

Appeal of: _____ :
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 FESSEL, SIEGFRIEDT, : HUDBCA No. 90-5360-DO
 & MOELLER ADVERTISING :
 :
 Appellant :
 :
 Contract No. 083-89-035 :
 _____ :

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For the Appellant

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For the Government

DECISION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

January 31, 1991

Statement of the Case

By letter dated September 13, 1990, Fessel, Siegfriedt & Noeller Advertising ("Appellant" or "FS&M") filed a timely notice of appeal from a final written decision of a contracting officer of the U.S. Department of Housing and Urban Development ("HUD"), which disallowed certain costs associated with advertisements placed in the Wall Street Journal. Appellant elected to proceed under the expedited procedure and to submit its case for decision upon a written record. (24 C.F.R. S 20.10, Rule 11, Rule 12.2).

Findings of Fact

1. The Property Disposition Branch of HUD in Louisville, Kentucky awarded FS&M a cost-plus-fixed-fee contract on February

22, 1989. The purpose of the contract was to perform advertising and marketing services to facilitate the sale of HUD-owned properties. (AF, Tab 2).

2. Clause B.2 of the contract provides:

a. Placement of Ads

For each delivery order covering newspaper advertisements, the Contractor shall be paid a fixed fee of \$1006.20 per month. Ads are placed in the following newspapers, but will not be limited to them under this contract:

The Courier-Journal	6500 - 7000 lines
The Louisville Defender	75 - 100 inches
Lexington-Herald Leader	500 - 650 lines
The Paducah Sun	20 column inches
Daily News (Bowling Green)	45 column inches
The American Baptist	1/4 page - 1/2 page

* * *

This price covers the Contractor's total cost for such service. In addition, all advertising media charges will be paid by the Contractor on a monthly basis. Contractor will be required to obtain all bills from each newspaper and ensure that the rates on which billing is made is a non-commissionable rate. The Contractor shall certify that these bills were paid and that no commission was received from the media company. (emphasis supplied) (AF, Tab 2, section B.2.a).

3. All of the newspapers listed in clause B.2 of the contract are published in the state of Kentucky. (Ar, Tab 4.1; FS&M letter dated December 27, 1990).

4. The contract's Scope of Work, in elaborating upon or defining the "Placement of Ads," requires the contractor to "[assure that actual rates charged by the media shall not be in excess of the rates charged at a non-commissionable rate.]" (emphasis supplied) (Ar, Tab 2, section C.3).

5. The contract also specifies that "the geographic area to be covered by this contract is defined as the entire state of Kentucky." (Ar, Tab 2, section B.2.b).

6. The Government conducted a pre-bid conference on January

12, 1989, in which the contract terms and conditions were reviewed to ensure that potential bidders understood the requirements of the contract. FS&M was represented at the conference by William D. Falvey, former President of FS&M. During the conference, the geographic boundary clause of the contract was clarified to mean that "only properties within the state of Kentucky would be advertised." (Ar, Tabs 4.2 and 4.3).

7. In July 1990, FS&14 placed a number of advertisements in newspapers published in Kentucky. On July 31, 1990, the Daily News (Bowling Green, Kentucky) invoiced FS&M at the commissionable rate of \$230.33 for four advertisements. FS&M billed HUD at the non-commissionable rate of \$195.79 for these advertisements. Similarly, the Defender (Louisville, Kentucky) invoiced FS&M at the commissionable rate of \$227.61 each for three advertisements. FS&M billed HUD at the non-commissionable rate of \$193.47 per advertisement. There is no dispute that HUD paid these invoices at the non-commissionable rate. (Ar, Tab 4.1).

8. Linda J. Haddock, HUD contracting officer, testified by affidavit that on July 30, 1989, FS&M placed an advertisement in the Columbus (Ohio) Dispatch. The Dispatch billed FS&M at a commissionable rate of \$2847.52, but FS&M charged the Government the non-commissionable rate of \$2420.39 in invoice number 13028 dated August. 24, 1989. There is no dispute that HUD paid this invoice at the non-commissionable rate. (Govt's Response to Appellant's Brief, Exha. 1 and 2).

9. By letter dated August 3, 1990, John E. Stein, Sr., representative of FS&M, informed HUD that:

During the past year HUD has requested this agency to place a number of ads outside of Kentucky. These extra ads, not covered by this contract, cost the agency [FS&M] considerable extra expense including overnight express fees. The agency received no pay for these ads as they were not covered by the fee the agency received under this contract for placing ads in the state of Kentucky. These ads should have been billed at the gross rate; that is the same rate that HUD would have paid had they placed the ads themselves.

Although the agency in most cases mistakenly billed these ads at net; in effect making a donation to HUD of their earned commission from these media; this agency does not intend to rebill or try to collect these incorrect billings. However, any future ads placed outside of

Kentucky and any ads so placed which have not been billed will be billed at the gross rate. (Ar, Tab 3.6, p. 2).

10. By invoice number 14031 dated August 30, 1990, FS&M billed HUD for seven advertisements in the Wall Street Journal in the months of June and July, 1990. In this invoice, FS&M sought payment from HUD in the amount of \$40,809.60, which represents the commissionable rate for placing these advertisements. The Wall Street Journal charged FS&M \$34,688.17, which represents the non-commissionable rate for these advertisements. (Ar, Tab 4.1, p.4, 16-18).

11. By final written decision dated August 16, 1990, the contracting officer objected to FS&M's August 30, 1990 billing of the Wall Street Journal advertisements at the commissionable rate, and deducted FS&M's commission in the amount of \$6121.43 from the invoiced amount. The final decision states, among other things, that it is clear, under clause B.2.a of the contract, that HUD is to be billed at a non-commissionable rate for all newspaper advertisements, and that the fixed fee of \$1006.20 per month represents the contractor's profit for the placing of all advertisements. (Ar, Tabs 1 and 3.1).

Discussion

FS&M contends that, as the geographic area of the contract is defined under contract section B.2.b as the state of Kentucky, the placement of advertisements in the Wall Street Journal is outside the scope of the contract. FS&M argues on this basis that the provisions in the contract which required it to obtain "non-commissionable rates" are inapplicable to the advertisements placed in the Wall Street Journal. Conversely, the Government contends that the geographic area provisions of the contract apply only to the location of the properties which are to be sold through the advertising effort, and not to the geographic location of the media in which the advertisements were to be placed. The Government further contends that (1) FS&M was made aware of this interpretation at a pre-bid conference; (2) FS&M performed in accordance with the Department's interpretation of this provision; and (3) FS&M was bound by the non-commissionable rate provisions of the contract.

A basic tenet of contract interpretation is that all parts of a contract must be read as a whole and harmonized, and that all provisions of a contract are to be given effect if possible. J.F. O'Healy Construction Corp., VABCA Nos. 2784, 2858, 91-1 BCA

23,320; Singleton Contracting CorD., GSBCA Nos. 9614, et al., 90-3 BCA 23,125. The words at issue are to be given their plain and ordinary meaning. *Munkev Conkin Constr. Co. v. United States*, 461 F.2d 1270 (1972). Conflicting interpretations of a contract provision must both be reasonable in order for that provision to be determined ambiguous. There is no need to conclude that one interpretation is more reasonable than the other. So long as a contractor's interpretation of a disputed contractual clause is reasonable, the clause is ambiguous. *George Bennett v. United States*, 178 Ct. Cl. 61, 371 F.2d 859 (1967).

The express language in section B of the contract does not explicitly restrict the placement of advertisements outside the state of Kentucky. The contract is designated on its front page as a "Supplies/Services" contract for the "Placement of Ads," and contract clause B.2 states that the "geographic area to be covered by this contract is . . . the entire state of Kentucky." Although contract clause B.2.a states that advertisements "will not be limited" to the six newspapers listed in that clause, all of the newspapers listed in that clause are published in Kentucky. Based on these facts, neither parties' interpretation of the geographic scope provision of the contract is unreasonable. Since the contract is susceptible to two reasonable interpretations, the contract is ambiguous as to the application of its geographic boundaries. See *Palm Springs Aviation, Inc. dba Landells Aviation*, AGBCA No. 89-180-3, 90-2 ECA 22,683.

Under the general rule of *contra proferentwn*, a writing will be construed against the drafter where (1) there is no patent ambiguity giving rise to a contractor's duty to inquire (*Doyle Construction Co.*, DOT BCA No. 2244, 90-3 BCA 23,176); and (2) the contractor relied upon its interpretation at the time of bidding or in performing the contract (*Butt & Head, Inc.*, EBCA No. 177-7-81, 85-1 BCA 17,807 citing *Dale Ingram, Inc. v. United States*, 18 CCF 82,123] 475 F.2d 1177 (1973)). A failure to seek clarification of a patent ambiguity prevents the contractor from recovering. *Carl Garcia & Son, Inc.*, ASBCA No. 36614, 90-2 ECA 22,655. An ambiguity is patent where it is "glaring" and "leaps from the page at the viewer to such an extent that a reasonable person cannot avoid observing it." *B.L.I. Construction, Inc.*, DOT BCA No. 2147, 91-1 BCA 23,316, at 116,924. Here, there is no such glaring ambiguity in the contract's geographic scope provision, given the plain language of the provision and the lack of any direct or obvious conflict with other contract provisions. See *Palm Springs Aviation*, *supra*, at 113,930. Since the ambiguity in the contract does not rise to the requisite level of patency,

an examination of other factors is necessary to determine the contractual intent of the parties.

The conduct of the parties during performance is held to be an objective indicator of their intent at the time the contract was formed. *Tn-States Service Co.*, ASBCA No. 37058, 90-3 BCA 22,953. In *Macke Company v. United States*, 467 F.2d 1323 (Ct. Cl. 1973), Judge Davis stated that:

the greatest help comes not from the bare text of the original contract, but from the external indications of the parties' joint understanding, contemporaneously and later, of what the contract imported. The case is an excellent specimen of the truism that how the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself.

See also Standard Oil Co. of California v. United States [30 CCF 70,177] 685 F.2d 1337 (Ct. Cl. 1982). During contract performance, FS&M placed advertisements in papers outside of Kentucky and billed the Government at the non-commissionable rate. An example of this was shown in the July 30, 1989 advertisement placed in the Columbus (Ohio) Dispatch, which was billed to HUD at the non-commissionable rate. The parties' construction of the contract as evidenced by their performance is given great weight in determining the true intentions of the parties at the time the contract was created. *Patrician Equities Corp.*, GSBICA No. 8393, 90-2 BCA 22,880; *Harris Systems International, Inc.*, ASBCA No. 33280, 88-2 ECA 20,641.

The letter from John E. Stein, dated August 3, 1990 acknowledges that past billings for out-of-state advertisements had been invoiced at the non-commissionable rate, but insists that such billings were in error and would not be continued in billings submitted after August 3, 1990. FS&M's attempt to establish a different contract interpretation after over 17 months of contract performance is not supported by a preponderance of the evidence. The position on future billings for out-of-state advertisements set forth in Stein's letter can be viewed as a unilateral attempt to modify the contract and does not negate the impact of FS&M's prior conduct, which is consistent with HUD's interpretation of the contract. See Chronometrics, Inc., NASA BCA Nos. 185-2, 785-9, 90-3 BCA 22,992. It is well established that:

[w]here the evidence shows that the contractor performed in accordance with the same interpretation propounded by the Government, its claim that it relied on another reasonable interpretation must fail. Butt & Head, Inc., supra, at 88,982 citing Astro-Space Laboratories, Inc. v. United States [18 CCF 81,894], 200 Ct. Cl. 282; 470 F.2d 1003(1972).

Furthermore, where one party knows the meaning intended by the other party at the time of contract formation, then that party is bound by that meaning unless it unambiguously manifests disagreement before contract award. Hvdro Group v. United States, 17 Cl. Ct. 668 (1989); Amerifab Industries, ENG BCA No. 4981, 87-1 BCA 19,400 (and cases cited therein). The evidence demonstrates that the Government's interpretation of the geographic scope provision of the contract as applying to the location of Properties was made known to FS&M at the pre-bid conference. FS&M was represented at the conference and has not offered any evidence that: (1) contradicts the Government's evidence as to what was discussed at the pre-bid conference; (2) it contemporaneously manifested any disagreement with the Government's interpretation at the pre-bid conference; or (3) it relied upon its interpretation of the geographic scope provision of the contract when making its bid or during the course of performance.

For the above-stated reasons, I find that there is no basis for upholding FS&14's interpretation of the geographic scope provision of the contract. Cf. The Wackenhut Corporation, IBCA No. 2311, 91-1 BCA 23,318. (contractor's interpretation of the geographic scope provision was upheld where it was reasonably relied upon by the contractor in preparing its bid). I further find that the geographic scope of the contract was not limited to placing advertisements in the state of Kentucky.

With respect to commissions, the contract states in abundantly clear terms that all advertisements were to be placed at non-commissionable rates. This requirement of the contract is a natural consequence of the "cost-plus-fixed-fee" nature of the contract. In cost-plus-fixed-fee contracts, the fee represents the contractors profit. Ralph Construction, HUDBCA No. 83-801-CiS, 84-1 BCA 16,975 at 84,543. As the placement of out-of-state advertisements was within the scope of the contract, the additional amount sought for the Wall Street Journal advertisements would represent additional profit not permitted under the terms of the contract. I conclude, accordingly, that

there is no basis, under the terms of the contract, for sustaining FS&M's claim.

FS&M also asserts that billing HUD for out-of-state advertisements at a non-commissionable rate constitutes a violation of unspecified ethical and legal standards applicable to the advertising industry, in that it "kicks back" the contractor's profit to the Government. FS&M has submitted no evidence which would show a failure by HUD to comply with any contractual, regulatory, or statutory obligation in this context.

Consequently, I find this allegation without merit.

Conclusion

For the foregoing reasons, the appeal is denied.

Administrative Judge
Timothy J. Greszko