

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
ON GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

At issue is the government’s motion for summary judgment relating to interpretation of contract provisions it asserts do not require reimbursement of rest and recuperation (R&R) travel expenses. Appellant submitted a reply to the government’s motion to which the government has responded. We deny the motion for the reasons that follow.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Appellant Trace Systems, Inc. (Trace) was awarded Contract No. W91B4N-10-C-5007 on 1 May 2010 by the Bagram Regional Contracting Center, Bagram Air Field, Afghanistan. The base period of the contract was one year, Contract Line Items (CLINs) 0001-0008, at the estimated amount of \$1,740,515.16, with four one-year option periods, CLINs 1001-4008. (R4, tab 1 at 1-22)

The Statement of Work (SOW) explained that the government was “seeking to augment its military staff with highly qualified civilian contract subject matter experts” (SMEs) to provide network infrastructure support and audio visual support for the establishment of the Camp Sabalu Detention Facility in Parwan at Bagram, Afghanistan (R4, tab 1 at 49-50, §§ 1.1–1.5). The scope of work required Trace to provide five SMEs: two network infrastructure technicians, two closed-circuit television (CCTV) technicians, and one C4 support specialist (R4, tab 1 at 51, § 3). Each of the SME

positions was awarded on the basis of its own firm, fixed-price monthly unit CLIN (CLINs 0001-0005). (R4, tab 1 at 3-5, 51)

The SOW provided in 2.1 HOURS OF OPERATION:

2.1.1 The Contractor shall provide services as required by the supported forces up to 24 hours per day, seven (7) days per week. All positions are required to work seven (7) days per week, 12 hours per day for a total of 84 hours per week for all personnel.

2.1.2 All contracted positions described herein will also be on call during non-active work hours, 24/7, for emergency operational support as required....

2.1.3 LEAVE AND R&R The on-site contractor manager designated by contractor will coordinate with the SMEs and the Government to ensure minimal break in service as a result of personnel taking leave or R&R.

(R4, tab 1 at 50-51)

The SOW provided in 3.7 TRAVEL COSTS:

Official travel to and from Bagram, Afghanistan will be a separate cost from the labor cost and will be invoiced to the government at contractor incurred costs with no additional contractor markup. Actual travel expenses will be in accordance with the most current Joint Federal Travel Regulation [JFTR]. Receipts must be submitted with invoice....

(R4, tab 1 at 56-57)

“Travel,” CLIN 0007, was awarded at an estimated single lot unit price of \$60,000.00. The description of CLIN 0007 was as follows:

Travel to and from Afghanistan. Actual travel expenses will be in accordance with the most current Joint Federal Travel Regulation. Receipts must be submitted with invoice, regardless of the receipt amount.

(R4, tab 1 at 6)

The Purpose and Authority provisions contained in the Introduction to the JFTR establish that the JFTR “pertains to per diem, travel and transportation allowances...of Uniformed Service Active Duty and Reserve Component members” (JFTR at Intro-i). The Purpose and Authority provisions contained in the Introduction to the Joint Travel Regulation (JTR) establish that the JTR “pertains to per diem, travel and transportation allowances...of DoD civilian employees and civilians who travel using DoD funding” (JTR at Intro-i).

The JFTR R&R regulations are found in Chapter 7, “TRAVEL AND TRANSPORTATION ALLOWANCES UNDER SPECIAL CIRCUMSTANCES AND CATEGORIES,” Part J, paragraph U7300, “FUNDED R&R LEAVE TRANSPORTATION.” The JTR R&R regulations are found in Chapter 7, “TRAVEL UNDER SPECIAL CIRCUMSTANCES,” Part O, paragraph C7750 “FUNDED R&R LEAVE TRANSPORTATION.”

Subparagraphs A. “Policy” of Part J of the JFTR and Part O of the JTR both incorporate Department of Defense Instruction (DoDI) 1327.06, which establishes the R&R leave program for government-funded transportation from the R&R duty location to the designated leave R&R locations and requires that the restrictions outlined in DoDI 1327.06 apply, unless otherwise directed by applicable regulation (JFTR at U7J-1; JTR at C7O-1). The JFTR and JTR both state at Item 1. “Limitations.” of paragraph E. “Transportation” that “R&R transportation is only for” uniformed members and civilian employees (JFTR at U7J-4; JTR at C7O-4).

“APPENDIX A: DEFINITIONS & ACRONYMS” to both the JFTR and JTR contains the following definition of “TRAVEL, OFFICIAL” in “Part 1: DEFINITIONS:”

1. Authorized travel and assignment solely ICW [in connection with] business of the DoD or the GOV'T.
2. Official travel may be performed:
 - a. Within/in the vicinity of a PDS [Permanent Duty Station];
 - b. To/from the actual residence to, from or between PDSs; and
 - c. To, from, at, and between TDY assignment locations.

3. The below are not official travel. Travel:

- a. Any delays for personal reasons/convenience,
- b. By a circuitous route,
- c. By transportation modes other than authorized/approved,
- d. For additional distances, or
- e. To places ICW personal business.

(JFTR/JTR, App. A at A1-44-45)

“APPENDIX U: AUTHORIZED REST AND RECUPERATION (R&R) LOCATIONS/DESTINATIONS” to both the JFTR and JTR includes Afghanistan as an authorized R&R duty location (JFTR/JTR, App. U at U-1).

On 22 July 2010, the Army reimbursed Trace \$15,191.80 for mobilization air travel incurred in June 2010 for four of its contract employees (gov’t ex. 2 at 1). On 5 November 2010, Trace submitted Invoice No. 1317, which included R&R air travel expenses from Afghanistan to the United States and return in the total amount of \$5,051.20 for two of the contract employees (R4, tab 3). The contracting officer did not pay these R&R travel expenses (R4, tab 5).

By a letter dated 28 January 2011, Trace submitted a written claim seeking an interpretation of the contract as it related to the non-payment of travel-related expenses and requested a contracting officer’s final decision (R4, tab 6). On 22 March 2011, 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 was docketed on 28 March 2011.

The Army filed a motion for summary judgment on 21 June 2011. In a declaration submitted in support of Trace’s reply to the Army’s motion, Mr. John Wallace, Trace’s Vice President of Finance, states that the cost of air travel tickets is highly variable, depending upon how far in advance the tickets are purchased and that the initial mobilization travel tickets are the most expensive. Mr. Wallace believes that the \$60,000.00 provided in CLIN 0007 was “reasonable to cover one year’s travel costs, including R&R for five employees.” (Wallace decl. ¶ 5) He further states that on a similar contract with the same contracting office, the government paid R&R travel expenses for its employees and that this was consistent with Trace’s experience on similar contracts (Wallace decl. ¶¶ 3, 4).

DISCUSSION

In order to prevail on its motion for summary judgment, the government must demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The government asserts, and we agree, that there are no material facts in dispute relating to its motion.

The undisputed facts establish that the contract specified long working hours in a hostile environment in Afghanistan and anticipated the SME's would take R&R. Afghanistan is an authorized R&R duty location. Both section 3.7 of the contract specifications and CLIN 0007 provided for reimbursement of travel expenses in accordance with the JFTR. Contract section 3.7, unlike CLIN 0007, included the word "official" when describing travel and reimbursement of travel expenses to and from Afghanistan. The contract specifications do not define "official travel."

The legal issues raised in the government's motion relate to matters of contract interpretation, the applicable standards for which are familiar. First, we are to determine whether there is only one reasonable interpretation of the plain language of the contract. *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). If the contract is susceptible to more than one reasonable interpretation, it contains an ambiguity and we then proceed to determine whether that ambiguity is patent. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999).

The government asserts that the plain meaning of the contract terms limits R&R travel expenses to those incurred in connection with official travel and that reimbursement of R&R expenses for Trace's employees is not authorized by either the JFTR or JTR because Trace's employees are neither uniformed service members nor DoD employees. The government's argument continues that the contractual reference to the JFTR was an "inelegant way" of alerting Trace that official travel expenses would be allowed so long as they adhered to the JFTR guidelines, such as those prohibiting luxurious travel (mot. at 6). Finally, the government questions whether the \$60,000.00 limitation on travel in CLIN 0007 was sufficient to reimburse Trace for all of its travel expenses, including R&R.

Trace replies that the contract specifies that travel expenses will be in accordance with the JTR and that the JTR provides for reimbursement of R&R travel expenses. It does not explain why it cites to the JTR when the contract specifically incorporated the JFTR. In any event, Trace goes on to contend that official travel is not defined in the contract and that under the circumstances present here in which its employees are required to work seven days a week in a hostile environment, it is reasonable to interpret R&R travel as official travel. Trace characterizes the government's contention that its

travel costs would ultimately exceed the \$60,000.00 contractual limit if R&R costs were included as factual speculation. Finally, Trace points to the Wallace declaration regarding R&R travel reimbursement under previous contracts as evidence of a prior course of dealing.

We do not agree with the government's contention that the JFTR and JTR do not apply to Trace's employees. Section 3.7 of the contract specifications and CLIN 0007 both provide that the JFTR will be applicable to travel expenses to and from Afghanistan. Thus, the parties expressly agreed that reimbursement of these travel expenses would be subject to the JFTR. Although R&R travel is not specifically addressed in the contract, the R&R travel regulations set forth in Chapter 7, Part J, paragraph U7300 of the JFTR and Chapter 7, Part O, paragraph C7750 of the JTR authorize government-funded R&R transportation.

Despite its initial assertion that the JFTR and JTR do not apply, the government nevertheless contends that R&R travel reimbursement is subject to the transportation limitation contained in subparagraph U7300-E.1 of the JFTR, which in turn refers to subparagraph C7750-E.1 of the JTR. The transportation limitation reflected in U7300-E.1 of the JFTR and C7750-E.1 of the JTR broadly states that R&R transportation is only for uniformed service members and civilian employees. This is generally consistent with the Purpose and Authority provisions of the JFTR and the JTR. The difficulty with the government's argument on this point, however, is that the contract makes the JFTR applicable to reimbursement of Trace's travel expenses, thus treating Trace's employees in the same manner in which uniformed service members and civilian employees are treated. The contract does not make any exception for government-funded R&R transportation, which is authorized by both the JFTR and JTR.

"Official travel," as used in section 3.7 of the contract, is not defined and the government also turns to the JFTR/JTR definition of "TRAVEL, OFFICIAL" contained in Appendix A to the JFTR/JTR to support its interpretation of the contract. This definition, however, does not specifically address R&R travel.

Thus, when all of the contract provisions are considered, we conclude that both the government's contention that R&R travel 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." *Metric*, 169 F.3d at 751. 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 Comtrol, 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.

CONCLUSION

The government's motion for summary judgment is denied.

Dated: 20 October 2011



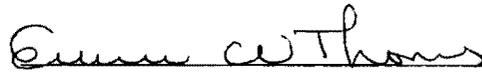
CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



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



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