



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 23, 2017

CBCA 5395

CB&I AREVA MOX SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Noah M. Hicks II and James A. Ouellette Jr. of CB&I AREVA MOX Services, LLC, Aiken, SC, counsel for Appellant.

Matthew Butsick, Office of the General Counsel, National Nuclear Security Administration, Department of Energy, Washington, DC; and Mary-Ellen Noone, Office of the General Counsel, National Nuclear Security Administration, Department of Energy, Aiken, SC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **KULLBERG**, and **SULLIVAN**.

DANIELS, Board Judge.

CB&I AREVA MOX Services, LLC (MOX Services) claims that it is entitled to a fee of .25% more than the Department of Energy's (DOE's) National Nuclear Security Administration (NNSA) paid, during a specified period of time, for work performed under a contract between the two parties. The parties have filed cross-motions for summary relief as to the dispute. We grant DOE's motion, deny MOX Services's motion, and thereby deny the appeal.

Background

On March 22, 1999, DOE awarded to a predecessor in interest to MOX Services a contract for mixed oxide (MOX) fuel fabrication and reactor irradiation services. The contract contemplated that the services would include the design and planning of a domestic MOX fuel fabrication facility [MFFF] and could also include, if options were exercised, acquisition of materials, construction, installation, and cold start-up (option 1); hot start-up and MFFF operations (option 2); and deactivation of the MFFF (option 3).¹ DOE had the unilateral right to exercise the options. The contract was awarded on a cost-plus-fixed-fee basis.

In 2008, after option 1 had been exercised, the parties entered into discussions regarding the early exercise of a limited portion of the option 2 scope of work: the hot start-up of the MFFF. NNSA designated the hot start-up scope of work as Early Option II or “EO2.” In February 2008, the agency authorized MOX Services to begin incurring costs for development of an EO2 proposal.

On May 20, 2008, NNSA and MOX Services bilaterally executed contract modification A124 (mod A124), definitizing option 1. The modification includes, in clause H.29, “Advance Understandings,” the following language in paragraph (g):

DOE has determined an early exercise of the hot start-up portion of Option II is in the best interest of the project to ensure that all aspects of the MFFF are operational before acceptance of the MFFF. DOE commits to immediate review [of] all of the issues associated with an early exercise of the hot start-up and begin the process of placing hot start-up on contract. Part of these activities will include the market research to determine whether or not the Contractor is the only company that is capable of performing these activities. If DOE determines that the Contractor is the only company capable of performing the additional work scope, then both parties agree to enter into good faith negotiations to add the additional work in accordance with H.6,

¹ These four phases are described in a paragraph of DOE’s statement of uncontested facts. MOX Services objects that “[t]o the extent [this paragraph] is a general characterization of the options contained with the contract, the words and generalizations used to describe the contract options are not, in and of themselves, relevant facts that may be substituted for the text of the actual contract.” Nevertheless, MOX Services includes a virtually identical description of the option phases in its own statement of uncontested facts. Thus, the parties agree that the description is accurate.

Options To Extend Services. It is agreed that the following parameters shall apply to the early exercise of hot start-up:

- 1) In recognition of the increased performance risk, an increased fee rate of 1 percentage point shall be applied to the negotiated value of Option 1, plus any fee bearing changes executed prior to definitization of the Hot-start scope, thus increasing the total fee to 7%.

On November 25, 2008, a DOE contracting officer wrote to MOX Services, "As negotiated in Option 1, the Government has agreed to partially exercise Option 2, MFFF Operations. The portion of scope being exercised is entitled Early Option 2 (EO2). . . . Request you submit a proposal for the attached Scope of Work (SOW) by *January 20, 2009*." MOX Services submitted such a proposal on January 26, 2009. From then until September 2011, the parties negotiated the terms for EO2. During this time, DOE requested, and MOX Services submitted, several revisions to the proposal.

While negotiations were continuing, on September 1, 2011, the parties bilaterally executed contract modification 183 (mod 183). "The purpose of this modification," mod 183 stated, "is to increase the Option 1 fee amount. . . . The fee will immediately increase to 6.75% with a subsequent increase of .25% occurring with the exercise of Early Option 2 for a total increase in fee from 6% to 7%." The modification deleted clause H.29(g), as included in mod A124, and replaced the portions of it quoted above with the following (with bolded portions in the original):

DOE has determined an early exercise of the hot start-up portion of Option II is in the best interest of the project to ensure that all aspects of the MFFF are operational before acceptance of the MFFF. It is agreed that the following parameters shall apply to the early exercise of hot start-up:

- 1) In recognition of the increased performance risk, an increased fee rate of 1 percentage point shall be applied to the negotiated value of Option 1, plus any fee bearing changes executed prior to definitization of the Hot-start scope, thus increasing the total fee to 7%. **Modification 183 incrementally increased the fee percentage for Option 1 to 6.75% in recognition of delays in exercising the Early Option 2 (EO2) scope. The remaining .25% recognizing a total fee rate of 7% will be added to Option 1 with the exercise of EO2.**

Negotiations regarding implementation of EO2 continued after the execution of mod 183. By letter dated April 26, 2013, however, NNSA told MOX Services that "considering

the preliminary cost increases and current budget environment, NNSA is beginning to assess alternative plutonium disposition strategies. As a result, NNSA will slow down the MOX project and activities supporting the current plutonium disposition strategy during the assessment period.” With specific reference to the matters discussed in previous paragraphs of this decision, NNSA said:

NNSA does not intend to continue negotiation of the Early Option II contractor modification proposal, or exercise any portion of Option II at this time. MOX Services need not maintain or otherwise update this proposal for potential future negotiation. NNSA recognizes that at the time it becomes appropriate to add operations to the MOX Services contract, the Early Option II proposal will either be updated as necessary, or a new proposal will be requested.

By letter dated April 1, 2015, MOX Services wrote to NNSA:

It has been almost 24 months since receiving the direction [to cease negotiations regarding EO2], and more than 6 years since submittal of the EO2 proposal. Due to these inordinate delays that were not within MOX Services’ control, MOX Services respectfully requests that the fee percentage for the subject contract be increased from 6.75% to 7.00%.

NNSA did not respond in writing. By letter dated September 2, 2015, MOX Services reiterated its request. Again, NNSA did not respond.

By letter dated February 8, 2016, MOX Services “submit[ted] a certified claim for the increase in previously paid fee from 6.75% to 7% along with an associated claim for payment of Award Fee associated with the increase in fee.” The claim was “for \$6,358,811.00 in additions to CLIN [contract line item number] 0007 and immediate payment of \$702,048 in additional FY13 [fiscal year 2013] Award Fee.” MOX Services said, “This claim requests relief arising under (i) Contract Clause H.29 *Advance Understandings* (increase in fee percentage) and (ii) the Contract Disputes Act (payment of FY13 Award Fee).” The contractor explained:

Using the date of NNSA’s decision not to exercise EO2 (26 April 2013) as determinative for when the fee should have been increased from 6.75% to 7% means that the above fee adjustments would have been issued in FY13. Had that happened, the Award Fee pool for FY13 would have been \$1,231,663.00 greater. Because Award Fee for FY13 already was paid under the existing

contract at 57% of the Award Fee pool at that time, MOX Services is claiming the sum certain of \$702,048.00 (\$1,231,663 X 0.57).

The contracting officer denied the claim by letter dated April 19, 2016, concluding that “MOX Services is not entitled to an increased fee pool or immediate payment of award fee.” He maintained that EO2, “if added to the Contract, would have increased scheduling risks due to the interdependent nature of the processes,” and that in 2008, “the parties agreed that, should the Government accept the Contractor’s future EO2 proposal, the Contractor would be compensated for this risk through a one-percent increase to Option 1’s available fee structure of 6.00%.” The contracting officer noted that the fee percentage for option 1 had been increased in mod 183 to 6.75%, with an additional .25% “added to Option 1 *with the exercise of EO2*.” He determined, “The Claim fails to identify why the express, negotiated, bilaterally accepted conditions included in Modification 183 should be set aside. . . . As EO2 was never exercised, it would be illogical and unreasonable for the Government to pay the Contractor for a performance risk that the Contractor never assumed.” Consequently, “any notion that the Contractor would be equitably entitled to additional fee is baseless,” notwithstanding the contractor’s position that it was entitled “to the requested 0.25% fee increase [because] it ‘made a good faith effort’ to add more work to its Contract.”

MOX Services appealed this decision on July 7, 2016.

Discussion

Is MOX Services entitled to an additional fee of .25%, pursuant to clause H.29(g) of the contract, as it maintained in the contractor’s certified claim? Both parties believe that the issue is amenable to resolution through motions for summary relief. They both point to our decision in *Marine Metal, Inc. v. Department of Transportation*, CBCA 4740, 16-1 BCA ¶ 36,386, as summarizing the rules applicable to such motions:

Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based upon undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact and all justifiable inferences must be drawn in favor of the non-movant. A material fact is one that will affect the outcome of the case. The party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.

Id. at 177,365 (citations and quotations omitted). We note additionally that “[w]hen, as here, both parties have moved 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.” *Charleston Marine Containers, Inc. v. General Services Administration*, CBCA 1834, 10-2 BCA ¶ 34,551, at 170,398 (citing *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003)).

The parties also appreciate that contract interpretation – our task in this case – is generally a legal question amenable to resolution on summary relief. *Marine Metal*, 16-1 BCA at 177,365 (citing *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002)). We must make an objective reading of the contract’s language, giving that language meaning that would be derived by a reasonably intelligent person acquainted with the contemporaneous circumstances and viewing the conduct of the parties prior to the dispute as especially strong evidence of the contract’s meaning. *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285, at 176,954 (citing *Varilease*, 289 F.3d at 799; *Blinderman Construction Co. v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982); *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965)).

How do these principles apply to this case? DOE takes a simple, straightforward approach to answering the question. According to the agency, the language of clause H.29(g) in mod 183 is “clear and unambiguous.” The increase in the fee percentage “is conditioned on the exercise of EO2.” “Under Clause H.29, the only fact that affects the outcome of the case is whether EO2 was exercised. . . . As EO2 was never exercised, Appellant is not entitled to the 0.25% increased fee rate (nor its requested immediate payment of \$702,048.00 of that increased fee). Therefore, Respondent is entitled to judgment as a matter of law on the matters raised in the Appeal.”

MOX Services offers several different theories in approaching an answer. One is that EO2 actually *was* exercised, notwithstanding DOE’s contention to the contrary. This argument proceeds from two documents in the record – first, the contracting officer’s statement in November 2008 that “[a]s negotiated in Option 1, the Government has agreed to partially exercise Option 2,” and second, mod A124’s inclusion of a milestone schedule, one of whose milestones is “Delivery of an acceptable ‘Hot Startup Plan’.” Acceptance is DOE acceptance of plan. (This deliverable marks the early exercise of a portion of Option 2 on MOX Services contract.)” A February 24, 2010, letter from the federal project director of the MFFF states, “[T]he review for Hot Start-Up Plan is complete and MOX Services has completed the subject contract deliverable.” The contractor asserts that it “accrued the right to the entire payment of the additional percentage point upon meeting its deliverable,” and that clause H.29 envisioned this, with “actual payment occurring with the definitization of EO2.”

A second theory advanced by MOX Services is that “[a] one percent (1%) increase in the fee was memorialized in MOD A124 as an incentive for MOX Services to negotiate and submit an EO2 proposal.” “The language of Clause H.29 clear[ly] and unambiguously means that Appellant’s entitlement to the remaining 0.25% fee was conditioned only upon its good faith negotiation of the terms of EO2, and the delivery of a proposal for the EO2 scope of work.” Thus, “the only fact that affects the outcome of the case is whether the Appellant complied with its duty to develop and present a proposal for the exercise of EO2, and whether the Government complied with its obligation to negotiate the terms of EO2 and definitize them into the Contract.” “Because EO2 was never definitized, and the Respondent imposed an indefinite delay, Appellant is entitled to the remaining 0.25% fee (and immediate payment of \$702,048.00 of that remaining fee), as well as a recalculation of all other allocable fees that apply to work done by Appellant in its performance of Option 1 of the Contract.”

A variant of this theory is that clause H.29 “clearly indicate[s] the mutual understanding of the Parties that Respondent was committed to exercise EO2, or at the very least to provide Appellant with a contract modification to add the remaining 0.25% fee to Option 1 of the contract in the event of any unreasonable or ‘indefinite’ delay by the Government in exercising EO2.” “But for the Government’s unilateral decision to cease negotiating the changes it desired for the EO2 proposal, it is clear and uncontested that the Appellant had realized increased risk, and had substantially complied with its required deliverable to earn[] the remaining fee on Option 1.”

Another thought offered by MOX Services is, “Despite the fact that the Government had not yet ‘exercised’ EO2, Respondent awarded a portion of the 1% fee via administrative modification in MOD 183. Because the Government has already recognized in the negotiation and text of MOD 183 that applying an increase in fee was an appropriate remedy for the Government’s unjustified delay in definitizing EO2, it should be estopped from asserting to the Board that the same remedy would not be authorized or appropriate in this instance.”

Finally, apparently on the theory that mod 183’s terms are not self-evident, MOX Services urges the Board to allow discovery, which “would reveal the actual intent and mutual understanding of the parties as to the meaning of [mod 183’s] terms, conditions, and clauses.”

Although MOX Services’ arguments are more numerous and more complex than DOE’s, the agency’s position is clearly correct. Clause H.29(g) appears in two contract modifications which are relevant to this dispute. In mod A124, the clause provided that upon “early exercise of hot start-up,” the fee would be increased from 6% to 7%. Mod 183’s

clause H.29(g), which replaced mod A124's version of the clause, stated explicitly that an increase in the fee percentage from 6.75% to 7% would occur "with the exercise of EO2." Although MOX Services now contends that "Respondent's assertion that EO2 was not exercised is a legal conclusion, not an uncontested fact," numerous statements by the contractor acknowledge that EO2 was never exercised. In bilaterally-executed mod 183, the contractor agreed that the fee percentage would not increase beyond 6.75% until the option was exercised. "In the realm of Government contracts, absent mistake or duress not present here, few things signify knowing and intentional conduct more than does the execution of a bilateral modification." *Jane Mobley*, 16-1 at 176,955 (citing *Eslin Co.*, ASBCA 34029, 87-2 BCA ¶ 19,854, at 100,454). After execution of mod 183, negotiations regarding implementation of EO2 continued for more than two years, with the contractor never objecting, "Hey! Why are we still talking? The option has already been exercised!" Two years after negotiations ended, the contractor requested an increase not on the ground that the option had been exercised, but due to delays in the negotiations. The claim itself references the agency's "decision not to exercise EO2." No reasonable person could conclude, based on these uncontested facts, that EO2 was ever executed. Consequently, pursuant to clause H.29(g), there is no justification for increasing the fee percentage.

The contractor's theories are unconvincing. As noted, the evidence is conclusive that EO2 was never exercised. The contracting officer's November 2008 statement that it was exercised is clearly incorrect, given all that transpired afterwards. Delivery of a hot start-up plan may have been a necessary precondition for exercising the option, but it was not the exercise itself. This is understood from the milestone schedule, which includes as a note to the milestone for the plan, "If Hot-Start is not exercised, the total milestone fee amount will be reduced by" the amount of that fee. Delivery of the plan milestone did not, by itself, require payment of an additional .25% fee on contract costs.

Nor have we been shown any evidence that MOX Services' good faith negotiations regarding the terms of EO2 was sufficient to trigger an increase in the fee percentage. Similarly, the contractor has not presented any evidence (or even proposed uncontested facts) that delay in completion of negotiations about EO2 (even if caused entirely by DOE) meant that the fee percentage would become 7%. To the contrary, the parties agreed in mod 183 that the percentage would increase – but only to 6.75% – "in recognition of delays in exercising the Early Option 2 (EO2) scope." Estoppel is an inapposite argument here for two reasons: first, because the contractor does not show that the elements of estoppel (*see Bryan Concrete & Excavation, Inc. v. Department of Veterans Affairs*, CBCA 2882, 16-1 BCA ¶ 36,475, at 177,732) are present, and second, because the matter as to which the agency is said to be estopped from asserting – that an increased fee "would not be authorized or appropriate" – is not at issue. We are concerned with what the contract says, not what it might say. Finally, discovery is not appropriate, for "if the provisions [at issue] are clear and

unambiguous, they must be given their plain and ordinary meaning, and the court may not resort to extrinsic evidence to interpret them.” *Douglas P. Fleming, LLC v. Department of Veterans Affairs*, CBCA 3655, et al., 16-1 BCA ¶ 36,509, at 177,879 (citations and quotations omitted).

In an earlier decision in this case, we held that we do not have jurisdiction to consider MOX Services’ allegation that DOE’s failure to negotiate in good faith was a material breach of the MOX contract, entitling the contractor to an additional .25% increase in the fee percentage. We reached this conclusion because reviewing the allegation, which had not been made to the contracting officer in a claim, would require us to “examine different operative facts . . . from the facts we must examine to resolve the contractor’s claim as presented to the contracting officer.” *CB&I AREVA MOX Services, LLC v. Department of Energy*, CBCA 5395, 17-1 BCA ¶ 36,591, at 178,218 (2016). The contractor now tells us that it intends to submit to the contracting officer a claim making this allegation. If such a claim is presented and the contracting officer denies it, the contractor is of course free to appeal the contracting officer’s decision to us. The decision we issue today resolves only the claim which was made on February 8, 2016.

Decision

The motion for summary relief by the Department of Energy is granted. The motion for summary relief by CB&I MOX AREVA Services, LLC is denied. The appeal is **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

H. CHUCK KULLBERG
Board Judge

MARIAN E. SULLIVAN
Board Judge