



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON MAY 12, 2020**

GRANTED IN PART: May 5, 2020

CBCA 4026

VALERIE LEWIS JANITORIAL,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Theodore P. Watson of Watson & Associates, LLC, Aurora, CO, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **DRUMMOND**, **KULLBERG**, and **O'ROURKE**.

KULLBERG, Board Judge.

Appellant, Valerie Lewis Janitorial (VLJ), timely appealed the contracting officer's final decision (COFD) that denied its two certified claims and asserted two counterclaims related to VLJ's contract with the Department of Veterans Affairs (VA) for custodial and aseptic cleaning services. In its first claim, VLJ sought to recover \$272,751.03 for the increased cost of using a two-step process of aseptic cleaning. In its second claim, VLJ sought to recover \$441,138.06 for the cost of the increased frequency of cleaning certain buildings. The counterclaims included a claim in the amount of \$112,682.12 for the use of

the VA's mops and laundry services, and a claim in the amount of \$56,924.20 for the cost of janitorial services for two buildings after VLJ stopped cleaning those buildings. A three-day hearing of the appeal was held at the Board, and the parties submitted briefs and reply briefs. Only entitlement is at issue. Board Order (Aug. 7, 2014).

As discussed below, the Board grants the appeal in part. The Board finds entitlement with regard to VLJ's implementation of the two-step aseptic cleaning process at the VA's direction. The Board denies VLJ's claim for increased frequency of cleaning. Additionally, the Board denies the VA's two counterclaims.

Background

Solicitation

On or about September 5, 2008, the VA issued solicitation VA-261-08-UP-0083 (solicitation). Appeal File, Exhibit 3 at 1.¹ The intent of the solicitation was "to enter into a contract to procure janitorial services and hospital aseptic maintenance services for the VA Northern California Health Care System, Martinez facility." *Id.* at 3. The solicitation stated that the Government "contemplate[d] award of a (Firm Fixed Price) contract." *Id.* at 48. Additionally, the solicitation was a set-aside for "[s]ervice-disabled veteran-owned small business concern[s]." *Id.* at 101.

The Martinez facility included buildings for in-patient and out-patient care and various other buildings related to research ("R" buildings), and administration ("AB" buildings). Exhibit 1 at 405-16. Building 20, the Center for Rehabilitation and Extended Care (CREC), consisted of three patient-care wings: Tahoe, 11,493 square feet (sq. ft.); Shasta, 12,753 sq. ft.; and Napa, 13,051 sq. ft. Exhibit 56 at 1. The cleanable area of other buildings on the campus included the following: building 19, outpatient clinic (OPC), 14,017 sq. ft.; building 18, bio-med, 1292 sq. ft.; the magnetic resonance imaging (MRI) trailer, 1295 sq. ft.; R1, 12,348 sq. ft.; R2, 1412 sq. ft.; R3, 1800 sq. ft.; R4, 7920 sq. ft.; AB2, 3981 sq. ft.; AB4, 1937 sq. ft.; AB5, 1321 sq. ft.; AB6, 7409 sq. ft.; AB7, 11,702 sq. ft.; and AB21, 22,083 sq. ft. Exhibits 56, 61.²

¹ All exhibits are found in the appeal file, unless otherwise noted. The appeal file consists of six volumes.

² Subsequent to the hearing the Board determined that various documents in the record contained inconsistent information as to the area of various buildings, and, in some cases, such information was lacking. The Board directed the VA to provide complete information as to the area, as measured in square feet, of the buildings and areas within

The solicitation provided for a contract performance period that consisted of a base year and four option years. Exhibit 3 at 6-7. The pricing schedule required that offerors propose a monthly unit price and total price for the base year and each option year. *Id.* Additionally, offerors were required to submit information regarding technical capability, technical approach, and past performance. *Id.* at 30-33.

The solicitation scope of work (SOW) set forth the following in pertinent part:

The Contractor shall furnish all management, labor, supervision, management support, transportation, equipment and materials to provide Hospital Aseptic [M]aintenance Services to Northern California Health Care Systems VA Martinez . . . and the VA Outpatient Clinic building . . . administration building[s,] and outl[ying] trailers. . . . An estimated total of **104,019** square footage is to be serviced by the contractor. Note: This figure does not include the kitchen square footage; see attachment 2 for Kitchen Work Statement.

Exhibit 3 at 51.

Section 1.3.1 of the SOW required that the contractor employ a certified executive housekeeper (CEH). Exhibit 3 at 52. The SOW further required that the CEH be “fully International Executive Housekeeping Association (IEHA) Certified at the contract start date or must possess an associate [IEHA] certification at the time of contract start and submit proof of full [IEHA] certification within nine months of contract start date.” *Id.*

The quality control section of the SOW stated, in pertinent part, the following:

1.4.4 Contractor Quality Control Program. Contractor shall have a quality control program to assure all requirements of the contract are provided as specified. The program shall be continuously improved and . . . documented in loose-leaf manual format. The program shall include, but not be limited to the following:

.....

certain buildings in Martinez facility, which are relevant to this appeal. Board Order (Aug. 16, 2018). Several exchanges with the parties followed. Without objection, the Board received from the VA the requested information, which is found at exhibits 56 through 61. Board Order (Apr. 15, 2019).

1.4.4.2 An inspection system (implemented by a work instruction as required in paragraph 1.4.4.1) covering the Hospital Aseptic Management System (HAMS) services stated in the Statement of Work. This inspection system shall include as a minimum, daily sampling inspection of the rooms . . . listed in attachment J-1.

....

1.4.4.6 The Awardee shall provide to the [contracting officer's technical representative (COTR)] its HAMS Policy and Procedure Manual it will use to implement the HAMS program. This will be provided at the time proposals are submitted as part of each offeror's package.

Exhibit 3 at 61-62.³

The definitions section of the solicitation provided the following:

2.1 GENERAL DEFINITIONS: As used throughout this Performance Work Statement (PWS), the following terms shall have the meaning set forth below:

HAMS POLICY AND PROCEDURES MANUAL.

Adapted manuals work instructions, quality control instruction, that are composed of all procedures/training, and other literature and directives that implement the HAMS program.

Exhibit 3 at 65.

Section 2.4 of the SOW stated the following in pertinent part:

2.4 HANDBOOK DEFINITIONS: The following definitions are from the American Hospital Association "Infection Control in the Hospital and Hospital Housekeeping Handbook, 1979.["]

³ The term COTR is often used throughout the record interchangeably with contracting officer's representative (COR).

2.4.1.1 Cleaning: This is the removal of soil from a surface and is the primary responsibility of the housekeeping staff.

....

2.4.2 Soil is dust, dirt, stains, grease, smudges, streaks, spots, lint, odors, organisms, vomits, or any agent that is injurious to health. Soil can be visible such as dust, or can be invisible such as organisms, and odors.

2.4.2.1 Soil can be removed chemically, mechanically, or by a combination of both. Mechanical soil removal is removing soil with a machine such as a vacuum cleaner. Chemical soil removal is removing soil with a liquid that contains cleaning agents, such as detergents, disinfectants, and sanitizes [sic]. The combination of chemical and mechanical methods, such as an automatic floor-scrubbing machine, uses the chemical method to break down and loosen the soil while the mechanical method picks up and carries the soil away. Which soil removal method is used depends on the cleaning objectives and on the size, location, and type of surface to be cleaned and is the prerogative of the Contractor.

Exhibit 3 at 65-66.

Section 4.2 of the SOW provided the following:

DISINFECTANT/DETERGENT: The disinfectant/detergent shall be currently Environmental Protection Agency (EPA) approved and registered as pseudomon[a]cidal, fungicidal, and viricidal at the recommended use dilution even in hard water 400 (Parts Per Million) PPM (CaCO₃). The germicidal detergent shall be coupled with a non-phenolic-based environmental disinfectant. Use dilution shall be that recommended by the Association of Official Analytical Chemists (AOAC) use dilution confirmation tests and maintain a record of tests. Any germicidal detergents must be presented to the ICC for approval prior to use. Automatic dilution centers will be used.

Exhibit 3 at 71. The solicitation did not include any historical data of infectious disease outbreaks. Exhibit 55 at 4, ¶ 13.

Section 5.2.2 of the SOW provided the following with regard to frequency of cleaning:

Categories of Time: There are three (3) categories of times housekeeping services are required to be performed:

Aseptic Seven (7) day per week minimum once per day. Aseptic Five (5) day week, (Mon through Fri) minimum once per day. Cycle task cleaning. Frequency task list cited on Attachment J.1 to J.10.

Custodial three (3) day a week minimum once per day.

Critical Care Areas, (Ref para 2.12.1) and Patient Use/Visit Areas. (Ref para 2.12.2) consist of rooms/areas that require housekeeping services to [b]e performed in one of the above categories. Specific rooms/areas are identified in the Room Listing Charts (see Attachments J.1–J.10).

Exhibit 3 at 76.

Section 5.2.2.2 of the SOW provided the following for cleaning a room after a patient's departure:

Unit Checkout Service: is a seven (7) day per week "as necessary" required service and includes patient rooms, On Call Staff/Residents Bedrooms. During the day shift and until 9:30 PM on the evening shift, the Contractor shall begin cleaning within 15 minutes. After 9:30 PM if the rooms vacated, cleaning shall start within 30 minutes of the following day shift. Except as to this requirement will be considered as an emergency response. All unit checkout cleaning includes obtaining clean linens for the rooms and bathrooms, removal of all soiled hospital linens and making the beds. It also includes the housekeepers changing of cubical curtains when visibly soiled or as required by [Veterans Administration Medical Center] personnel. Unit checkout service shall continue without interruption until completed.

Exhibit 3 at 77.

Section six of the SOW stated, in pertinent part, the following:

Administration Building and Trailers

6.1 The contractor shall provide all labor, equipment and materials required to provide custodial services Monday through Friday at the VA. Work shall start no later than 4:30 pm. DAILY TASKS:

Empty wastebaskets/replace liners when soiled

Relocate all recycle material to designated location.

Clean/sanitize wash basins, urinals, commodes, partitions, mirrors, chrome fixtures, paper and soap dispensers and sanitary napkin disposal containers. Replenish and refill paper/soap dispensers as needed.

Dust mop, damp mop (with generic detergent to sanitize), then buff all hard surface floors.

Vacuum all carpets/mats, spot clean as needed. (Move all furniture to clean and vacuum, replace in original position)

Pick up and dispose of all litter/debris in offices, restrooms and staff rooms.

Place marked "RED BAG" medical waste bags in locked container outside building for separate contractor's pick-up.

Clean fingerprints/smudges from the entrance doors and walls as necessary.

Mid day: Cleaning of restrooms and restocking of supplies.

Exhibit 3 at 82-83. Section six also listed various tasks that were to be completed either daily, weekly, monthly, quarterly, or semi-annually. *Id.* at 82-83. Monthly tasks included waxing all hard floors; those floors were also to be stripped and waxed semi-annually. *Id.*

Attachments J.1 through J.10 of the SOW were spreadsheets that listed the buildings and rooms in each building that were to be cleaned. Exhibit 3 at 85-107. The SOW required either aseptic or custodial cleaning in the three wings of the CREC (Tahoe, Shasta, and Napa), the outpatient clinic, AB4, AB6, AB7, AB21, R1, and bio-med, but the SOW lacked information about the cleanable area for all of the buildings. *Id.* Based upon information obtained after the hearing, the actual combined cleanable area of those buildings was 108,112 sq. ft. Exhibit 56.

A note at the top of the first page of attachment J.1 stated "FTE = Full Time Equivalent." Exhibit 3 at 85. For each of the three wings in the CREC, an additional note at the heading with attachments J.1 through J.3 stated "2 FTE," which amounted to six FTEs for the CREC. *Id.* at 85-87. In attachments J.4 through J.10, a note at the heading for each

building stated “2nd Shift Responsibilities 1 FTE,” which amounted to an additional six FTEs for the buildings to be cleaned.⁴ *Id.* at 89-96.

The rooms in each of the three wings of the CREC (Tahoe, Shasta, and Napa) were listed in attachments J.1, J.2, and J.3. Exhibit 3 at 85-88. There were sixty-six patient rooms in the CREC that required aseptic cleaning seven days per week. *Id.* Other rooms in the CREC, such as offices, lounges, and storage rooms, only required custodial cleaning. *Id.* Most of the rooms specified five days per week for custodial cleaning, but other rooms did not specify a minimum number of days per week for custodial cleaning. *Id.* The dining rooms (Shasta 103 and Napa 102) both showed a “0” frequency for aseptic cleaning. *Id.* at 86-87.

With regard to buildings AB6 and AB7, attachments J.4 and J.5 specified either aseptic or custodial cleaning five days per week. Exhibit 3 at 89-90. In the case of buildings AB4, AB21, R1, and bio-med, attachments J.7 through J.10 did not specify a minimum number of days per week for janitorial services. *Id.* at 93-94, 96-97. Although the majority of rooms in the administration and research buildings required only custodial cleaning, certain rooms, such as restrooms and some labs, required aseptic cleaning. *Id.* at 89-97.

Attachment two to the SOW described the work to be performed in the kitchen and canteen area, which had a combined area of 6777 sq. ft. Exhibit 3 at 104-08. Additionally, attachment two stated, in pertinent part, the following:

Provide daily janitorial services in the kitchen, dining, canteen area, offices, dressing rooms and lounge from Mondays [through] Fridays between 1 pm to 5 pm. The contractor shall use approved solutions to mop flooring, walls, clean tables, chairs, floors, walls, vents, lights, glass, empty [and] relined containers. On a daily basis, provide full service to the restrooms as outline[d] in the standards below. Follow daily schedule for canteen, dining areas as prescribed in the Frequency and Task schedule.

Id. at 104. Section 4 of the SOW provided that “[t]he Contractor shall furnish and maintain all equipment and supplies (other than that specified as Government-furnished) necessary to perform all services required by the contract.” *Id.* at 71.

⁴ Bio-med, which is listed at attachment J.10, did not have an FTE designated, but that building appeared to utilize the FTE associated with building R1. Exhibit 3 at 94-95.

The solicitation provided the opportunity for a site visit on September 17, 2008. Exhibit 3 at 49. Ms. Valerie Lewis, the owner of VLJ, attended the site visit. Exhibit 1 at 150, Exhibit 3 at 153. On or about October 20, 2008, VLJ executed a teaming agreement with ADS-Myers, Inc. (ADS). Exhibit 1 at 137-46. The agreement provided, generally, that ADS would work with VLJ “in preparing, performing and completing [the] contract.” *Id.* at 138.

Solicitation Amendments 0001, 0002, and 0004

On September 26, 2008, the CO issued amendment 0001 to the solicitation. Exhibit 1 at 402-16. Amendment 0001 extended the date for submission of proposals and “additional details of areas to be serviced via drawing attachments . . . [and] areas that will NOT be serviced.” *Id.* at 402. Those areas that amendment 0001 removed from the SOW included: Napa rooms 100–106, 2328 sq. ft.; Shasta rooms 100–107, 2637 sq. ft.; Tahoe rooms 100–102, 2200 sq. ft.; and the third and fourth floors of AB21, 11,091 sq. ft. *Id.* at 403; Exhibit 56 at 2-3.

Additionally, amendment 0001 included architect drawings of the CREC, the outpatient clinic, AB2, AB4, AB5, AB6, AB7, AB21 (first and second floors), and R4. Exhibit 1 at 405-15. A separate drawing that showed the entire Martinez campus included the aforementioned buildings as well as AB3, R1, R2, R3, and the MRI trailer.⁵ *Id.* at 416. The amendment also had a note that stated, “All other areas (drawings) that are attached . . . will be cleaned by the Contractors.” *Id.* at 403. VLJ acknowledged receipt of amendment 0001 on October 14, 2008. Exhibit 2 at 2.

The CO issued amendment 0002 on October 8, 2008. Exhibit 1 at 420. That amendment responded to the following:

Question 3). Are we responsible to wipe down and clean the MRI machine?

Answer: Yes. The entire department will require daily cleaning. (Monday thru Friday). It will also be the responsibility of the contractor to clean on week-ends should there be cases.

Id. at 421.

⁵ Although building AB3 was shown on a drawing of the Martinez facility, the Government has represented that building AB3 was demolished before the solicitation. Exhibit 56 at 3.

The CO also issued amendment 0004 on October 8, 2008, which responded to an inquiry regarding the buildings listed in amendment 0001. Exhibit 1 at 426. That inquiry asked in pertinent part:

Question 10): Amendment 1 indicates Buildings [AB2]; [AB5]; [R4] are to be serviced. We have no J attachments for them giving description and [square] footage. We have J attachments for [R1] but it was excluded in the Attachment 1 maps indicated to be cleaned. Would you confirm servicing status and forward any J attachments necessary?

Id. at 427. In response, amendment 0004 provided a spreadsheet for building R4 that required either aseptic or custodial cleaning five days a week for each of the rooms in that building. *Id.* The amendment, however, did not provide any information regarding buildings AB2 and AB5. *Id.*

Amendment 0004 also responded to the following:

Question 12): Please confirm that most of the non clean square footage in amendment 1 was not a part of the original identified cleanable square footage of 104,019. The room numbers do not seem to coincide with those in the J attachments other than in [AB21] – 3rd and 4th floors.

Answer: We still have over 180,000 sq ft cleaned by VA staff and the contract has the 104,000.

Exhibit 1 at 428. VLJ acknowledged amendment 0004 on October 23, 2008. Exhibit 2 at 6. The closing date for proposals was changed to October 28, 2008. *Id.*

VLJ's Initial and Revised Proposals

On or about October 26, 2008, VLJ submitted its first technical and cost proposal. Exhibit 4 at 5. VLJ's proposed cost for the base year and four option years was \$4,603,668. *Id.* at 10-11. VLJ's monthly unit price for the base year, November 1, 2008, to October 31, 2009, was \$76,111. *Id.* at 10. The scope of work section of VLJ's proposal stated that it would be providing services for "[a]n estimated total of 104,019 square feet." Exhibit 1 at 194. VLJ had previous experience performing a contract for janitorial services at a VA nursing facility. Transcript at 189.

VLJ's technical proposal stated the following with regard to the control of bloodborne pathogens stated the following:

Universal Precautions is an approach to infection control in which all human blood and other potentially infectious materials are handled as if they were known to be infectious for Bloodborne pathogens. ADS, as a provider of environmental services, works with each hospital to ensure compliance with the facility's engineering and work practice controls. The on-site supervisor is responsible for overseeing the implementation of the hospital's work practice and controls and for work in conjunction with the hospital's Infections Control Officer to assure the effectiveness of these controls.

Exhibit 4 at 33.

By letter dated February 23, 2009, the CO, Mr. William L. Ulibarri, requested that VLJ submit a revised technical proposal. Exhibit 4 at 131. Additionally, Mr. Ulibarri's letter noted that "all offerors continue to propose a level of staffing that is inadequate and below the Government estimate." *Id.* The letter directed VLJ to address the following:

1. General Introduction. Overall analysis of FTEs proposed and VA position, per the VA Environmental Programs Service Staffing Guide (provided to each offeror prior to the meeting).
2. General Discussion of VA Northern California housekeeping requirements, to include the following: general housekeeping (daily routines, floor care), linen, kitchen, inpatient and outpatient administration.

Id.

VLJ subsequently submitted its revised technical proposal and cost proposal. Exhibit 1 at 214-79. The cost proposal included rates for a base year commencing on November 1, 2008, and four option years with a total contract price of \$4,863,324. *Id.* at 265-66. VLJ's revised technical proposal stated, in pertinent part, the following:

The standard for hospital cleaning is 14,000 square [feet] per [f]ull-time employee (FTE). We believe that to have proper controls . . . to ensure patient, staff and employee safety the benchmark we strive for is 8,000 square feet per FTE. Custodial (non-aseptic) cleaning benchmarks are higher. Based on this standard and what the Martinez facility currently employ[s], we should be able to meet this staffing requirement with the proposed full-time employees and a C.E.H. Below is a sample CREC cleaning procedure:

6:00 a.m - 8:00 a.m. there will be two (2) to a ward. These housekeepers will dust mop and mop all hallways. Empty trash in rooms and vacuum all carpeted areas.

8:00 a.m. - 12:30 p.m. (approximate times) Team cleaning begins: After completion of ward cleaning, the housekeepers will report to lead and/or supervisor for other assigned tasks. The other tasks will include shampooing, buffing, afternoon trash pick-up, window cleaning, checking all restrooms inpatient rooms and hallways, and bed cleanings where needed.

After wards are cleaned this should leave an approximate 2 hour window to do other duties listed above.

Id. at 217-18. Ms. Lewis has represented that she had assistance in preparing her proposal from her attorney, certified public accountant, consultant, and ADS. Exhibit 34 at 25; Transcript at 151.

A VA evaluation Board convened and issued its recommendations in a memorandum dated May 27, 2009. Exhibit 4 at 135. The VA board recommended awarding the contract to a firm other than VLJ. *Id.* For reasons not reflected in the record, no award was made.

In an email dated January 28, 2010, Mr. Ulibarri informed VLJ that “things are still in ‘play’ as far as the award at VA Northern Calif[ornia].” Exhibit 4 at 139. Mr. Ulibarri also raised the question as to how VLJ “would meet the 51% requirement for cost of personnel.” *Id.* In response, VLJ represented that it would “team with the very capable . . . ADS Myers who brings the experience necessary to handle the 49% on a sub contract to VLJ.” *Id.*

By a fax, which was dated March 15, 2010, VLJ sent to Mr. Ulibarri a copy of its revised teaming agreement with ADS. Exhibit 4 at 141. The teaming agreement stated, in pertinent part, that “ADS is expected to be awarded a subcontract, subject to the negotiation of mutually acceptable terms and conditions between the Parties.” *Id.* at 143.

Solicitation Amendments 0013 and 0014

On May 25, 2010, Mr. Ulibarri issued amendment 0013, which extended the date for receipt of proposals to June 15, 2010. Exhibit 1 at 294. The page number block on the first page of amendment 0013 showed that it consisted of seventy-one pages. *Id.* VLJ acknowledged receipt of amendment 0013 on July 13, 2010. Exhibit 2 at 19.

Amendment 0013 included a revised SOW. Exhibit 1 at 297-364. The SOW in amendment 0013 stated, in pertinent part, the following:

The Contractor shall furnish all management, labor, supervision, management support, transportation, uniforms, equipment and materials/supplies to provide Hospital Aseptic [M]aintenance Services to the Northern California Health Care System's VA Martinez Building 19 VA Outpatient Clinic, Building 20 CLC/CREC, Building [AB21] Administration, and outlying trailers (except as specified herein as Government-furnished). An **estimated** total of **127,931** square footage is to be serviced by the contractor. Note: This figure does not include the kitchen square footage; see attachment 2 for Kitchen Work Statement.

Id. at 297.

Section 5.2.2, categories of time, of the revised SOW in amendment 0013 required aseptic cleaning seven days per week and custodial cleaning a minimum of three days per week. Exhibit 1 at 323. Section 6.1 of the SOW in amendment 0013 listed the same requirements for cleaning trailers and administration buildings as shown in section 6.1 of the solicitation. *Id.* at 329-30. Additionally, section 6.1 added a weekly requirement that stated in pertinent part:

Patient rooms/Offices/Exam Rooms/Halls to be burnished min[imum] of 2 times per/week and/or as often as necessary to maintain floors in an ASEPTIC appearance free from scratches, dulling and walk off of wax. High traffic areas may require 3 to 5 times per week burnishing. Top scrubbing and waxing to be on a[n] as needed basis to maintain the floors in an aseptic appearance.

Exhibit 1 at 330.

Attachments J.1 through J.10 of the revised SOW in amendment 0013 required either aseptic or custodial cleaning for the three wings of the CREC, the outpatient clinic, AB4, AB6, AB7, AB21, R1, and bio-med. Exhibit 1 at 332-45. The revised SOW required aseptic cleaning seven days a week in the dining rooms and custodial cleaning five days per week in buildings AB4, AB21, and R1. *Id.* at 333-34, 340-45. Although amendment 0001 had deleted Napa 100-106, Shasta 100-107, Tahoe 100-102, and the third and fourth floors of AB21 from the SOW, the revised SOW in amendment 0013 included those areas. *Id.* at 332-34, 340-43.

On June 6, 2010, the CO issued amendment 0014, which extended the date for submission of proposals to June 22, 2010. Exhibit 2 at 20. VLJ acknowledged the amendment on June 18, 2010. *Id.* The amendment also included responses to questions submitted by potential offerors regarding floor work, and included the following:

Q6: Is there something else that was added that is considered a “new” scope or a change to the previous scope that I might possibly be overlooking?

A6: None that we are aware of.

Id. at 22-23. Amendment 0014 also incorporated VA clause 852,219-10, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside. *Id.* at 21. That clause defined such a business concern as “[n]ot less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans.” *Id.*

Contract Award

The VA awarded to VLJ contract VA261-P-0356 (contract), Aseptic and Nonaseptic Janitorial services for northern California, with an effective date of October 1, 2010. Exhibit 2 at 29. The contract award, which was issued on a standard form 1449, referenced the solicitation number in block 5. *Id.* VLJ signed the contract on July 13, 2010, and the CO, Mr. Mark J. Mikus, signed it on August 18, 2010.⁶ *Id.* The total contract price for the base year and four option years was \$5,158,632. *Id.* at 24. VLJ’s monthly rate for the base year, which commenced on October 1, 2011, and first option year was \$85,368. *Id.* The monthly rate for the second and third option years increased to \$86,271, and the monthly rate for the final option year was \$86,608. *Id.*

The SOW in the contract required either aseptic or custodial cleaning in the three wings of the CREC, the outpatient clinic, AB4, AB6, AB7, AB21, R1, and bio-med. Exhibits 2 at 83-95, 3 at 85-97. The contract SOW and attachments J.1 through J.10 were the same as those set forth in the original solicitation. Exhibits 2 at 47-106, 3 at 51-108. The contract included copies of the standard form (SF) 30 for each solicitation amendment with VLJ’s signed and dated acknowledgment.⁷ Exhibit 2 at 2-23.

⁶ Mr. Mikus was Mr. Ulibarri’s supervisor. Transcript at 564.

⁷ Amendment 0012 was not issued. Exhibit 1 at 3 n.6.

The contract incorporated in full text Federal Acquisition Regulation (FAR) clause 52.212-4, Contract Terms and Conditions-Commercial Items (FEB 2007), which provided, in pertinent part, the following:

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post-acceptance rights-

(1) Within a reasonable time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

....

(c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action rising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

Exhibit 2 at 32-33.

Modification of the Date for Starting Contract Performance

On January 4, 2011, Mr. Ulibarri advised VLJ in an email that he would arrange a meeting with a VA employee and technical staff member, to determine “the exact areas that [VLJ] will be responsible for.” Exhibit 1 at 78. In a later January 14, 2011, email to VLJ, Mr. Ulibarri stated the following:

In order to maintain some grip on workload (which I am gradually losing) I need to be as efficient as possible, therefore, I’d prefer to get everything done at once. You can send me the wage determination part, I’ll hold it pending final figures on the addition which I should [have] heard . . . about first, not you. In fact, this makes me think we’d better wait until you and he are done with the walk through before I issue anything. The sooner you meet with him, the better.

Id. at 80. Mr. Ulibarri testified that meetings were held with VLJ to “get on the same page . . . and then . . . get pricing and fix . . . the contract . . . and then fix the statement of work.” Transcript at 28.

In an email dated January 13, 2011, the VA’s technical staff member informed VLJ of the following:

Just wanted to follow up with an E-mail concerning our earlier conversation. As we talked about, the start date is confirmed for 2/1/2011. Since you haven’t enough time to place an order for equipment and for it to be delivered by the start date, we will let you use VA equipment until yours arrive[s]. . . . Please let us know when you need us to remove our supplies so you can start stocking your supplies.

Exhibit 1 at 82. Mr. Ulibarri testified to the following regarding that email:

Q – would you agree that the VA gave [VLJ] permission to use their mops?

A Yes, but – yes, but there’s a but in there, you know, what’s reasonable.

Q So the answer to my question is, yes, the VA did give her permission?

A That’s what he did. I mean, I didn’t, you know.

Transcript at 35-36. Mr. Ulibarri also testified that “we didn’t set a deadline on that but reasonably speaking you would think she’d get her equipment within a short period.” *Id.* at

144. The VA did not have storage space available for VLJ when it allowed VLJ to use government-owned mops and laundry facilities. Exhibit 1 at 376. The record does not show when such storage space became available.

In a January 25, 2011, email to VLJ, Mr. Ulibarri stated the following:

We have a contract with a statement of work that we signed. We've had enough misery over the past three and one half years, now there are questions as to just what areas [VLJ] is responsible for - will this never end? I suggest you both review the SOW and any attachments (the ones that specify room numbers in particular areas). Whatever is not in there that . . . needs [to be] covered should be in a quote [VLJ] will provide five years pricing for. That should be clear cut. I need this immediately because she starts in one week.

Exhibit 1 at 84.

On January 28, 2011, the VA's technical staff member sent VLJ an email that stated the following:

According to Bill Ulibarri you are sending him a "catch all["] quote for the mod. Please make sure you include the offices in primary Care as well as the waiting area and receptionists desk, X-ray waiting area and receptionist desk, Primary Care and the 3 offices in the kitchen. The 5 offices in AB7 should have been part of your original quote. The sheet was cut off. Also AB5 and AB2 should also be in the package.

Exhibit 1 at 88.

In an email dated February 2, 2011, the VA's technical staff member advised Mr. Ulibarri, that VLJ "is not cleaning MRI, Bio Med, AB5 which was included [i]n the contract and questions & answers." Exhibit 1 at 462. In an email on that same date, VLJ's response stated that "[w]e have BIO MED INCLUDED and [it] is getting cleaned by our crew now. We are working on the MODS for the rest." *Id.* at 461.

In his February 2, 2011, response to VLJ's email, the VA's technical staff member stated that "MRI is part of the contract, Reference Amendment 2, question 3. To be serviced 5 days a week. AB2 & 5 also to be cleaned (see attachment for amendment 4, question 10. Reference amendment 1)." Exhibit 1 at 461. On that same day, VLJ responded to Mr. Zabadal's email with the following:

Amendment 13 modified the Scope of Work and outlined what was included. I signed the paperwork/contract that had all the rooms numbers & identified what they wanted cleaned. The VA answered the question back in 2008 and they still directed us to the Spreadsheet for further clarification. The Spreadsheet did not list any detail for AB2, or AB5 nor did it list the MRI. And, it is not listed anywhere else in the detail spreadsheet. The VA went through great detail to outline the rooms, square footage, description, area and so on. We never walked the Day Treatment Building and we did not walk the Magnetic MRI. Mr. Ulibarri already told us to give the price for those areas.

In the spirit of unity and more importantly, in order to bring this issue to a close; I will throw in the MRI and AB2. Please remember, I am a Small Business and I don't have the government's unlimited resources. The only way I can provide the services you are requiring is if you are willing to pay for them. I want to do a very good job and the VA hospital is near and dear to my heart. I am concerned about the cleanliness of the hospital, safety of all those who work here and well-being of the patients and my employees. Cutting corners is not my forte.

Please also note that we are already doing the MRI Building and AB2.

Id. at 460. VLJ disputed whether the contract included janitorial services for buildings AB4 and AB5. *Id.* at 376-77.

On February 11, 2011, VLJ executed bilateral modification P0002 to the contract, and the VA subsequently executed it on February 15, 2011. Exhibit 1 at 444. The modification stated, in pertinent part, the following:

This supplemental agreement is issued to: 1. Reset the start date for this contract to 2/1/11. 2. Incorporate the latest Dept. of Labor Wage Determination rates per Wage Determination 2005-2051, Rev. 10 dated 7/16/10 and 3. Incorporate the MRI and AB2 areas at no additional charge (excluding carpets/strip/wax). All other terms and conditions shall remain the same.

Id. The contract price increased to \$5,193,007.20. *Id.* at 457. The cleanable space in building AB2 and the MRI trailer amounted to 5276 sq. ft.

Mr. Ulibarri testified that modification P0002 was issued to include the MRI trailer and building AB2 in the SOW because those buildings were not in the contract. Transcript

at 70. Ms. Lewis testified that “the VA wanted more when we did the initial walk-through and Mr. Ulibarri had directed me to go back to the COR and for us to get straight what areas they wanted.” *Id.* at 155. She executed modification P0002 and agreed to clean building AB2 and the MRI trailer with no increase to the contract price “because they were . . . very small areas.” *Id.* However, she also expected to be paid for the “carpet, strip and wax” work referenced in modification P0002 under a separate modification, but no such modification was ever issued. *Id.* at 156-58.

The VA did not issue a written modifications to the contract to reflect other changes to those area where VLJ was supposed to work. Shortly after contract award, Mr. Ulibarri and VLJ’s representative reached a verbal agreement in which VLJ would perform custodial services in buildings R2, R3, and R4, and the parties would execute a written modification at a later date. Exhibit 32 at 11; Transcript at 425-26. The combined cleanable area of buildings R2, R3, and R4 was 11,132 sq. ft. Exhibit 56 at 4. VLJ only cleaned the first and second floors of building AB21 because “the third and fourth floor[s] . . . [were cleaned by] VA personnel.” Transcript at 461. VLJ, consequently, only had to clean 10,992 square feet of building AB21. Exhibit 56 at 3. As a result of those changes, VLJ would have been responsible under the contract for a cleanable area of 113,402 square feet, which would have included the CREC, the outpatient clinic, buildings AB2, AB4, AB6, AB7, AB21 (first and second floors), R1, R2, R3, R4, bio-med, and the MRI trailer. *Id.* at 3-4.

On March 8, 2011, ADS advised Mr. Ulibarri of the following:

As you know, I am looking to Terminate [ADS’] Teaming Agreement with Valerie Lewis Janitorial and our involvement with the Martinez contract. . . . Please let me know as I plan on terminating on March 22, unless you state there could be a problem with ADS’ performance rating if I were to terminate. I would also like to let you know that the CEH we trained has the capabilities and management skills to be able to run and do an excellent job for [VLJ] and intends to stay on as CEH. [He] has worked for ADS for over 7 years working in an aseptic environment. ADS has provided [VLJ] with [HAMS] and QC documents and training which she has at her disposal and the CEH knows those aspects of Aseptic cleaning and [Joint Commission on Accreditation of Healthcare Organizations] [regulations]. [VLJ] should do well on her own and we would still be available to assist her with any questions she might have.

Exhibit 1 at 202. ADS terminated its teaming agreement with VLJ on March 22, 2011. Exhibits 5 at 5, 55 at 4, ¶ 22. Mr. Ulibarri testified that he did not have any concerns about VLJ’s ability to perform the contract. Transcript at 145.

VLJ's October 14, 2011, email to Mr. Ulibarri stated the following:

Since we are at the point where we need to do some internal housekeeping, I think the time has come for us to clean up the whole contract or it will keep getting pushed back and I never get paid for any of this work.

....

At this point, I will settle for getting a modification that adds the floor work for carpet/stripping/waxing for AB2.

Exhibit 1 at 393.

Clostridium Difficile (C. diff) Outbreak in the CREC

On or about February 1, 2012, VA staff at the Martinez facility determined that an outbreak of clostridium difficile (C. diff) had occurred among patients in the CREC. Exhibit 55 at 5, ¶37. C. diff is transmitted through spores, which are difficult to eradicate, and affects the colon, causing severe and persistent diarrhea and posing increased risk among persons who are either elderly, have compromised immunity, or suffer from other illnesses. Exhibit 42. A nurse and infection control coordinator at the Martinez facility, advised VA housekeeping staff in a February 6, 2012, email about "a rash" of C. diff. Exhibit 7 at 1. He further advised that alcohol in hand sanitizers and antibacterial soaps were ineffective and "bleach must be used to kill it as it is often in spore form." *Id.* The infection control organization at the Martinez facility set the guidelines for cleaning in a hospital environment, and VA staff were responsible for instructing the contractor's employees as to those methods. Transcript at 819. On May 29, 2012, the COR, sent an email that stated she was "[s]haring with [the] Housekeeping contractor for appropriate response: -ensure EMS/housekeeping using bleach for disinfection for residents . . . and 48 hour after, then terminal clean; two step process (clean then disinfect)." Exhibit 9 at 1.

In a June 14, 2012, email, VLJ advised Mr. Ulibarri of the following:

This is all above and beyond and we are going through supplies at an alarming rate. I have tried to keep down costs but now they have changed their processes and throwing out [a lot] of things and because of the numerous outbreaks instituted a "two-step" process which used to be one which is more time-consuming and costly in manpower. I will be meeting with my staff today at the site to ensure that our steps [are] documented and followed to a tee. I will have to increase manpower and it seems because Napa is a problem

unit that I need supervision/quality control management just for that area and it will require dedicated people until the situation gets under control.

Exhibit 10 at 5-6. In response, Mr. Ulibarri advised VLJ that “what we currently have [is] the statement of work [versus] changing conditions that are causing your increased costs.” *Id.* at 5.

In an email dated October 16, 2012, Mr. Ulibarri advised VLJ of the following:

Two-Step Cleaning Process, as defined by VA [Northern California Health Care System] Infection Control Prevention . . . Staff:

- 1) Use hospital-grade detergent to clean. This removes soil and organic material allowing disinfectant to have maximum effect.
- 2) Use a disinfectant that kills [C. diff]. Generally, only bleach will kill [C. diff] in spore form.
- 3) Follow manufacturer[’s] recommendations for product, paying attention to “wet” or “dwell” times.

Exhibit 1 at 33. Before the C. diff outbreak, VLJ used only quaternary (QUAT) disinfectant for aseptic cleaning of patients’ rooms. Transcript at 194-95. After the outbreak, VLJ used bleach as a disinfectant. *Id.* at 781. The two-step process required that VLJ’s employees spray a surface to clean it, wait ten minutes before wiping it off, and then repeat the same procedure to disinfect with diluted bleach. Exhibit 34 at 56-59. Those ten-minute waiting periods were industry-standard dwell times. *Id.*

Contract Administration Issues

In an exchange of emails with Mr. Ulibarri on June 26, 2012, VLJ raised the issue of whether it was cleaning buildings and other areas that were not part of the contract, and they subsequently agreed to the removal of certain areas from the contract. Exhibit 10 at 14-15; Transcript at 296-97. In an August 8, 2012, email to Mr. Ulibarri, VLJ summarized their agreement as follows:

Here is a list of the areas that we will discontinue service in effective immediately. We are willing to negotiate to do the work per an Amendment/Modification to the Contract.

As agreed, the following areas are not included in this contract:

AB4

R1

R2

R3

Shasta Rooms 100-107

Tahoe Rooms 100-102D

Napa Rooms 100-106

Extra Trash Pickup

Exhibit 12 at 11. The combined cleanable area of those buildings and portions of the CREC in which VLJ ceased work totaled 24,662 sq. ft. Exhibit 56 at 1-4. In an August 9, 2012, email, Mr. Ulibarri stated that VLJ was “rightfully discontinuing the work we’ve been getting for free.” Exhibit 12 at 10.

In an August 6, 2012, email to VLJ, the COR stated that “VLJ needs to provide their own mop service as specified in [the] contract.” Exhibit 12 at 18. VLJ’s use of the VA’s mops and laundry service had not been an issue until the COR raised it. Exhibit 1 at 375. VLJ then ceased use of the VA’s mops and laundry. *Id.*

On February 15, 2013, VLJ sent an email to Mr. Ulibarri that stated the following:

I need a Modification to reflect that the hospital wants five (5) days a week Custodial and not three (3). The contract was supposed to be a working document and we were in the process of cleaning it up. . . . To go back and mock up the contract and input five (5) days . . . **is not fair to me**. It is a clear violation and I am willing to negotiate the work but have waited long enough.

Exhibit 17 at 29. In an April 3, 2013 email dated, Mr. Ulibarri responded to VLJ’s February 15, 2013, email and stated the following:

It’s been nearly a year since we started trying to revise and adjust the SOW fairly. The contract is now over two years old and it could almost be argued a precedent has been established for leaving some things the way they are. Let me know. I’d like to get this done and over with at some point, preferably sooner than later.

Exhibit 19 at 9. The VA and VLJ never reached an agreement that resulted in a written modification to the contract SOW.

The VA's Time Study and Proposed Increase for Two-Step Aseptic Cleaning

On May 20, 2013, VLJ requested a contract modification regarding its use of the two-step process for aseptic cleaning. Exhibit 21 at 10. On May 30-31, 2013, the COR conducted a study of the time VLJ's employees spent cleaning patients' rooms. Exhibit 23 at 1-3. The COR attached the results of the study to an August 30, 2013, email to the contract specialist, Ms. Felicia DeMita.⁸ *Id.* at 1. The record of the COR's time study showed, in detail, the time VLJ's employees spent performing similar cleaning tasks in three different double-occupancy rooms, including the time employees spent applying a bleach solution to surfaces, waiting, and then wiping it up. *Id.* at 3-4. The results of the time study showed the following:

Summary/Averages for Bleach Wipe:

9.3 minutes per double occupancy room = 4.6 minutes per each bed/space

4.6 minutes x 120 beds = 552 minutes (9.2) hours per day

Id. at 3. The COR testified that the average time VLJ's employees spent cleaning a room was thirty minutes. Transcript at 737. The VA did not notify VLJ that the COR was going to conduct such a time study. *Id.* at 620-21.

In his December 13, 2013, memorandum Mr. Mikus justified a contract modification in the amount of \$179,049.48 for VLJ's increased costs related to the two-step aseptic cleaning process. Exhibit 26 at 17-19. He stated the following:

The purpose of the contract modification is to compensate Valerie Lewis Janitorial (VLJ) for a constructive change to the contract beginning February, 2012, for the two-step cleaning process. The two-step cleaning process requires the contractor to wipe surfaces in the CREC twice as opposed to once. The second wipe of the surface is made with diluted bleach as a method of decontaminating the area for [C. diff], which is a particularly virulent bacteria that spreads rapidly in the hospital environment.

⁸ Ms. DeMita was assigned to the contract as a contract specialist in March of 2013 and took over Mr. Ulibarri's responsibility for the contract in April 2013. Transcript at 563-64. Mr. Mikus was her supervisor, and she became the CO responsible for the contract in January of 2014. *Id.*

Id. at 17. Mr. Mikus summarized the proposed increase for VLJ's use of the two-step process as follows:

Labor: The Government's anticipated labor costs are based on actual observations of the additional amount of time contractor employees spent doing the two-step process. The previous COR . . . made three observations of different areas to calculate the amount of extra time required of the contractor. The COR's observations indicated it would take 9.2 additional labor hours per day, seven days per week.

GSA labor rates for janitorial in this area is \$26.62, and is fully burdened and with overhead and profit included.

Each day: $\$26.62 \times 9.2 = \244.90

Each year: $\$244.90 \times 365 \text{ days} = \mathbf{\$89,388.50}$

Supplies: The contractor is required to use diluted bleach to clean the surfaces. Rags may also have been used, but for the majority of the time in question, the contractor was using VA linens without permission thus negating the cost for rags.

Cost of bleach: \$4.75 per 96 oz with dilution of 1:10,

Bleach calculation: 96 oz of bleach equals 960 oz of dilution. [The COR] estimated the CLC requires 64 oz of dilution per day. Thus, one bottle of undiluted bleach will last 15 days. ($960 \text{ oz} / 64 \text{ oz per day} = 15 \text{ days}$). Two bottles of bleach are required for one month, which is \$9.14 per month.

Year = $\$9.14 \times 12 = \109.68

Round up for waste = \$120.00

Overhead of 6% = \$7.20

Profit of 5% = 6.04

Total for Bleach per Year = \$133.24

Total \$89,521.74 per year

Two years: \$179,049.48

Id. at 18.⁹ By email dated December 19, 2013, Ms. DeMita informed VLJ's legal counsel of the VA's proposed cost increase in the amount of \$179,049.48. Exhibit 26 at 21-22.

VLJ's Claim for the Two-Step Cleaning Process

On January 10, 2014, VLJ submitted a certified claim in the amount of \$272,751.03 for the additional costs of supplies and labor for performing the two-step process for aseptic cleaning at the VA's direction since February of 2012. Exhibit 1 at 26-31. VLJ described the two-step process, in pertinent part, as follows:

First, clean with disinfectant (QUAT), allowing a proper dwell time of 10 minutes. The surface is then wiped down. The surface must then be allowed to air dry - keeping in mind that chemicals cannot be mixed.

Second, VLJ employees apply bleach solution to surface, allowing dwell time of 10 minutes. Then the surface is wiped down. Wipe down surface. Please consider that this is one process within a room and it only accounts for surfaces.

If done properly, the process should take a minimum of forty-five minutes, which may vary based on efficiency (to a degree) and whether the curtains need to be re-hung. To date, VLJ has not been written up by the VA for failing to meet its standards.

....

It should be noted that while it is not enumerated in the SOW or the current Contract, the VA has directed VLJ to change the curtains upon every instance of a patient room change, discharge, or terminal clean. . . . This required the curtains to be taken down, segregated, then re-hung, tagged and dated every time a patient moves his room. This practice has increased the number of labor hours expended by VLJ.

Id. at 28. VLJ stated that "it estimates that it has added the equivalent of *a minimum* one and half full-time employees in order to accomplish the additional duties required under the Two-Step Process." *Id.* at 30. According to VLJ, the time required to clean a patient's room

⁹ Mr. Mikus did not testify at the hearing.

before the C. diff outbreak was fifteen to twenty minutes, but the two-step process required a cleaning time of forty-five minutes. Exhibit 34 at 68; Transcript at 413.

Additionally, VLJ claimed an annual cost of \$20,645.52 for materials and supplies, which included an annual cost for bleach in the amount of \$12,765.60. Exhibit 34 at 61. Also, VLJ claimed costs for various other cleaning products such as QUAT, hand towels, and hand soap. *Id.* Finally, VLJ claimed “start-up” costs for cleaning equipment, such as carts, in the amount of \$1808.97. *Id.* VLJ, however, did not provide any documentary evidence of actual expenses for the purchase of cleaning supplies.

On January 27, 2014, VLJ and the VA executed bilateral modification P00019 to the contract. Exhibit 27 at 19. The modification stated the following:

1. The purpose of this bilateral modification is to formally add the two-step cleaning process to the Statement of Work incorporated into the contract. The two-step cleaning process is added as an addendum and is shown in full on the following page of this modification. The two-step-process is considered vitally significant to continued operations at the VA Northern California Health Care Clinic in Martinez.
2. The contractor has been performing the two-step process since February 2012 at the Government’s request. The contractor submitted a certified claim for the two-step process [on] January 10, 2014. The consideration required for the two-step process will be determined upon resolution of the certified claim. Upon resolution, the contract will again be modified to provide fair and reasonable consideration for the same.
3. The contractor agrees to continue performing the two-step process for the duration of the contract, including any and all option periods.

Id.

VLJ’s Frequency of Cleaning Claim

On March 17, 2014, VLJ filed its second certified claim in the amount of \$441,138.06. Exhibit 1 at 74. In pertinent part, VLJ’s claim stated the following:

This is a request . . . for equitable adjustment based on the additional janitorial services VLJ has been required to perform that are not enumerated in the . . . [contract]. This request covers the following areas of the Martinez campus:

AB21, R4, AB2, MRI and other areas where “custodial” services were either added or increased in frequency. This totals approximately 136 rooms with varying square footage and departments with the Martinez campus. VLJ has been performing these additional services from Contract’s start date on February 1, 2011 and will continue performing these services under VA direction through April 30, 2014.

To summarize . . . VLJ requests compensation for the hiring of the equivalent to 1.8 full-time equivalents: one full-time janitor, one half-time janitor, and an additional part-time employee to perform floor work and detailing. These employees were necessitated by the additional work directed by the VA, equaling 3360 . . . additional labor hours per contract year. VLJ also requests compensation for the costs of additional supplies necessary to perform this work. **This has resulted in a total increased actual cost to VLJ of \$441,138.06, which accounts for February 1, 2011 through April 30, 2014.**

Id.

With regard to building AB21, VLJ represented in its April 24, 2014, letter to the CO the following:

The custodial work VLJ performs is enumerated in the Schedules attached to the Contract, labeled as Attachments J.1 to J.10 (*See . . . the “Schedules,”* beginning on page 53 of the Contract). These Schedules identify the rooms VLJ is required to clean under the Contract, including the following: approximate square feet, the area to be cleaned, the room number, the type of room, housekeeping, and the type of cleaning. As you will note, the Schedules do not provide for frequencies for certain areas (see, specifically, AB21 at J.7 of the schedules); for others, the Contract specified that custodial work was to be performed three times a week but VLJ was directed by COTR to instead perform such work five times per week, or VLJ was directed to change the cleaning performed to “aseptic.”

Exhibit 1 at 75. VLJ also acknowledged that the cleaning frequencies for buildings R4 and AB2 and the MRI trailer were not in the contract but, instead, were the result of an agreement reached in a meeting with Mr. Ulibarri, the COR, and VLJ’s attorney. *Id.* at 76.

After VLJ submitted its frequency of cleaning claim, the CO requested additional information, which VLJ provided in its April 24, 2014, letter. Exhibit 1 at 372-78. VLJ represented that modification P0002 was executed with the parties agreeing that “VLJ would

add MRI and AB2, so long as costs associated with supply usage and the cost associated with carpets/strip/wax were excluded and separately modified.” *Id.* at 375. With regard to the research buildings, VLJ represented to the CO the following:

Pursuant to [amendment 0004], VLJ did not propose costs to service [R1], [R2] or [R3]. VLJ proposed costs for [R4] at the three (3) day a week frequency as there was ambiguity and ongoing discussions with the VA with regard to whether R buildings would be serviced by VLJ. After much discourse with regard to the R buildings and which were to be exempted, VLJ and the agency reached an agreement that VLJ would service all R buildings and a modification would be forthcoming. After VLJ began performance on the R buildings, the Agency never issued the modification. Eventually at the government’s sole decision all R buildings with the exception of [R4]; were returned to the VA. VLJ seeks compensation for the efforts up until the time the areas were returned to the VA.

Id. at 376. With regard to amendment 0013, VLJ represented that it “was only provided page one (1), the cover sheet for this amendment.” *Id.* at 373.

The CO exercised the options for the first and second option years of the contract, but did not exercise the option for the third year that began on February 1, 2014. Exhibit 1 at 3. VLJ, however, performed the contract through April 30, 2014. Exhibit 29 at 6.

The COFD

On May 23, 2014, Ms. DeMita, issued the COFD that denied both of VLJ’s claims. Exhibit 1 at 1-23. With regard to VLJ’s claim that the two-step process increased the time required to clean patients’ rooms, the COFD stated the following:

Through contractor employee interviews the Contracting Officer observed that it takes a total of 15 to 20 minutes to clean each room completely, first and second step, on a daily basis. Five employees provided the janitorial services to the patient rooms in the CREC. Of those five, the Contracting Officer asked two VLJ employees separately how long it took to clean a patient’s room. The first employee indicated it took between 15 to 20 minutes to clean a room, and she added that included the two-step process. The second VLJ employee also indicated it takes approximately 20 minutes to clean a room. A VA housekeeping supervisor also asked another VLJ employee the same question within hearing distance of the Contracting Officer, and the employee responded it takes about 20 minutes to clean the room in its entirety. The

Contracting Officer asked the VA nursing staff, who were unaware of any dispute between the Government and the contractor, how long it takes for a patient's room to be cleaned, and the nurse indicated it took approximately 20 minutes total.

Id. at 4. None of the persons referenced in that quoted portion of the COFD was ever identified. Additionally, the COFD did not mention the results of the VA's time study, which was conducted by the COR on May 30-31, 2013.

With regard to VLJ's claim for the increased costs of cleaning certain buildings five times per week as opposed to three times per week, the COFD represented that the inclusion of the original solicitation SOW in the contract was "an obvious, critical mistake upon contract award and incorporated the original, incomplete SOW into the contract." Exhibit 1 at 10. The COFD explained the following with regard to the amendments to the solicitation:

In this case, the contractor was provided a list of facilities in [amendment 0001] with the express intent that the contractor would provide service to those areas, which includes in part [AB2], [AB4], [AB5], [R4], and the first and second floors of [AB21]. Furthermore, [amendment 0002] discusses the cleaning requirements for [the] MRI [trailer]. Vendors note in question 10 of [amendment 0004] that [AB2], [AB5], and [R4] require service. The thirteen[th] amendment, [0013], provides a revised SOW showing a frequency schedule for [AB4] and [R1], followed by blank pages. A review of the amendments shows that the Government answered questions with a question and answer section rather than by revising the SOW, with the exception of [amendment 0013], and that generally the contractors understood which areas were to be serviced by considering all the amendments together in context to determine what was required.

When the Government amended the Request for Proposal with [amendment 0013], its revised SOW created an obvious patent ambiguity in relation to the requirement, because it did not mention several of the buildings provided by the other amendments.

Id. at 14-15. The COFD also cited a cost proposal, which was prepared by ADS, and contended that VLJ had intended to clean the disputed areas five times a week. *Id.* at 18-19. However, the cost proposal referenced a different solicitation number than the one related to the contract and a bid date of January 31, 2001, which was before VLJ was in business. *Id.* at 474; Transcript at 303, 306.

The COFD also asserted two counterclaims. Exhibit 1 at 20-22. First, the COFD claimed \$112,682.12 for VLJ's use of the VA mops and laundry service from February 1, 2011, through August 31, 2012. *Id.* at 21. Second, the COFD claimed \$56,924.20 the cost of janitorial service in buildings R1 and AB4 from September 1, 2012, through April 30, 2014. VLJ timely appealed the COFD.

Discussion

This appeal is before the Board pursuant to the Contract Act Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). VLJ asserts claims for the cost of implementing the two-step process of aseptic cleaning after the C. diff outbreak and the cost of cleaning buildings AB21, R4, AB2, the MRI trailer, and other areas five times, instead of three times, per week. The VA asserts two counterclaims that seek reimbursement from VLJ for the use of mops and laundry service and the cost of cleaning R1 and AB4 after VLJ ceased work in those buildings.

Two-Step Process of Aseptic Cleaning

The issues before the Board are whether, after the C. diff outbreak, the VA directed VLJ to change its process of aseptic cleaning to a two-step process and whether such a change is compensable. In general, a contractor asserting a claim for an equitable adjustment has the burden of proving “three necessary elements—liability, causation, and resultant injury.” *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991) (citing *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965)). The Veterans Administration Board of Contract Appeals (VABCA) recognized that “when the Government informally orders a method of performance more stringent than that required by the contract, a constructive change can be found to have occurred.” *Caddell Construction Co.*, VABCA 5608, 03-2 BCA ¶ 32,257 (citing *Aydin Corp. v. Widnall*, 61 F.3d 1571, 1578 (Fed. Cir. 1995); *Len Co. & Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967)). The VABCA also recognized the following:

To establish a constructive change, two essential elements must be present: a change and an order or direction, by word or deed. To find the change element, one must first examine the actual performance to see whether it went beyond the minimum standards demanded by the terms of the contract. Then it is necessary to find that the change was one that the Government's representative ordered the contractor to perform. . . . In particular, the rejection of a method or manner of performance selected or used by a contractor is a constructive change if the method was permitted by the contract.

John R. Hundley, Inc., VABCA 3493, et al., 95-1 BCA ¶ 27,494 (citations omitted).

The VA's direction that VLJ use a two-step process for aseptic cleaning amounts to a constructive change. Although the contract required aseptic cleaning for the patients' rooms in the CREC and other areas, it did not specify any particular method, and the contractor was tasked with preparing a HAMS policy and procedures manual. The VA's personnel first identified the C. diff outbreak on February 1, 2012, and that outbreak resulted in a significantly heightened concern about controlling infection. The VA's infection control personnel determined that diluted bleach was the only effective means of destroying the C. diff spores. The COR's February 8, 2012, email showed that VLJ was using diluted bleach as a disinfectant by that date. The first mention in the record of a two-step process for cleaning in response to the C. diff outbreak appeared in an email dated May 29, 2012. Mr. Ulibarri directed VLJ to implement that two-step process with specific directions.

The VA's time study showed how the COR measured the time that VLJ's employees spent to accomplish various tasks while cleaning patients' rooms. In particular, the time study analyzed the time that VLJ's employees spent applying, waiting, and wiping up diluted bleach. The COR computed an average cleaning time of thirty minutes per room and an average "bleach wipe time" of 9.3 minutes per double occupancy room, which amounted to an additional 9.2 labor hours per day. Mr. Mikus, determined that VLJ was entitled to compensation for the two-step process of aseptic cleaning based upon that increase of 9.2 labor hours per day for a two-year period, plus the additional cost of bleach during that same period. After VLJ submitted its claim, the VA issued a bilateral modification that implemented the two-step process of aseptic cleaning, but the modification did not include any increase in the contract price to reflect that change.

In spite of the findings of the time study and Mr. Mikus' recommended contract modification, the VA now takes the position that VLJ is not entitled to any compensation for implementing the two-step process of aseptic cleaning. The COFD made reference to statements from unidentified VA and VLJ employees regarding the time required for the two-step process of aseptic cleaning. The factual basis for such comments is unknown, and no affidavits or testimony from those persons is in the record. The VA has offered no evidence to disprove its own time study or Mr. Mikus' recommended contract modification for VLJ's increased costs due to implementing the two-step process for aseptic cleaning. Although the VA has offered various theories in an attempt to show that the two-step aseptic cleaning process did not increase the time that VLJ's employees spent cleaning rooms, such theories are of no avail where the VA has not refuted its own time study that contradicts those theories. Based upon those determinations by the COR and Mr. Mikus, the Board finds that the VA's direction to VLJ to implement the two-step aseptic cleaning process was a constructive change to the contract.

The Board's discussion, accordingly, turns to the measure of VLJ's recovery for its increased costs that resulted from the VA's direction to implement the two-step process of aseptic cleaning after the C. diff outbreak. The Court of Claims has held that "[t]he ascertainment of damages, or of an equitable adjustment, is not an exact science, and where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision." *Electronic & Missile Facilities, Inc. v. United States*, 416 F.2d 1345, 1358 (Ct. Cl. 1969). This Board has recognized the following:

As the court stated in *Dawco Construction Inc. v. United States*, 18 Cl. Ct. 682, 698 (1989), *aff'd in part*, 930 F.2d 872 (Fed. Cir. 1991), "All that is necessary is a reasonable showing of the extra costs. Defendant cannot be permitted to benefit from its wrong to escape liability under the guise of a lack of a perfect measure. *See generally Dale Construction Co. v. United States*, 161 Ct. Cl. 825 (1963)." In *Dawco*, the court had decided quantum on the basis of a jury verdict, a less-favored approach than total cost.

Moshe Safdie & Associates, Inc. v. General Services Administration, CBCA 1849, et al., 14-1 BCA ¶ 35,564. The Armed Services Board of Contract Appeals (ASBCA) recognized that a government estimate was "sufficient to support an award . . . under a 'Jury verdict' theory of arriving at a fair approximation of the damages." *Freeman General, Inc.*, ASBCA 34611, 02-1 BCA ¶ 31,758 (1991) (quoting *Freeman General, Inc. v. United States*, No. 90-1025, 1990 WL 165558 (Fed. Cir. Oct. 31, 1990) (unpublished)¹⁰).

The Board finds that the VA's estimate, which Mr. Mikus prepared, is the proper measure of recovery for VLJ's increased costs of implementing the two-step process of aseptic cleaning. VLJ's claim was not based on a time study similar to the COR's time study, but rather, the claim assumed that employees spent forty-five minutes cleaning each room using the two-step process. Additionally, VLJ did not have documentary evidence to support an increased cost of cleaning supplies in excess of \$20,000. The Board, accordingly, adopts Mr. Mikus' estimate of recovery for VLJ's labor hours and material costs in the amount of \$179,049.48 for the two-year period from February 2012 to February 2014, plus the additional two months VLJ performed the contract from March 1 to April 30, 2014. As directed in this decision, the Board remands this portion of the appeal back to the CO to compute quantum, including interest, consistent with this decision.

¹⁰ In its unpublished opinion, the Court of Appeals for the Federal Circuit reversed the ASBCA's earlier decision in *Freeman General, Inc.*, ASBCA 34611, 89-2 BCA ¶ 21,809, *reconsideration denied*, 89-3 BCA ¶ 22,096, *rev'd*, *Freeman General, Inc. v. United States*, 918 F.2d 188 (Fed. Cir. 1990) (table).

Frequency of Cleaning Claim

VLJ's frequency of cleaning presents the issue of how the Board should interpret a contract in which the SOW in the executed contract does not reflect the solicitation amendments and the parties dispute which of those amendments, if any, should comprise the terms of the contract. In general, the Board looks to the following:

In interpreting a contract, “[w]e begin with the plain language.” *McAbee Constr., Inc. v. United States*, 97 F.3d 1431,1435 (Fed. Cir. 1996). “We give the words of the agreement their ordinary meaning unless the parties mutually intended and agree to an alternative meaning.” *Harris v. Dep’t of Veterans Affairs*, 142 F.3d 1463,1467 (Fed. Cir. 1998). In addition, “[w]e must interpret the contract in a manner that gives meaning to all of its provisions and makes sense.” *McAbee*, 97 F.3d at 1435.

Jowett, Inc. v. United States, 234 F.3d 1365, 1368 (Fed. Cir. 2000). “[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous.” *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). “[I]t is elementary that the language of a contract must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances.” *Id.* at 975.

The VA and VLJ dispute whether amendment 0013 became part of the contract. In general, when a contractor acknowledges an amendment to a solicitation, that amendment becomes part of the contract. See *Charles Cunningham Construction Corp.*, GSBICA 7420, 85-2 BCA ¶ 17,965; *West Coast Research Corp.*, ASBCA 21087, 77-1 BCA ¶ 12,510; *Window Master Corp.*, GSBICA 4183, 76-1 BCA ¶ 11,735. Even if the awarded contract omits the terms of the solicitation amendment, that amendment is still part of the contract. See *ALCAN-JHW, A Joint Venture*, ASBCA 10773, 66-2 BCA ¶ 5932 (“To hold that the contract as awarded required something different from the advertised invitation as bid would be to find that the contracting officer had violated the statutes and regulations pertaining to procurement by advertising.”).

VLJ acknowledged amendment 0013 but contends that it only received the cover page to that amendment. This Board has recognized that when a contractor acknowledges an amendment that does not have all of the indicated number of pages, the contractor is responsible for inquiring as to the content of those missing pages. See *Future Forest, LLC v. Department of Agriculture*, CBCA 5764, 19-1 BCA ¶ 37,238 (2018). Additionally, the

fact that a contractor lacked all of the pages of an amendment does not mean that those pages “magically ‘dropped out’ of the [contract].” *Id.*

The awarded contract referenced the solicitation and the amendments, which included amendment 0013, and the Board reads all of those parts of the contract together so as to give a reasonable meaning to the contract as a whole. Amendment 0013, consequently, revised the entire contract SOW, and that revised SOW would have replaced any conflicting terms in the earlier amendments. *See Enterprise Information Services, Inc. v. Department of Homeland Security*, CBCA 4671, 15-1 BCA ¶ 36,010. In spite of the fact that the VA awarded the contract with a SOW that did not reflect those changes set forth in the solicitation amendments, nothing in the record would suggest that either the VA or VLJ intended to proceed as though the solicitation amendments had no meaning. VLJ referenced amendment 0013 in its February 2, 2011, email that questioned the VA’s position that it was required to clean buildings AB2, AB5, and the MRI trailer. The Board infers that the VA agreed with VLJ because it executed bilateral modification P0002 to add building AB2 and the MRI trailer to the contract.

The Board, accordingly, finds that amendment 0013 changed the frequency of cleaning requirements under the contract. The revised SOW in amendment 0013 required custodial cleaning five days per week in building AB21 and aseptic cleaning seven days per week in the CREC dining rooms. In the case of building AB2 and the MRI trailer, which were added by modification P0002, there was no schedule for frequency of cleaning, but other contract provisions provided guidance. Section 6.1 of the SOW required that the contractor perform specific custodial services five days per week in administration buildings and trailers. Those tasks included removal of trash and recycling, vacuuming, dust and damp mopping, cleaning and sanitizing restrooms, disposing of litter and debris, removal of medical waste, and cleaning fingerprints and smudges. Building AB2 and the MRI trailer were subject to those requirements. Additionally, that same language in section 6.1 was also in the solicitation SOW. VLJ and other bidders would have been on notice as to those requirements for custodial cleaning in excess of three days per week.

In the case of building R4, the awarded contract SOW did not list that building, and there is no way for the Board to determine a frequency of cleaning requirement. However, the VA added that building to the contract without a written contract modification. When VLJ identified in its August 8, 2012, email those buildings that it deemed not to be part of the contract, it did not include building R4 in that list, but rather, appeared to consider that building part of the contract. To the extent that VLJ is attempting to claim the cost of cleaning building R4 five times a week instead of three times, its claim fails. VLJ has not shown that the contract required it to clean building R4 only three times a week and that the VA directed a greater frequency of cleaning. Amendment 0013, which was the contract

SOW, required custodial cleaning five times a week for research and administration buildings. At most, VLJ has only shown that it believed that it was responsible for cleaning building R4 only three days a week, but such a belief is insufficient to support its claim.

VLJ's frequency of cleaning claim also fails to prove the amount of a financial loss in connection with its claim. As discussed above, a contractor's claim for a constructive change must prove the "liability, causation, and resultant injury." *Servidone Construction Corp.*, 931 F.2d at 861. VLJ contends that the VA's direction to provide custodial cleaning five days a week resulted in the hiring of an additional 1.8 FTEs, but the claim lacks any supporting evidence to show the extent that its actual costs of performing the contract exceeded its proposed cost of performing the contract.

Additionally, VLJ's claim does not account for changes in the number of buildings that were part of its contract and the financial benefit of such a reduction. Its claim states that it incurred costs for increased frequency of cleaning from February 1, 2011, to April 30, 2014. However, VLJ's claim ignores the fact that on August 8, 2012, the VA agreed to remove buildings AB4, R1, R2, and R3 and several rooms in the CREC, including the two dining rooms, from the contract. The removal of those areas from the contract, at VLJ's request, amounted to a reduction of 24,662 sq. ft. of cleanable space from the contract. VLJ has represented that the benchmark for its technical proposal would have been one FTE for every 8000 sq. ft. VLJ's claim does not account for that reduction in work, as it would have amounted to a reduction of three FTE's during the last half of the contract performance period.

As part of its frequency of cleaning claim, VLJ argues that the VA did not pay for work described as "carpet, strip, wax" under modification P0002, but the VA points out that VLJ's claim did not mention that modification. Appellant's Posthearing Brief at 77-78; Respondent's Posthearing Brief at 43. "It is well established that the 'proper scope of an appeal processed under the CDA is circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom.'" *Guilltone Properties, Inc.*, HUDBCA 02-C-103-C4, 2006 WL 990150 (Mar. 30, 2006) (quoting *Stencel Aero Engineering Corp.*, ASBCA 28654, 84-1 BCA ¶ 16,591 (1983)). VLJ's frequency of cleaning claim did not assert a claim for the cost of "carpet, strip, wax," and it does not mention modification P0002. At most, VLJ's claim makes a vague reference to "floor work" that required an additional part-time FTE without any specific reference to building AB2 and the MRI trailer. While there are several emails in the record in which VLJ indicated that it expected a contract modification subsequent to modification P0002 that would pay for "carpet, strip, wax" for building AB2 and the MRI trailer, its frequency of cleaning claim did not assert such a claim. The Board has no authority to supplement VLJ's claim. In any case,

VLJ provided no documentary evidence to support the costs incurred for such work, and the Board does not have the means to even speculate as to the amount of such costs.

The VA's Counterclaims

The VA asserts two counterclaims against VLJ regarding its use of mops and laundry services and stopping work in buildings R1 and AB4, but the counterclaims ignore the fact that VLJ did so with Mr. Ulibarri's authorization.¹¹ "[T]he Government can be bound by a contracting officer's 'unfettered opinion [as] the person delegated as decision maker by the parties to the contract,' . . . even when that opinion is expressed in internal correspondence." *Texas Instruments Inc. v. United States*, 922 F.2d 810, 814 (Fed. Cir. 1990) (quoting *General Electric Co. v. United States*, 412 F.2d 1215, 1221, *reh'g denied*, 416 F.2d 1320 (Ct. Cl. 1969)). The Government is bound by such an agreement and it cannot be revoked "based on unsupported and unverified allegations of impropriety not revealed to the contractor." *Id.* at 816. The VABCA has recognized that in the absence of a formal written modification, the contract will be deemed to have been modified where "there are present . . . sufficient writings either setting forth the terms of the agreement or reflecting the parties' intention to be bound." *Adams Construction Co.*, VABCA 4669, 97-1 BCA ¶ 28,801.

The Board finds no merit in the VA's counterclaim in the amount of \$112,682.12 for the use of the VA's mops and laundry service. The VA's technical staff member, with Mr. Ulibarri's knowledge, directed VLJ to commence work and authorized the use of the VA's mops and laundry service. The VA had held up commencement of work under the contract and had not made storage space available to VLJ. VLJ's use of the VA's mops and laundry service was for the benefit of both parties. The record does not explain why VLJ used the VA's resources for almost a year-and-a-half into the contract performance period, but VLJ stopped when directed to do so. There is no evidence of any impropriety on VLJ's part. Although the contract stated, generally, that the VLJ was to use its own resources, the Board does not construe that clause as giving the CO authority to charge a fee after-the-fact for such use. In any case, the VA made no effort to prove its asserted costs and the COFD is the only document in the record that relates to that counterclaim.

The VA's counterclaim in the amount of \$56,924.20 for the cost of cleaning buildings R1 and AB4 is also without merit. In response to VLJ's request, Mr. Ulibarri allowed VLJ

¹¹ VLJ argued that the VA did not assert its counterclaims in its answer. The Board does not find it necessary to address that argument because the COFD asserted the counterclaims and VLJ appealed the COFD. The counterclaims are properly before the Board under the CDA. 41 U.S.C. § 7104(a).

to stop work in buildings R1 and AB4 as well as other buildings. While the VA may now disagree with the terms of Mr. Ulibarri's agreement with VLJ, the Board will not undermine that agreement. Also, the VA has offered no proof to support the amount of its counterclaim.

Summary

As discussed above, this appeal consists of two claims by VLJ and two counterclaims by the VA. The Board finds entitlement with regard to VLJ's claim for implementing the two-step process of aseptic cleaning at the VA's direction. Using the jury verdict method to determine the amount of recovery, the Board adopted the VA's estimate of the cost of such work for the period from February 2012 to February 2014, which was \$179,049.48, plus two additional months, March and April of 2014, to be computed in accordance with the daily rate set forth in Mr. Mikus' December 13, 2013, memorandum. VLJ is also entitled to interest on that amount as calculated under the CDA. The Board, accordingly, remands this appeal to the contracting officer to compute quantum consistent with this decision. The Board denies VLJ's claim for increased costs for frequency of cleaning. Finally, the Board denies both of the VA's counterclaims regarding VLJ's use of mops and laundry facilities and the cost of cleaning buildings AB4 and R1.

Decision

The appeal is **GRANTED IN PART**. The appeal is remanded to the contracting officer for the computing of quantum as directed in this decision.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge