ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lear Siegler Services, Inc.	)	ASBCA No. 54449
	)	
Under Contract No. F41689-01-C-0029	)	

APPEARANCES FOR THE APPELLANT: Daniel B. Abrahams, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE TODD
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND
THE GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Appellant Lear Siegler Services, Inc. (LSI) has filed a motion for summary judgment asserting that it is entitled to judgment as a matter of law on its appeal from the contracting officer's denial of its certified claim under the Price Adjustment clause for increased costs of furnishing health and welfare benefits to its union employees in an option renewal period. The government has filed a cross-motion for summary judgment asserting that the increased costs did not result from appellant's compliance with a wage determination and do not qualify for a price adjustment. The parties have jointly submitted Stipulated Facts in Support of Cross-Motions for Summary Judgment (Stip.).

STATEMENT OF FACTS

On 17 July 2001, the Air Force, through the Air Force Air Education and Training Command (AETC), awarded a firm fixed-price contract, Contract No. F41689-01-C-0029, to LSI. The contract calls for LSI to provide aircraft maintenance at Sheppard Air Force Base, Texas. (Stip. ¶ 2; R4, tab 1)

The contract was LSI's second contract with the same command for substantially the same services. LSI's predecessor providing those services from 1997 until 2001 was

Lockheed Martin Logistics Management, a subsidiary of Lockheed Martin Corporation (Lockheed). LSI was the predecessor contractor to Lockheed from 1 October 1991 through 31 March 1997. (Stip. ¶ 3)

The estimated amount of the contract award was $26,908,641.13. The award included a mobilization period from 1 September 2001 through 30 September 2001 and a base performance period from 1 October 2001 through 30 September 2002. If all options are exercised, the contract will run through 30 September 2009. (Stip. ¶ 4)

The contract was subject to requirements of the Service Contract Act of 1965, as amended, 41 U.S.C. § 351 *et seq.* (SCA), which requires that certain minimum compensation be paid to service employees in accordance with wage determinations issued by the Department of Labor (DoL). The contract incorporated by reference FAR 52.222-41, SERVICE CONTRACT ACT of 1965, AS AMENDED (May 1989); FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT – PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (May 1989) (the Price Adjustment clause); and FAR 52.222-47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits (May 1989). (Stip. ¶ 5)

The contract made applicable Wage Determination (WD) No. 1997-0281, Revision 2, dated 1 August 2000. This WD incorporated by reference the wages and fringe benefits set forth in the collective bargaining agreement (CBA) between the predecessor contractor, Lockheed, and Aeronautical Industrial District Lodge 776 of the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union). (Stip. ¶ 6)

Clause H-903, "Service Contract Act Applicability," in the solicitation and contract provided:

> This contract is subject to the requirements of the Service Contract Act as amended, and attention is invited to the obligations of the contractor under section 4(c) of the amended Service Contract Act. Any questions regarding the extent of these obligations should be addressed to the Department of Labor.

(Stip. ¶ 7; R4, tab 1 at 53 of 67)

LSI did not ask the Air Force any questions concerning the existing CBA-based WD under which it was required to operate for the first year of the contract. Nor did LSI seek the advice of the DoL during the solicitation process. (Stip. ¶ 8)

The predecessor contractor's CBA listed the following fringe benefits: company-paid life insurance; company-paid accidental death and dismemberment insurance; short-term disability insurance; medical plan benefits for employees and insured dependents, with only nominal premiums and co-payments by the employee; a choice of dental plans, one of which was offered at no cost to the employees; vision benefits; and other insurance benefits. (Stip. ¶ 9)

The predecessor contractor provided some of the above health and welfare (H&W) benefits in the form commonly known as a "defined-benefit" plan. Under a defined benefit plan, an employee receives a fixed benefit or set of benefits regardless of the cost to the employer. A defined benefit provision in a CBA states in detail the benefits that an employer must provide for the workers but does not state a minimum cost contribution requirement to be paid by the employer for those benefits. Such costs are not a part of the collective bargaining process. (Stip. ¶ 10)

On 5 October 2001, during the base year of the contract, LSI and the Union, then the representative of successor LSI's employees, completed a "Settlement Stipulation," a copy of which was provided to the Air Force on 10 December 2001, approximately two months after contract performance began. Most of the provisions of this new CBA were similar to the predecessor CBA. A few provisions were revised. (Stip. ¶ 11)

The new CBA was delivered in a timely manner for purposes of becoming the WD for the first option period (1 October 2002 through 30 September 2003). LSI became the "successor contractor" to itself at the first option, and the monetary provisions covered by the SCA were thus made applicable to the first option period by operation of law. (Stip. ¶ 12)

Modification No. P00020 to the contract, dated 13 September 2002, exercised the option for the first option year. LSI's new CBA was similar to the predecessor CBA with regard to wages and prospective wage increases and with regard to the H&W fringe benefits and the maximum employee share of benefit costs. The CBA between LSI and the Union called for defined benefits. It does not contain written minimum employer cost requirements for group insurance such as health care, life, disability, and accidental death and dismemberment benefits. (Stip. ¶ 13)

Modification No. P00020 did not incorporate a revised WD for those employees covered by the predecessor CBA. The Stipulated Settlement between LSI and the Union became the SCA minimum wages and fringe benefits for the first option year by operation of law in accordance with the SCA and FAR 52.222-43(d)(2). For purposes of the SCA, a covered CBA is regarded as a WD with respect to FAR 52.222-43(d)(1) and (2). (Stip. ¶ 14)

By letter dated 31 October 2002, LSI submitted a request for an equitable adjustment under the Price Adjustment clause for the option year beginning 1 October 2002 (Fiscal Year (FY) 2003). LSI stated the basis for the price adjustment proposal as "Attachment 3 - Stipulation Agreement between the Union and LSI." It requested costs pertaining only to the specified hourly wage increases and did not request any costs related to H&W benefits. (Stip. ¶ 15; R4, tab 3 at 8)

After review and discussions with the contracting officer, LSI reduced its price adjustment request for the wage increases. Bilateral Modification No. P00037, dated 25 August 2003, made an adjustment to the contract price for "FY 03 Wage Pass-Through Adjustment." (Stip. ¶ 16; R4, tab 1)

Following the end of calendar year 2002, LSI calculated its cost of providing the defined group insurance benefits described in the Stipulation Settlement and notified the Air Force that the cost would be higher in the option year beginning 1 October 2002 than it had been in the base year. At a meeting on 28 January 2003 with the contracting officer, LSI's representatives stated that, after they had submitted the 31 October 2002 price adjustment proposal, there had been a change in employee insurance benefit costs. LSI requested that it be allowed to submit a revised price adjustment proposal. The contracting officer agreed to review such a proposal. By email dated 12 February 2003 to LSI, Mr. Harvey Scott, contract administrator, purporting to speak for the contracting officer, transmitted the contracting officer's instructions that LSI's proposal for the change in employee insurance benefits should be considered separately and should be submitted no later than 28 February 2003. (Stip. ¶ 17)

By letter dated 28 February 2003, LSI submitted its request for a price adjustment to account for an increase in LSI's projected group insurance expenses in the option year beginning 1 October 2002. The request was presented as "a modification to our REA dated 10-31-02," for an increase in LSI's H&W costs, citing "projected premiums" and "actuarial projections" as bases for the increase. (Stip. ¶ 18; R4, tab 3)

LSI did not provide the Air Force with any revision or amendment to the Settlement Stipulation. LSI stated in its request for price adjustment that the request was based on three months of actual health claims information and nine months of projected claims data provided to LSI by its third-party trust fund administrator, Anthem Blue Cross/Blue Shield (formerly Trigon). LSI based its request on the difference between the projected new H&W costs and its best and final offer. (Stip. ¶ 19)

By letter dated 30 June 2003, the Air Force denied LSI's second request for a price adjustment. The Air Force stated that there was no basis in the SCA that required the higher level of H&W benefit costs. Therefore, LSI was not "made to comply" and LSI was not timely in providing this "economic term" to the Air Force for "the beginning of the renewal period." (Stip. ¶ 20; R4, tab 4).

By letter dated 8 September 2003, LSI submitted a properly certified claim for $1,335,443.06 to the Air Force. By letter dated 6 November 2003, Ms. Linda C. Little, the contracting officer, denied LSI's claim on the grounds that the higher level of H&W benefit costs was not mandated by the SCA and the REA was not timely. (Stip. ¶¶ 1, 21-22; R4, tabs 6, 8) LSI filed this timely notice of appeal.

Lockheed held the previous contract with the Air Force for a period of four years and six months (1 April 1997 to 30 September 2001). Ms. Little was the contracting officer for the Air Force on that contract. LSI was the predecessor to Lockheed's contract for five years and six months (1 October 1991 to 31 March 1997). LSI's earlier contract was substantially the same in terms of its content and requirements as the contract at issue in this appeal. Ms. Little was the contracting officer on that contract only briefly. She signed three closeout modifications one and one-half years following the end of contract performance. (Stip. ¶ 24)

On or about 24 September 2002, the acting chief of the contracting division of the Air Force command that awarded LSI's contract distributed a memorandum which stated in pertinent part:

> We have determined that several AETC contracts were modified to improperly pass-through [sic] increases in contractor costs associated with employee fringe benefits provided under the auspices of a Collective Bargaining Agreement . . . . For example, on one contract the CBA included specified wages and fringe benefits. Among the fringe benefits was the provision of health care insurance. The CBA guaranteed a certain kind of insurance to employees, but did not quantify the cost of that insurance to the company on an employee-hour basis. Since the cost of the health care insurance to the company was not quantified in the CBA, it was illegal to pass-through [sic] increases solely because the contractor incurred increases in premiums.

(Stip. ¶ 25) The memorandum instructed all commanders to review contracts for additional examples of such adjustments (stip. ¶ 26).

Among the contracts that AETC had modified in the past in the manner described in the memorandum, dated 24 September 2002, was the contract between LSI and the Air Force that was the predecessor to Lockheed's contract. During the course of its contract with the Air Force, Lockheed did not request reimbursement for increases in H&W costs. As a result, the Air Force neither received a downward price adjustment for any

decreased H&W costs experienced by Lockheed, if any, nor made any payments for increased H&W costs to Lockheed, if any. (Stip. ¶ 27)

In connection with the subject appeal, the Air Force requested an opinion from Mr. William W. Gross, Director of Wage Determinations for the DoL. By email dated 23 February 2004, to Ms. Little, the contracting officer, Mr. Gross wrote:

> Under Sections 2(a) and 4(c) of SCA, employees of the successor contractor must receive no less than the wages and fringe benefits to which they would have been entitled if employed under the predecessor contractor's CBA. In situations where the predecessor contractor's CBA provides for a "defined benefit," the Wage and Hour division has said that the successor contractor may satisfy its obligations under the SCA by providing the identical benefit (regardless of the cost), or by providing an equivalent benefit. For compliance purposes, the cost for providing an equivalent benefit must be equal to or greater than the cost to the predecessor for providing the named benefits.

(Stip. ¶ 28)

On 7 May 1986, the Wage and Hour division of DoL stated its position on the fringe benefit obligations of a successor contractor under the SCA. The DoL interpretation of the statutory obligation included the following:

> The successor contractor . . . is not required to furnish employees with the specific or identical benefit provided for in the predecessor's CBA. As set forth in section 2(a)(2) of SCA and discussed in section 4.163(j) of Regulations, 29 CFR Part 4, a contractor may discharge its fringe benefit obligations by furnishing any equivalent combinations or [sic] fringe benefits or by making equivalent or differential payments in cash.

(R4, tab 10 at 1-2)

DECISION

Appellant contends that it is entitled to a price adjustment under the plain language of the Price Adjustment clause. According to appellant, it experienced an actual increase in the costs of H&W benefits and provided the fringe benefits in compliance with the applicable CBA. It interprets the contract to provide for a contract price adjustment under these circumstances. Appellant further argues that the government practice to allow price adjustments in the same circumstances in the past created a course of dealing that establishes the meaning of the disputed contract language and is binding on the government in this appeal.

The government argues that the clause does not require reimbursement of the increased costs of H&W benefits claimed because the change in cost did not result from the application of a DoL wage determination or collective bargaining. If the clause did apply, the government maintains that appellant's notice of the changes was untimely for application to the first option period of the contract. The government argues that appellant has not shown a course of dealing, and, in any event, evidence of a prior course of dealing may not vary the clear terms of the contract as a matter of law.

Summary judgment is appropriate where there are no material facts genuinely in dispute, and the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. We must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *South Carolina Public Service Authority*, ASBCA No. 53701, 04-2 BCA ¶ 32,651. The parties have submitted stipulated facts, and there are no material facts genuinely in dispute. We decide the motions as a matter of law.

The Price Adjustment clause in the contract provides in relevant part:

> (d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits *to the extent that the increase is made to comply* with or the decrease is voluntarily made by the Contractor as a result of:
>
> > (1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period . . . .

> (2) An increased or decreased wage determination otherwise applied to the contract by operation of law . . . .

FAR 52.222-43 (emphasis added). Thus a price adjustment is required when a contractor pays increased wages and benefits in compliance with a wage determination current at the beginning of a new term of the contract or a wage determination otherwise applied to the contract as a matter of law. DoL wage determinations are required to be in accordance with the wages and benefits in an applicable CBA as a matter of law. 41 U.S.C. § 351(a)(1), (2).

Under the plain language of the Price Adjustment clause, the contract price will be adjusted to reflect the contractor's increase in fringe benefits to the extent that the increase is made to comply with the applicable wage determination. Section 2 of the SCA, which requires specifying the fringe benefits that will be provided to service employees, states in pertinent part:

> The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

41 U.S.C. § 351(a)(2). DoL regulations provide as follows:

> Wage determinations which are issued for successor contracts subject to section 4(c) are intended to accurately reflect the rates and fringe benefits set forth in the predecessor's collective bargaining agreement . . . . [A] contractor may satisfy its fringe benefit obligations under any wage determination "by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash" in accordance with the rules and regulations set forth in § 4.177 of this subpart.

29 C.F.R. 4.163(j). Section 4.177, which provides for discharging fringe benefit obligations by equivalent means, states in part:

> (3) When a contractor discharges his fringe benefit obligation by furnishing, in lieu of those benefits specified in the applicable fringe benefit determination, other "bona fide" fringe benefits, cash payments, or a combination thereof, the substituted fringe benefits and/or cash payments must be "equivalent" to the benefits specified in the determination.

> As used in this subpart, the terms "equivalent fringe benefit" and "cash equivalent" mean equal in terms of monetary cost to the contractor.

29 C.F.R. 4.177(a)(3). Consistent with the SCA and these regulations, DoL has interpreted the mandate of CBA provisions for a defined benefit plan to allow for providing an equivalent benefit, as long as the successor contractor incurs at least the same cost as that of the named benefits. Where the CBA does not include provision for the costs of the benefits, compliance with an applicable wage determination does not compel the contractor to incur increased costs. Appellant has not established that the H&W benefits that are the subject of its claim were mandated or increased by a DoL determination applicable at the beginning of the option renewal period.

Appellant's cited authorities do not support its position. The Price Adjustment clause refers to "[a]n increased or decreased wage determination" (FAR 52.222-43(d)(2)), but it is not necessary that the increased costs result from changes in the wage determination or a CBA. In *United States v. Service Ventures, Inc.*, 899 F.2d 1 (Fed. Cir. 1990), a price adjustment was made for the increased costs of vacation pay in an option renewal period although the applicable revised wage determination was identical with respect to vacation pay requirements. The contractor was required to pay more vacation benefits in order to comply with the wage determination. The increase was thus in compliance with the applicable wage determination in accordance with the Price Adjustment clause. Similarly, in *Holmes & Narver Services, Inc., & Morrison-Knudsen Co., a Joint Venture*, ASBCA Nos. 38867, 38868, 90-3 BCA ¶ 23,198, a price adjustment was made for the increased costs of an additional holiday observance although there was no change in the provisions of the wage determinations between the basic contract award and the option years in issue. The Board noted that nowhere in the Price Adjustment clause does it require that the wage determination be changed from the basic to the option year in order that a price adjustment be made. The Board stated:

> As in *SVI* [*Service Ventures*], all that is required for a price adjustment is that there be a change (increase or decrease) in the *cost* of providing the wages and benefits required by the WD. Where such change does occur, there is no reason to distinguish costs resulting from increases in basic wage rates from costs resulting from increases in the scope of benefits (such as an increase from two to three weeks of vacation based on seniority or tenure).

90-3 BCA at 116,422.

Where increased costs do not result from compliance with a WD, a price adjustment is not recognized. *Aleman Food Services, Inc. v. United States,* 994 F.2d 819

(Fed. Cir. 1993) (increases in workers' compensation and unemployment insurance taxes resulting from changes in state law not recognized for adjustment); *see Page Airways, Inc.*, ASBCA No. 21065, 77-1 BCA ¶ 12,450 (increases in costs related to changes in insurance premium rates and the basis for social security taxes not recognized for adjustment); *Contract Services, Inc.*, ASBCA No. 18954, 74-1 BCA ¶ 10,520 (increased costs resulting from an increase in the annual insurance premium for workmen's compensation insurance not recognized for adjustment). In this appeal, the increased costs of furnishing H&W benefits to appellant's union employees did not result from a change in the CBA at the beginning of the renewal period or from a change in the scope of benefits to be provided. What occasioned the increase were changes in health insurance costs and appellant's determination to provide the defined benefit plan in its CBA rather than equivalent benefits. The increased costs did not result from the requirement to comply with the applicable wage determination, *i.e.*, the CBA.

Appellant argues that the past practice of contract price adjustments for increases in H&W benefits is a prior course of dealing that supports its interpretation of the Price Adjustment clause and is binding on the government. Appellant points to the facts of Air Force documentation of price adjustments granted for increases in contractor costs associated with employee fringe benefits provided under the auspices of a CBA and an adjustment made pursuant to the contract it had with the Air Force before the predecessor contract with Lockheed. The government has rejected appellant's interpretation of the Air Force memorandum in arguing that the purpose of the memorandum was to achieve consistency with Air Force policy that these types of increases are not paid (gov't reply br. at 18).

Appellant has suggested that the interpretation of the Price Adjustment clause for contractors with defined benefit plans is a question of first impression for the Board. In its reply brief, appellant states:

> [W]hether a contractor is entitled to a price adjustment when the contractor is providing defined benefits has never before [been] questioned before this Board or any other board of contract appeals, despite the fact that *most* contractors are providing some kind of defined benefits. The reason is that agencies, including the Air Force, have traditionally granted price adjustments for such increased benefit costs without objection.

(App. reply br. at 12; emphasis in original.) Appellant's footnote to the first sentence quoted is:

> To the extent that the Board believes that the appeal turns on this fact (which LSI believes is not the case) and the Board

> cannot take judicial notice of the overwhelming predominance of defined benefit plans, the Board should deny summary judgment for both parties and hold a hearing to receive expert testimony on this issue.

(*Id.*, n. 11)

Consideration of a prior course of dealing between the parties can be appropriate to aid in the interpretation of contract language. *Longmire Coal Corp.*, ASBCA No. 31569, 86-3 BCA ¶ 19,110. A course of dealing is "a sequence of previous conduct between the parties to the agreement" which can afford "a common basis of understanding for interpreting their expressions and other conduct." RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981); Uniform Commercial Code § 1-205(1). In *Gresham & Co., Inc. v. United States*, 470 F.2d 542, 554 (Ct. Cl. 1972), the Court held that, where there were numerous actions by the Government involving many contracts, "[t]here can be no doubt that a contract requirement for the benefit of a party becomes dead if that party knowingly fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead."

Appellant has not provided legal authority that would govern its interpretation of the Price Adjustment clause here. The parties' course of dealing during performance of a previous contract has been used to support an interpretation of the meaning of contract terms that was consistent with the unambiguous price adjustment methodology in the contract. *Coastal States Petroleum Co.*, ASBCA No. 31059, 88-1 BCA ¶ 20,468 at 103,509. Here, appellant's offer of an instance of prior payment of a price adjustment for the increased costs of providing defined benefits is not to support interpretation of an unambiguous contract term, but rather to vary from it. The terms of a contract may be modified by the course of conduct of the parties to a contract if their mutual intentions are evident in their dealings regarding payments under the contract. *Central Navigation & Trading Co., S.A.*, ASBCA No. 23909, 82-2 BCA ¶ 15,947 at 79,052. But where there is no suggestion or evidence that a contract provision, upon which a contractor relies, has been changed as a result of government conduct, a contractor's contention of a long-sanctioned practice will fail. *David B. Lilly Co., Inc.*, ASBCA No. 34678 *et al.*, 92-2 BCA ¶ 24,973 at 124,472.

Appellant has only alleged a past practice of such duration and frequency as would reasonably lead to a belief that a price adjustment would be made for increased costs of providing the defined benefit plan in the CBA. Appellant's facts do not, however, demonstrate exchanges between the parties at or before the time of contracting that would give rise to appellant's interpretation of the Price Adjustment clause or a common basis of understanding held by both parties. The facts do not show consistent, frequent payments to the contractor over an extended period of time such that a practice was well known to appellant and relied on to its detriment. There is no contemporaneous evidence

that appellant at the time of submitting its proposal for the contract intended and believed from discussions with the government or otherwise that any upward change in fringe benefit costs would be subject to a price adjustment (app. br. at 14; gov't reply br. at 19). Appellant at the time of submitting its second price adjustment proposal did not expect an adjustment for increased defined benefit costs, but rather requested permission to have such a proposal considered. Appellant has thus failed to demonstrate that a genuine issue of material fact is in dispute. Appellant has shown only a single prior instance of its receipt of a price adjustment for the increased costs of providing defined benefits. Appellant's evidence is insufficient to infer the existence of a course of dealing that would be relevant to the meaning of the Price Adjustment clause in the circumstances of this appeal.

We have reviewed all the parties' other arguments to consider appellant's claim, but find it unnecessary to discuss them to resolve the issue presented.

We have concluded that there are no genuine issues of material fact and appellant is not entitled to a price adjustment as a matter of law. Appellant's motion for summary judgment is denied. The government's motion for summary judgment is granted, and the appeal is denied.

Dated: 11 April 2005

LISA ANDERSON TODD
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. 54449, Appeal of Lear Siegler Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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