



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 4920 DISMISSED FOR LACK OF JURISDICTION;
CBCA 5093 DENIED: October 13, 2016

CBCA 4920, 5093

ATTENUATION ENVIRONMENTAL COMPANY,

Appellant,

v.

NUCLEAR REGULATORY COMMISSION,

Respondent.

Justin E. Proper of White and Williams LLP, Philadelphia, PA, counsel for Appellant.

Michael L. Norris and Robin A. Baum, Office of the General Counsel, Nuclear Regulatory Commission, Washington, DC, counsel for Respondent.

Before Judges **DANIELS** (Chairman), **VERGILIO**, and **WALTERS**.

WALTERS, Board Judge.

These consolidated appeals consist of two appeals by appellant, Attenuation Environmental Company (AEC), under a contract with respondent, the Nuclear Regulatory Commission (NRC or agency) for environmental consultant services. The first (CBCA 4920) we dismiss for lack of subject matter jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), because it was filed prior to AEC providing the claim certification required by the CDA. The second appeal (CBCA 5093) was from respondent the NRC contracting officer's decision expressly denying appellant's properly certified claim. That claim sought \$652,199 of alleged lost profits in connection with the agency's failure to exercise a renewal option for the second and final option year under the contract. For the reasons explained below, CBCA 5093 is denied.

Findings of Fact

AEC is a small business and sole proprietorship owned by Ms. Doris Minor. Located in the State of Washington, AEC provides environmental consulting services. Joint Comprehensive Statement of Facts (JCSF)¹ ¶ 1.

On September 29, 2010, the NRC awarded to AEC, as a small business set-aside, contract no. NRC-41-10-014. JCSF ¶ 2. The contract, a labor hour indefinite delivery/indefinite quantity (IDIQ) contract, permitted the NRC to issue task orders for “technical assistance in the development of environmental and safety documents for uranium recovery and fuel-cycle facilities decommissioning, licensing, and other NRC technical-support activities.” *Id.* ¶¶ 5, 11, 12. The contract had a guaranteed minimum dollar amount for task orders of \$500,000 and a specified ceiling of \$5,974,592. *Id.* ¶¶ 6, 7.

The contract had an initial term running from September 30, 2010, until September 29, 2013, and contained two one-year renewal options. JCSF ¶ 8. The contract incorporated the option clause set forth in Federal Acquisition Regulation (FAR) 52.217-9 (MAR 2000), 48 CFR 52.217-9 (2009), which provided:

(a) The Government may extend the term of this contract by written notice to the Contractor within 60 days; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 15 days before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 5 years.

JCSF ¶ 9. The contract did not impose any additional restrictions on the NRC’s right to exercise the options. *See* Appeal File, Exhibit 1.

¹ Pursuant to the Board’s pre-hearing order, the parties submitted a joint comprehensive statement of facts, setting out the essential facts of the case chronologically in separate numbered paragraphs. Among them were facts identified as undisputed, which were to be treated as stipulations. These undisputed facts/stipulations and other disputed contentions are cited herein by JCSF paragraph number.

Prior to the expiration of the base contract, the NRC exercised the first one-year renewal option. JCSF ¶ 13. At the time of the exercise of that first renewal option, Mr. Hugo Alcantera served as the NRC contract specialist for the base contract. Transcript at 212. Mr. Alcantera, who had come to the NRC from a similar position with the Department of Defense (DoD), initiated the option exercise, providing the base contract's contracting officer's representative (COR), Ms. Kellee Jamerson, with forms to complete for purposes of option exercise. The forms sought Ms. Jamerson's input regarding AEC's contract performance and the need for AEC's continued services, as well as her recommendation regarding whether the renewal option should be exercised, i.e., whether its exercise was in the best interests of the Government. Appellant's Exhibit A-1; Transcript at 212-17. Those forms, the NRC has explained, were not standard NRC forms, but rather had been adapted by Mr. Alcantera from forms he had used while with the DoD. Transcript at 419-20.

Ms. Claudia Melgar later replaced Mr. Alcantera as contract specialist for the base contract. Transcript at 213. Ms. Melgar also possesses a limited warrant as a contracting officer (CO). Ms. Melgar was supervised by Ms. Dominique Malone, a senior CO with the NRC. *Id.* at 268-69, 388-89. Under the base contract, NRC issued three task orders to AEC – task orders 1, 2, and 3. JCSF ¶ 14. A separate COR was assigned for each of those task orders. In addition to her duties as base contract COR, Ms. Jamerson served as the COR for task order 3. Ms. Johari Moore served as COR for task order 1, and Mr. James Park served as COR for task order 2. The facts relating to each of the three task orders are described below.

As will be detailed below, the agency exercised the first, but not the second, option. The contract did not prohibit a task order performance period from extending beyond the contract term. It is undisputed that the total amount paid to AEC by the NRC for its work under the three task orders, \$1,569,376.49, exceeded the \$500,000 minimum specified under the base contract. Appellant's Exhibit A-8 at 1.

Task Order 1

In April 2011, the NRC issued task order 1 to AEC. JCSF ¶ 15. Task order 1 required AEC to provide technical assistance for the development of a supplemental environmental impact statement (SEIS) for the Ross In-Situ Recovery Project (Ross Project). *Id.* ¶ 16. As modified to accommodate the NRC's exercise of a hearing support optional task, the period of performance (POP) for task order 1 was extended through November 30, 2014. Appeal File, Exhibit 3. Under task order 1, AEC drafted a SEIS reviewing a license application of an applicant that was proposing to recover uranium at the Ross Project site in Wyoming. *Id.* ¶ 18. To complete this review, AEC prepared multiple SEIS drafts, addressed numerous

public comments, and released a final SEIS to the public. *Id.* ¶ 19. In the process, the work needed for the Ross Project expanded. Transcript at 71-72. More particularly, concerns developed over the Ross Project's potential implications with respect to historic property and compliance with applicable statutes. JCSF ¶ 20. The NRC directed AEC to develop a programmatic agreement, which outlined a plan that the NRC was to implement in phases once the license applicant began its uranium recovery, in order for the NRC to assure statutory compliance. Transcript at 71-75. Following the development of the programmatic agreement, Ms. Moore, the COR for task order 1, consulted with AEC about what tasks AEC could perform as part of the implementation of the Programmatic Agreement. Appeal File, Exhibit 12. At COR Moore's request, AEC provided the NRC with an estimate of the hours AEC would take to complete implementation as well as a cost proposal for the implementation work. *Id.* After several requested revisions of the AEC proposal, the NRC accepted only a small portion of AEC's final proposal. Appeal File, Exhibits 14, 15, 23, 27. The contract was bilaterally modified to incorporate this small portion of the implementation work, and the NRC paid AEC for all the time it had spent developing and revising its proposal for all the programmatic agreement implementation work. Appeal File, Exhibit 27; Transcript at 95-96.

AEC had believed that it would receive an extension of task order 1's POP because it had developed and revised proposals for programmatic agreement implementation that contemplated work extending beyond Task order 1's POP expiration date. Transcript at 85-86. Nevertheless, the NRC did not issue an extension, nor, as noted above, did it direct AEC to implement all aspects of the programmatic agreement. Appeal File, Exhibit 23. Accordingly, the task order 1 POP expired on November 30, 2014. JCSF ¶ 52.

Task Order 2

In July 2012, the NRC issued task order 2, for support of the Smith Ranch Project in Wyoming. JCSF ¶ 54. Task order 2 had a single period of performance, from July 11, 2012, through November 30, 2014, and did not contain option periods which the NRC unilaterally could exercise to further extend that period. Task order 2 required AEC to draft and revise an environmental assessment for a license-renewal application of an applicant that was seeking to increase its processing flow rates and expand its uranium recovery sites at the Smith Ranch Project. *Id.* ¶ 56. To complete this assessment, AEC visited the Smith Ranch, met with local regulatory agencies and a public-interest group, and developed a preliminary draft of the Smith Ranch environmental assessment. *Id.* ¶¶ 55-59. Because the applicant delayed in responding to the NRC's requests for additional information (RAIs), AEC was unable to proceed with performance of its remaining work under task order 2. *Id.* ¶ 64.

For its work relating to the Smith Ranch Project, AEC worked closely with Mr. James Park, the COR for task order 2. *See* Transcript at 99-108. In July 2014, COR Park contacted CO Melgar and COR Jamerson and inquired about the possibility of extending task order 2's POP, in light of the license-renewal applicant's extended delay in responding to the NRC's RAIs. JCSF ¶ 170. To extend the POP under that task order, he was advised that a Justification of Other than Full and Open Competition (JOFOC) would be needed, in order to justify continued use of AEC on a sole-source basis. Transcript at 101-02. On August 28, 2014, COR Park submitted a JOFOC to CO Malone for that purpose. JCSF ¶ 174. COR Park sought to modify task order 2's POP end date from November 2014 to March 2016. *Id.* ¶ 171. In his JOFOC, COR Park opined that having to re-award the remaining work under task order 2 to another firm would substantially and unreasonably delay the applicant's ability to complete the proposed uranium recovery by up to one year. *Id.* ¶¶ 176-77.

COR Park explained in an email message to AEC dated August 28, 2014, that, although he was hoping to have the applicant's responses within a few months, he did not expect to have all of the necessary information by the end of 2014. Appeal File, Exhibit 18; Transcript at 101-02. With the task order 2 POP set to expire on November 30, 2014, COR Park informed AEC that he was filling out paperwork for the contracts office in an effort to extend task order 2's POP. Appeal File, Exhibit 18.

In her response email message to COR Park, also dated August 28, 2014, Ms. Minor ventured that the contract contained a second renewal option period and that it was that extension that was "probably what's in the pipeline, at least in part, as the [term] of the Contract is currently only through September 29, 2014." *Id.* ¶ 179. There was no response to her from COR Park with regard to her supposition. Since he was not the COR for the contract, but was focused strictly on administering AEC's work under task order 2, he would not have been involved directly in the exercise of the renewal option for the contract.

COR Park, by email message dated August 29, 2014, asked COR Jamerson, who was COR for the contract: "Is Doris correct as to [exercise of the renewal option] being in the pipeline?" *Id.* ¶ 180. On September 16, 2014, COR Jamerson confirmed to COR Park that the exercise of the NRC's renewal option on the contract "was in the pipeline." Nevertheless, COR Jamerson further advised COR Park that she had "a brief discussion with [COR Moore] regarding the [AEC] contract." *Id.* ¶ 181. In that regard, COR Jamerson's email message continued: "I guess I (we) need to discuss internally with Lydia [Chang, COR Jamerson's supervisor] whether it would be beneficial to exercise the option, given all of the issues we have had with task order 1 [issues regarding perceived AEC performance shortcomings she had discussed with COR Moore] and the uncertainty of timing of work (I

guess that's a good way to put it ☺)[²] for task orders 2 and 3.” *Id.* This email exchange between COR Park and COR Jamerson was strictly internal to the NRC and was not shared with AEC. (There is no record that this email exchange was shared with AEC at any time prior to its initiation of the appeals before the Board. We presume that AEC learned of this exchange through prehearing document discovery, which accounts for AEC's inclusion of the email messages as part of the appeal file supplement – *see* Appeal File, Exhibit 62.)

On September 26, 2014, the NRC rejected COR Park's JOFOC. JCSF ¶ 182; Appeal File, Exhibit 64; Transcript at 430. CO Malone testified that it was rejected by the NRC because there likely would be a time break between the upcoming task order 2 POP expiration and when the remaining work under the task order would be available for AEC to perform. Transcript at 420-21. CO Malone explained that, under the circumstances, she did not feel that the work needed to be “sole sourced” to AEC. *Id.* at 421. On November 30, 2014, the task order 2 POP expired. JCSF ¶ 63.

COR Park – who was not present during the hearing of the appeals – testified at his pre-hearing deposition that AEC consistently met all of task order 2's requirements.³ JCSF ¶ 185. COR Park further testified during that deposition that he had no difficulties working with AEC and would recommend AEC for use on future projects. *Id.* ¶ 186.

Task Order 3

Task order 3 was issued in August 2012 for AEC's environmental support on the Ludeman Project in Wyoming. JCSF ¶ 65. As noted above, COR Jamerson served as the COR for task order 3. Transcript at 211. Task order 3 had a single period of performance, from August 3, 2013, through January 31, 2015, and like task order 2 had no option periods which the NRC unilaterally could exercise to further extend the task order's POP.

Under task order 3, AEC was to draft and revise an environmental statement of a license amendment application submitted for the construction and operation of an additional uranium site in Wyoming. JCSF ¶ 67. As of September 2014, AEC had visited the Ludeman Project site, met with local regulatory agencies and public interest groups, prepared extensive RAIs for the NRC to send to the applicant, and provided the NRC with an evaluation of the applicant's responses to the RAIs. *Id.* ¶¶ 70-71; Transcript at 110-14.

² The emoticon shown above was included in the email message.

³ Mr. Park's deposition transcript is part of the record. Transcript at 445.

According to COR Jamerson, AEC did not perform any work on task order 3 after May 2014. Transcript at 242; JCSF ¶ 200. In December 2014, the NRC sent additional RAIs to the Ludeman Project applicant, which the applicant did not answer until June 2015. JCSF ¶¶ 201-02; Transcript at 241, 243. Months before then, on January 31, 2015, the task order 3 POP expired. JCSF ¶ 136; Transcript at 124.

It was stipulated that COR Jamerson had no issues with AEC's performance of task order 3. JCSF ¶ 207. However, during her hearing testimony, COR Jamerson also explained that the timing of any further work AEC could perform under both task orders 2 and 3 was uncertain, in light of the delay encountered in obtaining applicant responses to the NRC RAIs. Transcript at 230.

Financial Issues & Expiration of the Contract Term

In early 2014, a billing issue arose under task order 1. JCSF ¶ 75. The NRC had established hourly ceilings for individual subtasks under that task order. Appeal File, Exhibits 2, 10. During 2011 and 2012, AEC expended hours beyond those individual subtask ceilings for which it could not bill. JCSF ¶¶ 76-77; Transcript at 122-23. As a result, AEC was experiencing financial difficulties. Transcript at 122-23. Following a discussion between AEC and CO Melgar, the parties entered into a bilateral modification of task order 1, which removed the individual subtask ceilings while maintaining the task order's total overall labor hours ceiling. JCSF ¶ 83. Subsequently, CO Melgar advised AEC to submit a retroactive invoice for the unbilled hours. *Id.* ¶ 84. On April 29, 2014, AEC submitted a retroactive invoice totaling \$83,773.45 for the unbilled hours it had incurred during 2011 and 2012. *Id.* ¶ 85.

On June 18, 2014, CO Malone issued a final decision rejecting AEC's invoice. JCSF ¶ 86. In that decision, CO Malone stated that she had treated the retroactive invoice as a formal claim under the Contract Disputes Act (CDA), because, in her view, it was not a routine invoice. Appeal File, Exhibit 13; Appellant's Exhibit A-5. She rejected the claim by final decision. She explained at the Board hearing that she did so principally because she felt AEC had not adequately documented or explained the unbilled hours it was claiming. Transcript at 502-08. Her final decision also noted that, per the contract, AEC should have sought and obtained advance approval from the contracting officer before exceeding the subtask hourly ceilings. Having not obtained such advance approval, even informally, CO Malone determined AEC had no entitlement to recover the costs incurred beyond those subtask ceilings. Appeal File, Exhibit 13; Appellant's Exhibit A-5.

On September 16, 2014, AEC appealed the NRC's final decision to the Board. JCSF ¶ 91. Because the NRC's concerns regarding adequate documentation and explanation as to

the claimed unbilled hours were reasonably satisfied by the exchange of additional information as part of the discovery process in connection with the Board appeal, CO Malone testified, the parties were able to settle the claim for \$76,076.97 on November 19, 2014. Transcript at 503-08; JCSF ¶ 94. The appeal was dismissed, upon motion by AEC, on November 26, 2014. *Attenuation Environmental Co. V. Nuclear Regulatory Commission*, CBCA 4073 (Nov. 26, 2014).

A second dispute with AEC arose during the late summer of 2014. The dispute involved the NRC's preparation of two expert witnesses, employees of AEC who were needed for an upcoming agency proceeding in connection with task order 1. Transcript at 438-41. On September 5, 2014, the attorney who ultimately represented AEC in the Board appeal on the retroactive billing claim sent a letter to the NRC "objecting to the NRC's direct supervision of [AEC's] employees as a violation of the personal services prohibition under [the] FAR and failure to make timely payment of [AEC's] July 2014 invoice." JCSF ¶ 99. In that letter, the attorney took the position that the NRC acted unlawfully when it "communicated directly with both employees, issued them direct orders, mandated their work hours and oversaw all aspects of their work." *Id.* ¶ 100. AEC's Ms. Minor explained at the Board hearing that she had expressed particular concern to the attorney that the expert witnesses would be directed to work in excess of forty hours per week, and that AEC would not be reimbursed for any overtime premiums it might incur, since the contract specifically prohibited AEC from paying overtime premiums. *Id.* ¶¶ 102, 104; Transcript at 196-97. By email message of September 8, 2014, to CO Melgar and COR Moore, with a copy to CO Malone, Ms. Minor, as a follow-up to AEC's attorney's letter of September 5, sought a meeting in order to clarify AEC's role as employer with respect to the expert witnesses. Appellant's Exhibit A-3.

On September 12, 2014, AEC informed the NRC that it would not permit the expert witnesses to board an airplane for the NRC's proceeding until the overtime funding issue was resolved. JCSF ¶ 107; Transcript at 440. That same day, CO Melgar called AEC and advised Ms. Minor that money would be appropriated for the expert witnesses. Transcript at 345-46. CO Melgar testified that the NRC also purchased a BlackBerry cellular telephone for CO Melgar's use and that she was on standby with that cellular telephone, so that the NRC could authorize reimbursement for any overtime premiums AEC might incur for the witnesses. *Id.* at 344-45. CO Malone, by letter dated September 22, 2014, entitled "Expert Witness Preparation Issues and Request for Reasonable Assurance," sought AEC's assurance that the witnesses would appear and confirmed that payment for any overtime premiums would be made. Appeal File, Exhibit 28. AEC, by letter of September 23, 2014, acknowledged the CO's confirmation and assured her that the witnesses would be provided for the hearing. *Id.*, Exhibit 29. Thereafter, according to the NRC, the hearing took place "without incident and without overtime." Respondent's Post-Hearing Brief at 18.

The NRC was troubled by AEC's threat to withhold participation of the expert witnesses. Transcript at 344-45, 437. During the Board's hearing of the present appeals, it was explained that this threat had caused great consternation within the NRC's Office of General Counsel. *Id.* at 442. CO Malone testified that this was just one of AEC's several performance issues with regard to task order 1 and that this incident would certainly explain the "lack of motivation" within the NRC as to exercising the second renewal option under AEC's contract. *Id.* at 437, 442-43, 457-58, 490-92. The NRC was also confused by the letter from AEC's attorney, because AEC and the NRC had earlier agreed in August 2014 that Ms. Minor would not have a role in witness preparation and that direct contact by the agency's attorneys with the expert witnesses would be permitted. *Id.* at 438-39; Appeal File, Exhibit 28.

As noted above, the NRC had exercised its first renewal option, extending the term of the contract by an additional year. Fifteen days before the extended contract term was set to expire, however, the NRC still had not provided AEC with preliminary written notice of the NRC's intent to exercise the second option period, as would have been required by FAR 52.217-9 if the agency had wished to extend the contract for another year, and on September 29, 2014, the contract term expired. JCSF ¶¶ 131, 134. By the same token, the task orders did not expire, since all three task orders had POP expiration dates that extended beyond the contract term – two on November 30, 2014, and the third on January 30, 2015. *Id.* ¶¶ 134-36.

On October 29, 2014, one month after contract expiration, AEC's Ms. Minor contacted CO Melgar via email, inquiring about the status of the NRC's exercise of the renewal option for the contract's second option year. JCSF ¶ 138. CO Melgar responded, stating that the NRC did not intend to exercise its option for the contract's final option period. *Id.* ¶ 140. CO Melgar went on to indicate that the three outstanding task orders would remain active, because the task orders had been issued before the contract expired and had POPs that extended beyond the contract expiration date. *Id.* CO Melgar, however, did not articulate why the NRC had not exercised the final renewal option. *Id.* ¶ 141.

Performance of Work Following Contract Expiration

Prior to the expiration of the task order 1 POP, the NRC issued a sources sought notice on FedBizOpps.gov. JCSF ¶ 148. The notice invited interested parties to submit information regarding their ability to implement the programmatic agreement for the Ross Project. *Id.* AEC responded to the sources sought notice as an interested party, but it did not provide any information regarding its capabilities. *Id.* ¶ 150. AEC contends that the notice described "the very archeological work" it would have completed under task order 1, had the second renewal option for the contract been exercised, had the task order 1 POP been

extended, and had task order 1 been modified to incorporate all of the programmatic agreement implementation work AEC had proposed to perform. *Id.* ¶ 152.

As part of her market research, CO Melgar sent Niwot Archeological Consultants (Niwot), AEC's archeological consultant subcontractor on the Ross Project, an email message containing a link to the sources sought notice. JCSF ¶ 151. Niwot, however, did not respond to either CO Melgar's email message or the sources sought notice. *Id.* ¶ 153.

Following the issuance of the Sources Sought Notice, the NRC's Jean Trefethen took over management of the Ross Project. JCSF ¶ 155. Initially, Ms. Trefethen performed the Programmatic Agreement implementation work herself. *Id.* ¶ 156. On March 20, 2015, the NRC solicited proposals under the NRC's existing enterprise-wide contract for technical assistance (EWC) – another existing NRC IDIQ-type contract vehicle with multiple contractor awardees – to procure technical assistance support for the implementation of the Programmatic Agreement. *Id.* ¶ 158. Among the EWC contractors that submitted proposals for such work was Numark Associates, Inc. (Numark). The NRC's program office found Numark's implementation proposal to be technically acceptable and awarded a task order to Numark for that work, under the EWC. Transcript at 324; Appellant's Exhibit A-13. Numark's total budget for the required work on the Ross Project is \$628,832. JCSF ¶ 163. AEC contends that it could have completed the work the NRC assigned to Numark for \$227,874.20, the amount of its final proposal for the programmatic agreement implementation. *Id.*

In April 2015, the applicant for the Smith Ranch Project, the subject of AEC's task order 2, finally responded to the NRC's RAIs. JCSF ¶ 190. As of the hearing on the appeals, in June 2016, the work on the Smith Ranch Project was still ongoing and was being performed in-house by NRC staff personnel. *Id.* ¶ 191.

In June 2015, the applicant for the Ludeman Project, the subject of AEC's task order 3, responded to the NRC's additional RAIs (which had been issued after expiration of the AEC contract, in December 2014). JCSF ¶ 202. On September 29, 2015, the NRC issued a task order for work on the Ludeman Project to the Southwest Research Institute, Inc. Center for Nuclear Waste Regulatory Analysis (the Center). *Id.* ¶ 203. As with Numark's task order, the task order for the Center was issued under the EWC. The task order required the Center to provide technical assistance for the development of an environmental assessment. *Id.* AEC contends that the scope of work for the Center's task order was "almost verbatim" AEC's scope of work under task order 3 of its contract, and that the Center had to duplicate much of the work AEC had already completed. Transcript at 115. COR Jamerson, during her testimony, acknowledged that much of the Center's work would

have fallen within the scope of work of task order 3 under the AEC contract. *Id.* at 260-61. The Center's total budget for this work is \$665,021.71. JCSF ¶ 211.

AEC's Claim and Appeals

On May 18, 2015, AEC filed a claim with the NRC for CO decision. Appeal File, Exhibit 39. Though the claim as initially submitted was designated a "certified claim," by inadvertence, the claim certification signed by AEC's Ms. Minor that was to accompany the claim was not forwarded to the CO with the claim when it was submitted. Appellant's Exhibit A-8 at 1. In the claim, AEC alleged that, prior to the expiration of the contract's first renewal option period, the NRC assured AEC that the second renewal option would be exercised, that AEC continued performing work on the contract after the expiration of the first option period, and that the NRC thus was estopped from denying that it exercised the second contract renewal option. *Id.* AEC also claimed, as an alternative theory, that the NRC's decision not to exercise the second contract renewal option constituted "bad faith and/or an abuse of discretion." *Id.* AEC sought to recover \$652,199, plus legal fees and interest, for AEC's alleged lost profits resulting from the NRC's failure to exercise the second renewal option. *Id.*⁴

An NRC CO failed to render a decision on AEC's claim within sixty days of its submission, and counsel for AEC, by letter dated August 6, 2015, filed an appeal with this Board (docketed as CBCA 4920) based on a "deemed denial" of the claim. After that appeal was filed, the previously missing certification was located and sent on to the CO. By letter dated November 24, 2015, NRC CO Malone issued a final decision denying AEC's claim in its entirety. Appellant's Exhibit A-8. In the decision, CO Malone asserted that NRC personnel did not provide AEC with any assurances that the second one-year renewal option would be exercised and rejected the contention that the NRC had acted in bad faith in not exercising the option. *Id.* at 2. CO Malone also advised that the option was not exercised "primarily because the Government no longer had a need for the services under the contract beyond what was already obligated under the task orders." *Id.* at 2-3. On December 17,

⁴ At the hearing, AEC furnished the testimony of a financial expert, who presented a range of potential damages, from a low of \$385,351 to a high of \$578,027 in lost profits. The amount to be awarded, the expert suggested, would depend on the extent to which additional task order work growth/escalation might be assumed. (The lower figure assumes no escalation, while the higher figure assumes escalation at fifty percent.) Transcript at 525-38; Appellant's Exhibit A-29. The NRC rejects all such figures as speculative and without foundation. *See* Government's Post-Hearing Brief at 57-58.

2015, AEC filed an appeal with the Board from that denial (CBCA 5093), and that appeal was consolidated with the earlier appeal.

Discussion

As a preliminary matter, because the claim as initially submitted exceeded \$100,000 in amount and was not accompanied by the claim certification required by the CDA, it did not qualify as a claim under the Act. The Board thus lacks subject matter jurisdiction as to the initial appeal, CBCA 4920, and that appeal is dismissed for lack of jurisdiction. *See Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5246, 16-1 BCA ¶ 36,478, at 177,740 (referencing 41 U.S.C. § 7103(b)).

Turning to CBCA 5093, we note that AEC puts forth alternative arguments in support of its claim to lost profits. First, it argues that, in light of purported NRC assurances to AEC regarding option exercise and AEC's reasonable reliance on such assurances to its detriment, the NRC is equitably estopped from denying that it exercised its second and final contract renewal option under AEC's contract. Alternatively, AEC urges that the NRC's failure to exercise that option constituted a bad faith breach of contract and was the result of the agency's improper retaliation for the previous Board appeal relating to its claim for retroactive compensation for hours that AEC had worked but could not bill because of subtask hourly ceilings under task order 1. AEC also argues that the failure to exercise that option was a bad faith breach in retaliation for the complaint voiced by AEC's attorney concerning the NRC's allegedly improper direct supervision of the expert witnesses AEC furnished for an NRC proceeding and for AEC's subsequent threat to withhold the participation of those expert witnesses until the overtime compensation issue was resolved.⁵ In addition, AEC posits that, because the NRC failed to adhere to the FAR procedures for option exercise, as set forth in FAR 17.207, and to its own guidance for CORs with regard to option exercise, as set forth in a document entitled "Acquisition Guidebook for Contracting Officer's Representatives" (COR Guidebook), the agency's failure to perform an analysis of the need for exercising the option under AEC's contract amounted, "as a matter of law," to arbitrary and capricious action constituting an abuse of agency discretion and a breach of the agency's obligations of good faith and fair dealing.

AEC is wrong on all counts, as we explain below. But its claim must fail for a more fundamental reason. The contract at issue was an IDIQ contract. The United States Court of Appeals for the Federal Circuit has observed: "[U]nder an IDIQ contract, the government

⁵ As of its final reply brief, AEC's bad faith arguments appear to have been abandoned in favor of an assertion that the NRC's failure to exercise the option represented a violation of the duty of good faith and fair dealing inherent in its contract with AEC.

is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase its legal obligation under the contract is satisfied [and the government] is free to purchase additional supplies or services from any other source it chooses.” *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001); *see also Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002); *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,345. The guaranteed minimum under this contract was \$500,000. As stated above, the NRC paid AEC a total of \$1,569,376.49 for the work it did under the three task orders. The payments received obviously exceeded the \$500,000 minimum. Consequently, the NRC’s legal obligation to AEC under the contract was satisfied, and it was free not to exercise the option to extend the contract term and to purchase services from other contractors. *Travel Centre v. Barram*, 236 F.3d at 1319.

Under these circumstances, AEC could have no reasonable expectations beyond the guaranteed minimum and, as such, its theories of estoppel, bad faith, lack of good faith, and/or an abuse of discretion on the part of the agency are to no avail. Though further analysis is unnecessary to dispose of the appeal, because the parties have expended so much effort in discussing the theories advanced by AEC, we discuss them briefly as well.

Estoppel

In terms of estoppel, AEC’s post-hearing brief clarifies that it is relying on the doctrine of equitable estoppel. To prevail against the Government under a theory of equitable estoppel, an appellant must demonstrate some form of Government “affirmative misconduct.” *California Business Telephones v. Department of Agriculture*, CBCA 135, 07-1 BCA ¶ 33,553, at 166,172, (citing *Rumsfeld v. United Technologies, Inc.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003); *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000)). The contract permitted the NRC unilaterally to exercise the option in question. Here, the NRC took no action whatsoever and merely allowed the option to lapse. This hardly can be considered “affirmative misconduct.” Contrary to AEC’s allegations, there was no evidence of assurances being given that the option would be exercised. Transcript at 249-50, 348, 508. AEC was compensated fully for all work it had performed and thus could not demonstrate that it reasonably relied upon such purported assurances to its detriment, were such assurances provided. Moreover, even if the NRC had exercised the option, the agency would have had no obligation to alter or extend the POP of any task order or to issue new task orders. Under these circumstances, AEC has not made its case for invoking equitable estoppel.

Bad Faith Breach of Contract

The law regarding the Government's non-exercise of contract renewal options is well established: "Generally, such options are made for the benefit of the Government and absent express limitations in the contract, contractors have no recourse for the Government's failure to exercise an option." *Brenda R. Ronhaar*, AGBCA 98-147-1, 00-1 BCA ¶ 30,591, at 151,074 (1999) (citing *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988)); *see also G2G, LLC v. Department of Commerce*, CBCA 4996, 16-1 BCA ¶ 36,266, at 176,916, motion for reconsideration denied, 16-1 BCA ¶ 36,346 (an option clause does not obligate the Government to exercise an option and the Government's discretion as to option exercise is "nearly complete"). Under FAR 52.217-9, the option provision incorporated into the contract, the Government had a unilateral right to choose whether to exercise the renewal options. Nothing in that provision limits the Government's discretion regarding option exercise or obligates it to exercise an option.⁶

AEC seems to acknowledge that the Government's non-exercise of an option "can provide a vehicle for relief *only* if the contractor proves that the decision was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion." *G2G, LLC*, 16-1 BCA at 176,916 (emphasis added); *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770, at 167,161; *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062; *Monarch Enterprises, Inc.*, ASBCA 31375, 86-3 BCA ¶ 19,227, at 97,224. Proving that the Government acted in bad faith is a very difficult task, however, since government officials are presumed to act in good faith. *ALK Services, Inc. v. Department of Veterans Affairs*, CBCA 1789, et al., 13 BCA ¶ 35,260, at 173,075; *see also Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 44, et al., 08-1 BCA ¶ 33,854, at 167,584; *Vehicle Maintenance Services v. General Services Administration*, GSBCA 11663, 94-2 BCA ¶ 26,893, at 133,881. To overcome this presumption, a contractor must present evidence that is "almost irrefragable" (sometimes spoken of as "well nigh irrefragable proof"). *ALK Services, Inc.*, 13 BCA at 173,075 (quoting *Galen Medical Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004)). "Almost irrefragable proof" amounts to clear and convincing evidence and has been equated with evidence of "some specific intent to injure" the contractor. *Id.*; *Sword & Shield Enterprise Security, Inc. v. General Services Administration*, CBCA 2118, 12-1 BCA ¶ 34,922, at 171,725 (2011) (quoting *AFR & Associates, Inc. v. Department of Housing & Urban Development*, CBCA

⁶ The option provision under FAR 52.217-9, in relevant part, reads: "The Government *may* extend the term of this contract The preliminary notice *does not commit the Government* to an extension *If* the Government exercises this option, the extended contract shall be considered to include this option clause." Appeal File, Exhibit 1 at 31 (emphasis added).

946, 09-2 BCA ¶ 34,226, at 169,169). This Board has observed that an agency's failure to exercise an option is not inherently an act of bad faith. *ALK Services, Inc.*, 13 BCA at 173,076.

Attempting to demonstrate agency bad faith, AEC urges that the NRC failure to exercise the option was in retaliation for disputes AEC had with the agency during the summer and fall of 2014, one of which resulted in a prior Board appeal. In this regard, AEC alleges that, with the contract set to expire on September 29, 2014, the timing of the disputes "strongly suggests that the NRC's decision was motivated by bad-faith as retaliation against [AEC] for pursuing monies legitimately owed to it." Amended Complaint ¶ 62. The record does not support this contention. The first dispute, regarding the retroactive payments for services and AEC's earlier appeal to the Board, was resolved amicably, and the NRC agreed to pay AEC \$76,076.97, which represented the great majority of the \$83,773.45 AEC had been seeking. JCSF ¶ 94. More significantly, COR Jamerson testified that she was not even aware of the retroactive payment dispute (which involved unbilled work on task order 1, a task order being managed by another COR), and there was no evidence that it had any effect on her actions or lack of action regarding initiation of the option exercise process. Transcript at 248-49. AEC acknowledges that it was COR Jamerson's failure to initiate that process that was crucial. *See* Appellant's Reply Brief at 10.

The second dispute, involving AEC's attorney accusing the NRC of violating the FAR in terms of the prohibition against personal services contracts – in connection with its handling of AEC's employees who were to serve as expert witnesses – certainly reduced the level of motivation of NRC employees affirmatively to push for option exercise. The agency's motivation was reduced yet further when the attorney's letter was followed by AEC's threat to withhold participation of the witnesses in the upcoming proceeding – a threat that provoked concern within the NRC's Office of General Counsel ("the lawyers in our legal office were up in arms"), which had been counting on the availability of the expert witnesses for that proceeding. Transcript at 437-442, 481-82, 490-92. This lack of motivation, however, is hardly the equivalent of "almost irrefragable proof" that the NRC acted in bad faith. *See IMS Engineers-Architects, P.C.*, ASBCA 53471, 06-1 BCA ¶ 33,231, at 164,674 (citing *Empire Energy Management Systems, Inc.*, ASBCA 46741, 03-1 BCA ¶ 32,079, at 158,553 (2002)) (bad faith is not shown by demonstrating that agency personnel did not like dealing with a contractor).

AEC also makes much of the NRC's attempt to solicit Niwot, AEC's former subcontractor, to perform programmatic agreement implementation work that AEC might have done under task order 1, had its final option period been exercised and had task order 1 been modified to include AEC's performance of all such work. The NRC's email message to Niwot, however, only contained a link to a sources sought notice, a notice that had been publicly posted on FedBizOpps. JCSF ¶ 151. Furthermore, an agency is not required to

exclude a former subcontractor from a sources sought notice, simply because that firm may have gained relevant knowledge and experience while working on a past contract. *Data Based Decisions, Inc.*, B-232663 (Jan. 26, 1989). It was not inappropriate – and certainly not bad faith action – for the NRC to explore various avenues to satisfy its needs before the period to exercise the option here had lapsed.

Purported “Arbitrary and Capricious” Action

When determining whether government action is so arbitrary and capricious as to constitute an abuse of discretion, this Board has balanced the following four factors: “(1) evidence of subjective bad faith on the part of the government official; (2) whether there is a reasonable, contract-related basis for the official’s decision; (3) the amount of discretion given to the official;⁷ and (4) whether the official violated an applicable statute or regulation.” *ALK Services, Inc.*, 13 BCA at 173,079 (citing *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999)).

AEC has failed to establish any of the four factors. Regarding “evidence of subjective bad faith,” as detailed above, there is no evidence showing that the NRC acted in bad faith or with a specific intent to injure AEC. See *AFR & Associates, Inc.*, 09-2 BCA at 169,169. In terms of a “contract-related basis” for allowing the option to lapse, it is clear that, as of September 2014, there was uncertainty just when further work would become available for AEC as to task orders 2 and 3. As to task order 1, though it was acknowledged that AEC’s performance had been satisfactory, there were noted (and unrebutted) performance issues and hence a reasonable contract-related basis for exploring other sources of environmental consulting for implementation of the Programmatic Agreement and for not continuing with AEC for another option period. As for “the amount of discretion given to the official,” agency discretion over the exercise of options is very broad. *Greenlee Construction, Inc.*, 07-1 BCA at 166,062 (“[T]he Government’s discretion as to the exercise of an option is nearly complete.”). In addition, AEC has not presented any contract provision, statute, or regulation that the NRC violated when failing to exercise the second contract renewal option. In terms of option exercise, neither FAR 17.207 nor the NRC’s COR Guidebook were violated.⁸ AEC did contend that the FAR’s overarching policy that agencies should conduct

⁷ The more discretion an agency has over a decision, the more difficult it will be for a contractor to prove that the agency acted arbitrarily and capriciously. *AFR & Associates, Inc.*, 09-2 BCA at 169,169 (quoting *Galen Medical Associates, Inc.*, 369 F.3d at 1330).

⁸ Both FAR 17.207 and the COR Guidebook describe activities that need to be undertaken for exercising options, but only if and when agency personnel determine to proceed with option exercise. Contrary to AEC’s impression, neither requires the conduct of an analysis before allowing an option to lapse. During the hearing, AEC introduced CO

business fairly, openly, and with integrity required NRC employees to discuss whether it would be advantageous to exercise the final renewal option. Transcript at 10-11. And it might well have been prudent to engage in such discussion prior to allowing the option to expire. However, general guidelines (or good business practices) do not override an agency's unilateral right to exercise an option or to refrain from doing so. *Sword & Shield Enterprise Security, Inc.*, 12-1 BCA at 171,726.

Moreover, in the present case, the evidence was that there was no action or formal decision regarding whether or not to exercise the final contract renewal option. The option simply lapsed. Hence, the notion that there was "arbitrary and capricious" *action* here is not demonstrable in any event.

Alleged Breach of Duty of Good Faith and Fair Dealing

Although the allegation of NRC "bad faith conduct" had been front and center in both AEC's claim to the NRC contracting officer and in AEC's amended complaint in these appeals, AEC's final reply brief fails to raise that allegation even once. Instead, AEC posits that the NRC's failure to exercise the second renewal option without first performing an analysis constituted a violation of the duty of good faith and fair dealing inherent in its contract with AEC. Interestingly, in support of this argument, AEC cites to a 2004 decision of the Postal Service Board of Contract Appeals (PSBCA), *James Hovanec*, PSBCA 4767, 04-2 BCA ¶ 32,805, which addressed and resoundingly rejected that very argument in the

Malone's deposition testimony that purportedly agreed that, regardless of whether an option is exercised or not, an agency, "to act in good faith," must undertake an evaluation process. It relied on that deposition testimony in its post-hearing brief as well. The deposition testimony, however, does not go so far, and cannot reasonably be characterized as an "admission" by the CO:

QUESTION: In order to act in good faith ***and exercise an option***, don't you need to actually go through the exercise of . . . one, determining if there's a need and, two, determining if the contractor that you're dealing with is the most advantageous to do the work? Don't you have to do the process to act in good faith or no?

ANSWER: To act in good faith [in order to exercise an option], you have to do that process.

Transcript at 465 (emphasis added). In any event, a CO does not dictate the law or applicable standards; a *de novo* review occurs at the Board once a CO decision has been appealed.

context of the Postal Service's failure to exercise a contract renewal option. In that decision, the PSBCA made clear that, absent a showing of bad faith or abuse of discretion on the part of an agency, a contractor would have no relief for the agency's failure to exercise an option. *Hovanec*, 04-2 BCA at 162,262. As explained above, AEC here has failed to make either showing.

In sum, in addition to finding that the NRC had no further obligations to AEC under the IDIQ contract, having exceeded its guaranteed minimum amount, the Board concludes that the NRC did not act in bad faith or in violation of an existing contract provision, statute, or regulation, and that the NRC's actions were not arbitrary and capricious and did not amount to an abuse of its broad discretion when it came to option exercise or non-exercise. Under the circumstances presented, this Board will not second-guess the NRC's actions or lack thereof with regard to the final contract renewal option. *See Innovative (PBX) Telephone Services, Inc.*, 08-1 BCA at 167,586; *Pennyrile Plumbing, Inc.*, ASBCA 44555, et al., 96-1 BCA ¶ 28,044, at 140,029-30 (1995).

Because we find no entitlement here, we need not address the parties' arguments regarding damages. Moreover, since the NRC was not obligated to extend task order POPs or to issue further task orders, AEC cannot obtain the monetary relief it seeks.

Decision

For the foregoing reasons, CBCA 4920 is **DISMISSED FOR LACK OF JURISDICTION** and CBCA 5093 is **DENIED**.

RICHARD C. WALTERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JOSEPH A. VERGILIO
Board Judge