



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: May 22, 2014

CBCA 3566

PARTNERSHIP FOR RESPONSE AND RECOVERY, LLP,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Terry L. Elling and Timothy J. Taylor of Holland & Knight LLP, McLean, VA, counsel for Appellant.

Jeffrey D. Webb, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **McCANN**, and **DRUMMOND**.

VERGILIO, Board Judge.

On October 9, 2013, the Board received from Partnership for Response and Recovery, LLP (contractor) a notice of appeal. The contractor had provided services under a task order issued under its contract with the Department of Homeland Security, Federal Emergency Management Agency (FEMA) (agency). In a decision notifying the contractor of its appeal rights, the contracting officer authorized partial payment of two invoices, because the contractor had not provided the total number of workers said to be required by the task order. For the two invoices, the agency authorized payment of approximately \$2.8 million of the total of over \$7.2 million invoiced. The contractor views the task order to be for a firm, fixed-price amount. The contracting officer authorized payment for hours expended at firm, fixed rates, not a fixed amount. The contractor contends that the agency's refusal to pay the full amounts due under the contract constitutes a material breach of the contract, is arbitrary and capricious, and is a breach of its duty of good faith and fair dealing. Not relevant to this

dispute, separately the contractor has submitted a certified claim to receive unpaid amounts, and filed an appeal after the contracting officer denied the contractor's certified claim.

The agency filed a motion to dismiss for lack of jurisdiction. It maintains that in this appeal there is no certified claim by the contractor, while the amount in dispute exceeds \$100,000. It views the contracting officer's decision as a nullity, because of the lack of a certified contractor claim under the contract. The contractor opposes the motion. It asserts that the dispute involves a Government claim in that the agency withheld money from a fully performed firm, fixed price task order. The Board finds facts for the resolution of the motion based upon undisputed material in the existing record.

In the underlying decision, the contracting officer sets forth a specific contract interpretation and provides the contractor with a notification of appeal rights. The Board rejects the contractor's contention that this dispute involves a Government claim for money; the agency has not sought money from the contractor. However, a dispute and claim can involve contract interpretation. The contracting officer decision made the issue of contract interpretation ripe for resolution should the contractor dispute the interpretation. The lack of a certified contractor claim does not inhibit the contractor's ability to have the contract interpretation question resolved at this Board. Accordingly, the Board denies the agency's motion to dismiss.

Background

The agency engaged the contractor to perform under a task order and a later modification, issued pursuant to a contract. Exhibits 4, 5, 11 (all exhibits are in the appeal file). The contractor submitted two invoices (one after completing one month of performance, the other after completing three months of performance), treating the underlying task order as establishing a firm, fixed total price. The agency sought documentation reflecting the hours worked by individuals. Exhibits 6 at 1, 7 at 2, 16-18. The contractor resubmitted the invoices, with documentation.

By letter dated July 12, 2013, the contracting officer addressed the two invoices, summarizing the contractor's contention

that the task order payment should be for a firm fixed price that would be paid to them in total, regardless of the number of agents or leads that worked on the project, once task order objectives were accomplished. Therefore, on invoice #14657, [the contractor] billed for one third (1/3) of the total Task Order value and on invoice #14671, [the contractor] billed for the remaining two thirds (2/3) of the total Task Order value. The blanket invoices were submitted

without documentation as to the number of agents or leads that worked on the task order or for how long.

Exhibit 10 at 1. In rejecting the contractor's interpretation of the task order, the letter set forth the interpretation by the contracting officer and statement that this represented a "final decision":

In accordance with FAR [Federal Acquisition Regulation] Clause 52.232-1 Payments, the Government can only pay for services rendered by the contractor and accepted by the Government. [The contractor] has failed to provide adequate documentation to validate work commensurate with the invoices submitted. As a result, we can only authorize payment in the amount of \$848,289.76 for invoice #14657 and \$1,964,480.32 for invoice #14671 totaling \$2,812,770.08 which has been verified and accepted by the Contracting Officer Representative (COR).

This is the final decision of the Contracting Officer. You may appeal this decision to the Civilian Board of Contract Appeals (CBCA) . . . [or] you may bring an action directly in the United States Court of Federal Claims[.]

Exhibit 10 at 2.

The contractor filed an appeal with this Board within ninety days of receipt of the decision.

Discussion

Regulation defines a "claim" to be a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim by written notice to the contracting officer if it is disputed either as to liability or amount or is not acted upon in a reasonable time. 48 CFR 2.101 (2013). Under this regulation and precedent, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1576 (Fed. Cir. 1995) (en banc), the initially submitted invoices, by which the contractor sought to be paid for what it deemed the firm, fixed-price due under the contract, were not claims. Regarding this appeal, the contractor did not convert the submission of those invoices to claims.

However, by issuing the decision which recognized a dispute with the contractor's interpretation of the contract, the contracting officer perfected the agency's interpretation of the contract. This written assertion of the agency's interpretation constitutes a Government claim under the contract. The contractor need not submit a monetary claim to have the dispute over interpretation resolved; the resolution affects the billing by the contractor and the amount of payment it ultimately may receive under the contract. The contractor pursues a claim as defined by regulation and the contract. At issue is the determination of the type of contract and the obligations of the parties.

Decision

The Board **DENIES** the agency's motion to dismiss the case for lack of jurisdiction.

JOSEPH A. VERGILIO
Board Judge

We concur:

R. ANTHONY McCANN
Board Judge

JEROME M. DRUMMOND
Board Judge