



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 2, 2021

CBCA 7129

GCC TECHNOLOGIES, LLC,

Appellant,

v.

DEPARTMENT OF EDUCATION,

Respondent.

Jonathan Williams, Katherine B. Burrows, Eric A. Valle, and Christine Fries of Piliero Mazza PLLC, Washington, DC, counsel for Appellant.

Megan Nathan, Kristin Delbridge, and Michael S. Taylor, Office of the General Counsel, Department of Education, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN** and **RUSSELL**.

SHERIDAN, Board Judge.

GCC Technologies, LLC (GCC or appellant) appealed a contracting officer's final decision, which was issued by the Department of Education (DOE), asserting breach of contract and breach of the implied duty of good faith and fair dealing. GCC claimed \$160,709.92, plus interest, for unpaid amounts remaining from invoices issued in October, November, and December 2019. The contracting officer's final decision, dated June 4, 2021, agreed to pay \$110,462.63 of this amount but denied the remainder of the claim in the amount of \$50,247.29, which remains in dispute and is at issue in this appeal.

The case has been submitted for a decision on the basis of the written record pursuant to Board Rule 19 (48 CFR 6101.19 (2020)). The decision is being issued by a panel of two

judges, rather than the usual three, as a consequence of appellant's election of the accelerated procedure. *See* 41 U.S.C. § 7106(a) (2018); Board Rule 53(a). The record consists of the complaint and accompanying exhibits, the answer, the appeal file, and the briefs of the parties with attachments. For the reasons stated below, we deny the appeal.

Background

On September 25, 2009, DOE Federal Student Aid (FSA) awarded blanket purchase agreement (BPA) ED-FSA-09-A-0006 to GCC for acquisition and contract management support services. GCC was to provide support, including, but not limited to, providing assistance in acquisition planning, recommending acquisition strategies and approaches, drafting contract guidelines, providing technical assistance to integrated process teams and source selection or technical evaluation teams, providing business analysis of acquisition approaches and vendor proposals, drafting acquisition documents, and providing specific support under Federal Acquisition Regulation (FAR) part 42.

The BPA was issued under General Services Administration (GSA) Management, Organizational and Business Improvement Services (MOBIS) schedule contract GS-10F-0404R. In relevant part, the BPA says the following about contractor performance and the contracted staffing services:

The contractor is expected to have staff available upon award to perform all the work **at its location** unless otherwise indicated in the Task Order. Specific performance requirements, place of performance, and employee qualifications will be specified in TOs [task orders]. The contractor is expected to maintain a qualified staff capable of performing under this agreement

. . . .

All full-time schedules must provide for 80 hours of work during a two week period. Arrival and departure times must be on the quarter- or half-hour. **Part-time employees should establish schedules that are consistent with the hours that they work.** All schedules shall provide for a standard 30-minute lunch break (Non-Billable) to be taken between 11:00 am and 2:00 pm.

(Emphasis removed and added.)

The BPA utilized time-and-materials labor rates. With respect to invoicing, the BPA provides:

At a minimum the following items must be addressed in order for the invoice to be considered “proper” for payment: . . . **(4) Description, quantity, unit of measure, unit price, and extended price of the item delivered must agree with the contract or order. . . . (8) Totals must be supported by subtotals and subtotals should be supported by detail, (i.e. documentation for categories of labor, hours performed, unit prices) and deliverables provided. . . . (9) If required by this contract or order, receipts must be provided to support documentation of “other direct costs” (ODCs) or materials.**

(Emphasis added.)

The BPA describes the “Tour of Duty” as:

All full time schedules must provide for 80 hours of work during a two week period. . . . Part -time employees should establish schedules that are consistent with the hours that they work. **All schedules shall provide for a standard 30-minute lunch break (Non-Billable) to be taken between 11:00 and 2:00 p.m.** The basic work requirement must be accomplished between 6:45 a.m. and 6:30 p.m. However, surge requirement can be expected.

The “Tour of Duty” section went on to specify that **“Non productive time preparing or consuming meals, surfing the Internet will not be billable.”** (Emphasis added.)

On June 12, 2019, DOE awarded task order ED-FSA-09-A-0006/91990019F0339 (the contract) to GCC for contractor acquisition support services at a DOE office work site located in Washington, D.C., for the period from June 12 to December 11, 2019. The not-to-exceed amount of the contract was \$924,249.60. The award was subject to the “Terms and Conditions” clause contained in the BPA, which flowed down to the task order award. The performance work statement (PWS) in the task order describes the intent of the task order as obtaining acquisition support services for the Contract and Acquisition Management (CAM) effort, including “personnel qualified to perform duties and tasks commonly assigned to Contract Specialist(s) to support the CAM office.” The performance requirements in the PWS state:

The Contractor shall furnish all personnel, materials, resources and sufficient staff to perform the tasks as outlined in this PWS and as set forth on the Schedule. The anticipated contract type for this requirement is **Time and Material (T&M); payment shall be made only for the actual hours worked.**

....

An estimate of the number of anticipated actions by type of work (Action Code) and estimated number of actions to be completed is outlined in the Table below. The Contractor shall ensure all assigned tasks are accomplished within stated time line restrictions established at time of assignment.

NOTE: These estimates are provided for information purposes only; actual number of actions and/or days available to complete specific assigned tasks within each action may differ from that specified herein and over the course of performance. The Government reserves the right at its sole discretion to assign/unassign tasks to accommodate the Department's priorities.[¹]

....

The Government reserves the unilateral right to adjust the task type(s) required under this PWS to accommodate changing demands and priorities within the CAM acquisition portfolio.

(Emphasis added.)

Regarding the core hours of service the PWS provided:

General work hours under this requirement shall be from 9:00 a.m. to 5:30 p.m. The hours are Monday through Friday, except Federal Holidays, emergency closings and other non-workdays. However, in some instances, the contractor may be required to work outside of the stated core hours. The work schedule may be adjusted periodically, on an as-needed basis, by the . . . contracting officer's representative (COR) or contracting officer provided that the adjustments will not cause the Contractor to surpass the not-to-exceed amount of the contract at any time. The Government will make every attempt to provide a 24-hour notice in writing to the contractor, however, there may be

¹ A table was provided containing contract action type codes and the estimated number of contract actions of each type that DOE anticipated ordering. For example: "New Competitive Contract Award" (18); "New Direct Contract Award" (5); "Simplified Acquisition Procedures" (0); "New GSA Task Order" (7); "New Delivery Order against ED Contract or GSA for Supplies" (0); "New Task Order complex" (28); and "New Task Order Against ED Contract/BPAs, non-complex" (4). **There is no action type code regarding work-site staffing in the table.**

instances where this is not possible (i.e., IT systems go down and other unexpected disruptions of service).

The PWS addressed progress reporting:

The Contractor shall provide to the COR and CO written progress/financial status reports with its monthly invoice. These reports shall be for the period reflected in the invoice and must include the following information:

- Work completed during the reporting period (including listing of submitted deliverables);
- Description of work in progress;
- Issues identified and plan for addressing them;
- Labor hours expended (current month and cumulative);
- Amount of funds expended (current month and cumulative); and
- Amount of funds remaining under the contract; and Total cost estimate through completion of the contract period.

With respect to costing, payments, and/or invoicing, in relevant part, the contract references FAR clause 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts (Aug 2012), which states:

The Government will pay the Contractor as follows upon the submission of vouchers approved by the Contracting Officer or the authorized representative:

(a) *Hourly rate.* (1) *Hourly rate* means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are –

- (i) Performed by the Contractor;
- (ii) Performed by the subcontractors; or
- (iii) Transferred between divisions, subsidiaries, or affiliates of the Contractor under a common control.

(2) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed.

(3) The hourly rates shall be paid for all labor performed on the contract that meets the labor qualifications specified in the contract. Labor hours incurred to perform tasks for which labor qualifications were specified in the contract will not be paid to the extent the work is performed by employees that

do not meet the qualifications specified in the contract, unless specifically authorized by the Contracting Officer.

(4) The hourly rates shall include wages, indirect costs, general and administrative expense, and profit. Fractional parts of an hour shall be payable on a prorated basis.

(5) Vouchers may be submitted not more than once every two weeks, to the Contracting Officer or authorized representative. A small business concern may receive more frequent payments than every two weeks. The Contractor shall substantiate vouchers (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment and by –

- (i) Individual daily job timekeeping records;
- (ii) Records that verify the employees meet the qualifications for the labor categories specified in the contract; or
- (iii) Other substantiation approved by the Contracting Officer.

(Emphasis added.)

The PWS also provides:

The anticipated contract type for this requirement is **Time and Material (T&M); payment shall be made only for actual hours worked.**

....

The Contractor shall propose fixed hourly rate(s) that include all wages, overhead, general and administrative expense, and profit for each category of labor necessary to execute assigned tasks in accordance with this PWS. The Contractor shall provide fixed hourly labor rates for each proposed labor category; separate payment for indirect costs shall not be payable. Labor rates shall be provided for the Contractor's labor categories . . . planned to be utilized in performance of this PWS. The Contractor shall indicate which tasks will be performed by each proposed labor category.

....

A not-to-exceed (NTE) ceiling shall be established at time of award as specified in the Schedule. The ceiling shall be calculated using the Contractor's proposed hourly labor rates multiplied by the estimated number

of labor hours for each proposed labor category hourly rate. At no time shall the Contractor exceed the established ceiling during performance.

(Emphasis added.)

The project began around June 17, 2019. Persons attending the kick-off meeting included, but were not limited to, individuals from DOE's CAM office, the contracting officer, the COR, and GCC's project manager. Meeting minutes addressed the operating procedures and introduced for the first time the master task tracker (MT2) system. The MT2 system was an excel spreadsheet devised by DOE for tracking and payment of the assigned acquisition tasks. DOE explained at the meeting that in order for work to be billable it had to be inputted into the MT2 system. The meeting minutes indicate that only the contracting officer or the COR could modify the MT2 system, which was to be updated at least weekly at the status meeting. For the MT2 system, GCC was required to identify the staff working on a particular task, provide the estimated number of hours needed to complete the task, and include appropriate notes. The attendees discussed DOE's position that if the task was in the MT2 system, GCC should proceed with the work and interface with DOE staff. However, if the task was not in the MT2 system, the work was not authorized, and GCC should not bill for any work performed on tasks not in the MT2 system.

GCC did not raise any objections to using the MT2 system, and it was touted as a way to protect both GCC and DOE. Subsequent emails from the COR to a GCC contract manager address DOE's intentions for the MT2 system in project operations:

As we discussed, the attached MT2 [system] will become the official "approval" document for any actions assigned to GCC staff for execution. It [is] my intention that nothing will roll-on/roll-off this list without my express approval. We will use our Wednesday AM weekly status [meetings] to formally capture changes, discuss hours expended to date, est[imate] time to completion, etc. for each action.

Furthermore, the COR clarified that "[the MT2 system is] what I will be using to validate invoicing when [an invoice] comes in."

The July, August, and September invoices appear to have been paid to each party's satisfaction after some back-and-forth discussions between DOE and GCC to resolve discrepancies between the hours billed and the hours recorded in the MT2 system. The COR and GCC personnel worked together to get the invoices into a form that was supported by the MT2 system, and DOE was willing to use these as support for payment. The contract appears to have worked to everyone's satisfaction, with GCC employees assigned and paid on an hourly basis to perform each acquisition task that was placed into the MT2 system.

In October 2019, DOE started to assign fewer tasks into the MT2 system, resulting in GCC employees at the work site not being fully occupied, and subsequently, problems started to arise. Emails exchanged between the parties in October 2019 clarified their respective positions during this period. GCC expected to be reimbursed by DOE for employees reporting to the work site each day during core hours, even if they were not working on a task, while DOE took the position that in order to be paid the employee had to be working on a task assigned in the MT2 system. GCC wrote to the contracting officer on October 30, 2019:

GCC proposed this order as a time and material with our staff working a full eight-hour day and not as a piece-part billing. If our staff is on duty for eight hours and you do not assign them work to do, then their time is billable and GCC expects to be paid for their time.

I also understand that no new work (acquisition packages)^[2] have [sic] been assigned to our staff since the beginning of the new fiscal year. If that is true then how can they be kept fully occupied for the eight hour day for which they are being contracted to perform?

These are serious concerns and I request your time and consideration to address them with me.

The contracting officer responded on November 8, 2019:

CAM has been explicit in its notice to GCC that this order was placed as a T&M type inasmuch as the workload demands of the Government were (and continue to be) undefined and subject to change throughout performance. The PWS does not prescribe, nor has the Department committed, to payment of 40-hour work weeks for . . . staff (this is neither FFP [firm-fixed price] or FFPLOE [firm-fixed price level of effort]). In fact, this would be contrary to the premise and authorities of contracting by the T&M type. Rather, requirements were intentionally expressed in terms of estimated number of tasks to be assigned with clear notice that, “The anticipated contract type for this requirement is Time and Material (T&M); payment shall be made only for actual hours worked.” Further, IAW [in accordance with] PWS para B.1.

² Acquisition package (AP) was the term used in the contract to denote a task as assigned on the MT2 system. For ease of understanding, we have changed all references to acquisition package to acquisition task, or simply task. Every acquisition task was assigned a number when it was inputted into the MT2 system.

Estimate (sic) of Tasks to be Assigned, only an estimate of the number of anticipated actions and estimated number of actions to be completed was outlined. Specifically, the PWS states: “All estimates were provided for information purposes only; actual number of actions and/or days available to complete specific assigned tasks within each action may differ from that specified herein and over the course of performance. The Government reserves the right at its sole discretion to assign/unassign tasks to accommodate the Department’s priorities.”

Apparently, GCC continued to staff the work site based on forty-hour weeks after the contracting officer specifically informed it that the PWS is not construed as requiring GCC to staff the work site when there were no tasks to perform.

On November 12, 2019, GCC submitted an invoice to DOE (91990019F0339004) for services rendered from October 1 through October 31, 2019, along with the accompanying progress and financial status report required in the contract. GCC again raised the decline in assignments under “Issues and/or Concerns” in the accompanying progress report:

GCC was not assigned any new [acquisition tasks] for processing during October. The COR, on-site PM [project manager] and GCC’s Director of [Management] Support have been working together to address any concerns. This has enabled CAM to make decisions regarding the assignment of new work/[acquisition tasks] for processing. Due to the lack of new [task] assignments four FTEs [full time employees] are currently not working as expected during October. Personnel were on site for a total of 626.5 hours, but can only account for 597.25 hours of work directly connected to the processing of [tasks]. The number of billable hours associated with assigned [task]s in November will be even less.

The COR responded to GCC on November 15, 2019, regarding the October invoice submission, noting discrepancies between the hours billed and the hours recorded in the MT2 system for almost every GCC employee. In the November 19, 2019, weekly status update, the parties discussed some of the discrepancies for week eighteen of the contract, noting that the variances were due to GCC billing for actual time on site even though the hours were not direct hours on assigned work. GCC complained about being paid “piece and part” for only direct hours on assigned work, stating that its proposal, which was incorporated into the contract, was based on providing an estimated eight full-time employees on site and was not based on billing for tasks completed. In an email dated December 5, 2019, DOE wrote, “[W]e have been clear from the beginning that GCC can only bill for hours actually worked on assigned tasks on the tracker.” The contracting officer noted:

At no time did [DOE] authorize or approve for payment billings for non-work hours. All FTE-billings (i.e., 40 hour work weeks) were supported by direct labor hours billed to specific [tasks] (or assigned to workload-related PM [project management] efforts such as account setup, training, etc.). [Examples were given where adjustments were made to the MT2 system to reflect direct hours worked.]

At no time has GCC billed (nor has [DOE] approved) 8 FTE work hours on this contract as they have never staffed to the level estimated during negotiations with the exception of one day. 8/13 was the single (only) day the contract has been fully “staffed” at the estimated 8 FTE level. Note that Dora resigned 8/13 (same day as start date); and then Anthony resigned 8/19 (one week after start date). At most, we’ve had 6 staff onboard at any given time.

Attorneys for GCC contacted DOE on December 8, 2019, to discuss the October invoice:

CAM was to pay GCC in part on the hourly rates prescribed in the [task] Order for payment for labor that met the labor category qualification of the labor category specified in the order. . . . Hourly rate amounts were to be computed by multiplying the appropriate hourly rates prescribed in the schedule by the number of direct labor hours performed. . . . GCC submitted invoices for providing acquisition specialists for direct labor hours (40-hour work weeks) performed, as mandated by the order.

GCC maintains the plain language of the BPA and subsequent [task] Order support its position that labor hours are defined as a 40-hour work week for each specialist position filled and performed on location.

On December 12, 2019, GCC submitted an invoice to DOE (91990019F0339005) for services rendered from November 1 through November 30, 2019, along with the accompanying progress and financial status report required in the contract. As in the October progress report, GCC raised the lack of assignments. The COR responded to the November invoice submission on December 19, 2019, again noting discrepancies between the hours billed and the hours recorded in the MT2 system for each employee.

On January 16, 2020, GCC submitted an invoice to DOE (91990019F0339006) for services rendered from December 1 through December 11, 2019, along with the accompanying progress and financial status report required in the contract. As in the October and November progress reports, GCC raised the lack of assignments. The COR responded

to the December invoice submission, again noting discrepancies between the hours billed and the hours recorded in the MT2 system for each employee. GCC responded on February 18, 2020, that “[t]he invoice is correct as submitted. Our staff was on site for the full period billed, and accomplished all work assigned by the COR for this Time & Material contract.” DOE responded back on February 26, 2020, that, “[a]s we have discussed in the past, as it pertains to invoices, the MT2 would serve as the final approval document for actual hours worked and invoicing.”

On March 10, 2021, GCC submitted a certified claim to DOE in the amount of \$160,709.92, plus interest, for the unpaid amounts from the October, November, and December 2019 invoices. The claim was based on GCC’s position that it was required to have its employees physically on the work site forty hours a week, from 9:00 a.m. to 5:30 p.m., and they should be paid on those bases as opposed to by task. In its final decision issued on June 4, 2021, DOE agreed to pay a total of \$110,462.60 for what it referred to as “actual work performed” per the October invoice (\$69,127.27), the November invoice (\$32,560.73), and the December invoice (\$8774.63). DOE denied GCC’s claim for the remaining invoiced amount of \$50,247.29, citing GCC’s lack of evidence showing that actual work was performed. That amount remains in dispute.

Discussion

This appeal involves a question of contract interpretation regarding whether GCC was entitled to be paid for staff that it had at the work site for a forty-hour work week, even if those employees were not working on an acquisition task. GCC alleges that it was required to have staff physically on duty and at the work site for forty hours a week and is entitled to be paid for those employees, whether they had tasks to perform or were idle. GCC posits that the invoices it submitted in July, August, and September included all “direct labor hours” performed, which it construed as a forty-hour work week, and DOE “changed tactics” regarding payment midway through this six-month contract, when it tied payment to specific tasks.

DOE alleges that GCC was entitled to bill only for “direct labor,” which the contract defined as the hours of the work performing labor directly related to the item produced or service rendered. According to DOE, payment was conditioned on the number of hours the contractor logged in the MT2 system associated with specific acquisition tasks and was not defined by the number of hours the contractor had employees physically on the site that were not working on tasks. DOE posits that it never paid GCC based on a forty-hour week but rather that it paid based on the tasks performed.

When reading the contract as a whole, we interpret the contract as requiring that GCC employees be working on an acquisition task in order for GCC to be paid for the work. The

contract did not require DOE to pay for GCC employees that were at the work site but not working on an assigned task.

The Board in *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, explained how contract interpretation issues are analyzed:

Contract interpretation begins with an examination of the plain language of the contract. *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)). The contract must be read as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). 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). But if the contractual language at issue is susceptible of more than one reasonable interpretation, it is ambiguous, and it is the Board's task to determine which party's interpretation should prevail. *Gildersleeve Electric, Inc. v. General Services Administration*, GSBICA 16404, 06-2 BCA ¶ 33,320, at 165,210.

An ambiguity exists when a contract is susceptible to more than one reasonable interpretation. *See, e.g., E.L. Hamm & Associates, Inc. v. England*, 379 F.3d 1334, 1341-42 (Fed. Cir. 2004); *Metric Constructors, Inc. v. National Aeronautics and Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999). When a dispute arises as to the interpretation of a contract and the contractor's interpretation of the contract is reasonable, tribunals apply the rule of *contra proferentem*, which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document. *Turner Construction Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004); *United States v. Turner Construction Co.*, 819 F.2d 283, 286 (Fed. Cir. 1987). If an ambiguity exists, the next question is whether that ambiguity is patent. An ambiguity is patent if the ambiguity is so glaring that it is unreasonable for the contractor not to discover and inquire about it. The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter. More subtle ambiguities are deemed latent, and the general rule that such language is interpreted in favor of the nondrafting party will apply. *See Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997); *Interstate General Government Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434-35 (Fed. Cir. 1992).

It is not the subjective intent of the drafter, but rather the intent that is conveyed by the language used, that governs the contract's interpretation. *See, e.g., JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,480 (citing *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971)). In addition, "the language of [the] contract must be given the meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances," *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006), "unless a special or unusual meaning of a particular term or usage was intended, and was so understood by the parties." *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

We believe that, when this contract is read as a whole, giving meaning to each portion, there is no ambiguity about what was and was not required. GCC was required to have employees available within a reasonable time for acquisition tasks as assigned by DOE. It was not required to have every employee on the work site forty hours each week.

Regarding payment, DOE consistently paid GCC in line with the acquisition tasks its employees performed that were inputted into the MT2 system. DOE did not pay GCC based on a forty-hour work week. We cannot agree with GCC that DOE changed payment tactics, as it appears from the record that DOE consistently tied payments to the tasks assigned and performed. There is no indication in the record that DOE ever paid GCC for its employees simply being on the work site but not working on a specific task that had been assigned in the MT2 system. During the first three months of this contract, there were repeated back-and-forth discussions between DOE and GCC calculating the actual hours worked on each assigned task. During the first three months of the contract, GCC was paid after working with DOE to calculate and reconcile the time each GCC employee worked on a particular acquisition task in the MT2 system.

The contract's PWS clearly informed GCC that this was a T&M contract and "payment shall be made only for actual hours worked." An estimate for the type of work anticipated, as well as the estimated number of actions expected to be completed, was included in the contract, but it was noted that these were only estimates and were provided for information purposes only. The actual number of acquisition tasks "may differ from that specified herein and over the course of performance. The Government reserves the right at its sole discretion to assign/unassign tasks to accommodate the Department's priorities." *Id.*

While the PWS noted that the general work hours were to be from 9:00 a.m. to 5:30 p.m., Monday through Friday, the PWS did not state that GCC employees who were not assigned tasks had to be at work. GCC was required to provide to the COR and contracting

officer written progress/financial status reports with its monthly invoice. These reports were to be for the period reflected in the invoice and had to include the following information: work completed during the reporting period (including listing of submitted deliverables); description of work in progress; issues identified and plan for addressing them; labor hours expended (current month and cumulative); amount of funds expended (current month and cumulative); amount of funds remaining under the contract; and total cost estimate through completion of the contract period. If a GCC employee was idle on the work site, such information could not be provided.

DOE agreed to pay GCC's vouchers based on an employee's hourly rate, with the amount computed by multiplying the appropriate hourly rates prescribed in the schedule by the number of direct labor hours performed. *See* 48 CFR 52.232-7 (2020) (FAR 52.232-7). Lunch time and surfing the Internet were specifically mentioned in the contract as not being direct labor hours. We conclude that this was DOE's attempt to make clear that idle time would not be compensable.

Appellant argues that the labor hours referred to in the contract include every hour that the contractor was at DOE's work site available to work. DOE argues that labor hours are only those hours that the contractor put towards completing a specifically defined task. The contract itself does not define "labor hours," but when we read this contract as a whole, we construe labor hours to be hours in which a GCC employee is actually working on an acquisition task assigned by DOE, i.e., tasks (as opposed to Internet surfing).

GCC was required to substantiate its vouchers in several ways. It appears that the parties agreed to use the MT2 system as a way to prove the reasonableness of the work assigned, performed, and billed. There has been no complaint as to the MT2 system's accuracy. We note that the MT2 was not mentioned in the contract documents. It appears to have been created by DOE at the start of the contract. However, under the PWS and FAR 52.232-7, payment provisions in the contract envision using "[o]ther substantiation approved by the Contracting Officer," and the MT2 system was just that. FAR 52.232-7(a)(5)(iii). The MT2 system helped the contracting officer and COR track the acquisition tasks that were assigned and helped GCC track how many hours each of its employees was spending on performing an assigned task. The MT2 system seemed to work for each party until the number of acquisition tasks being assigned by DOE declined.

We reviewed some language in the BPA's "Tour of Duty" that states: "All full-time schedules must provide for 80 hours of work during a two week period. Part-time employees should establish schedules that are consistent with the hours that they work." We do not read this phrase as requiring GCC to have full-time employees on the work site for eighty hours per pay period or forty-hour weeks. Further, the core hours set forth in the contract were merely core hours that the employee had to work on site if they had been assigned an

acquisition task. They were not a direction to work a forty-hour week in which the employee had no tasks to perform. To construe these meager statements out of the context of the rest of this T&M contract and rely on them to create a contract where GCC employees had to do nothing but show up on the work site for forty hours a week flies in the face of the intent of this contract.

As to GCC's allegations regarding breach of the duty of good faith and fair dealing, that duty does not serve to extend a contractor's rights beyond the terms of the contract. Having interpreted this contract as not requiring GCC to have employees on site while there were no acquisition tasks available to work on, we cannot find that DOE breached the duty by refusing to pay GCC for its employees' idleness. "The implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Metcalf Construction Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) (citing *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 1988)). Contractors with the Government "cannot rely on the implied covenant of good faith and fair dealing to change the text of their contractual obligations." *Century Exploration New Orleans, LLC v. United States*, 745 F.3d 1168, 1179 (Fed. Cir. 2014). To find otherwise would negate the T&M nature of this contract, as well as the parts of the contract specifying that payment would be made only for actual hours worked.

Decision

For the foregoing reasons, the appeal is **DENIED**.

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

I concur:

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge