ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
GaN Corporation	)	ASBCA No. 57834
	)	
Under Contract No. W912DY-08-D-0042	)	

APPEARANCES FOR THE APPELLANT: J. Dale Gipson, Esq.
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Huntsville, AL

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
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Huntsville, AL

OPINION BY ADMINISTRATIVE JUDGE WILSON
PURSUANT TO RULE 12.3

This appeal arises out of a government claim for alleged overcharges under an interior design contract in the amount of $72,378.08. The government argues that it properly withheld the sum because appellant submitted erroneous invoices for hours worked, but not paid to its workers. Appellant contends that the invoices were proper because its workers actually worked the invoiced hours and it billed the government accordingly. Appellant elected to proceed under the Board's Accelerated Procedures (Rule 12.3). The parties agreed to have the Board decide the matter on the written record, pursuant to Board Rule 11. Only entitlement is before the Board. The government has also moved to strike the affidavit of appellant's proposed expert, contending that the affiant offered legal opinions, and, as such the affidavit is inadmissible. Because we find that appellant billed the government in conformance with the Payments clause of the contract, we sustain the appeal.

FINDINGS OF FACT

1. On 20 August 2008, the U.S. Army Engineering Support Center, Huntsville (USACEH) entered into Contract No. W912DY-08-D-0042 with the GaN Corporation (GaN) for $338,208.00 (R4, tab A-2). The contract was awarded on a sole source basis

under the Small Business Administration's 8(a) program (R4, tab A-5). Under the contract, GaN was required to provide interior design support for office and barracks furnishings for USACEH's Centrally Managed Furnishings Program (R4, tab A-2). Section A of the contract stated: "Firm fixed price rates will be established [in] Section B of the contract. Task orders will be Labor Hour (LH) and/or Firm Fixed Price (FFP) and will be priced in accordance with the pricing schedule in Section B." The contract included a base period of six months with four option periods of six months each. (*Id.* at 2) Note A of Section B included the prime contractor rates for the following labor categories: Architect, Business Specialist, Administrative Support, Senior Engineer/Analyst, Interior Designer, Junior Engineer/Analyst, Technician, and Technical Specialist (*id.* at 3-4). Note B contained the subcontractor labor categories and rates (*id.* at 5). Each labor category is further broken down by levels with contract rates for the years 2008 through 2011. The rates are "fully burdened to include General and Administrative (G&A) costs, overhead, and profit." Individual task orders will be priced in accordance with the pricing schedule in Section B, Notes A and B. (*Id.* at 6)

2. Appellant's Cost Proposal dated 15 August 2008, the basis upon which the contract was awarded, contained the following language:

> **1.5 Uncompensated Overtime**
>
> GaN's proposed pay rates are based on an employee's annual salary divided by 2,080 non-overtime man-hours. Under our Timekeeping Policy, all employees are required to record all hours worked, whether compensated or uncompensated, while performing work under a contract. Our accounting and timesheet procedures will require the recording of uncompensated overtime and its allocation to all charge numbers worked throughout the pay period. As such, because of the contract type, all hours worked, whether compensated or uncompensated, will be charged and billed to the contract.
>
> GaN work hours are based on a 40-hour work week equating to 2,080 hours per year. One Full Level of Effort (LOE) is 1,920 hours per year. Overtime, as discussed above, may be either paid as regular straight time or uncompensated (but recorded) time.

(R4, tab A-1) We find that this language demonstrated appellant's basis for its proposed pay rates and was not specifically incorporated into the resultant contract. We also find that the government was on notice with regard to appellant's salary structure and billing procedures. The proposal also indicated that GaN would utilize Fuqua and Partners (Fuqua) as a subcontractor on the task orders (*id.* at 5).

3. The contract contained the following clauses:

> 52.242-4617 III INVOICING AND VOUCHERING INSTRUCTIONS
>
> (a) The Contractor shall submit, at least monthly, billings using Standard Forms 1034 and 1035 to invoice its costs and earned fee in accordance with the appropriate clause FAR 52.232-7 Payments Under Time-and-Materials and Labor Hour Contract.
>
> ....
>
> 52.242-4650 I BILLING PROCEDURES
>
> (a) The contractor shall submit, at least monthly, billings using Standard Forms 1034 and 1035 to invoice its costs in accordance with contract clause FAR 52.232-7 – Payment[s] Under Time-and-Materials [and] Labor-hour[] Contracts [FEB 2007]" as applicable.

(R4, tab A-2 at 25)

4. The contract incorporated FAR 52.232-7, PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (ALT. I) (FEB 2007) (Payments clause) which states in relevant part:

> The Government will pay the Contractor as follows upon the submission of vouchers approved by the Contracting Officer or the authorized representative:
>
> (a) *Hourly rate*. (1) Hourly rate means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are –
>
> (i) Performed by the Contractor;
>
> (ii) Performed by the subcontractors....
>
> ....

(2) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed.

(3) The hourly rates shall be paid for all labor performed on the contract that meets the labor qualifications specified in the contract....

(4) The hourly rates shall include wages, indirect costs, general and administrative expense, and profit....

(5) Vouchers may be submitted once each month...to the Contracting Officer or authorized representative. The Contractor shall substantiate vouchers (including any subcontractor hours reimbursed at the hourly rate in the schedule) **by evidence of actual payment** and by–

(i) Individual daily job timekeeping records;

(ii) Records that verify the employees meet the qualifications for the labor categories specified in the contract; or

(iii) Other substantiation approved by the Contracting Officer. [Emphasis added]

....

(8) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis. If no overtime rates are provided in the Schedule and overtime work is approved in advance by the Contracting Officer, overtime rates shall be negotiated....

....

(d) *Total cost.* It is estimated that the total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule, and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price....

> (e) *Ceiling price*. The Government will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule.... When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

5. Based on the record, USACEH issued eight task orders under the subject contract. The first order was issued on 21 August 2008 and the last was issued on 18 August 2010. This appeal only concerns the labor hour task orders. (R4, tabs A-5 to -12; am. compl. ¶ 3, answer ¶ 3)

6. By letter dated 20 December 2010, the contracting officer (CO) notified appellant that auditors had completed an internal review of the contract and isolated invoices and determined that GaN's employees were working certain hours for which they were not being paid, yet appellant billed the government for those same hours. Additionally, the CO indicated that the invoices did not include proper substantiation of these expenses as required by the Payments clause. Specifically, the CO states: "The contractor never states that it actually paid the employee for those hours [billed]." Thus, the CO required that GaN provide the necessary substantiation that it made actual payment to the employees for all hours claimed in those invoices. (R4, tab B-38)

7. Appellant responded, by letter dated 28 December 2010, averring, *inter alia*, that its employees are exempt under the Fair Labor Standards Act (FLSA) because they are compensated on an annual salary, not an hourly basis. Appellant also informed the CO that its proposed rates, which were accepted by the government, were based on an employee's annual salary, not an hourly rate, and that all hours worked will be charged and billed to the contract. Finally, in addition to agreeing to provide the requested substantiation, appellant contended that the Payments clause states that the government will pay the contractor for all hours performed by the contractor. According to appellant, it does not state that GaN "can only be paid for hours that their employees are compensated for thus allowing for exempt employees to be paid on a salaried basis versus hourly per the FLSA." (R4, tab B-39)

8. The CO responded, by letter dated 4 March 2011, disagreeing with appellant's reasoning and conclusions by stating: "If your firm does not incur certain costs for your employees, pursuant to FAR 52.232-7, these costs are not billable to the Government under the labor hours provisions of the contract." The CO determined that GaN had

overcharged the government by $51,723.50 and advised that this amount would be deducted from the next invoice submitted. (R4, tab B-41) By email dated 10 August 2011, this amount was recalculated to $51,276.56. Further, the government determined that an additional $21,101.52 (for invoices received through June 2011) was overcharged, bringing the total to $72,378.08. (R4, tab B-47)

9. After meeting on 11 August 2011 to discuss the issue, appellant responded to the email the next day, disagreeing with the government's position and the amount of the government assessment. Appellant stated "[e]ven though we have to agreed to disagree about the assumptions that form the basis of the assessment it is clear from the data provided by [the CO] that the calculations need to be reexamined." (R4, tab A-49)

10. On 14 September 2011, the CO issued a final decision for a government claim in the amount of $72,378.08 (R4, tab B-34). By letter dated 11 November 2011, appellant filed a timely notice of appeal.

11. In support of its position, appellant submitted the affidavit of Darryl Wortman, the Chief Operating Officer of GaN. Attached to this affidavit are numerous exhibits which contain invoices, detailed labor charts, and time sheets for GaN and Fuqua employees under the subject contract. Mr. Wortman declares "I further certify the GaN's [sic] employees worked the number of hours reflected in the submitted vouchers, and that GaN paid its employees in accordance with their respective terms of employment for each of the hours they worked."

12. Five employees were identified as the subject of the government's withholding (App. Statement of Undisputed Material Facts ¶ 4; answer ¶ 5). We find that these employees actually worked the hours claimed that are the subject of this dispute and were paid their respective salaries. We also find that the government did not dispute Mr. Wortman's affidavit nor the accuracy of the attached exhibits and has not presented any evidence that these employees were not compensated.

Motion to Strike

Appellant also submitted the affidavit of its proposed expert, Milton Looney, Certified Public Accountant, who offered several opinions about the subject contract and its payment provisions. Specifically, Mr. Looney opines: (a) the contract is a labor-hours contract and is not a cost-reimbursement contract; (b) GaN is entitled to be paid at the rates set forth in the contract; and (c) it is irrelevant whether GaN paid its employees an annual salary or an hourly wage–appellant is entitled to be paid at the hourly rate in the contract for each hour worked by its employees. The government moved to strike this affidavit, contending that it represented expert testimony on issues of law. We agree. Mr. Looney's opinions involve issues that are within the unique purview of the Board, i.e., whether appellant is legally entitled to be paid under the applicable

contract clauses. An expert opinion relating to the proper interpretation of a contract clause is an issue of law, and as such, is inadmissible. *See Mola Development Corp. v. United States*, 516 F.3d 1370, 1379 n.6 (Fed. Cir. 2008). Accordingly, the government's motion is granted and the Looney affidavit is stricken from the record.

DECISION

The government contends that under the plain meaning of the Payments clause and the contract billing procedures, appellant overbilled the government regarding the labor for "unexpensed hours" worked by the above-mentioned GaN employees. As such, its withholding was justified. (Gov't br. at 7) It argues that, except for the labor rates being fixed, the contract is a variant of a Time and Materials (T&M) contract and is tantamount to a cost reimbursement contract (*id.* at 8). The government states that the central issue is whether appellant, under a labor hour task order, is entitled to charge the government for the employees "unexpensed and uncompensated" overtime when the contract in effect made them all hourly workers (*id.* at 9). Because appellant's "novel and unsupportable interpretation allows the contractor to pocket undue windfall profits at taxpayer expense," the government avers that we "should not countenance such a 'weird and whimsical result'" (*id.* at 11, citation omitted). Appellant counters that it is entitled to be paid at the contract rates for the undisputed hours actually worked; overtime is not an issue because the contract does not provide for the payment of overtime premiums (app. br. at 3-4). Appellant alleges (and the government concedes, albeit for different reasons) that its salary agreements with its employees are irrelevant to the dispute. We agree.

The government appears to think that the various references to actual payment and cost mean that the contractor cannot recover for hours unless the employees were paid on an hourly basis. We disagree.

There is no dispute regarding whether the affected employees worked the hours billed to the government or were paid their salaries (finding 12). The dispute mainly revolves around interpretation of the Payments clause, and in particular, pursuant to Section (a)(5), what constitutes "evidence of actual payment" as well as Sections (d) and (e) which relate to costs. We interpret the arguments as follows: the government believes that evidence of actual payments under the Payments clause means appellant can only bill the government when it incurs an hourly cost and thus, if salaried employees are not paid for working extra hours, appellant cannot charge the government for those extra hours; while appellant counts the fact that its employees receive a salary as evidence of payment, buttressed by the fact that it is only billing for the hours charged to the government for its workers at the rates proscribed in the contract.

The analytic framework of rules to resolve disputed contract terms is well established. "In resolving disputes involving contract interpretation, we begin by examining the plain language of the contract." *Valley Apparel, LLC*, ASBCA No. 57606,

12-1 BCA ¶ 35,013 at 172,051 (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). We construe a contract "to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract." *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002). The threshold question is whether the plain language of the contract "supports only one reading or supports more than one reading and is ambiguous." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). If a contract is susceptible of more than one reasonable interpretation, it is ambiguous. *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992).

Here, based on the contract as a whole, we find the government's interpretation of the Payments clause and its arguments unpersuasive and without merit. The contract is clear: "Firm fixed price rates will be established [in] Section B of the contract. Task orders will be Labor Hour (LH) and/or Firm Fixed Price (FFP) and will be priced in accordance with the pricing schedule in Section B." (Finding 1) The pricing schedule is cross referenced within Sections (a)(2) and (3) of the Payments clause, which controls: "the amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed." Further, "[t]he hourly rates shall be paid for all labor performed on the contract that meets the labor qualifications specified in the contract...." (Finding 4) There is no question that the labor was performed and the employees paid their regular salaries (finding 12). The government's argument that the other provisions of the clause that refer to costs (Sections (d) *Total Cost* and (e) *Ceiling Price*) "make[] all employees hourly workers for purposes of reimbursing the contractor" (gov't br. at 11) is not a reasonable interpretation of the entire clause. First, these sections are not germane to the issue at hand as they merely reference "costs" in conjunction with the ceiling price of the contract and the procedures to ensure that the contractor does not exceed such limit. Secondly, and most importantly, these sections do not specifically prohibit the contractor from collecting its hourly rates for work performed by salaried employees (subject to the ceiling price). Thus, to "read out" or ignore portions of Sections (a)(2) and (3) of the Payments clause is not legally defensible.

CONCLUSION

The appeal is sustained. The appeal is remanded to the parties for a determination of quantum.

Dated: 13 July 2012

OWEN C. WILSON
Administrative Judge
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. 57834, Appeal of GaN Corporation, rendered in conformance with the Board's Charter.

Dated:

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