UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON DECEMBER 10, 2019

DENIED: November 1, 2019

CBCA 5814, 5815, 5816

HARRIS IT SERVICES CORPORATION,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Steven M. Masiello and J. Quincy Stott of Dentons US LLP, Denver, CO, counsel for Appellant.

Jason A.M. Fragoso, Office of General Counsel, Department of Veterans Affairs, Washington, DC; and Frank DiNicola, Office of General Counsel, Department of Veterans Affairs, Eatontown, NJ, counsel for Respondent.

Before Board Judges **DRUMMOND**, **LESTER**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Pending before the Board are cross-motions for summary judgment on consolidated appeals to recover back wages paid to employees under the Service Contract Act (SCA), 41 U.S.C. § 6701 (2012). Pursuant to a Department of Labor (DoL) investigation, the contracting officer retroactively incorporated wage determinations into three task orders believed to be staffed with professionals. Appellant seeks reimbursement of its costs under the Changes clause. Because appellant did not comply with the terms of the contract, we grant respondent's motion for summary judgment and deny the appeals.

The Base Contract

The Department of Veterans Affairs (VA) established the Transformation Twenty-one Total Technology (T4) contract, a $12 billion indefinite delivery, indefinite quantity (IDIQ) multiple-award task order contract, to modernize information technology (IT) infrastructure at VA facilities worldwide, and to streamline the VA's acquisition of IT products and services.

According to the contract's performance work statement, T4 contractors were required to perform a wide range of IT services, including systems engineering, modeling and simulation, knowledge management, strategic planning, cyber security, data migration, network administration, enterprise architecture support, web applications design and development, operations and maintenance, coding and unit testing, help desk support, software integration, and equipment installation. In an attachment to the contract, these services were organized into 167 different labor categories and each assigned a designated number. Of the 167 labor categories, 137 required an advanced degree or significant work experience. Most of the remaining positions required an associate's degree or two years of technical school. Only six positions required a high school diploma or GED.

The T4 request for proposals (RFP) required interested contractors to bid these labor categories by proposing fully loaded labor rates for subsequent task order execution. Specific requirements for individual jobs, to include the place of performance, were defined at the task order level and typically involved work across multiple functional areas. Task orders were issued on a time and materials, cost reimbursement, or firm fixed-price basis. Some task orders, including two of the three at issue in this case, were referred to as "hybrid task orders" because they contained both time and materials and firm fixed-price requirements.

Procedures for soliciting and awarding task orders required the VA to issue a "request for task execution plan" (RTEP). In response to the RTEP, each interested T4 contractor submitted a "task execution plan" (TEP). TEPs for time and materials task orders required the contractor to reference the T4 labor categories using the Government-designated numbering system. In the event a T4 contractor intended to use DoL labor categories in a particular TEP, the contractor was required to notify the VA, including identifying the county and state where the work would be performed and which DoL labor categories it intended to use.

During the T4 solicitation period, interested bidders asked the VA whether it would hold winning contractors to their proposed staffing model and would compare the labor rates

of the personnel actually doing the work against the labor rates of the proposed staffing: "It is believed that some companies propose senior level people, only to switch them out with cheaper junior level people when performance starts." The VA responded:

> Under [firm fixed-price task orders], the contractor is required to perform successfully and at the proposed price. If staff is being switched out to lower level personnel when a higher level is required to perform the work, it should become evident in performance. We would not check labor rates against proposed staffing. Under [time and materials task orders], notification of any change in support shall be given to the [] team as prime/team member labor categories [] and rates are incorporated at the task order level and must be adhered to unless a formal modification has been executed to add or delete [labor categories] and rates of team. Under [time and materials], changes in staff qualifications are reviewed against the labor category proposed.

The contract informed bidders that the SCA applied to its terms, and it incorporated by reference certain clauses from the Federal Acquisition Regulation (FAR). These included FAR 52.222-41, Service Contract Act of 1965 (NOV 2007); FAR 52.222-43, Fair Labor Standards Act and Service Contract Act - Price Adjustment (Multiple Year and Option Contracts) (SEPT 2009); and FAR 52.232-7, Payments Under Time-and-Materials and Labor Hour Contracts (FEB 2007). Regarding the application of the SCA, clause H-9 of the contract stated:

> This contract is subject to the Service Contract Act (SCA), though the exact places of performance are unknown.
>
> The contractor is responsible for ensuring that the base rates proposed for personnel subject to the SCA meet or exceed the corresponding minimum wages established by the Department of Labor (DoL) for the corresponding region (State/county) in which the task order is performed. When task order performance is in a lower wage determination location, contractors are encouraged to propose rates commensurate with the performance location on individual task orders.
>
> At the time of task order competition, contractors will be responsible for identifying any personnel subject to the SCA, and their corresponding region

(state/county), within their proposed Task Execution Plans. The Government will incorporate wage determinations on the basic contract as applicable.[1]

Award of T4 Contract to Harris

In 2011, the VA awarded Harris IT Services Corporation (Harris) a T4 contract, which incorporated Harris's pricing methodology submitted with its proposal. With respect to the T&M labor rates, Harris's direct labor rates were based on the qualifications for each labor category identified in the T4 contract, but because those labor categories did not match the job codes that Harris used to classify its employees, "[t]he labor categories and descriptions, to include education and years of experience requirements, provided in the [T4] RFP were reviewed and a specific job code family/level was mapped to each T4 labor category."

The WiFi Task Orders

In 2012, the VA awarded three task orders to Harris under the T4 contract. Referred to as "WiFi 1," "WiFi 2" and "WiFi 3," the task orders had a combined total value of $126,786,745. WiFi 1 and WiFi 2 were hybrid task orders, whereas WiFi 3 contained only firm fixed-price cost items. In the RTEPs for each task order, the VA identified the specific cities and states where the work would be performed. WiFi 1 identified twenty-six locations, WiFi 2 identified forty locations, and WiFi 3 identified forty-six locations. The VA did not incorporate wage determinations into any of the RTEPs. In building its TEPs,[2] Harris utilized the T4 labor categories and did not identify any SCA personnel for any positions.

With respect to labor hours compensated on a time and materials basis, the WiFi 1 and WiFi 2 task orders as awarded incorporated Harris's proposed time and materials labor rates and specified that Harris was not authorized to bill rates exceeding these rates. Harris's firm fixed-price TEP for WiFi 3 was developed by applying the fully loaded labor rates that Harris utilized for its time and materials task orders. Since T4 labor categories were used to price all of Harris's TEPs, and no SCA personnel were identified by Harris, the VA understood

[1] The VA erred in stating that it would incorporate wage determinations *on the basic contract* as applicable. After contract award, the VA amended this language to state *at the task order level* as applicable. Appellant has not argued that this post-award change in language had any effect on its case, and we need not consider that change any further.

[2] Although Harris's own labor categories did not match the VA's in the T4 contract, Harris was able to map its categories to the VA's.

Harris's TEPs to contain only professional labor and, consistent with clause H-9, did not incorporate wage determinations into any of the task orders.

Mason Technologies - Subcontractor Labor

On August 17, 2012, Harris submitted a request to use additional subcontractors to work on the task orders, including Mason Technologies (Mason). Harris identified the T4 labor categories applicable to this request as follows: Installation Technician, Installation Engineer, and Senior Installation Engineer. On September 4, 2012, Harris sent an email to Mason stating, "T4 IDIQ is subject to SCA but they do not provide a Wage Determination with the WiFi task orders. We will have to look up the labor category to determine if they are SCA applicable and for each site."

On October 11, 2012, the VA and Harris executed a bilateral modification to WiFi 1 in order to include Mason as an approved subcontractor, specifically incorporating the three labor categories identified in the August 17, 2012, request.

On October 22, 2012, Mason inquired with Harris about the SCA's application to WiFi 1, noting challenges it was having staffing the work until Mason received clarification on this issue. That same day, Harris responded that there was no SCA clause in the T4 contract, or in any of the WiFi task orders.

Conversion of WiFi 1 and WiFi 2 Task Orders to Firm Fixed-Price

In response to invoices from Harris for work performed on WiFi 1 and WiFi 2 on a time and materials basis, the VA requested the required supporting documentation for amounts invoiced in accordance with FAR 52.232-7, to include actual cost data. Despite multiple requests for the data, Harris never provided it, so the VA ultimately rejected the invoices. Soon thereafter, however, the VA and Harris agreed to convert both task orders to firm fixed-price.

On March 18 and April 26, 2013, the VA modified WiFi 1 and WiFi 2 respectively to convert the pricing for installation tasks from time and materials to firm fixed-price. Harris's original proposal in response to the RTEPs for these task orders included labor hour pricing in the form of loaded labor rates inclusive of profit, overhead, and other burdens. In addition, Harris proposed loaded labor rates for Mason which were subsequently incorporated into the WiFi 1 task orders as time and materials rates. These labor rates, as well as the labor hours proposed by Harris on a site-by-site basis in each TEP, were used to determine prices when the task order was converted to firm fixed-price.

Harris's Inquiries with the VA About SCA Application

On November 13, 2013, Harris notified the VA that it had never received any wage determinations for any of the WiFi task orders. Harris asked the VA to verify if SCA wage determinations were required for the labor categories, but the VA would not provide the requested verification, responding that under clause H-9 of the contract, "it was Harris's responsibility to decide if [the] SCA applie[d] for particular labor categories."

On November 22, 2013, Harris followed up with the VA about SCA application to the task orders, this time pointing out that "various FAR and DoL regulations require[d] the contracting agency to incorporate wage determinations [into the task orders], contrary to the VA's interpretation of clause H-9."

The DoL Investigation

On March 11, 2014, Harris again expressed its concerns related to the SCA. Harris stated that any interpretation of the H-9 clause that imposed on the contractor the obligation to determine whether wage determinations were required would be "contrary to Harris's previous experience and understanding of DoL regulations and the FAR." The letter also advised the VA that Harris had become aware that the DoL had opened an investigation concerning Mason's performance under one of the WiFi task orders. In response to the investigation, the VA retroactively incorporated wage determinations into the task orders through several unilateral modifications. Mason then paid its employees the back wages, and Harris reimbursed Mason for the same.

On December 23, 2014, the VA amended clause H-9 with the italicized language:

> This contract is subject to the Service Contract Act (SCA), though the exact places of performance are unknown.
>
> The contractor is responsible for ensuring that the base rates proposed for personnel subject to the SCA meet or exceed the corresponding minimum wages established by the Department of Labor (DoL) for the corresponding region (state/county) in which the task order is performed. When task order performance is in a lower wage determination location, contractors are encouraged to propose rates commensurate with the performance location on individual task orders.

> At the time of task order competition, contractors will be responsible for identifying any personnel subject to the SCA, and their corresponding region (state/county), within their proposed Task Execution Plans. *The Government will incorporate wage determinations at the task order level as applicable. The Government shall not be liable for any increased costs as a result of the Contractor's failure to identify SCA categories or failure to pay minimum wages established by DoL.*

(Emphasis added.)

Harris's Requests for Equitable Adjustment (REA), Certified Claims, and Appeals

On March 25, 2016, Harris submitted an REA to the VA for work on WiFi 2 in the amount of $374,542.26. On August 4, 2016, Harris submitted two additional REAs to the VA, one for work related to WiFi 1 in the amount of $118,307.83, and the other for work on WiFi 3 in the amount of $73,983.92. On March 20, 2017, the contracting officer denied the REAs.

In 2017, Harris submitted three certified claims to the contracting officer, seeking $112,311.38 for WiFi 1, $371,069.30 for WiFi 2, and $76,900.94 for WiFi 3. For each claim, Harris requested full recovery of amounts claimed plus interest from the date of the claim for "costs (inclusive of fee) incurred by Harris as a result of wage determinations retroactively incorporated into the task orders."

On July 31, 2017, the VA issued three separate contracting officer's final decisions, denying each claim. Harris timely appealed all three decisions to the Board. The Board granted the parties' joint motion to consolidate the appeals on November 9, 2017.

Summary Judgment Motions

In the fall of 2018, the parties filed cross motions for summary judgment along with a joint stipulation of facts, which identified the issues to be decided as: 1) whether the language contained in clause H-9 of the contract is consistent with the FAR and DoL regulations; and 2) whether the contract's Fair Labor Standards Act Price Adjustment clause or the Changes clause governs the calculation of any costs resulting from the contracting officer's retroactive incorporation of wage determinations into the task orders.

Discussion

Standard of Review

Resolving a dispute by summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986); *MLJ Brookside, LLC v. General Services Administration*, CBCA 3041, 15-1 BCA ¶ 35,935, at 175,622. A material fact is one that will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,392. "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." *Systems Management Research & Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333, at 177,129 (quoting *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,991). "The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue." *Sectek, Inc. v. National Archives & Records Administration*, CBCA 5084, 16-1 BCA ¶ 36,403, at 177,466 (quoting *Fortis Networks, Inc. v. Department of the Interior*, CBCA 4176, 15-1 ¶ 36,066, at 176,123). We may summarily resolve issues of contract interpretation, provided we need not resolve disputes of fact. *E.g., P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984).

Interpretation of Clause H-9

These appeals present matters of contract interpretation. "The primary objective of contract interpretation is to determine the intent of the parties at the time an agreement is created." *Belle Isle Investment Co. v. General Services Administration*, CBCA 4734, 16-1 BCA ¶ 36,416, at 177,554 (quoting *Systems Management Research*, 16-1 BCA at 177,129). To interpret the contract, we begin by examining its plain language. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (citing *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). When interpreting a contract, it must be read as a whole, giving reasonable meaning to all its parts, so as not to render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract. *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285, at 176,954 (citing *Champion Business*

Services v. General Services Administration, CBCA 1735, et al., 10-2 BCA ¶ 34,539, at 170,345).

The first paragraph of the H-9 clause simply—and clearly—informs prospective offerors that "[the T4] contract is subject to the SCA." The second paragraph places the responsibility for SCA compliance on the contractor to "ensur[e] that the base rates proposed for personnel subject to the SCA meet or exceed the corresponding minimum wages established by the [DoL] for the corresponding region (state/county) in which the task order is performed." The third and final paragraph explains how, under the framework of this worldwide multiple-award task order contract, the VA will implement the requirements of the SCA: "At the time of task order competition, contractors will be responsible for identifying any personnel subject to the SCA . . . within their proposed [TEPs]. The Government will incorporate wage determinations . . . as applicable."

Harris argues that the VA is improperly applying the H-9 clause to impose upon Harris the burden of determining whether the SCA applies to the contract. Harris's position is untenable. The clause itself expressly establishes that the SCA applies to the contract. Nevertheless, the contract did not *require* Harris to utilize SCA personnel in every instance. The RTEPs defined the performance requirements and identified the places of performance. In formulating its TEPs, Harris was free to staff the task orders with professionals, with SCA personnel, or with a combination of these types as long as the loaded labor rates did not exceed the T4 rates, and the base rates for SCA personnel met or exceeded DoL rates in a particular location—information which Harris's employees acknowledged could be accessed on line. When Harris decided to use SCA personnel, the plain language of the clause required Harris *first* to identify any SCA personnel in its TEPs. Only then would the VA incorporate the correct wage determinations into the contract. Indeed, once Harris made a business decision to use SCA personnel, Harris was bound by the notice requirements of its agreement. *See Reliance Insurance Co. v. United States,* 931 F.2d 863, 867 (Fed. Cir. 1991) ("The contractor entered its contract with full knowledge of the clause and there is no reason under the circumstances not to hold it to the terms of the contract."). Because Harris failed to comply with the clear terms of the clause, it cannot impose upon the VA liability for any extra wage amounts that Harris ultimately had to pay as a result of that failure.

Harris defends its failure to comply with the clause's notice provision by arguing that the clause contravenes the FAR and DoL regulations:

> Clause H-9 cannot be read to imply the meaning that the VA assigns to it, because the VA does not have the authority to alter DoL regulations and the provisions of the FAR part 22 through nonconforming contract clauses. . . .

> Here, if it is enforceable at all, Clause H-9 must be read in a manner consistent with the FAR and DoL regulations, all of which place the responsibility for obtaining a wage determination squarely on the contracting agency before a request for proposals is issued and require an equitable adjustment if a wage determination is incorporated later than required and causes an increase in costs.

Although the relevant DoL regulations require a contracting agency to obtain a wage determination prior to issuing an RFP, we do not agree that the text of clause H-9 is inconsistent with this requirement. The clause merely provided an efficient procedure for incorporating wage determinations into the task order in the event the contractor decided to use SCA employees to perform some of the work. With the vast majority of T4 labor categories requiring advanced degrees and professional skills, and no incentive to propose lower-priced labor,[3] the clause is structured to complement the regulations, not contravene them.

In a case before the Court of Appeals for the Federal Circuit, the Court disagreed with a contractor's assertion that a contract clause which allowed a contracting officer to decide SCA applicability conflicted with the statutory directive entrusting the DoL with the authority to implement the SCA. The Court held, "We do not agree that the clause impermissibly intrudes on DoL's authority to make the ultimate decisions about whether the SCA applies; it simply fills in the contractual gaps created by DoL's subsequent direction to incorporate SCA provisions." *Dalco Electronics Corp. v. Dalton*, No. 93-1486, 1994 WL 319299, at 2 (Fed. Cir. 1994) (citing *Santa Fe Engineers, Inc. v. United States*, 801 F.2d 379, 382 (Fed. Cir. 1986) ("approving clause designed to supplement, not conflict with other provisions")).

We have a similar situation in this case and find *Dalco* on point. Although the contract was subject to the SCA, it did not mandate use of SCA labor. Professionals are exempt from the SCA, and the vast majority of the T4 labor categories were professional. Nevertheless, the clear terms of the contract permitted a T4 contractor to propose SCA employees if it so chose. In this case, the H-9 clause instructed the contractor to identify the employees and the locations, so that the Government could incorporate the correct wage determinations. This procedure did not conflict with DoL regulations. It simply recognized

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[3] The task orders did not incentivize contractors to propose lower-wage employees. The basis for award placed a premium on an offeror's technical approach to the work, not its price: "The technical factor is significantly more important than the cost/price."

the contractor's domain for constructing a proposal to meet the technical terms of the contract using labor of its choosing.

Here, there was no question about the contracting officer's authority to incorporate the wage determinations into the task orders. The only question was whether the contractor would staff the task orders with SCA personnel. Based on the language set forth in clause H-9, if Harris chose not to propose any SCA personnel to perform work on a particular task order, and did not notify the contracting officer of that decision, there was no reason for the contracting officer to incorporate a wage determination into that task order. Indeed, the only reason why the contracting officer was directed to incorporate wage determinations into the task orders was because the DoL discovered that, without any notice to the contracting officer, Harris's subcontractor employed SCA personnel in positions that were bid as non-SCA personnel.

After proposing T4 labor categories, then staffing the task orders with SCA personnel performing time and materials functions, Harris failed to communicate the change. Harris was the only party in a position to know whether SCA employees were actually working on these task orders, yet Harris remained silent, depriving the Government of the opportunity to incorporate the necessary and appropriate wage determinations in a timely manner in accordance with the clause. We find that it was Harris's failure to comply with the terms of its contract—terms that complemented, not contravened, DoL regulations—that caused the contracting officer to determine that no SCA personnel were performing under the task orders, and to conclude that no wage determinations were required. The risk of Harris's noncompliance fell on Harris, not the VA.

To the extent that Harris is complaining that the clause was unclear, or that it conflicted with DoL regulations, the time to have challenged that provision was before contract award. *See United States v. Turner Construction. Co.*, 367 F.3d 1319, 1321 (Fed. Cir. 2004). By failing to take that opportunity, Harris is bound by the terms of its agreement. *See Triax Pacific, Inc. v. West*, 130 F.3d 1469 (Fed. Cir. 1997). Furthermore, we find no evidence that the notice requirement was waived after contract award. "A waiver is the 'intentional relinquishment or abandonment of a known right.'" *Cindy Karp v. General Services Administration*, CBCA 1346, BCA 11-1, ¶ 34,716, at 170,936 (quoting *Johnson v. Zerbst*, 304 U.S. 458,464 (1938)). Even drawing all factual inferences in favor of Harris, as we are required to do when examining the VA's motion, we do not view the retroactive incorporation of wage determinations into the task orders as somehow waiving the clause's clear notice requirement or excusing the lack of notice from Harris. On the contrary, the contracting officer steadfastly refused to waive the notice requirement, a fact that underscores Harris's breach and plainly shows that Harris could not meet its burden and prevail at a hearing.

Finally, because we find that any costs incurred by Harris resulted from its failure to comply with the contract's clear terms, not from a change to the contract, we need not decide whether the Changes clause or the Fair Labor Standards Act Price Adjustment clause applies to any price adjustment. That issue is now moot.

Decision

Respondent's motion for summary judgment is granted. Appellant's motion for summary judgment is denied. The appeals are DENIED.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge