**PATENT AMBIGUITY**



This blog has frequently explained the duty of a contractor to inquire about a patent ambiguity in a solicitation (or a contract) before submitting an offer or before beginning to perform the contract. A very simple patent ambiguity (one which is obvious on its face, merely from reading the document) was recently discussed by the Civilian Board. A contractor will not have its claim sustained where there is patent ambiguity and the contractor fails to inquire. *Harry Chupnick v. Social Security Administrtion*, CBCA 6539, Oct. 4, 2019.

Mr. Chubnick is a verbatim hearing recording contractor for the Social Security Administration who held a Blanket Purchase Agreement ("BPA") and performed pursuant to task orders.

The BPA stated the following with regard to payments for hearings:

(1) & (2) $5 per hearing where it is clear before the scheduled day that the hearing will not take place.
(3) $5 per hearing when the contractor "supplies a digital recording after the hearing was not held as scheduled because the claimant/representative failed to appear, or requested representation."
(4) $50 when the contractor delivers a final product recording.
(5) $50 when a hearing was convened and testimony was taken but not complete.

Mr. Chubnick's denied claim was for 122 hearings for which the agency paid $5, but for which he argued he should be paid $50. The agency agreed 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 and the hearing was adjourned, and Mr. Chubnick delivered a recording.

The basic issue was what the BPA meant by "testimony taken but not complete." The hearings at issue could be considered either a hearing that was not held as scheduled ($5 payment) or a hearing convened but not completed ($50 payment).

The CBCA did not enter into a long discussion of whether the agency or Mr. Chubnick was right. The Board concluded that "the ambiguity or vagueness" is patent in the words of the BPA, and Mr. Chubnick failed to request clarification before accepting the contract. Because of this failure, courts and boards rule for the government, regardless of the contractor's interpretation. *Fortec Constructors v. United States,*760 F.2d 1288, 1291 (Feb. Cir. 1985).

The takeaway: What if Mr. Chubnick was unaware when he received the BPA that he could be asked to perform services for something that was not included as a specific item in the BPA? As soon as the ambiguous situation arose, Mr. Chubnick should have stated in writing to the contracting officer that the BPA and the task order did not cover that particular situation and sought a clarification of the BPA. At that point, instead of 106 hearings being at issue, there would have only been 105 at issue—and the parties could have reached agreement or a claim

could have been submitted at the time by Mr. Chubnick, reserving his rights to resubmit invoices after the CO and the Board had ruled. The Board's ruling that the BPA did *not* cover the situation at issue implies that the scope of the BPA and task orders needed to be changed, and a new dollar amount needed to be identified for the task orders at issue. If the Board was correct that the situation was outside the scope of the BPA, Mr. Chubnick could have refused to perform recordings that did not fall within the scope, without fear of a default.

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