ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Plum Run, Inc.	)	ASBCA Nos. 46091, 49203
	)	
Under Contract No. N62470-92-D-8778	)	

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OPINION BY ADMINISTRATIVE JUDGE THOMAS

These appeals arise out of a contract for base maintenance services at the U.S. Naval Base, Guantanamo Bay, Cuba (GITMO).[1] ASBCA No. 46091 is an appeal from a decision of the contracting officer (CO) partially terminating the contract for default. ASBCA No. 49203 is an appeal from the CO's deemed denial of nine claims. Two of those claims are no longer in issue. We decide both entitlement and quantum as to the remaining seven.

With respect to ASBCA No. 46091, in April 1993, the CO terminated for default all or part of five Contract Line Items (CLINs) relating to housing maintenance services. We sustain the appeal except as to subCLIN 9AA, Change of Occupancy Maintenance (COM). With respect to ASBCA No. 49203, we sustain the appeal from the deemed denial of claims 2 and 6 in the total amount of $14,286 and otherwise deny it.

[1] Judge Lipman, who heard these appeals, died in December 2004. We have benefited from his work on the appeals.

ASBCA No. 46091

FINDINGS OF FACT

Contract Performance and Partial Termination

1. On 11 September 1992, the Navy awarded Contract No. N62470-92-D-8778 (the BOS contract) for base maintenance services at GITMO to appellant Plum Run, Inc. (sometimes PRI). The estimated amount of the contract was $6,992,148.19. The period of performance was 1 October 1992 through 30 September 1993 (the base year). There were options that the Navy did not exercise. (R4, tab 10 at Bates 1-2, 278)

2. The contract included FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). That clause provides in part:

> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension . . . .

The contract also included clause E.6, P-68 52.249-10113, CONSEQUENCES OF CONTRACTOR'S FAILURE TO PERFORM REQUIRED SERVICES (ALTERNATE I) (NAVFAC MAR 1989). Clause E.6 allowed the government to use "a statistically extrapolated inspection technique" to assess the contractor's performance of the specified services. It provided that for non-performed or unsatisfactory work the Navy could deduct from the contractor's invoice "all amounts associated with such nonperformed [or unsatisfactory] work at the rates [or prices] set out in the Schedule" plus liquidated damages (L/Ds) of 10% for administrative costs and other expenses resulting from the non-performance or unsatisfactory performance of the work. Clause E.6f provided that the exercise of rights under the clause would not preclude instances of non-performance or unsatisfactory performance, regardless of whether deductions were taken, from being grounds for termination for default. Clause G.2, INVOICING INSTRUCTIONS, provided that the contractor would be paid for "satisfactorily completed work." (R4, tab 10 at Bates 241-43, 260, 291)

3. The contract included 22 firm fixed-price and indefinite quantity CLINs, subdivided into numerous subCLINs. The contract covered a wide variety of functions including services relating to family housing maintenance. (R4, tab 10 at Bates 17-37)

4. The following CLINs and subCLINs were terminated for default in April 1993:

ITEM NO.	SUPPLIES/SERVICES
0002	SERVICE CALLS
0002AB	Family Housing Appliance Service Calls
0002AC	Family Housing Window A/C Units Service Calls
0002AD	Family Housing Central A/C Service Calls
0002AF	Family Housing Maintenance Service Calls
0003	MAINTENANCE, INSPECTION, AND REPAIR OF A/C
0003AA	A/C PM Family Housing Systems up to 5 tons
0003AF	A/C Filters/Algecide Family Housing Systems up to 5 tons
009	PERFORM HOUSING MAINTENANCE
0009AA	Change of Occupancy Maintenance
0009AB	Annual Housing Exterior Inspections
0009AC	Loaner Furniture Operation
0009AD	Self Help Store Operation
0009AE	Playground Equipment Maintenance

SCHEDULE OF INDEFINITE QUANTITY WORK

0016	INTERIOR & EXTERIOR PAINTING
0016AE	Housing Partial Paint Vacant
0016AF	Housing Partial Paint Occupied
0016AG	Housing Complete Paint Vacant
0016AH	Housing Complete Paint Occupied
0021	HOUSING MAINTENANCE
0021AA	Custodial Service
0021AB	Countertop Replacement
0021AC	Exterior Glass Cleaning
0021AD	Concrete Slab Demolition
0021AE	Roof Cleaning
0021AF	Pressure Wash V/Siding and Stucco Surfaces
0021AG	Wood Floor Refinishing
0021AH	Reglaze Bathtub
0021AJ	Reglaze Sink
0021AK	Floors & Floor Coverings

(R4, tab 72 at Bates 4-6) In addition, two subCLINs for delivery order tracking and inventory control were partially terminated for default. We delete the "zeroes" from the CLIN identifiers hereafter.

5. The course of the contract was not smooth. In October 1992, the Navy terminated the contract for default because of bonding problems and reinstated it a few days later once those problems were resolved. In January 1993, appellant sought chapter 11 protection in the bankruptcy courts. (R4, tab 12 at Bates 1, 9, tabs 34, 55) We focus on the facts relating to the termination of the CLINs listed above in April 1993.

6. SubCLIN 9AA, COM, consisted of inspections, cleaning, repairs, alterations, pest control and other maintenance when a family housing unit was vacated prior to a new occupant moving in. The relevant specification provided:

> C.15.7.c CHANGE OF OCCUPANCY MAINTENANCE (COM) . . . . The Contractor shall perform COM in accordance with Attachment J-C15.6, which not only includes maintenance, repair, and alterations, but interior and exterior pest control and a termite and wood decay infestation inspection, Attachment J-C13.7-2. The Contractor's limit of liability is equal to that of a service call for any single item of repair. COM historical data is provided in Attachment J-C15.6. Random samples of actual COM work authorizations are provided in Attachment J-C15.7.
>
> (1) COM Inspections. The Government will conduct the following inspections associated with each change of occupancy maintenance requirement. The Contractor shall participate as indicated. All inspections will be conducted during normal working hours.
>
> (a) Pre-termination Inspections. . . . During the pre-termination inspection the Contractor will identify the scope of maintenance, repair/replacement, and other work to be accomplished by the Contractor during the change of occupancy period on Attachment J-C.15.6 (Change of Occupancy Pre-Termination, Final Termination Inspection and Maintenance Form also called the COM form) issued by the Government. . . .

(b) Final Termination Inspections. . . . Any additional deficiencies shall be added to the original COM form written during the pre-termination inspection for the unit as well as any Indefinite Quantity work that is to be ordered by an attached DD 1155 (Delivery Order). The number of days allowed to complete change of occupancy work established during the pre-termination inspection will not be changed, unless Indefinite Quantity work items not included on the original work authorization are added to the work to be accomplished according to paragraph C.15.9. A copy of the final COM form shall be provided to the Government the same day the final termination inspection is completed. The Government will issue a DD 1155 for the IQ work the same day.

(c) Make Ready Inspections. Make ready inspections are conducted by the Government after the change of occupancy period to ensure that all change of occupancy work has been properly completed and that the unit is clean and ready for occupancy. The Contractor shall accompany the Housing Representative or CSR [contract surveillance representative] during this inspection. . . .

(2) Change of Occupancy Period. The change of occupancy period will begin at 1230 on the day of the final termination inspection . . . .

(a) All work must be completed within two working days after the change of occupancy period begins, as defined above. . . .

(b) One additional working day will be allowed when the change of occupancy begins on more than five units in any single working day. For example, if the change of occupancy period begins on seven different units on a single day each of the first five units shall be completed within two working days. Units six and seven must be completed within three working days.

(c) One additional work day will be allowed when Indefinite Quantity custodial services are ordered to be

accomplished during the change of occupancy maintenance period.

(d) One additional working day will be allowed when Indefinite Quantity interior painting of more than 400 square feet but less than 10,500 square feet is ordered to be accomplished during the change of occupancy period. Two additional working days will be allowed when Indefinite Quantity interior painting of more than 10,500 square feet is ordered to be accomplished during the change of occupancy.

(e) Two additional working days will be allowed when, either singularly or in combination, the following Indefinite Quantity items are ordered to be accomplished during the change of occupancy maintenance period: floor refinishing, floor tile replacement, vinyl sheet flooring replacement and complete fixture reglazing.

(f) No additional time will be allowed to complete any [other] Indefinite Quantity work items except Labor Hour Unit Price (LHUP) that may be ordered to be performed during the change of occupancy period. When LHUP work is performed the following formula will be used to calculate additional working days allowed:

*ADDITIONAL DAYS FOR LHUP WORK = NUMBER OF DAYS NEGOTIATED PER PARAGRAPH C.1.b.1.b LESS 2 DAYS.

*NOT LESS THAN 1 ADDITIONAL DAY WILL BE ADDED.

(3) Materials and Equipment. The Contractor shall maintain sufficient materials and equipment on hand to complete all change of occupancy work within the required time periods specified above. Lack of availability of material or equipment will not relieve the Contractor from the requirement to complete Change of Occupancy Maintenance within the specified time period.

(4) Cleaning. The Contractor shall ensure that all fingerprints, stains, unsightly marks, trash, debris, excess material and parts, and other objectionable items resulting

> from change of occupancy work are cleaned up and removed as part of the Firm Fixed Price portion of the job.

(R4, tab 10 at Bates 210-12) (Emphasis in original)

7. Attachment J-C.15.6, the COM form, consisted of a detailed, five-page form to be filled out during the inspections. For example, for the living room/dining room, the form listed 17 items such as doors and hardware, weatherstrip, and threshold, with a five-column chart for each item indicating "OK, Missing, Repair, Replace, Comments." Attachment J-C.15.6 also included historical data about the number of COMs per month. (R4, tab 11)

8. From the beginning of the contract, appellant failed to perform COM on time. Appellant performed 209 COMs in whole or in part from 1 October 1992 through 6 April 1993. Appellant was 1,080 days late on 177 of the 209 COMs (or an average of 6 days late per late COM) through 6 April 1993. This pattern was not confined to October through December 1992 when appellant was engaged in various payment and other disputes with the Navy but continued throughout performance until the termination. Appellant only completed 32 COMs on time over the course of the contract. (Supp. R4, tab 165)

9. The parties held weekly or biweekly performance evaluation meetings. The record includes minutes for the period 2 October 1992 through 10 February 1993. Throughout that period the Navy advised appellant during these meetings of its unsatisfactory COM work. Appellant blamed its performance problems on an alleged difficulty in obtaining material and spare parts, and there was also a problem with delayed pest control services. (R4, tab 14 at Bates 1, 4, 10-11, 15, 20, 26-27, 31, 34, 40, 44)

10. Because of GITMO's remote location, prompt performance of COM was vital to morale. On 16 October 1992, the Commanding Officer, GITMO expressed the following concern:

> Unsatisfactory Change of Occupancy Maintenance (COM) – The contractor has consistently not completed this work on time. Personnel awaiting housing must wait even longer for housing assignments. Of the 28 units scheduled for turnover in October, 14 were accepted with numerous discrepancies. None have been completed on time; some were 8 days late. We do not have commercial facilities available for temporary accommodations. Some families have been separated from their sponsors for months . . . .

> This situation with Plum Run Corporation is a major degradation to quality of life at Guantanamo.

(R4, tab 29) We find this letter accurately summarizes the effect of appellant's late COM work on the Navy not only in October but throughout the period of performance prior to termination.

Appellant has alleged various reasons why it was not responsible for the delays. The following findings (11 through 23) relate to those allegations.

11. Number of days for varnishing. The specifications required one coat of stain and three coats of varnish for interior natural finish wood surfaces "Not Specified Otherwise" (R4, tab 11 at J-C.10.2-4, referencing Fed. Spec. TT-V-119).

12. Appellant submitted three sets of paints and varnish, one from each of three suppliers. One of the submittals indicated a 24 hour drying time to recoat. Appellant certified that each potential supplier's products was in compliance with the contract specifications and was currently being used by the outgoing contractor. Appellant's submittal was approved on 21 October 1992. Appellant itself decided, and received no government direction, as to which manufacturer or specific varnish to use. (Supp. R4, tab 46, tab 232 at Bates 54; tr. 370, 443)

13. The contractor received an additional day for COM performance if varnishing was required in performing a repair (resulting in a minimum of three working days for COM performance) (tr. 369-70). If varnishing was required as part of a repair, appellant could, and did, remove a cabinet door or an interior door and perform that work outside while the COM was in progress (tr. 370).

14. At the performance evaluation meeting on 20 November 1992, William W. Johnson, appellant's president, "stated that the contract required 3 coats of varnish and for this he needed additional days for each coat to dry." The Navy's housing representative responded that only one coat of varnish and stain was required. The Navy contract administrator said that the Navy would verify that contractual position. In a letter dated 1 December 1992, appellant stated that "[i]f wood surfaces are to be completed as per contract specifications, Plum Run requests an additional 3 days when COM IQ painting is ordered." On 4 December 1992, an exchange similar to that on 20 November 1992 took place. At the performance evaluation meeting of 23 December 1992, the Navy confirmed that only one coat of varnish was required. The contracting officer (Ms. Nita Branscum) approved the minutes of each of these meetings and copies were provided to appellant. (R4, tab 14 at Bates 28, 30, 37; supp. R4, tab 232 at Bates 48)

15. The record contains no evidence as to the number of coats of varnish actually applied on any repair either before or after appellant's inquiry and little evidence as to which units had any varnish repairs (*see, e.g.*, supp. R4, tab 39, unit late because varnish did not match existing). Mr. Johnson testified generally that 90 or 95% of COMs required varnish work (tr. 156). We are not persuaded that varnishing in fact delayed the turn-over of units past the make ready date.

16. Interpretation of reference to a limit of 16 labor hours or $500 materials. SubCLINs 2AC and 2AD, family housing A/C service calls, referenced specification ¶ C.15.7.a. That paragraph provides:

> C.15.7.a SERVICE CALLS . . . . The Government will issue five (5) types of Service Calls for family housing in accordance with Clause C.5. These will be 1. Maintenance Service Calls - limit of 16 labor hours or $500 materials (except for floor tile which is 300 SF), 2. Appliance Service Calls - no limit of liability, 3. Window A/C Service Calls - no limit of liability, 4. Central A/C Service Calls - limit of 16 labor hours or $500 materials, 5. Pest Control Service Calls - limit of 16 labor hours or $500 materials.

(R4, tab 10 at Bates 18, 209)

17. CLIN 22, an indefinite quantity CLIN, called for Labor Hour Unit Price (LHUP) work at specified hourly rates for such labor as "Air Conditioning/Refrigeration Mechanic." Specification ¶ C.1.b.1.a. stated that LHUP work "consists of specific repair work that exceeds the limits of a service call and may include minor construction and alteration work." (R4, tab 10 at Bates 36, 122)

18. Appellant's interpretation was that it was only required to perform 16 hours of work on each COM and all other work would be reimbursed as indefinite quantity, LHUP work. The Navy disagreed with that interpretation. According to Mr. Johnson, "We mentioned it every COM after the first three or four days, this is LHUP work, it's going over the 16 hours, and [the Navy] were directing this is a COM, there will be no LHUP work." (Tr. 314, *see also* tr. 158, 310-11, 390)

19. A COM would typically include several items of repair (R4, tab 11 at J-C.15.6-1 through J-C.15.6-5, J-C.15.7-1 through J-C.15.7-33). Appellant has not proved that there were instances in which any single item of repair for a COM unit exceeded 16 labor hours or $500 materials. Appellant has not proved that there were any specific instances of COMs where work should have been ordered as LHUP work and was not. Mr. Johnson acknowledged that some LHUP work had been ordered, but did

not know any specifics (tr. 314). We find the parties negotiated LHUP work for each COM when appellant had to perform LHUP work (tr. 274).

20. Availability of CSRs. The Navy had two full-time CSRs (contract surveillance representatives) dedicated to COMs who were supplemented as required by other CSRs. Generally, there were sufficient CSRs to attend inspections. (Tr. 576-77) There were some inspection problems, when CSRs were not available, including instances when five or more COM inspections were scheduled for the same day (R4, tab 14 at Bates 23, 35; tr. 419-21). There were also instances in which appellant failed to attend scheduled inspections (tr. 577). In part, the heavy inspection schedule was due to reinspections necessitated by appellant's late and deficient COM performance (R4, tab 14 at 34). We find that lack of CSRs to attend inspections was not a significant problem.

21. Payment for Mobilization. CLIN 12, Mobilization was a lump sum item in the firm fixed-price amount of $482,040 (R4, tab 10 at Bates 24). Mobilization included expenses incurred prior to 1 October 1992 preparing for the commencement of services. In addition, it included "all costs to activate and transport personnel and equipment for the start up of contract operation." (R4, tab 10 at Bates 128)

22. On 22 October 1992, the Navy received appellant's invoice for the full lump sum price of $482,040 for CLIN 12. Navy personnel at GITMO considered that appellant had not satisfactorily completed mobilization. In addition, there was internal debate about whether appellant should be paid $371,020 or $382,040. On 29 October 1992, the Navy paid appellant $371,020 on its invoice. On 22 December 1992, Navy counsel advised that the Navy should pay the balance due on mobilization and address any deficiencies in performance (for example, lack of key personnel or equipment) under other CLINs. On or about 4 January 1993, the Navy paid the balance due for mobilization as part of a payment of $314,337.36. (Supp. R4, tabs 43, 244; app. supp. R4, tab 22; exs. A-2, A-3)

23. Mr. Johnson testified that, based upon appellant's prior experience at GITMO, he expected to receive the full mobilization payment for which he invoiced within four to five days from the date of the invoice, and that the absence of a full, timely payment impacted appellant's cash flow (tr. 125-26, 286-88). We are not persuaded that the delay in making full payment for CLIN 12 between 29 October 1992 and 4 January 1993 caused the persistent problems with timely completion of the COMs.

24. On 18 December 1992 the Navy sent appellant a cure notice:

> You are hereby notified that the Government considers your failure to perform all of the functions of the Base

> Maintenance Contract a condition that is endangering performance of the contract.
>
> Specifically, your failure to perform the housing maintenance functions which includes Housing Change of Occupancy Maintenance (COM) has caused inconvenience as well as financial hardship to residents of the Base.

(R4, tab 45) There followed a two-page single spaced list of problems with COMs, which we find well supported by the record.

25. On 30 December 1992, the Navy issued appellant a show cause notice that the government was considering terminating the contract for default because appellant had "failed to cure the conditions endangering performance" as described in the cure notice of 18 December 1992. It gave appellant ten days to present any facts bearing on the question. Appellant received the show cause notice on the same day. (R4, tab 47)

26. Appellant responded to the cure notice by letter dated 29 December 1992; the letter was delivered to the Navy on 30 December 1992—after the Navy had issued the show cause notice. Appellant acknowledged performance problems but also cited instances when Navy CSRs were unable to attend inspections, the contractual requirement for three coats of varnish, the Navy's failure to pay for mobilization in full and unsubstantiated allegations of being required to perform non-contractual work. (R4, tab 46)

27. Appellant responded to the Navy's show cause notice by letter of 8 January 1993 in which it primarily repeated contentions it had made in its 29 December 1992 letter. It also cited Navy retentions of portions of appellant's invoices due to alleged performance deficiencies. (R4, tab 53)

28. On 11 January 1993, appellant filed for re-organization in the United States Bankruptcy Court, Southern District of Ohio (R4, tab 55). The bankruptcy filing delayed any termination action.

29. On 7 April 1993, the Bankruptcy Court entered a consent order which allowed the Navy to partially terminate the contract (R4, tab 71).

30. Effective 15 April 1993, by Modification No. P00005, the CO partially terminated the contract for default "due to unsatisfactory performance for the services related to the housing maintenance function" (R4, tab 72 at Bates 4). The terminated subCLINs are listed above in finding 4.

31. According to the CO, since appellant was having problems with significant portions of housing maintenance, the Navy decided to delete the entire housing maintenance area "as a more appropriate way to deal with the division of this contract" (tr. 55).

32. By letter dated 13 May 1993, appellant filed a notice of appeal of the partial termination for default (supp. R4, tab 179). The Board docketed the appeal as ASBCA No. 46091.

33. The Navy maintains that appellant failed to perform the terminated subCLINs other than 9AA. We find that there were performance problems with some of them. However, the records relating to deductions, liquidated damages, retentions, and released retentions for the firm fixed-price terminated subCLINs simply do not support, as a factual matter, the contention that there was a substantial failure of performance (supp. R4, tabs 243-54). We have little information on the indefinite quantity items. We conclude that the Navy has not proved that there was a substantial failure of performance as to the terminated subCLINs other than 9AA.

Certification

34. As of 1992, the FAR required offerors on contracts expected to exceed $25,000 to certify whether they and/or any of their principals "Are ( ) are not ( ) presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency." FAR 52.209-5, CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT, AND OTHER RESPONSIBILITY MATTERS (MAY 1989) (the Debarment clause), prescribed by FAR 9.409(a).

35. Appellant checked "are not" in its 7 May 1992 proposal and 20 July 1992 revised proposal and did not change that information prior to award (R4, tab 8 at Bates 5; supp. R4, tab 16 at K-11, tab 19 at Bates 88, tab 23 at Bates 2).

36. Although the Department of Labor had sought to have appellant declared ineligible for contract awards pursuant to the Service Contract Act of 1965, 41 U.S.C. §§ 351 *et seq.*, starting in June 1984, during the relevant period, from submission of its proposal through award of the contract, appellant had not been declared ineligible for the award of contracts. (Ultimately, in July 1995, appellant prevailed in the litigation with the Department of Labor.) (*See* supp. R4, tabs 17, 61, 214, 235)

Bankruptcy

37. On 19 August 1993, appellant filed a complaint in the Bankruptcy Court, seeking, among other things, a judgment against the Navy finding that the Navy's partial

termination of the contract was improper and converting the termination for default into a termination for convenience (supp. R4, tab 194 at 17). On 4 April 1994, the Bankruptcy Court determined that it should defer to this Board as to the contractual claims raised by appellant (supp. R4, tab 218 at 13).

38. During the course of the bankruptcy proceeding, appellant as debtor-in-possession moved to assume the captioned contract and to have the Navy exercise the contract options against its will. In a 27 September 1993 hearing on that motion, appellant's opening statement included the assertion that "I believe the real issue before the Court today is the issue . . . whether or not the debtor was in default of its performance under the contract" (supp. R4, tab 11 at I-14). In its 30 September 1993 Order denying the motion, the Bankruptcy Court stated, in part: "in order to assume a contract, the Debtor must cure or provide adequate assurance that any default would be cured . . . . Here, the default and subsequent termination of the housing maintenance portion of the contract is, without question, a default incapable of cure." (Supp. R4, tab 1 at 7)

DECISION

Termination for default is a drastic sanction that should be imposed upon a contractor only for good cause and based upon solid evidence. *J. D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969). The government bears the burden of proving that its default termination was proper. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). If the government satisfies its burden, a defaulted contractor has the burden of proving that its nonperformance was excusable under the provisions of the Default clause. *DCX, Inc. v. Perry*, 79 F.3d 132, 134 (Fed. Cir.), *cert. denied*, 519 U.S. 992 (1996).

The government contends that the partial default termination was proper because appellant: (1) falsely certified before award that neither it nor its president were then proposed for debarment; (2) is collaterally estopped to deny its default by the Bankruptcy Court finding that the default was not curable; and, (3) failed to perform the housing maintenance services within the time specified in the contract (gov't br. at 2-3). Appellant generally disputes the foregoing and contends any default was excusable.

Certification

The government contends that appellant falsely certified that it was not proposed for debarment despite the fact that it was in the thick of on-going proceedings with the Department of Labor. We are not persuaded by this argument. FAR subpart 9.4, Debarment, Suspension, and Ineligibility, distinguishes between debarment and ineligibility. "Debarment" refers to actions taken by debarring officials under FAR

9.406. "Ineligible" refers to exclusion from contracts pursuant to statutes such as the Service Contract Act. FAR 9.403. We construe the terminology in the Debarment clause in accordance with these definitions. Appellant was not proposed for debarment; rather, the Department of Labor was seeking to have it declared ineligible. Appellant was not, however, ineligible at the relevant time. Accordingly, its certification was not false. (Findings 34-36)

Bankruptcy (Collateral Estoppel)

In August 1993, appellant filed a complaint seeking from the Bankruptcy Court a judgment against the Navy finding that the Navy's partial termination of the contract was improper and converting the termination for default into a termination for convenience. The government points to (a) appellant's statement at the Bankruptcy Court hearing that the real issue was whether appellant was in default of its performance under the contract, and (b) the Bankruptcy Court's statement that "the default and subsequent termination of the housing maintenance portion of the contract is, without question, a default incapable of cure." (Findings 37, 38) The government contends that, under the doctrine of collateral estoppel, the issue of the propriety of the partial default termination has been decided by the Bankruptcy Court and cannot be relitigated here.

We do not agree. The ultimate determination by the Bankruptcy Court was that it should defer to this Board as to the contractual claims raised by appellant. The above-quoted Court statement was not one judging the merits of the propriety of the partial termination, but appears to have been merely reflecting reality at that date in September 1993 that the contractual situation could not be cured.

Appellant's Performance

Each failure of appellant to perform an item of service when specified by its contract was technically a default under paragraph (a)(i) of the Default clause. However, for the contract to be terminated for default in whole or in part on that basis, "a sufficient number of such failures must accumulate such that it could be said that there had been a substantial failure of performance." *Suburban Industrial Maintenance Co.*, ASBCA Nos. 23570, 25154, 85-2 BCA ¶ 18,148 at 91,096. The government has proven by a preponderance of the evidence that there was a substantial failure to perform subCLIN 9AA, COM, within the time specified in the contract (findings 8-10, 24). The government has not proved, however, that there was a substantial failure to perform the other subCLINs (finding 33).

In this circumstance, we are confronted with the question whether the government may terminate all of the subCLINs relating to family housing because of the failure to perform subCLIN 9AA. The government offers the explanation that it was "a more

appropriate way to deal with the division of this contract" (finding 31). We conclude that explanation is insufficient. We are not persuaded, on the facts of this appeal with their focus on the COMs, that the government has proven that subCLIN 9AA was not severable and thus it was entitled to terminate 24 other subCLINs. *Cf. Technocratica*, ASBCA Nos. 44134 *et al.*, 94-2 BCA ¶ 26,606 at 132,370 (separable part of contract); *Overhead Electric Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 at 90,471 and cases cited, *aff'd on the basis of the Board's opinion*, 795 F.2d 1019 (Fed. Cir. 1986) (table) (severable or divisible contracts).

We turn now to appellant's defenses as they relate to subCLIN 9AA. Appellant admits that numerous units were not returned to the Navy within the two-day turn around period. It argues that the Navy failed to allow it the time necessary to comply with the varnishing requirements. In addition, it contends that all work in excess of 16 labor hours and/or $500 of material costs should have been treated as LHUP work. (App. br. at 38-39)

We have found that appellant received an additional day of COM performance if varnishing was required in performing a COM repair and that, if varnishing was required, appellant could, and did, perform that varnishing work (*e.g.*, on cabinet doors) outdoors while COM work was being performed concurrently indoors (finding 13).

We have also found that, at performance evaluation meetings, the Navy's housing representative told appellant that it was requiring only one coat of varnish. Appellant asserts that the Navy never issued a written directive reflecting that information and that it was never contractually relieved of the three-coat requirement (app. br. at 38-39). The contracting officer approved, however, minutes confirming the Navy's verbal assurance. Moreover, our record contains no evidence as to the number of coats of varnish actually applied on any repair and little evidence as to which units had any varnish repairs. Appellant has failed to establish that its late COM work was attributable to the varnish requirements. (Findings 14, 15)

With respect to the second contention, ¶ C.15.7.c of the specifications, "CHANGE OF OCCUPANCY MAINTENANCE (COM)," provided that, with respect to COM work, appellant's limit of liability was "equal to that of a service call for any single item of repair." The limit of liability for some, but not all, types of service calls was 16 labor hours or $500 in material (¶ C.15.7.a). Appellant contends that the COM work required in excess of 16 labor hours and/or $500 of material costs, and should have been treated as LHUP work. (Findings 6, 16-18)

Appellant appears to be reading "for any single item of repair" as "for any single COM." It argues that "[t]he Navy refused to accept responsibility for treating the COMs as [LHUP] work, pay PRI for the COM work as [LHUP] work, and extending the time

for performance of the work in the units in accordance with the provisions of § C.1" (app. br. at 39).

Our task, if possible, is to interpret the contract by referring to the plain meaning of its words. *Timber Access Industries Co. v. United States*, 553 F.2d 1250, 1256 (Ct. Cl. 1977). Appellant's interpretation of "for any single item of repair" fails to meet that test and is unreasonable. We note also that LHUP work was required for "specific repair work," not COMs as such (finding 17).

Furthermore, there is nothing in the record to indicate that "any single item of repair" exceeded 16 labor hours or $500 in material (finding 19). While appellant attempts to shift the burden to the government, it is appellant which bears the burden of proving its contention that its default was excusable. It has not done so. Accordingly, there is no basis upon which to conclude that the manner in which the Navy managed COM work adversely affected appellant's performance.

We have considered appellant's other arguments as they may relate to subCLIN 9AA, for instance the CSR and mobilization issues, and conclude that they do not render the default excusable.

We sustain the appeal as to all of the subCLINs except 9AA, and deny it to the extent of the default of that subCLIN. The termination for default of the subCLINs other than 9AA is converted to a termination for the convenience of the government.

ASBCA No. 49203

Background

39. On 20 May 1994, appellant submitted nine claims totaling $1,582,927.62. Mr. Johnson certified the claims. We find the contracting officer received the claims on or about 23 May 1994. (Supp. R4, tab 220) On 23 December 1994, at the Navy's request, appellant provided supporting detail for the claims. As a result of the discovery of errors in the course of preparing that detail, appellant corrected the total for the claims to $1,664,951.38. (Supp. R4, tab 232 at Bates 267) On 27 September 1995, appellant appealed from the deemed denial of its claims and the appeal was docketed as ASBCA No. 49203. The Board granted summary judgment denying claim 9 (97-2 BCA ¶ 29,193) and appellant withdrew claim 8 (tr. 319, 380). The remaining seven claims are before us.

CLAIM 1 – LOST ON-SITE OVERHEAD, G&A AND PROFIT FOR CLIN 3

FINDINGS OF FACT

40. One of the firm fixed-price CLINs, CLIN 3, required performance of preventive maintenance (PM) on A/C, refrigeration units, air compressors, fire protection, ventilation and fly fan, and chilled water unit systems. Another firm fixed-price CLIN, CLIN 2, required *inter alia* service calls for family housing window and central A/C. (R4, tab 10 at Bates 17-20) Claim 1 has its genesis in a dispute about the proper interpretation of the specifications for CLIN 2 that, according to appellant, adversely affected its PM work under CLIN 3.

41. The specifications for CLIN 2 distinguished between emergency, urgent and routine service calls:

> C.5.b. Service Call Classification.
>
> (1) Emergency calls. Service calls will be classified as an emergency call when the work consists of correcting failures which constitute an immediate danger to occupants or threaten to damage property. . . .
>
> (2) Urgent calls. Service calls will be classified as urgent when the work involves failure of equipment or services which do not immediately endanger occupants or property, but would soon inconvenience or affect the health or well being of occupants. Urgent Calls are also issued when the military mission or operations would be impacted. The Contractor shall be on the job site and working within four hours after receipt of an urgent service call. Once begun, the work shall proceed to completion and must be completed within eight hours.
>
> (3) Routine Calls. Service calls will be classified as routine calls when the work does not qualify as an emergency or urgent call. Routine calls shall be considered as received by the Contractor at the time and date the work reception center makes the work authorization form available for pickup. All routine calls must be completed within five working days after receipt, and once begun, the work shall be prosecuted to completion. Routine calls shall normally be accomplished during Contractor regular working hours.

(R4, tab 10 at 137-38)

42. From the beginning of contract performance, the Navy classified family housing A/C service calls as "urgent" rather than "routine." The Navy considered that the climate at GITMO was such that lack of residential air conditioning "would soon inconvenience or affect the health or well being of occupants." (Finding 41; app. supp. R4, tab 24; tr. 473-79)

43. At the joint weekly performance evaluation meeting, on 9 October 1992, appellant's A/C manager, Mr. Keith Lindsey, who had worked on this part of appellant's proposal, informed the Navy that appellant's interpretation was that family housing A/C service calls should be classified as routine. According to the minutes:

> Mr. Lindsey (PRC [Plum Run]) stated housing window A/C units service calls were presenting a problem since they are labelled "urgent". He states if a call is received after-hours, the Contractor is required to respond within 4 hours to perform and some housing tenants are upset when they arrive at their home at 8/9/10 p.m. He is stating that their bid was based on housing window A/C units being classified as "routine" vice "urgent". His records indicate that of 120 HVAC service calls, 72 were for window A/C units (50% of these 72 being after-hours calls). Mr. Lindsey stated that the historical data in the contract indicated these calls were to have been classified as routine. It was noted the Government would research this issue.

(R4, tab 14 at Bates 5; tr. 179)

44. In a letter dated 19 October 1992, appellant contended that the classification of family housing A/C service calls was a changed condition and that it was entitled to its increased costs:

> From the first day of the contract we were directed to respond to housing air conditioner service calls under classifications of urgent and occasionally routine. Of the 115 service calls to date, 96% or 110 have been classified as urgent.
>
> The actual on unit work time required, regardless of classification, is basically the same. The manning level

> required, in order to comply with response times for the higher priority classifications, increases dramatically. Increased manning levels obviously increases our costs to perform this particular function, and has had a detrimental effect on our ability to perform our regularly scheduled PM work elsewhere.
>
> . . . .
>
> The government might take the stand that they have now elected to change housing air conditioning service calls from routine to urgent . . . . If that is the case, we contend that this is a changed condition that was unknown or even anticipated by the Contractor, and an increased cost for additional manning should be negotiated. [Emphasis in original]

(Supp. R4, tab 232 at Bates 111-13)

45. At a meeting on 19 October 1992, Mr. Johnson told the CO that due to the differing interpretation of the A/C service call requirements, appellant had been "hard pressed" to perform A/C maintenance. The CO directed appellant to comply with the Navy classification, and stated that if it was wrong, the Navy would compensate appellant later. (R4, tab 34 at 2)

46. By letter of 27 November 1992, appellant reiterated its contention that its proposal was reasonably based on housing A/C service calls being primarily "routine." Although the letter stated "[w]e agree that the tenants well being should classify almost any housing call as urgent," it contended that the specifications pointed to housing service calls for window A/C units being "routine." It offered the following "suggestions" in resolution of this "difficult problem:"

> A. Notify Plum Run to stand down and only perform housing calls as routine, except when instances warrant otherwise, and reimburse us our cost through 30 November 1992.
>
> B. Immediately issue a formal modification to the contract changing housing calls to urgent from routine, paying all costs associated with said charge [sic] . . . .

Appellant's letter quantified the total cost of the change at $23,476 per month. The costs included an additional ten technicians at $1,300 per month and crew berthing for those technicians as well as additional vehicles, radios and tools.[2] (Supp. R4, tab 232 at Bates 109-10)

47. On 31 December 1992, the parties executed bilateral Modification No. A00003, effective 16 December 1992. This modification revised specification ¶¶ C.5.b(1) and (2) (finding 41). The changes to ¶ C.5.b(1) related to response times. The changes to ¶ C.5.b(2) included an explicit reference to residential air conditioning and relaxed response times:

> (2) Urgent calls. Service calls will be classified as urgent when the work involves failure of equipment or services which do not immediately endanger occupants or property, but would soon inconvenience or affect the health or well being of occupants, e.g. residential air conditioning units. Urgent calls are also issued when the military mission or operations would be impacted. The Contractor shall schedule an appointment with the customer within four hours of notification and complete all repairs within 48 hours of the original notification.

(R4, tab 13 at Bates 8, 11) The modification also stated that crew berthing would be increased by ten men. The modification included the following release:

> In consideration of the modification agreed to herein as complete and equitable adjustment, the Contractor hereby releases the government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to this modification.

(*Id.* at Bates 9)

48. Appellant argues "the Navy intentionally mislead PRI into executing what is, on it [sic] face, a palpably unfair settlement of the costs and issue of service call classification then in dispute" (app. br. at 29). We have carefully studied Mr. Johnson's testimony relating to the modification, as well as the other evidence, and we find no credible evidence supporting this argument.

[2] Due to space limitations at GITMO, a floating dormitory is operated for workers. CLIN 11 stated the cost of crew berthing per occupant day (R4, tab 10 at Bates 23-24).

49. In February 1993, the parties executed Modification No. A00007, also effective 16 December 1992, increasing the estimated contract price by $50,904.46 for the additional berthings on the housing barge agreed to in Modification No. A00003. Modification No. A00007 contained the identical release language as had Modification No. A00003 except that "fact" in the last line was singular. (R4, tab 13 at Bates 22-23)

50. In Claim 1, appellant seeks to recover lost on-site overhead, G&A and profit for required PM work which it allegedly did not perform in the period October through December 1992 because of urgent service calls. It claims $93,984.25, which it calculates by (a) taking the total base year "On-site overhead" included in the proposal for CLIN 3, and mark-ups for G&A and profit, (b) dividing that number by 12, and (c) multiplying that number by the three months for which claim is made. The claim makes no adjustment for payments actually received on CLIN 3. (Supp. R4, tab 232 at Bates 268; tr. 306-07)

51. Mr. Johnson testified that the supporting data for Claim 1 "definitized to the Navy the ongoing dispute with the urgent and routine service call issue . . . and showed and specified when we raised to the government the service call issue and how we followed it up by letter." Appellant did not "file a claim for the cost of the window units or the labor involved in doing the service calls. We filed a claim for not being able to perform our PMs and the lost revenue off of the PMs and the profit." (Tr. 145, 307)

DECISION ON CLAIM 1

Appellant argues "the effort to respond to window A/C service calls within the timeframes required by the urgent classification disrupted PRI's schedule for performing PM service calls." Appellant requests "an Order awarding PRI the sum of $93,984.25 for its additional costs, overhead, and a reasonable amount of profit required to add additional manpower to accommodate the government's election to classify window A/C service calls as urgent." (App. br. at 42) The government argues that there is no evidence of any added costs, and "even if there were any added costs, bilateral modifications with contractor releases, would preclude further contractor recovery" (gov't br. at 81).

Bilateral Modification No. A00003 executed 31 December 1992 resolved the dispute about the interpretation of the family housing service call requirements. On the one hand, it modified the definition of "urgent" explicitly to include residential air conditioning units; on the other, it extended the time to complete work on such calls. It also provided for additional crew berthing. Modification No. A00007 increased the contract price by $50,904.46 to pay for berthing ten additional men. Both modifications contained the following release:

> In consideration of the modification agreed to herein as complete and equitable adjustment, the Contractor hereby releases the government from any and all liability under this contract for further equitable adjustments attributable to such fact[s] or circumstances giving rise to this modification.

(Findings 47, 49)

In interpreting a release, we first "ascertain whether its language clearly bars the asserted claim." *Dureiko v. United States*, 209 F.3d 1345, 1356 (Fed. Cir. 2000). We think it is clear that "such facts or circumstances giving rise to this modification" refers to the Navy's classification of family housing A/C service calls as "urgent" rather than "routine" and appellant's contention that the Navy was misinterpreting the specifications. In Claim 1 appellant seeks recovery for lost overhead, G&A and profit on PM work that it allegedly did not perform in the period October through December 1992, and for which it was not paid, because of urgent service calls (findings 50, 51). Those amounts, assuming that they were otherwise proven, are attributable to the Navy's classification of family housing A/C service as "urgent" rather than "routine." Accordingly, the release clearly bars the claim.

CLAIM 2 – DEDUCTIONS FOR LATE COMPLETION OF PM WORK IN MARCH AND SEPTEMBER 1993

FINDINGS OF FACT

52. Claim 2 seeks reimbursement of amounts withheld from the invoices for March 1993 and September 1993 "for late completion of periodic [CLIN 3 PM] work completed within required time" (supp. R4, tab 232 at Bates 273). According to Mr. Johnson, appellant "completed the work within the contract time period; however, the government took a deduction because we didn't follow the monthly schedule that we submitted that was never approved, but was a tentative schedule, but they inspected off of it" (tr. 308). Appellant quantified the claim at $97,409.10 for March and $20,766.64 for September for a total of $118,175.74 (supp. R4, tab 232 at 273-75).

53. CLIN 3 (*see* finding 40) and referenced documents required quarterly, semi-annual and/or annual PM for certain equipment. For example, subCLINs 3AA through 3AE for A/C systems referenced specification ¶ C.6.4.D.1 that required semi-annual PM. Specification ¶ C.1.c.27 stated that there were two semi-annual periods within the period of the contract and that semi-annual services were to be performed at intervals of 160 to 200 days. For a further example, subCLINs 3AP and 3AQ required quarterly and annual PM for the air compressors. They referenced specification

¶ C.6.4.D.4. That paragraph referenced attachment J-C6.3. Attachment J-C6.3 included an air compressor maintenance check list that had check marks for quarterly and yearly maintenance items (at J-C6.3-6). (R4, tab 10 at Bates 18-19, 131, 145; R4, tab 11)

54. The specifications required appellant to provide a schedule showing the planned PM for the contract period (1 October 1992 through 30 September 1993) and a monthly schedule for the up-coming month. All schedules were to be approved by the Navy. (R4, tab 10 at Bates 127, ¶ C.1.b.6, Bates 144, ¶ C.6.4.D, Bates 256-57, clause F.6)

55. At the beginning of performance appellant turned these schedules in but the Navy did not approve them because the Navy wanted a different format. Appellant redid the schedule for the first month in a couple of weeks. It took approximately three months to redo the schedule for the whole year. (Tr. 197-98; *see also* supp. R4, tabs 34, 62)

56. Appellant billed each subCLIN monthly regardless of the frequency of maintenance (*see, e.g.*, supp. R4, tab 248 at Bates 4).

57. Appellant's invoice for March 1993 for all firm fixed-price CLINs totaled $299,014.09. March represented the end of the second quarter and the first semi-annual period since the start of the contract on 1 October 1992. On 27 April 1993, the Navy informed appellant that it had assessed deductions and liquidated damages in the amount of $110,265.37 for non-performed or unsatisfactory performance of second quarter and semi-annual PM work. (Supp. R4, tab 248 at Bates 2, 31)

58. Appellant challenges the deductions for March 1993 for subCLINs 3AA through 3AE, 3AK, 3AL, 3AP, 3AT, 3AV and 3BA, totaling $97,409.10 (supp. R4, tab 232 at Bates 274, subCLINs marked with an "x"). Those amounts include deductions for unsatisfactory quality. Appellant clarified at the hearing that its affirmative claims (relating to deductions with respect to COMs, buses and PMs) do not include return of amounts withheld for quality (tr. 568-70).

59. The record includes the contemporaneous Navy work papers relating to payment of the invoice for March 1993 and, in particular, the deductions taken as to the listed subCLINs (supp. R4, tab 248). Mr. Frederick W. Friedley, a supervisory CSR, who supervised 18 CSRs, spent about 65% of his time on the contract (tr. 567). He initialed the "INVOICE ROUTING" sheet for the March 1993 invoice ("FWF") and signed the endorsement for payment to the disbursing officer (supp. R4, tab 248 at Bates 1, 9). He testified credibly to the Navy's procedures when an invoice came. One of the CSRs would document the basis for any deductions. At that point:

> . . . I would take and review, get all the invoices, review the invoices, make sure that everything that was being stated and claimed on the invoices, if there was lateness or timeliness on deductions, work not performed, make sure that the CSR had all the documentation, he had done all the paper work, to make sure that it was a valid claim, that we could take the deduction for the government.

(Tr. 574-75) We have examined the various payment work sheets for the subCLINs in question. Appellant has not pointed to any flaws in them or challenged Mr. Friedley's testimony. We have not found any indication that the Navy took deductions because appellant didn't follow a tentative schedule that had never been approved (*see* finding 52), as opposed to failing to complete the work within the contractual time period. We find that the government has established the propriety of the deductions in question for March 1993.

60. Appellant's invoice for September 1993 for all firm fixed-price CLINs totaled $229,618.93. September represented the end of the fourth quarter, second semi-annual and first annual period since the start of the contract. On 2 December 1993, the Navy informed appellant that it had assessed deductions and liquidated damages in the amount of $94,760.95 for non-performed or unsatisfactory performance of services. (Supp. R4, tab 254 at Bates 2, 24)

61. Appellant challenges the deductions for September 1993 for subCLINs 2AF, 3AA through 3AE, and 3AT, totaling $20,766.64. The reference to subCLIN 2AF, one of the subCLINs terminated in April 1993, appears to be a mistake. (Supp. R4, tab 232 at Bates 275, compare subCLINs marked with a bracket on left with those marked with an "x"). Our findings for March 1993 are equally applicable to September 1993 with one exception. We were unable to identify any supporting work papers for the deduction for subCLIN 3AA in the amount of $4,286. We conclude that the government has not established that it was entitled to this deduction. Mr. Johnson testified at the hearing, based on a handwritten note on the claim, that an amount of liquidated damages of $500 should not have been deducted from the amount due for another subCLIN, AR (tr. 309-10). We find that the Navy's work papers together with Mr. Friedley's testimony set forth above substantiate the correctness of this deduction (supp. R4, tab 254 at Bates 18).

DECISION ON CLAIM 2

The government has the burden of proving both its entitlement to and the amount of its deductions. *Oliver's Landscape*, ASBCA No. 23488, 80-1 BCA ¶ 14,320; *Exquisite Service Co.*, ASBCA No. 21058, 77-2 BCA ¶ 12,799. The government has

carried that burden here with the exception of one deduction from the invoice for September 1993 in the amount of $4,286 (finding 61).

CLAIM 3 – LABOR AND MATERIALS FOR LHUP WORK CLASSIFIED AS COM

FINDINGS OF FACT

62. In claim 3, appellant claims $361,034.45 for all labor hours allegedly expended on COM work (subCLIN 9AA) in excess of 16 labor hours per COM and $49,669.53 for a proportionate share of materials, for a total of $410,703.98. Appellant calculates the number of COMs each month, for October 1992 through March 1993, multiplies that by 16, and subtracts that from total hours expended, to arrive at "HOURS OVER CONTRACT REQUIREMENT." Thus, for example, for October 1992, appellant calculates that there were 45 COMs, times 16 equals 720, subtract that from total hours expended of 5700, to arrive at 4980 hours over the contract requirement. Appellant multiplies that by a labor rate of $9.89 for a labor amount due of $49,252.20. (Supp. R4, tab 232 at 283) This subCLIN was one of those terminated in April 1993 and so the claim ends in March 1993 (finding 4).

DECISION ON CLAIM 3

Appellant's claim is based on its interpretation, referred to above in connection with the partial termination for default, that it was only required to perform 16 hours of work or $500 materials on each COM and all other work would be reimbursed as indefinite quantity, LHUP work (findings 16-18). According to appellant "[t]he contract unequivocally limited PRI's obligations on COM work to 16-man hours (e.g., 1 man 8 hours for 2 days) or $500.00 of materials" (app. br. at 44). We have rejected this interpretation above as unreasonable and, accordingly, reject it here as well.

CLAIM 4 – ALL AMOUNTS WITHHELD BASED ON ALLEGED LATE COMPLETIONS TO COM'S

FINDINGS OF FACT

63. This claim is closely related to claim 3. Clause E.9, CONTRACTOR'S FAILURE TO COMPLETE CHANGE OF OCCUPANCY WORK provided that the Navy would assess liquidated damages per calendar day per unit of $50.00 (R4, tab 10 at Bates 245).

64. Appellant completed the vast majority of the COMs it worked on from October 1992 through March 1993 from 1 to 23 days late (supp. R4, tab 165).

65. Appellant quantified claim 4 at $71,355.10 consisting of "Deduct" items totaling $51,119.55 and L/Ds totaling $20,235.51. We find that "Deduct" amounts of $3,100 for February 1993 and $2,650 for April 1993 should have been included in L/Ds for a total of $25,985.51. (Supp. R4, tab 232 at Bates 284, 299, 303, tab 247 at Bates 9, tab 249 at Bates 15) The "Deduct" items are not in issue except to the extent they may have involved timeliness (*see* finding 58).

66. According to Mr. Johnson, claim 4 is based on the fact that there would have been no deductions for lateness if the Navy had treated all work over 16 hours as LHUP work and if the Navy had given appellant additional days for varnishing (tr. 159).

DECISION ON CLAIM 4

This claim raises the same core issue as claim 3: could appellant reasonably interpret the specifications as providing that all COM work in excess of 16 labor hours or $500 would be LHUP work and, thus, entitle it to additional time to complete the COMs? We have concluded above that appellant's interpretation was not reasonable. Insofar as varnishing is concerned, appellant has not proved that varnishing in fact delayed the turn-over of units past the make ready date (finding 15).

CLAIM 5 – UNRECOVERED COST FOR PICKUPS

FINDINGS OF FACT

67. Appellant started off the contract with 14 pickup trucks for the A/C, refrigeration, ventilation, galley and related services function. It had planned on 16 pickups and one van in its proposal. (Supp. R4, tab 19 at Bates 320, tab 31)

68. In November 1992, appellant arranged to acquire 12 pickups. The pickups were delivered in mid to late January 1993, and seven or eight were allocated by appellant to A/C work. There was no Government direction either to acquire the 12 pickups or as to their allocation. Appellant considered that the main purpose of the pickups was to get back on schedule with the PM work. Mr. Johnson testified that appellant purchased them because of the "service call issue." (Supp. R4, tab 232 at 308-21; tr. 243-45, 314-15, 363)

69. In its 27 November 1992 letter contending that its proposal was reasonably based on housing A/C service calls being primarily routine (finding 46), appellant listed its costs for the "Routine to Urgent" change. Among the costs were five vehicles at $854 monthly for 60 months (the base year plus four option years), freight for five vehicles at $2,000 each, and insurance for five vehicles at $550.0 each plus mark-ups. (Supp. R4, tab 232 at 110)

70. Appellant seeks to recover $156,402.84 in "Unrecovered cost for vehicles spread over five (5) years and freight" (supp. R4, tab 232 at Bates 307). The vehicles subject to the claim are the 12 pickups. As a result of the decision on summary judgment, appellant concedes that it may not recover costs beyond the contract performance period (tr. 320-21). Appellant's brief states that the amount of the claim as reduced is $61,000 (app. br. at 37).

DECISION ON CLAIM 5

Appellant seeks to recover $61,000 in "Unrecovered cost" for pickups. The vehicles subject to the claim are 12 pickups which appellant purchased because of the "service call issue." (Findings 68, 70)

We have found that appellant's proposal included a substantial number of pickups to be used in performing the A/C portion of the contract (finding 67). We have also found that there was no government direction to appellant either to acquire the additional 12 pickups or as to their allocation during performance (finding 68). Essentially, appellant is claiming entitlement to costs allegedly incurred to perform the "urgent" A/C service call work.

As we have found, the parties signed bilateral contract modifications which, in exchange for providing appellant a payment and an increase in the amount of time required to complete work on "urgent" window A/C service calls, released the government from "any and all liability under this contract for further equitable adjustments attributable to such fact[s] or circumstances giving rise to this modification" (findings 47, 49). We conclude that like Claim 1, Claim 5, which seeks relief arising from the nature and number of service calls required, is barred by release.

CLAIM 6 – BUSES

FINDINGS OF FACT

71. SubCLIN 4AD required appellant to perform daily maintenance and cleaning of government owned buses. Appellant was to maintain the buses in safe operating condition and return them to the government at the end of the contract "in the same condition as originally provided to the Contractor less normal wear and tear." The firm fixed-price for this subCLIN was $1,001.00 per month. (R4, tab 10 at Bates 20, 133, 156)

72. In preparing its proposal, appellant knew and took the age and mileage of the buses into account (tr. 377). It also observed the buses prior to its proposal submission

and discussed the buses with Mr. Ramsey, who had been responsible for maintaining, repairing and operating the buses for the previous BOS contractor, and who appellant hired to perform these services under this contract. Appellant knew that the prior contractor had barely kept the buses running and that they had exhausted their useful life. (Tr. 378)

73. The contract also required appellant to furnish five new buses by 1 April 1993. On 1 February 1993, the Navy requested that appellant submit a cost proposal for eliminating the requirement that appellant provide buses under the contract. (R4, tab 10 at Bates 156, ¶¶ C.7.2, C.7.3; supp. R4, tab 124)

74. Appellant tendered its proposal by letter of 23 February 1993. Its letter included the following:

> Since original materials and supplies were figured on new bus replacement and all but three of the government furnished buses exceed mileage/age standards of NAVFAC P-300, it is impossible to estimate the increase in costs associated with this proposed change.
>
> Plum Run proposes returning all monies associated with:
>
> (1) Purchase of New Buses
> (2) Materials and Supplies
>
> Plum Run will supply only the tools, equipment and labor necessary for satisfactory Contract Completion. A detailed cost estimate is attached.

Appellant's base year cost estimate was $30,715 for five buses, plus $14,774 for materials and supplies, or a total reduction of $45,489 for that year. The record apparently does not include the detailed cost estimate of increased costs for "satisfactory Contract Completion." (Supp. R4, tab 145)

75. On 11 March 1993, the Navy notified appellant that it was eliminating the requirement for the new buses and that negotiations toward a deductive contract modification would ensue (supp. R4, tab 154).

76. On 14 April 1993, appellant sent the Navy the following letter, in pertinent part:

> The intent of the Bus . . . contract was not for the contractor to refurbish the Government's buses . . . . The intent was for the contractor to receive the Buses . . . in mechanically sound condition, maintain and repair these vehicles during the contract period, and return the vehicles in the same condition as originally provided less normal wear and tear.
>
> During the Governments [sic] inspections prior to turning over the vehicles to Plum Run the Government found many major problems with the Government furnished vehicles. (ie. Wore [sic] Tires, Wore [sic] King Pins, Damaged and Toren [sic] Seats, Engine and Transmission Leaks, etc.) A copy of these inspections was given to Plum Run. Is it the Government's intention to reimburse Plum Run for these Out of Scope Repairs? [Emphasis in original]

(App. supp. R4, tab 35)

77. In claim 6 appellant seeks to recover cost of labor and material for "the extensive repair of buses beyond the requirements of the contract" (supp. R4, tab 220 at 9). According to appellant's claim description in December 1994:

> During the first six (6) months, October – March, Plum Run received $0.00 dollar in deductions for vehicle maintenance. . . .
>
> . . . .
>
> Now that the Government was not receiving new vehicles [as of 11 March 1993], the inspection process changed. Each vehicle was taken to the PWD (Governments) garage and given a thorough inspection. Plum Run was given a discrepancy report and told to correct all items. . . . Plum Run asked if the Government would reimburse Plum Run for the OUT OF SCOPE REPAIRS. (Exhibit 13) [the 14 April 1993 letter, finding 76]. Plum Run continued maintenance of the buses as in the first six (6) months of the contract. The Government's response to Exhibit 13 was major deductions for vehicle maintenance.

(Supp. R4, tab 232 at Bates 127-29)

78. The claim totals $66,484.47, consisting of deductions and L/D's of $22,609.47, deduction from the invoice for September 1993 of $10,000.00, materials of $31,354.79 and labor of $2,520.21 (supp. R4, tab 232 at Bates 322).

79. Appellant has not provided a work paper or other explanation for the allegation that the government deducted $22,609.47 relating to bus maintenance. Invoice records show that the government reduced total payments for subCLIN 4AD by a total of $50.54 in April and May 1993. This amount is supported by contemporaneous documentation by the government inspector. We do not have a basis, in the absence of a work paper or other explanation enabling us to trace the amounts, for finding that the government deducted the balance of $22,558.93. The $10,000 deduction was taken on the final (September 1993) invoice. The deduction was for "parts stripped from vehicle #91-05991 and never replaced by your company and for non-repair (Engine and Transmission) of vehicle #91-06319." There is, however, no inspector's report supporting the deduction, no listing of the missing parts, no estimate of the cost of those parts, no estimate of the cost of the engine/transmission repair or other substantiating data. (Supp. R4, tab 249 at 14, 17, tab 250 at 12, 14, tab 254 at 24)

80. Appellant has not supported its claim for materials of $31,354.79 and labor of $2,520.21 for alleged additional bus repairs. Appellant's claim consists of a two-page computer listing of materials that it allegedly used for repairs plus a handwritten note that it incurred $2,520.21 for labor. The first entry consists, for example, of "WHEEL BRNG REAR," one-each at a cost of $47.43. All of the entries in the computer listing are dated between October and December 1992 with the exception of a total of $3,381.95 for May 1993. (Supp. R4, tab 232 at Bates 164, duplicated at Bates 323-24) There are no documents in evidence (*e.g.* vendor invoices, receipts, time sheets) substantiating that repairs in excess of contract requirements were in fact performed or that the claimed costs were incurred. Appellant agreed at the hearing that the repairs in the computer list were of the type necessary to safely operate the buses (tr. 379-80).

DECISION ON CLAIM 6

In claim 6, appellant seeks a total of $66,484.47 for "the extensive repair of buses beyond the requirements of the contract" (findings 77, 78). This amount consists of a combination of alleged deductions and L/Ds and extra costs. We found that appellant failed to substantiate its affirmative claim, and failed to identify the amounts of any deductions or L/Ds other than amounts of $50.54 for April and May 1993 and an amount of $10,000.00 for September 1993 (findings 79, 80). The government sustained its burden of substantiating the validity of the amount of $50.54 but failed to show a basis for the amount of $10,000.00 (finding 79).

CLAIM 7 – REPLACEMENT OF OVERAGE APPLIANCES

FINDINGS OF FACT

81. The specifications for SubCLIN 2AB, Family Housing Appliance Service Calls, ¶ C.15.7.b, stated:

> The Contractor shall repair or replace appliances at his discretion when issued an appliance service call. There is no limit of Contractor liability for appliance service calls. Appliance inventory is provided in Attachment J-C.15.3.
>
> (1). When repairs require more than four (4) hours to complete, the Contractor shall remove the malfunctioning appliance and replace it with a fully working appliance of the same capacity.
>
> (2). The Contractor shall replace, with new (brand name or equal) appliance as listed in Attachment J-C.15.3, which has exceeded its useful life according to the following table minimum capacity and limitations:
>
> | | |
> |---|---|
> | Refrigerator (17 cubic feet) | 12 years |
> | Stove | 8 years |
> | Dishwasher | 9 years |
> | Freezers (13.3 cubic feet) | 12 years |

(R4, tab 10 at Bates 209-10)

82. Attachment J-C.15.3 was a 61-page Housing Appliance Inventory. It listed location, appliance make, model, serial number, and installation date. The list included many appliances that, based on installation dates, had exceeded their useful life. For example, at location TK 103, the list showed a refrigerator installed in 1988 and a range installed in 1980, respectively within and without the useful life parameters. (R4, tab 11, attach. J-C.15.3 at 44)

83. The specifications for subCLIN 9AA, COM, ¶ C.15.7.c, did not include a provision comparable to that in ¶ C.15.7.b, *supra*, requiring replacement of appliances that had exceeded their useful life (finding 6). Those specifications referenced attachment J-C15.6, the COM form and historical data (finding 7). The COM form, under the heading Appliances, has checkmarks for each item (for example, stove) for

OK, missing, repair, replace. Attachment J-C.15.6 does not refer to whether an appliance designated to be replaced is or is not still operable. (R4, tab 11)

84. Appellant took the age of the appliances in the housing inventory into account in preparing its proposal (tr. 375). Its proposal indicated that it anticipated replacing 63 refrigerators and 295 ranges during the base year of the contract (supp. R4, tab 19 at Bates 319). The record does not reflect the number of refrigerators and ranges appellant actually replaced.

85. Mr. Johnson testified that the basis of claim 7 is that the Navy improperly required it to replace appliances during COMs (as opposed to service calls) that had exceeded their stated useful life even though they could have continued functioning perfectly (tr. 160-62). Appellant alleges it unnecessarily replaced (a) 13 refrigerators at a unit cost of $605, or a total of $7,865 and (b) 28 ranges at a unit cost of $305, or a total of $8,540. Its total claim is, therefore, in the amount of $16,405 (appellant mistakenly calculates the total to be $16,045). (Supp. R4, tab 232 at Bates 325-27)

86. The support for the claim consists of a computerized list of appliances appellant allegedly installed and the specific building numbers of those installations. For example, the list includes a range installed at location TK 103. (Supp. R4, tab 232 at Bates 326)

87. Appellant has not identified specific information or testimony about any of the items on the list. We have found some references in the record to the building numbers. For example, the record contains an inspection document for COM at TK 103 signed off by the Navy and appellant on 1 February 1993 (supp. R4, tab 122). This document apparently requires a new stove under "MAKE READY/ DESCREPANCIES/ COMMENTS." Without more elucidation from appellant, we are unable to find that it has proved by a preponderance of the evidence that it replaced any of the appliances on the list at Navy direction that were in fact operational.

DECISION ON CLAIM 7

Assuming that appellant's interpretation of the specifications is correct, it has failed to prove that it actually replaced any specific appliance, at Navy direction, that was in fact operational.

CONCLUSION

ASBCA No. 49203 is sustained with respect to claims 2 and 6, in part, in the total amount of $14,286 with CDA interest from 23 May 1994. The appeal is denied in all other respects. ASBCA No. 46091 is sustained as to all subCLINs except 9AA and denied in all other respects.

Dated: 23 May 2005

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

I concur

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

I concur

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 46091 and 49203, Appeals of Plum Run, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals