

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Public Warehousing Company, K.S.C.) ASBCA No. 56116
)
Under Contract Nos. SPO300-03-D-3061)
 SPM300-05-D-3119)
 SPM300-05-D-3128)

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OPINION BY ADMINISTRATIVE JUDGE TING
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT
AND ON THE GOVERNMENT'S MOTION TO DISMISS

This appeal arises under three contracts entered into between May 2003 and June 2005 by Public Warehousing Company, K.S.C. (PWC) and the Defense Supply Center Philadelphia (the government or DSCP) for supplying food and other items to military customers in the Middle East. In March 2007, PWC submitted a claim for interpretation of the contracts with respect to its right to retain early payment discounts from its suppliers. Because of an ongoing fraud investigation, the contracting officer on 18 July 2007 issued a decision declining to interpret the contracts with respect to the discounts already received by PWC, but setting forth the conditions under which any such future discounts could be retained.

Over PWC's objections, we have twice granted the government's motions to stay to allow the Department of Justice (DOJ) to complete its ongoing civil and criminal fraud investigations. *Public Warehousing Company, K.S.C.*, ASBCA No. 56116, 08-1

BCA ¶ 33,787; *Public Warehousing Company, K.S.C.*, ASBCA No. 56116, 09-1 BCA ¶ 34,038. Before the second stay expired on 31 March 2009, PWC moved for summary judgment based on the record before us, forgoing discovery which might compromise the still unfinished DOJ investigations. In response, the government moved to dismiss the appeal without prejudice, and asked us to deny PWC's motion for summary judgment if we deny the motion to dismiss. PWC opposed the motion to dismiss.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. DSCP, a field activity of the Defense Logistics Agency (DLA), issued Solicitation No. SPO300-02-R-4003 (PV1 RFP) on 10 May 2002. The RFP sought proposals for "FULL LINE FOOD AND NON-FOOD DISTRIBUTION FOR AUTHORIZED CUSTOMERS IN NORTHERN EUROPE, SOUTHERN EUROPE AND MIDDLE EAST ZONES." (R4, tab 1 at 1)
2. The Middle East zone, identified as "Zone 3," covered the geographical area of Kuwait, Qatar and Saudi Arabia. DSCP intended to make one award for Kuwait and Qatar, and a separate award for Saudi Arabia. (R4, tab 1 at 9)
3. The PV1 RFP stated that pricing would be based on the following formula: "Unit Price = Delivered Price + Fixed Distribution Price (or Fee)." (R4, tab 1 at 11)
4. The PV1 RFP defined "Unit Price" as "the total price (in U.S. Currency) that is charged to DSCP per unit for a product delivered to the Government" (R4, tab 1 at 11). The PV1 RFP, as amended by Amendment No. 0002 dated 15 July 2002, also included the note: "Multiple Unit Prices for the same item are not permitted" (R4, tab 3 at 3).
5. The PV1 RFP, as amended by Amendment No. 0002, defined the "Delivered Price" for purchases from suppliers within the continental United States (CONUS) as "the manufacturer/supplier's actual invoice price (in U.S. currency) to deliver product to the Prime Vendor's CONUS distribution point." (R4, tab 3 at 3)
6. The PV1 RFP, as amended by Amendment No.0002, defined the "Delivered Price" for purchases from suppliers outside the continental United States (OCONUS) as "the manufacturer/supplier's actual invoice price (in U.S. currency) to deliver product to the Prime Vendor's OCONUS distribution point" (R4, tab 3 at 3).
7. The PV1 RFP defined "Distribution Price" as:

a firm fixed price, offered as a dollar amount, which represents all elements of the unit price, other than the delivered price. The distribution price typically consists of the Prime Vendor's projected general and administrative

expenses, overhead, profit, packaging costs, transportation cost from the Vendor's OCONUS distribution facility(s) to the final delivery point or any other projected expenses associated with the distribution function. This distribution price is intended to reflect the difference between the delivered price and the unit price to deliver the specified product to the ordering activity. This distribution price shall represent the amount to be added to the actual invoice price paid to the manufacturer or supplier by the Prime Vendor for each item. This distribution price shall remain fixed for the base year of the contract, and is subject to any agreed option year adjustments.

(R4, tab 1 at 11)

8. The PV1 RFP included a section titled "REBATES/DISCOUNTS." That section included the following language: "Rebates and discounts are to be returned to DSCP when they are directly attributable to sales resulting from orders exclusively submitted by DSCP or its customers." (R4, tab 1 at 18)

9. The PV1 RFP included the following language in its Submission Requirement: "The offeror shall ***BRIEFLY*** address how rebates, discounts and allowances as a result of manufacturer or broker's specials, other than the NAPA [National Allowance Pricing Agreement] Program or Food Shows, are to be returned to the Government.... The offeror will provide a description of those rebates and discounts meeting the requirements herein" (emphasis in original) (R4, tab 1 at 137).

10. PWC submitted its initial proposal in response to the PV1 RFP on or around 14 August 2002. The package submitted by PWC included a technical proposal, a business proposal and a socioeconomic proposal. (App. supp. R4, tabs 36-38)

11. PWC's PV1 business proposal included the following language: "Delivered Price is not reduced by cash discounts for prompt payment available to PWC or its supplier" (R4, tab 37 at 12).

12. PWC's PV1 business proposal also included the following language with respect to "Rebates Directly to DSCP":

In keeping with the standard commercial practice in the food service industry with respect to rebates and allowances, PWC will pass to the DSCP the following types of rebates and allowances:

(a) Off-Invoice Allowances – manufacturer promotions or allowances that are reflected on the invoices to PWC.

(b) Applicable Non-Profit Allowances – special allowances that are generally established by certain manufacturers specifically for non-profit concerns. The manufacturers of certain products for certain specific market areas usually offer these allowances.

(c) Specific Manufacturer Pricing, Rebates or NAPA's – many manufacturers offer specific rebates or special pricing for specific items and customers. These deals are negotiated directly between the manufacturer and the customer. If the DSCP negotiates with a manufacturer a special price for a certain product, PWC will use the special price as the basis of the Unit Price charged to the DSCP. If the DSCP negotiates a specific rebate for certain products, the rebate is either paid directly to the DSCP by the manufacturer or the rebate will be passed through to the DSCP by PWC as a reduction in the Unit Price (and the applicable party, i.e., PWC will “bill back” the manufacturer). PWC agrees that all rebates, allowances and discounts outlined above will be passed through to DSCP....

(R4, tab 37 at 14-15)

13. DSCP awarded Contract No. SPO300-03-D-3061 (the PV1 contract) for Zone 3 (Kuwait/Qatar) to PWC on 28 May 2003 (R4, tab 9). The PV1 contract incorporated by reference FAR 52.233-1, DISPUTES (JUL 2002), which defines “Claim” to mean “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract” (R4, tab 1 at 84). The PV1 contract included in full text FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (FEB 2002) which provides at (c) Changes, that “Changes in the terms and conditions of this contract may be made only by written agreement of the parties” (*id.*). The PV1 contract included the Defense Logistics Acquisition Directive (DLAD) 52.212-9000, CHANGES – MILITARY READINESS (MAR 2001) clause which provides:

The commercial changes clause at FAR 52.212-4(c) is applicable to this contract in lieu of the changes clause at FAR 52.243-1. However, in the event of a Contingency Operation or a Humanitarian or Peace Keeping Operation, as

defined below, the contracting officer may, by written order, change –

- (1) the method of shipment or packaging, and
- (2) the place of delivery.

If any such change causes an increase in the cost of, or the time required for performance, the contracting officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract....

(R4, tab 1 at 94)

14. The PV1 contract did not specifically incorporate PWC's initial proposal by reference. Instead, the PV1 contract incorporated only PWC's Final Proposal dated 14 April 2003 (R4, tab 10 at 2). DSCP has not disputed that PWC's PV1 business proposal (SOF ¶¶ 11, 12) is a part of the PV1 contract. The PV1 contract also included the same pricing language as in the PV1 RFP with respect to the definition of "Unit Price," "Delivered Price" for CONUS purchases, "Delivered Price" for OCONUS purchases, "Distribution Price," and disallowing "Multiple Unit Prices." (R4, tab 10 at 3-4; *see* ¶¶ 4-7 above)

15. On 3 September 2004, DSCP issued Solicitation No. SPM300-04-R-0323 (PV2 RFP) (R4, tab 16 at 1). The PV2 RFP sought proposals for "FULL LINE FOOD AND NON-FOOD DISTRIBUTION FOR AUTHORIZED CUSTOMERS IN THE MIDDLE EAST ZONES AS IDENTIFIED HEREIN" (*id.* at 2).

16. The PV2 RFP identified five Middle East zones (R4, tab 16 at 10). Zone 1 covered the geographical area of Kuwait, Iraq, and Jordan (*id.*).

17. The PV2 RFP included the same pricing language as in the PV1 RFP (R4, tab 16, at 19-20; *see* ¶¶ 3-7 above).

18. The PV2 RFP included a section titled "REBATES/DISCOUNTS," which included the same language as in the PV1 RFP: "Rebates and discounts are to be returned to DSCP when they are directly attributable to sales resulting from orders exclusively submitted by DSCP or its customers" (R4, tab 16 at 27).

19. The PV2 RFP included the following language in its Submission Requirements: "The offeror shall address how rebates, discounts and allowances as a result of manufacturer or broker's specials, other than the NAPA Program or Food Shows, are to be returned to the Government.... The offeror will provide a description of those rebates and discounts meeting the requirements herein" (emphasis in original)

(R4, tab 16 at 102).

20. DSCP issued Amendment No. 0002 to the PV2 RFP on 13 October 2004 (R4, tab 18 at 1). Section II of the amendment included a list of questions asked by potential offerors, along with DSCP's answers (*id.* at 10).

21. Question 149 of the PV2 RFP, Amendment No. 0002, Section II reads as follows: "Item 24, 27. Please provide more clarity as to this requirement" (R4, tab 18 at 35). The questioner was referring to the clause titled "REBATES/DISCOUNTS," which appeared as number 24 on page 27 of the PV2 RFP (*see* ¶ 18 above).

22. In response to question 149, DSCP stated: "Based on the volume of product a PV [Prime Vendor] purchases from a manufacturer, the manufacturer will offer rebates and discounts to the PV. These rebates and discounts must be passed on to DSCP and their customers." (R4, tab 18 at 35)

23. PWC submitted its initial proposal in response to the PV2 RFP on 16 November 2004. The package submitted by PWC included a technical proposal, a business proposal and a socioeconomic proposal. (R4, tabs 21-22, app. supp. R4, tab 44)

24. PWC's PV2 business proposal included the following language: "Delivered Price is not reduced by cash discounts for prompt payment available to PWC or its supplier" (R4, tab 22 at 6).

25. PWC's PV2 business proposal also included the following language:

In keeping with the standard commercial practice in the food service industry with respect to rebates and allowances, PWC will pass to the DSCP the following types of rebates and allowances:

(a) Off-Invoice Allowances – manufacturer promotions or allowances that are reflected on the invoices to PWC.

(b) Applicable Non-Profit Allowances – special allowances that are generally established by certain manufacturers specifically for non-profit concerns. The manufacturers of certain products for certain specific market areas usually offer these allowances.

(c) Specific Manufacturer Pricing, Rebates or NAPA's – many manufacturers offer specific rebates or special pricing

for specific items and customers. These deals are negotiated directly between the manufacturer and the customer. If the DSCP negotiates with a manufacturer a special price for a certain product, PWC will use the special price as the basis of the Unit Price charged to the DSCP.

If the DSCP negotiates a specific rebate for certain products, the rebate is either paid directly to the DSCP by the manufacturer or the rebate will be passed through to the DSCP by PWC as a reduction in the Unit Price (and the applicable party, i.e., PWC will “bill back” the manufacturer). PWC agrees that all rebates, allowances and discounts outlined above will be passed through to the DSCP....

(R4, tab 22 at 9-10)

26. DSCP awarded Contract No. SPM300-05-D-3119 (the PV Bridge contract) to PWC effective 16 February 2005 (R4, tab 15). The PV Bridge contract incorporated all of the terms and conditions of the PV1 contract, including FAR 52.233-1 DISPUTES (JUL 2002) (*id.*).

27. DSCP awarded Contract No. SPM300-05-D-3128 (the PV2 contract) for Zone 1 (Iraq/Kuwait/Jordan) to PWC effective 3 June 2005 (R4, tab 29 at 1; app. supp. R4, tab 46).

28. The PV2 contract incorporated the PV2 RFP and PWC’s proposals by reference (R4, tab 29 at 2). The PV2 contract included FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (OCT 2003) and DLAD 52.212-9000, CHANGES – MILITARY READINESS (MAR 2001) (R4, tab 16 at 250, 264).

29. The PV2 contract included the same pricing language as in the PV1 RFP, the PV1 contract and the PV2 RFP (R4, tab 16 at 19-20; *see* ¶¶ 3-7, 17 above). Performance of the PV2 contract is continuing (gov’t mot. and opp’n at 6, ¶ 4). In May 2009, DSCP exercised the PV2 contract’s final 18-month option period through PV2 Modification No. P00068. Thus, the PV2 contract performance period is expected to run through 4 December 2010. (App. resp. at 6-7, ex. A)

30. On 24 October 2006, DSCP contracting officer Timothy Dlugokecki (CO Dlugokecki) sent an e-mail to PWC Prime Vendor General Manager Toby Switzer (R4, tab 35). The subject of the e-mail was “Discounts for Early Payment Inquiry.” CO Dlugokecki asked:

How does PWC track the discounts that PWC receives and its subcontractors receive when paying early per payment terms to their suppliers.

For example, if a supplier offers 5% discount for paying within 14 days (a 5%/14, net 30 agreement), how does PWC track this?

(Id.)

31. On 26 October 2006, CO Dlugokecki wrote again, this time stating the following:

I would like to rescind this request.

I was informed the following:

Discounts or rebates received by the prime vendor from its suppliers as a result of a prompt or early payment made by the prime vendors to such suppliers are not required to be passed to DSCP or its customers.

(Id.)

32. By letter dated 16 March 2007, PWC submitted a claim to CO Ford and CO Dlugokecki. The claim was submitted pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, and sought the CO's "interpretation as to whether PWC is required to return to the government any prompt or early payment discounts it receives from its suppliers under the definition of "Delivered Price" or the "REBATES/DISCOUNTS clause" in the PV1, PV Bridge and PV2 contracts. PWC gave two reasons for requesting a CO's decision: (1) "to resolve a pending investigation being conducted by the government," and (2) "[g]iven the existence of a disagreement between PWC and certain government representatives over the meaning of the cited clauses, it is clear that there are present consequences for the parties that require interpretation of the clauses." (R4, tab 33)

33. In response to PWC's claim, CO Ford issued a decision by letter dated 18 July 2007. The decision stated that she was "reluctant to address any prior PWC practices that could be the subject of the ongoing DOJ investigation." The decision explained that inasmuch as PWC failed to "identify any specific rebates or discounts," her decision is "prospective only." Thus, the CO decision declined to address whether PWC was required to return early payment discounts under the PV1, PV Bridge and the PV2 contracts up to the date of the decision – 18 July 2007. The decision acknowledged

that “[c]ontract performance is on-going.” Prospectively, or post 18 July 2007, CO Ford’s decision stated:

I have determined for purposes of this claim response only that bona fide early payment/prompt payment discounts/rebates may be retained by PWC under contract SPM300-07-D-3128 [sic] only if these discounts satisfy all of the following conditions:

- the discount/rebate is based on the cost of money,
- the discount/rebate is consistent with commercial practice,
- the discount/rebate is routinely given by the suppliers to customers other than PWC at the same discount rate and under the same conditions as provided to PWC,
- the discount/rebate is not established, requested, or negotiated for the purpose of avoiding giving DSCP a lower cost or a rebate or in exchange for a higher invoice price.
- the discount/rebate is no more than 2 percent and to obtain the discount/rebate, the early payment is required within 10 days, AND
- The discount/rebate was actually earned by PWC making the required payment within the time period required to receive the discount/rebate.

(R4, tab 34)

34. On 23 July 2007, PWC filed a Notice of Appeal and Complaint with the Board. In the complaint, PWC explained that it was appealing (1) the deemed denial of its claim for an interpretation of the PV1 and PV Bridge contracts as well as the PV2 contract up to 18 July 2007, and (2) the CO’s prospective final decision with respect to the PV2 contract (compl. at 1). The Board docketed the appeal on 24 July 2007 as ASBCA No. 56116.

35. As relief, PWC’s complaint asked the Board to interpret the PV1, PV Bridge and PV2 contracts “as not requiring PWC to pass on to the U.S. Government prompt or early payment discounts PWC received and continues to receive from its suppliers.” PWC also requested the Board to “interpret the conditions imposed by the Contracting

Officer prospectively to prompt payment discounts to be unsupported by the terms of the PV2 Contract.” (Compl. at 25-26)

36. On 24 April 2009, CO Ford issued a supplemental final decision “to address all three contracts and provide additional information.” The decision said that under the three contracts that were the subject of PWC’s claim, PWC “may retain...early payment discounts.” The supplemental decision said to be able to retain such discounts, however, they must be “genuine and legitimate bona fide early payment discounts,” and “[a]ll discounts that do not qualify as genuine and legitimate bona fide early payment discounts, regardless of how PWC has characterized them, must be passed on to DSCP.” As for what constitutes “genuine and legitimate bona fide early payment discounts,” CO Ford said that the six conditions “identified” in her 18 July 2007 decision “on a prospective basis” “remain valid.” (Gov’t mot. and opp’n, attach. 5)

DECISION

PWC submitted a claim seeking the CO’s interpretation on whether it was required to return to the government early payment discounts it received from its suppliers (SOF ¶ 32). In a decision issued on 18 July 2007, the CO declined to address the PV1, PV Bridge and PV2 contracts up to the date of the decision – 18 July 2007 – because PWC failed to identify any specific rebates or discounts and because PWC’s practice “could be the subject of the ongoing DOJ investigation.” Going forward, for the remainder of the PV2 contract, the CO decision listed six conditions which she determined must be met in order for PWC to retain any early payment discounts it would receive from its suppliers (SOF ¶ 33). PWC appealed and now moves for summary judgment on the ground that the PV contracts expressly and unconditionally excepted early payment discounts from consideration in the pricing formula (SOF ¶¶ 3, 24).

In a supplemental CO decision issued on 24 April 2009, partly in response to PWC’s motion, the CO conceded that under the three contracts PWC “may retain...early payment discounts.” The CO’s decision went on to say, however, only “genuine and legitimate bona fide early payment discounts” may be retained and “[a]ll discounts that do not qualify as genuine and legitimate bona fide early payment discounts, regardless of how PWC has characterized them, must be passed on to DSCP.” The decision found the six conditions set out in the July 2007 CO decision “remain valid for the determination of what constitutes a genuine and legitimate bona fide early payment discount” under the PV2 contract prospectively. (SOF ¶ 36, gov’t mot. and opp’n, attach. 5) In response, the government moved to dismiss the appeal without prejudice, and asked us to deny PWC’s motion for summary judgment if we deny the motion to dismiss. PWC opposed the motion to dismiss.

While acknowledging that the Board generally has jurisdiction to consider non-monetary claims that seek an interpretation of a contract, the government asks us to

exercise our discretion to decline to decide a “largely academic contract interpretation question” and dismiss the appeal without prejudice (gov’t mot. and opp’n at 15). The government points out that the Federal Circuit has said that neither the Court of Federal Claims nor the Board is “required to issue a declaration of rights whenever a contractor raises a question of contract interpretation during the course of contract performance,” and that the court or board is free to consider the appropriateness of declaratory relief, including such factors as “[1] whether the claim involves a live dispute between the parties, [2] whether a declaration will resolve that dispute, and [3] whether the legal remedies available to the parties would be adequate to protect the parties’ interests.” *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271, *reh’g denied*, 186 F.3d 1379 (Fed. Cir. 1999).

Although it could be argued that the first and third *Alliant* factors are met, we find the second factor problematic. The second factor is “whether a declaration will resolve [the]...dispute.” *Alliant* at 1271. Here, the government argues that to resolve the dispute “each early payment discount retained by PWC would need to be evaluated to determine if it was in fact a genuine, bona fide early payment discount.” The government tells us that since PWC has not identified a single specific early payment discount for evaluation, “the Board would be greatly handicapped in making even a general decision on the issue.” (Gov’t mot. and opp’n at 17-18)

We do not want to leave the impression that the government is home free with respect to the six conditions which it contends must be met in order for any early payment discount to be considered a “genuine and legitimate bona fide early payment discount” for purposes of the PV contracts. Although these conditions may reflect an established industry definition of early payment discount they are not expressly stated in the PV contracts and it remains to be seen in the fuller context of a monetary claim whether they are valid.

CONCLUSION

Because we are not persuaded that a decision in the nature of a declaratory relief at this juncture will resolve the parties’ dispute, in exercising our discretion we dismiss this appeal without prejudice to *de novo* review of the CO’s 18 July 2007 decision as supplemented on 24 April 2009, in any subsequent appeal.

Dated: 25 September 2009

PETER D. TING
Administrative Judge
Armed Services Board

of Contract Appeals

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

MONROE E. FREEMAN, JR.
Administrative Judge
Acting 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. 56116, Appeal of Public Warehousing Company, K.S.C., rendered in conformance with the Board's Charter.

Dated:

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