



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED AS TO ENTITLEMENT: March 6, 2009

CBCA 449

NAVIGANT SATOTRAVEL,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

James H. Roberts, III and Carrol H. Kinsey, Jr. of Van Scoyoc Kelly PLLC, Washington, DC, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **KULLBERG**.

KULLBERG, Board Judge.

This appeal concerns a task order issued by the Army Contracting Agency-ITEC4 (DoD) to Appellant, Navigant SatoTravel (NST),¹ for travel services in Defense Travel Region 6 (DTR6). Respondent, General Services Administration's (GSA's) contracting

¹ NST was acquired by Carlson Travel in 2006 and is now known as Carlson Sato Travel. Transcript at 191.

officer, in a decision issued on March 21, 2006, determined that the order for DTR6 services was provided under NST's Federal Supply Schedule (FSS) contract with GSA and demanded payment of the applicable Industrial Funding Fee (IFF) in the amount of \$292,609.50. NST appealed from that decision, and contended that no IFF was due because the services were not provided under its FSS contract. We conclude that the travel services were provided under NST's FSS contract. DoD issued a task order referencing NST's FSS contract number, and NST accepted the order by performance.

This appeal was docketed previously at the General Services Administration Board of Contract Appeals (GSBCA) as GSBCA 16873. On January 6, 2007, in accordance with section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391, the Civilian Board of Contract Appeals (CBCA) was established, and this case was then docketed by the CBCA as CBCA 449. This Board previously denied appellant's motion for summary relief. *Navigant SatoTravel v. General Services Administration*, CBCA 449, 08-1 BCA ¶ 33,821. A hearing was held on May 28-29, 2008. Only the issue of entitlement was tried at the hearing.² We deny the appeal as to entitlement.

Findings of Fact

On March 24, 2004, GSA issued solicitation number FBGT-RK-040001-B (solicitation), Travel Services Solutions (TSS). Appeal File, Exhibit 28.³ The solicitation referenced multiple award schedule (MAS) number 599. *Id.* The types of services called for under the solicitation were classified by special item numbers (SINs). *Id.* at 6. Those travel-related services under the statement of work (SOW) included: travel consultant services (SIN 599-1), travel agent services/travel management center services (SIN 599-2), new products/services (SIN 599-99), and contract support items (SIN 599-1000). *Id.* at 7-20.

Generally, the solicitation described TSS as follows:

The Travel Services Solution Schedule is a comprehensive contracting vehicle that will encompass a variety of distinct commercial travel services in support of the Government's travel needs. Each SIN solicited stands alone. Companies may choose to offer one or more SINs for which they meet the requirements of and qualifications for the service solicited.

² Board's Memorandum of Conference Call and Order (Mar. 8, 2007) at 3.

³ All exhibits are found in the appeal file, unless otherwise noted.

Exhibit 28 at 8. Generally, the types of travel services to be provided under the terms of the solicitation included arrangements for temporary change of station, permanent change of station, and temporary duty travel, and travel-related services such as “travel management, travel security, [and] travel technology” *Id.* at 9. GSA prepared the solicitation to cover a broad variety of commercial travel services, and an agency ordering services from a schedule contractor would specify travel requirements based on that agency’s requirements. Transcript at 115-16. Orders for services from schedule contractors could be placed by “Executive agencies[,] other Federal agencies, mixed-ownership Government corporations, and the District of Columbia” Exhibit 28 at 24.

The solicitation also defined “eTravel Service” (eTS) as “a web-based, end-to-end travel management service for use by all civilian Executive Branch departments and agencies of the Federal Government.” Exhibit 28 at 9. The purpose of eTS was to provide “a common, automated, and integrated approach to managing Federal Government travel functions.” *Id.* Consequently, “[c]ompeting end-to-end eTS [was] not solicited under TSS.” *Id.*

The clause at solicitation paragraph C.19 was General Services Administration Regulation (GSAR) 552.238-74, Industrial Funding Fee and Sales Reporting (JUL 2003),⁴ which provided in pertinent part the following:

(a) Reporting of Federal Supply Schedule Sales. The Contractor shall report all contract sales under this contract as follows:

(1) The Contractor shall accurately report the dollar value, in U.S. dollars and rounded to the nearest whole dollar, of all sales under this contract by calendar quarter (January 1 - March 31, April 1 - June 30, July 1 - September 30, and October 1 - December 31). The dollar value of a sale is the price paid by the Schedule user for products and services on a Schedule task or delivery order. The reported contract sales value shall include the Industrial Funding Fee (IFF). The Contractor shall maintain a consistent accounting method of sales reporting, based on the Contractor’s established commercial accounting practice. The acceptable points at which sales may be reported include—

⁴ 48 CFR 552.238-74 (2003).

- (i) Receipt of order;
- (ii) Shipment or delivery, as applicable;
- (iii) Issuance of an invoice; or
- (iv) Payment.

(2) Contract sales shall be reported to FSS within 30 calendar days following the completion of each reporting quarter. The Contractor shall continue to furnish quarterly reports, including “zero” sales, through physical completion of the last outstanding task order or delivery order of the contract.

(3) Reportable sales under the contract are those resulting from sales of contract items to authorized users unless the purchase was conducted pursuant to a separate contracting authority such as a Governmentwide Acquisition Contract (GWAC); a separately awarded FAR [Federal Acquisition Regulation] Part 12, FAR Part 13, FAR Part 14, or FAR Part 15 procurement; or a non-FAR contract. Sales made to state and local governments under Cooperative Purchase authority shall be counted as reportable sales for IFF purposes.

....

(b) The Contractor shall remit the IFF at the rate set by GSA’s FSS.

(1) The Contractor shall remit the IFF to FSS in U.S. dollars within 30 calendar days after the end of the reporting quarter; final payment shall be remitted within 30 days after physical completion of the last outstanding task order or delivery order of the contract.

(2) The IFF represents a percentage of the total quarterly sales reported. This percentage is set at the discretion of GSA’s FSS. GSA’s FSS has the unilateral right to change the percentage at any time, but not more than once a year. FSS will provide reasonable notice prior to the effective date of the

change. The IFF reimburses FSS for the costs of operating the Federal Supply Schedules Program and recoups its operating costs from ordering activities. Offerors must include the IFF in their prices. The fee is included in the award price(s) and reflected in the total amount charged to ordering activities.

....

(d) Failure to remit the full amount of the IFF within 30 calendar days after the end of the applicable reporting period constitutes a contract debt to the United States Government under the terms of FAR Subpart 32.6. The Government may exercise all rights under the Debt Collection Improvement Act of 1996, including withholding or setting off payments and interest on the debt (see FAR clause 52.232-17. Interest). Should the Contractor fail to submit the required sales reports, falsify them, or fail to timely pay the IFF, this is sufficient cause for the Government to terminate the contract for cause.

Exhibit 28 at 35-37.

On May 5, 2004, GSA awarded to NST contract GS-33F-0020-P (FSS contract) under the solicitation. Exhibit 29. Under the FSS contract, NST would provide services under SINs 599-2, 599-99, and 599-1000. *Id.* at 2. NST's rates for services under SIN 599-2 included an IFF rate of \$1.50 per transaction. *Id.* Under SIN-2, NST had separate rates for domestic and international air and rail travel, transaction A; lodging and car rental, transaction B; and online bookings, transaction C. *Id.*; Transcript at 117-20. Travel arrangements under transaction C were referred to as "touchless" in that the transaction was automated and involved a reduced level of effort. Transcript at 117-18.

On September 2, 2004, DoD issued request for quotations (RFQ) W91QUZ-04-T-0016 for the "acquisition of official travel management and related additional services . . . of authorized [DoD] travelers whose duty station is within Defense Travel Region 6 (DTR6)." Exhibit 1 at 44, ¶ C.1.1. The RFQ stated that "travel management services shall be provided using both traditional methods and automated methods using the Defense Travel System (DTS) web portal." *Id.* The contracting officer, Ms. Peggy Butler, intended to issue an order against an existing GSA schedule contract. Transcript at 17. The first page of the RFQ was a standard form (SF) 18. Exhibit 1 at 1. Ms. Butler inserted DTS-GSA-002 in block 3, Requisition/Purchase Request No., on the SF 18, and she deemed it a matter of

discretion to style the requisition number in that manner in order to show DoD's intent to issue an order against a GSA schedule contract. Exhibits 1 at 1, 63; Transcript at 18.

Paragraph L.1.2 of the RFQ stated that the "Government contemplates award of one Firm Fixed Price task order with a base period of 5 months, plus 2 option periods of 6 months and 1 months [sic]." Exhibit 1 at 78. Paragraph L.4 of the RFQ provided that "[a]t the time of award of any contract resulting from this solicitation, the successful Offeror's offer will be incorporated by reference as part of the contract." *Id.* at 80. An offer under the RFQ meant an "'offer' as described in FAR 2.101." *Id.* Paragraph L.5.1 of the RFQ stated that "[o]fferors shall identify all existing GSA FSS contract(s) to be used to satisfy the requirement of the Statement of Work (SOW)." *Id.*

The RFQ required submission of a technical proposal and a pricing spreadsheet with cost assumptions. Exhibit 1 at 82-83. The various services to be provided for the base and option periods were listed as numbered contract line items (CLINs). *Id.* at 2-43. The pricing spreadsheet was an attachment to the RFQ, and it required that each "[o]fferor insert a Firm Fixed Price for each Priced CLIN or subCLIN." *Id.* at 83. The CLINs for the various services during the base period were numbered 0001 through 0015, and there were separately numbered CLINs for each of the two option periods.⁵ *Id.* at 2-30.

Travel agent services under CLIN 0001 were arranged by means of the DTS web portal. Exhibit 1 at 2-3; Transcript at 28-30. DTS is an on-line system, which is used by DoD personnel for managing commercial travel, and a contractor performing DTR6 services would access the data within DTS to obtain air or rail tickets or make other travel-related reservations. Transcript at 15, 25, 129-32. Transactions for travel services using DTS included "touched" transactions that involved assistance from the Commercial Travel Office (CTO) to make special arrangements for a traveler. *Id.* at 31. Travel agent services provided under CLINs 0002 and 0003 were identified as "traditional" in that such services were provided where DTS was not available, and arrangements were made by contacting a travel agent. *Id.* at 31-33. The services provided under CLINs 0004 through 0015 included: fees for reconciling claims (CLIN 0004), support contractor travel (CLIN 0005), leisure travel in conjunction with official travel management services (CLIN 0006), paper ticket delivery (CLIN 0007), reporting requirements (CLIN 0008), staffed locations (CLINs 0009-0011), satellite ticket printer (CLIN 0012), global distribution system (GDS) terminal and software (CLINs 0013-0014), and movement of human remains (CLIN 0015). Exhibit 1 at 6-16.

⁵ The CLINs for the first option period were numbered 0016 through 0030, and the CLINs for the second option period were numbered 0031 through 0045.

With the exception of CLIN 0015, each CLIN also referenced the purchase request number DTS-GSA-002. *Id.*

When DoD issued the RFQ, NST had been providing DTR6 travel services as a subcontractor under a contract between DoD and Northrop Grumman Mission Systems. Exhibit 24, ¶ 4; Transcript at 267. Because DoD had been ordered to terminate its contract for DTR6 services and competitively procure those services as a result of an action before the United States Court of Federal Claims,⁶ very little time was allowed by DoD for submission of a quote. Transcript at 269. No face-to-face meetings took place between DoD and NST, and communication between DoD and NST was by either telephone or electronic mail. *Id.* at 268.

Ms. Butler contacted five or six qualified commercial travel office companies (CTOs), which included NST, and described the RFQ. Transcript at 19-20. It is not clear from the record if Ms. Butler specifically advised any representative from NST that an award would be made against a GSA schedule contract. *Id.* at 20. No documentation of such discussions was included in the record. *Id.* at 55. The RFQ was not advertised. *Id.* at 19, 151. Ms. Butler believed that it would have been a requirement to advertise an open-market acquisition. *Id.* A copy of the RFQ was subsequently sent to those CTOs. *Id.* at 22.

On September 23, 2004, NST submitted its technical proposal and pricing spreadsheet. Exhibit 16. Attached to NST's proposal was a standard form (SF) 18 that referenced the RFQ number, W91QUZ-04-T-0016, in block one. *Id.* At block three was the requisition purchase number, DTS-GSA-002. *Id.* At block ten was the printed instruction that stated in pertinent part: "This is a request for information, and quotations furnished are not offers." *Id.* Mr. Marc Stec, who was then NST's vice president for contracts and proposals,⁷ executed that document. *Id.* NST's technical proposal and pricing spreadsheet did not reference its FSS contract number, nor did its proposal contain information about its rates under its FSS contract. Exhibits 16, 24, ¶ 12; Transcript at 70.

On October 29, 2004, DoD issued to NST order number W91QUZ-05-F-0005 on a SF 1449 for DTR6 travel services. Exhibit 2 at 1. Inserted at block two of the SF 1449 was NST's FSS contract number, GS-33F-0020P. *Id.* Ms. Butler inserted the FSS contract

⁶ On July 26, 2004, the United States Court of Federal Claims ordered DoD to "terminate those portions of the DTS DTR6 contract and recompetete that work." *CW Government Travel, Inc. v. United States*, 61 Fed. Cl. 559, 582 (2004).

⁷ Mr. Stec is currently vice president for development for Carlson SATO Travel. Transcript at 190.

number because it was her intent to award an order under NST's FSS contract. Transcript at 49. Block 28 of the SF 1449 stated the following:

The Contractor is to sign this document and return to issuing office. Contractor agrees to furnish and deliver all items set forth or otherwise identified above and on any additional sheets subject to the terms and conditions specified herein.

Ref: Quote as amended 20 Oct 04.

Exhibit 2 at 1. NST did not execute the SF 1449. *Id.* Ms. Butler executed the SF1449 on the date of award by means of a computer-generated signature. *Id.*; Transcript at 49. Although NST failed to sign the SF 1449, Ms. Butler did not deem the lack of a signature to be unusual based upon her experience with other contractors who would commence performance without executing a contract document. Transcript at 51.

Subsequent to DoD sending to NST the SF 1449, NST proceeded to perform DTR6 travel services under the order and invoiced DoD for those services. Exhibit 24, ¶ 16; Transcript at 52. Mr. Stec testified that the SF 1449 was received at NST's office, as evidenced by the fact that it was in company records, but neither he nor any other person employed by NST and responsible for processing such orders recalled receipt of the document at the time NST commenced performing services under the order. Transcript at 206, 259. Mr. Stec speculated that the SF 1449 could have been sent to NST by an electronic mail message. *Id.* at 258. He was unable to explain why the SF 1449 was not signed. *Id.* at 206-07. Two other NST employees who might have seen the SF 1449, according to Mr. Stec, were Ms. Gladys Masaro, proposal director, and Ms. Maureen Keating. *Id.* at 218. Neither Ms. Masaro nor Ms. Keating testified at the hearing, nor was there an affidavit or other evidence of their knowledge of the circumstances surrounding receipt of the SF 1449 submitted in this appeal.

Mr. Lee Templeman, a contracts manager for NTS, stated in his declaration that upon "contract award, [he] review[s] the Task Order (T.O.) documents prior to signature by the Vice President of Contracts and Proposals; once signed, [he] 'process[es]' the T.O. . . . assigning a DK number, issuing a CIN (Contracting - IMS Notification document) with all the pertinent contract and fee information . . ." Exhibit 25, ¶ 2. The DK number was assigned internally by NST "to track information related to specific accounts." *Id.* ¶ 3. In the case of orders placed under a GSA contract, the DK number would begin with either a "34" or a "44." *Id.* ¶ 5. Mr. Templeman further stated: "Because there was no GSA TSS or other schedule involvement in [NST's] award and administration of DoD's DTR6 Contract

. . . and, therefore, no need for IFF tracking, [he] did not assign it a GSA-type ‘34’ or ‘44’ DK code.” *Id.* ¶ 9. Mr. Templeman did not testify at the hearing.

A post-award meeting between NST and DoD took place on November 19, 2004. Exhibit 20. Mr. Stec attended the meeting along with another NST employee, Ms. Frances Jackson,⁸ who was the contract administrator. Transcript at 249-50. Ms. Jackson would have had access to the DTR6 order, including the SF 1449, as evidenced by her electronic mail message before the meeting. Exhibit 20; Transcript at 252-53. There was no discussion of the SF 1449 and the reference to NST’s FSS contract number at the meeting between NST and DoD. Transcript at 253-54. Ms. Jackson did not testify at the hearing, and there is no affidavit or other evidence that would show her knowledge of the SF 1449.

During October of 2005, GSA contacted NST to arrange a “contractor assistant visit” (CAV). Exhibit 3. The purpose of the CAV was to “ensure the company has an adequate sales tracking system in place and that ‘government’ sales are properly reported, and the correct Industrial Funding Fees (IFF) remitted.” *Id.* GSA’s review of NST’s DTR6 contract was the result of an anonymous tip that NST had not been paying IFF. Exhibit 36, ¶ 3; Transcript at 125. Mr. Stec testified that it was not until GSA conducted its review that he became aware of the fact that the SF 1449 referenced NST’s FSS contract number. Transcript at 206, 218.

In December of 2005, Ms. Lisa Maguire, a GSA contracting officer, contacted Ms. Butler to determine whether the order for DTR6 travel services was an order under a GSA schedule contract. Exhibit 4. Ms. Butler’s response was the following:

The DTS DTR6 requirements mirror those of the GSA contract, with more definitive information provided as outline[d] in our separate DTS Statement of Work and CLIN structure.

The existing DTR6 task order also reflects SATO’s schedule number.

The RFQ requested that offerors provide firm fixed transaction fee’s [sic]. The Government did not perform a realism analysis prior to award to determine if a portion of the price included

⁸ Ms. Jackson used the nickname “Frank” in her electronic mail message. Exhibit 20; Transcript at 250.

a[n] IF[F]. It is the offeror's responsibility to ensure that their proposed price is appropriate.

Id. at 2.

Ms. Rebecca Koses, a contracting officer and division director for travel and transportation services at GSA, prepared the schedule portion of the TSS solicitation, and she subsequently determined that NST was responsible for paying IFF in that NST's DTR6 contract was within the scope of its FSS contract. Transcript at 109-11, 113, 125-27. The TSS schedule was "a broad omnibus contract vehicle for commercial services and the schedule was meant to capture a variety of commercial services in the travel industry" *Id.* at 115. NST's FSS contract included travel agent services, SIN 599-2, and various contract support services, SINS 599-99 and 599-1000. Exhibit 29; Transcript at 117-18.

According to Ms. Koses, CLINs 0001 through 0003, DTS, DTS "touched," and "traditional" travel agent services, were within the scope of NST's FSS contract. Transcript at 131-36. Ms. Koses testified that GSA had issued other orders to NST under its FSS contract for travel services with other DoD agencies that involved providing services through the use of DTS.⁹ Exhibits 61, 62; Transcript at 133. NST did not object to those other orders that included DTS-related travel agent services. Transcript at 133-34. DTS is similar to eTS, but DTS is for use by DoD agencies while eTS is for use by civilian agencies. *Id.* at 129-31. In order to provide travel agent services using DST, NST would access DTS data through a commercial global distribution system with which it had a contract. *Id.* at 154-55.

CLINs 0004 through 00012, which involved related travel services, were within the scope of NST's DTR6 contract. Transcript at 135-39. Of the remaining CLINs under NST's DTR6 contract, Ms. Koses conceded that only CLINs 0013-0014, GDS terminal and software, were outside the scope of NST's FSS contract. *Id.* at 139-40. Ms. Koses testified that the RFQ would not have required a separate competition for CLINs 0013 and 0014 because their cost was less than the micro-purchase threshold of \$3000. Exhibit 2 at 16-17; Transcript at 139-41.

With regard to CLIN 0015, movement of human remains, Ms. Koses acknowledged that such shipments are classified as freight, and the TSS schedule did not mention the shipment of freight in conjunction with travel. Transcript at 141-42. Ms. Koses did point

⁹ Those orders included order number TSS 80629-3 with the Defense Contract Management Agency and order number TSS 80936-1 with the Defense Contract Audit Agency. Exhibits 61, 62.

out that other GSA schedule contractors have provided for shipment of human remains as part of their travel services contracts. *Id.* at 142-43. NST's FSS contract only provided, generally, for "miscellaneous arrangements," which Ms. Koses considered sufficiently broad to include such services. *Id.* at 145. NST had no unit price for CLIN 0015 in its DTR6 contract. Exhibit 2 at 17; Transcript at 149.

On January 9, 2006, representatives from DoD and GSA met to discuss the order for DTR6 travel services with NST because it had been "flagged as a potential GSA Schedule purchase and as such, subject to the performance required by the vendor's TSS contract terms and conditions." Exhibit 40 at 1. According to the minutes of the meeting, DoD representatives acknowledged that "there may have been enough ambiguity in the attending documents . . . and that . . . if there was vendor confusion, it was not readily apparent at the time of award." *Id.* Additionally, "DoD expressed concern about the amount of monies that may be due GSA as a result of the purchase being identified as a GSA Schedule should the vendor submit a claim to DoD claiming it did not fully understand that the requirement was a GSA schedule purchase." *Id.* In response to DoD's concern about potential liability for the cost of NST's payment of IFF, Ms. Koses advised that a GSA schedule contractor would propose a price that already included IFF. Transcript at 159.

On March 21, 2006, GSA's contracting officer issued a decision that demanded from NST payment for IFF in the amount of \$292,609.50 for transactions under its order with DoD for DTR6 travel services. Exhibit 8. That amount represented IFF for 195,073 transactions for travel service arrangements, which included DTS, DTS "touched," and "traditional" travel services, under SIN 599-2 at a rate of \$1.50 for each transaction during the period from November 29, 2004, to January 31, 2006. *Id.* NST timely appealed that decision to this Board.

Discussion

NST argues that there was no meeting of the minds and mutual assent to DoD's order to provide DTR6 travel services under its FSS contract. Instead, NST contends that it intended to enter into an open-market agreement to provide DTR6 travel services for DoD, and NST was not obligated to pay IFF under such an agreement. Further, NST contends that the RFQ contained work that was outside the scope of its FSS contract, and DoD was legally precluded from awarding an order for DTR6 services under NST's FSS contract. Finally, NST contends that the contracting officer's decision asserting GSA's claim for IFF was made without considering legal advice presented at a January 9, 2006, meeting between GSA and DoD representatives.

GSA contends that upon NST's receipt of the SF 1449, which was an order for services under its FSS contract, NST proceeded to perform travel services under the terms of the order without objecting to its terms. NST, consequently, was obligated to pay IFF to GSA. Additionally, the Government argues that any services under DTR6 that were outside the scope of NST's FSS contract were within the micro-purchase threshold, and DoD's award of a FSS contract was proper. GSA has the burden of proving its claim by a preponderance of the evidence. See *Xerox Corp. v. General Services Administration*, GSBCA 15190, 01-2 BCA ¶ 31,528, at 155,651.

The requirements for a binding contract with the Government, whether express or implied-in-fact, are "mutual intent to contract including an offer, an acceptance, and consideration." *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). It is well recognized that the question of "whether a legally enforceable contract has been formed by a meeting of the minds depends upon the totality of the factual circumstances." *Texas Instruments Inc. v. United States*, 922 F.2d 810, 815 (Fed. Cir. 1990). In this case, DoD solicited and acquired DTR6 travel services under an RFQ. The FAR defines offer and acceptance as they pertain to an RFQ as follows:

(a) A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Therefore, issuance by the Government of an order in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.

(b) When appropriate, the contracting officer may ask the supplier to indicate acceptance of an order by notification to the Government, preferably in writing, as defined at 2.101. In other circumstances, the supplier may indicate acceptance by furnishing the supplies or services ordered or by proceeding with the work to the point where substantial performance has occurred.

48 CFR 13.004 (2003) (FAR 13.004). A party that receives such an order and fails to execute it, but instead, substantially performs that order from the Government, is deemed to have accepted the terms of that order. See *Syracuse International Technologies*, ASBCA 55607, 08-1 BCA ¶ 33,742, at 167,043 (2007). The SF 18 that NST used to submit its quote stated that it was not an offer. The SF 1449 that DoD sent to NST was the offer, and acceptance of DoD's offer could have been accomplished either by NST's execution of the

SF 1449 or by its substantial performance. In this case, NST did not execute the SF 1449, but proceeded to perform the contract by providing DTR6 travel services and invoicing for those services. NST's performance of DTR6 travel services upon receipt of the SF 1449 was an acceptance of an order to perform those services under its FSS contract number.

Although NST argues that neither Mr. Stec nor any other employee of NST recalled receipt of the SF 1449, it is undisputed that the document was received by NST, and NST cannot avoid its obligation under the terms of the SF1449 by asserting a lack of knowledge of the terms of a document in its possession. A fundamental principle of contract law is the following:

According to the objective theory of contract formation, what is essential is not assent, but rather what the person to whom a manifestation is made is justified as regarding as assent. Thus, if an offeree, in ignorance of the terms of an offer, so acts or expresses himself as to justify the offeror in inferring assent, and this action or expression was of such a character that a reasonable person in the position of the offeree should have known it was calculated to lead the offeror to believe that his offer had been accepted, a contract will be formed in spite of the offeree's ignorance of the terms of the offer.

1 Richard A. Lord, *Williston on Contracts* § 4:16 (4th ed. 1990). It is well recognized "as the Supreme Court has said long ago, '[i]t will not do for a man to enter into a contract and when called upon to respond to its obligations, say that he did not read it when he signed it, or did not know what it contained.'" *Fiesta Leasing and Sales, Inc.*, ASBCA 29311, 86-3 BCA ¶ 19,045, at 96,188 (quoting *Upton v. Tribilock*, 91 U.S. 45, 50 (1875)). "Any other rule would throw chaos into all contract arrangements because a party could avoid responsibility thereunder at his convenience simply by saying that he had signed the contract without reading it." *Schoeffel v. United States*, 193 Ct. Cl. 923, 935 (1971).

Mr. Stec conceded during his testimony that the SF 1449 was in NST's files.¹⁰ Although Mr. Stec asserted that he and other NST employees had no recollection of receipt of the SF 1449, the record shows that NST had a procedure for the processing of such documents, which presumably would have required review of a document such as the

¹⁰ Mr. Stec acknowledged at the hearing that his earlier declaration, Exhibit 24, provided no details as to the receipt of the SF 1449. Transcript at 218-19.

SF 1449. Mr. Templeman's declaration stated that NST's procedure was to assign the appropriate DK code in the course of processing each order, but he stated, without further explanation, that the order for DTR6 travel services was not processed as an order under NST's FSS contract. We conclude from Mr. Templeman's declaration that the SF 1449 was reviewed in the course of assigning the appropriate DK code. Any failure by NST's personnel to ascertain the contents of the SF 1449 cannot be attributed to anyone outside NST.

Although Mr. Stec testified that other NST employees could have had occasion to see the SF 1449, NST called Mr. Stec as its only witness to prove a lack of knowledge of receipt of the SF 1449 by all of NST's personnel. We find, however, that "[w]hen the persons having the greatest familiarity with events are not called, but a litigant seeks to rely on second-hand, hearsay evidence, a tribunal may draw an inference that the testimony of the persons not called would not support a litigant's position" *TDC Management Corp.*, DOT BCA 1802, 91-2 BCA ¶ 23,815, at 119,259. Mr. Stec testified that Ms. Masaro and Ms. Keating possibly had the opportunity to see the SF 1449. Additionally, Ms. Jackson probably had access to the SF 1449 when she assumed responsibility for management of the order. Apparently, Mr. Templeman also had that opportunity to see the SF 1449 since he was responsible for assigning the DK code for the DTR6 order. Nothing in the record would suggest that Mr. Stec was the only person available who could have testified as to the circumstances surrounding receipt of the SF 1449. At most, Mr. Stec has only established through his testimony his lack of personal knowledge about receipt of the SF 1449.

Regardless of whether the testimony of any other NST employees would have corroborated Mr. Stec's testimony, we find that NST received the SF 1449 in the normal course of business. Consequently, NST's officers and employees who were responsible for the administration of the DTR6 travel services order had the opportunity to review the SF 1449 and accept or reject it as an order for services under its FSS contract. NST cannot use Mr. Stec's asserted lack of recollection of the SF 1449 to avoid the fact that it obligated itself to perform DTR6 travel services under its FSS contract.

NST argues that it believed that the RFQ allowed for submission of an open-market proposal. Appellant's Brief at 20. A contractor cannot use his proposal to alter the terms of a contract that he failed to read. *See Marine Design Technologies, Inc.*, ASBCA 39391, 94-1 BCA ¶ 26,355, at 131,094 (1993) (appellant believed that it had entered into a requirements contract, but failed to read the contract before executing it to determine that it was an indefinite quantity contract). Moreover, when "a detailed contract is executed by the parties, it will be presumed to represent their complete undertakings and is conclusive and in derogation of any prior understandings" *Schoeffel*, 193 Ct. Cl. at 934. NST has only established that "the mistake sought to be avoided is unilateral and could have been detected

by the simple, prudent act of reading the contract.” *Id.* at 935. DoD intended to issue an order under a GSA schedule contract, and its offer, the SF 1449, reflected that intent. While NST may have intended to enter into an open-market contract, that belief, which could have been corrected by reading the SF 1449, does not alter the terms of the SF 1449.

Having found that NST entered into a contract to provide DTR6 services under its FSS contract, our inquiry turns to whether NST is responsible for paying IFF under the terms of its FSS contract. The agency comments that accompanied the publication of GSAR 552.238-74 stated that GSA would “consider the totality of the circumstances in determining if a sale is subject to the IFF.” 68 Fed. Reg. 41,286 (July 11, 2003).¹¹ We find no circumstances to excuse NST from payment of IFF. NST’s asserted but mistaken belief that its DTR6 order with DoD contained different terms is not such a circumstance. For purposes of meeting its burden of proof, it is only necessary for GSA to establish that: (1) GSA awarded to NST an FSS contract that required NST to pay IFF; (2) DoD issued to NST an order to provide DTR6 travel services under NST’s FSS contract; (3) NST accepted that order and provided such services to DoD that were transactions requiring the payment of IFF; and (4) NST has failed to remit to GSA those IFF payments. GSA has met its burden of proof.

The only work under the order for DTR6 travel services for which GSA seeks IFF are DTS, DTS “touched,” and “traditional” travel agent services, which are under CLINs 0001, 0002, and 0003 for the base period and the corresponding CLINs for the option periods. NST contends that DTS transactions were outside the scope of its FSS contract since its contract provided only for eTS as a web-base system. The Board finds that DTS transactions were within the scope of NST’s contract in that eTS is a web-based system for civilian agencies and nothing in NST’s FSS contract precludes use of a web-based system for DoD personnel. The solicitation for NST’s FSS contract provided, generally, that orders could be placed by executive agencies, which would have included DoD.¹² Moreover, NST accepted at least two other orders from DoD agencies that included the use of DTS. NST is responsible for paying IFF at the rate set forth under SIN-2 of its FSS contract, \$1.50 per transaction, for those transactions under DTR6 that include DTS, DTS “touched,” and “traditional” travel services.

¹¹ A June 26, 2003, letter from Ms. Patricia M. Mead, an assistant commissioner at GSA, to the Coalition for Government Procurement, similarly stated that determining whether a purchase was under a schedule and subject to collection of IFF payments requires looking “at the totality of the circumstances.” Exhibit 50.

¹² 5 U.S.C. § 101 (2000).

NST also contends that DoD was legally precluded from awarding the order for DTR6 services because its unit prices for CLINs 0013 and 0014, GDS terminal and software, exceeded the micro-purchase threshold of \$3000, and a separate competition for such work would have been required. Appellant's Brief at 29 (citing *ATA Defense Industries, Inc. v. United States*, 38 Fed. Cl. 489 (1997); *SMS Systems Maintenance Services, Inc.*, B-284550.2, 2000 CPD ¶ 127 (Aug. 4, 2000)). This Board does not have jurisdiction over protests and, consequently, lacks authority to review procurement decisions. *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685, at 166,765. NST fails to explain what remedy this Board can provide in that this appeal is not a protest and DoD is not a party before this Board. Regardless of NST's assertions of any legal defects in DoD's ordering of DTR6 travel services, this Board has no authority to disturb the rights and obligations of NST and DoD under the terms of that order.¹³

Finally, NST argues that the March 21, 2006, decision of the contracting officer, Ms. Susan Lum, did not consider the concerns expressed by a DoD attorney in a memorandum of a January 9, 2006, meeting between GSA and DoD representatives. NST contends that the memorandum mentioned comments by a DoD attorney about possible ambiguities in the RFQ. NST contends Ms. Lum, however, did not see that memorandum, and she wrote her decision unaware of those concerns. We find no merit in NST's assertion that Ms. Lum's decision lacked her personal and independent judgment. Such a finding requires a showing that the "purported decision is imposed by higher authority or . . . the contracting officer completely abandon[ed] his [or her] decisional responsibility to another." *Air-O-Plastik Corp.*, GSBCA 4802, et al., 81-2 BCA ¶ 15,338, at 75,963-64. Although Ms. Lum may not have seen that memorandum, which NST deems to be critical, that fact does not justify a finding that she did not consider all relevant matters in this appeal. It is well settled that determining whether a contract is ambiguous begins with the plain language of the contract. *See Gardiner, Kamy & Associates, P.C. v. Jackson*, 467 F.3d 1348, 1353 (Fed. Cir. 2006). The DoD attorney's concern contained in the memorandum has been noted by this Board, but we do not find this case to be one of ambiguity, but rather, a failure by appellant to properly determine the contents of the SF 1449.

¹³ GSA contends that even if CLINs 0013, 0014, and 0015 (a no-cost item) were outside the scope of NST's FSS contract, the micro-purchase threshold was not exceeded. Government's Reply Brief at 3. We do not find it necessary to determine whether or not those CLINs exceeded the micro-purchase threshold since we do not have jurisdiction over protests, and we have no authority to grant relief.

Decision

The appeal is **DENIED AS TO ENTITLEMENT**. The presiding judge will schedule further proceedings with regard to quantum.

H. CHUCK KULLBERG
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

CATHERINE B. HYATT
Board Judge