ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Penn Enterprises, Inc.	)	ASBCA No. 52234
	)	
Under Contract No. DABT31-97-D-0001	)	

APPEARANCES FOR THE APPELLANT: Christopher Solop, Esq.
Lynn Hawkins Patton, Esq.
Ott & Purdy, P.A.
Jackson, MS

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Ralph J. Tremaglio, III, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-C0NROY

This appeal arises from a contracting officer's final decision denying appellant' s $20,114.44 claim for reimbursement of the fringe benefit appellant paid its employees for unused sick leave. The parties elected to waive a hearing and proceed under Board Rule 11. Only entitlement if before us. We sustain the appeal.

FINDINGS OF FACT

The Government awarded Contract No. DABT31-97-D-0001 to appellant, Penn Enterprises, Inc., on 18 October 1996 for laundry and dry cleaning services at Fort Leonard Wood, Missouri at an estimated price of $1,093,708.67. The contract provided for a base year beginning 1 November 1996, and four options. (R4, tab 1)

The contract incorporated FAR 52.222-41 SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989); FAR 52.222-43 FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT—PRICE ADJUSTMENT (MULTIPLE YEAR AND OPTION CONTRACTS) (MAY 1989); and FAR 52.233-1 DISPUTES (OCT 1995) (*id*.).

FAR 52.222-41 provides in relevant part:

> (c) *Compensation*. (1) Each service employee employed in the performance of this contract by the Contractor . . . shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor, or

> authorized representative, as specified in any wage determination attached to this contract.
>
> . . . .
>
> (3) Adjustment of Compensation. If the term of this contract is more than 1 year, the minimum monetary wages and fringe benefits required to be paid or furnished thereunder to service employees under this contract shall be subject to adjustment after 1 year and not less often than once every 2 years, under wage determinations issued by the [Department of Labor] Wage and Hour Division.

(R4, tab 1 at I-13)

FAR 52.222-43 provides in relevant part:

> (c) The wage determination, issued under the Service Contract Act of 1965, as amended, . . . current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract. . . .
>
> (d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with . . . .
>
> (1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. . . .

(R4, tab 1 at I-23)

The contract included Department of Labor (DOL) Wage Determination No. 77-0603 (Rev. 17) which provided that employees of the predecessor contractor, I.G.I.T., Inc., who were covered by the 24 April 1995 collective bargaining agreement (CBA) between I.G.I.T., Inc. and the National Association of Government Employees, Local Union No. R14-150 (the union), were to be paid the wage rates and fringe benefits set forth in the CBA. Copies of Wage Determination No. 77-0603 (Rev. 17) and the 24 April 1995 CBA were included as Attachments 4 and 12, respectively, in Section J of the contract. (R4, tab 1 at J-20 through -22, J-46 through -60)

The 24 April 1995 CBA contained the following sick leave provision:

ARTICLE IX
Sick Leave

> Section 1: Sick leave will be paid at the rate of eight (8) hours per day . . . . Unused sick leave will accrue to a maximum of eight (8) days as of 29 February 1996, 10 days as of 28 February 1997, and 12 days as of 28 February 1998.

(R4, tab 1 at J-50)

By Modification No. P00001, the 1 November 1996 start date was changed to 1 March 1997, resulting in a contract base period covering the period 1 March 1997 through 28 February 1998 (R4, tab 3).

On 10 July 1997, during the base year of the contract, appellant and the union executed a new CBA, a copy of which was provided to the contracting officer (ex. A, affidavit of James V. Penn (Penn aff.) ¶¶ 5-8). The new CBA contained the following new provision on sick leave benefit:

ARTICLE IX
SICK LEAVE

. . . .

> Section 6. Effective 1 March 1998, all unused sick pay will be paid out on the next regularly scheduled payday after each anniversary date of the Government Contract, or upon termination of the Government Contract.

(SR4, tab 15)

On 27 February 1998, the contracting officer executed Modification No. P00004, which exercised the first contract option for the period 1 March 1998 through 28 February 1999 (R4, tab 3).

On or about 15 March 1998, which was the next regularly scheduled payday after the 1 March 1998 beginning of the first option period, appellant paid its employees $20,114.44 for unused sick leave accrued during the base period of the contract (R4, tab 14; Penn aff. ¶ 11).

By letter dated 23 March 1998, appellant advised the Fort Leonard Wood Directorate of Contracting that the new CBA required it to pay accrued sick leave at the end of each contract year. Appellant requested reimbursement for the increased costs of this new employee fringe benefit. (SR4, tab 17)

On 15 May 1998, DOL issued Revision No. 18 to Wage Determination No. 77−0603 which provided that employees covered by the new 10 July 1997 CBA were to be paid the wage rates and fringe benefits set forth therein. On 29 May 1998, the contracting officer executed Modification No. P00005 which incorporated Wage Determination No. 77-0603 (Rev. 18) into the contract and made "Rev. 18 retroactively applicable to the First Option Period covering 1 March 1998 through 28 February 1999." A copy of the 10 July 1997 CBA was attached to Modification No. P00005. (R4, tab 3)

By letter to the Government dated 2 August 1998, appellant submitted a claim requesting reimbursement of $20,114.44 under the new sick leave provision of the CBA for the fringe benefit it paid employees in the first option year for unused sick leave they had accrued during the base year of the contract. (R4, tab 4)

By letter dated 19 March 1999, the contracting officer issued a final decision denying appellant's claim. The contracting officer concluded that the base period of the contract ended prior to the effective date of Wage Determination No. 77-0603 (Rev. 18) and that the Government could not reimburse appellant for the payment of sick leave accrued during the base period. (R4, tab 11) This timely appeal followed.

DISCUSSION

The CBA incorporated into the contract by Wage Determination No. 77-0603 (Rev. 17) for the base year allowed employees to accrue a specified amount of sick leave, but did not provide for the payment of money for unused sick leave. The CBA incorporated in the contract by Wage Determination No. 77-0603 (Rev. 18), which was effective 1 March 1998, at the beginning of the first option period, provided that employees were to be paid for unused sick leave on the next regularly scheduled payday after each anniversary date of the contract. Appellant seeks reimbursement of the $20,114.44 it paid its employees during the first option year of the contract for unused sick leave that was accrued by them during the base year.

Appellant contends that the sick leave provision set forth in Section 6 of Article IX of the new CBA incorporated into Wage Determination No. 77-0603 (Rev. 18) clearly and unambiguously requires that, effective 1 March 1998, it must pay its employees for unused sick leave carried over from the previous contract period. It asserts that the payment is to be made "after each anniversary date" of the contract, including the first anniversary date. It further contends that Modification No. P00005 made the new CBA retroactively applicable to the first option period of the contract.

The Government contends that appellant is not entitled to a contract price adjustment because the unused sick leave for which the employees were paid accrued during the base year of the contract and the CBA incorporated by Wage Determination No. 77-0603 (Rev. 17) applicable to the base year did not provide for the payment for unused sick leave. Relying upon *Ameriko, Inc. d/b/a Ameriko Maintenance Co.*, ASBCA No. 50356, 98-1 BCA ¶ 29,505, it asserts that a retroactive price adjustment is not required under FAR

52.222-43. Alternatively, the Government argues that the reference to the anniversary date of the contract contained in Section 6 of Article IX of the new CBA creates a latent ambiguity which should not be interpreted against the Government under the doctrine of *contra proferentem* because it did not draft the provision.

With respect to the Government's reliance upon *Ameriko*, appellant responds, and we agree, that *Ameriko* does not apply. In *Ameriko*, the contractor executed a new CBA and paid the resulting increased wage rates to its employees during the base period of the contract. We concluded that the contractor was not entitled to a contract price adjustment because FAR 52.222-43 limits such adjustments to renewal option periods and the modification incorporating the new CBA into the first option year of the contract "did not expressly specify retroactive application" to the base period. 98-1 BCA at 146,384. In this case, the new CBA made no changes to the sick leave benefits during the base year of the contract. It did not change the rate at which sick leave accrued during the base year and did not change unused sick leave carry-over provisions. The change implemented by the new CBA was that, beginning 1 March 1998, accrued sick leave was to be paid out in wages. Unlike the circumstances in *Ameriko*, this change did not become effective during the base year of the contract. Modification No. P00005 made the new CBA "retroactively applicable" to the first option period and appellant paid its employees the new benefit on the first regularly scheduled payday of the first option period.

Nor are we persuaded that the contract is ambiguous as the Government also asserts. A contract must be reasonably susceptible to more than one interpretation to be ambiguous. *See Grumman Data Systems Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996); *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). Here, the Government's interpretation of Section 6 of Article IX of the new CBA simply is not reasonable.

As we understand it, the Government maintains that a new contract was created when it executed Modification No. P00004 and exercised the first option. According to the Government, the term of the new contract was 1 March 1998 through 28 February 1999, the anniversary date of the new contract was 1 March 1999, and all unused sick leave accrued during this new contract was to be paid out on the next regularly scheduled payday after 1 March 1999. (Gov' t br. at 6, 15-16)

The Government relies on 29 C.F.R. § 4.143 (2000), EFFECTS OF CHANGES OR EXTENSIONS OF CONTRACT, GENERALLY to support its argument that a new contract was created by the execution of Modification No. P00004. 29 C.F.R. § 4.143 relates to the Service Contract Act, and provides in relevant part:

> (a) Sometimes an existing service contract is modified, amended, or extended in such a manner that the changed contract is considered to be a new contract for purposes of the application of the Act's provisions. The general rule with respect to such contracts is that, whenever changes affecting

> the labor requirements are made in the terms of the contract, the provisions of the Act and the regulations thereunder will apply to the changed contract in the same manner and to the same extent as they would to a wholly new contract. . . .
>
> (b) Also, whenever the term of an existing contract is extended, pursuant to an option clause or otherwise, so that the contractor furnishes services over an extended period of time, rather than being granted extra time to fulfill his original commitment, the contract extension is considered to be a new contract for purposes of the application of the Act's provisions. All such "new" contracts as discussed above require the insertion of a new or revised wage determination in the contract as provided in § 4.5.

29 C.F.R. § 4.5 (2000), CONTRACT SPECIFICATION OF DETERMINED MINIMUM WAGES AND FRINGE BENEFITS, in turn, identifies the contracts to which DOL wage determinations are applicable.

The Government's contention has no merit. While the exercise of the contract's first option may have created a "new" contract for purposes of the Service Contract Act, thus requiring the insertion of a new or revised wage determination in the contract, it does not follow that a new contract was created for all other purposes. Indeed, the general rule is squarely to the contrary: once exercised, an option simply becomes part of the contract. *See VHC Inc. v. Peters*, 179 F.3d 1363, 1366 (Fed. Cir. 1999). "[T]he exercise of an option in an existing contract is not equivalent to the award of a new and different contract; it is an element in the continuation of a unitary contract package." *Id.* (quoting *C.M.P., Inc. v. United States*, 8 Cl. Ct. 743, 746 (1985)). In short, there was no new contract, absent which there is no ambiguity regarding the anniversary date.

Appellant's interpretation of Section 6 of Article IX, on the other hand, is reasonable because it gives the words of the provision their "plain and ordinary meaning." *George Hyman Construction Co. v. United States*, 832 F.2d 574, 579 (Fed. Cir. 1987). The plain words of the provision require, as appellant asserts, that, "[e]ffective 1 March 1998," it was obligated pay its employees "all unused sick pay" and that the payments were to be made "on the next regularly scheduled payday after each anniversary date of the" contract. The fact that the unused sick pay accrued during the base period of the contract does not change this result. Under Section 6 of Article IX of the new CBA, appellant became obligated to pay, and did pay, its employees a fringe benefit that was retroactively incorporated into the first option year of the contract by Wage Determination No. 77-0603 (Rev. 18). FAR 52.222-41 and 52.222-43 provide for recovery of a contract price adjustment reflecting appellant's payment of accrued sick leave.

CONCLUSION

The appeal is sustained and returned to the contracting officer for determination of quantum.

Dated: 5 January 2001

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

I concur

MARK N. STEMPLER
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. 52234, Appeal of Penn Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals