

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Production Packaging) ASBCA No. 53662
)
Under Contract No. SP3100-00-A-0002)

APPEARANCE FOR THE APPELLANT: Terry R. Spencer, Esq.
Sandy, UT

APPEARANCES FOR THE GOVERNMENT: Michael P. Mahoney, Esq.
Chief Trial Attorney
Janet R. Wise, Esq.
Assistant Counsel
Defense Distribution Center (DLA)
New Cumberland, PA

OPINION BY ADMINISTRATIVE JUDGE WILLIAMS
PURSUANT TO RULE 11

This appeal was filed following a contracting officer's final decision denying appellant's claim for losses resulting from an alleged termination of a blanket purchase agreement (BPA). Appellant also claims the Government delayed making payment on supplies already delivered. We find that the BPA was not a contract and that the procurement of supplies from other sources was not improper. Further, because the order in question under the BPA was an unauthorized commitment, and thus disputed, we find that appellant is not due interest under the provisions of the Prompt Payment Act, 31 U.S.C. §§ 3901-3907. Accordingly, the appeal is denied.

FINDINGS OF FACT

1. In October 1999, the Government entered into a BPA with appellant to supply various shipping containers to the Defense Distribution Depot at Hill Air Force Base, Ogden, Utah (DDHU). The BPA specifically provided that "Payment is authorized via credit card for up to \$2500 per individual call." (R4, tab 1)
2. The BPA incorporated by reference several FAR clauses, including 52.232-25, PROMPT PAYMENT (JUN 1997), and 52.233-1, DISPUTES (OCT 1995) (SR4, tab 1).

3. Prior to the execution of the BPA, the Government purchasing agent, Ms. Owens, was delegated authority to use the “Governmentwide Commercial Purchase Card for official Government purchases within the single purchase dollar limitation of \$2,500” (R4, tab 8).

4. On 2 June 2000, Ms. Owens placed an order under the BPA with appellant for various boxes, the total value of which exceeded \$225,000. Ms. Owens instructed appellant to process credit card payments up to her daily limit of \$2,500 every day of the week, including Sundays, to pay for the order. She interpreted her actions as proper under her delegation of authority. We find Ms. Owens’ actions exceeded her authority. In July of 2000, Ms. Owens requested that the Defense Distribution Center authorize the processing of up to four credit card transactions of \$2,500 per day. At the time of the request, a \$160,437.54 balance remained unpaid to appellant. (R4, tab 9)

5. Ms. Owens’ request alerted the contracting officer, Ms. DuBose, at the Defense Logistics Agency’s Defense Distribution Center in New Cumberland, Pennsylvania, to the fact that Ms. Owens had exceeded her authority to use the credit card and had violated the BPA payment limit of \$2,500 per call. In addition, Ms. Owens ordered items not included on the BPA. (R4, tabs 4, 9; supp. R4, tab 5) The contracting officer suspended the credit card payments on supplies already delivered under the BPA (comp. & ans., ¶ 4) and Ms. Owens’ authority to use the credit card was subsequently suspended (R4, tab 15). In her un rebutted affidavit, Ms. Owens indicated that her predecessor purchasing agent interpreted her credit card authority in a similar manner and had also instructed appellant to bill her card \$2,500 per day (Nielsen Affidavit).

6. Following the contracting officer’s stoppage of the credit card payments on supplies already delivered, appellant demanded an explanation as to why it had not been paid for services provided (R4, tab 5). The Government responded that appellant had participated in the purchase with knowledge that the order exceeded the \$2,500 limit and that it contained \$32,326.70 worth of goods not listed on the BPA. Moreover, the contractor had knowingly agreed to process credit card charges in excess of the \$2,500 limit by charging \$2,500, seven days a week until paid. The Government advised that payment on unauthorized commitments was prohibited, but that the contracting officer had initiated the process to secure ratification of the commitment in order to pay for the goods. (R4, tab 6)

7. While Ms. Owens’ actions were in excess of her authority, Ms. DuBose acknowledged that the supplies were necessary for the mission, and by memorandum dated 6 September 2000, she sought ratification of the unauthorized commitment from the Defense Logistics Agency Headquarters (R4, tab 9). On 25 September 2000, Executive Director, Logistics Policy and Acquisition Management, Mr. Kenny, ratified the unauthorized commitment and directed payment of \$160,437.54 to Production Packaging. (R4, tab 9)

8. Between 19 July and 30 September 2000, the date the BPA expired, the Government did not make any further purchases against the BPA. At the same time, the Government continued to purchase cardboard containers listed on the BPA from other sources. By letter dated 5 October 2000, the contracting officer notified appellant that the BPA had not been canceled but rather it had expired. For items not being provided pursuant to the *Javits-Wagner-O'day Act* (JWOD) of 1971, 41 U.S.C. 46-48c, appellant was advised it could compete on those buys. (R4, tab 11)

9. The balance due appellant, \$160,437.54, was disbursed on 19 October 2000 (R4, tab 10).

10. By letter dated 23 April 2001 and supplemented on 21 June 2001 appellant submitted a certified claim seeking: (1) \$100,000 in lost revenues; (2) \$50,000 for lost opportunity; (3) \$35,000 in remaining inventory; (4) \$2,500 in interest due to late payment; and, (5) \$18,000 in attorney fees. By final decision dated 9 October 2001, the contracting officer denied the claim. (R4, tabs 14, 15) This appeal followed.

DISCUSSION

Appellant first alleges that the Government improperly canceled the contract and improperly used the JWOD program to purchase the supplies that were previously provided by appellant. Second, appellant alleges that the Government blacklisted it from doing business at DDHU. Third, appellant alleges it was left with \$35,000 worth of supplies that it had inventoried in anticipation of continued Government orders. Fourth, appellant claims interest on past due invoices alleging that the Government did not pay its invoices timely. And fifth, appellant asserts that the Government is liable for its attorney fees. Additionally, appellant seeks, for the first time in its brief, \$300,000 as punitive damages.

The Government argues that a BPA is not a contract, and that as a result it did not obligate itself to make any purchases. The Government further alleges that its personnel made unauthorized commitments with appellant, and those commitments were not valid contracts until ratified. When the Government ratified the commitment, it paid appellant in full. Likewise, appellant has no claim for lost revenue because under a BPA, the Government does not guarantee that anything would be ordered. The Government argues that claims of bad faith are unsupported as well as the fact that allegations of tortious conduct are not properly before the Board. With regard to claims for interest, the Government points to 31 U.S.C. § 3907(c) for the rule that Prompt Payment Act interest is not owed if the delay was due to a dispute between the contractor and the Government over the terms of the contract.

DECISION

It is well established that a BPA is not a contract. Rather, a BPA is nothing more than an agreement of terms by which the Government could purchase. *See, e.g., Mid-America Officials Ass'n*, ASBCA No. 38678, 89-3 BCA ¶ 22,231 at 111,775-76. Until the Government places an order under a BPA, no contract is formed for lack of consideration. *Julian Freeman*, ASBCA No. 46675, 94-3 BCA ¶ 27,280 at 135,906.

Also necessary for a binding contract is the requirement that the party attempting to bind the Government have the authority to do so, and the contractor “bears the risk that that [government] employee actually possesses the authority necessary to take the action being accomplished.” *American Aerospace Technology Corp.*, ASBCA No. 36049, 89-3 BCA ¶ 22,100 at 111,127. Here, not only was the BPA limited to \$2,500 per order by credit card, but Ms. Owens’ personal authority to bind the Government with the credit card was also limited to the single purchase dollar limitation of \$2,500. Despite these limitations, the parties agreed to an order, the total value of which exceeded \$225,000, and agreed that appellant would charge the credit card \$2,500 per day, every day of the week, until the obligation was satisfied. This unauthorized commitment was further tainted by the fact the order included items not listed in the BPA. Therefore, with regard to the \$225,000 order placed by Ms. Owens, there was no contract between appellant and the Government until 25 September 2000, when this unauthorized commitment was ratified by Mr. Kenny, a Government employee with the authority to bind the Government. The fact that a prior purchasing agent may have also misinterpreted her credit card authority does not support appellant’s position. At best, it may reflect the absence of bad faith on the part of the parties. The clear reading of the BPA and Ms. Owens’ authority reflects that the commitments in dispute were unauthorized.

Appellant’s claim seeks interest on its invoices submitted prior to the ratification of the unauthorized purchases from 30 days following their submission through the date of payment together with interest on that interest. “The Prompt Payment Act (PPA) directs that agencies pay proper invoices on time or pay interest when payments otherwise due and owed, are paid late. 31 U.S.C. §§ 3901-3907.” *Innovative Refrigeration Concepts*, ASBCA Nos. 48625, 49475, 01-1 BCA ¶ 31,250 at 154,335. On 19 October 2000, the Government paid appellant the outstanding balance. Payment was made twenty-four days after the Government ratified the unauthorized purchases which was within the thirty days allowed by the PPA. Moreover, PPA interest does not apply where payment is delayed due to a “dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract.” 31 U.S.C. § 3907(c). *See Steven E. Jawitz*, ASBCA No. 33610, 87-3 BCA ¶ 20,011 at 101,332-33 (earlier version of PPA). Under the circumstance of this appeal, payment was timely and the claim for interest is denied.

Appellant also alleges that the BPA was wrongfully canceled; the Government wrongfully began purchasing the same items from a JWOD contractor; and the Government blacklisted it from doing business at DDHU. These arguments are without merit because the BPA was not a contract, and the Government was under no obligation to make any

purchases under the BPA. Even for authorized orders, the Government was under no obligation to order all its needs via the BPA. The BPA did not establish a process which would result in a requirements contract. Moreover, the BPA was not terminated but rather expired on 30 September 2000. Appellant had no legal expectation to receive exclusive orders for the items in question, during the terms of the BPA. Appellant's claims for \$100,000 representing lost revenue on the balance of the contract, \$50,000 for lost opportunity, and \$35,000 representing lost inventory, are denied

The Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(2), provides, in pertinent part, that “[a] party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section” At this stage in the proceedings, appellant has not prevailed. Should appellant subsequently qualify as a prevailing party otherwise eligible under the EAJA, it may file an application. Appellant's claim for attorney's fees is dismissed as premature. *See Rig Masters, Inc.*, ASBCA No. 52891, 01-2 BCA ¶ 31,468 at 155,379.

Concerning appellant's claim for \$300,000 in punitive damages, we lack jurisdiction to adjudicate this matter. Congress mandated in 41 U.S.C. § 605(a) that all contractor claims “be submitted to the contracting officer for decision.” Appellant's claim for \$300,000 was first presented to the Board in appellant's Board Rule 11 brief. Therefore, as this claim has yet to be presented to the contracting officer for a decision, we have no jurisdiction to issue a decision on this matter. Even if this claim had been submitted to the contracting officer for a final decision, we would still dismiss it for lack of subject matter jurisdiction. We have consistently held that we are without authority to award claims for punitive damages. *See Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,668, and cases cited.

For the foregoing reasons, this appeal is denied in its entirety except for appellant's claims for attorney fees and punitive damage which are dismissed.

Dated: 23 July 2003

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur

I concur

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

CARROLL C. DICUS, JR.
Administrative Judge
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. 53662, Appeal of Production Packaging, rendered in conformance with the Board's Charter.

Dated:

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