ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
IVA'AL Solutions, LLC	)	ASBCA No. 63430
	)	
Under Contract No. FA8052-21-C-0004	)	

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS

Appellant, IVA'AL Solutions, LLC (IVA'AL) has a contract with the United States Air Force (Air Force or government) to provide healthcare professionals in the continental United States as part of the Family Advocacy Program and Domestic Abuse Victim Advocacy program. IVA'AL appeals from a contracting officer's (CO) final decision denying its certified claim regarding a purported change in billing requirements and allegations that the government failed to disclose superior knowledge or breached the duty of good faith and fair dealing with regard to staffing vacancies for one of the incumbent contractors. For the reasons stated below we deny IVA'AL's contract billing claim, but hold that the government failed to disclose superior knowledge.

FINDINGS OF FACT

The Contract

On May 12, 2021, IVA'AL and the United States Air Force entered into contract No. FA805221C0004 (R4, tab 1 at 1). IVA'AL is a tribally-owned participant in the Small Business Administration 8(a) business development program (app. supp.

R4, tab 170 at 4)[1] and the contract was an 8(a) small business set-aside (R4, tab 1 at 1). The contract had a total award amount of $12,143,079.72, comprised of various contract line items (CLINs) and sub-CLINs (SLINs) for various labor categories, as well as CLINs for miscellaneous expenses such as travel and training (R4, tab 1 at 1-24). In box 27 of the contract, neither box 27a "SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4. FAR 52.212-3 AND 52.212-5 ARE ATTACHED" nor box 27b "CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4. FAR 52.212-5 IS ATTACHED" are checked (R4, tab 1 at 1); however, the contract incorporates FAR 52.212-4 by reference (R4, tab 1 at 131) and FAR 52.212-5 is incorporated by full text (*id.* at 133-39).

The SLINs in dispute provide that they are "Firm Fixed Price" SLINs with a quantity of hours and a unit price per hour (*id.* at 3-24). As an example, SLIN 0002AB pertains to Domestic Abuse Victim Advocates (*id.* at 5). The SLIN provides that it is for "personal services in accordance with the Performance Work Statement (PWS) section 3.1.6. Payment shall only be submitted for those services rendered in compliance with the PWS. This labor category represents 1,360 hours per FTE" (*id.*). The SLIN further provides that it is "Firm Fixed Price" with a "quantity" of 68,000; the "unit" is "hours"; the "unit price" is $[redacted] for an "amount" of "Firm Price USD [redacted]" (*id.*).

Certain of the miscellaneous expense line items, not in dispute in this appeal, are described as "time and material" line items (R4, tab 1 at 4-25). The CO prepared a determination and findings justifying the use of a time and materials contract for the Other Direct Expenses and travel on the contract but made no finding regarding the labor hours (app. supp. R4, tab 33).

The contract is for "personal healthcare services In Accordance With (IAW) Federal Acquisition Regulation (FAR) 37.104 & DFARS 237.104 to provide qualified clinical (masters-level) social workers, U.S. licensed registered nurses, certified victim advocates, and FAP staff personnel in implementing the FAP/DAVA at U.S. AF Military Treatment Facilities (MTFs) and Joint Bases where AF is the lead" (R4, tab 2 at 3).

FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (OCT 2018) (R4, tab 1 at 131); FAR 12.302, TAILORING OF PROVISIONS AND CLAUSES FOR THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES; Defense Federal Acquisition Regulation Supplement

[1] Not all of the documents in IVA'AL's supplemental appendix contain Bates Numbers. This decision cites to Bates Numbers when available, and otherwise cites to the .pdf document page number.

(DFARS) 252.232-7003, ELECTRONIC SUBMISSION OF PAYMENT REQUESTS AND RECEIVING REPORTS (DEC 2018) (R4, tab 1 at 115); and DFARS 252.232-7006, WIDE AREA WORKFLOW PAYMENT INSTRUCTIONS (DEC 2018) (R4, tab 28 at 2-4) are the relevant contract clauses appearing in the contract or incorporated by reference that control the invoicing process for this contract.

The contract's Performance Work Statement (PWS) provided that IVA'AL was required to "provide all labor, personnel, tools, equipment, transportation, and materials . . . to perform all tasks" in the PWS (R4, tab 2 at 4, § 1.2.5). PWS section 1.2.6 specifies that IVA'AL provide services in the form of "Full Time Equivalents (FTE) . . . ." (*id.*, § 1.2.6). PWS section 2.7 "Duty Hours," provides that:

> **FATM, Family Advocacy Outreach Manager (FAOM), FAIS, FAN, and Family Advocacy Program Assistant (FAPA)**: Weekly hours shall not exceed a 40 hour workweek and a typical workday will be between 7:00 AM to 4:30 PM Monday through Friday. The Government reserves the right to change hours of operation or restrict Contractor access to installation. Routine hours: As set by the MTF Commander are 40 hours per week, Monday through Friday, excluding federal holidays or when the Government is closed due to local or national emergencies, administrative closings, or similar Government directed facility closings, unless otherwise approved. Routine hours may vary for specific instances; however, 40 hours should not be exceeded in a given week. Contract personnel shall coordinate all absences with the FAO.

(R4, tab 2 at 6, § 2.7—Duty Hours)

The PWS section 2.8 "Federal Holidays," provides at § 2.8.2:

> The Government reserves the right to verify the hours worked by the contract personnel by requiring them to complete the Family Advocacy Program Network (FAPNet) on-line time card module for the previous month. Only hours worked for the preceding month will be annotated by the 5th workday of the following month and reviewed by the FAO.

(R4, tab 2 at 7) Also under the "Federal Holidays" section of the PWS, section 2.8.4 states:

> The Contractor shall be compensated for services satisfactorily performed and accepted by Government COR. Under no circumstance will the Government be liable for hours not worked as a result of base closure regardless of the reason (emergency or otherwise). Additionally, the Government will not reimburse the Contractor for any federal holidays unless service was provided. If services are required on a federal holiday the labor hour rates specified in the contract schedule shall apply.

(*Id*.)

The PWS also contains the contract's performance objectives. The fourth performance objective pertains to contract staffing: "Staffing- Only hours worked for the preceding month will be annotated by the 5th workday of the following month and reviewed by the FAO." The performance objective references ¶ 2.8.2, described above, and provides the performance threshold: "Submit work hours no later than the 5th work day of the following month. No more than 5 late submissions per month." (*Id.* at 30) Section 3.1.16 provides that "Contractor will not invoice for and Government will not pay for any positions during the time those positions are vacant" (R4, tab 2 at 25).

During the solicitation period for the contract, there were two questions and answers (RFIs) pertaining to vacancies on the existing contracts. Question No. 62 asked:

> Question:
> Are there current openings on the contract and if so, can the Government share which positions are vacant?
>
> Response:
> No.

(App. supp. R4, tab 12 at IVAAL2082). The other question, No. 142 asked:

> Can the government advise if all current positions are filled? If not, please state which positions are currently open.
>
> Response:

> Given that the Award will be made at a much later date the Government cannot provide realistic data at this time.

(*Id.*, tab 12 at IVAAL2097)

Attachment 19 to the RFP provided that:

> All labor CLINs, except for DAVA Overtime, and transition CLINs will be firm-fixed price (FFP). All Other Direct Cost (ODC) CLINs and DAVA Overtime CLINs will be Time & Material, but will not be proposed on. ODCs and their prices, except for the 90-day transition period, are established based on historical market research and anticipated level of effort. ODC cells and prices are locked and shall not be altered.

(App. supp. R4, tab 58 at 12) Two questions pertaining to this clause were included in the questions and answers. Question 48 asked:

> Can the government please clarify whether this means the expected contract type for these labor categories is FFP?
>
> Answer:
>
> Yes, the contract type is FFP.

(App. supp. R4, tab 12 at IVAAL2079) The next question, number 49 asked:

> If all labor CLINs, except for DAVA Overtime and transition CLINs will be FFP, can the Government please reconcile this with the language from PWS 3.1.16, stating that []the "Contractor will not invoice for and Government will not pay for any positions during the time those positions are vacant?"
>
> Answer:
>
> Contractor will not invoice for and Government will not pay for any positions during the time those positions are vacant.

(*Id.*) The questions and answers were included as attachment 25 (app. supp. R4, tab 75 at 2, app. supp. R4, tab 66) to the request for proposals (solicitation) (app. supp. R4, tab 39).

IVA'AL's Billing Under the Contract

The contract's performance work statement requires that the contractor submit its draft invoices as a deliverable under the contact (R4, tab 2 at 34). The Contract Data Requirements List (CDRL) A008 provides that the draft invoice "[f]ormat shall be mutually agreed to between Contractor and the Government" (R4, tab 10 at 1). On September 22, 2021, during the contract's transition period, IVA'AL and Air Force personnel held a post-award orientation meeting. (app. supp. R4, tab 80). During the transition period, Mr. Corey Berry, the CO, told IVA'AL that invoicing on the current FAP CONUS Contract would be similar to IVA'AL's invoicing on the predecessor CONUS East contract (tr. 61, 86-87). IVA'AL began performance of the contract in December 2021 (tr. 109). In January of 2022, IVA'AL contacted the government regarding invoice formatting (R4, tab 34 at 3-4). On January 12, 2022, the CO, Mr. Berry, stated that IVA'AL should be billing monthly only for hours performed per the contract terms (R4, tab 34 at 2). On January 14, 2022, Mr. Berry provided IVA'AL with an explanation of the contract CLIN and SLIN structure and provided instructions on the proper method to invoice in accordance with the contract terms (R4, tab 35 at 2-4).

On February 2, 2022, the Air Force and IVA'AL executed bilateral contract Modification No. 4. This modification outlined the process for IVA'AL to submit invoices using the Wide Area WorkFlow (WAWF) program. (R4, tab 28 at 1-4) Specifically, the modification incorporated DFARS 252.232-7006 "Wide Area WorkFlow Payment Instructions" (*id.*). The DFARS clause provides that "[f]or services that do not require shipment of a deliverable, submit either the Invoice 2in1, which meets the requirements for the invoice and receiving report, or the applicable invoice and receiving report, as specified by the CO" (*id.* at 3). IVA'AL's Chief Financial Officer, Ms. Jessica Miller, testified on cross-examination that IVA'AL's invoice 2in1 (R4, tab 45 at 5-6) was a format expressly identified in DFARS 252.232-7006, and that the invoice contained information mutually agreed to by both parties (tr. 75-76, 100).

On February 4, 2022, IVA'AL submitted its first invoice seeking payment for work performed during December 2021 (R4, tab 36; tr. 36-37, 82). In submitting the invoice, IVA'AL "block billed" the labor hours, following the process it had used on the CONUS East contract (tr. 37, 86-87). IVA'AL contends that it invoiced in this manner because the CO, Mr. Berry, directed IVA'AL to do so (tr. 86-87). In essence, IVA'AL billed 1/9th of the nine-month fixed-price line item amount, minus vacancies (tr. 82-84, 89). However, the record is unclear as to how IVA'AL made these

adjustments. The Air Force contended that IVA'AL was billing for vacant positions (app. supp. R4, tab 116 at USAF335). It appears that IVA'AL may be making a distinction between the hours worked and a vacant position (app. supp. R4, tab 94 at IVAAL1066 (contending that it was able to bill for positions once it submitted a qualified candidate to the government)).

On February 8, the Air Force rejected the invoice (R4, tab 37 at 1; tr. 37, 84). In the email rejecting the invoice, the CO wrote to IVA'AL, "[p]lease make sure the invoices for SLINs under CLINs 0001 and 0002 are captured in hours as that is how the SLINs are built. If the invoices do not follow that process, they will be rejected by DFAS" (R4, tab 37 at 1; tr. 84).

On February 9, IVA'AL's then-chief contracts and compliance officer responded to the Air Force's directive that the Contract requires invoicing based on individual hours worked:

> Our accounting system restrictions will not allow hourly invoicing on a FFP type contract. The current system calculation is based on the total number of billable days in the month less the number of days that position is vacant. In order to include hours and/or rates, we will need to change the contract type to T&M [time-and material] and reverse and correct all four timesheet periods. This is a deviation to our accounting system and could have audit implications as we would then be out of compliance with the prescribed contract type. Can the Government please reconsider its instruction given the required deviation?

(R4, tab 38 at 1) The same day, the CO rejected IVA'AL's request that the Air Force reconsider its direction that the company submit invoices on the basis of hours worked (R4, tab 40 at 1-2).

The Air Force eventually paid IVA'AL for the December, January, and February invoices in what the Air Force characterizes as an accommodation to avoid a cash flow issue for IVA'AL (R4, tab 45 at 1). The Air Force paid the full amount of IVA'AL's first three invoices without deducting any amounts for vacancies (tr. 89-90).

The Air Force continued to direct IVA'AL on how to invoice properly (R4, tab 37 at 1). IVA'AL continued to submit "block billing" invoices, using the number of billable days in a month less any days that a position was vacant (R4, tab 38 at 1). IVA'AL continued to submit invoices that were not prepared in accordance with the CO's instructions for submission into WAWF (app. supp. R4, tab 137 at USAF1192).

Adding to the confusion regarding billing are problems the Air Force experienced setting-up the WAWF interface. On February 15, 2022, the CO wrote:

> First, the news: we received internal information that there was an issue with WAWF being able to receive the information to auto-populate everything. Unfortunately, you will need to manually build the CLINs/SLINs when invoicing. There is no other way or solution that can be had here, and the sooner they are built the quicker the invoices will push through. However, we can assist by providing you with a copy of the conformed award (to-date) and a copy of the CLINs and SLINs in excel format. This should hopefully make it easier for you [to] work your way through the CLINs and SLINs as they are built in the system.

(App. supp. R4, tab 176 at 1)

The Air Force has continued to require IVA'AL to manually enter invoices in WAWF (tr. 41-42, 92-93). Specifically, the WAWF system lacked any CLINs or SLINs for labor (tr. 42). To date, IVA'AL must still enter each invoice manually based on hours worked by individual personnel (tr. 42, 94). IVA'AL personnel testified that the Air Force's actions were not normal, in that IVA'AL personnel had never experienced a U.S. government agency administering a contract in this manner (tr. 42-43, 93-94). In IVA'AL's experience, the U.S. government agency—not the contractor—builds the CLIN and SLIN structure in WAWF (tr. 73). The government has paid IVA'AL for all hours worked pursuant to the contract (tr. 47).

IVA'AL Learns of Unfilled Positions in the CONUS West Contract

Prior to combining the Family Advocacy Program and Domestic Abuse Victim Advocacy (DAVA) requirement into a single contract, the Air Force organized the FAP/DAVA program by region within the Continental United States (app. supp. R4, tab 170 at 5). IVA'AL performed one such predecessor contract known as "CONUS East" (app. supp. R4, tab 174 at 1). Choctaw Staffing Solutions (Choctaw) performed the "CONUS West" predecessor contract (app. supp. R4, tab 170 at 5-6, tab 172 at 2). The FAP CONUS East contract had a different CLIN and invoicing structure than the current contract, with the unit as "Each" and the Unit Price as $1.00 (app. supp. R4, tab 174 at 3).

The predecessor contracts had a performance standard requiring the contractor to maintain 95% staffing 100% of the time (tr. 27).[2] The CONUS West contract, and the CONUS East contract performed by IVA'AL incorporated clauses that were "materially the same" (tr. 29-30). IVA'AL complied with the performance standard and maintained 95% staffing 100% of the time (tr. 26-27). However, Choctaw had difficulty filling vacant positions. Choctaw had a 29% vacancy rate when the Air Force issued the solicitation for the contract at issue (app. supp. R4, tab 172 at 3). The vacancy rate declined to 26% by the date that offerors were required to submit their proposals but increased to 38% by the date of award (*id.*). The rate further increased to 47% by Choctaw's last day performing the CONUS West contract (*id.*). The 47% vacancy rate was based on the government's discovery response that 35 of 74 positions were vacant (*id.*). However, IVA'AL presented testimony that there were actually 41 vacancies attributable to the CONUS west contract (tr. 110-11).

During the transition period IVA'AL personnel learned of significant vacancies arising from the predecessor CONUS West contract performed by Choctaw. An August 31, 2021 IVA'AL email summarized a call with Air Force CO representative Robert "Bob" Faust attributing the staffing vacancies to the Air Force hiring Choctaw's employees. The e-mail states that:

> [Mr. Faust] reported FAP West is staffed at 62% at no fault of Choctaw – the Gov has hired 70 of Choctaw LCSW's for 77 positions and made them GS employees for the other AF Mental Health initiatives i.e. True North. Bob is hoping since this contract salaries are priced higher, than we [sic] they were priced in 2015, it should be closer to the GS salaries and it will assist with retention.

(App. supp. R4, tab 79) At the September 22, 2021 post-award orientation, Bob Faust stated to the IVA'AL personnel in attendance, "Do not expect [Choctaw] to fill any professional positions where Credentialing is required" (app. supp. R4, tab 169 at 8; tr. 90-92).

Although the government did not disclose the vacancy rate on the CONUS West contract to bidders, it did provide three evaluation notices to IVA'AL advising that its proposed salary rates were too low and questioning IVA'AL's decision not to include transition costs in its price proposal (app. supp. R4, tab 173 at 33-34, 42-43, 60-61). The government additionally points out that it informed offerors in July 2018, that "business intelligence" indicated that there will be a shortfall of 195,00 social workers by the year 2030 (gov't br. at 20 (citing app. supp. R4, tab 35 at 4)).

[2] The government did not respond to IVA'AL's proposed findings of fact. We find this fact to have been established by a preponderance of the evidence.

IVA'AL's Claim and Appeal

On August 9, 2022, IVA'AL submitted its certified claim to the Air Force CO (R4, tab 32). IVA'AL's claim asserted entitlement to an equitable adjustment to the Contract price of $7,091,311.29 (*id.* at 5). On October 6, 2022, the Air Force CO issued a final decision denying IVA'AL's claim (R4, tab 33). The final decision, in its entirety, provided that: "I have reviewed and considered the allegations contained in the certified claim dated August 9, 2022, and find that there is no basis in fact and law to support the claim. Accordingly, I deny the claim" (*id*. at 1). On October 11, 2022, IVA'AL timely filed a notice of appeal (dkt. entry 1). On December 28, 2022, IVA'AL filed its Complaint, which included five counts: Count I: Breach of Contract—Invoicing; Count II: Breach of Covenant of Good Faith and Fair Dealing—Failure to Disclose Predecessor Staffing Vacancies and Failure to Recruit; Count III: Breach of Contract—Air Force Poaching of IVA'AL Professional Staff; Count IV: Breach of Contract—Failure to Provide Competent Air Force Administration; and Count V: Non-Monetary Claim—Improper Attempted Option Exercise (compl. ¶¶ 77-94). By notice submitted January 5, 2024, IVA'AL voluntarily dismissed Counts III, IV, and V of its complaint (app. not. dtd. Jan. 5, 202[4]). On February 6, 2024, the Board held a one-day hearing (tr. 2). IVA'AL called three witnesses; however, the government rested its case without calling any witnesses of its own (tr. 3, 128).

DECISION

IVA'AL asserts that the government breached the contract by forcing it to bill on a time and materials basis rather than the firm-fixed-price specified for the CLINs in the contract. IVA'AL additionally asserts a breach of the duty of good faith and fair dealing, and failure to disclose superior knowledge because the government failed to disclose the vacancy rate on the predecessor CONUS West contract. (app. br. at 19-30)

I. IVA'AL's Breach of Contract Claim Pertaining to Invoicing

IVA'AL's breach of contract claim for invoicing is not entirely clear. IVA'AL asserts that it submitted its invoices on a firm-fixed-price basis, based on FTE staffing levels, and deducting for vacancies (app. br. at 15). IVA'AL relies upon the statement in the SLINs identifying the labor categories by "hours per Full Time Equivalent" as requiring performance "in the form of FTEs" (app. br. at 20). However, the SLINs have a quantity expressed in units of "hours" and a rate expressed in dollars per hour. For example, SLIN 0001AB, Family Advocacy Treatment Manager (FATM) calls for 2,820 hours of labor at $[redacted] per hour. (R4, tab 1 at 3) The SLIN specifies that the labor category represents 1410 hours per FTE (*id.*). Thus, the FTE staffing is mathematically equivalent to two FTEs (2,820 hours / 1410 hours per FTE = 2). That

is, for the FATM SLIN above, the contract specifies that an FTE is 1,410 hours, so invoicing for 2 FTEs at $[redacted] per hour is exactly the same as invoicing for 2,820 hours at $[redacted] per hour -- $[redacted]. Whether the contractor bills $[redacted] for 2 FTEs or $[redacted] for 2,820 hours is a distinction without a difference.

It is unclear how IVA'AL calculated its deductions from the FTE staffing levels. In its brief, IVA'AL argues that the PWS only required deductions from the FTE level of staffing for Federal holidays and instances where the installation was closed (app. br. at 20; app. reply br. at 1, 6). In addition, the record contains a reference to billing for positions once a qualified candidate was submitted to the government, rather than when the employee started work (app. supp. R4, tab 94 at IVAAL1066). The record does not appear to contain a monthly invoice calculated using both methods to allow a direct comparison to determine how IVA'AL calculated its deduction for vacancies. Despite the lack of clarity regarding IVA'AL's calculation of the deductions, we think the record is sufficient to resolve the matter before us.

A. The Relevant CLINs are Fixed-Price, Level-of-Effort Term CLINs

As noted above, the CLINs in dispute are listed as firm-fixed-price in the contract. IVA'AL argues that it is entitled to invoice monthly, based on the pro-rata share of the FFP amount. That is, one-ninth of the nine-month base period, subject to deduction (however IVA'AL calculates the deductions). The government argues that the contract is a "firm-fixed price hourly contract" (gov't br. at 7). However, the government cites no authority for this purported contract type beyond the CLINs in the contract (R4, tab 1 at 3-24). "Firm-fixed price hourly" is not a contract type listed in the FAR, and we are not aware of a decision by a board of contract appeals or the Court of Federal Claims referencing a "firm-fixed price hourly" contract. Regardless of the characterization of a contract type by the parties, the determination of the type of contract is a question of law to be determined by the Board. *See, e.g., Heartland Energy Partners LLC*, ASBCA No. 62979, 22-1 BCA ¶ 38,200 at 185,520. We determine that the CLINs at issue are fixed-price, level-of-effort term CLINs. FAR 16.207-3, LIMITATIONS (NOV 2024). The government may be arguing the same thing, just using a different term.

The fixed-price, level-of-effort term contract is a fixed-price type contract, so it does not require cost-realism or price realism analysis. *AllWorld Language Consultants, Inc.*, B-291409, 2003 CPD ¶ 13 (Comp. Gen. Dec. 16, 2002). However, it is like a cost-reimbursement contract in that the agency pays for the level of effort expended. "Failure to expend the effort should lead to a pro rata reduction in payment while complete expenditure of the labor-hours should result in full payment without regard to the level of accomplishment of the work called for by the contract." John Cibinik, Ralph C. Nash, Christopher, R. Yukins & Nathaniel E. Castellano, Formation

of Government Contracts Sect. 12.06, Level of Effort Contracts (5th ed. 2023). Thus, with a fixed-price, level-of-effort term contract, IVA'AL is entitled to payment for the labor provided (whether expressed as FTEs or hours), for the term of the contract, regardless of the results achieved (subject to any contractual provisions).

To the extent IVA'AL is arguing that it is only required to deduct for holidays and base closures, we reject its interpretation. A contractor performing a fixed-price, level-of-effort term CLIN is only entitled to compensation for the hours actually worked. *Halifax Eng'r, Inc.*, ASBCA No. 37335, 91-1 BCA ¶ 23,492 at 117,830, *aff'd on other grounds, Halifax Eng'r, Inc. v. United States*, 949 F.2d 403 (table). IVA'AL relies upon a statement in the PWS that "[u]nder no circumstance will the Government be liable for hours not worked as a result of base closure regardless of the reason (emergency or otherwise). Additionally, the Government will not reimburse the Contractor for any federal holidays unless service was provided." (R4, tab 2 at 7) While the PWS provision clearly provides that the contractor will not be compensated for base closures and Federal holidays, IVA'AL attempts to read this as an exclusive list of instances requiring deductions. However, the PWS section cited by IVA'AL is titled "Federal Holidays" and does not claim to be an exclusive list of instances for which IVA'AL will not be paid (*id.*). The PWS also provides, at section 3.1.16 that "[c]ontractor will not invoice for and Government will not pay for any positions during the time those positions are vacant" (R4, tab 2 at 25). Reading the contract in its entirety we conclude that IVA'AL is only entitled to compensation for hours actually worked.

B. The Contract Was Modified to Require IVA'AL to Bill Through WAWF

IVA'AL complains of being required to bill though the wide area workflow system (app. br. at 20). According to IVA'AL the government failed to properly set-up the WAWF billing information in the system (*id.* at 21). Part of IVA'AL's argument is that the government required it to bill on an hourly, time and materials basis, rather than on a firm-fixed-price, basis as IVA'AL interprets its contract (*id.* at 20-21). Above, we held that the contract was a fixed-price, level-of-effort, term contract, and that IVA'AL was required to bill on the basis of hours actually worked (or the mathematically equivalent number of FTEs). To the extent IVA'AL is asserting a claim for its difficulties in billing through WAWF, we deny the claim.

As set-forth above, bilaterial contract modification 4 added DFARS 252.232-7006 to the contract (R4, tab 28). Clause 7006 contained billing instructions (*id.*), and IVA'AL's witness conceded on cross-examination that IVA'AL's 2in1 invoice (R4, tab 45 at 5-6) was in a format required by the contract (tr. 100).

IVA'AL instead relies upon a statement by the CO, Mr. Berry, that invoicing would be similar to IVA'AL's invoicing on the predecessor contract (tr. 61, 86-87). The Air Force did not rebut this testimony. As a CO, Mr. Berry possessed the authority to enter into an implied-in-fact contract. The parties did not allege or brief the requirements of an implied-in-fact contract. In order to establish the existence of an implied-in-fact contract with the United States, IVA'AL would need to establish the same elements as for a written contract: 1) mutuality of intent to contract; 2) consideration; 3) unambiguous offer and acceptance; and 4) actual authority on the part of the government representative whose conduct is relied upon. *See, e.g.*, *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). However, even if we assume that Mr. Berry's statement that billing would be "similar to" the predecessor contract created an implied-in-fact contractual obligation, such an agreement would have been superseded by the execution of bilateral contract modification 4 (R4, tab 28). IVA'AL asserts that the statement was made during the transition period, and before the start of performance (app. br. at 10-11). Performance began in December 2021, and modification 4 was not executed until February 2, 2022 (tr. 109; R4 tab 28). Thus, even if we were to assume that Mr. Berry's statement legally modified the contract's payment instructions, the execution of modification 4 two months after the start of contract performance modified the contractual requirements going forward. IVA'AL has already been compensated for its December 2021, January 2022 and February 2022 invoices using the block billing method (R4, tab 45 at 1). Thus, the only invoices in dispute are those after the execution of Modification No. 4. Accordingly, we deny IVA'AL's appeal with regard to contractual billing.

II. The Air Force Failed To Disclose Superior Knowledge

Every contract "imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)). This duty of good faith and fair dealing "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Id.* at 991 (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010)). However, the implicit duty prevents a contracting party from "interfer[ing] with the other party's *performance* and not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract*." *Id.* (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (emphasis in original)). We recently explained that "the doctrine imposes duties that fall within the broad outlines set forth by the express terms of the contract, approximating the parties' intent, as divined by the express terms of the contract, for addressing circumstances not specifically set forth by the contract." *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,539.

Related to the implied duty of good faith and fair dealing is the doctrine of superior knowledge. As a general rule, a contractor performing a fixed-price contract assumes the risk of unexpected costs. *See, e.g.*, *Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774, 777-78 (Ct. Cl. 1963). However, the government has an implied duty to "disclose to a contractor otherwise unavailable information regarding 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). Superior knowledge generally applies when: (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. *Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994) (*quoting American Ship Bldg. Co. v. United States*, 654 F.2d 75, 79 (Ct. Cl. 1981)). IVA'AL contends that superior knowledge is a "subset" of the duty of good faith and fair dealing (app. reply br. at 12). One significant difference is that the breach of the duty of good faith and fair dealing does not apply prior to contract formation, while the superior knowledge applies to contract formation issues. *See, e.g., Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012) (holding that the government "could not have breached the covenant of good faith and fair dealing by its pre-award conduct because the covenant did not exist until the contract was signed"). Here, IVA'AL alleges actions both before and after contact execution, so we consider both good faith and fair dealing and superior knowledge.

IVA'AL asserts that two actions by the government demonstrate a breach of the duty of good faith and fair dealing, or superior knowledge. First, IVA'AL cites to the RFI response to a question about the vacancy rates on the existing contract. (app. br. at 29-31). Second, IVA'AL complains of the government's statement during the post-award orientation that IVA'AL should not expect Choctaw to fill any professional positions where credentialing is required (app. br. at 31-33). According to IVA'AL this was a violation of the government's duty to enforce another contract for the benefit of IVA'AL (app. br. at 33). The government argues that IVA'AL has not cited to a violation of a contract term (gov't br. at 21-24). However, IVA'AL is alleging a violation of an *implied* duty and not a violation of *express* contractual terms. *See Metcalf*, 742 F.3d at 994 ("a breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision in the contract").

A. The Government Possessed Superior Knowledge of The Vacancy Rate on The CONUS West Contract

We turn first to the government's RFI response indicating that there were no vacant positions on the current contract. As this was a statement made prior to execution of the contract, we consider whether this constitutes superior knowledge.

i. The Existing Vacancy Rate Constituted Vital Knowledge

The first prong of the superior knowledge test asks whether "a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration." The superior knowledge doctrine is not limited to technical information related to materials or manufacturing methods, but includes any information that affects performance costs or duration. *Yates-Desbuild J.V. v. Dep't of State*, CBCA No. 3350 *et al.*, 17-1 BCA ¶ 36,870 at 179,690. The labor market conditions at issue here are analogous to the facts in *J.A. Jones Constr. Co. v. United States*, 390 F.2d 886 (Ct. Cl. 1968). In that case, the government solicited a construction project without disclosing to offerors that it was about to initiate a large, high-priority construction program for intercontinental ballistic missile sites that would pay premium wages to laborers in the same area. *Id.* at 887. The court held the government liable for failing to disclose its superior knowledge. *Id.* at 893. Moreover, as in *Jones*, the government here was partially responsible for the labor market conditions. IVA'AL presented evidence that Choctaw's unfilled positions were due to the government hiring away Choctaw's employees (app. supp. R4, tab 79). The government did not respond to IVA'AL's proposed finding of fact, so we find the statement to be established.

It is routine for contractors on service contracts to hire the exiting contractor's workforce. Knowledge of a large number of vacancies would indicate to a bidder the need for higher wages and more recruiting expenses. We hold that IVA'AL has satisfied the first prong of the test for superior knowledge.

ii. The Government Was Aware That IVA'AL Lacked Information

The second prong of the test for superior knowledge requires that "the government was aware the contractor had no knowledge of and had no reason to obtain such information." IVA'AL only knew that it was complying with the contractual staffing requirements for its CONUS East contract and had no way of knowing of the problems on the staffing of the CONUS West contract. The information about vacancies on the CONUS West contract were only known to the government and the contractor for the CONUS West contract, Choctaw.

iii. The Government's RFI Answer Was Misleading

The third prong of the superior knowledge test requires that "any contract specification supplied misled the contractor or did not put it on notice to inquire." As noted above, RFI number 62 asked:

> Question:
> Are there current openings on the contract and if so, can the Government share which positions are vacant?
>
> Response:
>
> No.

(App. supp. R4, tab 12 at IVAAL2082) As written, the government's response is plainly incorrect. The predecessor contracts had a performance standard requiring the contractor to maintain 95% staffing 100% of the time. (Tr. 29) Choctaw had a 29% vacancy rate when the Air Force issued the solicitation for the contract at issue (app. supp. R4, tab 172 at 3). The vacancy rate declined to 26% by the date that offerors were required to submit their proposals but increased to 38% by the date of award (*id.*). The rate further increased to 47% by Choctaw's last day performing the CONUS West contract (*id.*).

The government contends that its answer of "no" was a response to the second part of the RFI question ("if so, can the Government share which positions are vacant") and not the first part of the question ("Are there current openings on the contract") (app. supp. R4, tab 172 at 6). While this may have been the government's intended meaning, bidders are entitled to rely upon the plain meaning of the government's responses to the RFIs. If we were to consider the subjective intent of the parties, all contract language would be subject to interpretation.

The government cites to its response to another RFI, number 142, that responded to a similar question about vacancies by stating "[g]iven that the Award will be made at a much later date the Government cannot provide realistic data at this time" (app. supp. R4, tab 12 at IVAAL2097). According to the government "[t]hroughout the pre-award Q&A, the Government made it clear that it would not provide data on incumbent vacancies or incumbent staff because those vacancy rates and staff experience levels would not remain static throughout the source selection, making them unreliable as a substitution for industry market research" (gov't br. at 19). The government additionally cites to market research provided to bidders, such as a July 2018 notice that "[b]usiness intelligence indicates by 2030 the nation will experience a shortfall of over 195,000 social workers" and evaluation notices indicating that IVA'AL's salary rates were too low and that it had underpriced transition costs (gov't

br. at 20). However, vague references to business intelligence regarding expected labor shortages years in the future cannot offset the misstatement in response to the Q&A that there were no vacancies.

We conclude that the government misled IVA'AL.

iv. The Government Failed To Provide Relevant Information

The final prong of the superior knowledge test requires that the "the government failed to provide the relevant information." Here, as discussed above, it is clear that the government failed to provide offerors information regarding the staffing vacancies on the CONUS West contract. Thus, we determine that the government failed to disclose superior knowledge regarding vacancy rates on the CONUS west contract.

B. The Government Did Not Violate The Duty of Good Faith and Fair Dealing By Failing To Enforce the Terms of Another Contract

IVA'AL additionally asserts that the government violated its duty of good faith and fair dealing by failing to enforce the staffing requirements of the CONUS West contract (app. br. at 32). While we have on rare occasions found a government breach of the duty of good faith and fair dealing based on a failure to enforce another contract (*see, e.g.*, *Toombs & Co., Inc.*, ASBCA No. 34590 *et al.*, 91-1 BCA ¶ 23,403 at 117,422) these cases typically involve one contractor on a construction project delaying the performance on another contractor on the same project. Here, IVA'AL complains of performance of a predecessor contractor on a different contract. We determine that IVA'AL's evidence is insufficient to demonstrate a government breach of the duty of good faith and fair dealing. While it has been established that there were vacancies on the CONUS West contract, the record is devoid of information regarding what actions, if any, the government took against the contractor, Choctaw. It is unknown whether the government was withholding contractual funds or threatening Choctaw with termination. IVA'AL's other cited evidence is a statement that IVA'AL should not count on Choctaw filling any vacant professional positions requiring credentialing (app. supp. R4, tab 169 at 8; tr. 90-92). While that statement could be interpreted as meaning that the government would not be enforcing Choctaw's contractual requirements, it also could be Mr. Faust's assessment that Choctaw would not meet performance requirements.

CONCLUSION

For the reasons stated above, we deny IVA'AL's appeal in part with regard to its billing claim, but hold that the government withheld superior knowledge from IVA'AL. The appeal is returned to the parties to negotiate quantum consistent with this decision.

Dated: February 12, 2025

DAVID D'ALESSANDRIS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

MICHAEL N. O'CONNELL
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. 63430, Appeal of IVA'AL Solutions, LLC, rendered in conformance with the Board's Charter.

Dated: February 12, 2025

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