

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Haskell Company) ASBCA No. 61711
)
Under Contract No. N40080-10-D-0491)

APPEARANCE FOR THE APPELLANT: John Gardner, Esq.
Counsel

APPEARANCES FOR THE GOVERNMENT: Craig D. Jensen, Esq.
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Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WILSON ON THE
PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal involves the interpretation of a contract as it relates to the procurement responsibility for desktop telephones. The parties filed cross-motions for summary judgment.¹ The Navy (government) asserts that the contract and supporting documents specified procurement and installation of telecommunications equipment by the contractor. The Haskell Company (appellant), contends that the telephones were intended to be government furnished equipment (GFE). We find that there are genuine issues of material fact and deny both motions for summary judgment.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On December 30, 2009, the government awarded Contract No. N40080-10-D-0491 to The Haskell Company to “perform various large dollar construction projects” in the metropolitan Washington, DC, Maryland, and Virginia locations (R4, tab 1.1 at GOV 0001-0002. The Contract incorporated Request for Proposal (Basic Contract RFP) No. N40080-09-R-0491, which contained the following provision:

2. SCOPE OF WORK: This indefinite quantity contract has no fixed unit prices. Each Task Order awarded shall include all labor wages, management, supervision, mobilization, material and equipment costs. The contractor shall furnish all project

¹ The government, by submittal dated January 29, 2020, revised the Rule 4 file to include the subject delivery order which was omitted from its original Rule 4 submission. All Rule 4 citations refer to the aforementioned revision.

management...materials, equipment, tools, supervision, design and all other associated costs necessary to fulfill the requirements of the Task Order.

...

c. Each Task Order shall be issued with appropriate technical requirements. Special requirements, including work hours, safety and security regulations, etc. for the specific sites/locations of the identified work will be defined in the Task Order.

(*Id.* at GOV 0013)

2. On December 5, 2014, the government issued Task Order (TO) No. 0002 (TO 0002) for the construction of a helicopter operations facility at Joint Base Andrews, Maryland. TO 0002 also incorporated RFP N40080-14-R-0153 (TO RFP)², which was issued on August 19, 2014 and included several items under Section 00100, Bidding Schedule Price Schedule. Specifically, Item 003 read as follows:

Bid Option #2 Voice and Data Systems	The price
of 003 shall be for Voice & Data Systems (VDS), including SIPR/NIPR/ GPON Equipment (OLT's/ONT's), Wireless Access Points, Phones /Active electronics, and Network Switches. Price includes: procurement, and installation.	

(Emphasis added) (R4, tab 1.3 at GOV 0068)

3. On August 7, 2015, the government issued Modification No. 1B of TO 0002 to exercise “Item 0003, Bid Option #2: Voice and Data Systems” (R4, tab 1.4 at GOV 0097). The requirements for Bid Option #2 are contained in the August 19, 2014 TO RFP (R4, tab 2.2). A number of provisions in the TO RFP are relevant to the pending motions.

4. Section C of the TO RFP provides “Evaluation Factors” for determining which proposal provides the best value to the government (*id.* at GOV 0350). Under “Factor 2 – Technical Solution,” subsection (a) contains a list of required items the contractor must address in its proposal (*id.* at GOV 0352-53). The list includes, “Procurement and construction of Integrated Telecommunication system” (R4, tab 2.2 at GOV 0353).

² The parties also collectively refer to the RFP for TO 0002 as incorporating the statement of work, also titled “RFP,” dated August 8, 2014 (gov’t mot. at 2; app. mot. at 3; R4, tab 2.3).

5. Section D of the RFP provides the “Price Schedule” with a description for each bid option (*id.* at GOV 0357-59). Item 0003 describing “Bid Option #2: Voice and Data Systems” specifically provides, “The price of 0003 shall be for Voice & Data Systems (VDS), including Wireless Access Points, Computers/Phones/Active electronics and Network Switches. Price includes: procurement, installation and configuration.” (*Id.* at GOV 0357)

6. Under the chapter titled “Project Objectives” in the statement of work, audiovisual systems and subsystems are described for particular areas of the helicopter operations facility (R4, tab 2.3 at GOV 0376, 584-90). The auditorium section provides an illustration of an audio conferencing desktop unit below a list, which states that such units “will be supported via Government-furnished equipment (GFE)” (R4, tab 2.3 at GOV 0586).

7. In the mission control room section, it provides that “[e]ach workstation will have access to a VoIP phone with local encryption capabilities for secure voice communication. Secured VoIP phones to be GFE.” Also within that section, other required phone lines are mentioned as “phone systems [that] will be provided by GFE.” (*Id.* at GOV 0589)

8. Further in the same section, it instructs that each workstation is required to be equipped with a paging station for public announcements, but mentions that “[p]aging can also be made via the GFE phone system” (R4, tab 2.3 at GOV 0590).

9. Later in the document, Part 4 titled, “Minimum Materials, Engineering and Construction Requirements,” has a section specifically for equipment (R4, tab 2.3 at GOV 0376). Under the “Equipment” section is a subsection titled, “Government Furnished Equipment.” “Desktop phones” is included in the list of items that falls within this subsection of government furnished equipment. (*Id.* at GOV 1020)

10. Appellant submitted a certified claim dated December 1, 2017, to the government for the cost of 201³ desktop VoIP phones at issue in this dispute (R4, tab 3.1). A contracting officer’s final decision dated May 22, 2018 was issued, denying the claim based on the government’s position that procurement and installation was the responsibility of the contractor (R4, tab 3.2). Appellant filed a notice of appeal with the Board dated July 19, 2018, which was docketed as ASBCA No. 61711 and is before us now.

DECISION

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party has demonstrated that it is entitled to judgment as a matter of law.

³ Appellant’s opposition and counter-motion dated April 11, 2019, notes that due to changes in contract requirements, appellant is only seeking relief for 151 phones (app. mot. at 2 n.1).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Conclusory statements and mere denials are not sufficient to ward off summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). The inquiry performed by the Board is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved, only by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson*, 477 U.S. at 250. The fact that both parties have moved for summary judgment does not mean that the Board must grant judgment as a matter of law for one side or the other. *Mingus*, 812 F.2d at 1391. Rather, the Board must evaluate each party’s motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. *Id.* (citations omitted).

In construing a contract, we start with its plain language. *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (citations omitted). We must interpret the contract as a whole and “in a manner which gives reasonable meaning to all its parts” *United Int’l Investigative Services v. United States*, 109 F.3d 734, 737 (Fed. Cir. 1997) (quoting *Granite Constr. Co. v. United States*, 962 F.2d 998, 1003 (Fed. Cir. 1992); see also *McAbee Constr.*, 97 F.3d at 1435).

Further, with respect to contract interpretation, the parties’ original contracting intent and contemporaneous construction of the contract, before it became the subject of dispute, is entitled to great weight in its interpretation. *AshBritt, Inc.*, ASBCA Nos. 56145, 56250, 09-2 BCA ¶ 34,300 at 169,434 (citations omitted). “When the meaning of a contract and the parties’ intentions are both relevant and in dispute, there are mixed questions of fact and law that pose triable issues precluding summary judgment.” *AshBritt*, 09-2 BCA ¶ 34,300 at 169,434 (citations omitted); see also *Metro. Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006) (“Having found the contract ambiguous, we may appropriately look to extrinsic evidence to aid in our interpretation”) (citations omitted); *Delfasco LLC*, ASBCA No. 59153, 15-1 BCA ¶ 35,853 at 175,310 (denying summary judgment after identifying at least one disputed issue for trial).

Examining the government’s argument, we look to the referenced portions of Sections C and D of the TO RFP (R4, tab 2.2 at GOV 0353, 0357). Read in isolation, these provisions would suggest that procurement of the phones was intended to be the responsibility of the contractor. Section C stating, “[p]rocurement . . . of Integrated Telecommunication system” and Section D, the Price Schedule, stating, “Computers/Phones/Active electronics Price includes: procurement” (SOF ¶¶ 4, 5). The government argues that the price paid, \$604,648 for voice and data systems in Modification No. 1B, included such procurement (see gov’t mot. at 5-9; R4, tab 1.3 at GOV 0068).

However, appellant points to sections in the statement of work that specifically refer to phones as GFE (see app. mot. at 6). For example, “[s]ecured VoIP phones to be GFE” and “[t]hese phone systems will be provided by GFE” (SOF ¶ 7). The plain language in

these sections suggest that it was the government's intention to provide phones. Notably, "[d]esktop phones" is in a list of equipment, under the heading titled "Government Furnished Equipment" (SOF ¶ 9).

The facts here demonstrate that there are contrary provisions in the TO RFP and subsequently incorporated into TO 0002. These contrary provisions create an ambiguity that cannot be resolved without examining extrinsic evidence to aid the Board in its interpretation. The record, as it currently exists is not sufficiently complete in order for the Board to effectively resolve this issue. Accordingly, because the contract is not clear on its face as to whether the phones were intended to be government furnished, we find material facts in dispute.

CONCLUSION

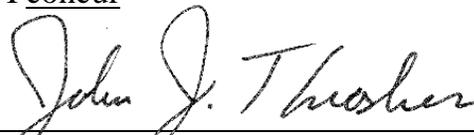
The parties' cross-motions for summary judgment are denied.

Dated: May 7, 2020



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur



JOHN J. THRASHER
Administrative Judge
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. 61711, Appeal of The Haskell Company, rendered in conformance with the Board's Charter.

Dated: May 7, 2020



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals