ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Concorde, Inc.	)	ASBCA No. 53749
	)	
Under Contract No. DAAA09-99-A-0001	)	

APPEARANCE FOR THE APPELLANT: Arthur J. Cohen, Esq.
General Counsel

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
LTC Scott Lind, JA
Branch Chief
COL Mark E. Landers, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STEMPLER
ON THE GOVERNMENT'S MOTION TO DISMISS

Concorde, Inc. (appellant) appealed from a denial of its $63,354 claim under a Blanket Purchase Agreement (BPA). The Government has moved to dismiss the appeal for lack of jurisdiction arguing that the BPA is not a contract or in the alternative, dismissal for failure to state a claim upon which relief can be granted. Appellant responded in opposition.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 5 August 1999, the Government issued a Request for Quotation (RFQ) for medical evaluations for applicants entering the United States Army in locations remote to already established Military Entrance Processing Stations (MEPS). The RFQ was the result of the Secretary of Defense's directive to conduct a test of alternative means of processing applicants for entry into military service. The RFQ stated "it is anticipated that a BPA will be awarded to include all sites shown" in the Statement of Work (SOW). Nothing in the request provided any information as to a Government estimate of expected usage. (R4, tab 1)

2. Under the Federal Acquisition Regulation (FAR), a method for filling anticipated but not quantifiable needs of the Government is established in section 13.303 *et seq*. Paragraph 13.303-1(a) states:

> (a) A blanket purchase agreement (BPA) is a simplified method of filling anticipated repetitive needs for supplies or services

> by establishing "charge accounts" with qualified sources of supply . . . .

3. On 11 August 1999 the contract specialist, after answering a question from appellant concerning the RFQ regarding historical volume for these types of exams, wrote a note indicating that, after checking her information sources, she had stated "about 1300-w/no guarantee." (R4, tab 2)

4. On 14 September 1999, the Government issued BPA No. DAAA09-99-A-0001 to Concorde, Inc. The base period of performance was from 14 September 1999 through 30 September 2000. The agreement set forth a schedule of prices for medical examinations for the base period and option period 1. (R4, tab 1)

5. Appellant further alleges in its claim and complaint that on 17 September 1999, the command surgeon at Army headquarters contacted appellant and directed certain actions (R4, tab 15 at 2; complaint ¶ 7). Appellant alleges other contractual directions at various times by Government personnel (complaint; R4, tab 15).

6. The BPA included two Statements of Work, SOW 01 and SOW 02. SOW 01, dated 30 July 1999, stated in pertinent part:

> C.1 **Background.** The Secretary of Defense has directed the Commander, United States Military Entrance Processing Command . . . to conduct a test to evaluate alternate methods of . . . processing applicants for entry into the Armed Forces. . . .
>
> C.2 **Objectives.** The purpose of this SOW is to purchase medical examinations for applicants desiring to enter the United States Military Services at sites "remote" . . . . The sites currently identified for remote processing are Billings, MT, Evergreen, MT, Lubbock, TX, Odessa/Midland, TX, Las Vegas, NV, Pensacola, FL, and Newark, NJ.
>
> C.3 **Definitions and Acronyms.**
>
> . . . .
>
> Blanket Purchase Agreement (BPA). A contracting vehicle which allows purchases of an item or services on an "as needed" basis.
>
> . . . .

> Military Entrance Processing Station (MEPS). Activities staffed by military and civilian employees responsible for administering aptitude tests, conducting medical examinations, and providing administrative processing for applicants for the Armed Forces.
>
> . . . .
>
> C.4 **Scope of Work.**
>
> C.4.1 Independently, not as a Government agent, Contractor shall develop and provide professional medical services including all qualified personnel, supervision, facilities, material, equipment, supplies and other items necessary (unless otherwise specified) . . . .

(R4, tab 1)

7. SOW 01 was related to work in the above-stated remote areas. SOW 02, which is undated, states a slightly different objective than SOW 01:

> The purpose of this SOW 02 is to purchase the history and physical evaluation portions of medical examinations for applicants . . . . The site currently identified for this process is Shreveport, Louisiana.

(R4, tab 1)

8. The BPA included, among other provisions, FAR 52.233-1, DISPUTES (DEC 1998), FAR 52.243-1, CHANGES FIXED-PRICE (AUG 1987) -- ALTERNATIVE I (APR 1984). Also included was a provision stating that "[a]ward of a BPA will in no way obligate the government to issuing calls against that BPA. The Government is obligated only to the extent of authorized purchases actually made under the BPA." The BPA did not include a termination for convenience clause. (R4, tab 1 at 2)

9. Because appellant perceived its services were underutilized, appellant requested permission to directly contact and market its services to the recruiting officers in order to stimulate usage. By letter dated 30 November 2000, the contracting officer representative denied the request stating that the study is "designed as a recruiting reengineering initiative" and that direct marketing may negatively affect the fairness of the study. (R4, tab 8)

10. On 31 March 2001, Modification No. P00006 was issued to extend the BPA through 30 September 2001 (R4, tab 10).

11. On 15 May 2001, the contracting officer, citing FAR 52.243-1 CHANGES FIXED-PRICE (AUG 1987), issued unilateral Modification No. P00007 to change SOW 01 as follows: '"[t]he remote locations in Billings, MT; Evergreen, MT; Pensacola, FL; and Newark, NJ, will be closed immediately, but no later than 01 June 2001. The only sites approved for remote processing after 01 June 2001 are Lubbock, TX; Odessa/Midland, TX; and Las Vegas, NV."' (R4, tab 11)

12. By letter dated 17 September 2001 the contracting officer informed appellant that the BPA will conclude on 30 September 2001 in accordance with its terms. Appellant was paid for all call orders that had been issued by the Government under the BPA. (R4, tab 14; app. br. at 3, admission 14)

13. On 26 September 2001, appellant submitted a claim for an equitable adjustment of $63,354 for "uncompensated services rendered." The discussion section of the claim states:

> Concorde lost the amount of $63,354.00 in rendering services. This represents the difference between the gross amount received less all direct and indirect costs and expenses. It does not include any claim for lost profit. Simply stated, Concorde spent more money than it received in order to build a network of Contracted Medical Facilities together with the necessary systems to manage that network and operate the program. Unfortunately the utilization of the CMFs turned out to be far less than anticipated and advised. In order to determine the effectiveness of the program, Concorde was limited from contacting recruiters to stimulate utilization. As a result, Concorde was put in the position of having to maintain a constant state of readiness at its expense. This was never intended.
>
> Concorde is entitled to an equitable adjustment under the Changes Clause of the BPA. Under the Changes Clause and well established precedent, a contractor is entitled to an equitable adjustment in the contract price where the agency constructively changes the contract requirements. Here, the government constructively changed the contract by increasing the scope of work, failing to cooperate, and interfering with Concorde's performance. For example, government personnel repeatedly advised Concorde that the entire program would ramp up quickly in all locations. Accordingly, Concorde incurred substantial additional costs that would not have been required but for direction given by government personnel. In fact, however, no "ramp up" was taking place. Further, the

> government failed to cooperate in Concorde's efforts to develop utilization of the Concorde BPA as discussed above.

(R4, tab 15 at 7)

14. By final decision dated 13 February 2002, the contracting officer denied the claim in its entirety (R4, tabs 15, 17). Appellant timely appealed to this Board.

DECISION

In seeking to dismiss this appeal, the Government contends that appellant's claim must be dismissed because it arises from a claim for set-up costs incurred in preparation of performing potential call orders under the BPA. The Government maintains that it is obligated only to the extent of authorized calls actually placed against the BPA and that the Board lacks jurisdiction over appellant's claim as it does not arise under a contract of purchase.

We have held that the issuance of a BPA itself does not create a contract of purchase. All that a BPA purports to do is prescribe terms and conditions for any orders that may be awarded. *See Dr. Chauncey L. Duran d/b/a Chesapeake Orthopedics*, ASBCA No. 35773, 90-1 BCA ¶ 22,386. The issuance of a BPA establishes a "charge account" with the vendor so purchases can thereafter be made without having to issue individual purchase documents each time. (FAR 13.301(a))

Appellant does not dispute that it was fully paid for all call orders performed. Admittedly, appellant received calls, albeit fewer than it had hoped for, under the BPA and was fully paid in accordance with the terms of the agreement. Instead, appellant argues, under various legal theories, that due to direction from Government personnel to perform certain tasks related to "ramping up" for a Government predicted influx of use of appellant's medical facilities, in addition to tasks performed in an effort to encourage utilization of the programs by recruiting officers, an implied-in-fact contract was created and it is under this implied contract that appellant is entitled to compensation. Appellant also argues that the BPA was an enforceable contract, that the Government improperly partially terminated the BPA for convenience, constructively changed appellant's work requirements, failed to cooperate and interfered with performance.

The Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended, gives the Board jurisdiction over any express or implied contract for the procurement of property or services. Accordingly, the Board has jurisdiction to consider a claim for breach of an implied-in-fact contract. *Liquid Carbonic*, ASBCA No. 39645, 91-2 BCA ¶ 24,040 at 120,334. Further, we have jurisdiction to consider appellant's claims that arise under the orders placed pursuant to the BPA.

We have jurisdiction over appellant's claim under an alleged implied-in-fact contract theory and at least in part, under alleged changes to work ordered pursuant to the BPA.

The motion to dismiss is denied.

Dated: 19 December 2002

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

I concur

I concur

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

PETER D. TING
Administrative Judge
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. 53749, Appeal of Concorde, Inc., rendered in conformance with the Board's Charter.

Dated:

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