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Appellant	)	
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**DECISION OF THE BOARD OF CONTRACT APPEALS**

March 8, 2000

**Before HOURY, POLLACK, and WESTBROOK, Administrative Judges.**

**Opinion for the Board by Administrative Judge WESTBROOK.**

This appeal arises from Contract No. 53-0385-7-3135 for helicopter services in the Flathead National Forest, Flathead and Lake Counties, Montana, awarded by the Forest Service (FS or Government) to Minuteman Aviation, Inc. (MAI or Appellant), of Missoula, Montana, on May 20, 1997. The contract was for a 1-year period to be renewed for one or two additional 1-year periods at the option of the Government. This appeal is similar to Minuteman Aviation, Inc., AGBCA No. 98-201-1, 1999 WL 1212544 (Dec. 8, 1999), in that it involves the same Appellant and the same issue. The contract, Contracting Officer (CO) and the equipment used, however, are different. Here, in its claim dated August 27, 1997, Appellant claims entitlement to an equitable adjustment of \$6,765 for the cost difference in paying its fuel truck driver according to the Department of Labor (DOL) 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 CO's deemed denial of its request for an equitable adjustment.

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. 53-0385-7-3135 (the contract) to provide helicopter services in the Flathead National Forest, Flathead and Lake Counties, Montana, was awarded to MAI, on May 20, 1997, by the FS CO (Appeal File (AF) 29-34). The contract period was for 1-year with a provision for no more than two additional 1-year periods at the option of the Government (AF 76). The options were exercised (AF 13-14 and 316-17).
2. The contract required Appellant to furnish one helicopter with a one-pilot crew (AF 36, 37) and provided a list of 58 acceptable helicopters (AF 121). The contract indicated the hourly fuel consumption of the helicopters (AF 121). Also required to be furnished was a fuel servicing vehicle with a full tank capacity sufficient to sustain 8 hours of flight (AF 57). Appellant proposed to use a helicopter that consumes 27 gallons of fuel an hour (AF 121) and would therefore require a truck with a capacity to carry at least 216 gallons of fuel. Aircraft fuel weighs 7 pounds (Affidavit of CO). Therefore, the fuel weight alone of a full tank of aircraft fuel would be at least 1,512 pounds.
3. The contract contained FAR clause 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989) (SCA). The clause provides, in pertinent part, 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). (AF 100.)
4. The contract contained DOL SCA Wage Determination No. 94-2317, Revision No. 3, last revision date April 4, 1996, for the state of Montana statewide. That determination provided that a truck driver of a light truck should be paid a minimum wage of \$7.27 per hour and a truck driver of a medium truck should be paid a minimum wage of \$12.40 per hour. The notes applying to the wage determination explained that the duties of employees under job titles listed were those described in the "Service Contract Act Directory of Occupations," Fourth Edition, January 1993, as amended, obtainable from the Superintendent of Documents by writing or telephoning. The note also advised that copies of specific job descriptions could be obtained from the CO. (AF 126-34.)
5. The SCA Directory of Occupations (Directory) provides that for wage study purposes, truck drivers are classified by type and rated capacity of the truck. Occupation 31361 is shown to be the driver of a light truck (straight truck, under 1½ tons, usually 4 wheels). Occupation 31362 is shown to be the driver of a medium truck (straight truck, 1½ tons to 4 tons inclusive, usually 6 wheels). Rated capacity is the gross vehicle weight minus the empty weight of the vehicle. (AF 418-19.)

6. A previous wage determination to be used on U.S. Government flying services contracts in this area was wage determination No. 80-0256, revision No. 19, last revision date December 5, 1994. Under wage determination, the wage rate for truck drivers of light trucks was \$9.51. (AF 271.)

7. The contract contains clause I-5, STATEMENT OF EQUIVALENT RATES FOR FEDERAL HIRES (FAR 52.222-42) (MAY 1989), identifying the classes of service employees expected to be employed under the contract. It lists aircraft pilot, three levels of mechanics and a laborer, but no truck driver. The equivalent rate for a pilot was \$21.61 less 5 percent. The equivalent rate for a laborer was \$8.79 less 5.1 percent. The clause stated that the statement of equivalent rates was for information only and was not a wage determination. (AF 104.)

8. The contract incorporates by reference FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT--PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (FAR 52.222-43) (MAY 1989) (Multiple Year Price Adjustment clause) which provides for a contract price adjustment where changes to the wage determination cause an increase in the wage payable in a subsequent year of a multiple year contract or an option year (AF 100).

9. The contract incorporates by reference CHANGES -- FIXED-PRICE (FAR 52.243-1) (AUG 1987) ALTERNATE I (APR 1984) (Changes clause) (AF 101).

10. Clause G-11, PAYMENT FOR FUEL SERVICING VEHICLE, provides that mileage for the fuel servicing vehicle will be paid at the rate of \$.75 per mile where the carrying capacity of aircraft fuel is less than 350 gallons and at the rate of \$1 per mile where the carrying capacity of aircraft fuel is at least 350 gallons but less than 750 gallons (AF 85).

11. Appellant's bid was prepared by its Chief Financial Officer (CFO). Appellant has presented his affidavit as an attachment to its brief. Therein, he states that he had previously bid "this contract" and had always paid the truck driver the wage of a light truck driver, unless a truck larger than a pick-up was used. The wage classifications he used in bidding this contract were based on previous bid solicitations documents and revised wage determinations along with his review of the provided solicitation documents. He states that the revised wage determinations did not indicate that the "rated and current capacity was the manner prevailing or determining factor in the categorization of truck drivers, nor did any previous wage determination." He also avers that the information provided on the "publications from the Forest Service and Department of Labor indicated that the pick-ups . . . used were of the 'light classification'." He does not identify the publications to which he refers. (CFO Affidavit.)

12. The CFO avers that neither the solicitation for the subject contract nor previous wage determinations contained 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 [its] past practice of paying light truck wages for pick-ups." (CFO Affidavit.)

13. The record reveals that the dispute arose during July 1997. The FS inspector called the CO on July 5, 1997, to inquire about the wage rate for the fuel truck driver. (AF 284.) On July 22, 1997, the CO received a telephone call from the fuel truck driver on the same subject (AF 286). The truck driver was being paid at the rate for a light truck driver (\$7.27 per hour) (AF 7, 288-89). Concurrently, a dispute over the same issue was taking place on FS Contract No. 53-03R6-6-L0015 with Appellant for like services in the Lolo and Bitterroot National Forests (Lolo contract). That dispute, involving a contract administered by CO, Harlan Johnson (Lolo CO), was the subject of the Board's decision in AGBCA No. 98-201-1. The events surrounding the two appeals took place concurrently. The driver on the Lolo contract who had been promised pay at the rate of \$9.51 per hour, but who also was actually paid at the rate of \$7.27 per hour, was the primary actor behind raising the issue to the Lolo CO and the driver under this contract. In researching why he was paid less than expected, he discovered that rated capacity was the determinant in classifying trucks for the purpose of SCA wages. (Malatare Affidavit attached to Government brief.)

14. The record contains evidence that both COs at some time opined that the light truck driver rate was the correct rate. On July 5, 1997, the CO on this contract had a telephone conversation with the Government helicopter manager. He asked the size of the truck used on this contract and was told that the truck was one ton. Based on that information, he advised that he would classify the truck driver as a light truck driver. (AF 284.) The Lolo CO had a telephone conversation with Appellant's Financial Officer, in which after hearing the Financial Officer's description of the truck used on the Lolo contract and without investigation, he stated that it sounded like a light truck. This conversation was also post-award of the relevant contract. (Lolo CO Declaration.)

15. On August 1, 1997, the CO met with the truck driver.<sup>1</sup> The driver gave the CO a log weight ticket indicating a vehicle weight of 8,940 pounds on July 30, 1997, at 11:30 a.m. Driver number is shown as "Minuteman Aviation" (AF 290).

16. The record reveals that the two FS COs consulted with each other and jointly with DOL. In an August 6, 1997 telephone conversation among the two COs and a DOL official, the DOL representative advised that the wage rate was clear in wage determination No. 94-2317 (Revision 3) and that the definition of the truck categories of light truck, medium truck, etc., is clear from the language of the SCA Directory of Occupations. He advised that the determinative wording is "rated capacity," defined as the gross vehicle weight minus the empty weight of the vehicle. (AF 297-98.)

17. The CO and Appellant's president spoke by telephone on August 6, 1997. Appellant's president assured the CO that Appellant would pay the medium truck driver rate, including back pay. He also advised that Appellant intended to file a claim stating that he believed the contract to be unclear in the matter of truck driver rates. During the conversation, Appellant's president asked the CO to fax a copy of the SCA Directory of Occupations truck driver classifications which the CO did. (AF 304-08.)

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<sup>1</sup> The CO's handwritten memorandum of this meeting is erroneously dated August 1, 1996.

18. On August 27, 1997, Appellant's president wrote the CO alleging ambiguities in the definition of the truck driver classifications and seeking "relief from changed terms." He stated that the solicitation "only contained generic categories of truck driver pay - light, medium, heavy & tractor-trailer" and that Appellant elected to use the light category for two reasons. One was that wage determination #80-0256, rev. 19, which applied to Appellant's previous contract for the Lolo and Bitterroot National Forests, contained definitions of the truck driver categories. The definition for light truck was "under 1½ tons, usually 4 wheels" and the definition for medium was "1½ to 4 tons, usually 6 wheels." His second reason was that he reviewed the rates in the Equivalent Rates for Federal Hires clause. He compared the pilot rates in that clause and in the contractual wage determination and found a 17 percent variance with the wage determination rate being the lower. He then compared the laborer rate from the Equivalent Rates for Federal Hires clause with the light truck driver and the medium truck driver rates and found the light truck driver rate 17 percent less and the medium truck driver rate 41 percent more. He also quoted the Lolo CO as concurring that the light truck driver rate appeared proper. (AF 357.)

19. Appellant does not contest that the fuel truck used on the contract, as modified, was a medium truck (i.e., had a rated capacity between 1½ and 4 tons).

20. Concerning truck size, the record of the June 16, 1997 pre-work meeting contains a notation that the fuel truck capacity is 350 gallons (AF 280). The tank, therefore, had the capacity to carry 134 gallons of fuel in excess of the 216 gallons required under the contract. Those excess gallons of gasoline would weigh 938 pounds, bringing the total fuel weight alone of a full tank to 2,450 pounds or 1.225 tons.

## DISCUSSION

### Appellant's Contentions

Appellant contends that it is entitled to an equitable adjustment for its increased costs resulting from paying the fuel truck driver under this contract at the SCA rate specified for the driver of a medium truck, rather than the rate specified for the driver of a light truck. Appellant does not assert, nor does it provide evidence, that the truck used on the contract was, in fact, a light truck. Rather it argues that it reasonably concluded that the truck driver employed on this contract should be paid the light truck wage rate.

Appellant argues that the parties were mutually mistaken as to the appropriate rate of pay for the driver of Appellant's fuel truck and that the Multiple Year Price Adjustment clause and the Changes clause entitle it to an equitable adjustment. Appellant contends that the CO also believed that the light truck classification was proper and therefore that Appellant's interpretation of the contract was reasonable. Appellant also argues that it is entitled to recover on a theory of unjust enrichment or quantum meruit.

### **Government's Contentions**

The Government argues that the truck driver classifications were unambiguous and there was no mutual mistake between the parties. Also, the Government contends that a CO's opinion or unauthorized acts cannot bind the Government in matters addressing the SCA. In addition, the Government argues that Appellant's past practice argument lacks legal significance or application. Finally, the Government asserts that Appellant has made errors in business judgment.

### **The Issue**

This matter has been presented to the Board as a contract ambiguity matter. The question is whether Appellant is entitled to be compensated under the contract for the difference between the wages paid using the medium truck rate and what it would have been paid absent the DOL determination that the light truck rate was not applicable.

### **Entitlement to an Equitable Adjustment**

At the outset, Appellant has presented no evidence that the rated capacity of the truck in issue is less than 1½ tons qualifying the truck as a light truck, and allowing Appellant to properly pay its driver \$7.72 per hour instead of \$12.40. The contract required the Appellant to pay wage rates commensurate with the wage determination attached to the contract (Finding of Fact (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 4). The contract gave bidders great latitude in the choice of size and type of helicopters allowed to be used under the contract. The type aircraft equipment to be used had to be identified on the bid schedule. The contract required Appellant to furnish a fuel truck but, apart from the requirement that it have the capability to carry enough fuel for the selected helicopter to fly 8 hours (FF 2), it did not require a truck of any particular size or configuration. That choice was Appellant's.

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 in the proper amount. The wage determination provided the hourly rates of pay for the categories of light, medium and heavy truck drivers (FF 3). The notes thereto informed bidders that the duties of the categories of employees could be obtained from the SCA Directory of Occupations and described several ways it could be obtained (FF 4). This directory 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. A bidder seeking to properly classify a truck in order to price his bid would see from this document that two unconditional factors (type and rated capacity) and one conditional factor (number of wheels) weigh in making that determination. The definition of truck driver in the directory also provided the following definition for "rated capacity": "Rated capacity is the gross vehicle weight minus the empty weight of the vehicle." (FF 5.)

Appellant did not ask for this document at the time it prepared its bid. Rather, Appellant asserts that the wage determinations it used were based on previous bid solicitation documents and revised wage determinations along with the preparer's review of the provided bid solicitation documents. The preparer of Appellant's bid also states that he found no apparent change in the categories from his past experience so he bid the job consistent with Appellant's past practice of paying light truck wages for the drivers of pick-ups. (FF 11.) Pick-up, however, is not a description used in any of the wage determinations in the record.

The contract required no particular size or type of fuel truck beyond one capable of carrying enough fuel for the selected helicopter to sustain 8 hours of flight. Only someone with knowledge of both the helicopter selected and the fuel truck used could have determined the minimum size gas tank required and the actual size truck furnished. This was an exercise Appellant was required to do pre-bid or suffer the consequences of its failure to do so.

Appellant's reliance on contract clause I-5, STATEMENT OF EQUIVALENT RATES FOR FEDERAL HIRES (FAR 52.222-42) (MAY 1989) is misplaced. It applies only when the rate for a classification is not in the contract. Here, the wage determination contained rates for light, medium and heavy truck drivers. Also, the clause contained no truck driver rate. Appellant's extrapolation of the rate for laborer provided no meaningful information. Moreover, the clause specifically informed bidders that it was not a wage determination.

Appellant relies on comments by the CO and the Lolo CO that the trucks seemed to be light trucks as evidence of a reasonable interpretation. The comments by the two COs that each truck as described to the CO seemed to be a light truck are of little or no probative value. The Lolo CO's remarks were in response to a brief description of another truck used on another contract altogether. The CO in this case made his comment based on only the statement that the truck was one ton. There was no discussion of required or actual fuel capacity or of modifications for carrying fuel or of rated capacity. There is no evidence that either CO was viewing the truck in question or its specification. We do not find that the comments of the CO, given their circumstances, can be said to reflect a interpretation of the contract similar to that espoused by Appellant. Without knowledge of the truck in question as modified to carry fuel and without reference to the contract documents, these comments are not evidence of a reasonable interpretation of the contract. Appellant may not recover based on the CO's comment.

Appellant misreads the Fair Labor Standards Act and Service Contract Act – Price Adjustment (Multiple Year and Option Contracts) clause. 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 8.)

Appellant's argument 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 preparing its bid based on the light truck driver rate in the contractual wage determination while

failing to consult the Directory for definitions of the various truck sizes. That error was compounded by its reliance on its past experience in determining the truck size in light of a drop in the hourly rate of pay of over \$2 per hour. There is no evidence that the Government shared in that error or was even aware of the equipment Appellant intended to employ or rate it used in calculating its bid.

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 remedies 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 presented.

**DECISION**

The appeal is denied.

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**ANNE W. WESTBROOK**  
Administrative Judge

**Concurring:**

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**EDWARD HOURY**  
Administrative Judge

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**HOWARD A. POLLACK**  
Administrative Judge

**Issued at Washington, D.C.**  
**March 8, 2000**