ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Keco Industries, Inc.	)	ASBCA No. 50524
	)	
Under Contract No. DAAK01-92-D-0048	)	

APPEARANCES FOR THE APPELLANT: Joseph J. Brigati, Esq.
Stephen G. Topetze, Esq.
Lief B. King, Esq.
Kirkpatrick & Lockhart, LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ Sandra Fortson, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MOED
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The issue in this appeal and these motions is whether appellant ("Keco") was entitled to refuse two delivery orders issued under this requirements contract. Keco complied with the contracting officer's direction to fulfill the orders and then submitted the present monetary claim on the basis that the direction was a constructive change.

STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTION

1. This appeal relates to a firm, fixed-price requirements contract awarded to Keco, through sealed bidding, on 6 April 1992, for supplies described as "36,000 British Thermal Units [BTU] Air Conditioners, Compact Vertical Units, Multiple Power Input." The contract schedule states that "this contract consists of one ordering period [hereinafter "Ordering Period 1"] with two additional optional ordering periods [hereinafter "Ordering Period 2" and "Ordering Period 3"]."

2. The schedule states that the "total estimated quantity" is 847 units. The stated estimated quantities for the individual ordering periods is the following: Ordering Period 1 - 447 units; Ordering Period 2 - 175 units; and Ordering Period 3 - 225 units. In Section M of the solicitation ("Evaluation Factors for Award"), Clause M-3 ("Evaluation of Requirements Pricing") states that the Government would evaluate offers for the purposes of award by adding the prices of various schedule line items, including the "total price for

any First Articles" and "the total price for the remaining estimated total quantity." The clause ends with notice to prospective bidders that:

> Evaluation of quantities in this manner will not obligate the Government to order the estimated total quantity or to distribute orders in any predetermined manner among ordering periods or destinations.

3. Clause I-4 of the contract, set forth below, is the standard "REQUIREMENTS (APR 1984)" clause, FAR 52.216-21. The clause provides, in pertinent part, as follows:

> (a) This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.
>
> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Delivery-Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering Clause. . . .
>
> (c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.
>
> (d) The Government is not required to purchase from the Contractor requirements in excess of any limit on total orders under this contract.

4. Clause I-5 of the contract, which is the standard "ORDERING (APR 1984)" clause, FAR 52.216-18, permits orders to be issued from the date of contract award until 1,450 days after first article approval. Clause I-6 of the contract, which is the standard

"OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989)"clause, FAR 52.217-9, grants the Government the right to "extend the term of this contract by written notice to the Contractor within 7 days prior to the end of the ordering period." That period had been inserted by the contracting officer pursuant to instructions in the FAR for use of the clause. The clause also requires the Government to give Keco a "preliminary written notice of its intent to extend at least 60 days before the contract expires." Said notice, however, "does not commit the Government to an extension."

5. Section I-3 of the contract, set forth below, is the standard "DELIVERY-ORDER LIMITATIONS (APR 1984)" clause, FAR 52.216-19. The underlined matter are insertions in the text made by the contracting officer pursuant to instructions in the FAR:

> (a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than 1, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.
>
> (b) Maximum order. The Contractor is not obligated to honor --
>
> (1) Any order for a single item in excess of 847;
>
> (2) Any order for a combination of items in excess of N/A; or
>
> (3) A series of orders from the same ordering office within 1 day that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.
>
> (c) 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.
>
> (d) Notwithstanding paragraphs (b) and (c) above, the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within 5 days after issuance, with written notice stating the Contractor's intent not to ship

> the item (or items) called for and the reasons. Upon receiving this notice, the Government may acquire the supplies or services from another source.

(R4, tab 1 at 35-36)

6. The total estimated quantity for the potential three year term of the contract, namely, 847 units, was inserted in § I-3(b) as the maximum quantity of "[a]ny order for a single item" (finding 5). According to an interrogatory response prepared by Ms. Lorraine M. Jones, the contracting officer who was in charge of preparing the solicitation and awarding the contract, the use of that quantity "was designed to protect the Government against funding and requirement uncertainties resulting in all of the items being purchased within one ordering period" (app. opposition to motion, ex. 1 at 4).

7. Delivery Order No. 0001 (D/O No. 0001), the first delivery order under the contract, was issued on 6 April 1992 for 550 production units and six first article units. This was followed by Delivery Order No. 0002, issued on 31 August 1994 for 144 units. With these two orders, a total of 694 production units and six first article units had been ordered during Ordering Period 1.

8. On 10 March 1995, pursuant to Modification No. P00022, the contracting officer exercised the option for Ordering Period 2, extending the duration of the contract from 20 April 1995 through 19 April 1996 (R4, tab 35). During that period, the contracting officer issued delivery orders for 461 production units as follows:

Order No.	Date	Quantity
D/O No. 0003	29 August 1995	307 units
D/O No. 0004	29 September 1995	146 units
D/O No. 0005	11 December 1995	8 units

9. By letter dated 14 February 1996, the contracting officer gave Keco preliminary notice of intention to exercise the option for Ordering Period 3. On 15 February 1996, by unilateral contract Modification No. P00023, the Government exercised that option, thereby extending the term of the contract from 19 April 1996 until 18 April 1997 (R4, tab 53). On 26 February 1996, the contracting officer issued D/O No. 0006 for 7 units. With that quantity, a total of 1,162 production units and six first article units had been ordered under the contract.

10. By letter of 28 February 1996 (R4, tab 55), Keco acknowledged receipt of unilateral contract Modification No. P00023 and also advised the contracting officer as follows:

> [W]e also want to give you advance notice that, per Contract Section I-3, it is not our intention to accept any future delivery orders.
>
> Keco submission of approximately twenty-five (25) Class II Engineering Change Proposals [ECP] that should have been submitted as Class I Cost Changes resulted in an increased unit price and, ultimately, a considerable dollar loss under this contract.
>
> Should the Government wish Keco to investigate the above mentioned increase and advise your office of the revised unit price, we ask that you provide a written request to the attention of the undersigned.

11. On 6 March 1996, Keco informed the contracting officer that, pursuant to the above notification, it would not proceed with D/O No. 0006 (R4, tab 56). The contracting officer responded by letter dated 21 March 1996 (R4, tab 57), informing Keco that the Government had acted "within its legal rights" in exercising its option for Ordering Period 3. Furthermore:

> The fact that Keco has lost money on the 25 ECP's does not excuse the company from its responsibility to continue performing under the contract. If Keco believes it is entitled to equitable adjustment for any of the ECP's mentioned in its letter dated February 28, 1996; it should submit a claim for such an adjustment and proceed with contract performance.

12. On 4 April 1996, the contracting officer issued D/O No. 0007 for 147 units. With that order, a total of 1,309 production units and six first article units had been ordered under the contract. By letter dated 10 April 1996 (R4, tab 59), Keco notified the contracting officer that it "must reject" D/O No. 0007 but was "agreeable to holding [D/O Nos. 0006 and 0007] for acceptance after settlement of the claim we will be filing."

13. In a letter dated 19 April 1996 (R4, tab 60), the contracting officer responded that the Government had acted within its rights in issuing D/O Nos. 0006 and 0007 and that if Keco "continues to refuse to perform these delivery orders, the Government will be forced to take whatever steps are necessary to enforce this contract including possible default termination." By letter dated 22 April 1996 (R4, tab 61), Keco notified the contracting officer that:

> While we do not agree with your interpretation of Contract Clause I-3, DELIVERY ORDER LIMITATIONS , we do accept your letter of 19 April 1996 as direction to proceed. We, of course, reserve our right to file claim [sic] under the DISPUTES Clause for our full cost including profit.

14. In an affidavit submitted in opposition to the motion, Mr. George W. Andrews, the president and chief executive officer of Keco states that from review of the solicitation, he gained the following understandings: (a) he "understood that the Government may order all of its requirements for the A/C units in a single order or ordering period, or over the three ordering periods outlined in the solicitation"; (b) he "was aware that Section I-3(b) of the contract . . . provided that [Keco] was not required to accept 'any order for a single item in excess of 847'; (c) he "was also aware of Section I-3(d) of the contract which permitted Keco to reject any order that exceeded the Government's estimated quantities of 847 units within five (5) days." Mr. Andrews states that "Keco interpreted these provisions *as giving it discretion to accept or reject any order or orders that exceeded the total estimated quantities of 847 A/C units under the Contract*" (emphasis added). (App. opposition to motion, ex. 2 at 2).

15. Mr. Andrews' interpretation of § I-3 is contradicted, however, in another affidavit, also submitted by Keco. The affiant is Ms. Sandra E. Hollaender, who was Keco's contract administrator for this contract with duties and responsibilities "primarily involv[ing] the oversight and coordination of the federal procurement contracts awarded to Keco." Her affidavit states that:

> *Keco has always interpreted Section I-3(b) of the Contract as obligating it to supply the Government's requirements for the specified air conditioning units up to 847 total air conditioning units.* Keco based this interpretation on the fact that this figure is equal to the total estimated quantity for the single ordering period and two optional ordering periods . . . provided for in the Contract, and that 847 units substantially exceeded the individual estimates for the different ordering periods provided for in the contract.
>
> . . . .
>
> *Keco understood that the 847 unit limit prescribed by Section I-3(b) of the Contract was a limit on the total number of air conditioning units it could be required to deliver under the Contract.*

. . . .

> Before the underlying claim arose, Keco and the Government had no conversation or communication directed at the interpretation of Section I-3 of the Contract, or any similar provision contained in any other previous contract awarded to Keco.

(Emphases inserted) (App. reply memorandum, ex. 1 at 2)

16. On 25 April 1996, Keco submitted its claim with respect to the ECP's (R4, tab 62) which was denied in a written decision of the contracting officer dated 20 September 1996 (R4, tab 72). The denial was timely appealed and docketed as ASBCA No. 50426. The claim was subsequently settled by the parties, resulting in the dismissal of that appeal with prejudice on 7 July 1999.

17. By letter dated 13 December 1996 (R4, tab 73), Keco submitted a certified claim for an equitable adjustment in the amount of $817,838.68 "based upon the facts that the Government directed Keco to deliver 154 contract items in excess of the Contract-specified limit on quantities, despite Keco's timely objection to the delivery orders." Keco, asserted that under the contract, it was not obligated to accept orders for more than the "total estimated quantity" stated in the Schedule which was 847 units (finding 2). In Keco's view, after that quantity had been ordered, it had the right to refuse to deliver any additional ordered units upon giving five days notice of intention not to ship the ordered supplies as provided in § I-3 of the contract (finding 5). In its claim, Keco sought to recover the "additional engineering and production costs allocable to" those 154 units. The contracting officer denied the claim in its entirety in a written decision pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, dated 13 January 1997. This timely appeal ensued.

DECISION

The dispute in this appeal results from differing interpretations of § I-3, the "DELIVERY-ORDER LIMITATIONS" clause of the contract. If there are no material facts in dispute, the appeal is eligible for disposition by summary judgment. *Mingus Constructors, Inc., v. United States,* 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

Under Keco's interpretation of § I-3, it was obligated to fulfill orders for the Government's requirements up to a maximum of 847 units, with the right, but not the obligation, to fulfill orders for additional quantities. Keco had accepted orders for 315 units more than this estimate under D/O Nos. 0001-0005, for a total of 1,162 production units plus six first article units. On the ground that it had sustained a considerable

financial loss in performing the contract, Keco refused to honor D/O Nos. 0006 and 0007 for 154 additional units. Under the Government's interpretation of § I-3, Keco's right to refuse orders applied only to individual orders exceeding 847 units, as provided in § I-3(b), subject, however to giving notice of intention to refuse in accordance with § I-3(d) (finding 5). The Government rejects the view that § I-3 contains any limitation as to the total quantity of required supplies that could be ordered under the contract.

The Government's interpretation accords with the plain meaning of § I-3 (finding 5). Keco's president, Mr. Andrews, interpreted the clause in the same manner in preparing its offer for the contract (finding 14). The contrary interpretation, advanced by Ms. Hollaender and adopted in the claim, was that delivery of 847 was the limit of Keco's contract obligations. This was based on the fact that 847 units was "equal to the total estimated quantity for the single ordering period and two optional ordering periods . . . provided for in the contract" (finding 15). This was an erroneous basis for the interpretation. It is inconsistent with: (1) Section M of the solicitation ("Evaluation Factors for Award"), Clause M-3 ("Evaluation of Requirements Pricing") stating that the estimated quantities served to enable the Government to evaluate offers for the purposes of award and did not give rise to any purchase obligations (finding 2); (2) ¶ (c) of the "REQUIREMENTS (APR 1984)" clause which provides at the outset that this a requirements contract encompassing "*all the supplies* or services specified in the Schedule *that are required to be purchased* by the Government activity or activities specified in the Schedule" (finding 3); and (3) § I-3(b) in which the quantity of 847 units is stated as relating to "*[a]ny order* for a single item" (emphases added) (finding 5).

On this motion, Keco offers an alternative basis for its position that its obligation to fulfill orders under the contract was limited to a maximum of 847 units. According to Keco, the opening phrase of §I-3(d), namely, "[n]otwithstanding paragraphs (b) and (c)" indicates that what follows is a limitation of the Government's ordering rights separate and distinct from those set forth in ¶ (b) of the clause (finding 5). Keco next reads the phrase "order *(or orders)*" (emphasis added) in § I-3(d) as signifying that the "maximum order limitations" in § I-3(b) is the cumulative total of all units ordered (app. opposition to motion, 11-12).

This is an unreasonable interpretation wholly at odds with the plain meaning of the language. The only quantity limitation in § I-3 is in § I-3(b) setting forth the maximum amount for individual orders. Section I-3(d) does not purport to establish a superseding limitation on the quantity of supplies that the Government is entitled to order, as claimed by Keco. Under its plain terms, it serves only to impose an advance notice condition precedent on Keco's otherwise unconditional right to invoke the limitation on the size of orders in § I-3(b).

Keco contends that it is "simply illogical" to interpret § I-3(b) as solely limiting the quantities under individual orders because that interpretation would allow the Government "to order unlimited quantities of [the] units so long as each order did not exceed 847 . . . units" (app. opposition to motion, 13). We addressed a similar contention in *American Drafting & Laminating Co.*, ASBCA No. 23648, 82-1 BCA ¶ 15,687 at 77,599, which involved a requirements contract that was susceptible to that interpretation. After observing that "bidders could not reasonably be expected to bid on such an extreme basis," we said that attacking the interpretation on that basis "simply knocks down a straw man" because "[t]he record does not show that the Government ever issued orders remotely close to such an extreme." That is also the case here.

Keco asserts that § I-3 is ambiguous. On that basis, it contends that the Government was required to show that the interpretation followed in directing Keco to fulfill D/O Nos. 0006 and 0007 was also the interpretation held at the time of award. Keco states that that there is no record evidence as to how the Government interpreted § I-3 at the time of award and, for that reason, the Government's motion for summary judgment must be denied. (App. opposition to motion, 15). The argument is without merit. Section I-3 is clear and unambiguous. Accordingly, its meaning is controlled by the plain meaning of its terms, with the result that "extraneous circumstances and subjective interpretations" are irrelevant. *Community Heating & Plumbing Co., Inc. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993); *Perry & Wallis, Inc. v. United States*, 427 F.2d 722 (Ct. Cl. 1970). Resort to evidence as interpretation of this provision at the time of award is also precluded by the parol evidence rule which requires that a "clear written agreement . . . be interpreted to mean what it says, notwithstanding contrary extrinsic evidence." *Bradley Construction, Inc.* ASBCA Nos. 43891, 43892, 95-2 BCA ¶ 27,647 at 137,814.

Keco asserts also that the record "raises significant questions as to the Government's due care and good faith in preparing" the estimated requirements set forth in the solicitation and contract (app. opposition to motion, 19). According to Keco, there are genuine issues of material fact in this regard which require denial of the motion for summary judgment. Based on the record before us, this matter has never before been raised by Keco. Indeed, it is labeled by Keco as "an entirely independent basis for relief" for the claim (app. opposition to motion, 20). The novelty of the contention, however, does not automatically preclude consideration thereof in connection with this motion. The test is whether this matter can be viewed as an alternate legal theory for recovery based on operative facts already brought out. If that is the case, the matter is within the scope of this appeal, obliging us to determine the merits of Keco's contention that it presents a basis for denial of the motion.

Keco contends that under a proper interpretation of § I-3, it was not obligated to honor and fulfill D/O's 0006 and 0007. As presented by Keco in the claim, this is purely a matter of contract interpretation, to be resolved by reference to its text (finding 17). However, the contention that there was a lack of due care in formulating the estimated quantities in the contract involves inquiry, outside the four corners of the contract, as to whether the Government met its duty to base the estimates on "all relevant information . . . available to it." *Womack v. United States*, 389 F.2d 793, 801 (1968) The operative facts under that standard are wholly distinct from those involved in the present claim and have never been submitted to the contracting officer. These circumstances demarcate the allegation of lack of due care in preparation of the estimates as a new claim which is not part of the present appeal and will not come within our jurisdiction under the CDA until it has been presented to, and decided by the contracting officer and, thereafter, timely appealed. *J & J Maintenance, Inc.*, ASBCA No. 50984, 15 February 2000, slip op. at 10; *Shams Engineering & Contracting Co./Ramli Co.*, ASBCA Nos. 50618, 50619, 98-2 BCA ¶ 30,019. Inasmuch as that claim is outside the scope of this appeal, it is not capable of generating "material" issues of fact in said appeal, and, as such, cannot provide the basis for denial of the motion.

CONCLUSION

Keco is not entitled to recover additional compensation for complying with D/O Nos. 0006 and 0007. Pursuant to the plain terms of § I-3, the Government had the right to issue those orders for the stated quantities of supplies and Keco was obligated to fulfill the same and to furnish and deliver the ordered supplies at the prices set forth in the contract. Accordingly, the Government's motion for summary judgment is granted; Keco's cross-motion is denied; and the appeal is denied.

Dated: 24 March 2000

PENIEL MOED
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

RICHARD SHACKLEFORD
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. 50524, Appeal of Keco Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals