ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
JWK International Corporation	)	ASBCA No. 54152
	)	
Under Contract No. DAJB03-00-D-0007	)	

APPEARANCES FOR THE APPELLANT: Keith L. Baker, Esq.
Jerome H. Gress, Esq.
Barton, Baker, McMahon,
Hildebrant & Tolle, LLP
McLean, VA

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

OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the contracting officer's (CO) final decision that denied the contractor's $236,120 claim under the captioned U. S. Army contract. The contractor seeks to recover the monetary value of employees' sick leave balances that were transferred from the predecessor to the successor contractor (appellant). The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607, and is to decide entitlement only (tr. 1/126). After a two-day hearing, the parties submitted post-hearing briefs.

FINDINGS OF FACT

1. Immediately prior to the captioned contract, Pacific Architects and Engineers, Inc. (PAE) provided maintenance services at air bases in Korea under a U. S. Army cost type contract that expired on 31 March 2000 (R4, tab 12 at 2; ex. A-3 at 4; tr. 1/41, 2/13, 24).

2. Attachment 11 to the 4 August 1999 solicitation for the successor air base maintenance contract (the RFP) listed PAE employees by position with each individual's service start date, job title, retirement eligibility date, grade/step, base pay, tuition allowance, and service years, but did not identify any employee names and their accumulated sick leave hour balances. Most employees had at least ten years of service. (R4, tab 1, attach. 11; ex. A-2 at 19; tr. 1/37-38, 133-34, 2/51)

3. On 29 October 1999, the CO prepared and sent to all prospective offerors, the following question and answer by amendment of the RFP:

> 2. . . . Who is responsible for the employees' compensation when new contractor make a RIF, which nothing to do the existing contract and contractors? [sic]
>
> **Answer: Contractors shall be responsible for payment of all pay and benefits accrued during the period(s) of their respective contracts.** [Emphasis in original]

(Ex. A-1 at 19; hereafter "Q&A-2") "RIF" means "reduction in force" (tr. 1/57).

4. On 29 February 2000 the U. S. Army Contracting Command Korea awarded fixed-price type Contract No. DAJB03-00-D-0007 (contract 7) to JWK International Corporation (JWK) for grounds maintenance, custodial and other services (R4, tab 1[1] at 1, C-2).

5. Contract 7 included both fixed-price and time and materials line items for such services, a 1-31 March 2000 phase-in period, a 1 April to 30 September 2000 base period, and four annual option periods (R4, tab 1 at C-2 to C-66).

6. Contract 7's § H 52.000-4405, COMPLIANCE WITH 690-1, provided "that Contractor shall comply with USFK Regulation 690-1 in all regards as to any direct-hire Korean employees" (R4, tab 1 at 148 of 156). Attachment 1 is United States Forces Korea (USFK) Regulation No. 690-1 (USFK 690-1); Attachment 2 is Revision No. 1 to USFK 690-1. USFK 690-1 applied to "Department of Defense (DOD) components and agencies in Korea" and to "USFK invited contractors except as modified by chapter 19" of USFK 690-1 (R4, tab 1, attach. 1 at 1-1). PAE and JWK were "USFK invited contractors" (tr. 1/29, 257, 2/13).

7. USFK 690-1 provided in pertinent part:

> **7-3. TRANSFER OF LEAVE BALANCE**. Annual or sick leave accumulated while employed by a USFK component will be transferred to any other USFK component, if the employee moves to that component with no break in service. . . . No transfer of funds will be made. Leave

---

1 The contract submitted in ASBCA No. 54153 as R4, tab 1, was cross-referenced in ASBCA No. 54152 as R4, tab 1.

accumulation (annual or sick leave) during direct/indirect employment is not transferable on change from or to USFK invited contractor status. Annual and sick leave balance will be liquidated at the time of change from USFK employment to USFK invited contractor employment or vice versa. Accrued sick leave will be included in the computation of the employee's severance pay. [As modified by Rev. No. 1]

. . . .

7-6. SICK LEAVE.

a. Accrual. Full-time employees will earn 8 hours of sick leave upon completion of each complete 28-day period. . . . A total of 104 hours per leave year is earned. . . .

. . . .

8-11. SEVERANCE PAY.

a. General. Eligible employees are entitled to a 1-month average total wage for each year of continuous service. . . . The total wage includes base pay, premium pay . . . allowances . . . prorated over the entire 12 months. . . . Severance pay for invited contractor . . . employees may be computed annually or quarterly and will be deposited in the employee's bank account NLT 30 days after the annual or quarterly cut-off date.

b. Eligibility.

(1) Full time . . . employees, including those of invited contractors, are eligible for severance pay. . . .

. . . .

c. Computation.

. . . .

(2) Upon separation from USFK by other than resignation or removal for cause, creditable service for severance pay purposes will include accrued sick leave. In

determining service length credit for severance pay purposes, all periods of an employee's creditable service and the period represented by unused sick leave at the time of separation will be added . . . .

. . . .

(7) Creditable service is transferable between [appropriated fund] organizations and [non-appropriated fund instrumentalities] . . . or between direct hire and indirect hire, except for invited contractor employment. Severance pay obligations will not be liquidated at the time of change in employment . . . . No transfer of funding will be made. . . . Creditable service is not transferable between direct/indirect employment and USFK invited contractor employment. Therefore, creditable service for severance pay will be liquidated on change from direct/indirect hire to USFK invited contractor hire or vice versa . . . .

. . . .

19-1. GENERAL.

a. This chapter outlines variations in certain policy aspects and procedural requirements that apply to USFK invited contractor employees.

. . . .

19-8. LEAVE ADMINISTRATION. (See chapter 7.)

. . . .

b. Sick leave.

(1) Sick leave balances are transferred on contractor change over and when employees are reassigned between contractors without a break in service. However, sick leave accumulation during direct hire U. S. Forces Korea employment is not transferable on change to invited contractor employment or vice versa. [Bold in original]

(R4, tab 1, attach. 2 at 6, attach. 1 at 7-6, 19-1, 19-5) USFK 690-1, ¶ 19-8.b (1), did not mention transfer of funds for the sick leave balances of eligible employees reassigned to a successor invited contractor (tr. 2/18, 51, 58, 76), and contract 7 did not expressly provide that the government had the duty to reimburse the contractor's costs of such transferred sick leave balances.

8. Contract § L required: "Korean labor costs shall be submitted in the format provide [sic] at Attachment 12" (ex. A-24). Attachment 12, item 16, stated: "Sick Leave (S/L): Regular Pay x S/L/ hours x 50% (Non-use) x 10% (Compensation in Cash) = 5% of the total S/L hours," which formula did not mention "transferred sick leave" (R4, tab 1 at attach. 12; tr. 1/30, 2/166).

9. Mr. Francis Pepe and Mr. James Gilmore, both Senior Vice Presidents of JWK, prepared its 18 November 1999 proposal for contract 7 (tr. 1/23, 149-50). That proposal included 173 hours per month to be paid to each full time employee (ex. A-2 at 47-53). According to Mr. Pepe, those 173 hours included, but did not separately identify, sick leave hours and their costs (tr. 1/31, 36, 59-60, 66-67). Each such employee was paid for his 173 monthly hours whether he took sick leave or not (tr. 1/60). According to Defense Contract Audit Agency (DCAA) auditor Jeannie Buchanan, if such employee took sick leave that exceeded his unused sick leave hours, such excess hours were deducted from the 173 monthly hours (tr. 2/154).

10. When preparing JWK's proposal, Messrs. Pepe and Gilmore knew that USFK 690-1 required PAE's sick leave balances to be transferred to JWK (tr. 1/63-64, 169). They interpreted Q&A-2 (finding 3) to mean that JWK would only be responsible for the employee pay and benefits that accrued during the term of contract 7 (tr. 1/25-26, 56), so JWK did not ask the CO to clarify the amount of PAE's transferred sick leave (tr. 56-57, 168-69). From the RFP information, JWK could not determine PAE employees' sick leave hour balances (finding 2; tr. 1/37-39, 66-67, 82). According to Messrs. Pepe and Gilmore, JWK included no cost in JWK's proposal for the earlier accrued sick leave balances of PAE employees reassigned to work under contract 7 (tr. 1/26, 36, 54, 68-69, 153-54, 2/166).

11. The 13 December 1999 DCAA pre-award report on JWK's proposal did not identify, or question the absence of, any costs of transferred sick leave hours (ex. A-3; tr. 1/40, 103, 2/126-27). Before contract award, JWK sent no notice to the CO of any mistake in its proposal (tr. 2/31-32) or its foregoing interpretation of Q&A-2.

12. Mr. Lawrence Smith was the Administrative Contracting Officer (ACO) on the predecessor PAE contract (tr. 1/232), and also was the initial ACO on contract 7 (tr. 1/188).

13. Just before 1 April 2000, PAE sent JWK a computer disk having a 29 March 2000 "file date" (date created) that listed the balances of sick leave hours of PAE employees reassigned to work under contract 7 (tr. 1/44-45, 152-53, 181, 184-85). Such balances, some of which had accumulated for 20 to 30 years, were transferred from PAE's contract to JWK's contract (tr. 1/153).

14. In early April 2000 Messrs. Gilmore and Pepe met with ACO Smith in a post-award conference and asked him whether JWK should recognize PAE's sick leave balances, since they were transferred without compensation and such liability was not priced in contract 7 (tr. 1/44-46, 153-54, 190-91). ACO Smith answered that sick leave payments were a liability of JWK "because [JWK] had to assume or take over the accrued leave of the predecessor" (tr. 1/45-48, 155, 209-10).

15. JWK sent correspondence to ACO Smith from May 2000 to July 2002 regarding transferred sick leave. JWK's 19 June 2000 memorandum stated that it understood that USFK 690-1 required it to assume the liability to pay for transferred sick leave hour balances, but that "it was also assumed that based on common accounting principals [sic], any liability which transfers between contractors would carry with it the transfer of the accrued funds." JWK proposed to add to contract 7 a clause to provide for reimbursement for transferred sick leave payments to terminated employees. (R4, tab 3) JWK's later letters to Mr. Smith estimated the amount of such liability, increasing from $39,089.16 through January 2002, to $150,497.12 by 30 November 2002, and asked whether it could invoice for payment of transferred sick leave costs. (R4, tabs 2-5)

16. ACO Smith: (a) did not respond to any of the foregoing JWK correspondence in writing, but orally answered that it would be better for JWK to wait to submit its invoice when the contract ended (tr. 1/62, 65-69, 97-98, 127, 157, 2/240-41); (b) could not recall whether, in any of the foregoing communications, JWK ever mentioned that Q&A-2 was the reason JWK did not include the costs for transferred sick leave in its proposal (tr. 1/205-06); and (c) told JWK that it could submit a claim, and denied that he told JWK that the government would reimburse JWK's payments for transferred sick leave balances (tr. 1/193, 196-97).

17. In July 2002 Mr. Paul Lamantini replaced Mr. Smith as ACO (tr. 1/98). The September 2002 letter of William Reed, JWK's Director of Contracts and Administration, to ACO Lamantini, summarized JWK's discussions with ACO Smith with respect to transferred sick leave, and said that JWK intended to send an "invoice for the amounts of sick leave/severance paid out to date" (R4, tab 6). Such invoice was for "approximately $213,000" (tr. 1/100), but is not in the appeal record.

18. ACO Lamantini's internal e-mail on which he wrote "18 Oct 02," sought review of JWK's voucher for payment of "sick leave/severance" for Korean employees

under contract 7 and stated: "I have determined that this is a valid request for payment" (ex. A-6).

19. On 28 October 2002 Ms. Kyong Cyr notified JWK that she was the new ACO effective 22 October 2002, she had reviewed the prior correspondence concerning JWK's sick leave/severance payouts, she found nothing in JWK's contract 7 proposal showing that it included the costs of transferred sick leave balances, and she opined that since JWK offered the highest price of the five offers received, the CO was not on notice of any omission or mistake in JWK's proposal (R4, tab 9; tr. 2/23, 29-31). JWK's 5 November 2002 letter to ACO Cyr provided further information (R4, tab 10).

20. ACO Cyr's 12 November 2002 letter requested JWK to explain how sick-leave payments were factored into the contract pricing and mentioned Q&A-2 (R4, tab 11). Mr. Gilmore's 15 November 2002 letter to ACO Cyr stated that the RFP did not inform offerors of PAE's sick leave balances or of any intent not to recompete the contract on the pre-existing basis, so inclusion of money for such balances would have constituted "defective pricing, if not outright fraud," and the CO's answer to Q&A-2 "actually contradicts 690-1" and "was the final determination on this issue" (R4, tab 12).

21. When JWK submitted its 18 November 1999 proposal for contract 7 (ex. A-2), it did not know that the Army would not re-compete the Korean base maintenance contract among invited contractors subject to USFK 690-1 (tr. 1/167). The record does not show that the Army knew in 1999 or before 31 March 2000 that it planned to solicit the successor contract from local Korean firms. On about 30 November 2002, pursuant to USFK 690-1, JWK RIF'd all its Korean national employees who had worked on contract 7 (tr. 2/172). Each such employee accrued up to 276 sick leave hours from 1 April 2000 to 30 November 2002, the start and finish of contract 7's performance (R4, tab 1 at C-2; SR4, tab 20; tr. 1/140-41, 2/8, 112). Thereafter, JWK Korea Ltd., a local Korean contractor not subject to USFK 690-1, and a subsidiary of JWK, received the successor contract. Thus, JWK did not transfer the cumulative sick leave balances of its Korean national employees who were reassigned to JWK Korea. (Tr. 1/166, 2/172-73)

22. JWK paid its employees for earned sick leave hours when the employee took sick leave (tr. 2/146, 153), and when the employee's unused sick leave hour balance, at his hourly pay rate, was included in his severance pay upon termination (tr. 2/157, 161). JWK paid for sick leave hours accrued during the term of contract 7, and those previously accrued and transferred from PAE's contract to contract 7 (tr. 2/153-55).

23. On 31 January 2003 JWK submitted a certified claim for $236,120 to the CO (R4, tab 13). ACO Cyr's 21 February 2003 letter to JWK described the claim information as inadequate and requested further information (R4, tab 14). JWK's 20

March 2003 letter to ACO Cyr tabulated sick leave balances transferred by PAE to JWK (R4, tab 16).

24. The CO's 1 April 2003 final decision denied that claim for alleged failure to submit documentation to substantiate the amount claimed (R4, tab 16; tr. 2/40). JWK timely appealed that final decision to the Board on 8 April 2003.

25. After the CO's final decision was issued, DCAA did further work. It issued a report finding that JWK paid employees $106,073 for 4,079 sick leave hours exceeding 14,300 hours accrued for sick leave under contract 7. (Supp. R4, tab 35; ex. G-3; tr. 2/74, 107-10, 125, 135-36) Additional DCAA calculations suggest that the costs JWK recovered under the contract exceeded its payments for sick leave hours (supp. R4, tabs 20-22, 34). We need not decide this disputed issue to resolve entitlement.

26. ACO Cyr's 17 July 2003 e-mail to Mr. Gilmore stated:

> . . . [M]y final decisions . . . have been mooted partly from DCAA's subsequent obtaining of documentation and additional clarification on the issues provided by yourself.
>
> I explained in previous e-mails that I was willing to compensate JWL . . . for any sick leave actually paid which exceeds the sick leave accrued under the current contract [7]. I further stated that the USFK . . . 690-1, paragraph 7-3 specifically prohibits any transfer of funds associated with previously accrued balances (in this case the potential accrued sick leave liability transferred from PAE). Therefore, the Government does not expect JWK to be responsible for sick leave costs associated with previously accrued sick leave balances. . . .
>
> . . . .
>
> Again, the Government agrees that if previously accrued sick leave balances cost JWK any money above and beyond what the [contract] price included or should have included for current accruals of sick leave, the Government is willing to compensate JWK.

(Ex. A-23 at 1) ACO Cyr confirmed her foregoing views at the hearing (tr. at 2/88, 90).

DECISION

I.

JWK argues that: (1) the USFK 690-1 provisions with respect to transfer of sick leave balances from PAE to JWK either support its interpretation or were ambiguous regarding financial responsibility, but were clarified by Q&A-2; (2) JWK reasonably interpreted such provisions to mean that it was required to pay only those sick leave balances that accrued under contract 7; (3) the ACO's direction to transfer PAE's sick leave balances to contract 7 without transfer of funds or other compensation therefor was a constructive change (app. br. at 12-23); (4) respondent is bound by statements of its COs indicating that the government would reimburse JWK for the sick leave costs accrued by PAE (*id*. at 24-27) and (5) alternatively, respondent knew or had reason to know that JWK interpreted the sick leave transfer provision as not to require it to bear, without compensation, the cost of sick leave accrued while employees were employed by PAE, and thus there was a remediable mutual mistake (app. br. at 27-28).

Respondent argues that (A) JWK's error in business judgment is not a mistake that justifies contract reformation, (B) JWK's interpretation of Q&A-2 was not reasonable, (C) the Army did not order a constructive change to contract 7, and (D) JWK suffered no financial harm by its decision to omit the transferred sick leave costs from its proposal (gov't br. at 2, 18-27).

II.

USFK 690-1, ¶ 7-3, provided that sick leave accumulated while an employee was employed by a USFK component was to be transferred to any other USFK component, but expressly prohibited any transfer of funds therefor. USFK 690-1, ¶ 19-8.b.(1) required the transfer of sick leave balances of invited contractor employees reassigned to another invited contractor, but was silent with respect to transfer of funds therefor. (Finding 7)

The preparers of JWK's proposal for contract 7 knew the requirements of ¶ 19-8.b.(1) but included no costs in that proposal for accrued sick leave balances of PAE employees reassigned to work under contract 7 (finding 10). In April 2000 JWK advised ACO Smith that liability for PAE employees' transferred sick leave balances was not priced in contract 7 (finding 14). In June 2000 JWK told ACO Smith that JWK understood that USFK 690-1 required JWK to assume the liability to pay for transferred sick leave balances, but that "it was also assumed that based on common accounting principals [sic], any liability which transfers between contractors would carry with it the transfer of the accrued funds" (finding 15).

ACO Cyr told JWK on 17 July 2003, after this appeal had been filed, that since USFK 690-1, ¶ 7-3 "specifically prohibits any transfer of funds associated with previously accrued balances (in this case the potential accrued sick leave liability transferred from PAE)", the government does not expect JWK to be responsible for sick leave costs associated with previously accrued sick leave balances (finding 26).

JWK's post-award interpretation of USFK 690-1, ¶ 19-8.b.(1), and ACO Cyr's recent views about ¶ 7-3 (finding 26), are illogical. Paragraph 7-3 does not address transfer of accumulated leave or transfer of funds between USFK invited contractors and does not equate an inter-invited contractor transfer to an inter-DoD component transfer (findings 6-7). One cannot logically conclude that, because ¶ 7-3 forbids transfer of funds for employees transferred among DoD components, therefore ¶ 19-8.b.(1) authorizes transfer of such funds or government reimbursement of JWK's costs for transfers between invited contractors. Hence, we conclude that JWK's interpretation which evolved during April to June 2000, and the ACO's 2003-04 interpretation, of USFK 690-1, ¶¶ 7-3 and 19-8.b.(1), are unsound.

III.

JWK's argues that Q&A-2 --

> Who is responsible for the employees' compensation when new contractor make a RIF, which nothing to do the existing contract and contractors?
>
> Answer: Contractors shall be responsible for payment of all pay and benefits accrued during the period(s) of their respective contracts.

(finding 3) clarified USFK 690-1, ¶ 19-8.b(1), and so JWK had no need to seek further clarification from the CO with respect to transferred sick leave balances under USFK 690-1 before contract award (finding 10).

Q&A-2 did not expressly address the transfer of funds for transferred sick leave balances between invited contractors (finding 3). JWK unilaterally interpreted Q&A-2 to mean that a successor contractor, in the event its employees were RIF'd, would be responsible to pay only their unused sick leave hours accrued during the period of contract 7 (finding 10).

To the extent it is coherent, what the CO said in Q&A-2 was that predecessor and successor contractors are responsible for payment of all benefits accrued during the period(s) of their respective contracts. JWK conceded that USFK 690-1, ¶ 19-8.b.(1),

required it to assume the liability to pay for transferred sick leave balances (finding 15). Thus, we hold that Q&A-2, interpreted as JWK interpreted it, was patently inconsistent with USFK 690-1, ¶ 19-8.b.(1).

An offeror has the duty to seek clarification of a patent ambiguity, and its failure to do so results in its loss of the opportunity to rely on its unilateral interpretation of ambiguous provisions. *See S.O.G. of Arkansas v. United States*, 546 F.2d 367, 370-71 (Ct. Cl. 1976). Whether the parties' interpretations were in the zone of reasonableness, so as to invoke the *contra proferentem* rule in favor of the non-drafting party, is not applicable. *See Beacon Construction Co. of Massachusetts v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963). Therefore, JWK's argument that Q&A-2 clarified the ambiguity in USFK 690-1, so it had no need to seek further clarification from the CO before contract award with respect to transferred sick leave balances, is unsound.

JWK argues that, because the RFP did not provide the PAE employee sick leave balances or state that the future, successor contractor would not be an invited contractor subject to USFK 690-1, JWK reasonably excluded from its proposed fixed price any cost for transferred sick leave benefits (app. br. at 12-13). We do not agree. Neither PAE nor the Army could have known on 4 August 1999 when the RFP was issued, or by 29 February 2000 when contract 7 was awarded (findings 2, 4), what the PAE employees' final sick leave balances on 31 March 2000 would be, nor does the record show that the Army knew in 1999 or before 31 March 2000 that it planned to solicit the successor contract from local Korean firms (finding 21). Despite such incomplete quantitative information and future contingencies, fixed-price government contracts are routinely estimated, proposed, and priced.

IV.

JWK argues that each ACO assigned to contract 7 admitted the validity of JWK's sick leave balance claim. That contention is not sound. ACO Smith denied that he told JWK that the government would reimburse JWK's payments for transferred sick leave balances (finding 16(c)). ACO Lamantini's comment that JWK's voucher for payment of "sick leave/severance" was "valid" was not communicated to JWK (finding 18) and did not bind the government. This Board is not bound by a CO's interim findings or conclusions about the government's legal liability stated before the CO's final decision. *Space Age Engineering, Inc.*, ASBCA No. 26028, 82-1 BCA ¶ 15,766 at 78,032; *cf. England v. Sherman R. Smoot Corp*., 388 F.3d 844, 856-57 (Fed. Cir. 2004) (interim findings of fact not binding).

During litigation, ACO Cyr advised JWK, both in correspondence and in testimony in the Board hearing, that her final decision had been "mooted" due to post-appeal documentation and clarification of issues, the government did not expect JWK to

be responsible for sick leave costs associated with previously accrued sick leave balances, and she was willing to compensate JWK for any sick leave liability that exceeded the sick leave hours accrued under contract 7 (finding 26). The Board and the government are no more bound by the CO's conclusions stated after issuance of her final decision on the contractor's claim than those stated before. Moreover, respondent's post-hearing brief did not state that ACO Cyr's foregoing statements settled JWK's claim and mooted this appeal, but instead denied government liability to pay for sick leave benefits transferred from PAE to JWK.

V.

JWK's mutual mistake argument is unsound because its premise -- that respondent knew or had reason to know that JWK's interpretation of the sick leave transfer provision to require a transfer of funds differed from the government's interpretation -- was not shown to be pre-award knowledge. JWK's 19 June 2000 memorandum to ACO Smith, nearly four months after contract 7 was awarded, first stated JWK's view that "any liability which transfers between contractors would carry with it the transfer of the accrued funds" (finding 15).

Since JWK has not proven that the government had pre-award 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).

The record of the instant appeal discloses 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 in interpretation of the sick leave provisions in USFK 690-1.

Therefore, JWK has not established the elements of proof of mistake in bid warranting contract reformation.

CONCLUSION

For the reasons set forth above, we deny the appeal.

Dated: 28 January 2005

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. 54152, Appeal of JWK International Corporation, rendered in conformance with the Board's Charter.

Dated:

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