

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Local Communications Network, Inc.) ASBCA No. 55154
)
Under Contract No. N68939-95-D-0016)

APPEARANCES FOR THE APPELLANT: Anne B. Perry, Esq.
Louis D. Victorino, Esq.
Keith R. Szeliga, Esq.
Sheppard Mullin Richter
& Hampton LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Mark R. Wiener, Esq.
Senior Trial Attorney
David H. Turner, Esq.
Assistant Counsel
Fleet Industrial Supply Center
Norfolk, Philadelphia Detachment

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Local Communications Network, Inc. (LCN) initially appealed the denial of six claims for alleged government breaches of the captioned requirements contract. In our 29 November 2007 decision on the government’s motion for summary judgment, we dismissed two claims for lack of jurisdiction and granted the motion on two other claims. *Local Communications Network, Inc.*, ASBCA No. 55154, 08-1 BCA ¶ 33,734. The parties now submit the two remaining claims for decision under Board Rule 11 on both entitlement and quantum. We find both claims without merit on entitlement and deny the appeal.

FINDINGS OF FACT

1. On 7 September 1995, an agency of the Department of the Navy awarded the captioned contract to LCN for official and unofficial long distance telephone services (CLINs 0001-0004), a “T-1 Service” (CLIN 0005) and “Ancillary Services” (CLIN 0006) at the U.S. Naval Station Guantanamo Bay (GTMO), Cuba (R4, tab 22

at Bates 921).¹ The T-1 Service and the Ancillary Services were described respectively in Sections C3.6 and C3.7 of the contract specifications as follows:

C3.6. Technical Requirements and Performance

Specifications. The Contractor shall provide one T1 for a mixture of voice and data circuits with dedicated JTF connectivity between Bldg. M51, Naval Station Norfolk, Virginia to Bldg. N609 Naval Station [GTMO]....

....

C3.7. Ancillary Services. The Contractor may wish to market or the Government may request ancillary services not specifically identified in this contract. The Contracting Officer must approve in writing, both the marketing of and the cost for any ancillary service....

(R4, tab 22 at Bates 939, 942)

2. Sections B1 and H1 of the LCN contract expressly stated that it was a “requirements type contract” (R4, tab 22 at Bates 923, 977). The contract document at award, however, neither included nor incorporated by reference the FAR 52.216-18 Ordering clause or the FAR 52.216-21 Requirements clause. Both clauses were mandated for inclusion in requirements type contracts by regulation. FAR 16.505(a), (d)(1). However, by Contract Modification No. P00005 dated 7 September 1996, the FAR 52.216-18 ORDERING (OCT 1995) clause was incorporated into the contract by reference (R4, tab 27), and in our prior decision on the government’s motion for summary judgment we held that the FAR 52.216-21 REQUIREMENTS (APR 1984) clause was incorporated into the contract by operation of law. *Local Communications Network, Inc.*, 08-1 BCA ¶ 33,734 at 167,026-27.

3. Paragraph (c) of the Requirements clause stated, among other things, that “the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.” Paragraph (a) of the Ordering clause stated, among other things, that “[a]ny 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.” The LCN contract

¹ For convenience we hereinafter will refer to the Department of the Navy, its agencies and its activities as “the Navy.”

schedule at award, however, did not specify the government activity or activities whose purchase requirements for the specified services were required to be ordered under the contract, nor did it designate the individuals or activities authorized to issue delivery orders under the contract (R4, tab 22). After award, delivery orders were issued only by the Navy activity that awarded the contract (the Naval Information Systems Management Center (NISMC)) and three other Navy activities designated as ordering activities by contract modification (R4, tabs 33, 42, 43, 54-120).²

4. The base term of the LCN contract was one year plus options for nine additional years and a maximum 120-day phase out period. The Navy exercised the options for eight additional years and the phase out period. LCN's work under the contract was concluded on 6 January 2005. (R4, tab 22 at Bates 966, 977, tabs 26, 30, 34, 38, 42, 43, 49, 52; app. supp. R4, tab 43)

A. The Alleged Diversion of DISA DS-3 Requirements

5. At all times relevant herein, the Defense Information Systems Agency (DISA) was an agency of the Department of Defense (DoD). It was not an agency of the Navy. The mission of DISA included the acquisition of commercial communications systems to serve the needs of the National Command Authorities. *See* 32 C.F.R. §§ 362.3, 362.4, 362.5(a)(9) (1995).

6. On 1 December 1994, five months before the solicitation for the LCN contract and nine months before its award, the Navy notified DISA that it intended to solicit a contract for commercial telephone service at GTMO and requested DISA to respond "if this is agreeable to you" (R4, tab 5). DISA did not respond.

7. On 15 May 1996, DISA had a requirement for a dedicated T-1 service at GTMO and requested the Navy to procure that service for it under CLIN 0005 of the LCN contract "using funding provided to you by MIPR from this Agency" (app. supp. R4, tab 63).³ On 30-31 May 1996, the Navy modified the specified T-1 service in the

² In addition to NISMC, the other designated ordering activities were the Fleet and Industrial Supply Center Norfolk, Philadelphia Detachment (FISC), the Naval Computer and Telecommunications Area Master Station, Atlantic (NCTAMS LANT) and the Space and Naval Warfare Systems Center (SSC) Charleston, Norfolk Office.

³ A MIPR is a Military Interdepartmental Purchase Request. It was (and is) a required document by which one military department or DoD agency requests another

LCN contract to provide for DISA connectivity in place of the originally specified JTF connectivity⁴ and issued a delivery order to LCN to perform the revised T-1 requirement (R4, tab 25 at Bates 1093-94, tab 71).

8. On 21 May 1996, DISA issued competitive solicitation RG11JUL951483 for an additional T-1 service at GTMO. LCN protested that this service should be ordered under its requirements contract. The Navy advised DISA that the intent of the LCN contract was “for additional circuits like that described in [the DISA solicitation] to be within the scope of the Navy’s requirements contract” (app. supp. R4, tabs 67, 71).

9. In a 30 July 1996 email, a DISA/DITCO⁵ contracting officer noted the Navy contracting officer’s advice and stated that: “At this point in time, DITCO has no authority to order this [T-1] service and must abide by the Navy contract.” However, she went on to question the Navy’s authority to bind DISA to order all future requirements under the LCN contract. That portion of her email stated in relevant part:

Based on Pat Reinhart’s [the Navy contracting officer’s] correspondence, the Navy’s contract is for all telecommunications including long haul into Guantanamo Bay, Cuba. If this interferes with DISA’s function, specifically Department of Defense Directive, “Management of Base and Long-Haul Telecommunications Equipment and Services,” dated 5 December 1991, it will need to be resolved at higher levels than this office. My guess is that resolution will take time. Once and if the two agencies agreed, transferring the contract to DISA/DITCO or adding DISA/DITCO as an authorized ordering activity it would take at least 6 months to 1 year to accomplish.

(App. supp. R4, tab 73 at 3)

10. On 1 August 1996, the Officer-in-Charge, Naval Communications Detachment, GTMO wrote an email commenting on the DISA/DITCO contracting officer’s 30 July 1996 email. The Navy OIC’s email stated in relevant part:

military department or DoD agency to purchase material or services for the requesting department or agency’s use. *See* 48 C.F.R. § 208.7004-1 (1994).

⁴ *See* finding 1 above.

⁵ DITCO was the DISA Defense Information Technology Contracting Organization.

DITCO's statements below pertain only to the DISN T-1 procurement action that is pending between Hampton Rds and Gitmo...As you can see from the Contracting Officer's (Ann Ferranti's) response, a legal determination will have to be made by the higher HQ DISA regarding the Department of Defense Directive dtd 5 Dec 91 to verify if NISMC's contract is in violation of that directive. Also, DISA HQ will have to make a determination whether or not NISMC would consider transferring the contract to DITCO or adding DITCO as an authorized ordering activity for the contract. Either of these solutions would take approx 6 mths to 1 year to accomplish. As of this date, no one but NISCM [sic] can order services into GITMO.

(App. supp. R4, tab 73 at 2)

11. Subsequently, DISA withdrew its solicitation and between September 1996 and April 2002 it requested the Navy to procure three T-1, a fractional T-1, and two DS-3 trunk line services under the LCN contract for its use at GTMO. The Navy procured the requested services by first modifying the LCN contract to incorporate each individual service requested by DISA as a new requirement into the contract schedule, and then issuing delivery orders to LCN to provide the requested requirement. Each of the DISA-requested requirements was specified in the LCN contract schedule by its connectivity and other specific technical requirements. The DISA DS-3 requirement was also specified as ending on 30 April 2003. (R4, tabs 35, 36, 47, 83, 88, 111, 115) DISA did not request and the Navy did not modify the LCN contract schedule to include all other DISA telecommunication requirements at GTMO or to designate DISA as an ordering activity under the contract.

12. The DISA DS-3 lines at GTMO were procured to provide the bandwidth required by the United States Southern Command (SOUTHCOM) at that base. SOUTHCOM was a DoD agency, not an activity of the Navy. (App. supp. R4, tab 138) The procurement was funded by DISA, not by the Navy. When installed, the DS-3 lines were part of DISA's Defense Information Systems Network (DISN). The DISN was available for use by all DoD components at GTMO including the Navy. (App. supp. R4, tab 145) There is, however, no evidence that the Navy required the bandwidth of the DS-3 lines for its own activities at GTMO either before or after 30 April 2003.

13. Between 30 January and 8 February 2002, DISA issued four circuit orders for specific circuits installed or to be installed on the T-1 trunk lines that the Navy had procured for DISA's use under the LCN contract. Each of the orders stated: "This

circuit must be provided utilizing the existing [LCN contract] to obtain leased services into Guantanamo Bay Cuba. LCN is the sole provider of commercial leased circuits accessible to world wide locations from Guantanamo Bay.” (App. supp. R4, tabs 31 at 4, 32 at 4, 33 at 5, 34 at 5) Since these circuit orders applied to the DISA T-1 requirements already ordered under the contract, they did not constitute recognition of any purchase obligations beyond those specific T-1 requirements.

14. On 30 September 2002, the Navy issued a delivery order to LCN purporting to extend the DISA DS-3 service to 30 September 2003. However, since the DISA DS-3 requirement specified in the contract schedule ended on 30 April 2003, the delivery order had no effect beyond that date.⁶

15. On 2 April 2003, the Navy told LCN that it would not be extending the 30 April 2003 end date for the DS-3 requirement in Modification No. P00025 (R4, tab 132). In response to a complaint by LCN that DISA was contracting for its DS-3 requirement at GTMO after 30 April 2003 with MCI WorldCom, the Navy replied on 14 April 2003 that: “Because the performance period for these [DS-3] services under [the LCN contract] ends on 30 April 2003, acquiring those services from the DISN approved source after that date cannot be viewed as a diversion of requirements” (R4, tabs 125, 136 at Bates 1381).

16. When MCI WorldCom was unable to get one of the two DISA DS-3 lines at GTMO operational by 30 April 2003, the Navy and LCN at DISA’s request entered into a separate contract to continue that line by LCN on a month-to-month basis (R4, tabs 126, 139). On 28 May 2003, DISA told the Navy that the LCN DS-3 line would not be needed after 30 June 2003. (R4, tab 140) From 30 June 2003 through 31 December 2004 and beyond, DISA ordered two DS-3 lines at GTMO from MCI WorldCom. The Navy had no involvement in the DISA procurement from MCI WorldCom. (App. supp. R4, tab 145 at 1-5)

17. LCN claims \$2,475,914 as the additional profit it would have earned if the Navy had extended the expiration date of the DS-3 requirement in its contract to 31 December 2004 and issued a delivery order for performance accordingly (app. supp. R4, tab 147, ex. 1).

⁶ Pursuant to Section G1.1 of Modification No. P00001 of the LCN contract, only the procuring contracting officer (PCO) (Patricia Reinhart) or the successor contracting officer (SCO) (James Swizewski) were authorized to modify the contract (R4, tab 23 at 1081, 1084-85, tab 32). The contracting officer (Sheila Hall) who issued the delivery order was neither the PCO nor the SCO (R4, tab 116 at 1).

B. The Alleged Diversions of PCI Requirements

18. On 8 April 1997, the Navy solicited a proposal from LCN for internet service at GTMO, as a technology improvement pursuant to Section H2 of the contract (R4, tab 150). On 15 April 1997, LCN responded with a proposal for “using a small part of the existing telephone switch capacity for access by Internet subscribers” (R4, tab 29 at Bates 1112, 1114). On 3 July 1997, the Navy and LCN entered into bilateral Modification No. P00007, adding to the Contract Schedule CLINs 0006AB and 0006AC for “Internet Service - Official User” and “Internet Service – Unofficial User” respectively. Modification No. P00003 incorporated by reference LCN’s 15 April 1997 proposal and made it a part of the contract. (R4, tab 29 at Bates 1103-04)

19. On 4 July 2001, the GTMO base commander renewed a franchise agreement with Phoenix Cable Television, Inc. (PCI) for operation and maintenance by PCI of the government-owned cable television system at GTMO. In the discussions leading up to the renewal agreement, PCI offered to provide internet service over the cable system (app. supp. R4, tab 85 at 2). The renewal agreement provided that the parties “will consult... regarding the provision of Internet access over the cable system.” (R4, tab 179 at Bates 1508, 1511, 1518)

20. On 12 December 2001, LCN complained to the Navy that PCI had installed an internet facility with direct satellite access to the continental United States (CONUS) and that: “This bypass facility is an infringement on LCN’s authority to be the exclusive communications transmission carrier between the CONUS and [GTMO] in accordance with [the LCN contract]” (R4, tab 153). On 17 December 2001, FISC told LCN that its right to provide internet services in conjunction with its telephone services did not “create any exclusive right for LCN to provide internet access at GTMO” (R4, tab 155 at Bates 1447).

21. On 1 February 2002, LCN complained to the Navy that PCI was providing voice over internet (VOI) services to its cable customers at GTMO. LCN alleged that the Navy’s acquiescence in this activity was a breach of the LCN contract. (R4, tab 143 at Bates 1403, 1406, tab 165 at Bates 1475-76) On 13 February 2002, the Navy replied that LCN did not have exclusive rights to provide internet services that did not involve long distance telephone connectivity (R4, tab 144 at Bates 1408).

22. LCN claims \$199,198 as the additional profit it would have earned absent the competition for internet service from PCI (app. supp. R4, tab 147, ex. 11).

DECISION

The LCN contract stated that it was a “requirements” contract and we have previously held that the FAR 52.216-21 REQUIREMENTS (APR 1984) clause was incorporated into that contract by operation of law. That clause stated that the government was obligated to purchase “all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule” (emphasis added). The contract schedule, however, did not specify the government activity or activities whose purchase requirements for the specified services were required to be purchased under the contract. (Findings 2, 3) The Navy contracting officer who awarded the LCN contract derived her contracting authority from the statutory authority of the Secretary of the Navy to “conduct all affairs of the Department of the Navy.” 10 U.S.C. § 5013(b) and (g)(1). Considering that the awarding contracting officer’s authority at most did not extend beyond the affairs of the Navy, and in the absence of a specific designation in the contract schedule of the government activities whose purchase requirements were subject to the contract, we conclude that those activities were the awarding activity (NISMIC) and the other Navy activities that were granted ordering authority by contract modification after award. (Findings 2, 3)

DISA was not specified in the LCN contract schedule as an activity whose purchase requirements for the specified services were required to be purchased under that contract, nor was it the awarding activity, nor was it at any time a designated ordering authority under the contract. DISA was an independent agency and activity of the DoD. It was not an agency or activity of the Navy. (Finding 5) The Navy contracting officer had no authority to commit DISA to purchase any of its telecommunication requirements at GTMO except to the extent requested by DISA in accordance with the interdepartmental purchase procedures set forth in 48 C.F.R. § 208.7004 (1994).

LCN contends that DISA’s withdrawal of its competitive solicitation for a T-1 service at GTMO, after being advised by the Navy contracting officer that its requirement was covered by the LCN contract, was a “ratification” of the LCN contract (app. br. at 3, 41-44). We do not agree. The DISA contracting officer’s 30 July 1996 email discussing the Navy contracting officer’s interpretation of the LCN contract recognized that “[a]t this point in time” DISA had no contractual authority to order its T-1 requirement other than under the existing LCN contract. But the DISA contracting officer did not express agreement with the Navy interpretation that DISA was legally bound to order all of its future GTMO telecommunication requirements under the LCN contract. To the contrary, her email stated that the Navy contracting officer’s interpretation raised an issue of conflicting agency functions defined in a DoD Directive that “will need to be resolved at higher levels than this office.” Her email further stated that: “Once and if the two

agencies agreed, transferring the contract to DISA/DITCO or adding DISA/DITCO as an authorized ordering activity...would take at least 6 months to 1 year to accomplish.” (Finding 9) These statements clearly show the author’s lack of both authority and intent to bind DISA/DITCO to order all of its future telecommunication requirements at GTMO under the LCN contract. Moreover, the Officer-in-Charge of the Naval Communications Detachment at GTMO also agreed in a 1 August 1996 email that “a legal determination will have to be made by the higher HQ DISA regarding the Department of Defense Directive dtd 5 Dec 91 to verify if NISMC’s [LCN] contract is in violation of that directive” (finding 10).

The subsequent DISA requests to the Navy to procure for its use specific telecommunication services under the LCN contract, and the manner in which the Navy fulfilled those requests, were also inconsistent with any “ratification” by DISA of an obligation to procure all of its telecommunication requirements at GTMO from LCN for the duration of the LCN contract. Each of the DISA requested services was added by modification to the LCN contract schedule as a requirement for a specific number of services, each service with a specific connectivity and, in the case of the two DS-3 lines, a limited duration of the requirement ending on 30 April 2003. (Finding 11) With DISA’s requested requirements defined in that limited manner, we do not find in them either individually or collectively any implied broader consent to procure all future telecommunication requirements at GTMO under the LCN contract.

LCN argues that even if DISA had no obligation to procure its DS-3 requirements after 30 April 2003 under the LCN contract, the Navy breached that contract by using the DS-3 lines that DISA purchased from MCI WorldCom. We do not agree. The Requirements clause of the LCN contract applied only to the specified supplies or services “required to be purchased” by the designated activities (finding 3). There is no evidence that the Navy had any purchase requirement for the increased bandwidth of the DS-3 lines for its activities at GTMO either before or after 30 April 2003. Those lines were purchase requirements of DISA to support SOUTHCOM, fully funded by DISA, and part of the DISA DISN. Any use of those lines by the Navy at GTMO was merely incidental to the use of the DISN by all DoD components, including the Navy. (Findings 12, 16)

For the reasons stated above, we find no diversion of DS-3 requirements specified in the LCN contract. We also find no diversion of the internet service requirements specified in that contract. The internet service requirement specified in the LCN contract was proposed by LCN and incorporated into the contract schedule as a requirement for internet service “using a small part of the existing telephone switch service” (finding 18). This was not a requirement for internet service in general but only for telephone-based internet service. The cable television internet service allowed by the Navy did not use

any part of the telephone system and therefore did not constitute a diversion of requirements for the telephone based internet service specified in the LCN contract. (Findings 19-21)

The appeal with respect to the alleged DS-3 and internet service diversions from the LCN contract is denied.

Dated: 28 May 2009

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. 55154, Appeal of Local Communications Network, Inc., rendered in conformance with the Board's Charter.

Dated:

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