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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of - )  
)  
ESA South, Inc. ) ASBCA Nos. 62242, 62243, 63222  
)  
Under Contract Nos. W9128F-14-D-0014 )  
W912EP-17-F-0098 )

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OPINION BY ADMINISTRATIVE JUDGE MCILMAIL UPON THE  
GOVERNMENT’S MOTION FOR PARTIAL SUMMARY JUDGMENT

The government moves for summary judgment upon appellant’s claim that the government breached a roof repair requirements contract by issuing fewer than 8,846 “rights of entry” (ROEs) to hurricane-damaged properties for the purpose of repairing damaged roofs. The government says that it satisfied the \$2,500 minimum guarantee of what the government says is an indefinite quantity, indefinite delivery (IDIQ) contract.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The following is not in genuine dispute. On May 30, 2014, the government contracted with appellant, ESA South, Inc. (ESA), to provide emergency temporary roof repairs in certain states (R4, tab 2 at 201). Paragraph 2.1 of the contract’s supplementary conditions provides:

**Contract Type, Value, Performance Period, and Minimum Guarantee.** Any contract to be awarded as a result of this solicitation will be an Indefinite Delivery/Indefinite Quantity (IDIQ) for a contract capacity up to a total estimated contract value of \$45,000,000.00 for

a two-year base performance period; and three (3) one year option periods. After the award of any resultant contract a minimum guarantee in the amount of \$2,500.00 is anticipated to be awarded by the issuance of a task order.

(R4, tab 2 at 224 ¶ 2.1).

In addition, the contract includes Federal Acquisition Regulation (FAR) 52.216-22, INDEFINITE QUANTITY (OCT 1995), which provides, at paragraph (a):

This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

(R4, tab 2 at 216). And at paragraph (b) of FAR 52.216-22, the contract provides:

Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, *when and if ordered*, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the “maximum”. *The Government shall order at least the quantity of supplies or services designated in the Schedule as the “minimum”.*

(R4, tab 2 at 216) (emphasis added). The contract also includes FAR 52.216-19, ORDER LIMITATIONS (OCT 1995) which provides:

If this is a requirements contract (*i.e.*, includes the Requirements clause at subsection 52.216-21 of the Federal Acquisition Regulation (FAR)), the Government is not required to order a part of any one requirement from the Contractor if that requirement exceeds the maximum-order limitations in paragraph (b) above.

(R4, tab 2 at 215). The contract does not include or incorporate FAR 52.216-21, REQUIREMENTS. *See* R4, tab 2 at 212-16.

Regarding the provision of roofs for repair, paragraph 1.2 of the contract's summary of work provides:

The contractor shall prepare bonds and submittal submissions during days one through three after a task order is awarded. Starting with day four, the following production rates apply for each contractor per mission:

Days after task order award	Individual contractor production rate per mission
4	1 roof/day
5	5 roofs/day
6	20 roofs/day
7	40 roofs/day
8	60 roofs/day
9	120 roofs/day
10	200-300 roofs/day

The full production rate is 200-300 roofs/repairs per day per contractor as determined by USACE. Contractor must use at a minimum 30% in-house crews to perform the temporary roof repairs. From the day the contractor receives the Work Order, the contractor has 10 days to complete the installation of the temporary roof.

(R4, tab 2 at 228 ¶ 1.2). And paragraph 5.0 of the supplementary conditions provides:

**Performance Period.** The performance period shall commence within 12 hours following receipt of the task order. The contractor shall prepare bonds and submittal submissions during days one through three after a task order is awarded. The contractor shall demonstrate increasing progress towards the minimum production target within the designated number of days after task order award. The target production rate for roofing after 10 days is 200-300, while the target production rate for rapid temporary repairs is 30 properties per day. This minimum target production level can be set higher or lower if agreed to by both the government's contracting officer and the contract awardee. The number of days after task order award and minimum target production rates shall be

specified in the task order. The number of days after task order award and minimum target production level is specified herein:

**ROOFING**

<b>Days after task order award</b>	<b>Individual contractor production rate per mission</b>
4	1 roof/day
5	5 roofs/day
6	20 roofs/day
7	40 roofs/day
8	60 roofs/day
9	120 roofs/day
10	200-300 roofs/day

**RAPID TEMPORARY REPAIR (RTR)**

<b>Days after task order award</b>	<b>Individual contractor production rate per mission</b>
4	1 property/day
5	5 properties/day
6	15 properties/day
7	25 properties/day
8	30 properties/day

(R4, tab 2 at 225 ¶ 5.0).

Regarding liquidated damages, FAR 52.211-12, LIQUIDATED DAMAGES-CONSTRUCTION (SEP 2000), paragraph (a) of the summary of work provides:

If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of \$150.00 per house/repair for each house that the Contractor is below the minimum production target for that day,

whether it be in the Ramp-up phase or the full production phase.

(R4, tab 2 at 227, § 52.211-12(a)). And paragraph 6.0 of the supplementary conditions provides, in part:

LIQUIDATED DAMAGES (LD's) ALL PHASES.

Liquidated damages will be assessed at the rate of \$150.00 per house for each house that the Contractor is below the minimum production target for that day, whether it be in the Ramp-up phase or the full production phase. The number of roofs completed is equal to the number that the Government Representative and the contractor have final inspected. The LDs will be assessed on a daily basis and the Contractor will be notified the following day of the LDs assessed.

(R4, tab 2 at 225, ¶ 6.0).

The government has compensated ESA over \$3 million for its work on the contract (*see resp.* at 13 ¶ 28; R4, tabs 17, 22).

On July 12, 2021, ESA moved to add new legal theories to ASBCA Nos. 62242 and 62243, including those set forth in a Count II relating to ASBCA No. 62243. We granted that motion on August 2, 2021. Count II alleges breach of contract claims and requests \$2,557,957.19 and the release of liquidated damages.<sup>1</sup> *See* Mot. for Leave to Amend (mot. to amend) at 6, 26, 31-32, ¶¶ 139-43; 36, ¶ 6. Among the allegations in Count II are that:

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<sup>1</sup> In a “claims summary” of what ESA calls its “amended appeal” (essentially an amended complaint) ESA describes ASBCA No. 62243 as consisting of Count II, which alleges two breaches: (1) the government’s issuance of only 3,748 instead of 8,846 roofs for temporary repair (*id.* at 1, 6-7 ¶¶ 27-32); and (2) the government’s assessment and continued withholding of liquidated damages (*id.* at 7-8, ¶¶ 33-38). We read the government’s motion as a request for summary judgment only upon the claim in Count II that the issuance of fewer than 8,846 ROEs breached the contract. In so doing, we note that (1) the government’s motion (and in particular its concluding paragraph (mot. at 19-20)) does not address the claim that the government breached the contract by assessing and continuing to withhold liquidated damages; and (2) the motion does not request the denial of ASBCA No. 62243.

Based on the Contract, Task Order, and Corps' directives and representations, the Corps had to provide a minimum of 200 roofs per day by Day 10 of the mission. Including the ramp up and ramp down, over the entire mission, this equates to 8,846 roofs for ESA to perform. ESA mobilized to perform a minimum of one-third of the 39,000 roofs discussed at the Pre-mobilization meeting with the Corps on September 11, 2017. Instead, the Corps only issued 3,748 valid ROEs to ESA [hereinafter "ROE"].

*Id.* at 31 ¶ 137. Count II also alleges that:

Based on the Contract language of the ramp-up and full production schedule, ESA received 5,098 less roofs than the Corps contract to provide by virtue of the minimum required ROEs necessary to avoid liquidated damages, and ESA expected, and mobilized, to perform. ESA incurred damages in preparation, mobilization, performance inefficiencies, overhead, and other damages due to the actions and non-actions by the Corps, including this breach of contract, and is entitled to an equitable adjustment for the damages incurred.

*Id.* at 31 ¶ 138.

### DECISION

Summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,067 at 176,127 (citing FED R. CIV. P. 56(a)). When interpreting a contract, the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts. *NVT Techs., Inc v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous. *Id.*

A requirements contract calls for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price. *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). By contrast, an IDIQ contract

provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time; it requires the government to order only a stated minimum quantity of supplies or services. *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001) citing 48 C.F.R. § 16.504(a)(2000). Under an IDIQ contract, the government is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase its legal obligation under the contract is satisfied. *Travel Ctr.*, 236 F.3d at 1319.

In Count II of the amended complaint, ESA says that the government “had to provide a minimum of 200 roofs per day by Day 10 of the mission . . . equat[ing] to 8,846 roofs for ESA to perform” and breached the contract “by not providing the required minimum of 200 ROEs per day,” and “only issu[ing] 3,748 valid ROEs to ESA” (mot. to amend at 31 ¶ 137; 32, ¶ 145 (alterations added)). ESA also asserts that: (1) the contract’s \$2,500 minimum guarantee applies only in the absence of performance (*id.* at 27, ¶ 121); (2) “[t]he 200 roofs per day minimum performance required represents the actual guaranteed minimum when the contractor is called upon to perform” (*id.* at 28, ¶ 122); (3) the contract is a requirements contract (*id.* at 30, ¶ 136), and (4) the liquidated damages provisions of the contract “require[] adherence to the minimum daily performance requirement of 200-300 roofs” (*id.* at 27, ¶ 119(a) (alteration added)). ESA does not argue that in issuing only 3,748 ROEs, the government breached the contract’s guaranteed minimum by ordering less than \$2,500; indeed, ESA does not deny that it has been compensated over \$3 million for its work on the contract.

Reading the contract as a whole and interpreting its provisions reasonably, we disagree with ESA that the government breached what ESA calls a requirements contract by not providing ESA 8,846 roofs to repair.<sup>2</sup> For the following reasons, we conclude that the only reasonable interpretation of the contract is that it is of the IDIQ type with a \$2,500 minimum guarantee. The contract provides that other than that minimum, the contractor shall furnish supplies and services “when and if ordered,” and that if the contract were a requirements contract, it would include FAR clause 52.216-21, REQUIREMENTS, which does not appear in the contract. In addition, the production rates and targets recited in the contract provisions above impose obligations upon ESA, not upon the government; those provisions oblige ESA to be able to meet those rates and targets (that is, to repair given numbers of roofs by given days), in the words of FAR 52.216-22(b) above, “when and if ordered.”

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<sup>2</sup> Although ESA urges that we resort to extrinsic evidence (*see app. resp.* at 4, 6), we need not do so because we do not find the contract language at issue ambiguous. *See All Star/SAB Pac., J.V.*, ASBCA No. 50856, 99-1 BCA ¶ 30,214 at 149,479.


Finally, interpreting the liquidated damages provisions as *guaranteeing* ESA any specific number of roofs is not reasonable; rather, the reasonable interpretation of those provisions is that the government's issuance of ROEs to ESA is a prerequisite to the government's assessment of liquidated damages upon ESA for failure to repair roofs. Indeed, paragraph 52.211-12(a) of the summary of work provides (emphasis added) that "[i]f the Contractor fails to complete *the work* within the time specified in the contract, the Contractor shall pay liquidated damages," indicating that work must be issued in the form of ROEs before the government could assess liquidated damages against ESA for failure to complete work.

Because there is no genuine dispute as to any material fact and the government is entitled to judgment as a matter of law that the contract is of the IDIQ type with a \$2,500 minimum guarantee that the government has satisfied, the government is granted summary judgment in its favor upon the claim in Count II that the government breached the contract by issuing fewer than 8,846 ROEs; that is, we enter judgment that the government *did not* breach the contract by issuing fewer than 8,846 ROEs. *Cf. Elec. Data Sys., LLC*, CBCA No. 1552, 10-1 BCA ¶ 34,316 at 169,507-08 (government anticipation that contractor would enroll 420,000 individuals for purposes of providing personal identification cards was not a guarantee; actual enrollment of approximately 210,000 individuals satisfied contract enrollment guarantee of 10,000 individuals, entitling government to summary relief).

### CONCLUSION

The government's partial summary judgment motion is granted, and judgment *in favor of the government* is entered upon appellant's claim in Count II that the government breached the contract by issuing fewer than 8,846 ROEs.

Dated: March 16, 2023

  
TIMOTHY P. MCILMAEL  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)



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The decision issued on the date March 21, 2023 below is subject to an ASBCA Protective Order.  
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I concur



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RICHARD SHACKLEFORD  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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OWEN C. WILSON  
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 Nos. 62242, 62243, 63222, Appeals of ESA South, Inc., rendered in conformance with the Board's Charter.

Dated: March 21, 2023



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PAULLA K. GATES-LEWIS  
Recorder, Armed Services  
Board of Contract Appeals