

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Trace Systems Inc.) ASBCA No. 57574
)
Under Contract No. W91B4N-10-C-5007)

APPEARANCE FOR THE APPELLANT: Michael H. Ferring, Esq.
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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Samuel E. Gregory, JA
Stephanie B. Magnell, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

At issue in this opinion is the motion of appellant Trace Systems Inc. (Trace) for an Order Sustaining Appeal on Issue of Entitlement based upon our decision reported as *Trace Systems, Inc.*, ASBCA No. 57574, 11-2 BCA ¶ 34,861. The government opposed the motion and Trace did not reply. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Trace was awarded Contract No. W91B4N-10-C-5007 for five subject matter experts (SMEs) who were to provide network infrastructure support and audio visual support for the Camp Sabalu Detention Facility in Parwan at Bagram, Afghanistan (R4, tab 1 at 49-50). The Army reimbursed Trace \$15,191.80 under contract line item (CLIN) 0007 for mobilization air travel incurred for four of its contract employees, but would not reimburse \$5,051.20 in rest and recuperation (R&R) air travel expenses from Afghanistan to the United States and return for two of the employees (R4, tab 3).

On 28 January 2011, Trace submitted a claim to the contracting officer seeking an interpretation of the contract as it related to the non-payment of travel-related expenses. The claim stated: "Quantum is not within the scope of this request for a COFD [contracting officer's final decision], rather only the Contracting Officer's contract interpretation for declining payment is within the scope of this inquiry." (R4, tab 6) The contracting officer issued a final decision in which she determined that "R&R travel

is not considered official travel and cannot be billed under CLIN 0007 Travel” (R4, tab 9). This timely appeal followed.

On 21 June 2011, the government filed a motion for summary judgment advancing its interpretation of contract provisions relating to reimbursement of R&R travel expenses. Trace submitted a reply to the motion, providing its interpretation of the contract provisions, but did not cross-move for summary judgment and the government filed a response. Along with its reply, Trace offered the declaration of Mr. John Wallace, Trace’s vice president for finance, in which Mr. Wallace stated that Trace had performed a number of contracts in which R&R travel costs were compensable when a travel line item was included in the contract (Wallace decl. ¶ 4). He explained that the government had included \$60,000 as the cost of CLIN 0007, Travel, in the solicitation and that he thought the amount was “reasonable to cover one year’s travel costs, including R&R for five employees” (*id.* ¶¶ 2, 5). Mr. Wallace does not state that Trace interpreted the provisions of the instant contract to provide for reimbursement of R&R travel expenses or that it relied upon that interpretation in submitting its bid.

After due consideration, we denied the government’s motion. We concluded:

Thus, when all of the contract provisions are considered, we conclude that both the government’s contention that R&R is not reimbursable because it is not official travel and Trace’s argument that R&R travel is reimbursable to be within a “zone of reasonableness.” [Citing *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999)] Further, we are satisfied that the lack of any statement in the contract regarding whether R&R travel is official travel or is otherwise reimbursable was neither a glaring conflict or obvious error, such that it created a patent ambiguity. See *Control, Inc. v. United States*, 294 F.3d 1357, 1364 (Fed. Cir. 2002).

The remaining arguments relate to the Wallace declaration and the \$60,000.00 estimate of travel expenses. The respective arguments made by the parties relating to the Wallace declaration are of no consequence because the declaration lacks sufficient factual specificity regarding the prior contracts. And, finally, we agree with Trace that the government’s contentions regarding whether \$60,000.00 is sufficient to reimburse Trace for all travel expenses, including R&R, are speculative.

On the issue of contract interpretation, we conclude the contract was ambiguous with respect to whether R&R travel expenses would be reimbursed and that the ambiguity was latent, not patent.

Trace Systems, 11-2 BCA ¶ 34,861 at 171,484.

DISCUSSION

Based upon our previous decision, Trace filed a one-page Motion for Order Sustaining Appeal on Issue of Entitlement in which it asserts that the effect of our decision is that Trace had prevailed on the question of entitlement. The government's response urges us to treat the motion as one for summary judgment and argues that appellant has not carried its burden of showing that it relied upon its interpretation of the contract at the time it submitted its bid.

We agree with the government that appellant's motion should be treated as one for summary judgment, which requires a finding that Trace is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In our previous decision, we concluded that the contract was ambiguous with respect to whether R&R travel expenses would be reimbursed and that the ambiguity was latent. In order to prevail on entitlement as a matter of law, Trace must show that it relied upon the interpretation it now advances at the time it prepared its bid. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1432 (Fed. Cir. 1990). Trace has not come forward with any evidence of such reliance. Accordingly, it has not met its burden of proof on the issue of entitlement.

CONCLUSION

Appellant's Motion for Order Sustaining Appeal on Issue of Entitlement is denied.

Dated: 25 May 2012



CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



MARK N. STEMPLE
Administrative Judge
Acting Chairman
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. 57574, Appeal of Trace Systems Inc., rendered in conformance with the Board's Charter.

Dated:

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