Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

GRANTED: July 27, 2001

GSBCA 15190

XEROX CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

William H. Butterfield of Bell, Boyd & Lloyd PLLC, Washington, DC, counsel for Appellant.

Robert T. Hoff, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **WILLIAMS**.

WILLIAMS, Board Judge.

In this appeal, Xerox Corporation (Xerox) challenges the General Services Administration's (GSA's) decision that Xerox has underpaid the Industrial Funding Fee (IFF)[1] on its multiple award schedule (MAS) contract in the amount of $163,362. GSA contends that Xerox must pay an IFF on the listed price of equipment which Government agencies purchased under the contract, even when the agencies actually paid Xerox a lower net price calculated after a trade-in of used equipment. Xerox argues that by the terms of its contract and as a matter of policy the IFF should be applied only to the net price after trade-in -- the dollar amount the Government actually paid Xerox.

Based on the record before us, we conclude that the Government has not met its burden of proving that the IFF should be applied to the list prices in Xerox's MAS contract.

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[1]The IFF is a fee paid by customer agencies to fund GSA's operation of the Schedules program. The fee, 1% of the total contract sales, is incorporated into the award price charged to agencies, and then is remitted by contractors to GSA on a quarterly basis.

Although there is no express contract provision that addresses whether the IFF should be applied to listed prices or prices net of trade-in allowances, Xerox's offer -- which was accepted without reservation by GSA -- was clearly predicated on the understanding that decreasing prices to account for trade-ins would be done as in an open market transaction and consequently not subject to the MAS contract or its price reduction clause. The Government admitted that the IFF does not apply to discounts, and Xerox treated the trade-in allowances it offered here as a special kind of discount. Xerox reported its MAS sales to Government agencies by recording the payments it received as net of trade-in allowances, and paid the IFF on the total of those net payments. Xerox believed it was in compliance with the IFF requirement because contractors were to report the total dollar value of the sales, and the IFF is defined to be one percent of that total. Given the absence of a specific contract provision on the applicability of the IFF to prices discounted for trade-ins, and the parties' agreement that trade-in credits would be treated on an open-market basis and not as a contractually required element of a MAS transaction, we find reasonable Xerox's understanding that the IFF should be paid on those discounted prices.

Findings of Fact

Negotiation and Award

On September 30, 1993, GSA awarded multiple award schedule contract number GS-26F-1001B to Xerox for the "purchase, rental, lease, repair, and maintenance of copying equipment supplies, accessories and attachments." Appeal File, Exhibit 1. The contract has been extended by GSA since its original expiration date of September 30, 1996. Under the latest extension, the contract is due to expire on September 30, 2001. The IFF did not exist at the time of contract award; it was first introduced in 1995.

Xerox's Offer

Xerox's offer letter of October 8, 1992, contained certain clarifications, including an express clarification on equipment trade-in. The offer letter provided:

> Xerox Corporation is pleased to submit the enclosed Offer under Solicitation FCGR-92-0041-N-10-08-92 for the period from October 1, 1993 through September 30, 1996. This letter, with all attachments, is a part of our Offer.
>
> The following exceptions, or clarifications, are made to the Solicitation terms, and are stated in their order of appearance in the Solicitation. Our Offer is conditioned upon acceptance of the exceptions, clarifications, or modifications.
>
> Clarification to the Price Reduction Clause
>
> Refer to Paragraph I-FSS-390, Pages 74-76, Price Reduction. As stated and discussed in previous years, we have a deep concern with the possible interpretations of the clause. While we appreciate the need for the clause, our Offer is conditioned upon agreement to and acceptance of the following clarifications.

. . . .

Equipment Trade-In

As a commercial practice, Xerox offers trade in allowances for certain customer owned copying and printing equipment that is traded in (Xerox models and competitive models). These [trade-in] allowances may be applied as credit against the purchase price of certain replacement Xerox models or, under certain terms, be applied against rental charges resulting from the installation of a replacement Xerox model under a rental plan.

Trade-in allowances are offered to Federal Government customers on an "Open Market" basis and are not included under the proposed Contract. Accordingly, the Price Reduction Clause is not applicable to Trade-in Allowance transactions that may be offered by Xerox during the proposed Contract period.

Appellant's Exhibit 1 (emphasis added).

In Attachment 1 to the Marketing Data Xerox was required to submit as a part of its offer, Xerox again included language to the effect that any trade-in allowance would be outside the scope of its MAS contract:

IV. Commercial Prices Not Offered to GSA

. . . .

Trade-In

The trade-in of Government-owned equipment is not solicited and will not be included under any resultant GSA contract. Further, Xerox understands GSA's position to be that any trade-in allowance afforded any customer, including Federal Government customers, is outside the scope of any resultant Multiple Award Schedule contract and, therefore, the trade-in allowance applied against the purchase price of any copier offered under the resultant contract is exempt from application of the Price Reduction Clause.

Appellant's Exhibit 1; see also id., Attachment 1, V.(d)(1).

The Price Reduction clause provided, in pertinent part:

PRICE REDUCTION:

(a) General. This price reductions clause is intended to ensure that throughout the term of the contract, the Government shall maintain its relative price/discount (and/or term and condition) advantage in relation to the Contractor's commercial customer(s) price/discount upon which this contract award is predicated. The customer or category of

customers upon which the contract award is predicated will be identified at the conclusion of negotiations.

(b) Pricing Reductions to Customers Other than the Federal Agencies.

(1) Prior to the award of contract, the Contracting Officer and the offeror shall reach an agreement as to the price relationship between the Government and the offeror's identified customer or category of customers upon which the contract award is predicated. This relationship shall be maintained throughout the contract period. Any change in the Contractor's commercial pricing arrangement for the identified customer or category of customers which disturbs this relationship will constitute a price reduction.

. . . .

(3) If, after the date of the conclusion of negotiations, the Contractor (i) reduces the prices contained in the commercial catalog, pricelist, schedule, or other documents (or grants any more favorable terms and conditions) offered by the Contractor and used by the Government to establish the prices with the contract; or (ii) reduces the prices through special discounts to the identified customer or category of customers upon which the award was predicated so as to disturb the relationship of the Government to that identified customer or category of customers, price reduction shall apply to this contract for the remainder of the contract period, or until further reduced, or, in the case of temporary price reductions, for the duration of any temporary price reduction period.

. . . .

(c) Price Reductions to Federal Agencies. . . .

Except for temporary "Government-only" price reductions described below, if, after the effective date of this contract, the Contractor reduces the price of any contract item to any Federal agency and the sale falls within the contract maximum order limitation, an equivalent price reduction shall apply to all subsequent sales of the contract item to Federal agencies for the duration of the contract period or until the price is further reduced. The Contractor may offer to the Contracting Officer a temporary "Government-only" price reduction which has a duration of 30 calendar days or more, except during the last month of the contract period when any such offer must be for the remainder of the contract period.

Appeal File, Exhibit 1 at 74.

GSA's Rulemaking Establishing the Industrial Funding Fee

On April 18, 1995, GSA published a final rule in the Federal Register adding a new IFF clause and amending the "Contractor's Report of Orders Received" clause, effective that day. 60 Fed. Reg. 19,360 (Apr. 18, 1995). GSA noted that it previously had published a notice of proposed rulemaking and that comments which had been received from federal agencies and vendors were considered in formulating the final rule. GSA stated:

> Fees will be included in the prices charged to ordering activities and contract award prices will reflect the total amounts charged. Federal Supply Schedule contractors will remit fees to the General Services Administration based on quarterly contract sales. GSA will recoup its costs from the ordering activities through the contractor's quarterly remittance.
>
> The General Services Administration will use the industrial funding fee to fund the cost of providing supplies and services through the Federal Supply Schedule Program. As solicitations are issued with the new clause, the program will convert from an operation funded through congressional appropriations to a reimbursable activity. GSA's fiscal year 1995 budget reflects a $7.8 million reduction in operating expenses for the schedules program. The remaining appropriated monies for the program will be eliminated over the next two fiscal years.

Id. The publication of the final rule reflected that comments from twenty-two agencies were received and that "nearly all agencies perceived the [previously] proposed centralized billing and payment system to be cumbersome, intrusive, and unnecessarily bureaucratic." Id. The Federal Register notice continued:

> Other concerns frequently raised by agencies included payments to vendors without proper verification of acceptance; payment of the 1 percent fee for nonschedule items included on purchase orders for schedule items; and problems associated with the use of a Governmentwide credit card under such a system.
>
> Fourteen vendors and associations responded. Their responses for the most part indicated that they did not wish GSA to assume the role of centralized billing and payment point; that they did not want to adjust their agency price lists to reflect a price other than the contract award price; and they found it burdensome that the agency purchase order would not reflect their invoiced amounts.

Id.

Based upon these comments, GSA determined "that implementation of industrial funding of the Federal Supply Schedule Program must be accomplished in the least disruptive manner possible to both agencies and contractors and that the concerns raised must be alleviated." 60 Fed. Reg. 19,360. GSA determined that the most efficient and least disruptive method of obtaining the funding would be "by recouping its costs from ordering

activities through a quarterly remittance from contractors based on reported sales. This method [would] require no changes in agency ordering or paying procedures and [would] have minimal impact on schedule contractors." Id. The notice of rulemaking further stated: "The award price or discount appearing in schedule price lists will already include the 1 percent IFF." Id. There is no mention in the proposed rulemaking of whether the IFF would apply to prices net of trade-in allowances.

Contract Modification 500

On June 29, 1995, GSA and Xerox signed Modification 500, which added a new clause, Industrial Funding Fee, 552.238-77, as well as a revised Contractor's Report of Sales clause, 552.238-72, to the contract. Appeal File, Exhibit 2. The modification had an effective date of October 1, 1995. The new contract clauses provided, in pertinent part:

> 552.238-77 INDUSTRIAL FUNDING FEE (APR 1995)
>
> (a) Contractors shall pay the Federal Supply Service, GSA, an industrial funding fee (IFF) at the end of each contract quarter. The IFF shall be remitted at the same time the GSA Form 72A, Contractor's Report of Sales, is submitted under clause 552.238-72, Contractor's Report of Sales. The IFF equals one (1) percent of total sales reported on GSA Form 72A. The IFF reimburses the GSA Federal Supply Service for the costs of operating the Federal Supply Schedules Program and recoups its operating costs from ordering activities. Offerors should include the IFF in the prices submitted with their offer. The fee will be included in award price(s) and reflected in the total amount charged to ordering activities.
>
> . . . .
>
> 552.238-72 CONTRACTOR'S REPORT OF SALES (APRIL 1995)
>
> (a) Contractors shall furnish quarterly the dollar value (rounded to the nearest whole dollar) of all sales under the contract during the preceding 3-month period to include any partial month. A separate report for each National Stock Number (NSN), Special Item Number (SIN), or subitem shall be prepared and submitted, unless otherwise specified, on GSA Form 72A.

Id.

IFF Purpose and Scope

GSA's guidance on the IFF is contained in a publication from the GSA Vendor Support Center entitled "Industrial Funding Fee Frequently Asked Questions and Answers." Appellant's Hearing Exhibit 15. In the introductory paragraph of its "Frequently Asked Questions and Answers" publication, GSA says:

> The IFF is a fee paid by customers to fund the cost of operating the Schedules program. Customer agencies pay this fee when they purchase items from a Federal Supply Schedule contractor with a contract containing industrial funding provisions.

Appellant's Hearing Exhibit 15.[2]

> The GSA publication contains the following pertinent questions and answers:
>
> 2. Do customers pay the industrial funding fee in addition to the price listed by the schedule contractor?
>
> No--the industrial funding fee is not a separate line item. The fee is already included in the price of the item because GSA negotiated the fee into the contract price before award was made.
>
> 5. How do agencies pay the industrial funding fee?
>
> The fee is included in the price customer agencies pay the contractor when they purchase items from a Federal supply schedule contract. The contractor remits the fee due to GSA, quarterly.
>
> 12. How much is the industrial funding fee?
>
> The industrial funding fee is currently 1% of contract sales. The fee is set by the Federal Supply Service (FSS) Commissioner, and is periodically reviewed.
>
> 13. How is the fee calculated?
>
> Contractors calculate the fee to be remitted to the Government by taking one percent (1%) of their total schedule contract sales as reported via Internet. Because the industrial funding fee has already been included in the reported sales, the remittance amount is a very simple calculation: if the reported sales are $500.00, the industrial funding fee is $5.00.
>
> 21. How do contractors know when to record a sale for 72A/industrial funding reporting purposes?
>
> For industrial funding purposes, a sale is recognized in a manner consistent with the contractor's accounting system, for example, at time of receipt of an order, at time of invoice, or at time of payment. The IFF is a simple application of a rate to a sale. This method was implemented to minimize the administrative burden on contractors: they need not maintain separate

[2]The Board is referring to the exhibits in appellant's trial book as appellant's hearing exhibits.

> accounts for the purposes of calculating contract sales. If a contractor changes his accounting and reporting practices, he must notify the ACO.

Appellant's Hearing Exhibit 15. None of the vendor questions and answers expressly addressed whether the IFF applied to trade-in credits. Id.

By letter dated June 28, 1995, Xerox advised GSA of a change in its price list due to the IFF, as follows:

> As covered in our May 10, 1995 letter to you, Xerox has elected to change the prices in the Authorized Federal Supply Schedule price list for the referenced contract to meet GSA's requirements for "Industrial Funding". This means that prices agreed to by GSA and Xerox will be uplifted by a certain percentage.
>
> Our agreement to participate in GSA's Industrial Funding initiative is made on the provision that GSA agree to the following stipulations:
>
> 1) With the exception of the payments to be made by Federal agencies for Lease to Ownership Plan (LTOP) placements made prior to October 1, 1995, all prices, including price increases under the Economic Price Adjustment Clause to become effective on October 1, 1995, will be increased by 1.3%. The agencies will order and be invoiced at the uplifted prices beginning with orders dated on or after October 1, 1995. Xerox' first Industrial Funding reimbursement (1% of contract sales) will occur not more than 30 days after December 31, 1995. The 1.3% uplift will apply to contract revenues from October 1, 1995 through September 30, 1996 with GSA receiving 1% of contract revenues. For the period from October 1, 1996 through September 30, 1997, the uplift will be changed to 1.2% with GSA receiving 1% of contract revenues. For the period from October 1, 1997 through September 30, 1998, the uplift will be changed to 1.1% with GSA receiving 1% of contract revenues.
>
> 2) The Government agrees to allow the additional uplift (above 1%) based on the fact that Xerox has no practical way of collecting the 1% uplift from agencies with equipment installed on LTOP prior to October 1, 1995. These customers were provided firm, fixed payments at the inception of their LTOP based on a number of factors such as length of LTOP term, purchase price of the equipment and open market trade in deductions. For these reasons, specific LTOP payments are impossible to publish in a price list.
>
> We are basing the Fiscal Year 1996 uplift on the fact that Xerox will be providing GSA with 1% of all LTOP revenues even though Xerox will be unable to collect this 1% from its current LTOP customers. For the 12 month period ending December, 1994, total sales under the referenced contract totaled approximately $284 million. 1% of this equals $2.8 million. But Xerox would only be collecting 1% from its

> non-LTOP customers, approximately $221 million. The $2.8 million provided to GSA, when divided by $221 million equates to .0127, rounded to .013.
>
> As we have discussed, Xerox' participation in this program cannot be done without significant costs. We have already determined that sizable investments in manpower and financial resources in such areas as:
>
> - Financial Reporting and Control: where Xerox will implement an ongoing monthly management process to separate actual revenue from billed revenue with IF uplift as invoiced to correctly reflect GSA sales on our balance sheet.
> - Quarterly payment process: where the various products and services sold under GS-26F-1001B through separate Xerox departments/divisions must be brought together for a composite payment. Monthly and quarterly accounting and account reconciliations will be required. A quarterly non-routine check generation process for GSA remittance with appropriate audit trail and controls will be required.
> - Billing table management: where Xerox will literally be required to maintain two sets of automated billing systems tables records: one for the commercial price and one for the uplifted GSA price.
> - Systems enhancements: where complex internal systems created to run our business will have to be adapted to efficiently manage the GSA Industrial Funding process. Systems modification in Billing/Pricing Tables; Consolidated Revenue Reporting account recognition; Financing Businesses; Revenue and Activity Reporting Systems; Supplies Order Entry; Sales Profit Reporting; and Sales Compensation.
> - Commission Recalibration: where steps must be taken to adjust current and future commission programs to avoid compensation does not occur for revenue that does not materialize for the Corporation.

Appeal File, Exhibit 4.

On May 9, 1997, the contract was extended until September 30, 1998, and on October 1, 1998, GSA and Xerox entered into Modification 650 extending the contract for three years through September 30, 2001. Appeal File, Exhibit 8.

GSA's MAS team leader, who is also an administrative contracting officer (ACO), testified that the clarifications in Xerox's offer which recognized that trade-in allowances

were open market transactions not subject to the MAS survived Modification 500 and continued to exempt trade-ins from the MAS. Transcript at 44, 52-54. Specifically, the MAS team leader/ACO testified:

> Q . . . My question is did Xerox negotiate provisions into the contract which is at issue which exempted trade-ins from coverage under the price reduction clause?
>
> A Based on the fact that the items would not be discounts, and therefore would not be reportable under that clause. The other thing is that I've [read] documents from Xerox that were part of the original contract that indicated that trade-ins were not subject to the multiple award schedule contract. In fact, that they were open market transactions.
>
> . . . .
>
> Q Okay. Have those provisions remained in the contract following the adoption of the IFF to your knowledge?
>
> A Yes.
>
> Q Okay. And were those provisions to your knowledge changed in any way with the onset of the IFF concept?
>
> A No.
>
> Q Okay. And do the provisions that we are now talking about . . . do those Xerox negotiated provisions, open market off contract kind of provisions, do they remain in the contract today as we speak?
>
> A Yes.

Id. at 53-55.

The record is devoid of evidence concerning the valuation of the trade-ins here. However, GSA's MAS team leader/ACO acknowledged that in virtually all instances involving a trade-in, the product being replaced could perhaps be at or past its useful life and be obsolete. Transcript at 63. He further acknowledged that the value attached by Xerox and other vendors to a trade-in is arbitrary, market driven, and may not have any real relationship to the value of the equipment being traded in. Id. at 64.

In the view of GSA's MAS team leader/ACO, the IFF would not apply to discounts, i.e., if Xerox discounted a list schedule price from $10,000 to $7500, the IFF would apply to the $7500 price. Transcript at 56. However, if Xerox gave GSA a $2500 credit for trading in an old copier, and GSA then paid a reduced price, i.e., $7500 for a new copier, the ACO believed that the IFF would apply to $10,000 because payment was made by two methods, money and the old copier. Id. at 57.

GSA's MAS team leader/ACO testified that based upon his experience, virtually every product that the Government now trades in has already had an IFF fee paid on it when it was originally bought by the Government. Transcript at 65. However, he does not believe that if the IFF were added to the trade-in value of that piece of equipment, the IFF would be paid twice. He testified: "It's a new transaction, and we are going to give a new product. As a method of payment offered by the seller, they will accept cash plus a trade-in which has been assigned some value and that's used to consummate the deal." Id. at 66. GSA's MAS team leader/ACO agreed that it is the Government agency, not Xerox, that ultimately pays the IFF. Id. at 68-69.

Under this contract, Xerox uniformly recorded sales as the net amount in any transaction involving a trade-in, i.e., not including the value of the trade-in in the sales price. Appellant's Exhibit 2.

In delivery orders to Xerox under this MAS contract, Government agencies reported the sales transaction as net of the trade-in. Appellant's Hearing Exhibits 13, 14.

The Inspector General's Audit and Xerox's Response

On July 31, 1998, GSA's Office of Inspector General (OIG) issued a preaward audit report concerning the instant contract. In that preaward audit, OIG concluded:

> Xerox is underpaying the Industrial Funding Fee (IFF) on all equipment purchase SINs [Special Item Numbers]. Specifically, the company is not paying IFF on the trade-in value, where applicable, associated with each equipment purchase.

Appeal File, Exhibit 7. The OIG further stated:

> Xerox is subtracting the value of the trade-in from the GSA contract price before calculating the amount of the IFF due GSA. Company representatives offered no acceptable rationale for not paying the IFF on the trade-in portion of the sale. Under the GSA schedule contract, trade-ins are open market items, separate from the schedule sale. Therefore, the trade-in amount should not affect the IFF due to GSA. . . . Also, the contract price of a GSA schedule item includes the IFF, so, in effect, Xerox is collecting the full IFF from the schedule customer, but only calculating and remitting the IFF on the lower net invoice amount after the trade-in amount is subtracted.

Id. at 14.

By letter dated July 6, 1999, the GSA MAS team leader/ACO advised Xerox of the Inspector General's conclusion that Xerox was underpaying the IFF on all purchases involving trade-ins. Appeal File, Exhibit 9. Xerox responded to this letter on August 25, 1999, disagreeing with the OIG's conclusions. Xerox's Manager, Federal Contract Operations, stated:

> Xerox has never considered trade in allowances to be forms of payment. To the contrary, the allowances are true promotions designed to encourage the customer to replace older generation equipment with newer technology. We treat the trade in allowance as a discount to the sale. In fact, our internal accounting practices are to recognize as sale revenue the net amount of the transaction after discounts or promotions (such as trade in allowances) are deducted. Moreover, we are in full compliance with 552.238-72(a) which states "The dollar value of a sale is the price paid by the schedule user for products and services on a schedule delivery order, **as recorded by the Contractor**".
>
> This is how Xerox has always recorded revenue and reported GSA contract sales data to GSA, even before the beginning of the Industrial Funding Fee program. While GSA's auditors have reviewed our records on numerous occasions over the years (in the course of pre award or post award audits), there has never been a question or even an observation either on the methodology used to "record" our sales or to report 72A contract sales to GSA.

Id., Exhibit 13.

Discussion

This case raises an issue of first impression regarding whether the IFF should be applied to the MAS contract list price or the price net of trade-in allowances. Nonetheless, the instant case can be resolved on a much narrower basis -- by reference to the parties' contract, in particular, to specific provisions in Xerox's offer which the Government accepted without reservation or objection. As the United States Court of Appeals for the Federal Circuit has recognized in Alvin Ltd. v. U.S. Postal Service, 816 F.2d 1562, 1565 (Fed. Cir. 1992):

> In resolving a disputed interpretation of a contract, "[w]ords and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable, it is given great weight." Restatement (Second of Contracts § 202(1). Indeed, "[i]n the case of contracts, the avowed purpose and primary function of the court is the ascertainment of the intention of the parties." 4 S. Williston, A Treatise on the Law of Contracts § 601 (3d ed. 1961), quoted with approval in Dynamics Corp. of America v. United States, 389 F.2d 424, 429, 182 Ct. Cl. 62 (1968). See also Restatement (Second) of Contracts § 202 comment b.
>
> . . . .
>
> "The parties' intent must be gathered from the instrument as a whole", Kenneth Reed Construction Corp. v. United States, 475 F.2d 583, 586, 201 Ct. Cl. 282 (1973), from the perspective of "a reasonably intelligent person acquainted with the contemporary circumstances". Firestone Tire & Rubber Co. v. United States, 444 F.2d 547, 551, 195 Ct.Cl. 21 (1971). See also Restatement (Second) of Contracts § 202(1).

Cf. United States v. Data Transmission, Inc., 984 F.2d 1256, 1259-60 (1st Cir. 1992) ("in deciding the question of comprehensibility one must examine the relevant provisions, not necessarily as GSA intended them, but rather from the perspective of a reasonable person in [the contractor's] position. See Restatement (Second) of Contracts §§ 20, 203 (1981)").[3]

At the outset, we note that Xerox expressly conditioned its offer on the understanding that trade-in allowances were not included in the contract but, if offered to Federal Government customers, would be on an "open market" basis. We understand this to mean (as Xerox itself explained in Attachment 1 to its marketing data) that trade-ins of Government equipment were not solicited and would not be included in any schedule contract. Nevertheless, in its offer, Xerox did not exclude the possibility of discounting from the schedule price by offering trade-in credits. What is significant about this component of its offer is that any such discounts or credits were to be provided on an "open market basis" without regard to the application of price reduction clause to this aspect of the transaction.

We understand the term "open market" as used in this portion of Xerox's offer as being in contrast to a MAS purchase. In its marketing data submission, Xerox wrote that it understood GSA's position to be that "any trade-in allowance afforded any customer including Federal Government customers, is outside the scope of any resultant Multiple Award Schedule contract and, therefore, the trade-in allowance applied against the purchase price of any copier offered under the resultant contract is exempt from application of the Price Reduction Clause." We view this formulation of GSA's position by Xerox to be entirely consistent with the proviso concerning trade-in allowances contained in Xerox's offer and discussed above. From these two statements it is apparent to us that Xerox, as offeror, would not consider itself bound under this schedule contract to provide discounts through trade-in credits. Such credits or allowances, if offered, would be gratuitous and in this sense "outside the scope of the contract." Nothing in the record for this appeal indicates that GSA took issue with the condition contained in Xerox's offer or with Xerox's characterization of GSA's position on the issue.

Although this aspect of Xerox's offer and GSA's acceptance of it addressed compliance with the price reduction clause and did not contemplate the IFF, which did not yet exist, it was nonetheless a clear expression of Xerox's and the Government's intent that trade-ins would be treated as they are in open market transactions, not as a contractual element of a MAS transaction. The parties agreed that although the dollar price could be reduced by the value of the trade-in credit, this reduced price would not trigger the price reduction clause. What this agreement tells us is that there was a mutual recognition that the listed price could be discounted at the vendor's option by the amount of the trade-in credit. Thus, because the parties understood that the discounted price, net of the trade-in value, could become the actual sale price (albeit without triggering the price reduction clause), the IFF should be applied to that net price, not the MAS list price.

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[3]The Data Transmission case involved the court's interpretation of the price-discount disclosure provisions of GSA's MAS contract. The Court, per then-Judge Breyer, found these provisions "virtually unintelligible if read literally." 984 F.2d at 1260.

This original understanding of the parties was not changed when Modification 500 amended the contract to include the new regulatory requirement of the IFF. In entering into Modification 500, neither GSA nor Xerox addressed the circumstance of whether the IFF would be payable on the listed price for an item or, if a trade-in was involved, the price net of the trade-in allowance. However, given the parties' continuing agreement that trade-ins offered under the schedule contract were to be dealt with on an open-market basis, we agree with Xerox that the trade-in credits are here best interpreted as this vendor's discretionary discount from the schedule price and not subject to the IFF assessment.

Further support for this interpretation is derived from the IFF and reporting clauses and Xerox's contemporaneous effort to comply with those clauses. The amended "Contractor's Report of Sales Clause" provides that contractors shall furnish quarterly the dollar value of all sales under the contract during the reportable period. In addition, the IFF is defined to be equal to 1% of total sales reported on GSA's Form 72A, which Xerox consistently reported as the net amount of the transaction, i.e., the list price less the amount of the credit allowed for the trade-ins. GSA did not object to Xerox's reporting or remittance of the IFF, which was imposed in late 1995, until July 1998 when the GSA's OIG completed its audit. As our appellate authority has recognized, one may not ignore the interpretation and performance of a contract, whether termed "mistake" or not, before a dispute arises. Alvin, 816 F.2d at 1566. The court noted: "As in Macke Co. v. United States, 467 F.2d 1323, 1325, 199 Ct.Cl. 552 (1972), we discern an 'excellent specimen of the truism that how the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself'." Id.

Xerox itself uniformly treated the trade-in allowance as a discount to the sale and remitted the IFF on the discounted price, believing that it was fully compliant with the IFF. This is not an unusual characterization of a trade-in allowance. For example, in Convery v. United States, 597 F.2d 727 (Ct. Cl. 1979), Chief Judge Friedman, dissenting in part, stated in dicta in another context, "The trade-in allowance thus appears, to a large extent, to be merely a method of providing a discount to the government." Id. at 733. Similarly, in 60 Comp. Gen. 255 (1981), the Comptroller General ruled that a prompt payment discount should be computed on the basis of the net contract price, i.e., the actual cash balance due and not include the value of a trade-in. The decision reasoned: "[W]hen a trade-in is involved, before computing the discount, the vendor will presumably seek to deduct the value of the trade-in from the gross contract price because the amount of the trade-in does not represent cash due. . . . [T]his method of computing prompt payment discounts is consistent both with generally accepted accounting principles and trade practice." Id. at 256. Here, the Government admitted that the IFF does not apply to discounts, and in view of Xerox's reasonable characterization of the trade-in allowance as a discount, no IFF should be required on the amount of the discount.

In attempting to ascertain the intent of the parties here, we are also cognizant of both the nature of the governmental obligation being imposed as well as the timing of its imposition. The IFF is a fee levied by GSA on agencies for procuring their supplies under the GSA schedule. As such, it is akin to a user fee. See generally National Cable Television Association, Inc. v. United States, 415 U.S. 336, 340 (1974) ("A fee, however, is incident to a voluntary act . . . . The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other

members of society."); Thomas F. Burke, Robert J. Sherry, "Pay the Piper, Call the Tune: Unresolved Issues Concerning the MAS Program's Industrial Funding Fee," 42 The Gov't Contractor ¶ 127 (Apr. 5, 2000) (In effect, the IFF is a "user fee" that procuring agencies pay for the convenience of ordering goods and services from the schedule.). It is fundamental that the imposition of this type of a fee by a Government agency, which was effected here as a modification to the parties' contract, should at a minimum be done with clarity.[4] As this Board recognized in Broyles and Broyles, Inc., GSBCA 5694, 81-1 BCA ¶ 14,969, at 14,969, "It is the obligation of the drafter of a contract to 'assure itself that it has accurately expressed its intent.'" GSA introduced the IFF some two years after the contract was awarded, such that the parties did not originally expect that the IFF would be imposed at all, let alone on the trade-in allowance. Here the Government drafted the IFF and reporting clauses. To extend the imposition of this fee to an aspect of the transaction not mentioned in the rulemaking or envisioned by the parties as part of their agreement would, in our view, be redrafting the parties' original contract to add a requirement on Xerox which was not bargained for.

GSA contends that because the trade-in is an in-kind payment which comprises a part of the schedule sales price, the IFF applies to the total sales price including the valuation of the trade-in. Respondent's Posthearing Brief at 13. While possessing some facial appeal, the Government's interpretation is not borne out by the parties' agreement. The contract does not state that a trade-in credit is to be considered as part of the price for purposes of the IFF, and the original contract was premised on the understanding that trade-in credits would be dealt with as they are in open market purchases, namely, as discretionary discounts.

An additional problem with the Government's contention that the IFF must be paid on trade-in value as part of the schedule sales price rests in the Government's failure to establish that the actual valuation of the trade-in is equivalent to the trade-in allowance given by Xerox. In fact, the record in this case suggests otherwise. As acknowledged by GSA's schedule team leader/ACO, it appears that the machines which were traded in had no further useful life, and were obsolete and of limited value. In any event, the Government has not proved the valuation of the trade-in.[5] The Government has the burden of proving quantum as well as entitlement and has not done so here.

The Government further argues that appellant is in apparent violation of constraints on the donation of Government property, citing Federal Property Management Regulation (FPMR) 101-46.200, which provides:

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[4]The legitimacy of the IFF has not been and could not be challenged in this proceeding.

[5]There are methodologies for valuing trade-ins. E.g., Roberts Construction Co., ASBCA 31648, 87-2 BCA ¶ 19,899 (trade-in value of cash registers and processor based upon testimony of second-hand dealer familiar with identical equipment); Warren v. Commissioner of Internal Revenue, 56 T.C.M. (CCH) 1125 (1989) (trade-in or residual value as copier machines based upon considerations of useful economic life stream of income from continued rentals); cf. American President Lines v. United States, 821 F.2d 1571 (Fed. Cir. 1987) (fair and reasonable trade-in value for obsolete ships determined under statute considering scrap value, depreciated value, and market value, as well as lay-up costs and other costs and expenses in the contracts).

> Subject to the provisions in this part, in acquiring replacement personal property, similar items may be exchanged or sold and executive agencies are authorized to apply the exchange allowance or the proceeds from sale in such cases in total or in partial payment for the replacement property acquired. Any transaction carried out under this part shall be evidenced in writing.

Respondent posits that "based upon this regulatory language no Government agency could give or donate equipment to appellant unless it involved a total or partial payment in the exchange, which is in opposition to appellant's premise that the trade-ins have 'no value'."[6] Respondent's Posthearing Brief at 12. Respondent continues that if such actions by the Government did occur they would have been unauthorized acts of Government agents. Id. at 13. This line of argument is apparently based upon the assumption -- still unproven -- that the trade-in has a value, equivalent to the trade-in credit offered by Xerox. We remain convinced that in the context of the parties' agreement here, the trade-in allowance does not constitute an exchange or a sale by the Government but rather a discount offered by Xerox.

GSA also argues that "appellant is possibly in violation of the Price Reduction clause," stating:

> Appellant's stated position in its Complaint is that trade-ins are a discount to the sale. Under the provisions of Contract Clause 52-215-23, Price Reduction for Defective Cost or Pricing Data, appellant is required to report to the contracting office any price reductions provided to a user. Appeal File, Exhibit 1, [at] 48. For the purchase of equipment, the designated customer class was the commercial customers receiving discounts in accordance with BPA Level IV of their commercial pricing. To date, there is no known evidence that GSA received any notification of specified particular promotional discounts based upon trade-in allowances. Either appellant has treated trade-in allowances as something other than a promotional "discount", which it has on its delivery orders, or appellant is in violation of this clause.

Respondent's Posthearing Brief at 13. Respondent seems to be arguing that trade-in allowances cannot be considered as discounts here because if they are, Xerox would be in violation of the clause.

We disagree. This argument ignores the fact that Xerox conditioned its offer on the understanding that trade-in allowances would not trigger the price reduction clause here, and the Government accepted that condition. The issue here is not compliance with the price reduction clause. Rather, it is to Xerox's and GSA's intent in negotiating the agreement that trade-in allowances would not trigger the clause that we look in order to aid us in deciding a wholly different issue -- whether the IFF should apply to prices net of the trade-in allowance. Whether the parties legally succeeded in exempting their trade-in allowances from the price reduction clause is another matter and one not before us. Respondent's arguments on these alleged violations of the clause are quoted in full above, and they do not

[6]Respondent does not indicate what the import of this apparent violation would be other than to imply that the trade-ins must have some value.

suggest that the parties' contract has been rendered void or voidable by these alleged "possible violations" or that we are otherwise prevented from interpreting the parties' contract as we have.

In conclusion, we emphasize that the Government as the proponent of this claim has the burden of proving by a preponderance of the evidence that it is entitled to the additional monies claimed. E.g., Southland Enterprises, Inc. v. United States, 24 Cl. Ct. 596, 598 (1991) ("The Government, in deducting from Southland's earnings, must carry the burden of proof to show that its actions were correct. . . . [T]he Government has the burden of proving how much of a downward adjustment in price should be made . . . has the laboring oar, and bears the risk of failure of proof, when a decrease is at issue." (citing Nager Electric Co. v. United States, 442 F.2d 936 (Cl. Ct. 1971)); see also Mutual Maintenance Co., GSBCA 7496, 85-2 BCA ¶ 18,098. Even if one were to conclude that the evidence equally supported the Government's position, that would not enable the Government, which has the burden of proof here, to prevail. In the event of a "tie," the Government would lose because it needs to prove its case by a preponderance of the evidence, and a tie is less than a preponderance of the evidence. Grumman Data Systems Corp. v. Department of the Navy, GSBCA 12912-P, 95-1 BCA ¶ 27,314, reconsideration denied, 95-1 BCA ¶ 27,314, aff'd, Grumman Data Systems Corp. v. Dalton, 88 F.3d 990 (Fed. Cir. 1996).

Decision

The appeal is **GRANTED**. GSA is not entitled to receive additional IFF amounts based upon trade-in allowances on the transactions at issue here.

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MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

_____
STEPHEN M. DANIELS
Board Judge

_____
EDWIN B. NEILL
Board Judge