UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 9, 2023

CBCA 7145

TEAM SYSTEMS INTERNATIONAL, LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

James Y. Boland of Venable LLP, Tysons, VA; Christopher G. Griesedieck and Lindsay M. Reed of Venable LLP, Washington, DC; and David W. Carickoff of Archer & Greiner, P.C., Wilmington, DE, counsel for Appellant.

Rafael Lara, Jr., Jeffrey D. Webb, Sarah Jaward, and Matthew Lane, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **DRUMMOND**, and **SHERIDAN**.

SHERIDAN, Board Judge.

The Department of Homeland Security, Federal Emergency Management Agency (FEMA) awarded Team Systems International, LLC (TSI) a contract to provide bottled drinking water. When FEMA decreased the quantity of water bottles ordered by approximately sixty-seven million liters, TSI sought $13,504,320 in restocking fees. The parties seek a decision on the record pursuant to Rule 19 (48 CFR 6101.19 (2021)).

Background

We have previously summarized many of the relevant facts. *See Team Systems International, LLC v. Department of Homeland Security*, CBCA 7145, 22-1 BCA ¶ 38,045, at 184,754. We repeat facts below only as necessary to explain the basis for our decision.

On September 5, 2017, FEMA awarded contract number HFSE70-17-D-0021 (contract) to TSI for the provision of bottled drinking water. Contract line item number (CLIN) 0005, the subject of the instant dispute, states: "Restocking fee – The initial ordered quantity either decreases or the order is cancelled. The fee covers the costs of restocking decreased or cancelled order to the Contractor." The unit price for CLIN 0005 was $0.20 per liter.

On September 29, 2017, FEMA awarded TSI firm-fixed-price task order HFSE70-17-J-0273 (task order) for the delivery of 80,000,640 liters of bottled drinking water to Puerto Rico, totaling $117,566,730. On November 6, 2017, FEMA issued bilateral modification P0001 (Modification 1), decreasing the quantity of bottled drinking water from 80,000,640 liters to 12,479,040 liters, a reduction of 67,521,600 liters.

Three years later, on October 20, 2020, TSI submitted an invoice to FEMA seeking $13,504,192 in restocking fees under CLIN 0005 due to the 67,521,600 liter reduction. FEMA rejected the invoice. On November 20, 2020, TSI submitted a certified claim to the contracting officer stating that TSI was entitled to a restocking fee of $.20 per liter for the 67,521,600 liter reduction, totaling $13,504,320. The contracting officer issued a final decision rejecting TSI's argument that it was entitled to $13,504,320.

TSI appealed to the Board, where both parties filed motions for summary judgment. The Board denied both motions, finding that there were genuine issues of material fact "as to whether TSI suffered actual harm when FEMA reduced the task order quantity." *See Team Systems International, LLC*, 22-1 BCA at 184,757. The Board concluded that TSI was not entitled to recover restocking fees unless TSI could "prove that the fees were actually incurred." *Id.*

Of importance here are two of TSI's responses to FEMA's request for admissions, wherein TSI admits that it has neither paid any restocking fees nor actually restocked any of the bottled water. Specifically, TSI stated that "TSI has not made any 'restocking fee' payments to any subcontractors yet" and admitted that "TSI did not physically restock any bottles of water as a result of Modification 1."

Discussion

TSI urges the Board to look to extrinsic evidence to interpret CLIN 0005 as not requiring the incursion of costs as a trigger. TSI argues that industry custom prohibits TSI from physically restocking bottled water due to health and safety regulations. Therefore, it would be unreasonable to require TSI to physically restock bottled water before receiving a restocking fee.

TSI argues that a prior contractual arrangement between FEMA and TSI sheds light on the parties' intent as to and mutual understanding of CLIN 0005. FEMA had previously contracted with TSI to provide bottled drinking water. When FEMA decreased the initially ordered quantity of water, TSI sent an invoice for a restocking fee, and FEMA paid the fee without requiring proof of the costs TSI incurred as a result of the decrease. TSI argues that this demonstrates that FEMA understood the restocking fee provision to be akin to an automatic cancellation fee, which is how TSI interprets CLIN 0005.

FEMA maintains that the plain meaning of CLIN 0005 clearly requires TSI to incur costs before any obligation is placed on FEMA to pay a restocking fee, as evidenced by the latter portion of the provision. Simply put, FEMA argues that a restocking fee is only paid if restocking actually occurs. Since TSI did not restock any bottled water and incurred no costs associated with restocking, TSI cannot receive a restocking fee. FEMA also urges the Board to ignore any extrinsic evidence that TSI may present in light of CLIN 0005's plain meaning.

The issue presented here is solely one of contract interpretation, in that we must only determine whether FEMA was obligated to pay the restocking fee automatically upon its reduction of the ordered quantity of water, or if such obligation only arises if TSI incurred costs as a result of the reduction. When interpreting a contract, the process starts with the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009); *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). If the plain language of the contract is unambiguous, the inquiry ends there. *Hunt Construction Group, Inc.*, 281 F.3d at 1373. Even if the parties propose differing interpretations of contractual language, this does not necessarily mean that the contract is ambiguous. *See Tri-Cor, Inc. v. United States*, 458 F.2d 112, 126 (Ct. Cl. 1972). Where "the contract's requirements are unambiguous," there is "no need to examine extrinsic evidence, such as industry standards." *Master's Transportation, Inc. v. General Services Administration*, CBCA 6565, 22-1 BCA ¶ 38,001, at 184,552 (2021). The interpretation of the contract must afford reasonable meaning to each portion of the contract and not render any portion meaningless. *See Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285, at 176,954.

Here, the Board does not need to look beyond the plain meaning of CLIN 0005 to consider the parties' intent and prior treatment of the restocking fee provision. Such factors are only considered when the plain language of the contract is unclear. The restocking fee provision, CLIN 0005, unambiguously provides that "[t]he fee *covers the costs* of restocking decreased or cancelled order to the Contractor." (Emphasis added.) This language makes it clear that costs must be incurred for the provision to be triggered, and TSI incurred no such costs. TSI's argument that the restocking fee is not intended to cover the costs of physically restocking bottled water would render the second sentence of CLIN 0005 meaningless.

As we previously found in our January 27, 2022 decision, the plain meaning of CLIN 0005 clearly requires that TSI incur costs before the provision is triggered. TSI has provided no evidence that it was charged for or paid a restocking fee. Thus, consistent with our earlier decision, the Board rejects TSI's argument.

Even if we were to find the contract ambiguous and look to extrinsic evidence, we could not give weight to TSI's allegation about its prior dealings with FEMA because we have no reliable evidence, such as where the order was in the delivery process, by which to evaluate whether the circumstances of the task orders were similar. Also, while TSI argues that industry custom prohibits restocking, that does not necessarily prohibit a supplier from seeking to recover costs associated with an order cancellation such as this. Yet, it seems apparent from the record that TSI's suppliers did not charge TSI anything for the cancellation. There is no evidence in the record that TSI or any of its suppliers actually incurred costs associated with the reduction in the number of liters ordered. TSI has never explained what happened to the water or the circumstances under which it was not charged by any of its subcontractors for the reduction.

If we interpreted CLIN 0005 as allowing for restocking fees in a matter such as this one, the claim would still fail. In general, a contractor asserting a claim for an equitable adjustment has the burden of proving "three necessary elements—liability, causation, and resultant injury." *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991) (citing *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965)). Evidence of some damage resulting from the claim event is necessary to establish entitlement. *See Corners & Edges, Inc. v. Department of Health & Human Services*, CBCA 648, 07-2 BCA ¶ 33,706 (citing *Wilner Construction Co. v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc); *Cosmo Construction Co. v. United States*, 451 F.2d 602, 606 (Ct. Cl. 1971)). Here, no such damage is present. Furthermore, to award TSI the claimed $13,504,320 after no costs were incurred would constitute a windfall for TSI and that would be inappropriate. *See Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1315 (Fed. Cir. 2004) ("Courts should avoid bestowing an unfair windfall on the plaintiff by compensating him or her above and beyond the losses suffered") (internal quotation marks and citation omitted). As TSI has suffered no damages, TSI is not entitled to recover.

Decision

The appeal is **DENIED**.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge