

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Paradigm II, LLC, d/b/a JB Carpet &) ASBCA No. 55849
Upholstery Care)
)
Under Contract No. W911RX-05-D-0013)

APPEARANCE FOR THE APPELLANT: Mr. James L. Bolden, Jr.
Managing Member

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
LTC Dana J. Chase, JA
MAJ Christine C. Fontenelle, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PAUL

This is a timely appeal of a contracting officer's (CO) final decision denying Paradigm II, LLC's (Paradigm) certified claim in an amount of \$128,952.80 for breach of contract damages, unrealized anticipated profit and unabsorbed overhead damages.¹ The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 is applicable. A hearing was held at the Board's offices which Paradigm's representative declined to attend, and each party filed a post-hearing brief. We deny the appeal.

FINDINGS OF FACT

1. On 25 April 2005, the Army awarded Contract No. W911RX-05-D-0013 to Paradigm in a total amount of \$319,783.83. The contract encompassed custodial services for 80 buildings at Fort Riley, Kansas. The performance period ran from 25 April 2005 through 30 September 2006. (R4, tab 3)

2. The solicitation stated, in pertinent part:

This is a multiple award contract and may be made to more than one quoter. This is also a requirements contract and delivery orders will be issued to the contractor who is

¹ In an opinion promulgated on 3 February 2009, 09-1 BCA ¶ 34,070, we denied the government's summary judgment motion. Familiarity with that decision is presumed.

available to perform custodial services at the time it [sic] is required.

(R4, tab 1 at 3)

3. Paradigm was one of three successful quoters; and accordingly, the Army awarded three separate contracts. The other contracts were awarded to AnjeLink and Quality First Cleaning. (R4, tab 3)

4. The solicitation and contract included FAR 52.216-18, ORDERING (OCT 1995) and FAR 52.216-19, ORDER LIMITATIONS (OCT 1995). The solicitation and contract also included FAR 52.216-21, REQUIREMENTS (OCT 1995) which provides, in part:

(a) This is a requirements contract for the supplies or services specified and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. Subject to any limitations in the Order Limitations clause or elsewhere in this contract, the Contractor shall furnish to the Government all supplies or services specified in the Schedule and called for by orders issued in accordance with the Ordering clause....

(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.

(R4, tab 1)

5. FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) was not incorporated into the contract (R4, tabs 1, 3 *passim*).

6. The nine-page Performance Work Statement (PWS) provided a detailed recitation of the required tasks and standard of workmanship required by the contract. It stated, in part:

1. DESCRIPTION OF SERVICES. The required work shall include the principal features listed below. The Contractor shall furnish all necessary management, personnel, materials, equipment, and transportation necessary to clean buildings identified in Technical Exhibit 1 (TE1) at Fort Riley, Kansas, in their entirety, in accordance with the terms and conditions specified herein. The Contractor shall plan, program, coordinate, estimate, and schedule resources to accomplish all cleaning services as specified.

....

3. ESTIMATED QUANTITIES: Estimated quantities are provided in Technical Exhibit 2 (TE2) and are for informational purposes only. It is highly advised that prospective bidders field verify all quantities when preparing their bids....

4. RATE OF PERFORMANCE: The rates of performance for each individual building are identified in TE1 and shall not exceed the specified calendar days....

5. SCHEDULE: A tentative schedule of start dates for when the work is to commence in each building is included in TE1. This is for informational purposes only, and may be adjusted either earlier or later depending on the completion of other ongoing work in these facilities.

(R4, tab 3 at 27, 32)

7. Estimated quantities were provided in a chart entitled Technical Exhibit 2 (TE 2). The contract did not contain a guaranteed minimum order provision. (R4, tab 3, *passim*)

8. By email dated 23 May 2005 to the government's contract administrator, Mr. Ron Seibel, Paradigm inquired as to when "work might get started." Appellant went on to state; "I do have workers standing by since I have a signed contract I need to know when will work get started...?" (R4, tab 9)

9. The next day Mr. Seibel responded, stating in part:

No Delivery Orders have yet been issued.... As discussed at the pre-performance conference...this is a "Requirements" type contract, which means that delivery orders are issued as requirements for the service arise.... Due to the nature of the contract, there is no "start date" for work except as established by Delivery Orders are [sic] they are issued.

There is no prescribed procedure for priority or sequence in contacting contractors about pending work orders, but...flexibility and ability of the contractor to do the work will be major factors.

(R4, tab 9)

10. By emails dated 21 July, 8 August, and 21 September 2005, similar correspondence took place between government personnel and appellant, with appellant asking whether there was a start date and reiterating that it stood ready to perform. The government responded that no new information was available and appellant would be contacted when there was need for its services. (R4, tabs 9-13)

11. By letter to appellant dated 18 November 2005, the contracting officer responded to appellant's 16 November 2005 email.² He stated, in pertinent part:

As you noted in your email, this is a requirements contract. Specifically, the contract is an IDIQ (Indefinite Delivery Indefinite Quantity) Requirements contract.

IDIQ contracts are governed by Federal Acquisition Regulation (FAR). Below is some general information from the FAR that describes and defines this type of contract.

....

By definition, the schedule and firm dates you request do not exist in this type of contract. Rather, as explained in Ron Seibel's email...delivery orders are issued as

² The November 2005 email is not in the record but it appears that this email was similar to earlier emails from appellant inquiring about when work would start.

requirements for the service arise. Due to the nature of the contract, there is no “start date” for work except as established by Delivery Orders as they are issued.

(R4, tab 14)

12. Between June 2005 and February 2006, the government issued 12 delivery orders: three to appellant (totaling \$5,042.25), nine to Quality (totaling approximately \$34,575), and none to AnjeLink. Appellant did not receive its first delivery order until 24 October 2005. (R4, tabs 5-7)

13. Mr. Sandy Walker, the chief of job order contracting in the Department of Public Works (DPW) at Fort Riley, gave extensive testimony at the hearing. He testified that the government estimated the cost of cleaning 80 buildings at Fort Riley at approximately \$320,000. This was based “on square footage of a facility, the type of facility, what the facility contained, and then the various cleaning needs, and that’s defined in the performance work statement...” (tr. 14). Mr. Walker explained the disparity between the Army’s pre-award estimates of \$320,000 and the amount of work actually awarded under the contract of \$39,617.25 in these terms:

We had this planned for all these buildings to be cleaned, but the war and the deployment, redeployment of our soldiers changed during that time frame, so we were unable to get in and clean facilities. Soldiers either did not deploy at the times we were given or soldiers returned early, and we were not able to get in and take care of the facilities, so we only cleaned about 11 or 12 of the 80 we had planned.

(*Id.* at 15-16)

14. Mr. Walker testified further that the Army’s intent was to rotate work through all three contractors because “with limited notification of when soldiers would return, I needed a contractor or vendor to start within a day or two of me [sic] requesting and be [sic] able to complete it within the allotted times I had set for the various facilities.” Accordingly, in June 2005, Mr. Walker made telephone calls to all three vendors and only one of them, Quality First, responded that it was ready to perform. Despite its prior representations that it was available for work and that it had employees waiting on standby, Paradigm declined several delivery orders in the time frame of June to July 2005. (Finding 10; tr. 16-18)³ Mr. Walker persisted, however, and subsequently issued three delivery orders to Paradigm (finding 12; tr. 20).

³ The third vendor, AnjeLink never accepted delivery orders (tr. 19).

15. On 15 December 2006, Paradigm filed a certified claim in a total amount of \$128,952.80 for anticipated profits (\$95,000) and for “inverted unabsorbed overhead damages” (\$33,952.80). Appellant asserted that the Army either negligently prepared its estimates or altered its requirements in bad faith. (R4, tab 16) The CO denied Paradigm’s claim in its entirety in a final decision dated 8 February 2007 (R4, tab 15); this timely appeal followed.

16. The Defense Contract Audit Agency (DCAA) subsequently conducted an audit of Paradigm’s claim. The auditor, Ms. Patricia Miller, questioned the entire amount of the claim for \$95,000 of anticipated profits. A summary of her report is stated below:

a. The contract was a “Requirements Contract” per FAR 52.216-21, which stated that “the quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.” Additionally, the contract stated that “this is a multiple award contract...and delivery orders will be issued to the contractor who is available to perform custodial services at the time it is required.”

b. Appellant could request a claim for profit under FAR 52.242-15 (Stop Work Order), FAR 52.243 (Changes Clause) and FAR 52.236-2 (Differing Site Conditions). Since none of the available FAR clauses for recovery of profit was the basis of appellant’s claim, the claim for profit in the amount of \$95,000 was not in compliance with FAR Part 52.

(Supp. R4, tab 17 at 7)

17. The remainder of Paradigm’s claim sought “inverted unabsorbed overhead damages” in the amount of \$33,953. As a basis for this claim, Paradigm contended that, as a result of a lack of delivery orders under the instant contract, it endured a lengthy, unanticipated downtime period during which its employees had to remain on standby and could not secure similar replacement work. (R4, tab 16)

18. DCAA questioned the entire amount of this claim. The auditor’s findings are summarized below:

a. Appellant fails to meet the criteria for recovery of unabsorbed overhead changes as outlined in *West v. All State Boiler*, 146 F.3d 1368 (Fed. Cir. 1998).

b. Delay/suspension was Government caused. Since the contract specifically states that the quantities of services are only estimates, the delay/suspension was not government caused and therefore, the contractor does not meet this requirement for recovery of unabsorbed overhead damages. Additionally, appellant could not provide any other documentation that the government caused a delay or suspension.

c. The government required the contractor to standby during the delay/suspension period and it was impractical for the contractor to take on other work. The contract contains no provision requiring contractors to remain on standby during the period of performance. A review of appellant's Sales by Customer Summary report for FY 2005 through 2006 revealed that appellant was able to and did continue to actively bid and obtain additional work during the claimed "standby" period of the contract.

d. It was impractical for the contractor to take on other work. A discussion with appellant on 2 May 2011 also revealed that the contractor owner, Mr. Bolden, is the only permanent employee of Paradigm. Mr. Bolden stated that if Paradigm had been summoned to fulfill the contract requirements during FY 2005 through 2006, Paradigm would have obtained temporary employees through a call list and the Topeka Workforce Center. Once the contract requirements were complete, the employees would be laid off.

e. When requested, appellant could not provide any documentation from the government stating that appellant was required to remain on standby.

f. The delay/suspension caused the contractor to be unable to complete the contract within the original contract period of performance. Appellant was requested and did perform services of \$5,042.00 within the original contract period of performance and therefore does not meet this requirement for entitlement for the recovery of unabsorbed overhead damages.

(Supp. R4, tab 17 at 4-6)

19. Ms. Miller also testified that Paradigm's financial documents demonstrated that it did perform other work during the term of the instant contract. Because Paradigm's sales records were consistent for the years 2004, 2005, and 2006, the auditor concluded that the instant contract had no bearing on its overhead which was absorbed by the other work which Paradigm performed. (Tr. 40-47)

20. With respect to Paradigm's contention that its employees were on standby during the performance period of the Fort Riley contract, Ms. Miller testified that it did not pay employees to standby because its only permanent employee was Mr. Bolden, its managing member (tr. 47).

DECISION

Regardless of the manner in which the parties' contract is characterized, Paradigm is not entitled to recover on its claim. In order to prevail, appellant must demonstrate that, throughout the contractual period, it was ready, willing, and able to perform according to the contract's PWS. Despite its representations that it was available for work, Paradigm declined several delivery orders during the life of the contract (finding 14). Moreover, Paradigm cannot assert that its employees were on standby because it had no permanent employees other than Mr. Bolden (finding 20).

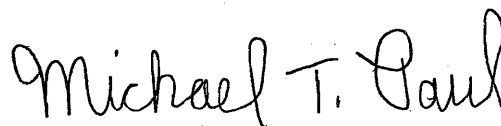
We are also unpersuaded that the Army prepared its work estimates negligently. As our appellate court held in *Medart v. Austin*, 967 F.2d 579, 581-82 (Fed. Cir. 1992), a mere disparity between a contract's estimate of work and the total amount of work subsequently awarded is not sufficient, by itself, to establish negligence. Here, as Mr. Walker testified credibly, the vagaries of the Iraq war, specifically the deployment and redeployment of large numbers of troops, caused the Army's estimates to be inaccurate (finding 13). Under these circumstances, we cannot hold that the Army was negligent. Accordingly, Paradigm's claim for lost profits is denied.

Paradigm's claim for unabsorbed overhead must also fail. First, it consistently performed other work during the contractual period (finding 19). In addition, Paradigm had no permanent employees other than Mr. Bolden. Thus, it could not have paid any employee to remain on standby status (finding 20).

CONCLUSION

The appeal is denied.

Dated: 8 June 2012



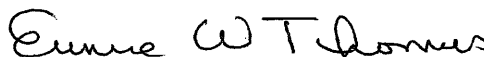
MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55849, Appeal of Paradigm II, LLC, d/b/a JB Carpet & Upholstery Care, rendered in conformance with the Board's Charter.

Dated:

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