

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Emergency Pest Control Services) ASBCA No. 55321
)
Under Contract No. DAAB08-03-D-0001)

APPEARANCE FOR THE APPELLANT: Adam H. Van Buskirk, Esq.
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Auburn, NY

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Robert T. Wu, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL
ON THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

This is a timely appeal of a contracting officer’s denial of appellant Emergency Pest Control Services’ (EPCS) claim in the amount of \$153,976.54. While the parties were conducting discovery, the Army filed a motion for summary judgment. EPCS filed an opposition to the motion, contending that there were material facts in dispute. The Army subsequently filed a reply brief. We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 7 January 2003, the Army issued Solicitation No. DAAB08-03-R-0002 for pest control services. Mr. John Sanchez, ECPS’s president, asserts that the solicitation was a 116-page document, extracts from which are attached to his sworn affidavit (Sanchez aff.). He stated on pages 1 and 2 of that affidavit:

This solicitation listed various quantities for various pest control services needed at Fort Monmouth, including the family housing units of Fort Monmouth. The solicitation did not make clear that these quantities were only estimates, and they appeared to be fixed quantities. The solicitation did not indicate that an “IDIQ” or “Requirements” contract was to be issued, so I assumed that a contract would be issued for the quantities as stated in the solicitation, including all work in the Family Housing Units.

The record does not contain a complete copy of the 116-page solicitation.

2. Mr. Sanchez stated on page 2 of his affidavit that, upon receipt of the 116-page solicitation, he “calculated the prices that [appellant] would have to charge for each service in order to make a reasonable profit.” He subsequently entered into negotiations with MAJ Robert E. Backman, the contracting officer (CO). On page three of his affidavit, Mr. Sanchez stated that he “was never informed that the contract was to be an ‘IDIQ’ contract or a ‘Requirements Contract’ ...during subsequent communications with Contracting Officer Backman. I assumed that it would simply be a contract for the quantity of services specified in the solicitation.”

3. Also as stated on page three of Mr. Sanchez’s affidavit, the parties reached an agreement on pricing, and the Army provided him with a 123-page document which “appeared to be a contract.” This document is attached as Exhibit B to Mr. Sanchez’s affidavit and indicates a total award amount of \$694,247,75. Exhibit B contains FAR clause 52.216-21, REQUIREMENTS (OCT 1995), which provided in subsection (a):

This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government’s requirements do not result in orders in the quantities as described as “estimated” or “maximum” in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.

(Sanchez aff., ex. B at 73). The document does not contain any references to an “IDIQ contract.” Exhibit B was signed, but not dated, by Mr. Sanchez. It was neither signed nor dated by the CO.

4. Mr. Sanchez further stated on page 3 of his affidavit that on or around April 2003, the Army provided him with a 45-page version of a contract for the pest control services and instructed him to sign it. A copy of this document is attached to Mr. Sanchez’s affidavit as Exhibit C and indicates a total award amount of zero. This document differs in many salient respects from the two documents which we have previously reviewed. For example, it contains 15 pages of estimated quantities for various pest control services to be provided by the contractor. It also states on p. 17 that it is “an IDIQ type of Contract with a Minimum Guarantee of 7,500 dollars for the Base and Option Periods if exercised.”¹ However, the document also contained clause

¹ There were four option periods listed (Sanchez aff., ex. C at 17).

52.216-21, which stated that it was a “requirements contract” (Sanchez aff., ex. C at 44). According to Mr. Sanchez’s un rebutted affidavit (¶ 11):

I was given no oral nor written warning that this contract differed from the solicitation documents or from the contract version provided earlier for my review. I later learned that language referring to an “IDIQ” contract had been inserted at page 17 of this contract. In April of 2003, I did not know of this “IDIQ” language, and did not consent to this language. Had I been informed of this new “IDIQ” term buried in my contract, I would have immediately objected. However, I assumed that this document would necessarily be the same as the solicitation and other documents provided to me.

5. In the R4 file which it submitted for this appeal, the Army did not include either the 116-page or the 123-page document. Instead, it proffered the 45-page document which Mr. Sanchez stated that he received in April 2003. In its Rule 4 file, the Army describes the 45-page document as tab 1, “CONTRACT NO. DAAB08-03-D-0001...14-APR-03.” Although the copy in the Rule 4 file is not signed, appellant evidently does not dispute that Mr. Sanchez signed it, under the circumstances described above.

6. However, in “Proposed Findings of Facts” (PFF) no. 1, which it filed in conjunction with its summary judgment motion, the Army described R4, tab 1, as a 45-page solicitation which was issued on 7 January 2003. Again describing this 45-page document as the “Solicitation,” the Army contends that the contract was intended to be an IDIQ contract, although it erroneously contained a requirements contract clause (mot. at 2). In no. 5 of its PFF, the Army describes the 45-page document as “contract number DAAB08-03-D-0001, dated 11 April 2003,” although it, once again, refers to that document as the “Solicitation” (mot. at 3).

7. EPCS commenced contractual performance upon receipt of Delivery Order 0001, dated 5 May 2003. The contract’s base year extended from 14 April 2003 through 14 April 2004 (R4, tab 10 at 1-2).

8. After EPCS commenced work, a new CO discovered that the “contract” contained both IDIQ and requirement language. Although a meeting was held between the parties to correct this problem, no modification was forthcoming (R4, tab 41). Around this time, appellant notified the Army that it had not timely forwarded notice of its intent to exercise the first option year. The CO thereupon issued Modification No. P00001 in order to exercise the option and to delete the requirements clause contained in the “contract” (R4, tab 5). Mr. Sanchez stated on page 4 of his affidavit that he never

received this modification. The document described in the R4 file as tab 5, “Modification No. P0001...13-APR-04”, is neither signed nor dated by any representative of appellant.

9. The Army ceased to order any further services from appellant effective 30 August 2005 (R4, tab 37).

10. On 14 November 2005, the CO received a properly certified claim from EPCS stating that it was owed \$153,976.54 as a result of the Army’s alleged “failure to contract [for] ‘minimum’ services as specified in the Contract Schedule” (R4, tab 40).

11. On 15 December 2005, the CO issued a final decision denying appellant’s claim in its entirety (R4, tab 41). This appeal followed.

CONTENTIONS OF THE PARTIES

In its summary judgment motion, the Army states:

Prior to award, this contract contained both IDIQ language and Requirements clause. (PFF-3, 4) It was the intent of the Army to request bids for an IDIQ contract. (PFF-5) It was a glaring error that should have been recognized by the by the [sic] Appellant, but it was not. Regardless of the potential arguments by Appellant, the Requirements clause and the IDIQ language were facially inconsistent and presented the Appellant with a duty to inquire prior to award.

(Mot. at 9-10). Reasoning from this premise, the Army concludes that, because appellant failed to make such an inquiry, it must face the consequences and suffer the denial of its claim (mot. at 11-13). The Army did not fortify either of its briefs with sworn affidavits.

In its opposition brief, appellant includes a 10-page sworn affidavit from its president, Mr. John Sanchez. Through this document, Mr. Sanchez places into question the very nature of the contract itself. As we have indicated, the Army did not rebut Mr. Sanchez’s statements with any affidavits of its own.

DECISION

Summary judgment is appropriate where no material facts are genuinely in dispute, and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). We resolve all inferences in favor of appellant, as the party against which the motion is directed. *JT Construction Co.*, ASBCA No. 54352, 06-1 BCA ¶ 33,182 at 164,464.

Here, through the affidavit of its president, appellant has raised fundamental questions regarding the very nature and content of the contract at issue. Under these circumstances, a grant of summary judgment to respondent is impossible.

CONCLUSION

The motion is denied.

Dated: 4 June 2009

MICHAEL T. PAUL
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. 55321, Appeal of Emergency Pest Control Services, rendered in conformance with the Board's Charter.

Dated:

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