UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL
SUMMARY RELIEF GRANTED IN PART: January 14, 2011

CBCA 1695

SERCO, INC.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

Rebecca E. Pearson and Jeffery M. Chiow of Venable LLP, Washington, DC, and J. Scott Hommer, III of Venable LLP, Vienna, VA counsel for Appellant.

Mark L. Hansen, Kimberly A. Manganello, Scott D. Sadler, and Andrew J. Seff, Office of the General Counsel, Pension Benefit Guaranty Corporation, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **SHERIDAN**, and **WALTERS**.

BORWICK, Board Judge.

This appeal involves a claim by the Pension Benefit Guaranty Corporation (PBGC or respondent) against Serco, Inc. (Serco or appellant), involving two time and materials labor hour contracts for database management services and information technology support. The contracting officer issued a decision on May 18, 2009, seeking appellant's reimbursement of $115,773 for alleged improper payments under the two contracts, including $84,769 for improperly billed subcontract labor, $24,894 for labor hour charges with insufficient time sheet support, and $6110 for charges billed through administrative error.

The parties have submitted cross-motions for partial summary relief on respondent's claim for repayment of improperly billed subcontract labor. We grant respondent's motion on that issue as to entitlement only. We conclude that appellant, or its predecessor contractors, billed respondent at its higher direct labor hourly rate for the subcontracted employees' services, rather than at the lower hourly rate appellant actually paid the subcontractors for those services. Appellant's arguments that it should be permitted to bill at the higher hourly rate are not persuasive and not in accordance with the plain meaning of the 2000 and 2002 versions of the Payments Under Time and Materials Labor Hours Contract clause. There are disputes of fact as to whether the amount owed is $75,588.16, the figure calculated by respondent[1], or $24,813.69, the figure calculated by appellant.

Background

The following facts are not disputed. Respondent administers the pension plan insurance termination program established by Title IV of the Employee Retirement Income Security Act of 1974, as amended, Pub. L. No. 93-406, 88 Stat. 829 (1974). Respondent's Statement of Undisputed Facts ¶ 1. Respondent funds its expenses through premiums it charges to employers, from plan assets of terminated plans, and from earnings on investment of terminated plan assets. *Id*. The money used by respondent to fund its contractual obligations does not come from the United States Treasury. *Id*.

Appellant's first predecessor, Innerbase Technologies, Inc. (Innerbase), was awarded contract PBGC-CT-01-0603 (the "01-0603 contract") on October 1, 2000. Respondent's Statement of Undisputed Facts ¶ 2. The contract, a labor hour contract for database administration and Unix support, was for a one-year base period and four one-year options. *Id*. Respondent exercised each of the one-year options and paid Innerbase or Serco a total of $28,299,955. *Id*.

The payments clause of the 01-0603 contract -- Payments Under Time and Materials Labor Hours Contract, 48 CFR 52.232-7 (2000) -- was incorporated by reference and provided as follows:

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[1] The difference between the contracting officer's determination of $84,769 over-billing of subcontract labor and the $75,588.16 identified by respondent in its statement of undisputed facts in its motion is $9180.84. That difference is not explained in the record.

The Government will pay the Contractor as follows upon the submission of invoices or vouchers approved by the Contracting Officer:

(a) *Hourly rate*. (1) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed. The rates shall include wages, indirect costs, general and administrative expense, and profit. Fractional parts of an hour shall be payable on a prorated basis. Vouchers may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer), to the Contracting Officer or designee. The Contractor shall substantiate vouchers by evidence of actual payment and by individual daily job timecards, or other substantiation approved by the Contracting Officer. Promptly after receipt of each substantiated voucher, the Government shall, except as otherwise provided in this contract, and subject to the terms of (e) below, pay the voucher as approved by the Contracting Officer.

(2) Unless otherwise prescribed in the Schedule, the Contracting Officer shall withhold 5 percent of the amounts due under this paragraph (a), but the total amount withheld shall not exceed $50,000. Reimbursable costs in connection with subcontracts shall be limited to the amounts paid to the subcontractor for items and services purchased directly for the contract only when cash, checks, or other form of payment has been made for such purchased items or services; however, this requirement shall not apply to a Contractor that is a small business concern.

(3) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis. If no overtime rates are provided in the Schedule and overtime work is approved in advance by the Contracting Officer, overtime rates shall be negotiated. Failure to agree upon these overtime rates shall be treated as a dispute under the Disputes clause of this contract. If the Schedule provides rates for overtime, the premium portion of those rates will be reimbursable only to the extent the overtime is approved by the Contracting Officer.

(b) *Materials and subcontracts*. (1) The Contracting Officer will determine allowable costs of direct materials in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract. Direct materials, as used in this clause, are those materials that enter

directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product.

(2) The Contractor may include reasonable and allocable material handling costs in the charge for material to the extent they are clearly excluded from the hourly rate. Material handling costs are comprised of indirect costs, including, when appropriate, general and administrative expense allocated to direct materials in accordance with the Contractor's usual accounting practices consistent with Subpart 31.2 of the FAR.

(3) The Government will reimburse the Contractor for items and services purchased directly for the contract only when payments of cash, checks, or other forms of payment have been made for such purchased items or services.

(4)(i) The Government will reimburse the Contractor for costs of subcontracts that are authorized under the subcontracts clause of this contract, provided that the costs are consistent with paragraph (b)(5) of this clause.

(ii) The Government will limit reimbursable costs in connection with subcontracts to the amounts paid for items and services purchased directly for the contract only when the Contractor has made or will make payments of cash, checks, or other forms of payment to the subcontractor—

> (A) In accordance with the terms and conditions of a subcontract or invoice; and
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> (B) Ordinarily prior to the submission of the Contractor's next payment request to the Government.

(iii) The Government will not reimburse the Contractor for any costs arising from the letting, administration, or supervision of performance of the subcontract, if the costs are included in the hourly rates payable under paragraph (a)(1) of this clause.

(5) To the extent able, the Contractor shall—

> (i) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory

> materials; and
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> (ii) Take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and other benefits. When unable to take advantage of the benefits, the Contractor shall promptly notify the Contracting Officer and give the reasons. The Contractor shall give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that have accrued to the benefit of the Contractor, or would have accrued except for the fault or neglect of the Contractor. The Contractor shall not deduct from gross costs the benefits lost without fault or neglect on the part of the Contractor, or lost through fault of the Government.

Appeal File, Exhibit 1, § I at 39. Subsection (d) of this clause contained a ceiling price clause. *Id*.

Section B.1(e) of the solicitation for the 01-0603 contract stated that offerors were not to include cost of subcontractors or temporary labor in the development of their proposed labor rates, as reimbursement under the Payments Under Time and Materials Payment Labor Hours Contract clause was limited to the amounts paid to the subcontractor. Respondent's Motion for Summary Relief, Exhibit A.

Serco's second predecessor in interest, Resource Consultants Inc. (Resource Consultants), was awarded contract PBGC-01-CT-04-0691 (the "04-0691 contract"), also a labor hour contract. Respondent's Statement of Undisputed Facts ¶ 3. This contract called for the contractor to provide system engineering services in support of respondent's information technology initiatives. *Id*. As with the 01-0603 contract, that contract contained a one-year base period and four option years. Respondent paid appellant or its predecessor a total of $7,085,479 for service performed under that contract. *Id*. As did the 01-0603 contract, the 04-0691 contract incorporated by reference the Payments Under Time and Materials Labor Hours Contract clause. Appeal File, Exhibit 55 at 50. The version incorporated was the 2002 version, which, for purposes of this appeal, was substantively the same as the 2000 version. *Id*.

In response to offerors' questions about the solicitation for the 04-0691 contract, respondent stated that subcontractors should be invoiced as other direct costs, with the labor rate the subcontractor was paid, plus the addition of a general and administrative (G&A) rate. Respondent's Motion for Summary Relief, Exhibit B.

After a post-payment audit performed on the two contracts by auditors of the Defense Contract Audit Administration, the contracting officer issued a final decision dated May 18, 2009. Appeal File, Exhibit 162. That decision directed appellant to reimburse respondent $115,773 for alleged improper payments under the two contracts, including $84,769 for improperly billed subcontract labor, $24,894 for labor hour charges containing insufficient time sheet support, and $6110 for charges billed through administrative error. *Id*. Appellant appealed the decision to this Board.

Alleged improper subcontract billings

On the two contracts, appellant[2] used ten identified individuals and two unidentified individual, who were employed by subcontractors Application Technologies, ICSA, Commerce Funding, and Total Sumparts. Respondent's Statement of Undisputed Facts ¶¶ 19-34. These individuals worked as database administrators, senior database administrators, or technical specialists. *Id*. Appellant billed these individuals to respondent at the hourly labor rates appellant had bid for its own direct labor under paragraph (a)(1) of the Payments clause as if they were employees of appellant, even though the hourly billing rates of the third parties to appellant were less than appellant's direct hourly billing rates to respondent. *Id*. Consequently, the total amounts paid by appellant to the subcontractors for the subcontractor labor was less than the total amount appellant billed respondent for that same labor. *Id*. For example, G.P.[3] worked as a senior database administrator on respondent's contracts, but was employed by ICSA. *Id.* ¶ 19. Appellant paid ICSA $71.71 per hour for 89.25 hours of work, for a total payment to ICSA of $6400.12. *Id*. ¶ 20. However, appellant billed respondent at $96.45 per hour, appellant's hourly rate for one of its own senior data base administrators. *Id*. The difference between the paid cost to appellant and the billed cost to respondent, taking into account the allowable general and administrative (G&A) overhead amount of $77.06[4] allocable to the paid cost, is $2130.98.[5] *Id*. ¶ 20. As another example, appellant used

[2] References to appellant or Serco include appellant's predecessor contractors.

[3] The names of the subcontractor employees are in the record, but their names are irrelevant to the disposition of this appeal. To protect their privacy, we use the employees' initials.

[4] The allowable G&A amount is found at Appeal File, Exhibit 136 at PBGC-2009-002324.

[5] The amount is calculated as follows: $96.45 x 89.25 hours = $8608.16. $71.71 x 89.25 hours = $6400.12. $6400.12 + $77.06 = $6477.18. $8608.16 - $6477.18 = $2130.98.

I.B., who was employed by ICSA, as a database administrator. I.B. worked 159.75 hours on Serco's contract at a cost to Serco of $56.67 per hour, or $9053.03. Appellant billed respondent at its direct labor rate under its contract of $78.51, or $12,541.97, a difference of $3488.94. Allowing for G&A of $475.28[6] allocable to that work, the difference is $3013.66. *Id.* ¶ 29.[7]

Respondent identifies fourteen instances of appellant's overbilling respondent for subcontractor labor, as shown in the following table:

Employee	Subcontractor	Excess amount billed to respondent
G.R.	ICSA	$2,130.98
M.L.	ICSA	$1,884.61
M.L.	ICSA	$5,429.34
M.L.	ICSA	$5,280.18
R.B.	Application Technologies	$1,611.15
R.B.	Application Technologies	$1,892.33
R.B.	Application Technologies	$3,621.44
I.B.	ICSA	$3,013.66

[6] The calculation of allowable G&A is found at Appeal File, Exhibit 137 at PBGC-2009-002365.

[7] Appellant would enter into purchase orders with staffing firms for the services of the individuals to work on the contracts with respondent. *See* Respondent's Motion for Summary Relief, Exhibit Q.

G.K.	Commerce Funding	$15,472.00
S.P.	ICSA	$4,278.28
D.S.	Total Sumparts	$3,045.00
Unidentified	Total Sumparts	$2,297.00
A.D. & A.O.	Total Sumparts	$17,062.00
D.S.	Total Sumparts	$7,681.00
Unidentified	ICSA	$889.19
Total		$75,588.16

Respondent's Statement of Undisputed Facts ¶¶ 19-56.

In pricing its direct labor for both contracts, appellant proposed fully burdened labor rates. Respondent's Motion for Summary Relief, Exhibit B. Those rates included fringe benefits, "C-Pool overhead", and G&A. Profit was added to the subtotal of the fully burdened labor rates. *Id*.

Appellant does not dispute the substance of these facts. Appellant says, however, that if one takes the actual cost to appellant of the subcontractor employees, and adds to that figure allocations to appellant's overhead pool, its G&A pool, and appellant's profit, the difference between what appellant charged respondent for its direct labor for the same contract work and what appellant paid the subcontractor employers, plus the add-ons would be $24,813.69. Appellant's Memorandum in Opposition to Respondent's Cross-Motion for Summary Relief (Appellant's Opposition Memorandum) at 16.

Discussion

Appellant has submitted a motion to dismiss, or, in the alternative, a motion for summary relief for failure to state a claim on the alleged overcharges that appellant billed respondent for the cost of its subcontractor employees. Respondent has submitted a

cross-motion for summary relief or, in the alternative, an opposition to appellant's dispositive motion. Each side has submitted replies to the other's dispositive motion.

Standards for considering cross-motions for summary relief

> As the Board recently held:
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> > Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justiciable inferences must be drawn in favor of the non-movant. *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,990-91 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).
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> > When, as here, both parties have moved for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 181-ISDA, et al., 09-2 BCA ¶ 34,307, at 169,466; *Government Marketing Group*, 08-2 BCA at 167,991 (citing *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001)). The mere fact that both parties have moved for summary relief does not impel a grant of one of the motions. *California*, 271 F.3d 1377, 1380; *see also Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009).
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> > Pure contract interpretation, however, is a question of law that may be resolved on summary relief. *Electronic Data Systems*, 10-1 BCA at 169,505 (citing *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)).

Dick/Morganti, A Joint Venture v. General Services Administration, CBCA 420, et al., 10-2 BCA ¶ 34,528, at 170,274.

Based upon a review of the parties' statement of undisputed facts, and the terms and conditions of the contract, the Board concludes that there are no material disputed

facts regarding the alleged overcharges for subcontractor employees and that this issue is appropriate for summary resolution, since the matter is one of pure contract interpretation.

Contentions of the parties

Respondent states that its claim for subcontractor overcharges is based on the language of subsection (b)(4)(ii) in the Payments Under Time and Materials Labor Hours Contract clause, which provides: "the Government will limit reimbursable costs in connection with subcontracts to the *amounts paid for items and services purchased directly for the contract*." Respondent's Motion at 13 (emphasis supplied). Respondent argues that appellant, or its predecessors, overbilled respondent $75,588.16, because it billed respondent at its own employees' higher burdened direct labor rates for the subcontractor employees identified above. *Id*.

Appellant argues that, as the parties had entered a "fixed-price" contract, it had every right to bill at the fixed hourly rate of its direct labor hours. Appellant's Opposition Memorandum at 4. Appellant posits that the employees in question, instead of being treated as subcontractor employees, they should be treated as "temporary to permanent" employees. This is so because appellant intended them to be hired as its own direct contract employees at a future time, and because they were performing the same contract services under the same supervision as its direct labor employees. Appellant's Memorandum in Support of Appellant's Motion for Summary Relief (Appellant's Memorandum) at 6. Consequently, appellant argues that it is absolved from the prohibition of subsection (b)(4)(ii) of the Payments Under Time and Materials Labor Hours Contract clause that payment to subcontractors is limited to the "amounts paid." Finally, appellant relies on the case of *Software Research Associates*, ASBCA 33578, 88-3 BCA ¶ 21,046, for the proposition that it can bill subcontractor employees at its direct burdened labor rate. Appellant's Memorandum at 8.

Entitlement analysis

Appellant's arguments are unpersuasive and amount to literary ledgerdemain to obscure that which is obvious. As we recently stated:

> In interpreting the language of a contract, reasonable meaning must be given all parts of the agreement so as not to render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc*., 713 F.2d 1541,

> 1555 (Fed. Cir. 1983). In other words, "an interpretation that gives a reasonable meaning to all parts will be preferred to one which leaves a portion of [the contract] useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978); *see also, e.g.*, *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Johnson Controls*, 713 F.2d at 1555.
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> Contract language should be given the plain meaning that would be derived by a reasonably intelligent person acquainted with the contemporaneous circumstances. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971); *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). The contract must be construed to effectuate its spirit and purpose, giving reasonable meaning to all of its parts. *Gould, Inc*., 935 F.2d at 1274.

Electronic Data Systems, 10-1 BCA at 169,505.

Appellant first argument, that it may bill all labor at its direct rate hours specified in subsection (a)(1) of the of the Payments Under Time and Materials Labor Hours Contract clause because the contracts are "fixed price," would render meaningless the later subsection (b)(4)(ii) of that clause which limits appellant's reimbursement for subcontracted work to the "amounts paid . . . for services purchased." These contracts are cost reimbursement contracts with ceiling limitations, not fixed price contracts. *See, e.g.*, *CACI, Inc.-Federal v. General Services Administration*, GSBCA 15588, 03-1 BCA ¶ 32,106 (2002). That being the case, the only price component that is fixed under subsection (a)(1) of the clause is the hourly *rate* for "direct labor hours," i.e., the labor rate for hours performed by appellant's own employees.

Appellant's second argument, that the billed employees are not subcontractor employees because they were intended to be "temporary to permanent employees," is also specious. Regardless of the clever nomenclature that appellant seeks to apply to the individuals, at the times relevant to the appeal, they were employed by subcontractors, not appellant. The FAR defines a subcontract as "any contract as defined in sub-part 2.1 entered into by a subcontractor to furnish . . . services for performance of a prime contract." 48 CFR 44.101; *see* Respondent's Motion for Summary Relief, Exhibit O.

The individuals for whose services appellant overcharged respondent were clearly subcontracted employees.[8]

Finally, appellant argues that *Software Research Associates* supports its position. We disagree. The Armed Services Board in *Software Research Associates* considered a 1972 version of the Payments clause of the Defense Acquisition Regulation in a contract for the provision of engineering services where the contractor hired outside consultants and charged the Government for those consultants at the contractor's direct labor rate. In allowing the higher rate, the board found that the contractor paid the consultants more than other contractor personnel so that the consultants could fund their own benefits. *Software Research Associates*, 88-3 BCA at 106,309.

Consequently, the board held that there was "no logical reason to have appellant compensated for their work on a basis different from that of its regular employees when this does not produce a 'windfall' to appellant." *Software Research Associates*, 88-3 BCA at 106,310. The board conducted a "windfall" analysis, 88-3 BCA at 106,308 n.1., and concluded that there was no showing of a windfall. *Id*. at 106,310-11.

We are not persuaded that *Software Research Associates* applies here. Unlike that case, this one involves a different clause and involves subcontractor employees, not consultants. Most significantly, the result in *Software Research Associates* was based on the board's finding that there was no windfall to the contractor from the Government's being charged direct labor rates for the consultants' services. This may have been based on the board's conclusion that the *Software Research Associates* contractor paid its consultants more than its other personnel so that the consultants could purchase their own benefits.

In our case, there was a windfall to appellant, of either $75,588.16 (respondent's figure) or $24,813.69 (appellant's figure). *Software Research Associates* does not control the result here; we are guided by the plain meaning of the Payments Under Time and Materials Labor Hours Contract clause.

Windfall amount

[8] The parties dispute whether the subcontracted employees performed exactly the same duties as appellant's direct labor employees. This dispute is not relevant to the employees' status as subcontracted employees.

Appellant says that the amount of the overpayment, if any, should be calculated at $24,813.69, using the methodology of *Software Research Associates*. Appellant's Motion for Summary Relief at 16. Appellant seeks to retain the cost it paid to the subcontractors plus percentage amounts for G&A, overhead, and profit. Appellant's Opposition, Exhibit A. Appellant argues that "appellant used its temp-to-permanent employees in the same way as its own labor force; it in fact incurred indirect costs in managing and training such labor." Appellant's Opposition at 20. In contrast, respondent states that because appellant did not incur labor burden for subcontract labor, Serco may not charge respondent fully burdened labor rates. Respondent's Memorandum at 13. There are disputes of fact as to whether appellant incurred any costs arising from the letting, administration, or supervision of performance of the subcontracts. We read sub-part (b)(iii) of the Payments Under Time and Materials Labor Hours Contract clause as prohibiting such add-ons only if they had already been included in the direct labor hours charged to respondent. In other words, appellant must also show that its existing direct labor contract rate had not already captured subcontractor add-ons such as G&A, overhead, and profit. Resolution of these matters must await further development of the record.

Decision

Respondent's motion for partial summary relief is **GRANTED IN PART** as to entitlement to repayment of improperly billed subcontractor labor.

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ANTHONY S. BORWICK
Board Judge

We concur:

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PATRICIA J. SHERIDAN
Board Judge

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RICHARD C. WALTERS
Board Judge