ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Phillips National, Inc.	)	ASBCA No. 53579
	)	
Under Contract No. N62467-98-D-1037	)	

APPEARANCES FOR THE APPELLANT: Dennis E. Jontz, Esq.
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OPINION BY ADMINISTRATIVE JUDGE ROME
PURSUANT TO RULE 12.3

Phillips National, Inc. (PNI) has appealed under the Contract Disputes Act, 41 U.S.C. § 606, from the final decision of the contracting officer (CO) denying its claim for the balance of the fixed price allegedly due under its firm fixed-price/indefinite quantity contract. Appellant has elected the accelerated procedures prescribed in Board Rule 12.3 and the parties have submitted the appeal for decision on the record, without a hearing, under Board Rule 11. The record consists of the Rule 4 file and joint exhibits submitted by the parties, including the transcript of the Government's deposition of Michael Phillips, PNI's owner. Both entitlement and quantum, the amount of which is undisputed, are before us for decision. For the reasons given below, we deny the appeal.

SUMMARY FINDINGS OF FACT

The Naval Facilities Engineering Command (NAVFAC), Southern Division, issued a solicitation dated 22 September 1998 seeking proposals for a combination firm fixed-price/indefinite quantity contract for the maintenance of military family housing at Millington, Tennessee. There were 13 fixed price contract line items (CLINs), some to be unit priced and others to be priced on a monthly services basis. The remainder of the solicitation's CLINs for the most part covered indefinite quantity work and are not at issue. (R4, tab 1 at 1, B-2, B-4 through B-7)

The solicitation included clauses derived from the NAVFAC Contracting Manual, NAVFAC P-68 (P-68 manual), which states that it:

> provides *general guidance* to field [COs] in the execution of their delegated authority. [COs] must refer to the Federal Acquisition Regulation (FAR), the Defense Federal Acquisition Regulation Supplement (DFARS), and the Navy Acquisition Procedures Supplement (NAPS) *for regulatory guidance*.

(Ex. 11 at Foreword) (emphasis added)

Paragraph I.5 of the solicitation, FAC 5252.216-9310 COMBINATION FIRM-FIXED PRICE/INDEFINITE QUANTITY CONTRACT (OCT 1996) (FFP/IQ clause), provides in relevant part:

> (a) This is a combination firm fixed-price/indefinite quantity contract . . . . Work items for the fixed-price portion are identified in the Schedule and include all work except that identified as Indefinite Quantity. The fixed-price quantities shown in the Schedule are considered to be accurate estimates for this contract period.
>
> . . . .
>
> (c) Delivery or performance shall be made only as authorized by orders issued in accordance with FAR clause 52.216-18 [the Ordering clause]. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to the contract stated maximum.

(R4, tab 1 at I-2)

Paragraph I.5 does not mention a minimum guarantee of work to be ordered and thus varies from the FFP/IQ clause in the P-68 manual, which provides at the end of subparagraph (c), in its basic form, that "[t]he minimum guarantee of work to be ordered is the firm fixed-price portion of the contract" and provides at the end of subparagraph (c), in its ALTERNATE I (OCT 1996) form, that "[t]he minimum guarantee of work to be ordered is (fill-in)% of the total estimated quantity" (ex. 11 at 47-48). The P-68 manual states that the FFP/IQ clause is to be used in "all combination firm-fixed price/indefinite quantity facilities support solicitations/contracts" and that Alternate I is to be used "when the firm

fixed-price of the contract is less than nominal" (§§ 16.506-100(g)(1) and (g)(2); ex. 11 at 17).

Nevertheless, paragraph H.1 of the solicitation, FAC 5252.216-9313 MAXIMUM QUANTITIES (JUN 1994), does include a minimum guarantee. It states in relevant part that "the minimum guarantee of work is 50% of the firm fixed-price portion of the contract" (R4, tab 1 at H-1). Paragraph H-1 varies from the FAC 5252.216-9313 MAXIMUM QUANTITIES (JUN 94) clause in the P-68 manual, which states, in its basic form, that "the minimum guarantee of work is the firm fixed-price portion of the contract" and, in its Alternate I format, that "the minimum guarantee of work is (fill-in)% of the estimated total quantity" (ex. 11 at 48). P-68 states that the FAC Maximum Quantities clause is to be used "in all facilities support service combination fixed-price/indefinite quantity solicitations/contracts" and Alternate I is to be used "when the firm fixed-price portion of the contract is less than nominal" (§§ 16.506-100(i)(1) and (i) (2); ex. 11 at 17).

Paragraph C.32.19 of the solicitation, Invoicing Instructions, provides in part that:

> Invoices for fixed price work shall include only the work actually performed and at the prices listed on the Schedule pages. . . . Where necessary, the quantities for fixed price work will be decreased by modification at the end of each contract period to reflect the actual amount of work performed.

(R4, tab 1 at C-115)

On 14 October 1998 the Navy conducted a pre-proposal conference, attended by representatives from many companies, including PNI. The Navy indicated that only two of the fixed-price CLINs, Work Management and Environmental Management, would be paid in full regardless of the amount of services performed. The others were to be billed as services were "performed and completed (actual quantities)." (R4, tab 2) On 24 November 1998 PNI submitted its proposal, including a total price of $938,725.03 for all of the fixed-price CLINs. PNI priced Work Management at $570,276 and Environmental Management at $18,000, for a subtotal of $588,276 for those two CLINs. (R4, tab 3)

In about February 1999, Mr. Phillips engaged in at least one telephonic discussion with the Navy's contracting personnel, including the CO, during which Mr. Phillips acknowledged that he understood the Navy's payment position concerning the fixed-price CLINs (ex. 7 at 28). There is no evidence that, prior to entering into its contract, PNI notified the Navy of any disagreement with its interpretation of the fixed-price portion of the contract. Rather, PNI communicated to the Navy that it was prepared to contract based upon that interpretation. On 12 February 1999 Mr. Phillips wrote to the Navy, responding to questions posed concerning the pricing of PNI's proposal, and confirmed:

> There is an element of risk for a contractor inherent in all housing maintenance contract[s]. This risk is particularly apparent at Millington since the contract is effectively almost all IQ items. Only 2 clins within the fixed portion of the bid are guaranteed.

(Ex. 7 at ex. A-2 at 3; *see also* ex. 7 at 57)

On 21 April 1999 the Government awarded Contract No. N62467-98-D-1037 to PNI in the not-to-exceed amount of $3,682,230.03, including PNI's $938,725.03 total price for the fixed-price CLINs (R4, tab 3). During the contract's base year the Navy ordered $901,760.54, or 96 percent, of the total fixed-price work (complaint and answer, ¶ 14). On 6 October 2000 PNI billed the Navy $36,964.49, the claimed balance due under the fixed-price portion of the contract. PNI had been paid $2,633,052.50 under the contract to that point. (R4, tab 5; complaint and answer, ¶ 15) On 17 October 2000 the Navy returned PNI's invoice "due to the services not being performed" (R4, tab 5). Appellant acknowledges that PNI did not perform the services (ex. 7 at 14, 15, 64).

On 29 January 2001 the Navy issued unilateral Modification No. A00016 to the contract which reduced its price by $39,683.12. The deduction was based upon the unperformed services in question, among other things. (R4, tab 4) On 29 March 2001 PNI submitted a claim in the amount of $36,964.49, which the CO denied on 22 August 2001 (R4, tabs 8, 9). PNI timely appealed to the Board on 22 October 2001.

DISCUSSION

Appellant alleges that it agreed to a total price for the 13 fixed-price CLINs and that it is entitled to that price regardless of whether it performed the services. It also contends that the Navy was required to include in its contract the basic versions of the FFP/IQ and Maximum Quantities clauses contained in the P-68 manual, which provide that the minimum guarantee of work is the firm fixed-price portion of the contract. Appellant asserts that the contract's versions of the clauses are unauthorized, illegal and unenforceable.

Appellant's interpretation of its contractual agreement is not reasonable. Apart from the Navy's pre-contract notice, and contract indicia such as the Invoicing Instructions clause, that the Navy was not intending to pay the total price for all of the fixed-price CLINs if work were not performed, it was evident from the contract's Maximum Quantities clause that the Navy was not guaranteeing payment of more than 50 percent of the fixed-price portion of the contract. Applying the Navy's communication that the fixed-price portion covered only the two CLINs totaling $588,276, the guarantee would be $294,138. Applying appellant's contention that the fixed-price portion covered all 13 CLINs, totaling $938,725.03, the guarantee would be $469,362.52. In either case the guarantee is more

than a nominal amount, and is adequate contract consideration. *See Coastal Government Services, Inc.*, ASBCA No. 49625, 97-1 BCA ¶ 28,888 at 144,049. We need not decide the proper scope of the guarantee because the Navy paid PNI 96 percent of its total price for the fixed-price CLINs and satisfied its payment obligation in any event.

Further, we find nothing illegal in the Navy's modification of P-68's Maximum Quantities and FFP/IQ clauses. The P-68 manual itself notes that it is not regulatory and that it provides general guidance only. Internal procedures are promulgated for the benefit of the Government and do not create any rights in a contractor. *See Hartford Accident & Indemnity Co. v. United States*, 127 F. Supp. 565 (Ct. Cl. 1955); *McDonnell Douglas Corp*., ASBCA No. 46266, 99-1 BCA ¶ 30,152 at 149,188.

PNI entered into its contract with the understanding that the Navy intended it to mean that only two CLINs would be paid in their total firm fixed-price amount, regardless of services performed. Prior to entering into the contract, PNI did not communicate to the Navy any disagreement with that interpretation. Under such circumstances, when the Government is not acting plainly contrary to the contract's terms or illegally, appellant is deemed to have acquiesced in the Government's interpretation and is bound by it. *Cresswell v. United States*, 173 F. Supp. 805, 811 (Ct. Cl. 1959); *JC&N Maintenance, Inc.*, ASBCA No. 51283, 02-1 BCA ¶ 31,799 at 157,077; *J&J Oilfield & Electrical Service*, ASBCA Nos. 46044 *et al*., 98-2 BCA ¶ 29,965 at 148,256.

DECISION

The appeal is denied.

Dated: 5 June 2002

CHERYL SCOTT ROME
Administrative Judge
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. 53579, Appeal of Phillips National, Inc., rendered in conformance with the Board's Charter.

Dated:

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