Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON OCTOBER 7, 2004

DENIED: September 28, 2004

GSBCA 15757

SPRINT COMMUNICATIONS COMPANY, L.P.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

George J. Affee of Sprint Communications Company, L.P., Herndon, VA, and David S. Cohen of Cohen Mohr LLP, Washington, DC, counsel for Appellant.

Robert T. Hoff, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **DeGRAFF**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, Sprint Communications Company, L.P. (appellant or Sprint), has appealed respondent General Services Administration's (respondent or GSA) contracting officer's final decision which denied appellant's claim for entitlement to reimbursement for international mobile termination surcharges pursuant to appellant's contract with respondent for telecommunication services. The parties have submitted the appeal for decision on the written record pursuant to Board Rule 111. We deny the appeal.

Findings of Fact

The General Services Administration issued a Request for Proposals (RFP) in May 1997 for a telecommunications contract known as FTS2001. Appeal File, Exhibits 1-16. On December 18, 1998, appellant was awarded a fixed-price contract for the provision of "worldwide telecommunications services" to the Federal Government. The contract incorporated appellant's proposal. Appeal File, Exhibit 3 at C-3.

Section B.1.1 of the contract states that, with regard to prices for services supplied by the contractor, all prices had to conform to the format and structure defined in the contract, and any service required in the performance of the contract for which a price is not specifically identified in the price table will be considered to be included in the price of another item or provided at no cost to the Government, except as otherwise provided in the contract. Appeal File, Exhibit 2 at B-1.

Section B.1.2 of the contract states that "pricing will be fixed for all specified basic services and for all mandatory services and features. . . . All pricing shall be binding at the time of contract award." Appeal File, Exhibit 2 at B-3.

Section H.29 of the contract specified two surcharges that the Government would allow included in the fixed price as separate line items -- the Federal Universal Service Fund Charge and the Federal Pre-subscribed Interexchange Carrier Charge. Appeal File, Exhibit 8 at H-26-27.

The glossary of the contract contained the following definitions relevant to this appeal:

> On-Net Call - a call between two or more on-net locations.
>
> On-Net Location - a location that is presubscribed to services provided by the FTS2001 contractor(s). On-net locations may be implemented using either dedicated, switched, integrated, or internetworked access.
>
> Location - a physical space, such as a building or a room. A physical point where the FTS2001 contractor delivers service to the user.
>
> Off-Net Call - a call between two or more stations, at least one of which is a presubscribed user of service delivery point (usually a PBX or Centrix) and at least one of which is not.

Appeal File, Exhibit 10.

Under the terms of the contract, the contractor would not provide wireless service to Government users. Appeal File, Exhibit 3 at H-1. However, a subscriber to FTS2001 services could originate a call from a domestic location to a wireless phone, including mobile phones in various foreign countries.

Prior to the award of the FTS2001 contract, various providers of service to mobile phones in foreign countries were assessing a surcharge to initiating callers who placed calls to wireless phones in their jurisdiction. This surcharge is referred to as the international mobile termination surcharge. Both Sprint and the Government were aware of the existence of this surcharge when the contract was negotiated and awarded, and knew that a subscriber to FTS2001 services who initiated a phone call to a mobile phone in a foreign country could be charged this surcharge. Appeal File, Exhibit 80 at ¶16-17; Appeal File, Exhibit 76 at 28, 33. Sprint alleges that it did not include this surcharge in its fixed pricing, because it was

only providing "wireline" services through the Publicly Switched Telephone Network (PSTN) and was not providing wireless service. Sprint also alleges that the Government was aware that Sprint did not include these charges in its fixed pricing. Appeal File, Exhibit 80 at ¶ 9.

From the beginning of contract performance, Government users who subscribed to FT2001 services were able to place calls from their phones to mobile phones in various foreign countries. Sprint, as provider of these services to Government users, was assessed the international mobile termination surcharge. More than two and one-half years after contract award, by letter dated August 27, 2001, Sprint notified GSA that on June 21, 2001, Sprint had begun passing through to its commercial customers the international mobile termination surcharges.[1] The letter described these charges as "per-minute surcharges for voice calls and other international surcharged calls originating in the U.S. and terminating to international mobile phone numbers in certain countries. Sprint incurs these surcharges each time an outbound call on its network terminates to an international mobile phone." Sprint's letter stated further that, beginning with the September 2001 invoice for August usage, Sprint would begin passing through these surcharges to its FTS2001 customers as part of its non-domestic terminating access charges for Circuit Switched Service pursuant to Section B.2.1(e) of the FTS 2001 contract, as these charges were pass-through terminating access charges for Non-Domestic On-Net Terminating Access. Appeal File, Exhibit 17.

Section B.2.1(e), which is relied upon by Sprint, reads as follows:

> (e) Domestic Access or Non-Domestic On-Net Terminating Access. The price of the connection, either circuit-switched or dedicated access, from the domestic point or from a non-domestic on-net terminating point to the transport provider's connecting POP [Point of Prescence] that is designated for the terminating point. Prices for non-domestic on-net terminating access shall be provided on a pass through basis from the foreign carrier.

Appeal File, Exhibit 2 at B-14.

GSA's contracting officer responded to Sprint's letter as a claim pursuant to the Contract Disputes Act and issued a final decision stating that appellant was not entitled to payment for the surcharge. The contracting officer stated that the applicable contract provision was Section B.2.1(h) of the contract, Non-Domestic On-Net to Off-Net Transport, which required appellant to include such surcharges in its fixed price. The final decision noted that contract Section H.29 specified only two charges that the Government would allow included as allowable surcharges (the Federal Universal Service Fund Charge and the

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[1] Sprint did not begin to charge the Government for the surcharge until June 2001 because, as the result of Y2K, most of the Government agencies waited until January 2000 to begin the transition of services to FTS2001. This transition continued through May 2001. Sprint began charging the Government for the surcharge as soon as its billing system development was completed to enable the FTS2001 billing system to charge the fees to Government customers. Affidavit of Mitchell J. Singer (July 11, 2003) ¶ 2.

Federal Pre-subscribed Interexchange Carrier Charge), and the surcharge which appellant sought to charge respondent was not allowed. Appeal File, Exhibit 8 at H-26-27.

Section B.2.1(h), which is cited by respondent, reads as follows:

> (h) Non-domestic On-Net to Off-Net Transport. The price for the connection from the transport provider's connecting POP for the domestic originating point or non-domestic on-net originating location to its non-domestic off-net terminating point, computed on a country/jurisdiction basis. The cost of terminating access at the non-domestic off-net location is included in the transport price.

Appeal File, Exhibit 2 at B-15.

Sprint appealed the contracting officer's decision to this Board, and the parties agreed to submit the appeal for a decision on the written record. After both parties filed record submissions, respondent filed a motion to reopen the record to include the decision in MCI WorldCom Communications, Inc. v. United States, 58 Fed. Cl. 287 (2003). The Board reopened the record and directed the parties to file additional briefs as to the significance of this decision to the issues in the instant appeal.[2]

Discussion

Sprint seeks reimbursement of the international mobile termination surcharge which is incurred when Government subscribers to its services under the FTS2001 contract place calls from domestic locations to international mobile phones. This surcharge is assessed against Sprint, the provider of service to the originating caller, by the provider of services to the mobile phone. Sprint asserts that because it did not provide wireless service under the FTS2001 contract, it did not include these surcharges in its pricing during negotiation of the FTS2001 contract. Sprint therefore seeks reimbursement for these surcharges as a compensable change to its contract.

Sprint knew when it negotiated the contract that, even though it was not providing wireless service, users of the services provided by Sprint under the contract would place calls to international mobile phones and would be assessed surcharges by the providers of the wireless service. The contract directed offerors submitting proposals that pricing would be fixed for all basic services provided and any service required in the performance of the contract for which a price was not specifically identified in the price table would be considered to be included in the price of another item or provided at no cost to the Government, except as otherwise provided in the contract. The contract specified two

[2] MCI WorldCom (MCI) was also awarded an FTS2001 contract for telecommunication services in January 1999, after submitting proposals in response to the same RFP and negotiations with respondent. MCI sought reimbursement of the international mobile termination surcharge in the United States Court of Federal Claims. That court denied MCI's appeal.

surcharges that the Government would allow included in the fixed price as separate line items, but the surcharge in question was not one of these two surcharges.

Sprint makes various assertions for entitlement to reimbursement of this surcharge. In its initial letter to respondent more than two and one-half years after beginning contract performance, Sprint informed respondent that it would begin to bill for and request payment for the surcharge, as it was entitled to pass through the surcharge under a contract provision which refers to passing through "prices for non-domestic on-net terminating access." Respondent's contracting officer, in addition to emphasizing that the contract was a fixed-price contract that only allowed for reimbursement of two surcharges that did not include the surcharge at issue, contended that Section B.2.1(e) of the contract (cited by Sprint) is not applicable to the situation which results in the international mobile termination surcharge because this provision involves non-domestic on-net terminating access. The contracting officer cited another provision of the contract, Section B.2.1(h), which required the contractor to include the cost of terminating access at a non-domestic off-net locations in the transport price of Sprint's service.

Sprint does not prevail in this appeal. The contract is clear and unambiguous that the contract was fixed-price and the Government would allow only two surcharges to be reimbursed as separate line items, the Federal Universal Service Fund Charge and the Federal Pre-subscribed Interexchange Carrier Charge. The price for any service required in the performance of the contract for which a price was not specifically identified in the price table would be considered to be included in the price of another item or provided at no cost to the Government, except as otherwise provided in the contract. The contract did not allow the contractor to be reimbursed for the international mobile termination surcharge as a separate, allowable surcharge.

There is no other contract provision that entitles Sprint to reimbursement of the surcharge. Section B.2.1(e) of the contract, cited by Sprint in its initial letter, applies to "on-net calls." An "on-net call" is defined in the contract as a call between two on-net locations, and an on-net location is a location that is presubscribed to services provided by the FTS2001 contractor. As Sprint was not providing wireless service under its contract, an international mobile phone called by an FTS2001 caller is not an "on-net location." Section B.2.1(e) therefore does not provide a contractual basis for reimbursement of the surcharge.

Section B.2.1(h) of the contract required that Sprint absorb charges that apply to domestic calls originating from on-net locations even if the call is terminated at a non-domestic "off-net location," i.e., one such as a mobile phone that does not subscribe to FTS2001 services. This provision of the contract required the cost of terminating access at the non-domestic off-net location to be included in Sprint's transport price. If Sprint did not include such costs in the transport price, as it alleges it did not, it cannot now be reimbursed for this surcharge in addition to its transport price.

In its record submission in this appeal, Sprint offers a contractual interpretation which differs from that asserted in its initial letter claiming entitlement pursuant to Section B.2.1(e) arising from an "on-net call." Rather, Sprint takes the position that a call originating in a domestic location and terminating on a mobile international phone is neither an on-net nor

an off-net call, basing this interpretation on an underlying interpretation that a mobile phone cannot be a "location" as defined in the contract.

The doctrine of concurrent interpretation, or contemporaneous construction, holds that great, if not controlling, weight should be given to a party's actions before a dispute arises in order to interpret an agreement. Fentress Bradburn Architects, Ltd. v. General Services Administration, GSBCA 15898, 02-2 BCA ¶ 32,011. As Sprint did not interpret the contract to characterize such calls as "neither on-net nor off-net" until respondent denied entitlement, this interpretation could not have been Sprint's interpretation at the time the contract was negotiated. Rather, its initial characterization of the calls as "on-net," though erroneous, appears to have been its interpretation when the contract was negotiated and awarded. It cannot now posit a different interpretation upon which it did not rely when the contract was entered into.[3]

Sprint also asserts that since it did not provide wireless service under the FTS2001 contract, but only "wireline" service through the publicly switched telephone network, the surcharge resulting from terminating calls to non-domestic mobile phones was not priced in its proposal as part of the transport price. According to Sprint, the Government's assertion that the contractor is responsible for these charges adds to the scope of the contract as negotiated and awarded and is a compensable change. This argument also lacks merit. The surcharge at issue results when FTS2001 users avail themselves of FTS2001 services and place calls to non-domestic mobile phones. The fact that Sprint is not providing wireless service to the called party does not avoid the incurrence of, or Sprint's obligation to absorb, the surcharge, as Sprint's obligation to provide service arises when an FTS2001 user originates a call from an "on-net" location.

[3] MCI made a similar argument that a domestic call to an international mobile phone was neither on-net nor off-net, also relying on the definition of "location" in its similarly- worded contract. The court rejected this interpretation. MCI WorldCom, Inc. v. United States, 58 Fed. Cl. at 290.

Decision

The appeal is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

MARTHA H. DeGRAFF
Board Judge