ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Konitz Contracting, Inc.	)	ASBCA No. 52113
	)	
Under Contract No. F48608-96-D0007	)	

APPEARANCE FOR THE APPELLANT: Shane D. Colton, Esq.
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Billings, MT

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Robert P. Balcerek, Esq.
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CAPT Catherine M. Fahling, USAFR
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Respondent moved for summary judgment on ASBCA No. 52113 on the ground that the captioned contract is unenforceable as a "definite quantity," "indefinite quantity," or "requirements" type contract; therefore, appellant is entitled to payment only for work ordered and performed, and so its claim in ASBCA No. 52113, for the price difference for the work performed and for 85% of the estimated quantity in the contract's first option year, is invalid. Appellant opposed the motion with argument and affidavits. In a 29 August 2000 conference call, respondent clarified that it moved for partial summary judgment on the "minimum funding" claim only.

Statement of Facts (SOF) for the Purposes of the Motion

1. On 12 April 1996 the Air Force awarded Contract No. F48608-96-D0007 (contract 7) to Konitz Contracting, Inc. (appellant) for contours restoration and fence repairs at the launch facility of Warren Air Force Base, Wyoming (LF/WAFB). Contract 7 included a base year with 54 line items of varying quantities for a "total amount" of $2,543,841.84, and one option year with 54 additional line items of varying quantities for a "total amount" of $2,797,855.20. The quantities for the 108 line items were stated as "EST QTY" (estimated quantity). (R4, tab 1 at 2-3, 5, 8)

2. Contract 7, as amended on its award date by bilateral Modification No. P00001, incorporated by reference the following FAR clauses: (a) 52.211-18 VARIATION IN ESTIMATED QUANTITY (APR 1984), which provided:

> If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in the costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity.

(b) 52.216-18 ORDERING (OCT 1995), which provided:

> Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from Date of Award through 365 days from Date of Award. [Underlining in original]

(c) "52.216-19 DELIVERY-ORDER LIMITATIONS (OCT 1995)" (sic; FAR 52.216-19 clause is actually entitled "ORDER LIMITATIONS"), which provided in pertinent part:

> (a) *Minimum order*. When the Government requires supplies or services covered by this contract in an amount of less than $20,000.00, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.

(d) FAR 52.216-22 INDEFINITE QUANTITY (OCT 1995), which provided:

> (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.
>
> (b) 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."
>
> (c) Except for limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued . . . .
>
> (d) Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order . . . provided, that the Contractor shall not be required to make any deliveries under this contract after 12 months. [Underlining in original]

(e) 52.217-8 OPTION TO EXTEND SERVICES (AUG 1989), which permitted respondent to extend the services at the specified rates for a period not to exceed six months, and (f) 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989), which required respondent to give the contractor 60 days preliminary and 15 days prior written notice to extend the contract's term, and limited the total term of the extended contract to two years (R4, tab 1 at 15-16, tab 2).

3. Contract 7 did not: (a) incorporate the FAR 52.216-21 REQUIREMENTS (OCT 1995) clause, or contain language to the effect that respondent would order all its requirements for contours restoration and fence repairs at the LF/WAFB exclusively under contract 7, (b) designate any maximum or minimum quantity or dollar amount for all delivery orders to be issued during the 12 April 1996 through 11 April 1997 base period, or during the 12 April 1997 through 11 April 1998 option period, or (c) contain any provision addressing the contractor's capacity or capability to meet contract needs or demands, or disclaiming any Government warranty of the accuracy of its estimated quantities of services (R4, tabs 1, 2).

4. Bilateral Modification No. P00002 on 4 March 1997 changed the estimated quantities and amounts of most (but not all) of the line items, decreasing the base year's "Estimated Total Amount" of $2,543,845.59 by $3.75 to $2,543,841.84, and the option year's "Estimated Total Amount" of $2,798,099.12 by $243.92 to $2,797,855.20, without reference to any minimum or maximum quantity or amount (R4, tab 3).

5. The appeal record does not include delivery orders (DO) Nos. 5000, 5001 and 5002 issued during the base year of contract 7 (according to the appeal file in consolidated appeal ASBCA No. 51819). In May 1998 appellant, however, advised the

contracting officer (CO) that appellant "completed 80% on the Base Year Contract" (R4, tab 27).

6. On 20 March 1997, by unilateral Modification No. P00003, citing the FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT clause, the CO exercised the option year from 12 April 1997 through 11 April 1998 without altering the option year's $2,797,855.20 "total amount," and without reference to any minimum or maximum quantity or amount (R4, tab 4).

7. During the option year the CO issued DO No. 5003 effective 21 November 1997 for various quantities of line items in the total amount of $612,861.25 (R4, tab 11). Effective 18 June 1998 Amendment 01 to DO No. 5003 reduced such amount by $12.98 to $612,848.27 (R4, tab 12).

8. Appellant's 7 January 1998 letter to the CO stated that, pursuant to the FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY clause, appellant was entitled to at least 85% of the amount bid on the option year, of which it had received 22% (*i.e.*, $612,848.27 ÷ $2,798,099.12 = .219), and asked the CO to "acknowledge the remaining financing" (R4, tab 17).

9. The CO's 27 February 1998 letter to appellant stated that the FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY clause "does not guarantee a minimum of 85% of the estimated contract amount," the specified quantities "are estimates only and are not purchased by the contract," and he might extend contract 7's option period (R4, tab 19).

10. Citing the FAR 52.217-8 OPTION TO EXTEND SERVICES clause, by unilateral Modification Nos. P00004, P00005, P00006, and P00007, dated 20 March 1998, 26 June 1998, 12 August 1998, and 15 September 1998 respectively, the CO four times extended contract 7's term for a cumulative total of 182 days to a final ending date of 10 October 1998 (R4, tabs 5-7, 9). 182 days did not exceed six months.

11. During the final option period extension under Modification No. P00007, the CO issued DOs: (a) No. 5004, on 23 September 1998, for several line item quantities in the amount of $235,624.03 (R4, tab 13); and (b) No. 5005, on 30 September 1998, for several line item quantities in the amount of $188,196.41 (R4, tab 16).

12. Appellant's 8 December 1998 letter submitted a claim to respondent, alleging failure to receive "minimum funding" during the option year pursuant to the FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY clause, Government changes in base course quantities, painting acceptance and security procedures, and violations of the 2-year extension limit and the specified 60-day preliminary and 15-day notices of extension. Appellant calculated the minimum funding amount claimed by subtracting

15% from the original option year amount of $2,798,099.12, yielding $2,378,384.25, and deducting the "funded amount" of $1,036,681.60 in 1997-98 therefrom, resulting in $1,341,702.65.* The claim stated no dollar amount for the other five alleged causes. (R4, tab 32)

13. On 22 February 1999 bilateral Amendment 02 to DO No. 5004 increased the quantities on some line items, for a total $52,283.91 increase (R4, tab 15).

14. On 24 March 1999 appellant appealed to this Board on the basis of a deemed denial of its 8 December 1998 claim pursuant to 41 U.S.C. § 605(c)(5), on which the CO had issued no final decision within 60 days after receipt (R4, tab 37).

15. In DO Nos. 5003-5005, respondent ordered no work under line items 61-62, 66-67, 90, 92, 97, 98, 101, and 103-108. Moreover, in DO No. 5003 respondent ordered no work under line items 79-81; in DO No. 5004 respondent ordered no work under line items 55, 68-69, 84, 94 and 99-100; and in DO No. 5005 respondent ordered no work under line items 58, 60, 63-64, 69, 84, 94 and 99-100. (R4, tabs 11, 13, 15, 16)

16. In 1996 (a) DFARS 204.7003(a)(3)(iv) provided that a "D" in position 9 of a defense agency contract number meant "Indefinite delivery contracts" and (b) FAR 16.501-2(a) provided: "There are three types of indefinite-delivery contracts: Definite-quantity contracts, requirements contracts, and indefinite-quantity contracts."

17. In its answer, respondent pleaded that Contract No. F48608-96-D0007 is a "requirements" contract and the FAR 52.216-22 INDEFINITE QUANTITY clause was included in contract 7 "in error" (answer ¶¶ 3, 4, 8-9, 13, 16-19, 22, 25).

18. CO Carroll M. Vye executed contract 7 for respondent. Mr. Vye's 6 February 1996 pre-award internal memorandum and a 23 February 1996 letter to prospective bidders described Contract No. F48608-96-D0007 as "an ID/IQ requirements contract" (exs. A-C, A-E). His 26 March 1996 Determination and Findings described contract 7 as a "firm fixed price ID/IQ contract" (ex. A-D).

19. Mr. Vye deposed in October 1999 that: (i) contract 7 is a "requirements contract," despite the absence of the FAR 52.216-21 REQUIREMENTS clause, because contract 7 lacked any minimum quantity; (ii) the FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY and 52.216-22 INDEFINITE QUANTITY clauses were inserted in, and the FAR 52.216-21 REQUIREMENTS clause was omitted from, contract 7 "by [his] mistake"; and (iii) despite the statement in his 23 February 1996 letter to prospective

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* Appellant ignored the $243.92 reduction of the option year's estimated total amount, and the $12.98 reduction of DO No. 5003's amount (see SOF ¶¶ 4, 7).

bidders, there is no such thing as an "ID/IQ requirements contract." (Ex. A-J, Vye depo. at 14, 16, 18, 22, 24)

20. CO Leona Fitzpartick deposed in September 1999 that she succeeded CO Vye in January 1998, and "I wasn't there at the thought process" when contract 7's clauses were included. In her view contract 7 was a requirements contract because it lacked minimum and maximum quantities; the FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY and 52.216-22 INDEFINITE QUANTITY clauses were "surplus language"; and if bidders were confused by inclusion of such clauses, they should have asked for clarification by the CO or contract administrator. (Ex. A-J, Fitzpatrick depo. at 9, 11, 17-18, 27-29)

21. According to appellant's Thomas Konitz:

> [A]t the pre-work conference . . . when we [appellant] went out to the site and saw that some of the sites weren't at first going to meet the 85 percent, . . . I went back in and asked Janet [Dull, respondent's contract administrator (ex. A-B)] to go over the contract with me and explain to me what I can count on. And she said that it was an ID/IQ contract and that the minimums are set within the contract, meaning that that price for Option Year One and Option Year Two would be met, at least 85 percent of it . . . ."

(ex. A-G, 16 February 2000 depo. at 19-20) Neither that deposition nor the appeal record identifies whether or when such "pre-work conference" occurred, although presumably it was not before contract award; the foregoing deposition excerpt does not clarify whether Janet Dull understood the "meaning" that the contract minimum was at least 85% of the option year price.

22. Janet Dull deposed that CO Vye told her to prepare a requirements type contract; she made a mistake by putting the FAR 52.216-22 INDEFINITE QUANTITY rather than the 52.216-21 REQUIREMENTS clause in the contract; and she believed contract 7 was a requirements contract for lack of minimum quantities (ex. A-J, Dull depo. at 18-19, 28, 34-36). In the present record there is no evidence that Ms. Dull was asked, nor did she depose, whether and when there was a pre-work conference and what she said to Thomas Konitz about minimum quantities on such occasion. In the deposition excerpts submitted, she did not deny the statements attributed to her by Mr. Konitz.

Positions of the Parties

Movant argues that its motion presents only a question of law that is resolvable by summary judgment. It contends that contract 7 is not a definite quantity contract, because it did not purchase a fixed, definite quantity of services and its line item quantities are solely estimates (SOF ¶ 1). Contract 7 is not a requirements contract -- notwithstanding that movant so pleaded in its answer (SOF ¶ 17) -- because it does not include either the FAR 52.216-21 REQUIREMENTS clause or provide that the Government would order all its requirements for contours restoration and fence repairs at the LF/WAFB exclusively thereunder (SOF ¶ 3(a)). Nor is contract 7 an indefinite quantities contract, although it incorporates the FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY and 52.216-22 INDEFINITE QUANTITY clauses, because (1) the FAR 52.211-18 clause did not designate, as the contract's minimum quantity, 85% of the total estimated quantity for ***all*** delivery orders issued during the option period but rather addresses 85% to 115% of an individual delivery order, and (2) contract 7 did not elsewhere designate any minimum quantity or minimum amount for ***all*** delivery orders issued during the option period (SOF ¶ 3(b)). Respondent concludes that contract 7 is enforceable only to the extent that it has been performed, and so appellant's claim for the difference between the price of services ordered and the price of 85% of the estimated quantity of all services is unsound.

Appellant argues that the CO and other Government officials have vacillated in their interpretations of whether contract 7 is a requirements or an ID/IQ type contract (SOFs 17-20), contract administrator Janet Dull told Thomas Konitz that contract 7 "was an ID/IQ contract and that the minimums are set within the contract, meaning that that price for Option Year One and Option Year Two would be met, at least 85 percent of it" (SOF ¶ 21); Janet Dull has not denied such statement (SOF ¶ 22); the present appeal file does not include sufficient evidence of the parties' original intent with respect to contract type and discovery is ongoing with respect to such intent, and thus it is inappropriate to grant summary judgment to movant on the issue presented.

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

In an indefinite quantities contract, the Government agrees to purchase a guaranteed minimum quantity of goods or services. Without such agreement, its promise to the contractor would be illusory, since the Government would have no obligation to make a purchase even if it had a requirement for the goods or services. A requirements contract requires the Government to fill all of its actual requirements for the specified supplies or services during the contract period under the requirements contract. *See Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993 at 115,481, *aff'd*, 935 F.2d 281 (Fed. Cir. 1991) (table) (contract called itself an indefinite

quantities contract, contained the required clauses for such a contract, and included a $85,000 minimum quantity of laundry services; held: it was unambiguously an indefinite quantity contract); FAR 16.503(a), 16.504(a).

A contract for bicycle assemblies did not identify itself as a requirements contract and contained no minimum quantity of assemblies. We denied the Government's motion for summary judgment because terms of exclusivity indicative of a requirements contract (the contractor's capacity to meet contract demands, and the Government's disclaimer of any warranty of the number of assemblies needed) and the Government's post-award statements of the contractor's exclusive right to provide the assembly services and its assistance to obtain compliance in ordering services from the contractor, did not support the contention that the contract could not be a requirements contract. *See Jez Enterprises, Inc.*, ASBCA No. 51851, 00-2 BCA ¶ 30,939 at 152,716-17.

Contract 7 contained no terms or conditions indicative of exclusivity in ordering all respondent's LF/WAFB requirements for contours restoration and fence repairs from appellant, or addressing appellant's capacity or capability to meet contract needs or demands, or disclaiming any Government warranty of the accuracy of its estimated quantities of services (SOF ¶ 3). The record contains no evidence of any post-award statements or conduct of the parties recognizing appellant's exclusive right to provide contours restoration and fence repairs at LF/WAFB, and no persuasive evidence of any post-award course of conduct to treat the FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY clause's 85% variance of actual from estimated quantities for repricing individual unit-priced items as the total contract 7 minimum purchase for all 54 line items in the option year for purposes of avoiding an illusory ID/IQ contract.

Contract 7 is not enforceable as either a requirements contract or as an indefinite quantity contract. As such, appellant is entitled to payment only for services actually ordered by LF/WAFB and provided by appellant. *See Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998).

Accordingly, we grant respondent's motion for summary judgment with respect to the "minimum funding" claim.

Dated: 26 September 2000

DAVID W. JAMES, 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
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. 52113, Appeal of Konitz Contracting, Inc., rendered in conformance with the Board's Charter.

Dated:

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