ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Beyley Construction Group Corporation	)	ASBCA No. 55692
	)	
Under Contract No. DAJN02-01-C-0101	)	

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APPEARANCES FOR THE GOVERNMENT: COL Anthony M. Helm, JA
Chief Trial Attorney
LTC David W. Newsome, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING

Beyley Construction Group Corporation (BCG) appealed from the failure of a contracting officer (CO) to issue a decision on its claim submitted almost two years earlier. BCG's claim sought reformation of its contract due to a mistake made in bidding on the contract and other equitable adjustments arising out of the performance of the grounds maintenance contract at Fort Buchanan, Puerto Rico. As the case was proceeding before the Board, the CO issued a decision on 12 March 2007 denying BCG's claim in its entirety. In October 2007, the Board issued a pretrial order scheduling a hearing on entitlement and quantum. As the hearing approached, both parties decided to submit the appeal on the written record without a hearing pursuant to Rule 11.

FINDINGS OF FACT

1. On 10 August 2001, United States Army South (USARSO), Directorate of Contracting (government) issued a solicitation (DAJN02-01-T-0076) for an 8(a) small business set aside contract for grounds maintenance at Fort Buchanan, Doddea and USARSO properties in Puerto Rico (R4, tab 1 at 1 and 14 of 39).

2. The scope of the contract as set out in the solicitation is as follows:

> C.1.1 SCOPE OF WORK: The contractor shall provide all personnel, management, equipment, materials, supplies and any other items and services not government furnished necessary to perform grounds maintenance at Fort Buchanan,

> Doddea and USARSO properties, Puerto Rico. The services include; mowing improved and semi-improved grounds; fence line clearing and cleaning; policing and removal of leaf and debris; maintenance of all open surface drains on post; edging; trimming; around obstruction; sign cleaning; removal of dead and down trees; clearing right of way of all aerial electrical lines; clean up and clearing before, during or after natural disasters and re-planting selective plant material and plant bed maintenance. Contractor shall perform an initial site visit to review all the areas to be serviced according to this Scope of Work. The contractor shall perform to the standards and specifications in this contract.

(R4, tab 1 at 14-15 of 39)

3. The solicitation contemplated a contract for a base year (29 September 2001 to 28 September 2002) (CLIN No. 0001) plus two option years (CLIN Nos. 0002 and 0003). The first option year was to run from 29 September 2002 to 28 September 2003; the second option year was to run from 29 September 2003 to 28 September 2004. (R4, tab 1 at 2, 6, 9 of 39)

4. For the base year, the solicitation included the following line items or CLINs: CLIN No. 0001AA, LOT A, Fort Buchanan ground maintenance; CLIN No. 0001AB, LOT B, school areas ground maintenance; CLIN No. 0001AC, LOT C, housing areas ground maintenance; CLIN No. 0001AD, tree pruning, removal and clearing, and drainage system maintenance; CLIN No. 0001AE, maintenance of the perimeter road fence line and water tank areas; CLIN No. 0001AF, clearing and cleanup after natural disasters, and CLIN No. 0001AG, restoration of damaged areas. Each line item was required to be performed in accordance with the appropriate sections of the Performance Work Statement (PWS). The line items for the option years were separately listed under different line item numbers. The solicitation required bid prices for all line items except those pertaining to clearing and cleanup after natural disasters (CLIN No. 0001AF). Pricing CLIN No. 0001AF and its option counterparts was to be on a "TBN" or "To Be Negotiated" basis. (R4, tab 1 at 2-12 of 39; supp. R4, tab 3; BCG 1550-51)

5. The solicitation and resulting contract, Contract No. DAJN02-01-C-0101 (Contract 0101), incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 2001) (R4, tab 1 at 31 of 39). The solicitation and Contract 0101 added by addendum to Paragraph (q) of FAR 52.212-4, FAR 52.217-8, OPTION TO EXTEND SERVICES (NOV 1999) and FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (NOV 1999), and a clause entitled AUTHORITY OF GOVERNMENT REPRESENTATIVES, stating *inter alia* that the Contracting Officer's Representative (COR) was not authorized to make changes. They also included FAR 51.212-5, CONTRACT

TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS – COMMERCIAL ITEMS (FEB 2001). (*Id.* at 31-32, 36 of 39)

6. The government exercised its option with respect to the First Option Year extending the contract through 29 September 2003 (Modification No. P00007) (supp. R4, tab 43). Thereafter, through Modification Nos. P00009, P00010 and P00011, the government extended BCG's services to 28 March 2004 (supp. R4, tabs 44, 45, 46). Finally, on 26 March 2004, the government exercised its option with respect to the Second Option Year extending the contract through 28 March 2005 (Modification No. P00012) (supp. R4, tab 47).

7. The contract incorporated FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (41 U.S.C. 351, *et seq.*) (R4, tab 1 at 38 of 39). This clause provides:

> (c) *Compensation.* (1) 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 this contract.
>
> ….
>
> (e) *Minimum Wage.* In the absence of a minimum wage attachment for this contract, neither the Contractor nor any subcontractor under this contract shall pay any person performing work under this contract (regardless of whether the person is a service employee) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938. Nothing in this clause shall relieve the Contractor or any subcontractor of any other obligation under law or contract for payment of a higher wage to any employee.

The contract did not attach any wage determination and, accordingly, the minimum wage—$5.15—was applicable. Had it been made a part of the contract, the proper wage determination (WD) would have established a wage of $6.13 plus $2.02 in health and welfare benefits. (R4, tab 7 at 3; supp. R4, tab 48 at 26)

I.

Mistake in Bid

8. The solicitation went to eight potential bidders. Four bids were received:

Bidders	Bid Amount
Beyley Construction Group (BCG)	$2,417,064.00
Professional Management & Environmental Control (PM&EC)	$3,283,937.48
IRC Air & Contractors, Inc (IRC)	$3,660,708.00[1]
Coqui Lawn Services, Inc. (Coqui)	$2,478,000.00

(R4, tab 39) The government sought verification of bids to ensure that the bidders understood that CLIN Nos. 0001AG, 0002AG and 0003AG would not be considered in evaluation of bids. BCG confirmed its bid by fax dated 7 September 2001. (Supp. R4, tabs 34, 35)

9. BCG was the low bidder and was awarded Contract 0101 on 29 September 2001 (R4, tab 1).

10. BCG's bid was prepared "mainly" by Ramon L. Mercado (Mercado) and Francisco Vila (Vila) (supp. R4, tab 48, Beyley dep. at 30). Mercado would later become project manager of the Fort Buchanan contract. Vila ran All Maintenance & Remodeling Contractor (AMRC), a firm that was engaged in "landscaping, office maintenance, and light construction" (*id.*, Beyley dep. at 29). According to Manuel Beyley (Beyley), president of BCG, he and his wife owned AMRC but he "do[es] not interfere in anything that had to do with the company" (*id.*, Beyley dep. at 29).

11. According to Beyley, to perform the Fort Buchanan contract, BCG would enter into a subcontract with AMRC. AMRC would provide "advice…and the equipment to do the work" (supp. R4, tab 48, Beyley dep. at 30). BCG employees, however, would perform the work under the contract (*id.*, Beyley dep. at 31).

12. Beyley testified at his deposition that he did not personally "look at the details of what was included in the specifications." He testified that after Mercado and Vila had "the number, the amount, more or less established," he sat down with them and asked questions with respect to personnel and equipment based on the scope of work. Of the three, no one realized that the bid did not include health and welfare benefits for the employees. (Supp. R4, tab 48, Beyley dep. at 27-28)

[1] As revised pursuant to its 10 September 2001 letter (R4, tab 38).

13. When asked why BCG did not include health and welfare costs in its bid, Beyley gave the following explanation:

> Q. Did you -- why did you not include health and welfare in the -- in your bid for this particular appeal of this contract?
>
> A. Because we forgot. Okay, because we forgot to include it. …[W]e included…the rate that was provided by the government with the table they have where it says the set amount that we have to pay for each trade…that we had.
>
> But we forgot -- we forgot the requirement of health and welfare.
>
> Q. So you included the rate that the government provided but did not include the health and welfare rate; is that correct, as I understand it?
>
> A. It is correct.

(Supp. R4, tab 48, Beyley dep. at 26)

14. The United States Department of Labor (DOL) issues wage determinations (WDs) under the Service Contract Act. 41 U.S.C. § 358. When incorporated into a federal services contract, a WD establishes the minimum wages and fringe benefits a contract must pay non-exempt service contract employees working under the contract. 41 U.S.C. § 351. Fringe benefits include "medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, cost of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor." 41 U.S.C. § 351(a)(2).

15. BCG expected to pay its service employees in accordance with the WD (supp. R4, tab 48 at 45; finding 7). According to its 4 September 2001 "ORIGINAL ESTIMATE," BCG included a wage rate of $6.13 plus 40% for workman's compensation insurance, social security and unemployment insurance (R4, tab 7 at 2, 7). BCG's bid papers do not indicate it included health and welfare benefits which would have amounted to $2.02 (R4, tab 15). Beyley testified that had BCG included health and welfare benefits, the fringe benefit portion of its service employees' pay "would have been like around 72 percent instead of 40 percent" (supp. R4, tab 38 at 45).

16. The evidence shows that Fort Buchanan Directorate of Public Works (DPW) prepared an Independent Government Estimate (IGE) of the contract work prior to issuance of the solicitation. The IGE was prepared by D. Ruiz and was dated 1 August 2001. (Supp. R4, tab 33) The total cost estimated for the base contract year was $1,228,697.80, for the first option year was $1,265,337.05, and for the second option year was $1,304,197.62 (*id.* at 4, 9, and 14 of 15). The total estimated costs for three years came to $3,798,232.47. The IGE used the then prevailing minimum wage rate of $5.15 plus 35.7% in fringe benefits (supp. R4, tab 33).

17. For bid evaluation purposes, the government used $2,917,332. This amount did not include CLIN 0001AF (CLEARING AND CLEANUP AFTER NATURAL DISASTER) and CLIN 0001AG (RESTORATION OF DAMAGE [sic] AREAS) and their counterparts for the option years (supp. R4, tab 52 at 1). Contract specialist Geneva Emiliani's 28 September 2001 "ANALYSIS AND PRICE COMPARISON" showed the following comparison between the government's estimate and the four bids received:

Beyley Construction Group	$2,417,064
Coqui Lawn Service, Inc.	$2,478,000
IGE (government estimate)	**$2,917,332**
Professional Management & Environmental Group	$3,283,937
IRC Air And Contractors, Inc.	$3,660,708

(Supp. R4, tab 52)

18. Using the same basis for comparison, the IGE ($2,917,332) was 20.69% above BCG's bid and 17.72% above Coqui's bid ($2,478,000). BCG's bid was $60,936 below Coqui's bid or 2.52% less. There is no evidence that Coqui made a mistake in its bid.

19. Referring to Wage Determination No. 94-2461 Rev (16) area: PR, Island Wide, Beyley's 8 May 2002 letter to contract specialist Belkis Torres requested a meeting with the CO to discuss the cited wage determination "which we missed to include in our estimate." The letter said that the omission "is hurting us; however, we are providing the services." (R4, tab 7)

20. As a part of its record submission, BCG provided a sworn statement from Beyley. The statement, signed on 16 May 2008, stated that he and Mercado met with CO Luis Torres and Belkis Torres on 26 June 2002 at Fort Buchanan. According to Beyley:

> 7. On June 26, 2002 I attended a meeting at Fort Buchanan on which Mr. Luis Torres (Contracting Officer)

> and Belkis Torres and Ramon Mercado where [sic] present. At said meeting the Contracting Officer represented and acknowledged that based on the "mistakes after award" clause Appellant has a compensation right for the additional amount of health and welfare benefits incurred. Based upon the "mistakes after award" clause the Government committed and agreed to compensate Appellant for the additional amount of health and welfare benefits incurred.
>
> 8. After said meeting Appellant requested the Government a written determination on health and welfare payment claim.

(BCG 1604A[2])

21. BCG's record submission also included a hand-written note, taken at the meeting. This note was written in Spanish. (BCG 1604C). A typed translation of the note states:

> 1. We discussed in the point of health and welfare and they informed us that it proceeded. They will evaluate a clause "mistake after bid" to see if they can use it to help us.

(BCG 1604D) To say that the government will evaluate the "mistake after bid" clause (FAR 14.407-4) to see if it can be used to help BCG is not quite the same as saying that "the Government committed and agreed to compensate Appellant for the additional amount of health and welfare benefits incurred." As between the notes taken at the meeting in 2002 and a statement furnished in 2008 in support of BCG's litigation position, we find that the 2002 note is more reflective of what was actually discussed.

22. On 11 November 2003, Mercado wrote to another contract specialist (Reggie Taylor) and inquired about the status of investigation "related to the fringe benefits we are currently paying to our employees." The letter explained that the issue discussed with Torres "is very important…since we did not considered it in our original estimate." (R4, tab 13)

23. Mercado wrote again on 23 January 2004 to CO Torres. One of the issues that Mercado wanted answered "despite several written notifications" related to "Fringe benefits ($2.02) not contemplated in the original estimate." (R4, tab 15) Receiving no response from CO Torres, Mercado wrote again on 21 April 2004 asking the CO to

[2] As a part of its record submission, BCG submitted documents Bates stamped from BCG1 to BCG1642.

propose a date to discuss "payment of fringe benefits not included in our original estimate" (R4, tab 18).

24. According to Mercado's 12 May 2004 letter, "the issue of the Health & Welfare…that were not included by mistake in our original estimate" was discussed at a meeting held on 4 May 2004. The letter asked for help "since it [health and welfare costs] represents an expense that was not contemplated." (R4, tab 19) DPW supposedly was to address the issue by 28 June 2004. When no action was taken, Mercado wrote on 13 July 2004 demanding "immediate attention to this issue and request a meeting as soon as possible in order to solve this matter." (R4, tab 22)

25. By letter dated 20 January 2005, Beyley submitted a certified claim to CO Edwin Mendez. The claim set out five areas (I–V) for equitable adjustment. With respect to the "Mistake Discovered After Award" issue (II), BCG claimed $322,084.94 and gave the following arguments for adjustment:

> Pursuant to FAR 14.407-4(a), "When a mistake in a contractor's bid is not discovered until after award, the mistake may be corrected by contract modification if correcting the mistake would be favorable to the Government without changing the essential requirements of the specifications." Moreover, under FAR 14.407-4(b)(2), the Government is authorized to "reform a contract (i) to delete the items involved in the mistake or (ii) to increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids." Under both of these clauses, the analysis is basically the same. Under clause (a), correcting the mistake would be favorable to the Government because (i) BCG would still be the lowest bidder and (ii) the essential requirements of the specifications remain unchanged. Under clause (b)(2), therefore, the Government may reform the contract by increasing the price since the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids.

(R4, tab 31 at 2) BCG also contends that "the mistake is so apparent as to have charged the contracting officer with notice of the probability of the mistake" (*id.* at 3).

26. FAR 14.407-4, Mistakes after award, upon which BCG relies, provides, in part, as follows:

> (a) When a mistake in a contractor's bid is not discovered until after award, the mistake may be corrected by contract modification if correcting the mistake would be favorable to the Government without changing the essential requirements of the specifications.
>
> (b) In addition to the cases contemplated in paragraph (a) above or as otherwise authorized by law, agencies are authorized to make a determination –
>
> (1) To rescind a contract;
>
> (2) To reform a contract (i) to delete the items involved in the mistake or (ii) to increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original invitation for bids; or
>
> (3) That no change shall be made in the contract as awarded, if the evidence does not warrant a determination under subparagraphs (1) or (2) above.
>
> (c) Determinations under subparagraphs (b)(1) and (2) above may be made only on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was (1) mutual, or (2) if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake.

27. The CO failed to issue a decision on the claim. BCG appealed on 15 December 2006 and filed its complaint at the same time. The CO ultimately issued his decision by letter dated 12 March 2007 denying BCG's claim including the health and welfare claim in its entirety. The decision acknowledged that the government failed to incorporate "the applicable Wage Determination" as a part of the contract, and asserted that BCG nonetheless must comply with the minimum wage of the Fair Labor Standards Act of 1938 pursuant to FAR 52.222-41. (R4, tab 32)

28. In BCG's complaint, its health and welfare claim allegations were set out in unnumbered paragraphs under the heading "II. Equitable Adjustment to the Contract for Health & Welfare Payments (Mistakes Discovered After Award)" (compl. at 4-6). With respect to its allegation that "BCG therefore understands that it is entitled to an equitable adjustment to the Contract to compensate for this mistake, and the Government is liable to BCG for payment," the government's answer, received by the Board on 23 March

2007, pled that "[t]he allegation contained in this sentence states a legal conclusion, which does not require a responsive pleading" (answer at 10).

29. As was its practice, after answering BCG's complaint, the government set forth its version of the case in PART II of its answer. In the "CONCLUSION" part of its answer, the government said:

> In this appeal, Appellant is seeking an equitable adjustment for omitted DOL wage rates…. With respect to the claim for omitted DOL wage rates, the contracting officer will issue a modification that compensates Appellant for the difference between the amount Appellant received from the Army and the prevailing DOL wage rate for health and welfare benefits plus interest in accordance with the Prompt Payment Act.…

(Answer at 26-27)

30. On 17 October 2007, the Board issued a Pretrial Order scheduling a hearing on entitlement and quantum to commence on 24 March 2008. On 6 November 2007, government counsel withdrew from the case, and the government's present counsel filed his notice of appearance.

31. On 28 November 2007, the CO requested from the Defense Contract Audit Agency (DCAA) an audit on BCG's claim. In a letter dated 18 January 2008 faxed to the Board, BCG requested on behalf of the parties a stay of the discovery proceedings until after the DCAA audit report was issued. In an order issued on 31 January 2008, the Board modified certain deadlines set out in the 17 October 2007 Pretrial Order. Based on the parties' representations that the 24 March 2008 trial date could still be met if the appeal was not settled, the order did not change the trial date.

32. DCAA issued its audit report (No. 1271-2008F17200001) on 29 February 2008 (supp. R4, tab 50). Even though it found that BCG actually incurred $343,020 in health and welfare payments, more than the $322,085 originally claimed, DCAA questioned the entire amount claimed. It found that "[t]he contractor failed to include these costs," in its bid, and that it signed the contract, "either knowingly or unknowingly, omitting the costs." (*Id.* at 5-6) BCG received the audit report on 3 March 2008.

33. At a conference call held on 5 March 2008, BCG asked for a two-week continuance in the schedule to allow for a deposition of the DCAA auditor. In an order issued on 7 March 2008, the Board modified certain deadlines in the 17 October 2007 Pretrial Order and rescheduled the hearing to start on 7 April 2008.

34. By letter dated 24 March 2008 and faxed to the Board the same day, BCG notified the Board that despite the government's earlier concession with respect to the health and welfare benefits, "it seems that the new position of the Government, LTC David Newsome, is that it has no obligation to pay said amount and intends to litigate this issue before the Board." The letter asked the Board to determine "if the Government can, without proper notification, change its position with respect to the claim of health and welfare benefits." The letter stated that BCG's position is that the government should not be allowed to change its position, and if the Board were to allow the change in position, BCG needed additional time for depositions. As reflected in the Board's order dated 3 April 2008 the parties subsequently agreed to the submission of their positions on the record pursuant to Board Rule 11. The hearing scheduled to commence on 7 April 2008 was cancelled.

35. By letter dated 11 April 2008, the government forwarded a motion for leave to amend its answer. It sought to amend its answer by deleting the sentence quoted in finding 29. The government argues that audits are routinely performed on claims subsequent to the filing of answers, and its request is "neither atypical nor unreasonable" because its concession on the health and welfare costs was "based upon a then incomplete understanding of Appellant's claim" since clarified by the audit. The government also contended that BCG was not prejudiced because it "has engaged in discovery by submitting interrogatories, conducting document review, and even deposing the DCAA auditor who performed the audit." Relying on Board Rule 7, the government argued that "it would certainly be fair to the Army, and not unfair to Appellant, for the Board to permit the Army to amend its Answer." (Mot. to amend at 3)

36. BCG's opposition to the government's motion, received by the Board on 18 April 2008, argues that since "the audit cannot express any opinion on the contractor's entitlement," the audit can only be used to determine quantum but not entitlement (opp'n to amend at 9). BCG also argues that, in any event, the "audit report did not provide any additional facts…that were not provided by the Appellant earlier," and the government is "using the audit report as an excuse for its delay in requesting the Board['s] leave to amend its Answer…causing undue prejudice to the Appellant" (opp'n at 8). BCG maintains that it is entitled to reformation pursuant to FAR 14.407-4(a). As for prejudice, BCG argues that "[d]ue to the Government's representations that the parties had reached an agreement Appellant did not pursue additional discovery," and the government's change in position would require BCG to pursue "new discovery phase on a different issue than the ones upon which the case had been proceeding for over a year" (opp'n to mot. to amend at 10).

37. The record reflects that as a result of a Motion to Compel Discovery filed by fax on 8 May 2008, the Board directed the CO to furnish an affidavit on the unavailability of certain documents requested by BCG, and to make available contract specialist Emiliani, who had evaluated the bids, for telephonic deposition. The

government produced the requested documents on 16 May 2008. On the same day, BCG asked for a two-day extension to evaluate and to submit "in the event that Appellant deems necessary to include all or part of the documents recently obtained as part of the supporting document regarding the health and welfare claim." On 19 May 2008, the Board received from BCG a 10-page "Memorandum Submitting Evidence On All Claims" including those relating to its health and welfare payments. Thereafter, the government filed its Rule 11 brief on 30 May 2008. BCG's brief was received at the Board on 6 June 2008.

DECISION

We address first the question whether the government should be allowed to amend its answer. Inherent in that question is whether the government should be allowed, before trial or submission of its case for decision, to change its position on the health and welfare claim.

Rule 7 of the Rules of the Armed Services Board of Contract Appeals provides, in part, that "[t]he Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties." The Federal Rules of Civil Procedure to which we look from time to time for guidance allows pretrial amendment of pleading once as a matter of course under certain circumstances, and in all other cases "only with the opposing party's written consent or the court's leave." The rule makes clear that "[t]he court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(1), (2). In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme Court interpreted a similar mandate under the old FED. R. CIV. P. 14(a) -- leave to amend "shall be freely given when justice so requires" -- to mean:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should as the rules require, be "freely given."

None of the reasons the Court articulated are present here. Here, the government's change of position was brought to the Board's attention before trial. After the parties decided to submit the appeal on the written record, the Board authorized additional discovery. BCG was allowed to depose contract specialist Emiliani who put together the bid evaluation papers; to further inspect documents at Fort Buchanan; and to supplement the record with additional documents and a sworn statement. Before filing its brief, BCG was allowed to file a "Memorandum Submitting Evidence On All Claims."

Because allowing the government to change its position or to amend its answer is not prejudicial or unfair to BCG, we hold the government is allowed to change its position with respect to the health and welfare claim, and to amend its answer accordingly. The government's motion for leave to amend its answer is therefore granted.

We turn next to the question of whether BCG is entitled to reformation of its contract due to its unilateral mistake in bid. In this connection, the Federal Circuit has accepted, in *McClure Elec. Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed Cir. 1997), the Board's formulation for analysis articulated in *Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26,901 at 133,954, where we said the contractor must show, by clear and convincing evidence:

> (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, and, therefore, should have requested bid verification; (4) the Government did not request bid verification or its request for bid verification was inadequate; and (5) proof of the intended bid is established.

In this case, testimonial and documentary evidence established that while BCG included a WD rate of $6.13 plus 40% for workman's compensation insurance, social security and unemployment insurance, its bidding team (Mercado, Vila and Beyley) forgot to include health and welfare benefits. Health and welfare benefits turned out to be a $2.02 cost element which would have boosted the mark-up part of BCG's service employees' pay from 40% to "around 72%." We are satisfied that BCG has proved elements (1) and (2).

As to element (3), BCG contends that comparing its bid ($2,417,064) with the IGE ($3,798,232) (finding 16) shows a 36.3% difference and this "should have alerted the Government of a possible mistake on Appellant's bid proposal" (app. br. at 7-8). BCG contends further that even using the number the government used in its Analysis of Price Comparison ($2,917,332), there was a $500,268 or 17.2%[3] difference (app. br. at 8). BCG points out that the IGE used a wage rate of $5.15 rather than the WD rate of $6.13 it used, and contends that the IGE also "omits to include health and welfare costs" (app. br. at 8). BCG argues that "had the Government included the health and welfare benefits on its estimate [$2,917,332] the total amount of the estimate would have been $3,948,248.01, so the actual difference between Appellant's bid proposal and the

[3] The difference between $2,917,332 and $2,417,064 is actually 20.69% of $2,417,064.

Government's estimate as corrected would have been $1,531,184.01, roughly a 38.8% disparity" (app. br. at 8-9).

We do not believe that the IGE amount of $3,798,232 has any relevance for comparison purposes, since that amount included CLIN Nos. 0001AG and 0001AF (and their option counterparts) that the government did not use for price analysis purposes in evaluating bids. The appropriate number to use was $2,917,332. This IGE number was 20.69% above BCG's bid ($2,417,064) and 17.72% above Coqui's next lowest bid ($2,478,000). With Coqui's bid only 2.52% higher than BCG's bid, and with no evidence that Coqui made a mistake in its bid, we are not persuaded that, under the circumstances, the government knew or should have known that a mistake had been made by BCG. *Bromley Contracting Co. v. United States*, 794 F.2d 669 (Fed. Cir. 1986) (noting degree of CO knowledge determined on "all evidence presented on that issue"); *cf. C.N. Monroe Mfg. Co. v. United States*, 143 F. Supp 449 (E.D. Mich. 1956) (two out of ten bids substantially below the rest should have alerted the government that a mistake had been made).

With respect to BCG's argument that the IGE should have used the WD rate of $6.13, we have found that the Fort Buchanan contract did not incorporate any WD, and hence we reject the notion that the IGE should have used the WD rate of $6.13 as opposed to the minimum wage rate of $5.15. Moreover, the IGE included 35.7% in fringe benefits (finding 16). There is no proof of what components were included in the fringe benefits. Without such proof, we are unable to conclude that the government made a mistake in its IGE or the CO should have suspected a mistake in the IGE.[4]

Because BCG has failed to prove that prior to award the government knew or should have known that it made a mistake in its bid, and because the next lowest bid was only 2.52% higher than BCG's bid and there is no evidence that that bidder made a mistake, we hold that BCG is not entitled to reformation of its contract.

II.

The Half-Month Pay Issue

38. BCG was unable to start work immediately after the contract was awarded on 29 September 2001. At a meeting held on 2 October 2001, the parties agreed that the contract would commence on 15 October 2001. (Supp. R4, tab 48 at 51-52) The CO issued Modification No. P00002 formalizing the agreement (R4, tab 2). By letter dated

[4] In this case the government did seek verification from bidders to ensure they understood that CLIN Nos. 0001AG, 0002AG and 0003AG would not be considered in evaluation of bids (finding 8). This verification was unrelated to the issues in this appeal.

13 May 2004, BCG submitted an invoice for "half a month work at the beginning of the contract" (R4, tab 20). The government did not pay this invoice and BCG subsequently claimed $35,977 (R4, tab 31). BCG's complaint included a contention that it should be paid for the period 30 September to 15 October 2001, and for acceleration (compl. at 8-9). In Beyley's subsequent deposition, he admitted that BCG was not ready to start work (supp. R4, tab 48 at 51-52). There is no evidence that in agreeing to let BCG commence work on 15 October 2001 due to its inability to start right away, the government promised to extend the contract or to pay BCG. Also, there is no evidence that any authorized government official directed BCG to perform extra work such as bringing the base up-to-date or working on weekends.

DECISION

BCG's Rule 11 post-hearing brief does not address any of the issues it raised previously for which it claimed entitlement to $35,977. We consider the issue abandoned. *See Fru-Con Construction Corp.*, ASBCA Nos. 55197, 55248, 07-2 BCA ¶ 33,697 at 116,810; *Craft Cooling, Inc.*, ASBCA Nos. 52494, 54127, 06-1 BCA ¶ 33,268 at 168,876; *Imperial Construction & Electric, Inc.*, ASBCA No. 54175, 06-1 BCA ¶ 33,276 at 164,949. If not abandoned, the claim is denied because BCG has failed to carry its burden of proof.

III.

Cleanup After Tropical Storm Jeanne

39. BCG claims $9,330.46 for debris removal after Tropical Storm Jeanne (R4, tab 31).

40. Section C.5.1.5, CLEARING AND CLEANUP AFTER NATURAL DISASTERS provides:

> In lieu of normal grounds maintenance duties during periods of natural disasters, the government reserves the right to require the contractor to use its work force to perform clearing and clean up as directed by the Contracting Officer or COR. The cost of this work will be included in the contract estimate as a separate additive to be negotiated as necessary. In such event, in addition to utilizing his normal work force and equipment, the Contractor shall identify an emergency reaction crew by job title, cost per hour and any additional equipment required. The government will determine the number of crews and equipment necessary to perform the emergency service. The Contractor shall perform

> clean up service such as tree cutting, stump and branch removal of miscellaneous debris and general grounds maintenance and any other task requested by the Contracting Officer. The Contractor shall be required to commence work within twenty-four (24) hours after identification of the areas to be restored and complete work within two (2) weeks unless otherwise agreed to by the Contracting Officer or COR. The Contractor will be issued an immediate notice to proceed not to exceed the Government's estimated cost of clearing and clean up. This notice to proceed will be definitized prior to the completion of services.

(R4, tab 1 at 26 of 39)

41. As to whether it was the contractor or the government that would activate the clause, Beyley testified that he understood that the contractor would "report…immediately and take action. It is preferred to coordinate with the government if they are present" (supp. R4, tab 48, Beyley dep. at 53). Beyley acknowledged that without direction from the government, a contractor had no authority to commence clearing and cleanup after a natural disaster (*id.* at 55). He testified that he understood "TBN" in the case of CLIN No. 0001AF (CLEARING AND CLEANUP AFTER NATURAL DISASTERS) to mean that payment for natural disaster work would be paid on a "[t]o be negotiated" basis (*id.* at 57).

42. BCG's Daily Work Sheet for 15 September 2004 indicates that Tropical Storm Jeanne passed through Puerto Rico on 15 September 2004 (BCG 1635 B). In support of its claim that it performed clearing and cleanup work after Tropical Storm Jeanne, BCG submitted its Daily Work Sheets for the period 15 to 25 September 2004 (BCG 1635 A-1635 AA). These work sheets were translated into English. The work sheet for 16 September 2004, for example, indicates BCG performed "Ditches/drainage cleaning" (BCG 1635 D). The work sheet for 23 September 2004 indicates the tasks performed included "Works were completed on Community Club, Teen Center, bank, traffic lights, gazebo and communications. Continue works at 200. Finish trash disposal on the Van area" (BCG 1635 Q).

43. Toro Creek is a river that runs through Fort Buchanan "all the way to the lake." After Tropical Storm Jeanne, BCG cleaned the gutters of trees and debris at Toro Creek. The gutters referred to is a channel that "goes between the buildings and runs around the buildings." (Supp R4, tab 49, Castro dep. at 14) Carlos Javier Rivera Castro (Castro) was BCG's grounds maintenance supervisor (*id.*, Castro dep. at 5) He testified that before the storm, BCG had to clean Toro Creek as a part of normal preventive maintenance, and after the storm BCG went back to clean Toro Creek again "because it got full of trees and different debris" (*id.*, Castro dep. at 13). He testified that "no one from the government" gave him instructions to "clean the gutters" after the storm; rather,

he received orders from Mercado that "Toro Creek had to be clean[ed] and cut all the trees in the areas that were our responsibility, all the trees that fell" (*id.*, Castro dep. at 15-16).

44. Castro testified that after the storm, BCG cut trees, cut grass, fixed damage caused by tractors, and cleaned up in the perimeter area (supp. R4, tab 49, Castro dep. at 11). He testified that Carlos O. Guzman and Filiberto Zayas (Zayas) "put pressure for us to do it." Castro understood Guzman was Chief of Contract Administration. (*Id.*, Castro dep. at 12) Zayas was the Contracting Officer's Representative (COR) (*see* R4, tab 21). Castro acknowledged that government personnel also cut trees after the storm but did not dispose of them (supp. R4, tab 49, Castro dep. at 17).

45. Even though BCG might have received pressure from various government officials to cleanup after the storm, there is no evidence that the CO or the COR determined the number of emergency crews and equipment needed to perform any emergency services, established a not-to-exceed price for any emergency work, or issued a NTP. In short, we find that the government never activated Section C.5.1.5 of the contract.

46. In its 20 January 2005 certified claim, BCG asserted:

> At a meeting held on September 16, 2004, BCG representatives informed Mr. Carlos Guzman that BCG was ready, willing and able to perform under CLIN 0003AF, and that at that moment, BCG employees were in the process of cleaning gutters. However, since the Government failed to follow the clear mandate of Section C.5.1.5 in conjunction with CLIN 0003AF, the additive change to the Contract was never negotiated as required by the clear terms of the Contract. Therefore, BCG submits its claim for debris removal following Tropical Storm Jeanne with its supporting data.

(R4, tab 31 at 4)

47. The CO's 12 March 2007 decision denied BCG's claim related to Tropical Storm Jeanne cleanup in its entirety. The decision asserted that "[t]he contract has a negotiated CLIN which is activated by the government on a need basis. Based on this condition, the CLIN was never activated nor the Claimant ordered to perform pursuant to the conditions of this CLIN. All work for the removal of debris was performed by DPW in-house personnel." (R4, tab 32) The CO's letter of 21 September 2004, for example, explained why the government was doing BCG's work:

> Non-compliance of terms and conditions under this contract is causing the use of the Government's own internal resources to complete work that you were contracted for (*i.e.* removal and clearing right of way of aerial electrical lines after the most recent tropical storm Jeanne….

(R4, tab 23)

DECISION

Although clearing and cleanup after a natural disaster is a line item in the Fort Buchanan contract, the work specified therein is not a part of the normal contract work. Section C.5.1.5 provides that the cost of such work would be "a separate additive to be negotiated as necessary." CLIN No. 0001AF (CLIN No. 0003AF for the Second Option Year (R4, tab 1 at 12 of 39)) provides that pricing is on a "$TBN" basis. Section C.5.1.5 specifies the circumstances and conditions under which natural disaster cleanup would be activated: BCG would be obligated to identify "an emergency reaction crew," and "any additional equipment required." It would be up to the government to "determine the number of crews and equipment necessary" to perform the cleanup and "any other task requested by the Contracting Officer." When emergency services are activated by the government, it would issue a NTP "not to exceed the Government's estimated cost of clearing and clean up."

There is no evidence in this case that the CO or COR ever activated emergency cleanup work pursuant to section C.5.1.5. There is evidence that the government used DPW in-house personnel (finding 47). BCG has not disputed this. Indeed, Castro acknowledged that government personnel cut trees after the storm and left them. That is not to say that BCG did not do some cleanup work after Tropical Storm Jeanne. To the extent it did so however, it did so without direction from the CO or the COR pursuant to the contract.

Because BCG performed cleanup work at various Fort Buchanan locations as a volunteer after Tropical Storm Jeanne, we hold it is not entitled to recovery.

IV.

Miscellaneous Debris Removal

48. BCG claims $8,250.00 for miscellaneous debris removal (R4, tab 31 at 4). It alleges that "[o]n numerous occasions, BCG has been forced to remove debris left by the Government and/or its other contractors, of which BCG has provided ample notice to the Government both prior to removal of the debris and after the removal of the debris" (*id.*).

49. Section C.5 of the contract provides that "[t]he services required under this contract includes [sic]…clearing and cleaning, policing and removal of debris…right of way clearing of aerial electrical lines" (R4, tab 1 at 23 of 39). Section C.5.1.3.1 requires the contractor to "[r]emove crossing limbs, broken branches and superfluous growth next to the tree to admit sunlight and air circulation as well as control insects and diseases." Section C.5.1.3.2 requires the contractor to "[r]emove dead or broken branches and those that turn back towards the center of the tree. Cut thin branches that interfere with each other." (*Id.* at 25 of 39)

50. Section C.1.6, QUALITY ASSURANCE, provides:

> The government will monitor the contractor's performance under this contract through the Contracting Officer's Representative (COR). Contractor performance will be reviewed based on this Scope of Work specifically section C.5 and submitted maps.

Section C.1.6.1 provides:

> Whenever the COR notifies the contractor of any deficiencies detected in the work performed, the contractor shall correct cited deficiencies within three (3) work days, or as otherwise authorized by the COR, after the notification in writing by the COR without affecting the regularly scheduled work. Payment vouchers shall be submitted to and approved by the Contracting Officer Representative. Payment vouchers shall not be approved until all cited deficiencies have been corrected.

(R4, tab 1 at 17 of 39)

51. By letter dated 1 September 2004, BCG submitted Invoice No. 01092004-CA to COR Zayas. The invoice sought payment of (1) $500 for "Pick up and disposal of branches at Antilles High School" and (2) and $7,750 for "Pick up and disposal of branches and vegetative material at Coqui Garden" for a total amount of $8,250. The invoice noted that the "[w]ork was executed on September 30, 2004[5] and August 4, 2004 respectively." (BCG 1637)

52. As explained in BCG's 1 September 2004 letter, DPW employees apparently cleared the electrical lines at Coqui Gardens without notifying BCG and "left the site

[5] BCG's cover letter referred to an incident on 30 August 2004 which was what it was probably referring to.

without properly picking up and disposing the cut material." The letter said that BCG sent "a complete brigade and a truck to pick up and dispose of the material at our dumpster." BCG's letter said that on 30 August 2004, BCG supervisor found "several branches that where [sic] cut and left on the school grounds," and BCG was told that "government personnel had cut this [sic] branches and left them on the site." (BCG 1636)

53. In connection with BCG's 1 September 2004 invoice, COR Zayas advised BCG by letter dated 22 September 2004 that "[t]he contractor is required to receive approval for any work not included within the scope of work. The work performed voluntarily mentioned in reference[d] letter were not authorized or directed by the Contracting Officer Representative (COR)" and BCG was therefore, "not entitled to submit an invoice for work not authorized" (BCG 1642).

54. BCG's 5 October 2004 reply complained that the government failed to advise BCG in writing when deficiencies were found as required by Section C.1.6.10 [sic] of the contract and "went ahead trying to perform a job included in our contract." The letter went on to say "the job was poorly performed since the waste material was not properly disposed, forcing us to pick up and disposed [sic] the material in order to continue with the mowing activities on the school grounds." (BCG 1641)

DECISION

BCG claimed $7,750 for picking up and disposing of branches and other vegetative materials at Coqui Gardens left there by DPW employees, and claimed $500 for picking up and disposing branches at a high school, also left there by the government. Under the contract, it was BCG's responsibility to clear electrical lines (Section C.5), to remove dead or broken branches (Section C.5.1.3.2), and to remove debris (Section C.5). BCG does not contend that the disposal work involved was beyond the scope of its contract. We find that government personnel performed the clearing and the cutting only because BCG failed to do so. That, however, did not alleviate BCG from removing and disposing the cut branches left by the government which were within the scope of its contract.

Because BCG's responsibility under the contract included removal and disposal of cut branches and debris, and because the government did not require BCG to perform work beyond the scope of the contract, we hold that BCG is not entitled to recover the amount ($8,250) claimed.

V.

The "Changed Conditions" Claim

55. BCG's certified claim seeks $174,923.00 through 31 December 2004 for "Changed Conditions" (R4, tab 31 at 2). BCG alleges that it encountered four categories of conditions during performance not anticipated when it bid the contract:

> a. Obstruction of areas by equipment and materials placed by the Government and/or other contractors;
>
> b. Changes in terrain condition caused by Government and/or other contractors;
>
> c. Median barriers placed in certain areas after the terrorist events of September 11, 2001;
>
> d. Areas damaged by the Government and/or other Government contractors

(*Id.* at 1-2) Based on the invoices it submitted, BCG's brief contends that it is entitled to $130,923.00 for "changed conditions" (app. br. at 14).

a. Obstruction of Areas

56. During the course of performance, BCG had to use trimmers to trim around certain grassy areas instead of using tractors. This was caused by the placement of various things at various grassy locations: Photograph Nos. 48 and 49 show a container parked on a grassy area next to a road (BCG 7); Photograph No. 10 shows a wrecked car parked on a grassy area to dissuade drunk driving (BCG 3); Photograph No. 19 shows a temporary tent erected on metal legs on a grassy area (BCG 4); Photograph No. 37 shows an electrical generator on wheels parked on a grassy area (BCG 6); Photograph No. 42 shows several moving vans parked on a grassy area at the Reserve Building (BCG 6). Some of these obstructions appeared to be for short durations only. There is no evidence to the contrary.

b. Terrain Change

57. According to Beyley, ditches caused by vehicles' tires are an example of terrain conditions that impeded it from using tractors to cut grass because BCG did not want to be held responsible for damages to the terrain. When asked whether BCG was cutting grass using trimmers as opposed to lawnmowers, Beyley testified "We were obligated to do it manually." (Supp. R4, tab 48, Beyley dep. at 68-69)

c. Median Barriers

58. After the terrorist attack on 11 September 2001, Fort Buchanan was put on alert and the government put up concrete barriers at various locations to make access to certain areas more difficult (supp. R4, tab 48, Beyley dep. at 70-71, tab 49, Castro dep. at 19). Barriers were put up at the front and back gates, at the Reserve Building, and in the area where "the Southern Command was." Some of the barriers were placed on concrete surfaces; others were placed on grass. (*Id.*, Castro dep. at 20)

59. Beyley testified BCG had planned to use lawnmowers to cut grass, and because the concrete barriers were "interfering with normal operations," BCG had to "bring three or four or five guys to use the trimmer" (supp. R4, tab 48, Beyley dep. at 70). After the barriers were put up, BCG moved its tractors to a different location, added more employees and bought more trimmers. It assigned people with trimmers to work in the barrier areas (supp. R4, tab 49, Castro dep. at 21, 23).

60. In a letter the government received on 8 January 2004, BCG forwarded a number of photographs on the "change of existing working conditions" which the parties had discussed at a meeting held on 23 October 2003 (BCG 1). Some of the photographs show white concrete barriers placed on grassy areas, roads and grassy median strips (*see* Photograph Nos. 7, 14, 23, 28, 31, BCG 2, 4, 5). From the photographs BCG submitted, we find that while some of the concrete barriers could have interfered with mowing with a tractor, the extent of such interferences was insignificant in terms of the few areas and the number of barriers shown to have been put up.

61. According to BCG's 2 December 2004 letter, "government personnel placed two rows of concrete planters…on the planting strip at the center of the front gate." BCG contended that "[t]his is a clear example of changes in the work areas that where [sic] not present at the start of the contract." BCG's letter stated that "[o]ur personnel has been forced to cut the area only by trimmer since the tractors can't enter this area due to the placement of the concrete planters slowing down the usual progress of our brigades." (BCG 50)

d. Areas Damaged by the Government or Contractors

62. According to Castro, when the new Reserve Building was being built, the garbage trucks and the trucks picking up the containers damaged the terrain (Photograph Nos. 1, 3, BCG 2). When DPW worked on the electrical posts, "they would always leave trash." With respect to these damaged areas, BCG "had to bring earth…and cover the area, fix the area, and then we could not do the work with tractors. We had to use trimmers." Castro considered using trimmers additional work because BCG's estimate was "based on the condition of the area" and use of a tractor. (Supp. R4, tab 49, Castro dep. at 23-24)

63. On 27 August 2004, BCG personnel met with government personnel about a VIP visit. The parties identified five areas that "needed work in order to comply with contract specifications"[6]: (1) Pee Wee fields; (2) Areas in front of the High School; (2) 200 acres; (4) Front gate areas leading to DPW; and (5) the panoramic route. BCG began doing some of the work on Saturday, 28 August 2004, until it had to suspend work due to heavy rain. On Monday, 30 August 2004, BCG noticed work had been done on the Pee Wee field "the day before despite the saturated terrain conditions due to the previous heavy rains." According to BCG's 1 September 2004 letter, "government personnel came on Sunday and worked on the area despite the terrain conditions." BCG's letter said that "[t]he equipment used to perform the job damaged the playing grounds and the grass that was cut was not removed from the fields." The letter stated "[w]e will use proper equipment and personnel as soon as the terrain conditions improve in order to put the area as the contract specifies, but will bill any extra effort and work made by our personnel to perform the job on the area." (BCG 39-40) There is no evidence that BCG actually restored the areas damaged by the government. Nor is there evidence relative to the costs BCG incurred in restoring the area, if it did so.

64. BCG's 5 October 2004 letter charged that "the government tried to perform work assigned to our contract without using proper equipment damaging the play areas on the Pee Wee Field." The letter went on to say that "the government failed to restore the damage caused by its equipment and personnel." (BCG 43)

65. As reflected in Mercado's 3 November 2004 letter to COR Zayas, one of the government's supervisors apparently believed it was BCG's equipment that damaged the terrain at the Pee Wee Fields. Mercado's letter stated "I personally inspected the areas and the treads at the fields could not belong to any of our equipment. In addition we found two plastic covers usually found in the back bumpers of pick up trucks probably used to pull the stocked equipment out of the field." (BCG 44) The government has not disputed that its personnel worked in the Pee Wee Field prior to the VIP visit.

BCG's Quantum Evidence

66. By letter dated 23 January 2004, BCG submitted to CO Torres Invoice No. 2401200-4AW in the amount of $120,000. The invoice was for "Additional ground maintenance work performed at Fort Buchanan." Attached to the letter was an 8-page hand-written calculation which BCG later told DCAA were estimates prepared at the time of the claimed "changed conditions." (BCG 13-20; supp. R4, tab 50 at 4-5) In its estimate, BCG appeared to have developed a "COST OF BRIGADE WORK PER HOUR" of $280. From what we can discern, this $280 rate consisted of the following

[6] Section C.5.1.13 covers "MOWING AND CLEANING FOR VIP OCCASIONS" (R4, tab 1 at 27 of 39). BCG has not claimed the five areas of work identified were additional work.

cost elements: labor, equipment, materials, garbage disposal, general conditions and overhead (10%) and fee (10%). (BCG 13-15) BCG's estimate also referenced 70 numbered photographs which were furnished with the invoice (BCG 2-10). The estimate calculated an amount for the condition shown in each numbered photograph (BCG 15-20). For example, photograph 28 shows three concrete barriers placed on the grass median strip of a road (BCG 5). BCG calculated its claim using this formula:

$$28 - (.25)(2)(24) = 12$$
$$(12)(\$280) = (\$3,360)$$

(BCG 17) Photograph 41 shows a road. It is not clear what changed condition BCG intends to show. BCG calculated the claimed amount using this formula:

$$41 - (.16)(2)(12) = 3.84$$
$$(3.84)(280) = \$1,075.2$$

(BCG 19)

67. By letter dated 8 March 2004, BCG submitted Invoice No. 08032004-AW in the amount of $5,223. This invoice was for additional ground maintenance work performed at Fort Buchanan during the period 24 January to 24 February 2004. BCG attached a number of photographs and calculated the amounts claimed in each photograph using the same approach. (BCG 22-31) By letter dated 21 April 2004, BCG submitted Invoice No. 19042004-AW in the amount of $5,700. The cover letter said the invoice was for "the changes in current working conditions trough [sic] the post." The invoice included 5 photographs and BCG calculated the amount claimed for each photograph using the same approach. (BCG 32-35)

68. In submitting its entitlement and quantum case on the written record, BCG has relied principally on photographs and estimates of work required to overcome the conditions shown. While a number of photographs showed damaged terrain (*e.g.*, photographs 1-5, 9, 12-14, 20, 22, 34, 50-57, BCG 2, 3, 5, 8), we are not told whether BCG was directed to restore the damaged terrain. A number of photographs (*e.g.*, photographs 1, 39, 47, BCG 1, 6, 7) show dumpsters possibly interfering with BCG's mowing operations, but we are not told whether these dumpsters were in place so that BCG should have seen them during a site-visit. As for its estimates, no information was provided with respect to who developed the estimates, his or her competency to do so, and whether the calculated amounts reasonably reflect the additional work BCG allegedly performed. Without testimony, we find the formulas BCG used to develop its claim for the condition shown in each photograph incomprehensible. In short, BCG's quantum evidence lack the necessary foundation to support a conclusion that the amounts claimed are commensurate with the damages suffered.

DECISION

The crux of BCG's "changed conditions" claim is that it did more work in cutting grass with trimmers at various locations that were obstructed by the placement of concrete barriers, planters, moving vans, electrical generator and other items, and that its work was impeded or it had to restore the terrain at certain locations damaged by the government. BCG does not contend that the additional work was directed by the government. As its basis for recovery, BCG argues "where a benefit has been conferred by the contractor on the Government in the form of goods or services, which it accepted, a contractor may recover at least on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods or services received by the Government" (app. br. at 13).

The term *quantum meruit* means "as much as he merited" to recover on any implied-in-fact contract for goods or services. The term "*quantum valebant"* means "as much as it was worth" and has been applied to implied-in-fact contracts involving goods. *United States v. Amdahl Corp.*, 786 F.2d 387, 393 n.6 (Fed. Cir. 1986); *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1154-55 n.8 (Fed. Cir. 1983). Under the Contract Disputes Act, our jurisdiction extends only to express or implied-in-fact contracts, and does not extend to contracts implied-in-law. 41 U.S.C. § 602. We have said "Absent an implied-in-fact contract, the Board has no authority to award appellant recovery for benefits received by the Government under the equitable doctrine of *quantum meruit.*" *Eaton Corp.*, ASBCA No. 38386, 91-1 BCA ¶ 23,398 at 117,403.

BCG has the burden to prove the existence of an implied-in-fact contract. *Pac. Gas & Elec. V. United States,* 3 Cl. Ct. 329, 339 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir 1984) (table). An implied-in-fact contract requires proof of (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) "actual authority" on the part of the government representative. *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). The requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs. An implied-in-fact contract is founded upon a meeting of the minds and is "inferred as a fact, from the conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding." *Balt. & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923).

BCG argues in its brief that "[t]he Government was well informed of those changes in conditions as evidenced by the letters sent by Appellant throughout Contract performance, some of which referenced terrain damages on the playing grounds and debris left on the fields" (app. br. at 14). We have reviewed each of the letters cited: 1 September 2004 letter at BCG 39 (finding 63); 5 October 2004 letter at BCG 43 (finding 64); 3 November 2004 letter at BCG 44 (finding 65); and 2 December 2004 letter at BCG 50 (finding 61). We conclude that none of the letters individually or collectively could support a conclusion that an implied-in-fact contract came into existence between the parties.

As the claimant, BCG has the burden of proving its monetary claim. *Senor Tenedor, S.A. de C.V.,* ASBCA Nos. 48502, 49272, 97-2 BCA ¶ 29,192 at 145,223. The "preferred" method of proving a claim is by the "actual cost method." *Dawco Construction, Inc. v. United States,* 930 F.2d 872, 882 (Fed. Cir. 1991), *overruled in part on other grounds, Reflectone, Inc. v. Dalton,* 60 F.3d 1572 (Fed. Cir. 1995) (*en banc*). Where actual cost records were unavailable, we have used best estimates. *Bregman Construction Corporation,* ASBCA No.15020, 72-1 BCA ¶ 43,715 at 9411.

In this case, we need not decide whether BCG is entitled to recover for additional work at various locations where "changed conditions" occurred. The DCAA found that BCG was "unable to demonstrate that the costs claimed have been incurred." Estimates prepared at the time the "changed conditions" occurred were the only quantum evidence BCG provided in support of its claim for $130,923. We have found that BCG's quantum evidence lacked the necessary foundation to support a conclusion that the amounts claimed are commensurate with the damages suffered. We have found that, without testimony, the formulas BCG used to develop its claim for the condition in each photograph incomprehensible. *Nager Electric Co. v. United States,* 442 F.2d 936, 950 (Ct. Cl. 1971) (Court upheld hearing examiner's exclusion of cost breakdown exhibit based on failure of the contractor to present evidence as to the validity or correctness of the exhibit). BCG chose to submit its entitlement and quantum case on the record. That, however, did not excuse BCG from carrying its burden of proof.

CONCLUSION

For the reasons stated, this appeal is denied.

Dated: 21 October 2008

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

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55692, Appeal of Beyley Construction Group Corporation, rendered in conformance with the Board's Charter.

Dated:

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