UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, ex rel.
MARY J. PATZER and PETER CIMMA,
Plaintiffs,

v. **Case No. 11-C-0560**

SIKORSKY AIRCRAFT CORPORATION,
SIKORSKY SUPPORT SERVICES, INC., and
DERCO AEROSPACE, INC.,
Defendants.

DECISION AND ORDER

The United States alleges that defendant Sikorsky Support Services, Inc. ("SSSI") breached its contract with the Navy and violated the False Claims Act ("FCA") by subcontracting with its affiliate, defendant Derco Aerospace, Inc., on a cost-plus-a-percentage-of-cost ("CPPC") basis. In prior orders, I addressed several matters relating to the measure of damages. (ECF Nos. 312 & 329.) I assume that the reader is familiar with those orders. Before me now is the government's motion for reconsideration of my ruling that "procurement services" are allocable to the prime contracts' parts-and-materials contract line items ("CLINs").

The government first argues that my prior ruling amounts to a *sua sponte* grant of summary judgment that did not comply with Federal Rule of Civil Procedure 56(f)(3), which requires notice and an opportunity to respond. However, I issued the prior order as part of a decision on defendants' motion for "clarification" of my original decision on the parties' motions for summary judgment. Thus, the standards governing summary judgment necessarily applied to the prior order. Further, in their motion for clarification,

defendants argued that the allocation issue presented a question of contract interpretation for the court, and the government did not respond by arguing the issue involved a question of fact for the jury. Accordingly, I determined that I could resolve the issue as a matter of law under Rule 56.

In any event, to the extent that the government was entitled to notice and a reasonable opportunity to respond, my prior decision would qualify as such notice, and I will treat the government's motion for reconsideration as its response. Although a movant ordinarily must satisfy a higher standard to prevail on a motion for reconsideration, *see Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000), I will not hold the government to that standard here but will consider the arguments it makes in the motion for reconsideration de novo.

Turning to those arguments, I first address the government's interpretation of the contracts' text. In the prior order, I determined that three textual elements showed that procurement services were allocable to the parts-and-materials CLINs rather than the fixed-price CLINs for on-site support. First, the prime contracts separately required SSSI, on the one hand, to "provide On-Site Support Center Services," and, on the other, to "provide through FAA approved sources" the parts and materials necessary to maintain the aircraft. (Prime Contract §§ C-2.c & C-2.t, ECF No. 260-1 at 515, 517.) Second, the pricing notes to the parts-and-materials CLINs stated that the contractor was entitled to recover its "normal material burdens" or "indirect costs" and listed "outsourcing the procurement service associated with processing the orders for direct parts, repair parts, and/or materials" as an example of a recoverable indirect cost. (Prime Contract § B-5.f, ECF No. 260-1 at 513, Bridge Contract § B-1.g, ECF No. 260-2

at 5 of 163.) Third, the Performance Work Statement ("PWS") that described the work associated with the fixed-price CLINs for on-site support did not specifically list procuring parts and materials as a responsibility associated with those CLINs. (PWS Section 4, ECF No. 322-1 at 24–47.)

The government challenges my interpretation of the PWS. It notes that the PWS provisions describing on-site support services required the contractor to "maintain" the government's "inventory of parts" (PWS § 4.30.1), and it contends that this necessarily included procuring the parts necessary to replenish the inventory. However, I addressed this possibility in the prior order and determined that the specific tasks described in the PWS related to management of the on-site inventory (such as implementing a computerized inventory-management system) rather than to performing the administrative work necessary to acquire replacement parts from third-party vendors. (ECF No. 329 at 10–11.) Nothing in the government's motion for reconsideration convinces me that this interpretation was erroneous.

The government also contends that the prime contracts' separating the requirements of on-site support and providing parts through FAA-approved sources does not imply that providing parts was allocated to the parts-and-materials CLINs. The government argues that the parts requirement merely specifies that the Navy would not accept parts from non-FAA approved sources. However, the full text of the parts provision, when read in the context of the section of the contract in which it appears, shows that it does more than define acceptable parts vendors. It provides, in full, as follows:

> CLIN's X023 and X045 – Parts and Material. The Contractor shall provide through FAA approved sources, services and material for repair,

> replacement or overhaul of components and parts and subscription services required to support CLIN's[.]

(ECF No. 260-1 at 517.) Here, use of the phrase "shall provide" parallels how that phrase and related phrases (such as "shall perform") are used in the other provisions that appear in the "Requirements" section of the contract. (Prime Contract § C-2.) Each provision identifies the work that the contractor must perform under the related CLINs. For example, one requirement states that the contractor "shall perform, at the Government sites stated in Section B, all fixed maintenance associated with the aircraft, avionics, engines and associated equipment as specified in Section 2 of the PWS." (*Id.* § C-2.a.) Another states that the contractor "shall provide overhaul services for the T-34 and T-44 propeller assemblies as specified in Section 20 of the PWS." (*Id.* § C-2.g.) These provisions create the contractual obligations to perform the work—fixed maintenance and overhaul services, respectively—and do not specify how work identified in other contractual provisions must be performed. Given this usage, it would be anomalous to interpret the "shall provide" language in the description of the parts-and-materials CLINs as doing nothing more than imposing a limit on where the contractor may obtain parts. To be consistent, this provision must be interpreted as also creating the contractual requirement to procure parts in the first place.

The government also takes issue with my reliance on the contractual language allowing the contractor its "normal material burdens" and "indirect costs." First, the government contends that such language does not control the scope of SSSI's claim for *quantum meruit*, since a claim for *quantum meruit* is not based on the written contract. Although I agree that a claim for *quantum meruit* is not based on the written contract, here the written contract is still relevant to determining which aspects of SSSI's

performance were allocated to the fixed-price CLINs for on-site support and which were allocated to the cost-reimbursable CLINs for parts and materials. Only aspects of SSSI's performance that were allocated to the parts-and-materials CLINs are includable in SSSI's claim for *quantum meruit*. (ECF No. 312 at 61–64.) The reason I relied on the language allowing SSSI its "normal material burdens" and "indirect costs" was to show that the contract contemplated that SSSI would receive, under those CLINs, more than just reimbursement for the cost of parts and materials. In the context of the contract, this additional reimbursement was likely for the administrative aspects of parts procurement. As noted, the Bridge Contract specifically identifies "the procurement service associated with processing the orders for direct parts" as the kind of indirect cost that was reimbursable under the parts-and-materials CLINs. (ECF No. 260-2 at 5 of 163.)

Second, the government emphasizes that the pricing notes merely implement the general rule stated in 48 C.F.R. § 31.201-1(a) that a contractor may recover its total direct and indirect costs under a cost-reimbursable contract. However, that rule does not undermine the broader point that SSSI was entitled to recover something above the fair market value of the parts under the cost-reimbursable CLINs. The fair market value of the parts was SSSI's direct cost, and the contractual language and the regulation confirm that SSSI was entitled to also recover its indirect costs under those CLINs. This, in turn, implies that the contract did not allocate the indirect costs associated with procuring parts and materials to the on-site support CLINs.

Besides the textual arguments discussed above, the government points to the undisputed fact that, in its proposal to the Navy, SSSI allocated the positions of "Logistics Manager" and "Buyer/Purchasing Agent" to the on-site support CLINs. (Defs.

PFOF ¶ 24, ECF No. 240.) Defendants' evidence indicates that the on-site buyers were responsible for certain procurement services, including "sourc[ing] . . . parts and repairs from Government approved vendors" and issuing the purchase order to the vendor. (Decl. of Richard Bailey ¶¶ 8–11, ECF No. 241-18.) I conclude that this evidence does not establish that the contractual language discussed above allocates procurement services to the on-site support CLINs. However, SSSI's proposal became a part of its contract with the Navy (*see* Defs. PFOF ¶ 33), and therefore I also conclude that the proposal is an additional source of limitations on SSSI's *quantum meruit* claim. Because the proposal specifically assigned the work of the logistics managers and buyers to the on-site support CLINs, SSSI cannot claim the value of any services performed by those workers as part of its claim for *quantum meruit*. SSSI already received the benefit of its bargain through the fixed price it agreed to accept for providing on-site support. Thus, the government is not required to pay SSSI for those services a second time through the claim for *quantum meruit*, even if the services performed by on-site support staff could be described as procurement services.[1]

[1] SSSI notes that, in its proposal, the labor cost of the on-site Derco employees was priced at 0, and it claims that therefore the government never paid SSSI anything for the services performed by those employees. To the extent that SSSI means to argue that therefore it may recover the value of those employees' services in *quantum meruit*, I reject that argument. SSSI offered to provide such services to the government in exchange for the price the government agreed to pay for on-site support. Thus, the price that SSSI received for on-site support is the only consideration it was entitled to receive for the work of those employees. The CPPC violation does not render that part of the parties' agreement void, and therefore SSSI cannot be compensated for the work of the on-site employees in *quantum meruit*.

Although the on-site buyers appear to have performed some of the work that I have described as procurement services,[2] this does not mean that there is nothing left of SSSI's *quantum meruit* claim for such services. SSSI also points out that Derco employees performed services such as "quality assurance, commodities research, finance, program management, and training/supervision of the on-site buyers." (ECF No. 341 at 3 of 5.) These administrative aspects of procurement are potentially includable in SSSI's claim for *quantum meruit*, since they provided value to the Navy and were not necessarily performed by on-site support staff. Moreover, these are the kinds of tasks that would seem to fall under the "normal material burdens" and "indirect cost" language of the parts-and-materials CLINs. *See* 48 C.F.R.§ 52.216-7(d)(2)(iii)(C) (overhead expenses are part of indirect costs).

Accordingly, I will not change my prior ruling that the contract allocates procurement services to the parts-and-materials CLINs. However, I will clarify that, to the extent that Derco's on-site buyers and logistics managers performed procurement services, those specific services are not recoverable under the parts-and-materials CLINs.[3]

The government also contends that, because the work of the on-site buyers is allocable to the on-site support CLINs, I should reinstate my holding that defendants have the burden of proving that Derco provided some other procurement services that

[2] To be clear, I am not determining, as a matter of summary judgment, that on-site support staff performed any specific procurement service. The extent of the procurement services performed by on-site personnel presents a factual issue for trial.

[3] The government also asks me to clarify that the services provided by "the IFS system" are not allocable to the parts-and-materials CLINs. (ECF No. 330 at 4 of 5.) I address this issue in more detail in my decision, issued today, on the government's motion to exclude the expert testimony of Garry Richey.

are compensable under the parts-and-materials CLINs, and of proving the value of those services. However, the government has the ultimate burden to prove its damages. *See* 31 U.S.C. § 3731(d). When I previously held that defendants had the burden to identify compensable services and their value, I was concerned about requiring the government to prove a negative. (ECF No. 329 at 17.) In my last order, I determined that because defendants had identified the services that they will claim in *quantum meruit*, requiring the government to prove the value of those services would not require it to prove a negative. (*Id.*) Nothing in this order changes that fact. Defendants now indicate that they will claim that SSSI is entitled to recover in *quantum meruit* the value of Derco's administrative procurement services, such as "quality assurance, commodities research, finance, program management, and training/supervision of the on-site buyers." (ECF No. 341 at 3 of 5.) Further, the expert testimony of Garry Richey identifies the universe of services that defendants could claim as "procurement services" (*see* Richey Report at 13–46, ECF No. 260-28), and in my decision on the government's motion to exclude his testimony, I identify which of those services are potentially includable in the *quantum meruit* claim. The government may carry its burden of proof at trial by proving the amount by which its payments to SSSI exceeded the value of the parts plus any of the identified services that were not performed by Derco's on-site personnel.

For the reasons stated, **IT IS ORDERED** that the government's motion for reconsideration (ECF No. 330) is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted to the extent that I clarify that any procurement services actually

performed by on-site personnel are not recoverable in *quantum meruit*. In all other respects, the motion is denied.

Dated at Milwaukee, Wisconsin, this 6th day of March, 2024.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge