ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
JWK International Corporation	)	ASBCA No. 54153
	)	
Under Contract No. DAJB03-00-D-0007	)	

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APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
CPT Sunny S. Ahn, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal arises from the contracting officer's (CO) 7 April 2003 final decision that denied the contractor's $399,002.43 claim for recovery of bonus payments to its employees under the captioned base maintenance services contract. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. As ordered on 9 September 2003, the Board is to decide entitlement only. The parties have cross-moved for summary judgment based on stipulated facts filed 18 May 2004 (superseding stipulated facts filed 31 October 2003), the Rule 4 documents, and their legal arguments. Each has replied to the other's motion. In the Statement of Facts below, we rely upon the same documents.

Appellant's claim included amounts for a year-end bonus, Lunar New Year's bonus, and spring bonus. The parties' motions and stipulations relate to the year-end and Lunar New Year's bonuses. The parties agree that the board's decision on the motions will resolve any entitlement issues relating to the spring bonus (memorandum of telephone conference call on 8 September 2004).

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The U. S. Army Contracting Command awarded Contract No. DAJB03-00-D-0007 (the contract) to JWK International Corporation (JWK) on 29 February 2000 (stip., ¶ 1).

2. The contract term included a one-month phase-in period, a six-month base period and four one-year options. The base and option periods ended on 30 September. (Stip., ¶ 2; R4, tab 1, § B)

3. Section B of the contract included both fixed-price and time and materials (T&M) line items for maintenance services at six air bases in Korea (stip., ¶¶ 3, 13).

4. The fixed price line items in § B showed a "quantity" of six (for the base period) or twelve (for each of the option years), a "unit" expressed in months, a "unit price," and an "amount." Each T&M line item showed one lot price, which was the estimated ceiling amount. (Stip., ¶ 15)

5. The government exercised the first and second one-year options on 1 October 2000 and 1 October 2001, respectively (stip., ¶ 4).

6. The contract incorporated by reference the FAR 52.217-8 OPTION TO EXTEND SERVICES (AUG 1989) clause which stated:

> The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. . . .

(R4, tab 1 at 153; stip., ¶¶ 32-33)

7. Rather than exercising the third option year, the government invoked FAR Clause 52.217-8 and extended the contract for two months only. The final day of contract performance was 30 November 2002. (Stip., ¶ 5)

8. The contract contains a line item price for a "quantity" of six months of services (for the base period) or one year of services (for each of the option periods), paid in equal monthly increments. The monthly price stated in § B of the contract was clearly just one-twelfth of the line item price for the "quantity" stated in the contract for one year of services. (Stip., ¶ 34; R4, tab 1, § B)

9. The contract incorporated United States Forces Korea (USFK) Regulation No. 690-1 (USFK 690-1) as Attachment 1. JWK was required to comply with USFK 690-1, which provided policies and procedures for the uniform administration of Korean National employees assigned to USFK. This regulation addresses issues associated with personnel management (*e.g.*, recruitment and replacement, reduction-in-force, leave and pay administration, etc.). Paragraph 19 of the regulation contains special provisions for Korean National employees of Invited Contractors (American firms that have an overseas contract with the United States Government), such as JWK. (Stip., ¶ 8)

10. USFK 690-1, 4 October 1994, ¶ 8-12a, as amended by Change No. 1, 29 July 1996, required the payment of the equivalent of eight months bonus pay during the course of a year for five employee bonuses:

> (1) Summer bonus. . . . of one month's pay . . . .
>
> (2) Chusok bonus. . . . of two months' pay . . . .
>
> (3) Year-end bonus. A year-end bonus of two months' pay will be paid to personnel employed as of 31 October who have three months' continuous service, from 1 August through 31 October. Payment will be made in December prior to Christmas.
>
> (4) Lunar New Year bonus. A Lunar New Year bonus of two months' pay will be paid to personnel employed as of 30 November who have three months' continuous service, from 1 September through 30 November. Payment will be made before the Lunar New Year holiday.
>
> (5) Spring bonus. . . . of one month's pay . . . .

(R4, tab 1, USFK 690-1 at 8-11, 8-12, Change 1 at 12; stip., ¶¶ 16, 36 (¶ 36 corrected to reflect change from one to two months pay for the Lunar New Year's bonus in Change 1)

11. The lunar bonus and the year-end bonus were equal to four months pay (two months for each bonus) for every covered employee (stip., ¶ 9). Employees that had the required three months' service became eligible for the year-end and lunar bonuses during the two-month extension (stip., ¶ 36).

12. Attachment 12 to the contract provided the "Standard Calculation for Korean Employees Labor Cost." Bonus payments were to be calculated by multiplying the base pay times regular work hours times 66.67%. (Stip., ¶ 17)

13. In accordance with USFK 690-1, JWK included in its pricing for each contract period (phase-in, base, or option) an allowance for bonus payments. For each hour worked an additional two-thirds of an hour of bonus pay was accrued for each employee. (Stip., ¶ 18)

14. During the course of a full contract year, the payment method specified by the contract, namely twelve equal monthly payments, compensated the contractor for all bonus payments required to be paid during one full contract year. Each of the twelve equal monthly payments included only one-twelfth of the total annual amount for bonus payments, which by the end of a full year resulted in total recovered costs for bonuses equal to the actual payments required to be made to employees during one full contract year. (Stip., ¶ 19)

15. Because of its interpretation of the foregoing requirements and the timing of the extension period, JWK paid each employee four months of bonus pay for having worked during the Year-end Bonus Entitlement Period and the Lunar Bonus Entitlement Period. This was in addition to two months' regular pay, for a total of six months' pay. (Stip., ¶ 12)

16. On 4 November 2002 JWK notified the Administrative CO, Kyong S. Cyr, that JWK had been required to pay the four months worth of bonuses over a two-month period, even though only a portion of those bonuses was included in the monthly billed amount (stip., ¶ 20).

17. On 14 November 2002 Ms. Cyr requested that JWK provide an explanation as to how the bonus payments were factored into the pricing (stip., ¶ 21). On 15 November 2002 Warren R. Goldman, JWK Controller, explained in writing the pricing methodology (stip., ¶ 22).

18. JWK calculated the additional compensation claimed for bonus payments by taking the actual amounts paid out to employees for the Year-end and Lunar bonuses, less the amount recouped for all bonus payments through payment of the monthly invoices for the two-month extension (stip., ¶ 38).

19. The Year-end bonus was paid to eligible JWK employees on 11 December 2002, and the Lunar bonus was paid to eligible employees on 31 December 2002 (stip., ¶ 37).

20. JWK paid W431,167,449 Korean Won (W) in Year-end bonuses and W417,466,598 in Lunar bonuses, for a total payment of W848,634,047 for the lunar and year-end bonuses (stip., ¶ 39). During the two-month extension, JWK recovered, through

the accrual of bonus amounts contained in the billing rates, W440,726,456 (stip., ¶ 40). The net amount for bonus payments that JWK asserts is not recovered by billing rate accruals was W407,907,641 (stip., ¶ 41). Contract clause H.5 specifies a conversion rate of 1199.1 Korean won to the dollar (stip., ¶ 42). Applying the contract conversion rate, the W407,907,641 equals $340,178 (stip., ¶ 43).

21. On 14 March 2003, JWK submitted a certified claim for $399,002.43 (stip., ¶ 30). The CO issued a final decision denying that claim on 7 April 2003 (stip., ¶ 31). JWK timely appealed that CO's final decision to the Board on 8 April 2003.

22. The contract did not include or incorporate by reference the FAR 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT—PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) clause (the FLSA clause) (R4, tab 1 at 153-55).

DECISION

I.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *U.S. Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001). The parties agree that there are no disputed issues of material fact. The disputed legal issue is whether the FAR 52.217-8 OPTION TO EXTEND SERVICES clause permits the contractor to recover the bonuses paid to employees whose entitlement thereto arose during the two-month extension period. This is a matter of contract interpretation that is appropriate for decision by summary judgment. *See Analysas Corp.*, ASBCA No. 54183, 04-1 BCA ¶ 32,629 at 161,445.

Appellant argues that: (1) USFK 690-1 required JWK to pay bonuses to all employees eligible to receive year-end and lunar bonuses; (2) but for the government's two-month extension, no JWK employee would have become eligible to receive such bonuses; (3) JWK would have had to increase its proposed annual price to account for the possibility that a short-term extension would be exercised "for the high bonus months of October and November"; (4) JWK did not know before contract award in which months the government might exercise the FAR 52.217-8 clause, so as to be able to price such contingency in the line item prices; (5) the uniform monthly prices did not permit JWK to recover the actual bonus payments accrued during any particular month of the year; (6) the CO's position that the fixed-price contract forbade payment of any more than the specified two months' price during the extension period is not reasonable or equitable; and (7) the FAR 52.217-8 phrase "rates specified in the contract" is sufficiently flexible to allow for additional compensation for the bonuses (app. mot. at 2-4).

Respondent argues that the contract was a firm fixed-price contract that placed upon appellant the risk of paying the year-end and lunar bonuses to employees eligible or such bonus payments, and the FAR 52.217-8 OPTION TO EXTEND SERVICES clause required JWK to continue performance for the two-month extension "at the rates specified in the contract" and did not provide additional compensation for the cost of such bonuses (gov't mot. at 2-3, 7-8).

Appellant attached a government letter dated 11 July 2003 to its motion. The letter addressed settlement. We grant the government's motion pursuant to FED. R. EVID. 408 to disregard that letter.

The FAR 52.217-8 OPTION TO EXTEND SERVICES (AUG 1989) clause gave the government the right to extend the performance of services "at the rates specified in the contract" subject to adjustment "only as a result of revisions to prevailing labor rates provided by the Secretary of Labor." Domestic service contract labor rates are adjustable pursuant to the FAR 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT—PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) clause (the FLSA clause).

FAR 37.111, added by Federal Acquisition Circular No. 84-49, effective 10 August 1989, provided:

> **37.111 Extension of services**.
>
> Award of contracts for recurring and continuing service requirements are [sic] often delayed due to circumstances beyond the control of contracting offices. Examples of circumstances causing such delays are bid protests and alleged mistakes in bid. In order to avoid negotiation of short extensions to existing contracts, the [CO] may include an option clause (see 17.208(f) [which prescribes the FAR 52.217-8 clause]) in solicitations and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract. *However, these rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor*. . . . [Emphasis added]

FAR 37.111 confirms that only domestic labor rate revisions made by the U.S. Secretary of Labor are subject to contract price adjustment under the FAR 52.217-8 clause.

To support its claim for recovery of bonuses paid to JWK employees whose eligibility for such bonuses accrued in the October-November 2002 extension period, appellant cites *Crawford Technical Services, Inc.*, ASBCA No. 40388, 93-3 BCA ¶ 26,136 (CTS). CTS' service contracts were performed at Columbus Air Force Base, Mississippi, and included the DAR 7-1905(b) FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT—PRICE ADJUSTMENT (MULTI-YEAR AND OPTION CONTRACTS) (1979 SEP) clause for domestic service contracts, and the FAR 52.217-8 OPTION TO EXTEND SERVICES (APR 1984) clause, which provided:

> The Government may require continued performance of any services within the limits and at the rates stated in the Schedule. The [CO] may exercise the option by written notice to the Contractor within the period specified in the Schedule.

That FAR 52.217-8 clause did not provide for any adjustment of the "rates stated in the Schedule" for the extension period. We found that each of CTS' three contracts was extended from one to six months pursuant to the FAR 52.217-8 clause, and the "rates set forth in the schedule were to apply to any renewal of the contract, except as provided in the [FLSA] clause." 93-3 BCA at 129,914. *Crawford* stated that the "Government does not dispute CTS' entitlement to the remuneration of the vacation pay paid to employees who celebrated their hire date anniversary during the periods the three contracts were extended" (citing *Government Contractors, Inc.*, ASBCA No. 24112, 80-1 BCA ¶ 14,281, *aff'd on recon.*, 80-1 BCA ¶ 14,454; *Service Ventures, Inc*., ASBCA No. 36726, 89-1 BCA ¶ 21,264, *aff'd on recon.*, 89-1 BCA ¶ 21,438, *aff'd, United States v. Service Ventures, Inc.*, 899 F.2d 1 (Fed. Cir. 1990)), 93-3 BCA at 129,919.

Government Contractors and *Service Ventures* held that the contractors were entitled to adjustments for vacation pay, required to be paid during an option year, in accordance with the FLSA clause in domestic service contracts. *Government Contractors* did not identify the contract's option clause. See 80-1 BCA at 70,329, 71,239. *Service Ventures* identified an OPTION TO EXTEND THE TERM OF THE CONTRACT (1981 DEC) clause that provided:

> The Government may extend this contract for an additional period of one to twelve months at the same price, subject to labor rate adjustments that may be required by the "Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multi-Year and Option Contracts)" clause of this contract.

89-1 BCA at 107,197. JWK's contract did not include the FLSA clause (SOF, ¶ 22). JWK has not identified, and the Board's review of the contract and USFK Regulation 690-1 has not disclosed, any provision analogous to the FAR 52.222-43 FLSA clause. Therefore, *Crawford,* does not support JWK's argument that the FAR 52.217-8 phrase "rates specified in the contract" allows additional compensation for the bonus payments accrued during the extension period of this non-domestic services contract.

Respondent argues that *Tecom, Inc.*, ASBCA No. 51880, 00-2 BCA ¶ 30,944, requires denial of JWK's claim (gov't mot. at 5-6). That contract for services at Wright-Patterson AFB, Ohio, included the FAR 52.217-8 OPTION TO EXTEND SERVICES (APR 1984) clause and the FLSA clause. The Air Force issued contract modifications which extended contract performance from the end of September 1996 through May 1997, and a modification pursuant to the FLSA clause which increased wages and fringe benefits for the first five months of such extension. Without citing any price adjustment clause, Tecom claimed $154,748.55 for payments it made to its employees in lieu of vacation time, alleging that it could not plan vacations during the month to month extension period. The Board distinguished *Crawford*, and held that Tecom's cash payments for unused vacation time were "not brought about by compliance with a wage determination pursuant to the FLSA clause or any other price adjustment clause" and thus, with no contract clause providing for a price adjustment, the contractor bore the risk of all costs exceeding the firm fixed contract price. 00-2 BCA at 152,739.

JWK seeks to distinguish *Tecom* by arguing that there the Board "held" that the contractor's decision to schedule vacation time was "a management issue," but under JWK's contract the bonus requirements were prescribed by USFK 690-1 and so were not a "management issue" (app. mot. at 5-6). In *Tecom* we agreed with the Air Force's argument that the contractor's inability to schedule vacations "was a management issue" 00-2 BCA at 152,739. This distinction, however, does not render inapplicable our holding in *Tecom* that, absent an FSLA clause or any other price adjustment clause, the FAR 52.217-8 clause did not allow any price adjustment for the fringe benefit payments the contractor claimed.

JWK argues that respondent has "conceded that FAR 52.217-8's use of the term 'rates specified in the contract' allows the Government to compensate a contractor fairly for bonuses that became due and payable during the period of the extension" (app. reply and cross motion at 6-7), citing Part II of respondent's answer, that alleged:

> 4. FAR 52.217-8's use of the term "rates specified in the contract" allows the Government to compensate a contractor fairly for bonuses that become due and payable during the period of extension. This FAR provision allows the

> Government flexibility to for [sic] bonuses that become due and payable during a period of extension.

Respondent counters that:

> [T]he contract does contain sufficient flexibility to allow compensation to the Contractor, through the mechanism of monthly payments that, over time, fully compensate the Contractor for any bonuses paid. However, nothing in that statement [*i.e.*, Part II, ¶ 4, *supra*], or in the contract itself, changes the essential nature of this firm-fixed-price contract . . . or . . . authorizes paying the contractor for this risk.

(Gov't mot. at 11-12)

The parties' superseded 31 October 2003 stipulation, ¶ 35, included the essence of Part II, ¶ 4, of the answer: "FAR 52-217-8's use of the term 'rates specified in the contract' provides enough flexibility to allow the Government to compensate a contractor fairly for bonuses that became due and payable during the period of the extension." The parties deleted ¶ 35 from their 18 May 2004 superseding stipulation, the subject of these cross-motions. We conclude that respondent constructively amended its answer to conform to the superseding stipulation. Consequently, this argument is not well taken.

II.

In the alternative JWK argues that it interpreted "the contract to allow payment of the contractually required bonuses" while the government interpreted the contract to permit only an adjustment of "exactly two times one-twelfth of the annual price stated in the contract." JWK's "mistake in bid" was "mutual because the Army clearly was on notice that the contract did not contemplate or allow unequal monthly payment amounts" and it "had reason to know that JWK made a mistake in its bid" because it "was fully aware that the required bonus payments varied from month to month, but the contract stated a single annual price with no variation in monthly pricing." JWK concludes that there was a "mutual mistake" entitling it to contract reformation, citing *P. T. Service Co.*, GSBCA Nos. 7589, 7590, 85-3 BCA ¶ 18,430, and *Atlantic Research Corp.*, GPO BCA No. 22-87, 1989 GPOBCA LEXIS 42 (July 10, 1989). (App. reply and cross motion at 10 and n.4.)

The government denies that it had any knowledge or notice that JWK had made any mistake in its bid, and argues that at the time of JWK's bid it did not know that it

would extend the time of performance for two months upon expiration of the second option period (gov't mot. at 11).

Since the parties did not stipulate that the government had knowledge or notice of any mistake in JWK's proposal, JWK's characterization of the relief it seeks as "mutual mistake" does not convert a unilateral mistake into a mutual one. The criteria for reformation which JWK seeks are:

> Under [*United States v.*] *Hamilton* [*Enterprises, Inc*., 711, F.2d 1038 (Fed. Cir. 1983)], "[a] contract will not be reformed because of a unilateral mistake in a bid unless the contractor establishes that the error resulted from a 'clear-cut clerical or arithmetical error, or a misreading of the specifications.' " 711 F.2d at 1046. Moreover, "in such cases, the degree of proof demanded for reformation is higher than where rescission is requested. The contractor must establish by clear and convincing evidence what his bid price would have been but for the error." *Id*.

Liebherr Crane Corp. v. United States, 810 F.2d 1153, 1157 (Fed. Cir. 1987).

In the instant appeal, the parties' stipulations and the Rule 4 file at a minimum disclose no clear and convincing evidence that JWK's proposal had any "clear-cut clerical or arithmetical error, or a misreading of the specifications" or that prior to award the government knew or should have known that a mistake had been made. Therefore, JWK has not established the elements of proof of mistake in bid warranting contract reformation.

The authorities JWK cites do not change that conclusion. In *P. T. Service Co*. the contractor's work sheets showed that it had made a unilateral mistake by calculating its bid prices without regard to the mandatory minimum man-hours provisions, and the government suspected that very mistake but made an inadequate bid verification to put the contractor on notice of such suspected mistake. The GSA Board held that those contracts were rescinded. 85-3 BCA at 92,558. That decision is of no help because that contractor, unlike JWK, established the required elements of proof. In *Atlantic Research*, the Board denied a price adjustment due to the contractor's unilateral error because the CO had adequately requested the contractor to verify its bid before contract award, and found no proof of the price the contractor actually intended (*supra* at *6-7). Again, those facts are plainly distinguishable from JWK's facts in this dispute.

CONCLUSION

We hold that appellant has failed to establish that the FAR 52.217-8 clause permits it to recover the bonuses paid to its employees whose entitlement thereto arose during the extension period, or that the contract may be reformed due to a mistake in bid. We grant respondent's motion for summary judgment, and we deny appellant's motion for summary judgment. We deny the appeal.

Dated: 27 October 2004

DAVID W. JAMES, JR.
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

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. 54153, Appeal of JWK International Corporation, rendered in conformance with the Board's Charter.

Dated:

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