

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Eastern New Mexico University - Roswell) ASBCA No. 57110
Under Contract No. FA9401-06-T-0035)

APPEARANCES FOR THE APPELLANT: Christopher A. Holland, Esq.
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Albuquerque, NM

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Acting Air Force Chief Trial Attorney
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OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The United States Air Force (USAF or government) entered into a contract with Eastern New Mexico University – Roswell (ENMU-R) to provide paramedic training classes. After the contract ended, ENMU-R submitted a claim based on shortfalls of the students attending the classes, rewriting USAF's curriculum for the basic course, and conducting more counseling and feedback sessions than contractually required. The government moves for summary judgment contending that the contract is not enforceable either as an indefinite-quantity contract or as a requirements contract, and that ENMU-R is entitled to no more than what it has already been paid. ENMU-R opposed the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The USAF's Pararescue & Combat Rescue Officer School operates through Detachment 1, 342nd Training Squadron at Kirtland Air Force Base (Kirtland AFB). Pararescuemen, or PJs, are enlisted personnel, and Combat Rescue Officers, or CROs, are commissioned officer personnel.¹ These personnel are "the only Department of Defense specialty specifically trained and equipped to conduct conventional or unconventional rescue and recovery operations."² The school's mission is to provide "the highest quality

¹ See 9 April 2012 letter from government counsel, forwarding respondent's first supplement to the Rule 4 file (gov't 1st supp. R4).

² See <http://www.Kirtland.af.mil/library/factsheets/factsheet.asp?id=5589>.

pararescuemen and combat rescue officer personnel capable of worldwide deployment and recovery operations.”³

2. On 1 November 2005, the USAF through its 377 Contracting Squadron issued Solicitation No. FA9401-06-T-0002 (Solicitation 0002) (SF 1449 for commercial items) (R4, tab 2). As reflected in the Statement of Work (SOW) of 13 October 2005, the USAF was seeking services to “provide education, training and testing in support of the USAF Combat Rescue Officer/Pararescue School Emergency Medical Technician Program at Det 1, 342 TRS, Kirtland AFB NM” (gov’t 1st supp. R4, tab 13). The SOW required the contractor to “sponsor the United States Air Force Emergency Medical Technician Basic (EMT-B) and Paramedic (EMT-P) Course (USAF EMT Course) for the purpose of receiving recognition as an approved emergency services training program from the New Mexico State Joint Organization of Education (JOE) and accreditation by the Committee on Accreditation of Educational Programs for the Emergency Medical Services Professionals (CoAEMSP)” (*id.*). The SOW went on to say that the “estimated course size, length, frequency, and clinical/field objectives are listed in Appendix A, titled Workload Estimates,” the course curriculum and syllabus are listed in Appendix B, and the “proposed consortium agreement for CoAEMSP accreditation is detailed in Appendix D” (*id.*).

3. The SOW listed a number of other requirements, among them, the contractor:

- Shall bill the USAF on a per class or per-student basis for each EMT-B and EMT-P.
-
- Shall provide up to 4 courses of EMT-B and 4 courses of EMT-P at Kirtland AFB, NM in facilities provided by USAF Pararescue/Combat Rescue Officer School annually, according to the needs of the United States Air Force.
- Shall have capability to provide 2 (or more) EMT-B and 2 (or more) EMT-P courses at the host campus annually, according to the needs of the USAF, including all services available to host institution students.

(Gov’t 1st supp. R4, tab 13) Paragraph I.1. of the SOW also stated that “[t]he contractor shall be required to provide all supplies and equipment in support of USAF EMT training at host institution facility” but it “shall not be required to provide any supplies or equipment not otherwise specified in support of this training at Kirtland AFB, NM” (*id.*).

³ *Id.*

4. The SOW's APPENDIX A, "ESTIMATED WORKLOAD DATA COURSE SIZE/LENGTH/FREQUENCY" provided:

1. **Course Size**....Class sizes may range from low of 24 to high of 32 for EMT-P based on needs of USAF, and size may range from 24-36 for EMT-B. *Projected* class sizes, by fiscal year, are detailed as follows:
 - FY06: 100 PJ/CRO students for EMT-B, 72 PJ Students for EMT-P (3 classes of 33 for EMT-B and 3 classes of 24 for EMT-P). This shall consist of 2 classes to be conducted at Kirtland AFB, NM, 1 class to be taught at host institution.
 - FY07/08: 144 PJ/CRO students for EMT-B and 121 PJ students for EMT-P; contractor to provide six EMT-B classes (24 students per class) and six EMT-P classes (21 students per class) plus any additional EMT-P wash-backs. This shall consist of 4 classes of EMT-B and EMT-P to be conducted at Kirtland AFB, and 2 classes of EMT-B and EMT-P to be conducted at host institution.
 - FY09-13: 212 PJ/CRO students for EMT-B and 183 PJ students for EMT-P; contractor to provide seven EMT-B classes (30 students per class) and seven EMT-P classes (26 students per class) plus any EMT-B/P wash-backs. This shall consist of 5 classes of EMT-B and EMT-P to be conducted at Kirtland AFB, and 2 classes of EMT-B and EMT-P to be conducted at host institution.

(Gov't 1st supp. R4, tab 13)

5. Appendix D of the solicitation contained the proposed "EMERGENCY MEDICAL SERVICE (EMS) CONSORTIUM" between the government (Det 1, 342nd TRS) and the contractor. Several paragraphs were relevant to the USAF's obligation in filling classes:

II. **Understanding:** The parties acknowledge and agree to the following

....

2. This EMS training program will not result in, nor is it meant to displace employees or impair existing contracts for services.

3. The parties have mutually agreed to the number of Air Force students to be trained; the number of students will be reviewed on a regular basis....

....

8. Admission into this Air Force Training Program

a. Admission into this Air Force paramedic training program will be governed in accordance with Air Force, Air Education and Training Command (AETC), and 37th Training Group policies and directives.

b. The Air Force will be responsible for recruiting, admitting, and regulating the number of students into the didactic component of the Air Force Consortium training program. While Contractor students will adhere to admission requirements as outlined in Appendix A, the parties agree that successful completion of the Air Force Pararescue Pipeline Indoctrination course, along with the endorsement of the Associate Medical Director (the Air Force's Medical Director), will suffice for entrance into training.

(Gov't 1st supp. R4, tab 13)

6. ENMU-R is a branch community college. ENMU-R established the Emergency Medical Services (EMS) program in 1986 offering EMT Basic and Intermediate classes. In conjunction with the University of New Mexico's EMS Academy, the program became the first decentralized Paramedic Program outside of Albuquerque in 1988. ENMU-R's EMS program became independent from the EMS Academy in 1991. The Joint Review Committee for Educational Programs for the EMT-Paramedic accredited ENMU-R's Paramedic Program in 1994. The CoAEMSP accredited the program in 1999, and reaccredited the program in 2005 for a five-year term. (Gov't 1st supp. R4, tab 14 at 6)

7. In response to Solicitation 0002, ENMU-R submitted a proposal on 30 November 2005. The proposal listed, among other credentials, that it was a JOE Approved Teaching Program and accredited by the CoAEMSP. (Gov't 1st supp. R4, tab 14 at 2) The proposal stated that in FY 2002, it was awarded a contract to provide "sponsorship and clinical experiences for the USAF Combat Rescue Officer/Pararescue School Emergency Medical Technician Program at Det 1, 342nd TRS, Kirtland AFB," and in FY 2003, it entered into a consortium agreement with Det 1, 342nd TRS to provide

“full CoAEMSP accredited and college credit for all students enrolled in Pararescue Paramedic Program” (*id.* at 7).

8. The USAF awarded Contract No. FA9401-06-T-0035 (Contract 0035) to ENMU-R on 4 January 2006 (R4, tab 2). The contract’s base period was from 4 January 2006 to 3 January 2007 (*id.* at 18). It included FAR 52.217-8, OPTION TO EXTEND SERVICES (NOV 1999) and FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000) (*id.* at 24). The USAF subsequently exercised Option Year One by Modification No. P00003 extending the contract to 3 January 2008. Bilateral Modification No. P00004 extended the contract by six more months to 20 June 2008. (*Id.* at 40, 44)

9. FAR 16.506(d)(1) instructs the government to “[i]nser[t] the clause at 52.216-21, Requirements, in solicitations and contracts when a requirements contract is contemplated.” FAR 16.506(e) instructs the government to “[i]nser[t] the clause at 52.216-22, Indefinite Quantity, in solicitations and contracts when an indefinite-quantity contract is contemplated.” It is undisputed that Contract 0035 included neither the clause at FAR 52.216-21 for a requirements contract nor the clause at FAR 52.216-22 for an indefinite-quantity contract.

10. Contract 0035 contained a number of CLINs and subCLINs. The CLINs (0001, 1001, 2001, 3001 and 4001) pertained to the Base Period and the Option Periods I-IV. The subCLINs (000101-000104 etc.) pertained to individual classes (*e.g.*, Class I, Class II) within the base and option periods. (R4, tab 2 at 3-17)

11. All CLINs and subCLINs set out the parties’ agreement on a “FFP” basis which we take to mean “firm-fixed price.” Typical of the other CLINs, CLIN 0001 provided:

This agreement is for Educational services to be provided IAW the attached Statement of Work to personnel at Detachment 1, 342 TRS, Kirtland AFB. The Contractor is responsible for providing all materials, supplies, and equipment necessary to accomplish these educational services. Base Period 4 Jan 06-03 Jan 07. Rates are itemized as follows: Per student at KAFB: \$6,700.00; Per student at KAFB: \$3,400.00 (Class taught by USAF); Per student at Roswell: \$7,300.00; Per CRO student: \$700.00; Re-entry Fee for washback during EMT-B: \$800.00; Re-entry Fee for washback [sic] prior to Paramedic portion: \$600.00; Re-entry Fee for washback during Paramedic portion: \$500.00. Contractor will invoice for each class using the subCLINs based on the actual composition of that class and the agreed

upon prices per student. Thus, contractor will be paid only for the actual number of students attending the classes during the period of performance.

(R4, tab 2 at 3)

12. Typical of the other subCLINs, subCLIN 000101 for Class I, base contract period, provided:

This agreement is for Educational services to be provided IAW the attached Statement of Work to personnel at Detachment 1, 342 TRS, Kirtland AFB. The Contractor is responsible for providing all materials, supplies, and equipment necessary to accomplish these educational services. Base Period 4 Jan 06-3 Jan 07. Rates are itemized as follows: Per student at KAFB: \$6,700.00; Per student at KAFB: \$3,400.00 (Class taught by USAF); Per student at Roswell: \$7,300.00; Per CRO student: \$700.00; Re-entry Fee for washback during EMT-B: \$800.00; Re-entry Fee for washback prior to Paramedic portion: \$600.00; Re-entry Fee for washback during Paramedic portion: \$500.00. Contractor will invoice for this class at the agreed upon rates per student based on actual class composition.

(R4, tab 2 at 4)

13. From January 2006 until October 2007, ENMU-R taught 11 classes, 8 at Kirtland AFB and 3 at Roswell. The table below summarized the fill rate of these classes:

Class No.	Start Date	Location	Enrolled	Alleged Shortfall
1	17 Jan 06	KAFB	24	0
2	9 Jan 06	KAFB	25	0
3	15 May 06	Roswell	18	6
4	24 July 06	KAFB	16	8
5	13 Nov 06	KAFB	21	3
6	22 Jan 07	KAFB	14	10
7	12 Mar 07	Roswell	4	20
8	12 May 07	KAFB	7	17
9	9 July 07	KAFB	14	10
10	15 Oct 07	Roswell	0	24
11	15 Oct 07	KAFB	25	0

The government does not dispute that out of the 11 classes, 8 classes had less than 24 students. (*See* charts at R4, tab 3 at 5 and compl. ¶ 11; mot. ¶ 6) ENMU-R does not dispute that it accepted payments in accordance with the per student rates set forth in the contract (mot. at 3, ¶ 6; opp'n at 4, ¶ 6).

14. After the contract ended, ENMU-R submitted a \$835,190.50 Request for Equitable Adjustment (REA) to the CO by letter dated 11 February 2009 (R4, tab 3). The letter requested a written decision within 60 days of its receipt⁴ (*id.* at 9). The REA presented 3 claims: (1) Shortfalls in the Numbers of Trainees; (2) Curriculum Development; and (3) Scope Creep. Under the "Shortfalls" claim, ENMU-R contended Contract 0035 was an "Indefinite delivery/indefinite quantity or ID/IQ" contract and had a "minimum order quantity of 24 students per class" (*id.* at 7, 8). ENMU-R sought \$808,200.00, representing the difference between its actual fee receipts and what it would have collected had each class had 24 students (\$858,200.00) (*id.* at 2, 5) after deducting \$50,000 worth of medical consumables it believed it saved as a result of the student shortfalls (*id.* at 8-9). Under the "Curriculum Development" claim, ENMU-R asserted that the USAF's curriculum for the EMT-B course was "woefully inadequate" and fell far short of the contractually required training standards. ENMU-R said that it was forced to hire an adjunct instructor to "overhaul and rewrite" the EMT-B course at \$13,343.62. (*Id.* at 6) Under the "Scope Creep" claim, ENMU-R sought \$13,646.88 contending that its instructors were required to provide "daily verbal and written feedback to each trainee in...the clinical portion of the EMT-P course," and to "document these daily sessions on official USAF forms" exceeding the SOW requirements (*id.* at 7).

15. CO Peter G. Weber, Jr.'s 13 November 2009 decision denied ENMU-R's claim in its entirety (R4, tab 11). On the student shortfalls claim, the decision said that the contract was based on ENMU-R's proposal that called for a price per student as reflected in the SOW, Appendix A. The decision noted that each CLIN stated that "the contractor will be paid only for the actual number of students attending the classes during the period of performance" (*id.* at 2). The decision said that the 24 to 32 student range used in Appendix A was "an estimate, not a guarantee," and ENMU-R understood this when it "created invoices for payment for the actual number of students trained, as opposed to a minimum of 24 students" (*id.*). On the Curriculum Development claim, the CO took the position that the SOW showed no requirement for curriculum development, that the government was responsible for curriculum development, that the USAF Medical Director and Program Director had ultimate authorities to make curriculum changes, and that the contractor was required by the SOW

⁴ ENMU-R's 11 February 2009 REA was certified pursuant to 10 U.S.C. § 2410(a). The government's 10 April 2009 letter advised ENMU-R that to be considered a valid claim, it must be certified in accordance with FAR 33.207(c) (R4, tab 5). By letter dated 30 April 2009, ENMU-R provided a CDA certification signed by Michael Buldra, EMS Program Director at ENMU-R (R4, tab 6).

to purchase supplemental services to support the USAF EMT Program deemed necessary to complete training in accordance with the course objectives at no additional cost to the government. The decision also stated, "At no time did ENMU-R contact the contracting officer concerning this issue." (*Id.* at 2) On the Scope Creep claim, the decision said that ENMU-R's proposal provided that "[t]o insure student success each student will receive informal evaluation at least daily while in the classroom." The decision acknowledged "ENMU-R was performing these duties, and the government only requested that it be documented on a USAF form." (*Id.* at 3)

16. ENMU-R appealed the CO's decision by letter dated 8 February 2010. The Board docketed the appeal on 12 February 2010.

DECISION

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). "[S]ubstantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Colbert v. Potter*, 471 F.3d 158, 164 (D.C. Cir. 2006). The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Pure contract interpretation is a question of law which may be resolved by summary judgment. *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984); *Textron Defense Sys. v. Widnall*, 143 F.3d 1465, 1468 (Fed. Cir. 1998). Determination of the type of contract the parties entered into is generally a matter of law. *Maintenance Engineers, Inc. v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984).

Is Contract 0035 Enforceable as an Indefinite-Quantity Contract?

The government argues that Contract 0035 is not an indefinite-quantity contract because it did not include the Indefinite Quantity clause at FAR 52.216-22, prescribed by FAR 16.506(e) for such a contract, and because the contract "contains no minimum quantity of supplies and services by which the Government is bound" (mot. at 6-7). ENMU-R counters that "the absence of a standard ID/IQ clause does not mean that this Contract cannot be an ID/IQ contract" (opp'n at 9). It argues that while "[t]he Contract indicated that the precise number of airmen to be trained was unknown, and that it would vary from class to class, depending upon the needs of the USAF," paragraph 1 of Appendix A of the SOW "contains a minimum number of students to be trained, 24," and

therefore, the contract “was a valid, enforceable ID/IQ services contract with a minimum order quantity of 24 students per class” (*id.* at 10-11). ENMU-R argues further that “[a]t best, the SOW when read with the CLIN and the deposition testimony, show the contract language is ambiguous and therefore should be construed against the drafter, USAF” (*id.* at 7).

FAR 16.504(a), Indefinite-quantity contracts, describes an indefinite-quantity contract as one providing for “an indefinite quantity, within stated limits, of supplies or services during a fixed period.” An indefinite-quantity contract “must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies and services.” FAR 16.504(a)(1). FAR 16.506(e) prescribes the inclusion of the clause at FAR 52.216-22, INDEFINITE QUANTITY, in solicitations and contracts when an indefinite-quantity contract is contemplated.

To be enforceable as an indefinite-quantity contract, substantive law requires that the buyer must agree to purchase from the seller “at least a guaranteed minimum quantity of goods and services.” *Mason v. United States*, 615 F.2d 1343, 1346 n.5 (Ct. Cl. 1980); *Torncello v. United States*, 681 F.2d 756, 761 (Ct. Cl. 1982) (“With indefinite quantities contracts, however, the buyer’s promise specifically is uncertain, and such a contract would fail for lack of consideration if it did not contain a minimum quantity term.”); *Maintenance Engineers*, 749 F.2d at 726 (holding under an indefinite quantities contract, “the legal obligation of the Government was to order a minimum value of maintenance services during the life of the contract while retaining the right to obtain additional such services from any source it chose”).

Consistent with its title, paragraph 1 of the SOW Appendix A provides an estimated range from a “low of 24 to high of 32” students for EMT-P classes and an estimated range from “24-36” students for EMT-B classes. An estimated range is not a “guaranteed minimum” contract term. A range that may fluctuate depending on the “needs of USAF” lacks a firm, determinable number that can be contractually enforced. Also undermining ENMU-R’s argument that 24 students could be interpreted as the guaranteed minimum number of students for each class is the fact that, for FY07/08, paragraph 1 of Appendix A “projected” 6 EMT-P classes of “21 students per class.”

Nor do we agree that paragraphs II.3 and II.8.b of Appendix D help ENMU-R’s interpretation. If anything, they detract from ENMU-R’s argument that the contract guaranteed a minimum number of students. Paragraph II.3 provides no information on “the number of Air Force students to be trained,” but states that “the number of students will be reviewed on a regular basis.” While paragraph II.8.b states that “[t]he Air Force will be responsible for recruiting, admitting, and regulating the number of students into the didactic component of the Air Force Consortium training program,” it does not, as ENMU-R asserts, “restate[] the USAF’s obligation to provide the minimum number of trainees for each class session.” (Compl. ¶ 9)

“[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). Each CLIN of the contract instructs the contractor to “invoice for each class using the subCLINs based on the actual composition of that class and the agreed upon prices per student.” Each CLIN also states that “contractor will be paid only for the actual number of students attending the classes during the period of performance” (SOF ¶ 11). Each subCLIN of the contract requires the contractor to “invoice for this class at the agreed upon rates per student based on actual class composition” (SOF ¶ 12). ENMU-R’s interpretation that the contract is an indefinite-quantity contract containing “a minimum number of students to be trained, 24,” conflicts with the subCLINs and the CLINs. If the government is obligated to pay for at least 24 students per class, then it makes no sense to require ENMU-R to invoice based on “the actual number of students attending the classes” and to tell ENMU-R the government will pay accordingly. The government’s interpretation that paragraph 1, Appendix A of the SOW, as providing only estimates of the number of students who will be attending classes is not only consistent with the plain language of the entire paragraph but can be read harmoniously with the CLINs and subCLINs of the contract. Since the government’s interpretation is the only one that falls within the “zone of reasonableness,” there is no ambiguity. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999) (citing *WPC Enters., Inc. v. United States*, 323 F.2d 874, 876 (Ct. Cl. 1963)).

We conclude Contract 0035, when read as a whole, does not contain a guaranteed minimum quantity term so that it is enforceable as an indefinite-quantity contract.

Is Contract 0035 Enforceable As a Requirements Contract?

The government also contends that Contract 0035 is unenforceable as a requirements contract (mot. at 8-9). It contends that “[t]here was nothing contained within the terms of the contract as awarded that precluded the Government from awarding additional EMT training needs to another contractor or from performing that function in-house” (*id.* at 8-9). Even though ENMU-R has not argued that Contract 0035 is an enforceable requirements contract, the government, as the moving party, bears the burden of establishing the absence of any genuine issue of material fact, and it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrell*, 477 U.S. 317, 322-25 (1986).

FAR 16.503, Requirements contract, describes a requirements contract as one providing “for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor.” FAR 16.506(d)

prescribes the inclusion of the clause at FAR 52.216-21, Requirements, in solicitations and contracts when a requirements contract is contemplated.

As a matter of substantive law, “an essential element of a requirements contract is the promise by the buyer to purchase the subject matter of the contract exclusively from the seller.” *Modern Systems Technology Corp. v. United States*, 979 F.2d 200, 205 (Fed. Cir. 1992); *Mason*, 615 F.2d at 1346 n.5. The seller’s entitlement to all of the buyer’s requirement is the key, furnishing the necessary consideration for an enforceable requirements contract. *Torncello*, 681 F.2d at 761.

Several reasons persuade us that Contract 0035, as written, is not intended to be a requirements contract: First, it is undisputed that Contract 0035 does not include FAR 52.216-21, prescribed for use when a requirements contract is contemplated. We do not, however, let this omission be conclusive that that the contract is not a requirements contract. *Crown Laundry and Dry Cleaners v. United States*, 29 Fed. Cl. 506, 515 (1993); *Coyle’s Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1305 (Fed. Cir. 1998) (“Because this agreement does not include the FAR requirements clause, it is more difficult to find the required exclusivity.”). Second, the SOW issued with the solicitation and which became a part of Contract 0035 requires the contractor to “provide education, training and testing in support of the USAF Combat Rescue Officer/Pararescue School Emergency Medical Technician Program at Det 1, 342 TRS, Kirtland AFB NM.” There is no language of exclusivity associated with this requirement. Third, the government’s obligation in Contract 0035 is expressed at various places in terms of the needs of the Air Force: The SOW states the contractor “Shall provide up to 4 courses of EMT-B and 4 courses of EMT-P at Kirtland AFB, NM in facilities provided by USAF Pararescue/Combat Rescue Officer School annually, according to the needs of the United States Air Force” (SOF ¶ 3). Appendix A, Estimated Workload Data, gives course size ranges for EMT-B and EMT-P “based on needs of USAF” (SOF ¶ 4). Moreover, Paragraph II.3 of the parties’ consortium agreement states that “the number of students will be reviewed on a regular basis” (SOF ¶ 5). Conspicuously absent is any language committing the government to fill all of its EMT-B and EMT-P training needs from ENMU-R. This lack of exclusivity is consistent with the parties’ understanding, as expressed in Paragraph II.2 of the parties’ consortium agreement at Appendix D, that “[t]his EMS training program will not result in, nor is it meant to displace employees or impair existing contracts for services” (*id.*).

We conclude Contract 0035, when read as a whole, does not contain a commitment from the government to fill all of its EMT training needs from ENMU-R. Therefore, it is not enforceable as a requirements contract.

Is Contract 0035 an Enforceable Definite-Quantity Contract?

In addition to being an indefinite-quantity contract or a requirements contract, an indefinite-delivery contract can also be a definite-quantity contract. FAR 16.501-2; *Mason*, 615 F.2d at 1347. Even though neither party has argued Contract 0035 is a definite-quantity contract, we nonetheless consider if the contract could be considered as an enforceable definite-quantity contract.

A definite-quantity contract provides for “delivery of a definite quantity of specific supplies or services for a fixed period, with deliveries or performance to be scheduled at designated locations upon order.” FAR 16.502. Because the actual number of students would vary from class to class depending upon the needs of the Air Force, and because the needs of the Air Force would in turn, depend on the Air Force’s admission policies and recruiting results (Appendix, paragraphs II.8.a and b), we conclude Contract 0035 does not provide for delivery of a definite-quantity of EMT training services to qualify as a definite-quantity contract.

Should Summary Judgment be Granted on ENMU-R’s Curriculum and Scope Creep Claims?

Even though Contract 0035 is not enforceable as either an indefinite-quantity contract or a requirements contract, this does not mean that ENMU-R is necessarily precluded from pursuing remedies resulting from its Curriculum Development and Scope Creep claims. The government has not argued that ENMU-R did not actually perform the tasks involved in the Curriculum Development and Scope Creep claims. To the extent performed as a part of Contract 0035, ENMU-R might be entitled to payment. *Coyle’s*, 154 F.3d at 1306.

On the Curriculum Development claim, the government has not disputed ENMU-R’s claim that the EMT-B course was so inadequate to the point that ENMU-R was forced to “overhaul and rewrite” the course. There is a genuine issue of material fact as to whether ENMU-R sought and received approval to incur the costs to “overhaul and rewrite” the course. On the “Scope Creep” claim, as the government itself acknowledges, there is a genuine issue of material fact as to whether requiring ENMU-R instructors to document daily counseling and feedback sessions exceeded the SOW requirements (gov’t reply br. at 9). On these two claims, the government has not satisfied its burden in establishing the absence of genuine issues of material fact.

CONCLUSION

Because Contract 0035 is not enforceable either as an indefinite-quantity contract or as a requirements contract, and because ENMU-R has already been paid for all of the classes it taught at the per student rates set out in the contract, we hold that it is not

entitled to further adjustment. The government's motion for summary judgment on the Student Shortfalls claim is granted.

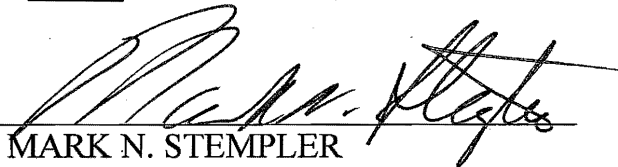
Because there are genuine issues of material fact relating to the Curriculum Development and the Scope Creek claims, the government's motion for summary judgment relating to those claims is denied.

Dated: 22 June 2012



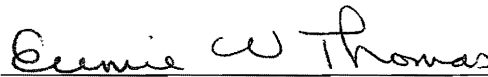
PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMLER
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. 57110, Appeal of Eastern New Mexico University – Roswell, rendered in conformance with the Board's Charter.

Dated:

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