UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON DECEMBER 2, 2021

MOTIONS FOR SUMMARY JUDGMENT DENIED: November 18, 2021

CBCA 6887

NTT DATA SERVICES FEDERAL GOVERNMENT, LLC,

Appellant,

v.

DEPARTMENT OF EDUCATION,

Respondent.

Kevin J. Maynard, Tracye Winfrey Howard, and Nicole E. Giles of Wiley Rein LLP, Washington, DC, counsel for Appellant.

Paula S. Hughes, Office of the General Counsel, Business and Administrative Law Division, Department of Education, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **DRUMMOND**, and **SHERIDAN**.

GOODMAN, Board Judge.

Appellant, NTT DATA Services Federal Government, LLC (appellant or NTT DATA) has appealed a decision by a contracting officer of respondent, Department of Education (respondent, the Department, or ED). The parties have filed cross-motions for partial summary judgment as to entitlement. We deny the motions.

Background

On September 27, 2007, respondent awarded the Education Department Utility for Communications, Applications and Technology Environment (EDUCATE) contract no. ED-07-CO-0042 (the contract) to Perot Systems Government Services, Inc., now known as NTT DATA Services Federal Government, LLC. The contractor was required to provide comprehensive commercial information technology services to transfer respondent from a government-owned, contractor-operated structure to a contractor-owned, contractor-operated (COCO) structure. Three bilateral modifications extended the contract's original period of performance through July 31, 2019.

The contract provides that task orders may be issued under a fixed price or time and materials (T&M) basis. The contract's performance work statement required appellant to perform and provide transition out services in accordance with a transition out plan. Appellant's business proposal stated that appellant would prepare a transition out plan and perform transition services on a T&M basis and included the following:

> Perot Systems will develop an initial [transition out plan] with an annual refresh, including an annual Quality Assurance review.
>
> The End of Contract Transition Out phase of the contract is priced on a T&M basis to cover required additional support while operations are ongoing, assuming a period of performance of three months, for pricing purposes.

Appellant submitted the final transition out plan on September 1, 2018. Respondent accepted the final transition out plan on September 17, 2018.

In its motion for summary judgment, appellant asserts that the transition out plan included a specific task to shut down NTT DATA infrastructure. Appellant does not specify the task to which it refers but includes the list of tasks to be performed under the transition out plan. Task 5.2 in that list states, "Shutdown NTT DATA support infrastructure including Remedy ITSM, EDUCATE OPAS, CMDB, RUM, AND Atrium. [acronyms not defined]."

The final transition out plan contained the following transition acceptance criteria:

> ED agrees to accept the final completion of transition out services when NTT DATA has met the following list of acceptance criteria:

> 1. All transitioning GFE [government furnished equipment] Assets and services have been received by successor contractors and/or ED as the case may be.
>
> 2. All NTT DATA equipment and people have been removed from ED facilities.
>
> 3. No ED data pertaining to the EDUCATE program remains at NTT DATA.

In 2017 and 2018, respondent issued two task orders for transition services – task order 52 (Transition Out Support and Equipment Buyback) and task order 53 (Transition Out Services and Equipment Buyback). Respondent incorporated appellant's proposal dated September 26, 2017, into task order 52 and incorporated appellant's proposal dated March 16, 2018, into task order 53. Both proposals contain the following:

> 3.2 Task 4.2 – Software, Systems, and Asset Buyout
>
> NTT DATA will provide support to the Department in the removal, sanitizing, and disposal of any GFE network equipment according to EDUCATE SOPs [acronym not defined] and disposal terms and pricing. In the event that NTT DATA employees, subcontractors, or equipment are no longer required after transition actions are complete, employees and subcontractors will return physical security items (including but not limited to items such as closet keys and ID badges) to points of contact identified by the Department; the Department will provide documentation of the date received and items received as validation of receipt. NTT DATA will purge Department data from any system owned by NTT DATA which is in scope for the network equipment transition, and will provide confirmation that these system(s) have been purged of Department data.

Appellant alleges that the above language obligates respondent to pay for removal of respondent's data from COCO equipment on a T&M basis pursuant to the task orders. Respondent alleges that the language only obligates it to pay for removal of data from GFE within the fixed-price of the contract, as pricing is only mentioned for work involving GFE.

Appellant submitted two invoices to respondent for labor hours performed under the task orders. The Government did not pay these invoices. On March 10, 2020, appellant submitted a certified claim requesting payment of the invoices, stating that respondent had refused to pay for decommissioning services. On July 12, 2020, the contracting officer

issued an appealable decision denying the claim. On July 30, 2020, appellant appealed to this Board. The parties have filed cross-motions for summary judgment on the issue of appellant's entitlement to payment on a T&M basis for removing respondent's data from COCO equipment.

Discussion

The question presented by the parties' motions for summary judgment is whether appellant is entitled to payment for removal of respondent's data from COCO equipment at the end of contract performance. Appellant argues that the contract entitles it to payment, on a T&M basis, and the actions of respondent during contract performance confirm entitlement. Appellant states the basis of its motion for summary judgment as follows:

> NTT DATA seeks judgment as a matter of law on the issue of entitlement based on a factual record that is not in dispute and is ripe for review. The Department's breach of contract here is straightforward: NTT DATA "sanitized" and "decommissioned" equipment to remove Department data as part of the transition-out phase of the [contract], and the Department refused to pay for those services despite its contractual obligation and repeated assurances from two Contracting Officers that it would do so. Further, by directing NTT DATA to perform this work, yet refusing to compensate NTT DATA, the Contracting Officer constructively changed the Contract without NTT DATA's consent. Additionally, the Department, through its conduct and misleading communications, breached its implied duty of good faith and fair dealing. . . . [T]he Department repeatedly and unequivocally agreed that NTT DATA would be paid on a time-and materials basis for the performance of transition services—including "decommissioning" services, which consists of shutting down equipment that would not be transferred to the successor contractor, "sanitizing" or "purging" the equipment to remove Department data, and disposing of the equipment at the end of the Contract. The evidence of the Department's agreement to pay for these decommissioning services is clear and undeniable, and spans the entire life of the Contract.

Appellant's Motion for Summary Judgment at 1-2.

Respondent argues that the contract does not entitle appellant to additional payment for removal of respondent's data from COCO equipment, as this task was included in the fixed price of the contract, and appellant's actions, by not charging for identical services during contract performance during the "refresh" stage, indicate that appellant did not expect to be paid for the same services rendered at the end of the contract.

Pure contract interpretation is a question of law that may be resolved by summary judgment. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984). However, the question of interpretation of language, the conduct, and the intent of the parties, i.e., the question of what is the meaning that should be given by a court or board to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law. If there is a genuine dispute of material fact, summary judgment is inappropriate. *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988); *see also Butte Timberlands, LLC v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730 (2007).

The fact that both parties have moved for summary judgment does not mean that the Board must grant judgment in favor of either party. If there are any issues of material fact, summary judgment is not proper for either party. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987); *6th & E Associates, LLC v. General Services Administration*, CBCA 1802, 10-2 BCA ¶ 34,596.

While both parties are of the opinion that this dispute is ultimately one of contract interpretation, they have referred not only to the terms of the contract but to the terms of task orders, contract extensions, and various proposals (including assumptions in those proposals) allegedly incorporated into these documents. The parties have submitted statements of undisputed facts and opposing statements identifying genuine issues of material fact (which, while admitting issues of undisputed fact propounded by the opposing party, dispute these facts by extended "clarifying statements"). Both parties have referred to various documents in the appeal file, and appellant has submitted additional exhibits, including deposition testimony of individuals who were involved in contract performance, email strings, and decommissioning reports. The totality of these submissions indicates considerable disagreement regarding the interpretation of the contract and whether the costs which appellant seeks are compensable. The record is not clear as to whether many of the interpretations offered by the parties are from individuals who negotiated or have personal, contemporaneous knowledge of the contract, the task orders, and the contract extensions.

The record presented for consideration by the parties to resolve their motions is extensive, and while the parties' dispute focuses on the removal of respondent's data from COCO equipment, the parties' references to the contract, task orders, and contract extension do not clearly and unambiguously mention this task. It is difficult to discern where this task is included within the many technical contractual terms, including undefined acronyms, to which the parties refer that describe actions that take place during contract performance. These terms include shutdown, shutdown infrastructure, refresh, sanitize, sanitize during refresh, purge, decommission, decommissioning services, data wiping, transition, transition out plan, transition services, disentangle, disentanglement transition plan, IT refresh, IT

refresh plan, IT commissioning and decommissioning plan, additional support services, SOP, Remedy ITSM, EDUCATE OPAS, CMDB, RUM, and Atrium. The parties offer varying interpretations of the provisions containing these terms, alleging that the provisions and terms intersect or are exclusive of each other, thereby making the offered interpretations unclear as to whether they even refer to the removal of respondent's data from COCO equipment.

For instance, appellant equates the terms "transition" and "decommission," and respondent asserts that these terms define different concepts. Respondent refers to provisions involving "disentanglement," and appellant raises the issue as to whether these provisions were removed or remain in the contract. Another difficulty is presented by the parties' interchangeable use of the terms "purge" and "sanitize." While at times it appears that "purge" refers specifically to removing data from COCO equipment and "sanitize" refers to removing data from GFE, appellant at times uses both terms in regard to removing data from COCO equipment.

Appellant offers several depositions of government witnesses that include lapses of memory as to issues in the past, uncertainty about the concept of disentanglement and its interaction with transition, and whether sanitizing equipment was included in the task orders to be paid or only required to be reported as completed. One of the contracting officers who administered the contract disputes that the costs at issue were included in the task order, despite appellant's allegations that this contracting officer affirmed that such costs would be paid during decommissioning.

The parties' submissions raise many additional issues of material fact in dispute. For example, appellant's proposal for the contract contained statements that are designated as "assumptions," which appellant asserts were incorporated into the contract and are relevant to the interpretation of the task orders. It is not clear whether the incorporation of these assumptions into the contract binds respondent or is simply respondent's acknowledgment of these assumptions. Respondent alleges that only portions of the proposal were incorporated.

Also, it appears that, during contract performance, the parties agreed that appellant's price proposal did not account for decommissioning and shutdown activities that are required for all of the impacted hardware and infrastructure and that these costs were therefore subject to further negotiation. However, it is not clear that removal of respondent's data from COCO equipment was included in decommissioning and shutdown activities to which this agreement referred. Respondent alleges that the refresh process, for which it did not compensate appellant during contract performance, encompassed the removal of data from COCO equipment and that therefore respondent did not owe compensation for the same task

performed at the end of the contract for which appellant now seeks compensation. Various emails are referenced that refer to decommissioning, but none of these explicitly refer to removal of data from COCO.

While two task orders were issued on a T&M basis, the parties dispute whether compensation for removal of data from COCO equipment was included within the scope of the task orders. Appellant points to communications from the contracting officer which appellant interprets as confirming that removal of respondent's data from COCO equipment was to be paid for on a T&M basis, while the contracting officer disputes this interpretation of his communication. Appellant's proposal refers to "additional support" during the final transition out plan, and it is unclear whether the task of removing respondent's data from COCO equipment is additional support or included within the scope of the contract's fixed price.

Finally, while the task at issue is appellant's removal of respondent's data from COCO equipment, the parties do not offer in their motions any guidance as to where there appears in the contract, task orders, contract extensions, or claim a description of how this was to be accomplished—whether by reformatting a drive, removing a drive and destroying it, destroying the equipment in total, or some other method. The labor costs in the unpaid invoices which are the subject of the certified claim are not itemized by any specific task. It is not apparent what portion of the invoiced costs, whether all or a portion, are for the removal of respondent's data from COCO equipment.

On the current record, we cannot determine if appellant is entitled to be paid on a T&M basis for the removal of respondent's data from COCO equipment. The record in this case must be developed further by testimony from those with contemporaneous, personal knowledge of the parties' understanding of the drafting, negotiation, and meaning of the contract, task orders, and contract extensions. Interpretation offered for the sake of argument by those without such knowledge is not helpful. To resolve this dispute, there must be a clear understanding of the nature of the task at issue—how respondent's data was removed from COCO equipment—and where this task is allegedly included or excluded within the scope of the various provisions and terms in the contract, task orders, and contract extensions.

In considering motions for summary relief, we cannot try issues of fact, i.e., weigh evidence or judge credibility but only determine whether there are issues to be tried. Based on the foregoing, there are certainly many issues of material fact that remain in dispute. On the record as presented, we conclude that neither appellant nor respondent is entitled to judgment as a matter of law. *CH2M Hill Hanford Group, Inc. v. Department of Energy*,

CBCA 1187, 08-2 BCA ¶ 34,002; *Moshe Safdie & Associates, Inc. v. General Services Administration*, CBCA 2386, 11-2 BCA ¶ 34,851.

Decision

The parties' cross-motions for summary judgment are **DENIED**.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge