



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY JUDGMENT DENIED: January 27, 2022

CBCA 7145

TEAM SYSTEMS INTERNATIONAL LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

James Y. Boland of Venable, LLP, Tysons, VA; and Christopher G. Griesedieck and Lindsay M. Reed of Venable, LLP, Washington, DC, counsel for Appellant.

Rafael Lara, Jr., Jeffrey D. Webb, 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 Federal Emergency Management Agency (FEMA) awarded Team Systems International, LLC (TSI) an indefinite-delivery, indefinite-quantity (IDIQ) contract to provide bottled drinking water during a declared disaster. The contract included contract line item number (CLIN) 0005, Restocking Fee. After FEMA cancelled an order for several million liters of drinking water, TSI claimed \$13,504,320 in restocking fees. When the contracting officer denied the claim, TSI appealed the final decision, and the matter was docketed as CBCA 7145.

TSI moved for summary judgment, arguing that the contract clearly allows for recovery of the restocking fee under the current circumstances. FEMA opposes the motion and cross-moves for summary judgment, positing that the plain language of the CLIN requires it to pay the restocking fee to cover costs only “when a contractor must restock bottles of water due to a decrease or cancellation of an order.” Based on our plain reading of the contract, we find that in order for TSI to recover restocking fees under this contract, it must prove more than that the order was simply decreased or cancelled.

Background

On September 5, 2017, FEMA awarded TSI IDIQ contract HFSE70-17-D-0021 (contract) to provide bottled drinking water during a declared disaster. Among other things, the contract incorporated as attachments a price schedule for each CLIN and the statement of work (SOW). The SOW included CLIN X005, the restocking fee provision in dispute here.

Restocking fee (CLIN X005) – 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.

When Hurricane Maria hit Puerto Rico on September 20, 2017, the President issued a major disaster declaration enabling FEMA to provide emergency assistance. Three days later, FEMA issued a request for quote (RFQ) for delivery of 240 million liters of water. Among other information, the RFQ asked TSI to address:

- Ability to terminate undelivered/not-shipped loads
- 1 liter & ½ Liter Bottles
- Restock Penalty if applicable

Also, the RFQ indicated that several CLINs, including CLIN 0005, Restocking, would be utilized.

TSI submitted its quote, which included a unit price of \$0.20 for CLIN 0005, Restocking Fee. FEMA accepted TSI’s quote, and on September 29, 2017, 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. The task order totaled \$117,566,730 and provided, in pertinent part, at CLIN 0002AA:

Bottled Water – Emergency Site Zone 1

Quantity 80,000,640 @ \$0.75 = \$60,000,480

Delivery Cost to Puerto Rico Port – Firm Fixed price of \$57,566,520

Total price for the water + delivery = \$117,566,730

The task order also set forth CLIN 0005:

Restocking Fee @ \$0.20

IDIQ restocking terms and condition [sic] applies. As requested by vendor, Government [is] to provide 24 hour notice for cancellation.

All clauses from the contract were incorporated into the task order. According to FEMA, “[n]o quantities were identified and no funds were obligated for CLIN 0005 at the time of award.”

FEMA notified TSI on October 9, 2017, that it was decreasing the quantity ordered to three million bottles of water per week. On October 12, 2017, TSI responded that it had “two weeks [of] water in transit through JAX [Jacksonville] to PR [Puerto Rico]” and “[w]e have purchased the other 6.0MIL and are holding back to stage the shipments.” On November 4, 2017, TSI informed FEMA that 695 containers had been shipped and that four containers with twenty pallets each, with each pallet containing 18,240 liters, had not yet been shipped. Bilateral modification P0001 was issued on November 6, 2017, decreasing the water quantity from 80,000,640 liters to 12,479,040 liters. This reduced the initial order quantity by 67,521,600 liters.

Approximately three years later, on October 20, 2020, TSI submitted an invoice seeking payment of \$13,504,192 from FEMA for the CLIN 0005 restocking fee resulting from the 67,521,600 liter reduction. FEMA rejected the invoice, stating that CLIN 0005 was never funded. On November 20, 2020, TSI submitted a certified claim to the contracting officer for \$13,504,320 for the restocking fee. The claim stated that TSI was entitled to a restocking fee of \$0.20 per liter for the entire reduction in quantity of 67,521,600 liters.

On April 30, 2021, the contracting officer issued a final decision, disagreeing with TSI’s interpretation that it was entitled to a restocking fee of \$13,504,320 for the cancelled water but finding that, under CLIN 0005, TSI was entitled to be compensated \$14,562 for the four pallets of 18,240 liters each that had not been shipped. The contracting officer concluded that TSI was entitled to a restocking fee of \$14,592 for reduced quantities (four containers x 18,240 liters x \$0.20 per unit restocking fee = \$14,592).

The contracting officer explained further that CLIN 0005

is intended to cover vendor costs where the vendor relied on FEMA's original ordered quantity to its detriment because it obtained quantities that are no longer needed by the Government and the vendor subsequently must expend funds to return, re-route or store the unneeded quantities. It is not intended to provide an economic windfall for a contractor that has not incurred costs to "restock" bottled water.

TSI appealed the final decision to the Board and moved for summary judgment, requesting \$13,504,320 for the full restocking fee. FEMA filed an opposition to the motion and cross-moved for summary judgment, asking the Board to determine whether CLIN 0005 applied to the quantity of liters restocked or to a decrease in ordered quantity.

Discussion

TSI's Motion for Summary Judgment

TSI argues FEMA disregarded the language of CLIN 0005 by turning the fixed priced CLIN into a cost-reimbursable CLIN requiring TSI to prove the actual incurred costs for restocking the bottled water. First, TSI asserts that under the plain and unambiguous language of CLIN 0005, TSI is entitled to the per-liter restocking fee for each liter decreased when FEMA lowered the ordered quantity by 67,521,600 liters. TSI claims that the contract's first sentence establishes the required event for when CLIN 0005 is triggered and that is when the "initial ordered quantity either decreases or the order is cancelled." TSI then interprets the second sentence, which says the fee "covers the costs of restocking," as providing the rational and legal consequences of the restocking fee instead of a criterion for when CLIN 0005 is applicable. TSI argues that the language does not say anything about reimbursement or actual costs incurred.

TSI contends that CLIN 0005 is a fixed cost, negotiated fee in lieu of a reimbursement of actual costs. TSI interprets CLIN 0005 as a "penalty" that FEMA must pay when it decreases the initial ordered quantity, regardless of the contractor actually incurring restocking or cancellation costs. TSI states that since CLIN 0005 was included as a fixed-price CLIN rather than a cost-reimbursement CLIN, FEMA had not intended for the contractor to recover only actual, incurred costs. TSI argues that the contracting officer's final decision was unreasonable because FEMA's interpretation of CLIN 0005 added words to the contract and changed the fixed-price nature of the contract by requiring the contractor to prove damages or harm.

FEMA's Cross-Motion for Summary Judgment

Respondent's motion states:

There is no dispute that the Restocking Fee applies. There is no dispute that the Restocking Fee is valid, and that the unit price is fair and reasonable. There is no dispute that the relevant language defining the Restocking Fee is the aforementioned language in the SOW.

The dispute is limited to determining the proper quantity to which the Restocking Fee unit price should apply. FEMA believes that the applicable quantity should be the number of liters restocked as a result of a decreased order quantity, while TSI argues that the quantity should be determined solely by the decreased order quantity itself, regardless of whether any restocking occurs.

FEMA argues that the plain language of the CLIN requires it to pay the restocking fee to cover costs only "when a contractor must restock bottles of water due to a decrease or cancellation of an order." FEMA contends that TSI's interpretation renders the second sentence and the restocking title meaningless by only relying on the first sentence as the operative, or triggering, language. Instead, FEMA asserts that the commonsense reading of the entire CLIN means that the restocking fee applies only when restocking is necessary. FEMA argues that TSI's interpretation is further unsupported by the plain language of the title and two-sentence description of the CLIN when TSI redefines the restocking fee as a quantity reduction penalty or cancellation fee. FEMA asserts that the only reasonable interpretation that gives meaning to all portions of CLIN 0005 is that the restocking fee covers the costs of any restocking that occurs. FEMA explains that the negotiated restocking fee was a fixed-price instead of a cost-reimbursement fee because it was a simple way to pay for the restocking fees, and TSI would only have to show that it had to restock the bottles of water rather than demonstrate actual incurred costs.

Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). It is established that when both parties move for summary judgment, the Board will evaluate each party's motion on its own merits and resolve all justifiable inferences against the party whose motion is under consideration. *CH2M-WG Idaho, LLC, v. Department of Energy*, CBCA 6147, 19-1 BCA ¶ 37,339, *motion for reconsideration denied*, 19-1 BCA ¶ 37,408; *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139.

Contract Interpretation

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).

Butte Timberlands, LLC v. Department of Agriculture, CBCA 646, 08-1 BCA ¶ 33,730 (2007).

Contract interpretation begins with the plain language of the contract, and if the plain language is unambiguous, the inquiry ends. *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). The parties present the issue as one of contract interpretation – whether a restocking fee applies when FEMA decreased or cancelled the initially ordered quantity versus whether it applies to the quantity actually restocked when the order was decreased. While TSI interprets CLIN 0005 as a quantity-reducing penalty, FEMA interprets it as compensation for restocking supplies. The Board looks at the objective reading of the language to determine the nature of the contract and not the parties' characterization of the provision. *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285.

Reading the contract as a whole, as precedent requires, the Board is led to the conclusion that in order for TSI to recover restocking fees, more must occur than FEMA simply decreasing or cancelling the number of liters ordered. There must be proof that the supplies were actually restocked and a fee was charged for that restocking. To hold any other way would read the term “restocking fee” out of the contract.

Thus, to recover restocking fees, TSI must prove that the fees were actually incurred and explain the chain of events leading up to them being paid. The record is unclear as to where in the shipping process the liters were when they were decreased, and how the supplies were treated by the suppliers. Also, it is not clear to what extent TSI actually paid restocking fees and to whom they were paid. Based on the foregoing, the record must be further developed to support a finding in favor of TSI.

The Board also finds that there are genuine issues of material fact as to whether TSI suffered actual harm when FEMA reduced the task order quantity. TSI claims to owe its supplier a fee of “Original Supplier Cost + 6%,” which includes the supplier’s \$0.05 per liter restocking fee. However, there is no evidence in the record, aside from TSI’s declaration, that TSI paid the supplier for the reduced quantity. Therefore, the Board denies TSI’s motion for summary judgment.

FEMA’s Interpretation

FEMA’s cross-motion for summary judgment is not really a motion for summary judgment. It is more of an argument that the Board should accept FEMA’s interpretation that a restocking fee should not be paid simply as a result of a decrease in the order quantity. In denying TSI’s motion, we concluded that more than simply cancelling or decreasing the order is needed to require payment of a restocking fee. Still, the record is not sufficiently developed to grant summary judgment in favor of FEMA. Among other things, we need further evidence of whether TSI was charged a restocking fee by its vendors and the circumstances under which those restocking fees were charged. It is unclear from the record if any supplies were actually restocked, thereby incurring a restocking fee. According to the complaint, the contracting officer found that TSI was entitled to a restocking fee of \$14,592 for reduced quantities (four containers x 18,240 liters x \$0.20 per unit restocking fee). However, TSI argues that the contracting officer misinterpreted the November 4, 2017, email and that the four containers were shipped on a second barge and paid for by FEMA. The Board is unable to determine whether the four containers mentioned by the contracting officer represented the restocked quantity or if the four containers had shipped and were already paid for by FEMA. The Board cannot grant a motion for summary judgment until these and other pertinent facts are more fully explained.

Decision

Appellant’s motion for summary judgment is **DENIED**. Respondent’s motion for summary judgment 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