



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 24, 2013

CBCA 3239

THE DUCKE GROUPE, LLC dba HAVEN HOUSE VETERANS RESIDENCE,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Donald A. Woodruff, Director of The Ducke Groupe, LLC, Cleveland, OH, appearing for Appellant.

Lindsay C. Roop, Office of Regional Counsel, Department of Veterans Affairs, Columbus, OH; and Natica C. Neely, Office of Regional Counsel, Department of Veterans Affairs, Minneapolis, MN, counsel for Respondent.

VERGILIO, Board Judge.

On February 7, 2013, the Board received a notice of appeal from The Ducke Groupe, LLC dba Haven House Veterans Residence (contractor) concerning its contract, VA250-P-0592, with the respondent, the Department of Veterans Affairs (agency). The contractor was a successful awardee under a commercial item solicitation, as part of the community based health care for homeless veterans program, to provide basic services, including room and board, to each veteran referred for care. Under the agreement the contractor would be paid on a per diem basis based upon the number of beds occupied by veterans. The contractor received payment pursuant to the contract, but claims that for the first option year it is entitled to a greater per diem rate because the number of veterans receiving services was significantly below the estimates (approximately 4.3 in contrast to 9 per day). The contractor maintains that it calculated its per diem rate pursuant to the solicitation, that it did not recoup its fixed costs during the option year because of the fewer number of veterans referred for

services, and that it should not be expected to absorb the loss. The contractor seeks to be paid \$47,400. The contracting officer denied the claim.

On February 12, the contractor elected to proceed utilizing the small claims procedure such that this decision is made by one judge, is binding on the parties but is not precedential, and may be set aside only in limited circumstances. 41 U.S.C. § 7106 (Supp. IV 2011); Rule 52, 48 CFR 6101.52 (2012). The parties have presented a written evidentiary record (the appeal file as supplemented) and discussed issues with the presiding judge during a telephone conference.

The Board denies the claim. This was not a cost-reimbursement contract. Despite the statement in the solicitation, this was not an indefinite delivery contract--there was no guaranteed minimum. A contract arose with the agency ordering particular services by referring veterans to this contractor and the contractor performing. The agency was obligated to pay the contractor at the agreed-upon per diem rates--that is the fixed-price nature of the contract. As the request for quotations and contract make clear, the agency's obligations do not reach beyond the services ordered at the agreed upon per diem rates for services provided. The contractor, not the agency, bore the risk that beds would not be utilized fully over the base and option periods.

Findings of Fact

1. The agency issued a solicitation to obtain quotations as it attempted to negotiate commercial item contracts as part of its homeless veterans program. In particular, the goal of the program was to remove homeless veterans from the street or habitations unfit for veterans and place them in community-based, residential environments with sufficient therapeutic services to meet their needs. The contractor was to provide care, treatment, and rehabilitative services, that is, a residential environment and treatment, including transitional housing and support services (basic and supplemental) for veterans. The solicitation notes the agency's intent to award an indefinite delivery, indefinite quantity contract "because it is impossible to determine with any certainty the amount of services that will be required under this contract. It is understood that no obligation will be incurred by the [agency] except for services rendered under this contract pursuant to referrals issued by the [agency] for residential treatment for specific beneficiaries." Exhibit 1 at 2-3 (exhibits are in the appeal file, or the appeal file supplement if the exhibit number is prefaced by an "S"). The contractor was to submit monthly invoices for the number of veterans entering housing, with bed tracking information showing dates of admission and discharge. Exhibit 1 at 10. The solicitation further specified that there would be a base period of performance and option years with a "minimum maximum" value of services identified for each period as the dollar value calculated by multiplying the daily rate by number of available beds by 365 (or 366)

days. Exhibit 1 at 2. This calculation represents the total price offered to include all charges. Exhibit 1 at 11. The solicitation indicated that the contractor would be obligated to employ sufficient qualified personnel, with at least one administrative staff member (or acceptable designee) to be on duty on the premises or residing at the house and available for emergencies twenty-four hours a day, seven days a week. Exhibit 1 at 5. The agency would be responsible for determining the eligibility of veterans prior to referral to the contractor for treatment. A written referral signed by an authorized agency ordering officer was required to be provided to the contractor for each veteran referred for services under the contract. Exhibit 1 at 6.

2. The contractor submitted a price quotation sheet for the base period and option years that identified a daily rate and a number of beds for each period; e.g., for the base period $\$50$ (daily rate) \times 12 (number of beds) \times 365 days = $\$219,000$, and for the first option year $\$52 \times 12 \times 366 = \$228,384$. The contractor's initial prices were proposed using twelve beds for the base and option periods. Exhibit 2 at 3. The parties engaged in negotiations and entered into an agreement, identified as a contract with an award/effective date of September 16, 2010, with a base period through September 22, 2011, and with four option years thereafter. Exhibit 3 at 1, 7. This agreement specifies that invoices shall be submitted monthly, in arrears. Exhibit 3 at 4. This agreement obligates no dollars, with a grand total amount of $\$0$; funding is $\$177,390$ for fiscal year 2010. It states that the contractor is responsible for sufficient residential capacity to place up to approximately nine veterans in safe, community-based residence, and for support services to continue throughout the authorized stay of each veteran. Further, the agreement says of payments: "Invoices will be paid at the per diem rate for days of residential placement already completed with services provided as described in the Statement of Work." Moreover, the agreement expressly states that the contract is subject to the availability of agency funds and the contractor "shall perform no services after July 31, each year, until the contracting officer authorizes such services in writing." Further, "Estimated per diem based on 365 days a year for 9 potential beds is approximately $\$60.00$ per day." Exhibit 3 at 7-11. The agreement does not specify that it is an indefinite quantity contract or identify any minimum dollar amount to be ordered thereunder. Exhibit 3.

3. Having obtained referrals during the base period, the contractor provided services and received payment. Exhibits S2 at 2, S8 at 3 (§ 10). On September 22, 2011 (the final day of the base period), the contractor signed a bilateral modification under which the agency exercised its option for the first option year. The contracting officer signed the modification on October 1, 2011. The modification specifies that the procurement action is subject to the Availability of Funds clause for the next fiscal year, and that the per diem rate remains at $\$60$. Exhibit 3 at 20. On November 22, 2011, the agency informed the contractor

that the agency was given the green light to proceed with the option year. "Funding is in place. Please send me a tracking sheet and invoice for the month of October." Exhibit S8-5.

4. During the first option year, the contractor invoiced and was paid during each month between \$2680 and \$12,060, inclusive. Exhibit 6 at 2. The number of beds occupied per month varied between 1.5 and 6.7, inclusive, for an average of approximately 4.3 beds per month over the first option year. Exhibit S8-7. The agency did not exercise the second year option.

5. By letter dated September 12, 2012, the contractor sought additional money under the contract, noting various difficulties encountered with agency personnel and claiming an underutilization of the beds and services under the contract. The contractor stated that its revenue was directly proportional to the occupancy under the contract, although many of its costs for having services available were incurred regardless of occupancy. Exhibit 5. In a letter dated September 17, 2012, the contractor provided the agency with further details, including a statement: "[W]e have had to continually incur costs to remain in a ready state to house nine Veterans while our admissions have averaged only five (5) per month since the beginning of the option year--our occupancy has continued to dwindle." Exhibit 7 at 2.

6. In a follow-up letter dated October 11, 2012, the contractor requested an equitable adjustment of \$47,440 under the contract, said to represent its losses incurred by continuing to operate during the first option year. The contractor again pointed out its precarious financial situation and stated that the agency had unilaterally adjusted the contract without the contractor's agreement. The contractor took issue with what it viewed to be an agency decision to reduce the number of beds from nine to five, and the agency determination of who could be accepted and referred to the contractor's facilities. Exhibit 6 at 1.

7. The contracting officer issued a decision, dated January 9, 2013, denying the claim. In explanation, the decision specifies that the contract provided no guarantee of the number of veterans to be housed, and that the agency would incur an obligation only based upon services rendered pursuant to agency referrals. The contracting officer reads the contract as not obligating the agency to pay based on either nine beds or the contractor's expenses and allocation thereof. Exhibit S2.

8. On February 7, 2013, the Board received a notice of appeal from the contractor.

Discussion

In its notice of appeal, the contractor maintains that throughout the contract it provided all services without interruption:

To that end we incurred cost and expenses for which we were not compensated. As we indicated to the CO [contracting officer] we are only requesting *reimbursement* for those expenses incurred in our efforts to stay within our contractual obligation to provide for ‘approximately nine’ at any time. This meant that at any given time our facility was in constant readiness to provide services to nine veterans in need.

The contractor recognizes that reimbursement under the contract was based on a \$60 per diem rate for each veteran who stayed at the contractor’s facility. The contractor contends that the rate “was reasonably based on our assumption that there would be approximately nine veterans occupying the facilities.” The contractor asserts that it established the negotiated per diem rate based on the formula in the solicitation and contract that multiplies the daily rate by the number of available beds by the days per year, while emphasizing that it was responsible and obligated to have nine beds available. The contractor also maintains that the agency underutilized the contractor. The contractor sums up its request with the statement that it is asking only to be reimbursed for its out of pocket costs. Notice of Appeal; Exhibit S3.

The agreement does not guarantee that the contractor will receive any minimum payment. Although the request for quotations states that the “minimum maximum” is to be calculated by multiplying the number of available beds by the daily rate by the number of days per year, the agreement does not identify a price as a minimum amount to be received by the contractor. The solicitation states that “no obligation will be incurred by the [agency] except for services rendered under this contract pursuant to referrals issued by the [agency.]” The agreement states that invoices “will be paid at the per diem rate for days of residential placement already completed with services provided as described[.]” As awarded, the contract was for zero dollars, with payments to be obligated based upon the number of beds occupied, with the contractor to be paid each month, in arrears, based upon the actual number of beds occupied during the preceding month. The agreement unambiguously states that the contractor would receive payment only at the fixed rate for beds occupied. The contractor is not entitled to more than the agreed upon per diem rate of \$60.

This is neither a requirements nor an indefinite delivery indefinite quantity (IDIQ) contract. There is no requirements clause or language to indicate that the agreement is such. Because it lacks a minimum price guarantee, the agreement is not an IDIQ contract. 48 CFR

16.504(a) (2010) (an indefinite quantity contract must require the agency to order and the contractor to furnish a stated minimum quantity). Rather, a contract arose for each veteran assigned to the contractor, with the agency obligated to make payments at the agreed-upon prices for services ordered and provided by the contractor. *Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302 (Fed. Cir. 1998). The agreement was structured as a purchasing agreement, whereby the agency would pay for the services provided as ordered by the agency. This is fully in keeping with the clause in the agreement that payments are to be made in arrears, based upon the services provided during the preceding month.

While the contractor maintains that it could not recoup its basic, fixed overhead costs when the number of veterans receiving services averaged fewer than six per month, such an assertion does not alter the interpretation of or create a basis to reform the agreement

Decision

The Board **DENIES** the appeal.

JOSEPH A. VERGILIO
Board Judge