

POOR DRAFTING OF A CONTRACT BY THE GOVERNMENT

Coyright 2023 Richard D. Lieberman, Consultant & Retired Attorney

The Government is responsible for drafting clear, unambiguous specifications that can be followed by the contractor that is awarded a contract. Unfortunately, that was not the case in *IMC Construction Group*, ASBCA No. 62422, March 30, 2023. The U.S. Army Corps of Engineers (“Corps”) awarded a task order contract to install a cooling tower upgrade system at Maxwell Air Force Base in Alabama. The sole issue in the appeal was whether the task order required IMC to provide a Direct Digital Control (“DDC”) system.

The task order was unusual because it stated that all infrastructure equipment and all Heating Ventilating and Air Conditioning systems shall be monitored and controlled through a facility Building Automation System (“BAS”). Further, all installation, connection of new equipment on BAS systems shall be conducted solely by the enterprise BAS Service Provider, also referred to as the “integrated automated service provider,” who was responsible for performance, installation, modification or repair to the DDC system. That entity was known as SPEC, LLC.

IMC believed it could install the DDC itself, and so advised the contracting officer. The CO, however, insisted that the RFP required IMC to utilize SPEC as the provider. Based on CO direction, IMC subcontracted with SPEC to provide the DDC, incurring \$208,000 more than it had offered in its proposal. This claim followed and was denied by the CO.

The Board noted that the issue was simply one of contract interpretation. The Board further noted that if a contract is unambiguous, it is given its plain and ordinary meaning, and the Board doesn’t look to extrinsic evidence. If the ambiguity is not resolved by considering the contract as a whole and extrinsic evidence, then *contra proferentem* (“against the drafter”) applies. If the ambiguity is patent, rather than latent, the non-drafting party has a duty to inquire, and the ambiguity will be construed against that party if it fails to inquire.

Considering the task order language, the Board noted:

- There is no language expressly stating that the contractor is required to provide and install the referenced DDC controls
- Instead, the specifications provide that the government maintains a contract with a BAS Service Provider/integrated automation Service Provider to maintain, repair and install the integrated automation systems and further, all installations, consisting of new and maintenance on those systems and components must be conducted “solely” by the government’s provider.
- The Board held that the “most natural reading of the task order language is that the DDC controls would be provided and installed via the government’s separate contract with its provider and the task order contractor is forbidden from performing that work.”

The Board noted how unusual it is for the government to direct the use of a particular subcontractor, and to prohibit any other entity other than the government’s provider from performing any of the DDC system installation work.

The Board noted that the extrinsic evidence did not change its conclusion that the best reading of the task order was that it did not require IMC to provide the DDC system.

Under the contra proferentem doctrine, the flaw was in the government's drafting failure because it could have made plain that it intended for the task order contractor to provide the DDC system through a subcontract with SPEC. Nor was this a "patent ambiguity" which required the contractor to inquire. The Board noted that the drafters of the task order here "wholly failed to convey the government's intent" and IMC was entitled to rely on the RFP language.

The Board awarded an equitable adjustment of \$326,865 to IMC, consisting of the \$283,000 paid by IMC to SPEC for the DDC system work, plus 15% for overhead and profit.

Takeaway. The government drafts the contract (or in this case the task order). It is incumbent upon the contracting officer and his/her team (including technical members who are assisting in writing specifications) to write clear, unambiguous specifications in order to avoid the type of situation that occurred here on the DDCs.

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