ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Dixie Construction Company, Inc.	)	ASBCA No. 56880
	)	
Under Contract No. W91ZLK-07-D-0104	)	

APPEARANCES FOR THE APPELLANT: Laurence Schor, Esq.
Susan L. Schor, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
MAJ Timothy A. Furin, JA
Trial Attorney

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

Dixie Construction Company, Inc. (Dixie) has appealed under the Contract Disputes Act (CDA), 41 U.S.C § 605(c)(5), from the contracting officer's (CO's) deemed denial of its breach of contract claim for $533,362 in profit it asserts it would have earned on work that the Department of the Army allegedly diverted from its captioned contract for paving, drainage, and civil site work. Appellant alleges that the Army wrongfully awarded the work through delivery or task orders to a contractor under a different contract.

The government has moved for summary judgment on the ground that the total dollar value of the disputed orders exceeds the amount it was required to order from appellant under its contract. The government also contends that the disputed work did not fall within the scope of appellant's contract but it does not move for summary judgment on that basis, acknowledging that the scope question entails disputed issues of material fact. Appellant opposes the government's motion. For the reasons set forth below, we grant the motion in part and otherwise deny it.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The Contract

On 18 May 2007, the Army's Aberdeen Proving Ground (APG), Directorate of Contracting, in Maryland awarded the subject negotiated contract to Dixie, which included a base year, from 18 May 2007 through 17 May 2008, and four option years (R4, tab 1 at 1-2, 4-5). The government exercised the first two options, extending the contract period through 17 May 2010 (R4, tab 3 at 1, tab 6 at 1-2).

Paragraph 10 of the solicitation, included in the contract, states in part:

> THE GOVERNMENT REQUIRES PERFORMANCE OF THE WORK DESCRIBED IN THESE DOCUMENTS…
>
> Paving, Drainage and Civil Site Work in Aberdeen, Edgewood, Churchville, Carroll Island, and Spesutie Island Areas at [APG], Maryland….

(R4, tab 1 at 1)

Section B, Part I, of the contract Schedule describes the contract work for the base and option years, under firm fixed-price contract line item numbers (CLINs) 1000, 2000 and 3000 (R4, tab 1 at 3, 5-7). Under each of these CLINs Dixie is to:

> Furnish all plant, labor, materials, equipment, services, incidentals, and perform all work necessary for the demolition, repair, and construction of a variety of paving structures and drainage devices at several areas at the [APG], Maryland….

(R4, tab 1 at 5-7)

Each CLIN's "ESTIMATED AMOUNT" is "$6,304,825," the same as its "ESTIMATED QUANTITY" (R4, tab 1 at 5-7). Contract attachments 1a through 1c list the quantities, units, unit prices, and amounts for numerous subCLINs. Dixie's claim relies in part upon subCLIN 100 4 (200 4, 300 4, for option years), "AGGREGATES," which covers "ARMOR STONE" at subCLIN 10 04AP (20 04AP, 30 04AP, options). (R4, tab 1 at 41 *et seq*.)

The contract Schedule, at Section C, "STATEMENT OF WORK, WORK SPECIFICATIONS, REQUIREMENTS AND RESPONSIBILITIES," provides at C.1. Location(s), subsection C.1.1:

> For the length or duration of this contract the Department of the Army at [APG], Maryland shall require all work as specified in each delivery order and the specific location shall be noted within the delivery order and designated as one of the following areas.
>
> a. Aberdeen Area of [APG]
> b. Edgewood Area of [APG]
> c. Churchville Area of [APG]
> d. Carroll Island Area of [APG]
> e. Spesutie Island Area of [APG]

(R4, tab 1 at 12) Subsection C.1.2. states: "MCA projects executed by the Corps of Engineers are excluded from this contract" (*id.*). The Schedule does not name any other exclusions.

Contract section C.3, Requirements, among 22 other listed requirements (R4, tab 1 at 12-15), states at subsection C.3.7:

> Contractor shall be required to complete all earthwork as associated with paving and drainage, such as, clearing and grubbing, excavation and grading, geotextiles, topsoil, seeding and mulching, sod, rip rap, soil stabilization, etc. The work shall be based on the type of construction….

(R4, tab 1 at 13)

The contract contains the Federal Acquisition Regulation (FAR) 52.216-19, ORDER LIMITATIONS (OCT 1995) clause, which provides:

> (a) *Minimum order*. When the Government requires supplies or services covered by this contract in an amount of less than $500.00, the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.
>
> (b) *Maximum order*. The Contractor is not obligated to honor--
>
> (1) Any order for a single item in excess of $500,000.00;

(2) Any order for a combination of items in excess of $500,000.00; or

(3) A series of orders from the same ordering office within 5 days that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.

(c) *If this is a requirements contract (i.e., includes the Requirements clause at subsection 52.216.21 of the* [*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*. [Emphasis added]

(d) Notwithstanding paragraphs (b) and (c) above, the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within 10 days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, the Government may acquire the supplies or services from another source.

(R4, tab 1 at 36)

The contract contains the FAR 52.216-21, REQUIREMENTS (OCT 1995) clause, which states in part:

(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 an equitable price adjustment.

(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 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.
>
> (c) *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. [Emphasis added]
>
> (d) The Government is not required to purchase from the Contractor requirements in excess of any limit on total orders under this contract.

(R4, tab 1 at 36-37)

The contract also contains the FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) clause, which states in part:

> (a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.
>
> (b) ...The Government shall order at least the quantity of supplies or services designated in the Schedule as the "minimum".

(R4, tab 1 at 37) There is no stated minimum quantity of work to be ordered.

The Dispute

APG had awarded an indefinite delivery/indefinite quantity (IDIQ) Base Environmental Support (BEST) contract effective 1 July 2004 to General Physics, including a base year and four one-year options, with an estimated value for the base year of $14,188,452.23 (R4, tab 105 at 1, 2-11, 19). The BEST contract states: "The objective of the BEST contract is to provide, on a task order basis, technical environmental engineering expertise...in support of APG mission…along with construction and operations of remedial systems" (R4, tab 105 at 19).

By letter to the CO dated 10 September 2008, Michael E. Higinbothom, Dixie's vice president, asserted that three shoreline protection projects for which the government had solicited bids under the BEST contract should have been performed by Dixie under its subject "requirements" contract because they were civil site work projects to correct drainage and erosion problems and: (1) the major work items for shore stabilization were clearing, grading, and placing geotextile stabilization fabric, sand, rip rap and armor stone, all said to be line items in Dixie's contract; (2) the sole purpose for armor stone, included as subCLIN 04AP in Dixie's contract, was for shoreline stabilization to reduce erosion; (3) shoreline stabilization and erosion are drainage issues covered by section C.3.7 in Dixie's contract; and (4) Dixie had performed very similar shoreline stabilization work under a predecessor requirements contract (R4, tab 104 at 1; *see also* Bd. corr. file, 10/30/09 Higinbothom aff. ¶ 4).

On 30 September 2008, APG awarded Delivery (or Task) Order (hereafter "order") No. 0038 under the BEST contract to General Physics for "Environmental services at APG" as outlined in an attached work statement (R4, tab 110 at 1, 2). The awarded CLIN 0005AA covered "Task Number FY 2008-29, Shoreline stabilization for area known as northern Spesutie Island North 1 construction of shoreline revetments from Sandy Cove to Locust Point," for the firm fixed-price of $377,929.71 (R4, tab 110 at 3). The same day APG awarded order No. 0039 under the BEST contract to General Physics for "Environmental services at APG" as outlined in an attached work statement (R4, tab 111 at 1, 2). The awarded CLIN 0005AA covered "Task Number FY 2008-31, Shoreline stabilization for area known as northern Spesutie Island North 2 from Spesutie Island causeway to Sandy Cove," for the firm fixed-price of $814,945.39 (R4, tab 111 at 3). The orders' scopes of work, entitled "Spesutie Island Shoreline Stabilization Project," for the North 1 and North 2 areas, respectively, included construction of shoreline revetments and appear to be identical except for the reference points and amount of linear feet covered (R4, tab 110 at 5-6, tab 111 at 5-6). The orders had the same 30 September 2008 through 30 September 2009 performance period and referenced sequential purchase request numbers (R4, tab 110 at 2-3, tab 111 at 2-3). Combined, the orders totaled $1,192,875.10.

By letter to the CO dated 15 October 2008, entitled "Formal Notice of Protest & Claim," Mr. Higinbothom stated that Dixie had not received a response to his 10 September 2008 letter; he had learned that two of the shoreline projects at issue had been awarded to General Physics and the third had not been awarded due to lack of funds; Dixie had previously performed such work under its prior requirements contract; and the work should have been accomplished under its current contract.
Mr. Higinbothom stated that Dixie needed more information to determine the dollar value of its claim but that, at a minimum, it was the value of the work awarded to General Physics for the two projects or the value of the work as quantified and calculated under Dixie's contract, whichever was greater. He added that Dixie also planned to include the

third project, if awarded to another contractor, and that it would submit the dollar value of its claim once it was determined. (R4, tab 112)

By letter to Mr. Higinbothom of 18 November 2008, responding to his 10 September 2008 and 15 October 2008 submissions, the CO stated that the government had inquired of the "user", who had responded that the disputed work was not a drainage issue, and the government had determined that the work was not within the scope of Dixie's contract because it was not related to paving and drainage. The CO denied Dixie's "Claim/Protest" and stated that it had not submitted a proper claim. (R4, tab 113)

By letter to the CO dated 4 December 2008, Dixie's counsel submitted a certified CDA claim on its behalf. Dixie demanded that the Army reverse its decision denying its protest, effect the immediate termination of General Physics' contract for convenience, and award Dixie the work "improperly given" to General Physics or, in the alternative, that it pay Dixie its lost profit on the work, measured at a 19.89%. rate, in the amount of $533,362, due to the Army's alleged bad faith breach of contract. Dixie contended that the work in question was clearly within the scope of its contract and that it was also entitled to the work due to a prior six-year course of dealing between the parties. (R4, tab 114 at 1-3 and 12/3/08 certification, tab 115 at last page (attach. C at 2))

The CO did not issue a decision on Dixie's claim and this appeal ensued.

Dixie was issued six orders under the subject contract that each totaled or exceeded $500,000 (R4, tabs 24, 30, 37, 43, 95; Higinbothom aff. ¶ 3). The government has not refuted Mr. Higinbothom's sworn statement that Dixie was issued at least five orders "in excess of $500,000" on its immediately preceding contract, with the same maximum order limitation (Higinbothom aff. ¶ 4).

DISCUSSION

The parties agree that the contract is a requirements contract rather than an IDIQ contract (*e.g.*, R4, tab 114 at 1 (appellant's claim); gov't mot. at 1, 3; gov't reply at 3). In view of the omission of a guaranteed minimum (*see* FAR 52.216-22(b)), we accept their interpretation.

The Parties' Contentions

The government contends that it is entitled to summary judgment in its favor on appellant's claim because the total amount of the disputed orders under the BEST contract, which were issued by the same ordering office on the same day, exceeded the Order Limitations clause's $500,000 maximum order obligation, even if, *arguendo*, the work was within the scope of appellant's requirements contract. The government asserts

that the express language of the clause is unambiguous, rendering any extraneous circumstances irrelevant.

Appellant alleges that: paragraph (a) of the Order Limitations clause, covering supplies or services of under $500, is the only limitation upon the government's obligation to offer an entire order to a contractor under a requirements contract or otherwise; paragraph (b) addresses the limitations upon a contractor's obligation to accept orders or a series of orders exceeding $500,000, but it does not prohibit the government from issuing, or the contractor from accepting, such orders, and it does not reserve any rights to the government; and, under paragraph (c), in the case of a requirements contract, the government is not required to break up an order exceeding the contract's maximum order limitation into smaller parts to accommodate that limitation, but it is not prohibited from doing so or from offering the entire requirement to the contractor. At the same time, appellant contends that paragraph (d) qualifies the limitations in (b) and (c) and "**requires** the Government to issue orders exceeding the maximum to the contractor" (app. br. at 6) and that, only upon receiving a notice from the contractor that it declines to perform, can the government order the work elsewhere. Appellant asserts that the government's $377,929.71 order should have been issued to it and the $814,945.39 order also should have been issued to it under paragraphs (b)(2) and (d), even if the government were correct in "bundling" the two orders, because appellant alone had the right to refuse to perform (app. br. at 10).

Appellant further contends that, should the Board deem it necessary to look beyond the contract's plain language, the parties' contemporaneous pre-dispute actions, including the issuance to appellant of orders exceeding $500,000, contradict the government's current contract interpretation.

Summary Judgment Standards

The standards for summary judgment are established. It is a salutary method to resolve an appeal when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). Any significant doubt over factual issues, and all reasonable inferences, must be resolved and drawn in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Legal questions of contract interpretation are amenable to summary resolution, unless there is an ambiguity that requires the weighing of extrinsic evidence. However, extrinsic evidence will not be received unless there is such an ambiguity. *Coast Federal Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (*en banc*); *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1181, 1183 (Fed. Cir. 1988); *Gosselin World Wide Moving NV*, ASBCA No. 55367, 09-2 BCA ¶ 34,242 at 169,234.

Interpretation of the Order Limitations Clause

Paragraph (c) of the contract's Requirements clause provides that "[e]xcept 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." The contract's Order Limitations clause "otherwise provides" in paragraph (c) that, in the case of a requirements contract, "*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" (emphasis added). The referenced paragraph (b) contains three maximum order limitations that the contractor is not obligated to honor:

> (1) Any order for a single item in excess of $500,000.00;
>
> (2) Any order for a combination of items in excess of $500,000.00; or
>
> (3) A series of orders from the same ordering office within 5 days that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.

Thus, in the case of a requirements contract, as here, paragraph (c) of the Order Limitations clause relieves the government of its obligation under paragraph (c) of the Requirements clause to order all of its subject requirements from the contractor, if a requirement exceeds the maximum order limitations listed in paragraph (b) of the Order Limitations clause. Paragraph (c) of the Order Limitations clause provides that the government is not required to break down an order that exceeds those limitations into smaller parts and to order those smaller parts from the contractor. It cannot then reasonably be read to require, nonetheless, that the government order the entire requirement from the contractor. On the other hand, nothing in paragraph (c) prevents the government, at its election, from placing orders with the contractor that exceed paragraph (b)'s limitations. In that event, under paragraph (b), the contractor is not obligated to honor those orders. However, paragraph (d) of the Order Limitations clause then limits the contractor's right to reject "any" orders that exceed the maximum order limitations.

When paragraphs (b), (c) and (d) of the Order Limitations clause are reasonably read together, paragraph (d) provides that "notwithstanding" the fact that, under paragraph (b), the contractor is not obligated to honor orders over the maximum order limitations and, under paragraph (c), the government is not required to issue them to the contractor, if the government elects to issue such an order to the contractor, then the contractor must honor it, unless the contractor timely notifies the government of

rejection, in which case the government can place the order elsewhere. Contrary to appellant's interpretation, paragraph (d) does not require the government to place orders with the contractor that exceed paragraph (b)'s maximum order limitations. Appellant's contention that paragraph (d) cancels the government's separate right under paragraph (c) to decline to issue orders to a contractor for a requirement that exceeds any of the maximum order limitations renders paragraph (c) superfluous. This runs afoul of the precept that a contract must be construed as a whole to give a reasonable meaning to all of its parts. *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

If a government contract provision is susceptible of more than one different, reasonable, interpretation, it is ambiguous. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999); *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). Because appellant's interpretation of the Order Limitations clause is unreasonable, it does not raise any contract ambiguity that would require the examination of extrinsic evidence, such as the parties' alleged course of conduct. In any event, the fact that the government placed some orders with appellant under the subject contract that exceeded its $500,000 maximum order amount does not obligate the government to continue to do so, even if the work were within the contract's scope.

"Any One" Requirement Language

The government contends that, per paragraph (b)(3) of the Order Limitations clause, it was not required to order the work covered in the northern Spesutie Island North 1 and North 2 orders from appellant because they were issued the same day by the same ordering office, in the combined amount of $1,192,875.10, and exceeded the contract's $500,000 maximum order limit. However, the Order Limitations clause requires further examination of the circumstances. Paragraph (c) of the clause provides that the government is not required to order "a part of any one requirement" from the contractor "if that requirement" exceeds paragraph (b)'s maximum order limits. The question is whether the orders were part of the same requirement or whether they pertained to separate requirements.

It is clear that, regardless of whether the North 1 and North 2 orders were part of the same requirement, the North 2 order, standing alone, in the amount of $814,945.39, exceeded the $500,000 maximum order limitation under paragraph (b)(1) of the Order Limitations clause. Accordingly, the government was not required to order that work from appellant and it is entitled to summary judgment in its favor with regard to the North 2 order.

However, it is not clear on the record before us whether the North 1 and North 2 orders should be considered to be parts of the same requirement or separate requirements. If separate, then it will be necessary to examine further the scopes of work covered by

appellant's contract and by the North 1 order, which was in the amount of $377,929.71 - under the contract's $500,000 maximum order limitation. Thus, material factual issues remain pertaining to the government's requirement(s), and potentially to the scopes of work in appellant's contract and the North 1 order, that preclude summary judgment for the government on the North 1 order.

DECISION

We grant the government's motion for summary judgment with regard to the North 2 order and deny it with regard to the North 1 order.

Dated: 15 April 2010

CHERYL L. SCOTT
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. 56880, Appeal of Dixie Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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