

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Emerson Construction Company, Inc. ) ASBCA No. 55165  
 )  
Under Contract No. DAKF48-97-D-0020 )

APPEARANCE FOR THE APPELLANT: Paul H. Sanderford, Esq.  
Pratt & Sanderford, P.C.  
Temple, TX

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA  
Chief Trial Attorney  
CPT Sean M. Connolly, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The government moves for partial summary judgment alleging that appellant is not entitled to an equitable adjustment under FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY (APR 1984) (VEQ clause), as a matter of law. According to the government, the VEQ clause is not applicable to firm, fixed-price requirements type construction contracts such as this. Appellant opposes the motion and cross-moves for partial summary judgment alleging that the VEQ clause is applicable and that the government admits it failed to order the quantities required by the VEQ clause.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. On 19 May 1997, the government issued Invitation for Bids (IFB) No. DAKF48-97-B-0010 for a firm fixed-price requirements type construction contract to provide "ALL LABOR, EQUIPMENT AND MATERIALS FOR MISCELLANEOUS ROADS, GROUNDS, SITE REPAIRS AND IMPROVEMENTS AT FORT HOOD, TEXAS" (R4, tab 1 at 00010-1). The schedule included 23 pages listing each item of work to be accomplished along with the estimated quantity of each (R4, tab 1 at 00010-3 through -25).

2. On 21 July 1997, the government awarded Contract No. DAKF48-97-D-0020 in the estimated amount of \$19,709,951 to appellant. The contract included a base year, which began on 1 August 1997 and ended on 31 July 1998, and two option years. The total estimated amount of the contract was \$59,129,853. (R4, tab 6) The government exercised the first option on 15 July 1998 subject to availability of funding after

30 September 1998, but did not exercise the option for the second year (R4, tab 9; compl. and answer, ¶ 8). The second option year is not before us.

3. The contract included the following FAR clauses that are relevant, in part, to these motions:

FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY (APR 1984)

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. . . .

FAR 52.216-18, ORDERING (OCT 1995)

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from 1 August 1997 through 31 July 1998.

(b) All delivery orders or task orders are subject to the terms and conditions of this contract. . . .

FAR 52.216-21, REQUIREMENTS (OCT 1995) – ALTERNATE I (APR 1984)

(a) This is a requirements contract for the supplies or services specified . . . . The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. . . .

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. . . .

FAR 52.232-19, AVAILABILITY OF FUNDS FOR THE NEXT FISCAL YEAR (APR 1984)

Funds are not presently available for performance under this contract beyond 30 September 1997. The Government's obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond 30 September 1997, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer.

(R4, tab 5 at 00700-1, 00700-5, 00700-29)

4. During the base year and the first option year, the government issued approximately 110 delivery orders (app. supp. R4, tabs 24 through 143). According to appellant, these orders totaled approximately 33 percent of the total estimated quantities in the contract (compl., ¶ 7). The government admits that it ordered far less than 85 percent of the quantities required by the VEQ clause (answer, ¶¶ 7, 8).

5. On 30 July 2004, appellant submitted a certified claim to the contracting officer requesting an equitable adjustment of \$1,628,287 under the VEQ clause alleging that the government failed to order the specified quantities. Alternatively, appellant argued that the government failed to exercise due care in the preparation of the estimates. (R4, tab 12)

6. The contracting officer denied the claim on 8 September 2005 (R4, tab 23).

7. Appellant appealed the denial of its claim to this Board on 19 September 2005.

### DECISION

Summary judgment is properly granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc.*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In deciding cross-motions for summary judgment, we evaluate each party's motion on its own merits, drawing all reasonable inferences against the party whose motion is under consideration. *Id.* at 1391. Where, as in this case, there are no disputed issues of material fact, we may properly resolve questions of law on summary judgment. *Konitz Contracting, Inc.*, ASBCA No. 53433, 02-1 BCA ¶ 31,845 at 157,363-64.

The government moves for summary judgment with respect to the VEQ clause upon the following basis:

The VEQ Clause is inapplicable to this firm-fixed-price, requirements type construction contract. As stated in FAR §§ 11.702 and 11.703, the VEQ Clause applies to awarded fixed-price construction contracts incorporating estimated quantities of unit-priced items. . . .<sup>[1]</sup> However, as stated in [the Requirements clause], “[t]he quantities of supplies or services specified in the Schedule [of a requirements contract] are estimates only and are **not purchased by this contract.**” . . . As such, the award of a requirements contract for construction services and supplies does not actually award a construction contract. . . .

. . . The only way to harmonize the VEQ Clause and the Requirements Clause is to apply the VEQ Clause to the individual delivery orders that create the individual fixed-price construction contracts, which may or may not include estimated quantities for unit-priced items. Here, however, Appellant failed to structure its claim that way to the Contracting Officer.

(Gov’t mot. at 6-7)

This interpretation of the relevant provisions is incorrect. The VEQ clause is applicable to the overall requirements contract, not just individual awarded delivery orders. The VEQ clause states that it is applicable to “this contract.” In our view, “this contract” indisputably refers to the overall requirements contract. Our precedents support this interpretation. *See Henry Angelo & Co.*, ASBCA No. 43669, 94-1 BCA ¶ 26,484; *Les Killgore’s Excavating*, ASBCA No. 32261, 86-3 BCA ¶ 19,117. Furthermore, FAR 11.703 states that the VEQ clause is applicable to requirements contracts such as this one. *Lambrecht & Sons, Inc.*, ASBCA No. 49515, 97-2 BCA ¶ 29,105, *aff’d on recons.*, 98-1 BCA ¶ 29,389. Finally, as stated by the Ordering clause, individual delivery orders are “subject to the terms and conditions of this [requirements] contract.” The government’s motion is denied.

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<sup>1</sup> FAR 11.703(c) provides: “The contracting officer shall insert the clause at 52.211-18, Variation in Estimated Quantity, in solicitations and contracts when a fixed-price construction contract is contemplated that authorizes a variation in the estimated quantity of unit-priced items.”

In its cross-motion, appellant moves for summary judgment as to entitlement on the VEQ issue because the government admits it ordered less than 85 percent of the estimated quantities set forth in the contract. The government initially opposed the cross-motion in part based upon its erroneous theory that the VEQ clause applies only to individual delivery orders and in part based upon its contention that the VEQ clause applies to each unit-priced item measured against the actual quantities of that item rather than total estimated quantities. In reply, appellant submitted an affidavit with an item-by-item analysis showing that the government ordered 85% of estimated quantities on only 7 of the 76 line items for the base year and only 6 of the 76 line items for the first option year. “For a majority of the 76 line items for the base year and first option year, the Government ordered less than 50% of the estimated quantities.” (Aff. Chuck Emerson at 2) In response, the government prepared its own item-by-item analysis, and concluded that “[o]ther than minor variations, the Government’s calculations appear to be substantially the same as Appellant’s calculations,” thus conceding this point for purposes of the cross-motion (gov’t resp. to app. reply br. at 1).

In response to appellant’s reply, the government raises a new argument. It states that it “has learned that it is possible that availability of funds contributed to the Government’s ability to issue task orders against the Contract” (*id.* at 2). According to the government, the type of funds available for services under this contract at Fort Hood declined from \$62.9 million in fiscal year (FY) 1997 to \$40.1 million in FY 1998 and \$35.5 million in FY 1999. Furthermore, based on a government email dated 22 July 1999, “[f]unding levels were lower than expected and it appears that they will continue to be low for the near future.” (*Id.* at 2-3) The government concludes that “[w]hile this information is preliminary, it is a material fact with respect to Appellant’s cross-motion that needs to be developed” (*id.*).

The government’s new argument does not raise a genuine issue of material fact with respect to the cross-motion. Under the VEQ clause, a contractor “is entitled to a [sic] equitable adjustment in contract price for increased costs due solely to the variation of unit-priced items actually ordered by the Government below 85 percent of the quantities of the unit-priced items estimated to be ordered under the contract.” *Henry Angelo & Co.*, ASBCA No. 43669, 94-1 BCA ¶ 26,484 at 131,824. Appellant has shown for purposes of entitlement that there was such a variation. The government cites no authority for the proposition that it would make a difference that the shortfall was attributable to lack of funding.

The government does refer to the fact that the contract included the Availability of Funds for the Next Fiscal Year clause. That clause provides that the government has no legal liability for payments arising for performance under the contract beyond the end of the current fiscal year until funds are made available and the contractor is so notified. In this case, at time of award there was no legal liability beyond 30 September 1997, and at the time of the option exercise, beyond 30 September 1998. Since the government issued

delivery orders in each of FYs 1998 and 1999, presumably funding was in fact made available in each of those years. The government does not assert the contrary, only that the funding may have been at levels that did not permit ordering additional quantities. The Availability of Funds clause does not preclude appellant's claim.

CONCLUSION

The government's motion for partial summary judgment is denied. Appellant's cross-motion for summary judgment as to entitlement on the VEQ issue is granted. In view of this result, it is not necessary to reach appellant's alternative claim that the government failed to exercise due care in its preparation of the contractual estimates. The appeal is sustained and remanded to the parties for determination of quantum.

Dated: 8 December 2006

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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. 55165, Appeal of Emerson Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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

