UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: May 13, 2010

CBCA 508

SIGAL CONSTRUCTION CORPORATION,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Hal J. Perloff of Husch Blackwell Sanders, LLP, Washington, DC, counsel for Appellant.

Leonard E. Lucas III, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

DRUMMOND, Board Judge.

This is an appeal from a General Service Administration (GSA) contracting officer's (CO's) final decision denying Sigal Construction Corporation's (Sigal) certified claim on a contract for renovation and improvement work at the Harry S. Truman (Old State) Building in Washington, D.C. Sigal is seeking $1,519,803 for the anticipatory profits lost on certain work that GSA precluded it from performing. GSA denies that it owes the claimed amount, asserting that the work was never part of the contract, and even if were, the CO properly terminated the work from the contract for the convenience of the Government. GSA alleges further that Sigal has been paid for all work it performed.

The parties have filed cross-motions for summary relief. In the alternative, GSA has moved to dismiss Sigal's appeal, arguing that Sigal has failed to state a claim upon which relief may be granted.[1] In addition, Sigal moves to strike GSA's opposition to Sigal's motion for summary relief, asserting that it was untimely and ex parte.

For the reasons stated below, we deny GSA's motion for summary relief and grant in part Sigal's motion for summary relief. The Board will schedule further proceedings on the issue of quantum. We deny Sigal's motion to strike.

Background [2]

In July 2003, GSA issued a solicitation seeking a contractor capable of providing renovation and improvement work at the Old State Building. Appeal File, Exhibit 1 at 4; Appellant's Statement of Uncontested Facts (ASUF) ¶ 2; Respondent's Statement of Genuine Issues (RSGI) ¶ 2. The solicitation required prospective offerors to submit two varieties of prices -- a firm fixed lump sum price for the base contract work and firm fixed unit prices for, *inter alia*, seventeen restoration work items. Appeal File, Exhibit 1 at 28, 29; Supplemental Appeal File, Exhibit 23 at 0710-0732. The solicitation described the restoration work in specification 01270, entitled "Unit Prices." Supplemental Appeal File, Exhibit 23 at 0710-0716. In addition, offerors were required to submit prices for certain allowances and option years.

The solicitation initially included specification 01210, entitled "Allowances." Supplemental Appeal File, Exhibit 23 at 0664-0666. This section described seventeen allowances relating to unit price restoration work items. *Id*.; Respondent's Statement of Uncontested Facts (RSUF) ¶ 2; Appellant's Statement of Genuine Issues (ASGI) ¶ 2. Section 1.2.A.1 of this specification addressed the administrative and procedural requirements governing allowances. It states:

> Certain materials and equipment are specified in the Contract Documents by allowances. In some cases, these allowances include installation. Allowances have been established in lieu of additional requirements and to defer selection

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[1] Because the parties have submitted and the Board has considered materials outside the pleadings, the Board will consider Respondent's motion to dismiss and/or for summary relief (Respondent's Motion) as a motion for summary relief only. *Rotec Industries, Inc. v. Mitsubishi Corp.* 215 F.3d 1246, 1251 (Fed. Cir. 2000); *Hare v. United States*, 35 Fed. Cl. 353, 354 (1996), *aff'd*, 108 F.3d 1391 (Fed. Cir. 1997) (table).

[2] The Board considers these facts to be undisputed.

> of actual materials and equipment to a later date when additional information is available for evaluation. If necessary, additional requirements will be issued by Change Order.

Supplemental Appeal File, Exhibit 23 at 0709.

After issuing the solicitation, GSA received inquiries from prospective offerors seeking clarification on various aspects of the solicitation provisions. Several of the inquiries and responses focused on the distinction between the quantities stated for restoration work in the allowance and unit price provisions. Request for information (RFI) 3-11 states: "[a]llowances 1 thru 17 . . . appear to be the same items of work as Unit Prices 1 thru 17 . . . however the quantities to be included differ between the two sections. Please clarify the intent." GSA responded:

> Both sections will be combined into one section and revised to make the distinction between the unit price quantities to be used as the total bid amount, and the unit price quantities to be included in addition to the bid amounts indicated on the Construction [Drawings].

Appeal File, Exhibit 1 at 147; Supplemental Appeal File, Exhibit 24 at 0879.

As promised in the response to RFI 3-11, GSA issued an amendment to the solicitation deleting the seventeen allowances for unit price restoration work and separating this work into two categories - total project quantity and additional quantity unit price work. Appeal File, Exhibit 1 at 20-26; Supplemental Appeal File, Exhibit 23 at 0710-0732. Estimated quantities were provided for the restoration work items. Supplemental Appeal File, Exhibit 23 at 0710-0716. Offerors were informed that the estimated quantities were solely "For Bid Purposes, that is, for the purpose of evaluating offers." *Id*. The total project quantity unit price items involve repair or restoration work such as refinishing of ornamental metals, repair and refinishing of wood paneling and flooring, and interior stone restoration. Appeal File, Exhibit 1 at 46-52; Supplemental Appeal File, Exhibit 23 at 0710-0716. This work was shown on the contract drawings. The additional quantity unit price work applied to different work from that listed as total project quantity work. This work was in addition to work indicated on the drawings and was only to be performed at locations indicated by the CO. Supplemental Appeal File, Exhibit 23 at 0716-0732. The unit price work at issue here concerns only the total project quantity restoration work. No changes were made to the drawings for this work.

On October 23, 2003, GSA awarded to Sigal contract GS11P03MKC0047 (contract). Appeal File, Exhibit 1 at 1, 3. The contract, in the amount of $36,892,500, required Sigal to perform, *inter alia*, the base contract work. *Id*. Following award, GSA determined that

Sigal's proposed unit prices were fair and reasonable. The agency then modified the contract to include the unit price items. Appeal File, Exhibit 6. The amount of the contract increased to $38,692,598.25.[3] *Id*.

The contract incorporated by reference the solicitation, unit price schedule, and drawings. Appeal File, Exhibit 1. Specification 01270 of the contract addressed the requirements for the restoration work, established the procedure for payment, and described a unit price as:

> an amount proposed by bidders, stated on the Bid Form, as a price per unit of measurement for materials or services added to or deducted from the Contract Sum by appropriate modification if estimated quantities of work required by the Contract Documents are increased or decreased above/below allowances.

Id. at 45; RSUF ¶ 3.

Relevant to this appeal, the contract prices for the total project quantity unit price restoration work items were:[4]

Unit Price	Description	Prices 00
4	Repair and Refinish of Wood Paneling	$75 per square foot (sf)
5	Repair and Refinish of Wood Floors	$15/sf
6	Repair of Black Marble Floor Fill Missing Areas	$300/sf
7	Repair of Variegated Black Marble Wall – Broken Section w/ Missing Pieces	$200/sf
8	Repair of Variegated Black Marble Wall – Fractured Repair	$300/sf

[3] While Sigal's individual unit price multiplied by the corresponding listed quantities total twenty-five cents less than the total dollar amount added by this modification, the additional twenty-five cents appears to be attributable to a simple math error.

[4] Sigal's claim does not include costs for unit price items 1, 2, 3 and 17. Therefore, those items are not included here.

9	Repair of Variegated Black Marble Wall – Scratch Removal	$40/sf
10	Repair of Variegated Black Marble Wall – Adhesive Removal	$20/sf
11	Repair of Variegated Black Marble Wall – Paint Removal	$30/sf
12	Repair of Travertine Wall – Fill Broken and Missing Areas	$100/sf
13	Repair of Travertine Wall – Fill Drilled Holes	$75 each (ea)
14	Repair of Travertine Wall – Fill Worm Holes	$75 ea
15	Repair of Travertine Wall – Re-Point Joints	$10 per linear foot (lf)
16	Repair of Travertine Wall - Cleaning	$5/sf

Appeal File, Exhibit 1 at 5-6.

The contract also incorporated by reference standard Federal Acquisition Regulation (FAR) clauses, including FAR clause 52.249-2 (Alt.1), Termination for Convenience of the Government (Alt. 1) (Sept. 1996); and FAR clause 52.211-18, Variation in Estimated Quantity (April 1984). Appeal File, Exhibit 1 at 196-98.

After award, Sigal began to a survey the quantities for the total project quantity unit price restoration work required by the contract. Appeal File, Exhibits 7, 10, 27. On February 11, 2004, Sigal submitted an e-mail message to GSA's construction manager, Jacobs Facilities, Inc., which included updated quantities for unit price items 4 through 16. *Id*., Exhibit 7; Declaration of Kerric T. Baird (Aug. 31, 2007) ¶ 7. The message included as an attachment a unit cost work sheet which contained revised quantity calculations and costs to complete, *inter alia*, unit price items 4 through 16. The solicitation and bid form had identified the estimated quantities for bid purposes for unit price items 4 and 5 as 3750 sf and 1500 sf, respectively. Appeal File, Exhibit 1 at 5, 27. Sigal's submission to Jacobs, *inter alia*, showed per the survey 21,500 sf of unit price 4 work (at a cost of $1,612,500) and 8000 sf of unit price 5 work (at a cost of $120,000). Supplemental Appeal File, Exhibit 27.

At various times in 2004, Sigal attempted to get Jacobs to verify the surveyed quantities of the restoration work. Appeal File, Exhibit 35; Baird Declaration ¶ 7. On March 31, 2004, Jacobs sent an e-mail message to Sigal directing it to refinish, *inter alia,* 23,335 sf of historic wood paneling under unit price 4. Sigal's Motion, Exhibit 7.

On August 25, 2004, GSA's project manager wrote to another contractor requesting a cost proposal to perform wood paneling restoration and interior stone restoration required by the contract awarded to Sigal. Appeal File, Exhibit 33. The project manager's letter included the construction drawings and specifications for Sigal's contract. *Id.* The project manager later forwarded the contractor's proposal to employees of Jacobs with the message: "Please review cost proposal and let's meet to develop strategy to deal with Sigal contract and schedule . . . to do the restoration." Sigal's Motion, Exhibit 6.

On October 6, 2004, Jacobs wrote to Sigal, suspending the restoration work under this contract for unit price items 4 and 6 through 16. Appeal File, Exhibit 17; ASUF ¶ 39. The work associated with unit prices 1 through 3 and 5 was unaffected, and Sigal continued to perform that work. *Id*.

GSA took no action to reinstate the suspended unit price work. On January 4, 2006, Sigal submitted to the CO a certified claim, asserting that GSA had breached Sigal's contract by "improperly eliminating unit price restoration work." Appeal File, Exhibit 20 at 1. Sigal asserted that GSA intended to have the unit price work performed by another contractor at lower prices. *Id*.; ASGI ¶ 38. Sigal sought breach damages totaling $1,519,803, comprising $1,143,340 in lost profits for itself and $376,463 for its subcontractor. *Id*.

The CO denied the claim, stating that:

> Sigal's argument assumes the unit-priced work at issue is part of the scope of the Contract. Assuming for the sake of argument that Sigal is correct, which GSA does not admit, GSA's position is that it, through the contracting officers, has broad rights to delete or terminate work through the Changes Clause or Termination for Convenience Clause, respectively. In either case, a contractor is not entitled to recover lost profits on work not yet performed. Sigal did not perform the work in question and anticipatory or lost profits are not available.

Appeal File, Exhibit 21 at 2. Sigal timely appealed the CO's decision. *Id*., Exhibit 22.

It is undisputed that Sigal, through its subcontractors, performed 4954 sf of repair and refinishing of wood paneling pursuant to unit price 4, whereas the quantity for bid purposes listed in the solicitation was 3750 sf. Appeal File, Exhibit 2 at 3; Baird Declaration ¶ 16; ASUF ¶ 45. Similarly, it is undisputed that Sigal, through its subcontractors, performed 7738

sf of repair and refinishing of wood flooring pursuant to unit price 5, whereas the quantity for bid purposes was 1500 sf. Appeal File, Exhibit 2 at 3; Baird Declaration ¶ 15; ASUF ¶ 44.

Discussion

Sigal's claim is for the profits it and its subcontractors would have received on certain work it was precluded from performing. The parties have cross-moved for summary relief. Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justiciable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The mere fact that both parties have moved for summary relief does not impel a grant of one of the motions. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

Pure contract interpretation is a question of law that may be resolved on summary relief. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984). The parties are in agreement that there are no genuine issues of material fact for trial. Their differences are confined to the law and its application to the contract in this appeal; therefore, summary relief as to entitlement is appropriate in this case.

In interpreting the language of a contract, reasonable meaning must be given all parts of the agreement so as not to render any portion meaningless. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996). An interpretation that gives a reasonable meaning to all parts will be preferred to one which leaves a portion of the contract meaningless. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260 (Fed. Cir. 1999); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Additionally, contract language should be given the plain meaning that would be derived by a reasonably intelligent person acquainted with the contemporaneous circumstances. *McAbee Construction*, 97 F.3d at 1435.

Sigal alleges that the specifications and drawings, as a whole, required it to perform all the ornamental metal restoration, wood paneling restoration, wood flooring restoration, and interior stone restoration work, regardless of the for-bid-purpose estimates. Sigal asserts that the for-bid estimates were just that, and did not limit the amount of work for which it was responsible under the contract. It argues further that because the unit price work at issue was for total project quantity, it was required to perform every part of that work at the unit prices specified. As support, Sigal refers to the definition of a unit price in the contract.

Sigal asserts that the definition provides that the contract sum would change based on the number of units of work the contractor performed.

GSA, while relying of the definition of a unit price in specification 01270, argues that Sigal's claim fails because the work was not in the contract. Based on the use of the word "allowances" in the definition, GSA contends that any unit price work in excess of that specified in the solicitation for the purpose of evaluating offers required a contract modification.

A fundamental problem with GSA's argument is it runs contrary to the plain wording of the unit price definition and the solicitation amendment which contemplated the successful offeror performing all of the total project quantity work unit price work as specified on the drawings. Although initially the unit prices were to cover work additional to certain work described as "allowances," after the solicitation was modified, there were no allowances for any of that work, so the unit prices covered all such work. GSA's contention that the retention of the word "allowances" in the contract was a mistake, and that the contract should have been phrased differently, is irrelevant -- we must interpret the contract as it is written, not as one party wishes in retrospect that it should have been written.

The quantities stated in the solicitation for unit price work were estimates for the sole purpose of evaluating offers. The unit price work at issue here was for total project quantity. The quantities do not limit the amount of such work for which Sigal was responsible under the contract.

GSA recognized this in that it did not modify the contract to cover unit price work above the estimated quantities which Sigal performed; it simply paid Sigal at the unit prices for all the work it performed. GSA's assertion that Sigal could only perform the unit price work by contract modification is thus not only wrong, but also inconsistent with the agency's actions during contract performance. The modification which obligated a specific amount of money to cover unit price work did not change the requirement that Sigal perform all unit price work shown on the contract drawings.

GSA cites *Fire Security Systems, Inc. v. General Services Administration*, GSBCA 12267, et al., 97-2 BCA ¶ 28,992, as support for its interpretation. In that case, the contractor argued that it should be reimbursed for the removal of ceiling tiles under a unit price schedule. The unit prices were to be applied to items that might be added to or subtracted from base contract work, and the base contract work included the work for which the contractor sought additional compensation. The board concluded that the contractor was not entitled to additional costs under the unit price schedule because it was obligated to perform the work as part of its base bid under the fixed price contract.

As Sigal maintains, the facts in this appeal are distinguishable from those in *Fire Security*. Unlike the language in this contract, the definition of unit price in *Fire Security* explicitly only applied to work added or deducted by change order. 97-2 BCA at 144,362. The work in question here was to be bid on a unit price basis and not as part of base contract work.

Luther L. Essary Construction Co., IBCA 1556-2-82, 83-2 BCA ¶ 16,631, cited by Sigal, involved another variant of the relationship between estimated quantities and base contract work. There, estimated quantities were included in the base work and unit prices were paid for all quantities greater than those estimated. *Essary*, too, is different from our case in that here, the base work did not include any of the unit price work.

Considering all specifications and drawings together, we find that the contract unambiguously required Sigal to perform all the total project quantity restoration work at the applicable rates specified on the unit price bid schedule.

The parties agree that by precluding Sigal from performing some of the unit price work, GSA constructively terminated for convenience a portion of the contract. One of the few limitations on the Government's right to terminate for convenience is that the Government may not terminate simply to get a better price for performing needed work. *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996) ("A contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source. When tainted by bad faith or an abuse of contracting discretion, a termination for convenience causes a contract breach."). That is what GSA did here. It was a breach of the contract.

GSA's assertions that the actions suspending Sigal's right to proceed were unauthorized because they were not taken by the CO are not on point. The CO has ratified all of these actions -- if not earlier, certainly in issuing his final decision on the claim.

Accordingly, we find that Sigal prevails as to entitlement. We stop there, however, in granting the contractor's motion. While Sigal is correct in asserting that its breach damages should be the profit it would have received if it had performed the work it was improperly precluded from performing, it has not demonstrated what that profit would have been. Sigal says that it is entitled to the difference between a contract unit price and the price Sigal would have paid a subcontractor for performing the work. There are two problems here: (1) We have no evidence as to the price Sigal would have paid the subcontractor; and (2) To find the profit, we must subtract from the difference various costs Sigal would have incurred in having the work performed. This may include job site overhead, home office overhead, and other costs. Additionally, the claim includes lost subcontractor profit, which

is calculated as subcontractor price less cost to perform. We have no evidence as to either of these factors.

Finally, we address Sigal's motion to strike GSA's opposition to Sigal's motion for summary relief. Sigal's motion challenges a two-day extension the Board granted to GSA pursuant to Rule 3 of the Board's Rules of Procedure, 48 CFR 6101.3 (2009). Sigal asserts that it was unaware of GSA's oral request for an extension to file its opposition. Sigal, while acknowledging that it was not prejudiced by the brief extension afforded to GSA, contends that GSA's oral request was ex parte in violation of Rule 33(b) of the Board's Rules of Procedure. GSA opposes this motion, asserting that its actions were appropriate and reasonable. While the record documents that GSA's oral request was followed by a written request to the Board, copied to Sigal, GSA acknowledges that it may have inadvertently neglected to forward to Sigal this written request. GSA, however, asserts that any errors it made in seeking the enlargement of time were harmless and unintentional. We agree with GSA on this matter. The motion to strike is denied.

Decision

We deny GSA's motion for summary relief and GRANT IN PART Sigal's motion for summary relief. The presiding judge will schedule further proceedings to determine the amount of Sigal's recovery.

JEROME M. DRUMMOND
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ANTHONY S. BORWICK
Board Judge