

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Wackenhut Services, Inc.) ASBCA No. 55691
)
Under Contract No. N62477-00-D-0043)

APPEARANCE FOR THE APPELLANT: Judith Ward Mattox, Esq.
Colorado Springs, CO

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Mark R. Wiener, Esq.
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Wackenhut Services, Inc. (WSI) appeals the deemed denial of its claim for increased costs of performing the above-captioned regional base operating support contract (hereinafter “the RBOS contract”) during the contract option years four through six. WSI moves for summary judgment on entitlement. The government opposes. We grant the motion and remand to the parties for determination of quantum.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 31 January 2002, the U.S. Navy Engineering Field Activity Chesapeake awarded the RBOS contract to WSI (R4, tab 1 at 1-2). Section C, ¶ 1.1 of the contract specified its general scope in relevant part as follows:

The Contractor shall provide all labor including supervision, management, security escorts, tools, materials, equipment, transportation, and other items necessary to provide services for Federal facilities in the Washington DC area in accordance with general craft and industry standards, applicable laws, regulations, codes and Federal Specifications. Initially services shall be provided for the National Maritime Intelligence Center (NMIC) Suitland, Maryland, and Nebraska Avenue Complex (NAC), Washington, D.C. Depending on the quality of the

Contractors [sic] performance other federal facilities within 100 miles may be added in the future.

(R4, tab 1 at 75)

2. The contract had a base term of one year from 1 April 2002 to 31 March 2003 and provided that: “[t]he Government has the option to extend the term of the contract in accordance with the ‘OPTION TO EXTEND THE TERM OF THE CONTRACT – SERVICES’” clause (R4, tab 2 at 398). The referenced NAVFAC 5252.217-9301, OPTION TO EXTEND THE TERM OF THE CONTRACT – SERVICES (JUN 1994) clause provided for up to six successive one month to one year extensions of the “term” of the contract as follows:

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.

(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 84 months.

(R4, tab 2 at 412)

3. The contract also included, among other provisions, the FAR 52.243-1, CHANGES–FIXED PRICE (AUG 1987) clause, the FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996) clause, and the FAR 52.217-8, OPTION TO EXTEND SERVICES (NOV 1999) clause that stated:

OPTION TO EXTEND SERVICES (NOV 1999)

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within 30 days prior to the contract expiration date.

(R4, tab 2 at 408, 416)

4. The contract schedule at award established separate firm fixed-price contract line item numbers (CLINs) for the base year and each option year of services at NMIC and NAC (R4, tab 1 at 5-12). These prices included WSI's estimated indirect facility management and administration costs that were allocated, by the Board's calculation, 51.8% to the NAC CLINs and 48.2% to the NMIC CLINs (R4, tab 7 at 18-20, 215, 218). Over the course of the contract as subsequently extended by exercised annual options, a number of other facilities were added by modification to the contract (*see, e.g.*, R4, tab 3 at 3, 44, 46, 72, 76, 358-60, 397, 497, 552-53).

5. In Modification No. P00014, effective 28 March 2003, the government exercised the first option year for the period 1 April 2003 through 31 March 2004 (R4, tab 3 at 80). In July 2003, WSI and the contracting officer orally agreed that a field overhead rate of 37 percent would be "applied to new work added to the contract after July 2003" (compl. and answer ¶¶ 16-17).

6. In Modification No. P00038, effective 1 April 2004, the government exercised the second option year for the period 1 April 2004 through 31 March 2005 (R4, tab 3 at 454). In February 2005, the government orally advised WSI that NAC would not be part of the RBOS contract after 31 March 2006 (app. mot., attach., Plutt aff. ¶ 9).

7. In Modification No. P00052, effective 31 March 2005, the government exercised the third option year for the period 1 April 2005 through 31 March 2006 (R4, tab 3 at 534). By letters dated 23 January 2006, the government notified WSI that (i) it

intended to exercise the fourth option year, (ii) services at NAC and another facility (Annex 8)¹ would be “discontinued” effective 1 April 2006, and (iii):

Should you feel that any type of compensation will be due please submit a proposal to this office No Later Than February 13, 2006. Please include all calculations and certifications used to determine any potential compensation.

(R4, tabs 12, 13, 19)

8. By letter dated 22 February 2006, WSI submitted a proposal for the increased costs associated with the government’s discontinuance of the services at NAC. This letter stated in relevant part:

Please note that in our original cost proposal submitted January 3, 2001, the indirect labor and material costs associated with management oversight of the RBOS contract (Facility Management & Administration) were essentially split equally between the Nebraska Avenue Complex and the National Maritime Intelligence Center With the deletion of facility maintenance services at the NAC, some of the positions identified in our original proposal are no longer required and our Cost Proposal reflects the deletion of the costs associated with these positions. However, six management positions remain essential to the successful operation of this contract....

As stated above, the costs associated with the above positions are currently shared equally between NAC and NMIC. With the deletion of services at the NAC, there is insufficient funding available to cover the labor costs associated with these Key Personnel. As such, the attached proposal reflects those costs that we feel must be recovered in order to adequately manage and oversee the RBOS contract.

(R4, tab 14 at 1)

¹ The annex number refers to the contract annex that specified the services to be performed at the indicated facility. The facilities under contract were often referred to in the documentation by their contract annex number.

9. The schedules in WSI's 22 February 2006 proposal were based on the estimates for the NAC CLIN prices in WSI's 3 January 2002 final cost proposal for award of the contract. These schedules showed that the NAC CLIN prices for option years 4, 5 and 6 included respectively \$223,519.90, \$230,225.50, and \$237,132.26 for the six persons in the facility management and administration indirect cost pool whom WSI in February 2006 considered essential for continuing contract performance after discontinuance of the NAC CLINs. (R4, tab 14 at 4, 6, 9-10 and finding 4 above) The government admits that the six persons in question "worked not only on the deleted ANNEX 2 NAC but also on the other Annexes of the Contract," and that "[t]hey continue to work on the other Annexes" (gov't opp'n at 3).

10. In Modification No. P00058, signed by the contracting officer on 31 March 2006, the government exercised the fourth option year for the period 1 April 2006 through 31 March 2007 (R4, tab 3 at 589). In addition to exercising the option, Modification No. P00058 made various changes to the services to be performed at some of the facilities, and included the following statement regarding NAC:

All parties agree that RBOS services (to include guard services) will no longer be provided at the Nebraska Avenue Complex after March 31, 2006. HOWEVER the Government concedes that the contractor submitted a proposal on February 22, 2006 for the indirect labor and material costs associated with management oversight of the RBOS contract which remains unresolved. Execution of this modification does not approve nor reject the Contractor's proposal.

(R4, tab 3 at 592)

11. On 19 April 2006, in response to WSI's 22 February 2006 proposal, the government advised that it found no justification to approve the proposed costs, and in an apparent reference to the July 2003 oral agreement for a 37 percent field overhead rate on "new work," stated: "Both parties have previously accepted a field overhead rate that was designed to compensate the contractor for the field overhead costs associated with the support of the direct labor requirements." (R4, tab 15)

12. By letter to the contracting officer dated 25 May 2006, appellant converted its 22 February 2006 cost proposal into a request for equitable adjustment (R4, tab 16). When no favorable action was taken on the request, WSI converted the request into a certified claim in the amount of \$690,877.66 by letter dated 23 August 2006 (R4, tab 17). When no action was taken on the certified claim, WSI filed this appeal on 8 December 2006. On 3 January 2007, the contracting officer issued a decision denying the claim entirely (R4, tab 18).

13. By Modification No. P00071, effective 31 March 2007, the government exercised the fifth option year for the period 1 April 2007 through 31 March 2008 (gov't opp'n, encl. 2).

DECISION

WSI moves for summary judgment on the grounds that (i) there are no genuine issues of material fact, (ii) the option provision for extending the term of the contract did not provide for extending the term of only part of the contract, and (iii) the deletion of the work at NAC constituted a deductive change or a partial termination for convenience for which WSI is entitled to compensation under either the Changes clause or the Termination for Convenience clause of the contract (app. mot. at 7-11). The government opposes the motion on the grounds that the contract option clauses allowed the government to discontinue services at NAC while extending services at other facilities without compensation to WSI (gov't opp'n at 4).

The term extension options at issue in this appeal were all exercised for an additional one-year period, and as such were necessarily exercised under the NAVFAC Option to Extend the Term of the Contract clause and not under the FAR Option to Extend Services clause. The option to extend services under the FAR clause was limited to a total cumulative contract time extension of no more than six months after contract expiration. The government argues that since the FAR clause permitted extensions of specific services, the NAVFAC clause should be similarly interpreted as allowing extension of the term of some services and not others. The wording of the two clauses, however, is different. The FAR clause expressly states that the government may require the continued performance "of any services." The NAVFAC clause includes no similar language. (*See* findings 2 and 3)

In the absence of any provision in the contract for a one year extension of the term of only part of the contract, the discontinuance of the NAC CLINs beginning with the fourth option year was a partial termination for convenience, or alternatively a deductive change, for which WSI is entitled under paragraph (l) of the Termination for Convenience clause, or alternatively under paragraph (b) of the Changes clause, to an equitable adjustment of the contract price(s) for any increased cost of the remaining or unchanged work incurred as a result of the discontinuance of the NAC CLINs. *See Old Dominion Security, Inc.*, ASBCA No. 47018 *et al.*, 95-1 BCA ¶ 27,391 at 136,545. It is not disputed that the NAC CLINs provided a substantial part of the allocation base for WSI's indirect facility management and administration cost pool, and the government admits that the six persons on whom the claim is based were part of that pool and continued working on the contract after the NAC termination (*see* finding 9). This record

is sufficient to establish that there was some increased indirect cost burden on the remaining or unchanged work as a result of the discontinuance.

Therefore, we grant the motion for summary judgment as to entitlement with respect to the exercised options, and remand the dispute to the parties for determination of quantum.

Dated: 21 March 2008

MONROE E. FREEMAN, 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. 55691, Appeal of Wackenhut Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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