



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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RESPONDENT'S MOTION FOR SUMMARY RELIEF GRANTED  
IN PART; APPELLANT'S MOTION FOR SUMMARY RELIEF  
DENIED: November 13, 2009

CBCA 938

JAVIS AUTOMATION & ENGINEERING, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Crishon D. Jordan, Knightdale, NC, counsel for Appellant.

Stephen R. Palmer, Office of the Regional Solicitor, Department of the Interior,  
Sacramento, CA, counsel for Respondent.

Before **DANIELS** (Chairman), **GILMORE**, and **HYATT**, Board Judges.

**HYATT**, Board Judge.

This appeal is from a contracting officer's decision seeking to recover from appellant, JAVIS Automation & Engineering, Inc. (JAVIS), the amount of \$333,955 in alleged overpayments made under task orders issued pursuant to a letter contract for the provision of information technology and geographic information system services.

JAVIS and respondent, the Department of the Interior, Bureau of Reclamation (BOR), filed an extensive joint stipulation of undisputed facts,<sup>1</sup> followed by the submission of cross-motions for summary relief. For the reasons set forth below, we deny JAVIS's motion and grant the Government's motion in part.

### Findings of Fact

1. In September 2001, JAVIS and BOR entered into letter contract no. 01-CS-20-2178, under which JAVIS was to provide BOR with information technology (IT) and geographic information system (GIS) services. The letter contract provided that the definitized contract would be an indefinite delivery/indefinite quantity (IDIQ) type contract, with work to be performed as identified in task orders issued by the contracting officer. Task orders could be issued as cost-plus-fixed-fee (CPFF), time and materials (T&M), or fixed price. The letter contract included Federal Acquisition Regulation (FAR) clause 52.216-26, permitting payment of allowable costs before definitization. The letter contract was originally scheduled to be definitized by December 5, 2001. Appeal File, Exhibit B.2; SF ¶¶ 2-6.

2. On December 5, 2001, BOR issued the first two task orders for work under the contract, one (order 01A1202178) for GIS services, and the other (order 01A2202178) for IT services.<sup>2</sup> The funding estimate for the GIS task order was \$800,000. For the IT task order the funding estimate was \$125,000. Each of these task orders proposed a new definitization date of February 10, 2002, which also became the target date for definitization of the letter contract. Appeal File, Exhibit B.2; SF ¶¶ 7-8, 10-11.

3. The start date for each task order was retroactive to October 1, 2001, and the end date was September 30, 2002. In enumerating the categories of services to be purchased, both task orders were identified as "cost plus fixed fee" in several places. The task orders also provided that final rates and fee would be negotiated and definitized. Appeal File, Exhibit B.2; SF ¶ 14.

4. The GIS task order set forth labor categories, estimated hours, and estimated rates for the various labor categories. Estimated amounts were to include all direct and

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<sup>1</sup> The joint stipulation of facts filed by the parties is cited herein as SF (stipulated fact) together with the numbered paragraph(s).

<sup>2</sup> The GIS task order also included remote sensing (RS) services. Appeal File, Exhibit B.2.

indirect costs and fee. The estimated hours and amounts were to be negotiated at definitization. Appeal File, Exhibit B.2; SF ¶ 13.

5. Modification 0001 to the GIS task order 01A1202178, in which BOR exercised the option to extend performance for another year, through September 30, 2003, was issued on September 30, 2002, effective September 25, 2002. Modification 0001 repeated that the task order was CFFF and further stated “[t]he estimated hours and amounts for these labor categories are to be negotiated at the definitization of the Letter Contract.” Modification 0002 to the GIS task order, obligating additional funding, was issued on September 9, 2003. Modification 0003 was issued on December 18, 2003. This modification exercised an option to extend performance for six months, from October 1, 2003, through March 31, 2004. Modification 0004 was issued on January 30, 2004. Modification 0005 extended the date of completion of the GIS task order to May 28, 2004, and was issued on April 27, 2004. Modification 0006, issued on August 31, 2004, extended the period of performance from May 28 through August 2, 2004. Appeal File, Exhibit B.2; SF ¶ 14.

6. IT task order 01A2202178, issued on December 5, 2001, stated that it was a CFFF task order and that “[f]inal labor categories, labor rates and estimated hours for performance will be negotiated at the definitization of the Letter Contract.” Modification 0001 to the IT task order was issued on December 13, 2002, effective December 11, 2002, for the purpose of adding funding to the task. It confirmed that this was a CFFF task order and stated that “[f]inal labor categories, labor rates and estimated hours for performance will be negotiated at the definitization of the Letter Contract.” Appeal File, Exhibit B.3; SF ¶ 14.

7. JAVIS commenced performing services under the letter contract in early October 2001, prior to issuance of the task orders. By December 18, 2001, JAVIS had submitted three invoices for payment. All three invoices billed the work performed under the task orders by multiplying hours worked by hourly rates. SF ¶¶ 15-16.

8. In a letter dated December 18, 2001, the BOR contracting officer informed JAVIS that its invoices had been approved and forwarded for payment. The letter stated that “[a]ll costs on these invoices were approved except for Other Direct Costs and the labor costs for the Administrative Specialist.” At the same time, the contracting officer cautioned that “[i]t is apparent you submitted and [were] paid direct labor rates that include all indirect costs and profit or fee. We have not negotiated any of these direct or indirect costs or profit/fee with JAVIS. We are treating all costs as provisional pending definitization.” Appeal File, Exhibit C.2.4; SF ¶¶ 17-18.

9. In a letter dated December 31, 2001, JAVIS responded to BOR’s contracting officer and contract specialist enclosing proposed cost information for the two task orders. The proposal included tables displaying the salary labor rates, fringe, overhead, general and

administrative (G&A) expenses, fees, and the base annual hours for each labor category. This letter also stated that the rates used were based on rates evaluated by the Defense Contract Audit Agency (DCAA). Finally, JAVIS requested that the GIS task order be converted to a firm-fixed-price basis. SF ¶¶ 19-20.

10. On January 7, 2002, the DCAA wrote to JAVIS and approved provisional billing rates for JAVIS's fiscal year 2002 (January 1 through December 31, 2002). Appeal File, Exhibit C.2.12; SF ¶ 21.

11. Beginning in February 2002, the parties made efforts to definitize the letter contract. In a letter dated February 22, 2002, BOR's contracting officer asked JAVIS to submit a cost/price proposal for the basic contract in accordance with sections B, H, J, and L of the solicitation. The letter noted that a cost/price proposal previously had been submitted for both the IT and GIS task orders, but added that the Government required a proposal for the basic contract as well. Appeal File, Exhibit C.2.7; SF ¶¶ 22-23.

12. In response to the contracting officer's request, JAVIS provided its proposal to BOR on March 5, 2002. The proposal included specific fully burdened hourly labor rates and labor categories. Appeal File, Exhibits C.2.9, G.5; SF ¶¶ 22-25.

13. In April 2002, the parties engaged in discussions in an effort to definitize the contract. The parties considered changing the billing method to that of a firm-fixed-price contract and submitting bi-weekly invoices in order to resolve definitization issues. Appeal File, Exhibit G.6; SF ¶ 25.

14. On June 24, 2002, BOR forwarded the JAVIS cost proposal to the DCAA for review, advising that the existing task orders were "both cost plus fixed fee." Appeal File, Exhibit G.7; SF ¶ 26.

15. On July 1, 2002, another BOR contracting officer assigned to this contract wrote to JAVIS with questions regarding the proposal JAVIS had submitted on March 5, 2002. In particular, she asked JAVIS to clarify and justify a "fringe rate" of sixteen percent, and requested a rationale for the application of overhead rates. Appeal File, Exhibit C.2.11; SF ¶ 27.

16. On July 24, 2002, the operations manager for JAVIS wrote to the contract specialist and the contracting officer enclosing a definitized cost schedule for the basic contract period and for the first and second option periods. Appeal File, Exhibit G.8; SF ¶ 28.

17. Subsequently, BOR contacted JAVIS to seek reconciliation of perceived inconsistencies that BOR had identified in the proposal. JAVIS responded with a corrected proposal. Although BOR evaluated JAVIS's cost proposal, the parties never reached agreement as to the proposal and never definitized the letter contract or the task orders. SF ¶¶ 29- 31.

18. JAVIS continued to perform services under the undefinitized letter contract and to bill for those services using the proposed labor rates. BOR continued to pay JAVIS's invoices, but not all invoices were paid in full. SF ¶¶ 32-33.

19. On September 24, 2002, JAVIS submitted its final invoice for the IT task order in the amount of \$26,783.92. SF ¶ 34.

20. On September 26, 2002, BOR issued modification 1 to the letter contract, exercising its one year option to extend the period of performance from October 1, 2002, to September 30, 2003. Appeal File, Exhibit B.1; SF ¶ 35. On September 30, 2002, BOR issued modification 0001 to the GIS task order, exercising its one year option to extend the period of performance from October 1, 2002, to September 30, 2003. Modification 0001 also increased the amount of the GIS task order from \$800,000 to \$1,700,000. Appeal File, Exhibit B.2; SF ¶ 36.

21. On December 13, 2002, BOR issued modification 0001 to the IT task order, amending the task order amount to \$164,086.56 and permitting payment before definitization. Appeal File, Exhibit B.3; SF ¶ 37.

22. BOR paid all amounts that were billed by JAVIS under the IT task order. SF ¶ 38.

23. In a letter dated January 24, 2003, a new BOR contracting officer asked JAVIS to submit another cost proposal for definitization of the letter contract. Appeal File, Exhibit C.2.8. Once again, the parties failed to bring their negotiations to a conclusion and neither the letter contract nor the task orders were ever definitized. SF ¶¶ 39-40.

24. On September 9, 2003, BOR issued modification 0002 to the GIS task order, increasing the amount of the task order by \$300,000 from \$1,700,000 to \$2,000,000. On December 18, 2003, BOR issued modification 0003 to the GIS task order to extend services for an additional six months -- from October 1, 2003, through March 31, 2004. The total amount of the GIS task order was increased from \$2,000,000 to \$2,865,000. On April 27, 2004, BOR issued modification 0005 to the GIS task order, extending the period of performance at no additional cost from March 31 to May 28, 2004. Appeal File, Exhibit B.2; SF ¶¶ 41-43.

25. On August 6, 2004, JAVIS submitted its final invoice for the GIS task order in the amount of \$169,263.24, of which \$28,351.45 was paid, leaving a balance of \$140,911.79. SF ¶ 44.

26. On August 31, 2004, the Government retroactively issued modification 0006 to the GIS task order, extending the period of performance from May 28, 2004 to August 2, 2004, at no additional cost to either party. The modification stated: "Estimated management hours of 250 per year at \$80 per hour, total \$20,000 for this line item. This estimated hourly rate includes all indirect costs and fee. The estimated hourly rate and number of hours for this management category are to be negotiated at the definitization of the Letter Contract." Appeal File, Exhibit B.2; SF ¶ 45.

27. JAVIS provided services under the GIS task order through August 2004. SF ¶ 46.

28. Completion of performance under the IT task order occurred in September 2002, while it remained undefinitized. In a September 2, 2003 letter, the contracting officer notified JAVIS of performance issues requiring further action, including cooperating with DCAA regarding an audit of JAVIS's rates. Appeal File, Exhibit G.12; SF ¶ 47.

29. As of the conclusion of the letter contract, JAVIS had performed all work satisfactorily for BOR under the IT task order; however, the letter contract remained undefinitized. The period of performance under the GIS task order ended in August 2004. SF ¶ 48.

30. On September 14, 2005, JAVIS received an electronic mail message from DCAA acknowledging receipt of time and materials rates that it had requested, and requesting JAVIS to forward the allowable time and material rates for the undefinitized letter contract. The auditor also inquired why the contract was being billed by JAVIS as a time and materials effort when the task orders specified a CPFF contract. Appeal File, Exhibit C.2.15; SF ¶ 49.

31. With respect to the DCAA communication, JAVIS's president and CEO stated in an affidavit that:

In response to the September 14, 2005 request from DCAA, JAVIS discussed the billing of the Letter Contract as T&M with Eileen P. CiCi, Auditor with the DCAA and Evelyn Yamamoto, Contracting Officer with the BOR. JAVIS understood that agreement was reached as to the billing of the Letter Contract as T&M. The Indirect Rate Letter included fiscal indirect cost rates which were consistent with JAVIS' understanding of the Letter Contract's billing as T&M and the exit briefing discussion between JAVIS, Eileen P. CiCi, Auditor

with the DCAA, and Esther M. Fischer, Supervisory Auditor with the DCAA. JAVIS signed the Indirect Rate Letter in agreement with the DCAA and returned it the next day.

Affidavit of John Long, Sr. (Nov. 12, 2008) ¶ 11.

32. On October 28, 2005, DCAA issued an indirect rate letter setting forth the agreed upon final indirect cost rates established by the DCAA auditor in accordance with FAR 42.705-2(b)(2)(ii) and Department of Defense FAR Supplement 242.705-2(b)(2)(ii). The rates were applicable to JAVIS's fiscal years ending December 31, 2001, and December 31, 2002. JAVIS's president signed the letter, accepting the indirect cost rates as final. Appeal File, Exhibit C.2.16; SF ¶¶ 50-51.

33. The indirect rate letter directed JAVIS to submit adjustment or final vouchers for all flexibly priced contracts. Appeal File, Exhibit C.2.16; SF ¶ 52.

34. From November 2005 through April 2007, JAVIS sought payment of its final invoices and vouchers on the undefinitized letter contract. During this time period, BOR and JAVIS tried to negotiate the definitization amount but could not reach an agreement. BOR questioned the final voucher amounts because the rates had not been definitized. SF ¶¶ 53-54.

35. JAVIS sent a letter, dated July 19, 2006, to the contracting officer, following up on a meeting held on July 18, 2006, to discuss final vouchers. In the letter, JAVIS contended that final contract closeout costs should be determined using its time and materials rates. JAVIS also asserted that it had used DCAA's audited rates for JAVIS's fiscal years 2001 and 2002 to bill for the remainder of the contract term and took the position that the contract should be closed out using those approved rates. SF ¶¶ 55-56.

36. After this correspondence, the parties still failed to reach any agreement on contract closeout costs. SF ¶ 57.

37. On January 18, 2007, DCAA unilaterally issued a supplemental memorandum modifying its earlier audit report to correct the contract type from T&M to CPFF. Appeal File, Exhibit G.15; SF ¶ 58.

38. After further correspondence, the parties were still unable to reach an agreement on the amount that should be paid to definitize and close out the undefinitized letter contract. SF ¶ 59.

39. On August 10, 2007, the contracting officer issued a decision, providing a unilateral closeout of task orders 01A1202178 and 01A2202178. The letter stated that it was

a final decision with respect to “overpayments on these task orders.” The letter also stated that review of all documents and the audit reports made “clear that each of the task orders issued under this IDIQ contract were CPFF and not T&M.” Appeal File, Exhibit A; SF ¶¶ 60-61.

40. In this letter, the contracting officer unilaterally closed the letter contract and task orders. With respect to the IT task order, the contracting officer stated that this order was “being definitized in the amount of \$164,086.56, which has been paid in full, all work performed was acceptable.” As to the GIS task order, the contracting officer stated that the DCAA audit issued in January 2007 reflected an overpayment of \$183,277 for fiscal years 2001 and 2002, and an overpayment of \$150,678 for JAVIS’s fiscal years 2003 and 2004. With respect to JAVIS’s fiscal years 2003 and 2004, the contracting officer adopted DCAA’s recommendation to apply a twenty percent decrement to direct and indirect costs.<sup>3</sup> The contracting officer then unilaterally modified the GIS task order to decrease the amount paid by BOR to JAVIS by \$333,955 and demanded that JAVIS refund that amount to BOR. Appeal File, Exhibit A; SF ¶¶ 62-66.

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<sup>3</sup> In a memorandum to BOR, issued on November 16, 2005, DCAA advised that JAVIS had not responded to repeated requests for the contractor’s certified incurred costs proposal for JAVIS’s fiscal year ending December 31, 2003. For that reason DCAA recommended that the contracting officer unilaterally establish contract costs set low enough to ensure that no potentially unallowable costs would be reimbursed. DCAA’s rationale for this position is set forth in pertinent part:

Recent relevant historical data is not available for Javis . . . for fiscal year December 31, 2003. Therefore, we recommend that you unilaterally determine contract costs using a DCAA-wide decrement factor of 20 percent applied to contract costs (direct and indirect) for FY 2003. . . . The 20 percent decrement factor is based on DCAA-wide questioned costs for high-risk contractors. Because Javis . . . has not complied with FAR 52.216-7 and furnished the contracting officer and DCAA its certified indirect cost rate proposal for fiscal year 2003, we consider Javis . . . to be a high-risk contractor. We believe the 20 percent is conservative because it is based on contractor costs after voluntary exclusions of unallowable costs, and the 20 percent is applied to contractor costs as identified in the books and records that probably do not exclude unallowable costs.

Appeal File, Exhibit E.2.

41. JAVIS timely submitted a notice of appeal from the contracting officer's final decision to the Civilian Board of Contract Appeals. SF ¶ 67.

42. With respect to the Government's understanding of the nature of the task orders and its intentions concerning pricing, BOR has submitted the affidavit of its contract specialist, who states that:

The Letter Contract . . . contains FAR Clause 52.216-26[,] titled "Payment of Allowable Costs Before Definitization[,]" which states that "the Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable expenses incurred by the Contractor in performance of this contract." The clause further explains that allowable costs are those such as supplies/services purchased directly for the contract and associated financial payments to subcontractors, materials, direct labor, direct travel, other direct in-house costs, and allowable/allocable indirect costs. Similarly, FAR Clause 52.232-7, titled "Payments under Time-and-Material or Labor-Hour contracts," which is also part of the letter contract, states "the Government will pay the contractor as follows upon the submission of vouchers approved by the Contracting Officer or authorized representative by multiplying the appropriate hourly rate by the number of direct labor hours performed. The hourly rates shall include wages, indirect costs, general and administrative expense, and profit." As the two [types of] contracts are invoiced in a similar fashion, the fact that the Government accepted invoices from JAVIS based on hours worked multiplied by hourly rates did not constitute treatment of the contract as T&M.

Affidavit of Brenda Davis (Dec. 11, 2008) ¶ 2 (Davis Affidavit).

#### Discussion

Both BOR and JAVIS have filed motions for summary relief with respect to the proper interpretation of the terms of the letter contract and the two task orders issued under it. BOR contends that the task orders were clearly intended to be, and were treated by the Government as, CPFF contracts. JAVIS maintains that the actions of the parties during performance demonstrates that the contracts were performed as, and paid as, T&M contracts, and thus its interpretation should prevail. Further, JAVIS contends that BOR breached its obligation under FAR 52.216-25(c) (Contract Definitization) to establish a reasonable unilateral contract price determination upon failing to achieve a mutually agreed upon price definitization.

### Applicable Legal Standards

Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). In resolving summary relief motions, a fact is considered to be material if it will affect our decision and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing. *John A. Glasure v. General Services Administration*, GSBCA 16046, 03-2 BCA ¶ 32,284, at 159,746 (citing *Celotex Corp.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The nonmoving party is then required to “go beyond the pleadings and . . . designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex Corp.*, 477 U.S. at 324. In considering summary relief, the tribunal will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249; *accord Acquest Government Holdings U.S. Geological, LLC v. General Services Administration*, CBCA 439, 07-1 BCA ¶ 33,576.

When both parties move for summary relief, each party’s motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *Anderson*, 477 U.S. at 248; *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The fact that the parties have cross-moved for summary relief does not compel a grant of one of the motions; each motion must be independently assessed on its own merit. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001). In this case, the facts pertinent to determining the nature of the task orders are largely undisputed.

The issue raised by both parties in their motions is one of contract interpretation, which is a legal question that is often amenable to summary disposition. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002) (citing *Textron Defense Systems v. Widnall*, 143 F.3d 1465, 1468 (Fed. Cir. 1998)). The determination of a contract type is also a matter of law, and the tribunal is not bound by the label attached to it by the parties. *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984); *Mason v. United States*, 615 F.2d 1343, 1346 (Ct. Cl. 1980).

### The Parties’ Positions

BOR’s argument in support of its motion is straightforward. BOR asserts that the two task orders contain express unambiguous statements that the work to be performed by JAVIS would be paid for on a cost plus fixed fee basis. The task orders set forth various labor categories, estimated hours, and estimated rates, and also stated that estimated amounts were

to include all direct and indirect costs and fee. Final hours and rates were to be negotiated at definitization. Construing the agreements in context and giving full import to all provisions of the contracts, it follows as a matter of law that the task orders created CPFF contracts.

JAVIS, for its part, acknowledges that the task orders state that the work was to be performed and compensated on a CPFF basis, but nonetheless maintains that other provisions in the task orders, such as the enumeration of labor categories and estimates of costs of labor categories, are suggestive of a time and materials arrangement and thus create an ambiguity. It further contends that since the Government paid appellant's invoices, which used T&M rates proposed by JAVIS, BOR effectively created a new implied-in-fact contract under which the work was performed on a T&M basis. Finally, JAVIS asserts that the contracting officer's final decision was issued improperly.

#### Propriety of Contracting Officer's Decision

We start with JAVIS's contentions concerning the validity of the contracting officer's decision. JAVIS posits that the contracting officer failed to follow applicable regulatory procedures in issuing the final decision with respect to the closeout of the contract and unilateral determination of the final price or fee. In support of this assertion, JAVIS cites FAR 52.216-25(c), which provides that:

If agreement on a definitive contract to supersede this letter contract is not reached by the target date . . . or within any extension of [the target date] granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with subpart 15.4 and part 31 of the FAR, subject to Contractor appeal as provided in the Disputes clause.

48 CFR 52.216-25(c) (2001). JAVIS contends that there is no evidence on the face of the decision to show that the contracting officer's final decision, which unilaterally determined a "reasonable price," was issued with the requisite approval of the head of the contracting activity and that the final decision was therefore defective.

In response, BOR submitted a statement by the contract specialist to the effect that all appropriate approvals were obtained and the contracting officer was authorized to issue the decision establishing a definitized price and asserting the Government's claim for refund. Davis Affidavit ¶ 3. JAVIS did not rebut this evidence. Even if it had, however, the regulation appellant relies upon is not one that confers a benefit upon the contractor. Rather, it is the type of internal regulation that is designed for the agency's benefit. When the primary intended beneficiary of a regulation is the Government, a private party cannot complain about the Government's failure to comply with that regulation, even if that party derives some incidental benefit from compliance with it. *See, e.g., Freightliner Corp. v.*

*Caldera*, 225 F.3d 1361, 1365 (Fed. Cir. 2000); *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1451-52 (Fed. Cir. 1997); *Rough Diamond Co. v. United States*, 351 F.2d 636, 640-42 (Ct. Cl. 1965); *Charitable Bingo Associates, Inc.*, ASBCA 53249, et al., 05-1 BCA ¶ 32,863.

### Proper Interpretation of Contract Language

Although BOR maintains the contract is unambiguous and clear on its face, appellant disagrees. Appellant argues that regardless of what the task orders stated, the conduct of the parties during performance supports its position that the task orders were actually treated as and became T&M contracts. Appellant points to the fact that the Government paid its invoices, which were derived by multiplying hours worked by hourly rates. This, JAVIS contends, supports its position that the parties agreed to calculate costs using T&M rates and profit.

Under a T&M contract, the Government acquires services on the basis of “direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit.” FAR 16.601(a); *Resource Consultants, Inc.*, ASBCA 29710, 86-2 BCA ¶ 18,916, at 95,403. A CPFF contract is a cost-reimbursement contract wherein the Government pays the contractor’s allowable incurred costs to the extent prescribed in the contract, plus a negotiated fee that ordinarily is fixed at the inception of the contract. FAR 16.301-3, .306. Both types of contract contain a ceiling amount, or limitation on costs incurred, which the contractor exceeds at its own risk.

The costs that are considered in negotiating fixed labor rates for a T&M contract are not dissimilar from those that are compensable under a CPFF contract. The fact that JAVIS computed its invoices using hourly rates and specific labor categories was, therefore, not enough to put the Government on notice that JAVIS interpreted the task orders to be T&M, rather than CPFF, contracts, or to create a course of conduct reflecting BOR’s agreement with or adoption of JAVIS’s interpretation. Nor does payment of invoices constitute a ratification of JAVIS’s view.

As respondent notes, in countering appellant’s argument, the letter contract contained FAR clauses 52.216-26 (“Payment of Allowable Costs Before Definitization”) and 52.232-7 (“Payments under Time-and-Materials or Labor-Hour Contracts”). Clause 52.216-26 permits the contractor to submit to the Government an invoice or voucher supported by a statement of the claimed allowable costs incurred by the contractor in performing. The clause defines allowable costs as supplies and services purchased directly for the contract and associated financial payments to subcontractors, materials, direct labor, direct travel, other direct in-house costs, and allowable/allocable indirect costs. Clause 52.232-7 provides that the Government will pay the contractor upon the submission of vouchers reflecting an appropriate hourly rate multiplied by the number of direct labor hours performed. The clause further states that the hourly rates shall include wages, indirect costs, general and

administrative expenses, and profit. Thus, similar information is requested for both types of contracts.

In addition, BOR has provided the affidavit of the contract specialist assigned to this contract, who stated that “[a]s the two [contract types] are invoiced in a similar fashion, the fact that the Government accepted invoices from JAVIS based on hours worked multiplied by hourly rates did not constitute treatment of the contract as T & M.” Finding 41. The task orders’ instructions to the contractor on invoicing stated that estimated hours were to include “all direct and indirect costs and fee.” BOR points out that under the FAR an appropriate instruction for a T&M effort would be to include “fully burdened” rates and a separate amount for profit. This is reflected in paragraph H.4 of the letter contract. In BOR’s view, the task orders thus clearly provided for JAVIS to track and invoice costs for a CPFF contract.

We agree with BOR’s position. The Government never agreed through its conduct, either expressly or by implication, that the task orders were to be priced on a T&M basis. Regardless of what JAVIS intended by submitting its vouchers, the Government consistently informed JAVIS that payments were provisional and subject to audit. The Government undertook to have the invoices audited. There was never any concession on the part of the Government that JAVIS’s rates were acceptable and would be adopted under a T&M format.<sup>4</sup> The record consistently reflects that BOR wanted to audit the proposals to determine what costs were properly allowable and allocable to the task orders, and then to attempt to definitize the task orders. The parties never managed to complete this process, however.

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<sup>4</sup> The affidavit of Mr. Long, *see* Finding 31, does not establish that the BOR contracting officer agreed to accept JAVIS’s proposed T&M rates to price the GIS task order. The affidavit refers to a conversation with the BOR contracting officer, the DCAA auditor and states that JAVIS “understood” that it could bill the task order as a T&M contract. The only participant in that conversation with authority to agree to this was the contracting officer, and there is no documentation or other evidence that she ever did so, other than Mr. Long’s vague statement that JAVIS understood that it could bill the task orders as T&M efforts. This falls short of creating a material issue of fact.

There is also an e-mail message from a DCAA auditor seeking clarification of why appellant provided T&M rates in response to CPFF task orders. On the following page there is a cryptic statement, with no identified author, to the effect that after JAVIS explained its labor rates, the agency validated them during the audit. Appeal File, Exhibit C.2.15. This document is too vague and questionable to suffice to create a genuine issue of fact. In any event, after some early confusion, DCAA corrected its report to reflect that the task orders were CPFF contracts.

The dispute presented by the parties is indeed one of contract interpretation, which begins “with the language of the written agreement.” *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). The plain and unambiguous meaning of the written agreement controls, with reasonable meaning given to all of its parts. *Hercules Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed. Cir. 2002). It is not the subjective intent of any one party that is controlling. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971).

The fact that appellant regularly invoiced the Government using what JAVIS considered to be T&M rates, and was paid on a provisional basis, did not serve to transform the task order from a CPFF to a T&M contract. This practice was contrary to BOR’s invoicing instructions. BOR requested a DCAA audit to determine the accuracy of the provisional rates, and once it obtained a report, stopped paying on JAVIS’s GIS task order invoices. The record supports the Government’s position that it always understood the task orders to be CPFF contracts. *See Dawkins General Contractors & Supply, Inc.*, ASBCA 48535, 03-2 BCA ¶ 32,305.

JAVIS also argues that the failure to definitize, together with BOR’s payment of its invoices, served to create an implied-in-fact T&M contract for the task order services. As respondent points out, this argument is readily disposed of. An “express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract.” *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990); *see also Trauma Service Group v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997); *ITT Federal Support Services, Inc. v. United States*, 531 F.2d 522, 528 n.12 (Ct. Cl. 1976); *Todd Pacific Shipyards Corp.*, ASBCA 55126, 08-2 BCA ¶ 33,891. The matters raised in this appeal -- the type of contract and the proper pricing of the services supplied by appellant -- are covered by the express letter contract and task orders issued by BOR. The “implied-in-fact” contract that JAVIS believes was created covers precisely the same subject matter as the express contracts it already held with BOR.

Finally, JAVIS asserts that BOR’s decision not to claim a refund under the IT task order, which JAVIS states was also invoiced on a T&M basis, supports its position that BOR was in agreement with JAVIS’s interpretation. BOR’s response to this argument is that this was a much smaller order, the payments did not appear to be excessive, and the agency simply elected not to devote resources to seeking repayment of any overpayments that might have been made. BOR also points out that once an appeal is taken, the Board may decide the appeal without deference to the contracting officer’s findings in her final decision. *See Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994)(en banc). Thus, the acceptance of the IT invoices may still be revisited. We agree with BOR that this argument does not require the conclusion that the task orders must be paid using JAVIS’s T&M rates.

Upon consideration of the undisputed facts before us, we find that BOR has demonstrated that as a matter of law the task orders created CPFF contracts. BOR

consistently made it clear that it expected to reimburse JAVIS on a CPFF basis. JAVIS's interpretation would render the CPFF provisions in the task orders superfluous and would effectuate the contractor's subjective intent.

Although we are persuaded that, as a matter of law, BOR is entitled to prevail on the question of whether the proper billing rates are CPFF or T&M, we are not convinced that the amount of the overpayment alleged by BOR is sufficiently accurate that we should deny the appeal outright. Although both parties seem to expect that resolution of the question of whether the task orders were CPFF or T&M will fully resolve the appeal, that is not the case. Neither party has provided sufficient support for the dollars claimed to decide the amount in dispute given the record available to the Board. Thus, while the agency has prevailed as to the type of contract performed, it has not demonstrated that the amount by which it considers JAVIS to have been overpaid is correct. Accordingly, we grant BOR's motion limited to the question of the nature of the contract and the corollary pricing of the services provided. The amount of the overpayment, if any, that BOR may be entitled to collect back from the contractor remains to be determined.

#### Decision

Respondent's motion for summary relief is **GRANTED IN PART**. Appellant's motion for summary relief is **DENIED**.

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CATHERINE B. HYATT  
Board Judge

We concur:

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STEPHEN M. DANIELS  
Board Judge

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BERYL S. GILMORE  
Board Judge

