ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Jez Enterprises, Inc.	)	ASBCA No. 51851
	)	
Under Contract No. HW930001	)	

APPEARANCE FOR THE APPELLANT: T. B. Patterson, Jr., Esq.
Hot Springs, AR

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ Howard W. Roth, JA
MAJ Susan D. Tigner, JA
CPT Stephen P. Bell, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL
ON THE PARTIES' CROSS-MOTIONS
FOR SUMMARY JUDGMENT

The parties cross-move for summary judgment in this appeal. At issue is whether or not the agreement in question may constitute a valid requirements contract. Since we think it premature to decide the issue at this time, we deny the motions.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTIONS

1. On 4 February 1993, the Army and Air Force Exchange Service (AAFES or Government) awarded Contract No. HW930001 (contract) to Jez Enterprises, Inc. (Jez). The contract called for Jez to perform the "assembly of new bicycles/merchandise" at various AAFES locations in the continental United States. (R4, tab 1)

2. The solicitation requested proposals for providing the merchandise, supplies, equipment or services described in this solicitation (*e.g.*, assembly of new bicycles, installation of new bicycle racks, and adjustment of assembled bicycles). The solicitation was organized so that prospective contractors could bid separately on particular geographical regions of the country, and stated that "[t]he responsive, responsible offeror(s) submitting the lowest aggregate assembly cost to [the Government] for each

region . . . will be awarded the contract." (R4, tab 1, Schedule at 2, ¶ 11) The contract awarded to Jez encompassed six specific regional areas (R4, tab 1).

3. The contract did not contain any provision specifically designating the agreement as a requirements contract. Nor did the contract identify a minimum quantity of bicycle assemblies that must be completed. (R4, tab 1)

4. The contract did include an estimate of the number of bicycle assemblies that were anticipated (R4, tab 1, exhibit D). The contract further provided that "AAFES makes no warranty, express or implied of the total bicycle assemblies needed" (R4, tab 1, Schedule at 1, ¶ 4). Under the terms of the agreement, Jez was required to "provide sufficient qualified technicians to perform and meet the demands of this contract" (R4, tab 1, exhibit C at 1, ¶ 6).

5. The parties disagree as to whether the agreement was intended to be a requirements contract. According to Jez, the parties' actions and communications during performance demonstrate that a requirements contract was created. (App. mot. SJ at 4) For instance, Jez directs our attention to various documents in the Rule 4 file suggesting that the parties intended to establish a requirements contract. One such letter contains appellant's unrebutted assertion that the parties are "agreed that Jez is responsible for all bikes assembled at AAFES locations." (R4, tab 9) In later correspondence, Jez informs the Government of its understanding that "we have a right by contract to assemble all bikes in each base that we have been assigned by contract" (R4, tab 27). The Government's response thereto does not directly contravene appellant's statement, but rather asserts that "unforeseen developments" subsequent to contract award justify the assembly of bicycles by Government personnel *vice* appellant's personnel (R4, tab 28).

6. The contract indicates that, because AAFES does not obligate appropriated funds, the Federal Acquisition Regulation (FAR) is not applicable to the agreement. However, the contract is subject to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601 *et seq.* (R4, tab 1, exhibit A at ¶ 2)

7. On 28 May 1998, Jez submitted to the Government a claim for $291,899.84. The claim alleged that the Government had failed to procure services within the scope of the contract exclusively from Jez, and that the Government instead had employed other contractors or had performed contract tasks in-house. (R4, tab 34) The contracting officer denied the claim in its entirety (R4, tab 35). Jez appealed to this Board.

DECISION

The parties now cross-move for summary judgment in this appeal. In evaluating the motions, we follow the established rule that summary judgment is appropriate when no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may effect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Company,* ASBCA No. 30144, 90-2 BCA ¶ 22,847. Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corporation,* ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851.

The crux of this dispute is whether or not the agreement between Jez and the Government is a valid requirements contract. The Government contends that a requirements contract did not exist, and that the Government therefore had no obligation to purchase services exclusively from appellant. Jez takes the opposite position. We address the motions *seriatim*.

Government's Motion for Summary Judgment

In support of its motion, the Government maintains that its agreement with Jez is not an enforceable contract of any type. The Government correctly argues that the agreement cannot be a valid indefinite-quantity arrangement because it does not include a guaranteed minimum purchase obligation (finding 3).[1] Nor, in the Government's view, can the agreement constitute a valid requirements contract. The Government observes that the agreement does not either include any provision specifically identifying the agreement as a requirements contract or contain "words of exclusivity sufficient to create a requirements contract" (finding 3; Gov't reply at 2). Unless the Government obligates itself to purchase supplies or services exclusively from a single source, there can be no valid requirements contract. *Coyle's Pest Control, Inc. v. Cuomo,* 154 F.3d 1302, 1305 (Fed. Cir. 1998); *Modern Systems Technology Corporation v. United States*, 979 F.2d 200, 205 (Fed. Cir. 1992).[2] The Government concludes that the contract is enforceable neither as a requirements contract nor an Indefinite Delivery Indefinite Quantity (IDIQ) contract, and instead was simply "void at its inception" (Gov't reply at 4).[3] According to the Government, since no valid contract exists, Jez may recover only for services that Jez actually performed, not for services that the Government failed to procure from Jez.

In response, Jez maintains that the agreement is a valid and enforceable requirements contract. While conceding that the contract does not contain a clause

specifically designating the agreement as a requirements contract, Jez points to other language in the agreement as indicating that a requirements contract was intended. For instance, the contract required Jez to have the capability to meet the "demands of this contract" and stated that the Government "makes no warranty, express or implied of the total bicycle assemblies needed." (Finding 4) These provisions, in Jez's view, are consistent with a requirements contract since the amount of services to be provided is determined by the Government's needs rather than by fixed quantity. Furthermore, Jez identifies provisions in the contract suggesting that the parties intended to form an exclusive relationship. The solicitation, for example, states that "[t]he responsive, responsible offeror(s) submitting the lowest aggregate assembly cost to [the Government] *for each region* . . . will be awarded *the* contract" (finding 2, emphasis added). Jez alleges that, in accordance with this provision, it was actually assigned all the exchanges specified for each region in which it received the contract award.

Jez maintains that the actions and communications of the parties will provide "cogent evidence" that a requirements contract was created. According to Jez, during the course of contract performance:

> There are repeated references to the exclusive right to provide services, as well as to the obligation to provide services, at the locations included in the contract awarded to Jez . . . . There were issues as to interference by other offerors and as to exchanges which were not using Jez throughout the contract term; the contracting officer . . . was responsive to the requests of Jez for assistance in obtaining the compliance of individual exchanges with the obligation of the government to obtain the covered services from Jez.

(App. mot. SJ at 4; finding 5)

The Government's contention that the contract cannot be a requirements contract because it purportedly lacks enough "words of exclusivity" to give rise to a requirements contract, and contains no clause specifically designating the agreement as a requirements contract is not dispositive. Jez has directed our attention to various provisions in the contract suggesting that the parties intended to, and did, form an exclusive relationship. Indeed, the agreement on its face bears many of the hallmarks of a requirements contract. Moreover, Jez has indicated that the parties' actions and communications during performance will demonstrate that the parties created a requirements contract. At this point in the proceedings, then, we cannot determine as a matter of law that the Government was not contractually obligated to purchase bicycle assembly services exclusively from Jez. Even if such an obligation were not expressly stated in the agreement, we might infer its existence from the parties' statements or conduct.

In *Marine Design Technologies, Inc.,* ASBCA No. 39391, 93-1 BCA ¶ 25,220, we considered an appeal analogous in many respects to the instant one. In that case, the parties disputed whether their agreement was a requirements contract or an IDIQ contract. The Government moved for summary judgment, observing that the contract solicitation contained all the appropriate clauses for an IDIQ contract and no language or clauses suggesting a contrary intent. The contractor opposed the motion on grounds that the parties' conduct arguably was inconsistent with an IDIQ arrangement. In denying the Government's motion, we stated:

> Appellant argues that . . . the Board must look outside the contract to the evidence provided by appellant in order to determine the intent of the parties in entering into this contract. We agree. There is sufficient evidence proffered by appellant to create a genuine issue of material fact. . . . The actions taken by the Government and the pre-award discussions between the parties, at least, raise questions concerning the intent of the parties. It may well be that the contract speaks unambiguously in this regard, but appellant is entitled to the hearing if it seeks to pursue its arguments and introduce evidence in support thereof. With respect to a motion for summary judgment, we resolve all significant doubt over factual issues in favor of the party opposing summary judgment, here, appellant.

93-1 BCA at 125,629-30;[4] *see International Source and Supply, Inc.,* ASBCA Nos. 52318, 52446, *slip op.* dated 6 April 2000. Likewise, in the instant case, we are not prepared to say at this stage that a requirements contract could not have existed as a matter of law. Accordingly, the Government's motion for summary judgment is denied.

Appellant's Cross-Motion for Summary Judgment

As is evident from our above discussion, the existing record does not, in our view, support the Government's contention that the agreement could not be a requirements contract. Nor, however, can we accept appellant's position that the parties' agreement necessarily does amount to a requirements contract. As we have noted, a crucial element to any requirements contract is a "promise by the buyer to purchase the subject matter of the contract exclusively from the seller." *Modern Systems Technology Corporation v. United States*, 979 F.2d 200, 205 (Fed. Cir. 1992). Although Jez has directed our attention to various provisions in the contract which suggest exclusivity, said language does not conclusively establish the existence of a Government promise to purchase exclusively from Jez. The evidence presently available to us is limited, and neither party

has offered affidavits or sworn statements to support its motion. Drawing inferences in favor of the Government, then, we find that appellant has not demonstrated that it is entitled to judgment as a matter of law. We therefore deny appellant's motion.

CONCLUSION

The parties' respective motions for summary judgment are denied.

Dated: 24 May 2000

J. STUART GRUGGEL, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] It is well-recognized that an indefinite-quantity contract must contain consideration in the form of a minimum guarantee in order to avoid being illusory. *See, e.g., Apex International Management Services, Inc.,* ASBCA Nos. 38087 *et al.*, 94-2 BCA ¶ 26,842 at 133,550, *aff'd on recons.*, 94-2 BCA ¶ 26,852 ("[A]n [indefinite-quantity] contract would fail for lack of consideration if it did not contain a minimum quantity.").

[2] *See also* FAR 16.503. Although the FAR is inapplicable to this agreement (finding 6), we nevertheless may refer to the FAR as a general statement of federal procurement law. See, *e.g., Cellular 101, Inc.,* ASBCA No. 51578, 00-1 BCA ¶ 30,582 at 151,034 (FAR definition of "subcontractor" was "instructive" although the FAR itself did not apply to the agreement); *Harvex Trading Company,* ASBCA No. 38279, 90-2 BCA ¶ 22,640 at 113,568 (applying FAR definition of "claim" in non-FAR surplus sale case).

[3] Interpreting a purported contract to be void and unenforceable is not an approach favored by law. Rather, we are charged with a "fundamental obligation to interpret contracts so as to preserve their validity, not to destroy it." *Maxima Corporation v. United States*, 847 F.2d 1549, 1557 (Fed. Cir. 1988). Furthermore, a tribunal must "assume the parties intended that a binding contract be formed." *Torncello v. United States*, 681 F.2d 756, 761 (Ct. Cl. 1982).

[4] We determined in subsequent proceedings that the agreement was in fact an IDIQ contract, not a requirements contract. *Marine Design Technologies, Inc.,* ASBCA No. 39391, 94-1 BCA ¶ 26,355.

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. 51851, Appeal of Jez Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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