ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Community Consulting International	)	ASBCA No. 53489
	)	
Under Contract No. LAG-I-00-99-00010-00	)	

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTION TO DISMISS

Respondent has moved to dismiss this appeal relating to a multiple award, indefinite quantity, task order contract issued to appellant and others for "sustainable urban management" services. Respondent contends that we lack subject matter jurisdiction. Respondent also argues that appellant has failed to state a claim upon which relief can be granted in its two-count complaint alleging breach of the contract's small business set-aside provisions by expanding the number of other-than-small awardees, and alleging breach of the duty to provide a fair opportunity to compete for task orders. We treat the motion as one for summary judgment and grant it in part and deny it in part.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. By date of 1 April 1999, respondent awarded appellant, a small business, Contract No. LAG-I-00-99-00010-00 as a multiple award, time and materials, indefinite quantity, task order contract for advisory services, technical assistance, and training in the area of sustainable urban management ("SUM"). (R4, tab 3 at 1-2, 13) The contract period was three years from the award date, with two option years thereafter (*id*. at 27).

2. The contract contained various standard clauses, including: FAR 52.216-18, ORDERING (OCT 1995); FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995); FAR 52.219-6, NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (JUL 1996); and FAR 52.232-7, PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR HOURS CONTRACTS (FEB 1997).

(R4, tab 3 at 29, 43, 44, 47) As initially awarded, the contract also contained the standard clause appearing at FAR 52.233-1, DISPUTES (OCT 1995). (*Id.* at 44) (*see also* finding 9)

3. Section B of the contract Schedule contained clause B.2, CONTRACT TYPE, which provided in part that "[t]his is a Time and Materials Indefinite Quantity contract utilizing . . . Task Orders to provide technical direction, a ceiling price for the task order and obligation of funds; . . . " (R4, tab 3 at 2) The Schedule also contained clause B.3, OBLIGATED AMOUNT, which provided that

> [t]he basic contract includes an initial obligation of funds of at least $50,000 per contractor to cover a minimum of services, which will be applied towards the first Task Order(s). . . . If a contractor receives no Task Order during the period of performance of the contract, then the contractor shall invoice for the $50,000 under the designated [contract line item number].

(*Id*.)

4. The Schedule included clause B.9, TASK ORDER LIMITATIONS. Paragraph B.9(a), MINIMUM ORDER, included subparagraph B.9(a) (1), which provided that respondent "guarantees that it shall order, and the Contractor is guaranteed to receive, a minimum amount of $50,000 for services or reports and other deliverables during the period of this contract." (*Id*. at 11)

5. Clause B.9 also contained paragraph B.9(b), MAXIMUM ORDER. Paragraph B.9(b)(2), Option, included the following statement:

> The total ordering limitation of $110 million ($90,000,000 for the base years 1-3 and $20,000,000 for option years 4&5, provided the option is exercised) will be the sum of all task orders under all contracts awarded under this RFP [sic] up to the IQC ceiling of $90,000,000 for the base years 1-3 and $20,000,000 for option years 4&5, if the option is exercised. The ordering limitation refers to obligated funds, not actual expenditures.
>
> Thus, each contractor under the SUM IQC has the opportunity to compete for awards up to the ceiling of $90,000,000 for the base years and $20,000,000 for years 4&5, provided the option is exercised. The total contract cost for the base contract years 1 - 3 and option years 4&5 is $110,000,000.

(R4, tab 3 at 12)

6. The contract included clause F.3, Task Orders, which provided in part:

> In no event shall the aggregate total of all task orders under all contracts awarded under this RFP [sic] exceed the Maximum Ordering Limitation authorized in the contract ($90 million ceiling for base years 1-3 and $20 million ceiling for option years 4&5, if the option is exercised). . . .

(R4, tab 3 at 27)

7. The contract included clause F.4, FAIR OPPORTUNITY TO BE CONSIDERED. In pertinent part, it provided:

> F.4. (a) Pursuant to FAR 16.505, the following procedures shall be followed in order to ensure that the Contractor shall have a fair opportunity to be considered for each task order:
>
> F.4.(a) (1) If the requirements for a particular activity to be implemented through a task order are such that past performance/experience is the criterion for selecting the contractor, the cognizant [official] will review and consider the past performance/experience for each of the multiple awarded contracts. . . . If review of this information is sufficient for the cognizant [official] to determine which contract to order against, each contractor is considered to have been provided a fair opportunity to be considered for the order. . . .
>
> F.4.(a) (2) If past performance information is insufficient for the [cognizant technical officer] to determine which contract to place an order against, or personnel qualifications (resumes) and schedule of availability will determine selection, the cognizant [official] will provide orally or in writing . . . a description of the intended services . . . to each of the contractors awarded a contract under the SUM IQC. Each contractor will have the opportunity to submit personnel resumes and a schedule to the [cognizant technical officer] so the [cognizant technical officer] can determine which contract to award against.
>
> F.4.(a) (3) If a requirement requires consideration of cost/price information for the cognizant [technical officer] to

> determine which contract to order against, or the government estimate for the requirement is over $4,000,000, or technical approach would be a determining factor on which contract to order against, the procedures/selection for an order award will be undertaken as described below as opposed to procedures/selection described in Section F.4. (a) (1) and F.4. (a) (2) above. The cognizant [technical officer] will forward the requirement to the cognizant Contracting Officer who will in turn contact each of the contractors awarded a contract and provide them an opportunity to submit a proposal for the requirement. The cognizant Contracting Officer along with the cognizant [technical officer] will determine the minimal information necessary to obtain from each contractor in order to make the selection among them, and will provide each of them the evaluation criteria which will be utilized in making the selection. . . .

(R4, tab 3 at 27-28)

8. The contract included clause G.8, SUM CONTRACTORS AND CONTRACT AWARD NUMBERS, which identified the three contractors who received awards, aside from appellant, as Abt Associates, Inc., International City/Council Management Association, and the Research Triangle Institute. (R4, tab 3 at 39) It is undisputed that these contractors were other-than-small businesses and that they received unrestricted awards. We find no undertaking in clause G.8 to limit the awardees to the contractors listed.

9. It is undisputed that, following award of appellant's contract, two other-than-small disappointed bidders filed protests with the General Accounting Office, and, in consequence, respondent reopened the unrestricted portion of the procurement for such bidders in the competitive range. (Compl. ¶ 9; answer, ¶ 9) Thereafter, effective 13 August 1999, appellant and respondent entered into bilateral Modification No. 01 "to 1) add new contractors and award numbers to § G [of the contract]; and 2) Revise and incorporate clauses in Section I." The parties agreed that, "[d]ue to this modification," two new SUM contractors would be added to those identified in clause G.8 (*see* finding 8), the newer FAR 52.233-1, DISPUTES (DEC 1998) clause would be substituted for the clause in the contract at award (*see* finding 2), and two other clauses would be added. With respect to the additional contractors, the modification provided in its entirety:

> In Section G.8 SUM Contractors and Contract Award Numbers [*see* finding 8], add the following:
>
> "5. Planning and Development
> Collaborative Int' l, Inc.

[PADCO] - LAG-I-00-99-00035-00
6. The Urban Institute - LAG-I-00-99-00036-00"

(R4, tab 3, Modification No. 01 at 1-2) The parties further agreed that, "[e]xcept as herein modified, all other terms and conditions remain unchanged and in full force and effect." (*Id*. at 2) It is undisputed that both PADCO and the Urban Institute were other-than-small contractors and that they received unrestricted awards.

10. We find no evidence that appellant reserved any rights in executing Modification No. 01. The copy of the modification in the record bears no indication of any reservation of rights (*id*. at 1-2). The executive vice president of appellant's corporate parent asserts in his declaration that "[s]everal days" after executing Modification No. 01, appellant's president sent the signed copy to respondent with a cover letter stating that, "by executing this modification, [appellant] does not waive any rights it may have against [respondent] to object to the addition of two unrestricted contract awards to the three previously made," including "the right to file a claim . . . for any damages resulting from this modification." (Decl. of Charles J. Billand, ¶ 7) However, no such cover letter appears in the Rule 4 file or in either party's papers and, in this state of the record, we find the purported quotations from the cover letter to be not credible.

11. We find that Modification No. 01 resulted from protests filed by PADCO and the Urban Institute with the General Accounting Office. We further find that, as a result of the protests, respondent reopened the competition for the unrestricted awards but that appellant did not compete. (Compl., ¶¶ 9-10; answer, ¶¶ 9-10)

12. By letter dated 23 August 1999, appellant filed a protest with respondent, seeking termination of two of the five unrestricted awards (R4, tab 6 at 1).

13. Contract formation had included a solicitation issued to interested bidders. The cover letter to the solicitation provided in part that

> The total estimated cost of the [indefinite quantity contract's] [IQC's] base years 1 - 3 is $90,000,000 and the total estimated cost of the option years 4 and 5 is $20,000,000, if exercised.
>
> [Respondent] anticipates awarding up to four (4) multiple task order-based indefinite quantity Time and Materials contracts (ICQs) with one of the four awards as a small business set-aside.

(R4, tab 1 at 1). The solicitation contained § L.5(d)(1), Multiple Awards, which provided that "[i]t is anticipated that the Government will award up to four (4) contracts under this solicitation with one of the four awards to a small business" (*id*. at 128). The solicitation

further contained § M.2, GENERAL INFORMATION. Paragraph M.2(a) (3) of § M.2 provided in part that "[t]he Government intends to select up to four (4) contractors for award but reserves the right not to award any contract(s)" (*id*. at 140).

14. It is undisputed that, during the first 18 months of contract performance, appellant received task orders aggregating $1,719,503, based on ceiling prices. (R4, tab 9 at 5; tab 12 at 3) During the same period, respondent awarded task orders aggregating $37,336,454, based on ceiling prices, to the other five awardees. (R4, tab 9 at 1-4, 6)

15. By letter of 21 March 2001, mistakenly dated 21 March 2000, appellant submitted a certified claim to the contracting officer. In its ten-page claim, appellant asserted entitlement under two theories. First, appellant claimed a breach of the contract's small business set-aside restrictions, quoting the statement in the solicitation that one of the four awards would be made to a small business and citing FAR 19.501(a) and case law. (R4, tab 12 at 3-5) Second, appellant claimed a breach of the fair opportunity to compete, outlining the factual contentions and citing the Federal Acquisition Streamlining Act, 41 U.S.C. § 253j(b) (FASA), as well as FAR 16.505, and clause F.4 of the contract (*see* finding 7). Appellant devoted over two pages of the claim to the relief requested. Citing the "relevant factors in determining the value of a chance for obtaining business" in *Ace Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000), appellant outlined its calculations, quantifying those factors as percentages that it applied to an alleged $8 million shortfall in task orders, as a result of which calculations it arrived at "an estimated amount for [its] damages pertaining to orders awarded in the first eighteen months [of performance] of $1,520,000." (R4, tab 12 at 8-9) Appellant also sought relief in the form of a contract interpretation, citing FAR 33.201, requested a final decision in 60 days, and sought alternative dispute resolution. (*Id*. at 9-10) We find that the claim gave the contracting officer adequate notice of the facts upon which appellant relied, the theories upon which appellant sought relief, and the nature of the relief sought. We further find that the certification in the claim was substantially identical to that prescribed in 41 U.S.C. § 605(c)(1).

16. By letter dated 17 May 2001, the contracting officer advised appellant that the matters raised in its claim were "virtually identical" to those raised in the August 1999 agency protest and he had concluded that it had not submitted a valid claim because the matters raised "are *not* issues relating to contract administration for which the Contract Disputes Act is applicable." (R4, tab 14 at 2) (emphasis in original) Appellant thereafter filed its notice of appeal in August 2001.

DECISION

A. *Allegations of the Complaint*

Appellant's complaint consists of two counts, which we summarize as follows. In count one, appellant alleges that respondent breached the contract's small business set aside provisions. In particular, appellant alleges that, "by its unilateral action following the protests against the unrestricted awards [*see* finding 9], AID has required [appellant] to compete for orders with up to five large business concerns." (Compl., ¶ 15) Appellant further alleges that respondent's "statement in the solicitation, which was incorporated into the Contract with [appellant], that task order competition would be restricted to the four awardees was a valid and enforceable contractual promise." (*Id*., ¶ 16) Respondent breached this promise, maintains appellant, by the awards to PADCO and the Urban Institute, with the result that it has "significantly and substantially impaired the value of the ' total set-aside' to [appellant]." (*Id*., ¶¶ 17-18) Based upon several assumptions, appellant alleges that it "could look forward to winning roughly a fourth of the total contemplated $110 million in contemplated awards" under the SUM contract, and it compared that expected amount to the amount that it was in fact awarded following the inclusion of PADCO and the Urban Institute to arrive at its damage figure. (*Id*. at ¶ 19)

In count two, appellant alleges a breach of the duty to provide a fair opportunity to compete. It is said to be rooted in the Federal Acquisition Streamlining Act, 41 U.S.C. § 253j(b), in the implementing regulation found at FAR 16.505, and in clause F.4 of the contract (*see* finding 7). In substance, appellant alleges that respondent's practices in awarding task orders under the SUM contract denied it a fair opportunity to compete for task orders, largely by restricting the orders on which it could bid, all in violation of statute, regulation and contract. (Compl., ¶¶ 26-29) Appellant estimates that it was damaged in "the amount by which the SUM orders it received fell short of the 25% it should have received, given [respondent's] target for small business contracting." (*Id*., ¶ 30)

B. *Jurisdiction*

1. *Adequacy of Claim*

Respondent argues that we lack subject matter jurisdiction because appellant's claim (*see* finding 15): (1) did not state a sum certain; (2) failed to give the contracting officer adequate notice of the basis of the claim; and (3) was not properly certified. Respondent adds a fourth ground, adding that neither a final decision by the contracting officer, nor a deemed denial, is or can be present. (USAID's reply to app. opp' n to mot. to dismiss (reply) at 1-6)

We treat each of the four grounds in turn and conclude that none warrants dismissal for lack of jurisdiction. First, with respect to the sum certain requirement, respondent insists that the $1,520,000 that appellant seeks is the "numerical representation" of a flawed legal theory. (Reply at 3) Regardless, "[a]ll that is required is that the contractor submit . . . to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the . . . amount of the claim," *Contract Cleaning*

Maintenance, Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987). We conclude that appellant provided what was required in that portion of the claim devoted to the relief requested (*see* finding 15), setting out the calculations by which it arrived at the specific dollar amount of $1,520,000. Second, with respect to adequate notice, respondent contends that appellant's "failure to identify the task orders and/or the specific problems it perceives with each task order at issue" left the contracting officer in the dark regarding the acts or omissions of which respondent was accused. (Reply at 3-4) However, a valid claim need not include detailed cost breakdowns and "the contracting officer's desire for more information [cannot] change the 'claim' status of the contractor's letter," *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). We have found that the ten-page claim apprised the contracting officer of the facts and theories upon which appellant relied, and of the relief sought (finding 15). Third, with respect to defective certification, respondent contends that appellant's president "cannot" certify to the accuracy of the amount requested because it came from a Government summary of task orders that was itself based upon inaccurate information. (Reply at 4-5) Perhaps so, but we have found that the certification is substantially identical to that prescribed in 41 U.S.C. § 605(c)(1) (*see* finding 15). Finally, with respect to the deemed denial argument, respondent urges that the contracting officer's May 2001 letter (*see* finding 16) and his inability to issue a final decision cannot be treated as a deemed denial because appellant failed to submit a valid claim. (Reply at 5-6) We disagree, inasmuch as we have concluded that appellant did submit a valid claim in March 2001, the contracting officer refused to issue *any* decision in his May 2001 letter (*see* finding 16), and the notice of appeal was filed three months after that, in August 2001 (*see id.*).

2. *Jurisdiction Over Count One*

Respondent contends that we lack jurisdiction over count one of the complaint because it constitutes a bid protest. That is, respondent insists that the allegations of count one meet the elements of a bid protest, which is defined in 31 U.S.C. § 3551(1)(C) for purposes of the Competition in Contracting Act as "a written objection by an interested party to . . . [a]n award or proposed award of . . . a contract" for the procurement of property or services. Respondent urges that appellant is an "interested party" because it is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract" within the meaning of 31 U.S.C. § 3551(2). (Mot. to dismiss appeal of Community Consulting International (mot.) at 7-8) Appellant counters that its claim "does not state any objection to either a . . . solicitation, contract, proposed award of a contract or the cancellation of the award of a contract. Consequently, it is not a bid ' protest.'" (App. opp'n to resp't mot. to dismiss (opp' n) at 19)

We conclude that we have jurisdiction over count one. In the core allegations of count one, appellant alleges, first, that respondent's "statement in the solicitation, which was incorporated into the Contract . . ., that task order competition would be restricted to

the four awardees was a valid and enforceable contractual promise." (Compl., ¶ 16) Appellant then unmistakably alleges that respondent breached that contractual promise "[b]y its unilateral action in awarding two additional unrestricted contracts to large businesses." (Compl., ¶¶ 16-17) Appellant further alleges that damage, in the form of a dilution of appellant's total small business set aside, ensued from the breach. (Compl., ¶ 18)

These allegations fall within the classic elements of non-performance of a contractual duty, resulting in damages. *See, e.g*., RESTATEMENT (SECOND) OF CONTRACTS §§ 235(2), 236 (1979). As such, they fall within our Contract Disputes Act breach jurisdiction, which embraces disputes "relating to a contract." 41 U.S.C. § 605(a); *see Malone v. United States*, 849 F.2d 1441, 1444 (Fed. Cir. 1988) (noting that the Act expanded boards' jurisdiction to include "breach of contract issues"). We do not understand the allegations of count one to constitute, in the formulation of 31 U.S.C. § 3551(1)(C), an objection "to . . . [a]n award or proposed award of . . . a contract," to either of the two additional awardees. Instead, the allegations regarding the additional awards lay out what are said to be the contractual consequences that have ensued from respondent's failure to adhere to promises made in appellant's contract.

3. *Jurisdiction Over Count Two*

Respondent contends that "Count II of [appellant's] Complaint is nothing more than a collective bid protest on task orders that [respondent] issued to other SUM ICQ contractors." (Mot. at 19) Respondent maintains that, as such, count two is outside our jurisdiction because FASA prohibits protests "in connection with the issuance or proposed issuance of a task or delivery order," except in circumstances not relevant here. 41 U.S.C. § 253j(d). Appellant's recourse, says respondent, is to complain to the task and delivery order ombudsman provided for in 41 U.S.C. § 253j(e). (*Id*.) Appellant counters that it is not "objecting to the placement of a task or delivery order with another SUM contractor." Rather, appellant contends, by count two it "seeks only to enforce the terms of its own contract and for the damages it has suffered as a result of [respondent's] failure to follow the contract ordering provisions." (Opp' n at 19)

We conclude that we have jurisdiction over count two. As we did with respondent' s argument regarding jurisdiction over count one, we again reject the contention that the allegations here constitute nothing more than a bid protest. To the contrary, the allegations of count two are rooted squarely in the contractual promise found in clause F.4 of the contract (*see* finding 7). (Compl., ¶¶ 24-25) The alleged breach is that, during the first 18 months of contract performance, it "was given the opportunity to bid on only 26 of a total of 51 orders awarded," and that, in the circumstances, respondent "has awarded task orders under SUM in violation of the procedures mandated by statute and regulation, and set forth in" clause F.4. (Compl., ¶¶ 26-29) Appellant further alleges that, "[a]s a result of [respondent's] breach, [appellant] has been denied the opportunity to compete for and win

additional SUM task orders," for which damages are sought. (Compl., ¶ 30) As with count one, we conclude that the allegations of count two fall within our Contract Disputes Act breach jurisdiction. *See* 41 U.S.C. § 605(a); *Malone*, *supra*, 849 F.2d at 1444.

We also reject the argument that resort to the task and delivery order ombudsman is appellant's exclusive remedy. Neither 41 U.S.C. § 235j(e) not FAR 16.505 confers remedial powers on the ombudsman. In addition, respondent does not cite to any provision of FASA, and we know of none, in which Congress explicitly carved out multiple award, task order contracts as an exception to our Contract Disputes Act jurisdiction. While respondent argues that 41 U.S.C. § 253j(e) "creates a forum for reviewing IQC contractors' complaints and for ensuring that they are afforded a fair opportunity to be considered for task and delivery orders" (mot. at 19), we decline to regard that provision as an implicit exception to our jurisdiction. "[R]epeals by implication are strongly disfavored . . . so that a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two." *United States v. Fausto*, 484 U.S. 439, 352-53 (1988); *see also Dalton v. Sherwood Van Lines*, 50 F.3d 1014, 1018 (Fed. Cir. 1995) (holding that Contract Disputes Act did not impliedly repeal dispute resolution procedures applicable to common carriers in earlier statute). Moreover, the available legislative history does not appear to support the conclusion that Congress intended to establish an exception to our jurisdiction. 41 U.S.C. § 235j(e) was part of section 1054 of Pub L. No. 103-355. The conference report regarding section 1054 states that

> the conference agreement would provide general authorization for the use of task and delivery order contracts to acquire goods and services other than advisory and assistance services. The conferees note that this provision is intended as a codification of existing authority to use such contractual vehicles. All otherwise applicable provisions of law would remain applicable to such acquisitions, except to the extent specifically provided in this section. . . .

H.R. CONF. REP. NO. 103-712, *reprinted in* 1994 U.S.C.C.A.N. 2607, 2611.

C. *Sufficiency of Count One*

In moving to dismiss count one for failure to state a claim upon which relief can be granted, respondent contends that, having entered into an indefinite quantity contract, appellant was entitled to no more than the $50,000 minimum value of task orders specified in the contract. (Mot. at 9-10, 11-14) In addition, respondent argues that neither by the small business set aside provisions of appellant's contract, nor otherwise, was it promised that it would be competing for task orders with no more than three unrestricted awardees. (*Id*., at 10-11, 14-17) For its part, appellant largely asserts the negative of these propositions. (Opp' n at 13-18)

Inasmuch as the parties rely upon matters outside the pleadings, we treat respondent's motion to dismiss for failure to state a claim upon which relief can be granted as one for summary judgment. *E.g.*, *Giuliani Associates, Inc.*, ASBCA No. 51672, 00-1 BCA ¶ 30,780 at 152,008; FED. R. CIV. P. 12(b). Applying the summary judgment standard, *see, e.g.*, *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987), we conclude that count one raises no triable issue. We reach this conclusion for three principal reasons.

First, because of appellant's execution of Modification No. 01, there is no triable issue regarding the inclusion of the two additional unrestricted awardees. Central to count one is the allegation that "[b]y its unilateral action in awarding two additional unrestricted contracts to large businesses, [respondent] has breached the Contract" (compl., ¶ 17). The two unrestricted awardees -- PADCO and the Urban Institute – were added by Modification No. 01 (finding 9).

"In the realm of Government contracts, absent mistake or duress not present here, few things signify knowing and intentional conduct more than does the execution of a bilateral modification." *USD Technologies, Inc.*, ASBCA No. 31305, 87-2 BCA ¶ 19,680 at 99,620, *aff'd*, 845 F.2d 1033 (Fed. Cir. 1988)(table), and appellant has not surmounted its own agreement to the addition of the unrestricted awardees. By executing Modification No. 01, appellant itself expressly agreed to the addition of PADCO and the Urban Institute to the four awardees (including appellant) identified in clause G.8, SUM CONTRACTORS AND CONTRACT AWARD NUMBERS (finding 8; *see also* finding 9). As we have found, appellant's agreement was made unreservedly. Appellant did not reserve any rights on the face of the modification itself (finding 10). In addition, we have not been able to ascribe any credibility to appellant's present position that it reserved the right to object to the addition of PADCO and the Urban Institute in an unproduced letter said to have been written or sent "[s]everal days" after execution of the modification (*id*.). The present record, therefore, raises no triable issue regarding appellant's waiver of its right to object to the inclusion of PADCO and the Urban Institute. *Cf.*, *CTA, Inc.*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,761 (holding that contractor's execution of modification reducing the scope of an option without reserving a material breach claim was a waiver of that claim).

Second, irrespective of the modification, the contract contains no undertaking to restrict the size of the competitive environment for task orders in any event. According to count one, the contract contemplated that appellant "would be the sole small business set-aside awardee competing for [task] orders with *no more than* three other concerns (none of which were required to be a small business)." (Compl., ¶ 15) (emphasis in original) The premise of the alleged breach is that respondent' s "statement in the solicitation, which was incorporated in the Contract . . . , that task order competition would be restricted to the four awardees was a valid and enforceable contractual promise." (Compl., ¶ 16)

We do not read the contract to contain the promise alleged. Appellant insists that the claimed promise is to be found in: (a) the statement in the cover letter to the solicitation that respondent "anticipates awarding up to four (4)" contracts (*see* finding 13); (b) the standard NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE clause (*see* finding 2); and (c) clause G.8 (*see* finding 8).

Examining these statements in turn, we disagree that the cover letter to the solicitation "did not leave open the possibility that [respondent] would award more than four contracts, including the small business set-aside." (Opp' n at 15) Even treating the cover letter as tantamount to a contract term, we cannot harmonize the use of the verb "anticipates" with a guarantee of only four contracts. Rather, the verb denotes no more than a hope or an expectation. *See Kato Corp*., ASBCA No. 51513, 02-1 BCA ¶ 31,669 at 156,495 (holding that contract clause stating that contaminated soil was "not anticipated" did not constitute "a positive indication that no subsurface contamination would be encountered" when read in context).

The cover letter to the solicitation contains the strongest support for appellant's position. With respect to the two cited contract clauses, the NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE clause includes no express representation that appellant would compete for task orders with any given number of other-than-small businesses. *See* FAR 52.219-6. It also contains no set-aside for task orders. The standard ORDERING clause (*see* finding 2), which does relate to task orders, also contains no set-aside. *See* FAR 52.216-18. In addition, clause G.8 is nothing more than a listing of the names of appellant and the other three participating contractors, together with their respective contract numbers. As we have found, it contains no limitation on the number of unrestricted awards (finding 8).

Third, irrespective of the modification, respondent is not liable to order more than the $50,000 minimum quantity absent some other breach. It is undeniable that appellant entered into an indefinite quantity contract. The contract contained the standard INDEFINITE QUANTITY clause, and clause B.2, CONTRACT TYPE, provided that "[t]his is a Time and Materials Indefinite Quantity contract" (findings 2-3). In addition, clauses B.9 and F.4(a)(2) referred to the contract as an "IQC," as did the solicitation cover letter (findings 5, 7, 13). At the same time, clause B.9(1) (1), MINIMUM ORDER, guaranteed appellant "a minimum amount of $50,000 for services or reports and other deliverables during the period of this contract," a guarantee that is also reflected in clause B.3, OBLIGATED AMOUNT (findings 3,4).

It is undisputed that respondent ordered more than the minimum guaranteed amount from appellant (finding 14; *see also* mot. at 5). Hence, absent some other breach, respondent's ordering obligation is ended. *E.g., Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001) (holding that, under an indefinite quantity, indefinite delivery 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.") The only breach alleged in count one is the addition of the two unrestricted awardees. (Compl., ¶¶ 15-16; *see also* finding 9) As indicated above, however, as a result of Modification No. 01 and the lack of a contractual promise to restrict the competitive environment to a total of four awardees, that action raises no triable issue.

D. *Sufficiency of Count Two*

In moving to dismiss count two, respondent stresses that, when the complaint was filed, appellant had already received 34 times the $50,000 minimum guaranteed by clause B.9 (*see* findings 4, 14), and hence appellant is not entitled to any relief because respondent has met its legal obligation under the contract. (Mot. at 20-23) Respondent also urges that the claimed damages are remote and speculative and hence unrecoverable. (*Id*. at 23-26) In opposing the motion, appellant relies upon clause F.4 (*see* finding 7), which it asserts constitutes an enforceable promise, the breach of which may give rise to damages notwithstanding that the contractor has exceeded the guaranteed minimum. (Opp' n at 20-26) Appellant also denies that its damages are remote and speculative. (*Id*. at 26-29)

As we did with count one, we treat the motion to dismiss count two as one for summary judgment. *See Giuliani Associates, supra,* 00-1 BCA 152,008; FED. R. CIV. P. 12(b). Considered as a motion for summary judgment, *Mingus, supra,* 812 F.2d at 1390, we conclude that count two presents a triable issue regarding breach of clause F.4. In reaching this conclusion, we recognize that, under an indefinite quantity 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 Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001). While the minimum quantity represents the extent of the Government's purchasing obligation, however, it does not constitute the outer limit of all of the Government's legal obligations under an indefinite quantity contract.

Burke Court Reporting Co., DOT BCA No. 3058, 97-2 BCA ¶ 29,323 at 145,801, recognized this principle. There, the contractor entered into a multiple award, indefinite quantity, task order contract. The contractor received more than the guaranteed minimum but filed a breach of contract claim, contending that the contracting officer had arbitrarily exercised her discretion in awarding task orders and "ignored the factors listed in the contract to be considered before a task order was issued." *Id.* The board denied the Government's motion for summary judgment, concluding that the award of more than the guaranteed minimum did not relieve the Government of other contractual obligations:

> Every contract contains with it the implied obligation that the parties will act in good faith during performance. Exculpatory language giving one party broad discretion to act in its own best interest does not negate other parts of the contract

> which also impose duties on that party. While the indefinite quantities clause of the contract only obligates respondent to order a specified dollar amount of services, a bidder has a right to rely on other contract provisions implying that it will be fairly considered for additional work, if required by the government.

Id. The board concluded that "[w]hether the contracting officer fairly considered appellant for orders in accordance with the terms of the contract raises factual issues that cannot be resolved by summary judgment." *Id*.

In weighing the parties' positions regarding count two, we are "guided by the well accepted and basic principle that an interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless." *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985). Respondent's position is unreasonable because it renders other clauses of the contract meaningless. While respondent insists that its legal obligations to appellant have been satisfied once appellant had been awarded the $50,000 minimum guaranteed amount in task orders, we cannot harmonize that result with other provisions in the contract. In particular, clause B.9(b) contained the promise that "each contractor under the SUM IQC has the opportunity to compete for awards up to the ceiling of $90,000,000 for the base years and $20,000,000 for years 4&5, provided the option is exercised" (finding 5). Clause F.4 implemented that opportunity by holding out specific "procedures [that] shall be followed in order to insure that the Contractor shall have a fair opportunity to be considered for each task order" (finding 7), which we can only construe to be task orders issued both before and after the $50,000 threshold is achieved.

Given our reading of the contract, denial of respondent's motion regarding count two is warranted. If anything, the record here presents a stronger case for denial of summary judgment than *Burke Reporting*. Here, clauses B.9(b) and F.4 constitute express contractual undertakings to consider appellant fairly, in contrast to the implied obligation to act in good faith that the Board relied upon in *Burke Reporting*. Like the Board there, we conclude that "[w]hether the contracting officer considered appellant fairly for task orders . . . raises factual issues that cannot be resolved by summary judgment." *Burke Reporting, supra*, 97-2 BCA at 145,801.

CONCLUSION

Respondent's motion to dismiss for lack of jurisdiction over counts one and two of the complaint is denied. Respondent's motion to dismiss count one of the complaint,

treated as a motion for summary judgment, is granted. Respondent's motion to dismiss count two of the complaint, treated as a motion for summary judgment, is denied.

Dated: 2 August 2002

ALEXANDER YOUNGER
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. 53489, Appeal of Community Consulting International, rendered in conformance with the Board's Charter.

Dated:

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