



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED AS TO ENTITLEMENT: July 28, 2009

CBCA 1188

BRINK'S/HERMES JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Robert K. Tompkins and Elizabeth M. Gill of Patton Boggs, LLP, Washington, DC, counsel for Appellant.

Dennis J. Gallagher, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **HYATT**, **STEEL**, and **SHERIDAN**.

STEEL, Board Judge.

Appellant, Brink's/Hermes Joint Venture¹ (Brink's), seeks a contract adjustment in the amount of €28,811.09 pursuant to the Variation in Quantity clause in its contract with respondent, the Department of State. (Complaint ¶ 1). Respondent claims that appellant is not entitled to an adjustment. The appeal was timely filed with this Board. The parties have filed cross-motions for partial summary relief on entitlement.

¹ The Joint Venture is comprised of Brink's, Incorporated, and its Greece-based subsidiary, Hermes Security, S.A., now Brink's Hermes Security Services SA, ("Hermes Security" or "Brink's Security Services").

Finding of Fact

The following facts are based on the contract, the appeal file, and the parties' joint statement of uncontested facts (JSUF) .

1. On July 1, 2006, Brink's and the Department of State, through the United States Embassy, Athens (Embassy), entered into contract number SGR100-06-C-0353 for the operation and management of guard services. These services were secured in order to prevent unauthorized access; protect life; maintain order; deter criminal attacks against employees, their dependents and property, and terrorist acts against all U.S. assets; and to prevent damage to government property, specifically, the Embassy and constituent posts. The contract covered a base year through June 30, 2007, followed by four one-year option periods. The contract had a total ceiling price of €31,359,937.70, or €6,271,987.54 for the base and each of the option years. Appeal File, Exhibit 1 at 4-16.²

2. The contract required two types of guard services, standard services and additional or emergency services (A&E services), each to be paid on a time and materials basis with a fixed monthly rate for vehicles and other equipment, as follows:

C.2.1 STANDARD SERVICES. Exhibit A specifies the standard services [guard posts and schedule of guard coverage]. The Contractor shall not subcontract or lease for the standard services.

C.2.2 ADDITIONAL OR EMERGENCY SERVICES. Additional or emergency services are services within the scope of this contract but not specified in Exhibit A. The performance of duties listed in Exhibit A does not constitute additional or emergency services. The contractor shall not subcontract or lease for the additional or emergency services.

C.2.2.1 The COR [contracting officer's representative] may orally request additional or emergency services to meet increased workload or temporary needs for services arising from visitors to post or special events. The Contractor shall obtain the COR's approval for reimbursement of any non-expendable equipment or expendable supplies to be supplied by the Contractor related to the additional or emergency services.

² All exhibits are found in the appeal file, unless otherwise noted.

C.2.2.2 The COR shall confirm any oral request for additional or emergency services in writing within forty-eight (48) hours of the oral request.

C.2.2.3 The Contractor shall include in its next regular invoice details of the additional or emergency services and any materials provided. The Contractor shall also include a copy of the COR's written confirmation to provide such services.

Exhibit 1 at 2, 26.

3. The hourly rates for both standard services and A&E services were fully loaded rates and included all direct and indirect labor costs (including any premiums relating to overtime, holidays or night shifts, etc., and materials, excluding separately priced vehicles and communications equipment); all direct and indirect material costs (except for separately priced vehicles and communications equipment); insurance (except for separately reimbursed insurance); severance pay; all overhead and indirect costs, including general and administrative expenses (G&A); and profit. Exhibit 1 at 2-3.

4. Section B of the contract provided, in pertinent part, a breakdown of the fixed hourly rates and the estimated number of hours for the base year and each individual option period, including:

Standard Services:

Athens and surrounding suburbs:	421,973 hrs
Consulate General Thessaloniki:	30,184 hrs

Additional and Emergency Services:

Athens and surrounding suburbs:	21,360 hrs
Consulate General Thessaloniki:	1,510 hrs

Exhibit 1 at 4-16.

5. Section H of the contract contained the following Variation in Quantity clause:

H.12 Variation in Quantity

(a) The Government reserves the right to increase or decrease the number of hours required for each labor category of Standard Services shown in Section B.

(b) The Government reserves the right to increase or decrease the number of hours required for each labor category of Additional and Emergency Services shown in Section B.

(c) As long as the cumulative number of hours required due to increases or decreases is not less than 75% or more than 125% of the number of hours specified for that labor category in Section B at the time [of]³ award, neither the Contractor nor the Government shall be entitled to an adjustment of the hourly rates. The Government will modify the contract to show any decrease or increase in the number of hours with a unilateral modification. The contract modification may include revisions to Section B, Exhibit A, Exhibit B, and any other portion of the contract requiring revision to reflect the increase or decrease in the number of hours.

(d) If the cumulative number of hours required as the result of any increases is less than 75% or more than 125% of the number of hours required for the labor category in Section B for either Standard Services or Additional or Emergency Services, the Government or the Contractor may request adjustment of the hourly rates under the Changes clause or the Termination clause. The allowable adjustment shall be based only on any increase or decrease in costs due to the variation above 125% or below 75%. Requests for adjustments shall be made within 90 days of the change in requirements that caused the hours to exceed the 25% variation. The Contractor and the Government shall sign modifications adjusting the hourly rates. If an agreement cannot be reached on the amount of the adjustment the Government shall prepare a unilateral modification and the Contractor may assert its rights under the Changes clause.

Exhibit 1 at 46.

The contract included by reference Federal Acquisition Regulation (FAR) 52.243-1 Changes – Fixed Price – Alternate II (Aug. 1987), which applied to the fixed price portion

³ The parties inserted the word “of” in their JSUF ¶ 11.

of the contract, and FAR 52.243-3 Changes – Time and Materials or Labor Hours (Sept. 2000), which applied to the hourly rates. Exhibit 1 at 49. FAR 52.243-3(b) provides:

(b) If any change causes an increase or decrease in any hourly rate, the ceiling price, or the time required for performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer will make an equitable adjustment in any one or more of the following and will modify the contract accordingly:

....

(2) Hourly rates.

48 CFR 52.243-3(b) (2006).

6. During the base year of the contract, 442,982 hours of standard services were ordered and performed. JSUF ¶ 21.

7. During the base year, the total number of A&E services provided by Brink's was 695 hours, a reduction of 22,175 hours, and only 3% of the amount estimated in the Contract. JSUF ¶ 22, 23.

8. Appellant's hourly rates included a mark-up of 9% for overhead and indirect costs, including general and administrative expenses. JSUF ¶ 24.

9. Brink's submitted a request for additional reimbursement to recover its increase in overhead and indirect costs resulting from the 97% shortfall in A&E service hours ordered by the State Department. Exhibit 6. The contracting officer denied the claim because she found that the Changes clause did not allow the contractor to seek unabsorbed overhead cost under A&E service hours that were not used, stating that "you have no entitlement to payment of any component of the fixed hourly rate for services not provided." Exhibit 9.

Discussion

The parties submit that there are no material facts in dispute in this case (as evidenced by their JSUF) and agree that the matter is appropriate for resolution on the motions for partial summary relief. The fact that both parties have moved for summary relief does not

require a grant of one of the motions. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001). Summary relief is properly granted when there is no genuine issue of 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). 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. The Board has reviewed the undisputed facts and agrees that the issue of entitlement is appropriate for resolution on summary relief.

The legal question presented by both parties is whether Brink's is entitled to an increase in compensation based on the shortfall in the number of hours of A&E services ordered by the Government in the base year of the contract. As stated by respondent, the parties differ solely with respect to the interpretation and application of the Variation in Quantity clause contained at section H.12 of the contract.

Appellant maintains that the drastic shortfall in A&E service hours ordered by the Government (only 695 of the 22,870 hours estimated to be needed) entitles it to be reimbursed for indirect costs attributable to the underrun. In support of its claim, appellant relies on the Variation in Quantity clause contained in the contract. Finding 5. Appellant argues that this clause is intended to permit repricing of cost units to adjust for fixed and other costs that are not recovered because the estimated amounts fell short of the stated range in the clause.

The Government counters that appellant is not entitled to additional compensation because the estimates were just that, estimates not guarantees. Further, it asserts that the company should not be entitled to payment of any component of the fixed hourly rate for services not provided. Finally, the Government argues that the Changes clause does not authorize the contractor to seek unabsorbed overhead costs in the absence of government fault, such as delay.

We agree that the estimate of A&E service hours was not a guarantee that those hours would be ordered, and that the Government was not required under the contract to order the number of hours listed. The contract's Variation in Quantity clause, however, on its face provided for an adjustment in the hourly rate in certain situations where the stated range of estimated hours was exceeded or not met so as to cause the contractor to reap a windfall or incur a loss. In such situations, the contract provided that the hourly rates were to be adjusted via a modification. If the parties were unable to negotiate the modification, the contracting

officer (CO) was to issue a unilateral modification and the contractor could assert its rights under the Changes clause.

Although the Variation in Quantity clause in this service contract is not the standard FAR Variation in Estimated Quantity (VEQ) clause which applies to construction contracts, that clause is similar enough to be instructive. The VEQ clause states in pertinent part:

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item is more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon the demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity

48 CFR 52.211-18 (Apr. 1984). Except for a different variation range, the VEQ clause is virtually identical to clause H.12 in this contract. Therefore, we have considered cases interpreting this FAR clause as applicable precedent in resolving the cross-motions that are before us.

In construction contracts, items of work are often priced on a per unit basis, rather than on a lump sum basis. *Burnett Construction Co. v. United States*, 26 Cl. Ct. 296, 302 (1992). The construction VEQ clause permits adjustment of unit prices set forth in construction contracts. In a contract authorizing a variation in estimated quantity, the Government is, in effect, willing to modify the contract when such a variation occurs. *See id.* at 301 n.4. When actual quantities cannot be forecast, this estimated unit price mechanism ameliorates the risk of inaccurate government quantity estimates. *Id.* at 302 (citing John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts*, 405 (2d ed. 1986)).

Likewise, in the instant contract the parties agreed that payment for provision of services would be made on a per-unit, i.e. hourly, rate applicable to specified guard services. Each party's risk that estimates of projected Standard Service and A&E Service hours might be inaccurate was mitigated by the Variation in Quantities clause. The parties were bound to the unit price within a prescribed reasonable range of the estimated quantities (+/- 25%), but the contract allowed for adjustment when variations fell outside that prescribed range.

Adjustment to the unit prices or the total contract price is intended "to prevent either windfalls or losses, potentially even immense windfalls or ruinous losses, to the contract.

The object is to retain a fair price for the contract as a whole in the face of unexpectedly large variations from the estimated quantities on which bids are based.” *Burnett*, 26 Cl. Ct. at 303 (quoting from the concurring opinion in *Bean Dredging Corp.*, ENG BCA 5507, 89-3 BCA ¶ 22,034, at 110,824.)

Here, the Government balks at adjusting the hourly rate, asserting that the contractor did not have to do any unanticipated work for A&E services, and might therefore receive a windfall. It argues that Brink’s did not have to hire, train, or equip additional guards for performance of A&E services, as it would have had to do for standard services, and suggests that appellant incurred no additional costs as a consequence of the underrun. Respondent’s Motion for Summary Relief at 5, 6. As stated in respondent’s motion,

[w]hile a large increase in Additional or Emergency Services over 125% of the estimate might have required Appellant to retain additional guards or pay additional overtime premiums, the shortfall merely meant that the existing guard force received fewer extra assignments in addition to their regular duties.

Id. at 6.

The fallacy in the Government’s argument is that appellant does not seek costs for hiring, training, or equipping guards to perform A&E services. Instead, appellant explains, when the Government failed to order the minimum 75% of A&E service hours expected (17,152), the fixed, indirect costs originally allocated to the hours the Government failed to order were incurred, but were not compensated by the Government. It is recovery of those uncompensated indirect costs that appellant seeks under the Variation in Quantity/Changes clause mechanism. Appellant’s Reply to Respondent’s Motion for Summary Relief at 4. Moreover, the Government concedes that appellant would have recovered more overhead had the estimated A&E service hours in fact been ordered. Respondent’s Motion for Summary Relief at 7.

The clause at issue provides that if the cumulative hours required are less than 75% of the hours set forth in section B of the contract, the contractor is entitled to a modification repricing the rates to account for unrecovered costs attributable to the variation in hours ordered. When the Government ordered only 3% of the anticipated A&E service hours, the indirect overhead costs previously allocated to those “fully loaded” hours disproportionately

shifted to the hours actually ordered.⁴ Under the contract, the contractor may assert its right to an equitable adjustment to recoup the indirect overhead costs lost as a result of the reduced hours expended.

Although the Government recognizes that Brink's would have recovered more overhead had the estimated hours been ordered, it contends that appellant is not entitled to such costs under the Changes clause, which provides the mechanism for adjusting the rates under the Variation in Quantity clause set forth in H.12. Citing *Nicon, Inc. v. United States*, 331 F.3d 878, 887 (Fed. Cir. 2003), the Government urges that appellant is not entitled to adjust the hourly rate because appellant did not prove a government-caused delay. Respondent's Motion for Summary Relief at 9. *Nicon*, a construction case, is inapposite here. That case involved the entirely different principle of the application of the *Eichleay*⁵ formula for recovery of unabsorbed overhead resulting from government-caused delay, not application of a VEQ clause. As stated in *Natco Limited Partnership*, which did include a VEQ clause:

[t]here is no reason why the costs recoverable should not include overhead which would have been absorbed had the estimated quantities been ordered, but were left unabsorbed by the order shortfall. These costs are real, whether they result from delay or some other cause, and the absence of delay allegations does not prevent their recovery.

ENG BCA 6183, 96-1 BCA ¶ 28,062, at 140,132 (1995) (citing *Henry Angelo & Co.*, ASBCA 43,669, 94-1 BCA ¶ 26,484, at 131,824 (1993)). The principle that costs are real and recoverable even in the absence of government-caused delay applies here.

To summarize, the Variation in Quantity clause in the contract is clear and unambiguous and must be given its plain and ordinary meaning. The type of costs contemplated to be adjusted in accordance with the clause include the indirect and overhead costs sought by Brink's. See *Gulf Construction Group, Inc.*, ENG BCA 5945, et al., 94-1 BCA ¶ 26,525, at 132,034 (1993) ("In general, where a contractor seeks a cost increase pursuant to the VEQ provision for a quantity underrun, the equitable adjustment usually reflects unrecovered fixed costs attributable to non-performance of the adjustable or underrun

⁴ The Government does not dispute that the entire indirect cost amount was spread across the total number of hours included in the Contract for both Standard and A&E Services by way of a 9% markup. Finding 8.

⁵ *Eichleay Corp.*, ASBCA 5183, 60-2 BCA ¶ 2688, at 13,568.

quantities.”). The unrecovered costs are directly tied to the non-performance of the labor hours for A&E Services specified in the 75% threshold under the Contract.

In this instance, the Variation in Quantities clause provides a remedy for the contractor. Brink’s is entitled to be reimbursed for the indirect costs associated with the number of hours below the range that were not ordered.

Decision

Appellant’s motion for partial summary relief is granted. The Government’s motion for partial summary relief is denied. The appeal is **GRANTED AS TO ENTITLEMENT**.

CANDIDA S. STEEL
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

PATRICIA J. SHERIDAN
Board Judge