ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Advanced Technologies &	)	
Testing Laboratories, Inc.	)	ASBCA No. 55805
	)	
Under Contract No. DACW51-02-D-0015	)	

APPEARANCES FOR THE APPELLANT:	Jeffrey D. Walker, Esq. Adam Van Buskirk, Esq. Camardo Law Firm, P.C. Auburn, NY
APPEARANCES FOR THE GOVERNMENT:	Thomas H. Gourlay, Jr., Esq. Engineer Chief Trial Attorney Donald M. Harris, Esq. Rita M. Fang, Esq. Engineer Trial Attorneys U.S. Army Engineer District, New York

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal involves a New York District (NYD) U.S. Army Corps of Engineers (USACE) contract for sampling and testing dredged material with Advanced Technologies & Testing Laboratories, Inc. (ATTL). The parties have filed cross-motions for summary judgment. Appellant also requests attorney fees and expenses and moves to amend its complaint as necessary. We deny all motions and requests.

STATEMENT OF FACTS (SOF)

1. The government issued Solicitation No. DACW51-02-B-0010 in May 2002. Section C.1. of the Statement of Work, "Description of Services to be Performed," stated:

> The work to be performed…consists of sampling and testing of dredged material following procedures described in the 1992 ACENYD/EPA REGION II REGIONAL IMPLEMENTATION MANUAL on Dredged Material Proposed for Ocean Disposal (See Section J), the 1991 GREEN BOOK (Green Book), and subsequent updates to these two documents and, where applicable, the most recent New England Division Corps of Engineers (NED) publication

> entitled Guidance on the Collection of Sediment Samples for Dredged Material Testing.

(R4, tab 4 at 86) Section C.1 also provided that a "Work/QA Plan prepared by the contractor and approved by NYD would be required prior to any sampling or testing" (*id.*). Section C.2 set forth 112 items of sampling and analysis services to be detailed by delivery orders, not including "QA/QC procedures and necessary corrective actions" (R4, tab 4 at 86-92). The foregoing provisions were included in the resulting contract with ATTL.

2. In pertinent part, § C.10 in the solicitation and resulting contract with ATTL stated as follows:

> 10.7. Prior to initiation of the first sampling or testing project, the contractor must submit a Sampling Work Plan/Laboratory Quality Assurance Plan (Work/QA Plan) prepared as specified in the most recent ACENYD/EPA Region II Regional Implementation Manual for approval by NYD (unless formally instructed otherwise by the COR). Subsequent efforts will require identification of any anticipated changes to the initially submitted Work Plan.
>
> 10.8. The contractor must comply with the requirements of the approved Work/QA Plan, as well as the most recent versions of the Green Book and the ACENYD/EPA Region II Regional Implementation Manual. If the contractor does not comply, the contractor will be required to reperform all tests conducted during the time of non-compliance at no cost to the government, or pay the cost of having the samples rerun by another contractor.

(R4, tab 4 at 94) The parties do not genuinely dispute that the Work/QA Plan was the same requirement mentioned in SOF ¶ 7 as the QAPP, and that the terms "Work/QA Plan" and "QAPP" are synonymous. ATTL says that paragraphs 10.7 and 10.8 apply in "actual testing" under the contract, but that they do not apply prior to such testing (app. opp'n at 5).

3. Attached to the solicitation was an 18 December 1992 draft document entitled "United States Army Corps of Engineers, New York District, Environmental Protection

Agency, Region II, GUIDANCE FOR PERFORMING TESTS ON DREDGED MATERIAL PROPOSED FOR OCEAN DISPOSAL" (Regional Manual) (R4, tab 4).[1]

4. The Regional Manual presents "sediment testing guidelines and requirements to be used by applicants who wish to obtain a Department of the Army (DA) permit from the New York District of the United States Army Corps of Engineers (USACE) for dredging and disposal of the dredged material at an ocean disposal site." It "implements the technical guidance contained in the Green Book providing regional specifications such as the use of local or appropriate species in the biological tests and identification of contaminants of concern" and provides that copies of the Green Book could be obtained from a designated government office. (R4, tab 4, Regional Manual at 1-1, 1-5)

5. At some point after the Regional Manual was issued, Appendix D on Quality Control and Assurance was added and was included in the Regional Manual attached to the instant solicitation (R4, tab 4, Regional Manual at iii). Appendix D provided guidance in ensuring the quality of data collected through quality assurance/quality control (QA/QC) "guidelines." The first guideline was an "initial demonstration of capability" (IDC) which provided: "Prior to sample analysis, the laboratory must demonstrate proficiency in several ways including" written protocols for analytical methods; calculating method detection limits; establishing an initial calibration curve; and demonstrating acceptable performance on known or blind material. The guidance in Appendix D corresponded to the QA/QC "minimum requirements for any given analytical method" (emphasis in original) in an implementation manual for EPA/COE Regions IV and VI as modified by a guidance manual for Region II. (R4, tab 4, Regional Manual at D.1-D.4)

6. The Green Book was the February 1991 Environmental Protection Agency (EPA) document entitled "Evaluation of Dredged Material Proposed for Ocean Disposal" which is in the record as an attachment to a 29 October 2002 government letter to ATTL

[1] According to appellant, since contract § J includes no "1992 ACENYD/EPA REGION II REGIONAL IMPLEMENTATION MANUAL," §§ C and J are inconsistent and ambiguous. Appellant's president stated that the Manual referenced in the solicitation and contract was not attached to those documents and had not been offered in evidence. (App. opp'n at 4, 28-29, Goswami aff.) According to respondent, the "New York District/EPA Region II Regional Guidance Manual" and the "1992 ACENYD/EPA REGION II REGIONAL IMPLEMENTATION MANUAL" are "the same and are interchangeably used." The government Chief of the Dredged Material Management Section said the same thing, added that the Manual was attached to the solicitation, and noted that if appellant had been confused it should have asked the government. (Gov't reply at 2, second Greges aff.)

(R4, tab 6). The Green Book described itself as a national testing guidance manual containing "procedures applicable to the evaluation of potential contaminant-related environmental impact of the ocean disposal of dredged material." (R4, tab 6, Green Book at xi)

7. Solicitation § B provided for issuance of one contract for sampling and testing to a contractor/laboratory *with* a United States Environmental Protection Agency, Region 2 approved Quality Assurance Project Plan (QAPP) at the time of award and another contract for sampling and testing to a contractor/laboratory *without* an approved QAPP at the time of award in the amount of $250,000 for the base year and $1,000,000 for each of four option years. With respect to the latter contract, § B stated:

> Within one month of award, the contractor without an USEPA, Region 2 approved QAPP at the time of award must request information from USEPA, Region 2 that will tell them how to obtain an approved QAPP. If said contractor does not obtain an USEPA, Region 2 approved QAPP by the end of the base year, the contractor will paid [sic] the base year minimum task order amount of $5,000.00 and Operation Division will not pick up the option years.

(R4, tab 4 at 85-86)

8. On 21 September 2002, the government awarded Contract No. DACW51-02-D-0015 to ATTL (the contract), which was identified as not having a QAPP at the time of award. The contract, in the estimated amount of $4,250,000, consisted of $250,000 for the base year and $1,000,000 for each of four option years. Only the first year minimum guarantee of $5,000 was obligated and awarded. (R4, tab 5 at 1, 168)

9. The contract incorporated by reference the FAR 52.243.1, CHANGES – FIXED PRICE (AUG 1987) clause (R4, tab 5 at 181).

10. On 29 October 2002, the USACE/NYD's Chief of the Dredged Material Management Section, Monte Greges, sent ATTL a copy of the Green Book and informed ATTL that it would have to submit its initial demonstration of capability (IDC) data and standard operating procedures (SOPs) "to show proficiency in the required analyses." The letter referred ATTL to Appendix D of the Regional Manual and to the enclosed Green Book. Mr. Greges also stated that a QAPP would be required after ATTL's IDC data had been evaluated, and indicated that when the NYD received the IDC and SOPs, they would be sent to the EPA Region II for review. (R4, tab 6) Appellant characterizes the 29 October 2002 letter as a constructive change to the contract, and the government

disputes that characterization. (Compl. and answer ¶¶ 9; app. opp'n at 8, ¶ 4; gov't reply at 1, ¶ 1).

11. On 21 February 2003, 5 September 2003, and 30 December 2003, appellant submitted IDC data and SOPs, and on 18 June 2004 submitted IDC and QAPP data for review (R4, tabs 7, 10, 12, 20). Each time, the EPA found the submissions deficient (R4, tabs 8, 11, 15, 22). Following the last EPA determination on 12 August 2004, the USACE/NYD sent a letter to ATTL recounting the EPA conclusions and appellant's failure to obtain approval of its IDC, SOPs, and Work/QA Plan. It said that no further extensions would be granted and that appellant would be paid the minimum task order amount of $5,000 upon receipt of an invoice. (R4, tab 23) Respondent approved ATTL's 31 January 2006 invoice for $5,000, which was paid in March 2006 (R4, tab 24; gov't Statement of Undisputed Facts, ¶ 22 and app. response ¶ 22). ATTL says that the EPA reviews of appellant's IDCs and SOPs were deficient. The government contests that there were problems with the reviews. (Compl. and answer ¶¶ 25)

12. ATTL submitted a request for equitable adjustment in the amount of $210,066.51 with a defective certification signed by ATTL's President on 10 May 2006. (ATTL submitted a proper certification on 16 February 2007.) ATTL's claim acknowledged that the contract required approval of ATTL's "Work/QA Plan" before analyzing samples, but alleged that the USACE/NYD's 29 October 2002 letter changed the contract by requiring an approved IDC and SOPs before analytical work on the contract could begin, recounted its efforts at submitting and resubmitting the IDC and SOPs, and alleged various inconsistencies in EPA's review and rejection of its submissions. Neither ATTL's claim nor its 25 exhibits mentioned the December 2001 Beth Nash, USACE/NYD, environmental engineer, and John Hartmann, USACE/NYD, Chief, Operations Division, memoranda or the December 2004 Monte Greges e-mail discussed below, or the theories of contract ambiguity, implied duty to cooperate, superior knowledge, or commercial impracticability. (R4, tab 3; app. opp'n, Goswami aff., exs. 1, 2)

13. The contracting officer denied ATTL's claim on 21 December 2006 (R4, tab 2).

14. ATTL filed this appeal on 16 February 2007. Appellant's complaint contains, in large part, the same allegations set out in its claim.

15. Attached to ATTL's cross-motion for summary judgment are an affidavit of Lovely Goswami and four exhibits provided to appellant during discovery. Exhibit 1, a 4 December 2001 memorandum written by Beth Nash, states that the contract could not be a Small Business set-aside, because the contract would be difficult to perform and would require a high degree of precision; most chemical laboratories did not have the equipment or personnel to make the analyses required and only one or two laboratories in

the country were able to perform the tests to the satisfaction of EPA's Region 2 office. Ms. Nash stated that the EPA, not USACE, approved the testing criteria and data analyses and prior solicitations had been set up to ensure that the quality of work would meet the EPA standards. (App. opp'n, Goswami aff., ex. 1) Exhibit 2 was a December 2001 memorandum by John Hartmann to the chief of the contracting division stating that the contract to be issued could not be a Small Business set-aside for the reasons set out in Ms. Nash's memorandum (app. opp'n, Goswami aff., ex. 2).

DECISION

The government's motion for summary judgment argues that it purchased the minimum quantity required under this indefinite quantity contract and that it has no further legal obligation to appellant. ATTL's opposition and its cross-motion assert that it does not claim for the government not exercising the option years of the contract. It claims to recover the time and costs it expended as a result of a contract change, or alternatively because the contract was ambiguous, the government withheld superior knowledge regarding the contract, the government breached its implied duty of cooperation, and the government's actions made contract performance commercially impracticable. ATTL's claim alleges that the EPA review of appellant's submissions was faulty (app. opp'n at 13, ¶¶ 17, 20), requested costs and attorney fees alleging that Mr. Greges' 19 July 2007 affidavit was submitted in bad faith, and requested permission to amend its complaint to allege a superior knowledge cause of action.

Jurisdiction to Hear New Claims

Although not addressed by the parties, appellant's motion raises jurisdictional issues. We have jurisdiction to resolve contractor claims only to the extent they have been presented to a contracting officer for decision. We do not have jurisdiction over claims presented for the first time on appeal, in a complaint or otherwise. Whether a claim is new or essentially the same as that presented to a contracting officer depends on whether the claims "derive from common or related operative facts." *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 07-1 BCA ¶ 33,472 at 165,933.

Appellant's original claim alleged operative facts limited to two theories of recovery – the government changed the contract and the EPA review of appellant's submittals was faulty. The claim did not allege facts relating to ambiguity of the contract, superior knowledge, implied duty of cooperation, and commercial impracticability causes of action now set out in ATTL's motion for summary judgment. Obviously, it did not mention the Beth Nash and John Hartmann memoranda and Monte Greges e-mail that it obtained through discovery (the Discovery Documents). (SOF ¶¶ 12, 15)

Appellant's constructive change theory is based, in large part, on the single allegation that the 29 October 2002 letter changed the contract by adding the requirement that ATTL obtain approval of its IDC and SOPs, in addition to approval of its Work/QA plan, before beginning work on the contract (SOF ¶ 12). The ambiguous contract theory is a part of the constructive change theory, since there would be a change to the contract only if the contract did not already require pre-work approval of the IDC and SOPs. Appellant uses the *contra proferentem* argument to bolster its position that the contract did not originally include such a requirement. Although appellant mentions the Discovery Documents, they are not used to assert a claim separate from the constructive change claim. We reach the same conclusion with respect to the implied duty of cooperation theory. ATTL says that the government hindered its performance by adding an extra condition (IDC approval) to the contract. In our view, this is based on the same operative facts as the constructive change claim.

In its superior knowledge argument, appellant says that the Discovery Documents show that the government knew a § 8(a) business would have difficulty performing the contract. ATTL also says that it was not clear that IDC/SOP approval would be required in advance of performance. Likewise, appellant uses both the Discovery Documents and the IDC/SOP approval requirement in arguing that the contract was commercially impracticable. To the extent that the underlying basis for each of these theories is the IDC/SOP approval requirement, we have jurisdiction even though appellant may use the Discovery Documents to augment its basic position. We do not have jurisdiction to the extent that the underlying bases for the superior knowledge and commercial impracticability theories are the information in the Discovery Documents (*i.e.*, a small business would find it difficult to complete the contract).

I.

Cross-Motions for Summary Judgment

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In cross-motions for summary judgment, we must evaluate each motion on its merits and decide whether summary judgment is appropriate. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

As to the government's motion for summary judgment, there are genuine issues of material fact regarding whether the 29 October 2002 letter was a constructive change to the contract or whether the EPA's review of the IDCs and SOPs was faulty and/or actionable (SOF ¶¶ 10, 11).

The government correctly notes that the Federal Circuit has said that the government purchase of a guaranteed non-nominal minimum amount under an indefinite quantity contract satisfies its legal obligation. *Travel Centre v. Barram*, 236 F.3d 1316, 1320 (Fed. Cir. 2001). However, *Travel Centre* involved a claim that the government had induced the contractor to base its proposal on estimated sales that the government knew were overstated. The claim here is not based on the government's purchasing obligations. Appellant asserts that the 29 October 2002 Greges letter changed appellant's responsibilities under the contract, or breached the government's implied duty to cooperate, or rendered the contract commercially impracticable, or reflected information available to the government but withheld from appellant. The government's purchase of the minimum quantity does not preclude ATTL's assertion, or our review, of either those causes of action or that part of the claim not addressed in the pending motions – that EPA's review of appellant's submissions was flawed. "While the minimum quantity represents the extent of the Government's purchasing obligation…it does not constitute the outer limit of all of the Government's legal obligations under an indefinite quantity contract." *Community Consulting International*, ASBCA No. 53489, 02-2 BCA ¶ 31,940 at 157,789. Even if there were no genuine issues of material fact, the government is not entitled to judgment simply because it purchased the contract's minimum quantity and its motion must be denied.

The genuine issues of material fact as to the 29 October 2002 letter and whether it was a constructive change to the contract or whether the EPA review of the IDCs and SOPs was faulty (SOF ¶¶ 10, 11), also preclude appellant's motion for summary judgment.

Further, as suggested in the discussion on jurisdiction, appellant's motion, under any of its various theories, hinges on the contention that the contract did not originally require the preperformance approval of its IDC and SOPs. The government says that the IDC requirement was discussed in Appendix D of the Regional Manual (SOF ¶ 5). ATTL asserts that the Regional Manual was not referenced in the solicitation or contract and although a Manual was referenced in those documents, that Manual has not been introduced into evidence. The government counters that the Regional Manual and the Manual referenced in the solicitation and contract are the same document despite the differences in their titles.

We agree with appellant that the fact that the Regional Manual was attached to the solicitation while the solicitation and contract referred to a Manual with a somewhat different title could create an ambiguity. However we cannot, at this point, also agree that the principle of *contra proferentem* applies. In order to do so, we would have to determine whether the ambiguity was patent. *H. Bendzulla Contracting*, ASBCA No. 51869, 00-1 BCA ¶ 30,803. And, even if the ambiguity was not obvious, we would need to determine whether appellant relied on its interpretation of the ambiguity in preparing its bid. *Id.* These questions raise genuine issues of material fact.

The parties have both submitted affidavits that, in part, address the difference in the titles of the Manual attached to the solicitation and contract and the Regional Manual. The affidavit of appellant's president stated that the Manual referenced in the solicitation and contract was not attached to the solicitation or contract and had not been offered in evidence by the government (SOF ¶ 3 n.1). In his affidavit, the chief of the government section responsible for administering the contract stated that the only difference between the Manual referenced in the solicitation and contract and the Regional Manual was their titles. They were the same document and the document was in the record as an attachment to the solicitation. He suggested that if appellant was confused by the difference in titles it should have asked the government about that. (SOF ¶ 3 n.1)

Patent ambiguities must be determined on a case-by-case basis. *L. Rosenman Corp. v. United States*, 390 F.2d 711, 713 (Ct. Cl. 1968). The inquiry involves contract interpretation but is not made in a factual vacuum. *Murson Constructors, Inc.*, ASBCA No. 34538, 88-2 BCA ¶ 20,549. Where facts relevant to the issue are disputed, summary judgment is inappropriate. *Carmon Construction, Inc.*, GSBCA No. 13412, 96-2 BCA ¶ 28,354. In addition, summary judgment should be denied where the record relating to this issue is not fully developed. *Murson Constructors, supra*; *All-State Construction, Inc.*, ASBCA No. 48728, 97-2 BCA ¶ 29,080. The above affidavits shed much light on whether the alleged ambiguity was patent. And, even if we found that it was not patent, we would still have to determine, as a factual matter, whether ATTL relied on its view of the ambiguity. *Pettibone Corp.*, ASBCA No. 25612, 82-1 BCA ¶ 15,778. We believe the better course of action is to proceed to a hearing. This ruling applies to all of the theories that are properly before us and are the subject of the cross-motions for summary judgment because they all depend on the argument that the contract did not require an IDC or SOPs.

II.

Request for Attorney Fees and Costs

The ASBCA does not have authority to assess monetary sanctions against the parties before us. *Security Insurance Co. of Hartford and National American Insurance Co.*, ASBCA No. 51813, 01-2 BCA ¶ 31,588 at 156,090. Any request for attorney's fees under the Equal Access to Justice Act is premature. *Turbomach*, ASBCA No. 30799, 87-2 BCA ¶ 19,756 at 99,954. The request is denied.

Motion to Amend Complaint

A claim cannot properly be raised for the first time in the pleadings before the Board. *See Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,668-69. The criteria for jurisdiction to decide such a claim are whether the claim

requires review of evidence on a common or related set of underlying operative facts, or on different or unrelated operative facts. *See Placeway Construction Corp. v. United States*, 920 F.2d 903, 907-08 (Fed. Cir. 1990); *JWK International Corp.*, ASBCA No. 54075, 04-1 BCA ¶ 32,561 at 161,057. Appellant's claim documents did not include operative facts relating to the claim of superior knowledge (SOF ¶ 12). This cannot be remedied by amending the complaint. Accordingly, ATTL motion to amend is denied.

CONCLUSION

For the reasons set out above, we deny both parties' motions for summary judgment.

Appellant's request for attorney fees and costs, and appellant's motion to amend its complaint are denied.

Dated: 26 August 2008

DAVID W. JAMES, JR.
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

PETER D. TING
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. 55805, Appeal of Advanced Technologies & Testing Laboratories, Inc., rendered in conformance with the Board's Charter.

Dated:

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