ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
JWK Korea Ltd.	)	ASBCA No. 54198
	)	
Under Contract No. DAJB03-02-D-0047	)	

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OPINION BY ADMINISTRATIVE JUDGE HARTY

This dispute stems from a contract awarded to JWK Korea Ltd. by the U.S. Army Korea for base maintenance and civil engineering operations at various Air Force bases located throughout the Republic of Korea. The services covered by this contract have been provided by contract for many years. The previous contractor was JWK International, a company owned by JWK Korea's parent—JWK Corporation.

JWK Korea seeks to recover increased labor costs it incurred incident to the unionization of its work force after the award of the subject contract. JWK Korea maintains generally that the government: (1) failed to disclose superior knowledge; and (2) represented to JWK Korea during pre-award discussions that JWK Korea would be compensated for cost increases due to unionization. Entitlement only is before us. We deny the appeal.

FINDINGS OF FACT

Background

Government Contracting in the Republic of Korea

The government obtains services and other contracting support from local Korean contractors. The government also contracts with so-called "Invited Contractors." Under the Status of Forces Agreement (SOFA) between the United States and the Republic of

Korea, an "Invited Contractor" is a "corporation[ ]organized under the laws of the United States . . . present in the Republic of Korea solely for the purposes of executing contracts with the United States for the benefit of the United States armed forces." Invited contractors are specifically exempt "from the laws and regulations of the Republic of Korea with respect to terms and conditions of employment, and licensing and registration of businesses and corporations." (R4, tab 29 at 000448-49) An invited contractor's labor-management relations are also governed by the SOFA and United States Forces Korea (USFK) Regulations. Under the SOFA the invited contractor designation is to be withdrawn when it is no longer necessary and the services can be obtained from local sources. (R4, tab 29 at 000452, tab 28 at 000393)

SOFA Requirements Governing U.S. Government Relations with Korean National (KN) Employees

USFK Regulation 690-1 governs relations between the government and KN employees who are either direct-hires or employees of invited contractors. The Korean Employees' Union (KEU) is the sole representative of KN employees recognized by the government for those KN employees that are employed by the USFK directly or by an invited contractor. Relations between the government and the KEU for direct hires and invited contractor KN workers are governed by a Labor Management Agreement (LMA). (R4, tabs 28, 29 at 000448, 000452-53, tab 30 at 000485; app. supp. R4, tab 37)

Wages and benefits for direct hire and invited contractor KN employees are established through negotiations between the government and the KEU, and are published as KN Employee Wage Schedules (SOFA wages). When the USFK and the KEU reach an agreement on changes in SOFA wages, the government issues a contract modification to invited contractors, adjusting the contract price to reflect the changes in SOFA wages. (Tr. 2/71-72)

Invited contractors are not parties to the LMA, and have no authority to enter into negotiations with either the government or the KEU regarding adjustments to KN employees wage and benefit schedules. Invited contractors are required to comply with the wage schedules established pursuant to the negotiations between the government and the KEU. (Tr. 1/142-43, 152)

Local contractors are companies permitted to conduct business pursuant to the laws of the Republic of Korea, which are also registered with the government for the purpose of competing for and performing contracts for the government (tr. 1/152). They are, by definition, not covered by the SOFA, and must comply with applicable Korean laws and regulations.

The Request for Proposals

On 28 January 2002, the United States Army Contracting Command, Korea (USACCK or CCK) issued Request for Proposal DAJB03-01-R-0157 (RFP 0157) for civil engineering operations and base maintenance requirements at certain air bases throughout the Korean peninsula. The RFP contemplated a fixed-price-award-fee contract, with award fee for defined requirements, such as mobilization, management, and administration, and certain time and materials (T&M) and reimbursable contract line items for planned work and contingency/emergency support. Award was to be made on the basis of the proposal offering the best value to the government. (R4, tabs 3, 18 at 001995-96)

The period of performance for the proposed contract included a phase-in period from 1 October 2002 through 30 November 2002; a base period from 1 December 2002 through 30 September 2003; and four one-year options starting on 1 October 2003 and ending on 30 September 2007. (R4, tab 3 at 000583-84)

The RFP and resultant contract contained two provisions pertinent to our consideration here. The first, which was stated in full text in the solicitation, was a clause entitled "52.0000-4404 KOREAN LABOR LAW." The clause provided:

> 52.0000-4404 KOREAN LABOR LAW
>
> Contractor shall honor employees' rights in full compliance with Korean Labor Law, including the rights of succession of employment. Failure to comply may be deemed breach or default of the contract and evidence of nonresponsibility. Such violation of Korean Labor Law may be evidenced by a Republic of Korea Ministry of Labor determination, a court decision, or a Labor Relations Commission adjudication. If a contractor is found to be in serious violation and fails to take adequate corrective action promptly, USFK may consider this grounds for determining the contractor to be non-responsive for future Government contracts.

(R4, tab 3 at 000696) The second provision, which was incorporated by reference, was the DFARS 252.222-7002 COMPLIANCE WITH LOCAL LABOR LAWS (OVERSEAS) (JUN 1997) clause. This clause provides:

> (a) The Contractor shall comply with all-
>
> (1) Local laws, regulations, and labor union agreements governing work hours; and

(2) Labor regulations including collective bargaining agreements, workers' compensation, working conditions, fringe benefits, and labor standards or labor contract matters.

(b) The Contractor indemnifies and holds harmless the United States Government from all claims arising out of the requirements of this clause. This indemnity includes the Contractor's obligation to handle and settle, without cost to the United States Government, any claims or litigation concerning allegations that the Contractor or the United States Government, or both, have not fully complied with local labor laws or regulations relating to the performance of work required by this contract**.**

(c) Notwithstanding paragraph (b) of this clause, consistent with paragraphs 31.205-15(a) and 31.205-47(d) of the Federal Acquisition Regulation, the Contactor will be reimbursed for the costs of all fines, penalties, and reasonable litigation expenses incurred as a result of compliance with specific contract terms and conditions or written instructions from the Contracting officer.

(R4, tab 1 at 000224, tab 3 at 000698)

The government received approximately 1096 questions concerning the solicitation from prospective offerors. The majority of the questions were generated by JWK Korea and New Pishon, a subcontractor to JWK International, which was performing on the then current contract on an invited contractor basis. (R4, tabs 9, 11; tr. 2/91-92)

Overall eight amendments were issued to the RFP (R4, tabs 4 through 11). By Amendment No. 0004, dated 1 April 2002, the government informed offerors that:

As required by Articles XV of the US-ROK Status of Forces Agreement (SOFA), this Solicitation is issued only to local sources in Korea. If any offeror wishes to be considered a local source, it either must have registered as such with USACCK prior to submitting its proposal or it must provide with its proposal all evidence necessary to establish that it is permitted by the Korean Government to – and otherwise –

> can perform contracts in Korea for United States Forces Korea (USFK) without SOFA status and privileges.

(R4, tab 8)

Amendment No. 0005, dated 5 April 2002, revised the specifications. Among other things, it deleted Section L from the RFP in its entirety and replaced it with a revised Section L. Section L(a) stated in part:

> . . . The Government warns Offerors that taking exception to any term or condition of the solicitation (including submitting any alternate proposal that requires relaxation of a requirement) may make the Offeror ineligible for award.

(R4, tab 9 at 001055, 001145)

The amendment also published responses to 554 questions, including the following question posed by JWK Korea:

> ***Questions 310:*** In the event that a Korean company wins the contract, what will happen if the labor force organizes? Will the contract be modified to accommodate labor rates, benefits, etc. reflected in a Collective Bargaining Agreement (CBA)?
>
> ***Answer:*** The Government generally does not intervene in issues between the company and labor unions. The contractor is required to comply with all terms of the contract. *The fact that the labor force organize[s] does not relieve the contractor of these responsibilities. There is no provision to modify the contract to accommodate changes reflected in a Collective Bargaining Agreement.* [Emphasis added]

(R4, tab 9 at 001431-33)

However, at the time the government issued Amendment No. 0005, the RFP contained the FAR 52.216-4, ECONOMIC PRICE ADJUSTMENT – LABOR AND MATERIAL (JAN 1997) clause, which provides for adjustments for increases or decreases in the "rates of pay for labor (including fringe benefits)," subject to a certain ceiling. This provision was included in the solicitation when it was issued. The lead contracting officer subsequently determined the inclusion of the clause was an error (tr. 2/83, 93-95, 113). On 19 April 2002, the government issued Amendment No. 0008, removing the clause. One effect of the removal of the economic price adjustment clause was to validate the

answer to Question 310. JWK Korea acknowledged receipt of Amendment No. 0008 when it submitted its proposal.

JWK Corporation

JWK Corporation is a holding company with the following subsidiaries: JWK International Corporation, JWK Korea, and JWK Thailand. JWK Korea was established in 2002 as a Korean company organized under the laws of the Republic of Korea. For the purpose of performing contracts with the United States forces located in the Republic of Korea, JWK Korea is a local contractor. Dr. Jay W. Khim, the CEO of JWK Corporation, testified that at the time JWK Korea was formed he was the sole shareholder. He was also the sole shareholder and owner of JWK International. Mr. Khim testified that JWK International was never the parent company of JWK Korea and appellant's contrary certification in its proposal was in error. (Tr. 1/74-75, 82-83, 85-86, 100)

Prior to the award of the subject contract, the services involved here were being performed on an invited contractor basis by JWK International under Contract No. DAJB03-00-D-0007 (007 contract). The contract was awarded on 29 February 2000 for a six-month base period, with several one-year options. The government exercised the first and the second one-year option, carrying performance through 30 September 2002. The third one-year option was not exercised; instead, the government exercised its option pursuant to the FAR 52.217-8, OPTION TO EXTEND SERVICES (AUG 1988) clause to extend the contract for two months only. The final day of performance under this contract was 30 November 2002. (*JWK International Corp.*, ASBCA No. 54153, 04-2 BCA ¶ 32,783 at 162,136 (findings 2 through 7)).

The KEU

On 19 February 2002, approximately two weeks after RFP 0157 was issued, Mr. In-Suk Kang, the president of the KEU, accompanied by the KEU's executive director and another union official, had a luncheon meeting with Dr. Khim to discuss contract conversion from invited contractor to local contractor. At the time of the meeting, JWK International was performing the predecessor contract and a majority of its workforce were members of the KEU. (Tr. 1/77) According to Mr. Kang, Dr. Khim explained that he planned to participate in the "bidding with a different name," but would "make his best effort" to maintain the JWK International contract. If that effort were unsuccessful, Dr. Khim would do his "utmost effort to protect all the employees of JWK International" and "maintain the original labor conditions." (Kang Dep. at 11-12, 15, 16-17, 18) Mr. Kang explained that he "really trusted" Dr. Khim and made a commitment to help him "make the JWK International stay in the Air Force bases." Mr. Kang maintained that Dr. Khim "promised" that if a "new contract has to be made in this case, even in this case, I can guarantee the original labor conditions should be kept."

(*Id.* at 13, 14) When asked if there was a discussion about whether the KEU could represent the new local source contractor after award, Mr. Kang responded that he "didn't need to talk about this kind of thing because he [Dr. Khim] 100 percent promised to me that the same conditions could be kept, so I didn't have to talk about other conditions" (*id.* at 18).

Dr. Khim recalled the meeting with Mr. Kang in February of 2002. He thought it was going to be a courtesy visit between the head of the corporation and the head of the union. He had expected Mr. Kang to come alone and was surprised that he brought along some associates. The associates did not participate in the meeting, saying only "one or two words." He felt that their purpose in being there was "sort of a, I guess, intimidation." (Tr. 1/77-78) He recalled the "big issue" of concern to both of them was changing from a SOFA to non-SOFA contract. He wanted the contract to remain within the SOFA because JWK International had a five-year contract and the SOFA status was going to be changed after only two years. From Dr. Khim's perspective, Mr. Kang was also concerned because if it were a non-SOFA contract, it would be non-union. However, Dr. Khim testified that he made no promises to Mr. Kang related to JWK Korea winning the contract award. He also confirmed that there were no discussions about the number of JWK International employees that JWK Korea might hire if successful or the terms and conditions of such employment. Apart from this meeting, he did not talk to Mr. Kang or anyone else from the KEU either before or after award of the contract to JWK Korea. He also testified that he did not relay the substance of the meeting to anyone at JWK Korea. (Tr. 1/78-79)

The KEU Inquiry to the Korean Ministry of Labor

On 28 February 2002, Mr. Kang submitted an inquiry to the Korean Ministry of Labor (MOL) regarding the transfer of a business and union membership. The MOL responded on 22 March 2002 as follows:

> 1. This is to reply to your letter number 2002-24, dated February 28, 2002
>
> 2. When the personnel and physical organization of the business, while maintaining the same identity, are transferred to a new owner, and when the labor union maintains its same organizational identity, then it is an inevitable conclusion that the existing labor union will continue to exist. If there was no union member in the business for which the ownership is changed, and when employment relationship of the employees of the business was transferred completely to the new business owner, then the employees can establish and manage a new labor organization. However, not withstanding [sic] the business ownership change, if the employees of the business

> come under the existing labor organization based on the labor union's bylaw, then the employees can belong to the existing labor union.
>
> 3. It is difficult to render a decision without specific factual information related to your inquiry; however, please refer to the above in determining eligibility for union membership. The end.

(R4, tab 7; *see also* R4, tab 37 at 000628 for a slightly different translation)

The government's expert on Korean law noted that the 22 March Korean MOL opinion just confirms an established or "black letter" interpretation—as JWK counsel puts it—of Korean labor law and reflects the comprehensive business succession doctrine.

The KEU also had in its possession another MOL opinion, dated 31 March 1997, which states, in part:

> 2. When the management body of a business is changed while keeping the homogeneity of business itself, it is assumed that its labor union is [sic] also remain[s] effective and continues to exist, unless there are other factors to be considered. Also, the regulations provided in labor union and labor relations law are stating that it is not necessary for the organization of [the] labor union to be included in the union exist[ing] within the corresponding company. Therefore, employment contract and independent management operations are no concerns of this case.

(R4, tab 37 at 000629; *see also* app. supp. R4, tab 4 for slightly different translation)

The KEU's Approach to USACCK

By memorandum dated 22 April 2002, the president of the KEU forwarded the MOL letters to the government, together with a number of demands. First, the KEU demanded that the "U.S. Army Contracting Command Korea . . . have all contractors who submitted bids . . . consult with the KEU, before May 15, 2002, on the collective bargaining agreement which is to be signed between the successful contractor and the KEU." The KEU also asked the government to "cooperate closely with the KEU" because the government had the primary responsibility to take whatever actions were necessary to prevent any work stoppage that could be anticipated because of labor actions

during the course of contract conversion. The KEU contended that if its requests were not accommodated it would "stage large scale demonstrations" and the government had to realize it was responsible for the consequences. (App. supp. R4, tab 13 at 000137-38)

On 13 May 2002, COL Stephen G. Bianco, commander of the USACCK responded to the KEU's request:

> 1. This is to inform you that, after consulting with my staff, I have determined that CCK cannot require firms that submitted proposals on the contract in question to "consult" with [the] KEU. It would be inappropriate and potentially disruptive to the acquisition process to require any such consultation. The procurement is in the evaluation stage, and any agency disclosure related to any determinations of the competitive range is not permitted. The Federal Acquisition Regulation, FAR, requires U.S. agencies to remain impartial concerning any dispute between labor and a contractor.
>
> 2. CCK will continue to strive to maintain a good working relationship with your labor organization. Nonetheless, your reference to potential intentional disruptive behavior by KEU members is counterproductive to maintaining a good relationship between the KEU and USFK, and is also suggestive of actions that violate various labor relations laws and/or regulations, e.g., USFK Regulation 690-1, Labor-Management Agreement, and Article XVII, Labor, the Status of Forces Agreement between the United States of America and the Republic of Korea.

(App. supp. R4, tab 13 at 000135)

COL Bianco confirmed at the hearing that he denied the KEU's request because it would be inappropriate for USACCK to require offerors to consult with the KEU. He believed that it would be unreasonable and disruptive to the procurement process to require each bidder to sit down and negotiate with a labor union prior to proposal submission. When asked about the KEU's threat of staging demonstrations, COL Bianco testified that the government was not going to agree to the union's demands. (Tr. 2/54-55, 66; Bd. ex. 1)

On July 24, 2002, the KEU contacted the government, through the USFK Civilian Personnel Director, again expressing its displeasure with the planned contract conversion (R4, tab 37 at 000673).

JWK Korea's Proposal

A number of proposals were received by the 24 April 2002 closing date, including JWK Korea's proposal (R4, tab 18 at 001994). JWK Korea's offer in response to the RFP 0157 included one technical proposal and two cost proposals: a "Cost/Price Proposal" (also referred to as its primary cost proposal) and, an "(Alternate) Cost/Price Proposal" (R4, tab 15; tr. 2/97). The primary cost proposal was based on the "use of non-union rates and benefits" and the alternate cost proposal was "based on continued use of union labor pay rates and benefits" (app. supp. R4, tab 2 at 00022). The primary cost proposal offered a price based on contemporaneous commercial sector Korean wages and fringe benefits. The alternate cost proposal contained a price consistent with the SOFA wages paid on the JWK International contract. (Tr. 1/118-19) JWK Korea's reasons for submitting two cost proposals were explained in its management proposal:

> . . . We also understand that because *recognition of the union, including wages and benefits, will not be required of the new BMC* [base maintenance] *contractor*, there will more than likely be a significant amount of labor unrest, perhaps including violence. We believe the labor problems can be alleviated if union wages and benefits are approved under the new contract. However, we also understand the importance of keeping costs as low as possible without endangering performance. Because of these considerations, JWK has submitted two cost proposals each based on a different approach to providing [KN] staffing, described in the following paragraphs. [Emphasis added]

(R4, tab 27 at 117)

JWK Corporation's comptroller, Mr. Warren R. Goldman, was responsible for supervising the financial affairs of JWK Corporation, including its subsidiary JWK Korea. He was also responsible for preparing both cost proposals. (Tr. 1/107-08) Mr. Goldman testified that "[t]he proposal which we labeled union encompassed the actual wages and benefits which JWK International was paying at the time that [it] submitted that proposal in April 2002." He further testified that the non-union proposal was based on research he and two others, acting under his direction, did to determine Korean domestic wages and benefits. (Tr. 1/118-19, 120-22)

Mr. Goldman also testified that he did not review the DFARS 252.222-7002 COMPLIANCE WITH LOCAL LABOR LAWS (OVERSEAS) clause before preparing or submitting the proposals (tr. 1/127). Mr. Goldman testified that his firm internally analyzed the meaning of the clause, but he never sought legal advice prior to preparing and submitting the cost proposal. Mr. Goldman did not think "rights of succession of employment" applied because they were "going from a union situation to a non-union

situation" and nothing in the internet research he conducted indicated otherwise, although he recognized that "[t]his workforce had been unionized for over 30 years." (Tr. 1/122-24, 125-26, 128)

Both the primary and alternate cost proposal were subject to the following condition contained in a section, entitled "ASSUMPTIONS":

> This proposal has no escalation for labor rates. JWK Korea assumes we will be granted an equitable adjustment should the workforce unionize and JWK Korea must accept a Collective Bargaining Agreement which increases the labor rates of this contract. JWK Korea also anticipates an equitable adjustment should outside Government, Korean or US, Agency impose any upwards escalation factors onto the labor rates of this contract.

(R4, tab 14 at 001747-48, tab 15 at 001839-40) The condition with respect to the alternate cost proposal is identical except that the words "assumes we" in the second line of the quote, *supra*, have been deleted.

At the time of the hearing, Mr. James Gilmore was the senior vice president of JWK Corporation, JWK International, JWK Korea, and president of JWK Thailand. From January 2002 through December 2002, he was the senior vice president for JWK International. He was involved in the preparation of JWK International's proposal for the predecessor contract. Once JWK International won the contract, he was the phase-in and project manager for the first six months. (Tr. 1/141-42) He was familiar with the effort to recompete the contract. He testified that the first RFP was issued in the summer of 2001, but was cancelled because the KEU had "lobbied very heavily" for at least one more full option period of performance for JWK International. From his perspective, JWK had an obvious concern that the contract continue because of its investment and the Korean employees did not want to see the contract go to a local contractor because they were afraid of losing wages and benefits. (Tr. 1/146-48, 155)

With respect to the KEU's intentions, Mr. Gilmore recalled an incident that occurred in connection with the resolicitation during a site visit at the Suwon Air Base. As the tour bus, which contained all of the prospective offerors who were interested in responding to RFP 0157, approached the JWK International compound, the KEU staged a stand-up demonstration, with union representatives lined up, several rows deep, across the gate to the compound. They had signs protesting the decision to end the JWK International contract and make it available to a local contractor and were led in chanting by the local chapter president, who had a bullhorn. The demonstration prevented the bus from entering the compound. (Tr. 1/153-54)

Mr. Gilmore testified that the decision to submit two proposals was made after the incident at the gate. He knew that because RFP 0157 was a best value procurement, award did not have to go to the lowest priced offeror. He explained that the lower cost proposal obviously represented a cost savings to the government; however, it carried with it an attendant risk of labor unrest because the KEU had on many occasions said that they did not want to see their employees suffer a reduction in wages and benefits. The more expensive proposal had the benefit of avoiding potential labor unrest allowing retention of a greater percentage of incumbent JWK International employees, although he believed the wages and benefits proposed in the non-union proposal were those prevailing in the local economy. (Tr. 1/158-60)

He read the 52.0000-4404 KOREAN LABOR LAW clause. He did not see it as doing anything more than admonishing compliance with Korean labor law and included "the rights of succession of employment" as an example. (Tr. 1/156-57) He believed they could offer the lower wages reflected in the non-union proposal because the LMA mandated by USFK Reg. 690-1 did not apply to a local contractor (tr. 1/163).

JWK Korea's witnesses maintained there were no discussions between any JWK Korea, JWK International, or JWK Corporation personnel and the KEU regarding contract bid strategy, wages and benefits, or union succession regarding RFP 0157 at any time between the issuance of the RFP on 28 January 2002 and the award of the subject contract in August 2002 (tr. 1/79, 110, 193). Mr. Gilmore testified in this regard that the KEU made several attempts to contact JWK Korea personnel before award about the proposal, but he said "don't sit down and talk to them about it, you know, it's not appropriate. Don't get sucked in." (Tr. 1/193-94)

We find the decision to avoid contact with the KEU was a calculated business decision.

Proposal Evaluation

JWK Korea was among the offerors included in the competitive range. At the time of the determination, the Technical Evaluation Board (TEB), chaired by CAPT Mark K. Restad, USAF, had concluded that JWK Korea was technically qualified based on its review of the proposal against the solicitation's technical and past performance evaluation factors. (App. supp. R4, tab 33)

LTC Preston A. Butler, Jr. was the Division Chief of USACCK's Contract Operation Division. The division was responsible for soliciting and awarding the contract. Mr. Joseph Smithey and Mr. Arthur Fanter were contracting officers working for LTC Butler. (Tr. 2/159-60) Mr. Smithey was the principal contracting officer on the RFP. However he was not able to attend any discussions with any of the offerors in the competitive range. (Tr. 2/73-74) Mr. Fanter attended the discussions in his place

(tr. 2/159, 189). At that time Mr. Fanter and Mr. Smithey worked as team chiefs and, in LTC Butler's opinion, were co-equals (tr. 2/160). LTC Butler explained that he, Mr. Fanter, and Mr. Smithey operated as a team and, with the exception of his broader contracting officer's warrant, all three contracting officers were "interchangeable" (tr. 2/159-60, 173).

Proposal Discussions

The government conducted discussions with JWK Korea on 28 June 2002. JWK Korea was represented by Mr. Michael Dayberry, Mr. Goldman, and Mr. Gilmore (via telephone conference call). (Tr. 1/110, 165, 2/12) The government was represented by Mr. Fanter, CAPT Restad, and Ms. Chong, a contract specialist who was present principally to take notes (tr. 2/190) and did not testify. LTC Butler was present for several minutes near the end of the discussions (tr. 1/110).

Mr. Fanter was new to the procurement. Mr. Fanter's contracting officer's warrant limited his authority to obligate to $25,000,000 (app. supp. R4, tab 15), which was less than the expected value of the proposed contract. He was not involved in the preparation of RFP 0157 and had not read the scope of work. He had "very, very little" involvement in proposal review (tr. 2/187-88). As preparation for his participation, Mr. Fanter did not personally review any documents related to RFP 0157. Instead, he relied on oral briefings from Mr. Smithey and CAPT Restad. (Tr. 2/190) He received only a general briefing from Mr. Smithey about the subject of the discussions because most of the discussions were going to involve technical matters and those discussions were going to be led by CAPT Restad, as head of the TEB. JWK Korea's submission of two price offers was mentioned and Mr. Smithey wanted him to tell the offeror to submit one. He also recalled that he was told to get JWK Korea to eliminate the condition calling for adjustments in labor costs. (Tr. 2/201)

CAPT Restad's primary responsibility with the 607th Air Support Group was contract liaison and he represented the requiring activity in connection with the RFP. In addition to chairing the TEB, he also chaired the Past Performance Evaluation Board (tr. 2/136). He attended the contract discussions with JWK Korea to provide any necessary TEB input and discuss proposal weaknesses. (Tr. 2/114-15, 119)

From his perspective the effect of JWK Korea's two cost proposals and the assumption that there would be an equitable adjustment in the event of unionization was to shift the liability for union wage increases from the contractor to the government. According to his testimony, the government representatives made it clear that the approach was unacceptable. He did not recall Mr. Fanter or anyone directing JWK Korea to withdraw the alternate proposal. However, there was some discussion of the competitiveness of the proposal, with the alternate proposal being described as less competitive. He remembered Mr. Gilmore asking which proposal the government

thought was more competitive and Mr. Fanter responding that the primary, lower cost proposal was more competitive because the technical side was the same for both proposals. In CAPT Restad's view, there was nothing too remarkable about a lower price proposal being more competitive than a higher priced proposal, everything else being equal. He was not directly involved in the evaluation of the cost proposals, although information on both was on a spreadsheet that he received. (Tr. 2/121-23, 150-51) (Mr. Smithey later testified that if he had been left to pick between the proposals, he would have chosen the lower priced proposal because the scope of work was the same and the technical evaluation indicated that JWK Korea was able to perform on the basis of the primary proposal (tr. 2/98).)

CAPT Restad's review of the initial proposal led him to conclude that JWK Korea had made two assumptions which, in his opinion, "made them unresponsive." He was concerned about the provision for an equitable adjustment in the event of unionization and a provision for currency conversion (which was later resolved). He recalls that when they told Mr. Gilmore the condition calling for an equitable adjustment was unacceptable, Mr. Gilmore made "some sort of allegation" that he felt the government would be legally required to make an adjustment anyway. He recalled Mr. Fanter saying in reply that "the government would do whatever it was legally required to do." In his view, Mr. Fanter gave the JWK representatives no indication that if they removed the assumption, it would still be there in the contract. When asked whether there was anything that could have been misinterpreted, he commented again that Mr. Fanter said, "We would do what we were legally required to do. So, there was some doctrine that would allow that but there was no specific promise to pay." (Tr. 2/144-48)

Mr. Fanter had very little recall of the negotiations and had never encountered the issues associated with the KEU before. Mr. Fanter kept no contemporaneous notes of the negotiations, but did prepare a memorandum dated 13 November 2002. The memorandum reported that he stated during the negotiations that "only one proposal could be evaluated . . . for the same statement of work, and we could not evaluate a proposal that seemed to be based on a contingency." In addition, "[i]f an offeror submitted two proposals, the Government would only accept the one offering the Best Value to the Government." (R4, tab 21)

He confirmed that he instructed JWK Korea to submit only one proposal, although he was aware of no prohibition against submitting two proposals (tr. 2/192-94). He recalled that JFK Korea's proposal had a condition about "whether or not they were going to get the change in labor costs" and he testified that he "would have told them that they can't impose conditions on the government and that they should revise their proposal." He explained that by including the condition JWK Korea was not responding to the solicitation. He denied making any promises to JWK Korea because:

> You're incurring an obligation. It becomes second nature. You just never do that. Commitments by the Government are in writing. Too, there wasn't any way to quantify what their condition had been on, more money for labor cost, but there's no way to know what that was.
>
> And second, the contracting officer didn't have any funds to support a commitment, so you don't make a commitment.

(Tr. 2/200-05)

On the question of what could be done if JWK Korea encountered higher labor rates than they were proposing, he recalled saying—while branding it an "old memory": "There is a claims process in the FAR. Everybody knows how it works." Mr. Fanter could not recall saying that he would do whatever he was "legally obligated to do." He could not remember how he phrased it, "but that the only process there would be would be a claim or a request for an equitable adjustment." (Tr. 2/205-06) He had no specific recall of discussing the removal of the economic price adjustment provision with JWK Korea's representatives (tr. 2/208).

Mr. Gilmore had a different perspective of events. He testified that he had never met Mr. Fanter before the discussions and had no dealings with him after the discussions, nor to his knowledge did anybody in JWK Korea or JWK International. Mr. Fanter identified himself as the contracting officer who would represent the government in discussions that day, explaining that he was sitting in for Mr. Smithey, who had a previous travel engagement that he could not avoid. (Tr. 1/167)

According to Mr. Gilmore, Mr. Fanter explained that there had been substantial confusion concerning the reasoning behind the submittal of two proposals and asked him which one he wanted the government to evaluate. When Mr. Gilmore replied that he wanted the government to evaluate both, he was told without explanation for the prohibition that the government would "only score one proposal and I needed to remove one." Mr. Gilmore responded that if the government was only going to allow one proposal, "I would withdraw the higher cost proposal because I assumed at that point that the price was going to play a larger role." (Tr. 1/168; *see also* tr. 1/203) Mr. Gilmore fully appreciated that while the lower cost proposal "obviously represented a cost savings" to the government, it had "an intended risk of labor unrest because the KEU had expressed on numerous occasions that they did not want to see their employees suffer a reduction in wages and benefits" (tr. 1/159, 168, 203).

Mr. Gilmore acknowledged that Mr. Fanter also told him the proposal "assumption" concerning unionization had to be removed because the government was "not going to

award a contract based on a contingency like that." Mr. Gilmore testified that in response he told Mr. Fanter that the provision was put in because the "equitable price adjustment clause had been removed during the solicitation process and [JWK Korea] needed some protection." According to Mr. Gilmore, Mr. Fanter's response "directly to me on that issue was that the equitable price adjustment clause should not have been removed but that was neither here nor there. And, in the event that the workforce unionized . . . there was a mechanism that would be followed to take care of us and I obviously understood what that mechanism was." However, Mr. Fanter "didn't specify what he meant." Mr. Gilmore testified that because the comment was:

> . . . in the context of the EPA clause referenced in discussion, the removal of that clause, I assumed that that's what it meant. And, also when he said it should never have been removed, I read that as being it doesn't matter that it may have been removed by amendment, because it should not have been removed, it was therefore still part of the package.

(Tr. 1/167-70, *see also* 1/204-05)

When asked by JWK Korea counsel, what he understood Mr. Fanter's "representation" to be, Mr. Gilmore responded that:

> . . . it was very clear to me that he was telling us that he needed the assumption removed, but that we would be protected anyway and that in the event of a unionization and if JWK Korea experienced increased costs as a result of that unionization, that the provisions of the EPA clause would be followed and a contract modification would be negotiated and exercised.

When asked whether he thought the government would honor requests for adjustments without limitations, he responded:

> I've been dealing with the government for a long time, and they've yet to write me a blank check, so no. I expected there to be a negotiation process and a reasonable number arrived at. It's always been my practice in union negotiations to hold my costs down as much as I could.

(Tr. 1/170)

On cross-examination Mr. Gilmore reaffirmed that Mr. Fanter said "the Equitable Price Adjustment clause should never have been removed, but that's neither here nor there."

He was convinced that he remembered the statements "almost verbatim." He took the statements "to mean that if it was not supposed to have been removed that it was actually still part of the solicitation." While Mr. Gilmore conceded that Mr. Fanter did not say the clause was still in the solicitation, he reemphasized that Mr. Fanter did tell him that if the work force unionizes "there is a mechanism that you can follow and you're obviously aware of what that mechanism, what that process is." (Tr. 1/204-05)

Mr. Goldman's contemporaneous notes on 28 June 2002 (tr. 1/112-13) also record that Mr. Fanter said there was a "mechanism to resolve this issue" in the event of an increase in labor costs due to unionization.

> Equitable adjustment: Government states JWK cannot impose conditions. If we do, they will throw us out of competition.
>
> Our assumption must be removed from the proposal on equitable adjustment.
>
> . . . .
>
> JWKL stated that employees could organize and unionize and that is why we offered the union priced proposal. Government stated that this is outside of this proposal. Mr. Fanter stated that there is mechanism to resolve this issue if this happens. Mr. Fanter stated that he wanted us to remove verb[i]age out of this proposal. Conditional verb[i]age in technical needs to be removed as well.

(App. supp. R4, tab 7 at 00109)

When asked what he thought the "mechanism . . . to resolve the issue" that Mr. Fanter was referring to was, he responded that he believed Mr. Fanter was trying to say to them that even though the economic price adjustment clause may have been removed, if necessary the clause could be reinserted in the event there was a union and in the event that the wages and benefits were higher. He was not troubled that an amendment was not issued after the discussions putting the clause back in because Mr. Fanter was a contracting officer and "[w]hat a contracting officer tells me is gold." He felt the contracting officer's statement would trump the actual contract terms. (Tr. 1/131-32)

Mr. Goldman's view of what Mr. Fanter "was trying to say" is unpersuasive and not supported by his contemporaneous notes.

Mr. Michael A. Dayberry is a vice president with JWK Corporation with responsibilities for operations in South Korea and operations at JWK (tr. 2/6). He signed JWK Korea's initial proposal, the 4 July 2002 letter transmitting the revised proposal, and ultimately the contract. He prepared notes of the meeting shortly after the discussions concluded. His notes have the following pertinent entries with respect to a provision for equitable adjustment in the event of unionization:

> Jim [Gilmore] explained [that] . . . due to our concerns of the absents [sic] of a means to request equitable adjustment[] should the workers unionize and we were forced into a CBA [collective bargaining agreement]. These concerns are based on the Govt removing the FAR clause from the SOL [solicitation].
>
> Mr. Fanter stated even though it [the Economic Price Adjustment clause] had been removed [it] did not matter because it still applied.
>
> . . . .
>
> Jim stated that we had to have some means to recover our cost should we be forced into a CBA.
>
> Mr. Fanter stated that if that happened, that we could file a claim and that CCK would take care of JWK.
>
> Mr. Fanter stated that we should remove the Alt[ernate] proposal & assumption.
>
> If we don't we run a chance of being excluded from the competition.
>
> Mr. Gilmore said that based on these assurances we would remove them.

(App. supp. R4, tab 8 at 00113-14; tr. 2/11, 13)

He was asked on direct what his understanding of the statements "even though" the economic price adjustment clause had been removed "it did not matter because it still applied" and that if JWK Korea was forced into a CBA that increased its costs, JWK Korea could file a claim and "CCK would take care of JWK." He replied that Mr. Fanter told them that if they needed to file an equitable adjustment claim, then they could file a claim and CCK would recognize the claim and take care of it. He did not recall whether

he knew at the time that the clause had been removed. However, he thought Mr. Fanter could make such a promise because he had the authority to obligate the government even though the economic price adjustment clause had been removed. (Tr. 2/12-14, 29) When pressed on cross-examination about the statement that "we could file a claim and that CCK would take care of JWK," he acknowledged that it was not a direct quote. He also acknowledged that Mr. Fanter never told him that the government would pay for escalated rates. Instead, "Mr. Fanter indicated that we could file a claim and that the government would review those claims." "He did not say pay it." (Tr. 2/30-31) He could not remember whether Mr. Fanter used the words "equitable adjustment" when he assured them they could file a claim. He was also sure that Mr. Fanter did not use the exact words "we'll take care of you." (Tr. 2/41-42)

LTC Butler testified that he spoke briefly with Mr. Fanter before negotiations and was briefed on the issues that were going to be discussed. He was also briefed after the discussions because he wanted to make sure "they stuck to the plan" and to find out if there were any unresolved issues that would require his involvement. He was told that JWK Korea elected to stay with their primary proposal and "the contingency or the assumptions" were removed. (Tr. 2/174-75)

Based on our evaluation of the record, the witnesses' testimony, including an assessment of their credibility, we find that there was no commitment made by an authorized government representative—in this case Mr. Fanter—during the proposal discussion on 28 June 2002 to compensate JWK Korea for increases in labor costs. (In reaching this conclusion, we assume, but do not decide, that any commitment would have been within the monetary limit on Mr. Fanter's contracting officer's authority.)

The testimony of the witnesses is in agreement with respect to the salient points that were discussed during the 28 June 2002 negotiations. There is no disagreement that the JWK Korea representatives were told the "assumptions" or conditions had to be withdrawn and that only one cost proposal would be evaluated.

On the important question of what was promised, there is no adequate proof that Mr. Fanter did more than point JWK Korea to the claims process, with a promise that any claims would be evaluated. This is reflected in the testimony of CAPT Restad and Mr. Dayberry—once Mr. Dayberry's testimony is properly understood. As Mr. Dayberry said, Mr. Fanter said "we could file a claim." "He did not say pay it." Mr. Gilmore's contrary understanding is not persuasive.

We found Mr. Fanter's testimony to be credible. His recall and testimony are consistent with the testimony of someone who was "filling in" for a colleague in an unfamiliar matter and following a set agenda. In this context, a commitment by a contracting officer, filling in at the last minute, to agree, in effect, to the precise condition

that he was expected to get JWK Korea to agree to remove would be extraordinary indeed and would in itself raise questions about the integrity of the procurement process.

In reaching our conclusion, we credited Mr. Gilmore's recollection that Mr. Fanter told him that the "equitable price adjustment clause should not have been removed, but that was neither here nor there," though Mr. Fanter had no recall of this aspect of the matter. However, this recollection is not a springboard for concluding that the economic price adjustment provision would, in effect, be read back in. It is at most an expression of personal opinion, coupled with the observation that the opinion did not matter—it is "neither here nor there"—but the parties have to deal with its absence and "move on." (Mr. Smithey, on the other hand, testified that the clause did not belong in the solicitation.) In our view, having conceded that Mr. Fanter told him that the government was "not going to award a contract based on a contingency like that," Mr. Gilmore's "assumption" that relief would be granted from an increase in labor costs due to unionization of the work force is based on an unreasonable reading of what Mr. Fanter is credited with saying and his testimony on this subject is ultimately unpersuasive.

Moreover, everyone at the meeting was operating in an environment where it was expected that any "understandings" would be reflected in JWK Korea's best and final offer, which would become a part of the contract.

JWK Korea's Final Proposal Revisions

After the discussions Mr. Gilmore met with staff, including Mr. Goldman and Mr. Dayberry. They reviewed their respective memories of the meeting and the notes that they had taken and reached consensus on what the strategy would be for the final proposal revisions. Mr. Gilmore testified that in their final proposal revision they did not plan for labor escalation in the option years, but instead "flat lined our labor costs in those years, because we did expect some turn over in the workforce." According to Mr. Gilmore, JWK Korea did not have a plan for an increase in wages based on unionization "because we relied on Mr. Fanter's representation." (Tr. 1/171-72)

On 4 July 2002, appellant submitted its revised proposal, which consisted of its original technical proposal and the primary price proposal, which was based on non-union rates and benefits. Mr. Gilmore personally took the responsibility for memorializing JWK Korea's responses to the issues presented during the 28 June discussions, although Mr. Dayberry signed the letter. He also explained that he did not get "Mr. Fanter's promise to adjust the contract price in writing"—as JWK Korea's counsel framed the question—because he was concerned about getting the final proposal revisions finished and it was not his "habit to provide direction to a contracting officer, it's the other way around." It was his practice "upon receipt of direction, if I don't get it followed up in writing by a contracting officer, . . . to respond with a memorandum of understanding as to what I have been told and expect." In this respect he identified the

following item (which appeared inside a black bordered box on page two of JWK's final proposal revisions) as memorializing his understanding of Mr. Fanter's representation:

> ***Issue 2: Assumption regarding equitable adjustments for labor escalations.***
>
> Based on the assurance provided by the Government during discussions that adjustments will be considered in the event of increases to labor costs, JWK has deleted this assumption from our proposal. Revised pages are included with this transmittal.

(App. supp. R4, tab 2 at 00021; tr. 1/173-74)

When asked by JWK Korea counsel what the word "considered" meant to him, he responded that:

> I'm not an attorney, but ["]considered["] in consideration from my experience indicates an exchange in value for value. So, in this particular case it would have been the cost of the services at the higher wages would result in reimbursement of those higher costs.

(Tr. 1/175)

On cross-examination, when asked about an "assurance" that the EPA clause would be read back into the contract, he responded that "[a]t that point, I did not think it needed to be read back into the contract if it had been removed erroneously that it was still part of the contract" (tr. 1/207-08). He further explained that he saw Mr. Fanter's statement that the price adjustment provision should never have been removed as an "admission of an erroneous action taken by the contracting office and that therefore, if it was erroneous and it was invalid as he represented, then it either had the same effect of not having been removed in the first place or would be reinstated at some point" (tr. 1/210). As previously indicated, we found this reading of Mr. Fanter's remarks unpersuasive.

Mr. Gilmore expected that if the government disagreed with the Issue 2 statement, someone would have contacted him and taken exception to it. Since no one contacted him before contract award, he believed that his issue two summary was a proper and accurate summary. (Tr. 1/176)

With respect to its alternate cost proposal, JWK Korea stated:

> ***Issue 4: Alternate Cost Proposal.***
>
> We apologize for the confusion created by our submission of the alternate cost proposal based on continued use of union labor pay rates and benefits. As we indicated, our *primary* cost proposal is based on the use of non-union rates and benefits. We believe the primary cost proposal is the more competitively priced approach and is more in line with the cost savings the Government seems to be looking for through the re-competition. However, due to overt demonstrations by the Korean Employees Union, we believe there is a very real probability of significant labor unrest on contract turnover, regardless of who is awarded the contract. Further, we believe the *alternative* of continuing to use the current pay and benefit structure presents the advantage of avoiding potentially violent labor unrest and might be in the best long-term interests of USFK. Our alternate proposal is simply an *option* presented for consideration and should not be construed as our primary offer. . . . Is [sic] it *not* our wish that the alternate proposal be scored *instead* of our primary cost proposal. Therefore, as requested during discussions, we hereby withdraw the alternate cost proposal.

(App. supp. R4, tab 2 at 00022)

In its technical proposal, appellant stated the following regarding its strike contingency plan:

> Even though the incumbent employees are represented by a collective bargaining agreement (CBA) recognition of the union by JWK following award is not an issue, as JWK is not a signatory to the CBA**.** However, should the employees elect to be so represented at a point in time subsequent to contract award, we will immediately begin negotiations with the chosen representative organization.

(R4, tab 27 at 000081)

With respect to the recruitment of KN national workers, appellant's proposal states:

> Our *primary* cost proposal is based on an approach whereby in a worst-case basis we retain approximately 35% of the incumbent staff to capture critical institutional knowledge and experience. Any smaller level of retention would endanger performance. We do not anticipate many more than 35% accepting our proposed compensation; however, we are prepared to retain as many of the incumbents as will accept the new wages and benefits.
>
> For the balance of our proposed staffing we will recruit retirees and other skilled labor from the local economies. We have retained the services of a Korean company to assist us with this effort. There have been substantial numbers of employees forced to resign that will be available once union recognition is no longer an issue.
>
> . . . .
>
> . . . Our parent company has an excellent record of accomplishing recruitment in a timely manner so as to preclude endangering performance.

(R4, tab 27 at 000117-18)

Mr. Gilmore testified that appellant's intent was to obtain as much staffing as they could from JWK International and it had retained the services of two Korean companies to assist in hiring new employees in the event that its incumbent workforce rejected the lower wages and benefits (tr. 1/197).

The Government's Award Decision

On 5 July 2002, Mr. Fanter signed a memorandum, transmitting the revised technical proposals to the technical evaluation panel for a second technical evaluation in accordance with the criteria established in the source selection plan. Although JWK Korea's proposal was among those transmitted, Mr. Fanter was "pretty sure" that he did not see JWK Korea's final proposal revisions. After transmitting the proposal for evaluation, he had no discussions with the technical evaluators. (App. supp. R4, tabs 2, 36; tr. 2/192-94)

After the discussions, CAPT Restad, as chairman of the TEB, was involved in evaluating the revised proposals and saw JWK Korea's proposal revisions at that time. He recalled reading the Issue 2 statement. He believed the assumption had been withdrawn. He thought the statement reflected Mr. Fanter's advice that the government would do whatever it was legally required to do. In his view, "the fact that we said that adjustments would be considered is by no means any guarantee that any decision would be rendered in their favor." He did not discuss the Issue 2 statement with Mr. Smithey, Mr. Fanter, LTC Butler, or JWK Korea personnel. (Tr. 2/124, 149-50, 151-53, 155)

CAPT Restad subsequently prepared briefing charts for use by the source selection authority, the 7th Air Force Commander at the time, on the understanding that JWK Korea had dropped the assumption they would be granted an equitable adjustment if the workforce unionized. He did not discuss the issue with the source selection authority. (Tr. 2/153-55)

JWK Korea's best and final offer was reviewed for price reasonableness. The analysis consisted of two parts: comparison of proposed prices received and comparison of proposed prices with the government estimate. In accordance with the FAR, Mr. Smithey testified that he did not scrutinize appellant's cost elements and proposed profit, but rather compared it to the proposed prices received in response to the solicitation. (Tr. 2/78, 100, 106, 108) Because the next low offeror was within 9.9% of the proposed evaluated price, the government concluded that JWK Korea's price was reasonable based on adequate price competition. Mr. Smithey also determined that appellant's price reflected an overall understanding of the requirement and noted that its costs were lower because it did not propose a phase-in cost, but that after the transition years, appellant's offer was more in line with other offerors. Moreover, Mr. Smithey did not think there was a mistake in appellant's proposal because of its relatively close proximity to the next lowest offeror. (Tr. 2/106-08)

Mr. Smithey did not recall seeing JWK Korea's Issue 2 statement between its submission, his proposal evaluation and the award of the contract. When showed the statement during his deposition, it was not clear to him that JWK Korea had removed the assumption. (Tr. 2/75) He explained that his role was limited to looking at the final revised pricing. He testified that LTC Butler was responsible for reviewing the final proposal revisions. (Tr. 2/110-12)

On 12 July 2002, the government's source selection authority decided that JWK Korea's proposal offered the best overall value (app. supp. R4, tab 19 at 000175-76).

On 5 August 2002, LTC Butler awarded the contract to JWK Korea on behalf of the government. He testified that he did not read JWK Korea's entire revised proposal and could not recall what parts he did read (tr. 2/183). Standard Form 26 (Rev. 4-85) "AWARD/CONTRACT" at Item 18 provides in part that: "This award consummates the

contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary." (R4, tab 1 at 000001)

JWK Korea's Negotiations with the KEU

On 24 September 2002, Mr. Dayberry and another JWK Korea employee (with Mr. Gilmore joining by telephone) met with the president of the KEU. At the meeting, the president provided appellant with the Korean MOL opinions of 22 March 2002 and 31 March 1997 that the KEU had previously provided to the government by memorandum of 22 April 2002. The KEU also informed JWK Korea that it had provided these same documents to the government prior to contract award. The union president indicated that he expected a continuation of the wage and benefits currently being paid the KEU members. (Tr. 1/219)

Mr. Gilmore was "very upset and extremely angry" when he learned that the MOL opinions had been provided to the government in April. A cursory review of the 22 March MOL opinion indicated that "the union had a right to survive," which was not his understanding of Korean labor law when they put the proposal together. More timely notice would have given him enough time to get a "valid and accurate opinion" of the validity and applicability of the 22 March opinion or the opportunity to request an extension of the proposal due date in order to get one. He also would have been able to consider other options. For example if he had not been given enough time to determine the opinion's applicability, the alternate proposal ("the union wages and benefits") could have become his "primary and only proposal." (Tr. 1/180-81) In the end, the 22 March MOL opinion left Mr. Gilmore with the feeling that he had "no choice but to deal with the KEU at some level" (tr. 1/179).

Mr. Gilmore had made no effort at the time of proposal preparation to research Korean labor law. He recalled no specific request for legal advice on the labor laws before proposal preparation, nor did he receive any specific legal advice in preparing the technical proposal. JWK International had a law firm on retainer, but he did not contact them. He did not believe a generalized request for legal advice would have been fruitful or a good use of limited budgets. If he had the 22 March MOL opinion, he could have gotten a legal opinion. (Tr. 1/214-218, 189-90)

In any event, he rejected the applicability of the March 2002 MOL opinion to JWK Korea's situation. In his view, there was no business to transfer. JWK International's contract ended on 30 November 2002. When the contract ended there were vehicles and equipment, including computer assets remaining in the country. Since JWK Korea entered into a contract with the government, JWK International entered into agreements transferring the items to JWK Korea. (Tr. 1/164-65)

Dr. Khim, JWK Corporation's president, testified that neither he nor, to his knowledge, anyone at JWK Korea saw the 22 March 2002 Korean MOL opinion and the KEU president's 22 April 2002 letter before JWK Korea submitted its proposal. He did not see the documents until shortly before the hearing. He could not say what he would have done if he had seen them before proposal submission, calling the matter "iffy." (Tr. 1/81-82; R4, tabs 36, 37; app. supp. R4, tab 13 at 000137)

On 9 October 2002, the KEU insisted that the appellant enter into a CBA by 21 October 2002:

> KEU has been delegated the authority to control entire process related to wage negotiation and collective bargaining by the union members of your company located in Suwon, Daegu (including Kimhae) and Kwangju.
>
> Our union has received official reply from the [MOL] on Mar 31, 1997 and Mar. 22, 2002. This official reply states that "when the management body of a business is changed while the homogeneity of business maintained, the organization of labor union continues to exist with full effect."
>
> In our case, the management body of the company is not changed and only the name of the company, from JWK International to JWK Korea, and its subcontracting status (Invited –>Local) are changed. Therefore, transference of all employees and guarantee to existing working conditions should be preceded. Any more delay or avoidance to carry on collective bargaining shall be deemed as an attempt to evade obligation. Hence, we notify that we would not tolerate such avoidance any more.

(R4, tab 37 at 000671; *see* app. supp. R4, tab 3 for a slightly different translation dated 9 October 2002)

JWK Korea initially sought to hire replacement workers based on the wages and benefits in the contract as awarded. However, when the arrangements with replacement workers collapsed due to pressure by the KEU, JWK Korea concluded that it had no option but to enter into negotiations with the union. (App. supp. R4, tab 1 at 11) Mr. Gilmore characterized the negotiations with the KEU as coercive. As Mr. Gilmore testified:

> We were prepared for the prospect of the KEU causing us problems for the start-up including withholding our--giving our workers instructions not to show up or to not accept offers from us. So, we had a contingency plan to start the contract by utilizing subcontractors to provide certain services and hire Korean nationals directly from the economy so we did some quiet recruiting activity.
>
> I felt that we had a good fallback position to start-up the contract in an emergency situation with no Korean employees coming on board, Korean union employees coming over to JWK Korea.
>
> So, we operated under that basis, but as time wore thin and December 1 approached, the Korean Employees Union some how found out who our subcontractors were and actually went to them and threatened physical violence to them and our subcontractors began to contact us and say look, KEU has contacted us and they threatened to burn our houses down and put our families in the hospital. And those are not exaggerations. And, we don't feel safe helping you out on December 1 if these guys don't come on board.
>
> So, at that point with that little bit of time remaining, I had two choices, I could either have continued to fight the KEU and have no employees and a violent labor unrest situation on December 1 and been terminated for default or I could go ahead and work the best deal I could with the KEU and try to work it out with the government later. And, I have never defaulted on a contract and so I chose the second method.

(Tr. 1/177-79)

Mr. Gilmore testified that during the CBA negotiations, the KEU refused to consider any adjustment from the working conditions granted under the KEU-USFK LMA or any adjustment from the SOFA wages paid on the predecessor 007 contract, relying on its interpretation of the 22 March MOL opinion (tr. 1/179-80).

The phase-in period of the contract ended on 30 November 2002 and the base period began the next day. On 2 December 2002, JWK Korea entered into a CBA with the KEU. (App. supp. R4, tab 9)

JWK Korea's Claim, the Contracting Officer's Final Decision and JWK Korea's Appeal

In October and November 2002, while JWK Korea was negotiating with the KEU, JWK Korea was also in communication with the government attempting to obtain an equitable adjustment. The government rebuffed JWK Korea's efforts both before the 1 December start-up of base period performance and after.

After correspondence and meetings extending over the next several months, by letter dated 21 March 2003, JWK Korea filed a certified claim seeking $110,000 per month for every month of contract performance, representing the difference between the contract price and JWK Korea's actual costs. (At the time of the certification, the claim could be expected to be $8,115,229.29, if the contract were fully performed (R4, tabs 20, 22)).

By final decision dated 21 May 2003, the contracting officer, LTC Butler, denied the entire claim on the grounds that: (1) JWK Korea was a local contractor charged with knowing and complying with local labor laws and knew there was a high probability that it would have to negotiate with the union; and (2) there was no basis to rescind the contract or to reform it to include the deleted economic price adjustment clause because of an alleged mistake or otherwise (R4, tab 25).

This timely appeal followed.

Change of Union Representatives and Negotiation of a New Collective Bargaining Agreement (CBA)

In June 2003, after the appeal was filed, the KEU decided to separate the "branch" of the KEU representing JWK Korea's KN employees from the KEU, thereby allowing JWK Korea employees to form their own union, the JWK Korea Labor Union. By letter dated 24 July 2003, the KEU withdrew its representation of appellant's workforce, based on a union separation of local chapters. (App. supp. R4, tab 10; Kang dep. at 21-22)

In August 2003, JWK Korea and the JWK Korea Labor Union negotiated a new CBA, which went into effect on September 1, 2003.

Mr. Gilmore testified that the wages and benefits under the new CBA are "substantially lower" than the wages JWK Korea was paying under the initial CBA with the KEU. According to Mr. Gilmore, when compared to the wages and benefits in appellant's final proposal, "[t]hey pretty much average out to an equivalency. They're very, very similar." (Tr. 1/182, *see also* 1/114, 2/15) JWK Korea's increased costs from December 2002 until the new CBA went into effect were in the range of $870,000 to $893,568 (app. supp. R4, tabs 12, 41 at 510; app. br. at 72 n.12).

DISCUSSION

Counsel for JWK Korea has presented comprehensive arguments in support of recovery under several theories. Its core contention in support of recovery is that during negotiations leading up to the submission of best and final offers, the government's representatives agreed to compensate JWK Korea in the event of increased costs due to unionization, while failing to disclose superior knowledge of the KEU's intentions. We deal first with the contention that the government failed to disclose superior knowledge and then with the allegation the government agreed to compensate JWK Korea for increased costs of unionization.

The Failure to Disclose Superior Knowledge

JWK Korea has argued that it was forced to begin performance without "vital" knowledge. Specifically, it says that it had no knowledge of the Korean MOL opinions forwarded to the government by the KEU in April 2002 until it was provided with the correspondence by the KEU after contract award. From JWK Korea's perspective, the communications clearly express the KEU's understanding that it would be the union representing the KN employees on the new contract, as evidenced by the demand that the government require offerors to enter into negotiations with the KEU. Without a copy of the 22 March 2002 MOL opinion and the KEU's understanding concerning its survival as the union for the KN employees on the contract, JWK Korea did not have the opportunity to seek clarification from local counsel or petition the MOL for a more dispositive ruling. It alleges that instead of disclosing the information the government determined that the 22 March MOL opinion would have no impact on the cost to or performance of any of the offerors, including JWK Korea. Through its failure to disclose, "this performance-affecting information," the government prevented all offerors from adequately researching and assessing the applicability of the 22 March MOL opinion as part of proposal preparation. (App. br. at 41-42)

The superior knowledge doctrine imposes an implied duty on the contracting agency to disclose to a contractor "otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000). The superior knowledge doctrine is generally applicable "where (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration,[1] (2) the government was aware the

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[1] In some formulations of the elements for recovery under the superior knowledge doctrine, the word "direction" is substituted for the word "duration." *See, e.g.*, *AT&T Communications, Inc. v. Perry*, 296 F.3d 1307 (Fed. Cir. 2002), quoting from *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1071, 112 S. Ct. 965, 117 L. Ed. 2d 131 (1992); *Lopez v. A.C. &*

contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information." *American Ship Building Co. v. United States*, 654 F.2d 75, 79 (Ct. Cl. 1981). *See also, e.g., Giesler, supra*; *Hercules Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994), *aff'd on other grounds*, 516 U.S. 417, 116 S. Ct. 981, 134 L. Ed. 2d 47 (1996). One important corollary to the application of the superior knowledge doctrine in general and the second and third elements in particular is that the government is under no duty to volunteer information which the contractor can reasonably be expected to seek out itself. *Johnson Controls World Services, Inc.*, ASBCA Nos. 40233, 47885, 96-2 BCA ¶ 28,458 at 142,140, *citing Petrosky v. United States*, 616 F.2d 494, 497 (Ct. Cl. 1980), *cert. denied*, 450 U.S. 968 (1981). If the contractor could have readily obtained the information, the government is not obliged to volunteer it. *Giesler, supra*, 232 F.3d at 877.

Korean Labor Law

The significance of the 22 March 2002 Korean MOL opinion has been a matter of considerable discussion. According to the government's expert, the 22 March MOL opinion and the 31 March 1997 opinion just reflect an established or, as appellant's counsel puts it, "black letter" interpretation of Korean labor law: under the doctrine of comprehensive succession of employment relations, there generally must be a transfer of working conditions when there has been a "comprehensive business succession." If there has been a comprehensive business succession, employment relations in the business are also comprehensively succeeded and the employment of employees must be maintained as they were. Partial succession of incumbent employees is an unlawful and prohibited layoff and the succeeding employer is not permitted to unilaterally worsen the preexisting terms and conditions of employment. (App. supp. R4, tab 38 at 000695, 000700-701; tr. 1/36-39, 43, 47, 50, 56; app. br. at 16)

The question of whether one company comprehensively succeeds another obviously depends upon an examination of the surrounding circumstances and the MOL opinions themselves underscore this observation. Based on the facts presented to him, the government's expert concluded in his report that JWK Korea had comprehensively succeeded JWK International. (App. supp. R4, tab 38; tr. 1/57) Nevertheless, he also believed it was possible to structure a new company, like JWK Korea, in a way that would avoid a comprehensive succession. It was a difficult issue and the answer depended on a careful analysis of the specific circumstances of the particular transaction. (Tr. 1/43-47, 55, 60-62)

S. Inc., 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904, 109 S. Ct. 3185, 105 L. Ed. 2d 694 (1989).

Apparently, JWK Korea's local Korean counsel at one time held the same opinion as the government's expert. After the meeting with the KEU, Mr. Gilmore sought an opinion from local Korean counsel, Yoon & Partners (formerly Yoon & Yang), on the 22 March 2002 Korean MOL opinion (tr. 1/161-63). On 9 October 2002, Korean counsel advised, in part:

> The letter from the Ministry of Labor of Korea attached to your fax seems to be a proper interpretation of the relevant Korean labor law. In addition, under the Korean labor law, JWK Korea is banned from employing KEU members on such condition that they should leave KEU after they are employed by JWK Korea.
>
> Furthermore, *if JWK Korea employs KEU members, it is required to respond in good faith to KEU's (or KEU Songtan Chapter's) request for a collective bargaining [agreement] with respect to the labor conditions of such KEU employees.* A refusal or neglect to respond to such request without a reasonable cause will constitute an unfair labor practice and be subject to penalty.

> Also, JWK Korea is not required to employ KEU members but could employ those who are not KEU members. However, such non-KEU employees could also join KEU voluntarily after JWK Korea employs them. [Emphasis added]

(R4, tab 19)

On the other hand, JWK Korea counsel has drawn attention to another Korean MOL opinion included in the record. This opinion is dated 26 January 2002 and responds to a question about the succession of working conditions for KN employees of an invited contractor during change over from a SOFA-covered contract to a contract performed by a local contractor. The question and answer follow:

> **Question Presented:**
>
> - Company A is a domestic corporation, which has executed the service supply agreement with the U.S. Forces and provides services regarding the combat support business of the U.S. Forces, such as a fire brigade, goods, vehicles, etc.
>
> - The U.S. Forces in Korea had hitherto conducted the management of the buildings and other facilities of its four (4) air bases under the service supply agreement with Company B, a corporation organized under the laws of the U.S.A. However, immediately before an expiration of the service supply agreement with Company B, the U.S. Forces in Korea has executed a new service supply agreement with Company A, a domestic corporation, in April 2002 for the purpose of localizing and externalizing military businesses.
>
> - Then, is Company A legally obligated to take over the employment relationship of the employees who have been employed by Company B?
>
> **Answer:**
>
> - Notwithstanding the unclearness of the above question, if a new service supply agreement has been executed with Company A in consequence of an

> expiration of the service supply agreement with Company B, in principle, Company A is not obligated to take over the employment relationship with the employees belonging to Company [B] unless a separate agreement exists between Company A and Company [B].

(App. supp. R4, tab 35 at 00445) As JWK counsel explains, although the question presented may be unclear, the principle outlined is clear: (1) when there is a changeover on a service contract from an invited contractor to a local contractor, (2) the changeover results from the execution of a new service contract upon the expiration of the prior service contract, and (3) there is no separate agreement between the two companies providing for a transfer of "employment relationships" of the invited contractor's KN employees, then there is no obligation for the local contractor to take over "employment relationships" of the predecessor invited contractor. (App. br. at 15)

Ultimately, in June of 2004, while the appeal was pending, JWK Korea submitted a detailed request to the Korean MOL asking it to analyze the transactions between JWK International and JWK Korea during the contract changeover in order to determine whether there had been a business transfer requiring a succession of KN employee working conditions (app. supp. R4, tab 42; app. letter dtd. 23 July 2004, tabs C, D).

By letter dated 29 June 2004, the MOL concluded that there was no comprehensive business transfer between JWK International and JWK Korea requiring a succession of KN employee working conditions during the contract changeover (app. supp. R4, tab 43; app. letter dtd. 23 July 2004, tabs A, B, E). The opinion stated:

> . . . [I]f "JWK Korea", a local corporation was awarded a contract through an open competitive bidding and "JWK Korea" took over some specific properties from "JWK International", the preceding contractor, but other operational rights and debts were not transferred to "JWK Korea" after the contract . . . between the USFK and "JWK International" . . . expired, then it is difficult to consider it as transfer of business. Hence, it is difficult to say that "JWK Korea" bears an obligation to continuously employ some employees of "JWK International".

(App. letter dtd. 23 July 2004, tab E)

The 29 June 2004 Korean MOL opinion favors the view that JWK Korea officials held from the beginning. Ironically then, the information which JWK Korea says was vital is information it also considers erroneous. In JWK Korea's view, the 22 March

MOL opinion was in error in that it did not reflect the circumstances that were pertinent to JWK Korea's situation. JWK Korea counsel has argued in this respect that JWK Korea was the only one with a correct, contemporaneous understanding that the comprehensive succession doctrine did not apply during a changeover from an invited contractor to local contractor. Consequently, in its view, there was no obligation under Korean labor law for appellant to continue the working conditions under the JWK International contract on the present contract. It has pointed in this regard to the 29 June 2004 MOL as support for its understanding at the time of contracting. (App. reply br. at 4-5, 7)

At the time the RFP was issued, the government understood the phrase "rights of succession of employment" in the 52.0000-4404 KOREAN LABOR LAW clause to mean that Korean law required a new company to provide "first right of refusal" to employees of the incumbent company at the same wage rates and benefits. According to the USACCK's chief counsel at the time, it was common knowledge among USACCK procurement officials that the "first right of refusal" applied to all contractors, which is why the Korean Labor Law clause was included. However, neither he nor his staff were trained or licensed to practice law in Korea. When he had a question, he would typically forward it to the Korean lawyer assigned to Office of the Judge Advocate, 8th Army, U.S. Forces Korea and believed he did so when giving advice in this case. He counseled COL Bianco, the USACCK commander, when he denied the KEU's request to meet with potential offerors, and LTC Butler before he issued his final contracting officer's decision. (Bd. ex. 1)

He was not aware that the "first right of refusal" was tied to the "comprehensive succession" doctrine. It was not until he reviewed the 29 June 2004 Korean MOL opinion obtained by JWK Korea (app. supp. R4, tab 43) and the government's expert report (R4, tab 38) in connection with this litigation that he "realized that the 'first right of refusal' only applies to those contractors who have 'comprehensive[ly] succeeded' the incumbent"—in this case JWK International. (Bd. ex. 1 at 2)

Our review of the contracting officer's decision is de novo. It may be that the government did not fully appreciate the nuances of Korean labor law and read more into the "rights of succession of employment" than warranted. However, JWK Korea was not misled by the general language of the 52.0000-4404 KOREAN LABOR LAW clause. It believed, as its proposal reflected and Mr. Gilmore testified, it had a solution that complied with Korean labor law without embracing the government's understanding of employees' rights—an understanding that would apparently find support in the 22 March 2002 Korean MOL opinion, as well as the Yoon & Partners 9 October 2002 advice.

Nevertheless, it is not necessary for us to definitively answer the question of which of the various opinions is the correct one in order to resolve the issues presented to us. For us the question is who bore the responsibility for compliance with Korean labor

laws. Both JWK Korea and the government knew how interested the KEU was in the procurement—particularly in light of the demonstrations—and what its goals were. We note in this regard that the government did not determine—as asserted by JWK Korea counsel (app. br. at 42)—that the 22 March 2002 MOL opinion would have no impact on the cost to or performance of any of the offerors. The government, in fact, made no determination one way or the other about any cost or performance impact of its refusal to agree to the KEU's demands. On the face of it, the government's refusal as a matter of procurement policy and labor-management relations to agree to KEU's demands to include the KEU in the negotiation process was reasonable and JWK Korea has not contended otherwise. While the government could not turn its back on the situation, it is fair to say that it was looking to JWK Korea and the other offerors to assess the requirements of Korean labor law as they pertained to each offeror's individual, and potentially unique circumstances, and act accordingly. The DFARS 252.222-7002 COMPLIANCE WITH LOCAL LABOR LAWS and the 52.0000-4404 KOREAN LABOR LAW[2] clauses reflect this assignment of responsibility and the clauses place the responsibility squarely on JWK Korea.

With respect to the "vital," albeit erroneous, information itself, one of JWK Korea's key witnesses was unable to identify any impact of the non-disclosure. When Dr. Khim, the president of JWK Corporation, was asked about the potential impact of the 22 March 2002 opinion on proposal preparation, he never claimed that there would have been any impact. Instead, he branded the opinion "iffy" and indicated that he would have to have time to study it. Mr. Gilmore, on the other hand, was angry when confronted with the opinion during negotiations with the KEU. His reaction is understandable if for no other reason than the positive impact the opinion had on the KEU's negotiating position. With respect to the importance of the information, he explained that if he had been provided a copy of the opinion and the KEU-government communications, JWK Korea would have had more time to investigate and obtain its own legal opinions or, with the benefit of hindsight, he might have reconsidered his pricing strategy. The most it seems that can be said with certainty is that earlier knowledge of the position might have put JWK Korea in a better position to resist the KEU's subsequent demands. Whether this is vital information or not is problematic.

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[2] The Korean Labor Law clause is not a special responsibility standard—as JWK Korea counsel suggests—and does not impose on the government a duty to determine that JWK Korea was in compliance with Korean law at time of contract award. Instead, the clause identifies the government's view of one of the possible consequences of a breach of the requirements of the clause—namely, denial of future contract opportunities—when it states that a "serious violation" of the clause "may" be "grounds for determining the contractor to be non-responsive for future Government contracts."

Moreover, on the record before us, the conclusion seems inescapable that the information which JWK Korea now says it should have had an opportunity to study when preparing its proposal would have been JWK Korea's for the asking, if it had approached the KEU. The KEU would have welcomed discussions with JWK Korea at any time during the pre-award period. However, Dr. Khim and Mr. Gilmore had made a business decision to avoid the KEU altogether before award because—in our view—their business plan was not likely to gain a sympathetic hearing from the KEU no matter when it was unveiled and they knew it. More importantly, if JWK Korea could have gained government acceptance of the "assumption" contained in the initial proposal that an equitable adjustment would be granted in the event of unionization, any engagement with the KEU could be deferred and ultimately any conflict with the KEU could be resolved by agreeing to the union's position and seeking an adjustment from the government.

Once the government insisted on removal of the condition and indicated that it would evaluate only one cost proposal—while indicating that if it were left with two proposals, it would select the lower priced one—JWK Korea had a choice to make.[3] Regardless of the choice it made, it still had the responsibility to comply with the Korean Labor laws. Moreover, once JWK Korea made the business decision to rely on its primary proposal, it knew it would have to deal with the not unexpected antipathy of the KEU. The information it considers vital would have been available at any time it sought to engage the KEU.

In the circumstances, JWK Korea has failed to establish entitlement to relief under the superior knowledge doctrine.

The Alleged Agreement to Compensate JWK Korea for Increased Costs of Unionization

On the key question of just what was agreed to at the negotiations, our findings support the government's view of events and undermine the foundation of JWK Korea's arguments. Based on our evaluation of the record, the witnesses' testimony, including an assessment of their credibility, we found that there was no commitment made by an

[3] This is not a compensable mistake case. The most that can be said is that, perhaps, JWK Korea made a judgmental error in staying with its primary proposal and underestimated its ability to come to terms with the KEU. It was a business judgment—a "conscious gamble with known risks." *Liebherr Crane Corp.*, ASBCA No. 24707, 85-3 BCA ¶ 18,353 at 92,071, *aff'd*, 810 F.2d 1153 (Fed. Cir. 1987); s*ee, e.g.*, *Kato Corp.*, ASBCA No. 47601, 97-2 BCA ¶ 29,131 at 149,932, and *Klinger Constructors, Inc.*, ASBCA No. 41006, 91-3 BCA ¶ 24, 218 at 121,125.

authorized government representative during the proposal discussions on 28 June 2002 to compensate JWK Korea for increases in labor costs.

More importantly, any "understandings" reached during the discussions were to be reflected in the proposal revisions, that is, JWK Korea's best and final offer, which became a part of the contract. The contract language used does not support JWK Korea's position. The alleged agreement is traced to the Issue 2 statement:

> ***Issue 2: Assumption regarding equitable adjustments for labor escalations.***
>
> Based on the assurance provided by the Government during discussions that adjustments will be considered in the event of increases to labor costs, JWK has deleted this assumption from our proposal. Revised pages are included with this transmittal.

Contract interpretation begins with the plain language of the agreement and must be aimed at construing the agreement in a manner that effectuates its spirit and purpose. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). We must give a reasonable meaning to the questioned language within the context of the contract when read as a whole, giving effect to all of its provisions. *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). *See also Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985).

According the language used its plain meaning, the Issue 2 statement, in a straightforward fashion, withdraws the "assumption" based on the government's assurance that "adjustments will be considered in the event of increases in labor costs." In other words, the certainty of a price adjustment (the previous "assumption") is dropped in favor of a promise to *consider* an adjustment in the event labor costs increase. A promise to consider is not an agreement to make an adjustment. To consider is to "reflect on: think about with a degree of care or caution." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 483 (1986). Though no contracting officer could recall seeing the Issue 2 note before contract award, it is the contract language that controls.

The language used would lead one to reasonably conclude that the assumption had been withdrawn. This is the reading CAPT Restad gave the statement and the one that makes sense to us. However, Mr. Gilmore advocated another reading. When asked by JWK Korea counsel what the word "considered" meant to him, he responded that:

> I'm not an attorney, but ["]considered["]in consideration from my experience indicates an exchange in value for value. So, in this particular case it would have been

> the cost of the services at the higher wages would result in reimbursement of those higher costs.

(Tr. 1/175) We note also that Mr. Smithey expressed some doubt during his deposition about whether the assumption had been removed.

When a contract is susceptible to more than one reasonable interpretation, it contains ambiguity. It is not enough, however, that the parties may differ in their interpretation. Both interpretations must be within a "zone of reasonableness." *Metric Constructors v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999), and cases cited.

Despite Mr. Smithey's uncertainty, we find Mr. Gilmore's explanation of what he meant when he wrote the note unpersuasive, if not incredible, and not supported by the language used. If Mr. Gilmore intended this language to convey an understanding that JWK Korea would be entitled to an adjustment if its labor rates increased as a result of unionization, he failed to communicate that idea. The interpretation advanced is not within the zone of reasonableness. Even if we were to assume there were an ambiguity in this regard, under the principles of *contra proferentem*, the ambiguity would be construed against JWK Korea as the drafter, not the government, as JWK Korea's counsel argues. (App. reply br. at 13-14)

JWK Korea's position is not sustainable. In reaching this conclusion, we have considered appellant's other arguments and are not persuaded otherwise.

DECISION

The appeal is denied.

Dated: 22 May 2006

MARTIN J. HARTY
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 54198, Appeal of JWK Korea Ltd., rendered in conformance with the Board's Charter.

Dated:

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