ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
CAE USA, Inc.	)	ASBCA No. 58006
	)	
Under Contract No. FA8223-10-C-0013	)	

APPEARANCES FOR THE APPELLANT: Joseph P. Hornyak, Esq.
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OPINION BY ADMINISTRATIVE JUDGE CLARKE ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

CAE USA, Inc., appeals from a contracting officer's final decision denying its claim for $668,094 for fringe benefits it is required to pay as a successor contractor pursuant to the Service Contract Act (SCA). The Board has jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. The parties filed cross-motions for summary judgment and oppositions/replies. The motions are appropriate for decision on summary judgment because the material facts are undisputed. Although we largely decide in favor of the government, we treat this as a grant of partial summary judgment. In its reply brief, appellant raised a legal theory, based on the same operative facts, that has not been adequately developed by either party and that remains to be litigated.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 6 November 2009, the government posted Solicitation No. FA8223-10-R-50094, entitled "KC-135 Aircrew Training System (ATS) Re-compete" on the Federal Business Opportunities website (R4, tab 3). The Request for Proposal (RFP) called for services in support of the KC-135 ATS at thirteen Air Force bases worldwide (R4, tab 4). The RFP contemplated the award of a firm fixed-price contract with a three-month "ramp-up" period, a one-year base period and nine one-year option periods for a total of ten years (R4, tab 4 at 5-201, 204).

2. On 26 April 2010, the government issued RFP Amendment No. 0006 to incorporate by reference two Collective Bargaining Agreements (CBAs) between the

International Association of Machinists and Aerospace Workers and the incumbent contractor, FlightSafety Services Corp. (FSSC), both effective on 1 October 2010. One of the CBAs was for the Altus, Oklahoma, AFB and the other was for all other CONUS locations (non-Altus). Potential offerors were informed they could obtain copies of the CBAs by contacting the contracting officer (CO). (R4, tab 11 at 2) CAE requested and received copies of the CBAs from the government (compl. and answer ¶ 12).

3. The copy of the Altus CBA provided to appellant included the following pertinent language:

ARTICLE XVII
GROUP BENEFITS

> **Section 1** Effective 1 January, 2008, the employees represented thereby as employees of Employer, shall continue to fully participate in and be entitled to the Employer's Corporate Benefit Program including the 401(k) program applicable to program employees not subject to collective bargaining agreement. Seniority (length of service) provided under Article VIII will apply. Employee eligibility and costs will continue to be defined based upon the Employer's and individual benefit program definitions. As a condition of continued eligibility for such benefit programs, all other company-wide policies and procedures of the benefit programs shall apply to all employees subject to this Agreement, except as specifically changed or modified by this Collective Bargaining Agreement. The cost share of the medical insurance will be eighty (80%) Company and twenty (20%) employee over the life of the Agreement.
>
> ....

ARTICLE XVIII
PAID TIME OFF

> ....
>
> **Section 3 – Purchase Time Off (PTO)** Employees may buy Purchased Time Off (PTO) to supplement Vacation, on a Pre-Tax basis through the use of the Flexible Benefits Program with Flex Credit Dollars. Employees may purchase up to 80 hours for a calendar year. The value of the PTO that is unused at the end of the year will be paid to the employee.

(R4, tab 11 at 33, 35-36) The non-Altus CBA provided to appellant contained substantially the same Group Benefits and Paid Time Off clauses (R4, tab 11 at 93, 96). The CBA's table of contents listed attachments A (seniority dates), B (hours of work and pay), C (paid time off), and D (unpaid time off) (R4, tab 11 at 4-5, 42, 45, 49, 58).[1] The CO did not provide attachments B, C, and D with the CBAs it made available to appellant (gov't reply br., attach. 1, ¶ 6; Hardman decl.; R4, tab 19).

4. The "Employer's Corporate Benefits Program" referred to in the body of the CBAs (as distinct from attachment B, C, and D) includes in pertinent part the following:

> FlightSafety Services Corp Users' Guide to the Benefits Program
>
> ....
>
> **401(k) Plan**
>
> This plan gives you a special opportunity to boost your retirement income by making tax-deferred investments while you are working. The company helps you build your retirement savings by contributing 3% of your annual salary to your account and by matching 50% of your contributions up to 8% of your annual salary. You manage how your money is invested in the plan.
>
> ....
>
> **FLEXIBLE DOLLARS**
>
> Each year, you are provided with a "flexible dollars" amount. This amount is based on your salary in effect on January 1, or your hire date if this is later. You can use these flexible dollars to offset the cost to you of purchasing any of the following benefits:
>
> - Medical Coverage
> - Dental Coverage

[1] Although the government included attachments B, C, and D in the Rule 4 in the same tab as Amendment No. 0006, they were not provided with Amendment No. 0006 as provided to potential bidders.

- Vision Coverage
- Personal Accident Insurance
- Purchased Time Off

Together, these plans make up an overall program that is often called a "cafeteria plan." ...

....

To calculate your flex dollars, you need to use the following formula: your annual salary as of January 1st or your date of hire, if later, times 3%, plus $1,400, divided by 24 pay periods. (annual salary x 3% + $1,400) / 24 = flex dollars per pay period.

Flexible dollars are tax-free when used to purchase benefits from the cafeteria plan, with one exception:

- If you use flexible dollars for Purchased Time Off (PTO), you will be taxed when you use your time off.

(R4, tab 7 at 1, 5, 10)

5. In an internal email, Mr. Jim Ward, CAE, wrote:

> Teri attached is a summary of the WRAP Rates for the KC-135. The [sic] was very little information on benefits included in the CBA's. The CBA provides for 11 holidays per year and a normal vacation schedule. The CBA's did not list the costs of health insurance, disability insurance, 401K contribution, etc. Therefore I used $4.25 per hour as cash in lieu, same rate we employ at Little Rock.

(Gov't reply br., attach. 3)[2]

[2] Attachment 3 included protective markings on the email and attached rate data. Pursuant to concurrence of appellant in its 16 April 2013 email, the Board removed and shredded the rate data and cancelled the markings on the email.

6. Appellant's proposal included the following:

> **Labor Fringe**
>
> Labor Fringe includes vacation, holiday, sick, jury duty, military leave, bereavement, and excused absence for direct employees, employee health benefits, FICA, FUTA, SUTA, Unemployment Tax, Workmen's Compensation, 401(k) match, Short Term Disability (STD) and Long Term Disability (LTD). Under our DCAA audited accounting system, these costs are pooled and allocated to all CAE programs/proposals as a percentage factor applied to direct labor.

(R4, tab 6 at 9)

7. Contract No. FA8223-10-C-0013 for the ATS requirement was awarded to appellant on 31 August 2010 (R4, tab 1).

8. During the process of negotiating with the labor union, appellant gained access to FSSC's Benefits Guide (*see* SOF ¶ 4), and learned that the fringe benefits relating to the 401(k) program and health benefits/flexible dollars exceeded what appellant had included in its proposal (app. opp'n and cross-mot., Deacon decl. at 2).

9. In a 7 January 2011 email to CO Hardman, Ms. Lowe, CAE, wrote:

> I wanted to give you a heads up that we have discovered that the CBAs that were provided as part of the RFP were not complete (i.e., did not [sic] attachments). During our meeting earlier this week with the Union, these missing attachments were provided. A quick review indicates the attachments contain additional benefits. We are in the process of thoroughly assessing the impact. We will provide formal notice to you, including the cost delta, no later than COB next Thursday (January 13th).

(R4, tab 18)

10. CO Hardman wrote back on 10 January 2011:

> I am aware of the "attachments". They are appendices described to me as FSSC internal policies. As such, they are proprietary to FSSC, were not provided to bidders, are NOT a formal part of the CBA, other than as referenced. I'm not

> even sure the union has the right or should have been showing them to you. As they are FSSC internal policy, external to the CBA, we need to remain neutral on this as you negotiate with the unions. How can you be bound by FSSC policy, even if referenced in the CBA?

(R4, tab 19) In a declaration attached to the government's reply brief, Mr. Hardman stated, "it is my belief that what was provided at the time were only the CBAs and Attachments [sic] A. I do not believe that FSSC provided me with copies of the Attachments B-D at that time." (Gov't reply br., attach. 1, ¶ 6)

11. On 28 June 2011, appellant submitted a Request for Equitable Adjustment (REA) for "additional [benefits] related to CBA benefits that were not identified during the RFP phase" by the government in the amount of $668,094.13 (R4, tab 29). The additional benefits were identified as:

> 1) Health care benefits beyond the 80/20 health insurance plan consisting of:
>   a. 3% of base wage
>   b. $1,400 annually
> 2) 401(k) program consisting of the following[:]
>   a. 3% employer contribution
>   b. Employer match of 50% of up to 8% of base wage

(R4, tab 29) On 20 December 2011, the government denied the REA (R4, tab 32). On 19 January 2012, appellant wrote to the government expressing its disagreement with the rationale for the denial of its REA (R4, tab 34). The government responded on 30 January 2012 stating that its denial was final (R4, tab 35). On 17 February 2012, appellant submitted a CDA certification for its REA/"Claim" (R4, tab 36). On 22 March 2012, appellant submitted its complaint to the Board (R4, tab 37). The appeal was docketed as ASBCA No. 58006.

DECISION

Contentions of the Parties

In its complaint and cross-motion, appellant makes three arguments concerning the fringe benefits: Count I, Failure to Disclose Superior Knowledge; Count II, Unilateral Mistake; and Count III, Breach of the Implied Duty to Cooperate and the Duty of Good Faith and Fair Dealing.

In its motion for summary judgment, the government argues that the CBAs provided to appellant mentioned the flex dollars and 401(k) but "[t]he scope and potential

cost cannot be known because they are not defined in the agreement [CBA]" (gov't mot. at 11). It then argues "[t]he reference in the CBAs to these benefits, without any explanation or detail with respect to the specifics, thus created a patent ambiguity, which required CAE to investigate further" (*id.* at 11-12) (citation omitted). The government concludes that because appellant failed to inquire, it should not be allowed to recover (*id.* at 14). Next, the government proceeds to argue that appellant cannot prove the elements required to establish unilateral mistake, failure to disclose superior knowledge and breach of implied duties.

Appellant filed an opposition and cross-motion for summary judgment. The government filed a reply to appellant's opposition and cross-motion. Appellant filed its reply to the government's reply. In its reply, appellant argues "[h]owever, the Contracting Officer had a statutory and regulatory obligation to obtain complete CBAs from the predecessor and inform prospective offerors of the fringe benefits that incumbent employees would be entitled to under the successor contractor rule" (app. reply br. at 7).

Unilateral Mistake

To prove unilateral mistake, appellant must prove the following:

> (1) [A] mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error; (3) prior to award the Government knew, or should have known, that a mistake had been made and, therefore, should have requested bid verification; (4) the Government did not request bid verification or its request for bid verification was inadequate; and (5) proof of the intended bid is established. [Citations omitted]

Macro-Z Technology, ASBCA No. 56711, 12-1 BCA ¶ 35,000 at 172,004.

Appellant cannot point to a "clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error." *Macro-Z Technology*, 12-1 BCA ¶ 35,000 at 172,004. Appellant knew it did not have the fringe benefit information referred to in the CBAs and "used $4.25 per hour" to account for the missing information (SOF ¶ 5). This is the exercise of business judgment. The government's motion as to unilateral mistake is granted.

Superior Knowledge

The elements of proof of superior knowledge:

> [I]s generally applied to situations where (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

UniTech Services Group, Inc., ASBCA No. 56482, 12-2 BCA ¶ 35,060 at 172,224 (quoting *American Ship Bldg. Co. v. United States*, 654 F.2d 75 at 79 (Ct. Cl. 1981)).

First, we deal with the missing attachments B, C, and D (SOF ¶ 3). We see nothing in the attachments that identifies the missing fringe benefit information. The missing information is in the benefits guide (SOF ¶ 4), that was not one of the attachments listed in the CBAs. In its motion, the government argues that appellant cannot prove the second and third elements of superior knowledge (gov't mot. at 18-19). We agree that appellant cannot prove the third element. The CBAs referred to flex dollars, 401(k) and the corporate benefits program (SOF ¶ 3), but provided no details of the benefits. Appellant knew it did not have the fringe benefit information but rather than seeking the missing information from the CO, it choose to use "$4.25 per hour" to account for the missing information (SOF ¶ 5). We conclude that appellant cannot prove the third element in that it knew fringe benefit information was missing and chose to do nothing to obtain it. The government's motion as to superior knowledge is granted.

Breach of Implied Duty to Cooperate and the Duty of Good Faith and Fair Dealing

Appellant argues, "CAE maintains that the Air Force breached its duty of good faith and fair dealing when it unreasonably abdicated its regulatory and statutory duties, causing it to erroneously withhold from offerors information regarding the unknown employee benefits" (app. reply br. at 17). The implied duty to cooperate and of good faith and fair dealing does not arise until after contract award:

> The Forest Service could not have breached the covenant of good faith and fair dealing by its pre-award conduct because the covenant did not exist until the contract was signed. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Restatement (Second) of Contracts* § 205 (1981). But that

> duty "does not deal with good faith in the formation of a contract." *Id.* cmt. c. As our sister circuits have explained, "because the existence of th[e] covenant [of good faith and fair dealing] depends on the existence of an underlying contractual relationship, there is no claim for a breach of this covenant where a valid contract has not yet been formed." *Mountain Highlands, LLC v. Hendricks*, 616 F.3d 1167, 1171 (10th Cir. 2010) (internal quotation marks omitted); *see also AccuSoft Corp. v. Palo*, 237 F.3d 31, 45 (1st Cir. 2001) ("[T]he covenant applies only to conduct during performance of the contract, not to conduct occurring prior to the contract's existence."); *Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 941 (2d Cir. 1998) ("[T]he implied covenant of good faith and fair dealing does not apply to...pre-contract conduct....").

Scott Timber Co. v. United States, 692 F.3d 1365, 1372 (Fed. Cir. 2012).

Appellant alleges breach of the implied covenant based solely on the government's pre-award conduct. Since the covenant does not arise until contract award, appellant's argument must fail. The government's motion as to breach of the implied covenant is granted.

Patent Ambiguity

Although the CBAs mention flexible dollars, 401(k) and FSSC's Corporate Benefit Program (SOF ¶ 3), they are silent about the details of the actual benefits. Appellant was aware of this fact and decided to add $4.25 per hour to account for the benefits rather than inquire about FSSC's Corporate Benefit Program (SOF ¶ 5). This situation is analogous to the line of cases dealing with missing information in specifications and drawings and the duty to inquire. In *Cambridge Marine Industries, Inc.*, ASBCA No. 37355, 91-2 BCA ¶ 23,894, the contract involved manufacturing shore power plugs used to allow ships in port to use shore electrical power. The contract required that "potting shall be performed by the contractor" in accordance with drawing 9000. *Cambridge Marine*, 91-2 BCA ¶ 23,894 at 119,712. Drawing 9000, however, did not "tell one how or what specifically to pot." *Id.* Cambridge Marine did not inquire about the potting requirement; a requirement that, when properly understood, increased the cost of the contract by 150%. The Board held, " [w]e have held previously that when directions to perform significant work required by the contract are omitted from the contract, their omission is patent, creating a duty on the part of the contractor to inquire before bidding." *Id.* Because of Cambridge Marine's failure to inquire, the Board denied its appeal. Based on *Cambridge*, we would grant summary judgment to the government were it not for the argument raised by appellant in its final reply brief discussed below.

Contracting Officer's Duty To Seek Missing Information

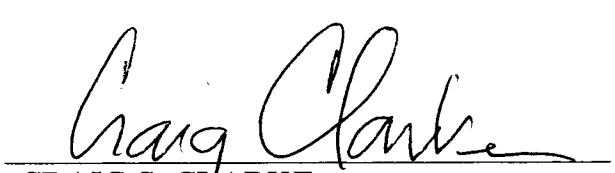
In its final reply brief, appellant argued that the Service Contract Act (SCA) places a duty on the CO to affirmatively seek out the missing benefit information. Appellant frames the issue this way, "[u]nder the Service Contract Act clause, the [predecessor] contractor must report to the Contracting Officer 'the ***full information*** as to the application and accrual of such wages and fringe benefits, including any prospective increases, to service employees engaged in work on the contract, ***and*** a copy of the collective bargaining agreement.' FAR 52.222-41(m)" (app. reply br. at 2-3) (emphasis in original). Therefore, the remaining issues for the Board to decide include if the CO discharged his duty by obtaining the CBAs or if the SCA places a duty on the CO to seek out all the missing information from the predecessor contractor and whether in fact appellant was required to pay the fringe benefits included in FSSC's Benefit Program but not detailed in the CBAs. If a regulatory or statutory duty that requires the CO to supply the missing information is proven, this could affect the duty to inquire analysis. If appellant is correct, we could conclude that the patent ambiguity was caused by the CO's failure to comply with the SCA. This would likely relieve appellant from its duty to inquire.

Even though we grant summary judgment to the government as to appellant's unilateral mistake, superior knowledge, and breach of implied covenant arguments this result does not dispose of the appeal. We therefore view this decision as granting the government partial summary judgment. This will significantly narrow the remaining issues to be litigated. If the parties agree that the facts as set out in this decision with respect to this newly raised legal issue are both undisputed and complete, then the issue becomes a question of law. The parties could resolve this case either on summary judgment or by record submission, if desired.

CONCLUSION

We grant the government's motion and dismiss appellant's claims of unilateral mistake, failure to disclose superior knowledge and breach of the implied covenant of good faith and fair dealing with prejudice. The case is remanded to the parties to deal with the remaining issue as explained above.

Dated: 23 May 2013



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

(Signatures continued)

I concur

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

I concur

RICHARD SHACKLEFORD
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. 58006, Appeal of CAE USA, Inc., rendered in conformance with the Board's Charter.

Dated:

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