



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: May 5, 2009

CBCA 1509

HOUCK LIMITED,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Chad A. Readler and Grant W. Garber of Jones Day, Columbus, OH, counsel for Appellant.

Brian Reed and Larry Stunkel, Chicago Office of Regional Counsel, Department of Veterans Affairs, Hines, IL; and Phil Kauffman, Phillipa L. Anderson, and Lynn T. Burleson, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman) and **VERGILIO**.

DANIELS, Board Judge.

Houck Limited (Houck) and the Department of Veterans Affairs (VA) entered into an indefinite quantity contract for the provision by Houck of vocational rehabilitation and employment services to veterans with service-connected disabilities. Through this appeal, Houck challenges VA's interpretation of the rates of payment to be applied to one group of services being provided under the contract, case management services. According to Houck, each rate covers the services provided to one veteran for one month. A VA contracting

officer decided that each rate covers all the services provided to a veteran, no matter how long Houck counsels that individual.

VA has filed a motion for summary relief, premised on the theory that the contract unambiguously makes clear that the agency's position is correct. Because the language is unambiguous, VA says, the Board may not rely on extrinsic evidence, such as a prior course of dealing, for interpretation. In any event, the agency continues, because the language of this contract is different from the language of previous contracts between the parties, a prior course of dealing does not illuminate the meaning of the terms at issue here. VA concludes by alleging that Houck presented an unbalanced offer to win the contract.

The amount in dispute is less than \$100,000, and Houck has elected the accelerated procedure. 41 U.S.C. § 606(f) (2006). Consequently, this decision is being issued by a panel of two judges. Rule 53(b) (48 CFR 6101.53(b) (2008)).

The contract covers vocational rehabilitation and employment services in two "subareas," number 8 (Louisville, Kentucky, and Nashville, Tennessee) and number 23 (Africa, Europe, and the Middle East). (Similar contracts for twenty-four other subareas were awarded to other companies.) For each subarea, the contract contains contract line items (CLINs) and sub-contract line items (sub-CLINs) within five different "service groups." The service groups are A (initial assessment/evaluation), B (case management/rehabilitative services), C (employment services), D (educational and vocational counseling), and E (discrete services). For each sub-CLIN, the contract shows an estimated quantity, unit price, unit of measure, and total estimated price. The unit of measure is "per case" for each sub-CLIN, and the total estimated price is the estimated quantity multiplied by the unit price. The contract provides, "Cost for such services is on a firm-fixed price basis, in accordance with pricing for each Group as awarded in the Schedule." CLINs and sub-CLINs are included for a base year and each of four option years.

VA maintains that answers it provided in the solicitation to questions posed by prospective offerors explain what the term "per case" means. Amendment 6 to the solicitation contains these questions and responses:

Q. 124 On Attachment D-I (the pricing sheets), the unit of measure for all services is "per case". While a per case basis works for some services (price can be reasonably estimated), it doesn't seem appropriate in others, such as case management. In reality, case management is ordered by the month. The term of a case management referral could be 6 months or it could be 1-2 months. Asking a contractor to assume an average will translate into higher prices the VA will pay.

R. 124 Pricing is required for submission per case. The Offeror must determine the cost per case for each level^[1] of Case Management.

Q. 125 For case management, why can't pricing be "monthly" instead of "per case"?

R. 125 Pricing is required for submission per case. The Offeror must determine the cost per case for each level of Case Management.

....

Q. 131 In bidding Group B - Case Management Services, is the "Unit Price" per case regardless of the time period during which case management services are provided on a file or can it be bid price per month or quarter for case management on a file.

R. 131 Per case -- see pricing schedule.

....

Q. 208 The spreadsheet for the budget is listed in "units." What is the definition of "unit?" Is a unit per visit, per hour, per day?

R. 208 Unit refers to "unit price" (the price for the respective service being offered) and "unit of measure"; in this solicitation "per case" refers to an individual patient.

VA maintains that these responses clearly show that the agency required "per case," not "per month," pricing. Houck's position is inconsistent, the agency says, because the contractor interpreted "per case" to mean "per veteran" as to service groups A, C, D, and E, yet contends that it means something different as to service group B. The contractor's interpretation consequently, in the agency's eyes, "would give rise to a weird and whimsical result." Additionally, VA asserts, nothing in the contract or even the document containing

¹ The contract provides for three levels of case management services. Level I includes veterans with few needs and demonstrated capacity for independent action; level II includes veterans with multiple or complex needs and minimal resources; and level III includes veterans who need substantial assistance in securing necessary services.

Houck's "base cost per case assumptions" put the agency on notice that the contractor was treating "per case" pricing differently for group B.

With regard to prior contracts, VA urges that "the parties have changed their intent" in agreeing to this contract. The agency says that it has a different understanding of the pricing arrangement from what the parties had on earlier contracts, so there cannot have been a common understanding that past practice would be continued into this contract. With regard to the allegation of unbalanced bidding, VA shows that for each of the subareas for which Houck was awarded a contract, Houck's prices for some of the sub-CLINs were higher than prices of its competitors and others were lower. The agency "believes this may reflect a bidding strategy by certain offerors based on economies of scale" and that "[n]othing in the overall price structures indicated that [Houck] had significantly underbid Service Group B."

In response, Houck agrees that solicitation amendment 6 question-and-response 208 makes clear that the term "per case" means "per veteran." Houck maintains, however, that the contract does not define the term as pertaining to any particular period of time. Questions and responses 124, 125, and 131, Houck urges, preclude an offeror from pricing its services in monthly or annual block form, but do nothing more. Thus, whether "per case" means "unlimited per case," "monthly per case," or "annually per case" is not clear. The contract is therefore ambiguous in expressing a meaning of the term, according to Houck.

The ambiguity is amplified, the contractor continues, by both a previous course of dealing and the solicitation's reference to that practice. Houck shows through an affidavit and exhibits that under its three previous contracts with VA for services like those covered by this contract, "cost per case" was considered by both parties to be "monthly per case." Question-and-response 72 in solicitation amendment 5 question set 2 reads:

Q.72 Generally speaking in what ways is the current solicitation different from the 2002 solicitation?

R.72 Please read the solicitation.

Houck maintains that "[a] change in the time period covered by rates is no small matter" and urges that if a significant change had been made, question 72 obligated the agency to highlight that change in its response.

Houck notes that VA's assertion that its offer was unbalanced and the agency's comparison of its prices with those of its competitors are attorney argument only; they are not supported by any affidavits from persons knowledgeable about how the agency analyzed

offers. Contrary to VA's assertion as to an unbalanced offer, Houck points out that the solicitation requires each offeror to "document in its proposal any assumptions" about pricing, and that Houck did include in its offer a "base cost per case assumptions" page which shows that the price for each CLIN and sub-CLIN is based on all costs associated with each task. In particular, Houck notes that the small number of hours on which its service group B prices are based demonstrates that it must have offered "monthly per case" prices for case management tasks.

The comparison of Houck's prices with its competitors' prices is invalid, the contractor argues, because the interpretation of "per case" by the competitors with whom VA compared its prices is uncertain -- at least one other offeror bid "monthly per case" prices (as did Houck), and at least two bid "annual per case" prices; whether any bid "unlimited per case" prices is unknown. Houck states that these three firms and itself constitute half of the firms to which VA awarded contracts for the twenty-six subareas. Houck relies upon an affidavit and exhibits to urge that applying VA's interpretation to Houck's current contract sub-CLIN for case management services, the contractor is receiving compensation for only a tiny fraction of its costs. The contractor based its price for one level of case management services on the assumption that these services would require two hours of counselor time; the agency paid for these services by dividing the price by twenty-two and paying only one twenty-second of the price for the month for which the invoice was sent. Under the agency's practice, Houck is receiving immensely less for its case management services than it pays its counselors for providing those services.

Houck finally contends that it is not asking that the term "per case" be applied differently to service group B CLINs and sub-CLINs from the way in which it is applied to CLINs and sub-CLINs in other service groups. The contractor says that it has highlighted service group B in its claim because work assigned in the other service groups is by its nature of short-term duration; whether "per case" means "unlimited per case" or "monthly per case" for the other groups is immaterial because payment will be the same regardless of the interpretation.

We can grant VA's motion for summary relief only if the agency persuades us that as a matter of law and undisputed facts, the agency's interpretation of the term "per case" is unambiguously correct. VA has not met this burden. At this stage of the proceedings, the agency has not demonstrated that Houck's interpretation of the term is unreasonable. If Houck is correct in asserting that half the awardees of the contracts for the twenty-six subareas understood the term differently from the agency, that may indicate an ambiguity in the use of the term. Given several requests to clarify its position through its solicitation, VA provided equivocal responses. When asked to describe the ways in which this solicitation differed from previous contractual instruments covering similar services, VA refused to

provide any answer at all. The agency has not demonstrated, based on the limited record presented for the motion for summary relief, that the language of the contract compels the interpretation it advances.

It is not surprising, in light of the agency's opaque approach to the matter at issue during the solicitation process, that the parties have entered into a contract with different understandings of an important term. How that predicament will be resolved must be explored through further development of the case.

Decision

VA's motion for summary relief is **DENIED**.

STEPHEN M. DANIELS
Board Judge

I concur:

JOSEPH A. VERGILIO
Board Judge