

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: July 6, 2004

GSBCA 16374-TD

BENMOL CORPORATION,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Terrence M. O'Connor, Alexandria, VA, counsel for Appellant.

Marvin Kent Gibbs, Office of Chief Counsel, Bureau of Engraving and Printing,
Department of the Treasury, Washington, DC, counsel for Respondent.

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

DANIELS, Board Judge.

Contracts between BENMOL Corporation (BENMOL) and the Department of the Treasury's Bureau of Engraving and Printing (BEP) each contained a firm fixed-price line item and two time-and-materials line items. The parties disagree as to which line item encompasses material handling costs incurred by BENMOL in performing the contracts. The parties propose that we resolve the disagreement through cross-motions for summary relief. In denying both motions, we hold that BENMOL's reading of the contracts is the reasonable one, but that an element essential to a ruling in favor of the contractor's position on entitlement remains unproven.

Uncontested Facts

BENMOL held two successive contracts for operation and maintenance of BEP's wastewater pre-treatment facility in Fort Worth, Texas. The first, which was competitively awarded, covered the period from July 7, 1997, through March 30, 2002. The second, a letter contract, covered the period from the end of the first contract until June 30, 2003, when another firm was to begin performance under a new, competitively-awarded contract. The

two contracts are essentially identical insofar as they concern the issue raised in this appeal. Appeal File, Exhibits 12, 13, 15, 16, 19, 21, 22, 24, 26, 27.

Each contract contains in its Section B a "price/cost table" for each contract period. Each table contains the same four line items, some of which have the same sub-items. For example, the original contract shows, for the contract's base period (July 7 through September 30, 1997), line items 001, "Operate Wastewater Pretreatment Plant (Firm Fixed Price)"; 002, "Labor Categories (T&M) [time and materials]"; 003, "Reimbursables (T&M)"; and 004, "Award Fee." Line items 002 and 003 have sub-items. The sub-item of line item 002 is 002A, "Off-Site Engineering." The sub-items of line item 003 are 003A, "Materials as specified in Paragraph C.26 (**Items below only**)" (listing calcium chloride, sulfuric acid, sulfonated castor oil, caustic soda, and pellet salt); 003B, "Facility Improvements"; 003C, "Spare Parts as in Paragraph C.5(b)"; and 003D, "Emergency Technician Services in accordance with Paragraph C.28." Appeal File, Exhibit 12 at 3-4; see also id., Exhibit 22 at 1-2.¹

Section B of each contract also contains a paragraph, B.3, which defines line items. Line items such as 001 which are entitled "Operate Wastewater Pretreatment Plant" –

include[] all charges not listed elsewhere that are necessary for the safe, clean, and successful operation of the Bureau of Engraving and Printing's Wastewater Pretreatment Plant, Water Wipe Solution Unit and Electroplating Treatment Systems. These CLINS [contract line item numbers] include all labor not listed elsewhere in the price/cost table (e.g., project manager, full time on-site senior engineer (2080 hours), laborers, operators, and routine maintenance personnel). These CLINS also include all materials, supplies, tools, personal protective equipment, training, and equipment not listed elsewhere in the price/cost table which the Bureau of Engraving and Printing has not agreed to provide elsewhere in the solicitation/contract. It also includes all laboratory testing, corrosion monitoring, test sampling, and calibration work.

During performance, the Contracting Officer's Technical Representative may request submission of proposals for **Facility Improvements The costs associated with the preparation of proposals shall be included in the Operation of Wastewater Pretreatment Plant line items.**

Appeal File, Exhibits 12 at 13, 24 at 13.

Paragraph B.3 of each contract also contains definitions of "Materials[] and Spare Parts" line items, such as 003A and 003C, and "Labor Categories" line items, such as 002. Paragraph B.3 states that "Materials[] and Spare Parts" are "Reimbursable Line Items" which "are actual cost reimbursables. The Contractor will be reimbursed based on actual receipts."

¹Quoted contract provisions in this paragraph and elsewhere in this decision are taken from the original contract. Virtually identical provisions, with some slight variations in wording, spelling, and punctuation, are contained in the second contract.

The paragraph states that "Labor Categories" "are Time and Material line items and will include specialized analysis that is beyond the expertise of the on-site engineer." Appeal File, Exhibits 12 at 13, 24 at 13-14.

The penultimate subparagraph of paragraph B.3 consists of this cautionary language:

NOTE, ONLY THOSE ITEMS SPECIFICALLY LISTED IN SECTION B UNDER CLINs [including 002 and 003] WILL BE PAID FOR SEPARATELY BY THE BEP. ALL OTHER ITEMS WILL BE COVERED UNDER THE FIXED MONTHLY CHARGE UNLESS SPECIFICALLY LISTED AS A BEP PROVIDED ITEM.

Appeal File, Exhibits 12 at 14, 24 at 14.

Paragraph C.26 of each contract, which is referenced in line item 003A, is entitled "Contractor Provided Materials/Supplies/Tools/Equipment." It includes a statement similar to the one in the penultimate paragraph of paragraph B.3:

NOTE, ONLY THOSE ITEMS SPECIFICALLY LISTED IN SECTION B AS REIMBURSABLE ([including] CLINs 002 [and] 003 ...) WILL BE PAID FOR SEPARATELY BY THE BEP ON A REIMBURSABLE BASIS. ALL OTHER ITEMS WILL BE COVERED UNDER THE FIXED MONTHLY CHARGE UNLESS SPECIFICALLY LISTED AS A BEP PROVIDED ITEM.

Appeal File, Exhibits 12 at 33, 22 at 26.

The two provisions just cited refer to items which are "specifically listed as a BEP provided item." Material handling is not specifically listed as a BEP provided item. Respondent's Statement of Uncontested Facts ¶ 16 (uncontested).

The parties agree that the sub-line items entitled "Off-Site Engineering," "Facility Improvements," and "Emergency Technician Services" (such as 002A, 003B, and 003D in the original contract) include, in whole or in part, labor costs. Respondent's Statement of Uncontested Facts ¶ 10; Appellant's Statement of Genuine Issues at 1-2.

Each contract incorporated by reference Federal Acquisition Regulation (FAR) clause 52.232-7, "Payments Under Time-and-Materials and Labor-Hour Contracts." Appeal File, Exhibits 12 at 65, 26 at 57. The clause includes this statement:

Reasonable and allocable material handling costs may be included in the charge for material to the extent they are clearly excluded from the hourly rate. Material handling costs are comprised of indirect costs, including, when appropriate, general and administrative expense allocated to direct materials in accordance with the Contractor's usual accounting practices consistent with subpart 31.2 of the FAR.

48 CFR 52.232-7(b)(1) (1997).²

Each contract also incorporated by reference an "Order of Precedence" FAR clause. Appeal File, Exhibits 12 at 64, 26 at 55. This clause states:

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

48 CFR 52.215-33 (1996).³

BENMOL first notified BEP on or about June 19, 2003, that it sought payment for material handling costs. At no time prior to this date did BENMOL even suggest that material handling charges had not been included under the firm fixed-price contract line item. BENMOL requested payment in the amount of \$795,743. Respondent's Statement of Uncontested Facts ¶¶ 20-21 (uncontested); see Appeal File, Exhibit 28. On September 17, 2003, BENMOL filed a certified claim for payment in this amount. Appeal File, Exhibit 31. In its complaint, BENMOL reduced the amount of its claim to \$694,614.

Discussion

Each party has submitted a motion for summary relief. BEP's motion seeks resolution of the entire appeal by concluding that BENMOL is not entitled to reimbursement of any material handling costs under a time-and-materials sub-line item. According to the agency, the contracts mandate that all such costs be encompassed by the firm fixed-price line item for operation of the facility. BENMOL's motion seeks a ruling that the contractor is entitled to recover material handling costs under the time-and-material sub-line item for materials. If we were to grant BENMOL's motion, we would leave for another day the determination of how much money the contractor could recover under this sub-line item.

As we have previously explained:

Resolving a dispute on . . . a motion [for summary relief] is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. A fact is material if it might significantly affect the outcome of the case. An issue is genuine if enough evidence exists that the

²The original contract incorporated by reference the February 1997 version of the clause. The second contract incorporated the February 2002 version. We quote from the 1997 version. The 2002 version is structured differently, but is substantively the same. See 48 CFR 52.232-7(b)(2) (2002).

³The original contract incorporates by reference this clause, which is dated January 1986. The second contract incorporates by reference 48 CFR 52.215-8, "Order of Precedence – Uniform Contract Format," which is dated October 1997 and is substantively identical to but stylistically different from the earlier clause. See 48 CFR 52.215-8 (1997).

fact could reasonably be decided in favor of the nonmovant at a hearing. The fact that both parties have moved for summary relief does not dictate that the Board grant one of the motions. Rather, each party's motion is to be evaluated independently on its own merits, with all reasonable inferences being resolved against the party whose motion is under consideration.

2160 Partners v. General Services Administration, GSBCA 15973, 03-2 BCA ¶ 32,269, at 159,639 (citing Clark College District 14 Foundation v. General Services Administration, GSBCA 15603, 02-2 BCA ¶ 32,005, at 158,136-37); see also Parcel 49C L.P. v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073, at 153,405 (citing numerous decisions of the Court of Appeals for the Federal Circuit).

To the extent that the issue in dispute is one of contract interpretation alone, it is appropriate for decision on motion for summary relief, since contract interpretation is a matter of law. Parcel 49C, 00-2 BCA at 153,405-06 (citing Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed. Cir. 1996); P. J. Maffei Building Wrecking Corp. v. United States, 732 F.2d 913, 916 (Fed. Cir. 1984)).

Our task in this case has been explained by the Court of Appeals:

Contract interpretation begins with the language of the written agreement. When interpreting the contract, the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts. An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous.

NVT Technologies, Inc. v. United States, 370 F.3d 1153, 1159 (Fed. Cir. 2004) (citations omitted); see also, e.g., M. A. Mortenson Co. v. Brownlee, 363 F.3d 1203, 1206 (Fed. Cir. 2004); Jowett, Inc. v. United States, 234 F.3d 1365, 1368 (Fed. Cir. 2000).

BEP views the contract in the following way: The contract made only the items in the time-and-materials line items (such as 002 and 003 in the original contract) reimbursable. These line items were to be "actual cost reimbursables." The fixed-price line items (such as 001) were to "include[] all charges not listed elsewhere," and in particular, "all labor not listed elsewhere in the price/cost table." The only labor that was listed elsewhere in the price/cost table was for off-site engineering, facility improvement, and emergency technician services. Further, notes in paragraphs B.3 and C.26 of each contract stated that only items "specifically listed in Section B as reimbursable" would be "paid for separately by the BEP" on a reimbursable basis. "All other items," those notes provided, "will be covered under the fixed monthly charge" – in other words, paid for under the fixed-price line items – "unless specifically listed as a BEP provided item." Material handling is not specifically listed as a BEP-provided item.

BEP believes that although "the plain language of FAR 52.232-7(b) ['Payments Under Time-and-Materials and Labor-Hour Contracts'] would seem to authorize including [material handling] costs in the cost for materials," this clause conflicts with provisions of Sections B and C of the contract. Respondent's Motion for Summary Relief at 3. Therefore, under the

Order of Precedence clause, because Sections B and C are part of the Schedule and FAR 52.232-7(b) is a contract clause, FAR 52.232-7(b) must give way to the provisions of those sections. And if the contract's inclusion of both the Section B and C provisions, along with FAR 52.232-7(b), creates an ambiguity, that ambiguity was patent. Therefore, because BENMOL did not inquire about the ambiguity before performing under the contracts, it may not rely on its interpretation.

Finally, BEP maintains that BENMOL is precluded from obtaining relief because it did not notify the contracting officer of its claim, which would have boosted contract payments above the established ceiling price, while it was performing under the contract. In this regard, BEP notes that FAR 52.232-7(c) states that "[i]t is estimated that the total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule." 48 CFR 52.232-7(c) (1997 & 2002). Further, "If at any time during performing [sic] this contract, the Contractor has reason to believe that the total price to the Government for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation." Id.

BENMOL views paragraph B.3's requirement that the fixed-price line items include "all charges not listed elsewhere" as being restricted to direct and indirect costs of operations covered by those line items. The material handling costs it seeks, the contractor says, include no costs for the labor of any of those operations, including any of the named positions involved in those operations. BENMOL maintains that BEP's interpretation fails to harmonize the B.3 and C.26 notes or the language of FAR 52.232-7(b) with the paragraph B.3 definition of the fixed-price line items. The notes, BENMOL contends, say merely that only the reimbursable line items and specifically-listed BEP-provided items will be paid for separately from the fixed-price line items. This poses no difficulty for the contractor's position, BENMOL continues, because FAR 52.232-7(b) expressly provides that material handling costs may be included in one set of the reimbursable line items – that for materials. Indeed, the contractor suggests that paragraph B.3 anticipates this result by providing that for materials, "[t]he Contractor will be reimbursed based on" – not "restricted to" – "actual receipts." BENMOL concludes that just as some labor is included without being expressly mentioned in the price/cost tables in one set of reimbursable sub-line items (facility improvements), other labor is included without being expressly mentioned in the price/cost tables in another set of reimbursable sub-line items (materials).

BENMOL makes an additional argument in this regard: By specifically excluding certain labor – labor involved in proposal preparation – from the facility improvements sub-line items, BEP required the contractor to include that labor in the costs associated with the fixed-price line items. BEP did not specifically exclude any labor from the materials sub-line items, so it must not have required the contractor to include any materials-related labor in the costs associated with the fixed-price line items.

As to BEP's point regarding a requirement that the contractor provide notice under FAR 52.232-7(c), BENMOL responds that the ceiling price was not exceeded in any contract year, so the lack of notice prior to the request for reimbursement is immaterial. Further, BENMOL maintains that in almost every year of contract performance, BEP paid amounts

in excess of the "not to exceed" amount for particular line items or sub-line items, thereby demonstrating that the agency itself did not consider these to be strict limitations.

We conclude that BENMOL's reading of the contracts is reasonable and BEP's is not. BENMOL's interpretation considers each contract as a whole. It harmonizes and gives reasonable meaning to all parts of each document. In accordance with that interpretation, by stating that the costs of certain materials will be reimbursable, the contract, through FAR 52.232-7(b), included among the costs of those materials, material handling costs. Thus, for the purpose of paragraph B.3's definition of the fixed-price line items, material handling costs were "listed elsewhere" and are therefore excluded from payment under those line items. BEP's interpretation is not reasonable because it leaves FAR 52.232-7(b) useless, inexplicable, or in conflict with other portions of the contracts. A contract should be read to avoid a conflict, so as to make unnecessary invocation of the Order of Precedence clause. Sun Microsystems Federal, Inc. v. Department of the Army, GSBCA 13615-P, 96-2 BCA ¶ 28,507, at 142,365. That is what we do here. BEP's motion for summary relief is consequently denied.

In opposition to BENMOL's motion, BEP contends that "the parties did not intend the phrase 'all labor not listed elsewhere in the price/cost table' to mean only some of the labor not listed elsewhere, or only the labor the Appellant chooses." Respondent's Opposition to Appellant's Motion for Partial Summary Relief at 3. This contention is not supported by any evidence, however. Both parties have asked us to resolve their dispute as to the contracts' meaning solely by reference to the contracts themselves, and we are readily able to do so. There being no evidence which might suggest that the parties intended some different meaning from the one expressed in the documents, we have no reason to go beyond the four corners of the contracts to interpret the instruments. Giove v. Department of Transportation, 230 F.3d 1333, 1340 (Fed. Cir. 2000); Harris v. Department of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

Finding for BENMOL as to the meaning of the contracts is not sufficient for us to conclude that the contractor is entitled to recover any material handling costs, however. FAR 52.232-7(b) allows these costs to be included in the charge for material only if they meet various tests. The costs must be "[r]easonable and allocable." General and administrative expense may be allocated to materials only if doing so is "in accordance with the Contractor's usual accounting practices consistent with subpart 31.2 of the FAR." The preferred way of demonstrating proper allocation is to establish and implement a separate cost pool for material handling costs. General Engineering & Machine Works v. O'Keefe, 991 F.2d 775 (Fed. Cir. 1993); E-Systems, Inc., ASBCA 18877, 76-1 BCA ¶ 11,797. In addition, the contractor must show that the material handling costs are "clearly excluded from the hourly rate." The purpose of this requirement is to ensure that the Government does not make duplicate payments for the same costs. Id.; see also Lee Associates, Inc., NASA BCA 1268-21, 69-2 BCA ¶ 7864. Given that the contracts with which we are concerned include fixed-price as well as labor-hour line items, the purpose can be effected here only by a showing that the material handling costs are excluded from the hourly rates used to calculate costs for the fixed-price line items, as well as from the hourly rates used to calculate costs for the labor-hour line items.

BENMOL asserts that under its usual accounting practices, material handling costs are excluded from any hourly rate for which it has charged or seeks to charge the Government. Appellant's Response to the Government's Motion for Summary Relief and Appellant's Motion for Partial Summary Relief at 4, Affidavit of Benjamin Molayem (May 19, 2004) at 2. BEP responds that BENMOL has provided the agency with no documentation of this assertion. Respondent's Opposition to Appellant's Motion for Partial Summary Relief at 2. On cross-motions for summary relief, we are in no position to determine whether the appropriate documentation exists. We therefore deny BENMOL's motion for summary relief as to entitlement.

We will need documentation as to BENMOL's accounting practices before we can complete our analysis of the contractor's entitlement to material handling costs. For BENMOL to prevail, the documentation must be sufficient for us to conclude that the material handling costs are excluded from both the hourly rate of labor reimbursed under time-and-materials sub-line items other than materials and the fixed-price line items of the contracts. We will also obviously require evidence as to the amount claimed before we can determine the appropriate amount (if any) to be awarded. To the extent that the parties' disagreement as to the impact FAR 52.232-7(c)'s references to ceiling price and notification may bear on the contractor's recovery of material handling costs, we will consider the matter at a later date. Depending on the size of the award, this matter may or may not require analysis. Thus, in the interest of judicial economy, we do not examine it now.

Decision

BEP's motion for summary relief is **DENIED**. BENMOL's motion for partial summary relief (as to entitlement) is also **DENIED**. The panel chairman, after conferring with the parties, will by separate order schedule further proceedings in this case.

STEPHEN M. DANIELS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

EDWIN B. NEILL
Board Judge