ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
General Dynamics Ordnance and Tactical Systems, Inc.	)	ASBCA Nos. 56870, 56957
	)	
	)	
Under Contract No. W52P1J-05-G-0002	)	

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

In these appeals, General Dynamics Ordnance and Tactical Systems, Inc. (appellant) claims an equitable adjustment in contract price caused by inaccurate or negligently prepared quantity estimates in the subject "requirements contract" for the manufacture and delivery of small munitions. The Department of the Army (government) contends, among other things, that the parties' agreement was not a requirements contract but a "basic ordering agreement" (BOA). Based upon its interpretation of the parties' agreement, the government has moved for summary judgment. Appellant has filed in opposition to the motion. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The "Lake City Army Ammunition Plant" (LCAAP), Independence, Missouri, is a government owned, contractor operated plant that produces small arms ammunition for the U.S. military. Because of increased training and international combat operations, the government became of the view that its munitions needs might exceed the manufacturing capacity at LCAAP. Hence, the government sought to obtain a second source for these munitions.

2. The government issued a draft solicitation to industry on or about 6 October 2004. The draft solicitation expressly set forth the government's intention at that time to award a requirements contract under which firm fixed price delivery orders would be issued for small caliber munitions. *See, e.g.,* SECTION A –SPECIAL PROVISIONS, ¶ 4. (Supp. R4, tab 207 at 2 of 93)

3. The government hosted a pre-solicitation conference on 1 December 2004 at which industry representatives, including appellant, attended. The government made a presentation to the attendees that included questions from potential offerors and answers from the government, which confirmed that the government anticipated the award of a requirements contract at this time. (R4, tabs 24, 25 at 7)

4. On 18 January 2005, the government issued Solicitation No. W52P1J-05-R-0010. The solicitation contained material changes from the draft solicitation. There were no longer any express references to the award of a requirements contract. These references were deleted and replaced with express references to the award of a BOA. For example, section C-8, Statement of Work (SOW) ¶ 6 in the draft solicitation provided: "TYPE OF CONTRACT: A requirements type contract will be utilized with Firm Fixed Price delivery orders" (R4, tab 15 at 33). The solicitation now provided under that same paragraph: "TYPE OF CONTRACT: A Basic Ordering Agreement will be utilized with Firm Fixed Price delivery orders/modifications" (R4, tab 33 at 37).

5. The draft solicitation, section L, included clause FAR 52.216-1, TYPE OF CONTRACT (APR 1984). This clause provided: "The Government contemplates the award of a Requirements contract under which Firm-Fixed Price Delivery Orders will be issued" (R4, tab 15 at 78, ¶ L-5). The new solicitation provided in section L: "The Government contemplates the award of a Basic Ordering Agreement (BOA) contract under which Firm-Fixed Price Delivery Orders will be issued" (R4, tab 33 at 88, ¶ L-14). Also, SECTION A – SPECIAL PROVISIONS, ¶¶ 3, 5, of the draft solicitation provided for a requirements contract (R4, tab 15 at 2); its counterpart in the new solicitation, section A-2, ¶¶ 3, 4, provided for a BOA (R4, tab 33 at 2).

6. Notwithstanding the above changes, the new solicitation retained the clauses from the draft solicitation that are commonly found in requirements contracts and not BOAs, *e.g.*, FAR 52.216-18, ORDERING (OCT 1995); FAR 52.216-19, ORDER LIMITATIONS (OCT 1995) (R4, tab 33 at 64). *See* FAR 16.506(a), (b). The solicitation also retained the provision for FY 2005 estimated quantities, which type of clause is typically found in a requirements contract and not in a BOA. FAR 16.503(a)(1). The solicitation however did not include the FAR clause to be used when a requirements contract is contemplated, FAR 52.216-21.

7. The new solicitation provided in Section C-8 of the SOW ¶ 1.2, as follows:

> It is the objective of this effort to establish a single commercial Second Source Prime Contractor to provide the U.S. Army with additional capability...of up to 300M rounds per year of small caliber ammunition. Depending on future Government needs, this requirement could increase up to 500M rounds per year.

(R4, tab 33 at 30)

8. During the relevant period, FAR 16.703 defined a BOA as follows:

> **16.703 Basic ordering agreements.**
>
> (a) *Description.* A basic ordering agreement is a written instrument of understanding, negotiated between an agency, contracting activity, or contracting office and a contractor, that contains—
>
> (1) terms and clauses applying to future contracts (orders) between the parties during its term,
>
> (2) a description, as specific as practicable, of supplies or services to be provided, and
>
> (3) methods for pricing, issuing, and delivering future orders under the basic ordering agreement. **A basic ordering agreement is not a contract.**
>
> ....
>
> (c) *Limitations.* A basic ordering agreement shall not state or imply any agreement by the Government to place future contracts or orders with the contractor or be used in any manner to restrict competition.
>
> **(1) Each basic ordering agreement shall—**
>
> (i) Describe the method for determining prices to be paid to the contractor for the supplies or services;

(ii) Include delivery terms and conditions or specify how they will be determined;

(iii) List one or more Government activities authorized to issue orders under the agreement;

(iv) Specify the point at which each order becomes a binding contract (*e.g.*, issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days);

(v) Provide that failure to reach agreement on price for any order issued before its price is established (see paragraph (d)(3) of this section) is a dispute under the Disputes clause included in the basic ordering agreement; and

....

(d) *Orders*. A contracting officer representing any Government activity listed in a basic ordering agreement may issue orders for required supplies or services covered by that agreement.

(1) **Before issuing an order under a basic ordering agreement, the contracting officer shall—**

(i) Obtain competition in accordance with Part 6;

(ii) If the order is being placed after competition, ensure that use of the basic ordering agreement is not prejudicial to other offerors; and

(iii) Sign or obtain any applicable justifications and approvals, and any determination and findings, and comply with other requirements in accordance with 1.602-1(b), as if the order were a contract awarded independently of a basic ordering agreement.

(Emphasis added) The government's solicitation did not include the provisions required by FAR 16.703(c)(1)(iv) and (v) above.

9. During the relevant period, DFARS 216.703 provided as follows:

> **216.703 Basic ordering agreements.**
>
> (c) *Limitations.* The period during which orders may be placed against a basic ordering agreement may not exceed three years. The contracting officer, with the approval of the chief of the contracting office, may grant extensions for up to two years. No single extension shall exceed one year. See subpart 217.74 for additional limitations on the use of undefinitized orders under basic ordering agreements.

Under the solicitation, the government contemplated the award of a five year BOA (R4, tab 33 at 2, § A-2, ¶ 3).

10. During the relevant period, FAR 16.503 defined a requirements contract as follows:

> **16.503 Requirements contracts.**
>
> (a) *Description.* A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor.
>
> (1) For the information of offerors and contractors, the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract. 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. The contracting officer may obtain the estimate from records of previous requirements and consumption, or by other means, and should base the estimate on the most current information available.
>
> (2) The contract shall state, if feasible, the maximum limit of the contractor's obligation to deliver and the Government's obligation to order. The contract may also specify maximum or minimum quantities that the Government may order under each individual order and the maximum that it may order during a specified period of time.

11. After the government issued the solicitation, the potential offerors, including appellant, were again given the opportunity to pose additional questions to the government. The questions and answers were memorialized and made available to the potential offerors. They included the following:

> [Question] 200. Will the government provide the offerors its Best Estimated Quantities (BEQ) along with the high and low quantities (evaluation points) for each year as discussed on page 101 of 103 of the solicitation?
>
> A[nswer] No. Reference Q#123[1]
>
> ....
>
> [Question] 217. **The solicitation is currently structured as a Basic Ordering Agreement.** However, the resulting BOA would not be consistent with the three year limitation set forth at DFARS 216.703(c), and the solicitation structure does not contemplate the government obtaining competition before placing orders under the BOA as required by FAR 16.703(d)(1)(i). Will the government explain how it intends to meet the referenced regulatory requirements?
>
> A[nswer]. See DFARS 217.204(e)(i):
> "**Notwithstanding FAR 17.204(e), the ordering period of a task order or delivery order contract awarded by DoD pursuant to 10 U.S.C. 2304a—**
>
> **(A) May be for any period up to 5 years;**
> (B) May be subsequently extended for one or more successive periods in accordance with an option provided in the contract or a modification of the contract; and
> (C) Shall not exceed 10 years unless the head of the agency determines in writing that exceptional circumstances require a longer ordering period."
>
> In reference to obtaining competition before placing orders under the BOA as required by FAR 16.703(d)(1)(i), the

[1] The answer to question 123 stated that evaluation points would not be provided to offerors (R4, tab 25 at 59).

> **Government** is getting competition initially, will be using a multiple year price matrix, and **does not plan to obtain competition before placing every order. That would defeat the purpose of getting a BOA in place, and wouldn't allow the Government the flexibility it needs in this requirement.**

(R4, tab 47 at 102, 108) (Emphasis added)

12. Question 217 was posed by appellant (app. surreply at 4). Appellant recognized that the solicitation was "currently structured" by the government as a BOA, but it raised questions regarding the solicitation's consistency with regulatory BOA requirements. The government's answer that it did not intend to obtain competition before placing each delivery order appears to be inconsistent with the definition of a BOA, FAR 16.703(d)(1)(i) (SOF ¶ 8). With respect to the general three year limit for a BOA, DFARS 216.703 (SOF ¶ 9), the government suggested that DFARS 217.204 provided additional flexibility for the term of a BOA. However DFARS 217.204 is entitled "Contracts" and is found in FAR "Subpart 217.2 – Options." A BOA is not a contract, and it does not appear that the government used any Option solicitation provisions here. Moreover, this DFARS provision cited statutory authority for the government to award a task order or delivery order "contract" for up to five years, 10 U.S.C. § 2304a, but since a BOA is not a "contract" it does not appear to fall under this statutory authority.

13. Appellant submitted its proposal to the solicitation on 18 March 2005, stating in pertinent part as follows: "GD-OTS agrees with all terms, conditions, and provisions included in the solicitation and agree [sic] to furnish any or all items upon which prices are offered at the price set opposite each item" (R4, tab 52 at 2).

14. The government issued award to appellant on 23 August 2005. Section A-2 of the award document provided: "This Basic Ordering Agreement (BOA) is awarded as a result of the formal source selection conducted under AFSC's request for proposal (RFP) W52P1J-05-R-0010." (R4, tab 60 at 2) It is undisputed that the award document states that it is a "BOA" in a number of places, but it also states that it is a "contract" in a number of places.

15. At the same time the award was issued, the government issued Delivery Order (DO) 0001. DO 0001 was issued for a total quantity of 300,000,360 small caliber ammunition rounds in the amount of $171,177,550.52. Insofar as pertinent, DO 0001 stated the following: "In accordance with the procedures established under BOA W52P1J-05-G-0002, the Government hereby exercises its right to award Delivery Order 0001." (R4, tab 61 at 2) Appellant accepted this DO and performed thereunder.

16. DO 0002, FY 06, was issued by the government on 27 February 2006 for a total quantity of 10,607,400 small caliber ammunition rounds in the amount of $25,263,681.04. Insofar as pertinent, Block 16 of DO 0002 stated as follows:

> 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.

Block 16 was signed on behalf of appellant by Thomas W. Gleason, Director of Contracts on 27 February 2006. The signed DO 0002 also provided: "[e]xcept as provided herein, all terms, conditions, and requirements of the BOA remain unchanged and in full force and effect." (R4, tab 69)

17. DO 0003, FY 07, was issued by the government on 30 January 2007 for a total quantity of 84,915,000 small caliber ammunition rounds in the amount of $77,665,731.62 (R4, tab 88). The purpose of the DO, as stated therein, was "To award FY 07 requirements in accordance with clause F-16, paragraph 3 of the Basic Ordering Agreement (BOA)..." (*id.* at 2 of 15). Block 16 of DO 0003 included the same "Acceptance" language above. The DO was signed on behalf of appellant by Mr. Gleason on 30 January 2007. (*Id.* at 1 of 15)

18. DO 0004, FY 08, was issued on 15 February 2008 for a total quantity of 21,021,120 rounds of small caliber ammunition in the amount of $20,522,073.50 (R4, tab 120). The purpose of the DO, as stated therein, was "To award FY 08 requirements in accordance with clause F-16, paragraph 3 of the Basic Ordering Agreement (BOA)..." (*id.* at 2 of 18). Block 16 of DO 0004 included the same "Acceptance" language above. The DO was signed on behalf of appellant by Kelly L. Jagr on 15 February 2008. (*Id.* at 1 of 18)

19. As far as this record shows, the government did not obtain competition before issuing these DOs, FAR 16.703(d)(1)(i) (SOF ¶ 8), nor did it seek or allow for any price negotiation with appellant prior to issuing the DOs.

20. By letter dated 13 February 2009, appellant filed a certified claim in the amount of $18,193,894 and requested a final decision based upon unanticipated costs associated with the government's orders in the out years (*e.g.*, DO 0002 and thereafter). Appellant claimed as follows:

> **This claim should be granted because, notwithstanding the fact that this was a requirements contract that covered**

> **a base year plus four options, the Government provided no estimates for projected quantities beyond the first year.** As a result, GD-OTS had no option but to base its proposal for all years on the projected quantities for the base year. After that initial contract year, however, the orders placed by the Government became dramatically different than the estimates provided in the Solicitation. This change in quantities caused a corresponding increase in the cost of contract performance for which GD-OTS is entitled to compensation.

(R4, tab 187 at 3) (Emphasis added)

21. After appellant filed this claim, it appears that the government issued DO 0005 dated 26 March 2009 for FY 09 requirements. The copy of DO 0005 in the record however is unsigned by the CO and appellant. (R4, tab 190) It is unclear to what extent there was performance under DO 0005.

22. By decision dated 29 May 2009, the CO denied appellant's claim in its entirety. The CO stated, among other things, that the award document of August 2005 was not a requirements contract but a BOA. (R4, tab 202) On 14 September 2009, appellant filed a revised claim in the amount of $17,242,899, and the revised claim was denied by CO decision dated 22 September 2009 (ASBCA No. 56957, corr. file). Appellant took appeals to this Board from both of these CO decisions and the appeals were consolidated.

DECISION

Summary judgment is properly granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. All reasonable inferences must be drawn in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

The government's motion calls for us to construe the parties' legal arrangement. The parties argue with equal vigor about the nature and effect of the documents they signed. In support of its motion for summary judgment, the government argues that the award document of August 2005 was a non-binding BOA, and it cites terms in the solicitation and in the purported BOA to support its position. Appellant argues that the award document of August 2005, even though "labeled" a BOA, was in effect a binding requirements contract and it cites terms in the solicitation to support its position. Appellant further contends that the government's wrongful estimates under this binding requirements contract caused it to incur unanticipated costs for which it should be reimbursed by the government.

There are fundamental differences between a requirements contract and a BOA. A requirements contract is a binding contract; a BOA is not. A requirements contract, as the name implies, creates a binding contractual obligation upon the government to order, and for the contractor to furnish the government's needs or requirements of a specific item or service for a specified period of time. FAR 16.503. *See Medart, Inc. v. Austin,* 967 F.2d 579, 581 (Fed. Cir. 1992); *Centurion Electronics Service*, ASBCA No. 51956, 03-1 BCA ¶ 32,097 at 158,658, *aff'd on recon.*, 03-2 BCA ¶ 32,262, *aff'd*, 95 Fed. Appx. 978 (Fed. Cir. 2004). On the other hand, a BOA is merely a mutual written understanding that provides for terms and conditions that will apply to future contracts between the parties. FAR 16.703. *See Modern Systems Technology Corp. v. United States*, 979 F.2d 200, 203-04 (Fed. Cir. 1992) (and authorities cited).

It is well settled that in contract interpretation disputes we seek to determine the intentions of the parties. At times, the intentions of the parties are manifest by the clear, plain language in the documents they sign, under which circumstances summary judgment may be appropriate. At other times, this language sends mixed or ambiguous messages that do not clearly reflect a readily evident interpretation or do not reflect an interpretation that the parties mutually intended. Under these circumstances we may consider extrinsic evidence, that is, evidence beyond the four corners of the disputed documents, to glean the intentions of the parties. Under these circumstances summary judgment is not appropriate. *See Skanska US Building, Inc.*, ASBCA No. 56339, 10-1 BCA ¶ 34,392 at 169,832-33 (and cases cited).

The draft solicitation here clearly provided for the award of a requirements contract. In the new solicitation the government deleted certain references to a requirements contract, identifying it as a BOA, but at the same time retained the clauses from the draft solicitation typically found in a requirements contract and not a BOA (SOF ¶ 6). It is undisputed that a BOA is not a contract and that under a BOA a contract is formed only to the extent the parties enter into subsequent delivery orders. However, the new solicitation and resulting award document of August 2005 did not so state, nor did they provide all the prescribed BOA clauses required by the FAR (SOF ¶ 8). While the award document stated throughout it was a "BOA," it also stated throughout it was a "contract," which is inconsistent with it being a BOA (SOF ¶ 14).

Appellant's pre-bid request for clarification and the government's response provided further confusion. The government advised appellant that 10 U.S.C. § 2304a authorized the government to enter into a five-year BOA, but that statute specifically refers to a task and delivery order "contract," which presumably includes variable quantity contracts such as a requirements contract, but not a BOA which is not a contract. The government also advised appellant that it did not plan to obtain competition before the issuance of each delivery order, which would be consistent with a requirements contract but would be inconsistent with a BOA. (SOF ¶ 12) On the other hand, appellant

signed and agreed to perform a number of delivery orders apparently without protest that stated that the delivery orders were issued under a BOA (SOF ¶¶ 16-18). The record contains no affidavits or declarations from those that signed the August 2005 award document or the delivery orders that could provide evidence of the parties' intentions.

Based upon the present state of the record, we are unable to determine whether the award document of August 2005 was a BOA or a requirements contract. Further evidence of the parties' contemporaneous interpretation will be necessary to assist the Board to make that decision. *See L-3 Services, Inc., Unidyne Division*, ASBCA Nos. 56304, 56335, 09-2 BCA ¶ 34,156 at 168,849. Accordingly, the government's motion for summary judgment on this ground must be denied. *See AshBritt, Inc.*, ASBCA Nos. 56145, 56250, 09-2 BCA ¶ 34,300 at 169,434: "When the meaning of a contract and the parties' intentions are both relevant and in dispute, there are mixed questions of fact and law that pose triable issues precluding summary judgment" (cases omitted).

Alternatively, the government contends that even if the parties' legal arrangement was in effect a requirements contract, the requirements contract allocated the risk of variations in mix to the contractor and thus the government is entitled to summary judgment. However, appellant assumes this risk only when the government's quantity estimates are not negligently prepared. *See Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328, 1335 (Fed. Cir. 2003); *Medart*, 967 F.2d at 581. We are not persuaded that under the contract the appellant assumed or accepted the risk of variations in mix if the government's estimates were negligently prepared or impermissibly omitted, nor did appellant's proposal, incorporated into the contract, assume or accept such a risk.

Appellant challenges the government's quantity estimates in these appeals. In discovery, the government has refused to disclose to appellant certain documents that were allegedly used by the government to help develop these estimates on the grounds that the disclosure would violate the Trade Secrets Act. The government's refusal to comply with a Board order requiring disclosure of this information limited to certain persons under limited circumstances, *see General Dynamics Ordnance and Tactical Systems, Inc.*, ASBCA Nos. 56870, 56957, 10-2 BCA ¶ 34,525, is the subject of a pending motion for sanctions by appellant which shall be separately addressed. For present purposes, we cannot accept the government's argument in support of its motion for summary judgment that appellant has failed to provide a "scintilla of evidence" (gov't surreply at 7) to support its allegations because the government has hampered appellant's efforts to adduce such evidence. Under these circumstances and drawing all reasonable inferences in favor of the non-moving party, we hold that there is a dispute of material fact on this issue, making summary judgment inappropriate.

We have considered all of the government's remaining contentions but are not persuaded that they entitle the government to judgment as matter of law. For reasons stated, the government's motion for summary judgment in these appeals is denied.

Dated: 26 May 2011

JACK DELMAN
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. 56870, 56957, Appeals of General Dynamics Ordnance and Tactical Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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