ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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DynCorp International LLC	)	ASBCA No. 59244
	)	
Under Contract No. FA8617-12-C-6208	)	

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

In this appeal, appellant, DynCorp International LLC (DI), seeks $1,283,162.51 in costs arising from the contract referenced above in which DI provides serviceable aircraft material and support at various Air Force bases and Naval air stations for the T-6A/B Texan II aircraft (R4, tab 1 at 244). The dispute is whether DI can charge certain repair work on the aircraft engines to contract line item numbers (CLINs) that provide for payment on a time-and-materials basis, or whether this work falls under other CLINs that are firm-fixed-price.

DI submitted a certified claim to the contracting officer in which it sought to recover based on its interpretation of the contract (Count I), or based on alternate theories of unilateral mistake (Count II) and superior knowledge (Count III) (R4, tab 33). The contracting officer rejected all of DI's legal theories and denied the claim (R4, tab 34). DI appealed to the Board, raising the same theories. The government has moved for summary judgment. We deny the motion as to DI's contractual

interpretation theory and defer consideration on the unilateral mistake and superior knowledge claims pursuant to Board Rule 7(a).

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. DI is performing a Contractor Operated and Maintained Base Supply (COMBS) Services contract, through which it provides serviceable aircraft material and support equipment to support safe, flyable aircraft to meet the user's daily flight schedule (R4, tab 1 at 244 of 565).[1]

2. The contract has hundreds of CLINs (*see* R4, tab 1 at 2-178) but, for purposes of this motion, only three categories are significant. The "3XXX CLINs" required DI to provide all maintenance, repairs, overhauls and replenishments/replacements, including "consumables" (the contract does not appear to define this term), which are required as a function of flight hours. The contract type is listed as firm-fixed-price. These CLINs state that the work is to be performed in accordance with section 1.1.B of the performance work statement (PWS). (R4, tab 1 at 55)

3. Section 1.1.B of the PWS is entitled "Cost per Flight Hour – Aircraft." Among other things, this section required DI to:

> 1. Provide repair of reparable aircraft material
> 2. Provide replenishment of non-reparable aircraft material and consumables...

(R4, tab 1 at 259)

4. PWS section 1.1.B.1.a, Repair, required DI, among other things, to obtain off-site repair for reparable aircraft material ("including those parts subject to time-change requirements not specifically defined in PWS Section 1.1.D") (R4, tab 1 at 259).

5. PWS section 1.1.B.1.b, Failures Found During TCTO/TD Incorporation, provided that aircraft material or parts that are found to be "unserviceable during TCTO/TD incorporation" that are not specifically called out in the TCTO/TD, or failed parts discovered during a "one-time inspection (including overhaul inspections)" will be considered "normal wear and tear" and included in cost per flight hour (R4, tab 1 at 259). Elsewhere, the PWS states that a TCTO is a time compliance technical order and a TD is a technical directive (*id.* at 289), but it does not further define or explain what these are. The terms "one-time inspection" and "overhaul inspections" are also not defined.

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[1] Rule 4 cites at tab 1 are to the Bates-stamped numbers 1-565.

6. The definitions section of the PWS provides a definition of "Repair." It states that repair is the "restoration or replacement of material required to return it to a serviceable condition." (R4, tab 1 at 285)

7. The next group of CLINs of interest is the 4XXX CLINs, which involve major time change items. More specifically, we are interested in CLINs 4228 and 4229, which require overhaul of the engines. These CLINs are firm-fixed-price. (R4, tab 1 at 126) Although not specified in the contract, the engines require overhaul after 4,500 operating hours pursuant to the manual of the manufacturer, Pratt & Whitney (app. opp'n at 20-21, ¶ 36).

8. The term "overhaul" is not defined in the contract. Although the parties appear to agree that it involves the removal of the engine from the aircraft and shipment to a depot facility, which disassembles the engine and performs various maintenance or repair activities, the precise meaning of the term is disputed. The primary difference is that the government describes the procedure as a repair-like procedure where the parts are examined and, if found to be outside tolerances, they are repaired or replaced. DI, on the other hand, emphasizes that a significant part of the process involves the mandatory replacement of parts, regardless of whether they are damaged or outside tolerances. (*See* app. statement of genuine issues of material facts at 5 n.5 (contrasting respective definitions))

9. CLINs 4228 and 4229 stated that the contractor shall perform the work in accordance with PWS section 1.1.D (R4, tab 1 at 126).

10. PWS section 1.1.D, Major Time Change Items/Components, required DI, among other things, to "[o]btain off-site maintenance capabilities for overhaul of engines" (R4, tab 1 at 263).

11. The final CLINs of interest are the 5XXX CLINs entitled "OVER AND ABOVE ENGINES," which required DI to perform the work in accordance with PWS section 1.1.E. This work was identified as time-and-materials. (R4, tab 1 at 159)

12. PWS section 1.1.E, Over and Above, provided that: "The intent of O&A is to permit the delivery of COMBS services and ancillary parts that are within scope of the current effort but not necessarily delineated herein. This includes TCTO / TD support" (R4, tab 1 at 264)

13. "Over and Above" is defined in the PWS as:

> Charges not covered in the flying hour rate or separately priced in a contract line item. O&A Charges are

> Government directed tasks within scope of the contract but not specifically forecasted such as; bird strikes, lightening strikes, FOD, dropped or damaged components, as well as Government directed actions beyond the scope of the current contract but do not require a change in the PWS or any contract clauses.

(R4, tab 1 at 284)

14. The difference between work that is repair, and therefore cost per flight hour, and Over and Above work is further delineated in special contract requirement H320, Engine Over and Aboves. Section H320(a) provided that repair of the engines should be included in the cost per flight hour CLINs, "excluding any condition of or damage to an engine that results from a cause listed below." (R4, tab 1 at 200)

15. Section H320(b) then provides that "[f]or purposes of the Firm Fixed Price Engine Overhaul and Engine Repair Program, such excludable conditions are as follows," and then proceeds to list conditions that are at least somewhat overlapping with the definition of Over and Above in the PWS, such as improper use, acts of God, and belligerent acts (R4, tab 1 at 200).

16. Although section H320(b) refers to the "the Firm Fixed Price Engine Overhaul and Engine Repair Program," the government apparently concedes that there is no such program (*see* app. opp'n at 19, ¶ 33 (and lack of response from gov't)).

17. In their briefs, the parties rely heavily upon: a) questions and answers between the Air Force and potential offerors; b) letters of concern sent by DI to the Air Force during the solicitation period, and the Air Force response; c) DI's request for proposals to Pratt & Whitney; and, d) evaluation notices sent by the Air Force to one or more offerors (*see, e.g.*, gov't reply br. ¶¶ 11-14, 20-22, 28, 32; app. opp'n ¶¶ 16-18, 22, 43-47, 57, 64-76). Neither party has contended that these documents are incorporated in the contract.

18. DI also relies heavily upon trade practice. According to DI, engine "repair" generally involves localized inspection of an engine where only a portion of the engine is disassembled and damaged parts replaced (app. opp'n at 5-6, ¶ 8 (citing the deposition testimony of, among others, Mr. Wormsbacher, a Pratt & Whitney official). An overhaul is performed offsite at an engine depot facility and involves a complete breakdown of the engine into its component parts. The industry considers repair and overhaul to be separate and distinct events (*id.* at 6, ¶ 9). During an overhaul, there are certain parts that are always replaced (referred to as "100 percent replacement parts," "mandatory replacement parts," or "consumables.") There are other parts that may need to be replaced depending on their condition but it is

impossible to predict before disassembly which parts will need to be replaced; the industry refers to this as "on-condition" work. (*Id.* at 6-7, 17, ¶¶ 9-11, 28) The government disputes whether it is impossible to estimate the extent to which internal parts will need replacement (gov't reply br. ¶ 3).

DECISION

Standard of Review for Summary Judgment Motions

Pursuant to Board Rule 7(c)(2), the Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance in deciding motions for summary judgment. Under FED. R. CIV. P. 56(a), summary judgment may be granted if there is no genuine dispute as to any material fact. In considering such a motion, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Contract Interpretation and Extrinsic Evidence

In *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996), the Court of Appeals for the Federal Circuit held that when the provisions of a contract are plain and unambiguous they must be given their plain and ordinary meaning and a court or board may not resort to extrinsic evidence to interpret them. Subsequent to *McAbee*, the Federal Circuit has issued several decisions that illuminate when it is proper for the Board to consider extrinsic evidence, including trade practice.

In *Metric Constructors, Inc. v. NASA*, 169 F.3d 747 (Fed. Cir. 1999), the Court of Appeals held that it "adheres to the principle that 'the language of a contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.'" *Id.* at 752 (quoting *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965)). With respect to disputed contract terms, "the context and intention [of the contracting parties] are more meaningful than the dictionary definition." *Id.* (quoting *Rice v. United States*, 428 F.2d 1311, 1314 (Ct. Cl. 1970)). The Federal Circuit held that before the Board can conclusively determine whether a contract is ambiguous or unambiguous, it must consult the context in which the parties exchanged promises. Trade practice and custom illuminate that context. *Id.* However, the Court of Appeals also cautioned that a party cannot invoke trade practice where a contract was not reasonably susceptible of differing interpretations. Thus, a party must show that it relied reasonably on its interpretation when it entered into the contract before the Board can accept evidence of trade practice. *Id.*; *see also TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329 (Fed. Cir. 2006).

In *Jowett, Inc. v. United States*, 234 F.3d 1365 (Fed. Cir. 2000), the contractor attempted to introduce trade practice evidence to contradict contract language that the Federal Circuit held clearly required insulation of cold-air supply ducts. The court held that affidavits describing an industry practice of not insulating air supply ducts are "simply irrelevant where the language of the contract is unambiguous on its face" because the government has the right to vary from standard practice in the trade when it enters into a contract. *Id.* at 1369.

As we found in SOF ¶ 18, the government is relying on, among other things, questions and answers with the offerors during the solicitation period in support of its position that "on-condition" work is not an Over and Above and DI is, therefore not entitled to be paid for it on a time-and-materials basis. However, the government has not contended that these questions and answers and other cited materials were incorporated in the contract. Accordingly, we conclude that the questions and answers, letters of concern, DI correspondence with Pratt & Whitney, and the evaluation notices, are extrinsic evidence. *See KD1 Development, Inc. v. Johnson*, 495 F. Appx. 84, 88 (Fed. Cir. 2012) (solicitation not incorporated in contract is extrinsic evidence).

The Government Is Not Entitled to Summary Judgment

The government can point to several provisions in the contract that cast doubt on DI's contention that it is entitled to be paid for on-condition work as Over and Above. As stated above, CLINs 3XXX requires DI, among other things, to "provide...repairs" (SOF ¶ 2). Despite DI's contention that repair in the industry refers to activities that are local rather than off-site (app. opp'n at 50), the contract, in its discussion of the cost per flight hour work, specifically requires DI to obtain off-site repair:

> **1.1.B.1.a Repair**
> The contractor shall:
> 1. Obtain <u>off-site repair</u> for reparable...aircraft material

(R4, tab 1 at 259) (Underlining added) Moreover, this section of the contract also provides that failed parts discovered during overhaul inspections are cost per flight hour (*id.* ¶ 1.1.B.1.b). In addition, the PWS's definition of repair ("restoration or replacement of material required to return it to a serviceable condition") is not limited to localized work (*see* SOF ¶ 6).

Further, in contrast to the relatively broad definition of the work that is included under CLINs 3XXX, the contract contains a correspondingly narrow definition of "Over and Above" (CLIN 5XXX) that contemplates such work as involving

government-directed changes or work that is required as a result of an accident or mishap:

> Over and Above (O&A) - Charges not covered in the flying hour rate or separately priced in a contract line item. O&A Charges are Government directed tasks within scope of the contract but not specifically forecasted such as; bird strikes, lightening [sic] strikes, FOD [foreign object damage], dropped or damaged components, as well as Government directed actions beyond the scope of the current contract but do not require a change in the PWS or any contract clauses.

(SOF ¶ 13) (Emphasis added)

On the other hand, the government cannot identify any contract provision that specifically provides that on-condition work is cost per flight hour, which raises the issue as to whether the contract is silent with respect to on-condition work, or contains a latent ambiguity. The government attempts to bridge the gap in the contract language by extensive citations to extrinsic evidence. The problem for the government is that DI has its own citations to extrinsic evidence and, in our view, summary judgment is a poor vehicle for sorting this out.

A second problem for the government is that some of the contract terms are not defined, perhaps in recognition that contractors in this industry know, for example, what an engine overhaul is. But, for purposes of this motion, "overhaul" is not defined in the contract and the parties dispute what an engine overhaul encompasses. They also dispute whether an offeror can predict the level of on-condition work that may be expected during an overhaul. (SOF ¶¶ 8, 18) We cannot determine these issues on summary judgment.

We are also cognizant of the Federal Circuit's instruction in *Metric Constructors* that when determining the meaning of disputed contract terms we must examine the context and intention of the parties when they entered into the contract. *Metric Constructors,* 169 F.3d at 752. We believe that the various evidence cited by the parties, including the questions and answers, the letters of concern, the evaluation notices, and trade practice evidence provide information concerning the context in which the parties entered into this contract, and their intent. The weight and relevance of this evidence can best be determined during a hearing. At the hearing, DI can offer its extrinsic evidence (as can the government) but ultimately, DI bears the burden of demonstrating that the work in question is properly chargeable as Over and Above.

CONCLUSION

For the foregoing reasons, the government's motion for summary judgment is denied as to count one of the complaint and consideration is deferred for counts two and three.

Dated: 14 July 2015

MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

RICHARD SHACKLEFORD
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. 59244, Appeal of DynCorp International LLC, rendered in conformance with the Board's Charter.

Dated:

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