

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
C. Martin Company, Inc.) ASBCA No. 54182
)
Under Contract No. N68711-00-D-0501)

APPEARANCE FOR THE APPELLANT: Ms. Laura Craig
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
John S. McMunn, Esq.
Senior Trial Attorney
Naval Facilities Engineering Command
Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE DELMAN

In this appeal the appellant, C. Martin Company, Inc., asserts a number of contentions related to the government’s exercise of options extending contract performance under this contract. Appellant contends, among other things, that it was entitled to the exercise of options through September 2004, that the contract erroneously excluded a FAR option clause, and that an option clause that was made part of the contract violated the FAR. We have jurisdiction under 41 U.S.C. §§ 601 *et seq.* For reasons stated herein, we deny the appeal.

FINDINGS OF FACT

1. The subject contract was awarded to appellant by the Department of the Navy, Southwest Division, Naval Facilities Engineering Command, San Diego, CA (NAVFAC or government) on 29 June 2000 (R4, tabs 1, 2). Under the contract, appellant was to provide various repair and maintenance services for military family housing units in the north and east portions of San Diego County. The contract included one base year of 12 months with three options for a contract duration not to exceed 48 months. Section B included a “Schedule of Firm Fixed Price Services,” for the base year period and for options one, two and three. The contract line numbers therein were priced on a monthly basis for 12 months (quantity “12”, units in “months”). (R4, tab 1 at B-14, B-48, B-93, B-138)

2. Paragraph F.2 of the contract provided for the base year performance period of 12 months, commencing 1 October 2000 through 30 September 2001. It further stated as

follows: “The Government has the option to extend the term of the contract for a period of 12 months in accordance with the FAC Clause 5252.217-9301, Option to Extend the Term of the Contract (Services) (JUN 1994), Section I.” (R4, tab 1 at F-1)

3. This option clause (hereafter the “NAVFAC clause”) is found at paragraph I.5 of the contract and provides as follows:

I.5 FAC 5252.217-9301 OPTION TO EXTEND THE TERM OF THE CONTRACT (SERVICES) (JUN 1994)

(a) The Government may extend the term of this contract for a term of one (1) to twelve (12) months by written notice to the Contractor within the performance period specified in the Schedule; provided that the Government shall give the Contractor a preliminary written notice of its intent to extend before the contract expires. The preliminary notice does not commit the Government to an extension. [Emphasis added]

(b) If the Government exercises this option, the extended contract shall be considered to include this option provision.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 48 months.

(R4, tab 1 at I-3) It was standard procedure at NAVFAC to use this NAVFAC clause in its contracts to define the government’s rights and responsibilities with respect to the exercise of options (tr. 112). The contract also included FAR 52.217-8, OPTION TO EXTEND SERVICES (NOV 1999), which also allowed for option exercise but provided that “the total extension of performance hereunder shall not exceed 6 months.” (R4, tab 1 at I-9)

4. By letter to appellant dated 30 August 2001, the government provided appellant with a preliminary written notice of its intent to extend the contract term, as contemplated by the NAVFAC clause. This was roughly 30 days prior to the expiration of the contract term. The government advised that it intended to extend performance for 3 months, from 30 September 2001 through 31 December 2001. (R4, tab 3) This extension was to allow for the award of a new housing contract (R4, tab 4). The notice stated that it was given in accordance with the option clause found at FAR 52.217-9. However, this clause was not part of the contract, and it was an error to reference it in this letter.

5. On 28 September 2001 at 1:42 p.m., the government emailed to appellant a copy of unilateral contract Modification No. P00015 (R4, tab 5), which exercised the government's option to extend contract performance in accordance with the NAVFAC clause (see original email message, attach. to app. compl.). Insofar as pertinent, Modification No. P00015 provided as follows (R4, tab 5 at 2):

The purpose of this modification is to exercise the Option Period One in accordance with NAVFAC Clause 52.217-9301 [sic] "OPTION TO EXTEND THE TERM OF THE CONTRACT-SERVICES (JUN 1994).

The contract is hereby extended for 5 months, commencing **October 1, 2001 through February 28, 2002.**

The government extended performance for 5 months rather than for 3 months as envisioned by the preliminary notice because the award of the new contract had slipped and the government needed additional contract coverage in the interim (tr. 88). Appellant does not dispute this slippage and the government's need for additional coverage.

6. It appears that 28 September 2001 was the last workday of the original contract term. However, the government's written notice to extend the contract term was "within the performance period" as specified by the NAVFAC clause (finding 3). The contracting officer was waiting for the approval of funding, which was needed prior to the exercise of this option (tr. 146-49). Appellant did not contemporaneously object to the manner in which the government exercised this option, or to the duration of the option period. Appellant performed the work during the contract term, as extended.

7. By letter to appellant dated 16 January 2002, the government provided appellant with a preliminary written notice of its intent to further extend the contract term, as contemplated by the NAVFAC clause. This notice was roughly 43 days prior to the expiration of the contract term. The government advised that it intended to extend performance for 2 additional months, from 1 March 2002 through 30 April 2002. This extension was needed due to a further delay in the award of the new housing contract (R4, tab 9). The notice also stated that it was given in accordance with the option clause found at FAR 52.217-9, but this was an error since this clause was not part of the contract.

8. By unilateral contract Modification No. P00021, dated 14 February 2002, the government exercised its option to extend contract performance. Insofar as pertinent, Modification No. P00021 stated as follows (R4, tab 11 at 2):

The purpose of this modification is to exercise the Option Period Two in accordance with NAVFAC Clause

52.217-9301 [sic] “OPTION TO EXTEND THE TERM OF THE CONTRACT-SERVICES (JUN 1994).

The contract is hereby extended for 2 months, commencing **March 1, 2002 through April 30, 2002.**

Appellant did not contemporaneously object to the manner in which this option was exercised, or to the duration of the option period. Appellant performed the work during the contract term, as extended.

9. The government chose not to further extend the contract term. The contract ended on 30 April 2002.

10. By letter to the contracting officer dated 15 June 2002, appellant filed a certified claim, contending that under the contract it was entitled to maintain certain units through 30 September 2004, that is, through option three. This presupposed that the government had exercised the third option under the contract, but it had not done so. Appellant requested that the government pay the balance due and owing on a bank note, the proceeds of which were used for the transition and start-up of the contract, in the amount of \$167,797.77. (R4, tab 12)

11. By decision dated 8 April 2003, the contracting officer denied the claim, stating generally that the government had met all of its obligations under the contract, and that it had no contract obligation to exercise any options (R4, tab 14). This appeal followed.

12. During the proceedings before the Board, appellant focused its claim more specifically on the manner in which the government exercised the first option, contending that its receipt of Modification No. P00015 in the afternoon of the last working day of the original performance period was not fair or equitable (app. compl. ltr. dtd. 9 June 2003 at 3). Appellant also contended that the option clause under FAR 52.217-9 was erroneously excluded from the contract and had it been included, appellant “would have been aware of the upcoming, shortened option period” (*id.* at 2). According to appellant, “had we been given the at least 60 days notice that the FAR requires, then [we] would have been given at least an opportunity to mitigate those costs that [we] assumed” (tr. 23-24).

13. We find the following FAR regulations pertinent to appellant’s claim:

17.208 Solicitation provisions and contract clauses.

....

(g) Insert a clause substantially the same as the clause at 52.217-9, Option to Extend the Term of the Contract, in

solicitations and contracts when the inclusion of an option is appropriate (see 17.200 and 17.202) and it is necessary to include in the contract any or all of the following [emphasis added]:

(1) A requirement that the Government must give the contractor a preliminary written notice of its intent to extend the contract.

(2) A statement that an extension of the contract includes an extension of the option.

(3) A specified limitation on the total duration of the contract.

52.217-9 Option to Extend the Term of the Contract [(11/99)]

As prescribed in 17.208(g), insert a clause substantially the same as the following [emphasis added]:

**OPTION TO EXTEND THE TERM OF
THE CONTRACT (NOV 1999)**

(a) The Government may extend the term of this contract by written notice to the Contractor within _____ [insert the period of time within which the Contracting Officer may exercise the option]; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least _____ days [60 days unless a different number of days is inserted] before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option provision.

(c) The total duration of this contract, including the exercise of any options under this clause shall not exceed . . . (months)(years).

17.204 Contracts.

(a) The contract shall specify limits on the purchase of additional supplies or services, or the overall duration of the term of the contract, including any extension.

(b) The contract shall state the period within which the option may be exercised.

(c) The period shall be set so as to provide the contractor adequate lead time to ensure continuous production.

(d) The period may extend beyond the contract completion date for service contracts. This is necessary for situations when exercise of the option would result in the obligation of funds that are not available in the fiscal year in which the contract would otherwise be completed.

(e) Unless otherwise approved in accordance with agency procedures, the total of the basic and option periods shall not exceed 5 years in the case of services, and the total of the basic and option quantities shall not exceed the requirement for 5 years in the case of supplies. . . .

. . . .

17.205 Documentation.

(a) The contracting officer shall justify in writing the quantities or the term under option, the notification period for exercising the option, and any limitation on option price under 17.203(g); and shall include the justification document in the contract file.

. . . .

17.207 Exercise of options.

(a) When exercising an option, the contracting officer shall provide written notice to the contractor within the time period specified in the contract.

.....

(g) The contract modification or other written document which notifies the contractor of the exercise of the option shall cite the option clause as authority.

DECISION

In its claim letter, appellant contends that it was entitled under the contract to maintain certain units through 30 September 2004. This presupposed that the government was required under the contract to exercise its options through 30 September 2004. The government had no such obligation. The contract gave the government discretion regarding whether to exercise any or all of its options (finding 3). We have held that this discretion is broad, and will not be questioned absent a showing of bad faith, abuse of discretion or arbitrary or capricious action, *Plum Run, Inc.*, ASBCA Nos. 46091 *et al.*, 97-2 BCA ¶ 29,193, which has not been shown here. Appellant's claim is without merit.¹

Appellant also contends that the government unlawfully excluded FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (NOV 1999) from the contract, and that

¹ The record reflects that the contract contained a number of clauses that generally talked to the duration of option periods, *i.e.*, the NAVFAC option clause (1 to 12 months); Paragraph F.2 (12 months "in accordance with" the NAVFAC option clause); the Section B option schedules ("quantity" identified as 12 months); FAR 52.217-8 (total extended performance period not to exceed 6 months). See findings 1, 2, and 3 *supra*. The government relied upon the NAVFAC clause here, which gave the government the discretion to exercise option periods from one month to no longer than 12 months. See generally, *NMS Management, Inc.*, ASBCA No. 53444, 03-2 BCA ¶ 32,340 at 159,980 (government exercises three months of a four month option period under this NAVFAC option clause). Appellant's certified claim dated 15 June 2002 did not challenge the duration of the option periods exercised by the government. Assuming, *arguendo*, that we have jurisdiction over this issue, we note that appellant performed under the contract as extended without protest, and did not contest the duration of the options at the time they were exercised by the government. To the extent this claim is now before us, we believe that it has been waived by appellant. *E. Walters & Co.*, ASBCA No. 19335, 76-1 BCA ¶ 11,767, *aff'd*, 576 F.2d 362 (Ct. Cl. 1978). Alternatively, we believe that this confusing mix of contract language regarding option period durations presented a patent ambiguity, about which appellant was required to seek clarification from the contracting officer prior to bid. *Triax Pacific, Inc. v. West*, 130 F.3d 1469 (Fed. Cir. 1997). The record contains no evidence of such an inquiry, and we would deny the claim on this ground as well.

the NAVFAC clause it chose to include in the contract violated the FAR. We believe that appellant is not correct on either account. As for the latter contention, the Comptroller General has held that this NAVFAC option clause does not violate the FAR, nor is it unduly restrictive of competition. *Madison Services, Inc.*, B-278962, 98-1 CPD ¶ 113. As for the former contention, the FAR does not require that FAR 52.217-9 be included in this contract. FAR 17.208(g) expressly allows the government the discretion to fashion its own clause, so long as it is “substantially the same” as the subject clause (finding 13).

The government exercised this discretion by using the NAVFAC clause in this contract, FAC 5252.217-9301. Appellant believes that this clause was not “substantially the same” as FAR 52.217-9. We do not agree. Subsections (b) and (c) of the NAVFAC clause are identical to the FAR clause. Subsections (a) of both clauses provide for the government’s rights and responsibilities regarding the manner in which it may exercise options. Both clauses allow for option exercise only upon written notice to the contractor. Both clauses permit the exercise of such an option on the condition that the government provides the contractor with a preliminary notice of intent to extend before the contract expires.

Under the FAR clause, however, the dates on which these notices must be provided are to be determined by the government at or before the time the solicitation is issued, by allowing the contracting officer an opportunity to fill in the “blanks” provided for in the clause. Under the NAVFAC clause, as included in the contract, the government retains some discretion in setting these notification dates during the contract term, so long as the requirements of the clause are otherwise met. The NAVFAC clause also provides for the duration of the option period; the FAR clause does not. However, the clauses need not be identical, only “substantially the same.” Given the discretion afforded by the regulations, we believe the government is authorized to fashion a contract clause that provides for a reasonable accommodation between the needs of the contractor for notice and the needs of the government to meet changing circumstances consistent with the purpose to be served by the FAR clause. With due regard to this authorization and the general purpose to be served by the option clause, we conclude that the NAVFAC clause is “substantially the same” as FAR 52.217-9, and was lawfully inserted in this contract.

In any event, we fail to see how this FAR option clause, standing alone, helps appellant’s cause. This clause does not provide for an automatic 60-day notice period for the preliminary written notice or for the notice of option exercise, as appellant suggests. Rather, the clause allows the contracting officer discretion to set these dates – by filling in the blanks in the clause – prior to the issuance of the solicitation. It is only when the contracting officer fails to do so that the government is required to furnish a preliminary written notice of intent to extend at least 60 days before the contract expires. (Finding 13)

Appellant also contends that the NAVFAC clause, as applied by the government, violates FAR 17.204, specifically FAR 17.204(c), which directs the government to provide an option period with “adequate lead time to ensure continuous production” (finding 13). However, the reference in subsection (c) to “continuous production” suggests manufacturing or a related delivery of supplies. This contract is a service contract. The subsection of this regulation that expressly relates to service contracts is subsection (d), not subsection (c). Subsection (d) states that for service contracts the period within which the option may be exercised may even “extend beyond the contract completion date” (finding 13). We believe that the NAVFAC clause, as applied by the government here, is not inconsistent with FAR 17.204 with respect to this service contract.

Appellant also contends that the government failed to justify, in writing, the option term and the notification period, as required by FAR 17.205 (finding 13). Assuming, *arguendo*, that the government failed to document its contract files in this manner, this would not help appellant’s cause. The purpose of this type of regulatory direction is to benefit the government, not the contractor, and no private cause of action lies for its violation. *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1365 (Fed. Cir. 2000); *Bruce E. Zoeller*, ASBCA No. 54205, 2004 WL 483249 (10 March 2004).

For reasons stated, the appeal is denied.

Dated: 17 May 2004

JACK DELMAN
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 54182, Appeal of C. Martin Company, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals