

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Paradigm II, LLC, d/b/a JB Carpet & Upholstery Care) ASBCA No. 55849
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Under Contract No. W911RX-05-D-0013)

APPEARANCE FOR THE APPELLANT: Mr. James L. Bolden, Jr.
Managing Member

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
Geraldine Chanel-Carpenter, Esq.
Trial Attorney

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

This matter comes before us on the government’s motion for summary judgment upon the ground that the contract is not enforceable. The appeal is from the contracting officer’s decision denying appellant’s \$128,952.80 certified claim for breach of contract damages, unrealized anticipated profit and unabsorbed overhead damages.¹ We deny the government’s motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 25 April 2005, the Department of the Army awarded Paradigm II, LLC, d/b/a JB Carpet & Upholstery Care (appellant), Contract No. W911RX-05-D-0013 for custodial services from 25 April 2005 through 30 September 2006 for 73 buildings at Fort Riley, Kansas. The total amount of the contract was \$319,783.83. (R4, tab 3) Appellant was one of three successful bidders, and the government awarded three separate contracts. The other two contracts were awarded to AnjeLink and Quality First Cleaning (Quality First). (Gov’t br. ¶ 5, attachs. 1, 2) The solicitation stated, in pertinent part:

This is a multiple award contract and award may be made to more than one quoter. This is also a requirements contract and delivery orders will be issued to the contractor who is

¹ Appellant was represented by counsel until his withdrawal by letter dated 2 October 2008.

available to perform custodial services at the time it is required.

(R4, tab 1 at 3)

2. The solicitation and contract included FAR 52.216-18, ORDERING (OCT 1995) and FAR 52.216-19, ORDER LIMITATION (OCT 1995). The solicitation and contract also included FAR 52.216-21, REQUIREMENTS (OCT 1995) which states in part:

(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 described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause....

(c) Except as this contract otherwise provides, 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.

FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) was not incorporated into the solicitation. (R4, tabs 1, 3)

3. The contract stated: "This is also a requirements contract and delivery orders will be issued to the contractor who is available to perform custodial services at the time it is required" (R4, tab 3 at 3). The nine-page Performance Work Statement (PWS) provided a detailed recitation of the required tasks and standard of workmanship. The PWS stated in part:

1. **DESCRIPTION OF SERVICES**. The required work shall include the principal features listed below. The

Contractor shall furnish all necessary management, personnel, materials, equipment, and transportation necessary to clean buildings identified in Technical Exhibit 1 (TE1) at Fort Riley, Kansas, in their entirety, in accordance with the terms and conditions specified herein. The Contractor shall plan, program, coordinate, estimate, and schedule resources to accomplish all cleaning services as specified.

....

3. **ESTIMATED QUANTITIES**: Estimated quantities are provided in Technical Exhibit 2 (TE2) and are for informational purposes only. It is highly advised that prospective bidders field verify all quantities when preparing their bids....

4. **RATE OF PERFORMANCE**: The rates of performance for each individual building are identified in TE1 and shall not exceed the specified calendar days....

5. **SCHEDULE**: A tentative schedule of start dates for when the work is to commence in each building is included in TE 1. This is for informational purposes only, and may be adjusted either earlier or later depending on the completion of other ongoing work in these facilities.

(R4, tab 3 at 27, 32)

4. Estimated quantities were provided in a chart entitled Technical Exhibit 2 (TE-2). The contract does not contain a guaranteed minimum order provision.

5. By electronic mail (e-mail) dated 23 May 2005 to the government's contract administrator, Mr. Ron Seibel, appellant inquired as to when "work might get started." Appellant went on to state; "I do have workers standing by since I have a signed contract I need to know when will work get started...?" The next day Mr. Seibel responded, stating in part:

No Delivery Orders have yet been issued...As discussed at the pre-performance conference...this is a "requirements" type contract, which means that delivery orders are issued as requirements for the service arise....Due to the nature of the contract, there is no "start date" for work except as established by Delivery Orders are [sic] they are issued.

There is no prescribed procedure for priority or sequence in contacting contractors about pending work orders, but...flexibility and ability of the contractor to do the work will be major factors.

(R4, tab 9)

6. By e-mails dated 21 July, 8 August, and 21 September 2005, similar correspondence took place between the government and appellant, with appellant asking whether there was a start date and reiterating that it stood ready to perform and the government responding that no new information was available and appellant would be contacted when there was need for its services. (R4, tabs 9-13)

7. Between June 2005 and February 2006, the government issued 12 delivery orders: three to appellant (totaling \$5,042.25), nine to Quality (totaling approximately \$34,575), and none to AnjeLink². Appellant did not receive its first delivery order until 24 October 2005. (R4, tabs 5-7; gov't mot. ¶¶ 9-19, attach. 3)

8. By letter to appellant dated 18 November 2005, the contracting officer (CO) responded to appellant's 16 November 2005 e-mail.³ He stated, in pertinent part:

As you noted in your email this is a requirements contract. Specifically, the contract is an IDIQ (Indefinite Delivery Indefinite Quantity) Requirements contract.

IDIQ contracts are governed by Federal Acquisition Regulations (FAR). Below is some general information from the FAR that describes and defines this type of contract.

....

By definition, the schedule and firm dates you request do not exist in this type of contract. Rather, as explained in Ron Seibel's email...delivery orders are issued as requirements for the service arise. Due to the nature of the contract, there is no "start date" for work except as established by Delivery Orders as they are issued.

(R4, tab 14)

² There is no explanation as to AnjeLink's status.

³ The 16 November 2005 e-mail is not in the record; however, it appears that it was similar to earlier e-mails inquiring when work would start.

9. On 15 December 2006, appellant filed a certified claim in the amount of \$128,952.80 for anticipated profits (\$95,000) and “inverted unabsorbed overhead damages” (\$33,952.80). Appellant asserted that the Army either negligently prepared its estimates or altered its requirements in bad faith. The contracting officer issued a final decision dated 8 February 2007 denying appellant’s claim in its entirety and this timely appeal followed. (R4, tab 16)

CONTENTIONS OF THE PARTIES

According to the government, despite the description in the solicitation and contract, the contract was not enforceable as either a requirements contract, or as an IDIQ contract. “The Army was not obligated to acquire any of its requirements for custodial services directly from Paradigm” (gov’t reply at 7). Therefore, there was no enforceable contract except to the extent orders were issued. Because Paradigm received payment for all the custodial services it provided, it is not entitled to any additional payment. The government concludes by stating that the Board might find that the government had actually issued a Basic Ordering Agreement (BOA).

Appellant argues that the contract is a “non-exclusive”, “partial, or limited” requirements contract and that the government was negligent in creating its estimates (app. opp’n at 1, 8). Appellant contends that the government is trying to evade its contractual obligations. The government does not dispute for purposes of this motion that its estimates were negligent (gov’t reply at 3).

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Factual inferences are drawn in favor of the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The government argues that there are no material facts in dispute regarding what type of contract was issued to appellant. By process of elimination, the government concludes that the contract was not a requirements contract or an IDIQ contract and therefore the government had no contractual obligation to appellant beyond payment for the services actually ordered. The government further asserts that because it cannot be identified as a requirements or IDIQ contract that this may have been a Basic Ordering Agreement (BOA) under FAR 16.703.

Appellant counters that as a multiple-award solicitation the contract awarded to it was a type of partial requirements contract and that multiple awards of separate contracts for government requirements are not uncommon. *Cf. Maya Transit Co.*, ASBCA No.

20186, 75-2 BCA ¶ 11,552; *Valley Forge Flag Co.*, VABCA Nos. 4667, 5103, 97-2 BCA ¶ 29,246. Appellant also contends that contractors have not been precluded from claiming lost profits if the government breached these contracts. *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000).

The determination of a contract type is a matter of law, *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984), and we are not bound either by what the contract is called or by the label attached to it by the parties. *Mason v. United States*, 615 F.2d 1343, 1346 (Ct. Cl.), *cert. denied*, 449 U.S. 830 (1980). Here, the contract stated that award might be made to more than one bidder, and that delivery orders would be “issued to the contractor who is available to perform custodial services at the time it is required.” We have no information as to how the decisions to issue orders were to be made. We are not prepared to conclude on this record, without more information as to the parties’ intent and practices, that the contract was not enforceable.

Accordingly, we conclude that there are disputed issues as to material facts related to appellant’s claim that preclude us from granting summary judgment.

CONCLUSION

The motion for summary judgment is denied.

Dated: 3 February 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. 55849, Appeal of Paradigm II, LLC, d/b/a JB Carpet & Upholstery Care, rendered in conformance with the Board's Charter.

Dated:

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