ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Gosselin World Wide Moving NV	)	ASBCA No. 55367
	)	
Under Contract No. DAJA16-01-D-0018	)	

APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq.
Attorney at Law
Glashuetten, Germany

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT John J. Pritchard, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Gosselin World Wide Moving NV (Gosselin) appealed from the contracting officer's (CO's) deemed denial of its claims under the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)(5), under its contract with the United States Army for packing, drayage and other services pertaining to the personal property of military personnel. The parties filed cross-motions for partial summary judgment, excluding appellant's claim for Prompt Payment Act (PPA) interest. The basis for determining the contract price for services pertaining to household goods (HHG) weighing less than 500 pounds is at issue. We decide that entitlement issue only. For the reasons that follow, we grant appellant's motion for partial summary judgment and deny the government's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

The following facts for purposes of the motions are undisputed:

The Solicitation and Contract

The solicitation represented the Army's conventional direct procurement method (DPM) for the packing, drayage, containerization and storage of the personal property of military members and their dependents. The DPM method is one in which the government manages the shipments. The "PERFORMANCE WORK STATEMENT [PWS], 25 JANUARY 2001, FOR PACKING, CONTAINERIZATION AND LOCAL

DRAYAGE OF PERSONAL PROPERTY SHIPMENTS" was "Attachment # 1" to the solicitation. (R4, tab 1 at 0, 266, 269, ¶ 2.6; AFs 2-4[1])

On 11 April 2001 the Army's Regional Contracting Office, Grafenwoehr, Germany, awarded the subject negotiated indefinite quantity, firm fixed-price contract to Gosselin, of Antwerp, Belgium, for a base period, with two one-year options, following a best value procurement. The contract incorporated Gosselin's offer, the solicitation, and Amendments No. 0001 and 0002 thereto. The base year contract line items (CLINs) covered Schedule I (Outbound) and Schedule II (Inbound) shipments of HHG or unaccompanied baggage (UB) in the contract's performance areas of Germany, Italy, Belgium and The Netherlands. (R4, tab 1 at 0, 1, 3, 5, 6, 12-14, 16, 34, 52, 236, 270-71, ¶¶ 2.10, 2.24; *see* AF 5)

Solicitation paragraph 6, "**SCHEDULE OF COMPENSATION**,**"** stated:

> In consideration for the performance pursuant to delivery/call order issued against this requirements contract[2], *the Contractor will be paid on the basis of the prices provided in the schedules I and II* (offeror shall insert the offered prices below [sic] entitled "COMPENSATION FOR SERVICES").
>
> ....
>
> Unless otherwise provided in this solicitation, the offeror shall state prices in amounts per hundred pounds on gross or net weights, whichever is applicable. *All charges shall be* subject to, and *payable on*, the basis of 100 pounds minimum weights for [UB] and a 500 pound minimum weight for [HHG], net or gross weight, whichever is applicable. [Emphasis added]

(R4, tab 1 at 12)

Paragraph 10, "**COMPENSATION OF** [sic] **SERVICES**," included the inbound and outbound "SUPPLIES/SERVICES" to be provided, described the units of issue, and gave the CLINs, estimated quantities and units for pricing. The offeror was to fill in the unit price and the total amount per CLIN. (R4, tab 1 at 16-232) The units of issue for

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[1] "AF" refers to a fact, or portion thereof, proposed by appellant that is undisputed. Page citations are to Bates-stamped numbers.

[2] Solicitation Amend. No. 0001 deleted the Federal Acquisition Regulation (FAR) 52.216-21, REQUIREMENTS (OCT 1995)-ALTERNATE I (APR 1984) clause and added FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) (R4, tab 1 at 3, 5, 248).

HHG services were NCWT (Net Center Weight) or GCWT (Gross Center Weight) (*e.g*. R4, tab 1 at 14, 18, 22; *see also* AF 6). The solicitation defined "CENTER WEIGHT" as 100 pounds. "GCWT" designated gross hundredweight and "NCWT," net hundredweight. (R4, tab 1 at 14, 270; *see* AF 6) There were other units of issue, for services other than HHG or UB, which included by the cubic foot or fraction thereof, by the piece, by the shipment, and "per loaded mile" (R4, tab 1 at 24-26, 32).

The contract included the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (MAY 1999) clause, which, at paragraph (c), Disputes, stated that the contract was subject to the CDA and incorporated the FAR 52.233-1, DISPUTES clause by reference. The Contract Terms and Conditions clause also provided in pertinent part at paragraph (q), Order of precedence:

> Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services;… (4) addenda to this solicitation or contract… (5) solicitation provisions… (8) other documents, exhibits, and attachments; and (9) the specification.

(R4, tab 1 at 252, 254)

PWS Part 5, SPECIFIC TASKS, stated at paragraph 5.2.15:

> Billing Procedures. For CONUS activities, to include Hawaii and Alaska, shipments are payable on the basis of 100-pound minimum weight for [UB] and a 500-pound minimum weight for [HHG], net or gross weight, as indicated in the bid item. *For overseas activities, excluding Hawaii and Alaska, shipments are payable on the actual weight shipped*. [Emphasis added]

(R4, tab 1 at 276)

Performance and Claim

From approximately 25 April through 3 May 2003, the Army placed about 1,268 orders under the contract for Gosselin to provide services for "deployment shipments," which involved the separate handling, packing, containerization, drayage and storage of the personal property of U.S. military members being located in kasernes or barracks in Germany (AF 11). Of the 1,268 shipments, approximately 585 weighed less than 500 pounds, or less than 5 NCWT. Each was an HHG shipment required to be packed, containerized, drayed and placed in storage during the term of the individual service

member's deployment. (AF 12; *see also* AF 16 and documentation in R4, tabs 32, 36) The parties disputed the amount due Gosselin for the HHG shipments. Gosselin contended that it was to be paid based upon the Schedule of Compensation clause's 500-pound minimum weight pricing. The Army contended that payment was to be based upon actual weight under PWS 5.2.15 and would only accept and pay invoices based upon that pricing. (R4, tabs 20, 22-24; *see also* AFs 15, 16)

After Gosselin's contract expired on 30 April 2004, it submitted what it described as a claim to the CO dated 6 September 2004, upon which the CO did not issue a decision (R4, tab 32; *see* AFs 18-20). On 14 December 2005 Gosselin submitted what it described as five separate claims to the CO for decision, which included some revisions to the initial submission and additional matters. Gosselin sought: (1) €41.011,56 for "origin services," which was the difference between what Gosselin had been paid for the 585 HHG shipments and the amount payable based upon 500-pound minimum pricing; (2) €17.788,50 for the 585 shipments, for "storage-in-transit and delivery out services," based upon the stated pricing difference; (3) €29.339,68 for the 585 shipments, which the Army was said to have required Gosselin to deliver to NTS (non-temporary storage) in Giessen, Germany, based upon the stated pricing difference; (4) €5.308,54 for unpaid invoices; and (5) €36.856,66 [3] for PPA charges. (R4, tab 36 at 475-76)

The total of the claimed amounts exceeded $100,000. Gosselin stated that it was certifying its five claims out of caution, although it alleged that they had separate bases and did not exceed $100,000, taken individually. (R4, tab 36 at 477) The CO did not issue a decision and this appeal ensued.

DISCUSSION

Summary judgment is a salutary method to resolve an appeal when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). Even when there is a factual dispute, a disputed fact is only material if it might make a difference in the appeal's outcome. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Cross-motions for summary judgment covering the same central issue can suggest that the material facts are undisputed. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). Legal questions of contract interpretation are amenable to summary resolution, unless there is an ambiguity that requires the weighing of extrinsic evidence. However, extrinsic evidence will not be received unless there is such an ambiguity. *See Coast Federal Bank, FSB v. United States,* 323 F.3d 1035, 1040 (Fed. Cir. 2003) (*en banc*); *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1181, 1183 (Fed. Cir. 1988).

[3] Gosselin sought €36.757,27 in the body of its claim letter but listed €36.856,66 in the caption (R4, tab 36 at 475-76) and in AF 21. The difference is immaterial.

The Schedule of Compensation clause and the PWS billing procedure paragraph 5.2.15 are at issue. The Schedule of Compensation clause stated that the contractor "*will be paid*" on the basis of the prices it provided in Schedules I and II. It continued: "Unless otherwise provided in this solicitation, the offeror shall state prices in amounts per hundred pounds on gross or net weights, whichever is applicable. All charges *shall be…payable on*" the basis of a 500-pound minimum weight for HHG. (R4, tab 1 at 12, emphasis added) PWS 5.2.15 provided that, for United States activities, HHG shipments were payable based upon a 500-pound minimum weight for HHG and that, for overseas activities, shipments were payable on the actual weight shipped.

Appellant contends that PWS 5.2.15's "actual weight" provision reflects how it was, in fact, paid for all HHG shipments exceeding 500 pounds, but that the paragraph was not intended to supersede the Schedule of Compensation clause's minimum weight payment requirement. (*See* app. br. at 10) It asserts that the phrase "[u]nless otherwise provided in this solicitation" in that clause applied only to the sentence in which it appeared and thus only to modify the phrase "the offeror shall state prices in amounts per hundred pounds on gross or net weights." Appellant further alleges that, if there were any ambiguity, it was resolved by the Order of precedence provision in the Contract Terms and Conditions clause, and the Board cannot resort to alleged extrinsic evidence proffered by the government to interpret the contract.

The government alleges that the Schedule of Compensation clause only instructed bidders how to offer their prices but was not a payment clause, and that PWS 5.2.15 instructed them how to invoice and was the only billing clause in the contract (*see* gov't br. at 5, 7-8; gov't reply at 6-7). It contends that the Order of precedence provision did not apply because PWS 5.2.15 reiterated the Schedule of Compensation clause's 500-pound minimum weight pricing for work in the United States but "otherwise provided" for actual weight pricing for overseas work, and there was no inconsistency to be resolved. The government also contends that appellant agreed with or acquiesced in its contract interpretation during performance. It seeks to establish this through extrinsic evidence, such as appellant allegedly agreed at a pre-performance conference that PWS 5.2.15 controlled pricing for HHG shipments under 500 pounds; it originally submitted some invoices for such shipments based upon actual weight; it did not reserve its current claim when invoicing; and it is established practice under other such DPM contracts that such HHG shipments are paid based upon actual weight.

The government's interpretation that the Schedule of Compensation clause merely instructed the contractor how to enter prices for the contract work but that invoicing and payment were governed by PWS 5.2.15 leads to the conclusion that the contractor was to price the contract on a different basis than it would be paid—a "weird and whimsical result" to be avoided in contract construction. *Gould, Inc. v. United States*, 935 F.2d

1271, 1274 (Fed. Cir. 1991), *quoting Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978).

The Schedule of Compensation clause meant what its title indicated. The contractor was to be "compensated" in accordance with its prices as listed in Schedules I and II. The clause noted that, "[u]nless otherwise provided" in the solicitation, the offeror was to state prices in amounts per hundred pounds on gross or net weights. Indeed, for services other than HHG or UB, the solicitation "otherwise provided" for pricing by the cubic foot, by the piece, by the shipment, and "per loaded mile." Thus, restriction of the "unless otherwise provided in this solicitation" phrase to the sentence in which it appears is the reasonable reading of the Schedule of Compensation clause. The government's attempt to extend the phrase to encompass PWS 5.2.15 overreaches.

On the other hand, appellant's suggestion that the Schedule of Compensation clause is consistent with PWS 5.2.15 ignores the payment differences between United States and overseas work mentioned in that paragraph. Nonetheless, appellant is correct that the Order of precedence clause resolves the inconsistency. The Schedule of Compensation clause, whether considered to be part of, or associated with, the schedule of supplies and services, or to be a solicitation provision, which we need not decide, takes precedence over the PWS, which, as self-described, was a contract attachment. Because there is no unresolved contract ambiguity, we do not consider the government's alleged extrinsic evidence of contract interpretation.

Appellant is entitled to summary judgment that the government was required to pay it for the HHG services at issue on the basis of 500-pound minimum weight pricing in accordance with the contract's Schedule of Compensation clause.

DECISION

We grant appellant's motion for partial summary judgment, deny the government's cross-motion, and remand this portion of the appeal to the parties for the negotiation of quantum.

Dated: 19 August 2009

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 55367, Appeal of Gosselin World Wide Moving NV, rendered in conformance with the Board's Charter.

Dated:

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