

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Trans Com Systems) ASBCA No. 53865
)
Under Contract No. F04700-99-D-0004)

APPEARANCE FOR THE APPELLANT: Cynthia Malyszek, Esq.
Malyszek & Malyszek
Los Angeles, CA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
CAPT Sky W. Smith, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Respondent moves for summary judgment on this appeal on the grounds that the captioned contract is unenforceable as an “indefinite quantity” or “requirements” type contract, and, therefore, appellant is entitled to payment only for work ordered and performed. Appellant opposes the motion, has submitted no affidavits of fact, but adverts to Rule 4 documents with respect to some disputed material facts, and argues that the parties intended the contract to be a requirements type contract.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

1. Air Force solicitation No. F04700-98-R-0036, dated 27 August 1998, for medical transcription services at Edwards Air Force Base (AFB), stated in § L: “52.216-01 TYPE OF CONTRACT (APR 1984) The Government contemplates award of a **Firm Fixed Price Requirements** contract resulting from this solicitation” (emphasis in original) (R4, tab 1 at 1-2, tab 4 at 13).

2. The 9 November 1998 letter of Edwards AFB’s Director for Small Business to the U.S. Small Business Administration (SBA) offered an SBA § 8(a) contract to Trans Com Systems (TCS) for medical transcription services for the 95th Medical Group at Edwards AFB, and described the contract as a “fixed price, indefinite delivery, indefinite quantity delivery order contract” (R4, tab 8).

3. The contracting officer's (CO) 13 November 1998 price negotiation memorandum stated that negotiations of fixed unit prices with TCS were concluded on 12 November 1998 for transcription services for the 95th Medical Group, and—

This is a requirements task order contract with no guarantees to the contractor as to the amount of work that will be ordered over the 5 year performance period. The dollar and quantities are estimates. The actual amounts will be determined on the individual task orders.

(R4, tab 31)

4. On 24 November 1998, the Air Force awarded Contract No. F04700-99-D-0004 (contract 4) to TCS, effective 1 January 1999, for medical transcription services for the 95th Medical Group at Edwards AFB, at an estimated value of \$456,000 for fiscal years 1999-2003 (R4, tab 1 at 1-2, tab 2 at 4).

5. Contract 4's § B provided that "funding will be provided on task orders" and set forth estimated quantities of 600,000 lines (of transcription) for each of fiscal years 1999, 2000, 2001, 2002 and 2003, at unit prices of \$.145, \$.15, \$.155, \$.155 and \$.155 per line, respectively (R4, tab 1 at 1-2).

6. Contract 4's § C, DESCRIPTION/SPECIFICATIONS, provided in ¶ 1.1:

Scope of Work: The contractor shall provide all personnel, equipment, tools, materials, supervision, and other items and services necessary to perform medical outpatient and inpatient transcription of clinical services dictated by 95th Medical Group, USAF health care providers as defined in this performance work statement (PWS)

(R4, tab 2 at 1)

7. Contract 4 incorporated by reference, *inter alia*, the FAR 52.216-18 ORDERING (OCT 1995) clause, which required any supplies or services to be ordered by issuance of delivery or task orders, and FAR 52.216-19 ORDER LIMITATIONS (OCT 1995) clause, which set a \$100 minimum order amount and a \$250,000 maximum order amount for a single item and for a combination of items (R4, tab 1 at 1-3).

8. Contract 4 did *not* incorporate the FAR 52.216-20 DEFINITE QUANTITY (OCT 1995), 52.216-21 REQUIREMENTS (OCT 1995), or 52.216-22 INDEFINITE QUANTITY (OCT 1995) clauses in effect on the contract award date, and did not designate any minimum quantity or dollar amount of services in the contract schedule (R4, tab 1 at 1-4).

9. The CO issued two delivery orders (DO) under contract 4*:

<u>DO No.</u>	<u>Date</u>	<u>Est. Value</u>	<u>Amount Ordered</u>
0001	11-24-98	\$80,999.90	\$26,535
0002	10-01-99	\$90,000	\$20,213

(R4, tab 3 at 1-5)

10. Respondent's 12 April 2000 memorandum reported that its contract specialist, upon advice of the JAG office, told TCS that—

. . . the Government wasn't obligated to provide [TCS] any consideration [for down scope of transcription services] as our requirement only guaranteed that [TCS] would get the work as long as we had a requirement. . . .

. . . this was a contract that was set-up guaranteeing that [TCS] would get all the hospital's transcription requirements. It did not guarantee [TCS] the maximum estimated lines per year.

(R4, tab 12)

11. The Air Force contract specialist's 27 February 2001 facsimile to TCS sent a "new Statement of Work" for the 12 February 2001 to 30 September 2003 period of performance, which stated: "The Contractor shall provide all labor, materials, equipment, transportation, and supervision necessary to perform transcription services for *all medical and radiological reports from the 95th Medical Group*, located at Edwards AFB CA" (emphasis added) (R4, tab 17). Effective 19 March 2001, Modification 2 to DO 0002 changed the unit price from \$.15 to \$.20 per line of transcription and incorporated the new statement of work (R4, tab 3 at 8-10).

12. The CO's undated MEMO FOR RECORD referred to a 27 August 2001 letter about TCS and stated: "We recognize that the contract estimates were significantly greater than actuals but the contract type is a requirements type" (R4, tab 20).

13. On 24-25 February 2002 TCS submitted a certified claim to the CO under contract 4 for \$228,000 because of the reduced actual transcription services performed in

* Respondent asserts that on 1 October 2001 the CO issued a DO 0003 for \$2,666, citing R4, tab 3; but the Rule 4 file does not include any DO 0003.

1999-2001 due to closure of the Edwards AFB hospital, and on 27 March 2002 revised the claim amount to \$230,844 (R4, tabs 24, 27).

14. The CO's 22 April 2002 final decision letter to TCS stated:

2. Reference to the pertinent contract terms

a. Although the Requirements Clause, 52.216-21, was inadvertently omitted from the contract, 52.216-01, Type of Contract (APR 1984), was included in the solicitation and it states, "The Government contemplates award of a Firm Fixed Price Requirements contract resulting from this solicitation." The letter to the [SBA] stated the contract type as requirements. The contractor was briefed on the type of contract during the solicitation process. Further, this contract has been administered as a requirements contract and consistent with a requirements contract [TCS] billed only for the work performed.

....

4. Subject claim is denied in its entirety.

a. This contract is an indefinite quantity requirements contract. The only guarantee for this type of contract is all of the medical transcription services done at Edwards [AFB] would go to this contractor during the period of performance of this contract. . . .

(R4, tab 28 at 1-2)

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *U.S. Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001).

Movant points to SOF ¶¶ 4-9, showing that contract 4 had no FAR 52.216-21 REQUIREMENTS clause, did not require the Government to order from TCS all its medical transcription services for the 95th Medical Group, Edwards AFB, had no FAR 52.216-22 INDEFINITE QUANTITY clause, and did not designate any minimum quantity or dollar amount of services in the contract schedule. Movant argues that contract 4 cannot be a

requirements or an ID/IQ type contract, and TCS, therefore, is entitled to payment only for services ordered and performed.

TCS points to SOF ¶¶ 1-3, 10-14 showing that the respondent and its CO, in the solicitation and pre-award communications, and thereafter in its communications and the CO's final decision denying TCS' claim, considered contract 4 to be a requirements type contract and recognized TCS' exclusive right to provide medial transcription services at Edwards AFB during contract 4's term, albeit respondent twice commingled indefinite quantity terminology. TCS argues, in the alternative, that discovery is needed to develop a more complete record from which to determine the type of contract intended, so movant is not entitled to judgment at present.

The absence of the FAR 52.216-21 REQUIREMENTS and 52.216-22 INDEFINITE QUANTITY clauses, and of a designated minimum quantity of supplies or services, from an instrument does not end the inquiry into the type of contract the parties intended. One must review the specified terms and conditions, including the Government's estimate of the quantities of supplies or services, and the parties' course of dealing with respect to purchasing the designated supplies or services exclusively from the contractor. *See Centurion Electronics Service*, ASBCA No. 51956, 03-1 BCA ¶ 32,097 at 158,658-59 (contract was a requirements contract despite absence of FAR clause, since contract required contractor to perform all repairs of specified ADP equipment); *cf. Konitz Contracting, Inc.*, ASBCA No. 52113, 00-2 BCA ¶ 31,121 at 153,717 (contract was not a definite quantity, requirements, or indefinite quantity type contract when there was no evidence of terms of exclusive ordering from the contractor, stated minimum quantity of services, or parties' conduct clarifying the intended type of contract).

It appears that the parties genuinely dispute whether contract 4's terms and conditions and their pre- and post-award conduct establish the intended type of contract. Furthermore, much of the documentary evidence in the present record is indicative of a mutual intent to enter into a requirements type contract. Considered in isolation from other facts, the original statement of work, "The Contractor shall provide all personnel . . . and services necessary to perform medical . . . transcription of clinical services dictated by the 95th Medical Group" (SOF ¶ 6), fell short of the exclusivity language necessary for a requirements contract. *See Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1305-06 (Fed. Cir. 1998). However, considering that the solicitation stated that the Government contemplated "award of a **Firm Fixed Price Requirements** contract" (emphasis in original) (SOF ¶ 1), the "new Statement of Work" provision added to DO 0002 -- "The Contractor shall provide all labor, materials, equipment, transportation, and supervision necessary to perform transcription services for *all medical and radiological reports from the 95th Medical Group*" (emphasis added) (SOF ¶ 11) was clearly indicative of exclusivity, *see Centurion, supra*, 03-1 BCA at 158,659, at the very least after 19 March 2001, if not also indicative of the parties' original intent. Therefore, movant is not entitled to judgment as a matter of law.

We deny the Government's motion for summary judgment.

Dated: 1 May 2003

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

RONALD JAY LIPMAN
Administrative Judge
Acting 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. 53865, Appeal of Trans Com Systems, rendered in conformance with the Board's Charter.

Dated:

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