



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL
SUMMARY RELIEF DENIED: October 6, 2009

CBCA 1268

SERCO, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

E. Sanderson Hoe, Stephen M. Sorett, William T. O'Brien, and Erin B. Sheppard of McKenna Long & Aldridge LLP, Washington, DC, counsel for Appellant.

Elin M. Dugan, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **VERGILIO**, and **McCANN**.

VERGILIO, Board Judge.

On July 11, 2008, Serco, Inc., filed a notice of appeal of a contracting officer's decision. The appeal arises under a contract between Serco Management Services, Inc. (which later merged into Serco, Inc., hereafter referred to as the contractor) and the Forest Service of the Department of Agriculture (Government) to provide fleet maintenance services in Region Five. The contractor pursues relief under five counts, following the contracting officer's denial of certified claims relating to the issues.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (2006) (CDA). The Government seeks summary relief regarding three counts; the contractor opposes the Government's request. The Board denies the Government's motion for partial summary relief.

Under count two, the contractor claims it is entitled to relief under the Changes clause because modification five altered the Minimum Order clause by replacing “-n/a-” (“not applicable”) with “\$200.” The clause then read, “When the Government requires supplies or services covered by this contract in an amount of less than \$200, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.” The Government seeks summary relief, asserting that this is not a requirements contract, and, therefore, the Government was never obligated to purchase orders of less than \$200 from the contractor, such that the modification did not remove work from the contract. The Board concludes that this is not a requirements contract. However, that determination does not preclude the contractor from seeking relief under the Changes clause. The clause entitles the contractor to additional compensation if it can demonstrate that the change caused an increase in the cost of performance of any part of the work under this contract, whether or not changed by the order.

In count three, the contractor seeks payment for what it claims was work (inspection services) required by the Government in excess of that dictated in the original contract. The Government maintains that a release precludes relief. The release does not, on its face, support the Government’s interpretation.

In count five, the contractor seeks payment for costs of in-house and retained services incurred in the preparation of requests for equitable adjustments. The Government contends that no relief is available because the contractor submitted the requests after the contract was terminated and because the contractor has not established that the costs were incurred to further the negotiation process. The Government has not established a factual or legal basis to preclude relief on count five, in whole or part, at the summary relief stage.

Findings of Fact¹

1. With an award date of January 7, 2004, the Government completed the formation stage of a negotiated procurement, a competition conducted under OMB (Office of Management and Budget) Circular A-76 to provide fleet repair and maintenance services within Region 5 of the Forest Service. The Government accepted all items in the contractor’s

¹ With a motion for summary relief, the moving party bears the burden of establishing the absence of any genuine issue of material fact; all significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At the summary relief stage, the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

proposal in the amount of \$26,067,298.40, while noting that payment will be made by task orders. The award document contains a price breakdown for a phase-in period, a base period, and each of four option periods, with the total identified as a not-to-exceed price equal to the award price. Exhibit 5 at 135-36 (exhibits are in the Appeal File). Forest Service personnel, who had been performing the services, unsuccessfully pursued protests.

2. The Indefinite Quantity clause, Federal Acquisition Regulation (FAR) 52.216-22 (OCT 1995), of the contract includes the following language:

(a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the “maximum.” The Government shall order at least the quantity of supplies or services designated in the Schedule as the “minimum.”

(c) Except for any limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

Exhibit 5 at 178 (¶ I.4). As referenced in paragraph (b), the contract contains an Ordering clause, FAR 52.216-18 (OCT 1995). Exhibit 5 at 177 (¶ I.2).

3. The contract contains a Minimum and Maximum Contract Amounts clause (Department of Agriculture Acquisition Regulation (AGAR) 452.216-73 (FEB 1988)), as applicable to the “all or none” proposal of the contractor: “During the period specified in FAR clause 52.216-18, ORDERING, the Government shall place orders totaling a minimum of \$519,000.00, but not in excess of \$4,000,000.00.” Exhibit 5 at 137 (¶ B.1). This clause is referenced in the procurement regulations of the agency, with the following direction to the contracting officer: “The contracting officer shall insert the clause at 452.216-73, Minimum and Maximum Contract Amounts, in indefinite-delivery, indefinite-quantity contracts when the clause at FAR 52.216-18 is used.” 48 CFR 416.506(b) (2004).

4. The contract contains an Order Limitations clause, FAR 52.216-19 (OCT 1995), stating in relevant part:

(a) *Minimum order.* When the Government requires supplies or services covered by this contract in an amount of less than -n/a-, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

(b) *Maximum order.* The Contractor is not obligated to honor-

(1) Any order for a single item in excess of \$15,000.00;

(2) Any order for a combination of items in excess of \$25,000.00; or

(3) A series of orders from the same ordering office within 3 calendar days that together call for quantities exceeding the limitation in paragraph (b)(1) or (2) of this section.

(c) If this is a requirements contract (*i.e.*, includes the Requirements clause at subsection 52.216-21 of the Federal Acquisition Regulation (FAR)), the Government is not required to order a part of any one requirement from the Contractor if that requirement exceeds the maximum order limitations in paragraph (b) of this section.

Exhibit 5 at 178 (¶ I.3). The contract does not contain the referenced Requirements clause.

5. The contract contains the Changes -- Fixed Price (AUG 1987) Alternate II (APR 1984) clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

(2) Time of performance (*i.e.*, hours of the day, days of the week, etc.).

(3) Place of performance of the services.

(4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(5) Method of shipment or packing of supplies.

(6) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

Exhibit 5 at 177 (¶ I.1).

6. Modification five to the contract, effective January 25, 2005, made pursuant to the Changes clause, alters the minimum order in the order limitations clause from "-n/a-" to "\$200," so as to read:

(a) *Minimum order.* When the Government requires supplies or services covered by this contract in an amount of less than \$200.00, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

Exhibit 12 at 1-2.

Discussion of Count Two

In count two, the contractor contends that modification five reduced the workload under the contract; it claims entitlement to relief under the Changes clause for the modification five change to the minimum order amount. Exhibit 14 (Certified Claim Number Two at 38-39 (¶ III.A)); Amended Complaint at 37 (¶ 121).

Regarding count two, the Government maintains that the parties did not enter into a requirements contract; lacking a requirements contract, the Government contends that the Board must grant summary relief for the Government. “The Contract was for an indefinite quantity of services, under which Serco bore the risk that it would not receive more than the minimum dollar amount[.]” Government’s Memorandum at 2. The contractor contends that the parties entered into a requirements contract, under which the Government was obligated to utilize only the contractor for its fleet servicing. The contractor maintains that modification five clearly demonstrates that the parties viewed the contract as a requirements contract, because the Government would have no need to exempt orders of less than \$200 if it was not obligated to utilize the contract to satisfy all of its servicing requirements.

The plain language of the contract indicates that it is an indefinite-delivery, indefinite-quantity (ID/IQ), not a requirements, contract. 48 CFR subpart 16.5 (2003). There is no ambiguity. A clause expressly states that this is an indefinite quantity contract, and a clause specifies a minimum to be purchased over the life of the contract. In addition, there is no requirements clause. The parties entered into an ID/IQ contract. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798-99 (Fed. Cir. 2002).

The initial “not applicable” entry for a minimum single order value does not alter the type of contract. The contract guarantees the contractor a minimum total dollar value of orders; the non-applicable minimum value for individual orders is a notion fully consistent with an ID/IQ contract. The contractor references documents and statements revealing the conclusions of some agency personnel that the contract is ambiguous because of the “not applicable” value. Those views are not material; moreover, the documents and statements suggest that the individuals believed that they had entered into an ID/IQ contract, until they were made aware of the lack of a minimum order value. Contractor’s submission dated July 30, 2009. Neither the contractor nor the Government could reasonably conclude that this is a requirements contract, such that any expectations are not controlling in the interpretation of the plain language of the contract. The Government’s issuance of modification five does not impact on or alter the interpretation of the contract.

The contractor also urges that this must be a requirements contract because it results from an A-76 competition between a commercial provider and a “most efficient

organization” (MEO) (the incumbent Forest Service personnel performing the vehicle repair and maintenance work). However, no submission indicates or suggests that only a requirements contract can result from such a competition or that an ID/IQ contract(s) may not result. The contractor has not established an inconsistency between the language of this contract, expressly identifying it as an ID/IQ contract, and any rules or regulations relating to an A-76 competition.

This conclusion that an ID/IQ, and not a requirements, contract underlies this dispute, does not permit the Board to grant the Government’s motion regarding count two. Through modification five, the contracting officer unilaterally changed a term of the contract, altering the obligations of the parties regarding orders of less than \$200. The contractor seeks relief under the Changes clause, which directs that:

If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

The contractor may pursue relief under this clause. The Board denies the Government’s motion for partial summary relief regarding this count.

Additional Findings of Fact

7. After the commencement of the contract, the parties had differing views on the inspection services the contractor was to provide. On December 6, 2005, the contracting officer issued a work order under a cover letter. The letter states in pertinent part:

The purpose of this Work Order is [to] provide consistency in the annual inspection/service component of our contract with you. It is my determination that the activities spelled out on the Work Order are, and always have been part of the service you should have been providing under the annual inspection/service component. This Work Order is effective immediately.

Please note on the Work Order that I have made the statement that I will rescind it once agreement is reached on your annual inspection/service proposal. My concern is that may not happen in a timely fashion and therefore the Forest Service will not continue to accept services that are less than what we firmly believe we contracted for.

It is your contractual right to dispute my decision, however you will proceed as directed by the Work Order.

Exhibit 2 at 152. The Work Order directs the contractor to perform specific work with no adjustment in contract time or price, and states, "This Work Order will be rescinded when agreement is reached on Serco's 2-P-210 and 2-P-211 Quality Procedures." Exhibit 2 at 153.

8. Bilateral modification twelve, with an effective date of April 3, 2006, although signed later by the parties (the contractor signed on April 14, 2006, the contracting officer on April 19, 2006), states that it is entered into pursuant to the authority of the Changes clause and the mutual agreement of the parties. The document describes the modification as follows:

The purpose of this modification is to memorialize negotiations conducted on January 18 and 19, 2006. Wherein, the Forest Service has agreed to accept Serco's operational inspection procedures as outlined in Serco's 2-P-210 & 2-P-211 training syllabus. Further, it is agreed that the procedures in 2-P-210 & 2-P-211 are incorporated in their entirety-- except

Serco's proposed hours for Annual Services of chassis are hereby incorporated into the contract Schedule of Items . . . as follows:

[For each of six vehicle types, a specific number of hours is indicated.]

The contract amount specified in Section B under AGAR 452.216-73 is increased annually to not-to-exceed \$4,400,000. The contract period of performance remains unchanged. All other terms and conditions of the contract remain unchanged.

In consideration of the modification agreed to herein as a complete and equitable adjustment of both cost and time for the work incorporated in this modification, the Contractor hereby releases the Government from any further liability under this contract for any additional equitable adjustments attributable to the circumstances giving rise to this modification.

The parties hereto hereby agree that this modification to the contract is not to be construed as an implication or admission of responsibility or liability in regard to any unsettled or contemplated claims each party may have against the other as of the date of this modification.

Exhibit 12 at 13-14. The modification does not expressly reference or rescind the work order of December 6, 2005.

9. On May 1, 2006, the contracting officer terminated the contractor's right to proceed under the contract. Exhibit 2 at 286-87.

Discussion of Count Three

In support of its certified claim to the contracting officer, the contractor explains that it:

incurred excess annual inspection manhours as a result of Mod 12. In early December, 2005, Serco and the Forest Service agreed to increase the scope and number of manhours Serco could bill for performing annual service inspection work. However, Mod 12 was not signed until late April, 2006 just prior to contract termination. During the period from 12-6-05 through contract termination, Serco was not permitted to bill the Forest Service for the newly agreed to increase in annual inspection manhours. Therefore, Serco is entitled to the excess manhours incurred to perform the work in accordance with the Mod 12 agreement. In order to identify the excess annual inspection manhours for the period 12-6-05 through contract termination, Serco reviewed each annual inspection work order and determined the excess number of manhours incurred in accordance with the Mod 12 requirements.

Exhibit 14 (Certified Claim Two, Exhibit AA). In its amended complaint, the contractor makes similar statements, and notes that, in the modification, it reserved its right to assert a claim for the increased costs it incurred from December 6, 2005, through April 19, 2006, as a result of the change in work. Amended Complaint at 37-38 (¶¶ 124-29).

The Government seeks summary relief on this count, maintaining that, in modification twelve, the contractor "expressly released the Forest Service from any liability for equitable adjustments relating to the Contract's annual inspection requirements," and that "the bilateral nature of Modification 12 precludes Serco from seeking an equitable adjustment for any resulting increase in costs." Government's Motion at 8. Opposing the Government's motion on this count, the contractor contends that it expressly preserved its claim through the modification language.

Despite the Government's contentions, the modification language is not unambiguous on its face regarding the issues of count three. Although the release relates to the "work incorporated in this modification," the modification does not explicitly define the work

incorporated therein. The modification does not indicate which, if any, of various dates may be controlling--an effective date, signature dates, or the earlier agreement said to be memorialized in the modification. Moreover, the final paragraph of the modification expresses limitations when construing the modification in regard to any unsettled or contemplated claims.

The contractor contends that it seeks relief in accordance with modification twelve. Factually and legally, at this summary relief stage, the Government has not established that it must prevail against the contractor regarding the contractor's claimed costs for any period in question, from December 6 through the alleged agreement in mid-January (factually, the parties differ on the date of an agreement, the contractor saying early December), from thereafter through the effective date of modification, or until the termination. Accordingly, the Board denies the Government's motion for summary relief regarding count three.

Additional Findings of Fact

10. Under a cover letter dated June 26, 2007, the contractor sent to the contracting officer four requests for equitable adjustment (REAs). Each relates to a specific basis for relief as alleged by the contractor: REA 1, stop work order/phase-in period delay; REA 2, Forest Service hindrance and failure to cooperate during performance, and changes in scope of work; REA 3, Forest Service constructive change during phase-in period; and REA 4, request for unpaid invoices. Exhibit 2 at 291-364. In this appeal, REA 4 is not at issue.

11. By letter dated February 22, 2008, the contracting officer denied in its entirety each of REA 1, 2, and 3. Exhibit 2 at 365-70.

12. Under a letter with a certification, dated April 25, 2008, the contractor submitted three certified claims relating to the first three REAs referenced above, and a fourth certified claim for REA preparation costs. Exhibit 2 at 372-73; Exhibit 14. In the latter claim, the contractor contends that it incurred both internal and external costs to prepare REAs 1-3. The hours and expenditures are identified as having been incurred over the period beginning in December 2004 and ending in April 2007. The summary of the claim explains: "In the REA submissions, these costs were allocated between REAs. However, to simplify the presentation and administration of the claim for these costs, Serco has decided to consolidate and claim them in this 'stand alone' submission." Exhibit 14 (Certified Claim Four at 2, 4-7).

Discussion of Count Five

In count five, the contractor seeks to recover what it describes as its costs incurred in preparing requests for equitable adjustments. The contractor states, “The cost of preparing the REAs is an allowable cost of contract administration under FAR 31.205-33 and recoverable directly as part of equitable adjustments.” Amended Complaint at 41 (¶¶ 155-56).

The Government maintains that the contractor seeks costs associated with prosecuting a claim against the Government, such that they are unallowable under regulation, FAR 31.205-47(f)(1). Government’s Motion at 14. Further, the Government asserts that the contractor has failed to present evidence that shows it incurred costs related to the preparation of REAs 1 through 3 for the genuine purpose of materially furthering the negotiation process, such that under a case relied upon by the contractor, *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995), the contractor is not entitled to relief.

Factually and legally the Government has not supported its position as the party seeking summary relief. The contractor’s submissions suggest that it incurred costs related to the requests for equitable adjustments in the period of December 2004 through April 2007. The contractor’s submissions indicate that it initially sought reimbursement of its costs associated with preparation of the REAs as part of the REAs. The contractor did not submit a certified claim until April 2008, thereby foregoing interest accrued prior to that date on any claims upon which it may ultimately prevail. One cannot conclude on this record for summary relief that the costs were incurred in the prosecution of claims yet to be filed. Further, as the court observed in *Bill Strong*, at 1551, contract administration may continue after the completion of contract work. At this stage, the Government has not demonstrated a basis to preclude the contractor from pursuing the relief it seeks, particularly as the contractor does not appear to be claiming a right to the costs absent relief on the underlying claims.

Decision

The Board **DENIES THE RESPONDENT’S MOTION FOR PARTIAL SUMMARY RELIEF.**

JOSEPH A. VERGILIO

Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

R. ANTHONY McCANN
Board Judge