



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 14, 2023

CBCA 7168

THE GEO GROUP, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

J. Chris Haile, Matthew D. Lewis, and John Nakoneczny of Crowell & Moring LLP, Washington, DC, counsel for Appellant.

Oleta Vassilopoulos, Daniel Stovall, and Thomas Sutton, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **GOODMAN**.

Opinion for the Board by Board Judge **GOODMAN**. Board Judge **VERGILIO** concurs.

GOODMAN, Board Judge.

Appellant, The GEO Group, Inc. (GEO), has appealed a decision of a Federal Bureau of Prisons (BOP) contracting officer pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). The appeal is decided on the written record pursuant to Board Rule 19 (48 CFR 6101.19 (2021)).¹ We deny the appeal.

¹ The parties have filed briefs and reply briefs.

Background

The Solicitation

In June 2013, BOP issued a solicitation as part of a negotiated procurement of an indefinite-delivery indefinite-quantity firm fixed-priced type contract for services to manage and operate a contractor-owned/contractor-leased correctional facility, which would house approximately 1565 to 2000 low security, adult male inmates. Appeal File, Exhibit 2 at 1.² The solicitation originally anticipated a contract with a four-year base period, commencing April 1, 2016, and three two-year option periods. *Id.* at 1, 4.

In November 2014, BOP issued amendment 4 to the solicitation, which revised the type of anticipated contract to a firm-fixed-price service contract with a five-year base period and five one-year option periods. It modified the solicitation to provide that the performance period of the contract “shall be effective from the [notice to proceed (NTP)] through 60 months [the five base years], with the Government’s unilateral right to exercise the five individual one-year option periods in accordance with the terms of this contract.” Exhibit 3 at 117-18, 121. Amendment 4 required offerors to submit five different prices, as follows:

- 1) Monthly Ramp Up Pricing (MRP)[;]
- 2) Monthly Operating Price (MOP) for each contract year;
- 3) Annual Operating Price (AOP) (AOP = MOP* 12) for each contract year;
- 4) Monthly Ramp Down Price (MRDP)[;]
- 5) 6-Month Extension Price (In Accordance with FAR 52-217-8 [(48 CFR 52-217-8))][.]

....

Monthly Ramp Up Price (MRP) – The MRP applies when the average number of inmates housed in a monthly payment period does not exceed 50% of 100% contract beds. Once the population reaches 50% plus 1 inmate during the monthly payment period, the MRP shall be considered expired for the

² All exhibits are found in the appeal file, unless otherwise noted.

remainder of the contract. The MOP becomes effective after the expiration of the MRP. . . .

Monthly Operating Price (MOP) – The MOP will apply after the Ramp Up Period when the average number of inmates housed in a monthly payment period exceeds 50% of 100% accepted contract beds.

Monthly Ramp Down Price (MRDP) – Monthly ramp down refers to a period of time when inmates are transferred from the facility due to the expiration of the contract. This period may become effective approximately three (3) months prior to the expiration of the contract. The MDRP applies when the average number of inmates housed in a monthly payment period reaches 50% of the 100% accepted contract beds. . . .

6-Month Extension Price (FAR 52.217-8 Option to Extend Service (NOV 1999)) – This will be used in the event that the Government exercises its unilateral right to extend the term of the contract (not to exceed six months).

Id. at 123-24.

The application of the MRDP is the subject of the dispute in this appeal. Amendment 4 required the offeror to submit its proposed pricing on a page titled “Schedule A,” which contained three separate boxes. Exhibit 3 at 125. The first box was for the offeror’s proposed price for the base year MRP. The second box contained a table listing the eleven performance periods (the five base years, each of which was identified as a twelve-month period; five option years, each of which was identified as a twelve-month period; and a six-month extension) and required the offeror to enter its proposed price for the MOP and AOP for each period. The third box, at the bottom of the schedule, was for the offeror’s proposed price for the MRDP. Schedule A did not indicate that the price for the MRDP was related to any specific performance period. Exhibit 3 at 125.

GEO’s Final Proposal Revision

On December 5, 2014, in response to BOP’s request dated December 2, 2014, GEO submitted its final proposal revision to BOP, including pricing in Schedule A. GEO alleges that it calculated its MRDP, \$2,697,182, as 75% of its proposed price for the MOP for the fifth option year—\$3,596,243.³ Exhibit 11 at 1-4. Amendment 4 did not require offerors to

³ The proposed MRDP amount was less than the amounts of the proposed MOPs for all performance periods, from the first base year through the fifth option year, and therefore could be interpreted as a percentage of any of these values. While the MRDP amount is 75% of the MOP for the fifth option year, there is no statement in the final

base the calculation of MRDP as a percentage of the MOP for any specific performance period, nor did the final proposal revision's pricing schedule, which had the same structure as Schedule A, relate the MRDP to any specific performance period.

Contract Award and Pricing

On December 29, 2014, BOP awarded contract no. DJB1PC018 (the contract) to GEO to operate the Moshannon Valley Correctional Facility in Philipsburg, Pennsylvania, a 1878-bed correctional facility that GEO owned. The period of performance was a five-year base period that began on April 1, 2016, and concluded on March 31, 2021, with five one-year option periods thereafter. Exhibit 1 at 1-2; Exhibit 6 at 6.

The prices in GEO's final proposal revision were included in Section B, "Supplies/Services," which was set forth beginning on page 1 of the contract with contract line item (CLIN) 0001. CLIN 0001 stated, "Base Year 1—Monthly Operating Price (MOP) —Total number of Beds 1878," and listed the dollar amounts of the MOP and AOP for base year 1. The AOP for base year 1 was designated as "Guaranteed amount for Base Year 1 only." Schedule B continued on page 2 of the contract with eight CLINs, 0002 through 0009, that each provided for a twelve-month performance period and listed the dollar amounts of the MOP and AOP for base years 2 through 5 and the first four of the five option years. Exhibit 1 at 1-2.

CLIN 0010 stated "Option Year 5 – AOP 9 Months," with prices for the MOP and AOP for nine months, with an MOP of \$3,596,243.⁴ CLIN 0011 stated "Option Year 5 – AOP 3 months RAMP DOWN [MRDP], MOP 3 months (inmates below 50%)," with an MOP in the amount of \$2,697,182, as listed in the final proposal revision. Exhibit 1 at 2.

The contract contained the clause specified in Federal Acquisition Regulation (FAR) 52.217-9, "Option to Extend the Term of the Contract (Mar 2000)," which read in relevant part:

- (a) The Government may extend the term of this contract by written notice to the Contractor prior to the expiration of the contract period; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.

proposal revision that it was calculated on this basis.

⁴ In CLIN 0010, the MOP for the fifth base year from the final proposal revision was included and a nine-month value calculated for the AOP.

Exhibit 1 at 22.

The contract also expressly incorporated by reference the solicitation, amendments to the solicitation, GEO's original proposal, amendments to GEO's original proposal, and GEO's December 5, 2014, final proposal revisions. Exhibit 1 at 2.

Contract Modification 5

During performance, the parties executed five modifications with updated pricing schedules to account for equitable adjustments to the contract price required by new wage determinations issued by the Department of Labor. In each modification, uniform increases to the MOPs and AOPs were made for each base and option year not yet completed, as well as for the MRDP. Each contract modification that established an updated pricing schedule setting forth the increased pricing for affected performance periods began with a stated purpose and title designation:

This information is provided only for the purpose of maintain [sic] current and up-to-date pricing information associated with this revision and is NOT an obligation of funds for future contract years. Funds will be requested as appropriate in the amounts below unless changed by future Wage Determinations or other Modifications affecting the price of the contract.

UPDATED PRICING SCHEDULE

100% Contract Beds 1,878

Exhibit 12 at 386 (emphasis added).

After the stated purpose and title designation, the five modifications followed the same format for the updated pricing schedule. The parties stated the specific period of performance for each price, identifying the specific date range.

Modification 5, designated as P00092, had an effective date of April 1, 2020, coinciding with the start of the fifth base year. As with the prior modifications, the parties established an updated pricing schedule, updating the performance periods that had not yet begun. The updated pricing schedule listed option year five in two lines, the second of which identified "Option Year 5 (3 Months) 01/01/2026 – 03/31/2026. RAMP DOWN BELOW 50% Population." In this modification, the price for the MRDP had increased from that specified in the original contract, from \$2,697,182 to \$2,833,251.30. After the pricing schedule, the modification stated: "All other terms and conditions of the contract remain unchanged." Exhibit 12 at 571-72.

Contract Performance, Expiration of Contract, and GEO's Claim

GEO performed the contract for the five base years, from April 2016 through March 2021. By letter dated January 14, 2021, BOP informed GEO that it did not intend to exercise the first option year of the contract and that the contract would expire on March 31, 2021, at the end of the fifth base year. Exhibit 44. By the end of February 2021, the inmate population dropped below 50%. Exhibit 23 at 3. In March 2021, BOP informed GEO that it would not be paying the MOP, but only paying the MRDP, for March 2021. Exhibit 22 at 4.

GEO submitted a certified claim to the BOP contracting officer on April 16, 2013, asserting that the MRDP was only applicable at the end of the fifth option year, and it was therefore entitled to the sum certain of \$719,065 for additional payment for March 2021, representing the difference between the MOP for the fifth base year of \$3,552,316.30 for March 2021 and the MRDP \$2,833,251.30 from modification 5 paid by BOP, plus CDA interest on the claimed amount pursuant to 41 U.S.C. § 7109. Exhibit 22 at 9. In its certified claim, GEO stated that “[n]either [modification 5] nor any Contract CLIN includes a ramp down price for a period of performance *other than* Option Year 5.” *Id.* at 4. The claim includes legal arguments that will be addressed in the discussion below.

On June 15, 2021, the BOP contracting officer issued a final decision denying the claim, stating that the contract definition of MRDP was unambiguous, that the conditions that allowed the payment of the MRDP had occurred, and that payment of MRDP was not solely restricted to the end of the fifth option year as alleged by GEO. Exhibit 23. On July 21, 2021, GEO filed its notice of appeal at this Board. The parties submitted the case on the written record after briefing concluded in March 2023.

Discussion

Standard of Review

As stated recently in *Adventus Technologies, Inc. v. Department of Agriculture*, CBCA 7283, slip op. at 7-8 (July 24, 2023), for cases submitted for decision on the written record pursuant to Board Rule 19:

[T]he parties can include in the written record “(1) any relevant documents or other tangible things they want the Board to admit into evidence; (2) affidavits, depositions, and other discovery materials that set forth relevant evidence; and (3) briefs or memoranda of law that explain each party’s positions and defenses.” *I-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,551 (citing Rule 19). “Based on the parties’ submissions, the Board is authorized to make findings of fact, even if such findings require ‘credibility determinations on a cold [paper] record,

without the benefit of questioning the persons involved,’ and can decide issues of law based on those factual findings.” *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 17-1 BCA ¶ 36,863, at 179,613 (quoting *Bryant Co.*, GSBCA 6299, 83-1 BCA ¶ 16,487, at 81,967).

The Dispute

GEO asserts that the contract’s schedule of services and the updated pricing schedules in the modifications make clear that the MRDP only applies at the end of the fifth option year and that BOP breached the contract by charging the MRDP in modification 5 rather than the MOP in March 2021 when the contract expired. GEO seeks the difference between the MOP for March 2021 and the MRDP paid by BOP. Appellant’s Opening Brief at 4. BOP contends that the application of the MRDP is not restricted to the fifth option year, as the definition of MRDP is clear that the MRDP applies within three months prior to the contract’s expiration, when inmate population reduces to 50%, which happened in March 2021. Respondent’s Opening Brief at 8-9.

The sole issue is whether the contract limited the application of the MRDP to only the fifth option year. We find that it did not.

The Contract is Unambiguous

When interpreting a contract, the process starts with the plain language of the contract. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009); *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002). If the plain language of the contract is unambiguous, the inquiry ends there. *Hunt*, 281 F.3d at 1373. “The words of a contract are deemed to have their ordinary meaning appropriate to the subject matter, unless a special or unusual meaning of a particular term or usage was intended, and was so understood by the parties.” *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

The MRDP is clearly and unambiguously defined in the contract as the price paid by BOP during the period of time when inmates are transferred from the facility due to the expiration of the contract. This period becomes effective approximately three months prior to expiration of the contract and applies when the average number of inmates housed in a monthly period reaches 50% of the 100% accepted contract beds, which was 1878 beds.

Those circumstances that entitled BOP to apply the MRDP under the terms of the contract occurred. On January 14, 2021, more than sixty days before the end of the fifth base year, BOP informed GEO (in accordance with the contract’s requirements) that the first option year would not be exercised and, therefore, that the contract would expire on March 31, 2021. The number of inmates housed decreased to 50% at the end of February 2021, and, as a result, BOP, in accordance with modification 5, applied the MRDP during March 2021.

The interpretation of the contract must afford reasonable meaning to each portion of the contract and not render any portion meaningless. *See Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,285, at 176,954. GEO's interpretation would define the term "expiration" to mean the expiration of only the fifth option year, which would not be reasonable, as the contract could expire at the end of the fifth base year or any exercised option year before the fifth option year. This interpretation would also be unreasonable in that it would render the definition of MRDP meaningless if the contract expired, as it did here, before the exercise of the fifth option year. In light of the foregoing, GEO's interpretation is unreasonable and does not entitle it to the relief it seeks.

GEO contends that CLIN 0011 in the contract and the MRDP in the fifth modification limit the application of the MRDP to the fifth option year. Appellant's Opening Brief at 24-25. This interpretation is not reasonable, as a contract must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts. *See Charles Blalock & Sons, Inc. v. Department of Transportation*, CBCA 4601, 15-1 BCA ¶ 36,039, at 176,023. The application of the MRDP must be read in conjunction with and give reasonable meaning to the Government's clear and unambiguously stated unilateral right to exercise the five individual one-year options and the sixty-day notice requirement as to the exercise of any option period. As BOP was not obligated to exercise any option year, it was reasonable to expect that the contract could expire at the end of the fifth base year, as it did. GEO could not have had a reasonable expectation that BOP would exercise all five option years, as BOP had the unilateral right to exercise any option and the continuation of the contract was dependent upon annual funding. Thus, the effective date of the MRDP would not be limited to the expiration of the contract's fifth option year, which might never occur, but applies to any time the contract expires.

The updated pricing schedules in the five modifications followed the same format and also did not limit the MRDP to the end of the fifth option year. Modification 5 stated that the updated pricing is based on the assumption of "100% Contract Beds 1878;" that the "information is provided only for the purpose of maintain [sic] current and up-to-date pricing information and is not an obligation of funds for future contract years;" and that "all other terms and conditions of the contract remain unchanged," which would include the definition of MRDP and the Government's unilateral right to exercise options. Thus, the modifications did not guarantee that the contract would continue through the exercise of the fifth option year, and it was clear that the contract could expire at the end of any performance period for lack of funding or at the end of the fifth base year or any option year as the result of the non-exercise of the following option year, which resulted in the average number of the inmate population decreasing to 50% of the 100% of the accepted 1878 contract beds.

GEO's Additional Arguments Lack Merit

GEO has submitted a declaration from an employee who participated in the negotiations, alleging that he understood that the MRDP would apply only at the end of the

fifth option year and that GEO therefore priced its MRDP as a percentage of its MOP in the fifth option year. Further, this employee alleges that:

At no time during the proposal or award process for the Contract did BOP or any of its representatives assert that the Monthly Ramp Down Price should apply prior to the end of Option Period 5, nor did BOP or any of its representatives raise any concern about GEO's consistent use of the [fifth option year] MOP as the basis from which to calculate the Monthly Ramp Down Price.

Exhibit 57, ¶ 9.

The declarant's assertions do not support GEO's interpretation and are not credible. The MRDP was clearly defined as applicable upon contract expiration, which could occur at the end of the fifth base year or any exercised option year, as BOP had the right not to exercise any option year. In light of this unambiguous language, the declarant does not provide a basis for his subjective understanding during negotiation that the MRDP would only apply to the fifth option year nor a reason why BOP or any of its representatives should need to assert that the MRDP could apply prior to the end of the fifth option year. In GEO's final price revision, its MRDP was stated solely as an amount and could have been a percentage of the MOP of any performance period. There is no indication that BOP was aware that the MDRP was calculated as a percentage of the MOP for the fifth option year or any other performance period.

GEO argues that the contract is ambiguous and that therefore the rule of *contra proferentem* should be applied to construe the contract against BOP. Appellant's Opening Brief at 32. However, *contra proferentem* "is applied only where there is a genuine ambiguity and where, after examining the entire contract, the relation of the parties and the circumstances under which they executed the contract, the ambiguity remains unresolved." *Gardiner, Kamy & Associates, P.C. v. Jackson*, 467 F.3d 1348, 1352 (Fed. Cir. 2006) (quoting *Lewis v. United States*, No. 34-78, 1982 WL 36718, at *7 (Ct. Cl. 1982)). The rule does not apply when, as here, the contract is unambiguous. *Id.*

Further, the rule of *contra proferentem* does not apply when the contract, as here, is negotiated and bargained for.

The rationale behind not applying this rule in negotiated contracts is that the "drafter" envisioned by the rule is one who unilaterally prepares a document which is not subject to negotiation. The Government is not deemed to be the [sole] drafter of . . . clauses which it includes in the initial document of negotiated contracts, when, as in the instant appeal, such clauses are subject to the other party's scrutiny and alleged ambiguities could therefore be clarified during negotiation.

Prince George Center, Inc. v. General Services Administration, GSBCA 12289, 94-2 BCA ¶ 26,889, at 133,847 n.9 (citation omitted). As both parties participated in the negotiation of this contract for more than a year after the solicitation was issued and until contract award, neither can assert a benefit from an alleged lack of clarity of the document by construing it against the other party.

GEO also argues the inclusion of MRDP in CLIN 0011 and not in any other CLINs was deliberate and meant to convey that MDRP would only apply at the end of the fifth option year.⁵ Appellant's Opening Brief at 27. The unambiguous definition of MRDP elsewhere in the contract and BOP's right not to exercise any option year do not support GEO's argument.

Finally, GEO asserts in its claim that its interpretation must be correct, as it is the only interpretation that would allow GEO to comply with the requirement of the Federal Worker Adjustment and Retraining Notification (WARN) Act, as well as similar state laws, to notify employees at least sixty days before closing a facility or conducting substantial layoffs. *See* 29 U.S.C. § 2102. According to GEO's claim, because of various business considerations, only when the fifth option year is exercised and there are no further option years will GEO be able to plan for and provide the WARN notices to employees well in advance of ramp down. Therefore, GEO maintains that, because this is the only scenario that makes business sense, the contract must be so construed, arguing that "[b]usiness contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." Appellant's Opening Brief at 27-28 (quoting *Giove v. Department of Transportation*, 230 F.3d 1333, 1340-41 (Fed. Cir. 2000)).

In support of this argument, GEO has submitted a declaration executed in November 2022 from a current employee who states that he is aware of the contract terms, the certified claim, and the requirements of the WARN Act. He opines that BOP's interpretation of the contract, that the MRDP can be applied at the end of any performance year, is incompatible with requirements of the WARN Act. Exhibit 58. The declarant does not state that he was employed during, participated in, or has contemporaneous personal knowledge of the

⁵ GEO cites the common law canon *expressio unius est exclusio alterius*, "the expression of one is the exclusion of the other." However, we apply the principles of federal government contract law. If at contract award GEO believed the structure of the awarded CLINs indicated that the MRDP would only be applied at the end of the fifth option year, this would have been an obvious patent ambiguity, in light of the unambiguous definition of MRDP, and would have raised an obligation of the party alleging the ambiguity to clarify the ambiguity before executing the settlement agreement and accepting its benefits. *ServiTodo, LLC v. Department of Health & Human Services*, CBCA 5524, 17-1 BCA ¶ 36,672, at 178,569; *P.J. Dick Inc. v. Department of Veterans Affairs*, CBCA 3927, et al., 16-1 BCA ¶ 36,239, at 176,815.

contract negotiation, pricing submissions, review of the contract terms before award, or contract modifications during performance.

There is no evidence that the declarant or any other employee of GEO considered compliance with the WARN Act or other statutes during contract negotiation or at the time the contract was executed nor that GEO sought damages in its claim for, or alleged that it has been charged with, a violation of the WARN Act or any other statute. The issue of contract compliance with the WARN Act or similar state statutes is not relevant to the resolution of this appeal.

Decision

BOP correctly interpreted the unambiguous language of the contract when it applied the MRDP in the final month of the fifth base year. The appeal is **DENIED**.

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

I concur:

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

VERGILIO, Board Judge, concurring.

I write separately to voice my approach and analysis. I start with the contract and modifications, not the solicitation and amendments. The contractor provided a facility to house inmates within agency custody. The contract envisions a ramp down period that applies when the average number of inmates housed in a monthly payment period reaches 50% of the 100% accepted contract beds. The contract contains a line item that specifies a ramp down price for the final option period of \$2,697,182 per month. However, the contract also incorporates the contractor's final proposal dated December 5, 2014. Exhibit 1 at 2. The final proposal, and thus the contract, specifies a ramp down price of \$2,697,182 per month, that is not limited to option year five. Exhibit 11 at 3. That price escalated during the contract to reflect labor rate adjustments. At the end of the base period, the agency did not exercise its option. It provided notice to the contractor in excess of sixty days before the end of the contract. Near the end of the contract, the number of inmates fell below 50% of

the accepted contract beds. The agency paid the ramp down price, as adjusted through escalations. The agency paid the contractor as required by the contract.

The contractor ignores the terms of the contract, particularly the statement that the contract includes the contractor's final proposal. That proposal specifies pricing for the ramp down period, not connected to a specific period (base or any option year). The contractor references and relies upon modification 92, Exhibit 12 at 572, which further revised prices to account for changes in labor rates, and again states a price for option year five ramp down. However, the modification specifies: "All other terms and conditions of the contract remain unchanged." The modification does not delete the general ramp down price from the contract. In sum, the contractor's assertions that the contract envisions and prices ramp down pricing only for option year five is belied by the actual language of the contract and modifications. Moreover, to read the contract as narrowly as does the contractor (anticipating a ramp down period only for the final months of the final option period, when the agency was not obligated to exercise any option) for a contract of unknown duration at the outset is inconsistent with the contract read as a whole.

The contractor also alleges that its interpretation, and not that of the agency, is consistent with the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. § 2102 ("An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order"), and other requirements that it provide notice to employees of layoff. Assuming, without deciding, that the Act applies here, the contractor's attempt to interpret the contract in light of the Act is not persuasive. First, the contractor should have priced the ramp down period to take such laws into account, so employees would not need to be laid off and would receive required payments. Second, the agency provided sufficient notice under the Act—the contractor knew more than sixty days before the end of the base period that the agency would not exercise the option. Finally, the contractor has not alleged that any employee was affected by the ramp down period; that is, every employee could have continued to work on this or another project of the contractor. The end of the contract, and a ramp down period, do not equate to a layoff.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge