

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
BAE Systems Technology Solutions )  
& Services Inc. ) ASBCA No. 57581  
)  
Under Contract No. FA2517-09-C-8000 )

APPEARANCE FOR THE APPELLANT: Duane L. Brummett, Esq.  
Counsel

APPEARANCES FOR THE GOVERNMENT: Col Jennifer L. Martin, USAF  
Air Force Chief Trial Attorney  
Skye Mathieson, Esq.  
Amanda Page, Esq.  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE CLARKE

This appeal arises out of a contract between the Air Force and BAE Systems Technology Solutions & Services Inc. (BAE) for support services at Cavalier Air Force Station, North Dakota (CAFS). BAE claims \$61,335.95 for costs incurred for contracted out labor required to repair a generator damaged during a fire. The Air Force contends that BAE is responsible for all labor, whether contracted out or organic to BAE, required to complete the repairs. We have jurisdiction pursuant to the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101–7109. The parties elected to proceed under Board Rule 11 Submission Without a Hearing. The record consists of the parties' Rule 4 file documents and briefs. Only entitlement is before the Board for decision. We sustain the appeal.

FINDINGS OF FACT

1. Contract No. FA2517-09-C-8000 (8000) was awarded to BAE effective 1 January 2009 for various support services for the Perimeter Acquisition Radar Attack Characterization Systems (PARCS) located at CAFS (R4, tab 1). The contract's period of performance included a base year and eight option years (*id.*).

2. The contract included Section B – Supplies or Services and Prices that listed contract line item numbers (CLINs) for the work to be done in each of the performance periods (R4, tab 1 at 8-80). Details of the work requirements were stated in Section C – Descriptions and Specifications that incorporated the Performance Work Statement (PWS) for the PARCS (R4, tab 1 at 81, tab 2). The PWS consisted of four sections:

Section 1, PARCS Service Requirements; Section 2, Services Summary; Section 3, Government-Furnished Property (GFP), Equipment, Resources, Services and Information; and Section 4, Appendices (R4, tab 2 at 123-26). Section 1 included 15 chapters relating to various areas where service was required (*id.*). Section 4 included 6 appendices including Appendix 2, Definitions (*id.*).

3. Section B – Supplies or Services and Prices contained firm fixed-price (FFP) CLIN 1001<sup>1</sup> as follows:

Operations, Maintenance, & Support  
FFP

CONTRACTOR SHALL, EXCEPT FOR ITEMS, EQUIPMENT, VEHICLES AND SERVICES SPECIFIED IN SECTION 1 OF THE PERFORMANCE WORK STATEMENT AS GOVERNMENT FURNISHED PROPERTY OR SERVICES, PROVIDE NON-PERSONNEL SERVICES FOR ALL PERSONNEL, SUPERVISION, TRANSPORTATION, ITEMS, AND SERVICES NECESSARY TO PERFORM SERVICES AS STATED IN THE PERFORMANCE WORK STATEMENT, AND ACTIVITIES IAW CHAPTER 1, 2, 3, 4 (4.1 – 4.4), 5, 6, 7, 8 (not 8.18, 8.19, 8.20), 9, 10, 11, 13).

(Period of Performance: 1 Oct 09 – 30 Sep 10)

(R4, tab 1 at 20) Section B includes CLIN 1007<sup>2</sup> that allows the Air Force to place job orders on either a FFP or cost reimbursable (CR) basis as appropriate:

Individual Job Order Services  
COST

INDIVIDUAL JOB ORDERS ARE WORK NOT SPECIFICALLY IDENTIFIED IN THE PWS, BUT WHICH IS STILL WITHIN THE GENERAL SCOPE OF THE CONTRACT. THE GOVERNMENT ANTICIPATES USING FIXED-PRICE OR COST REIMB[U]RSABLE INDIVIDUAL JOB ORDERS TO BE DETERMINED BY THE CO ON A CASE-BY-CASE BASIS. INDIVIDUAL JOB ORDERS WILL BE NEGOTIATED BY THE CO AS THE ACTION OCCURS AND IAW CHAPTER 14 (see Section 4, Appendix 2, Definitions)

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<sup>1</sup> This is the first option year CLIN number which is relevant to this appeal.

<sup>2</sup> *Id.*

(Period of Performance: 1 Oct 09 – 30 Sep 10)

(R4, tab 1 at 23) Chapter 14 simply repeats the language in CLIN 1007 and adds management requirements (R4, tab 1 at 173). Section B includes CLIN 1008<sup>3</sup> as follows:

OM&S Local Purchase Items/ODCs

COST

LOCAL PURCHASE: THE CONTRACTOR SHALL BE REIMBURSED FOR WEAPON SYSTEM PARTS NOT OBTAINABLE THROUGH SBSS IAW SECTION 1, CHAPTER 6, PARA 6.3. NON-LOCAL PURCHASE ITEMS: THE CONTRACTOR SHALL BE REIMBURSED FOR SUPPLIES, MATERIALS, *PURCHASED SERVICES*, AND EQUIPMENT (Other Direct Costs) NECESSARY IN SUPPORT OF CAVALIER AFS. APPROVAL OF THESE REIMBURSEMENTS SHALL BE IAW SECTION 1, CHAPTER 6, PARA 6.3.1. ANY SINGLE PURCHASE OVER \$5,000 REQUIRES CO APPROVAL (SEE SECTION G, PARA G-5)

(Period of Performance: 1 Oct 09 – 30 Sep 10) (emphasis added)

(R4, tab 1 at 23) OM&S is defined in the PWS as “Operations, maintenance and support” (R4, tab 2 at 185).

4. Section G of the conformed contract<sup>4</sup> includes clause G-5, “CONSIDERATION AND PAYMENT,” that reads in part:<sup>5</sup>

a. Cost Reimbursables. For the basic period cost reimbursable (CR) CLINs, and option period CR CLINs, (if exercised) the Government will pay the Contractor such costs as are determined to be allowable, allocable, and reasonable in accordance with Part 31, Subpart 31.2 of the Federal Acquisition Regulation. For the purposes of this provision, allowable items of cost shall include costs for initial or

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<sup>3</sup> *Id.*

<sup>4</sup> The index identified Rule 4, tab 27 as the PWS for the “conformed contract” but the copy in the record is unsigned.

<sup>5</sup> Clause G-5 was included in the solicitation (R4, tab 74 at 909; supp. R4, tab 112 at 38), but is not the version of the original contract in the Rule 4 (R4, tab 1 at 96).

replenishment spare parts, operational materials/supplies, material handling, off-site depot level maintenance, packaging, freight and G&A burden (when applicable), for those approved purchases authorized by the PWS. Fee will not be allowed. All purchases will be reviewed and approved as specified in the PARCS PWS, Part 1, Chapter 6, para 6.3.1.

(R4, tab 26 at 573) PWS, Part 1, Chapter 6, paragraph 6.3.1. reads:

Local purchase support is available under the cost reimbursable CLINs for services, and for supplies not obtainable through SBSS. Obtain approval from 10SWS Mission Support Officer for all purchases under the cost-reimbursable CLINs.

(R4, tab 27 at 632) The previous contract, also with appellant, FA2517-C-04-0002 (0002), included clause G-3 that was substantially the same<sup>6</sup> as the current contract's clause G-5 and included "off-site depot level maintenance" (supp. R4, tab 112 at 38).

5. The PWS for the PARCS for Contract 8000 contains the following general scope statement:

**1.1. SCOPE.** Provide non-personal services to operate, maintain, and support (OM&S) the Perimeter Acquisition Radar Attack Characterization System (PARCS) and site at Cavalier Air Force Station (CAFS), North Dakota. Services encompass base support including management of radar and mission computer maintenance, civil engineering, environmental functions, security, transportation, supply, fuels, sensitive and non-sensitive communications and operation of the precision measurement equipment laboratory. Cavalier AFS receives limited support from Grand Forks AFB, located approximately 90 miles south of Cavalier. Contractor shall provide all necessary personnel, administrative, and managerial resources necessary on a continuous, 24-hours-a-day, 7-days-a-week (24/7) basis to meet mission requirements as specified in this PWS. The Contractor shall also interface with other Contractors, and/or Government agencies in support of all programs and efforts dealing with evolution and/or operation of systems and

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<sup>6</sup> Clause G-3 included "consultant services" not found in G-5 and different cites at the end of G-3 (supp. R4, tab 112 at 38).

equipment, as well as in providing day-to-day site support services.

(R4, tab 2 at 127)

6. Chapter 4 of the PWS, "MISSION SYSTEMS MAINTENANCE" includes five sections: 4.1. General Maintenance; 4.2. Communications-Electronics (C-E) Maintenance Management; 4.3. Test, Measurement and Diagnostic Equipment (TMDE); 4.4. Precision Measurement Equipment Laboratory (PMEL); and 4.5. Military Strategic, Tactical, Relay System (MILSTAR) (R4, tab 2 at 137-40). Section 4.1. includes the following:

**4.1. GENERAL MAINTENANCE.** The contractor shall perform all authorized organizational, intermediate, and depot level maintenance. Plan, schedule, direct, organize, coordinate, control, document, report, and execute all actions necessary to maintain mission equipment operability and availability. Maintain logs, records, inspection forms and Maintenance Information Systems (MIS) reflecting equipment status, inspections, and maintenance performed.

(R4, tab 2 at 137) Section 4.2. included the following:

**4.2. COMMUNICATIONS-ELECTRONICS (C-E)  
MAINTENANCE MANAGEMENT**

....

**4.2.6. Repairs.** The Contractor shall repair equipment at the lowest level of maintenance. The contractor shall request depot level maintenance when the maintenance required is beyond the scope, capability, and authorization given.

....

**4.2.6.1.3. Request for Assistance.** Submit maintenance assistance requests for Technical Assistance (TA), Engineering Assistance (EA), Emergency Depot Level Maintenance (EDLM) or Urgent Depot Level Maintenance (UDLM) (*see Appendix 6, R-4.1*).

(R4, tab 2 at 137-38)

7. Chapter 8 of the PWS, "CIVIL ENGINEERING" includes the following:

....

## **8.5. ELECTRICAL**

**8.5.1. Power Plant.** The Contractor shall operate, maintain, and repair the power plant generators and ancillary equipment to provide continuous regulated power to Cavalier AFS.

....

**8.5.1.2. Generators.** The Civil Engineering Maintenance Inspection and Repair Team (CEMIRT) will perform the 12,000 and 24,000 hour Preventative Maintenance Inspections (PMIs). The Contractor shall forecast and coordinate CEMIRT PMIs with 21 CES/CECR at least one year prior to required completion for funds programming. The Contractor shall calibrate all gauges and meters during CEMIRT PMIs.

**8.5.1.3. PCCIE/RPIE.**<sup>7</sup> The Contractor shall operate, maintain and repair all mission-essential PCCIE/RPIE systems to ensure 99.99% availability, equivalent annual downtime of 53 minutes IAW AFSPCI 32-1010, attachment 1.

....

**8.5.2. Emergency Generators.** The Contractor shall perform the following emergency generator tasks:

**8.5.2.1.** Operate, maintain, repair and inventory emergency generators and ancillary equipment.

**8.5.2.1.1.** Perform oil changes and analysis IAW AFI 32-1062, Ch 10, Paragraph 10.1-10.2.

**8.5.2.1.2.** Maintain operation and maintenance records and submit maintenance data and inventory. (see Appendix 6, R-8.10).

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<sup>7</sup> Power Conditioning and Continuation Interface Equipment/Real Property Installed Equipment (R4, tab 2 at 70-71).

**8.5.2.2.** Develop, implement, and post complete starting, stopping, operating, load transfer, and emergency shutdown instructions in conspicuous locations near the auxiliary power unit to include single line diagrams of electrical and mechanical systems showing normal and emergency configurations IAW AFI 32-1062, paragraph 4.4 through 4.5.3.

(R4, tab 2 at 152, 154-55) The previous Contract 0002 contained a different version of the requirement to maintain the emergency generators:

**1.8.1.5. ELECTRICAL**

**1.8.1.5.1. Power Plant.** Provide continuous regulated power to Cavalier Air Force Station.

....

1.8.1.5.1.3. All power plant generator depot level maintenance/repair and preventive maintenance outside of the contractor's in-house capabilities will be performed by Civil Engineering Maintenance Inspection And Repair Team (CEMIRT), to include 12,000 and 24,000 hour preventive maintenance inspections (PMIs). Forecast and coordinate these PMIs with 21st CES site support at least 1 year prior to required completion for funds programming.

(Supp. R4, tab 113 at 43)

8. Section 4, Appendices, Appendix 2, of the PWS for Contract 8000 includes a list of definitions including the following:

**DEPOT LEVEL MAINTENANCE.** That maintenance performed on equipment requiring major overhaul. Depot level maintenance includes: repair, replacement, or a complete rebuild of parts, assemblies, subassemblies, or the end items. It also includes the manufacture, reclamation, and testing of parts, assemblies, etc., when required.

**EMERGENCY or URGENT DEPOT LEVEL MAINTENANCE.** The replacement work required to restore real property facilities damaged by fire, storm,

explosion, and other disasters to preserve mission capability and protect and preserve government property or personal safety.

**IN-HOUSE WORK.** These two terms<sup>[8]</sup> have the same contractual connotation; they refer to all capabilities and personnel that the contractor must provide to accomplish the responsibilities of this contract, but not including services subcontracted to another contractor.

**INTERMEDIATE LEVEL MAINTENANCE.** That maintenance performed on equipment requiring minor overhaul. Intermediate maintenance includes: the periodic inspection and servicing of equipment; the repair or replacement of unserviceable parts, assemblies, subassemblies, and components; the local manufacture or reclamation of non-available parts; and the calibration of instrumentation and protective devices.

**MAINTENANCE.** The retention of material and equipment in a serviceable condition or action taken to restore material and equipment to serviceability through repair, rebuilding, and reclamation.

**MISSION ESSENTIAL RPIE/RPIE SYSTEM.**

Equipment or system required for support of the mission sensor system. Any equipment or system that causes an OPSCAP RED, such as, but not limited to, HVAC chiller, computer system power, and power plant is considered mission essential.

**OPERATION, MAINTENANCE, AND SUPPORT.**

Includes the operation, maintenance (scheduled and unscheduled), support, and management necessary to satisfy the operational requirement. Contractor support includes repair, lubrication, equipment alignment, installation of government-approved modifications, testing, performance monitoring, data gathering, data processing, and corrosion

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<sup>8</sup> In the previous contract Statement of Work (SOW) this definition was titled “**IN SERVICE/IN-HOUSE WORK**” (supp. R4, tab 113 at 107). In the 8000 contract PWS “**IN-SERVICE**” was deleted but the wording of the definition was not changed from the previous SOW which is why it refers to “two terms.”



control, and the maintenance and dissemination of logs, drawings, records, and forms. The contractor on-site maintenance support will encompass all organizational, intermediate, and depot level maintenance. Consultant technical support necessary to resolve equipment or facilities maintenance problems will be at contractor expense.

**ORGANIZATIONAL MAINTENANCE.** The systematic, timely, and periodic inspection and servicing of equipment which results in elimination of hazard to life and property, induces maximum reliability of equipment, and creates the minimum number of major and costly repair jobs, and produces the optimum utilization of equipment throughout its serviceable life.

**POWER CONDITIONING AND CONTINUATION INTERFACE EQUIPMENT (PCCIE).** Any of the following forms of power conditioning and continuation systems: power conditioning without continuation for use during power fluctuations, frequency changing transformers, surge suppressors, filters, and motor generators.

**REAL PROPERTY INSTALLED EQUIPMENT (RPIE).** Government owned or leased equipment, apparatus, or fixtures which aid in the function of real property and are an integral part of government owned or leased real property.

**REPAIR.** Restoring a failed or failing facility, system, or item of equipment so it may be used effectively for its designated purpose. Restoring or replacing components damaged by the elements or by fire, storm, explosions, or other disasters. It further consists of overhauling, reprocessing, or replacing deteriorated constituent parts, equipment, or materials. For the purpose of the CE portion of this statement of work, the term maintenance includes all repair work.

(R4, tab 2 at 189, 191-97)

## Notice of Concern

9. On 3 August 2009 the Air Force contracting officer (CO) sent BAE a Notice of Concern (NOC) enumerating three areas of “noticeable developments in contract performance” (R4, tab 29). The first, part a, was that BAE was not meeting the 99.99% availability requirement whereby the mission essential equipment could not be unavailable for more than 53 minutes a year (*id.* at 712). The second, part b, was BAE’s questioning of its responsibility for conducting depot level maintenance outside of its on-site capability (*id.* at 714). In support of the position that BAE was required to perform depot level maintenance, the CO provided the following rationale:

- PWS paragraph 8.5.1. Power Plant required BAE to “operate, maintain and repair the power plant generators and ancillary equipment to provide continuous regulated power to Cavalier AFS” (R4, tab 27 at 636).
- PWS Section 4, Appendix 2, Definition of Operation, Maintenance, and Support that includes “[t]he contractor on-site maintenance support will encompass all organizational, intermediate, and depot level maintenance” (R4, tab 27 at 677).
- PWS paragraph 8.5.1.2. provides the only outside depot level maintenance support of 12,000 and 24,000 hour preventive maintenance inspections (PMIs) by the Civil Engineering Maintenance Inspection and Repair Team (CEMIRT) (R4, tab 27 at 637).
- PWS Chapter 4, Mission Systems Maintenance, paragraph 4.1 General Maintenance required BAE to perform “all authorized organizational, intermediate, and depot level maintenance” (R4, tab 27 at 619).

(R4, tab 29 at 714)

10. On 14 August 2009, BAE responded to part b of the NOC as follows:

BAE Systems disagrees with the assertion that the Power Plant equipment is a Mission System. PWS Chapter 4 defines Mission Systems as Comm-Electronics, TMDE, PMEL and MILSATCOM. Our understanding, based on the PWS and Air Force AFI 32-9005, is that the generators are defined as Real Property Installed Equipment (RPIE).

AFI 32-9005, Paragraph 3.1 – *Real Property Installed Equipment (RPIE)* states: *List any generator installed in a facility on the real property record as RPIE. A permanently installed generator that is an essential component of an electrical power system and supports mission essential or critical functions is considered RPIE equipment.*

Additionally, BAE Systems disagrees that the PWS instructions found in Chapter 4 pertaining to maintenance for Mission Systems are applicable to the maintenance of RPIE as defined in Chapter 8. We believe that PWS Chapter 8 clearly defines the requirements for RPIE equipment maintenance management.

(Supp. R4, tab 121)

11. The CO responded to BAE's responses to the 3 August 2009 NOC on 11 September 2009 (R4, tab 31). Concerning the depot level maintenance issue, the CO again provided his rationale:

- PWS Chapter 4, Mission Systems Maintenance, Chapter 8, Civil Engineering, and AFI 32-9005 do not define RPIE.
- PWS Section 4, Appendix 2, Definitions, Mission Essential RPIE/RPIE System includes, "Any equipment or system that causes an OPSCAP RED, such as, but not limited to, HVAC chiller, computer system power, and power plant is considered mission essential."
- PWS Section 4, Appendix 2, Definitions, Operation, Maintenance and Support includes, "on-site maintenance support will encompass all organizational, intermediate, and depot level maintenance."
- PWS Section 4, Appendix 2, Definitions, Repair includes, "[r]estoring a failed or failing facility, system, or item of equipment so it may be used effectively for its designated purpose. Restoring or replacing components damaged by the elements or by fire, storm, explosions, or other disasters. It further consists of overhauling, reprocessing, or replacing deteriorated constituent parts, equipment, or materials."

(R4, tab 31 at 722-23)

12. Option year one was exercised by Modification No. P00012, 14 September 2009, and had a performance period of 1 October 2009 through 30 September 2010 (R4, tab 14).

### The Fire

13. A fire on 25 January 2010 damaged the emergency generators (R4, tab 58 at 809).

14. In a 24 February 2010 email, the Air Force acknowledged that the "Mod 4" generator had been released to BAE for repairs and authorized BAE to begin purchasing

parts needed for the repair (R4, tab 37 at 742). BAE responded on the same day stating, "I understand we are responsible for repairs, however some repairs are beyond our capability, such as cleaning and drying the windings in the generator. This is a specialized function that can not be done by BAE." (*Id.* at 741) The Air Force responded stating that if BAE did not have the expertise to perform all repairs, it was obligated to subcontract the work at its expense (*id.*).

15. On 2 March 2010, BAE wrote the Air Force stating, "BAE Systems believes the repair/replacement of the Module #4 generator and associated systems as a result of the recent catastrophic fire on 25 Jan 2010 is outside the scope of the contract and therefore we are not liable for its repair costs" (R4, tab 38).

16. The CO responded on 9 March 2010 disagreeing with BAE stating that while the Air Force would reimburse the costs of repair parts, pursuant to PWS paragraph 8.5.2.1., BAE was responsible for paying for subcontract labor needed to repair the Module #4 generator (R4, tab 41).

17. In a 10 March 2010 email to the CO, BAE took the position that it would not perform any work or repair on the Module #4 generator until it reached a "mutually acceptable" agreement on who was responsible for subcontract labor to complete the repairs (R4, tab 43). The Air Force responded on 19 March 2010 directing BAE to perform the repair work (R4, tab 48). BAE responded on the same day stating that it will perform the repair, but that it will collect the costs it considers outside of its scope of work and will submit a request for equitable adjustment (R4, tab 49).

18. The record includes a "FY 2010 CONSTRUCTION PROJECT DATA" sheet (DD form 1391) containing a cost estimate for "[r]epair damage to Standby Generator #4 from catastrophic fire." The total cost estimate was \$702,797.00. The most expensive repair was the alternator repair (\$620,860.00) that consisted of cleaning and testing stator and rotor poles (\$46,486.14), rewinding rotor poles (\$104,544.00) and rewinding stator (\$339,768.00). (R4, tab 47)

19. On 10 May 2010 the CO issued a Performance Assessment Report (PAR) containing the following assessment:

Failed to begin repairs on Mod 4 generator. After several communications between the Govt and BAE, the Contracting Officer (CO) directed BAE on 19 Mar 2010, to repair the emergency generator damaged by the 25 Jan 2010 fire. Failure to perform upon direction from CO constitutes "failure to perform" contract requirements that can lead to termination by the Government for default. Corporate directed "stop work" in spite of contractual requirements,

may have detrimental impact to Government and Management business relations.

(R4, tab 62 at 853) BAE responded stating in part:

BAE Systems recognizes the Contracting Officer's author [sic], however in this case the direction from the government represented a cardinal change to the contract of such magnitude (directing BAE Systems to pay the estimated \$600,000 in labor cost for restoration services provided by a vendor) that due diligence both contractually and legally was required.

(*Id.*) BAE stated that it had initiated the repairs and that vendors were on-site (*id.*).

20. In an 11 May 2010 letter to the CO, BAE stated that it would repair the Module #4 generator "under dispute," but that it considered the Air Force's direction to be a cardinal change to the contract for which it would submit a claim for equitable adjustment (R4, tab 55).

21. The CO held a government only meeting on 2 June 2010 with "our Subject Matter Expert from CE" to discuss the language of the PWS as it related to the repair of the Module #4 generator. The meeting was documented in a 3 June 2010 email containing the following relevant excerpts:

The customer stands by his initial interpretation that the Government expects BAE to make all repairs in accordance with the definition of Repair. He asserts that if for some reason there was a catastrophic event at the site, the Government would in good faith, pay to Restore the site to like or better than condition. But responsibility for normal wear and tear and other circumstances outlined in the PWS (Repairs) should fall to that of the successful contractor.

....

I read to the group Jeremy's interpretation provided by Charlotte that states "It would be a situation where it was decided to pay to have an item fixed, paying for the service, rather than pay to buy the item new." I asked a couple of other COs what their definition or determination of that statement would be; while we all agree that it's rather vague. One CO stated that given the "intent" of IJOs to be "new

work”, this statement suggests to them that it would be smarter for the Government to pay for repairs of an item (such as the generator) than to pay for a new generator, but first, we have to remember that the contractor was hired to Operate, Maintain and Support the Radar site. Hence, the definition of Maintenance/Repair.

So then we moved on to the line item description which states, “INDIVIDUAL JOB ORDERS. Consists of new work, minor construction, or upgrades to real property, RPIE, PCCIE, EAID or ITE,” wondering if it’s here that we need to work on the definition. It was determined that this description is clear, again supporting the position that the compensation for repairs of the generator do not fall under this CLIN, but to that of BAE.

We then moved to “Purchased Services”. Jeremy’s email to BAE stated that purchased services reimbursement “will be rare”. “The CLIN language is all encompassing but not all inclusive.” Within the contract, CLIN 0108, it states “THE CONTRACTOR SHALL BE REIMBURSED FOR WEAPON SYSTEM PARTS NOT OBTAINABLE THROUGH SBSS IAW SECTION 1, CHAPTER 6, PARA 6.3.” Para 6.3.1. states, “Local purchase support is available under the cost reimbursable CLINs for services, and for supplies not obtainable through SBSS.” The team is unsure of the intent of identifying services here as this is applicable only to the Supply Support function and may be a pointer to CLIN ’07 for \_\_\_\_.<sup>[9]</sup>

Therefore, after several discussions regarding the definitions and intent of the PWS, the core team believes that the expectation that BAE will repair these generators under the contract without further compensation is valid and substantiated by the language found in the contract.

(R4, tab 72 at 897, 899)

22. On 10 June 2010, BAE sent the CO another letter further explaining its position on the labor costs associated with the repair of the Module #4 generator. BAE made two points. First, that the solicitation did not allow prospective bidders to include

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<sup>9</sup> The word is obscured by a hole punch.

costs for outside vendor labor costs for items that could not be repaired on-site. BAE identified two instances where such outside repair was paid for by the Air Force. Second, BAE stated that the work needed to repair stator windings did not fall within the definition of the work required in PWS Chapter 8. (R4, tab 71 at 894-95)

23. On 16 June 2010, the CO sent an internal email presenting further analysis of BAE's position on the cost reimbursable CLIN:

I have read through BAE's initial proposal in response to BAE's position on the Cost Reimbursable CLIN.

First, however, I needed to extract what the Government's requirements were in the solicitation.

In accordance with the CLIN description, COST LOCAL PURCHASE: THE CONTRACTOR SHALL BE REIMBURSED FOR WEAPON SYSTEM PARTS NOT OBTAINABLE THROUGH SBSS LAW SECTION 1, CHAPTER 6, PARA 6.3. NON-LOCAL PURCHASE ITEMS: THE CONTRACTOR SHALL BE REIMBURSED FOR SUPPLIES, MATERIALS, PURCHASED SERVICES, AND EQUIPMENT (Other Direct Costs) NECESSARY IN SUPPORT OF CAVALIER AFS. APPROVAL OF THESE REIMBURSEMENTS SHALL BE LAW SECTION 1, CHAPTER 6, PARA 6.3.1. ANY SINGLE PURCHASE OVER \$5,000 REQUIRES CO APPROVAL. (SEE SECTION G, PARA G-5) Para G-5 states, G-5 CONSIDERATION AND PAYMENT a. Cost Reimbursables. For the basic period cost reimbursable (CR) CLINs, and option period CR CLINs, (if exercised) the Government will pay the Contractor such costs as are determined to be allowable, allocable, and FA2517-09-C-8000 P00034 Page 125 of 152 reasonable in accordance with Part 31, Subpart 31.2, of the Federal Acquisition Regulation. For the purposes of this provision, allowable items of cost shall include costs for initial or replenishment spare parts, operational materials/supplies, material handling, off-site depot level maintenance, packaging, freight and G&A burden (when applicable), for those approved purchases authorized by the PWS. Fee will not be allowed. All purchases will be reviewed and approved as specified in the PARCS PWS, Part 1, Chapter 6, para 6.3.1. And para 6.3.1., states, Local purchase support is available

under the cost reimbursable CLINs for services, and for supplies not obtainable through SBSS. Obtain approval from 10SWS Mission Support Officer for all purchases under the cost-reimbursable CLINs.

I have highlighted depot level maintenance because in accordance with the PWS, the definition is, DEPOT LEVEL MAINTENANCE. That maintenance performed on equipment requiring major overhaul. Depot level maintenance includes: repair, replacement, or a complete rebuild of parts, assemblies, subassemblies, or the end items. It also includes the manufacture, reclamation, and testing of parts, assemblies, etc., when required. And, in accordance with PWS para 4.1. GENERAL MAINTENANCE. The contractor shall perform all authorized organizational, intermediate, and depot level maintenance.

Clearly, the PWS indicates that the contractor is responsible for all maintenance. Now, did BAE understand that - -

(R4, tab 74 at 909) The email went on analyze BAE's proposal concluding that BAE was responsible all labor costs (*id.* at 910-12).

24. In a 29 June 2010 email, BAE reported that the alternator rotor poles and stator were cleaned and dried, functioning, and that rewinding would not be required for the repair (R4, tab 93 at 1035). In response to this notification, the Air Force inquired if BAE's request for equitable adjustment was now "closed" because the rewinding by highly skilled craftsman was not required (*id.* at 1034). BAE responded stating that even though rewinding was not required, drying the poles was required and that the specialized equipment needed to perform the drying was not available on-site. BAE indicated that it would still request and equitable adjustment because it was not capable of performing the work. (*Id.*)

25. On 13 July 2010, the CO responded to BAE's 10 June letter essentially restating the Air Force's position that it would not pay for labor to repair the Module #4 generator (R4, tab 98). On 8 November 2010, BAE submitted a request for equitable adjustment (REA) claiming \$61,335.95 for "purchased services" needed to complete the repair of the Module #4 generator (R4, tab 109). The REA identifies the generator work as:

(1) Removal, transportation, clean-up, repair, and transportation and reinstallation of the repaired generator by Dakota Services, Inc. (DSI);



- (2) Removal of the rotor from the generator, recondition of the rotor, reinstalling the rotor into the generator by Western Engineered Solutions, Inc.;
- (3) Sprinkler system repair by Dakota Fire Protection, Inc.; and
- (4) Mileage, expenses, and labor to tune-up and adjust the generator's diesel engine by Jasper Engineering & Equipment, Inc.

(R4, tab 109 at 1085) BAE explained that it was entitled to reimbursement under cost reimbursement CLIN 1008 because the work was not within the scope of fixed-price CLIN 1001 (*id.* at 1086).

26. The CO denied the claim by a final decision dated 4 January 2011 (R4, tab 111). The reasoning for the denial was that CLIN 1001 required BAE to perform services as stated in the PWS, that PWS paragraph 8.5.2.1. requires BAE to “operate, maintain, repair and inventory emergency generators and ancillary equipment” and the definition of repair required BAE to do the work (*id.* at 1092). In the decision the CO stated that compensation under cost reimbursement CLIN 1008 was not appropriate quoting, “THE CONTRACTOR SHALL BE REIMBURSED FOR WEAPON SYSTEM PARTS NOT OBTAINABLE THROUGH SBSS IAW SECTION 1, CHAPTER 6, PARA 6.3”<sup>10</sup> (*id.* at 1093).

27. BAE appealed the final decision to the Board and the case was docketed as ASBCA No. 57581 on 8 April 2011.

### Declarations/Affidavits

#### Mr. Jeremy Lubbert

28. The Air Force submitted a one-page declaration from Mr. Jeremy Lubbert, the former CO for the PARCS contract (supp. R4, tab 123). Mr. Lubbert stated that he was the CO from February 2008 to December 2009 (*id.* ¶ 2). He participated in the negotiations with bidders, including BAE, leading up to award of Contract 8000 (*id.* ¶ 3). BAE was the incumbent contractor under the previous Contract 0002 (*id.* ¶ 5). Contract 0002 had a SOW that was changed to a PWS for Contract 8000 pursuant to guidance in FAR 37.102 (*id.* ¶ 6). The PWS had “many updates to the requirements from the requirements stated in the previous SOW” (*id.*). He did not recall, after reviewing documents, that there were any questions relating to cost reimbursement CLIN 1007 for repair during the solicitation phase (*id.* ¶ 7).

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<sup>10</sup> The decision does not appear to recognize the second part of CLIN 1008 providing for payment of costs for “NON-LOCAL PURCHASE ITEMS” including materials and services in support of CAFS that are unrelated to weapon system parts (findings 2, 3).

29. The Air Force submitted a more detailed supplemental declaration from Mr. Lubbert (supp. R4, tab 124).<sup>11</sup> His first point was that Contract 8000 was not simply a “recompete” (*id.* ¶¶ 1-11). He discussed the conversion of the SOW to the PWS and made the point that the cost history was well known and there was no longer “a high level of price-uncertainty as there had been a decade earlier” (*id.* ¶ 3). He said that the Air Force no longer wanted to “figure out what was ‘over and above’ *maintenance* work” but wanted “fixed-prices for all labor, maintenance, and repair work that is specified in the PWS” (*id.* ¶ 5). Mr. Lubbert stated, “CLIN 1007 was only intended to be used on extremely rare occasion [sic], if and when the parties encountered a situation not envisioned in the PWS” (*id.* ¶ 7). He did not directly address CLIN 1008, but did discuss clause G-5 that is referenced in CLIN 1008. He stated that G-5 was intended to “reimburse the costs of materials” (*id.* ¶ 8), and that all labor in the PWS was to be performed under fixed-price CLIN 1001 (*id.* ¶ 9). Mr. Lubbert stated that the language obligating the Air Force to perform depot level maintenance was removed because the Air Force wanted all maintenance labor to be performed under fixed-price CLIN 1001 (*id.* ¶ 10). He said the Air Force evaluated the staffing matrix on a pass-fail basis did not review it in detail (*id.* ¶ 12-14). Mr. Lubbert said nothing about discussing any of the intent behind the changes incorporated in the PWS with the bidders on Contract 8000.

Ms. Jeanie Schwab

30. BAE submitted an affidavit and supplemental affidavit from Ms. Jeanie Schwab (R4, tab BAE-1; supp. R4, tab BAE-4). She is BAE’s contracts manager and held that position for the previous contract, 0002, for 5 years for “the exact same work, with the same Air Force contracting officials, and the same Air Force site management officials, at the exact same location” (supp. R4, tab BAE-1, ¶ 3). The solicitation leading to Contract 8000 required proposers to submit a staffing matrix identifying the proposed labor to be used for the fixed-price work, CLIN 1001<sup>12</sup> (*id.* ¶ 4). She stated:

The PWS was written with words that sounded like the In-House Workforce was required to do every possible piece of work that could ever be done on a military base....which would have taken a staff of 10 times as many people, and would have required hundreds of millions of dollars worth of subcontracted off-site labor every year. However, both the Air Force and BAE Systems had the clear understanding that the FFP CLIN was not intended by the Air Force, or by BAE Systems, to encompass every possible repair to Cavalier Air Force Station.

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<sup>11</sup> The Air Force did not designate a Rule 4 tab for the supplemental declaration so the Board assigns it “supp. R4, tab 124.”

<sup>12</sup> Ms. Schwab’s affidavit refers to CLIN 1001 as 0X01 and CLIN 1008 as 0X08.

(*Id.* ¶ 5) In her supplemental affidavit she explained that her belief that the Air Force understood the FFP CLIN was not all encompassing is based on her experience from 1994 to 1999 where the Air Force repeatedly agreed to work that was “over and above” the scope of the FFP CLIN (supp. R4, tab BAE-4 at 2-3). She explained that the 8000 contract was a “recompete” of the previous contract and the scope didn’t change even though the SOW was converted to a PWS (*id.* at 3). She also explained that it was obvious that BAE did not price the FFP CLIN to compensate for any increase in workload (*id.* at 5), and that no one from the Air Force stated that the work required of BAE under the FFP CLIN had increased (*id.* at 8). Concerning the deletion of the sentence “[a]ll power plant generator depot level maintenance/repair and preventive maintenance outside of the contractor’s in-house capabilities will be performed by Civil Engineering Maintenance Inspection And Repair Team (CEMIRT)” (finding 7) in the 8000 contract, Ms. Schwab testified, “[y]es, we noticed it [during the proposal phase], but we did not interpret that to mean that any change would take place in regard to the work done by the CEMIRT team” (*id.* at 10). BAE did not ask the Air Force why the sentence was removed (*id.* at 13-14 ). She explained that the 8000 contract still required the CEMIRT to do the 12,000 and 24,000 PMI that required four men working seven weeks to perform the depot level maintenance during the PMIs (*id.* at 12).

31. Ms. Schwab stated that cost reimbursement CLIN 1008 was applicable to civil engineering work such as repairs to the emergency generators. The Air Force could use CLIN 1008 for “local purchase” of “off-site” services and supplies to accomplish “repairs” that were outside the scope of the fixed-price CLIN 1001. During the previous five years the Air Force tasked BAE to do many off-site depot level repairs through subcontractors under cost reimbursement CLIN 1008 for the emergency generators. (R4, tab BAE-1, ¶¶ 6, 8) CLIN 1008 referred to Section G, clause G-5, that provided that the cost reimbursement CLIN provided for the payment of allowable costs including “off-site depot level maintenance” (*id.* ¶ 14) (emphasis omitted).

32. Ms. Schwab described an emergency generator (diesel engine and electric alternator combination) as 30-feet long and 15-feet tall (supp. R4, tab BAE-4 at 10). There were six emergency generators in a nuclear-hardened facility with the PARCS (*id.*).

33. Ms. Schwab discussed depot level maintenance. She stated that typically a “depot” is an off-site centralized facility that performs highly complex repairs on military equipment. Usually depot level maintenance requires that the item to be repaired be moved to the depot for the work. However, where the equipment is too large to send to the depot, such as the PARCS emergency generators, a military depot repair team travels to the location of the equipment to conduct the maintenance. (Supp. R4, tab BAE-1, ¶ 23) In some instances repair was performed on the emergency generators by off-site subcontractors. The term “off-site depot level maintenance” as it applied to the

emergency generators included off-site contractors conducting maintenance on the emergency generators at Cavalier Air Force Station. (*Id.* ¶ 24)

## DECISION

### Contentions of the Parties

The fundamental disagreement between the parties relates to BAE's responsibility to conduct all maintenance, including all "depot level maintenance," on emergency generators under the fixed-price CLIN 1001 of the contract. BAE argues that it is only obligated to conduct depot level maintenance that is within its in-house capability; when that capability is exceeded, the work is to be performed under cost reimbursement CLIN 1008.<sup>13</sup> BAE relies heavily on the initial affidavit of its contract manager, Ms. Jeanie Schwab, in support of its arguments (app. br. at 12-23). BAE also presents a contract interpretation argument citing a variety of Contract 8000 provisions (*id.*).

The Air Force contends that the predecessor 0002 contract employed a SOW that was changed to the PWS used in the 8000 contract and that the PWS was "significantly different substantively than the SOW for the previous contract" (gov't br. at 4).<sup>14</sup> It therefore disagrees that BAE's experience during the predecessor 0002 contract is relevant to the proper interpretation of the 8000 contract. The Air Force also presents a contract interpretation argument based on a variety of Contract 8000 provisions, echoing the rationale in the final decision (finding 25). The CO states that CLIN 1001 is a fixed-price CLIN that requires BAE to "repair" an emergency generator damaged by fire. He then relies upon the contract's definitions of "repair" which he regards as obliging BAE to perform the work under this fixed-price CLIN. (Gov't br. at 8-9) In its reply brief, the Air Force cites to the Notice of Concern (NOC), and argues its only obligation to conduct depot level maintenance support for the Power Plant was specified in PWS 8.5.1.2 which provided for the CEMIRT to conduct the 12,000 and 24,000 hour preventive maintenance inspections (gov't reply br. at 2).

### Course of Dealing

BAE buttresses its position by arguing that Contract 8000 was a follow-on contract to Contract 0002 that involved the same work, same location, same Air Force representatives and "essentially the same PWS and terms and conditions" and that a

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<sup>13</sup> The judge asked BAE to clarify Ms. Schwab's testimony that the Air Force "understood" that the FFP CLIN scope had not changed, but the explanation remained course of dealing in the prior 0002 contract (supp. R4, tab BAE-4 at 1-6).

<sup>14</sup> The record does not contain any information relating to the government's price estimate for the 8000 contract.

course of dealing was established during the predecessor contract supporting BAE's interpretation of its obligations under the 8000 contract (app. br. at 3-5).

The RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981) sets out the basic rules regarding course of dealing:

§ 223 Course of Dealing

(1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.

....

*b. Common basis of understanding.* Course of dealing may become part of an agreement either by explicit provision or by tacit recognition, or it may guide the court in supplying an omitted term. Like usage of trade, it may determine the meaning of language or it may annex an agreed but unstated term. There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown, nor is it required that the course of dealing be consistent with the meaning the agreement would have apart from the course of dealing.

The Board has relied upon the Restatement in support of its decisions before. *See C. R. Pittman Constr. Co.*, ASBCA No. 54901, 08-1 BCA ¶ 33,777 at 167,178. However, the course of dealing argument depends on “essentially” the same contract provisions. *T&M Distributors, Inc.*, ASBCA No. 51405, 00-1 BCA ¶ 30,677 at 151,509 (“Justifiable reliance on a prior course of dealing requires proof of the same contracting agency, the same contractor, and essentially the same contract provisions.”).

BAE's course of dealing argument is problematic in this instance because of a change in contract language between the SOW in the 0002 contract and the PWS in the 8000 contract. The 0002 contract included the notion that BAE's obligation to repair the emergency generators was limited by its in-house capability, but the conversion of the

SOW in the 0002 contract to a PWS in the 8000 contract resulted in the deletion of the language referring to in-house capability.

The 0002 contract clearly specified that the CEMIRT would perform depot level maintenance that BAE could not perform in-house. Under the 8000 contract this language was deleted. Under the 8000 contract the CEMIRT was only responsible for PMIs. Since the language of the 0002 and 8000 contracts is not “essentially” the same in this regard, BAE cannot rely on course of dealing in support of its claim.

### The 8000 Contract

The claim in this appeal arose during the first option year (findings 12, 13). The 8000 contract Section B, CLINs relevant to this appeal during the first option period are CLIN 1001,<sup>15</sup> Operations, Maintenance, & Support; CLIN 1007, Individual Job Order Services; and CLIN 1008, OM&S Local Purchase Items/ODCs (finding 3). The 8000 contract’s PWS consists of four sections. The sections relevant to this appeal are Sections 1 and 4. Section 1, PARCS Service Requirements, includes fifteen chapters specifying the service to be provided. The chapters most relevant to this appeal are: Chapter 1, General Requirements; Chapter 4, Mission Systems Maintenance; and Chapter 8, Civil Engineering. (Findings 5, 6, 7) PWS Section 4, Appendix 2, Definitions, is relevant because the definitions serve to help interpret words included in PWS Chapters 1, 4, and 8 (finding 8).

### The Fire

On 25 January 2010 a fire damaged an emergency generator (finding 13). BAE notified the Air Force that although it was responsible for repair of the generator, the required work on the generator windings was beyond BAE’s capability (findings 14, 15). The Air Force took the position that if BAE could not do the repair itself, it was responsible to subcontract for the work at its expense under FFP CLIN 1001 (findings 14, 16). The Air Force directed BAE to do the work. BAE agreed “under dispute” and stated it would submit a claim for reimbursement (findings 17, 20). BAE estimated that if the rotor and stator poles required rewinding it would cost \$702,797 (finding 18). It was later determined that rewinding was not required; cleaning and drying was all that was required resulting in a claim for \$61,335.95 (findings 24, 25). BAE, however, remained adamant that it was not responsible for the cost of repairing the generator because the work was not within BAE’s in-house capability.

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<sup>15</sup> The first number represents the option year and the last number represents the CLIN number. Therefore, CLIN 1001 means CLIN 1 for the first option year (R4, tab 1 at 20).

## Depot Level Maintenance

As a preliminary step in this analysis, it is necessary for the Board to decide if the cleaning and drying of the rotor and stator windings was depot level maintenance. There are three levels of maintenance identified in the PWS: organizational, intermediate, and depot level (findings 6, 8). Depot level maintenance is defined in PWS, Section 4, Appendix 2 (finding 8). However, the definition alone does not answer the question of if rotor/stator cleaning and drying is depot level maintenance or not. We therefore look to the positions of the parties. BAE consistently stated that cleaning and drying the windings was outside of its capabilities (findings 10, 14), and outside of the scope of the contract (findings 15, 17, 19, 20). The Air Force disagreed. In its NOC the Air Force cited to PWS Chapter 4, Mission Systems Maintenance, paragraph 4.1., General Maintenance, to support its position that BAE was obligated to perform “all authorized organizational, intermediate, and depot level maintenance” (finding 9). The CO also took the position that BAE was required to perform depot level maintenance based on the definition of “Operation, Maintenance and Support” (finding 11). Based on these facts we conclude that both parties considered cleaning and drying the windings to be depot level maintenance. Therefore, we conclude that cleaning and drying the windings was depot level maintenance.

## SOW Conversion to PWS

In the 0002 contract SOW the Air Force agreed to send the CEMIRT to perform depot level maintenance when the work exceeded BAE’s in-house capability (finding 7). The sentence in 0002 contract SOW paragraph 1.8.1.5.1.3. that limited BAE’s obligation to perform depot level maintenance to its in-house capability was deleted when the SOW was transformed into a PWS for the 8000 contract (*id.*). However, all that deletion accomplished was to relieve the Air Force of its obligation to send its CEMIRT to perform depot level maintenance. Although it eliminates the Air Force’s obligation to perform depot level maintenance itself, it does not resolve the questions of if FFP CLIN 1001 requires BAE to perform all depot level maintenance or if the work could be performed by BAE under CLIN 1007 or cost reimbursement CLIN 1008 and paid for by the Air Force.<sup>16</sup> BAE agrees that it was responsible for the repair of the fire damaged emergency generator, but contends it falls under cost reimbursement CLIN 1008 (finding 14).

## Firm Fixed-Price CLIN 1001

The rest of our analysis involves classic contract interpretation. “When the contract’s language is unambiguous it must be given its ‘plain and ordinary’ meaning and

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<sup>16</sup> The Air Force retained the discretion to do the work itself by sending the CEMIRT team but was no longer obligated to do so.

the court may not look to extrinsic evidence to interpret its provisions.” *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (citations omitted).

CLIN 1001 is the firm fixed-price CLIN that requires BAE to provide non-personal services as stated in the PWS (finding 3). Services relating to BAE’s responsibility for the emergency generators are defined in PWS Chapter 8, Civil Engineering, paragraph 8.5.2. Emergency Generators<sup>17</sup> (finding 7). Subparagraph 8.5.2.1. required BAE to “Operate, maintain, repair and inventory emergency generators and ancillary equipment” (*id.*). The Air Force relies upon the definition of “repair” in PWS Section 4, Appendix 2 in support of its interpretation:

**REPAIR.** Restoring a failed or failing facility, system, or item of equipment so it may be used effectively for its designated purpose. Restoring or replacing components damaged by the elements or by fire, storm, explosions, or other disasters. It further consists of overhauling, reprocessing, or replacing deteriorated constituent parts, equipment, or materials. For the purpose of the CE portion of this statement of work, the term maintenance includes all repair work.

(Findings 8, 11) This is indeed a broad definition of repair and is encompassed by “maintenance” which has its own definition:

**MAINTENANCE.** The retention of material and equipment in a serviceable condition or action taken to restore material and equipment to serviceability through repair, rebuilding, and reclamation.

(*Id.*) There is also a separate definition of depot level maintenance in this appendix.<sup>18</sup>

**DEPOT LEVEL MAINTENANCE.** That maintenance performed on equipment requiring major overhaul. Depot level maintenance includes: repair, replacement, or a complete rebuild of parts, assemblies, subassemblies, or the

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<sup>17</sup> In Chapter 8 there are two subparagraphs dealing with generators: 8.5.1.2. Generators and 8.5.2. Emergency Generators. Because 8.5.1.2. deals with the CEMIRT 12,000 and 24,000 hour PMIs, we conclude that both paragraphs deal with emergency generators.

<sup>18</sup> There is no separate definition of depot level repair.



end items. It also includes the manufacture, reclamation, and testing of parts, assemblies, etc., when required.

(*Id.*) Likewise, these are broad definitions of maintenance and both encompass repair. The definitions of maintenance and depot level maintenance each incorporates repair, and therefore, there is no distinction among these in this contract as regards this dispute. It is also clear that BAE is responsible for “[r]estoring or replacing components damaged by the elements or by fire, storm, explosions, or other disasters.” The Air Force interprets this sentence to require all repairs and maintenance, including depot level labor necessary to fix the emergency generators, to be paid for by BAE. BAE, however, interprets this sentence to be limited to a firm-fixed price obligation tied to its in-house capabilities. This potential conflict in interpretations is resolved by looking at other language in the contract.

There is no mention of “depot level” maintenance/repair in the definitions of repair or maintenance or in subparagraph 8.5.2.1. (findings 7, 8). In contemporaneous documents, the Air Force CO points to the definition of “Operation, Maintenance, and Support” that refers to depot level maintenance, but the language in paragraph 8.5.2.1. is “[o]perate, maintain, repair”<sup>19</sup> so the definition of “Operation, Maintenance, and Support” is not instructive (findings 9, 11). This is a problem for the Air Force’s interpretations since we must read the contract as a whole and depot level maintenance/repair is found elsewhere in various provisions of the contract. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004) (“An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous.”).

To bring depot level maintenance/repair within the scope of subparagraph 8.5.2.1., the Air Force CO also referred to Chapter 4, Mission Systems Maintenance, paragraph 4.1. General Maintenance that reads in part, “[t]he contractor shall perform all authorized organizational, intermediate, and depot level maintenance” (findings 6, 9, 11, 23).<sup>20</sup> BAE disagrees that Chapter 4 applies to the emergency generators (finding 10). We agree with BAE. Chapter 4 applies to the four categories of equipment listed in Chapter 4’s four principle subparagraphs: 4.2. Communications-Electronics (C-E) Maintenance Management; 4.3. Test, Measurement and Diagnostic Equipment (TMDE); 4.4. Precision

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<sup>19</sup> The Section 4, Appendix 2, definitions of “maintenance” and “repair” do not refer to depot level maintenance. There is no stand alone definition of “operation.”

<sup>20</sup> The Air Force does not address the fact that within Chapter 4, paragraph 4.2.6. provides that BAE may request depot level maintenance “beyond the scope, capability, and authorization given.” Paragraph 4.2.6.1.3. allows the contractor to request assistance for Urgent and Emergency Depot Level Maintenance at a fixed-price, which lends support to BAE’s interpretation that it is only required to perform depot level maintenance within its in-house capability (finding 6).

Measurement Equipment Laboratory (PMEL); and 4.5. Military Strategic, Tactical, Relay System (MILSTAR) (finding 6). Emergency generators are not identified in Chapter 4. Chapter 4 and Chapter 8 serve different purposes; each has its own introductory paragraph and itemizes different equipment. The “areas of concern” of Chapter 4 and Chapter 8 are different. *See Harbor Construction Co.*, ASBCA No. 39039, 90-1 BCA ¶ 22,343 at 112,289 (“The areas of concern of the cited paragraphs are different, and the instructions regarding each do not conflict.”). Introductory paragraph 4.1.<sup>21</sup> to PWS Chapter 4 applies to the equipment identified in Chapter 4, not Chapter 8. This is another fatal flaw in the CO’s contemporaneous interpretation since it was another way the Air Force attempted to link the requirement to perform depot level maintenance/repair to Chapter 8. The CO’s interpretation applying the language in PWS Chapter 4, paragraph 4.1., to the emergency generators covered in Chapter 8 is not “within the zone of reasonableness.”<sup>22</sup> *States Roofing Corp. v. Winter*, 587 F.3d 1364, 1369 (Fed. Cir. 2009) (A reasonable interpretation need not be the best or only interpretation, but must be within the zone of reasonableness.).

We note further that the Air Force does not rely on the language of Chapter 4 in its briefs filed with the Board. In its Rule 11 brief, the Air Force quotes Chapter 4 Mission System Maintenance, paragraph 4.1, General Maintenance in its proposed findings (gov’t br. at ¶ 11) but does not refer to it in its argument. In its reply brief the Air Force selectively cites to the NOC. The NOC relied upon the language of Chapter 4, paragraph 4.1. that refers to “depot level maintenance” but the Air Force does not repeat that argument in its reply brief (gov’t reply br. at ¶ 26). In paraphrasing the NOC the Air Force writes, “[t]he NOC again noted the PWS’ requirement at paragraph 8.5.1 in an attempt to clarify questions about the definition of Depot Level Maintenance; it clarified that ‘On-site Maintenance Support will encompass all organizational, intermediate, and depot level maintenance’...” (gov’t reply br. at ¶ 26). The language relied upon by the Air Force in its reply brief comes from the definition of “Operation, Maintenance, and Support” in Chapter 4, Appendix 2 (finding 8). This is not the language in Chapter 8.5.2, Emergency Generators, paragraph 8.5.2.1 that requires BAE to “operate, maintain and repair” the emergency generators – “repair” not “support” (finding 7). While in its briefs the Air Force abandons the CO’s reliance on Chapter 4, Mission Systems Maintenance, subparagraph 4.1. General Maintenance, it continues to argue the wrong definition as if it matched the words in paragraph 8.5.2.1, which it does not.

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<sup>21</sup> The Scope paragraph in PWS Chapter 1, GENERAL REQUIREMENTS, which arguably might be applicable to all chapters, makes no reference to depot level maintenance (finding 5).

<sup>22</sup> The CO made this mistake in his 16 June 2010 analysis of BAE’s interpretation in which he used PWS Chapter 4, paragraph 4.1. to justify his conclusion that BAE was responsible for all depot level maintenance on the emergency generators (finding 23).

What we are left with is FFP CLIN 1001, which has relatively broad language as seen in the definitions of repair and maintenance but no requirement for the contractor to perform depot level maintenance/repair. Our conclusion that CLIN 1001 does not require BAE to perform all depot level maintenance/repair is supported by Ms. Schwab's un rebutted discussion of depot level maintenance/repair. The most complex level of maintenance/repair usually is performed at a "depot" that is typically an "off-site centralized facility" (finding 33). We agree with BAE that it would not be BAE's responsibility to perform all of the most complex maintenance/repair on the emergency generators because there is no evidence that CAFS is a "depot" or that the 8000 contract intended to create a "depot" at CAFS for the emergency generators.

#### Individual Job Orders CLIN 1007

CLIN 1007 provides for either cost reimbursement or fixed-price job orders for "WORK NOT SPECIFICALLY IDENTIFIED IN THE PWS, BUT WHICH IS STILL WITHIN THE GENERAL SCOPE OF THE CONTRACT" (finding 3). According to Mr. Lubbert, CLIN 1007 was only intended to be used on extremely rare occasions (finding 29). Nothing in CLIN 1007 or Chapter 14 says anything about depot level maintenance/repair. The government could order depot level maintenance under CLIN 0007 if it is not identified in the PWS but falls within the general scope of the contract.

#### Cost Reimbursement CLIN 1008

CLIN 1008, OM&S Local Purchase Items/ODCs is the cost CLIN that BAE asserts should be used to reimburse it for depot level maintenance outside of BAE's in-house capacity (findings 25, 29). It reads:

OM&S Local Purchase Items/ODCs  
COST

LOCAL PURCHASE: THE CONTRACTOR SHALL BE REIMBURSED FOR WEAPON SYSTEM PARTS NOT OBTAINABLE THROUGH SBSS IAW SECTION 1, CHAPTER 6, PARA 6.3. NON-LOCAL PURCHASE ITEMS: THE CONTRACTOR SHALL BE REIMBURSED FOR SUPPLIES, MATERIALS, *PURCHASED SERVICES* AND EQUIPMENT (Other Direct Costs) NECESSARY IN SUPPORT OF CAVALIER AFS. APPROVAL OF THESE REIMBURSEMENTS SHALL BE IAW SECTION 1, CHAPTER 6, PARA 6.3.1. ANY SINGLE PURCHASE OVER \$5,000 REQUIRES CO APPROVAL (SEE SECTION G, PARA G-5)

(Finding 3) (Emphasis added) CLIN 1008 covers two types of purchases: local purchase of weapon system parts<sup>23</sup> and ODCs/non-local purchase items (*id.*). The non-local purchase items allows reimbursement for “SUPPLIES, MATERIALS, PURCHASED SERVICES AND EQUIPMENT (Other Direct Costs) NECESSARY IN SUPPORT OF CAVALIER AFS” (*id.*).<sup>24</sup> CLIN 1008 specifically includes “PURCHASED SERVICES,” i.e., labor. CLIN 1008 does not reference depot level maintenance/repair. In order to determine if depot level maintenance/repair falls within the “NON-LOCAL PURCHASE ITEMS” we look to the definition of OM&S and Section G, clause G-5, referenced in CLIN 1008.

OM&S stands for Operation, Maintenance, and Support (finding 3). This is the same definition misapplied by the Air Force above. OM&S is defined in PWS Section 4, Appendix 2, as follows:

**OPERATION, MAINTENANCE, AND SUPPORT.**

Includes the operation, maintenance (scheduled and unscheduled), support, and management necessary to satisfy the operational requirement. Contractor support includes repair, lubrication, equipment alignment, installation of government-approved modifications, testing, performance monitoring, data gathering, data processing, and corrosion control, and the maintenance and dissemination of logs, drawings, records, and forms. The contractor *on-site* maintenance support will encompass all organizational, intermediate, and *depot level maintenance*. Consultant technical support necessary to resolve equipment or facilities maintenance problems will be at contractor expense.

(Finding 8) (Emphasis added) Accordingly, CLIN 1008 applies to “PURCHASED SERVICES” for “contractor on-site...depot level maintenance.” CLIN 1008 also refers to Section G, clause G-5, that reads in part:

**G-5, CONSIDERATION AND PAYMENT**

a. Cost Reimbursables. For the basic period cost reimbursable (CR) CLINs, and option period CR CLINs, (if exercised) the Government will pay the Contractor such costs as are determined to be allowable, allocable, and reasonable

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<sup>23</sup> We note that the weapon system language of this clause is limited to the purchase of parts, whereas the second type of local purchase is not.

<sup>24</sup> The Air Force internally expressed concerns about the proper interpretation of CLIN 1008 (finding 21).


in accordance with Part 31, Subpart 31.2 of the Federal Acquisition Regulation. For the purposes of this provision, allowable items of cost shall include costs for initial or replenishment spare parts, operational materials/supplies, material handling, *off-site depot level maintenance*, packaging, freight and G&A burden (when applicable), for those approved purchases authorized by the PWS. Fee will not be allowed. All purchases will be reviewed and approved as specified in the PARCS PWS, Part 1, Chapter 6, para. 6.3.1.

(Finding 4) (Emphasis added) Accordingly, allowable costs to be reimbursed under CLIN 1008 include "PURCHASED SERVICES" for "off-site depot level maintenance." Although the definition of OM&S refers to "on-site" depot level maintenance and clause G-5 refers to "off-site" depot level maintenance, we are obligated to read the contract as a whole and interpret language "harmoniously" where possible. *NVT Technologies*, 370 F.3d at 1159 ("When interpreting the contract, the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts."). We interpret these provisions harmoniously and conclude that BAE may perform either "on-site" or "off-site" depot level maintenance/repair under CLIN 1008 and be reimbursed by the Air Force. This interpretation makes particular sense given the size of the emergency generators which dictates that as much work is accomplished on-site as possible. We understand from the description of the invoices in BAE's REA that cleaning and drying the windings required removal and transport of the generator so the work could be done off-site by a subcontractor (finding 25).

#### CONCLUSION

Although not a model of clarity, the PWS sets forth a scheme that requires BAE to perform organizational and intermediate maintenance/repair services under fixed-price CLIN 1001 and depot level maintenance/repair services under cost reimbursement CLIN 1008. BAE is entitled to be reimbursed for repairing the fire damaged emergency generator under CLIN 1008. The appeal is sustained. The matter is returned to the parties for negotiation of quantum.

Dated: 18 September 2013

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

(Signatures continued)

I concur



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

I concur



REBA PAGE  
Administrative Judge  
Acting 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. 57581, Appeal of BAE Systems Technology Solutions & Services Inc., rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals