ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Altos Federal Group	)	ASBCA Nos. 53523, 54404
	)	
Under Contract No. N00140-00-M-N522	)	

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OPINION BY ADMINISTRATIVE JUDGE PAGE

Altos Federal Group (Altos or AFG) was awarded a firm fixed-price contract by the Navy to provide administrative support services at Camp Lejeune, NC; it performed only the base and first option years. In ASBCA No. 53523, appellant asserts the discovery after award of two errors in employee wage costs that were made in its response to the government's request for quotations (RFQ). AFG contends that the parties mutually were mistaken, first regarding the applicability of a wage determination made by the United States Department of Labor (DOL) after the issuance of the solicitation but before contract award, and second by the alleged failure by AFG to include in base year costs an hourly employee health and welfare (H&W) benefit and the government's failure to include holiday and vacation pay, both mandated by DOL and resulting in an understatement by both parties of the contract's base year cost. AFG also claims commensurate increases for the first option year. In ASBCA No. 54404, AFG appeals the government's affirmative demand for the return of monies allegedly overpaid during the first option year under contract Modification No. P00004 due to the incorrect calculation of changed wage requirements. Entitlement only is before the Board; the parties elected to waive a hearing and have the appeals decided upon the written record in accordance with Board Rule 11 Submission Without a Hearing. Evidence includes Rule 4 submissions, declarations by key personnel, and joint stipulations of fact. Both AFG and the government filed briefs in each appeal.

FINDINGS OF FACT

The RFQ and Actions Prior to Award

On 10 September 1999, the Department of the Navy, Naval Supply Systems Command, Fleet and Industrial Supply Center Norfolk Detachment Philadelphia (FISC, Navy or government) issued Request for Quotations No. N00140-99-Q-N428. (R4, tab 2 at 1) The SCOPE OF WORK, ¶ 1.1.1 required the contractor to "provide administrative support services for the Naval Hospital, Camp Lejeune, NC [] and its branch clinics, all located within the Jacksonville, NC area" (*id.* at 5). The RFQ stated that the acquisition was being conducted in accordance with Federal Acquisition Regulation (FAR) part 12 ACQUISITION OF COMMERCIAL ITEMS, using procedures established by FAR subpart 13.5 TEST PROGRAM FOR CERTAIN COMMERCIAL ITEMS (*id.* at 2). For the eight-month "base year," offerors were directed to submit unit prices for contract line items (CLINs), including total amounts for providing administrative support services at the Family Practice Clinic (CLIN 0001) and the Navy Primary Care Clinic (CLIN 0002). Similar information was required for four 12-month option years, with the possible addition of Optional Emergency Room Administrative Support Services. (*Id.* at 2-5) The RFQ was posted electronically on two government websites, www.neco.navy.mil and www.nor.fisc.navy.mil. On 17 September 1999, a printed copy of the RFQ was provided to AFG. (Joint Stipulations (JS) 11, 12)

Potential contractors were placed on notice of the manner in which quotations would be evaluated, FAR 212-1 INSTRUCTIONS TO OFFERORS-COMMERCIAL ITEMS (JUN 1999) (R4, tab 2 at 37), and advised by FAR 52.212-2 EVALUATION-COMMERCIAL ITEMS (JUN 1999) in ¶ (a) that the government would award a contract to a responsible offeror submitting a conforming offer, based on "price and other factors" including past performance (*id.* at 39). Paragraph (b) explained that the price, including options, could not be significantly unbalanced (*id.*).

The RFQ called for a small business set aside, *id*. at 1. AFG certified that it was a small business and listed an address in Washington, DC (R4, tab 3 at 4).

The RFQ (R4, tab 2) and resulting contract with AFG (R4, tab 6) included FAR 52.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 1989) and FAR 52.212-5 CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS – COMMERCIAL ITEMS (MAY 1999) (R4, tabs 2 at 22-24, 26-28, 6 at 22-24, 26-28). The latter clause incorporated by reference FAR 52.219-14 LIMITATIONS ON SUBCONTRACTING (DEC 1996), which requires the prime contractor to expend at least 50 percent of the contract's personnel costs by employees of the concern (R4, tabs 2 at 27, 6 at 27). The clause also mandated FAR 52.222-41 SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989) (*id.*), which

requires at ¶ (c)(1) COMPENSATION that employees must be paid a minimum wage and fringe benefits as follows:

> Each service employee employed in the performance of this contract by the Contractor or any subcontractor shall be paid *not less than the minimum monetary wages and shall be furnished fringe benefits* in accordance with the wages and fringe benefits determined by the Secretary of Labor, or authorized representative, *as specified in any wage determination attached to the contract.*

(emphasis supplied)

The solicitation and contract at § C-7 OTHER PROVISIONS require at ¶ 7.8.1 that "[t]he Contractor shall be responsible for payment of all wages and salaries [and] fringe benefits" for contractor employees. (R4, tabs 2 at 20, 6 at 20)

FAR 52.212-5 further incorporated by reference FAR 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT –PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) (*id.*), which requires at ¶ (c) that the DOL wage determination "current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply" to the contract. This regulation instructs the parties on the manner in which the impact of changed wage determinations is to be calculated:

> (d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:
>
> (1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. For example, the prior year wage determination required a minimum wage rate of $4.00 per hour. The Contractor chose to pay $4.10. The new wage determination increases the minimum rate to $4.50 per hour. Even if the Contractor voluntarily increases the rate to $4.75 per hour, the allowable price adjustment is $.40 per hour;
>
> (2) An increased or decreased wage determination otherwise applied to the contract by operation of law; or

> (3) An amendment to the Fair Labor Standards Act of l938 that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law.
>
> (e) Any adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) of this clause, and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but shall not otherwise include any amount for general and administrative costs, overhead, or profit.
>
> (f) The Contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a new wage determination unless this notification period is extended in writing by the Contracting Officer. The Contractor shall promptly notify the Contracting Officer of any decrease under this clause, but nothing in the clause shall preclude the Government from asserting a claim within the period permitted by law. The notice shall contain a statement of the amount claimed and any relevant supporting data, including payroll records, that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price or contract unit price labor rates shall be modified in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date.

(R4, tab 2 at 27)

The parties jointly stipulate that the RFQ contained Wage Determination No: 4-2393 Rev (15) AREA: NC, FAYETTEVILLE (REV 15), as revised 23 August 1999 (REV 15) for the contract base year (JS 9). The two categories of employees required by the solicitation to perform the contract were listed in the wage determination as "Medical Record Clerk" and "General Clerk III" (R4, tab 2 at 26). REV 15 set the minimum hourly wage for a General Clerk III at $8.59 and the minimum hourly wage for a Medical Record Clerk at $10.37. (*Id.* at 42, 45; JS 9, 10) REV 15 stated that fringe benefits were to be afforded to employees in all occupations that were part of that wage determination; these fringes included a health & welfare benefit of $1.63 per hour, vacation benefits commensurate with the employee's length of service, and a minimum of ten paid holidays per year. (R4, tab 2 at 47)

The government's correspondence log of 17 September 1999 indicates that both the initial solicitation for the subject contract and amendment 0001 extending the time for response to the RFQ were distributed to potential contractors including AFG (R4, tab 59).

On 22 September 1999, DOL issued Wage Determination No: 94-2393 Rev (16) Area: NC, Fayetteville (REV 16) updating requirements for the area in which the subject contract was to be performed. This determination set minimum hourly wage rates for a Medical Record Clerk at $9.02 and for a General Clerk III at $8.00. (R4, tab 9 at 4-5) Like REV 15, the REV 16 wage determination required employees to be provided mandatory fringe benefits including the H&W benefit of $1.63 per hour. The RFQ was never amended to substitute REV 16 for REV 15. (JS 15, 16)

AFG submitted to the government its initial quote dated 24 September 1999 to provide "Emergency Room and Primary Care Administrative Support Services" (R4, tab 3) and affirmed that it "agree[d] with the terms and conditions stated in the solicitation" (*id.* at 1). In accordance with the government's instructions for the RFQ, the quotation included a firm fixed-price per month for each CLIN. The quote included a table labeled "Section B – Pricing," in which AFG offered to provide for the eight-month base period both Family Practice Clinic Administrative Support Services and Navy Primary Care Clinic Administrative Support Services in the total amount of $260,948.57. Information provided in "Section B – Pricing" was set forth by the contractor for the Base Year as follows, with similar data for Option years 1 through 4:

Altos Federal Group, Inc.
Solicitation # N00140-99-Q-N428
Naval Hospital – Camp Lejeune, NC

Section B – Pricing

Item No.	Supplies/Services	Quanity	Unit	Unit Price	Total Price
Base Year					
Lot 1	Service Period 01-Feb-2000 to 30-Sep-2000				
0001	Family Practice Clinic Administrative Support Services	8	Months	22,203.99	177,631.90
0002	Navy Primary Care Clinic Administrative Support Services	8	Months	10,414.58	83,316.66
					260,948.57

(*Id.* at 6)

AFG advised in a section entitled "Past Performance" of its initial quote dated 24 September 1999 that it "has partnered with Capital Health Services, Inc. (CHS)" which held the then-current administrative support services contract at Camp Lejeune (*id.* at 16). AFG noted that the incumbent CHS, a large business, was not eligible to submit a quote as a prime contractor because the RFQ was issued as a small business set aside (*id.* at 1; JS 19; *see also* R4, tab 2 at 1). AFG's initial quote contained no financial

detail other than the summary amounts provided in the table that comprised "Section B-Pricing," which did not indicate the manner in which AFG determined amounts stated for each CLIN (R4, tab 3 at 6).

The government extended the period for receipt of quotations by RFQ amendment 0001 (R4, tab 4 at 3). On 1 October 1999, AFG submitted its first revised quotation (R4, tab 4). There is considerable controversy between the parties regarding the information conveyed by AFG's first amended quotation dated 1 October 1999, and there are multiple versions of the 1 October 1999 quotation in the record. While there are other differences, the key disparity is that the iteration relied upon by appellant contains a spreadsheet labeled by AFG as its "Labor Rate Calculation" that states a specific "Pay Rate" for each employee classification corresponding to the rates in REV 16 rather than the higher rates in REV 15 (*see, e.g.*, compl. in 53523, tab A; R4, tab 13 at 8-13). This information is absent from the versions of the 1 October 1999 quotation proffered by the government (*see, e.g.*, R4, tabs 4, 5). As discussed in *Further Findings* below, we accept the government's versions of AFG's 1 October 1999 quotation as accurate for purposes of the record and find the government was not put on notice of appellant's use of REV 16 by this correspondence, despite AFG's contentions otherwise (*see* compl. in 53523, tab D).

Government contract negotiator Ms. Mary Mezzatesta telephoned AFG president Dr. Paula Shaw on 10 November 1999 regarding the contractor's 1 October 1999 quotation (R4, tab 64 at ¶¶ 1-2, ¶ 14). During that conversation, Ms. Mezzatesta raised the requirement found in contract provision FAR 52.219-14 LIMITATIONS ON SUBCONTRACTING (DEC 1996) that at least 50% of the cost of contract performance had to be expended by AFG as the prime contractor. Ms. Mezzatesta specifically was concerned that AFG's quotation might not be in compliance with this provision; she also questioned Dr. Shaw regarding escalations included in AFG's pricing for optional contract years. (JS 22) Ms. Mezzatesta's later declaration stated that she and Dr. Shaw did not discuss actual employee wage rates, but focused upon subcontracting limits, the requirement that employees must be paid minimum hourly wage rates plus fringe benefits, and that FAR 52.222-43 [FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT – PRICE ADJUSTMENT MULTIPLE YEAR AND OPTION CONTRACTS (MAY 1989)] provided for adjusted wage rates at the exercise of each option year (R4, tab 64 at 3, ¶ 14). Dr. Shaw agreed in her declaration that Ms. Mezzatesta's call "raised several issues" relating to AFG's relationship with its subcontractor CHS, including Ms. Mezzatesta's concern over the relative amount of work to be performed by the two companies (app. br. in 53523, ex, 1, ¶ 9).

On 11 November 1999, AFG submitted its second revised quotation, providing firm fixed-pricing for each CLIN (R4, tab 5). While AFG's proposal for the base period remained unchanged from its 1 October 1999 submission, AFG reduced its pricing for the optional out-years (*id.* at 1-2; JS 23). Added together, AFG's quote for performing the

base and four option years totaled $3,220,091.81 (*id.* at 2). AFG addressed questions regarding its proposal posed by Ms. Mezzatesta in her 10 November 1999 telephone call (*id.* at 1). Under the paragraph headed "Prime Contractor and Subcontractor Roles," AFG's transmittal letter stated that it had enclosed as Attachment 1 the "teaming agreement" between AFG and CHS which indicated that "AFG will administer the contract and maintain 50 percent or more of the total cost of the contract." The remainder of the paragraph stated that "Further, AFG and CHS have established a distribution of work that provides approximately a 51 percent (AFG) to 49 percent (CHS) split of the labor (Attachment 2)" (*id*.).

As with the government's version of the 1 October 1999 quotation accepted for purposes of the record (R4, tab 4 at 2), we find there is inadequate proof that AFG's 11 November 1999 quotation contained the spreadsheet labeled by AFG as its "Labor Rate Calculation" nor did the quote indicate which DOL wage determination had been followed or state specific hourly rates used by AFG in computing CLIN prices for the required positions of General Clerk III and Medical Record Clerk (R4, tab 5). *See Further Findings* below. Without specifying how these prices were derived, AFG's 11 November 1999 "Section B – Pricing" table did include "unit prices" for "Optional Increased Medical Record Clerk Services" during the base year at $13.87 and "Optional Increased Medical Clerk Services" at $12.31, with increased amounts for the optional years (*id*. at 2).

According to the government's 24 November 1999 "Pre-negotiation and Post-negotiation" analysis (also referred to as a business clearance memorandum or BCM) of submissions responding to the RFQ, the government had developed "baseline total contract costs" for comparison purposes to "ensure compliance with: (1) all minimum staffing requirements specified within the RFQ, and (2) Service Contract Act (SCA) Wage Determination #94-2393 Rev. 15, incorporated via attachment to the RFQ," and to serve "as the Independent Government Estimate (IGE)." (R4, tab 63) The government's total baseline cost, against which responses to the RFQ were evaluated, was $2,535,399.12 including the H&W benefit of $1.63 per hour; however, government negotiators recognized that this cost was "somewhat understated" because it did not contain "indirect rates for additional overheads (FICA, FUTA, SUTA, etc.) or G&A and profit, as [are] routinely proposed by industry" (*id*. at 7). The government negotiators apparently did not recognize that the IGE also did not include holiday and vacation pay (*see* R4, tab 56). Quotations from nine potential contractors proposed prices for the base and four option years, and ranged from a low of $1,906,642.88 to a high of $4,828,682.24 (*id.*). The government's award of the contract to AFG was based on its evaluation of AFG's 11 November 1999 quotation, which was the fourth lowest received by the government (JS 24).

Prior to award, the government revisited AFG's quote because it was "21% higher than the computed IGE," but the government concluded that this disparity was neither

"uncommon nor unreasonable" if the IGE's omitted indirect costs were considered nor was AFG's quote materially unbalanced when the base and all option years were considered. The government further noted that although AFG was the lowest offeror among the six firms with relevant experience that submitted a quote, the other firms had no advantages that would "justify paying a premium of 10% to 50%." (R4, tab 63 at 8) We find that the government reasonably evaluated AFG's quotation by comparing its price to others received from other contractors also deemed acceptable and to the IGE.

Contract Award and Performance

On 24 November 1999, AFG was awarded Purchase Order No. N00140-00-M-N522 (the contract) (R4, tab 6), which was 63 days after the 22 September 1999 issuance of REV 16. The contract was never amended to include REV 16 (R4, tabs 2, 6; JS 26).

The contract called for performance to begin on 1 February 2000 (R4, tab 6 at 2). On that date, AFG sent an email to Ms. Mezzatesta, and listed wage rates between $8.00 and $9.02 per hour to be paid to AFG and CHS employees (R4, tab 7 at 1-2); AFG provided no information regarding fringe benefits. These rates were equivalent to those set forth in REV 16 (R4, tab 9 at 4-5), and were lower than the $8.59 for a General Clerk III and $10.37 for a Medical Record Clerk set as the minimum wage by REV 15 (R4, tab 2 at 42, 45; JS 28). Wages for certain "Per-Diem Employees" to be used as needed by either company were set at $9.63; AFG explained the rate as the "base wage [of] $8.00 per hour plus the benefit allowance of $1.63." (R4, tab 7 at 1-2)

Dr. Shaw sent an email to Ms. Mezzatesta on 3 February 2000, advising that AFG had followed wage determination REV 16 in preparing its cost proposal in response to the solicitation (R4, tab 8). That email had an attachment entitled "Final Revised Pricing.xls" offered by AFG as "supporting documentation which shows the hourly rates that were used to develop the Price Proposal" that were "identical" to those found in REV 16 (*id.* at 1). The second page of the proposal as then-furnished by AFG is a single-page, undated, spreadsheet labeled "Labor Rate Calculation" that is faintly annotated with difficult-to-read handwriting.[1] The "Labor Rate Calculation" contains a column entitled "Pay Rate" showing that "Medical Clerks" would be paid $8.00 per hour ($8.40 for weekends) and "Medical Records Clerks" would be paid $9.02 per hour ($9.47 for weekends). The third page of the exhibit is the same table labeled "Section B-Pricing" (*id*. at 3), that was part of AFG's 11 November 1999 quotation; hourly wage rates were shown only for "Optional Increased Medical Record Clerk Services" ($13.87 for the first year) and "Optional Increased Medical Clerk Services" ($12.31 for the first year), with increases for option years two through four (R4, tabs 8

[1] No explanation is provided for the source of or time the handwriting was added to the documents that were furnished via email.

at 3; 5 at 2). We note that the one-page spreadsheet labeled "Labor Rate Calculation" is the first page of the same document later alleged by AFG to have been part of its 1 October 1999 and 11 November 1999 quotations (*see* compl. in 53523 at ¶ 12; tab D). We find insufficient proof that the "Labor Rate Calculation" was included in AFG's 1 October or 11 November 1999 submissions. *See Further Findings* below.

AFG stipulated that for the base period of 1 February – 30 September 2000, it "paid its employees in accordance with the labor rates set forth in Wage Determination No: 94-2393 Rev (16) Area: NC,Fayetteville [sic]" (JS 27).

On 15 February 2000, Ms. Mezzatesta corresponded with Mr. Doyle Williams, the Navy's liaison with DOL, emphasizing the decrease in applicable hourly wage rates from REV 15 (R4, tab 9 at 1-3) to REV 16 (*id.* at 4-5). Relevant to the subject contract, the minimum rates for a General Clerk III declined from $8.59 to $8.00 per hour (*id.* at 2, 4), and the rates for a Medical Record Clerk from $10.37 to $9.02 per hour (*id.* at 2, 5). (JS 29)

By email of 22 May 2000, Dr. Shaw contacted Ms. Mezzatesta seeking guidance regarding the classification of AFG's employees. Dr. Shaw asked "what Wage & Determination schedule is in effect" noting that the contract as awarded contains REV 15 but contending that REV 16 was used in the solicitation. (R4, tab 45) Ms. Mezzatesta replied that, as discussed previously with AFG, REV 15 was "attached to the solicitation and incorporated into the resultant award." She emphasized that the government had "never cited nor incorporated any other wage determination" into the subject procurement. (R4, tab 46)

By email dated 29 June 2000, Dr. Shaw again asked Ms. Mezzatesta what wage determination applied; she contended that AFG's 11 November 1999 quotation advised the government that the contractor had used REV 16 in preparing its price. Dr. Shaw also noted that the transition on 1 July 2000 of medical clerk services previously provided by CHS to AFG would proceed smoothly. (R4, tab 47) This "unexpected loss of Capital" had prompted an exchange between AFG and the government on 10 May 2000 about filling positions, as noted in a timeline later prepared by AFG (R4, tab 33 at 6).

On 30 June 2000, the government by bilateral Modification No. P00001 exercised the contract's option for increased medical clerk and emergency room medical clerk services during the base year of 1 February 2000 through 30 September 2000 (R4, tab 10; JS 29). On 31 August 2000, the government issued contract Modification No. P00003 (incorrectly labeled P00002), exercising the first option year of the contract from 1 October 2000 through 30 September 2001 (R4, tab 14; JS 30). In accordance with the contract's FAR 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT -PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) clause (R4, tab 14 at 4), this modification incorporated Wage Determination No. 94-2393

(REV 17) into the contract (*id.* at 5-12). According to REV 17, which was issued by DOL on 5 June 2000, the minimum hourly wage rate for a General Clerk III was revised to $8.28 and for a Medical Record Clerk to $9.34, and the H&W benefit increased to $1.92 (*id.* at 5,7).

By facsimile dated 29 September 2000 from Dr. Shaw to government contracting officer (CO) P.R. Russial, the contractor expressed repeated concern over its financial predicament due to AFG's use of REV 16 in its price, the disputed DOL classifications of its employees, and AFG's increased and unanticipated workload due to its subcontractor CHS having gone out of business (R4, tab 13 at 2-4). The contractor "request[ed] the adjustment permitted by Modification P00002" over a period of base and option years (*id.* at 2). AFG asked that General Clerk III positions be reclassified to those of a Medical Record Clerk (*id.* at 3). AFG also sought an adjustment to the contract's firm fixed-price, contending this was necessary to bring the wage rates being paid its employees into compliance with REV 17 (*id.* at 2). The contractor explained that it had used REV 16 "to determine the hourly wage paid to employees" in responding to the RFQ for the base year, and had "learned after the contract was awarded that [REV 15] was included in the contract." AFG asserted that because the "RFP [sic] attachments were not electronically available" it had searched a government website and obtained the "most current [wage determination, REV 16] for the area." AFG stated that it "was under the impression" that the government was aware of AFG's use of REV 16 rates prior to award of the contract due to information conveyed by the table in its 1 October 1999 quotation labeled "Section B -Pricing" that "included an itemized breakdown of our bid, showing our use of WD 16 labor figures" (*id.* at 3).

By letter dated 27 November 2000, AFG advised CO Kevin Sweetra that DOL had denied AFG's request for the reclassification of its employees categorized in the contract as a "Medical Record Clerk" to "Medical Clerk" (R4, tab 17; JS 35). On 11 December 2000, Dr. Shaw sent an email to Ms. Mezzatesta requesting information on the status of AFG's request for equitable adjustment for (among other things) the impact of REV 17 (R4, tab 18); AFG was informed on 15 December 2000 by the government that DOL had denied AFG's request to reclassify General Clerk III positions to Medical Record Clerks (JS 37). Dr. Shaw on 18 December 2000 sent another email to Ms. Mezzatesta acknowledging DOL's denial and seeking additional funds as earlier requested (R4, tab 19; JS 38). Dissatisfied with DOL's ruling, AFG continued to pursue reclassification of its employees to categories with lower minimum wages and to advise the government of AFG's hardship resulting from the position taken by DOL (R4, tabs 20-22). There was repeated correspondence on these issues, and questions arose between the parties regarding whether the Navy or DOL was responsible for the primary role in specifying the duties used to determine an employee's classification (R4, tabs 25, 30 at 3). There is no evidence, and the parties do not contend, that appellant ever petitioned DOL to require the government to incorporate REV 16 wages instead of REV 15 into the contract for the base year.

On 21 January 2001, the government forwarded proposed contract Modification No. P00004 to AFG for signature (R4, tab 51). That modification proposed to add $14,899.94 to the fixed-price contract to cover H&W benefit changes occasioned by the incorporation on 1 October 2000 of REV 17 into the contract as the wage determination for the first option year (*id.* at 3, 6). This amount was determined by multiplying 51,376 (the number of contract labor hours) times $0.29 (the difference between the H&W benefit rate of $1.63 required by REV 15 for the base year and the H&W benefit of $1.92 required for the first option year by REV 17) (R4, tab 50).

Ms. Mezzatesta on 25 January 2001 questioned AFG's position that the government's calculations in proposed Modification No. P00004 were understated (R4, tab 26 at 1-2). Dr. Shaw's reply asserted that several outstanding contract issues remained in contention, including AFG's requested employee reclassifications and the "W&D Schedule used in proposal vs award and wage implications" (*id.* at 1; JS 40, 41).

CO Sweetra responded to AFG by letter dated 26 January 2001, addressing among other issues AFG's assertion that it had used REV 16 in responding to the RFQ. The contracting officer noted that the matter had been discussed with AFG at length, and contended that AFG's assertion that REV 15 "was neither available nor included in the subject procurement" was incorrect. CO Sweetra advised AFG that REV 15 was found on the two websites identified in the RFQ, and reminded the contractor that a printed copy of the RFQ specifying the use of REV 15 was mailed to AFG on 17 September 1999. (R4, tab 27 at 2-3)

CO Sweetra specifically denied that the government knew that AFG had used wage determination REV 16 in preparing its proposal (R4, tab 27). He recounted that "On 24 Sep 99, a Federal Express package was sent to this office by Capital Health Services (your firm's proposed subcontractor at that time) which contained your firm's proposal." CO Sweetra stated that AFG's "proposal did not contain an itemized price breakdown nor any reference to WD 94-2393 Revision #16, but rather a one-page completed Schedule of Services which simply contained proposed unit pricing and extending totals for all contract line item numbers (CLINs)." CO Sweetra asserted that it was not until after contract award that AFG provided the government with "an itemized pricing breakdown and admitted to the use of WD 94-2393 Revision # 16 in the preparation of its proposed contract pricing, and as such has sought an adjustment." (*Id*. at 2) CO Sweetra stated that AFG was "not entitled to an adjustment since it deviated from the mandated WD 94-2393, Revision # 15 that was clearly identified and incorporated into both the RFQ and the resultant award" (*id*. at 2-3). CO Sweetra reminded the contractor that the government had furnished AFG with proposed Modification No. P00004 for signature, which would increase the contract price by $14,898.94 due to "the $0.29 increase in the Health & Welfare rate, as stipulated by

Wage Determination 94-2393, Revision #17, incorporated into the subject contract upon exercise of [the first option year] via Modification P00002 [sic]" (*id*. at 2).

AFG responded through counsel by letter dated 16 February 2001 to CO Sweetra's correspondence of 26 January 2001 (R4, tab 30). The attorney's letter emphasized *inter alia* that the contractor's reliance upon REV 16 in its quoted prices was reasonable because that wage determination "was, at the time of the solicitation, the most recent wage determination issued by the DOL," and "this wage determination was available through a government web site and appeared to be applicable to the Contract" (*id.* at 3). The letter asserted that the government was knowledgeable prior to award of AFG's use of REV 16:

> Moreover, it appears that the Navy was on notice, prior to award, of [AFG's] use of Wage Determination Revision 16. Specifically, by letters dated October 1, 1999 and November 11, 2000 [sic], copies of which are enclosed, [AFG] informed the Navy of the wage rates that it intended to pay its employees. These wage rates clearly corresponded to those included in Wage Determination Revision 16, rather than Wage Determination Revision 15. Furthermore, it appears that following the award, after [AFG] learned of its "mistake" and informed the Navy's Contracting Officer Specialist, Mary Mezzatesta, Ms. Mezzatesta stated that the Navy would incorporate Wage Determination Revision 16 into the Contract. Thus, the Navy recognized that Wage Determination Revision 16 would be applicable to the Contract.

(*Id.*)

The letter from AFG's counsel concluded that, "to the extent [AFG] was mistaken in its reliance upon Wage Determination Revision 16," AFG "nevertheless should be entitled to a modification of the Contract and an equitable price adjustment pursuant to 48 CFR 14.407–4 [Mistakes after award]." AFG's counsel further posited that "the Navy was, or should have been, on constructive notice" of AFG's "mistake" prior to award, and that AFG was "entitled to a reformation of the Contract so as to allow it to pay its employees those wages and benefits set forth in Wage Determination Revision 15, and in the most recently issued Wage Determination 17." (*Id.*) Counsel's letter included as an attachment a four-page spreadsheet entitled "Labor Rate Calculation" (*id.* at 7-10), that purportedly was part of the six-page version of Dr. Shaw's quote dated 1 October 1999 (*id.* at 5-10). This spreadsheet was also appended to AFG's 29 September 2000 letter to CO Russial (R4, tab 13 at 8-13).

On or about 28 February 2001, CO Sweetra and Ms. Mezzatesta participated in a conference call with AFG and its counsel. The government asserted that the pricing data forwarded by the attorney's 16 February 2001 letter had not been provided with any of AFG's pre-award submissions. (R4, tab 64, ¶ 20; tab 65, ¶ 12) In response to appellant's request, the government forwarded an abstract from its business clearance memorandum that evaluated AFG's quote (R4, tab 31; JS 45). The BCM noted "prevailing FY00 wages" inclusive of a $1.63 hourly H&W benefit of $12/hour for medical records clerks and $10.22/hour for medical clerks (equivalent to General Clerk III) (*id.* 3). The BCM observed that AFG's pricing at 21% above the government IGE was deemed fair and reasonable since the latter estimate did not include certain indirect costs, and concluded that AFG's price was "not materially unbalanced" and compared favorably to quotes received from other acceptable companies (*id.* 4). Although a table comparing AFG's proposed prices for each year was prepared showing sums with and without the H&W benefit (*id.* 5), the government's analysis does not indicate specific amounts used by AFG in preparing its quote (*id*.).

CO Sweetra on 13 March 2001 contacted DOL to provide a history of AFG's request for reclassification of certain employee categories (R4, tab 52). Noting that the issue had been before DOL for several months without a final determination, CO Sweetra advised DOL that he had told AFG to consider the request to have been denied (*id.* at 2).

Dr. Shaw on 5 April 2001 sent an email to CO Sweetra, summarizing their conversation of the previous day and asking that he confirm her understanding of issues discussed. Relevant to these appeals, Dr. Shaw indicated her belief that the government would "Fund the difference in wages between REV 16 and REV 17 plus statutories"; AFG would provide further payroll information verifying wages paid employees; the government would also fund "the difference in the H&W benefit" between REV 16 and REV 17; and the government would not pay for the $1.63 hourly H&W benefit AFG claimed was omitted from its bid. (R4, tab 54)

On 6 April 2001, CO Sweetra advised Dr. Shaw that DOL had determined that the questioned positions would continue to be paid as either "General Clerks" or "Medical Record Clerks [sic]" (R4, tab 55).

On 9 April 2001, CO Sweetra responded to Dr. Shaw's 5 April 2001 email, disagreeing with her view of their 4 April 2001 conversation. CO Sweetra recounted that Dr. Shaw had advised both during that conversation and in a 13 March 2001 email message that AFG could not perform at the prices stated in the contract, and that AFG stood to lose money if all five option years of the contract were to be performed. In light of those assertions, and expressing the desire to harm neither performance at the medical facility nor the company, CO Sweetra told Dr. Shaw that the government had determined not to exercise the remaining option years and would instead on 1 October 2001 issue another solicitation for the work. CO Sweetra confirmed that the government's price

analysis for the contract did not include holiday and vacation pay but stated that this "omission does not constitute a mutual mistake, for both parties were not mistaken in belief regarding this fact." (*Id*. at 1) CO Sweetra confirmed that Dr. Shaw was correct that the government intended to "fund the difference in wages" between REV 16 and REV 17, and stated that the proposed modification to accomplish this had been given to AFG for signature. He again noted that DOL had not approved AFG's request for reclassification of the employees. (R4, tab 56)

ASBCA No. 53523

The Contractor's Claim Asserting Mutual Mistakes Discovered After Contract Award

AFG seeks an equitable adjustment by certified claim dated 23 April 2001, alleging that reformation of the contract is warranted by two "mistake[s] in bid [discovered] after award" made by AFG in calculating its price for the base year that adversely affect AFG's anticipated labor costs for both the base and first option years. The first mistake asserted is AFG's use of REV 16 instead of the contract's higher REV 15 wage rates in formulating its base year price, resulting in an understatement of AFG's labor costs. Although appellant proposes that the government amend the contract to substitute REV 16 for REV 15 and fears a potential "Labor Violation position" if the government does not do so, AFG alternatively seeks an adjustment to pay employees the higher rates of REV 15 for the base year. The second alleged mistake by AFG is appellant's failure to add the required $1.63 H&W benefit to the cost of each base year labor hour. AFG further asserts that its two late-discovered mistakes also increase the amount it is due for the contract's first option year, during which AFG was required to pay REV 17 wages and an hourly H&W benefit of $1.92. (R4, tab 32 at 1)

Appellant summarized its claim as follows:

> If the Government modifies the contract to incorporate WD 16 in the base year then the adjustment for the base year will total $42,620.96. If the Government uses WD 15 in the base year then AFG's claim adjustment for the base year is $66,087.52. For option year one, since the Government will be funding the difference in wages between WD 16 and 17 as indicated in your letter dated April 9, AFG seeks an equitable adjustment for wages and the H&W amount of $1.92 (see paragraph b); these amounts total $119,018.04.

(*Id*. at 2)

CO Sweetra on 18 June 2001 requested further information from AFG regarding its claim, and anticipated that a final decision would be rendered by 29 June 2001

(R4, tab 34). He expressed concern that the "number of hours worked, as calculated from your firm's payroll register data, is less than that which is required under the subject contract and appears only to address the labor classification of General Clerk III," and that the data did "not appear to contain wage rate information for the classification of Medical Record Clerk." (*Id.* at 1)

Dr. Shaw responded by email of 22 June 2001, attributed the lack of payroll documentation to AFG's former subcontractor CHS, and indicated that she would attempt to obtain more information from that now-defunct company (R4, tab 36). CO Sweetra's email of 25 June 2001 emphasized that this documentation was needed before AFG's claim could be decided. CO Sweetra explained that pay records provided by AFG showed only 18,078.75 hours were worked by contractor employees from 24 September 2000 through 7 April 2001, an amount equal to only 14 biweekly pay periods. His extrapolation of that data yielded the expenditure of only 33,600 labor hours, far short of the 46,362 hours required by the contract for a General Clerk III and 4,974 hours for a Medical Record Clerk. He noted that the hours substantiated by AFG appeared to be only for the General Clerk III positions at the REV 16 rate of $8.00. The contracting officer asked that AFG verify whether it sought "a Revision #16 to Revision #17 adjustment for the 33,600 hours of General Clerk III" supported by the payroll data. He also required AFG to "provide additional pay records from FY 2001 that will support an adjustment for any greater number of hours." (R4, tab 37 at 1)

By final decision dated 27 June 2001, CO Sweetra denied AFG's claim in full (R4, tab 38). The contracting officer noted that the total amount sought by AFG was $161,639.00, which included $42,620.96 (based upon the substitution of REV 16 for REV 15 in the base year and the addition of $1.63 per labor hour for H&W benefits) and $119,018.04 (the additional amount derived from difference in wages between REV 16 for the base year ("Lot 1") and REV 17 for the first option year ("Lot 2"), plus a $1.92 H&W benefit per labor hour in accordance with REV 17). The decision referenced FAR 14.407-4 MISTAKES AFTER AWARD, which provides that a contract may be reformed or rescinded where there is clear and convincing evidence of the error. CO Sweetra found that AFG's failure to include the $1.63 hourly H&W benefit for the base year was "neither mutual nor so apparent as to have charged the contracting officer with notice of the probability of a mistake," especially as AFG's bid was "the fourth highest of nine offers" and was "comparable in price to other acceptable offers" (*id.* at 1). The decision advised that the government was reviewing AFG's second assertion regarding its use of REV 16 for the base year, and was in the process of calculating the difference in wages between REV 16 for the base year and REV 17 for the first option year. AFG was again told that the government could not complete its analysis without additional payroll register data to support the hours claimed. The contracting officer reminded AFG that the government previously had calculated the difference in H&W

benefits between REV 16 and REV 17 to be $14,899.04[2], and was awaiting the contractor's signature on contract Modification No. P00004 to add that amount to the contract. AFG was once more admonished that the firm fixed-price contract placed the risk of loss on the contractor and that the only clause in the contract providing for a price adjustment was FAR 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT – PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS). (*Id.* at 2)

Ms. Mezzatesta on 17 July 2001 analyzed additional records furnished by the contactor. She determined that AFG failed to provide complete documentation and had furnished "only 14 weeks" of additional payroll register data for General Clerk and Medical Record Clerk positions (R4, tab 40 at 1). Ms. Mezzatesta used the data to compute the "total Wage Determination adjustment" due the contractor, looking only at "the difference in basic wage rates" for the base and first option years. She stated that the "increase in the health and welfare rate was addressed" by contract Modification No. P00004, but because "each of the listed general clerk employees was paid more than the basic WD rate," AFG "is not entitled to an adjustment for these additional general clerk hours" (*id.* at 1). Ms. Mezzatesta calculated the total adjustment due AFG to be $11,107.57, inclusive of all H&W benefits and "FICA, FUTA, SUTA, and Workmen's Compensation" (*id.*)

AFG on 6 and 20 September 2001 contacted CO Sweetra, asking for a "breakdown" regarding "total payment amounts for employees due to increase[d] H&W benefit and wage increase[s]" (R4, tab 57).

AFG on 19 September 2001 timely appealed the contracting officer's 25 June 2001 adverse decision. This appeal was docketed as ASBCA No. 53523.

To reflect the changes required by the 1 October 2001 incorporation of REV 17 into the contract, the contracting officer on 26 September 2001 unilaterally issued Modification No. P00004 (erroneously labeled Modification No. P00002), adding $14,898.94 as an adjustment for the first option year that represented the $0.29 increase in hourly H&W benefits required by REV 17 ($1.92) over the base year rate of REV 15 ($1.63). The modification also added $11,107.57 to the first option year price to adjust wages for both General Clerk III and Medical Record Clerk positions from the rates required in REV 16 to those of REV 17. The total adjustment was $26,006.51. (R4, tab 44) According to an internal government memorandum justifying Modification No. P00004, the increase of $11,107.57 was intended to recompense AFG for having to pay increased REV 17 wages in the first option year that were greater than

[2] Although the contracting officer stated the amount due AFG for the difference in H&W benefit between REV 16 and REV 17 as $14,899.04 (R4, tab 38 at 1), Modification No. P00004 was issued in the amount of $14,898.94 (R4, tab 44 at 2).

the REV 16 rates the contractor actually paid its employees during the base year. The memorandum noted that although the contract specified REV 15 wages were to be paid during the base year, DOL had superseded that determination with REV 16 by the time of contract award. (R4, tab 41; JS 67)

AFG's complaint dated 7 December 2001 explained that it sought "Total Contract Reformation" costs of $255,040.31, which consisted of an additional $107,148.30 for the base year and $149,190.60 for the first option year, plus $24,707.92 in overhead and profit and less $26,006.51 for the "EPA of Rev. 17." (Compl. in 53523 at 1, tab N)

ASBCA No. 54404

AFG's Appeal from the Government's Affirmative Claim for the Return of Alleged Overpayments During the First Option Year

CO Sweetra issued a second final decision dated 4 August 2003, stating that the portion of Modification No. P00004 adding $11,107.57 to the contract to recompense AFG for wage increases between REV 16 and REV 17 was improperly issued by the government, and agreed with AFG that doing so had exceeded the contracting officer's authority (R4, tab 66). Noting that REV 16 was never incorporated into the contract and that REV 15 applied to the base year, the contracting officer demanded that AFG repay the government "$12,833.33 for the correct downward wage rate adjustment between Rev. 15 and Rev. 17" and "$11,107.57 for the wage rate adjustment from Rev. 16 to Rev. 17" that erroneously had been paid to AFG (*id.* at 4). The government's affirmative claim against AFG was in the total amount of $23,940.90 (*id.*). AFG's timely appeal of the contracting officer's second final decision was docketed as ASBCA No. 54404.

The Parties' Declarations

The government supplemented the record in both appeals with the 7 October 2003 declaration of Ms. Mezzatesta, who states that it was made pursuant to 28 U.S.C. § 1746 (R4, tab 64). Ms. Mezzatesta affirms that, as CO Sweetra's primary representative for negotiation and administration of the subject contract, she prepared and coordinated the RFQ that formed the basis for the award to AFG (¶¶ 2-3). Among other matters, Ms. Mezzatesta attests to the accuracy of the record as propounded by the government (*see, e.g.*, ¶¶ 4-5, 11-16); the government's analyses of quotations and its determination to award the contract to AFG (¶¶ 17-18); and communications between the parties regarding the wage determinations in question (*see, e.g.*, ¶¶ 14, 19). Ms. Mezzatesta averred that, prior to award, the government was never made aware that AFG omitted the H&W benefit (¶ 22) and did not know AFG had used other than REV 15 in preparing its price (¶ 21). She stated:

4. Both during the solicitation process and purchase order administration process, I served as the primary custodian of the Navy's Contract file. I assembled the initial solicitation and contact [sic] files and added documents to the files as appropriate.

5. I also aided in the assembly of the Navy's Rule 4 file for this Appeal. I have reviewed all documents included in that file and find them to be complete and accurate copies of the original documents included in the contract file.

. . . .

11. On 24 September 1999, Altos submitted its initial quotation. I personally opened Altos' proposal and placed it in the official solicitation/contract file. I was careful, as with all other offerors' submissions, not to modify the submission or change the order of its pages. In accordance with the RFQ's instructions, the quotation included firm fixed-pricing by the month for each CLIN. The pricing portion of the quote consisted of one page and no explanation was provided regarding how the monthly prices were calculated. The "Labor Rate Calculation" provided at Rule 4a, tab 8, page 2 was not included in Altos' initial quotation submission, nor was it otherwise provided to my office prior to the purchase order award. The document at Rule 4a, tab 3 is a complete and accurate copy of that 24 September 1999 initial quotation submission. The handwritten page numbers in the lower right of each page of that document were added by the Government to the Rule 4 copy for ease of reference.

12. On 1 October 1999, Altos submitted a revision to its quotation that included revised pricing. I personally opened Altos' submission and placed it in the official solicitation/contract file. I was careful, as with all other offerors' submissions, not to modify the submission or change the order of its pages. As with the submission of its initial quotation, the revised pricing provided firm–fixed pricing for each CLIN with no explanation regarding how the monthly prices were calculated.

13. At Attachment A to its Complaint, Appellant has provided an incorrect copy of its 1 October 1999 revised

quotation submission. The actual quotation submission did not include any of the last three pages included in Attachment A to the Complaint. The document at Rule 4a, tab 4 is a complete and accurate copy of that 1 October 1999 quotation submission; the handwritten page numbers in the lower right of each page of that document were added by the Government to the Rule 4 copy for ease of reference.

14. On 10 November 1999, I telephoned Altos' president, Paula Shaw to discuss the company's revised quotation submission. During those discussions, I addressed the FAR 52.219-14 Limitation on Subcontracting Requirement that at least 50 percent of the cost of purchase order performance incurred by personnel be expended by Altos personnel. I further questioned the escalations included in Altos' pricing for the solicitation's option periods. In this context, we discussed the fact that the wage determination establishes the minimum hourly rates that must be paid employees as well as various required minimum benefits such as health & welfare and fringe benefits. I pointed out that FAR 52.222-43 provided for adjustments to the purchase order price for any increases in DoL wage determinations at the exercise of each one-year option period. Altos had never revealed the actual wage rates that it intended to pay its employees and, during this conversation, we did not discuss actual wage rates. Rather, the focus of the conversation was on the fact that Altos had proposed escalated rates in the option years even though FAR 52.222-43 already provided for adjustments due to increased wage determination rates.

15. Altos responded to my 10 November 1999 telephone call with a letter dated 11 November 1999. I personally opened Altos' submission and placed it in the official solicitation/contract file. I was careful, as with all other offerors' submissions, not to modify the submission or change the order of its pages. The document provided at Rule 4a, tab 5 is a complete and accurate copy of Altos' actual 11 November 1999 submission with attachments. The hand written page numbers at the bottom right of each page of the Rule 4 copy were added by the Government for ease of reference.

16. As Attachment D to its Complaint, Altos provided the Board with an incorrect copy of its 11 November 1999 submission. The unsigned six page "SUBCONTRACT FOR MEDICAL ADMINISTRATIVE SUPPORT SERVICES BETWEEN ALTOS FEDERAL GROUP, INC AND CAPITAL HEALTH SERVICES, INC." included in Attachment D to the Complaint had not been included in the actual 10 [sic] November 1999 submission. Rather, the actual 10 [sic] November 1999 submission included a signed "TEAMING AGREEMENT" between Altos and its proposed subcontractor that Altos omitted from its Complaint attachment. See Rule 4a, tab 5 at pages 3-9. Further, Attachment D to the Complaint included a "Labor Rate Calculation" page and three pages of hand written notes that were not included in the actual 11 November 1999 submission; excluded from the Complaint attachment was Altos' "Past Performance" information what [sic] was, in fact, included in the 11 November 1999 submission. See Rule 4a tab 5 at pages 10-19.

17. Altos final quotation was the fourth lowest of the nine quotations received. The total prices quoted were as follows:

OFFEROR	BASE PERIOD PRICE	TOTAL PRICE
Company 1	$215,112.16	$1,906,642.88
Company 2	$276,882.16	$2,519,412.60
Company 3	$355,381.68	$3,049,456.72
Altos	***$349,746.64***	***$3,220,101.64***
Company 5	$365,103.76	$3,494,051.76
Company 6	$445,032.64	$3,859843.20 [sic]
Company 7	$568,014.08	$4,252,232.96
Company 8	$415,210.40	$4,390,694.12
Company 9	$517,157.68	$4,828,682.24

I assisted the Contracting Officer in comparing the proposals in accordance with the evaluation criteria set forth in the solicitation, i.e., considering past performance and price. The two lowest priced quotes were rejected because they appeared unreasonably low-priced and the companies had no relevant past performance that would indicate that they could perform the RFQ's requirement at the quoted prices. The third lowest priced quoter also had no relevant past performance. The Navy did not find its price to be unreasonably low and,

accordingly, considered that proposal to be acceptable and eligible for award. However, under the evaluation criteria, past performance was considered more important than price. . . .

18. At the direction of the contracting officer, I performed an informal cost analysis of Altos' proposal to confirm Altos' capability to perform at its proposed price. We performed only a very limited analysis because the Navy was conducting the procurement for a firm-fixed purchase order using simplified acquisition procedures for commercial items, and in this type of procurement, the contractor generally bears the risk if it submits too low a price. Altos' price was in the mid-range of the 9 quotations received with three quotes lower and one only slightly higher than Altos' quote. Accordingly, Altos' pricing, on its face, appeared to be viable. In further assessing the viability of Altos' pricing, I tried to get an idea of the approximate cost of performance, considering the required Service Contract Act labor rates included in the solicitation. To that end, I calculated the basic anticipated cost of direct labor based on the staffing hours called for in the RFQ for each labor category at the SCA wage rates called for in the attached SCA Wage Determination, Revision 15. When I documented this calculation in the post-negotiation business clearance memorandum, I incorrectly referred to the total direct labor cost calculation as an "independent government estimate." However, the calculation was never intended to be an estimate of the total cost of performance. Rather, it only reflected the total unburdened direct labor costs. Indirect costs and fringe benefits were not included in that calculation. However, I found that Alto's [sic] quoted price was 21% higher than the total for those unbalanced wage requirements. Completing this informal analysis, I concluded that that 21% should be sufficient to cover the remaining purchase order costs such as FICA, FUTA, SUTA, G&A and profit and determined that Altos should be able to perform the RFQ's requirements at its proposed price.

19. Purchase order performance was to begin on 1 February 2000. On that date, Altos employee, Lenore Ammons e-mailed me forwarding Altos' employee wage rates for personnel to be used under the purchase order; the wage rates

> listed for Altos and its subcontractor's personnel were between $8.00 and $9.02 per hour. Those wage rates were lower than the $8.59 and $10.37 rates required by Wage Determination No: 94-2393 Rev (15) Area: NC, Fayetteville for those labor categories. This was the first time that I had any indication that Altos was considering other than the wage rates required by the solicitation. The document at Rule 4a, tab 7 is a true and complete copy of Ms. Ammons' e-mail with its attachment. The document at Rule 4a, tab 8 is a complete and accurate copy of that e-mail with its attachment.
>
> . . . .
>
> 21. Prior to award of the purchase order, I never received any indication from Altos, either orally or in writing that, in the preparation of its quotation, Altos had used other than Wage Determination No: 94-2393 Rev (15), the wage determination attached to the solicitation.
>
> 22. Prior to award of the purchase [sic], I never received any indication from Altos, either orally or in writing that, in the preparation of its quotation, Altos had failed to consider the $1.63 per hour "Health and Welfare" benefits required by the applicable wage determination.

(R4, tab 64)

The government also furnished the 6 October 2003 declaration of CO Kevin Sweetra, who also states that it was made pursuant to 28 U.S.C. § 1746 (R4, tab 65). Mr. Sweetra's assertions were consistent with those of Ms. Mezzatesta. He declared that, as Ms. Mezzatesta's supervisor, he had ultimate responsibility for the subject RFQ and contract (¶¶ 1-2). CO Sweetra affirmed that the government's submissions to the Rule 4 file are complete and accurate versions of quotations received from AFG as follows:

> 3. On 24 September 1999, Altos submitted its initial quotation. In accordance with the RFQ's instructions, the quotation included firm-fixed pricing by the month for each CLIN. The document at Rule 4a, tab 3 is a complete and accurate copy of that submission.
>
> 4. On 1 October 1999, Altos submitted a revision to its quotation that included revised pricing. The document at

> Rule 4a, tab 4 is a complete and accurate copy of that submission.
>
> 5. Altos submitted its final quotation submission on 11 November 1999. The document provided at Rule 4a, tab 5 is a complete and accurate copy of that submission.

(*id*., ¶¶ 3-5)

A supplementary declaration by Ms. Mezzatesta dated 19 May 2005, also made pursuant to 28 U.S.C. § 1746, was submitted by the government, Supp. Decl. Mezzatesta. She avers:

> 2. In my capacity as a Navy contract Negotiator, and under the supervision of Mr. Sweetra, I prepared and coordinated request for quotation (RFQ) No. N00140-00-Q-N428. Under that competitive solicitation, Purchase Order N00140-00-M-N522 was awarded to Altos Federal Group. In accordance with the source selection criteria set forth in the solicitation, Altos' quotation was found to offer the best value to the Government.
>
> 3. The document at Rule 4a Tab 2 is a true and accurate copy of the solicitation as it was mailed to contractors listed on the bidders mailing list. That list included Altos. The Solicitation, as mailed to those contractors contained, in its entirety, Wage Determination No: 94-2393 Rev (15) Area: NC,Fayetteville.
>
> 4. The solicitation, as I posted it on two Government websites, also contained, in its entirety, Wage Determination No: 94-2393 Rev (15) Area: NC,Fayetteville. The solicitation was posted as a zip file. When opened, the text of the solicitation was provided as one file, and the attachments to the solicitaiton [sic], including the wage determination, were provided, each as a separate file.

In support of its initial brief in ASBCA No. 53523, AFG provided the 24 November 2003 declaration of Dr. Paula Shaw, made in accordance with 28 U.S.C. § 1746. Dr. Shaw's declaration focuses upon AFG's response to the government's RFQ as well as the accuracy of AFG's submissions to the Rule 4 file, and AFG's interactions with the government regarding contract wage rates:

2. I am the President and Chief Executive officer of Altos Federal Group ("Altos"). In this role I supervised and was actively involved in the preparation of Appellant's response to Solicitation No. N00140-99-Q-N428 (the "RFQ" or the "Solicitation").

. . . .

4. The Solicitation stated that the services and labor rates to be paid under the RFQ were subject to the terms of the Service Contract Act ("SCA"). The RFQ included Wage Determination 94-2393, Revision No. 15 ("REV 15"). Id. Prior to the closing date for the Solicitation the Department of Labor rescinded REV 15 and substituted it with Wage Determination 94-2393, Revision No. 16 ("REV 16"). R4, Tab 41; Appellant's Complaint, Tab U.

5. In pertinent part REV 15 set the wage rates for the medical records clerks as $11.37 [sic] per hour and for medical clerks as $8.59 per hour. R4, Tab 62. Conversely, REV 16 set the wage rates for medical records clerk as $9.02 per hour and for medical clerks at $8.00 per hour. R4, Tab 41. Both wage determinations require that a health & welfare ("H&W") rate of $1.63 be applied to the salary rates, and that the proposals include an amount for federal holidays and SCA mandated vacation time. R4, Tabs 41 and 62.

6. Although the RFQ was never amended to reflect the rescission of REV 15, Appellant mistakenly used REV 16 in calculating its bid price. R4, Tab 41. Also Altos's bid price failed to include the required H&W rate on each labor hour.

. . . .

9. Prior to award of the Contract the contracting officer's Contract Specialist, Mary Mezzatests [sic], raised several issues with Altos specifically relating to the relationship between Altos and CHS. Ms. Mezzatesta stated that she wanted to ensure that CHS was not performing more than 50% of the contract work.

10. In order to address the issues raised by Ms. Mezzatesta, Dr. Shaw submitted a letter, dated November 11, 1999, which

attached documents demonstrating the contractual relationship between Altos and CHS, a revised pricing sheet for Section B of the RFQ, and a spreadsheet entitled "Labor Rate Calculations."

11. A copy of my letter is included in the record of this appeal as Tab 5; however, the version in the record fails to include my contemporaneous attachments to that letter including the labor rate calculation, which was sent with that letter.

12. The Government contends that the version in the appeal file is accurate, R4, Tab 64; however, the Government's position ignores that my letter clearly states that it addresses the subcontracting issue by providing the agreement between the prime and sub and a calculation showing the relative amounts of effort provided by each member of the team. The only document that addresses this issue is the sheet entitled "Labor Rate Calculations." Obviously, my letter quieted the Government's stated concerns.

13. For the Base Year of the Contract Altos has paid its employees at the REV 16 rate (plus $1.63 per hour), in the 1st option year the wage determination was modified to REV 17 (the correct wage determination for that year); however, the calculation was based on the difference between REV 16 and REV 17 even though the Government refused to recognize that REV 16 was the correct wage determination for the Base Year. Therefore, Altos's Option Year 1 price was still understated by $1.63 per hour.

(App. br. in 53523, ex. 1 at 1-3)

Further Findings Regarding AFG's Controverted 1 October and 11 November 1999 Revised Quotations

AFG's Complaint in No. 53523 alleges that its revised quotations of both 1 October and 11 November 1999 placed the government on notice before award of appellant's use of REV 16 in computing its prices, and what AFG asserts are true copies of that correspondence are made attachments to that pleading (compl. in 53523, ¶¶ 12-14, tabs A, S).

We address two different assertions by AFG for purposes of clarifying the record. First, although appellant's Complaint in No. 53523 asserts that the government knew or should have known of AFG's use of an "incorrect Wage Determination Schedule" due to appellant's 1 October 1999 and 11 November 1999 quotations "that were sent to the Contracting office prior to the award which included Section B pricing" (*id.* at ¶ 12), AFG's brief in No. 54404 makes clear that the cost information appellant relies upon as notice is found in "a spreadsheet entitled "Labor Rate Calculation"" (app. reply br. in 54404 at 3). We assess the variously proffered documents on the basis of whether we find more credible appellant's assertion that the "Labor Rate Calculation" was included with either or both of these revised quotations, or the government's contention that this spreadsheet was never furnished prior to award. Second, there is an apparent inconsistency between AFG's Complaint in No. 53523 and its subsequent briefs in both Nos. 53523 and 54404 regarding which (or both) of appellant's quotations allegedly provided the government with a copy of the "Labor Rate Calculation." AFG maintains that the government's Rule 4 file submissions containing the 1 October 1999 and 11 November 1999 revised quotations omit key pages disclosing that information (compl. in 53523, ¶¶ 12, 17). Without explanation, appellant's briefs continue the argument of prior government notice of AFG's use of REV 16 but do not rely upon the 1 October 1999 first revised quotation as evidence thereof; instead, the briefs assert only that AFG's 11 November 1999 second revised quotation provided the government with notice of the contractor's use of REV 16 (app. br. in 53523 at 3, 6; app. reply br. in 53523 at 3-4, 7). Because the relative credibility of each party as a reliable records custodian is important, we assess the iterations of the proffered quotes of both 1 October 1999 and 11 November 1999. Appellant's argument in No. 54404 also relies upon the 11 November 1999 quotation as alleged evidence of the government's knowledge prior to award of AFG's use of REV 16 calculating its prices (app. reply in br. 54404 at 3, 6).

1. *AFG's First Revised Quotation Dated 1 October 1999*

The document urged by appellant as the true copy of AFG's first revised quote of 1 October 1999 is six pages in length, Compl. in 53523, tab A.[3] The first page as provided by appellant is the same transmittal letter to Ms. Mezzatesta signed by Dr. Shaw that is found in the government's version at (R4, tab 4 at 1). On company letterhead, the body of the letter states in its entirety:

> Dear Ms. Mezzatesta:
>
> Altos Federal Group, Inc. (AFG) received Amendment 1 to Solicitation N00140-99-Q-N428 after submitting our proposal

[3] As part of its Complaint in 53523, AFG encloses both a stand-alone copy of AFG's 1 October 1999 quotation (*id.* at tab A) and an identical copy of that document as attachment 2 to its 29 September 2000 correspondence (*id.*, tab S at 9-12).

on September 24, 1999. Enclosed is our revised Section B Pricing and amendment acknowledgment. Please replace the original Section B with this revised Section B.

Please contact me directly at (202)726-6950 if you have questions or require additional information about this bid.

Sincerely,
/s/
Paula Shaw, Ph.D.
President

Enclosure:
AFG's Revised Pricing

It is important to note that Dr. Shaw's letter refers only to two enclosures: the revised "Section B – Pricing" table and the contractor's acknowledgment of the amendment to the government's solicitation; the letter does not mention a spreadsheet entitled "Labor Rate Calculation" (compl. in 53523, tab A at 1; R4, tab 4 at 1).

The second page of appellant's version of the 1 October 1999 quotation is its revised table labeled "Section B – Pricing" (compl. in 53523, tab A at 2). That table does not specify how hourly employee rates for the listed "Family Practice Clinic Administrative Support Services" or the "Navy Primary Care Clinic Administrative Support Services" were determined. The table lists for the base year the "unit price" for "Optional Increased Medical Record Clerk Services" as $13.87 per hour and for "Optional Increased Medical Clerk Services" at $12.31 per hour; hourly rates for Option Year 1 for these positions were stated at $14.43 and $12.80, respectively. (*Id.*) AFG does not explain how these rates were derived, nor does it argue that these correspond to rates set forth in REV 16.

Next in appellant's proffered 1 October 1999 quotation is a four-page spreadsheet labeled "Labor Rate Calculation" (*id.*, tab A at 3-6) which provides data not found in the table captioned "Section B – Pricing" (*id*. at 2). Critical to appellant's notice argument is that the first page of the "Labor Rate Calculation" spreadsheet lists, among other information, categories of employees by labor classification, the number of anticipated hours for each, and hourly wages. The "Labor Rate Calculation" spreadsheet states that the regular hourly rate for a medical clerk is $8.00, and for a medical records clerk is $9.02. (*Id.* at 3) Page four is also entitled "Labor Rate Calculation"; although pages five and six lack a caption, these appear to be a continuation of that spreadsheet. Hourly employee rates are also shown at page five (*id.* at 4-6). AFG's version of the 1 October 1999 quotation does not contain the contractor's signed acknowledgment of the amended

solicitation clearly mentioned in the body of Dr. Shaw's transmittal letter (compl. in 53523 at tab A) nor does AFG explain this omission.

The government's relatively short, three-page version of appellant's 1 October 1999 first revised quotation begins with the same one-page transmittal letter from Dr. Shaw (R4, tab 4 at 1) as AFG's version (compl. in 53523, tab A at 1). The second page as provided by the government is AFG's revised table labeled "Section B – Pricing" (R4, tab 4 at 2). Like the uncontested iteration of that table submitted with appellant's 24 September 1999 initial quotation (R4, tab 3 at 6), the "Section B - Pricing" table does not disclose wage rates used by appellant, nor does it provide any information pertaining to the manner in which AFG determined its prices (R4, tab 4 at 2). The third and last page of the government's version of AFG's 1 October 1999 quotation is appellant's acknowledgment of the amendment to the solicitation signed by its president, Dr. Paula Shaw (*id.* at 3).

Unlike the copies of the 1 October 1999 quotation furnished by AFG (compl. in 53523, tabs A and S at 9-12), the government's proffered version does not contain the "Labor Rate Calculation" spreadsheet (R4, tab 4). According to the 7 October 2003 declaration of Ms. Mezzatesta, government recipient and records custodian for contractor quotations responding to the solicitation, the government never received particular hourly wage information used by AFG prior to award, nor was the government furnished the spreadsheet labeled "Labor Rate Calculation" as part of AFG's 1 October 1999 quotation before award. Ms. Mezzatesta stated that she personally received AFG's first revised quote and upon receipt placed it in the government's official files. She averred that she has reviewed the government's Rule 4 file submission of that document as found at R4, tab 4, and states that the government has placed into the record a complete and accurate copy of AFG's 1 October 1999 quotation as it was received from AFG (R4, tab 64, ¶¶ 4-5, 11-16, 23, 26-28).

The accuracy of appellant's versions of the 1 October 1999 quote and its enclosures, as placed into the record by AFG in its complaint in 53523, tabs A, S at 9-12, is not supported by the evidence. Among other things, appellant provides no explanation for the absence in its copies of AFG's acknowledgment of the amendment to the solicitation, which is clearly noted in Dr. Shaw's transmittal letter as an enclosure to the first revised quotation (compl. in 53523, tab A at 1). AFG does not explain why the quote, which specified only the amendment acknowledgment and revised table "Section B – Pricing" as enclosures, would have included without mention the "Labor Rate Calculation" spreadsheet that appellant now contends was part of the overall document. We find the government's copy of AFG's 1 October 1999 quote, found at R4, tab 4 to be correct and complete, noting especially the specific language in the transmittal letter that a revised "Section B – Pricing" and an acknowledgment of the amendment to the solicitation were enclosures to that correspondence. We are persuaded by the government's further evidence in Ms. Mezzatesta's affidavit regarding the compilation,

organization, and maintenance of the government's files. AFG has failed to prove that it furnished the government prior to award with a copy of its "Labor Rate Calculation" as an attachment to its 1 October 1999 quotation; that the information actually received by the government explained how appellant calculated its monthly prices; and that the government was placed on notice of appellant's use of REV 16 by AFG's 1 October 1999 quote.

2. *AFG's Second Revised Quotation Dated 11 November 1999*

There is additional controversy over whether appellant's or the government's version of AFG's 11 November 1999 second revised quotation is correct, as AFG contends that its version placed the government on notice of the contractor's use of REV 16 in calculating its price. *See* R4, tab 5; compl. in 53523, tab D. AFG supports its argument that this quote included the "Labor Rate Calculation" by asserting that "the Altos letter clearly states that it addresses the subcontracting issue by providing the agreement between the prime and sub and a calculation showing the relative amounts of effort provided by each member of the team" and that "the "only document that addresses this issue is the sheet entitled "Labor Rate Calculations." (App. br. in 53523 at 3)

Both parties provide Dr. Shaw's transmittal letter of the same date as the first page of the 11 November 1999 quote (R4, tab 5 at 1; compl. in 53523, tab D at 1). Appellant's version then contains at pages two through six an unsigned and undated copy of the "Subcontract for Medical Administrative Support Services between Altos Federal Group, Inc. and Capital Health Services, Inc." (Compl. in 53523, tab D at 2-6) The subcontract states that AFG's prime contract with the government will be attached as Appendix 1 (*id.* at 2). The seventh page of the record copy submitted by AFG is a cover sheet entitled "Appendix 1 Prime Contract." (*Id.* at 7) The eighth page is AFG's revised table labeled "Section B – Pricing" (*id.* at 8). The ninth page is a single page spreadsheet that AFG entitled as "Labor Rate Calculation" which states *inter alia* that the regular hourly rate for medical clerks will be $8.02 with $8.40 for weekends, and that medical records clerks will be paid at the hourly rate of $9.02 with $9.47 for weekends. The spreadsheet does not specify relative percentages of contracting effort for AFG and CHS (*id.* at 9). Pages 10-13 of appellant's submission are handwritten notes dated 10 November 1999 relating to the conversation of that date between Dr. Shaw and Ms. Mezzatesta (*id.* at 10-13).

Appellant's initial brief attaches a copy of its 11 November 1999 quote similar to the one furnished with the complaint in 53523, tab D at 1-9; this document omits only the handwritten notes pertaining to the parties' telephone conversation of 10 November 1999 (app. br. in 53523 at 12-20). Dr. Shaw's 7 October 2003 affidavit is also appended to that brief, in which she avers that the government's version of 11 November 1999 is in error (*id.* at ex. 1, ¶¶ 9-13). Dr. Shaw says that she responded to the issues raised by Ms. Mezzatesta regarding the contractual relationship between AFG and CHS (*id.*, ex. 1,

¶¶ 9-11), and notes that the "only document that addresses" the relative amounts of effort provided by each member of the team "is the sheet entitled 'Labor Rate Calculation'" (*id.* at ex. 1, ¶ 12).

The first page of the government's version of AFG's 11 November 1999 quote mirrors the first page of appellant's, and is the transmittal letter from Dr. Shaw (R4, tab 5 at 1). At page two is AFG's revised table labeled "Section B – Pricing" (*id.* at 2) which is the same as appellant's page eight (compl. in 53523, tab D at 8). There the resemblance ends. Pages three through nine of the government's submission contain the "Teaming Agreement" between AFG and CHS (R4, tab 5 at 3-9). Attachment B of the Teaming Agreement states that AFG will maintain "at least 50 percent of all labor and associated management costs" while providing for "approximately 50 percent of labor and associated management costs for CHS." (*Id.* at 9) The final pages of the government's record copy of AFG's 11 November 1999 quote and attachments is a document entitled "Altos Federal Group Past Performance" which provides information on contracts performed by both AFG and CHS. (*Id.* at 10-19)

Although AFG states in the transmittal letter for its 11 November 1999 quote that its Teaming Agreement with CHS is provided as Attachment 1 (compl. in 53523, tab D), that agreement is found only in the government's version of the document (R4, tab 5 at 1); there is no explanation of that agreement's absence from appellant's record copy. Most importantly, the government's record copy does not contain the "Labor Rate Calculation" spreadsheet depicting specific hourly wages used in pricing AFG's quote, as does appellant's.

We accept the government's version of AFG's 11 November 1999 letter and its attachments as the correct copy of the contractor's correspondence of that date. AFG has failed to convince the Board of the merits of its recordkeeping. We are further troubled by appellant's failure to address the fact that the transmittal letter clearly states that the teaming agreement between AFG and CHS is provided as attachment 1, and that this document is omitted in the copy urged as true by AFG. Additionally, despite AFG's contention that the only document responsive to the mention in its transmittal letter of a "calculation showing the relative amounts of effort provided by" AFG and CHS is the "Labor Rate Calculation," the 11 November 1999 quotation makes no mention of a "*calculation* showing the relative amounts of effort" (emphasis supplied) by each firm. The transmittal letter provides appellant's assurance that AFG will conduct approximately 51% of the contract effort, thereby responding to the government's concern regarding the allocation of work between AFG and CHS, as relayed during Ms. Mezzatesta's 10 November 1999 telephone call to Dr. Shaw. Attachment B of the teaming agreement also requires that AFG maintain "at least 50 percent" of all costs. (R4, tab 5 at 1, 9) According to Ms. Mezzatesta's declaration, the government's record copy correctly reflects AFG's submission. (R4, tab 64 at ¶¶ 4-5, 14-16) In this Rule 11 record submission, we are unaided by hearing testimony that might explain these

differences. Left with the unexplained inconsistencies in AFG's proffered record regarding copies of critical documents that call into question AFG's recordkeeping ability, we conclude that AFG's version of the 11 November 1999 document is less credible than the government's and accept the government's record copy found in R4, tab 5. Because neither of the government's more acceptable versions of AFG's 1 October and 11 November 1999 submissions contains a copy of AFG's spreadsheet labeled "Labor Rate Calculation" stating the hourly wages at issue, we find that the government was not on notice prior to award of AFG's use of REV 16 in preparing its offer.

We also reject appellant's contention that only the "Labor Rate Calculation" spreadsheet missing from the government's record copy of the 11 November 1999 quotation would have answered the government's query regarding the relative amount of work to be performed by AFG. (App. br. in 52523 at 3) According to Attachment B of the teaming agreement between AFG and CHS, found only in the government's Rule 4 file, AFG would incur "at least 50 percent of all labor and associated costs." (R4, tab 5 at 9) This statement is responsive to the contract's FAR 52.219-14 LIMITATIONS ON SUBCONTRACTING, ¶ (b)(1) requirement that the prime contractor expend at least 50% of contractor personnel costs, the issue raised by Ms. Mezzatesta in her telephone call of 10 November 1999 to Dr. Shaw. (R4, tab 64 at 3-4, ¶¶ 14-16)

DECISION

A. *The Government's Challenge to the Remedy of Contract Reformation in ASBCA No. 53523*

AFG contends in No. 53523 that it is entitled to contract reformation following its discovery of alleged mutual mistakes after award (app. br. in 53523 at 5). The government posits that "correction of mistakes through contract reformation or any other vehicle" is not permitted in contracts made under simplified acquisition procedures for commercial items (SAP-CI) (gov't br. in 53523 at 28). The government observes that the less restrictive measures of FAR parts 12 and 13 exempt this type of purchase from various acquisition-related laws, argues that these regulations do not provide for the correction of errors in quotations, and asserts that FAR part 14 SEALED BIDDING, particularly FAR ¶ 14.407-4 MISTAKES AFTER AWARD, is inapplicable (*id*. at 28-31).

The Board considered a similar argument in *Orion Technology, Inc.*, ASBCA No. 54608, 06-1 BCA ¶ 33,266, wherein appellant sought contract reformation based upon a unilateral mistake discovered after award. The government defended against the claim by asserting that FAR 14.407 MISTAKES IN BIDS did not apply to awards made under FAR subpart 13.5 TEST PROGRAM FOR CERTAIN COMMERCIAL ITEMS, and argued that simplified acquisition procedures imposed only the duty of reasonableness upon the contracting officer. The Board disagreed, and distinguished

facilitating the procurement process by avoiding unnecessarily constrictive procedures from precluding contractors from obtaining relief due to government error, and held that "While [FAR 13.106-2 EVALUATION OF QUOTATIONS OR OFFERS, ¶ (b)(1)] gives the contracting officer flexibility as to evaluation procedures, it does not affect the principles applicable to remedies for mistakes disclosed after award," *Orion*, 06-1 BCA at 164,853. *Accord*, *Finlen Complex, Inc.*, B-288280, 2001 WL 1198650 (Comp. Gen) at *7 ("the labeling of a procurement as 'simplified' does not absolve the agency from its obligation to treat vendors fairly").

Reformation traditionally has been the relief afforded in cases where the government knew or should have known of the mistake in bid, or where there was no meeting of the minds in making the contract. This equitable remedy was developed to prevent the "overreaching of a contractor by a contracting officer when the latter has the knowledge, actual or imputed . . . that the bid is based on or embodies a disastrous mistake and accepts the bid in face of that knowledge," *Ruggiero v. United States*, 420 F.2d 709, 713 (Ct. Cl. 1970). The issue of fundamental fairness is especially important where, as in the instant appeals, the contractor is a small business, as one of the goals of part 13 is improving "opportunities for small, small disadvantaged, and women-owned small business concerns to obtain a fair proportion of Government contracts," FAR 13.002 PURPOSE, ¶ (b).

B. *AFG's Allegations of Mutual Mistakes in ASBCA No. 53523 Regarding the Wage Determination to be Followed During the Contract's Base Year*

AFG's certified claim of 23 April 2001 seeks redress for mutual "mistake[s in] bid after award in accordance with FAR 14.207-4 [sic, 14.407-4]." Among other relief, appellant asks "that the subject contract be modified for the base year to delete [REV 15] and replace [it] with [REV 16] to reflect the wages employees are currently being paid." AFG in the alternative "requests an equitable adjustment for the difference in wages between WD 16 and WD 15 in order to compensate the employees affected by this disparity." (R4, tab 32 at 1) Later asserting that this mistake was a clear mathematical error, AFG described the alleged mutual mistake as: "Specifically, the Government failed to amend the RFQ to recognize REV 16, and Altos failed to employ the wage determination called out in the RFQ" (app. br. in 53523 at 6).

The government raises multiple arguments in rejecting appellant's claim. These include jurisdictional challenges to reformation as a remedy available under SAP-CI contracts (gov't br. in 53523 at 28-30) which we rejected in Decision § A, *The Government's Challenge to the Remedy of Contract Reformation in ASBCA No. 53523*. The government also contends that AFG failed to prove the government was on notice of appellant's use of REV 16 prior to award due to receiving AFG's two revised quotations (*see* compl. in 53523, ¶¶ 12-14, tabs A, S; app. br. in 53523 at 3, 6; app. reply br.

in 53523 at 3-4, 7), an argument we accepted; *see Further Findings* determining that the government was not so informed by those submissions. The government further argues that AFG failed to prove requisite elements to prevail on the theory of mutual mistake, including that the alleged mistake was mutual (gov't br. in 53523 at 31-40) or a mathematical error occurred (*id.* at 40-44), or that appellant established its intended quote (*id.* at 49).

With respect to the request for reformation, AFG must furnish "clear and convincing evidence" of the alleged mistake, a decidedly demanding burden to obtain reformation after award. *National Australia Bank v. United States*, 452 F.3d 1321, 1329-30 (Fed. Cir. 2006); *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990) citing 3 *Corbin on Contracts*, § 614 at 723 (1960) ("a court will not decree reformation unless it has convincing evidence that the parties expressed agreement and an intention to be bound in accordance with the terms that the court is asked to established and enforce" (*id*. at 725). Reformation due to a mutual mistake is justified as a matter of fundamental fairness, designed to bring about the contract the parties believed to have been made. AFG must show both that the alleged mutual mistake was made regarding a fact essential to the making of the bargain, and that the contract did not impose the risk of making that mistake upon AFG as proponent of reformation. *Atlas*, 895 F.2d at 750 citing RESTATEMENT (SECOND) OF CONTRACTS §§ 151-152, 155 (1981); *National Presto Indus., Inc. v. United States*, 338 F.2d 99, 107-09 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962, 85 S.Ct. 1105, 14 L.Ed.2d 153 (1965). *Accord*, *Alfair Development Co., Inc.*, ASBCA No. 53119, 05-2 BCA ¶ 32,990 at 163,514, *aff'd*, 208 Fed. Appx. 840 (Fed. Cir. 2006).

AFG asserts errors by the parties regarding the choice of employee wage rates for the base year as proof of the first requirement that a mistake in fact occurred prior to award. To be sure, missteps in selecting wage rates were made by both AFG and the government. AFG stipulates that both the solicitation and resulting contract contained REV 15 (JS 9) and that it "was aware of the rescission of REV 15" prior to award, but that AFG "bid the contract and paid its employees according to" REV 16 as the "proper wage determination" (app. reply br. in 53523 at 2). The record shows that the government included REV 15 in the contract, but failed to learn prior to award that this wage determination had been superseded by REV 16. Among difficulties facing appellant in meeting its burden of proof is that AFG has not proven that the parties made the same "mistake in fact" prior to award that would warrant revision of the contract. At most, appellant has shown that it harbored a misconception regarding the wage determination to be followed in performing the base year of contract; this is insufficient to prevail, as to be "mutual" the mistake must be bilateral and reflect a misunderstanding, error or incorrect assumption common to the parties. *See Western Cartridge Co. v. United States*, 61 Ct. Cl. 482, 498 (1926) ("The rule unquestionably is that 'the mistake must be mutual and common to both parties to the instrument'" and that "both have done what neither intended"). This commonality is essential, for the mistake must materially

affect the basis for the bargain. *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990). That both the government and AFG proceeded under misapprehensions regarding the status of REV 15 is insufficient where their mistakes were unrelated, and the Board will not grant the remedy of reformation where its proponent cannot meet its burden as in so doing we wrongly should have "engaged in the singular office, for a court of equity, of doing right to one party at the expense of a precisely equal wrong to the other," *Wm. Cramp and Sons Ship and Engine Bldg. Co. v. United States*, 46 Ct. Cl. 521, 536 (1911), *aff'd*, 239 U.S. 521 (1915).

With respect to appellant's alternative request for an equitable adjustment, AFG correctly recites precedent for the proposition that relief for a unilateral mistake in bid may be found where the petitioner proves the following:

> (1) a mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error; (3) prior to award the Government knew or should have known that a mistake had been made; (4) the Government's request for [verification of the quotation] was inadequate; and (5) proof of the intended [quotation] was established.

(App. reply br. in 53523 at 5 citing *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed. Cir. 1987) and *United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038 (Fed. Cir. 1983)). *Accord, Alfair*, 05-2 BCA at 163,514-15 citing *McClure Electrical Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997) quoting *Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26,901 at 133,954. The purpose of relief on this basis is to protect a contractor from overreaching by the government under circumstances where the government knew or should have known of the error. *Ellis Environmental Group, LC*, ASBCA No. 54066, 07-1 BCA ¶ 33,551 at 166,162 citing *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 54529, 52551, 02-1 BCA ¶ 31,849 at 157,395.

Assuming the first requirement is met, AFG urges that it meets the second requirement that the alleged mistake be a "clear-cut clerical or mathematical error" by characterizing the failures of the government to amend the solicitation, and of AFG to utilize wage rates called out in the RFQ, as "clear mathematical errors" (app. reply br. in 53523 at 7). Well-established precedent provides that the term "mathematical" has also been used instead of "arithmetical" in describing errors for which relief will lie, *Rockwell International Corp.*, ASBCA No. 41095, 95-1 BCA ¶ 27,459 at 136,808 citing *Aydin Corp. v. United States*, 669 F.2d 681, 687 (Ct. Cl. 1982); *Chemtronics, Inc.*, ASBCA No. 30883, 88-2 BCA ¶ 20,534 at 103,835. A "mathematical" error must be clearly evident, "such as misplacing a decimal point, or in processes such as addition, subtraction, division, or multiplication," *Rockwell* at 136,808 citing *Aydin Corp.*

v United States, supra; Boeing Computer Services, ASBCA No. 42674, 94-3 BCA ¶ 27,114; *Northern NEF, Inc.,* ASBCA No. 44996, 94-3 BCA ¶ 27,094; *Solar Foam Insulation,* ASBCA No. 46921, 94-2 BCA ¶ 26,901; *Triax Pacific, Inc.*, ASBCA No. 41891, 94-1 BCA ¶ 26,380; *Klinger Constructors, Inc.,* ASBCA No. 41006, 91-3 BCA ¶ 24,218; *Worldwide Parts, Inc.,* ASBCA No. 38896, 91-2 BCA ¶ 23,717; *Chemtronics, Inc., supra*.; and *Columbia Pacific Constr. Co.,* CG No. B-207313, 82-1 CPD ¶ 436.

AFG has not shown its use of REV 16 instead of REV 15 was a clear-cut mathematical error, and has not met this essential element of proof. AFG's selection of REV 16 in calculating its quote was neither the simple transposition of a number, the missing of a decimal point, nor an inaccurate computation that was plain or evident. Appellant chose deliberately to disregard the wage rates stated in the contract, survey the DOL website for then-current information, select REV 16 to calculate its prices, and repeatedly submit quotes based upon lower REV 16 rates instead of wages specified in both the RFQ and the contract. AFG took these measures without disclosing these choices to the government before tendering its offers; by using REV 16, appellant made an error in judgment for which it bears responsibility.

The third criterion focuses upon whether the government knew or should have known prior to award of AFG's mistake regarding the wage rates, *Rockwell* at 136,808. AFG contends that it provided the government with a copy of its "Labor Rate Calculation" which disclosed the use of hourly rates for employees consistent with REV 16, as part of AFG's 1 October 1999 and 11 November 1999 quotations. We determined in *Further Findings* that AFG failed to meet its burden of proving that the government was placed on actual notice of AFG's alleged mistake in using REV 16 by these quotations. In assessing whether the government should have known of AFG's mistake, we apply the test of "whether a reasonable person, knowing all the facts and circumstances, would have suspected a mistake," *Orion Technology, Inc.*, ASBCA No. 54608, 06-1 BCA ¶ 33,266 at 164,854 citing *Chernick v. United States*, 372 F.2d 492, 496 (Ct. Cl. 1967). Beyond its assertions regarding the disputed "Labor Rate Calculation" spreadsheet, AFG has not provided proof that the government otherwise should have known of its use of REV 16 prior to award. We find appellant has not proven that the government knew or should have known of its use of REV 16 prior to award, and failed to meet this necessary element.

In view of appellant's failure to establish elements (2) and (3), we need not discuss the remaining criteria. Appellant has failed to prove a basis for relief as to its use of REV 16.

C. *ASBCA No. 53523: AFG's Allegations of Mistakes Regarding Its Omission of the Required Hourly Health & Welfare Benefit for Each Employee*

The second mistake alleged by AFG deals with the hourly H&W and holiday and vacation benefits mandated by REV 15 for each employee during the base year (R4, tab 32 at 2). AFG describes the government's omission of the holiday and vacation benefit from its IGE, and appellant's failure to consider the H&W benefit cost, as mistakes due to mathematical errors as follows:

> Also the Government failed to base its IGE on the correct terms of the SCA because the Government failed to include an amount for mandated federal holiday and vacation time leading to an understatement in the number of labor hours required to proposed [sic] in performance of the contract. Conversely, Altos failed to include the required H&W in its bid price. All of these mistakes are clear mathematical errors.

(App. br. in 53523 at 6)

AFG elaborates that "the Government's defective IGE" led to the government's "inability to verify the bid prices" and that had the government correctly calculated its IGE, it would have realized that AFG's price was insufficient to cover all required contract costs, including taxes, overhead, general and administrative expenses, and profit (app. reply br. in 53523 at 7-8). Appellant asserts that if holiday and vacation pay were included in the IGE, its bid would only have exceeded the IGE by 11%, not 21% (app. br. in 53523 at 6). We understand AFG to argue that reliance by the government on the allegedly flawed IGE as a basis for evaluating potential contractors' quotes was unreasonable, and that the government should be charged with constructive notice of appellant's error in omitting the H&W benefit because AFG's quote was too low to cover costs of performance.

The government disputes appellant's arguments, terming any omission by the contractor of the H&W benefit "a unilateral mistake [on the part of appellant] and an act of carelessness for which the Navy bears no responsibility" (gov't reply br. in 53523 at 42). The government disagrees that there was reason to believe that it either knew or should have known of the error, and contends that the alleged mistake could not have been inferred from the information available during evaluation of the quotes (*id.* at 44-45, 49). The government argues that the contracting officer's evaluation did not rely upon the IGE alone but reasonably considered prices offered by other submissions. It contends that AFG's price was not deemed unreasonably low as it was comparable to other acceptable quotes, AFG's price quote was in the middle range, and the quote did not appear irregular on its face (*id.* at 46-47).

We focus upon the government's primary argument that there was here, at most, a unilateral mistake on the part of appellant, and that AFG failed to meet its burden to prove (among other things) that the government was on notice of AFG's omission of the H&W benefit from its quote. We again follow the analysis articulated in DECISION § B as it relates to relief for a unilateral mistake in bid. *See Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed. Cir. 1987) and *United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038, 1046 (Fed. Cir. 1983).

The government used several factors in evaluating the various quotations received in response to the RFQ, including total price, past performance, and whether overall pricing for the base year and options was balanced. *See* INSTRUCTIONS TO OFFERORS-COMMERCIAL ITEMS (FAR 212-1)(JUN 1999) (R4, tab 2 at 37-38), and EVALUATION – COMMERCIAL ITEMS (FAR 52.212-2)(JAN 1999) (*id.* at 39). According to the government's business clearance memorandum (BCM) memorializing the evaluation of quotes received (R4, tab 63), the government did not rely solely on its roughly-prepared IGE, calculated as a "baseline" by multiplying minimum staffing requirements by wage rates set by REV 15. The government's BCM noted that the IGE's "calculated basic contract costs do not contain the application of indirect rates for additional overheads (FICA, FUTA, SUTA, etc.) or G&A and profit, as routinely proposed by industry, and is therefore somewhat understated," (*id*. at 7). The total "base" cost for the base year and all four option years, as computed by the government, within these constraints, was $2,535,399.12 (*id*.). Although including holiday and vacation pay would have increased the IGE, it still would have been well below AFG's offers. Two offers were rejected as priced too low, with the government's fear that it was "highly doubtful that these two quoters [sic] can perform, recruit and maintain staff at the 'bare bone' prices proposed," especially where these companies lacked relevant past experience. AFG's past experience and other qualifications were deemed to compare favorably with that of other acceptable offerors, and the government determined that the other quotes that ranged from 10-50% higher did not offer the government further value (*id*. at 8). Even the disparity among quotes received has not inevitably been proven to place the government on constructive notice of error, as "Price disparity alone does not necessarily mean there has been constructive notice of a mistake where other factors tend to negate the inference of an error," *Orion Technology, Inc.*, ASBCA No. 54608, 06-1 BCA ¶ 33,266 at 164,854.

Conclusion in ASBCA No. 53523

AFG failed to satisfy the requisite elements of proof for reformation due to a mutual mistake or an equitable adjustment and we deny the appeal. Because we are concerned only with "the contract rights of the parties (appellant and the contracting agency) rather than the labor standards or the Department of Labor," *Dahlstrom & Ferrell Construction Co., Inc.*, ASBCA No. 30741, 85-3 BCA ¶ 18,371 at 92,164, we exercise our jurisdiction to hold that the contract obligated appellant to pay not less than

the minimum wages of REV 15 during the base year. The contract at FAR 52.222-41, ¶ (c)(1) requires the contractor to pay the wages "as specified in any wage determination attached to this contract." Here, REV 15 was attached to the contract and applies to the base year. It is irrelevant for purposes of this decision that REV 15 had been superseded by REV 16, especially where AFG was knowledgeable regarding both the change and the government's failure to amend either the solicitation or the contract but did not alert the government until months after award. We note that the wage rates of REV 15 are minimum, not maximum, amounts to be paid employees and exceeded the rates required by REV 16, which DOL had instituted at the time the contract was awarded. Adherence to the contract terms would not have exposed AFG to the peril of having paid less than DOL-mandated wages during the base year of performance. There is no disagreement that the contract required that each employee be paid an hourly H&W benefit; however, AFG failed to prove the government was on notice prior to award that AFG had omitted this cost from its price.

D. *AFG's Appeal from the Government's Affirmative Claim for the Return of an Alleged Overpayment of H&W Benefits in ASBCA No. 54404*

In ASBCA No. 54404, AFG appeals from the contracting officer's final decision of 4 August 2003 in which the government affirmatively reclaims monies allegedly overpaid to AFG for the first option year of the contract. Relying upon FAR 52.222-43, the Price Adjustment clause, particularly ¶¶ (d) and (d)(1), the government seeks a total of $23,940.90 (R4, tab 66 at 4).

The first component of the $23,940.90 the government seeks to recoup is $11,107.57, previously given to AFG by unilateral Modification No. P00004 dated 26 September 2001, as an equitable adjustment attributed to increased minimum wage requirements for the first option year (R4, tab 44 at 3). CO Sweetra later decided that this amount was determined improperly because the government calculated the increase by comparing wage rates in REV 16, which AFG actually paid employees during the base year, to the contract's higher wages in REV 17 for the first option year. The contracting officer stated that "the proper adjustment to the Contract Price, in accordance with FAR 52.222-43, should have reflected the difference between Revision 15 which was originally included in the Contract, and Revision 17, which was incorporated by Modification P00004." The government concluded that, because wages in REV 17 were less than those found in REV 15, appellant should not have received the "increase of $11,107.57 that was based on the difference in REV 16 and REV 17 wage rates" (R4, tab 66 at 3). The government supports recovery of these alleged overpayments by arguing that it has authority to claim a retroactive price adjustment under the rubric of FAR 52.222-43, even after contract completion (gov't br. in 54404 at 25-27; gov't reply br. in 54404 at 9-10).

Central to the government's argument for recovery of the $11,107.57 is the assertion that the contracting officer "had no legal basis" to pay the contractor in excess of amounts dictated by FAR 52.222-43 (gov't reply br. in 54404 at 9). If the Board grants the remedy sought by the government, it would effectively void the contested portion of Modification No. P00004. The government contends that the contracting officer's decision to use REV 16 as the baseline to calculate the adjustment for first option year wages was contrary to FAR 52.222-43(d), because REV 16 was never made part of the contract (gov't br. in 54404 at 25-27). This provision of the Price Adjustment clause states that the contract price "will be adjusted to reflect the Contractor's *actual* increases or decreases in *applicable* wages and fringe benefits" (*id*., emphasis supplied). This adjustment may only be granted to the extent that the contractor incurs an increase or decrease in its costs due to changes in employee minimum wage rates to comply with the DOL "wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period," FAR 52.222-43(d)(1).

Next, in addition to the return of the $11,107.57 by which it erroneously increased the contract by Modification No. P00004, the government also contends that the overall fixed-price for the first option year should be decreased by $12,833.33. This is the amount the government calculates to be the difference between the contract's first option year minimum wage rates set by REV 17, and the contract's higher requirements of REV 15 for the base year (gov't br. in 54404 at 24-25, citing R4, tab 66 at 4). The government again relies upon the Price Adjustment clause, which requires an adjustment to reflect the contractor's actual increase or decrease in applicable wages and fringe benefits to comply with the DOL wage determination applicable at the beginning of the renewal option period (*id.* at 26, citing FAR 52.222-43(d)(1)).

AFG largely reiterates its argument from No. 53523 of alleged mistakes, and continues to seek contract reformation to incorporate REV 16 as the base year wage determination on that basis (app. br. in 54404, *passim*). Appellant contends that because No. 54404 is "the mirror-image" of No. 53523, if the Board grants the latter appeal and "modifies the contract to reflect" REV 16 wages, then the government's "claim to decrease the contract price for option year 1 must fail" (app. opp'n in 54404 at 5). We reiterate our rejection of AFG's mutual mistake as detailed in No. 53523 and decline to reform the contract to incorporate REV 16 for the base year; it is unnecessary to further consider that assertion here.

AFG's alternative argument, succinctly stated without legal or factual support, is that the contracting officer had authority to modify the contract to pay the contractor amounts that AFG actually spent to comply with the higher wages of the first option year by providing employees with H&W benefits (app. br. in 54404, *passim*). Appellant contends that even if the Board finds that REV 15 was the proper wage determination for the base year, "the Board can find that the contracting officer had the discretion to issue the modification at issue here" (app. opp'n in 54404 at 5).

The government is correct that, where a payment is erroneously made and the demand for its return timely, "the government can claim a retroactive price adjustment, even after contract completion." *Olympiareinigung, GmbH*, ASBCA No. 53643, 04-1 BCA ¶ 32,458 at 160,562 citing *Maxima Corp. v. United States*, 847 F.2d 1549, 1555 (Fed. Cir. 1988). Further, "it is not only lawful but the duty of the government to sue for a refund thereof, and no statute is necessary to authorize" the recovery, *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959), citing *United States v. Wurts*, 303 U.S. 414 (1938). There was no basis for paying AFG in excess of the amounts dictated by the Price Adjustment clause, particularly where REV 16 was never made part of the contract; the contracting officer cannot bind the government to pay more than is authorized by statute or regulation. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 425 (1990).

We agree that the government's $11,107.57 favorable adjustment to AFG was inconsistent with the Price Adjustment clause because REV 16 was never made part of the contract and should not have been used to evaluate potential wage increases for the base year. The clause provides that the contractor may only be recompensed for additional costs actually incurred due to higher contract minimum wage determinations adopted in subsequent years; *see* FAR 52.222-43(d); *Professional Services Unified, Inc.*, ASBCA No. 45799, 94-1 BCA ¶ 26,580 at 132, 248 (the Price Adjustment clause "does not provide a vehicle for adjusting the contract price with respect to changes in wages or fringe benefits effectuated during the base year of a multiple year or option contract to which the SCA applies"). The government by Modification No. P00004 paid AFG for the actual increase the contractor incurred by paying employees in accordance with REV 17 rather than rates earlier paid using REV 16, satisfying one premise of the Price Adjustment clause that a contract will be increased or decreased due to amounts "actually paid" by the contractor. However, the clause disqualifies AFG for reimbursement for this amount, in that it also expressly conditions increases upon changes attributable to "applicable wages," FAR 52.222-43(d). Neither AFG's use of REV 16 nor the government's calculation of changed amounts was consistent with the contract's requirement of REV 15 as the applicable wage for the base year, and it is undisputed that REV 16 was never made part of the contract. Because the contract's minimum wages were higher in the base year than the first option year, AFG did not experience an "actual increase" in "applicable wages."

Furthermore, the contract's fixed-price should be decreased to reflect the lower DOL wages for the first option year, and the government is entitled to recover the erroneously paid $12.833.33 difference. The Price Adjustment clause prohibits contractors from including contingency labor costs in base year prices, squarely places the risk of increased minimum wages for out-years in a fixed-price service contract upon the government, and permits the government to increase the contract price only to cover the contractor's actual costs of complying with increased minimum wages in effect at the

beginning of an option year. FAR 52.222-43 ¶¶ (b), (d)(1); *JDD, Inc.*, ASBCA No. 55282, 06-2 BCA ¶ 33,345 at 165,346. Although contractors must bid the base year in accordance with attached contract wage rates for that period, contract modifications adjusting the price for subsequent option years are made, as necessary, to comport with DOL minimum wage rates. *United States v. Service Ventures, Inc.*, 899 F.2d 1, 3 (Fed. Cir. 1990); *accord, Guardian Moving and Storage Co., Inc. v. Hayden*, 421 F.3d 1268, 1273 (Fed. Cir. 2005). Conversely, the government is protected against declining minimum wages after the base year, and the contract will be decreased to reflect those decreased costs of compliance. Although AFG failed to follow REV 15 as required by the contract for the base year and chose to pay employees the lower rates of REV 16, it cannot recover its actual cost differential to comply with REV 17 for the first option year as REV 16 was never made applicable to the contract. The government is entitled to lower the first option year contract price retroactively to conform to the lower wages of REV 17, and is entitled to recoup the $12,833.33 claimed as well as the $11,107.57.

Conclusion in ASBCA No. 54404

We deny AFG's appeal from the government's affirmative claim for overpayments totaling $23,940.90 made during the contract's first option year.

Dated: 23 August 2007

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

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. 53523, 54404, Appeals of Altos Federal Group, rendered in conformance with the Board's Charter.

Dated:

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