ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Dawkins General Contractors & Supply, Inc. | ) | ASBCA No. 48535 |
| | ) | |
| Under Contract No. NAS3-26528 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE ROME

Appellant Dawkins General Contractors & Supply, Inc. (Dawkins)[1] appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 605, 606, from the contracting officer's (CO's) denial and deemed denial of its claims under its National Aeronautics and Space Administration (NASA) construction services contract, including its claim for unpaid invoices. The parties dispute whether the contract was essentially a fixed-price or a time-and-materials contract. At the hearing, which covered entitlement only, the Government asserted that the Board lacked jurisdiction on the ground that appellant was advancing a new claim that it had not submitted to the CO. The issue was left for resolution post-hearing. The parties entered into certain stipulations of fact, cited in our findings. For the reasons that follow, we deny the Government's motion to dismiss for lack of jurisdiction and we deny the appeal.

FINDINGS OF FACT

1. On 10 January 1992, NASA issued a Request for Proposal (RFP) to Dawkins pursuant to the Small Business Administration's (SBA's) 8(a) program, 15 U.S.C. § 637(a), for general construction services at the Lewis Research Center (LeRC)[2] in Cleveland, Ohio (ex. G-1).

2. Attachment I to the request letter provided:

D. Type of Contract

> The contract will be a Task Order/Time and Material type contract. The Government will issue orders for work (description of services required, period of performance, etc.). The Contractor in turn will submit labor hours required (which will be at a fixed price). The Contractor will also submit material and equipment costs. The material and equipment costs will be on a cost-reimbursement basis.

(Ex. G-1 at 2)

3. Per RFP § L.20A.1., the offeror was to submit "hourly rates for each of the disciplines required to provide the services" (ex. G-1 at 94, ¶ 1). The "[h]ourly rates" were to be "fully loaded to include base rate, payroll markup (fringe benefits, taxes and insurance), overhead, and profit" (*id*., ¶ 1.(a)). Materials and equipment rental were to be "on a cost-reimbursement basis with no mark-up allowed" (*id*., ¶ 1.(b)). Cost breakdowns with supporting data were to be provided for each loaded "hourly rate" (*id*., ¶ 1.(c)).

4. The RFP and Part I of the subsequent contract, "The Schedule," incorporated by reference the Federal Acquisition Regulation (FAR) 52.246-6 INSPECTION--TIME-AND-MATERIAL AND LABOR-HOUR (JAN 1986) clause (Time-and-Materials Inspection clause) (R4, tab 2 at E-1, ¶ E.3; ex. G-1 at 10), required by FAR 46.306 TIME-AND-MATERIAL AND LABOR HOUR CONTRACTS as amended effective 20 January 1986, 48 C.F.R. § 46.306 (1986), to be inserted in solicitations and contracts when a time-and-materials contract is contemplated.

5. The RFP and Part II of the contract, "Contract Clauses," incorporated by reference the FAR 52.215-2 AUDIT - - NEGOTIATION (DEC 1989) clause (Audit clause) (R4, tab 2 at I-1; ex. G-1 at 41), applicable to negotiated time-and-materials, fixed-price, and most other types of negotiated contracts (*see* FAR 15.106-2 Audit—Negotiation clause, 48 C.F.R. § 15.106-2 (1984)), which provides in part:

> (a) *Examination of costs*. If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor shall maintain - - and the [CO] or representatives of the [CO] shall have the right to examine and audit - - books, records, documents, and other evidence and accounting procedures and practices . . . sufficient to reflect properly all

> costs claimed to have been incurred or anticipated to be incurred in performing this contract.

They also incorporated FAR 52.233-3 PROTEST AFTER AWARD (AUG 1989) (R4, tab 2 at I-3; ex. G-1 at 43), required for time-and-materials, fixed-price and other contracts (*see* FAR 33.106 SOLICITATION PROVISION AND CONTRACT CLAUSE as amended effective 20 June 1985, 48 C.F.R. § 33.106 (1985)) and numerous other clauses applicable to time-and-materials and to other types of contracts, including cost-reimbursement and fixed-price (*e.g.*, R4, tab 2 at I-1 - I-3; ex. G-1 at 41-43).

6. The RFP and contract did not contain or incorporate the FAR 52.232-7 PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (APR 1984) clause (Time-and-Materials Payments clause), required by FAR 32.111(b) CONTRACT CLAUSES as amended effective 20 January 1986, 48 C.F.R. § 32.111(b) (1986), to be inserted in solicitations and contracts when a time-and-materials contract is contemplated. The Government contends that the clause should be incorporated into the contract by operation of law under the "*Christian* doctrine" (*see G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl.), *reh'g denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963)). The Time-and-Materials Payments clause provides in part:

> The Government shall pay the Contractor as follows upon the submission of invoices or vouchers approved by the [CO]:
>
> (a) *Hourly rate*. (1) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed. The rates shall include wages, indirect costs, general and administrative expense, and profit. . . . The Contractor shall substantiate vouchers by evidence of actual payment and by individual daily job timecards, or other substantiation approved by the [CO]. Promptly after receipt of each substantiated voucher, the Government shall, except as otherwise provided in this contract, and subject to the terms of (e) below, pay the voucher as approved by the [CO].
>
> . . . .
>
> (b) *Materials and subcontracts*. (1) Allowable costs of direct materials shall be determined by the [CO] in accordance with Subpart 31.2 of the [FAR] in effect on the date of this contract. Reasonable and allocable material handling

costs may be included in the charge for material to the extent they are clearly excluded from the hourly rate. . . .

. . . .

(2) The cost of subcontracts that are authorized under the subcontracts clause of this contract shall be reimbursable costs under this clause . . . . Reimbursable costs in connection with subcontracts shall be limited to the amounts paid to the subcontractor in the same manner as for items and services purchased directly for the contract under subparagraph (1) above; however, this requirement shall not apply to a Contractor that is a small business concern. Reimbursable costs shall not include any costs arising from the letting, administration or supervision of performance of the subcontract, if the costs are included in the hourly rates payable under (a)(1) above.

. . . .

(d) *Ceiling price*. The Government shall not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the [CO] shall have notified the Contractor in writing that the ceiling price has been increased . . . .

(e) *Audit*. At any time before final payment under this contract the [CO] may request audit of the invoices or vouchers and substantiating material. Each payment previously made shall be subject to reduction to the extent of amounts, on preceding invoices or vouchers, that are found by the [CO] not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments.

7. The RFP and contract also omitted other clauses required by the FAR to be inserted in solicitations and contracts when a time-and-materials contract is contemplated, particularly FAR 52.243-3 CHANGES—TIME-AND-MATERIALS OR LABOR HOURS (AUG 1987) (*see* FAR 43.205(c) CONTRACT CLAUSES as amended effective 15 May 1991, 48 C.F.R. § 43.205(c) (1991)) and FAR 52.244-3 SUBCONTRACTS (TIME-AND-MATERIALS

AND LABOR-HOUR CONTRACTS) (Apr 1985) (*see* FAR 44.204 CONTRACT CLAUSES as amended effective 30 April 1985, 48 C.F.R. § 44.204(c) (1985)).

8. On the other hand, the RFP and contract Schedule contained clauses, normally included in Part II (*see* FAR 15.406-1 UNIFORM CONTRACT FORMAT as amended effective 28 December 1989, 48 C.F.R. § 15.406 (1989)), that do not apply to time-and-materials contracts, but are required for fixed-price construction contracts, such as FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) (*see* FAR 36.502, DIFFERING SITE CONDITIONS, 48 C.F.R. § 36.502 (1984)) (R4, tab 2 at H-4; ex. G-1 at 21); FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) (*see* FAR 36.503 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK, 48 C.F.R. § 36.503 (1984)) (R4, tab 2 at H-5; ex. G-1 at 22); FAR 52.236-6 SUPERINTENDENCE BY THE CONTRACTOR (APR 1984) (*see* FAR 36.506 SUPERINTENDENCE BY THE CONTRACTOR, 48 C.F.R. § 36.506 (1984)) (R4, tab 2 at H-6; ex. G-1 at 23); and FAR 52.246-12 INSPECTION OF CONSTRUCTION (JUL 1986) (*see* FAR 46.312 CONSTRUCTION CONTRACTS, 48 C.F.R. § 46.312 (1984)) (R4, tab 2 at E-1; ex. G-1 at 10).

9. The RFP and Schedule also contained clauses required for both fixed-price and cost-reimbursement construction contracts, such as the FAR 52.236-5 MATERIAL AND WORKMANSHIP and FAR 52.236-7 PERMITS AND RESPONSIBILITIES clauses (*see* FAR 36.505 MATERIAL AND WORKMANSHIP as amended effective 28 December 1989, 48 C.F.R. § 36.505 (1989), and FAR 36.507 PERMITS AND RESPONSIBILITIES as amended effective 28 December 1989, 48 C.F.R. § 36.507 (1989)) (R4, tab 2 at H-5 - H-7; ex. G-1 at 22-24)[3].

10. The RFP and Part II of the contract also incorporated some clauses applicable only to fixed-price contracts, including FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989) (Fixed-Price Payments clause), FAR 52.244-1 SUBCONTRACTS (FIXED-PRICE CONTRACTS) (APR 1991); FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) (ALTERNATE I) (APR 1984); and FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 2 at I-1 - I-3; ex. G-1 at 41-43).

11. The Fixed-Price Payments clause provides in part:

> (a) The Government shall pay the Contractor the contract price as provided in this contract.
>
> (b) The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the [CO], on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the [CO]. The Contractor shall furnish

> a breakdown of the total contract price showing the amount included therein for each principal category of the work, which shall substantiate the payment amount requested in order to provide a basis for determining progress payments, in such detail as requested by the [CO].
>
> . . . .
>
> (c) Along with each request for progress payments, the contractor shall furnish the following certification, or payment shall not be made:
>
> . . . .
>
> (1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
>
> (2) Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of chapter 39 of Title 31, United States Code.

12. The RFP and Part II of the contract also incorporated or included clauses applicable both to fixed-price and to cost-reimbursement construction contracts, such as FAR 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (APR 1989) (R4, tab 2 at I-15; ex. G-1 at 55).

13. The RFP included the NASA FAR Supplement 1852.216-79 LEVEL-OF-EFFORT (FIXED-PRICE) (DEC 1988) clause (Level-of-Effort clause), required by NASA FAR Supplement 1816.207-70(a), 48 C.F.R. § 1816.207-70(a) (1989), to be inserted in fixed-price term solicitations and contracts. Under the clause, the contractor was to provide a minimum number of direct labor hours at an hourly rate. Otherwise, the contract's "fixed price" would be reduced; it would not be increased if the stated labor hours were exceeded. (Ex. G-1 at 17, at ¶ H.1(c), (d))

14. The RFP included a NASA FAR Supplement 1852.216-80 TASK ORDERING PROCEDURE (DEC 1988) clause, which stated in part that, "[w]ithin the direct labor hours specified in the Level-of-Effort clause," the contractor was to incur costs in the performance of task orders and "[n]o other costs are authorized without the express written consent of the [CO]" (ex. G-1 at 18, ¶ H.2(a)). NASA FAR Supplement 1816.307-70(d),

48 C.F.R. § 1816.307-70(d) (1989), provides that the Task Ordering Procedure clause is "applicable to both fixed-price and cost type term contracts."

15. Unlike the RFP, the contract Schedule did not include the Level-of-Effort clause (tr. 92). It included a somewhat modified NASA 1852.216-80 Task Ordering Procedure clause, which did not refer to the Level-of-Effort clause (R4, tab 2 at H-1), but still provided that the contractor "shall incur costs under this contract in the performance of task orders" and that "[n]o other costs are authorized without the express written consent of the [CO]" (R4, tab 2 at ¶ H.1(a)). Task orders were to include a "[m]aximum number of contract labor hours and other resources authorized" (*id*., ¶ H.1(c)(4)). After receipt of an order, the contractor was to submit a task plan for completing it, to include, among other things:

> (3) Direct labor hours, both straight time and overtime (if authorized), on a monthly basis by applicable labor category, and the total direct labor hours, including those in (5) below, estimated to complete the task.
>
> (4) The material estimates.
>
> (5) An estimate for subcontractors and consultants, including the direct labor hours, if applicable.
>
> (6) Other pertinent information, such as indirect costs . . . .
>
> (7) The total estimated cost . . . for completion of the task order.

(*id*., ¶ H.1(e)). The CO was to approve the task plan prior to the start of work. If an order and a plan conflicted, the order controlled. (*Id*., ¶ H.1(f), (g))

16. The RFP and contract incorporated the FAR 52.215-33 ORDER OF PRECEDENCE (JAN 1986) clause (R4, tab 2 at I-1; ex. G-1 at 41), which provides:

> Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

17. A NASA 27 May 1992 Memorandum for Record of negotiations with Dawkins and other 8(a) firms selected for different services under the same procurement, signed by CO Thomas A. Spicer and his supervising CO, Paul A. Karla, states that the contract is to be a "Task Order/Time and Material type contract" (ex. G-2 at 109, 116; tr. 80-82). It records that Dawkins, which competed with another firm for the general construction services, proposed hourly labor rates and fringe benefits based upon Davis-Bacon rates, plus about 24 percent payroll markup, 15 percent overhead, and 10 percent profit; and that its superintendent would be the full time supervisor for each job, as a direct contract charge (ex. G-2 at 112). The memorandum stated that a five percent markup was allowed on materials and subcontracts, noting:

> This rate was proposed by some firms and other firms did not propose any markup. Five percent is . . . lower than the prevailing industry rate charged; however, this being a time and material contract provides less risk than a fixed price contract. Thus, five percent is considered a fair rate.

(*id*. at 115). The memorandum recommended award to Dawkins (*id*. at 116). CO Spicer accepted Dawkins' proposed rates and negotiated the contract accordingly (tr. 47-50).

18. CO Spicer prepared the contract documents (tr. 80). He believes that it was the first time he had assembled a time-and-materials contract, but he had administered them (tr. 83). He prepared the contract by looking up clauses in the FAR, using a computer program to "spit out" clauses, and "probably" performing a general check for accuracy (tr. 84, 92). He included the provisions that pertained only to fixed-price construction contracts by mistake (tr. 93-94).

19. Effective 14 July 1992, Dawkins and NASA entered into the subject contract for construction services for routine repairs, modifications and maintenance at LeRC, for one year, with NASA options for four more. CO Karla had executed the contract on behalf of NASA on 26 May 1992; William S. Dawkins, Dawkins' president, had executed it on 24 June 1992; and the SBA's CO had executed it on 14 July 1992. The contract Schedule began with a list of the labor categories Dawkins was to supply, at stated hourly rates, plus its five percent subcontract handling fee and five percent materials markup. NASA was to issue task orders to Dawkins for services. The contract's cost estimate for the base year was $500,000, to be obligated under individual task orders. (R4, tab 2 at A-1; A-3, A-5, B-1, F-1 at ¶ F.5; stips. 1, 2)

20. The parties stipulated as follows: Dawkins' performance and NASA's payments were to be implemented under the task ordering procedure. The NASA CO and the CO's Technical Representatives (COTRs) issued work requests to Dawkins to provide estimates for work to be performed under the contract. Based upon the scope of work in the requests and the labor rates set forth under the contract, Dawkins provided to the CO or the COTRs

cost estimates to perform the work. Based upon the cost estimates, the CO issued task orders to Dawkins for the work to be performed. The CO issued and approved all task orders to Dawkins. After the work was performed under each task order, Dawkins submitted to the CO or the COTRs an invoice for payment pursuant to the task order. Between 1992 and 1994, NASA issued approximately 128 task orders to Dawkins under the contract. NASA has refused to pay Dawkins the full amount invoiced for some of the task orders. (Stips. 6-14)

21. If NASA deemed Dawkins' cost estimate to perform a task order to be unreasonably high, a reduced estimate would be negotiated and the scope of the order might change (tr. 27-28, 52).

22. Dawkins subcontracted the work to be performed under NASA's task orders. The subcontracts were placed at a fixed price and presented to NASA with Dawkins' markup. Other than task plan preparation, Dawkins performed field supervision services only. (R4, tab 42; ex. G-6 at 128, 130; tr. 26-27)

23. The task orders were issued via Optional Form 347 (10-83), "Order for Supplies or Services," prescribed by FAR 53.213(e) as amended effective 7 April 1986, 48 C.F.R. § 52.213(e) (1986), for use, *inter alia*, under existing contracts. The task orders did not describe their total amounts as "maximum" or "not-to-exceed," but provided that they were issued subject to the terms and conditions of the contract. (Ex. A-7 at 0048, § 8.B; G-6 at 140, 146, § 8.B)

24. At some point "before the contrac[t] began" (tr. 51), CO Spicer had discussed the estimating and invoicing process with Dawkins, stating that it was to generate an estimate and that, if it used subcontracts, it was entitled to a five percent markup; if it was using its own employees, it would be paid based upon actual hours worked as documented in certified payrolls. After a job was completed, Dawkins was to bill for the actual job cost, composed of its subcontractors' invoices, plus Dawkins' markup, and Dawkins' labor hours, tied to its certified payrolls. As envisioned by CO Spicer, the contractor's cost estimate, once accepted by NASA, served as the task order's maximum not-to-exceed price. (Tr. 51-53)

25. Although it is not clear whether CO Spicer's discussion occurred at the proposal stage, before Dawkins signed the contract, or after signature but before performance began, Dawkins' president, who testified at the hearing, did not dispute that CO Spicer had so instructed Dawkins. There is no evidence that Dawkins expressed any question about or disagreement with the CO's instructions at the time they were issued.

26. Other than its proposed hourly labor rates, which the Government accepted (finding 17), Dawkins' proposal is not in the record. It did not submit any documentary or testimonial evidence concerning the manner in which it interpreted the RFP prior to

submitting its proposal. Thus, there is no evidence that it relied upon its current interpretation at that time.

27. According to testimony by Dawkins' president, during the course of the contract, when specifically confronted with payment issues, NASA responded consistently with the CO's instructions. Mr. Dawkins testified that, on one or more occasions, when the labor hours expended were less than the amount in a task order, Dawkins nonetheless sought to be paid the full amount of the order, but CO Spicer or his representatives would not allow it, informing him that this was contrary to the contract as written and as it should have been bid (tr. 32-33, 37).[4]

28. Also consistently, although there is no contemporaneous documentary evidence of any unpaid extra labor hours properly allocable to a task order, Mr. Dawkins testified that the contractor once attempted to get paid more than the amount of an order when its subcontractor encountered difficulties, but NASA declined (tr. 28).

29. By unilateral modifications dated 1 and 11 December 1992, NASA increased the contract value to $2,000,000 (R4, tabs 3, 4; stips. 3, 4). Dawkins' performance during the contract's base period was satisfactory and NASA exercised its option to extend the contract for a year. A bilateral modification effective 15 July 1993, among other things, extended the contract through 14 July 1994; increased its value to $3,500,000; incorporated new wage determinations; and increased Dawkins' markup on subcontracts of $25,000 or less to 10 percent, and on subcontracts of more than $25,000 but less than $50,000 to seven percent. (R4, tab 5; tr. 53-54)

30. On 26 January 1994, based upon information CO Spicer received from a Dawkins subcontractor, he asked the Defense Contact Audit Agency (DCAA) to conduct a billing system review of Dawkins. NASA was concerned that, apart from the contractor's allowable markup, it was estimating as a subcontractor cost, and billing NASA, for more than the fixed price of its subcontract agreements, and that it might be double charging for subcontractor labor hours. (R4, tab 7 at 1; tr. 56) NASA's Letter of Audit Delegation described the contract as "Time and Materials" (R4, tab 7 at 3).

31. Commencing in early March 1994, several subcontractors alleged that Dawkins was not paying them (R4, tabs 9, 10, 13, 14; tr. 56-57).

32. On 23 March 1994, the CO returned Dawkins' 11 March 1994 $33,697.57 invoice, alleging that it had overbilled NASA (R4, tab 6). By letter to the CO dated 30 March 1994, Dawkins claimed that it was owed $40,440.60 under the contract (*id*.).

33. On 7 April 1994 CO Spicer requested that DCAA perform a Financial Capability Review of Dawkins (R4, tab 15).

34. In April 1994, NASA informed Dawkins that certain task orders were being canceled and the funds deobligated (stip. 15; *see also* R4, tabs 27, 29, 35).

35. On 6 May 1994 DCAA issued an audit report on Dawkins' invoicing for task order No. 43, Building 14, for additional supervision of on-site subcontractors and material costs (R4, tab 37). The auditors concluded that the claimed costs had not been incurred (*id*. at 2; *see also* tr. 102-05).

36. On 16 May 1994 CO Spicer asked DCAA to conduct an incurred cost audit on at least task orders Nos. 16, 20 and 43, stating that, "[a]lthough this is a time and material contract," Dawkins subcontracted the work and provided supervision only. NASA requested that DCAA review the supervision hours incurred for each task and costs incurred for each of the subcontracts. (R4, tab 42)

37. On 27 May 1994 DCAA issued its audit report on Dawkins' billing system, finding that Dawkins had inadequate accounting procedures to bill costs incurred; lacked documents or supporting rationale for subcontract charges; and, where documentation was available, Dawkins had overcharged for subcontracted work (R4, tab 49 at 2, 5-7). Dawkins had responded to a draft of the report, and to the 6 May 1994 DCAA report, *inter alia*, that it had changed personnel, and had implemented new accounting, billing and validation procedures to track and bill costs (R4, tabs 38, 44, 49 at appendix 4).

38. NASA did not exercise its option to extend the contract for a third year and it expired under its own terms on 14 July 1994 (stip. 16).

39. On 22 July 1994 DCAA issued a report concluding that Dawkins' unfavorable financial condition could jeopardize its ability to perform Government contracts (R4, tab 50 at 2, 5). Dawkins had responded to a draft of the report, in part, that some of its losses were attributable to non-reimbursement for costs incurred on NASA jobs because its accounting system was not capturing all costs; certain costs, such as task preparation, job supervision and management, were not always charged to the jobs and it was unclear whether they were chargeable; and complete general and administration expenses, and compensation for Dawkins' president's time, were never charged *(id*. at 12-13). Dawkins announced a "retroactive billing to recover properly billable costs incurred on NASA jobs from inception (July 1992)" (*id*. at 15).

40. By letter to the CO dated 9 August 1994, Dawkins submitted its "retroactive billing" for "unbilled, billable costs" of $72,934.63, for task preparation and additional management costs, plus overhead, by its estimator and its president, on jobs that had been completed by 31 December 1993 (R4, tab 52 at 1-2). Dawkins also sought $228,864.25 for amounts previously invoiced but not paid by NASA, plus interest. Dawkins listed 10 unpaid invoices, with the largest in the amount of $212,430.12, covering task order

No. 43. Dawkins also requested contract reinstatement. (*Id*.; R4, tab 52 at ex. 2; *see also* stip. 17)

41. After CO Spicer wrote to Dawkins concerning CDA claim certification requirements, on 27 September 1994, Dawkins' president certified its 9 August 1994 claim (R4, tabs 54, 56; *see also* stip. 18). The Board later ascertained that the certification had omitted a required element. Pursuant to 41 U.S.C. § 605(c)(6), it required correction of the defect and it received a proper certification on 5 May 2003. (Board corresp. file)

42. On 21 December 1994, the CO issued a final decision denying appellant's claim for $72,934.63 in task preparation and additional management costs, alleging that, under the contract, such costs were only reimbursable at an indirect rate based upon direct costs. The CO also found that the claimed costs were not substantiated. (R4, tab 61 at 1) The CO deferred his decision on Dawkins' $228,864.25 claim for amounts previously invoiced pending completion of a final audit to determine the allocability and allowability of actual costs incurred. The CO cited DCAA's 27 May 1994 audit findings of accounting inadequacies, billing discrepancies, and lack of supporting documentation. The CO also stated that the contract had lapsed when NASA did not exercise its second option and could not be reinstated. (*Id*. at 2)

43. On 17 January 1995 NASA's Office of the Inspector General (OIG) asked LeRC to refrain from audits of Dawkins while it conducted a criminal investigation of Dawkins' claims under the subject contract and another NASA contract. DCAA then suspended its incurred cost audit. (R4, tab 62; tr. 63-64)

44. On 22 March 1995 Dawkins appealed *pro se* to the Board from the CO's final decision, which it had received on 27 December 1994 (R4, tab 63; Board corresp. file).

45. On 5 October 1995 appellant, now through counsel, moved for an indefinite stay of proceedings pending completion of the OIG's criminal investigation. On 19 October 1995 the Board dismissed the appeal without prejudice pursuant to Board Rule 30. (Board corresp. file)

46. On 25 November 1996, the OIG notified CO Spicer that the criminal investigation of Dawkins had been dismissed and granted permission for an incurred cost audit. However, in January 1997, DCAA determined that records were missing or insufficient to conduct the audit. (Ex. G-7 at 280; tr. 68-70)

47. In April 1997, the CO received from the OIG a 1994 report by Chattree Associates, prepared pursuant to an SBA task order. The report reviewed Dawkins' 128 task orders from NASA. (Exs. G-6, -7 at 280; tr. 74-75) It found: (1) in almost all cases, Dawkins' invoices to NASA were the same as its accepted task order estimates; Dawkins did not invoice based upon actual labor hours or actual costs incurred; and Dawkins'

subcontractors invoiced based upon their bids as accepted by Dawkins, without adjustment for variances in labor hours or material costs; (2) Dawkins frequently used incorrect hourly rates in developing its estimates and, in almost all cases, NASA issued the task order, and paid Dawkins, based upon the incorrect rates; (3) several times, Dawkins' task order estimates and subsequent invoices to NASA incorrectly applied the five percent subcontractor handling fee to all cost elements, including to Dawkins' field supervision labor costs, and NASA paid the invoices in full, making no adjustment to exclude the markup; (4) a great number of task orders were estimated and invoiced by Dawkins, and paid by NASA, with more field supervision hours than were documented by Dawkins' certified payroll records; and (5) in particular, on six task order estimates, Dawkins inflated its subcontractor's accepted bid, both as to labor and material costs; added a five percent markup to its own field supervision costs; paid the subcontractor its bid price; but billed and was paid by NASA for the full amount of the task order as estimated. (Ex. G-6 at 131-33, 140-41, 185-92, 194-215, 217, 220, 226-28, 231, 235-36, 239, 251)

48. The Chattree report compared the amount Dawkins had billed to NASA on each of the 128 task orders with its actual subcontractor costs, including all labor, material and other charges billed to Dawkins by the subcontractor, plus Dawkins' markup, and with Dawkins' own labor hours for field supervision that were supported by its payroll records. The report also credited Dawkins with task preparation hours supported by its payroll records. (Ex. G-6 at 170-79)

49. CO Spicer accepted the resulting debit and credit amounts set forth in the Chattree report, which indicated that Dawkins had overbilled, and been overpaid by, NASA by somewhat more than $65,000 (ex. G-6 at 172-83; tr. 74-75). Of the $228,864.25 NASA had withheld from Dawkins' invoices, the CO continued to withhold $65,000 and determined to release the $163,864.25 balance, which NASA sought to deposit by interpleader in a United States District Court action brought by one of Dawkins' subcontractors (tr. 76-77).

50. By letter dated 23 January 1998, Dawkins, once again *pro se*, asked the Board to reinstate its appeal, and it did so on 30 January 1998 (Board corresp. file).

51. On 26 February 1998, Dawkins filed its complaint, which stated in part:

> 1. The original contract was written by NASA for [Dawkins] to function as a general contractor. The work to be performed was established to be completed under a T&M agreement. The contract included hourly pay rates for non-technical trades. An alternative process of pricing was established to cover limited work that would be performed by technical trades. This alternative method . . . is understood in the industry to be a lump sum or fixed price method.

> 2. [Dawkins] was to receive a nominal allowance of 5% for handling the work, typical to a construction manager. It was designed to compensate direct expenses. However, indirect expenses and profits were considered covered by the T&M work.
>
> 3. NASA's representatives controlled the method of pricing by generally assigning work, which was technical in nature and not covered under the established contractual hourly rates. For the few situations where Dawkins could have furnished direct labor, NASA's representatives directed Dawkins to obtain bids [and] turn them over to them, as in the other cases and have the work performed by another sub-tier level. In all cases, whether the work was or was not technical work, **NASA set [the final] value of each task order**. In many cases [Dawkins'] attempts to recover related expenses such as direct site administration were denied by the COTR/[CO]. In the past NASA has mixed both forms of contractual agreements in T&M and lump sum.

(Compl. at 1-2) (Emphasis in original). Alleging that NASA owed appellant for a general superintendent; project manager and executive management; invoiced but unpaid work; and administrative expense, the complaint sought $632,295, plus interest, without allocation of the amount among the items claimed (compl. at 3).

52. In its answer, the Government admitted it owed appellant $163,864.25, for amounts invoiced but unpaid, but denied that it owed anything else (answer at ¶ 18). On 26 October 1998, after its attempt at interpleader failed, the Government paid Dawkins the $163,864.25 (ex. G-10; tr. 77). In the meantime, appellant again retained counsel (Board corresp. file).

53. Appellant's hearing exhibits included invoice No. 1620, dated 12 January 1998, in the amount of $835,656.69, covering various task orders. The invoice is the culmination of monthly invoices, with the first dated May 1997, about three years after the contract ended. The invoices were backed by numerous, undated, unnumbered "revised invoices," to CO Spicer's attention. The revised invoices do not identify the alleged fixed-price of any task order and indicate that they were not based upon a fixed-price. For example, subcontractor estimates were sometimes modified upwards or downwards to cover alleged actual expenses. (Ex. A-6) CO Spicer did not recall whether he had previously seen invoice No. 1620 and the predecessors in the exhibit, but he had not seen the back-up revised invoices until Government counsel showed them to him the day before the hearing (tr. 78).

54. Appellant's president acknowledged that its 1994 claim had identified different invoices as unpaid by NASA, but said that, at the time, Dawkins did not have all of the invoices. It decided to submit what it had and to try to get back to work. It later determined that, since its claim had not been paid, it should bill NASA "for everything that they owe us." (Tr. 36-37)

55. As of the hearing, appellant now claims only that the task orders were fixed-price with respect to their specified labor hours, regardless of the hours expended; it is entitled to that fixed price; and it no longer seeks additional sums for supervision or anything beyond the unpaid amount of the orders (tr. 5, 20-21; app. br. at 1-2). It asks the Board "to decide a single issue with respect to entitlement, i.e., whether the contract between NASA and Dawkins is a fixed price or a time and materials contract under the [FAR]" (app. br. at 1).

## DISCUSSION

### I. Government's Motion To Dismiss For Lack Of Jurisdiction

The Government asserts that the Board lacks CDA jurisdiction to consider appellant's current claim because it is fundamentally different from the claim it submitted to the CO in 1994, which did not allege that task orders were fixed-price and, inconsistently, sought reimbursement for additional costs not covered by the orders (tr. 21; Gov't br. at 5-7). Appellant responds that it had billed NASA based upon the alleged fixed price of the labor hours in the task orders and that its claim to the CO for those billed amounts that NASA did not pay, and its current claim, are identical. Appellant states that it also had made an alternative request for unbilled, billable costs on a time-and-materials basis, which has no bearing upon its current claim for payment for labor hours on a fixed-price basis. (App. br. at 2-4; app. reply at 5)

Under the CDA the Board has jurisdiction over disputes based upon claims that a contractor has first submitted to the CO for decision. 41 U.S.C. §§ 605(a), 606. We lack jurisdiction over claims raised for the first time on appeal, in a complaint or otherwise. *D.L. Braughler Co., Inc. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Consolidated Defense Corp*., ASBCA No. 52315, 03-1 BCA ¶ 32,099. Whether a claim before the Board is new or essentially the same as that presented to the CO depends upon whether the claims derive from common or related operative facts. *Contel Advanced Systems, Inc.*, ASBCA No. 49073, 02-1 BCA ¶ 31,809 at 157,149; *Trepte Construction Co., Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86; *see also Placeway Construction Corp. v. United States*, 920 F.2d 903, 908 (Fed. Cir. 1990). The assertion of a new legal theory of recovery, when based upon the same operative facts as the original claim, does not constitute a new claim. *Trepte, id.*

Appellant now is pursuing only one of the claims it submitted to the CO -- its request for payment of the unpaid amounts of its invoices. Although appellant did not articulate a theory of recovery in its claim to the CO for that unpaid amount, it had billed based upon the full price of each task order (*see* finding 47). Thus appellant's claim to the CO and its claim before the Board are derived from the same or similar operative facts and the Government's motion to dismiss is denied.

## II. Liability

Appellant asserts that: (1) the numerous contract provisions applicable to fixed-price contracts, the RFP's instruction that the contractor "will submit labor hours required (which will be at a fixed price)," and the alleged absence of time-and-materials and cost reimbursement provisions, establish that the contract was a task order fixed-price contract; (2) it cannot be a time-and-materials contract because NASA would not pay for labor hours expended in excess of the hours specified in an order, with the inequitable consequence that appellant would not benefit from cost savings, but would assume the risk of cost overruns; (3) the CO's alleged unilateral mistake in incorporating fixed-price contract provisions is not a ground for contract reformation; and (4) the *Christian* doctrine cannot be applied to incorporate the Time-and-Materials Payments clause, which would benefit the party seeking incorporation, or to excise the Fixed-Price Payments clause to which the parties agreed.

The Government responds that: (1) the parties intended to enter into a task order time-and-materials contract, which comports with their actions when the contract was negotiated and gives meaning to the contract as whole, whereas appellant's interpretation would render portions meaningless; (2) under the contract's Order of Precedence clause, the contract's Schedule and instructions take priority over contract clauses; (3) notwithstanding the CO's erroneous inclusion in the contract of the Fixed-Price Payments clause, the FAR required that he include the Time-and-Materials Payments clause, which, pursuant to *General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775 (Fed. Cir. 1993), should be deemed incorporated into the contract by operation of law under the *Christian* doctrine; and (4) any ambiguity concerning whether the contract was on a fixed-price or a time-and-materials basis was patent, charging appellant with a duty to inquire before entering into it.

From the outset, NASA informed appellant that its contract was intended to be a time-and-materials contract. The RFP stated that "[t]he contract will be a Task Order/Time and Material type contract" (finding 2). FAR 16.601 TIME-AND-MATERIALS CONTRACTS, 48 C.F.R. § 16.601(a) (1984), describes such contracts:

> A time-and-materials contract provides for acquiring supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit and (2) materials at cost,

> including, if appropriate, material handling costs as part of material costs.

The RFP's statement that the contractor was to "submit labor hours required (which will be at a fixed price)" and material and equipment costs to be "on a cost-reimbursement basis" (finding 2), when read in conjunction with the RFP's provisions referring to hourly labor rates to be "fully loaded to include base rate, payroll markup (fringe benefits, taxes and insurance), overhead and profit," in contrast to materials and equipment, which were to be "on a cost-reimbursement basis with no mark-up allowed" (finding 3), parallels FAR 16.601(a). Further, prior to contract commencement, the CO's contemporaneous memorandum of negotiations with Dawkins and the other 8(a) firms involved in the procurement recorded that the contract was to be a "Task Order/Time and Material type contract" (finding 17).

Reasonably interpreted, the RFP's reference to the "fixed price" of labor hours meant the "fixed hourly rates" for labor mentioned in the FAR and negotiated by the parties (*see* findings 17, 19). Indeed, a time-and-materials contract is one under which the parties "agree to fixed hourly rates for specified classes of labor with payment based on the number of actual hours incurred." John Cibinic, Jr. and Ralph C. Nash, Jr., FORMATION OF GOVERNMENT CONTRACTS 1174 (3d ed. 1998).

Contrary to appellant's contention, the contract included or incorporated numerous clauses applicable to time-and-materials and/or cost-reimbursement contracts (*see* findings 4, 5, 9, 12). However, regardless of NASA's documented intent that the contract be a time-and-materials contract (*see* findings 2, 17), CO Spicer, who believes that he was assembling a time-and-materials contract for the first time, and had used a computer to "spit out" clauses (finding 18), largely included or incorporated clauses required for or applicable to fixed-price contracts (findings 5, 8-10, 12). He omitted certain clauses required for time-and-materials contracts (findings 6, 7), and he included clauses pertaining only to fixed-price construction contracts by mistake (findings 10, 18).

The contract contains an Order of Precedence clause, which "may be consulted when an inconsistency arises in a contract." *General Engineering & Machine Works, supra*, 991 F.2d at 781. The contract's Order of Precedence clause provides that, in resolving inconsistencies, the contract Schedule and representations or other instructions predominate over contract clauses (finding 16). As noted, the RFP had instructed that the contract was to be a time-and-materials contract (finding 2). Consistent with that instruction and with such a contract, the contract Schedule began with a list of the labor categories Dawkins was to supply, at stated hourly rates, plus its subcontract handling fee and materials markup (finding 19). Also consistently, NASA's tailored Task Ordering Procedure clause, contained in the contract Schedule, called for the contractor to submit a task plan including the direct labor hours, by labor category, estimated to complete a task and subcontractor and materials estimates, noting that task orders would include a maximum

number of labor hours and other resources authorized (finding 15). Finally, although the Schedule contained clauses required for fixed-price contracts (findings 8, 9), it also incorporated the FAR Time-and-Materials Inspection clause required for time-and-materials contracts (finding 4).

CO Spicer reinforced the instructions contained in the RFP when, before the contract began, he discussed the estimating and invoicing process with the contractor, noting that it was to bill and be paid based upon actual hours worked (finding 24). Although it is not clear at what point prior to contract performance the discussion occurred, appellant's president did not dispute that CO Spicer had so instructed appellant and there is no evidence that appellant expressed any contemporaneous question about or disagreement with the instructions (finding 25). According to testimony by Dawkins' president, NASA responded in accordance with those instructions when specifically confronted with payment issues during the contract (findings 27, 28).

As to appellant's contention that the contract could not be a time-and-materials contract because, inequitably, NASA would not pay for labor hours expended in excess of the hours specified in a task order, there is no evidence, substantiated by contemporaneous documentation, of any such unpaid extra labor hours properly allocable to a task order (finding 28). Regardless, any such stance by NASA would be consistent with the administration of the contract as a time-and-materials contract. In accordance with the contract's Task Ordering Procedure clause, NASA was not obligated to pay any amount in excess of the maximum amount authorized under an order and the task orders themselves were subject to the terms of the contract (findings 15, 23). This is in line with the payment process referred to in the Time-and-Materials Payments clause, which the Government contends should be incorporated into the contract under the *Christian* doctrine (finding 6). That process is not inequitable. As the clause states, a contractor is not obligated to continue performance if to do so would exceed the applicable ceiling price, unless the CO increases that price (*id*.). As the CO's memorandum of contract negotiations reflects (finding 17), there is, in fact, less risk to a contractor under a time-and-materials contract than under a fixed-price contract. *See* Cibinic and Nash, FORMATION OF GOVERNMENT CONTRACTS, *supra*, at 1174, 1178.

There is no evidence of record concerning the manner in which appellant interpreted the RFP prior to submitting its proposal (finding 26). If appellant interpreted the RFP to call for labor hours to be paid at fixed-price, regardless of hours incurred, it should have inquired of the CO before submitting its proposal. Any ambiguity in the RFP was patent, by virtue of its statement that the contract "will be a Task Order/Time and Material type contract" (finding 2) and its incorporation of the Time-and-Materials Inspection clause required for time-and-materials contracts (finding 4), when at the same time it omitted clauses required for time-and-materials contracts, such as the Time-and-Materials Payments clause, but included or incorporated clauses required for fixed-price contracts, such as the Fixed-Price Payments clause (findings 6, 8, 10). Therefore, under the patent

ambiguity doctrine, appellant proceeded at its own risk when it did not inquire prior to submitting its proposal. *General Engineering & Machine Works, id.*; *Newsom v. United States*, 676 F.2d 647, 649 (Ct. Cl. 1982). As an exception to the rule of *contra proferentem*, under which a contract is construed against the drafter, the patent ambiguity doctrine applies to bar appellant's recovery even though the Government was responsible for the poorly-drafted contract. *Interstate General Government Contractors, Inc. v. Stone*, 980 F.2d 1433, 1436 (Fed. Cir. 1992). Even if any ambiguity were deemed to be latent, appellant could not prevail because it did not establish that it relied upon its current interpretation at the time it submitted its proposal (finding 26). *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1429-30 (Fed. Cir. 1990); *see also H. Bendzulla Contracting*, ASBCA No. 51869, 00-1 BCA ¶ 30,803 at 152,075.

In practice, appellant regularly invoiced and was paid on a fixed-price basis, regardless of the actual amount of its subcontractors' invoices and of its field supervision hours, and it frequently used incorrect hourly labor rates (finding 47). However, this was contrary to the CO's invoicing instructions (finding 24) and there is no evidence that NASA knowingly paid appellant more than its actual subcontractor costs and incurred labor hours. Once the CO learned of alleged overbilling, he sought a billing system review by DCAA (finding 30). NASA ceased paying appellant's invoices and canceled certain task orders (findings 32, 34). Thus, the prior payments do not estop the Government from asserting that the contractor was overpaid. *General Engineering & Machine Works, supra* (Government entitled to reimbursement of overpaid material handling charges under time-and-materials contract despite having paid them as billed by contractor throughout contract's four-year term and under three prior time-and-materials contracts audited by Government with no questions raised about charges); *see also JANA, Inc. v. United States*, 936 F.2d 1265 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992) (Despite Government's certifications that contractor's work as invoiced was satisfactorily performed, Government not estopped from recovering overpayments under time-and-materials contracts when audit over two years after contracts' completion revealed large discrepancies between hours billed and paid and hours actually worked).

In sum, appellant's contract, reasonably interpreted, was a time-and-materials contract. As such, it is established that the Time-and-Materials Payments clause, mandated by regulation to be included in time-and-materials contracts (finding 6), expresses a purpose "sufficiently ingrained in public procurement policy to properly trigger use of the *Christian* doctrine." *General Engineering & Machine Works, supra*, 991 F.2d at 780 (incorporating the Defense Acquisition Regulation (DAR) 7-901.6 PAYMENTS (1972 MAY) clause required for time-and-materials contracts, the predecessor to the FAR 52.232-7 Time-and-Materials Payments clause at issue in this appeal). The CO's erroneous incorporation into the contract of the Fixed-Price Payments clause does not bar the application of the *Christian* doctrine. *See S.J. Amoroso Construction Co., Inc. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993) (Buy American Act clause required for construction contracts incorporated into contract even though parties had stricken that

clause and had included supply contracts clause; "Application of the *Christian* doctrine turns not on whether the clause was intentionally or inadvertently omitted, but on whether procurement policies are being 'avoided or evaded (deliberately or negligently) by lesser officials'," *id*., quoting *Christian*, *supra*, 320 F.2d at 351).

In view of our holding that the contract is a time-and-materials contract and the *Christian* doctrine applies to incorporate the Time-and-Materials Payments clause, we need not reach appellant's argument pertaining to unilateral mistake, which relates to the equitable remedy of reformation.

DECISION

The Government's motion to dismiss is denied. The appeal is denied.

Dated: 14 July 2003

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] In July 1993 Dawkins changed its name to Dawkins General Contractors, Inc. (*see* R4, tab 37 at 2).

[2] The name later changed to the NASA John H. Glenn Research Center (*see* ex. G-10; tr. 36; Board corresp. file).

[3] The Schedule included the 1984 versions of the clauses rather than the correct 1989 versions.

[4] The referenced time frame is unclear, but it appears likely that any such discussion was after NASA initiated a billing system review and investigation of Dawkins, which revealed that the contractor typically billed and was paid on a fixed-price basis, regardless of labor hours incurred (below).

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. 48535, Appeal of Dawkins General Contractors & Supply, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals