ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
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General Dynamics - National Steel and Shipbuilding Company	)	ASBCA No. 61524
	)	
	)	
Under Contract No. N00024-17-C-4426	)	

APPEARANCE FOR THE APPELLANT:	William M. Pannier, Esq. Pannier Law, PC Thousand Oaks, CA
APPEARANCES FOR THE GOVERNMENT:	Craig D. Jensen, Esq. Navy Chief Trial Attorney Devin A. Wolak, Esq. Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SWEET

This appeal involves a contract for appellant General Dynamics - National Steel and Shipbuilding Company (NASSCO) to provide Dry-Docking Phased Maintenance Availability repairs and alterations onboard the USS MAKIN ISLAND. The contract was a fixed-price contract for NASSCO to accomplish defined work items. However, it also provided for growth work—work that the government might assign in addition to the defined work—which NASSCO committed to perform at a fixed labor rate and material burden percentage. At the heart of this appeal are certain disputed clauses requiring reservations of labor and material, which the government argues were for growth work *in addition to* the defined work, and NASSCO argues *capped* the defined work by limiting the defined work to the reservation work. Therefore, NASSCO argues that the government constructively changed the contract when it required NASSCO to perform defined work beyond the disputed reservation work. In the alternative, NASSCO argues that the contract should be reformed because NASSCO made a unilateral mistake regarding the meaning of the disputed clauses.

In an earlier decision—*General Dynamics – National Steel and Shipbuilding Co.*, ASBCA No. 61524, 19-1 BCA ¶ 37291 at 181,415 (*NASSCO I*)[1]—we denied the parties' cross-motions for summary judgment, holding that the disputed clauses' plain language was ambiguous regarding whether the disputed reservation clauses were for growth work that NASSCO may have to perform in addition to the defined work, or capped the defined work by limiting the defined work to the reservation work. The parties elected to

[1] We presume familiarity with *NASSCO I*.

proceed pursuant to Board Rule 11. We now hold that there was not a constructive change because extrinsic evidence establishes that the parties intended that the disputed clauses be for growth work in addition to the defined work. In any event, we would read the ambiguity against NASSCO because NASSCO was aware of the ambiguity—or, at a minimum, the ambiguity was patent—and NASSCO failed to adequately seek clarification regarding the disputed clauses' meaning. Nor was there a unilateral mistake because NASSCO made the business decision to proceed under its interpretation of the disputed clauses. Therefore, we deny the appeal.

FINDINGS OF FACT

I. The 4426 Contract

1. On January 24, 2017, the United States Navy Sea Systems Command[2] issued Solicitation No. N00024-17-R-4426 (4426 RFP), under which:

> The Contractor shall prepare for and accomplish repair and alterations during the Dry-Docking Phased Maintenance Availability (DPMA) onboard USS MAKIN ISLAND (LHD 08) as specified in the statement of work provided herein and in accordance with standard items, work item specification package SSP TPPC-LHD8-SWRMC17-CN01 drawings, test procedures, and other detailed data as included in Attachments J-1 and J-2. See Notes A and C.

(R4, tab 1 at 2; app. Proposed Finding of Fact (PFOF) ¶ 1; gov't resp. to app. PFOF ¶ 1).

2. The 4426 RFP generally was for a fixed-price contract (R4, tab 1 at 2-11, 14). However, the contractor would commit in Notes A and C to provide reservations of labor and material at a fixed rate for "growth" work. Growth work was tasks that the government might assign in the future in addition to the tasks enumerated in the contract. (*Id*. at 12-14)

3. The 4426 RFP contained numerous Work Items (R4, tab 1 at 187-1568), which were individual sets "of work requirements . . . to accomplish a specific alteration or repair." Joint Fleet Maintenance Manal (JFMM), VII-4E-7, § II(A)[3] The JFMM

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[2] We refer to the United States Navy Sea Systems Command as NAVSEA; the Southwest Regional Maintenance Center as SWRMC, and NAVSEA and SWRMC collectively as the government.

[3] We grant NASSCO's unopposed motion that we take judicial notice of the JFMM. Citations to pages "VII-4-" are to JFMM, Volume VII, Chapter 4, which is available at

recognized that a commercial contract with a shipyard "depends upon clear, well defined specifications developed for each specific repair work item or alteration included in the work package accompanying each solicitation or job order presented to the contractor for use in preparing an offer." *Id*. at VII-4-1, § 4.1.2. Thus, Work Items:

> are written to convey the Government's requirements to the contractor. They are extremely important for several other reasons. The specifications are the heart of the contract and serve as the basis for the formation of offers by the shipyards, the baseline for the evaluation of offers and, after awarded, the means for binding the contractor to required performance . . . . The specifications serve as the basis for determining whether desired work is a change to the contract or is already required.

Id. at VII-4E-15, § V(A). Each Work Item "becomes a legally binding contractual document that is the determining factor as to what the Government will receive from the contractor accomplishing the work." *Id*.

4. In particular, Work Items 311-21-001, 311-22-001, 311-23-002, 311-24-001, 311-25-001, and 311-26-003 (Work Items 21 through 26, collectively Work Items) addressed Ship Service Diesel Generators (SSDGs) Number 1 through 6, D level, respectively (R4, tab 1 at 506-667).

5. Paragraph 3 of each Work Item contained the "REQUIREMENTS" (R4, tab 1 at 506-667). As the JFMM indicated, "[p]aragraph 3 shall be REQUIREMENTS. The REQUIREMENTS paragraph of the Work Item is the portion which must detail the minimum work and material requirements not already invoked by Standard Items." JFMM § VII(B)(4) (emphasis in original). The first several sub-paragraphs of paragraph 3 (Defined Work Clauses)[4] enumerated tasks for NASSCO to accomplish (Defined

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https://www.navsea.navy.mil/Portals/103/Documents/SUBMEPP/JFMM/Volume%20VII.pdf. Citations to pages "VII-4E" are to JFMM, Volume VII, Chapter 4, Appendix E, which is available at https://www.navsea.navy.mil/Portals/103/Documents/SSRAC/4E/FY20/10%2026%20FY20%20Apendex%204E%20JFMM%2001OCT2018.pdf?ver=2-18-10-26-103938-110.

[4] The Defined Work Clauses were sub-paragraphs 3.1 through 3.3 of Work Items 22, 24, and 25; and sub-paragraphs 3.1 through 3.4 of Work Items 21, 23, and 26 (R4, tab 1 at 1418-1568). Because NAASCO's dispute relates to Work Items 21, 22, 23, and 26, we refer to those Work Items as the Disputed Work Items, and Work Items 24 and 25 as the Undisputed Work Items. Moreover, we refer to the

Work). Nothing in the Defined Work Clauses indicated that NASSCO only had to accomplish the Defined Work if required to do so by the supervisor. (R4, tab 1 at 506-667) Rather, the 4426 RFP unconditionally included the Defined Work in the "REQUIREMENTS" section of the Work Items (*id*.), which the 4426 RFP mandated that NASSCO "shall" accomplish (app. supp. R4, tab 1 at 2).

6. Then, paragraph 3 of each Work Item contained a sub-paragraph mandating a reservation of labor and materials. In particular, sub-paragraphs 3.5 of Work Items 21, 23, and 26, and sub-paragraph 3.4 of Work Item 22 (Disputed Reservation Clauses) stated, "[p]rovide 60 mandays of labor and 16,000 dollars of material to accomplish this Work Item, as designated by the SUPERVISOR" (Disputed Reservation Work). (R4, tab 1 at 507, 517, 539, 659) Sub-paragraph 3.4 of Work Items 24 and 25 (Undisputed Reservation Clauses) stated, "[p]rovide 100 mandays of labor and 50,000 dollars of material to accomplish additional work not already covered by this Work Item, as designated by the SUPERVISOR" (*id*. at 552, 598).

7. According to NASSCO, it read the Disputed Reservation Clauses as capping the Disputed Defined Work by limiting the Disputed Defined Work to the Disputed Reservation Work (Robertson dep. at 16, 28-33). However, the Disputed Reservation Clauses' 60 mandays and $16,000 of Disputed Reservation Work was "woefully inadequate" to perform the Disputed Defined Work (Askew dep. at 23), and "nowhere close to being what is needed to accomplish all the [Disputed Defined W]ork by 1,000s of man hours." (Klemp dep. at 192; *see also id*. at 104). Instead of 60 mandays, performance of all of the Disputed Defined Work in each Disputed Defined Work Clause required 1,100 mandays or 4,100 mandays, depending upon the Disputed Defined Work Clause (Sherman dep. at 179-80). Thus, to reconcile its reading of the Disputed Reservation Clauses and the Disputed Defined Work Clauses, NASSCO interpreted the Disputed Defined Work Clauses as providing for optional work—or a "menu"—that NASSCO only had to perform if directed to do so by the supervisor (Robertson dep. at 16, 28-33).

8. After the government issued the RFP, its depot-level planning department prepared an independent government estimate (IGE) for each work item (Klemp dep. at 101). The IGE estimated that the total number of mandays to perform each Disputed Work Item was 66 mandays or 93 mandays, which was consistent with the Disputed Reservation Clauses' 60 mandays (Klemp dep. at 33-35, 94-97, 104-05, 192-98; app. PFOF ¶¶ 5-7, 9; gov't resp. to app. PFOF ¶¶5-7, 9; finding 6).

9. In preparing its proposal, NASSCO sent RFPs to potential subcontractors, which reviewed the RFPs and submitted proposals to NASSCO (Askew dep. at 10-11; Robertson dep. at 74-75). One potential subcontractor did not bid for Disputed Work

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Disputed Work Items' defined work, as the Disputed Defined Work, and to all of the work required by the Disputed Work Items as the Disputed Work Items Work.

Items Work (app. supp. R4, tab 7 at 737-42), but five potential subcontractors bid for Disputed Work Items Work (*id.* at 718, 733, 744, 755, 775). That most—but not all—of the subcontractors' bids for Disputed Work Items Work made NASSCO aware that the Disputed Work Items were ambiguous—and that most of the subcontractors disagreed with its interpretation of the Disputed Work Items Work as being limited to the Disputed Reservation Work—because NASSCO understood that subcontractors generally did not bid on reservation work (Askew dep. at 40-41). However, despite having received five subcontractor bids for Disputed Work Items Work (*id.*), NASSCO did not include any subcontractor costs in its price proposal for the Disputed Work Items (app. supp. R4, tab 7 at 788, 829-30).[5]

10. NASSCO's estimator estimated that the Undisputed Work Items' prices would be higher than the Disputed Work Items' prices (app. supp. R4, tab 7 at 547, 561, 584, 598, 600, 648, 650, 699; gov't PFOF ¶ 16). NASSCO's Vice President questioned the estimator about that price discrepancy (Askew dep. at 36-37). NASSCO's estimator and others explained that the difference was due to the fact that the Disputed Reservation Clauses capped the Disputed Defined Work. That response satisfied NASSCO's Vice President. (Askew dep., at 36-37, 39)

11. On April 7, 2017, NASSCO submitted its initial price proposal to the government (app. supp. R4, tab 2 at 84). NASSCO subsequently submitted its final price proposal (app. supp. R4, tab 7 at 829-30). For each Disputed Work Item, both documents proposed [redacted] mandays of labor,[6] about [redacted] in material costs, and a total price of about [redacted]. For each Undisputed Work Item, both documents proposed [redacted] mandays of labor, about [redacted] of material, and a total price of about [redacted]. Neither price proposal specifically indicated that NASSCO read the Disputed Reservation Clauses as capping the Disputed Defined Work. (App. supp. R4, tab 7 at 788, 829-30) There is no evidence that the government responded to NASSCO's price proposal by addressing or resolving the Disputed Reservation Clauses' meaning, or that NASSCO

[5] Indeed, the vast majority of the discrepancy in NASSCO's proposed prices between the Disputed Work Items and the Undisputed Work Items is attributable to the inclusion of subcontractor costs for the Undisputed Work Items. In particular, only [redacted] of the [redacted] price discrepancy between the final price proposal for each Disputed Work Item and each Undisputed Work Item is attributable to prime contractor costs, while [redacted] of that amount is attributable to subcontractor costs. (App. supp. R4, tab 7 at 829-30)

[6] NASSCO proposed labor hours for each Work Item. We convert those hours to mandays by dividing those proposed labor hours by an eight-hour work-day. The above mandays and material costs include both prime and subcontractor labor and materials. (App. supp. R4, tab 7 at 788, 829-30)

sent any other communications that could be construed as an inquiry about the Disputed Reservation Clauses' meaning.

12. On June 6, 2017, NAVSEA awarded contract N00024-17-C-4426 (4426 contract) to NASSCO based upon the 4426 RFP (R4, tab 1 at 1338). NASSCO's final price proposal formed part of the 4426 contract (R4, tab 1 at 1417; app. PFOF ¶ 26, gov't resp. to app. PFOF ¶ 26). The 4426 contract incorporated by reference FAR 52.215-8 (Order of Precedence – Uniform Contract Format) (R4, tab 1 at 1404), which gave precedence to representations and other documents over the specifications. 48 C.F.R. § 52.215-8.

II. Performance

13. At a meeting on July 10, 2017, NASSCO informed the government that it viewed the Disputed Reservation Clauses as capping the Disputed Defined Work, such that any work beyond the caps would require a change (R4, tab 3 at 1593).

14. After the meeting, SWRMC made a number of statements acknowledging that the Disputed Reservation Clauses were ambiguous. First, Nicholas Klemp—the SWRMC project manager—wrote change orders for the Disputed Work Items because he thought that the Disputed Reservation Clauses were ambiguous, and that the government "usually loses" when clauses are ambiguous (Klemp dep. at 121-22).

15. Second, Captain Chong Hunter—the SWRMC Chief of the Contracting Office (CCO)—emailed NASSCO on September 8, 2017, stating that the government:

> agrees that [the Disputed Reservation Clause] was not clearly written when the contract was awarded. The government agrees with NASSCO's interpretation of the work item as written. Therefore, it is the Government's intent to negotiate and settle the COPA's associated with [the Disputed Reservation Clauses]. However, in order to do so the Government is hereby requesting a Request for Equitable Adjustment (REA) be submitted [no later than] Monday, September 11, 2017.

While CCO Hunter stated that "the government agrees with NASSCO's interpretation of the work item as written," that statement only acknowledged an ambiguity when read in the context of the prior sentence, which stated that the Disputed Reservation Clause "was not clearly written[.]" (R4, tab 3 at 1598) As requested, NASSCO submitted an REA on September 11, 2017, (app. supp. R4, tab 3 at 71-126). On September 13, 2017, SWRMC Branch Head Suzanne Shin sent an email to NASSCO stating that "[t]he Government has found the subject REA valid and is in the process of analyzing the cost and processing the paperwork in order to provide a supplemental agreement." (App. supp. R4, tab 6 at 500)

16. Third, the SWRMC prepared a memorandum for file on September 14, 2017, indicating that "it was determined that there was ambiguity in the language of the work item specifications, which could lead to confusion in the interpretation." Therefore, the memorandum concluded that "the Government has agreed that NASSCO's request is valid and an equitable adjustment is due." (App. supp. R4, tab 6 at 511-13)

17. On September 14, 2017, SWRMC Branch Head Shin sent an email "rescinding" her September 13, 2017 email because "[i]t has been brought to our attention that the [procuring contracting officer] (PCO) will be handling this REA (app. supp. R4, tab 6 at 514). Likewise, on September 14, 2017, SWRMC CCO Hunter sent an email to NASSCO rescinding his September 8, 2017 email because "this contract was awarded by Ms[.] Jamillah Powell (NAVSEA), I (SWRMC) do[] not have the authority to analyze/negotiate REAs. We have forwarded all of your REA documentation to Ms. Powell." (App. supp. R4, tab 6 at 517) A subsequent internal NASSCO email indicated that NASSCO spoke to CCO Hunter and "he swears up and down that this was a misunderstanding of his authority and that his expectation is that the REA will still go" through (*id*.).

18. As CCO Hunter's September 14, 2017 email stated, he did not possess the authority to make an equitable adjustment or to interpret the 4426 contract on behalf of the government because it was not SWRMC's contract (Hunter depo. 23). The delegation letter from PCO Powell to the SWRMC indicated that the SWRMC was authorized to issue change orders and execute resulting supplemental agreements (R4, tab 3 at 1584). However, the delegation letter stated that "SWRMC is not delegated the authority to modify the contract for the purpose of changing . . . terms and conditions of the contract (*id*.). Therefore, as CCO Hunter testified, he did not have the authority to interpret the Disputed Work Items in the September 8, 2017 email (Hunter depo. 68-69).

19. On September 15, 2017, NAVSEA PCO Powell issued a letter directing NASSCO to perform all of the Disputed Defined Work, and indicated that NASSCO could submit an REA. The letter reasoned that the Disputed Reservation Clauses were for growth work that may have to be performed in addition to the Disputed Defined Work. (R4, tab 3 at 1593-94)

20. On September 22, 2017, NASSCO submitted an updated REA (R4, tab 3 at 1595), which NAVSEA PCO Powell rejected on October 5, 2017 (R4, tab 3 at 1657, 1664-65).

III. Procedural History

21. On December 1, 2017, NASSCO filed a certified claim (R4, tab 2). Based upon a deemed denial of that claim, this appeal followed.

22. Both parties moved for summary judgment. The government argued that the Disputed Reservation Clauses were for growth work, which NASSCO may have to perform in addition to the Disputed Defined Work. NASSCO argued that the Disputed Reservation Clauses capped the Disputed Defined Work by limiting the Disputed Work Items Work—including the Disputed Defined Work—to the Disputed Reservation Work. On March 25, 2019, we denied both summary judgment motions on the grounds that the Disputed Work Items were ambiguous. *NASSCO I*, 19 BCA ¶ 37,291 at 181,415.

23. The parties have fully briefed this appeal pursuant to Board Rule 11.

DECISION

The government did not constructively change the 4426 contract when it directed NASSCO to perform Disputed Defined Work beyond the Disputed Reservation Work. Moreover, NASSCO is not entitled to reformation of the 4429 contract because it has not shown that it made a unilateral mistake regarding the Disputed Reservation Clauses' meaning. Therefore, the appeal is denied.

I. There was no Constructive Change

The government did not constructively change the 4426 contract when it directed NASSCO to perform Disputed Defined Work beyond the Disputed Reservation Work. As we have held:

> In order to show that there was a constructive change, a contractor must show that: (1) an official compelled it to perform work not required under the terms of the contract; (2) the official directing the change had contractual authority to alter the contractor's duties unilaterally; (3) the official enlarged the contractor's performance requirements; and (4) the added work was not volunteered, but resulted from the official's direction.

CDM Constructors, Inc., ASBCA No. 60454, 18-1 BCA ¶ 37,190 at 181,011-12.

Here, the government did not compel NASSCO to perform work not required under the terms of the 4426 contract when it directed NASSCO to perform Disputed Defined Work beyond the Disputed Reservation Work because the 4426 contract required NASSCO to perform all of the Disputed Defined Work in addition to any Disputed Reservation Work. In *NASSCO I*, we held that the plain language of the Disputed Work Items was ambiguous (finding 22). However, as discussed in greater detail below, extrinsic evidence shows that the parties intended that the Disputed Reservation Clauses be for growth work that NASSCO may have to perform in addition

to the Disputed Defined Work. Even if extrinsic evidence left the parties' intent unclear, we would read the ambiguity against NASSCO because it knew about the ambiguity—or, at a minimum, the ambiguity was patent—but NASSCO failed to adequately seek clarification about the Disputed Reservation Clauses' meaning.

A. Extrinsic Evidence Shows That the Parties Intended That the Disputed Reservation Clauses Were for Growth Work That NASSCO had to Perform in Addition to the Disputed Defined Work

Extrinsic evidence shows that the parties intended that the Disputed Reservation Clauses be for growth work in addition to the Disputed Defined Work. If—as is the case here—a contract is ambiguous, then we may resort to extrinsic evidence to determine the parties' intent. *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988). "[T]he 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." *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). Thus, "a party's interpretation must be logically consistent with the contract[.]" *ECCIC Metag, JV*, ASBCA No. 59031, 15-1 BCA ¶ 36,145 at 176,418 (citations and quotations omitted). Moreover, the contract terms are "interpreted and read as a whole, giving reasonable meaning to all of its parts, and without leaving a portion of the contract useless, inexplicable, void, or superfluous." *JAAAT Technical Services, LLC*, ASBCA No. 61180, 19-1 BCA ¶ 37297 at 181,429 (citation and quotation omitted).

Here, extrinsic evidence establishes that the parties intended that the Disputed Reservation Clauses be for growth work in addition to the Disputed Defined Work, instead of a cap on the Disputed Defined Work that limited the Disputed Defined Work to the Disputed Reservation Work. Extrinsic evidence shows that the 60 mandays and $16,000 of Disputed Reservation Work was "woefully inadequate" to perform the Disputed Defined Work, and "nowhere close to being what is needed to accomplish all the [Disputed Defined W]ork by 1,000s of man hours[.]" (finding 7). Therefore, in order to render the Disputed Reservation Clauses logically consistent with the Disputed Defined Work Clauses, a reasonable contractor acquainted with the contemporaneous circumstances would not read the Disputed Reservation Clauses as capping the Disputed Defined Work by limiting the Disputed Defined Work to the 60 mandays and $16,000 of Disputed Reservation Work.

In an attempt to render the Disputed Reservation Clauses logically consistent with the Disputed Defined Work Clauses, NASSCO argues that it read the Disputed Defined Work Clauses as providing an optional menu, whose component tasks NASSCO only had to perform if directed to do so by the supervisor (finding 7). However, that reading is inconsistent with the 4426 contract's language because the contract documents included the Disputed Defined Work in the "REQUIREMENTS" section of the Disputed Work Items, which the contract documents mandated that NASSCO "shall" accomplish

(finding 5). The contract documents did not indicate that the Disputed Defined Work was optional. Unlike the Disputed Reservation Clauses—which indicated that NASSCO only had to perform the Disputed Reservation Work "as designated by the SUPERVISOR"—the Disputed Defined Work Clauses did not indicate that NASSCO only had to perform the Disputed Defined Work if required to do so by the supervisor. (findings 5-6). The parties reasonably would have qualified the Disputed Defined Work—instead of merely the Disputed Reservation Work—with the "as designated by the SUPERVISOR" language if they had intended that NASSCO only perform the Disputed Defined Work if directed to do so by the supervisor. Thus, reading the Disputed Defined Work Clauses as optional menus improperly would leave the pages of detailed Disputed Defined Work useless, inexplicable, void, or superfluous. *See JAAAT*, 19 BCA ¶ 37,297 at 181,429. Moreover, NASSCO's reading of the Disputed Defined Work Clauses as optional menus would be inconsistent with the JFMM, which recognizes the importance of clear, well defined specifications to specifically define what the government will receive from the contractor (finding 3). Because the Disputed Defined Work was not optional and the extrinsic evidence shows that a contractor could not perform all of the Disputed Defined Work with the Disputed Reservation Clauses' 60 mandays and $16,000 of Disputed Reservation Work, the extrinsic evidence establishes that the parties intended that the Disputed Reservation Clauses be for growth work in addition to the Disputed Defined Work, instead of a cap on the Disputed Defined Work that limited the Disputed Defined Work to the Disputed Reservation Work.

B. In any Event, we Would Resolve the Ambiguity Against NASSCO

Even if extrinsic evidence left the parties' intent unclear, we would resolve the ambiguity against NASSCO. Typically, if we are unable to determine the parties' intent with regard to an ambiguous contract term based upon extrinsic evidence, then we read the contract against the party that drafted the contract under the doctrine of *contra proferentem*. *R.L. Persons Constr., Inc.*, ASBCA No. 60121, 18-1 BCA ¶ 37007 at 180,236 (*citing Turner Constr. Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004)). However, if a contractor that is aware of an ambiguity before bidding fails to adequately seek clarification from the contracting officer, then the contractor is bound by the government's interpretation, regardless of whether the ambiguity is patent or latent. *James A. Mann, Inc. v. United States*, 535 F.2d 51, 61 (Ct. Cl. 1976). Moreover, even if the contractor is not aware of an ambiguity, "if the ambiguity is sufficiently apparent that there is a patent ambiguity, then the contractor must inquire as to the meaning of that contractual provision." *Id*. Failing to do so, we resolve the ambiguity against the contractor. *Id*. (*citing Triax Pacific, Inc. v. West*, 130 F.3d 1469- 1475 (Fed. Cir. 1997)). An ambiguity is patent when it is "obvious, gross, [or] glaring, so that [the] contractor had a duty to inquire about it at the start." *NVT Tech., Inc. v. United States*, 370 F.3d 1153, 1162 (Fed. Cir. 2004). More subtle ambiguities are deemed latent and accorded an interpretation favorable to the contractor. *R.L. Persons Constr.*, 18-1 BCA ¶ 37007 at 180,236 (*citing Triax*, 130 F.3d at 1475).

That inquiry is done on an *ad hoc*, case-by-case basis. *Interstate Gen. Gov't Contractors v. Stone*, 980 F.2d 1433, 1435 (Fed. Cir. 1992); *Max Drill, Inc. v. United States*, 427 F.2d 1233, 1244 (Ct. Cl. 1970). However, we may consider factors such as: (1) the complexity and volume of the specifications and drawings; (2) the comparison of the amount of recovery sought for the work involved with the total contract price; (3) the conduct of other bidders during the pre-award period; (4) the importance of the disputed work items as compared to the contractual requirement; and (5) the review process to which the bid has been subjected. *Pathman Constr. Co.*, ASBCA No. 22343, 81-1 BCA ¶ 15,010. Nevertheless, "the most critical factor is the degree of scrutiny reasonably required of a bidder in order to perceive the discrepancy between the contract provisions or omissions in the solicitation documents." *Transco Contracting Co.*, ASBCA No. 25315, 82-1 BCA ¶ 15,516 at 76,974. In particular, where some line items are expressed in a manner so different from the other line items, yielding totals disproportionate to the remainder of the solicitation, the difference may be so obvious, gross or glaring as to be patent. *NVT Tech.*, 370 F.3d at 1162.

Although some of our older precedent cited by NASSCO (*see* app. br. 50-54) suggests that a contractor satisfies its duty to inquire when its price proposal puts the government on notice of the contractor's interpretation of an ambiguous contract provision, *see Fairchild Indus., Inc.*, ASBCA Nos. 16302, 16413, 74-1 BCA ¶ 10,567 at 50,084, it is of questionable value here in light of later decisions by the Federal Circuit. In particular, the Court of Appeals has held that "it is not enough under the duty to inquire that a contractor merely make an initial inquiry." *Community Heating & Plumbing Co., Inc. v. Kelso*, 987 F.2d 1575, 1580 (Fed. Cir. 1993). Rather, if the government's response to that initial inquiry fails to address and resolve the ambiguity, the contractor is obligated to request further clarification. *Id*. (holding that an initial letter summarizing a bid confirmation meeting—which expressed the contractor's interpretation—did not satisfy the contractor's duty to inquire because the government's response did not resolve the ambiguity).

The reason a contractor must adequately seek clarification of known or patent ambiguities is:

> [T]o prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact.

Id. Furthermore, "the duty of inquiry prevents contractors from taking advantage of ambiguities in government contracts by adopting narrow interpretations in preparing their

bids and then, after the award, seeking equitable adjustments to perform the additional work the government actually wanted." *Triax Pacific*, 130 F.3d at 1475.

Here, NASSCO had a duty to inquire about the meaning of the Disputed Reservation Clauses—regardless of whether the ambiguity in those clauses was patent—because NASSCO was aware of the ambiguity as to whether the Disputed Reservation Clauses capped the Disputed Defined Work by limiting the Disputed Work Item Work to the Disputed Reservation Work (finding 9). The facts that subcontractors generally did not bid on reservation work, and that most—but not all—of the subcontractors bid on the Disputed Work Items made NASSCO aware that the Disputed Work Items were ambiguous, and that most of the subcontractors disagreed with its interpretation of the Disputed Work Items as being limited to Disputed Reservation Work (finding 9).

Even if we were to conclude that NASSCO was not aware of the ambiguity, we would hold that the ambiguity was patent because it was so obvious, gross, or glaring that it was unreasonable for NASSCO not to inquire about it. NASSCO argues that the ambiguity was latent because the amount of recover sought is small compared to the total contact price, the Disputed Work Items were not complex, and the government did not notice the ambiguity during the review process (app. br. 55-57). Assuming that NASSCO is correct, those factors would be outweighed by the most critical factor, which is that it did not reasonably require much scrutiny for a bidder to perceive the discrepancy between the Disputed Work Items and the Undisputed Work Items because the Disputed Work Items were expressed in a manner so different from the Undisputed Work Items that they yielded disproportionate totals. *See NVT Tech.*, 370 F.3d at 1162; *Transco Contracting*, 82-1 BCA ¶ 15,516 at 76,974. In particular, the manner in which the Disputed Work Items were expressed yielded a total of about [redacted] mandays of labor and a total price of about [redacted]—according to NASSCO's interpretation of the Disputed Work Items (finding 11). However, the Undisputed Work Items were expressed in a manner that yielded a total of [redacted] mandays and a total price of about [redacted] (finding 11). Indeed, NASSCO actually noticed and questioned internally the discrepancy between the Disputed Work Item totals and the Undisputed Work Item totals (finding 10). Given the magnitude of the difference in the totals between the Disputed Work Items and the Undisputed Work Items, the ambiguity was so obvious, gross or glaring as to be patent and require NASSCO to inquire about the ambiguity.

However, NASSCO did not satisfy its duty to inquire about the ambiguity. Even if we were to treat NASSCO's price proposal as an initial inquiry under *Fairchild Industries*, 74-1 BCA ¶ 10,567 at 50,084 (app. br. 50-54) and find that case still controlling, the government did not respond to that initial inquiry by addressing—let alone resolving—the ambiguity (finding 11). Therefore, under *Community Heating & Plumbing*, NASSCO was obligated to request further clarification. 987 F.2d at 1580. Having failed to do so (finding 11), NASSCO is bound by the government's interpretation. To hold otherwise would be unfair to other bidders by allowing NASSCO

to bid on a more favorable set of specifications, and undermine the administration of government contracts by failing to resolve the ambiguity before bidding. *See id*. It also improperly would allow NASSCO to take advantage of the ambiguity in the Disputed Work Items by adopting a narrow interpretation in preparing its bids and then, after the award, seeking equitable adjustments to perform the additional work the government actually wanted. *See Triax Pacific*, 130 F.3d at 1475.

C. NASSCO's Arguments to the Contrary are Meritless

NASSCO's arguments to the contrary are meritless. NASSCO first argues that there is no evidence that the subcontractors read or cared about the Disputed Reservation Clauses because they did not bid on reservation work (app. reply 6). But that is the point. It is precisely because subcontractors did not bid on reservation work that the evidence that five subcontractors bid on the Disputed Work Items showed that those five subcontractors did not understand the Disputed Work Items Work to be limited to Disputed Reservation Work (finding 9).

NASSCO also argues that contemporaneous statements from SWRMC—and particularly CCO Hunter—purportedly indicating that the Disputed Reservation Clauses capped the Disputed Defined Work is extrinsic evidence that the government intended the Disputed Reservation Clauses to cap the Disputed Defined Work (app. br. 46-49; app. reply 8-10). However, SWRMC did not state that the Disputed Reservation Clauses capped the Disputed Defined Work; it merely stated that the Disputed Work Items were ambiguous (findings 14-17).[7] Contrary to NASSCO's argument, the fact that SWRMC conceded that the Disputed Work Items were ambiguous—and therefore that NASSCO's interpretation fell within the zone of reasonableness—does not mean that the government was bound by NASSCO's interpretation (app. br. 45-47; app. reply 5-6). *States Roofing Corp. v. Winter*—upon which NASSCO relies—merely held that, under the *contra proferentem* doctrine, we will adopt a contractor's reasonable interpretation "unless the parties' intention is otherwise affirmatively revealed." 587 F.3d 1364, 1368-69 (Fed. Cir. 2009). However, one exception to the *contra proferentem* doctrine recognized by *State Roofing* is the patent ambiguity doctrine. *Id*. at 1368, 1372. Under that doctrine, as discussed above, the "existence of a patent ambiguity in the contract raises the duty of inquiry, regardless of the reasonableness of the contractor's interpretation." *Interstate Gen. Gov't Contractors v. Stone*, 980 F.2d 1433, 1435 (Fed. Cir. 1992). Because we find above, that there was a patent ambiguity the *contra proferentem* doctrine does not bind the government to NASSCO's interpretation.

[7] A similar analysis applies to the extent that the IGE implicitly recognized that NASSCO's interpretation was reasonable by adopting a similar approach (app. br. 46-49; app. reply 8-10).

Even if we were to read SWRMC and CCO Hunter's statements as an acknowledgement that the Disputed Reservation Clauses capped the Disputed Defined Work, that would not establish that the government intended the Disputed Reservation Clauses to cap the Disputed Defined Work because SWRMC and CCO Hunter were not authorized to interpret the 4426 contract on behalf of the government (finding 18). Only an authorized government representative may bind the government to an interpretation of a contract. *Allen Co. Builders Supply*, ASBCA No. 41836, 93-1 BCA ¶ 25398. Here, "SWRMC is not delegated the authority to modify the contract for the purpose of changing . . . terms and conditions of the contract" (finding 18). Therefore, CCO Hunter did not have the authority to interpret that 4426 contract on behalf of the government (finding 18). Indeed, CCO Hunter informed NASSCO at the time that "I (SWRMC) do[] not have the authority to analyze/negotiate REAs." (finding 18).

NASSCO finally argues that, even if the Disputed Reservation Clauses were for growth work in addition to the Disputed Defined Work, its price proposal—which was incorporated into the 4426 contract (finding 12) and purportedly indicated that the Disputed Reservation Clauses capped the Disputed Defined Work—would take precedence over the Disputed Work Item under the order of precedence clause (app. br. 57-58). However, we only resort to an order of precedence clause when there is an actual conflict or inconsistency between different contract provisions. *David Boland, Inc.*, ASBCA No. 61923, 21-1 BCA ¶ 37,822 at 183,658. Moreover, regardless of which contract provisions take precedence under the order of precedence clause, we give specific provisions precedence over possible inferences that may be drawn from the contents of more general provisions. *Id.*; *Propulsion Controls Engineering*, ASBCA No. 54330, 04-1 BCA ¶ 32,566 at 161,088; *Hartman-Walsh Painting Co.*, ASBCA No. 5130, 59-1 BCA ¶ 2226.

Here, there was no actual conflict between the Disputed Work Items and the price proposal. NASSCO's price proposal does not specifically indicate that the Disputed Reservation Clauses cap the Disputed Defined Work (finding 11). Rather, at best, an inference can be drawn from the price proposal that NASSCO viewed the Disputed Reservation Clauses as capping the Disputed Defined Work (finding 11). Thus, the Disputed Work Items' more specific requirement that NASSCO perform the Disputed Reservation Work in addition to the Disputed Defined Work takes precedence over any possible inference that may be drawn from the more general price proposal.

II. <u>There was no Unilateral Mistake</u>

Nor was there a unilateral mistake. In order to reform a contract based upon unilateral mistake, a contractor has the burden of proving by clear and convincing evidence that:

(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."

Holmes & Narver Constructors, Inc., ASBCA No. 52429, 02-1 BCA ¶ 31,849 at 157,393 (quoting *McClure Elec. Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997)). Thus, we will not reform a contract where a contractor merely made a business judgment in its bid. *Hydraulics Int'l, Inc.*, ASBCA No. 50325, 00-2 BCA ¶ 30,921 at 152,627 (citing *Ruggiero v. United States*, 420 F.2d 709, 713 (Ct. Cl. 1970)). A business judgment is a "conscious gamble with known risks." *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed. Cir. 1987).

Here, NASSCO has failed to show by clear and convincing evidence that its misreading of the Disputed Work Items was a unilateral mistake instead of a business judgment. As discussed in greater detail above, NASSCO knew that there was a risk that the Disputed Reservation Clauses did not cap the Disputed Defined Work by limiting the Disputed Work Item Work to the Disputed Reservation Work because it was aware that most subcontractors did not read the Disputed Reservation Clauses that way (finding 9). However, instead of seeking clarification from the government, it consciously gambled that the Disputed Reservation Clauses capped the Disputed Defined Work (finding 11). Therefore, NASSCO made a business judgment to adopt the more contractor-friendly reading of the Disputed Reservation Clauses, and we cannot reform the 4426 contract based upon a purported unilateral mistake.

CONCLUSION

For the foregoing reasons, we deny this appeal.

Dated: January 27, 2022

James R. Sweet

JAMES R. SWEET
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
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. 61524, Appeal of General Dynamics - National Steel and Shipbuilding Company, rendered in conformance with the Board's Charter.

Dated: January 27, 2022

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals