duties imposed for "EXTERIOR OF QUARTERS AND GROUNDS," Figure 1-D set forth comprehensive requirements concerning cleaning the "INTERIOR OF QUARTERS" (ex. A-1 at 1-8). Military tenants were expected to meet the cleaning standards stated in the Handbook and both a "pre-vacate" inspection and final inspection were conducted by Murphy Canyon housing inspectors to enforce them (*id*.; tr. 286, 1030).

16. The cleaning standards and requirements specified in the contract are substantially the same as those set forth in the Handbook, with the exception of cleaning of furnaces, ducts and vents, which was required to be performed by the contractor but not the vacating tenant (tr. 1044; ex. A-1; finding 10 above).

17. There is voluminous evidence concerning the actual condition during performance of the units to be COM-cleaned by appellant, including over 4,000 pages of inspection reports and several hundred pages of testimony addressing this issue. In particular, we have considered that there were numerous instances where the family housing inspectors found units vacated by residents to be in "unsatisfactory," unclean condition and that fines were often assessed and withheld from the pay of the military member involved (tr. 1348-51; exs. G-174, -175) based on the poor condition of the units and failure to comply with standards prescribed in the Housing Manual. Our overall conclusion is that a substantial number of the units turned over to appellant for COM cleaning were in materially worse condition than appellant reasonably was required to expect and that appellant was required to perform 25% more cleaning work than was contemplated by the contract. (Tr. 136, 285-86, 395-98, 447, 471-84, 736-38, 827, 839-40; exs. G-174, -175; A-5, -14, -24, -26, -30, -31, -39, -40, -48, -51)

18. Shortly following the commencement of performance, appellant orally notified the Government that the units turned over to NMS for COM were "filthy," requiring far greater cleaning than it had anticipated (tr. 195-98, 420, 449-50, 822, 840, 859-60, 738). The Government informed appellant that cleaning services were detailed in ¶ 38 and appellant was directed to perform the specified cleaning tasks under the firm-fixed-price CLIN XX01 or deductions would be taken from payments due appellant (tr. 195, 419, 450). Because of the unanticipated extent of the cleaning services required, appellant hired a subcontractor to perform COM cleaning services (ex. G-70; tr. 193-94, 891-96).

19. The claim also alleges that the Navy made inappropriate deductions related to the COM cleaning work (ex. A-69 at 26-28). No testimony concerning the bases for the deductions and reasons why they were asserted to be improper was offered by appellant; nor have these issues been briefed by appellant.

DECISION

Appellant claims that it interpreted the contract reasonably as imposing only minimal COM cleaning responsibilities. The fundamental problem with appellant's position is that it ignored the unambiguous dictates of § C4 of the contract (finding 10) which squarely placed extensive cleaning requirements on appellant that were to be performed as part of the fixed-price work covered by CLIN XX01. In particular, NMS was required to perform each and every task that was expressly detailed in ¶ 1.9.38. Appellant essentially ignored these responsibilities in formulating its proposal. No matter how clean NMS considered that the housing units would be when turned over to them, appellant was unequivocally required by the contract to perform ¶ 38 cleaning services. It was not a matter left to its judgment or discretion. To the extent that the appellant interpreted the contract to not require performance of the cleaning requirements of ¶ 1.9.38, its interpretation was unreasonable.

Nevertheless, appellant's interpretation of the condition of the units to be expected as to cleanliness at the time they were turned over for COM cleaning was reasonable. Specifically, its reliance on the Handbook as evidencing general standards of cleanliness to be anticipated was reasonable in this case. Substantially the same cleaning requirements were imposed on housing residents prior to vacating their units as the contractual COM cleaning requirements that were imposed on appellant. Those cleaning requirements were frequently not performed by the vacating tenants.

We have found that the conditions in numerous units were materially worse than appellant was required to anticipate. This is a matter of subjective degree not objective certainty. But we conclude that appellant was required to perform more work. We have considered the entire record in concluding that 25% more cleaning was required than should have been anticipated by appellant. In reaching this result, we consider that appellant was reasonable in relying on standards of cleanliness established in the family housing manual in evaluating what was expected of military members before vacating their units. Many units were turned over to the appellant in "filthy" condition. The military members involved did not comply with their responsibilities in maintaining the units and many were fined substantial amounts by the housing office for their noncompliance. On the other hand, we have also considered the fact that many units were turned over to appellant for COM cleaning in better condition than appellant should have anticipated, thus requiring appellant to perform less work. On balance, we conclude that 25% more cleaning work was required than appellant reasonably should have anticipated. Because of that variance in the degree of difficulty, appellant is entitled to an equitable adjustment under the Changes clause to compensate it for the additional cleaning effort.

In addition, to the extent that deductions were taken for COM cleaning which we have held was not required by the contract, appellant is entitled to return of the amounts

deducted. Otherwise, appellant has failed to explain or brief issues pertaining to COM cleaning deductions and we consider that portion of the claim to be abandoned.

This portion of the appeal is sustained to the extent indicated.

B. THERMOSTATS

FURTHER FINDINGS OF FACT

20. Annex 1, Fixed-Price Maintenance at ¶ 1.9.32 set forth requirements pertaining to "House Accessories." Thermostats were included among the listed accessories which the contractor was required to replace, if defective, under the fixed-price maintenance portion of the contract. The servicing or replacement of thermostats was to be performed during COM or pursuant to a service call scheduled by the resident. (Ex. G-6 at C4-1-18)

21. CLINs XX87AA, XX87AB, and XX88 of the Schedule provided prices for "INDEFINITE QUANTITY (REQUIREMENTS) INSTALLATION OF GAS-FORCED AIR FURNACES AND THERMOSTATS ANNEX 14 (hereinafter Annex 14). Under CLINs XX87AA and XX87AB the removal of the old, and installation of new, furnaces could be ordered. Under CLIN XX88 an IQ order could be placed for the contractor to "[r]emove and Install new thermostat as specified in Section C, Annex 14" at a unit price of $45.00 per thermostat. (Ex. G-6 at B-20)

22. Annex 14 at ¶ 14.9, THERMOSTAT INSTALLATION, requires among other things, that "[t]he contractor shall install a new thermostat with each unit" and "shall furnish all hardware and wiring to make the necessary connection" (ex. G-6 at C4-14-3).

23. During performance, appellant installed new replacement thermostats during its maintenance of family housing units. For an unknown period of time during the base year of contract performance, NMS initially billed and was paid by the Government $45 per thermostat pursuant to CLIN XX88 even when the thermostat was not installed concurrent with the installation of a new furnace as specified in Annex 14. There is no evidence detailing the circumstances surrounding these payments and how they were authorized. At some point, the Government declined to pay any additional amounts for replacement thermostats that were not installed concurrently with new furnaces taking the position that replacement of thermostats was covered by ¶ 1.9.32 of Annex 1 and paid for as part of the firm-fixed price for that maintenance work. (Tr. 749-50) We are cited to nothing in the record indicating that appellant took issue with the Government's revised position in writing prior to filing its claim.

24. There is no evidence establishing that appellant relied on the above interpretation of the contract with respect to payment for replacement thermostats at the time of submission of its proposal.

DECISION

Appellant alleges that it was entitled to be paid $45 for each thermostat installed in accordance with CLIN 88. Appellant's interpretation is unreasonable, created patent ambiguities and there is no proof it was relied on during preparation of appellant's proposal.

Annex 1 at ¶ 1.9.32 expressly provides for the replacement of "house accessories," including thermostats, under the firm fixed-price maintenance provisions of the contract. The Annex 14 CLINs relate solely to the installation of new thermostats (including necessary wiring) in conjunction with the installation of each new "unit," *i.e.*, furnace. Only upon installation of the new furnace was appellant entitled to the $45 CLIN XX88 unit price. Appellant's interpretation ignores and fails to reconcile its thermostat replacement obligations contained in Annex 1 and is unreasonable.

There is insufficient evidence for us to conclude that any authorized Government agent affirmatively interpreted the contract to permit payment for replacement thermostats that were not installed concurrently with new furnaces. Although NMC was paid initially over an indefinite period for the invoiced thermostats, the precise circumstances surrounding the payments are unclear. Nor did appellant contest the revised Government position on the issue prior to submission of its claim. In any event, the payments were erroneously made given the unambiguous requirements of the Annex 1 fixed-price maintenance provisions. Here, it is neither necessary or appropriate to look to pre-dispute or other conduct given the unambiguous provisions.[1] *E.g.*, *Black River Limited Partnership*, ASBCA No. 46790, 97-2 BCA ¶ 29,077 at 144,747.

This portion of the appeal is denied.

C. BOARDED WINDOWS

FURTHER FINDINGS OF FACT

25. Contract § C2, "General Overview" at ¶¶ C2.5 and C2.6, stated in part as follows:

> C2.5 INHERENT CONDITIONS: Murphy Canyon Heights property may be subject to damage caused by vandalism, malicious mischief, resident negligence and abuse. Examples include theft, graffiti and physical damage to recreational buildings, structures, playground equipment, and vacant and occupied units. This work is repetitive in nature and shall be repaired or serviced as part of regular maintenance as specified and is included in the firm-fixed-price portion of the contract.

> C2.6 WHOLE HOUSE RENOVATIONS During the term of this contract and beyond, the Navy will be engaged in upgrading and improving the housing units and common areas as Murphy Canyon Heights under a project known as "Whole House Renovation". The performance of the Whole House Renovation project will be accomplished by other Government contractors under other Government contracts.
>
> C2.6.1 As a result of the Navy's Whole House Renovation efforts, during the period of this housing maintenance contract the Navy will be periodically removing groups of housing units and common areas from its inventory of available housing at Murphy Canyon Heights and turning them over to its Whole House Renovation Contractors. Units so removed from availability (hereinafter, "off-line" housing units), will not require, during the period they remain "off-line", the housing maintenance services that would otherwise be performed by the Contractor under this contract. Therefore, the contractor shall not perform these services during this time. . . .
>
> C2.6.2 Upon the completion of renovation, newly renovated housing units and common areas will be returned to the inventory of available housing at Murphy Canyon Heights. The Contractor shall at that time resume performing all of the housing maintenance services on the newly renovated, returned to service units in accordance with the requirements of this contract.
>
> C2.6.3 The contracting officer will notify the contractor in advance when housing units are to be taken "off-line" or returned to service. Such notice may be oral or written, and will state the address(s) of the effected units and the dates and times the units are to be taken "off-line" or returned to service.

26. Contrary to the requirement of ¶ 6.3 above, there is no documentary notice or other evidence establishing when or what housing units were to be taken off-line or returned to service following WHR (tr. 876-77).

27. The practice of the Government was to erect fences blocking off sections of the housing area having "off-line" units undergoing WHR. After commencement of the renovation work, the "off-line" units were often vandalized. As a consequence, in approximately April 1999, appellant was orally directed by the Government to board up all

WHR units over appellant's objection that the "off-line" units were not its responsibility under ¶ C2.6.1 above. Some of the WHR units may have been listed on "Vandalism Reports" prepared by appellant as under a contractually-established "liability limit" for service calls. That report was not used for payment-related purposes. All units that were "boarded up" were in fact WHR units that appellant was not contractually required to repair while they were "off-line." (Tr. 452-53, 503-04, 569-72, 874, 877-83, 919-20; exs. G-82, -85)

DECISION

Appellant was directed to board up the windows of "off-line" units undergoing Whole House Renovation. Under ¶ C2.5, appellant was only responsible for repairs caused by vandalism of the units not undergoing WHR. Once the units were taken "off-line" that responsibility ended under ¶ C2.6.1. Accordingly, the Government's direction to board up "off-line" units required appellant to perform extra work for which it is entitled to an equitable adjustment under the "Changes" clause.

The Government alleges that appellant has failed to prove that the units it was directed to board up were "off-line." We have found that the practice established by the parties to designate "off-line" units was to erect fencing around the units. The boarded windows were on the fenced-off units.

Similarly, the Government's contention that the cost of the work was under the liability limit for service calls is not well taken. Whether the work was over or under the service call "liability limit" is irrelevant. Any "service call" pertaining to a WHR unit was beyond the scope of appellant's contractual duties. Those limitations applied only to the extent that the work fell within the maintenance parameters established in the contract. The limit did not apply to maintenance of "off-line" units that was not required under ¶ C2.6.1. Moreover, there is nothing in Annex 1 that mentions the boarding up of "in service" units.

This portion of the appeal is sustained.

D. CEILING PAINT

FURTHER FINDINGS OF FACT

28. CLINs XX45 and XX47 provided for indefinite quantity (requirements) painting work. CLIN XX45 stated "Paint entire interior: Perform surface preparation, sealing, priming, painting, staining, varnishing, and related tasks as specified in § C, Annex 6 for entire interior of vacant units" (emphasis in original). Sub-CLINs XX45AA and XX45AD provided for separate per unit prices based on the number of bedrooms in the housing unit. CLIN XX47 stated "Paint Ceilings: Prepare surfaces, seal all stains, and paint ceilings as specified in Section C, Annex 6" (emphasis in original). Sub-CLINs XX47AA

and XX47AB provided prices per square foot (SF.) for an estimated quantity of 1,000 SF. in vacant and occupied units, respectively. (Ex. G-6 at B-10)

29. Contract § C, Annex 6 at ¶ 6.5.3.1 stated, "Interior painting: Interior painting includes preparing all surfaces (i.e., interior walls, ceiling, trim, baseboards, . . . doors . . . cabinets, window sills, closets, vanities, range hoods, and other miscellaneous interior items) and priming, staining, varnishing, painting, all prepared surfaces . . ." (emphasis in original) (ex. G-6 at C4-6-8).

30. Appendix 6-1 of Annex 6, "Summary of Units—Interior Painting" described the various housing areas at Murphy Canyon Heights, providing the "average floor plan" in square feet, the "APPROXIMATE SQUARE FEET WALL AREA," and the "APPROXIMATE SQUARE FEET CEILING IN BATH & KITCHEN" for each of the various types of units in each area.

31. There is no evidence as to appellant's interpretation of the above portions of the contract in pricing its BAFO.

32. After commencement of performance, the Government ordered the interior painting of vacant units under CLIN 0045. In January 2000, appellant took issue with the Government's interpretation that the CLIN XX45 work included the painting of ceilings other than those in kitchens and bathrooms. According to appellant, ceiling painting in other areas was required only if ordered pursuant to CLIN XX47 because Annex 6-1 only listed the square footage for kitchen and bathroom ceilings. (Ex. G-111; tr. 207, 454-55, 552-53). To the extent that the appellant did not paint the ceilings the Government took deductions from amounts due appellant for painting (tr. 1513; exs. G-157 through -161, -165).

DECISION

Appellant's interpretation that it was only required to paint bathroom and kitchen ceilings is unreasonable. Appellant's obligation to paint all ceilings at the CLIN XX45 firm fixed-prices was unambiguously stated in the contract. CLIN XX45 covers the painting of the "entire interior" of vacant units. *Cf. Elam Woods Construction Co., Inc.*, ASBCA No. 52448, 01-1 BCA ¶ 31,305 at 154,546 ("entire area" of running track included "whole area"); *Phillips National, Inc.*, ASBCA Nos. 41654 *et al.*, 93-1 BCA ¶ 25,271 at 125,864-65 (indefinite quantity CLIN for "quarters cleaning; complete" encompassed floor waxing even though a separate indefinite quantity CLIN called for "quarters, clean and wax floor tiles"). In addition, the scope of "interior painting" as discussed in Annex 6 at ¶ 6.5.3.1 extends to "all surfaces," expressly including ceilings. The break out of the ceiling square footage for baths and kitchens in Appendix 6-1 did not eliminate the clear requirements to paint "all surfaces" and the "entire interior." Although the contract made provision for ordering the painting of the ceiling only (CLIN XX47) at the Government's election, the

painting of the ceiling was encompassed by CLIN XX45, where, as here, the Government ordered services thereunder.

Similarly, because the painting of the ceilings was required, any deductions taken by the Government for the failure to perform that work were proper.

This portion of the appeal is denied.

E. FAUCET REPAIRS

FURTHER FINDINGS OF FACT

33. One of the contractor's maintenance responsibilities under ¶ 1.9.35.1 of Fixed-Price Annex 1 of § C4 was to repair and replace plumbing fixtures, including faucets (ex. G-6 at C4-1-21).

34. During WHR, the faucets were replaced. The replacement faucets (new faucets) were made by a different manufacturer than the pre-renovation faucets (old faucets) (tr. 359, 460-61, 1468, 1473).

35. During the site visit, appellant's representatives viewed a unit that had undergone WHR. The renovated unit was equipped with the new faucets. During the visit to that unit, appellant "didn't pay any attention to the type of faucets in the unit." According to appellant, the type of faucet would not have had any impact on the pricing of appellant's proposal. (Tr. 357). There is also no evidence of the faucet repair rate, or the reasonableness of any such rate, that was anticipated in appellant's proposal.

36. Sometime beginning in 2000, appellant asserted that the new faucets were requiring repair at an unanticipated "alarming rate" substantially beyond that allegedly experienced with the old faucets. Appellant informed the Government that the increased repairs were attributable to the allegedly substandard "low grade" quality of the new faucets as compared with the "high grade" old faucets and the increased repairs had caused extra work. The Government directed appellant to perform the repairs and denied that appellant was entitled to additional compensation. (Tr. 460-62, 574) Appellant has not identified in its brief any contemporaneous documentation that the faucet repair rate was the subject of dispute prior to submission of the claim. The Government representatives most likely to have been contacted orally denied that the issue had been brought to their attention (tr. 1468-69, 1477, 1556).

37. There is no technical information or expert testimony comparing in detail the specific models of the old and new faucets as to grade or quality. There is no persuasive proof of the relative repair rates or standard of quality of the old and new faucets.[2]

DECISION

Appellant agrees that it was required to repair faucets as part of its maintenance responsibilities under the contract. It contends, however, that the new faucets installed in renovated units were of lower quality than the old faucets that were replaced. According to appellant, the new faucets had to be repaired more frequently than the old and it is entitled to compensation for the attendant additional work.

The claim lacks merit for several reasons. Appellant has failed to establish that the new units were substandard or "lower grade" than the old. It has failed to prove what repair rate it anticipated in its proposal. Finally, it was charged with knowledge of the new faucets because they were installed in the renovated unit that appellant toured on the site visit. To the extent that any difference in the new and old faucets was significant, the difference should have been reflected in appellant's pricing.

This portion of the claim is denied.

F. PRIMER

FURTHER FINDINGS OF FACT

38. Specification § C4, Annex 6, Painting, at ¶ 6.5.3.2 stated, "Kitchen, Pantry, Utility, Bathroom, Laundry Rooms, Walls, Previously Painted Cabinets and Ceilings: These surfaces shall be primed with one coat of primer. . ." (emphasis in original) (ex. G-6 at C4-6-8).

39. There is no evidence relating to appellant's interpretation of this provision at the time of bidding. There is no persuasive evidence in the record regarding "industry standards" for priming.

40. During performance, appellant interpreted ¶ 6.5.3.2 as not requiring the application of primer to previously painted surfaces with the exception of previously painted cabinets. The Government ordered appellant to prime all of the surfaces underlined in that paragraph and took deductions from payments otherwise due to the extent that a coat of primer had not been applied in certain units. (Tr. 748; exs. A-8, -9)

DECISION

Appellant argues that it reasonably interpreted the contact to only require the application of a coat of primer to "previously painted cabinets." That contention is meritless. NMS's interpretation was unreasonable. The ¶ 6.5.3.2 requirement to prime extended to the walls and ceilings of each unit's "Kitchen, Pantry, Utility/ Bathroom, [and] Laundry Rooms," (emphasis omitted) not merely "previously painted cabinets." Appellant

ignored the references to these rooms. Moreover, there is no persuasive evidence of any contrary industry standard which, in any event, could not override the unambiguous requirement of ¶ 6.5.3.2 to prime all the listed surfaces. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369 (Fed. Cir. 2002). Deductions taken by the Government for failure to prime were also proper.

This portion of the appeal is denied.

G. FLOOR TILE

FURTHER FINDINGS OF FACT

41. CLINs XX60 through XX64 of the Schedule provided for INDEFINITE QUANTITY (REQUIREMENTS) FLOOR COVERING ANNEX 9 work. These CLINs permitted the Government, "as specified in Section C, Annex 9," to obtain the contractor's services to "Remove and dispose of existing resilient sheet or tile flooring" (CLIN XX60), "Prepare substrate and install resilient sheet flooring" (CLIN XX61), "Prepare substrate and install vinyl floor tile" (CLIN XX62), "Remove and dispose of existing carpet" (CLIN XX63), and "Install new carpet" (CLIN XX64). Estimated quantities were provided for each of these CLINs. (Ex. G-6 at B-14)

42. Specification § C4, Annex 9, Floor Coverings at ¶ 9.1 required the contractor "to remove existing floor covering, tile, carpet, underlayment and baseboards and replace with new sheet resilient flooring, vinyl composition floor tile, carpet, underlayment, tackstrip, and vinyl or wood baseboards as ordered" (ex. G-6 at C4-9-1). Annex 9, ¶ 9.7 "Preparation," further stated, "Remove existing flooring material . . . or prepare existing flooring for recover as ordered. Prepare substrate for flooring installation. . . . All deteriorated subflooring shall be replaced before installation of new flooring material." (Ex. G-6 at C4-9-7)

43. The contract incorporated the provisions of FAR 52.216-19 ORDER LIMITATIONS (OCT 1995) which stated in pertinent part:

> (b) Maximum order. The Contractor is not obligated to honor:
>
> (1) Any order for a single item in excess of 125% of the estimated quantity stated for that bid item;
>
> . . . .
>
> (d) Notwithstanding paragraphs (b) . . . the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the

> ordering office within two days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, the Government may acquire the supplies or services from another source.

44. In early 2000, the Navy began issuing orders requiring NMS to cover existing tile with carpet or resilient sheet flooring. Ms. Ravello objected stating that NMS's CLIN prices did not anticipate installing carpet or resilient sheet flooring over existing VCT tile. Ms. Ravello maintained that appellant and the contract anticipated that any replacement of existing floor covering would be with like floor covering. According to Ms. Ravello, the installation of different floor covering than previously existing would be more labor intensive and increase appellant's installation costs. (Tr. 456-58; ex. G-149) By letter of 11 August 2000, appellant notified the Government that appellant considered the orders to require extra work and that appellant would "respectfully decline any further requests for such work until this matter has been settled" (ex. G-149).

45. The Government issued orders to cover tile with resilient sheet flooring during the option periods that exceeded the estimated quantity of 6,000 SF. per period set forth in CLIN XX61 (ex. G-149). NMS did not return any order to the Government stating that appellant did not intend to honor it (tr. 543). To the extent that these orders exceeded the limitations specified in FAR 52.216-19, there is no evidence that appellant sought to avail itself of its right not to honor any specific order.

46. There is no evidence concerning appellant's interpretation of the contract's floor covering requirements at the time of pricing its proposal. Ms. Ravello was not employed by appellant at the time of proposal preparation and had no involvement with the preparation of NMS's proposal (tr. 550).

DECISION

Appellant contends that it was required to perform extra work to the extent that delivery orders required it to install new floor covering, either carpeting or resilient sheet flooring, over preexisting tile rather than first removing that tile. NMS also argues that it was required to install substantially more resilient sheet flooring during the option periods than the estimated quantity of 6,000 SF. per period prescribed in CLIN XX61, thus "accelerating" its performance and entitling it to an equitable adjustment of the unit price.

With respect to its first contention, ¶ 9.7 of Annex 9 expressly provides that the Government has the option of directing appellant to "prepare existing flooring for recover." A comparison of CLINs XX60 and XX61 further indicates that the quantities of existing flooring removed would not necessarily equal the quantities of new flooring to be installed. To the extent that NMS interpreted the contract to require the Government to order the

removal of existing floor covering every time it ordered installation of new floor covering, appellant's interpretation was unreasonable. There is also no evidence from persons preparing appellant's proposal that it relied on its present interpretation.

With respect to its contention that the Government issued excessive orders under CLIN XX61 during the option periods, the contract's Order Limitations clause provided appellant with a remedy. It could simply notify the Government that it declined to honor orders exceeding the specified limitations, thus affording the Government the option of fulfilling its requirements from another source. Appellant never gave such notice. By contemporaneously failing to comply with the provisions of the clause, it waived any right to object that the orders were excessive after performance. *Petroleum Terminal Management, Inc.*, ASBCA No. 33680, 89-2 BCA ¶ 21,835 at 109,855-56; *see also Keco Industries, Inc.*, ASBCA No. 50524, 00-1 BCA ¶ 30,857 at 152,332.

This portion of the appeal is denied.

H. APPLIANCE REPAIRS

FURTHER FINDINGS OF FACT

47. Annex 1, ¶ 1.9.37.1 stated that, "The contractor shall be responsible for all maintenance and repair of appliances as an integral part of the contractor[']s firm fixed-price services" (CLIN XX01) with appliances to be serviced during COM or when ordered as a service call (ex. G-6 at C4-1-22).

48. Under ¶ 1.9.37.11 of Annex 1, NMS was directed to remove any defective appliance that could not be repaired economically at the site and replace the unit. Requirements pertaining to determining when appliances were considered beyond economical repair (BER) and the procedures pertaining to proper notification and documentation were set forth in ¶¶ 1.9.37.12 and 1.9.37.13 (ex. G-6 at C4-1-24, -25).

49. Annex 1, ¶ 1.9.37.17 provided for "a $75.00 Liability Limit for Appliance service calls" and that servicing accomplished during COM "will be subject to the liability limits as specified for COM." As awarded, the contract at Annex 1, ¶ 1.12, "LIABILITY LIMITS FOR FIRM-FIXED-PRICE MAINTENANCE SERVICE WORK" established a liability limit of $1,350.00 per unit per "Change of Occupancy Maintenance (Not Including Appliances)," as well as reiterating the $75.00 limit for appliance service calls earlier prescribed in ¶ 1.9.37.17.

50. The claim pertains to 128 appliances that were repaired during performance. Appellant submitted two letters to the Government concerning these appliances. (Exs. G-134, -214; A-69 at 41-42)[3] The first letter, dated 20 September 1999, sought $1,771.27 "for Appliance Parts over $75.00," with an attached breakdown of the "cost associated with

this effort. . . ." The attached breakdown listed, *inter alia:* the parts replaced by appliance, the associated "cost," and amount by which the cost exceeded $75.00. Only one "COM" repair is listed on the breakdown. (Ex. G-214)

51. Pursuant to bilateral Modification No. P00011, effective 23 November 1999, appellant received compensation for the excess repair costs listed in its 20 September 1999 letter as a "ONE TIME Entitlement in the total amount of $1,718.87 for Appliance Service Calls exceeding the Liability Limit of $75.00 per call in accordance with Clause 1.12 . . . [supra]." The modification contained a release stating in part that, "Acceptance of this modification . . . constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs . . . arising out of, or incidental to, the work as herein revised." The modification contained no reservation of any claim for additional compensation associated with the repair work. (Ex. G-215) There is no evidence pertaining to any negotiations relating to this modification.

52. The second letter, dated 18 May 2000, requested $4,996.44 for "Appliance Part(s) expenditures over the contract liability limit" and provided "documentation of the cost associated with this effort . . . on attached breakdown sheet. . . ." The breakdown sheets listed, *inter alia*, the appliance, a description of the part replaced and the associated "cost," and the excess over $75.00. Numerous repairs listed indicated they were performed concurrent with COM. (Ex. G-134)

53. Effective 18 May 2000 and executed by appellant on 11 July 2000, bilateral Modification No. P00019 provided for a "ONE TIME entitlement in the total amount of $4,996.44 for Appliance Service Calls exceeding the liability limit" (ex. G-135). The work referenced in Modification No. P00019 concerns "work done in connection with the appliances listed in" appellant's letter of the same date (tr. 529). The modification also "correct[ed an] ambiguity" by deleting the language "(Not Including Appliances)" from the ¶ 1.12 liability limit of $1,350 for COM (*see* finding 49 *supra*). No reservation of any claim or right by appellant is indicated in the modification and it contains the same release language as Modification No. P00011, above. (Ex. G-135) There is no evidence relating to any negotiations pertaining to the modification.

DECISION

As briefed, appellant alleges that it is entitled to additional compensation for repairing 158 appliances. According to NMS, Mods. 11 and 19 only compensated appellant for the cost of the replacement parts that exceeded the $75 liability limit for each service call but did not cover its additional "labor costs." (App. br. at 12)

Appellant's current claim fails to address and contravenes the releases contained in both modifications. The modifications were clearly intended to resolve "all costs" associated with appellant's September 1999 and May 2000 letters relative to the listed

appliance repairs. Appellant failed to reserve any rights expressly in the modification and there is no evidence of negotiations indicating that the parties intended the modifications to be more limited in scope than is unambiguously set forth in the all encompassing language of the release. A contractor who accepts an all encompassing release is barred from additional compensation. *Northwest Marine, Inc.*, ASBCA No. 40505, 94-3 BCA ¶ 27,036. Accordingly, the modifications operate as an accord and satisfaction barring appellant's claim for labor costs.

This portion of the appeal is denied.

I. RECYCLING

FURTHER FINDINGS OF FACT

54. Contract CLIN XX04 provided for "Refuse Collection and Disposal Services as specified in § C, Annex 4 (per PRS Item 015-019)" at a monthly price of $27,903.02 and a total price of $334,836 for the base period (ex. G-6 at B-3).

55. Annex 4, ¶ 4.1 required appellant to collect and dispose of "refuse, recyclable waste, and oversized items."

56. Annex 4, ¶¶ 4.5 and 4.6 set forth, respectively, "CONTRACT REQUIREMENT NO. 018, CURBSIDE RECYCLING SERVICE (NON-GREENWASTE)" and "CONTRACT REQUIREMENT NO. 019, CURBSIDE GREENWASTE RECYCLING SERVICE." Each paragraph was subdivided into three subparagraphs that contained detailed requirements for: "Response Time," "Procedures and Documentation," and "Quality of Work," as follows:

> i. With respect to "Response Time," appellant was required to "collect contractor-provided [non-green and green] waste recycling containers . . . on the same date of household refuse collection. . . ."
>
> ii. With respect to "Procedures and Documentation," appellant was required, *inter alia*, to purchase and provide the recyclable waste containers and transport the waste to an appropriate recycling center or central collection point.
>
> iii. With respect to "Quality of Work," appellant was required to perform the work "in a safe manner . . . and by an experienced sanitation truck driver" and was provided more detailed instructions regarding the services to be provided.

(Ex. G-6 at C4-4-3-4)

57. Part 3 § J, Attachment 7 of the contract contained the PRS, or "PERFORMANCE REQUIREMENTS SUMMARY," referenced in CLIN XX04. The PRS is defined at ¶ C.1(u) of the contract as "[a] tabular summary of contract firm fixed-price work requirements itemized by work requirements (task), weight, standards of performance . . . which is used by the Government to assess monthly contractor performance and is the primary basis for deducting for partially performed, unsatisfactorily performed, and unperformed work." (Ex. G-6 at C1-3) Item Nos. 018 and 019 of the PRS assigned "weights" to "Work Require[ments]" detailed in each of the three subparagraphs of both ¶¶ 4.5 and 4.6, discussed in the preceding finding. "Response Time" was assigned a weight of 60%, with a notation that, "UNSATISFACTORY PERFORMANCE OF THIS WORK REQUIREMENT WILL RESULT IN AN UNSATISFACTORY RATING FOR THE ENTIRE CONTRACT REQUIREMENT." The "Work Requirement" in the PRS corresponding to the subparagraph entitled "Procedures and Documentation" in ¶¶ 4.5 and 4.6 was labeled "Class & Documents" and was assigned a weight of 5%. "Quality of Work" was assigned a weight of 35%. (Ex. G-6 at J-1-15-16)

58. Contract Section E: Inspection and Acceptance, at ¶ E.9 required the contractor to develop and furnish to the Government a "Schedule of Deductions" (SED) within 15 days following award. Paragraph E.9 further stated that, "Prices shown in the Schedule of Deductions will be utilized in connection with the 'CONSEQUENCES OF THE CONTRACTOR'S FAILURE TO PERFORM REQUIRED SERVICE' clause in making deductions to the contract price for non performed or unsatisfactory work." (Ex. G-6 at E-7)

59. Paragraph E.7, FAC 5252.246-9303 CONSEQUENCES OF CONTRACTOR'S FAILURE TO PERFORM REQUIRED SERVICES (MAR 1996), at subparagraph c(3) stated that the Government "shall deduct from the Contractor's invoice all amounts associated with the unsatisfactory or nonperformed work at the prices set out in the Schedule or provided by other provisions of this contract. . . . In addition, the Government can assess liquidated damages . . . in the amount of 10% of the value of all observed defects." (Ex. G-6 at E-4-5)

60. Following award and under cover of a letter dated 3 September 1998, appellant submitted its SED for the various CLINs to the Government in the specified format. With respect to CLIN XX04, the total possible deductions stated in the SED for collection and disposal of all refuse and recyclable materials equaled the total base period firm-fixed-price for that CLIN of $334,836.24. With respect to recyclables, the SED provided for a deduction of $.76 "per container" per week for both green and non-green recyclable material and indicated appellant's breakdown of the total contract price for this work to be $82,001.80 for each of the recycling collection services during the base period. (Ex. G-28 at 13)

61. Appellant's refuse collection subcontractor failed to provide the required containers for green and non-green recyclables during the first weeks of performance. As a result, all recyclable materials were collected and disposed with regular waste. (Exs. G-43, -58, -59 at 4, -62)

62. The Government determined that appellant had failed to perform the recycling requirements of ¶¶ 4.5 and 4.6 above and made deductions from amounts invoiced by appellant. The Government computed the deductions by multiplying the number of recycling containers (2,321) by the number of weeks missed by the $.76 (per container) specified in appellant's SED. It then added to that total the 10% liquidated damages specified in ¶ E.7.c(3), *supra*. (Exs. G-54, -61, -65, -66, -67)

63. Appellant objected to the deductions by letter dated 8 December 1998. The sole basis for its objection was that the full $.76 per container should not have been used in the Government's calculation. Emphasizing that it collected and disposed of the recyclable materials, appellant maintained that it simply failed to provide the recycling containers. Noting that the requirement to furnish the containers was contained in the "Procedures and Documentation" subparagraphs of ¶¶ 4.5 and 4.6 and that the corresponding "work requirement" in the PRS was assigned a weight of only 5%, appellant reasoned that the appropriate amount upon which to base the deductions should have been only 5% of the $.76 (or $.038) per container. (Ex. G-62)

DECISION

Appellant argues that merely because it failed to provide containers for recycling green and non-green materials, the full $.76 deduction per container should not have been taken. We disagree. Appellant wholly failed to perform the recycling services required by the contract during the early weeks of performance. Recyclable materials were not segregated, collected separately, and transported to appropriate disposal sites. Appellant's strained interpretation of the PRS, one that essentially emasculates the contract's clear recycling requirements, leads to an absurd result and is patently unreasonable. NMS is not entitled to 95 % of the payment for recycling services for the weeks in dispute when no materials were recycled. Among other things, even the PRS's "Response Time" summary cited in finding 57 provided the failure to pick up the containers would result in an unsatisfactory rating for the entire work requirement set forth in ¶¶ 4.5 and 4.6. The Government deductions were proper.

This portion of the appeal is denied.

THE GROUNDS MAINTENANCE CLAIMS

64. Appellant anticipated prior to award that its grounds maintenance subcontractor would be Ponderosa Landscape (Ponderosa). Ponderosa's subcontract quotes to NMS for

the grounds maintenance CLINs of the contract were incorporated into appellant's proposal. (Ex. G-15 at 3, 16; tr. 1006-07, 1210) There is no evidence as to how Ponderosa or appellant interpreted any of the specific provisions or specifications of the contract related to grounds maintenance prior to submission of appellant's BAFO. After award and sometime in September 1998, Ponderosa determined that it had "significantly underbid" the job and declined to perform as a subcontractor for NMS (exs. G-30, -31, -40, -49, -185 at 6; tr. 179, 232-37, 1131, 1210-11).

65. On 30 September 1998, NMS entered into a subcontract with another landscaping firm, Young and Nicks (Y&N). Y&N had not submitted a quote to NMS or reviewed the solicitation prior to award but agreed to perform the work for the subcontract prices quoted to NMS by Ponderosa. Y&N had no involvement with the preparation of appellant's proposal and had not submitted a pre-proposal subcontract quote to appellant. Y&N had performed grounds maintenance work on the predecessor contract and determined that the grounds maintenance work on the instant contract was "pretty much the same" as the predecessor contract. There is no evidence comparing specific terms of the predecessor contract with the current contract. Mr. William Nicks is the President of Y&N. (Exs. G-6, -38, -40, A-4; tr. 178, 237-38, 645-47, 932-35, 925, 961) Prior to entering into its subcontract with NMS, Y&N had not reviewed all provisions of the contract pertinent to grounds maintenance (tr. 594, 643-645, 923, 932-35, 961**,** 1499-50**).**

66. Following award of its subcontract, Y&N reviewed all of the contract's grounds maintenance requirements and concluded that Ponderosa's quote did not provide for sufficient labor hours to perform even an "average" job much less an "excellent" job. Y&N considered that Ponderosa had underestimated the labor hours required by at least 10,800 man hours per period. (Tr. 655-56, 925-31)

J. OVER INSPECTION

FURTHER FINDINGS OF FACT

67. In this portion of the appeal, appellant alleges that it was forced to hire additional personnel to perform grounds maintenance tasks because of unreasonably strict, "overzealous" Government inspections (ex. G-69 at 19-21, 42-43).

68. During the summer of 1999, Y&N was not accomplishing the grounds maintenance work in a timely manner. In particular, the subcontractor tended to use its personnel to perform IQ delivery orders at the expense of timely completing its fixed-price grounds maintenance responsibilities. (Ex. G-78; tr. 1498-1500)

69. In April 2000, appellant notified the Government that NMS was hiring an additional crew of laborers (the Saturnino Ambrosio crew) primarily to "weed" in support of Y&N because Y&N had not been timely performing weeding duties**.** In addition,

appellant earlier hired a quality control representative, Ms. Elizabeth Jones, and a consultant (Mr. Gregory Graham) to evaluate the grounds maintenance work. (Exs. G-128, -138; tr. 199-200, 250, 465, 487, 1504-07) Appellant admitted that "quality control" was a "weak area" when it notified the Government that it was hiring Ms. Jones (ex. G-98). At the time she was hired, appellant had no quality control checklists covering the grounds maintenance work (tr. 153, 1501-02; ex. G-97).

70. To support its allegations of over inspection, appellant relies almost exclusively on a small number of anecdotal "examples" provided by several witnesses for appellant of "overzealous" practices by one of the Government's inspectors (tr. 381-82, 627-28, 641). Some of these "examples" pertain to the other grounds maintenance claims discussed below. With respect to the other "examples," there is insufficient detail to assess the merits of the complaints to make a determination concerning their propriety.

71. Appellant has failed to cite specific contemporaneous daily and deficiency reports that tended to substantiate appellant's allegations of over inspection. A Government summary of the daily reports and our own *sua sponte* limited examination of the contemporaneous documents indicate that they do not support appellant's allegations that overly stringent criteria were imposed or that any pervasive pattern of unreasonable inspections occurred. Numerous adverse comments by government inspectors in the daily reports elicited no response from the appellant and NMS has failed to adduce evidence that the comments were inaccurate, improper, in error or otherwise reflective of the imposition of "overzealous" inspection criteria. (Exs. G-177, -178, -210, -211; tr. 871, 1359-82) Similarly, there is no explanatory evidence tending to cast doubt on deductions taken for failure to timely or properly perform grounds maintenance work.

72. Ms. Jones' "overall opinion" and "assessment" were that the Government's grounds inspectors were not overzealous and did not perform untimely inspections or impose unreasonable requirements beyond those specified in the contract (tr. 175-77). She was also critical of the timeliness of Y&N's performance of the work, their lack of compliance with contractual standards and Y&N's inadequate staffing (tr. 156-57, 159-64). Mr. John Garcia, Y&N's on-site supervisor, also considered one of the two Government inspectors alleged to be "overzealous" to be a "reasonable" inspector (tr. 947). The other inspector involved is now deceased.

DECISION

Appellant alleges that the Government imposed unreasonable criteria during its inspection of the grounds maintenance work and that the overzealous Government inspections forced NMS to hire additional workers, a quality control representative and a consultant to "appease" the Government. Appellant's over inspection contentions are untenable. Appellant underbid the grounds maintenance work. Provision for additional

personnel should have been made in its bid. Because the project was initially understaffed, appellant needed to hire the additional personnel to satisfy contract requirements.

Appellant's proof of over inspection is also anecdotal, based on a small number of "examples." It has failed to prove even with respect to those examples that the Government imposed overly stringent inspection standards. Two "examples" relate to appellant's "seed v. sod" claim and its tree pruning/removal claim. Both of the latter claims are without merit for reasons discussed below. The record wholly fails to establish any pervasive pattern of overzealous inspection. The contemporaneous daily reports and deficiency items do not evidence overly strict inspections. Even Ms. Jones, appellant's quality control representative, denied that the grounds inspectors imposed unreasonable criteria.

Similarly, the record fails to demonstrate that deductions taken by the Government related to grounds maintenance were improper. Appellant has failed to address or brief issues related to the propriety of specific deductions and we consider any claim for remission of the deductions to have been abandoned.

This portion of the appeal is denied.

K. CALSENSE ALERTS

FURTHER FINDINGS OF FACT

73. Under ¶ 3.9.12.6, of § C4, Annex 3, appellant was "responsible for the maintenance and repair of all components of all sprinkler systems" with above ground repairs generally included within the fixed price for grounds maintenance (up to the liability limit specified in ¶ 3.9.12.8 of $450.00 per repair) and underground piping repairs considered an IQ item. Appellant was advised in ¶ 3.4.5.1 that the Government was "upgrading the . . . [h]ousing area irrigation systems to a computer controlled network utilizing Calsense Corporation [hereinafter Calsense] components and technology" and appellant was directed to review Appendix 3-2 that identified a substantial number of locations where the Calsense network had already been installed. In ¶ 3.4.5.2 appellant was required, "At a minimum . . . [to] inspect, test and repair all Calsense systems once per month . . . to ensure proper operation, coverage and identify defective components." (Ex. G-6 at C-4-3-7, -26, -30)

74. Paragraph 3.9.12.7.1 set forth extensive explanations and requirements pertaining to maintenance and repair of the Calsense system, among other things, directing the contractor to Section J of the contract containing a "schematic diagram of a typical . . . system" (ex. G-6 at C4-3-28). Subparagraph c. of ¶ 3.9.12.7.1, stated:

> The Government "water manager" will notify the contractor of any . . . irrigation system problems by fax, telephone, or other

> means. The contractor shall troubleshoot the system, determine the cause of the problem, and effect repairs within three working days. If the problem is in equipment for which the Government is responsible the contractor shall notify the "water manager" and Contracting Officer within 24 hours.

(*Id.*)

75. The extent of appellant's experience with operation or maintenance of a Calsense system prior to performance of this contract is not detailed. There is no evidence as to any pre-proposal estimate made by appellant (or Ponderosa), or the reasonableness of assumptions it may have made relating to its pricing, with respect to Calsense system maintenance requirements.

76. During performance, Y&N was requested by the Government water manager to investigate numerous problems with the Calsense system. Y&N contends that it had 3400 "call outs" or "service chits" that it performed. No records were offered by appellant into evidence that would independently substantiate this number or provide details concerning the problems investigated. The 3400 figure appears to be the number of computer sheets routinely generated by the Calsense system. Those sheets contained details concerning the operation of the system and were not solely concerned with "false alerts." (Tr. 1441-43, 1453, 1458-59, 1462) Testimony at trial concerning Calsense-related problems was highly generalized, attributing the problems for the most part to "false alerts" or other nonspecific malfunctions of the system. There is no evidence addressing the details of the cause(s) of any particular problem or how they were resolved. Appellant offered no expert testimony concerning the operation of the system elaborating on the alleged malfunctions, causes of the "false alerts" and addressing whether the amount of work appellant performed on the system was unreasonable. (Tr. 616-19, 1608-10)

77. Appellant also considered that the failure of the Government to provide "as built" drawings of the system contributed to its difficulties. With respect to the "as built" drawings, the contract did not require that they be furnished to appellant and there is no evidence as to when the WHR contractor was required to furnish them to the Government. Nor does the record indicate whether such drawings were in fact available for areas (not precisely defined in the record) where appellant alleged that the absence of the drawings contributed to its problems (*see* tr. 1450-52). Calsense representatives also instructed Y&N on site concerning the operation of the system (tr. 1443).

78. The witness with the most demonstrated knowledge of Calsense systems was Mr. Charles Zinky, the Government's water manager. Mr. Zinky testified that the system did not experience out of the ordinary malfunctioning and that "false alerts" should have been expected by appellant and were part of the "fine tuning" reasonably to be expected with the introduction of a computerized irrigation system. Mr. Zinky considered that appellant

failed to timely address problems and that this failure "compounded" appellant's difficulties contributing to multiple "alerts" for the same problem until it was resolved. (Tr. 1437, 1443-44, 1458, 1462-63)

DECISION

NMS alleges that the extent of maintenance work on the new Calsense system exceeded what it anticipated. According to NMS, the contract reasonably implied that it would only need to inspect the Calsense system once a month when in fact the system actually required daily maintenance. It also maintains that the absence of "as built" drawings for the system contributed to its difficulty in locating and resolving the "alerts."

Contrary to appellant's contentions, there is no evidence concerning the amount of maintenance the Calsense system reasonably required. The monthly inspection was a "minimum" requirement that assumed that the system was operating without problems. Other extensive maintenance requirements were detailed elsewhere in the contract. Appellant's interpretation that only a monthly inspection of the system was to be anticipated is patently unreasonable.

Appellant has also failed to produce evidence establishing what reasonably should have been anticipated. Moreover, NMS introduced no expert testimony or other convincing evidence establishing a reasonable baseline for the amount of work that should have been foreseen.

Appellant claims that there were 3400 "call outs" related to Calsense. First, that number is not independently corroborated by documentation of record. It appears that the 3400 figure is the number of routinely-generated computer sheets (not of record) containing details of the system's operation not simply "alerts." Nor is there any evidence providing specific details, causes and resolutions of the particular problems, other than generalized allegations that there were numerous "false alerts." The most persuasive evidence in the record on that issue was Mr. Zinky's opinion that "false alerts" were to be expected as a normal part of the "fine tuning" of a computerized irrigation system and, to that extent, the work actually performed by appellant was not excessive. Moreover, we also conclude, based on Mr. Zinky's testimony, that appellant frequently failed to timely investigate the alleged "false alerts" and thus compounded them. The failure to timely respond exaggerated the number of alerts because the same alert would register multiple times until it was addressed.

With respect to the "as built" drawings, there is no evidence as to when they may have been provided to the Government by the replacement contractor or when they were formally requested by appellant. The contract was silent with respect to them. Appellant was provided a general schematic of the Calsense system and there is no specific proof as to why the schematic was inadequate for any specific area or problem.

This portion of the appeal is denied.

L. SEED V. SOD

FURTHER FINDINGS OF FACT

79. The contract required "Lawn Renovation" as part of the fixed-price grounds maintenance work in ¶ 3.9.1.1 of § C4, Annex 3. Under that provision appellant was permitted to use either seed or sod, at its discretion, in renovating lawn areas less than ten square feet in dimension. (Ex. G-6 at C4-3-11)

80. Contract CLIN XX11 was an IQ item that also permitted the Government to order "Grounds Renovation" work as prescribed in § C, Annex 3A (ex. G-6 at B-5). Detailed requirements for Grounds Renovation were prescribed in ¶ 3A.2 of Annex 3A, which, *inter alia*, required the installation of sod, not merely seeding (ex. G-6 at C4-3A-1-3).

81. During performance, the Government issued delivery orders to appellant under CLIN XX11. Pursuant to Annex 3A, appellant was required to install sod and was not given the option of seeding, in lieu of the sod. Appellant claimed that it had the discretion under ¶ 3.9.1.1 of Annex 3 to seed and that the direction to use sod constituted a change to the contract. (Ex. A-69)

DECISION

The contract required the installation of sod for IQ work ordered pursuant to CLIN XX11. Appellant did not have the option of seeding when IQ work was ordered as it did for small lawn areas renovated as part of its fixed-price grounds maintenance work. Appellant's interpretation of the IQ requirements in Annex 3A is unreasonable.

This portion of the claim is denied.

M. TREE PRUNING/REMOVAL

FURTHER FINDINGS OF FACT

82. Removal of unsafe trees having a diameter of eight inches or less could be ordered by the CO as part of NMS's fixed-price grounds maintenance responsibilities (ex. G-6 at C4-3-19). The removal of trees with a diameter greater than eight inches could be ordered as IQ work pursuant to CLIN XX12 (*id*. at B-5). Similarly, the pruning of trees less than 25 feet in height was part of appellant's fixed-price responsibilities (*id*. at C4-3-17), while pruning trees taller than 25 feet was to be ordered under IQ CLIN XX13 (*id*. at

B-5). The contract required that, "All tree maintenance must be performed in accordance with ANSIZ133.1, 1988 Safety Standards" (*id*. at C4-3-17, C4-3A-4).

83. Y&N generally subcontracted out work requiring the removal of large trees because it lacked necessary equipment and because that work had resulted in deaths on earlier projects (tr. 984-87). Prior to 9 November 1998, Y&N entered into a subcontract with Cooley's Landscaping for certain tree and stump removal services required under the instant contract (ex. G-52; tr. 692-93).

84. Y&N did, however, also perform certain tree removal services under the contract. On 3 December 1998, Y&N was removing a tree in the housing area and it fell and damaged a fence and a children's swing set. In a response by NMS to a resident's complaint, appellant promised to repair the damages and informed the Government inspector that NMS would implement a "more responsible tree removal plan along with a definite safety plan for future tree removal." (Ex. G-177 at 144) There is no evidence that such a plan was prepared.

85. On 8 and/or 9 December 1998, Y&N was cited for further unsafe stump/tree removal practices. There was some confusion as to whether the inspector cited the contractually-specified ANSIZ133.1 or relied on a Corps of Engineers safety manual. However, there is no evidence of any dispute or protest by the contractor concerning whether the practices in question were unsafe or violated pertinent safety criteria. (Ex. G-177 at 151, 157; tr. 691, 887-88, 1431-34)

86. Following the 8/9 December 1998 incidents, appellant claims that a Government inspector (now deceased) prohibited Y&N from performing IQ large tree removal/pruning services (ex. A-69 at 18). There is no persuasive evidence establishing that such a prohibition was imposed. The only evidence cited in appellant's briefs supporting its argument is to the daily reports, generally. The relevant daily reports contain no reference to any such prohibition (ex. G-177 at 151, 157). The allegation appears to be based on hearsay testimony of Mr. Nicks who apparently considered that the prohibition was implied based on his perception of what was relayed to him by one of appellant's superintendents concerning a conversation that the superintendent allegedly had with the inspector (tr. 687-88, 1510). The superintendent did not substantiate the alleged conversation with the inspector who was deceased at the time of the hearing. There is no contemporaneous written documentation corroborating or protesting any Government order or prohibition restricting Y&N's performance of IQ tree removal/pruning. We find that no such order was issued (tr. 693-94, 889). As a result of the alleged order, appellant contends that it was required to subcontract out the IQ work at a loss (ex. A-69 at 19, 40).

87. In January 1991, appellant leased a "Dasko chipper" for use in the tree removal/pruning work (ex. A-17,-69 at 19; tr. 698-700).

88. The Government exercised three (of the four) months of the third option period (*see* finding 2, *supra*). Appellant alleges, without citation to the record, that during the three months it received delivery orders requiring removal of 37 trees and pruning of 36 trees pursuant to IQ CLINs XX12 and XX13, respectively (ex. A-69 at 19). The estimated quantity for each CLIN was 50 for each option period (ex. G-6 at B-68). The estimated quantity of 50 was specified for the base period as well as for each of the first two option periods (*see* finding 3, *supra*). There is no evidence that appellant gave the Government notice under the Order Limitations clause (finding 43, *supra*) that it declined to honor any order. Nor is there any contemporaneous evidence that appellant considered the issuance of the delivery orders to be improper.

DECISION

Appellant alleges that a Government inspector refused to allow Y&N to perform IQ tree removal/pruning work forcing it to subcontract the work at a loss. It also contends that it was forced to forego use of the leased Dasko chipper as a result of the Government's prohibition. Finally, NMS contends that it was forced to "accelerate" performance of the IQ work during the three months of the third option period further increasing its losses.

Appellant has failed to prove that any order was issued prohibiting appellant from performing the IQ services (finding 86). There was no contemporaneous documentation, corroboration, protest or notice of the alleged Government refusal. It is based on equivocal, uncorroborated hearsay testimony that is unpersuasive and not even cited by appellant in its briefs. Even before the alleged order was issued, Y&N was subcontracting large tree removal/pruning work because of lack of equipment and death of employees performing such work in the past. Particularly disingenuous is appellant's allegation that Y&N lost the use of the Dasko chipper as a result of the alleged Government prohibition. The chipper was leased well after the alleged Government prohibition was issued. The later leasing of that equipment in fact substantiates that the Government had not earlier prohibited performance of the IQ work.

Appellant's allegations regarding "acceleration" of the IQ work in the third option period are also untenable. The orders did not exceed the estimated quantity for the period. If appellant considered the orders to be improper, it contemporaneously failed to protest, provide notice to the Government invoking the Order Limitations clause, or otherwise indicate its interpretation of the contract. If it had done so, the Government would have had the option of satisfying its needs from another source, irrespective of what the proper interpretation of the contract might be given the compressed option period.

This portion of the appeal is denied.

CONCLUSION

The appeal is sustained in part with respect to the COM Cleaning and Boarded Windows claims and is remanded to the parties to negotiate quantum in accordance with this decision. The appeal is otherwise denied. The additional unquantified requests for relief set forth in appellant's letter of 26 April 2001 that do not qualify as claims are dismissed without prejudice.

Dated: 6 August 2003

ROBERT T. PEACOCK
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

CARROLL C. DICUS, JR.
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] Because there are other reasons for denying this and other claims herein, we need not discuss the import of appellant's frequent failure to adduce proof of its interpretation of key solicitation provisions at the time of preparing its proposal.

[2] Appellant's claim also seeks relief for other replacement items in the renovated units and grounds. The new replacement items were alleged to be of "lower grade" or inferior quality than the items that they replaced in the old units, including "diverters," ceiling fans, dimmer switches, and "pop-up" sprinkler heads (ex. G-69 at 38-39). There is little, if any evidence concerning these items. The claim in this regard suffers from the same lack of proof as the faucet claim and must be denied for that reason alone. The "pop-up" heads were installed in the renovated unit toured on the site visit and could have been observed by appellant at that time (tr. 1209). Appellant's briefs also contain no analysis of any entitlement to relief pertaining to them and we consider claims with respect to these other replacement items to have been abandoned.

[3] The claim also alleges that the Government required NMS to repair appliances that should have been determined to be BER and thus NMS should not have been required to incur any repair costs with respect to them (ex. A-69 at 41-42). However, we are cited to no evidence supporting a conclusion that individual appliances repaired by appellant were BER. There is no evidence that appellant complied with contractual notice and other procedures pertaining to BER determinations. The issue has not been briefed. Accordingly we consider that claim issue to have been abandoned.

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. 53444, Appeal of NMS Management, Inc., rendered in conformance with the Board's Charter.

Dated:

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