ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
DTS Aviation Services, Inc.	)	ASBCA No. 56352
	)	
Under Contract No. F29651-99-C-9000	)	

APPEARANCES FOR THE APPELLANT: David M. Nadler, Esq.
David Y. Yang, Esq.
Dickstein Shapiro LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Marvin K. Gibbs, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND APPELLANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON ENTITLEMENT

DTS Aviation Services, Inc. seeks a price adjustment of $4,818,024, plus interest, under the contract clause FAR 52.222-43(d), FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT- PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) for increased costs to provide certain defined labor benefits to its employees under collective bargaining agreements (CBAs). The government has filed a motion for summary judgment, contending that appellant's claim must be denied as a matter of law. Appellant opposes the motion, and has filed a cross-motion for partial summary judgment on entitlement, contending that it has established entitlement to recover as a matter of law. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S. C. §§ 601-613.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE CROSS-MOTIONS

1. Contract No. F29651-99-C-9000 was a firm-fixed-price services contract that was awarded to DynCorp Technical Services, Inc. on 26 August 1999 for consolidated aircraft maintenance services at various locations. The contract provided for a one year base contract period, from 1 October 1999 through 30 September 2000, and an option to extend contract performance from year to year for up to six years. (R4, tab 1) Pursuant to bilateral contract Modification No. P00112 effective 10 February 2005 and an attached

novation agreement, the contract was transferred from DynCorp Technical Services, Inc. to its subsidiary, DTS Aviation Services, Inc. (DTS or appellant)[1] (R4, tab 22).

2. The contract included the following standard clauses incorporated by reference: FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989); FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT- PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989) (hereafter "Price Adjustment clause"); FAR 52.222-47, SCA MINIMUM WAGES AND FRINGE BENEFITS APPLICABLE TO SUCCESSOR CONTRACT PURSUANT TO PREDECESSOR CONTRACTOR COLLECTIVE BARGAINING AGREEMENTS (MAY 1989); and FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989). (R4, tab 1 at 33–35)

3. The predecessor contractor, Lockheed Martin, signed a CBA with White Sands Local Lodge 2515 of the International Association of Machinists and Aerospace Workers (Union), related to the maintenance services to be provided for the earlier contract. The CBA covered the period 25 November 1998 through 1 June 2001. (R4, tab 2) Pursuant to FAR 52.222-41(f) (finding 22), appellant was the contractor on the "successor contract," and as such was obligated to provide its employees with the same benefits agreed upon by the predecessor contractor under the CBA. Accordingly, appellant entered into a Settlement Stipulation with the Union on 16 September 1999 to assume the terms and conditions of the CBA (app. supp. R4, tab 1).

4. On 24 August 2000, the Contracting Officer (CO) executed Modification No. P00017, a unilateral modification to the contract exercising the first option period, 1 October 2000 through 30 September 2001 (FY 2001) and incorporating a new Department of Labor (DOL) wage determination, No. 94-2512, Revision 15, dated 21 June 2000. This wage determination did not contain the pertinent benefits under the governing CBA. Insofar as pertinent, this modification also stated as follows:

> If the attached Wage Determination affects the contract price, the Contracting Officer shall be notified within 30 calendar days after receipt of this modification. The notification shall contain a statement of the amount claimed and any relevant supporting documentation including payroll records. If adjustment is necessary, it will be effected by a subsequent modification to the contract and shall apply retroactively to 01 Oct 00.

(R4, tab 3). Appellant did not seek a price adjustment under the Price Adjustment clause for increased costs to provide benefits to its employees under the CBA for FY 2001 at this time.

[1] For ease of reference, we shall refer to "DTS" as the contractor and the appellant throughout this opinion.

5. On 31 August 2001, the CO executed Modification No. P00035, a unilateral modification to the contract exercising the second option period, 1 October 2001 through 30 September 2002 (FY 2002) and incorporating a new DOL wage determination, No. 94-2512, Revision 17, dated 16 May 2001. This wage determination did not contain the pertinent benefits under the governing CBA. This modification also required a notification to the CO of increased costs similar to that found in Modification No. P00017 above. (R4, tab 5)

6. On 27 September 2001, DTS submitted a request for equitable adjustment (REA) under the Price Adjustment clause for increased costs to provide benefits to its employees resulting from a change to the CBA for performance in the upcoming option period (R4, tab 6). This REA was based upon a new agreement with the Union covering the period of 1 July 2001 through 20 June 2004 (R4, tab 4). On 15 March 2002, DTS signed a bilateral contract modification, Modification No. P00046, documenting an agreement on appellant's REA. As stated in the modification, the purpose of the modification was to "add funds" for the CBA, in the amount of $859,233.00. (R4, tab 8)

7. On 29 August 2002, the CO executed Modification No. P00064, a unilateral modification to the contract exercising the third option period, 1 October 2002 through 30 September 2003 (FY 2003), and incorporating a new DOL wage determination, No. 94-2512, Revision 18, dated 28 February 2002. This wage determination did not contain the pertinent benefits under the governing CBA. The modification also required a notification to the CO of increased costs similar to that in Modification No. P00017 above. (R4, tab 9)

8. By letter dated 23 September 2002, DTS submitted an REA under the Price Adjustment clause for increased costs to provide benefits to its employees resulting from a change to the CBA for performance in the upcoming option year (R4, tab 10). On 25 March 2003, DTS signed a bilateral contract modification, Modification No. P00080, documenting an agreement on appellant's REA. As stated in the modification, the purpose was to "add funds for the Collective Bargaining Agreement (CBA) for FY02 outyear (FY03), current FY03 increase and incorporate outyear pricing." The total funded amount for FY 2003 was increased by $1,210,066.00. (R4, tab 11)

9. On 28 August 2003, the CO executed Modification No. P00088, a unilateral modification to the contract exercising the fourth option period, 1 October 2003 through 30 September 2004 (FY 2004). This modification provided that DOL wage determination No. 94-2512, Revision 18, dated 28 February 2002 was current and still in effect. This wage determination did not contain the pertinent benefits under the governing CBA. (R4, tab 12)

10. By email dated 26 September 2003, DTS submitted an REA under the Price Adjustment clause for increased costs to provide benefits to its employees resulting from

a change to the CBA for performance in the upcoming option year (R4, tab 14). On 25 March 2004, DTS signed a bilateral contract modification, Modification No. P00096, documenting an agreement on appellant's REA. As stated in the modification, the purpose was to "add funds for the Collective Bargaining Agreement (CBA) for FY04 and incorporate out year pricing (FY 05, and FY 06)." The total funded increased amount for FY 2004 was $500,805.00. (R4, tab 17)

11. On 25 August 2004, the CO executed Modification No. P00103, a unilateral modification to the contract exercising the fifth option period, 1 October 2004 through 30 September 2005 (FY 2005), and attaching DOL wage determination No. 94-2512, Revision 21, dated 21 July 2004. This wage determination did not contain the pertinent benefits under the governing CBA. (R4, tab 19)

12. By letter dated 27 September 2004, DTS submitted an REA under the Price Adjustment clause for increased costs to provide benefits to its employees resulting from a change to the CBA for performance in the upcoming option year, reflecting a new labor agreement with the Union effective 1 July 2004 and expiring 30 June 2007 (R4, tab 21). On 22 March 2005, DTS signed a bilateral contract modification, Modification No. P00113, documenting an agreement on appellant's REA. As stated in the modification, the purpose was to "add funds for the Collective Bargaining Agreement (CBA) for FY 05 and incorporate outyear pricing (FY 06)." The total funded increased amount for FY 2005 was $663,945.76 (R4, tab 23).

13. On 1 September 2005, the CO executed Modification No. P00119, a unilateral modification to the contract exercising the sixth option period, 1 October 2005 through 30 September 2006 (FY 2006), and attaching new DOL wage determination No. 94-2512, Revision 23, dated 14 June 2005. This wage determination did not contain the pertinent benefits under the governing CBA. (R4, tab 24)

14. By letter dated 26 September 2005, DTS submitted an REA under the Price Adjustment clause for increased costs to provide benefits to its employees resulting from a change to the CBA for performance in the upcoming option year (R4, tab 26). On 18 January 2006, DTS signed a bilateral contract modification, Modification No. P00129, documenting an agreement on appellant's REA. Per ¶ 5 of the modification, the total funded amount for FY 2006 was increased in the amount of $2,704,011.33. (R4, tab 27)

15. None of the aforementioned bilateral contract modifications contained a release clause or similar release language, nor did they contain any language reserving appellant's rights to seek its actual costs.

16. On 9 February 2007, DTS submitted a request for price adjustment under the Price Adjustment clause in the amount of $4,368,043 for unrecovered increased actual costs to provide the CBA-defined benefits to its employees under all the CBAs for all previous years under the contract as extended (R4, tab 29).

17. On 15 February 2007, the government sent DTS a letter requesting that it certify and resubmit the request (R4, tab 30). On 19 February 2007, DTS submitted a certified analysis of increased health and welfare costs in the amount of $4,368,043, but the certification did not follow in full the certification language of the CDA, 41 U.S.C. § 605(c)(1) (R4, tab 31).

18. On 18 April 2007, the CO denied the REA. The CO stated that appellant's REA failed to notify the CO of any claimed increases of cost within 30 days after receiving a new wage determination, as required by FAR 52.222-43(f) of the Price Adjustment clause (finding 22). The CO also stated that DTS previously requested, agreed to and was paid for all price adjustments under the bilateral contract modifications, and the government considered the matter settled. (R4, tab 33) On 2 May 2007, DTS submitted a letter converting the REA into a claim, in the amount of $5,067,489, requested a CO's decision and included a claim certification in accordance with 41 U.S.C. § 605(c)(1) (R4, tab 34).

19. By letter to appellant dated 12 June 2007, the CO sought additional information to support the claim (R4, tab 25), and appellant provided additional information by letter dated 3 July 2007 (R4, tab 36 at 8). By letter to appellant dated 24 September 2007, the CO requested that appellant remove from its claim the portion relating to FY 2007 and recertify the adjusted claim (R4, tab 38), and appellant did so, submitting an adjusted certified claim in the amount of $4,818,024 on 15 October 2007 (R4, tab 39).

20. On 25 February 2008, the CO denied DTS's claim. The CO reiterated that DTS failed to comply with the contract requirement to notify the CO of its increased costs within 30 days after receiving a new wage determination. The CO reiterated that DTS had signed bilateral modifications for costs in FY 2002 through FY 2006 and the matter was settled. (R4, tab 43)

21. By letter dated 17 March 2008, DTS timely filed a notice of appeal with this Board (R4, tab 44). The appeal was docketed as ASBCA No. 56352. Pleadings were filed, and these motions followed.

22. We find the following contract provisions pertinent for purposes of the motions:

> **52.222-41 Service Contract Act of 1965, as Amended (May 1989)**
>
> ....

(b) *Applicability*. This contract is subject to the following provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor (29 CFR Part 4). This clause does not apply to contracts or subcontracts administratively exempted by the Secretary of Labor or exempted by 41 U.S.C. 356, as interpreted in Subpart C of 29 CFR Part 4.

....

(f) *Successor Contracts*. If this contract succeeds a contract subject to the Act under which substantially the same services were furnished in the same locality and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, *in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rate and fringe benefits, neither the Contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreement*, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement....

....

52.222-43 Fair Labor Standards Act and Service Contract Act – Price Adjustment (Multiple Year and Option Contracts) (May 1989)

(a) *This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements.*

(b) The Contractor warrants that the price in this contract does not include any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.

(c) The wage determination, issued under the Service Contract Act of 1965, as amended, (41 U.S.C. 351, *et seq*.), by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract.

(d) *The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits* to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period....

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

(3) An amendment to the Fair Labor Standards Act of 1938 that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law.

....

(f) *The Contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a new wage determination* unless this notification period is extended in writing by the Contracting Officer. The Contractor shall promptly notify the Contracting Officer of any decrease under this clause, but nothing in the clause shall preclude the Government from asserting a claim within the period permitted by law. The notice shall contain a statement of the amount claimed and any relevant supporting data, including payroll records, that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price or contract unit price labor rates shall be modified in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date.

(Emphasis added) (R4, tab 1 at 34-5)

The Cross-Motions for Summary Judgment and Partial Summary Judgment

23. Relying upon the bilateral contract modifications and other contract records in the Rule 4 file, the government has moved for summary judgment, contending that appellant is not entitled to any additional price adjustment under its claim. The government contends that price adjustment under the contract is unavailable for FY 2000, the base year of contract performance; that appellant's claim for price adjustment for FY 2001 was time-barred under the CDA; and that appellant's claim for price adjustment for FY 2002 through FY 2006 was untimely under FAR 52.222-43(f) of the Price Adjustment clause, and alternatively was barred by the bilateral contract modifications on the grounds of "accord and satisfaction."

24. In appellant's opposition and cross-motion for partial summary judgment on entitlement, appellant withdrew its claim for price adjustment for FY 2000, the base year of performance (app. opp'n at 2, n.3). As for the claim for the option years, appellant contends that it is entitled to partial summary judgment as a matter of law because paragraph (d) of the Price Adjustment clause, FAR 52.222-43 (finding 22) provides for the recovery of appellant's actual increased costs to provide applicable benefits to the extent required by governing DOL wage determinations or CBAs, *Lear Siegler Services v. Rumsfeld*, 457 F.3d 1262 (Fed. Cir. 2006), while the bilateral contract modifications were only based upon estimated or projected costs. Appellant also contends that its claim for FY 2001 cost was not time-barred under the CDA; that the notice requirement of paragraph (f) of the Price Adjustment clause did not apply, but if applicable did not bar appellant's claim because the government was not prejudiced by any delay; and that appellant's claim was not barred by accord and satisfaction because it did not release its claim for actual costs.

25. In support of its motion for partial summary judgment, appellant attached certain discovery responses from the government (app. opp'n, attachs. B, C), and a Declaration of Mr. George Fleischmann, Senior Vice President and Chief Financial Officer, Maintenance and Technical Support Services Division, DynCorp International LLC. Insofar as pertinent, Mr. Fleischmann declared as follows:

> 3. DTS was required by its Collective Bargaining Agreements ("CBAs") applicable under the Contract to provide the defined-benefit obligations at issue in this appeal. DTS was the "successor contractor" under the Contract, as that term is used and defined under the Service Contract Act ("SCA").
>
> ....

5. The subject claims are CBA imposed employee defined-benefit obligations, which DTS was required to provide as the successor contractor under the Contract.

....

8. [F]or each of the option years under the Contract, DTS did not know its actual total costs to provide its CBA defined-benefit obligations for the preceding year until after the close of the Company's fiscal year which was after the close of the Contract's fiscal year. For example, DTS did not know its actual total costs for meeting defined-benefit obligations for the 2001 Option Year (*i.e.*, the Contract's 2001 fiscal year) until after the close of the Company's fiscal year on December 31, 2001.

9. For the 2002 through 2006 option years, DTS submitted requests for equitable adjustment to the Air Force, requesting the Company's projected total defined-benefit cost obligations for each of those periods. The requests were generally based upon a projected hourly benefit rate which the Company developed based upon its historical and actuarial experiences. The projected rate encompassed all of the defined benefits required by the Company's CBAs.

10. The request did not seek all of the Company's actual total defined-benefit cost obligations for each year. As noted, no request seeking DTS's actual total cost was possible, since such costs were not known until after the close of the Company's fiscal year. It was at that time that the Company could determine whether actual costs had exceeded projections.

11. As noted, each of DTS's prior equitable adjustment requests sought to recover the Company's projected total defined-benefit costs for each respective year. They did not seek recovery of all of the Company's actual cost obligations for any of those years. DTS has never understood or agreed, including during any discussions or negotiations with the Air Force, that the subject requests represented all inclusive claims to recover defined-benefit costs. Nor did DTS understand or agree that the bilateral contract modifications were intended to settle, discharge, or

> otherwise preclude the subject claims or any other subsequent contract price adjustments, as additional cost increases became known.

(*Id*., attach. A)

DECISION

The law of summary judgment is familiar. As stated in *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1371-72 (Fed. Cir. 2005):

> Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law and no disputes over material facts remain [citation omitted]. The moving party bears the burden of demonstrating the absence of a genuine issue of material fact [citation omitted].

When the parties file cross-motions for summary judgment, neither motion need be granted. Rather, each motion must be examined independently against the record and the governing law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). Whether there are genuine, material disputed facts on the record "must be viewed in the light most favorable to the party opposing the motion, with doubts resolved in favor of the opponent [citation omitted]," *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1339 (Fed. Cir. 2001). For these purposes, we do not weigh the evidence of record or make findings of fact, but only determine whether there are genuine disputed issues of material fact suitable for resolution at trial. *Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083.

I. Whether the Claim for FY 2001 is Time-Barred under the CDA

The government contends that appellant's 2 May 2007 certified claim to recover increased costs incurred in FY 2001 is time-barred under the CDA as a matter of law. Appellant contends that said claim is not time-barred under the CDA as a matter of law.

According to the government, the date of claim accrual was on or about 24 August 2000, the date on which appellant received notice of the government's exercise of the option to extend the contract term for FY 2001, and which notice included a revised wage determination and sought notice from appellant of any increased costs within 30 days. According to the government, appellant's 2 May 2007 claim for FY 2001 costs was filed more than 6 years after the date of claim accrual and the claim for FY 2001 costs was time barred under the CDA.

According to appellant, its claim for FY 2001 "consists of costs which were actually incurred during that period to provide employees with the defined benefits" required by the pertinent CBA. Appellant contends that its claim for these costs was not

time barred as a matter of law because "no claim for DTS's actual costs for the Contract's 2001 fiscal year could have been asserted (and thus could have accrued) prior to when the *full extent* of those costs was either known or could have been known by DTS," which in this case, was the end of the calendar year after the completion of its performance in the option year, or 31 December 2001. (App. opp'n at 9) (Emphasis added) Hence, appellant's claim of 2 May 2007 was filed within 6 years of claim accrual and was not time barred under the CDA.

Under the CDA, we have jurisdiction over appeals related to properly submitted claims under government contracts subject to the Act. One requirement of such a claim is that it must be submitted within 6 years of accrual of the claim, 41 U.S.C. § 605(a). As recently stated by the Court in *Arctic Slope Native Association, LTD. v. Secretary of Health and Human Services*, No. 2008-1532, 2009 U.S. App. LEXIS 21361, at *17-18 (Fed. Cir. September 29, 2009):

> The six-year presentment period is part of the requirement in section 605(a) that all claims by a contractor against the government be submitted to the contracting officer for a decision. This court has held that the presentment of claims to a contracting officer under section 605(a) is a prerequisite to suit in the Court of Federal Claims or review by a board of contract appeals. [Citations omitted]....[S]ubject to any applicable tolling of the statutory time period, the timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA.

Under FAR 33.201, the accrual of a claim is defined as follows:

> "Accrual of a claim" means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

Based upon the present record, we believe that neither party has shown it is entitled to prevail on the time-bar issue as a matter of law.

As for the government's position, we note that for liability to fix for purposes of claim accrual under the FAR definition "some injury must have occurred." The government has not shown on this record that appellant experienced any injury with

respect to this claim on or about 24 August 2000, the date on which appellant received notice of the exercise of the option.

As for the appellant's position, we read Mr. Fleischmann's declaration to state that appellant was aware of the full extent of its FY 2001 costs on 31 December 2001. However, the FAR definition states that for liability to fix for purposes of claim accrual, only "some" but not necessarily "all" of the injury must be shown. *Accord Gray Personnel, Inc*., ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,476 where we stated as follows:

> We do not think, however, that appellant must have completed the delivery order, or even, as appellant argues, have completed the contract in order for liability to be fixed. The CDA permits contractors to submit claims before they have incurred the total costs relating to the claim.

In addition, appellant's claim under FAR 52.222-43(d) is for its increased costs as a result of complying with the CBA, and under the FAR definition accrual of such a claim may occur when all the relevant events fixing such liability "should have been known." The record is unclear as to this date.

Appellant concedes that the parties conducted limited discovery prior to filing of the cross motions (opp'n at 1). The Board is of the view that it needs a more developed record to address the time bar question. Viewing the record in the light most favorable to the nonmoving party for purposes of these cross motions, we believe that neither party has shown that it is entitled to prevail as a matter of law.

II. Whether Appellant's Claim is Barred by Accord and Satisfaction

Each party seeks summary judgment as to whether appellant's claim for actual increases in costs for the option years is barred by the bilateral contract modifications. According to the government, these bilateral contract modifications - on their face - are a bar to appellant's further recovery based on the legal principle of "accord and satisfaction." According to the appellant, these contract modifications did not contain release language nor did appellant sign any other releases, and per the declaration of Mr. Fleischmann, appellant understood that its right to obtain its actual, rather than its projected costs for each year was preserved.

In *Bell BCI Co. v. United States*, 570 F.3d 1337, 1340 (Fed. Cir. 2009), the Court stated the familiar law of "accord and satisfaction:"

> Accord and satisfaction occur "when some performance different from that which was claimed as due is rendered and such substituted performance is accepted by the claimant as

> full satisfaction of his claim." *Cmty. Heating & Plumbing Co. v Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993). To prove accord and satisfaction, the government must show "(1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration." *O'Connor v. United States*, 308 F.3d 1233, 1240 (Fed. Cir. 2002).

As framed by the parties, the key issue here is element (3) above, whether the parties had a "meeting of the minds" regarding the matter covered by the contract modifications. We believe that the record does not present undisputed facts to support the position of either party on this issue. The contract modifications – the best evidence of their content and meaning -- do not establish a meeting of the minds precluding the filing of actual cost claims because they do not contain any release-type language. On the other hand, the modifications do not establish appellant's position because they do not contain any reservations of rights to file such claims, nor do they suggest that the amounts agreed to by the parties under the modifications were subject to change, up or down, based upon appellant's actual cost experience.

Based on the present record, we believe that the parties' intentions related to the contract modifications are unclear. Viewing the record in the light most favorable to the nonmoving party, we conclude that there are genuine, material disputed facts of record regarding the parties' intentions, and that neither party has shown its entitlement to summary judgment as a matter of law.

While we agree with appellant that *Lear Siegler* recognizes a contractor's right to obtain a price adjustment under the Price Adjustment clause, FAR 52.222-43(d), for its increased costs to provide wages and fringe benefits in compliance with a CBA, since appellant's entitlement to such costs for the option years is inextricably bound to the aforementioned issues of time bar (FY 2001) and accord and satisfaction (FYs 2002-2006) for which we have denied appellant summary judgment, we must deny appellant's request for partial summary judgment as to its entitlement to increased costs as well.

III. Whether Appellant's Claim is Barred by the Notice Provision of the Price Adjustment Clause

Paragraph (f) of the Price Adjustment clause, FAR 52.222-43 (finding 22), requires that a contractor give timely notice to the CO of any cost increases within 30 days after receiving a "new wage determination." The government contends that appellant's 2 May 2007 claim is barred because the claim failed to provide such timely notice. Appellant contends that this notice requirement does not apply to its claim because appellant never received a "new wage determination," insofar as the CO failed to provide DOL with the CBAs, and DOL did not include the relevant CBA terms and

conditions into the wage determinations that were attached to the unilateral contract modifications exercising the options.

Appellant was the contractor on the "successor contract," FAR 52.222-41(f). As such, appellant was obligated to provide the CBA-defined benefits agreed to by its predecessor even if those benefits were not expressly made part of the DOL wage determination attached to the contract, with exceptions not relevant here. See FAR 52.222-41(f) (CBA benefits apply "in the absence of the minimum wage attachment" setting out the benefits) (finding 22). See also the Price Adjustment clause, FAR 52.222-43(a): "This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements" (*id*.). *See also Lear Siegler*, 457 F.3d at 1268 (Fed. Cir. 2006): "Regulations make clear that the term 'wage determination' includes a CBA–defined benefit level." Given the foregoing, appellant fails to satisfactorily explain why the paragraph (f) requirement of notice to the CO of increased costs should not apply equally to the applicable benefits under the governing CBA. In any event, we need not determine the matter at this point for reasons stated below.

Appellant contends that even if the notice provision in paragraph (f) does apply, appellant is nevertheless entitled to partial summary judgment on entitlement because the record does not show that the government was prejudiced by any delay in the assertion of the 2 May 2007 claim. The government disagrees, contending, *inter alia*, that prejudice due to appellant's delay is self-evident on the record through the wasted time and resources expended by prior COs to address appellant's REAs in prior years.

We believe that the "notice" and "prejudice" issues also present genuine, material disputed facts on the record. Drawing all factual inferences in favor of the nonmoving party, we believe that neither party has shown its entitlement to summary judgment as a matter of law on these issues.

CONCLUSION

For reasons stated, the government's motion for summary judgment is denied. Appellant's motion for partial summary judgment on entitlement is denied.

Dated: 14 October 2009

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56352, Appeal of DTS Aviation Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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