



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: April 25, 2019

CBCA 6029, 6030

SOTERA DEFENSE SOLUTIONS, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Nathanael D. Hartland and Katherine B. Burrows of Nelson Mullins Riley & Scarborough LLP, Baltimore, MD, counsel for Appellant.

Antonio T. Robinson, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

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

SULLIVAN, Board Judge.

Sotera Defense Solutions, Inc. (Sotera) appealed the deemed denial of its claims on two task orders issued by the Department of Agriculture (USDA) for the provision of information technology (IT) support services at agency locations throughout the country. The task orders were issued on a government-wide acquisition contract (GWAC) issued by the National Institutes of Health (NIH). In its claims, Sotera sought the costs of complying with the Service Contract Act (SCA) and area wage determinations (AWDs), after the

Department of Labor (DOL) directed that SCA clauses and wage determinations be incorporated into the first task order.

By order dated December 20, 2018, the Board, sua sponte, asked the parties to brief the issue of the Board's jurisdiction, questioning whether the claims were properly presented to the USDA contracting officer. In response to the Board's request, USDA moved to dismiss the appeals, arguing that the NIH contracting officer should decide the "applicability of the SCA." We deny USDA's motion, finding that the claims were properly presented to the USDA contracting officer.

Statement of Facts

I. Relevant Terms of NIH ID/IQ Contract

In 2012, NIH awarded Sotera an indefinite delivery/indefinite quantity (ID/IQ) contract for the provision of IT support services. Complaint ¶ 13; Answer ¶ 13.¹ The contract, awarded pursuant to 40 U.S.C. § 11302(e) (2012) (section 5112(e) of the Clinger-Cohen Act), was a GWAC against which "any duly warranted federal government Contracting Officer" could place task orders. Exhibit 2 at 5.² The contract incorporated by reference the clause at Federal Acquisition Regulation (FAR) 52.233-1, Disputes (July 2002) (48 CFR 52.233-1 (2012) (FAR 52.233-1)), which provided that disputes on the contract would be resolved starting with the submission of a claim to the contracting officer. Exhibit 2 at 40.

The contract delineated the responsibilities of the NIH contracting officer and any contracting officer for a task order:

G.3.1. Government Personnel

a. Procuring Contracting Officer

The procuring Contracting Officer (PCO) is the only individual with authority to act as an agent of the government under this contract. Only the PCO has authority to:

¹ The Board relies upon the parties' agreement in the pleadings because the copy of the NIH contract included in the appeal file is neither signed nor dated. Exhibit 2 at 1.

² All exhibits referenced in this decision are found in the appeal file.

- (1) Direct or negotiate any changes in the statement of work;
- (2) Modify or extend the period of performance;
- (3) Change the delivery schedule;
- (4) Authorize reimbursement to the Contractor for any costs incurred during the performance of this contract; and,
- (5) Otherwise change any terms and conditions of this contract.

....

c. Agency Ordering Contracting Officer (OCO)

The agency OCO for each task order is the sole and exclusive government official with authority to take actions which may bind the government under task orders under the contract.

Exhibit 2 at 16-17.

Prior to award of the contract, the NIH contracting officer prepared a “determination of SCA exemption,” indicating that the contract positions were bona fide executive, administrative, or professional positions and that all labor categories on the contract met the criteria for the exemption. Exhibit 1. The contract stated that the positions on the contract were exempt from the SCA but advised that an ordering contracting officer would have to determine whether the SCA applied to any positions requested on a task order:

G.7.4 Service Contract Act

The preponderance of the GWAC’s labor categories are considered bona fide executive, administrative, professional labor and are generally exempt from the [SCA]. To the extent that any labor is subject to the SCA and is within scope of a Task Order and the GWAC, the [OCO] must identify such work under a separate [contract line item] on the task order and apply wages as required under FAR 22.10, Service Contract Act Wage Determinations.

Exhibit 2 at 21. The contract neither contained nor incorporated by reference FAR 52.222-41, Service Contract Labor Standards, or 52.222-43, Fair Labor Standard Act and Service Contract Labor Standards—Price Adjustment (Multiple Year and Option Contracts), clauses that govern the application and the adjustment of wage rates on service contracts. Exhibit 2.

II. Task Order Contracts Awarded by USDA

A. Initial Task Order

USDA issued two task orders against the NIH GWAC to Sotera that are at issue in this appeal. With these task order contracts, USDA sought IT operations and maintenance (O&M) support for twenty-four offices of the Food Safety and Inspection Service, located throughout the United States. Exhibit 4 at C-1, F-2, F-3. Neither task order contained a disputes clause or mentioned the resolution of disputes.

The first task order was issued in June 2016, and it neither included nor incorporated by reference clauses regarding the SCA. Exhibit 4. In January 2017, the USDA contracting officer received a notice from the Wage and Hour Division of DOL that the task order contracts included work covered by the SCA. Exhibit 5. Pursuant to 29 CFR 4.5(c), DOL directed the USDA contracting officer to amend the task order contracts to include FAR 52.222-41 and the applicable wage determinations. *Id.*

Following this direction, in February 2017, the USDA contracting officer issued modification 6 to the initial task order to “retroactively insert back to the original date of award on [June 9, 2016]” clauses FAR 52.222-41 and 52.222-43. Exhibit 6 at 1. As authority for the modification, the contracting officer cited the direction from DOL and FAR 22.1015. *Id.* at 1-2. The contracting officer also attached wage determinations for sixteen localities throughout the United States. *Id.* at 2. On March 10, 2017, DOL notified both Sotera and the USDA contracting officer that it was conducting an investigation of Sotera for possible violations of the SCA. Exhibits 8, 9. It further directed the USDA contracting officer to withhold \$701,590.94 from funds due to Sotera on the task order, pursuant to 29 CFR 5.5(a)(2). Exhibit 8.

B. Follow-On Task Order

While DOL was investigating the first task order, in March 2017, the USDA contracting officer notified Sotera that it had been selected for award of the second task order. Exhibit 21. Following notification, Sotera asked whether the task order had any applicable wage determinations, and the contracting officer provided the “updated SCA/AWDs for each appropriate service location.” Exhibit 21 at 4, 6 (e-mail exchange on March 24 and 27, 2017). Sotera also requested that FAR 52.222-43 be included in the new task order, *id.* at 4, to which the contracting officer responded that it had been included. *Id.* at 3. The task order executed by Sotera on March 28, 2017, included both FAR 52.222-41 and 52.222-43.

In June 2017, the USDA contracting officer forwarded a new contract for O&M services to take the place of the task order executed in March 2017, along with sixteen wage determinations “for the various locations the services of the O&M task order will be performed.” Exhibits 12, 13. Sotera executed the replacement contract on July 19, 2017. Exhibit 15.

III. Claims to the USDA Contracting Officer

In the claim on the initial task order, Sotera sought \$720,451.19 for the increased wage costs for itself and a subcontractor following the incorporation of modification 6 plus the costs of complying with the SCA provisions and preparing the request for equitable adjustment. Exhibit 17. In the claim on the follow-on task order, Sotera sought \$3,337,101.50, for the increased costs of performance in the base period and each of the option years as a result of the application of the SCA requirements as well as the costs to prepare the request for equitable adjustment. Exhibit 18. When the USDA contracting officer failed to issue a decision within sixty days, Sotera appealed the deemed denial of its claims to the Board. Upon Sotera’s request, the Board consolidated the appeals.³

Discussion

In its order requesting briefing, the Board asked whether the NIH contract and the USDA task orders were akin to GSA schedule contracts, which are governed by regulations that dictate which contracting officer has authority to resolve a dispute. Having considered the parties’ arguments, the terms of the NIH contract, and the issues raised in Sotera’s claims, we determine that Sotera properly presented its claims to the USDA contracting officer and the Board possesses jurisdiction to decide these appeals.

The contract awarded by NIH to Sotera is a GWAC, issued pursuant to section 5112(e) of the Clinger-Cohen Act. A GWAC is a “task-order or delivery-order contract for [IT] established by one agency for Governmentwide use.” FAR 2.101. A GWAC is different from a schedule contract administered by GSA. *See* FAR 7.101 (supply schedule contracts and GWACs listed separately). Schedule contracts are governed by the requirements set forth in FAR subpart 8.4, whereas the ordering requirements for GWACs are set forth in FAR 16.505. *See Chameleon Integrated Services, Inc. v. United States*, 111 Fed. Cl. 564, 570 (2013).

³ By order dated April 4, 2019, the Board Chair transferred the appeals from Judge Kullberg to Judge Sullivan.

As noted, the schedule contract regulations require that the contractor presents any disputes pertaining to the terms and conditions of the underlying schedule contract to the GSA contracting officer rather than the OCO. FAR 8.406-6. The Board lacks jurisdiction to decide appeals of claims presented to the OCO that should have been presented to the GSA contracting officer. *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367, 1373 (Fed. Cir. 2013). We find no similar provisions bifurcating responsibility for the resolution of disputes on GWACs and no cases in which this issue has been resolved. Thus, we are left to decide this issue as one of first impression.

Finding no direction in governing law or regulation, we are guided by the terms of the contract and the nature of the dispute. Here, the Board must decide which party should bear the costs resulting from the application of wage rates required by the SCA. Sotera does not challenge the application of the SCA to the task orders.⁴ Rather, Sotera argues that USDA should reimburse its costs incurred as the result of the belated application of the SCA to the task orders. We have jurisdiction to decide this type of dispute. *See, e.g., C&H Reforesters, Inc.*, AGBCA 84-295-1, 88-3 BCA ¶ 21,067, at 106,393.

The issue, then, is whether Sotera properly submitted its claims to the USDA contracting officer. The NIH contract assigns responsibility to the ordering agency, USDA, for identifying any additional labor categories on a task order that are governed by the SCA. That assignment of responsibility is understandable because the OCO would know the labor categories required and the locations where services will be provided on the task orders. NIH made a determination that the positions on the base contract were exempt, but left open the possibility that task orders could include SCA covered positions. Moreover, DOL addressed its concerns about the SCA coverage issues to the USDA contracting officer rather than NIH because the alleged violations occurred on the task order and, presumably, because the USDA contracting officer had the funds to withhold. Finally, the terms of the base contract permit the OCO to bind the Government with regard to matters on the task order. *See AmerescoSolutions, Inc.*, ASBCA 56824, 11-1 BCA ¶ 34,705, at 170,907. Sotera properly submitted its claims regarding the application of the SCA and the resulting costs to the USDA contracting officer, and we have jurisdiction to decide the appeals from the deemed denials of those claims. 41 U.S.C. § 7105(e)(1)(B).

⁴ The Board does not have jurisdiction to decide that issue. *Sectek, Inc. v. National Archives & Records Administration*, CBCA 5084-R, 16-1 BCA ¶ 36,466, at 177,692.

Decision

USDA's motion to dismiss for lack of jurisdiction is **DENIED**.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge