ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
ARCTEC Services	)	ASBCA Nos. 56444, 56631, 57193
	)	
Under Contract Nos. F05604-99-C-9005	)	

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

The referenced consolidated appeals concern claims by ARCTEC Services (appellant or ARCTEC) for reimbursement of, or in the alternative, a price adjustment to recover, the cost of severance benefits paid to unionized employees pursuant to collective bargaining agreements following expiration of the referenced contract. As a further alternative claim for relief, appellant alleges that it is entitled to reformation of the contract based on unilateral or mutual "mistake."[1] The parties have filed cross-motions

[1] ARCTEC has submitted three claims to recover the severance costs. Each of the claims and referenced appeals seeks recovery of essentially the same costs, albeit using three different theories. The first claim was submitted by ARCTEC on 8 January 2007 seeking reimbursement under the contract's "phase-out" provisions. On 8 April 2008 the contracting officer (CO) denied the "phase-out" claim in its entirety. That decision is the subject of ASBCA No. 56444. The second claim was submitted on 5 August 2008 asserting that ARCTEC was entitled to a price adjustment pursuant to FAR 52.222-43 (the Fair Labor Standards Act and Service Contract Act—Price Adjustment clause) ("Service Contract Price Adjustment clause") and cost incentive/sharing provisions of the contract. On 10 September 2008, the CO denied the Service Contract Price Adjustment claim. That decision is the subject of ASBCA No. 56631. The third claim was submitted on 24 December 2009 ("Mistake Claim") and asserted that ARCTEC was entitled to a reformation of the contract to cure the effects of alleged mutual or unilateral mistakes. This claim was denied in its entirety by the

for summary judgment.[2] Entitlement only is for decision. We conclude that appellant is entitled to a price adjustment pursuant to the pertinent labor and cost incentive provisions of the captioned contract. Accordingly, we sustain ASBCA No. 56631 and dismiss as moot the companion appeals involving the alternative claims.[3]

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

Background and Contract Provisions

1. ARCTEC was awarded the captioned contract on 25 June 1999, to provide a range of services to the Air Force (AF) relating to certain Solid State Phases Array Radar Systems (SSPARS) facilities in a variety of locations (R4, tab 1-1; compl. and answer ¶ 13).[4]

CO's final decision dated 7 April 2010. The third alternative claim is the subject of ASBCA No. 57931.

[2] The record includes the following filings concerning the motions. On 10 November 2009, the "Government's Motion for Summary Judgment and Partial Motion to Dismiss" were filed. ARCTEC's Motion for Summary Judgment was filed 18 November 2009. Both the "Government's Response To ARCTEC's Motion for Summary Judgment" and "ARCTEC's Opposition to the Air Force's Motion for Summary Judgment and Partial Motion to Dismiss" were filed 24 December 2009. "ARCTEC's Reply Brief in Support of its Motion for Summary Judgment" was filed on 9 January 2010. At the Board's request, further briefs were submitted as follows: "ARCTEC's Supplemental Brief Regarding Price Adjustment Methods" was received on 4 October 2010; and, the "Government's Response to the Board's 19 August 2010 Order" was filed on 8 October 2010. We do not address the partial motion to dismiss since it is clear, and the government does not dispute, that the Board has jurisdiction of the Service Contract Price Adjustment claim under ASBCA No. 56631.

[3] Because essentially the same relief is sought in each of the claims, we need not consider the merits of all of the appeals given that such consideration might result in the granting of duplicative relief. Recognizing that sustainment of any one of the appeals would grant it the same relief sought in the other appeals appellant has consistently argued and briefed these appeals as providing three "alternative" bases for substantially the same relief. As a consequence and in the unusual circumstance of these appeals, our sustainment herein of ASBCA No. 56631, renders moot and we need not consider, the two remaining appeals.

[4] Unless otherwise indicated, references to the pleadings are to those filed in ASBCA No. 56444.

2. The locations pertinent to this claim include Cape Cod Air Station, MA (Cape Cod), Beale Air Force Base, CA (Beale), and Clear Air Station, AK (Clear) (compl. and answer ¶ 14).

3. The contract called for the provision for services during a base period that ended on 31 March 2000 (compl. and answer ¶ 15).

4. The contract included option periods following the initial base period including an option period for the second half of Fiscal Year (FY) 2000 and six additional option periods for services to be provided in FY 2001 through FY 2006 (compl. and answer ¶ 16).

5. The AF exercised all options extending the contract through the end of FY 2006. Accordingly, the contract ended on 30 September 2006. (Compl. and answer ¶ 17)

6. The AF conducted a procurement to select a contractor to assume responsibility for the work called for in ARCTEC's contract after the contract would conclude on 30 September 2006. ARCTEC was not selected as the successor contractor.

7. The contract required ARCTEC to pay specified minimum wages and provide fringe benefits to non-exempt employees working on the contract (R4, tab 1-9 at 1-300). Specifically, FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989) (sometimes referred to herein as the SCA clause), provided that (¶ (c)(1)):

> Each service employee employed in the performance of this contract by the Contractor...shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor [DOL], or authorized representative, as specified in any wage determination attached to this contract.

8. The DOL sets the prevailing wages and fringe benefits that must be paid non-exempt service workers engaged to perform services directly on a covered U.S. government service contract such as the contract at issue in these appeals. Collective Bargaining Agreements (CBA) negotiated by a contractor and accepted by DOL take the place of any prevailing wage determination issued by DOL. *See* 29 C.F.R. § 4.1(b) (2005). The economic terms and conditions of the CBAs, including those provisions that regulate wages and fringe benefits, become the wage determination under the SCA. *Id.*

9. FAR 52.222-43, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT–PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989), is included

in the contract (R4, tab 1-9 at 1-301). The clause, referred to sometimes herein as the Service Contract Price Adjustment clause, states in pertinent part:

> (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 prices in this contract do 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. If no such determination has been made applicable to this contract, then the Federal minimum wage as established by section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 206) 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. For example, the prior year wage determination required a minimum rate of $4.00 per hour. The Contractor chose to pay $4.10. The new wage determination increases the minimum rate to $4.50 per hour. Even if the Contractor voluntarily increases the rate to $4.75 per hour, the allowable price adjustment is $.40 per hour;
>
> (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.

(e) Any adjustment will be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) of this clause, and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but shall not otherwise include any amount for general and administrative costs, overhead or profit.

(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.

FAR 52.222-41 and 52.222.43 are also sometimes referenced to collectively hereinafter as the pertinent labor provisions of the contract.

10. Many of the contract's line item numbers (CLINs) provided that services within the scope of the applicable CLIN would be paid for by the AF on a fixed-price incentive basis. A few CLINs provided for compensation on a cost reimbursement basis. (Compl. and answer ¶¶ 33-34)

11. The contract included three CLINs, which provided that contract phase-out services provided pursuant to the contract's Statement of Work (SOW) Part 5 would be paid on a cost reimbursement basis (R4, tab 1-2 at 1-166). CLIN 7004AA applied to phase-out costs for the Clear facility; CLIN 7001AA governed phase-out costs at Cape Cod; and CLIN 7002AA was applicable to Beale (*id.*).

12. Part 5 of the SOW stated that "[t]he Incumbent shall perform the following" and set forth a range of activities and duties, including the transition of records and reports, taking inventory of data processing equipment, transferring classified materials, turning over keys, and a number of other tasks. In addition, the incumbent was to "[a]ssist the personnel of the Successor in understanding the philosophy, goals, organizational structure, patron needs and desires, operational procedures, and requirements for conducting activities." And, the incumbent was to "[p]rovide liaisons to the Successor to ensure continuity of programs until phase in is complete." The SOW had no provisions relating to costs and made no reference to the payment of severance compensation. (R4, tab 1-16 at 1-568-69)

13. The "estimated amounts" for the phase-out CLINs were left blank in the RFP. The amounts were to "be negotiated after [the CO] notification that the services will be required." At which time the "contractor shall provide a fully supported proposal for these costs within 30 days of the notification." (App. mot., ex. 1 at E1-01) In addition, section F noted that the performance period for the phase-out CLINs was "TBD" (to be determined) (*id.* at E1-04).

14. Most of the contract's activities fell within the scope of line items subject to compensation pursuant to the "Fixed Price Incentive Firm (Target) with Award Fee" (FPIFT) provisions of the contract. The costs for these line items were combined for each fiscal year to establish a Target Cost, Target Profit, Target Price (equal to Target Cost plus profit), and a Ceiling Price that would be the maximum amount that ARCTEC would be paid regardless of costs overruns (*i.e.*, those amounts that exceeded the Target Cost). (*See, e.g.*, R4, tab 1-2 at 1-152 showing Incentive Pricing Arrangement Elements for FY 06 (CLINs 6001-6017))

15. In addition, the contract provided for "share ratios" applicable to the amounts of Overruns or Underruns. Underruns and Overruns were the difference between Target Cost and actual incurred costs for the applicable fiscal year. (*Id.*)

16. Pursuant to the terms of FAR 52.216-16, INCENTIVE PRICE REVISION–FIRM TARGET (OCT 1997) (the IPR clause), the AF and ARCTEC would "share" the overrun or underrun on a percentage basis that would be calculated in accordance with FAR 52.216-16(d). ARCTEC's share of underruns was 75% and the government's share was 25%. (R4, tab 1 at 1-228; app. mot., ex. 1 at E1-10)

17. Costs for the purposes of the IPR clause means costs that are allowable "in accordance with Part 31 of the [FAR] in effect on the date of this contract." FAR 52.216-16(b).

18. "Severance pay is allowable" if "it is required by...employer-employee agreement...." FAR 31.205-6(g)(2). ARCTEC did not include an allowance for severance compensation in its proposal. Nor did appellant include any allowance for the severance costs in dispute when it submitted proposals for adjustment during performance pursuant to the Service Contract Price Adjustment clause. (App. mot., exs. 4, 5 and 2, Leong, Wisely and Frothingham decls.; app. supp. R4, tabs 15, 17)

19. In addition to the specific prohibition in the Service Contract Price Adjustment clause (SOF ¶ 9), FAR 31.205-7(c)(2) also generally requires exclusion from cost estimates of "contingency" costs arising from conditions "the effect of which cannot be measured so precisely as to provide equitable results to the contractor and to the Government."

The Collective Bargaining Agreements and Severance Requirements

20. At the time the contract ended, the services being provided by ARCTEC to the AF at the Cape Cod, Beale and Clear installations were being performed in part by workers whose employment was governed by CBAs (compl. and answer ¶ 17).

21. At Cape Cod, ARCTEC's employees were covered by a CBA entered into with the International Brotherhood of Electrical Workers, Local 223 (the Cape Cod CBA) (compl. and answer ¶ 19).

22. At Beale, ARCTEC's employees were covered by a CBA entered into with the International Brotherhood of Electrical Workers, Local 340 (the Beale CBA) (compl. and answer ¶ 20).

23. At Clear, ARCTEC's employees were covered by two CBAs entered into, respectively, with the International Brotherhood of Teamsters, Local 959 (the Clear Teamsters CBA) and the Fairbanks Joint Crafts Council (the Clear Crafts Council CBA) (compl. and answer ¶ 21).

24. Following the execution of the CBAs, ARCTEC forwarded copies of the signed CBAs to the AF. Those CBAs were adopted by the DOL as the wage determinations (WD) applicable to the contract. The table below identifies each CBA and its corresponding WD number:

CBA	WD. No.
Beale CBA	CBA-2005-3265
Clear Teamsters CBA	CBA-2005-3262
Clear Crafts Council CBA	CBA-2005-3263
Cape Cod CBA	CBA-2005-3264

(Compl. and answer ¶ 22; supp. R4, tab 16 at 16-027)

25. All four WDs were incorporated into the contract pursuant to unilateral Contract Modification No. P00479 dated 1 October 2005 (compl. and answer ¶ 23; app. supp. R4, tab 16 at 16-001, -027).

26. In addition to governing the wages and other compensation to be paid to the workers, all of the CBAs provided for payment of certain fringe benefits, including severance payments (ASBCA No. 56631, compl. and answer ¶ 22).

27. In all cases, employees were not eligible for severance payments in the event they were hired by a successor contractor within given time periods following expiration of the contract. For example, the Beale CBA provided in pertinent part:

> **Section 6 –**
>
> (a) Each permanent employee who is laid off from the Company shall received fifty-six (56) hours of straight time pay or portion thereof for each year of service. Employees who are terminated by the Company and are subsequently hired by a follow-on contractor within thirty (30) days are not eligible for severance pay.

(Supp. R4, tab 8 at 8-20-21; compl. and answer ¶ 25)

28. Likewise, the Cape Cod CBA stated:

> I. Severance Pay
>
> 1. **Eligibility:** Employees with more than one (1) year continuous services will be eligible for severance as follows:
>
> ....

3. **Effective 1 October 2004:** Each permanent employee who is laid off from the Company shall receive forty hours (40) of straight time pay or portion thereof for each year of service. Employees who are terminated by the Company and are subsequently hired by a follow-on contractor or continue employment with the Company at another facility, subsidiary, affiliate or parent Company within thirty-one (31) days are not eligible for severance pay. Employees terminated because of disciplinary action are not eligible for severance pay.

(Supp. R4, tab 9 at 9-13; compl. and answer ¶ 26)

29. Consistent with the Beale and Cape Cod CBAs, the Clear Crafts Council CBA provided:

9.05 SEVERANCE PAY.

An employee with two (2) years or more of continuous service credit, who meets the continuous service requirements stated herein, shall be entitled to severance pay in accordance with the following provisions of this paragraph when the employee is laid off for lack of work for a period in excess of thirty (30) days.

....

Employees shall not receive severance pay if the employee, within thirty (30) days after termination of their employment or completion of this Contract, whichever is later, is employed by or accepts employment...with a succeeding contractor under a follow-on contract in a position requiring the same, similar, or greater responsibility or skill.

(Supp. R4, tab 11 at 11-23-24; compl. and answer ¶ 27)

30. The Clear Teamsters CBA, similarly provided:

14.05 Severance Pay Eligibility. An employee will be entitled to severance pay...when the employee is laid off for lack of work for a period in excess fifteen (15) days, unless the layoff is due to causes beyond the control of the Company, such as, by way of example and not by way of

limitation, fire, flood, explosion, bombing, earthquake, or picketing.

....

(a) Severance shall be paid at the end of a waiting period of fifteen (15) days from the date of such layoff. An employee, who is reinstated in employment with the Company during the waiting period, shall not be entitled to severance pay as herein provided.

....

14.06 Severance When Re-employed by a Successor Contractor. If an employee is laid off because of termination by the customer of its contract with ARCTEC Services, the rules for severance pay will be modified. In this case, the employees shall not receive severance pay if they are employed by, or enter into an agreement for subsequent employment with, a successor contractor within fifteen (15) days after termination of employment or the completion of the contract, whichever is later. This restriction only applies if the position accepted requires the same, similar, or greater level of responsibility of skill.

(Supp. R4, tab 10 at 10-46, -47; compl. and answer ¶ 28)

31. All four CBAs, therefore, required ARCTEC to pay severance to all eligible employees who had been laid off unless they obtained employment with a successor contractor within a specified number of days after the employees' termination (compl. and answer ¶ 29).

Service Contract Act Price Adjustments

32. Unilateral Contract Modification No. P00479 (Mod. 479), issued on 1 October 2005, incorporated into the contract new WDs based on the CBAs discussed above (app. supp. R4, tab 16).

33. By letter dated 30 December 2005, ARCTEC submitted a price adjustment proposal, in accordance with the Service Contract Price Adjustment clause, seeking an adjustment to account for the increased FY 2006 costs of compliance at the Clear site

with the terms of the WD/CBAs that had been incorporated by Mod. 479 (gov't mot., ex. G-2; app. supp. R4, tab 53).

34. No allowance for severance costs was included in this proposal and the contract modification that granted the price adjustment contained no allowance for severance compensation. Specifically, "ARCTEC did not include any actual, potential, contingent or speculative costs for the payment of severance compensation in its proposals for price adjustments pursuant to FAR § 52.222-43 (governing price adjustments for increased costs of complying with wage determinations)." (App. supp. R4, tab 17; app. mot., ex. 2, Frothingham decl. ¶ 13)

35. At the time of ARCTEC's price adjustment proposal, ARCTEC lacked information sufficient to determine how much, if any, severance compensation would be paid. "This is because ARCTEC: (1) did not know whether the Contract would be reprocured; (2) did not know whether it would be selected to receive a successor contract; (3) could not control whether a successor contractor would hire any or all of ARCTEC's incumbent employees to perform the successor contract; and (4) did not know which employees would be hired or their length of service" (Frothingham decl. ¶¶ 8, 9).

36. In August 2006, the parties executed bilateral Contract Modification No. P00529 (Mod. 529), equitably adjusting the contract price (including pertinent cost incentive provisions) to account for increased costs of compliance at the Clear site with the WD/CBAs for FY 2006 incorporated by Mod. 479. Mod. 529 stated that appellant "hereby releases the Government from any and all liability under this contract for further equitable adjustment attributable to said changes." (App. supp. R4, tab 17 at 17-004) There is no evidence or contention by the government that appellant was compensated by Mod. 529 for any portion of the severance costs in dispute or that such costs were included in any preceding proposal by appellant or were the subject of negotiations preceding execution of Mod. 529.

The Severance Payments

37. Following expiration of the contract on 30 September 2006, severance payments were made by appellant to those CBA-covered employees who did not obtain employment with the successor contractor (compl. and answer ¶ 30).

38. ARCTEC paid severance benefits to eligible workers at a total cost of $570,676.95 inclusive of direct labor, other fringe benefits costs, applicable unemployment taxes and workers' compensation costs, and overhead (compl. and answer ¶ 42).

39. These costs were incurred by ARCTEC pursuant to the terms of WDs (incorporating the CBAs) (ASBCA No. 56631, compl. and answer ¶ 33).

40. There is no dispute that the claimed severance costs were incurred, allocable to the contract, reasonable and otherwise allowable.

41. Beginning on or about 28 June 2006, ARCTEC and the AF CO conferred regarding the upcoming phase-out of the contract. In particular, the parties considered what costs should and should not be included in ARCTEC's proposal to the AF for closing out the contract (compl. and answer ¶ 36). In an e-mail to appellant dated 26 June 2006, the CO requested that ARCTEC's phase-out proposal be submitted by 31 July 2006; however, he asked ARCTEC to let him know if meeting the deadline would be a problem "due to ongoing interviews and hiring by the successor contractor" (app. supp. R4, tab 49).

42. In an e-mail of 27 July 2006, the CO stated "we're waiting on BAE [the successor contractor] to finalize their hiring" decisions (app. supp. R4, tab 50).

43. Once the government believed that the successor contractor had completed its hiring process, it asked ARCTEC on 28 August 2006, how long it would take to complete its phase-out proposal. ARCTEC responded that it would know soon and that the timing of its proposal depended, in part, on the resolution of severance issues. (App. supp. R4, tab 51)

44. The AF reimbursed predecessor contractors for severance costs paid to union employees who were not rehired under "phase-out" provisions in the predecessor contracts (app. supp. R4, tabs 39, 39A, 40-43, 45-48; app. mot., ex. 5, Wisely decl.).

45. ARCTEC submitted its phase-out cost proposal on 5 September 2006. The proposal included anticipated severance costs of $484,067.40 for such costs incurred at Beale and Clear. At the time of this submission, ARCTEC did not anticipate severance costs at Cape Cod. Ultimately, severance payments totaling $570,676.95 were paid to union employees at Clear, Beale and Cape Cod. (Compl. and answer ¶¶ 37, 42) The severance costs included in the proposal were calculated "[b]ased on direction received from the [CO]" (app. supp. R4, tab 18 at 18-008).

46. On 18 September 2006, the CO advised ARCTEC severance costs were not reimbursable under the phase-out costs CLINs noting that advisory AF counsel "insists" such costs "are not allowable" (app. supp. R4, tab 19 at 19-003; compl. and answer ¶ 38).

47. Accordingly, the AF advised ARCTEC that these costs were to be excluded from its phase-out proposal (compl. and answer ¶ 39). The CO states that after further consultation "with both my legal advisor and DCAA...the government will not consider paying severance costs in the Phase-out proposal" (app. supp. R4, tab 29 at 19-001).

48. Excluding severance costs, the government determined that for FY 2006, the audited Target Cost equaled $38,292,191. Excluding severance costs, the government determined that for FY 2006, ARCTEC's actual incurred costs were $35,840,172 resulting in an underrun of $2,452,019. (R4, tab 2 at 2-7) Excluding severance costs, ARCTEC's share of the underrun equaled $1,839,014 (*i.e.* 75% of $2,452,019). Accordingly, ARCTEC was entitled to $35,840,172 plus $1,839,014 for a total of $37,679,186 exclusive of target profit. (R4, tab 2 at 2-7)

49. The government (having agreed that the severance costs are allowable, allocable and reasonable), asserts that the severance costs should be added to actual incurred costs. This would have the effect of decreasing the amount of the underrun and appellant's incentive fee. (R4, tab 3)

50. ARCTEC contends, however, that it should be reimbursed for the severance costs it incurred pursuant to the "phase out" provisions and that the severance costs should not be added to actual incurred costs. Thus, the underrun would not be decreased. Alternatively, ARCTEC contends that it is entitled to a price adjustment pursuant to the terms of the contract's labor clauses in the amount of $539,558.41, which reflects its severance costs (exclusive of overhead, general & administrative costs, and profit), with appropriate adjustments of the contract's target cost and price. (ASBCA No. 56631, compl. and answer ¶ 43).

51. On 8 January 2007, appellant filed a certified claim in the amount of $570,676.95 for reimbursement of the severance costs under the "phase-out" CLINs for the three sites. The claim alleged in particular that the "phase-out" work statement, the parties' prior understanding and course of conduct warranted recovery. The claim made no mention of factual or legal allegations relating, *inter alia,* to recovery under the Service Contract Price Adjustment clause and cost incentive provisions of the contract. (R4, tab 5 at 5-8-3)

52. The CO denied the claim in a final decision dated 9 April 2008 based principally on the government's view that the contract's "phase-out" provisions made no mention of severance costs and they were not within their scope (R4, tab 3). Appellant's timely appeal of 30 June 2008 was docketed as ASBCA No. 56444.

53. On 5 August 2008, appellant submitted a second alternative certified claim in the amount of $539,558.41 to the CO seeking recovery pursuant to the Service Contract Price Adjustment clause and IPR clause of the contract (gov't mot., ex. G-3). The monetary reduction from the prior claim reflects the elimination of overhead, G&A and profit in compliance with the Service Contract Price Adjustment clause.

54. In a final decision dated 10 September 2008, the CO denied appellant's alternative claim. The CO conceded that appellant was required to pay the severance

costs to comply with its CBAs. In denying the claim, the final decision discusses in considerable detail the case of *ITT Federal Services Corp.*, ASBCA No. 46146, 97-1 BCA ¶ 28,655, *aff'd,* 132 F.3d 1448 (Fed. Cir. 1997), noting that in *ITT* severance costs were not recoverable under a fixed price contract. The final decision then distinguishes *ITT* because the instant contract contains predominantly Fixed Price Incentive CLINs. As a consequence, the CO considered that severance costs should be treated like other costs and added to the total costs incurred by appellant thereby decreasing the amount of appellant's cost underrun and thus its total savings under the incentive provisions. According to the CO, appellant also was not entitled to an equitable adjustment increasing the target cost of the contract because appellant released any claim for the severance payments when it executed bilateral Mod. 529. The CO considered that appellant knew that it was potentially liable for severance costs when the pertinent CBAs for the three sites were incorporated into the wage determinations and unilateral Mod. 479. Therefore, he concluded that appellant should have estimated and "accrued" severance costs and made them a part of its proposal for the FY 2006 adjustment preceding Mod. 529. (R4, tab 6)

55. Although we do not address quantum, the following table summarizes the parties' positions regarding the treatment of severance costs (app. opp'n, ex. 1, ¶ 95 and gov't resp. thereto):

	FY 2006 W/out severance	Government Approach	ARCTEC Reimbursement	ARCTEC SCA Adjustment
Treatment of Severance Costs[5]		$576,677 (added to incurred costs; no change to target cost)	$576,677 (treated as a reimbursement; no change to target or incurred costs)	$539,558 (added to target cost; $576,677 added to incurred costs)
Target Cost[6]	$38,292,191	$38,292,191	$38,292,191	$38,831,749
Incurred Costs	$35,840,172	$36,416,849	$35,840,172	$36,416,849
Underrun	$2,452,019	$1,875,342	$2,452,019	$2,419,900
ARCTEC share	$1,839,015	$1,406,507	$1,839,015	$1,811,175

[5] [This footnote and the following footnote are taken from the table as presented in appellant's opposition. The shift from an amount of $570,676 (in round numbers) to $576,677 is not explained.] ARCTEC's actual total severance costs were $576,677, including cost mark-ups. Excluding indirect cost mark-ups, the severance costs for the purposes of an SCA price adjustment were $539,558.

[6] Target Cost is adjusted upwards by $539,558 to $38,831,749 to reflect the SCA price adjustment. Actual incurred costs for determining an overrun (after the target cost adjustment) are increased the full $576,677.

DECISION

The parties have filed cross-motions for summary judgment. The motions and referenced appeals involve alternative claims. Because we determine that ARCTEC is entitled to the alternative relief requested in ASBCA No. 56631, we need address solely the motions as pertinent to that appeal. Summary judgment is appropriate where the moving party establishes that there are no genuine issues of fact and the moving party establishes that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Riley & Ephriam Construction Co. v. United States,* 408 F.3d 1369, 1371 (Fed. Cir. 2005). The parties substantially agree on all material facts and dispute the legal consequences of those facts.

Appellant's motion maintains, in pertinent part, that it paid the severance costs in dispute pursuant to collective bargaining agreements in force at the three sites following expiration of the contract. Therefore, appellant argues that it is entitled to a price adjustment under the Service Contract Price Adjustment clause compensating it for the severance costs incurred. Consequently, ARCTEC avers that it is entitled to a corresponding adjustment of the impacted IPR clause's cost sharing/incentive provisions.

The government does not dispute that the severance payments in dispute in this case were properly incurred and otherwise allowable costs of performing the contract. As such, the costs must be added to the appellant's incurred cost total according to the government. However, the government considers that ARCTEC is not entitled to an equitable adjustment of the contract's predominantly fixed-price CLINs or any increase of the target cost of the contract. In practical effect, the government's position reduces appellant's cost underrun and ARCTEC's resultant share of the cost savings computable under the contract's incentive provisions. The government also maintains that, in any event, appellant released any claim to recovery of the severance payments as a consequence of its execution of bilateral Mod. 529. The government considers that appellant should have "accrued" and included severance costs in its SCA price adjustment proposal underlying that modification. Finally, the government argues that the severance costs must be identifiable with specific CLINs and because it is allegedly not feasible to make such a precise allocation, appellant is not entitled to an equitable adjustment of the contract's CLINs.

Entitlement to Price Adjustment and Increased Savings

The government agrees that the severance costs would ordinarily be allowable under the FAR cost principles and recoverable under cost contracts. However, the government notes that the instant contract consists essentially of fixed-price CLINs and appellant ordinarily bears the risk of cost increases under fixed-price contracts. For that proposition, it cites *ITT Federal Services Corp.,* ASBCA No. 46146, 97-1 BCA ¶ 28,655, *aff'd,* 132 F.3d 1448 (Fed. Cir. 1997). The CO's final decision correctly distinguished

the *ITT* case based on the fact that the instant contract was in essence a fixed price incentive contract. However the CO failed to recognize the full ramifications of that distinction and missed the salient point.

Here, in contrast to the *ITT* case, the contractor is entitled to a price adjustment for the severance costs as a consequence of the wage determinations incorporating appellant's collective bargaining agreements with unionized employees at the three relevant sites into the contract. The DOL wage determinations and CBAs require the payment of severance costs upon expiration of the contract in certain circumstances. Pursuant to the Service Contract Price Adjustment clause, contractors are entitled to price adjustments to recover increased wages and fringe benefits resulting from required compliance with DOL wage determinations incorporated into the contract. Appellant paid covered employees in each of the three locations and the government does not dispute that those payments were required by, and made in accordance with, the CBAs. Accordingly, the contractor is entitled to a price adjustment under the clause. *See Lear Siegler Services, Inc. v. Rumsfeld,* 457 F.3d 1262 (Fed. Cir. 2006); *see also Aleman Food Services, Inc. v. United States,* 994 F.2d 819, 822 (Fed. Cir. 1993); *United States v. Service Ventures, Inc.,* 899 F.2d 1, 3 (Fed. Cir. 1990). There was no pertinent price adjustment clause in *ITT* where the contractor relied on the FAR cost principles and FAR 52.237-3 to justify recovery. Appellant's present claim is premised on the price adjustment clause not solely the cost allowability provisions.

Because the pertinent labor provisions provide for a price adjustment, the cost incentive provisions must be commensurately adjusted as promised by, and in accordance with, the contract. The IPR clause of the contract expressly provides:

> (k) *Equitable adjustment under other clauses*. If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment shall be made in the total target cost and may be made in the maximum dollar limit on the total final price, the total target profit, or both....

FAR 52.216-16(k).

Similarly, FAR 16.403-1 expressly provides that the ceiling price "is the maximum that may be paid to the contractor, except for any adjustment under other contract clauses." Here, the total final price has not been established.

We consider that appellant is entitled to a price adjustment under the IPR clause to compensate it for the severance expenses incurred. Appellant seeks solely an increase in the target cost in accordance with the parties' prior course of performance, citing the similar "constant dollar" methodology described in NASH & FELDMAN, GOVERNMENT CONTRACT CHANGES, § 18:21 at 156 (3d ed. 2007) (app. supp. br. at 7-8). Appellant's

general methodology is reflected in the "ARCTEC SCA Adjustment" column of the chart set forth in SOF ¶ 55 detailing the parties' alternative positions. No adjustment of the contract's ceiling price is required to fully compensate appellant in this instance and it seeks no profit adjustment. Appellant agrees with the government that, *after* making the target cost adjustments, severance costs (*inclusive* of cost mark-ups), are to be added to ARCTEC's total incurred costs for FY 2006 for purposes of applying the contract's cost sharing provisions.

The Mod. 529 Release

The government maintains that, at the time of negotiation and execution of Mod. 529 addressing increases in wages to be paid in FY 2006 prior to expiration of the contract, appellant's CBAs at the three sites had been incorporated into its wage determination and the contract pursuant to Mod. 479. Therefore, the government alleges that appellant should have estimated potential severance costs, "accrued" the estimates, and included them in its price adjustment proposal for 2006. Because appellant executed Mod. 529 without doing so, or reserving its rights to claim severance costs in the future, the modification's unconditional release bars the present claim according to the government, at least with respect to the Clear site.

The government bears the burden of establishing the essential elements of an effective accord and satisfaction, including most basically a "meeting of the minds." In particular, it must establish that the release here "included compensation for all the costs associated with the change and the compensation was being accepted without qualification." *Crawford Technical Services, Inc.*, ASBCA No. 40388, 93-3 BCA ¶ 26,136 at 129,920 (vacation expense fringe benefits not covered by release). There is no merit to the government's contention that the severance payments in dispute were within the scope of the Mod. 529 release.

At the time of negotiation and execution of Mod. 529, the potential incurrence and amount of severance costs were wholly contingent on numerous unknown factors detailed herein. Under FAR 52.222-43, appellant warranted that it had not and would not include such contingent labor costs in the contract prices. The same clause in turn promised an adjustment when any increased costs actually were known, incurred and measurable. All factors bearing on the incurrence and amount of such costs were not known until after negotiation of Mod. 529 and expiration of the contract. Consistent with the express prohibition in FAR 52.222-43(b) against including contingency costs in price adjustment proposals, is the proviso in FAR 52.222-43(d) that the adjustment is limited to the "*actual* increase or decrease in applicable wages and fringe benefits" (emphasis added). "Actual" severance costs were not known until after conclusion of the contract. The government in our view could not reasonably consider that the modification covered such contingent costs or that appellant was required to estimate them in violation of the unambiguous language of the clause.

There is also no evidence that either party intended that modification to encompass or address severance costs. Nothing in the documentation supporting the price adjustments involved in Mod. 529 or the modification itself addresses the severance costs in question. The record contains an unrebutted affidavit that the disputed severance costs were not included and it is evident from the actions of the parties, that they would be reserved for later discussions as part of the "phase out" line item negotiations.

The government was well aware that appellant was deferring final determination of severance cost issues until all factors bearing on the amount of its liability were resolved. Contemporaneously, both parties anticipated that severance would be addressed as a reimbursable cost under the "phase-out" CLIN.[7] The severance costs were a separate and distinct liability and substantively different claim for costs incurred by appellant under the CBA having no relation to earlier wage revisions. The pre-termination "changes" referenced in the releases addressing wage revisions plainly did not cover possible post-termination liability for contingent severance costs.

According to the government, the FAR cost principles require annual "accrual" of anticipated future fringe and/or "other" wage benefits (including severance payments). Therefore, the government suggests that appellant should have been "accruing" potential severance costs (apparently since FY 2000 if one follows the logic), and should have included the costs in the FY 2006 proposal. Whatever validity the government's notions of an alleged obligation to "accrue" potential severance costs may have with respect to cost reimbursement contracting generally, appellant had no obligation to estimate such costs under this essentially fixed-price contract that promised an equitable adjustment if appellant in fact was required to pay them. Accruing and assigning these costs over the years of performance of this contract would have been an unnecessary speculative exercise since it was prohibited from including contingent costs in price adjustment proposals under the labor provisions during performance of the contract.

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[7] Because we decide that appellant is entitled to a price adjustment pursuant to the contract's labor provisions with commensurate adjustment of the contract's cost incentive provisions, we need not address appellant's alternative claims alleging a prior course of conduct to pay severance costs under the "phase-out" CLINs of predecessor contracts. Although the government eventually denied any obligation to pay based upon the alleged prior course of conduct, the record is clear that the parties contemporaneously viewed the yet-to-be-determined severance payments as a segregable and unresolved issue from other FY 2006 wage issues settled in Mod. 529. In this case, dealings with the predecessor contractors bear on the issue of the scope and intended coverage of the modification and contemporaneous state of mind of the parties, regardless of whether a "prior course of conduct" exists.

Moreover, the government's contention that severance costs were released in Mod. 529, is logically inconsistent with its position that the same costs are allowable, reimbursable and includable in total costs incurred for purposes of the IPR cost sharing provisions. The essential gravamen of the government's case in this respect is that the modification's release precludes appellant from claiming an adjustment with respect to severance costs at the Clear site but does not preclude their payment and inclusion in total costs for purpose of the incentive provisions. Either the costs were fully addressed, resolved and released in the modification for all purposes or they were not. Clearly, the costs in dispute here were not covered by the modification nor included in any contractual price adjustment. The parties deferred addressing the severance payments until all of the numerous factors bearing on their amount and allowability were resolved after expiration of the contract.

Allocation to CLINs

The government also disputes liability because it considers that the amount of the price adjustment to compensate appellant for its severance payments cannot be identified with, or allocated to specific, preexisting fixed-price CLINs. This contention also lacks any merit. There is no contract requirement that requires such an identification or allocation process. In fact, the contracting officer previously has established new CLINs and/or subsidiary CLINs to accomplish simple administrative tasks to facilitate payment of increased labor costs associated with wage revisions. In any event, the price adjustment promised by the SCA clause and to be implemented via the IPR clause necessarily encompasses all administrative particulars required for its implementation.

CONCLUSION

In conclusion, appellant is entitled to a price adjustment under both the Service Contract Price Adjustment and IPR clauses. Therefore, ASBCA No. 56631 is sustained and remanded to the parties for determination of quantum. Appellant is also entitled to interest from the date of receipt by the CO of the underlying claim dated 5 August 2008. To that extent, appellant's Motion for Summary Judgment is granted and the government's cross-motion is denied. ASBCA Nos. 56444 and 57193 involving the alternative claims for relief are dismissed with prejudice as moot.

Dated: 15 April 2011

RØBERT T. PEACOCK
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 Nos. 56444, 56631, 57193, Appeals of ARCTEC Services, rendered in conformance with the Board's Charter.

Dated:

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