UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 26, 2014

CBCA 3678

SOS INTERNATIONAL, LTD,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Ryan C. Bradel and Jacob B. Pankowski of Greenberg Traurig, LLP, Washington, DC, counsel for Appellant.

James E. Hicks and Luis A. Lopez, Office of Chief Counsel, Drug Enforcement Administration, Department of Justice, Springfield, VA, counsel for Respondent.

Before Board Judges **HYATT** and **SHERIDAN**.

**SHERIDAN**, Board Judge.

In this decision, we conclude that pursuant to the terms of its contract to provide linguist services for respondent, Department of Justice, Drug Enforcement Administration (DEA), appellant, SOS International, Ltd. (SOSi) is not permitted to apply a mark-up rate for general and administrative (G&A) expenses in its billings for exception travel ordered under the contract. This decision is being issued by a panel of two judges, rather than the usual three, as a consequence of the appellant's election of the accelerated procedure. *See* 41 U.S.C. § 7106(a) (2012) and Board Rule 53, 48 CFR 6101.53 (2013).

## Findings of Fact

The DEA issued request for proposals (RFP) DJD-12-R-0030 on May 3, 2012, to procure linguist services for the southeast region of the United States. DEA's Southeast Region includes the Caribbean, Miami, New Orleans, and Washington, D.C. field divisions as well as associated district and field offices. The RFP contemplated the award of an indefinite delivery, indefinite quantity task order type contract. The linguist services were to be ordered on an as-needed basis pursuant to task orders issued by the contracting officer.[1]

Contracting officer (CO) Justice Parker testified at the hearing that the RFP was restructured from past contracts to take a regional approach with "all-inclusive labor rates" that were "inclusive of all the elements . . . management and supervisory services, as well as G&A, profit, labor, and overhead." Transcript at 174. The RFP's statement of work informed prospective offerors:

> The [DEA] has a requirement to obtain the services of a qualified Contractor to provide highly-skilled intelligence and language analyst support to perform language-related services including analysis, monitoring, transcription, translation, interpretation, validation, and minimization services. The Contractor shall provide all management, supervision, personnel, quality control, and security necessary for these services. *The cost for all direct and indirect language-related services and other services shall be included in the hourly Analytic Linguist rate* specified in Section B of the contract.[2]

(Emphasis added).

The RFP contained a chart for proposal pricing that set forth a series of contract line item numbers (CLINs), the estimated quantity (hours) of linguist services by type of linguist (Spanish, common language, and exotic language), and the division office (the Caribbean, Miami, New Orleans, and Washington, D.C.). Thus, each category of linguist for each division office constituted a separate CLIN in the RFP. There were also individual CLINs for regular versus overtime hourly rates.

---

[1] In practice, however, the task orders were issued by a task order manager in DEA's Special Operations Division (SOD), which actually used the linguists.

[2] Section B of the RFP and contract contains the schedule of services by CLIN.

The RFP instructed offerors to "propose a single rate per contract line item (CLIN) that includes *all costs associated with contract performance* to include wages (including apportioned supervisory and management labor), overhead, general and administrative [G&A] expenses, and profit." (Emphasis added.) Offerors were also instructed to "provide substantiating information supporting the overhead and G&A rates on which the fully loaded labor rates are based." Offerors provided their prices by filling in the CLIN chart columns with their proposed unit prices for each type of linguist service CLIN and calculating the total estimated price for each type of linguist service proposed.[3]

The CLIN chart also included several CLINs identified as "Travel."[4] The purpose of the travel CLINs was to cover what was described as "exception" or "exceptional" travel. Exception travel was described in the RFP at section H, Special Contract Requirements, to cover the cost of transporting linguists "on an exception basis" and "with the prior approval of the DEA" when the need for linguists exceeded the contract estimates for linguists in a given location (as set forth in RFP Exhibit J-E-5)[5], or when a linguist was subpoenaed or required to serve as a witness on behalf of the DEA. Section H provided in pertinent part:

> Costs for transportation, lodging, meals, and incidental expenses incurred by the contractor on official company business are allowable subject to FAR [Federal Acquisition Regulation] 31.205-46, Travel Costs. These costs will be considered to be reasonable and allowable only to the extent that they do not exceed on a daily basis the maximum per diem rates in effect at the time of travel as set forth in the Federal Travel Regulation (FTR).

In each of the CLINs associated with exception travel, the DEA listed the CLIN by division office, the type of linguist, that travel was on an "as needed" basis, and the total dollar limit for that CLIN. The travel CLINs set exception travel at a not-to-exceed annual amount of $2,500,000, $500,000 each annually for the New Orleans, Caribbean, and

---

[3] The estimated total price for each CLIN was presumably reached by multiplying the estimated quantity (hours) provided by DEA by the unit price provided by the offeror.

[4] CLINs 0007, 0014, 0021, 0028, 1007, 1014, 1021, 1028, 2007, 2014, 2021, 2028, 3007, 3014, 3021, 3028, 4007, 4014, 4021, and 4028.

[5] Exhibit J-E-5 was a chart that specified the minimum number of linguists by language required for a locality at all times. Exception travel could be authorized if the DEA needs substantially exceeded the numbers set forth in the chart and travel was deemed to be in the best interest of the DEA.

Washington, D.C. division offices and $1,000,000 annually for the Miami division office. Offerors were not required to provide any information or proposal pricing for the exception travel CLINs.

Offerors were required to provide in their proposals "substantiating information supporting the overhead and G&A rates on which the fully loaded labor rates are based." SOSi's proposal indicated that SOSi used a G&A rate of 5.8 percent in its proposal. SOSi's proposal also stated that the G&A rate was "based on [SOSi's] most current outlook of estimated expenses and the cost bases over which they are to be allocated," as "in line with [SOSi's] historical averages of indirect rates over the past three years," and that "[t]he source of this information [was SOSi's] 2012 operating budget that reflect[ed its] most current estimate of operating costs."

The DEA also conducted an industry Q&A with potential offerors during the proposal preparation period. The following is set forth in Q&A 46, which includes an answer as well as a question:

> Question:
> Section H.2 Travel Costs, page H-1. TDY [temporary duty] costs are likely to be incurred in performance of this contract. Please confirm that the offeror is responsible for including these costs in the hourly linguist rates.
>
> Answer:
> See Section L.9(c)(2): "The Offeror shall propose a single rate per contract line item number (CLIN) that includes all costs associated with contract performance to include wages (including supervisory and management labor), overhead, general and administrative expenses (G&A), and profit."

SOSi and the DEA entered into contract DJD-13-C-0007 for linguist services for the southeast region of the United States on November 2, 2012. The contract contained the clause found at FAR 52.216-22 stating that the contract was an "indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule." Section B.3 of the contract provided that the CLIN services shall be obtained by issuance of task orders, with the Government paying the contractor the fixed unit rate for linguist services in effect on the effective date of the task order. Payment for linguist services was to be calculated using the fixed unit rate per hour multiplied by the total number of hours eligible for payment, and "allowability of travel costs shall be determined based on FAR Part 31. Travel Costs shall be limited to travel approved by the Task Monitor or COR [contracting officer's representative] and the amounts authorized under the Federal Travel Regulation." The fixed linguist rates were to include "all costs associated with contract

performance to include wages (including apportioned supervisory and management labor), overhead, general and administrative expenses (G&A), and profit."

As set forth in the contract, the DEA issued several task orders to SOSi under the contract from February 15, 2013, through July 1, 2013. Several of the task orders included orders using the exception travel CLINs, and some of those stated: "travel expenses to include G&A." SOSi invoiced for the travel costs it incurred during a period and included a G&A mark-up in its invoices for the travel costs. DEA paid several invoices that included G&A mark-ups on invoiced travel costs.

According to CO Parker, some task orders were filled out by DEA's SOD or a field division that erroneously allowed for G&A expenses for exception travel on the task order. This error was discovered through an audit performed by the Office of Finance at SOD. Transcript at 186. On May 30, 2013, CO Parker received an email from an accountant in SOD stating: "I just received word from HQ [Headquarters] that SOD is not to pay G&A fees for travel that occurred after 10/1/2012. The higher rates on the regional contracts are considered inclusive of G&A already. There is no language in the contract that advises the linguist companies of this, so a modification to those contracts is possible, but until further notice, we are to reject travel invoices with G&A fees back to the vendors." CO Parker informed SOSi on June 5, 2013, that under the contract "G&A cannot be billed against travel costs. The G&A should be built into the hourly labor CLINs." On June 27, 2013, SOSi wrote requesting assistance regarding two invoices which the CO had rejected because they included mark-ups for G&A. SOSi explained:

> When SOSi submitted its proposal in response to [the RFP] we developed hourly labor rates by CLIN for each of the field divisions (New Orleans, Miami, Caribbean, Washington, D.C.) in accordance with Section 2. Cost/Price Proposal (Volume II), (a) of the RFP which stated *"The Offeror shall propose single rate per contract line item number (CLIN) that includes costs associated with contract performance to include wages (including apportioned supervisory and management labor), overhead, general and administrative expenses (G&A) and profit."* Given Section B included a travel LT[6] CLIN for each field division, with no additional instructions to price trips based on each field division lot amount, there was no requirement to state our Cost Accounting Standards (CAS) G&A allocation practice, approved by our

[6] This acronym was not defined by either party, but, in context, appears to be shorthand for "limited."

> DCAA [Defense Contract Audit Agency] Field Office, for applying allocable G&A expense to allowable travel costs.

DEA denied SOSi's request to allow a G&A mark-up on exception travel by letter dated July 17, 2013. In this letter, DEA responded that the RFP clearly requested "all-inclusive hourly labor rates." DEA also cited the answer to Q&A 46, which DEA posits provided further clarification regarding temporary duty related costs and the Government's guidance that they were to be included in the single hourly labor rate of the linguists. SOSi submitted another letter on July 24, 2013, requesting reimbursement of G&A expenses on costs paid under the travel CLINs. DEA's CO again denied the G&A mark-up for travel by letter dated July 25, 2013.

Using a G&A rate of 6.29 percent, SOSi submitted a claim to the CO in the amount of $8269.48 on December 9, 2013, and asserted that the G&A sought was associated with the exception travel. Sometime after the claim was submitted, SOSi explained that it had revised the G&A rate of 5.8 percent that it had originally sought upward to 6.29 percent, explaining that SOSi was not bound to the "estimated" and "provisional" rate contained in its proposal (which it had used in its earlier vouchers) and that the G&A rate it currently seeks, 6.29 percent, is the actual G&A rate SOSi has calculated for 2011, the performance period in issue. DEA denied the claim on January 2, 2014, citing the previous rejections in its letters of July 17 and July 25, 2013. On January 15, 2014, SOSi filed this appeal.

The contract incorporated by reference the clauses found at FAR 52.216-7, Allowable Cost and Payment; FAR 52.232-1, Payments (for fixed-price supply or service contracts); and FAR 52.232-7, Payments Under Time-and-Material and Labor-Hour Contracts. FAR 52.232-7 provides in pertinent part:

> The Government will pay the Contractor as follows upon the submission of vouchers approved by the Contracting Officer or the authorized representative:
>
> (a) *Hourly rate*.
>
> . . . .
>
> (4) The hourly rates shall include wages, indirect costs, general and administrative expense, and profit. Fractional parts of an hour shall be payable on a prorated basis.
>
> . . .

(b) *Materials.* (1) For the purposes of this clause—

. . .

(ii) Materials means—

(A) Direct materials, including supplies transferred between divisions, subsidiaries, or affiliates of the Contractor under a common control;

(B) Subcontracts for supplies and incidental services for which there is not a labor category specified in the contract;

(C) Other direct costs (*e.g.*, incidental services for which there is not a labor category specified in the contract, travel, computer usage charges, etc.); and

(D) Applicable indirect costs.

. . .

(4) Payment for materials is subject to the Allowable Cost and Payment clause of this contract. The Contracting Officer will determine allowable costs of materials in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(5) The Contractor may include allocable indirect costs and other direct costs to the extent they are—

(i) Comprised only of costs that are clearly excluded from the hourly rate;

(ii) Allocated in accordance with the Contractor's written or established accounting practices; and

(iii) Indirect costs are not applied to subcontracts that are paid at the hourly rates.

48 CFR 52.232-7 (2011).

Appellant called Ernest Agresto as a witness in this case. Mr. Agresto is a certified public accountant who originally worked for the Defense Contract Audit Agency (DCAA), but who, for the past several years, has had a private consulting business primarily representing government contractors. In Mr. Agresto's opinion, SOSi was entitled to apply its G&A rate to the exception travel "consistent with the company's methodology for allocating G&A expense, and the terms and conditions in the contract not excluding the incurrence of those costs." Transcript at 36. Mr. Agresto testified that the contract did not restrict appellant's ability to recover G&A on exception travel. Mr. Agresto opined that the contract was a time and material (T&M) contract and that the travel CLINs were "material components," noting:

> [I]t's not just material costs, it represents material, subcontractor costs that are not included in the labor rate, it would include other direct costs, inclusive of travel, and then it is identified under the FAR as applicable indirect expense. And indirect expense would include any rate that's factored in as part of the [company's normal] policies and procedures, and practices.

*Id*. at 21-22. Mr. Agresto testified that SOSi uses a total cost input base which "is the difference between total cost, inclusive of G&A, minus G&A . . . [to reach] a pool of expense that is allocated over every element of cost, other than G&A itself." *Id*. at 24. He went on to state that the total cost input base is the preferred base for the majority of companies and that under that base everything, except for G&A, is included in that base, including travel expenses.

In T&M contracts, Mr. Agresto testified, "[t]ravel is one element of other direct cost" and that if a company is using a total cost input base to reach its G&A rate, then G&A should be applied to travel as any other direct cost line item. Transcript at 28-29.

> The exception to that is if it's . . . excluded specifically under the terms of the contract where there's a line item that says, you know, travel will not – or G&A will not be allocated to any other direct costs. Contract terms do take precedent . . . over the FAR, but in this particular case . . . I was unable to see anything that precluded the G&A [from being] applied.

*Id*. at 29. Mr. Agresto discounted the language requiring that an offeror propose a single rate per CLIN that included "all costs associated with contract performance to include wages (including apportioned supervisory and management labor), overhead, general and administrative expenses, and profit," opining that the language did not exclude G&A from being applied to exception travel because the contract "says the single [labor] rate . . . shall include wages, which it does, from SOSi's proposal, G&A, which it does, and profit, but it's

only the allocable portion of the G&A applicable to the wages and overhead." *Id*. at 31-32. According to Mr. Agresto, contractors in T&M contracts are typically allowed actual costs for the elements of cost that are not part of the hourly rates, and the G&A rates sought on the exception travel are a form of actual costs.

## Discussion

Both parties maintain that the contract is clear. Appellant avers that the contract clearly entitles SOSi to include a mark-up for G&A in SOSi's billings for exception travel. Respondent insists that it is clear that the contract does not allow a G&A mark-up to be added to the exception travel expenses.

The dispute before us involves a question of contract interpretation – specifically, whether the contract entitles SOSi to include G&A costs in its billings for exception travel. The Board in *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,151, recently explained how contract interpretation issues are analyzed:

> Contract interpretation begins with an examination of the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009) (*citing M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)). The contract must be read as a whole, giving reasonable meaning to all its parts. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). But if the contractual language at issue is susceptible of more than one reasonable interpretation, it is ambiguous, and it is the Board's task to determine which party's interpretation should prevail. *Gildersleeve Electric, Inc. v. General Services Administration*, GSBCA 16404, 06-2 BCA ¶ 33,320, at 165,210.
>
> An ambiguity exists when a contract is susceptible to more than one reasonable interpretation. *See, e.g., E.L. Hamm & Associates, Inc. v. England*, 379 F.3d 1334, 1341-42 (Fed. Cir. 2004); *Metric Constructors, Inc. v. National Aeronautics and Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999). When a dispute arises as to the interpretation of a contract and the contractor's interpretation of the contract is reasonable, tribunals apply the rule of *contra proferentem*, which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who

> drafted the document. *Turner Construction Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004); *United States v. Turner Construction Co.*, 819 F.2d 283, 286 (Fed. Cir. 1987). If an ambiguity exists, the next question is whether that ambiguity is patent. An ambiguity is patent if the ambiguity is so glaring that it is unreasonable for the contractor not to discover and inquire about it. The doctrine of patent ambiguity is an exception to the general rule of *contra proferentem*, which courts use to construe ambiguities against the drafter. More subtle ambiguities are deemed latent, and the general rule that such language is interpreted in favor of the nondrafting party will apply. *See Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997); *Interstate General Government Contractors, Inc. v. Stone*, 980 F.2d 1433, 1434-35 (Fed. Cir. 1992).
>
> It is not the subjective intent of the drafter, but rather the intent that is conveyed by the language used, that governs the contract's interpretation. *See, e.g., JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,480 (citing *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971)). In addition, "the language of [the] contract must be given the meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances," *Teg-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006), "unless a special or unusual meaning of a particular term or usage was intended, and was so understood by the parties." *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

Appellant's argument appears to hinge on the Board finding that the exception travel was a type of material as defined under FAR 52.232-7(b)(ii)(B) as "[s]ubcontracts for supplies and incidental services for which there is not a labor category specified in the contract." FAR 52.232-7(b)(ii)(D) provides that applicable indirect costs may be charged to such subcontracts. However, FAR 52.232-7(b)(ii)(D)(5) allows a contractor to include allocable indirect costs and other direct costs only to the extent those costs are clearly excluded from the hourly rate, allocated in accordance with the contractor's written or established accounting practices, and are not applied to subcontracts that are paid at the hourly rates.

In deciding the question of whether SOSi is entitled to apply a G&A mark-up to its exception travel expenses, the Board focuses on the RFP, which was incorporated into the contract, and the language of this particular contract, and reaches the conclusion that SOSi is not entitled to recover G&A on the exception travel billings. While the RFP required

offerors to submit supporting information for the G&A rate they used in their proposals, and SOSi supported its G&A rate of 5.8 percent, the RFP did not instruct offerors to provide a G&A rate for the exception travel CLINs. The only portion of the contract addressing the G&A as an allowable cost is the language instructing SOSi to propose a single rate for each linguist services CLIN. That is not surprising because the RFP instructed offerors to "propose a single rate per contract line item (CLIN) that includes *all costs associated with contract performance* to include wages (including apportioned supervisory and management labor), overhead, general and administrative expenses, and profit." The RFP clearly informed prospective offerors that they were responsible for providing all management, supervision, personnel, quality control, and security necessary for contract performance by stating "[t]he cost for all direct and indirect language-related services and other services" shall be included in the hourly linguist rate.

The referenced "other services" put prospective contractors on notice that there were "other services" to be performed in the contract and that they should include in the linguists hourly rates all the "direct and indirect costs," including any "wages (including apportioned supervisory and management labor), overhead, general and administrative expenses, and profit," "associated with contract performance." The only costs that were excepted from the hourly linguist rates were the "transportation, lodging, meals, and incidental expenses" associated with exception travel. Indirect costs, like G&A, are not travel costs as envisioned by the contract, which describes the costs specifically in the narrow terms of "transportation, lodging, meals, and incidental expenses," and provides that even those costs "will be considered to be reasonable and allowable only to the extent that they do not exceed on a daily basis the maximum per diem rates as set forth in the . . . FTR." "Transportation, lodging, meals and incidental expenses" have specific meanings in the FTR, which makes no provision for a G&A mark-up.

We reject appellant's argument that the travel costs are materials subject to FAR 52.232-7(b)(1)(B) as "subcontracts for supplies and incidental services for which there is not a labor category specified in the contract." Appellant argues that pursuant to the application of this clause, SOSi is entitled to recover "applicable indirect costs" on the travel materials it provided, unless there is another clause in the contract that clearly excludes recovery of indirect costs. We consider the "transportation, lodging, meals, and incidental expenses" to be in the nature of services, as in "other services," that are explicitly contemplated in the contract. Although exception travel services have separate CLINs, any exception travel services that SOSi provides are ancillary to providing the linguist services and are not independent of that objective.

We interpret the previously discussed language in the RFP and the contract to unequivocally limit the costs SOSi could recover for exception travel to "transportation,

lodging, meals, and incidental expenses." We conclude that the RFP and the contract warned SOSi to include in its proposed hourly linguists' rates all costs necessary to perform the contract. The only contract performance costs that were excepted from the hourly rates were the costs for "transportation, lodging, meals, and incidental expenses" listed for exception travel.

Q&A 46 does not clarify the interpretation of the contract. The parties also referenced several prior contracts for propositions that each believed supported its respective position. The Board does not find these contracts to provide probative value. As far as the G&A rate to be applied, we need not address that issue because we have concluded that G&A is not allowed on the exception travel ordered under this contract.

While we believe that the contract is clear on its face, to the extent that SOSi interpreted the contract to allow G&A mark-up on the exception travel costs, that interpretation would create a patent ambiguity in the face of contract language clearly indicating DEA's intent to have all contract performance costs, except the "transportation, lodging, meals, and incidental expenses" associated with exception travel included in all-inclusive hourly linguist rates. That would have created for SOSi a duty to inquire, which it failed to do. *HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004); *Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999).

## Decision

The appeal is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

I concur:

CATHERINE B. HYATT
Board Judge