ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
L&C Europa Contracting Company, Inc.	)	ASBCA No. 53270
	)	
Under Contract No. DAKF29-95-D-0014	)	

APPEARANCE FOR THE APPELLANT: Walter D'Ull, Esq.
New York, NY

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
MAJ Jennifer S. Zucker, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PEACOCK

This appeal involves a requirements contract for asbestos removal and abatement. No delivery orders were issued under the contract. L&C Europa Contracting Company, Inc. (appellant or L&C) alleges that the government "illegally and fraudulently" diverted orders for requirements to other firms and thus breached the contract. Both entitlement and quantum are before us for decision.

FINDINGS OF FACT

1. The referenced contract was awarded to appellant by the Directorate of Contracting at Fort Dix, New Jersey (Army or government) for asbestos removal and disposal at Fort Hamilton, Brooklyn, New York and various locations throughout the New York Area Command (NYAC) for the period 1 September 1994 (or date of award, if subsequent thereto) through 31 August 1995 (R4, tab 1). The total estimated aggregate amount of all contract line item numbers (CLINs) was $1,758,000.00 (R4, tab 1 at B-34). The CLINs provided for pricing based on estimated quantities of supplies and services and were not broken down by site location or specific building number (*id*. at B-1 to B-34).

2. The solicitation was issued on 21 June 1994 and bid opening occurred on 12 August 1994. Appellant submitted the lowest bid but was found nonresponsible by the contracting officer because the company lacked requisite licensing to perform asbestos removal work. Appellant obtained a Certificate of Competency from the Small Business Administration. Whereupon, the contract was awarded on 3 November 1994. (R4, tab 1; tr. 75)

3. The following relevant provisions of the contract stated in pertinent part:

> I.98 52.216-0018 ORDERING (APR 1984)
>
> (a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders by the individuals or activities designated in the Schedule. Such orders may be issued from 1 SEPTEMBER 1994 through 31 AUGUST 1995.
>
> . . . .
>
> I.99 52.216-0019 DELIVERY-ORDER LIMITATIONS (APR 1984)
>
> (a) Minimum order. When the Government requires supplies or services covered by this contract in an amount of less than $25,000 FOR WORK AT FORT HAMILTON, FORT TOTTEN AND BELLMORE AND $800.00 FOR ALL OTHER LOCATIONS UNDER THIS CONTRACT, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract. [Emphasis added; capitalization in original]
>
> (b) Maximum order. The Contractor is not obligated to honor –
>
> (1) Any order for a single item in excess of $40,000.00;
>
> (2) Any order for a combination of items in excess of $220,000.00; or
>
> (3) A series of orders from the same ordering office within SEVEN (7) days that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.
>
> (c) If this is a requirements contract (i.e., including the Requirements clause at subsection 52.216-21 of the Federal Acquisition Regulation (FAR)), the Government is not required to order a part of any one requirement from the Contractor if that requirement exceeds the maximum-order limitations in paragraph (b) above.

I.100 52.216-0021 REQUIREMENTS (APR 1984)

> (a) This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for the equitable price adjustment. [Emphasis added]
>
> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Delivery-Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause. The Government may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(R4, tab 1 at I-8-9)

4. The contract also included FAR 52.232-19, AVAILABILITY OF FUNDS FOR THE NEXT FISCAL YEAR (APR 1984), which stated:

> Funds are not presently available for performance under this contract beyond 30 September 1994. The Government's obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payments may arise for performance under this contract beyond 30 September 1994, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer.

(R4, tab 1 at I-10)

5. The contractor was required to furnish performance and payment bonds within ten days following contract award. Legally sufficient bonds were not submitted and approved until late March 1995. (R4, tab 2)

6. The contract further required appellant to have workmen's compensation, general liability and automobile liability insurance, as well as liability insurance covering asbestos abatement work (R4, tab 1 at H-1, 3-5). No separate CLIN in the bid schedule provided for payment for bonds and/or insurance charges paid by appellant.

7. The Army issued no orders under the contract. By letter dated 26 April 1996, the government notified L&C that "It was originally intended that the [requirements] would be satisfied via contract for such services; unfortunately, the US Army's 1995 fiscal year program was not able to support subject effort." (R4, tab 3) Dates and other pertinent details regarding lack of funding are not addressed in the record. There is no evidence that the government knew prior to bid opening or contract award that funding for the project for the fiscal year commencing 1 October 1994 definitely would not be available.

8. The government's 26 April 1996 letter also returned appellant's "application and certificate for payment" seeking reimbursement of $105,480. The latter sum represented the total of amounts sought by L&C for bonds ($17,580) and insurance ($87,900). (R4, tab 3)

9. There is no evidence of any further activity related to the contract until 17 April 2000. By letter of that date, appellant indicated that it would file a claim. Mr. Edward Zahorak, appellant's consultant, signed the letter. Mr. Zahorak had no involvement with the contract during the performance period. (R4, tab 4)

10. By letter dated 4 September 2000, Mr. Zahorak submitted an uncertified claim in the total amount of $229,204.34 seeking recovery of L&C's "contract overhead costs and profit on such overhead costs" (R4, tab 6 at 2).

11. In a final decision dated 14 September 2000, the contracting officer notified appellant the claim required certification but denied the claim notwithstanding this deficiency. The contracting officer further indicated that the government had reimbursed appellant for bonding and insurance costs and concluded that payment "represents a fair and reasonable settlement of expenditures made by your company." (R4, tab 7) Appellant's bonding costs were "paid" (recouped or reallocated by the surety to defray the costs of other contracts) and are not part of appellant's claim in this appeal (tr. 23, 45-46). Appellant also does not seek compensation for insurance costs (ex A-1; R4, tab 6). Insurance costs were typically spread over all of appellant's contracts and L&C had other work during the performance period (tr. 97). It is not possible on this record to determine whether insurance costs were increased as a result of the instant contract (tr. 97-98).

12. By letter dated 27 September 2000, appellant's attorney filed an appeal from the final decision (R4, tab 8). The appeal was docketed as ASBCA No. 53066 (R4, tab 9).

13. Following the docketing of the appeal, the Board notified appellant of potential jurisdictional issues presented by the failure to certify its claim. As a result, appellant resubmitted its claim to the contracting officer along with a certification executed by appellant's president, Mr. Louis Soldatovic (R4, tab 10). In a final decision issued on 18 January 2001, the contracting officer again denied the claim (R4, tab 11). Appellant timely appealed the denial by letter of 8 February 2001 and the appeal was docketed as ASBCA No. 53270. On 2 April 2001, by agreement with the parties, the Board dismissed the identical earlier appeal (ASBCA No. 53066) and incorporated the pleadings, Rule 4 file and other pertinent filings into the instant appeal.

14. Appellant has expressly confined its claim of entitlement in this appeal to allegations that the government improperly diverted the asbestos work to other contractors (tr. 8-9). There is no evidence and no contention that estimated quantities in the contract's schedule were negligently or otherwise improperly calculated and included in the contract.

15. During discovery, the government learned that the Fort Hamilton Director of Public Works (DPW) approved seven work requests for asbestos removal work on Fort Hamilton on 29 July 1995 (exs. G-4, -5). The Army concedes that orders for performance of this work may have been issued under the Fort Hamilton base operations contract on unidentified date(s) during the performance period of the contract in dispute (*id*.; gov't br. at 13). The base operations contract provided that all asbestos and abatement work under $25,000 at Fort Hamilton would be awarded to the base operations contractor (ex. G-5 at 3). The seven work requests all fell below the $25,000 threshold set forth in the contract's base operations exception with "approved" amounts ranging from a low of $9,500 to a high of $24,700. The total amount of all seven work requests was $137,100. Only two of the work requests pertained to the same building on Fort Hamilton; each of the remaining five requests concerned work on separate buildings. (Exs. G-4, -5). We are unable to determine the precise nature of the asbestos removal operations covered by the work requests.

16. On 28 August 2003 shortly prior to the hearing of this appeal, the contracting officer issued an Amended Final Decision. Based on the discovery of the seven approved work requests for Fort Hamilton, the contracting officer assumed that orders were actually issued to the base maintenance contractor for all of the work. (Ex. G-5 at 3-4) He further noted that, "the government is no longer contesting entitlement" with respect to the work covered by the requests which collectively total $137,100 (*id*. at 4). Consequently, the contracting officer calculated that, "If the Government had ordered the work from L&C, at a profit rate of 10% . . ., then the lost profit they would have been

entitled to is $12,463.64 [*i.e.*, the profit component of the $137,100], plus interest in the amount of $1,844.36 for a total of $14,308.00" (*id.*). As a result, the Amended Final Decision found appellant entitled to that total and indicated that appellant "should submit an invoice to the government for payment and it will be paid without prejudice to the current claim pending before the ASBCA. All other matters of entitlements and quantum should be addressed at the hearing . . ." (*id.*). The contracting officer further explained his rationale for the payment at the hearing stating that he gave appellant the "benefit of the doubt" and was "hoping that [the payment] would appease [appellant] and we wouldn't have to be going to trial . . . ." (Tr. 76-77) Appellant did not appeal the Amended Final Decision.

17. Bearing an effective date of 9 September 2003, Modification P00002 (Mod. 2) was unilaterally issued by the contracting officer to increase the contract price in the amount of $14,308 based on the rationale of, and in accordance with, his Amended Final Decision (ex. G-4).

18. Other than the seven work requests discussed above, there is no evidence or offer of proof by appellant that the government diverted asbestos abatement/disposal work to other contractors. The government made an exhaustive search of its records for the contract period and did not uncover evidence of other such work during the instant contract's performance period (ex. G-4 at 2). With the exception of these seven work requests, appellant's sole witness had no specific knowledge that any other asbestos work was possibly diverted to other contractors. The record reveals no evidence of bad faith on the part of the government.

19. There is no persuasive evidence concerning the incurrence, amount and/or allocability of any increased costs related to the contract. Appellant offered no books or accounting records, including cancelled checks, establishing the incurrence of costs (tr. 86-88, 97-100). There is no evidence establishing the extent, if any, that specific overhead accounts were impacted by the contract (tr. 43, 45). Appellant failed to produce any evidence explaining how it computed its bid (tr. 87). There is no persuasive evidence that appellant "mobilized," hired or dedicated personnel for performance of the contract. There is no evidence that L&C obtained additional equipment or purchased materials for performance of the contract. Nor is there any evidence demonstrating how appellant otherwise relied to its detriment on the estimated quantities set forth in the bid schedule.

20. The testimony of appellant's only witness, Mr. Zahorak, lacked foundation and was not credible. For example, Mr. Zahorak was asked whether he had any knowledge of L&C's contract-related costs. The witness replied, "No, not really. I never really got involved in it . . . ." (Tr. 43) He never reviewed appellant's accounting records or the contract and had no knowledge of other contracts performed contemporaneously by appellant (tr. 27, 40, 45, 48, 50, 56-57, 59). Mr. Zahorak's first involvement with the contract occurred after the performance period had expired (tr. 19, 33). The claim is

based on an arithmetic calculation of the alleged 15% "overhead" included in the bid with 10% profit added (tr. 39, 43, 87). In Mr. Zahorak's opinion, "the fifteen percent [claimed]" is "not an abnormal thing, okay" (tr. 43). Mr. Zahorak stated, "I made it up, okay, if you want to know" (tr. 61). Mr. Zahorak will receive a share of any recovery resulting from prosecution of the claim (tr. 53-54).

DECISION

Appellant argues that the government diverted business to third parties in bad faith breaching[1] the captioned requirements contract (app. reply at 21).

It is well established that to the extent that the government purchases "requirements" from other sources in violation of terms of a contract, it may be found liable for breach of contract. *See Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000); *T&M Distributors, Inc.*, ASBCA No. 51279, 01-2 BCA ¶ 31,442; *Viktoria Transport GmbH & Co.*, ASBCA No. 30371, 88-3 BCA ¶ 20,921. However, the essential dispositive factor in this appeal is that no diversions of asbestos work violating the terms of the contract have been proven. With the exception of the asbestos work possibly awarded to a base maintenance contractor,[2] appellant's allegations are based wholly on supposition unsubstantiated by the record.

Relief is generally not available where properly prepared estimated requirements vary from actual requirements or fail to materialize, *e.g.*, as a result of the lack of

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[1] At no time has appellant claimed that the contract was constructively terminated for convenience. *See T&M Distributors, Inc.*, ASBCA No. 51279, 01-2 BCA ¶ 31,442 at 155,281. The government has also tried and briefed this case solely on the issue of whether a breach of contract occurred. Nor has appellant alleged that the estimated quantities of work set forth in the CLINs were negligently or inadequately calculated.

[2] The government has conceded entitlement as to the work possibly awarded to the base maintenance contractor, notwithstanding the specific contractual exception permitting the issuance of delivery orders under $25,000 to that contractor. The contracting officer has authorized payment of anticipatory profits (plus statutory interest) for such possible diversions. There is no dispute concerning that work. There is also no proof that the contractor is entitled to any additional amount with respect thereto. In particular, absent independent corroboration and a knowledgeable explanation of appellant's accounting system, there is insufficient proof that any costs claimed by appellant were incurred in the amounts asserted or properly allocated to this contract. (*See* findings 19, 20) Nor have they been shown to have proximately resulted from any breach of this contract. Accordingly, we need not further address the matter.

funding. *Cf. Hilton's Cleaners, Inc.*, ASBCA No. 18213, 74-1 BCA ¶ 10,433 at 49,298-99 (and cases cited). Here, the solicitation straightforwardly cautioned appellant that funds were not presently available during the 1995 fiscal year commencing 1 October 1994 (finding 4). *See Arcon-Pacific Contractors*, ASBCA No. 25057, 82-2 BCA ¶ 15,838 at 78,516 (uncertain availability of funds was made known to contractor during negotiations); *see also Metro Industrial Painting Corp.*, ASBCA No. 6328, 1962 BCA ¶ 3343 at 17,208. The clause further advised that the government's obligations under the contract were contingent on the availability of funds and "no legal liability" would result until they were available and appellant was so advised by the contracting officer. As a consequence of delays associated with the certificate of competency process, the contract was awarded after the advent of the 1995 fiscal year. Appellant's failure to furnish adequate bonds until approximately five months after award further delayed commencement of performance. There is no evidence that funds for the project ever became available. Appellant was so warned and has shown no basis for recovery.

The appeal is denied.

Dated: 24 August 2004

ROBERT T. PEACOCK
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. 53270, Appeal of L&C Europa Contracting Company, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals