UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 13, 2012

CBCA 2633

IAP WORLD SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

David J. Craig of IAP World Services, Inc., Cape Canaveral, FL, counsel for Appellant.

David A. Ingold, Office of Chief Counsel, Internal Revenue Service, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SHERIDAN**, and **DRUMMOND**.

DANIELS, Board Judge.

Three times as much snow as the average annual amount fell in Ogden, Utah, during the winter of 2008-2009. Consequently, says the contractor, it is entitled to be reimbursed for the costs it incurred, in excess of normal, in removing snow from a government facility in that city. We disagree, affirming the contracting officer's decision which denied the claim.

Findings of Fact

On August 31, 2005, the Internal Revenue Service (IRS), an entity within the Department of the Treasury, awarded a firm, fixed-price contract to IAP World Services,

Inc.[1] (IAP) for "all management, supervision, labor, materials, supplies, and equipment necessary for operation and maintenance of building equipment at [six] IRS facilities," one of which was located in Ogden. The contract covered a phase-in period, which per amendment 1 ran until March 13, 2006, and five option periods, each one year in duration, with the first beginning on March 14, 2006. The IRS exercised all of the options and later extended the contract through May 8, 2011.

The contract required IAP to provide "basic services," including snow removal, for the fixed price specified. The contractor had to "remove snow from the parking spaces/areas and sidewalks following all snow falls of one inch or more or when unsafe conditions exist[] for IRS employees." The contract explicitly made the snow removal requirement applicable to all parking areas and sidewalks at the Ogden facility.

The contract also contained several provisions under which IAP could be paid more than the fixed price for performing certain kinds of work. If requested by the IRS, IAP had to provide "additional services," "using IDIQ [indefinite delivery/indefinite quantity] [Special][2] Orders." One of these "additional services" was snow hauling. The contract explained, "If snow accumulation exceeds the capability to pile the snow on the IRS premises as determined by the COTR [contracting officer's technical representative], hauling of snow to an offsite location may be deemed necessary. If this happens, the COTR will verbally direct [IAP] to perform the required services and follow it up in writing by an issuance of an IDIQ [special] order."

The contract also included two examples of other additional services which might be ordered through the issuance of IDIQ special orders and result in extra payments to IAP. If in the course of making an inspection during the phase-in period, the parties found a deficiency that they agreed required repairs costing more than $500, IAP would be paid a negotiated price for all costs in excess of $500 necessary to make the repairs. If the COTR initiated a service call for an unscheduled building-related problem and agreed that the cost of work responsive to the call would exceed $2500, IAP would be paid a negotiated price for

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[1] The contract was awarded to IAP World Services, Inc. The company is also referred to, in some filings with the Board, by the name of its parent company, IAP Worldwide Services, Inc. *See*, as to the relationship between the two firms, <<http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=4235284>> (last visited Aug. 9, 2012).

[2] The contract originally called these orders "task orders." Per amendment 2, the term was changed to "special orders."

all labor, materials, and subcontract costs in excess of $2500 necessary to perform that work.[3] Additionally, if IAP were to encounter unforeseen conditions during the performance of a special order, it could ask the IRS to modify the order in a way appropriate to the change in scope.

The contract further permitted extra payments to IAP through the incorporation by reference of the Changes clause at Federal Acquisition Regulation 52.243-1, Alternate II (APR 1984) (48 CFR 52.243-1 (2004)). This clause provides that if the contracting officer makes a change within the general scope of the contract in any of several ways, including the description of services to be performed, and the change causes an increase or decrease in the cost of performance, the contracting officer is to make an equitable adjustment to the contract price. In addition, the contracting officer was to modify the contract to increase payments to IAP whenever the Government, through the issuance of wage determinations, mandated that the contractor increase the wages of its employees who performed work under the contract at various locations.

The contract included an exhibit, which was also part of the solicitation provided to bidders (including IAP), which stated that from January 1, 1924, to December 31, 2001, the average annual snowfall in Ogden was 29.6 inches.

On March 6, 2008, IAP sent to the IRS "a request for an equitable adjustment (REA) for the near record amount of snowfall in Ogden, UT this season." The amount of money sought as additional costs incurred to remove the snow in excess of the average annual snowfall was $109,619. The contractor explained, "For the season to date, the amount of snowfall for the season has reached 98 inches . . . . This amount of snowfall has caused a financial burden for IAP due to the additional effort for snow removal." The IRS acknowledges that the amount of snowfall cited by IAP is correct. On August 20, 2008, IRS contracting officer Barry Sparks modified the contract to pay IAP $109,619 from IDIQ funds "to cover the cost for snow removal" in Ogden.

On April 14, 2009, IAP sent to the IRS "a Request for Equitable Adjustment (REA) proposal for an increase to [the contract price] in the amount of $100,326.00 based on the increased effort expended responding to the near record snowfall in Ogden, UT this season." The contractor explained that ninety-two inches of snow had fallen that winter and said that "[t]his unusual increase in the snowfall required an unexpected increase in effort for snow

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[3] After May 14, 2008, per amendment 28 (and retroactively, per amendment 33), the $2500 threshold did not apply to orders for repair/replacement service calls for equipment, systems, and building infrastructure deemed obsolete by the IRS.

removal which had placed a financial burden on IAP." Again, the IRS acknowledges that the amount of snowfall cited by IAP is correct.

On June 10, 2009, IRS contracting officer Sharon Boykin denied the request. Ms. Boykin wrote:

> The subject contract was awarded as a firm fixed-price contract and is not subject to any adjustment on the basis of contractor's actual cost experience in performing the contract. The contractor bears the risk of the cost associated with additional snowfall just as the Government would not reap any benefit if there was no snowfall.

On May 13, 2011, IAP submitted a certified claim for the $100,326 alleged increased costs of removing snow at the Ogden facility during the winter of 2008-2009. In making the claim, IAP asserted that the agency's determination regarding snow removal during the winter of 2007-2008 set a precedent that removing snow in excess of the average annual snowfall was compensable. Contracting Officer Boykin denied the claim. She noted that another contracting officer had reimbursed IAP for similar costs during the previous winter, but said that in her view, the contractor bore the risk of these costs under the fixed-price contract, so she could not provide reimbursement for them. She noted that the contract made snow hauling, but not snow removal, compensable under an IDIQ order.

In a later memorandum for the record, Ms. Boykin stated that IAP did not haul any snow from Ogden during the winter of 2008-2009. The contractor does not take exception to this assertion.

Discussion

IAP maintains that the requirement that it remove from the parking areas and sidewalks at the Ogden facility, during the winter of 2008-2009, three times the amount of snow that fell in Ogden during an average winter constituted a constructive change to the contract. This characterization is incorrect.

"A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government." *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007) (citing *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 678 (1994)); *see also Ace Constructors, Inc. v. United States*, 499 F.3d 1357, 1361 (Fed. Cir. 2007). "To recover on its constructive change claim, [a contractor] must prove that the [government] ordered it to [perform additional work] . . . and that this work was not required under the

contract." *LB&B Associates Inc. v. United States*, 91 Fed. Cl. 142, 153 (2010) (quoting *Al Johnson Construction Co. v. United States*, 20 Cl. Ct. 184, 204 (1990)).

The contract in question was for the most part a firm, fixed-price contract. Snow removal was one of the "basic services" which were to be performed for the agreed-upon fixed price. The Federal Acquisition Regulation explains that "[a] firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss." 48 CFR 16.202-1. "It is well-established that absent a special adjustment clause, a contractor with a fixed price contract assumes the risk of increased costs not attributable to the Government." *Southwestern Security Services, Inc. v. Department of Homeland Security*, CBCA 1264, 09-2 BCA ¶ 34,139, at 168,777 (citing *Gulf Shores, LLC v. Department of Homeland Security*, CBCA 802, 09-1 BCA ¶ 34,024, at 168,305 (2008)). No such clause is implicated in the dispute before us. Thus, however much snow fell in Ogden while the contract was in effect, IAP was required to remove it from parking areas and sidewalks at the IRS facility as part of its commitment to perform work for the contract's fixed price. The risk that snow removal would be expensive, such as during a year with heavy snowfall, was explicitly placed on the contractor. Similarly, the reward that snow removal might be inexpensive, such as during a year with light snowfall, would redound to the contractor's benefit.

The contract did provide for payments to the contractor, in addition to the fixed price, under certain circumstances. When the contractor was directed to perform "additional services," it would be paid for that work under IDIQ orders. One type of additional services described in the contract was snow hauling, which would be necessary when snow accumulation, in the judgment of the COTR, exceeded the capability to pile snow on IRS premises. Other types of additional services were making certain repairs during the phase-in period or in responding to a service call. IAP could also be paid moneys in excess of the fixed price when it encountered unforeseen conditions during the performance of an IDIQ order, when the IRS changed the services to be performed, and when the Government mandated that the contractor increase the wages it paid its employees. None of these conditions pertains to snow removal, however. Despite a heavy snowfall in Ogden during the winter of 2008-2009, IAP never had to haul snow from the IRS facility there. No repairs were necessary as a result of that snowfall, no unforeseen conditions occurred, no changes were made to the services, and no wage determination impact is alleged.

IAP advances two theories in an effort to escape these conclusions. First, the contractor asserts that it "performed work beyond the contract requirements by removing snow in an amount significantly in excess of the estimated amount contained in the Contract. This estimate was provided by the Government as the means by which contractors should

price their snow removal efforts." There is a fundamental problem with this perception: the IRS never gave prospective bidders an estimate of the amount of snow the contractor would have to remove from the Ogden parking areas and sidewalks. The agency simply provided historical data, independent of the agency's knowledge, as to the average amount of snow which had fallen annually in Ogden during the previous eight decades. An average, of course, is simply that. "By definition, averages are composed of figures both greater and less than the average," so a bidder receiving this information would have to know that it would encounter snowfalls heavier than average in some years. *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987). As IAP concedes, "Nobody can predict the weather precisely in any given period, let alone over the course of five years. Both IAP and the IRS understand this fact."

The two cases IAP cites in support of its argument involved situations plainly different from the one at issue here. In both *Womack v. United States*, 389 F.2d 793 (Ct. Cl. 1968), and *Medart, Inc. v. Austin*, 967 F.2d 579 (Fed. Cir. 1992), the Government had supplied in bid documents estimates as to work which would be required under the contract, the contractors relied on that information in making their bids, and actual work differed significantly from the estimates. The court in each case held that if the contractor could show that the estimates had been made without reasonable care, or negligently, the Government would be liable for resulting damages. In our case, the IRS made no estimates as to future snowfalls or how they could affect removal efforts, and no one has disputed the accuracy of the historical data that the agency included in the bid documents. IAP has submitted no evidence that it relied on the data in pricing its bid.

The contractor's other theory is that IRS Contracting Officer Sparks' modification of the contract to reimburse IAP for its expenses of removing above-average amounts of snow from the Ogden facility in the winter of 2007-2008 established a precedent, or course of dealing, which bound the agency to make similar modifications in future years. For two reasons, this position cannot prevail. First, "A course of dealing is defined as 'a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. . . . The emphasis is on a sequence of events; a single transaction cannot constitute a course of dealing." *DeLeon Industries, LLC v. Department of Veterans Affairs*, CBCA 986, 12-1 BCA ¶ 34,904, at 171,630 (2011) (quoting *Underground Construction Co. v. United States*, 16 Cl. Ct. 60, 66, 67 (1988)). Second, a course of dealing establishes a basis for recovery only where a contractor can show reliance on it to the contractor's detriment. This occurred, for example, in the one case IAP cites as to this theory, *L. W. Foster Sportswear Co. v. United States*, 405 F.2d 1285 (Ct. Cl. 1969). There, the contractor had been making flying jackets for the Government under a series of contracts for seven years. The Government had consistently granted the contractor a deviation from contract specifications

so that it could manufacture an acceptable garment. When bidding for another contract, the contractor assumed that it would be given a similar deviation from similar specifications. The court held that the contractor acted reasonably, in light of the course of dealing, and that it was entitled to an equitable adjustment in the amount that its costs increased in complying with the specifications.[4] Here, there was no course of dealing and IAP has not shown that it ever did anything different from what it would otherwise have done in reliance upon any action of the IRS. It merely expected that Contracting Officer Boykin in 2009 would make the same decision Contracting Officer Sparks made in 2008. She did not, and her determination was consistent with the words of the contract.

Decision

The appeal is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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PATRICIA J. SHERIDAN
Board Judge

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JEROME M. DRUMMOND
Board Judge

[4] IAP cites two other decisions in support of this theory, but neither of them involved a course of dealing. In *Superstaff, Inc.*, ASBCA 46112, 94-1 BCA ¶ 26,574 (1993), the board explicitly did not decide whether a course of dealing had been established. In *American Transport Line, Ltd.*, ASBCA 44510, 93-3 BCA ¶ 26,156, the contractor had bid with knowledge of the Government's interpretation of an ambiguous contract provision, so it was bound by that interpretation.