ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Valley Apparel, LLC	)	ASBCA No. 57606
	)	
Under Contract No. SPM1C1-08-D-1029	)	

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

This appeal arises from the contracting officer's (CO) 7 March 2011 decision which denied Valley Apparel, LLC's (Valley) 10 January 2011 claim for $238,412.45 under an indefinite quantity contract with a base and four option years. The contract called for the supply of various sizes of parkas. Valley alleges that the government's orders failed to conform to the anticipated percentage of each size of parka and, therefore, it was required to use more cloth than anticipated. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109. Valley and the government have each moved for summary judgment on entitlement. Each party replied to the opposing motion for summary judgment, stating that the only issue is contract interpretation.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 7 May 2007 the Defense Supply Center Philadelphia (DSCP)[1] issued negotiated-type Solicitation No. SPM1C1-07-R-0055 (solicitation) requesting proposals for the manufacture and delivery of Navy Task Force Uniform parkas on a firm fixed unit

[1] Renamed Defense Logistics Agency Troop Support in 2011 (see R4, tab 11).

price, indefinite-quantity basis. Solicitation § B specified a base year and four option years. (R4, tab 1 at 1, 6-8, 48, 66)

2. The solicitation stated the following minimum and maximum parka quantities:

Quantities:	Minimum	Maximum
Base Year:	45,164	180,651
Option 1:	34,398	137,588
Option 2:	12,732	50,924
Option 3:	12,732	50,924
Option 4:	12,732	50,924

Section B included a size chart which listed 26 parka sizes, but not the quantity or percentage of each parka size. (R4, tab 1 at 6, 7, 49)

3. The solicitation included the FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) clause which provided in pertinent part:

> (a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.
>
> (b) ...The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the "maximum." The Government shall order at least the quantity of supplies or services designated in the Schedule as the "minimum."

(R4, tab 1 at 48) and the DSCP 52.245-9P20 SIZED ITEMS (JAN 1992) clause, which provided, *inter alia*: "(c) Sizes and/or quantities of each size awarded are subject to change by the contracting officer [CO]. The Government and the contractor agree that the monetary adjustment shall be limited to the value of the saving or excess in material usage." (R4, tab 1 at 65; gov't surreply br., ex. A at 1)

4. The solicitation listed, but did not mark [X] for inclusion in the contract, the following clause:

> 52.245-9P21 FIRM AND FLEXIBLE SIZES (JAN 1992) DPSC (Applicable when cited in the individually numbered solicitation)

(a) The sizes set forth in [§] F hereto for the first three delivery increments are firm....

(b) Except as provided below:

(1) The sizes for the remaining delivery increments are flexible;

(2) The flexible sizes are furnished for the purposes of formulation and evaluation of offers;

(3) Contractor may not proceed to cut and fabricate the flexible portion.

(c) Firm sizes for the flexible portion will be furnished by the [CO] not later than 120 days prior to the end of each applicable delivery period....

(d) Notwithstanding the above, sizes and/or quantities of each size are further subject to change by the [CO]; any such change shall be deemed to be a change within the purview of the article entitled "Changes." All changes made under the provisions of this clause shall be made in accordance with DPSC clause 52.245-9P05, Sized Items.

(R4, tab 1 at 65; app. reply br. at 7-8)

5. Solicitation Amendment No. 0004 (amendment 0004), of 7 June 2007, provided a "SIZE TARIFF" to replace the § B list of parka sizes. For each of the 26 sizes which the government could order the size tariff set forth a percentage, ranging from 0.5% to 24% and totaling 100% for the 26 sizes, with a note that stated in pertinent part:

> This chart depicts by size what the Government anticipates ordering under the resultant contract. Each delivery order issued will stipulate exactly what sizes and quantities the Government will require for delivery.

(R4, tab 2 at 2)

6. Amendment 0004 included a § F delivery schedule for the 45,164 minimum base year quantity, with 15,060, 15,050, and 15,054 parkas to be delivered on or before 180, 210 and 240 days respectively. The delivery schedule included 17 of the 26 sizes, and omitted 2 small, 1 medium and 6 large sizes, that were in the size tariff. (R4, tab 2 at 3-4)

7. On 5 December 2007 DSCP awarded Contract No. SPM1C1-08-D-1029 (the contract) to Valley, which included the amended solicitation (R4, tab 3 at 1).

8. Pursuant to DSCP clause 52.245-9P20, on 11 and 25 September 2009, 6 November 2009 and 28 January 2010, Valley sent to the government "reconciliation of sizes" for delivery orders 4, 5, 6 and 13 seeking a total adjustment of $244,341.61 (Niethammer decl., exs. A-D).

9. The CO's 27 October 2010 letter denied Valley's adjustment, stating: "Since size changes were not issued against these orders [4, 5, 6 and 13], no monetary consideration is due your firm" (Niethammer decl., ex. E).

10. Valley's 27 October 2010 email to the CO stated that "to the extent that the actual delivery orders placed differ from the [solicitation Amendment 0004] size tariff then a monetary adjustment is required as provided for in Clause 52.245-9022 [which in July 2008 superseded clause 52.245-9P20]. This position is supported in section (c) of the Clause which states 'Sizes and/or quantities of each size awarded are subject to change by the [CO].'" The CO's undated email reply to Valley stated:

> Size reconciliations under Clause 52.245-9022, "Sized Items", apply only when the [CO] has issued a size change to an existing order. The key word in the...clause is "awarded". When the [CO] issues an order, a size is "awarded" under the contract. Unless a size change has been issued against the order or the order contains a size not within the original tariff, then the "Sized Item" clause does not apply and no reconciliation is required.

(Niethammer decl., ex. F)

11. By 2 December 2010, the government had exercised three of the four options with option 3 due to expire on 3 December 2011 (R4, tabs 5, 6, 9). Prior to exercising such options, the parties agreed to reduce the minimum quantities to be ordered in option 1 to 26,500 parkas and in options 2 and 3 to 6,366 parkas each year (R4, tabs 4-9). Over the course of the base year and options 1, 2 and 3 the government issued 47 delivery orders (none of which is in the appeal record) (Appellant's Statement of Undisputed Material Facts, ¶¶ 18, 23, 33, 39, undisputed by the government). The parties agree that the government ordered more than the minimum quantities specified in the contract, as modified, for the base and each of option years 1-3 (Government's Statement of Undisputed Fact, ¶ 9, undisputed by appellant).

12. On 10 January 2011 Valley submitted a properly certified claim in the amount of $238,412.45, alleged that the government constructively changed the contract when it

did not order parkas in conformance with the percentages in the size tariff in amendment 0004 and cited the inapplicable DPSC clause 52.245-9P21 (R4, tab 10).

13. The contracting officer's 7 March 2011 final decision denied Valley's claim in its entirety (R4, tab 11). Valley timely appealed the final decision to the Board.

14. On 29 August 2011 Valley's President, John Niethammer, stated in support of its motion, *inter alia*, that the solicitation required use of very expensive Gore-Tex fabric and a very accurate fabric usage had to be determined (Niethammer decl. ¶¶ 5-6); Valley developed the total square inches for each of the 26 parka sizes, but the solicitation lacked information on what percentage of each such size would be ordered (Niethammer decl. ¶¶ 7, 11-12); amendment 0004's size tariff provided size percentages which Mr. Niethammer "understood" were what "DSCP 'anticipated' ordering over the life of the contract; [and] if the quantities in later orders varied from what was 'anticipated,' there would be size 'reconciliations,' with a price adjustment (up or down) as is normally the case where a solicitation provides a size breakdown and DSCP later changes the sizes at the time of ordering" (Niethammer decl. ¶¶ 13, 15)[2]; Valley used a 4,307.16 square inch weighted average of all the sizes of Gore-Tex fabric for its offered unit prices for the base and four options years (Niethammer decl. ¶ 17); Valley calculated its 10 January 2011 claim from the difference between the number of square inches of fabric it "should have used" (based on 4,307.16 square inches per parka) and the square inches it "actually used" per ordering year, and multiplied the difference by the annual price per square inch it paid for the Gore-Tex fabric (Niethammer decl. ¶¶ 21-23) and as of the time of Mr. Niethammer's declaration, the correct cost due to variations from the size tariff was:

Base Year (credit)	($56,364.75)
Option Year 1	$173,227.50
Option Year 2 (credit)	($45,185.88)
Option Year 3 (credit)	($18,652.77)
TOTAL	$53,024.10

(Niethammer decl. ¶ 53) To that $53,024.10 Valley added $1,802.82 for G&A at 3.4%, for a subtotal of $54,826.92, to which it applied $3,289.62 for profit at 6%, for a total claimed amount of $58,116.54 (app. Statement of Undisputed Material Facts, ¶ 47, whose arithmetic the government does not dispute).

[2] The record contains no evidence that Valley advised DSCP of Mr. Niethammer's foregoing understanding before contract award on 5 December 2007.

15. On 9 November 2011 Mr. Niethammer further stated:

> 4. The Solicitation and Amendment 0004 both made clear that notwithstanding the projection of specific quantities for the first three (3) deliveries, the actual breakdown of sizes and quantities would be specified in the delivery orders...; the first three (3) deliveries might match the information in the Amendment 0004 schedule and might not.
>
> ....
>
> 6. While I would not expect the sizes ordered in the first three (3) deliveries to exactly match the percentage breakdown in the Size tariff, I would expect that over the term of the contract, the quantities ordered would approximately match the percentages in the Size tariff.

(App. reply br., Niethammer Supplemental Declaration)

DECISION

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A material fact is one that may have an impact on the outcome of the appeal. *See Anderson*, 477 U.S. at 248. In cross-motions for summary judgment, we must evaluate each motion on its merits and decide whether summary judgment is appropriate. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987).

The issue to be decided is whether the solicitation statement that the size tariff "chart depicts by size what the Government anticipates ordering under the...contract" guaranteed that the percentages of sizes to be ordered would conform to the size tariff percentages per size. The parties maintain, and we agree, that there are no genuine issues of material fact and this appeal is appropriate for decision by summary judgment, since the issue to be decided is one of contract interpretation.

The analytic framework of rules to resolve disputed contract terms is well established. "In resolving disputes involving contract interpretation, we begin by examining the plain language of the contract." *M.A. Mortenson v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004). We construe a contract "to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract." *Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002). The threshold question is whether the plain language of the contract "supports only one reading or supports more than one reading

and is ambiguous." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). If a contract is susceptible of more than one reasonable interpretation, it is ambiguous. *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992). *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999), explains:

> To show an ambiguity it is not enough that the parties differ in their respective interpretations of a contract term. *See Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1578 (Fed. Cir. 1993). Rather, both interpretations must fall with a "zone of reasonableness." *See WPC Enters., Inc. v. United States*, 163 Ct. Cl. 1, 323 F.2d 874, 876 (1963).

In choosing between competing reasonable interpretations of an ambiguous contract provision, the general rule of *contra proferentem* requires the ambiguity to be resolved against the drafter. *See HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004). Exceptions to the rule of *contra proferentem* arise when an ambiguity is so "patent and glaring" that it is unreasonable for a contractor not to discover it. *See Newsom v. United States*, 676 F.2d 647, 650 (Ct. Cl. 1982) (an ambiguity is patent if it is "so glaring as to raise a duty to inquire").

We turn first to the "plain language of the contract." The amendment 0004 size tariff note stated:

> This chart depicts by size what the Government anticipates ordering under the resultant contract. Each delivery order issued will stipulate exactly what sizes and quantities the Government will require for delivery.

(SOF ¶ 5)

The first sentence of that note states that the tariff chart depicts the sizes "the Government anticipates ordering." The *New Oxford American Dictionary*, 1st Ed., 2010 defines "anticipate," as relevant to this dispute, as "regard as probable; expect or predict...guess or be aware of...look forward to...or act as a forerunner or precursor of." Valley cites *Random House Dictionary* definitions of "anticipate" to realize beforehand, foretaste or foresee; to expect, look forward to, to be sure of; to answer a question, obey a command or satisfy a request before it is made; to consider or mention before the proper time (app. mot. at 10). The *Random House* and *New Oxford* definitions are consistent. The term "anticipates" does not denote or connote exactitude. It "denotes no more than a hope or an expectation." *See Community Consulting International*, ASBCA No. 53489, 02-2 BCA ¶ 31,940 at 157,788.

The second sentence of the tariff note is: "Each delivery order issued will stipulate exactly what sizes and quantities the Government will require for delivery." The plain meaning of this sentence is that delivery order sizes and quantities of sizes could differ from the sizes and quantities of sizes in the size tariff. The second sentence confirms that "anticipates" does not mean that the size tariff specified certain or exact parka size quantities or percentages. Moreover, reading the contract as a whole, an interpretation of "anticipates" to mean "specify exactly" is foreclosed because amendment 0004's delivery schedule for the base year minimum quantity listed only 17 of the 26 parka sizes in the size tariff and provided no expectation, prediction or guess of the percentages of the other 9 parka sizes (SOF ¶ 6). Therefore, the term "anticipates" does not mean that the government specified exactly or guaranteed the sizes and quantities in the size tariff for all years of garment fabrication. We hold that the plain language of the size tariff terms supports only the aforesaid reading.

Mr. Niethammer, Valley's President, interpreted the size tariff to mean that if the quantities ordered after the initial orders varied from what was anticipated, there would be size reconciliations with an upward or downward price adjustment (SOF ¶ 14, see also SOF ¶ 8). Valley's interpretation is unreasonable because the amendment 0004 size tariff quantities and percentages on their face did not match the base year delivery schedule quantities (SOF ¶¶ 5, 6), and because the contract's DSCP 52.245-9P20, SIZED ITEMS (JAN 1992) clause authorized adjustments only when the CO changed "sizes and/or quantities of each size" of quantities already "awarded," which did not happen during Valley's performance of the contract (SOF ¶¶ 3, 8-10).

Valley argues that the government could have included in the contract the DSCP 52.245-9P21 FIRM AND FLEXIBLE SIZES (JAN 1992) clause and "equate[d] the term 'flexible sizes' with the percentages in the [amendment 0004] Size Tariff" to make clear its asserted interpretation (app. reply br. at 8). The government did not include the Firm and Flexible Sizes clause in the contract, did not interpret it, and presumably thought that the Sized Items clause was more appropriate for this procurement. Finally, Valley argues that respondent's interpretation makes the size tariff meaningless. On the contrary, the size tariff provided useful information for offerors, although it did not guarantee the sizes and quantities it set forth.

We find Valley's contract interpretations unreasonable and its arguments are not persuasive. We hold that the size tariff chart did not guarantee that the percentage of each size to be ordered would conform to the size tariff percentage for each such size.

CONCLUSION

We deny appellant's motion for summary judgment, grant the government's cross-motion for summary judgment, and deny the appeal.

Dated: 10 April 2012

DAVID W. JAMES, JR.
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. 57606, Appeal of Valley Apparel, LLC, rendered in conformance with the Board's Charter.

Dated:

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