ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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R. L. Bates General Contractor Paving & Associates, Inc.	)	ASBCA No. 53641
	)	
Under Contract No. DAAG60-95-D-0018	)	

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Army Chief Trial Attorney
MAJ Timothy A. Furin, JA
CPT Marlin D. Paschal, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

R. L. Bates General Contractor Paving & Associates, Inc. (Bates) appeals the denial of its claim for breach damages and equitable price adjustments in the total amount of $3,891,403.50 under the captioned contract (hereinafter Contract 0018). The appeal is before us on both entitlement and quantum. For the government's improper deduction of prompt payment discounts, we sustain the appeal to the extent of interest pursuant to 41 U.S.C. § 611 for the periods from 27 July to 19 December 2001 and from 13 September 2004 to 6 September 2007 on the principal amount of $20,839.87. In all other respects, the appeal is denied.

I. GENERAL FINDINGS OF FACT

1. Effective 22 August 1995, Bates was awarded Contract 0018 as a "requirement type contract" for specified unit-priced line items of work. Section C1.1 of the Contract stated: "The work to be performed under this Contract consists of maintenance and repair to existing roads and parking areas at the United States Military Academy at West Point, New York, and Stewart Army Subpost, New Windsor, New York." (R4, tab 1 at 1-12, 56). The contracting officer identified in the solicitation, and signing the award was Ms. Marilyn Quinn of the United States Military Academy (USMA) Directorate of Contracting (DOC) (R4, tab 1 at 1, 75).

2. The term of the contract at award was a base year from 1 September 1995 through 31 August 1996, and an option year (if exercised) from 1 September 1996 through 31 August 1997. The specific maintenance and repair requirements to be provided when ordered were set forth in 68 unit-priced line items for the base year and 68 unit-priced line items for the option year. Each line item had an estimated total quantity for the year. The total estimated amount of the contract at award (all line items at their total estimated quantity) was $952,192.50 for the base year and $2,442,236.75 for the option year. (R4, tab 1 at 2-11)

3. Contract 0018 included among other provisions the FAR 52.216-19 DELIVERY ORDER LIMITATIONS (APR 1984) clause, the FAR 52.216-21 REQUIREMENTS (APR 1984) clause, the FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989) clause, the FAR 52.233-1 DISPUTES (MAR 1994) clause, and the FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) clause (R4, tab 1 at 73, 77, 80-81).

4. The Requirements clause at paragraph (c) stated in relevant part: "Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule." Section F.4 of the contract Schedule stated: "Work to be performed under this contract will be ordered by the execution of Delivery Orders by the Contracting Officer" (R4, tab 1 at 73). Section G.2 of the contract Schedule identified the contracting officer as Ms. Quinn of the USMA DOC (*id.* at 75). The contract Schedule did not specify at award or at any time thereafter any other government activity whose requirements for purchase of the specified services were to be ordered under Contract 0018.

5. The USMA DOC requirements for purchasing the unit-priced items for maintenance of existing roads and parking areas were generated by requisition/purchase requests with funding authorization from the USMA Department of Housing and Public Works (DHPW) (tr. 8/21). The USMA DHPW also issued requisitions/purchase requests to the U.S. Army Corps of Engineers (COE) for facility construction or renovation contracts at West Point to be funded by military construction (MILCON) appropriations. Some of these MILCON contracts at West Point included road and parking lot work similar to the work under Contract 0018. However, MILCON contracts at West Point (and throughout the Army) were required by DOD Directive 4270.5 (2 March 1982) to be awarded and administered by the COE (tr. 5/7, ex. G-11). USMA DOC had no authority to contract for MILCON-funded projects (tr. 8/22, 24-25).

6. Effective 6 December 1996, bilateral Modification No. P00002 to Contract 0018 added six unit-priced line items to the contract Schedule for both the base and option years. These items increased the total estimated contract prices to $1,044,177.50

for the base year and $2,534,221.75 for the option year (R4, tab 19). During the base contract year (1 September 1995-31 August 1996), the DOC issued four delivery orders to Bates under Contract 0018. As subsequently amended, those orders totaled $1,147,903.25 in amount (ex. B-2 at 1-28, ex. A-25). On 16 August 1996, the government exercised the option extending the contract from 1 September 1996 to 31 August 1997 (R4, tab 7). During that year DOC issued 31 delivery orders to Bates under Contract 0018. As subsequently amended those orders totaled $2,565,163.35 in amount (ex. B-2 at 29-157, ex. A-146 at 41-60, ex. A-46).[1]

7. On 23 August 1996, Bates wrote to the DOC alleging that the government was awarding "requirements valued in the thousands of dollars that fall under the scope of our contract to other sources." Bates requested a meeting "to resolve this condition" which it described as "a suspected breach of contract." (R4, tab 8) The contracting officer replied on 9 October 1996 with a review of ten construction projects awarded to other contractors during the term of the Bates contract and concluded that any paving work in those projects was only incidental to other construction that was not within the scope of Contract 0018 (R4, tab 13).

8. On 23 April 1997, Bates sent a letter to the DOC stating that it was claiming damages for breach of contract. Bates' claim letter alleged that the 9 October 1996 DOC letter "did confirm" a breach of contract violation and that "the extent is still debatable." Bates' letter did not claim a sum certain nor provide the certification required for claims in excess of $100,000 by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. (R4, tab 29) In a subsequent exchange of letters, Bates still failed to state a sum certain for its claim, but it did offer to settle the claim for a one-year extension of the contract. The government accepted this offer with the clarification that the extension would be "at the current price with all terms and conditions remaining the same" (R4, tabs 30, 32, 46 at 15).

9. Effective 11 August 1997, the parties entered into bilateral Modification No. P00004, extending the contract for one year from 1 September 1997 through 31 August 1998. Modification No. P00004 stated in relevant part:

> This modification represents the mutual agreement made between the Government and R. L. Bates & Associates (Contractor) in settlement of the Contractor's breach of contract claim that requirements of Contract

[1] Three of the issued orders were cancelled before substantial performance by Bates (ex. A-46). The amounts of those orders are not included in the total amount for the year.

> DAAG60-95-C-0018 had been diverted by the Government to other contracts in violation of said contract.
>
> It is hereby agreed to that a one year extension of the subject contract at the fixed prices stated therein constitutes full and final disposition of this claim. The contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the aforesaid claim.

(R4, tab 46 at 1-2)

10. Bates alleges in its post-hearing reply brief that "on the same day Modification P00004 was executed, West Point was awarding a contract to another contractor (J. Kokolakis) at Gray Ghost housing facility which contained a significant amount of work that Bates should have been receiving under its requirements Contract." Bates' reply brief further states that: "R.L. Bates testified that had he known about Gray Ghost, he would never have agreed to the terms of Modification P00004." (App. reply br. at 1) Mr. R.L. Bates signed Modification No. P00004 to Contract 0018 on 18 August 1997 (R4, tab 46 at 3). The "Gray Ghost" contract awarded to J. Kokolakis was a contract to "Construct Family Housing Replacement." It was not a requirement of or awarded by the USMA DOC, but a requirement of and awarded by the COE-Norfolk District. Moreover, it was not awarded on the date R.L. Bates signed Modification No. P00004, but 11 days later on 29 August 1997. (Ex. A-121 at 1)

11. During the third contract year (1 September 1997-31 August 1998), the USMA DOC issued 13 delivery orders to Bates. As subsequently amended, those delivery orders totaled $1,735,934.96 in amount. (Ex. B-2 at 158-213)

12. On 24 April 1998, Bates submitted a second claim for diversion of requirements. This claim stated in relevant part:

> The projects we have observed to have our contract items included in them are, but not limited to, the following:
>
> Replacement of Cullum Road Bridge
> Replacement of Running Track at North Athletic Field
> Tennis Court on Schowfield Place
> Tennis Court at building 26 off Smith Road
> Crack filling of roads at West Point
> Townsley Road Sewer Replacement
> New housing adjacent to our staging area.

> R. L. Bates & Associates, Inc. is therefore claiming damages for additional Breaches of Contract for the above referenced contract. We are requesting either a Contracting Officer's final decision on this matter in accordance with the Disputes Clause of the FAR or a negotiated a [sic] settlement. We are seeking monetary damages equal to 10% overhead and 10% profit for the total contract amounts for all contracts that are deemed to be in breach.

(R4, tab 59)

13. By final decision dated 1 June 1998, received by Bates on 4 June 1998, the contracting officer denied Bates' 24 April 1998 claim entirely (R4, tab 62). Bates did not appeal this decision.

14. On 31 August 1998, Contract 0018 ended insofar as ordering work was concerned. The total estimated contract amount, as amended, for the full three year term of the contract including the third year at the same level as the second year in accordance with Modification No. P00004 was $6,112,621.[2] The total actual amount of work ordered under the contract during the three year term was $5,449,001.56.[3] The actually ordered amount was 89.1 percent of the estimated total contract amount for the three year term of the contract.[4]

15. The last delivery order under Contract 0018 to be completed was Delivery Order No. 48. It was completed at sometime between 24 August and 10 September 1999. (Ex. B-3 at 431-34) Bates claims that its total costs incurred in performing Contract 0018 (including G&A) were $6,738,149. It claims that the total payments received were $5,448,252 for a total loss on the contract of $1,289,897. The Defense Contract Audit Agency (DCAA) audit report on Bates' claim states that, due to deficiencies in Bates' accounting system, "we place no reliance on this information." (R4, tab 96 at 79)

16. On 22 April 1999, the contracting officer denied a request by Bates for payment of its bond premiums over and above the unit prices in the contract for the bonded work (R4, tab 75). Thereafter, there is no evidence of any course of negotiations or other substantial communications between Bates and the contracting officer regarding any claims of Bates under or relating to Contract 0018 until 8 November 2000.

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[2] $1,044,177.50 + $2,534,221.75 + $2,534,221.75 (*see* findings 6 and 9).
[3] $1,147,903.25 + $2,565,163.35 + $1,735,934.96 (see findings 6 and 11).
[4] $5,449,001.56/$6,112,621.00

17. On 8 November 2000, Bates submitted a request for equitable adjustment (REA) to Contract 0018 in the amount of $3,891,403.50 (ex. B-1 at 32-33). By letters dated 25 and 26 July 2001, received by the contracting officer on 27 July 2001, Bates converted its 8 November 2000 REA to a certified CDA claim, and demanded a contracting officer's final decision (R4, tab 93 at 2, 3). By final decision dated 24 September 2001, the contracting officer denied the claim entirely (R4, tab 94). This appeal followed. Bates' REA/CDA claim consists of 15 separately priced claim items. Our findings of fact and decisions on each of these items are set forth in Sections II though XVI below.[5]

II. DIVERSION OF PURCHASE REQUIREMENTS

FINDINGS OF FACT

18. As modified in its post-hearing brief, Bates claims $1,105,056.42 for lost overhead and profit on 17 purchases allegedly diverted by the government from Contract 0018 and purchased from other sources after the effective date of Modification No. P00004 (app. br. at 26-27, 33-34). Eight (8) of the alleged diversions, however, were procurement actions by the COE and not by the USMA DOC.[6] One of the alleged diversions is not identified by a procurement instrument identification (PII) number.[7] Absent the PII we cannot determine whether the alleged diversion was a procurement instrument of the USMA DOC or the COE.

19. Of the eight remaining alleged diversions, DAAG60-95-C-0085 was a contract awarded on 11 September 1995 before the settlement and release in Modification No. P00004 (ex. G-20 at 1). DAAG60-98-C-0020 and Delivery Order No. C243 under Contract DAAG60-98-D-0004 were purchases made on 8 and 9 September 1998 respectively after the 31 August 1998 end-date for orders under Contract 0018 (ex. A-127 at 6, ex. A-130 at 25).[8] DAMA01-97-B-0016, DAAG60-98-R-0021 and

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[5] Bates attached as exhibit 1 to its brief an invoice for release of a retainage on Delivery Order No. 48. Release of a retainage on Delivery Order No. 48 was not an item in the claim submitted to and decided by the contracting officer and cannot be made a part of this appeal by attachment to the brief. *See Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981).

[6] These were the DACA51 and DACA65 purchases by respectively the COE-New York office and the COE-Norfolk office.

[7] SOLW16BCU-6157-5001.

[8] Bates alleges in its brief that Contract No. DAA60-98-C-0020 was dated 19 May 1998 and that Delivery Order No. C243 under Contract No. DAAG60-98-D-0004 was dated 6 August 1998 (app. br. at 26-27). Neither of these dates are the date of purchase. The solicitation for Contract No. DAAG60-98-C-0020 was issued on

DAA60-98-T-0294 were not purchases but only solicitations for which there is no credible evidence as to the date and amount of any resulting purchases.[9] Only two of the alleged diversions, DAMA01-97-M-1760 and Delivery Order No. C213 under Contract No. DAAG60-98-D-0004 were purchases made by USMA DOC after the effective date of Modification No. P00004 and before the end of the ordering period under Contract 0018.

20. DAMA01-97-M-1760 was a purchase order issued by USMA DOC on 25 August 1997 for "Rental of one crack sealing truck with self-contained compressor, 700 gallon storage capacity, with three employees" (ex. A-122 at 1). Bates alleges that this purchase order diverted $298,125 worth of line item 212 work from its Contract 0018, and claims 28 percent of that amount as the "gross lost overhead and profit" resulting from that diversion (ex. A-154 at 15, app. br. at 27). However, the unit price of line item 212 was $.53 per linear foot, and Bates' alleged incurred costs show a $.58 direct cost per linear foot performing line item 212 work (R4, tab 96 at 83, 85).[10] On this evidence, Bates has failed to prove that it would have recovered any overhead and profit on DAMA01-97-M-1760 if that purchase had been ordered under Contract 0018.

21. Delivery Order No. C213 under Contract No. DAAG60-98-D-0004 was issued on 9 June 1998 for the "North Formation Area Beautification Project." The North Formation Area was not a street or parking lot but an open space where military formations assembled, and the paving portion of the work as calculated by Bates was only 16 percent of the total initial amount of the order. (Ex. A-129 at 2, 29; tr. 2/183-85)

DECISION

Under the terms of the Requirements clause and Sections C1.1, F.4 and G.2 of Contract 0018, the government was obligated to purchase from Bates only the purchase requirements of the USMA DOC for the line items of work specified in the contract Schedule for the maintenance and repair of existing roads and parking areas at USMA

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19 May 1998, but the contract was not awarded until 8 September 1998 (ex. A-126 at 1, ex. A-127 at 6). The negotiations for Delivery Order No. C243 were completed on 6 August 1998, but the delivery order was not issued by the contracting officer until 9 September 1998 (ex. A-130 at 19-20, 25).

[9] The "B", "R" and "T" letters in the PII identify the procurement instruments as respectively an invitation for bids, a request for proposal and an automated request for quotation. DFARS (48 C.F.R.) § 204.7003 (1997).

[10] The DCAA audit of Bates' claim found that no reliance can be placed on its cost data. *See* finding 15. We cite the Bates cost data here only to show that its own data do not support its claim that it would have recovered overhead and profit on the diverted crack-filling work.

and the Stewart Army Subpost during the term of the contract. (Findings 1, 4) The COE was not designated in Contract 0018 as an activity whose purchase requirements were to be ordered under Contract 0018, and the USMA DOC contracting officer had no authority to obligate the COE to order its purchase requirements under Contract 0018. (Findings 4, 5)

Bates first alleged that the government breached Contract 0018 by diverting purchase requirements to other contractors in its letters of 23 August 1996 and 23 April 1997. Those letters did not limit the claim to any specific diversions, and the 23 April 1997 letter expressly stated that "the extent [of the breach] is still debatable." (Findings 7-8) After a further exchange of letters, Bates and the government agreed in bilateral Modification No. P00004, effective 11 August 1997, to a one-year extension of the contract at the second year prices specified therein "in settlement of the Contractor's breach of contract claim that requirements of Contract [0018] had been diverted by the Government." The parties further agreed that the one-year extension "constitutes full and final disposition of this claim" and Bates released the government "from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the aforesaid claim." (Findings 8-9) Since Bates did not limit its claim to any specific diversions, the broad language of the release applying to "such facts or circumstances giving rise to the aforesaid claim" was sufficient to encompass all alleged diversions occurring up to the effective date of the release.

Only two of the 17 alleged diversions were purchases made by USMA DOC after the effective date of Modification No. P00004 and before the end of the ordering period under Contract 0018 (findings 18, 19). These purchases were Delivery Order No. C213 for beautification of the North Formation Area under Contract No. DAAG60-98-D-0004 and Purchase Order No. DAMA01-97-M-1760 for a crack-sealing truck and crew (findings 20, 21). Delivery Order No. C213 was not a purchase of maintenance and repair for existing roads and parking areas, and Bates has failed to prove that it would have recovered any overhead and profit if the DAMA01-97-M-1760 crack sealing purchase order had been ordered under Contract 0018 (*id*.). Accordingly, the claim for diversion of purchase requirements is without merit and is denied.

III. UNREASONABLE DELIVERY ORDERS

FINDINGS OF FACT

22. As modified in its post-hearing brief, Bates claims $66,100.67 for the cost of a second quality control person to deal with "Unreasonable Delivery Orders." The alleged unreasonable delivery orders consisted of the government issuing a number of separate delivery orders over a period of time for maintenance and repair of sections of a single road rather than issuing one delivery order for maintenance and repair of the entire road

at one time. (App. br. at 34-35) Pursuant to the Delivery Order Limitations clause, Bates was not required to perform any delivery order of less than $100 in amount, any order for a single item in excess of $100,000, or any order for a combination of items in excess of $500,000 (R4, tab 1 at 85-86). Bates does not allege that any delivery orders violated those limits, nor does it cite any provision of the contract requiring the government to consolidate all work on one road in a single delivery order.

23. The government project engineer (Mr. Toman) testified that he "put together a unit price contract that the government could use at the spur of the moment for pavement, sidewalk repairs here at the post…when they had funding available to do these repairs" (tr. 5/52-53). He further testified that, when the government negotiator at the 9 August 1995 price negotiation stated that the job was very similar to one Bates had recently performed at West Point: "I immediately stated that that's not true, that they were completely different type contracts" (tr. 5/85-86). There is no evidence that separate delivery orders for different sections of the same road were issued for any reasons other than the availability of funds for the work.

DECISION

Contract 0018 was structured as a unit-priced requirements contract specifically so the government could purchase road maintenance and repair "at the spur of the moment" when funding became available and for whatever amount of work the available funding would allow. The only contractual limitations on the amount of work in any one delivery order were those specified in the Delivery Order Limitations clause and Bates has cited no delivery orders violating those limits. (Findings 22, 23) To the extent that Bates relied on a prior contract at West Point for the manner in which the work would be ordered that reliance was not justified in light of the project engineer's statement at the 9 August 1995 price negotiation that "they were completely different type contracts" (finding 23). There is no evidence that the delivery orders were issued on any basis other than the availability of funds for the work (*id*.). The claim for unreasonable delivery orders is without merit and is denied.

IV. BAD FAITH NEGOTIATIONS - PRICING OF CONTRACT

FINDINGS OF FACT

24. Bates claims $563,579 for the government's alleged bad faith in negotiating the contract line item unit prices. The alleged bad faith is that the government misled Bates as to the nature of the work in that "the prices recommended by the government were extremely low for the work to be performed." Bates further alleges that the government "used the unequal bargaining position between the parties and systematically 'negotiated' down the majority of the larger line items." The amount claimed is "the

difference between the amount at which Bates was forced by the government to perform the work and the costs actually incurred by Bates in performing the work." (Ex. B-1 at 11-14)

25. Bates' initial offer in response to the solicitation was dated 18 July 1995 and proposed a total estimated price for the base and option years of $3,680,163.75 (R4, tab 1 at 44-55). On 4 August 1995, Bates submitted a revised proposal in the total amount of $3,701,363.75 in response to a solicitation amendment adding line items 167 and 267 to the contract (R4, tab 1 at 28-39). After a price negotiation meeting on 9 August 1995, Bates submitted its final proposal on 15 August 1995 for a total estimated contract price for the base and option years of $3,394,429.25 (R4, tab 1 at 16-27). This proposal was accepted by the government and the proposed line item unit prices therein became the contract unit prices at award (R4, tab 1 at 2-11). The government's estimated total price for base and option years was $3,287,345.25 (R4, tab 45 at 5). The final negotiated contract price was 92 percent of Bates' 4 August 1995 pre-negotiation proposal and three percent greater than the government estimate.

26. Bates' contention that the government "systematically 'negotiated' down the majority of the larger line items" is not supported by the evidence. The three largest dollar amount line items proposed by Bates were line items 235 ($612,000), 228 ($376,000) and 229 ($312,000) (R4, tab 1 at 36-37). Two of those three (228 and 229) were accepted by the government as proposed (R4, tab 1 at 9).

DECISION

Government officials are presumed to act in good faith in discharging their contracting duties. That presumption can be overcome only by clear and convincing evidence of a specific intent on their part to injure the contractor. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995). There is not a scintilla of evidence on this record, that the government misrepresented its own estimates or otherwise negotiated the contract prices with a specific intent to injure Bates. The final negotiated total estimated contract price for the base and option years was 92 percent of Bates' 4 August 1995 pre-negotiation total proposed price, three percent greater than the government's estimate, and accepted as proposed two of the three highest priced line items in Bates' initial proposal. (Findings 25-26) Neither the differences between the initially proposed prices and the final negotiated prices, nor anything else presented by Bates in support of this claim, prove government bad faith in the negotiation of the prices. The claim for bad faith pricing is denied.

V. BAD FAITH/DEFECTIVE GOVERNMENT ESTIMATES

FINDINGS OF FACT

27. Bates claims $718,840.36 as the overhead and profit it would have made on those line items for which the government ordered less than the contract estimated quantities. Bates alleges that the quantities of work in the delivery orders differed from the government-estimated quantities in the contract to such a degree that "it can only be concluded that [the] Government's estimates were made in bad faith."[11] (Ex. B-1 at 15) In its post hearing brief, Bates titles this claim "LACK OF ORDER." The brief does not allege bad faith but seeks to recover the same claimed amount on the ground that "the actual quantities ordered were well below the estimate provided by West Point in the Contract and during negotiations" (app. br. at 37).

28. The data submitted by Bates in support of this claim show substantial variations between the estimated quantity and the ordered quantity for most line items of the contract. In 33 line items the ordered quantities were greater than the estimates. In the remainder they were less. However, for the contract as a whole and for its full three year term the total ordered quantity of 634,149 items exceeded the total estimated quantity of 629,658 items. Moreover, Bates' calculation of its lost overhead and profit on unordered estimates ignores the line items with orders in excess of estimates and the $1,886,957 in added revenue from those excess orders. (Ex. B-1 Pricing Vol., tab 3C2)

29. The estimated quantities for the line items in Contract 0018 were prepared by Mr. Toman (tr. 5/56). When he prepared those estimates, Mr. Toman had 23 years of post graduate civil engineering experience including five years as an assistant superintendent for an asphalt company, and several years as a paving inspector and chief specification writer for a nation-wide architect/engineer firm (tr. 5/46-50). Mr. Toman prepared the Contract 0018 line item quantity estimates based on "certain roads on the post...that the government thought they would like to do" (tr. 5/63, 76-77, 92). However, he had no information as to the amount of funding that would be available to order the work. He testified that: "What they were looking for was a method or a mechanism that they could use when they had funding available to do these repairs" (tr. 5/53, 56, 74, 76-77). There is no evidence that Mr. Toman deliberately inflated the estimated quantities to get lower units prices form Bates or that he otherwise estimated those quantities on any basis other than the most current information available to him.

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[11] The supporting data for this claim item shows a total claimed amount of $714,908.37 (ex. B-1, Pricing Vol., tab 3C2). This discrepancy between the supporting data in the pricing volume and the amount in the narrative volume of the claim is not explained.

DECISION

Bates' post-hearing brief states that the actual quantities ordered were "well below the estimates" (finding 27). That statement is incorrect. Bates' own data show that for the contract as a whole and for its full three-year term the ordered quantities exceeded the estimated quantities (finding 28). While most of the line items had substantial variations between the estimated and ordered quantities, such variations are not sufficient alone to prove bad faith or negligence in preparing the estimates. Nor are they sufficient alone to shift to the government the burden of proving reasonable care in preparing the estimates. *See Medart, Inc. v. Austin*, 967 F.2d 579, 581-82 (Fed. Cir. 1992). There is no evidence that the government deliberately inflated the estimates to get lower unit prices from Bates, or that the estimates otherwise were prepared on any basis other than the most current information available (finding 29). On this record, the claim for bad faith/defective government quantity estimates is not proven, and accordingly is denied.

VI. DEFECTIVE SPECIFICATIONS—MAINTENANCE/TRAFFIC

FINDINGS OF FACT

30. As modified in its post-hearing brief, Bates claims $148,385.37 for providing "flagmen" over and above an alleged $10,000 for that purpose included in its bid (app. br. at 41-42). Bates contends that "[d]uring Contract negotiations prior to commencement of performance, the Contracting Officer represented...that based upon past experience of the Government on similar contracts, in all likelihood flagpeople [for traffic control] would not be required to any significant degree during performance." Bates further contends that, as a result of this alleged representation, it "adjusted its prices to reflect…that flagpeople would not be required." (Ex. B-1 at 16-17)

31. Section 01570, paragraph 1.2.2 of the contract Technical Provisions required Bates to "furnish sufficient flag persons to facilitate the safe movement of vehicular and pedestrian traffic." Paragraph 3.2.6 of the same section required Bates to "provide a minimum of two flag persons when maintaining single lane staggered traffic." (R4, tab 1 at 136, 138) Section 01570 also included the following provision:

> 4.1 Separate measurement or payment will not be made for the Contractor's work required under this Section. The Contractor's cost for maintenance and protection of traffic, including temporary Type 3 asphalt concrete, shall be included in the various unit prices bid for the work.

(R4, tab 1 at 140)

32. Mr. Bob Stivers was Bates' general manager at the time Contact 0018 was solicited. He prepared Bates' price proposals and conducted the price negotiations for Bates. (Tr. 1/42-44, 60-61) Mr. Stivers testified that he discussed the maintenance and protection of traffic (hereinafter "MPT") requirement with Patricia Wood, and that as a result of these discussions: "My understanding was that if we were doing road work that had a flag person at either end, we were covering it. If it needed a major [MPT] set up, then we would have to price it separately and submit it as outside the contract" (tr. 1/82-83). Patricia Wood was a contract specialist and negotiator. She was not a contracting officer and was never identified as such in any contractual document or correspondence with Bates. The contracting officer was identified in the solicitation and contract as Ms. Quinn (findings 1, 4). Mr. Stivers testified that he personally never had any dealings with Ms. Quinn (tr. 1/238-39). There is no evidence that the contracting officer, Ms. Quinn, knew about and ratified for inclusion in the contract any oral "understanding" between Ms. Wood and Mr. Stivers modifying the express terms of the contact with regard to billing for MPT work.

33. MPT was discussed at the 9 August 1995 price negotiation meeting. Mr. Toman, the government project engineer, was present at that meeting. He testified that there was no agreement that MPT would be separately priced (tr. 5/81). The government's Memorandum for Record of the negotiations noted an agreement by the parties to add separate unit priced line items for the base and option years for relocation of the milling machine (R4, tab 3 at 4).[12] It did not record any agreement to add separate unit priced line items for MPT work (R4, tab 3). The Memorandum was sent to Bates on 17 August 1995 with a request that Bates "advise in writing, if there is any conflict with your records" (R4 tab 3 at 1). Bates did not reply to this request.

34. On 21 April 1997, Bates submitted to Patricia Wood, a "Notice of Claim" for costs of MPT on Delivery Orders Nos. 4, 5 and 7. This notice did not assert that there had been an agreement or understanding prior to award that MPT costs could be separately billed, nor did it allege that the government had misrepresented the amount of the MPT work that might be required. The Notice stated in relevant part:

> The original negotiated prices with the government did not accurately reflect the cost of [MPT] for the delivery orders issued to date under this contract. At the time the original prices were negotiated all of the parties involved had no way of knowing the location of any future work. Without having specific locations the amount of MPT needed was unknown.

[12] Those new line items were added to the contract Schedule by Amendment 0004 to the solicitation and were part of the contract at award (R4, tab 1 at 16-17, 23, 27).

> Based upon our past experiences at West Point, we had been able to utilize personnel from our crews, as needed, to perform any flagging duties that maybe required. Our costs for MPT were therefore minimal in the past and expected to be so for this contract.
>
> As the scope of this contract increased so did our costs for MPT. Neither the government, nor R.L. Bates & Associates, Inc., anticipated the large expenses relating to MPT for this project.

(R4, tab 39 at 1, 2)

35. Bates' claim for MPT work consists entirely of an alleged 4,438 man-hours of flagman labor at direct labor cost plus "fringes," "labor burden," G&A, profit and bond (ex. B-1, Pricing Vol., tab 3D at 1; app. br. at 41-42). An audit of the claim by the DCAA found that Bates' accounting system was unreliable and that the claimed costs for MPT were otherwise unsupported by source documents. (R4, tab 96 at 55-56)

DECISION

Section 01570 of the contract Technical Provisions expressly required Bates to furnish sufficient flag persons to facilitate the safe movement of vehicles and pedestrians on roads and sidewalks being repaired (finding 31). The fact that there was no separate line item for billing the cost of complying with that requirement did not excuse Bates from compliance or constitute a defect in the specifications. Paragraph 4.1 of Section 01570 expressly stated that separate payment "will not be made" and that "the Contractor's cost for maintenance and protection of traffic…shall be included in the various unit prices bid for the work" (*id.*).

While Mr. Stivers testified to his "understanding" that if a major MPT set up was required it could be billed separately "outside the contract," there is no credible evidence that this alleged understanding of the contract requirement was communicated to and approved by the contracting officer, Ms. Quinn (finding 32). To the extent this understanding was based on discussions with the negotiator, Ms. Patricia Wood, the negotiator was not the contracting officer and had no authority to revise express provisions of the contract. MPT was discussed at the 9 August 1995 price negotiation meeting, but the government's Memorandum for Record of that meeting contains no reference to any agreement for separate billing of MPT costs. That Memorandum was provided to Bates for comment. Bates did not reply. (Finding 33) Moreover, there was no reference to the alleged understanding or to alleged government misrepresentations of the scope of the specified MPT work in Bates' 21 April 1997 claim for separate billing of

MPT costs (finding 34). On this record, the claim for MPT costs is without merit and is denied.

VII. DEFECTIVE SPECIFICATIONS – SURVEYOR

FINDINGS OF FACT

36. As revised in its post-hearing brief, Bates claims $83,165.19 for a licensed land surveyor and other survey costs where survey work was required to perform the delivery orders (app. br. at 46). Section 01050, paragraph 1.2.1 of the contract Technical Provisions specified that a licensed land surveyor "shall be directly responsible for survey work." Paragraph 1.2.2 of the same section specified that (i) contractor "shall have in his employ a crew of sufficient size to perform the work," and that (ii) "[e]ach Delivery Order will require a survey crew." (R4, tab 1 at 124) Paragraph 4.1.1 of the same section stated that "[t]he Contractor's cost for survey work shall be included in the various unit prices bid for the Work" (*id.* at 126).

37. Bates alleges that "during negotiations the Government instructed Bates that based on its knowledge and experience, a surveyor would not be required on the contract," and that "[c]onsequently, and with full awareness by the Government, Bates did not include costs for a surveyor or staking in its Bid on the Contract" (ex. B-1 at 18). In its post-hearing brief, Bates alleges that "Contract Specialist Patricia Wood agreed that if a licensed surveyor were required, West Point would pay Bates for the cost of that," and that "if outside survey work would be required, it was agreed that Bates would be paid for it 'outside the regular prices'" (app. br. at 43-44, 94-95). These contentions are based on the testimony of Mr. Stivers as to discussions he allegedly had with the government negotiator prior to the 9 August 1995 price negotiation meeting (tr. 1/87-88). There is no contemporaneous documentation of these alleged discussions.

38. There is no reference in the Memorandum for Record of the 9 August 1995 price negotiation meeting to any agreement that Bates could bill for its survey costs separately, and Mr. Toman who was present at the meeting testified that there was no such agreement (R4, tab 3; tr. 5/82).

DECISION

The contract Technical Provisions at Section 01050 expressly specified that survey costs "shall be included in the various unit prices bid for the Work" (finding 36). The testimony of Mr. Stivers as to undocumented discussions with the government negotiator (*see* finding 37) is not sufficient to negate an express provision of the contract without the concurrence of the contracting officer. Mr. Stivers testified that he had no dealings at any time with the contracting officer, Ms. Quinn (finding 32). Assuming *arguendo*, that the negotiator, Ms. Patricia Wood made the statements attributed to her,

she was not the contracting officer and had no authority to amend the terms of the contract. At the 9 August 1995 price negotiation meeting, two new unit-priced line items were agreed upon and added to the contract Schedule (finding 33). But no new line items were added for separate payment of survey costs (finding 38). The Memorandum for Record of the negotiation meeting did not indicate any agreement on separate billing for survey costs (finding 38). Bates was given an opportunity to correct that memorandum but did not do so (finding 33). On this record, the claim for payment of survey costs is without merit and is denied.

VIII. DEFECTIVE SPECIFICATIONS – 6F VS. 7F TOP PAVING MATERIAL

FINDINGS OF FACT

39. As amended in its post-hearing brief, Bates claims $262,119.16 for the government's allegedly improper rejection of paving work performed under Delivery Orders Nos. 43, 47, 48 and 50. Those orders were issued respectively on 16 March, 27 March, 12 August and 21 August 1998. As subsequently amended, 4,880 tons of 6F paving were placed under these orders. (Ex. B-1 at 19-20; ex. B-2 at 172-207; app. br. at 46-52) Contract Drawing RP-9 entitled "TYPICAL PAVEMENT SECTIONS" designated the top (surface) pavement section as 2"± TYPE 6F – TOP COURSE." Note 1 on the drawing stated: "DEPTH OF REMOVAL BY COLD MILLING OR EXCAVATION AND THICKNESS OF OVERLAY WILL BE SPECIFIED IN THE INDIVIDUAL DELIVERY ORDERS." (R4, tab 1 at 234) Type 6F paving was specified for the wearing or top course rather than Type 7 or 7F because its larger aggregate made the pavement more durable under heavy truck traffic and provided greater traction for vehicles on hills (tr. 5/87, 7/19-21).

40. The thickness of the 6F top course pavement was not specified in the delivery orders, however, it is not disputed that the contracting officer's representative (COR), Mr. Lark, orally directed Bates to use a thickness of 1.5 inches for the wearing course (tr. 3/41-45). Mr. Lark also testified that "in the last 13 years at West Point, the [wearing course] has always been placed at an inch and a half and it continues to be an inch and a half thick, and that's just a general rule" (tr. 7/53-55).

41. On 2 December 1998, Mr. Lark issued rejection notices to Bates for the wearing (top) course paving placed under Delivery Order Nos. 43 and 47. The stated reason for the rejections was the same in both cases – "(Asphalt) aggregate on the wearing course is separating." (Exs. A-105, A-106) Although the record does not include a rejection notice for work under Delivery Order No. 48, Mr. Lark testified that, for the same reason, he rejected the Type 6F paving on two roads that were repaved by Bates under Delivery Order No. 48 (tr. 7/14-16).

42. On 7 December 1998, Bates' president (Mr. R.L. Bates) and its job superintendent (Mr. Joe Bates) inspected the rejected work sites with Mr. Lark and Contract Specialist Elizabeth Wood (R4, tab 72).[13] By letter to Bates dated 9 December 1998, Ms. Wood referred to the inspection and stated: "Based upon the multitude of areas viewed that are unacceptable, it is quite apparent that your Quality Control Program is ineffective and in most cases non-existent" (*id.*).

43. By letter dated 10 December 1998, Mr. Joe Bates told the government that his quality control person was new, in training and that: "We will monitor his performance and see that this issue is not a problem in the future." Mr. Joe Bates also stated that: "[t]he 6FX mix…is not the cause of the areas that are in question," that "[t]he areas that need repair is [sic] about 988.44 square yards in which has a value of $7872.27," and that repairs would be made "next spring." This letter did not allege that the cause of the aggregate separation was either the Type 6F paving or the 1.5 inch wearing course thickness directed by the COR. (R4, tab 73)

44. Prior to Delivery Orders Nos. 43, 47, 48 and 50, Bates performed 22 delivery orders specifying a total of 12,392 tons of 6F top course paving under Contract 0018 (ex. B-2, A-146 at 41-63). A note dated 25 November 1996 in Bates' Construction Quality Control Management Reports for Delivery Order No. 4 states that the 6F material "was placed at 2" depth to get 1½" compacted material" (ex. A-134 at 61). There is no evidence of aggregate separation on the delivery orders using 6F paving prior to Delivery Order No. 43. There is also no evidence of aggregate separation on five delivery orders placing a total of 1,863 tons of 6F paving after Delivery Order No. 43. (Exs. B-2, A-146 at 41-63)

DECISION

The government specification of 6F rather than 7F paving was based on the requirement for durability under heavy truck traffic (finding 39). There is no credible evidence that either the specification of a 6F wearing course or the 1½ inch compacted thickness requirement was a cause of the separation of the aggregate in the wearing course placed under Delivery Orders Nos. 43, 47, 48 and 50. A total of 12,392 tons of 6F wearing course had been placed under 22 delivery orders prior to Delivery Order No. 43 without aggregate separation problems (finding 44). Moreover, Bates' 10 December 1998 letter replying to the rejection notices after a joint inspection of the rejected work expressly stated that the 6F paving was not the cause of the aggregate separation, and expressly acknowledged that the problem was caused by a deficiency in its quality

[13] Ms. Elizabeth Wood replaced Ms. Patricia Wood as contract specialist on Contract 0018 in "roughly" February 1997 (tr. 7/75).

control (findings 42-43). On this record, the claim for defective paving specifications is without merit and is denied.

IX. DEFECTIVE SPECIFICATIONS –ADDITIONAL RESTORATION WORK

FINDINGS OF FACT

45. As modified in its post-hearing brief, Bates claims $296,100.67 for alleged additional work restoring the ground areas behind curbs where the existing curb elevation had to be raised to maintain the specified six-inch "reveal" (ex. B-1 at 20-21; app. br. at 57). [14] Section 02220 of the contract Technical Provisions stated in relevant part:

> 1.1.1 This Section covers the work necessary to complete site cleaning, excavation, filling and grading, including preparation of subgrade for subbase, slabs and pavement, and restoration of disturbed turf areas as shown on the drawings and specified herein [emphasis added].
>
> ….
>
> 4.1.9 Restoration of turf areas will not be measured separately for payment but costs in connection therewith shall be included in the Contractor's unit price bid for the item of work to which it pertains.

(R4, tab 1 at 148, 162)

46. Contract drawing RP-4 showed a six-inch reveal from the top of the road pavement to "top of existing curb." Drawing RP-4 also included a note pointing to the back-side of the curb from the top of the curb 5 inches down. The note stated: "RESTORE DISTURBED AREAS 'IN KIND' IN TURF AREAS PROVIDE 5" NEW TOP SOIL & SEED." The note and drawing did not indicate how far out from the back of the curb the disturbed area extended. (R4, tab 1 at 228) However, Mr. Stahlbrodt, a witness called by Bates with 20-plus years experience in the heavy highway industry, testified that for every inch of curb elevation the restoration area extends four feet out (tr. 12/7, 19). On this evidence, the restoration area for the five-inch deep "disturbed" area shown on contract Drawing RP-4, extended 20 feet out from the back of the curb. Mr. Stivers testified that he included in Bates' curb work unit prices turf restoration extending only 1½ feet out from

[14] The "reveal" is the vertical distance from the top of the curb to the top of the pavement on the side of the curb facing the road (R4, tab 1 at 230).

the back of the curb. He further testified that this 1½ foot estimate was not based on anything in the contract drawings but on a "typical restoration area." (Tr. 1/99)

47. During the course of performing the delivery orders, Bates found that the reveal on some existing curbs was less than six inches and that for concrete roads where the government would not authorize milling down the existing concrete to accommodate a new asphalt layer, the resulting curb reveal would also be less than six inches. In both cases, Bates was required to elevate the curb to maintain the six-inch reveal (tr. 2/42-46). The amount of increased elevation required ranged from 2½ inches to, in some locations, four inches (tr. 3/84). There is no evidence, however, of the linear footage of the curbs that were in fact raised.

48. Bates' additional restoration costs allegedly caused by increased curb elevations are 60 percent of the "restoration" costs on its "Project Summary" sheets allegedly showing the direct costs for each delivery order (ex. B-1, Pricing Volume, tab 7, Job Cost at 16-79). The claimed amount assumes that (i) all curbs had to be elevated to maintain the six-inch reveal, (ii) the contract drawing indicated a restoration area extending only one foot back from the back-side of the curbs, and (iii) the actual restoration area extended 2½ feet out from the back of the curbs (tr. 3/84-86).

49. When its claim was audited by the DCAA, Bates was "unable to demonstrate through verification to source documents that the recorded amounts [for restoration] were in fact incurred." The DCAA found Bates' accounting system unreliable to support the claimed amounts. (R4, tab 96 at 23-25) Bates has similarly failed to demonstrate to the Board at hearing through verification to source documents (such as contemporaneous time cards) that the restoration costs shown on its Project Summary sheets were in fact incurred.

DECISION

The contract drawing showing existing curb with a six-inch reveal was defective to the extent that it indicated that all existing curbs had a six-inch reveal (findings 46-47). Bates, however, has failed to prove the increased restoration cost incurred for raising the existing curb elevations. There is no credible evidence that all curbs had to be elevated (finding 47), and the assumption that the contract indicated a restoration area extending only one foot back from the curb is contradicted by the testimony of a Bates witness, Mr. Stahlbrodt. Applying Mr. Stahlbrodt's ratio of curb elevation to lateral extent of restoration, contract Drawing R4 indicated a restoration area extending 20 feet back from the curb. (Finding 46) Bates has also failed to show by verification to source documents either to the DCAA auditor or to this Board that the restoration costs in its Project Summary sheets on which the claimed amount is based were in fact incurred (finding 49).

On this record, the claim for Defective Specifications – Additional Restoration Work is denied for lack of proof of amount.

X. DEFECTIVE SPECIFICATIONS – GOLF COURSE RESTORATION

FINDINGS OF FACT

50. As modified in its post hearing brief, Bates claims $43,513.32 for "restoration work not anticipated by the plans and specifications on the golf course located at the site" (ex. B-1 at 21; app. br. at 61). Delivery Order No. 40 required paving a golf cart path and lot at the USMA golf course under three line items of Contract 0018 (ex. B-2 at 164). The specified work involved a complete removal and reconstruction of the existing golf cart paths (tr. 12/15). One of the Contract 0018 line items on the delivery order was item 206 "General Excavation" (ex. B-2 at 164). The contract Technical Provisions for excavation and backfilling at Section 02220, paragraph 3.13.1 required restoration of turf areas "where excavation work has been performed" (R4, tab 1 at 159).

51. By letter dated 16 April 1998, Bates requested additional compensation over and above the specified line item prices for restoration of disturbed areas in connection with Delivery Order No. 40 on the grounds that:

> Due to the width and construction of paths we are unable to access the disturbed areas, with our equipment, without causing damage to the pathway itself. Our equipment must access the disturbed areas by using undisturbed areas adjacent to the new pathways. The additional restoration required far exceeds that which was caused by the construction of the pathways itself.

(Ex. A-85)

52. By letter to Bates dated 5 May 1998, the contract specialist stated that the government disagreed with the request for additional compensation for restoration at the golf course on the following grounds:

> During the week of October 14, 1997, the COR and using activity performed an initial site visit with your Project Engineer/CQC Superintendent to determine if the work could be completed utilizing the existing contract line items. Your Superintendent agreed that this could be done. During the same week, the COR revisited the site with your Superintendent to ensure that this could be accomplished and

> was again told that it could. On October 21, 1997, the COR and Superintendent drove through the site yet again to ensure that both parties were in full agreement, and it was confirmed.
>
> Therefore, based on the above, the delivery order was issued. The Government disagrees with your statement that "The intent of the contract is to restore disturbed areas behind newly installed curbs and sidewalks." There are areas where general excavation, subbase and asphalt are used that include restoration, but there are no curbs or sidewalks placed.
>
> Request you proceed with the restoration work as previously agreed to, described above.

(R4, tab 61)

53. Mr. Lark was the COR who made the site visits described in the contract specialist's 5 May 1998 letter. Mr. Lark's testimony at hearing confirmed the facts stated in that letter. (R4, tab 61 at 2, tr. 7/30-31) Mr. Lark also testified that Bates' project superintendent told him three times that Bates would do the golf cart track paving work under the existing contract line items (tr. 7/70).

54. In addition to the cost of restoring the areas damaged by its equipment accessing the disturbed areas, Bates incurred additional golf cart path restoration costs because (i) it initially attempted to use sod rather than top soil and seeding for turf restoration, and (ii) it was required to remediate its illegal dumping of excavated material (tr. 7/28-29, 33-34, 12/16-17, 28).

DECISION

Paving the golf cart path and lot was not within the scope of Contract 0018. It was not maintenance or repair of existing roads and parking areas. Therefore, Bates was under no obligation to accept Delivery Order No. 40 for that work at the Contract 0018 line item prices. Nevertheless, after three site visits and discussions with the COR, Bates agreed to perform the golf cart path work under Delivery Order No. 40 and Contract 0018 (findings 52-53). Bates states that the additional restoration work was caused by the fact that it could not access the disturbed areas with its equipment on the new paved golf cart path without damaging the path, and therefore "[o]ur equipment must access the disturbed areas by using undisturbed areas adjacent to the new pathways" (finding 51).

Contract 0018 included the FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) clause (finding 3). Paragraph (a) of that clause placed

on Bates the responsibility for ascertaining "the general and local conditions which can affect the work or its cost" including, among other things, "the conformation and conditions of the ground" and "the character of equipment and facilities needed preliminary to and during work performance." In agreeing to perform the golf cart path work under Contract 0018, Bates assumed the contractor's responsibilities in the above cited clause with respect to that work. There was no defective specification for the golf cart path work, only a failure of Bates to estimate the full cost of using its equipment to perform that work and a failure to decline the work if that cost could not be recovered in the unit priced line items specified in the delivery order. The claim for golf course restoration is without merit and is denied.

XI. ABNORMAL/ADDITIONAL INDIRECT TO DIRECT COSTS

FINDINGS OF FACT

55. Bates claims that, "as a result of defective specifications," it incurred $148,096.65 for "additional work performed…on research and development that should be charged directly to [Contract 0018]" (ex. B-1 at 21-22). Neither the claim nor any evidence at hearing identifies any specific "research and development" work that was caused by a defective specification. The claimed amount is based on the estimated percentage of time each of 14 office employees "should have" expended on Contract 0018 and each employee's own estimate of the amount of time he or she actually expended on Contract 0018. The percentage difference is multiplied by each employee's total hours during the period Contract 0018 was being performed, and the resulting "additional hours" are multiplied by the employee's wage rate. (Ex. B-1, Pricing Vol., tab 3D9 at 3; tr. 3/123-26)

56. For Bates' Indirect to Direct Cost claim, the DCAA auditors requested (i) time sheets supporting the claimed total hours that each indirect office employee worked, (ii) time sheets supporting the claimed hours that each employee worked on Contract 0018, (iii) a "budget" or estimate of the time the office employees were supposed to have worked on the contract, and (iv) support for the claimed rates of pay. None of the requested support was provided by Bates to the auditors. (R4, tab 96 at 30: tr. 4/56-58, 60, 80-81, 83-84) No supporting source documentation showing that the claimed costs were in fact incurred is in the record on appeal.

DECISION

We have found in Sections VI through X of this opinion that Bates' claims of defective specifications have been proven only to the extent that Contract Drawing RP-4 indicated that all existing curbs had a six-inch reveal. However, there is no credible evidence of the hours that any indirect-charged Bates personnel performed "research and

development" or any other work directly related to that defect in Contract Drawing RP-4 (findings 55-56). The claim for "abnormal/additional" indirect to direct costs is denied.

XII. BONDING COSTS

FINDINGS OF FACT

57. Bates claims $64,431 for performance and payment bond costs incurred in performing the delivery orders under Contract 0018 (ex. B-1 at 22-23). Bates alleges that during pre-award negotiations the government instructed it to procure a bond for the full estimated base year amount, and that its "understanding from negotiations with Patricia Wood was that it would bill out the cost of the bond as an invoice and be paid separately" (app. br. at 63). At hearing, the government project engineer, Mr. Toman, testified that he had no recollection of any discussion of bonding costs at the price negotiation meeting. The Memorandum for Record of that meeting contains no reference to any agreement that bonding costs would be invoiced and paid as a separate line item of the contract (tr. 5/82-83; R4, tab 3). Contract 0018 as solicited and as awarded included no separate line item for bonding costs (R4, tab 1).

58. There is no evidence that Bates submitted an invoice for the first year bond premium as a separate line item of the contract. Bates alleges that during the second year of the contract (1 September 1996-31 August 1997), the government agreed that it should provide bonds only for each delivery order issued (app. br. at 63). There is no evidence, however, that Bates billed the government at any time during the second and third years for bond premiums as a separate line item on any of 45 delivery orders issued during those years.

59. By letter dated 19 January 1999, Bates requested the government to reimburse it for all performance and payment bond premiums incurred in performance of the delivery orders under Contract 0018. Bates cited as the basis for this request paragraph (g) of the Payments under Fixed-Price Construction Contracts clause of the contract (hereinafter "the Payments clause"). The letter did not refer to any agreement in the 1995 price negotiations for payment of bonding costs as a separate line item of the Contract. (Ex. B-1 at ex. 14)

60. By letter dated 22 April 1999, the contracting officer denied Bates' request for separate payment of its bonding costs on the ground that paragraph (g) of the Payments clause authorized reimbursement of bond premiums "only as a request for and payment of progress payments," and not as "a separate entitlement under the contract, independent of Section B" (R4, tab 75). The DCAA audit found that Bates' accounting system was unreliable for supporting the claimed bonding costs, and that Bates otherwise provided

supporting source documents (invoices, checks, etc.) for only part of the claimed amounts (R4, tab 96 at 72).

DECISION

Bates' contention that there was an undocumented oral agreement in the negotiations before award for payment of bonding costs as a separate line item of the contract is not credible in light of the facts that (i) it submitted no invoices for such payment during the first three years of contract performance, and (ii) when it did submit its January 1999 request for payment of bonding costs, it was not on the ground of an alleged oral agreement in negotiations before award, but on a provision in the Payments clause of the contract.

Bonding costs, similar to MPT, survey and restoration costs, for which no separate line items were provided in the contract, were recoverable only to the extent they were included in the priced line items. Paragraph (g) of the Payments clause allowed incurred bonding costs to be included, along with other incurred costs, in determining the portion of the price to be paid as a progress payment on priced line items of work. It did not provide for payment of bonding costs over and above the prices of the priced line items of work. *Bean Stuyvesant, LLC*, ASBCA No. 52889, 01-1 BCA ¶ 31,224 at 154,117. The claim for separate payment of bonding costs is without merit and is denied.

XIII. IMPROPER CREDIT

Bates' claim in the amount of an alleged wrongful government credit of $45,000 has been voluntarily withdrawn (ex. B-1 at 23-24; app. br. at 64).

XIV. PROPOSAL PREPARATION

FINDINGS OF FACT

61. Bates claims $15,082.50 for "costs incurred in [preparation] of this Request for Equitable Adjustment" (ex. B-1 at 24). The evidence for this claim is a check dated 20 July 2000 in the amount of $15,000 payable to "Joseph Camardo" (ex. A-181). This was a lump sum payment by Bates to its lawyer for preparation of the REA (tr. 3/136-37). The REA was dated 8 November 2000 (ex. B-1 at 33). The ordering period under Contract 0018 ended on 31 August 1998 and the work on the last of the delivery orders was completed by 10 September 1999 (findings 14-15). During the 18 months from the contracting officer's 22 April 1999 rejection of a Bates request for payment of bonding costs to the 8 November 2000 submission of the REA, there was no negotiation process or other substantial communication between the parties regarding any claims of Bates under or related to the contract (finding 16).

DECISION

The costs of professional and consultant services are unallowable if they are incurred in connection with "the prosecution of claims or appeals against the Federal Government." FAR 31.205-47(f)(1). When considering a claim for professional services preparing an REA, we look to see whether the contractor incurred the claimed cost "for the genuine purpose of materially furthering the negotiation process [with the contracting officer]." *AEI Pacific, Inc.*, ASBCA No. 53806, 08-1 BCA ¶ 33,792 at 167,284. Considering the absence of any negotiation process in the 18 months preceding submission of the REA, we conclude that the REA was prepared as a first step towards litigation and not for purposes of negotiation. Accordingly, the claim item for REA Proposal Preparation is denied.

XV. IMPROPER INVOICE DEDUCTION

FINDINGS OF FACT

62. As modified in its post-hearing brief, Bates claims $3,360.49 as CDA interest due on its original claim for $20,839.87 in unearned prompt payment discounts taken by the government on Bates' invoices (ex. B-1 at 24; app. br. at 64-65). After the appeal hearing, the contracting agency on 31 March 2009 paid to the U.S. Treasury the amount of $25,359.87 for deposit as a credit to a tax deficiency account of Bates. The paid amount consisted of the entire principal amount ($20,839.87) claimed by Bates plus CDA interest on that amount from 19 December 2001 (the date of the appeal) to 13 September 2004 and from 6 September 2007 to 31 March 2009. (Gov't mot., attachs. 1, 2) The three-year gap in the CDA interest payment is five days short of the period from 13 September 2004 to 11 September 2007 when the appeal was suspended, with the consent of the parties, by a Rule 30 dismissal and subsequent reinstatement.

63. On 13 May 2009, the government moved for partial dismissal of the appeal as to the improper invoice deduction claim because "the contracting officer has voluntarily granted the relief sought by Appellant and there is no reasonable expectation that the alleged violation will recur" (gov't mot. at 2). Bates has opposed the motion on the grounds that (i) it did not agree to a settlement of the claim, (ii) the interest paid ($4,520) is not the total amount of interest ($7,813.56) due under the CDA, and (iii) the amount paid did not include any amount for the REA preparation cost.

DECISION

The government motion for partial dismissal of the appeal with respect to the claim for improper invoice deduction is denied. While the contacting officer has paid the

principal amount of the claim to the credit of Bates' tax deficiency account at the U.S. Treasury, the amount of interest due under the CDA is still in dispute (finding 63). CDA interest on a valid claim is due from the date the claim is received by the contracting officer for decision under the CDA, not from the date of an appeal of that decision. 41 U.S.C. § 611. Moreover, the government has not cited, and we have not found, any authority for the proposition that a Rule 30 dismissal with the consent of the parties tolls the running of CDA interest for the period the dismissal is in effect in the absence of a specific agreement to a suspension of interest. To the extent there is any precedent on this issue, it is to the contrary. *See Tom Shaw, Inc.*, ASBCA Nos. 28596 *et al*., 95-1 BCA ¶ 27,457 at 136,784 (finding 68) and 136,790 (interest allowed in Claim 4 without deduction for a three year dismissal under Rule 30).

Accordingly, Bates is entitled to CDA interest on the principal amount of $20,839.87 for the periods from 27 July 2001 to 19 December 2001 and from 13 September 2004 to 6 September 2007 (findings 17, 62). The contracting officer will compute the balance of CDA interest due Bates in accordance with this decision. Since the full principal amount in dispute was paid to Bates' credit on 31 March 2009, no CDA interest is due beyond that date. No REA preparation cost is owed Bates with respect to this claim for the reasons stated in Section XIV of this opinion.

XVI. LOSS OF BUSINESS

FINDINGS OF FACT

64. Bates claims $230,750.64 "for its net loss of profit for fiscal year 1999." Bates alleges that this loss occurred because "as a result of the Government's actions and inactions, Bates can no longer obtain bonding and its sales have consequently dropped dramatically" (ex. B-1 at 24). The claimed amount is derived by (i) assuming that, but for the loss of bonding, the average annual sales revenue in the years 1994-1998 would have been achieved in each of the years 1999-2000 for a total sales revenue in those years of $9,808,787.23, (ii) subtracting from that amount an "estimated" actual sales revenue for the two years of $3,525,480.06, and (iii) multiplying the difference by the profit rate (3.67 percent) on the 1994 and 1995 sales revenue (ex. B-1, Pricing Vol., tab 3E5; app. br. at 65-66).

DECISION

The lost profits in this claim item are not lost profits on Contract 0018. They are lost profits that allegedly would have been made on future contracts, but for the loss of bonding capacity allegedly caused by the government's breach of Contract 0018. Lost profits on an existing breached contract may be a question of fact. But lost profits on future contracts are too speculative and remote as a matter of law to be allowed as

damages of the breached contract. *Collette Contracting, Inc.*, ASBCA No. 53706, 03-1 BCA ¶ 32,056 at 158,459. The claim item for lost profits/loss of business is without merit and is denied.

XVII. CONCLUSION

On the findings and decisions above, the appeal is sustained to the extent that Bates is entitled to interest pursuant to 41 U.S.C § 611 on the principal amount of $20,839.87 in wrongful invoice deductions for the periods from 27 July to 19 December 2001, and from 13 September 2004 to 6 September 2007. The appeal is in all other respects denied.

Dated: 16 December 2009

MONROE E. FREEMAN, JR
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. 53641, Appeal of R. L. Bates General Contractor Paving & Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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