UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: October 4, 2019

CBCA 6539

HARRY L. CHUPNICK,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Harry L. Chupnick, pro se, Reisterstown, MD.

Brandon Dell'Aglio and Alice Somers, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

CHADWICK, Board Judge.

The Board handled this appeal under the small claims procedure of Board Rule 52 (48 CFR 6101.52 (2018)) at the appellant's election. This decision "is final and conclusive, shall not be set aside except for fraud, and is not precedential." Rule 52(c).

The appellant, Mr. Chupnick, recovers $720 plus statutory interest. The award is not reduced by the overpayment credit sought by the respondent agency.

Mr. Chupnick is a verbatim hearing recording contractor for the Social Security Administration under task orders issued pursuant to blanket purchase agreement (BPA) SS03-12-40003. On February 1, 2019, he mailed the contracting officer a claim under the Contract Disputes Act, 41 U.S.C. §§ 7101–7109 (2012), for $5760. In the absence of a return receipt, we find that the agency received the claim on Monday, February 4.

Mr. Chupnick filed this appeal from a deemed denial of his claim in June 2019. He argues that he was not properly paid for recording hearings at which an administrative law judge spoke but no witness testified under oath. The parties briefed this contractual issue in September 2019.

To decide entitlement, we must apply the rule that a government contractor has a "duty to inquire" about a "patent" or obvious ambiguity before signing a contract. "Absent such inquiry, a patent ambiguity in the contract will be resolved against the contractor." *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997). The BPA is patently ambiguous because it does not conclusively address the situation at issue in this case.

The BPA states that the agency will pay the contractor $5 per hearing in three circumstances. The first two are situations in which it is clear before the scheduled day that the hearing will not take place. We do not address those situations. The third circumstance is when the contractor "suppl[ies] a digital recording" after "the hearing was not held as scheduled because the claimant/representative failed to appear, or requested representation."

The BPA states that the agency will pay the contractor $50 in two situations. The first is if the contractor "delivers a final product" recording. Mr. Chupnick does not rely on that provision. The second circumstance is when "the hearing was convened and testimony was taken, but not complete." Mr. Chupnick and the agency now agree that his claim encompasses 122 hearings for which the agency paid $5, but he argues he should be paid $50. The agency agrees to pay the $50 fee for sixteen of those hearings.

In the other 106 hearings, the judges spoke briefly to the claimants on the record about how to proceed, but no one was sworn in, the hearings were adjourned, and Mr. Chupnick delivered a recording. Mr. Chupnick argues that the word "'[t]estimony' in the BPA is non-defined and vague" but that, under an ordinary definition, an "entire hearing even when the claimant is not sworn in is testimony," entitling him to the $50 fee for his recordings. The agency argues that it and Mr. Chupnick "agree on how to interpret the BPA" but simply disagree as a matter of fact about whether "testimony was taken" at the 106 hearings. This is not a helpful argument. As Mr. Chupnick recognizes, he and the agency obviously disagree about what the BPA means by "testimony . . . taken, but not complete."

Mr. Chupnick cannot win that argument because he is correct that the language of the BPA does not settle the issue on its face. None of the five circumstances listed in the BPA for payment of the $5 fee or the $50 fee is exactly the situation at issue here. A hearing at which a judge speaks briefly to the parties but does not swear anyone in could be considered either a "hearing [that] was not held as scheduled" under the $5 provision, or a "hearing [that] was convened . . . but not complete[d]" under the $50 provision. Ordinarily, a judge

would not consider an unsworn conversation for the record "testimony," which weighs against Mr. Chupnick's reading of the BPA. The important point, however, is that we need not resolve this issue because the ambiguity or vagueness is patent in the words of the BPA. When this is the case, a bidder must ask for clarification before accepting a contract. When the contractor did not do so, courts and boards rule for the Government "regardless of the reasonableness of the contractor's interpretation." *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985).

Mr. Chupnick therefore recovers no additional fees for the 106 hearings at which no one was sworn in to testify. He is owed an additional $45 for each of the sixteen hearings at which someone was sworn in.

The agency argues that it is "entitled to a set-off"of $135 for three hearings for which it says it should have paid Mr. Chupnick $5 but paid him $50. There is no government claim before us in this appeal. We have no basis to grant the agency any relief.

Decision

We **GRANT IN PART** the appeal and award Mr. Chupnick $720 plus interest under 41 U.S.C. § 7109 from February 4, 2019, to the payment date.

Kyle Chadwick

KYLE CHADWICK
Board Judge