UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

TASK ORDER INTERPRETED: July 23, 2021

CBCA 6885, 7051

ROCJOI MEDICAL IMAGING, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Joseph A. Camardo, Jr. of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR; and Jared M. Levin, Office of General Counsel, Department of Veterans Affairs, Brockton, MA, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **ZISCHKAU**, and **CHADWICK**.

CHADWICK, Board Judge.

The Board granted a joint motion by the appellant, RocJoi Medical Imaging, LLC (RocJoi), and the respondent, Department of Veterans Affairs (VA), to consolidate partially these two related appeals for the purpose of resolving a common issue. The parties agreed that a Board decision on the common issue would help to defuse disputes that had arisen between them in discovery and would advance the resolution of both appeals. Rather than cross-moving for partial summary judgment, which would not have guaranteed a resolution of the merits, the parties submitted the issue for decision on the written record.

The parties want to know whether a task order issued under an indefinite quantity contract was a "standalone contract" by which VA ordered from RocJoi the entire volume of contract services that were listed in the task order's price schedule, with a total value of $358,210, the same dollar amount that appeared in the task order's appropriation block. We hold that the task order, construed in the context of the surrounding circumstances, was only what the parties treated it as being at the time—and what VA now says the task order was—a "funding document" rather than a firm order for a fixed selection of future services.

Background

We described some of the background of this dispute in a previous decision.

> In September 2017, VA awarded [RocJoi][1] an indefinite quantity contract for "Long Term Tele Radiology Services" for a VA facility in Muskogee, Oklahoma. The contract included the Indefinite Quantity clause (48 CFR 52.216-22 (Oct. 1995)) and the corresponding Ordering clause (48 CFR 52.216-18 (Oct. 1995)). Contract section B.3 stated, "The minimum guarantee under this contract is 7,000 studies." A "study" was a review of radiological examination results. The price schedule listed fourteen types of studies with various estimated quantities, totaling approximately 10,000 studies per contract year, at an estimated total annual price of about $360,000.

RocJoi Medical Imaging, LLC v. Department of Veterans Affairs, CBCA 6885, 20-1 BCA ¶ 37,746. The contract's performance work statement (PWS) described "a tele-radiology service that will provide interpretation of radiological results after hours and [will] serve as backup on-demand for interpretation during normal working hours if such need should arise. . . . Services shall be provided . . . as requested, primarily after hours, weekends, and federal holidays." The PWS also said that the contracting officer's representative would "review and certify monthly invoices for payment" and could adjust payments "in the event the Contractor fails to provide the services in this contract."

> Although performance was originally expected to start in October 2017, in September 2018, the parties bilaterally modified a task order issued under the contract to reset the base year to August 2018 through July 2019. [RocJoi] alleged in its claim that this modification (P00005, appeal file exhibit 19) was "unilateral." [RocJoi's] president signed the modification without noting any objection, however. "In reviewing a motion to dismiss, . . . we are not

[1] The first word of the appellant's name appears in the record and in the briefs variously as "RocJoi," "Roc Joi," "Rocjoi," and "ROCJOI." The appellant previously used the abbreviation "RJMI." We adopt here the spelling used in the notices of appeal.

> required to accept the asserted legal conclusion[]" that the bilaterally signed modification was unilateral. *American Bankers Ass'n v. United States*, 932 F.3d 1375, 1380 (Fed. Cir. 2019). VA did not exercise its option to extend the contract past the base year.
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> [RocJoi alleged in CBCA 6885 in 2020] that VA ordered fewer than 7000 studies but it does not allege in the pleadings, as far as we can determine, exactly how many studies VA did order.
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> In October 2019, [RocJoi] submitted a request for an equitable adjustment (REA), which [RocJoi] certified as a claim for $420,531 in January 2020. The claim had three itemized components . . . .
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> The claim went on to state that "[a]n alternative damage calculation would be based upon not receiving [orders for] the minimum quantity of 7,000 studies for the time frames of 10/1/17 to 9/30/18 and 10/1/18 to 7/31/19. For these two years, [RocJoi] should have [performed] 14,000 studies" [earning] "overhead and profit in the amount of $33,319.55."

RocJoi Medical Imaging. We granted in part and denied in part a motion by VA to dismiss. We held that RocJoi failed to state a claim for defective estimates on which we could grant relief, but that it might be entitled to recover for VA's failure to order the guaranteed minimum under the contract and for unforeseen contract administration. *Id*.

Three months after our decision in CBCA 6885, RocJoi filed another appeal (CBCA 7051) based on a new theory. Whereas RocJoi had argued in CBCA 6885, among other things, that it should be compensated for the fact that VA ordered fewer than 7000 studies, RocJoi alleged in a certified claim submitted to VA in November 2020 (days before we issued our decision) that documents filed in CBCA 6885 had "revealed" something RocJoi had not known, namely, that "VA executed a delivery order dated September 27, 2017, for the estimated quantities in the Contract" for the base year. RocJoi sought $274,831.90 in the November 2020 claim. VA denied the claim in January 2021. RocJoi explained in an initial filing in CBCA 7051, in March 2021, "It is the Appellant's position that the VA ordered the entire quantity for the base year, refused to provide the Appellant with studies, and utilized the funding to purchase studies from [another contractor], resulting in a breach of contract."

We find the following additional facts concerning the September 2017 task order now at issue. We agree substantially with VA's version of events. The agency's August 18, 2017, award letter for the underlying contract stated in part, "Funding will be available for this contract on October 1, 2017 which is the first day of VA's new fiscal year. The awarded contract and funding will be issued to Roc Joi via email on Monday, October 2, 2017." In

fact, RocJoi and VA executed the contract on September 14, 2017, with an effective date of October 1, 2017. On October 2, 2017, a VA contracting officer emailed to RocJoi the task order now at issue, writing, "Attached is the task order providing funding for the Base year of the contract. Funds in the amount of $358,210.00 have been added to this order. Please reference obligation 623C80027 on all of your invoices."

RocJoi's president replied, "Thank you. Can you give me information on closing the gap between the projected volume and the estimated volume?" (Paragraph break omitted.) In response to a request to clarify the question, RocJoi's president added, "We understand that there was a guaranteed volume of only 7,000 per year;[2] however, we did prepare for the projected volume of 65,000 per year. Please be assured that should you choose to increase the volume of cases read by us, we stand ready to do so."

The task order in dispute has four pages. Page one is the standard form 1449. It lists both the contract number in block 2 and an order number in block 4. Block 20, the schedule block, states in part, "Please reference obligation 623C80027 on your invoices" and incorporates attached pages of the order. Block 26 states the total award amount as "NTE [not to exceed] $358,210.00." The contracting officer's electronic signature is dated September 27, 2017. Page two of the task order is the table of contents. Page three consists of section B.1, which shows contract administration data from the contract. Section B.1.3 states that invoices shall be "Monthly, in arrears." Page four of the order contains section B.2, the price schedule, and section B.3, the delivery schedule.

The price schedule in the task order mirrors the schedule in the contract, described in the quotation above from our prior decision. The schedule lists, as item numbers, fourteen types of studies, with prices ranging from $11 to $42 and quantities ranging from 25 to 3450, totaling 9930 studies.[3] The schedule shows a "grand total" price of $358,210. A box under the schedule contains an appropriation code in the same amount. Section B.3 states the delivery schedule as October 1, 2017, through September 30, 2018, the performance period.

VA issued no other task order under the contract, including when the parties postponed the base year of performance to August 2018 through July 2019 under bilateral contract modification P00005. RocJoi submitted invoices to VA for radiology services in which it cited the obligation number (623C80027) stated in the September 2017 task order.

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[2] We held in November 2020 that the guarantee was for the life of the contract.

[3] RocJoi states, and VA previously agreed, that the task order lists 10,155 studies. The sum of the quantities is in fact 9930.

In 2021, once the remaining aspects of RocJoi's original claim as well as its new claim based on the September 2017 task order were both before the Board in CBCA 6885 and CBCA 7051, respectively, the parties disagreed about the extent to which the appeals were related and whether the Board should consolidate them. VA stated that RocJoi had asserted in objections to discovery requests "that its claims in CBCA 6885 that survived the VA's Motion to Dismiss have been amended and superseded by its claims in CBCA 7051 and that the Parties should no longer look to CBCA 6885 but only to CBCA 7051. As such . . . the remaining claims in CBCA 6885 are either moot or irrelevant."[4] RocJoi argued that "based upon additional documents found in the [appeal file], Claims in CBCA 6885 [are] amended and revised. For example, the changes, disruptions, and delays portion of CBCA 6885 is independent of any breach of any minimum quantity . . . . [T]here would be no reason not to consolidate since the issues in both Appeals are closely related."

The parties proposed a path forward. They jointly advised us that a Board decision on their competing interpretations of the September 2017 task order "would help to move both Appeals forward and limit the issues remaining to be heard before the Board. In fact, resolution of this issue might enable the parties to resolve the remaining issues in both of these Appeals." After a conference, the Board granted a joint motion to consolidate CBCA 6884 and CBCA 7051 in part, "solely for the purpose of" resolving the disputed meaning of the task order "on the record under" Board Rule 19 (48 CFR 6101.19 (2020)).[5] The parties completed the pertinent record and filed two briefs each.

Discussion

We begin for clarity with our interpretation of the September 2017 task order. We then address the parties' positions. We apply "the usual rules of contract interpretation, which 'are well settled and without need of elaborate reiteration.'" *Meridian Global Consulting, LLC v. Department of Homeland Security*, CBCA 6906 (June 15, 2021) (quoting *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 684 (Ct. Cl. 1975)). Of special relevance here is the maxim that we must find the "meaning that would be derived from the

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[4] RocJoi objected to two dozen VA interrogatories on the grounds that they were "moot," "irrelevant," or otherwise superseded by the November 2020 claim.

[5] The exact question we set for resolution was whether the September 2017 task order was "a separate, standalone contract for 10,155 [sic] studies at a total price of $358,210 and, as such, not subject to the terms or conditions of [the] indefinite quantity contract . . . (including the minimum guarantee)" or instead was "issued under that contract and, as such, [was] subject to all of the contract's terms and conditions." This somewhat ungainly question no longer aligns well with our fact finding or with the parties' positions, which we address as presented in their briefs.

contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965); *see also Cooper/Ports America, LLC v. Secretary of Defense*, 959 F.3d 1373, 1377 (Fed. Cir. 2020) (noting the relevance of "the context of the communication between the parties" even where a contractual notice "must be unambiguous"). We do not endorse a "naive stance that" either party "had the right to read its contract as an unsophisticated layman might, without bothering to inquire into the established meaning and coverage of phrases and provisions which appear to be unusual or special to federal procurement." *General Builders Supply Co. v. United States*, 409 F.2d 246, 250–51 (Ct. Cl. 1969).

The purpose and meaning of the task order are apparent from the face of the document, the contemporaneous documents, and the parties' actions before the task order's significance came into dispute in 2020. *See Reliable Contracting Group, LLC v. Department of Veterans Affairs*, 779 F.3d 1329, 1332 (Fed. Cir. 2015) ("Generally, evidence of contemporaneous beliefs about the contract is particularly probative of the meaning of a contract."). We see either no ambiguity in the task order or a trace of ambiguity that is easily removed by examining the surrounding circumstances. *Cf. R.G. Robbins & Co.*, GSBCA 4748, 79-1 BCA ¶ 13,665 (1978) ("[A]ny ambiguity created by the [contract's] erroneous use of an upper case 'I,' rather than a lower case 'i'" in citing a specification "was cured by the furnishing of . . . references to the [specification]."). We need not choose definitively between those two rationales, as they both lead us to the same outcome in this case. *See 1-A Construction & Fire v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913 ("[T]he Board is entitled to make findings of fact" under Rule 19 "and can decide issues of law based upon those factual findings.").

Task orders issued under indefinite quantity contracts "represent the government's exercise of existing contract rights and are not separate, individual contracts." *[HMR]Tech2, LLC*, ASBCA 56829, 10-1 BCA ¶ 34,397; *see Coastal States Petroleum Co.*, ASBCA 31059, 88-1 BCA ¶ 20,468; *see also Walker Development & Trading Group Inc. v. Department of Veterans Affairs*, CBCA 5907, 19-1 BCA ¶ 37,376 (defaults on delivery orders justified termination of the contract as a whole).[6] We will construe a task order as part of the "whole [contract] instrument." *Hol-Gar*, 351 F.2d at 975; *see OMNIPLEX World*

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[6] By contrast, "[t]he placement of an order" under a Federal Supply Schedule (FSS) contract "creates a new contract; the underlying FSS contract gives the Government the option to buy, but it does not require the Government to make a purchase or expend funds. Further confirming that FSS orders are [new] contracts, the Government is not completely bound by the FSS contract's terms" and may renegotiate the pricing. *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016). Suffice it to say these are not features of valid contracts containing the Indefinite Quantity clause. *See Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1304–06 (Fed. Cir. 1998).

Services Corp. v. Department of Homeland Security, CBCA 5971, 19-1 BCA ¶ 37,209 (holding that "read as a whole, the contract" authorized deductions taken from task order prices)*; Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285 (citing *Hol-Gar* in construing an order placed under a schedule contract).[7]

It is possible, to be sure, to follow an argument that because (1) the Indefinite Quantity clause stated that "the Contractor shall furnish to the Government, when and if ordered, the . . . services specified in the Schedule," 48 CFR 52.216-22(b); and (2) the Ordering clause said "services to be furnished under this contract shall be ordered by issuance of . . . task orders," *id*. 52.216-18(a); and (3) VA issued the September 2017 task order showing quantities of services and a total dollar amount; therefore, (4) VA "ordered" the listed services. VA ran a risk that its conduct might be construed that way. The agency uses the word "order" in inconsistent ways.[8] We do not encourage that practice, which can foster issues of interpretation. For example, another board found that the Army "ordered" 216 "temporary" registrars to staff base gates, under an indefinite quantity contract for both "permanent" and "temporary" registrars, when the agency used that number to price a contract modification that exercised an option year of the contract. *CI^2, Inc*., ASBCA 56257, 14-1 BCA ¶ 35,698. Because the contract said the Army would "order" registrars via contract modifications, the board reached a conclusion similar to RocJoi's position and rejected the Army's argument that the figure of 216 temporary registrars in the modification was not a firm "order" but was only an "estimate" to be definitized in the course of assigning staff to the gates during the contract year. *Id*.

Here, VA's September 2017 task order did not "order" any radiology services but only allocated funds to the contract for RocJoi to invoice against after providing services "as requested" per the PWS. No other interpretation of the task order makes sense in context. The contracting officer told RocJoi in August 2017 to expect "funding" along with the signed contract. She then described the task order as "the task order providing funding for the Base year" in her October 2017 email transmitting the order. The task order and the transmittal email provided an obligation account number for RocJoi to note in its invoices, which the task order (like the underlying contract) required RocJoi to submit "in arrears" *after* providing radiology analyses "as requested, primarily after hours, weekends, and

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[7] Under the Ordering clause, "the contract shall control," should there be a "conflict" between the contract and an order. 48 CFR 52.216-18(b). We do not see a "conflict" here and need not invoke this order of precedence to interpret the task order.

[8] VA argues that a "prospective offeror should have been on notice that the *mechanism for ordering services* would be via Task Orders" but then argues that "the Task Order was issued . . . in order for *services to be ordered*" later, and that "the quantities listed in the Task Order were *estimates only*." (Emphasis added.)

federal holidays," as described in the contract. VA gave RocJoi no reason to think that the estimates in the contract had suddenly become firm VA requirements. RocJoi's president confirmed receipt of the task order and indicated by her questions to the contracting officer an understanding that the parties were discussing only "estimated" and "projected' volumes of studies, not a fixed list of studies that RocJoi should immediately arrange to provide.

The record shows, therefore, that the process by which VA was to obtain a radiology study had, in practice, two steps: (1) a "task order" obligating annual "funding" and (2) a "request" from the medical facility for a specific type of study from the price schedule. That is exactly how the parties proceeded. Once performance began, RocJoi provided radiology studies as requested by the medical facility and invoiced VA for the studies individually in arrears, citing the obligation number provided by VA. Until it submitted its second certified claim in November 2020, RocJoi did not act as if it thought it had received a task order in October 2017 requiring RocJoi to perform approximately 10,000 studies in a year whether or not the VA facility ever requested them.

Revealingly, in its thirty-nine pages of briefing, RocJoi never alleges in so many words that it genuinely interpreted the September 2017 task order during performance as RocJoi urges us to interpret it now, as "a standalone contract . . . that ordered 10,155 studies." We find no evidence that RocJoi read the task order that way. Likewise, RocJoi's earlier expressions of surprise at "discovering" the task order in the appeal file of CBCA 6885 in 2020 have fallen flat. The record shows (and RocJoi does not deny) that RocJoi received and acknowledged the task order in 2017 even if, perhaps, its counsel became aware of the order more recently. RocJoi urges a literal reading of the task order which, as we have explained, cannot bear scrutiny in the light of the contemporaneous communications and circumstances, including the parties' subsequent conduct.

VA, for its part, gives RocJoi a wide target by failing to recognize that the parties' behavior under the contract did not fit snugly within the language of the Indefinite Quantity and Ordering clauses. Those clauses do not say that an "order" will set forth "estimates" and will be followed by separate "requests" that will definitize the order, as happened here. Nor does VA cite any court or board decisions that have construed a task or delivery order as reciting only estimates, as we do here. Much of the briefing consists of arguments by VA such as, "the only mechanism under the Contract for the VA to order services was by the issuance of a task order," to which RocJoi responds, in effect, *Yes, that is exactly what we mean—so the 2017 task order "ordered" all of the studies listed in it*. Reading the task order is not as simple as either party suggests, but our bottom line is much closer to VA's position than to RocJoi's. The task order was not intended, was not understood by the parties, and cannot be viewed now as a firm order for any radiology services. As a result, the task order has no bearing on RocJoi's entitlement in these appeals.

Decision

We interpret the September 2017 task order as we have set forth above.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge