DENIED: September 16, 2016

CBCA 5291

BULLSEYE INTERNATIONAL SDVOB, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Sarah Schauerte of Legal Meets Practical, LLC, Roswell, GA, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

O'ROURKE, Board Judge.

Appellant, Bullseye International SDVOB, Inc. (Bullseye), appealed the denial of its claim to recover merchant transaction fees incurred when the agency used government purchase cards in amounts, and at intervals, that allegedly violated agency regulations. Bullseye claims that such misuse increased its cost of performance and seeks $16,888.22 for reimbursement of those fees, as well as interest, reasonable costs, and attorney fees. We deny the appeal in this non-precedential decision issued under the small claims procedure, 41 U.S.C. § 7106(b) (2012).

Findings of Fact

Bullseye is a service-disabled, veteran-owned small business (SDVOSB). The Department of Veterans Affairs (VA) awarded Bullseye a contract to provide restroom products, which included, among other supplies, paper towels, toilet tissue, and hands-free towel dispensers, at fifty medical centers and clinics within the VISN (Veterans Integrated

Service Network) 15 Region, which includes Kansas, Missouri, and parts of Illinois, Kentucky, and Arkansas. The contract was a requirements contract with a two-year base period, followed by three one-year option periods. The base period began on January 1, 2009. The VA exercised all three option years and the contract expired on December 31, 2013.

The contract authorized two methods of payment for the VA to use in purchasing supplies: electronic funds transfer (EFT) and the government purchase card (GPC). These payment methods were addressed in at least three areas of the contract. Section B.2 stated, "[A]ll payments by the Government to the contractor will be made in accordance with 52.232-34, *Payment by Electronic Funds Transfer–Other than Central Contractor Registration*, or 52.232.36, *Payment by Third Party*." Section C.5 referenced these same Federal Acquisition Regulation (FAR) clauses. The statement of work provided that, "[B]oth purchase orders and Government Purchase Card will be authorized as the method of payment."

Dollar thresholds for single and combined supply purchases were established in section C.2 under FAR clause 52.216-19, *Order Limitations*. This clause provided for a minimum order threshold of $150 under which the agency was not obligated to purchase–nor was Bullseye obligated to furnish–the specified supplies or services. Under the same clause, a maximum order threshold of $100,000 was established for a single item or a combination of items; Bullseye was permitted to either accept or decline orders in excess of that amount. Bullseye was also permitted to accept or decline a series of orders "from the same ordering office within 14 (fourteen) days" that, when combined, exceed the maximum order amount. The contract terms required Bullseye to notify the agency within seven days of receipt if it planned to decline an order under this clause. No additional requirements regarding method of payment, quantities, or frequency of orders were specified in the contract.

The contract made no reference to the micro-purchase threshold, which was $3000 at that time. FAR 13.301 encourages contracting officers to use the GPC for task or delivery orders that exceed $3000, as long as the basic contract authorizes its use. In this case, the basic contract permitted use of the GPC to pay for supply orders, and the VA used it almost exclusively during the five-year performance period. With each GPC transaction, Bullseye incurred a fee. A third-party card vendor charged Bullseye .00924328% of each dollar in merchant fees for each use of the GPC. The contract made no provision for the reimbursement of GPC transaction fees. Prior to award, Bullseye did not seek to price any item differently based upon the payment method used, nor did it request a post-award modification for reimbursement of merchant transaction fees.

On July 31, 2015, Bullseye sent the VA a request for equitable adjustment (REA) for $16,888.22 to recover some of the transaction fees. The VA did not respond to Bullseye's REA or to any of its numerous follow-up communications, so on December 10, 2015, counsel for Bullseye re-sent the REA to the VA and requested a final decision on what was described as a claim within sixty days. The VA again failed to respond to Bullseye's request, so this appeal was filed at the Board on April 19, 2016, based on a deemed denial. Bullseye elected to process its appeal under Board Rule 52 (48 CFR 6101.52 (2015)), the small claims procedure.

Discussion

Appellant, Bullseye, does not dispute that use of the GPC was authorized under the contract. Its complaint is that the agency overused the GPC and, as a result, increased the costs of appellant's performance. Appellant blames the agency's failure to comply with its own internal policies regarding GPC use, as the cause of its increased performance costs. Specifically, Bullseye argues that the VA placed orders which exceeded the $3000 micro-purchase threshold, and that it "split" orders to avoid exceeding the maximum spending threshold. According to Bullseye, the VA purchased $584,453.31 worth of products in excess of the micro-purchase threshold and $1,242,627.59 worth of products that qualified as "split" purchases. As such, Bullseye alleges that each violation resulted in additional fees that could have been avoided if the VA had properly adhered to the GPC system or utilized the alternative EFT payment method included in the contract. Bullseye maintains that had it known that all orders would be placed using GPCs, it would have accounted for GPC transaction fees in its quotation.

The terms of the contract between the VA and Bullseye clearly established both the GPC and EFT as acceptable methods of payment for supplies. They also established a maximum order threshold of $100,000 for a single or combined purchase and made no reference to the micro-purchase threshold. Further, the contract contained no prohibition against "split orders" unless they exceeded $100,000 during any fourteen-day period. The plain meaning of the contract's terms must prevail. *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174, 972 (contract interpretation begins with the contract language's plain meaning). The inquiry ends if the plain language is unambiguous. *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,151 (citing *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002)). In this case, purchasing officials at all VISN Region15 locations consistently chose the GPC, knowing that the express terms of the contract gave them that choice. It was clear at the outset of the contract that either payment method could be used and appellant agreed to those terms. Thus, exclusive use of the GPC was not only a permissible option, but also a foreseeable one. The fact that the appellant did not account for this possibility in its pricing should not deprive the Government of receiving the benefit of its bargain.

Appellant's persistent use of the words, "abuse," "illegal," and "impermissible" seems to suggest that the agency violated its duty of good faith and fair dealing, or abused its discretion. In every contract there is an implied duty of good faith and fair dealing in both performance and enforcement. *Metcalf Construction Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014). This covenant "imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). An act will be found in violation of the implied duty where the conduct is at odds with the original bargain, either by (1) altering the allocation of risks and benefits under the contract or (2) by conflicting with a contract provision. *Metcalf Construction Co.*, 742 F.3d at 991.

Analyzing the facts of this case against the test articulated in *Metcalf*, we find no breach of the duty of good faith and fair dealing. Here, the original bargain between the parties permitted unrestricted use of the GPC, so there can be no conflict between the agency's actions and a contract provision. While such use appropriately presumes that agency officials would comply with GPC policies–and thereby act in good faith when choosing a method of payment–appellant has failed to show that agency officials violated these policies. Relying on presumptions that are not supported by the contract language, or by the actions of either party at the time of contracting, is insufficient to prove entitlement. *American Bank Note Co.,* AGBCA 2004-146-1, 05-1 BCA ¶ 32, 867. Appellant's reliance on the transaction record is also misplaced. This was a requirements contract, the purpose of which was to enable all facilities to place orders as needed. Although the contract contained minimum and maximum ordering limits, appellant did not show that they were violated in offering the transaction record. Appellant has not demonstrated that the VA placed orders outside the terms of the contract. There was no overuse or abuse of the GPC.

In arguing that the VA violated regulations, appellant is confusing with contract provisions, policies which proscribe non-warranted individual GPC card holders from making purchases that exceed the micro-purchase threshold or that constitute split purchases. As noted by the agency and supported by FAR 13.301, when a properly executed contract is established by a warranted contracting officer, purchases are made under the authority and terms of that contract. They are not bound by the same restrictions that govern single purchases made by non-warranted cardholders. The electronic message exchanges submitted by appellant reinforce this point; they reference transactions that were executed after the contract expired, leaving individual card holders without the convenience and safeguards of the former agreement.

Furthermore, the policies identified by appellant consist of instructions to benefit the agency and do not give the contractor rights beyond those contained in the contract. In order to determine whether an agency's violation of a regulation or policy results in a compensable claim for breach of contract, appellant must show that the regulation or policy in question intended to benefit the contractor. *De Matteo Construction Co. v. United States*, 220 Ct. Cl. 579, 593 (1979) (failure of a government contracting agency to abide by a provision of its own regulation is material only if the provision is for the benefit of the contractor and there is a causal nexus between the failure and the asserted financial injury to the contractor). The VA's policies are in place to protect *the agency* against financial commitments made by unauthorized individuals, not to protect the contractor.

Although appellant has the right to raise a claim after the expiration date of the contract, it cannot expect the contracting officer to retroactively modify an expired contract to enhance appellant's financial position after-the-fact. In this case, appellant had two opportunities to better its bargaining position: first, prior to award of the contract, and second, during performance. Yet appellant accepted and performed each order without any objection during the five-year period of performance. This fact, along with the clear language of the contract, precludes the relief sought.

Decision

For the foregoing reasons, appellant's appeal is **DENIED**.

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KATHLEEN J. O'ROURKE
Board Judge