

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Dynamics Research Corporation) ASBCA No. 57830
)
Under Contract No. W91WAW-08-D-0013)

APPEARANCE FOR THE APPELLANT: Brian S. Gocial, Esq.
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Army Chief Trial Attorney
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Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES

Dynamics Research Corporation (DRC) timely appealed from the contracting officer's (CO) 15 September 2011 final decision which denied DRC's 15 July 2011 claim for \$288,111.37 of "unfunded work" under an incrementally funded task order issued under the captioned contract. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7701-7109. The parties elected a Board Rule 11 decision on the written record. We are to decide entitlement only.

FINDINGS OF FACT

1. On 19 March 2008 the Army Contracting Agency¹ awarded indefinite-delivery, indefinite-quantity, Contract No. W91WAW-08-D-0013 (the contract) providing for the issuance of task orders to DRC for services to support the Naval Air Systems Command (NAVAIR) Joint DoD Maintenance Resource Planning Program Office for the base year (19 March 2008 through 18 March 2009) and two option years (R4, tab 1 at 1-2, 14, 16, 42-43).

2. Contract Modification Nos. P00003 and P00004 exercised Option Periods 1 and 2, extending the contract to 18 March 2011 (R4, tab 1 at 4, 7, tabs 3, 4).

3. On 30 June 2010 ACC contracting officer (CO) Danny Golden issued Task Order No. 0008 (TO 8) under the contract to DRC, in the estimated amount of

¹ Contract Modification No. P00002 changed the name of the government activity to the Army Contracting Command (ACC) (R4, tab 3 at 2).

\$2,477,065.65, for services to support the Missile Defense Agency's (MDA) delivery of "Lean Six Sigma (LSS) –Pathways" (LSS-Pathways) to selected Ballistic Missile Defense System program offices, prime contractors and suppliers (R4, tab 9 at 1, 10).

4. TO 8 had a base year from 1 July 2010 through 30 June 2011 including contract line item numbers (CLINs) 2001, 2002, 2003 and 2005, and had two options, which were not exercised. CLIN 2001, "Fixed Price Labor," prescribed an "FFP" of \$146,636.556 per month for 12 months, totaling \$1,759,638.67. (R4, tab 9 at 2-11) Only the funding for CLIN 2001 is in issue in this appeal (app. br. at 7 ¶ 36).

5. TO 8 incorporated all clauses in the contract, including DFARS 252.201-7000 CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991) that provided: "The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract" ; section G, ¶ 1.2, that provided:

The contractor is advised that only the Contracting Officer [CO] can change or modify the contract terms and other action, which obligates the Government. Then, such action must be set forth in a formal modification to the contract. Contractors who rely on direction from other than the [CO] or a COR acting within the strict limits of his responsibilities as set forth in his/her letter of appointment do so at their own risk and expense. Such actions do not bind the Government contractually. Any contractual question shall be directed to the [CO].

and FAR 52.242-15, STOP-WORK ORDER (AUG 1989). (R4, tab 1 at 35, 41, tab 9 at 32)

6. TO 8 designated Hillari K. Hawkins of ACC as contract administrator; Stephen M. Dudley and Jeffery O'Neil of NAVAIR, respectively, as the COR and Alternate COR; and Steve Linder of MDA as Technical Point of Contact (TPOC), whose "authority is limited to providing basic guidance and advice to the contractor while on-site," and required distribution of DRC's Monthly Status Reports (data item A005) to the COR and TPOC (R4, tab 9 at 1, 11-12, 37).

7. TO 8 included the DFARS 252.232-7007, LIMITATION OF GOVERNMENT'S OBLIGATION (MAY 2006) ("LOGO") clause, which provided in pertinent part:

(a) Contract line item(s) 2001 through 2005 are incrementally funded. For these item(s), the sum of \$500,000.00 of the total price is presently available for payment and allotted to this contract. An allotment schedule is set forth in paragraph (j) of this clause.

(b) For item(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement in the event of termination of those item(s) for the Government's convenience, approximates the total amount currently allotted to the contract. The Contractor is not authorized to continue work on those item(s) beyond that point. The Government will not be obligated in any event to reimburse the Contractor in excess of the amount allotted to the contract for those item(s)....

(c) Notwithstanding the dates specified in the allotment schedule in paragraph (j) of this clause, the Contractor will notify the [CO] in writing at least 90 days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the applicable item(s). The notification will state (1) the estimated date when that point will be reached and (2) an estimate of additional funding, if any, needed to continue performance of applicable line items up to the next scheduled date for allotment of funds identified in paragraph (j) of this clause....

....

(j) The parties contemplate that the Government will allot funds to this contract in accordance with the following schedule:

On execution of contract	\$500,000.00
July 2010	\$494,266.42
September 2010	\$494,266.42
November 2010	\$494,266.42
January 2011	\$494,266.39

TOTAL \$2,477,065.65

(R4, tab 9 at 31-32) Of the \$500,000, \$409,000 was allotted to CLIN 2001 (*id.* at 2).

8. CO Golden increased the total funding for TO 8, CLIN 2001, in Modification No. 01 (Mod. 01) dated 6 August 2010 and in Modification No. 2 (Mod. 02) dated 13 August 2010 by \$732,600 from \$409,000 to \$1,141,600. Those modifications revised the LOGO clause ¶ (j) allotment schedule as follows:

Mod. 01

On execution of contract	\$500,000.00
5 August 2010	\$181,440.00
30 September 2010	\$312,826.42
1 October 2010	\$494,266.42
30 November 2010	\$494,266.42
1 January 2011	\$494,266.39

Mod. 02

On execution of contract	\$500,000.00
5 August 2010	\$181,440.00
13 August 2010	\$670,160.00
1 October 2010	\$562,732.83
1 January 2011	\$562,732.82

(R4, tab 10 at 3-5, tab 11 at 2, 4, 6-7)

9. On 20 January 2011 DRC notified ACC's Hillari Hawkins and NAVAIR contractor Integri LLC's John Bechard that it had \$121,000 left on the contract. DRC stated that the Mod. 02 funding schedule had not been followed and wanted assurance of receiving funding in the next three weeks. Mr. Bechard told Ms. Hawkins and DRC that \$214,000 had been received, but would take 5-6 weeks to place on the contract. In response DRC asked Mr. Bechard to accelerate the funding. DRC also said the foregoing \$121,000 was mistaken, and actually was \$262,000. (App. supp. R4, tab 25 at 1-3)

10. CO Angela Yates increased the funding for TO 8, CLIN 2001 by Modification No. 4 (Mod. 04) dated 9 February 2011 by \$214,000.00 to \$1,355,600. Mod. 04 revised the ¶ (j) allotment schedule as follows:

On execution of contract	\$500,000.00
5 August 2010	\$181,440.00
13 August 2010	\$670,160.00
1 February 2011	\$214,000.00
8 April 2011	\$911,465.65

(R4, tab 13 at 2, 4)

11. DRC’s monthly status reports set forth the following remaining funds for fixed price labor, CLIN 2001:

<u>Month</u>	<u>Amount Remaining</u>	<u>App. Supp. R4, tab</u>
Aug. '10	\$994,963.45	26 at 17
Sep. '10	\$701,690.35	27 at 17
Oct. '10	\$555,053.80	28 at 18
Jan. '11	\$329,144.15	29 at 22
Feb. '11	\$182,507.60	30 at 17
Mar. '11	\$ 55,243.50	31 at 16
Apr. '11	\$ 55,243.50 [sic]	32 at 16

DRC’s status reports stated: (a) January 2011: “Need additional funding to initiate program” with Raytheon, “Meet with Standard Missile Program Office to discuss obtaining funding to replace MDA’s arbitrary cut of DEP/DV MT and related funds,” “LSSP Battery: LithChem: likely not to initiate due to lack of funding.” (b) February 2011: “Meeting conducted with TPOC to discuss funding shortfalls.” (c) March 2011: “LSSP Battery: EaglePicher and LithChem: likely not to initiate due to lack of funding,” “Work with TPOC to obtain funding shortfall.” (d) April 2011: “Due to non-receipt of new funds DRC is unable to invoice.” (App. supp. R4, tab 29 at 26, tab 30 at 21, tab 31 at 20, tab 32 at 20)

12. According to DRC, and undisputed by respondent, its foregoing status reports were sent to ACC contract specialist Hawkins, NAVAIR contractor Bechard and MDA TPOC Linder (app. br. at 6, ¶ 28; gov’t reply br. at 2; cf. finding 6).

13. In a 12 April 2011 internal email TPOC Linder requested MDA to provide a \$361,000 funding increment to the DRC contract, stating that DRC was “working at risk.” On 4 May 2011 MDA financial analyst Jared Carpenter emailed to TPOC Linder:

The next increment of funding is currently in the approval process and should be certified with any luck by the end of this week. The next increment...will send \$361K, in addition to the \$214K already sent, for a total of \$575K funded in FY11. The approval process is normally a day, but given the recent tornado damage, the Huntsville MDA offices have been closed and there may be delays. Once the funding document is certified, I will forward to the NAVAIR POCs, and also cc to you.

TPOC Linder's 6 May 2011 email to NAVAIR contractor Bechard stated: "Funding is moving[,] will talk next week." On 9 May 2011 Mr. Bechard apparently forwarded the foregoing emails to DRC. (R4, tab 21, enclosure D at 8-11; app. br. at 7 ¶ 32)

14. MDA's John Joyce's 20 May 2011 email to TPOC Linder and NAVAIR contractors stated: "MDA has been operating under CRA [Continuing Resolution Act] for most of FY11.... The FY11 Appropriation^[2] included a Congressional mark (program reduction) in the amount of \$40M to the Enabling Technology Program Element.... As a result, SM3-IIB will not provide additional FY11 funding for the Lean Pathways Initiative effort at NAVAIR." TPOC Linder's 24 May 2011 email to Mr. Joyce stated: "I communicated to the contractor that funding was being delayed because of the continuing resolution. They decided on their own to work at risk because they felt MDA would honor the funding commitment." On 25 May 2011 TPOC Linder apparently forwarded those 20, 24 May 2011 emails to DRC. (R4, tab 21, enclosure D at 3, 6)

15. After a 24 May 2011 oral stop work order (R4, tab 22 at 1), ACC CO Yates' 25 May 2011 letter ordered DRC to stop work on TO 8 Performance Work Statement (PWS) §§ 1.6.1, 1.6.2, 1.6.3 and 5.1.2 for LSS-Pathways for "(BMDS) Program Offices and Battery Manufacturers" only, due to "lack of available funding." This order was to be in effect until funding was provided and a supplemental agreement was reached, or the government determined that no more funding was available and issued a partial or full convenience termination, or the current performance period expired (on 30 June 2011) and was confirmed by TO 8 Mod. 07. (App. supp. R4, tab 29 at 1-2; R4, tab 20)

16. As of 29 June 2011, the government allotted \$1,355,600 to TO 8 CLIN 2001 (R4, tab 17 at 17). DRC invoiced, and the government paid, \$1,355,600.00 for TO 8 CLIN 2001 services performed from 1 July 2010 through 30 June 2011 (R4, tabs 23, 24).

17. DRC's 15 July 2011 certified claim demanded \$288,111.37 for "unfunded work" performed under TO 8, CLIN 2001, during fiscal years 2010 and 2011 "based on assurances received from the Government [namely, "the MDA...(TPOC) Mr. Steve Linder"] that funding would be made available" (R4, tab 21 at 1-2). DRC included invoice No. 011 dated 13 July 2011 in the amount of \$288,111.37, stating: "Claim for Payment of Unfunded Work Performed under Contract W91WAW-08-D-0013, Task Order 0008, CLIN 2001" (R4, tab 21, enclosure F).

18. The 15 September 2011 final decision of ACC CO Valerie Mills denied DRC's 15 July 2011 claim in its entirety, stating that "[a]ny reliance by DRC on representations by Mr. Linder, who was not the COR, much less the authorized [CO], was patently unreasonable" and DRC did not notify the CO 90 days prior to the date it

² The "Department of Defense and Full-Year Continuing Appropriations Act, 2011," Pub. L. No. 112-10, 125 Stat. 38, was enacted 15 April 2011.

would expend 85% of the amount allotted to TO 8 (R4, tab 22 at 1-2). On 7 November 2011 DRC timely appealed that final decision to the ASBCA.

DECISION

The contract's LOGO clause provided that the contractor was not authorized to continue work on the incrementally funded items including CLIN 2001, beyond the point at which the total amount payable by the government, including convenience termination reimbursement, approximated the total amount allotted to the contract. That LOGO clause further provided that the contractor must notify the CO in writing at least 90 days before the date the contract work would reach 85% of the total amount then allotted. (Finding 7) DRS did not comply with those LOGO clause provisions by stopping when the work approximated the total amount allotted, and it did not notify the CO at least 90 days before it reached 85% of the total amount then allotted (findings 9, 11-12). Therefore, DRS cannot recover the costs it incurred in excess of the allotted funds under the LOGO clause, as we analyze below.

DRC cites *Applied Technology Associates, Inc.*, ASBCA No. 49200, 98-1 BCA ¶ 29,633, as authority to recover overrun costs. The LOGO clause in *Applied* lacked the key provision, "The Contractor will not be obligated to continue performance of the work beyond that point." That point meant the point when the amount payable by the government would approximate the total amount at the time allotted to the contract. We sustained the appeal on the rationale that "[u]nder the foregoing peculiar circumstances...the absence of the right of ATA to cease performance at the time of exhausting allotted funds made the notice provisions of contract 51's LOGO clause unenforceable." 98-1 BCA ¶ 29,633 at 146,843-44.

TO 8's LOGO clause is enforceable because its ¶ (b), provided:

For item(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement in the event of termination of those item(s) for the Government's convenience, approximates the total amount currently allotted to the contract. The Contractor is not authorized to continue work on those item(s) beyond that point.

(Finding 7) Thus, DRC had the duty to stop performing CLIN 2001 work when its performance and termination costs approximated the funds allotted for such CLIN.

We turn to whether DRC provided the TO 8 LOGO clause notice of impending exhaustion of allotted funds. DRC's 20 January 2011 emails notified ACC's

Hillari Hawkins and NAVAIR contractor Bechard that \$121,000, corrected to \$262,000, of TO 8 funds remained, but DRC did not provide the estimated date to reach the 85% point and estimated additional funds needed to continue performing CLIN 2001 (finding 9). Such emails did not satisfy DRC's LOGO clause duties.

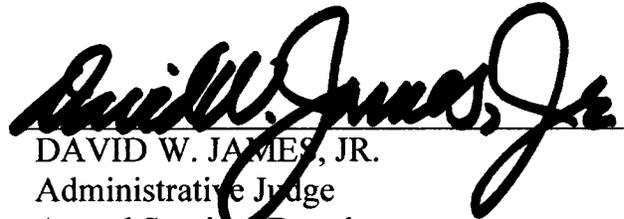
DRC's monthly status reports stated the amount remaining of CLIN 2001 allotted funds, but did not estimate the date when 85% of allotted funds would be expended and the additional funding needed to continue performance to the next scheduled date for fund allotment (finding 11). Thus, DRC's status reports did not satisfy its LOGO clause duties. As stated in *Falcon Research & Development Co.*, ASBCA No. 26853, 87-1 BCA ¶ 19,458 at 98,336, *aff'd*, 831 F.2d 1056 (Fed. Cir. 1987), with respect to a Limitation of Funds (LOF) clause whose notice requirement was functionally the same as that in the LOGO clause:

[N]ot every kind of notice complies with the LOF clause. Not only must the notice be in writing and addressed to the CO, but...it must also set forth the amount of additional funds which the contractor believes is required. A notice addressed to administrative personnel and not to the CO, does not comply with the LOF...clause....

DRC alleges that TPOC Linder assured it that funding would be made available (finding 17). The April-May 2011 emails of Mr. Linder and MDA described MDA's efforts to obtain further funding for CLIN 2001 performance (finding 13). If such emails were viewed as assuring DRC that such funding would be provided, a view that is by no means self-evident, Mr. Linder had no actual authority to assure DRC that the government would provide such funding (findings 5, 6). DRC does not deny Mr. Linder's statement that DRC "decided on their own to work at risk" on CLIN 2001 (finding 14). "A contractor cannot create an obligation on the part of the Government to reimburse it for a cost overrun by voluntarily continuing performance and incurring costs after the cost limit has been reached." *North American Rockwell Corp.*, ASBCA No. 14329, 72-1 BCA ¶ 9207 at 42,722 (construing LOC clause that superseded LOGO clause upon full funding of the contract).

Based on the foregoing analysis, we deny the appeal.

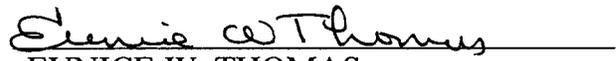
Dated: 26 March 2013


DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

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. 57830, Appeal of Dynamics Research Corporation, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals