UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 28, 2012

CBCA 2779

PAPA FRANKS,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Steven K. Sanders of Steven K. Sanders & Associates, L.L.C., Albuquerque, NM, counsel for Appellant.

Barbara Thomas, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, counsel for Respondent.

VERGILIO, Board Judge.

On March 13, 2012, the Board received a notice of appeal from Papa Franks (contractor) concerning an agreement, DJMS-11-51-M001, with the Department of Justice's United States Marshals Service (agency) under which the contractor was supplying meals for those within the custody of the agency at a given location during fiscal year 2011 (October 1, 2010, through September 30, 2011). After April 15, 2011, the agency ordered significantly fewer meals because it no longer needed the contractor to provide many of the meals; prisoners were fed by other means, while the contractor provided meals for new arrestees. The contractor filed two claims, deemed denied by the contracting officer. Under the first, the contractor seeks $4157.91, said to be its cost to have a new ventilation system installed at its restaurant during the performance period, with the equipment required for the contractor to retain insurance while preparing the volume of hamburgers under the contract. Under the second, the contractor seeks $28,336, the difference between the maximum value of the agreement and the payment the contractor says it received.

The contractor has elected to utilize the small claims procedure, such that the presiding judge renders the decision which is binding upon the parties, does not establish precedent, and may not be set aside except in the case of fraud. 41 U.S.C.A. § 7106(b) (2011); Board Rule 52 (48 CFR 6101.52 (2011)).

The agency was obligated to pay for meals ordered at a fixed unit price. The agency made such payments. The agreement does not obligate the agency to pay for improvements to the contractor's facilities or to pay for meals not ordered. Accordingly, the Board denies the appeal.

Findings of Fact

1. The agency solicited prices to obtain meals for prisoners in the custody of the United States Marshals in a courthouse and cellblock in Albuquerque, New Mexico. Exhibit 1 (all exhibits are in the appeal file). On October 1, 2010, the agency placed an order with the contractor to provide prisoner meal services for fiscal year 2011 (October 1, 2010, to September 30, 2011), not to exceed $50,000, and subject to a statement of work with additional terms and conditions; the order is on a Standard Form 347. Exhibits 5, 7. The solicitation and agreement specify that, upon the verbal request of the Marshal or a designee, the contractor is to provide meals (breakfast, lunch, and airlift) for federal prisoners while confined within the courthouse and cellblock. Exhibits 1 at 2 (¶ B), 7 at 10 (¶ B). Payment is based upon the fixed unit price per meal and the number of meals ordered during a billing cycle. Exhibits 1 at 2 (¶¶ B, D), 7 at 2 (¶ 1.1.3). The solicitation and agreement do not contain estimates for the number of meals or a minimum quantity or dollar amount guaranteed under the agreement. That is, the solicitation and agreement do not specify that a requirements or a delivery order (indefinite delivery/indefinite quantity) contract will result. Exhibits 1, 7.

2. In response to daily orders, the contractor provided lunch meals for prisoners, billing at the fixed unit price and receiving payment. From October 1, 2010, through April 15, 2011, the contractor provided approximately 3474 meals, or 534 meals per month. Declaration of Contracting Officer, Exhibit A. This represents an increase over the number of meals per month provided by the contractor during the prior fiscal year, when the figures were approximately 5775 meals, or 481 meals per month. Exhibit 10 at 1.

3. By letter dated January 3, 2011, the contractor's insurance company informed the contractor:

> This letter is to inform you that currently we insure your restaurant . . . as a burrito and sandwich shop. Due to your increase in Hamburger production we

> required you to upgrade your hood and exhaust in order to maintain fire safety requirements to maintain your insurance . . . . If the hood and exhaust are not upgraded your policy may not be renewed.

Exhibit 10 at 2. On February 12, the contractor entered into an arrangement with a company to install a new hood and exhaust system. The contractor claims to have expended $4157.91 for the equipment, parts, and labor. Exhibit 10 at 1, 4-6.

4. By letter dated March 18, 2011, the contracting officer informed the contractor of funding cuts, that requirements under the contract had been reduced, and that the agency no longer would be providing prisoner meals for in-custody prisoners. The agency anticipated future needs of approximately ten prisoner meals per week, after utilizing the contractor for thirty days to permit the contractor to use its inventory of food. The contracting officer inquired if the contractor would be interested in providing that limited number of meals. Exhibits 9, 15.

5. Beginning in mid-April, many of those in the custody of the agency no longer needed contractor-provided meals; jails provided meals at the time of a prisoner's departure or return. Exhibit 8. Accordingly, the agency's needs for meals from the contractor were reduced. The contractor continued to provide meals as ordered by the agency under the agreement. Between March 16 and April 15, 2011, the agency ordered and paid for approximately 671 meals. For the final five and one-half months of the contract (April 18 through September 30, 2011), the contractor provided approximately 469 meals, or 85 meals per month. Declaration of Contracting Officer, Exhibit A.

6. By "invoice" dated April 14, the contractor sought payment from the agency of $4157.91 (the contractor's claimed cost for the exhaust system). The contractor explains that it would not have incurred the expense had it known that the contract could be changed at any time. The contractor maintains that it operates a burrito and sandwich restaurant, and served burgers only to satisfy the agency's requirements. Exhibit 10 at 1. The contractor views the amount as a recoverable "reasonable charge" under the termination for convenience clause of the agreement. Exhibit 15 at 4.

7. The contractor submitted to the contracting officer two claims dated January 7, 2012. In the first claim, the contractor seeks $4157.91, for the reasons set forth in the finding above. In the second claim, the contractor seeks $28,336. The contractor maintains that it has received $21,664 from the agency; it seeks the balance of what it views to be a $50,000 contract. Exhibit 15 at 2-5.

8. On March 13, 2012, the Board received the contractor's notice of appeal, based upon a deemed denial by the contracting officer of the two claims. On March 27, 2012, the Board received the contractor's election to utilize small claim procedure.

Discussion

The contractor seeks payment under two claims. Under claim one, the contractor seeks $4157.91, said to be its costs of having a new exhaust fan and hood installed in its restaurant. Under claim two, the contractor seeks $28,336, the difference between the $50,000 the agency allocated to the fiscal year delivery order and the $21,664 the contractor says it received during the fiscal year for meals provided.

The contractor bears the burden of proof to recover. Here, the contractor has failed to demonstrate entitlement to additional payment from the agency. The agency ordered and paid for meals pursuant to the agreement throughout its term. The contractor received its fixed unit price for each meal delivered.

This agreement represents a blanket purchase agreement; it is not a requirements contract. There is no express or implied obligation by the agency to order every meal from this contractor. The contract contains no estimates of the number of meals that the agency projected over the contract term. Rather, under the agreement, the agency places orders (or not) on a daily basis and the contractor provides meals for the fixed price.

The agency did not breach the agreement, as suggested by the contractor's first claim. Moreover, the agency continued to place orders to satisfy its needs. The contractor received the fixed price for each meal. Similarly, the agency did not terminate the contract for its convenience; the agreement did not obligate the agency to purchase meals, particularly when there was no need. Because no provision obligates the agency to reimburse the contractor for any of its particular costs of doing business or for any amount greater than the fixed, per meal charge, the contractor is not entitled to recover its costs to upgrade its facilities.

The agreement is not a contract to pay the contractor $50,000 during the contract period. Rather, the agency is obligated to pay only for meals ordered, with the total for the meals not to exceed $50,000. Because the agency never was obligated to pay the contractor $50,000, that amount does not control the contractor's relief. Thus, the contractor's second claim fails.

In summary, the contractor is not entitled to payment for meals not ordered or for more than the unit price for each meal ordered. The agency has paid the contractor pursuant to the terms and conditions of the agreement.

Decision

The Board **DENIES** the appeal.

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JOSEPH A. VERGILIO
Board Judge