

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of-- )  
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DWBH Services, Inc. ) ASBCA No. 56948  
 )  
Under Contract No. FA4809-07-D-V001 )

APPEARANCE FOR THE APPELLANT: Edward J. Kinberg, Esq.  
Kinberg & Associates, LLC  
Melbourne, FL

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.  
Air Force Chief Trial Attorney  
Maj Jonathan P. Widmann, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES  
UNDER BOARD RULES 11 AND 12.3

This dispute arises from the contractor’s timely appeal of the 26 June 2009 final decision of the contracting officer (CO) which denied the contractor’s June 2009 claim for approximately 38 acres of grounds maintenance service allegedly outside the scope of the captioned contract. Appellant argues it was not required to provide services at locations where housing units, existing at the time of award, were demolished and not rebuilt. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. Appellant elected the Board’s Rule 12.3 accelerated procedure. The parties elected to submit the appeal on the record, pursuant to Board Rule 11. The Board grants respondent’s 21 April 2010 Motion to Augment the Record. The Board is to decide entitlement and quantum, by agreement of the parties and concurrence of the Board on 8 April 2010.

On 17 May 2010, the Board asked the parties to advise whether DWBH had received any adjustment(s) under CLIN X002, pursuant to the PWS Appendix 1, “Variations in Contract Workload” clause, for increases or decreases in the number of housing units to be maintained in the base year and in option years 1 and 2, including any amount allocable to, or considered for, additional common areas to be maintained due to the demolition without replacement of housing units in the disputed 38-acre area. The parties responded to the Board’s inquiry on 24 and 28 May 2010.

## SUMMARY FINDINGS OF FACT

1. Solicitation No. FA4809-07-R-0001 was issued on 4 December 2006 for military family housing (MFH) maintenance at Seymour Johnson Air Force Base (SJAFB), North Carolina (R4, tab 7 at 1, 3).

2. The 1 December 2006 Performance Work Statement (PWS) for MFH Maintenance in the foregoing solicitation, as amended prior to award and included in the contract, provided in pertinent part (R4, tab 2 at 1, 8-9 of 56) (bold in original):

**1. DESCRIPTION OF SERVICES:** The Contractor shall maintain military family housing units at Seymour Johnson AFB.... Appendix 1 shows how the “**average**” number of active housing units varies by year from a high of 1,336 units to a low of 900 units. Appendix 6 provides an estimated annual active unit amount and breakdown by unit type....

....

**1.6 GROUNDS MAINTENANCE.** The Contractor shall provide grounds maintenance for all grounds within the boundaries of the housing areas. Grounds maintenance includes, but is not limited to, maintenance of lawns of unoccupied/deactivated (See Para 1.6.1 and 1.6.1.2. for exception) family housing units up to the curbs, common grounds areas.... Weekly, QA personnel shall provide the Contractor a list of unoccupied/deactivated units. The Contractor is not required to provide lawn maintenance within 50 feet of occupied family housing units (See Para 1.6.1.1. for exception). Grounds within the boundaries of the housing area shall be classified as either improved or unimproved as indicated on the grounds maintenance layout in Appendix 9a (**Amendment 0005**).

**1.6.1. IMPROVED GROUNDS:** The Contractor shall maintain the lawn between 1-2 inches in height.... Some improved grounds areas landscaped by a Government contract are within 50 feet of occupied housing units. These locations are shown on the Grounds Maintenance Layout (**Appendix 9a**) (**Amendment 0005**) and shall be maintained by the housing maintenance Contractor....

....

1.6.1.2. CONSTRUCTION AREAS/DEACTIVATED UNITS. The Contractor will not be required to perform any grounds maintenance to housing units/areas temporarily turned over to another Contractor. QA personnel will inform Contractor, in writing, of affected areas, as applicable.

....

1.6.3. UNIMPROVED GROUNDS. Areas along the boundaries of the housing area (see Appendix 9c for locations) shall be permitted to grow naturally. Where grass abuts pavement, curb, sidewalk, trees, shrubs, fences, or any other fixed object, trimming or edging will be used to remove grass or other vegetation....

3. PWS Appendix 1 provided workload estimates. It stated the average annual number of housing units to be maintained as follows (R4, tab 2 at 29 of 56):

Base Period	1,150
Option Year 1	1,036
Option Year 2	1,140
Option Year 3	1,088
Option Year 4	900

Appendix 1 also provided:

#### VARIATIONS IN CONTRACT WORKLOAD

a. As the number of housing units to be maintained changes (either increase or decrease) from the quantities shown in the Performance Work Statement (PWS)(Changed by Amendment 1), an adjustment will be made to the monthly price. This adjustment shall be applied when the number of units available for maintenance changes for 30 days or more.

b. The Government shall provide the Contractor 30 days notice prior to adding or deleting units for maintenance and the adjustment will be effective on the day the unit(s) are added or deleted from service. Reference CLIN X002.

4. PWS Appendix 6 provided housing lists. It stated: “Due to phases of construction, the number and type of units included in this Appendix is [sic] based on the anticipated construction dates and are provided for Contractor estimating only. The Government reserves the right to any variation to this Appendix based on actual construction schedules.” The base year list totaled 1,336 units. There were no totals for the option years. (R4, tab 2 at 43-47 of 56)

5. PWS Appendix 7 contained the following pertinent definitions:

Active Unit. A housing unit for which the Contractor will be responsible for performing the full range of maintenance services described in the PWS.

Deactivated Unit. A housing unit that the Contractor shall not be required to perform interior maintenance service calls. Accomplishment of exterior...grounds maintenance shall still be required, unless otherwise determined in writing by the CO.

....

Unoccupied Unit. A housing unit that is vacated by one occupant and is prepared for a new occupant. The contractor is required to maintain the unit as if it were an Active Unit.

(R4, tab 2 at 49 of 56)

6. PWS Appendix 9 consisted of maps and layouts. Appendix 9a was the “Project Location Plan and Grounds Maintenance Layout.” The notes on Appendix 9a required the contractor to perform grounds maintenance on all grounds within the boundaries shown on the plan, except areas that were the responsibility of the housing occupant to maintain, and stated that all grounds within the boundaries shown were classified as improved, except for two areas that were unimproved. Appendix 9a depicted, in outline form, housing units, streets, and common areas. The parties have provided marked-up copies of Appendix 9a showing the disputed acreage. (R4, tab 8 at 2; exs. A, G-3)

7. On 8 January 2007 Amendment No. 5 to the foregoing solicitation was issued to correct and clarify the solicitation as a result of site visit questions, and stated: “QUESTIONS IN REGARDS TO THE PROPOSAL AND SITE VISIT MUST BE FAXED TO THE CONTRACTING OFFICE...AND WILL BE ADDRESSED IN WRITING....” (R4, tab 13 at 1, 5).

8. An Air Force 8 January 2006 (sic, 2007) memorandum for All Prospective Bidders from CO Marion S. Faulhaber described the 19 December 2006 site visit and provided them the following questions and answers relevant to this dispute (R4, tab 6 at 1, 12-13, 17-18):

zz. Please clarify the forecasted average housing units per year and how many units you would like to have priced per year on CLINS 0001, 2001, 3001, and 4001

Answer: The base period and all option years are estimated on the base year of 1,336 units.... CLIN X002 is used to adjust for any decrease in units.

....

ggg. Are the lots where units have been demolished considered as common areas (landscaping)?

Answer: Yes.

....

jjjj. Will the government provide an estimated number of unoccupied/deactivated family housing units to receive grounds maintenance?

Answer: Currently there are 690 deactivated units. However, this number is subject to change weekly.

....

nnnn. Reference Section 1.6, Grounds Maintenance and Appendix 9a Map, there is no indication of how many total acres are to be maintained. Request that the Government provide total acreage to be maintained, mowed, and raked in this contract and acreage breakdown of the Improved areas and Unimproved areas.

Answer: The total acreage of the [MFH] Area is approximately 450 acres. However, due to ongoing

construction a breakdown of improved and unimproved acreage is not easily identifiable.

9. On 15 March 2007 DWBH Services, Inc. (DWBH) and the U.S. Air Force entered into Contract No. FA4809-07-D-V001 (the contract), of the firm-fixed-price, indefinite quantity, commercial item type, providing for the issuance of delivery orders or task orders to provide maintenance services for the family housing units and surrounding grounds at SJAFB (R4, tab 1 at 1, 134, 143-44 of 165).

10. The contract, signed by CO Faulhaber, was awarded for the 1 April 2007 to 31 March 2008 base year, and had four option years, including option year 1 (1 April 2008 through 31 March 2009), and option year 2 (1 April 2009 through 31 March 2010). Contract line item No. 0001 (CLIN 0001) required "Complete Maint[enance] and Repair of 1,336 [housing] units," including, *inter alia*, "Grounds Maintenance" for the base year. The first CLIN of each option year also specified maintenance and repair of 1,336 units. CLIN 0002 specified a "Credit for Deactivate Units Over 30 Days." The contract incorporated DWBH's following monthly prices: Base year, \$78,616.75 (CLIN 0001), \$22.52 (CLIN 0002); Option Year 1, \$72,732.92 (CLIN 1001), \$19.28 (CLIN 1002); Option Year 2, \$73,549.90 (CLIN 2001), \$20.18 (CLIN 2002); Option Year 3, \$70,929.67 (CLIN 3001), \$18.23 (CLIN 3002) and Option Year 4, \$56,882.47 (CLIN 4001), \$15.71 (CLIN 4002) (R4, tab 1 at 1, 3, 28-29, 54, 79-80, 105 of 165). The government exercised the options for the first two option years (R4, tabs 14, 18, 24).

11. The parties agree that beginning at an unidentified date after contract award, the government paid DWBH on a "per cut basis" to maintain a 38-acre area where housing units had been demolished.

12. Respondent's Arnold T. Waller, Jr., contract monitor, and Jerry V. Crawley, quality assurance person, stated in essentially the same terms (exs. G-1, G-2):

3. ...DWHB Services was paid additional funds...for the extra effort needed to restore certain grounds areas that were returned to the government by another contractor in poor condition that did not meet the Military Family Housing Contract [PWS] specifications. Because the grounds were out of standards, (such as tall grass and weeds, bare patches, ruts), DWBH was paid additional monies for the extra effort required to maintain the grass and to bring the area back into standard with the contract requirements. Once the area was returned to the condition specified in the PWS the area reverted to "common grounds" within the Military Family Housing Area and was required to be maintained IAW MFH PWS at no additional cost to the government as per the firm fixed price. Mr. Waller further stated (ex. G-4):

3. The 38 acres referred to in the claim were calculated by taking the area covered by each demolished unit's footprint plus the fifty foot boundary that is considered the housing occupant's responsibility to maintain. The fifty foot boundary is where the common area starts...as referenced in...PWS 1.6, and 1.6.1.

13. Monika White, DWBH's Vice President who prepared its "bid" for the contract, stated (White aff. at 2):

8. The areas marked in red [on exhibit A] are the areas involved in this dispute. At the time of the award, there were housing units in these areas.... During the course of the contract, these areas were turned over to a demolition contractor and DWBH was no longer responsible for maintaining the[ir] grounds.

9. Due to the lack of accurate information provided in the original RFP pertaining to whether demolished houses would be rebuilt or converted to additional grounds, it was not possible to accurately forecast increases in grounds maintenance. It was DWBH's understanding that if a house is not rebuilt and the footprint of that house becomes additional grounds, it would be compensated.

10. The 38 acre area in dispute consists of the footprint of each of the demolished homes....

We find no record evidence that before contract award DWBH communicated to the government its alleged understanding that it would be compensated for cutting "new" common areas accruing due to demolition of MFH units.

14. DWBH's 2 June 2009 claim to CO Kyle Donah stated that in the past the government had paid DWBH to maintain a 38 acre parcel of MFH on a "per cut basis"; DWBH had cut that area on 8-9, 15-16, 22-23 and 29-30 April and 6-7, 13-14 and 21-22 May 2009, which it described as "additional services"; and DWBH requested payment of \$2,000 per cut for those seven cuts, totaling \$14,000 (R4, tab 24).

15. Since the CO directed DWBH to continue providing the disputed services, DWBH cut the disputed area approximately nine more times, increasing the amount of DWBH's claim to approximately \$32,000.00 (compl. and answer ¶ 4).

16. The CO's 26 June 2009 final decision denied DWBH's claim in its entirety (R4, tab 25).

17. On 21 September 2009 DWBH submitted its timely notice of appeal to the ASBCA, which docketed the appeal as ASBCA No. 56948 (compl. and answer ¶ 5).

18. In response to the Board's 17 May 2010 request for additional information, CO Donah stated that no formal modification was executed to add or remove any units from the contract, or to change the contract price; CLIN X002 allowed the government to adjust the amount invoiced by the contractor based on the CLIN X002 prices multiplied by the number of deactivated units; the government took "credits" for such adjustments; the government continued to pay DWBH the full CLIN 0001 price, adjusted for the credits, even when units were turned over to a separate construction contractor; DWBH's invoiced amounts contained the funding applicable to the units that formerly occupied the 38 acres in question; and the credits taken and the 38 acres are "separate, non-related contractual issues." (Kyle aff. dtd. 27 May 2010 at 1 ¶ 3, *see also* Kyle aff. dtd. 21 May 2010)

19. In response to the Board's 17 May 2010 request for additional information, appellant's 24 May 2010 letter to the Board stated that the "record clearly shows, as demonstrated by the attached chart, that the [government] took substantial credits for deactivated units," namely, \$119,468.60 in credits against DWBH's invoices at the CLIN 0002 rate of \$22.52 per unit for the base year; \$172,980.16 at the rate of \$19.28 per unit for option year 1; and \$196,755 at the rate of \$20.18 per unit for option year 2, for a total credit of \$489,203.76 for those three years. Appellant avers: "As of this date, there has been no specific adjustment made under CLIN X002 for additional common areas to be maintained due to the demolition without replacement of housing units in the disputed 38 acre area."

### DECISION

Appellant argues that (i) the number of housing units would change during the course of the contract due to demolition of old units and construction of new units, during which time such units would be under the control of another contractor and DWBH would not be responsible for their grounds maintenance; (ii) given the relatively small change in total units at the beginning of option year 2 estimated in Appendix 1 (1,140 in option year 2 compared to 1,150 in the base year, *see* finding 3), there was nothing to indicate the common area would increase by 38 acres during option year 2; (iii) DWBH did not "bid" on such additional work; (iv) DWBH could not reasonably have anticipated that the government would change its plan and decide not to rebuild a large number of the housing units and instead to convert their acreage to common property; (v) DWBH is entitled to additional compensation for maintaining the additional "common area" (app.



br. at 4-5); and (vi) respondent has made no specific price adjustment under CLIN X002 pursuant to the Variations in Contract Workload clause in PWS Appendix 1 for added common area resulting from demolition without replacement of housing units in the disputed 38-acre area (24 May 2010 ltr.).

Respondent argues that DWBH did not prove that the 38 acres of maintenance work were “additional” to the work required by the contract, *i.e.*, the “clearly defined” area within the boundaries of the MFH area; respondent paid DWBH for “restorative maintenance” to bring those 38 acres into compliance with “the Improved Grounds standard,” but DWBH made no such “additional efforts...after approximately March 2009” (gov’t br. at 5-6), no formal adjustment was made to the contract price with respect to deactivated units turned over to another construction contractor, for which the government continued to pay DWBH the CLIN X001 price, adjusted for credits under CLIN X002; and credits taken for deactivated housing units and the 38 acres of added common grounds are separate and non-related issues (Donah 27 May 2010 aff. at 1 ¶ 3).

Contract CLIN X001 required DWBH to maintain all improved grounds in common areas within the boundaries of the housing areas, and did not except common areas ensuing from completion of demolition of housing units (finding 2, PWS ¶ 1.6, finding 10). When respondent turned over such units temporarily to another contractor for demolition, DWBH was not required to perform grounds maintenance thereon (finding 2, PWS ¶ 1.6.1.2). After such units were demolished, their lots were considered “common areas,” as the offerors, including DWBH, were advised on 8 January 2007 before contract award (findings 7-8).

DWBH’s argument that the relatively small change in total housing units at the beginning of option year 2 estimated in Appendix 1 did not indicate that the common area would increase by 38 acres during that option year, and so it did not bid on the disputed 38-acres of grounds maintenance, is not convincing because appellant has not shown that it relied in bidding on its current interpretation (dependent upon minor changes from the base year to option year 2). Rather, Ms. White stated that:

Due to the lack of accurate information provided in the original RFP pertaining to whether demolished houses would be rebuilt or converted to additional grounds, it was not possible to accurately forecast increases in grounds maintenance. It was DWBH’s understanding that if a house is not rebuilt and the footprint of that house becomes additional grounds, it would be compensated.

This interpretation that “if a house is not rebuilt” DWBH would be compensated for additional grounds, was not communicated to respondent before contract award (finding

13), and is directly contrary to its argument that the small net change in housing units at the beginning of option year 2 caused it not to bid on the disputed 38 acres of grounds maintenance.

The parties agree that for an unidentified period of weeks prior to 8 April 2009, respondent paid DWBH on a \$2,000 “per cut basis” to maintain the disputed 38 acres of common areas, whose maintenance duties had been temporarily suspended during the period of their demolition by another contractor. Respondent explains that the government made those payments to bring such common areas up to PWS standards. (Findings 11-12) We find this explanation credible.

We hold that the contract required DWBH to mow all common areas within the boundaries of the disputed 38 acres, including the common areas that resulted after demolition without replacement of housing units. We deny the appeal.

Dated: 2 June 2010

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DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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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. 56948, Appeal of DWBH Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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