

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
LABAT-Anderson, Inc.) ASBCA Nos. 54904, 54905, 54906
)
Under Contract No. SP0710-02-D-7005)

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OPINION BY ADMINISTRATIVE JUDGE JAMES

These three appeals arise from the contracting officer's final decision that denied appellant's claims under the captioned three-year contract for materiel distribution services at the Defense Distribution Depot, San Diego, CA. ASBCA No. 54904 concerns appellant's claim that it should be paid under contract line item (CLIN) 0002, rather than under CLIN 0001, for minimum military packing (MMP) protection of "off-base transshipments" performed in the U.S. Naval Station Building 66. Appellant's claim as quantified for the first 15 months of the contract was \$5,962,848.34. Its claim for the entire three-year period is approximately \$11.3 million. ASBCA No. 54905 concerns appellant's \$73,366 claim for payment of CLIN 0011's price. ASBCA No. 54906 concerns appellant's \$135,503.18 claim for Prompt Payment Act interest penalty on the preceding two claims. The Board has jurisdiction of these appeals under the Contract Disputes Act of 1978, 41 U.S.C. § 607. After a four-day hearing, the parties submitted post-hearing and reply briefs. The Board is to decide entitlement only (tr. 1/14).

FINDINGS OF FACT

1. Defense Supply Center, Columbus (DSCC) issued Solicitation No. SP0700-00-R-7007 (RFP) on 15 August 2000, requesting proposals for materiel distribution services at Defense Distribution Depot San Diego (DDDC), located at the Naval Station, San Diego, and the Naval Air Station, North Island, on a hybrid fixed-price, cost-reimbursement, indefinite delivery, indefinite quantity basis under which the government could issue delivery orders (DO) for a 36-month “Base Period” with a 24-month option. The RFP (and subsequent contract) included the FAR 52.215-8 ORDER OF PRECEDENCE—UNIFORM CONTRACT FORMAT (OCT 1997) clause. (R4, tab 1 at 334, tab 12 at 2-4, 6, 203, 208-09, 230 of 250). DSCC subsequently issued 24 amendments to the solicitation which we refer to as relevant (R4, tabs 13-36).

2. DSCC was responsible for drafting the RFP, except its § C, Performance Work Statement (PWS) (tr. 3/64-66). Ms. Rosemary Snavelly of the OMB Circular A-76 Program Office of the Defense Distribution Center, New Cumberland, PA (DDC), a subordinate activity of Defense Logistics Agency (DLA), was responsible for preparing the RFP’s PWS (tr. 2/180-85; 3/66-67).

3. In RFP § B: (a) CLIN 0001, Materiel Distribution Services at DDDC, set forth spaces for a unit price “PER LINE” and a total price, forecast 2,946,498 units for three years and required services as defined in PWS §§ C-5.1 through 5.4, 5.5.2.1, 5.5.2.3, 5.5.4, 5.5.5 and 5.5.6.1a, and (b) CLIN 0002, Preservation, Packaging, Packing and Marking (PPP&M) and Container Fabrication, requested unit and total prices for sub-CLINs 0002AA for “Bin,” 0002AB for “Medium Bulk” and 0002AC for “Heavy Bulk,” to reflect the different levels of PPP&M effort and costs for those items (tr. 3/72-73). CLIN 0002 was to be in accordance with PWS §§ C-5.5.1.1 – C-5.5.1.3. Section C-5.5.1.2 provided that “[t]he PA shall perform PPP&M . . . for off-base transshipments.” CLIN 0002 did not define “units” and stated that “Offeror shall base their prices on the sample CTDFs [Contract Technical Data Files] provided in Attach 1 and the forecasted quantities listed.” The “sample CTDFs” included cost estimates for five items – altitude indicator, horizontal stabilizer, aircraft fuel tank, aircraft eject seat, and nitrogen receiver assembly – representative of DDDC’s PPP&M workload, and packaging characteristics and requirements including dimensions, unit pack quantity, preservation method, wrapping and cushioning materials, and marking for the horizontal stabilizer, aircraft fuel tank, aircraft eject seat, nitrogen receiver assembly, and “insulator, washer,” but not for the altitude indicator. No CLIN cited PWS § C-5.5.1, but Technical Exhibit (T.E.) 1.2 projected workloads for “5.5.1 PPP&M” that correlated approximately to “5.5.1.2 – PPP&M” returns and transshipments under CLIN 0002. (R4, tab 12 at 2-3, 82, 121 of 250, attach. 1 at 1-16, tab 45 at 12; tr. 1/113, 3/80, 4/35-38)

4. DDDC's briefing at its 27-28 August 2000 pre-proposal conference, to which LABAT sent representatives, stated that CLIN 0001's units were "Per Line" and CLIN 0002's units were per "Each" (R4, tabs 44-45; tr. 1/87, 208, 2/50).

5. On 29 September 2000 RFP amendment 3 revised § C-5.5.1 to define applicable levels of protection for PPP&M as "Level A, Level B and Minimum Military packing (formerly known as Level C)," but the § B CLINs still did not mention § C-5.5.1 (R4, tab 15 at 8, 43 of 71).

6. On 6 October 2000 RFP amendment 4 stated with respect to the first of nine questions and answers (R4, tab 16 at 104):

Q: CLIN 0002 and 5002 appear to ask for unit price per container. Does this CLIN include both labor and material costs?

A: Yes

7. On 18 October 2000 RFP amendment 5 added a new CLIN 0002 for "PPP&M for COSIS [Care of Supplies in Storage]" under PWS § C-5.5.1.1 and re-numbered prior CLIN 0002 with its three sub-CLINs as CLIN 0003, "PPP&M and Container Fabrication," citing PWS §§ C-5.5.1.2 – C-5.5.1.3 (R4, tab 17 at 4 of 38).

8. On 20 October 2000 RFP amendment 7 revised § B to require CLIN 0003 to be performed in accordance with §§ C-5.5.1, C-5.5.1.2 – C-5.5.1.3 (R4, tab 19 at 4 of 29).

9. As of 3 November 2000, when LABAT submitted its first proposal (finding 10), the RFP as amended through amendment 10 included the following provisions:

(a) The § B definition of PWS sections applicable to CLIN 0001 continued to specify §§ C-5.1 through 5.4 and those applicable to CLIN 0003 consisted of §§ C-5.5.1, C-5.5.1.2 and C-5.5.1.3 (*id.*).

(b) Section C-2.1 specified under "Minimum Military Packing" that when items "will not be exposed to shipping environments more severe than those normally encountered in the commercial distribution system, military packing requirements need not be implemented" and defined "Off-base Transshipment" as "[m]aterial received by the distribution depot from the customer with a request for the material to be packed and shipped to another destination." (R4, tab 12 at 22-23 of 250) Testimony at the hearing amplified that transshipments are "non-accountable items that pass through DDDC to another location and are not "mission stock" (tr. 3/146-47, 175-76).

(c) Section C-5.4. (CLIN 0001) dealt with “issue” of material. Section C-5.4.1.3 required “packing and packaging” of materiel issues “to minimum military requirements” and stated: “Requirements above minimum military requirements for packing and customer requested container work orders are addressed in Section C-5.5.1.” Section C-5.4.1.6 stated:

Off-base Transshipments may include the packaging and labeling of materiel upon customer request. The PA [contractor] shall ship the materiel by processing the transaction into DSS [Distribution Standard System] as on [sic] off-base transshipment

(R4, tab 12 at 69, 71 of 250, tab 21 at 3 of 84)

(d) Section C-5.5.1 (CLIN 0003) dealt with PPP&M and container fabrication. It stated:

The PA shall provide preservation, packaging, packing, and marking of materiel received, stored and/or shipped by DDDC. The applicable levels of protection are Level A, Level B and Minimum Military packing (formerly known as Level C). . . . PPP&M shall be accomplished, as appropriate, for field returns, MTIS [Material Turned In To Store], materiel shipped from commercial or organic repair sites, vendors, etc.

Section C-5.5.1.2 provided that “[t]he PA shall perform PPP&M, based on customer requests, for off-base transshipments.” (R4, tab 12 at 82 of 250)

(e) T.E. 1.2, Projected Workload, projected 770,249 total issues in the first performance year (PP1) under § C-5.4 (CLIN 0001). That quantity included 82,212 Medium Bulk “Off Base Issues” and 86,615 “Off-Base Transshipments”, totaling 168,827. T.E. 1.2 projected 5,673 “PPP&M Transshipments (Bldg. 36)” in PP1 under § C-5.5.1.2 (CLIN 0003). (R4, tab 17 at 17, 20 of 38)

10. On 3 November 2000 LABAT proposed \$13,346,631 for CLIN 0001 and \$4,830,775 for CLIN 0003. Its CLIN 0001 price contained labor costs and hours in PP1 for packing off-base transshipments. Thus, it stated that there were 168,827 medium bulk shipments, which “[i]ncludes Off Base Transshipments.” It estimated that “80% 135061 will ship small package carrier, which is included in the Pack/Sort/Offer Standards.” LABAT’s Sort/Pack/Offer Standards were part of the “PACKING AND

OFFER” standards for CLIN 0001.¹ Its CLIN 0003 price for PPP&M in PP1 contained labor costs and hours of 24.3 FTEs (full time equivalents) for 65,175 “eaches,” including 5,673 transshipments (764 + 4,331 + 578 for sub-CLINs 0003AA, -AB, -AC, respectively), and \$411,757 for packing materials. (R4, tab 17 at 19-20 of 38, tab 48A at 2, 8, 11, 15, 30). We do not attach probative weight to appellant’s witness Sanchez’ contrary testimony regarding CLIN 0001 costs of off-base transshipments (tr. 1/91-95, 106-07). LABAT did not raise any question in its proposal regarding the interpretation of the PWS.

11. LABAT’s 6 December 2000 message regarding the RFP advised DCAA auditor Dana Ungerman, under the heading “CLIN 0001 YEAR 1 WORKLOAD UNIT COSTS MATERIALS ONLY,” that “[t]ransshipment supplies/material costs are recovered under CLIN 0003” PPP&M (app. supp. R4, tab 4 at 994, -1001). DSCC’s PCO Deborah Raita did not receive that message (tr. 4/44, 48).

12. On 26 March 2001 RFP amendment 11, without explanation, in § B, CLIN 0003, omitted the reference to § C-5.5.1, though T.E. 1.2 still projected workload for “5.5.1 PPP&M” (R4, tab 23 at 7, 42 of 123).

13. On 9 July 2001 RFP amendment 12 revised § B by adding CLINs 0001AA “MISSION STOCK” with “PER LINE” units, and 0001AB “Meals Ready to Eat” (MRE), with “PER CASE” units and continued to omit any reference in § B CLINs to § C-5.5.1. T.E. 1.2 now projected 80,897 Medium Bulk Off Base Issues, 1,989 Medium Bulk Off Base Sales, and 85,228 Off-base Transshipments, totaling 168,114. It projected PPP&M of 5,632 transshipments under § C-5.5.1.2 and workload under § C-5.5.1. (R4, tab 24 at 4, 28-29, 31 of 43; tr. 3/73-74)

14. LABAT’s 2 August 2001 proposal revisions for CLIN 0001, as amended through RFP amendment 12, included \$90,781 in packing/packaging costs for 50,434 off-base transshipments/issues and deleted from its “CLIN 0001 YEAR 1 WORKLOAD UNIT COST MATERIALS ONLY” chart (finding 11) the note stating that transshipment supplies/material costs were recovered under CLIN 0003. LABAT took the total of 168,114 medium bulk shipments, including 85,228 off-base transshipments, estimated the quantity which would require packing/packaging (50,434) and included the material costs for that quantity in CLIN 0001. (R4, tab 51 at 18-19)

15. On 4 December 2001 RFP amendment 14 reissued the RFP and called for proposal revisions on 25 January 2002. Its § B defined the units for CLINs 0002 and

¹ According to the proposal, “[p]erformance standards were developed for each function to determine resource requirements” (R4, tab 48A at 4).

0003 as “EACH,” forecast 165,085 units for CLINs 0002 and 0003 over three years and continued to omit any reference in the CLINs to § C-5.5.1, while projecting workload for 5.5.1 in T.E. 1.2. (R4, tab 26 at 2, 140-41 of 372; tr. 3/79). Section C-5.4.1.6 now stated that --

Off-base transactions are materiel received by the PA for non-local customers which require further packaging and/or labeling of material. The PA shall ship the material by processing the transaction into DSS as an off-base transaction. . . .

The provisions of §§ C-5.4.1.3, C-5.5.1 and C-5.5.1.2 quoted above (finding 9) remained unchanged.

16. LABAT’s 25 January 2002 revised offer for CLIN 0001 as contained in the record did not indicate any change in methodology for proposing costs related to off-base transshipments from that in November 2000 (as to labor costs and hours) and August 2001 (as to materials). LABAT continued to lump medium bulk shipments, including off-base transshipments, together for purposes of calculating packing costs for CLIN 0001. LABAT based its CLIN 0003 material costs on quantities which included PPP&M of 5,077 transshipments (the current T.E. 1.2 projected quantity). LABAT proposed \$270,000 for CLIN 0001 packing materials in PP1, and \$333,488 for CLINs 0002 and 0003 packing materials in PP1. (R4, tab 48B at 14, 52-56; tab 156 at 38)

17. DDDC’s 1 May 2002 summary of the RFP building changes stated: “Building 66 Relocated and implemented PPP&M operations from building 280” and included “planographs” showing, *inter alia*, “heavy pack” and “light pack” areas in Building 36 and “heavy pack” and “DHL Int’l Pack Stations” in Building 66 (app. supp. R4, tab 9 at 2, 3, 27, tab 14 at 3). PCO Raita intended those planographs to provide offerors an accurate description of activities occurring in those buildings, but “it was always up to the offerors to determine how they would operate [W]e didn’t tell them what they had to do, where” (tr. 3/94-95).

18. On 21 May 2002 RFP amendment 19: (a) redefined CLIN 0001’s work scope to encompass PWS §§ C-1 through C-6 “unless noted below” in another CLIN, (b) in § B combined CLINs 0002 and 0003 into CLIN 0002 for PPP&M, with a forecast quantity of 165,085 “eaches” over three years, eliminated sub-CLINs 0003AA, -AB and -AC, and without explanation re-introduced § C-5.5.1 to define CLIN 0002, (c) revised § C-5.4.1.3’s last sentence to state: “Section C-5.5.1, PPP&M, addresses packing requirements for repairable items with G & F condition codes needing minimum military packing, and all items needing above minimum military packing,” (d) moved the reference to PPP&M of off-base transshipments from § C-5.5.1.2 to § C-5.5.1, (e) added

Building 66 to the list of facilities utilized for PPP&M in § C-5.5.1.6, (f) in T.E. 1.2, projected 688,199 total issues (CLIN 0001), including 69,595 Medium Bulk Off Base Issues and 73,193 Off-Base Transshipments, 57,258 total PPP&M (CLIN 0002), including 5,077 PPP&M Transshipments, and eliminated the reference to Building 36, and (g) eliminated CLIN 0002's reference to "sample CTDFs," but not the CTDFs themselves. PCO Raita opined that retention of the CTDFs and inclusion of the "insulator, washer" in the RFP were both in "error," and she was unaware of the insulator error before the present litigation. (R4, tab 31 at 7, 48-49, 51 of 187; tr. 2/119, 219, 4/38-44, 54-55) Subsequent amendments 20-24 made no further changes in relevant provisions (R4, tabs 32-36).

19. LABAT President Walter Malinowski and PCO Raita understood that the CLIN 0001's scope of PWS §§ C-1 through C-6 "unless noted below" (as revised by RFP amendment 19), meant that work under CLIN 0002 specified by § C-5.5.1 excluded such work from CLIN 0001, § C-5.5.1 work was paid under CLIN 0002 (tr. 2/63-64, 3/109-11, 4/10, 243) and transshipments could be compensated as "issues" under CLIN 0001 and as requiring "PPP&M" under CLIN 0002 (tr. 2/265, 3/111-12).

20. LABAT's 14 June 2002 letter to DSCC stated that LABAT planned to perform PPP&M at North Island Buildings 36, 656, 378, 472 and 463, "PPP&M will also be performed at the National City location in Bldgs 66, 322, 3304, 3322 and at other locations as may be dictated by the requirement" and proposed to use 49,758 containers and 7,500 "water vapor and new overpack" for 57,258 items, including "minimal protection" and "container preservation only" for 10,066 of those items, totaling \$460,567 for PPP&M packing materials in PY 1 of CLIN 0002 performance (R4, tab 53 at 8, 15-16, 28-29; tr. 1/106-11, 3/162-63). Respondent raised no pre-award objection to LABAT's proposed PPP&M performance in Building 66 (tr. 2/122).

21. LABAT's 24 June 2002 letter, responding to DSCC's 20 June 2002 question about conflicts between the § C-5.5.1 workload projections and LABAT's proposed number of packing supplies, stated: "Our assumptions relating to Bin, Med Bulk, and Heavy Bulk sizes are for each bare item and are not intended to be a total exterior pack for shipping or storage purposes," the T.E. 1.3 historical supply requirements exceeded the T.E. 1.2 workload projections and LABAT had factored into its cost estimates all facilities changes in all RFP amendments (R4, tab 54 at 2-4; tr. 1/109-12, 287-88).

22. LABAT's 29 June 2002 final proposal on the RFP, as revised 1 July 2002, proposed for the three-year base period: (a) \$15,518,636 for CLIN 0001, including labor costs for packing off-base transshipments and \$270,000 for packing materials in PY 1, and (b) \$4,183,254 for CLIN 0002, including \$460,567 for "Lumber, Packing Materials" in PY 1 (R4, tab 55 at 1, 5-6; app. supp. R4, tab 35 at 4-4, 4-8). LABAT's proposal did not raise any question to the CO regarding the interpretation of the PWS provisions.

23. LABAT's 1 July 2002 letter responding to DSCC's 26 June 2002 request that LABAT review its "cost data for both CLINs 0001 and 0002 to ensure that it includes adequate material and supplies . . . needed for preparing the items for shipment" (app. supp. R4, tab 21 at 2), stated: "Our proposal cost takes into consideration and includes the unit container cost . . . required to support both items shipping out of storage or directly out of the PPP&M areas" (R4, tab 56 at 1).

24. PCO Raita awarded Contract No. SP0710-02-D-7005 (contract 7005) to LABAT on 9 August 2002. The projected value of the contract for the 36-month base period was \$22,851,625. (R4, tab 1 at 1, 5) Contract 7005's § B, "Supplies or Services and Prices/Costs," provided in pertinent part (R4, tab 1 at 4):

BASE PERIOD 36 MONTHS

LINE ITEM

....

CLIN 0001 is to be UNIT PRICE FORE-
 priced as a fixed PER LINE CAST TOTAL
 unit price per line.

0001	DISTRIBUTION SERVICES: C-1 thru C-6, unless noted below	\$5.87	2,643,720	\$15,518,636
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....

CLINs 0002, 0003, UNIT PRICE
 0004 and 0005 are
 to price as a fixed
 unit price per each.

EACH	<u>FORE</u> <u>CAST</u>	<u>TOTAL</u>
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0002	PPP&M: C-5.5.1	\$25.34	165,085	\$4,183,254
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25. Contract 7005, § C-2.1, General Definitions, included the following terms:

Minimum Military Packing When anticipated logistics paths indicate that items requiring military preservation, as outlined in MIL-STD-2073-1 and subsequent updates, will not be exposed to shipping environments more severe than those normally encountered in the commercial distribution system, military packing requirements need not be implemented. Acceptable minimal packing requirements for shipments of this nature are listed in Table J.IXa, MIL-STD-2073-1 and subsequent updates.

....

Off-base Transshipment Materiel received by the distribution depot from the customer with a request for the materiel to be packed and shipped to another destination.

(R4, tab 1 at 27-28)

26. Contract 7005's PWS, § C, included the following relevant provisions:

5.2.1 REQUIREMENTS

....

b. NADEP Maintenance Returns. . . . "G"
condition materiel shall be processed as transshipment. . . .
Materiel receipted on DD Form 1149 shall be inducted into PPP&M as non-accountable work order materiel for packing and transshipment. . . .

c. Material Turned-In To Shore (MTIS).

. . . All repackaging [of unopened returns] requiring PPP&M shall be performed in accordance with C5.5.1.

All repackaging of "A", "D" and "F" condition MTIS items [opened returns] requiring PPP&M shall be performed in accordance with C-5.5.1.

....

Repairable items downgraded to “F” condition after the MTIS screening shall be packed/repackaged to the minimal packaging level of protection to ensure adequate materiel protection

. . . .

5.3.1.1 Routine Care of Supplies in Storage (COSIS)

activities include . . . minor repair . . . on packaging . . . performed IAW . . . applicable standards and specifications for PPP&M. . . . Repairs exceeding the limits of minor repair . . . shall be . . . performed IAW Section C-5.5.1 for PPP&M.

. . . .

5.4 ISSUE

The PA shall issue the correct materiel in the correct quantity and condition code at the correct time IAW Section C-5.4.2 and C-5.4.3, Standards and Documentation Requirements.

. . . .

5.4.1 REQUIREMENTS

The PA shall perform issue processes including selection of stock from storage, issues from receiving, releases of materiel to transportation or direct delivery to the customer. . . . Materiel issue is processed from the buildings/sites identified under Storage in Section C-5.3. Workload transactions may include electronically received MROs, DROs, RDOs and non-automated requirements such as those contained on a DD Form 1149 for off-base transshipments. . . . Issue actions shall result in:

. . . .

5.4.1.3 Packing and packaging shall be accomplished to minimum military requirements IAW DLAI 4145.12, Section E, Paragraph 3, The DLA Packaging program, MIL-STD-2073-1, Standard Practice for Military Packaging . . . customer requirements and DSS packaging data. The PA

shall provide packing and shipping supplies, which may include containers as provided by the Government Small Parcel Contract, all required Performance Oriented Packaging (POP) certified containers, fiberboard, wood or other containers, whether the containers are obtained or fabricated; labels; dunnage; . . . and, customs and HAZMAT related forms to support the correct domestic or international transportation requirements for all shipments. . . . The PA shall provide containers required to support the packing requirements, which may include containers that are provided by small parcel carriers. Section C-5.5.1, PPP&M, addresses packing requirements for repairable items with G & F condition codes needing minimum military packing, and all items needing above minimum military packing.

. . . .

5.4.1.6 Off-base Transshipments are materiel received by the PA for non-local customers which require further packaging and/or labeling of materiel. The PA shall ship the materiel by processing the transaction into DSS as on [sic] off-base transshipment record

. . . .

5.5 SPECIAL FUNCTIONS

5.5.1 PRESERVATION, PACKAGING, PACKING AND MARKING (PPP&M)

The PA shall accomplish PPP&M to be performed . . . on a variety of materiel received, stored and/or shipped at DDDC.

The PA shall perform PPP&M IAW the DoD Stock Readiness Program Guidance on

- Materiel received that is improperly packaged or marked,
- Materiel in storage where packaging has deteriorated or damaged

The PA shall perform PPP&M on

- Materiel to be shipped, off-base transshipments, MTIS, and for special packaging support, to include non-routine COSIS.
- Materiel received from organic repair facilities (NADEP) or commercial vendors

Special packaging support

. . . . Container fabrications in support of the PPP&M operations are currently performed in Bldg 36, 66 and 656. The applicable levels of protection are Level A, Level B and Minimum Military packing (formerly known as Level C). . . .

. . . .

The PA shall perform PPP&M on materiel to be packaged in a manner that conforms to an acceptable level of packaging protection to meet packing specifications, MIL-STD-2073-1 . . . and Special Packaging Instruction (SPI).

. . . . The PA shall research the appropriate database to obtain the preservation method and instructions to perform PPP&M . . . [and] maintain records for each item for which PPP&M was performed that identify the PPP&M provided and the person or persons that performed the PPP&M action.

PPP&M requirements shall be performed prior to transshipments of non-accountable materiel. The PA shall protect PPP&M non-accountable material during transportation. The PA shall process PPP&M off-base transshipments for expedited packing and shipping based on customer needs.

. . . .

Materiel requiring a level of PPP&M exceeding the above requirements, standards and specifications are to be performed in accordance with Section C-5.5.3, Customer Specified PPP&M [CLIN 0007].

. . . .

5.5.1.6 Buildings/Sites

The following table represents existing facilities utilized for packaging, packing, preservation and marking process.

<u>BLDG . . .</u>	<u>COMMODITIES</u>	<u>SPECIAL CONDITIONS</u>
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. . . .

Bldg. 36	All types materiel or equipment	Repair returns, ESD sensitive, FMS, Bare items, maintenance turn-ins, container fabrication
Bldg. 66	All types materiel or equipment	Packaging, packing, marking and container fabrication.

(R4, tab 1 at 58, 60, 71, 78-80, 83, 91-93, 96-97) We find that contract 7005 did not limit performance of CLIN 0002 PPP&M to “existing facilities” or buildings that respondent used for PPP&M (tr. 4/150).

27. On 1 November 2002, DDC, which administered contract 7005 after award, issued a DO to LABAT for CLIN 0010, 120-day transition period services (R4, tab 37; tr. 3/108).

28. DDC appointed Gregory Mednick of DDDC as the CO’s representative (COR), responsible for “final inspection and acceptance by the Government of all items required by the contract” and for reviewing and certifying contractor invoices (R4, tab 1 at 330; tr. 3/168, 177).

29. On 11 May 2001, LABAT had been awarded Contract No. SP0710-01-D-7002 for materiel distribution services at Cherry Point, NC (R4, tab 134). Under that contract, disputes arose in 2003 about sizes of bin, medium bulk and heavy bulk units under individually priced sub-CLINs 0002AA, -AB and -AC for PPP&M, and counting multiple units in one box (tr. 1/129, 2/51-52, 3/265, 4/208, 212; R4, tab 134 at 2).

30. To avoid such problems, in January-February 2003 LABAT met with DDC contract specialist Cynthia Sheaffer in San Diego to reach a common understanding on

how LABAT would invoice the DDDC CLINs (app. supp. R4, tab 6 at L0001870, -75; tr. 1/127-35, 2/58, 4/167-68).

31. In mid-February 2003 the parties performed a test run of DSS data queries regarding CLIN 0002. According to COR Mednick, those test data derived from Buildings 322, 36, 378 and 463, where PPP&M was being performed (tr. 4/167-68, 171). According to LABAT's Mr. Sanchez, those test data queries derived from Buildings 36, 656 and North Island satellite sites and Naval Station Building 66 (tr. 1/132-34). Documentation of those data is not in the record to resolve that discrepancy. During those January-February 2003 meetings, no one from LABAT, including Mr. Sanchez, told Ms. Sheaffer that LABAT should be paid for MMP of off-base transshipments under CLIN 0002 (tr. 4/218).

32. LABAT's 26 February 2003 notes of the parties' agreed upon invoicing procedures include (app. supp. R4, tab 29 at 2; tr. 4/209-16):

Procedures for determining workload counts and invoicing backup documentation at DDDC.

CLIN Documentation

.....

0002 The invoice will include the total PPP&M count obtained from DSS accountable and non-accountable workorders [sic]. Data query name BLB-PP-WRK-ORD will be run to determine multiple quantities, which will be added to work order count.

Ms. Sheaffer noted "okay" in the margin of the foregoing notes (tr. 4/215, 231).

33. As of 28 February 2003, there was a 320 item backlog of material requiring packing and shipping in Building 36 and a 52 item backlog for pack in Building 66, the majority of which were off-base transshipments (tr. 1/118-21; R4, tab 63). On 1 March 2003 DDC issued DOs for work under CLINs 0001 through 0009 and 0011 (R4, tabs 38-39, 41), LABAT assumed operational responsibility for DDDC distribution services (compl. and answer ¶¶ 12) and effective the same date bilateral Modification No. P00003 increased the CLIN 0002 unit price to \$26.03 (R4, tab 4 at 2).

34. For its March 2003, CLIN 0002 invoice for \$1,100,314.13 submitted on 9 April 2003, LABAT derived 42,271 "eaches" from a DSS data query by adding completed Naval Station and North Island PPP&M work orders (including MMP at

building 66), subtracting multiple “lines” and adding the number of “eaches” for those multiple lines (R4, tab 185 at 111-14; app. supp. R4, tab 17; tr. 1/142-46).

35. On 10 April 2003 COR Mednick annotated on LABAT’s 9 April 2003 invoice for March 2003 CLIN 0002 services:

SHORT PAY THIS INVOICE BY \$824,838.64. THE TOTAL QUANTITY INVOICED IS 42,271 EACH WHICH INCLUDES WORK PERFORMED UNDER CLIN 0001, NOT CLIN 0002 OF THE CONTRACT. THE CORRECT QUANTITY IS CHANGED TO READ 10,583 EACH. THIS INVOICE SHALL BE PAID IN THE AMOUNT OF \$275,475.49 IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE CONTRACT.

(R4, tab 123 at 2; tr. 1/139-40, 3/178-80)

36. Before disapproving LABAT’s invoice for CLIN 0002 services in March 2003, COR Mednick conferred with contract specialist Cindy Sheaffer and contracting officer Merlene Dubose. In reliance on COR Mednick’s experience in PPP&M, the CO advised him that he should approve payment for CLIN 0002 PPP&M work performed in Building 36 and the North Island satellite buildings, and disapprove payment for MMP of off-base transshipments performed in Building 66 since it was not PPP&M (tr. 4/182-84, 200). Ms. Sheaffer relied on COR Mednick’s PPP&M experience to verify LABAT’s CLIN 0002 invoices (tr. 4/239) and stated that “the dispute was there at the first invoice” (tr. 4/244). COR Mednick based his 10 April 2003 CLIN 0002 invoice changes on his views that: (a) off-base transshipment packing and packaging at Building 66 to minimum military requirements, including Method 10 preservation, were not PPP&M work under CLIN 0002, and (b) since DDDC had done PPP&M at Naval Station Building 322 (for MTIS) and North Island Buildings 36, 378 and 463, and in February 2003 the parties had test run data queries for those four buildings, Mr. Mednick obtained a PPP&M workload count of 10,583 from the DSS, including multiple “eaches” packed in a single container, in those four buildings in accordance with the agreed upon procedures (R4, tab 174 at 69-72; tr. 3/180, 182-85, 4/171, 183-84, 187, 191-92).

37. COR Mednick acknowledged that Building 66 could be used for PPP&M and LABAT performed minimum military packing (MMP) of off-base transshipments in Building 66 (R4, tab 174 at 27-28; tr. 3/175-76, 193, 4/177, 192, 195). But he opined that minimum military packing was not PPP&M, Levels A and B, under CLIN 0002, but rather was “issue” under CLIN 0001, based on § C-5.4.1.3 (tr. 3/199-200, 4/199).

38. COR Mednick continued to reduce quantities and disallow payments on LABAT's CLIN 0002 invoices for off-base transshipment packing and packaging to MMP requirements at Building 66 through February 2006 (R4, tabs 123, 138; tr. 3/180, 184).

39. LABAT packed all of the off-base transshipment items disapproved by COR Mednick from March through October 2004, and from January 2005 through February 2006 in Building 66 at the MMP protection level (tr. 2/109, 3/193; R4, tabs 136A-136T, tabs 155A-155N).

40. LABAT's 24 August 2004 letter to CO Renee Cairo-Iocco submitted three claims under contract 7005, which LABAT certified on 26 August 2004 (R4, tabs 105, 106, 137). LABAT's "Claim Number One (1)" sought \$5,962,848.34 in –

payment for CLIN 0002 services provided in building 66 at the applicable period prices on the basis of each individual item or unit for which it provides . . . [PPP&M] services without regard for the number of items packed into individual containers or the services being categorized as minimum military packing for items being transshipped for organizations other than DDDC.

(R4, tab 105 at 1-2) LABAT's claim Nos. 2 and 3, respectively, were for payment of CLIN 0011's price and Prompt Payment Act interest on claims 1 and 2 (R4, tab 105 at 2-3). The CO received LABAT's claims on 10 September 2004 (R4, tab 106 at 1). As revised on 21 October 2004, LABAT's claim 1 sought \$5,962,848.34 for 229,076 CLIN 0002 items billed but unpaid from March 2003 through May 2004 (R4, tab 112).

41. CO Cairo-Iocco's 13 December 2004 final decision denied LABAT's 26 August 2004 claim in its entirety, stating with respect to claim 1, *inter alia*, that it was unreasonable to pay \$2,603.00 at \$26.03 per unit "for one box containing 100 gas masks which were already individually packaged when they arrived at DDDC" (R4, tab 121 at ¶ 3). Appellant timely appealed that decision on 25 January 2005, which the Board docketed as ASBCA No. 54904.

42. The unit price of CLIN 0002 was increased for the base period by bilateral Modification No. P00013 on 12 September 2005 to \$26.82 and by bilateral Modification No. P00014 on 28 February 2006 to \$27.52 (app. supp. R4, tab 10 at 2, tab 11 at 2).

43. LABAT's complaint, ¶ 46, alleged that its CLIN 0002 \$5,962,848.34 claim amount (as revised on 21 October 2004) was based upon workload as of the date that

claim was submitted and necessarily would increase over time as additional transshipments were processed.

44. LABAT's CLIN 0002 invoices for March 2003 through February 2006 (*i.e.*, the 36-month base period) sought payment of the cumulative total of 606,384 items, of which respondent paid for 177,367 and refused to certify for payment under CLIN 0002 the balance of 429,017 items (R4, tabs 99, 123, 138, 144-47, 150 at 2). Respondent calculates that the claim is now approximately \$11.3 million (gov't br. at 1, 43).

DECISION ON ASBCA No. 54904

The major issue presented is whether contract 7005 required respondent to pay for minimum military packing (MMP) protection of off-base transshipments in Building 66 under CLIN 0001 or CLIN 0002. If the contract required such payment under CLIN 0002, another issue is whether the contract required respondent to pay for "each" off-base transshipment packed in a single shipping container (app. br. at 53, gov't br. at 86).

Appellant argues that its interpretation of contract terms to require payment of the disputed PPP&M services at the CLIN 0002 rate was contemporaneous, is reasonable, harmonizes contract §§ C-5.4.1.3 and C-5.5.1, and renders no terms meaningless or void (app. br. at 54-60, 64-67, 71-74); under the contract's Order of Precedence clause, § B trumps § C, the PWS, to the extent of any inconsistency between such sections (*id.* at 56 n.2); its pre-award proposals notified respondent of such interpretation (*id.* at 60-64); respondent's interpretation of § C-5.4.1.3 is unreasonable and renders terms in § C-5.5.1 meaningless or void (*id.* at 67, 70); the contract's plain language supports LABAT's interpretation of the term "each" as each "item" or each "unit of issue" (*id.* at 74), but does not support respondent's interpretation of the term "each" as "container" or "PPP&M action" (*id.* at 77-78); the parties' course of dealing shows that PPP&M services were paid on a per item basis (*id.* at 79-80); and if these contract terms are deemed ambiguous, such ambiguity was latent and requires application of the *contra proferentem* rule against respondent (*id.* at 84-92).

Respondent contends that its interpretation of §§ C-5.4.1.3 and C-5.5.1 is reasonable (gov't br. at 65-71) and is supported by the contract's workload tables (*id.* at 71-73, 77-78); its pre-contract use of Building 66 does not support appellant's interpretation (*id.* at 74-77); appellant's interpretation leads to absurd pricing patterns and results (*id.* at 78-82); appellant did not give the CO notice of its interpretation of the disputed terms until submission of the first invoice (*id.* at 82-83), any ambiguity in such terms is patent, and appellant did not show that it relied on its interpretation before award (*id.* at 84-86); and respondent's interpretation of "each" as a "final container" or "PPP&M action" is the only reasonable interpretation and appellant's interpretation of

“each” is unreasonable, leads to absurd results and is inconsistent with its proposals (*id.* at 86-99).

We address first the major issue of contract interpretation: whether respondent was required to pay for minimum military packing protection of off-base transshipments in Building 66 under CLIN 0001 or CLIN 0002.

As stated in *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993):

A contract term is unambiguous if there is only one reasonable interpretation. Although a disagreement as to the meaning of a contract term does not of itself render the term ambiguous [citation omitted], if more than one meaning is reasonably consistent with the contract language it can not be deemed unambiguous. *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986); *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992).

In determining whether a contract term is unambiguous or ambiguous, one must interpret the contract as a whole, give reasonable meaning to all of its parts and avoid conflict or an interpretation that renders any of its provisions meaningless or surplusage. *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

“The existence of a patent ambiguity in itself raises the duty of inquiry, regardless of the reasonableness vel non of the contractor’s interpretation. . . . The Court may not consider the reasonableness of the contractor’s interpretation, if at all, until it has determined that a patent ambiguity did not exist.” *Newsom v. United States*, 676 F.2d 647, 650 (Ct. Cl. 1982); *see also Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985) (existence of a patent ambiguity raises a duty to inquire, regardless of the reasonableness of the contractor’s interpretations); *Beacon Construction Co. of Massachusetts v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963) (if patent ambiguity exists, the rules of government contracting place the obligation of inquiry upon the contractor).

When LABAT submitted its first proposal on the RFP in November 2000, § C-5.5.1, which specified “Level A, Level B and Minimum Military” packing protection, was inconsistent with § C-5.4.1.3, which stated that § C-5.5.1 addressed “[r]equirements above minimum military” (findings 9(c), (d)). LABAT raised no question about the interpretation of those PWS provisions (finding 10).

When LABAT submitted its August 2001 and January 2002 revised proposals, § B omitted the specification of § C-5.5.1 for CLIN 0003, thus avoiding the foregoing inconsistency, although a potential inconsistency still lurked in T.E. 1.2's projected workloads for § C-5.5.1 PPP&M (findings 12-15).

When LABAT submitted its final proposal in June-July 2002, RFP amendment 19 in May 2002 had re-defined CLIN 0001 to specify PWS §§ C-1 through C-6 “unless noted below” in another CLIN, re-introduced § C-5.5.1 to specify CLIN 0002, and revised § C-5.4.1.3 to provide that § C-5.5.1 “addresses packing requirements for repairable items with G & F condition codes needing minimum military packing, and all items needing above minimum military packing” (findings 18, 22). Thus, the conflict between §§ C-5.5.1 and C-5.4.1.3 had resurfaced, but LABAT did not question the CO about those PWS provisions (finding 22) or advise her of any ambiguity. Therefore, insofar as the conflict in the contract's PWS §§ C-5.4.1.3 and C-5.5.1 was patent, appellant cannot prevail since the record has no evidence that it called such ambiguity to the CO's attention before contract award. *See Beacon Construction*, 314 F.2d at 504.

Assuming, *arguendo*, that the conflicting provisions in contract 7005 were not a patent ambiguity, but rather a latent ambiguity, then one must determine whether appellant's interpretation of those provisions was within the zone of reasonableness. *See Newsom v. United States*, 676 F.2d at 650; *Mountain Home Contractors v. United States*, 425 F.2d 1260, 1263 (Ct. Cl. 1970).

Appellant interprets contract 7005 as follows: Contract § B stated that CLIN 0001 encompassed “C-1 thru C-6 unless noted below” and § B, CLIN 0002, “noted below” § C-5.5.1; § C-5.5.1 required the PA to “accomplish PPP&M . . . on a variety of materiel received, stored and/or shipped at DDDC” including “off-base transshipments”; § C-5.5.1's “applicable levels of protection are Level A, Level B and [MMP] (formerly known as Level C)”; and so MMP of off-base transshipments is PPP&M under CLIN 0002. Appellant interprets § C-5.4.1.3 to prescribe packing requirements for issue of mission stock, not “transshipments,” which § 5.4.1.3 does not explicitly mention. Section C-5.4.1.6 *describes* off-base transshipments as materiel “which require[s] further packaging and/or labeling,” but only *requires* LABAT to ship off-base transshipments. Thus, appellant seeks to harmonize these PWS provisions by limiting C-5.4.1.3 to packing only of CLIN 0001 mission stock, by interpreting C-5.4.1.6 to require only CLIN 0001 shipping of off-base transshipments, and by interpreting C-5.5.1 to require CLIN 0002 PPP&M of transshipments, *inter alia*, at MMP. (App. br. at 67-71)

Appellant's attempt to harmonize §§ C-5.4.1.3 and C-5.5.1 is unsound because it adds the term “mission stock” to limit the scope of § C-5.4.1.3's requirement to pack items, although that provision does not contain the term “mission stock,” and § C-5.4.1.3 is a subsection of § C-5.4.1, which clearly required appellant to select and to issue stock

stored at distribution depots, *i.e.*, mission stock, and to issue “off-base transshipments” (finding 26). Its argument that by the Order of Precedence clause, § B trumps § C is of no assistance because there is no inconsistency between § B, which defines which § C provisions are applicable to each CLIN, and the § C provisions themselves. Section B does not address or resolve the conflict between the two § C provisions. Thus, appellant does not resolve the conflict between § C-5.4.1.3, which limits § C-5.5.1, PPP&M, to protection levels above MMC, and § C-5.5.1, which specifies protection levels A, B or MMC for all PPP&M, including transshipments. Appellant’s interpretation, therefore, is not within the zone of reasonableness.

A contractor whose interpretation of ambiguous contract terms is not within the zone of reasonableness cannot invoke the rule *contra proferentem* against the drafter of the contract provisions, here the government. *See T. F. Powers Construction Co.*, ASBCA Nos. 38031 *et al.*, 90-1 BCA ¶ 22,483 at 112,844-45, *aff’d*, 918 F.2d 187 (Fed. Cir. 1990) (Table) (contractor failed to establish that its interpretation of ambiguous provisions was reasonable, so appeal denied).

Moreover, even if one were to regard appellant’s interpretation of the disputed contract terms as within the zone of reasonableness, the preponderance of evidence does not show that appellant relied on such interpretation before contract award. To show such reliance, appellant’s offers and pre-award correspondence under the RFP logically would include all labor and material costs of preservation, packing, packaging and marking (*i.e.*, PPP&M) of off-base transshipments under CLIN 0002 (and CLIN 0003 in interim stages of the RFP). But its offers and correspondence on the RFP invariably included in its proposed CLIN 0001 price, labor or material costs or both for off-base transshipments (findings 10, 14, 16, 22(a)). Therefore, appellant cannot invoke the rule of *contra proferentem*. *See Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986) (in preparing its bid, contractor did not rely on its interpretation of ambiguous terms; well established rules of contract law preclude its right to recover); *T. F. Powers, supra*.

Accordingly, we deny the appeal in ASBCA No. 54904 and do not reach the issue of how to interpret “each.”

FURTHER FINDINGS OF FACT, ASBCA No. 54905

45. Contract 7005, § B, specified a firm fixed price of \$73,366 for CLIN 0011 and stated (R4, tab 1 at 5):

INVENTORY ACCURACY IMPROVEMENT PLAN (IAIP): Paragraph C-1.3.2

Improvement to APL(s) to be completed within 12 months of the beginning of full performance.

46. Contract 7005 incorporated by reference the FAR 52.232-1 PAYMENTS (APR 1984) clause, which provided only for payments “for services rendered and accepted,” not for monthly payments for services under any CLIN (R4, tab 1 at 335), as appellant internally acknowledged in April 2003 (R4, tab 159).

47. Contract 7005, § C-2.1, defined an “Acceptable Performance Level (APL)” as: “The minimum performance of each requirement before the Government considers performance unsatisfactory” (R4, tab 1 at 24).

48. Contract 7005, § C-5.1, provided in pertinent part (R4, tab 1 at 55):

5.1 . . . The PA shall meet the APL requirements as specified in this section upon completion of the transition period.

. . . .

5.1.2 PROPERTY ACCOUNTABILITY FOR MISSION STOCK

Except as noted in Section C-5.1.4 [Transition Inventories], the PA shall maintain inventory record accuracy for stock warehoused at DDDC IAW Section 5.3.3, Standards.

49. Contract 7005, § C-5.1.4, required respondent to perform transition inventories of three types of mission stock 30 to 60 days before the end of the transition period (R4, tab 1 at 56).

50. Contract 7005, § C-5.3.3, required APLs for inventory accuracy quality with respect to designated categories of 99% or 95%, and for inventory accuracy timeliness with respect to designated activities of 95% or 100% (R4, tab 1 at 73-75).

51. Contract 7005, § C-1.3.2 stated (R4, tab 1 at 13-14):

1.3.2 INVENTORY ACCURACY IMPROVEMENT PLAN

The PA shall utilize the information on inventory population and accuracy rates provided in Technical Exhibit 1.1 in order to determine if the PA will need to bring any or all of the

inventory accuracy rates up to the APLs specified in paragraph C-5.3.3. If so, the PA shall develop and submit an Inventory Accuracy Improvement Plan (IAIP) At a minimum, this IAIP shall address the actions, resources and schedule for improving the deficient inventory accurate rate(s) to the APL(s) within twelve months of the beginning of full PA performance. If the Overall Inventory Accuracy Rate, during transition differs by more than 5% from the most recent rates included in Technical Exhibit 1.1, the Plan shall be revised and renegotiated as appropriate.

52. Contract 7005, § C-1.5, required the contractor, at the end of the 120-day transition under CLIN 0010, to maintain a workforce –

until the PA has met the required APLs for two consecutive months. (NOTE: This does not relieve the PA from its responsibility to meet the required APLs when it takes over performance.)

. . . .

It is critical that the PA stand up an organization at the end of transition that is able and prepared to perform the contract requirements at the required APLs.

. . . .

If . . . the current performance is not meeting the required APLs, the PA and [CO] may negotiate a temporary deviation to the affected APLs.

Section C-1.5 required respondent to report the total receipts and total issues in process on the last day of the transition period. (R4, tab 1 at 14-17) Contract 7005 did not include or incorporate by reference any liquidated damages clause.

53. LABAT’s IAIP, revised on 5 June 2002 and incorporated in contract 7005, stated that “LABAT will accomplish the actions cited above [including improving inventory accuracy to acceptable APLs] within the prescribed time frame of twelve months and will meet the APLs for inventory accuracy” (R4, tab 1 at 563, 565).

54. On 28 February 2003, at the conclusion of the transition period the APLs for respondent’s DDDC transition inventories, categories A and D, did not meet their

required 99% and 95% APLs (R4, tab 62 at 1-2), and the CO issued a delivery order in the amount of \$73,366 for the CLIN 0011 IAIP (R4, tab 38 at 1, 3). LABAT hired and trained two persons in accordance with its IAIP (tr. 1/152).

55. Each of LABAT's 12 monthly invoices for CLIN 0011, submitted beginning on 9 April 2003, was in the amount of \$6,113.83, one-twelfth of the CLIN 0011 price. Beginning 10 April 2003, COR Mednick denied each of those invoices, stating:

INVOICE DENIED. PAYMENT FOR THIS CLIN [0011]
WILL NOT BE MADE UNTIL THE WORK IS
PERFORMED AND COMPLETED IN ACCORDANCE
WITH THE TERMS AND CONDITIONS OF THE
CONTRACT.

(R4, tab 142) We find that such statement was consistent with the contract's FAR 52.232-1 PAYMENTS (APR 1984) clause (finding 46).

56. CO Cairo-Iocco's 14 April 2004 letter to LABAT stated that the government's February 2004 inventory sampling results showed 96.75% for Category A and a required APL of 99%, and 92.74% for Category B and 93.26% for Category D and required APLs of 95% for both categories, and further stated:

As shown above, Labat-Anderson, Inc. has failed to meet the APL in three of the four categories in accordance with [contract 7005]. The next sample inventory of this nature will be conducted during August 2004. The Government expects the results of the next inventory will be in compliance with the APLs listed above. To address this significant deficiency, you are hereby requested to submit a detailed plan of action (POAM) identifying the specific steps being taken to improve your inventory accuracy. . . . This POAM needs to stand alone as an individual project

. . . .

Implementation of this plan should enable you to achieve the APLs in Inventory Accuracy outlined in [contract 7005], which to date have not been met.

(R4, tab 104)

57. LABAT submitted a POAM on 28 May 2004 (app. supp. R4, tab 47) and continued its efforts to attain the APLs (tr. 1/155).

58. CO Cairo-Iocco's 3 November 2004 letter to LABAT stated that the government's August 2004 inventory accuracy sampling results showed that LABAT again failed in Categories A, B and D and it expected the results of its next inventory during February 2005 to show compliance with the required APLs (R4, tab 114).

59. LABAT submitted another plan of action on 17 December 2004 (app. supp. R4, tab 48) and devoted additional resources to attain the APLs (tr. 1/156-57).

60. CO Cairo-Iocco stated that her 14 April and 3 November 2004 letters did not mention LABAT's IAIP or waive the 12-month period required by CLIN 0011, and if she had intended to extend the 12-month period for CLIN 0011, she would have done so by contract modification (tr. 3/257-58).

61. CO Cairo-Iocco's 13 December 2004 final decision denied LABAT's 26 August 2004 claim for \$73,366 for implementation of the CLIN 0011 IAIP (finding 43) because it failed to meet the CLIN 0011 condition to improve inventory accuracy to the specified APLs within 12 months of beginning full performance (R4, tab 121 at ¶ 4). Appellant timely appealed that decision on 25 January 2005, which was docketed as ASBCA No. 54905.

62. Respondent's February 2005 inventory sampling showed that LABAT exceeded the required APLs for all categories (R4, tab 170 at 2). Respondent did not pay LABAT for such attainment of the required APLs (tr. 1/157).

DECISION ON ASBCA No. 54905

Appellant indisputably did not meet the required APLs for inventory accuracy within 12 months after 28 February 2003, when the CO issued the delivery order for CLIN 0011, *i.e.*, by 28 February 2004 (findings 45, 56). Appellant argues that it should be paid the CLIN 0011 price for implementing its IAIP, nonetheless, since it eventually attained the prescribed inventory accuracy APLs (finding 62), on the theory that CO Cairo-Iocco waived the 12-month period prescribed by contract § B, CLIN 0011, and § C-1.3.2, and, in effect extended it to 24 months. Respondent disputes that theory, arguing that the CO's letters to LABAT did not expressly waive or extend the 12-month period to perform CLIN 0011 (findings 56, 58, 60).

CLIN 0011 was a fixed price item whose performance was to be completed within 12 months of beginning of "full performance," *i.e.*, by 28 February 2004. When a contractor fails to perform a fixed price contract by the specified date, the government

generally has the alternatives to permit continued performance subject to payment of liquidated damages, to terminate the portion of the contract for default, or to extend the completion date for such work. *See* FAR 49.402-1, 49.402-4, 49.402-7. Contract 7005 did not specify any liquidated damages (finding 52). The CO did not terminate CLIN 0011 or any other part of contract 7005. Her April and November 2004 letters urged LABAT to attempt to meet the inventory accuracy APL requirements (findings 56, 58).

Thus, the CO impliedly encouraged LABAT to continue performing CLIN 0011 services, albeit without expressly designating such services as CLIN 0011 services. We hold that the CO extended the completion date for such work, even beyond the date of her final decision denying LABAT's CLIN 0011 claim, until LABAT attained the specified inventory accuracy APLs. Having performed CLIN 0011, appellant is entitled to be paid the fixed price for that work.

We sustain the appeal in ASBCA No. 54905, including CDA interest beginning 10 September 2004 (finding 40).

FURTHER FINDINGS OF FACT, ASBCA No. 54906

63. The Prompt Payment Act (PPA), 31 U.S.C. § 3907(c) in effect in August 2002 provided:

Except as provided in section 3904 of this title [which is inapplicable to this appeal], this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of the payment or compliance with the contract. A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to the Contract Disputes Act of 1978.

64. Contract 7005 incorporated by reference the FAR 52.232-25 PROMPT PAYMENT (FEB 2002) clause (R4, tab 1 at 335), whose ¶ (a)(5) provided:

(5) Computing penalty amount. . . .

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance is deemed to occur constructively on the 7th day . . . after the Contractor delivers the supplies or performs the services in accordance with the terms of the contract, unless

there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. . . .

(ii) The prompt payment regulations at 5 CFR 1315.10(c) do not require the Government to pay interest penalties if payment delays are due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. The Government and the Contractor shall resolve claims involving disputes and any interest that may be payable in accordance with the clause at FAR 52.233-1, Disputes.

65. On 9 April 2003 LABAT submitted invoices for March 2003 services under CLINs 0002 and 0011, and on 10 April 2003 COR Mednick paid in part the CLIN 0002 invoice and declined to pay the CLIN 0011 invoice (findings 35, 38, 55).

66. COR Mednick continued to reduce quantities and payments on LABAT's CLIN 0002 invoices for off-base transshipment packing and packaging to minimum military requirements at Building 66 through February 2006 (R4, tab 123), and to disallow LABAT's CLIN 0011 invoices through February 2004 (R4, tab 142).

67. CO Cairo-Iocco's 13 December 2004 final decision denied LABAT's 26 August 2004 claim for PPA interest of \$135,503.18 on its other claims regarding CLINs 0002 and 0011 (finding 46; R4, tab 121 at ¶ 5). Appellant timely appealed that decision on 25 January 2005, which the Board docketed as ASBCA No. 54906.

DECISION ON ASBCA No. 54906

Within one day after receiving LABAT's initial invoices for CLINs 0002 and 0011 respondent disagreed about its liability to pay for off-base transshipment packing and packaging to minimum military requirements at Building 66 and the monthly part of the CLIN 0011 price before LABAT complied with the prescribed IAIP requirements (finding 65), and continued to disagree on such payments for those CLINs for the remainder of LABAT's monthly billings (finding 66).

The legal precedents interpreting the PPA, 31 U.S.C. § 3907(c), require that a disagreement over the amount of payment invoiced be an objectively discernable dispute raised in good faith at the time the government retained the disputed payments. *See Asbestos Free, Inc.*, ASBCA No. 50805, 98-1 BCA ¶ 29,488 at 146,333 (good faith, objectively discernable dispute about liability to pay bond premium). The fact that a

contractor may ultimately prevail on the merits of an underlying dispute does not defeat an otherwise proper good faith dispute at the time of the withholding. *Information Systems & Networks Corp.*, ASBCA No. 46119, 02-2 BCA ¶ 31,952 at 157,878.

We have upheld the government's position with respect to the CLIN 0002 issue, and denied the appeal in ASBCA No. 55904. Therefore, appellant cannot recover PPA interest on the withholdings from its CLIN 0002 invoices. The dispute about CLIN 0011's requirement to improve inventory accuracy to specified APLs was an objectively discernable dispute raised in good faith: (a) on 10 April 2003 when COR Mednick rejected LABAT's March 2003 CLIN 0011 invoice and at the time he rejected the 11 monthly invoices thereafter, which actions we found were consistent with the contract's FAR 52.232-1 PAYMENTS (APR 1984) clause (finding 55) and (b) on 28 February 2004, when LABAT had not performed the CLIN 0011 services to the specified APL levels within 12 months after beginning full performance (finding 56). Since the dispute about payment of CLIN 0011's price was objectively discernable and raised in good faith, at least until 10 September 2004, when the CO received LABAT's CDA claim (finding 40), PPA interest was not recoverable before that date. Because PPA interest is not recoverable for the period after the submission of LABAT's CDA claim, 31 U.S.C. § 3907(c), FAR 52.232-25(a)(5)(ii), we need not address or decide whether there was an objectively discernable dispute raised in good faith after 10 September 2004.

Accordingly, we deny the appeal in ASBCA No. 54906.

CONCLUSION

We sustain the appeal in ASBCA No. 54905. We deny the appeals in ASBCA Nos. 54904 and 54906.

Dated: 31 December 2007

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

I concur

I concur

MARK N. STEMLER

EUNICE W. THOMAS

Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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 Nos. 54904, 54905 and 54906, Appeals of LABAT-Anderson, Inc., rendered in conformance with the Board's Charter.

Dated:

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