



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON AUGUST 26, 2019**

DENIED: August 20, 2019

CBCA 6185

P.K. MANAGEMENT GROUP, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Doug P. Hibshman and Nicholas T. Solosky of Fox Rothschild LLP, Washington, DC, counsel for Appellant.

Julie Cannatti and Jonathan English, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **RUSSELL**, and **CHADWICK**.

CHADWICK, Board Judge.

P.K. Management Group, Inc. (PKMG) timely appealed from a decision of a Department of Housing and Urban Development (HUD) contracting officer denying a claim for nonpayment of \$53,812.44 under a HUD field service management (FSM) contract. After discovery, PKMG filed a summary judgment motion, and HUD cross-moved in the alternative for dismissal for failure to state a claim on which we could grant relief or for summary judgment. Because we resolve the case in HUD's favor based on PKMG's

allegations and the terms of the contract, we grant HUD's motion to dismiss, deny HUD's summary judgment motion as moot, deny PKMG's motion, and deny the appeal.

Background

HUD awarded contract DU204SA-14-D-06 to PKMG in September 2014. This "FSM 3.8" contract, which remains in effect in an option year, resembles the 2010 FSM contract that the Board examined in *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, *clarified on reconsideration*, 15-1 BCA ¶ 36,184, but it has a different price structure, and the differences matter here.

Section C.1.1 of the contract identifies the contract's general purpose as procuring assistance for the "Federal Housing Administration (FHA), an organizational unit within HUD, [in] administer[ing] the single-family mortgage insurance program. FHA insures approved lenders against the risk of loss on FHA financing." As explained in contract section C.1.6, field service managers, or "FSMs[,] are companies that provide property maintenance and preservation services consisting of, but not limited to, inspecting [an FHA-insured] property, securing the property, performing cosmetic enhancements/repairs, and providing on-going maintenance."

HUD assigns particular properties to PKMG to manage by issuing task orders pursuant to the standard Ordering clause (48 CFR 52.216-18 (Oct. 1995)), set forth in contract section I. Contract section C.2.3 (Acquisition Types) lists examples of properties subject to FHA-insured mortgages that may enter HUD's management portfolio. These examples include, among others, "properties conveyed to HUD by a Mortgagee following foreclosure, or deed-in-lieu of foreclosure" of an insured mortgage and a claim for insurance money; "custodial properties secured by a . . . mortgage . . . in default" and "vacant or abandoned," but as to which "[t]itle is not yet in HUD's name"; and "properties acquired as the result of the foreclosure of a mortgage serviced by HUD[,] including assigned and purchase money mortgages."

This dispute is about payment for inspecting "custodial properties." Section B of the contract includes nine line item numbers (CLINs) (including one sub-CLIN) for each year of performance. Each year has its own set of sequential line items, identical year to year except for the estimated quantities, unit prices, and total prices, making a total of forty-five CLINs and sub-CLINS for the base year plus four option years. For convenience, like the parties, we refer to the relevant CLINs by their base-year numbers.

The dispute centers on CLINs 0005, 0005AA, and 0006. CLIN 0005 is titled, "On-Going Property Management (PM) Fee, HUD-Owned Vacant." CLIN 0005AA is titled,

“On-Going Property Inspection HUD-Owned Vacant.” CLIN 0006 is titled, “Inspection, Initial Services, On-Going (PM) for Custodial Properties.” (Here and elsewhere, we occasionally alter the capitalization and/or bolding of contract headings for readability.)

Each CLIN is divided into columns listing “supplies or services,” “estimated quantities,” “unit,” “unit price,” and “total price.” In CLIN 0005, the service listed is “HUD-Owned Vacant,” with an estimated quantity of 67,651 in units of months, at \$117.70 per unit and a total price of \$7,962,522.70. The service listed in CLIN 0005AA is “Property Inspection,” the estimated quantity is 146,578 in units of “Bi-Weekly,” the unit price is \$23.31, and the total price is \$3,416,733.18. The service listed in CLIN 0006 is “Custodial Properties,” the estimated quantity is 200 in units of “Monthly,” the unit price is \$122.05, and the total price is \$24,410. CLIN 0007, not at issue here, addresses vacant lots.

Contract section C.2.2 (Definitions) defines a “Custodial Property” as “a borrower owned property . . . which HUD, through the Contractor [PKMG], has taken possession of following default and vacancy or abandonment.” The same section defines “HUD-Owned Properties” as including “[u]nless otherwise indicated . . . vacant land and occupied-conveyance properties.” The contract does not expressly define “HUD-Owned Vacant.”

In January 2018, PKMG submitted a claim to the HUD contracting officer “seeking: (1) a determination that PKMG is entitled to CLIN 5AA fees for routine inspections PKMG has performed and will perform on custodial properties . . . (the ‘CLIN 5AA Fees’); and (2) the amounts due and owing for PKMG’s 5AA Fees for the months of October–December 2017, totaling \$53,812.44.” PKMG stated that HUD had been paying those fees but stopped paying them after September 2017. In its eight-page claim, PKMG argued that “the plain language of the contract entitles PKMG to the CLIN 5AA Fees” and, further, that a “prior course of conduct established between HUD and PKMG entitles PKMG to the CLIN 5AA Fees,” in that a PKMG submittal for payment for September 2017 (the month immediately preceding the claim period), “approved and paid by HUD, included CLIN 5AA [fees] for inspections performed on Custodial properties.” PKMG added that “HUD has paid all of its FSM 3.8 FSMs CLIN 5AA [fees] for Custodial cases, for nearly two years.”

The contracting officer denied the claim in April 2018. In a three-page letter, the contracting officer maintained that “[t]he Section B language in the contract is clear that CLIN 0005AA applies to HUD-Owned Vacant Properties only” and that “CLIN 0005AA was first used in [these] FSM 3.8 contracts, so there are no relevant prior contracts,” and PKMG had not “alleged a pattern or practice established by a prior contract.” The contracting officer added that HUD’s payment system “was erroneously programmed to pay [under] CLIN 0005AA for Custodial Properties and Vacant Lots” at the outset of the

contract, until “the Contracting Officer became aware of the erroneous programming” and directed “the appropriate personnel . . . to stop [such] payments immediately.”

PKMG filed this appeal in June 2018. The Board stayed the case based on the parties’ representation that another FSM contractor with the same counsel wished to litigate other, apparently similar appeals first. The parties changed their minds and asked to lift the stay in late October 2018. Granting the request, the presiding judge ordered that, “[g]iven the amount at issue and the clarity of the parties’ pre-appeal correspondence, the Board deems the notice of appeal (including the claim) to be the complaint and the contracting officer’s decision to be the answer.” Neither party filed a motion to amend its pleading under Board Rule 6(c) (48 CFR 6101.6(c) (2018)).¹

The parties filed dispositive cross-motions in June 2019. PKMG seeks summary judgment under Rule 8(f), including an award of “\$418,302.62 in damages for unpaid routine inspection fees . . . through April 30, 2019,” and a declaration that HUD must pay for routine inspections in accordance with PKMG’s reading of the contract. HUD argues that PKMG “has failed to state a claim of breach of contract, making dismissal [under Rule 8(e)] appropriate,” or alternatively, that HUD is entitled to summary judgment.

Discussion

“We focus on, and grant, the motion to dismiss because we conclude that the facts alleged, with reasonable inferences drawn in [the contractor’s] favor, do not support a facially plausible claim to relief.” *TranBen, Ltd. v. Department of Transportation*, CBCA 5448, 17-1 BCA ¶ 36,635 at 178,429 (quoting *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009)) (internal quotation marks omitted); *cf. U.S. Bank National Ass’n v. SFR Investments Pool 1, LLC*, 2019 WL 1446961 (D. Nev. Mar. 31, 2019) (granting the defendant’s motion to dismiss for failure to state a claim and denying the defendant’s summary judgment motion as moot).²

¹ In May 2019, PKMG filed, with no accompanying motion, a document titled, “More Definite Statement of Claim.” PKMG explained that it thought “it w[ould] be helpful for the Board to receive additional facts related to the appeal.” The Board’s rules do not contemplate such a filing, and it has no bearing on the cross-motions now before us.

² We need not and do not decide whether we have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2012), to adjudicate entitlement to the entire amount that PKMG now seeks, which is for a longer period than, and is almost eight times the amount stated in its January 2018 claim. *Cf. A-Son’s Construction*, 15-1 BCA at 176,203-04 (holding that the Board had no “jurisdictional basis” to address new grounds for

To state a claim for relief under the contract, PKMG must identify “(1) an obligation or duty arising out of the contract and (2) factual allegations sufficient to support the conclusion that there has been a breach of the identified contractual duty.” *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014). We agree with HUD at step one that the plain contract language does not obligate HUD to pay the unit price in CLIN 0005AA (or in the corresponding CLINs for option years) for routine inspections of custodial properties. This conclusion renders any facts that may be disputed by the parties immaterial.

“Contract interpretation begins with the language of the written agreement.” *Coast Federal Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc). As HUD argues, “Under the Contract, HUD pays for ongoing [management] services under different CLINs for [three] different property types,” i.e., HUD-owned vacant properties, custodial properties, and vacant lots. Focusing on the CLINs and property types at issue here, CLIN 0005 and its sub-CLIN 0005AA establish two separate fees for “HUD-owned vacant” properties: (1) a “monthly” fee of \$117.70 per property and (2) a fee of \$23.31 for each “bi-weekly” property inspection. The total fee per HUD-owned vacant property, per month in HUD’s inventory, is thus about \$164. CLIN 0006, which the contract says applies to “custodial” properties that borrowers still own but have vacated (a much smaller estimated quantity), provides only a “monthly” management fee of \$122.05 per property. (This fee multiplied by the estimated quantity for CLIN 0006 equals the total CLIN price, confirming that the estimated quantity of 200 property-months is for the full base year.) CLIN 0006 must therefore cover, on a monthly basis, what its title says it does: “*Inspection, Initial Services, [and] On-Going PM for Custodial Properties*” (emphasis added). In order to accept PKMG’s position that CLIN 0005AA sets the unit price of inspections of *custodial* properties, we would need to read the words “HUD-owned vacant” out of CLIN 0005AA and ignore the words “Inspection” and “for Custodial Properties” in CLIN 0006. Doing so would violate the rule of construction requiring us to “give[] a reasonable meaning to all parts of an instrument” and not to “leave[] a portion of it useless, inexplicable, inoperative, void insignificant, meaningless or superfluous.” *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285, at 176,954 (citing *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. C1.1965)).

PKMG advances several arguments to support its reading of the contract’s price terms. We find none of them persuasive when matched against the plain language. PKMG’s first argument rests on the contract’s definition of “Routine Inspections,” which PKMG argues “maps exclusively” to CLIN 0005AA. The definition in section C.2.2 reads in relevant part: “Routine Inspections: CLIN 0005AA and corresponding option CLINs—The failure of the

relief where “the contracting officer would have [had] to review different payment files,” had those grounds been presented in a CDA claim). We simply find no entitlement.

Contractor to perform [an inspection or a proper documentation upload] within the required timeframe . . . will be considered a complete failure . . . in performing the . . . inspection. The Contractor shall inspect the property every two weeks[.]” PKMG argues, “There is no other language in the [contract] that maps Routine Inspections to a different CLIN.” We agree with PKMG that this definition alone does not, on its face, advise the contractor what the word “inspection” means in CLIN 0006. We disagree that this omission renders CLIN 0005AA ambiguous as to whether it sets a price for inspections of custodial properties, which CLIN 0005AA, especially when read together with CLIN 0006, plainly does not.

PKMG’s second argument is that the description of services in CLIN 0005AA does not contain a “property-specific limitation.” PKMG notes that the service column in every CLIN other than 0005AA identifies a type of property, such as “HUD-Owned Vacant” or “Vacant Lot,” whereas the service in CLIN 0005AA is simply “Property Inspection.” To PKMG, the absence of a reference to a property type “validates that CLIN 0005AA covers Routine Inspections for all three property types.” We disagree. CLIN 0005AA and its option-year successors are the only sub-CLINs in the contract. The parent CLIN is CLIN 0005, which lists “HUD-Owned Vacant” as the property type in the service column. The words “HUD-Owned Vacant” are then repeated in the title of CLIN 0005AA. The unit price stated in CLIN 0005AA is subject to an express “property-specific limitation.”

PKMG further argues that the contract’s performance work statement (PWS) “unambiguously indicates that HUD will pay PKMG on a per inspection basis for each Routine Inspection . . . (regardless of property type).” PKMG relies on language in PWS section 5.2.3.2 (Routine Inspections) directing the contractor to “routinely inspect and take all actions necessary to ensure that HUD properties are maintained in Ready to Show condition” and to complete an “FSM Property Inspection Form,” and stating that “[t]he Contractor will receive credit for performing an inspection if they perform [it] and report inspection results.” This language does not “unambiguously indicate” that HUD will pay a separate price for anything, as it does not mention payment and is not in the price section of the contract, i.e., the CLINs. Rather, the fixed monthly price in CLIN 0006 includes inspections of custodial properties, which PKMG needs to perform and document in accordance with the PWS. *Cf. Financial & Realty Services, LLC v. General Services Administration*, CBCA 5354, 16-1 BCA ¶ 36,472 (single judge) (involving a fixed-price contract for property management and lease administration services).

Relatedly, PKMG argues that reading the contract as including the price of inspections of custodial properties within the fixed unit price of CLIN 0006 would render the word “credit” in PWS 5.2.3.2 “meaningless” as to CLIN 0006, since the contract has no “mechanism for clawing back ‘credit’ for a Routine [inspection] that is not performed.” This, too, is a stretch. “Credit” in PWS section 5.2.3.2 obviously just means recognition or

a figurative checkmark in a box. The PWS explains in detail how PKMG can get “credit” from HUD for performing whatever property inspections the contract requires, regardless of how those inspections are priced under the applicable CLINs. PKMG gets “credit” for inspecting or it does not. There is no need to claw credit back. Even if we found this use of the word “credit” ambiguous (which we do not), this would not suffice to undermine all of the plain language of CLINs 0005, 0005AA, and 0006.

PKMG’s remaining arguments about CLIN 0005AA fees all invite us to consider parol or other extrinsic evidence, which we could do only if we found the contract ambiguous regarding the pricing of inspections of custodial properties, which we do not. *See Coast Federal Bank*, 323 F.3d at 1038; *JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, et al., 18-1 BCA ¶ 37,019, at 180,276, *motion for reconsideration denied*, 18-1 BCA ¶ 37,087. Citing no documentary evidence, PKMG asserts that the questions and answers (Q&A) issued with the contract solicitation are “part of the PKMG Contract.” We see nothing in the contract that incorporates solicitation documents. PKMG cites as support for its assertion *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991), and our decision in *A-Son’s Construction*, 15-1 BCA ¶ 36,089. *Gould* states that we must read *contracts* as a whole. 935 F.2d at 1274. In *A-Son’s*, we discussed a solicitation Q&A because HUD cited it as “extrinsic evidence” to help clarify an asserted ambiguity. 15-1 BCA at 176,213-14. Neither decision makes the Q&A here part of this contract.³

Similarly, we need not examine how HUD paid for inspections of custodial properties under this contract, or under other FSM contracts, before the claim period, since evidence of past practice could be relevant only if the applicable price terms were ambiguous. *E.g.*, *JBG/Federal Center*, 18-1 BCA at 180,276. PKMG argues that “even if pre-dispute actions are later found to be a mistake [as HUD asserts here], the actions are still persuasive evidence of intent,” citing *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562 (Fed. Cir. 1987). *Alvin* was unlike this case. The issue in *Alvin* was whether a contract promising reimbursement of “general real estate taxes” entitled the contractor to reimbursement of “special assessments” that partly replaced real estate taxes in California starting in 1978, years after the contract was formed. *Id.* at 1563. This necessarily involved an ambiguity, since the contract did not use the term “special assessment.” In rejecting the Postal Service’s argument that the term “general real estate taxes” excluded “special assessments,” the Court noted, among other things, that the agency had reimbursed some special assessments from 1978 to 1981, purportedly by mistake. “As in *Macke Co. v. United States*, 467 F.2d 1323,

³ PKMG does not argue that the Q&A affirmatively misled bidders. It points out that, when asked what CLIN 0005AA covered, HUD responded, “Routine Inspections,” which PKMG argues is consistent with PKMG’s contract interpretation.

1325 (Ct. Cl. 1972),” the *Alvin* Court wrote, “we discern an ‘excellent specimen of the truism that how the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself.’” 816 F.2d at 1566. *Macke*, quoted in *Alvin*, was likewise a case about an ambiguous contract, which the *Macke* Court described as “somewhat amorphous and openended” and which it found “did not deal directly with the problem” the *Macke* Court faced. 467 F.2d at 1325-26. Precedents such as these regarding conduct under ambiguous contracts do not displace the rule that “[i]f a contract provision is clear and unambiguous, [we] may not resort to extrinsic evidence to interpret it.” *Premier Office Complex of Parma, LLC v. United States*, 916 F.3d 1006, 1011 (Fed. Cir. 2019) (citing *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)). Nor do we need to determine here how a concept from outside the contract fits into the contract language before us, as the *Alvin* Court had to do with “special assessments.” In sum, we agree with HUD’s reading of the contract.

Finally, PKMG seeks summary judgment on a distinct theory of relief that it did not present in its January 2018 CDA claim. PKMG argues that it is entitled to breach damages (apparently in the full amount of the disputed fees) because the contracting officer allegedly “abdicated his decision-making authority insofar as he did not direct, manage, or oversee essential Contract administration matters, including those related to [his decision] denying PKMG’s Claim.” PKMG’s claim sought only a contract interpretation and payment of fees in accordance with that interpretation. Because the claim alleged no operative facts supporting a theory of breach by “abdication of authority,” that theory is a “new claim” beyond our jurisdiction in this appeal. *See K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015).⁴

⁴ Our jurisdictional ruling does not turn on any technicality as to what document or documents constitute PKMG’s complaint. *See* Rule 6(a). A complaint “generally” does not “establish[] the bounds of [our CDA] jurisdiction,” which we determine, instead, by examining the original CDA claim, the agency decision, and the theories of relief argued in the appeal. *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,603; *accord Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561, at 178,065.

Decision

The Board grants HUD's motion to dismiss for failure to state a claim, denies PKMG's motion for summary judgment, and denies HUD's motion for summary judgment as moot. The appeal is **DENIED** to the extent it is within our jurisdiction.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge