

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DR. ADOLPH BAER, P.D. AND APOTHECARIES, INC.)))	Docket No. MSBCA 1285
Under Department of Health and Mental Hygiene Contract No. 55439)))	

April 21, 1987

Patent Ambiguity - Duty to Inquire - Assuming arguendo that a patent ambiguity existed as to whether indirect costs were reimbursable under the contract, the contractor's duty to inquire was met through its prebid opening request for clarification from the person named in the solicitation to contact for further information.

Contract Interpretation - Appellant was entitled to indirect costs through application of the rule that to ascertain the meaning of a contract the words used in the document should be given their ordinary everyday meaning.

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim for reimbursement of indirect costs under a contract to provide pharmaceutical products and services.

Findings of Fact¹

1. Appellant, a pharmacy located in Hagerstown, Maryland, was awarded a contract by the Department of Health and Mental Hygiene (DHMH) to provide pharmaceutical products and services at Potomac Center in Hagerstown over a three (3) year period from July 1, 1984 to June 30, 1987. Appellant was the incumbent contractor under the prior contract for the provision of pharmaceutical services to the Potomac Center, and had provided such services to the Center for some ten years. The services required by the contract include both the providing of a unit dose medication system for each resident of the facility as well as the providing of consultant services to the Center including attending meetings and rendering reports.

2. Prior to the inception of the current contract at the Potomac Center, Appellant had always been reimbursed for the services it rendered to the Center, as well as to other State of Maryland institutions and programs, on the basis of a fee plus the average wholesale price (AWP) cost of drugs. AWP costs are established list prices found in certain catalogs. Because AWP costs are based upon standard published prices, a program which provides for reimbursement on the basis of AWP, for example, the Maryland Medicaid program, results in every pharmaceutical provider receiving the same reimbursement for the same drugs. However, because pharmacies typically receive discounts from their suppliers from standard AWP prices, payment for drugs on the basis of AWP normally results in additional compensation to the provider of drugs above his actual cost for the drugs.

¹In material part the findings of fact are based on stipulations entered into by the parties.

3. In the spring of 1984, Appellant was invited to bid on the present contract and was provided with a copy of the bid solicitation by Ms. Barbara Freeman, director of nursing and the contract monitor for the Potomac Center. Upon review of the proposed new contract contained in the solicitation, Dr. Adolph Baer, Appellant's co-owner, noted provisions which differed from the provisions of the prior contract for the Potomac Center and all other State of Maryland contracts with which he was previously familiar.

4. The provisions which Dr. Baer recognized as different were those contained in Section III E. that (1) indicated that drugs would be reimbursed, not on the basis of AWP,² but on the basis of the provider's individual acquisition, or actual invoice, cost and (2) made reference to the contract being a cost reimbursement contract of the cost plus fixed fee type wherein reimbursement would be in accordance with Subtitle .09 of the Code of Maryland Regulations ("COMAR") dealing with cost principles.

Section III E. of the contract specifically provides that:

1. The Contractor agrees that this is a cost reimbursement contract of the cost plus fixed fee type as defined in COMAR 21.06.03.03A-2, and as such, costs shall be reimbursed only if they are costs recognized as allowable and allocable under the cost principle regulations in Subtitle .09 [of COMAR Title 21] or in the contract.

2. The Contractor agrees upon written request to provide the Department with a copy of the most recent drug invoices to evidence cost of drugs purchased. All drugs will be reimbursed at the actual cost of the drugs as verified from these drug invoices. However, the pharmacy will not be reimbursed for costs of drugs in excess of Federally established MAC multiple source drug price lists or any prospective State generic drug pricing program for multiple source drugs.

5. Several weeks prior to bid opening, Dr. Baer contacted Ms. Barbara Freeman, who was the person named in the solicitation to contact for further information, to find out what was intended by the inclusion in the contract of the reference to the COMAR regulations (Subtitle .09). In response, Ms. Freeman sent Appellant a copy of Subtitle .09 of COMAR with a letter dated May 11, 1984 which stated that it was in response to Dr. Baer's request for clarification of the bid proposal. This letter also noted that the low bid would be determined on the basis of Section III G. of the contract.

Section III G. of the contract provides:

G. Evaluation Criteria for Proposals

This bid shall be awarded based on the total of two factors as entered on the bid page (Page 1 of the Contract):

1. Professional Consultant Fee.

2. Dispensing Fee Per Prescription. For purposes of this solicitation all bidders shall base the fee computation of [sic] 625 prescriptions per month. This figure is estimated and shall not be construed to be a minimum or maximum guaranteed level of volume.

6. There was no pre-bid conference for the Potomac Center contract and no guidance (other than as set forth in Finding of Fact No. 5 respecting Appellant) was provided to bidders on the meaning of the provisions of Section III E.1 of the instant contract.

7. Enclosed with the Appellant's bid was a letter dated June 11, 1984 in which Appellant acknowledged receipt of the Subtitle .09 COMAR regulations from Ms. Freeman. This letter stated in part: "We have in good faith based our bid proposal on these regulations [Subtitle .09] as they exist now. . . . Any changes in these Comars [sic] . . . may materially affect this contract proposal - since all figures were formulated based on the validity of the . . . Comars [sic] now in effect. . . ." Dr. Baer also testified that he

²The parties have stipulated that AWP is not an issue respecting cost reimbursement in this appeal.

believed in good faith at the time of bid opening that Section III E.1 of the contract entitled Appellant to reimbursement for its indirect costs as allowable and allocable under the cost principle regulations in Subtitle .09 of COMAR.

8. Based upon the language of Sections III E.2 and III G. supra, the DHMH procurement officer refused to honor Appellant's billings for indirect costs and denied Appellant's claim for these costs by final decision dated April 24, 1986. The parties are in agreement that the contract was to be awarded on the basis of the low bid established by the fees as entered on the bid page. The parties also agree that the successful bidder would be reimbursed for the actual invoice cost of drugs provided to the Center. The dispute centers on entitlement to reimbursement for the indirect costs associated with such drugs, it being the opinion of the procurement officer that reimbursement for cost of drugs was to be limited to invoice costs.

9. The parties have stipulated that Appellant's allowable indirect costs allocable to this contract under Subtitle .09 of COMAR are \$13,941.00 for the period 7/19/84 -7/18/85 and \$12,908.00 for the period 7/19/85 - 7/18/86. Indirect costs, if any, for the period 7/19/86 until contract completion cannot be determined until after the end of the contract term.

Decision

The sole issue for resolution by the Board is whether indirect costs (in the stipulated amounts) are reimbursable under the contract. Appellant claims that the contract in issue is a cost-plus fixed fee type contract and that the plain and unambiguous language of Section III E.1 entitles it to its indirect costs in the stipulated amounts. DHMH agrees that the stipulated indirect costs are appropriate under the cost principle regulations in Subtitle .09 of COMAR 21. However, DHMH asserts that the cost principles of Subtitle .09 do not apply to contracts let by competitive sealed bidding citing COMAR 21.09.01.02 which provides in part:

A. Limitation, These cost principles regulations are not applicable to:

(1) The establishment of prices under contracts awarded on the basis of competitive sealed bidding, or otherwise based on adequate price competition rather than the analysis of individual, specific cost elements, except that this subtitle does apply to the establishment of adjustments of price for changes made to these contracts. . . .

Contrary to DHMH's assertion, however, the quoted portion of COMAR 21.09.01.02 does not simply state that where there has been competitive sealed bidding, the cost principle regulations do not apply. It states that the regulations do not apply to "[t]he establishment of prices under contracts awarded on the basis of competitive sealed bidding," in other words, to those prices which are established on the basis of what the contractor submits as a bid, rather than upon the contractor's costs. This is made clear by the following phrase "or otherwise based on adequate price competition rather than the analysis of individual, specific cost elements." Thus, while the cost principles of Subtitle .09 would not apply to the establishment of price in a fixed-price contract, such principles would apply to the establishment of price in a cost-plus fixed fee contract.

The real question for resolution, therefore, is whether the instant contract is a cost-plus fixed fee contract, albeit competitively bid, in which indirect cost elements are reimbursable and to be determined by reference to Subtitle .09, or whether the contract is a type of fixed-price contract where all cost elements (changes and adjustments excepted) are assumed to be included in the contractor's bid. See COMAR 21.06.03.01, 21.06.03.02 and 21.06.03.03.

DHMH argues that Section III E.2 and Section III G. read together make it clear that the contract is a fixed-price contract with price adjustment as defined in COMAR 21.06.03.02A(3).³ Section III G provides:

³COMAR 21.06.03.02A(3) provides: "'Fixed-price contract with price adjustment' means a fixed price contract that provides for variations in the contract price under special conditions defined in the contract, other than customary provisions authorizing price adjustments due to modifications." The procurement officer testified at the hearing that this was the COMAR reference that should have been contained in Section III E.1 rather than the COMAR reference to cost-plus fixed fee that was actually used.

G. Evaluation Criteria for Proposals

This bid shall be awarded based on the total of two factors as entered on the bid page (Page 1 of the Contract):

1. Professional Consultant Fee.
2. Dispensing Fee Per Prescription. For purposes of this solicitation all bidders shall base the fee computation of [sic] 625 prescriptions per month. This figure is estimated and shall not be construed to be a minimum or maximum guaranteed level of volume.

Section III E.2 provides:

The Contractor agrees upon written request to provide the Department with a copy of the most recent drug invoices to evidence cost of drugs purchased. All drugs will be reimbursed at the actual cost of the drugs as verified from these drug invoices. However, the pharmacy will not be reimbursed for costs of drugs in excess of Federally established MAC multiple source drug price lists or any prospective State generic drug pricing program for multiple source drugs.

In DHMH's view, the language of Section III E.2 and Section III G. sets forth a fixed price based on two components (1) the fixed consultant fee and per prescription dispensing fee and (2) the variable adjustment represented by the actual invoice cost of drugs (which are fixed at a price not to exceed invoice price) which in combination set a fixed price for total compensation under the contract. DHMH contends that the language of Section III E.1 which would also allow reimbursement for indirect costs:

The Contractor agrees that this is a cost reimbursement contract of the cost plus fixed fee type as defined in COMAR 21.06.03.03A-2, and as such, costs shall be reimbursed only if they are costs recognized as allowable and allocable under the cost principle regulations in Subtitle .09 [of COMAR Title 21] or in the contract.

is surplusage and should be ignored.

Alternatively, DHMH asserts that Section III E.1 is in obvious conflict with Section III G. and Section III E.2, and thus Appellant had a duty to seek pre-bid clarification concerning whether indirect costs would be allowed. This duty was not met by the actions Appellant took, asserts DHMH, and thus Appellant is bound by the procurement officer's contrary interpretation that indirect costs are not allowed.

In resolving the issue of whether, as contended by DHMH, Section III E.1 is surplusage, we note that a contract should if reasonably possible be construed as a whole to give effect to all of its provisions such that no provision is disregarded. Granite Construction Company, MDOT 1011, 1 MICPEL ¶8 at p. 12 (1981); Sagner v. Glenangus Farms, Inc., 234 Md. 156, 167 (1964). Indeed, even conflicting provisions of a contract should, if possible, be reconciled to give meaning to all. S.J. Groves & Sons Company, MSBCA 1122, 1 MICPEL ¶97 at p. 10 (1985); Mattingly Lumber Co. v. Equitable Building & Savings Ass'n, 176 Md. 403 (1939).

We believe that the language of Sections III E.1, III E.2 and III G. can be read together in harmony to allow reimbursement for the indirect cost of the drugs pursuant to the cost principles of Subtitle .09 of COMAR in addition to reimbursement for the actual invoice cost of the drugs. While inconsistent with the subjective intent of DHMH (as expressed by the procurement officer in his final decision and in the hearing), such a reading we believe to be consistent with the plain meaning of the provisions. Perhaps one of the most fundamental rules of construction to be applied in ascertaining the meaning of a contract is that the words used should be given their ordinary everyday meaning. See Kasten Const. Co., Inc. v. Rod Enterprises, Inc., 268 Md. 318, 327-330 (1973); Fruin-Colnon Corporation and Horn Construction Co., Inc., MDOT 1001, 1 MICPEL ¶1 (1979); Cam Construction Company, Inc., MSBCA 1088, 1 MICPEL ¶62 at p. 8 (1983). Applying this rule to the words used in the instant contract, we determine that Appellant should be reimbursed for (1) the consultant fee and the per prescription dispensing fee, (2) the actual invoice cost of drugs, and (3) the indirect cost of such drugs as allowed by the cost principles of Subtitle .09 of COMAR. Accordingly, Appellant is entitled to its indirect costs in the amounts stipulated for the first two years and as to be determined for the third.

Our finding that the contract is a cost-plus fixed fee contract entitling Appellant to indirect costs based on a plain reading of the document renders moot the alternative argument by DHMH that the contract compensation provisions are in obvious conflict and thus present a patent ambiguity concerning whether the contract is a fixed-price or a cost-plus fixed fee contract. However, the result would not be changed even were we to conclude that the compensation provisions were in obvious conflict so as to require application of the doctrine of patent ambiguity.

The doctrine of patent ambiguity may be summarized as follows:

. . . If a patent ambiguity is found in a contract, the contractor has a duty to inquire of the contracting [procurement] officer the true meaning of the contract before submitting a bid. [citations omitted]. This prevents contractors from taking advantage of the Government; it protects other bidders by ensuring that all bidders bid on the same specifications; and it materially aids the administration of Government contracts by requiring that ambiguities be raised before the contract is bid on, thus avoiding costly litigation after the fact. [citations omitted].

George E. Newsom v. United States, 230 Ct.Cl. 301, 303, 676 F.2d 647 (1982).

The practical application of this doctrine may be summarized as follows:

. . . First, the court [Board] must ask whether the ambiguity was patent. This is not a simple yes-no proposition but involves placing the contractual language at a point along a spectrum: Is it so glaring as to raise a duty to inquire? [citation omitted]. Only if the court [Board] decides that the ambiguity was not patent does it reach the question whether a plaintiff's interpretation was reasonable. [citation omitted]. The existence of a patent ambiguity in itself raises the duty of inquiry, regardless of the reasonableness vel non of the contractor's interpretation. [citations omitted]. . . . The court [Board] may not consider the reasonableness of the contractor's interpretation, if at all, until it has determined that a patent ambiguity did not exist.

George E. Newsom v. United States, *supra* at 230 Ct.Cl. 304 citing Mountain Home Contractors v. United States, 192 Ct.Cl. 16, 425 F.2d 1260 (1970). See Dominion Contractors, Inc., MSBCA 1041, 1 MICPEL ¶69 at pp. 6-11, 20-23 (1984); American Building Contractors, Inc., MSBCA 1125, 1 MICPEL ¶104 at pp. 5-7 (1985); Concrete General, Inc., MSBCA 1062, 1 MICPEL ¶87 (1984).

We shall approach the application of the doctrine by assuming *arguendo*, as DHMH contends, that there is a patent ambiguity resulting from the alleged conflict between Sections III E.1 and III G. and Section III E.2 regarding entitlement to indirect costs. The Board must then determine whether Appellant met its duty to inquire concerning the true meaning of the contract prior to submitting its bid. Several weeks prior to bid opening Dr. Baer specifically requested clarification from Ms. Freeman, the contract monitor and contact person for the solicitation,⁴ concerning the applicability of the Subtitle .09 COMAR provisions. In response to this inquiry, Dr. Baer was provided a copy of these COMAR provisions by Ms. Freeman prior to bid opening with a letter stating that it was in response to Dr. Baer's request for clarification. This pre-bid opening activity suffices to persuade us that Appellant met its duty to inquire as to any alleged patent ambiguity prior to submitting its bid and that the response from DHMH reasonably indicated that reimbursement for indirect costs would be allowed.

Based on the above the appeal is sustained.

⁴While Ms. Freeman was not the procurement officer, we believe that under the facts of this appeal any requirement for prebid inquiry of the procurement officer was met by directing such inquiry to the person named in the solicitation to contact for further information. See Eagle International, Inc., MSBCA 1121, 1 MICPEL ¶40 at p. 7 (1983). Compare Granite Construction Company, *supra*, at pp. 10-11.

