ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Impact Associates, Inc.	)	ASBCA No. 57617
	)	
Under Contract No. GS-23F-0061M	)	
Delivery Order No. W912DR-05-F-0317	)	

APPEARANCES FOR THE APPELLANT: Andrew K. Wible, Esq.
William F. Savarino, Esq.
Cohen Mohr LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
William Selinsky, Esq.
Assistant District Counsel
U.S. Army Engineer District,
Baltimore

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON JURISDICTION

This appeal arises from the contracting officer's (CO) 31 March 2011 denial of Impact Associates, Inc.'s (Impact) 6 August 2010, certified, $197,552.46 claim under U.S. Army Corps of Engineers (USACE) Delivery Order No. W912DR-05-F-0317 (DO 317), awarded under General Services Administration (GSA) Federal Supply Schedule (FSS) Contract No. GS-23F-0061M. Impact alleged that in 2009 the CO directed Impact to make several changes to DO 317, constituting a "cardinal change (breach)."

STATEMENT OF FACTS (SOF)

1. GSA and Impact entered into Contract No. GS-23F-0061M (FSS contract) on 3 January 2002 for Special Item No. (SIN) 738-3, "Trade Shows/Exhibits and Conference and Events Planning Services" (R4, tab 29 at 1-2).

2. On 6 May 2005 Modification No. PO-04 added the following no-cost task order clause to the FSS contract:

> The Contractor may choose to provide for all services as required by the task order at no cost to the Government.

> The Contractor is entitled to all of the registration, exhibition, sponsorship and/or other fees collected as payment for performance under the task order if there is no cost to the Government. In this case, the Contractor is liable for all costs related to the performance of the task order as defined in the task order and the government's liability for payment of services under this task order is "zero." For Industrial Funding Fee calculation and Sales Reporting...the value of the task order is determined by the amount of the registration, exhibition, sponsorship and/or other fees collected under the task order. The Contractor shall provide an accounting of expenses and revenues when requested by the government agency issuing the task order.

(R4, tab 36 at 1)

3. As amended prior to 2 September 2005 the FSS contract included, *inter alia*, the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS clause, which included (c), Changes, and (q) Other compliances, which stated: "The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract" (R4, tab 53 at 8) and the GSA 552.203-71, RESTRICTION ON ADVERTISING (SEP 1999) clause, which forbade the contractor's advertising to state or imply that its services were endorsed or preferred by any element of the federal government, and required such advertising to state: "This advertisement is neither paid for nor sponsored, in whole or in part, by any element of the United States Government" (R4, tab 32 at 29).

4. At some point GSA apparently modified the FSS contract to include the FAR 52.203-13 CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (DEC 2008) clause, whose ¶ (d) required the contractor to "(i) Exercise due diligence to prevent and detect criminal conduct; and (ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law" (R4, tab 4 at 4-5).

5. Effective 2 September 2005 the USACE, Baltimore District, awarded DO 317 to Impact under the FSS contract for technical assistance and support to plan, organize and conduct the "UNEXPLODED ORDNANCE (UXO)/COUNTERMINE FORUM 2006." The amount of the DO was $0.00. DO 317 included option items for the UXO Forum for 2007 through 2010 also at an amount of $0.00 and the no-cost task order clause set forth above. DO 317 also included the following Statement of Work (SOW) provisions, *inter alia*:

> C.3.1.13 The contractor shall be financially responsible for all obligations, assessments, and attendant fees for this conference.... The United States Government will not be liable for any aspect of DoD or AEC's [Army Environmental Center] involvement with the conference and the contractor shall receive no appropriated funds from DoD or AEC for providing any support hereunder or for any other aspect of conducting the conference. The Government reserves the right to change the nature or extent of its involvement, reduce the level of participation, or even withdraw from the conference, and DoD, AEC, its officers or employees shall not be liable to the contractor.... The contractor may not claim against the government or its employees for any costs or other damages that the contractor might incur by government required changes, reduction in participation or withdrawal.
>
> ....
>
> C.3.1.13.2 The contractor shall require a registration fee for all conference attendees and require a [sic] exhibition fee for all exhibitors. The contractor shall retain all funds collected for repayment of all expenses incurred. Budgeting of conference activities and the conference fee structure shall be determined by the contractor.
>
> C.3.1.13.3 Nothing in this contract shall obligate the US Government to expend appropriated funds.

(R4, tab 2 at 1, 5-6)

6. Bilateral Modification No. P00002 (Mod. 2) to DO 317, signed by USACE CO Jeffrey May and Impact's President Kathleen G. Metts on 19 September 2008, exercised the UXO Forum 2009 option and changed the government's technically responsible office from the AEC to the Office of the Assistant Secretary of the Army, Installations and Environment (OASA(I&E)) (R4, tab 2 at 8, tab 7 at 1, 3-5).

7. Impact's plans for the UXO Forum 2009 included obtaining commercial sponsors. As Ms. Metts explained to OASA(I&E), there would be federal activity sponsors and "Impact works...to secure commercial sponsors that meet your approval and are consistent with [DoD] ethics, policy and programmatic needs." (App. mot., ex. G)

8. On 24 or 28 April 2009 USACE attorney Stephen A. Douglas and CO May spoke with Ms. Metts about their concern that "sponsorship...created the perception/appearance of 'access' for sponsorship" (R4, tab 13; May decl. ¶¶ 3-4).

9. Pursuant to "guidance" received from the Army's Office of General Counsel, CO May's 8 June 2009 letter to Impact directed the following actions:

> 1. Corporate sponsorships in all forms must be eliminated as an additional funding source for the conference, and as any indication this is a joint Army and corporate conference.
>
> 2. Special billing for advertising of corporate logos on events or publications must be eliminated because of the appearance of endorsement by DoD, and use by corporate attendees of the conference or agencies' logos must be eliminated.
>
> 3. Contractors or nonfederal personnel cannot be entitled to "special access" to events or DoD personnel based on funding...or contributions provided.
>
> ....
>
> 8. No other special treatment is permitted that would create even the appearance of preferential treatment.
>
> ....
>
> Please respond to this letter...by...June 18, 2009.... I invite you to identify the effects these instructions have on your ability to organize the conference, and to notify me if you feel this constitutes a change to the contract....

(R4, tab 14 at 3-4)

10. In response to Impact's 8-9 June 2009 inquiries, on 12 June 2009 CO May identified the authorities underlying his 8 June 2009 directions as including 5 U.S.C. (Appx. 4), § 101 *et seq.*, 5 C.F.R. Part 2635, and DoD 5500.7-R, Joint Ethics Regulations (JER), Chapters 2 and 3 (R4, tabs 15, 17, 18).

11. Impact's 25 June 2009 and 13, 17 and 20 July 2009 letters to CO May described the consequences for Impact of his 8 June 2009 directions, reserved its rights to file a claim under applicable law and confirmed its oral statements that Impact considered his directions as "changes to our contract" (R4, tabs 20, 24-26).

12. On 6 August 2010 Impact submitted to CO May a certified claim for $197,552.46, including $168,950 in lost sponsorship revenue, due to CO May's 8 June 2009 directions. Impact alleged that the "Army threatened Impact with withdrawing from the UXO conference entirely if Impact did not accept the Army's changes." Impact alleged that, based on the no-cost task order clause in the FSS and DO 317, and DO 317's SOW ¶ C.3.1.13.2, CO May's directions were a "Cardinal Change (Breach)" or unilateral contract change. (R4, tab 28 at 1, 3, 5, ex. 4 at 3, ex. 5 at 3)

13. CO May's 31 March 2011 decision stated that he issued his 8 June 2009 directions to Impact pursuant to "Base Contract [i.e., GSA FAA contract] FAR clause 52.214-4." He found that FAR 52.212-4(q) required Impact to comply with all applicable federal regulations, including DoD Joint Ethics Regulations, ¶ 3-206, which "does not allow for co-sponsorships of non-Governmental entities of DoD sponsored conferences except in two circumstances, neither of which is applicable here" and that Impact had "violated the plain instructions" of GSA clause 552.203-71. CO May also cited and referred to the provisions of DO 317 such as those set forth above in SOF ¶ 5. Therefore, CO May denied Impact's claim in its entirety. (R4, tab 1 at 11-13)

14. Impact's complaint in ASBCA No. 57617 alleged that DO 317 was a no-cost contract (compl. ¶ 7). Respondent's answer stated that the CO's 8 June 2009 directions to Impact were "to bring its performance into compliance with the contract clauses, ethics rules and fiscal laws applicable to the contract" and relied on the FSS contract's no-cost task order clause, FAR 52.203-13, 52.212-4(q) and GSA 552.203-71 clauses, DoD Joint Ethics Regulation ¶ 3-206, and various provisions of DO 317 (gov't answer ¶¶ 7, 13e, 15, PART II ¶¶ (d)-(i), (n), (o)).

15. On 5 September 2012 the Board requested, and on 12 and 26 October 2012 the parties submitted, supplemental briefs on the Board's jurisdiction to adjudicate this appeal in accordance with FAR 8.406-6. After receipt of the 22 February 2013 decision of the U.S. Court of Appeals for the Federal Circuit in *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013), the Board requested further briefs, which the parties submitted on 12 and 15 March 2013. Impact maintains that the Board has jurisdiction. The government argues that the Board should dismiss the appeal.

16. FAR Subpart 8.4, FEDERAL SUPPLY SCHEDULES, issued effective 19 July 2004, prescribes in pertinent part:

8.406-6 Disputes.

(a) Disputes pertaining to the performance of orders under a schedule contract. (1) Under the Disputes clause of the schedule contract, the ordering activity contracting officer may—

(i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or

(ii) Refer the dispute to the schedule contracting officer.

(2) The ordering activity contracting officer shall notify the schedule contracting officer promptly of any final decision.

(b) Disputes pertaining to the terms and conditions of schedule contracts. The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

(c) Appeals. Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

DECISION

Sharp Electronics Corp. v. McHugh, 707 F.3d 1367 (Fed. Cir. 2013) is the first Federal Circuit interpretation of FAR 8.406-6 regarding the respective authorities of GSA schedule COs and ordering agency COs – and hence the ASBCA on appeal – to decide disputes under agency orders issued under an FSS contract. In *Sharp*, the Army issued a delivery order to Sharp to lease copier equipment in accordance with Sharp's GSA schedule contract. The order provided for a base year and three option years. The Army exercised the first two option years. The Army "partially" exercised option year three for six months and the parties extended the lease for three more months. Sharp filed a claim with the ordering CO alleging that the Army's failure to fully exercise option year three was a "premature cancellation" entitling Sharp to fees under the termination provisions of its schedule contract, and appealed to the ASBCA on the basis of a deemed denial. The ASBCA dismissed the appeal for lack of jurisdiction on the ground that FAR 8.406-6 did

not permit an agency CO to decide disputes pertaining to the terms and conditions of schedule contracts. The Federal Circuit affirmed the ASBCA, holding that:

> FAR 8.406-6 does not authorize an ordering CO to decide a dispute requiring interpretation of schedule contract provisions, in whole or in part, regardless of whether the parties frame the dispute as pertaining to performance. However, the ordering CO is certainly authorized to construe the language of the order (or its modifications). Because an order's details—not merely price, quantity, and specifications, but also permissible variation in quality or quantity, hours and location of delivery, discounts from schedule pricing, etc.—are arranged between the schedule contractor and the ordering CO, the ordering CO is able to construe these commonly disputed terms as long as the dispute does not involve interpretation of the schedule contract. We also see no reason why an ordering CO resolving a dispute cannot apply the relevant provisions of the schedule contract, as long as their meaning is undisputed. For example, an ordering CO who resolves a dispute over whether goods are conforming may apply schedule contract provisions governing replacement of nonconforming goods. See FAR 8.406-3(a) (2012) ("If a [schedule] contractor delivers a supply or service, but it does not conform to the order requirements, the ordering [CO] shall take appropriate action in accordance with the inspection and acceptance clause of the contract, as supplemented by the order.") The dispute only need go to the GSA CO if it requires interpretation of the schedule contract's terms and provisions. [Footnotes omitted.]

707 F.3d at 1374.

Pursuant to the foregoing criteria, we must determine whether this dispute requires interpretation of schedule contract provisions, in whole or in part. Impact's claim interpreted the FSS contract's no-cost task order clause to entitle it to "all of the registration, exhibition, sponsorship and/or other fees collected as payment for" task order DO 314 performance (SOF ¶¶ 2, 12). The CO interpreted the FSS contract's FAR 52.212-4(q) clause to justify his 8 June 2009 directions that Impact comply with all applicable federal regulations, including the DoD Joint Ethics Regulations, ¶ 3-206, and he decided that Impact had violated GSA clause 552.203-71 (SOF ¶ 13). Impact's claim and complaint relied upon the no-cost clause in the FSS contract and DO 317. Respondent's answer reiterated its reliance on the FSS no-cost task order clause and

FAR 52.203-13, 52.212-4(q) and GSA 552.203.71 clauses as valid grounds for the CO's 8 June 2009 directions. (SOF ¶¶ 12, 14)

The parties plainly dispute the meaning of the FSS contract's no-cost task order clause, FAR 52.203-13, 52-212-4(q) and GSA 552.203-71, as well as the DoD Joint Ethics Regulations, ¶ 3-206, allegedly referenced in the 52.212-4(q) clause (SOF ¶¶ 12-14). Hence, to decide this appeal, the CO inescapably must interpret those FSS provisions as well as provisions of DO 317. Therefore, we hold that FAR 8.406-6(b) required the ordering CO to refer this dispute to the GSA schedule CO, and the ASBCA lacks jurisdiction of the appeal.

Accordingly, we dismiss the appeal.

Dated: 19 April 2013

DAVID W. JAMES, JR.
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
Acting 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. 57617, Appeal of Impact Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals