

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
)
Vox Optima, LLC) ASBCA No. 62644
)
Under Contract No. N00178-19-D-8818)

APPEARANCE FOR THE APPELLANT: Darrell M. Allen, Esq.
General Manager

APPEARANCES FOR THE GOVERNMENT: Craig D. Jensen, Esq.
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OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
PURSUANT TO BOARD RULE 12.2¹

Before us is the Navy’s (government) Motion to Dismiss for Lack of Subject Matter Jurisdiction. Vox Optima, LLC (appellant) opposes the motion. As set forth more particularly below, we grant the motion and dismiss the appeal.

In its motion, the government has set forth what it terms a Statement of Undisputed Facts. In its reply opposing the motion, appellant does not dispute those facts. Accordingly, we deem the following facts to be stipulated and, thus, undisputed. The facts have been modified for clarity and for conformance with the Board’s standard citation conventions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. Appellant is an awardee of an indefinite-delivery indefinite-quantity (IDIQ) contract (known as the SeaPort-NxG contract) from the Navy under Contract No. N00178-19-D-8818 (Contract 8818), effective January 2, 2019 (R4, tab 1 at 1, 8).

2. Contract 8818 includes a maximum pass through rate of 8% on subcontractors (R4, tab 1 at 7).

3. Section C.8 of Contract 8818 describes the task order process, including in sub-section C.8.1., that in accordance with Federal Acquisition Regulation 16.505(b),

¹ A decision under Rule 12.2 shall have no value as precedent, and in the absence of fraud, shall be final and conclusive and may not be appealed or set aside.

“the Task Order Contracting Officer will give all awardees a ‘fair opportunity’ to be considered for each order in excess of \$3,500.” Sub-section C.8.2, discussing evaluation, indicates “[t]he ordering activity issuing the solicitation will evaluate responses against selection criteria contained in the proposed [task order].” (R4, tab 1 at 12-13)

4. On March 6, 2019, the Navy solicited responses or proposals from interested small businesses holding a SeaPort-NxG contract under task order Solicitation No. N00178-19-R-3502 (Solicitation 3502) (R4, tab 2 at 1-2).

5. Solicitation 3502 was amended three times and had a closing date and time of 10:00 am on April 24, 2019 (R4, tabs 2-5).

6. Section L.3 of Solicitation 3502 advised that “[o]fferors whose mandatory requirements clearly show that the Offeror does not stand a reasonable chance of award, will not be invited to make an Oral Presentation” (R4, tab 5 at 58).

7. Section L.8 of Solicitation 3502 indicated two mandatory requirements: Requirement 1 – Facility Security Clearance; and Requirement 2 – Personnel Security Clearance (R4, tab 5 at 63).

8. Section M.6 of Solicitation 3502 indicated offerors would be evaluated, among other factors, under Factor 1: Portfolio (Oral) and Factor 2: Technical Understanding/Capability/Approach (Oral) (R4, tab 5 at 81-82).

9. Appellant timely submitted a response or proposal under Solicitation 3502 (R4, tab 6).

10. Following solicitation closing and receipt of appellant’s proposal, the Navy issued an invitation via e-mail to appellant on May 1, 2019, to provide an oral presentation to the Navy. The oral presentation was scheduled for May 15, 2019, in Dahlgren, Virginia. (R4, tab 7)

11. Appellant traveled from New Mexico to Virginia and made the presentation to the Navy on May 15, 2019 (app. supp. R4, tab 3).

12. On December 2, 2019, the task order contracting officer notified appellant via e-mail that it had submitted a materially non-compliant proposal and its proposal was unacceptable and ineligible for award. The basis for the notification was appellant’s inclusion in its proposal of a pass through rate exceeding 8%, which exceeded the maximum pass through rate in appellant’s SeaPort-NxG contract. (R4, tab 10 at 2)

13. As part of the notice to appellant of ineligibility for award, on December 2, 2019, the task order contracting officer indicated appellant would not be permitted an opportunity to revise its proposal (R4, tab 10 at 3).

14. Appellant responded to the notice of ineligibility via multiple e-mails the same day, asking to correct the pass through rate and submitting a corrected cost summary (R4, tabs 11-12).

15. Appellant then e-mailed another Navy employee on December 3, 2019, asking that employee to intervene on its behalf with the task order contracting officer to revisit the decision on ineligibility (R4, tab 13).

16. The task order contracting officer responded to appellant via e-mail on December 3, 2019, indicating the Navy would not consider the corrected cost summary format or a revision to appellant's proposal (R4, tab 14).

17. On December 4, 2019, appellant sent an e-mail to the task order contracting officer requesting a phone call and asking that the buying activity's ombudsman join in the call (R4, tab 15). The task order contracting officer sent a reply via e-mail on December 5, 2019, indicating no further debriefing would be provided and reinforcing the decision on ineligibility of appellant's proposal for award (R4, tab 16).

18. The same day, appellant provided a reply by e-mail, indicating it was not requesting a debriefing and requesting contact information for both the buying activity ombudsman and the SeaPort-NxG ombudsman (R4, tab 17).

19. A series of additional exchanges by e-mail then occurred between appellant, the buying activity ombudsman, and the SeaPort-NxG ombudsman. Both ombudsmen replied to appellant that they considered the task order contracting officer's decision on ineligibility to be made in accordance with the terms of the solicitation. (R4, tabs 18-20)

20. Following the response from both ombudsmen, appellant filed its first appeal with the Board on December 17, 2019, which we docketed as ASBCA No. 62313 (R4, tab 21).

21. On April 8, 2020, the Navy awarded the task order from Solicitation 3502 to StraCon Services Group, LLC, providing notice of the award by e-mail to appellant (R4, tab 22).

22. Following the Board's dismissal of appellant's first appeal (ASBCA No. 62313) on June 2, 2020, due to a failure to file a claim with the contracting officer, *Vox Optima, LLC*, ASBCA No. 62313, 20-1 BCA ¶ 37,625, appellant submitted a

claim to the task order contracting officer on June 17, 2020. The claim requested reimbursement for costs incurred by appellant for its proposal under Solicitation 3502, consisting of salary and other costs for a key employee designated in the proposal, travel costs to attend the oral presentation, and costs to prepare a portfolio for the oral presentation. (R4, tab 24)

23. On August 11, 2020, the task order contracting officer denied the claim, finding appellant was provided fair opportunity and that the decision on ineligibility was proper under the terms and conditions of both appellant's SeaPort-NxG contract and the task order solicitation (R4, tab 27).

CONTENTIONS OF THE PARTIES

Count I – Breach of Opportunity to Compete Clause

In Count I of its complaint, appellant contends that the decision to eliminate Vox Optima from consideration for Solicitation 3502 was arbitrary and capricious and violated the fair opportunity to compete clause in Contract 8818, causing it to suffer damages of over \$50,000 (compl. at 2-3²). In its motion to dismiss, the government argues that appellant was provided a fair opportunity to compete under the SeaPort-NxG contract by participating in the task order solicitation and by submitting an offer. Furthermore, the government stated that

[a]ppellant's disagreement otherwise with the task order contracting officer's evaluation of its proposal is akin to a bid protest challenge by a disappointed offeror, which does not state a claim within the CDA. Appeal of *Chugach Federal Solutions, Inc.*, ASBCA No. 61320, 2019-1 BCA ¶ 37380, 2019 ASBCA Lexis 189 at 12-13 (citing *Coastal Corp. v. United States*, 713 F2d 728, 370 (Fed. Cir. 1983) (holding that an implied contract to treat bids honestly and fairly is not a contract covered by the CDA)). See also *Amaratek*, ASBCA No. 60503, 2016-1 BCA ¶ 36,491 at 177,831-32.

(Gov't mot. at 4)

In its response to the Motion to Dismiss, appellant states that while the government argues that the contracting officer's decision to exclude appellant from the task order was akin to a bid protest, which does not state a claim under the Contract Disputes Act

² Appellant did not number the pages of its complaint. As such, any reference to page numbers refers to the PDF page number.

(CDA), said argument disregards the fact that appellant is the holder of the prime (IDIQ Contract 8818) which gave it a promise of a fair opportunity to be considered for each order in excess of \$3,500. (App. resp. at 2)

Count II – Breach of Contract by Detrimental Reliance

Count II of appellant’s complaint alleges that when the agency invited it to participate in oral presentations in support of its proposal it made an enforceable promise that Vox Optima would remain in consideration for the task order on the basis of the proposal previously submitted. Thus, Vox Optima relied on this promise to its detriment by incurring additional costs in the form of salary, travel, and printing costs. Despite this “promise” that Vox Optima would remain in consideration, it was eliminated from consideration solely because of the spreadsheet discrepancy in Vox Optima’s proposal. (Compl. at 3-4)

In its Motion to Dismiss the government states:

Appellant also argues that the Navy’s conduct in inviting Appellant to participate in an oral presentation was an enforceable promise that Appellant would remain in consideration for award of the task order. This promise is not expressly stated in Appellant’s SeaPort-NxG contract or in the task order solicitation, nor can it be reasonably inferred as a promise from any term or condition in Appellant’s SeaPort-NxG contract or the task order solicitation.

(Gov’t mot. at 4)

Appellant counters in its response to the motion, in part, as follows:

The Appellant’s proposal under solicitation N00178-19-R-3502 erroneously included a pass-through rate of 8.15%, and this was known to the Navy when it received the Appellant’s proposal. However, the Navy invited the Appellant to make an oral presentation anyway. The Navy later disqualified Appellant’s proposal because it was “materially non-compliant” and “its proposal was unacceptable and ineligible for award[.]”[] The basis for the disqualification was Appellant’s inclusion in its proposal of a pass through rate exceeding 8%, which exceeded the maximum pass through rate in Appellant’s SeaPort-NxG contract. . . . Since this was the reason for

disqualification, the Navy should not have invited the Appellant to make an oral presentation . . . because “[O]fferors whose mandatory requirements clearly show that the Offereor does not stand a reasonable chance of award, will not be invited to make an oral presentation.”

(App. resp. at 3) Appellant concludes that the CO’s invitation to make an oral presentation and appellant’s reliance thereon caused it to incur additional costs and “constitutes a contract formed on the doctrine of detrimental reliance” (*id.* at 3-4).

DECISION

Having considered the contentions of the parties and the stipulated facts, we dismiss the claim for proposal costs based upon the breach of fair opportunity to compete clause in the IDIQ contract for lack of jurisdiction, as it amounts to a bid protest for which we do not have jurisdiction. *See, e.g. Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). With respect to the claim that appellant is entitled to proposal costs due to a breach of contract based upon detrimental reliance, we likewise dismiss that claim for lack of jurisdiction.

Breach of Fair Opportunity to Compete Clause

Appellant complains that by inviting appellant to make an oral presentation and incur costs, when in fact appellant had made a mistake in its proposal which would have disqualified it for award of the procurement, the government breached the fair opportunity to compete clause in the IDIQ contract. In support of that view, appellant cites *Community Consulting International*, ASBCA No. 53489, 02-2 BCA ¶ 31,940 and two other Board decisions for the proposition that “[t]he Federal Acquisition and Streamlining Act’s (FASA) bid protest bar does not preclude a claim for breach of contract damages for lack of a fair opportunity to compete.” However, appellant was not excluded from the procurement, it was invited to submit a proposal and it was invited to make an oral presentation so it was given fair opportunity to compete. Appellant made a mistake in its proposal, and whether the government noticed that mistake before or after it invited appellant to make a presentation and incur additional costs does not change the fact that appellant was given a fair opportunity to compete. Thus, *Community Consulting* does not apply.

The costs appellant seeks are bid/proposal costs incurred in an effort to obtain a contract, which never came into existence. Section 7102 of the Contract Disputes Act (41 U. S.C §7101-7109) states that the CDA applies to any express or implied contract made by an executive agency for the procurement of property; the procurement of services; the procurement of construction, alteration, repair, or maintenance of real property; or the disposal of personal property. Thus, a contract must exist for CDA

jurisdiction to attach. *Engage Learning, Inc. v Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011). No contract was ever made with Vox Optima for the work sought in Solicitation No. N00178-19-R-3502, and thus there is no contract under which it could file a claim. Its only avenue for relief would be through a protest of the procurement, a class of cases for which we lack jurisdiction.

Breach of Contract by Detrimental Reliance

As to appellant's second argument, breach of contract by detrimental reliance, it is unclear which contract appellant believes was breached. It could not have been the IDIQ contract nor could it have been the contract resulting from the procurement complained of because appellant was not awarded that contract. Nor is a contract based upon the conduct of the parties, a contract for the procurement of goods, or services or construction, or disposal of property.

Tellingly, appellant cites no cases from the Courts or this Board or any other Board to support its view of the law. The only case cited is a quote from *Paragon Energy Corp. v. United States*, 645 F.2d 966, 975 (Ct. Cl. 1981), wherein the Court stated:

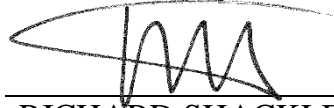
Congress could not have expressed itself more clearly to the effect that all contractor claims based upon a valid contractual theory fall within the procuring agencies' jurisdiction under the Contract Disputes Act. This was essential to Congress' design that all contract disputes be resolved according to the same set of procedures, beginning with the decision of the contracting officer.

Appellant uses the *Paragon* citation for the general proposition that "this Board clearly has jurisdiction to adjudicate this claim" (app. resp. at 4). The context of this quote however is a claim under Public Law 85-804 and for reformation and the Court was not considering whether a contract subject to the CDA existed, the court found that one clearly did in that case as it found the claim for reformation to be pursuant to the CDA and the claim under Public Law 85-804 was not.

CONCLUSION

Based upon the foregoing, appellant's claim is dismissed for lack of jurisdiction.

Dated: December 15, 2020



RICHARD SHACKLEFORD
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. 62644, Appeal of Vox Optima, LLC, rendered in conformance with the Board's Charter.

Dated: December 15, 2020



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals