

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
PAW & Associates, LLC ) ASBCA No. 58534  
)  
Under Contract No. W9133L-08-D-0010 )

APPEARANCE FOR THE APPELLANT: Paul A. Weaver, Jr.  
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
CPT Ahsan M. Nasar, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES  
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT  
OR IN THE ALTERNATIVE MOTION TO DISMISS

The captioned appeal arises from the contracting officer's (CO) 9 November 2012 denial of the 5 October 2012 claim of PAW & Associates, LLC (PAW) that respondent did not fairly and honestly evaluate PAW's April 2012 task order proposal and award PAW a task order under the captioned contract, and that it improperly divulged in a separate solicitation proprietary information contained in PAW's proposal. On 12 July 2013, respondent moved for summary judgment asserting that it had met its minimum purchase requirement under its indefinite delivery/indefinite quantity (IDIQ) contract with PAW and thus had no duty to award it another task order. In the alternative, respondent moved to dismiss for lack of jurisdiction the portions of PAW's appeal concerning respondent's alleged breaches of its implied duties to evaluate PAW's proposal fairly and honestly and not to divulge PAW's proprietary information. PAW opposed the motions on 14 August 2013, and respondent replied on 23 August 2013.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTIONS

1. Effective 22 April 2008, U.S. Army National Guard Bureau (NGB) CO Christine Pettigrew (CO Pettigrew) entered into multiple award IDIQ Contract No. W9133L-08-D-0010 (contract) with PAW for subject matter expert/program analysis support services. The contract provided for issuance of task orders. (R4, tab 1 at 1-2, 16, 28)
2. Contract Section B, Supplies or Services and Prices, stated that the period of performance (POP) consisted of a base year and four one-year option periods (R4, tab 1 at 2). Section F, Deliveries or Performance, specified the following POPs: Base year, 22 April 2008 to 21 April 2009; Option 1, 22 April 2009 to 21 April 2010; Option 2,

22 April 2010 to 21 March 2011 (CLIN 2001) and 22 April 2010 to 21 April 2011 (CLINs 2002, 2003); Option 3, 22 April 2011 to 21 April 2012; and Option 4, 22 April 2012 to 21 April 2013 (*id.* at 20-21).

3. Contract clause H-13, **ORDERING** (FAR 52.216-18) (OCT 1995), provided:

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of task orders by the individuals or activities designated in the contract. Such orders may be issued from date of contract award through expiration of the contract.

(b) All task orders are subject to the terms and conditions of this contract. In the event of conflict between a task order and this contract, the contract shall control.

(R4, tab 1 at 28) The contract also contained the FAR Ordering clause separately and specified in paragraph (a):

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of task orders by the individuals or activities designated in the contract. Such orders may be issued from **Date of Award through 21 April 2013**. [Emphasis in original]

(*Id.* at 33)

4. Contract Section B provided that the minimum guaranteed funding amount was \$250,000 and the minimum task order was \$25,000. It listed the base year and option year CLINs, at a minimum \$25,000 amount for each. (R4, tab 1 at 2, 10-11) From contract award through either February or April 2012 (respondent's and appellant's statements, respectively), NGB issued 12-14 contract task orders to PAW with a combined value exceeding \$2.9 million (compl. and answer ¶ 4). Appellant does not allege that respondent failed to meet its minimum order requirements under the contract.

5. The contract contained the FAR 52.212-4, **CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS** (FEB 2007) clause, which provides in part:

(d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended [CDA, now 41 U.S.C. §§ 7101-7109]. Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be

resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference....

(R4, tab 1 at 30) The incorporated FAR 52.233-1 Disputes clause also provides that the contract is subject to the CDA and that, except as otherwise provided in the CDA, “all disputes arising under or relating to this contract shall be resolved under this clause.”

6. Effective 1 October 2008, bilateral contract Modification No. P00003 (Mod. 3), signed by CO Pettigrew and by Paul A. Weaver, Jr., PAW’s president, provided that the government exercised its unilateral rights to extend the contract term for the stated period 1 October 2008 through 30 September 2009 and that the delivery schedule for option one CLINs 1001-1003 had been changed “from” (presumably meant “to”) POP 1 October 2008 to 30 September 2009 (R4, tab 4 at 1-4)

7. Effective 16 July 2009, unilateral contract Modification No. P00004 (Mod. 4), signed by CO LTC James A. Helm (CO Helm), exercised option year 2 for the stated period 1 October 2009 through 30 September 2010 (R4, tab 5 at 1-2, 6; *see* R4, tab 30 at 3).

8. Effective 19 August 2010, unilateral contract Modification No. P00006 (Mod. 6), signed by CO Pettigrew, exercised option year 3 for the stated period 1 October 2010 through 30 September 2011 (R4, tab 7 at 1-3, 5).

9. NGB CO Lisa Loverde’s (CO Loverde) 17 April 2012 email to Mr. Weaver requested a technical and price proposal for a “STEEP Task Order” pursuant to an attached performance work statement. She stated that she had a proposal from [DRAKE] but could not accept it because “our contract will be with PAW”. (R4, tab 16 at 1) Appellant’s claim states that it formed a subcontract relationship with DRAKE and movant refers to DRAKE as PAW’s subcontractor (R4, tab 29 at 4; gov’t mot. at 8 n.1). CO Helm’s final decision, below, stated that “[t]he understanding at the time was that this contract vehicle was to be used to make a non-competitive award to PAW for the requirement” (R4, tab 30 at 3; *see also* R4, tab 19 at 2 (same understanding by DRAKE)). There is no dispute that the STEEP task order was contemplated to be issued under the subject IDIQ contract (*see* R4, tab 29 at 4 n.3).

10. Effective 19 April 2012, bilateral contract Modification No. P00008 (Mod. 8), signed by CO Pettigrew and Mr. Weaver for PAW on 20 and 19 April 2012, respectively, provided that the government exercised its unilateral rights to extend the term of the contract for the stated period 22 April 2012 through 21 April 2013 for option period 4 (R4, tab 17 at 1-2, 5). The modification was executed prior to the 21 April 2013 contract expiration date contemplated in the contract Schedule (SOF ¶ 2) and in the contract’s Ordering clause (SOF ¶ 3) but over six months after the stated 30 September 2011 expiration of the option 3 year POP (SOF ¶ 8).

11. On 24 April 2012, PAW sent CO Loverde a “STEEP Follow-on” task order proposal pursuant to NGB’s solicitation under the subject contract (R4, tab 18 at 1-2). The proposal cited unnumbered “Solicitation No. W9133-R-11-OXX” and unnumbered “Task Order No. W9133L-08-D-0010/XXX” (*id.* at 2, 4) and stated:

Use and Disclosure of Data

This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed—in whole or in part—for any purpose other than to evaluate this proposal. However, if a contract is awarded to this Offeror as a result of—or in connection with—the submission of these data, the government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract....The data subject to this restriction are contained in Sheets 1 to 30.

(*Id.* at 4)

12. On 10 May 2012, NGB advised DRAKE and PAW concerning the STEEP project that the procurement was on hold until the program office had more time to fully develop its requirements (R4, tab 23 at 1).

13. On 5 September 2012, NGB notified Mr. Weaver that it was requesting proposals for “STEEP Solicitation No. W9133L-12-C-0147” and directed him to FedBizOpps to view the opportunity (R4, tab 26). On 7 September 2012, that solicitation was cancelled on the stated ground of “time constraints” (R4, tab 27 at 1).

14. NGB asserted to PAW on 29 September 2012 that the contract was no longer viable, on the grounds that option 4 was not timely exercised; Mod. 8 was void; and an award for the “STEEP project” under the IDIQ contract was impossible (R4, tab 28).

15. On 5 October 2012, PAW submitted a certified \$718,498.46 CDA claim to NGB. PAW alleged that NGB notified PAW that evaluation of PAW’s 24 April 2012 proposal was complete, but the procurement was placed “on hold”; NGB “was prepared to issue an order to acquire PAW’s approach” and on 29 September 2012, NGB notified PAW that the subject task order contract that CO Loverde had directed be used to conduct the acquisition “had expired more than six-months prior to the solicitation by the NGB for PAW’s task order proposal.” PAW asserted that the NGB COs failed to exercise their fiduciary obligations properly to plan an acceptable acquisition strategy and denied PAW “a fair and honest evaluation” of its proposal, breached “the implied contract” formed when “PAW responded to the NGB solicitation with a fully compliant proposal,” arbitrarily and capriciously failed to comply with requirements to make a prompt award of any resulting task order to PAW and purposefully ignored the qualification under which

PAW had submitted its proposal by releasing PAW's proprietary information "for purposes other than the evaluation of PAW's approach." (R4, tab 29 at 1-2, 10)<sup>1</sup> While PAW claimed that respondent breached an implied-in-fact contract obligation to safeguard PAW's proprietary data in its 24 April 2012 proposal for a task order, it referred to the underlying IDIQ contract as the source of the government's task order obligations (*id.* at 6). PAW alleged that an "overwhelming amount" of the technical requirements in the 5 September 2012 STEEP solicitation reflected PAW's approach in its proposal in response to respondent's 17 April 2012 request for a task order proposal under the subject contract (*id.* at 5).

16. The 9 November 2012 final decision of CO Helm denied PAW's claim in its entirety and notified PAW of its appeal rights (R4, tab 30 at 1, 6-7).

17. In a sworn affidavit/affirmation dated 5 August 2013, CO Pettigrew stated:

4. That the procurement process associated with the [solicitation for the subject contract] resulted in my awarding three...ID/IQ contract[s], and each...had a period-of-performance of April 22, 2008 thru April 21, 2009, with four...year-long option periods (the "Multiple Awards").<sup>2</sup>

....

9. That I never intentionally initiated, or received and acted upon a request to change the periods-of-performance (base and option periods) associated with the Multiple Awards.

10. That the periods-of-performance (base and option periods) associated with the Multiple Awards are those delineated in the respective contracts at the time of their award.

11. That any expression of the periods-of-performance associated with Contract No. W9133L-08-D-0010 that differs from that reflected in the contract at the time of its award is in error.

(App. opp'n, attach. B (Pettigrew aff.); app. opp'n, exs. A-1 to -3)

---

<sup>1</sup> For purposes of its jurisdictional motion, despite DRAKE's involvement, the government assumes *arguendo*, but does not concede, that the alleged proprietary information at issue was that of appellant (mot. at 8 n.1).

<sup>2</sup> The referenced contracts were PAW's contract at issue and two contracts awarded to other contractors (app. opp'n, attach. B at 2).

## DECISION

### I. Respondent's Motion for Summary Judgment

With respect to respondent's motion for summary judgment on PAW's claim that NGB had the duty to award it a task order under the captioned contract based upon its 24 April 2012 proposal (SOF ¶ 15), a tribunal shall grant summary judgment if the movant shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Citing CO Pettigrew's sworn statement (SOF ¶ 17), appellant alleges that the stated option exercise periods under Mods. 3, 4 and 6 (SOF ¶¶ 6-8) erroneously differed from the contract-specified periods (SOF ¶ 2) and were due to typographical errors (app. opp'n at 3-4). Movant replies that "these disputed facts" are immaterial because, even if appellant were correct, respondent met the contract's minimum purchase requirements and had no further obligation to place orders with appellant (gov't reply br. at 3).

PAW has not alleged that respondent failed to order the minimum required quantity under the subject IDIQ contract (SOF ¶ 4). Further, neither party avers that the requirements that were the subject of the task order in question were acquired. PAW does not cite any decision holding that, notwithstanding the satisfaction of an IDIQ contract's minimum purchase requirement, the purchaser has the duty to order additional quantities during an option performance period. In fact, irrespective of the validity of CO Pettigrew's assertion that the performance periods for option years 1-3 were in error, and the resulting inference that the contract was still in effect when respondent exercised option 4, ordering more than the minimum quantity under an IDIQ contract is not required. *See Tekkon Engineering Co.*, ASBCA No. 56831, 10-2 BCA ¶ 34,563 at 170,442-43 (IDIQ contract specified no minimum quantity or work for, and government ordered no work in, option period 1; Board granted summary judgment to government on contractor's claim for unrecovered option period 1 costs); *Five Star Electronics, Inc.*, ASBCA No. 44984, 96-2 BCA ¶ 28,421 at 141,956-57 (indefinite quantity supply contract specified only a base year minimum quantity; no minimum quantity was required for any option year; Board granted summary judgment to government).

Accordingly, we hold that there are no genuinely disputed material facts that require denial of the motion. NGB did not breach any contract by failing to issue another task order to PAW. Respondent is entitled to judgment as a matter of law on this claim element and we grant its motion for partial summary judgment on this issue.

## II. Respondent's Motions to Dismiss

### A. Fair Opportunity

PAW contends that NGB breached an implied-in-fact contract duty to provide PAW a fair opportunity to be considered for issuance of a task order, in violation of FAR § 16.505(b)(1) (app. opp'n at 8-10). PAW argues that, under a multiple award, task order contract, the CO is required to afford all contractors a fair opportunity to submit an offer and have that offer fairly considered, without regard to the quantity of services previously ordered (app. opp'n at 5-6).

FAR 16.505(b)(1)(i) provided on 22 April 2008 when the contract was awarded:

(b) *Orders under multiple award contracts—*

(1) *Fair opportunity.*

(i) The [CO] must provide each awardee a fair opportunity to be considered for each order exceeding \$3,000 issued under...multiple task-order contracts, except as provided for in paragraph (b)(2) of this section.

FAR 16.505(b)(2) was to the same effect.

The above-quoted FAR provisions implemented 10 U.S.C. § 2304c(b), which provided:

(b) Multiple award contracts. When multiple task or delivery order contracts are awarded under section 2304a(d)(1)(B) or 2304b(e) of this title [10], all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts unless.... [There follow four exceptions.]

Respondent argues that the duty to provide a fair opportunity to be considered for a task order under a multiple award contract is based on an implied-in-law contract, which the ASBCA has no CDA jurisdiction to entertain (gov't mot. at 6-8). It states that FAR 16.505(b)(1) requires fair consideration of "proposals among multiple awardees on a potential ID/IQ contract" (emphasis in original), which is an implied-in-law duty (gov't reply br. at 6).

We need not resolve the parties' foregoing "implied-in-fact" and "implied-in-law" contract arguments. We base our decision instead on the express terms of the contract's

FAR 52.212-4(d), commercial items Disputes clause, which provides that the contract is subject to the CDA and directs the parties to resolve “any...claim, appeal or action arising under or relating to this contract” in accordance with the FAR 52.233-1 Disputes clause (SOF ¶ 5). The FAR 52.233-1 clause also provides that the contract is subject to the CDA and that all disputes arising or related to the contract are to be resolved under this clause. Both clauses encompass PAW’s fair opportunity claim which relates to the underlying IDIQ contract. Thus, this Board has CDA jurisdiction to decide the breach of contract claim for failure to comply with the 10 U.S.C. § 2304c(b) and FAR 16.505(b)(1) requirements to give all contractors awarded multiple award contracts a fair opportunity to be considered for task order awards. Whether those statutory and regulatory requirements apply here pertains to the merits of PAW’s claim, which are not before us to decide on the motion to dismiss. Accordingly, we deny respondent’s motion to dismiss PAW’s fair opportunity claim.

### B. Duty to Safeguard Proprietary Information

Respondent argues that the CDA does not give the Board jurisdiction to adjudicate an appeal involving an implied contract to protect proprietary data submitted through a proposal, because the proposal is not a procurement of goods or services by the government covered by the CDA and PAW’s “implied-in-fact contract” basis for NGB’s duty to safeguard its proprietary data fails for lack of an offer, acceptance and consideration regarding the data. (Gov’t mot. at 8; gov’t reply br. at 4-7)

PAW argues that FAR 15.207(b) requires that the government protect its proprietary data. That regulation provides:

Proposals shall be safeguarded from unauthorized disclosure throughout the source selection process...Information received in response to an RFI shall be safeguarded adequately from unauthorized disclosure.

PAW further argues that 41 U.S.C. § 111, Procurement, provides that:

In this subtitle, the term “procurement” includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.

It asserts that the underlying IDIQ contract is the governing procurement contract which provides the basis for the Board’s CDA jurisdiction to hear the aspect of its appeal regarding the government’s alleged contract breach by its failure to safeguard PAW’s proprietary information. (App. opp’n at 10-11)

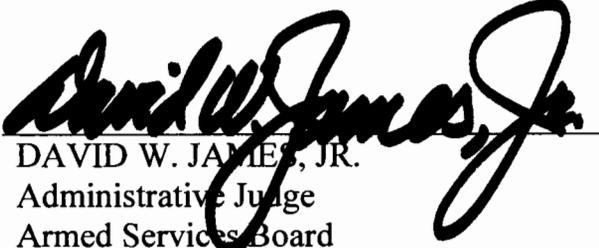
As it does currently, at the time of the parties' IDIQ contract, FAR 3.104-2 implemented the Procurement Integrity Act, 41 U.S.C. § 423. FAR 3.104-2(b)(4) noted that FAR Part 15 placed restrictions "on the release of information related to procurements and other contractor information that must be protected under 18 U.S.C. § 1905 [the Trade Secrets Act]." FAR 15.209(a) provided that, when contracting by negotiation, the CO shall insert the clause at 52.215-1 in all competitive solicitations where the government intended to award a contract without discussions. That clause provided at subparagraph (e) that offerors that did not want data in their proposals to be disclosed to the public or used by the government except for evaluation purposes were to include a stated restrictive legend.

PAW included a restrictive legend in its proposal that was substantially similar to the FAR legend (SOF ¶ 11), clearly stating its demand that its proprietary information be safeguarded.

Consistent with our forgoing holding with respect to PAW's fair opportunity claim, we hold that, as provided in the contract's FAR 52.233-1 Disputes clause (SOF ¶ 5), the parties' dispute concerning POW's proprietary information submitted in response to NGB's request for a task order proposal relates to an alleged breach of the underlying IDIQ procurement contract and we have jurisdiction over the matter. We deny respondent's motion to dismiss this aspect of appellant's appeal.

In summary, we grant respondent's motion for summary judgment on the issue of breach of contract by failure to issue a task order to PAW. We deny respondent's motions to dismiss for lack of subject matter jurisdiction over PAW's claim that NGB breached its duty to give PAW a fair opportunity to be considered for the task order in question and PAW's claim that the government improperly divulged proprietary information contained in PAW's task order proposal. Thus, we deny the appeal in part and retain jurisdiction over the balance of the appeal as set forth above.

Dated: 22 November 2013

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

(Signatures continued)

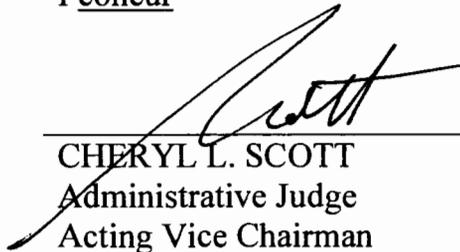
I concur



---

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

I concur



---

CHERYL L. SCOTT  
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. 58534, Appeal of PAW & Associates, LLC, rendered in conformance with the Board's Charter.

Dated:

---

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