ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Space Gateway Support, LLC	)	ASBCA No. 56592
	)	
Under Contract No. NAS10-99001	)	

APPEARANCES FOR THE APPELLANT:

Karen L. Manos, Esq.
Brian C. Baldrate, Esq.
Gibson, Dunn & Crutcher LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Vincent A. Salgado, Esq.
NASA Chief Trial Attorney
Amber M. Hufft, Esq.
Assistant Chief Counsel
Sariah M. Adams, Esq.
Trial Attorney
Kennedy Space Center, FL

OPINION BY ADMINISTRATIVE JUDGE TING

John F. Kennedy Space Center, National Aeronautics and Space Administration (the government or NASA) entered into an operations and support contract with Space Gateway Support, LLC[1] (SGS) in 1998. In accordance with the applicable provisions of the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. §§ 351-358, the contract required SGS to pay service employees the wages and fringe benefits set forth in 23 separate Collective Bargaining Agreements (CBAs) listed in the Department of Labor Wage Determination attached to the contract. SGS, as the successor contractor, was required to accept the accrued sick leave hours—a form of fringe benefits—earned by those employees hired from the predecessor contractor. SGS claimed the costs of accrued sick leave hours paid to employees in cash at termination of employment in accordance with the terms of certain CBAs. The government contended such payments did not constitute use of the carry-over sick leave hours and disallowed the costs by a contracting officer decision issued in 2008. SGS timely appealed. Entitlement is before us for decision.

[1] SGS was a joint venture of Northrop Grumman Technical Services, Inc., ICF Kaiser Defense Programs, Inc., and Wackenhut Services, Inc. (R4, tab 84 at 35).

FINDINGS OF FACT

1. In the late 1970s, Boeing Services International, Inc. (Boeing Services) held a supply and transportation contract at NASA's John F. Kennedy Space Center (KSC) in Florida (tr. 1/144). In the early 1980s, EG&G Florida, Inc. (EG&G) won a portion of the work originally covered by the Boeing Services' contract (tr. 1/61, 76). EG&G's contract was referred to as the Base Operations Contract (BOC). The BOC combined various KSC services contracts into a "single centralized contract." EG&G held the initial BOC until 1992. It later won the follow-on contract, BOC-2.[2] During BOC-2, KSC decided not to exercise its option, but to combine its service requirements with those of the Air Force at Patrick Air Force Base (AFB). This combination resulted in what would be referred to as the Joint Base Operations and Support Contract (JBOSC). (Tr. 1/143-44; R4, tab 2[3])

2. Most of the service contractor employees at the KSC were represented by unions (tr. 1/145). Providing a sick leave benefit that could be cashed out at termination of employment began with Boeing Services in the 1970s (tr. 1/64-65). It was not a benefit all unions negotiated with KSC contractors[4] (*id.*). International Association of Machinists and Aerospace Workers (IAM) and United Plant Guard Workers of America (UPGWA)[5] had CBAs with sick leave cash-out benefits (*id.*).

3. The CBA between Boeing Services and IAM for the period 23 January 1978 to 23 January 1981, for example, allowed employees to accumulate and transfer "up to a maximum of forty (40) hours of sick leave credits into a reserve sick leave account of which all unused credits will be paid to the employee at the time of termination" (R4, tab 85a, Article 19.1(e)). It permitted employees to accumulate and carry forward from year to year an unlimited number of regular sick leave credits (*id.*, Article 19.1(d)). The "Use of Sick Leave" provision of the CBA provided that sick leave would be granted

---

[2] Both BOC and BOC-2 were cost reimbursement contracts (tr. 1/89).

[3] At the hearing, the parties jointly provided an abbreviated 4-volume Rule 4 file containing pages to be used at the hearing with the understanding that the parties can refer to the complete documents in the 5-volume Rule 4 file if necessary (tr. 1/6). Unless otherwise noted, our citations to "R4" in this opinion are to the 4-volume Rule 4 file used at the hearing.

[4] For examples of CBAs which did not provide for a sick leave cash-out benefit see Rule 4, tabs 85g, 85m, 85r and 85s. Some CBAs provided for payment of unused accumulated sick days at designated times but not at termination of employment (R4, tabs 85h, 85o).

[5] UPGWA is now known as International Union Security Police Fire Professionals of America (SPFPA) (app. br. at 4 n.1). We refer to the union by its previous name in this decision.

for (1) illness of employee; (2) illness of immediate family; (3) medical or dental appointments; and (4) death in the immediate family (*id.*, Article 19.3(b)). The "Termination" provision provided that "[a]n employee removed from the active payroll regardless of reason...shall be eligible to receive payment for sick leave credits accumulated in his reserve sick leave account up to a maximum of 40 hours for each year of eligibility not to exceed 120 hours over the life of this Agreement" (*id.*, Article 19.4(a)). Thus, the Boeing Services/IAM CBA recognized two distinct types of sick leave benefits: (1) the regular sick leave benefit available for medical purposes and (2) the reserve sick leave termination benefit available for payment at termination of employment. The IAM and UPGWA CBAs involved in this appeal are modeled after this CBA.

4. On 12 December 1997, KSC issued a RFP (No. 10-98-0001) for the JBOSC to provide unified base support services to KSC, Cape Canaveral Air Station (CCAS), Patrick AFB and Florida Annexes (R4, tab 1, attach. J-1, ex. A, ¶ 1.0, ex. B, ¶ 1.0). The JBOSC was to be a cost plus award fee contract (tr. 1/22). The JBOSC procurement was undertaken using a Joint Source Evaluation Board (SEB) with both NASA and Air Force representatives (tr. 1/153, 207). The SEB used "the Air Force Source Selection procedures...[and] wrote a NASA contract" (tr. 1/207).

5. Section B of the RFP pertained to "SUPPLIES OR SERVICES AND PRICES/COSTS." Article B-5, "SPECIAL COST PROVISIONS" provided:

> Without otherwise affecting the applicability of the cost principles set forth in FAR Part 31 and pursuant to the terms of the contract clause entitled "Allowable Cost and Payment," the contractor shall be reimbursed for such actual and allowable expenditures incurred in the performance of work required by this contract as may be approved by the contracting officer subject to the following limitations and provisions....

(R4, tab 1, Article B-5) Article B-5C defined "Fringe benefits" to include "leave policies" (R4, tab 1 at B-6).

6. Article B-5F, "Transfer of Accrued Benefits," provided:

> The successful offeror will accept transfer of accrued sick leave hours of personnel hired from the incumbent contractor without a break in service from the predecessor contract in excess of 60 days. However, the costs of these carry-over hours will not be paid under the successor contract unless

> used. Additionally, the successor offeror will recognize the vacation accrual rates, earned through seniority, of personnel hired from the incumbent contractor without a break in service from the predecessor contract in excess of 60 days.

(R4, tab 1 at B-7)

7. None of the government witnesses was able to pinpoint who drafted Article B-5F. James E. Hattaway, Jr. (Hattaway), KSC's director of contracting at the time, who was a member of the Source Selection Advisory Committee for the JBOSC procurement and who had management oversight responsibility of the SEB, testified that Article B-5F "would have been [drafted by] the people on the Source Evaluation Board that pulled the RFP, the solicitation together" (tr. 1/141-43, 207). Dudley R. Cannon, Jr. (Cannon) was an attorney at the NASA Chief Counsel's Office at the time of the JBOSC procurement. He was legal counsel to the JBOSC SEB. (Tr. 2/7) Cannon testified that although he was involved in "the drafting or tweaking of the clause," he could not say "specifically who drafted it" except that "it was the Business Committee [of the SEB] that drafted it" (tr. 2/11). Roy Mitchell Colvin II (Colvin) was CO of the JBOSC SEB (tr. 2/139). He testified that Article B-5F was drafted by a member of the SEB (tr. 2/143). As CO of the SEB, Colvin recalled no discussion about whether Article B-5F was designed to disallow reserve sick leave termination payments (tr. 2/145). Bryce Collins (CO Collins), the CO who issued the decision in this appeal, testified "there was never anyone...that stood up as the author of the clause" (tr. 2/111).

8. Hattaway testified that the purpose for Article B-5F was to preserve, as a matter of KSC's "management philosophy," sick leave from being "calibrated to zero as new employees despite the fact that some of these employees may have worked there for 20 or 25 years for different contractors" (tr. 1/148-49). He acknowledged he did not understand at the time that reserve sick leave accounts provided a cash-out benefit upon termination of employment (tr. 1/147). He did not know how NASA accounted for the costs of reserve sick leave payments during BOC and BOC-2 (tr. 1/149). Hattaway testified that "from the narrow perspective of the Government...we have never dealt...with reserve sick leave" and "have always treated sick leave as sick leave." He acknowledged that putting himself in "the contractor's shoes, the term accrued sick leave [in Article B-5F] [could] include both [reserve sick leave as well as regular sick leave]." He testified that "the Government never differentiated or categorized sick leave as anything other than sick leave." (Tr. 1/172-73) He testified "sick leave was just sick leave from our mind...that our intent was to have sick leave used for employee illnesses and not as some bank for severance pay" (tr. 1/209).

9. Cannon testified that it had been NASA's policy, going back to the 1970s "for successive [sic] contractors to recognize the unused leave that [was] on the books of the

predecessor at the time of the transition for those employees that they [successor contractor] pick[ed] up" (tr. 2/9). He explained the policy "grew out of a concern...where employees would basically be reset...to zero in their sick leave every time a successor contractor came in" (tr. 2/9). He testified that the practice at NASA had been "that the billing for sick leave [was] on a[n] as-used basis...at the time the sick leave [was] used then they can bill for it" (tr. 2/18).

10. Cannon testified that Article B-5F was discussed within the SEB Business Committee, the SEB as a whole and KSC's management. He testified that he was not sure if the SEB CO "appreciated the distinction between the reserve sick leave and regular sick leave. But he did understand that the limitation on reimbursement applied to all accrued sick leave that was carried over." (Tr. 2/15) He testified SEB's intent in Article B-5F was to "cover any of the accrued leave that's sick leave that was recognized and carried over to the new contract" (tr. 2/10). He acknowledged that, other than what was stated in Article B-5F, no one on the SEB advised SGS that NASA would not reimburse reserve sick leave termination payments (tr. 2/57). He maintained, however, that Article B-5F clearly put bidders on notice that "reimbursement of...carryover leave [would be limited] to...only that leave that was used for...legitimate CBA purposes" (tr. 2/43).

11. As for the word "used" in Article B-5F, Cannon maintained that reserve sick leave termination payments were "not a use in the sense of the collective bargaining agreement descriptions of use" (tr. 2/22). He testified that, when the CBAs "talk about use," typically it was for "employee illnesses, medical appointments, immediate family illnesses.... So really it refers to the legitimate uses that were described." (*Id.*) Article B-5F did not say that "used" sick leave meant sick leave as defined in any "Use of Sick Leave" provisions of the various CBAs. The government never took this position before Cannon asserted it at the hearing.

12. Attachment J-6 of the JBOSC RFP, "REGISTER OF WAGE DETERMINATION AND FRINGE BENEFITS" included the "REGISTER OF WAGE DETERMINATION UNDER THE SERVICE CONTRACT ACT" issued by direction of the Secretary of Labor. Wage Determination No. 98-0040 as revised 9 February 1998, applicable for those "Employed on contracts for Project Management, Public Works and Base Support Services for Kennedy Space Center, Patrick Air Force Base, Cape Canaveral" required the contractor to pay wage rates and fringe benefits set out in 23 listed CBAs:

> In accordance with Sections 2(a) and 4(c) of the Service Contract Act, as amended, employees employed by the contractor in performing the above services and covered by the following collective bargaining agreements are to be paid

> wage rates and fringe benefits set forth in the bargaining agreements:...(5) EG&G Florida, Inc. and International Association of Machinists and Aerospace Workers, AFL-CIO District Lodge 166 and Local Lodge 2061, effective October 25, 1994 – October 24, 1997, extended to January 12, 1998...(9) EG&G Florida, Inc. and International Union, United Plant Guard Workers of America, Local 128, effective November 28, 1994 – November 27, 1997, extended through November 27, 1998....

(R4, tab 77)

Relevant Collective Bargaining Agreements

13. The EG&G/IAM CBA listed in the JBOSC RFP Wage Determination included Article 19, "SICK LEAVE." It provided at Article 19.1b:

> On December 31of each year, employees may transfer up to forty (40) hours of unused sick leave credits into a reserve sick leave account, up to a maximum of six hundred (600) hours, of which all unused credits will be paid to the employee at the time of termination.

The CBA provided under Article 19.2c. "Use of Sick Leave" conditions under which earned sick leave would be granted:

> (1) Illness of employee.
>
> (2) Illness in the immediate family....
>
> (3) Medical or dental appointments....

The CBA contained the following carryover feature for unused sick leave credits at Article 19.5:

> Maximum Allowance and Carryover
>
> Previously awarded sick pay credits, which remain unused on the 31st day of December, may be carried over to the following calendar year.

Finally, the CBA explained at Article 19.6, "Termination," the conditions under which reserve sick leave accounts would be paid at termination of employment:

> An employee removed from the active payroll of EG&G Florida, who has reached his first sick leave anniversary date, shall be eligible to receive payment for sick leave credits accumulated in his reserve sick leave account up to a maximum of forty (40) hours for each year of eligibility, not to exceed six hundred (600) hours.... The only exception would be if, through recompetition of the BOC Contract with NASA, EG&G Florida were to lose the contract and the employee was hired by the successor contractor within thirty days, the reserve sick leave account would not be paid, but transferred to the successor contractor.

(R4, tab 85w)

14. The EG&G/UPGWA CBA listed in the JBOSC RFP Wage Determination included Article 19, "SICK LEAVE." It contained virtually the same provisions: Article 19.1.3 allowed an employee to transfer up to 40 hours of unused sick leave credits into a reserve sick leave account up to a maximum of 584 hours, and all such unused credits would be paid out at the time of the employee's termination. Article 19.2.4 provided sick leave would be granted for, among other reasons: (1) Illness of employee, (2) Illness in immediate family, and (3) Medical or dental appointments. Article 19.6, "Maximum Allowance and Carryover" provided: "Previously awarded sick pay credits, which remain unused on the 31st day of December, may be carried over to the following calendar year." Article 19.7, "Termination," told employees that they "shall be eligible to receive payment for sick leave credits accumulated in his reserve sick leave account up to a maximum of forty (40) hours for each year of eligibility, not to exceed five hundred eighty-four (584) hours." There was also an exception to payout for employees hired by the successor contractor within 30 days if EG&G were to lose the contract. (R4, tab 85l)

SGS's Interpretation of the Contract's Sick Leave Provision

15. When the hearing took place in August 2010, Nimish M. Doshi (Doshi) was Vice President of Business Management, Northrop Grumman Technical Services, Inc. (tr. 1/20). At the time of the JBOSC procurement, Doshi was the Lead Pricing Cost-Value Manager responsible for putting together SGS's JBOSC proposal (tr. 1/21). In developing SGS's proposal, Doshi worked with his Human Resources Department and outside experts, including experts in CBAs (tr. 1/25-26). He also consulted with "a couple of people" who had worked for EG&G (tr. 1/45).

16. In preparing SGS's proposal, Doshi considered all of the CBAs listed in the RFP Wage Determination (tr. 1/27). He testified that based on input from his Human Resources people, he did appreciate the fact that, under certain CBAs, SGS was required to pay out accrued sick leave balances to terminating employees (tr. 1/27, 40-41).

17. Doshi initially believed, under Article B-5F, SGS would pay employees' reserve sick leave accounts at termination on an "accrual" basis. He thought "there would be some money that would come with it" because the government "would have been billed for those costs." (Tr. 1/35) He thought the money would sit in SGS's balance sheet until an employee cashed out at termination (tr. 1/34). Based on input from his experts, however, he came to understand that no funds would be transferred into SGS's account. Rather, SGS was to pay its employees when they actually cashed out at termination and bill the government for the costs. (Tr. 1/36, 1/47) As explained at the hearing, SGS came to understand that reserve sick leave termination payments were to be made on a "pay-as-you-go" basis (tr. 1/34-35).

18. Doshi testified that during SGS's pre-proposal internal discussions, SGS did not consider reserve sick leave termination payments as a cost allowability issue: "It was about how do we recognize this?" Also, SGS "never ever doubted that this was not going to be an allowable cost, because this is not a normal unallowable cost." (Tr. 1/50) He testified "there was nothing explicitly [in Article B-5F] that said that would be an unallowable cost," and "[t]hat is not a typical unallowable cost" (tr. 1/39).

19. Doshi testified that had SGS known that the reserve sick leave termination payment costs would not be reimbursed by the government, SGS "would have accounted for that in our calculation when we did our internal assessment of the opportunity" (tr. 1/39). He testified that, "with the margin so thin on this program...something like this would...come up with a red flag" (tr. 1/42). He testified had SGS known that the reserve sick leave termination payments would be disallowed it would have been extremely selective in hiring EG&G employees with high sick leave balances (tr. 1/43).

20. SGS submitted its proposal on 6 July 1998. In the section titled "Explanation of Pricing (Indirect Costs)," it told the government at paragraph 5.4, Fringe Benefits:

> As shown on Table 5.9 located at the end of this section, SGS's proposed fringe benefits expense exceed the Service Contract Act Wage Determination Health and Welfare (H&W) requirement by an average of 18%. SGS has ensured that the benefits proposed will meet all the collective bargaining agreements.

(R4, tab 83) During proposal evaluation, SGS received written questions concerning its fringe benefit calculations from DCAA and the PCO (tr. 1/30-31). The government "never talked about" the different accounting treatment of regular sick leave versus reserve sick leave during these clarification exchanges (tr. 1/32).

21. Before award of the JBOSC, SGS advised the government that it had entered into bridge agreements with various unions.[6] As a result, SGS's proposal was highly rated by the government in recognition that bridge agreements provided labor peace while SGS negotiated its own CBAs with the unions (tr. 2/56-57).

Applicable CBA Provisions During the JBOSC

22. The JBOSC was awarded to SGS on 21 August 1998. Hattaway signed the contract as CO. (R4, tab 2) The contract included at Section B, Article B-5F (*id.*, § B at 14-15). Numerous CBAs including those between EG&G and IAM and between EG&G and UPGWA were incorporated into the JBOSC through the DOL Wage Determination (tr. 1/154-55). The JBOSC included FAR 52.216-7, ALLOWABLE COST AND PAYMENT (APR 1998), and FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989) (R4, tab 2 at 56-57).

23. EG&G's BOC-2 ended at the end of September 1998, and the JBOSC began 1 October 1998 (tr. 1/79). SGS hired "70 or 80 percent, may be more" of EG&G's employees (tr. 1/43).

24. SGS and IAM negotiated a new CBA effective 30 April 1999. Under Article 17.2.1 of this CBA, the parties agreed to freeze union members' vested reserve sick leave account balances, and to discontinue union members' right to accrue additional hours to their reserve sick leave accounts under the JBOSC (R4, tab 85y). Article 17.2.1 provided "Any remaining reserve sick leave [not used after regular sick leave was depleted] will be paid at the current hourly rate of pay when an employee terminates" (*id.* at 30). Thus, the vested reserve sick leave account balances accumulated under the predecessor contracts remained unchanged except to the extent they were used after regular sick leave was depleted. Subsequent SGS/IAM CBAs for the periods 1 April 2002 to 31 March 2005 (R4, tab 85aa) and 1 April 2005 to 31 March 2009 (R4, tab 85ae) contained the same Article 17.2.1.

25. SGS and UPGWA also negotiated a new CBA. A 9 March 1999 "LETTER OF AGREEMENT" attached as page 66 of the CBA provided:

[6] *See, e.g.*, undated SGS/IAM Bridge Agreement (R4, tab 86; tr. 1/85).

> This letter summarizes the agreement reached today regarding the use of previously accrued sick leave hours.
>
> Regular and reserve sick leave hours that were transferred from EG&G Florida to SGS at the start of the J-BOSC contract may be used and/or paid out as applicable in accordance with the terms of the previous EG&G/Local 128-UPGWA Collective Bargaining Agreement dated November 28, 1994 through November 27, 1997, and extended through to September 30, 1998.

(Original R4, tab 55) The same letter, dated 1 June 2003, was attached to the SGS/UPGWA CBA for the period 1 June 2006 to 30 May 2009 (Original R4, tab 57 at 85).

Historical Accounting Treatment of Reserve Sick Leave Credits

26. Doris L. Bailey (Bailey) went to work for Boeing Services at KSC as an accountant in 1981 (tr. 1/61). When EG&G won BOC, she went to work for EG&G as a cost accountant (tr. 1/62). During BOC-2, she became EG&G's controller (tr. 1/63). When SGS took over from EG&G in October 1998, Bailey went to work for SGS (tr. 1/90). Bailey was Director of Finance and Accounting for SGS during performance of the JBOSC. She was responsible for the "[o]verall financial management of the company" (tr. 1/61). When the hearing took place in 2010, Bailey was Director of Business Management for Northrop Grumman Technical Services, Inc. (tr. 1/59).

27. Bailey testified that SGS accepted the transfer of the reserve sick leave accounts of the IAM and UPGWA members from EG&G. According to Bailey, SGS did so because Article B-5F so required: "The CBA was included in the contract as a part of the wage determination," and "the service contract...the Fair Labor Standards Act...[and Article B-5F] of the contract led everyone to believe...these were valid costs and used the way they had been used." About $1.6 to $1.7 million worth of reserve sick leave liabilities were transferred from EG&G to SGS. Most of the liabilities were accrued during union members' employment at EG&G. (Tr. 1/90-91)

28. Historically, when EG&G took over from Boeing Services, EG&G accepted the transfer of reserve sick leave accounts from Boeing Services (tr. 1/91). Under EG&G's BOC and BOC-2, IAM and UPGWA employees were paid for their accrued reserve sick leaves upon termination of employment and NASA reimbursed EG&G (tr. 2/46).

29. Also, during EG&G's contracts, reserve sick leave termination payments were accounted for on a "pay-as-you-go" basis, not on an "accrual" basis because "[t]hat was the process followed by Boeing." Bailey explained that reserve sick leave credits "came over as a lump sum liability that was owed to the employees.... And it was basically never funded. So it was only funded when the employee used it." (Tr. 1/88) Thus, under BOC and BOC-2, the cost of reserve sick leave was "accumulated as a liability" and "accounted for and expensed through the contract as sick leave"[7] (tr. 1/86-87).

30. Kathleen McGraw-Davis was a 13-year veteran of the Defense Contract Audit Agency (DCAA). At the time of the hearing she was SGS's audit liaison with the government. (Tr. 1/134) She testified that, as an auditor, she read Article B-5F as relating to "the timing of when the contractor would have billed the Government" (tr. 1/136). She testified "I always thought it was an allowable cost. It was just the timing of when you would expense it to the Government." (Tr. 1/137) She testified that Article B-5F was an unusual accounting provision for an accrued fringe benefit because it required SGS to "recognize the cost on a pay-as-you-go basis as opposed to accruing the cost upon receiving the transferred hours" (tr. 1/135) and "expens[ing] the liability" on "day one of the contract" (tr. 1/136).

31. As someone who worked for both Boeing Services and EG&G, Bailey explained that a covered employee could accumulate up to 80 hours of sick leave a year (tr. 1/71). Of the 80 hours, the employee was entitled to put up to 40 hours of unused sick leave earned into a reserve sick leave account (*id.*). For the remaining unused sick leave hours earned, the employee could "continue to accumulate," and to "roll [them] over" from contractor to contractor (*id.*). According to Bailey, the difference between reserve sick leave benefit and regular sick leave benefit was that "[t]he reserve sick leave benefit was a set of hours that [employees] expected to be paid for at termination when they used it finally" and "[r]egular sick leave was not a set of hours that were monetized, so they would lose that if they left" (tr. 1/64). Bailey explained the ability to accumulate sick leave in a reserve sick leave account benefitted both the contractor/employer and the government because they "incentivized the employees to spend more time at work" and not to use accrued sick leave hours when they were not actually sick (tr. 1/73). Even though employees had used reserve sick leave credits to meet long-term health needs, "most people use[d] their reserve sick leave[s] at termination" (tr. 1/72).

32. During the first two years of the JBOSC, when employees covered by the IAM and UPGWA CBAs terminated their employment, SGS paid these employees the balances in their reserve sick leave accounts. SGS then billed the costs to the

[7] Neither the BOC nor the BOC-2 was a part of the record before us. It is not known to what extent the BOC and BOC-2 contract terms might be different from the JBOSC.

government, and the government reimbursed SGS the billed costs. (Tr. 1/92-93) Bailey testified using reserve sick leave credits for payments at terminations of employment was how Article B-5F was actually applied in practice before the dispute in this case arose (tr. 1/92).

Events Leading to Disallowance of the Reserve Sick Leave Termination Payment Costs

33. Sometime after 1999, when SGS "came up for incurred costs" audit, DCAA approached SGS's audit liaison and said there was "an issue that needs to be resolved" (tr. 1/99). Believing initially that DCAA had determined there had been a Cost Accounting Standard (CAS) 408 violation requiring it to charge the government "a lump sum" for the reserve sick leave termination payment costs, SGS "approached the budget people and asked them to seek funding and...approached the contracting officer and asked for an advance agreement" (tr. 1/97).

34. In her 2 August 2000 e-mail to CO Rene E. Paquette (CO Paquette), DCAA auditor Janet Koca (Koca) advised that, according to the SGS payroll supervisor, "there were costs paid in CFY 1999 to employees for Reserve Sick Leave earned at predecessor contractors." Koca wanted to know if a contract modification had been issued that changed JBOSC Article B-5F that "makes these costs allowable." The e-mail said "The contract reference appears to make the costs unallowable on the JBOSC, although some of the collective bargaining agreements require SGS to pay the costs." (R4, tab 5) Responding on behalf of CO Paquette, Jane Rievley's[8] 15 August 2000 e-mail said that she did not "come to the same conclusion that the costs for carry over sick leave are unallowable" since SGS was not "asking to be paid all at once for all the sick leave transferred." The e-mail said "if all they are doing is asking for reimbursement of carry over sick leave paid to employees who have used it, then I see that as an allowable cost to this contract." (R4, tab 7 at 2)

35. Auditor Koca's 15 August 2000 e-mail reply said "The question comes up because SGS is paying employees for these hours when they terminate for whatever reason. That is, upon retirement, RIF, etc. Therefore, they are paying out these hours when they are not 'used.'" Koca said that she believed "the contract reads that the cost for these hours not 'used' are unallowable per the JBOSC" even though a CBA required such payment. (R4, tab 7 at 1) In other words, auditor Koca did not interpret payment of

[8] NASA established the Joint Project Management Office (JPMO) to administer the JBOSC. Various people with the title CO worked in that office. Air Force Contract Specialist Jane Rievley worked with CO Paquette (tr. 1/193, 199). Both worked for Air Force's Lead CO Laura Rochester (Lead CO Rochester) (tr. 1/194, 199).

reserve sick leave benefit at termination of employment as use of accrued sick leave hours under Article B-5F.

36. By e-mail on 17 August 2000, Rievley sought input from David Wansley (Wansley), Hattaway's deputy (tr. 1/198). Her e-mail stated:

> While I agree with the concept of not paying out for sick leave unless it is used, I would tend to interpret the sick leave hours as being "used" if an employee terminates and the union agreement says that the employee must be paid for his sick leave upon termination. Do you agree?
>
> For those employees that stay the life of the contract, if they don't use all their sick leave, then we wouldn't have to pay that. Therefore, there may be a lot of sick leave that we don't have to pay for, but if an employee terminates, then that appears to me to be a different scenario of "use".

(R4, tab 7 at 1) Rievley e-mailed Lead CO Rochester on 31 August 2000 and said she had not heard from Wansley, and her determination was that "we interpret 'used' as encompassing paying for unused leave at termination IAW the CBA" (*id.*).

37. Hattaway testified at the hearing that "armed with the knowledge of the philosophy of what we intended as a management team" he disagreed with Rievley's interpretation (tr. 1/199). He testified he interpreted the word "used" in Article B-5F to mean use for "[s]ick leave," as meaning "[b]eing out with an illness away from work for a legitimate purpose" (tr. 1/151). When asked how that philosophy was communicated to SGS and other offerors, Hattaway testified "I was not on the SEB and was not involved with the day-to-day operations of the SEB. We tried to communicate it through Article B(5)" (tr. 1/200).

38. In an undated e-mail to Wansley and others, CO Paquette wrote:

> The current JBOSC contract contains a provision that states "Unused sick leave will not be paid." This language was not in the old BOC....
>
> We NASA are responsible for unpaid sick leave costs accumulated under the EG&G contract. These costs are now an SGS liability. Total estimated cost is $1.7Million. At the moment, SGS is paying out these costs as an employee retires

> or is terminated. SGS has not paid out the $1.7M as a one time payment.
>
> DCAA has informed the CO that they plan on disallowing costs paid out for unused sick leave unless the contract is changed to allow for these costs.
>
> Spoke with Dave Alonso some time ago on this issue. We at KSC do not have $1.7M to make payoff, and Dave agreed with the manner that SGS was using in handling payments.

CO Paquette recommended that Article B-5F be modified to "include language 'Except for existing CBAs at time of contract award.'" (R4, tab 6)

39. Still believing that its issue with DCAA related to how the reserve sick leave termination payment costs ought to be treated and not to their allowability, SGS approached CO Paquette in October 2000 with an advance agreement proposing to treat reserve sick leave termination payment costs as "special or unusual costs." Such an advance agreement would have allowed the costs to be charged to the government when they were "actually paid versus a lump sum expense for the entire liability." (R4, tab 8) SGS did not know the government was discussing disallowing reserve sick leave termination payment costs altogether (tr. 1/96).

40. In December 2000, CO Paquette and Cannon briefed the KSC Director. As reflected in the briefing charts, three options were considered:

- Disallow all payout of unused reserve sick leave under the SGS contract (JBOSC) IAW contract provision. Approximately $94K paid out in 1999 and $86K paid out in 2000 for a total of $180K.

- Make payment under the EG&G BOC as a close-out cost. TA-A would be required to go to NASA Hqtrs for the 1.7M.

- Modify JBOSC to include language such as "except for existing agreements with the IAM and the UPGWA at time of contract award." Payout of unused reserve sick leave to be made as the employee is terminated by SGS.

(R4, tab 13)

41. CO Paquette asked Cannon[9] and others by e-mail sent on 8 March 2001 if they could meet to "discuss and resolve how we will close this issue." Cannon's reply said on the same day:

> I am not sure what there is left to resolve. The J-BOSC expressly makes such costs unallowable. It was done so intentionally. The contract still allows reimbursement for payment involving an employee's use of carry-over if and when used for authorized sick leave purposes. It does not allow for reimbursement of an employees cashing out sick leave. If SGS went and negotiated such provisions to allow cash out of sick leave for separating or retiring employees, it did so at its own risk and is probably on the hook from a labor relations perspective. Notwithstanding that, the J-BOSC and its solicitation clearly put the contractor on notice, it could not be reimbursed for such payments....

(R4, tab 14)

42. CO Paquette's 20 March 2001 e-mail to Hattaway asked if it was "OP's final decision" to "disallow costs under the JBOSC for unused reserve sick leave for employees of the IAM and UPGWA unions." Hattaway's 20 March 2001 e-mail said "I see no legal or other reason to alter the contract language which expressly makes pay-out for unused sick leave under the JBOSC an unallowable cost." Hattaway's reply made the point that "[t]he J-BOSC does allow for reimbursement for sick leave that was carried over from the prior contract AND is actually used for authorized sick leave purposes, as opposed to a lump sum pay-out for unused reserve sick leave." (R4, tab 18) (emphasis in original)

43. Thereafter, CO Paquette notified SGS by letter dated 21 March 2001:

> The Contracting Officer has determined that all costs paid out by SGS for unused reserve sick leave under SGS's Collective Bargaining Agreements with the IAM and the UPGWA unions are unallowable under subject contract. The language in Section B, Article B-5F strictly prohibits payout of carry-over sick leave hours unless used. The JBOSC does allow for reimbursement for sick leave that was carried over from the prior contract and is actually used for authorized sick leave purposes, as opposed to a lump sum payout for

[9] In September 2000, Cannon became deputy to Hattaway (tr. 2/6).

> unused reserve sick leave. SGS shall show a credit adjustment to a future cost voucher for all costs associated to payout of unused reserve sick leave.

(R4, tab 19) While maintaining that "the contracting officer made the decision," Hattaway acknowledged that his opinion, as KSC's director of contracting, "had a significant bearing upon that decision" (tr. 1/163).

44. Based on CO Paquette's direction, SGS "reversed" all reserve sick leave payment costs and stopped billing such costs to the government (tr. 1/101). Over its subcontractors' objection, SGS required them to reverse any reserve sick leave termination costs and stop billing such costs (tr. 1/102). SGS proposed that CO Paquette charge the costs to EG&G's BOC-2 that he was closing out (tr. 1/103). CO Paquette refused (tr. 1/104).

45. In June 2001, SGS sought payment from EG&G, its predecessor contractor. EG&G refused, commenting that when it held the KSC contract during the 15-year period, "the sick leave accounting practices were consistently followed and annually accepted by DCAA." Its letter also noted that "when EG&G assumed the contract from Boeing back in 1983, no lump sum payment for unused sick leave was made and/or required by Boeing since they operated under the same CBA." (R4, tab 24)

Events Leading to Submission of SGS's Claim

46. In the following years, SGS continued to make reserve sick leave termination payments in accordance with its applicable CBAs and continued "to give the Government credit to the extent that we made those payments." It continued a dialogue with NASA on whether such costs should be allowable. (Tr. 1/104)

47. In its letter dated 1 March 2004 to Lead CO Rochester, SGS requested that she render a final decision pursuant to the JBOSC's Disputes clause determining "that the costs of sick leave reserve payments made in accordance with SGS's collective bargaining agreements are allowable" (R4, tab 27 at 5). The letter said after consulting with legal counsel, SGS had concluded that CO Paquette's 21 March 2001 determination was in error (*id.* at 1) for three reasons: First, since SGS and its subcontractors were required by the Service Contract Act and FAR 52.222-41(f) to pay their employees not less than the wages and fringe benefits provided for in the predecessor contractor's CBAs, and since the reserve sick leave benefits in SGS's CBAs simply carried forward the same benefits provided by the predecessor contractor's CBAs, the costs were allowable under FAR 31.205-6 and required under FAR 52.222-41(f) (*id.* at 3). Second, Article B-5F was ambiguous because there were two ways an employee could "use" sick leave: "by [1] taking sick leave or [2] by selling it back upon termination." SGS said

that its interpretation was within "the zone of reasonableness" and the ambiguity was latent. (*Id.* at 3) Third, if Article B-5F were interpreted as making reserve sick leave payouts unallowable, it would be contrary to FAR 31.205-6 and FAR 52.222-41(f) and, therefore, invalid and unenforceable (*id.* at 4).

48. Senior Air Force CO Larry J. Griffin (CO Griffin)[10] was assigned to address SGS's request for a decision. His 25 June 2004 letter reminded SGS that it "has not identified a 'sum certain' for a final decision" and said that a final decision would be issued "within 30 days of receipt of this information" (R4, tab 32). SGS provided a certified sum certain claim by letter dated 10 January 2007 stating:

> The sick leave costs discussed in our Claim are continuing to accrue. The costs incurred to date are $762,649. We estimate that the costs that will be incurred over the remaining term of the contract will total $2,125,291. Accordingly, we hereby request a Contracting Officer's Final Decision that the sick leave reserve termination payments in the amount of $2,887,940 are allowable and will be reimbursed under the J-BOSC.

(R4, tab 34)

49. In the meantime, CO Griffin analyzed the issues presented. As reflected in his memorandum (R4, tab 29), he read the relevant contract provisions, CO Paquette's 21 March 2001 determination, reviewed the SEB documents, and consulted with a labor advisor from the Air Force. Based on his analysis, CO Griffin agreed with SGS that there was an ambiguity in Article B-5F and clarification of the term "used" was required. He opined that the word "used" in Article B-5F "should be interpreted based on the reading of the contract as a whole and not solely on the merits of B5F standing alone." He said that "'use' of sick leave should include the consumption at termination in accordance with Union Agreements/WD requirements under the Service Contract Act." He concluded that "the position taken by the government to date is not sustainable," and recommended that "a final decision be made that the costs are allowable." (*Id.* at 4)

50. SGS's claim was given to CO Collins who became the Lead CO for the JBOSC from February 2005 to September 2008 (tr. 2/103). CO Collins had been a Lead CO on the BOC (tr. 2/101). There is no evidence he was involved with the JBOSC procurement effort. CO Collins gave SGS's claim to Douglas S. Melin (Melin). Melin was an Air Force CO who had come to work for NASA (tr. 2/106). According to CO Collins, he was "looking for a fresh set of eyes to give me...an opinion on...where he

[10] CO Griffin was assigned to the JPMO (tr. 1/200).

thought we stood" on the claim (*id.*). Melin opined in a 12 July 2007 e-mail that, in his view, Article B-5F could be interpreted to permit any legitimate use of accrued sick leave "allowed by the contractor policy/disclosure and CBAs" including use for actual sick leave purposes and "selling it back upon termination." He concluded that "the cost incurred by the contractor for those legitimate uses should be an allowable cost under the JBOSC." (R4, tab 36) CO Collins testified he disagreed with Melin's views. He testified that, based on his reading, he thought Article B-5F was "plain in the intended use" (tr. 2/107).

51. CO Collins' 29 August 2008 final decision said "The Government reiterates its decision of March 21, 2001 that these costs are unallowable under the terms and conditions" of the contract. The decision went on to say:

> The Government is not persuaded by SGS's assertion that disallowance of these sick leave balance payout costs is a violation of the Service Contract Act. The Government does not believe there is any ambiguity in the word "use" as it appears in Article B-5F. Also, the Government considers the clause to be fully valid and enforceable and not inconsistent with law and/or regulation.

(R4, tab 47) SGS appealed the decision by letter dated 14 October 2008. The Board docketed the appeal on 16 October 2008.

52. In 2007, NASA issued a RFP for an Institutional Services Contract to replace the JBOSC. Article B.6(e) of the new contract replaced Article B-5F in the JBOSC:

> Transfer of Accrued Benefits
>
> The Contractor shall accept transfer of accrued sick leave balances earned on predecessor NASA-KSC contracts and unused by incumbent employees from the immediate predecessor contract NAS10-99001 and shall recognize the sick leave and vacation leave accrual rates of incumbent personnel hired from the immediate predecessor contract, provided the employee had no break in service from the immediate predecessor contract exceeding 60 days prior to their hire for service on this contract. Costs associated with transferred sick leave hours shall be allowable costs for reimbursement under this contract only when used by the employee, and shall be allowable only to the extent used by the employee to receive pay for hours off work for approved

> medical purposes during a duty tour. All other lump sum or other sick leave payments for transferred sick leave shall be considered expressly unallowable costs under this contract.

(R4, tab 87 at B-34)

53. After the JBOSC ended, SGS made reserve sick leave termination payments to all of the IAM and UPGWA members who terminated from SGS. As of May 2010, the amount paid by SGS and its subcontractors for reserve sick leave benefits totaled $1,809,247. Additionally, SGS and its subcontractors are still performing one contract involving UPGWA members, and the amount yet to be paid at termination, according to SGS's most recent calculations, is $820,434. (Tr. 1/138-39; R4, tab 89 at tab A)

DECISION

In 1998, the government awarded the JBOSC to SGS. SGS became the successor contractor to EG&G, the predecessor contractor. (Finding 22) The Wage Determination attached to the JBOSC required SGS to pay the wage rates and fringe benefits set forth in the CBAs listed. Among the 23 CBAs listed were those entered into between EG&G and IAM, and EG&G and UPGWA. (Finding 12)

The IAM and UPGWA CBAs allowed employees to accumulate sick leave and to transfer up to 40 hours of unused sick leave into a reserve sick leave account each year. Except for those employees hired by a successor contractor within 30 days, the CBAs also allowed employees to receive payment for the reserve sick leave credits accumulated at termination of employment. When the JBOSC was awarded in 1998, IAM employees were eligible to receive up to 600 hours of reserve sick leave payments at termination of employment, and UPGWA employees were eligible to receive up to 584 hours of reserve sick leave payments at termination of employment. (Findings 13, 14) Providing a sick leave benefit that could be cashed out at termination of employment began with Boeing Services in the 1970s. It was not a benefit all unions negotiated with KSC contractors. (Finding 2)

During the first two years of the JBOSC, SGS paid IAM and UPGWA employees the balance of their reserve sick leave accounts at termination of employment. SGS then billed the government and the government reimbursed SGS for the billed costs. (Finding 32) In 2000, DCAA first questioned whether reserve sick leave termination payments were allowable (findings 33, 34). In March, 2001, the CO notified SGS that Article B-5F of the JBOSC allowed for "reimbursement for sick leave...actually used for authorized sick leave purposes" but not for "a lump sum payout for unused reserve sick leave." SGS was directed to show a credit adjustment for all costs paid for reserve sick leave

termination payments. (Finding 43) SGS subsequently submitted a certified claim to the CO and the CO denied the claim by decision issued in August 2008 (findings 47, 48, 51).

FAR part 31.2 provides in relevant part that a "cost is allowable only when the cost complies with...terms of the contract." The government bears the burden of establishing that a cost is unallowable by operation of a specific contract provision. *Lockheed Martin Western Development Laboratories*, ASBCA No. 51452, 02-1 BCA ¶ 31,803 at 157,102. In disallowing SGS's reserve sick leave termination payments, the government has not taken the position that the costs were unreasonable or not allocable to the JBOSC. Nor has it taken the position that SGS was in violation of CAS. We address first whether the contract terms limit the payment of the termination cash out benefit.

Reserve Sick Leave Termination Payments are Allowable Under the Plain Language of the JBOSC

The parties' dispute centers on the interpretation of Article B-5F of the JBOSC. This article required SGS to "accept transfer of accrued sick leave hours of personnel hired from the incumbent contractor," and it told SGS "the costs of these carry-over hours will not be paid under the successor contract unless used" (finding 6).

The government says "[t]he instant contract is clear on its face. It requires the contractor to recognize sick leave hours earned by its employees which remained on the books of the predecessor contractor at the time of contract transition. It further provides the Government will only reimburse the costs of these carry-over hours if they are used." (Gov't br. at 19) A more straightforward and focused articulation of the government's position, however, was provided by Cannon, a KSC attorney and later deputy director of contracting, in his 8 March 2001 e-mail reply to CO Paquette: "The J-BOSC *expressly* makes such costs [reserve sick leave termination payments] unallowable. It was *done so intentionally*. The contract still allows reimbursement for payment involving an employee's use of carry-over *if and when* used for authorized sick leave purposes. It does not allow for reimbursement of an employees cashing out sick leave" (emphasis added). (*See* finding 41).

SGS points out that, in the case of IAM and UPGWA employees, their CBAs provide for two types of sick leave benefits: (1) regular sick leave benefit for medical purposes such as illness of the employee or his immediate family, and (2) reserve sick leave benefit which allows an employee to accumulate unused sick leave hours in a separate reserve sick leave account and to cash out those hours up to a specified maximum at termination of employment. SGS points out also that the IAM and UPGWA CBAs listed in the JBOSC's Wage Determination "expressly state that...the employee is entitled to receive payment for sick leave credits accumulated in the employee's reserve sick leave account." SGS contends "[i]t is consistent with the plain meaning of Article

B-5(F) that the 'use' of accrued sick leave encompasses any permissible use of regular sick leave or reserve sick leave provided for under the relevant CBAs," and although the term "used" in Article B-5F is not defined, "how a benefit is used plainly depends on the nature of the benefit." (App. br. at 37)

In interpreting a contract, the Federal Circuit has said to "begin with the plain language." *McAbee Const., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). The Court said that it will "give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternate meaning." *Harris v. Department of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998). It said also that "[w]e must interpret the contract in a manner that gives meaning to all of its provisions and makes sense." *McAbee*, 97 F.3d at 1435.

"[B]ecause the meaning of words is very often imprecise, and no inherent meaning exists outside of context, interpretive tools such as dictionaries are frequently used by courts to determine the meaning of a document's phrase or provision." *Travelers Casualty and Surety Company of America v. United States*, 75 Fed. Cl. 696, 708 (2007) (footnote omitted). Article B-5F does not say how or for what specific purpose the "accrued sick leave hours"—the "carry-over hours"—must be used in order for their costs to be paid by the government. Absent evidence that the parties "mutually intended and agreed to an alternative meaning," [11] we give the word "use" its ordinary meaning. *Harris*, 142 F.3d 1467. The ordinary meaning of the word "use" is "to put or bring into action or service; employ for or apply to a given purpose." NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1564 (2d ed. 1974).

It is undisputed that, in the case of IAM and UPGWA employees, the term "accrued sick leave hours" in Article B-5F included both regular sick leave hours and reserve sick leave hours transferred (finding 8; gov't. br. at 19). Given that the ordinary meaning of the word "use" is simply "to put or bring into action," we interpret Article B-5F to say any permissible use of the carry-over accrued sick leave hours will be paid by the government. If those hours included only hours for medical purposes as provided by some of the CBAs, those hours may be used and then paid by the government. If, on the other hand, those hours included both regular and reserve sick leave hours, as in the case of those employees covered by the IAM and UPGWA CBAs, both types of hours may be used and then paid by the government.

---

[11] While the evidence amply supports that Article B-5F was drafted to protect long-time NASA contractor employees who had worked for successive contractors from losing their accumulated sick leave benefits, there is no evidence that the article was written to disallow payment for a type of sick leave benefit which allowed cash payment at termination of employment (findings 8-11, 37).

Absent clear qualifying language, it makes no sense in interpreting Article B-5F to require SGS to accept "accrued sick leave hours" including both regular and reserve sick leave hours from IAM and UPGWA employees it hired, but to impose an unannounced cost allowability limitation within the same paragraph—regular versus reserve sick leave—based on the nature of the benefit used. "[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible." *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965) The government's interpretation leaves Article B-5F inexplicable and internally inconsistent.

SGS's interpretation that "'use' of accrued sick leave encompasses any permissible use of regular sick leave or reserve sick leave provided for under the relevant CBAs" is consistent with other provisions of the JBOSC. The JBOSC Wage Determination required the contractor to pay its employees the wage rates and fringe benefits listed in the CBAs (finding 12). In addition to sick leave benefits for medical purposes, the IAM and UPGWA CBAs contained provisions that specifically allowed the transfer of "unused" sick leave credits into a reserve sick leave account up to a maximum number of hours, and to receive payment for sick leave credits accumulated up to a maximum number of hours at termination of employment (findings 13, 14). Subsequent IAM and UPGWA CBAs applicable throughout the JBOSC continued the reserve sick leave termination benefit payments at termination of employment[12] (findings 24, 25).

The government nonetheless argues that SGS's interpretation is unreasonable. According to the government, "if both these possibilities [use of carry-over sick leave hours for medical purposes and use of carry-over sick leave hours for cash payment at termination] are considered 'use' of an hour of sick leave under the contract, then there would be no instance when the leave would not be 'used' and therefore, no instance where the costs would not be paid." The government says "[t]his interpretation is contrary to the plain meaning of the clause and would render the second sentence of the clause unnecessary and meaningless." (Gov't br. at 17)

Contrary to this argument, there would be and were instances where carry-over sick leave hours were unused and therefore unpaid: Under the EG&G/IAM CBA, for example, an employee was entitled to transfer up to 40 hours of unused sick leave credits into a reserve sick leave account, up to a maximum of 600 hours. The employee was also entitled to carry over to the following calendar year unused sick pay credits (regular sick leave) previously awarded. (Finding 13) The carry-over regular sick leave hours and the

[12] In connection with the IAM CBAs, see finding 24 for the payment of "remaining" reserve sick leave hours at termination of employment.

carry-over reserve sick leave hours SGS accepted from EG&G were unused and unpaid sick leave hours accumulated during EG&G's contracts. Similarly, to the extent regular sick leave and reserve sick leave hours accumulated and were unused during the JBOSC, they were not paid by the government. Instead, these unused and unpaid sick leave hours were required to be transferred to the accounts of those employees hired by SGS's successor contractor (*see* finding 52). In short "unless used," carry-over sick leave hours remained unused and unpaid by SGS and the government. On the flip side, to the extent regular sick leave hours were used for medical purposes, and to the extent reserve sick leave hours were paid out at termination of employment, Article B-5F could reasonably be interpreted, as SGS did, to say both would be reimbursed by the government.

To Cannon's points, we see nothing in Article B-5F, and within the JBOSC contract for that matter, that "expressly makes" reserve sick leave termination payments "unallowable." The evidence in the record does not support the government's contention that it "intentionally" wrote Article B-5F to disallow reserve sick leave termination payments (findings 7-11, 37). And, as discussed above, SGS's interpretation does not render the second sentence of Article B-5F unnecessary and meaningless. We conclude that the only reasonable interpretation of Article B-5F and the JBOSC as a whole is that, both regular sick leave and reserve sick leave termination payments are allowable, if and when paid by SGS.

The Disputed Costs are Allowable under FAR 31.205-6(m)(1)

SGS also contends that "to the extent that Article B-5(F) was intended to disallow costs of a collectively-bargained, bona fide fringe benefit without a variance hearing, it is contrary to the Service Contract Act, as well as FAR 52.222-41(f) and FAR 31.205-6, and is therefore void and unenforceable" (app. br. at 49). For our purposes here, we need to address FAR 31.205-6 only.

FAR 31.205-6(m), *Fringe benefits*, provides:

> (1) Fringe benefits are allowances and services provided by the contractor to its employees as compensation in addition to regular wages and salaries. Fringe benefits include, but are not limited to, the cost of vacations, sick leave, holidays, military leave, employee insurance, and supplemental unemployment benefit plans. Except as provided otherwise in Subpart 31.2, the costs of fringe benefits are allowable to the extent that they are reasonable and are required by law, employer-employee agreement, or an established policy of the contractor.

We believe the disputed reserve sick leave termination payments provided under the IAM and UPGWA CBAs qualified as "fringe benefits" under FAR 31.205-6(m)(1). In *Penn Enterprises, Inc.*, ASBCA No. 52234, 01-1 BCA ¶ 31,244 we considered payment for unused sick leave a fringe benefit. The government says that FAR 31.2 provides otherwise, and "recognizes the enforceability of limits on reimbursement of costs by the terms of the contract" (gov't br. at 7). As discussed, Article B-5F is ineffective contractually in limiting the reimbursement of reserve sick leave termination payments to IAM and UPGWA union members SGS was required to honor during the course of the JBOSC. We conclude, as a fringe benefit, the costs of reserve sick leave termination payments are allowable under FAR 31.205-6(m)(1).

Absent a Properly Approved Deviation, Article B-5F as Interpreted by the Government is Unenforceable

Pointing to FAR 1.401(a), the government argues that a deviation for Article B-5F was not required "because it is not inconsistent with or unauthorized by the FAR which expressly includes the contract terms as a factor of allowability." The government says "[w]hile no contract term could make allowable a cost that is specifically unallowable in the FAR, contractors and the Government are free to negotiate terms that would make unallowable a cost that may otherwise be allowable." (Gov't br. at 38)

Departures from the FAR are permitted. FAR 1.402 ("Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specific needs and requirements of each agency."). FAR Subpart 1.4 governs deviations from the FAR. FAR 1.401(a) defines "Deviations" to mean "[t]he issuance or use of a policy, procedure, solicitation provision...contract clause...that is inconsistent with the FAR."

The FAR distinguishes between "Individual deviations" (FAR 1.403) and "Class deviations" (FAR 1.404). Class deviations affect more than one contracting action. FAR 1.404. For NASA, class deviations are controlled and approved by the Associate Administrator for Procurement and deviations must be processed in accordance with agency regulations. FAR 1.404(c). Individual deviations affect only one contracting action and may be authorized by agency heads or their designees. The justification and agency approval are required to be documented in the contract file. FAR 1.403. We treat Article B-5F as an individual deviation since it affected only the JBOSC.

For deviations from the FAR Part 31 cost principles, however, FAR 1.402 states FAR 31.101 governs. The overall objective of the FAR Part 31 cost principles is to provide that, "to the extent practicable, all organizations of similar types doing similar work will follow the same cost principles and procedures." To achieve this uniformity,

"individual deviations concerning cost principles require advance approval of the agency head or designee." FAR 31.101.

A contract modification to a prescribed FAR clause has been held to be void and unenforceable where the CO has not obtained an individual deviation to do so. *Johnson Management Group CFC, Inc. v. Martinez*, 308 F.3d 1245, 1255-56 n.2 (Fed. Cir. 2002) (CO's modification of FAR's Advance Payment clause implementing 41 U.S.C. § 255(a) held void and without effect); *Kearfott Guidance & Navigation Corp.*, ASBCA No. 49271 *et al.*, 04-2 BCA ¶ 32,757 at 162,021-22 (without a paper trail, neither a PCO nor an ACO could have acted lawfully to exempt contractor from submitting quarterly limitation on payments statement (QLOPS) required pursuant to the prescribed Incentive Price Revision Firm Target (APR 1984) clause); *Southwest Marine, Inc.*, ASBCA No. 34058 *et al.*, 91-1 BCA ¶ 23,323 at 116,985 (decision on ASBCA No. 34166–a clause precluding contractor from claiming delay or disruption deviated from the Changes clause held unenforceable because the government failed to seek an individual deviation).

In including a contract clause–Article B-5F (as interpreted by the government)–without obtaining advance approval of the agency head or designee, the government would not have followed the proper procedure in deviating from the applicable cost principles in FAR 31.205-6. Moreover, FAR 31.101 requiring advance approval of the agency head or designee draws no distinction between making a specifically unallowable cost allowable versus making an allowable cost unallowable.

As a part of fringe benefits, the costs of reserve sick leave termination payments are allowable under FAR 31.205-6(m)(1). There is no evidence that the government obtained advance approval from appropriate officials within NASA in accordance with FAR 31.101 to deviate from this cost principle. Consequently, to the extent Article B-5F could be interpreted to disallow the costs otherwise allowable under FAR 31.205-6(m)(1), it is unenforceable.

CONCLUSION

Because the ordinary meaning of the word "use" is simply to bring into action, we hold that the only reasonable interpretation of the JBOSC as a whole is that both sick leave benefits—regular sick leave and reserve sick leave benefits—specified in the applicable (IAM and UPGWA) CBAs are allowable, if and when paid by SGS.

Alternatively, even if Article B-5F could be interpreted to disallow the reserve sick leave termination payments, such interpretation is inconsistent with FAR 31.205-6(m)(1) and, absent approval from appropriate NASA officials to deviate from the cost principle, it is unenforceable.

For these reasons, we sustain the appeal as to entitlement and remand the appeal to the parties to determine the amounts payable.

Dated: 30 January 2012

PETER D. TING
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. 56592, Appeal of Space Gateway Support, LLC, rendered in conformance with the Board's Charter.

Dated:

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