

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE COMMISSIONER OF  
THE DEPARTMENT OF ADMINISTRATION**

In the Matter of: )  
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GOVERNMENT COMPUTER SALES, Inc. )  
 )  
Appellant. ) OAH No. 04-0005-CON  
 ) Contract No. 2001-9900-1941

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**PROPOSED DECISION ON MOTION FOR DECLARATION OF DAMAGES<sup>1</sup>**

**I. Introduction**

This contract claim was filed by the Division of General Services under AS 36.30.620(f). On cross-motions for summary judgment, the hearing officer issued a decision concluding that “the contract price for Gateway products was the percentage of manufacturer’s list price set out in the bid, plus the amount charged by Gateway to Government Computer Sales, Inc. (GCS) for 2-day air shipment.” GCS’s motion for reconsideration was denied.

On November 5, 2004, the division filed a motion requesting entry of an order awarding it damages in the amount of \$228,935. GCS opposed the motion and filed a second motion for summary judgment; the division responded. The hearing officer issued an order denying the motion for summary judgment as untimely, but accepting the materials filed by both parties for purposes of the motion regarding damages.

For the reasons set out below, the motion for declaration of damages will be granted and the amount overpaid under the contract set at \$228,935.00.

**II. Facts<sup>2</sup>**

Prior to November 17, 2000, GCS held a contract for the supply of Gateway computers to State of Alaska customers. Under the contract, the cost of shipping was added to the price of the goods and was included as part of the contract price.

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<sup>1</sup> Effective January 26, 2005 this matter was transferred by the commissioner from the Office of Tax Appeals to the Office of Administrative Hearings and assigned by the chief administrative law judge to the previously appointed hearing officer for further proceedings. A new case number applies as shown in the caption. The filing address has changed as shown below; telephone, fax and email have not changed.

<sup>2</sup> The material facts are set forth viewing the evidence in the light most favorable to the non-moving party, GCS. All reasonable inferences from those facts are taken in favor of GCS.

In 2000, the division issued an invitation to bid for a contract to replace the existing computer supply contract. Under the invitation, bid prices were to be expressed as percentages of the manufacturer's list price. All bid prices were to be compared with prices available from the Western States Contracting Alliance, which were included on the bid schedule and represented an alternative source. The winning vendor would be the bidder with the greatest price discount (or least price increase) from the manufacturer's list price. Because Gateway's manufacturer's list prices do not include shipping, the division added Gateway's standard shipping costs to the bid schedule for Gateway products for evaluation purposes only. The contract price was the bid percentage of Gateway's list price plus the actual cost charged by Gateway to the winning bidder for 2-day air shipment.

After the invitation to bid was issued, Gateway and GCS entered into negotiations to establish terms for sales by Gateway to its Alaska vendor, GCS, for resale to agencies under the Alaska contract. In exchange for Gateway's agreement to provide free shipping direct from the manufacturer to the agency of all products ordered under the Alaska contract, GCS agreed to a higher vendor's price than it otherwise would have. After reaching the vendor's price agreement and free shipping arrangement with Gateway, GCS submitted its bid.

At the time it submitted its bid, GCS had a good faith belief that it would be entitled to charge agencies a fixed amount for shipping because that is how the prior contract had been structured and because that is how the bid schedule was structured. Although in good faith, the decision to submit a bid without making any further inquiry regarding the treatment of shipping costs was unreasonable.<sup>3</sup> Anticipating payment of a fixed amount for shipping, regardless of the actual cost (or the lack of any cost), GCS reduced its bid percentage of Gateway's list price by approximately 3% from what it would otherwise have bid.

GCS and Logicom Systems, Inc., submitted the only responsive bids for Gateway products. For every class of equipment, the Logicom bid price was from 4 to 5

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<sup>3</sup> That GCS had a good faith belief does not mean that GCS had no reason to seek clarification on the issue. For purposes of this motion, viewing the facts favorably to GCS, I cannot go so far as to infer that GCS could reasonably forgo further inquiry: the invitation to bid refers to shipping costs only "for evaluation purposes." Given that phraseology, a reasonable bidder would have inquired further.

percentage points lower than the GCS bid price. [R.157] The Logicom bid prices ranged from -2% to -10% from Gateway's list price; the GCS prices ranged from +2% to -5% from Gateway's list price. However, because GCS is an Alaska bidder, it received a preference. After applying the preference, GCS was awarded the Alaska contract in 7 of 12 classes of Gateway equipment; Logicom was awarded the Alaska contract on the remaining 5 Gateway classes. [R.157] If the GCS bid prices had been 3% higher across the board, none of its bids would have been low; in fact, all of its bids would have been higher than the Western States Contracting Alliance benchmark price, even after the reduction for the Alaska bidder preference.

The new contract went into effect on November 17, 2000. Over the course of the next three years, the normal procedure for purchasing computers under the contract was this: (1) the agency notifies GCS of the desired computer and requests GCS to provide the manufacturer's list price for that item; (2) GCS provides the agency a screen print of the manufacturer's list price, calculating the appropriate percentage discount (the bid price) and adding a specific amount for shipping to indicate the total price; (3) the manufacturer's invoice to GCS shows the vendor's price; (4) GCS's invoice to the agency shows a unit price equal to the total price previously provided, not showing a separate charge for shipping. [*e.g.*, Ex. A pg. 7-10]

The division was not aware that GCS had reached an arrangement with Gateway for free shipping until 2003. As soon as it learned of the arrangement, the division notified GCS that it considered the past payments in excess of the bid percentage of the manufacturer's list price to be in excess of the amount due under the contract and demanded repayment, ultimately filing this claim.

### **III. Analysis**

The division takes the position that because the contract price has been determined, the calculation of damages simply calls for applying the standard shipping cost to every order. It has presented a spreadsheet estimating the shipping costs as so calculated, supported with by an affidavit from the responsible contracting officer. GCS has not disputed the division's calculations. Rather, it takes the position that it is entitled to an offset against the higher contract price to reflect the lower bid price that it offered,

based on its good faith understanding that it would be entitled to add a fixed amount for shipping as part of the contract price.

In reply, the division argues that GCS is attempting to reopen the issue of the contract price, and that the evidence submitted by GCS is untimely and should not be considered. If the evidence is considered, division argues, it is insufficient as a matter of law.

A. The Evidence of A Reduction in Bid Price Does Not Alter the Contract.

GCS argues that because it has now submitted evidence that it reduced its bid price in the expectation that it would receive a fixed amount for shipping costs, the contract interpretation previously adopted should no longer govern. It relies on language in the decision on reconsideration pointing out that GCS had not provided any such evidence, and that the contract should be interpreted to avoid a windfall to one party at the other's expense.

The evidence was, as the division notes, submitted untimely. However, even taking that evidence into consideration, the prior interpretation of the contract is not altered.

The reference in the decision on reconsideration to the role of extrinsic evidence of a reduction in the bid price was in the context of the rule of contract interpretation calling for interpretation contrary to the drafting party. In the context of government contracts, that rule does not apply in two distinct situations: (1) the bidder overlooked a patent ambiguity in the solicitation; or (2) the bidder did not rely on the ambiguity in submitting a bid. GCS's evidence goes to the second situation, not the first. seeking to take advantage of the rule failed to seek clarification prior to contract award. Because GCS overlooked a patent ambiguity in the bid, it is not entitled to a favorable interpretation of the disputed contract terms.<sup>4</sup>

GCS asserts, and has submitted evidence, that it did not obtain a windfall profit at the division's expense. But the point of interpreting the contract price to include only actual shipping costs is to avoid an after the fact accounting. To interpret the contract as

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<sup>4</sup> Memorandum and Order [on Reconsideration] at 7, citing Interstate Gen. Gov't. Contractors, Inc. v. Stone, 980 F.2d 1433, 1434-35 (Fed. Cir. 1992); Newsom v. United States, 676 F.2d 649 (Cl. Ct. 1987); Fruin-Colon Corp. v. United States, 912 F.2d 1426, 1430 (Fed. Cir. 1990). The patent ambiguity that GCS ignored was the lack of a specific provision governing the amount to be paid as compensation for shipping costs. The only reference to shipping costs in the invitation to bid was "for evaluation purposes".

GCS does mean that the division would not know whether it got GCS's best price, absent a cost-price analysis such as GCS now asks for. Interpreting the contract as allowing only actual shipping costs protects the interests of both GCS and the division. If GCS in fact reduced its bid and received no windfall, the primary cause for its current predicament is not the interpretation of the contract adopted in this case, but its own failure to read the solicitation fairly to both parties at the time it submitted a bid.

Assuming that GCS reduced its bid price based on its understanding of the solicitation and did not receive a windfall, the contract interpretation previously adopted in this case would not be affected.

B. Denial of a Contract Modification May be Grounds for a Contract Claim.

For purposes of this motion, the facts must be viewed in a light favorable to the non-moving party, GCS. In that light, GCS's assertion, supported by a sworn affidavit, that it reduced its bid price in anticipation of receiving a fixed amount for shipping costs even though it would incur no actual shipping costs, must be taken as established. The question remains, does GCS's reduction in its bid price (based on a mistaken understanding of the terms of the invitation) warrant any offset or adjustment to the amount due under the contract?

This is a question that goes to the scope and nature of the remedies available in an administrative contract claim. To the extent that the relief sought by GCS is not the enforcement of an existing contractual right, the relief sought is essentially equitable in nature. In a civil action, the superior court's equitable authority would enable it to award equitable relief as might be appropriate. However, this case is an administrative claim, not a civil action, and the relief available in this forum is limited to that provided by law.

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A contracting officer has discretion, within the limits prescribed by law, to modify a contract. *See* AS 36.30.430(a); AS 36.30.470; 2 AAC 12.485(d). In effect, the posture of this case is that a GCS is requesting a contract modification (*i.e.*, increasing the

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<sup>5</sup> The Procurement Code provides indirect support for the award of equitable relief with respect to contract claims: AS 36.30.860 provides that "the principles of law and equity...shall supplement the provisions of this chapter." By comparison, federal law provides express authority for agencies to award the same relief in an administrative claim as would be available in the federal district courts. *See*, 41 U.S.C. §607(d). Furthermore, the federal statute makes a monetary award by the agency enforceable in court. 41 U.S.C. §612. The Procurement Code does not contain equivalent language in either respect.

contract price so that it includes a fixed amount for shipping, regardless of the actual cost). The request is raised, in effect, as a counterclaim to division's claim for reimbursement of excess payments. Assuming, without deciding, that a request for modification may be brought as a claim under AS 36.30.620, I will proceed to address the merits of GCS's claim.

C. Denial of Modification is Not an Abuse of Discretion.

GCS's argument is an equitable one: it did not understand the bid documents correctly and, therefore, a modification of the contract is in order. As previously noted, when a bidder overlooks patent ambiguity in the solicitation, the contract need not be interpreted against the government.<sup>6</sup> However, depending on the circumstances, patent ambiguity may justify a contract modification, to the extent the contracting officer has authority to make the modification.

A contracting officer's authority to modify a contract is limited by 2 AAC 12.485. Except in unusual circumstances that do not apply to this case,<sup>7</sup> an unanticipated contract amendment is limited to the lesser of 20% of the original contract, or \$50,000. In this case, then, the contracting officer had authority, in the officer's discretion, to modify the contract to provide for increased compensation up to \$50,000, in effect reducing the division's claim to \$178,935. An increase of \$50,000 might still be less than the amount bid by the next lowest bidder.

In determining whether to modify a contract to provide for increased payments by an agency due to a mistaken interpretation of the bid documents by the contractor, the contracting officer should consider all of the circumstances. GCS asserts that it acted in good faith, that the parties' course of prior dealing had included payment of a fixed amount for shipping, and that GCS reduced its bid to reflect its no-cost shipping arrangement with Gateway.<sup>8</sup> But on the other hand, GCS did not attempt to clarify the

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<sup>6</sup> *Supra* at note 4.

<sup>7</sup> Under 2 AAC 12.485(d)(1), an unanticipated contract amendment in excess of the limits is generally available only with respect to changes in the "due to unforeseen circumstances which occurred as work progressed". This subsection is inapplicable to disputes over the interpretation of the contract terms.

<sup>8</sup> Because the case is before me on summary judgment, I accept GCS's assertion that it reduced its bid price (supported by an affidavit) at face value. I note, however, that this issue would be subject to dispute if the case proceeded to hearing.

bid documents, and enforcement of the contract as written is not commercially unreasonable<sup>9</sup> or impracticable.

In light of the circumstances, viewing the evidence favorably to GCS, denial of a request for modification would not have been an abuse of discretion. But neither would it have been an abuse of discretion to grant such a request. Assuming that the commissioner's authority under AS 36.30.680 to take "appropriate action" includes ordering a contract modification, modification of the contract within the limits provided by law would be within the commissioner's discretion.

**V. Conclusion**

The contract provides for payment of the bid percentage of the manufacturer's list price plus the actual shipping costs incurred. GCS incurred no shipping costs. GCS does not contest the division's calculation of the amount paid by the division over the course of the contract that was in excess of the bid percentage of the manufacturer's list price. Denial of modification is not an abuse of discretion. I recommend that the commissioner grant the division's claim in its entirety, in the amount of \$228,935.

DATED August 25, 2005.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

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<sup>9</sup> According to GCS, shipping costs amounted to about 30% of its "margin". [Mem. In Supp. Of 2d Mot. for S.J.at 3] Thus, it appears that the contract remained profitable, albeit less so than anticipated.

**ADOPTION**

Under the authority of AS 36.30.680 by delegation of the Commissioner of the Department of Administration, I, Terry Thurbon, Chief Administrative Law Judge, adopt the Administrative Law Judge's Proposed Decision on Motion for Declaration of Damages as the final administrative action in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 36.30.685 within thirty (30) days of the date of this decision.

DATED August 25, 2005.

By: Signed  
Terry Thurbon  
Chief Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]