

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Petchem, Inc.) ASBCA Nos. 51687, 51688, 52362
)
Under Contract No. N62387-96-D-1305)

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OPINION BY ADMINISTRATIVE JUDGE LIPMAN
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

These are appeals from the contracting officer's decisions denying appellant's claims totaling \$216,152.11 based on its contention that the Government breached the terms of the captioned indefinite delivery, indefinite quantity (IDIQ) contract when it ordered less than the estimated quantities under the contract. ASBCA No. 51687 involves the claim for the base year and ASBCA Nos. 51688 and 52362 concern the claims for the first and second option years, respectively. We are to decide entitlement only.

The Government has moved for summary judgment on the ground that it met the contract's guaranteed minimums. Appellant has opposed the motion and has submitted an affidavit by its president, Mr. Anthony Savas, in support of its opposition. Appellant has also requested that we consider its opposition to the Government's motion as its own motion for summary judgment.

STATEMENT OF FACTS

1. Pursuant to a Memorandum of Agreement executed in 1994 between the Commander, Military Sealift Command (MSC) and the Commander, Naval Supply Systems Command (NAVSUP), MSC was designated as the single agency responsible to contract for tug and tow services for the Navy. MSC assumed responsibility for the acquisition of tug and tow services

in Puget Sound, Washington in Fiscal Year 1995 with MSC contracts to replace NAVSUP contracts upon their expiration. (R4, tab 1)

2. Pursuant to its delegated authority, MSC received a requirement from Submarine Base Bangor, Washington for the acquisition of commercial tug and towing services to support Trident submarine and Naval surface vessel movements in the Hood Canal and adjacent Puget Sound waters including the Strait of Juan de Fuca and coastal waters from Southern Alaska, NanOOSE, Canada and Portland, Oregon (Columbia River). The commercial tug services would be used to assist Navy YTB tugs (Naval tug boats) in the berthing of those vessels along with operations consisting of towing barges, personnel transfers, search and rescue/recovery, and fire fighting as necessary. On 6 June 1995, MSC issued a Commerce Business Daily notice of solicitation for an Indefinite Delivery contract for United States flag tugs to perform tug and tow services on a "call out" basis in the Puget Sound, Port Angeles, Bangor, Keyport, Washington areas for a period of 12 months with two twelve-month option periods. (R4, tabs 2-5)

3. In preparing the solicitation, the MSC contract specialist planned on the use of an IDIQ contract in order to minimize costs, and he sought and received information from Navy operations personnel regarding the historical and projected use of contract tug services (R4, tabs 7-14, 19).

4. On 15 September 1995, MSC issued a Request for Proposals (RFP) for the services of one tug for the services described above, requiring offers to be submitted by 16 October 1995. The RFP modified the master solicitation to state the following:

Section H2 Government Obligation

As a minimum, the Government shall be obligated to place sufficient delivery orders, the total compensation for which (including straight time, overtime, and call-out fees) shall equal 1000 hours of service calculated at the straight rate.

The RFP also included the following, in pertinent part:

C2.2 Operations

C2.2.1 When on call, the Contractor will perform under the operational control of the operational officer designated by the ordering officer.

C2.2.2 Monthly planning meeting [sic] shall be held by the COR and the contractor to produce a monthly schedule of call-outs and

rotations. This is for guidance only and shall not preclude the Government from employing the vessel during unscheduled times.

C2.2.3 Anticipated operating hours are between 0600-1700; however, tug may be called upon to perform work before or after these hours, and for period [sic] of up to 5 continuous days.

C2.3 Tempo

C2.3.1 Tug may be put on a daily rotation schedule with Navy YTB harbor tugs; this rotation will employ the tug for an average of 35 hours each week with 5 call-outs per week. During this time the tug may be called upon to perform services as outlined in section C4. This estimate may increase or decrease pursuant to operational need.

C2.3.2 The estimated operating scenario for the tug when called out is as follows: 20% underway in transit; 60% underway towing/assisting; 20% standby.

C2.3.3 The Contractor shall provide the tug as specified in each individual order. Said tug shall be able to present at SUBBASE Bangor on two hours notice, if required.

....

C4.1(a) The following list, all-inclusive in neither scope nor description, is illustrative of the towage services to be performed under this Contract:

(1) . . . Government reserves the right to use Government-owned or controlled Tugs or vessels separately or jointly with Owner's Tugs in the performance of any services listed in this Contract.

....

F1 PERIOD

F1.1 This Contract shall be for the period stipulated in Box 10, as from 0600 hours local time on the date identified in Box 9. Any optional periods shall be stated in Box 10; in addition, the Government shall have the option to extend services specified in

Article I14.0 entitled “Option to Extend Services”. All option periods shall be without guarantee, at Government’s sole option. Option periods shall be declared not later than thirty (30) days prior to the expiration of the period then current.

Box 9 of the RFP set forth the contract’s commencement date as 1 December 1995. Box 10 of the RFP set forth the period of performance as 1 December 1995 to 30 September 1996, with two one-year options. The RFP also included the following:

J1 Contract Administration Plan

....

It is emphasized that only the Contracting Officer has the authority to modify the terms of the contract. Therefore, in no event will any understanding, agreement, modification, change order, or other matter deviating from the terms of the basic contract between the Contractor and any other person be effective or binding on the Government. When/if, in the opinion of the Contractor, an effort outside the existing scope of the contract is requested, the Contractor shall promptly notify the Contracting Officer in writing. The Government will not be required to pay for such services performed by the Contractor unless the Contracting Officer has issued a contractual change. (Emphasis in original)

(R4, tab 21)

5. The RFP also included the following Federal Acquisition Regulation (FAR) clauses: FAR 52.216-18 ORDERING (APR 1984); FAR 52.216-19 DELIVERY-ORDER LIMITATIONS (APR 1984); FAR 52.216-22 INDEFINITE QUANTITY (APR 1984) (R4, tab 21).

6. Appellant had been providing contract tug services to the Navy at Submarine Base Bangor since 1989 and appellant’s president, who prepared appellant’s bid, expected the amount of work under the captioned contract to be approximately the same as under the previous contracts -- about 3000 hours per year. That expectation was based, in part, upon a report by the captain of appellant’s tug of conversations with a Naval officer, who was not the contracting officer, in which the latter allegedly assured him that the 2,500 estimated hours in the RFP would be met. (SR4, tab 2; Savas aff. ¶¶ 2-4)

7. After bidders expressed concern that the guaranteed hours were too low, the Government’s contract specialist requested and received information regarding the number of hours that contract tugs were used in fiscal years 1994 (2,836 hours) and 1995 (2,589 hours) (R4, tabs 26, 28-29, 31). The Government decided to modify the RFP, and, on 10 October

1995, it issued Amendment A00002 which increased the guaranteed hours in paragraph H2 to 1,800 and modified paragraph C2.3.1 to read, as follows :

Tug may be put on a daily rotation schedule with Navy YTB harbor tugs. In this capacity it is estimated that the tugs will be used for 2500 hours each year, with 200 call-outs (these are only estimated and may increase or decrease pursuant to operational need; guaranteed amounts can be found in Article H2). During this time, the tug may be called upon to perform services as outlined in Section C4.

The amendment also included the following response to offeror questions:

Q1. Explain what is meant by “daily rotation schedule with Navy tugs?”

A1. The tug will be the “duty” tug on a rotating basis with the Navy YTB tugs present at SUBASE Bangor; while the “duty” tug, she will be the first tug to be called out if appropriate work arises at the base. It is anticipated that this rotation will be on a daily basis. Please note that the tug may be called even if not designated as the “duty” tug.

Q5. Will the tug work 5 days per week for 7 hours each day?

A5. The length and number of call-puts [sic] will be dependant [sic] on operational needs.

(R4, tab 32)

8. In response to further questions, the Government issued Amendment A00003 to the RFP on 17 October 1995, and it included the following:

Q4. What percentage of the total hours are performed after hours, weekends, and holidays?

A4. Work may be required during overtime hours; for evaluation purposes, an estimate of 10% is used. (Note, this is an estimate used for evaluation. Actual overtime may increase or decrease significantly due to operational need.)

(R4, tab 35)

9. By letter of 20 October 1995, appellant offered comments to the Government's responses to questions. The comments included the following:

According to our statistics and based upon your definition of overtime in the solicitation, 38% of the hours will be performed on an overtime basis as opposed to the 10% that you have indicated in the amendment. . . . The 2500 hours that you have indicated in the solicitation are consistent with what has been done in the past i.e. the tug will be in a rotation with the three Navy YTBs. . . .

(R4, tab 37)

10. Further discussions resulted in additional amendments to the RFP and, following initial offers, discussions with bidders, and a first round of best and final offers, appellant asked additional questions including an inquiry as to whether the estimated 2,500 hours would be prorated over the performance period (R4, tab 51). On 17 November 1995, the Government issued Amendment A00005 to the RFP, which, in pertinent part, responded to appellant's inquiry with "clarification," as follows:

Scheduling call-outs and incorporating Contractor's tug into a daily rotation is for planning purposes with a view towards efficient use of Navy owned and contract resources. Whether Contractor's tug is actually called out during these scheduled periods is based entirely upon actual operational needs. Thus, Contractor's tug may not be called out at all, and therefore not entitled to the hourly rate or fees, during the aforementioned periods. Conversely, Contractor's tug may be called out during unscheduled periods. It must be emphasized that hourly rates and fees shall not be earned unless Contractor's tug is actually called out, regardless of the schedule, and that the Government will have the right to call out the tug at any time, provided appropriate notice is given per Article B1.3. During those periods, whether scheduled or not, the Contractor's tug is not being used by the Government, Contractor is free to employ its tug as desired; however, Contractor will still be liable for performance under the Contract. Contractor is guaranteed only the minimum set forth in Article H2.

. . . .

Government's minimum guarantee under Article H2 will be calculated by multiplying contractor's hourly rate by 1800 hours.

(R4, tab 52)

11. Following further RFP amendments and an agency protest on other issues, on 20 December 1995, appellant submitted its second best and final offer in which it inserted in paragraph H2 the number “1800” as the number of hours constituting the Government obligation (R4, tab 66).

12. In January 1996, the parties entered into the captioned contract under which appellant was to perform the specified tug and towing services for a one-year period with two, twelve-month option periods. The base year commenced on 1 February 1996 and ended on 31 January 1997. The terms of the contract were as set forth in the RFP including the amendments described above. Section C2.3.1 estimated the tug usage to be 2,500 hours and paragraph H2 stated that the Government obligation was to place sufficient delivery orders for compensation of 1,800 hours of service. (R4, tab 68)

13. The total hours of service actually ordered by the Government and provided by appellant during the base year were 2,118 (ASBCA No. 51687, compl. & answer ¶ 18).

14. On 1 February 1996, the Government exercised the option for the first option period which commenced on 1 February 1997 and ended, after being extended by Modification Nos. P0003 and P0004, on 20 February 1998 (R4, tab 69). During the first option period, the Government delivery orders utilized appellant’s tug for 2,204 hours (ASBCA No. 51688, compl. & answer, ¶ 23).

15. On 29 January 1998, appellant submitted a claim seeking compensation in the amount of \$77,289 for the contract’s base year. The claim was based on the contention that the Government breached the contract by ordering less than the estimated 2,500 hours of tug services for reasons other than the operational needs of the Navy and in violation of the duty rotation requirements of the contract. (R4, tab 81)

16. As a result of budgetary constraints, the Government for some time considered not extending the contract into the second option year (ex. A-1). However, by bilateral Modification No. P0005 dated 13 February 1998, the Government exercised the second and final option for the period 21 February 1998 through 20 February 1999. The modification also increased the Government minimum obligation from 1,800 to 2,100 hours of service. (R4, tab 69)

17. On 28 May 1998, appellant submitted a claim seeking compensation of \$58,816.03 for the first option year on the same grounds as its claim for the contract’s base year (R4, tab 82).

18. The total hours actually ordered by the Government and provided by appellant during the second option period were 1,959, which was 141 less than the guaranteed minimum of 2,100 hours (R4, tabs 110, 112; ASBCA No. 52362, compl. ¶¶ 4 5, answer ¶ 10).

19. By decision dated 4 August 1998, the contracting officer denied appellant's claims for the base year and first option period. (R4, tab 83) Appellant timely appealed; the base year appeal was docketed as ASBCA No. 51687 and the first option period appeal was docketed as ASBCA No. 51688.

20. On 31 March 1999, appellant submitted a claim to the contracting officer seeking compensation in the amount of \$108,263.67 for the second option period. The claim sought (a) \$28,216.59 in compensation for the difference between the actual hours ordered and the guaranteed minimum of 2,100 hours, and (b) \$80,047.08 for the difference between the guaranteed minimum and the 2,500 estimated hours of service. (R4, tab 110)

21. By decision dated 30 June 1999, the contracting officer granted, in part, appellant's second option year claim in the amount of \$28,216.59 based on the difference between the actual hours ordered and the guaranteed minimum of 2,100 hours. The decision denied the portion of the claim seeking compensation for the failure of the Government to meet the estimate of 2,500 hours of service. On 8 July 1999, the Government issued Modification No. P0006 which authorized payment to appellant in the amount of \$28,216.59. (R4, tabs 112-113) Appellant timely appealed the contracting officer's denial of compensation for the failure of the Government to meet the estimate of 2,500 hours, and the appeal was docketed as ASBCA No. 52362.

DECISION

Summary judgment is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

In seeking summary judgment, each of the parties maintains that there are no material facts in dispute. We agree, and summary judgment is, therefore, appropriate.

The dispute concerns the extent of the Government's obligation to utilize appellant's tug and towing services under this IDIQ contract. The Government contends that it was obligated to order no more than the amount (1,800 or 2,100 hours) specified in the contract as the guaranteed minimum. Appellant argues (a) that the Government was obligated to order the estimated amount of services (2,500 hours), but that Government orders could either be greater or smaller than the estimated hours (with a floor of 1,800/2,100 hours) where the deviation from the estimated hours was based on the Government's "operational need"; (b) that appellant would not be able to recover the difference between the guaranteed minimum of 1,800 hours

and the estimated 2,500 hours if the latter amount was not achieved because the Navy's operational needs had declined; but (c) that the Navy, due to budgetary constraints or other reasons, would not have the unilateral right to substitute its own tugs in lieu of the contract's daily rotation schedule to meet the unchanged, or even increased, operational needs. In support of its contentions, appellant points to (a) the number of hours which were ordered under its previous contract, (b) the pre-award communications between bidders and the Navy regarding the meaning of terms included in the RFP, and (c) an alleged communication between appellant's tug captain and a Naval officer who was not the contracting officer.

In an indefinite delivery, indefinite quantity contract, the Government is obligated to order only the minimum quantity stated. In entering into such a contract, a contractor bears the risk that the estimate used for the solicitation will not be reached and can not shift that risk to the Government. *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001); *DynCorp*, ASBCA 38862, 91-2 BCA ¶ 24,044, *aff'd*, 972 F.2d 1353 (Fed. Cir. 1992) (table); *C.F.S. Air Cargo, Inc.*, ASBCA No. 40694, 91-2 BCA ¶ 23,985 *aff'd*, 972 F.2d 1353 (Fed. Cir. 1992) (table); *Crown Laundry & Dry Cleaners, Inc.*, ASBCA 39982, 90-3 BCA ¶ 22,993, *aff'd* 935 F.2d 281 (Fed. Cir. 1991) (table).

In this appeal, during the base year of the contract the Government was obligated to use appellant's tug for 1,800 hours of service. The Government, in fact, used appellant's tug for 2,118 hours of service, 318 hours more than the obligated minimum. During the first option year the Government was obligated to use appellant's tug for 1,800 hours of service. The Government, in fact, used appellant's tug for at least 2,203.75 hours of service. During the second option year the Government was obligated to use appellant's tug for 2,100 hours of service. The Government, in fact, used appellant's tug for 1,959 hours of service, 141 hours less than the guaranteed minimum. We have found that the Government agreed to compensate appellant for the failure to meet the minimum in the second option year. The Government has met its contractual obligation.

The language in the contract did not alter the nature of the guaranteed minimum nor the estimate. Appellant's argument that the contract language found at section C2.3.1, "(these are only estimates and may increase or decrease pursuant to operational need . . .)" changed the nature of the estimate is not persuasive. The parties entered into an IDIQ contract. The phrase "operational need" is not given special meaning in the contract. Placed in its proper context in the contract, it meant that the Navy would utilize appellant's tug when it needed to do so, but not less than the guaranteed minimum number of hours.

Our findings further reflect that, in each communication during development of the RFP, the Navy drew bidders' attention to the guaranteed minimum as the limit of its obligation under the contract. That result is not changed by appellant's expectations based upon prior contracts or informal conversations between appellant's personnel and Government officials lacking authority to modify the contract. Nor is it changed if the Navy's decisions regarding the use of tugs were driven by budgetary constraints, which would not be inappropriate.

Appellant's motion for summary judgment is denied. The Government's motion for summary judgment is granted. The appeals are denied.

Dated: 20 November 2001

RONALD JAY LIPMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 51687, 51688 and 52362, Appeals of Petchem, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals