ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Zalzar FZE	)	ASBCA Nos. 59545, 59546, 59616
	)	60053, 60054
Under Contract	)	
No. SDZ-OEF/OIF-06-011-08-006-08027	)	

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL

These appeals arise out of a contract to provide temporary workers for the operation of Army and Air Force Exchange Service (AAFES) facilities in the Middle East. Appellant, Zalzar FZE (Zalzar), seeks a total of $6,092,845 in five appeals. The largest is ASBCA No. 60054, in which it seeks $4,203,312 arising from an alleged change in the logistical support it received from the government. Zalzar also seeks $1,284,930 due to AAFES' alleged unfair administration and bad faith termination of the contract (ASBCA No. 59616); $246,852 for price rate increases for reasons including the poaching of its workers and more stringent medical screenings and background checks (ASBCA No. 60053); and, in two related appeals, $351,540 due to higher prices for military air transport (ASBCA No. 59545) and $6,211 for commercial air travel (ASBCA No. 59546).

The Board conducted a three-day hearing at which both parties presented fact and expert witnesses. Liability and quantum are before us, although as will be seen, we will remand a portion of the quantum to the parties for further calculation.

FINDINGS OF FACT

1. AAFES awarded Zalzar the above-referenced contract on April 2, 2008 (R4, tab 1 at KFLD-000001-ZALZAR LLC (hereinafter "R4, tab 1 at 1")). The contract provided for a five-year performance period (R4, tab 1 at 5). The award was not exclusive (*id.*) with AAFES awarding 27 other contracts (tr. 2/99). Zalzar was an incumbent, having performed a predecessor contract since 2002 (tr. 1/51-52).

2. The contract contained hourly rates Zalzar would be paid for five categories of temporary workers (manpower associates or "MPAs") in Afghanistan, Kyrgyzstan, the United Arab Emirates (UAE), Qatar, Kuwait, and Iraq. The contract divided the workers into local nationals ("LNs" or residents of the host country) and third country nationals ("TCNs" or workers from outside that country or the United States). For example, in Afghanistan the contract included category one (laborer/stocker) rates of $4.73 per hour for LNs and $7.68 per hour for TCNs, and category five (e.g., store manager) rates of $11.08/$14.15. (R4, tab 1 at 6, 23-31, 34-37)

Logistics Fee Claim (ASBCA No. 60054[1])

3. Zalzar's largest claim involves the provision of logistics (medical and food) by the government to Zalzar workers. To understand how the claim arose, we must wade through some confusing provisions in the solicitation and contract.

The Solicitation

4. The solicitation, in Exhibit D, Wage and Fee Schedule, paragraph 5, Logistics Support (Clause D5), directed the offerors to provide an hourly rate if they were to provide logistic support to their workers. It stated that "[c]urrently logistic support is being provided [by the military] to TCN's in Afghanistan and Iraq. If this changes in the future the amount you have proposed will be added to the cost per employee to be paid for services rendered to AAFES." (App. supp. R4, tab 80 at ZAL-R4-2665 (app. supp. R4, tab 80 at 2665)). The bid form for Afghanistan TCN's provided in relevant part:

EMPLOYEE CATEGORY	PRICE PER POSITION OFFERED TO AAFES
Category 1, Third Country National	$_____/hour
Category 2, Third Country National	$_____/hour

[1] The Board docketed the logistics fee claim as ASBCA No. 60054 and the price increase claim as ASBCA No. 60053. The parties have switched these numbers in their briefs.

Category 3, Third Country National $_____/hour

Category 4, Third Country National $_____/hour

Category 5, Third Country National $_____/hour

Additional cost factor

Logistic Support
(food, housing and medical) $_____/hour

(App. supp. R4, tab 80 at 2667) The bid forms for Iraq TCNs and Afghanistan LNs were similar (*id.* at 2666-675).

5. As Zalzar states in its brief, one reading of Clause D5 would be that if there is any change in logistical support, then Zalzar would be entitled to the predetermined logistics fee rate and would not have to prove its actual costs (app. br. at 31). Unfortunately for Zalzar, the signed contract did not contain Clause D5 (R4, tab 1 at 22). The record does not explain why it was omitted from the signed contract or when the change was communicated to Zalzar. (This contracting officer died during performance and did not testify (tr. 2/95)).

The Contract

6. Both the solicitation and contract identified 22 cost factors for which Zalzar was responsible and thus had to take into account when it formulated its hourly rates. These factors included "medical care to include first aid, immunizations, etc." and "employee medical insurance" (R4, tab 1 at 21; app. supp. R4, tab 80 at 2664). Before he signed the contract, the contracting officer asked Zalzar to confirm that its proposed rates took into account all 22 cost elements. Zalzar responded that it "certainly includes our responsibility for all costs listed in Exhibit D" (R4, tab 37). The contract further demonstrated that Zalzar understood its responsibility for employee medical costs because it incorporated a spreadsheet breaking down Zalzar's hourly rates for category two workers and included amounts for medical insurance[2] as well as medical care in Kyrgyzstan where Zalzar was based (R4, tab 1 at 32).

[2] In its reply brief, Zalzar appears to contend that it did not obtain medical insurance, only employer liability insurance (app. reply at 17-18 (citing app. supp. R4, tab 2 at 23)); *see* 46 C.J.S. *Insurance* § 1421 (Feb 2020) (discussing relationship between workers compensation and employers' liability insurance). The contract required medical insurance, which was separate and in addition to its requirement for workers compensation/employer liability insurance and/or

7. As proposed by Zalzar and incorporated in the contract, the logistics fee rates were:

Afghanistan LNs:	$1/hour
Afghanistan TCNs:	$2/hour
Iraq TCNs:	$3/hour

(R4, tab 1 at 23-24, 31)[3]

8. The solicitation contained a second clause discussing logistics fees. Exhibit C, Special Provisions, paragraph 7 (Clause C7), provided that for locations where TCNs were not allowed to leave the installation, the military may provide logistical support including "employee housing, meals, emergency medical care, and use of morale/welfare/recreation facilities." But such logistical support was "subject to change" and the decision whether to provide logistical support and "the extent of such support rests with [the] overseas commander concerned and not with AAFES." AAFES directed offerors to consider the current level of logistical support and, if the support changed, the contractor could request a price revision. (App. supp. R4, tab 80 at 2660) Unlike Clause D5, Clause C7 was incorporated in the signed contract (R4, tab 1 at 17).

9. Exhibit D to both the solicitation and the contract specified that a request for a price revision "must provide sufficient factual information and data to substantiate the proposed revision, including clear and definite identification of existing cost factors which could not be identified at time of entering into contract or renewal." (R4, tab 1 at 22; app. supp. R4, tab 80 at 2665)

10. In sum, the solicitation contained inconsistent messages concerning how additional payments for logistical fees would be obtained. One clause (D5) simply provided that if there was a change, then the contractor would be entitled to the agreed upon logistics fee rate. Another set of clauses (C7 and the price revision clause) required the contractor to submit a written request for a price revision, which required it not only to "substantiate" the change with facts and data but also to demonstrate that

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Defense Base Act insurance (R4, tab 1 at 15, 21, 40). Thus, to the extent that Zalzar failed to obtain medical insurance for its employees, it was in breach of the contract.

[3] This may be confusing to the reader, given that we previously noted in Finding of Fact 5 that Clause D5, involving logistics fees, was not in the contract. Finding of Fact 8 addresses a different logistics fee provision and we will provide an explanation for the incorporation into the contract of the fees discussed here later in this opinion.

the costs could not be identified prior to contract. As we have stated, only the latter clauses made it into the signed contract.

11. Execution of the contract without Clause D5 is not quite the end of the story, however on December 14, 2009, bilateral contract amendment no. 6 added positions for associates at roving retail activities (rodeo) in Iraq (R4, tab 7). The amendment specifically incorporated new pages 6A and 7A to Exhibit D, the Wage and Fee Schedule. While the two new pages largely contained provisions specific to rodeo workers, it also included what we have been referring to as Clause D5. There was no explanation for the addition of this clause and, notably, it contained the same misspelling of "Offeres" as the solicitation. (*Id.* at 3; app. supp. R4, tab 80 at 2665) This leads us to suspect that, rather than an intentional act, the contracting officer was cutting and pasting without proofreading.[4]

Zalzar's Claim

12. The crux of Zalzar's claim is that until the fall of 2008, the U.S. military provided free health care and meals to Zalzar's workers but after that required payment (app. br. at 35). Zalzar supports the claim primarily with testimony from its chief executive officer, Leila Seiitbeck, and Phyllis Taylor (tr. 1/57, 74, 77-78, 107; app. ex. 1 at 55-57). AAFES denies that the military provided free meals or medical care (gov't br. at 30-32).

13. Ms. Taylor was an AAFES contracting officer's representative (COR) on the MPA contracts from 2005 until November 2011, retiring in December 2011 (app. ex. 1 at 16-17). Ordinarily, we would give her testimony considerable weight but she accepted a position with Zalzar in July 2013 to work on this contract (*id.* at 29). This resulted in an investigation for a conflict of interest by AAFES's regional general counsel, which caused her to incur legal fees and resulted in her departure from Zalzar after only three months (R4, tab 153 at 31-33 ("AAFES threw a stink about me working for them"); app. supp. R4, tab 118).

14. During performance, Zalzar did not object to the alleged discontinuance of free food and medical care, nor did it seek payment of the logistics fees until after AAFES terminated the contract in 2014. If AAFES had paid Zalzar the contractual logistics fees it would have increased the Afghanistan rates by as much as 26% and the Iraq rates by as much as 30% (R4, tab 1 at 24, 31). When AAFES' counsel asked Zalzar's chief executive officer at the hearing why Zalzar never requested payment of

[4] Pages 6A and 7A (governing Iraq rodeo associates) are also included in R4, tab 6, which contains bilateral amendment no. 5, adding a warehouse foreman position in the UAE. The most plausible explanation for this is a filing error.

the logistics fees until after the termination notice, she testified that they were "very busy" (tr. 2/36).

15. The record demonstrates that the military provided some medical services to the MPAs but the weight of the evidence indicates that it always expected to be reimbursed. First, in November 2008, the contracting officer emailed all contractors to "remind" them that the military would provide "resuscitative care and stabilization requiring emergency hospitalization at military treatment facilities when wound, loss of limb or eyesight occurs" and that hospitalization would be limited to emergency stabilization and short term treatment with an emphasis on returning the patient to his country of origin. The contracting officer further stated that the contractors were financially responsible for the medical treatment. (R4, tab 40) Neither Zalzar, nor any other contractor appears to have contended that this email changed anything.

16. On March 31, 2010, the contracting officer issued a memorandum to all MPA contractors once again describing the emergency and short-term medical treatment available to contractors and the responsibility of contractors for the cost of treatment. He added that care was dependent on availability and at the discretion of the military commander. (R4, tab 45) Once again, Zalzar did not object.

17. On November 10, 2010, the contracting officer issued unilateral amendment no. 10 to the contract (R4, tab 11). The amendment added a new clause to the contract: FITNESS FOR DUTY AND MEDICAL/DENTAL CARE LIMITATIONS (JCC-I/A CLAUSE 952.225-0003) (JAN 2010) (*id.* at 4-5). The amendment was generally consistent with the November 2008 and March 2010 communications but went into greater detail. It specifically added statements that routine, primary, and dental care were not available, nor were pharmaceutical services available for routine or known issues and specified daily rates for in and outpatient visits. As justification, the clause cited, among other things, Department of Defense Instruction (DoDI) 3020.41. It once again stated that contractors were responsible for the costs of medical services. (*Id.*) Zalzar did not object or notify AAFES that it considered this a change.

18. DoDI 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES, had been in effect since October 2005 and remained so during the time the contract was awarded and performed. It authorized emergency medical treatment for contractors but, among other things, barred primary medical or dental care, or pharmaceutical support unless specifically authorized under a contract and a letter of authorization. Moreover, it specifically provided that the costs of any treatment would be reimbursable to the government by the employee, his employer, or health insurer. DoDI 3020.41 at ¶ 6.3.8. Thus, free medical care for contractors was contrary to policy at the time of award.

19. On March 19, 2013, the parties entered into bilateral amendment no. 13 extending the period of performance from April 1, 2013 to December 31, 2015 at the same rates (R4, tab 14). Before signing the amendment, Zalzar did not request an increase to the hourly rates, nor did it seek payment of the logistics fees either retroactively or prospectively (*id.*; tr. 1/70 (Q. What discussions did you have with [the CO] about this amendment? A. None)).

20. On May 23, 2014, contracting officer, Michelle Blake (CO Blake) notified Zalzar that she was terminating the contract upon 30 days' notice per the contract's termination clause (R4, tab 22).

21. It is not entirely clear when Zalzar first raised payment for logistics fees. The record contains an email from a Zalzar official to the contracting officer on May 30, 2014 (seven days after the termination notice), attaching a certified claim for logistics fees totaling $3,297,509.96 (app. supp. R4, tab 16). Zalzar subsequently began adding the logistics fees to its invoices (tr. 2/46, 119).

22. On September 8, 2014, Zalzar appealed the deemed denial of its claim, and the Board docketed it as ASBCA No. 59547. In its answer to the complaint, the government contended that it had not received the claim (answer at 2-3).

23. Zalzar submitted a new certified claim for logistics fees on April 9, 2015, now seeking $4,764,253.50 (R4, tab 33). On June 8, 2015, the contracting officer denied the claim with the exception of $129,424.82 for logistical support in the UAE (R4, tab 35). Zalzar filed a timely appeal that the Board docketed as ASBCA No. 60054.

24. At the hearing Zalzar sought a total of $4,203,312 for logistics fees. This amount included: $3,366,361 for Afghanistan TCNs: $190,759 for Afghanistan LNs; $558,582 for Iraq TCNs; and $87,611 for UAE TCNs (app. ex. 3, Binder 1[5] at 11) (hereinafter "app. ex. 3, B1 at 11"). The two larger amounts (Afghanistan and Iraq TCNs) solely involve medical care, while the smaller claims are combined medical and food (tr. 1/76-79 (Seiitbek discussing app. demonstrative ex. no. 1)). Zalzar's claim is not based on actual costs of providing medical care or food to its workers. Rather, it has simply multiplied the hourly rates for logistics fees by the hours worked. (R4, tab 33 at 11, n.13)

DECISION

We deny ASBCA No. 60054 and dismiss ASBCA No. 59547 as moot. To begin, despite the testimony of Ms. Seiitbeck and Ms. Taylor, we do not believe that

[5] Appellant's exhibit 3 is the expert report by Chelsea R. Taylor of the Kenrich Group, LLC. This report and supporting materials are formatted into two binders.

the military ever provided free medical care to Zalzar's workers. There is too much evidence indicating that medical services had always been limited in scope and subject to reimbursement. This evidence includes the existence of DoDI 3020.41 at the time of award, the contracting officer's reminders of the limited and reimbursable nature of medical services in 2008 and 2010, Zalzar's failure to object to the alleged changes, and the bilateral extension of the contract without Zalzar demanding payment of logistics fees. Further, it would have been nonsensical for AAFES to require Zalzar to include medical insurance and care in the hourly rates paid by AAFES if the military were providing free care. There is insufficient evidence for us to conclude that the military ever changed the alleged free meal policy.

We construe a contract "to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract." *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002), citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). The relationship between the parties is governed by the contract, not solicitation provisions that the contract failed to incorporate. *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1344 (Fed. Cir. 2008); *KD1 Dev., Inc. v. Johnson*, 495 Fed. App'x 84, 88 (Fed. Cir. 2012).

As we have found, the executed contract provided that the contractor could request a price revision if the logistics services changed; to obtain the price revision it had to provide "sufficient factual information and data to substantiate the proposed revision" and to identify "cost factors" that could not be identified before entering into the contract (finding 9). We believe that the terms "factual information and data," "substantiate," and "cost factors" communicate that the contractor would be entitled to recover only to the extent that it could demonstrate that a change that occurred and that the amount would be based on the actual cost of the change. This would be consistent with the government's usual approach to changes. *Dawco Const., Inc. v. United States*, 930 F.2d 872, 882 (Fed. Cir. 1991) (The use of actual costs "is preferred because it... ensur[es] that the final amount of the equitable adjustment will be just that—equitable—and not a windfall for either the government or the contractor").

By contrast, the approach advocated by Zalzar cannot be reconciled with the price revision clause. According to Zalzar, "if the military's provision of logistical support in these countries changed *in any way* after the award, Zalzar's compensation for the attendant costs would be based *not* on Zalzar's actual costs for these services, but rather by adding the hourly rates Zalzar bid for logistical support to Zalzar's standard hourly labor rates." (App. br. at 31 (emphasis in original)) Under this theory, if the military ended the alleged free lunches and imposed a $5 fee, this would be a wonderful development for Zalzar: each $5 lunch in Iraq would entitle it to payment of $24 ($3/hr. logistics fee x 8 hours per shift). The contractual requirement that Zalzar substantiate the price revision with facts and data and to identify cost factors

that could not be identified prior to award makes no sense if such a simplistic mechanism were intended.

Zalzar would have a stronger argument if the contract had included Clause D5, which required offerors to bid an hourly rate for logistics and represented that if "logistic support . . . changes in the future the amount you have proposed will be added to the cost per employee" (finding 4). The omission of Clause D5 should have set off alarm bells at Zalzar, but apparently it did not. But even if Clause D5 had remained in the contract, the best case scenario for Zalzar is a contract that had a glaring inconsistency between that clause and the price revision clause. Such an obvious problem would have required Zalzar to seek clarification prior to signing the contract.[6] *Comtrol, Inc. v. United States*, 294 F.3d 1357, 1365 (Fed. Cir. 2002).

This leaves us with the question as to why the original contracting officer (who died prior to the hearing) omitted Clause D5 from the contract but included logistics fee rates that seem to correspond to the instructions in that clause. When CO Blake reviewed Zalzar's claim, she interpreted the logistics fee rates to be a ceiling (tr. 2/118). In other words, she concluded that they were the total value of logistics for each category of worker and were, therefore, the maximum amount AAFES would have to pay if the military eliminated logistics[7] (*id.*). This would have been a useful tool to AAFES when it evaluated bids because it established AAFES' upside price risk. This approach in our view is the only way to harmonize the requirements of Clause C5 and the price revision clause with the logistics fee rates. We conclude that this is the correct interpretation of the contract.

Even if we acknowledge that the bidding process may have created some confusion and consider extrinsic evidence, Zalzar fares no better. One of the tools at our disposal is to consider the conduct of the parties before the dispute, which can be illuminating and may be given great weight. *Metropolitan Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006); *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982). Zalzar's failure to object to any of the communications from the contracting officer describing the limited and reimbursable nature of government-provided health care services or to ever request payment of the

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[6] The mysterious reappearance of RFP D5 20 months after award in a contract amendment does not change the result (finding 11). As we have found, the most likely explanation for this was carelessness on the part of the contracting officer. Zalzar should have sought clarification if it was confused by the reintroduction of the clause.

[7] Whether $2/hr for Afghan TCNs and $3/hr for Iraq TCNs corresponds to the actual costs of food, housing, and emergency medical cannot be determined on this record. However, we observe that it comes in a context where the category one workers were paid as little as $2.00 per hour (R4, tab 1 at 32).

logistics fees at any time prior to termination is persuasive evidence that the parties understood the contract in the manner advocated by the government. *Id.* It is also entirely consistent with DoDI 3020.41, which barred the military from providing free health care.

ASBCA No. 60054 is denied.

Unfair Administration and Bad Faith Termination Claim (ASBCA No. 59616)

FINDINGS OF FACT

Additional Relevant Contract Provisions

25. The contract gave AAFES a great deal of flexibility over its work force. It provided that AAFES had the authority to add or delete MPA positions, and to increase or decrease the number of workers. It provided that if a worker became ill, quit, or was found to be unacceptable by AAFES, the contractor could not replace the worker unless directed in writing by the COR. In addition, when AAFES negotiated with a contractor to fill a position, AAFES reserved the right to have the position filled by another contractor if the proposed candidates were not acceptable. (R4, tab 1 at 16-17)

26. By contrast, the contract had no provision that allocated contractors any number of MPA positions, nor did it provide that a contractor "owned" a position once it filled that position. While the MPA contractors entered into contracts with their workers (e.g., app. supp. R4, tab 112), there was no provision in the contract providing that, upon signing a contract, the contractor "owned" the rights to that worker. Nor was there any provision that required AAFES to bar an employee who switched companies from working at an AAFES site.

27. The contract did not have a standard termination for convenience clause. Rather, it allowed either party to terminate the contract without cause upon 30 days' notice in writing (R4, tab 1 at 9). It also provided that "all business risk remains with the contractor" including "lost income" from "operational changes or contract termination" (R4, tab 1 at 5).

28. The contract provided that the hourly rates would remain fixed for the term of the contract unless the parties agreed to a price adjustment (R4, tab 1 at 22) and that Zalzar was responsible for "all salaries" and "yearly raises" of the workers (*id*. at 15).

Employee Poaching

29. Zalzar contends that "[b]eginning in 2012, other MPA contractors began soliciting Zalzar's workers by approaching the workers directly during their shifts,

offering them more money, and encouraging them to switch companies" (app. br. at 22). The record indicates that the actual wages Zalzar paid to its workers were as low as $2.00 per hour (R4, tab 1 at 32).

30. The hiring or "poaching" of workers by other companies appears to have been an issue raised by contractors throughout the performance period. For example, on January 14, 2009, the initial contracting officer wrote to the MPA contractors to inform them that he had been "flooded with letters" complaining about poaching. While not crystal clear, the crux of his message was that workers could not switch companies without following procedures; his email cited provisions of the contract that required contractors to follow installation regulations and to obtain proper badges or credentials for its workers. He cautioned them that workers could not switch companies until they had been properly badged for the new company. He also stated that AAFES had no obligation to hold positions open for either the contractors or the workers. (App. supp. R4, tab 90 at 2748-49)

31. Similarly, on May 23, 2013, CO Blake wrote to the MPA contractors to advise them that they "do not have the right to literally **transfer** employees from their contract to another MPA company or vice versa" (app. supp. R4, tab 37) (emphasis in original). She reminded the contractors that AAFES needed to know who employed the workers in its facilities and that "there is a lot of administrative paperwork tied to your employees within the military systems." She also stated that contractors could not grow their businesses at the expense of safety and security. (App. supp. R4, tab 37)

32. The record also indicates that human trafficking was an issue in Afghanistan. The Army was concerned that if procedures requiring new employees to report to a deployment center before arriving in country were not followed, human traffickers would bring workers into the theater with the goal of obtaining employment from an MPA contractor. (App. supp. R4, tab 36)

33. Despite complaints by Zalzar, the contracting officer refused to intervene in poaching disputes if the employee followed procedures in switching companies (app. supp. R4, tab 45 at 0328).

Termination

34. After she became contracting officer in 2013, one of Ms. Blake's first actions was to allow 13 of the 28 MPA contracts to expire. She extended 15 contracts, including Zalzar's. (Tr. 2/99; R4, tab 14)

35. On March 14, 2013, CO Blake wrote to Zalzar, requesting it sign the contract extension. Although Zalzar was one of the surviving contractors, she left no doubt that more reductions were coming due to the drawdown of American forces in

the region, advising Zalzar: "[p]lease understand that as our presence in these contingency areas continues to shrink, so will our needs for contractor employees" and that AAFES would continue "to phase out our contractor employees." (App. supp. R4, tab 71)

36. In April 2013, CO Blake offered Zalzar the opportunity to obtain additional work by referring it to an opportunity with the Navy Exchange (NEXCOM) in Dubai and offering to amend the contract to add the "sister exchange" clause so that NEXCOM could order using this contract (R4, tab 75 at 1005-06). On May 23, 2013, the parties executed a bilateral amendment to the contract adding the sister exchange clause (R4, tab 15).

37. During her testimony, Zalzar's CEO, Ms. Seiitbeck, seemed to question whether a drawdown occurred, referring to it as "a legend" (tr. 2/62-63). But as CO Blake convincingly testified, "[t]he number of MPA contracts in contingency decreased because the military decreased. And any time the military decreases, we decrease . . . . we're only as large as what is needed to support the military" (tr. 2/129).

38. In December 2013, CO Blake received instructions from AAFES headquarters to reduce manpower costs. She formed a committee that included representatives from her office, general managers, area managers, the military commander, and the finance and accounting office. (Tr. 2/129-33) The committee first looked at coverage, meaning which contractors could cover all of the countries, and then at the cost per hour of the contractor (tr. 2/134). CO Blake also had to take into account that forces in Kuwait would not be reduced and two contractors servicing that country would have to be retained (tr. 2/135-36). Further, she determined that the contractor Asia Logistics Company (Asia Logistics) was one of the only contractors that could serve all countries and was an economical option for retention (tr. 2/136).

39. CO Blake received input from the committee members as to which contractors should be retained. With respect to Zalzar, she took into account a price increase request submitted by Zalzar and the administrative time required by its contract (R4, tab 111). While there was some differences of opinion among the committee members as to which contractors should be retained, no one advocated for Zalzar (R4, tabs 111-18). As a result of the process, CO Blake determined that she would terminate nine of the remaining contractors, including Zalzar (tr. 2/136; R4, tabs 22, 120-27). As described above, CO Blake issued the termination notice to Zalzar on May 23, 2014, terminating the contract effective June 30, 2014 (R4, tab 22).

40. Zalzar was responsible for the costs of transporting the workers out of the country at termination, the costs of which were included in the 22 costs itemized in the contract (R4, tab 1 at 21). Thus, if Zalzar did not have to pay these costs, Zalzar would benefit financially.

41. While AAFES reduced the number of MPA contracts, it still needed workers because its stores did not immediately close and it wanted to be able to keep the best workers even if their employer had been terminated (R4, tab 116). As a result, in June 2014, AAFES discussed with Zalzar releasing certain associates from their contracts. (R4, tab 137) This not only benefited AAFES, but it also offered a potential benefit to Zalzar by saving its return air fare for which it had already been compensated through the hourly rates (as discussed further below in the military air appeal). Thus, we do not consider this evidence of bad faith on the part of AAFES, notwithstanding Zalzar's contentions to the contrary.

42. On July 8, 2014, Zalzar submitted a certified claim seeking $471,084.54 for the alleged improper administration and bad faith termination of the contract (R4, tab 28). The contracting officer denied the claim on September 29, 2014 (app. supp. R4, tab 70). Zalzar filed a timely appeal that the Board docketed as ASBCA No. 59616.

43. Zalzar contends that "AAFES's termination of Zalzar was primarily motivated by improper favoritism of Asia Logistics and disdain for Zalzar" (app. br. at 3).

44. The record shows that, while Asia Logistics was one of the six surviving contractors, it was not spared from the drawdown. In November 2013, Asia Logistics had 179 TCNs in Afghanistan (app. supp. R4, tab 35). By May 31, 2014 (the month of the Zalzar termination), this number had fallen to 147 and by December 31, 2014, Asia Logistics had only 107 TCNs (R4, tabs 140, 147). (Asia Logistics had no LNs during this period).

45. At the hearing, Zalzar increased the claim to $1,284,930 including $985,307 in lost profits due to the alleged poaching of its workers. The remainder involves damages related to the termination: $244,091 in lost profits from July 1, 2014 to December 31, 2015 (the contract expiration date before termination); $48,915 in non-refundable costs for leasing office space and apartments; and $6,617 in losses on new workers it hired but who were unable to start work due to the termination. (App. ex. 3, B1 at 14-18, add. at 2-3).

46. The calculation of $985,307 in lost profits due to worker poaching is what might be loosely called a total cost claim. Zalzar's expert did not verify that the workers Zalzar included in the lost profits calculation had left due to poaching. She testified that she understood that they had left "primarily" for this reason. Thus, she did not remove from the calculation any worker who simply left exchange employment (such as at the end of his contract), nor any employees who were terminated by Zalzar. Nor did she account for the overall decrease in workers due to the drawdown. (Tr. 1/165-67) Thus, the calculation is overstated by an unknown amount.

DECISION

Zalzar's claim for $985,307 related to the poaching of its workers by other contractors is not well received by the Board. We find it unsurprising that workers making as little as $2.00 per hour in a war zone were receptive to offers of better pay from other companies. Zalzar had no basis to expect AAFES to help maintain such a status quo and the contract had alerted Zalzar that compensation raises would be its responsibility (finding 28). It would have been unconscionable for AAFES to cooperate with Zalzar's efforts to claim permanent ownership of these workers and restrict them to the wages Zalzar chose to pay.

Zalzar's claim is based in part on a misunderstanding of the communications from the contracting officers in which they tried to maintain some order over the movement of workers among contractors. To the extent AAFES regulated the flow of workers, it arose from its goals of maintaining security by ensuring that the workers were properly vetted, badged, and tracked, and preventing human trafficking, rather than a desire to help contractors cap wages at a low level (findings 30-32).

Zalzar's claim is also based on a misreading of the contract. As we have found, the contract gave AAFES a great deal of flexibility in increasing or decreasing the number of workers and positions, hardly a surprising feature for temporary workers in a war zone. The contract did not parcel out slots to contractors and if, for example, a worker quit, the contractor could only replace the worker if AAFES requested it do so, and, even if AAFES requested a replacement, AAFES retained the right to select a better candidate from another contractor. (Finding 25) AAFES did not assume any responsibility under the contract to protect Zalzar from competitors who bid rates high enough to offer better wages.

Zalzar cites deposition testimony from former COR Phyllis Taylor who testified that a "position belonged to that MPA manpower agency" (app. ex. 1 at 134). But there is no basis in the contract for this. While there may have been an informal practice to give contractors the first chance to replace one of their workers who had departed, this does not compel the conclusion that the position "belonged" to that contractor.

We have scoured Zalzar's briefs in vain for some explanation of the contract terms violated by AAFES. It instead falls back on the implied duty of good faith and fair dealing. But AAFES' actions were consistent with the express terms of the contract, and were not unfaithful to an agreed common purpose or the justified expectations of either party. *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014). As the Federal Circuit has held, the implied duty of good faith cannot overcome a fixed price contract's allocation to the contractor of the risk that prices may rise. *Lakeshore Eng'g Servs, Inc. v. United States*, 748 F.3d 1341, 1349

(Fed. Cir. 2014); *see United States v. Beuttas*, 324 U.S. 768, 772-73 (1945) (government did not breach the implied duty not to hinder the foundation contractor or to increase costs of performance when it let for bids a subsequent contract on the same project with higher wages that resulted in a strike by the plaintiff's workers until it agreed to pay the higher wages).

Zalzar's claim is, however, contrary to the government's justified expectations in entering a fixed price contract. The government reasonably expected that Zalzar was competent to judge labor rates in the market and its bid was a representation that it could perform for the fixed rates over the five-year term of the contract. Zalzar is essentially contending that the government could only receive the benefit of the fixed rates if it conspired with contractors to artificially deflate wages by restricting free movement of workers. This is not consistent with the allocation of risk in a fixed price contract.

Finally, even if Zalzar had proven entitlement, the amount is inflated by a significant amount (finding 46). Accordingly, we hold that it has not proven damages to a reasonable degree of certainty. *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 833 (Fed. Cir. 2010).

As for the bad faith termination claim, Zalzar faces two enormous hurdles: the language of the contract and the cold math imposed by the drawdown. In the contract, AAFES bargained for maximum flexibility in increasing or decreasing the workforce while assigning maximum risk to the MPA contractors. By signing the contract, Zalzar accepted all business risk, including lost income, of operational changes and termination (finding 27). By 2013, Zalzar had been performing for more than a decade (finding 1) and it must have realized that the war could not go on forever. Nevertheless, Zalzar is unhappy because the risk it freely accepted – the drawdown of forces and termination – finally came to pass.

Contracts with a Federal Acquisition Regulation (FAR) termination for convenience clause allow the government to terminate contracts for convenience without being held liable for breach and required to pay the contractor lost profits on the termination. A narrow exception to this rule is if the contractor can show that the government acted in bad faith, a heavy burden contractors have rarely been successful in meeting. *Nexagen Networks, Inc.*, ASBCA No. 60641, 19-1 BCA ¶ 37,258 at 181,328 (citing *Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996)).

As described above, the clause in this contract was not a termination for convenience clause but was broader in the sense that it gave both parties the right to terminate without cause. The Board has stated that the right to terminate in this clause is "unfettered" and the motive of the terminating party is "immaterial." *Christine Turner*, ASBCA No. 26900, 84-1 BCA ¶ 17,138 at 85,381. We have nevertheless

considered whether the AAFES contracting officer acted in bad faith in terminating the contract similar to a termination for convenience. *Id.*; *Jarke Corp.*, ASBCA No. 43509, 93-2 BCA ¶ 25,866 at 128,696.

Zalzar has not met its heavy burden of proving bad faith. Despite suggestions to the contrary by its CEO, the drawdown was real and it forced the contracting officer to sharply reduce the number of contractors (findings 35, 38). We understand that Zalzar is unhappy with the result, but it was 1 of 22 contractors that either were not extended or were terminated by CO Blake (findings 34, 39). The record demonstrates that CO Blake went through a rational process of gathering input from various DoD stakeholders in determining which contractors to retain. Unlike other contractors, there was no compelling reason to retain Zalzar. (Findings 38-39)

In addition, the CO's extension of the Zalzar contract in 2013 and her offer of work with NEXCOM are affirmative evidence of good faith (findings 34, 36). The evidence is wholly insufficient to conclude that AAFES officials were engaged in a conspiracy to take work from Zalzar and funnel it to Asia Logistics.

Zalzar has made a variety of other allegations concerning the contracting officer's alleged bad faith that are not directly tied to a damages calculation but are intended to show an overarching pattern of bad faith. We have considered them but find that they do not prove bad faith on the part of the contracting officer. For example, Zalzar alleges that CO Blake failed to take action when workers complained about working conditions (app. br. at 56-57). But she testified convincingly that she was not the first line of contact for such a complaint and she put Zalzar in touch with the appropriate COR (tr. 2/125). In addition, while Zalzar has nothing to say in its briefs about the NEXCOM opportunity in Dubai, it complains that CO Blake did not properly assist it in pursuing opportunities in Egypt and Jordan (app. br. at 55-56). The limited documentation in the record (app. supp. R4, tabs 41-42) does not support a finding of bad faith.

ASBCA No. 59616 is denied.

Price Increase Claim (ASBCA No. 60053)

47. This appeal arises from a certified claim Zalzar submitted on May 1, 2015 seeking increases to its hourly rates totaling $602,359.49 (R4, tab 34). The contracting officer denied the claim on July 1, 2015 (R4, tab 36). Zalzar filed a timely appeal on July 2, 2015 that the Board docketed as ASBCA No. 60053.[8]

[8] Similar to the logistics fee claim, Zalzar may have submitted an earlier claim to the contracting officer (app. supp. R4, tab 25) that it appealed based on a deemed denial and the Board docketed as ASBCA No. 59548. AAFES contended in its

48. At the hearing, Zalzar reduced the claim to $246,852. As re-calculated by its expert, Zalzar seeks increases in the hourly rates for Afghanistan and UAE workers from September 16, 2013 to June 30, 2014 (R4, tab 34 at 1; app. ex. 3, B2 at ex. 4.1). Zalzar requested various rate increases including the following category one changes: Afghanistan LNs from $4.73 to $9.01; Afghanistan TCNs from $7.68 to $8.58; and UAE TCNs from $10.10 to $13.87 (R4, tab 1 at 23-24, 26; app. ex. 3, B1 at 20, 23, 26).

49. As discussed below, the claim is based largely on events that happened before the contract extension, meaning that Zalzar knew about the costs before it agreed to an extension at the same rates. Zalzar's expert addresses this curiosity in her report by stating that "Zalzar alleges that the Contracting Officer did not allow Zalzar to propose updated hourly labor rates as a part of its contract extension" (app. ex. 3, B1 at 19).

50. The Board has reviewed the record but has found nothing that indicates that the contracting officer prevented or discouraged Zalzar from requesting a rate increase before the contract extension.

51. The largest component of the claim stems from wage increases that Zalzar contends it incurred "[b]eginning in 2012" to stave off poaching attempts by its competitors (app. br. at 22; tr. 1/107; *see* app. ex. 3, B2 at tab 4B (spreadsheets itemizing claim)). As calculated by AAFES' expert, when items such as pension that are based on a percentage of wages are taken into account, the wage increase makes up 65-70% of the claim amount (tr. 3/57).

52. Somewhat confusingly, the wage increase is not based on the difference between Zalzar's bid and the actual wages it paid its workers but rather on what its competitors, primarily Asia Logistics, paid their workers. Ms. Seiitbek used her knowledge of the industry in specifying the claim rates. (App. ex. 3 at 20-21) It is unclear why Ms. Seiitbek would have a better grasp of Asia Logistics' wages than Zalzar wages.

53. We have not found a direct explanation for the methodology, but we surmise that it relates to the unavailability of Zalzar's financial documents, a circumstance that Ms. Seiitbek has variously blamed on Zalzar's accountants and the "Kyrgyz KGB" (tr. 2/80-81). During discovery, the government attempted to obtain documents from Zalzar that would demonstrate the amounts paid to its employees, but Zalzar failed to provide responsive documents (tr. 3/150-51; R4, tab 148 at 24-27). The Board finds that Zalzar has not proven its increased costs related to poaching.

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answer that it had not received it (answer at 4), which led to the May 1, 2015 claim. We deny ASBCA No. 59548 as moot.

54. As for the remaining elements of this claim, we would characterize the information provided by Zalzar during the hearing and in its briefs as modest and the government's defense as close to nonexistent. The items that Zalzar discusses in its brief are: new medical screening requirements; expenses that arose after workers were no longer able to collect their pay at a military "cash cage"; and changed background check requirements (app. br. at 77-79).

New Medical Screenings

55. On July 25, 2010, COR Taylor forwarded to contractors a memorandum she described as containing "the new medical requirements for badging on military installations" (app. supp. R4, tab 97 at 2767). The memorandum applied to Afghanistan LNs (*id.* at 2769). Despite her reference to "new medical requirements" it is not clear from the memorandum if the requirements changed or if it was the method of screening that changed due to the expiration of a vendor contract. However, a later email from COR Taylor to contractors in October 2010 suggests that there were new screening and/or immunization requirements (app. supp. R4, tab 99 at 2776).

56. Zalzar's expert calculates a claim amount of $.20/hour for Afghanistan LNs based on two screenings per year at $250 each (app. ex. 3 at 21). However, the memorandum forwarded by COR Taylor (app. supp. R4, tab 97 at 2769) required one screening before issuance of a base access badge and then annual screenings thereafter. Moreover, in her analysis of the Afghanistan TCNs, the expert observed that while Zalzar was claiming for two medical screenings per year, the requirement was for only one screening. Thus, she reduced the claim amount from $0.26/hour to the actual cost for one screening of $0.07/hour. She did not address the discrepancy in the claimed number of screenings. (App. ex. 3, B1 at 24)

57. Zalzar also seeks $0.08/hour for medical care of UAE employees back in Kyrgyzstan (app. ex. 3 at 26). However, this does not appear to be related to increased screening or immunization requirements but rather a decision by Zalzar that medical care was cheaper in Kyrgyzstan than the UAE (tr. 2/87-88). The contract placed responsibility for medical care and medical insurance on Zalzar (R4, tab 1 at 21).

Cash Cage

58. This part of the claim stems from two emails in February 2010. On February 12, Ms. Seiitbek wrote to Western Union, or more specifically to wu-governmentsanctions@intl.westernunion.com. The email is lengthy but started with a description of Zalzar's contract with AAFES in what appears to be an attempt to establish that it was a legitimate business. In the second paragraph, she stated that most Western Union offices in Bishek, Kyrgyzstan, had prohibited money transfers to Afghanistan and that this was a problem for her company and its workers because

"banking services are not well developed or not easily available" in Afghanistan and that most transactions are done in cash. (App. supp. R4, tab 92 at 2755)

59. The third paragraph of the email grew more specific and turned to a somewhat different problem than a blanket prohibition on transfers. Ms. Seiitbek stated that Zalzar's cashier had been blacklisted by Western Union because "he was making too many payments." She asserted that Zalzar was "not involved in any suspicious activity" and requested that his name be removed from the blacklist. (*Id.*)

60. Finally, Ms. Seiitbek stated that there were "other money transfer systems we may use that provide services similar to yours" but stated that Zalzar preferred to use Western Union because each AAFES facility has a Western Union office (*id.* at 2756).

61. Ms. Seiitbek copied on the email, among others, COR Taylor. Ms. Taylor responded two days later with something of a non sequitur, stating, in total, "Leia, I told you last year to get bank accounts for your workers, the military is going to no cash, they have issued so [sic] you might as well get the bank accounts." (*Id.* at 2754)

62. The contract provided that the contracting officer "[i]s the person who can contractually commit AAFES. All contract changes and notices of major contract violations (default) must come from the contracting officer." (R4, tab 1 at 6)

63. At the hearing, Ms. Seiitbek testified that after receiving COR Taylor's email, Zalzar set up bank accounts for its workers at a cost of $35 per person (tr. 1/105-06). However, in her report, Zalzar's expert stated that the claim was based on a fee of $35 per person per month for bank transfers, which amounted to an increase of $0.17/hour (app. ex. 3, B1 at 21, 25, 27). The expert included the $0.17 charge for UAE workers (*id.* at 27) but there is no evidence that Western Union barred money transfers to the UAE.

64. In its brief, Zalzar also cites testimony from COR Taylor, who did not address the Western Union issue but she stated that there was "a lack of funds generated with the military" and there was not enough money in the cash cage to pay MPA workers (app. ex. 1 at 110-11). Piecing this together, we infer that the cash cage was instrumental in converting the Western Union transfers into cash, or at least that is what Ms. Taylor believed.

65. The Board finds that Zalzar's explanations for the claim (Western Union's refusal to transfer money to Afghanistan and the lack of funds in the cash cage) are inconsistent and the most plausible is the one presented at length in Ms. Seiitbek's February 12, 2010 email, namely the Western Union explanation. However, based on COR Taylor's statement that "the military is going to no cash," it appears that this

might have become a problem if Western Union had not blocked the transfers to Afghanistan.

66. The contract did not mention Western Union or place any obligations on AAFES to facilitate Zalzar's payment to its employees. The costs for which Zalzar was responsible under the contract included administrative costs (R4, tab 1 at 21).

Enhanced Background Checks

67. Contract exhibit D, Wage and Fee Schedule, included employee background checks in the 22 items for which Zalzar was responsible (R4, tab 1 at 21). Similarly, contract exhibit C, Special Provisions, provided "Contractor will provide (at their expense) fully qualified employees that have received security screening . . . . In accordance with Paragraph 1, Employee Costs, of Exhibit D, Wage and Fee Schedule, it will be the contractor's responsibility to provide this at no additional charge to AAFES." (*Id.* at 16) The contract did not describe in detail the nature of the background checks at the time of award.

68. On February 10, 2011, COR Taylor wrote to MPA contractors stating:

> Ladies and Gentlemen,
> I need to bring some new regulations to your attention about the documents presented by your associates for badging purposes.
> **Background Checks**
> Background Checks must now be country wide back ground checks and must be able to be verified through the internet.

(App. supp. R4, tab 103 (emphasis in original))

69. When asked by Zalzar's counsel whether this email imposed new background check requirements, Ms. Taylor testified: "I wouldn't say it was a new requirement, but it was a requirement to make sure that the background checks were not forged" (app. ex. 1 at 112).

70. Ms. Seiitbek testified that Zalzar had to "upgrade the background checks to inspire more comfort on the base" and that it had to do them "through a notary office with an English translation. And, that severely increased the expenses of the documentation." (Tr. 1/106-07)

71. Zalzar did not provide a quantification of the allegedly increased costs of background checks during the hearing or in its briefs. The Board has plumbed the

depths of both volumes of Zalzar's expert report and has found spreadsheets calculating that background checks for Afghanistan and UAE TCNs increased from $0.01/hour as bid to $0.08/hour (app. ex. 3, B2 at exs. 4.7 to 4.16, tab 4B at Afghanistan TCN and UAE TCN spreadsheets).

DECISION

The Board denies the wage increase portion of this claim for the same reasons as in No. 59616 above. This was a fixed priced contract and, if it did not bid prices high enough to retain workers, that was Zalzar's problem, not AAFES's. Certainly, it should not have agreed to an extension of the contract if it viewed its fixed prices as inadequate.

In the June 10, 2014, claim letter that preceded the filing of ASBCA No. 59548, Zalzar stated:

> Salaries for [Afghanistan] local nationals (LN) have gone up since 2008. The local population is demanding higher and higher salaries as the years go by. Zalzar FZE needs to be able to pay a fair and competitive salary to its' local national workers. In almost every case we are currently paying a higher hourly rate to our workers then [sic] what we are charging to AAFES.

(App. supp. R4, tab 25 at 0203) This letter indicates that Zalzar simply miscalculated what it would have to pay workers, a risk that it faced on a fixed price contract. But whether poaching or the changing expectations of Afghan workers was the root cause of the higher wages is irrelevant. As the Federal Circuit has stated, "[t]he essence of a firm fixed-price contract is that the contractor, not the government, assumes the risk of unexpected costs." *Lakeshore*, 748 F.3d at 1347.

Zalzar's claim with respect to the cash cage is denied. The government did not bear the risk of a change in practice by Western Union in its Kyrgyzstan offices. COR Taylor had no authority to order Zalzar to open bank accounts for its workers and her reference to bank accounts did not make any sense in response to an email about Western Union's prohibition on money transfers. The contract did not require AAFES to take any action to facilitate Zalzar's payments to its workers, such as making a cash cage available.

Finally, Zalzar has made a plausible showing of increased costs for medical screenings and background checks, especially in light of the lack of a defense from the government. We find that Zalzar has demonstrated that it is entitled to an additional $0.07/hour for medical screenings for its Afghanistan LNs and TCNs. It is entitled to

an additional $0.07/hour for increased background check requirements for Afghanistan and UAE TCNs. Both amounts are due for the entire claim period, that is, from September 16, 2013 to June 30, 2014. We remand to the parties for calculation of the precise amount owed.

Military Air (ASBCA No. 59545) and Commercial Air (ASBCA No. 59546)

72. One of the expenses for which Zalzar was responsible under contract exhibit D was transportation, including transportation from the installation upon termination, and vacation/home leave transportation (R4, tab 1 at 21).

73. As discussed above, Clause C7 directed contractors to take into account various factors when they formulated their cost proposals. The clause highlighted the availability of military air:

> The contractor should consider the services currently provided when submitting their cost proposals to AAFES. . . . The contractor employee, if authorized, may use Military Air flights, however, the contractor shall be responsible for reimbursing the military (through AAFES) for these costs. The contractor will be responsible for all other costs associated with the employee. This includes but is not limited to the cost of transportation to and from the installation.

(R4, tab 1 at 17) (emphasis omitted)

74. There is no dispute that for most of the contract Zalzar was able to take advantage of military air between Manas Air Base in Kyrgyzstan and Afghanistan. But on February 19, 2014, AAFES notified all contractors that they would no longer be able to use military air at Manas as of February 28, 2014 (R4, tab 16).

75. On April 7, 2014, Zalzar submitted a certified claim seeking $6,216.45 for the cost of transporting eight workers on commercial air after the February 28, 2014 closure of Manas. It alleged that military air through Manas had been the sole transportation method it had used between Kyrgyzstan and Afghanistan during the contract. Zalzar calculated the claim by taking the $8,048.45 price of the commercial flights and subtracting from it the $1,832 price it alleged was the military airfare in 2008. Zalzar also requested $190 for shipping individual body armor and a helmet. (R4, tab 20 at 3, 6-7)

76. On May 30, 2014, Zalzar submitted a certified claim seeking $330,208 for increases in the cost of military air from May 2009 through March 2014. According to

the documents submitted with the claim, in 2008 the military air price of flights from Manas to Bagram was $165; from Manas to Kandahar it was $245. Zalzar alleged that after 2008 the average flight cost increased by 181.41% (R4, tab 23 at 1, 3, 5).

77. The contracting officer denied the commercial air claim on June 10, 2014 but the decision was not transmitted in full to Zalzar until the following day (R4, tab 26 at 1, 29). The contracting officer denied the military air claim on July 31, 2014 (R4, tab 31).

78. Zalzar filed a timely appeal of both claims on September 9, 2014.

79. At the hearing, Zalzar increased the military air claim to $351,540 based on the analysis of its expert, and reduced the commercial air claim by $5 to $6,211 (app. ex. 3 at 7).

80. Zalzar's expert increased the military air claim by correcting some calculation errors in a spreadsheet. She also included a decrease of $492 due to inadequate documentation on the flight route of Kandahar to Pasab to Manas. (App. ex. 3 at 30) AAFES's expert found a greater decrease for this route and recalculated the claim value as $343,988 (R4, tab 148 at 10).

81. In its 2008 bid, Zalzar included $0.39/hour for transportation costs (app. supp. R4, tab 79; R4, tab 150 at 2). AAFES' expert determined that Zalzar spent a total of $651,584 in military airfare. AAFES' expert multiplied the hours invoiced by Zalzar, as accumulated and submitted with the logistics fee claim, by the $0.39 bid cost, finding that Zalzar recovered $567,370 from AAFES for the flight costs. (R4, tab 148 at 6-7, tab 150 at 2) Thus, Zalzar lost $84,214 on military air.

DECISION

The Board holds that Zalzar has established entitlement. AAFES bases its defense upon the fixed price nature of the contract and clauses that required it to pay for transportation as a component of its hourly rates, as well as the clause placing business risk on Zalzar (findings 27, 72). Neither the fixed price nature of the contract nor Zalzar's responsibility for transportation precludes a cost increase. A general clause that places business risk upon Zalzar does not overcome the more specific Clause C7 which directed contractors to base their bids on the relatively low military air prices that were available in 2008 (finding 73). *Hometown Fin., Inc. v. United States*, 409 F.3d 1360, 1369 (Fed. Cir. 2005) (citing *Hol-Gar Mfg. v. United States*, 351 F.2d 972, 980 (Ct. Cl. 1965) ("where an agreement contains general and specific provisions which are in any respect inconsistent or conflicting, the provision directed to a particular matter controls over the provision which is general in its terms").

AAFES cites *Weatherford Group, Inc.*, ASBCA No. 59315, *et al.*, 15-1 BCA ¶ 36,143, which bears some similarity to these appeals because it also involved a military air claim for flights to Afghanistan. But the issue in that appeal was whether the contractor was entitled to free air fare, a dispute entirely dependent on the specific language of the contract and a contention that Zalzar has not made in these appeals. *Weatherford Group* is inapposite.

A somewhat more difficult question is the proper measure of damages. Other than some relatively small corrections by its expert, AAFES does not challenge the basic fact that military air rates increased by about 181% over the course of the contract. As described above, AAFES' expert contends that Zalzar would receive a windfall if the Board awarded the amount sought by Zalzar because its actual losses were only $84,214 based on an analysis of its wage rates (finding 81). Interestingly, however, AAFES does not pursue this defense in its post-hearing brief.

The Board concludes that the proper measure of recovery is the $343,988 increase from the anticipated cost at bid (finding 80). In other words, we believe that the proper approach under these facts is to award damages based on Zalzar's expectation interest or the interest in having the benefit of its bargain by being put in "as good a position as he would have been in had the contract been performed." *Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348, 1355 (Fed. Cir. 2001) (quoting RESTATEMENT (SECOND) OF CONTRACTS, § 344 cmt. a (1981). The damage that Zalzar would suffer if it bid based on 2008 rates as directed by AAFES but the military then sharply increased those rates was entirely predictable and ascertainable. Because AAFES cannot have its cake (2008 rates) and eat it too (disclaiming responsibility for increases in those rates) we award Zalzar its damages.

For the same reasons, we award Zalzar its commercial air claim of $6,211, the costs for which have not been challenged by AAFES. The increased costs of commercial flights to Afghanistan were entirely predictable and ascertainable if Zalzar bid the contract based on the 2008 rates but the military air service was thereafter terminated.

CONCLUSION

We deny ASBCA No. 60054 and ASBCA No 59616. ASBCA No. 60053 is sustained in part. ASBCA No. 59545 and ASBCA No. 59546 are sustained.

Dated: May 6, 2020

MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

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 Nos. 59545, 59546, 59616, 60053, 60054, Appeals of Zalzar FZE, rendered in conformance with the Board's Charter.

Dated: May 12, 2020

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