

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Intermark Managed Services, Inc.) ASBCA Nos. 57654, 57655
)
Under Contract No. W911SE-08-D-0016)

APPEARANCES FOR THE APPELLANT: Eric W. Leonard, Esq.
Jon W. Burd, Esq.
Tracye Winfrey Howard, Esq.
William Novak, Esq.
Wiley Rein LLP
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
LTC Dana J. Chase, JA
LTC Mark A. Ries, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON
THE GOVERNMENT'S MOTIONS TO DISMISS

The Department of Army (government) has filed two motions to dismiss these appeals for lack of jurisdiction. In the first motion the government contends that Intermark Managed Services, Inc. (Intermark or appellant) is a subcontractor with whom the government has no privity of contract. In the second motion, the government reiterates that appellant lacks standing to bring these appeals, and also contends that appellant failed to provide a signed claim certification on its claim for wage rate adjustment under ASBCA No. 57655.

Appellant filed in opposition to the government's motions. At appellant's request, we held an evidentiary hearing on the government's motions and the parties filed briefs.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On or about 27 August 2007, the government issued a solicitation for a requirements-type contract to provide food services at dining facilities at Fort Rucker, Alabama. The solicitation provided in pertinent part as follows:

7. NOTICE OF APPLICABILITY OF RANDOLPH-SHEPPARD ACT

All offerors are hereby advised that this solicitation is subject to the exercise of certain Defense preference policies regarding the Randolph-Sheppard Act (20 U.S.C. 107) as related to offerors of military food services. Present DoD and Army policy interpreting the Randolph-Sheppard Act applies a selection preference to qualified nominees of State Licensing Agencies (SLA) for the Blind who represent clients seeking Defense contracts for so-called "military cafeteria-style food operations."

This notice is not designed to discourage competition from any small business offerors interested in this requirement. Rather, it merely represents notice regarding a mandatory preference for Randolph-Sheppard Act State Licensing Agencies in the event that an offer from such source is received.

The solicitation is 100% set-aside for small business concerns, but also permits the State Licensing Agency (SLA), which is not considered a small business concern, to participate in the procurement. The exercise of certain preference policies regarding the Randolph-Sheppard Act (RSA) remains. The preference embodied in the RSA takes precedence over small business preferences. Therefore, if the SLA's proposal satisfies the technical requirements, in accordance with the Randolph-Sheppard Act, the Government will hold direct negotiations with the SLA. Application of the SLA preference may result in an award to other than the highest rated and/or lowest priced proposal. The SLA will be required to provide a subcontracting plan to afford small business an opportunity to perform aspects of the requirement.

The Government intends to award a contract without conducting discussions. The Government, however, reserves the right to conduct discussions if deemed in its best interest. Discussions, if necessary with SLA will be conducted in accordance with the Randolph Sheppard Act and/or FAR 52.212-1. Communication conducted to resolve minor or clerical errors does not constitute discussions.

(R4, tab 1 at 4)

2. For purposes of this solicitation, the State Licensing Agency for the Blind (SLA) under the Randolph-Sheppard Act was the “Alabama Department of Rehabilitation Services – Business Enterprise Program” (ADRS). The licensed blind vendor selected by ADRS was James E. Waldie, d/b/a J & K Waldie, LLC (Waldie). In November 2007, Waldie entered into an agreement with Intermark, forming the joint venture known as “Southern Alabama Food Services” (SAFS)¹, whose purpose was to provide cafeteria and related food services at Fort Rucker. (Joint ex. 3)

3. Paragraph 17.2 of the joint venture agreement outlined Intermark’s “Areas of Responsibility,” including the following:

- a. Perform overall management and operational decision-making for the Joint Venture.
- b. Accomplish all official written and verbal communications on behalf of the Joint Venture, to include all financial documents.

....

- g. Perform operational management, including, but not limited to, compliance with the technical requirements, discharge of administrative duties, legal and regulatory requirements and interpretations.

(Joint ex. 3 at 4)

4. ADRS, as the SLA, submitted a proposal on this solicitation on or about 26 September 2007. It appears that this proposal was prepared by Intermark in accordance with a Management Services Agreement with ADRS. (Joint exs. 1, 2) The government awarded this contract to ADRS on 28 February 2008 for a base year starting on or about 1 April 2008 and four, one-year option periods. The contract incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (FEB 2007), which incorporated by reference the Disputes clause, FAR 52.233-1, in subsection (d). (R4, tab 1 at 1, 3, 35)

5. On 19 March 2008, ADRS submitted a letter to the government from Steve Shivers, Commissioner, noting that ADRS had been awarded the contract in its

¹ While the subject agreement identifies the joint venture as “Southern Alabama Food Services,” almost all of the documents of record refer to the joint venture as “Southern Alabama Food Service,” and we shall use the latter name for purpose of these appeals.

capacity as SLA under the Randolph-Sheppard Act, but that “[t]his contract will be performed on behalf of ADRS-BEP by Southern Alabama Food Service.” The letter further stated:

Accordingly, ADRS-BEP hereby delegates to Southern Alabama Food Service *all the rights, authority, and responsibility of ADRS-BEP with respect to the referenced contract, including but not limited to:*

1. Execution of delivery orders, contract modifications, and any other document required or necessary for contract administration or performance;

....

5. Performance of any requirement of the referenced contract;

6. *Appeal in the name of ADRS-BEP from decisions of the Contracting Officer under the Disputes clause of said contract;*

7. *The taking of any action with respect to the contract which could have been taken directly by ADRS-BEP.*

(Joint ex. 4) (Emphasis added)

6. Thereafter, the government issued Modification No. P00001 (P00001), effective 1 May 2008, which implemented the ADRS letter above. The government and ADRS signed this modification. Block 14 of P00001 stated as follows:

Reason: To establish a Tripartite Agreement to recognize the assignment of all rights, authority and responsibility for this contract as requested by Alabama Department of Rehabilitation Services – Business Enterprise Program (ADRS-BEP) letter dated March 19, 2008 [SOF ¶ 5] signed by Steve Shivers, Commissioner.

(Joint ex. 5)

7. Page 2 of P00001 contained a paragraph entitled “TRIPARTITE AGREEMENT” dated 28 April 2008 that was executed by the government and SAFS.

The Tripartite Agreement, *inter alia*, identified SAFS as a contracting party with the government under this contract, stating in pertinent part as follows:

Full Food Service contract W911SE-08-D-0016 is between the Alabama Department of Rehabilitation Services, Business Enterprise Program (ADRS-BEP), a small business Joint Venture, Southern Alabama Food Service, comprised of Intermark, Inc. and James Waldie, an individual, and the United States Army. Southern Alabama Food Services [sic] will perform the contract on behalf of ADRS-BEP. The ADRS-BEP has delegated to [SAFS] all rights, authority, and responsibility of the ADRS. This includes execution of contract modifications or other documents required or necessary for contract administration or performance,...performance of any requirement of the referenced contract, appeal in the name of the ADRS from decisions of the Contracting Officer under the Disputes clause of the contract; and the taking of any action with respect to the contract that which [sic] could have been taken directly by the ADRS-BEP. The offer [sic]/subcontractor agrees and acknowledges that it will, for and on behalf of the Small Business Administration (SBA), fulfill and perform all of the requirements of the contract. The offeror/subcontractor agrees that it will not subcontract the performance of any of the requirements of this subcontract to any lower tier subcontractor without the prior written approvals of the SBA and the cognizant Contracting Officer....

(Joint ex. 5 at 2 of 3) (Emphasis added) The Tripartite Agreement was signed on behalf of SAFS by both joint venture members, Waldie and Intermark, and also by the contracting officer (CO) (*id.* at 3 of 3).

8. Two days later, the Army issued unilateral Modification No. P00002 (P00002). Block 14 of P00002 provided as follows:

Reason: In accordance with the Tripartite Agreement executed in modification P00001 this modification reassigns all rights, responsibilitys [sic] and authority under this contract from the Alabama Department of Rehabilitation Services, Cage code ITTP8 to Southern Alabama Food Service, Cage code 50YU7.

(Joint ex. 6) (Emphasis added) Block 8 of P00002 identified the name of the "CONTRACTOR" as "Southern Alabama Food Service" (*id.*).

9. On 17 December 2010 and 8 February 2011 Intermark submitted claims to the CO, stating therein that these claims were submitted on behalf of SAFS (R4, tab 42 at 1, tab 53 at 1). The earlier claim sought a monetary adjustment in the amount of \$433,194.73, for the government's failure to incorporate the latest Collective Bargaining Agreement Addendum, effective 1 October 2007, into the solicitation. The CO issued a decision on 21 April 2011 granting this claim in part (R4, tab 58). The later claim sought \$1,315,022.94 for negligently prepared estimates for weekend meal services; the CO denied this claim on 12 April 2011 (R4, tab 56).

10. On 16 June 2011, Intermark timely filed a notice of appeal (NOA) from both CO decisions. Insofar as pertinent, the NOA provided as follows:

Pursuant to Board Rules 1 and 2, Intermark Managed Services, Inc., *on behalf of Southern Alabama Food Service*, appeals two final decisions of contracting officer....
[Footnote omitted]

(Bd. corr. file) (Emphasis added) The Board issued its notice of docketing of the appeals on 16 June 2011. The "negligent estimate" appeal was assigned ASBCA No. 57654. The "wage rate adjustment" appeal was assigned ASBCA No. 57655. The Board captioned each appeal in the name of "Intermark Managed Services, Inc." (Bd. corr. file).

Certification of Claim dated 17 December 2010

11. With respect to appellant's claim for wage rate adjustment dated 17 December 2010, appellant's counsel provided a declaration to the Board under penalty of perjury that the claim package contained a signed certification page and that the signed certification page was included in the claim package for delivery to the CO. Counsel declared: "I carefully reviewed each page of the Certified Claim package to be submitted, including the signed certification page and each exhibit, and confirmed that the package was complete (i.e. included the Certified Claim, signed certification from Ms. O'Connor and exhibits to the Certified Claim)." According to counsel, the certified claim was then handed off to a legal assistant under his supervision who made copies and who dispatched the certified claim for delivery to the CO via UPS. (Joint ex. 22, ¶¶ 4, 5, 6) The claim package contained several hundred pages, including exhibits. The signed, certified claim is of record (joint ex. 14).

12. When the CO received this claim, she did not review the claim to determine whether it contained a signed certification (tr. 10). She also did not check for a signed claim certification when she prepared the CO's final decision (tr. 13), nor did she check for a signed claim certification when she assembled the Rule 4 file (tr. 16). When

preparing the Rule 4 file, the CO opened the claim binder to make a copy of the claim and copied one section at a time. She would take out one section, copy it in its entirety, and then put it back in the claim binder. (Tr. 15-6, 48-9) In following this procedure, she failed to include Exhibit 4 from the claim in the Rule 4 file (tr. 38). A signed claim certification was also not included in the Rule 4 file.

13. According to the CO, she first noticed the absence of a signed claim certification when she was preparing documents for a DCAA audit, roughly eight months after she received the claim (tr. 16, 17, 44). She then mentioned this matter to counsel, who subsequently filed the subject motion.

14. The record reflects that during the claim review period, the CO repeatedly referred to appellant's claim as a "certified claim." By letter to appellant dated 2 February 2011, the CO stated she was extending the period to issue a CO decision on appellant's "Certified Claim submitted under the Contract Disputes Act" (joint ex. 15 at 2). By email dated 20 April 2011, the CO advised appellant that the "certified claim...is in legal review" (joint ex. 16). As far as the record shows, the government attorney who performed this legal review did not raise any question with respect to the lack of a signed claim certification.

15. The contract specialist's cover letter enclosing the CO's decision to appellant on 21 April 2011 also referenced appellant's "Certified Claim" (joint ex. 17). The CO's decision, dated 21 April 2011, referred to appellant's claim certification twice in the first sentence of the decision:

On December 17, 2010, Southern Alabama Food Service, Intermark, Inc. submitted a *certified Claim* for \$433,194.733 under the Contract Disputes Act *certifying* its entitled to a unit price adjustment....

(*Id.*) (Emphasis added)

16. The CO also prepared an internal Memorandum For Record (MFR) dated 28 April 2011, after issuance of the CO decision. The MFR provided, in pertinent part, as follows:

MEMORANDUM FOR RECORD

SUBJECT: Full Food Services *Certified Claim* Final Decision

On December 17, 2010, Southern Alabama Food Service, Intermark, Inc. *submitted a certified Claim* for \$433,194.73

under the Contract Disputes Act *certifying* its entitled to a unit price adjustment on all Base Year and Option Year CLINs in accordance with FAR Clause 52.243-7....

(Joint ex. 19 at 1) (Emphasis added)

17. According to the CO, she referred to appellant's claim as a "Certified Claim" in all the above instances only because appellant's claim so indicated on the claim binder and on the first page of the claim (tr. 13).

DECISION

The government asserts two legal bases to support its motions to dismiss for lack of jurisdiction: (1) appellant lacked "standing" to bring the appeals and therefore both appeals must be dismissed; and (2) alternatively, appellant failed to submit to the CO a signed certification of the wage rate claim, and therefore ASBCA No. 57655 must be dismissed. We address the government's contentions below.

I. Whether Appellant Has Standing to Appeal (ASBCA Nos. 57654 and 57655)

The government contends that the joint venture's authority to file these appeals was limited by the language of the 19 March 2008 ADRS letter as implemented in the Tripartite Agreement of 28 April 2008 under P00001, which authorized the joint venture to file appeals "in the name of the ADRS" (SOF ¶¶ 5, 7). According to the government, appellant failed to appeal "in the name of the ADRS" and thus we are without jurisdiction over the appeals.

We disagree with the government's narrow interpretation of these key documents. Based upon our reading of the ADRS delegation letter of 19 March 2008, and contract modifications P00001 and P00002 it is clear that ADRS assigned all of its rights, authority and responsibility under the contract to the joint venture, SAFS, including "*the taking of any action with respect to the contract that which [sic] could have been taken directly by the ADRS-BEP*" (SOF ¶ 7). Plainly, this broad language constituted a full and complete delegation of all of ADRS' contract rights to the joint venture, including the filing of appeals under the CDA. The language relied upon by the government did not limit the authority of the joint venture to file appeals. Rather, the aforementioned documents, when read as a whole, authorized the joint venture, SAFS, to file appeals as fully as ADRS could have filed appeals as the original contractor. Such appeals were filed here.

Indeed, the CO expressly made SAFS a party to the contract under P00001 and P00002 (SOF ¶¶ 7, 8). As such, it became a "contractor" in privity with the government – with all the appeal rights of a contractor – under the Contract Disputes Act (CDA),

41 U.S.C. §§ 7101-7109. The Act defines “contractor” as “a party to a Federal Government contract other than the Federal Government.” 41 U.S.C. § 7101(7). Under the contract as modified, SAFS was such a contractor. That SAFS is also alluded to as a “subcontractor” in the Tripartite Agreement does not change this fact.

Intermark, as co-joint venturer, appealed upon behalf of SAFS. We believe that the joint venture agreement provides Intermark with sufficient authority to do so (SOF ¶ 3). The government contends, however, that Intermark appealed in its “own right” or in its “own name.” The government is not correct. Clearly, the NOA states that the appeals were filed by “Intermark Managed Services, Inc., *on behalf of Southern Alabama Food Service*” (the joint venture) (SOF ¶ 10). There is no requirement that each joint venturer sign the NOA.

Intermark’s failure to reference the name of the joint venture in the caption of the NOA was not an omission of jurisdictional significance, nor was the Board’s failure to docket the appeals in the name of the joint venture. The latter action was merely administrative in nature and may be corrected.²

For reasons stated, we conclude that the joint venture, SAFS, was and is a “contractor” for purposes of the CDA, and that Intermark lawfully appealed these CO decisions on behalf of SAFS under the CDA. The government’s motion to dismiss these appeals due to appellant’s purported lack of standing is denied.

II. Whether Appellant Provided a Signed Certified Claim (ASBCA No. 57655)

A contractor’s claim exceeding \$100,000 must be certified to the CO, 41 U.S.C. § 7103(b). This is a prerequisite to our jurisdiction. *Weststar Engineering, Inc.*, ASBCA No. 52484, 02-1 BCA ¶ 31,759 at 156,851. A contractor’s failure to sign a certification renders the certification ineffective. *Sygnetics, Inc.*, ASBCA No. 56806, 10-2 BCA ¶ 34,576 (collecting cases).

A “certified claim” is one that is certified and signed. The record shows that the government’s contemporaneous writings repeatedly refer to appellant’s claim as a “certified claim” (SOF ¶¶ 14-16). We understand this to mean that the claim included a signed claim certification. We do not find persuasive the CO’s trial explanation otherwise. *See Fareast Service Co.*, ASBCA No. 50570 *et al.*, 97-2 BCA ¶ 29,279 at 145,682: “The ‘actions and conduct before the inception of a controversy is of much greater weight than what [the parties] said or did after a dispute arose.’ *Fincke v. United States*, 675 F.2d 289, 295 (Ct. Cl. 1982).”

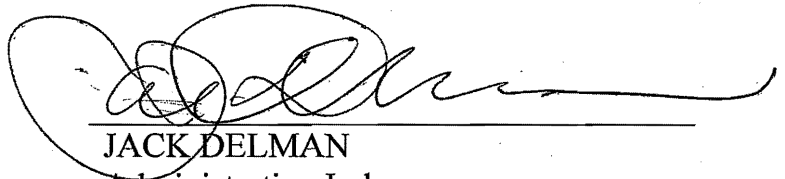
² The ASBCA Recorder is hereby directed to change the caption of these appeals to:
Southern Alabama Food Service (Joint Venture).

Having duly considered counsel's declaration to the Board (SOF ¶ 11) and all the evidence of record, we conclude that appellant's claim of 17 December 2010 was submitted by appellant to the government as a signed, certified claim as required by the CDA. We need not explore the circumstances surrounding the loss or disappearance of the signed certification.

CONCLUSION

For reasons stated, both of the government's motions to dismiss these appeals for lack of jurisdiction are denied.

Dated: 22 June 2012



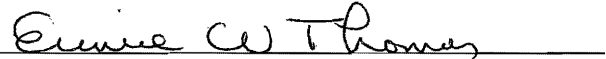
JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



MARK N. STEMPLER
Administrative Judge
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 Nos. 57654, 57655, Appeals of Intermark Managed Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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