



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED: April 9, 2020

CBCA 6543

CSI AVIATION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jason N. Workmaster, Abigail T. Stokes, and Caroline J. Watson of Miller & Chevalier Chartered, Washington, DC, counsel for Appellant.

Sarah E. Park, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DRUMMOND**, **KULLBERG**, and **CHADWICK**.

CHADWICK, Board Judge.

This appeal concerns orders placed under a Federal Supply Schedule contract. The contractor alleges that the orders were cancelled and that it is entitled to fixed cancellation charges under its commercial price list. The agency maintains that not all of the orders were cancelled and that any “cancellations” that did occur must be viewed as terminations for the Government’s convenience under the applicable termination clause.

Prior to discovery, the contractor seeks partial summary judgment on two, essentially legal issues, which it phrases as (1) whether “the [schedule] Contract’s standard termination-for-convenience clause takes precedence over [a] cancellation provision” or vice versa, and

(2) whether the contractor “violated an obligation to publish the full text of its [commercial] Terms and Conditions” for the ordering agency to consult before placing orders. The agency opposes the contractor’s motion as to both issues.

We cannot resolve the issues presented on this limited record. The schedule contract is not clearly enough written to allow us to do so. We find that, in the event of a conflict between the “commercial price list” incorporated in the schedule contract and the standard termination provision in the contract, the price list would control—but that conclusion does not get us very far. Among other things, the price list incorporated in the schedule contract does not state a price for cancelling an order, and the language used in the price list to refer the reader to a separate, unattached “terms and conditions” document, which allegedly contained the cancellation charge, is too vague or ambiguous for us to interpret in favor of either party without further factual development.

Background

We summarized the filing history of this appeal in *CSI Aviation, Inc. v. General Services Administration*, CBCA 6543 (Mar. 10, 2020) (denying a motion by the ordering agency to intervene). As we explained there, we are satisfied at this time that we have jurisdiction of this appeal from a deemed denial by a General Services Administration (GSA) contracting officer of a certified claim.

We turn to facts pertinent to the motion. GSA awarded the appellant, CSI Aviation, Inc. (CSI), a schedule contract for air charter brokerage services and ancillary supplies and services in March 2009. We have the schedule contract in the record. It consists in part of a standard form 1449 and an attachment titled, “Attachment to the Standard Form 1449.” The attachment is two pages and has three numbered sections. The third section reads:

3. The following documents are hereby incorporated and made part of the contract:
 - a. [A revised solicitation] dated February 10, 2009
 - b. [Another solicitation] dated March 24, 2004
 - c. Offer dated November 6, 2008.
 - d. [A wage determination.]
 - e. [Final proposal revision] letter dated March 9, 2009.
 - f. Revised Commercial Price List, submitted March 9, 2009.

Also in the record is the March 9, 2009, “CSI Commercial Price List.” It is three pages. The first page and most of the second page contain a schedule of hourly prices for

various aircraft, identified by type, size, and number of seats. The third page of the commercial price list contains language at issue. The disputed paragraph reads in full:

Terms & Conditions

Period of performance longer than 30 days will incur bi-monthly billing (every 15 days). CSI Terms and Conditions 02/09, or most current, will apply to all operations.

CSI also attached to its motion a three-page, densely formatted exhibit with the heading, “CSI TERMS AND CONDITIONS.” This exhibit bears no corporate letterhead or logo, signature, initials, or express date, although “02/14” appears in the lower left corner of each page. February 2014 was almost five years after GSA awarded CSI the schedule contract. This exhibit has twenty-two numbered paragraphs. Paragraph 18 is “Cancellation by the Charterer.” CSI relies on the following language therein: “(A) Cancellation of flights by the Charterer will incur cancellation charges. . . . (D) If no cancellation charges are set forth on the first page of this Agreement, then a 25% cancellation charge applies for cancellations occurring up to 14 days prior to flights”

CSI states in support of its motion that “[t]hroughout . . . the time period relevant to this appeal, CSI’s Terms and Conditions have included [the] cancellation provision” just quoted. As support for this statement, CSI cites only the exhibit itself. GSA responds that it “disputes” CSI’s statement—but GSA cites no evidence to rebut CSI’s unsupported factual assertion about the content of the “terms and conditions” throughout the time period at issue. Instead, GSA raises a legal argument, disputing CSI’s interpretation of the legal effect of the cancellation language in the “terms and conditions” exhibit.

The schedule contract included, by way of the incorporated February 2009 solicitation, a tailored version of Federal Acquisition Regulation (FAR) clause 52.212-4, Contract Terms and Conditions—Commercial Items (Deviation Feb. 2007) (48 CFR 52.212-4 (2008)). Paragraph 1 of this clause is a termination for convenience provision for commercial items. It begins, “The Ordering Activity reserves the right to terminate this contract, or any part thereof, for its sole convenience.” Paragraph 5 of the FAR clause is an order of precedence provision. It states, as relevant here, “Any inconsistencies in the . . . contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services; . . . (4) addenda to this . . . contract; . . . (6) other paragraphs of this clause; (7) the Standard Form 1449; [and] (8) other documents, exhibits, and attachments”

CSI states in support of its motion that U.S. Immigration and Customs Enforcement (ICE) placed task orders under the schedule contract and “ordered numerous flights under the Task Orders.” CSI adds that “*it is CSI’s position that* ICE cancelled dozens of flights . . . with less than 14 days’ notice.” (Emphasis added.) As CSI cites no record evidence that

ICE either ordered or cancelled any flights, we do not view those facts, which would be crucial to the merits, as undisputed, nor do we assume them. *See* Board Rule 8(f)(1) (48 CFR 6101.8(f)(1) (2019)). We address the issues raised by CSI's motion in isolation from other issues in the case only because the issues briefed appear to be in dispute and in the hope that our decision, limited though it is, may help guide discovery and future proceedings.

Both parties make additional factual assertions about events after the award of the schedule contract. We find those factual matters to be disputed and of limited legal relevance, as discussed below.

Discussion

“A party may move for summary judgment on all or part of a claim or defense,” which we will grant if the party “is entitled to judgment as a matter of law based on undisputed material facts.” Rule 8(f). We are guided by applications of Rule 56 of the Federal Rules of Civil Procedure. *See id.* CSI's motion for partial summary judgment involves a narrow aspect of its claim. Even so, in endeavoring to interpret the schedule contract while drawing all reasonable factual inferences in favor of GSA, *see, e.g., Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–92 (Fed. Cir. 1987), we find CSI's motion unripe for decision in this posture and at this early stage of the case. “[S]ummary judgment is inappropriate if the factual record is insufficient to allow [us] to determine the salient legal issues.” *Mansfield v. United States*, 71 Fed. Cl. 687, 693 (2006) (citing cases).

CSI asks us to rule that the schedule contract (1) mandated fixed cancellation charges, rather than termination for convenience costs, for certain order cancellations and (2) did not require CSI to “publish” the unattached “terms and conditions” document. “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), from which we try to discern the parties' intent at contract formation. *See, e.g., Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987). Unfortunately, the schedule contract is marred by ambiguity. Neither the convenience termination paragraph of the Commercial Terms and Conditions clause nor the commercial price list that CSI says entitles it to cancellation charges is clear enough to allow us to resolve the motion by applying the schedule contract's order of precedence, as CSI asks. We would need more evidence.

Because this case allegedly involves terminations or cancellations of orders for CSI's services, which in the ordinary run of government contracting we would be inclined to view as terminations for convenience, *e.g., Paradise Pillow, Inc. v. General Services Administration*, CBCA 5179, et al., 17-1 BCA ¶ 36,641, we start with the schedule contract's termination for convenience provision in the Commercial Terms and Conditions clause. It says that the “Ordering Activity” may terminate “this contract” wholly or in part. Because

these words appear in the schedule contract solicited and awarded by GSA, “this contract” must refer to the schedule contract. A schedule contract and an order placed under the schedule contract are two different contracts. *See Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016). On its face, then, the schedule contract seems to allow an ordering agency such as ICE to *terminate the schedule contract* while *not* reserving that option to the awarding agency, GSA. This obviously makes no sense, and we are sure it is not what GSA intended, but it is literally what the schedule contract says. If called on to apply this termination provision, we would probably find it ambiguous and resort to the tools that tribunals use to resolve such ambiguities. *See, e.g., CFP FBI-Knoxville, LLC v. General Services Administration*, CBCA 5210, 17-1 BCA ¶ 36,648.

This case, as noted, involves ICE task orders. Does this mean that we should treat the unclear termination language in the Commercial Terms and Conditions clause as flowing down, potentially to govern terminations or cancellations of task orders? Possibly, but neither party has briefed such an argument to us, and we see no unambiguous language in the schedule contract telling us how to apply the Commercial Terms and Conditions clause to task orders. Moreover, we have no task orders in the record and we do not know what, if anything, they may say about terminating an order.

Turning to the commercial price list incorporated in the schedule contract, on which CSI relies to claim cancellation charges, we find equally significant ambiguity. To start, while the attachment to the form 1449 clearly states that CSI’s commercial price list is part of the schedule contract, the schedule contract nowhere states in so many words, and therefore it does not make clear, that *other* documents referenced *in* the price list are also part of the schedule contract. *See Northrop Grumman Information Technology, Inc. v. United States*, 535 F.3d 1339, 1344 (Fed. Cir. 2008) (“[T]he incorporating contract must use language that is express and clear, so as to leave no . . . reasonable doubt about the fact that the referenced document is being incorporated into the contract.”). CSI cannot point to a cancellation charge in the price list itself. CSI relies instead on a separate document, the alleged “terms and conditions.”

The language used in the commercial price list to call out the unattached “terms and conditions” is not clear enough on its face to make a price stated in the “terms and conditions” *unambiguously* part of the price list or the contract, as CSI would have us rule. No language in the price list advises a reader to consult any other document to find additional prices. The price list simply says, in the second sentence of a paragraph that starts with a sentence about CSI’s billing policy, that unstated “CSI Terms and Conditions . . . will apply to all operations.” “All operations” in this sentence does not *unambiguously* mean “all other pricing issues.” It *could* mean that, but it could alternatively refer to something else, such as logistical operations. As with the schedule contract’s termination provision, we cannot

interpret what the commercial price list may say about terminating or cancelling an order without learning more about the context of the contract language.

While “a mere lack of clarity on casual reading is not the criterion for determining whether a contract is afflicted with ambiguity,” *McCann v. McGlynn Lumber Co.*, 34 S.E.2d 839, 845 (Ga. 1945), *quoted in Bank of America, National Ass’n v. Department of Housing & Urban Development*, CBCA 5571, 18-1 BCA ¶ 36,927 (2017), our difficulty in reading the schedule contract is more serious than that, and we would need to consider evidence that is not before us to resolve the ambiguities.

Both parties offer us extrinsic evidence to support their positions on the motion, but none of it is true parol evidence, i.e., evidence of “the parties’ intent *at the time they executed the contract*,” *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (emphasis added) (citing *Dureiko v. United States*, 209 F.3d 1345, 1356 (Fed. Cir. 2000)), and none of it helps us with the ambiguities we have identified. Most significantly, CSI states that in July 2019, during negotiations about GSA’s exercise of an option to extend the schedule contract, the contracting officer said that “right now CSI’s terms and conditions are on top of everything” in the schedule contract’s order of precedence. GSA responds that this was the contracting officer’s “initial interpretation at th[at] time.” Indeed, GSA concedes that “there was a mutual understanding” in 2019 “that CSI’s Terms and Conditions had been incorporated in the Schedule Contract from the time it was first awarded in 2009,” but GSA argues that, legally, the terms and conditions were not “at the top of the order of precedence.” What the parties said about how they understood the schedule contract more than ten years after it was awarded may be interesting, but legal admissions of that kind cannot bind us, e.g., *Technicon Instruments Corp. v. Alpkem Corp.*, 866 F.2d 417, 422 (Fed. Cir. 1989) (Nies, J., joining with comments) (citing cases), and evidence of conversations a decade after award does not necessarily illuminate “the parties’ intent at the time the contract was executed,” the aim of contract interpretation. *ASP Denver, LLC v. General Services Administration*, CBCA 2618, et al., 15-1 BCA ¶ 35,850 (2014). CSI also directs our attention to a regulatory action by GSA in 2018 to revise and rearrange an order of precedence clause that GSA uses in schedule contracts. That evidence is similarly too remote from contract award and too uncertain in significance to help us interpret this ambiguous schedule contract.

We discern only one contractual issue that we can resolve on this record. It is not exactly an issue that CSI raises, but the issue has been briefed and is closely enough linked to the partial summary judgment motion that deciding it now may advance the case somewhat. We find that the commercial price list expressly incorporated in the schedule contract would take precedence, in the event of a conflict, over the termination for convenience paragraph in the Commercial Terms and Conditions clause. We are not holding that such a conflict exists. For reasons given above, that remains to be determined.

Paragraph s of the Commercial Terms and Conditions clause states that both “the schedule of supplies/services” and “addenda” to the schedule contract (which are first and fourth in the order of precedence, respectively) take precedence over “other paragraphs of this clause” (which are listed sixth). We must view the commercial price list either as an integral part of the schedule contract’s “schedule” or as an addendum to the schedule; we need not decide which. Unless the commercial price list is read into the ordering schedule, the schedule contract would lack price terms and could be void for indefiniteness or lack of consideration. See *Kingdomware Technologies*, 136 S. Ct. at 1978 (noting a schedule contract “gives the Government the option to buy”); *Maxima Corp. v. United States*, 847 F.2d 1549, 1557 (Fed. Cir. 1988) (noting “the fundamental obligation to interpret contracts so as to preserve their validity, not to destroy it”). Regardless of whether we consider the price list part of the schedule or an addendum, the price list is above the Commercial Terms and Conditions clause in the schedule contract’s order of precedence.

GSA—focusing mainly on whether the unattached “terms and conditions” were part of the schedule contract, which we are not deciding here—argues that a provision for termination for convenience must be “at the top” of the order of precedence as “an inherent right of the government,” citing cases applying *G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963). We disagree. The express purpose of the *Christian* doctrine in this context is to ensure that the Government can end a contract without committing a breach. See *id.* at 427; *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1304 (D.C. Cir. 1971). GSA cites nothing suggesting that such a risk of material breach could arise under the facts of this case. CSI does not allege that ICE *breached* contract obligations by cancelling flights. Instead, CSI seeks a fixed measure of compensation for cancellations, under what CSI argues are the terms of the ICE task orders. The *Christian* doctrine has not been construed to bar an agency from negotiating such a fixed termination or cancellation charge in advance. *E.g.*, *Montana Refining Co.*, ASBCA 44250, 94-2 BCA ¶ 26,656. The contract dispute in this case therefore does not implicate the *Christian* doctrine.

Our ability to make headway on CSI’s motion ends there. We cannot decide the first issue raised by CSI—whether any cancellation terms that may have been set forth in any unattached “terms and conditions” document take precedence over the termination language in the schedule contract’s Commercial Terms and Conditions clause—because we cannot determine whether or to what extent (1) any such “terms and conditions” became part of the schedule contract or (2) the termination language of the Commercial Terms and Conditions clause was applicable to ICE task orders. The second issue raised by CSI, regarding whether the schedule contract required CSI to “publish” the alleged “terms and conditions,” is equally murky on this record and would probably only be legally relevant as a defense asserted on behalf of the ordering agency if we ruled for CSI on the first issue.

We would need more evidence to advance the case further.

Decision

CSI's motion for partial summary judgment is **DENIED**.

Kyle Chadwick

KYLE CHADWICK

Board Judge

We concur:

Jerome M. Drummond

JEROME M. DRUMMOND

Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge