



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: November 12, 2014

CBCA 3566, 3715

PARTNERSHIP FOR RESPONSE AND RECOVERY, LLP,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Terry L. Elling and Elizabeth N. Jochum of Holland & Knight LLP, McLean, VA, counsel for Appellant.

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

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

Opinion for the Board by Board Judge **VERGILIO**. Board Judge **McCANN** concurs separately.

VERGILIO, Board Judge.

On October 9, 2013, the Board received a notice of appeal from Partnership for Response and Recovery, LLP (contractor). The contractor had provided registration intake services under a task order issued under its contract with the Department of Homeland Security, Federal Emergency Management Agency (FEMA) (agency). The task order contract, as amended, states that it is for a firm, fixed price of \$7,901,573.60 covering a three-month period (not here relevant are two option months), with the contractor to provide a total of 286 individuals (268 agents and 18 leads, i.e., supervisory individuals).

The contractor interprets the contract as entitling it to recover the firm, fixed price after performing satisfactorily. The contractor invoiced for one-third of the fixed price after the first third of the contract period, and two-thirds of the fixed price at the end of the contract period. The contracting officer viewed the contract as obligating the agency to pay fixed rates for hours expended. Concluding that the agency could only pay for services rendered and accepted, the contracting officer did not approve payment in full of either invoice. Partial payments were made for what the agency deemed to be the services rendered, involving fewer individuals than those identified in the contract. The dispute: the agency interprets the contract as obligating it to pay firm, fixed hourly rates for services; the contractor interprets the contract as a firm, fixed-price agreement without regard to the number and hours of individuals providing services. The contractor disputes the agency's interpretation (docketed at CBCA 3566) and seeks to recover the full contract price (docketed as CBCA 3715). Each party seeks summary relief.

Based upon undisputed material facts, and in the context of the cross-motions for summary relief, the Board concludes that neither party can prevail at this summary relief stage. The task order contract (as amended, and so referenced herein) describes a firm, fixed-price purchase by the agency of one lot for a stated unit price. That contract specifies that the contractor is obligated to provide a total of 268 agents and 18 leads; that is the lot purchased. The firm, fixed-price is tied explicitly to the contractor providing the stated number of agents and leads over specific time periods. Although the agreement contains the contractor's calculations utilizing hourly rates, it establishes neither specific hourly rates for the agency to pay nor not-to-exceed costs. The unambiguous plain language is at odds with the interpretations put forth by each party regarding the contracted obligations.

Given the conclusion regarding the interpretation of the contract based upon its unambiguous language, which cannot be fully reconciled with the positions of the parties, the Board denies the cross-motions for summary relief.

Findings of Fact

1. The base contract between these parties has various line items for its base and option years. While some line items have units of monthly or per person with stated unit prices, those for registration intake services note they are for a firm, fixed price and specify the quantity as "varies," a unit of "each," a unit price of "N/A," and an extended price of "(to be determined at time of task order award)*" with the asterisk explained:

Note: These CLINs are for capped and/or unpriced items that cannot be defined prior to contract award. A Fixed Price will be negotiated on an as needed basis for items falling within the CLIN description above and as

specified in the Performance Work Statement. Note: “FFP” means “firm-Fixed-Price”; “NSP” means not separately priced; “NTE” means: “not-to-exceed” the period/annual ceiling price specified.

Exhibit 1 at B-1 to B-3 (¶ B.3(a)) (all exhibits are in the appeal file; those exhibits submitted by the contractor for the combined cases are prefaced with a “C-”).

2. The contract details that services specified by line item number shall be obtained by issuance of task orders at the price or not to exceed price specified. Further:

Task orders will be Firm-Fixed-Price (FFP) type task orders. The FFP amount of each task order will be based on either (1) the applicable Unit Price specified in Section B.3 (a) above that is in effect on the effective date of the task order, even if the task order is later modified for any reason and/or performance under the task order crosses into another performance period; or (2) a firm fixed price will be negotiated prior to execution of the task order.

Exhibit 1 at B-4 (¶ B.3(b), (c)) (emphasis added). Registration intake would be invoiced on a monthly basis. *Id.* (¶ B-3(c)). As further noted in the section on the issuance of task orders, a task order proposal request will include a request for a firm, fixed price or a not-to-exceed price based on fixed unit rates. *Id.* at G-3 (¶ G.3(a)(2)).

3. These contract terms and conditions were incorporated into a bridge contract, entered into between the parties. Exhibit 11. The bridge contract line items for registration intake services, described as firm, fixed price, state a quantity of “varies,” for a unit of “each,” a new unit price of “N/A,” and an extended price of “to be determined.” Exhibit 11 at 5-6. The bridge contract has no hourly rates for registration intake services. Exhibit 11. Under that bridge contract, the agency sought proposals to fulfill task orders for registration intake services.

4. The proposal request issued in October 2012 that led to the task order at issue here states:

Total overall price shall be submitted in accordance with registration intake, [CLIN] 0056[,] based upon a fully loaded flat rate. However, offerors must complete the attached spreadsheet . . . breaking out each labor category and cost listed. This will be rolled up into one overall CLIN total.

Exhibit 2 at 1; Exhibit C-12 at 1 of 3.

5. By submission dated October 30, 2012, the contractor “proposes to provide the requested staff for ninety days on a firm fixed price per unit basis.” Exhibit 3 at 2.

6. A performance work statement (PWS) dated November 1, 2012, tailored to the intake services here, describes the agency’s need for contracted private sector full-time equivalent temporary employees. Exhibit 4. Under contractor responsibilities, the document specifies that the contractor would provide services on day 1 by up to 100 individuals, and on day 2 by up to 68 individuals, and that the contractor shall maintain the required amount of trained staff during the task order period. Exhibit 4, PWS at 2 (¶ 3).

7. A subset of the identified contractor responsibilities is work volume. Of note:

It is difficult to predict with any amount of certainty the number of events, the degree and duration of each event, or the amount and type of miscellaneous technical assistance that may be required during the term of the contract. The Task Order(s) will define the scope of the services required and the number of temporary call agents required.

Exhibit 4, PWS at 4 (¶ 3.aa) (emphasis added).

8. The contractor responsibilities also include a section on work schedule which specifies that the “contractor shall provide the required number of call agents after issuance of a Notice to Proceed[,]” and:

Due to the fluctuating nature of disaster call activity, the contractor shall increase or decrease: staffing levels and shift times within 24-hours of notification in accordance with staffing requirements provided by the COR or designated task monitor. Work hours will not exceed the NTE number of hours set forth in the Pricing Schedule of the Task Order unless modified by the Contracting Officer.

Exhibit 4, PWS at 4 (¶ 3.bb), 5 (¶ 3.gg).

9. The management support portion of the contractor responsibilities section directs the contractor to provide the following, among other items:

Contractor shall provide electronic time clocks at each location and shall track employees’ time via these time clocks. Invoices shall be submitted along with summary time sheets or other supporting documentation. FEMA’s CMS [Call Management System] will be the system of record to verify invoiced hours and

for payment approval. FEMA will verify hours billed against staffed time data logged in CMS. Contractor will be required to justify discrepancies between invoiced hours and CMS records.

Exhibit 4, PWS at 6 (¶ 3).

10. Invoicing is addressed separately in the performance work statement. Each invoice shall be supported by data for all work accomplished during the previous month of performance. Supporting documentation for the invoice shall include, but not be limited to, pertinent contractor information as well as a description, quantity, unit of measure, unit price, and extended price. Further, invoices are to contain any other information or documentation required by the contract. Exhibit 4, PWS at 13 (¶ 10).

11. The performance work statement has a section on project completion, including the following:

The COR [contracting officer's representative] shall notify the CO [contracting officer] in writing when call volume has decreased. Notification to begin downsizing staff due to a decrease in call volume will occur one work day prior to actual employee release date; the notice will occur in writing, [and] include the date and time of release.

Notification will be given to the Contractor 12 hours prior to actual termination of the Task Order by the CO; the notice will occur in writing, [and] include the date and time of release.

Exhibit 4, PWS at 15 (¶ 13).

12. By submission dated November 2, 2012, the contractor "proposes to provide the requested staff for ninety days on a firm fixed price per unit basis." In the proposal details, it specifies that it is available to begin recruiting efforts to meet the agency's need for temporary human resources for 168 intake staff. Exhibit C-41, Proposal at 1-2.

13. As initially awarded, the task order contract required the contractor to provide registration intake services for the base period of November 3, 2012, through February 2, 2013, for one lot, at a unit price and amount each of \$6,861,679.20. The agreement specifies that the contractor "will provide a Total of 168 agents to assist with Call Center Services [at] the Maryland National Processing Service Center for an Estimated 90 days. Firm Fixed Price (FFP), \$6,861,679.20." Exhibit 40 at 1, 3. By incorporating a PWS, the task order contract required the contractor to provide full time equivalent employees, adjudicated and

trained/qualified, within given time lines throughout the contract life cycle. The task order contract also incorporated terms and conditions of the bridge contract, and, thereby, the base contract. A fixed price is identified; the pricing schedule identifies no not-to-exceed figure for, or reference to, work hours, and no stated hourly rates. Exhibits 40 at 1-4 (¶¶ 9, A.1, A.2), 4, PWS at 11 (¶ 7); Finding 8. The contractor's cost breakout, attached to the task order contract, contains hourly rates and hours for agents and leads. This indicates how the contractor arrived at its firm, fixed price. Exhibit 4 at 13-14.

14. As bilaterally amended and effective on November 9, 2012, the task order contract states that the contractor is to provide 286 agents and leads during the base period identified as one lot for a unit price equal to the total amount of \$7,901,573.60. This reflects an increase of 111 agents and 7 leads; these additional positions "are estimated to be needed for only 20 days." Although there is a total dollar figure obligated, there is no not-to-exceed figure for, or reference to, work hours. Exhibit 5 at 1-2; Finding 8.

15. The contractor performed under the contract. The contractor submitted an invoice dated December 14, 2012, seeking \$2,633,857.87, for work performed through December 2, 2012, broken down for intake agents, intake leads, and intake project manager and deputy. This invoice shows a remaining balance of \$5,267,715.73. Exhibit 16. This invoice was for one-third of the three-month unit price. The contracting officer did not pay this amount, instead seeking documentation he concluded was required by the contract to be included with the invoice. In particular, he noted the requirement that a proper invoice shall contain specific information, including "[d]escription, quantity, unit of measure, unit price and extended price." Exhibit 6 at 1. The contractor provided some additional documentation and a revised invoice. Exhibit 13. The contracting officer concluded that the agency had verified payment due as \$848,289.76, not the amount sought by the contractor. Exhibit 16.

16. The contractor submitted an invoice dated February 4, 2013, seeking \$4,597,325.06, for work performed from November 3, 2012, through February 2, 2013, .67 of the lot and unit price. The contracting officer did not pay this amount, instead seeking additional documentation from the contractor. The contractor provided additional information. The contracting officer concluded that the contracting officer's representative had verified and accepted only \$1,964,480.32 of the amount sought. Exhibits 15, 17.

17. In a decision 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 (docketed as CBCA 3566) with this Board within ninety days of receipt of the decision.

18. In a decision of January 31, 2014, the contracting officer acknowledged receipt of the contractor's certified claim for payment in full of the amount sought in the two invoices. The decision states that the agency has determined that the task order required the contractor to provide 268 agents and 18 leads for an estimated 90 days, and that the prices negotiated were fixed hourly rates to be paid to agents and leads for hours and days worked. Further, the "total cost estimate of \$7,901,593.60 was based on the cost schedule submitted with your proposal and incorporated in the task order." The decision specifies that the contractor completed only a portion of the requirement and will be compensated only for the work completed. The stated total amount validated and paid is \$2,812,289.08. Exhibit 48 at 1. The decision interprets the task order contract as a firm, fixed-price, level-of-effort term contract: "The fixed prices negotiated with [the contractor] in the Task Order Proposal Request (TOPR) were fixed hourly rates to be paid to agents and leads for the hours and days worked . . . in accordance with the Performance Work Statement (PWS)." Exhibit 48 at 3. With a reference to the management support portion of that work statement, Finding 9, the

decision contends that the agency clearly identified billing in accordance with the number of employees working and that payments would be based on hourly rates. Exhibit 48 at 4.

19. On February 6, 2014, within ninety days of receipt of the contracting officer's decision, the contractor filed a notice of appeal (docketed as CBCA 3715) regarding its claim to recover the full contract price.

Proffered Evidence of Conduct

20. In a task order contract issued in 2007 under the base contract, the agency obtained registration intake services. The task order states that it is for a firm, fixed price, requires up to a maximum number of agents, as well as supervisors, expressly identifies hourly rates for the associated line items of staff and supervisors, and states a not-to-exceed price for labor costs, inclusive of overtime. Regarding compensation, the task order specifies that the contractor shall be reimbursed for the line item (identified as a single lot for the same dollar figure for the unit price and amount) in accordance with the firm, fixed negotiated daily rate. Exhibit 21 at 1 (¶ 9). The price/cost schedule contains a single item--for registration intake based on one lot, at a stated unit price and amount. Exhibit 21 at 2 (¶ A.1).

21. In a task order contract issued in 2008 under the base contract, the agency obtained registration intake services. The task order requires up to a maximum number of agents, as well as supervisors. Under a "payment and consideration (fixed price and not-to-exceed)" subparagraph, the order lists four line items, each associating a regular hourly rate with a position (e.g., registration intake agents and supervisors), and states that the total estimated labor costs shall not exceed a given price. A separate "consideration" subparagraph states that the contractor shall be compensated on a per-line-item basis. Exhibit 22 at 1 (¶¶ 9.A, B). The price/cost schedule contains a single item--for registration intake agents based on one lot, at a stated unit price and amount. Exhibit 22 at 2 (¶ A.1).

22. An agency internal exchange involved a question from the program manager, on November 4, 2012: "When [the contractor] does not produce the 168 agents are we still paying the \$6.8 mil[lion]?" and a response from the contracting officer on the same day: "With oversight, we should only be paying based on the number of agents actually working. We pay for the services we receive." Exhibit 42.

23. The agency also has put into the record, with objections by the contractor, a parallel contract and task order with another contractor, and evidence of the practices of that contractor and the agency in administering the task order on an hourly basis despite the firm, fixed-price language. The agency represents that the contract and task orders are

substantively the same as those here at issue, and that the information demonstrates that this task order contract is ambiguous.

Discussion

Each party seeks summary relief urging its interpretation of the task order contract. The contractor contends that it is entitled to the contract price for the base period as the task order contract establishes a firm, fixed price to be paid, without regard to the actual hours worked. The agency disputes this interpretation, as it contends that the contract is patently ambiguous, but that, as supported by the interpretations of the agency and another contractor with a similar task order, the only reasonable interpretation of the agreement is that it obligates the agency to pay for services on an hourly basis.

A party seeking summary relief bears the burden of establishing the absence of any genuine issue of material fact. All significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At this stage, the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, “the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). If a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its filings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *J.C. Lee v. Department of Agriculture*, CBCA 3536, 14-1 BCA ¶ 35,595. The Board has made findings consistent with these dictates.

Summary relief is appropriate when undisputed material facts demonstrate that the moving party is entitled to judgment as a matter of law. Questions of contract interpretation largely are questions of law. The Federal Circuit has stated:

When interpreting a contract, “the language of [the] contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances.” When deriving this meaning, we begin with the contract’s language. When the contract’s language is unambiguous it must be given its “plain and ordinary” meaning and the court may not look to extrinsic evidence to interpret its provisions. Although extrinsic evidence may not be used to interpret an unambiguous contract provision, we have looked to it to confirm that the parties intended for the term to have its plain and ordinary meaning.

TEG-Paradigm Environmental, Inc. v. United States, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (citation omitted). The opinion also notes that it may be appropriate to turn to evidence of trade practice and custom, a form of extrinsic evidence, even when a contract is unambiguous. *Id.*

Contract Interpretation

The base and bridge contracts do not establish hourly prices for registration intake services. Those contracts indicate no specific quantities (using the term “varies”), specify unit prices as not applicable, and note that an extended price is to be determined at the time of task order award (in the base contract) and to be determined (in the bridge contract). Findings 1-3. Consistent with the contract language that specified that a task order proposal request would seek either a firm, fixed price, or a not-to-exceed price based on fixed unit rates, the request sought a total overall price, not a not-to-exceed price based on fixed hourly rates. Findings 2, 4.

This task order contract, through the work statement, specifies that the task order will define the scope of the services required and the number of call agents required. It also dictates that the contractor shall provide the required number of call agents. Findings 6-8, 13. The contractor committed to providing the required number of call agents. Finding 12. Through its price/cost schedule, the task order contract specifies that the contractor will provide a total of 168 individuals for an estimated ninety days, at a specific firm, fixed price of over \$6.8 million dollars. The task order contract establishes no unit prices or hourly rates for the registration intake services. Finding 13. By bilateral amendment, the contractor became obligated to provide an additional 111 agents and 7 leads to assist with the ramp-up of support services for an estimated twenty days. A firm, fixed price is established. Finding 14. This task order contract is consistent with the base and bridge contracts, which specified that the agency could order services on either a firm, fixed-price basis or a not-to-exceed price based on fixed unit rates. This task order is consistent with the first option, not the second, given that the order did not specify either hourly rates or not-to-exceed costs. Finding 2. This contrasts with earlier-issued task orders which identified not-to-exceed prices and hourly rates. Findings 20-21.

Contrary to the interpretations put forward by the parties, the plain language of the task order contract requires the contractor to provide a given number of agents and leads over a given period, for a firm, fixed price. The firm, fixed price is for the stated services. Findings 12-13.

This reading is at variance from the contractor’s interpretation that it is entitled to the total price once performance is completed satisfactorily and that it was not obligated to

provide the stated number of individuals. The agreement requires more than performance, as the contractor is obligated to provide stated numbers of individuals to perform the services. Through its response to the request, the contractor committed to provide the requested staff. Finding 12. The task order initially stated that the contractor would provide 168 individuals. Finding 13. As amended, the task order requires the contractor to provide 286 individuals. Finding 14.

This interpretation also varies from the agency's interpretation that it contracted on a fixed-price basis for services rendered, to pay hourly rates for those services. The task order is not structured to support the agency's interpretation. The underlying contract permitted the agency to enter into the task order it states it contemplated. However, the language of the task order and the request involve a firm, fixed-price contract. While the agency refers to task orders under the original contract, as already noted, the language of those orders is materially different from the language in the task order here.

In conclusion, neither party has met its burden of proof to prevail based on the submitted motions for summary relief.

What Remains

Because the plain language of the contract supports the position of neither the contractor nor the agency, summary relief is not justified. The contractor has not established that the contract and undisputed material facts or the mutual intent of the parties at the time of contracting entitle it to recover the firm, fixed price. Similarly, the agency has not established that it is entitled to relief at this stage. With a developed record, the two appeals can be resolved. The burden remains on the contractor to demonstrate that it is entitled to compensation in addition to what it has received.

Over the objections of the contractor, the agency seeks to place into the evidentiary record documents relating to actions of the agency and another contractor under a parallel task order and contracts to demonstrate that this contract is ambiguous. Although the use of extrinsic evidence is not appropriate to establish the existence of an ambiguity, because the information may be used to establish the intent of the agency (and as suggested, an interpretation recognized in such contracts) at the time of contracting, the information is appropriately part of the record for ultimately resolving this dispute. As finally developed, the record may contain information that reveals the intents and understandings of these parties at the time of contracting.

Decision

The Board **DENIES** the cross-motions for summary relief.

JOSEPH A. VERGILIO
Board Judge

I concur:

JEROME M. DRUMMOND
Board Judge

McCANN, Board Judge, concurring

I concur that both motions for summary relief should be denied on the present record. It is unclear whether there are additional facts that should be presented. To the extent that the majority opinion suggests an interpretation of the contract, I do not concur, and reserve judgment until the record is fully developed, or until the case is submitted for a decision on the record.

R. ANTHONY McCANN
Board Judge