

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Freeport Technologies, Inc.) ASBCA No. 56665
)
Under Contract No. HHM402-05-D-0014)

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Army Chief Trial Attorney
MAJ Timothy A. Furin, JA
CPT Bridget E. Keenan, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Freeport Technologies, Inc. (Freeport) appeals the deemed denial of its claim for government breach of the captioned contract (hereinafter "Contract 0014"). The government denies any breach. The appeal was heard on entitlement only. We sustain the appeal in part.

FINDINGS OF FACT

1. On 1 August 2005, the Defense Intelligence Agency (DIA) awarded Contract 0014 to Freeport. This was a requirements contract to provide when and as ordered audio-visual system design, integration, installation, and related services at the Defense Intelligence Analysis Center Expansion (DIAC Expansion) facility under construction at Bolling Air Force Base (AFB), Washington, DC. Ms. Jan Timmer, Vice President of Federal Operations, signed the contract on behalf of Freeport. (R4, tab 1 at 1-2, 8, 13)

2. Contract 0014 included, among other provisions, the following:

H.3 52.216-18 ORDERING (OCT 1995)

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the

Schedule. Such orders may be issued from July 2005 through July 2008.

....

H.4 52.216-21 REQUIREMENTS (OCT 1995)

....

(c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

....

I.13 52.249-4 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM) (APR 1984)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

(R4, tab 1 at 13, 14, 26)

3. The contract Schedule consisted of three contract line items (CLINs) in relevant part as follows:

0001 FFP- The contractor shall be responsible for accomplishing audio visual services and supplies such as, but not limited to: [various services and supplies in accordance with the Performance Work Guidelines]

0002 FFP- WARRANTY

The Contractor shall provide warranty on the entire system, installation workmanship, materials employed, and equipment installed.

*Warranty terms are provided in Performance Work

Guidelines*

0003 TIME & MATERIALS

This CLIN will be used to issue Time and Materials delivery orders at the discretion of the Contracting Officer.

(R4, tab 1 at 2)

4. There is no document in the contract entitled “Performance Work Guidelines.” However, the technical provisions containing the references in the CLINs are in a 137 page attachment to the contract bearing on each page the designation “DIAC SOW.doc March 11, 2005.” (R4, tab 1 at 28-164) We hereinafter refer to this document as the contract SOW or statement of work.

5. The contract SOW included provisions for a one-year warranty by the contractor of its installed systems with first year service and maintenance being provided by the contractor during the warranty period. The contract SOW also included the following provisions for second and third year maintenance:

1.7 2ND & 3RD YEAR SERVICE CONTRACT

1.7.1 PREVENTATIVE MAINTENANCE

The AV Sub-Contractor [sic] shall offer a separate service contract price for the 2nd and 3rd years after system acceptance. This contract price shall cover all elements of the installed systems. This service contract shall cover a minimum of four (4) visits per year, at regular intervals, to perform operation checks of the equipment, to clean recording heads, screens, projector lenses and other critical surfaces, to lubricate moving parts as recommended by the respective manufacturers and to adjust and align projectors to maintain optimum registration and focus.

1.7.2 ON-SITE SERVICE

On-site emergency service shall be available within 4 or 24 hours, with telephone support assistance provided within 2 hours. Please provide pricing for each of these options. Such visits occur in addition to the mandatory preventative maintenance inspections.

1.7.3 CONTRACTUAL ARRANGEMENT

Non-emergency, scheduled preventative maintenance service is handled as a fixed price contract with emergency service handled on a time and materials basis. The Owner may separately contract these services.

(R4, tab 1 at 35, 37)

6. The government issued nine delivery orders to Freeport under Contract 0014 between 28 July 2005 and 13 April 2007. Delivery Order 0008 issued on 10 April 2007 required Freeport to provide maintenance through 9 June 2007 on its installed systems for which the first year warranty had expired at a firm fixed price of \$67,534.12 for the 60 day term of the order. (R4, tabs 2-7, 9-11; tr. 1/114)

7. When Contract 0014 was awarded to Freeport, a competitor, Video Dynamics, Inc. (VDI), was performing a DIA requirements contract awarded in July 2002 for audio-visual systems installation, maintenance and related services at other DIA facilities in the Washington, DC area (hereinafter the "VDI-1 contract"). These facilities included the DIAC Bldg. 6000 facility at Bolling AFB. (R4, tab 25 at 1-13)

8. On 27 September 2006, DIA issued Delivery Order 121 under the VDI-1 contract for upgrading the existing commercial cable television (CATV) system in the DIAC Bldg. 6000 facility and the extension of that system into the DIAC Expansion facility then under construction (R4, tab 64 at 1, 3).

9. By email dated 10 January 2007, Ms. Timmer complained to the contracting officer that Freeport had not been given a fair opportunity to compete for the CATV work in the DIAC Expansion facility. Ms. Timmer did not contend that the CATV system was within the scope of Freeport's Contract 0014. To the contrary, she stated: "The CATV system was not listed in our contract's SOW." The basis of her complaint was an allegation that Freeport had been given a more expensive design to bid than was given to VDI, the successful offeror. (Ex. A-4)

10. At hearing, Ms. Timmer attempted to retract the statement in her 10 January 2009 email that "The CATV system was not listed in our contract's SOW" by opining that installation of a CATV system was included in the contract SOW items for a "flat panel distribution rack" and "flat panel displays in vestibule spaces" (tr. 1/57-59; R4, tab 1 at 28).

11. The contract SOW item for a flat panel distribution rack stated in relevant part:

This distribution rack shall be as a subsystem to the existing distribution system within the existing building. RGB HS Vs video and audio signals are to be transported from their existing rack locations to this new sub rack location. Others shall provide all fiber optic cabling between the existing building and the new rack location with the exception of optical fiber Jumpers not to exceed 30 meters.

....

Video Systems

....

(b) Provide cable television tuners, rack mounted

....

(R4, tab 1 at 101)

12. The contract SOW item for flat panel displays in vestibule spaces stated in relevant part:

These displays are an extension of an existing video content distribution system to be extended from the existing distribution via fiber to each of the display locations.

....

These displays shall have the ability to have any of the sources from the distribution rack in section 2.2.13 routed to any or all of the displays within this distribution.

(R4, tab 1 at 104)

13. The contract SOW items for video systems in the classrooms, conference rooms, briefing room, small lecture rooms and small study rooms included the following requirement:

Provide a NTSC TV tuner, rack mounted. TV tuner shall demodulate off air and campus television RF signals for large

screen display. Contractor shall connect to the cable television signal that is provided by others.” [Emphasis added]

(R4, tab 1 at 53, 59, 63, 66, 70, 74, 78, 81, 85, 89, 91, 95, 98, 113, 118, 121)

14. We conclude from the foregoing contract SOW items that while cable TV tuners were part of the audio-visual system requirements under Contract 0014, installation of a complete CATV system was not. Ms. Timmer’s stated understanding of the contract in her 10 January 2007 email was correct. Moreover, that understanding was substantially concurred in by Mr. McGreevy, the President and CEO of Freeport, who testified:

Q. So, sir, you would agree based on your earlier testimony that the cable TV distribution system and the flat panel distribution system are two distinct separate areas of work. Is that correct sir?

A. They are.

(Tr. 1/124, 157)

15. The ordering period under the VDI-1 contract was scheduled to expire on 30 September 2006 (R4, tab 25 at 23). However, it was extended thereafter to provide continuing maintenance by VDI while a successor contract was solicited and awarded (answer, Part II, ¶ 13; app. br. at 6 ¶ 25).

16. At a 31 January 2007 pre-proposal conference on the initial RFP for the VDI-1 successor contract, the government stated that a transitory plan, “acceptable to all parties,” would have to be worked out to “migrate” the systems installed by Freeport in the DIAC Expansion facility to the new contract (ex. A-1). However, the initial RFP was cancelled sometime after 31 January 2007 and a new RFP for the successor contract was issued on 26 April 2007.

17. The 26 April 2007 RFP included the DIAC Expansion facility with the other DIA facilities for which audio-visual system maintenance was to be provided. It had no provision for a transitory plan to “migrate” the maintenance of the systems in the DIAC Expansion facility from Contract 0014 to the new contract. It did include, among other provisions, a requirement for the contractor to have a facility security clearance as follows:

5. Facilities: Contractor facilities shall be adequate for equipment staging, testing, preassembly and other related activities as appropriate for this effort. Facility clearance shall be maintained for duration of contract. A facility clearance

(FCL) is an administrative determination that, from a national security standpoint, a facility is eligible for access to classified information at the same or lower classification category as the clearance being granted. The FCL may be granted at the Confidential, Secret, or Top Secret level. The FCL includes the execution of a Department of Defense Security Agreement (DD Form 441).

(R4, tab 26 at 18)

18. Freeport did not have a facility security clearance. Contract 0014 did not require the contractor to have a facility security clearance, nor did it require the contracting officer to “sponsor” or assist the contractor in obtaining a facility security clearance for another procurement.

19. Since Freeport did not have a facility security clearance, it was not eligible to compete for the VDI-1 successor contract under the 26 April 2007 RFP (R4, tabs 1, 12-15). The contract solicited by that RFP (hereinafter "the VDI-2 contract") was awarded to VDI on 31 May 2007 (R4, tab 26 at 1).

20. In an email to the Director of the DIA, dated 21 June 2007, the President of Freeport, alleged that:

Freeport was prevented from competing for the follow-on [VDI-2] contract due to the fact that we did not have a Top Secret Facilities Clearance. Over the course of nine months from Sept 06 to present, the COR Tim Graves committed to submit our application paperwork for the clearance and through his gross incompetence and lack of follow through we still don't have any action on this even today. Consider that Tim Graves also wrote the...procurement specification around the incumbent vendor's capabilities, and not the government's real requirements, Mr. Graves repeated failure to submit Freeport's clearance application for processing suggests that his actions did not meet procurement integrity standards.

(R4, tab 21 at 1-2; tr. 1/132)

21. Mr. Graves was a video engineer and the contracting officer's representative (COR) for technical matters on Contract 0014 and on the VDI-1 and VDI-2 contracts (tr. 2/6, 44, 53). At hearing, Mr. Graves testified as to his involvement in Freeport's facility security clearance application as follows:

Q. ...Now sir, were you ever required under the existing Freeport contract to assist Freeport with obtaining security clearances?

A. I was not required to, no.

Q. Did you ever offer to help or try to help Freeport obtain security clearances or facilities clearances?

A. Yes. They asked me if I could pass documents to our security officer.

Q. Could you explain to the Board what your involvement was with that process?

A. I don't have any actual involvement with the security process. I know who our security officer is, and so I pass documents to her...

Q. Did you ever intentionally not pass the documents that Freeport submitted?

A. No.

(Tr. 2/43-44)

22. The term of the VDI-2 contract was a base year from 1 June 2007 through 31 March 2008 with up to four successive option years thereafter. Delivery Order 0001 under the VDI-2 contract was issued on the date of the contract award. It ordered, among other things, maintenance of the audio-visual systems in the DIAC Expansion facility for the base term of the contract at a fixed monthly fee for designated "unique" systems and on a time and materials basis for the remaining "basic" systems. (R4, tab 26 at 1-12, tab 27 at 1, 6)

23. On 19 September 2007, the government issued Delivery Order 0014 under the VDI-2 contract for relocation of an audio-visual system on the 6th floor of the DIAC Expansion facility (R4, tab 43 at 1-2, 4).

24. On 24 September 2007, Contract 0014 was terminated for the convenience of the government (R4, tab 24).

25. On 26 September 2008, Freeport submitted a certified claim to the contracting officer in the amount of \$1,807,984 for lost profits on four specifically identified alleged diversions of work from its requirements contract to the VDI-1 and VDI-2 contracts. The claim document under the heading “IMPROPER TERMINATION FOR CONVENIENCE OF THE CONTRACT” also claimed: “unspecified damages in the amount of the lost profits associated with work that was improperly diverted to the VDI Contract after the Contract [0014] was terminated.” A “Summary of Consequential Damages” attached to the claim allocated \$1,807,984 to the specifically identified diversions and listed the “Improper Termination Damages” as “TBD.” (R4, tab 52 at 1, 14-18)

26. The diversions of work in the DIAC Expansion facility specifically identified by Freeport were (i) installation of the CATV system, (ii) “rework of the dining room on the 6th floor”; (iii) the second and third year maintenance requirements; and (iv) design and installation of a television production suite (R4, tab 52 at 14-15).

27. Freeport's claim expressly requested a contracting officer's final decision within 60 days (R4, tab 52 at 17). The contracting officer neither issued a final decision nor provided notice of when a final decision would be issued within 60 days of receipt of the claim. On 2 December 2008, Freeport appealed the deemed denial of the claim.

28. At hearing, Freeport did not identify any diversions other than those previously identified in its claim, and withdrew its claim for diversion of the television production suite work. That item of work was never in fact ordered from VDI or anyone else. (Tr. 1/8, 164; app. br. at 2) At hearing the government conceded entitlement on Freeport's claim for diversion of the 6th floor audio-visual system relocation work in Delivery Order 0014 under the VDI-2 contract (gov't br. at 1-2).

DECISION

With Freeport's withdrawal of its claim for diversion of the television production suite work, and the government's admission of the diversion of work in Delivery Order 0014 of the VDI-2 contract (finding 28), the remaining issues for decision on entitlement as to the specifically indentified alleged diversions are (i) the alleged diversion of the CATV work, and (ii) the alleged diversion of the second and third year maintenance work.

The government does not deny that VDI installed portions of a CATV system in the DIAC Expansion facility during the term of Contract 0014, but argues that installation of a CATV system was not a requirement included in that contract. We agree. While cable TV tuners were a specified part of the audio-visual systems required to be installed under Contract 0014, the installation of a complete CATV system was not. To the

contrary, the SOW items for the tuners in the class, conference, briefing, lecture and study rooms expressly stated that the cable television signal “is provided by others.” (Findings 11-13)

We are further persuaded by the fact that when Freeport noticed that components of a CATV system were being installed by VDI in the DIAC Expansion facility, Ms. Timmer, the person who signed Contract 0014 for Freeport, complained to the contracting officer, not on the basis of a diversion from Contract 0014, but on the ground that Freeport had been denied a fair opportunity to compete for the work. In her complaint, Ms. Timmer expressly acknowledged that “The CATV system was not listed in our contract’s SOW.” (Finding 9) This statement was in the nature of a contemporaneous interpretation of the contract before the diversion issue was raised, to which we give great if not controlling weight. *Max Drill, Inc. v. United States*, 427 F.2d 1233, 1240 (Ct. Cl. 1970).

We also note that, at hearing, Freeport’s CEO testified that the flat panel distribution system and the CATV system were “two distinct separate areas of work (finding 14). On this record, we conclude that the installation of the CATV system by VDI in the DIAC Expansion facility was not a diversion of a requirement that the government was obligated to have performed by Freeport under Contract 0014.

There was also no diversion of the second and third year maintenance requirements in Contract 0014. That contract did not specify performance by a contractor with a facility security clearance. The VDI-2 contract did so specify. (Findings 17-18) We have no jurisdiction to review the merits of the agency decision to require audio-visual system maintenance in the DIA Expansion facility after 9 June 2007 to be performed by a contractor with a facility security clearance. *See Department of the Navy v. Egan*, 484 U.S. 520, 529-30 (1988).¹ The fact that the government’s requirements after that date for maintenance by a contractor with a facility security clearance could not be met under Contract 0014 did not constitute a breach of that contract.

Freeport’s claim for lost profits in an unspecified amount for alleged diversions resulting from the allegedly improper termination of Contract 0014 must be dismissed for lack of jurisdiction. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995). That claim is not a component of the \$1,807,984 claimed for the specifically identified

¹ Although *Egan* involved the revocation of a personal security clearance, the rationale of the Supreme Court in reversing a lower court review of the merits of the revocation is equally applicable here: “the protection of classified information must be committed to the broad discretion of the agency responsible...[t]hus unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” 484 U.S. at 529-30.

diversions, and is expressly stated in the claim “Summary of Consequential Damages” as “TBD” (finding 25). *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 07-1 BCA ¶ 33,472, cited by Freeport, is inapposite. In *Lockheed*, the complaint on appeal did not allege a sum certain, but the claim submitted to the contracting officer did. 07-1 BCA at 165,933. That was not the case here.

The government having conceded entitlement on the diversion of the 6th floor audio-visual system relocation in Delivery Order 0014 under the VDI-2 contract, the appeal is sustained as to entitlement on that item and remanded to the parties for the negotiation of quantum. The appeal is dismissed as to the claim for improper termination and denied in all other respects for the reasons stated above.

Dated: 24 June 2010

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
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 No. 56665, Appeal of Freeport Technologies, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals