UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON SEPTEMBER 20, 2021

APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED;
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT DENIED:
September 9, 2021

CBCA 6400, 6401, 6700

INTERNATIONAL DEVELOPMENT SOLUTIONS, LLC,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Todd M. Garland, Nora K. Brent, Richard C. Johnson, and Amanda C. DeLaPerriere of Smith Pachter McWhorter PLC, Tysons Corner, VA, counsel for Appellant.

Randal W. Wax, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **ZISCHKAU**, **SULLIVAN**, and **CHADWICK**.

CHADWICK, Board Judge.

These consolidated appeals, which are before the Board on cross-motions for summary judgment, seem straightforward in broad outline. The appellant, International Development Solutions, LLC (IDS), provided security services to the respondent, Department of State (State), in Afghanistan. IDS alleges that it incurred unexpected tax liabilities to the Government of Afghanistan as a result of its work on two task orders. IDS seeks payment for the taxes under cost-reimbursement provisions. State argues, among other

things, that IDS is not entitled to recover because IDS did not include the taxes in its cost proposals for the task orders.

So far, so clear. The surprise is that after conducting discovery for eighteen months (much of it concerning State's dealings with other contractors under other contracts), assembling an appeal file of 378 exhibits, and briefing the cross-motions, the parties leave open fundamental questions to which the Board would need answers to understand the dispute adequately, much less to resolve it. We cannot determine from the record, among other things, the legal grounds on which Afghanistan assessed the taxes at issue; exactly what corporate entity was liable for the taxes (it does not appear to have been IDS); what entity paid the taxes (it does not appear to have been IDS); whether IDS incurred the taxes as costs on its books; or what the parties knew or should have known about the taxation of U.S. contractors in Afghanistan when State issued the task orders approximately a decade ago.

In the case as a whole, the risk of these factual gaps falls mainly on IDS, which bears the burden of proof. On summary judgment, the deficient record causes us to deny both motions and to proceed to a hearing.

Background

So many of the parties' proposed facts are genuinely disputed, unsupported, or irrelevant to summary judgment that our factual summary is compressed. IDS provided the services at issue under task orders 9 and 11 (SAQMMA12F1044 and SAQMMA11F2609) issued by State under an indefinite quantity contract in 2011 and 2012. One of the many puzzling things about the case is that the parties agree that task order 11 preceded task order 9. In general, the task orders were for "movement" protective and support services within Afghanistan and had a combined value of more than $400 million.

In September 2018, December 2018, and September 2019, IDS submitted to the contracting officer a series of certified claims that collectively sought $36,714,278.18 as reimbursement for taxes paid to Afghanistan in 2017 and 2018 for Afghan tax years 1389 to 1394 (roughly March 2010 to March 2015). State denied the first two claims in February 2019. The appeals from those denials are CBCA 6400 and CBCA 6401, filed in March 2019. The third claim was deemed denied and is before us in CBCA 6700, filed in January 2020. The Board granted IDS's motions to consolidate the appeals as they were filed. Discovery ended in March 2021. The parties filed dispositive cross-motions in June 2021.

IDS argues that it is "entitled to recover the taxes it claims under CLIN [contract line item number] X404" in both task orders. As far as we can determine from the parties'

citations to the record,[1] CLIN X404 was a row in the price schedules (or "pricing sheets") of the task orders that had no text other than its title: "License, Tax, Permits, Visa and Registration Fees." The parties do not direct us to any language in the task orders or elsewhere that defines the term "tax" as used in CLIN X404 or that explains the purpose of the CLIN. The base contract, awarded in 2010, stated in relevant part, "Non-labor/Material/Other Direct costs (e.g., . . . insurance, travel, licenses, taxes, permits, and registration fees) will be proposed and negotiated at the task order level. Furthermore, the Contractor shall exclude these costs from its indirect cost pool(s)." State urges us to consult the solicitations for the task orders to construe CLIN X404, an argument we address below. The parties agree that the reimbursement that IDS seeks is in addition to the dollar amounts that IDS listed in the CLINs when State awarded the task orders.

In its certified claims, IDS stated that "IDS paid" the tax amounts it seeks. In its pleadings at the Board, IDS has altered that allegation. In the second amended consolidated complaint, filed in all three appeals in February 2020, IDS alleges that "IDS is a wholly owned subsidiary of ACADEMI Training Center, LLC," which in turn is "wholly owned" by "ACADEMI LLC." IDS goes on to allege that it "maintained an Afghanistan business license" "[t]hrough its corporate parent, ACADEMI LLC," the entity that IDS actually alleges is the parent of IDS's immediate corporate parent.[2]

IDS further alleges, "Historically, IDS operated in Afghanistan under the licenses of its corporate parent [sic], ACADEMI LLC, with the approval of [the Afghanistan Government]. Accordingly, ACADEMI LLC is the reporting tax entity in documents relied on in support of this Consolidated Complaint." The Board simply does not know what this means as a matter of fact or law. We do not know what a "license" to "operate" is (or was) under Afghan law. We do not know what "approval of" the Afghan Government might consist of. We know nothing about Afghan tax law and will not guess what a "reporting tax entity" is under that law. Nor do we understand why IDS repeatedly alleges that ACADEMI LLC is IDS's "parent" while alleging that another, intermediate LLC wholly owns IDS.

The issues surrounding the identity of the taxpayer in the pleadings have not been clarified in the briefing of the motions. To begin, neither party offers us expert testimony or

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[1] The Board asked IDS for supplemental record citations in September 2021. IDS confirmed that the "pricing table" that presumably included CLIN X404 is not attached to the copy of task order 9 in the appeal file. CLIN X404 appears in the price schedules of subsequent modifications of task order 9 and in task order 11 in the appeal file.

[2] *See Corporation,* Black's Law Dictionary (11th ed. 2019) ("A [parent corporation is a] corporation that has a controlling interest in another corporation . . . [usually] through ownership of more than one-half the voting stock.").

any other authoritative explication of Afghanistan's tax laws, although the presiding judge noted the likely need for such guidance in a case conference and a memorandum. Further, IDS has multiplied the entities that it alleges acted on IDS's behalf. In the space of a few paragraphs of its updated statement of undisputed material facts, filed under Board Rule 8(f)(1) (48 CFR 6101.8(f)(1) (2020)) in September 2021, IDS refers to itself interchangeably as (1) "USTC/IDS" (referring to U.S. Training Center (USTC), which IDS alleges, without citing evidence, is "one of the two . . . joint venturers" that created IDS, even though IDS executed the contract as an LLC and does not style itself as a joint venture); (2) "Xe" (apparently referring to Xe Services LLC, an entity that IDS alleges "purchased" an unspecified "share" of IDS in 2011 after adopting the name "Academi"); (3) "an Academi affiliate"; and then as (4) "ACADEMI/IDS," as if this were a single entity. As State points out, nothing in the record substantiates or even supports a suggestion that International Development Solutions, LLC, the appellant, lacks a distinct corporate identity. All of IDS's statements that other companies formed beliefs about Afghanistan's tax laws or took actions on IDS's behalf or in its name relating to the task orders are conclusory.[3]

The last point is crucial because, as IDS acknowledges in the operative complaint, its case depends on documents that on their face reflect tax settlements between Afghanistan and Academi (or ACADEMI) LLC, the alleged parent of IDS's corporate parent. None of the documents on which IDS relies as evidence of the interactions with the tax authorities—we emphasize, *not one* of them—mentions IDS by name or by clear implication. IDS's statement of fact regarding the first of the two settlements is as follows:

> On March 27, 2018, [Afghanistan] agreed to settlement of the tax years at issue . . ., agreeing to the following offer:
>
> > *Academi* will pay AFs 2.1 billion ($30 million) for settling the taxes and penalties for all years through the end of 1393 (2014). *Academi* has already paid AFs 1 billion and will pay another AFs 1.1 billion immediately to close this settlement. Please note that *Academi's* previous offer of AFs 2.1 billion covered all years through the end of 1394 (2015). In this modified offer, the settlement amount is for those years that are covered by the ongoing audit, excluding 1394 (2015).

(Emphasis added.) IDS further states as facts that "IDS and [Afghanistan] continued to negotiate resolution of taxes . . . for Afghanistan tax year 1394," and that "[i]n 2017 and 2018, IDS (*through Academi*) paid the negotiated settlement amount." (Emphasis added.)

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[3] Further, IDS cites no direct evidence of the chain of corporate transactions and ownership that it alleges.

The documents cited as support for these statements do not mention IDS. The documents allegedly showing the tax payments are bank statements of (1) "Academi LLC," for an account named "Academi Training Center *Inc*." (emphasis added), which appears to be another new entity in the record, and (2) "Constellis Holdings LLC," yet another entity, for an account named "Academi Training Center Inc [sic] AP." The only links we can see between this evidence and IDS are IDS's unsupported assertions that the emails and the bank statements relate to IDS. IDS cites no evidence that IDS itself has paid or owes anything to anyone in connection with the taxes at issue.[4]

Discussion

We apply the familiar standards for cross-motions for summary judgment. *E.g.*, *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987). We ask whether one party or neither party "is entitled to judgment as a matter of law based on undisputed material facts." Rule 8(f). A party opposing summary judgment need only show that "one or more" facts on which the moving party relies are "genuinely in dispute" and legally "material." *Amini Innovation Corp. v. Anthony California, Inc*., 439 F.3d 1365, 1368 (Fed. Cir. 2006); *see Grand Strategy, LLC v. Department of Veterans Affairs*, CBCA 6795 (July 9, 2021). We will read a contract and a task order issued under that contract as a single, unified instrument and endeavor to harmonize all of the applicable language. *See RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, et al. (July 23, 2021); *OMNIPLEX World Services Corp. v. Department of Homeland Security*, CBCA 5971, 19-1 BCA ¶ 37,209; *HMR Tech2, LLC*, ASBCA 56829, 10-1 BCA ¶ 34,397.

IDS moves for partial summary judgment as to "IDS's entitlement to reimbursement for amounts paid for Afghan taxes attributable to the contract under CLIN X404, the cost-reimbursement CLIN for 'taxes.'" What we have said about the record suffices to explain why we deny IDS's motion. We see no evidence that the "amounts paid for Afghan

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[4] Additionally, the record, while vague as to the nature of the taxes at issue, suggests that some 20% of the payments were "withholding taxes," which are sometimes viewed as taxes on wages or salaries rather than on employers. *See, e.g., Morrison-Knudsen Co.*, ASBCA 16483, 72-2 BCA ¶ 9733 ("[U]pon analysis it becomes apparent that the [Turkish] withholding law did not, in itself, require appellant to incur additional costs. Had appellant known about the law . . . [it] presumably would have withheld three percent of monthly payments made to subcontractors, instead of paying the subcontractors the full amount[.]"); *Polanco v. Bensonhurst Restaurant Corp*., No. 16-CV-1085 (ILG) (CLP), 2021 WL 1254445, at *2 (E.D.N.Y. Apr. 5, 2021) ("The Court agrees with plaintiffs that defendants' payment of these withholding taxes is 'remuneration for employment paid . . . on behalf of' [employees under] 29 U.S.C. § 207(e).").

taxes" here were costs incurred by IDS, the contractor. *Cf. JDL Castle Corp. v. General Services Administration*, CBCA 4717, et al., 16-1 BCA ¶ 36,249 (denying relief where the contractor "ha[d] not provided any evidence of additional incurred cost"); *Beyley Construction Group Corp.*, ASBCA 55692, 08-2 BCA ¶ 33,999 (similar); *Opportunities Industrialization Centers International, Inc.*, ASBCA 20604, 78-2 BCA ¶ 13,385 (cost-reimbursement contract) ("The costs were not incurred by appellant and there is no evidence of any legal obligation on appellant's part to pay them.").

Actual or alleged parent companies of the contractor are not in privity with the Government with respect to a procurement contract. *E.g.*, *BLH, Inc. v. United States*, 13 Cl. Ct. 265, 271–72 (1987); *see also Mission Support Alliance, LLC v. Department of Energy*, CBCA 6476 (Dec. 8, 2020) ("The 'contractor' in this case is [the appellant]." (citing 41 U.S.C. § 7101(7) (2018)); *cf. Federal Deposit Insurance Corp. v. United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003) ("Neither . . . knowledge, the supplying of . . . capital, or [their] position as stockholders" made shareholders parties to a corporation's contract.). Even if we were to credit it in full, IDS's evidence that other entities made tax payments does not even shift the burden to State to rebut IDS's claim of entitlement to reimbursement for those payments under the task orders. *See Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1368–69 (Fed. Cir. 2006) ("If . . . the movant bears the burden and its motion fails to satisfy that burden, the non-movant is 'not required to come forward' with opposing evidence. . . . [A] non-movant is required to provide opposing evidence . . . only if the moving party has provided evidence sufficient, if unopposed, to prevail as a matter of law."); *Microtechnologies LLC v. Department of Justice*, CBCA 6772, 21-1 BCA ¶ 37,830.

We turn then to State's motion. State seeks summary judgment based solely on what it describes as "the plain terms of the parties' contracts [sic]," arguing that CLIN X404 does not on its face provide for reimbursement of taxes that were not expressly priced in the CLIN at the time of task order award. Our problems with State's arguments are that State relies heavily on (1) solicitation documents that were not expressly incorporated in the base contract or in the task orders and (2) a variety of contemporaneous statements by representatives of IDS and its alleged affiliates, and by State officials, regarding whether *they thought* U.S. contractors were "tax exempt" under Afghan law while working in Afghanistan. State raises the second issue in response to arguments by IDS that IDS experienced such an "abrupt change" in Afghan tax law during performance of the task orders that the taxes were "after-imposed." *See* 48 CFR 52.229-6.

In general, if we must "weigh[] . . . external evidence" to construe a contract, "the matter is not amenable to summary resolution." *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988); *see CFP FBI-Knoxville, LLC v. General Services Administration*, CBCA 5210, 17-1 BCA ¶ 36,648. CLIN X404, as noted above, had only seven words, one of which was "Tax," with no express limitation. Standing alone, this could

indicate that allocable taxes in general were allowable costs. The base contract said that direct costs such as taxes would "be proposed and negotiated at the task order level." This *might* mean that, as State argues, IDS was obligated to "propose" taxes in advance in order for the taxes to be reimbursable under CLIN X404—but the contract language is hardly clear on that point, especially given the use of the additional word "negotiated." The contract does not say in so many words that State will not reimburse IDS for taxes that IDS did not identify in advance. Because we cannot tell from the contract alone what the inclusion of CLIN X404 with a dollar amount in a task order was intended to mean or to require with regard to reimbursement of taxes, CLIN X404 is ambiguous. *Cf. CFP FBI-Knoxville*.

To support its interpretation, State offers dozens of paragraphs of proposed facts concerning, among other things, communications surrounding the solicitations for the base contract and for the task orders (including internal government documents), and about documents such as a Defense Contract Audit Agency handbook, the relevance of which to this civilian contract is unclear. IDS shows that disputes of fact exist as to many of State's assertions. Inasmuch as we have concluded that CLIN X404 is ambiguous, now is not the time to review the factual record any further to decide entitlement. *See Beta Systems*, 838 F.2d at 1183; *Belle Isle Investment Co. v. General Services Administration*, CBCA 4734, 16-1 BCA ¶ 36,416*; Carmon Construction, Inc. v. General Services Administration*, GSBCA 13412, 96-2 BCA ¶ 28,354 ("[O]n a motion for summary judgment, we do not have to get all the way to the bottom . . . [if] there are legitimate questions about what the contract means."), *quoted in CFP FBI-Knoxville*. We will proceed to a hearing. *See* Rule 18(a).

Decision

IDS's motion for partial summary judgment and State's motion for summary judgment are **DENIED**.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge