ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Trace, Inc.	)	ASBCA No. 56594
	)	
Under Contract No. HDEC08-06-C-0008	)	

APPEARANCE FOR THE APPELLANT: James F. Nagle, Esq.
Oles, Morrison, Rinker, Baker, L.L.P.
Seattle, WA

APPEARANCES FOR THE GOVERNMENT: Elliot J. Clark, Esq.
Chief Trial Attorney
Helen J. S. White, Esq.
Assistant General Counsel
Defense Commissary Agency
Fort Lee, VA

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
PURSUANT TO RULE 12.3 AND RULE 11

Appellant timely appealed a contracting officer's final decision asserting a claim arising out of certain Contract Discrepancy Reports (CDRs) for October, November, and December 2007, and January 2008. Appellant asserts that these CDRs were meritless, and were issued in retaliation for appellant's filing of a formal complaint with the Defense Commissary Agency (DeCA) asserting that the commissary management subjected appellant's employees to verbal and sexual harassment and other inappropriate actions that impeded appellant's performance of the contract and created a hostile working environment. The government admits that several employees of appellant were subjected to verbal or sexual harassment during the calendar year 2005 and 2006, but denies that appellant's employees were subjected to other inappropriate action by commissary personnel that impeded contract performance and created a hostile working environment. The parties elected to waive a hearing and to proceed on the record under Rule 11.

FINDINGS OF FACT

1. On 14 December 2005, the government, Defense Commissary Agency, awarded appellant the subject, firm, fixed-price contract with an estimated value of $1,136,724.80 (R4, tab 2). Appellant was required under the contract to provide, *inter alia*, shelf stocking, receiving and storage, and custodial services for a base year and four

follow-on years, extending from 1 January 2006 through 31 December 2010, for the commissary at Fort Sam Houston, Texas.

2. The contract contained the Federal Acquisition Regulation (FAR) clauses appropriate to this type of service contract. Included in the clauses, were clauses relating to the contractor's quality assurance requirement and government rights to inspection. Specifically, the contract included the FAR 52.246-4501 QUALITY ASSURANCE EVALUATOR (QAE) (OCT 1995) clause. (R4, tab 2 at 26)

3. The Performance Work Statement, Section C-1, paragraph 1.4, QUALITY CONTROL/QUALITY ASSURANCE, set forth the contractor's requirements with respect to maintaining the quality control plan and inspection system for the contract. (R4, tab 2 at C1-5) The contractor's plan was required to cover all services to be performed and identify the areas and items to be inspected, the method for inspection, inspection frequency, and the names of the individuals who were to perform the inspection. It also required the contractor to establish methods for identifying and preventing deficiencies in the quality of services performed before the level of performance becomes unacceptable, and for documenting results of all inspections with identification of the corrective actions taken. Under subparagraph 1.4.2, the government had the right to monitor the contractor's performance using Quality Assurance Evaluator (QAE) inspections. Those surveillance observations permitted by this subparagraph indicating defective performance were to be initialed by the contractor's project manager (PM). If the PM disagreed with the government's QAE surveillance inspection detailing defective performance, the PM was required to submit a written response to the contracting office within two working days of the QAE's identification of the deficiencies.

4. Contract Section C-4, SPECIFIC TASKS, identified the tasks required to be performed by the contractor. (R4, tab 2 at C-4) Paragraph 4.6 and its included subparagraphs set forth the requirements for the custodial services. Custodial tasks were identified as day custodial, and were generally limited to rapid response and quick fix actions during hours of commissary operations, except with respect to maintaining clean restrooms properly stocked paper and soap products, and night custodial services that were generally to be performed at the frequency listed in the frequency charts included in the contract.

5. Contract section, TECHNICAL EXHIBIT 1, PERFORMANCE REQUIREMENTS SUMMARY, identified the service outputs the contractor was expected to perform and that were to be evaluated by the government to assure contractor compliance with the performance standards set forth in charts in this section. (R4, tab 2 at TE1.1) Paragraph 2.1 set forth the government quality assurance procedures. Under these procedures, the government may inspect by either random sample or checklist. If the percentage or number of defects in the contractor's performance exceeds the

Acceptable Quality Level (AQL) set forth in the contract tables for the month, the contractor shall be required to respond to a Contractor Discrepancy Report (CDR). Paragraph 3.1 of the Technical Exhibit prescribes the method for determining whether the number of defects will cause less than maximum contract payment. If at the end of a surveillance month, the surveillance record indicates the number of defects exceeds the AQL, the government QAE shall prepare a proposed CDR which is submitted, together with supporting documentation, to the contracting officer. The contractor is offered the opportunity to reply within 10 working days from the receipt of the CDR indicating corrective actions to prevent recurrence. The contractor's failure to reply will be considered agreement with the CDR. Paragraph 5.1 sets forth the method for calculating reduced contract payment when the AQL is exceeded.

6. On 20 September 2007, appellant wrote the Defense Commissary Agency headquarters in Fort Lee, Virginia, complaining that since the arrival of Store Director Martin Jackson at the Fort Sam Houston, Texas commissary, Store Director Martin Jackson and commissary employees and management created an intimidating, hostile, and offensive work environment, and thereby, unreasonably interfered with appellant's work performance. (App. supp. R4, tab A-5) According to appellant, the commissary store management and employees engaged in conduct that defamed, showed hostility to and threatened the well-being and safety of appellant and its employees. Moreover,

> As the Store Director, Martin Jackson has not only failed to maintain a safe and respectful environment free from harassing and violent behavior; he participated in, directed and promoted unprofessional, unethical, unprincipled, and insidious conduct. While the forms of these incidents have been many and varied, one thing has remained constant; the Agency has failed to treat these acts seriously, deal with the incidents appropriately or immediately. Through its neutrality the Agency has allowed misconduct to escalate to an irreparable level forcing Trace to seek legal recourse in order to ensure the safety and well being of our employees.

(App. supp. R4, tab A-5) Appellant enclosed with its complaint, a six-page summary of the documents detailing the alleged incidents of sexual harassment, of intimidating and harassing conduct by specifically named government employees and members of the commissary management, including the QAEs. Included within this summary of alleged acts of misconduct, appellant identified its specific complaints to contracting officer personnel. The supporting documentation included the Defense Commissary Agency's policy on anti-harassment, which included specific examples of prohibited harassment, verbal and physical conduct that defamed or showed hostility, intimidation, offensive conduct that interfered with individuals' work performance. (App. supp. R4, tab A-5) Additionally, the alleged prohibited verbal and physical conduct was documented

through government memoranda for record detailing meetings and attempts to investigate specific incidents, statements by appellant's complaining employees, and exchanges of correspondence and emails. The supporting documentation was comprised of government memoranda for record regarding investigations of the allegations, sworn and unsworn statements and affidavits, and correspondence between the parties extending from April 2005 to August 2007. There was evidence in investigation reports, affidavits, sworn and unsworn statements concerning inappropriate sexually oriented touching and comments by QAE personnel, repeated disagreements between QAE personnel and appellant's employees concerning work and inspection results, differences caused by vendors bringing stock to the store, disputes over government supervisors alleging stealing products from the commissary, government commissary officials interfering with appellant's employees performance of work, loud and abusive comments directed at appellant's employees by government commissary QAEs, QAEs damaging government equipment used in the performance of the contract, and commissary personnel preventing re-performance when appellant requested. (App. supp. R4, tab A-5)

7. However, it appears that appellant was not the only one unhappy with the work environment created by the parties in the Fort Sam Houston Commissary. Government QAEs also reported clashes with appellant's project manager during the October 2007 to January 2008 time frame. (Exs. G-1 – G-4) Government QAEs asserted that appellant's project management was rude and abusive toward the government QAEs. By letter, dated 9 January 2008, the contracting officer directed appellant's removal of one of appellant's project managers. Some of the QAEs attributed the tensions between government and appellant personnel to the fact that the new QAEs were enforcing the performance standards more strictly than enforced by prior QAEs (ex. G-2). The government's assistant general counsel, Defense Commissary Agency, conducted an investigation in March 2008, primarily into the allegations of sexual and abusive harassment on the part of government personnel, and prepared a report of his findings (exs. G-7, G-13, G-14). Although he included in his recommendations to the contracting officer a conclusion that the contract was being fairly administered and that the allegations asserted by appellant with respect to appellant's allegations concerning the surveillance of the performance and of sexual and abusive harassment were not supported by the evidence he considered, we make no findings on the basis of this report other than to note that the government did conduct an investigation of the allegations asserted by appellant.

8. Appellant, in its complaint, alleges that appellant's employees were subjected during contract performance to verbal and sexual harassment and other inappropriate actions by commissary personnel and that such actions impeded contract performance and created a hostile environment. The government in its answer admits only that several of appellant's employees were subjected to verbal and sexual harassment during calendar years 2005 and 2006, but denies that appellant's employees were subjected to other

inappropriate conduct by commissary personnel that impeded contract performance and created a hostile working environment. (Compl. and answer ¶ 4)

9. The record is unclear whether or not there were CDRs issued prior to October 2007 (other than ones which were waived, *infra*), and the parties are unhelpful in identifying in their submissions or briefs whether or not there were any CDRs issued prior to October 2007. There was evidence in the record in the form of sworn and unsworn statements by appellant's employees to the effect that the surveillance results by the QAEs prior to October were similar to those after the inspection results noted in the CDRs for October, November, December 2007 and January 2008 following appellant's submission of its 20 September 2007 complaint alleging the commissary management creating an intimidating, hostile, and offensive work environment. The discrepancy reports for October 2007 address alleged unsatisfactory custodial services, by sample square footage, without more specific identification of the specific performance requirements deemed to be unsatisfactory except in the case of isolated entries. (R4, tabs 30E and 30F) Appellant submitted QAE Inspection Reclama documents for these CDRs stating appellant's disagreements with the CDRs, and indicating the specific non-concurrence grounds for such disagreements. (R4, tab 30G) The stated grounds for disagreement on each of these Reclama documents are generally identical, and state the same reasons for all of the alleged discrepancies identified in the CDRs. These include: no official documentation for the inspecting personnel indicating qualifications and designation by commissary, or alleging that the inspecting person is not the QAE; defective performance was immediately corrected following the QAE's observation but not re-inspected or accepted; the level of acceptability imposed by the QAE far exceeded the performance standards established by the performance work statement in the contract; specific actions and inactions by commissary store personnel directly interfered with appellant's ability to perform to the standard; reported defective performance was not part of the contract services for which appellant was responsible; square footage applied in the CDRs was not according to the formula contained in the applicable criteria of the performance work statement. The Reclama documents also stated, with some minor variation in some of the Recama documents:

> WE DO NOT AGREE WITH THE SQFT BECAUSE THE QAE'S [sic] DO NOT POINT OUT ANY SQFT. ALL THEY SAY IS THAT THE FLOOR IS UNSAT AND ASK IF WE ARE GOING TO REPERFORM. WHEN WE DO FLOOR WORK THE QAE'S [sic] TAKE OFF THE SQFT OR MOST OF IT FOR ONE NIGHT AND THEN ITS RIGHT BACK UP TO WERE [sic] IT WAS BEFORE WE EVEN DID THE FLOOR WORK. ALSO, THEY ARE WRITTING [sic] UP STAINS, SCRATCHES IN THE TILE, AND VENDOR TRASH. THEY WRITE US UP FOR ANYTHING THE VENDORS LEAVE BEHIND AFTER

> WE HAVE CLEANED. THE STORE DOESNT [sic] GIVE US A CHACE [sic] TO CLEAN UNDER ANY END CAPS OR DISPLAYS BUT THEY WRITE US UP FOR DISCOLORATION UNDER THEM. THE QAE'S [sic] THEN SAY IF WE BUFF THE SQFT WILL COME DOWN 500 SQFT AND THAT IF WE DONT [sic] IT WILL GO UP 200 SQFT. THE QAE'S [sic] ARE NOT GRADING THE FLOOR. THEY HAVE THE SQFT DONE IN THERE [sic] OFFICE. THEY DONT [sic] INSPECT WHEN WE CALL THEY JUST WRITE WHAT TIME WE CALL IT. THEN ASK IF WE ARE GOINT [sic] TO REPERFORM. BUT CANT [sic] POINT OUT WHAT IS DEFFECTIVE [sic].

(R4, tab 30G) On each Reclama form there was a statement that "[I]f a response to this Reclama is not received within 48 hours, we will understand that you concur." Each Reclama indicated the date of the inspection and the date of the Reclama. According to the dates indicated on the Reclama form, the Reclama's were submitted in every case the day following the date of the inspection. In some instances there is a date/time indication of a transmission of the form by facsimile transmission. However, there is no explanation in the record as to the meaning of the date/time fax indication and whether it applied to the specific initial submission of the Reclama. Nevertheless, there is a memorandum for the record from a contract specialist stating the dates of the facsimile transmissions of the reclama documents which had been sent in groups of reclama documents in three separate transmissions.

10. Although the appeal involves deductions only for the period of October 2007 through January 2008, QAEs had found areas of deficiency prior to that time and had recommended deductions. (Ex. G- 20) The contracting officer, by letter dated 27 January 2007, waived all the CDRs and proposed deductions submitted by the QAEs for the months of February 2006 through September 2006, because of inconsistencies between the government surveillance documentation and appellant's reclamas, and continuous concerns, including lack of QAE training and unprofessional conduct between the parties. (*See also*, exs. G-21, G-23)

11. By letter dated 4 March 2008, the contracting officer stated that she was submitting to appellant for appellant's review and comment CDRs for the month of October 2007 with what appears to be a contract price adjustment in the amount of $1,299.57 for alleged deficient performance. (R4, tab 30C) The contracting officer stated that a number of the reclamas were not submitted timely in accordance with paragraph 1.4.2 of the Performance Work Statement. The contracting officer stated therein that appellant had ten (10) business days from the date of receipt of the letter to respond to the subject CDRs. Appellant received this letter on 14 March 2008. The

contracting officer, therefore, stated that upon receipt of appellant's response to this letter, she would review and make a decision concerning the CDR.

12. Appellant responded to the contracting officer by letter dated 24 March 2008, stating appellant's disagreement with the contracting officer's identified CDRs and alleging the QAE's had not performed the surveillance as required by the Quality Assurance Surveillance Plan. (R4, tab 30B) Appellant addressed each of the matters contained in the contracting officer's letter of 4 March 2008. Appellant asserted that during appellant's visits to the commissary, appellant's officers had never spotted any of the alleged deficiencies reported in the CDRs, and further, that there was continual harassment by store managers and staff. Moreover, appellant contended, as it had in the reclama documents, that the documented square footage deficiencies had been fabricated in commissary offices.

13. There was a similar pattern of CDR's issued to appellant for November 2007, and responses or Reclamas submitted by appellant. (R4, tabs 31E, 31F, 31G) Although the stated alleged custodial deficiencies were the same for the most part, there were additional deficient performance issues with several of appellant's employees without their identification badges. Appellant's responses were generally the same responses as provided for the CDRs for October 2007, with the same disagreements or nonconcurrences asserted previously by appellant, and the same general statement of disagreement quoted in block capitals above in finding 9.

14. The contracting officer in a letter dated 4 March 2008, to appellant worded in identical language except as to the amount of claimed adjustment to the contact price, asserted that the CDRs for November for custodial services resulted in an adjustment in the amount of $1,609.34. (R4, tab 31C) Appellant in its letter of 24 March 2008, also addressed its disagreement with the CDRs relating to the custodial service for November 2008. (R4, tab 31B)

15. The correspondence relating to the CDRs for December 2007 was essentially identical to that for October and November 2007. (R4, tab 32B, 32C) In this instance, the asserted amount of adjustment was $4,478.15. As in the case of the CDRs and Reclama documents relating to appellant's October and November performance, the CDRs and Reclama documents for December were essentially identical with the same assertions of defective performance and the same statements of disagreement by appellant. (R4, tabs 32E, 32F, 32G)

16. The pattern for the CDRs and Reclama documents for contract performance during January 2008 was essentially the same as that for October, November, and December 2007, although there was slightly more specificity in the identification of the defective performance in January. (R4, tabs 33E, 33F, 33G)

17. By letter dated 3 March 2008, the contracting officer in a format and language essentially identical to her letters of 4 March 2008, asserted a contract adjustment in the amount of $3,157.52 for alleged defective performance during January 2008 as identified in the CDRs for January 2008. (R4, tab 33C) In a Memorandum for Record prepared by a contract specialist, she stated that all appellant's Reclamas indicated that they merely reflected the use of a form since they contained the same information from one day to the next, and that they were received for all days except 13-16 January 2008. (R4, tab 33D) She concluded that as a result of inconsistencies between the government's and appellant's comments, the square footage computations stated in the Memorandum for Record were removed, with the result that the deficient square footage was reduced from 215,162 to 118,521. The CDR was recalculated for a proposed deduction of $2,436.35.

18. On 22 July 2008, the contracting officer issued her contracting officer's final decision. (R4, tabs 30A, 31A, 32A, 33A) Having reviewed appellant's letter of 24 March 2008, and after discussions with the Fort Sam Houston Commissary QAEs, she determined that many areas of square footage remained in unsatisfactory condition from day-to-day. According to the contracting officer, the Commissary Agency legal counsel supported her determination that the QAEs surveillance practices have been and continued to be fair and impartial. Nevertheless, she determined that because the government was unsure as to the amount of square footage of floor associated with damaged tile, she would reduce the total dollars associated with the CDRs, from $8,720.13 to $6,540.10. There was nothing in the contracting officer's final decision addressing appellant's allegations of verbal and sexual harassment and other conduct on the part of government officials and employees that allegedly impeded appellant's performance and created a hostile work environment.

DECISION

The parties agree that the government has the burden of proof, that is, of establishing that appellant did not meet the contract requirements and that the deductions were properly taken for performance deficiencies. *Clarkies, Inc.*, ASBCA No. 22784, 81-2 BCA ¶ 15,313; *Fraton, Inc.*, ASBCA No. 32935, 87-1 BCA ¶ 19,613. The government's argument is based on the position that the contracting officer properly validated and approved the CDRs at issue in this appeal and reviewed all the documentation presented by the QAEs and appellant. Appellant disputes the specific deductions on the basis that the government permitted improper surveillance techniques by the QAEs from the beginning of the contract, and that appellant was unable to re-perform alleged deficient work because the government was not specific in identifying the defective work, and that when appellant re-performed the work, the CDR was not corrected to reflect the corrective action taken by appellant.

However, one thrust of appellant's evidentiary presentation and argument is that the government must also show that its deductions were not improperly influenced or

otherwise tainted by animus on the part of the QAEs. In this regard, appellant argues that substantial evidence was presented regarding the hostile relationship between the QAE's and appellant's employees. Quoting *The Libertatia Associates, Inc. v. United States*, 46 Fed. Cl. 702, 710 (Fed. Cl. 2000), appellant argues that the aggregate of the actions of all the agents of the government, if done by one individual, would fall below the standard of good faith. What appellant appears to suggest here is that the actions of the QAEs, and contracting personnel, both with respect to the inspection and surveillance process, and the review and issuance of the CDRs and deductions, when taken together amounted to lack of good faith. The government, in its reply brief, asserts that appellant claimed for the first time in its brief that the QAEs acted in bad faith, and since it did not plead that claim, moved that this be stricken.

Although appellant used some inartful language in asserting its arguments as a basis for overturning the deductions, we do not believe that an argument of bad faith was presented at all throughout the performance and proceedings in this appeal. Indeed, appellant opposed the government's motion to strike on the grounds that it had not asserted a bad faith action against the government as a separate cause of action. We deny the government's motion to strike.

In the instant appeal, both parties contributed to the hostile environment between the parties that impeded satisfactory performance. While we realize that this appeal involves $6,540.10 and was brought under the Board's Rule 12.3, the parties are responsible for presenting their cases so that the Board can make appropriate findings of fact and conclusions of law thereby disposing of the merits of the appeal. We have reviewed the CDRs and rebuttal statements, but without further assistance from the parties, we are unable to make specific findings with respect to the correctness of the deductions for unsatisfactory performance on the part of appellant. "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 966 (7th Cir. 1991). While there is evidence upon which we might surmise that the performance did not live up to the standards set forth in the contract, the contracting officer, by her own admission, waived all the CDRs and proposed deductions for the months of February 2006 through September 2006 because of inconsistencies between the CDRs and appellant's reclamas, and continuing concerns about the lack of QAE training on the part of the government QAEs and the unprofessional conduct between the parties. Since this period was a year prior to the deductions for October, November, and December 2007 and January 2008, and there is no record in this appeal record concerning CDRs and deductions for any period between September 2006 and October 2007, and for the period following January 2008, we are not persuaded that the government has carried its burden of proof establishing that the deductions assessed for the period in question here were properly taken.

Accordingly, we sustain the appeal.

Dated: 15 April 2009

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
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. 56594, Appeal of Trace, Inc., rendered in conformance with the Board's Charter.

Dated:

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