ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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Science and Management Resources, Inc.	)	ASBCA No. 60412
	)	
Under Contract No. FA8101-08-D-0008	)	

APPEARANCE FOR THE APPELLANT: William J. Spriggs, Esq.
Spriggs Consulting Services
Lynchburg, VA

APPEARANCES FOR THE GOVERNMENT: Jeffrey P. Hildebrant, Esq.
Air Force Deputy Chief Trial Attorney
Kyle E. Gilbertson, Esq.
Christopher S. Cole, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS

Appellant, Science and Management Resources, Inc. (SMR) was awarded a contract to perform Precision Measurement Equipment Laboratory (PMEL) services at Tinker Air Force Base (AFB) in Oklahoma City, Oklahoma. Pursuant to the contract, SMR was required to obtain and maintain Air Force Metrology and Calibration (AFMETCAL) certification. In January 2012, SMR failed an AFMETCAL assessment, requiring it to prepare a Corrective Action Plan (CAP). SMR contends that the United States Department of the Air Force (Air Force or government) changed the requirements of the contract through the CAP by requiring SMR to add staff and by imposing new turn-around time requirements for equipment inspections. In response, the government presented credible direct testimony that it was SMR, and not the government, that inserted the complained of language in the CAP regarding SMR's plans to add staff, and that the CAP did not modify the contract. In addition, although a contract modification to impose turn-around requirements was discussed by the parties, evidence demonstrated that the contract was not modified, and SMR was not held to the proposed standards. As we find that SMR failed to establish that the government imposed new contractual requirements, we deny the appeal.

FINDINGS OF FACT

SMR's Contract

On July 16, 2007, the Air Force issued Solicitation No. FA8101-07-R-0016 for PMEL services at Tinker AFB (R4, tab 1 at 1, 82). A PMEL facility is "authorized to have Air Force reference standards and is responsible for calibration, certification, and

repair" of Precision Measurement Equipment (R4, tab 72 at 48; tr. 2/9). Precision Measurement Equipment is "the equipment that is used to perform adjustment, alignment, calibration, repair, and maintenance of weapon system equipment" (tr. 2/8-9). Precision measurement equipment is tested and calibrated in order to "ensure the accuracy, reliability, and performance of Air Force weapons systems" (tr. 2/9).

On December 12, 2007, SMR submitted its Final Proposal Revision (FPR) which provided that, for the best estimated quantity of items, "if any area needs additional manpower at any time SMR will provide at no cost to the Government" (supp. R4, tab 127 at 1; tr. 1/42-43). The technical volume of SMR's FPR confirmed the company's understanding that it was required to obtain and maintain AFMETCAL certification (app. supp. R4, tab 112A at 6; supp. R4, tab 192 at 5).

On January 3, 2008, the Air Force awarded Contract No. FA8101-08-D-0008 (the contract) to SMR for PMEL services at Tinker AFB (R4, tab 1 at 1; tr. 1/167-68, 2/8). The contract had an estimated value of $12,087,702.84, inclusive of a base year and four option years (R4, tab 1 at 3; tr. 1/28). Option year four of the contract concluded on September 30, 2012 (R4, tab 1 at 59). Subsequently, the contract was extended from October 1, 2012 through March 31, 2013, pursuant to FAR 52.217-8 at the same terms and conditions as option year 4 (R4, tab 28 at 1). The contract was subsequently extended by bilateral modification from April 1, 2013 through September 30, 2013 (R4, tab 59 at 13).

The contract was primarily firm-fixed-price, compensating SMR on a per-unit basis for each item calibrated or tested (R4, tab 1 at 3-51; tr. 1/85, 168-69). The contract's schedule of supplies and services required SMR to "provide all personnel, equipment, tools, materials, supervision and other items and services necessary to manage, test, calibrate, repair, modify, certify and perform" PMEL services, as defined by the contract's Performance Work Statement (PWS) (R4, tab 1 at 3). During the course of SMR's contract, when SMR required additional personnel to perform PMEL services, it provided those personnel at no additional charge to the government (tr. 1/107-08).

SMR's contract incorporated by full text Federal Acquisition Regulation (FAR) clause 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (FEB 2007). Section (c) of that clause, states that "[c]hanges in the terms and conditions of this contract may be made only by written agreement of the parties" (R4, tab 1 at 61). In addition, the contract contained a clause incorporating SMR's technical proposal (*id.* at 69). Subsection d of 5352.215-9005, INCORPORATION OF CONTRACTOR'S TECHNICAL PROPOSAL (AUG 1998), provides "[i]f it is necessary to change the performance, design, configuration, or other items specified in the technical proposal in order to comply with the requirements of the contract clauses, special contract requirements, or statement of work, the contract shall be modified appropriately" (*id.*).

PWS section 1.3, PMEL AFMETCAL Certification, required SMR to "obtain and maintain PMEL certification in accordance with paragraphs 7.3 and 7.4 of [technical order (TO)] 00-20-14," adding that the contractor "shall maintain PMEL certification during the term of the contract" (R4, tab 72 at 8). The PMEL AFMETCAL certification requirement under PWS section 1.3 was monitored through performance objective #1, AFMETCAL laboratory certification, in the PWS's services summary chart (*id.* at 34). SMR was held to a "100% of the time" performance threshold (*id.*).

TO 00-20-14 contains the methods and procedures for the management of the AFMETCAL program (R4, tab 76 at 7; tr. 2/11). TO 00-20-14, paragraphs 2.2.2, "Resources Used by AFMETCAL Program" and 2.6 "Personnel" both reference the need for SMR to provide "sufficient personnel" having the "necessary education, training, technical knowledge and experience for their assigned functions" (R4, tab 76 at 17, 20). Section 7 of TO 00-20-14 describes the PMEL Assessment and Certification Program (*id.* at 75; tr. 2/14). Section 7.3 of TO 00-20-14 describes the AFMETCAL certification process and certification criteria (R4, tab 76 at 75-77). When a PMEL does not meet the listed certification criteria, AFMETCAL is permitted to take actions including "[w]ithhold[ing] the PMEL certification until the problems identified during the assessment are corrected" (*id.* at 78; tr. 1/99). In "most cases" where a certification is withheld, AFMETCAL's final evaluation report will require a CAP:

> A CAP shall be requested when identified problems require a formal response from the PMEL or base leadership. When requested, the CAP shall be coordinated through the [Headquarters Major Command Function Managers] and provided to AFMETCAL within 60 calendar days of the final report date. The CAP shall contain as a minimum: the documented problem(s), detailed corrective actions, and a time schedule for resolution of the problem(s).

(R4, tab 76 at 78) Mr. Zimmerman, the government's flight chief testified that a CAP is not a directive, but rather, "a guideline or a roadmap to achieve resolution of whatever problem was identified by AFMETCAL" and that "historically, they rarely follow...the exact guideline. It's just a guide.... It's a plan." (Tr. 2/17-18)

The PMEL Fails its AFMETCAL Assessment and Submits a CAP

From January 11 to 25, 2012, an assessment team from AFMETCAL's Laboratory Certification Branch assessed SMR's PMEL (R4, tab 77 at 1). On the morning of January 25, 2012, an AFMETCAL "outbrief" was held (supp. R4, tab 128 at 2; tr. 2/20). As noted in the outbrief's PowerPoint slides, the PMEL received a fail rating under Measurement Capability Assessment (MCA) and Quality

Program (QP), with a recommendation that the AFMETCAL certification be withheld (supp. R4, tab 128 at 16-17). As Mr. Zimmerman explained at the hearing, this PMEL had been under contract since "October 1979, some 33 years, continuously, and this was the first failure that ever occurred" (tr. 2/21). The assessment team identified an additional problem under the quality program in that "[d]ocumentation of root cause analysis [sic] (RCA)[1] were not accomplished in a timely manner. It took an average of one month for RCAs to close and two months for recalls to be generated." (Supp. R4, tab 128 at 11)

On the afternoon of January 25, 2012, a second meeting was held to discuss the failed AFMETCAL assessment (tr. 1/146-47). Contract specialist Geoffrey Craigwell, Mr. Zimmerman, and contracting officer Maisie Raju each testified that SMR's corporate program manager, and later vice president, Donald Robertson stated at the meeting that SMR would fix any problems at no additional cost to the government (tr. 1/147, 172, 2/24). Mr. Robertson was the only SMR witness who attended that meeting (supp. R4, tab 191 at 10; tr. 1/154). On January 31, 2012, shortly after the meeting, Mr. Robertson emailed SMR's site manager, Mark Murray, stating that he had been asked by SMR's president, Larry McKee "to give him a written report of what happen[ed] during the in/out briefs. There at the end things started running together for me (I should have taken better notes)." (R4, tab 130; tr. 2/82-83)

According to Mr. Robertson's written report of the January 25, 2012 afternoon meeting, he recalled that Mr. Zimmerman stated that "he felt the contract was under manned" (R4, tab 78; tr. 1/101). At the hearing, Mr. Robertson clarified that Mr. Zimmerman was only offering his opinion, and not directing SMR to hire additional people (tr. 1/101). Mr. Robertson also recalled in his written report that Colonel (Col) George, Commander of the 76th Maintenance Wing "asked me if I felt we were under manned. I told him that we had two additional people on the contract over what was bid and we were working overtime at no cost to the government." (R4, tab 78) Mr. Robertson testified that, at the time of the 2012 AFMETCAL assessment, SMR already had two additional employees over what was in SMR's final proposal (tr. 1/102). SMR had not sought payment or a modification for those two additional personnel, nor had it argued its contract had been modified or changed when it added these two employees (tr. 1/102). Moreover, Mr. Robertson and Mr. McKee both admitted that SMR needed to hire additional people, at least on a temporary basis, and that the temporary hires would be at SMR's expense (tr. 1/43, 107, 137).

SMR's final technical proposal included a manning chart that showed SMR's "proposed manning for the base period and four (4) option years for all areas of the contract" (app. supp. R4, tab 112C at 133-34). Mr. Robertson testified that this

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[1] "AFMETCAL requires that every non-conformity that's identified must be analyzed to find the true root cause so that corrective measures can be implemented to prevent recurrence" (tr. 2/31; R4, tab 76 at 92).

manning chart listed 3 full-time quality personnel, 18 full-time technicians, and 1 part-time technician (tr. 1/89). SMR's staffing report from February 1, 2012 includes 22 technicians (supp. R4, tab 177 at 21; tr. 1/90). Thus, around the time of the failed AFMETCAL assessment, SMR employed 3 technicians more than it had proposed (app. supp. R4, tab 112C at 134; supp. R4, tab 177 at 21; tr. 1/89-90).

Mr. Robertson also reported that in the January 25, 2012 afternoon meeting he informed Col George that "[w]e are also looking for a couple more Techs. He seemed okay with that." (R4, tab 78 at 1) According to Mr. Robertson, SMR had decided to look for additional technicians in late January 2012 (tr. 1/102-03). Witness testimony conflicted regarding SMR's assertion that Col George asked at the afternoon meeting what the cost would be for adding additional people, and that Mr. Robertson responded that SMR would not be able to quote a price until it knew the details of the increase (tr. 1/34, 63; app. supp. R4, tab A-3). Mr. Craigwell testified that this exchange "did not happen" (tr. 1/154). We credit the testimony of Mr. Craigwell. SMR's witness testimony was by Mr. McKee, who did not attend the meeting in question, and according to the email in the record, the statement purportedly was made by Mr. Robertson. However, Mr. Robertson did not testify to this point, and the statement is not contained in his summary of the meeting (R4, tab 78).

On February 13, 2012, AFMETCAL released its final assessment report concerning its January 2012 PMEL assessment (R4, tab 62 at 1; tr. 2/24). The report's cover letter stated that the "Laboratory certification was withheld because of deficiencies in the Type IIA Laboratory Measurement Capability Assessment and Quality Program" (R4, tab 62 at 1). The cover letter provided that "[t]o achieve certification, the laboratory must submit a Corrective Action Plan (CAP) within 60 days of this report to AFMETCAL" (*id.*). In the final assessment report, the laboratory was formally assessed a "Fail" rating under measurement capability assessment and quality program (*id.* at 4). AFMETCAL identified four problems in its report: a problem with laboratory product quality; a failure to initiate effective corrective actions following trend analysis meetings; root cause analyses not completed in a timely manner; and failure to take corrective action to fix deficiencies (*id.* at 4-5).

On January 30, 2012, before AFMETCAL issued its final report, Mr. Murray emailed Mr. Robertson and Mr. McKee a draft CAP, with the file name "2012 Tinker CAP.docx," for comment (R4, tab 80 at 1; tr. 1/51-52, 104). Mr. Zimmerman indicated that he primarily interacted with Mr. Murray, regarding the drafting and submittal of the CAP (tr. 2/25). Under the contract's PWS, SMR's "Contract Manager" was defined as "[a]n individual designated by the contractor to act as single point of contact with the government for all matters pertaining to administration of this contract. Also known as a Site Manager." (R4, tab 72 at 44) Mr. Robertson testified that this "single point of contact" for SMR was Mark Murray (tr. 1/94). Both of SMR's witnesses, Larry McKee and Donald Robertson, conceded at the hearing that they were not substantively

involved in the drafting of the CAP (tr. 1/51, 103). On February 1, 2012, Mr. Murray emailed this same "draft CAP" to Mr. Zimmerman, attached as a file with the file name "2012 Tinker CAP.docx" (supp. R4, tab 132 at 1; tr. 2/26). Mr. Zimmerman testified that he had "no role" in drafting this document (tr. 2/26).

Several hours after receipt of the initial CAP, Mr. Zimmerman responded to Mr. Robertson via email indicating that the draft response was "completely unacceptable" and providing comments on SMR's initial draft (supp. R4, tab 134 at 1; tr. 1/105-06). In addition to his specific comments regarding problems identified in the AFMETCAL assessment report, Mr. Zimmerman commented that "I heard from Mark [Murray] that you are bringing in some extra technicians" (supp. R4, tab 134 at 2). Mr. Zimmerman testified that the email from Mr. Murray was the first time he had heard of SMR's plans to bring in extra technicians, and that he was "concerned about that because AFMETCAL did not identify any problems with technician throughput" (tr. 2/29-30). Mr. Zimmerman concluded his email stating that "it seems to me that you should be sending [quality assurance] help, not production help (my opinion)" (supp. R4, tab 134 at 2). Mr. Zimmerman testified that he added the parenthetical "my opinion" because he "wanted to be sure that [he] wasn't trying to direct them in any way" (tr. 2/30).

As of February 1, 2012, the same day that SMR sent its first draft of the CAP to the government, Mr. Zimmerman had not made any edits to the draft CAP (tr. 1/105-06, 2/28) and SMR was already in the process of bringing in extra technicians (tr. 1/106-07). Mr. Robertson responded to Mr. Zimmerman's email also on February 1, 2012, indicating that SMR would revise its initial draft of the CAP, stating "I will be working on the CAP this evening and tomorrow and I will get with Mark [Murray]...so that we can get it done ASAP" (supp. R4, tab 164 at 3; tr. 1/108-09, 2/31-32). Mr. Robertson also stated in his email response with regard to the PMEL quality assurance inspectors, "I'm talking with Mr. McKee about hiring an additional person for the Quality Section" (supp. R4, tab 164 at 3; tr. 1/109).

Mr. Robertson confirmed that, as the CAP was being drafted, SMR continually discussed hiring additional personnel (tr. 1/111). For example, on February 2, 2012, Mr. Robertson wrote Mr. Murray an email stating "Larry also want[s] to hire 5-7 more people as soon as we can find them" (supp. R4, tab 138 at 2; tr. 1/110). Mr. Murray responded "That sounds great. We could definitely use some help," adding that "I sent out two offer letters yesterday...hopefully something will come of it. Also, have two more people I'm chasing. Where's that bus full of PMEL technicians...?" (Supp. R4, tab 138 at 1; tr. 1/110-11) As Mr. Robertson explained at the hearing, SMR wanted to hire five to seven more people to correct some of its "issues" (tr. 1/110).

On February 6, 2012, Mr. McKee wrote a letter to Col Mitchell, director, AFMETCAL, stating:

> I do see and agree with the fact that there is work to do in the quality area, the basic problem is after our previous audit we had to change quality managers and it has been slow gaining ground. We are now making an offer for a new much more experienced Quality Manager that gets out the USAF on the 10th of February and the current manager will return to QA auditor position. I have had several discussions with John Zimmerman, the Flight Chief for Tinker AFB PMEL and I am in agreement that we need another quality person. In addition to the offer extended for a new Quality Manager we have made an offer for another quality person which is an increase of two more quality personnel to be added in February.

(Supp. R4, tab 140 at 1) As Mr. McKee acknowledged at the hearing, this was the same number of additional quality personnel that was eventually referenced in the final CAP (tr. 1/47-49).

SMR also recognized that problems with its performance had contributed to the failed AFMETCAL assessment, and took a number of personnel actions. SMR provided written warnings to four individuals responsible for nonconformities due to a clear inattention to detail or failure to follow the guidelines of a TO, decertified two SMR technicians, counseled two employees for inattention to detail, terminated an employee for falsifying documents, and demoted its quality manager (app. supp. R4, tab 124 at 1, 9, 17, 20; supp. R4, tab 185 at 28, tab 191 at 16; tr. 1/99-100).

In late February 2012, Mr. Murray composed a revised CAP that for the first time included corrective action language referencing adding two inspectors to quality control staff, and adding four technicians to the technical staff (supp. R4, tab 145 at 3). On February 24, 2012, Mr. Murray distributed this revised draft, "2012 Tinker CAP.docx," to Mr. Zimmerman via email (supp. R4, tab 145 at 1; tr. 1/56, 2/35). Shortly after sending it to Mr. Zimmerman, Mr. Murray also emailed the revised draft to Mr. Robertson, stating "John [Zimmerman] preferred that I send him the draft copy. and he is going to mark it up and send back" (supp. R4, tab 146 at 1; tr. 1/112-13).[2]

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[2] Mr. Robertson did not review this draft of the CAP before Mr. Murray sent it to Mr. Zimmerman on February 24, 2012, and only reviewed it after Mr. Murray later forwarded it to him (supp. R4, tab 146 at 1; tr. 1/116-17). When Mr. Robertson later reviewed this February 24 draft, he did not inform Mr. Murray that there were any changes that needed to be made to it (tr. 1/120).

Metadata for the email's attachment, "2012 Tinker CAP.docx," indicated that the file was created on January 26, 2012, at 4:06 p.m., with Mark Murray listed as the author, and showing that Mr. Murray had made edits to the document, most recently on February 24 (supp. R4, tab 145 at 6, tab 146 at 7; tr. 2/27-28, 39).

This revised February 24 draft of the CAP was the first to list the increased staffing. Under Problem #1, Corrective Action, the draft stated:

> 1. Add two inspectors to Quality Control staff. Add one inspector to Quality Control (QC) staff by 1 March 2012. Add additional inspector to Quality Control staff by 1 May 2012.
> 2. Add four technicians to Technical staff. Add one technician each month, with the first month starting in January 2012.

(R4, tab 145 at 3, tab 146 at 4; tr. 1/117-18, 2/35-36) As Mr. Robertson and Mr. McKee conceded at the hearing, this February 24 draft was the first to reference these staffing increases, and these staffing increases were the same as contained in the final CAP (tr. 1/58-59, 118). Mr. Zimmerman testified both that Mr. Murray added this language referencing additional staff to the CAP, and that he had not instructed Mr. Murray to do so (tr. 2/37). The only contradictory testimony was from Mr. Robertson, who testified that he thought the February 24th draft was the "hacked-up" version that Mr. Zimmerman had sent back (tr. 1/61). However, we credit Mr. Zimmerman's testimony, rather than Mr. Robertson's testimony, because Mr. Zimmerman's testimony is supported by the emails in evidence, and because Mr. Robertson admittedly was not actively involved in drafting the CAP (tr. 1/51). Mr. Murray did not testify at the hearing.

On February 27, 2012, Mr. Zimmerman provided his first proposed revisions in "track changes" [redline] format to the February 24, 2012 draft CAP, in a file named "20120225 CAP draft1.docx" (supp. R4, tab 147 at 1; tr. 2/39-41). Mr. Zimmerman's email also asked Mr. Murray to "[t]ake a look at this and if you don't see anything jumping out, I'll accept the changes and we'll clean it up for a final version" (supp. R4, tab 147 at 1; tr. 2/40-41). Although Mr. Zimmerman proposed changes to the wording of the proposed corrective actions, he did not propose any changes to the number of referenced additional staff, or the timeline for implementing that referenced staff (supp. R4, tab 147 at 3; tr. 2/41). Also on February 27, 2012, Mr. Murray forwarded Mr. Zimmerman's proposed revisions to Mr. Robertson, stating "Here is the mark-up from John Z. Please take a look and let me know if you see anything we need to add." (Supp. R4, tab 148 at 1; tr. 1/121-22) The next day, February 28, 2012, Mr. Murray emailed Mr. Zimmerman a draft copy accepting each of Mr. Zimmerman's changes, but indicating that SMR leadership would still review the CAP before officially submitting it (supp. R4, tab 150 at 1; tr. 2/43-46).

The following day, February 29, 2012, Mr. Murray emailed Mr. Zimmerman, a revised draft containing SMR's proposed additions; however, there was no change to any of the CAP's language referencing additional personnel[3] (supp. R4, tab 153 at 1-6; tr. 2/46-48). On March 1, 2012, as a "professional courtesy," Mr. Zimmerman emailed the final CAP draft to Mr. Robertson and Mr. Murray for a final review (supp. R4, tab 155 at 1; tr. 2/48-49). Later that same day, Mr. Robertson responded, stating "I think it looks good" and without proposing any changes (R4, tab 91 at 1; tr. 2/50-51).

The final CAP, dated March 8, 2012, included language requiring the retention of additional staff in numbers and on the schedule first contained in the February 24 draft prepared by Mr. Murray (R4, tab 63; supp. R4, tab 145; tr. 2/53-54). The final CAP also provided "Estimated Completion Dates" for adding the referenced personnel (R4, tab 63 at 4). The estimated completion dates for "Add first PQA," "Add first tech," and "Add second tech" all preceded the final CAP's March 8, 2012 date, indicating that those individuals had already been hired by SMR, or were in the process of being hired (*id.*; tr. 1/127-28, 2/57). In addition, the final CAP corrective action progress chart, again indicated that some of the referenced additional personnel had already been hired by SMR (R4, tab 63 at 9). In fact, three of the referenced individuals had already been hired by SMR as of the March 8, 2012 date of the final CAP (tr. 1/128-29, 2/57).[4]

Following submission of the CAP, Mr. Murray maintained a weekly follow-up spreadsheet to "track the weekly progress of the CAP" (supp. R4, tab 158 at 1). One iteration of this "Weekly Follow-Ups" spreadsheet that was emailed to Mr. Zimmerman on March 13, 2012, identified Hercules Veneris as the "First PQA," Chad Vaughn as the "First Technician," and Justin Martin as the "Second Technician" (*id.* at 1-2). A later follow-up listed Jacob Peterson as the "Third Technician" (*id.* at 2). However, none of the individuals identified in Mr. Murray's "Weekly Follow-Ups" spreadsheet are those being claimed by SMR in this appeal (app. supp. R4, tab 126; supp. R4, tab 158 at 2; tr. 1/132). Although the final CAP references "[a]dd two additional PQA evaluators to Quality Control staff" and "[a]dd four technicians to Technical staff," SMR is *not* claiming alleged labor costs associated with any PQA evaluators, but is claiming labor costs for two "PMEL Technician I," three "Sr. PMEL Technician II," and a "Tech Ops Supervisor" (R4, tab 63 at 3; app. supp. R4, tab 126; tr. 1/132-33).

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[3] The only change was to clarify that one SMR technician had been dismissed.

[4] Although the CAP indicates that three of the six additional workers had already been hired, the workers identified in the CAP are not the same workers identified by SMR as part of its claim (R4, tab 63 at 4). In its interrogatory responses, SMR provided the following dates of hire for the individuals included in the claim: Melvin Moore (April 9, 2012); Marquis Crowley (May 30, 2012); Mark Lilly (April 9, 2012); Rocky Sirois (April 16, 2012); and Joshua Lagunas (May 23, 2012) (supp. R4, tab 191 at 28; app. supp. R4, tab 126).

The Proposed Contract Modification

In its final assessment report, AFMETCAL noted the excessive time it was taking in SMR's Type IIA laboratory to perform a root cause analysis and recall analysis and recommended that the PMEL take corrective action and establish a timeline to complete quality reviews and to complete root cause analysis (R4, tab 62 at 5; tr. 2/38). In line with AFMETCAL's recommendation, the February 1, 2012 initial draft of the CAP from Mr. Murray recommended as corrective action to "[e]stablish reasonable timelines and goals for completion of Quality Reviews (QR), including time to complete Root Cause Analysis (RCA) and generation of recalls when applicable" (supp. R4, tab 132 at 4). At the hearing, Mr. Zimmerman explained that his wing commander, Col George, had demanded that he submit a change request related to the timeline for quality reviews. However, Mr. Zimmerman personally felt such a change was unnecessary in light of the contract's existing throughput time requirements. (Tr. 2/58, 73)

On February 21, 2012, Mr. Zimmerman circulated a "doc requesting a change to the PWS [of the] PMEL contract" to contracting officer Maisie Raju and contract specialist Geoffrey Craigwell (supp. R4, tab 141 at 1). The contemplated PWS change involved adding a paragraph to PWS section 1.6, "Throughput Time" establishing a five working day timeline for review, with an additional five working days for root cause analysis and recall analysis if required (*id.* at 2; tr. 1/148, 173, 2/59). This language originated in Mr. Murray's February 24 draft CAP (supp. R4, tab 145 at 4; tr. 1/119-20, 2/37-38). As with the staffing language, Mr. Zimmerman testified both that Mr. Murray added this language to the CAP, and that he had not instructed Mr. Murray to do so (tr. 2/38).

The March 8, 2012 final CAP, under Problem #3, Corrective Action Item 2, stated that a proposed modification to the PWS had been "submitted 22 Feb 2012 to include the requirements listed in #3 below," and corrective action item 3 actually quoted the proposed PWS change (R4, tab 63 at 5). The final CAP's quoted language under corrective action item 3 is identical to that earlier circulated by Mr. Zimmerman to Ms. Raju, Mr. Craigwell, and to SMR (supp. R4, tab 141 at 2, tab 151 at 2).

Each of the government witnesses at the hearing testified that this proposed PWS modification had nothing to do with either SMR hiring additional personnel, or the government compensating SMR to hire additional personnel (tr. 1/148, 158, 175-78, 2/59-60, 68).

On February 23, 2012, Ms. Raju emailed Mr. Craigwell, stating that "[t]his doesn't sound like a legitimate need for a mod" (supp. R4, tab 143 at 2). At the hearing, Ms. Raju explained that she consulted Mr. Zimmerman about the proposed

PWS modification, and concluded based on their conversations that no modification was needed (tr. 1/149, 175, 187).

SMR's Request for Equitable Adjustment

On April 25, 2012, about five months prior to the end of option year four of the contract, Mr. Craigwell emailed Sheree Riffenburg, SMR's vice president of contracts administration, asking for a "monthly cost for extension of services" not to exceed six months (supp. R4, tab 163 at 4; tr. 1/151). On May 11, 2012, Ms. Riffenburg responded with a "spreadsheet for the 6-month contract extension for the [collective bargaining act] increases effective 1 Oct 2012 and the additional new hires as a result of the AFMETCAL audit" (supp. R4, tab 162 at 3-6, tab 163 at 3; tr. 1/151). This was the first time SMR had asserted its entitlement to extra compensation for the additional hires. Mr. Craigwell responded to Ms. Riffenburg via email, stating that he had a:

> [Q]uestion on New Hires pricing being added to this summary billing. Your company failed the AFMETCAL inspection as we are all aware and it was as a result of quality issues NOT number of workers I would think. If your corrective action or root cause is attributed to shortfalls in manpower, then it's the contractor's responsibility. You simply can't go out and hire 50 workers and expect[] the Government to pay their wages.

(Supp. R4, tab 163 at 2)

Before this May 2012 email exchange, which occurred over two months after the final CAP, SMR had never informed either Mr. Craigwell or Ms. Raju that it wanted to be compensated for the additional personnel referenced in the CAP (tr. 1/153, 176). Ms. Raju was the contracting officer under SMR's contract from 2011 until 2013 and she testified that she never agreed to compensate SMR for the costs it claims in this appeal (tr. 1/168-70).

The government internally discussed SMR's decision to hire additional personnel. On May 23, 2012, Mr. Zimmerman emailed Susan Eads, chief, services contracting section, explaining that "the addition of technicians and QA people was their idea. We did not mandate it." (Supp. R4, tab 164 at 2) Ms. Eads responded to Mr. Zimmerman that "I think we (gov't) have enough evidence to the fact that we did not direct them to hire more people. Plus, since a modification was NOT done to the contract that made changes that would cause a need for more people, we are good." (*Id.* at 1) Mr. Zimmerman replied to her via email, reiterating "[a]t no time has there ever been a direction to the contractor regarding staffing. The proposed increases were from the contractor." (*Id.*) Ms. Raju and Mr. Zimmerman testified that no one from the government ever directed SMR to hire additional personnel (tr. 1/177, 2/63).

On May 30, 2012, Mr. Zimmerman again emailed Ms. Eads, explaining the decision not to execute any modification to the PWS, stating "Maisie [Raju] and I decided this requirement would already be covered by SS#7 'Throughput Time' and no mod was necessary, therefore the mod was scrapped. There never was any mention of staffing in the mod." (Supp. R4, tab 166 at 1)

On June 18, 2012, Mr. Craigwell emailed Mr. Robertson and Mr. Murray to state that any references to a proposed PWS modification were "indeed erroneous and must be corrected" (R4, tab 85). On June 19, 2012, Mr. Zimmerman emailed Mr. Craigwell, stating that the "mod was for throughput time in their Quality program, nothing else.... There never was a mod proposal for personnel." (Supp. R4, tab 167 at 1) That same day, Mr. Zimmerman again emailed Mr. Craigwell, attaching the CAP, and stating that page four of the CAP:

> [C]learly states that the mod is to establish throughput times through their quality program and says nothing about personnel. It was later determined by Maisie [Raju] that the throughput time is already covered by SS#7 in the PWS and no mod was necessary.
>
> Also, if they hadn't failed in the first place none of this would be an issue.

(Supp. R4, tab 168 at 1)

On June 19, 2012, Mr. Craigwell emailed Mr. McKee and stated that:

> The problem here is that your company upon advise [sic] from your management NOT the Government; decided to add members to your staff in other words—increase manpower in efforts to fix the problem. NOTE: Larry the modification proposed was to address throughput time which is already covered in SS#7, therefore there was and still is NO reason for a modification.

(Supp. R4, tab 169 at 1)

AFMETCAL reassessed SMR's PMEL from July 23 to 31, 2012 (R4, tab 65 at 1). On August 10, 2012, the laboratory was found to have met certification requirements (*id.*). In its reassessment report, AFMETCAL did not list the CAP as one of the six "Critical Assessment Factors" it used, and did not reference the CAP in the report (*id.* at 6; tr. 1/135-36).

On May 17, 2013, Ms. Raju emailed Mr. McKee to deny SMR's request for additional funds, stating "I still do not see a rationale for why you are requesting $435,816.81 per your spreadsheets. SMR has failed to comply with the Performance Work Statement (PWS) and failed the AFMETCAL. To remedy this problem, SMR hired people." (R4, tab 66 at 1) Shortly thereafter, on May 21, 2013, Mr. McKee emailed Ms. Raju, representing to her that he had no copy of the CAP:

> [W]ritten and submitted by any SMR employee that addresses adding anyone until I received the official copy approved and signed by someone in the Government. We are simply looking for who wrote the requirement for adding personnel to the CAP....
>
> ...We did submit input to the Tinker CAP but did not suggest adding anyone, the CAP was obviously modified by someone in the Government after the fact to add people.

(Supp. R4, tab 174 at 1)

On February 17, 2015, SMR submitted a request for equitable adjustment (REA), seeking $773,073.24 for "the increased cost placed on SMR by the increase in workload as outlined in the Government written and signed Corrective Action Plan (CAP) as approved by AFMETCAL" (R4, tab 70 at 4). The contracting officer treated SMR's submission as a claim (R4, tab 67) but did not issue a final decision with regard to this REA and claim. On January 8, 2016, SMR appealed to this Board from the deemed denial of its claim, also in the amount of $773,073.24. On March 9, 2016, SMR filed its amended complaint seeking the same amount (supp. R4, tab 180). During the course of settlement discussions with the government, SMR "updated" its claim by adding labor costs for Mr. Schmadeker, a "Tech Ops Supervisor," thereby revising its claim upwards to $937,772.75 (app. supp. R4, tab 126 at 1; tr. 1/39).

DECISION

SMR contends that the government forced it to increase staffing through the CAP. According to SMR, language in the CAP regarding staffing levels and the modification of the contract to impose throughput limits were constructive changes to the contract entitling it to compensation. (App. br. at 11-15) The government contends that it was SMR, and not the government, that proposed hiring additional workers, and even if the government had proposed that SMR include additional workers in the CAP, the CAP did not change the terms of the contract (gov't br. at 78-82). The government further alleges that the contracting officer never authorized a change to the contract. Additionally, the government contends that the proposed contractual amendment addressing processing times does not relate to the additional workers for which SMR seeks compensation. (Gov't br. at 82-98)

We find that SMR has not demonstrated that the government forced it to add workers. Rather, the evidence at the hearing almost uniformly demonstrated that SMR itself added language to the CAP regarding the hiring of additional workers. Moreover, evidence at the hearing demonstrated that SMR acknowledged that it needed to bring on additional workers and was planning to retain additional workers even *before* the CAP was issued. Additionally, we find that the language of the CAP did not bind SMR to hire the additional workers. With regard to the throughput requirement, we again find that SMR has not established entitlement to recovery. As SMR admits, the proposed contractual amendment regarding processing times was never adopted. Thus, SMR was not required to comply with the proposed processing times. Additionally, SMR does not cite any evidence that it was held to the throughput requirement. Finally, SMR did not establish a breach of the duty of good faith and fair dealing.

As an initial point, we note that SMR did not present any evidence at the hearing or in its post-hearing brief regarding count I (defective performance work statement); count III (authorized agents); and count IV (constructive change) of its amended complaint. Such claims are abandoned. *See, e.g.*, *States Roofing Corp.*, ASBCA No. 54860 *et al.*, 10-1 BCA ¶ 34,356 at 169,664.

I. The CAP did Not Modify the Contract

SMR's theories of recovery all depend upon a finding that the government modified SMR's contract and that these modifications imposed additional costs upon SMR. As only entitlement is before us, we do not address quantum in this decision. SMR first alleges that the government modified the contract through the CAP. According to SMR, the government inserted language into the CAP requiring SMR to add six additional employees and that the language of the CAP was binding upon SMR. We disagree with both of these assertions. SMR additionally asserts that the government violated the Changes clause by not following-through on a promise to modify the contract regarding the throughput times. (App. br. at 13) In order to recover for a breach of contract, SMR must demonstrate: 1) that the government owed SMR a contract duty; 2) that the government breached that duty harming SMR; and 3) that the damage was "reasonably foreseeable at the time of contract award." *See, e.g., Edinburgh Int'l*, ASBCA No. 58864, 16-1 BCA ¶ 36,227 at 176,743. Because SMR did not establish that the government breached a duty to it, we deny SMR's appeal.

A. SMR, and Not the Government, Inserted Language into the CAP Stating that SMR Would Add Six Employees

SMR asserts that the government inserted language in the CAP stating that SMR would hire six additional employees to work at the PMEL. However, testimony at the hearing did not support this assertion. As best, SMR presented the testimony of

its vice president, Mr. Robertson, that he didn't believe that Mr. Murray added the language indicating that SMR would add six employees; however, Mr. Robertson was not actively involved in the process of drafting the CAP (tr. 1/51, 61-62). Additionally, SMR points to the fact that Mr. Zimmerman indicated that he thought the contract was undermanned in rejecting SMR's initial CAP. However, both of SMR's witnesses conceded that the initial CAP was deficient, and Mr. Robertson testified that Mr. Zimmerman was only offering an opinion and not directing SMR to hire additional people (tr. 1/101). Moreover, both of SMR's witnesses conceded that they were not actively involved in drafting the CAP, and that Mr. Murray was the SMR individual primarily involved in drafting the CAP (tr. 1/51, 103). Neither party called Mr. Murray as a witness at the hearing.

Against this meager evidence supporting SMR's assertion that the government required it to insert language regarding the hiring of additional staff, the government demonstrated, by direct testimony of individuals with personal knowledge of the events, that Mr. Murray inserted the language requiring the hiring of additional staff into the CAP. The statement of facts above provides a detailed recitation of the drafting of the CAP that need not be repeated in detail here.

In summary, Mr. Zimmerman testified that the language regarding the hiring of additional staff was first inserted into the draft CAP by Mr. Murray, and that he did not instruct Mr. Murray to add staff (tr. 2/37). In addition, Mr. Zimmerman's testimony was supported by the metadata for the draft CAPs, including the February 24 draft that first included the hiring of additional staff, demonstrating that the draft was prepared by Mr. Murray (supp. R4, tabs 145-46; tr. 2/27-28). Additionally, Mr. Zimmerman testified that he had not made any edits to that draft version of the CAP, although he edited a later version (tr. 2/39-40). We find Mr. Zimmerman's testimony to be credible, and find that his testimony, supported by the documents in the record, establish that it is more likely than not that SMR added the language to the CAP regarding the hiring of additional staff, and that the government did not direct SMR to add the language to the CAP.

In addition, the government established that SMR was planning to add staff before this language was added to the CAP, and that SMR's contract required it to provide all necessary labor for the fixed-price contract elements. In fact, on February 2, 2012, Mr. Robertson wrote Mr. Murray an email stating "Larry also want[s] to hire 5-7 more people as soon as we can find them" (supp. R4, tab 138 at 2; tr. 1/110). This was before the additional staff, and the proposed modification regarding throughput, were added to the CAP.

Similarly, on February 6, 2012, again before the language of which SMR complains was inserted in the CAP, Mr. McKee wrote to the director of AFMETCAL that "[i]n addition to the offer extended for a new Quality Manager we have made an offer for another quality person which is an increase of two more quality personnel to

be added in February" (supp. R4, tab 140 at 1; tr. 1/44-47). SMR does not dispute that it would have added staff on a temporary basis, but argues that the CAP required permanent additions to staff (app. br. at 12). However, there is nothing in the CAP providing that the additions to the staffing levels were permanent. Moreover, we note that SMR reviewed the draft CAP before submission toAFMETCAL and no documents in the record, or hearing testimony, indicate that SMR objected to the language. SMR contends that this was because of the proposed contract modification addressed below.

B. The Proposed Throughput Amendment did Not Modify the Contract

SMR asserts that the proposed modification addressing processing times constituted modification of the contract. However, the record is clear that the proposed modification was not enacted. In fact, SMR concedes that the modification was never enacted (app. br. at 1). Although Col George insisted that the contract be modified to insert a throughput requirement, he was not the contracting officer. The contracting officer testified that it was her opinion that the modification was not necessary because the contract already contained a processing time requirement, and SMR was not in compliance with the existing requirement (tr. 1/168-70, 175).

In addition, there was no evidence presented of a constructive modification of the contract (tr. 1/135-36). Testimony at the hearing uniformly demonstrated that SMR was not held to the five-day throughput requirement contained in the proposed amendment. Against this factual background, SMR contends that the CAP itself modified the contract, an argument we reject below.

II. The Language of the CAP does Not Modify the Contract

SMR's argument that the government breached the Changes clause by failing to modify the contract also fails. To begin with, the CAP simply notes that a proposed modification to the PWS was "submitted" (R4, tab 63 at 5). SMR's theory is that TO 00-20-14 required the PMEL to prepare a CAP in the event that it failed AFMETCAL inspection. According to SMR, the TO additionally required AFMETCAL to determine whether SMR was complying with the CAP in determining whether the PMEL would be recertified. The PWS requires SMR to comply with TO 00-20-14. The contract's order of precedence lists SMR's proposal as second in priority, with the PWS ninth in priority. Thus, according to SMR, changes to the PWS require a contract modification. (App. br. at 14) We disagree.

The specific language in paragraph 7.3.2. of TO 00-20-14 provides that an AFMETCAL on-site assessment team will assess, at a minimum "g. Corrective actions resulting from previous on-site assessments" (R4, tab 76 at 76). SMR contends that the quoted language requires AFMETCAL to evaluate its compliance with the CAP. However, we do not read the language as imposing such a requirement. First, while

some subparts of paragraph 7.3.2 provide that the assessment team will "assess" "compliance with" a requirement, paragraph 7.3.2(g) simply states that the team will "assess" "Corrective actions" (*id.*). Second, paragraph 7.3.2(g) refers to "Corrective actions" and not a CAP. We read this language as standing for the unexceptional idea that the AFMETCAL inspectors will determine whether the PMEL has corrected the problems identified in the assessment that resulted in decertification (R4, tab 77). This is consistent with paragraph 7.3.3.1 "Certification Criteria" which does not list the CAP as a criterion (R4, tab 76 at 77-78). Thus, the assessment team would determine whether the specific problems identified in the assessment were corrected, but would not test to see if the PMEL followed the CAP in fixing the problems. This is consistent with Mr. Zimmerman's testimony that the CAP is not binding on the contractor, but is instead a road map of how to fix the problem and that the corrective actions "rarely follow the...exact guideline" (tr. 2/17-18). Additionally, record evidence demonstrates that the AFMETCAL assessment team only evaluated SMR against the terms of the contract and did not evaluate SMR against its CAP (R4, tab 65 at 6).

Moreover, the CAP does not change TO 00-20-14. The TO simply requires that a CAP be provided to AFMETCAL within 60 days of the final report date (R4, tab 76 at 78). The PWS similarly requires that SMR comply with TO 00-20-14 (R4, tab 72 at 8). Thus, the contract required SMR to submit a CAP, but the CAP does not modify the terms of the contract.

SMR contends that the language in the CAP was a modification to its technical proposal, which contained staffing levels. According to SMR, its technical proposal was incorporated into the contract by contract clause 5352.215-9005(b) (R4, tab 1 at 69) and was assigned to rank second in the contract's order of precedence pursuant to FAR 52.212-4(s) (*id.* at 63; app. br. at 12-13). Thus, SMR contends that the CAP language specifying a larger number of employees constitutes a change to its technical proposal. However, the order of precedence only applies when there is a conflict between provisions of the contract, something that SMR has not demonstrated. In addition, the clause incorporating the technical proposal provides that nothing in SMR's technical proposal could waive any of the other requirements in the contract (R4, tab 1 at 69). As the contract required SMR to provide all personnel to perform PMEL services and that SMR was required to maintain AFMETCAL certification, the number of employees contained in SMR's technical proposal could not modify the contract.

III. The Government did Not Violate its Duty of Good Faith and Fair Dealing

Finally, SMR asserts that the government breached its duty of good faith and fair dealing by promising to amend the contract but, then, failing to make the amendment after SMR added additional staff (app. br. at 14-15). Every contract "imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) (quoting

RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)). This duty of good faith and fair dealing "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Id.* at 991 (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010)). However, the implicit duty prevents a contracting party from "interfer[ing] with the other party's *performance* and not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract*." *Id.* (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)). We recently explained that "the doctrine imposes duties that fall within the broad outlines set forth by the express terms of the contract, approximating the parties' intent, as divined by the express terms of the contract, for addressing circumstances not specifically set forth by the contract." *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,539.

In this appeal, the broad outline set forth by the express terms of the contract is that SMR was required to maintain AFMETCAL certification, something that it failed to do. In addition, SMR was contractually obligated to provide all labor necessary to perform, at the fixed-unit price, pursuant to the terms of the contract. While the government made a number of suggestions or recommendations that SMR increase staffing because of an opinion that SMR was understaffed, this was in response to SMR's loss of accreditation and efforts to enable SMR to correct its performance deficiencies and not be terminated for default. Moreover, this is not a subject where we need to refer to the "broad outlines set forth by the express terms of the contract" (*Relyant*, 18-1 BCA ¶ 37,085 at 180,539) because the express terms of the contract required SMR to develop a CAP and to provide all labor required to perform the contract. Accordingly, we find that SMR has not established a breach of the duty of good faith and fair dealing.

CONCLUSION

SMR's appeal is denied.

Dated: January 8, 2019

David D'Alessandris

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

(Signatures continued)

I concur

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

I concur

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. 60412, Appeal of Science and Management Resources, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals