



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 27, 2018

CBCA 5971

OMNIPLEX WORLD SERVICES CORPORATION,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Andrew K. Wible, Senior Counsel, Government Contracts, Constellis, LLC, Reston VA, counsel for Appellant.

Roger A. Hipp and Charlene T. Storino, Office of the General Counsel, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **DRUMMOND**, and **KULLBERG**.

VERGILIO, Board Judge.

OMNIPLEX World Services Corporation (contractor) provides guard services under a contract and task orders with the Department of Homeland Security (agency). Different contract clauses permit the agency to take deductions from payment for instances when the contractor fails to satisfy contract requirements. The contractor maintains that the contract is ambiguous with respect to which deduction provision applies when an open post occurs (when a post is unstaffed or staffed by one who fails to meet contract requirements) and that the agency is limited to assessing the lesser deduction specified in the contract, either because such is stated in the more specific (as opposed to general) provision of the contract, or under the rule of contra proferentum, because the agency drafted the provisions.

The Board concludes that the contract is clear on its face. The provisions addressing deductions may be read together; nothing prohibits the agency from taking a deduction under each clause that addresses a deficiency in performance. The clauses are not mutually exclusive. Moreover, the clause that defines open posts and specifies a deduction of \$200 per hour is more specific than a deduction clause that associates types of deficiencies with deductions of an employee's hourly rate. The contractor has not established that the agency is prohibited from taking only the greater deduction allowable under the contract. The suggestion that an ambiguity exists and the rule of contra proferentum be applied is not helpful to the contractor because the asserted ambiguity would be patent; there was no inquiry prior to award to resolve the asserted ambiguity. The Board denies the appeal.

Findings of Fact

1. Under the labor hour indefinite delivery indefinite quantity (IDIQ) contract, HSHQDC-17-D-00014, effective February 1, 2017, the contractor is to provide protective security officer (PSO) services in accordance with task orders (which incorporate the terms and conditions of the contract). Exhibit 1 (all exhibits are in the appeal file) (references to amendments and task orders are not included because the language does not change). Such officers are required to perform duties in accordance with assigned post orders. Exhibit 1 at 11 (¶ II.3.2). Among the duties and obligations detailed in the specifications/statement of work section of the contract is a paragraph within a contract effort required section, titled "Open Post":

The Contractor shall not allow security post to be an open post. An Open Post is any post not being staffed or is being staffed, or operated by a PSO who does not meet requirements as outlined within this contract. The contractor shall be assessed a deduction of \$200 per hour of transgression. Examples include, but are not limited to: expired or missing training, certifications, licenses, permits, fitness determinations, etc.

Exhibit 1 at 33 (¶ II.7.2.7).

2. The specifications/statement of work section of the contract also dictates performance standards. A paragraph dealing with price deductions states in pertinent part:

Where security guard services are concerned, there is no way for the Government to obtain re-performance of un-provided or unacceptable work by the Contractor's employees. Thus, the Government shall remedy the Contractor's non-performance or unacceptable performance through price deductions.

The Government may either accept in part or decline altogether deficient services rendered by the Contractor. Following are criteria for deductions that the Government may take as a result of deficient performance.

Exhibit 1 at 56 (¶ II.17.1). A subsection addressing a failure to provide man-hours, contains language similar to that regarding an open post:

Price reductions or performance related deductions for other [than failure to meet training requirements] infractions such as SOP [standard operating procedure] violations, security violations, and personnel transgressions will be assessed in hour increments, in the amount of \$200 per hour of transgression. Contractor will also be assessed for deductions for any unqualified PSO working a critical post in hour increments, in the amount of \$200 per hour of transgression.

Exhibit 1 at 57 (¶ II.17.1.1.1).

3. The deduction schedule referenced in paragraph II.17.1 states that the deduction rate for failure to provide a required level of service shall be the established hourly rates contained in the final contract as awarded, and also specifies twelve deficiencies and associates a deduction rate with each. The contractor focuses upon five. For a deficiency of an unarmed guard working in an armed guard position and of a guard working without a valid certification or suitability clearance, the deduction is 100% of the hourly rate for each hour the employee works; for a failure to provide requested relief breaks, supervisory hours, or non-supervisory hours, the deduction is the hourly rate pro-rated for the number of hours not provided. Exhibit 1 at 60 (¶ II.18.0).

4. A paragraph in the invoice and payment provisions section addresses adjusting payments for contractor performance. Regarding deductions for failure to provide man-hours, the contract states that the Government will pay for the number of labor hours actually performed as documented by a prescribed system. Further,

The Government may assess price deductions in the amount of \$50.00 per hour for each post hour where services are not rendered in accordance to the provisions of the contract (e.g. PSO on post but not properly equipped, certified, or licensed.)

Use of deductions does not preclude the use of any other remedies. The Government reserves all contractual rights and remedies. Nothing in this section shall be interpreted to allow the contractor to knowingly fail to provide

the manpower specified for labor and/or render services that are not in accordance with the provisions of the contract.

Exhibit 1 at 66 (¶ V.8.0).

5. In response to an inquiry from the contractor (with no inquiry made prior to award), the contracting officer issued a letter dated September 18, 2017, specifying that when an open post situation occurs, the agency shall deduct \$200 per hour of deficiency as specified in paragraph 7.2.7, and that for violations not specific to open posts as detailed in paragraph 18, deductions would be made under that paragraph. Exhibit 21.

6. Contesting the interpretation put forward by the contracting officer, the contractor filed its appeal at this Board on December 15, 2017.

Discussion

Regarding the timely filed appeal, the contractor states that during performance it failed to staff or staffed various posts with personnel who did not meet all contract requirements, situations that fall within the definition of open post. The contractor disputes the agency's interpretation of the contract which has led to deductions of \$200 per hour under the open post definition, as the contractor contends that the proper deduction is found in the deduction schedule. The contractor maintains that the deduction schedule is a more specific provision than the open post provision, such that as a matter of contract interpretation, the more specific terms of the deduction schedule must govern over the more general provision. Further, the contractor contends that construing the open post provisions to apply to all open post violations would render meaningless the provisions of the deduction schedule. Moreover, the contractor asserts that any ambiguity in conflicting provisions must be construed against the drafter, the agency.

There is no conflict or ambiguity. The deduction provisions are not mutually exclusive; the contract does not prohibit the agency from assessing a deduction under each provision for a violation addressed in a given provision. While the contractor urges a reading of either/or in applicability, the plain language of the contract does not support such a reading. Read as a whole, the contract expressly permits the agency to assess deductions of \$200 per hour, as detailed in findings 1 and 2. Through the clause found in finding 4, the agency even expressly reserves all contractual rights and remedies, although the contractor has not demonstrated why something less should be presumed even without the clause.

Also, the contract is not as the contractor surmises. The open post definition is more specific than the general deduction provision, such that the contractor's notion that the

deduction provision must take precedence over the open post provision is not supported by the language of the contract. The two clauses are not in conflict; harmoniously reading the clauses, the agency may take a deduction for each violation of each clause. And, the open post provision both defines what an open post is and specifies the available deduction. That represents a specific provision, particularly in comparison to the more general deduction provision and schedule.

Even were the Board to agree with the contractor that there is an ambiguity among the clauses, we find that the alleged ambiguity is patent such that the contractor's interpretation does not prevail. The distinction between a patent ambiguity (facially inconsistent provisions place a reasonable bidder or offeror on notice and prompt it to rectify the inconsistency by inquiry) and latent ambiguity (the ambiguity is neither glaring nor substantial nor obvious) is often addressed. *K-Con, Inc. v. Secretary of the Army*, No. 2017-2254 (Fed. Cir. Nov. 5, 2018); *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997). Here, even if pre-award one may anticipate satisfying all contract requirements and fulfilling the contract without an open post and without incurring a deduction, the deduction provisions are clear. The definition of open post is of significance in the contract, falling under a section on contract effort required, and the clause specifies the importance of appropriate coverage. The deduction is enunciated in the clause and would be difficult to overlook. The different parts of the same contract section cannot be read in isolation. While the contractor maintains that it realized the alleged inconsistency upon review after award, that review occurred too late. The position the contractor here puts forward is not reasonable given the lack of prior inquiry.

Decision

The contract is not ambiguous; even under the contractor's view the contract would be patently ambiguous. The Board **DENIES** the appeal.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge