

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

EDUCATIONAL MANagements)	
ASSOCIATES, INC.,)	
)	
Claimant,)	
)	
v.)	
)	
ENTERPRISE TECHNOLOGY SERVICES,)	
)	
Contracting Agency.)	OAH No. 10-0233-CON
<hr style="width: 40%; margin-left: 0;"/>) ITB No. 2009-0200-8281

DECISION

I. Introduction

Educational Management Associates, Inc., (EMA) submitted a bid on a solicitation to provide Enterprise Technology Services (ETS) with upgrades to the computer system of the Division of Retirement and Benefits. EMA was the lowest bidder and was awarded the contract. After providing services under the contract for a period of time, a dispute arose regarding payment for maintenance services. EMA filed a claim which was denied, and EMA appealed.

The matter was referred to the Office of Administrative Hearings and the assigned administrative law judge conducted a telephonic hearing on June 16, 2010. Because the terms of the solicitation expressly include maintenance services, the claim is denied. This matter is remanded to the contracting officer for consideration of a contract amendment.

II. Facts

In 2008, the Division of Retirement and Benefits determined that its computer system was in need of an upgrade. Gene Chittenden, an analyst programmer with no procurement authority, was the division's project leader for the planned upgrade. Mr. Chittenden contacted IBM, the manufacturer of the division's existing equipment, asking about replacing or upgrading two of the division's servers, and mentioning that the division's regular contact for IBM equipment needs was EMA. On the morning of June 27, 2008, Nelson Ng of IBM replied, noting that EMA was not a "registered [IBM] reseller" but adding, "I can engage the correct

resources to work with them if you would like.”¹ Mr. Chittenden replied to Mr. Ng, copying Sam Lazenby at EMA, outlining his planned upgrade.² EMA was a long-time provider of IBM equipment, software and services to the division under the state’s Western States Contracting Alliance (WSCA) arrangement, a multi-state agreement providing reduced rates for a variety of computer equipment from specified manufacturers and suppliers.³ Mr. Chittenden had worked with EMA’s personnel a number of times over the years. Mr. Lazenby replied to Mr. Chittenden that he would, in consultation with Mr. Ng, work up a quote.⁴

EMA provided Mr. Chittenden with several different pricing and configuration options for the division to consider. On August 27, 2008, Mr. Chittenden informed Mr. Lazenby that the division had decided to upgrade its two existing IBM Model 9406-520 servers to two IBM Model 9409-M50 servers, anticipating a total contract price of \$370,000 for the two servers and associated equipment, or significantly less if purchased off the WSCA contract.⁵ But by the end of September Mr. Chittenden learned that cost of the new servers exceeded the allowable limits for a purchase off of the WSCA contract.⁶ In early October, Mr. Chittenden prepared a spreadsheet showing the anticipated cost for the new servers, based on IBM list pricing, totaling about \$350,000.⁷ The spreadsheets did not include a component for post-installation maintenance and servicing.⁸

By this time, procurement officials in ETS (which manages all major computer system purchases, statewide) were preparing a solicitation, in consultation with Mr. Chittenden. In aid of that effort, at Mr. Chittenden’s request, Mr. Lazenby on October 13 provided Mr. Chittenden with an unpriced equipment list for the planned upgrade.⁹ On October 14, EMA provided more detailed information, indentifying a three-year software maintenance agreement, 24 x 7, as part of the planned upgrade.¹⁰ EMA confirmed from its own records that IBM was providing

¹ Email, N. Ng to G. Chittenden, 6/27/2008 @ 4:58 a.m.

² Email, G. Chittenden to N. Ng, 6/27/2008 @ 9:47 a.m.

³ See generally, In Re Government Computer Sales, Inc., OAH No. 04-005-CON (Department of Administration 2005).

⁴ Email, S. Lazenby to G. Chittenden, 6/27/2008 @ 2:04 a.m.

⁵ Emails, G. Chittenden to S. Lazenby, 8/27/2008 @ 2:53 p.m.; 10/10/2008 @ 5:26 p.m.; S. Lazenby to G. Chittenden, 10/13/2008 @ 4:32 p.m.

⁶ Email, G. Chittenden to S. Lazenby, 9/30/2008 @ 6:06 p.m.

⁷ Emails, G. Chittenden to S. Lazenby, 10/7/2008 @ 12:03 p.m.; 10/10/2008 @ 5:26 p.m.

⁸ *Id.*

⁹ Email, S. Lazenby to G. Chittenden, 10/13/2008 @ 4:32 p.m.

¹⁰ “Detailed List of [Customer] Requirements”, 7/30/2008 (Email, S. Lazenby to G. Chittenden, 10/14/2001 @ 10:32 a.m.) (LPAR worksheets).

software maintenance service for the division's current servers under a three year agreement that had been in effect since late in 2006, and Mr. Lazenby was aware that software maintenance services for those servers, and any replacement servers, would be covered under that existing agreement, which was scheduled to expire at the end of 2009. Mr. Lazenby told Mr. Chittenden, "I do not think you should include a requirement on the ITB for long term service agreement because of your current direct contract with IBM."¹¹ Mr. Chittenden replied, including a copy of a first draft of language he had prepared to be included in the planned solicitation.¹² The draft did not include a component for post-installation maintenance and servicing.¹³

On October 15, Mr. Chittenden again contacted Mr. Lazenby, responding to his earlier email of October 13 with specific information regarding questions or issues Mr. Lazenby's email had raised.¹⁴ In regard to Mr. Lazenby's advice not to include a long term service component, Mr. Chittenden stated: "Due to [Division of] General Services requirements, this won't be possible."¹⁵ Because the division's administrative staff found the multiple service billings difficult to administer, Mr. Chittenden and Mr. Lazenby discussed the possibility of consolidating the various IBM hardware and software maintenance and service agreements, but the matter was dropped without any resolution. Towards the end of October, Mr. Lazenby learned that IBM planned on discontinuing the M50 model at the end of the calendar year, and that the new machines would cost an additional \$40-50,000.

On November 17, Mitch Gross of EMA contacted Mr. Chittenden, noting that the division had a "separate contract directly from IBM that limits our ability to put items under a maintenance contract."¹⁶ Mr. Gross pointed out that the division's existing servers were still under a software maintenance agreement, but that when that lapsed EMA would be unable to provide maintenance.¹⁷

At the division's request, on December 8, 2008, Guy Crockroft, who was ETS's primary contact with the division for the procurement, notified Mr. Lazenby that the solicitation, ITB No.

¹¹ *Id.*

¹² Email, G. Chittenden to S. Lazenby, 10/13/2008 @ 5:41 p.m.

¹³ *Id.*

¹⁴ Email, G. Chittenden to S. Lazenby, 10/15/2008 @ 12:05 p.m.

¹⁵ *Id.*

¹⁶ Email, M. Gross to G. Chittenden, 11/17/2008 @ 9:44 a.m.

¹⁷ *Id.* ("It would be great if we could compete for the maintenance business on these boxes [the 520's], however, the purpose of this email is only to make you aware of the possible lapse in coverage....If you would like me to send a quote for this renewal, please let me know.").

2009-0200-8281, had been posted online.¹⁸ Mr. Lazenby responded, noting that IBM was planning on withdrawing the specified equipment from the market, and asking if the solicitation would be awarded in time to meet IBM's schedule.¹⁹ Mr. Crockroft responded that the anticipated date of contract award should meet the deadline.²⁰

The ITB included 15 pages of largely generic provisions, in fine print, including instructions to bidders, general conditions, and preferences, and standard provisions concerning a variety of incidental matters such as required licenses, the solicitation process, insurance and indemnification, delivery, and manuals. The warranty is described as the standard manufacturer's warranty, with any "maintenance charges, if applicable" beginning after termination of the manufacturer's warranty.²¹ Among these fine print terms were two short paragraphs including provisions specific to this ITB stating, "This Invitation to Bid (ITB) is intended to result in the purchase, installation and three years post installation maintenance of upgrades to the [division's] Servers and related equipment,"²² and describing the "Service Scope of Work" as full service for a three year period, including "all service, repair, parts and maintenance necessary to keep the equipment operating in a manner that meets the manufacturer's published performance specification."²³ Mr. Chittenden had failed to notice this language when he reviewed the ITB before it was issued.

Following these 15 pages of fine print, the ITB included, in normal-size print, a "Scope of Work" provision of the ITB which did not specifically mention any post-installation maintenance services; rather, it stated "the contractor will provide all equipment and services specified within this ITB."²⁴ It described a requirement for a "turn-key" operation, referencing all services necessary for initial installation, configuration and data conversion, but without any reference to long term maintenance.²⁵ The ITB also included, in normal-sized type, an itemized list of required services that does not mention post-installation long term maintenance.²⁶ The bid schedule included line items for the equipment and installation, but did not include a line item

¹⁸ Email, G. Crockroft to S. Lazenby, 12/8/2008 @ 10:46 a.m.

¹⁹ Email, S. Lazenby to G. Crockroft, 12/8/2008 @ 10:59 a.m.

²⁰ Email, G. Crockroft to S. Lazenby, 12/8/2008 @ 11:21 a.m.

²¹ ITB, p. 8 ¶12. Elsewhere, the ITB provides for a contractor's warranty for 90 days. ITB p. 14.

²² ITB at 10.

²³ *Id.*, at 14.

²⁴ *Id.* at 15.

²⁵ *Id.*

²⁶ ITB at 17-21.

for maintenance services.²⁷ An attachment to the ITB describes the service package for the upgraded system as including software maintenance for an i5/OS, with extended coverage 24/7, but does not reference any hardware maintenance requirements.²⁸

When Mr. Lazenby reviewed the ITB, he noticed the fine print references to a long term service maintenance agreement, but he assumed that it was boilerplate that would not be enforced. Mr. Lazenby's assumption was based on (1) his prior communications with Mr. Chittenden; (2) his own experience as a vendor to the state under the WSCA agreement, because maintenance for equipment purchased under the WSCA agreement was handled separately and was not included in the equipment sales agreement; and (3) the lack of a line item for maintenance in the bid schedule. Because it believed that long term maintenance would not be required, EMA's bid price did not include the cost of a long term maintenance service agreement. EMA was the sole bidder. EMA was awarded the contract, which was executed on December 29, 2008.

After installation, the pre-existing IBM extended coverage service agreement continued in effect.²⁹ In late January, 2009, the division had its first service call on the new equipment.³⁰ Mr. Chittenden requested informal quotes from EMA for a new long term hardware maintenance contract to cover the newly delivered units and other equipment, in order to include funding in the division's FY 2010 and FY 2011 budget requests.³¹ Mr. Chittenden was under the impression that the new contract had included software maintenance, but that hardware maintenance on the new servers was covered only by the new equipment standard manufacturer's warranty.³² A year later, on February 17, 2010, the division contacted ETS procurement personnel and requested authority to purchase maintenance services for the next two fiscal years, at a total estimated cost of \$20,000.³³ Mr. Crockroft determined that maintenance services were within the scope of the contract awarded in 2008.³⁴ He informed the division that it should look to EMA to provide any needed maintenance services.³⁵ The division

²⁷ ITB at 19, 20

²⁸ These descriptions are attached to the ITB as provided to the administrative law judge; it is not clear whether this attachment was part of the original ITB.

²⁹ Email, M. Gross to G. Chittenden, 11/17/2008 @ 9:44 a.m.

³⁰ Email, G. Chittenden to S. Lazenby, 1/23/2009 @ 10:34 a.m.

³¹ Email, G. Chittenden to S. Lazenby, 1/23/2009 @ 10:34 a.m.

³² Email, G. Chittenden to S. Lazenby, 1/23/2009 @ 10:34 a.m.

³³ Protest Decision, p. 2.

³⁴ *Id.*

³⁵ *Id.*

approached EMA, which agreed to perform the requested maintenance services if it could obtain authorization from IBM do so, reserving the right to seek compensation by way of a contract claim.³⁶ IBM subsequently authorized EMA to provide the services,³⁷ under a separate agreement with IBM at a cost to EMA of \$11,845.84.³⁸

III. Discussion

A contract is interpreted “to ‘ascertain and give effect to the reasonable intentions of the contracting parties.’”³⁹ The parties’ reasonable intentions are determined by “resort[ing] to the language of the disputed provisions and other provisions, relevant extrinsic evidence, and case law interpreting similar provisions.”⁴⁰

In this case, ETS relies on the clear and unambiguous language of certain provisions of the ITB quoted above, which quite plainly state that a three year service agreement is part of the deal, and which indicate that both hardware and software maintenance services will be required. But although these specific provisions are clear and unambiguous, other provisions of the written contract suggest that post-installation long term maintenance services were not required: as noted above, the Scope of Work provision of the ITB states a requirement for a “turn-key” operation, referencing all services necessary for initial installation, configuration and data conversion, without any reference to long term maintenance,⁴¹ and elsewhere the ITB provides an itemized list of required services that also does not mention post-installation long term maintenance.⁴² Moreover, the bid schedule did not include a line item for maintenance services.⁴³

That the written contract includes specific language calling for the provision of long term maintenance services does not necessarily mean that is what the parties actually intended. As noted above, other provisions of the contract, read in isolation, suggest that no such services were required. While specific contract terms may not be ignored, in ascertaining the parties’

³⁶ Contract Claim, February 24, 2010.

³⁷ *Id.*

³⁸ Testimony of S. Lazenby.

³⁹ Estate of Polushkin v. Maw, 170 P.3d 162, 167 Alaska 2007), quoting W. Pioneer Inc., v. Harbor Enterprises, Inc., 818 P.2d 654, 656 (Alaska 1991). In some cases, interpreting a contract is described as an attempt to give effect to the parties’ reasonable expectations. See, e.g., Southwest Marine v. State, 941 P.2d 166, 173 (Alaska 1997).

⁴⁰ *Id.* See, e.g., Lesnoi, Inc. v. Stratman, 945 P.2d 452, 454 (Alaska 1998).

⁴¹ *Id.*

⁴² ITB at 17-21.

⁴³ ITB at 19, 20

intent the contract terms must be considered in light of the contract as a whole, and of the relevant extrinsic evidence, even if the contract terms at issue are unambiguous.⁴⁴

In this particular case, there is undisputed written extrinsic evidence that EMA had informed the Division of Retirement and Benefits, before the ITB was issued, that it would be unable to provide long-term maintenance services. Moreover, Mr. Chittenden, the division's project manager, was under the impression that the ITB did not include long-term maintenance services. Indeed, Mr. Chittenden asked for additional funding to purchase such services after the contract had been awarded. Mr. Chittenden was the individual responsible for identifying the division's needs. However, ETS was the purchasing agency, and was the agency whose procurement personnel prepared the ITB. The division's status was analogous to that of an intended third-party beneficiary to the contract agreement between ETS and EMA.

In this case, the disparity between the intent of the client agency (the Division of Retirement and Benefits) and the purchasing agency (ETS) was the result of pre-solicitation contacts between Mr. Chittenden and Mr. Lazenby (outside the scope of an existing contractual relationship) and inadequate communication between Mr. Chittenden and ETS procurement staff, which led the issuance of an ITB that did not refer to maintenance services in those portions of the ITB drafted by Mr. Chittenden, and ultimately to EMA's failure to raise the issue before submitting a bid. As this train of events demonstrates, pre-solicitation contacts between the purchasing agency or the client agency and a potential vendor can be problematic. If a potential vendor improperly affects the contents of the solicitation or obtains inside information, the vendor could be precluded from participating in the solicitation. Depending on the circumstances, cancellation of a solicitation or a resulting contract could be appropriate.

In this particular case, EMA's pre-solicitation contacts with Mr. Chittenden did not materially affect the contents of the solicitation. The division's existing equipment was IBM equipment, and there is no indication that EMA's pre-solicitation contacts with the division affected the brand of equipment purchased. While EMA provided information regarding alternative system setups, it was the division, not EMA, that ultimately selected the equipment to be ordered. Moreover, EMA did not wrongfully obtain inside information that gave it a competitive advantage. First, EMA's knowledge that the division had a pre-existing long-term software maintenance service agreement was not inside information that it obtained through

⁴⁴ See, e.g., Estate of Smith v. Spinelli, 216 P.2d 524, 530 (Alaska 2009);

contacts with Mr. Chittenden, but rather through its role as a long-standing provider of equipment under the WSCA agreement. Second, to the extent that EMA might be said to have obtained inside information (*i.e.*, that long term maintenance services would not be required), it did not obtain any competitive advantage because EMA was the sole bidder and in any event the information was erroneous. Most importantly, all of EMA's contacts were the result of contacts initiated by Mr. Chittenden, not by EMA. Under these circumstances, there is no reason to cancel the contract. Nonetheless, the matter should be reviewed by the Chief Procurement Officer for compliance with applicable policies and procedures.

Turning to EMA's claim for additional compensation, it is undisputed that EMA did not include the cost of providing long term maintenance services in its bid, and that it incurred an additional out-of-pocket cost of \$11,845.84 to provide those services. It appears that the maintenance services being provided include both hardware and software maintenance, although neither EMA nor ETS has consistently distinguished those services. Whatever the scope of the services being provided, ETS is under no contractual obligation to compensate EMA for the additional costs of either hardware or software maintenance services not included in its bid price. Nonetheless, there is clear and convincing evidence that ETS is receiving long term maintenance services at no cost. In order to compensate EMA for the services it is providing at no cost to ETS, a contract amendment would be required. A contract amendment increasing the amount paid by \$11,845.84 would compensate EMA for its actual unanticipated cost, without rewarding it (in the form of compensation for lost profits) for its own error in failing to bring the issue to the attention of the purchasing agency before submitting a bid. ETS had authority to provide a contract amendment in that amount,⁴⁵ but there is no indication in the record that it considered doing so.

IV. Conclusion.

EMA is not entitled to any additional payment under the terms of its contract with ETS. The claim for additional compensation under the present contract is therefore denied. However, under the circumstances of this case a contract amendment may be appropriate. This matter is remanded to ETS for consideration of a contract amendment. Because under the facts of this case it would be within the discretion of the contracting officer to grant an amendment or to deny

⁴⁵ Pursuant to 2 AAC 12.485(d), a purchasing agency may make unanticipated amendments to a contract that do not exceed 20% of the contract amount or \$50,000, whichever is less, without formal approval from the chief procurement officer.

one, the contracting officer's decision on that issue shall be final.⁴⁶ A copy of this decision will be provided to the Chief Procurement Officer for review of compliance with applicable policies and procedures.

DATED August 19, 2010.

Signed

Andrew M. Hemenway
Administrative Law Judge

Adoption

On behalf of the Commissioner of Administration, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 15th day of September, 2010.

By: Signed

Signature
Andrew M. Hemenway

Name
Administrative Law Judge

Title

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

⁴⁶ For purposes of this decision, it is assumed that the grant or denial of a request to amend or modify the contract would be within the scope of a contract claim. See, In Re Government Computer Sales, Inc., *supra*, at 6-8.