

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Lear Siegler Services, Inc. ) ASBCA No. 57264  
)  
Under Contract No. FA8108-09-D-0006 )

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OPINION BY ADMINISTRATIVE JUDGE SCOTT

Lear Siegler Services, Inc. (LSI)<sup>1</sup> has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from the contracting officer's (CO's) denial of its \$1,483,631.06 certified claim under its indefinite delivery, indefinite quantity (IDIQ) contract with the Air Force. Appellant alleges that unilateral Modification No. 2 (Mod. No. 2) to its task order (TO) No. 13 for aircraft and depot maintenance for National Guard aviation facilities increased the agreed maintenance workload under the TO and was a compensable change. The Board held a hearing on entitlement only. For the reasons stated below, we sustain the appeal.

FINDINGS OF FACT

Background

1. The Army National Guard Bureau (ANG or NGB) is responsible for certain aviation maintenance and limited depot repair, and maintenance of all Army National Guard helicopters, helicopter subsystems and ground support equipment. The 1108<sup>th</sup>

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<sup>1</sup> During at least part of the period at issue, LSI's parent corporation was EG&G Technical Services, Inc. LSI is now known as URS Federal Services. For convenience, we refer to appellant as LSI throughout. (See ex. A-76; tr. 1/5 (counsel statement), 2/36-37)

Aviation Classification and Repair Activity Depot, in Gulfport, Mississippi (MS AVCRAD), oversees 22 facilities in 9 southeastern states, Puerto Rico and the Virgin Islands. (Ex. A-25 at 8245; tr. 3/155-56, 192)

2. Like the subject contract, its predecessor was part of the Air Force's Contract Field Team (CFT) program, overseen by the Air Force's Air Logistics Center, Oklahoma City, Oklahoma, for temporary and long-term labor support for technical services needs, including maintenance and repair, depot services, inspections and modernization for contingency support for aircraft, vehicles, weapons systems and other equipment. Maintenance requirements were similar to those under TO No. 13 and the same types of aircraft were involved. Services under the predecessor contract were on a time and materials (T&M) basis. LSI, which was in charge of MS AVCRAD's paint hangar, provided paint services, including limited depot maintenance. A different company, L-3, provided most of the maintenance. In addition to being one of the two incumbent contractors at MS AVCRAD, LSI also performed paint and maintenance services, combined, at AVCRAD locations in California, Connecticut and Missouri, covering needs similar to those of MS AVCRAD. (Ex. A-1; compl., answer ¶¶ 4; tr. 1/43, 77-78, 107-09, 125, 2/7-10, 2/61-63, 141, 3/190, 200-04, 4/14, 68, 73, 96; see R4, tab 1 at Fair Opportunity Notice (FON); ex. A-6; tr. 1/38, 2/230)

3. In March 2008 the Department of Defense (DoD) discouraged T&M contracts unless appropriate and authorized. It reported General Accountability Office findings, including that DoD was using them because they could be adjusted easily when requirements were unclear or funding uncertain. On 5 August 2008 the Air Force issued a policy memorandum implementing DoD's direction and CFT began looking for requirements to convert to fixed-price. (Exs. A-5, -7; tr. 2/141-43)

#### The Contract

4. On about 3 October 2008, the Air Force awarded 11 multiple-award contracts for CFT support services, including the subject negotiated IDIQ contract awarded to LSI. The CO was Jeff Frederick of Tinker AFB, Oklahoma. The base year was 1 October 2008-30 September 2009. Options run through 30 September 2015. Contract line item numbers (CLINs) are on T&M, firm-fixed-price (FFP) and cost reimbursement bases. (Ex. A-8 at 1-25, 60; compl., answer ¶¶ 5, 6) The contract Schedule provides that the contract minimum for all CLINs when combined is \$40,000.00 for each individual contract issued and the maximum is \$10,123,901,515.00 (ex. A-8 at 2, § B, n. 1).<sup>2</sup>

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<sup>2</sup> The maximum and minimum are also addressed in the contract's Federal Acquisition Regulation (FAR) 52.216-19, ORDER LIMITATIONS (OCT 1995) and 52.216-22, INDEFINITE QUANTITY (OCT 1995) clauses (ex. A-8 at 59, 60).

5. FFP CLIN 0004 covers modification, maintenance and repair services on-site at government locations pursuant to individual TOs. It states in part:

Payment for labor shall be in accordance with the prices established in Attachment 1 and the hours negotiated in accordance with the Special Provision entitled, "FIXED PRICE WORK PROCEDURES FOR CLIN X004 (FIXED PRICE LABOR)" [Fixed Price Labor clause]. ACRN [Accounting Classification Reference Number] to be cited on individual [TOs].

(Ex. A-8 at 3) The contract describes "ATTACHMENT 1" as a 5 November 2007 13-page pricing matrix. We have not been directed to it and have not located it in the record. The contract describes "APPENDIX A," referred to below, as the Performance Work Statement (PWS) to be issued with each TO. (*Id.* at 79; *see* finding 6)

6. The contract contains or incorporates, *inter alia*, the following clauses:

FAR 52.211-11, LIQUIDATED DAMAGES—SUPPLIES, SERVICES OR RESEARCH AND DEVELOPMENT (SEP 2000), providing that, if the contractor fails to perform services within the time specified in the contract, it shall pay the government liquidated damages of \$1 per calendar day of delay (ex. A-8 at 27).

PLACE OF PERFORMANCE (APR 2007) (ex. A-8 at 28), providing that services are to be performed at locations specified in TOs.

PROJECTED TEAM COMPLEMENT (APR 2007) (PTC clause):

The projected team complement (PTC) is the estimated number and skill classification of personnel expected to be required to accomplish a task. The government reserves the right to determine whether the PTC will be determined solely by the Contractor based on the number of personnel the Contractor believes to be necessary to accomplish the required task(s), or whether the Government will solely determine the PTC. Regardless of the contract type...utilized for [TO] selection, the Contractor shall provide a breakout of the PTC on which their proposal is based.

(Ex. A-8 at 33)

The Fixed Price Labor clause (finding 5) provides that, for an FFP TO, the Procuring CO is to issue a notice to the contractor for the work "and the details of the work to be performed" (ex. A-8 at 42). The contractor is to provide an FFP and is to break down its price to include proposed hours and proposed burdened labor rate. Payment for FFP items is to be at the fixed-price listed for each item.

ORDERING PROVISIONS FIXED PRICE/FIXED PRICE INCENTIVE FIRM TARGET/COST PLUS INCENTIVE FEE/[T&M] (APR 2007) (Ordering Provisions clause):

(c) All [TOs] issued hereunder are subject to the terms and conditions of this contract. This contract shall control in the event of conflict with any [TO].

(d) [TOs] issued under this contract shall contain the following:

- (1) Services to be furnished (by [CLIN]);
- (2) Appendix "A", [PWS];

....

(6) Appropriate data for funds obligated with the dollar amount chargeable thereto...;

- (7) Site or sites where services are to be performed;

....

- (10) For FFP [TOs], the contractor's proposed FFP;

....

- (14) [PTCs] by numbers and skill classification.

(Ex. A-8 at 45)

ACCEPTANCE OF TASK ORDERS (APR 2007) (TO Acceptance clause):

(a) [T]he contractor agrees to accept any [TO] issued in accordance with the terms and conditions of this contract. The Government reserves the unilateral right to adjust those provisions within the scope of the contract including...the estimated quantities, requirements...within the scope of the

[TO's] Appendices..., site locations, and other support items not specified herein, at the [schedule rates], of any [TO].

(Ex. A-8 at 46)

CRITERIA FOR ISSUING [TOS]/FAIR OPPORTUNITY (APR 2007), providing in part:

The Government reserves the right to reject any [TO] proposal that is evaluated to be unrealistic in terms of program commitments, including contract terms and conditions, or unrealistically high or low in cost when compared to Government estimates, such that the proposal is deemed to reflect an inherent lack of competence or failure to comprehend the complexity and risks of the applicable task.

(Ex. A-8 at 49)

FAR 52.243-1, CHANGES—FIXED-PRICE (AUG 1987) -- ALTERNATE II (APR 1984)  
(ex. A-8 at 75):

(a) The [CO] may at any time, by written order...make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

....

(3) Place of performance of the services.

....

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the [CO] shall make an equitable adjustment in the contract price...and shall modify the contract.

....

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause....

TO No. 13

7. In August 2008, MS AVCRAD began developing a PWS for aircraft and depot maintenance at MS AVCRAD locations on a T&M basis. CO Frederick later advised that it was to be FFP. MAJ Daryl Gilbert, production control division chief and an assistant Project Officer (PO) at MS AVCRAD, worked with the Tinker CFT program office, including CO Frederick, to develop the PWS, under which contractor personnel would augment government employees performing the work. MAJ Gilbert worked from the prior consolidated PWS that had included paint and maintenance and developed a separate PWS for each function. Under the direction of LTC Richard Poole, then MS AVCRAD's Deputy Commander of Maintenance and the PO for TO No. 13, MAJ Gilbert included in the draft maintenance PWS "the footprint that we had on the ground" (tr. 4/81), which was 83 personnel, under the predecessor maintenance contract with L-3. He also included facilities supported by MS AVCRAD that had no current staffing on the basis that any of them might need support during the year. In CO Frederick's view, the contractor might later have to staff a location where no one was currently located as long as the total number of personnel supplied fell within alleged 83 minimum and 109 maximum ranges. MAJ Gilbert did not complete drafting the PWS because he was away. He did not include the workload created by subsequent deployments of government personnel from North Carolina and Tennessee (below). While he was away, LTC Poole and MAJ James E. Brown, another PO, worked on the PWS, using input from the three other AVCRADs. LTC Poole arrived at the 109 figure, which he deemed to be the maximum number of contractor personnel to be assigned under TO No. 13 and the amount for which funds were available. The 109 number was about 3 to 4 extra CFT teams over the 83 number, which he deemed to be the minimum. LTC Poole included the 109 maximum to cover unknown circumstances such as unscheduled maintenance, slots vacated due to deployments, or lack of full-time manning. (Tr. 2/13, 62-63, 139-40, 159-61, 163, 165, 3/42, 69, 86-87, 186-87, 193, 196-98, 202, 210-11, 219-22, 224-25, 231-32, 243, 251, 4/20, 25, 30-31, 54, 64, 67-68, 72-76, 79, 81-82, 84, 86-87, 95-96, 110; *see ex. A-10*)

8. By memorandum to LTC Poole of 21 November 2008 the Tennessee ANG requested personnel:

The 1-230<sup>th</sup> ACS will mobilize beginning March 2009. A majority of the full time support personnel for the three flight facilities are assigned to the 1-230<sup>th</sup> ACS and will be deploying with that unit. This will cause a personnel shortage that must be filled in order to continue supporting the aviation assets

remaining in the state. AASF [Army Aviation Support Facility] # 1 in Smyrna will have 5 HH-60 Blackhawks and 4 OH-58A/C helicopters. AASF # 3 in Jackson will have 8 AH-64 Apaches.

(Ex. A-10) The memorandum listed numbers and skill types, amounting to 21 personnel for Smyrna, Tennessee, and 22 for Jackson, Tennessee, as follows:

<u>AASF# 1 Smyrna</u>	<u>AASF# 3 Jackson</u>
10 Aircraft Mechanics	1 ALSE
1 Prop and Rotor Mechanic who is NDI qualified	1 NDI
1 Sheet Metal	6 Armament/Avionics
1 Electrician	1 Sheet Metal
1 Avionics Tech	1 GSE
2 Technical Inspectors	2 Supply
1 Quality Assurance Tech	10 Mechanics
1 PC Clerk	
1 Computer Database Manager (ULLS A)	
1 ALSE Tech	
1 Safety Tech	

The memorandum stated that if a person had multiple skills, the number of personnel could be reduced. CO Frederick was not aware of the memorandum prior to his award of TO No. 13 (below) and no one from MS AVCRAD told him there was going to be a deployment in March 2009 (tr. 3/41, 43, 84). LTC Poole did not notify anyone at Tinker about the deployment. He was ultimately able to reduce the number of support staff from that requested. LSI serviced the equipment left behind after the deployment under TO No. 13, Mod. No. 2. (See tr. 2/40-41, 3/162, 170, 242-43, 245, 247, 4/36, 55)

9. On 29 January 2009 CO Frederick issued a CFT FON for MS AVCRAD to CFT contract awardees, attaching a PWS prepared on 25 August 2008 by MS AVCRAD. The FON stated that the PWS would be awarded as an FFP TO and that, as noted in the pricing sheets, the team complement could not be altered. The pricing sheets are attached to the PWS and numbered sequentially as part of it. (R4, tab 1 at FON, PWS at 1, 36-37; see finding 15)

10. PWS ¶ 1.1 stated that work may be accomplished at the 1108<sup>th</sup> AVCRAD's Gulfport, Mississippi, site "or those sites designated by the AVCRAD Commander" (ex. A-25 at 8245).

11. PWS ¶ 2.2 stated: “All work will be performed in facilities under the control of the customer or other government locations as directed by the [PO]” (ex. A-25 at 8245). Assigned aircraft included but were “not limited to” UH-60, AH-64, UH-1, OH-58 and CH-47 (*id.* ¶ 2.3).

12. PWS ¶ 4.2.14 stated:

Maintenance may be performed at any [AVCRAD] or [AASF] under the command and control of the [NGB], at any other military installation designated by the NGB, or at any FAA approved facility as designated by the AVCRAD commander. Maintenance performed at any locations other than those defined in Section 1.1, above, will be considered Temporary Duty locations and will be funded separately as over & above, travel.

(Ex. A-25 at 8252)

13. PWS ¶ 8.0, ESTIMATED TEAM COMPLEMENT, stated that “[t]he first table listed below indicates current qtys on hand, with the specific locations broken out in the second table” (ex. A-25 at 8259). As follows, the first table showed 38 labor skill categories, current quantity of personnel on hand per category (83 total), and a quantity limit per category (109 total). The quantity on hand and quantity limit numbers were the same for all but three skills: Supply Technician **TS1** (20 on hand, 23 limit); Mechanic, ACFT I **MA1** (32 on hand, 52 limit); and Mechanic, ACFT III (Inspector) **MA3** (13 on hand, 16 limit). The potential additional personnel in those three skill categories totaled 26. The second table showed 24 locations and the number of workers at each location per skill category (83 total), which was a matrix of every facility in PO Poole’s support area. (Ex. A-25 at 8259-60; tr. 2/155, 3/218)



Skill Title	Skill Code	PWS Paragraph Reference	Quantity (On Hand)	Quantity (Limit)
General Clerk I	01111	8.1		
General Clerk II	01112	8.2		
General Clerk III	01113	8.3		
Production Control <b>CT1</b>	01270	8.4	1	1
Supply Technician <b>TS1</b>	01410	8.5	20	23
Computer Operator II	14042	8.6		
Computer Operator III	14043	8.7		
Computer Operator IV	14044	8.8		
Computer Operator V	14045	8.9		
Computer Programmer II	14072	8.10		
Computer Programmer III	14073	8.11		
Computer Programmer IV	14074	8.12		
Computer Systems Analyst I	14101	8.13		
Computer Systems Analyst II	14102	8.14		
Material Coordinator	21020	8.15		
Stock Clerk	21150	8.16		
Tools and Parts Attendant	21210	8.17		
Warehouse Specialist	21410	8.18		
Aerospace Structural Welder	23010	8.19		
Mechanic, ACFT I <b>MA1</b>	23021	8.20	32	52
Mechanic, ACFT II	23022	8.21		
Mechanic, ACFT III (Inspector) <b>MA3</b>	23023	8.22	13	16
Aircraft MECH Helper	23040	8.23		
Aircraft Painter	23050	8.24		
Aircraft Servicer	23060	8.25		
Aircraft Worker	23080	8.26		
Aircraft Mechanic I (AH Armament)	23021	8.27		
Aircraft Mechanic I (electronics specialty)	23021	8.28	10	10
Aircraft Mechanic I (OH Armament)	23021	8.29		
Aircraft Mechanic II (electronics specialty)	23022	8.30		
Aircraft Mechanic III (electronics specialty)	23023	8.31		
Aircraft Mechanic I (Machinist specialty)	23021	8.32		
Aircraft Mechanic I (Sheet-Metal specialty)	23021	8.33	7	7
Laboratory Technician	30210	8.34		
Technical Writer I	30461	8.35		
Technical Writer II	30462	8.36		
Technical Writer III	30463	8.37		
Maintenance Test Pilot	Specialty	8.38		
		Total	83	109

CITY/STATE	FACILITY	CT1	MA1	ME1	MS1	TS1	MA3	TOTAL
Gulfport, MS	AVCRAD <sup>[3]</sup>	1	3	2	3	9	4	22
Frankfort, KY	AASF# 1		6	2	1	2	1	12
Birmingham, AL	AASF# 2		5		1	1	3	10
Dobbins, GA	AASF# 2					2		2
Hope Hull, AL	AASF# 1		1			1		2
Morrisville, NC	AASF# 1		5	2	1	2	1	11
Salisbury, SC <sup>[4]</sup>	AASF# 2		3	2	1	1	1	8
Hammond, LA	AASF# 1		2	1			1	4
Smyrna, TN	AASF# 1		1				1	2
Ft. Rucker, AL	Audio Visual BR					1		1
Mobile, AL	AASF# 3					1		1
St. Croix, VI	AAOF		2					2
Brooksville, FL	AASF# 2		4	1			1	6
Jacksonville, FL	AASF#1							
Savannah, GA	AASF# 3							
Winder, GA	AASF# 1							
Pineville, LA	AASF# 2							
Jackson, MS	AASF# 1							
Meridian, MS	AASF# 3							
Tupelo, MS	AASF# 2							
San Juan, PR	AASF# 1							
Eastover, SC	AASF# 1							
Jackson, TN	AASF# 3							
Louisville, TN	AASF# 2							
		1	32	10	7	20	13	<b>83</b>

Thus, despite notice of the Tennessee deployments, the PWS showed only 1 MA1 mechanic and 1 MA3 mechanic for Smyrna. It was not amended to include the additional 10 aircraft mechanics and 11 other skills requested for that location. The PWS did not show any personnel or skills for Jackson and was not amended to include the 22 personnel and 7 skills requested. (See finding 8)

14. Below the tables the PWS stated in part:

The actual number of employees required on site will be communicated by the [PO] at the time of award. Any changes thereafter will be emailed by the PO to the contractor's Site Manager as soon as exact needs are known. Labor needs may

<sup>3</sup> The AVCRAD is a hub maintenance facility for higher level maintenance. The AASF are lower level maintenance support facilities. (Tr. 1/216)

<sup>4</sup> This was a typographical error. The intended location was Salisbury, NC (tr. 3/231).

vary throughout the period of performance. Not all labor may be needed as projected and not all labor will be needed at one time. However, high numbers in some categories may be required expeditiously. As labor needs are determined by each AVCRAD, the contractor will be required to respond and provide actual on-site labor in a compressed timeframe. The contractor shall also be required to reduce the team complement as required and within the timeframe required upon notification from the PO....

(Ex. A-25 at 8260)

15. Attachments 1 and 2 to the PWS, the FFP Pricing Proposal for MS AVCRAD for the base and option years, provide:

**Estimated Man Hours:** The Government considers a Full Time Equivalent (FTE) to consist of 1,920 hours annually. The Government estimates a total of up to 109 FTE positions (83 normal load and an additional 26 surge load) are needed to support this requirement. While Offerors are allowed to utilize any amount of hours they consider to be equivalent to an FTE in developing their proposal and are not necessarily expected to provide 109 positions at exactly 1,920 hours annually; the number of hours utilized in developing the proposal must be adequate to support the overall mission and all Offerors will be expected to staff in a manner sufficient to support the requirement regardless of the number of hours they utilize in their proposal. The number and types of skills required for this mission are not open to alternate proposal. One total [FFP] should be submitted for this portion of the overall effort to be inclusive of all labor and any miscellaneous costs.

(R4, tab 1 at PWS at 36-37)

16. In the pricing sheets the government gave "Total Estimated Man-Hours by CFT" per skill, which was the same as in the "Quantity (Limit)" portion of the first chart above and totaled 109. The contractor was to complete "Proposed Hours per FTE":

Proposed Skills

Proposed Hours per FTE

(PWS 8.4) – Prod Ctrl x (1) FTE	_____
(PWS 8.5) – Supply Tech x (23) FTE’s	_____
(PWS 8.20) – A/C Mech I x (52) FTE’s	_____
(PWS 8.22) – A/C Mech III x (16) FTE’s	_____
(PWS 8.28) – A/C Mech I (Elec Spcl) x (10) FTE’s	_____
(PWS 8.33) – A/C Mech I (Sht Mtl) x (7) FTE’s	_____

(R4, tab 1 at FON at 36-37) The contractor was to add any other proposed direct costs, then to insert a total proposed FFP for MS AVCRAD for the base year (*id.*). PO Poole did not participate in drafting the proposal pricing sheet (tr. 4/61-62).

17. In completing the PWS and the two tables, CO Frederick did not include any pending deployment and any associated additional work (tr. 3/31-32, 43).

18. LSI’s operations manager, Joshua Frankel, was responsible for preparing its bid. Daniel Skinnell, LSI’s program manager for TO No. 13, and for the predecessor contract, was also involved. (Tr. 1/37, 40-41, 194-96, 199, 4/128) LSI first established a baseline figure by estimating its competitors’ bids. Using 109 personnel it arrived at a baseline bid amount of \$7,261,509.20. It recognized that it was to price based upon 109 personnel, but did not believe it actually had to use a specific number of people. It could change the number of hours per man, so it used a lower FTE because it believed it could do the work with fewer people. LSI estimated the amount of work to be done based upon its prior AVCRAD experience; discussions with Fred Collins, its experienced site supervisor under its MS AVCRAD contract at the time, who also so served under TO No. 13; discussions with PO Poole and customer staff at sites outside Gulfport, Mississippi where LSI had not worked; and its business judgment. It developed its proposal based upon using 79 personnel and arrived at a bid amount of \$5,264,629.70. (Ex. A-25 at 8279, 8285; tr. 1/42-43, 47-52, 62, 107-09, 113, 115, 136, 200, 202, 209-10, 215, 225-26, 2/8-10, 59-60, 63, 72-73, 4/129) Mr. Frankel noted that LSI followed an industry Lean Six Sigma program relating to work efficiencies and cost reduction and that, when it had implemented those processes, it had experienced at least a 10 percent reduction (tr. 1/53-54). LSI estimated that it could perform the TO No. 13 work with only 90 percent of the “core group of 83 folks” (tr. 4/122-23, 129; *see also* tr. 1/135). It deemed that a “surge load” of 26 heads would involve an unexpected, short-lived event, such as a weather event or backfilling positions when government personnel were on a mission (tr. 1/67-68, 82, 4/125-26).

19. Regarding the first PWS table, in LSI’s experience, TOs listed all job classes then placed numbers next to the ones needed. It understood that it might have to provide services at the sites listed in the second table that showed no personnel currently on hand

but it believed that the additional effort would be accompanied by additional funding. It deemed that this was an easy way the government could lay the groundwork for more in-scope, additional, work without having to re-compete. LSI did not price that potential future work in arriving at its bid. (Tr. 1/121, 123-24, 215-16, 2/67)

20. On 2 February 2009, LSI submitted its bid. Its pricing sheet included 1,355 hours per FTE in each skill category listed in the PWS for the base and option year, at a proposed FFP for each year of \$5,264,629.70, and grand total of \$10,529,259.40. (Ex. A-25 at 8243, 8279-81)

21. Messrs. Frankel and Skinnell were unaware of impending deployments in North Carolina and Tennessee when LSI submitted its bid. There is no evidence that other LSI personnel knew of the planned deployments at the time of its bid, which would have been higher had it known, because more work and more people would be required. (Tr. 1/85-86, 2/12, 38-39, 41-42)

22. By email of 2 February 2009 CO Frederick inquired of Mr. Frankel about LSI's proposed FTE of 1,355 hours per person. The CO stated that it equated to someone working about 26 hours per week or having about 4 months' leave and the government could not consider it an FTE. He stated that it appeared that the proposal contained a mistake and he requested verification of the submission and the supporting rationale. He concluded that, even though the effort was FFP, he could not make an award without determining that the price was fair and reasonable to both parties. (Ex. A-27) The CO and Milo Fogle, then LSI's CFT program manager responsible for helping to assemble TO "capture teams" to win awards (ex. A-25 at 8243; tr. 4/120), engaged in a telephonic discussion in which Mr. Fogle explained LSI's bid. The CO asked him to confirm with a follow-up email. After the call, the CO sent Mr. Fogle an email on 2 February 2009 stating: "Thanks much Milo. I feel better now hearing that." (Ex. A-29) Mr. Fogle's follow-up email to the CO of 2 February confirmed that "LSI developed bid strategy based on approx...1820 hours per person for core individuals and expect the surge (26 individuals) to last 7-8 weeks" (ex. A-28; tr. 4/126). LSI had advised the CO that it was making the surge estimate based upon its experience as an incumbent contractor. The CO acknowledged at the hearing that he understood LSI's approach and he had no basis to find it unreasonable. He determined it was fair and reasonable based upon adequate competition. The CO did not consider LSI's bid to be a prohibited "alternate proposal." (Ex. A-100 at 2; tr. 1/141-42, 2/170-73, 175-76, 3/27-28, 32-35, 4/122-24, 127, 162) There is no evidence that, at the time of LSI's bid and TO award, the government disputed its interpretation of "surge" (see tr. 1/84-85).

23. On 12 February 2009 SFC Rodney P. Shiyou, then Inventory Management Supervisor at MS AVCRAD (tr. 3/147-48, 168), prepared a Military Interdepartmental Purchase Request (MIPR) which provided \$2,000,000 in funds for use under TO No. 13

for maintenance operations in the 1108<sup>th</sup> AVCRAD support area and \$500,000 in funds for use under the TO for support of depot maintenance operations at the 1108<sup>th</sup> MS AVCRAD by personnel located in Gulfport, Mississippi. Although the same MIPR number was involved, the two funding sources were separate. (Supp. R4, tab 25; tr. 3/142-43, 152-53, 156, 158-59)

24. In early to mid-February 2009<sup>5</sup>, the Air Force, through CO Frederick, awarded TO No. 13 to LSI for the base and one option period, at \$5,264,629.70 each. Performance began on 1 March 2009. (Ex. A-31 at 1, 2) FFP CLIN 0004, at \$5,264,629.70, pertained to "Fixed Price Labor" for MS AVCRAD and stated: "The total price does not equally convert to 26 payments. As a result, there will be 25 payments of \$202,485.76 and 1 payment of \$202,485.70." (Ex. A-31 at 2) CLIN 0004 called for:

All labor/services necessary to accomplish modification/maintenance/repair effort on-site at operational government locations as defined in Appendix A, attached, AFI 21-102 and AFMC 21-141. Rates shall not exceed the pricing in the basic contract, Attachment 1. The team complement is attached in the PWS.

(Ex. A-31 at 2) CLIN 0004AA, covering fixed price labor for maintenance operations in the 1108<sup>th</sup> AVCRAD support area, was funded in the amount of \$2,000,000 and CLIN 0004AB, covering fixed price labor for support depot maintenance at the 1108<sup>th</sup> AVCRAD by personnel located in Gulfport, Mississippi, was funded in the amount of \$500,000, both in accordance with the above MIPR (ex. A-31 at 3, 9-10).<sup>6</sup>

25. FFP CLIN 0005, in an amount to be negotiated, covered performance of:

[A]ny other over and above work requirements not listed in the work specifications but required in support of the items requiring repair/overhaul/remanufacture as may be called for by the ACO.

<sup>5</sup> The TO is undated (ex. A-31 at 1). The complaint and answer allege award on 1 March and 19 February 2009, respectively (¶¶ 26), and appellant's brief, on 4 February 2009 (app. br. at 30, ¶ 84). CO Frederick believed it issued in about mid-February 2009 (tr. 2/177). Events surrounding the issuance of Mod. No. 2 suggest that the TO had been awarded by mid-February (*see, e.g.*, finding 29).

<sup>6</sup> The accounting line for the \$2,000,000 contained an apparent typographical or other immaterial error, corrected in Mod. No. 3 (ex. A-74 at 2).

(Ex. A-31 at 4) The CLIN concluded:

In the event of a surge or within scope urgent requirement, as defined by the [PO] and approved by the ACO or PCO, overtime may be required. Overtime will not be approved for work defined in the PWS but for which the contractor is short manned. Any overtime required as a result of manning shortages, either temporary or permanent, shall be the responsibility of the contractor.

(*Id.*)

26. Cost reimbursement CLIN 0006 and subCLINs, with the total estimated cost to be negotiated, covered certain contractor acquired property and contractor acquired services (ex. A-31 at 5-6).

27. The TO contained DoD FAR Supplement 252.232-7007, LIMITATION OF GOVERNMENT'S OBLIGATION (MAY 2006), providing that CLIN 0004 was incrementally funded and \$2,500,000 of the total price was presently available for payment and allotted to the contract. It set forth an allotment schedule, which stated that the parties "contemplate" funding of \$2,500,000 upon contract execution and, thereafter, \$921,543.23 on each of 1 June and 1 September 2009 and \$921,543.24 on 1 December 2009. The clause provided that the government could, at any time prior to termination, allot additional funds for CLIN 0004. (Ex. A-31 at 12-13, ¶¶ (a), (f), (j))

28. LSI retained L-3's employees who had been working on the predecessor contract on maintenance (tr. 4/14; *see, e.g.,* ex. G-10). PO Poole and/or MAJ Gilbert normally communicated project requirements daily to LSI's site superintendent Collins through emails or personal visits. He normally then communicated with Mr. Skinnell and/or others at LSI, who evaluated the work to be done. Most of the time LSI provided the requested skill sets. However, based upon its evaluation, after prior discussion with MS AVCRAD, it sometimes provided a different number of personnel or skill set. The number did not always match that estimated in PWS Attachment 1, the pricing sheet. For example, LSI provided far fewer "A/C Mech III" positions than the estimated 16 (ex. G-12; tr. 2/195-97; finding 16, *see also* finding 13 (PWS table one quantity limit of 16)). PO Poole expressed to Mr. Fogle at one point that LSI was not manning the job in the manner he had expected. LSI's position was that the TO was based upon accomplishing the work, not the number of individuals in place. LSI negotiated with the government concerning requirements, available resources, and appropriate increases or decreases. Staffing levels fluctuated somewhat but remained fairly steady. There were personnel transfers when needed. (Tr. 1/213, 227, 2/21, 69-71, 85, 98-99, 4/87-88, 134-35) MAJ Gilbert reported to the CO on 2 December 2009:

I usually just walk over to our LSI office and tell them I need this. I let them work it out with corporate to fill the slot. The local LSI supervisor here has worked with us for over 10 years and works hard to make sure we are supported.

(Ex. A-122) PO Poole praised the performance of Mr. Collins, who now works for the follow-on contractor to LSI under a T&M contract. MAJ Gilbert found him to be “outstanding” (tr. 4/107). He was a good manager of personnel and requirements. (Tr. 4/15-16, 18, 29)

29. By email of 27 February 2009 to CO Frederick, SFC Shiyou advised that he needed to add 20 personnel in Tennessee and 5 in North Carolina to TO No. 13, stating “[t]his requirement was outside the scope of the original contract. What do I need to do in order to add them to [the TO].” (Ex. A-43) The CO responded:

To be honest, if it’s something outside the scope of what we competed, I can’t let you add it. In the past, it was no real big deal; but times have changed.

Now if we can argue what you’re talking about is actually within scope workwise, we just need more bodies than we planned, I might be able to get there on that.

(*Id.*) SFC Shiyou forwarded the CO’s response to LSI’s Mr. Collins, stating, “[h]e’s right in the sense that all we are doing is adding more bodies to the contract. The scope of work being performed is exactly the same.” He asked for Mr. Collins’ view. (Ex. A-43) Mr. Collins forwarded the emails on 27 February to Mr. Fogle, who replied to Mr. Collins and others at LSI that MS AVCRAD needed to clarify that this was add-on work within the TO’s scope. He expressed that the work was new work that only MS AVCRAD could do and that it was clearly added work not called for in the original bid. (Ex. A-44 at 1) Mr. Fogle sought to have the work added to TO No. 13 as “over and above.” Otherwise, Tinker AFB had advised that it would have to be under a new TO that was competed. (Tr. 4/131-33) The parties disagree about who originated the concept that the work would be additional to that originally covered by TO No. 13.<sup>7</sup>

30. On 3 March 2009, in response to a 2 March request by SFC Shiyou, LTC Robert L. Whitaker of the Tennessee ANG advised that a total of 20 positions would

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<sup>7</sup> Their disagreement was expressed in hearsay testimony upon which we do not rely in this circumstance (*e.g.*, tr. 3/163-64, 177-78 (LSI was source (Shiyou)), 1/232, 235, 4/130, 133, 143-44, 146 (government was source (Skinnell, Fogle))).



be required and gave the individual numbers at Smyrna and at Jackson, Tennessee, for various skills (exs. A-45, -46).

31. By 4 March 2009 email to PO Poole, LTC Todd Hunt, Director of Aviation & Safety for the North Carolina National Guard, noted that its UH60 facility (AASF # 2) had over 30 of 45 personnel affected by a mobilization. The PWS had shown 3 MA1, 2 ME1, 1 MS1, 1 TS1, and 1 MA3 at Salisbury (finding 13). LTC Hunt sought 8 additional contract personnel in Salisbury, North Carolina, for 12-18 months, stating that the contract team would augment an already short staff. He acknowledged that funding was an issue but described the requirement as a critical need. The specific skill sets requested are not clear. (Ex. A-52; tr. 3/172) PO Poole inquired of SFC Shiyou about a funding source and "how close we are to the max CFT hire according to the contract" (ex. A-53). PO Poole did not want to exceed what he deemed to be the TO's 109 maximum (tr. 3/244).

32. Citing an LSI Costpoint-Timesheet History, the government alleges in briefing that, as of 5 March 2009, throughout TO No. 13's performance period, without alleging a contract change, LSI provided personnel at Eastover, South Carolina, even though the PWS, while listing the location, did not show quantities on hand there (supp. R4, tab 46B; finding 13; gov't br. at 51). It appears that the government did not raise this matter at the hearing. In any event, it did not direct us to any testimony concerning it, which might have elucidated the circumstances; there is no evidence that any unilateral contract modification such as Mod. No. 2 was involved; there is a lack of supporting evidence that it is relevant; and we accord it little weight.

33. At some point in February to early March 2009, CO Jeremy Messer of Tinker AFB took over administration of TO No. 13. CO Frederick resumed administering it in June 2009. He was not involved in Mod. No. 2's issuance. (Tr. 2/180-81, 3/108-09)

#### TO Modifications and REA

34. On 11 March 2009 CO Messer issued unilateral Mod. No. 1 to TO No. 13. Its stated purpose was to establish and fund CLINs 0005AA and 0005AB, for "Over and Above" work and per diem/travel in support of CLINs 0004AA and 0004AB, with the obligated amount increased from \$0 to \$100,000 and \$150,000, respectively, and to establish and fund CLIN 0006AC, for contractor acquired services/medical services in support of CLINs 0004AA and 0004AB, with the obligated amount increased from \$0 to \$36,000. Like each subsequent modification, Mod. No. 1 was described as "Routine" and stated that all other terms and conditions remained unchanged. The funding sources and associated MIPR, identified as Amendment No. 1, prepared on 6 March 2009 by SFC Shiyou, were the same as for TO No. 13. SFC Shiyou verified that "the funds were provided from the exact same accounts." (Supp. R4, tab 29; ex. A-57 at 1-4; tr. 3/159)

The newly funded CLINs were cost-reimbursable and the modification increased TO No. 13's value by the stated sums (tr. 2/110-12).

35. SFC Shiyou prepared a MIPR, issued on 20 March 2009, identified as Amendment No. "ORG" (supp. R4, tab 30), which we infer means "original." It stated that the funds were for TO No. 13 and would be used to backfill positions due to the deployment of the 1/230<sup>th</sup> ACS in Tennessee and the 1/130<sup>th</sup> AV BN in North Carolina. The funds were for ten positions in Smyrna, Tennessee, ten in Jackson, Tennessee, and eight in Salisbury, North Carolina. The MIPR noted the establishment of a "new Labor [sub]CLIN same as [sub]CLIN 0004AA," in the estimated total price of \$2,040,000, as well as "new" subCLINs "same as" subCLINs 0005AC and 0006AD for "over and above" and per diem/travel and contractor acquired services/medical services in support of the "new Labor [sub]CLIN," in the amounts of \$11,200 and \$65,000, respectively, for a grand total MIPR amount of \$2,116,200. The "brand new" MIPR (tr. 3/160) was different than the initial MIPR for TO No. 13 and had a different funding source. The new MIPR used Global War on Terrorism dollars because they could be used to support deploying or deployed units. (Supp. R4, tabs 30, 31; tr. 3/160-61, 167, 179-80) SFC Shiyou prepared the new MIPR in a manner:

[J]ust to make sure that this funding was only to pay for these positions, because of the deployment...the only people that could use this funding [were] deployed units.

(Tr. 3/161) At the time he drafted the MIPR, SFC Shiyou thought that TO No. 13 was on a T&M basis, like its predecessors. He arrived at the \$2,040,000 funding amount by using a man-hour formula he typically used for T&M contracts. (Tr. 3/166, 180, 182-83)

36. On 5 April 2009 CO Messer issued unilateral Mod. No. 2 to TO No. 13. Its stated purpose was to establish and fund CLINs 0004AC, 0005AC, and 0006AD. It established FFP CLIN 0004AC in the amount of \$2,040,000 for labor for maintenance operations to backfill positions due to the deployment of the 1/230<sup>th</sup> ACS in Tennessee and the 1/130<sup>th</sup> AV BN in North Carolina, stating it would fund ten positions in Smyrna and ten in Jackson, Tennessee, and eight in Salisbury, North Carolina. The performance period was 1 March 2009 through 28 February 2010. The modification did not name any particular skills involved. It noted that CLIN 0004AC funding went from \$0 to \$2,040,000 and stated that "the total dollar amount for CLIN 0004 is hereby increased" from \$2,500,000, by \$2,040,000, to \$4,540,000. It increased "the total dollar amount" of CLIN 0005 from \$250,000, by \$65,000, to \$315,000, and increased "the total dollar amount" of CLIN 0006 from \$36,000 by \$11,200, to \$47,200, for a total modification amount of \$2,116,200. The accounting and appropriations data in Mod. No. 2 reflected funding as obligated from \$0 to \$2,116,200. The funding source was as stated in the new MIPR. (Ex. A-64 at 1-2, 4-5) CO Messer testified that he established CLIN 0004AC to

reflect the fact that the MIPR associated with Mod. No. 2 had a separate accounting line and needed a new CLIN and ACRN (tr. 3/121). He maintained that he had included language from the new MIPR by mistake in his description of Mod. No. 2 and that he had intended only incremental funding, but he acknowledged that it was his office's normal practice to include the MIPR description in modifications. (Tr. 3/122-23, 127-29)

37. CO Frederick acknowledged that the positions referred to in Mod. No. 2 were not part of the TO's staffing at the time of award (tr. 3/55).

38. When LSI received funded Mod. No. 2, which it considered to be additional work changing TO No. 13, it still expected to receive the remaining originally scheduled incremental funding under the TO (tr. 1/86, 91-92, 159-60, 180, 234-35, 2/90, 93-94, 96). In the next week or two after LSI's receipt of Mod. No. 2, Mr. Frankel inquired of CO Frederick about the next installment of TO No. 13's price and learned that the CO felt that the Mod. No. 2 payment constituted the remaining amount due (tr. 1/86).

39. Mr. Skinnell testified credibly that Mod. No. 2 was "a significant amount of new work" for LSI (tr. 2/13). It created a separate charge code to track the work and capture its costs under the new CLIN 0004AC. LSI had to support additional aircraft, hire new people, and transfer people from other sites. However, it ultimately developed that the "28 full heads" (tr. 1/98) contemplated by the modification were not necessary; LSI was able to accomplish the mission with fewer personnel. (Tr. 1/79, 97-98, 156-57, 233-34, 2/13-14, 16-17, 121; *see* R4, tab 46A at 1, tab 46B at 12; tr. 4/88)

40. On 14 May 2009, Amendment No. 2 to the MIPR issued for TO No. 13 was prepared to increase funds for ACRN AA by \$800,000 for maintenance operations in the 1108<sup>th</sup> AVCRAD support area and for ACRN AB by \$735,000 to support depot maintenance operations at MS AVCRAD by personnel located in Gulfport. The funding sources were the same as for the original TO. (Supp. R4, tab 32) On 26 May 2009, referring to Amendment No. 2, CO Messer executed an "ACCEPTANCE OF MIPR" form stating that funds in the amount of \$810,370.30 were not required and could be withdrawn. (Supp. R4, tab 33; tr. 3/144)

41. Effective 15 June 2009 CO Messer issued unilateral Mod. No. 3, which increased "the total amount obligated for CLIN 0004" (specified in the referenced Schedule as CLIN 0004AA) from \$4,540,000, by \$724,629.70, to \$5,264,629.70 and increased the total amount obligated for TO No. 13 from \$4,902,200.00, by \$724,629.70, to \$5,626,829.70. The accounting and appropriations data showed funds obligated from \$2,000,000 to \$2,724,629.70. The funding source was as described in MIPR Amendment No. 2, the same as for the original TO. (Ex. A-74)

42. On 26 June 2009 LSI submitted a \$1,868,043.20 request for equitable adjustment (REA) to CO Messer to cover its alleged increased costs to provide additional staff in accordance with Mod. No. 2 for 28 positions expected to remain filled for 12 to 16 months, an alleged change to FFP TO No. 13. LSI alleged, *inter alia*, that the added 28 people for 12 to 16 months was a change to the 83-person "Normal Load" identified in the PWS and was not properly considered a surge. It also noted that Mod. No. 2's \$2,116,200 in funding varied from the incremental funding established under TO No. 13 and concluded that the government could not expect a contractor to absorb \$1.9 million in additional costs on a TO currently valued at only \$5,264,630. (R4, tab 2) On 24 July 2009 CO Frederick denied the REA on the basis that the government was not bound by LSI's bid strategy, which had estimated a surge at 7 to 8 weeks, and because the government had not exceeded TO No. 13's maximum of 109 FTEs (R4, tab 3).

43. On 19 August 2009 LSI asked for reconsideration (ex. A-93 at 2). CO Frederick evaluated the situation in subsequent August and September 2009 emails among government personnel. He noted that he had begun to "see things differently" (ex. A-91 at 2). He expressed that Mod. No. 2 had added 28 personnel to TO No. 13, which was within its 109 maximum; the fact that new sites were involved was insignificant; but the government potentially owed LSI money if it had actually provided more personnel than anticipated in order to staff new skill sets that had not been part of the TO. On the other hand, he also considered that any amount owed would be offset by LSI's "shorting us on the minimum skills we asked for" (ex. A-89 at 1), which he deemed to be the skill categories and 83 associated personnel that formed the PWS' Estimated Team Complement. He stated that, at the time of Mod. No. 2, LSI had provided "only 74" personnel and the addition of 28 would not exceed TO No. 13's 109 maximum (ex. A-100 at 1). The CO opined that the term "surge," which he had inserted into the PWS pricing sheet after talking to MS AVCRAD, was a sudden sharp increase in volume and did not equate to "short term" (ex. A-92 at 1, ex. A-100 at 1-2). He also inquired whether Mod. No. 2's funding was intended to be part of the original TO's incremental funding, or only to fund the new positions named in the Mod.'s MIPR, and concluded it was the former (exs. A-89 to -92, A-95 to -97, A-99 to -100).

44. However, in response to a 20 August 2009 email from COL George Berry, MS AVCRAD's commander (tr. 3/194), who opined that the government had already paid for a full team complement, CO Frederick stated:

[W]e asked LSI to give us a price for 6 different skill sets that totaled up to a max of 109.... When we asked them to provide new skills they hadn't proposed to support, we changed the game. This has nothing to do with whether they provided all 109 or only 5 slots in total.

....

I do need to work with them to figure out what we owe them for asking for new skills as well as work out what they owe us for shorting us on the minimum skills we asked for.

(Ex. A-90 at 2) In a subsequent email that day to government personnel, the CO addressed whether the government had been "shorted" but concluded:

Do keep in mind though, if they meet the requirements and we continue to ask for more, they are legally entitled to more money. So we either need to stop using those extra skills or plan to be able to fund them.

(*Id.* at 1)

45. PO Poole advised CO Frederick in a 27 August 2009 email:

In the past when we were adding personnel to our Contracts (which were T&M), each time we added people we had to plus up the \$\$\$. So when we added the people the last time we sent \$\$\$ up to support the requirement because that is what we had done in the past. [CO Messer] sent the \$\$\$ back because this is a [FFP] Contract and the bid was for 83 personnel up to 110 personnel and as long as we did not exceed our maximum numbers there was no requirement to send more money.

(Ex. A-98)

46. By 1 September 2009 email to LSI CO Frederick disputed that Mod. No. 2 was a contract change, except he conceded that "Comp Oper and Helpers" added in the modification were not skills LSI was to have priced in response to the FON (R4, tab 10 at 2). By 28 September 2009 email to PO Poole, CO Frederick advised:

I would recommend that your folks immediately cease using the skills (Comp Oper and Helpers added to Smyrna, Jackson, TN and Salisbury, NC) not originally asked for as LSI is 100% legit in asking for more money for those folks. I still argue they owe us more than those folks cost for the skills they shorted us for the first 14 weeks or so....

(Ex. A-108) To the CO's knowledge, the government did not cease using the named skill sets (tr. 3/68).

47. Bilateral Mod. No. 4, signed by CO Frederick on 17 February 2010, extended TO No. 13 by three months, to 31 May 2010; increased the total amount obligated for CLIN 0004 by \$1,937,000, from \$5,264,629.70 to \$7,201,629.70; and stated that, as a result, the total amount obligated for TO No. 13 was increased from \$5,626,829.70 to \$7,563,829.70. The modification was divided into two parts, CLIN 0004AD, in the amount of \$1,491,000, with a designated funding source, and CLIN 0004AE, in the amount of \$446,000, with a different source. The funding sources were different than for the initial TO No. 13 and for Mod. No. 2. (Ex. A-132) CLIN 0004AD represented the original contract effort and CLIN 0004AE, the Mod. No. 2 work. LSI was paid for all of its work during the extension period. (Tr. 2/56, 117-18, 125)

48. LSI's performance of the Mod. No. 2 work lasted for the duration of TO No. 13. Its assigned personnel never exceeded 109. (Supp. R4, tab 46A at 21-22, tab 46B at 84-86; ex. G-12; see tr. 2/52-53, 3/58-59) MAJ Gilbert found the maintenance workers and maintenance provided by LSI to be very good (tr. 4/109-10).

#### LSI's Claim and CO's Decision

49. On 3 May 2010, by regular mail and email, LSI submitted a certified CDA claim to CO Frederick in the amount of \$1,483,631.06, alleging that Mod. No. 2 added 28 positions and labor requirements that were outside TO No. 13's scope and constituted a compensable change (R4, tab 20). We infer that the CO received the emailed claim on 3 May 2010. LSI did not claim the \$2,040,000 amount of Mod. No. 2 but only its costs incurred under it plus 3.5% profit (*id.*; tr. 2/119). LSI disputed that the 28 positions were within the "surge load" contemplated by the PWS. It alleged that a "surge" position would be temporary, as it had explained in connection with its bid proposal, without government objection, such that the government was bound by LSI's interpretation. LSI also stated that the 12 to 16 months' work period named in Mod. No. 2 would extend beyond TO No. 13's base year into the first option year, thereby reflecting full-time positions that clearly were not temporary. LSI asserted that the PWS had identified only six labor categories for which offerors were to propose hours: Production Control; Supply Technician; Mechanic, ACFT I; Mechanic, ACFT III; Aircraft Mechanic I (electronics specialty); and Aircraft Mechanic I (Sheet-Metal specialty) (*see* finding 16). LSI claimed that Mod. No. 2 had added positions in four labor categories, of which only Mechanic I was listed in the PWS as one for which offerors were to submit proposed hours. An additional Mod. No. 2 position, Computer Operator III, was listed in the PWS but offerors had not been required to submit proposed hours for it. Two other Mod. No. 2 positions, Inspector I and Helper, were not in the PWS. The source of the skills mentioned by LSI is not clear, because Mod. No. 2 did not name any (finding 36). LSI

also noted that Mod. No. 2 had added positions in Jackson, Tennessee, and claimed that TO No. 13 had not designated it as a work location. Finally, LSI contended that Mod. No. 2's explicit funding for the 28 additional positions contradicted the government's position that they were merely a surge load and no compensable change had occurred. (R4, tab 20)

50. On 26 May 2010 CO Frederick issued his final decision denying LSI's claim. He alleged that, under TO No. 13, the PWS' Estimated Team Complement made it clear that the government was to determine staffing levels needed, when they were needed, and where, in accordance with the locations and skill sets described in the PWS. Contractors were not allowed to revise the team complement. Under the pricing sheets attached to the FON, offerors were expected to staff to support the government's requirement regardless of the number of hours used in their proposals and the number and types of skills required were not open to alternate proposal. The CO also stated that, although the TO had a funding schedule, under the TO's Limitation of Government's Obligation clause (finding 27), the government could allot funds as provided by the customer. Mod. No. 2 was to provide incremental funding and to communicate the need for positions within the scope of and at locations contemplated in the PWS. He stated that Mod. No. 2 did not specify types or quantities of skills needed, which, under the PWS, were to be communicated by the PO. He alleged that AVCRAD had provided funding as available, with Mod. No. 3 completing the TO's funding, and the close proximity of the funding actions belied LSI's presumption that Mod. No. 2 was to fund out of scope work. The CO disputed LSI's position on "surge" and stated that the government had not exceed the TO's maximum of 109 FTEs. (R4, tab 21) LSI's timely appeal was filed with the Board on 11 June 2010.

51. The CO testified that he felt forced to deny LSI's claim because it did not supply requested manning levels, payroll history, time sheets or other material in support. LSI had sent him a summary of actual costs incurred under CLIN 0004AC on 11 May 2010, stating that it could provide whatever level of additional detail he required, but he found the submission inadequate. (Supp. R4, tab 20; tr. 3/76-77, 81)

52. The government concedes that, at some point after Mod. No. 2 issued, MS AVCRAD directed LSI to provide two positions—one Helper and one Computer Operator—that were listed in the PWS but not shown in either the Quantity (On Hand) or Quantity (Limit) columns, not listed in the PWS' proposal pricing worksheet, and for which LSI did not provide a bid price. The government agrees that these skill sets were outside the scope of requirements contemplated by the parties or the TO. However, the government continues to contend that, while LSI was entitled to reimbursement regarding those two positions, it owes the government a greater amount for not providing all of the positions upon which it bid. Thus, while there were TO changes, there was no resulting damage to LSI. (See ex. A-97 at 2, ex. A-101 at 2, ex. A-108; gov't br. at 55-58) Apart from the fact that LSI disagrees that it was required to provide a minimum number of

personnel under the TO, the government has not assessed any liquidated damages, asserted a claim against LSI, or directed us to evidence of any specific manning or skill request by the government under the TO with which LSI allegedly did not comply (including after any negotiations on the matter).

## DISCUSSION

### Preliminary Matter—Appellant’s Motion to Strike Government’s Proffered Expert’s Report and Testimony

Appellant renewed its pre-hearing motion to strike the report and testimony of Defense Contract Audit Agency (DCAA) technical specialist David Katz, offered by the government as an expert in government contracts accounting. The Board ultimately determined to evaluate his report (ex. G-17) and testimony at the hearing and reserved ruling pending panel review. (Tr. 5/10, 13-14, 32, 44-48, 51-54; see Bd. orders dated 11 and 18 July 2011)

We conclude that Mr. Katz’ report and testimony do not help to resolve the entitlement issues before us. See FED. R. EVID. 701, 702. His premise that appellant proposed to provide 109 personnel, or a maximum of 109, and his implicit assumption that it was required to do so under TO No. 13, which appellant strongly disputes, are in effect legal conclusions that are not within an expert’s province. *Lockheed Corp.*, ASBCA No. 36420 *et al.*, 91-2 BCA ¶ 23,903. Further, we do not agree with the government that Mr. Katz’ report and testimony show that appellant suffered no damage from Mod. No. 2. While appellant must show some related damage in the entitlement phase of proceedings, *Cosmo Construction Co. v. United States*, 451 F.2d 602, 605-06 (Ct. Cl. 1971), it is clear that, under its theory of entitlement, it was damaged.

Accordingly, we grant appellant’s motion to strike Mr. Katz’ report and testimony.

### The Parties’ Positions on Entitlement

Appellant describes the two bases of its claim as: (1) FFP TO No. 13 covered aircraft and depot maintenance for MS AVCRAD and was based upon the Air Force’s PWS requirements and LSI’s proposal to perform the maintenance. The TO did not require LSI to provide 83 or 109 personnel but rather to perform the maintenance expressed in the PWS; and (2) the Air Force changed the TO’s requirements through Mod. No. 2, which was issued in response to the deployment of ANG personnel from North Carolina and Tennessee, and which added maintenance load not expressed in the PWS. Among other things, appellant alleges that Mod. No. 2 added labor categories and a new location that were not contained in the PWS’ Estimated Team Complement and the modification’s performance period, of at least 12 months, was not a temporary event that



could be characterized as a “surge.” It greatly exceeded appellant’s proposed seven to eight weeks surge load factor, which the government had understood at the time of its proposal. Appellant asserts that Mod. No. 2 was not an incremental funding modification. It provided funding for the additional maintenance load that was outside the TO’s funding schedule and from a different source. Appellant further asserts that both parties treated Mod. No. 2 as a change contemporaneously, supporting the reasonable interpretation that it was one.<sup>8</sup>

The government alleges that Mod. No. 2 was not a compensable change. TO No. 13 required appellant to provide a maximum of 109 skill sets and positions and did not allow it to propose its own staffing levels. The PWS provided that the number and types of skills required were not open to alternate proposal and that only the PO could decide the number of employees required on site. The government contends that appellant is attempting to take advantage of the CO’s alleged unnecessary addition of language to Mod. No. 2 that did not change its substantive purpose, which was to provide incremental funding to TO No. 13. The government alleges that, unlike Mod. Nos. 3 and 4, Mod. No. 2 did not state that it was increasing the amount obligated for TO No. 13 and thus it was not intended to increase the TO’s value.

The government also asserts that a focus upon the term “surge” is misplaced, because it allegedly is mentioned only in the FFP pricing proposal worksheet. The government states that the PWS identified the locations named in Mod. No. 2, regardless of the fact that the Jackson, Tennessee, location did not show any personnel on hand. It alleges that appellant provided personnel in Eastover, South Carolina, even though the PWS did not include any quantities on hand at that location, and appellant did not allege a contract change when it did so. The government urges that this alleged pre-dispute conduct should inform the Board’s interpretation of TO No. 13. However, we have accorded the alleged Eastover issue little weight for lack of supporting evidence that it is relevant (finding 32).

The government further alleges that the only change to TO No. 13 occurred when MS AVCRAD directed appellant to provide the one Helper and one Computer Operator positions not contemplated in the TO and not originally priced by appellant, but that appellant did not suffer any injury thereby. The government concludes that, even if

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<sup>8</sup> In footnotes appellant also claims that the government’s specifications were defective because they did not alert appellant to known deployments (app. br. at 65 n.5; app. reply br. at 11 n.6). In view of our decision, we need not reach this issue.

appellant were damaged, its injury is only its costs for the Helper and Computer Operator skill sets.<sup>9</sup>

### Mod. No. 2 was a Compensable Contract Change

CLIN 0004 covers FFP labor at government locations pursuant to individual TOs (finding 5). Under the contract's Place of Performance clause TOs are to specify the locations where services are to be performed (finding 6). The contract's PTC clause provides that the PTC "is the estimated number and skill classification of personnel expected to be required to accomplish a task" (*id.*). Under the contract's Fixed Price Labor clause, for an FFP TO, the Procuring CO is to issue a notice to the contractor for the work "and the details of the work to be performed" (*id.*). The contractor is to provide its FFP, including proposed hours and labor rate. Payment is to be at the fixed-price listed for each item. (*Id.*) Under the contract's Ordering Provisions clause all TOs are to contain services to be furnished "by [CLIN]", an Appendix A that is the PWS, funding data, the sites where services are to be performed and PTCs by numbers and skill classification (*id.*).

Both parties contend that the pricing sheets are not part of the TO (tr. 1/96, 99, 2/99-100, 176; app. br. at 56; gov't br. at 44), although both base arguments upon them (*e.g.*, app. reply br. at 18; gov't reply br. at 4). The pricing sheets are attached to the PWS and numbered sequentially as part of it (findings 9, 15). Appellant's proposed base and option year price of \$5,264,629.70, each, contained in its completed pricing sheets, was the TO No. 13 award amount (findings 20, 24). We conclude that the pricing sheets, including as completed by appellant, are part of the TO.

The FFP pricing sheets called for the contractor to price 6 skills at specified numbers of FTEs, totaling 109. They stated that the government considered an FTE to consist of 1,920 hours annually and that it estimated a total of up to 109 FTE positions (83 normal load and an additional 26 surge load<sup>10</sup>) were needed. Offerors could use any amount of hours they considered to be equivalent to an FTE in developing their proposal and did not have to provide 109 positions at exactly 1,920 hours annually but the number of hours used had to be adequate to support the overall mission. The number and types of

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<sup>9</sup> In a footnote the government alleges that lack of notice prior to the REA prejudiced the government by depriving it of a potential termination for convenience (gov't br. at 2 n.1). It did not pursue this argument and we do not reach it.

<sup>10</sup> The parties differ about the meaning of "surge." They also contend, erroneously, that the term is used only in the pricing sheet. However CLIN 0005, concerning over and above work, addresses a "surge" or within scope urgent requirement that might call for overtime payment, unless it were for work already defined in the PWS for which the contractor was short-manned. (Finding 25) In view of our resolution of this appeal, we do not address the surge issue further.

skills required for the mission were not open to alternate proposal. (Finding 15) Contrary to the government's contention, nothing in the pricing sheets, or elsewhere in the contract or TO, specifies a 109 person maximum and 83 person minimum to be supplied by the contractor. Indeed, the IDIQ contract includes minimum and maximum amounts of work to be ordered and performed in terms of dollar amounts, not personnel (finding 4). If the government intended contractors to supply a minimum and maximum number of personnel, it should have drafted the PWS to make that requirement clear.

Moreover, under the contract's Criteria for Issuing [TOs]/Fair Opportunity clause, the government had the right to reject any TO proposal evaluated to be unrealistic in terms of contract requirements or cost (finding 6). However, after communicating with appellant about its proposed FTE and its interpretation of the term "surge," the CO accepted its bid as reflected in its pricing sheets and did not deem it to be a prohibited "alternate proposal" (finding 22).

Section 1.1 of the PWS provides that work may be accomplished at the 1108<sup>th</sup> AVCRAD's Gulfport, Mississippi, site or sites designated by the AVCRAD Commander. Under section 2.2 all work is to be performed in facilities under the customer's control or at other government locations as the PO directs. Section 4.2.14 provides that maintenance performed at any locations other than those defined in section 1.1 are to be considered Temporary Duty locations and to be funded separately as over & above, travel. (Findings 10-12)

TO No. 13's workload is based upon the PTC set forth in the PWS, which was based upon the pending workload under the predecessor contract. It is defined in terms of the quantities on hand and quantity limits at various named locations where specific numbers of personnel are listed under specific skill categories. The total number of personnel on hand was 83, spread over 13 named locations. The total potential number of personnel is 26 more than the number currently on hand. The 26 includes 3 extra supply technicians TS 1, 20 extra mechanics ACFT I MA1, and 3 extra mechanics ACFT III (Inspector) MA3. These are skills already variously in place at the named locations where skills are listed. (Findings 7, 13) The PTC also lists some locations and skills for which there was no quantity on hand or quantity limit. They were included because the government might have a need for work at those locations and/or for those skills over the course of the TO. (Finding 7) The PWS makes it clear that labor needs at sites could vary. It states that the PO will communicate the actual number of employees required on site at the time of award and will notify the contractor of changes thereafter as soon as exact needs are known. Not all projected labor might be needed, or needed at once, but high numbers in some categories could be required expeditiously. Also, the contractor is to reduce the team complement as required. (Finding 14) However, the PWS does not mention changing listed sites or skill categories and, under the FFP TO, it does not allow

the government to change and mix the number of specified personnel and specified locations at will without potential financial consequence.

Appellant's interpretation at the time of bid that the PWS listed sites for which no personnel or skills were named in order to allow the government to add in scope work without the need to re-compete is reasonable (finding 19). In fact, the contract anticipates the possibility of such changes. The TO Acceptance clause provides that the government has the unilateral right to adjust the TO's provisions within the contract's scope including "the estimated quantities, requirements...within the scope of the [TO's] Appendices..., site locations, and other support items not specified herein, at the [schedule rates], of any [TO]" (finding 6). Moreover, the FAR Changes clause incorporated into the contract provides that, by written order, the CO may make changes, within the contract's general scope, in the description of services and/or place of performance. If such a change causes an increase in the cost of or time required for performance of any part of the contract work, the CO shall make an equitable adjustment in the contract price. (*Id.*) Thus, the government can adjust quantities and locations listed in the FFP TO but the contract contemplates payment for additional quantities, requirements and site locations.

The Limitation of Government's Obligation clause in TO No. 13 provides that CLIN 0004 is incrementally funded and sets forth an allotment schedule, which states that the parties contemplate funding of \$2,500,000 upon contract execution and, thereafter, \$921,543.23 on each of 1 June and 1 September 2009 and \$921,543.24 on 1 December 2009. However, the government can, at any time prior to termination, allot "additional" funds for CLIN 0004. (Finding 27)

Mod. No. 2 was not merely for incremental funding as the government alleges. The contract's Ordering Provisions clause provides that TOs are to contain services to be furnished by CLIN (finding 6). The stated purpose of Mod. No. 2, which was funded by a "brand new" MIPR and new funding source, in an amount that was based upon a man-hour formula SFC Shiyou typically used for T&M contracts (finding 35), was to establish and fund subCLINs 0004AC, 0005AC, and 0006AD. The modification established FFP CLIN 0004AC in the amount of \$2,040,000 for labor to backfill positions due to the post-TO award Tennessee and North Carolina deployments. The accounting and appropriations data in Mod. No. 2 reflected funding as obligated from \$0 to \$2,116,200 (which includes funding for the other new subCLINs). (Finding 36) This was not part of or consistent with the TO's funding schedule, under which \$2,500,000, not "\$0", had already been funded upon contract execution (findings 24, 27). Rather, these were "additional funds" for CLIN 0004, as contemplated by the contract.

Mod. No. 2 required "a significant amount of new work" (finding 39). It called for additional work under the TO due to the deployments that were not known to appellant or CO Frederick prior to TO award, even though LTC Poole had been notified in November

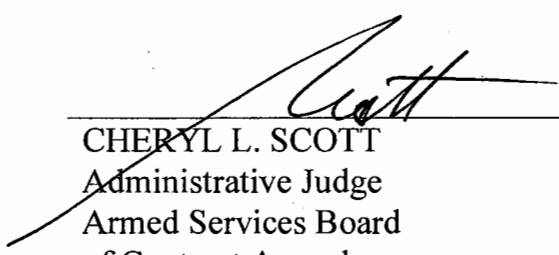
2008 that the Tennessee ANG "will mobilize" beginning in March 2009, causing a personnel shortage in Jackson and Smyrna, Tennessee, that "must be filled" (finding 8). The PWS, prepared in August 2008, showed only 1 MA1 mechanic and 1 MA3 mechanic for Smyrna. It was not amended to include the additional 10 aircraft mechanics and 10 other skills requested for that location. Also, the PWS did not show any personnel or skills for Jackson and was not amended to include the 22 personnel and 7 skills requested there. (Findings 8, 13, 17, 21) The government was not notified of the North Carolina deployment until after TO award. That deployment was to involve 8 more personnel than reflected in the PWS in Salisbury, North Carolina, for 12-18 months, with specific skill sets requested unclear. (Finding 31) Although Mod. No. 2 did not name any particular skills involved, CO Frederick acknowledged that the positions it referred to were not part of the TO's staffing at the time of award (findings 36, 37, 44).

Thus, in addition to the two changes conceded by the government involving computer operators and helpers (findings 46, 52), the CO's unilateral Mod. No. 2 to TO No. 13 changed the PWS' description of services and, in the case of Jackson, Tennessee, where no services had been listed, the place of performance. It increased the amount of services to be performed, at an increased cost to appellant, to be determined.

DECISION


We sustain the appeal and remand the matter to the parties for resolution of quantum.

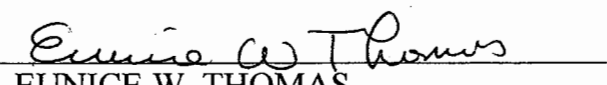
Dated: 1 August 2012

  
CHERYL L. SCOTT  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

  
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. 57264, Appeal of Lear Siegler 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