ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
AmerescoSolutions, Inc.	)	ASBCA Nos. 56824, 56867
	)	
Under Contract No. DE-AM36-99OR22701	)	
Delivery Order No. SPO600-03-F-8269	)	

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

These appeals involve a Department of Energy indefinite-delivery/indefinite-quantity (IDIQ) contract and a Defense Energy Support Center (DESC) delivery order issued against the IDIQ contract.[1] The delivery order was terminated for the convenience of the government. AmerescoSolutions, Inc. (Ameresco) submitted a termination settlement proposal that was denied in part by a DESC contracting officer and appealed here. A later protective claim resulted in another denial and another appeal. The government has moved to dismiss the appeals. The motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The United States Department of Energy (DOE) and Ameresco entered into Contract No. DE-AM36-99OR22701 in February 1999 (R4, tab 1). That contract was completely revised in bilateral Modification No. M006 dated 12 March 2003 (R4, tab 101).

[1] In 2010, the Defense Logistics Agency (DLA) renamed the Defense Energy Support Center "DLA Energy." Because the relevant events took place while the agency was called the Defense Energy Support Center, we will use the term DESC in this opinion.

2. The DOE contract was an IDIQ contract. Under Section B.1, appellant was to provide energy savings performance contracting (ESPC) conservation services including Geothermal Heat Pump (GHP) and other energy conservation measures (ECMs) for federal facilities in the United States and for federally-owned facilities in overseas locations. The total maximum contract value ("the sum of contractor payment streams associated with all delivery orders") was not to exceed $500,000,000. The minimum guarantee order(s) value was $150,000. (R4, tab 101 at B-1)

3. The DOE contract contemplated that federal agencies would issue delivery orders to Ameresco for specific projects. Section B.3 of the contract included FAR 52.216-22, (MODIFIED) INDEFINITE QUANTITY (OCT 1995) which stated, among other things, that the quantities set out in the Schedule were estimates and were not purchased by the contract. It also stated that delivery or performance would only be made "as authorized by orders issued in accordance with the Ordering clause." (R4, tab 101 at B-2)

4. Section B.4 set out clause FAR 52.216-18, (MODIFIED) ORDERING (OCT 1995) which provided as follows:

> (a) Any services to be furnished under this contract shall be ordered by issuance of delivery orders by an authorized Contracting Officer for a United States Government federal agency (Agency Contracting Officer). Agency Contracting Officers shall submit draft delivery order requests for proposals and draft delivery orders, prior to issuance, to the DOE Contracting Officer for this contract to obtain his/her review and suggestions/comments.
>
> ....
>
> (c) All delivery orders are subject to the terms and conditions of this contract, except as modified by the terms and conditions of a specific delivery order request for proposal, as permitted by the contract. In the event of a conflict between the terms and conditions of a delivery order and those of this contract, the delivery order provisions will take precedence. (Also see Section C.1.)

(R4, tab 101 at B-2)

5. At Section C.1, General Requirements/Project Scope, the DOE contract stated that its purpose was to acquire, under an energy savings performance, IDIQ contract, GHP-centered energy conservation services "as specified in each delivery order issued

against this contract." It went on to say that "[a]ll provisions that follow throughout...may be revised within the overall scope of the contract as necessary (based on the needs of an agency) in an Agency Delivery Order Request for Proposal (DO RFP), unless noted otherwise in this contract at the specific provision. In the event of a conflict between the DO RFP and the IDIQ, the provisions of the DO RFP will prevail. (**See more specific information at Section H-19.**)" (R4, tab 101 at C-1) (Emphasis in original)

6. Section E.1, INSPECTION (MAR 1997), stated that inspection of items and services provided under the DOE contract or any delivery order issued under it was to be accomplished by the agency contracting officer's representative (COR) identified in a specific delivery order. Section E.2, ACCEPTANCE (MAR 1997), stated that acceptance of work under the contract or any delivery order issued under it was to be accomplished by the agency contracting officer for a specific delivery order. (R4, tab 101 at E-1)

7. Section F of the DOE contract covered deliveries or performance. It provided that the contractor was required to commence work under the contract only upon issuance of delivery orders. As to specific delivery orders, the contractor was to commence and complete work as set out in the delivery order. The DOE contract was said to have a maximum period of 25 years from the date of contract award, but with a limit on the period for the placement of delivery orders. The term of delivery orders was to be stated in each delivery order. That term was comprised of the implementation period for ECMs installation, plus the energy savings performance period. The principal place of performance was to be specified in each delivery order. Finally, there were no specific deliverables for delivery orders in the DOE contract. The contractor was required to submit the deliverables set out in the reporting requirements in each specific delivery order as well as Section D of the DOE contract. (R4, tab 101 at F-1)

8. Section G.1 discussed contract administration for the DOE contract and for the delivery orders. Administration of delivery orders was to be accomplished by the agency contracting officer (CO), agency COR, and any other persons identified in the delivery order by the ordering agency contracting office. Section G.3 addressed invoice submittals and stated that payments would commence when all ECMs were installed and accepted, all other deliverables were received, and the installation was successfully operational for a 30-day test period. The agency CO or COR for the specific delivery order would make the latter determination. (R4, tab 101 at G-1)

9. In Section H.3, the DOE contract provided that performance was subject to the technical direction of the DOE COR or of the agency COR for a specific delivery order issued under the DOE contract (R4, tab 101 at H-2).

10. Sections H.19 through H.26 of the DOE contract covered the process leading to the issuance of delivery orders (R4, tab 101 at H-10-26). Section H.19 stated that

the IDIQ contract could be used by all federal agencies, solicitations for specific delivery orders "may contain additional clauses and provisions, as well as differing clauses and provisions than those included in this contract, whether due to [the] FAR, other agency-specific regulations, or agency requirements or practices dictated by the specific project. The agency-specific requirements as documented in the agency solicitation (DO RFP) shall be understood to either override or supplement the contract requirements, as indicated in the DO RFP, and as permitted by the language at Section C.1 of this contract." In Section H.20, the DOE contract provided that agency contracting officers could issue delivery orders using single source awards (contractor-identified projects) or by selecting competing contractors (government-identified process). The section stated that the government anticipated "awarding fixed price delivery orders against" the DOE contract. Before a contractor could submit a contractor-identified proposal, it had to obtain the concurrence of the DOE COR. (R4, tab 101 at H-10-12) Sections H.21 and H.22 set out the requirements for contractor initial proposals and the evaluation procedures (R4, tab 101 at H-12-17). Sections H.24 and H.25 set out the preparation instructions and evaluation procedures for final proposals (R4, tab 101 at H-18-26).

11. Part II, Section I of the DOE contract incorporated by reference, among other clauses, FAR 52.202-1, DEFINITIONS (OCT 1995), ALTERNATE I (APR 1984); FAR 52.233-1, DISPUTES (DEC 1998), ALTERNATE I (DEC 1991); and FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996). It also incorporated, as to the construction phases of the contract and delivery orders, FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) and, as to the services phases of the contract and delivery orders, FAR 52.249-8, DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984). (R4, tab 101 at I-1-5)

12. On 18 October 1999, DOE and DESC entered into a memorandum of understanding (MOU) relating to DOE regional super ESPC. The purpose of the MOU was to "establish the organizational relationships, responsibilities, and activities" of DOE and DESC for award of delivery orders under such ESPCs. The MOU stated that DOE contracts:

> [C]ontain the terms and conditions generally applicable to all Federal Agencies. Each project Delivery Order will include all agency specific requirements, terms and conditions and all project specific information.... Delivery Orders will be signed by the DESC Contracting Officer, as delegated to DESC by the DOE Contracting Officer. Administration of the Delivery Orders will be the responsibility of DESC and/or the DoD customer.

(Gov't mot., attach. A at 1, 2)

The primary responsibilities for DOE included providing support in explaining the Super ESPC contracting process, providing guidance to DESC for preparation of delivery order RFPs, and delegating authority to award ESPC delivery orders to the DESC Directorate of Alternative Fuels. DESC was to pursue award of delivery orders, provide expertise in implementation of ESPC contracts and delivery orders, determine the method of procurement, negotiate and prepare the delivery order, and award the delivery order (*id.*).

13. In September 2003, Ameresco submitted to DESC a proposal for an Energy Savings Performance Contract relating to Fort Monmouth, New Jersey (R4, tab 3). Shortly thereafter, DESC issued a delivery order denominated an Order for Supplies or Services to appellant (R4, tab 4).

14. The Order for Supplies or Services was issued on a form that is very similar to a DD Form 1155 although it was not labeled as such. The DOE contract number, DE-AM36-99OR22701, was listed as was the number of the delivery order, SPO600-03-F-8269. The order was said to have been issued by DESC to "CONTRACTOR," Ameresco, for shipment to the U.S. Garrison at Fort Monmouth, New Jersey. It also stated that "PAYMENT WILL BE MADE BY" "DFAS – St. Louis Field Sites." Under Box 16, "Type of Order," "Delivery" was checked and followed by the text: "This delivery order is issued on another Government agency or in accordance with and subject to terms and conditions of above numbered contract." Under the statement, "ACCEPTANCE. THE CONTRACTOR HEREBY ACCEPTS THE OFFER REPRESENTED BY THE NUMBERED PURCHASE ORDER AS IT MAY PREVIOUSLY HAVE BEEN OR IS NOW MODIFIED, SUBJECT TO ALL OF THE TERMS AND CONDITIONS SET FORTH, AND AGREES TO PERFORM THE SAME," an Ameresco vice president signed the order on 30 September 2003. The schedule of supplies/service stated "ENERGY SAVINGS PERFORMANCE CONTRACT, FT. MONMOUTH, NJ, Contractor shall install Energy Conservation Measures in accordance with this Delivery Order Statement of Work /DO RFP, See page 2." The amount of the contract was $51,491,892. (R4, tab 4 at 1)

15. Section B, "Supplies or Services and Price/Costs," provided as follows in paragraph B.7.

> This delivery order (DO) award is issued pursuant to the authority granted by the Energy Policy Act of 1992 (P.L. 102-486), Executive Order 13123 and 10 USC 2865, for the purpose of reducing energy consumption and energy costs. Unless otherwise specified herein, this DO incorporates the terms and conditions of the United States Department of Energy's Energy Savings Performance Contract No. DE-AM36-99OR22701, as modified. Agency and site specific requirements are identified below, as permitted by

> the terms and conditions of the contract, using the same standard contract format numbering as the Indefinite Delivery Indefinite Quantity (IDIQ) contract. These requirements may either supercede the IDIQ contract requirement or represent requirements that are in addition to those specified in the IDIQ contract. In either case, specific guidance is provided at the beginning of each clause. In all cases, agency and site-specific requirements are considered to be within the scope of the IDIQ. Unless specifically noted, any reference to the Contracting Officer (CO) or the Contracting Officer's Representative (COR) within this DO is directed toward those of the ordering agency (See block 24 of the DD 1155, found on page 1 of this document) and not of the Department of Energy (DOE) CO and COR.
>
> Ameresco's revised final proposal dated September 19 and September 30, 2003, is hereby incorporated into this DO contract award.

(R4, tab 4 at 2)

16. Section B also included five schedules setting out the work to be accomplished, the estimated cost savings as a result of the work, and the prices to be paid for the work (R4, tab 4 at 2a-f).

17. Paragraph C.2 of the DO specified five ECMs to be implemented at Fort Monmouth: lighting upgrade; HVAC renovation; utility energy services contract (UESC) implementation; geothermal heat pumps; and cogeneration system site preparation (R4, tab 4 at 3). The remainder of Section C set out further requirements relating to the ECMs. As to each category of ECM and the DO generally, the order stated that the requirements in the DO either superceded or were in addition to the requirements of the DOE contract. (R4, tab 4 at 3-22)

18. Paragraph F.2 identified the place of performance as the Fort Monmouth Army Installation, New Jersey (R4, tab 4 at 23). Paragraph G.1 stated that the agency contracting officer for the DO from project inception and the agency contracting officer's representative were DLA or DESC personnel. The agency COR at Fort Monmouth also had the responsibility for certifying invoices. (R4, tab 4 at 23-24)

19. The DO incorporated a number of FAR, DFARS, and DLAD clauses. These did not include disputes, termination for convenience, or default clauses. (R4, tab 4 at 28-29)

20. On 27 September 2006, a DESC CO terminated appellant's DO for convenience under FAR 52.249-2 (R4, tab 51). Ameresco submitted termination settlement proposals on 27 August 2007 and 12 November 2007 (R4, tabs 52, 53). A DESC CO granted the proposals to the extent of $19,667,872 and denied them to the extent of $6,697,526 (R4, tab 7). Ameresco filed an appeal that was docketed as ASBCA No. 56824. Appellant later submitted a protective claim for $6,697,526 and a Contract Disputes Act certification (R4, tab 8), which the DESC CO also denied (R4, tab 9). A new appeal was filed and docketed as ASBCA No. 56867. The appeals have been consolidated.

21. Ameresco has submitted its complaint. In lieu of filing an answer, the government moved to dismiss. Briefing was concluded on 11 February 2011.

DECISION

The government contends that the Contract Disputes Act (CDA), 41 U.S.C. § 7105(e)(1)(A) as amended in 2006, only provides for ASBCA jurisdiction over appeals from Department of Defense (DoD) contracting officer decisions relative to DoD contracts (gov't mot. at 7). The government argues, in moving to dismiss, that the Board lacks jurisdiction because the "contract" at issue is not the delivery order but the DOE contract, and the Board has not been authorized to decide appeals under a non-DoD contract (gov't mot. at 6).

Appellant contends that the 30 September 2003 delivery order relating to Fort Monmouth was a discrete contract between Ameresco and DESC, a DoD agency. The delivery order was terminated for convenience by the DESC contracting officer. Appellant submitted termination settlement proposals to DESC which were paid in part and denied in part by a DESC contracting officer who issued the final decisions under the delivery order, further evidencing that the delivery order was a DoD contract. Accordingly, appellant concludes that the Board has CDA jurisdiction over the instant appeals. (App. resp. at 6-12)

Because the government challenges the factual basis for our jurisdiction, the allegations in the pleadings are not controlling. *Cedars Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-1584 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994); *E.M. Scott & Associates*, ASBCA No. 45869, 94-3 BCA ¶ 27,059. We accept as true for purposes of the motion only the factual allegations that are uncontroverted. *Id.* The facts supporting the challenged jurisdictional allegations are subject to fact finding by the Board, and the burden of establishing jurisdiction is on appellant. *Id.*

The CDA applies to express or implied contracts for, among other things, the procurement of services and the procurement of construction, alteration, repair or maintenance of real property. 41 U.S.C. § 7102(a)(2), (3). This Board has jurisdiction

"to decide any appeal from a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency." 41 U.S.C. § 7105(e)(1)(A). The question raised by the government's motion is whether the DESC delivery order constituted a "contract." The government cites *Gardner Zemke Co.*, ASBCA No. 51499, 98-2 BCA ¶ 29,997, in arguing that the Board does not have jurisdiction here because DOE "made" the contract at issue. (Gov't mot. at 9)

For the reasons stated below, we find that the DESC delivery order was a discrete contract between a DoD entity and appellant and, as a result, we have jurisdiction to hear these appeals under the CDA.[2]

The fact that the DESC delivery order was issued against an established DOE contract with appellant does not mean that the delivery order does not constitute a separate contract. Both parties focus on FAR 2.101 which defines "contract" as follows:

> [A] mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.*

The above FAR definition is sufficiently comprehensive to include "delivery" orders. The fact that "delivery" (as opposed to "purchase") "orders" are not expressly enumerated is not significant. The listing of examples was not all inclusive. The delivery order here was clearly a bilateral "mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them." Moreover, delivery orders also qualify as "orders, such as purchase orders,

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[2] We emphasize that our discussion of the contractual status of delivery orders concerns solely our CDA jurisdiction. Whether "orders" of various types issued pursuant to various contractual vehicles constitute separate "contracts" in other contexts may involve other FAR provisions, issues and considerations that we do not reach.

under which the contract becomes effective by written acceptance or performance." *Id.* Although the definition of "delivery order" in FAR 2.101 refers to orders "against an established contract," that language does not exclude the existence of both an "established contract" and a delivery order that also qualifies as a contract. We have, in fact, described delivery orders as contracts in decisions such as *Mach II*, ASBCA No. 56425, 09-2 BCA ¶ 34,224 and *Winding Specialists Co.*, ASBCA No. 37765, 89-2 BCA ¶ 21,737. The DESC delivery order also describes itself as "this DO contract award" (SOF ¶ 15). This case involves two different government "buyers." The relevant "buyer" for purposes of this dispute was not DOE but DESC, the only agency obligated to pay for the supplies/services furnished by Ameresco. Basic, essential operative contractual terms and details in dispute here were not in place prior to issuance of the delivery order. There was no "commitment" to purchase definite supplies/services, obligation to buy or sell such services/supplies, or agreement to expend appropriated DoD funds in a specific amount prior to execution of the DO. The DO's incorporation of some provisions in the DOE contract by reference, does not convert the DO into a DOE acquisition.

Our conclusion that the delivery order constitutes a discrete contract under the above FAR definition is consistent with traditional case law analyses of what constitutes a contract. In determining whether an arrangement is a contract for purposes of jurisdictional statutes, the Federal Circuit has stated that "any agreement can be a contract within the meaning of the Tucker Act, provided that it meets the requirements for a contract with the Government, specifically: mutual intent to contract including an offer and acceptance, consideration, and a Government representative who had actual authority to bind the Government." *California Federal Bank, FSB v. United States*, 245 F.3d 1342, 1346 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002); *Massie v. United States*, 166 F.3d 1184, 1188 (Fed. Cir. 1999).[3] We have reached similar conclusions with respect to our jurisdiction under the CDA. *Factek, LLC*, ASBCA No. 55345, 07-1 BCA ¶ 33,568. Both appellant and the government characterize agreements that meet the requirements listed above as "common law" contracts. The government goes on to propose that even if delivery orders could be considered "common law" contracts, they would not have "contract status" because they are not set out in the above FAR definition of contracts. (Gov't reply at 2-3) Nothing in *California Federal Bank, Massie*, or *Factek* suggests that a contract for purposes of jurisdictional statutes has to be explicitly listed in FAR 2.101. Implied-in-fact contracts are not listed and both the Court of Federal Claims and this Board have unquestioned authority to hear appeals relating to such contracts. 28 U.S.C. § 1491(a)(1); 41 U.S.C. § 7102(a). And, as noted, delivery orders are not excluded from the definition of "contract" in FAR 2.101. The listing of some contractual types and vehicles in that FAR section is not intended to be exhaustive and exclude others that satisfy the basic prerequisites.

[3] The Tucker Act, 28 U.S.C. § 1491(a)(1), gives the Court of Federal Claims jurisdiction to hear claims based upon express or implied contracts with the United States.

The delivery order here was issued by DESC to Ameresco which was listed as the "CONTRACTOR." It included the work to be done by appellant and the prices to be paid by DESC. The supplies and services were to be provided at the U.S. Garrison at Fort Monmouth, New Jersey. Payment to Ameresco was to be made through the St. Louis office of the Defense Finance and Accounting Service (DFAS). The delivery order was signed by a DESC contracting officer and sent to appellant. In Box 16, an Ameresco vice president signed the delivery order on 30 September 2003 under the statement: "ACCEPTANCE. THE CONTRACTOR HEREBY ACCEPTS THE OFFER REPRESENTED BY THE NUMBERED PURCHASE ORDER AS IT MAY PREVIOUSLY HAVE BEEN OR IS NOW MODIFIED, SUBJECT TO ALL OF THE TERMS AND CONDITIONS SET FORTH, AND AGREES TO PERFORM THE SAME." (SOF ¶ 14)

The delivery order included all of the required elements of a contract.[4] There was mutuality of intent to contract as indicated by the order/offer signed by the DESC contracting officer and the explicit written acceptance by Ameresco through its vice president. Appellant's promise to deliver the supplies and services in the order and DESC's promise to pay for them constituted the necessary consideration. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 75 cmt a. (1981) ("In modern times the enforcement of bargains is not limited to those partly completed, but is extended to the wholly executory exchange in which promise is exchanged for promise").

Our finding that the delivery order was a contract is supported by the form used by DESC. As noted, the delivery order is not labeled but appears to be a version of the DD Form 1155. (SOF ¶ 14) The DD Form 1155 is authorized for placing orders under indefinite-delivery contracts, DFARS 216.505 (2003), and may be used in ordering services that exceed $100,000 under multiple award contracts, DFARS 216.505-70 (2003). We have stated, albeit in dicta, that acceptance of a government "offer by the supplier when box 16 of DD Form 1155 is checked results in a bilateral contract." *Western Manufacturing Co.*, ASBCA No. 25089, 81-1 BCA ¶ 15,024. We also find it significant that the order form used here appears to be a DoD form rather than the non-DoD specific SF 1449 or the DOE F 4250.3, Order for Supplies or Services. It is also noteworthy that DESC was responsible for administration of the DO and, for the most part, the DESC DO provisions took precedence over those of the DOE contract. In most matters relating to the DO, DESC, rather than DOE, officials had authority to act.

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[4] The government also notes that the ASBCA Charter, in subsections (b) and (c), provides for jurisdiction pursuant to contract provisions or DoD directives, but goes on to say that there is nothing in either the DOE contract or the DO that would meet those requirements (gov't mot. at 9-10). We have found that the delivery order was an express contract under the CDA. The Charter subsections cited by the government do not delimit that statutory jurisdiction.

(SOF ¶¶ 4, 5, 6, 8, 10, 12, 15, 18) There is no dispute that the DESC contracting officer had authority to bind the government and issue final decisions. It would be inappropriate for the DESC contracting officer to have conceded authority to decide a dispute under a non-DESC contract.

CONCLUSION

For the reasons stated above, the government's motion to dismiss is denied.

Dated: 4 March 2011

ROBERT T. PEACOCK
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 Nos. 56824, 56867, Appeals of AmerescoSolutions, Inc., rendered in conformance with the Board's Charter.

Dated:

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