UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: April 30, 2013

CBCA 3072

ENVIRONMENTAL QUALITY MANAGEMENT, INC.,

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Brian W. Craver of Person & Craver LLP, Washington, DC, counsel for Appellant.

Kenneth R. Pakula and Sara E. McGraw, Office of the General Counsel, Environmental Protection Agency, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **STEEL**.

BORWICK, Board Judge.

Respondent, the Environmental Protection Agency (EPA), entered into an environmental cleanup contract with Environmental Quality Management, Inc. (appellant or EQM). Appellant asserted a claim against respondent for alleged diversion of work to another contractor, under its theory that it had entered into a requirements contract, or alternatively, an indefinite-quantity contract. Appellant also asserted a claim for a price adjustment under the Variation in Estimated Quantity (VEQ) clause arising from the alleged shortfall in work and a differing site conditions claim because it had to dig deeper than specified in the contract to meet the 400 parts per million (PPM) minimum lead specification (the dig-deeper claim).

Respondent's contracting officer denied the claims in their entirety and appellant appealed.

Before the Board, respondent moves for summary relief and seeks dismissal of the appeal. We deny the motion. Respondent's motion is based on the proposition that the contract was neither a requirements nor an indefinite quantity contract and that appellant has been fully paid for the services rendered. We conclude that in this appeal a determination of the contract type is not suitable for summary relief and must await interpretation of ambiguous contract language after full development of the record. Appellant may also maintain its equitable adjustment claims for a variation in estimated quantities and differing site conditions.

Background

Contract objective

This case involves a certified claim of $6,515,878 for an equitable adjustment under contract EP-S7-09-07, which was awarded to appellant by respondent on September 28, 2009. The contract called for remediation of lead-contaminated residential property surface soil at the Madison County Mines superfund site (Madison County superfund site), operable unit 3 (OU-3) in Madison County, Missouri.[1] According to the contract's performance work statement (PWS), the properties to be addressed were single family dwellings constructed during the 1900s and mobile homes. Basically, the site was a contaminated neighborhood. The contract's objective was to alleviate human health risk arising from lead exposure by excavating lead-contaminated soil to a specified depth and specified lead concentrations of parts per million (PPM).

Undisputed contract terms and conditions.

The original contract solicitation incorporated in section B-1 the Commercial Item Description clause of Federal Acquisition Regulation (FAR) 52.212-4 (Alternate I (Oct. 2008)). The final contract did not incorporate FAR 52.212-4, but did incorporate 52.212-5 (Contract Terms and Conditions Required to Implement Statutes or Executive Orders–Commercial Items) (Sep. 2008), FAR 52.216-31 (Time and Materials/Labor Hour

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[1] The site is approximately 498 square miles in area and is located in a rural agricultural area eighty miles south of St. Louis. The site is at the southern end of the Old Lead Belt, where heavy metal mining has occurred since the early 1700s.

Proposal Requirements–Commercial Item Acquisition (Feb. 2007) and FAR 52.244-6 (Subcontracts for Commercial Items (Mar. 2009)).

In section L.7 the contract was briefly described as a "firm fixed price contract" and nothing more. The contract did not include, nor incorporate by reference the FAR Requirements clause, FAR 52.216-21, or the FAR Indefinite Quantity clause, FAR 52.216-22. The contract, however, contained the Differing Site Conditions clause of FAR 52.236-2 (Apr. 1984) and initially, the Changes clause of FAR 52.243-1. Contract modification 008 incorporated the Changes clause in FAR 52.243-4 (June 2007).

The pricing schedule of the contract set forth fourteen contract line items (CLINS), with the primary lead remediation CLIN being set forth below in the following format:

CLIN	DESCRIPTION	EST QTY	UNIT	UNIT PRICE	TOTAL
0001	Remediation (short not metric)	up to 430,000	Ton		

The PWS estimated that there would be 600 known properties to be remediated, with the possible addition of 300 more properties, and the estimated total universe of properties would be between 800 to 1100 properties. The PWS provided:

> Schedule of Property Cleanups
>
> A list of known properties requiring remediation is included in Enclosure F, all of which are included within Madison County. Please note that the list is general and not all-inclusive or all exclusive. For example, additional properties may be added during the contract, such as properties where a child with an EBL lives or a property that is screened and requires remediation by EPA during the contract period. Also properties may be taken off the list for various reasons. For example, a property may be removed from the list if the landowner refuses access or has constructed over the existing contamination, or if the current contractor addresses the property prior to the end of his contract (September 25, 2009). However, EPA expects the large majority of these properties will be available for the Contractor to remediate under this contract. (emphasis added)

There are disputes of fact as to whether the Government represented at a bidders conference whether, in light of the above language, the awardee would be the exclusive

remediation contractor after September 25, 2009. Appellant proffers the affidavit of Mr. William Brunston, appellant's response manager, who heard the contracting officer represent that there would only be one contractor working in OU-3. Affidavit of William Brunston (Mar. 8, 2013). Respondent's contracting officer denies making the statement. Declaration of Yolanda Nero (Apr. 10, 2013).

The PWS also stated:

> Please note that this cleanup addresses all residential soil with lead levels greater than 400 PPM and that the large majority of the properties with lead levels greater than 1200 PPM have previously been addressed.

Enclosure F to the contract listed in tabular form un-remediated properties by an EPA identification number, street address, city, and maximum lead concentration. Enclosure B to the contract defined "residential properties" as:

> [a]ny area with high accessability to young children. This includes, but is not limited to, properties that contain single and multi-family dwellings, apartment complexes, vacant lots in residential areas, schools, daycare centers, playgrounds, parks and green ways."

Undisputed Statements of Fact in Respondent's Motion for Summary Relief

Appellant does not dispute respondent's statement of undisputed facts as to the date of contract award and the basic purpose of the contract, i.e., remediation of lead-contaminated properties in OU-3 of the Madison County superfund site. Appellant does not dispute respondent's statement reproducing the contract's definition of "residential properties." Finally, appellant does not dispute respondent's statement that appellant excavated 379,089.5 tons of lead-contaminated soil from properties in OU-3 of the Madison County superfund site.

Disputed Statements of Fact in Respondent's Motion for Summary Relief

Appellant disputes the following statement of fact in respondent's statement of undisputed facts ¶ 2:

> The contract contains neither the FAR requirements clause [FAR 52-216.21] nor any statement obligating [respondent] to assign all Madison County superfund site properties to appellant for remediation.

In its statement of genuine issues, appellant does not deny the absence of FAR 52-216.21 from the contract but states as a genuine issue of material fact "whether the contract provides any reasonable basis to conclude it is not a requirements contract." Appellant's Statement of Genuine Issues ¶ 2. Appellant also poses as an issue of material fact "whether a reasonable bidder would have interpreted the language of the contract to create an exclusive purchase arrangement for a fixed period of time." *Id.* ¶ 1.

Respondent, in its statement of undisputed facts, states that "the contract contains neither the FAR indefinite quantity clause [FAR 52.216-22] nor a specified minimum quantity." Appellant does not deny the absence of FAR 52.216-22 or the absence of an explicit minimum quantity. However, appellant poses as a genuine issue of material fact whether the contract contains that FAR clause by operation of law as prescribed by FAR 16.506(e).

Respondent, in its statement of uncontested facts, states that CLIN 0001 of the contract provided for "remediation." Respondent's Statement of Undisputed Facts ¶ 4. Appellant in its statement of disputed facts disputes any interpretation of that CLIN as including high child impact areas (HICA). Appellant's Statement of Genuine Issues ¶¶ 6-7, 12. Appellant, however, does not dispute respondent's literal re-statement of the contract language as set forth in CLIN 0001.

<u>The Claim</u>

The claim, dated June 8, 2012, alleged that appellant incurred extra costs because of a severe under-run in excavation quantities on the residential properties covered by the contract. Appellant alleged that it calculated its unit price per ton bid of $24.25 on an alleged contract estimate of 430,000 tons of lead-contaminated soil on 800 residential properties. Appellant alleged that the actual quantities of excavation for residential properties amounted to 183,537 tons of soil with only 566 residential properties out of the estimated 800 being remediated. Appellant claimed that the contract was of the requirements type, and consequently, respondent was obligated to assign all remediation on residential properties at OU-3 to appellant. Appellant maintained that after its contract was awarded, respondent diverted 250 residential properties to another incumbent contractor, ASW, whose contract had been set to expire on September 25, 2009.

Appellant claimed a cardinal change and a differing site condition for the alleged diversion of work. Appellant also claimed recovery for breach under the superior knowledge doctrine because respondent did not disclose that it would extend ASW's contract by one year and divide the available work between two contractors over the first

year of appellant's two-year contract. Appellant's alternative argument was that respondent acted in bad faith in developing its estimate of tonnage to be excavated.

Appellant claimed entitlement to an equitable adjustment under an alleged VEQ clause because the quantity of residential excavation fell short of the alleged estimated quantity by 15% or more. Appellant recognized that respondent had assigned additional work in HICA and other high volume sites, but alleged that this work was outside the scope of the contract, specifically CLIN 0001, and that the assigned work did not count towards achieving the 430,000 ton estimate.

Appellant also alleged a type I differing site condition and cardinal change because it had to excavate deeper into the soil than shown in the contract to reach specified minimum PPM of lead concentration, thereby increasing its costs.

Decision of the contracting officer

The contracting officer's decision of August 15, 2012, denied the existence of a requirements contract but asserted that the contract was an indefinite quantity contract. Since appellant had been paid $9,598,329.05 for the 379,089.5 tons of lead-contaminated soil removed, the contracting officer maintained that appellant had been fairly compensated for the work.[2] The contracting officer denied the existence of a cardinal change, since appellant, including the remediated HICA areas, excavated 88% of the estimated tonnage from 575 properties. The contracting officer stated that these figures proved the accuracy of the estimates. The contracting officer denied the existence of a VEQ clause in the contract. She also denied (1) the existence of differing site conditions, (2) superior knowledge on the part of respondent, (3) that respondent acted in bad faith, and (4) the existence of constructive change. In short, she denied the claim in its entirety.

Discussion

This appeal involves a claim on an environmental clean-up contract with respondent in what was essentially a contaminated neighborhood. Appellant says it did not obtain the amount of work it expected, i.e., removal of an estimated 430,000 tons of lead-contaminated

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[2] If the contracting officer's data is accurate, the arithmetic shows the unit price per ton respondent paid appellant was almost $25.32, not the per ton bid price of $24.35. The discrepancy is not material to our decision.

soil, because respondent gave work to an incumbent contractor.[3] Appellant's claim is based on the proposition that its contract with respondent was a requirements contract and that it was entitled to the exclusive right to work in the area.

Alternatively, claimant alleges that if the contract was not a requirements contract, respondent breached the contract by issuing a bad faith estimate. Appellant also maintains that if we deem the contract not to be a requirements contract, it should be construed as an indefinite quantity contract. This theory is based on the proposition that FAR clause 52-216.22 should be read into the contract as a matter of law.

Respondent has moved for summary relief on these issues, maintaining that the contract was neither of the requirements type nor the indefinite quantity type; consequently, it was an illusory contract and appellant was only entitled to payment for the work performed at the contract price, i.e., the $9,598,329.05 respondent has already paid it.[4]

Summary relief is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862 slip op. at 15 (Apr. 19, 2013); *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260, 12-2 BCA ¶ 35,094, at 172,353. Disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248; *URS Energy & Construction*, 12-2 BCA at 172,353. "[A]ll reasonable inferences must be resolved against the party whose motion is under consideration." *Charleston Marine Containers, Inc. v. General Services Administration*, CBCA 1834, 10-2 BCA ¶ 34,551, at 170,398.

Identification of contract type generally is a matter of law. *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984). Since the contract does not contain the FAR Requirements clause, to qualify as a requirements contract it must contain "words of exclusivity" that not merely suggest, but require that *all* of the work be assigned to the contractor. *Coyle's Pest Control v. Cuomo*, 154 F.3d 1302, 1305-06 (Fed. Cir. 1998). The Court in *Coyle's Pest Control* held that if a contract is neither a requirements nor an

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[3] In respondent's response to appellant's opposition to respondent's motion for summary relief, respondent admits that it exercised the incumbent contractor's option and allowed it to continue working at the site.

[4] Respondent's position before the Board differs from the analysis of respondent's contracting officer in her decision. The contracting officer construed the contract as an indefinite quantity contract.

indefinite quantity contract, then a contractor is only entitled to payment for the services actually ordered by the contracting agency. *Id*. at 1306.

In this instance, the contract type is identified merely as a "firm fixed price" contract without further elaboration and the FAR's requirements clause is not in the contract. However, the phrase in PWS that "a property may be removed from the list . . . if the current contractor addresses the property prior to the end of his contract (September 25, 2009)" reads as if respondent committed to assign remaining work to appellant after September 25, 2009. Respondent places great store by the other "various reasons" in the PWS that work might not be assigned to appellant, but that list at this stage of the proceeding seems to relate to the availability of properties to be remediated, not whether another contractor could remediate them in place of appellant. In any event the "various reasons" phraseology is at best ambiguous and might well have to be construed against respondent if the fully-developed record shows that the text was drafted by respondent. *HPI/GSA-3C, LLC v. Perry*, 364 F.3d. 1327 (Fed. Cir. 2004). At the least, full discovery and a hearing is required to determine the intent behind the "various reasons" language.

There is a dispute of fact as to whether respondent's contracting officer stated at a pre-bid conference that there would only be one contractor working in OU-3. Tribunals will admit oral statements at pre-bid conferences as an aid to interpretation of ambiguous contract language. *See Sylvania Electric Products v. United States*, 458 F.2d 994, 1006-07 (Ct. Ct. 1972); *P.J. Dick, Inc. v. General Services Administration*, GSBCA 12151, 96-1 BCA ¶ 27,955 (1995). Our task will be to resolve the factual disagreements between the Nero declaration and Brunston affidavit after full discovery and a hearing on the merits. A contracting officer's officer statement, if made, that there would only be one contractor working on OU-3 might assist us in construing the ambiguous "various reasons" provision of the contract.

Although the contract may well be found to be of the requirements type, we agree with respondent that it cannot be deemed an indefinite quantity contract, since the FAR Indefinite Quantity clause -- FAR 52.216-22[5]-- is not in the contract, and there is no

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[5] That FAR provision provides:

52.216–22 Indefinite Quantity.

As prescribed in 16.506(e), insert the following clause: INDEFINITE QUANTITY (OCT 1995)

minimum quantity stated. Since there is no minimum quantity, we may not classify the contract as one for an indefinite quantity. *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493 (1923); *Coyle's Pest Control*, 154 F. 3d at 1306.[6]

Other claims

Even if we were to later decide that the contract was "unenforceable" because it was neither a requirements nor an indefinite quantity contract, that does not mean, as respondent urges, that appellant is not entitled to an equitable adjustment for the remainder of its claims. Those claims are: (1) an alleged variation in estimated quantities under a VEQ clause, if the clause exists in the contract, and if the clause is applicable given the assignment of HICA properties, and (2) a Differing Site Condition under the contract's differing site condition clause for the dig deeper claim. In this respect, we agree with appellant that the ruling in *Coyle's Pest Control* does not prevent a contractor from seeking relief under the equitable adjustment and remedy granting clauses that are in the contract. *Konitz Contracting*, ASBCA 52299, 01-2 BCA ¶ 31,572, at 155,902. Resolution of those issues also awaits development of the record.

> (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.
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> (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.

48 CFR 52.216-22.

[6] Appellant urges that we read FAR 52.216-22 into the contract under the *Christian* doctrine, *G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963), to make the contract an indefinite quantity contract. However, application of FAR 52.216-22 presupposes the existence of a contract containing a minimum quantity, which is lacking here. Consequently, that provision of the FAR is simply not applicable.

Decision

Respondent's motion for summary relief is **DENIED**.

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ANTHONY S. BORWICK
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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CANDIDA S. STEEL
Board Judge