

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
EJB Facilities Services) ASBCA No. 57547
Under Contract No. N44255-05-D-5103)

APPEARANCES FOR THE APPELLANT: Kenneth B. Weckstein, Esq.
Pamela A. Reynolds, Esq.
Brown Rudnick LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
Robert C. Ashpole, Esq.
Senior Trial Attorney
Robyn McNish, Esq.
Tracey Rockenbach, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND
THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

EJB Facilities Services (EJB) moves for partial summary judgment, alleging that the Department of the Navy (government) improperly based a deduction for deleted work on EJB's original bid prices. The government moves for summary judgment on the ground that EJB's method of calculating the deduction results in an award of anticipatory profits. We have jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 24 November 2004, the Navy issued Request for Proposals (RFP) No. N44255-04-R-0003 for a combination firm fixed-price/indefinite-quantity contract to provide base operating and support services for various facilities in the western Puget Sound area of Washington State (app. supp. R4, tab 1 at EJB1, -35, -41).

2. The performance period established by the RFP was as follows:

1. Phase In Period: 02 August 05 thru 30 September 05
2. Base Year: 01 October 05 thru 30 September 06
3. Option Year One: 01 October 06 thru 30 September 07
4. Option Year Two: 01 October 07 thru 30 September 08
5. Option Year Three: 01 October 08 thru 30 September 09
6. Option Year Four: 01 October 09 thru 30 September 10
7. Award-Option One 01 October 10 thru 30 September 11
8. Award-Option Two 01 October 11 thru 30 September 12
9. Award-Option Three 01 October 12 thru 30 September 13

(App. supp. R4, tab 1 at EJB35)

3. The Performance Work Statement was divided into the following "annexes":

Annex 0100000	General Information
Annex 0200000	Management and Administration
Annex 0300000	Visual Information Services
Annex 1000000	Supply
Annex 1401000	Family Housing
Annex 1402000	Bachelor Housing
Annex 1501000	Facility Management
Annex 1502000	Facility Investment
Annex 1503020	Pest Control
Annex 1503030	Refuse Collection
Annex 1503060	Street Sweeping and Snow Removal
Annex 1602000	Electrical
Annex 1603000	Natural Gas
Annex 1604000	Wastewater
Annex 1605000	Steam
Annex 1606000	Water
Annex 1607000	Compressed Air
Annex 1700000	Base Support Vehicles and Equipment
Annex 1704000	Crane Services
Annex 1800000	Environmental

(App. supp. R4, tab 11 at EJB224-26)

4. The annexes were further divided into firm fixed-price (FFP) and indefinite-quantity (IQ) "EXHIBIT LINE ITEM NUMBERS" (ELINs) (*id.*).

5. NAVFAC 5252.215-9300, CONTENT OF PROPOSALS (MAR 2002) provided, in part, as follows:

(1) Offers are solicited on an "all or none" basis....
Failure to submit offers for all line items listed shall be cause for rejection of the offer.

(App. supp. R4, tab 1 at EJB87-88)

6. On 1 August 2005, the Navy awarded the contract to EJB in the amount of \$405,270,351.64 (R4, tab 1 at GOV1).

7. The contract incorporated FAR 52.233-1, DISPUTES (JUL 2002) – ALTERNATE I (DEC 1991) and FAR 52.243-1, CHANGES–FIXED-PRICE (AUG 1987) – ALTERNATE II (APR 1984) by reference (R4, tab 1 at GOV28). The Changes clause provides that if any change "causes an increase or decrease in the cost of...performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price...and shall modify the contract."

8. On 30 March 2010, six months before the commencement of option year five, the Navy requested EJB to submit a proposal for deleting Annex 1000000 (Supply) in its entirety (R4, tab 12 at GOV1604, tab 35).

9. On 13 July 2010, EJB submitted Proposed Change (PC) #10-037 (revision 3) to the Navy for deletion of Annex 1000000 (Supply). Based on its actual historical costs, EJB proposed a price reduction of \$331,137.92. (R4, tab 34 at GOV2319, -2343-44, tab 35 at GOV2432)

10. The parties failed to reach agreement on price. Pursuant to the Changes clause, the contracting officer (CO) issued unilateral Modification No. A00049 on 17 August 2010, deleting Annex 1000000 and reducing the contract price by \$1,375,833.80 for option years five through seven. The deduction was based on EJB's original bid price for Annex 1000000 (\$1,919,883.16) plus compensation for unabsorbed overhead costs and profit associated with Annex 0200000 Management and Administration (\$544,049.36). (R4, tab 33 at GOV2051-52, tab 35 at GOV2432)

11. On 4 November 2010, EJB submitted a claim to the CO, requesting that Modification No. A00049 be adjusted by \$1,044,695.88, decreasing Modification No. A00049 from \$1,375,833.80 to \$331,137.92 (R4, tab 34 at GOV2150).

12. On 7 December 2010, the CO denied the claim, stating that the proper measure of a downward adjustment on a separately priced contract item where the

contractor has not yet performed any work is the contract item price rather than the amount the work “would have cost.” The CO explained her position as follows:

(1) The deletion of Annex 1000000 is a complete and severable item; (2) Annex 1000000 is composed of separately priced contract line items; (3) Annex 1000000 was deleted prior to the execution of option year five....

(R4, tab 35 at GOV2432-33)

13. EJB did not perform any work or incur any costs in connection with Annex 1000000 in the relevant option years.

14. Appellant timely appealed the denial of its claim to this Board on 4 March 2011, where it was docketed as ASBCA No. 57547.

15. The government’s Statement of Material Undisputed Facts proposes that “EJB’s complaint seeks anticipatory profits for work it never performed” (¶ 4). EJB disputes this statement of fact, stating that its claimed net cost saving included a 5% profit (app. opp’n to gov’t mot at 4, ¶ 4). EJB explains that its proposed deduction “was based upon its estimated cost to perform the work that included a 5% profit (‘BASE FEE’) on the deleted Supply Annex work,” citing pricing sheets in support thereof (*id.* at 4-5, ¶ 8).

DECISION

The fact that both parties have moved for summary judgment does not mean that we must grant judgment as a matter of law for one side or the other. Summary judgment in favor of either party is not proper if disputes remain as to material facts. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

EJB moves for partial summary judgment on two questions of law: “(1) that the Supply Annex work deducted by the Navy from EJB’s contract was not a ‘severable item’; and (2) it was not proper for the Navy to price the deductive change using EJB’s original proposed prices for the deleted work” (mot. at 1). EJB argues on the second point that since the contract is not severable, the proper measure of the deduction is the difference between performing without the deduction and the cost of performing with the deduction. *Celesco Industries, Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604 at 66,683. (Mot. at 18) In its opposition to the motion, the Navy does not contend that the contract was severable. Rather, the Navy argues that “the issue of severability...is merely a diversion from the real issue and subject of [the motion]; namely whether EJB is entitled to anticipatory profits for the deleted work associated with Annex 10” (gov’t opp’n at 3).

In its reply, appellant affirms that “if the Navy has abandoned that position [severability], which it should have deemed to have done, there is no reason for the Board to decide whether the Navy deleted a severable part of the Contract” (app. reply at 4 n.5). In its subsequent 16 December 2011 letter, the government reiterates that “the severability issue is a red herring....” In short, the government does not argue that the contract was severable. It follows that the change should not be priced on that basis, but rather on a “would have cost” basis under *Celesco Industries, Inc.*, and the motion is moot.

The government argues as one of its material undisputed facts that “EJB’s complaint seeks anticipatory profits for work it never performed” (gov’t mot. at 2). In its opposition, EJB disputes this purported fact, asserting that its “proposed deduction (based upon what it would have cost EJB to perform the deleted work) included profit on the deleted work” (app. opp’n to gov’t mot. at 2). In addition, EJB’s counter-statement of material undisputed facts indicates that its claimed net cost saving included 5% profit. It cites its pricing sheets in support thereof. (SOF ¶ 15) On this record, there are disputed issues of fact which preclude summary judgment.

EJB’s motion for partial summary judgment is denied as moot. The Navy’s motion for summary judgment is denied because there are disputed issues of material fact.

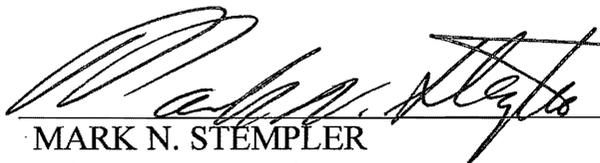
Dated: 8 March 2012



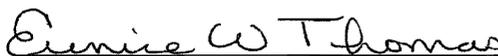
ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

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. 57547, Appeal of EJB Facilities Services, rendered in conformance with the Board's Charter.

Dated:

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