

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
United Healthcare Partners, Inc.) ASBCA No. 56939
)
Under Contract No. FA4608-07-M-S060)

APPEARANCE FOR THE APPELLANT: Mr. David D. Cooper
Chief Executive Officer

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Maj Theodore T. Richard, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

United Healthcare Partners, Inc. (UHP) seeks additional compensation of \$38,935.53 in connection with a contract for telephonic nurse triage services. The government moves for summary judgment, alleging that the contract unambiguously provided for fixed payments of \$6,381.00 per month. As a result, the government asserts that it is entitled to judgment as a matter of law. UHP opposes the motion, alleging that the solicitation provided for payment on a per call basis. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 21 August 2007, the government issued Request for Quotations (RFQ) No. FA4608-07-Q-S150 for a firm, fixed-price commercial items contract for telephonic nurse triage services for the region covered by Barksdale Air Force Base, Louisiana (compl., RFQ at 1, 3, 16-18).

2. The RFQ stated that “[q]uotes shall be submitted by dollar amount per call, NOT TO EXCEED THE AMOUNT of 5,400 calls per year (an estimate of 450 calls per month).” The RFQ included a base year and four option years. The base year extended from 30 September 2007 through 29 September 2008, and the first option year extended from 30 September 2008 through 29 September 2009. (Compl., RFQ at 13-15)

3. Block 28 of the RFQ was marked with an “X” and stated, in part, as follows:

CONTRACTOR AGREES TO FURNISH AND DELIVER
ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED

ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT
TO THE TERMS AND CONDITIONS SPECIFIED
HEREIN.

(Compl., RFQ at 1)

4. On 24 September 2007, Mr. David Cooper, UHP's Chief Executive Officer (CEO), submitted an offer of \$14.18 per call for the base year (compl., quote at 4 of 4).

5. On 28 September 2007, the government accepted UHP's offer with revisions to the payment schedule. Instead of providing for payment on a per call basis, the revised payment schedule provided for fixed payments of \$6,381.00 per month. (R4, tab 1 at 1, 14-16 of 30)

6. The contracting officer signed the contract on 28 September 2007. Mr. Cooper signed the contract on 30 September 2007 without objecting to the revised payment schedule. Block 29 of the contract was marked with an "X" and provided as follows:

OFFER DATED 24-SEP-2007. YOUR OFFER ON
SOLICITATION [FA4608-07-Q-S150] INCLUDING ANY
ADDITIONS OR CHANGES WHICH ARE SET FORTH
HEREIN, IS ACCEPTED AS TO ITEMS: SEE SCHEDULE

(R4, tab 1 at 1)

7. In addition to the FAR clauses required for commercial items contracts, the contract incorporated by reference DFARS 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) (R4, tab 1 at 1). That clause provided, in part, as follows:

(a) The amount of any request for equitable adjustment to contract terms shall accurately reflect the contract adjustment for which the Contractor believes the Government is liable. The request shall include only costs for performing the change, and shall not include any costs that already have been reimbursed, or that have been separately claimed.

(R4, tab 1 at 24 of 30)

8. The government exercised the first option on 22 September 2008 (R4, tab 2).

9. On 2 March 2009, UHP requested additional compensation of \$28,785.40 for receiving an additional 2,030 calls from June through 30 September 2008, increasing the total number of calls received during the base year from 5,400 to 7,430. Due to the

increased call volume, UHP also requested that the per call rate be increased from \$14.18 to \$14.40 per call with a differential payment of \$10,150.13 for calls received from October 2008 through January 2009, resulting in a new total call volume “not to exceed 7,430 calls per year without further cost adjustment.” (R4, tab 6 at 1, 3, 4)

10. On 18 March 2009, UHP converted its request into a Contract Disputes Act claim (R4, tab 7).

11. During the base year and the first option year (through 30 April 2009), UHP invoiced and was paid \$6,381.00 per month (R4, tab 12 at 11-28, 35-48).

12. On 12 May 2009, the contracting officer (CO), wrote UHP as follows:

[T]he government requests that UHP provide the government with current call usage for the first option year (1 Oct 08–30 Sep 09). Once UHP determines the current call usage, the contractor will notify the government when it has performed 85% of the 5,400 call threshold.

(R4, tab 8)

13. On 21 May 2009, the CO terminated the contract for convenience, stating that UHP “appears to have reached the expected level of effort for the first option year” (R4, tab 9).

14. On 15 June 2009, the CO issued a final decision denying the claim (R4, tab 11).

15. UHP appealed the CO’s final decision to this Board on 14 September 2009, where it was docketed as ASBCA No. 56939.

16. The parties did not submit any affidavits in connection with the motion.

DECISION

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); FED. R. CIV. P. 56(c). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). All justifiable inferences should be drawn in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc. v. United States*, 477 U.S. 242, 255 (1986); *Riley & Ephriam Construction Co. v. United States*, 408 F.3d 1369, 1371-72 (Fed. Cir. 2005).

The government offers three arguments in support of its motion for summary judgment. First, the government argues that the per call payment schedule in the RFQ did not become part of the contract because a quotation is not an offer and the government cannot accept a quotation to form a binding contract. Second, the government argues that UHP has not established a case for a negligent estimate. Since UHP has not asserted a claim for a negligent estimate, this argument is not material. Third, the government argues that UHP is not entitled to an equitable adjustment because it has already been paid for the alleged additional work.

Since the solicitation was issued as an RFQ, the government argues that UHP's quotation is governed by "FAR 13.004, Legal effect of quotations." FAR 13.004 provides that a quotation is not an offer and that the government cannot accept a quotation to form a binding contract. In order for a quotation to result in a binding contract, the government must issue an offer (or order) for the supplies or services. A contract is established when the contractor accepts the government's offer. Thus, the government concludes that the per call payment schedule in the RFQ did not become a part of the contract and that UHP is not entitled to any more than \$6,381.00 per month for its services. The government also argues that Mr. Cooper, UHP's CEO, did not take exception to the revised payment schedule when he executed the contract and that UHP billed the government \$6,381.00 per month without objection until the contract was terminated for convenience on 21 May 2009.

UHP argues that a bilateral contract was intended, pointing out that the following language appeared a total of five (5) times in the RFQ, once for the base year and each of the four option years:

Quotes shall be submitted by dollar amount per call, NOT TO EXCEED THE AMOUNT OF 5,400 calls per year (an estimate of 450 calls per month).

(Reply at 2 of 18) (Emphasis in original) UHP also argues that block 28 of the RFQ obligated it to "TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN" (reply at 1-2 of 18). Accordingly, UHP urges us to deny the government's motion.

The determination of contract type is a matter of law. *Maintenance Engineers v. United States*, 749 F.2d 724, 726 n.3 (Fed. Cir. 1984). Consequently, we are not bound by what the contract is called or by the label the parties attached to it. *Mason v. United States*, 615 F.2d 1343, 1346 (Ct. Cl.), cert. denied, 449 U.S. 830 (1980); *Paradigm II, LLC, d/b/a JB Carpet & Upholstery Care*, ASBCA No. 55849, 09-1 BCA ¶ 34,070 at 168,464. In determining the contract type, we look to the objective evidence surrounding

the formation of the contract to discern what type of contract was intended. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

The RFQ states that “[q]uotes shall be submitted by dollar amount per call, NOT TO EXCEED THE AMOUNT of 5,400 calls per year (an estimate of 450 calls per month).” The only reasonable interpretation of this language is that the parties intended a bilateral contract. In addition, block 28 of the RFQ required UHP to perform in accordance with the terms and conditions of the RFQ, which included payment on a per call basis. Block 29 of the contract stated that UHP’s offer of \$14.18 per call had been accepted, which further indicates that a bilateral contract was intended. Comments made by the CO after award suggest that she interpreted the contract to be bilateral. For example, on 12 May 2009, she required UHP to “notify the government when it has performed 85% of the 5,400 call threshold,” and on 21 May 2009, when she terminated the contract, she stated that UHP “appears to have reached the expected level of effort for the first option year.” Finally, the government’s interpretation leads to an unreasonable result. The government could instruct UHP to bid on the basis of 5,400 calls, but could increase the number of calls to 7,430 without any increase in price. After considering the foregoing facts and drawing all reasonable inferences in favor of UHP, we conclude that the government’s interpretation is unreasonable.

The government’s motion for summary judgment is denied.

Dated: 19 July 2010

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 56939, Appeal of United Healthcare Partners, Inc., rendered in conformance with the Board's Charter.

Dated:

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