



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL SUMMARY RELIEF GRANTED;
APPELLANT'S MOTION FOR PARTIAL SUMMARY RELIEF DENIED:
March 27, 2017

CBCA 2326

ASW ASSOCIATES, INC.,

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Robert B. Creager of Anderson, Creager & Wittstruck, P.C. LLO, Lincoln, NE,
counsel for Appellant.

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

Before Board Judges **VERGILIO**, **GOODMAN**, and **SULLIVAN**.

VERGILIO, Board Judge.

This dispute between ASW Associates, Inc. (contractor or ASW) and the Environmental Protection Agency (agency or EPA) survives the Board's dismissal of one aspect of the underlying appeal. *ASW Associates, Inc. v. Environmental Protection Agency*, CBCA 2326, 16-1 BCA ¶ 36,453. The contractor remediated lead-contaminated soil at a superfund site. The contractor performed with labor hours, equipment usage, and the number of properties below the estimates in the contract. In the remaining issue, the contractor asserts that the agency misrepresented the scope and quantity of work to be performed. In its various theories of relief, the contractor identifies the agreement as an indefinite

delivery/indefinite quantity (ID/IQ) and a requirements or requirements-type contract, while noting that it also is a time and materials and performance-based contract.

The Board now resolves the issue of the type of contract underlying this dispute. The performance work statement and clauses of the agreement specify or suggest that it is an ID/IQ contract. However, the written agreement contains no guaranteed minimum quantity. Under regulation and case law, a guaranteed minimum is necessary consideration to create an ID/IQ contract. Similarly, although the agreement contains references to estimated quantities for work to be performed, it does not contain language that supports this being a requirements contract. Again, consideration is lacking for such a contract. Lacking consideration, this agreement is not enforceable as either an ID/IQ or a requirements contract. The contractor is entitled to be paid only for work ordered and performed.

Findings of Fact

1. On September 25, 2008, the agency awarded contract EP-R7-08-15 to the contractor. Exhibit 2 (all exhibits are in the appeal file, as supplemented). The contract required the contractor to remediate lead-contaminated properties at a superfund site in Missouri. Exhibit 3.

2. The contract states that it is a time and materials contract, with payment to be made at defined rates for services and equipment ordered and utilized. Exhibit 2 at I-1. After referencing a commercial items, contract terms and conditions, clause from the Federal Acquisition Regulation, for each of the base and two option years, the contract has a schedule of hourly prices for various labor categories, as well as prices for estimated quantities for various types of equipment, each for an estimated quantity. The agency estimated the hours and quantities; the contractor supplied the prices. Exhibit 2 at B-1 to -8 (§§ B.1, B.2). The contract identifies a total contract ceiling value, the sum of a ceiling value for the base and two option years. Exhibit 2 at B-9 (¶ B.3). A funding clause indicates that task orders will be issued. Exhibit 2 at B-9 (¶ B.4).

3. The contract makes various references to it being an ID/IQ contract, in particular in the performance work statement. Exhibits 2 at J-1, 3 (Performance Work Statement Indefinite Delivery/Indefinite Quantity for Residential Property Surface Soil Remedial Action). The contract identifies no guaranteed minimum. Exhibits 2, 3.

4. The contract references “possible” properties that will need remediation. Exhibit 3 at 2. The contract does not state that the contractor will fulfill all remediation requirements in the area. Exhibit 2. During a pre-bid conference (transcribed, but not part of the contract), the agency indicated that this would be a time and materials contract, with

no set number of properties: “The number of properties that will be provided each year is dependent on good performance and available funding. EPA estimates that we’ll do between 200 and 300 properties for the base year.” Complaint (Apr. 9, 2011), Exhibit 13 at 12, 55 (questions and answers 1, 89), 75. The contract does not include a clause or provision that states that it is a requirements contract; there is no guarantee that the estimates will be purchased. Exhibit 2.

Discussion

The type of contract remains an unresolved issue, not placed before the Board with the agency’s earlier motion. To focus the further development of the record and arguments, the Board brought this matter to the fore. The parties agreed that, after an opportunity to conduct further discovery and add to the evidentiary record, they would provide briefs and reply briefs, and seek a ruling on the question of contract type. Conference Memorandum (Sept. 27, 2016). This is treated as cross-motions for partial summary relief.

At various points during the pendency of the appeal, the contractor has contended that this was an ID/IQ contract, as well as a requirements, or requirements-type contract, as it states that any breaches or damages resulting therefrom should be adjudicated. The contractor also maintains that although there may be grounds upon which it can claim that this is an ID/IQ, performance-based-type contract, the “type of contract” question is better resolved after a full and fair hearing on the merits of the claim. The agency notes that the agreement lacks clauses or language required by regulation and case law for some contract types; it concludes that the agreement is neither a requirements nor an ID/IQ contract.

Determining contract type is a matter of contract interpretation; a question of law is posed. The material facts are as those which dictated the result in *Coyle’s Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1304 (Fed. Cir. 1998). There is no guaranteed minimum (dollar amount or quantity) and no clause or provision requiring the agency to satisfy all of its requirements using this contractor. 48 CFR 16.506(d), (e), 52.216-21, -22 (2009). This written contract lacks the elements necessary for an enforceable ID/IQ contract and for an enforceable requirements contract. The lack of a minimum guarantee and the lack of a statement that the contractor would be fulfilling all agency requirements are apparent and require no further record development. Consideration is lacking; the contract is not enforceable as either an ID/IQ or a requirements contract.

However, the agency ordered and the contractor performed services. This further parallels what occurred in *Coyle’s*, 154 F.3d 1306, where the court concluded that the contractor:

is entitled to payment only for services actually ordered by [the agency] and provided by [the contractor]. See *Willard*, [*Sutherland & Co. v. United States*,] 262 U.S. [489,] 494, 43 S.Ct. 592 [(1923)] (“By the conduct and performance of the parties, the contract was made definite and binding as to the [quantity] ordered and delivered according to its terms.”).

This contractor provided pricing post-*Coyle’s*, when it should have been apparent that the written agreement could not be enforced as either an ID/IQ or a requirements contract.

In light of the conclusion that this agreement is not enforceable as either an ID/IQ or requirements contract and the dictates of *Coyle’s*, the contractor is to identify what, if any, additional payment it seeks, and its bases for asserting entitlement and its method of calculation.

Decision

The Board **GRANTS THE RESPONDENT’S MOTION FOR PARTIAL SUMMARY RELIEF** and **DENIES THE APPELLANT’S MOTION FOR PARTIAL SUMMARY RELIEF**. The agreement is not enforceable as either an ID/IQ or a requirements contract, such that the contractor’s entitlement to recovery is limited as discussed above.

JOSEPH A. VERGILIO
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

MARIAN E. SULLIVAN
Board Judge