GOVERNMENT OF THE DISTRICT OF COLUMBIA

CONTRACT APPEALS BOARD

APPEAL OF:

THE AMBUSH GROUP, INC.	)	
	)	CAB No. D-1014
Under Contract No. 4043-AA-NS-GM	)	

For the Appellant, The Ambush Group, Inc.: Samuel N. Omwenga, Esq. For the Government: Jack Simmons, III, Esq., Assistant Attorney General.

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

OPINION

(*LexisNexis Filing ID 3855773*)

Ambush Group, Inc. ("Appellant" or "Ambush") claims $135,259.72 pursuant to a variable contingent-fee contract for telecommunications audit services. The parties agree that the claim is based on unused telephone equipment reported by Ambush as having been erroneously billed by AT&T to the District. The claim is composed of $74,916.84 claimed by Ambush as its share of refunds totaling $227,020.73 actually received by the District from AT&T, and $60,342.88 claimed by Ambush's as its share of $182,857.20 of projected savings estimated to have been realized by the District in FY 1994 from cessation of the improper billings and attorneys' fees. The District contends that the scope of the contract, and therefore any entitlement to compensation, is limited to audit and discovery of erroneously billed telephone *lines* and *circuits* and does not authorize audit or compensation for savings resulting from reporting of erroneously billed unused *equipment*. The District further asserts that, even if audit of equipment is within the scope of the contract, Ambush is not entitled to compensation, since discovery of the errors on the AT&T bills was not the result of Ambush's work product. The District asserts that Ambush learned of the AT&T billing errors from District or AT&T employees who were already working on correcting the errors. We find that audit of equipment was within the scope of the contract and that Ambush is entitled to compensation for the overpayments on equipment billing which it reported. We grant Appellant's claim for $135,259.72 plus interest at the rate of 4% from May 10, 1995.[1]

BACKGROUND

By letters addressed to individual prospective offerors dated November 8, 1993 ("request letter") (Appellant Ex. 1), the District announced a requirement for "contractor services to audit

[1] There is no provision for attorneys' fees pursuant to the Procurement Practices Act, therefore Ambush's claim for such fees is denied.

[the District's] lines and circuits." The letter was not titled a "Request for Proposals," nor was it identified by an "RFP No.," as is the normal course in solicitations, but did state as its subject, "Procurement of Services to Audit Telephone Lines and Services." (*Id*.)

The request letter detailed "21000 Centrex lines, various XMB lines associated principally with the PBX at the Reeves Municipal Center, about 500 1MB lines, and about 1000 data circuits. In addition, the government pays for lines and circuits for the Lorton complex in Virginia and the Laurel complex in Maryland" and stated that the District believed that "savings may exist because of unused lines" and "further believes that savings may exist because of 1MB lines that are used when less costly Centrex lines could be used instead." In addition to the specific lines and circuits identified, the letter was an open-ended invitation to propose to discover other savings which might be achieved in an audit of telephone service. Following the reference to line and circuit savings the request letter stated that "[t]he government also requires an audit to verify the accuracy of invoices" and reiterated that "[t]he government requires the services of a contractor to identify all lines and circuits billing errors, including, but not limited to, those described above." (*Id.*) (Emphasis added).

The request letter stated that "[t]he contractor will be required to work directly with the telecommunications coordinators of 60 to 65 agencies." The intended agency input was emphasized by the requirement that "[t]he contractor will describe the project in a general meeting of the coordinators to be convened by the government within seven (7) days of contract award." (*Id*.). The letter does not reference any existing actions being taken by the government to secure refunds, nor does it give notice that any types of audit or individual areas of overbilling are off-limits to the contractor.

The request letter concluded that "prospective offerors are requested to provide proposals describing how the above work would be undertaken and how the savings would be shared, including the percentage requested." Ambush timely submitted a proposal, followed, after negotiations, by a best and final offer ("BAFO").[2]

Ambush's proposal, as refined in the BAFO, was responsive to the request letter but was clearly not limited to merely to an audit of lines and circuits. Ambush included equipment, and specifically AT&T equipment, within the scope of its proposed audit. Ambush prefaced its offer stating that "[s]ince the divestiture of AT&T on January 1, 1984, many organizations with leased AT&T equipment . . . have been erroneously billed." At the time that Ambush submitted its

[2] No copy of the BAFO was introduced during the hearing in this matter. A copy of the BAFO was requested by the Board after the hearing. Neither the District's nor the Ambush's files contained a hard copy of the document submitted by Ambush. Ambush maintained an electronic record which it asserts is identical to the hard copy actually submitted. (Affidavit of Vernon Ambush). Since the District incorporated specific sections of the BAFO into the contract, the BAFO must have existed prior to the execution of the contract and is essential to interpretation of the contract. The electronic document submitted by Ambush is the only document alleged to be the BAFO. There is no evidence challenging its authenticity. The Board therefore accepts the printout of the electronic record as the best evidence of the actual BAFO and, in the absence of any evidence submitted by the District to different terms, has relied on that record in its interpretation of the contract.

proposal, AT&T did not provide any dial tone lines and circuits to the District.[3] (Hearing Transcript ("Tr.") 110 and 122 (Brown); Tr. 134 (Bernhardt)). Although AT&T may have provided long distance service to the District, (Tr. 110 and 122 (Brown)), such service was not invoiced by AT&T, but was rather invoiced through Bell Atlantic. (Tr. 137-8 (Bernhardt)). The only items therefore which appeared on AT&T invoices are for equipment.

"AT&T" or "equipment" was referenced in four of six bullet points in the introduction to the BAFO:

> For the D.C. Government, the AGI telecommunications staff proposes the following:
>
> - Decode, analyze, and interpret the Public Service Commissions tariffs as they relate to leased AT&T equipment, your regional Bell Operating Company (RBOC) and Interexchange Carrier (IXC) circuitry and determine the accuracy of your monthly telephone billing;
>
> * * *
>
> - Compare your current on-site equipment, circuitry and features to what you are being billed and determine billing errors;
>
> * * *
>
> - Submit projected refund analysis reports to AT&T, the RBOC and the appropriate IXC requesting refunds; and
>
> - Maintain continuous contact with client, AT&T, the RBOC and the IXC personnel until the refunds are processed and the entire project is completed.

In the BAFO, Ambush proposed to perform the work in 5 phases. Four of the 5 phases specifically mentioned AT&T and/or equipment.[4] There is no indication in the record that the District raised any question as to the scope of the proposed audit. Indeed, Ambush's BAFO was accepted and portions of the BAFO were incorporated by reference as the contract scope of work. (Appellant's Ex. 1). The Scope of Work in the contract reads, in relevant part, as follows:

> ARTICLE I – SCOPE OF WORK
>
> The Contractor will perform telephone line and circuit auditing services for approximately 21,000 Centrex lines, various XMB lines associated with PBX at the

[3] Mr. Ambush, in deposition testimony, indicated that AT&T may also have provided data circuits. (Ambush Dep. July 13, 1998 at 21). The Board accepts the testimony of the District officials that AT&T did not provide circuits.

[4] Mr. Ambush testified at the hearing without having located or reviewed the BAFO that equipment was never mentioned in the contract. (Tr. 52-56 (Ambush)). The District argued, also without the benefit of reviewing the BAFO, that no reference to equipment was included in the contract. (Posthearing Brief, 25). The Board understands this testimony as referring to those parts of the contract that were admitted into the record at the hearing, but not thos portions of the BAFO incorporated by reference into the contract and not available at the time of the hearing.

Reeves Center, 500 1MB lines and approximately 1,000 data circuits. The government requires that the Contractor identify all line and circuit billing errors, including, but not limited to, those described above, in accordance with the following:

A. Request for Proposals (RFP) No. 4043-AA-NS-6-GM issued November 8, 1993 (Attachment 2);

B. Following sections of the AGI Best and Final Offer dated 11/23/93 in response to RFP No. 4043-AA-NS-6-GM issued November 8, 1993 (Attachment 3):

1. PHASE I - ITEMS I THROUGH 4

2. P/HASE II - ITEMS 1 THROUGH 8

3. PHASE III - ITEMS 1 THROUGH 6

* * *

5. PHASE V - ITEMS 1 THRUGH 10 AND ITEM 11 revised to read as follows: "Calculate fiscal year 1994 savings to be realized by analyzing the identified circuit data."

* * *

The referenced Phase I BAFO sections read as follows:

1. Describe the project in a general meeting of the telephone coordinators to be convened by the government within seven working days of contract award.

2. Gather required documentation from C&P Telephone Company (CSR), AT&T and other circuit vendors that provides [sic] circuitry for each agency.

3. Decode, analyze and recap monthly charges billed by C&P Telephone Company, AT&T and other circuit vendors.

4. Generate a documented listing of all circuitry included in the billings provided by C&P Telephone Company, AT&T and circuit vendors.

The referenced Phase II BAFO sections read as follows:

1. Work directly with the telephone coordinators of the 60 to 65 agencies to schedule appointments for on-site analysis of their respective agency. Obtain tapes, electronic disks or hard copy of the DC Government's telephone directory.

2. Perform an on-site inventory by actual physical count of all circuitry for each of the agencies in the Government.

3. Verify existence of circuitry through empirical evidence, dialing telephone lines and/or testing lines electronically.

4. Interview on-site telephone coordinators to further validate circuit discrepancies and unused circuitry. Obtain a list of on-site telephone users.

5. Prepare a comparative analysis of the information disclosed from the records of C&P Telephone Company, AT&T and other circuit vendors versus the actual count recorded during the on-site physical inventory.

6. Generate a formal audit report detailing the billing errors disclosed by the comparative analysis.

7. Prepare a formal claim for any refunds due from C&P Telephone Company, AT&T and other circuit vendors.

8. Submit the formal audit report claim(s) for refunds to the Contracting Officer of the District of Columbia and the telephone coordinators for review and final approval.

The referenced Phase III BAFO sections read as follows:

1. Perform a savings analysis of the D.C. Government's telecommunications system to identify unused lines.

2. Identify lines which are not being used based on the results of the on-site inventory.

3. Verify existence of circuitry through empirical, dialing telephone lines and/or testing lines electronically. Verify status of lines with the agency's on-site telephone coordinator.

4. Identify the lines to be disconnected and under the authority of the Contracting Officer notify the on-site agency telephone coordinator of the intent to disconnect.

5. Compile a list of lines to be disconnected after the coordination and confirmation of the disconnection with on-site agency telephone coordinator.

6. Calculate fiscal year (FY) 1994 savings to be realized by the disconnection of identified unused lines and equipment.

The referenced Phase V BAFO sections read as follows:

1. Gather required documentation from C&P Telephone Company (CSR), AT&T and other circuit vendors that provide data circuitry to each agency.

2. Decode, analyze and recap monthly charges billed by C&P Telephone Company AT&T and other circuit vendors for data circuits.

3. Generate a documented listing of all data circuits included in the billings provided by C&P Telephone Company, AT&T and circuit vendors.

4. Perform an on-site inventory by actual physical count of all data circuits for each of the agencies in the Government.

5. Verify existence of data circuitry through empirical evidence and/or test lines electronically.

6. Interview on-site telephone coordinators to further validate data circuit discrepancies and unused data circuitry. Obtain a list of data circuit users.

7. Prepare a comparative analysis of the information disclosed from the records of C&P Telephone Company, AT&T and other data circuit vendors versus the actual count recorded during the on-site physical inventory.

8. Generate a formal audit report detailing billing errors disclosed by the comparative analysis.

9. Generate a formal claim for refunds due from C&P Telephone Company, AT&T and other circuit vendors.

10. Submit the formal audit report claim(s) for refunds to the Contracting Officer of the District of Columbia and the telephone coordinators for review and final approval.

11. Calculate fiscal year (FY) 1994 savings to be realized by [analyzing][5] the identified data circuits.

The contract contained an "integration clause" stating that: "This contract, including specifically incorporated documents, constitute the total and entire agreement between the parties. All previous discussions, writings and agreements are merged herein." (*Id*., Art. X.) In addition, the contract states an order of precedence mandating that inconsistencies shall be resolved in the following order: Articles I through X; Standard Contract Provisions; Request for Proposals, and; Specified sections of the BAFO. (*Id*., Art. VIII).

Section C of Article I provided that Phases I through V, including Phase III would be completed within 120 days. Two amendments to the contract extended the time for performance to September 30, 1994.

In the communications industry, lines, circuits and equipment have distinct meanings. (Tr. 49 (Ambush); Tr. 98 (Brown); Tr. 183 (Eley)). Lines, sometimes referred to as dial tone service, carry voice communication on separate telephone numbers. (*Id*.). Circuits, or data circuits, carry data communications. (*Id*.). Equipment, as used in the telecommunications industry, is the switching apparatus used to make the connections between the lines and circuits. (Tr. 49-50 (Ambush)). Equipment controls the communications network and is essential to operate the telephone and data systems. Equipment includes hardware such as computers, switching equipment and PBXs. (*Id*.) Equipment does not include devices such as fax machines which merely utilize telephone lines, although such devices may be referred to as "customer premises equipment." (Tr. 98 (Brown)).

It is well-known to telephone professionals that Judge Greene's landmark decision breaking up AT&T divested it of providing dial-tone service, that is, lines and circuits.[6] The

[5] The contract substituted "analyzing" for "the conversion of" which appeared in the BAFO.

[6] "Section I of the proposed decree would provide for significant structural changes in AT&T. In essence, it would remove from the Bell System the function of supplying local telephone service by requiring AT&T to divest itself of the portions of its twenty-two Operating Companies which perform that function." *United States v. American Tel. & Tel. Co*., 552 F. Supp. 131, 141 (D.C.D.C., 1982)

District's own witnesses[7] concede that in the 1990s AT&T did not sell telephone dial tone service to the District. (Tr. 110 (Brown); Tr. 134 and 149 (Bernhadt)). ("[T]he local carrier is Bell Atlantic . . . [all District agencies] use the same dial tone provider, everybody does." (Brown 122-3). ""AT&T has nothing to do with dial tone whatsoever." (Tr. 183 (Bernhardt)). AT&T supplied equipment,[8] (Tr. 109 (Brown)), and possibly long distance service. (Tr. 109 and 122 (Brown); Tr. 134-5 (Bernhardt)). Even if AT&T provided long distance service, it did not bill that service directly to the Distict. AT&T long distance service was invoiced through Bell Atlantic, not directly by AT&T. (Tr. 138 (Bernhardt)).

The audit work was begun by a meeting on January 11, 1994, called by the District "for all agency coordinators, [and] all representatives. . . to discuss the future line and circuit audit that was going to be taking place citywide." (Tr. 98 (Brown)). At the behest of the District, representatives of AT&T were present at the meeting. (Tr. 100).

During the course of the audit, the District provided AT&T invoices to Ambush. (Tr. 151 (Bernhardt)). Ambush began the audit of AT&T invoices within the contract period and prior to September 16, 1994. (Appellant Ex. 5) Ambush determined that the invoices contained charges for unused equipment extending back prior to the inception of the contract, and, in some cases, as long as 4 years. (Appellant Ex. 7). Within the contract period, by memorandum dated on September 22, 1994, Ambush reported to the District that it "has discovered a potentially large amount of over-billing with the AT&T account." (Appellant Ex. 6). On September 26, 1994, Ambush gave a report to AT&T detailing total overbillings of $361,859.58. (Appellant Ex. 7). The report identified overbillings for unused equipment at 415 12th Street, NW; 613 D Street; and 301 C Street, NW., totaling $251,332.38. AT&T subsequently conceded that the District was erroneously billed $245,303 at these locations.[9] (Appellant Exs. 8 and 9).

After notice to AT&T by Ambush, no further effort was required by Ambush to secure refund of the erroneously billed amounts. The District actually received refunds from AT&T relating to the accounts and locations upon which Ambush reported in the amount of $227,020.73.[10] Other than the letters and memorandum sent by Ambush, there is no documentary evidence in the record to show that anyone other than Ambush, either in the

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[7] Ronald P. Brown, Department of Public Works telecommunications coordinator (Tr. 96) and William Bernhardt, Branch Chief, Department of Administrative Services, Information Resources Management Administration. (Tr. 130).

[8] The AT&T office with which the District dealt was later included in the spinoff of AT&T's equipment operations into Lucent Technologies. (Tr. 110 (Brown); Tr. 176 (Eley)). Lucent is well known as a supplier of equipment, not lines and circuits.

[9]

Location	Reported by Ambush (Appellant Ex. 7)	Conceded by AT&T (Appellant Exs. 8 and 9)
613 G St., NW	$162,977.40	$140,476.43
301 C St., NW	43,314.18	46,509.71
415 12th St., NW	45,040.80	59,322.75

[10] The difference between the overbilling conceded by AT&T and the refund represents a deduction by AT&T of $19,288.16 for the "sale in place" value of the equipment at 415 12th Street, NW. (Appellant's Ex. 9).

District Government or AT&T, initially identified the erroneous billings and payments or initiated a claim for the refund.

DISCUSSION

It is undisputed that Ambush had a contract to perform an audit of telecommunication billing which provided that it would receive, as compensation, a percentage of refunds and future savings for erroneous billing identified during the contract term. It is further undisputed that the District received refunds after expiration of the contract for erroneous billings for unused AT&T telecommunications equipment which Ambush had reported during the contract period. Ambush's claim is for compensation based upon the refunds received by the District from AT&T and associated future savings.

This matter turns on the interpretation of the contract in two areas. First, whether audit of unused equipment billing is within the scope of the contract. And, second, if audit of unused equipment billing is within the scope of the contract, whether Ambush is entitled to compensation for savings achieved from removal of the specific unused AT&T equipment. Ambush contends that it is entitled to compensation based on savings on unused equipment it reported during the course of contract performance. The District contends that audit of equipment is not covered by the contract, and, even assuming that audit of equipment is within the scope of the contract, Ambush has not shown that its efforts identified the unused equipment for which refunds were received. The District further affirmatively asserts that any savings resulting from recognition of unused equipment was the result of the work of District and AT&T employees.

Contract Interpretation

Interpretation of a contract must begin with the contract itself, particularly when the contract is a so-called "integrated" agreement. The contract provides:

> ARTICLE X - TOTAL AGREEMENT
>
> This contract, including specifically incorporated documents constitute the total and entire agreement between the parties. All previous discussions, writings and agreements are merged herein.

"An integrated agreement is a writing or writings constituting a final expression of one or more terms of the agreement." Restatement, Second, Contracts ("Restatement") § 209(1). "The interpretation of an integrated agreement is directed to the meaning of the terms of the writing ... in light of the circumstances. . . ." (Restatement, § 212(1)).

> It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is

> ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.

Id. Comment b.

Notwithstanding that an agreement is integrated, negotiations prior to or contemporaneous with the adoption of the agreement are admissible to establish the meaning of the writing. Restatement § 214(c).

> Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties. . . . In cases of misunderstanding, there must be inquiry into the meaning attached to the words by each party and into what each knew or had reason to know.

Id. Comment b.

The entire BAFO was an integral part of the contract negotiation. Since the District made its determination to award the contract based on the BAFO, the District clearly had knowledge of the offer made by Ambush. By incorporating portions of the BAFO into the final agreement, the District accepted the incorporated terms as they were used by Ambush in submitting its final offer. To the extent that it expressed no disagreement and made no clarifications of the meaning of the terms used in the BAFO, the District must be assumed to have concurred in the consistent meaning of terms in the entire BAFO. The words of the offer, as made, must be given the same meaning when abstracted from the BAFO and incorporated in the contract as the meaning the words had in the complete BAFO. Thus, the Board will consider, in addition to the sections of the BAFO which were specifically incorporated and became a part of the final contract, portions of the BAFO not incorporated into the contract which give meaning and context to the language of the incorporated sections.

If the incorporated terms, when read together with the unincorporated introductory terms, are still unclear, the Board must determine their most reasonable meaning. "A contract is not rendered ambiguous merely because the parties disagree over its proper interpretation. Instead, a contract is ambiguous when, and only when, it is, or the provisions in controversy are, reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings. If there is more than one interpretation that a reasonable person could ascribe to the contract, while viewing the contract in context of the circumstances surrounding its making, the contract is ambiguous. The choice among reasonable interpretations of an ambiguous contract is for the factfinder to make, based on the evidence presented by the parties to support their respective interpretations." *Gryce v. Lavine*, 675 A.2d 67, 69 (D.C. 1996) (citations omitted). The first step in contract interpretation is determining what a reasonable person in the position of the parties would have thought the disputed language meant. *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32 (D.C. 1982); *Minmar*

Builders, Inc. v. Beltway Excavators, Inc., 246 A.2d 784, 786 (D.C. 1968). The presumption is that the reasonable person knows all the circumstances before and contemporaneous with the making of the integration. The reasonable person is also bound by all usages—habitual and customary practices—which either party knows or has reason to know. The standard is applied to the circumstances surrounding the transaction and to the course of conduct of the parties under the contract, both of which are properly considered when ambiguous terms are present. *1901 Wyoming Ave. Cooperative Ass'n. v. Lee*, 345 A.2d 456, 461-62 (D.C. 1975). If the ambiguity is still not resolved, the Board will apply the rule construing the contract against the drafter. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 328 (D.C. 2001).

The contract document, exclusive of provisions incorporated by reference from the BAFO, does not mention "AT&T" or "equipment." (Tr. 51-54 (Ambush)). The contract document, however, also does not describe its most important requirement—the scope of work. The required tasks are specified by incorporating by reference sections of the BAFO. The BAFO scope of work separates audit of telephone circuits (Phases II and III) from data circuits (Phase V)[11]. Phase II deals with verification of telephone service and identification of nonexistent services billed to the District. It requires Ambush to: "Prepare a comparative analysis of the information disclosed from the records of C&P Telephone Company, AT&T and other circuit vendors versus the actual count recorded during the on-site physical inventory"; "Generate a formal audit report detailing the billing errors disclosed by the comparative analysis"; and "Prepare a formal claim for any refunds due from C&P Telephone Company, AT&T and other circuit vendors." Phase III directs Ambush to identify telephone service provided but not actually used by the District and then to "[c]alculate fiscal year (FY) 1994 savings to be realized by the disconnection of identified unused lines and equipment."

Phase V specifically references AT&T in 5 of the 11 sections incorporated into the contract.

By themselves, certain of the individual incorporated BAFO provisions may be unclear as to whether they include audit of AT&T equipment, as opposed to lines and circuits. Any ambiguity disappears, however, when read in the context of the entire BAFO. Ambush's introduction to the BAFO is replete with specific references to audit of AT&T equipment billings. In the introduction, Ambush proposed to "interpret the Public Service Commission's tariffs as they relate to leased AT&T equipment," compare "current on-site equipment . . . to what you are being billed and determine billing errors," and submit "projected refund analysis reports to AT&T." The introduction is followed by a proposed phased scope of work, which was incorporated into the final contract. Since the incorporated sections and the introduction were included in a single BAFO document submitted by Ambush, the Board must read terms used in the scope of work consistently with the same terms in the introduction. Read together with the introduction to the BAFO, we believe that the most reasonable interpretation of the scope of work incorporated from the BAFO into the executed contract is that the references to gathering AT&T information and preparing a formal claim to AT&T must include AT&T equipment. This interpretation is confirmed by the final step in Phase III which requires Ambush "to calculate savings to be realized by the disconnection of identified unused lines and equipment."

[11] Phase I appears to deal generally with all types of service. Phase IV deals with 1MB lines and Centrex service provided only by C&P.

Even if a consistent reading of the entire BAFO did not require inclusion of equipment within the scope of work, that would be the most reasonable interpretation of the scope of work standing alone. The Board must interpret the incorporated terms to give some meaning to the specific inclusion of AT&T as one of only two firms referenced by name in Phase II of the contract dealing with telephone service. Since AT&T did not provide dial-tone service, there would be no reason to include AT&T in the scope of work unless equipment was intended to be included in the audits. To interpret the incorporated provisions as excluding equipment would render the specific references to AT&T in Phases II and III dealing with telephone service meaningless.

Although the District used the shorthand title of 'line and circuit' audit to refer to the contactor's work, the references to AT&T were clearly not meaningless to District personnel initiating the contract. From the very start of the contract, the District included AT&T as a subject of the audit. Within two weeks after the beginning of the contract, District officials called a meeting "for all agency coordinators, [and] all representatives. . . to discuss the future line and circuit audit that was going to be taking place citywide." (Tr. 98 (Brown)). Representatives of AT&T were invited by the District and were present at the meeting. (Tr. 100). The District further conceded that in the course of performance of the contract it provided the AT&T invoices to Ambush. (Tr. 151-2 (Bernhardt)). AT&T invoices included only equipment. (Tr. 115 (Brown)). Since long distance billing was made through Bell Atlantic, there would be no reason for anyone knowledgeable in the telephone industry to include AT&T representatives at the initial meeting or to provide AT&T invoices unless billing for equipment was being audited.

The Board is not persuaded by the District's witnesses, Mr. Brown and Mr. Bernhardt. There is no indication that either of the two witnesses offered by the District was familiar with the negotiation or award of the contract. Mr. Brown, who had no authority as to the contract and was only "following the directions of [the Department of Administrative Services]" (Tr. 105), based his opinion as to coverage of the contract, not on the contract itself, but on a document distributed by Ambush at an initial meeting with agency personnel. (Tr. 99). Mr. Bernhardt, who also had no contracting authority (Tr. 133), was shown a contract document which did not include the referenced BAFO (Appellant's Ex. 1), and he expressed a general opinion as to the purpose of the contract without any specific reference to the contract terms. (Tr. 133). He acknowledged that he was not "instrumental in developing [the] contact, the scope of work or anything in the contract." (Tr. 153) In fact, Mr. Bernhardt testified that he was "only vaguely" familiar with the contract. (Id.). The District itself objected to any testimony by Mr. Bernhardt as to the RFP because he had never seen it before. (Tr. 154). The District did not offer any witness who participated in negotiating the contract, nor did it call any contracting officer involved in performance.

The Board finds that the most reasonable interpretation of the written contract, based on the negotiation, specifically the entire BAFO, and the actions of the District at the inception of the contract to include AT&T representatives at the initial meeting, is that audit of AT&T equipment billed to the District was within the scope of the contract.

Performance of work

Alternatively, the District argues that Ambush is not entitled to the compensation claimed because Ambush did not demonstrate that it performed the work for which it seeks compensation. (Appellee's Posthearing Brief, 17). The District states that "[t]he inescapable conclusion is that all of the work on the telecommunications equipment that led to the refunds or credits was done exclusively by DC government personnel and personnel from AT&T." (*Id.*, at 20). The District asserts as fact that "Ambush's knowledge of the telecommunications equipment issues derives from his conversations with Candy Cannon-Monk, an AT&T representative who worked for the billing manager," (*Id.*, at 12), implying that Ambush did not learn of the overbilled equipment through its own audit efforts.

In essence, it is that District's position that Ambush is not entitled to compensation under the contract unless it can demonstrate that it independently discovered the erroneous billing through its own efforts. The District, however, cites no provision of the contract which requires the contractor to document its efforts in determining the billing discrepancy. The payment provision of the contract provides only that "the contractor shall receive 33% of the gross amount of any moneys recovered or costs avoided pursuant to any claim made under this contract . . . for savings projected and/or realized in accordance with tasks listed in phases II and III of Article I.B. of this contract." (Appellant Ex. 1, Art VI A). Phase III, as incorporated into the contract, provides that the contractor shall, after analyzing telephone service and billing, "calculate fiscal year 1994 savings to be realized from the disconnection of identified unused lines and equipment." The District's logic that the contractor must show that it learned of the potential claims before District employees would create, during the contract period, a race between District employees and the contractor to initiate refund claims. This would be an untenable situation, since the contractor was "required to work directly with the telephone coordinators of 60 to 65 agencies" and to begin this collaboration "within seven (7) days of contract award." (RFP, AF, Ex 3). The Board finds that Ambush met the requirements of the contract by identifying the erroneously billed equipment and filing a claim on behalf of the District with AT&T.

The record does not support the District's position that Ambush's audit efforts did not result in the claim for overbilling for unused equipment. The District bases its assertion as to Ambush's source of the information on the testimony of the AT&T account executive for the District. First, the account executive does not claim any direct knowledge of how Ambush learned of the overbilling, but only testified as to her conjecture. She stated "I think what happened is [Mr. Ambush] got information from Candy Cannon-Monk, who really didn't know what was going on." (Tr. 188 (Eley)). She elaborated:

> Mr. Ambush started calling all around my office, until he basically reached a live person because I was out in the field a lot because I was in sales. So I was out with my customers and he kept calling and when he couldn't get me he would dial zero and

> basically go around my office until he could find a live person. Candy was a [billing] rep. Bettie [Terry] was a [billing] rep. They really didn't know what really was going on or anything. They were enlightened by their supervisor. They all worked for Rose Tomlin, who was manager for billing.

(*Id.*, 194).

The documentary record supports Ambush. Ambush notified the District of the AT&T billing irregularities in general by memorandum dated September 22, 1994 (Appellant's Ex. 6), and reported them to AT&T with specificity in correspondence dated September 26, 1994. (Appellant's Ex. 7). According to the AT&T account executive, Mr. Ambush did not attempt to contact her until "October or November 1994" (Tr. 179 (Eley)). She was very certain about the time period because, after the first call, not knowing who Mr. Ambush was, she called George Walker, chief of telecommunications for the Department of Administrative Services and learned that the Ambush contract was completed. "I knew it was after September 30." (Tr. 186). Since Mr. Ambush's first reports of the irregularities were as early as September 22, 1994, Mr. Ambush clearly was already aware of the overcharges when he first called the account executive and was alleged to "dial zero and basically go around [the AT&T] office until he could find a live person" claimed to be Ms. Cannon-Monk.[12]

The September letter was directed to Ms. Terry, not Ms. Cannon-Monk. (Appellant's Ex. 7). Ms. Terry was within the billing office, the proper office within AT&T to correct billing errors. When the account executive finally spoke to Mr. Ambush, she indicated that her "billing person was already working on these types of things." (Tr.180) The fact that the billing office was working on the errors is not surprising, since Mr. Ambush had previously advised the billing office of the errors. When no response had been received for an additional two months, on November 28, 1994, Mr. Ambush spoke to Ms. Terry's supervisor, Ms. Tomlin, the billing manager. (Appellant's Ex. 8). As opposed to "enlightening" Ms. Terry and Ms. Cannon-Monk, Ms. Tomlin apparently asked Ms. Cannon-Monk to respond to Mr. Ambush. Ms. Cannon-Monk responded to Mr. Ambush in a memorandum dated December 9, 1994, estimating the refund amounts and stating that the delay in issuing the refund was determining the "sale in place" value of the equipment which, Ms. Cannon-Monk advised, "will have to be discussed with Sherri Eley." (*Id.*).

AT&T did not respond as to the sale in place values for a further three more months. On April 3, 1995, Ms. Eley sent a letter to the Public Schools offering a settlement of the overpayment. (Appellant's Ex. 9). Although Ms. Eley had advised Mr. Ambush that the billing person was working on the refund and although Ms. Eley had been copied on the December 9 memorandum, neither the billing representative, Ms. Cannon-Monk, her colleague, Ms. Terry, nor her billing supervisor, Ms. Tomlin, was shown as receiving a copy of the April 3, 1995, letter. (*Id.*). A conversation on April 10, 1995, between Mr. Ambush and Ms. Cannon-Monk was confirmed by Ms. Terry in a memorandum of that date which stated the final amounts of the refunds for 613 G and 301 C Streets. Ms. Eley was shown as receiving a copy of the memorandum. The Board finds no indication from the correspondence that AT&T was taking

[12] Neither Mr. Walker, nor Ms. Cannon-Monk was presented by the District as a witness.

any steps to correct the overbilling before Mr. Ambush brought it to the attention of the AT&T billing department and persisted in asserting the claims. The amount of the credit indicates that the overbilling had continued for over a year.

The District asks the Board to draw an inference that Ambush did not discover the unused, but billed, equipment because Mr. Ambush was unknown to Ms. Eley during the course of the audit. The District relies on testimony that Ms. Eley, the AT&T account representative working on the telecommunications upgrade, "had never heard of Mr. Ambush prior to October 1994." (Appellee's Posthearing Brief, 19). Whether or not Ms. Eley knew of Mr. Ambush is not dispositive of whether Ambush had performed an equipment audit. Ms. Eley testified:

> Keep in mind, I am giving my best guess at everything that it entails because my responsibility was not a billing rep per se. But what it would entail for my billing manager to do was to basically make sure that what they had was what we were billing them for, and that is to sum it up in a nutshell."

(Tr. 180).

Ms. Eley's summation of the billing manager's responsibility is a clear statement of the Ambush audit function, to make sure that AT&T was billing the District correctly. The accuracy of the bills was the responsibility of the billing manager and her staff. On September 26, 1994, before the conclusion of the contract, Mr. Ambush properly contacted the billing representative, Ms. Terry, and followed up with the billing manager, Ms. Tomlin. Ambush introduced documentary evidence of these contacts. The District did not challenge the documents or offer testimony from the AT&T billing personnel rebutting Ambush's evidence.

Ambush's claims involve the Department of Public Works ("DPW") and the D.C. Public Schools. The District offered the testimony of Ronald Brown of DPW, William Bernhardt of the Department of Administrative Services and Marjorie Coachman of the Public Schools. None of the witnesses could shed light on the issue of whether Ambush discovered the unused equipment. Although the District presented these witnesses to show that it was District employees, not Ambush, whose work resulted in the refunds, their testimony does not support that premise.

The DPW portion of this claim involves billing codes BAC 101 and 168. (Posthearing Brief, 17) When asked if he remembered "thinking about BAC 101 and BAC 168 . . . preparing or seeing a request for equipment disconnection or refund or reimbursement from your offices at DPW to DAS on either of those account codes," Mr. Brown answered, "No, I do not, not at this time." (TR. 106). After describing equipment disconnection procedures, Mr. Brown was asked "Do you remember that happening with the two accounts here, BAC 101 and BAC 168?" Mr. Brown responded "No, I do not." (TR. 107).

It appears that Mr. Bernhardt was less than candid in his testimony. Although Mr. Bernhardt is shown as receiving a copy of Ambush's September 22 memorandum which clearly advised that Ambush had "discovered a potentially large amount of over-billing with the AT&T

account, Mr. Bernhardt testified that he was unaware of Ambush's claim for reimbursement for equipment until October or November of 1994 and specifically answered "No" as to whether he was aware prior to September 30, 1994, that Ambush was doing an equipment audit. (Tr. 145). On cross-examination Mr. Bernhardt conceded that Ambush could only have received AT&T invoices from his office and further stated that "they would have no reason to go to AT&T, except for long distance." (Tr. 151). Mr. Bernhardt had previously testified that long distance billing did not come from AT&T, but rather came as a single package from Bell Atlantic (Tr. 138), but gives no explanation as to why the AT&T invoices were provided.

At D.C. Public Schools, Ms. Coachman, the witness presented, was clearly not meaningfully involved in the audit of unused equipment. The Public Schools equipment which was disconnected was a Horizon system. (Tr. 181 (Eley)). Ms. Coachman denied that she was auditing unused equipment. (Tr. 170). When asked how long the Horizon equipment was not in operation she responded "Only about a month or two." (Tr. 171). The record shows the Horizon equipment was unused for well over a year and that the schools were overbilled by nearly $60,000. (Appellant's Exs. 9 and 11). Ms. Coachman stated that she worked with Ms. Eley on the refund, which may very well be accurate and is not inconsistent with the record. The record does not indicate Ms. Eley's activity until December 1994; over two months after Ambush filed the District's claim. (Appellant's Ex. 8).

The District concluded its argument that Ambush had not done the work it claims by stating:

> It is hard to imagine a professional telecommunications auditing company – much less any professional organization – failing to keep contemporaneous records of the work it claims to have done, particularly where there were as many individual components as here and compensation was based on the value of each piece of work.

(Appellee's Posthearing Brief, 20).

Since it is undisputed that AT&T actually gave the District a credit of over $200,000, the process of instituting that credit must have begun somewhere. It is Ambush's position that it reported the claim for credit for unused AT&T equipment. It is the District's position that the credit was initiated either by the District or by AT&T.

Although the documentation produced by Ambush is sparse, the District produced no documentation whatsoever as to initiating the credits. Not a single document prepared by the District was introduced into the record or included in the Appeal File which referred to a claim to AT&T for unused equipment in any way. In addition, no witness testified that the District instituted any claim for refund. Similarly, not a single document prepared by AT&T indicated that AT&T itself had instituted the process which resulted in the credit. The record contains 3 documents prepared by AT&T. (Appellant's Exs. 8, 9 and 10). The earliest date of the AT&T documents was December 9, 1994, over two months after the first Ambush document. Two of the 3 documents specifically state that they were in response to inquires made by Mr. Ambush.

(Appellant's Exs. 8 and 9). Only one of the AT&T documents did not reference Ambush as its impetus. That document, which is dated April 3, 1995, Ms. Eley's advice to the Public Schools of the amount of the credit to be granted, is silent at to how the credit was initiated. (Appellant's Ex. 9). The Board notes, however, that the letter was sent over 6 months after Ambush made the claim to AT&T and nearly 4 months after a copy of a memorandum regarding the claim was shown as being sent to Ms. Eley. Testimony by the Public Schools indicated that Ms. Eley handled processing of the credit, but significantly gives no dates as to when Ms. Eley was involved. Ms. Eley did not testify as to who initiated the claim.

On the other hand, the Appeal File contains memoranda from Ambush dated prior to the completion of the contract advising the District and AT&T of the claim for unused equipment which were introduced into evidence without objection as to authenticity. (AF, Exs. 5 and 6). Two further memoranda prepared by AT&T responded to the claims by Ambush. (AF, Exs. 7 and 8). If AT&T was actually working on refunding overpayments to the Public Schools at the time they received Mr. Ambush's claim letter, it is unlikely that the responses to Mr. Ambush would not mention this fact. The responses, however, are totally devoid of any indication that AT&T was already processing a refund.

The preponderance of the evidence supports our finding that Ambush initiated the claim for refund. Since the District had the opportunity to introduce evidence challenging Ambush's efforts in initiating the AT&T claims or to show that they were otherwise initiated, it can only be concluded that no such evidence exists. When Ambush pressed the claim on behalf of the Public Schools, it received written responses from AT&T confirming the progress toward ultimate payment. If copies of the initiating documents within AT&T and justification for payment of the claim were available, they would show when the claim was first raised to AT&T. In the absence of any other documentation or testimony, we find that Ambush initiated the equipment refund claim with AT&T in accordance with the contract scope of work.

CONCLUSION

It is unquestioned that Ambush was aware of and reported AT&T equipment overbilling to the District prior to the conclusion of the contract on September 30, 1994. Based on the record, Ambush submitted a reimbursement claim for the equipment with AT&T and followed proper procedures in pursuing that claim on behalf of the District. The District was advised of the equipment overbilling in general terms by memorandum dated September 22, 1994. The amounts were accurately quantified in a memorandum to AT&T dated September 26, 2004, also prior to the completion of the contract. The Ambush documents are the only evidence in the record as to the presentation of equipment reimbursement claims to AT&T. Pursuant to the contract, Ambush is entitled to the full amount of its claim, $135,259.72, plus interest at the rate of 4% from May 10, 1995, the date of its invoice to the District. (D.C. Code § 2-308.06 and D.C.

Code § 2-3302(b)). Because there is no provision for attorneys' fees in the Procurement Practices Act, Ambush's claim for such fees is denied.

SO ORDERED

July 8, 2004

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

Concur:

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

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