

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Optimization Consulting, Inc.) ASBCA No. 58752
)
Under Contract No. W9133L-10-D-0002)

APPEARANCE FOR THE APPELLANT: Mr. Richard Holmes
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
Robert B. Neill, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE NEWSOM
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This appeal comes before the Board on the government's motion for summary judgment. Appellant claims that the contract required the government either to purchase appellant's proposed Management Information System (MIS), or to provide a government-furnished MIS. The government did neither, which allegedly caused appellant to incur additional performance costs totaling \$3,661,683.16. The government contends that an MIS was optional, and the contract unambiguously allowed the government discretion neither to purchase nor provide an MIS.

For the reasons explained below, we deny summary judgment to the government because we find that the government's interpretation is inconsistent with other provisions of the contract.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Seeking to improve mental health support for its service members, the Air National Guard (ANG) issued Solicitation No. W9133L-10-R-0099 on 10 August 2010 (R4, tab 2 at 1). The solicitation called for competitive proposals to provide mental health counselors and clinicians and associated support services for ANG service members and their families (*id.* at 40).

2. On 24 September 2010, ANG awarded Contract No. W9133L-10-D-0002 (Contract) to Optimization Consulting, Inc. (OCI) (R4, tab 1 at 1). The Contract called for OCI to provide services in three out of six regions (R4, tab 1 at 126-27, tab 8).

3. The Performance Work Statement (PWS) described the work to be performed. In broad terms, the work fell into two categories: (a) psychological health services (PHS); and (b) records management and reporting services. (R4, tab 2 at 43, 94)

4. To meet its PHS obligations, the contractor was required to staff a psychological subject-matter expert in each ANG Wing, known as the Wing Psychological Healthcare Subject Matter Expert (PHSME), who would oversee and coordinate mental health services. It also was to provide a network of mental health clinicians and counselors to provide mental health support to service members and their families for a wide range of problems, such as adjustment disorders, traumatic brain injuries, or post-traumatic stress disorders. The contractor was also to undertake activities to promote psychological wellness. (R4, tab 2 at 56-88)

5. The records management and reporting duties are at the heart of this dispute. The contractor was required to collect and maintain data, including records of contacts with service members; records of “[e]very action taken by the PHSME in management of the case”; demographics of service members seeking assistance; key events in management of a case, and other data elements (R4, tab 2 at 97-99). The contractor was also to create and submit approximately 63 separate written deliverables or reports to the government or to other stakeholders, most of which were to be submitted on a recurring basis (*id.* at 88-93).

6. The dispute concerns the contractor’s use of an MIS to perform these data management and recordkeeping obligations. The PWS stated that the contractor was “expected to use an automated data processing system to support record management and reporting needs” (R4, tab 2 at 96).

7. The parties disagree, however, as to whether the Contract imposed an obligation on the government to supply or pay for an MIS to support the contractor’s records management and reporting duties (app. Statement of Genuine Issues of Material Fact (SGI) 2; gov’t mot. at 11, 13).

8. Both parties focus on language in Section III.A of the PWS. In the second subsection “a”¹ therein, the following language appeared, with bold and underlining in the original:

¹ The PWS Section III.A has two subsections labeled “a.” The relevant portion is the second subsection “a.”

a. Management Information System () (Portions are Optional for award)

The ANG is currently investigating a comprehensive multi-layered tracking and data collection system for many ANG personnel functions. The ANG may/may not elect to utilize the total capability of Contractor's comprehensive MIS system, but expects the offeror to provide and manage hardware necessary to accomplish and effectively communicate as well as track activity of the PHSME program. The ANG expects any data collected in the provision of this contract will have the ability to be transferred and/or to collaborate in partnership with other ANG /IT contractors, within the bounds of privacy and confidentiality laws and regulations. However, the Government does expect each offeror to propose as part of this solicitation, its MIS capabilities and plan for tracking PHSME services.

Offerors are to propose use of their MIS and describe in their proposal how their MIS will effectively support the full range of services needed under this contract. Offerors are to provide a breakout of MIS costs as part of their business proposal. The Government reserves the right to require use of a DoD system or a combination of DoD and Offerors' MIS.

(R4, tab 2 at 95) (Emphasis in original)

9. Other PWS provisions mentioned that the contractor would use an MIS to perform recordkeeping and reporting functions. The PWS stated, for example, the following:

- “The Contractor shall adhere to requirements of DoD, ANG and the *Contractor's Management Information System ()* security plan including security guidelines for electronic files” (R4, tab 2 at 94) (emphasis added).
- “The offeror will be responsible for collection and management of all case management, counselor activity, and business management data required to create operational and business reports for the ANG. *This data will be maintained within the Contractor's MIS*” (*id.* at 97) (emphasis added).

- “Consultation and information provided to PHSMEs during service contacts that do not immediately result in opening a case *shall be entered in the MIS* as a consultation occurring or documented immediately and entered by the close of business on the day of the contact” (*id.* at 99) (emphasis added).
- “The Contractor shall maintain all data sets *within their data systems....* [T]his information will be provided to the ANG as a backup of the data *from the MIS system used by the Offeror* in an agreed to format.” (*Id.* at 102-03) (Emphasis added)
- “The Contractor shall be required when requested by the ANG COTR, to promptly and fully participate in an in-depth study of the security of the *Contractor’s records system and Management Information System*” (*id.* at 106) (emphasis added).
- “*The MIS* must comply with DoD computer security requirements” (*id.* at 107) (emphasis added).

10. PWS Section III.D, entitled “**GOVERNMENT FURNISHED FACILITIES AND EQUIPMENT/PROPERTY**,” identified the equipment and facilities that the government would furnish. It did not list an MIS as government-furnished equipment or property. (R4, tab 2 at 103-04) (Emphasis in original)

11. The government issued three task orders to OCI, each of which funded portions of the period of performance (R4, tab 10 at 1, 6-7, tab 18 at 1, 4-5, tab 45 at 1, 7-8).

12. After performance commenced, OCI expressed concern about the lack of an MIS, claiming that the absence of an MIS was causing it to incur unanticipated performance costs (R4, tab 66 at 4). According to an OCI-prepared summary of a 27 February 2012 meeting, OCI urged the government either to “[i]mplement an MIS Solution immediately” or “[m]odify the pricing structure to account for the cost of OCI’s additional resources” (R4, tab 78 at 1).

13. OCI asserts that the government initially stated that it was “looking into” using a government-supplied MIS (R4, tab 66 at 4).

14. By November 2012, however, the government determined that it would not supply an MIS and would not modify the Contract to increase OCI’s funding (R4, tab 131 at 8).

15. On 26 December 2012, OCI submitted a claim to the contracting officer for costs incurred allegedly because of the government’s failure to implement an MIS.

OCI claimed that it was forced to analyze data and generate reports manually, which required more manpower than would have been required with an MIS. It claims to have added 4.5 full-time equivalent staff plus additional work hours for existing staff. (R4, tab 147)

16. The contracting officer denied the claim in a written decision dated 25 May 2013, which OCI received the same day (R4, tabs 213-15). OCI timely filed this appeal on 28 June 2013.

DECISION

Summary judgment is appropriate where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). As a general rule, pure contract interpretation is a question of law that may be resolved by summary judgment. *Aegis Defence Services Ltd.*, ASBCA No. 59082, 15-1 BCA ¶ 35,811 at 175,138; *Osborne Construction Company*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,514.

The government moves for summary judgment on the ground that the Contract did not require the government either to pay appellant for its MIS, nor to provide a government-furnished MIS for appellant's use (gov't mot. at 11, 13). Appellant claims that the Contract required the government either to provide an MIS or pay for appellant's MIS (SGI 2). As we explain below, we conclude that the Contract does not unambiguously support the government's interpretation.

The threshold question is whether the plain language of the Contract is clear or ambiguous, which is a question of law. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993). If a contract is reasonably susceptible of two or more interpretations, each of which is consistent with the contract language, it is ambiguous. *Community Heating & Plumbing*, 987 F.2d at 1579; *Phoenix Management, Inc.*, ASBCA No. 57234, 11-1 BCA ¶ 34,734.

The government contends that the Contract unambiguously stated that "an MIS tool was an optional service" and was "optional for award," (gov't mot. at 11, 13), relying principally on the language in Section III of the PWS:

- a. Management Information System () (**Portions are Optional for award**)

The ANG is currently investigating a comprehensive multi-layered tracking and data collection system for many ANG personnel functions. The ANG may/may not

elect to utilize the total capability of Contractor's comprehensive MIS system, but expects the offeror to provide and manage hardware necessary to accomplish and effectively communicate as well as track activity of the PHSME program. The ANG expects any data collected in the provision of this contract will have the ability to be transferred and/or to collaborate in partnership with other ANG /IT contractors, within the bounds of privacy and confidentiality laws and regulations. However, the Government does expect each offeror to propose as part of this solicitation, its MIS capabilities and plan for tracking PHSME services.

Offerors are to propose use of their MIS and describe in their proposal how their MIS will effectively support the full range of services needed under this contract. Offerors are to provide a breakout of MIS costs as part of their business proposal. The Government reserves the right to require use of a DoD system or a combination of DoD and Offerors' MIS.

(SOF ¶ 8)

The government points to three excerpts from this provision to support its interpretation. None of these excerpts stretches quite as far as the government urges. First, it points to the heading, arguing that the words “Management Information System” and “Optional for award,” meant that “an MIS tool” or “the MIS Section” were optional for award (gov’t mot. at 13-14).² That, however, is not quite what the heading stated. It did not state that an “MIS tool” or “the MIS Section” were “optional for award.” It stated “Management Information System () **(Portions are Optional for award)**” (SOF ¶ 8) (emphasis in original). The meaning depends on what the word “portions” refers to. While “portions” could refer to the entire MIS, supporting the government’s position, that is not the only reasonable reading. “Portions” could also refer to sub-elements of the MIS, suggesting that some portions of an MIS were optional while other portions of an MIS were mandatory.

² For convenience, the Board refers to the PWS in the solicitation, but the same language appears in the PWS in the awarded contract (*compare* R4, tab 1 with R4, tab 2). The Contract incorporated the PWS that was in the solicitation. Thus, all of the PWS provisions in the solicitation became part of the awarded Contract. (R4, tab 1)

Second, the government interprets the sentence fragment, “The ANG may/may not elect to utilize the total capability of Contractor’s comprehensive MIS system” (SOF ¶ 8) (emphasis in original deleted), to mean that the government “may/may not elect to utilize” an MIS (gov’t mot. at 15). That interpretation, however, ignores certain words and thereby changes the meaning. The provision did not state that the government may or may not elect to “utilize an MIS” (*id.*). It stated that the government may or may not elect to “utilize the total capability of Contractor’s comprehensive MIS system” (SOF ¶ 8). The actual words suggest that the government expected to use some element of the contractor’s MIS.

Moreover, the surrounding sentences explain that the government was “investigating a comprehensive multi-layered tracking and data collection system,” and that it “expects the offeror to provide and manage hardware necessary to accomplish and effectively communicate as well as track activity of the PHSME program” (SOF ¶ 8) (emphasis in original deleted). A fair reading of this entire passage is that in the event the government implemented its own MIS, it would not use the contractor’s entire system, but the contractor was expected in any event to “manage hardware necessary” to perform. Viewed in this context, an MIS would not have been optional – the contractor would have been expected to use its own MIS unless the government implemented one.

Finally, the government interprets the last sentence, “The Government reserves the right to require use of a DoD system or a combination of DoD and Offerors’ MIS,” (SOF ¶ 8), to mean that the government could choose neither to provide nor purchase an MIS (gov’t mot. at 15). Again, however, that is not quite what it said. It stated rather that the government could either use a DoD system or a “combination” of a DoD system and contractor system. It was entirely silent on the possibility of using no MIS at all. (SOF ¶ 8)

The government’s position that an MIS was “optional” is, moreover, difficult to reconcile with the numerous PWS elements, quoted above, that expressly mentioned use of an MIS (SOF ¶ 9). One, but by no means the only instance, is PWS Section III.A.d, under “Definition of Managed Data,” which stated that certain consultations with counselors “*shall be entered in the MIS* as a consultation occurring or documented immediately and entered by the close of business on the day of the contact” (SOF ¶ 9). Additional examples are quoted in paragraph 9 of the statement of facts above.

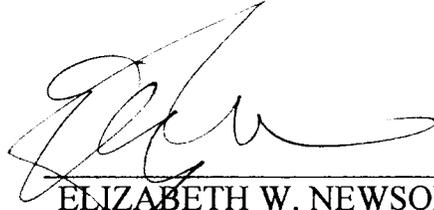
These excerpts could be read to mean that the government expected the contractor to have its own MIS and use it to perform. The large volume of data management and reporting obligations reinforces that impression (SOF ¶¶ 5, 6).

Thus, we conclude that the Contract does not unambiguously support the government's interpretation. In so ruling, we note that appellant has not moved for summary judgment. We have not reached, and expressly do not decide, whether appellant's interpretation is supported by the Contract.

CONCLUSION

The government's motion for summary judgment is denied.

Dated: 10 September 2015



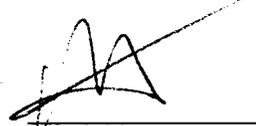
ELIZABETH W. NEWSOM
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
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. 58752, Appeal of Optimization Consulting, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals