GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:	)	
	)	
JET BLAST, INC.	)	CAB No. D-1039
	)	
Under Contract No. OMS-3042--AA-KH	)	

For the Appellant: Scott M. Heimberg, Esq., and Andrea T. Vavonese, Esq. For the Government: Mark D. Back, Esq., and Andrew J. Saindon, Esq., Assistants Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Matthew S. Watson, concurring.

OPINION

(Lexis-Nexis Filing ID 3986408)

Appellant Jet Blast, Inc., and appellee District of Columbia have each moved for summary judgment. Jet Blast requests payment of two unpaid invoices for services performed under the contract. Jet Blast also requests Quick Payment Act ("QPA") penalty interest for late payments, 4 percent simple interest on the unpaid balance, and repayment of Jet Blast's cost of pursuing payment from the District. The District responds that it overpaid Jet Blast for daily travel between Jet Blast's home office in Baltimore, Maryland, and the District's Blue Plains Wastewater Treatment Plant (Blue Plains) on 31 prior invoices. After completion of discovery, including document production and depositions, both parties agreed to submit this matter to the Board on the written record pursuant to Board Rule 209, 49 D.C. Reg. 2099 (Mar. 8, 2002).

BACKGROUND

On May 25, 1993, the Department of Public Works (DPW) issued Invitation for Bids ("IFB") OMS-3042-AA-KH for high vacuum, high pressure cleaning services at Blue Plains. The IFB required the contractor to clean equipment at Blue Plains and remove various materials from the plant. The IFB contemplated award of a requirements contract with a base period of one year and two option years. The IFB directed bidders to address all correspondence regarding the IFB to the contracting officer at DPW's Office of Management Services and listed Ms. Kathy Hatcher as the point of contact for all inquiries.

The price schedule on page 3 of the IFB contained four line item descriptions, as follows:

1. Waterjetblasting unit, sewer cleaning, minimum 2,000 pounds per square inch, 60 gallons per minute. Quantity, Estimated, 1,800 hours.

2. Liquid vacuum truck, minimum 400 cubic feet per minute. Quantity, Estimated, 1,800 hours.

3. Wet/dry vacuum truck, minimum 4,500 cubic feet per minute. Quantity, Estimated, 1,340 hours.

4. Miscellaneous equipment not included above, less discount offered off current contractor's current open market price list. $5,000 Discount 20%.

In the schedule, the District set forth the estimated amount of time that the District intended to use for the three cleaning services included in the schedule. The IFB required the bidder to set forth in its bid a unit price per hour for each of the three services.

Special Condition 12 of the IFB described the unit prices set forth in the price schedule:

> Unit prices and/or discounts offered herein for labor shall be portal-to-portal. Unit prices and/or discounts offered herein for equipment shall be for time at work site and shall include the total labor cost, accessories, materials, and chemicals necessary to complete the job.

The IFB did not expressly define the term "portal-to-portal" nor did it include an example of a "portal-to-portal" bid price. The IFB did not contain any language setting a ceiling for the amount of services to be ordered by the District.

Jet Blast submitted its bid to the District on June 25, 1993. The District determined that Jet Blast was the low bidder. On July 29, 1993, the District awarded the contract to Jet Blast. The contract awarded to Jet Blast had a maximum price of $363,920 in the base year, $377,400 in Option Year 1, and $388,200 in Option Year 2, for a total amount of $1,129,520. During the following three years, Jet Blast submitted 33 invoices to the District, totaling $1,739,465.75 for work completed under the contract. The District paid 31 of the invoices. The District withheld payment on the last two invoices after the District determined that Jet Blast had erroneously submitted on each invoice a separate request for reimbursement for portal-to-portal travel costs (costs for travel time from Jet Blast's facility in Baltimore to Blue Plains) for the contractor's employees. The District determined that it had overpaid Jet Blast by $153,846.00 in connection with the 31 prior invoices. Jet Blast's last two invoices totaled $70,453.00.

Jet Blast bases its theory of recovery on: (1) an implied modification of the IFB based on a discussion between Mr. Edward Jefferson of Jet Blast and Mr. Marco Garcia

of the District, (2) a course of dealings evidenced by the District's payment of the 31 Jet Blast invoices that included an amount for travel, and (3) QPA interest penalties for the District's untimely payment of invoices. The District responds that the IFB and thus the contract required bidders to include portal-to-portal prices in the bid price for the labor hour rate, and that the District did not alter the schedule to allow separate payment of portal-to-portal travel beyond what the contractor included in its labor rate bid price. Additionally, while the District concedes that it paid some invoices late to Jet Blast, the District asserts that it does not owe to Jet Blast the amount claimed in Jet Blast's QPA claim.

A. Portal-to-Portal Pay

In its motion for summary judgment, Jet Blast asserts that during the bid phase, District employees told Jet Blast that Jet Blast should separately invoice travel labor hours. Jet Blast says that it concluded from these instructions that the District did not want Jet Blast to include travel costs in the bid.

Jet Blast general manager Mr. Edward Jefferson picked up the bid package and spoke with Ms. Kathy Hatcher, the point of contact identified in the IFB. In his deposition, Mr. Jefferson stated that Ms. Kathy Hatcher referred him to Mr. Walter Bailey, Chief of the Bureau of Wastewater Treatment, who referred him to Mr. Garcia, the Solid Processing Manager and the District employee who would review the work of the contractor. Mr. Jefferson stated that he discussed the billing of portal-to-portal travel costs with Mr. Garcia in a meeting with Mr. Garcia before Jet Blast submitted its bid, during which Mr. Garcia told him that the District would reimburse the contractor for travel time and that the successful contractor should include travel time on its invoices to the District. (Jefferson Aff. ¶ 5; Jefferson Dep. 42, 47-49). Mr. Jefferson further stated that Mr. Garcia's statement was consistent with Jet Blast's prior dealings with the District, and that the District had reimbursed Jet Blast for portal to portal travel time for all the work Jet Blast had performed for the District since 1985.

However, Mr. Garcia's deposition testimony contradicted Mr. Jefferson's recollection regarding the substance of that conversation. Mr. Garcia stated that: "Nobody said anything about it, before the bidders bid, to me. Nobody mentioned anything about portal-to-portal … I don't remember anybody asking anything about travel time." (Garcia Dep. 88).

Mr. Jefferson stated that Jet Blast was confused about the meaning of Special Condition 12. According to Mr. Jefferson, the first sentence of Special Condition 12 indicates that the District would pay for labor travel costs portal-to-portal. However, he construed the second sentence to mean that the unit prices for equipment should include total labor costs for operating equipment at the work site only. In his affidavit dated August 14, 1998, Mr. Jefferson stated the following:

> 3. The first sentence of Paragraph 12 of the IFB states that unit prices for labor shall be portal-to-portal. This sentence indicated to me that the

> District would pay for travel costs. The second sentence of Paragraph 12 states that unit prices for equipment shall be for time at the work site and shall include the total labor cost. This sentence indicated to me that the unit prices for equipment should include labor cost for time at the work site, but should not include labor travel portal-to-portal.
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> 4. Based on the language of the IFB's Paragraph 12 stating that unit prices for labor shall be portal-to-portal, the failure to include an estimate of the number of trips to Blue Plains and the failure to include a line item for labor portal-to-portal on the Schedule, it was unclear to me how JBI should include labor travel costs in its bid. Additionally, because it was not known how many trips JBI would need to make to the work site, it was impossible to accurately estimate travel costs. JBI is based in Baltimore and the work was to be done in the District. Therefore, the number of trips portal-to-portal could have a significant impact on JBI's cost.

Jet Blast claims that its bid did not include travel time in the labor unit prices. Jet Blast submitted 33 invoices, dated August 31, 1993, through March 1996. Each invoice contained separate line items for the contract line items (waterblasting, liquid vacuum, wet/dry vacuuming and miscellaneous equipment) and an additional charge for travel time, routinely billed at 3 hours per day at a rate of $27.00 per hour. According to the Appellant's motion for summary judgment, Jet Blast submitted with its invoices a sheet entitled "Daily Break Down of Monthly Invoice Per Day/Per Job" which provided a description of the work done for each day included in the invoice. For each day worked, the daily break down included a line item entitled "Travel Charge." Each daily sheet also included the number of hours, number of items, hourly rate, and total amount next to each line item. Finally, the invoices included job tickets for each day worked during the invoice period. Jet Blast submitted the job tickets daily to a DPW employee, usually Mr. Garcia or his subordinate, who signed the job ticket indicating that Jet Blast performed the work indicated on that ticket. On each ticket, Jet Blast indicated the travel time to and from the job site.

Jet Blast asserts that three District representatives reviewed Jet Blast's invoices: Mr. Marco Garcia or his designee, Mr. Walter Bailey, and Mr. Bailey's supervisor. Mr. Jefferson testified that Mr. Garcia called Mr. Jefferson after completion of the first month's work and asked Mr. Jefferson why the price on Jet Blast's invoice was so high. Jet Blast responded in a letter dated September 9, 1993, which set forth the price of contract performance to that date. (Appeal File, Tab 8). Mr. Jefferson next called Mr. Garcia to discuss the invoice and travel costs. According to Mr. Jefferson's affidavit of August 14, 1998, Mr. Garcia told Mr. Jefferson that the invoices were fine.

Jet Blast argues that it received from Mr. Garcia verbal authority to include requests for travel time payment in its invoices submitted to the District and it is therefore entitled to payment for travel as a separate line item. Further, Jet Blast argues that because the District paid 31 invoices without questioning the amount of any invoice, the

District agreed to pay for travel as a separate line item. Jet Blast argues that the District cannot now refuse to pay the amounts claimed by Jet Blast for travel time reimbursement.

The District asserts that the bid clearly required Jet Blast to include any travel time in its labor pricing. Certainly there was no separate line item price for portal-to-portal labor in Jet Blast's bid. Although the District admits that it paid to Jet Blast the charges set forth in the 31 invoices submitted to the District, the District asserts that it withheld payment on the last two invoices after determining that Jet Blast had erroneously billed, and the District had erroneously paid, portal-to-portal travel as a separate line item. The District asserts that Jet Blast overbilled the District by $153,846.00.

Whether or not Mr. Jefferson and Mr. Garcia discussed portal-to-portal billing, it is clear that Mr. Garcia did not have authority to modify the IFB. There is no modification of the IFB issued by the contracting officer directing bidders to list travel time in any manner different from that provided in Special Condition 12, namely, that "unit prices … offered herein for labor shall be portal-to-portal." Therefore, even if Mr. Jefferson and Mr. Garcia had discussed travel time billing as alleged by Mr. Jefferson, Jet Blast could not have relied on an oral conversation to modify the IFB. See *Coffin v. District of Columbia,* 320 A.2d 301, 303 (D.C. 1974). Jet Blast's claim that the IFB was unclear as to travel time does not help it.

Any ambiguity as to portal-to-portal labor payments was apparent on the face of the solicitation. While the first sentence of Paragraph 12 stated "Unit prices . . . for labor shall be portal-to-portal," the second sentence distinguished equipment pricing from the basic labor pricing, stating that "Unit prices for equipment shall be for time at the work site and shall include total labor cost . . . necessary to complete the job." The only reasonable interpretation of the language "unit pricing . . . for equipment shall be for time at work site" was that the equipment was to be priced for time at the work site while the second part of the sentence for "total labor costs" incorporated the "portal-to-portal" feature of the first sentence of Paragraph 12. The IFB's pricing schedule thus had no separate item for pricing the transportation labor that Jet Blast invoiced and now seeks to recover. Rather, the contract required the contractor to integrate his travel costs into the labor pricing according to the clear language of the first sentence of Paragraph 12.

When a term in an IFB is ambiguous, the bidder must request clarification of the term before submitting its bid. See *AnA, Incorporated*, CAB No. D-1022, July 19, 2000, 2000 BCA Lexis 20, *W.M. Schlosser Company, Inc.*, CAB No. D-0889, June 25, 1992, 40 D.C.Reg 4434, 1992 DCBCA Lexis 163, J.I. Case Co., ASBCA 25419, 81-1 BCA ¶ 15064, *Malloy Construction Co.*, ASBCA No. 25055, 82-2 BCA ¶ 16104 (1982). Additionally, the party must make its inquiry to the person or persons identified in the IFB. The IFB identified Ms. Kathy Hatcher as the point of contact for all inquiries and directed bidders to submit all correspondence to the contracting officer. Jet Blast did not submit any request for clarification to Ms. Hatcher or to the contracting officer. Jet Blast could not reasonably believe that the alleged oral conversations with a District employee who was not the contracting officer would effectively modify the terms of the

solicitation. In our view, the language of Special Condition 12 is clear: the unit price for labor was to include all labor "portal-to-portal." Thus, if Jet Blast did not include sufficient amounts in its unit price for labor portal-to-portal it must live with its bid pricing for labor.

B. Equitable Estoppel

Jet Blast asserts that it should recover portal-to-portal payments from the District because the District established a pattern of paying portal-to-portal costs. Jet Blast asserts that the District's payment of 31 Jet Blast invoices that included a line item amount for travel effectively warned the District that Jet Blast expected to be paid for portal-to-portal travel. Additionally, Jet Blast asserts that the District's payment of those 31 invoices demonstrated that the District interpreted the contract language in the same manner as Jet Blast. The Jet Blast theory of recovery is that the District's payment of the 31 invoices irrevocably changed the contract so that the District is now obligated to pay Jet Blast for portal-to-portal travel. The problem with Jet Blast's argument is that the District properly could pay travel time insofar as it was included as part of the equipment costs called for by Special Condition 12. Thus, the District's payment of travel was proper to the extent that it did not exceed the labor price agreed between the parties in their contract which is based on Jet Blast's bid unit price for labor.

Jet Blast cannot assert that the District's payment of invoices had the effect of modifying the contract pricing terms that required portal-to-portal travel to be included in Jet Blast's unit labor rates. Certainly, there is no written contract amendment evidencing such a modification.

C. Late Payment Penalties

Jet Blast asserts, and the District admits in its brief, that the District made several late payments to Jet Blast after Jet Blast submitted invoices to the District. Jet Blast presented to the Board, as an attachment to the affidavit of Kevin Kavanagh, dated November 2, 1999, a spreadsheet setting forth an analysis of the payment dates for all invoices submitted to the District. The spreadsheet also sets forth interest penalties for each of the late paid invoices. The Board has reviewed that spreadsheet to determine the interest penalties that the District should pay to Jet Blast.

The Quick Payment Act (D.C. Code §§ 2.221.01-2.221.06) and the regulations promulgated at 1 DCMR §§ 1700-1799 set forth the mechanism to determine the amount of QPA penalties that the District must pay to contractors if the District fails to pay the contractor within the time period set forth in the Act.

D.C. Code § 2.221.02 provides as follows:

> (b)(1) Interest penalties on amounts due to a business concern under this subchapter shall be due and payable to the concern for the period beginning on the day after the required payment date and ending on the

date on which payment of the amount is made, except that no interest penalty shall be paid if payment for the complete delivered item of property or service concerned is made on or before:

(A) the 3rd day after the required payment date, in the case of meat or a meat product, described in subsection (a)(2)(B)(i) of this section;

(B) the 5th day after the required payment date, in the case of an agricultural commodity, described in subsection (a)(2)(B)(ii) of this section; or

(C) the 15th day after the required payment date in the case of any other item. Interest, computed at a rate of not less than 1%, shall be determined by the Mayor by regulation.

The D.C. Municipal Regulations at 1 DCMR § 1709, provide the following:

1709.1 A business concern shall be entitled automatically to receive an interest penalty payment if the following conditions are met:

(a) The business concern has a contract or purchase order for the goods or services provided;

(b) The agency has accepted property or service and there is no disagreement over quantity, quality or other contract provisions which would affect payment;

(c) A proper invoice has been received by the designated payment officer (except where no invoice is required; for example, as with periodic lease payment), or the agency has failed to give the business concern a notice of defect as required by Section 4905;

(d) Payment is not made on or before the end of the following periods:

(1) Meat and meat food products -- the third (3rd) calendar day after the payment due date;

(2) Perishable agricultural commodities -- the fifth (5th) calendar day after the payment date; and

(3) Other goods, property or services -- the fifteenth (15th) calendar day after the payment date.

The D.C. Municipal Regulations, 1 DCMR § 1710, provides the following:

1710.1 Interest shall be calculated at the rate of one percent (1%) per month.

1710.2 Interest shall be computed from the day after the required payment through the actual payment date.

1710.3 When an interest penalty that is owed is not paid, interest shall accrue on the unpaid amount until paid. Interest penalties remaining unpaid for any thirty (30) day period will be added to the principal, and interest penalties thereafter, will accrue monthly on the total of principal and previously accrued interest.

1710.4 When an agency takes a discount after the discount period has expired, the interest payment shall be calculated on the amount of the discount taken, for the period beginning the day after the end of the specified discount period through the actual payment date.

1710.5 No interest penalties shall continue to accrue under the following circumstances: (a) after the filing of a claim for such penalties, or (b) for more than one year.

1710.6 Interest penalties of less than five dollars ($5.00) shall not be paid unless requested.

1710.7 Adjustments shall be made for errors in calculating interest, if requested.

To start the analysis, the Board first subtracted from each invoice amount the amount claimed by Jet Blast for travel set forth on each invoice that is included in the supplemental appeal file. We made this subtraction, not because Jet Blast is not entitled to portal-to-portal travel costs but because such costs were to be already included in its unit labor rates. For example, for the first item on the spreadsheet, the invoice of August 31, 1993, the Board subtracted $2,995.00 from the invoice amount, which is the amount that Jet Blast claims for travel for that invoice. The Board used the Jet Blast calculation of "Days Past Due" that is set forth in the attachment to the affidavit. The Board converted the "Days Past Due" to months past due, since the statute and the regulations clearly require the District to calculate the interest penalty for each month. 1 DCMR § 1710.3 requires the District to calculate interest penalties for each thirty day period for the unpaid amount, and to add the interest penalty to the principal amount. This section sets forth a standard compound interest formula that can be expressed in the following form: S = P (1+i) times n , where "S" equals the compounded amount (or future value), "P" equals the original principal amount, "i" equals the period rate of interest, and "n" equals the number of compounding periods.

For example, if Jet Blast claimed a late payment period that was equal to or less than 15 days, the Board did not apply a penalty. This matches the analysis used by Jet Blast's Mr. Kavanagh in his affidavit. If Jet Blast claimed a late payment period greater than 15 days but equal to or less than 60 days, the Board applied a 1 percent penalty to the amount of the unpaid invoice, that is, the invoice minus the travel amount, or

$14,556.00 for the first item on the spreadsheet. Therefore, the penalty for late payment of the August 31, 1993, invoice is $145.56. If Jet Blast claimed a late payment period greater than 60 days but equal to or less than 90 days, the Board applied a 1 percent penalty compounded for two months, in accordance with the formula set forth above. The Board completed its analysis of the payment history of the 33 invoices by using the procedures set forth above. Once the Board determined the number of months past due for each invoice, the Board used the standard compound interest formula to calculate the penalty for those late payment dates that exceeded 60 days. Accordingly, the Board's late payment penalties are lower than the penalties claimed by Jet Blast.

The District must adjust its records to determine the true amount, if any, that the District owes to Jet Blast, using the time periods set forth in the Kavanagh affidavit. Additionally, if applicable, the District must credit to Jet Blast 4 percent simple interest for any outstanding unpaid amount.

D. Payments exceeding contract limits

We understand from the pleadings that because the District paid to Jet Blast invoice amounts for travel costs, the District appears to have overpaid Jet Blast. The contract awarded to Jet Blast authorized payments of $363,920 in the base year, $377,400 in Option Year 1, and $388,200 in Option Year 2. WASUA exercised Option Year 1 and Option Year 2 in contract actions 1 and 2, dated July 28, 1994, and July 6, 1995, respectively. The total price of the base year of the contract and the two option years is $1,129,520, which is the same amount set forth in the Jet Blast bid. We note that the invoices presented by Jet Blast indicate that the District has paid to Jet Blast $1,739,465.75 in 31 invoices, which exceeded by $609,945.75 the contract amount of $1,129,520 set forth in the contract. Neither party presented to the Board any explanation of the contract price overrun, nor could we locate in the record any indication that the District modified the contract to increase the price. The District should issue a contract modification indicating the proper adjusted contract price.

CONCLUSION

The Board concludes that the price schedule of the contract included portal-to-portal travel as part of the unit equipment rates. The Board also concludes that the District's contracting officer never modified the IFB or the resulting contract to alter the unit equipment rate to exclude portal-to-portal travel time. Accordingly, the District is not estopped from asserting that it overpaid Jet Blast during the contract. The Board orders the parties to determine the correct amount, if any, of Quick Payment Act interest that the District may owe to Jet Blast, based on the invoice payment dates submitted by Jet Blast. Since the contracting officer has not yet issued a written decision regarding the amount of any possible overpayment by the District to Jet Blast, the Board does not offer its opinion on that matter. The Board remands the claim to the Contracting Officer for resolution of any Quick Payment Act interest in light of any overpayment that the District may have paid to Jet Blast.

SO ORDERED

August 3, 2004

/s/ *Warren J. Nash*
WARREN J. NASH
Administrative Judge

CONCURRING:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge