

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
D.J. Miller & Associates, Inc. ) ASBCA No. 55357  
Under Contract No. 200-96-0016 )

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OPINION BY ADMINISTRATIVE JUDGE PAGE

This appeal arises from the contracting officer's (CO) final decision of 16 November 2005 denying in part appellant's claim for \$1,431,729.00. D.J. Miller and Associates, Inc. (DJMA, contractor or appellant) contends that it suffered damages of \$1,183,798 due to the government's wrongful diversion of contractually-required work to other contractors and government employees. The Board on 13 February 2006 received the contractor's timely appeal from this final decision. A hearing on entitlement only was held, and the parties filed post-hearing briefs. We deny the appeal.

FINDINGS OF FACT

*1. Contract No. 200-96-0016 Between CDC and DJMA*

On 26 March 1996, CDC, the Small Business Administration (SBA), and DJMA entered into "Tripartite Agreement" No. 200-96-0016 (the contract) under the SBA's § 8(a) small and disadvantaged business program. The purpose of the contract was to "Provide Call Management Services for CDC facilities in Atlanta, GA and Hyattsville, MD." (R4, tab B at 4, 9-11, 51-52)<sup>1</sup> Mr. Dave J. Miller, president and founder of DJMA, testified that DJMA is a small disadvantaged business under the SBA § 8(a) program (tr. 1/18-30). Prior to the instant contract, appellant was familiar with CDC due to its completion of a defaulted contractor's work (tr. 1/24-25, 2/8).

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<sup>1</sup> Unless otherwise specified, we cite the Bates-stamped numbers affixed by the parties to the Rule 4 file documents.

Contract No. 200-96-0016 is a “firm-fixed price/requirements type contract” that specified work in five contract line items (CLINs) designated as A through E. The contract period included a nine-month “base option year,” four one-year option periods, and one three-month “fifth” option year. (R4, tab B at 8-11) The government exercised all options, and then by Modification No. 11 extended the total contract period through 30 April 2001 (*id.* at 51, 105, 117, 144, 171, 199, 205, 220). The contract incorporates by reference FAR clause 52.233-1, DISPUTES (OCT 1999) (*id.* at 40-41). At issue in this appeal is work set forth in CLINs C, D and E for “Distributed Call Management Services,” “Temporary Special Project Call Management Services,” and “On-Site Teleconferencing Services” respectively (R4, tab D at 372).

Contract § B SUPPLIES OR SERVICES AND PRICES/COSTS, ¶ B.1 CONSIDERATION (FIXED-PRICE) described in relevant part the disputed CLINs C, D and E for the base contract and five option years, including prices agreed upon for each period and estimated quantities. The description for the base contract year is typical:

0001 Base Contract Year – Nine Months from Date of Contract Award					
ITEM NO.	DESCRIPTION	QTY	UNIT	UNIT PRICE	TOTAL PRICE
....					
0001C	Distributed Call Management Services (160 hrs per month per Individual)	EST 360	MO	\$3,446.00	ESTIMATED \$1,240,560.00
0001D	Temporary Special Project Call Management Services (160 hrs per month per individual)	EST 9	MO	\$5,120.25	ESTIMATED \$ 46,082.25
0001E	On-Site Teleconferencing Services (160 hrs per month per individual)	EST 9	MO	\$4,118.61	ESTIMATED \$ 37,067.49

(R4, tab B at 8)

Contract § C DESCRIPTION/SPECIFICATIONS/WORK STATEMENT explains at ¶ C.1 BACKGROUND AND NEED the government’s purpose in letting the contract. Relevant here is work to be performed for the CDC and Agency for Toxic Substances Disease Registry (ATSDR) in the Atlanta, GA Metropolitan Area that is tied to the use of government furnished equipment (GFE) to handle telephone calls:

The role of CDC/ATSDR in providing information to the public has recently evolved and expanded. Callers find it difficult to expeditiously access needed information or staff members as a result of CDC/ATSDR's organization of responsibilities. These factors require managers to adjust responsibilities to include *significant and very complicated call management functions*. Technological improvements in telephone systems result in more sophisticated and effective call management capability. The need to provide effective call management services at CDC/ATSDR are [sic] served through this comprehensive call management contract for call management services.

(*Id.* at 12) (emphasis supplied)

Contract ¶ C.2 SCOPE states in relevant part:

The purpose of this contract is to provide telephone call management services at CDC/ATSDR offices located in metropolitan Atlanta area....

....

B. Distributed call management services. This function includes decentralized operator activities located throughout CDC/ATSDR metropolitan Atlanta locations. These services are normally needed on a long term/continuing basis.

C. Temporary special project call management services. These services are normally of short duration.

D. Teleconferencing support services. These are services that shall be handled on site at CDC, Atlanta, Georgia.

(R4, tab B at 12-13)

Paragraph C.2.B DISTRIBUTED CALL MANAGEMENT SERVICES advised that these duties would take place at more than one locale, “includ[ing] decentralized operator activities located throughout CDC/ATSDR” offices (*id.* at 13). *See also* ¶ F.3 PLACE OF PERFORMANCE, specifying 13 addresses in the metropolitan Atlanta, GA area where DJMA had to provide “Distributed Call Management and Temporary Special Project Call Management Services for CDC and ATSDR” (*id.* at 25-26).

Contract ¶ C.3 GENERAL REQUIREMENTS at ¶ A DEFINITION states that “Call management services are continuing in nature,” “include operation of a variety of equipment used for receiving, answering, triaging, switching, and transferring internal and external calls,” and “may include auxiliary functions.” While mentioning certain types of government-furnished telephone equipment then in use, the contract advised that “technology changes may result in changes to the currently used equipment.” (R4, tab B at 13)

Contract ¶ C.5 SPECIFIC REQUIREMENTS FOR DISTRIBUTED CALL MANAGEMENT SERVICES furnished information on duties and equipment for this task:

**C.5 SPECIFIC REQUIREMENTS FOR  
DISTRIBUTED CALL MANAGEMENT  
SERVICES**

**A. Equipment Operation**

The Contractor shall perform call management services throughout CDC in the Atlanta metropolitan area including, staffing and operation of equipment to receive, answer, triage, switch, and transfer internal and external calls. The equipment used ranges from a microcomputer-based central workstation and console switchboard to other types of equipment such as 6-, 10-, or 20-button telephone sets, call directors, or similar types of consoles.

**B. Call Management Services**

Answers incoming calls on signal, triages the calls, using written and electronic resources, routes calls and, when appropriate, takes messages and forwards messages.

If any information is not available at CDC, Contractor staff will refer the caller to the appropriate office, such as the CDC Public Inquiries office.

Provides information to callers when requested by the CDC Project Officer or designee (such as using fact sheets to provide statistics, mailing out fact sheets, etc.). Updates all information resources relevant to tasks (electronic or printed, when required and authorized by the CDC Project Officer).

In addition, specific *ancillary* services needed by programs, such as receptionist services, providing basic information, data entry, locating, obtaining, organizing, and preparing information for mail outs, duplicating materials, and stuffing envelopes will be performed *when such tasks are relevant to calls received*.

(R4, tab B at 18-19) (italics supplied)

CLIN D TEMPORARY SPECIAL PROJECT CALL MANAGEMENT SERVICES called for 160 hours per month per individual (R4, tab B at 8-13). These services are further described in ¶ C.6.A:

Temporary call management operators may be called upon to carry out responsibilities at either the central or distributed on-site CDC Atlanta, Georgia Metro Area locations. These services will be required for unusual peak demands in call answering resulting from unusual temporary events or special projects of CDC.

(*Id.* at 20)

CLIN E calls for the contractor to provide “On-Site Teleconferencing Services,” also stated at 160 hours per month per individual (R4, tab B at 8-13). Additional information on this requirement is given at ¶ C.7 SPECIFIC REQUIREMENTS FOR TELECONFERENCING SUPPORT SERVICES. The contract at ¶ C.7.A advised that CDC “currently uses Southern Bell Central Office Digital ESSX facilities to perform teleconferences of over 3 participants,” and that “FTS 2000 services are also available which provide additional teleconferencing capabilities.” The contract stated that CDC had a current average of “approximately 200-225 teleconferences per month, with a duration of 90 minutes, and 15 conferees” participating, and “approximately 12 teleconferences per month with 75-125 participants.” These “participants [were] from throughout the U.S., including Hawaii, Alaska, and San Juan, and from many foreign

countries in Europe, Africa, South America, and Asia.” The contractor was required to (among other things) schedule CDC-originated teleconferences, maintain “recurring teleconference lists with originator name and number, participant names and numbers, schedules,” etc., establish teleconferences on appropriate equipment, alert participants of upcoming conference schedules, and provide supporting information in advance of the conference. DJMA had to place, maintain, and operate the telephone conferences, including troubleshooting the calls to ensure that satisfactory connections were made and maintained. (R4, tab B at 20)

Paragraph G.3, Payments for Distributed Call Management Services, provided in relevant part: “Contractor shall provide at a minimum 160 hours actual work time per individual per month” (R4, tab B at 28). Unilateral Modification No. 1 dated 1 April 1996 changed ¶ G.3 to apply to “Payments for Delivery orders,” added that reductions to the monthly minimum would not be taken for government-caused decreases, and provided a rounded-up formula for adjusting contractor payments for delivery orders when the unit ordered was more or less than eight hours/day (*id.* at 106-09).

Contract ¶ I.7, FAR 52.216-21, REQUIREMENTS (OCT 1995), applicable to CLINs C, D and E, provided in relevant part:

#### **52.216-21 REQUIREMENTS (OCT 1995)**

(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.*

(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 B at 50-51) (italics supplied)

## *2. Contract Administration*

Three CDC contracting officers were particularly involved with administration of DJMA's contract and reviewing its requests for relief. CO Susan Cleveland had oversight of the DJMA contract from its inception until about April 1998 (tr. 2/8, 4/16-17). CO Cleveland testified that a number of contractors, including DJMA, were brought in to assist CDC when the agency was under a hiring freeze in the early 1990's and did not have an adequate number of full time federal employees to carry out its work. She stated that the government's use of outside contractors lessened as the hiring freeze was lifted, and that the number of CDC employees "doubled" during the period of DJMA's contract. (Tr. 2/101) CO Cleveland testified that: DJMA was regarded as a "solid" contractor by the CDC; she received no complaints about its performance (tr. 2/115); and that appellant's services were "well performed" (tr. 2/99).

Successor CO Elmira Benson agreed that DJMA was "very good" to work with and that there were never any complaints about the contractor's performance (tr. 4/16-17, 60-61). She assumed overall responsibility for CDC's contract with DJMA prior to issuance of contract Modification No. P00005 (signed by DJMA on 14 October 1998) until the end of the contract (tr. 4/34, 42). CO Benson testified that prior to exercising option number three, she complied with FAR Part 17 by affirmatively determining that the government still required the work, the contractor had performed satisfactorily, and the price remained fair and reasonable (tr. 4/72). Government contract specialist (later contracting officer) Jeffrey L. Napier, who was supervised by CO Benson, was assigned to assist with CDC's evaluation of appellant's claim beginning about January 2003 (tr. 4/42-43, 91-94, 106-07, 130-31).

## *3. DJMA's Concern over Declining Orders*

On 20 February 1998, the contractor advised CO Cleveland of its concern that "[t]here has been a significant downward trend" in CDC's use of its services, although

DJMA “acknowledge[d] that there were no guarantees regarding the number of Distributed Call Management positions.” DJMA offered to explore opportunities for it to further assist CDC, hoping to offset its declining revenue. (R4, tab E at 1030-31)

#### 4. *DJMA's Initial Claim*

On 13 October 1999, DJMA submitted a certified claim in the amount of \$166,874.84 for alleged underpayment for services pursuant to contract ¶ G.3 (R4, tab C, subtab 12). DJMA contended that it was compensated by CDC for only 160 hours/month per employee, but was owed more where it paid its employees for the average of 167 hours/month that were necessary to meet the government’s required continuous phone coverage (*id.* at 320-21). On 27 January 2000, Mr. Miller notified CO Benson that a contracting officer’s final decision (COFD) was premature, as DJMA was in the process of “modifying and amending” its claim (R4, tab C, subtab 14). By letters dated 25 May and 5 June 2000, CO Benson returned this claim to DJMA but agreed to consider it upon resubmission (R4, tab C, subtabs 17, 18).

#### 5. *DJMA's Restated Claim*

On 1 October 2002, DJMA submitted its “Restated Claim” in the amount of \$1,431,729 (R4, tab D), adding to its 13 October 1999 claim (R4, tab C, subtab 12) that the government wrongly “failed to procure all of its required call management services” under CLIN C, and other services under CLINs D and E (R4, tab D at 382). The amount of \$1,431,729 consisted of \$247,931 relating to the alleged underpayment of services pursuant to the formula in ¶ G.3 and \$1,183,798 relating to diversion of requirements. DJMA asserted that “the parties expressly agreed that the CDC would purchase all of its requirements for call management services from DJMA,” subject only to “three narrow exceptions” that did not “account for the precipitous and sustained drop in delivery orders for call management services experienced by DJMA during the term of the Contract.” DJMA did not dispute work performed under fixed-price, specific quantity CLINs A and B for CENTRAL CALL MANAGEMENT SERVICES in Atlanta, GA and Hyattsville, MD respectively. (R4, tab D at 377-78) Mr. Miller certified the claim (*id.* at 383).

#### 6. *The Defense Contract Audit Agency Audit*

Prior to issuing a COFD, on 24 October 2002, CDC requested that the Defense Contract Audit Agency (DCAA) examine DJMA’s revised claim for \$1,431,729; that agency’s report was issued 6 December 2004 (R4, tab E; tr. 4/44-45). According to DCAA’s audit, CDC ordered the following level of services under CLIN C from appellant during the relevant period:



<u>CLIN</u>	<u>Year</u>	<u>Contract Value</u>	<u>Ordered Services</u>			<u>Percent Ordered</u>
			<u>Billed</u>	<u>Unbilled</u>	<u>Total</u>	
0001C	1996	\$ 1,240,560	\$ 1,035,712	\$ 77,341	\$ 1,113,053	90%
0002C	1997	1,628,424	1,338,659	73,682	1,412,341	87%
0003C	1998	1,667,717	779,796	20,700	800,496	48%
0004C	1999	1,693,627	486,918	18,369	505,287	30%
0005C	2000	1,714,286	651,411	1,649	653,060	38%
0006C	2001	<u>441,553</u>	<u>167,620</u>	<u>34,758</u>	<u>202,378</u>	<u>46%</u>
Totals *		<u>\$ 8,386,168</u>	<u>\$ 4,460,115</u>	<u>\$226,499</u>	<u>\$ 4,686,614</u>	<u>56%</u>

\*Note: Minor differences are due to rounding

(*Id.* at 1021) DJMA did not challenge the accuracy of this information, which we accept as the level of services ordered by CDC for purposes of entitlement.

### 7. *The Contracting Officer's Final Decision*

On 16 November 2005, CO Napier issued a final decision finding that DJMA was entitled to an equitable adjustment of \$237,851.95, comprised of \$226,499 plus \$11,352.95 in interest, for the government's failure to pay the contractor in accordance with the formula set forth in ¶ G.3 of the contract (R4, tab A). This amount is not in issue in this appeal, although DJMA cites this error as evidence of government mistreatment (tr. 1/59-60).

The government denied the remainder of the claim, rejecting as unfounded the contractor's assertions that CDC improperly diverted covered requirements to other contractors or performed the work in-house, and hired away DJMA employees to do the same work. The CO criticized DJMA for its failure to furnish support for its claim. (R4, tab A)

### 8. *Alleged Diversion of Work to CDC Employees*

DJMA's case relies heavily upon the testimony of Ms. Kishina Miller.<sup>2</sup> Throughout the period of performance, Ms. Miller worked on and eventually became a

<sup>2</sup> In its post-hearing brief the government moved to strike the testimony of Ms. Miller at tr. 3/29-43, 3/98-99, 3/104-105 because it allegedly was based on personal notes and annotated purchase orders not provided to the government prior to the hearing as required by the Board's order on discovery (gov't br. at 28-32). In its discretion, the Board determined to attempt to cure any prejudice to the government by reopening the record to allow rebuttal evidence (Order dated 31 May 2011). On 5 August 2011, the government advised that it did not wish to

project manager on DJMA's contract with CDC. She was familiar with those employees assigned by DJMA to that work and had helped hire, train, and supervise them; taken care of time sheets; and had assisted as needed in the field. (Tr. 3/7, 15-20) She believed that CDC diverted requirements away from DJMA. The supposed diversion occurred after the lifting of a government hiring freeze, which had been in place since the beginning of the contract. (Tr. 3/28-29) Ms. Miller alleged that an estimated 32 DJMA employees left DJMA's employ after delivery orders for their services ended, and then performed the same work for CDC or its other contractors. She disagreed that CDC had a decreased need for DJMA's services due to an increased reliance on technology, and observed that the decline in DJMA's work coincided with the hiring away of its employees. (Tr. 3/30-43)

According to Ms. Miller, these persons remained "in the same position and cubicle as they were up under the purchase order [from CDC to DJMA]. So the same phone setup was there that they were utilizing prior to the[n] with their new employment." (Tr. 3/67) She stated the former employees had "different titles because each individual [was] doing different but similar tasks" (tr. 3/75). She testified that she personally visited with ten of the former DJMA employees, whom she specifically identified as Sandra Tinker, Troy Gillespie, Donna Daniel, D'Artonya Graham, Deborah Glover, Vicki Thomas, LaTarsha Hall, Angelina Miller, Vivian Siler, and Etta Jenkins (tr. 3/68). Ms. Miller stated that "The vast majority of the employees were diverted during the contract, so [DJMA] still had the contract with CDC, and they were working, either for CDC or another contractor" (tr. 3/69).

Four of the ten individuals visited by Ms. Miller and verified as continuing to perform covered services for CDC (tr. 3/68) are also named in print on purchase orders as incumbents who worked under the DJMA contract: these are Donna Daniel (R4, tab G-3 at 70008-09, tab L at 22024-25); Vicki Thomas (R4, tab G-2 at 60060-64, tab L at 220355); LaTarsha Hall (R4, tab L at 220251-55); and Sandra Tinker (R4, tab L at 220316-23). Each of these had been identified to the government by DJMA on 14 April 2005 as "employees that the CDC hired from D.J. Miller during the term of its contract with the CDC" (R4, tab C, subtab 27). Ms. Miller testified that each of these later worked for CDC (tr. 3/30-31). Appellant offered no evidence of any employee who later worked for a particular government contractor.

Although appellant adequately established that CDC hired four former DJMA employees to perform covered services as government employees, the contractor furnished no proof that CDC did so for the purpose of injuring DJMA. Nor did appellant

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reopen the record to offer rebuttal evidence. The motion to strike Ms. Miller's testimony is denied.

controvert the testimony of CO Benson, who denied that CDC recruited DJMA employees in particular. She stated that CDC's vacancy "announcements are posted for the public viewing and that anybody could apply for a job with CDC," and that the government "could not restrict offering jobs just because a person worked with D.J. Miller" (tr. 4/60).

#### *9. Alleged Diversion of Work to Other CDC Contractors*

Appellant alleges that the government wrongly diverted work that should have gone to DJMA to other CDC contractors, including Elite Staffing Services, Inc. (Elite) and DESA, Inc. (DESA).

##### *a. Elite Staffing Services, Inc.*

The purpose of Elite's firm fixed-price requirements contract with CDC was to provide on-site, temporary employment services that included secretarial work. Elite's contract extended from 15 July 1994 to 15 July 1999. (R4, tab H-A at 2000, 2002)

Mr. Miller singled out the Secretary, Level I and Secretary, Level II positions of Elite's contract as particularly overlapping with DJMA's covered work (tr. 1/137-39). CDC's contract with Elite provides at ¶ C.7. TYPES OF EMPLOYEES AND LEVEL OF SKILL REQUIRED subparagraph A.1 SECRETARY, LEVEL I that this employee "Responds to routine telephone requests which have standard answers" and "refers calls and visitor to appropriate staff." Among the duties in subparagraph A.2 SECRETARY, LEVEL II are to "Screen[] telephone calls [and] visitors"; "Anticipate[] and prepare[] materials needed for...telephone calls, etc."; "[Collect] information from the files or staff for routine inquiries on office program(s) or periodic reports"; and "Refer[] nonroutine requests to appropriate staff member." (R4, tab H at 9600014)

Mr. Miller stated that a significant contractual modification of Elite's contract took place in June 1996 as the government "gave them permission" to provide the services "that D.J. Miller was providing" (tr. 1/76), including call management services. Mr. Miller emphasized the commonality between Elite's tasks and DJMA's duties, asserting that "in most businesses the phone--who controls the phone actually controls the flow of work and the activities associated with it" (tr. 1/138). He stated that Elite employees performed these duties at the same government locations as DJMA (tr. 1/139 citing R4, tab H at 19<sup>3</sup>). However, upon recross-examination, Mr. Miller agreed that DJMA's contract did not require employees providing call management services to be trained in the use of WordPerfect 6.0 (tr. 1/148-52), which is a qualification for Elite's Secretary Levels I-IV and typist positions (*see* R4, tab H at 9600014-16).

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<sup>3</sup> This document is found at R4, tab H at 9600022.

The government denied that Elite's contract diverted required services from DJMA. CO Cleveland testified that answering telephones as part of a temporary secretarial position under the Elite contract was peripheral to other duties. She stated that Elite's secretaries did not use the same complex division-wide consoles as DJMA employees; rather, Elite's employees answered smaller telephones designed to serve fewer persons. (Tr. 2/32-33, 38) CO Cleveland similarly differentiated between the telephone answering services provided by Elite, which generally were for calls made to "the individual or individuals that [Elite's administrative staff] directly supported," from distributed call management services provided by DJMA, as the latter's employees answered "branch telephones or division-wide phones" (tr. 2/38). CO Benson stated that she reviewed CDC requests to procure all services other than maintenance to ensure the purchases were properly made, and determined that there was no work therein that should have gone to DJMA (tr. 4/29-31).

We find that duties specified in CDC's contract with Elite did not duplicate the exclusive requirements of DJMA's contract. Although DJMA could be called upon to perform certain administrative duties that were also performed by Elite (*see, e.g.*, R4, tab B at 13, ¶ C.3.A), context is important. DJMA's contract specifically made this administrative work "auxiliary" or "ancillary" to or dependent upon DJMA performing distributed call management services (*id.* at 13, 19, ¶ C.5.B). As appellant has not shown that Elite performed these duties in conjunction with distributed call management services using the government-furnished telephone consoles operated by DJMA, and Elite's secretaries were required to have word processing skills not demanded of DJMA employees, we find that the government was not obligated to order this work from DJMA.

*b. CDC's Contract with DESA, Inc.*

On 1 October 1997, CDC entered into tripartite Contract No. 200-98-0003 with the SBA and DESA, Inc. (R4, tab K). The purpose of DESA's "CDC-wide Conference Support Services Contract" was to provide the government with "an as-needed mechanism to obtain logistical and administrative management for a variety of conferences" (*id.* at 9900007).

Work under DESA's contract included identifying sites and facilities for conferences; providing mailing lists; developing and preparing conference materials; mailing conference announcements; providing registration materials and invitations; developing a conference logo; supplying name tags; providing pre-registration and workshop scheduling; preparing signs; providing name-tents; arranging for audiovisual equipment; arranging for supplies to be at the conference site; assembling conference packages; room set up; on-site registration; taping plenary sessions; assisting attendees

with registering professional education requirements; arranging security; arranging for hearing impaired assistance; writing thank you letters to speakers; preparing, collecting and summarizing evaluation materials; and other detailed activities to support conference activities (*id.* at 9900007-11).

According to ¶ C.3, CONTRACT TASKS TO BE PERFORMED, of its contract, DESA could be required under ¶ C.3.d to conduct public health conferences attended by as many as thousands of people. Paragraph C.3.e advised that the “vast majority of the conferences will take place in the Atlanta, GA metropolitan area” but that “some conferences” may take place “elsewhere in the United States, internationally, *via teleconference*, or via satellite video conference” (*id.* at 9900007-08) (emphasis added). DESA’s contract did not specify the telephone equipment to be used in doing its work.

Appellant’s restated claim of 1 October 2002 does not mention DESA by name; however, DJMA does allege that the government failed to fulfill all its needs as specified in the requirements portion of the contract which includes CLIN E, ON-SITE TELECONFERENCING SERVICES (R4, tab B at 8, tab D at 378-82; tr. 1/83-84) and teleconferencing services are also mentioned in DESA’s contract (R4, tab K at 9900007-08).

CO Cleveland denied that CDC diverted services from DJMA by entering into the contract with DESA to furnish conference management services. She testified that DESA supported CDC by planning, organizing, and making all necessary arrangements for the public health related conferences. (Tr. 2/45-46)

We find that CDC did not divert work from DJMA by contracting with DESA to conduct national and regional conferences. Although Mr. Miller testified that DJMA’s employees were sometimes called upon to help “carry out the facilitation of the conference” (tr. 1/140), there was no proof that DESA’s work fell within the scope of DJMA’s contract. DESA’s coordination and management of in-person gatherings at various places (*see, e.g.*, R4, tab K at 9900007-08), was beyond the scope of DJMA’s contract, which called only for furnishing assistance with on-site telephone conferences (*see, e.g.*, R4, tab B at 8, CLIN 0001E). Although conducting teleconferences as set forth in DESA contract ¶ C.3.e (R4, tab K at 9900007) appears to overlap with the teleconferencing set forth in DJMA’s contract (R4, tab B at 8-13, 20), there is no proof that DESA was required to use the same specialized equipment as DJMA. As there is no proof DESA did so in practice, DJMA failed to show a duplication of services occurred.

#### *10. CDC’s Use of Other Means for Public Interface*

According to the government, orders under DJMA’s contract, particularly for CLIN C, DISTRIBUTED CALL MANAGEMENT SERVICES, did not decline due to

government diversions to other contractors or government employees. Instead, CDC's need for the DJMA contract decreased as the government transitioned from complex and sophisticated multiline telephone consoles, mentioned in DJMA's contract, to simpler desksets that did not necessitate the services of an operator. Additionally, CDC's requirements for DJMA's services tapered off as the government adopted different means, including internet websites and clearinghouses, to respond to requests for public health information. (Tr. 2/67-74)

*a. Clearinghouses and Internet Websites*

When asked at hearing why actual orders for DJMA's services dropped below the level estimated in the contract (*see* R4, tab B at 8-11), CO Cleveland "speculate[d] that during this period in the life of CDC there were a lot of things happening." She explained that "CDC was going from a relatively small organization and increasing in numbers...pretty exponentially during that period of time" and that CDC was "beginning to do things differently than what they had done in the past." The government was "introducing quite a bit of technology, including the new CDC website" from which information was displayed or could be downloaded. (Tr. 2/67-68) CO Cleveland explained that, as people increasingly accessed CDC's internet website "to get information as opposed to calling the [CDC] program office," the government's use of "the centralized call function" carried out by DJMA became a "secondary source for the information rather than a primary, because the website was providing a lot of that information" (tr. 2/69).

CO Cleveland further stated that CDC came to rely upon "clearinghouses, where there was a great amount of material developed and issued by contractors offsite from CDC" to handle "publications, distributions, and other things" regarding "major things related to HIV and other specific diseases or illness" (tr. 2/68). Those seeking public health information were referred to "1-800 numbers" to "access those clearinghouses" to satisfy their requests. As a result, "there was a lot less informal solicitation of information directly from CDC" because the "public had more options" to learn about health matters. She stated that CDC's changed approach to making available public health information would have a dramatic impact upon the level of distributed call management services needed, "particularly [at] switchboards at places such as the National Center for Sexually Transmitted Diseases." (Tr. 2/70)

CO Cleveland distinguished in several ways the work performed by clearinghouses reached by dialing "1-800" telephone numbers from DJMA's answering calls made to CDC offices. Calls to a clearinghouse did not involve the use of CDC telephone lines, and the work was performed at the contractors' facilities instead of in government offices. An additional difference was that clearinghouse contractors "dealt with not only providing the information, but developing the information from scientific resources."

With this additional requirement, clearinghouse contractors had to employ more highly skilled health care professionals who “understood the disease, understood how to prepare the materials, how to do the scripts, and then how to respond to callers” than DJMA. The clearinghouse employees were required to “take and develop all this public information, and develop scripts, and develop other things.” (Tr. 2/70-71)

*b. Changed Telephone Equipment*

The government-furnished telephone equipment by which DJMA performed “very complicated” call management services at specified CDC program offices (R4, tab B at 12, ¶ C.1) was more sophisticated than a standard desktop telephone. The consoles used by DJMA, described in contract ¶ C.5.A (*id.* at 18-19), represented the complex technology in use at the time the contract was made. These consoles had “call directors that had multi-lines that would come into a central location in an office, normally ten or 20 button sets” to “manage incoming calls and route them.” The consoles also were equipped with “several intercoms,” and “several programmed lines that a person could punch the button and send the call to central switchboard or to another CDC location.” (Tr. 2/24-25)

In addition to answering and transferring calls coming in to these consoles, DJMA’s operators “would have programmed material, programmed answers, and other things, that would avoid having to send a caller to another destination for information.” They “could provide the information at [that] point” without going “through additional layers of CDC to get the appropriate information,” and “could duplicate materials, and stuff envelopes, and send that information out, upon request, to the caller.” (Tr. 2/25-26)

CO Cleveland testified that there was no diversion of work from appellant where CDC transitioned from the multiline telephone consoles described in DJMA’s contract to simpler telephone equipment to answer calls (tr. 2/71-72). CO Cleveland described some of the changes made to telephone equipment used by CDC during DJMA’s contract, which altered the way incoming calls were handled. She testified that there were “less centralized switchboards or consoles at that time,” because the “equipment changed to desktop telephones” with private lines for individuals, and sometimes an incoming line “for the main division.” Increasingly, CDC employees had private lines they personally answered. (Tr. 2/71) The newer desktop telephones also permitted callers to leave voicemail messages, so “You didn’t have to have someone accept your message, write it down, and deliver it to you” (*id.*), as DJMA would have done in accordance with the auxiliary functions set forth in ¶ C.3.A (R4, tab B at 13).

## *11. CDC's Compliance with an Internal Revenue Service Levy against DJMA*

DJMA felt that it was particularly ill-treated by the government where CDC complied with a settlement reached by its prior counsel and the Internal Revenue Service (IRS), allegedly without appellant's consent (tr. 1/50-61). Although the amount is not at issue in the appeal, appellant contends that it was wrong for CDC to pay the IRS \$237,851.95, which was found due DJMA by the 16 November 2005 COFD for underpayments under contract ¶ G.3 (R4, tab A; tr. 1/41-43, 49-60). The payment took place after the IRS presented a demand to CDC dated 16 November 2005 that named DJMA as the subject taxpayer (R4, tab C, subtab 31).

Mr. Miller viewed this transaction as "a discussion between my counsel, the IRS and the CDC, and they came to a resolution that apparently satisfied everybody except me, and I just saw another continuation of CDC's behavior that no, we'll be sure you don't get your money, we'll facilitate somebody else getting it" (tr. 1/56).

CO Benson specifically denied having acted in bad faith by authorizing the payment of this money owed to DJMA after being presented with an IRS levy (tr. 4/65-68), and she "complied with those instructions" to pay according to a "deal" that DJMA's attorney and "the IRS worked out" (tr. 4/67).

We find no proof that CDC acted in bad faith where it complied with an IRS levy against DJMA, and acted in accordance with instructions from the contractor's legal representative. We note that this November 2005 event occurred more than four years after the DJMA concluded contract performance in April 2001.

### DECISION

#### *1. Positions of the Parties*

##### *a. The Contractor*

DJMA contends that CDC did not acquire from it all the government's requirements for work set forth in CLINs C Distributed Call Management Services, D Temporary Special Project Call Management Services, and E On-Site Teleconferencing Services. Appellant asserts that the government improperly obtained these services from other contractors, and performed that work in-house using former DJMA employees. (R4, tab D, *passim*; tr. 3/63-69) The contractor argues that CDC's actions, including its failure to fully utilize the maximum estimated services in DJMA's contract, taken "in whole, constitute bad faith" (app. br. at 35).



The contracting officer's final decision of 16 November 2005 found partial merit to DJMA's claim, and recognized that the contractor was due \$237,851.95 for CDC's failure to properly pay DJMA per contract ¶ G.3 (R4, tab B). Although that amount is not at issue in the appeal, appellant contends that CDC acted in bad faith by allegedly permitting the IRS to seize those funds in addition to its underutilization of the contract (app. br. at 32-36). DJMA seeks \$1,183,798 in lost profits and unabsorbed overhead, an amount it allegedly would have been paid had the government ordered the maximum services estimated in contract CLIN C (R4, tab D at 382).

*b. The Government*

The government argues that the subject requirements contract did not obligate CDC to order a definite quantity of services, and asserts that it bought from DJMA all that was required to be purchased for the specified work (gov't br. at 26-28). CDC denies that it diverted work from DJMA, and alleges that it appropriately used other contractors to perform work that fell outside the requirements of DJMA's contract and properly relied upon federal employees (gov't br. at 2, 21-35). The government also contends that its need for on-site operators to use complex telephone consoles to perform call management services described in CLINs C and D declined as CDC increasingly relied upon other technology to make available public health information. This included less complicated telephones to handle calls and other technology (such as internet websites and "1-800" telephone numbers accessing offsite clearinghouses staffed with scientifically-trained personnel) (*id.* at 5, 19, 22-24). CDC asserts that it did not improperly redirect teleconferencing work from CLIN E to another contractor. The government rejects DJMA's allegations that it demonstrated bad faith toward appellant, and asserts that DJMA failed to show that CDC acted with intent to injure appellant or was motivated by malice in their dealings (gov't br. at 35-38).

*2. Requirements Contracts*

The obligations between CDC and DJMA are defined by the terms of the contract. There is a requirements contract, which is one of the types of indefinite delivery contracts used by the government to acquire supplies or services when the "exact quantities of future deliveries are not known at the time of contract award." FAR 16.501-2, General. Procurement regulations provide that "the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract." The contractor is cautioned that this "estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal." FAR 16.503, Requirements contracts, ¶ (a)(1).

The contract between DJMA and CDC contained standard clause FAR 52.216-21, REQUIREMENTS (OCT 1995), which mandates that "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” (R4, tab B at 51, ¶ I.7). This type of contract “calls for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price.” *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328, 1334 (Fed. Cir. 2003) (interpreting FAR 52.216-21, REQUIREMENTS (APR 1984), which is identical in relevant particulars), *citing Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). CLINs C, D and E, at issue here (R4, tab B, 8-22, 50-51), were stated in estimated quantities and were to be performed as required by the government.

The “only limitation upon the government’s ability to vary its requirements under a requirements contract is that it must do so in good faith.” *Technical Assistance Int’l, Inc. v. United States*, 150 F.3d 1369, 1373 (Fed. Cir. 1998). A buyer is deemed to have “act[ed] in good faith if it has a valid business reason for varying its requirements other than dissatisfaction with the contract.” *Id.* at 1372. “The good faith standard has often been expressed in terms of its relationship to the buyer’s business judgment.” *Id.*, *citing* John C. Weistart, *Requirements and Output Contracts: Quantity Variations Under the UCC*, 1973 Duke L.J. 599, 628 n.71. A purchaser’s “bad faith,” on the other hand, “includes actions ‘motivated solely by a reassessment of the balance of advantages and disadvantages under the contract.’” *Technical Assistance Int’l*, 150 F.3d at 1372 *citing* *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333, 1341 (7<sup>th</sup> Cir. 1988). This is true where “the buyer ‘had second thoughts about the terms of the contract,’ and decreased its requirements in an attempt to avoid its obligations under the contract.” *Technical Assistance Int’l*, 150 F.3d at 1372 *citing* *Empire Gas* at 1340-41 and *Weistart, supra*, at 647.

Because DJMA as the “party alleging a breach of contract bears the burden of proving the breach,” *Technical Assistance Int’l*, 150 F.3d at 1373 *citing* *Perry v. Department of the Army*, 992 F.2d 1575, 1577 (Fed. Cir. 1993), it must prove that CDC “acted in bad faith” and declined its orders with the purpose of harming DJMA. Otherwise, the government “will be presumed to have varied its requirements for valid business reasons, *i.e.*, to have acted in good faith, and will not be liable for the change in requirements.” 150 F.3d at 1373.

### 3. *Work Allegedly Diverted to Elite Staffing, Inc.*

Appellant contends that CDC inappropriately gave work to Elite that fell within “the scope of services for call management services under the DJMA contract” (app. br. at 17). Although DJMA does not distinguish between call management services stated in its contract line items, we understand DJMA to argue that Elite provided distributed and special call management services specified in CLINs C and D of DJMA's contract for

routine and unusual peak demand periods respectively at the same locations (*see, e.g.*, R4, tab B at 18-20, ¶¶ C.5, C.6). According to appellant, services were diverted to Elite where it answered and triaged (routed or responded to) telephone calls and provided administrative support (*see app. br. at 17-18; app. reply br. at 6*).

Our inquiry begins with the work the government had to purchase only from DJMA, as CDC is obliged to purchase all specified services exclusively from appellant during the contract. The threshold question is: was the work done by Elite the same as the services specified by DJMA's contract? We conclude that it was not, particularly where CDC has shown that its need for call management services declined as it transitioned to simpler telephones with voicemail that did not require an operator and it communicated increasingly using websites and clearinghouses.

As to the task of answering and triaging telephone calls, DJMA's contract is explicit with respect to the equipment used for CLIN C. Contract ¶ C.5 Specific Requirements for Distributed Call Management Services specifies in ¶ C.5.A that particular telephones are to be used: "The equipment used ranges from a microcomputer-based central workstation and console switchboard to other types of equipment such as 6-, 10-, or 20-button telephone sets, call directors, or similar types of consoles" (R4, tab B at 18-19). DJMA's call management services are inextricably tied to complex government-furnished telephones, but appellant adduced no evidence that Elite used these devices or that CDC gave this same work to Elite.

DJMA also alleges that administrative support services were improperly diverted to Elite (*app. br. at 16-18*). However, appellant's failure to link Elite's work to the specialized equipment used by DJMA for call management services also defeats this assertion. Although DJMA is correct that it was obligated by contract to perform administrative and secretarial duties similar to those furnished by Elite (*see, e.g.*, R4, tab B at 13, 18-19, ¶¶ C.3.A, C.3.B), context is essential. DJMA's contract at ¶ C.3.A and ¶ C.5.B respectively make DJMA's providing administrative work "auxiliary" and "ancillary" to it also furnishing distributed call management services. Both words are defined as "attendant upon" and are synonyms for one another. *See BLACK'S LAW DICTIONARY* (6<sup>th</sup> ed. 1990). According to contract ¶ C.5.B, "specific *ancillary* services" were to be "performed *when such tasks are relevant to calls received*" (emphasis supplied), thus DJMA's providing call management services was a necessary predicate for DJMA to undertake associated tasks. Appellant's contract with CDC was not simply for clerical work; it was primarily for call management services, although it gave CDC the right to add subordinate administrative duties. DJMA failed to prove that Elite performed the work specified in DJMA's contract, or that CDC diverted DJMA's covered services to Elite.

#### 4. *Work Allegedly Diverted to DESA, Inc.*

According to DJMA, “when CDC needed to respond to certain health issues, per its contract, DJMA would establish call centers and provide these services under its line items for temporary special assignment and onsite teleconferencing” (app. br. at 18), which we understand to describe duties specified in CLINs D and E of its contract with CDC (*see, e.g.*, R4, tab B at 2). Appellant contends that this work declined after the government awarded a contract to DESA, Inc. to “consolidate CDC’s conference support requirements and have these requirements fulfilled by one contractor rather than many individual contracts” (app. br. at 18). However, DJMA offered no proof a diversion occurred, and we find none.

DESA generally conducted “in person” national and regional conferences having up to several hundred attendees (R4, tab K at 9900007-08). Paragraph C.3.e of DESA’s contract advised that the “vast majority [of conferences] will take place in the Atlanta, GA metropolitan area,” but some conferences may take place “via teleconference, or via satellite video conference” (R4, tab K at 9900007-08). But we cannot without more conclude that DESA performed DJMA’s work, especially as there is no proof that DESA used the same equipment and systems specified by DJMA’s contract at ¶¶ C.5 and C.6 for call managements services and ¶ C.7 Specific Requirements for Teleconferencing Support Services (R4, tab B at 20-21). DJMA failed to prove that CDC improperly diverted work to DESA.

#### 5. *Work Allegedly Diverted to CDC Employees*

Appellant asserts that CDC (and its other contractors) wrongly hired away as many as 32 of its employees to perform tasks that should have been awarded to DJMA, and that this diversion constituted government bad faith (app. br. at 9-15, 28-31, 35). CDC denies that it was prohibited from hiring DJMA employees after its hiring freeze was lifted, even though this diminished the amount of work required to be purchased from appellant. The government maintains that DJMA failed to show that CDC acted in bad faith by performing some work internally (gov’t br. at 15-16, 26-28).

Unless proven otherwise, CDC’s contracting officials are presumed to have acted in good faith and to have exercised prudent business judgment:

Government officials are presumed to act in good faith in discharging their contracting duties. That presumption can be overcome only by clear and convincing evidence of a specific intent on their part to injure the contractor. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240

(Fed. Cir. 2002); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995).

*R.L. Bates General Contractor Paving & Assocs., Inc.*, ASBCA No. 53641, 10-1 BCA ¶ 34,328 at 169,542-43, *aff'd*, 423 Fed. Appx. 996 (Fed. Cir. 2011).

The government is correct that DJMA failed to prove entitlement on this issue. Although DJMA demonstrated that CDC hired four contractor employees that were named incumbents on DJMA purchase orders who were verified by Ms. Miller as later doing the same work for the government (*see, e.g.*, R4, tab G at 70008-09, 70014-15, tab L at 220251-55, 220316-23, 220355; tr. 3/30-31, 68), this alone is insufficient to establish that a compensable diversion occurred. Appellant must also provide credible evidence that the government lacked a valid business reason for ordering less under DJMA's contract, and that CDC specifically intended to injure appellant by hiring more government employees. DJMA did not do so. Absent the requisite proof (*Technical Assistance Int'l*, 150 F.3d 1369, 1372-73), we cannot conclude that CDC's hiring of DJMA employees for the same work was an inherent act of bad faith.

DJMA cites only the opinions of its own witnesses to show that CDC officials intended to injure appellant or acted solely to avoid its contractual obligations. It failed to offer credible evidence meeting the requisite clear and convincing standard (*see, e.g., Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002)). We deny this portion of DJMA's claim.

#### 6. *CDC's Alleged Bad Faith in Complying with an Internal Revenue Service Levy*

After the CO found partial merit to DJMA's revised claim in his 16 November 2005 final decision, CDC did not give DJMA the \$237,851.95 admittedly owed appellant for underpayments under contract ¶ G.3. Rather, CDC paid the money in accordance with an IRS levy and an agreement reached between IRS and DJMA's legal representative. (App. br. at 19-22) DJMA cites this "compromise [of] DJMA's claim for underpayments without executing a release of claims or settlement agreement" as an example of "CDC's actions and responses in this dispute [which] constitute bad faith" (*id.* at 35).

We disagree that this payment, which took place over four years after DJMA ended contract performance, established that the government acted with bad faith toward appellant. Certainly this event occurred too late to show that CDC acted in bad faith toward DJMA during the period orders were being placed against the contract. Appellant failed to rebut the presumption that government officials are presumed to act in good faith and did not present clear and convincing evidence otherwise, *Am-Pro Protective Agency*, 281 F.3d 1234, 1240. DJMA cites no proof, and we are aware of none, that CDC was motivated by malice or an intent to injure appellant when it complied with an IRS levy

(which DJMA does not dispute was lawful) and according to an agreement entered into by IRS and appellant's then-attorney. We reject appellant's argument that this transaction further proves government bad faith.

CONCLUSION

We have considered all arguments advanced by appellant in support of its appeal, and find these to be without merit. For the reasons stated above, we deny the appeal.

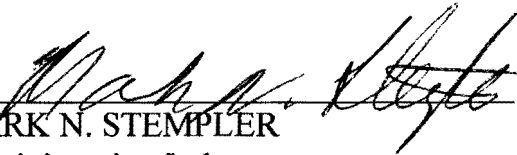
Dated: 13 October 2011



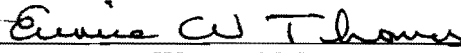
REBA PAGE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

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. 55357, Appeal of D.J. Miller & Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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