

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of-- )  
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Phoenix Management, Inc. ) ASBCA No. 57234  
 )  
Under Contract No. FA8501-09-C-0032 )

APPEARANCES FOR THE APPELLANT: Johnathan M. Bailey, Esq.  
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APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.  
Air Force Chief Trial Attorney  
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OPINION BY ADMINISTRATIVE JUDGE JAMES  
UNDER BOARD RULES 11 AND 12.3

This appeal arises from the contracting officer's (CO) 7 May 2010 final decision that denied Phoenix Management, Inc.'s (PMI) 26 January 2010 claim for \$8,721.19 in travel and per diem costs and expenses of its employees in support of U.S. Air Force Reserve Band trips under the captioned contract. In June 2010 PMI elected the Board's Rule 12.2 expedited procedure, but due to scheduling difficulties, changed its election to the Board's Rule 12.3 accelerated procedure. The parties elected to submit the appeal on the record, pursuant to Board Rule 11. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. The Board is to decide both entitlement and quantum.

SUMMARY FINDINGS OF FACT

1. On 1 April 2009 the U.S. Air Force issued Solicitation No. FA8501-09-R-0007 (the RFP), which encompassed vehicle transport services to support activities at Robins Air Force Base, GA, including the Air Force Reserve Band (AFRB) (R4, tab 2 at 153, tab 6 at 278-79).

2. The RFP's Performance Work Statement (PWS) provided in pertinent part (R4, tab 6 at 275, 279):

**1.1.2.7 Air Force Reserve Band Support.** The Contractor shall provide vehicle operators to support all Air Force Reserve Band engagements. Operators must be licensed and proficient in operation of 44 passenger inter-city buses over public roads and highways. Support includes cargo and passenger movement for temporary duty (TDY) assignments. Band buses shall be used in the most efficient and economical manner possible. (AFI 24-301, para 3.16 and 3.16.3) (Appendix 8).

3. RFP § B set forth 14 contract line items (CLINs) for the period 1 September 2009 through 31 August 2010, of which 11, including CLIN 0002, "Vehicle Operations" under PWS ¶ 1.1, were firm fixed-price. CLIN 0003 required "over and above" vehicle operation services on a labor-hour basis for PWS ¶ 1.1.5 mobility exercises, deployment, disaster preparedness, exercise and other contingencies. The other CLINs referred to PWS ¶ 1.2 or higher numbers. The RFP set forth corresponding CLINs for four option years. (R4, tab 2 at 154-99, tab 6 at 279)

4. On 22 April 2009 PMI asked regarding PWS ¶ 1.1.2.7, "How many of the 14 non-local runs require an overnight stay or result in hours worked that exceed 8?" and "How many days TDY was [sic] required to support the 25 non-local bus runs for the AFRC Band Support?" (app. supp. R4, tab A9 at 40). Respondent did not answer PMI's questions as such.

5. In April-May 2009 respondent posted questions from, and government answers available to, all prospective offerors on the RFP at the "Federal Business Opportunities" website (<https://www.fbo.gov/>) (R4, tab 11, ex. 2 at 360-61).

6. On 28 April 2009 Robins posted, *inter alia*, question No. 36 and its answer (Q&A) to all offerors solicited on the RFP (R4, tab 4 at 270):

**36.** Ref: Para 1.1.2.7, Air Force Reserve Band Support. Are contractor drivers required to perform duties [sic] that would require them to remain overnight at off base locations? If so, are expenses and per diem costs reimburseable [sic] to the contractor?

**Answer: Yes. Yes. The Air Force band will reimburse expenses.** [Emphasis in original]

7. On 1 May 2009 Robins posted the following Q&A, *inter alia*, regarding the RFP (R4, tab 5 at 271):

**Question:** PWS 1.1.2.7 Are TDY hours O&A? Who pays for food and lodging? Are there more than one dispatch at one time and how many days are they for?

**Answer:** There were 76 AFRC runs in 2008 of which 17 were longer than 8 hours. TDY's [sic] are not covered by the O&A CLINs. Contractors are only responsible for reimbursable costs. TDY's [sic] are reimbursed based on the rates and requirements listed in the JTR [Joint Travel Regulation]. [Emphasis in original]

8. The Air Force did not amend the RFP to add a CLIN to reimburse TDY costs of band support.

9. Based on the RFP, on 31 August 2009 the Air Force 78<sup>th</sup> Comptroller & Contracting Squadron awarded Contract No. FA8501-09-C-0032 (the contract) to PMI for vehicle operation and maintenance services at Robins AFB, GA (R4, tab 1 at 1).

10. PMI's 19 October 2009 letter to CO Marvin Gleaton set forth respondent's 28 April and 1 May 2009 Q&As and stated (R4, tab 9):

With this information [PWS ¶ 1.1.2.7] and the following clarification in the [Q&As] dated April 29 [sic] and May 1, [2009] listed below we were able to ascertain that the contractor would be liable for employees pay and if their travels required the payment of Per Diem, the government would reimburse the contractor. Thus in preparing our proposal we did not add any travel costs for meals, or rental car , as provided in the JTR associated with the AFRC band support other than the employee's wages.

....

Unfortunately the resulting contract does not provide any mechanism to bill for these travel costs.... Checks totaling \$1,922.18 have been issued to support these requirements. This total includes payments to our employees when they had to stay at a hotel used by the AFRC band where the daily rate exceed [sic] the JFTR [sic] amount.

[PMI] respectfully requests the contract be modified to allow recovery of cost associated with this support. These costs are beyond the firm fixed portion of this contract, consistent with the information and answers provided for our review during the solicitation, and could not be anticipated as non-reimbursable.

11. CO Gleaton's 17 November 2009 e-mail to PMI stated (R4, tab 10):

While the [Q&As] referenced in your 19 Oct 09 letter are what they are, the review of all internal documentation and the official contract related to this issue supports the contractor being fully responsible for all costs of providing support for the [AFRB]. PWS paragraph 1.1.2.7 defines "support" of the [AFRB] to "include cargo and passenger movement for TDY assignments." This means band cargo and band members on TDY status, not the contractor provided driver. This is a bilateral contract and does not provide for reimbursable contractor travel. Based on the above, contractor support of the [AFRB] in accordance with PWS paragraph 1.1.2.7 is within the scope of work covered by the contract firm fixed price of CLINs X002.

12. PMI's 26 January 2010 letter submitted an \$8,721.19 claim for reimbursement of travel expenses and per diem costs under the contract and requested a final decision thereon within 60 days (R4, tab 11).

13. CO Gleaton's 7 May 2010 final decision denied PMI's 26 January 2010 claim in its entirety (R4, tab 12). On 14 May 2010 PMI sent a timely notice of appeal of CO Gleaton's foregoing final decision to the ASBCA (R4, tab 13), which was docketed as ASBCA No. 57234.

## DECISION

### I.

PMI contends that PWS ¶ 1.1.2.7 originally seemed ambiguous with respect to whether TDY travel costs were reimbursable (app. reply br. at 12); respondent's 28 April 2009 and 1 May 2009 Q&As are not extrinsic evidence barred by the parol evidence rule because they constitute binding RFP amendments, which clarified PWS ¶ 1.1.2.7 and allowed PMI to be reimbursed for its TDY travel costs (*id.* at 10-14); the government was responsible for clarifying RFP ambiguities (*id.*); a contractor has no duty to seek

clarification when a solicitation amendment conflicts with the original solicitation and the contractor follows the language of the amendment (*id.* at 16-17); PMI's 22 April 2009 questions to respondent fulfilled its obligation to seek clarification of PWS ¶ 1.1.2.7 (app. reply br. at 14-15); and respondent is barred by the rule of *contra proferentem* (*id.* at 15-16).

Respondent argues that PWS ¶ 1.1.2.7 is clear and unambiguous (gov't br. at 14-15); the 28 April and 1 May 2009 Q&As are "extrinsic" evidence barred by the parol evidence rule (*id.* at 15-17); PMI did not rely on the foregoing Q&As but rather interpreted the contract not to allow reimbursement of TDY costs (*id.* at 17-18); and the alleged ambiguity or disconnect in the PWS CLIN structure and the Q&As was patent, because it was known to PMI, but PMI did not timely notify respondent of such ambiguity (*id.* at 18-20).

## II.

The threshold question for resolving contract ambiguity disputes is whether the plain language of the contract "supports only one reading or supports more than one reading and is ambiguous." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). If a contract is reasonably susceptible of more than one interpretation, it is ambiguous. *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992).

In choosing between competing reasonable interpretations of an ambiguous contract provision, the general rule of *contra proferentem* requires the ambiguity to be resolved against the drafter. *See HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004). Exceptions to the rule of *contra proferentem* arise when an ambiguity is so "patent and glaring" that it is unreasonable for a contractor not to discover it, *see Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997), and when the contractor knew of the ambiguity. *See Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993) (contractor inquired about conduit sleeves for new manholes before bidding; any ambiguity about them "would have therefore been patent"); *James A. Mann, Inc. v. United States*, 535 F.2d 51, 61 (Ct. Cl. 1976) (*contra proferentem* does not apply where plaintiff knew of the alleged ambiguity before it submitted its bid); *Beacon Construction Co. v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963) (contractor barred from recovery because "it is plain that...the discrepancy was in actual fact, and in reason must have been, fully known to plaintiff before it computed its bid").

There is no necessary bar to the Board considering the Q&As. In the right circumstances, they may give meaning to the contract's terms. *See Rio Construction Corp.*, ASBCA No. 54273, 04-1 BCA ¶ 32,534 at 160,912 and cases cited.

Here, although CLIN 0002 did not explicitly address whether the contractor's band support travel expenses were covered under its firm fixed-price, all costs and expenses to perform CLIN 0002 must be deemed to be in its firm fixed-price. As the solicitation was originally issued, its terms concerning CLIN 0002 and PWS ¶ 1.1.2.7 were not ambiguous.

On 28 April 2009 respondent posted the following Q&A (finding 6):

Ref: Para 1.1.2.7.... Are contractor drivers required to perform duties [sic] that would require them to remain overnight at off base locations? If so, are expenses and per diem costs reimbursable [sic] to the contractor?

**Answer: Yes. Yes. The Air Force band will reimburse expenses.**

On 1 May 2009, moreover, to the question who pays for food and lodging of bus operators, the Air Force answered: "TDY's are not covered by the O&A CLINs [0003, 0011]. Contractors are only responsible for reimbursable costs. TDY's are reimbursed based on the rates and requirements listed in the JTR." (Finding 7) That answer was inconsistent and confusing, because it stated that the contractor's TDY costs were not covered by the over and above CLINs and contractors were responsible for reimbursable costs, yet it also stated that TDY's were to be reimbursed under the JTR.

If respondent's 28 April 2009 answer was not ambiguous, its 1 May 2009 answer clearly created a patent ambiguity: whether the contractor's band support TDY costs were reimbursable under firm fixed-price CLIN 0002. That patent ambiguity triggered PMI's duty to inquire about it before bidding on the contract. *See Interstate General Gov't Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434-35 (Fed. Cir. 1992). Absent such inquiry, such ambiguity will be resolved against the contractor. *Triax Pacific*, 130 F.3d at 1475.

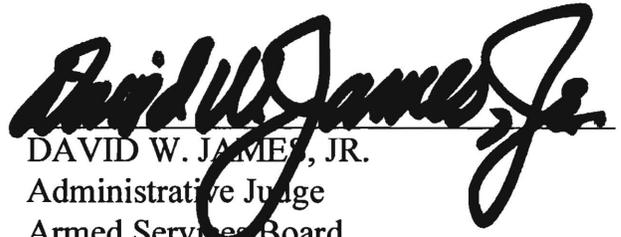
Furthermore, when an offeror attempts, but the government's response fails, to resolve an ambiguous solicitation provision, the offeror has the duty to continue to seek to resolve that ambiguity. *See Community Heating*, 987 F.2d at 1580 (it is not enough under the duty to inquire that a contractor merely make an initial inquiry). *Community Heating* cited *Southside Plumbing Co.*, ASBCA No. 8120, 1964 BCA ¶ 4314 at 20,860-61 (contractor was aware of an ambiguity prior to bidding, sought and received a supposedly clarifying addendum, realized that the addendum failed to resolve the ambiguity, sought no further clarification and bid on the basis of its own interpretation; the contractor did not meet its duty to inquire) and *Construction Service Co.*, ASBCA No. 4998, 59-1 BCA ¶ 2077 at 8846-47 (contractor requested and received an addendum that did not alleviate

the confusion; "If after receiving the addendum the intended meaning still was not clear to appellant, it should have requested a further clarification").

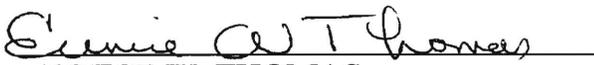
Since PMI knew or had reason to know of respondent's answers to the 1 May 2009 Q&As, and did not seek any clarification after 1 May 2009 of the ambiguity they created, such ambiguity must be resolved against PMI. *See Triax Pacific*, 130 F.3d at 1475; *Community Heating*, 987 F.2d at 1580; *Southside Plumbing*, 1964 BCA ¶ 4314 at 20,860-61; *Construction Service*, 59-1 BCA ¶ 2077 at 8846-47.

For the foregoing reasons, we deny the appeal.

Dated: 13 December 2010

  
DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

  
EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 57234, Appeal of Phoenix Management, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals