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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of - )  
 )  
CAE USA, Inc. ) ASBCA No. 63248  
 )  
Under Contract No. FA8223-10-C-0013 )

APPEARANCES FOR THE APPELLANT: Alexander B. Ginsberg, Esq.  
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OPINION BY ADMINISTRATIVE JUDGE D’ALESSANDRIS  
ON APPELLANT’S MOTION FOR SUMMARY JUDGMENT

In 2010, respondent, the Department of the Air Force (government or Air Force) awarded a firm-fixed-price contract for air-crew training to appellant CAE USA, Inc. (CAE). The contract contemplated that the training materials would require continuous updates, and provided for updates by engineering change proposal (ECP) or contract change proposal (CCP), with changes by either method leading to contract modifications. The contract also provided for changes by quality assurance change proposal (QACP); however, the contract contemplated that changes by QACPs would be smaller changes within the scope of the firm-fixed-price contract line items. The contract provided that CAE would only be entitled to additional compensation for changes performed pursuant to QACPs with a corresponding ECP or CCP. CAE moves for summary judgment on entitlement regarding changes to the training materials pursuant to ECPs and CCPs (Count I) and changes pursuant to QACPs (Count II). We find that there are material factual disputes, and deny CAE’s motion.

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STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

On or about November 6, 2009, the Air Force issued Request for Proposal No. FA8223-10-R-50094 (app. supp. R4, tab 282 at 1). The solicitation contemplated the award of a firm-fixed-price contract with a one-year base period, seven one-year options, and two additional contingency one-year options to provide support services at several Air Force bases in connection with the Air Force's ongoing use of the Boeing KC-135 Stratotanker refueling aircraft (*id.* at 190). The services included operations and maintenance, concurrence modifications, Training System Support Center sustainment, instructional courseware development, and student training (R4, tab 4 at 295).

The Performance Work Statement (PWS) listed the various training courses, and syllabi required pursuant to the contract (R4, tab 4 at 355; app. supp. R4, tabs 279 at 94; 283 at 71). Copies of the current syllabi were available to offerors (app. supp. R4, tab 441 at 1).

The PWS provided that “[i]n cooperation with the Government, the Contractor shall monitor, discuss, and incorporate the potential changes into the KC-135 ATS devices and courseware based upon changes to the documents in Table 2 and ATP-56 (Air to Air Refueling (NATO))” (R4, tab 4 at 315).

Relevant to this appeal, PWS paragraph 3.3.4, Contract Changes, provided that:

All ECPs and CCPs, whether submitted at the Government's request or upon the Contractor's request or upon the Contractor's own initiative, shall address all impacts to Cost, Schedule and Performance...

(*Id.* at 331-32). The PWS additionally provided that ECPs and CCPs should be submitted as firm-fixed-price proposals using change order accounting (*id.*).

The Air Force awarded CAE Contract No. FA8223-10-C-0013 on August 31, 2010 (*id.* at 1). The contract required CAE, in relevant part, to “update the KC-135 ATS instructional material and syllabi product baseline annually . . . to accommodate changes in instructions, policies and procedures, organizational, operational interfaces, target population, throughput, and operational resources” (*id.* at 348). The contract's “Scope of Contract Changes” clause provided, in relevant part:

Changes to trainer design and configuration and to academic syllabus and courseware can be expected during the performance of this contract . . . . Changes to training devices or to courseware . . . may be incorporated at the

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Government's discretion in accordance with FAR Clause 52.243-1 (Changes) and as approved by the PCO. . . . The Contracting Officer may at any time, by written or e-mail communication, request the Contractor prepare and submit an Engineering Change Proposal (ECP) or a Contract Change Proposal (CCP). All ECPs and CCPs, whether submitted at the Government's request or upon the Contractor's request or upon the Contractor's own initiative, shall address all impacts to Cost, Schedule and Performance.

(*Id.* at 331). The contract additionally provided that changes could be "initiated by Quality Assurance Change Proposals" (*id.* at 330). The contract explained that "[m]odifications to the product baselines, whether device or instructional material, must be done using an approved Engineering Change Proposal (ECP) for large baseline changes, or using [Training System Configuration Working Group (TSCWG)] initiated QA Change Proposals for smaller baseline changes" (*id.* at 310). QACPs could be initiated by either the government or the contractor (*id.* at 330). The contract provided that "QACPs shall be a normal function of the day-to-day Contractor performance and shall not result in modification to this contract without a properly approved ECP or CCP" (*id.* at 350).

Once the TSCWG approved the syllabi changes, the contract required CAE to implement the changes at the direction of the Air Education and Training Command Courseware (R4, tab 4 at 297). CAE was then to submit approved, updated syllabi to the program office as a deliverable within the Contract Data Requirement List (CDRL) – specifically CDRLs B002 or B003 (*id.* at 348). Each syllabus that CAE delivered to the program office, all of them via CDRL, was accompanied by a cover note signed by the relevant AETC Courseware official – a Major General or Brigadier General – that stated, in part, "[t]his syllabus outlines the training required to achieve the proficiency in the course training standards. It prescribes the course content, instructions to conduct the training, and the approximate time required to successfully complete all requirements" (*see, e.g.*, app. supp. R4, tabs 302 at 5; 303 at 5; 304 at 5; 305 at 5; 319 at 3).

On April 26, 2011, then-Contracting Officer Kraig Neer requested that CAE submit a CCP that would "determine the impact of the FTU syllabus change(s) (pilot instructor and boom instructor) between the baseline (what was awarded) and what is now required. Firm-Fixed Price contract CLINs are contemplated for this effort" (R4,

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tab 223 at 1). The Contracting Officer also asked CAE to suggest an alternative method of estimating the cost impact if CAE felt it would be more accurate:

If you believe a more accurate way to reflect the FTU Syllabi Differential is through proposing new prices to existing ranges, request CAE provide rationale in their proposal explaining as such. In addition to CAE's rationale, request CAE provide all impacts to each CLIN, for each year in Attachment 4 to the basic contract. If this methodology is used and acceptable on the part of the Government, all costs incurred prior to making the contract change shall be accomplished in a separate CLIN.

(*id.*).

On May 24, 2011, CAE submitted its proposal, which analyzed the change in scope to the syllabi between the contract, as-awarded, and FY2011 and FY2012 (R4, tab 224 at 5). To calculate the change in the level of effort required of CAE's instructors dictated by changes to the syllabi, CAE compared the level of effort required by each baseline syllabus – based on required hours of instruction and instructor-to-student ratios – to the new level of effort required of each revised syllabus for the fiscal year in question (*id.* at 5-6). CAE noted that the cost impact included “FY11 and FY12 only” (*id.* at 5) and that “[s]ince the KC-135 syllabi will change several times over the course of the contract, CAE will assess the syllabi annually to determine differences between the baseline (what was bid) and current syllabi” (*id.* at 6). The Air Force accepted and approved CCP-002 and paid CAE for the syllabi differential in question through two successive contract modifications (R4, tabs 5 at 2; 23 at 2).

On November 3, 2016, the Air Force requested that CAE submit an ECP to address the cost impacts of upgrading the KC-135 cockpit from “Block 40” to “Block 45”<sup>1</sup> (R4, tab 232 at 1). In addition to revising existing syllabi consistent with the change to the Block 45 cockpit, the Air Force also requested that CAE develop (and ultimately provide instruction for) several new courses (*id.* at 15-16). In May 2017, CAE submitted ECP-35, which described the efforts required to complete the Block 45 Conversion (R4, tab 233 at 2). CAE informed the Air Force that the “[syllabi] differential will not be fully known until all analyses are completed in the first six

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<sup>1</sup> At the contract's start, the government trained aircrew to operate KC-135 Block 40 aircraft. However, during contract performance, the KC-135 aircraft fleet underwent a cockpit modification/re-configuration called Block 45, which updated Autopilot and Flight Director Systems and included a new digital engine instrument display. These changes necessitated modifications to the training syllabus. (R4, tab 232 at 8).

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months after contract award, but may include an increase in instructor requirements in some courses and decrease in others . . . . Our team expects some changes simply based on known instructor/student ratio changes we identified while creating this proposal” (*id.* at 29). The Air Force implemented ECP-35 through Contract Modification No. P00106 (Mod P106) on July 28, 2017 (R4, tab 123 at 1-2). The modification provided:

1. The purpose of this modification is to incorporate ECP #035 - Altus Formal Training Unit (FTU) Conversion, into the KC-135 Aircrew Training System (ATS) contract. This change is entered into bilaterally pursuant to FAR 52.243-1, Changes Fixed-Price and FAR 43.103(a)(3) – Mutual Agreement of the Parties. The contract is hereby modified to:
2. As a result of paragraph 1 above, the subject contract is specifically modified as follows:

(*id.* at 2). Mod P106 did not include ECP-35 as an attachment and did not explicitly incorporate ECP-35 in its entirety by reference (*id.* at 1-215). The modification added paragraph 3.13.32 to the performance work statement and increased the contract amount by \$9,800,723 (*id.* at 4, 65). The newly added paragraph 3.13.32.1 provided that “[u]nless otherwise noted, the revised course durations shall not exceed current course durations” and that “[s]yllabi reflows will take into account both Block 45 and MAF DMO updates and must be accomplished in unison for all courses” (*id.* at 185). The modification also contained the following release language:

This Supplemental Agreement constitutes a full and equitable adjustment and the Contractor releases the Government from any and all liability under the contract for further claims or equitable adjustments arising out of or in connection with the changes effected hereby.

(*id.* at 59).

On March 13, 2018, CAE submitted CCP-18, which analyzed the changes in scope between the baseline syllabi and the syllabi for FY2016 through FY2018 (R4, tab 234 at 6). CCP-18 did not include an analysis of the cost impact of the syllabi differential from ECP-35 (*id.* at 8). CAE found that the syllabi differential increased CAE’s labor hours in FY2016- FY2018 by 1,609, 1,701, and 2,561 hours, respectively (*id.* at 11). On October 15, 2018, Contracting Officer McCartan sent CAE an email denying CCP-18 (R4, tab 235 at 4). On August 2, 2019, CAE submitted CCP-20 for the syllabi differential for FY2013 through FY2020, including the differential related

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to the Block 45 conversion (app. supp. R4, tab 442 at 2, 6). On November 15, 2019, Mr. McCartan informed CAE that he had rejected the proposal (R4, tab 235 at 6).

CAE submitted a Request for Equitable Adjustment (REA) for the FY2013-FY2019 syllabi differential on December 23, 2019 (R4, tab 191 at 1). On July 2, 2020, the Air Force denied CAE's REA for the FY2013-FY2019 syllabi differential (R4, tab 201 at 1). CAE submitted an REA for the FY2020 syllabi differential on August 5, 2020 (R4, tab 202 at 1). On December 18, 2020, the government denied CAE's REA for the FY2020 syllabi differential (R4, tab 209 at 1). CAE submitted a certified claim on October 6, 2021, with a claim amount of \$2,602,748 for the syllabi differential for 2015-2021 (R4, tab 214 at 1, 3, 5-6). The contracting officer issued a final decision on January 12, 2022, denying CAE's certified claim in its entirety (R4, tab 240 at 2). CAE subsequently appealed to the Board.

DECISION

I. Standard of Review

We will grant summary judgment only if there is “no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citation omitted). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Once the moving party has met its burden of establishing the absence of disputed material facts, then the non-moving party must set forth specific facts, not conclusory statements or bare assertions, to defeat the motion. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). “A genuine issue of material fact arises when the nonmovant presents sufficient evidence upon which a reasonable fact finder, drawing the requisite inferences and applying the applicable evidentiary standard, could decide the issue in favor of the nonmovant.” *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993) (citation omitted).

II. Material Factual Issues Prevent Entry of Summary Judgment

a. Count I

CAE seeks “partial summary judgment determining that CAE is entitled to be compensated for the syllabi differential resulting from ECPs and CCPs – specifically ECP-35 – relating to the Block 45 Conversion” (app. mot. at 3). The record is clear,

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and the parties do not dispute that CAE submitted an ECP regarding the Block 45 conversion and that there was a bilateral contract modification, Mod P106, related to ECP-35 (R4, tab 233). However, the parties disagree as to the significance of these events.

CAE contends that Mod P106 incorporated the entirety of its ECP-35. CAE stated in its ECP that the syllabi differential (the difference in effort between the modified syllabi and the base-line syllabi contained in the solicitation) “will not be fully known until all analyses are completed in the first six months after contract award” (R4, tab 233 at 29). Thus, pursuant to CAE’s interpretation, submission of its CCP-20, containing its calculation of the syllabi differential, demonstrates entitlement (with the accuracy of the calculations to be determined during a quantum phase of proceedings). CAE further contends that the government’s prior modifications granting it a syllabi differential confirm the parties’ mutual interpretation of the contractual language (app. mot. at 26-29).

The government opposes CAE’s motion by pointing to the contract’s performance work statement, which required CAE to submit an ECP or CCP that addressed “all impacts to Cost, Schedule and Performance” (R4, tab 4 at 331). The government further disputes that all of ECP-35 was incorporated into the contract, instead asserting that only the changes contained in Mod P106 were incorporated into the contract. In short, the government asserts that CAE was compensated for the changes in Mod P106 and that anything not contained in the bilateral contract modification was not incorporated into the contract (gov’t resp. at 21-24). The government additionally notes that the contract provided that CAE was to use “Change Order Accounting,” pursuant to which “[s]pecific charge accounts must be set up early enough in the planning process, and as soon as new work is identified to avoid using estimates or accumulating costs which cannot be certified as actuals” (R4, tab 4 at 331). As noted above, CAE did not include all impacts in the ECP, instead noting that the costs would be estimated within the first six months after the award. Additionally, CAE did not use change order accounting but instead calculated a syllabi differential. Thus, according to the government, CAE cannot prove that it incurred increased costs as required by the changes clause (gov’t resp. at 23-25).

CAE asserts entitlement pursuant to the contract terms and the changes clause, FAR 52.243-1. Thus, CAE must demonstrate that it performed work beyond the contract’s requirements, without a formal order, due to an express or implied order from an authorized government official, or due to government fault. *See, e.g., Brantley Constr. Servs., LLC*, ASBCA No. 61118, 21-1 BCA ¶ 37,794 at 183,490. However, CAE does not identify an express or implied order from an authorized government official. CAE notes that the government requested an ECP for the Block 45 change. That ECP culminated in bilateral Mod P106. CAE’s ECP stated that it would calculate a “syllabus differential” at a later date. CAE argues that Mod P106

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“incorporated ECP-35 – along with CAE’s assumptions and reservations – by reference” (app. reply at 13). However, CAE cites no language in the modification to support that statement. “To incorporate material by reference, ‘the incorporating contract must use language that is express and clear, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract.’” *CSI Aviation, Inc. v. Homeland Sec.*, 31 F.4th 1349, 1355 (Fed. Cir. 2022) (quoting *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1347 (Fed. Cir. 2008)). Thus, we find that CAE’s ECP-35 was not incorporated into Mod P106.

Mod P106 states that the purpose of the modification “is to incorporate ECP #035 – Altus Formal Training Unit (FTU) Conversion, into the KC-135 Aircrew Training System (ATS) contract” (R4, tab 123 at 2). That sentence, read in isolation, could support CAE’s argument, although, to be clear, that sentence states the purpose, but does not actually incorporate ECP-35. Rather, paragraph 1 provides that “[t]he contract is hereby modified to:” and paragraph 2 provides that “[a]s a result of paragraph 1 above, the subject contract is specifically modified as follows:” (*id.*). Read together, the first paragraph’s reference to “incorporate[ing] ECP #035” does not signify that the entirety of ECP #35 has been incorporated by reference, but rather, that the modification is implementing specific enumerated changes that originated in ECP #35. The language in paragraph 2 that “the subject contract is specifically modified as follows,” makes clear that only the changes enumerated in the modification are incorporated into the contract. Mod P106 did not include CAE’s proposal to calculate a syllabi differential at a later date.

The modification amended the performance work statement of the contract to add Section 3.13.32, providing the additional scope of the Block 45 training, including updating the syllabi and increasing the contract price by \$9.8 million. CAE’s “syllabi differential” claim also includes compensation for the Block 45 training in its CCP-20 that was the basis for its REA. Thus, there is a material factual issue regarding whether CAE’s claim seeks reimbursement of costs Mod P106 already compensated. Accordingly, we deny CAE’s motion for summary judgment regarding Count I of its complaint. Similarly, the disputed factual issues prevent the entry of summary judgment based upon CAE’s argument regarding the prior course of dealings. As the government has not cross-moved for summary judgment, we need not reach the government’s defense of accord and satisfaction.

b. Count II

CAE’s motion concerning Count II of its complaint asserts that it is entitled to compensation for work performed pursuant to changes made by Quality Assurance Change Proposals (QACPs). CAE again asserts entitlement pursuant to the changes

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clause. According to CAE, it modified the training syllabi pursuant to QACPs signed by general officers, and thus it is entitled to compensation (app. mot. at 25).

The government opposes CAE's argument by noting that the contract provides that the contractor is only required to perform out-of-scope work when authorized by a contracting officer pursuant to an ECP or CCP (R4, tab 4 at 331-32). Additionally, the contract provides that "QACPs shall be a normal function of the day-to-day Contractor performance and shall not result in modification to this contract without a properly approved ECP or CCP" (R4, tab 4 at 350).

To the extent CAE performed work beyond the scope of the contract pursuant to a QACP, the government notes that the general officers approving the QACPs did not possess contracting authority and therefore were not able to modify the contract or authorize additional work for which CAE would be entitled to compensation (gov't resp. at 26-28). CAE asserts that the ATEC Courseware "had contractual authority to direct CAE to implement changes to the instructional material" (app. resp. gov't finding of fact ¶ 110). However, the authority to direct CAE to modify training materials within the scope of a Firm-Fixed-Price contractual provision is a different question from authority to contract. *See, e.g., City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). As CAE has not demonstrated that a government employee with contractual authority directed it to perform additional work, we deny CAE's motion for summary judgment with regard to Count II of its complaint.

CONCLUSION

For the above reasons, we deny CAE's motion for partial summary judgment. The parties are directed to file a joint status report with a proposed schedule for further proceedings within 30 days of the date of the opinion.

Dated: July 5, 2023



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DAVID D'ALESSANDRIS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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I concur



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RICHARD SHACKLEFORD  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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J. REID PROUTY  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 63248, Appeal of CAE USA, Inc., rendered in conformance with the Board's Charter.

Dated:

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PAULLA K. GATES-LEWIS  
Recorder, Armed Services  
Board of Contract Appeals