MINUTEMAN AVIATION, INC.,	)	**AGBCA No. 98-201-1**
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Appellant	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

December 8, 1999

Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

This appeal arose under Contract No. 53-03R6-6-L0015 awarded to Minuteman Aviation, Inc. (MAI or Appellant) on May 17, 1996, to provide "exclusive use helicopter service" to the Forest Service (FS or Government) in the Lolo and Bitterroot National Forests in Montana, for use in the administration and protection of public lands. The required period of availability on the base year contract was from June 15 to September 15, 1996, a period of 92 days. The contract provided for 2 renewal years. This dispute arose during the performance of the first renewal year. In a claim dated July 24, 1997, MAI claimed entitlement to an equitable adjustment of $6,765 for the cost difference in paying its fuel truck driver according to the Department of Labor wage determination for medium truck drivers rather than light truck drivers.

The Board's jurisdiction derives from the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended.

Appellant has appealed the Contracting Officer's (CO's) decision denying its request for an equitable adjustment for paying the driver of its fuel truck the Department of Labor minimum hourly rate payable for medium trucks, rather than the rate for light trucks. Based on the following reasoning, the appeal is denied.

The parties have agreed that this appeal should be decided on the written record pursuant to Board Rule 11.

FINDINGS OF FACT

1. Contract No. 53-03R6-6-L0015 (the contract) to provide "exclusive use helicopter services" in the Lolo and Bitterroot National Forests was awarded to MAI by the FS on May 17, 1996. The CO was Harlan Johnson. (Appeal File (AF) 80-81.) The mandatory availability period for the aircraft during the base contract year was June 15-September 15, 1996 (AF 88).[1] The contract period was 1 calendar year from date of award. The contract provided for two additional 1-year periods at the option of the Government. (AF 134.) The Government exercised the options (AF 40, 62).

2. The contract required Appellant to furnish two single turbine helicopters each with a one pilot crew (AF 89). An approved fuel servicing vehicle (truck, pump house or trailer) was to be provided with each helicopter. (AF 116-17.)

3. The solicitation contained clause I-8 SERVICE CONTRACT ACT OF 1965 (FAR 52.222-41 (MAY 1989)) providing in (c) (1), "Compensation," that each service employee employed to perform under the contract shall be paid not less than the minimum wages and fringe benefits specified in *"any wage determination attached to this contract"* (emphasis supplied). The clause in (c) (2) (i) provided guidance for classifying any class of employees *"not listed therein"* (emphasis supplied). (AF 364, 65.) That guidance included reference to the way different jobs are rated under the Federal pay systems. Clause I-9 STATEMENT OF EQUIVALENT RATES FOR FEDERAL HIRES (FAR 52.222-42 (MAY 1989) of the solicitation showed the employee class of "Service Truck Driver" at a rate for monetary wages and fringe benefits of "GS-5 $9.52."

4. The solicitation also contained clause I-10 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT--PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (FAR 52.222.43) (MAY 1989) providing in paragraph (d) as follows:

> (d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease inn [sic] applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

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[1] Clause C-1, SCOPE OF CONTRACT, provides that during the mandatory availability period and any extensions thereof, the aircraft will be made available for the exclusive use of the Government (AF 103).

> (1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. For example, the prior year wage determination required a minimum wage rate of $4.00 per hour. The Contractor chose to pay $4.10. The new wage determination increases the minimum rate to $4.50 per hour. Even if the Contractor voluntarily increases the rate to $4.75 per hour, the allowable price adjustment is $.40 per hour;
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> (2) An increased or decreased wage determination otherwise applied to the contract by operation of law; or
>
> (3) An amendment to the Fair Labor Standards Act of 1938 that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law.

(AF 372.)

5. The contract contained clause I-7, CHANGES--FIXED PRICE (FAR 52.243-1) (ALT 1) (APR 1984).

6. The solicitation contained Department of Labor (DOL) Service Contract Act (SCA) wage determination No. 94-2317, revision No. 2, dated April 19, 1995. This determination applied to all counties in the state of Montana and contained minimum wage rates for many listed occupations (six pages of listings). Relevant to this appeal are the minimum hourly wages required to be paid to drivers of light trucks ($7.27) and drivers of medium trucks ($12.40). (AF 405-13.) The notes applying to the wage determination informed bidders that duties of the employees of the listed job titles are described in a publication, "Service Contract Act Directory of Occupations," Fourth Edition, January 1993, obtainable from the Superintendent of Documents (AF 412).

7. The "Service Contract Act Directory of Occupations" provides that, for wage study purposes, "Truck drivers are classified by type and rated capacity of truck, as follows," in pertinent part: "31361, TRUCKDRIVER, LIGHT TRUCK (straight truck, under 1-1/2 tons, usually 4 wheels); 31362, TRUCKDRIVER, MEDIUM TRUCK (straight truck, 1-1/2 to 4 tons inclusive, usually 6 wheels). . . . Rated capacity is the gross vehicle weight minus the empty weight of the vehicle" (Government Brief, Exhibit A).

8. The wage determination included in a prior solicitation for helicopter services was wage determination No. 80-0256, revision No. 19, last revision date December 5, 1994. This determination was a nationwide wage determination. Wage determination No. 80-0256 provided the following relevant minimum hourly wages for truck drivers: Light Truck (straight truck, under 1-1/2 tons, usually 4 wheels) $9.51; Medium Truck (straight truck, 1-1/2 to 4 tons inclusive, usually 6 wheels)

$10.70." The record contains pages 1 and 2 of 4 of wage determination No. 80-0256. Page 2 provides job descriptions for First Officer (Co-Pilot) and Aircraft Cleaner and directs the readers to the SCA "Directory of Occupations" for remaining classifications. (AF 466-67; Supplemental Appeal File (SAF) 2, 3.)

9. Clause G-1, MEASUREMENT AND PAYMENT, paragraph (K), PAYMENT FOR FUEL SERVICING VEHICLE provides that mileage for the fuel servicing vehicle will be paid at the rate of $.75 per mile when carrying capacity of aircraft fuel is less than 350 gallons and at the rate of $1 per mile when the carrying capacity is at least 350 gallons but less than 750 gallons.

10. Appellant's bid was prepared by its Controller.[2] Appellant has presented the Controller's Affidavit as an attachment to its reply brief and the Government interposed no objection to its submission at that time. In paragraph 3, he states that he reviewed the solicitation for Contract No. 53-03R6-6-L0015. He also states that Appellant had previously bid these contracts and had always paid the truck driver the wage of a light truck driver, unless a truck larger than a pickup was used. He further states that the "wage classifications" were based on previous bid solicitation documents and revised wage determinations that "did not indicate that rated and current capacity was the manner prevailing or determining factor in the categorization of truck drivers." He also avers that the information provided on "the publications from the Forest Service and Department of Labor clearly indicate that the pickups we used were of the 'light classification.' " He does not identify the publications to which he refers. (Controller Affidavit.)

11. In paragraph 4 of his Affidavit, the Controller avers that the solicitation for the subject contract contained no reference to "rated capacity" requirements or characteristics of the individual truck driver categories. He found the solicitation "quite understandable" as to the categories of truck drivers and that there had been no apparent change in the categories from Appellant's past experience so Appellant "bid the project consistent with our past experience of paying light truck wages for pickups." (Controller Affidavit.)

12. The dispute arose during the first renewal year. The truck driver, in question, was employed by Appellant from June to September 1997. His primary responsibility was to drive and maintain the fuel truck assigned to support the Bell helicopter. When hired, he was informed his salary would be $9.51 an hour. His first paycheck, however, indicated that he was being paid at the rate of $7.27 an hour. The difference between the promised pay of $9.51 per hour and the actual pay of $7.27 per hour led him to read the contract. In so doing, he discovered that he was being paid at the rate payable to the driver of a light truck. His previous experience with pickup trucks suggested to him that the truck he was driving was a medium rather than a light truck. If its rated capacity were within the range of a medium truck rather than a light truck, he would be in the category to be paid $12.40 an hour rather than $7.27 an hour. This motivated him to research the rated capacity of the truck he was driving. According to the driver's Declaration, the fuel truck used by Appellant was a 1977 Chevrolet 2500

[2] The record also contains references to this individual as Chief Financial Officer. Both terms refer to the same individual. The term "Controller" is used throughout this decision.

pickup, a type commonly referred to as a 3/4 ton pickup, denoted by the 2500. Mounted on the rear bed of the 3/4 ton pickup was a 350-gallon tank in which aviation fuel was stored. To confirm whether he was the driver of a "light truck" or a "medium truck," the driver contacted a local Chevrolet dealership for information of the 1977 Chevrolet 2500 3/4 ton pickup. There he learned the pickup's empty vehicle weight. Gross weight is the weight fully loaded with all modifications for use. When the truck was completely filled with aviation fuel, the driver drove it to a local weigh station to get the gross weight. By subtracting the empty vehicle weight from the gross vehicle weight, he determined that the "rated capacity" of the truck was within the limits of a medium, not a light truck. Thus, he concluded that he was entitled to the pay of $12.40 an hour. During this period, the driver was in contact with DOL. (Driver's Declaration.)

13. The rate of $7.27 an hour which Appellant paid the driver is the contractual minimum rate required for drivers of light trucks. The solicitation for this contract is the only place in the record where that rate is found.

14. While Appellant argues that it "logically" used the light truck wage rate to prepare its bid, it does not present persuasive evidence that the truck was not a medium truck.

15. When his inquiries to Appellant caused the driver to deduce that Appellant did not intend to pay the rate for a medium truck driver, he contacted the CO. The CO told the driver that if he wished to pursue the matter, he should make a written complaint to be submitted to the DOL. (Driver's Declaration.) The driver made his written complaint in a July 9, 1997 letter to the CO in which he stated Appellant had informed him that the fuel truck was a light duty truck with a rate of pay of $7.27 per hour. The driver stated his understanding that the truck should be classified as a medium duty truck at the rate of $12.40 per hour and asked the CO to contact him with his findings. (AF 484.)

16. The CO also spoke with Appellant's Controller during this period. Appellant quotes the CO as agreeing with the Controller that the light truck driver classification appeared correct (AF 33; Complaint at ¶ V; and Appellant's brief at 2, ¶ 5). The CO declares that this single conversation of less than 15 minutes has been overplayed in that he did no research, but merely concurred in the Controller's conclusion that the truck as described by the Controller sounded like a light truck. He also emphasizes that the conversation was post-award. (CO Declaration.)

17. In his declaration, the CO stated that under the contract Appellant had the choice of the size of fuel truck. The contract required a helicopter which could perform for a sustained 8-hour period and a fuel truck for providing the necessary fuel. It left to the contractor the choice of equipment which met these specifications. To meet the requirement of supplying sufficient fuel for 8 hours of sustained flight time, Appellant needed to use a fuel truck capable of carrying 216 gallons of fuel. The CO avers that Appellant's mileage payment under the contract indicated it was using a truck with a tank capable of carrying between 350 and 750 gallons of fuel. Aviation fuel weighs 7 pounds per gallon. The difference between the contractually required capacity of 216 gallons of fuel and a tank with a capacity of at least 350 gallons is an increase in gross weight of almost 1/2 ton. Using a tank with increased capacity was Appellant's choice. (CO Declaration.)

18. The CO based his conclusion that the truck was capable of carrying between 350 and 750 gallons of fuel on the fact that Appellant invoiced at the rate of $1 per mile indicating he used a truck with the carrying capacity of at least 350 gallons (CO Declaration). The driver, who was familiar with the vehicle, stated that a 350-gallon tank was mounted on the truck to carry aviation fuel. The Board concludes that the truck's fuel tank was capable of carrying 350 gallons of aviation fuel. Appellant has presented no evidence that it limited its fuel purchase to 216 gallons of fuel. Based on Appellant's invoices at the rate for at least 350 gallons and the driver's description of the tank capacity, the Board concludes that the vehicle carried 350 gallons.

19. The weight of 216 gallons of fuel at 7 pounds per gallon is 1,512 pounds. The weight of 350 gallons of fuel at 7 pounds per gallon is 2,450 pounds. Use of a 350-gallon tank added 938 pounds in fuel weight.

20. As a result of inquiries from the parties to this contract, the DOL initiated a limited investigation into the payment of SCA wages under the contract. The DOL concluded based on information from both the FS and Appellant that the rated capacity of the truck used in performance of the contract was in the range of a medium truck. Therefore, the driver should have been paid the medium truck rate of $12.40 an hour. By letter dated August 6, 1997, the DOL notified Appellant that it was in violation of the monetary and record-keeping provisions of SCA. The CO was furnished a copy of the letter. The DOL requested that Appellant remedy the under payments within 10 days and provide certain requested information to the DOL within the same period of time. The DOL expressed the hope that this investigation could be concluded as a limited investigation. The DOL stated that, as previously discussed with the Controller, if MAI had contractual claims with the FS, those claims were to be raised separate from payment of the required prevailing wages to the service employees working under the contract. (AF 476-78.)

21. In fact, Appellant had already submitted its claim on July 24, 1997. Therein, Appellant stated that it used the light truck wage rate "to bid the contract" for two reasons. The first reason was that the wage determination (#80-0256 rev. 19) under its previous contract defined light trucks as "under 1-1/2 tons, usually 4 wheels" and medium trucks as "1-1/2 tons to 4 tons, usually 6 wheels." MAI had used 3/4 ton, 4 wheel pickups for at least 5 years to provide fuel service for helicopters. Appellant therefore "logically referenced the light truck driver rates." Appellant's second reason was that the Statement of Equivalent Rates for Federal Hires rate of $9.52 (see Finding of Fact (FF) 3) for service truck drivers was at a greater variance below the $12.40 medium rate in the current wage determination than it was above the $7.27 rate for light truck drivers. (AF 33.)

22. In the claim letter, Appellant stated that in a phone conversation with the Controller, the CO concluded that the light truck driver rate "appeared proper." It referred to conversations with the DOL and stated that the DOL representative had stuck to the detailed description relative to rated capacity and said that the number of wheels was "a bad example and should not have been included." Appellant said that if it were to pay the higher wage rate for a medium truck driver, then it asked for an increase in the daily availability rates. Appellant then went on to suggest paying the driver as truck

driver at a rate "to be clarified" when driving and a laborer rate when not actually driving. Appellant planned no wage changes until a written response was received. (AF 33-4).

23. By letter dated September 11, 1997, the DOL informed the CO that Appellant had corrected the violations and that final payment and receipt of documentation was due within 3 weeks (AF 480).

24. The CO issued his findings and decision denying Appellant's claim in the amount of $6,765 on June 23, 1998. On September 15, 1998, after Appellant received the CO's decision and before he appealed it, Appellant wrote a letter to the CO referring to the $6,765 claim for the 1997 season and $74 per day "for the current season." Appellant appealed to this Board by a letter dated September 18, 1998. The appeal was received at the Board September 28, 1998. The appeal letter which the Board accepted as a Complaint stated the amount of the claim to be $14,270, being $6,765 for the 1997 fire season and $7,505 for the 1998 season.

DISCUSSION

A board of contract appeals has jurisdiction to resolve disputes involving contract rights and obligations even if labor standard issues within the exclusive jurisdiction of the DOL form the partial factual predicate of the dispute between the parties. Burnside-Ott Aviation Training Center, Inc. v. United States, 985 F.2d 1574 (Fed. Cir. 1993). Here, as in Burnside-Ott, the contractor paid the increased wages as required by DOL and seeks a determination whether it is contractually entitled to be compensated under the contract. The Board has jurisdiction to decide the appeal under the CDA.

Appellant's Contentions

Appellant contends it is entitled to recover as a constructive change; under a theory of unjust enrichment or *quantum meruit*; under clause I-10; and under the theory of mutual mistake (Appellant's Opening Brief, (pages) pp. 6, 7; Reply Brief, pp. 3, 6). The claim accrued during 1997, the first option year and the claim submitted July 24, 1997, was for an equitable adjustment in the amount of the difference between the wages paid using the medium truck driver rate and what Appellant would have paid using the light truck driver rate for that year. The option was exercised for 1998 and wage costs at the higher rate were experienced in that year also. Appellant argues that when the only change to its claim is the amount, the Board has jurisdiction even though the decision of the CO addressed only the lesser amount. Moreover, Appellant argues that a claim was submitted for the costs incurred in the second option year by letter dated September 15, 1998 and that the CO failed to respond. (Appellant's Opening Brief, pp. 4, 5.)

Government's Contentions

The Government disputes Appellant's mutual mistake argument. Rather, the Government argues that Appellant made an erroneous business judgment in classifying the fuel truck as a light truck, and that Appellant increased the rated capacity of its service truck. The Government also contends that there was no wage determination change by operation of law; the contract was not ambiguous; Appellant's

past practice is without merit as a basis for an equitable adjustment; and, the Government cannot be bound by unauthorized acts of its employees. (Government's Brief, pp. 5, 6, 9, 16, 18-21.)

Jurisdiction to Decide Claim for Increased Wages Paid in 1998

Appellant's original claim requested an equitable adjustment for costs incurred during 1997, the first option year. Subsequently, the Government exercised the option for performance during the 1998 fire season. Appellant experienced additional costs during that season as well. The Complaint alleges the amounts for both years. The operative facts are identical for both periods. The Board has jurisdiction to decide the claim for the 1998 amounts as well, notwithstanding the fact that the CO's decision mentioned only the costs for 1997. Tecom, Inc. v. United States, 732 F.2d 935 (Fed. Cir. 1984).

Entitlement to an Equitable Adjustment for the Direction to use the Medium Truck Driver Wage Rate

The Board here addresses only the question whether Appellant is entitled to be compensated under the contract for the difference between the wages paid using the medium truck rate and what would have been paid absent the DOL determination that the light truck rate was not applicable. The Board lacks jurisdiction to set aside the DOL determination.

The contract required Appellant to pay wage rates commensurate with the wage determination attached to the contract (FF 3). It is undisputed that the wage determination attached to the contract required the contractor to pay drivers of light trucks at the rate of $7.27 per hour and drivers of medium trucks at the rate of $12.40 per hour (FF 6). In preparing its bid, Appellant had the responsibility to identify the equipment it would use, determine the classification of the equipment and include its costs at the proper amount. The wage determination provided that trucks are classified "by type and rated capacity of truck." For each classification it provided the "type" and "the rated capacity" and then went on to state how many wheels each type "usually" had. Use of the conditional term "usually" should have alerted a bidder that "type" and "rated capacity" were more definite predictors of a truck's classification than the number of wheels. A bidder seeking to properly classify a truck in order to price his bid should have seen that he had two unconditional factors (type and rated capacity) and one conditional factor (number of wheels) to weigh in making that determination. The bidder was also directed to a document providing descriptions of the various occupations, the "Service Contract Act Directory of Occupations," Fourth Edition, January 1993, obtainable from the Superintendent of Documents. The definition of truck driver in that document provided the following definition for "rated capacity": "Rated capacity is the gross vehicle weight minus the empty weight of the vehicle." (FF 7.)

The solicitation, therefore, unambiguously, provided adequate information for a bidder to determine truck type and rated capacity and therefore the appropriate wage rate. Appellant did not use this information. Instead, according to Appellant's claim, Appellant bid the wage rate for its fuel truck driver by using the wage determination from a previous solicitation and by making an extrapolation from clause I-9, STATEMENT OF EQUIVALENT RATES FOR FEDERAL HIRES. (FF 21.) The Controller's Affidavit provides a different description of the bidding process. There he indicates that

while he reviewed the solicitation, he bid based on previous bid solicitations and revised wage determinations that "did not indicate that rated and current capacity was the manner prevailing or determining factor in categorizing of truck drivers." He states FS and DOL publications clearly indicate "the pickups we used were of the 'light classification,'" but he neither identifies the publications nor provides an analysis of the information in those publications vis-a-vis Appellant's equipment. (FF 10.) Both of these described methods ignored the contract provisions in favor of looking outside the contract. The claimed use of clause I-9 disregarded the purpose it was included: to provide guidance for classifying jobs not listed in the contract (FF 3).

Only Appellant or someone with knowledge of Appellant's equipment as modified for use as a fuel truck could make the analysis necessary to determine whether the truck was a light or a medium truck. The CO's affidavit indicates that the truck could have been adapted to carry varying amounts of fuel and the truck in question was adapted to carry more fuel than needed to fulfill the requirements of this contract (FF 17). After the dispute arose, the truck driver used the contract and his knowledge of the truck's modifications to determine the proper classification of the truck (FF 12). When Appellant prepared its bid, it could also have applied the contract provisions to the specifications of its truck as modified.

It is clear from the evidence that Appellant reviewed the contractual wage determination because the rate of pay that Appellant initially paid ($7.27 per hour) was contained only in that determination (FF 6, 12). Appellant contends that it relied on the determination from the previous solicitation to conclude that the truck was a light duty truck. That determination provided for a wage rate of $9.51 for light truck drivers (FF 8). Thus, if Appellant relied on that earlier determination, it would follow that it would have bid and paid $9.51 per hour for a light truck driver.

Appellant relies on a post-award telephone conversation with the CO in which the CO agreed that the truck, as described by Appellant's Controller sounded like a light truck (FF 14). Appellant's attempt to shift the responsibility to the CO is misplaced. While the parties' evidence regarding the conversation or conversations between the CO and the Controller varies somewhat, it is clear that the conversation in question was post-award, and could not have influenced Appellant's bid decisions. (FF 16.) Thus, there can be no detrimental reliance and Appellant may not recover based on the conversation with the CO.

Appellant misreads clause I-10. Its plain terms indicate that its purpose is not to correct mistakes made in the bidding process. Its purpose is to provide a contractual mechanism for adjusting wage rates in the subsequent years of multiple year contracts when a new wage determination has changed the requisite rates to be paid. (FF 4.)

Appellant's arguments based on mutual mistake and unjust enrichment, or *quantum meruit* are rejected. Clearly, this is not a case of mutual mistake. Appellant made a business judgment error in relying on the previous wage determination rather than the determination in the solicitation when it decided which truck driver rate to use in calculating its bid. There is no evidence the Government shared in that error or was even aware of the equipment Appellant intended to employ or rate it used

in calculating the bid. Here, Appellant originally paid the light truck wage rate contained only in the contractual wage determination.

Appellant's argument based on unjust enrichment or *quantum meruit* appears to be an alternative argument to the constructive change and mutual mistake arguments. It is inapposite here and must fail. The doctrine of unjust enrichment, for which *quantum meruit* is a remedy, is an equitable one, applied to those situations where the rights and liabilities of the parties are not defined in a valid contract. Means Co., AGBCA No. 95-182-1, 95-2 BCA ¶ 27,837. Here a valid contract exists. The claim has been properly decided as an alleged constructive change. The facts of the case do not support recovery under any of the theories espoused.

DECISION

The appeal is denied.

ANNE W. WESTBROOK
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
December 8, 1999