

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Distributed Solutions, Inc. ) ASBCA No. 57266  
 )  
Under Contract Nos. F41999-99-C-0027 )  
 F41999-07-F-1375 )

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OPINION BY ADMINISTRATIVE JUDGE CLARKE ON  
MOTIONS FOR SUMMARY JUDGMENT

Appellant, Distributed Solutions, Inc. (DSI), filed a motion for summary judgment on 7 June 2011 based on its interpretation of several modifications (the contract interpretation motion). The Air Force Non-Appropriated Fund Purchasing Office (AFNAFPO) opposed and filed a cross-motion for summary judgment. The AFNAFPO also filed a motion for summary judgment contending that if DSI's interpretation is correct, it is not supported by consideration (the consideration motion). DSI opposed AFNAFPO's motion. We grant in part the government's cross-motion on interpretation and deny all remaining motions.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

Order No. F41999-97-F-6019

1. Order No. F41999-97-F-6019 (6019) under Contract No. 263-97-D0334 was awarded by AFNAFPO, San Antonio, TX, to GCG on 8 October 1997 to develop an internet based purchasing system (IBPS) (R4, tabs 54, 73). The \$392,385.00 contract listed three CLINs:

0001 Software Development, CLIN 6175, convert the  
Electronic Commerce Purchasing System (ECPS) from

a DOS based program to an internet/intranet program in accordance with the attached statement of work, requirements incorporated by the question answer session of the pre-proposal conference, and the proposal submitted by GCG. (\$376,000.00)

0002 Training, CLIN 9002, training of 50 Agency personnel either at 9504 IH 35 N or Airport Center Building in San Antonio TX. (\$12,500.00)

0003 NIH administrative fee, CLIN 9999, 1 % of total (\$3,885.00)

(*Id.*) There was nothing in the CLINs requiring AFNAFPO to pay royalties to use the IBPS. Delivery was specified as 30 September 1998 (*id.*).

2. The “Statement of Work Development of Internet-based Purchasing System” (SOW) had the stated objective of, “To obtain customized software or existing commercial-off-the-shelf (COTS) software that will be modified to meet 100 percent of the specifications in this statement of work” (R4, tab 55 at 190, tab 73 at 292). The SOW set forth the organizational structure that must be supported, a description of the current Electronic Commerce Purchasing System (ECPS) and the “system requirements” for the IBPS (R4, tabs 55 at 189-95, 73 at 291-97). There was nothing in the SOW requiring the AFNAFPO to pay royalties to use the IBPS.

3. Judd’s Inc., the major subcontractor working with GCG, submitted the technical proposal that was physically included in the contract at award (R4, tabs 57, 73 at 272-90). Part II of Judd’s Inc.’s proposal, “Proposed Solutions and Associated Costs” discussed Architecture, Project Development Process, Project Development Milestones, Delivery Time and Technical Support (R4, tab 57 at 217, tab 73 at 284). The Architecture section lists a variety of primarily Microsoft® commercial COTS products that would be employed to provide the required customized solution (R4, tab 57 at 217-20, tab 73 at 284-287). The Source Code Management paragraph provided that “*all* source code developed specifically for the project will be delivered with the project as part of the baseline fixed cost” (R4, tab 57 at 219, tab 73 at 286) (emphasis in original). The development milestones included two prototypes, a system pilot and system implementation. After system implementation, a 90-day warranty period went into effect followed by help desk support. (R4, tab 57 at 221-22, tab 73 at 288-89) There was nothing in Judd’s proposal as contained in the record requiring the AFNAFPO to pay royalties to use the IBPS.

4. The two copies of the 6019 contract in the record do not have a list of clauses incorporated by reference or any provisions addressing intellectual property (R4,

tabs 54-57, 73)<sup>1</sup>. The copy of the 6019 contract in DSI's supplement to the Rule 4 included, "Answers to Questions Posed Regarding the Internet-based Purchasing System" that included the following:

Q26. What rights does AFNAFPO expect to retain with respect to the internet purchasing system?

A26. We expect to be able to provide the full range of purchasing functionality offered by the internet purchasing system to all government NAF entities. We need to remove the DoD stipulation from the arrangement as made with Loren Data, as Coast Guard installations (DoT) use NAF funds, as well as a small handful of other government offices, i.e. the CIA dining room in the Pentagon.

(R4, tab 73 at 314) The IBPS was not completed under the 6019 contract.

Contract No. F41999-99-C-0027

5. On 19 August 1999, Contract No. F41999-99-C-0027 (0027) in the total amount of \$276,700 was awarded by AFNAFPO to Judd's Online, Inc. ("Judd's") for completion of the IBPS (R4, tab 1). The contract included seven CLINs:

0001 – Completion of software development for Internet Based Purchasing System (IBPS). System shall be an internet/intranet program in accordance with the attached statement of work (SOW). A core system (including User's Guide) will be completed and tested no later than 30 November 1999. System will be upgraded to SQL 7. \$199,700

0002 – Installation of existing system. Installation shall be completed no later than 31 August 1999.... \$7500

0003 – Maintenance program for the IBPS – This is an annual maintenance program with an option to extend annually up to 5 years from original start date.... \$50,000 annually

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<sup>1</sup> The record does not contain the terms and conditions of Contract No. 263-97-D0334.

0004 – Help Desk – This is an annual help desk program with an option to extend up to 5 years from original start date.... \$15,000 annually

0005 – 100% system installation.... \$7500

0006 – Training–Training includes no more that 50 personnel per session, situated at the Headquarters Services Agency or the AFNAFPO.... \$12,000 annually

0007 – Enhancements: Scope, price, and performance period of program enhancements shall be negotiated between the parties....

(*Id.* at 2) The period of performance was “5 years from the signature date of the contracting officer with an option to extend an additional 5 years” (*id.*). Attachments 1 and 2 to the 0027 contract identified and prioritized the development tasks remaining to be accomplished to complete the IBPS (R4, tab 1 at 20, tabs 2, 3).

6. The IBPS was to replace a DOS based ECPS still being used by the AFNAFPO at the time of contract award (R4, tab 1 at 5). The “Objective” in the Statement of Work was, “To obtain customized software or existing commercial-off-the-shelf (COTS) software that will be modified to meet 100 percent of the specifications in this statement of work” (*id.* at 3). The contract at award did not include intellectual property rights provisions. There was no provision requiring the AFNAFPO to pay royalties to use the IBPS.

7. On 18 October 2000 Judd’s (Transferor), SMC Interactive, Inc. (SMC) (Transferee) and the AFNAFPO contracting officer signed a novation agreement transferring contract 0027 from Judd’s to SMC (R4, tab 7). Paragraph A.4 of the novation states, “The Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer” (*id.* at 54). The novation agreement was incorporated into the 0027 contract by Modification No. 003 on 11 December 2000. (R4, tab 6)

8. Through a series of name changes, SMC became SMC Interactive c/o Blazenet (Blazenet), and eventually SMC Interactive, Inc. c/o Susquehanna Technologies, Inc. (SusQtch) (R4, tabs 8, 10; compl. ¶ 10).

9. After a series of maintenance agreements and related projects added to the contract through a series of modifications, in Modification No. M0015, dated

31 January 2005, the AFNAFPO and SusQtech incorporated an intellectual property rights clause in the IBPS contract:

The purpose of this modification is to incorporate the following Intellectual Property Rights to the contract for the IBPS system.

AFNAFPO's rights to the IBPS system are hereby limited to its employment for the purpose of operating an electronic eProcurement system for the AFNAFPO organization. AFNAFPO's rights are continuous and non-exclusive.

All source code used for the development and deployment of the IBPS system will be placed in escrow and updated in conjunction with the deployment of new software versions. In the event Susquehanna Technologies, Inc. ceases operation, is acquired or merged, or should AFNAFPO choose to either support and build upon the IBPS system itself, or engage a third party to provide support and enhancements for AFNAFPO, AFNAFPO is granted authorization to retrieve all source code from the escrow system.

All deliverables and other materials created by Susquehanna Technologies, Inc. in the course of performance of its obligations hereunder, including, without limitation, the project components, all software object and source code, developer tools, and user manuals (collectively the "Deliverables"), shall remain the intellectual property of Susquehanna Technologies, Inc. Susquehanna Technologies, Inc. reserves the right to resell and distribute said intellectual property. AFNAFPO shall not sell, transfer or assign Deliverables to any third-party, nor will it allow any third-party to use Deliverables in whole or in part other than to support AFNAFPO. AFNAFPO retains the right to allow other DoD NAF entities to become users only on the existing instance of AFNAFPO IBPS. All rights not hereby specifically granted to AFNAFPO shall remain the sole property of Susquehanna Technologies, Inc.

(R4, tab 24) No money was placed on the contract by Modification No. M0015. There was no requirement for the AFNAFPO to pay royalties to use the IBPS.

10. On 30 September 2005 SMC Interactive, Inc. (Transferor), Distributed Solutions, Inc. (Transferee) and the AFNAFPO contracting officer signed a novation agreement transferring the 0027 contract to DSI (R4, tab 32). Modification No. M0022, effective date 5 August 2005 and executed by the contracting officer on 4 October 2005, incorporated the novation agreement into the contract (R4, tab 31). The purpose of Modification No. M0022 was, “to recognize Distributed Solutions Inc. as the successor contractor (See attached Novation Agreement) and agree to terms concerning execution of contract modifications 0008 through 0021 (See pages 2 and 3 of of [sic] modification)” (R4, tab 31 at 104). Pages 2 and 3 of the modification contained 12 paragraphs listing all prior modifications and indicating the present status of completion of each and DSI’s responsibility, if any, for each (*id.* at 105). For example, paragraph 1 on page 2 stated that “Modifications M0001 through M0007, M0009, M0010 (FY04 maintenance portion), M0011, M0019 are complete and accepted by the Government.” Paragraph 4 of the list on page 2 dealt with Modification No. M0015:

4. Modification M0015 shall remain in effect but will be changed to reflect DSI in lieu of “Susquehanna Technologies”. This modification is valid for the entire life of the contract and will not be considered complete until the contract is closed.

(R4, tab 31 at 105) The novation agreement incorporated into the 0027 contract by Modification No. M0022 included, in part, the following:

(a) Subject to the terms, conditions and limitations as agreed to in Modification M022, the parties agree to the following facts:

....

(2) As of 29 July, 2005, the Transferor [SMC Interactive] has transferred to the Transferee [DSI] certain assets relating to the AFNAFPO Project of the Transferor by virtue of an Asset Purchase Agreement between the Transferor and the Transferee.

(3) The Transferee has acquired certain assets relating to the AFNAFPO Project of the Transferor by virtue of the above transfer.

(4) The Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer.

....

(6) It is consistent with the Government's interest to recognize the Transferee as the successor party to the contracts.

....

(b) Subject to the terms, conditions and limitations as agreed to in Modification M022, in consideration of these facts, the parties agree that by this Agreement -

....

(2) The Transferee agrees to be bound by and to perform each contract in accordance with the conditions contained in the contracts. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the contracts as if the Transferee were the original party to the contracts.

(3) The Transferee ratifies all previous actions taken by the Transferor with respect to the contracts, with the same force and effect as if the action had been taken by the Transferee.

(4) The Government recognizes the Transferee as the Transferor's successor in interest in and to the contracts. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the contracts as if the Transferee were the original party to the contracts. Following the effective date of this Agreement, the term "Contractor," as used in the contracts, shall refer to the Transferee.

(5) Except as expressly provided in this Agreement, nothing in it shall be construed as a waiver of any rights of the Government against the Transferor.

....

(7) The Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other

expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or [sic] this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(R4, tab 32 at 107) While no money was obligated by Modification No. M0022, it recognized that DSI was entitled to invoice for unpaid completed work up to and including Modification No. M0020 and any “withheld amount or retainage upon the acceptance of R4 [Release 4]” (R4, tab 31 at 106).

11. Modification No. M0029, dated 1 October 2006, extended the period of performance of contract 0027 to 30 September 2007 and added a maintenance agreement and other provisions (R4, tab 43 at 152). It included the following:

9) Intellectual Property Ownership, Right-to-Use and Escrow

The rights and responsibilities of the Parties in regards to intellectual property ownership, right-to-use and escrow in Modifications M0015 and M0022 remain in full force.

(R4, tab 43 at 153)

12. In September 2007, AFNAFPO determined that it desired DSI to continue IBPS maintenance. Rather than extending contract 0027, AFNAFPO planned to issue an order against DSI’s GSA schedule contract. (R4, tab 78) The record contains a 20 September 2007 maintenance proposal from DSI that states in part:

**2 Proposal**

DSI proposes a Firm Fixed Price (FFP) effort to include very limited DSI project management and coordination/analysis which will allow DSI to place the vast majority of the effort on code development, code testing and software builds necessary to complete work assignments that will originate and be managed by AFNAFPO.

DSI also proposes that the escrow materials as of 9/30/2007 will be deposited with the escrow agent.

....

## 8 Escrow Materials

Since this effort is to be performed under an entirely new order, DSI proposes that the parties agree that the resultant order includes language that ensures that the understandings, agreements, duties and responsibilities of the parties in F41999-99-C-0027, Modifications 15, 22, 29 and the Rider C of the Escrow Agreement survive the end of F41999-99-C-0027 and are carried forward into the new order.

## 9 Pricing

....

[CLIN] 0001 - Technical Support consisting of one (1) DB-Level VI Customization (SIN 132-32) per month for eight (8) months - \$202,392.00

[CLIN] 0002 - Program Management Support consisting of one (1) DB-Level II Customization for eight (8) months - \$2,754.00

[CLIN] 0003 - Escrow of Deposit Materials (Open Market) - \$2,000.00

(R4, tab 64 at 242, 244)

13. The record also contains a 20 September 2007 “Air Force NAF Purchasing Office (AFNAFPO) Maintenance Agreement” with DSI (R4, tab 63). The agreement requires that DSI provide “one (1) full time equivalent resource to provide maintenance support for the period of performance” with additional support to be provided by a “mix of DSI staff” within the total level of effort authorized by the order (*id.* at 237). AFNAFPO was responsible for determining the maintenance tasks DSI was to support (*id.* at 238). There was no provision defining the parties’ rights in intellectual property. There are no signatures on the document.

14. On 26 September 2007, AFNAFPO issued Order No. F41999-07-F-1375 (1375) under a GSA schedule contract for:

[CLIN] 0001 - GLAC 1850000, IBPS Technical Support consisting of one (1) Level VI Customization per month for eight (8) months See Attached Statement of Work (\$202,392.00);

[CLIN] 0002 - GLAC 1850000, Program Management Support consisting of one (1) Level II Customization for eight (8) months (\$2,754.00);  
[CLIN] 0003 - GLAC 1850000, Escrow deposit (\$2,000)

(R4, tab 62) The total amount of the order was \$207,146 (*id.*). Although CLIN 0001 references “See Attached Statement of Work,” DSI received a FAX copy that apparently did not include the SOW (R4, tab 66 at 249). There is no statement of work with the copy of the order at Rule 4, tab 62.

15. The record contains a “revised” version of DSI’s Maintenance Proposal entitled, “Air Force NAF Purchasing Office Maintenance Proposal (Revised),” dated 26 September 2007 (the same date as order 1375), that is essentially the same as the 20 September 2007 version except for extensive changes to paragraph eight that was re-titled:

## **8 Intellectual Property Rights & Escrow Process**

....

### **DSI Rights:**

DSI is the sole and exclusive owner of IBPS and all customizations, modifications, and updates thereto, including without limitation, the project components, all software object and source codes, developer tools, and user manuals (collectively the “IBPS Intellectual Property”). DSI, as sole owner of the IBPS Intellectual Property, retains the exclusive right to re-use, modify, update or otherwise change, modify, customize and update the IBPS Intellectual Property. DSI retains all rights in the IBPS Intellectual Property including but not limited to the right to utilize, resell, license and distribute the IBPS Intellectual Property, its processes and technology for purposes and projects unrelated to AFNAFPO.

### **AFNAFPO Rights:**

During the term of this Agreement, AFNAFPO shall have nonexclusive right to use IBPS Intellectual Property in the operation of its electronic eProcurement System. AFNAFPO shall not sell, transfer or assign of [sic] IBPS Intellectual Property to a third party, nor will it allow any third party to

use IBPS Intellectual Property in whole or in part other than to provide support for the AFNAFPO eProcurement System. AFNAFPO shall have the right to allow other DoD NAF entities to become users of its eProcurement System subject to the terms of this agreement including any additional compensation due to or to become due to DSI. All rights not hereby specifically granted to AFNAFPO shall remain the sole property of DSI.

Escrow:

DSI and AFNAFPO agree the two party escrow agreement entered into between DSI and Escrow Associates dated February 14, 2005 and the Rider C (Amendment 0001) entered into between DSI and Escrow Associates dated August 10, 2006 shall remain in full force and effect with respect to this Agreement and all related orders. DSI and AFNAFPO further agree that the Rider C Amendment 0001 dated August 10, 2006 will be amended to add the new order number, but in the interim, the heretofore mentioned escrow agreement and Rider C shall remain in effect and shall be deemed to include this order number.

AFNAFPO may request a maximum of four (4) escrow deposits be made during the period of performance.

(R4, tab 68 at 256)

16. In a 28 September 2007 e-mail to AFNAFPO, DSI stated:  
We are in receipt of order (attached), however it did not reference any of the proposed language regarding IP ownership and the escrow process that we discussed or that was included in our proposal (also attached). The fax we received did not contain the SOW referenced in the order so we were unable to verify whether or not AFNAFPO accepted our proposal and/or included the language required by DSI as part of the follow-on contract/order to transition the IP protections, etc. from the previous contract per our discussion.

I've left you a voicemail but want to back it up with this note. The order transmitted via fax to DSI yesterday does not

appear to reflect the discussion points or the intent of the parties.

Hopefully, this was simply an administrative oversight on the part of AFNAFPO while cutting the order.

Please contact me ASAP so we can sort through this today.

(R4, tab 66 at 249) AFNAFPO responded stating, “We are in agreement with your proposal and will be sending an admin mod it [sic] incorporate” (*id.* at 248).

17. On 1 October 2007 AFNAFPO issued unilateral Modification No. M0001 to order 1375 stating, “The purpose of this modification is to incorporate the attached Statement of Work (SOW) ‘Air Force NAF Purchasing Office Maintenance Proposal (Revised)[’] dated September 26, 2007 to the Delivery Order” (R4, tab 67). There was no change in the price of the order associated with the modification. The unilateral modification was signed only by an AFNAFPO contracting officer. (*Id.*)

18. On 28 April 2009, DSI submitted an invoice in the amount of \$5,432,388.00 for two years of “Right to Use License” fees for IBPS<sup>2</sup> software (R4, tabs 69, 70).

19. On 10 June 2009 the AFNAFPO returned DSI’s invoice “without action” stating that “AFNAFPO enjoys continuous and ongoing rights to use the IBPS software, as evidenced by the escrow provisions which authorized AFNAFPO to retrieve the software’s source code for use in furtherance of AFNAFPO purposes” (R4, tab 71).

20. On 15 June 2009, DSI responded to AFNAFPO’s 10 June 2009 response to DSI’s invoice (R4, tab 72). DSI took the position that the AFNAFPO’s right to use IBPS software license free existed only so long as AFNAFPO maintained a valid contract with DSI (*id.*).

21. On 26 January 2010 DSI submitted a certified claim to AFNAFPO including an invoice for \$8,148,582.00 for three years of “Right to Use License”<sup>3</sup> (R4, tabs 51, 52).

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<sup>2</sup> The invoice refers to “ProTrac Right to Use License” that is on the GSA schedule, but it is clear in the “NOTES AND ASSUMPTIONS” that the invoice is for the use of IBPS software.

<sup>3</sup> The invoice uses the “ProTrac Right to Use License” rate from DSI’s GSA schedule.

22. On 18 March 2010, the AFNAFPO responded to DSI's claim stating in part:

The IBPS software solution at issue was developed for AFNAFPO by DSI's predecessor in interest (Judd's Online) in accordance with the subject nonappropriated fund contract [contract 0027], awarded in August 1999. Contract Modification 15 (which was entered into by Susquehanna Technologies, another predecessor in interest of DSI) incorporated specified Intellectual Property Rights. AFNAFPO was expressly afforded the "continuous and non-exclusive" right to employ the IBPS solution to operate an electronic eProcurement system for the AFNAFPO organization. Moreover, Modification 15 required that all source code used for the development and deployment of the IPBS system be placed in escrow. AFNAFPO was granted broad authority to retrieve the source code from escrow. Specifically AFNAFPO could retrieve all source code from escrow in the event that it should "choose to either support and build upon the IBPS system itself, or engage a third party to provide support and enhancements for AFNAFPO." AFNAFPO's continuous rights also permitted the selling, transferring and assigning of software deliverables (including object and source code and developer tools) to any third party to use in support of AFNAFPO activities only.

DSI became Susquehanna's successor in interest via a novation agreement recognized in Modification 22. Per the novation agreement, DSI was bound by the terms and conditions of Susquehanna's contract.

(R4, tab 53) DSI's claim was "dismissed" (*id.*).

23. On 16 June 2010 DSI filed its appeal with the Board and the appeal was docketed as ASBCA No. 57266.

24. DSI filed its complaint on 20 August 2010. The AFNAFPO filed its "Position and Answer" on 29 September 2010. The answer identified three affirmative defenses of "bar by license," estoppel, and laches. On 10 March 2011 the AFNAFPO moved to amend its answer to add the affirmative defense of lack of consideration. The Board granted the AFNAFPO's motion to amend its answer on 31 March 2011.

25. On 7 June 2011, DSI filed its motion for summary judgment. On 29 July 2011 the government filed Respondent's Cross Motion for Summary Judgment, Including Opposition to Appellant's Motion for Summary Judgment (gov't opp'n). On 29 July 2011 the government also filed Respondent's Cross-Motion for Summary Judgment for Lack of Consideration. On 7 October 2011, DSI filed Appellant's Response/Reply to Respondent's Cross Motion for Summary Judgment, Including Opposition to Appellant's Motion for Summary Judgment and Response to Cross Motion for Summary Judgment for Lack of Consideration (app. resp.).

### DECISION

This decision deals with cross-motions for summary judgment based on contract interpretation, the government's motion for summary judgment based on lack of consideration and DSI's opposition to that motion. We will deal with the interpretation of contract 0027 first and order 1375 second.

#### Cross-Motions for Summary Judgment – Contract Interpretation

Summary judgment may be appropriate in contract interpretation cases if there are no ambiguities requiring weighing of extrinsic evidence. Extrinsic evidence may involve material disputed facts making summary judgment inappropriate:

The standards for summary judgment are established. It is a salutary method to resolve an appeal when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). Any significant doubt over factual issues, and all reasonable inferences, must be resolved and drawn in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Legal questions of contract interpretation are amenable to summary resolution, unless there is an ambiguity that requires the weighing of extrinsic evidence. However, extrinsic evidence will not be received unless there is such an ambiguity. *Coast Federal Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (*en banc*); *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1181, 1183 (Fed. Cir. 1988); *Gosselin World Wide Moving NV*, ASBCA No. 55367, 09-2 BCA ¶ 34,242 at 169,234.

*Dixie Construction Co.*, ASBCA No. 56880, 10-1 BCA ¶ 34,422 at 169,918.

## The Parties

The 0027 contract was awarded to Judd's on 19 August 1999 (SOF ¶ 5). Judd's then by novation transferred the contract to SMC Interactive, Inc. that changed its name to SMC/Blazenet and then SMC/SusQtech (SOF ¶¶ 7, 8). SMC/SusQtech by novation dated 30 September 2005 transferred the contract to DSI (SOF ¶ 10). Pursuant to the novation agreement, DSI "assumed all obligations and liabilities" of the transferor contractor SMC/SusQtech (*id.*). This would include AFNAFPO's intellectual property rights in IBPS if any.

## Contract 0027 Interpretation Motions

In interpreting the 0027 contract we consider the contract as a whole and look for an interpretation that harmonizes and gives reasonable meaning to all of its parts. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). Within this holistic approach to contract interpretation, we give the language of the contract "that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006).

On 19 August 1999, AFNAFPO awarded contract 0027 in the amount of \$276,700 for IBPS completion to Judd's. The 0027 contract's CLINs involved software development, installation, maintenance, help desk, training and enhancements for the IBPS. (SOF ¶ 5) The software development was "[t]o obtain customized software or existing commercial-off-the-shelf (COTS) software that will be modified to meet 100 percent of the specifications in this statement of work" (SOF ¶ 6).

The 0027 contract at award did not include a provision defining the relative intellectual property rights of the parties. There was no requirement that the AFNAFPO pay a royalty to use the IBPS after contract completion. (SOF ¶ 6) In Modification No. M0015 the parties defined their relative intellectual property rights in IBPS. Modification No. M0015 provided that while SMC/SusQtech retained ownership of the intellectual property it developed, AFNAFPO had the right to use its version of the IBPS to operate its "eProcurement system." AFNAFPO's rights were described as "continuous and non-exclusive." Modification No. M0015 specified that the source code was to be placed in escrow, kept updated, and made available to AFNAFPO should it wish to retrieve the source code in the event SusQtech ceased operation or AFNAFPO desire to "support and build upon the IBPS" itself. (SOF ¶ 9) There was no requirement in Modification No. M0015 that AFNAFPO pay royalties for using IBPS.

Employing the rules of contract interpretation cited above, we interpret the 0027 contract and Modification No. M0015 to provide the AFNAFPO with, as a minimum, a fully paid up, royalty-free license to use and modify its version of the IBPS for the purpose of running the eProcurement system for as long as it desired.

DSI assumed responsibility for performance of the 0027 contract in a 30 September 2005 novation agreement (SOF ¶ 10). DSI therefore assumed SMC Interactive's "ownership" of IBPS subject to AFNAFPO's fully paid up, royalty-free license.

In their motions, the parties focus on the language in paragraph 4 of Modification No. M0022 to the 0027 contract:

4. Modification M0015 shall remain in effect but will be changed to reflect DSI in lieu of "Susquehanna Technologies". This modification is valid for the entire life of the contract and will not be considered complete until the contract is closed.

(SOF ¶ 10) The first sentence is clear and unambiguous - the government's fully paid up, royalty-free license in the IBPS remained in effect when DSI assumed responsibility for the contract. The parties disagree over the interpretation of the second sentence. DSI interprets this language as follows:

The plain meaning of this language is that AFNAFPO's intellectual property rights with regard to the IBPS Software last only until the end of the contract. Modification M0015 contains nothing other than a statement of the parties' intellectual property rights, including AFNAFPO's rights with regard to the IBPS Software. According to Modification 22, those rights are "valid for the entire life of the contract." There is no other way to interpret the quoted language other than its plain meaning – that once the IBPS contract ended, so did AFNAFPO's rights in the IBPS Software. [Footnotes omitted]

(App. mot. at 13)

DSI interprets the language "valid for the entire life of the contract" to divest the government of its fully paid up, royalty-free license at the end of the 0027 contract. According to DSI, Modification No. M0022's language obligates AFNAFPO to pay several million dollars a year to use the IBPS. Before Modification No. M0022

AFNAFPO had the right to use IBPS for free. DSI's interpretation results in a drastic, costly reallocation of the AFNAFPO's intellectual property rights in IBPS. For DSI's interpretation to be reasonable the language must unambiguously evidence the divestiture of the government's license rights. The words "valid for the entire life of the contract" do not clearly and unambiguously make that point. The more reasonable interpretation is that the language is simply a statement of the obvious. Modification M0015 "shall remain in effect" (first sentence) "for the entire life of the contract" (second sentence). This interpretation harmonizes the second sentence with the first sentence as required by the law of contract interpretation. *NVT Technologies*, 370 F.3d at 1159. There is nothing in the language of the second sentence that clearly and unambiguously states that the AFNAFPO's license ends when contract 0027 ends. Indeed it seems counterintuitive that AFNAFPO would agree to divest itself of its license rights. DSI's interpretation does not fall within the "zone of reasonableness." *NVT Technologies*, 370 F.3d at 1159.

The government interprets the language as follows:

When Modification 22 is read as a whole, it becomes clear that the "shall not be considered complete" language at issue refers to DSI's duties and obligations as set forth in Modification 15, not AFNAFPO's rights. These duties included the responsibility to place the software into escrow and to update the software as each new version was deployed. These obligations – to place the software into escrow and update it as new versions were deployed – remained throughout the course of the contract, and AFNAFPO would not consider these obligations completed and discharged until the contract was terminated. After the close of the contract, DSI was no longer required to place software into escrow or update it. However, this in no way affected AFNAFPO's rights to the software previously delivered to it or that it obtained or would obtain from escrow.

(Gov't opp'n at 23)

The government's interpretation of the second sentence does not conflict with the unambiguous first sentence and is therefore reasonable. *NVT Technologies*, 370 F.3d at 1159. There being only one reasonable interpretation of the language of paragraph 4 of

Modification No. M0022, the language is unambiguous and summary judgment for the government is appropriate.<sup>4</sup>

### Delivery Order No. 1375 Interpretation Motions

We must also consider the interpretation of the language in Modification No. M0001 to order 1375. Order 1375 was issued on 26 September 2007 in the amount of \$207,146 to provide an additional eight months of technical support, program management support and to pay for escrow deposits (SOF ¶ 14). Also on 26 September 2007, DSI revised its maintenance proposal rewriting paragraph eight and changing the name from “Escrow Materials” to “Intellectual Property Rights & Escrow Process.” (SOF ¶¶ 12, 15) It is the language of the 26 September 2007 revised SOW that DSI relies upon to support its argument that the government’s rights to use IBPS royalty-free ended when order 1375 ended.

On 28 September 2007, DSI e-mailed AFNAFPO stating that it had received a fax copy of order 1375 that did not contain a copy of the SOW. DSI stated that it was “unable to verify whether or not AFNAFPO accepted our proposal and/or included the language required by DSI as part of the follow-on contract/order to transition the IP protections, etc. from the previous contract per our discussion.” DSI also stated, “[t]he order transmitted via fax to DSI yesterday does not appear to reflect the discussion points or the intent of the parties.” (SOF ¶ 16) AFNAFPO responded to DSI’s 28 September 2007 e-mail on the same day stating “[w]e are in agreement with your proposal and will be sending an admin mod it [sic] incorporate” (SOF ¶ 16). On 1 October 2007, AFNAFPO issued unilateral Modification No. M0001 to order 1375 incorporating the 26 September 2007 revised SOW. The revised SOW includes the language, “AFNAFPO Rights: During the term of this Agreement, AFNAFPO shall have nonexclusive right to use IBPS Intellectual Property in the operation of its electronic eProcurement System.” (SOF ¶¶ 15, 17)

In its motion DSI argues that the words “[d]uring the term of this Agreement” in order 1375 “replaced” the word “continuous” in Modification No. M0015 of the 0027 contract, “By replacing the word ‘continuous’ with the phrase ‘During the term of this Agreement,’ the IBPS Delivery Order left no doubt as to the duration of AFNAFPO’s rights in the IBPS Software” (app. mot. at 16). DSI contends that this change in wording divests AFNAFPO of its fully paid up, royalty free license to use IBPS when order 1375 ends.

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<sup>4</sup> DSI also argues that Modification No. M0029 confirms its interpretation. This modification merely confirms that Modifications No. M0015 and M0022 remain in effect.

We are not persuaded that DSI is entitled to summary judgment on this basis for at least three reasons. First, on its face, the proposal language merely affirms AFNAFPO's right to use the IBPS, and says nothing about modifying its rights under contract 0027. Second, if the Board is to adopt DSI's interpretation, DSI must prove its inference that the fundamental elements of contract formation exist – that this interpretation was bargained for and that there was a meeting of the minds that AFNAFPO would lose its license rights in IBPS at the end of order 1375. Such bargaining and meeting of the minds are essential elements of a binding agreement, “[t]o constitute consideration, a performance or a return promise must be bargained for.” RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981); *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed. Cir 2002) (“‘To constitute consideration, a performance or a return promise must be bargained for.’ *Restatement (Second) of Contracts* § 71(1) (1979)”); *Star Food Processing, Inc.*, ASBCA No. 34161 *et al.*, 90-1 BCA ¶ 22,390 at 112,500 (Statement not supported by consideration because there was no “bargained for” return promise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71.); *see also O2 Micro International Limited v. Monolithic Power Systems Inc.*, 467 F.3d 1355, 1367 (Fed. Cir. 2006) (the district court did not err in concluding that the offers and counter-offers never constituted the “meeting of the minds” required for an enforceable agreement. *See* Joseph M. Perillo, 1 *Corbin on Contracts* § 4.13 (Rev. ed. 1993)). Third, order 1375 was placed against a GSA schedule contract. Neither party has placed in the record the terms and conditions of the schedule contract, as opposed to DSI's pricelist, that are applicable to order 1375, particularly any provisions relating to intellectual property rights.

Therefore, we conclude the parties must be afforded the opportunity to develop the record further on these points. Summary judgment is not appropriate if the record requires further development for the Board to render a decision. *ASFA Construction Industry and Trade, Inc.*, ASBCA No. 57269, 11-2 BCA ¶ 34,791 at 171,250 (“Acknowledging these difficulties, we hold that further development of the record is warranted as we must examine the parties’ conduct in light of the circumstances.”); *General Dynamics Land Systems, Inc.*, ASBCA No. 57293, 11-2 BCA ¶ 34,844 at 171,405 (“For the reasons set forth above, we conclude that the record is inadequately developed for us to determine as a matter of law whether the government is bound by the 10 June 2003 advance agreement, as something within its authority to do, even if that agreement contained an incorrect application of CAS 403. Consequently, we deny GDLS's motion for partial summary judgment.”); *CI<sup>2</sup>, Inc.*, ASBCA Nos. 56257, 56337, 11-2 BCA ¶ 34,823 at 171,354 (“We believe that a better developed record will assist us to resolve the disputed issues. Based upon the current record, appellant has not demonstrated its entitlement to judgment as matter of law on this claim.”).

The Government's Motion for Summary Judgment – Lack of Consideration

This argument is closely related to the “bargaining” and “meeting of the minds” issues discussed above. In view of our conclusion above, we likewise conclude that the parties must be afforded the opportunity to develop the record in support of the consideration question as it relates to order 1375. Since we have ruled that DSI’s interpretation of contract 0027 as modified is incorrect, we need not reach the government’s motion on consideration as it relates to that contract.

CONCLUSION

Appellant’s motion is denied. The government’s motion based on lack of consideration is denied as it relates to order 1375. The government’s cross-motion based on contract interpretation is granted insofar as it relates to contract 0027. We hold that appellant’s interpretation of contract 0027 Modification No. M0022 is unreasonable and that the modification does not divest AFNAFPO of its fully paid up royalty-free license to use the IBPS. The remaining portion of the government’s cross-motion relating to order 1375 is denied.

Dated: 28 December 2011



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CRAIG S. CLARKE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



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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. 57266, Appeal of Distributed Solutions, Inc., rendered in conformance with the Board's Charter.

Dated:

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