ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL

This appeal arises out of a contract between the government and appellant, DynCorp International LLC (DI), to perform a contractor operated and maintained base supply (COMBS) contract to support T-6A/B Texan II aircraft at various air force bases and naval air stations. The issue before us is whether DI is entitled to be paid for certain work performed during engine overhauls (referred to as "on-condition" work) on a time and materials basis. The Board conducted a four-day hearing from 21-24 July 2015. Only entitlement is before us. For the reasons set forth below, we deny the appeal.

FINDINGS OF FACT

Introduction

The COMBS contractor is responsible for on-site management and supply of parts for the T-6A/B, and obtains off-site "depot level" work, including engine overhauls, on the aircraft's Pratt & Whitney Canada PT6A-68 engines (R4 tab 1 at 244; tr. 2/26, 4/70-72). As described in *DynCorp International LLC*, ASBCA No. 59244, 15-1 BCA ¶ 36,084 (*DI I*), the government moved for summary judgment, contending that the

contract provided that on-condition work performed during the engine overhauls (that is, work required due to the condition of the part) was included in the firm-fixed-price contract work, and not the time and materials work (referred to as "over and above" work). We denied the motion in large part because both parties relied on extrinsic evidence to support its position. At the hearing, each party had the opportunity to present its extrinsic evidence and demonstrate the context in which it entered into this contract.

A Brief Summary of the CLINs

The contract has hundreds of contract line item numbers (CLINs) but only a limited number are significant for present purposes. The "3XXX CLINs" required DI to provide all maintenance, repairs, overhauls and replenishments/replacements, including consumables, which are required as a function of flight hours. These CLINs are identified as firm-fixed-price in that they are to be performed at a fixed rate per flight hour, but the overall amount paid is variable depending on the number of flight hours. (R4, tab 1 at 55; tr. 2/173) The government contends that the on-condition work should have been included in DI's cost per flight hour rate.

The "4XXX" CLINs cover major time change items such as the engines. CLINs 4228 and 4229 require overhaul of the engines and are firm-fixed-price (R4, tab 1 at 126). The contract provided for overhauls to be performed pursuant to the Pratt & Whitney PT6A-68 manual (*id.* at 184). Because on-condition work is performed during engine overhauls, these CLINs might seem a logical place to price on-condition work but neither party makes this contention.

Finally, some of the "5XXX" CLINs are entitled "OVER AND ABOVE ENGINES" and are paid on a time and materials basis (*e.g.*, R4, tab 1 at 159). The performance work statement describes over and above work, in part, as "permit[ting] the delivery of COMBS services and ancillary parts that are within scope of the current effort but not necessarily delineated herein" (*id.* at 264). DI contends that on-condition work is properly charged as over and above.

The Context – Two Prior Contracts

In the section of its proposal addressing past performance, DI identified a relevant contract it had performed as a life cycle support of U.S. Army C-12/RC-12/UC-35 aircraft (supp. R4, tab 65 at 6, 19). That contract provided for DI to provide "total aircraft system maintenance services, logistical support, and management processes to maintain the worldwide fleet of" these aircraft (supp. R4, tab 45 at 5). The contract provided for on-condition work to be paid on an over and above basis (*id.* at 10).

The second relevant contract is the predecessor COMBS contract (the "Legacy" contract), which was performed by the aircraft's manufacturer, Hawker Beechcraft

Corporation (HBC) (R4, tab 1 at 197) with L-3 Communications (L-3) as the primary subcontractor (tr. 2/166). On the Legacy contract, the Air Force intended the overhaul CLINs to be all inclusive, including on-condition work. Nevertheless, HBC/L-3 billed on-condition work as over and above (tr. 2/19-20, 168-69, 3/149). In preparing the solicitation for the instant contract, the Air Force intended to reduce the amount of work that the contractor could charge to over and above (tr. 2/167-70, 3/149).

The Context – Pratt & Whitney Overhauls and On-Condition Work

Pratt & Whitney Engine Services (PWES), an affiliate of the engine manufacturer, Pratt & Whitney Canada, provided engine overhaul services to both DI and to L-3 on the Legacy contract (R4, tab 33 at 4). James Wormsbacher, a PWES employee with a background as a mechanic who worked on the PT6 family of engines, and who now works in sales, testified at the hearing. He worked with DI on both the Army C-12 and the T-6A/B contracts. (Tr. 3/32-34)

As Mr. Wormsbacher testified, overhauls of the PT6A-68 engines are performed after 4,500 hours (hence the description of the engines in the 4XXX CLINs as a "major time change item") and involve disassembly of the engine into its smallest components, and cleaning, inspecting and testing those parts. This process involves mandatory replacement of some parts. These parts include gaskets, O-rings, packings, and locking tabs. (Tr. 3/36-37) Mandatory replacement parts are also referred to as "consumables" (tr. 3/39-40). The overhaul also includes on-condition parts, which are parts that must be cleaned and inspected and are only repaired or replaced if they fail to meet the inspection criteria (tr. 3/38-40). On-condition is a PWES term rather than an industry term (tr. 3/94-95). Importantly, about 80 percent of the cost of an overhaul stems from the on-condition work (tr. 3/99).

Mr. Wormsbacher drew a distinction between overhaul and "repair," but it appears that these are two closely related concepts. He testified that to "repair" an engine refers to the actions taken after an unscheduled event such as "foreign object damage, loss of oil pressure, [maybe] a prop strike, lightning strike, these kinds of things" (tr. 3/41-42). Despite this distinction, parts are repaired at both an overhaul and at a repair procedure (tr. 3/35-39, 76). At a repair procedure, the parts can be repaired to a slightly lower standard than during an overhaul; when a part is repaired at overhaul it must be repaired to the overhaul standards (tr. 3/38, 42). Both repairs and overhauls are performed at an engine depot (tr. 3/42). The Pratt & Whitney engine overhaul manual actually refers to repair as "light overhaul" rather than repair, which is a lay term (tr. 3/43-44).

PWES does not have a standard way of pricing engine overhauls; rather it depends on the customer's preferences. On one end of the spectrum, the customer can request that PWES bill by the hour and for installed parts; on the other end, PWES can charge an

all-inclusive firm-fixed price that includes both mandatory and on-condition work (tr. 3/49, 85).

The Solicitation

On 24 March 2010, the government issued a request for information/synopsis (R4, tab 23 at 7). The government issued a draft request for proposals (RFP) in October 2010 (supp. R4, tab 81 at 2; app. br. at 13). These documents are not in the record. The government issued the final RFP on 27 December 2010 (app. supp. R4, tabs 3-4). The relevant parts of the solicitation would later be incorporated in the contract (R4, tab 1 at 1).

Outreach to Offerors in 2010

On the FedBizOpps website, the government created a Bidder's Library for offerors to utilize (supp. R4, tab 81). The Bidder's Library consisted of data eligible for public release such as the draft solicitation, answers to questions posed by potential offerors, and consumption data (*id*). As one of DI's witnesses explained, "Consumption data is parts usage"[1] (tr. 1/85).

A. Questions and Answers Concerning Usage Data

The government conducted an industry day on 14 April 2010 to provide potential offerors information about the program and the T-6A/B, among other things (R4, tab 23 at 2). The government's presentation included an overview of the draft performance work statement (*id.* at 20). The government allowed offerors to ask questions at various sessions and then published the answers (*id.* at 10, 17, 43).

The Air Force received questions with respect to the scope of the consumption data to be provided. The answers suggested that the data provided would be detailed:

> Q36. Will the data cover the past 2, 3, or 5 years?
> A36. At a minimum, the USG will provide two years worth of demand data. The intent is to provide as much data as necessary for Offerors to adequately propose.
>
> ....
>
> Q38. How granular will the usage data be? For example, will it be per base? By fleet? Since all metrics are at the base level, could data be given at the base level?

[1] The parties appear to use the terms "consumption data" and "usage data" synonymously.

A38. Data will be as detailed as possible. Currently, the USG intends to provide demand data by base for the last two years.

(R4, tab 23 at 46)

On 18-19 August 2010 the Air Force held a requirements review at Randolph Air Force Base to present and discuss the draft performance work statement (app. supp. R4, tab 25; R4, tab 24). The Air Force once again provided time for questions and published the answers. Its answers concerning the scope of the consumption data again suggested that the data would be detailed:

Q48: Will the government provide consumption data down to the part number level?

A48: Yes. Part usage dat[a] for the period 2006 – 2009 will be provided in the Bidder's Library.

....

Q109: What data is available from the Data Accession Listed items on the current contract? I.E. Will the Government provide the data from the Data Accession List in the data library for all Bidders?

A109: Regardless of source, as much relevant data as possible will be provided in the Bidder's Library.

(R4, tab 24 at 50, 57)

Following the issuance of the draft RFP in October 2010, the Air Force received and responded to further rounds of questions and answers from prospective offerors (R4, tab 25). In a response posted to the Bidder's Library in December 2010, the Air Force clarified that the usage data provided did not pertain to the engine overhaul work:

192) Can bidders assume engine components and parts listed in the usage data are required for Hot Section Inspection (HSI) and general maintenance and not part of the FFP TCI engine overhaul program?

A: Yes.

(R4, tab 25 at 50) (Emphasis added)

Finally, in an answer posted to the Bidder's Library between January and March 2011, the Air Force again clarified that the data provided would be limited to the parts supplied by the contractor at the organizational level:

> **14.** Does the usage data provided in the bidders library comprise ALL parts transactions (i.e., issue, receipt, move, ship, transfer, re-stock, etc.) or does this data represent only transactions describing an issue from COMBS inventory to the user?
>
> **Answer**: This data only includes parts and support equipment issued by COMBS, including parts and support equipment issued to back shops, egress shops, etc. The vast majority of data is material issued to/for a specific aircraft. It does not reflect the more "supply chain"-type of transactions referred to in the question.

(R4, tab 26 at 13) Based on these answers, we find that the Air Force put offerors on notice that the usage data did not include depot level data from the engine overhauls.

B. Questions and Answers Concerning Cost per Flight Hour

At the August 2010 requirements review, the Air Force's presentation on the performance work statement included a discussion of cost per flight hour. Notably, one of the slides for the presentation states: "CPFH covers the repair, replacement, and replenishment of all parts, support equipment, and consumables for the T-6" (R4, tab 24 at 27) (emphasis added). The Air Force also answered questions concerning cost per flight hour, including:

> Q61: During a Major Time Change Item (TCI), additional maintenance occurs. Is it part of the TCI overhaul or is it additional Over and Above (O&A)?
>
> A61: This should be calculated as part of CPFH as it is Normal wear and tear. Refer to PWS section 1.1.D.
>
> ....
>
> Q108: For the time change items that have components that must be changed due to condition, will these components be considered O&A to the time change items FFP Section 1.1.D in the PWS[?]

A108: No. This will be covered in CPFH or cost of overhaul.

(*Id.* at 51-52, 57) (Emphasis added)

After the issuance of the draft RFP in October 2010, the Air Force answered a follow-up to question 61 from the requirements review in which it attempted to illustrate the distinction between cost per flight hour and over and above:

1) What is the effort referred to as "additional maintenance"? Why would this be included in the CPFH rather than the over and above TCI CLIN set up for the related overhaul (for instance engine repair)? Could government provide an example of this scenario where additional maintenance against a TCI occurs?

A: Example of additional maintenance: While doing an engine overhaul, if the fuel nozzles cannot be cleaned adequately to get an acceptable spray pattern, then replacement of the nozzle is to be considered part of cost per flight hour. If during the overhaul, it is determined the engine was overtemped due to operator error (not engine LRU failure) then the additional time and material not normally part of the overhaul is billed as additional maintenance (over-and-above, not necessarily part of the TCI).

(R4, tab 25 at 1) The Air Force also provided other answers to address the scope of cost per flight hour work:

161) Of the 3 major TCI items (engine, propellers and landing gear), if an item is found to be beyond economic repair and/or requires replacement for any reason, in which CLIN should the cost be accounted for?

A: If normal operations are the cause of an end item going BER, the cost to replace the end item is covered under CPFH. Please refer to PWS section 1.1.B.2.a. Additionally, please refer to Clauses H313 and H320 for additional information.

....

188) Will the government provide a feel for the scope of "Over and Above" work? Does this scope include any maintenance or AOG [aircraft on ground] support or is it primarily supply based?

A: Over-and-above typically involves repair and replacement of parts that result from induced failures. An LRU dropped by the T-6 maintenance organization is an example of an induced failure. Other over-and-above efforts do occur, however, the previous example is the most common/frequent instance. It is highly unlikely the Government will request AOG support from COMBS other than supply support functions.

....

197) For the 3 major TCI items (engine, propellers and landing gear), if an item is found to be beyond economic repair and/or requires replacement for any reason, in which CLIN should the cost be accounted for?

A: Propellers are not covered under CPFH and would be covered as an Over and Above if not considered an Overhaul. If the reason the other 2 Major TCI's are beyond economic repair is due to fair wear and tear, the replacement should be included in the Cost Per Flight Hour CLINs just like any other component of the aircraft. If the reason the other 2 Major TCI's are beyond economic repair is due to Beyond Fair Wear and Tear, as defined in the PWS, the replacement of such a part would be considered an over-and-above.

(*Id.* at 43, 49-51) (Emphasis added)

We find that the questions and answers taken as a whole placed offerors on notice that the Air Force intended on-condition work to be included in the cost per flight hour price, and would not be over and above work. For example, in response to question 108, the Air Force specifically answered "No" when asked if on condition work would be over

and above. Certainly, the answer was not perfect in that it indicated that on-condition work would be in cost per flight hour or the cost of the overhaul. What is important, however, is that both cost per flight hour and the overhauls were firm-fixed price and that the Air Force directly answered the question as to whether on-condition work was an over and above. Combined with other answers such as No. 188, which emphasized that over and above usually results from induced failures such as the maintenance organization dropping equipment, a reasonably prudent offeror would have been aware of the Air Force's intent.

Relevant Provisions from the Solicitation/Contract

The performance work statement incorporated in the RFP and contract had several provisions relevant to this dispute. First, section 1.1.B of the performance work statement governs "Cost per Flight Hour – Aircraft." This section provides:

> The contractor shall:
> 1. Provide repair of reparable aircraft material

(R4, tab 1 at 259)

The definitions section of the performance work statement defines "Repair" as "The restoration or replacement of material required to return it to a serviceable condition" (R4, tab 1 at 285). It further defines "Material" as "T-6A/B reparable and consumable aircraft material, and support equipment (SE) listed in the following manuals." These manuals include the "Illustrated Parts Catalog" and the "Maintenance Manual" for the aircraft. (*Id.* at 283) Neither party introduced these manuals into evidence but uncontroverted testimony from the Air Force established that these publications list the engines (tr. 2/83-84).

Further, section 1.1.B.1.b, provided that "failed parts discovered during a one-time inspection (including overhaul inspections) shall be considered normal wear and tear and thus included in CPFH" (R4, tab 1 at 259). The performance work statement provides that normal wear and tear "[o]ccurs when material has been used and maintained in a manner consistent with the intent of use and design for which it was manufactured" (R4, tab 1 at 284). By contrast, the performance work statement defines "Beyond Fair Wear and Tear" as damaged or failed parts that occur "when the damage o[r] failure is due to: Acts of God; aircraft components lost in flight (dropped objects), customer negligence or abuse; maintenance malpractice, misuse of technical data, improper installation by the USAF/USN; war damage; Foreign Object Damage (FOD)" (*id.* at 281).

Second, performance work statement section 1.1.E, Over and Above, provided that "[t]he 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" (R4, tab 1 at 264). The definitions section of the performance work statement provided:

> 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, dropped or damaged components, as well as Government directed actions beyond the scope of the current contract....

(*Id.* at 284)

Similar to the performance work statement definition of Over and Above, contract clause H320, "Engine Over and Aboves," provided that the following events are excludable from cost per flight hour:

> (1) Improper use...;
>
> (2) Acts of God such as lightning strikes, bird strikes, etc.;
>
> (3) Foreign object damage (FOD)...;
>
> (4) Oil or fuel system contamination;
>
> (5) Over-temperature or over-speed conditions;
>
> (6) Belligerent acts of any government or quasi-government body...;
>
> (7) Neglect, accidents, acts of vandalism or deliberate damage.

(R4, tab 1 at 200) Mr. Wormsbacher testified that he found clause H320 to be confusing. He noted that H320(a) provides that repairs are included in cost per flight hour but then in H320(b) it excludes from repair the very things that PWES considers to be repairs. (Tr. 3/97-99)

DI Experienced Difficulty in Obtaining Information from HBC

DI experienced difficulty in obtaining repair manuals and parts pricing information from the manufacturer, HBC, while formulating its proposal (app. supp. R4, tabs 8, 10, 11). DI also knew that there were "gaps" in the usage data provided by the government (tr. 1/26, 66-67). Despite these challenges, it made the decision to submit a proposal because it was able to obtain some of the new part pricing information from HBC; it

viewed the work on this contract as a "core competency" of the company; and it believed that it could make some "proper assumptions" about the gaps in information (tr. 1/36).

DI Retains PWES to Perform Engine Overhauls

DI prepared a request for proposals for engine subcontractors dated 3 December 2010 (app. supp. R4, tab 27). This request included a statement of work that contained a key provision not included in the government's performance work statement, namely, the DI statement of work specifically provided that repair or replacement of parts that do not meet the requirements of the overhaul and maintenance manuals and applicable technical directives would be priced as an over and above (*id.* at 20).

Mr. Wormsbacher did not review the government's RFP because PWES responds only to DI's RFP (tr. 3/82). PWES also generally ignores data provided in the government's bidder's library because it believes that its own data and sources are more reliable (tr. 3/114-15). PWES, through Mr. Wormsbacher, provided DI a proposal that provided that on-condition work would be paid on an over and above basis (tr. 3/62-64; supp. R4, tab 36 at 5; app. supp. R4, tab 12 at 5). DI and PWES thereafter entered into a subcontract that provided for on-condition work to be paid as an over and above (tr. 3/56-57).

In its proposal to DI, PWES noted that: "We have the complete technical history of this engine model from when the Air Force/Navy first took delivery in May of 2000" and "The Pratt & Whitney Customer Service Network is the only service provider to have undertaken a full overhaul of the PT6A-68 having accomplished fourteen (14) overhauls to date." (Supp. R4, tab 36 at 35-36) In 2010, PWES overhauled two of the PTA6A-68 engines for L-3 on the Legacy contract (supp. R4, tab 49; app. br. at 29; gov't br. at 45). An invoice from PWES to L-3 for work on engine Serial No. RA0066 is in the record (supp. R4, tab 49). It is not entirely clear what information from this invoice that HBC/L-3 forwarded to the government. The government contends that the invoices it received from L-3 during the Legacy contract "differ" from the invoice from PWES in the record (gov't br. at 45-46), but neither party has included them in the record. It is also not clear what restrictions the government faced in releasing the 2010 overhaul data to offerors. However, it is undisputed that the government did not include engine overhaul data in the Bidder's Library.

DI did not request any consumption data from PWES prior to award (supp. R4, tab 80, ¶¶ 6-7; app. br. at 30). Mr. Wormsbacher testified that PWES would object to providing other companies with the discount that it gave L-3, but he was unsure if PWES would object to providing other information in the invoices (tr. 3/132-33, 137-38). The record demonstrates that DI was able to obtain the PWES invoice for RA0066 post-award – including the discount information – so it is not clear why DI could not obtain this information preaward (supp. R4, tab 49). The record is silent with respect to DI's efforts

to obtain data on the 12 overhauls that PWES performed in addition to the two it performed in 2010.

Source Selection

The solicitation provided that the Air Force would evaluate pricing using a total evaluated price methodology (app. supp. R4, tab 4 at 662). The Air Force stated in a proposal analysis report that its analysis primarily consisted of: comparing the prices received from offerors; analyzing data other than certified cost or other data provided by the offeror (such as cost and technical narratives and evaluation notice responses); and comparison of proposed prices with independent government estimates (app. supp. R4, tab 41 at 8).

Testimony at the hearing demonstrated that the Air Force conducted a thorough analysis of pricing (tr. 2/205-14, 3/187-92). This analysis indicated that there was a fair amount of variability in CLIN prices but there was only a seven percent difference in the total evaluated price between DI and L-3. The Air Force reviewed the proposals for balanced pricing and sent out numerous evaluation notices; as a result of that process, the Air Force concluded that the offerors understood the requirements and that the CLIN pricing differences were based on different strategies (*id.*).

DI had the lowest total evaluated price at about $432 million. L-3 was second low at about $464 million. (App. supp. R4, tab 41 at 44) In May 2012, the Air Force's source selection authority determined to award the contract to DI (app. supp. R4, tab 96). The parties executed the contract on 1 June 2012. The base period of the contract had a value of $54,995,990 and the contract included four option years. (R4, tab 1 at 1)

DI's Certified Claim

The parties realized soon after contract performance began that they disagreed about the pricing of on-condition work. For example, on 19 December 2012, the contracting officer wrote to DI stating "There is a quite a bit of consternation regarding the over and above costs proposed for engine overhauls" (R4, tab 28 at 2). DI submitted a claim certified pursuant to the Contract Disputes Act on 1 November 2013 seeking payment of $1,283,162.51 for on-condition work during the base period of contract performance (R4, tab 33). The contracting officer denied the claim on 28 February 2014 (R4, tab 34). This timely appeal followed.

DECISION

Complaint Count One

DI styles count one of its complaint as "Contractual Entitlement" (compl. at 17). When interpreting a contract, "'the language of [the] contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.'" *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999) (quoting *Hol–Gar Mfg. Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965)). When the language of a contract is unambiguous, it must be given its "plain and ordinary" meaning and the Board may not look to extrinsic evidence to interpret its provisions. *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). Although extrinsic evidence may not be used to interpret an unambiguous contract provision, the Court of Appeals for the Federal Circuit has looked to it to confirm that the parties intended for the term to have its plain and ordinary meaning. *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (citing *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (en banc)). When a provision in a contract is susceptible to more than one reasonable interpretation, it is ambiguous and the Board may then resort to extrinsic evidence to resolve the ambiguity. *TEG-Paradigm*, 465 F.3d at 1338.

Even when a contract is unambiguous, it may be appropriate to turn to one common form of extrinsic evidence—evidence of trade practice and custom. *TEG-Paradigm*, 465 F.3d at 1338 (citing *Hunt Constr. Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002)). The Federal Circuit has explained that "'evidence of trade practice may be useful in interpreting a contract term having an accepted industry meaning different from its ordinary meaning—even where the contract otherwise appears unambiguous—because the 'parties to a contract...can be their own lexicographers and...trade practice may serve that lexicographic function in some cases.'" *Id.* (quoting *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000)). A contracting party cannot, however, invoke trade practice and custom to create an ambiguity where a contract was not reasonably susceptible of differing interpretations at the time of contracting. *Metric Constructors*, 169 F.3d at 752.

In *DI I*, we observed that there is no provision in the contract that specifically provides that on-condition work is part of the fixed price cost per flight hour. *DI I*, 15-1 BCA ¶ 36,084 at 176,185. However, we also held that there are several contract provisions that favor the government's interpretation. In general, the contract indicates that repair work falls under cost per flight hour and has a broad construction, while over and above is narrowly defined. Consideration of extrinsic evidence only reinforces this view.

A. Contract Language

We start with the language of the 3XXX CLINs. DI agreed to provide "all maintenance, repairs, overhauls and replenishments/replacements, to include consumables, which are required as a function of flight hours in accordance with COMBS performance work statement, more specifically Section 1.1.B, Section J, Attachment 1" (*e.g.*, R4, tab 1 at 55). Paring down the language, this provision requires DI to perform all repairs required as a result of flight hours. Engine overhauls are performed as a function of flight hours, namely after 4,500 hours of use. Thus, DI agreed to perform "all...repairs" that must be performed during the course of an engine overhaul.

Performance work statement, section 1.1.B, which describes the cost per flight hour work, is consistent with the 3XXX CLINs. It required DI to "Provide repair of reparable aircraft material." (R4, tab 1 at 259) The performance work statement defines repair broadly as "The restoration or replacement of material required to return it to a serviceable condition" (*id.* at 285). Material means "T-6A/B reparable and consumable aircraft material...listed in the following manuals...Illustrated Parts Catalog...Maintenance Manual" (*id.* at 283). As we have found, the engines are shown in both the Illustrated Parts Catalog and Maintenance Manual. Thus, the engines are reparable material. Further, sub-section 1.1.B.1.b provided that failed parts discovered during an overhaul inspection are part of cost per flight hour. Taken together, these provisions should have alerted a reasonably prudent offeror that cost per flight hour included repair of the engines as well as the repair/replacement of parts that failed to meet the inspection criteria at an engine overhaul.

The contract carved out some exceptions to the inclusion of repairs in cost per flight hour. As we have found, clause H320 provided that repairs would be performed in the cost per flight hour CLINs, with seven specific exceptions. These seven exceptions are preceded by the phrase "such excludable conditions are as follows" meaning that the seven exceptions are not simply examples. These seven exceptions could generally be described as conditions resulting from improper use of the engines, acts of God, accidents, or intentional acts. (*See* R4, tab 1 at 200) They stand in contrast to on-condition work where parts are repaired or replaced simply because the Pratt & Whitney manual requires that they be examined during the overhaul, and, if they do not meet established criteria, must be repaired or replaced. While it may not be possible to predict whether any specific part will need to be replaced during an overhaul, on a macro level the necessity for such work is predictable and can be priced. Thus, as we have found, Mr. Wormsbacher of PWES testified that about 80 percent of the overhaul cost is on-condition work and that PWES can provide a firm-fixed price for overhauls that includes on-condition work.

B. Extrinsic Evidence

Extrinsic evidence confirms this interpretation. As we found above, during the requirements review, the Air Force told potential offerors that "CPFH covers the repair, replacement, and replenishment of all parts, support equipment, and consumables for the T-6" (R4, tab 24 at 27) (emphasis added). This put offerors on notice that the Air Force expected them to include the pricing for the repair or replacement of "all parts" in cost per flight hour.

Further, as we found above, the Air Force published a number of answers to questions from potential offerors that, on the whole, clearly indicated that on-condition work should be considered part of cost per flight hour. For example, in response to the question "For the time change items that have components that must be changed due to condition, will these components be considered O&A to the time change items FFP Section 1.1.D in the PWS," the Air Force answered "No. This will be covered in CPFH or cost of overhaul."[2] To the extent that DI still viewed on-condition work as an over and above despite this and other answers set forth in our findings of fact, it should have confirmed this view with the Air Force before signing the contract.

The testimony of Mr. Wormsbacher of PWES about trade practice (which was most credible on this issue) does not alter our view. Mr. Wormsbacher testified that if an engine is taken off the aircraft for a repair event, this usually refers to an unscheduled event such as foreign object damage or a lightning strike, but he also testified that the Pratt & Whitney manual actually refers to such work as "light overhaul." More importantly, we understood Mr. Wormsbacher's testimony to be that the engine depot performs repairs at both a repair/light overhaul and at an overhaul after 4,500 hours of operation. (Tr. 3/42, 76)

Based on the Wormsbacher testimony, we understand "repair" to have somewhat of a dual meaning in this industry. In the broad sense, repair refers to the work that is done at both a light overhaul and a full overhaul. In a narrower sense, it refers to the actions taken after discrete events such as foreign object damage. DI interpreted repair in this narrower sense. The problem for DI, as illustrated by the Wormsbacher testimony, is that the contract is inconsistent with the narrower definition of repair. Clause H320

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[2] The Air Force contends that the contract incorporated the questions and answers. However, the Air Force has not identified any language specifically incorporating them; thus we hold that the questions and answers are extrinsic evidence. *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008) ("the language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract").

provided that repairs would be cost per flight hour but then excluded from repair "the very things we, Pratt Engine Services would consider a repair" (tr. 3/98). Mr. Wormsbacher testified that he would have needed to seek clarification of this provision (*id.*). Thus, to the extent that there is a trade practice of interpreting repair in this narrow sense, clause H320 was inconsistent with such an interpretation, signaling that the government was not following this practice. *See Jowett*, 234 F.3d at 1369 ("It is well-established that the government can vary from the norm in the trade when contracting for goods and services.").

Further, section 1.1.B.1.b of the performance work statement also signaled that the Air Force was not following the narrower definition of repair. As we have found, Mr. Wormsbacher explained that on-condition work stems from inspection of parts pursuant to the criteria in the Pratt & Whitney manual. Those parts that fail to pass the overhaul inspection criteria are repaired or replaced. Section 1.1.B.1.b provided that failed parts discovered during this inspection would be considered part of the cost per flight hour. This provision is inconsistent with DI's view that only repairs caused by discrete events such as foreign object damage are covered by the cost per flight hour CLINs.

C. DI's Other Arguments

DI contends that the contract has a latent ambiguity. It bases this argument in large part upon its view of trade practice. Its primary argument stems from a contention that repair and overhaul as they relate to engines "have very different meanings" and that an "engine is not 'repaired' during overhaul" (app. br. at 5-6, ¶¶ 9, 11). DI also distinguishes these activities by contending that repair requires a more limited work scope and is usually performed on-site, while overhaul is performed offsite at an engine depot facility such as PWES (*id.* ¶¶ 9-10). This latter point was contradicted by Mr. Wormsbacher, however, who testified that repairs are generally done at an engine depot (tr. 3/42).

Based on its understanding of repair, DI states that it "interprets 'repair,' as it applies to engines, to mean the on-wing or off-wing maintenance required to fix an engine that is not in serviceable condition – but that does not require a full teardown and end-to-end inspection, such as that required during an engine overhaul" (app. br. at 55). The problem with this argument as we have already explained is that it turns on interpreting repair in a narrow sense. Because repair has more than one meaning, and because clause H320 and performance work statement section 1.1.B.1.b are inconsistent with the narrower meaning, DI should have sought clarification before it pressed ahead. As we have found, the 3XXX CLINs require DI to perform "all...repairs." DI assumed that "all" meant something less than all at its own peril when it bid with this undisclosed assumption.

DI also contends that on-condition work does not fall under cost per flight hour because section 1.1.B.1.b uses the term "normal wear and tear," which is defined as "Occur[ring] when material has been used and maintained in a manner consistent with

the intent of use and design for which it was manufactured" (R4, tab 1 at 259, ¶ 1.1.B.1.b, at 284). According to DI, internal engine components cannot be maintained because they cannot be accessed short of removing the engine and overhauling it. Thus, DI argues, it is illogical to state that a part that cannot be maintained could be subject to normal wear and tear. (App. br. at 60-61) At best for DI, these contentions are not proven. Mr. Wormsbacher testified that internal engine parts can be maintained in the field (tr. 3/100). Similarly, the Air Force's program manager agreed that internal engine parts can be maintained in the field and gave examples of field maintenance procedures (tr. 2/90-91).

To buttress its position that there is more than one reasonable interpretation of the contract, DI contends that Tinker Air Force Base and L-3 also interpreted the contract differently. With respect to the former, DI points to one sentence in an email from a Tinker official who did not testify at the hearing (supp. R4, tab 84). In this email, the official indicated that Tinker prices on-condition work on "a case-by-case basis." Without testimony from this official, it is difficult to evaluate this email. However, testimony from other Air Force officials confirms that Tinker indeed priced the on-condition work differently but this may be due to differences in the fleet of aircraft it manages (tr. 2/129-34, 3/160). That there are different ways to price on-condition work is pretty clear at this point. After all, DI's contract with the Army for the C-12 aircraft provided that on-condition work would be paid as an over and above, while the Legacy contract provided that all of the overhaul work was part of the firm-fixed-price overhaul CLIN, and PWES as a subcontractor can price overhauls however the customer wants. Accordingly, even if Tinker's default position is to pay for on-condition work on an over and above basis, that is not probative of how the contract at issue addressed on-condition work.

DI has a slightly better argument with respect to L-3, which, as DI points out, was confused as to whether on-condition work should be priced in the 3XXX cost per flight hour CLINs or the 4228 and 4229 engine overhaul CLINs (app. br. at 70). Because the 3XXX CLINs refer not only to repairs but also to overhauls, and consumables (which Mr. Wormsbacher testified are the mandatory replacement parts during an overhaul (tr. 3/39)) the dividing line between these two sets of CLINs is not readily clear. However, that issue is not before us. As we found above, both of these CLIN sets are firm-fixed price. Even if there was some confusion as to which set of firm-fixed-price CLINs covered the on-condition work, this would not have led a reasonable offeror to conclude it was neither and expect to be paid for it on an over and above basis.

In summary, after consideration of all of the evidence, we hold that the contract required DI to perform on-condition work as part of cost per flight hour. The extrinsic evidence confirms this interpretation. We have considered the trade practice evidence but we conclude that trade practice does not support DI's position.

Count Two - Unilateral Mistake

Under FAR 14.407-4, a contracting officer may in limited circumstances rescind or reform a contract where the contractor has reported a bid mistake post award. Such determinations "may be made only on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was...if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake." FAR 14.407-4(c), (2). This FAR clause then sets out procedures for the contracting officer to follow in processing a mistake alleged after award. FAR 14.407-4(e).

Consistent with this FAR provision, the Board has required a contractor alleging a unilateral mistake to prove five elements by clear and convincing evidence: (1) a mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut clerical or mathematical error or 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; (4) the government's request for bid verification was inadequate; and (5) proof of the intended bid. *Triax Pac., Inc.*, ASBCA No. 41891, 93-1 BCA ¶ 25,441.

A. Misreading the Solicitation

With respect to the first and second elements, it is clear that DI made a mistake but there is disagreement with respect to the type of error it made. Based on the contentions DI made with respect to count one, it seems clear that DI's employees, based on their understanding of trade practice, had a much more limited definition of "repair" than the government intended, and, as a result, DI issued a statement of work to PWES that provided for on-condition work to be paid on an over and above basis. That is not, however, the contention that DI is making in count two. Instead, DI changes focus from the contractual meaning of repair to the Bidder's Library. DI contends that its "mistake resulted from the Solicitation's instructions to rely on the Bidder's Library data in developing their proposals." (App. br. at 78)

First, the only specific evidence that DI points to is the 2010 PWES overhaul of two PT6A-68 engines (app. br. at 29, ¶¶ 58-60). An invoice for one of those overhauls (Serial No. RA0066) is in the record. DI contends that it was not aware of this data prior to award but that if it had been aware, it "would have realized that the Air Force's intended CPFH pricing requirements differed from DI's interpretation that conditional internal engine components identified during an overhaul were to be charged to O&A, because the provision of such data would suggest that the contractor would be required to price those parts into its proposal" (app. br. at 29-30, ¶ 60). Why DI makes this contention is not clear. DI recognizes that these overhauls were performed on an earlier contract with a different price structure (app. br. at 16 n.5), so we do not see why the invoices would have clarified how to price a different contract given the ample evidence

that there are multiple ways to price on-condition work. Further, based on its professed understanding of trade practice, DI must have been aware that on-condition work is performed during overhauls. Thus, it is not clear why the existence of an invoice showing that PWES had performed on-condition work during an overhaul would have caused DI to realize that such work should be included in its cost per flight hour on the contract at issue.

Similarly, it is not clear why DI focuses upon these two engine overhauls or why PWES could not have provided DI a fixed price for the engine overhaul work. As we found, in its proposal, PWES informed DI that: "We have the complete technical history of this engine model from when the Air Force/Navy first took delivery in May of 2000" and "The Pratt & Whitney Customer Service Network is the only service provider to have undertaken a full overhaul of the PT6A-68 having accomplished fourteen (14) overhauls to date" (supp. R4, tab 36 at 35-36). Thus, PWES had data on 12 overhauls of these engines beyond the 2 that it performed in 2010. Simply put, PWES knew better than anyone how much an overhaul cost and, as we have found, could have provided DI a fixed price to perform that work, including the on-condition work.

Further, it is not clear why DI could not have obtained the information it needed from PWES prior to award. Mr. Wormsbacher testified that PWES would object to providing other companies with the discount that it gave L-3, but beyond that he was unsure if PWES would have any objection to providing information (tr. 3/132-33, 137-38). The record demonstrates that DI was able to obtain the PWES invoice post-award – including the discount information – so it is not clear why DI could not obtain this information preaward.

Second, and more generally, DI objects to the Air Force's failure to provide offerors depot level consumption data (app. br. at 79). However, the Air Force clearly told offerors in the Questions and Answers that it was not providing all possible data, for example:

> **14.** Does the usage data provided in the bidders library comprise ALL parts transactions (i.e., issue, receipt, move, ship, transfer, re-stock, etc.) or does this data represent only transactions describing an issue from COMBS inventory to the user?"
>
> **Answer**: This data only includes parts and support equipment issued by COMBS, including parts and support equipment issued to back shops, egress shops, etc. The vast majority of data is material issued to/for a specific aircraft. It does not reflect the more "supply chain"-type of transactions referred to in the question.

(R4, tab 26 at 13) As we have found, PWES knew before it submitted its original proposal that there were "gaps" in the data provided by the government. DI made a business decision to submit a proposal despite the gaps, which is not a basis for granting relief for a unilateral mistake. *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157-58 (Fed. Cir. 1987).

Accordingly, because the Air Force told offerors that the usage data was limited, and because DI was aware pre-bid that the data was limited, we hold that DI has not proved by clear and convincing evidence that it misread the solicitation or contract.

B. Government Knowledge of the Mistake

For similar reasons, we hold that DI has not proved by clear and convincing evidence that the Air Force knew or should have known that DI had made a mistake in its proposal. First, DI points to a statement in its proposal that it assumed the consumption data in the Bidder's Library was complete and correct (app. br. at 82). Despite this statement, the hearing testimony demonstrated that DI knew that the data in the Bidder's Library was incomplete but it decided to submit a proposal anyway.

DI also contends that the Air Force knew about the mistake through its price evaluation, or would have known about it if had conducted a proper price evaluation. DI's chief allegation in this respect relates to an email from a member of a "Multifunctional Independent Review Team" (MIRT) that advised the source selection team. In this email a member of the MIRT who did not testify raised questions on balanced pricing, noting that DI's cost per flight hour CLINs were lower than the other two offerors (app. supp. R4, tab 98 at 3). However, the Air Force officials who participated on the price analysis testified that they considered the question and resolved it to the satisfaction of the MIRT team member (tr. 2/211-14, 3/187; app. supp. R4, tab 41 at 49).

In a related argument, DI contends that the Air Force would have been aware of its mistake if it had conducted a proper price analysis. It is not precisely clear what DI contends that the Air Force did wrong. As we have found, the Air Force conducted a thorough analysis of pricing. This analysis indicated that there was a fair amount of variability in CLIN prices but there was only a seven percent difference in the total evaluated price between DI and L-3. As a result of that process, the Air Force concluded that the offerors understood the requirements and that the CLIN pricing differences were based on different strategies. The Air Force did not know that DI had a narrow definition of repair based on its understanding of trade practice, nor did it know that DI did not read or did not understand the answers that the Air Force provided to offerors concerning the scope of cost per flight hour work. Absent proof

that the Air Force had some knowledge of these circumstances, there was no reason for the Air Force to have known of DI's mistake.

DI also cites to an email in which the Air Force considered sending an evaluation notice to offerors that would have again clarified what should be included in cost per flight hour (app. supp. R4, tab 36). Notably, this email is more than four months before DI's final proposal revision (*compare id.* and app. supp. R4, tab 16). While this email indicates that the government considered sending an evaluation notice that would have summarized information in the questions and answers concerning cost per flight hour pricing, it also states that the employees had conferred and determined that the government had provided sufficient information to offerors. Because this email merely examines whether the government should reiterate information already provided to offerors, we do not see how it could be viewed as knowledge of a mistake in DI's subsequent final proposal revision.

Finally, in its reply brief, DI cites to some notes from a meeting in October 2013 taken by a DI employee who did not testify (app. supp. R4, tab 18). Most of the Air Force statements during this meeting are not attributed to any particular person in the notes. One of the Air Force employees who was allegedly present, Karl Heidrich, testified at the hearing, but neither party questioned him about his alleged statements during that meeting. To the extent that these notes address the consumption data, they generally support the government's position at trial in that they indicate that the government knew that the data was not complete but expected PWES to be able to provide pricing for the overhaul and on-condition work based on its experience performing that work (*e.g.*, tr. 2/159).

Accordingly, we hold that DI has not proved by clear and convincing evidence that the government knew or should have known of the mistake in DI's price. In light of this holding, we further hold that the government was not required to request verification of DI's cost per flight hour pricing.[3]

Count Three - Superior Knowledge

In count three of its complaint, DI contends that the Air Force breached its duty to disclose superior knowledge with respect to engine overhaul consumption data. Specifically, it points to the two overhauls that PWES completed in 2010 and that the Air Force had the invoice for at least one of those overhauls. (App. br. at 89-93)

"The superior knowledge doctrine imposes upon a contracting agency an implied duty to disclose to a contractor otherwise unavailable information regarding

[3] The government notes in its brief (at page 71) that DI has failed to submit proof of the fifth element, its intended price but for the mistake. In light of our holding on the other elements, we do not reach this argument.

some novel matter affecting the contract that is vital to its performance." *Scott Timber Co. v. United States*, 692 F.3d 1365, 1373 (Fed. Cir. 2012) (quoting *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000)).

The doctrine of superior knowledge is 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. *Scott Timber*, 629 F.3d at 1373 (citing *Hercules Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994)).

As the Federal Circuit explained in *Scott Timber*, "the doctrine only applies if 'the government was aware the contractor had no knowledge of and had no reason to obtain such information' and 'any contract specification supplied misled the contractor or did not put it on notice to inquire.'" 692 F.3d at 1373 (quoting *Hercules*, 24 F.3d at 196). *Scott Timber* involved a contractor that was awarded three timber contracts at an oral auction. At the auction, the agency read a statement that said that the sale was under environmental litigation and might be delayed. *Id.* at 1368. However, the government did not disclose that each of the contracts had been identified specifically in that litigation as an "at-risk" contract. *Id.* at 1371-72.

The Federal Circuit held that the government had discharged its duty by reading a notice at the auction. While the government failed to disclose that the three contracts at issue had been identified as at-risk, the Federal Circuit held that the government did not mislead Scott, and that the pre-auction notice was enough to put Scott on notice of the risk. *Scott Timber*, 692 F.3d at 1373. Further, the court of appeals held that the notice to Scott was actually more explicit than those found to be sufficient in other cases. *Id.* (citing *Glasgow Assocs. v. United States*, 495 F.2d 765, 766, 769 (Ct. Cl. 1974) (finding that the industry's general knowledge that government-guaranteed interest rates could rise gave the plaintiff sufficient notice to protect itself from such an increase and precluded a superior knowledge claim)).

In this appeal, the government did not mislead DI. As we have found, while information provided to offerors earlier in the procurement suggested that a broad range of usage data would be available, the Air Force later clarified that it would not provide depot level data. The record demonstrates that the Air Force provided DI enough information to put it on notice of the risk because, as we found, DI had actual knowledge that the usage data was incomplete and that DI made a business decision to submit a proposal despite the risk.

Furthermore, we also note that DI was aware that there was a body of knowledge in existence concerning overhauls of the PT6A-68 engines. DI was aware that PWES

had performed 14 overhauls. DI has contended that two of those overhauls (those performed by PWES for L-3 in 2010), were vital to its proposal. As we have already found, the precise amount of information that the government received from HBC/L-3, the government's ability to release that information to offerors, the alleged bar on PWES releasing that information to DI, and the circumstances in which DI was able to obtain the PWES to L-3 invoice (including the discount information) are all murky.[4] Moreover, little has been said about the other 12 overhauls, including what efforts DI made to obtain those invoices and what obstacles it encountered, if any. The bottom line, however, is that there was a body of information in existence concerning these overhauls and that DI knew about this information and made the decision to forge ahead knowing that it had incomplete information. Accordingly, DI's superior knowledge claim fails.

CONCLUSION

For the foregoing reasons, this appeal is denied.

Dated: 12 May 2016

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

[4] DI states in a footnote on page 39 of its reply brief that it was able to obtain the PWES to L-3 invoice post-award because it signed a data license agreement. But this does not explain why PWES would release the discount, nor does DI cite to anything in the record in support of its assertion.

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