



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON MARCH 30, 2021**

DISMISSED: March 15, 2021

CBCA 6128, 6129

PURDY ENTERPRISE, LLC,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Doug P. Hibshman and Nicholas T. Solosky of Fox Rothschild LLP, Washington, DC, counsel for Appellant.

Jonathan English and Julie Cannatti, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **BEARDSLEY**, and **RUSSELL**.

BEARDSLEY, Board Judge.

Purdy Enterprise, LLC (Purdy) timely appealed from the decisions of two Department of Housing and Urban Development (HUD) contracting officers, both denying Purdy's claims for payment under HUD field service management (FSM) contracts. The appeals were consolidated. Purdy filed a motion for summary judgment, and HUD filed a motion to dismiss for failure to state a claim on which we could grant relief or, in the alternative, for summary judgment. We grant HUD's motion to dismiss and deny Purdy's motion for

summary judgment. HUD's motion for summary judgment is moot and, thus, denied. We, therefore, dismiss the appeals.

Background

HUD awarded contracts to multiple contractors under two FSM programs — FSM 3.10 and FSM 3.8. The appeals at issue here arise out of FSM 3.10 contracts DU204SA-17-D-05 (D-05) and DU204SA-17-D-06 (D-06) (the “Purdy contracts”).¹ D-05 covers Area 4A (Indiana and Kentucky), and HUD awarded this contract on May 8, 2017. D-06 covers Area 5A (North Carolina and South Carolina), and HUD awarded this contract on May 22, 2017. The contracts require Purdy to provide management, maintenance, preservation, and inspection services to, as well as secure and perform cosmetic enhancements and repairs for, HUD properties.² Relevant here, Purdy performs two primary types of services under the Purdy contracts: (1) on-going property management services, and (2) routine property inspections. These contracts operate on a hybrid fixed-price and cost-reimbursable contract line item number (CLIN) basis.³ Pursuant to CLINs 0005 (HUD-Owned Vacant), 0006 (Custodial), and 0007 (Vacant Lot), Purdy performs ongoing property management services on a monthly fee basis for the three HUD property types. The

¹ These appeals are two of seven appeals before the Board involving FSM 3.10 contracts. While the seven appeals (CBCA 6128, 6129, 6174, 6175, 6176, 6177, and 6351) involve five different contractors, all seven appeals present substantially similar issues of law and fact, and “the Purdy contract terms mirror the contract terms of the other FSM contracts.” As a result, for purposes of judicial efficiency and by agreement of the parties, the Board stayed the five other appeals involving FSM 3.10 contracts pending resolution of these two appeals involving the Purdy contracts.

² HUD-owned properties are “vacant land and occupied-conveyance properties” that “HUD owns by reason of payment of an insurance claim or another acquisition method.” Custodial properties are “borrower owned [vacant] property . . . which HUD, through the Contractor, has taken possession of following default and vacancy or abandonment.” The contracts state that vacant lots are to be “maintained at all times in a manner that result in properties that are clean, safe and sanitary.” Otherwise, the contracts do not define vacant, vacant lots, or vacant properties.

³ Section B of both contracts contains CLINS for each year of performance, making a total of forty-five CLINs for the base year and four option years. Each year has its own set of CLINS, identical except for the number designation, the estimated quantities, and total prices. For convenience, we refer to the relevant CLINs by their base-year numbers.

contracts also required that HUD pay for routine, biweekly property inspections performed by Purdy.

The issue in these appeals is “which CLIN specifies the compensation for routine, bi-weekly inspections of custodial properties,” and the answer hinges on the interpretation of CLINs 0005, 0005AA, and 0006. In both contracts D-05 and D-06, CLIN 0005 is titled “On-Going Property Management (PM) fee, HUD-Owned Vacant,” and CLIN 0006 is titled “Inspection, Initial Services, On-Going (PM) for Custodial Properties.” CLIN 0005AA is titled “On-Going Property Inspection HUD-Owned Vacant.” Each CLIN is divided into three columns titled “Supplies or Services,” “Unit,” and “Unit Price.” For CLIN 0005AA, the service identified is “Property Inspection,” the unit is “Bi-Weekly,” and the unit price is “\$34.00” for D-05 and “\$33.00” for D-06. For CLIN 0005, the service identified is “HUD-Owned Vacant,” the unit is “monthly,” and the unit price is “\$117.00” for D-05 and “105.00” for D-06. For CLIN 0006, the service identified is “Custodial Properties,” the unit is “monthly,” and the unit price is “\$117.00” for D-05 and “105.00” for D-06. The estimated quantities for CLIN 0005 were “20900” for D-05 and “12960” for D-06, and for CLIN 0005AA, the estimated quantities were “41800” for D-05 and “25920” for D-06. For CLIN 0006, the estimated quantities were “234” for D-05 and “198” for D-06.

As part of solicitation amendment 2, HUD published questions and answers (Q&A) in which it responded to three questions about CLIN 0005AA with one answer:

[CLIN] 0005AA is a subset of the routine services (CLINs 0005, 0006, and 0007), and failure to perform the routine inspections has a greater cost impact to HUD then [sic] the amount of the inspection itself due to the additional holding costs and increased risk for vandalism or other damages absent the routine inspection(s).

These Q&As, however, were not incorporated into the contracts.

In both contracts, the performance work statement (PWS), section 5.2.3.2, Routine Inspections, stated:

The Contractor shall routinely inspect and take all actions necessary to ensure that HUD properties are maintained in Ready to Show Condition. The Contractor shall inspect the property every two weeks, where intervals between inspections shall be at least ten (10) calendar days and not more than fourteen (14) calendar days. Property inspections performed in accordance to this schedule will begin on day eight (8) of property assignment.

The Contractor is required to conduct routine inspections and report inspection results on FSM Property Inspection Form (Attachment 7). Notwithstanding the allowance of one day to upload documents generally, as noted elsewhere, the routine inspection reports must be uploaded within the 10th and 14th day interval. The contractor will receive credit for performing an inspection only if they perform and report inspection results, upload completed FSM Property Inspection Form with photo documentation as required by HUD, completely populate all required fields in P260, and upload a copy of the sign-in sheet clearly identifying the FSM inspector, date, and purpose of the visit into P260 during the 10th and 14th day weekly inspection intervals.

The Contractor, as part of their property management plan documentation, shall submit an itemized account of the services performed for property management. The failure of the Contractor to perform (1) any routine inspection, and/or (2) the proper upload of required documentation within the required timeframe [sic] will be considered a complete failure by the Contractor in performing the required property inspection.

PWS section 5.2.6, Custodial Properties, contained almost identical language to PWS section 5.2.3.2.

The Contractor shall inspect the property every two weeks, where intervals between inspections shall be at least ten (10) calendar days and not more than fourteen (14) calendar days. Property inspections performed in accordance to this schedule will begin on day eight (8) of property assignment.

The Contractor is required to conduct routine inspections and report inspection results on FSM Property Inspection Form (Attachment 7). Notwithstanding the allowance of one day to upload documents generally, as noted elsewhere, the routine inspection reports must be uploaded within the 10th and 14th day interval. The contractor will receive credit for performing an inspection if they perform and report inspection results, upload completed FSM Property Inspection Form with photo documentation as required by HUD, and completely populate all required fields in P260 during the 10th and 14th day weekly inspection intervals.

Both contracts D-05 and D-06 had a commencement date of June 1, 2017, followed by a sixty-day start-up phase ending on July 31, 2017. HUD paid Purdy for routine inspections of custodial properties and HUD-owned vacant properties performed in August 2017, pursuant to CLIN 0005AA. HUD had paid for routine inspections of custodial

properties and HUD-owned vacant properties pursuant to CLIN 0005AA for other FSM 3.10 and FSM 3.8 contracts as early as January 2016. After August 2017, however, HUD refused to continue to pay for routine inspections performed on custodial properties. On September 7, 2017, HUD changed the protocols set up in its billing system so that routine inspections under CLINs 0006 and 0007 would not be reimbursed separately or in addition to the on-going project management fee provided for under those CLINs. HUD explained that its payment system had been “erroneously programmed” to pay for each inspection individually.

HUD continues to assess liquidated damages of fifty dollars per property per day (up to \$500 per property) under CLIN 0005AA against Purdy due to its failure to timely perform routine inspections of custodial, vacant lot, and HUD-owned vacant properties.

Purdy submitted two certified claims to two different contracting officers — Charles W. Hoyle, Jr. for D-05 (Area 4A) and Sharon L. Washington for D-06 (Area 5A). Purdy claimed that the contract and HUD’s accepted practices required that HUD pay Purdy under CLIN 0005AA for routine inspections of custodial properties. Purdy pointed to the CLIN structure and labels, HUD’s published Q&A, HUD’s assessment of liquidated damages, and HUD’s prior payment for routine inspections of custodial properties under CLIN 0005AA to support its interpretation of the CLINs. Purdy’s claims do not assert that either contracting officer improperly delegated management tasks during contract performance or abdicated his or her decisionmaking authority.

On March 2, 2018, each contracting officer issued a final decision denying Purdy’s claim for damages for routine property inspections of custodial properties. The final decisions were nearly identical. Purdy timely filed its appeals. Its amended, consolidated complaint lays out three counts: first, that HUD breached each contract by failing to separately reimburse Purdy for routine inspections on custodial properties under CLIN 0005AA; second, that HUD contracting officers breached the contracts by abdicating decisionmaking authority; and third, that HUD breached its duty of good faith and fair dealing by failing to pay Purdy in accordance with the express terms and conditions of the Purdy contracts.

Discussion

The primary dispute in these appeals is whether HUD must reimburse costs for routine inspections of custodial properties under CLIN 0006 or CLIN 0005AA. We grant the motion to dismiss because the facts alleged, even with reasonable inferences drawn in Purdy’s favor, do not support “a facially ‘plausible’ claim to relief.” *TranBen, Ltd. v. Department of Transportation*, CBCA 5448, 17-1 BCA ¶ 36,635 (quoting *Cambridge v. United States*, 558

F.3d 1331, 1335 (Fed. Cir. 2009)). We agree that the contract language does not support Purdy's contention that HUD must pay the unit price in CLIN 0005AA for routine inspections of custodial properties. We conclude that CLIN 0005AA is limited by its title to only inspections on HUD-owned vacant properties, and CLIN 0006 sets forth the compensation for routine, biweekly inspections of custodial property.

Purdy's FSM 3.10 contracts have substantially similar contract terms to HUD's FSM 3.8 contracts and contain the same CLINs 0005, 0005AA, and 0006 that the Board and the Court of Appeals for the Federal Circuit examined in *P.K. Management Group, Inc. v. Department of Housing & Urban Development*, CBCA 6185, 19-1 BCA ¶ 37,417, *aff'd*, *P.K. Management Group, Inc. v. Secretary of Housing & Urban Development*, 987 F.3d. 1030 (Fed. Cir. 2021). These appeals and *P.K. Management Group* involve attempts to obtain payments for ongoing routine inspections of custodial properties under CLIN 0005AA rather than CLIN 0006.

While there are some factual differences (different contracts executed years apart, different pre-bid Q&A, and different pre-dispute conduct by HUD) between the P.K. Management Group and Purdy appeals, the only differences in the contract language at issue are the unit prices, estimated quantities, and total amount of the fees paid for each CLIN. None of these differences, however, matter in deciding the motion to dismiss or impact the interpretation of CLIN 0005AA and CLIN 0006.

In *P.K. Management Group*, the Board held that "the plain contract language does not obligate HUD to pay the unit price in CLIN 0005AA (or in the corresponding CLINs for option years) for routine inspections of custodial properties." The Federal Circuit agreed with the Board that the FSM 3.8 contract was unambiguous and held "that the plain meaning places compensation for routine inspections of Custodial properties under CLIN 0006 rather than CLIN 0005AA." *P.K. Management Group, Inc.*, 987 F.3d. at 1033. CLIN 0005AA applies only to the same properties, HUD-owned vacant, as CLIN 0005; and CLIN 0006 "governs the compensation for routine inspections of Custodial properties" through a monthly fee. *Id.* at 1032.

Like in *P.K. Management Group, Inc.*, we find that the contracts are not ambiguous "regarding the pricing of inspections of custodial properties." 19-1 BCA ¶ 37,417. CLIN 0006 covers on a monthly basis what its title says it does, "*Inspection, Initial Services, [and] On-Going PM for Custodial Properties*" (emphasis added), while CLIN 0005AA covers what its title says it does, "*On-Going Property Inspection HUD-Owned Vacant*" (emphasis added).

In order to accept [Purdy's] position that CLIN 0005AA sets the unit price of inspections of *custodial* properties, we would need to read the words "HUD-

owned vacant” out of CLIN 0005AA and ignore the words “Inspection” and “for Custodial Properties” in CLIN 0006. Doing so would violate the rule of construction requiring us to “give[] a reasonable meaning to all parts of an instrument” and not to “leave[] a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous.” *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285, at 176,954 (citing *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl.1965)).

Id. Purdy’s argument “would make the title of CLIN 0005AA inexplicable.” *P.K. Management Group, Inc.*, 987 F.3d. at 1033.

Another indication that CLIN 0005AA only applies to HUD-Owned Vacant properties is its connection with CLIN 0005. Neither party disputes that CLIN 0005 (entitled “On-Going Property Management (PM) Fee, HUD-Owned Vacant”) applies only to HUD-Owned vacant properties, and the two CLINs are linked by both their numbering and titles. . . . [T]he most sensible interpretation is that provisions with related numbering apply to the same properties, particularly when both have titles that say “HUD-Owned Vacant.” [Purdy’s] interpretation would require us to deem the CLIN numbering system and titles meaningless.

Id. at 1032. “Only CLIN 0006 refers to Custodial properties, and we hold that this CLIN governs the compensation for routine inspections of Custodial properties.” *Id.*

Purdy asserts several arguments to support its reading of the contracts’ terms. We and the Federal Circuit find none of these arguments persuasive. Purdy argues that the description of services in CLIN 0005AA does not contain a “property-specific limitation.” We note “that the service column in every CLIN other than 0005AA identifies a type of property, such as ‘HUD-Owned Vacant’ or ‘Vacant Lot,’ whereas the service in CLIN 0005AA is simply ‘Property Inspection.’” *P.K. Management Group, Inc.*, 19-1 BCA ¶ 37,417. Purdy reads the lack of a reference to a property type as proof that CLIN 0005AA covers routine inspections for all property types. We disagree. “CLIN 0005AA and its option-year successors are the only sub-CLINs in the contract. The parent CLIN is CLIN 0005, which lists ‘HUD-Owned Vacant’ as the property type in the service column. The words ‘HUD-Owned Vacant’ are then repeated in the title of CLIN 0005AA. The unit price stated in CLIN 0005AA is subject to an express ‘property-specific limitation.’” *Id.*

Purdy points to PWS section 5.2.3.2 and 5.2.6 and the term “credit” found therein to support its interpretation of the contracts. As the Board held in *P.K. Management Group, Inc.*, regarding this same contract provision,

[PWS section 5.2.3.2] does not “unambiguously indicate” that HUD will pay a separate price for anything, as it does not mention payment and is not in the price section of the contract, i.e., the CLINs. Rather, the fixed monthly price in CLIN 0006 includes inspections of custodial properties, which [Purdy] needs to perform and document in accordance with the PWS. *Cf. Financial & Realty Services, LLC v. General Services Administration*, CBCA 5354, 16-1 BCA ¶ 36,472 (single judge) (involving a fixed-price contract for property management and lease administration services).

Relatedly, [Purdy] argues that reading the contract as including the price of inspections of custodial properties within the fixed unit price of CLIN 0006 would render the word “credit” in PWS 5.2.3.2 “meaningless” as to CLIN 0006, since the contract has no “mechanism for clawing back ‘credit’ for a Routine [inspection] that is not performed.” . . . The PWS explains in detail how [Purdy] can get “credit” from HUD for performing whatever property inspections the contract requires, regardless of how those inspections are priced under the applicable CLINs. [Purdy] gets “credit” for inspecting or it does not. There is no need to claw credit back. Even if we found this use of the word “credit” ambiguous (which we do not), this would not suffice to undermine all of the plain language of CLINs 0005, 0005AA, and 0006.

Id. The Federal Circuit did not find this argument persuasive either and held that “‘credit’ does not equate to payment. One can receive credit for a required task without being individually paid for that task.” *P.K. Management Group, Inc.*, 987 F.3d. at 1033. This same analysis defeats Purdy’s argument that PWS section 5.2.6, which includes the identical “credit” language found in PWS section 5.2.3.2, “only makes sense if HUD pays for each routine inspection on a per inspection basis” instead of as part of the fixed monthly price of CLIN 0006.

Purdy’s other arguments about CLIN 0005AA require us to consider parol or extrinsic evidence. Purdy points to HUD’s answer to questions published as part of the contract solicitation that identifies CLIN 0005AA as a “subset of the routine services (CLINs 0005, 0006, and 0007).” There is no support for Purdy’s assertion that the Q&A “is part of the Purdy Contracts.” 19-1 BCA ¶ 37,417 (distinguishing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991), and *A-Son’s Construction*, CBCA 3491, 15-1 BCA ¶ 36,089, which are also cited by Purdy). “Because the Contract is unambiguous, we follow the plain

meaning without considering extrinsic evidence or related arguments.” *P.K. Management Group, Inc.*, 987 F.3d. at 1033 (citing *Northwest Title Agency, Inc. v. United States*, 855 F.3d 1344, 1347 (Fed. Cir. 2017)).

Purdy also asks us to consider its understanding as to payment for routine inspections at the time of its bid, HUD’s payment history on the other FSM 3.10 and FSM 3.8 contracts, and HUD’s erroneous programming of its payment system. Like we said in *P.K. Management Group, Inc.*,

we need not examine how HUD paid for inspections of custodial properties under this contract, or under other FSM contracts, before the claim period, since evidence of past practice could be relevant only if the applicable price terms were ambiguous. *E.g.*, *JBG/Federal Center*, 18-1 BCA at 180,276.

19-1 BCA ¶ 37,417 (distinguishing the ambiguous contract language in *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562 (Fed. Cir. 1987)). Since the price terms are clear and unambiguous, we “may not resort to extrinsic evidence to interpret it.” *Id.* (quoting *Premier Office Complex of Parma, LLC v. United States*, 916 F.3d 1006, 1011 (Fed. Cir. 2019)). For this same reason, we will also not look to the parties’ conduct, such as assessing liquidated damages under CLIN 0005AA, to assist us in interpreting the unambiguous contract terms. The Board also need not apply the doctrine of contra proferentem to construe the contracts because of the lack of ambiguity in the contract terms. *HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004) (rule of contra proferentem used only to choose between competing interpretations of an ambiguous contract provision (citing *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992))).

Lastly, Purdy argues that contracting officer Charles Hoyle “breached the Purdy Contracts and violated FAR 1.602 by unreasonably, arbitrarily, and capriciously abdicating his decision-making authority” because “he did not direct, manage, or oversee essential Contract administration matters, including payments to Purdy and the assessment of liquidated damages.” Purdy contends that Mr. Hoyle breached the Purdy contracts by allegedly failing to reach an independent conclusion regarding payment for routine inspections on custodial properties. Since Purdy’s claim under the Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2018), alleged no facts supporting a theory of breach by “abdication of authority,” as we’ve noted before, that theory is a “new claim” beyond our jurisdiction in this appeal. *P.K. Management Group, Inc.*, 19-1 BCA ¶ 37,417 (citing *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015)).

Decision

The Board grants HUD's motion to dismiss for failure to state a claim, denies Purdy's motion for summary judgment, and denies HUD's motion for summary judgment as moot. The appeal is **DISMISSED**.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge