



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: August 2, 2007

CBCA 432

JJA CONSULTANTS,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Edward V. Gregorowicz, Jr., and James P. Connor of The Law Offices of Edward V. Gregorowicz, Jr., Fairfax, VA, counsel for Appellant.

Lori R. Larson and John T. Kirsch, Office of the Chief Counsel, General Legal Services, Internal Revenue Service, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DeGRAFF**.

DeGRAFF, Board Judge.

The contractor seeks to recover discounts which it claims the agency was not entitled to take. In April 2006, the agency filed a motion for summary relief which one of our predecessor boards denied. *JJA Consultants v. Department of the Treasury*, GSBCA 16796-TD, 06-2 BCA ¶ 33,343. In March 2007, the agency filed a second motion for summary relief which we deny for the reasons set out below.

Background¹

On April 1, 1998, the Internal Revenue Service (IRS) awarded a contract to JJA Consultants (JJA). Exhibit 2 at 7, 42. The contract required JJA to provide training services for IRS employees, had a term of one year from the date of award, and gave IRS the option to renew the contract for four one-year periods. Exhibit 2 at 8-10, 21. The contract was an indefinite delivery, indefinite quantity type of contract, and guaranteed JJA minimum orders of \$9000. Exhibit 2 at 10.

IRS exercised all four of its options to renew the contract for one-year periods, which extended the term of the contract to March 31, 2003. Exhibit 2 at 35, 37, 39, 46. In addition, IRS modified the contract to extend the term to September 30, 2003, and to provide that in the event a delivery order required performance beyond the contract term, JJA would perform in accordance with the delivery order.² Exhibit 2 at 48, 51. During the term of the contract, IRS issued twenty task orders for approximately \$4.7 million. Exhibit 2 at 52-314.

Task Order 13

In early 2002, IRS sent JJA a statement of work and asked for a proposal in support of the agency's executive development program (XD-2). Exhibit 2 at 151. The statement of work contained eight tasks. The first four tasks were preparation and planning, design of a workshop, design of group development sessions, and design of a candidate transition session. These tasks were to be performed from June 1 through September 30, 2002. Exhibit 2 at 151-52. The remaining four tasks were optional tasks five through eight, each of which required JJA to repeat the first four tasks for subsequent IRS executive development programs. For each of the optional tasks, the statement of work provided, "Funding will be provided if the IRS elects to exercise this option." Exhibit 2 at 152.

On March 1, 2002, JJA submitted a proposal in response to the statement of work. Exhibit 2 at 141. JJA's proposed cost for the first four tasks was \$2180 per session, which

¹ By and large, the background facts set out here are the same as those set out in our predecessor board's earlier decision. Citations are to exhibits contained in the appeal file unless otherwise noted.

² Neither party explains how the contract's duration could have been extended to September 30, 2003. The explanation is contained in the contract, which provided that although the total duration of the contract, including the exercise of options, was not to exceed five years, IRS had an option to extend JJA's performance for an additional six months. Exhibit 2 at 32-S.

amounted to approximately \$212,000. Exhibit 2 at 144. However, JJA offered to perform the work at a discounted price of \$150,000, stating “This price has been discounted to the IRS due to the long-term nature of this contract. The current rate considers the option to execute four additional tasks related to this project.” Exhibit 2 at 144-45. JJA’s proposal covered services to be delivered from June through September 2002, “with optional four optional tasks [sic] which would result in the extension of the base contract for several fiscal years.” Exhibit 2 at 146. The price for each optional task was \$150,000 “after discount applied.” Exhibit 2 at 146.

On May 3, 2002, IRS issued task order 13 for the work covered by the statement of work and JJA’s proposal, for the price of \$150,000. Exhibit 2 at 137. On January 8, 2003, IRS modified task order 13 to exercise the first optional task for the fixed price of \$150,000. Exhibit 2 at 138-40. Between May 15, 2002, and May 31, 2003, JJA submitted invoices for the work it performed for task order 13, and IRS paid JJA \$300,000. Exhibit 4 at 444, 453-516.

Task Order 19

In early 2003, IRS sent JJA a statement of work and asked for a proposal in support of the agency’s accelerated executive readiness program (AXR). The statement of work contained four tasks and said the period of performance and funding would be from January 27 through September 30, 2003, with the option to extend the period of performance. Exhibit 2 at 232-33.

In January 2003, JJA submitted a proposal in response to the statement of work. Exhibit 2 at 199. JJA’s proposed cost to perform the four tasks set out in the statement of work was \$2180 per session, which amounted to approximately \$131,000. Exhibit 2 at 200. However, JJA offered to perform the work at a discounted price of \$86,000, stating, “This price has been discounted to the IRS due to the long-term nature of this contract. The current rate considers the option to execute four additional tasks related to this project.” Exhibit 2 at 200. JJA’s proposal contained eight optional tasks, each of which required JJA to repeat the first four tasks for subsequent IRS executive readiness programs. The price of each option was \$86,000. Exhibit 2 at 201-03. The proposal said it covered services to be delivered from January through May 2003, “with three [sic] remaining optional tasks which would result in the extension of the base contract for up to three fiscal years.” Exhibit 2 at 203.

On January 16, 2003, IRS issued task order 19 for the work covered by the statement of work, for the period January through May 2003. The price was \$86,000. Exhibit 2 at 196. Between either late January or early February 2003, and May 2003, JJA submitted

invoices for the work it performed for task order 19, and IRS paid JJA \$86,000. Exhibit 4 at 451.

Task Order 20

In early 2003, IRS sent JJA a statement of work and asked for a proposal in support of the agency's executive readiness program (XR-3). The statement of work contained eight tasks and said the period of performance was between twelve and fifteen months. Exhibit 2 at 313.

In late February 2003, JJA submitted a proposal in response to the statement of work.³ On March 3, IRS told JJA, "Due to the expiration of the umbrella contract further optional contracting vehicles will need to be explored. [The optional] tasks are to be excluded from this proposal." Exhibit 2 at 251.

On April 2, JJA submitted a revised proposal which did not contain optional tasks. The proposed cost to JJA was approximately \$890,000. However, JJA offered to perform the work at a discounted price of \$600,000 and stated the discount was "due to the long-term nature of this engagement, preferred customer benefits, and the comprehensive integrated aspects of each program." Exhibit 2 at 254, 258.

On April 4, 2003, IRS issued task order 20 for the work covered by the statement of work, for the period May 1, 2003, through September 30, 2004. JJA's April 2 proposal was made a part of the task order and the price was \$500,000. Exhibit 2 at 239. On May 3, IRS amended task order 20 to add \$100,000. Exhibit 2 at 242. Between April 2003 and April 2004, JJA submitted invoices for the work it performed for task order 20, and IRS paid JJA \$600,000. Exhibit 4 at 452, 522-36.

The Claim

On October 25, 2004, IRS wrote to JJA. In its letter, IRS said the contract was completed and ready to be closed out. IRS asked JJA either to sign a release stating it had been paid, or to submit a final voucher. Exhibit 3 at 417. On November 11, JJA said the IRS had "forfeited discounts . . . as a result of uncooperative contractual actions taken by selected IRS executives and staff," and asked for an unspecified amount of compensation for the discounts it provided for "XR and XD programs." Exhibit 3 at 420.

³ Although this proposal is not included in the appeal file, it is referenced at pages 292 and 296 of Exhibit 2.

On October 12, 2005, JJA submitted a certified claim for payment of forfeited discounts. JJA listed the forfeited discounts as those taken in connection with task orders 13, 19, and 20, which JJA said amounted to \$461,031.93. JJA said the basis for the discounts was the execution of a long-term contract, which never occurred. Exhibit 3 at 425-26.

The contracting officer issued her decision and denied the claim on December 9, 2005. Exhibit 1. This appeal followed.

The Positions of the Parties

In its motion for summary relief, IRS summarizes the facts underlying JJA's claim as follows: In exchange for JJA giving IRS discounted pricing for task orders 13, 19, and 20, IRS promised when it issued the task orders to make JJA whole by exercising options (task orders 13 and 19) and entering into another contract (task order 20). If these facts are true, says IRS, such a promise would be unenforceable because it would violate the Antideficiency Act, the *bona fide* needs rule, the Competition in Contracting Act, and the recording statute. Respondent's Motion for Summary Relief at 1; Respondent's Memorandum of Points and Authorities at 8-10.

In opposition to the motion, JJA says it is not alleging that IRS promised to exercise options or enter into another contract. JJA says IRS promised if it did not exercise the options or enter into another contract it would pay JJA the full, undiscounted price for the work JJA performed under task orders 13, 19, and 20. JJA also says, as it did in response to IRS's first motion for summary relief, that both parties understood the language contained in the task orders to reflect their agreement that IRS needed to exercise the options or enter into another contract in order to be entitled to retain the discounts. Appellant's Memorandum of Points and Authorities at 2, 16-17. JJA contends the agreement it reached with IRS does not violate any of the statutes upon which IRS bases its motion. *Id.* at 24-32.

Discussion

When considering a motion for summary relief, we review affidavits, declarations, documents, and appeal file exhibits. Board Rule 8(g) (72 Fed. Reg. 36,799 (July 5, 2007) (to be codified at 48 CFR 6101.8(g))). We do not weigh evidence in order to determine the truth of the matter. Rather, we examine evidence in order to determine whether there are factual issues in dispute. Summary relief is appropriate when there are no genuine issues of material fact in dispute and when the moving party is entitled to relief as a matter of law. A fact is material if it will affect our decision. An issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing.

Summary relief will be granted if the movant demonstrates there is an absence of evidence to support an essential element of the non-movant's claim or defense. Although the non-movant is entitled to the benefit of the doubt as to the facts, it cannot rest its opposition upon allegations, conclusions, and denials contained in its pleadings. If the moving party demonstrates the absence of a genuine issue as to any material fact, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue as to a material fact to be resolved at a hearing. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Antideficiency Act, the *Bona Fide* Needs Rule, and the Competition in Contracting Act

The Antideficiency Act prohibits Government officials from authorizing an expenditure or creating an obligation in excess of or in advance of an available appropriation. An appropriation available for a fixed term can be obligated only during the term and only up to the amount of the appropriation. 31 U.S.C. § 1341(a) (2000). The *bona fide* needs rule prohibits an agency from obligating an appropriation in advance of its needs. An appropriation available for a fixed term can be obligated only for the *bona fide* needs of the fixed term. 31 U.S.C. § 1502(a).

An obligation is created when a Government official does something which creates a legal liability or a definite commitment on the part of the Government, or which creates a legal duty that could mature into a legal liability by virtue of an action that is beyond the Government's control. 42 Comp. Gen. 733 (1963). A legal liability is one which can be legally enforced. *National Mediation Board*, B-305484 (July 2, 2006). When IRS awarded this indefinite delivery, indefinite quantity contract for services with an initial term of one year, it incurred an obligation only for the year it entered into the contract and the amount of the obligation was the required minimum purchase of \$9000. IRS incurred additional obligations when it issued task orders and when it exercised each of the contract's four one-year options. *Leiter v. United States*, 271 U.S. 204 (1926); Comp. Gen. Dec. B-308969 (May 31, 2007); 66 Comp. Gen. 556 (1987). IRS was not required to exercise any options, and could do so only when funds were available. *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811 (Fed. Cir. 1988); 61 Comp. Gen. 184 (1981); 19 Comp. Gen. 980 (1940).

The Competition in Contracting Act, as amended, requires executive agencies to obtain full and open competition when they procure services. 41 U.S.C. § 253. Although there are some exceptions to this requirement, none of them appears to apply to the contract between IRS and JJA.

As explained earlier, IRS summarizes the material facts underlying JJA's claim as follows: In exchange for JJA giving IRS discounted pricing for task orders 13, 19, and 20, IRS promised when it issued the task orders to make JJA whole by exercising the options contained in task orders 13 and 19 and by entering into another contract after the completion of the work required by task order 20. If the undisputed facts show JJA's claim is based upon such a promise, the promise might violate the Antideficiency Act, the *bona fide* needs rule, and the Competition in Contracting Act.

When IRS issued task orders 13, 19, and 20, if it promised to exercise options or enter into another contract, it might have violated the Antideficiency Act and the *bona fide* needs rule to the extent it incurred obligations by issuing task orders which would have satisfied the needs of more than one fiscal year. In order to create an obligation to meet the needs of more than one fiscal year, an agency must have no-year funds, multiple year funds, or specific statutory authority (such as that contained in 41 U.S.C. § 254c) to enter into multiyear contracts. Neither party has alleged IRS had no-year funds or multiple year funds, or that it complied with whatever statutory authority permitted it to enter into multiyear contracts. If IRS did not have such funds or such authority and if issuing task orders 13, 19, and 20 amounted to creating obligations which would have met the needs of more than one fiscal year, the task orders violated the Antideficiency Act and the *bona fide* needs rule because they created obligations in advance of an available appropriation and in advance of the agency's needs. 67 Comp. Gen. 190 (1988); 64 Comp. Gen. 359 (1985).

When IRS issued task orders 13, 19, and 20, if it promised to exercise options or enter into another contract it might also have violated the Antideficiency Act and the *bona fide* needs rule to the extent it incurred obligations by issuing task orders for severable services to be performed over more than a one-year period. If an agency incurs an obligation in order to satisfy a need which arises in one fiscal year even though the services to be provided will extend into another fiscal year, the obligation can be charged to the fiscal year when it is incurred so long as the services are "entire" and not severable. Services are "entire" if they make up only one, single undertaking and the Government receives value only when it receives the end product. Comp. Gen. Dec. B-305484 (July 2, 2006). If the services being provided are severable, the performance period can begin in one year and end in another year, and the obligation can be charged to the fiscal year when it is incurred, only if the contract period does not exceed one year. 41 U.S.C. § 2531 (civilian agencies). By issuing task orders 13, 19, and 20, if IRS created obligations for severable services to be performed for a period of more than one year, it created obligations in advance of an available appropriation and in advance of the agency's needs.

In addition, if IRS promised to enter into another contract with JJA after the completion of the work required by task order 20, it would have violated the Competition

in Contracting Act's requirements for full and open competition. If IRS promised to exercise the options contained in task orders 13 and 19, it might have also violated the statute, depending upon whether the options could have been exercised within the term of the contract. 41 U.S.C. § 253.

The success of IRS's legal arguments depends upon whether the undisputed material facts show JJA's claim is based upon IRS's promise to make JJA whole by exercising the options contained in task orders 13 and 19 and by entering into another contract after the completion of the work required by task order 20. In opposing the motion, JJA says it does not claim IRS made any such promise. JJA says both parties understood the language contained in the task orders to reflect their agreement that IRS needed to exercise the options or enter into another contract in order to be entitled to retain the discounts, and that IRS would pay JJA the full, undiscounted price for the work JJA performed under task orders 13, 19, and 20 if IRS did not exercise the options or enter into another contract.

In support of their positions, the parties refer the Board to deposition transcripts of two JJA employees. After reading these transcripts, we are not persuaded that IRS's motion is based upon undisputed material facts. At times during their testimony, the two JJA employees seemed to say IRS had promised to exercise the options contained in task orders 13 and 19 and to enter into another contract or extend the existing contract after the completion of task order 20. Deposition of Wanda Savage-Moore (Dec. 7, 2006) at 44; Deposition of Johnson Edosomwan (Dec. 7, 2006) at 82-83. At other times during their testimony, the employees seemed to say IRS was not required to exercise the options or enter into another contract unless it wanted to retain the discounted prices. Savage-Moore Deposition at 51; Edosomwan Deposition at 91. We deny the motion to the extent it is based upon the Antideficiency Act, the *bona fide* needs rule, and the Competition in Contracting Act because IRS has not established as an undisputed material fact that JJA's claim is based upon a promise by IRS to exercise the options contained in task orders 13 and 19 and to enter into another contract after the completion of task order 20.

IRS says if JJA's understanding of the language of the three task orders is correct and IRS promised to pay the full, undiscounted price if it did not exercise the options included in task orders 13 and 19 and did not enter into another contract or extend the existing contract after the completion of the work required by task order 20, this would mean IRS was obligated to pay JJA at least the undiscounted price of the work it performed under the three task orders. IRS says such an obligation would violate the Antideficiency Act. Also, says IRS, it would have been required to violate the Competition in Contracting Act in order to retain the discounts. Respondent's Reply Memorandum at 2-9.

IRS has not established as a matter of law that it would have been required to violate the Competition in Contracting Act in order to retain the discounts. The terms of the task orders, as JJA says it understood them, did not prevent IRS from recompeting the contract for training services. Instead, the terms of the task orders, says JJA, required IRS to pay the undiscounted prices if it did not exercise the options contained in task orders 13 and 19, and if it did not award another contract to JJA or extend JJA's existing contract after the task order 20 work was completed.

Occasionally, a contract contains a provision which seeks to impose an added charge on an agency if it decides not to exercise an option. Depending upon the circumstances, an agency may incur an obligation which includes the added charge without violating the Antideficiency Act or the *bona fide* needs rule. Whether such a provision violates these funding statutes depends in large part upon whether the charge represents the reasonable value of the work performed, or whether the charge amounts to a penalty for the agency's failure to continue to use the contractor's services. *Federal Data Corp.*, B-190659, 78-2 CPD ¶ 380 (Oct. 23, 1978); *Burroughs Corp.*, 56 Comp. Gen. 142 (1976), *modified in part, aff'd in part, Honeywell Information Systems*, 56 Comp. Gen. 505 (1977); *Honeywell Information Systems*, 56 Comp. Gen. 167 (1976); Comp. Gen. Dec. B-164772 (Aug. 16, 1968); 36 Comp. Gen. 683, *aff'd*, 37 Comp. Gen. 155 (1957); 8 Comp. Gen. 654 (1929). IRS has not established as a matter of law whether, if JJA's understanding of the language of the three task orders is correct, the task orders would violate the funding statutes in light of the standards set out in these decisions.

The Recording Statute

According to the Recording Statute, when a Government official creates a valid obligation on the part of the Government, the obligation is supposed to be recorded. 31 U.S.C. § 1501. When an obligation is recorded, it is officially charged against the agency's appropriation. In order to record an obligation which arises as the result of a contract, there must be documentary evidence of a written, binding agreement for a purpose authorized by law. The agreement must be executed before the end of the period of availability for obligation of the appropriation and it must be for specific services to be provided. 31 U.S.C. § 1501(a)(1). In order for an agreement to be binding, it must have been made by an official who was authorized to contract on behalf of the Government. *Lewis v. United States*, 70 F.3d 597 (1995).

IRS argues there was a violation of the Antideficiency Act if it failed to record anything less than the full, undiscounted price when it initially ordered work under task orders 13, 19, and 20, and when it exercised one of the options under task order 13. Respondent's Reply Memorandum at 5-6. However, the failure to record a valid obligation

does not make the obligation any less valid, just as the act of recording cannot create a valid obligation where none exists. *Integral Systems, Inc. v. Department of Commerce*, GSBCA 16321-COM, 05-1 BCA ¶ 32,946; *Kavouras, Inc.* B-226782 (Oct. 20, 1987); 63 Comp. Gen. 525 (1984); Comp. Gen. Dec. B-197274 (Feb. 16, 1982); 38 Comp. Gen. 81 (1958). If IRS created an obligation to pay JJA the undiscounted price, the obligation was not invalidated by IRS's failure to record it. We deny the motion to the extent it is based upon the Recording Statute, because IRS has not established it is entitled to relief as a matter of law.

JJA's Knowledge

IRS expects JJA will eventually argue that if IRS violated one of the statutes discussed above, JJA should be allowed to recover its undiscounted prices as a matter of equity. Anticipating JJA's argument, IRS says equity does not favor JJA because JJA knew IRS lacked sufficient funds to pay more than the discounted prices and knew IRS had "obligated" only the discounted prices. Respondent's Memorandum of Points and Authorities at 9, 23; Respondent's Reply Memorandum at 4.

As a general rule, a contractor paid from a general appropriation is entitled to be paid for its work even if the appropriation is insufficient, because a contractor "cannot justly be expected to keep track of appropriations where he is but one of several being paid from the fund." *Ross Construction Corp. v. United States*, 392 F.2d 984, 987 (Ct. Cl. 1968); *Joplin v. United States*, 89 Ct. Cl. 345 (1939). This is true even when the Government tells a contractor it has "programmed" only a certain amount of funds for a project, because a contractor is entitled to expect the Government will act in accordance with its contractual obligations. *Joplin*. If JJA was being paid from anything other than a general fund, IRS has not established this fact, and if the circumstances of this case take it outside the general rule, IRS has not established this as a matter of law. In addition, IRS has not established as fact either the amount it recorded as an obligation, or that JJA knew the amount IRS had recorded as an obligation, or that IRS lacked sufficient funds to pay the undiscounted prices, and each of these facts is material to IRS's argument. We deny the motion to the extent IRS asks for summary relief based upon JJA's knowledge of IRS's funding limits.

Summary

JJA claims it and IRS understood the language contained in the three task orders to say JJA would provide discounts only if IRS exercised the options offered in the proposals for task orders 13 and 19, or in the case of task order 20, only if IRS executed another contract with JJA or extended the existing contract. IRS has not established such an

understanding would violate either the funding statutes discussed above or the Competition in Contracting Act.

Decision

The **MOTION FOR SUMMARY RELIEF** is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge