

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Vantage Associates, Inc. ) ASBCA No. 51418  
 )  
Under Contract No. N66001-91-C-0225 )

APPEARANCE FOR THE APPELLANT: Brian J. Donovan, Esq.  
Jones & Donovan  
Irvine, CA

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.  
Navy Chief Trial Attorney  
Christopher P. Kneib, Esq.  
Trial Attorney  
Space & Naval Warfare Systems Center  
San Diego, CA

OPINION BY ADMINISTRATIVE JUDGE TUNKS

This appeal arises from the Government's rejection of a value engineering change proposal (VECP). Only entitlement is at issue. The parties waived post-hearing briefs.

FINDINGS OF FACT

1. The Government awarded Contract No. N66001-91-C-0225 (the -0225 contract) to Vantage Associates, Inc. (appellant) on 30 September 1991 for a quantity of accessory sets and spares which are used as underwater marking devices by dolphins in the Government's Marine Mammal System (R4, tabs 1, 3).
2. FAR 52.248-1 VALUE ENGINEERING (MAR 1989), which was incorporated into the contract by reference, defined a VECP as a proposal that "(1) [r]equires a change to this, the instant contract, to implement; and (2) [r]esults in reducing the overall projected cost to the agency . . . ." (R4, tab 3)
3. The clause requires a VECP to contain the following information (R4, tab 3):
  - (c)(1) A description of the difference between the existing contract requirement and the proposed requirement, the comparative advantages and disadvantages of each, a justification when an item's function or characteristics are

being altered, the effect of the change on the end item's performance, and any pertinent objective test data.

(2) A list and analysis of the contract requirements that must be changed if the VECP is accepted . . . .

(3) Identification of the unit to which the VECP applies.

(4) A separate, detailed cost estimate for (i) the affected portions of the existing contract requirement and (ii) the VECP. . . .

(5) A description and estimate of costs the Government may incur in implementing the VECP . . . .

(6) A prediction of any effects the proposed change would have on collateral costs to the agency.

(7) A statement of the time by which a contract modification accepting the VECP must be issued in order to achieve the maximum cost reduction. . . .

(8) Identification of any previous submissions of the VECP . . . .

4. Drawing Nos. 0127081 and 0127082 required that the shell blanks for the underwater marking devices be made of 10 percent glass-filled polyethylene with a flexural modulus of > 120,000 PSI (R4, tab 2). Specification paragraph 3.1.3 indicated that the Government would furnish the rotational molds to form the shell (R4, tab 3). The drawings suggested Phillips 66 Company (Phillips) as the source for the glass-filled material and RMB Products (RMB) as the vendor (R4, tab 2).

5. Appellant subcontracted the molding of the shells to RMB (Alpinieri decl.).

6. On 22 November 1991, Phillips announced that it would no longer make 10 percent glass-filled polyethylene (R4, tabs 6, 9). After Phillips announced its decision, appellant and RMB, with the knowledge of the Government, attempted to find an alternate material (R4, tabs 8, 9, 10, 13, 14, 15, 16).

7. In March 1992, the Government decided to contract directly with RMB for the replacement material and directed appellant to "stop work" on the -0225 contract (R4,

tab 20). Thereafter, the Government lifted its stop work order and work resumed. The delay claim resulting from the stop work order was settled in January 1993. (R4, tabs 29, 32, 39)

8. With the exception of one \$5 spare part, appellant completed delivery of all contract items by 22 September 1993 (R4, tabs 44, 45). The final contract price was \$1,955,339.05, of which appellant has been paid all but \$5 (R4, tab 46; Alpinieri decl.). To date, appellant has not submitted a final invoice (R4, tab 69; Gov't letter dated 9/24/98).

9. The Government closed the contract on 31 August 1995 (Lewis decl. at 3).

10. On 18 January 1996, Mr. Paul Roy, appellant's vice president, telefaxed a data sheet for a new commercial material known as Superlink 110 to Mr. Alan Lewis, a Government engineer assigned to the project. A note attached to the telefax by Mr. Lewis stated as follows:

Page #1, Sticky Note #1

Title: Notes

This was faxed to me by Paul Roy on 1/18/96. Paul said that he had found a possible alternative material and wanted to know if I was interested in evaluating it as a replacement for the fiberglass filled material knowing that another contract was pending. Paul expressed interest in getting our molds so Vantage could mold some shells.

(R4, tab 50)

11. On 12 March 1996, Mr. Lewis delivered a mold and a set of drawings to Mr. Roy. Using a Government credit card, he ordered shell blanks and test data from Vantage. (R4, tab 51)

12. On 19 August 1996, appellant reported that Superlink 110 complied with all the contract requirements except for the flexural modulus requirement (R4, tab 55).

13. On 28 January 1997, the Government advertised a new procurement for the underwater marking devices (R4, tab 57). The drawings accompanying the solicitation identified Superlink 110 as an acceptable alternative to glass-filled polyethylene and lowered the flexural modulus requirements to meet the performance characteristics of Superlink 110 (app. ex. 9).

14. On 4 March 1997, appellant advised the Government that it "would like to submit a value engineering change proposal" for Superlink 110 (R4, tab 58). In reply, the Government requested appellant to submit the information required by paragraphs (1) through (8) of FAR 52.248-1(c) and identify the contract under which the VECP was being submitted (R4, tab 60).

15. Appellant submitted its VECP on 1 May 1997. The submission identified the contract under which the VECP was being submitted as the -0225 contract and provided the information required by paragraphs (1) through (8) of FAR 52.248-1(c). (R4, tab 62)

16. On 20 August 1997, the Government awarded a follow-on contract, Contract No. N66001-97-C-0040 (the -0040 contract), to appellant (R4, tab 65).

17. On 6 October 1997, the contracting officer rejected appellant's VECP stating that 1) "there is no instant contract in place to which the VECP applies; and 2) there is no savings to the government as [we have] already purchased the items . . ." (R4, tab 68).

18. On 31 October 1997, appellant submitted a claim in the amount of \$295,717 for savings resulting from the Government's use of Superlink 110 (R4, tab 69).

19. The contracting officer denied the claim on 23 December 1997 stating that:

1. . . . Failure . . . to not deliver one insignificant spare part . . . is irrelevant. The government completed the close out information in August 1995 . . . . The [VECP] was submitted in May 1997 which is approximately 4 years after final shipment . . . . Therefore, the proposal was not submitted under an open contract . . . ;
2. Realizing this requirement might again become available, Mr. Paul Roy of Vantage made a verbal suggestion during the April 1996 time frame to Alan Lewis . . . and followed up with a fax showing the commercially available [Superlink 110]. In May 1996, using the Credit Card Purchase Program, a requirement to make 5 shells using the new material . . . was issued to Vantage. This material was then tested extensively by the Government. . . . The government was unaware . . . that your suggestion was a basis for claim under contract . . . Vantage's suggestion was not submitted officially . . . until after its suggestion had already been adopted in solicitation N66001-97-R-0040 as an alternative.

(R4, tab 70)

20. Appellant timely appealed the contracting officer's decision and this appeal ensued.

### DECISION

In order to be eligible for a VECP award, appellant must have a current contractual relationship with the Government. In *John J. Kirlin, Inc. v. United States*, 827 F.2d 1538, 1541 (Fed. Cir. 1987), the Federal Circuit stated the rule as follows:

[T]he contractor's right to compensation for a VECP depends on the existence of a contractual relationship with the government and on the existence of a VEI clause as a term of the contract. . . . When the contract is completed, the contractual relationship ends, and there is no basis for constructive acceptance of a VECP.

*See Grismac Corp. v. United States*, 556 F.2d 494 (Ct. Cl. 1977) (Government not authorized to expend appropriated funds to purchase unsolicited VECPs from a party that does not have an existing contract containing a value engineering clause).

We conclude that appellant no longer had a contractual relationship with the Government on 1 May 1997, the date on which it submitted its VECP. Appellant made final delivery, less one \$5 spare part, to the Government on 22 September 1993. Appellant has been paid all but \$5 of the contract price, which was \$1,955,339.05. The Government closed the contract on its books on 31 August 1995. Given the *de minimis* value of the outstanding part and the length of time between what amounted to contract completion on 22 September 1993 and the submission of the VECP on 1 May 1997, we must reject appellant's contention that it had a current contractual relationship with the Government at the time it submitted its VECP.

Appellant argues that *M. Bianchi of California*, ASBCA Nos. 37029, 37071, 96-2 BCA ¶ 28,410, *aff'd in relevant part, vacated in part, and remanded*, 178 F.3d 1310 (Fed. Cir. 1998) (table), requires us to find that its contract was still open at the time it submitted its VECP. We disagree. In *M. Bianchi*, the contractor failed to invoice the Government for a final shipment of 670 pantsuit coats. In this case, appellant failed to deliver and/or to invoice the Government for one \$5 spare part. In *M. Bianchi*, the contractor submitted its VECPs during performance of the contract. In this case appellant did not submit its VECP until almost four years after what amounted to contract completion.

The appeal is denied.

Dated: 29 September 2000

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

I concur

I concur

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

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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. 51418, Appeal of Vantage Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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