



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: September 2, 2011

CBCA 1975

EYAK TECHNOLOGY, LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Kathy C. Potter of Benton Potter & Murdock, P.C., Washington, DC; and Janine S. Benton of Benton Potter and Murdock, P.C., Falls Church, VA, counsel for Appellant.

Susan C. Murray, Office of Chief Counsel, Customs and Border Protection, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **HYATT**.

STERN, Board Judge.

Appellant, Eyak Technology, LLC (Eyak), moves for summary relief, alleging that respondent, the United States Customs and Border Protection (CBP) of the Department of Homeland Security, breached its contract with Eyak. This dispute concerns CBP's demand that Eyak provide reports as required by the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009).

Background

On September 16, 2008, CBP and Eyak executed a delivery order pursuant to which Eyak, for payment of \$1,177,488.09, agreed to deliver communications equipment to CBP

by March 15, 2009. (Throughout this decision, we also refer to this delivery order as the contract between the parties.) The original delivery order stated that some of the line items would be purchased at a later date with fiscal year 2009 funds, “because the work will not begin until FY 09.” Appeal File, Exhibit 1. Modification one to the contract extended the delivery date to September 30, 2009.

The ARRA was enacted into law on February 13, 2009. The statute mandates that “as a condition of receipt of funds under this Act, Federal agencies shall require any recipient of such funds to provide . . .” certain detailed items of information online.

The Federal Acquisition Regulation (FAR), implementing the statute, provides,

- (a) In any contract action funded in whole or in part by the Recovery Act, the contracting officer shall indicate that the contract action is being made under the Recovery Act, and indicate which products or services are funded under the Recovery Act. This requirement applies whenever Recovery Act funds are used, regardless of the contract instrument.

48 CFR 4.1501 (2010) (FAR 4.1501).

The FAR directs agencies to insert FAR clause 52.204-11, “American Recovery and Reinvestment Act - Reporting Requirements,” into “all solicitations and contracts funded in whole or in part with Recovery Act funds” FAR 4.1502. The FAR states, “Contracting officers may not use Recovery Act funds on existing contracts and orders if the clause at 52.204-11 is not incorporated.” *Id.*

Clause 52.204-11 provides, in part:

- (b) This contract requires the contractor to provide products and/or services that are funded under the American Recovery and Reinvestment Act of 2009 (Recovery Act). Section 1512(c) of the Recovery Act requires each contractor to report on its use of Recovery Act funds under this contract. These reports will be made available to the public.

The clause requires the contractor to disclose quarterly, online, a number of items, including the amount of ARRA funds invoiced, numerous items of progress and contract and subcontract information, the impact of jobs created with the ARRA funds, the names and total compensation of its five highest officers, and much other information. Contractors that are required to report, but fail to do so, are placed on a public non-compliant list and are subject to other negative actions, including negative past performance evaluations.

CBP unilaterally amended the contract on May 11, 2009, with the issuance of contract modification 2, increasing the contract funding by \$656,960.60, and purchasing the items that were not initially funded. At the time that modification 2 was issued, the contracting officer was unaware that the funds that were intended to be obligated with the execution of that modification were ARRA funds. The clause required by the FAR to be added to ARRA-funded contracts was not incorporated into the contract. Eyak was not notified that ARRA funds would be used for the work added pursuant to modification 2. Thus, Eyak did not accede to the use of ARRA funds and the added work required of a contractor that receives payments from ARRA appropriations.

The contracting officer was notified at least as early as August 2009 that the moneys referenced in modification 2 were ARRA funds. Still, Eyak was not informed of the attempted use of such funding. CBP issued modification 3 to the contract on September 24, 2009, extending the performance period to December 31, 2009. Modification 3 did not refer to the funding or contain the required ARRA FAR clause. CBP did not notify Eyak until October 15, 2009, that the funds referenced in modification 2 were ARRA appropriations. By the time it received this notice, Eyak had already received one payment from these funds.

The CBP's program manager inspected and verbally accepted performance on October 13, 2009, though Eyak stayed on the site until October 18, 2009, for clean-up, a walk-through inspection, and to make adjustments to the equipment. The CBP program manager executed the government acceptance form (DD Form 250) on October 22, 2009. Eyak's only subsequent return to the work site was for warranty work. Thus, Eyak had essentially completed its performance at the time it received notice of the ARRA funding.

On the same day that CBP notified Eyak that the funds referenced in modification 2 were ARRA appropriations, it sent a letter to Eyak informing it that Eyak was required to fulfill the online ARRA reporting requirements no later than October 20, 2009. Eyak refused to comply with the reporting requirements and was subsequently listed on the recovery.com website as being non-compliant. On December 7, 2009, the Department of Labor notified Eyak that it was being scheduled for a compliance evaluation due to its failure to report as required. Eyak responded that its contract was not awarded using ARRA funds.

In December 2009, CBP engaged in an effort to replace the funding of modification 2 with non-ARRA funds. On December 23, 2009, CBP drafted modification 4 providing that it was an administrative change to substitute the funding of modification 2. The modification was posted by CBP on the federal procurement data system website at www.fpds.gov. The contracting officer had not signed the modification. On December 28, 2009, an official of the Department of Homeland Security confirmed to Eyak that the funds were being reversed. On December 30, 2009, CBP's contract specialist sent an e-mail

communication to Eyak stating that CBP was “almost complete [in its process] to remove Eyak Technology from the ARRA reporting requirements list For all intents and purposes, Eyak Technology has been removed from the ARRA reporting requirements list. However, there are still activities on our end that need to be completed.” Appeal File, Exhibit 16. Also, on December 30, 2009, CBP drafted modification 5 and posted it on the federal procurement data systems website, stating that the purpose was to change the funding from ARRA funding to other specified funds. Modification 5 deducted \$676,960.66 from the funding. Again, the contracting officer did not sign this modification.

On January 6, 2010, Eyak wrote a letter to the Office of Federal Contract Compliance Programs, stating that its contract was not funded with ARRA appropriations and requested the cancellation of any compliance audit. On the same day, the contracting officer sent an email message to other employees stating that certain government representatives had asked CBP not to swap the ARRA funds for non-ARRA funds. The contracting officer requested that another employee so inform Eyak. On January 12 and 13, 2010, the contracting officer informed Eyak by telephone that the ARRA funds were not removed from modification 2.

By letter dated January 13, 2010, to Eyak, CBP proposed a modification (numbered 5 by CBP) to the contract to include the FAR clause required in contracts using ARRA funds.

On January 15, 2010, the acting chief procurement officer for the Department of Homeland Security sent a letter to Eyak strongly encouraging it to sign the modification incorporating the clause into the contract and to report as required by the clause. This official stated he had not heard an acceptable answer for Eyak’s failure to report as required. He noted that the Office of Management and Budget, the press, and other organizations had already identified this project as the one contract under which the contractor was not reporting required information.

On January 19, 2010, Eyak wrote the Department of Homeland Security and stated that it would not agree to the proposed modification 5. Eyak stated that agreeing to this modification would have the appearance of wrongdoing since it was after the fact and after the contract performance period had ended. On January 22, 2010, the executive director of CBP’s procurement directorate responded to Eyak that it was DHS’s only contractor which did not report as required by the ARRA and stated that it was “regrettable that Eyak chose not to cooperate with the Government in amicably satisfying a matter of national interest” Appeal File, Exhibit 27. On March 9, 2010, Eyak filed a claim with the contracting officer seeking enforcement of the contract modifications reversing the ARRA funding, a finding that Eyak was not required to comply with the ARRA reporting requirements, and reimbursement of unspecified costs and legal fees incurred as a result of CBP’s attempted enforcement of the ARRA reporting mandates. The contracting officer denied the claim,

and this appeal resulted.

Discussion

Eyak seeks summary relief on the basis that it was not subject to the ARRA reporting requirements and should not have been listed as non-compliant. Eyak submits that the modifications removing the ARRA funds that were drafted and published before being withdrawn by CBP are valid and binding and that the subsequent proposed modification to incorporate the ARRA FAR clause is not legally permissible. In this motion Eyak asks the Board to decide that the modifications are valid and that CBP breached the contract, entitling Eyak to the costs and legal fees it incurred in opposing CBP's efforts to add ARRA funds and have Eyak comply with the statute.¹

CBP disagrees with each contention raised by Eyak. CBP argues that the ARRA funds have been obligated to the Eyak contract and that Eyak must comply with the statutory and regulatory reporting requirements.

We are guided by the well-established rules applicable to summary relief motions. Summary relief is only appropriate where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party shoulders the burden of proving that no question of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Here, we find that there is no material fact in dispute and that it is appropriate for us to decide the matter, as set forth herein, on this motion.

The ARRA mandates that as a condition for the receipt of funds the agency must require the recipient to provide certain information online. The FAR, in implementation of the statute, requires that the contracting officer indicate in advance that a contract or modification is being funded with ARRA money. This is a requirement whenever ARRA funds are used, "regardless of the contract instrument." The FAR also directs the contracting officer not to use ARRA funds without insertion of the ARRA clause placing the contractor on notice of the funds being used and the requirements to be met due to the use of such funding.

¹ We have previously held that while we do not have jurisdiction to order specific performance or grant injunctive relief in this matter, we can decide the validity of the contract modifications, which determination may have the effect of providing Eyak with the relief it seeks. *Eyak Technology, LLC v. Department of Homeland Security*, CBCA 1975, 10-2 BCA ¶ 34,538.

As set forth above, CBP, without notice to Eyak, and in violation of the statute and regulations, added ARRA funds to the contract and subsequently sought Eyak's compliance with the provisions of the ARRA and regulations. The ARRA and implementing regulations clearly require notice to a recipient of ARRA funds in advance of the issuance of a contract modification seeking to incorporate ARRA funds.

CBP failed to comply with the express statutory and regulatory provisions applicable to any federal agency using ARRA funds. The statute, as a condition precedent to the use of ARRA funds, required CBP to impose the reporting requirement upon Eyak. In implementation of the statute, the regulations required disclosure to Eyak of the use of ARRA funds and insertion into the contract of the FAR ARRA clause. When it issued modification 2, CBP did not comply with any of these mandates. Its violation of these requirements resulted in the failure of Eyak to receive notice of the added requirements that CBP sought to impose. An action by an agency contrary to the requirements of a statute and regulation may render the action invalid. In *Urban Data Systems v. United States*, 699 F.2d 1147 (Fed. Cir. 1983), the Court affirmed a decision of the General Services Board of Contract Appeals which found certain pricing provisions of a contract invalid and unenforceable since the provisions expressly violated a statute. The Court, quoting the Supreme Court, stated that it "is the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id.* at 1154 (quoting *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947)); see also *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (funds may not be paid in violation of a statutory prohibition); *Total Medical Management, Inc. v. United States*, 104 F.3d 1314 (Fed. Cir. 1997). CBP's use of ARRA funds and its attempt to impose the reporting requirements on Eyak were invalid.

Eyak did not receive the required notice and did not agree to the added requirements imposed by the ARRA, which included the filing of numerous items of progress and contract and subcontract information, a determination of the number of jobs created with ARRA money, and the disclosure of the names and compensation of its five highest officers. We find that the contracting officer had no authority to unilaterally impose these requirements into this contract.

We conclude that Eyak is not required to comply with the ARRA reporting requirements.² Any other result would be inherently unfair to Eyak by requiring it to

² Because of the decision we reach herein, we need not address Eyak's argument that the modifications drafted by CBP which purported to remove the ARRA funds were legally effective. That argument presumes that modification 2, adding the ARRA funds, was valid. We also do not address the action to be taken by CBP. We note that a substitute of funding may avert a violation of the ARRA.

perform added work, including disclosure of its officers' salaries, without prior notice and agreement.

Eyak also seeks its costs and legal expenses resulting from CBP's improper designation of ARRA funding. It submits that the contract was breached by CBP's actions publicly designating it to be a non-compliant contractor. A breach of contract is a violation of a contractual obligation either by failing to perform one's promise or by interference with the other party's performance.

We find that we do not possess jurisdiction to determine whether Eyak would be entitled to the costs Eyak seeks, since Eyak has requested these costs without specifying the dollar amount it seeks. For a claim under the contract to be valid, the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (previously 41 U.S.C. §§ 601-613 (2006)), requires a sum certain to be stated by the contractor. Absent such specificity, such a claim is not properly before the Board. *See Red Gold, Inc. v. Department of Agriculture*, CBCA 2259 (July 6, 2011), and cases cited therein. Eyak has failed to state a sum certain for this portion of its claim.

Decision

The motion for summary relief is **GRANTED IN PART**, in accordance with the foregoing.

JAMES L. STERN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

CATHERINE B. HYATT
Board Judge