

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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WestWind Technologies, Inc. ) ASBCA No. 57436  
 )  
Under Contract Nos. DAAA09-99-D-0014 )  
W52P1J-05-D-0010 )

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CPT Matthew E. Dyson, JA  
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OPINION BY ADMINISTRATIVE JUDGE PEACOCK  
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal involves the withholding of fees under Cost-Plus-Fixed-Fee (CPFF) orders issued against the referenced contracts. Both parties have moved for a summary judgment. We grant the government motion and deny the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 4 August 1999, the government, through the Rock Island Contracting Center, issued indefinite-delivery/indefinite-quantity (IDIQ) Contract No. DAAA09-99-D-0014 (base contract) to Skyhook Technologies, Inc. (Skyhook) (R4, tab 1 at 1, 3, 6). The agreement reached by the government and Skyhook “provide[d] an omnibus contract capable of accepting any workload in the area of support services to DOD customers, other Government agencies, and commercial entities. Work [was to] be accepted or negotiated on a work order/task order basis under the general terms and conditions of this contract.” (R4, tab 1 at 4) Through novation, appellant,

WestWind Technologies, Inc. (WestWind) became the successor in interest to Skyhook effective 1 January 2002<sup>1</sup> (R4, tab 1 at 6).

2. Base contract Section A – SUPPLEMENTAL INFORMATION, at sub-section C.4, established the following Scope of Work: “The contractor shall furnish the end user all labor and services required to accomplish all approved work orders/task orders. Each task will have a statement of work, a negotiated cost, and delivery schedule.” It also established, at sub-section C.9, that “[e]ach order under the subject contract will specify its appropriate paying office.” (R4, tab 1 at 4-5) The base contract expressly contemplated that price proposals could be submitted and task orders issued on a CPFF, Time and Materials (T&M) or Firm-Fixed-Price (FFP) basis (R4, tab 1 at 11).

3. At section I, the base contract incorporated by reference, among other clauses, FAR 52.233-1, DISPUTES (JUL 2002) and, FAR 52.216-8, FIXED FEE (MAR 1997) which reads as follows:

(a) The Government shall pay the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee shall be made as specified in the Schedule; provided that after payment of 85 percent of the fixed fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the total fixed fee or \$100,000, whichever is less. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

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<sup>1</sup> Despite the fact that the novation was not effective until 1 January 2002, delivery orders were issued to WestWind under the base contract prior to that date (R4, tab 1 at 6, tabs 2-4).

(R4, tab 1 at 21-22) The authority for inserting this clause in the base contract is found at FAR SUBPART 16.3—COST-REIMBURSEMENT CONTRACTS which directs, at paragraph 16.307(b) that “[t]he contracting officer shall insert the clause at 52.216-8, Fixed Fee, in solicitations and contracts when a cost-plus-fixed-fee contract...is contemplated.”

4. FAR 16.306, COST-PLUS-FIXED-FEE CONTRACTS, describes this type of contract as follows:

(a) *Description.* A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual cost, but may be adjusted as a result of changes in the work to be performed under the contract....

5. The base contract did not include a “schedule” setting forth the items to be delivered pursuant to contract line item numbers (CLINs). Nor did the base contract specify monetary terms or a fixed fee. The deliverables, cost and fixed fee were subsequently negotiated in connection with each order contemporaneously with its issuance. The base contract, as modified through Modification No. P00013, contained the following clause concerning these details (R4, tab 1 at 11):

## B. ORDERING PROCEDURES

1. Organizations that require the services of the LSF [Logistic Support Facility] will submit a requirement to the Logistics Support Facilities Management Activity, (LSFMA). The request should include the following information: Background of the requirement; services to be performed; items to be delivered and delivery schedule and/or performance period; government furnished property to be provided (if required) and security classification designated for the task to be performed.

2. The [LSFMA] will determine the LSF capacity and capability. When approved, the requirement will be submitted to [appellant] for price proposal preparation. Price proposals may be Cost Plus Fixed Fee (CPFF), Time and Material (T&M) or Firm Fixed price (FFP). All requirements will be priced in accordance with Federal Acquisition Regulation (FAR) requirements. Commercial work will be

priced following similar procedures except for fee, which will be negotiated.

3. The completed price proposal will be submitted to the requiring organization through the LSFMA. Technical evaluations will be performed by the requiring organization. The contracting officer, supported by the LSFMA and contractor personnel will perform cost and price negotiations. Funding requirements will be the responsibility of the requiring organization.

4. When negotiations are complete, and funds submitted to the LSFMA government support personnel, a Work Order/Task Order will be issued. The Work Order will be comprised of all information necessary to complete the requirement and administer the Work Order.

6. From 2001 to 2004, WestWind negotiated and performed 31 different task orders under the base contract (R4, tabs 2-32). Each task order was priced on a cost-plus-fixed-fee basis and paid with funds from one of two individual paying activity codes,<sup>2</sup> HQ0304 (R4, tabs 2-6, 8-32) or HQ0339 (R4, tab 7).

7. On 13 January 2005, the government, again through the Rock Island Contracting Center, issued a second base IDIQ contract, Contract No. W52P1J-05-D-0010, to WestWind under substantively equivalent terms and conditions as the first including the same Fixed Fee clause (R4, tab 33 at 1, 3, 15). The EXECUTIVE SUMMARY states that the “contractual agreement between the LSFMA and WTI [WestWind Technologies, Inc.] will provide an omnibus contract capable of accepting any workload in the area of support services to DOD customers, other Government agencies, and commercial entities. Work will be accepted or negotiated on a delivery order basis under the general terms and conditions of this contract.” This summary also stipulated that “[t]he LSFMA and AFSC [Army Field Support Command] Acquisition Center will negotiate schedule, cost and performance standards with each end user. Changes to Delivery Orders will require prior approval of the end user.” (R4, tab 33 at 3)

8. From January 2005 to September 2007, WestWind negotiated and performed 87 different task orders under the second base contract (R4, tabs 34-120). Each task order was priced on a cost-plus-fixed-fee basis and each was to be paid with funds from

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<sup>2</sup> The Procedures, Guidance and Information (PGI) section of the DFARS instructs that the payment code to be used in box 15 of DD Form 1155, ORDER FOR SUPPLIES OR SERVICES, will be “the DODAAD code of the paying activity.” PGI 253.213-70(e)15.

one of four individual payment codes, HQ0304 (R4, tabs 34-35, 38-79, 81-96, 98-120), HQ0301 (R4, tab 97), HQ0303 (R4, tabs 36-37), or HQ0105 (R4, tab 80).

9. Delivery (or task) orders issued under both base contracts detailed the prices and deliverables to be furnished pursuant to CLINs, stated that the orders were issued subject to the terms and conditions of the base contracts, and stated that pertinent CPFF clauses (as opposed to T&M or FFP clause) identified and incorporated by reference into the base contracts “shall be in effect” (*see, e.g.*, R4, tab 2 at 1, 3, 8-11).

10. In accordance with the terms of paragraph (b) of each of the base contracts’ Fixed Fee clause, when making payment to the contractor, the contracting officer withheld 15% of the negotiated fixed fee (up to \$100,000) in each task order issued against both base contracts (R4, tabs 2-32, 34-239).

11. By letter dated 7 July 2010, WestWind submitted a certified claim, in the amount of \$367,273.14, in which the contractor alleged that the government was withholding in excess of the amount authorized under FAR 52.216-8(b). Specifically, WestWind wrote:

FAR 52.216-8(b), which you [the contracting officer] cited in the referenced correspondence, allows the government to withhold the lesser of 15% of the fixed fee portion of the contract or \$100,000. In this case, the government has withheld a portion of the fixed-fee [sic] under the two contracts at issue, which exceeds \$100,000 as to each contract. Under the clear language of FAR 52.216-8(b), the maximum amount of withholding as to each contract is \$100,000. Furthermore, WTI is entitled to 75% of the \$100,000 withheld on each contract, based upon its satisfaction of the requirements for same found in FAR 52-216-8(b). You acknowledged WTI’s entitlement to 75% of the fee withheld in your letters referenced above. Therefore, the total holdback on each contract should, at this point, be no more than \$25,000 per contract. Based on the clear language of the FAR, the government is improperly withholding at least \$367,273.14 of fixed fee, which WTI should be allowed to invoice immediately.

(R4, tab 246 at 1)

12. The contracting officer issued his final decision on 27 August 2010. In the final decision, the contracting officer disputes the contractor’s interpretation of FAR 52.216-8(b), maintaining that the withholding amount of 15% was properly applied to the

fixed-fee in each order, rather than a cumulative maximum of \$100,000 to be applied once per each base contract. (R4, tab 247)

13. Appellant filed its timely appeal which was docketed on 22 November 2010 as ASBCA No. 57436.

14. Following the filing of the complaint and Rule 4 in this matter, the government filed a motion for summary judgment, which appellant opposed and filed its cross-motion for summary judgment.

### DECISION

Appellant contends that the \$100,000 fee withholding limitation stipulated in FAR 52.216-8(b) is to be applied once per each of the two base contracts, regardless of the number, prices and fees of task orders issued. Appellant emphasizes that FAR 52.216-8(b) is included in the base contract and argues that the limitation applies to “this contract.” (App. br. at 3-4)

The government maintains that the fixed-fee withholding limitation applies to each order, arguing that the orders meet the FAR 2.101 definition of a contract and the base contract does not contain a schedule or fixed-fee. Therefore, the only appropriate interpretation according to the government is to apply the Fixed Fee clause withholding limitation to each order. (Gov’t br. at 5-7)

Summary judgment is appropriate where the moving party establishes that there are no genuine issues of material fact and the moving party establishes that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1371 (Fed. Cir. 2005). Both parties are in agreement on all material facts but dispute the legal consequences of those facts.

The case requires us to interpret FAR 52.216-8, FIXED FEE (MAR 1997). That clause provides in relevant part:

(a) The Government shall pay the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee shall be made as specified in the Schedule; provided that after payment of 85 percent of the fixed fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the

Government's interest. This reserve shall not exceed 15 percent of the total fixed fee or \$100,000, whichever is less. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract....

The question before us is whether the limitation that the “reserve shall not exceed 15 percent of the total fixed fee or \$100,000, whichever is less” applies to the contract as a whole or to the individual orders issued under it. We construe the quoted language as applying to the individual orders as a matter of textual analysis.

Paragraph (a) says that the government shall pay, for performance of “this contract,” the “fixed fee specified in the Schedule.” The contract schedule does not specify any fixed fee, so the reference “specified in the Schedule” must be to the fixed fee specified in the schedule of each of the individual orders.

Similarly, the first clause of the first sentence of paragraph (b) refers to payment of the fixed fee being made as “specified in the Schedule.” Again, the reference must be to the fixed fee specified in the schedule of each of the individual orders. The second clause of that sentence refers in turn to “payment of 85 percent of the fixed fee.” The words “the fixed fee” relate back to the fixed fee described in the first clause, namely the fixed fee in each of the individual orders. That is the fee as to which payment of 85 percent must be made. The second sentence then says: “This reserve shall not exceed 15 percent of the total fixed fee or \$100,000, whichever is less.” Considering that 15 percent represents the remainder after 85 percent is paid, “fixed fee” again refers to the fixed fee in each of the individual orders. The word “total”, in context, refers to the total of the fixed fee due under each individual order. The third sentence states “The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract....” This sentence suggests that there may be multiple withholds under the contract, consistent with the interpretation that the government may withhold 15 percent or \$100,000, whichever is less, under each individual order. The sentence then states explicitly, in contrast to the prior two sentences, that 75 percent of all of the withholds under “this contract” shall be released. We conclude, therefore, that the proper interpretation of the Fixed Fee clause is that the government may withhold 15 percent of the fixed fee or \$100,000, whichever is less, on each individual order until such time as the contracting officer receives the certified final indirect cost rate proposal, as more particularly specified in the clause, at which time it must release 75 percent of all fee withholds under the contract.

CONCLUSION

For the reasons discussed above, appellant's motion for summary judgment is denied, the government's motion for summary judgment is granted, and appellant's appeal is denied.

Dated: 21 July 2011



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ROBERT T. PEACOCK  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur



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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals



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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. 57436, Appeal of WestWind Technologies, Inc., rendered in conformance with the Board's Charter.

Dated:

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