GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD
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Date July 19, 2000

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SUBJECT CAB No D-1022, Appeal of ANA, Incorporated

Attached is a copy of the Board's opinion and order dismissing the above-referenced matter

Mia J. House
MIA J HOUSE
Administrative Assistant

Attachment

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

A n A, Incorporated	)	
	)	CAB No D-1022
Under Contract No	)	
FA50431S, Patrol Area South	)	

For the Appellant T. Clarence Harper, Esq. For the Government Robert C Utiger, Esq , Assistant Corporation Counsel

Opinion by Chief Administrative Judge Lorilyn E Simkins, with Administrative Judges Matthew W Watson and Phyllis W Jackson, concurring

OPINION AND ORDER

Appellant, A n A, Incorporated ("A n A") a District of Columbia towing and storage company, alleges that its multi-year contract to provide services to the Metropolitan Police Department ("MPD") was breached when MPD prematurely terminated the contract after only seven months The District filed a Motion to Dismiss arguing that (1) the "base year" of the contract ran only from the date of award through September 30, 1997, (2) the contract was terminated in a timely fashion and (3) the District would have been in violation of the Anti-Deficiency Act had it obligated funds past the base year ending on September 30, 1997 We grant the District's Motion to Dismiss on alternative grounds The RFP and subsequent contract contained two provisions that were patently ambiguous concerning the meaning of base year Based on the doctrine of patent ambiguity, a duty arose in A n A , the non-drafting party, to seek clarification of the meaning of the term "base year" prior to bidding A n A failed to seek such clarification, and accordingly we deny its claim

BACKGROUND

In October of 1996, MPD issued two Requests for Proposals for "No Cost" Towing Services ("RFP") The RFPs were identical except that one was designated for Patrol Area North and one for Patrol Area South At issue in this appeal is the RFP issued for Patrol Area South The RFP sought a contractor to provide "towing, storage and miscellaneous wrecker 'road' services (jump start, gas, tire changes, winch work, etc) to designated vehicles that are determined to be in need of such service by the District of Columbia Metropolitan Police Department " on a 24 hour basis The towing services were sought by MPD for a variety of situations, including the towing of automobiles that had been in accidents, recovered stolen cars, removal of cars from restricted rush hour areas The contract was captioned a "no-cost" contract in that the owners of the cars would pay for the towing and storage fees at the time

that they retrieved their cars However, Section 10 of the RFP provides that should the MPD itself elect to use the services of the contractor that the costs would be borne by MPD The RFP required all bidders to have a facility capable of storing a minimum of 175 vehicles and possess at least ten tow trucks

On January 15, 1997, A n A entered into Contract No FA50431S with the District of Columbia to provide towing services for Patrol Area South The contract was for a base year and four one year options A n A received virtually no calls relating to the contract until February 17, 1997, when then-Chief of Police Larry D Soulsby issued "Special Order 97-1" to inform all police officers of the existence of the towing contracts Special Order 97-1 provides that "[t]he principal benefit of the contract is that recovered stolen vehicles will be towed to the contractors impound lot at no charge to the department. Under certain, very specific circumstances the towing contractors may be requested to provide services to the department on a chargeable basis " From February 17, 1997, until September 30, 1997, A n A derived $220,967 in revenue or $29,463 on average for the 7 ½ months By letter dated August 14, 1997, Chief Soulsby informed A n A that MPD had elected "not to extend the contract beyond the base year which expires September 30, 1997 This is in accordance with Page 11,Section 7 0, item 4, of the aforementioned contract "

A n A filed a breach of contract claim with the Board on October 24, 1997, claiming $132,583 in damages for lost revenue alleging that MPD had impermissibly terminated the contract before the end of the first full year term A n A claims that the effective start date of the contract was February 17, 1997, and ran until February 16, 1998 A n A based its claim on § 7 3 of the contract which states "The initial term of this contract is one year "

On June 26, 1998, the District filed a Motion to Dismiss arguing that the District properly terminated the contract after less than a full year The District contends that A n A's assertion that the base year contract term was for a one-year term from the effective start date is erroneous The District points out that § 6 0 of the contract, Fee Structure and Schedule, defines the base year as the "Date of award through September 30, 1997" and each of the option years as running from October 1 through September 30 of the following year The District contends that the meaning of §7 3 can only be harmonized with the rest of the contract if the term year in §7 3 meant remainder of the fiscal year The District then postulates that even if the §§ 7 3 and 6 0 cannot be reconciled, the detailed definition of the base year set forth in §6 0 should control over the general statement set forth in §7 3 Further, the District maintains that the contract was structured to avoid violating the Anti-Deficiency Act by establishing an end date of September 30, 1997. The District also asserts that in accordance with §7 4 of the contract, MPD gave A n A the requisite 45-day written notice that it would not exercise the second year option

On July 23, 1998, A n A filed an Opposition to the District's Motion to Dismiss A n

A contends that §6 0, which defines the base year as the date of award through September 30, 1997, is too vague and non-specific to indicate when the contract would commence, and under the District's interpretation the term of the contract could be two months or only a few days A n A argues that it is unrealistic to "believe that Appellant, or any contractor, would invest huge sums of money for equipment and licenses and, specific storage space, as required by the contract, for a contract in which the beginning and termination dates rested solely upon the discretion of the MPD A n A states that MPD created further confusion by awarding the contract on January 15, 1998 and then establishing an effective date of February 17, 1998 A n A argues that the contract is ambiguous as to the meaning of the length of the first year and that the provision should be construed against MPD as the drafter of the contract Finally, A n A argues that the contract was for no cost to the District and no appropriated funds were used in the implementation of the contract A n A also points out that as soon as this contract was terminated on September 30, 1997, MPD immediately issued another series of contracts to other towing companies

At the parties request, a hearing on the Motion to Dismiss was held on September 30, 1998

DECISION

This appeal can be disposed of through consideration of the doctrine of patent ambiguities Generally, under the rule of *contra proferentem*, the drafter of a contract which contains latent ambiguities will have the ambiguous provision construed against it so long as the non-drafting party's interpretation is reasonable and the non-drafting party has reasonably relied on its interpretation *Newsom v United States,* 230 Ct Cl 301(1982) However, an exception to the rule exists if the ambiguity is patent *Id* When an ambiguity is patent or glaring, a duty arises for the non-drafting party to inquire concerning the ambiguity prior to contracting *Fry v United States,* 22 Cl Ct 497, 503 (1991) The doctrine of patent ambiguity prevents contractors from taking advantage of the Government by interpreting contract provisions to their own benefit when they know, or should know of an error in the solicitation prior to bidding *S O G of Arkansas v United States*, 212 Ct Cl 125 (1972) If a contractor fails to conduct such an inquiry, a patent ambiguity will be resolved against the contractor. *Id* The test is not the actual knowledge of the ambiguity by the contractor, but whether the inconsistency is plain and glaring The inconsistency cannot be subtle, but must be "an obvious error in drafting, a gross discrepancy, or an inadvertent but glaring gap " *WPC Enterprises, Inc v United States*, 163 Ct Cl 1, 6 (1963)

Based on the circumstances of this case, it is abundantly clear that the two sections defining the length of the initial contract year are facially inconsistent, raising the duty of inquiry regardless of how reasonable the contractor's interpretation was Section 6 0 of the RFP, which provided prospective contractors with the annual rate schedule for each anticipated

service, and the estimated number of annual incidents, required prospective contractors to fill in the percentage of the fees which it would pay to MPD for the base year and the four option years The following caption appears on page 9 of the RFP just above the area where the prospective bidder was to fill in the percentage of rebate **"Base Year: Date of award through September 30, 1997."** (Emphasis in the original) On pages 10 and 11, the option years are specifically described as beginning on October 1 and ending on September 30 of the following year In contrast to § 6 0, § 7 3, entitled **CONTRACT SCHEDULE,** provides "The initial term of this contract is one (1) year " If the RFP had been issued prior to October 1997, the two sections could have been read in harmony However, the RFP was not issued until sometime during the month of October 1997, so that even if the contract award occurred within a few days of the issuance of the RFP, there would have been less than a one-year period before the end of the base year as defined in §6 0 and the beginning of the expressly-defined, first year option. We find that Sections 6 0 and 7 3 are so glaringly inconsistent that A n A had a duty to inquire about the length of the base year before submitting its bid, regardless of the reasonableness of its interpretation As we have resolved this matter based on the doctrine of patent ambiguity, we have no need to address the parties' other issues

We therefore **GRANT** the District's Motion to Dismiss. Appellant's claim is **DENIED**

DATE July 19, 2000

LORILYN E SIMKINS
Chief Administrative Judge

PHYLLIS W JACKSON
Administrative Judge

MATTHEW S WATSON
Administrative Judge