ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
ThinkQ, Inc.	)	ASBCA No. 57732
	)	
Under Contract No. SP3100-08-A-0001	)	

APPEARANCE FOR THE APPELLANT: William J. Spriggs, Esq.
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Sumerduck, VA

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
DLA Chief Trial Attorney
Timothy J. Ryan, Esq.
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DLA Distribution
New Cumberland, PA

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND
GOVERNMENT'S CROSS-MOTION ON COUNT 5

Appellant has moved for summary judgment in this appeal. The government opposed the motion and cross-moved for summary judgment on Count 5. We deny appellant's motion and grant the government's cross-motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

On 13 February 2008, Defense Logistics Agency Distribution (DLA Distribution) issued a request for proposals (RFP) to be competed among General Services Administration (GSA) Federal Supply Service (FSS) Schedule 874 Mission Oriented Business Integrated Services (MOBIS) for a Blanket Purchase Agreement (BPA) for professional support services (R4, tab 2 at 1-2). Appellant ThinkQ (then doing business under the name Belle Enterprise and Technology, Inc.) had entered into an FSS Schedule 874 MOBIS contract with GSA on 15 June 2007, as a small, woman, service disabled veteran owned business (R4, tab 22).

The BPA provided in relevant part as follows:

> **EXTENT OF OBLIGATION**
>
> The Government is obligated only to the extent of authorized purchases actually made under this BPA.
>
> ....
>
> **PLACING ORDERS**
>
> An order shall be placed by an authorized user as required....
>
> Delivery orders will be fixed priced. The Government will only pay for actual quantities of each CLIN that are utilized in the delivery order.

(R4, tab 1 at 2, 3)

The BPA incorporated the full text of FAR 52.212-4, CONTRACT TERMS AND CONDITIONS–COMMERCIAL ITEMS ALTERNATE 1 (FEB 2007), which includes a changes clause in paragraph (c) *Changes*, providing that "[c]hanges in the terms and conditions of this contract may be made only by written agreement of the parties." FAR 52.212-4 also includes numerous provisions relating to requirements for delivery, performance and payment. Examples of such provisions are paragraphs: (d) *Definitions*, providing that the hourly rates prescribed are for payment for labor that is "[p]erformed by the contractor;" and (f) *Invoice*, providing that invoices include a "[d]escription, quantity, unit of measure, unit price and extended price of the items delivered." (R4, tab 1 at 11-14)

Similar provisions are found in paragraph (h) *Payments*, which states in (1) *Services accepted*, that payments would be for "services accepted by the Government that have been delivered" at (i)(A) hourly rates prescribed multiplied by "the number of direct labor hours performed" and for (i)(B) "all labor performed on the contract." Paragraph (2) *Total cost*, states:

> If at any time during performance of this contract, the Government has reason to believe that the work to be required in performing this contract will be substantially greater or less than the stated ceiling price, the Contracting Officer will so advise the Contractor, giving the then revised estimate of the total amount of effort to be required under the contract.

Paragraph (h)(4) *Access to records*, permits the government to review the contractor's records, among other reasons, in order to (paragraph (ii)(D)) verify employees worked the hours reflected on invoices. (R4, tab 1 at 15-18)

Paragraph (k) *Termination for the Government's convenience*, reserves the government's right to terminate "this contract, or any part hereof, for its sole convenience" (R4, tab 1 at 20).

ThinkQ submitted its proposal for the DLA Distribution BPA contract on 5 March 2008 and on 1 April 2008 was awarded BPA No. SP3100-08-A-0001, with a total maximum value of $12,631,796.14 over a period of five years (R4, tabs 1, 21). The BPA specified "MAXIMUM QTY" hourly rate labor units under contract line item number (CLIN) 0001 "PROFESSIONAL TECHNICAL SUPPORT SERVICES," with an "NTE" (not-to-exceed) total for labor and an NTE for CLIN 0002, "Material Support Costs in support of CLIN 0001." It further specified "MAXIMUM QTY" for the firm-fixed price CLINs 0003 through 0012 and a cost-reimbursement NTE for CLIN 0014, travel. CLIN 0013 was reserved. (R4, tab 1 at 4-10) Task orders were to be issued against CLIN X001 with either a labor hour pricing method (an estimated, not to exceed quantity of hours) or firm-fixed pricing method (a fixed quantity of hours). Task orders were also to be issued against CLINs X003 – X011 on a fixed price basis. (R4, tab 2 at 5)

Bilateral Modification No. P00002 to the BPA was executed on 15 August 2008, replacing the term "MAXIMUM QUANTITY" with "ESTIMATED QUANTITY" for CLINs X003 through X013 and replacing the term "NOT TO EXCEED (NTE)" with "ESTIMATED" for CLINs X002 and X014 (gov't opp'n & cross-mot., attach. 1).

Delivery Order (DO) 0006 was issued on 9 April 2009 with a total ceiling price of $3,417,777.15. It specified a "TIME AND MATERIALS PRICING ARRANGEMENT" for CLIN 1001, "Professional Technical Support Services," and an NTE for CLIN 1002, "Material Support Costs in support of CLIN 1001." It also specified a "FIRM-FIXED PRICING ARRANGEMENT" for CLINs 1003 through 1011 and a COST REIMBURSEMENT PRICING ARRANGEMENT" with a "Ceiling Price" for CLIN 1014. (R4, tab 4)

ThinkQ billed the government for work it performed under DO 0006. According to ThinkQ, the government paid $106,481.45 for CLINs 1002 (NTE) and 1014 (ceiling price) and $697,669.60 for CLINs 1003-1011 (fixed price), respectively for this work, and did not pay $1,566,351.70. (App. mot. at 1, 2) The government computes the amounts paid as $106,567.80 and $697,583.25, leaving $1,552,579.99 that was "not utilized" under DO 0006 (gov't opp'n & cross-mot. at 5, 8).

DOs 0001-0005 and 0007

The government provided a declaration from Mr. John M. Lesko, DLA Distribution, contracting officer's representative, which summarizes BPA performance under DOs 0001-0005 in support of its Statement of Undisputed Material Facts (gov't opp'n & cross-mot., attach. 2). According to tables prepared by Mr. Lesko, five DOs were issued during the first year of the BPA, each of which estimated labor hours under CLIN l001 and/or estimated quantities under the firm-fixed price CLINs. The tables indicate that the quantity utilized was always less than projected in the DOs. It is Mr. Lesko's understanding that ThinkQ did not invoice and the government did not pay for work that was not utilized. (Lesko decl. ¶¶ 3, 4, 10, 11) ThinkQ's responsive statement of genuine issues of material fact disputed the facts alleged in Mr. Lesko's declaration, but ThinkQ did not come forward with any affidavit or other documentary evidence to support this statement (app. resp. at 2).

The record does not contain a copy of DO 0007. It does, however, contain a copy of Modification No. 03 to DO 0007, which was issued unilaterally on 11 March 2011, and which states: "The purpose of this modification is to de-scope the estimated labor hours, training sessions, and travel costs originally contracted for under this order, as follows:..." (app. supp. R4, tab A-1 at 7).

ThinkQ's Claim

On 16 August 2010, ThinkQ submitted a request for equitable adjustment (REA) seeking $475,00.00 for increased costs of performance for DO 0006, apparently under the Changes clause. It contrasted the amount of work it had performed under DO 0006 with that performed under the first five DOs, for which it had invoiced approximately 80% of the total DO amount. (R4, tab 18) In a 17 February 2011 letter to the contracting officer concerning the work ordered under DO 0006, ThinkQ stated that it understood the "terms and conditions of the BPA" to mean:

> The delivery orders are required to be on a fixed price basis (page 3). Although, the government pays for actual quantities, the orders, such as [DO] 0006, state the total expected and anticipated needs and requirements of the government.

(R4, tab 15 at 1) ThinkQ stated that the legal bases for recovery were breaches of the government's alleged duty to notify it of a reduction in work and the implied duty to cooperate, communicate and disclose vital information (*id.* at 2).

In a 1 March 2011 letter prepared by counsel, ThinkQ again asserted a breach of the government's obligation to provide notice that its requirements would be substantially

less than the ceiling price as required by FAR 52.212-4(h)(2) and a breach of its implied duty "to cooperate and communicate with the contractor and provide the contractor information vital to its contract performance" (R4, tab 14 at 2).

Thereafter, on 20 April 2011, ThinkQ updated its REA, increasing the amount sought to $4.377 million, and then by a letter dated 10 May 2011, it converted the REA to a claim seeking $3,679,576.59 under the Contract Disputes Act, advising that the grounds for its claim had been explained in its earlier 1 March 2011 letter from counsel (R4, tabs 8, 10, 11).

The contracting officer responded on 13 May 2011 that the claim lacked sufficient information for her to issue a final decision and requested clarification and further information (R4, tab 9), which ThinkQ provided in a certified claim letter dated 22 May 2011, which also revised the amount requested to $3,176,861.60 (R4, tab 10). The contracting officer considered the 22 May 2011 letter to have replaced the 10 May 2011 claim and denied it in its entirety in a final decision dated 9 August 2011 (R4, tab 5). This timely appeal was docketed on 11 August 2011.

Count 1 of the complaint alleges the government breached the FAR 52.212-4(h)(2) clause of the BPA by failing to advise appellant that work ordered in DO 0006 was no longer required and failing to revise the estimate of the total work effort required; Count 2 alleges the government breached its implied duty to cooperate, communicate and not interfere with appellant's work by failing to advise that work ordered in DO 0006 was no longer required and failing to revise its estimate of the work; Count 3 alleges the government breached its implied obligation to provide information vital to appellant's performance; Count 4 alleges the government breached the contract by intentionally or negligently misrepresenting the amount of work required under DO 0006; and Count 5 alleges the government breached the contract by failing to pay for quantities utilized under DO 0006, unilaterally reducing the quantity of work and constructively partially terminating DO 0006 for convenience (compl. ¶¶ 42, 44, 46, 48, 50).

DISCUSSION

ThinkQ contends in its motion for summary judgment that, under its interpretation of the contract, it is entitled to full payment of DO 0006 and that the government breached the contract by unilaterally reducing the work without notice (app. mot. at 3). The government opposes the motion. It also cross-moved on Count 5, asserting that ThinkQ is only entitled to payment for work performed (gov't opp'n & cross-mot. at 25).

In order to prevail upon its motion for summary judgment, ThinkQ must show that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). As the movant, it must set forth sufficient material facts on all relevant

issues raised by its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A material fact is one which may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). With respect to the government's cross-motion on Count 5, we "evaluate each party's motion on its own merits." *BMY, A Division of Harsco Corp.*, ASBCA No. 38172, 93-2 BCA ¶ 25,704 at 127,868. The nonmoving party "must come forward with 'specific facts showing there is a *genuine issue for trial*[,]'" and must show what specific evidence could be offered. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (emphasis in original).

Count 5

We begin with the cross-motions on Count 5 of the complaint inasmuch as ThinkQ's motion emphasized its contention that the government breached the contract by failing to pay the full amount of DO 0006. We understand ThinkQ to interpret the BPA as providing quantities from which the government could select in issuing DOs which, under the Placing Orders clause, were required to be fixed price (except for the cost reimbursement items), the total cost of which the government was required to pay as quantities "utilized in the delivery order."

The government agrees in its cross-motion that the BPA required the DO 0006 CLINs to be fixed price (except for the cost reimbursement items); it disagrees, however, that the words "utilized in the delivery order" can be interpreted to mean the government was required to pay the full price of the DO.

Each party asserts that its respective interpretation of the contract is the only reasonable interpretation. ThinkQ further asserts that any ambiguity should be construed against the government and the government responds that, to the extent the contract may be ambiguous, ThinkQ did not rely upon the interpretation it now advances.

In resolving contract interpretation disputes, we are to examine the contract as a whole, harmonizing and giving a reasonable meaning to all of its provisions. *NVT Technologies, Inc. v. United States,* 370 F.3d 1153, 1159 (Fed. Cir. 2004). Questions of contract interpretation are questions of law that may be resolved by summary judgment. *Muniz v. United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992); *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984). A contract is unambiguous if there is only one reasonable interpretation. *See Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). Conversely, contract terms that are susceptible to more than one reasonable interpretation are ambiguous. *See Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999).

We consider the government's interpretation of the BPA and DO 0006 to be the only reasonable interpretation and view ThinkQ's interpretation to violate established

rules of contract interpretation. ThinkQ relies upon the Placing Orders clause of the BPA to support its interpretation of the contract as requiring the government to make full payment of DO 0006. The Placing Orders clause states:

> Delivery orders will be fixed price. The Government will only pay for actual quantities of each CLIN that are utilized in the delivery order.

The government argues, and we agree, that ThinkQ ignores the plain meaning of the words "utilized in the delivery order" and interprets them out of context to mean "listed" or "included" in the delivery order. Moreover, ThinkQ's interpretation fails to give meaning to the Extent of Obligation provision, which specifies that the government is "obligated only to the extent of authorized purchases actually made," and numerous other provisions of the BPA that use such words as "labor that is performed by the contractor," "items delivered," and "services accepted...that have been delivered" to describe payment for performance and services. Nor does ThinkQ's interpretation consider Modification No. P00002 to the BPA, which replaced the term "MAXIMUM QUANTITY" with "ESTIMATED QUANTITY" for CLINs X003 through X013 and "NOT TO EXCEED (NTE)" with "ESTIMATED" for CLINs X002 and X014.

In contrast, the government's interpretation gives meaning to all of these provisions and makes sense. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993). There is also support for the government's interpretation in FAR 16.601, TIME-AND-MATERIALS CONTRACTS. CLIN 1001 of DO 0006 was a "Time and Materials Pricing Arrangement." FAR 16.601(a) defines an hourly rate as the rate paid for labor "[p]erformed by the contractor." FAR 16.601(c) explains that time and materials contracts "may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence." *See Coastal Government Services, Inc.*, ASBCA No. 49625, 97-1 BCA ¶ 28,888 at 144,049 (hourly rate CLINs for estimated number of on-call services and maximum number of hours were indefinite quantities).

In sum, we conclude the contract is unambiguous and that the government's interpretation is the only reasonable interpretation. Accordingly, ThinkQ's motion for summary judgment on Count 5 must be denied and the government's cross-motion granted.

Counts 1 through 4

Counts 1 and 2 of the complaint allege the government breached the contract and its implied duty to cooperate, communicate and not to interfere with appellant's work by failing to advise that work ordered in DO 0006 was no longer required and failing to revise its estimate of the work. Count 3 alleges a breach of the government's implied

obligation to provide information vital to ThinkQ's performance. Count 4 alleges the government intentionally or negligently misrepresented the amount of work required.

The government contends that ThinkQ has not come forward with any proof to support its motion as to these four counts of the complaint. ThinkQ's reply seeks to clarify that its motion is based upon the government's breach of the contractual requirement that changes be made by mutual agreement and that there is no evidence that the parties agreed to change DO 0006 and no notice to ThinkQ that the work would be terminated. It asserts the breach theories and facts upon which it relies "form a continuum." (App. opp'n & reply at 3) The government's sur-reply contends that ThinkQ has failed to set forth any facts to support its allegation that the government was required to give notice of any change in quantities to ThinkQ or that the government knew the quantities would be significantly less than expected.

Despite ThinkQ's attempt to clarify that its allegations "form a continuum," we are somewhat perplexed as to how Counts 1 through 4 of the complaint relate to its interpretation of the contract provisions as requiring full payment of DO 0006. In any event, with respect to Count 1, FAR 52.212-4(h)(2) provides that the contracting officer will advise the contractor if the government has reason to believe the contract work will be "substantially greater or less than the stated ceiling price." ThinkQ asserts the government was required to advise it if work was eliminated and that it was obligated to act under either the changes or the termination for convenience clauses, FAR 52.212-4(c) or (k). The argument continues that the government gave proper notice on DO 0007 and issued Modification No. 03 when faced with a similar situation.

We agree with the government that ThinkQ has not set forth sufficient material facts to support its breach allegation; namely, that the government had reason to believe the work would be "substantially" less than the stated ceiling and, thus, that the contracting officer had a duty to notify ThinkQ and revise the work estimate. *Celotex Corp., 477 U.S. at 325.* Moreover, with respect to the issuance of Modification No. 03 to DO 0007, the government correctly points out that any subsequent change to, or clarification of, contract language has no bearing upon a previous interpretation. *See Intram Co.*, ASBCA No. 44159, 94-1 BCA ¶ 26,375 at 131,180. Nor is a subsequent clarification evidence that a contract is ambiguous. *See Collazo Contractors, Inc.*, ASBCA No. 53925, 05-2 BCA ¶ 33,035 at 163,744, *recon. denied*, 06-1 BCA ¶ 33,212, *aff'd*, 221 Fed. Appx. 993 (Fed. Cir. 2007).

As to Count 2, the government's implied duty to cooperate and communicate imposes an affirmative obligation on it to do what is reasonably necessary to enable the contractor to perform. Conversely, the government's implied duty not to interfere with a contractor's work is a negative obligation. For purposes of our discussion, we treat the implied duty to provide vital information alleged in Count 3 to be an affirmative obligation. A breach of either an affirmative or a negative obligation requires a

factually-based reasonableness inquiry. *American Ordnance LLC*, ASBCA No. 54718, 10-1 BCA ¶ 34,386 at 169,791. ThinkQ, however, has failed to set forth factual support either for the scope of the government's alleged implied duties or the government's alleged breach of them. *Celotex Corp., 477 U.S. at 325.* Moreover, determinations of the reasonableness of a party's acts and conduct are not ordinarily amenable to summary judgment. *BearingPoint, Inc.*, ASBCA No. 55354, 08-2 BCA ¶ 33,890 at 167,733.

With respect to Count 4, we note that ThinkQ's allegation of intentional misrepresentation implies bad faith. As we commented in *Lockheed Martin Aircraft Ctr.*, ASBCA No. 55164, 08-1 BCA ¶ 33,832 at 167,447, the elements of bad faith tend to be very fact-intensive. Further, its allegation of negligent misrepresentation seems to suggest a cause of action based upon negligent estimates, which typically is associated with a requirements contract and not a fixed priced contract as is asserted in Count 5. *See Womack v. United States*, 389 F.2d 793, 800 (Ct. Cl. 1968). In any event, as with Counts 1-3, ThinkQ has failed to identify or offer any factual evidence to support either theory. *Celotex Corp., 477 U.S. at 325.*

For all of these reasons, ThinkQ's motion for summary judgment as to Counts 1-4 of the complaint must be denied.

CONCLUSION

Appellant's motion for summary judgment is denied in its entirety. The government's cross-motion for summary judgment on Count 5 is granted.

Dated: 24 January 2013

Carol N Park-Conroy

CAROL N. PARK-CONROY
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

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. 57732, Appeal of ThinkQ, Inc., rendered in conformance with the Board's Charter.

Dated:

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