

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
MCC Construction Corporation) ASBCA No. 57400
)
Under Contract No. W912LA-08-D-0019)

APPEARANCE FOR THE APPELLANT: Charles R. Lucy, Esq.
Holland & Hart LLP
Colorado Springs, CO

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ K.L. Grace Moseley, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties have moved for summary judgment, each contending that it is entitled to prevail as a matter of law. There are no disputed issues of material fact. The parties seek an interpretation of the phrase “subsequent contracting opportunities”¹ as used in section 713(b) of the Small Business Competitiveness Demonstration Program Act of 1988 (the Act). 15 U.S.C. § 644 note.² MCC Construction Corporation (MCC) interprets the phrase to mean subsequent solicitations of contracts. The government interprets the phrase to mean subsequent requests for task order proposals. Alternatively, the government argues that it satisfied all its legal obligations by purchasing the minimum amount required by the contract. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

The Act provided, in part, as follows:

Sec. 712. Enhanced small business participation goals.

(a) Enhanced goals for designated industry groups.—
Each participating agency shall establish an annual small
business participation goal that is 40 percent of the dollar

¹ The Board requested supplemental briefs on the meaning of “subsequent contracting opportunities” on 16 February 2012. The last brief was received on 2 April 2012.

² The Act is set out at 15 U.S.C. § 644 note. It was repealed by Pub. L. No. 111-240, Title I, § 1335(a), Sept. 27, 2010, 124 Stat. 2543 (2010).

value of the contract awards for each of the designated industry groups....

....

(d) Monitoring agency performance.—

(1) Participating agencies shall monitor the attainment of their small business participation goals on an annual basis. An annual review by each participating agency shall be completed not later than January 31 of each year, based on the data for the preceding fiscal year, from October 1 through September 30.

....

(3) Modifications to a participating agency's solicitation practices, pursuant to section 713(b), shall be made at the beginning of the fiscal year quarter following each review, if the rate of small business participation is less than 40 percent of the contract awards.

Sec. 713. Procurement procedures.

(a) Full and open competition.—Except as provided in subsections (b) and (c), each contract opportunity with an anticipated value of more than \$25,000 for the procurement of services from firms in the designated industry groups...shall be solicited on an unrestricted basis during the term of the Program, if the participating agency has attained its small business participation goal pursuant to section 712(a). Any regulatory requirements which are inconsistent with this provision shall be waived.

(b) Restricted competition.—If a participating agency has failed to attain its small business participation goal[,] subsequent contracting opportunities...shall be solicited through a competition restricted to eligible small business concerns...only at those buying activities of the participating agency that failed to attain the small business participation goal.... Upon determining that its contract awards to small business concerns again meet the goals required by section 712(a), a participating agency shall promptly resume the use of unrestricted solicitations.... Such modifications in the

participating agency's solicitation practices shall be made as soon as practicable, but not later than the beginning of the quarter following completion of the review made pursuant to section 712(d) indicating that changes to solicitation practices are required.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 5 June 2006, the United States Property and Fiscal Officer (USPFO)³ for California issued request for proposals (RFP) No. W912LA-06-R-0009-0005 for a multiple award task order contract (MATOC) to provide maintenance, repair, construction, and design-build services in support of National Guard activities in central California. The acquisition was part of the Small Business Competitiveness Demonstration Program (Program) established by the Act. The RFP contemplated a base period of two years and three one-year option periods. (R4, tab 1) The minimum value for all orders issued against the contract was \$200 (R4, tab 2 at 7 of 45).

2. On 9 April 2008, the USPFO awarded 13 MATOCs. MCC, a large business, was one of the awardees under the captioned contract number. (Gov't mot., ¶ 4)

3. Paragraph 4.3.2 of the contract provided, in part, as follows:

4.3.2. All eligible MATOC contractors will be provided a fair opportunity to compete for each project offered under this contract unless the...(F[AR] 16.505(b)(2)) exceptions apply.^[4]

(R4, tab 2 at 26 of 45)

4. On 2 June 2008, the Department of Defense (DoD) issued a policy memorandum announcing the results of its annual review of small business participation data for fiscal year 2007. The DoD and the Army (among other agencies) failed to meet its small business participation goals for 2007. The memorandum provided, in part, as follows:

Under the Small Business Competitiveness Demonstration Program, small business set-asides are suspended for certain Designated Industry Groups (DIGs). However...participating agencies such as the Department of

³ The USPFO's authority to issue federal contracts is based on a delegation from the Secretary of the Army. *See* National Guard Federal Acquisition Regulation Supplement (NGFARS) 1.601-100(f).

⁴ FAR 16.505(b)(2) lists four exceptions to this requirement. The government does not allege that any of those exceptions apply here.

Defense (DoD) are required to reinstitute the use of small business set-asides whenever contract awards to small business, under any DIG, fall[s] below a 40 percent participation performance rate. Reinstitution of small business set-asides is limited to the organizational unit(s) within the participating agency that failed to meet the small business participation goal(s)....

[F]or the 12-month period ending September 30, 2007, DoD's small business participation rate was less than 40 percent....

(R4, tab 3)

5. On 11 June 2008, the USPFO awarded TO No. 5001 to MCC in the amount of \$2,002,418 for repair of a Fuel Cell Hangar, Project # HAYW962006, at the Fresno Air National Guard Station, thus meeting the minimum guarantee under the contract (R4, tab 4 at 1-2 of 6).

6. On 24 May 2009, the USPFO issued a "REQUEST FOR TASK ORDER PROPOSAL" (HAYW062171) under the MATOC to install direct digital controls basewide at a National Guard installation in Fresno, California. Although the RFP was initially unrestricted, the Army amended it two days later and restricted it to small business concerns. (R4, tabs 6-6A, 7 at 3)

7. On 26 May 2009, the USPFO issued another request for task order proposal (HAYW052114) under the MATOC to remodel Building 125, the NCC&CF Storage Room and Offices. The solicitation was totally set-aside for small business. (R4, tab 11 at 5)

8. On 26 June 2009, MCC requested the contracting officer (CO) to withdraw the total small business set-aside requirement for task orders HAYW062171 and HAYW052114 and affirm that the contract was not subject to small business set-asides. Alternatively, MCC requested an equitable adjustment sufficient to compensate it for the loss of revenue resulting from its exclusion from the competition. (R4, tab 11) The CO denied the request on 20 July 2009 (R4, tab 12).

9. On 9 July 2010, MCC submitted a certified claim to the CO requesting that the total small business set-aside designation for each and every task order issued, or to be issued, under the contract be withdrawn, or to compensate MCC \$1,120,743.20 for breaching the "fair opportunity to compete" clause in the contract. MCC also alleged that the CO abused his discretion by restricting the competition to small businesses. (R4, tab 14)

10. On 23 July 2010, the CO issued a final decision denying the claim (R4, tab 15).

11. MCC appealed the denial of its claim to this Board, where it was docketed as ASBCA No. 57400 on 19 October 2010.

DECISION

The material facts are undisputed. MCC was one of 13 contractors awarded a MATOC pursuant to the Act for maintenance, repair, construction, and design-build services in support of National Guard activities in central California. The solicitation was unrestricted. After award, the government issued TO No. 5001 in the amount of \$2,002,418 to MCC. Section 712(b) of the Act established a small business participation goal for participating agencies. If a participating agency failed to meet its small business participation goal, section 713(b) of the Act required that all “subsequent contracting opportunities” be restricted to small business concerns. The Act did not define the phrase subsequent contracting opportunities. On 2 June 2008, the DoD issued a policy memorandum with the results of its annual review of small business participation data. The Army was among those agencies that failed to meet its small business participation goal for fiscal year 2007. As a result, the government reinstated small business set-asides for all subsequent task orders under the MATOC, excluding MCC, a large business, from competing for any subsequent task orders.

Based on its analysis of the language of the Act, MCC argues that subsequent contracting opportunities can only mean a subsequent solicitation of a contract as opposed to a request for a task order proposal. MCC’s analysis highlights the text of the Act as follows:

[Sec. 712] (d) Monitoring agency performance.—

(1) Participating agencies shall monitor the attainment of their small business participation goals **on an annual basis**. An annual review by each participating agency shall be completed not later than January 31 of each year, **based on the data for the preceding fiscal year**, from October 1 through September 30.

....

(3) **Modifications** to a participating agency’s **solicitation practices, pursuant to section 713(b), shall be made** at the beginning of the fiscal year quarter **following each review**, if the rate of small business participation is less than 40 percent of the contract awards.

Sec. 713. Procurement procedures.

(a) Full and open competition.—Except as provided in subsections (b) and (c), **each contract opportunity** with an anticipated value of more than \$25,000 for the procurement of services from firms in the designated industry groups (unless set aside pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)) or section 2323 of title 10, United States Code) **shall be solicited on an unrestricted basis** during the term of the Program, if the participating agency has attained its small business participation goal pursuant to section 712(a). Any regulatory requirements which are inconsistent with this provision shall be waived.

(b) Restricted competition.—If a participating agency has failed to attain its small business participation goal under section 712(a), **subsequent contracting opportunities**, which are in excess of the reserve thresholds specified pursuant to section 712(b) **shall be solicited through a competition restricted to eligible small business concerns pursuant to section 15(a) of the Small Business Act** (15 U.S.C. 644(a)) only at those buying activities of the participating agency that failed to attain the small business participation goal required by section 712(a). Upon determining that its contract awards to small business concerns again meet the goals required by section 712(a), a participating agency **shall promptly resume the use of unrestricted solicitations** pursuant to subsection (a). **Such modifications in the participating agency's solicitation practices shall be made** as soon as practicable, but not later than the beginning of the quarter **following completion of the review made pursuant to section 712(d) indicating that changes to solicitation practices are required.**

(App. supp. br. at 4-5) (Emphasis in original)

We agree with MCC that the Act clearly indicates that subsequent contracting opportunities means a subsequent solicitation of a contract, not a subsequent request for a task order proposal. Thus, our sole function is to enforce it according to its terms. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

The government's arguments do not persuade us to a different result. The government argues that task orders are contracts or acquisitions. As a result, it concludes

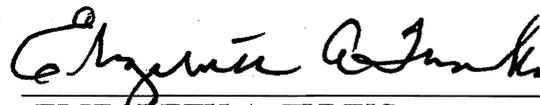
that subsequent contracting opportunities must mean task orders. Contrary to the government's contention, FAR 2.101 does not define a task order as a contract in the first instance. FAR 2.101 defines a task order as "an order for services placed against an established contract or with Government sources." While a task or delivery order may also be a contract under some circumstances, *see AmerescoSolutions, Inc.*, ASBCA Nos. 56824, 56867, 11-1 BCA ¶ 34,705 at 170,906, the plain meaning of the Act does not suggest such an interpretation here.

The government also cites *Delex Systems, Inc.*, B-400403, 2008 CPD ¶ 181 (Comp. Gen. Oct. 8, 2008) for the proposition that a task order is an acquisition. *Delex* concerned FAR 19.502-2(b), which incorporates the Rule of Two by requiring the CO to set-aside any acquisition over \$100,000 for small business concerns if there is a reasonable expectation of receiving offers from two or more responsible small business concerns. This provision is in direct conflict with section 713(a) of the Act which requires that solicitations in designated industry groups be unrestricted as long as the participating agency has attained its small business participation goal. Notwithstanding this apparent conflict, section 713(a) of the Act provides that "[a]ny regulatory requirements which are inconsistent with this provision shall be waived." We are not persuaded, therefore, that the interpretation in *Delex* controls in the context of the statute here.

Alternatively, the government argues that it satisfied all its legal obligations by purchasing the minimum quantity under the contract. We considered and rejected this argument in *Community Consulting International*, ASBCA No. 53489, 02-2 BCA ¶ 31,940 at 157,790. We endorse that view here.

We conclude that the government breached the contract when it did not permit MCC to compete for the two task orders. Appellant's motion for summary judgment is granted. The government's motion for summary judgment is denied. The appeal is sustained, and remanded to the parties for determination of quantum.

Dated: 16 July 2012



ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

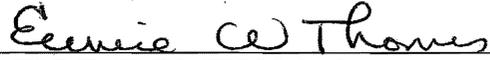
(Signatures continued)

I concur



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

I concur



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. 57400, Appeal of MCC Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

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