



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: June 26, 2014

CBCA 3563

FIRST PRESTON MANAGEMENT, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

J. Alex Ward and Ethan E. Marsh of Jenner & Block LLP, Washington, DC, counsel for Appellant.

Blythe I. Rodgers and Jonathan E. English, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **POLLACK**, and **STEEL**.

VERGILIO, Board Judge.

This opinion denies cross-motions for summary relief, with each party contending that its interpretation of the contract is supported legally and by undisputed material facts.

On October 7, 2013, the Board received a notice of appeal from First Preston Management, Inc. (contractor) concerning its contracts, C-OPC-23675 (or 675) and C-OPC-23677 (or 677), with the Department of Housing and Urban Development (HUD or agency). The contractor disputes the denial by the contracting officer of its claims for property management fees under contract line item numbers (CLINs) concerning on-going property management services provided for agency-owned vacant property until sold. The contractor provided these (among other) services based upon agency orders placed against the contracts during the base or option years or extended periods of performance. The parties espouse different views of the fixed, unit rate aspect of the indefinite-quantity contracts. The

contractor contends that it earned the monthly fee for each month in which it provided services on a given property, without regard to the date the services began. The agency has prorated the monthly rate, paying the contractor for services received based upon actual days of performance.

Based upon the existing record and constraints of resolving a motion for summary relief, the Board concludes that neither party has demonstrated either that its interpretation is supported by the plain language of the contracts or is reasonable, or that either party interpreted the contracts at the time of award or at the time of later modifications as now asserted. The contracts contain pricing on a monthly basis. The contractor has not demonstrated that the monthly units should be equated with each month in which performance occurred (that is, priced the same for performance beginning on the first or last day of a month). The agency has not demonstrated that prorating monthly pricing on a daily basis is consistent with the terms of the contracts. At this stage, the Board cannot resolve the dispute, as the assertions and conclusions of each party are not legally supported and go beyond undisputed facts. The Board denies each motion for summary relief.

Background

For the base (beginning June 1, 2010) and option years, the pricing structure of the contracts established fees for the contractor to provide on-going property management of agency-owned vacant properties. The contracts contained unit prices for the designated “estimated unit” of monthly. Exhibits 1 at 6 (¶ B.2), 7-10 (¶ B.4, CLINs 5, 14, 23); 2 at 102 (¶ B.2), 103-04 (¶ B.4, CLINs 5, 14); 10 at 218 (¶ B.2), 219-22 (¶ B.4, CLINs 5, 14, 23); 11 at 359 (¶ B.2), 360-62 (¶ B.4, CLINs 5, 14) (all exhibits are in the appeal file). Neither party has presented specific orders, so the assumption here is that services were ordered on a monthly basis, as the unit of pricing. The contracts stated: “The Government shall pay the Contractor as full compensation for all work required, performed and accepted under this contract, inclusive of all costs and expenses, the fixed-unit-rate for the applicable CLINS and applicable periods, as stated in Part I, Section B of this contract.” Exhibits 10 at 235 (¶ G.2(a)), 11 at 376 (¶ G.2(a)). Further, “The Contractor shall submit monthly invoices for payment of fixed-price services.” Also, invoiced prices shall be for properties on which fees were earned during the period covered by the invoice or from an earlier period but not previously invoiced. Exhibits 10 at 236-37 (¶ G.4.A, .E), 11 at 377-78 (¶ G.4.A, .E).

The contracts also contained Payment at Contract Expiration clauses. One such clause was in the initial contracts as signed:

The Contractor understands and accepts the risk that, upon expiration of the contract, including any options to extend that are exercised, properties

assigned to it may remain unlisted or unsold. In such case, in accordance with the fixed unit price nature of this contract, the Contractor shall only receive the portion of the fixed unit price due for the property as reflected in B.5 [sic]. For services that the Contractor may have performed during the contract term on HUD-owned properties which remain unlisted, unsold or have not closed at contract expiration, the Contractor and HUD agree that HUD shall only pay the Contractor as specified in B.4 as **the sole and exclusive compensation due** for such properties. The Contractor will not receive any further compensation for properties listed but not yet sold, closed and reconciled at the time of contract expiration. HUD will pay the Contractor appropriate pass through costs, which the Contractor may have incurred during the contract term, and which under the specific language of the contract the Contractor is entitled.

Exhibits 1 at 15 (¶ B.5), 2 at 111 (¶ B.5). The second sentence refers to the contractor only receiving a portion of the fixed unit price for services ended at the conclusion of the contract period--this is other than the entire monthly rate. This paragraph was changed as reflected in conformed copies of the contracts, with a stated effective date of March 9, 2011, although the modifications indicated that the changes were made to reflect pre-award solicitation amendments not captured in the signed contracts:

The Contractor understands and accepts the risk that, upon expiration of the contract, including any options to extend that are exercised, for properties assigned, the Contractor and HUD agree that HUD shall only pay the Contractor as specified in B.4 as **the sole and exclusive compensation due** for such properties. HUD will pay the Contractor appropriate pass through costs, which the Contractor may have incurred during the contract term, and which under the specific language of the contract the Contractor is entitled.

Exhibits 10 at 227 (¶ B.5), 11 at 368 (¶ B.5). Among other changes, this version eliminates the sentence discussed above which provided for only partial payment at the end of the contract. The existing record does not contain the entire underlying solicitation and amendments thereto; the contracts incorporated the solicitation. Exhibits 1 a 3 (¶ 17), 2 at 97 (¶ 17).

The agency assigned properties to the contractor on various days of months and the contractor completed services on various days of months. Performance rarely occurred in whole monthly increments. After the exercise of options, or extensions, performance under one contract ceased as of July 1, 2013, and under the other contract as of February 1, 2013. Exhibit 47. Throughout performance, the contractor submitted invoices that did not

necessarily coincide with one month of services for a given property. If the services were for a full month, the agency paid the full month; if for less than a full month, the agency paid on a prorated basis (i.e., calculating daily rates from the monthly unit pricing). The contractor disputes this method of payment, as it claims that it earned the full monthly unit price by performing services during a given month, without regard to the number of days of performance. These contrasting views made a difference for the first and final month of services for each property, when the invoiced services were for a partial month of services.

In September 2010, the contractor wrote to the contracting officer, regarding contract 675, seeking clarification on the fee structure as it prepared submissions for billing. The writing explains that the fee structure is monthly and states that the contract does not mention that the fee will be prorated. “We were under the impression that no matter the day of the month the asset was assigned we collected the entire monthly fee for the given month it was assigned.” The contracting officer responded: “I did not see or I’m aware [sic] of any prorated information. As far as what the contract states you should bill monthly. . . . You may submit the invoice monthly as stated in the contract.” Exhibit 5 at 204. The contractor pursued this matter by letter dated November 17, 2010, to the contracting officer. In response, the contracting officer provided a further explanation on December 14, 2010, stating that the contractor was entitled to a monthly fee after all services were rendered. Instead of withholding payment of a monthly amount when performance occurred over two invoice periods, the agency was prorating payments. Exhibit 40.

The parties also entered into bilateral contract modifications. For example, under contract 675, for the period of March 1 through May 31, 2012, the contractor submitted and the agency accepted a voluntary price reduction under procedures for fair opportunity ordering. Exhibit 20. Later under that contract, for the period of performance effective September 1 through November 30, 2012, the parties entered a bilateral contract modification again revising prices. The modification contains the following paragraph:

Pursuant to the terms of this contract and in consideration of the changes specified above, the Government of the United States, its officers, agents, and employees are hereby fully and finally released and discharged from all liabilities, demands, obligations, requests for equitable adjustment, and claims, whether legal, equitable, contractual, or administrative in nature, which the contractor (or any subcontractor or supplier) has or may have, now or in the future, arising under or relating to this modification of the contract or its resulting impact on a subcontract, delivery order, or tasking, including any and all impact and delay claims, claims for absorbed or unabsorbed overhead, and any amounts that may be due under the Equal Access to Justice Act. . . . Period of Performance: 06/01/2010 to 12/31/2012.

Exhibit 25 at 540-47.

Discussion

Each party has moved for summary relief, maintaining that there are no issues of material fact and that it is entitled to judgment as a matter of law because its interpretation of the contract is correct based upon the plain language of the contract. The contractor contends that it is entitled to the monthly fee for each month in which it provided services. The agency contends that it is obligated to pay only the monthly rate on a prorated basis for the days services were provided.

A few illustrative hypotheticals will highlight the differences in the approaches, with full months of performance not relevant. Example one: The contractor begins performance on day 20 of a month and completes performance on day 10 of the following month. The contractor would seek to be paid the full unit price for each of those two months. In contrast, the agency would pay the contractor a prorated amount totaling two-thirds of the unit price, one-third for the first month and one-third for the second month. Example two: (A.) The contractor begins performance on January 1 and completes performance on December 31. Both parties would calculate reimbursement as twelve times the unit price. (B.) The contractor begins performance on January 15 and completes performance on January 14 of the following year. This represents the same overall performance as in A, simply shifted to the middle of the month. The contractor would seek thirteen times the unit price, one month of payment for each month of service, January to January, inclusive; the agency would pay the same as in A, twelve times the unit price. (C.) If the contractor invoiced for the services in B on the fifteenth of February and each month thereafter, each invoiced period would represent one month of completed services; there would be twelve invoiced periods of one month each with payment totaling twelve months at the unit rate.

In the context of resolving the cross-motions for summary relief, neither party has demonstrated that its interpretation is consistent with a plain meaning of the clauses. The contracts do not specify that the contractor will receive the full monthly rate for services during a given month regardless of the start date of the services. Also, the contracts establish the unit of purchase as monthly, not daily. These matters remain to be fully explored.

We conclude that for purposes of resolving the motions on a summary relief basis, the record has not been developed to address the interpretation of the term “monthly” in these contracts (the same unit is used for other CLINs), or if there is a particular meaning in the phrase “monthly unit” for property management services and any understanding that may exist as a term of art to be considered in the interpretation. Should such additional information exist, it cannot be discounted when interpreting these contracts.

The contractor contends that in September 2010 the contracting officer agreed with the interpretation put forward by the contractor. The referenced response, by itself and in context, is not as convincing or dispositive as the contractor asserts. The record is not developed at this point regarding the intents of the parties at the time of contracting or if that intent was shared with the opposing party.

The agency maintains that the contractor is precluded from pursuing these claims because of release language found in various bilateral contract modifications. Further, the agency states that it accepted price reductions based upon its interpretation and application of the monthly rates, such that it would be inappropriate now to reprice the accepted prices. Because these assertions have yet to be placed in context, the issues are not ripe for resolution at this stage.

Decision

The Board **DENIES THE MOTIONS FOR SUMMARY RELIEF.**

JOSEPH A. VERGILIO
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

CANDIDA S. STEEL
Board Judge