ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
RJO Enterprises, Inc.	)	ASBCA No. 50981
	)	
Under Contract No. N66604-92-D-B172	)	

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OPINION BY ADMINISTRATIVE JUDGE PAUL

This is a timely appeal of a contracting officer's decision denying appellant RJO Enterprises, Inc.'s (RJO) claim in an amount of $997,621. The Contract Disputes Act, 41 U.S.C. §§ 601 *et seq*. (CDA), is applicable; only issues of entitlement are before us for decision. The Government filed a motion for summary judgment which RJO opposed on the basis that the appeal presented issues of material fact. The Board took the motion under advisement and subsequently held a full evidentiary hearing.[1] We deny the appeal.

FINDINGS OF FACT

1. RJO is a small, disadvantaged business incorporated in the State of Delaware (compl. and answer, ¶ 1).

2. On 7 May 1992, the Naval Undersea Warfare Center, Newport, Rhode Island (NUWC), issued Solicitation No. N66604-92-R-B172 under the auspices of the Small Business Administration's (SBA) 8(a) program (R4, tab 1). The solicitation described the contract in these terms:

> B18 Supplies/Services and Prices (ID/IQ-CPFF-Term/Comp) (May 1991)

[1] The Government's motion for summary judgment is denied as moot.

(9) This is an Indefinite Delivery-Indefinite Quantity contract with Cost Plus Fixed Fee provisions.

(R4, tab 1)

3. The solicitation also provided that the "Level of Effort estimated to be ordered during the term of this contract is 188,200 manhours of direct labor including authorized subcontract labor, if any" (R4, tab 1).

4. Another key clause contained in the solicitation was "Payment of Fixed Fee (IDTC-Term & Completion) (May 1991)," which provided:

> (a) The fixed fee specified in SECTION B of this contract represents the maximum fee that shall be paid under this contract. This fee shall be paid, subject to any adjustment required by other provisions of this contract, in installments at the time of each provisional payment for reimbursement of allowable cost. This clause addresses payment of fixed fee for both term and completion form delivery orders.
>
> (b) A Fixed Fee shall be established for each delivery order issued under this contract. The Fixed Fee established shall be in direct ratio to the total contract Fixed Fee as the Level of Effort (direct manhours) established in the delivery order is to the total contract Level of Effort (direct manhours). The amount of each installment payment of Fixed Fee shall be in direct ratio of the total contract Fixed Fee as the net direct labor hours expended during the period is to the total contract Level of Effort (direct manhours).
>
> (c) Completion Orders. The contractor is entitled to the full amount of Fixed Fee upon the acceptable completion of the delivery order.
>
> (d) Term Orders. No fee shall be paid under term form orders for hours not performed.
>
> (e) Withholding. As provided in FAR 52.216-8, after payment of 85% of the total fixed fee, the contracting officer hereby withholds payment of the remaining 15% of the total fixed fee or $100,000, whichever is less, as a reserve necessary to protect the Government's interest.

> (f) The terms of this clause and the provisions of FAR 52.216-8 apply to the total fixed fee specified in section B of the contract rather than to the individual orders placed hereunder.

(R4, tab 1)

5. Also included in the solicitation was Clause C12, "Statement of Work (ID/IQ) (JUL 1988)," which stated:

> SERVICES [sic] are to be performed in accordance with the Statements of Work which are included in the individual Delivery Orders. These Statements of Work detail efforts that fall within the scope of the basic contract Statement of Work, Attachment #1.

(R4, tab 1)

6. The Statement of Work referred to in Clause C12 of the solicitation provided, in pertinent part:

> 1.0 The Contractor shall furnish, as required, all services to accomplish those requirements set forth in Section B. Such services shall be furnished in accordance with the terms and conditions of this contract.

(R4, tab 1, attach. 1)

7. The solicitation also contained clause H-28, "Minimum and Maximum Quantities (ID/IQ-CPFF-Term/Comp) (May 1991)," which stated, in part:

> (a) As referred to in paragraph (b) of FAR clause 52.216-22, "Indefinite Quantity", the contract minimum quantity is a total of $50,000.00 worth of orders.
>
> (b) The contract maximum quantity is the total number of hours of effort specified in Section B. For the purpose of calculating the expenditure of hours in relation to the maximum quantity, the total hours expended shall be the sum of (1) the total number of hours ordered under all Term Form orders and (2) the total number of hours of estimated Level Of Effort established under all Completion Form orders.

(R4, tab 1) The contract did not state specific contract minimum quantities for the options (R4, tab 7).

8. Section L of the solicitation provided, in pertinent part, the following information:

> L INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS OR QUOTERS
>
> A. SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (See NUSC [sic] Provision L52-1)
>
> Notice. The following solicitation provisions pertinent to this section are hereby incorporated by reference:
>
> I. FEDERAL ACQUISITION REGULATION (48 CFR CHAPTER 1) SOLICITATION PROVISIONS

Solicit. Prov. No.	Title	Date
52.212-7	NOTICE OF PRIORITY RATING FOR NATIONAL DEFENSE USE check one: DX ____ or DO__x__rated order	(MAY 1986)
52.215-5	SOLICITATION DEFINITIONS	(JUL 1987)
52.215-7	UNNECESSARILY ELABORATE PROPOSALS OR QUOTATIONS	(APR 1984)
52.215-8	AMENDMENTS TO SOLICITATIONS	(DEC 1989)
52.215-9	SUBMISSION OF OFFERS	(DEC 1989)
52.215-10	LATE SUBMISSIONS MODIFICATIONS, AND WITHDRAWALS OF PROPOSALS	(DEC 1989)
52.215-12	RESTRICTION ON DISCLOSURE AND USE OF DATA	(APR 1984)
52.215-13	PREPARATION OF OFFERS	(APR 1984)
52.215-15	FAILURE TO SUBMIT OFFER	(APR 1984)
52.216-1	TYPE OF CONTRACT fill-in: INDEFINITE DELIVERY/INDEFINITE Quantity Cost Plus Fixed Fee (specific type of contract)	(APR 1984)
52.222-24	PREAWARD ON-SITE EQUAL OPPORTUNITY COMPLIANCE REVIEW	(APR 1984)

(R4, tab 1)

9. Section L of the solicitation also contained the following clause:

> L15-14 EXPLANATION TO PROSPECTIVE OFFERORS
> (FAR 52.215-14) (APR 1984)
>
> Any prospective offeror desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective offerors before the submission of their offers. Oral explanations or instructions given before the award of the contract will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished promptly to all other prospective offerors as an amendment of the solicitation, if that information is necessary in submitting offers or if the lack of it would be prejudicial to any other prospective offerors.

(R4, tab 1)

10. There is no record evidence demonstrating that, prior to award, RJO questioned whether the contract was a requirements contract as opposed to an indefinite delivery/indefinite quantity contract.

11. NUWC awarded Contract No. N66604-92-D-B172 to RJO on 26 August 1992. The contract incorporated the amended solicitation, as well as RJO's technical proposal. The estimated total cost of the contract, including fixed fees, for the base year and for option years was $9,910,977.30. (R4, tab 7)

12. Clause B18 of the awarded contract repeated certain language contained in the solicitation. Specifically, it stated: "This is an Indefinite Delivery—Indefinite Quantity contract with Cost Plus Fixed Fee provisions" (R4, tab 7).

13. Clause BX41, "Exercise of Option (Extension of Contract)," also provided:

> (a) The extension of this contract under the options, if exercised, shall be for the term of four - one year periods.
>
> (b) The Contracting Officer shall give preliminary notice of the Government's intent to exercise the option at least 60 days before this contract is to end. Such a preliminary notice of intent to exercise the option shall not be deemed to commit the

> Government. Actual exercising of any option will be executed by contract modification signed by the Contracting Officer.

(R4, tab 7)

14. RJO commenced work on the contract and completed the base year of performance. On 2 September 1993, the contracting officer exercised the first option year through the execution of Modification No. P00004 to the contract. On 11 August 1994, NUWC issued Modification No. P00008 which exercised the second option. On 30 March 1995, the contracting officer simultaneously exercised the third and fourth options through the execution of Modification No. P00010 (R4, tab 7), thereby extending the term of the contract through 26 August 1997 (R4, tab 8).

15. Mr. Walter Oliver, NUWC's contracting officer, explained the rationale for the simultaneous exercise of the final two options at the hearing. He stated that, at the time, the future of NUWC's New London detachment was "very uncertain" because the Base Realignment and Closure Commission was considering either closing or realigning the office. As a result, the base's computer department advised Mr. Oliver that it would possibly use all of the remaining hours available in RJO's contract. Accordingly, Mr. Oliver viewed the simultaneous exercise of the two options "as a conservative and a prudent business measure" (tr. 52-53).

16. On the date when he exercised the final options, Mr. Oliver believed that all of RJO's remaining effort would be expended even if a successor contract were awarded prior to the expiration of the fourth year option (R4, tab 16).

17. Ms. Mary Lee, the head of NUWC's computer department, corroborated Mr. Oliver's testimony. She testified that, during this time period:

> [W]e had a lot of work going on throughout my organization, especially in the networks area, basically moving all the people that we had to move.
>
> We had to - - even though we were closing bases and moving people . . . from Norfolk, we were moving people in New London, closing down New London.
>
> It involved a lot of operations and maintenance work for the network staff, because they were basically helping moving [sic] people, setting up new buildings, that type of thing.
>
> And it was my understanding, from information provided to me by managers, that we would be giving RJO more work

> than we had originally anticipated in those years insofar as getting some of the work done.
>
> And that we would probably be getting close to hours, or approaching some of the ceiling [in RJO's contract], that we probably needed to start a procurement process for the followon [contract].

(Tr. 63-64)

18. Both Mr. Oliver and Ms. Lee testified that NUWC commenced the reprocurement process prior to expiration of RJO's final option year because that effort involved "a long lead time." Specifically, Mr. Oliver testified that it took over a year to complete the reprocurement effort, but that this was a shorter time frame than he had anticipated (tr. 53-54). Similarly, Ms. Lee described the lengthy approval process which her department had to undertake before they could complete a follow-on contractual effort (tr. 64).

19. On 3 August 1995, Ms. Lee's department initiated the reprocurement effort by issuing a "request for material/services." The document stated, in pertinent part:

> REQUEST A 5-YEAR ID/IQ TYPE (CPFF) CONTRACT FOR ENGINEERING SERVICES AS DESCRIBED IN STATEMENT OF WORK (ENCL (1)) NOTE: THIS IS A NEW PROCUREMENT REQUEST. AN ID/IQ TYPE CONTRACT IS RECOMMENDED. FOLLOW-ON TO CONTRACT # N66604-92-D-B172.

The contract referenced in the requests was RJO's contract. (Ex. 1 to S.J. Mot.)

20. On 7 December 1995, NUWC issued request for proposals (RFP) No. N66604-96-R-A012 for a follow-on contract to RJO's effort. The RFP contained a statement of work for engineering services which was identical to the statement of work in RJO's contract. (Compl. and answer, ¶ 13)

21. The level of effort described in the RFP was approximately twice the level of effort in RJO's contract as finally modified. The contract contemplated by this RFP was to include a base year with four one-year options. (Compl. and answer, ¶ 13).

22. The RFP was for an 8(a) set aside contract. RJO as a graduate of the 8(a) program, could not compete as a potential prime contractor but proposed to subcontract with the 8(a) offeror that was ultimately unsuccessful in the competition. (Compl. and answer, ¶ 14).

23. In September 1996 NUWC awarded Contract No. N66604-97-D-H940 to Professional Software Engineering, Inc. (PROSOFT). One day after this award, the NUWC informed RJO in writing that no further delivery orders would be issued under its contract (compl. and answer, ¶ 17).

24. After the award of the contract to PROSOFT, NUWC unilaterally modified RJO's contract to reduce the period of performance (compl., ¶ 18; Govt. br. at 3, ¶ 12).

25. At the time when NUWC unilaterally reduced the period of performance of RJO's contract, it had actually paid RJO a total amount of $9,742,160 (ex. G-2). This compares with the estimated value stated in the contract of $9,910,997.30 (R4, tab 7). It, of course, far exceeds "the contract minimum quantity" of $50,000 (R4, tab 1).

26. On 17 April 1997, RJO forwarded a request for equitable adjustment (REA) to the contracting officer. It contended that the parties' contract was actually a requirements contract and that, by reducing RJO's period of performance, NUWC had illegally diverted work from it. (R4, tab 8)

27. On 23 May 1997, the contracting officer responded to RJO's REA. He stated, in pertinent part:

> . . . I conclude that your company was awarded an ID/IQ contract and further, our contractual obligation to order services from RJO was completed when we had fulfilled the contract's minimum of $50,000 worth of orders. In fact, we significantly exceeded the minimum guarantee by awarding over 9.8 million dollars['] worth of work to RJO.

(R4, tab 10)[2]

28. On 13 June 1997, RJO wrote to the contracting officer to convert its REA into a certified claim in accordance with the CDA. RJO sought payment "in the sum certain amount of $997,621." (R4, tab 11)

29. On 20 August 1997, the contracting officer issued a final decision denying RJO's claim in its entirety (R4, tab 13). This appeal followed.

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[2] The amount of orders was actually slightly smaller than the "over 9.8 million dollars" figure cited by Mr. Oliver (finding 25).

DECISION

RJO's principal argument is that "notwithstanding the ID/IQ label affixed to the contract in issue, the proper interpretation is that the contract was rightfully intended by the parties to be a requirements-type ordering vehicle . . . " (app. br. at 2). The Federal Circuit clearly set forth the distinctions between these two types of contracts in *Travel Centre v. Barram*, 236 F.3d 1316, 1318-19 (Fed. Cir. 2001). There the court stated:

> Both requirements contracts and IDIQ contracts provide the government purchasing flexibility for requirements that it cannot accurately anticipate. *See Stratos Mobile Networks U.S.A. v. United States*, 213 F.3d 1375, 1380 (Fed. Cir. 2000). A requirements contract requires the contracting government entity to fill all of its actual requirements for supplies or services that are specified in the contract, during the contract period, by purchases from the contract awardee. 48 C.F.R. § 16.503(a) (2000). *See also Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). Conversely, while an IDIQ contract provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time, it requires the government to order only a stated minimum quantity of supplies or services. 48 C.F.R. § 16.504(a) (2000). *See also Dot Sys., Inc. v. United States*, 231 Ct. Cl. 765 (1982). That is, under an IDIQ 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. *See, e.g., Mason v. United States*, 222 Ct. Cl. 436, 615 F.2d 1343, 1346 (1980). Moreover, once the government has purchased the minimum quantity stated in an IDIQ contract from the contractor, it is free to purchase additional supplies or services from any other source it chooses. An IDIQ contract does not provide any exclusivity to the contractor. The government may, at its discretion and for its benefit, make its purchases for similar supplies and/or services from other sources.

Noting that the contractor entered into a contract with GSA that explicitly stated, within its four corners, that it was an ID/IQ contract, the Federal Circuit ruled that the contractor was not entitled to sales which would yield more than the minimum contract revenue of $100. The Court held further: "Regardless of the accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the IDIQ contract, Travel Centre could not have had a reasonable expectation that any of the government's needs beyond the

minimum contract price would necessarily be satisfied under this contract." The Federal Circuit concluded by ruling: "In sum, when an IDIQ contract between a contracting party and the government clearly indicates that the contracting party is guaranteed no more than a non-nominal minimum amount of sales, purchases exceeding that minimum amount satisfy the government's legal obligation under the contract." 236 F.3d at 1319.

The Federal Circuit reached a similar decision in the recent case of *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795 (Fed. Cir. 2002). There, the contractor argued that despite language to the contrary in the instrument itself, an ID/IQ contract was really a requirements contract. The contractor also contended that the contract's option periods constituted the formation of a series of separate and distinct requirements contracts.

The court rejected both of these contentions. It held:

> We agree with the government that the contract is plainly an ID/IQ contract, and that Varilease could not have reasonably believed otherwise. Moreover, the intention of a party entering into a contract is determined by an objective reading of the language of the contract, not by that party's statements in subsequent litigation.

289 F.3d at 799

The Federal Circuit ruled further:

> We are also unpersuaded by Varilease's argument that the contract must be interpreted such that the option periods constitute a series of separate and distinct requirements contracts. We discern no basis in either the relevant regulations or case law for treating option periods of an ID/IQ contract as separate contracts.

289 F.3d at 799. In reaching this conclusion, the court noted that the only minimum ordering requirement contained in the contract was that covering the base period and that there were no minimum requirements stated specifically for the options. 289 F.3d at 800.

The fact patterns and legal principles contained in *Travel Centre* and *Varilease* are directly applicable to this appeal. In numerous places, the contractual documents plainly stated that this was an ID/IQ contract (findings 2, 4, 5, 7, 8, and 12). Indeed, the only reference to "requirements" was contained in an attachment to the Statement of Work. There the contract provided:

> The Contractor shall furnish, as required, all services to accomplish those requirements set forth in Section B. Such services shall be furnished in accordance with the terms and conditions of the contract.

Contrary to RJO's allegations, this reference did not define the parties' instrument as a requirements contract (app. br. at 9-10). It simply referred to the "requirements set forth in Section B" (finding 6). As we have seen, Section B clearly defines the contract as an ID/IQ instrument (finding 2). Moreover, by providing that "[s]uch services shall be furnished in accordance with the terms and conditions of this contract," the language merely reflected the several instances where an ID/IQ contract was specified (finding 6).

Because the contract constituted an ID/IQ instrument, the Navy was obligated to purchase no more than the contractual minimum quantity of $50,000 worth of orders (finding 7). The Navy actually paid RJO a total amount of $9,742,160 under the contract (finding 25). Therefore, RJO had no reasonable expectation that it would receive additional orders during the two final option years regardless of the manner in which they were exercised.

Moreover, the Board is unpersuaded by RJO's apparent arguments that the Navy somehow breached the contract by simultaneously exercising the final two options and subsequently reducing the performance period of the contract. The contracting officer credibly testified regarding his actions, and we hold that they had a rational basis (findings 15, 16, 17, 18). The options themselves did not state specific minimum ordering quantities (finding 7); and, because the Navy "met the legal requirements of the contract at issue, its less than ideal contracting tactics fail to constitute a breach." *Travel Centre*, 236 F.3d at 1319.

Finally, we reject RJO's contention that it is entitled to recover fixed fees and related costs for orders not placed by the Navy during the final two option years even if we otherwise hold that this is an ID/IQ contract (app. br. at 14). We note once again that the options themselves did not state specific minimum ordering quantities (finding 7). Moreover, the contract clearly states that the fixed fee can be paid only for delivery orders "issued under this contract" (finding 4). It is axiomatic that RJO cannot recover such a fee for orders which were never issued.

CONCLUSION

The appeal is denied.

Dated: 10 January 2003

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 50981, Appeal of RJO Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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