ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Local Communications Network, Inc.	)	ASBCA No. 55154
	)	
Under Contract No. N68939-95-D-0016	)	

APPEARANCES FOR THE APPELLANT:
Anne B. Perry, Esq.
Louis D. Victorino, Esq.
Charmaine A. Howson, Esq.
Sheppard Mullin Richter
& Hampton LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT:
Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Mark R. Wiener, Esq.
Senior Trial Attorney
David H. Turner, Esq.
Assistant Counsel
Fleet Industrial Supply Center
Norfolk, Philadelphia Detachment

OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON
THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

Local Communications Network, Inc. (LCN) appeals the denial of six claims for alleged government breaches of a requirements contract. The government moves for summary judgment on all six claims. We dismiss the appeal for lack of jurisdiction over two un-quantified claims. We grant the motion as to two of the quantified claims and deny it as to the other two.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 27 April 1995, the Naval Information Systems Management Center (NISMC) solicited proposals for a contract to provide commercial long distance telephone and related services at the U.S. Naval Station Guantanamo Bay (GTMO), Cuba. The solicitation at four different sections (B1, H1, L6, M1) described the proposed contract as a "fixed price, indefinite-delivery, requirements type contract." (R4, tab 10 at 1, 4, 10, 58, 115, 130)

2. LCN submitted a proposal in response to the solicitation, and on 7 September 1995, it was awarded the captioned contract (hereinafter "Contract 0016"). The requirements to be provided, when ordered, were designated in section B3 of the contract schedule as follows:

CLIN	DESCRIPTION
0001	Official Long Distance Telephone Service 24 Hours Per Day/7 Days Per Week Including Direct Dial and all Operator Assisted Calls
0002	Unofficial Long Distance Telephone Service For Direct Dial Calls
0003	Unofficial Long Distance Telephone Service For Operator-Assisted Calls
0004	800 Service Access Fee
0005	T-1 Service
0006	Ancillary Services

(R4, tabs 20, 22 at 1, 3)

3. The "Unofficial Long Distance Telephone Service" in CLINs 0002 and 0003 was described in the contract specifications as including: "connectivity to residential, Bachelor Quarters (BQ's), telephone toll center, pay stations, private contractor and migrant locations. . . ." (R4, tab 22 at 12). The term "unofficial" was defined as: "Any service furnished through telephone facilities owned, maintained, or contracted by [the Navy] and used by individuals or activities not authorized by law or regulation" (R4, tab 22 at 90).

4. The T-1 Service in CLIN 0005 was described in section C3.6 of the contract specifications as: "one T-1 for a mixture of voice and data circuits with dedicated JTF connectivity between Bldg. M51, Naval Station Norfolk, Virginia to Bldg. N609 Naval Station [GTMO]" (R4, tab 22 at 19).

5. The "Ancillary Services" in CLIN 0006 were described in section C3.7 of the specifications as:

> C3.7. **Ancillary Services**. The Contractor may wish to market or the Government may request ancillary services not specifically identified in this contract. The Contracting Officer must approve in writing, both the marketing of and the cost for any ancillary service. Once approved, fees for each ancillary service will become part of the contract price schedule.

(R4, tab 22 at 22)

6. The contract document included, among other provisions, the FAR 52.233-1 DISPUTES (MAR 1994) clause (R4, tab 22 at 76). Although the contract document at sections B1 and H1 expressly stated that it was a "requirements type contract," it did not contain or incorporate by reference the FAR 52.216-21 REQUIREMENTS (APR 1984) clause mandated for requirements type contracts by FAR 16.505(d), 48 CFR § 16.505(d) (1994) (R4, tab 22 at 3, 57, 75). Paragraph (c) of that clause stated:

> Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

7. The contract schedule did not specify the government activity or activities whose requirements for the specified services were to be ordered under the contract (R4, tab 22). After award, delivery orders were issued only by the following authorized Navy activities: NISMC, the Fleet & Industrial Supply Center Norfolk, Philadelphia Detachment (FISC),[1] the Naval Computer and Telecommunications Area Master Station, Atlantic (NCTAMS LANT) and SSC Charleston, Norfolk Office (R4, tabs 33, 42, 43, 54-120). Neither the Defense Information Systems Agency (DISA) nor the Federal Aviation Administration (FAA) were authorized ordering activities under the contract.

8. The base term of Contract 0016 was one year plus government options for nine additional years and a maximum 120-day phase out period. The Navy exercised the options for eight additional years and the phase out period. LCN's work under the contract was concluded on 6 January 2005. (R4, tab 22 at 46, 57; tabs 26, 30, 34, 38, 42, 43, 49, 52; app. supp. R4, tab 43)

[1] FISC was the designated successor contracting office with PCO authority from March 1998 through completion of the contract (R4, tab 32).

9. The Economy Act, 31 U.S.C. § 1535(a), states in relevant part:

> The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if –
>
> . . . .
>
> (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;

10. The implementing regulations at FAR 17.502 state in relevant part:

> [A]n agency may place orders with any other agency for supplies or services that the servicing agency may be in a position or equipped to supply, render or obtain by contract if it is determined by the head of the requesting agency, or designee, that it is in the Government's interest to do so.

48 CFR § 17.502 (1994).

A. The Alleged Diversion of DISA Requirements

11. In 1995, DISA was a component of the Department of Defense (DOD). It was not a component of the Department of the Navy. The mission of DISA was "planning, developing and supporting command, control, communications (C3), and information systems that serve the needs of the National Command Authorities (NCA) under all conditions of peace and war." To accomplish this mission, DISA was authorized to, among other things: "[a]cquire commercial communications services for the DoD and other federal agencies as directed." *See* 32 CFR §§ 362.3, 362.4, 362.5(a)(9) (1995).

12. The regulations establishing DISA included the following provision under the heading "Relationships":

> (b) The Secretaries of the Military Departments and the Directors of the Defense Agencies shall:
>
> . . . .

> (3) Coordinate with the Director, DISA, on all programs and activities that include, or are related to, C3 and information systems for which the DISA has a primary or collateral responsibility . . . . Obtain the DISA's concurrence on draft acquisition plans . . . for C3 and information systems, subsystems and projects.

32 CFR § 362.6(b)(3) (1994).

13. On 1 December 1994, prior to the solicitation and award of Contract 0016, NISMC sent the following message to the DISA Defense Information Technology Contracting Office (DITCO):

> Subj: COMMERCIAL TELEPHONE SERVICE FOR [GTMO]
>
> 1. Subject requirement has been met for many years by a contract administered through the authority of Naval Facilities Engineering Command . . . . Preparation for the follow-on procurement has begun including participation by your activity.
>
> 2. The procurement is predominantly post, camp, station telephone service normally the responsibility of the cognizant military department. In addition, transition challenges from the current NAVFAC contract are involved. For these reasons the Navy would like to continue as the contracting authority for the follow-on acquisition. Specifically [NISMC] supported by [NCTAMS LANT], would conduct the acquisition and arrange for subsequent contract administration.
>
> 3. Request you contact Dave Andros . . . if this is agreeable to you.

(R4, tab 5)

14. The record on the motion does not contain any evidence of DISA/DITCO's reply to the NISMC message.

15. On 15 May 1996, DISA requested NCTAMS LANT to provide the T-1 service under CLIN 0005 of Contract 0016 with DISA rather than JTF connectivity at

GTMO (app. supp. R4, tab 63). This request was granted and the contract was modified accordingly (R4, tab 25).

16. On 21 May 1996, DISA issued a competitive solicitation[2] for an additional T-1 service at GTMO. LCN protested and by letter dated 17 June 1996 a DISA contracting officer requested the NISMC PCO to determine "whether your contract includes all DOD requirements, all Federal Government requirements, or is limited to Navy requirements" (app. supp. R4, tab 67 at 1). The NISMC PCO replied that Contract 0016 was "indeed a requirements contract," and that "the Navy and LCN intended for additional circuits like that described in [the DISA solicitation] to be within the scope of the Navy's requirements contract" (app. supp. R4, tab 71).

17. The NISMC PCO's contracting authority was "[s]ubject to the limitations contained in the Federal Acquisition Regulation" (gov't supp. br., encl. 3).[3] FAR 1.602-1(b) stated: "No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met." 48 CFR § 1.602-1(b) (1994).

18. In an email dated 30 July 1996, subject "DISA T-1 REQUIREMENT," a DISA contracting officer commented on the advice received from the NISMC PCO with respect to this requirement as follows:

> LCN has claimed and as cognizant [Navy] contracting officer, Pat Reinhart has agreed [the DISA/DITCO solicitation] must be cancelled and the resulting requirement be provided under the terms of the Navy contract. As DITCO contracting officer, I can only address the contracting ramifications. At this point in time, DITCO has no authority to order this service and must abide by the Navy contract. Delivery orders against existing contracts are extremely fast once the contracting activity receives them.
>
> Based on Pat Reinhart's correspondence, the Navy's contract is for all telecommunications including long haul into

[2] Telecommunications Service Request (TSR).

[3] The warrant of the NISMC PCO who awarded Contract 0016 is not in evidence. But the parties have agreed that for purposes of this appeal the terms of her warrant were the same as those of the warrant of her successor (gov't supp. br., encl. 3; app. supp. memo at 1).

> Guantanamo Bay, Cuba. If this interferes with DISA's function, specifically Department of Defense Directive "Management of Base and Long-Haul Telecommunications Equipment and Services," dated 5 December 1991, it will need to be resolved at higher levels than this office. My guess is that resolution will take time. Once and if the two agencies agreed, transferring the contract to DISA/DITCO or adding DISA/DITCO as an authorized ordering activity it would take at least 6 months to 1 year to accomplish (emphasis added).

(App. supp. R4, tab 73 at 3)

19. DISA did not proceed with the solicitation that had instigated the LCN protest. On 30 September 1998, the successor contracting officer (SCO) at FISC modified the
"T-1 Service" (CLIN 0005) in Contract 0016 at DISA's request to provide for three "dedicated DISA connectivity" T-1 services from GTMO to the continental United States (R4, tab 35 at 1-2). On 16 April 1999, FISC again at DISA's request modified the T-1 service item in Contract 0016 to add a "SIPRNET CIRCUIT (Fractional T-1)" service for DISA's use (R4, tab 36).

20. NCTAMS LANT issued the initial delivery orders for these services to LCN on 1 October 1998 and 22 April 1999 respectively (R4, tab 83 at 2, tab 88 at 1). Four circuit orders issued by DISA for utilization of these services included the following statement:

> This circuit must be provided utilizing the existing government contract [contract 0016] between the Navy and LCN Communications to obtain leased services into [GTMO]. LCN is the sole provider of commercial leased circuits accessible to world wide locations from [GTMO].

(App. supp. R4, tabs 31 at 4, 32 at 4, 33 at 5, 34 at 5)

21. On 26 March 2002, FISC at DISA's request modified Contract 0016 to add a requirement for two DS-3 services for DISA use under the Ancillary Services line item (CLIN 0006) of Contract 0016. This modification (No. P00025) expressly limited the duration of the requirement to the period 15 April 2002 through 30 April 2003 with a proviso that: "If required longer than one year, a request will be submitted for an extended period." (R4, tab 47 at 1-2) On 28 March and 6 September 2002, NCTAMS LANT issued the delivery orders to LCN for installation and operation of the DISA DS-3 services through 30 September 2002 (R4, tabs 111 at 2, 115 at 2).

22. On 30 September 2002, NCTAMS LANT issued a delivery order to LCN for operation of the DISA DS-3 services from 1 October 2002 through 6 September 2003 (R4, tab 116 at 2). However, since there was no contract modification extending the requirement for the DS-3 services beyond 30 April 2003, the delivery order was effective only to the end-date of the requirement as specified in Modification No. P00025.[4]

23. On 2 April 2003, FISC told LCN that it would not be extending the 30 April 2003 end date specified in Modification No. P00025 for the DS-3 services (R4, tab 132). In response to a complaint by LCN that DISA was contracting with MCI WorldCom for DS-3 services at GTMO, FISC replied on 14 April 2003 that: "Because the performance period for these [DS-3] services under [Contract 0016] ends on 30 April 2003, acquiring those services from the DISN [Defense Information Systems Network] approved source after that date cannot be viewed as a diversion of requirements" (R4, tab 136 at 4).

24. When MCI WorldCom was unable to get one of the DISA DS-3 services at GTMO operational by 30 April 2003, FISC and LCN at DISA's request entered into a separate contract to continue that service by LCN on a month-to-month basis (R4, tabs 126, 139). On 28 May 2003, DISA told FISC and NCTAMS LANT that the DS-3 service by LCN would not be needed after 30 June 2003. FISC accordingly allowed the separate contract for that service to expire on that date. (R4, tab 140 at 1)

B. The Alleged Diversion of FAA Requirements

25. The FAA had a civilian air traffic control radar at GTMO. The FAA is a component of the Department of Transportation. It is not a component of either the Department of the Navy or the Department of Defense. 49 U.S.C § 106(a). There is no evidence that the FAA at any time before or after award of Contract 0016 requested the Department of the Navy, NISMC or its successor contracting agencies to purchase all its long distance telecommunication requirements at GTMO under Contract 0016. There is also no evidence of a determination by the head of the FAA or his designee, pursuant to the Economy Act, that the acquisition of the FAA's long distance telecommunication requirements at GTMO under Contract 0016 was in the interest of the government. *See* SOF ¶¶ 9, 10.

[4] Pursuant to Section G1.1 of Modification No. P00001 of Contract 0016, only the NISMC PCO (Patricia Reinhart) or the FISC SCO (James Swizewski) were authorized to modify the contract (R4, tab 23 at 1, 43, 46-47, tab 31 at 1). The NCTAMS LANT contracting officer who issued the delivery order (Sheila Hall) was neither the PCO nor the SCO (R4, tab 116 at 2).

26. By letter dated 21 February 1997, the FAA requested the NISMC PCO to: "Please advise of any restrictions or limitations that would apply to the establishment of an FAA satellite earth station due to your contract with LCN" (R4, tab 161 at 3). On 8 April 1997, the NISMC PCO replied that: "The intention was to make the awardee, in effect, the local exchange carrier for originating and terminating long haul circuits at [GTMO]", and requested the FAA to "send your completed requirement to our office in order for us to review and forward it to LCN" (app. supp. R4, tab 75).

27. The FAA did not send its earth station requirements to NISMC for procurement under Contract 0016. In March 1998, the FAA, the United States Navy and the United States Southern Command entered into an agreement on the operation and support of the FAA radar at GTMO. This agreement at Article IX, paragraph 4 stated: "To provide communications diversity, the FAA may install a satellite communications earth station at the GTMO ARSR-4 site through a vendor of the FAA's choice." (R4, tab 163 at 10, 13)

28. On 14 March 2003, LCN complained to FISC that the FAA had contracted with another contractor (SCSI) for multiple T-1 services between the FAA at GTMO and the continental United States allegedly in breach of Contract 0016 (R4, tab 128 at 2). On 14 April 2003, FISC advised LCN that: "the FAA T-1 line that you describe would not fall within the scope of [Contract 0016]" (R4, tab 136 at 4).

C. The Alleged Diversions of PCI and B&R Requirements

29. On 8 April 1997, NISMC solicited a proposal from LCN for internet service at GTMO, as a technology improvement pursuant to Section H2 of Contract 0016 (R4, tab 150). On 15 April 1997, LCN responded with a proposal for "using a small part of the existing telephone switch capacity for access by Internet subscribers" (R4, tab 29 at 10, 12). On 3 July 1997, NISMC and LCN entered into bilateral Modification No. P00007, adding official user and unofficial user internet services to the contract under the Ancillary Services CLIN 0006 (R4, tab 29 at 1-3).

30. On 4 July 2001, the GTMO base commander renewed a franchise agreement with Phoenix Cable Television, Inc. (PCI) for operation and maintenance by PCI of the government-owned Naval base cable television system at GTMO. PCI was an independent contractor, not a government agency. In the discussions leading up to the renewal agreement, PCI offered to provide internet service over the cable system (app. supp. R4, tab 85 at 2). The renewal agreement included the following provision on internet service:

> i. Internet Services. Franchise holder will consult with the Commanding Officer and his designees regarding the

> provision of Internet access over the cable system. Franchise holder and the Naval base acknowledge that the provision of such service will require a coordinated and cooperative effort and will remain subject to technical and financial limitations.

(R4, tab 179 at 6, 9, 17)

31. On 12 December 2001, LCN complained to FISC that PCI had installed an internet facility with direct satellite access to the continental United States (CONUS) and that: "This bypass facility is an infringement on LCN's authority to be the exclusive communications transmission carrier between the CONUS and [GTMO] in accordance with [Contract 0016]" (R4, tab 153). On 17 December 2001, FISC told LCN that its right to provide internet services in conjunction with its telephone services did not "create any exclusive right for LCN to provide internet access at GTMO" (R4, tab 155 at 2).

32. On 1 February 2002, LCN complained to FISC that PCI was providing voice over internet (VOI) services to its cable customers at GTMO, and that another contractor at GTMO, Brown and Root (B&R), had installed a telecommunications facility for its own use and "potentially for other entities." LCN alleged that the Navy's acquiescence in these activities was a breach of Contract 0016. (R4, tabs 143 at 1, 4, 165 at 2-3)

33. Although the Navy controlled physical access to GTMO, it is not disputed that B&R was an independent contractor at the base. LCN does not allege, nor does the evidence indicate, that the B&R telecommunication facility was a specified service to be operated and maintained by B&R for the government. There is no evidence that the B&R facility was in fact made available commercially to other entities, or that it was otherwise used for anything other than B&R's business.

34. With respect to the alleged VOI diversion by PCI, FISC on 13 February 2002 replied that LCN did not have exclusive rights to provide internet services that did not involve long distance telephone connectivity (R4, tabs 144 at 2). With respect to the alleged B&R diversion, FISC on 14 April 2003 replied that LCN had not identified any activity of B&R constituting "commercial telephone services," and that "the independent decision of a private entity not to use LCN's commercial services could not constitute the creation of a diversion of requirements by the Navy" (R4, tab 136 at 2).

D. The Alleged Morale Call Diversion

35. The Contract 0016 specifications at section C3.4 entitled "Toll Center/ Pay Stations" stated in relevant part: "a. The Contractor shall ensure that . . . Morale, Welfare and Recreation (MWR) calls can be placed at the toll center" (R4, tab 22 at 15). The

contract GLOSSARY OF TERMS AND ABBREVIATIONS defined "Morale Calls" as follows:

> **Morale Calls** - Service for Morale, Welfare and Recreation may be placed on DSN from or to CONUS isolated or remote geographic locations because of non-availability of acceptable commercial services. Policy is established by the Commander-in-Chiefs.

(R4, tab 22 at 89)

36. The DSN is a government official use only telephone system. On 21 March 2003, LCN complained to FISC that an increase in the number of 15-minute long distance "morale calls" from one per week to two per week that military personnel were allowed to place over the DSN was a diversion of requirements from the unofficial long distance telephone services under CLINs 0002 and 0003 of Contract 0016 (R4, tab 129). On 14 April 2003, FISC told LCN that morale calls were a not a diversion from LCN's contract because "[t]hose calls are made via the non-commercial DSN system and do not utilize any alternate 'commercial telephone services'" (R4, tab 136 at 5).

E. LCN's Certified Claim

37. On 18 March 2005, LCN submitted a certified claim for damages "incurred as a result of the Government's failure to order all of its requirements for the telecommunications services included within the scope of [Contract 0016]." The total claim consisted of four quantified claims and two un-quantified claims as follows:

Claim One: Diversion of DS-3 Services to MCI WorldCom: $2,475,914;

Claim Two: Diversion of Services by Brown & Root: $406,749;

Claim Three: Diversion of Internet Services to Phoenix Cable: $199,198;

Claim Four: Diversion of Services by SCSI: $641,542;

Claim Five: Other Diversions of Telecommunication Services:

1. Diversion of Telecommunication Services by

Phoenix Cable: not quantified;

2. Diversion of Long Distance Services by the Navy's Misuse of DSN for Morale Calls: not quantified.

(R4, tab 1 at 10-20)

38. With respect to the quantification of its claims, the last paragraph of LCN's claim letter stated:

> The measure of damages to which LCN is entitled as a result of the breach is the lost profits LCN would have earned if the diversions had not taken place. . . . [F]or the four claims reasonably quantifiable given the information currently available to LCN, LCN respectfully requests that the Navy remit payment to LCN in the amount of $3,723,403; and for the two diversions described but not quantified above in Claim Five, LCN respectfully requests the cooperation of the Navy in producing documentation which will permit the proper quantification of the lost profits that resulted from these diversions.

(R4, tab 1 at 20)

39. The alleged impact of the two uncertified claims was on the profitability of LCN's unofficial long distance telephone service for which it charged users the rates allowed in the contract. LCN does not explain why it could not estimate the impact of the alleged diversions from its own records of the charges collected before and after the alleged start of the diversions.

40. On 12 August 2005, the FISC contracting officer denied the claims entirely (R4, tab 2 at 1, 21). LCN timely appealed.

DECISION

The government moves for summary judgment on the grounds that (i) Contract 0016 was not a requirements contract because it did not include the terms and conditions necessary to create a requirements type contract, (ii) even if it was a requirements contract, it did not include DISA's actual purchase requirements, or those of the FAA, or B&R's telecommunication needs, or internet services, and (iii) the two un-quantified

claims are not valid "claims" under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, because they do not claim sums certain (gov't mot. memo at 1-4).

LCN opposes the motion on the grounds that (i) the "plain language" in the contract and the parties' conduct established that the contract was a requirements-type contract, (ii) the requirements obligation applied to all individuals and entities resident on or having requirements at GTMO, (iii) the requirements obligation applied to all requirements in the contract line items as awarded, as amended, and as specified in the statement of work, and (iv) it had submitted one claim for the diversion of requirements in a sum certain and a "sub-element" of that claim was not required to be stated in a sum certain (app. opp'n memo at 38-39, 44-45, 49).

A. The Un-Quantified Claims

The definition of "claim" for purposes of the CDA is set forth in the implementing FAR and the Disputes clause of the contract. That definition requires that a monetary claim under the CDA be stated in a sum certain. *See* 48 CFR §§ 33.201, 52.233-1(c) (1994). LCN's claims under "Claim Five" for alleged diversions by (i) PCI's voice-over-internet (VOI) service and (ii) the increased allowance of morale calls over the DSN were not quantified in sums certain. We do not agree with LCN's contention that these un-quantified claims were sub-elements of the claim for $3,723,403. That amount was the sum of the four quantified claims. The two un-quantified claims were stated in the claim letter as separate claims, over and above the sum certain claims. (SOF, ¶¶ 37, 38) Moreover, we do not agree that LCN needs access to Navy records to make a reasonable estimate of the impact of the un-quantified claims on the profitability of its unofficial long distance telephone service before and after the alleged breaches occurred (SOF ¶ 39).

The cases cited by LCN for its argument on this aspect of the appeal are inapposite. In *Applied Technology Associates, Inc.*, ASBCA No. 49200, 96-2 BCA ¶ 28,394, the item at issue was a component of the total amount claimed. In *Scientific Management Associates, Inc.*, ASBCA No. 50956, 98-1 BCA ¶ 29,656, the sum certain of the claimed fee could be easily determined by subtracting the amount of the fee already paid from the specified maximum fee. In *D.J. Barclay & Co., Inc.*, ASBCA No. 28908, 85-1 BCA¶ 17,922, and *Sarbo, Inc.*, ASBCA No. 34292, 87-3 BCA ¶ 20,176, the items at issue were additional cost components of other claims. In LCN's case, each of the six claims had unique facts as to what constituted the alleged diversion. None of the claims was only an added cost impact of another claim. Failure to state a claim for money under the CDA in a sum certain is a jurisdictional defect. *NMS Management, Inc.*, ASBCA No. 53444, 03-2 BCA ¶ 32,340 at 159,981.

B. The Quantified Claims

On its motion for summary judgment, the government as the moving party must establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. LCN as the non-moving party is entitled to have all reasonable factual inferences drawn in its favor. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

The government argues that Contract 0016 was not a requirements contract because "[i]t did not contain the FAR Clause 52.216-21 or any of its alternates; it did not identify any 'designated Government activities;' and it did not include any language that would require any Government activity to order from LCN all of its requirements for any of the services specified in the Contract's statement of work." The government also argues that, even if a requirements contract were intended, it was limited to the commercial telephone services CLINs and did not include the T-1 services or Ancillary Services CLINs. (Gov't mot. memo at 43-44)

Notwithstanding the omission in the contract document of the FAR Requirements clause and the failure to state the specific government activities whose requirements were subject to the contract, there is no genuine issue of material fact that Contract 0016 was intended by both LCN and the NISMIC PCO to be a requirements contract for at least all government requirements for long distance telecommunication services at GTMO. (SOF ¶¶ 1, 6, 16, 26) Giving effect to this manifest mutual intent, we consider the FAR 52.216-21 REQUIREMENTS (APR 1984) clause, mandated for all requirements type contracts by FAR 16.505(d), to be incorporated into the contract by operation of law. *See* 48 CFR § 16.505(d) (1994) and *Dawkins General Contractors & Supply, Inc.*, ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,847.

There is no genuine issue of material fact that there was no request of any kind at any time by the FAA under the Economy Act or otherwise for NISMC to contract under Contract 0016 for all or any part of the FAA's telecommunication requirements at GTMO (SOF ¶¶ 25, 26). The FAA did not submit its telecommunication requirements at GTMO to NISMC for procurement under Contract 0016 as advised by the NISMC PCO. To the contrary, it entered into an agreement with the U.S. Navy and the U.S. Southern Command expressly providing that its requirements could be met with "a vendor of the FAA's choice." (SOF ¶¶ 27, 28) LCN argues that the Department of the Navy had an independent statutory authority under the Information Technology Management Reform Act of 1996 to contract "on behalf of the FAA" without regard to the Economy Act (app. supp. memo at 2). We disagree. The effective date of the cited statute (8 August 1996)

was more than eleven months after the award of Contract 0016. Pub. L. No. 104-106, §§ 5001-5703, 110 Stat 679-703 (1996). Moreover, the authority in the section of the statute cited by LCN, 40 U.S.C. § 11314(a)(2), derived from 40 U.S.C. § 5124(a)(2), is qualified by the phrase "in accordance with guidance issued by the Director of the Office of Management and Budget." That guidance, provided by OMB Memorandum 97-07, dated 26 February 1997, concluded: "[a]ccordingly, to the extent practicable, and consistent with the requirements of the Economy Act, 31 U.S.C. 1535, and other relevant provisions of law, agencies may permit use of their contracts by other agencies, and award contracts for multiagency use."[5] On this record, there is no genuine issue of material fact that the NISMC PCO had no authority to include the FAA requirements in Contract 0016. Accordingly, there was no diversion of the FAA requirements from that contract, and we grant the government's motion for summary judgment as to that alleged diversion.

With respect to the alleged DISA diversion, and drawing all reasonable inferences in favor of LCN, there is a genuine issue of material fact as to whether DISA requested or otherwise concurred, before or after award of Contract 0016, that all of its long distance telecommunication requirements at GTMO be procured under that contract. There is no evidence on this record of an express request by DISA, and its issuance of a competitive solicitation for a T-1 requirement after the award of Contract 0016 is inconsistent with any such request having been made. However, DISA's subsequent cancellation of that solicitation and procurement of its GTMO T-1 requirements thereafter under Contract 0016 suggest the contrary, and are sufficient to defeat the government motion for summary judgment on the alleged DISA diversion. (SOF ¶¶ 13-20)

With respect to the alleged B&R diversion, there is no genuine issue of material fact that B&R was an independent contractor and that its telecommunication facility was used only for its own business (SOF ¶ 33). LCN argues that since B&R activities on the Naval base were subject to government control and since it was an unofficial user of the base long distance telephone system, its requirement for any other long distance telecommunication service was "in the scope of respondent's requirements obligations" (app. opp'n memo at 45-49). We do not agree. The scope of the government's purchase obligation as stated in the contract Requirements clause was the ordering from LCN of all services specified in the Schedule "required to be purchased by the Government activity or activities specified in the Schedule," (SOF ¶ 6). The B&R telecommunication facility was not a government activity. Therefore it was not a diversion from Contract 0016.

With respect to the alleged diversion of the PCI internet access facility, there is a genuine issue of material fact. PCI's franchise agreement specified the services it was to provide. The section on internet access over the cable system required PCI to "consult"

[5] http://www.whitehouse.gov/omb/memoranda/m97-07.html

with the base commanding officer or designees over provision of the service, but did not expressly require that the service be provided. Subsequently, PCI did provide the service with its own satellite access facility at GTMO. (SOF ¶¶ 30-31) The record on the motion is not clear whether the cable internet service via satellite became a requirement of the franchise, or was a voluntary service that PCI could abandon at its discretion. If the former, the satellite facility might be a government requirement within the scope of the Ancillary Services CLIN of Contract 0016.

For the reasons stated above, the appeal is dismissed in part for lack of jurisdiction over the two un-quantified claims. The motion for summary judgment is granted and the appeal is denied as to the FAA and B&R diversion claims. The motion is denied as to the DISA and PCI diversion claims.

Dated: 29 November 2007

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 55154, Appeal of Local Communications Network, Inc., rendered in conformance with the Board's Charter.

Dated:

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