ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Dachdeckermeister Udo Dämgen GmbH	)	ASBCA No. 53076
	)	
Under Contract No. DAJA22-97-C-0225	)	

APPEARANCE FOR THE APPELLANT: Ellen Ernst, Rechtsanwältin
Frankfurt am Main, Germany

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Gregg M. Schwind, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
PURSUANT TO RULE 12.3

Appellant seeks costs allegedly incurred because respondent failed to exercise option items under a construction contract following performance of the basic item. Appellant generally contends that it was led to believe that it had been awarded both the basic item and option items. Respondent insists that appellant was awarded an option contract and is not entitled to recover because the option items were not exercised. Both parties have elected to submit on the record under our Rule 11, and appellant has elected Rule 12.3 disposition. We deny the appeal.

FINDINGS OF FACT

1. By date of 30 September 1997, respondent awarded appellant contract No. DAJA22-97-C-0225, following sealed bidding, to repair roofs on buildings 325 and 336 in the Sportsfield Housing Area in Hanau, Germany. (R4, tab 1 at 1, B-1-2)

2. The sealed bid solicitation required all bidders to price separately five Contract Line Item Numbers (CLINs), corresponding to the "Basic Item" and four "Option" Items labelled as such (*id*., at B-1-3). Section B of the solicitation provided that:

> (c) The contractor shall also price the options 2 through 5.
>
> (d) Failure to include prices for all options will make the bid nonresponsive.

(e) The schedule for the Base item, and the optional items are as follows:

BASIC ITEM:	BLDG. 325 & 336	COMPLETION TIME: 60 DAYS AFTER NTP
OPTION 2:	BLDG. 335 & 334	
OPTION 3:	BLDG. 328 & 327	
OPTION 4:	BLDG. 330 & 312	
OPTION 5:	BLDG. 340 & 341	

Each separate line item is to be completed 60 calendar days after the receipt of the Notice to Proceed (NTP). The Government has 360 calendar days from the contract award to exercise optional CLINs.

(*Id*., at B-1) In the spaces provided on section B, appellant made handwritten entries for the components of its sealed bid, entering DM 523,000 for CLIN 0001, which was described as "BASE 1: ROOF REPAIR, BLDG. 325 & 336," and DM 516,000 for each of CLINs 0002 through 0005, each of which was described as an option, for a total bid of DM 2,587,000 (*id*., at B-1-3). The ensuing award document advised appellant, in block 21, Items Accepted, that "[y]our offer . . . is hereby accepted for CLIN 0001, . . . in the amount of DM 523,000.00" (*id*. at 1).

3. The contract contained various standard clauses, including: FAR 52.217-5, Evaluation of Options (JUL 90); FAR 52.217-7, Option for Increased Quantity - Separately Priced Line Item (MAR 1989; and FAR 52.217-9, Option to Extend the Term of the Contract (MAR 1989) (*id*. at I-5-6, M-1).

4. By memorandum dated 8 October 1997, a copy of which was furnished to appellant, the contracting officer designated Younes Rabiyan as his representative, stating that "you are *not* authorized to change the contract in any way whatsoever" (*id*., tab 8 at 2; emphasis in original).

5. On 17 October 1997, the parties held the post-award conference, at the conclusion of which appellant was given the notice to proceed, effective on that date (*id*., tab 10 at 1, 4).

6. By bilateral modification P00001 effective 22 December 1997, the parties agreed "to revise the performance period . . . for each separate Line Item (Base item and optional items) [*see* finding 2] to read: Completion date: 120 days after Notice to Proceed" (*id*., tab 2 at 1, 2).

7. It appears undisputed that appellant commenced work on CLIN 0001 on time and finished on time.

8. By letter to the contracting officer dated 7 January 1998, appellant stated that "the first stage of construction on Buildings 325-336 are near completion as of today 7.1.98 we have had no notice to proceed with the Option" (*id.*, tab 13). Appellant further stated that, unless it received notice to proceed "with the Option," it would be forced to remove a crane and scaffolding, causing increased cost to respondent (*id.*).

9. Respondent did not exercise the optional CLINs within 360 calendar days of award, or at any other time.

10. By undated letter to the contracting officer, appellant submitted a claim for DM 160,432.52 for additional costs incurred by reason of respondent's failure to exercise the option items under the contract (*id.*, tab 19). Thereafter, by letter to appellant dated 12 July 2000, the contracting officer rendered her decision denying the claim (*id.*, tab 21). This timely appeal followed.

11. Appellant has tendered a statement from Ralf Mosmann, its project manager. He states that, "[o]n the occasion of a site inspection/building site talks on 01.10.1997," Mr. Rabiyan showed him and appellant's proprietor the ten buildings, which were "subdivided into 5 building sections to be treated consecutively." Mr. Mosmann adds that "[i]f the individual building sections were not to be carried out immediately after one another, we also discussed where building materials, scaffolding, building site containers etc. could be stored safely and inaccessibly in the meantime." Mr. Mosmann adds that Mr. Rabiyan was unable "to provide us with any information on the sequence of the individual building sections, only that work was to begin on buildings 325 and 336." (Mosmann statement)

12. Respondent has tendered an affidavit from Ramón E. Best, who served as contracting officer for approximately three months following award. Mr. Best states that, to his knowledge, "no one representing the US Government ever made . . . statements" to appellant to the effect that all ten buildings had been approved for repair by respondent and that funding for work on all ten buildings had also been approved. (Best affidavit at 1)

13. Respondent also has tendered an affidavit from Younes Rabiyan, the contracting officer's representative. Mr. Rabiyan states that, to his knowledge, "neither I nor anyone else ever stressed that the Government had approved all 10 buildings for repair or that funds had been provided for the repair of all 10 buildings." (Rabiyan affidavit at 1)

14. We find no evidence that, in not exercising the option items, respondent acted in bad faith, or acted in abuse of its discretion or arbitrarily or capriciously.

DECISION

In seeking additional costs allegedly incurred when respondent failed to exercise option items, appellant contends that it understood from both the solicitation "and the contractual negotiations" that the scope of performance was "the repair and treatment of 10 roofs." It asserts that respondent's representatives, including Mr. Best, "always stressed that the entire scope of the repair and treatment work had been approved by the government and the money had already been approved for work to be carried out on all 10 roofs." (Letter complaint at 1) Appellant argues that, while "the impression created from the outset" was that appellant would perform the work on all ten buildings, the CLINS other than the basic item "were erroneously referred to in the Contract as 'options'" (*id*. at 1-2). For its part, respondent advances a straightforward position, arguing that the contract is an option contract and that, under settled principles, respondent's simple failure to exercise the options precludes recovery. (Government's Rule 11 Brief at 8-14)

Considering the case in light of established legal principles, we must reject appellant's argument and accept respondent's. In the first instance, the contract is undeniably an option contract. Numerous features confirm this conclusion. Thus, the sealed bid solicitation addressed pricing "for the Base item, and the optional items" and stated expressly that respondent had a year "to exercise optional CLINs" (finding 2). Apellant's offer was accepted only "for CLIN 0001," the base item (*id*.). The contract contained standard clauses employed in option contracts (*see* finding 3). And, notwithstanding its present position, appellant itself understood that it had an option contract (*see* finding 8).

In the second instance, respondent's actions under an option contract are measured against familiar principles. Thus, in *Kirk/Marsland Advertising, Inc.*, ASBCA No. 51075, 99-2 BCA ¶ 30,439 at 150,408, *appeal dismissed*, 230 F.3d 1378 (Fed. Cir. 2000) (table), we relied upon *Plum Run, Inc.*, ASBCA Nos. 46091 *et al*., 97-2 BCA ¶ 29,193 at 145,230, where we held that:

> [t]he exercise of an option is within the broad discretion of the Government, and appellant has no basis for relief unless it can establish that the Government has acted in a manner which violates its implied obligation to act in good faith and not to abuse its discretion or act arbitrarily or capriciously.

As we have found, the record here contains no evidence that respondent failed to act in good faith, or that it abused its discretion or acted arbitrarily or capriciously (finding 14). The record contains assertions that respondent engaged in such conduct, but the only evidence adduced by appellant is Mr. Mosmann's statement, which falls short of establishing that Mr. Rabiyan misled appellant, or that respondent committed to exercising the options (*see* finding 11). In any event, Mr. Rabiyan lacked authority to change the

contract and both he and Mr. Best deny that they or anyone stated that respondent would exercise the options (findings 4, 12, 13). Those denials have not been overcome.

CONCLUSION

The appeal is denied.

Dated: 8 June 2001

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signature continued)

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. 53076, Appeal of Dachdeckermeister Udo Dämgen GmbH, rendered in conformance with the Board's Charter.

Dated:

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