

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Delta Construction International, Inc.) ASBCA No. 52162
)
Under Contract No. DAJN21-97-D-0004)

APPEARANCE FOR THE APPELLANT: Mr. Mark Goldstein
Treasurer

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
LTC Richard B. O'Keeffe, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
UNDER BOARD RULE 11

This appeal arises from the contracting officer's (CO) 16 March 1999 final decision which granted \$11,216 on the contractor's January 1999, \$125,965.46 claim for failure of the Government to order the \$200,000 minimum quantity of services under the captioned indefinite quantity contract. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. The parties elected a record decision under Board Rule 11, and submitted documents and briefs. Respondent concedes entitlement; only quantum is to be decided.

FINDINGS OF FACT

1. On 25 April 1997 the U. S. Army South awarded Contract No. DAJN21-97-D-0004 (contract 4) to Delta Construction International, Inc. (Delta), to replace rotten lumber at various Government facilities in the Pacific Area of Panama. Contract 4 was an indefinite delivery/indefinite quantity type contract, with the following periods and amounts, based upon estimated quantities, exclusive of \$8,135.98 annual bond amounts:

<u>Periods</u>	<u>From</u>	<u>To</u>	<u>Amounts</u>
Base	4-1-97	12-31-97	\$156,693.50
1st Option	1-1-98	12-31-98	\$109,653.45
2d Option	1-1-99	12-31-99	\$ 76,834.40
Total Amount			\$343,181.35

(R4, tab 1 at 00010-1 to 00010-14; comp. & ans. ¶¶ 1, 6, 7)

2. Contract 4: (a) incorporated the FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) and 52.216-22 INDEFINITE QUANTITY (OCT 1995) clauses, the latter of which stated: “The Government shall order at least the quantity of supplies or services designated in the Schedule as the ‘minimum’” and (b) designated a “guarantee [sic] minimum of \$200,000.00 . . . for the base and option periods,” which amount was not apportioned among such periods (R4, tab 1 at 00010-1, 00700-5, -6; comp. & ans. ¶¶ 2, 3). At no time did the Government indicate, or Delta agree to, a reduction of the guaranteed minimum amount (comp. & ans. ¶ 30).

3. Clause C.9 provided: “The Contractor shall possess sufficient capability to accomplish a daily rate of work in monetary value of a minimum of \$3,000.00 when single or multiple delivery orders have been issued and accepted.” Clause C.12 provided: “The estimates indicated on the bid schedule reflect statistics of past performance as well as future requirements projections. Due to DoD overall drawdown and to the Panama Canal Treaty implementation, Government estimated quantities may change drastically.” (R4, tab 1 at 00010-22, -23)

4. In bilateral Modification No. P00003, executed 18 December 1997, respondent exercised the first option period (for 1998) and the parties agreed to reduce the option amount from \$109,653.45 to \$66,576.00 (R4, tab 3; comp. & ans. ¶ 11).

5. Delta’s 8 May 1998 letter to the CO submitted a claim alleging that delivery orders in the base period for \$38,288.42 were substantially less than the \$156,693.50 amount stated for such period, and sought to recover \$46,667.30, which amount Delta rounded to \$46,666.00. Delta stated that it had hired a foreman and six laborers on 1 April 1997 to perform the delivery orders, Panamanian law prohibited moving employees from one work site to another, and Delta retained its employees on the payroll on standby in anticipation of delivery orders from the Government. (Respondent did not controvert that statement.) Delta alleged: (a) idle labor costs at \$289.95 per day (comprised of one foreman at \$92.67/day and six laborers at \$32.88/day, both daily rates inclusive of specified fringe benefits) for 75 days delay in issuing the first delivery order, comprising \$21,746.00, plus 29 days delay after completion of the seventh delivery order

on 25 November 1997 to 31 December 1997, comprising \$8,408.00, for a subtotal of \$30,154.00; (b) Eichleay unabsorbed overhead at \$63.14 per day for 75 days delay, amounting to \$4,735.50; and (c) anticipatory profits of about 10% on the unordered work, amounting to \$11,777.80. (Comp. ¶ 12, tab 5¹, & ans.)

6. The CO's 19 June 1998 letter replying to Delta's 8 May 1998 claim stated:

It is premature to project that the Government will not order the guaranteed minimum [of \$200,000]. Furthermore, should the Government fail to order the guaranteed minimum, Delta . . . is not entitled to an adjustment on the basis of actual costs; the entitlement is the difference between the actual dollar volume ordered and the guaranteed minimum of \$200,000.00. Hence, my decision is that your claim is premature and lacks merit.

The letter stated that it was a final decision and gave notice of appeal rights. (Comp. ¶¶ 13, 31, tab 6, & ans.) There is no evidence that Delta appealed that final decision.

7. In July 1998 Delta's General Manager, Glenn Child, spoke with CO John Eugino about Delta's lack of work and idle work force. During the last five months of 1998, Mr. Child also spoke with Louis Dominguez, Chief of Contracts Division, about why work was not given to Delta. (Ex. A-11, Child decl., ¶¶ 3, 6, 11) Mr. Eugino denied knowledge of any meeting with Mr. Child (ex. A-9, Eugino decl., ¶¶ 3.2, 3-5, 10). Mr. Dominguez and Mr. Frank Finlason, Chief, Requirements Branch, Contracts Division, both stated that Mr. Child had advised them many times that Delta was out of work (exs. A-10, Dominguez decl., ¶ 6, A-12, Finlason decl., ¶ 6). Delta's 22 October 1998 letter to respondent complained of lack of delivery orders since 5 August 1998 under contract 4, stated that Delta "maintained employees under contract without work," and alleged a \$125,965.46 "shortfall" with respect to the \$200,000 minimum quantity (comp., tab 7).

8. The CO's 29 October 1998 letter to Delta stated:

Pursuant to . . . FAR 52.217-9, entitled "Option to Extend the Term of the Contract", this letter constitutes preliminary notice . . . that it is the intention of the U.S. Government not to extend the period of performance . . . from 1 January 1999 through 31 December 1999. Notwithstanding, you

¹ To appellant's complaint were attached 16 tabbed documents.

are cautioned that this letter does not commit the U.S. Government to non-renewal.

(R4, tab 4)

9. Delta's 11 January 1999 letter requested the CO to resolve the option issue "by means of a clear and definite decision concerning the continuity or termination" of contract 4 (comp., tab 9).

10. The CO's 12 January 1999 letter to Delta confirmed that the contract's second option had not been exercised and such decision did not constitute a termination of contract 4 (comp. ¶ 19, tab 10, & ans.).

11. Delta's 25 January 1999 letter, which the CO received on 29 January 1999, submitted a certified claim of \$125,965.46, for the alleged difference between the quantity of services ordered and the \$200,000.00 guaranteed minimum amount, citing the statement in the CO's 19 June 1998 letter quoted in finding 6 (R4, tab 5).

12. Respondent placed a total of \$38,915.08 under delivery orders 1-7 during the base period (comp., tab 1), and \$47,407.99 under delivery orders 8-18 during the first option period (comp., tab 2). Those amounts total \$86,323.07, which is \$113,676.93 less than the "guarantee minimum of \$200,000" stated in contract 4.

13. By unilateral contract Modification No. P00005, executed on 15 March 1999, the CO authorized payment of \$11,216.00 in compensation for respondent's failure to order the minimum amount of work under contract 4 (R4, tab 6; comp. & ans. ¶ 23).

14. The CO's 16 March 1999 final decision denied Delta's claim for \$125,965.46, except for the foregoing \$11,216.00 that he had allowed, stating:

The contractor is entitled to recover profit that it would have earned on the stipulated minimum amount of work, plus any other costs incurred because the Government did not order the guarantee minimum . . . the amount of \$11,216.00, [was] reasonable profit and fair and reasonable G&A

(R4, tab 7; comp. & ans. ¶ 22)

15. On 23 April 1999 Delta timely appealed the 16 March 1999 final decision to the ASBCA (comp. & ans. ¶ 24, tab 14).

16. We find that Delta possessed sufficient capability to perform the minimum amount of work throughout the contract performance period.

DECISION

I.

Appellant Delta has the burden of proving its monetary quantum claim. *See Bath Iron Works Corp.*, ASBCA Nos. 44618, 45442, 96-2 BCA ¶ 28,475 at 142,218, *aff'd sub nom. Bath Iron Works Corp. v. Dalton*, 113 F.3d 1256 (Fed. Cir. 1997) (table).

This appeal presents two issues. (1) By failing to appeal from the CO's 19 June 1998 final decision on Delta's base year claim for \$46,666, did such decision become final and conclusive with respect thereto? (2) What is the proper measure of damages when a buyer fails to order the minimum quantity under an indefinite quantity type of contract – (a) the difference between the amount ordered and the guaranteed minimum amount (as the CO stated in his 19 June 1998 final decision), or (b) the amount of costs incurred and profit lost because the Government did not order the guaranteed minimum amount (as the CO stated in his 16 March 1999 final decision)?

II.

Respondent argues that there is a jurisdictional bar to Delta's May 1998 base year claim, because Delta did not appeal the CO's 19 June 1998 final decision thereon (finding 6). Moreover, respondent continues, Delta cannot renew that claim by merging it with its January 1999 claim, the CO's final decision on which Delta timely appealed to the ASBCA in March 1999 (findings 14, 15). Respondent cites as support, *Santa Fe Engineers, Inc.*, ASBCA No. 26883, 82-2 BCA ¶ 16,030 at 79,439 (having failed to appeal timely a CO's final decision on the underground fume exhaust, the contractor could not renew the claim later by merging it into other claims which are the subject of another final decision).

The final decision in *Santa Fe* did not contend that the claim was premature, as did the CO's 19 June 1998 final decision in this appeal (finding 6). In May-June 1998 one could not know whether respondent would order the \$200,000 minimum amount, which amount was not apportioned to the base and option year periods (finding 2). Thus, we accord finality to the CO's proper decision that Delta's May 1998 claim was premature.

III.

Delta argues that the proper measure of damages for failure to order the minimum quantity under an indefinite quantity type of contract is the difference between the amount

for orders issued and the \$200,000 guaranteed minimum amount, citing *Maxima Corp. v. United States*, 847 F.2d 1549, 1556-57 (Fed. Cir. 1988) (court held that the CO's constructive convenience termination of the contract one year after the contract term had expired was improper, and that the contractor was entitled to retain the balance of the "annual Guaranteed Minimum" sum of \$420,534, since the Government's payment of such sum was in return for the contractor's duty to maintain work stations on and off site and to stand ready to perform at the guaranteed minimum level, and the contractor had repeatedly notified the Government of under-utilization of services).

Respondent argues that the measure of damages stated in the CO's 19 June 1998 final decision, and now advanced by Delta, is erroneous. Respondent cites *PHP Healthcare Corp.*, ASBCA No. 39207, 91-1 BCA ¶ 23,647; *Montana Refining Co.*, ASBCA No. 44250, 94-2 BCA ¶ 26,656; *Apex International Management Services, Inc.*, ASBCA Nos. 38087 *et al.*, 94-2 BCA ¶ 26,842; and *AJT & Associates, Inc.*, ASBCA No. 50240, 97-1 BCA ¶ 28,823, for the rule that the proper measure of damages is the amount Delta proved it lost as a result of the failure to order the guaranteed minimum quantity of services. Respondent concludes that Delta has proven no specific monetary losses resulting from respondent's breach, and thus the CO's unilateral calculation of \$11,216 in lost reasonable profit and G&A (finding 14), is the most to which Delta is entitled.

The indefinite quantity contract in *PHP Healthcare, supra*, had a base and four option years, each of which had line items which designated minimum quantities in terms of clinic visits, not in terms of dollars. During the base year the CO was told that about 45% of the guaranteed number (24,000) of visits had occurred. Three days after the base year ended, the CO notified the contractor of the constructive termination of the unordered base year quantity. The CO declined to pay the contractor the dollar value invoiced for the unordered quantity of guaranteed visits for the base year. Citing *Maxima*, the Board held that the retroactive constructive convenience termination was invalid. Regarding the measure of damages, the Board stated:

[I]t does not follow that PHP is *automatically* entitled to the difference between the dollar value of the minimum number of clinic visits guaranteed . . . and the actual number of visits claimed.

....

In our view, the [*Maxima*] damage award is based on its interpretation of the contract terms, rather than on a departure from general damage principles. Under the majority's interpretation "the Agency agreed to pay Maxima the annual 'Guaranteed Minimum' sum of \$420,534" in

return for its capability to provide the contract services Support for this interpretation was found in the first page of the contract [designating \$419,009 Guaranteed Minimum Production Requirements and \$1,525 Guaranteed Minimum Travel Charges in Year 1]. The *total guaranteed minimum dollars* . . . was calculated as the minimum total services at the 168-hour turnaround rate *For this capability the agency guaranteed the minimum amount of payment stated in the contract.* [Emphasis added] *Id.* at 1551, n.3

On the record before us, however, we are unable to conclude that the Army guaranteed PHP a minimum payment for being prepared to furnish services. In our view, notice in the award document of funds available to cover the minimum quantities guaranteed does not amount to a guarantee that a minimum amount will be paid. Instead, the Army's guarantee extended only to a minimum *number* of clinic visits.

91-1 BCA at 118,452-53, italics in original. In *PHP*, the key distinction was that Maxima's contract designated a minimum dollar amount for its capability to provide services, while PHP's contract did not guarantee any minimum payment for PHP's capability to provide services, only a minimum amount of clinic visits.

In *AJT & Associates*, the indefinite quantity contract provided that "the minimum quantity of services the government shall order is \$15,000." The contractor alleged, but did not prove, that it had maintained the capability of providing the minimum services required by the contract. The Board rejected the contractor's argument that the amount of \$15,000 was in the nature of "liquidated damages," and applied the proof of actual damages rule in *PHP*. 97-2 BCA at 143,826-27.²

From the foregoing analysis, the distinction between *Maxima*, where recovery was allowed, and *PHP* and *AJT & Associates*, where it was not, is that in the former the Court was persuaded that the contractor both "was required to and did maintain the capability of providing the minimum services set in the contract" in return for the minimum guaranteed payment (847 F.2d at 1554) and in the latter the Board was not persuaded that both of those factors were present. Here, contract 4 required Delta to possess sufficient capability to accomplish a daily rate of work of a minimum of \$3,000 value when single or multiple

² In *Montana Refining Co.* and *Apex International*, *supra*, the respective contracts prescribed minimum quantities as a percentage of estimated volume, or as craft hours, akin to *PHP*, and did not decide quantum, only entitlement.

delivery orders were issued, and we have found that Delta did possess and maintain such capability throughout performance (finding 16).

We hold that Delta is entitled to recover the difference between \$200,000 and the \$86,323.07 in orders performed, or \$113,676.93 (finding 12), less the \$11,216.00 payable under Modification No. P00005 (finding 13), together with CDA interest on the net amount of \$102,460.93 from 29 January 1999, when the CO received Delta's 25 January 1999 claim (finding 11), until the date of payment.

Dated: 16 November 2000

DAVID W. JAMES, 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. 52162, Appeal of Delta Construction International, Inc., rendered in conformance with the Board's Charter.

Dated:

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