Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON JUNE 6, 2002

GRANTED IN PART: March 26, 2002

GSBCA 13298-REM, 13507-REM, 13508-REM,
13509-REM, 13510-REM, 13511-REM

ACE-FEDERAL REPORTERS, INC.,

ANN RILEY & ASSOCIATES, LTD.,

ARTI RECORDING, INC.,

CALIFORNIA SHORTHAND REPORTING,

EXECUTIVE COURT REPORTERS,

and

MILLER REPORTING CO., INC.,

Appellants,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Ronald K. Henry and Mark A. Riordan of Kaye Scholer LLP, Washington, DC, counsel for Appellants.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **WILLIAMS**.

WILLIAMS, Board Judge.

In these appeals, six court reporting companies seek $4,972,363.85 in lost profits due to breaches of their mandatory General Services Administration (GSA) multiple award schedule contracts for court reporting services by numerous user agencies.[1] This matter comes before the Board after the reversal and remand by the United States Court of Appeals for the Federal Circuit in Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed. Cir. 2000). In Ace-Federal Reporters, Inc. v. General Services Administration, GSBCA 13298, et al., 99-1 BCA ¶ 30,139, the Board concluded that the terms of appellants' multiple award schedule contracts precluded recovery of lost profits because the contracts were not requirements contracts, and no individual contractor was given the exclusive right to provide all the mandatory user agencies court reporting services or was guaranteed that any quantities would be ordered. While the Board recognized that user agencies were not free to order services off schedule and should have ordered from one of the multiple awardees, it concluded that the fact that agencies did so did not give rise to the remedy of lost profits under the terms of the contracts. The Court of Appeals reversed, concluding that the Government's promise that it would purchase only from contractors on the schedule (with few exceptions) had substantial business value and the Government's breach of that promise could be remedied. Therefore, the Court of Appeals remanded the matter to the Board for determination of the appropriate damages due appellants.

In proceedings before the Board on remand, the parties supplemented the record, submitted briefs, and participated in oral argument, but elected not to have an evidentiary hearing.[2] On remand the Government admits that appellants are entitled to some damages,

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[1] GSBCA 13298-REM involves a claim by Ace-Federal Reporters, Inc. (Ace-Federal); GSBCA 13507-REM, a claim by Ann Riley & Associates, Ltd. (Ann Riley); GSBCA 13508-REM, a claim by ARTI Recording, Inc. (ARTI); GSBCA 13509-REM, a claim by California Shorthand Reporting (CSR); GSBCA 13510-REM, a claim by Executive Court Reporters (Executive), and GSBCA 13511-REM, a claim by Miller Reporting Co., Inc. (Miller).

[2] During oral argument, the Board requested additional evidence from the Department of Justice (DOJ), and DOJ searched its files and submitted what relevant documents it was able to locate. The Board admits into the record the following documents appended to a letter from Stuart Frisch, Esq., General Counsel, Justice Management Division, to the Board dated June 20, 2001: (1) Affidavit of James W. Johnston (Third Johnston Affidavit) (June 12, 2001); (2) Respondent's Brief in Opposition to Appellant's Motion for Partial Summary Judgment, Heritage Reporting Corp., GSBCA 10396, 91-1 BCA ¶ 23,379; (3) Delegation of authority to approve litigation expenses of United States Attorneys' Offices dated April 6, 1976; (4) Affidavit of James W. Johnston (Second Johnston Affidavit) (June 26, 1997); and (5) Letter from Ann Riley to Linda Lee Payne (July 15, 1988). In addition, DOJ submitted and the Board admits the eleven exhibits that accompanied respondent's November 12, 1991, brief in opposition to appellant's motion for partial summary judgment in Heritage, as follows: (1) Letter from Gene Walters to Linda Lee Payne (July 15, 1988); (2) Affidavit of Susan L. Flint (Flint Affidavit) (Aug. 13, 1990); (3) excerpts from the Flint deposition; (4) excerpts from the Marsh deposition; (5) excerpts from the Young deposition; (6) excerpts from the Marsh deposition; (7) Declaration of

but asserts two defenses which would potentially reduce appellants' recovery of lost profits. First, GSA contends that court reporting for grand jury proceedings is outside the scope of appellants' contracts, which would reduce appellants' recovery by $799,460.11. Second, GSA argues that each off-schedule purchase made at a lower price than schedule pricing was an exception to the mandatory use requirement, which would reduce appellants' recovery by $1,048,174.30. Because each contract as a whole may not reasonably be interpreted to include grand jury work, we reduce appellants' recovery to delete lost profits on such work. With respect to the lower price exception, we conclude that the clause incorporating this exception was not included in the parties' contracts either by incorporation, by reference, or by operation of law under the Christian doctrine. See, G. L. Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl.), reh'g denied, 320 F.2d 345, cert. denied, 375 U.S. 954 (1963). As such, user agencies were not free to purchase court reporting services off schedule at lower prices, and we will not exclude such transactions from appellants' recovery.

Background

The facts essential to resolution of the issue of damages are set forth below. For additional background, see Ace-Federal, 99-1 BCA at 149,098-106.

Findings of Fact

The Request for Proposals

On or about October 30, 1987, GSA issued request for proposals (RFP) number FCGA-SS-SS205-N, soliciting proposals for court reporting and transcription services contracts. The Statement of Work in the RFP specified:

> The Contractor shall furnish the necessary personnel, materials, and services and otherwise do all things necessary for and incidental to the verbatim reporting and transcription of conferences, courthouse and/or legal hearings, depositions, advisory board and committee meetings, arbitration hearings, personnel grievances and appeal hearings, and other administrative hearings for various Government agencies . . . .

Sandra M. Bridges (Bridges Declaration) (Nov. 6, 1991); (8) Affidavit of James W. Johnston (First Johnston Affidavit) (Nov. 12, 1991); (9) excerpts from the Marsh deposition; (10) excerpts from the Benson deposition; (11) Declaration of Doris L. Marsh (First Marsh Declaration) (Nov. 12, 1991). The Board also requested and admits into the record the following testimony adduced during the Heritage appeal: the depositions of Doris Marsh (May 22, 1991), Susan Flint (May 22, 1991), Teri Benson (Sept. 24, 1991), and Walter Young (excerpts) (May 21, 1991), and the affidavit of Susan Flint dated August 13, 1990. These were filed with the Board by respondent on July 17, 2001.

> Transcription of Government owned tapes, transcriptions and video recordings and military court martial boards, are outside the scope of any resultant contracts.

Appeal File, Exhibit 1 at 24.

> The RFP, at Section C.7, defined hearings as follows:
>
> Hearings - Any and all hearings conducted in connection with quasi-judicial, quasi-legislative, and other administrative hearings. Among other things, the term, "hearings" shall include hearings involving the submission of evidence, prehearing conference, oral argument, etc.

Appeal File, Exhibit 1 at 23.

The RFP as amended sought proposals for transcribing/recording by electronic device, stenomask, stenotype, and floppy disk. Appeal File, Exhibit 1 at 24. Offerors were required to be able to provide at least two of the above methods of transcribing/recording. Id.

> Section C.2 of the RFP further provided:
>
> In recording any hearings before the court or hearing [sic], the Contractor agrees to use only high grade Phillips or equal tape cassettes.

Stipulation ¶ 81.[3]

> Section C.3 of the RFP provided that:
>
> [t]he assigned reporter must be proficient in grammar, vocabulary and punctuation, and must be familiar with legal terminology and court or hearing procedures.

Stipulation ¶ 82.

> Section F.3 provided:
>
> F.3 Delivery of Transcripts and Exhibits . . . Closed Hearings - In the case of non-public or closed hearings, transcripts and any exhibits shall be delivered under cover to the designated Presiding Official or authorized representative(s) at the specified address, marked "TO BE OPENED BY ADDRESSEE ONLY".

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[3] On July 11, 1997, the parties submitted to the Board a Stipulation of Facts which contains 131 paragraphs.

Stipulation ¶ 84.

The RFP further provided:

> Note: Protected or in camera documents, transcripts or material shall not be made available to third parties without written or oral approval of the Presiding Official to the contractor.

Stipulation ¶ 85.

The RFP contemplated multiple awards under the Federal Supply Schedule (FSS) for professional verbatim reporting and transcript services. Appeal File, Exhibit 1 at 46, 97.

The RFP and the resultant contracts included the Federal Acquisition Regulation (FAR) clause entitled "Requirements (52.216-21) (Apr. 1984)," which provided, in pertinent part:

> c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

Appeal File, Exhibit 1 at 46.

Paragraph I.10 as modified in Amendment One to the RFP stated, in pertinent part:

> The solicitation provides for the normal supply requirements of the Federal Government and will be used as a mandatory source for the articles or services listed herein by all departments and independent establishments, including wholly-owned Government corporations, in the executive branch . . . for deliver[y] within the 48 Contiguous States and Washington, D.C.
>
> Articles or services will be ordered from time to time in such quantities as may be needed to fill agency requirements determined in accordance with currently applicable supply procedures. Since it is impossible to predetermine the precise quantities that will be required during the contract term, each Contractor is obligated within the scope of this contract to deliver all articles and services ordered.

Appeal File, Exhibit 1 at 3.

The second paragraph of Section I.10 of the RFP, as originally issued, contained language similar to that in the Federal Property Management Regulation (FPMR) at 41 CFR 101-26.401-4(f)(1) (1988). It stated:

> Articles or services will be ordered from time to time in such quantities as may be needed to fill agency requirements determined in accordance with currently applicable supply procedures: Provided, that if any ordering agency finds that an identical product (make and model number) including installation, training, warranties, guarantees, maintenance provisions and/or other comparable terms and conditions of the resultant contract is available from another source at a delivered price lower than the contract price without violating this contract. [sic] Since it is impossible to predetermine the precise quantities that will be required during the contract term, each Contractor is obligated within the scope of this contract to deliver all articles and services ordered.

Appeal File, Exhibit 1 at 53 (emphasis added). When it issued Amendment One to the RFP, GSA deleted the emphasized language quoted above. The record contains no evidence as to why this language was deleted.

The RFP's Schedule of Items included line items for each of the forty-eight contiguous states, Alaska, Hawaii, and Puerto Rico, followed by sub-items covering Standard Metropolitan Statistical Areas (SMSAs) or Standard Consolidated Statistical Areas (SCSAs). Each offeror was requested to mark the geographical areas covered by its proposal. Offerors could propose to provide services for an entire state or to provide services within a designated sub-area. Appeal File, Exhibit 1 at 5.

Prior to the contracts at issue in these appeals, GSA's regional office in Ft. Worth, Texas, had awarded a single award schedule contract (the predecessor contract) for court reporting services with one contractor serving as the exclusive source for all designated users' requirements in the geographic locale awarded. Declaration of Doris L. Marsh (Second Marsh Declaration) (July 14, 1997) ¶¶ 1, 6. The predecessor contract was mandatory for fourteen agencies, "which represent[ed] themselves in administrative litigation or regulatory hearings: GSA, Department of the Interior (excluding Office of Hearings and Appeals), HUD [Department of Housing and Urban Development], Treasury, Commerce (excluding Hearing Examiner, Maritime Administration), Transportation (excluding Contract Appeals Board and Coast Guard courts-martial), Selective Service, SBA [Small Business Administration], Personnel Grievance and Appeal Hearings and Hearings of Discrimination from Department of Defense, Foreign Claims Settlement Commission, National Science Foundation [Personnel Grievance & Appeal Hearings only], FMCS [Federal Mediation & Conciliation Service], VA [Veterans Administration] and the Federal Mine Safety & Health Review Commission." Id. ¶ 6. The RFP at issue was mandatory for over fifty agencies. Id. ¶ 1. The Department of Justice was not a mandatory user of the predecessor contract but was a mandatory user of the contracts that are the subject of these appeals. Appeal File, Exhibit 18 at 2.

The contracting officer testified in a declaration:

> Prior to award, neither I nor any of the other Contracting Officers had any contact with the procurement officials responsible for Court Reporting at the Untied States Department of Justice. Neither the Department of Justice nor

> any of the United States Attorneys Offices requested, prior to award, that their requirements for court reporting (of any type) be satisfied through this contract. There was no discussion within this agency prior to award that this contract would cover Department of Justice Grand Jury Court Reporting, or depositions related to litigation in any of the U.S. Courts conducted by the Department of Justice. It was my understanding as Contracting Officer that other than minor word-changes for clarification, the Statement of Work for Solicitation FGGA-SS-SS205N was essentially the same as that found in the prior, single award schedule contracts of IG-733.

Second Marsh Declaration ¶ 6.

Award

GSA awarded a total of ten multiple award contracts covering various geographic regions as a result of the offers received in response to the RFP. Appeal File, Exhibit 3. Work in Alaska, Hawaii, and Puerto Rico was made a non-mandatory requirement. Id.

At the times of the awards, each of the appellants was an established business with a history of performing Government contracts; each had one or more established offices in its respective areas of award, and each had made capital investments and developed an organization and structure that permitted it to accommodate fluctuating workloads through the use of piece-work or payment-by-the-page labor. Stipulation ¶ 46.

Ace-Federal, Ann Riley, and Miller were awarded contracts for reporting and transcription services for the District of Columbia, Maryland, and Northern Virginia from August 1, 1988, through July 31, 1989. Stipulation ¶ 48.

ARTI was awarded a contract for court reporting and transcription services for the New York City metropolitan area, including portions of New Jersey, for the term August 19, 1988, through July 31, 1989. Stipulation ¶ 49.

CSR was awarded a contract for court reporting and transcription services for California (except Los Angeles County) and Hawaii for September 26, 1988, through July 31, 1989. Stipulation ¶ 50.

Executive received a multiple award contract for reporting and transcription services in Alaska, Los Angeles County in California, the New York/New Jersey area, the District of Columbia, and the Chicago metropolitan area, for September 23, 1988, through July 31, 1989. Stipulation ¶ 51.

GSA awarded a contract to Heritage Reporting Corporation (Heritage), a company which is not an appellant in any of these cases, for the term of August 1, 1988, through July 31, 1989. Stipulation ¶ 53. The contract covered all types of court reporting and transcription services for the forty-eight contiguous states and the District of Columbia. Appeal File, Exhibit 3. In thirty-nine of the contiguous states, Heritage was the sole

contractor for mandatory users, and in the remaining contiguous states and in Washington, D.C., Heritage was one of several contractors. Id.

GSA awarded a contract to another company which is not an appellant in any of these cases, Argie Reporting Service, for the term of August 19, 1988, through July 31, 1989, for court reporting and transcription services in Illinois, Nebraska, the Des Moines and Cedar Rapids metropolitan areas in Iowa, the Kansas City, Topeka, and Wichita metropolitan areas in Kansas, and the Kansas City, St. Louis, and Springfield metropolitan areas in Missouri. Stipulation ¶ 57.

GSA awarded a contract to another entity which is not an appellant in any of these cases, Arlington Typing and Mailing, for the term of September 26, 1988, through July 31, 1989. Stipulation ¶ 58. The contract covered court reporting and transcription services in Massachusetts. Id.

The contracting officer who awarded appellants' and Heritage's contracts was Susan Flint. Appeal File, Exhibits 2, 9, 26, 29, 32, 35; Respondent's Record Submission, Appendix, Exhibit 4 at 10.

GSA's Responsibility for the Schedule Contracts

Under the multiple award schedule, individual agencies were to place orders directly with contractors, but GSA had supervisory responsibility with respect to the schedule contracts. Appeal File, Exhibit 22 at 2; 48 CFR 8.405 (1988). The parties stipulated that:

> GSA exercises supervisory authority for the schedule contracts under 40 U.S.C. § 481, which provides that the Administrator of General Services shall prescribe policies and methods of procurement and supply of personal property and nonpersonal services. . . . Pursuant to 41 U.S.C. § 252, the civilian portion of the executive branch is required to make purchases and contracts for property and services in accordance with the provisions of this title and implementing regulations of the Administrator. . . . The implementing regulations are the Federal Property Management Regulation[s] (FPMR), found at 41 C.F.R. § 101 et seq. 41 C.F.R. § 101-26.401 states, in part, that "[a]ll executive agencies shall procure needed articles and services from Federal Supply Schedule contracts in accordance with the provisions of the appropriate Federal Supply Schedule." The burden of complying with mandatory supply schedules is on the user agencies pursuant to 41 C.F.R. § 101-26.401(a) which provides that "prior to initiating procurement directly from commercial sources, agencies shall determine whether the required commodities and services or similar commodities and services serving the required functional end-use purpose are available from a Federal Supply Schedule." Under the FAR, the FPMR, and existing case law, GSA has been recognized as having overall supervisory responsibility for the GSA schedule contracts.

Stipulation ¶ 36.

Administration of the Schedule Contracts

On February 22, 1989, almost six months after the award of schedule contracts to Ace-Federal, Ann Riley, Heritage, and Miller, James W. Johnston, DOJ's Director, Procurement Services Staff, Justice Management Division, issued a memorandum to executive and administrative officers in the offices, boards, and divisions of DOJ regarding the GSA schedule for court reporting services. The memorandum stated:

> We recently became aware that the General Services Administration (GSA) awarded a mandatory Schedule Contract for nationwide court reporting services. The Schedule is mandatory for Executive Branch departments and agencies within the 48 contiguous states and Washington, D.C. It is non mandatory for use in Alaska, Hawaii and Puerto Rico.
>
> From reading the Schedule and speaking with GSA contracting personnel, we learned the following:
>
> - There are ten contractors on the Schedule. The Schedule specifies which contractor to use based upon (1) the state in which the service is needed and (2) the type of recording method desired.
> - For court proceedings in out-of-the-way locations, the GSA contractor subcontracts the work to a local court reporter.
> - The Schedule specifies charges for Daily, Regular and Expedited delivery as well as a charge for extra copies. There is a minimum charge of $100 per day.
> - When placing an order against the Schedule, the Government must provide the contractor a minimum of three days advance notice prior to the hearing date.
> - Grand Jury proceedings are not covered by the Schedule.
>
> I have attached a copy of the GSA Schedule for you to reproduce and distribute, as necessary, to those individuals within your organization who have a Delegation of Procurement Authority issued by our staff and who may require this type of service. Please note that this is a mandatory Schedule and should be used as a primary source of supply.

Third Johnston Affidavit, Attachment 1 (emphasis added).

Mr. Johnston, a licensed attorney who has served as Director of the Procurement Services Staff since 1985, testified that he issued that memorandum stating that grand jury

reporting was not covered by the contract based upon a conversation he had with the contracting officer, Doris Marsh. Third Johnston Affidavit ¶ 4. Mr. Johnston testified:

> In my June 26, 1997 affidavit, I stated that my understanding about the transcription of grand jury proceedings not being covered by the GSA FSS was confirmed in a telephone discussion which I had in late January or early February, 1989 with GSA's contracting officer for the FSS contract, Ms. Doris Marsh. Although I clearly recall my conversation with Ms. Marsh, I cannot locate my contemporaneous notes of my 1989 conversation with her.[4]
>
> I also recall that it was not until late January, 1989 that my office first became aware of the existence of this FSS court reporting contract. After learning of the existence of the contract for verbatim reporting and transcript services, I called Ms. Doris Marsh of GSA to clarify the scope of the contract. In the course of our discussion, Ms. Marsh told me that grand jury court reporting was not covered by the FSS contract. Based on this discussion with Ms. Marsh, I issued the memoranda . . . stating that grand jury court reporting was not covered by the contract.

Third Johnston Affidavit ¶¶ 3, 4.

On May 12, 1989, Mr. Johnston issued a follow-up memorandum to DOJ offices, boards, and divisions reminding these entities of the mandatory court reporting schedule for all non-grand jury work. Third Johnston Affidavit, Attachment 1. This memorandum stated, in pertinent part:

> On February 22, 1989, I sent a memorandum to you (copy attached) advising that we became aware of mandatory nationwide GSA Schedule Contract for court reporting services. After receiving the memorandum, several Divisions and district offices called us with questions on the mandatory use of the Schedule.
>
> I want to re-emphasize that this Schedule is a mandatory source of supply for all non-grand jury court reporting services performed in the 48 contiguous states and Washington, D.C. The GSA Schedule vendor for the locality in which the services are required must be given the opportunity to perform the services. Only in those cases where the vendor is unable to meet your

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[4] During the oral argument on remand, the Board requested that DOJ produce Mr. Johnston's notes. In the course of searching for those notes, Mr. Johnston located the two memoranda he issued in February and May of 1989, prior to any claim or dispute involving the issue of whether grand jury proceedings were covered by the contract. The first claim by any schedule vendor was filed by Heritage on November 15, 1989. Stipulation ¶ 93.

> requirements, can an alternate source be used. Our office is unable to grant waivers.

Id.[5]

In her deposition taken on May 22, 1991, in the appeal of Heritage Reporting Corp., GSBCA 10396, the contracting officer, Ms. Marsh, testified as follows:[6]

> Q If DOJ had placed a witness before a grand jury and recorded that testimony and transcribed it three months later, do you know whether that would be covered by the scope of the contract?
>
> A No, I wouldn't. I would probably have to get legal advice on that.
>
> Q If DOJ had placed a witness before a grand jury and transcribed the testimony -- decided at the end of the testimony they wanted it transcribed, would that be covered by the scope of the contract?
>
> A I'm not sure.
>
> Q In that same question, does it help that you assume that DOJ ordered the court reporter?
>
> A I'm not sure what you mean. If they ordered a court reporter?
>
> Q They ordered -- they took a purchase order and issued a purchase order for a court reporter who was in the Federal Supply Schedule -- or not using the Federal Supply Schedule. . . . that they had actually issued a purchase order for a court reporter to show up at that grand jury and record the testimony.
>
> Would you think that that would be covered by the scope of the contract?
>
> A Offhand, I would say yes, but I'm not sure.

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[5] This testimony is consistent with testimony in Mr. Johnston's November 12, 1991, affidavit submitted in the Heritage appeals, wherein he stated: "My statement pertaining to verbatim court reporting and transcription of grand jury proceedings not being covered by the GSA FSS was based on a telephone discussion I had in late January or early February 1989 with GSA's contracting officer . . . Ms. Doris Marsh. . . . In making this statement I relied on my review of handwritten notes which I took during my conversation with Ms. Marsh." First Johnston Affidavit ¶¶ 3, 4.

[6] The contracting officer testified that she had learned that Heritage had wanted to take her deposition in this case just the prior week, that she had done nothing to prepare for it, and that she had not reviewed any documents. Marsh Deposition at 4-5.

Q What was it about the hypothetical in the grand jury that causes you to pause?

A I think "grand jury."

Q Do you understand how a grand jury works?

A I'm not really sure, but I know that there has been some question about grand jury.

. . . .

Q When did the question first come up then?

A Probably in my discussions with the previous contracting officer.

. . . .

Q Could you tell me when those discussions took place?

A Probably when I started with the contract.

Q Would this have been some sort of briefing about the contract?

A Yes.

Q Do you have any idea of the time frame that that would be?

A Probably March, April [of 1989] . . . .

Q Do you recall the substance of those conversations?

A Just whether or not the contract covered grand jury proceedings. . . .

Q Do you know whether DOJ ever requested an opinion on the grand jury issue?

A I personally do not know.

Q But if they had requested a waiver, would it have been in writing?

A Yes it would.

Q If DOJ thought that grand jury proceedings were outside the contract, should they have requested a waiver?

A Yes they should have.

Marsh Deposition at 32-33. Subsequently, Ms. Marsh upon review of her deposition executed a declaration which changed that last answer -- she said that DOJ need not have requested a waiver if grand jury proceedings had been outside the contract. First Marsh Declaration; Letter from Stuart Frisch, General Counsel, Justice Management Division, DOJ, to the Board (June 20, 2001), Tab 2, Attachment 11.

According to DOJ's Director of Procurement Services Staff, during their conversation, Ms. Marsh did not request that DOJ submit a waiver request for grand jury reporting. Since Ms. Marsh stated that grand jury work was not included in the FSS contract, Mr. Johnston did not believe that he was required to submit a request for waiver. First Johnston Affidavit ¶ 4.

We find as fact that the contracting officer, Doris Marsh, advised DOJ's Mr. Johnston in a telephonic conversation that grand jury proceedings were not covered by the contract, and that as a result, Mr. Johnston issued the February 1989 memorandum advising DOJ components of this.

Susan L. Flint, the previous contracting officer on the schedule contracts between December 27, 1987, and October 1988, awarded appellants' contracts and briefed Ms. Marsh. Ms. Flint testified:

> Q Are there any types of court reporting type services that were not covered by the contract?
>
> A Yes. To the best of my knowledge, courtroom proceedings are not covered. This schedule was intended for administrative type hearings.
>
> Q What was the distinction between court proceedings and administrative proceedings?
>
> A I believe an administrative proceeding would be something like -- I don't know -- maybe a grievance filed by an employee, that type of thing. Courtroom proceeding, to me, would be something that took place in a courtroom with a judge and a jury and that type of thing.

Flint Deposition at 25, 49; Flint Affidavit at ¶ 2.[7]

During the time period of GSA's FSS contract, DOJ's Procurement Services Staff issued and administered grand jury court reporting contracts for approximately fifteen of the ninety-four districts of the United States Attorney's Offices. Second Johnston Affidavit ¶ 5. DOJ's U.S. Attorney's offices made the contractual arrangements for the recording and

[7] There is no express reference in Ms. Flint's deposition to grand jury proceedings.

transcribing of grand jury proceedings. Stipulation ¶ 93. RFPs soliciting grand jury court reporting services for the U.S. Attorney's Office for the District of Columbia and for the U.S. Attorney's Office for the Eastern District of Virginia were issued on September 26, 1988, and had a closing date of October 26, 1988. Id. ¶ 6. These RFPs were published in the Commerce Business Daily and were representative of those issued by DOJ for grand jury court reporting services for the 1988-1989 time period. Id. None of the appellants complained to GSA or DOJ that they were not receiving grand jury work under the contracts. Second Marsh Declaration ¶ 8.

Grand jury proceedings are conducted in secrecy; only the Government attorneys, the witness under examination, an interpreter (if necessary) and a court reporter are present. Second Johnston Affidavit ¶ 7. Because of security concerns surrounding grand jury work, DOJ's uniform practice in contracts for grand jury court reporting is to include a requirement that contractor personnel must receive a security clearance through background investigations as a condition precedent to being able to perform any required transcription of grand jury testimony. Id.

RFPs for grand jury court reporting contain a provision relating to security requirements stating that the U.S. Attorney's Office will request background investigations for contractor personnel and court reporters and that employees of the contractor are not to be assigned to grand jury transcription work unless and until the contractor has been notified by authorized personnel that the employees have been granted necessary access approvals. Second Johnston Affidavit ¶ 8.

Such contracts also include significant contractor facility requirements which restrict and control access to office automation equipment used to process grand jury information. Second Johnston Affidavit ¶ 9. The contractor's premises must receive a facility security clearance by DOJ. Id. The grand jury contracts administered by DOJ also contain specific provisions addressing protection and storage of grand jury notes and/or transcripts and specify certain security containers for national security information, as well as specific requirements for the files in which other grand jury transcripts are contained. Id. In addition, grand jury contracts specify that admittance to a contractor's storage area for such grand jury materials must be controlled by an alarm system or by locked entrances and exits with guards on patrol. Id.

Neither Mr. Johnston nor his staff had any conversation or written inquiry concerning grand jury verbatim transcription or any other court reporting work during the August 1988 through July 31, 1989, time period with ARTI, Ace-Federal, Miller, Executive, or CSR. Second Johnston Affidavit ¶ 9.

Ann Riley requested a copy of the RFP for grand jury court reporting for the U.S. Attorney's Office for the Eastern District of Virginia, and this RFP was sent to Ann Riley during the schedule contract term. Second Johnston Affidavit ¶ 11. Ann Riley did not contact DOJ to inform it that the RFP for grand jury verbatim transcription in the Eastern District of Virginia issued in September 1988 covered services encompassed by GSA's August 1988 through July 1989 FSS contract for verbatim reporting and transcript services. Id.

During the period covered by the schedule contracts, appellants received very little grand jury court reporting work compared to the overall volume of other FSS work. Stipulation ¶ 95. On December 21, 1988, ARTI provided reporting services for a deposition in connection with grand jury proceedings ordered by the U.S. Attorney's Office for the District of New Jersey which resulted in a 126-page transcript. Stipulation ¶ 94. On March 13, 1989, CSR performed reporting services for a grand jury proceeding ordered by a U.S. Attorney's Office which resulted in a 170-page transcript, but CSR was never asked

by DOJ to undergo a facility clearance. Id. ¶ 95; Affidavit of Marijke Elder (Elder Affidavit) (July 3, 1997) ¶ 3.

The functions of a court reporter who records and transcribes grand jury testimony are the same functions that are required to record and transcribe other proceedings covered by appellants' schedule contracts. Stipulation ¶ 88. Following award of its schedule contract, CSR complied with a demand of the U.S. Attorney's Office for the Northern District of California by submitting the names of three reporters for approval to do grand jury work. All of these reporters received approval to do grand jury work. Id. ¶ 89.

The owner of ARTI contacted the U.S. Attorney's Office for the Eastern District of New York and the U.S. Attorney's Office for the Southern District of New York to solicit grand jury reporting business on behalf of ARTI. Stipulation ¶ 90.

Appellants never declined or stated that they would decline any order for grand jury work under the FSS. Stipulation ¶ 96.

In early 1989 Sandra M. Bridges, the administrative officer to the United States Attorney in the Eastern District of Texas, Beaumont, Texas, received a copy of the GSA schedule contract and determined that Heritage was the court reporting contractor for her office. On February 21, 1989, she called Heritage about placing orders on the schedule and was told by a Heritage employee that the GSA contract "covered deposition reporting but did not cover reporting of grand jury proceedings. Accordingly [she] was informed that Heritage would not transcribe grand jury proceedings under the GSA schedule [contract]." Bridges Declaration; Respondent's Brief in Opposition to Appellant's Motion for Partial Summary Judgment, Exhibit 6, Heritage Reporting Corp.

GSA granted waivers from use of the contracts at issue to the Federal Communications Commission; the Federal Energy Regulatory Commission, Office of Administrative Law Judges; and the Department of Labor, Branch of Hearings and Review. Appellants' Record Supplement, Exhibit 20 at 5-6.

Appellants' contracts remained operative through the scheduled expiration on July 31, 1989, and appellants performed work under their contracts. Stipulation ¶ 69.

Facts Pertinent to Appellants' Calculation of Lost Profits

The parties stipulated that calculation of the profit rate which would have been earned by appellants for the original pages which were ordered off-schedule is determined by examining appellants' marginal cost of undertaking additional work beyond the work which was actually received by appellants. Stipulation ¶ 117. Payment for labor in the court reporting and transcription industry is predominantly based upon piece rate or per-page compensation. Id.

The total number of pages ordered off-schedule by user agencies was 3,741,487. Stipulation ¶ 111. Of this, 1,175,814 pages were grand jury transcript pages. Id. ¶ 123. The

parties stipulated that based upon appellants' share of the market, appellants' share of the original pages ordered off-schedule, including grand jury, was 1,381,731 pages. Id. ¶ 112. According to the parties' stipulation, appellants' share of original pages ordered off-schedule by mandatory schedule users (1,381,731 pages) times appellants' average original page price ($4.393) yields $6,069,944.28 as the amount of lost revenue from the sale of original pages. Stipulation ¶ 116.[8]

Appellants' average cost per original page for performing additional assignments was $2.55. Stipulation ¶ 119. The parties stipulated that the average marginal profit rate that would have been achieved by appellants if additional work had been ordered under the schedule rather than off-schedule by mandatory users is 41.91%. Id. ¶ 120. According to the parties' stipulation, appellants' lost revenue for original pages ordered off-schedule ($6,069,944.28) times appellants' profit rate for additional work ordered under the contract (41.91%) yields $2,543,913.65 as appellants' lost profits for original pages ordered off-schedule by mandatory users. Id. ¶ 121.

[8] The Federal Supply Schedule for court reporting and transcription services required each offeror to bid basic per-page prices for each category of services. The contracts also provided that the amount paid for individual orders would be increased for additional charges for such items as exhibits or inserts, minimum appearance fees, delivery, overtime, computer disks, and other special services. Stipulation ¶ 113.

According to the stipulation, the off-schedule order of original transcript pages by mandatory users deprived appellants of the opportunity to sell copies of those originals, except in grand jury proceedings where only the original is purchased and copies are not permitted. Stipulation ¶¶ 122, 123. The parties agree that applying appellants' market share to the off-schedule original pages which were eligible for copy sales results in 947,503 original transcript pages eligible for copy sales which were lost to appellants. Id. ¶ 124. The parties further stipulated that the average number of lost copy sales per eligible original page was 2.33, and that the number of off-schedule original transcript pages eligible for copy sales (947,503) times the average number of lost copy sales per original transcript page (2.33) yields 2,207,682 as the number of copy page sales lost to appellants. Id. ¶¶ 125, 126.

The parties agree that appellants' weighted average price per copy page was $1.10, and that the number of copy page sales lost to appellants (2,207,682) times appellants' weighted average price per copy page ($1.10) yields $2,428,450.20 as the amount of lost copy sale revenue to appellants. Stipulation ¶¶ 127, 128.

The parties stipulated that "[t]he cost of producing copy pages for sales is nominal. Accordingly, the profit rate for copy sales is set at 100 percent . . . ." Stipulation ¶ 129. Appellants claimed direct lost profits totaling $4,972,363.85, consisting of $2,543,913.65 in lost profits from sales of original transcript pages and $2,428,450.20 from sales of copy pages. Id. ¶ 130. Deducting grand jury transcript pages from the original transcript page calculation would reduce appellants' lost profits for those sales by $799,460.11 (1,175,814 pages times revenue per page ($4.393) times appellants' market share (36.93) times the profit rate (41.91%)).[9]

Appellants requested a joint judgment in the form of a consolidated award which they would apportion among themselves. On appeal, appellants represented:

> Since the appeals had been consolidated, it was thought to be appropriate for appellants to formally confirm their willingness to accept a consolidated award which would be subsequently apportioned among them. . . . If a consolidated award is inappropriate for any reason, the court (or board) is obviously free to enter individual awards for each appellant's damages in accordance with the stipulated formula and stipulated data.

Appellants' Record Submission on Remand, Exhibit 3, at 63-64. The total individual damages claimed under the parties' stipulation are as follows:

Contractor	Stipulated Damages	Percentage

[9] Although the parties did not stipulate to this amount, respondent set forth this calculation in its Record Submission of April 2, 2001, and appellants raised no objection to it in their Reply.

Ace-Federal Reporters, Inc.	$305,639.50	6.15
ARTI Recording, Inc.	$486,061.06	9.78
California Shorthand Reporting	$507,603.93	10.21
Executive Court Reporters	$1,012,515.00	20.36
Miller Reporting Co., Inc.	$1,472,993.90	29.62
Ann Riley & Associates, Inc.	$1,187,550.84	23.88
Total	$4,972,363.85	100.00

Id. at 62-63.[10]

In attempting to prove that a number of pages were ordered off-schedule at lower prices in accordance with the contract, respondent has selected an agency component which had been used in the prior Heritage litigation to cross-check the accuracy of Heritage's original page count analysis. The agency component selected was a portion of the Social Security Administration (SSA). Respondent identified 166 transactions as being in breach of the requirements contracts for the portion of SSA. In thirty-five of those 166 transactions, or 21.08%, the court reporting was obtained at a less expensive price than from the schedule vendors. Respondent suggests, therefore, that 21.08% should be applied to reduce any award of damages to appellants in this case.

Discussion

In its decision remanding these appeals to the Board, the Federal Circuit directed:

> There is sufficient content to the contracts to permit the determination of an appropriate remedy. "If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery," and the Board's duty is to "make a fair and reasonable approximation of the damages." Locke [v. United States], 283 F.2d [521] at 524 [Ct.Cl. 1960]. The relevant factors in determining the value of a chance for obtaining business include: the total amount of business the plaintiff would have been eligible for; any material facts that would have tended to prevent the plaintiff from receiving his proportionate share of such business; and the average expenses incurred in fulfilling the obligations of the contract. See id. In this case, the parties have stipulated the amount of additional transcription contracted off-schedule to the

[10] The stipulated total differs by 38 cents from the sum of the individual calculations because of rounding in the individual calculations.

> page and the amount of each contractor's market share of business. These stipulations would be a good start on a "fair and reasonable" basis from which to calculate damages.

Ace-Federal, 226 F.3d at 1333.

The parties stipulated that lost profits from sales of original pages purchased off schedule were $2,543,913.65 and that lost profits from sales of copy pages were $2,428,450.20, for a total of $4,972,363.85 in lost profits. Stipulation ¶ 130. GSA concedes that appellants are entitled to the damages they seek in these appeals with the exception of two elements of recovery, i.e., lost profits pertaining to grand jury reporting and "off schedule" purchases made at "below-schedule prices since both of these types of purchases were not covered by the contract and thus not diverted." Respondent's Supplemental Record Submission at 2. No other material facts which would have prevented any appellant from receiving its proportionate share of the damages have been suggested.

Are Grand Jury Reporting Services Covered by the Contract?[11]

The question of whether grand jury work is included in the contract is a matter of contract interpretation. In interpreting a contract, "[w]e begin with the plain language." Hunt Construction v. United States, No. 01-5061, slip op. at 4 (Mar. 1, 2002); Massie v. United States, 166 F.3d 1184, 1189 (Fed. Cir. 1999) (citing McAbee Construction, Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir. 1996)). "We give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning." Massie, 166 F.3d at 1189 (quoting Harris v. Department of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1998)). Further, "we must interpret the contract as a whole and in a manner that gives meaning to all its provisions and makes sense." Hunt, slip op. at 4; Massie, 166 F.3d at 1189; New Valley Corp. v. United States, 119 F.3d 1576, 1580 (Fed. Cir. 1997); McAbee, 97 F.3d at 1435.

Two provisions of the Statement of Work address the contract's coverage. Paragraph C.1 provides:

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[11] For ease of reference in this discussion, we refer to the parties' schedule contracts as "the contract" since all their contracts contain the identical clauses relevant here.

> The Contractor shall furnish the necessary personnel, materials and services and otherwise do all things necessary for and incidental to the verbatim reporting and transcription of conferences, courthouse and/or legal hearings, depositions, advisory board and committee meetings, arbitration hearings, personnel grievances and appeal hearings, and other administrative hearings for various Government agencies.

Paragraph C.7 defines hearings as follows:

> Any and all hearings conducted in connection with quasi-judicial, quasi-legislative, and other administrative hearings. Among other things, the term "hearings" shall include hearings involving the submission of evidence, prehearing conference, oral argument, etc.

Appellants submit that grand jury work is clearly included in the contract because the contract uses broad inclusive categories such as "courthouse," "court," and "legal" without particularizing the many different activities which fall within those categories. Appellants' Opening Brief and Record Submission on Remand at 17. Appellants argue that because the contract covers "courthouse and/or legal hearings," grand jury proceedings are necessarily included as a subelement of these type of hearings. Id. at 15. Appellants point out that in several additional sections of the RFP the hearings are referred to as "court" hearings.[12] Further, appellants point out that the contract explicitly excludes transcription of Government-owned tapes and video recordings and military court martial boards but that there is no exception for grand jury proceedings. Id. at 16.

The Government agrees that the contract covers courthouse and/or legal hearings, but emphasizes that the term "hearing" is limited by definition to quasi-judicial, quasi-legislative, or administrative proceedings. Respondent's Supplemental Record Submission at 2. GSA argues that grand jury proceedings are unambiguously excluded from the contract because the grand jury is not quasi-judicial, quasi-legislative, or administrative. Respondent

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[12] Appellants cite Section C.2, which provides:

> In recording any hearings before the court or hearing, the Contractor agrees to use only high grade Phillips or equal tape cassettes.

Stipulation ¶ 81 (emphasis added).

Appellants also cite Section C.3's reference to "court":

> The assigned reporter must be proficient in grammar, vocabulary and punctuation, and must be familiar with legal terminology and court or hearing procedures.

Stipulation ¶ 82 (emphasis added).

emphasizes that a grand jury operates as an accusatory body, not an adjudicatory body, and that under the contract, hearings "shall include hearings involving the submission of evidence, prehearing conference, oral argument, etc," thus, suggesting an adjudicatory, not accusatory proceeding.[13]

When read as a whole, the contract indicates that the court reporting services within its scope cover administrative-type proceedings which include courthouse, legal or other enumerated hearings, meetings, and conferences. In paragraph C.1, the phrase "and other administrative hearings" follows a group of identified court reporting services which either subsume "administrative" proceedings (such as arbitration hearings) or which are by their nature exclusively administrative (such as "personnel grievances and appeal hearings"). Stated differently, all of the categories of court reporting services which precede the terms "and other administrative hearings" can be readily limited to administrative-type proceedings, i.e., "conferences, courthouse and/or legal hearings, depositions, advisory board and committee meetings, arbitration hearings and personnel grievances and appeal hearings." Similarly, in paragraph C.7, the definition of "hearings" encompasses quasi-judicial, quasi-legislative, and "other administrative" hearings. The use of the term "other administrative hearings" in two separate paragraphs of the statement of work indicates that the hearings covered are administrative in nature.

Because the contract covers only administrative-type hearings, grand jury proceedings are not included. While the ancient institution of the grand jury has been historically characterized in many ways, it has not been described as administrative. See generally Charles Alan Wright, Federal Practice and Procedure, Criminal 3d § 101, Function of Grand Jury (West 1999).[14] The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Branzburg v. Hayes, 408 U.S. 665, 701 (1972). A grand jury proceeding is not an adversarial hearing in which the guilt or innocence of the accused is adjudicated, but rather an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. United States v. Calandra, 414 U.S. 338, 343-44 (1974). The grand jury is summoned by the District Court, is subject to the limited supervision of the District Court, and has been

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[13] Respondent relies on United States v. Williams, 504 U.S. 36 (1992), in which the Supreme Court held that a prosecutor was constitutionally obligated to disclose potentially exculpatory information to a grand jury and stated that a grand jury "has not been textually . . . assigned to any of the three branches described in the first three articles of the Constitution but rather is a constitutional fixture in its own right." Williams, 504 U.S. at 47.

[14] As appellants point out, some aspects of grand jury proceedings have been characterized as quasi-judicial -- in the wholly different context of affording immunity to grand jurors as quasi-judicial officers. Richardson v. McKnight, 521 U.S. 399, 417 (1997); Imbler v. Pachtman, 424 U.S. 409, 423 n. 20 (1976). However, even accepting the status of a grand jury as quasi-judicial for some purposes, because they are not also administrative, grand jury proceedings are not within the scope of this contract.

described as "an appendage of the court." Id.; Brown v. United States, 359 U.S. 41, 49 (1959).

Appellants' contention that the broad terms "courthouse," "court," and "legal hearings" necessarily include grand jury proceedings is inconsistent with the parties' recognition that the day-to-day Article III courtroom proceedings in a federal courthouse, such as civil or criminal trials or appellate arguments, are not within the scope of this contract. Those proceedings are obviously excluded because they are not conducted by executive agencies, the only users of this contract, but rather are the province of the third branch of Government, the judiciary. See 41 CFR 101-26.401-4(d) (1988).[15] Thus, the notion that "courthouse" proceedings must necessarily include grand jury proceedings, which are typically convened in courthouses, is belied by the contract's limitation to user agencies which are executive branch agencies.[16]

Further, appellants' interpretation does not give "a reasonable meaning to all parts" of the contract because it renders superfluous and meaningless the term "other

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[15] This regulation, which delineates exceptions to mandatory use of schedule contracts, provides:

> (d) Legislative and judicial agencies. Except as may be provided by law or by authorized agreement with responsible officials of any agency in the legislative or judicial branches of the Federal Government, no Federal Supply Schedule will include any such agency as subject to its mandatory use provisions.

[16] Appellants suggest that the GSBCA should consider GSA's disclosures to GAO during the Heritage proceedings on allocation of the judgment among GSA and the user agencies, as an admission against interest by an adverse party. Specifically, appellants point to GSA's counsel's statement that "GSA believed that a strong argument existed that grand jury work is covered by the contract phrase 'court-house hearings.'" Further, at GAO, GSA counsel stated:

> Because DOJ was not a party to this case, it could not file any motions on its own behalf. To accommodate DOJ, GSA would file motions on its behalf, which were signed by GSA trial counsel. Trial counsel believed these arguments to be, at best, merely colorable argument with a 5-15 percent chance of prevailing at hearing.

Appellants' Opening Brief and Record Submission on Remand at 13-14. We decline to regard GSA counsel's statements as an admission against interest by an adverse party because GSA counsel did not represent DOJ, and his advocacy and opinions about the meaning of the contract do not constitute evidence and are merely an assessment which concedes the possibility that either position may be correct.

administrative" hearings in both paragraphs C.1 and C.7. It is well recognized that an interpretation which 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." Alvin Ltd. v. United States, 816 F.2d 1562, 1567 (Fed. Cir. 1987) (quoting Arizona v. United States, 575 F.2d 855, 863 (Ct. Cl. 1978). In contrast to appellants' reading the words "other administrative" out of the contract, the use of the term "other administrative" necessarily characterizes the preceding categories of hearings as administrative -- a characterization which fits all the enumerated categories. While some of the preceding categories of hearings -- such as depositions and courthouse or legal hearings -- encompass activities which may be other than administrative, the term "other administrative" limits the application of the contract to the instances of those activities which occur in an administrative context.

Appellants argue that because the scope of work expressly provides that transcriptions of "government-owned tapes," "video recordings," and "military court martial boards" are outside the scope of any resultant contracts, grand jury proceedings would also have been listed as an exception if they were not covered. While the contract does exclude these three items, they, unlike grand jury proceedings, can be subsumed within the administrative-type hearings clearly covered. A military court martial board could be viewed as a component of a defense agency and its hearings within the scope unless expressly excluded, whereas grand jury proceedings, which are under the supervision of a court, do not fall within the plain meaning of an administrative proceeding. Similarly, Government-owned tapes and video recordings describe media to be transcribed and do not specify the type of proceedings covered, but such media could be used in an administrative-type hearing. Finally, the enumerated exceptions are not stated to be the sole exceptions to coverage.

Because we conclude that this contract may not reasonably be interpreted in the manner advanced by appellants, we do not deem it ambiguous. See, e.g., Massie, 119 F.3d at 1189; Hill Materials Co. v. Rice, 982 F.2d 514, 516 (Fed. Cir. 1992); Pacificorp Capital, Inc. v. United States, 25 Cl.Ct. 707 (1992), aff'd, 988 F.2d 130 (Fed. Cir. 1993) (a contract may be found ambiguous if the provisions under scrutiny may reasonably be interpreted in two ways).[17]

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[17] We recognize that in Heritage Reporting Corp., GSBCA 10396, 91-1 BCA ¶ 23,379, in the context of resolving GSA's motion for summary relief seeking a ruling that grand jury proceedings were not covered under the contract, we stated that the contract was sufficiently ambiguous to preclude the entry of judgment in the Government's favor. Our finding at that juncture of the Heritage proceeding was based upon a different, less developed record which did not include information as to whether transcripts of grand jury proceedings were ordered by DOJ or Article III courts, and the motion was premised on different legal arguments than those raised here. For example, the Board in Heritage was not asked to address the nature of a grand jury and whether it is quasi-judicial or administrative. In addition, the Board in Heritage "[made] no finding as to whether respondent's interpretation would be appropriate based upon extrinsic evidence or a more developed record." Heritage, 91-1 BCA at 117,292 n.2.

Appellants and respondent agree that the language of the contract is not ambiguous. Nonetheless, the parties address the legal implications assuming arguendo that the contract is ambiguous. Appellants contend in the alternative that if the contract is deemed to be ambiguous, the contract must be construed against the drafter under the principle of contra proferentem. Appellants' Record Submission at 22-23. Precedent makes clear, however, that the principle of contra proferentem is not to be applied until the tribunal determines whether an ambiguity is patent or latent, and whether the contractor's interpretation of the ambiguous language is reasonable. As we recognized in CRC Systems, Inc. v. General Services Administration, GSBCA 11173, 93-2 BCA ¶ 25,842, at 128,604:

> In Broyles & Broyles, Inc., GSBCA 5694, 81-1 BCA ¶ 14,969, this Board stated that the proper inquiry in a case where ambiguity is alleged is the reasonableness of appellant's interpretation. Only after an inquiry into the reasonableness of interpretation is it appropriate to apply contra proferentem, and then, as a last resort. As appellant's interpretation is unreasonable . . . the application of the rule concerning construction against the drafter is not reached.

A patent ambiguity is one that is "so glaring as to raise a duty to inquire." Hills Materials Co. v. Rice, 982 F.2d 514, 516 (Fed. Cir. 1992). A latent ambiguity, on the other hand, is not glaring, substantial, or patently obvious. Grumman Data Systems Corp. v.

Dalton, 88 F.3d 990, 997 (Fed. Cir. 1996); United States v. Turner Construction Co., 819 F.2d 283, 286 (Fed. Cir. 1987). Assuming arguendo that the contract is ambiguous, we do not view the absence of a reference to grand jury as so glaring as to raise a duty to inquire. In Turner, the contract failed to mention the item in question, and the court deemed the ambiguity latent.[18]

But even viewing the ambiguity as latent, appellants' claim would fail. As the United States Court of Appeals for the Federal Circuit recently recognized in P. R. Burke Corp. v. United States, 277 F.3d 1346, 1356 (Fed. Cir. 2002):

> [A] contractor's interpretation of a latent ambiguity will only be adopted if it is found to be reasonable." Cmty. Heating & Plumbing v. Kelso, 987 F.2d 1575, 1579 (Fed. Cir. 1993) (citing Froeschle Sons, Inc. v. United States, 891 F.2d 270, 270 (Fed. Cir. 1989)). . . . "If the court finds that a patent ambiguity did not exist, then the reasonableness of the contractor's interpretation becomes crucial in deciding whether the normal contra proferentem rule applies." Newsom v. United States, 676 F.2d 649-50 (Ct. Cl. 1982) (further explaining that "[t]he court may not consider the reasonableness of the contractor's interpretation, if at all, until it has determined that a patent ambiguity did not exist.").

As explained above, we find appellants' interpretation unreasonable since it ignores the administrative nature of the hearings covered and renders meaningless the two characterizations of covered hearings as "other administrative hearings" in the statement of work.

Although we determine the contract to be unambiguous in its exclusion of grand jury proceedings, we nonetheless look to extrinsic evidence to confirm this interpretation. While extrinsic evidence is ordinarily admitted to shed light on ambiguous contract provisions, it may also be used to explain and interpret, but not contradict, an integrated contract. As we recognized in Cascade Pacific International, GSBCA 6287, 83-1 BCA ¶ 16,501, at 82,004-05:

> Extrinsic evidence that is relevant to prove a meaning to which contract language is reasonably susceptible is always to be considered, Penzoil v. Federal Energy Regulatory Commission, 645 F.2d 360, 388 (5th Cir. 1981), and the conduct of the parties before the controversy arose is of great relevance. Julius Goldman's Egg City v. United States, 697 F.2d 1051, 1058

[18] Of course, were we to view the ambiguity as patent, appellants would have had a duty to inquire. Hills Materials, 982 F.2d at 516.

> (Fed. Cir. 1983); Blinderman Construction Co. v. United States, 695 F.2d 552, 558 (Fed. Cir. 1982); Westinghouse Electric Supply Co., v. Fidelity & Deposit Co., 560 F.2d 1109, 1114 (3rd Cir. 1977); Restatement (Second) of Contracts § 202(5) (1979); UCC § 2-208 (1977); 3 A. Corbin, [Contracts] § 558 [(1960)].

Accord O'Neill v. United States, 50 F.3d 677, 684 (1995) (Uniform Commercial Code "lets in evidence of prior dealings, usage and performance . . . even if the contract terms are clear").

Here, several independent elements of extrinsic evidence prove that grand jury proceedings are not within the contract's scope. First, DOJ's Director of Procurement Services Staff has consistently testified that in January or February 1989, before there was a claim regarding this contract, he spoke with GSA's contracting officer and she advised him that grand jury proceedings were not covered by the contract. Although the contracting officer did not recall this conversation and testified that she did not know whether grand jury proceedings were covered by the contract (or for that matter how the grand jury worked), we credit the testimony of DOJ's Director of Procurement Services Staff. In February and May 1989, this DOJ witness authored two DOJ memoranda instructing DOJ offices on compliance with the schedule contract and expressly advised DOJ components that grand jury proceedings were not covered by the contract -- based upon his conversation "with GSA contracting personnel."

Although appellants cite the contracting officer's testimony to attempt to discredit DOJ's Director of Procurement Services Staff's testimony, we find that the weight of the evidence supports the latter's recollection. See Appellants' Opening Brief at 19.[19] The contracting officer's deposition testimony in May 1991 was taken on short notice and with no preparation. When asked then if grand jury testimony would be covered by the contracts, the contracting officer who had not awarded the contracts, but had taken over their administration, was uncertain; she said she "probably would have to get legal advice"; "was not sure"; offhand she would say yes, but was not sure; and she was not really sure how a grand jury worked but she knew there had been some question about grand jury which probably first came up in her discussions with the previous contracting officer, probably when she started with the contract, in March or April 1989. When asked if she knew "whether DOJ had ever requested an opinion on the grand jury issue," this contracting officer answered "I personally do not know."[20]

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[19] Appellants suggest that in January-February 1989, the time DOJ's Director of Procurement Services Staff issued the first memorandum, "DOJ was just beginning to develop a challenge to the contract's coverage." This statement is wholly unsupported by evidence.

[20] The contracting officer may understandably have failed to remember Mr. Johnston's telephone call, or not characterized it as a formal request for an opinion by DOJ.

Appellants suggest that the Board should ignore DOJ's pre-dispute interpretation of the contract because "a party's subjective, unexpressed intent plays no role in interpreting a contract," citing Bayou Land and Marine Contractors, Inc. v. United States, 23 Cl.Ct. 764, 772 (1991). While this principle of contract interpretation is correct, it has no application here, since DOJ's memoranda addressing compliance with the contract cannot fairly be characterized as "a party's unexpressed subjective intent." DOJ's Director of Procurement Services Staff's memoranda to components of DOJ which were mandatory users of the schedule contracts, disseminating the contracts and advising them that grand jury reporting was not included in them, were the official notification to these entities concerning compliance with the contract. They were not the unexpressed subjective intent of a party to the contract; they were guidance on how the agency was to implement the contract before any dispute as to its meaning arose. We regard these business records generated during the course of the contract, authored by an attorney charged with implementing the contract who testified as to their accuracy and authenticity, as more reliable and probative than the contracting officer's after-the-fact lack of recollection of her conversation during a deposition for which she did not prepare or her statement that "offhand" she would say that grand jury work would be covered if DOJ issued the purchase order but that she "was not sure."

A second independent source of extrinsic evidence which proves the meaning which the contract language itself suggests is the testimony of the prior contracting officer. That contracting officer, who awarded the contracts, testified that it was her understanding that "this schedule was intended for administrative type hearings . . . like a grievance filed by an

employee as opposed to something that took place in a courtroom with a judge or jury." Flint Deposition at 25.

Third, extrinsic evidence of GSA's wholesale adoption of provisions of an earlier contract, which did not include grand jury work and which was intended for administrative and regulatory hearings, also supports an interpretation that grand jury proceedings are not covered. The predecessor contract covered fourteen federal agencies and used almost the identical language in the scope of work as the instant contract. The term "courthouse and/or legal proceedings" could not have encompassed grand jury proceedings because DOJ, the sole federal agency which does grand jury work, was not a user under that contract.

Fourth, the contemporaneous actions of appellants were inconsistent with an interpretation that grand jury work was included in the contract. Although ARTI solicited grand jury work in New York, none of the appellants complained to either GSA or DOJ that the contract was not being used for grand jury work. DOJ solicited and awarded two contracts for court reporting for grand jury work during the term of this contract, and appellants did not protest. Appellants have only pointed to three instances in which DOJ ordered transcripts in connection with grand jury proceedings under these contracts. Given that appellants now claim that some 947,503 original pages of grand jury transcripts should have been ordered, it is curious that appellants did not complain about this large diversion of work if they believed grand jury work was covered. There also is some evidence that Heritage and Ann Riley did not believe grand jury proceedings were covered. In early 1989, the administrative officer to the United States Attorney in the Eastern District of Texas called Heritage about placing orders on the schedule and was told by a Heritage employee that the GSA contract "did not cover reporting of grand jury proceedings," and that Heritage would not transcribe grand jury proceedings under the GSA schedule." Bridges Declaration. Ann Riley requested and received an RFP for grand jury court reporting during the contract term but did not complain that the services covered by the RFP were encompassed under the mandatory schedule.

Finally, the security requirements connected with transcribing grand jury proceedings are inconsistent with the requirements of the contract. Although the contract did contemplate non-public, closed hearings, the contract only obligated appellants to insure that their court reporters possessed the necessary permits and licenses to function as notaries with the ability to administer oaths for sworn testimony. DOJ, however, required court reporters to possess security clearances prior to taking grand jury testimony and imposed security requirements at the contractor's facilities such as a DOJ facility security clearance, an alarm system, and locked entrances and exits with guards on patrol. Yet, the instant contract mandated none of these protections, indicating that grand jury reporting was not within its scope. Although appellants may in fact be able to meet the security requirements of the contract, we look not to appellants' capabilities in interpreting the contract, but rather to the requirements of the contract itself vis-a-vis DOJ's security requirements for grand jury proceedings.[21]

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[21] While CSR was apparently permitted to perform transcription services for one grand jury proceeding without undergoing a security clearance or a facility clearance, this does not

On the basis of the plain language of the contract as further supported by extrinsic evidence, we conclude that grand jury proceedings were not included in the scope of the contract.

Are Off-Schedule "Purchases" Made at Prices Lower than Schedule Prices an Exception to Mandatory Use?

GSA also maintains that under the FPMR at 41 CFR 101-26.401-4(f)(1), the user agencies' purchases of court reporting services from non-schedule vendors at prices lower than those available under the schedule contracts did not constitute a breach. That section provides: "Agencies may purchase products from any source when they are available at prices lower than the prices of identical products provided by multiple-award Federal Supply Schedule contracts." Respondent contends that this regulation was part of the contract because it has the force and effect of law, even though the original RFP contained the substance of this regulation, but deleted this language in Amendment One.[22]

GSA suggests that this regulation remained part of the contract as an "applicable supply procedure" within the meaning of paragraph I.10 of the contract. That paragraph provides: "Articles or services will be ordered from time to time in such quantities as may be needed to fill agency requirements determined in accordance with currently applicable supply procedures." (Emphasis added.) GSA concludes that the FPMR regulation containing the lower-price exception, 41 CFR 101-26.401-4(f)(1), was an applicable supply procedure during the life of the contact, "in accordance with GSA's authority to promulgate regulations under the Property Act." However, the phrase "currently applicable supply procedures" is not defined in the RFP, and we believe it would be overreaching to conclude that this vague reference somehow incorporated the terms of a regulation which had been intentionally deleted from the contract. Further, the paragraph on its face suggests that "currently applicable supply procedures" will be used to determine agency requirements -- not to provide an exception to the mandatory nature of schedule purchase.

Importantly, when the lower-price exception was deleted from the RFP by Amendment One, vendors were on notice that agencies would not be free to purchase lower-priced services off schedule, unless expressly granted a waiver by GSA. This was part of the bargain. To reinject this lower price exception as part of the contract as an "applicable

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refute the testimony about DOJ's uniform security requirement.

[22] The language deleted by Amendment One, although grammatically incorrect, indicates that if identical products were available from another source at a lower delivered price, such products could be purchased "without violating this contract." GSA admits that "the solicitation as originally drafted did explicitly [contain] the language of 41 CFR 101-26.401-4(f)(1)," and suggests that this language was taken out in Amendment One "obviously because the language was superfluous." Respondent's Supplemental Record Submission at 13.

supply procedure" would render the amendment misleading and change the expectations of vendors.

A conclusion that the FPMR provision permitting agencies to procure lower-priced products off-schedule was not part of this contract is bolstered by extrinsic evidence of DOJ's pre-dispute interpretation. In his memoranda to user agencies explaining the mandatory nature of the schedule, DOJ's Director of Procurement Services Staff never intimated that agencies were free to purchase lower-priced services. In fact, his second memorandum suggested that they could not:

> I want to re-emphasize that this Schedule is a mandatory source of supply for all non-grand jury court reporting services performed in the 49 contiguous states and Washington, D.C. The GSA Schedule vendor for the locality in which the services are required must be given the opportunity to perform the services. Only in those cases where the vendor is unable to meet your requirements, can an alternate source be used. Our office is unable to grant waivers.

Respondent next urges the Board, in the alternative, to apply the Christian Doctrine to insert this regulation into the contract by operation of law. In G. L. Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl.), reh'g denied, 320 F.2d 345 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963), the Court of Claims established the principle that has become known as the Christian doctrine. Under this doctrine a court may insert a clause into a Government contract by operation of law if that clause is mandatory and expresses a significant or deeply ingrained aspect of public procurement policy. The regulation respondent seeks to insert here provides, in pertinent part:

> Subpart 101-26.4--Purchase of Items From Federal Supply Schedule Contracts
>
> § 101-26.401 Applicability.
>
> All executive agencies shall procure needed articles and services from Federal Supply Schedule contracts in accordance with the provisions of the appropriate Federal Supply Schedule.
>
> (a) The general principles and methods prescribed in this Subpart 101-26.4 apply to all such procurements. Consequently, prior to initiating procurement directly from commercial sources, agencies shall determine whether the required commodities and services or similar commodities and services serving the required functional end-use purpose are available from a Federal Supply Schedule. Agencies shall not solicit bids, proposals, quotations, or otherwise test the market solely for the purpose of seeking alternative sources to Federal Supply Schedules. Further, agencies shall not request formal or informal quotations from Federal Supply Schedule contractors for the purposes of contract price comparisons.

. . . .

(c) Agencies shall periodically compare prices quoted in Federal Supply Schedules with fully suitable products available from noncontract sources. When lower prices are encountered, this information shall immediately be brought to the attention of the Commissioner, Federal Supply Service (mailing address: General Services Administration (F), Washington, DC 20406), with full documentation. . . . This section does not authorize the purchase of such fully suitable products in place of products quoted in Federal Supply Schedules. When identical products are purchased from noncontract sources at delivered prices that are lower than the prices quoted in Federal Supply Schedules, agencies shall submit copies of the purchase order to GSA in accordance with § 101-26.401-4(f)(3).

. . . .

§ 101-26.401-4 Exceptions to mandatory use.

(a) Urgent requirements. These are individual bona fide delivery requirements or ordering activities for supplies or services which require shorter delivery times than those specified in the respective contracts. . . . .

(b) Small Requirements. . . .

(c) Maximum order limitations. . . .

(d) Legislative and judicial agencies. . . .

(e) Geographic location. . . .

(f) Lower prices for identical items. (1) Agencies may purchase products from any source when they are available at prices lower than the prices of identical products provided by multiple-award Federal Supply Schedule contracts.

(2) All of the costs and related considerations for lower priced products shall be evaluated, including but not limited to comparisons of warranties, transportation costs (origin and destination), and delivery terms. However, the prohibition in § 101-26.401(a) must be observed.

(3) When identical products are purchased from noncontract sources at delivered prices that are lower than the prices provided by multiple award schedule contracts, the following information shall be furnished to the General Services Administration (FCC), Washington, DC 20406, when the order is issued:

(i) Copy of the purchase order;

(ii) Identification of the Federal Supply Schedule;

(iii) Name of the schedule contractor;

(iv) Schedule contractor number;

(v) Schedule contract price;

(vi) Schedule special item number (SIN); and

(vii) Manufacturer's model and/or part number.

Documentation of paragraphs (f)(3)(ii) through (vii) of this section may be provided by an informal means, such as attachment(s) to the purchase order, annotation directly on the purchase order, or a combination of both.

(Emphasis added).

As the United States Court of Appeals for the Federal Circuit recognized in General Engineering & Machine Works v. O'Keefe, 991 F.2d 775, 779 (Fed. Cir. 1993), "under the Christian Doctrine a court may insert a clause into a government contract by operation of law if that clause is required under applicable federal administrative regulations. . . [and] expresses a significant or deeply ingrained strand of public procurement policy."

GSA argues that the Board is required to read a portion of this regulation into the contract under the Christian doctrine -- subsection f, which provides an exception to mandatory use for lower-priced items if the enumerated requirements are met. Although respondent characterizes this portion of the regulation as "a mandatory procurement regulation," it has not suggested a legal basis for that assertion, and none is apparent to us. The regulation itself nowhere states that this provision is required to be incorporated into mandatory federal supply schedule contracts. Nor have the parties cited a procurement statute or regulation which would require the terms of the lower price exception to be incorporated in the contract as a mandatory clause. See Amfac Resorts v. Department of the Interior, No. 01-5226, et al. (D.C. Cir. Mar. 1, 2002) (renewal provision in concession contract was by no stretch a mandatory contract term).

In S.J. Amoroso Construction Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993), the Court affirmed the incorporation into a contract of Buy American Act requirements which the parties had stricken. Initially observing that "[a]pplication of the Christian doctrine turns not on whether the clause was intentionally or inadvertently omitted," the court emphasized that the Buy American Act itself required that "[e]very contract for construction . . . shall contain a provision" with respect to materials, supplies, and articles manufactured in the United States. From this the Court concluded that the statute evidences "a significant and deeply ingrained strand of public procurement policy sufficient to require incorporation of

the clause prescribed . . . as a matter of law." Id. at 1076; accord General Engineering, 991 F.2d at 780 (court incorporated a regulation requiring separate cost pools, reasoning it was "sufficiently ingrained" in public procurement policy because it deterred double payments and "thus discouraged the unnecessary and wasteful spending of government money"); University of California, VABCA 4661, 97-1 BCA ¶ 28,652 (board incorporated defective pricing clause in order to protect the taxpayer's dollar from "excessive costs" and "unnecessary and wasteful spending" as a "deeply ingrained strand of procurement policy" based upon statutory mandate in Truth in Negotiations Act).

Nor do we discern a "significant deeply ingrained strand of public procurement policy" in this regulation. Although the Government cites the laudable purpose of enabling it to obtain the lowest price, this clause also permits the Government to avoid the mandatory contract by negotiating prices with other non-schedule vendors, for work covered by the contract. In contrast to this regulation, the clauses which have been incorporated under the Christian doctrine serve to "guard the dominant legislative policy against ad hoc encroachment or dispensation by the executive," and "prevent hobbling the policies which the appointed rule-makers consider significant enough to call for mandatory regulation." Amoroso, 12 F.3d at 1075 (citing Christian, 320 F.2d at 351).

Here, rather than promoting a statutory mandate being encroached, the regulation, in certain enumerated circumstances, would permit one party to the contract, the Government, to alter the business expectations of the other party after award in a material way – depriving a schedule vendor of business which had been promised and enabling competitors to undercut their contracts by their prices. We thus cannot conclude that there is a "significant or deeply ingrained strand of public procurement policy" implicated here, as the regulation in question serves to change the parties' bargain rather than to promote an entrenched legislative or regulatory procurement policy.[23]

Even if the "lower price defense" were incorporated into these contracts, 41 CFR 101-26.401-4(f) contains several affirmative requirements for invocation of the defense, including the requirement that:

> (3) When identical products are purchased from noncontract sources at delivered prices that are lower than the prices provided by multiple award schedule contracts, the following information shall be furnished to the General Services Administration (FCC), Washington, DC 20406, when the order is issued:
>
> (i) Copy of the purchase order;

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[23] Although the Christian doctrine has also been employed to incorporate less fundamental or significant mandatory procurement contract clauses if not written to benefit or protect the party seeking incorporation, this does not help GSA since the regulation at issue would benefit the Government. General Engineering, 991 F.2d at 780 (citing Chris Berg, Inc. v. United States, 426 F.2d 314, 317 (Ct. Cl. 1970)).

(ii) Identification of the Federal Supply Schedule;

(iii) Name of the schedule contractor;

(iv) Schedule contractor number;

(v) Schedule contract price;

(vi) Schedule special item number (SIN); and

(vii) Manufacturer's model and/or part number.

41 CFR 101-26.401-4(f)(3).

It is undisputed that this required information and documentation was not provided to GSA for any off-schedule order. Thus, even if the regulation were incorporated by law into the contract, the Government did not otherwise comply with it, such that allowing the Government now to benefit from it would be inequitable.

Decision

The appeals are **GRANTED IN PART**. Appellants are entitled to the stipulated damages of $4,972,363.85 less the sales attributed to grand jury proceedings, $779,460.11, for a consolidated recovery of $4,172,903.74. Based upon their stipulated percentages of the total recovery, appellants are entitled to judgment in the following amounts:

Ace Federal	6.15%	$256,498.55
ARTI	9.78%	$407,911.79
CSR	10.21%	$425,990.99
Executive	20.36%	$849,722.07
Miller	29.62%	$1,236,164.82
Ann Riley	23.88%	$996,615.52

In GSBCA 13298-REM, the Government is to pay to Ace-Federal Reporters, Inc. $256,498.55. In GSBCA 13507-REM, the Government is to pay to Ann Riley & Associates, Ltd. $996,615.52. In GSBCA 13508-REM, the Government is to pay ARTI Recording, Inc. $407,911.79. In GSBCA 13509-REM, the Government is to pay to California Shorthand Reporting $425,990.99. In GSBCA 13510-REM, the Government is to pay to Executive Court Reporters $849,722.07. In GSBCA 13511-REM, the Government is to pay to Miller Reporting Co., Inc. $1,236,164.82. Each amount specified is to be paid with interest from

the date on which the contracting officer received the claim in question. 41 U.S.C. § 611 (1994).

_____
MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

_____
STEPHEN M. DANIELS
Board Judge

_____
EDWIN B. NEILL
Board Judge